UNH Sports Law Review

Volume 3 | Issue 1 Article 14

2024

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The University of New Hampshire Sports Law Review

Volume 3 | Number 1 | Article 6

1-08-2024

SIDELINE INTERFERENCE: THE VULNERABILITY OF COLLEGE ATHLETE-WHISTLEBLOWERS IN THE IMPENDING "STUDENT-EMPLOYMENT-ATHLETE" ERA & CO-WORKER RETALIATION

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SIDELINE INTERFERENCE[1]: THE VULNERABILITY OF COLLEGE ATHLETE-WHISTLEBLOWERS IN THE IMPENDING "STUDENT-EMPLOYEE-ATHLETE" ERA & CO-WORKER RETALIATION

3 U.N.H. Sports L. Rev. 289 (2024)

ABSTRACT. Student-athlete whistleblowers have long faced retaliation for speaking out against sexual abuse and harmful locker-room behavior by teammates and coaches. As the recognition of student-athletes as employees has grown more likely in the years following *National Collegiate Athletic Association v. Alston*, normative thinking suggests anti-retaliation policies reserved for employees could help curtail these issues in the "student-employee-athlete" era. This essay addresses the implications a shift to employment status would have on student-athletes from a federal employment law perspective. Although student-athletes could soon receive the federal employment law protections guaranteed under a combination of Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, these two federal statutes fail to address co-worker retaliation, a form of retaliation shown to have a chilling effect on par with, or greater than, that of employer retaliation. Such a force is especially apparent in college athletics, where teammates enforce a code of silence surrounding hazing and sexual harassment. This essay will detail three strategies for attacking this persistent problem, approaching the issue with proposed actions by the Supreme Court, Congress, and the NCAA, and exploring the unique challenges facing each proposal.

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[1] In college football, sideline interference refers to an in-game penalty used to punish coaches for either their own, their players', or their non-player personnel's crossing over the sideline into the restricted-access area or onto the field of play during a game. Though the coach may not have committed the offense, nor be aware of their personnel committing the offense, the referee penalizes the team all the same. *See 2023 NCAA Football Rules and Interpretations*, Rule 9-2-5.

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INTRODUCTION

On July 8, 2023, Northwestern University's ("Northwestern") student newspaper, *The Daily Northwestern*, published an article in which an anonymous former Northwestern football player detailed numerous allegations of hazing in the football program.[2] At the time, the program was under the supervision of Head Coach Pat Fitzgerald, whom the whistleblower (hereinafter "John Doe") alleged was aware of the hazing.[3] Among the allegations was the practice of "running," in which upperclassmen in masks would restrain a player who made mistakes on the field and proceed to dry-hump the restrained victim.[4]"'It's a shocking experience as a freshman to see your fellow freshman teammates get ran, but then you see everybody bystanding in the locker room,'" John Doe lamented.[5] "'It's just a really abrasive and barbaric culture that has permeated throughout that program for years on end now.'"[6]

Perhaps the only thing more appalling than the allegations themselves was the blowback experienced by John Doe in the wake of *The Daily Northwestern* report. In the hours following the report, a group claiming to represent "the ENTIRE Northwestern Football Team" circulated a letter to ESPN and other news outlets condemning the allegations as "exaggerated and twisted" and expressing its commitment to "stand behind" Pat Fitzgerald.[7]

Within days, a former Northwestern football student manager, Eduardo Soto, outed John Doe's identity on social media in a letter that characterized the whistleblower's allegations as "dubious" and his decision to report as "maliciously misleading behavior."[8] Additionally, an anonymous current player spoke with ESPN after the

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[2] Nicole Markus, Alyce Brown, Cole Reynolds & Divya Bhardwaj, *Former NU Football Player Details Hazing Allegations After Coach Suspension*, THE DAILY NORTHWESTERN (Jul. 8, 2023), https://dailynorthwestern.com/2023/07/08/top-stories/former-nu-football-player-details-hazing-allegations-after-coach-suspension [https://perma.cc/UU92-EWUN].

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Adam Rittenberg (@ESPNRittenberg), TWITTER (Jul. 8, 2023, 8:16 PM), https://twitter.com/espnrittenberg/status/1677849108852375557?s=20 [https://perma.cc/EM66-2PGU].

[8] Eduardo Soto (@EduardoES97), TWITTER (Jul. 10, 2023, 1:28 PM), https://twitter.com/eduardoes97/status/1678471197019742228?s=20 [https://perma.cc/UR4C-3WXG].

report's publication, painting John Doe as a vindictive former athlete merely seeking Fitzgerald's termination.[9]

This story is not isolated to Northwestern. Allegations of hazing and various other instances of illegal locker room activity span the entirety of America's collegiate landscape, with some garnering national attention.[10] Though hazing and other abuse by peers and authority figures can take many forms, instances like the Northwestern football scandal illustrate that this behavior oftentimes constitutes sexual harassment.[11]

Student-athlete whistleblowers have long faced retaliation for speaking out against sexual abuse and harmful locker room behavior by teammates and coaches.[12] As the recognition of student-athletes as employees has grown more likely in the years

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[9] Adam Rittenberg, *Ex-Northwestern Player Says Coach Pat Fitzgerald 'Failed' By Not Stopping Hazing*, ESPN (Jul. 9, 2023, 10:49 PM), https://www.espn.com/college-football/story/_/id/37987381/ex-northwestern-player-says-coach-pat-fitzgerald-failed-not-stopping-hazing [https://perma.cc/GJL2-R97P] (reporting to ESPN the current player said, "I don't think [the whistleblower] ever acknowledged what he's saying is not true. It was just like, 'I might embellish or exaggerate to get Coach Fitz fired.' He said his sole goal was to see Coach Fitz rot in jail. 'The truth is none of that stuff happened in our locker room.'").

[10] *See generally* Matthew Ablon, *Davidson College Swim Team Member Alleges Hazing: Observer Report*, WCNC CHARLOTTE (Jun. 23, 2023, 9:59 PM) https://www.wcnc.com/article/news/crime/davidson-college-hazing-claims-crime-sports/275-492c5706-7b70-4eca-8042-f02b7cf1379a [https://perma.cc/VYF8-ALNJ]; Tom Schad, *Former New Mexico State Men's Basketball Players File Lawsuit Over Hazing Allegations*, USA TODAY (Apr. 19, 2023. 5:44 PM), https://www.usatoday.com/story/sports/ncaab/2023/04/19/new-mexico-state-hazing-incident-victims-step-forward-file-lawsuit/11697129002/ [https://perma.cc/9WZV-8APC] (detailing the circumstances surrounding the alleged hazing of two men's basketball players by three of their former teammates); Mark Zeigler, *Half of USD's Football Team Disciplined Following Hazing Incident, President Says*, THE SAN DIEGO UNION-TRIBUNE (Aug. 29, 2023. 12:17 PM), https://www.sandiegouniontribune.com/sports/toreros/story/2023-08-29/university-of-san-diego-usd-toreros-football-hazing-incident-suspensions-cal-poly-slo-opener-james-harris-letter [https://perma.cc/LGC4-EKVG] (University of San Diego President James T. Harris III explained in a letter to staff that roughly half of the players on the university's football roster "were either active or passive participants" in hazing.).

[11] *See* Aaron Slone Jeckell et al., *The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective*, 10 Sports Health 558, 560 (2018) (estimating as many as 48% of college student-athletes will experience some form of sexual abuse).

[12] *See infra* notes 69-71 and accompanying text.

following *National Collegiate Athletic Association v. Alston*,[13] normative thinking suggests anti-retaliation policies reserved for employees could help curtail these issues in collegiate athletics. However, as we move closer toward this "student-employee-athlete" world, the law must evolve to account for co-worker retaliation. Co-worker retaliation is a form of retaliation widely unaddressed by employment law and exemplified by the oft-hostile reactions to allegations of illegal behavior from teammates, student managers, and similar non-coach colleagues of athlete-whistleblowers.

I. BACKGROUND

A. Shifting from "Student-Athlete" to "Student-Employee-Athlete"

The uptick in hazing-related news reports parallels an increase in support for a movement which seeks to remedy these issues, among others: recognizing student-athletes as university employees. In 2014, National Labor Relations Board ("NLRB") Region 13 Director Peter Sung Ohr issued a direction of election permitting Northwestern University's football players to vote for unionization.[14] Director Ohr found the players were employees within the meaning of the National Labor Relations Act ("NLRA"), but when Northwestern appealed the case up to the NLRB's full board, that board ultimately declined to assert jurisdiction.[15] Although the NLRB's decision to punt the issue may have tempered the push for employment status, the Supreme Court's opinion in *NCAA v. Alston* breathed new life into the "collegiate athletes-as-employees" movement by questioning the legality of the National Collegiate Athletic Association's ("NCAA)" numerous compensation limitations.[16] In September of 2021, NLRB General Counsel Jennifer Abruzzo released an advisory memo asserting that

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[13] 141 S. Ct. 2141 (2021). Although *Alston* dealt with the issue of education-related benefits, *Alston* impacted student-athlete compensation policies beyond the case's scope, such as name, image & likeness; consequently, *Alston* renewed calls for student-athlete recognition as employees. *See* Tyler J. Murry, Note, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 794-797 (Summer, 2022) (detailing the fallout from the *Alston* opinion and subsequent increase in litigation regarding employee status); *see also* 2021 NLRB GCM LEXIS 25 (Dep't of Labor September 29, 2021) (NLRB General Counsel Jennifer Abruzzo asserted that student-athletes should be treated as employees for all purposes under the National Labor Relations Act ("NLRA.")).

