NOT THAT THERE IS ANYTHING WRONG WITH THAT: THE PRACTICAL AND LEGAL IMPLICATIONS OF A HOMOSEXUAL PROFESSIONAL ATHLETE

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I. INTRODUCTION

On May 21, 2002, New York Mets catcher Mike Piazza held a press conference to squelch a rumor that was circulating in the city’s gossip columns that he was gay.1 “The rumor’s been brought to my attention,” said Piazza. “First off, I’m not gay. I’m heterosexual. That’s pretty much it. That’s pretty much all I can say. I don’t see the need to address the issue further.”2 While this episode did not produce professional sports’ first openly gay athlete, it did revive the discussion about whether professional sports was ready for an openly homosexual participant and what the practical ramifications would be if a player were to come out of the closet and publicly acknowledge his homosexuality.3 As many have pointed out, there are over 2,500 professional athletes in the three major

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2. Id.

sports leagues—Major League Baseball, the National Football League, and the National Basketball Association—making it a virtual statistical certainty that there are at least a handful of homosexuals among them. Indeed, Olympic gold medalist Greg Louganis, who came out of the closet six years after competing in the 1988 Summer Olympics, has said that several athletes in professional team sports have asked him for advice about going public with their homosexuality. The fact that not a single one of them, or the others that are likely out there, has publicly acknowledged their homosexuality can likely be attributed to the culture of organized sports and the almost certain backlash that would result if a player were to do so. One sports commentator posits that this is “because accomplishment in male sport lies in direct proportion to virility. Touchdown equals manliness. Slam dunk equals large penis. Home run equals . . . prowess.” As former Major Leaguer Billy Bean, who came out of the closet after his career had ended, commented about a year before the Piazza episode, a major leaguer coming out “would become a circus . . . .I’ve never met the person that I think could do it.”

The “circus” that would ensue if a professional athlete were to come out of the closet could have several critical legal implications. What if, for example, teammates or opponents of the gay player refused to play on the same court or dress in the same locker room as the homosexual player? Would it be possible for a professional sports league to ban or restrict access to a player simply because he was gay? What sort of accommodations, if any, would a league or teams have to make to integrate this player?

This issue and its accompanying questions have come to the forefront recently with the release of a book by former National Basketball Association (NBA) player John Amaechi, in which he reveals that he is

5. 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.
8. Morford, supra note 4.
10. Id.
homosexual. In the book, entitled *Man in the Middle*, Amaechi discusses his reluctance to disclose his sexuality in the homophobic culture of sports. Amaechi writes:

Homosexuality is an obsession among ballplayers, trailing only wealth and women. The guys I played with just didn’t like “fags”—or so they insisted over and over again . . . . Most were convinced, even as they sat next to me on the plane or threw me the ball in the post, that they had never met one.

Predictably, this revelation triggered a flurry of responses—both positive and negative—from current and former NBA players, and re-energized a national discussion on the issue of gay athletes. Most notably, former NBA player Tim Hardaway declared on a sports radio show in Miami that he would not want a gay player on his team. “I let it be known, I don’t like gay people,” Hardaway said.

“I don’t like to be around gay people . . . . I’m homophobic. I don’t like it. It shouldn’t be in the world for that or in the United States for that.” He also commented that if such a player were to be on his team, he would distance himself from that player. Responding to Hardaway’s comments, NBA commissioner David Stern said “[i]t is inappropriate for him to be representing us given the disparity between his views and ours.”

However, while Amaechi’s disclosure has fueled a great deal of debate and discussion on the issue, it did not provide any practical results because he did not make this announcement until after he retired. Thus, the questions about the practicalities and legal considerations that would occur should an active player come out of the closet remain, and these questions are what this Comment seeks to address. Part I of this Comment will contain a general discussion of employment discrimination on the basis of sexual orientation. Part II will explore how, if at all, the law with regard to discrimination on the basis of sexual orientation may or may not differ when applied to professional sports. This section will focus on the two factors that may differentiate professional sports from other vocations: (1) the increased risk of transmitting HIV and (2) the potential unwillingness of athletes to share a locker room with homosexual teammates.

