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Unsportsmanlike Conduct: Female Sportswriters as Targets for Sexual Harassment

Aishlin P. Hicks*

I. SPORTS, JOURNALISM, AND THE LAW

The professional sports industry in the United States is big business. The average team in the NFL is worth a staggering $1.04 billion,1 while the MLB and NBA boast team averages of $523 million2 and $393 million,3 respectively. The reporters and media outlets that cover the leagues, teams, and athletes provide their audiences with unique insights into the world of sports. They attend the games, interview the players and coaches, and watch the practices. Though it sounds like the ideal job for any sports fan, sportswriters can, and do, find themselves facing animosity and even violence at the hands of the very athletes they are trying to interview.4 Female sports reporters confront all of the same challenges as their male counterparts, but also frequently become the targets for lewd, inappropriate, or offensive comments and gestures from the athletes they are charged with interviewing. As sportswriter Ann Killion put it: “[e]very few years, like clockwork, some overpaid athletes act like boorish frat boys and my job becomes a subject of debate.”5 The stories are many: from

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former Jets player and member of the Pro Football Hall of Fame Joe Namath’s (drunken) statement to ESPN reporter Suzy Kolber that he wanted to kiss her during an interview,\(^6\) to Mike Tyson’s infamous response to a female reporter’s question: “I normally don’t do interviews with women unless I fornicate with them. So you shouldn’t talk anymore. Unless you want to, you know.”\(^7\) In any other profession, this type of behavior would have serious ramifications for the offender, and yet in the world of professional sports, the offenders are almost never fired, and are hardly even punished. Because sidelines and locker rooms are different than the traditional workplace in many respects, however, the ways that harassment is dealt with should be adapted to deal with these differences.

There are two generally recognized types of sexual harassment in the employment context. The first, “quid pro quo,” is “sexual harassment in which an employment decision is based on the satisfaction of a sexual demand.”\(^8\) The second, known as “hostile environment” harassment, is defined as “sexual harassment in which a work environment is created where an employee is subject to unwelcome verbal or physical sexual behavior that is either severe or pervasive.”\(^9\) The Supreme Court, in *Meritor Savings Bank v. Vinson*, held that sexual harassment claims were actionable under Title VII’s prohibition of discrimination based on sex.\(^10\)

Title 29 of the Code of Federal Regulations deals with labor, and defines sexual harassment as:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.\(^11\)

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\(^8\) *BLACK’S LAW DICTIONARY* 1499 (9th ed. 2009).

\(^9\) Id.


\(^11\) 29 C.F.R. § 1604.11(a) (2010).
This Note explores the possible channels through which teams, players, members of the media, and the legal system can come together to address this type of behavior, and encourage a more respectful relationship between athletes and the media.

II. HISTORY OF LADIES IN THE LOCKER ROOM

The 1977 World Series between the New York Yankees and the Los Angeles Dodgers ended with a 4-2 Yankee victory. Those six games, however, resulted in something more than the Yankees’ Twenty-First World Championship title; the series was the catalyst for a federal court case that ultimately granted women reporters equal access to professional sports locker rooms.

Melissa Ludtke, a reporter for Sports Illustrated, wanted access to the Dodgers’ locker room during the series in order to interview players. She asked Tommy Lasorda, the manager of the Dodgers, if he was willing to allow her into the locker room the day before the series started. “Lasorda told her it wasn’t his call but introduced her to pitcher Tommy John, who was the Dodgers’ player representative.” John informed Ludtke that he would ask his teammates whether they were okay with her being in the locker room. “The next day, he told her that he’d taken a poll and that the majority had thought it would be fine. He also told her that the players who were opposed were willing to go along with the decision.” However, having the consent of the players was not enough—Ludtke was called into the main press box and was told by Bob Wirz, Director of Information for Baseball Commissioner Bowie Kuhn, that she “[would] not be getting access to the Dodgers’ locker room [that] evening or any other evening.”

Once Sports Illustrated got wind of Ludtke’s ban from the locker room, negotiations between the magazine and the Commissioner’s office began. Proposed solutions, like providing Ludtke with an “escort” to retrieve players from the locker room for her to interview, were tried, but to no avail. Ludtke and Time, Inc., the publisher of Sports Illustrated, filed a lawsuit in federal district court in New York against Bowie Kuhn and Lee...