[14] Nw. Univ., 2014 NLRB LEXIS 221 (Mar. 26, 2014); George J. Bivens, Comment, *NCAA Student Athlete Unionization: NLRB Punts on Northwestern University Football Team*, 121 PENN ST. L. REV. 949, 951-52 (Winter, 2017).

[15] Nw. Univ. & College Athletes Players Ass'n, 362 N.L.R.B. 1350 (2015); Bivens, *supra* note 14, at 968.

[16] *See* Murry, *supra* note 13, at 794-797.

universities should recognize student-athletes' status.[17] In February of 2024, NLRB Region 1 Director Laura Sacks echoed the sentiments of Director Ohr and General Counsel Abruzzo when she issued a direction of election to allow Dartmouth College's men's basketball team to vote on whether to unionize.[18] Director Sacks found that the college basketball players were employees of their private university under the NLRA because the university "exercises significant control over the basketball players' work."[19] Director Sacks declined to follow the *Northwestern* case, finding "nothing in that decision precludes the finding that players at private colleges and universities are employees under the [FLSA],"[20] and by doing so, opened the door for the NLRB's full board to revisit that matter.[21] Additionally, the Third Circuit has the potential to create a circuit split on the matter depending on its ruling in *Johnson v. NCAA*,[22] the principal circuit court case on the employee status of student-athletes post-*Alston*.[23] Regardless of *Johnson*'s outcome, the blitz against the NCAA will likely continue until athletes obtain formal recognition as employees.

Numerous legal scholars have posited their opinions and passionately campaigned for student-athletes' employee status.[24] However, the aim of this article is not to join either side of the crusade or to assess the merits of their respective

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[17] 2021 NLRB GCM LEXIS 25 (Dep't of Labor September 29, 2021); *NLRB Memo Says College Athletes Are Employees – Not "Student Athletes" – and Deserve Benefits, Pay*, CBS (Sept. 30, 2021, 5:40 PM), https://www.cbsnews.com/news/nlrb-memo-college-athletes-compensation-nil/ [https://perma.cc/XU2E-ZUTT]. This opinion from General Counsel Abruzzo, although possessing persuasive value, does not change any rules or laws surrounding the issue.

[18] 2024 NLRB Reg. Dir. Dec. LEXIS 17 (Feb. 5, 2024).

[19] *Id.* at 42.

[20] *Id.* at 34.

[21] *See* Bethany S. Wagner et al., *NLRB Regional Director Rules Dartmouth Basketball Players Are Employees, Setting Up Potential Landmark Board Case*, OGLETREE DEAKINS (Feb. 7, 2024), https://ogletree.com/insights-resources/blog-posts/nlrb-regional-director-rules-dartmouth-basketball-players-are-employees-setting-up-potential-landmark-board-case/ [https://perma.cc/D5QP-YVZB].

[22] 556 F. Supp. 3d 491, 495 (E.D. Pa., 2021), *cert. granted*, No. 22-1223 (3rd Cir. 2023).

[23] *See, e.g.,* Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); *and* Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (the Seventh and Ninth Circuits declined to recognize student-athletes as employees, but the circuits handed down those opinions years before the Supreme Court's *Alston* opinion).

[24] *See generally* Murry, *supra* note 13; Hailey Reed, Comment, *Cleating Up and Clocking In: A Joint-Employer Approach to Student-Athlete Employee Status*, 72 U. KAN. L. REV. 99 (November, 2023); *and* Joshua Hernandez, *The Largest Wave in the NCAA's Ocean of Change: The "College Athletes are Employees" Issue Reevaluated*, 33 MARQ. SPORTS L. REV. 781 (Spring, 2023).

arguments. Rather, this essay addresses the implications that a shift to employee status, if granted, would have on student-athletes from a federal employment law perspective.

Suppose we heed developments on this front and assume the "student-employee-athlete" era is on the horizon. In that instance, we begin to see the myriad of employee protections that federal law will soon extend to college athletes, particularly the combination of Title VII of the Civil Rights Act of 1964 ("Title VII") and Title IX of the Education Amendments of 1972 ("Title IX"). Some have suggested the anti-retaliation protections associated with these statutes will curtail issues of retaliation suffered by student-athlete whistleblowers.[25] However, such protections suffer from inadequacies which, while symptomatic of all federal employment law, profoundly impact intercollegiate athletics.

B. Title VII & Title IX: An Overview

Title VII and Title IX protect against discrimination and harassment based on a protected class – namely race, color, religion, sex or national origin for Title VII, and sex for Title IX.[26] Title VII protects individuals in the workplace, and Title IX protects those enrolled at federally funded educational institutions.[27] University student-athletes are presently protected by Title IX alone[28] but because both statutes cover university employees,[29] if student-athletes attain employee status, they will gain the protections of Title VII .[30] The statutes differ in legislative purpose: Congress created Title VII "with a compensatory scheme in mind,"[31] whereas Congress enacted Title IX to "prevent federal funding of discriminatory actions pursuant to Congress's spending

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[25] *See* Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1 (January, 2010); Whitney D. Hermandorfer, Note, *Blown Coverage: Tackling the Law's Failure to Protect Athlete-Whistleblowers*, 14 VA. SPORTS & ENT. L.J. 250 (Spring, 2015); *and* Chris Hanna et al., *College Athletics Whistle-Blower Protection*, 27 J. LEGAL ASPECTS OF SPORT 209 (2017).

[26] 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2.

[27] *Id.*; Kendyl L. Green, Note, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1, 3 (Fall, 2017).

[28] 20 U.S.C. § 1681.

[29] Circuits are split on whether Title VII and Title IX sexual harassment claims may be brought as independent claims or if Title VII preempts Title IX on such claims. *See infra* Section III.e.

[30] 20 U.S.C. § 1681.

[31] Hayley Macon et al., Note, *Introduction to Title IX*, 1 GEO. J. GENDER & L. 417, 423-24 (2000); *see* Landgraf v. USI Film Prods., 511 U.S. 244, 254-55 (1994) (noting Title VII's legislative purpose was to make "persons whole for injuries suffered through past discrimination," a compensatory policy aim.).

power."[32] However, after *Cannon v. University of Chicago*,[33] both Title VII and Title IX now provide a private right of action which allows for both compensatory and punitive damages.[34]

Before a plaintiff can file a Title VII claim in federal district court, the employee must "[exhaust]. . . administrative remedies."[35] The employee can pursue these administrative remedies by filing a complaint with the Equal Employment Opportunity Commission ("EEOC"), the federal administrative agency that enforces Title VII.[36] "[I]f the EEOC finds reasonable cause to believe the complaint is true, it must pursue informal efforts to resolve the complaint."[37] The EEOC may bring a civil action if these efforts do not yield a resolution.[38]

"If the EEOC fails to find probable cause to believe the complaint is true or decides not to bring an action to enforce its judgment, the EEOC must issue a right-to-sue letter."[39] This letter permits the aggrieved employee to bring a Title VII suit in federal district court.[40] Instead of filing with the EEOC, in some states the employee "may bring a discrimination claim with a state or local [administrative] authority," often a state-run counterpart of the federal EEOC, and if that state or local authority denies the employee relief, the employee may then bring a Title VII claim.[41] "[T]he Supreme Court held that a state administrative finding of non-discrimination does not

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[32] Macon et al., *supra* note 31, at 423; *see also* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) ("We have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause."); *and* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (noting Congress enacted Title IX "with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.") (internal quotations omitted).

[33] 441 U.S. 677 (1979).

[34] *Id.* at 703; Green, *supra* note 27, at 6.

[35] Green, *supra* note 27, at 4.

[36] *Id.*; 42 U.S.C. § 2000e-5(a) ("The [EEOC] is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704].").

[37] Green, *supra* note 27, at 4-5.

[38] *Id.* at 5.