15. Id.
16. Id. (“First of all, I wouldn’t want him on my team. And second of all, if he was on my team, you know, I would really distance myself from him because I don’t think that is right.”).
17. Id.
II. DISCRIMINATION ON THE BASIS OF HOMOSEXUALITY, GENERALLY

Traditionally, there has been little legal recourse for gays and lesbians who believe they have been discriminated against in the workplace as a result of their sexual orientation. In recent years, however, steps have been made to advance workplace rights for homosexuals. Twenty states\(^\text{18}\) and the District of Columbia have enacted antidiscrimination laws to protect homosexuals, and legislation was drafted to enact a similar law on the federal level.\(^\text{19}\) Until the federal legislation is implemented, however, the outcome of this issue will have to be determined based on current case law, which focuses on Title VII of the Civil Rights Act, the constitutional right to privacy and substantive due process as possible bases for protecting homosexual employees.

A. An Analysis of Homosexuality under Title VII.

Title VII of the Civil Rights Act of 1964\(^\text{20}\) provides:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.\(^\text{21}\)

Discrimination based upon an employee's sexual preferences—specifically, his homosexuality—has been held to be outside the scope of Title VII.\(^\text{22}\) The Equal Employment Opportunity Commission (EEOC) has found no basis in either the language of Title VII or its legislative history to

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22. See Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (ruling that sexual orientation is outside the reach of Title VII); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (“Discharge for homosexuality is not prohibited by Title VII or Section 1981.”).
support the notion that Congress intended to include a person’s sexual practices within the meaning of the term “sex” when it enacted Title VII.\(^2\) The Commission ruled that there was no direct definition of the word “sex” in the language of Title VII and, at best, negligible evidence of Congress’ intent in the statute’s legislative history, and that it therefore did not have the jurisdiction to hear the case presented, which alleged discrimination on account of sexual orientation (as opposed to gender.\(^2\))\(^4\) It did point out, however, that the congressional debates that preceded the enactment of Title VII focused almost entirely on the disparities in employment opportunities between males and females.\(^2\)\(^5\) Furthermore, the Commission cited a basic rule of statutory construction that unless there is a clear legislative expression to the contrary, words used in statutes should be given their ordinary meaning.\(^2\)\(^6\) This principle, coupled with the emphasis of the congressional debates, led to the conclusion that the word “sex” in Title VII referred to a person’s gender, and not their sexual orientation.\(^2\)\(^7\) Similarly, Congress had not intended for Title VII to forbid discrimination against an applicant for employment based upon “affectional or sexual preference.”\(^2\)\(^8\)

In *Desantis v. Pacific Telephone & Telegraph Co.*,\(^2\)\(^9\) the court rejected the employee’s “disproportionate impact” argument, which is explained below.\(^3\)\(^0\) In *Desantis*, gay and lesbian employees sued claiming that the company discriminated against them in employment decisions because of their sexual orientation.\(^3\)\(^1\) The men claimed discrimination against homosexuals “disproportionately affects men because of the greater visibility of male homosexuals and the higher incidence of homosexuality among males than females.”\(^3\)\(^2\) A similar argument was used in finding that educational tests on blacks disproportionately impacted them, and therefore

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\(^2\) See EEOC Dec. No. 76-67, EEOC Dec. (CCH) ¶ 6493 (Mar. 2, 1976) (ruling that the Commission did not possess the jurisdiction to decide the applicant’s claim of sex discrimination because the evidence in the case indicated that the reason the employer had failed to hire the applicant was because of his sexual practices and not his gender).

\(^4\) *Id.* (“[W]e find scant evidence of what Congress intended when it declared that there shall be no employment discrimination based on sex.”).

\(^5\) *Id.*

\(^6\) *Id.*

\(^7\) See also EEOC Dec. No. 76-75, EEOC Dec. (CCH) ¶ 6495 (Mar. 2, 1976) (“[T]he Commission is of the opinion that when Congress used the word ‘sex’ in Title VII it was referring to a person’s gender, an immutable characteristic with which a person is born.”).


\(^9\) 608 F.2d 327 (9th Cir. 1979).

\(^10\) *Id.* at 329-30.

\(^11\) *Id.* at 327.

\(^12\) *Id.* at 333 (Sneed, J., concurring and dissenting).
violated Title VII. The DeSantis court was unwilling to extend this idea
to gays. It also rejected the argument that if a male employee prefers
males as sexual partners, he will be treated differently than a female who
prefers male partners. The reason for the court’s rejection was that
Congress intended the prohibition on “sex” discrimination to apply only on
the basis of gender and not of sexual orientation.