15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id. at 103.
MacPhail, the President of the American League, alleging that keeping Ludtke out of the locker room violated her equal protection rights. The New York District Court held that excluding Ludtke from the locker room "unreasonably interfere[d] with [her] fundamental right to pursue her profession in violation of the Due Process Clause of the Fourteenth Amendment." The court rejected the defendants' claims that allowing women into the locker room would undermine "the status of baseball as a family sport" and violate "traditional notions of decency and propriety." Additionally, the court held that there were "less sweeping means" to protect the athletes' privacy than excluding women reporters, like providing athletes with bathrobes.

Though the case technically opened the locker room door to women, the problems were far from over; "[t]he first female reporters who came in [to the Yankees locker room] were greeted with a cake in the shape of a penis, paid for by a member of the Yankees." Reactions from other members of the media were not all positive: one male reporter said "[t]he liberal in me says that women reporters are entitled to be in the clubhouse and to get all the courtesies I get. The chauvinist and the realist in me says they don't belong." Women reporters also faced a backlash from the players they were charged with interviewing—Detroit Tigers pitcher Jack Morris purportedly said that "he wouldn’t talk to any women while he was naked ‘unless they are on top of me or I am on top of them.’" Others encountered conduct that bordered on threatening—Oakland A’s player Dave Kingman sent Sacramento Bee reporter Susan Fornoff a package containing a dead rat with a tag around its neck that said, "[m]y name is Sue" after denying her an interview. Kingman refused to apologize.

Perhaps the most egregious example of harassment inflicted upon a reporter was the 1990 incident involving Lisa Olson in the New England Patriots locker room. Olson was a twenty-six-year-old reporter for the

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24. Id.
25. Id.
27. Stiglitz, supra note 14 at 108.
30. Id.
Boston Herald responsible for covering the Patriots. On September 17, 1990, Olson was in the locker room, attempting to interview members of the team, when she was:

accosted by naked football players who made vulgar comments and lewd gestures as she conducted a practice-day locker-room interview. [O]ne player, Zeke Mowatt, was seen fondling himself at an arm’s length from Olson and asking her: “Is this what you want?” Others gyrated their hips behind the reporter, echoing Mowatt’s comments. [Olson] told how the players “positioned themselves inches away from my face and dared me to touch their private parts.” She depicted the incident as “mind rape.”

Reportedly, the players had dubbed Olson a “looker,” meaning that she was known to stare at players while they were naked, and decided to teach her a lesson. As if the trauma of the ordeal in the locker room was not enough, Olson faced a major backlash from fans for going public with her story. She received obscene phone calls and hundreds of hateful letters. Her apartment was burglarized and “leave Boston or die” was spray-painted on the wall. The tires of Olson’s car were slashed and a message was left for her that said, “next time it will be your neck.” She was even physically assaulted by a Patriots fan in Chicago. The owner of the Patriots, Victor Kiam, called Olson a “classic bitch” and said, “[n]o wonder none of the players like her.” Both the NFL and the Patriots conducted investigations and Olson filed suit against the team, which reportedly settled for around $500,000. Now, more than twenty years after Lisa Olson’s ordeal, female sports journalists are still dealing with harassment in the locker rooms and on the sidelines.

III. FEMALE SPORTS REPORTERS TODAY

Professional sports are becoming ever more popular: in 2012, 111.3 million viewers tuned in to watch the Super Bowl, making it the most-watched show in U.S. history. As a result, the people who do the reporting are nearly as well known as the players they cover. Erin

32. Id.
34. Ricchiardi, supra note 31.
36. Id.
37. Id.
38. Id.
39. Id.
Andrews is perhaps the most famous female sports reporter today. A recent Google search of her name turned up approximately 2,100,000 results.\(^4\) As a sideline reporter for ESPN, Andrews mainly covers college basketball and football.\(^5\) In 2009, Andrews was thrust into the spotlight after she was the victim of a peeping tom stalker who secretly filmed her undressing in a hotel room, and released the video online.\(^6\) Andrews' stalker was eventually caught and sentenced to two and a half years in prison for filming her and other women through hotel room peepholes.\(^6\)