[39] *Id.*

[40] *Id.*

[41] *Id.*

preclude a Title VII suit on the claim where the claimant does not appeal the administrative body's decisions through the state court system."[42]

Title IX has three methods of enforcement: (1) submitting an in-house complaint, typically through the institution's designated Title IX coordinator; (2) filing a lawsuit in federal district court; and (3) "filing a complaint within 180 days of the alleged discrimination" with the Department of Education's Office for Civil Rights ("OCR"), the primary enforcement authority for Title IX.[43]

C. § 704(a) of Title VII and Retaliation Claims

Section 704(a) codifies Title VII's anti-retaliation provision.[44] Congress enacted **§** 704(a) with two complementary purposes: first, to grant employees "unfettered access to statutory remedial mechanisms,"[45] and second, to prevent employers from retaliating against employees who try to access those mechanisms.[46]

Section 704(a) advances these objectives by extending a pair of protections to both current and former employees.[47] First, the provision protects those who oppose any "unlawful employment practice" – commonly known as the "opposition clause."[48]

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[42] *Id.* (citing Gerald S. Hartman & Richard H. Schnadig, 1 *Personnel Handbook* 36, 41 (1989)).

[43] *Id.* at 6.; *see* Macon et al., *supra* note 31, at 417-18.

[44] 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."); Elizabeth A. Cramer, *Taking Matters into Their Own Hands: Retaliatory Actions by Coworkers and the Fifth Circuit's Narrow Standard for Employer Liability*, 82 U. CIN. L. REV. 591, 592 (2018).

[45] Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

[46] Cramer, *supra* note 44, at 592-93; *see* Burlington N. & Santa Fe R.R. Co. v. White, 548 U.S. 53, 63 (2006) (noting Section 704(a) "prevents harm to individuals based on what they do, i.e., their conduct.").

[47] Cramer, *supra* note 44, at 593. These rights also extend to job applicants, but this essay focuses on the protections afforded to current and former employees – or in the athletics context, current and former student-employee-athletes.

[48] 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . . because he has *opposed* any practice made an unlawful employment practice by this subchapter. . .") (emphasis added); *see*

Second, the provision protects those who make a charge, testify, assist in an investigation, or otherwise participate in a Title VII proceeding – commonly known as the "participation clause."[49] Claimants benefit from these two protections and the right to bring claims under § 704(a) after filing a charge with the EEOC.[50]

If an employee files a Title VII retaliation claim in federal court, he or she "must be able to prove a prima facie case of retaliation."[51] "To prove a prima facie case, a plaintiff must show: (1) the employee was engaged in a protected activity, either opposition or participation; (2) the employer took a materially adverse employment action against the employee; and (3) a causal connection between the adverse employment action and protected activity."[52]

The Supreme Court resolved a circuit split over what constitutes a "materially adverse employment action" in *Burlington Northern & Santa Fe Railway Co. v. White*,[53] holding that material adversity exists when an action "might well have dissuaded a reasonable [employee] from making or supporting a charge of discrimination."[54]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), Enforcement Guidance on Retaliation and Related Issues, (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2._Opposition [hereinafter EEOC Enforcement Guidance] [https://perma.cc/N7JC-SBVQ]; *see also* Cramer, *supra* note 44, at 593.

[49] 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . . because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter") (emphasis added); *see* EEOC Enforcement Guidance; *see also* Cramer, *supra* note 44, at 593.

[50] 42 U.S.C. § 2000e-5(a). After *Jackson v. Birmingham Board of Education*, employees filing a Title IX complaint may also receive the benefit of anti-retaliation protections and the ability to file a Title IX retaliation claim and need not file a charge with the EEOC. *Jackson*, 544 U.S. 167, 174 (2005); *see infra* Section III.d.

[51] Cramer, *supra* note 44, at 594.

[52] *Id.*; *see also* Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) ("Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action").

[53] 548 U.S. 53, 67-68 (2006).

[54] *Id.* at 68 (internal citations omitted).

As scholars and courts note, not all actions by co-workers that have a chilling effect on complainants or whistleblowers satisfy the *Burlington Northern* standard.[55] Merely siding with the accused, avoiding conversation with the whistleblower or claimant, and several other forms of social ostracism fail to meet this standard.[56] There can be no doubt, however, that actions such as outing the whistleblower publicly, spreading false rumors about the whistleblower, and threats of violence or actual violence not only chill a whistleblower, but are materially adverse, and ought to satisfy a retaliation standard.[57] Student-athletes have and may continue to suffer from these forms of retaliation.[58] While a solution may not curtail every chilling action by teammates, managers, and other soon-to-be co-workers, we must bolster anti-retaliation policies to account for those co-worker behaviors that a court would find illegal if done by a supervisor or employer.

II. PROBLEM

Both Title VII and Title IX provide protections against discrimination and harassment based on status within a protected class,[59] and both statutes prevent an employer or supervisor from taking an adverse employment action against a whistleblower or complainant.[60] Unfortunately, these statutes — and labor & employment law in general — commonly fail to address a real and present danger to actual and would-be whistleblowers: co-worker retaliation.[61] Studies have shown that co-workers are just as powerful, if not more powerful, in discouraging an employee from reporting harassment and other forms of misconduct.[62] Such force is especially

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[55] *See* Deborah L. Brake, *Coworker Retaliation in the #METOO Era*, 49 U. BALT. L. REV. 1, 31-36 (Fall, 2019); Burlington N. & Santa Fey Ry. Co. v. White, 548 U.S. 53, 59 (2006) (laying out the standard for retaliatory actions under Title VII); Jensen v. Potter, 435 F.3d 444, 452 (3d Cir. 2006) (the Third Circuit is reluctant to interfere with coworker relationships, noting that allegations of harassment inevitably strain relationships).

[56] Brake, *supra* note 57, at 33.

[57] *See generally* Brake, *supra* note 57; 34 C.F.R. § 106.71(a) (2020) (including a prohibition on disclosure of whistleblower names).

[58] The Northwestern case provides a recent example of coworker retaliation. *See supra* notes 2-9.

[59] 20 U.S.C. § 1681; 42 U.S.C. §§ 2000e-2000e17 (as amended).

[60] *Id. See also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-74 (2005).

[61] *See generally* Brake, *supra* note 57; *and* Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605 (2017).

[62] *See* Schoenbaum, *supra* note 63, at 609, 621-24 (detailing the effect of coworker support on employees' willingness to report harassment in the workplace).

apparent in college athletics: a thriving athlete, manager, or booster on the team tends to stay on the good side of the harasser — oftentimes a coach, a group of veteran players, or a captain — which commonly involves exacting punishment or retribution against a whistleblower whose allegations threaten to disrupt the team's on-field performance.[63]

A. The "Code of Silence" Among College Athletes

College athletics – and sports in general – has long suffered from a deep-seated "culture of silence,"[64] which has led to officials "dramatically underestimat[ing]" hazing's frequency on college campuses.[65] Studies have found that although 80% of NCAA athletes describe experiencing hazing activities, only 12% reported their hazing, and 60% to 95% of student-athletes who were hazing victims expressly refused to report the hazing.[66] Although reasons for not reporting varied, a

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[63] *See* Andrew Seligman, *As Northwestern Hazing Scandal Plays Out, Athletes' Union Might Have Helped*, WISCONSIN STATE JOURNAL (Aug. 8, 2023), https://madison.com/ap/as-northwestern-hazing-scandal-plays-out-athletes-union-might-have-helped/article_46c45cf6-9637-5a61-8acc-c37090183a1e.html [https://perma.cc/47BZ-ASMY] (Judie Saunders, an attorney who has worked with Olympic and NCAA athletes and specializes in survivors of assault, notes this dynamic is common within collegiate athletics programs. Saunders also notes that while player unionization may be a way to combat coach-on-player abuse, player-on-player abuse would not likewise be curtailed by unionization. Though unionization is not a concern of this essay, the prospect of student-athlete unionization is an analogue of the student-employee-athlete movement with its own devoted set of scholarship.) S*ee* Todd A. Cherry, Note, *Declining Jurisdiction: Why Unionization Should Not Be the Ultimate Goal for Collegiate Athletes*, 2016 U. ILL. L. REV. 1937, 1941 (2016) (advocating for alternatives to the unionization of student-athletes); Bivens, *supra* note 14, at 951-52 (Winter, 2017). There are myriad other articles detailing both sides of the student-athlete unionization debate, and these hardly encapsulate the diversity of opinion on the matter.

[64] Seligman, *supra* note 65 (Plaintiff-side sports attorney Michelle Simpson Tuegel describes the problem of student-athletes remaining quiet about harassment as a "culture of silence."); *see also* Jeckell et al., *supra* note 11, at 560 (citing Ashley E. Stirling et al., *Mountjoy M. Canadian Academy of Sport and Exercise Medicine Position Paper: Abuse, Harassment, and Bullying in Sport*, 21 Clinical J. Sports Med. 385 (2011)). Colleges themselves are often just as motivated to shield coaches and players from internal discipline. Morgan M. Tompkins, Note & Comment, *Money for Your Image But No Recognition of Your Trauma: Lack of Institutional Accountability for Athletics Personnel Accused of Sexual Misconduct*, 15 ELON L. REV. 285, 289 (2023).