In Oncale v. Sundower Offshore Services, Inc., however, the
Supreme Court held that same-sex harassment claims are not necessarily
precluded from Title VII. In Oncale, a male employee was subjected to
sex-related humiliating actions by other employees, including physical
assault and threats of rape. Despite the fact that “male on male sexual
harassment in the workplace was assuredly not the principal evil Congress
was concerned with when it enacted Title VII,” the Court held that same-
sex harassment claims may be actionable under Title VII. Thus, although
gays and lesbians are not specifically protected under Title VII, if they—or
any member of a given gender—harass members of the same gender, they
are liable under Title VII. The acid test of whether a claim is actionable is,
like Title VII, whether or not the harassment was because of the victim’s
gender.

B. Privacy Interest?

A plaintiff alleging an invasion of his or her state constitutional right
to privacy is required to establish: (1) a legally protected privacy interest;
(2) a reasonable expectation of privacy in the circumstances; and (3)
conduct by the defendant constituting a serious invasion of privacy.
There are two types of legally recognized privacy interests: (1) interests in
precluding the dissemination or misuse of sensitive and confidential
information (i.e., “informational privacy”) and (2) interests in making
intimate personal decisions or conducting personal activities without
observation, intrusion, or interference (i.e., “autonomy privacy”).

tests on blacks violated Title VII).
34. 608 F.2d at 331.
35. Id.
36. Id. at 331-332.
39. Id. at 77.
40. Id. at 79.
1995) (ruling that since the employee admitted that his sexual orientation was not
confidential, the termination did not violate his constitutional right to privacy).
42. Id. at 1701 (quoting Hill v. Nat’l Collegiate Athletic Ass’n., 26 Cal. Rptr. 2d 834,
865 (1994)).
Although "the details of one’s personal life," including sexuality, generally fall within a protected zone of privacy, courts have held that a claim will be precluded if the information regarding the employee’s sexual orientation "was not improperly obtained and not confidential."

Similarly, courts have held that a city’s valid interest in eradicating employment discrimination against homosexuals does not justify, for example, severe intrusion of a local Boy Scouts organization’s rights to freedom of expressive association in the form of an injunction requiring the organization to hire homosexual individuals for leadership positions.

C. Due Process?

Rejecting an applicant for federal employment—or discharging a federal employee—on the basis of homosexuality without a showing that there is a rational connection between the employee’s homosexuality and a decreased efficiency in serving the position is a violation of the Due Process Clause.

In order for the defendants to prevail, the evidence must show at least one of the following existed: (1) a legitimate concern of potential tension between known and active homosexuals and others who possess a disdain for homosexuals; (2) legitimate doubts about the homosexual employee’s ability to gain the trust and respect of co-workers, or (3) the employer could have reasonably concluded that tolerating homosexual conduct could be construed as tacit approval, which could subject the department to approbation and cause interference with the effective performance of the department’s function.

However, courts have also ruled that even if a homosexual’s conduct is deemed immoral by the majority of society, this does not justify denying that person government employment. Rather, the Commission can

43. Id. (quoting Davis v. Superior Court, 9 Cal. Rptr. 2d 331, 338 (App. Dep't Super. Ct. 1992)).
44. Id. at 1700.
45. See Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Rels., 748 N.E.2d 759, 770 (Ill. App. Ct. 2001) (ruling that a man who was denied employment with the local Boy Scouts organization because of his homosexuality had no course of action).
46. See Childers v. Dallas Police Dep't, 513 F.Supp. 134, 147-48 (N.D. Tex. 1981) (ruling that the plaintiff failed to demonstrate the department’s actions were so irrational as to be arbitrary and that plaintiff thereby was not deemed to have been deprived of due process).
47. Id. at 147.
48. Soc'y for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399, 400-01 (N.D.Cal. 1973) (ruling that the dismissal of a federal employee solely because of his admission that his discharge from the United States Army was due to homosexuality—on grounds that his employment would bring the government service into "public contempt"—was so arbitrary
discharge a person for immoral behavior only if that behavior affects the efficiency of the service.\textsuperscript{49}

Similarly, courts have held that the Commission may not rely on a determination of "immoral conduct," based on vague terms like "homosexual" and "homosexual conduct," as grounds for disqualifying an applicant for government employment.\textsuperscript{50} Rather, the Commission must at least specify the conduct it considers to be "immoral" and explain why it is relevant to "occupational competence or fitness."\textsuperscript{51}