Besides being the victim of stalking, Andrews has been a target for inappropriate behavior from athletes as well as other members of the media. After playing his last game as a USC Trojan in the 2009 Rose Bowl, Rey Maualuga "spotted sports journalist (and internet sensation) Erin Andrews as he was heading towards the tunnel, and decided to make what some view as an inappropriate gesture behind her back."\(^7\) Essentially, Maualuga walked up behind Andrews and, unbeknownst to her, gyrated his hips behind her while her back was turned.\(^8\) Maualuga later apologized to Andrews, and USC issued a statement saying, "the situation was addressed immediately" and that Maualuga "realized he made a mistake and used poor judgment [and] deeply regrets his actions."\(^9\)

Andrews has been subjected to inappropriate comments from her own colleagues in the media as well. Rick Sutcliffe, a former MLB pitcher who now works as a baseball analyst for ESPN, is one such colleague.\(^10\) In 2008, during the broadcast of a game between the Braves and the Cubs when Andrews was reporting from the sidelines, announcer Dave O'Brien commented on the color of Andrews' dress.\(^11\) Sutcliffe responded, "I got a new favorite color, I know that, man."\(^12\) O'Brien then shifted the


\(^{44}\) Andrews’ Stalker Gets 2 ½ Years in Prison, supra note 43.


\(^{46}\) See Kahley Whaley, Erin Andrews Shares a Dance with Rey, YOUTUBE (Jan. 4, 2009), http://www.youtube.com/watch?feature=endscreen&NR=1&v=zlxt5ga7zMc.

\(^{47}\) Pollakoff, supra note 45.


\(^{50}\) Id.
conversation away from Andrews and mentioned that Sutcliffe, who had recently been diagnosed with cancer, had surgery coming up.\(^5\)\(^1\) Sutcliffe responded, “[w]ell, I’m more worried about Erin than I was me, wearing that skirt tonight in the Windy City... You think all eyes weren’t on her during batting practice?”\(^5\)\(^2\) Rather than treating Andrews as a respected colleague, Sutcliffe made her the butt of his jokes, as if she was there for little more than sideline entertainment.

Perhaps more troublingly, Andrews was criticized by Elizabeth Hasselbeck, a host on the daytime talk show The View (and the wife of an NFL player), for a dress she wore on the television show Dancing with the Stars. Hasselbeck said, “In light of what happened and as a legal matter—and as inexcusable as it was for that horrific guy to go in and try to peep on her in her hotel room... I mean, in some way if I’m him, I’m like, ‘Man! I just could’ve waited 12 weeks and seen this—a little bit less—without the prison time!’”\(^5\)\(^3\) Hasselbeck later apologized,\(^5\)\(^4\) but the damage was done. She essentially sent the message that Andrews’ ordeal with her stalker was her own fault, and that wearing a racy dress on television was analogous to being secretly filmed while naked.

Ines Sainz is yet another female sports reporter who has been thrust into the spotlight due to alleged misbehavior on the part of the professional athletes she was assigned to interview. Labeled “the self-professed hottest reporter in Mexico,” Sainz has been described as “[not] your typical sports reporter.”\(^5\)\(^5\) Reportedly, “TV Azteca [the network that employs Sainz] promotes her as a journalist and model. The network’s website includes a collection of skimpy bikini photos and an article in its ‘Bad Girls’ section headlines: ‘Ines Sainz, the perfect woman.’”\(^5\)\(^6\) Sainz was at a New York Jets practice on September 11, 2010, to interview quarterback Mark Sanchez\(^5\)\(^7\) when the team allegedly used a passing drill as an excuse to get close to her, or perhaps, to flirt. Later, in the locker room, Mexico’s hottest sports reporter found herself the object of catcalls. “I am in the locker room of the Jets waiting for Mark Sanchez while trying not to look anywhere,” she

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\(^{51}\) Deitsch, supra note 49.
\(^{52}\) Id.
\(^{54}\) Tim Nudd, Elisabeth Hasselbeck Tearfully Apologizes to Erin Andrews, PEOPLE (May 05, 2010, 12:00 AM), http://www.people.com/people/article/0,,20421038,00.html.
\(^{56}\) Id.
\(^{57}\) Killion, supra note 5.
tweeted, noting that she was “dying of embarrassment,” and had to “cover my ears.”