[65] Jeckell et al., *supra* note 11, at 560 (citing Elizabeth J. Allan & Mary Madden, *Hazing in View: College Students at Risk. Initial Findings From the National Study of Student Hazing* 35 (2008)).

[66] *Id.* (citing Nadine C. Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams* 12-14 (Aug. 30, 1999)).

common response was that "[t]eammates would make my life so miserable, I'd have to leave school."[67]

Peer-to-peer sexual harassment occurs *in addition to* the endemic sexual abuse perpetrated by authority figures against student-athletes, an issue that affects an estimated one in every four current and former college athletes.[68] Studies also estimate that over a quarter of these victims face threats by the perpetrating authority figure to prevent reporting the abuse.[69]

Under the current Title VII and Title IX anti-retaliation frameworks, the substance of these threats by an authority figure – and the threats themselves, if committed after filing a report or engaging in protected activity – fall under the blanket coverage of "adverse employment actions" that affords the victim a cause of action.[70] However, as demonstrated below, retaliation by peers – those outside of authority roles or what we would consider employer/supervisor capacities – often escape such protections, despite peer retaliation's profound chilling effect.[71]

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[67] *Id.* (citing Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams* 15 (Aug. 30, 1999)). Both Jeckell and Hoover note that a student-athlete's distrust of his/her institution's ability to resolve Title IX reports is an additional deterrent to reporting hazing, and this distrust of institutional remedy-seeking processes has been found in recent years to be especially pronounced in male student-athletes. *Id. See generally* Silvia Zenteno et al., *Prevention is a Team Sport: Empowering Male Student Athletes in Your Game Plan for Campus Sexual Assault Prevention* (It's On Us), https://www.itsonus.org/wp-content/uploads/ItsOnUs_PreventionIsATeamSport_Report_2023.pdf (Apr. 2023) (finding that a large percentage of male student-athletes, in addition to not trusting their institution's potential handling of a complaint, also had minimal awareness of school policies, procedures, and resources for victims, with many not knowing who their institution's Title IX coordinator was). The issue of ineffective Title IX education efforts in college athletics programs is a problem beyond the scope of this essay, but one that legal scholars can and should continue to explore.

[68] Lauren's Kids, *Campus Sex Abuse By Authority Figures* 1, https://laurenskids.org/wp-content/uploads/2021/08/21-CRU-001-Campus-Sex-Abuse-Report-V2_5.pdf (August 2021) [https://perma.cc/5DZ4-Q7EE] ("In June 2021, Lauren's Kids commissioned a survey of college-educated adults in cooperation with attorneys Ben Crump and Richard Schulte. . . More than 1 in 4 current and former college male and female athletes say they endured inappropriate sexual contact from a campus authority figure – most often a male professor or coach.").

[69] *Id.*

[70] *See generally* Burlington N. & Santa Fey Ry. Co. v. White, 548 U.S. 53 (2006) (laying out the standard for retaliatory actions under Title VII). As explored later in this essay, though Title IX lacks its own anti-retaliation provision, the Supreme Court interpreted the statute to implicitly contain an anti-retaliation provision and read the Title VII provision into Title IX. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

[71] Brake, *supra* note 57, at 7 (citing Schoenbaum, *supra* note 54, at 625).

B. The Scope of Who Constitutes a Co-Worker is Unclear in College Athletics

The Supreme Court's ruling in *Vance v. Ball State University* may expand who courts treat as a co-worker rather than a supervisor when determining employer liability in retaliation matters.[72] The distinction between supervisors and mere co-workers is important, as treatment of an employee as the former imposes strict liability on the employer if the supervisor's harassment culminates in a tangible employment action.[73] Such is not the case for those treated as "simply a co-worker"[74] (although such a distinction unduly dismisses a co-worker's capacity to chill a whistleblower).

Expanding on a framework first developed in *Burlington Industries v. Ellerth*[75] and *Faragher v. City of Boca Raton*,[76] in *Vance* the Supreme Court sought to lay out a clear distinction between supervisors and mere co-workers. This distinction allowed determination of supervisory status to be "readily determined" rather than dependent on "a highly case-specific evaluation of numerous factors."[77]

The upshot of this distinction, as employment law expert Deborah Brake[78] warns, is that many employees with day-to-day supervisory responsibilities over other workers will fall within the co-worker distinction rather than the supervisor distinction, which may result in retaliatory behavior otherwise punishable under Title VII being subject to the "murkier legal standards" of co-worker retaliation.[79]

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[72] Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) (holding "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. . . ").

[73] *Id.* The Supreme Court defines "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 453 (citing Burlington Industries v. Ellerth, 524 U.S. 742, 761 (1998)).

[74] *Id.*

[75] 524 U.S. 742 (1998).

[76] 524 U.S. 775 (1998).

[77] Vance v. Ball State Univ., 570 U.S. at 432.

[78] Deborah L. Brake is the John E. Murray Faculty Scholar and Professor of Law at the University of Pittsburgh and one of the foremost legal scholars on labor & employment law, particularly coworker retaliation.

[79] Brake, *supra* note 57, at 7. Brake also notes that "[a]lthough Vance's holding addressed employer liability for sexual harassment, its reasoning fully extends to retaliatory harassment as well." *Id.*

In the context of an athletics department, in which assistant coaches and support staff (i.e., trainers, team managers, and graduate assistants) can constitute dozens of employees under the department's watch,[80] this ruling raises questions as to whether courts will consider these individuals supervisors. For many programs, the head coach is the only coach with the ability to cut a player from the team, demote him or her to the practice squad, revoke a scholarship, or perform another act which might constitute an "adverse employment action."[81] It stands to reason, then, that under the *Ellerth/Faragher* framework adopted in *Vance*, a court may lump assistant coaches and support staff into the same co-worker status that student-employee-athletes would likely fall under.[82] In short, if student-athletes attain employee status, their anti-retaliation coverage may still exclude retaliatory acts by assistant coaches, trainers, student managers, and graduate assistants *in addition to* their teammates.[83] Thus, co-worker retaliation presents a significant and multifaceted threat to would-be athlete-whistleblowers in an environment with an alarmingly short list of parties subject to legal remedies for retaliation.

C. Circuit Courts are Split on How to Interpret Title VII with Respect to Co-Worker Retaliation

Without guidance from the Supreme Court, lower courts differ substantially in how they apply Title VII to instances of retaliation by co-workers. While some circuits offer a whistleblower-friendly standard for co-worker retaliation claims, others balk at such a framework and have opted for a more stringent and unaccommodating standard.[84]

1. The Whistleblower-Receptive Circuits

The First, Second, Third, and Sixth Circuits all apply a broad and whistleblower-friendly "knew or should have known" negligence framework for

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[80] *See* Mark Long, *Size of Support Staffs Gives Power Five Teams Big Edge*, USA TODAY (Dec. 20, 2017), https://www.usatoday.com/story/sports/ncaaf/2017/12/20/size-of-support-staffs-gives-power-five-teams-big-edge/108771796/ [https://perma.cc/B5LV-STLR] (noting that college football staffs can consist of over forty individuals under the supervision of a head coach).

[81] *See* Hermandorfer, *supra* note 25 at 252 (noting a coach has the discretion to commit these "adverse athletic actions"). "Adverse athletic action" is the term Hermandorfer gives for actions analogous to "adverse employment actions" or "tangible employment actions" in employment law. *See supra* note 75.

[82] *See* Vance v. Ball State Univ., 570 U.S. at 424.

[83] *See supra* notes 79-83 and accompanying text.

[84] See *infra* notes 87-126 and accompanying text.

determining employer liability for co-worker retaliation with minor variants.[85] in *Noviello v. City of Boston,* the First Circuit [86] established that the plaintiff must show the employer knew, or should have known, about co-workers creating hostile work environments, but failed to stop such harassment.[87] The Second Circuit also follows this standard, holding employers liable for co-worker retaliation if the employer knew of the co-worker's actions and either did nothing or failed to provide a reasonable avenue for complaint.[88] In a similar vein, the Third Circuit finds employers liable for co-worker retaliation when supervisors "knew or should have known" about the co-worker's actions, "but failed to take prompt and adequate remedial action to stop the abuse."[89]

Lastly, the Sixth Circuit applies a negligence standard akin to the aforementioned three, but with more elaboration as to its elements.[90] In *Hawkins v. Anheuser-Busch, Inc.*,[91] the Sixth Circuit held that an employer is liable for co-worker retaliation if:

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[85] Cramer, *supra* note 44, at 596; Brake, *supra* note 57, at 21-23; *see* Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005); Richardson v. N.Y. State Dep't. of Corr., 180 F.3d 426, 441 (2d Cir. 1999); Jensen v. Potter, 435 F.3d 444, 453 (3d Cir. 2006), *abrogated on other grounds by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008).