Similarly, in \textit{Norton v. Macy},\textsuperscript{52} the D.C. Circuit held that the Commission could not dismiss a federal employee who made a homosexual advance on another man while off duty without demonstrating a reasonably foreseeable, specific connection between the employee's potentially embarrassing conduct and the efficiency of the Civil Service.\textsuperscript{53} The court noted that the government's obligation to grant due process prohibits any dismissals that are arbitrary and capricious.\textsuperscript{54} It also ruled that these constitutional limits may be greater in situations where the dismissal would impose a "badge of infamy."\textsuperscript{55} Finally, the court held that the Due Process Clause may "cut deeper" into the government's discretion in situations where a dismissal would involve an intrusion upon an area of privacy that is increasingly recognized as a foundation of several specific constitutional safeguards.\textsuperscript{56}

II. APPLICATION TO PROFESSIONAL SPORTS—SHOULD THERE BE A DIFFERENCE?

While this issue is complex on its own, it becomes increasingly so when the unique nature of professional sports is added into the equation. There are many factors that distinguish professional sports leagues from other vocations, but this Comment will focus on the two most relevant to the question of whether homosexuals could be discriminated against. The factors are: (1) the perceived risk of infected athletes transmitting Human Immunodeficiency Virus (HIV) and (2) the potential unwillingness of heterosexual athletes to share a locker room with their homosexual teammates.
A. The HIV Factor

1. Background

On November 7, 1991, Earvin "Magic" Johnson retired from the National Basketball Association (NBA) because he tested positive for Human Immunodeficiency Syndrome (HIV). Johnson enjoyed thirteen seasons with the Los Angeles Lakers, during which he won five NBA championships, was a twelve-time All Star, earned most valuable player (MVP) honors and NBA Finals MVP three times each, and was a member of the All-NBA First Team nine times. After he publicly announced his condition, Johnson returned to basketball, leading the Western Conference to victory in the 1992 All-Star game and receiving the game’s MVP award, showing that being HIV-positive did not limit his athletic abilities.

Johnson continued this excellence while playing for the American "Dream Team" in the 1992 Summer Olympics, leading the U.S. squad to the gold medal. A mere four days before starting his second post-HIV-positive season, however, Johnson retired in response to concerns several teammates expressed about a cut on Johnson’s arm. Even before this preseason injury, Johnson’s health was a concern to other basketball players at the Olympics. An Australian Olympic team member declared that if his team was matched up against the United States for the gold medal, he would rather forfeit the game rather than risk contracting HIV. Nonetheless, after a four-year hiatus, Johnson announced his plans to return to basketball in 1996 and was welcomed back by players and fans alike.

However, other HIV-positive athletes did not receive a positive response. On February 22, 1996, just sixteen days after Johnson announced his plans to return to the NBA, professional boxer Tommy Morrison announced during a press conference that he was HIV-positive.

59. Id.
60. Id.
62. Elizabeth R. Sullivan, Australia Stirred by HIV Issue; Officials Say Johnson Welcome Despite Few Players’ Aversion, WASH. POST, Feb. 4, 1992, at E7 (citing Ray Borner’s remark that “[i]f it was a choice of playing for gold and staying off and playing for silver, I’d take silver.”).
and was subsequently shunned by the boxing community. At the time, Nevada was one of the few states that mandated blood tests for boxers, and this requirement prohibited Morrison from boxing in Nevada. Like Johnson, Morrison refused to remain isolated. In 1996, he returned to boxing for a fight in which all of the proceeds went to the K.O. AIDS Foundation, an organization that raises funds to assist children infected with HIV. Unlike Johnson, whose return to professional sports had been welcomed, Morrison’s decision to return to the ring was not received well. Even Magic Johnson criticized Morrison’s comeback.

Johnson distinguished his comeback from Morrison by stating, “I feel that he shouldn’t be doing it because [boxing is] a blood sport.” Johnson went on to say that "[i]f something were to happen, it would set the fight against HIV and AIDS back five to 10 [sic] years." Thus, the controversy concerning HIV-positive athletes and their participation in sports ensued.