Sainz was severely criticized following the incident with the Jets. Mark Kriegel, a writer for FOX Sports, had the following to say:

[T]here’s a new poster woman for sexual harassment in the locker room . . . . But unlike [Lisa] Olson, who went into exile [following her experience with the Patriots], Sainz went on CNN and Joy Behar. In other words, whatever happened didn’t hurt her career. Actually, within hours of this posting, I fully expect Sainz to announce her appearance on “Dancing with the Stars.” Is she a victim of harassment? I don’t know. Just the same, I wonder if her cause diminishes that of women in the locker room, and all the legitimate grievances and real prejudice they face every day.

Kriegel seems to be saying that, rather than going public with the story, Sainz should have gone into hiding following her experience with Jets, and that failing to do so de-legitimizes her complaints.

Ines Sainz has not been the only woman to have problems with the Jets. Jenn Sterger, a former game hostess for the team, was allegedly sent inappropriate voicemails and graphic text messages by Brett Favre, former quarterback of the Jets, during his time with the team in 2008. Favre was fined $50,000, not because the league found that he violated policy or acted inappropriately, but “for his failure to cooperate with the investigation.” Sterger has reportedly agreed not to sue the Jets or the NFL, so long as the league establishes an anti-sexual harassment program, which begs the question: Why wasn’t there a program already in place?

IV. WHY CAN’T WE PLAY NICE?

Offensive sexual language directed at women is by no means rare in our society. In one study performed by Laura Beth Nielsen, author of License to Harass, nineteen percent of women surveyed reported being

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59. Id. Kriegel goes on to describe what he has termed the “Attack of the Bimbo Journalists.” Id.
subjected to “offensive or sexually suggestive remarks” every day.\textsuperscript{63} Nearly half of the women surveyed, forty-three percent, reported hearing such comments “often,” twenty-eight percent said that they heard such comments “sometimes,” and only eleven percent responded that they “rarely” heard such comments.\textsuperscript{64} Not a single woman surveyed responded that she had “never” heard offensive or sexually suggestive remarks.\textsuperscript{65} Given these numbers, it is hardly surprising that harassment carries over into the sports reporting world as well.

Critics have attributed the comments that Ines Sainz received to the way she was allegedly dressed: “when this obscure Azteca TV sideline reporter slunk into a locker room full of half-naked Herculean athletes wearing nary but a low-cut black dress and heels, only Ned Flanders could have expected the outcome to be wholesome and professional.”\textsuperscript{66} Ms. Sainz, on the other hand, maintains that she was dressed appropriately, and in fact backtracked, later saying that, “in no moment did I feel attacked or subjected to anything really offensive.”\textsuperscript{67} Regardless of what she had on, it is troubling that Sainz’s ability to expect and receive professional treatment was apparently based upon her appearance, rather than her credentials.

In response to the Ines Sainz incident, Clinton Portis, a running back for the Washington Redskins,\textsuperscript{68} said that when a female journalist goes into a male locker room, she is “going to want someone.”\textsuperscript{69} Greg Aiello, a spokesman for the NFL, said that Portis’ remarks “are clearly inappropriate, offensive and have no place in the NFL”\textsuperscript{70} and Portis later apologized.\textsuperscript{71} However, one wonders if this is how some of the players really see it. There seems to be a disconnect between how the players view the presence of female reporters, and how the reporters themselves (and perhaps society) view their roles in the locker room—not as “easy targets” or potential love interests, but as professionals there to do a job. On one side are people like \textit{Sports Illustrated} columnist Ann Killion, who contends that “the locker room is a workplace where many people—including me

\begin{itemize}
\item \textsuperscript{63} \textit{Laura Beth Nielsen}, \textit{License to Harass: Law, Hierarchy, and Offensive Public Speech} 43 (2004).
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{69} Killion, supra note 5.
\item \textsuperscript{70} Id.
\end{itemize}
and other women—do our jobs.” On the other side of the equation are the players, some of whom undoubtedly share Portis’ view.