[86] 398 F.3d 76 (1st Cir. 2005).

[87] *Id.* at 95; Cramer, *supra* note 44, at 596.

[88] *Compare* Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1180 (2d Cir. 1996) (a plaintiff must "prove that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it" (internal citations omitted)); *and* Richardson v. N.Y. State Dep't. of Corr., 180 F.3d 426, 441 (2d Cir. 1999) (a plaintiff must show the employer either "provided no reasonable avenue for complaint or knew of the harassment but did nothing about it" (internal citations omitted)); *with* Noviello v. City of Boston, 398 F.3d 76, 97 (1st Cir. 2005) (a plaintiff must show the employer "knew or should have known about the hostile work environment, yet failed to stop it"); *and* Moore v. City of Philadelphia, 461 F. 3d 331, 349 (3d Cir. 2006) (plaintiff must show the employer "knew or should have known about the [co-worker] harassment, but failed to take prompt and adequate remedial action to stop the abuse" (internal citations omitted)). The difference is subtle, but the Second Circuit requires the employer did *nothing* or failed to provide a reasonable avenue for the original complaint, whereas the First and Third Circuits require the employer failed to *stop* the hostile work environment or failed to take *prompt and adequate remedial action.*

[89] *See supra* note 87; *and* Cramer, *supra* note 44, at 596 (quoting *Moore v. City of Philadelphia*, 461 F. 3d 331, 349 (3d Cir. 2006)).

[90] Cramer, *supra* note 44, at 596-97; *see* Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2007).

[91] 517 F.3d 321 (6th Cir. 2007).

> (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.[92]

This formulation reflects a more whistleblower-friendly approach to co-worker retaliation claims by imposing an obligation on employers to respond to co-worker retaliation effectively and adequately.[93]

2. The Reluctant Few

Three circuits, namely the Fifth, Eighth, and Tenth, have declined to adopt or mirror the frameworks of their peer circuits.[94] In 1996, the Fifth Circuit in *Long v. Eastfield College*[95] ruled that an employer is liable under both Title VII and the common law concept of agency "for the acts of employees committed *in the furtherance of the employer's business*."[96] Decades later, in *Hernandez v. Yellow Transp., Inc.*,[97] the Fifth Circuit demonstrated its commitment to this framework, explicitly declining to adopt the Sixth Circuit's standard in favor of upholding the *Long* rule.[98] In *Hernandez*, The Fifth Circuit reiterated that the plaintiff must prove the co-worker's actions were undertaken "in furtherance of the employer's business."[99]

The issue with this decades-old standard, however, is that there is no clear distinction between what type of retaliation does and does not serve the employer's business interests.[100] Realistically, *any* action by an employee that deters a colleague from speaking out against harassment of any kind can be said to serve the employer's

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[92] *Id.* at 347.

[93] Brake, *supra* note 57, at 23-24.

[94] *See infra* notes 97-126 and accompanying text.

[95] 88 F.3d 300 (5th Cir. 1996).

[96] *Id.* at 306 (citing *Moham v. Steego Corp.*, 3 F.3d 873, 876 (5th Cir. 1993)) (emphasis added).

[97] 670 F.3d 644 (5th Cir. 2012).

[98] *Id.* at 657-58 (citing *Macktal v. U.S. Dept. Of Labor*, 171 F.3d 323, 328 (5th Cir. 1999)) ("This court adheres strictly to the maxim that one panel of the court cannot overturn another, even if it disagrees with the prior panel's holding"). The Fifth Circuit in *Hernandez* denied the petition for rehearing en banc as no member of the panel nor judge in regular active service requested that the court be polled on rehearing en banc. *Id.* at 649 (citing Fed. R. App. P. and 5th Cir. R. 35).

[99] *Id.* at 657 (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996).

[100] Brake, *supra* note 57, at 11-12.

interest in having a unified and obedient workplace.[101] The Fifth Circuit rule's failure to delineate between these two types of retaliation, as Brake has noted, shows a misunderstanding of how employers may benefit from co-worker conflict.[102]

Furthermore, as the language in *Long* initially suggests,[103] the rule appears to import a principle of agency law akin to scope of employment.[104] From an agency law perspective, it is hard to imagine how sexual harassment by a co-worker, or even a supervisor, could fall within the scope of employment,[105] and retaliation claims would likely fare no better.[106] Thus, without the retaliating co-worker acting in an agency capacity for the employer, the chances of prevailing on a co-worker retaliation claim are slim to none.[107]

A number of post-*Vance* opinions by the Fifth Circuit illustrate just how perilous its standard can be to a retaliation claimant.[108] For example, in *Morrow v. Kroger Limited Partnership I*,[109] the plaintiffs, both employees in a grocery store, filed an internal complaint with their employer, claiming their department manager sexually harassed them.[110] Following an investigation, the plaintiffs claimed the department manager created a "hostile work environment" which led to one plaintiff's resignation and the other transferring to a different store.[111] The appellate court affirmed the district court's grant of summary judgment to Kroger, reasoning that, because the department manager did not have the power to "take tangible employment actions," the department manager was not a supervisor under *Vance*.[112]

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[101] *Id.*

[102] *See id.* at 11.

[103] *Long*, 88 F.3d at 306 (". . . in accordance with common law agency principles . . .").

[104] Brake, *supra* note 57, at 12.

[105] *Id.*

[106] *Id.* at 13 (citing Cramer, *supra* note 44, at 600-01).

[107] *Id.*

[108] *See, e.g.*, Morrow v. Kroger Lt. P'ship I, 681 F. App'x 377 (5th Cir. 2017); Matherne v. Ruba Mgmt., 624 Fed. Appx. 835 (5th Cir. 2015) (per curiam); Spencer v. Schmidt Elec. Co., 576 F. App'x 442 (5th Cir. 2014).

[109] 681 F. App'x 377 (5th Cir. 2017).

[110] *Id.* at 379.

[111] *Id.*

[112] *Id.* at 380

The appellate court in *Spencer v. Schmidt Electric Co.*,[113] another Fifth Circuit case, came to the same conclusion regarding two foremen who racially harassed and later retaliated against the plaintiff.[114] The court in *Spencer* only briefly addressed whether the severity of the offending co-workers' behavior met the threshold for actionable retaliation,[115] and noted that even if it did, the plaintiff had not shown the co-workers acted in an agency capacity with the employer.[116] In sum, the combination of *Vance* and the *Long* standard leave vicarious liability as the lone, narrow avenue for potential recovery in a co-worker retaliation cause of action, a predicament that amounts to a *de facto* bar to employer liability for co-worker retaliation.[117]

Although the Fifth Circuit is the least forgiving forum for co-worker retaliation claims, the Eighth and Tenth Circuits are similarly reluctant to interpret Title VII to protect complainants from co-worker retaliation.[118] In *Carpenter v. Con-Way Central Express*, the Eighth Circuit laid out its approach to co-worker retaliation, which requires the plaintiff to show (1) they engaged in protected conduct; (2) a reasonable employee would find the alleged retaliatory act by the co-worker was "materially adverse"; and (3) the fact the plaintiff engaged in protected activity *motivated* the employer's failure to take reasonable corrective action against the retaliating co-worker.[119] This standard goes beyond a mere negligence theory, based instead on a theory of intentional wrongdoing.[120]

The Tenth Circuit also requires that a plaintiff show intentional wrongdoing by the employer to prevail on a co-worker retaliation claim.[121] In *Gunnell v. Utah Valley State College*, the court declared "an employer can only be liable for coworkers'

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[113] 576 F. App'x 442 (5th Cir. 2014).

[114] *Id.* at 444.

[115] *Id.* at 449 ("The district court did not err in concluding that curses are the sort of 'minor annoyances [or] simple lack of good manners' not actionable for a Title VII retaliation claim.").

[116] *Id.*; *see* Brake, *supra* note 57, at 14.

[117] Brake, *supra* note 57, at 15. "With 'agent' defined narrowly to conform to the definition of a supervisor empowered to take tangible employment action, the court's reasoning shows how *Vance*, combined with the requirement that the retaliator act in furtherance of the employer's business, sets an *insurmountable hurdle* to establishing employer liability for coworker retaliation." *Id.* (emphasis added).

[118] *Id.* at 16-18; Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611 (8th Cir. 2007); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998).

[119] 481 F.3d 611, 618 (8th Cir. 2007).

[120] Brake, *supra* note 57, at 17.

[121] Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998).

retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the coworkers' actions."[122] These intent-based standards place a much higher burden of proof on the plaintiff than a negligence framework because constructive knowledge of the retaliation is insufficient, and the employer must encourage the co-workers' retaliation rather than merely fail to respond.[123] This heightened standard thus affords employers a much easier path to escape consequences for their employees' retaliatory acts than the negligence framework of the First, Second, Third and Sixth Circuits.[124]

D. Title VII & Title IX: Same Provisions, Same Lack of Protections

Due to a combination of Congressional foot-dragging and a broad interpretation of the statute by the Supreme Court,[125] Title IX suffers the same anti-retaliation shortcomings as Title VII.