2. Homosexuals and the Increased Risk of HIV: Reality and Perception

In the United States, there has been a high incidence of HIV infection and AIDS among men who have sex with men, or “MSM.” Of the estimated 332,578 male adults and adolescents living with HIV/AIDS, sixty percent were MSM. Given the high incidence of HIV/AIDS among men who have sex with other men, another concern among professional athletes is the potential for the spread of HIV/AIDS from their gay teammates. This concern may also deter gay male professional athletes from coming out.

64. Although Nevada does not statutorily mandate that boxers test for HIV, its state athletic commission is statutorily permitted to mandate the tests through its own regulations. See NV. REV. STAT. § 467.030 (1995) (detailing the powers and duties of the Nevada Athletic Commission). In fact, Nevada was one of the first states to require HIV testing. See Health and Safety of Professional Boxing: Hearings Before the Comm. on Commerce, Sci., and Transp., 103d Cong. 2 (1994) (statement of Sen. Richard H. Bryan).


67. See Jon Saraceno, Morrison Referee Might Wear Goggles to Keep Blood Out, USA TODAY, Nov. 1, 1996, at C3 (noting game official’s concern with being exposed to HIV if Morrison was cut during the match).

68. Id.

69. Id.

70. Id.

Despite continued improvements in educating the public about HIV and AIDS, the misconception of AIDS as a "gay disease" still exists on a large scale and may be even more prevalent in the world of sports. For example, a textual analysis of articles from the Los Angeles Times, the New York Times, and the Washington Post regarding the HIV-positive announcements of two heterosexual male athletes, Magic Johnson and Tommy Morrison, and one homosexual male athlete, Greg Louganis, reveals that the heterosexual athletes convey a sense of surprise, attempt to explain how the athletes actually contracted HIV and reaffirming the athletes' heterosexuality. On the other hand, articles about the homosexual athlete are lacking such details, insinuating that the athlete's homosexual lifestyle is a sufficient explanation for contraction of the disease. It is similarly likely to assume that many people in sports still view AIDS as a "gay disease," increasing the feeling of contempt and fear of gay male athletes.

3. HIV and AIDS: The Disease and How It Is Transmitted

Most researchers believe that HIV originated in sub-Saharan Africa during the twentieth century; it is now a pandemic, with an estimated 38.6 million people living with the disease worldwide. As of January 2006, the Joint United Nations Program on HIV/AIDS (UNAIDS) and the World Health Organization (WHO) estimate that AIDS has killed an estimated 2.8 million people since it was first recognized on June 5, 1981. In 2005 alone, AIDS claimed an estimated 2.4 to 3.3 million lives.

In 1981, very few were concerned about a new disease occurring predominantly in homosexual men in the form of pneumonia, but eventually the medical community began understanding the complexity of this illness and began calling it HIV or, in its advanced state, AIDS. Doctors now know that the HIV virus causes AIDS, and "studies

74. Id.
75. Mortens & Mobley, supra note 72, at 252.
77. Id.
78. Id.
demonstrate that the majority of HIV infected individuals will acquire AIDS within seven to ten years of the initial infection.\footnote{80}

Despite its devastating effect on the body, HIV, which is present only in cells and body fluids,\footnote{81} is quite fragile and will die quickly outside of the human body.\footnote{82} The three leading forms of HIV transmission are sexual contact with an infected person, transmission of HIV-infected cells or fluids into the blood stream and in utero transmission.\footnote{83} Babies may become infected before or during birth,\footnote{84} or through breast-feeding after birth.\footnote{85} The current scientific view is that body fluids other than blood, semen or breast milk contain so little, if any, HIV that they are not of major importance in HIV transmission.\footnote{86} Therefore, casual contact with HIV infected individuals carries no risk of infection.\footnote{87} HIV transmission requires the direct interaction between HIV-tainted fluids from an infected person and the blood stream or mucosal lining of another person.\footnote{88}

With respect to transmission of HIV in the realm of professional sports, there is a great deal of controversy over whether the blood of an HIV-positive athlete could contaminate the open wound of another athlete due to a collision or contact during a sporting event.\footnote{89} For this to occur, both athletes would have to be injured and bleed excessively. Additionally, the infected athlete would probably have to be in the later stages of the disease so that the concentration of HIV in his or her blood would be high.\footnote{90} Even if an athlete in the advanced stages of HIV suffers a severe laceration, a substantial amount of the infected blood must enter the open wound of another athlete to effectuate transmission of the virus.\footnote{91} Since HIV can only survive in the atmosphere for a brief period, however, “the timing of the contact between the wounds leading to the transfer of blood would need to be precise.”\footnote{92}