Finally, there is the problem of animosity and distrust of the media felt by some players. One sportswriter’s description of the problem portrays a particularly acrimonious situation: “[t]oday’s sports world, not unlike the society from which it draws its main combatants, is filled with venom. And the leading vipers are poised on either side of the microphone. A bunker mentality—an us-against-them attitude—pervades.” David Cone, at the time a pitcher for the Kansas City Royals, told *Sports Illustrated* that “[w]e [the players] feel like targets . . . A lot of times [the media is] looking for a reason to get on you. Negativity sells.” One player actually lashed out in violence at members of the media in 2005:

Kenny Rogers of the Texas Rangers attacked two TV cameramen at the yard in Texas as he came onto the field for his pregame warmup. The attacks were apparently unprovoked and sent one of the cameramen to the hospital on a stretcher. There might have been more violence had catcher Rod Barajas not hauled Rogers off to the clubhouse, as the pitcher reportedly yelled at other cameraman that he would “break every one” of them, referring to the cameras. . . . Ranger owner Tom Hicks told the *Dallas Morning News*, “He (Rogers) has issues. It’s directed at the media, and I don’t know why.”

Clearly, if the players distrust or dislike the media presence, they have less incentive to make them feel welcome in their locker rooms and on the field.

V. WHAT’S A GIRL TO DO?

What options does a female sportswriter have in responding to disrespectful, harassing behavior from pro athletes? For many employees facing sexual harassment at work, litigation is a possibility, under both state and federal law. However, it is unclear whether such protection would also be available to female journalists.

A. FEDERAL PROTECTION

In order to establish a cause of action for hostile environment harassment under Title VII, a plaintiff must show (1) that the harassment was “unwelcome” and “based on gender,” (2) that it was “severe and pervasive enough that a reasonable person in the plaintiff’s position would believe that the terms or conditions of employment had been altered,” (3)
that "the plaintiff did in fact perceive it that way," and (4) that the harassment "can be imputed to the employer." This is problematic in the sportswriter context for several reasons. First, while some reporters work directly for the teams and organizations, many of them are employed by other entities, like newspapers, television networks, and magazines. Therefore, any harassment that comes from players cannot correctly be "imputed to the employer" of the reporter, because the teams employ the players, not the reporters.

Moreover, because the locker room is hardly the "typical" workplace, there are additional complexities in fashioning a remedy. By definition, locker rooms are spaces where athletes undress, shower, and recover from games and practices. While they also serve as a work space for various reporters and journalists, locker rooms are clearly not analogous to the typical office—more likely than not, players will be in various states of undress when reporters enter. Though certainly not an excuse for inappropriate behavior, the boundaries and expectations are necessarily different in a locker room than in a typical employment setting. Additionally, reporters are in the locker rooms for relatively short periods of time following games or practices; they get their interviews, make their notes, and then leave. In order for a plaintiff to prevail on a Title VII sexual harassment claim, they need to make a showing that the harassment was severe and pervasive. The Supreme Court has held that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"

Moreover, the unique context in which the subject behavior takes place may also be relevant in evaluating a sexual harassment suit. In Lyle v. Warner Brothers Television Productions, the California Supreme Court analyzed an action for sexual harassment brought under California’s Fair Employment and Housing Act (FEHA). The case centered around some alleged vulgar behavior that took place in the writing room of the television show Friends. The court, in affirming the order of summary judgment in favor of the defendants, reasoned that "the record here reflects a workplace where comedy writers were paid to create scripts highlighting adult-themed

76. Sexual Harassment and Discrimination, 25 Pers. Inj. – Actions, Defenses, Damages (MB) § 122.02.
77. For example, Erin Andrews is employed by ESPN while Ines Sainz works for TV Azteca.
78. Sexual Harassment and Discrimination, 25 Pers. Inj. – Actions, Defenses, Damages (MB) § 122.02.
80. Lyle v. Warner Brothers Television Productions, 38 Cal. 4th 264 (2006). The Court noted that "California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment" due to the similarities between the two statutory schemes. Id. at 278.
sexual humor and jokes, and where members of both sexes contributed to and were exposed to the creative process spawning such humor and jokes. In this context, the defendant writers’ nondirected sexual antics and sexual talk did not contribute to an environment in which women and men were treated disparately.” In the context of sportswriters in locker rooms, the argument could certainly be made that the unique circumstances of the interaction necessarily change the dynamic. While certain behavior may be actionable under other circumstances, in light of the court’s holding in Lyle, the unique context of the locker room may support the argument that vulgar or offensive language does not constitute sexual harassment.