The majority of the Supreme Court in *Jackson v. Birmingham Board of Education* sought to resolve this legislative gap by reading an anti-retaliation provision into Title IX,[126] much to the chagrin of Justice Clarence Thomas.[127] In *Jackson*, the

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[122] *Id.*

[123] Brake, *supra* note 57, at 18.

[124] *Id.* at 18-20. (It is also worth noting that the Seventh Circuit does not fit neatly into this dichotomy of whistleblower-friendly and reluctant circuits.); Cramer, *supra* note 44, at 597. (The Seventh Circuit requires employers to (1) have actual knowledge of the coworkers' retaliatory conduct, and (2) fail to correct the conduct.) *Id.* (citing Knox v. State of Ind., 93 F.3d 1327, 1334 (7th Cir. 1996)). (This is not as whistleblower-friendly as the constructive knowledge standard, but also is not as stringent as the employer intent standard.)

[125] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 189 (2005) (Thomas, J., dissenting) ("[T]hat the text of Title IX does not mention retaliation is significant. By contrast to Title IX, Congress enacted a separate provision in Title VII to address retaliation, in addition to its general prohibition on discrimination. . . Congress' failure to include similar text in Title IX shows that it did not authorize private retaliation actions") (citation omitted). Congress also expressly prohibited retaliation in other antidiscrimination statutes, including the Americans with Disabilities Act of 1990 ("ADA") and the Age Discrimination in Employment Act of 1967 ("ADEA"). *Id.* at 190. *See supra* note 61.

[126] 544 U.S. 167, at 173-174 (2005).

[127] *Id.* at 184-196 (Thomas, J., dissenting) (In his dissent — joined by Chief Justice Roberts and Justices Scalia and Kennedy — Justice Thomas argues the majority "establishes a prophylactic enforcement mechanism designed to encourage whistle-blowing about sex discrimination. The language of Title

Court noted that although Congress could have expressly written an anti-retaliation provision in Title IX, as it did in § 704 of Title VII, Title IX is a "broadly written prohibition" on sex discrimination, including only specific and narrow exceptions to the broad prohibition.[128] In contrast to Title IX, the Court added, "Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute."[129] Thus, the Court determined that because Congress "did not list any specific discriminatory practices" in the text of Title IX, it is improper to presume its failure to list one such practice, namely retaliation, means Congress intended to exclude coverage of that practice.[130] From this reasoning, the Court held that Title IX's private right of action encompasses suits for retaliation.[131]

The Court in *Jackson* declined to lay out elements required to state a claim for Title IX retaliation, so the circuit courts have largely adopted the elements of the Title VII provision.[132] The upshot of this, however well-intentioned the *Jackson* majority's rationale may have been, was that the inadequacies of Title VII's anti-retaliation protections became those of Title IX as well.[133]

In 2020, the Department of Education introduced 34 C.F.R. § 106.71(a), which prohibits retaliation under Title IX.[134] The provision states:

> No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint,

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IX does not support this holding. The majority also offers nothing to demonstrate that its prophylactic rule is necessary to effectuate the statutory scheme.") *Id.* at 195 (Thomas, J., dissenting) (Justice Thomas laments the majority opinion returning the Court to "the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose" rather than following the intent of Congress, which he contends would have included an anti-retaliation provision in Title IX if it intended such a protection to exist.) *Id.* (Thomas, J., dissenting).

[128] *Id.* at 175.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 178.

[132] *See* Milligan v. Bd. of Trs. of S. Ill. Univ., 686 F.3d 378, 388 (7th Cir. 2012) (noting courts apply Title VII's retaliation framework to evaluate Title IX retaliation claims); Doe v. Columbia Coll. Chi., 933 F.3d 849, 857 (7th Cir. 2019); Doe 1-2 v. Regents of the Univ. of Minn., 999 F.3d 571, 579 (8th Cir. 2021); Emeldi v. Univ. of Oregon, 698 F.3d 715, 724 (9th Cir. 2012).

[133] *See* Milligan, 686 F.3d at 388 ("the fact [the defendant's] response [to harassment] was reasonable under Title VII necessarily absolves it of liability under Title IX") (The court declaring that a failure to satisfy Title VII implies a failure to satisfy Title IX shows that the Title IX standard is near identical to that of Title VII and thus presents the same hurdles as those of the latter.)

[134] 34 C.F.R. § 106.71(a) (2020).

> testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.[135]

The provision also includes a prohibition on the disclosure of whistleblower names.[136] Despite the passage of this regulation, issues persist. The provision codifies that which *Jackson* and its progeny of cases have already established,[137] but does not fill the gap in co-worker retaliation coverage present in § 704 of Title VII. Indeed, as post-2020 case law suggests, the standard for retaliation remains the same,[138] and although the sample size of relevant case law is presently small, nothing suggests 34 C.F.R. § 106.71(a) alters the circuit courts' approaches to co-worker retaliation.[139]

34 C.F.R. § 106.71(a) also came at a time when the Trump administration conducted a considerable overhaul of Title IX.[140] This overhaul included a revision requiring the institution to have actual knowledge of the sexual harassment or discrimination, as well as a revision which now precludes graduates, visitors, or other would-be complainants not attending the institution at the time of complaint filing from filing a complaint.[141] While they may not expressly address retaliation, these additional revisions considerably curtail who may file a complaint, and would remove a legal remedy for those alumni or former student-athletes who were discouraged from filing, or otherwise hesitant to file, a Title IX claim during their enrollment at the institution.[142]

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[135] *Id.*

[136] *Id.*

[137] *See supra* notes 128-33 and accompanying text (showing the extension of Title VII's anti-retaliation provision to Title IX retaliation claims).

[138] *See* Regents of the Univ. of Minn., 999 F.3d at 579; Doe v. Rowan Univ., No. 23-20657 (RMB-MJS), 2023 U.S. Dist. LEXIS 181801, at *10 (D. N.J. Oct. 10, 2023).

[139] *See* Doe v. Mass. Inst. of Tech., 46 F.4th 61, 75 (1st. Cir. 2022) (noting that Title IX does not impose a "gag order" on individual participants, and only governs the school's disclosure). The court declined to weigh in on whether the confidentiality clause of 34 C.F.R. § 106.71 imposed such a restriction on disclosures from individual participants. *Id.* at note 6.

[140] *See* Shiwali Patel, *Fulfilling Title IX's Promise Through the SAFER Act*, 103 B.U. L. Rev. 25, 30 (2023).

[141] 34 C.F.R. § 106.30(a) (defining "formal complaint").

[142] *See* Patel, *supra* note 142, at 31.

E. Circuit Courts Differ on Whether Title VII Preempts Title IX Harassment Claims

In addition to anti-retaliation coverage concerns, Title IX faces an additional legal hurdle that hinders its protective power for student-employee-athletes and university employees in general: the circuits disagree on whether a plaintiff may bring Title VII and Title IX sexual harassment claims as independent claims or if Title VII preempts Title IX on such issues.[143] Whereas the First, Third, and Fourth Circuits have found Title IX rights independent of and not preempted by Title VII,[144] the Fifth and Seventh Circuits have held that Title VII is the exclusive legal remedy for employees at federally funded universities claiming sex discrimination.[145]

This split is noteworthy when considering the advantages and disadvantages a Title VII complaint has over a Title IX complaint and vice versa. On the one hand, "Title VII, unlike Title IX, is governed by agency principles, contains an express cause of action, provides for specific compensatory damages, . . . does not rely on a contractual framework, . . . and does not require a showing that the employer was deliberately indifferent to the harassment."[146] On the other hand, Title IX does not require a plaintiff to exhaust their administrative remedies,[147] has a longer statute of limitations than Title VII,[148] and, unlike Title VII, has *no* damages cap.[149]

Because of the unique advantages the two statutes provide, a complaint comprised of both Title VII and Title IX claims affords a university employee the broadest array of remedies for sexual harassment. The Third Circuit has noted Congress created this substantial overlap to advance its goal of "eradicat[ing] private

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[143] *See generally* Green, *supra* note 27, at 2.

[144] *Id.*; *see* Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 560 (3d Cir. 2017); Preston v. Va. *ex rel.* New River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994); Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988).

[145] Green, *supra* note 27, at 2; *see* Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862 (7th Cir. 1996); Lakoski v. James, 66 F.3d 751, 752 (5th Cir. 1995).

[146] *Id.* at n. 49 ("[*c*]*ompare* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d591, 593 (5th Cir. 1995) (Title VII governed by negligence standards), *with* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642 (1999) (Title IX governed by "deliberate indifference" standard), *and* Gebser v. Lago Vista Indep. Sch., 524 U.S. 274, 290 (1998) (same)").