Several conditions determine whether an individual contracts HIV

\footnote{81. Fan, \textit{supra} note 79, at 131.}
\footnote{82. \textit{Id.} at 132.}
\footnote{83. \textit{Id.} at 135.}
\footnote{84. \textit{Id.}}
\footnote{85. \textit{Id.} at 131-32.}
\footnote{86. \textit{Id.} at 131 tbl. 7-1.}
\footnote{87. \textit{Id.} at 120. Casual contact includes hugging, touching, and sharing of eating and drinking utensils. \textit{Id.} at 120.}
\footnote{88. \textit{Id.} at 135.}
\footnote{90. \textit{Id.} at 226.}
\footnote{91. \textit{Id.}}
\footnote{92. \textit{Id.}}

from another. These include "the concentration of the virus in the infected person's blood, the amount of blood transferred, the recipient's general health and level of immunity, and other factors."93 Members of the medical community predict that for HIV to transmit from one athlete to another, "the contact must be precise and last for a relatively long period of time."94

Experts agree that the possibility of HIV transmission through athletic contact is extremely improbable.95 Indeed, the World Health Organization and International Federation of Sports Medicine stated in their 1989 joint report that "[t]here is a very low risk of HIV transmission if an infected athlete with a bleeding wound or a skin lesion comes into direct contact with another athlete who has a skin lesion or exposed mucous membrane that could possibly serve as a portal of entry for the virus."96

Although the abundance of medical authority asserts that the risk of an athlete contracting HIV through sports is insignificant, experts acknowledge that there is some chance—however small—of transmission, if certain conditions exist.97 For HIV to be transmitted during an athletic event, an HIV positive athlete's infected blood must enter the bloodstream of another athlete.98 This could be from another cut or through the eyes.99

Dr. Robert Voy, chief physician for the 1996 Olympic Games boxing competition stated, "We know that this is an infectious disease transmitted through blood . . . . It doesn't matter that there hasn't been an incident. The first one that happens is the death sentence."100 Therefore, although the risks are low, the stakes remain high. The necessity for precaution is heightened because there is no known cure for HIV or AIDS.101

Many athletes throughout professional sports have expressed their concerns about the transmission of the HIV virus. In boxing, the ex-

93. J. Louise Gerberding et al., Risk of Transmitting HIV, Cytomegalovirus, and Hepatitis B Virus to Health Care Workers Exposed to Patients with AIDS and AIDS-Related Conditions, 156 J. INFECTIOUS DISEASES 1, 6 (1987). HIV's relative lack of virulence contrasts with that of Hepatitis B, which is transmitted in the same manner as HIV. Id.
95. Id.
98. George, supra notes 89-91 and accompanying text.
heavyweight champion Larry Holmes declared, “Everybody that steps into that ring should be tested . . . Nobody has a right to put another person’s life on the line.” In basketball, when asked about the concern of playing against an HIV-infected player, Atlanta Hawks’ Grant Long stated, “Most guys are politically correct about it in public . . . But guys, behind closed doors, will admit they are frightened to play with [Magic].” In hockey, Toronto Maple Leaf player representative Todd Gill stated, “I feel I should have the right to know if someone I’m playing against has the HIV virus . . . I should feel I’m safe when I go to work.” In football, a survey of the 100 college football players most likely to be drafted by the NFL in 1992 found that eighty-two percent of the players supported mandatory HIV testing in the NFL. Finally, in tennis, Arthur Ashe, before dying from AIDS in 1993, spent a great deal of time supporting the implementation of mandatory HIV testing in professional sports.

Of all the athletes that compete in the world, there is only one known case of possible HIV transmission in sports. In that case, two soccer players in Italy collided, creating bloody head wounds that injured both men. At the time of the accident, one of the players was HIV-positive while the other tested negative. The HIV-negative player subsequently tested positive. However, this case is not conclusive because the player could have contracted HIV in numerous other ways, and Italian doctors could not conclude that the collision was the exclusive cause of the infection. It is interesting to note that no documented instances of exposure to HIV infection occurred during the Gay Games in 1982, 1986 and 1990, during which many HIV positive athletes competed in a variety of sports. Thus, there are presently no conclusive cases concerning HIV or AIDS transmission solely from athletic participation.