B. STATE PROTECTION

1. Statutory Claims

In recognizing that the typical employment situation often does not exist in sports journalism, and that therefore the typical cause of action for workplace sexual harassment is probably not applicable, what recourse do sports reporters who are harassed have? One option could be state-created remedies, such as California Civil Code section 51.9. Section 51.9 provides that a person is liable in a sexual harassment suit if the plaintiff proves that “there is a business, service, or professional relationship between the plaintiff and defendant,” and that “[t]he defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.” The plaintiff must be unable to “easily terminate the relationship,” and must have “suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress” because of the alleged conduct. The statute includes, but is not limited to, professionals like doctors, lawyers, building contractors, real estate agents, trustees, teachers, and landlords.

Again, however, reporters may encounter difficulties in proving the requisite pervasiveness or severity in order to maintain an action under section 51.9. In Hughes v. Pair, the California Supreme Court reviewed Suzan Hughes’ suit against Christopher Pair, in which she alleged that his conduct amounted to intentional infliction of emotional distress, and that he sexually harassed her under section 51.9. Pair was trustee of a trust left by Hughes’ late ex-husband to benefit her son, Alex. During a phone call, and later at an exhibit at a museum, Hughes alleged that Pair made

81. Lyle, 38 Cal. 4th at 288.
82. CAL. CIV. CODE § 51.9 (West 2011).
83. Id.
84. Id.
86. Id. at 1039.
harassing comments to her, including telling her “I’ll get you on your knees eventually. I’m going to fuck you one way or another.” The trial court granted Pair’s motion for summary judgment and dismissed Hughes’ case. The court of appeal, and later the California Supreme Court, affirmed the trial court’s decision. The court held that Pair’s alleged conduct was neither “pervasive” nor “severe” within the meaning of section 51.9; “[t]o be pervasive, the sexually harassing conduct must consist of ‘more than a few isolated incidents.’” The court also held that because Pair’s comments were isolated, and did not include “a physical assault or the threat thereof,” they did not rise to the level of “severe.” The Court declined to recognize the defendant’s “I’ll get you on your knees” comment as an actual threat to commit sexual assault or rape—“[a]lthough vulgar and highly offensive, this remark, which was made in the presence of other people attending a private showing at a museum, would not plausibly be construed by a reasonable trier of fact as a threat to commit a sexual assault on plaintiff.” The court drastically limited the scope of the statute by requiring that, in order to be “severe,” isolated actions must involve either actual violence or the threat of violence. Hughes was unable to prevail on her claim of sexual harassment essentially because Pair’s comments, while “vulgar and highly offensive,” were apparently not offensive enough. Short of an actual assault or explicit threats, many potential plaintiffs are left remediless in similar situations.

Most members of the media would have a similarly difficult time proving a cause of action under section 51.9. First, the reporter would have to convince a court that the reporter-athlete relationship rises to the level of the professional relationships named in the statute. The “interviewer-interviewee” relationship in the sports reporting context differs from the enumerated relationships in several respects, the most obvious of which is that it lacks the kind of power imbalance or fiduciary duty present in a doctor-patient, attorney-client, or trustee-beneficiary relationship. The statute explicitly provides that the list is not comprehensive, however, and does not limit the potential relationships that may be recognized by the statute. In the sports-interview context, a professional relationship does exist between athletes and members of the media, so reporters seeking to bring a cause of action under section 51.9 may be successful in establishing the requisite professional relationship.

87. Hughes, 46 Cal. 4th at 1040.
88. Id.
89. Id. at 1050.
90. Id. at 1048 (quoting Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264, 284 (2006)) (emphasis in original).
91. Hughes 46 Cal. 4th at 1049 (emphasis in original).
92. Id. (quoting Lyle, 38 Cal. 4th at 284).
Next, the reporter would need to demonstrate that she was not able to “easily terminate the relationship,” which might be difficult to establish, as athletes could argue that reporters can either choose to not interview them or get the information through some other source. Baseball commentator Gary Thorne, however, contends that, “[reporters] have to [gather in locker rooms]. Editors are sitting in press rooms and studios wanting to know why the reporters can’t get some juicy story nobody else has. The bosses demand it. The public expects it.” Certainly, this kind of pressure from editors and publishers suggests that sportswriters may be able to establish that they have an inability to easily terminate their relationship with teams and players.