[147] This may entail filing a charge with the Equal Employment Opportunity Commission ("EEOC"). Green, *supra* note 27, at 10 (citing *Waid*, 91 F.3d at 861). ("if a state agency stands as the local equivalent [to the EEOC], a plaintiff with Title VII claims may have to first seek relief from state administrators who act under state law.").

[148] Macon et al., *supra* note 31, at 425, n. 51.

[149] *Id.*

sector employment discrimination."[150] It follows, then, that a court's limitation of a plaintiff's remedies to only those of Title VII unduly hinders the efficacy of the statutes' combined protections.

Notwithstanding a liberal resolution to this circuit split in the future, Title VII provides the primary (or even sole) avenue for federal legal relief regarding reports of discrimination and harassment. Thus, it will be the route taken by most whistleblowers reporting such illegal acts and any related retaliation claims. This necessitates that Title VII have a means to combat the inevitable co-worker retaliation suffered by future student-employee-athletes.

III. FILLING THE GAP: THREE GAMEPLANS TO TACKLE CO-WORKER RETALIATION

Although co-worker retaliation presents a nuanced and pervasive danger to student-athletes, that does not make it an unbeatable foe. Below, I discuss the viability of three potential gameplans to combat co-worker retaliation in the context of this article: (1) the Supreme Court resolving the circuit split by adopting a broad employer negligence standard with respect to co-worker retaliation; (2) the NCAA's adoption of a comprehensive "Sideline Interference" rule in coordination with federal and state law; and (3) the Supreme Court's resolution of the circuit split by allowing university employees to bring a claim under both Title VII and Title IX, coupled with Congress' amendment of Title IX to include a unique anti-retaliation provision. Each of these proposals comes with its own set of flaws but also carries with it the potential to help safeguard the rights of thousands of student-employee-athletes with the courage to come forward about sexual harassment in their respective athletics programs.

A. A Uniform Co-Worker Retaliation Framework

The first approach in ameliorating this issue is a Supreme Court opinion which instructs lower courts to adopt a co-worker retaliation framework more akin to the Sixth Circuit and depart from the restrictive Fifth, Eighth, and Tenth Circuit standards.[151] This would increase the likelihood of recovering for retaliation by a teammate or student manager under a "mere negligence" standard and in-turn place more responsibility on university athletic departments to be proactive in their

[150] Green, *supra* note 27, at 17 (citing *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d at 564).

[151] *See supra* notes 87-126 and accompanying text.

discouragement of retaliatory behavior against a student-athlete whistleblower. While a solution reliant on a hypothetical Supreme Court opinion is almost always wishful thinking, the presence of the circuit split may increase the likelihood the Court grants certiorari on a case dealing with this matter.

Though Deborah Brake has advocated for such changes and clarifications, she has also rightly acknowledged such a shift would be insufficient due to the additional issues of mixed motives and the high bar for actionable behavior set by *Burlington Northern*.[152]

Brake notes the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* imposed a "but-for" test for determining whether the motive for the post-complaint action against the whistleblower was retaliatory or status-based, and she adds that such distinctions are often unclear and difficult to determine.[153] Parsing out motives can interfere with proof on both a retaliation and a harassment claim, as attributing proof to a retaliatory motive may discredit proof attributed to the harassment motive, and vice versa.[154] Unless the Court overturns *Nassar* and its but-for test and returns to a mixed motive framework, this dilemma will likely persist.

Brake also laments that threats of retaliation, "harassing, shunning, and ostracizing," generally do not meet the *Burlington Northern* standard, even when made by supervisors.[155] Furthermore, "judicial anxiety about how deeply courts would have to involve themselves" in co-worker relationships has helped create a general reluctance to expand the scope of what constitutes reasonably chilling behavior to include the aforementioned things.[156] Brake acknowledges such concerns by judges are "legitimate . . . with no easy answers,"[157] and effectively finding and advocating a solution to this issue is well beyond the scope of this essay.[158]

Turning to the Northwestern case, presuming (1) John Doe had the Sixth Circuit's framework at his disposal, and (2) he and his fellow student-athletes had

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[152] Brake, *supra* note 57, at 48-49.

[153] *Id.* at 45-46 ("Prior to *Nassar*, under a mixed motive framework, both a retaliatory motive and a sex-based motive might co-exist without undermining liability for either sexual harassment or retaliation."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

[154] Brake, *supra* note 57, at 45-47.

[155] *Id.* at 33.

[156] *Id.* at 36.

[157] *Id.*

[158] First Amendment concerns come into play regarding how broad the scope of the *Burlington Northern* standard can go without courts requiring employers unlawfully control the speech of their employees. *See infra* notes 177-78.

employee status, it is unlikely John Doe would succeed on a Title VII retaliation claim against Northwestern even under the Sixth Circuit framework. Because the student manager who outed his identity online was no longer an employee of the university when he outed John Doe, his actions would still fall outside the scope of Title VII. Additionally, even if the actions publicly taken by current student-athletes and staff amounted to harassment, shunning, and/or ostracizing, those actions would still fail to satisfy the *Burlington Northern* standard.[159] This is not to say that the Sixth Circuit framework is not worth adopting by the Supreme Court. To the contrary, it would still afford student-employee-athletes a fighting chance in the event chilling behavior by their teammates satisfies the *Burlington Northern* standard. The same cannot be said for a Fifth Circuit-esque framework. Thus, it would still be worthwhile for the Supreme Court to resolve this circuit split in favor of a Sixth Circuit approach to co-worker retaliation.

B. The Sideline Interference Rule

The second approach brings the NCAA itself into the fold under what I am calling the "Sideline Interference" rule. In college football, sideline interference is a penalty used to punish coaches for either their own, their players', or their non-player personnel's crossing the sideline into a restricted-access area or onto the field of play during a game.[160] Though the coach may not personally commit the offense, nor be aware of their personnel committing the offense, the referee penalizes the team nonetheless.[161] The NCAA should institute a policy that makes a violation "any reasonably chilling action taken by a student-athlete or representative of the institution's athletics interests in response to a federal or state complaint." The NCAA definition of a “representative of the institution's athletics interests" encompasses all athletics program alumni, university employees, boosters or donors, and anyone else who "ha[s] been involved otherwise in promoting the institution's athletics program."[162] "Once an individual . . . is identified as such a representative [of the institution's athletics interests], the person . . . retains that identity indefinitely."[163]

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[159] Brake, *supra* note 57, at 33.

[160] *See 2023 NCAA Football Rules and Interpretations*, Rule 9-2-5.

[161] *Id.*

[162] NCAA Bylaw 13.02.16.

[163] NCAA Bylaw 13.02.16.1.

Under such a policy, the NCAA could institute harsh penalties against the athletics program with which the offender is associated.[164]

Though it may not award the compensatory damages a traditional legal remedy may afford, this policy would substantially incentivize a coach to survey their locker room culture and promote a proactive policy that (1) encourages reporting misconduct and harassment and (2) makes it abundantly clear that there is zero tolerance for adverse action against a student-athlete who makes any such report. Not beholden to stare decisis or similarly restrictive legal doctrine, the NCAA could expand its interpretation of "materially adverse action" to encompass types of retaliation that courts have deemed fail to satisfy Title VII and Title IX but nonetheless have a chilling effect.

In contrast to the previous proposal, this approach theoretically provides John Doe an avenue to prevail against Northwestern University. While John Doe may not prevail on his Title VII or Title IX retaliation claim(s), the former student manager's outing of John Doe's identity on social media would present a violation under this NCAA policy. As a former student manager for the Northwestern football team, Eduardo Soto is a representative of the institution's athletics interests for purposes of NCAA rules.[165] As such, the NCAA would likely consider his outing of the whistleblower a reasonably chilling action and would accordingly impose a sanction on Northwestern. Although this would not award John Doe compensatory damages, his whistleblowing efforts would not be in vain. Harsh penalties from the NCAA can incentivize the university's athletics department to restructure its responses to and policing of harassment and abuse, and it is possible that the sanction would serve as a deterrent for future would-be retaliators who do not wish to jeopardize the success of their beloved athletics program.

The potential drawbacks with such a proposal are twofold. First, as the NCAA is a private organization and lacks the legal authority of a federal agency, it has a limited ability to remedy a situation of retaliation and its punishment of the offending institution is unlikely to bring the whistleblower compensatory relief. It is possible, however, that the NCAA's imposition of severe punishments on an athletics department, financial and/or otherwise, could be an effective deterrent to future instances of such retaliation, leading to university-wide overhauls and meaningful institutional change. In addition to any therapeutic or psychological value of effecting

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[164] *See generally* NCAA Bylaw 19 (establishing the NCAA's process for instituting punishments on violating schools, including a list of available punishments).

[165] NCAA Bylaw 13.02.16, *supra* note 164.

such change, the whistleblower could still recover on federal and state claims brought in court.