102. Jon Saraceno, Boxing Eyes Counterpunch To HIV Concerns, USA TODAY, Mar. 12, 1996, at 1C.
108. Id.
109. Id.
112. Robert J. Johnson, HIV Infection in Athletes, POSTGRADUATE MEDICINE, Nov. 15, 1992, at 73 (citing reports from the World Health Organization and the Canadian Academy
4. Restrictions Placed on HIV-Positive Athletes

Few sports regulation associations or franchises restrict participation of HIV-positive athletes. The United States Olympic Committee (USOC) has officially acknowledged that the chances of transmission of HIV in sports are remote.\textsuperscript{113} Moreover, the American Academy of Pediatrics stated that "in the absence of any proven risk, involuntary restriction of an infected athlete is not justified."\textsuperscript{114} Additionally, both the National Collegiate Athletic Association (NCAA) and National Federation of State High School Associations (NFSHSA) deter schools from excluding athletes solely because of their HIV-positive status.\textsuperscript{115}

Rather than restrict participation of HIV-positive athletes, many professional and amateur regulation entities have installed guidelines that attempt to decrease the already minimal risk of HIV transmission during athletic contests. For instance, the NCAA directs that players who are bleeding leave the game until they are bandaged and the bleeding has stopped.\textsuperscript{116} The National Hockey League (NHL) adheres to the Occupational Safety and Health Act (OSHA) regulation that calls for universal precautions.\textsuperscript{117} USOC guidelines provide that "when a bleeding injury occurs, the game or match must be stopped, [and] all bleeding athletes [are to] receive care as soon as practical, and injured players [are] not [to] resume participation until bleeding is halted and the wound dressed."\textsuperscript{118}

B. The Locker Room

Perhaps the most relevant ramification of an openly gay athlete would be the potential refusal of heterosexual players to play on the same team and share a locker room with their homosexual teammate. While most
players were not as harsh in their reaction to the Amaechi revelation as Hardaway, many still admitted that an openly gay player would create problems for a team. "We probably have gay players in the NBA," said Portland Trailblazers center Joel Pryzbilla. "Except, you know some guys on this team would have a problem with it if they knew who those players were." Similarly, when asked why he would not want a gay teammate, Seattle Supersonic Ray Allen responded, "You don’t want to know that there is somebody in your locker room and you are not aware of it . . . And maybe you had to be careful being where you put yourself in a situation where you might get hit on by a teammate." Finally, Shavlik Randolph of the Philadelphia 76ers commented that he would not mind having a gay teammate, "as long as you don’t bring your gayness on me." Clearly, there would be substantial opposition among some professional athletes to permitting an openly gay player to play on the same team, dress, and shower in the same locker room as his heterosexual teammates. The crucial point, however, is what the law would say about this issue.

Under the traditional rules of anti-discrimination law, employers cannot purposefully discriminate on the basis of gender. This guarantee of a workplace free of discrimination arises out of both the Equal Protection Clause and, even more directly, Title VII of the Civil Rights Act of 1964. A closer look, however, reveals that, in some circumstances, Title VII actually permits blatant, explicit sex discrimination. Despite its general prohibition of employment discrimination on the basis of sex, Title VII carves out an exception for sex-specific hiring practices justified because of a so-called “bona fide occupational qualification,” or “BFOQ”.

If an employer can demonstrate that being either male or female is an essential part of the job, the BFOQ provision protects the employer from liability under Title VII. The BFOQ provision reads:

Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or

120. Id.
122. Id.
The Interpretive Memorandum of Title VII ("Memorandum") submitted by the Senate Floor Managers of the Civil Rights Bill referred to the BFOQ as a "limited exception" to the prohibition against discrimination, conferring upon employers a "limited right to discriminate." The Memorandum offered as examples of legitimate discrimination "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of a particular religious group for a salesman of that religion." With regard to sex discrimination, the BFOQ exception was meant to accommodate those rare jobs that absolutely required employees to possess some unique sex-specific trait.