The plaintiff would also need to show that she “suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress.” The inclusion of emotional distress makes this prong of the cause of action less difficult to demonstrate, but would still require a showing that she had actually been harmed. Certainly, the loss of an important story or an inability to meet a deadline could amount to an “economic disadvantage” if a reporter were to lose her job or be precluded from promotion because of her inability to get a story. Additionally, if the plaintiff can prove emotional distress she can prevail on this prong of the statute.

By far the hardest element of section 51.9 for sportswriters to prove, however, is the requirement that the harassment be “pervasive” or “severe.” Even if they were able to meet the requirements of the rest of the statute, many claims would most likely fail for the same reason that Hughes’ did—lack of a showing of either severity or pervasiveness. Short of an actual assault or threat, even the most egregious instances of harassment would probably not rise to the level of “severe.” The pervasiveness requirement would be similarly difficult to meet because, as the court in Hughes pointed out, “a few isolated incidents” are not enough to constitute pervasive harassment. Moreover, because so many of these allegedly harassing encounters between athletes and members of the media all take place in the span of a few hours or even a few minutes, proving severity and/or pervasiveness would be nearly impossible.

93. CAL. CIV. CODE § 51.9 (West 2011).
94. Thorne, supra note 4.
95. CAL. CIV. CODE § 51.9.
96. For the elements of emotional distress, see section V.B.2., infra.
97. Hughes, 46 Cal. 4th at 1042.
98. In Fuentes v. Autozone, Inc., the California Court of Appeal held that certain behavior that took place in the span of a few weeks, including demands that the plaintiff display her body to customers, spreading rumors that the plaintiff had herpes, and other comments, including a suggestion that the plaintiff could pose in “lowrider magazines” or work for strip joints, was both pervasive and severe. 200 Cal. App. 4th 1221, 1231–35 (2011). The court found that the evidence established that the plaintiff’s supervisors “created a workplace permeated with discriminatory intimidation, ridicule and insult[.]” Id. at 1238. Fuentes
2. Tort Claims

Another option could be to file suit for intentional infliction of emotional distress, and/or interference with advantageous relations, as Lisa Olson reportedly did. The First Circuit laid out the elements of tortious interference of an advantageous relationship as such: "(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's interference with through improper motive or means; and (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct." In California, the elements of a cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." "Outrageous conduct" means that the conduct is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." This may be the best legal option for women who are harassed in a non-workplace setting like a locker room because the standards are decidedly lower than for sexual harassment. As the court in Hughes pointed out, however, "[l]iability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" In order for a plaintiff to prevail, the conduct has to be truly "extreme." Most of the behavior experienced by reporters (with the exception, perhaps, of Lisa Olson's ordeal) would probably not meet this standard, and would fall instead into the "mere insults, indignities, threats, annoyances" category.

exemplifies just how bad things have to be in order to constitute "pervasive and severe" harassment.

101. Tekle v. United States, 511 F.3d 839, 855 (9th Cir. 2007) (quoting Davidson v. City of Westminster, 32 Cal. 3d 197, 209 (1982)).
102. Id. at 856 (quoting Cross v. Bonded Adjustment Bureau, 48 Cal. App. 4th 266, 283 (1996)).
104. Tekle, 511 F.3d at 855.
105. The bar for what constitutes "extreme" or "outrageous" conduct is indeed very high. In Jones v. Clinton, an Arkansas District Court held that while the alleged actions of then-Governor Bill Clinton were "offensive," they were not sufficiently "extreme" or "outrageous" so as to constitute a claim of intentional infliction of emotional distress. 990 F. Supp. 657, 677–78 (E.D. Ark. 1998). The plaintiff alleged that the defendant had groped
Unfortunately, most of the legal remedies that have been developed to deal with sexually harassing conduct simply do not apply or would not be successful causes of action for female sports journalists. Additionally, reporters may be hesitant to take legal action at all, as lawsuits are costly, lengthy processes. Moreover, since many reporters regularly report on the same teams and players, they may fear backlash from players and clubs if they bring a lawsuit against them. As discussed above, reporters are not always seen as allies to athletes so why strain the relationship any further? If players see the presence of reporters as an invasion or a threat, there is no incentive to make members of the media feel welcome or comfortable in the locker rooms. Short of a sea change in the way athletes and media relate to each other, what are the options for preventing harassment?