Second, the NCAA may be unlikely to impose a legislative policy that explicitly states a working relationship with state and federal legal systems, given that such a course of action could re-open the decades-old debate as to whether the NCAA is a "state actor" for constitutional purposes.[166] To hold a private organization like the NCAA to Fourteenth Amendment standards of due process, the organization must be a state actor.[167] In *NCAA v. Tarkanian*, the NCAA found that University of Nevada, Las Vegas ("UNLV") personnel committed thirty-eight NCAA recruiting rules violations, including ten by head basketball coach Jerry Tarkanian.[168] "Facing demotion and a drastic cut in pay, Tarkanian brought suit [against the NCAA] . . . alleging that he had been deprived of his Fourteenth Amendment [right to] due process."[169] Though the trial court and Nevada Supreme Court ruled in favor of Tarkanian, the Supreme Court reversed, holding that the NCAA was not a state actor because the NCAA acted under the color of its own policies rather than under the color of Nevada state law and because UNLV did not delegate power to the NCAA to take specific action against Tarkanian.[170] In the years following the 1988 decision, legal scholars have debated whether the courts should reassess the NCAA's status as a state actor, as well as what recognition as a state actor could mean for how the NCAA operates.[171]

Whether this proposed policy would make the NCAA a state actor is beyond the scope of this article. However, the possibility of upsetting the NCAA's current status and opening the organization to due process claims may dissuade the NCAA from helping its student-athletes on the retaliation issue.

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[166] *See* Nat'l Coll. Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

[167] *Id* at 191.

[168] *Id.* at 181.

[169] *Id.*

[170] *Id.* at 193-95.

[171] *Compare* Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 4-7 (2012) (presenting arguments commonly used by those in favor of or against the recognition of the NCAA as a state actor; ultimately arguing not for either side but rather that the NCAA's hypothetical status as a state actor would have little effect on the operation of the organization as a whole), *with* James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269, 1270-71 (2007) (advocating for a reevaluation of the NCAA's state actor status and arguing the NCAA should be recognized as a state actor).

C. Allowing Both Title VII and Title IX Claims & Giving Title IX Its Own Statutory Anti-Retaliation Provision

The third and final approach is a two-pronged Hail Mary, but it is also the most narrowly tailored to address this issue. First, the Supreme Court should resolve the circuit split and allow a university employee to bring a claim under both Title VII and Title IX. Second, Congress should amend Title IX to (a) cover both current and former students, and (b) include its own standard for retaliation that encompasses the social ostracization, verbal harassment, and other forms of retaliation by co-workers which have a chilling effect despite not meeting Title VII standards for material adversity.

34 C.F.R. § 106.71(a) currently serves as the Department of Education's regulatory strategy to combat retaliation, but as previously mentioned, this regulation does little more than extend § 704 of Title VII to Title IX claims, bringing the same issues with it.[172] Additionally, a regulation does not carry the same lasting power as an amendment to the statute itself, as "there is no guarantee that Title IX regulations will not change every four to eight years with a change in administration."[173]

If Congress wishes to address this issue in the educational setting without upsetting Title VII's conceptions of co-worker retaliation and "materially adverse employment action," Congress should amend Title IX to include an anti-retaliation provision which bypasses the interpretive Goliath of co-worker retaliation by *expressly* prohibiting it within the text of the provision. Ideally, the provision would detail a standard for co-worker retaliation which imposes strict liability on the university for the retaliatory behavior of not just supervisors, but *any* of its employees, including student employees. If strict liability to this extent proves unworkable, Congress may include an alternative standard which holds the university liable when (1) it had actual or constructive knowledge of the retaliatory conduct by its employees, including student employees; and (2) it "condoned, tolerated, or encouraged the acts of retaliation, or [has] responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances" — borrowing the language of the Sixth Circuit's standard.[174] Either of these standards would provide a much more comprehensive protection for student-employee-athletes, and for all university employees, than what presently exists under Title VII—without

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[172] *See supra* notes 136-44 and accompanying text.

[173] *See* Patel, *supra* note 142, at 33.

[174] Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008).

disrupting standards of review for the countless other industries within the purview of Title VII.

This statutory fix, however, would not reach its full potential without the Supreme Court's action. With the Fifth and Seventh Circuits holding that Title VII is the *exclusive* legal remedy for employees at federally-funded universities claiming sex discrimination, student-employee-athletes within those circuits would not benefit from the protections these amendments would provide. Thus, the Court must resolve that Title VII and Title IX sexual harassment claims, and any accompanying retaliation allegations, may be brought as independent claims. In doing so, the Court would allow student-employee-athletes from all circuits to reap the benefits of Title IX anti-retaliation protections. Again, although a resolution from the Supreme Court is generally unlikely, the presence of a circuit split places it within the realm of possibility.

Applying these protections to the Northwestern case, however, John Doe would still fail to recover for co-worker retaliation. Because the student manager who outed his identity online is no longer a student employed by the university, his actions would still likely escape the provision's coverage, even under the strict liability formulation. Moreover, if the provision's definition of retaliatory behavior encompassed social ostracization and vocal opposition of the kind John Doe publicly faced from current Northwestern players and officials, there are considerable free speech issues with that provision. As both Brake and *Burlington Northern* caution, "there are reasons to pause before pressing too far in the direction of capturing all negative coworker reactions as retaliation."[175] If all reasonably chilling coworker interactions triggered the university's duty to take corrective action, Title IX would likely obligate the university to intrude deeply into co-worker relationships and expression, potentially limiting speech.[176]

CONCLUSION

Title VII and Title IX provide protections for university employees against discrimination and harassment if those employees belong to a protected class. Both

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[175] Brake, *supra* note 57, at 38; *see* Burlington N. and Santa Fe Ry. Co., 548 U.S. at 68.

[176] *Id.*; *see* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 511 (7th Cir. 1997) (Posner, C.J., concurring and dissenting) (reasoning that the constant surveillance of employees would invade their privacy and would be too costly).

prevent the employer or supervisor from taking an adverse action against a whistleblower or complainant. However, these statutes — and labor & employment law in general — fail to address a real and present danger to actual and would-be whistleblowers: co-worker retaliation.

As signs point to student-athletes attaining employee status in the future, and as rampant hazing and abuse scandals increase among the nation's top athletics programs, it is vital that these newly anointed employees have the full protection of federal law when deciding whether to blow the whistle on misconduct and illegal behavior in their respective athletics programs.

While each of these proposals attack the issue from a different angle —Title VII interpretation, NCAA legislation, and Title IX amendment — all three fail to encapsulate the entire problem. As this article demonstrates, there is no easy fix to the issue of co-worker retaliation, in the collegiate athletics context or beyond. Perhaps a proper solution will require action by the U.S. Supreme Court, Congress, *and* the NCAA. Or maybe the solution will not stem solely from legislation or stricter judicial standards, and instead the issue will resolve at its core: in the workplace — in this context, the campus Title IX office and the locker room.[177]

As the stories of abuse and sexual harassment at our nation's top athletics programs continue to be told, we possess opportunities to understand and empathize with survivors of these traumatic practices.[178] These have given us the chance to reflect on, and raise awareness about, the harmful effects of hazing in college athletics and the potential to shift social norms away from acquiescing to such harmful conduct.[179] While anti-retaliation law has failed to eradicate co-worker retaliation in response to whistleblowers alleging sexual harassment, it may still be effective so long as it allows these whistleblowers to tell their stories.[180]

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[177] Silvia Zenteno et al., *supra* note 69 (exploring how male athletes perceive existing sexual assault prevention education and, through their focus groups, yielded recommended practices for effectively educating male student-athletes on Title IX resources at their respective universities).

[178] Brake, *supra* note 57, at 58 (citing Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) finding disclosures of sexual harassment by survivors "have deepened our cultural understanding of the injuries of sexual misconduct, with the potential to generate social change to make these harms less common, particularly for younger generations.").

[179] *Id.*

[180] *Id.* at 57 (citing Vance, 570 U.S. at 431 noting "[i]n order to have more due process in the course of deciphering contested allegations, and more civility in the discourse around them, we need more - not less - space for telling accounts of sexual harassment in settings where accountability and redress are possible").

As we wait for the "student-employee-athlete" era to begin in earnest, it may help to analyze policies to address the underreporting of sexual harassment and hazing by student-athletes. As a large percentage of student-athletes distrust or generally feel unsafe reporting incidents of sexual assault to their university Title IX office,[181] implementing anonymous reporting procedures and other policies that encourage student-athletes to come forward with their stories is the first step in ensuring the public embraces whistleblowers' voices, potentially encouraging others to do the same and collectively breaking collegiate athletics free from its infamous code of silence.[182]

[181] *See* Jeckell et al., (citing Hoover), *supra* note 11.

[182] *See* Andrew Seligman, Jeckell et al., (citing Hoover) at 560, & Lauren's Kids, *supra* notes 65-70.