The Equal Employment Opportunity Commission (EEOC) regulations offer a substantially similar explanation regarding the scope of the BFOQ provision. The regulations call for a narrow interpretation of the BFOQ exception and reject purported BFOQs that are based on nothing more than stereotypical views about the capabilities of men and women. They also explicitly reject customer preferences as a basis for the recognition of a BFOQ. While suggesting that a sex-discriminatory practice justified in the name of "genuineness" or "authenticity" might qualify under the BFOQ provision, the regulations generally offer a more limited universe of examples for BFOQ-justified discrimination than the Memorandum.

124. Id.
125. 110 Cong. Rec. 6,7213 (1964).
126. Id.
127. 29 C.F.R. § 1604.2 (2002).
128. See 29 C.F.R. § 1604.2(a) ("The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—'Men's jobs' and 'Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other.").
129. The regulations state:
(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment, that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. Id.
130. See id. at § 1604.2(a)(1)(iii) ("The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section" does not justify a BFOQ).
131. See id. at § 1604.2(a)(2) ("Where it is necessary for the purpose of authenticity or
In the years immediately following the passage of Title VII, employers tried to utilize the BFOQ exception to preserve discriminatory policies that made it more difficult for women and men to take non-traditional jobs. Employers would suggest that women were not strong enough to perform physically intensive work, such as telephone repair. Men, on the other hand, were characterized as not soothing or sexy enough to hold certain service jobs, such as being a flight attendant. However, in these instances, the courts have rejected these explanations and avoided perpetuating the stereotypes that prevent men and women from breaking out of traditional sex-identified roles. Courts have continued to accept the BFOQ justification in a residual cluster of sex discrimination cases involving prison guards, medical attendants and bathroom custodians.

While seemingly unrelated, these positions share a common element because they involve the potential or actual observation of the naked body. It is this rationale inherent in the BFOQ that might give a professional sports league a leg to stand on if they decided to bar openly gay players from the locker room. Just as it might be inappropriate for a female to serve in certain roles where men would risk the potential undesired exposure of their naked bodies to a female, the argument could be made that the same should be true where men would risk the potential undesired exposure of their naked bodies to a homosexual male. While it might be a bit of a stretch to suggest that the exposure of the male body to a female is equivalent to the exposure of the male body to a homosexual male, the same discomfort and sexual tension might exist in both cases. Thus, if a player were to come out of the closet, the team or league that he plays for might be able to find an ally within the confines of Title VII to ban him from the locker room, and consequently, from the sport as a whole.

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132. See Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 233 (5th Cir. 1969) (noting that women were limited to lifting a maximum of twenty-five pounds, while the job required lifting loads greater than thirty pounds).
133. See Diaz v. Pan-American Airlines, 442 F.2d 385, 388 (5th Cir. 1971) (indicating that the airline only hired women as flight attendants because they were considered to be more "soothing" than male flight attendants); Wilson v. Southwest Airlines, 517 F. Supp. 292, 295 (N.D. Tex. 1981) (describing how Southwest Airlines only employed woman in "high customer contact positions" in order to advance its "youthful, feminine image").
134. See supra notes 132-33.
III. CONCLUSION

"The NBA locker room was the most flamboyant place I'd ever been. Guys flaunted their perfect bodies. They bragged about sexual exploits. They primped in front of the mirror, applying cologne and hair gel by the bucketful . . . . Surveying the room, I couldn't help chuckling to myself: And I’m the gay one,” Amaechi writes.  

Nonetheless, it is clear that the locker room of a professional sports team or the team as a whole is not a place where an open homosexual would be readily accepted by his teammates or even by society as a whole.  

While it might be hard to believe in this day and age, it is not clear whether the gay athlete would have any viable legal protections if his team or league decided to restrict his ability to play in order to accommodate other players. At the end of the day, what happens may depend on the caliber of the player that decides to come out. If a perceived superstar player such as Derek Jeter admitted to being a homosexual, he would probably have an easier time being accepted for his lifestyle than a player of lesser caliber. Until that day comes, however, the jury is still out on how players, sports leagues, society and the law would treat the presence of an openly gay player in a professional sports league.

136. AMAECHI, supra note 12.  
137. Homosexuality and Sports, Survey, SPORTS ILLUSTRATED, Apr. 12, 2005, available at http://sportsillustrated.cnn.com/2005/magazine/04/12/survey.expanded/ (indicating that twenty-four percent of people believed that having an openly gay player would hurt the entire team he played for and twenty-three percent believed it would hurt the entire sport).