VI. MOVING SOLUTIONS FROM THE COURT ROOM TO THE LOCKER ROOM

As discussed above, sports reporters who are harassed may not be successful in bringing a lawsuit under current sexual harassment or tort law. Short of the creation of a new civil cause of action, the best forums for dealing with media-related misconduct are probably not courthouses, but clubhouses, organization headquarters, and locker rooms of leagues and teams. The fact that this type of behavior has become a recurring theme suggests, however, that players are not being disciplined harshly enough, expectations of acceptable behavior are not clear enough, or the organizations are not taking the issue seriously enough. Ultimately, the most severe consequence the NFL and other professional organizations may face for taking a "boys will be boys" attitude about this type of behavior from their athletes will be some backlash from fans and the media. However, as the NFL attempts to reach out to more female fans, failing to take a hard line against sexual harassment could potentially alienate this new fan base. Therefore, this Note proposes that organizations like the NFL take a proactive approach and develop policies, educational programs, and explicitly outline the consequences of harassing or disrespecting members of the media.

A. RESET THE CLOCK: BAN ALL REPORTERS FROM THE LOCKER ROOM

One option that has been proposed is a flat ban on all reporters in locker rooms. However, the court in *Ludtke* found that banning reporter

her and exposed his penis, telling her to “kiss it.” *Id.* at 664. The court determined that the plaintiff’s allegations amounted to “a mere sexual proposition or encounter, albeit an odious one, that was relatively brief in duration, did not involve any coercion or threats of reprisal, and was abandoned as soon as plaintiff made clear that the advance was not welcome,” and granted the defendant’s motion for summary judgment. *Id.* at 677–79.

Melissa Ludtke from the locker room interfered with her "fundamental right to pursue her profession in violation of the Due Process Clause of the Fourteenth Amendment." Additionally, the backlash from the media would no doubt be overwhelming. When the Fort Myers New-Press tried to get their reporter, Michelle Himmelberg, equal access to the Tampa Bay Buccaneers' locker room in the late 1970s, "[o]ne solution to her challenge was to have all reporters conduct interviews in a separate area. Bucs' management built a wall—dubbed 'the Himmelberg Wall'—to separate the area from the locker area. However, male reporters objected and blamed Himmelberg rather than management." The wall was removed, but "[a]fter these incidents, Gene Upshaw, the Executive Director of the NFL Players Association suggested that all members of the media be barred from the locker rooms. . . . that suggestion was never pursued." Today, media presence in the locker room is the status quo and it would be impractical, if not impossible, to shut them out now. As discussed below, many professional sports leagues' media policies now require that teams allow members of the media into their clubhouses and locker rooms for specified amounts of time following games and practices.

B. SUIT UP: IMPOSITION OF A DRESS CODE

Another option could be imposing a dress code on members of the media who want access to athletes after practices or games. Here, too, organizations would risk running afoul of antidiscrimination laws. If applied unequally or if the code treats men and women differently, where the different treatment is not reasonably related to business needs, it can violate employment law. Additionally, dress codes have the potential to be enforced arbitrarily, as evidenced by the Ines Sainz controversy, one person's "low-cut black dress and heels" is another's "pair of jeans and . . . white blouse." Bill Walsh, former coach of the 49ers, reportedly "banished an attractive and provocatively attired woman from the practice field because he thought she was too much of a distraction." If the discretion is left in the hands of coaches, who have close ties with their

109. Id. at 110.
110. See section E., infra page 238–39.
111. In fact, Major League Baseball did impose a dress code on reporters in 2011 that banned tank tops, sheer shirts, and skirts and shorts that are too short. Reactions from female reporters varied, but at least one suggested that requiring certain types of clothing unfairly targeted "women's wallets." Maria Panaritis, It's Personal: Baseball Dress Code Seems to Target Women, PHILA. INQUIRER, Dec. 16, 2011, at A02.
113. Chapman, supra note 66.
114. Killion, supra note 5.
115. Walcoff, supra note 55.
players, then a dress code could potentially be used to exclude unpopular reporters from practices and locker rooms, thus foreclosing on their ability to interview players.

C. HITTING THE BOOKS: SEXUAL HARASSMENT EDUCATION

Training programs on sexual harassment could be another option. There have been doubts, however, about the effectiveness of rudimentary sexual harassment education programs.\textsuperscript{116} One study of the effectiveness of sexual harassment training programs produced surprising results:

Male program participants were significantly less likely than male nonparticipants to view sexual coercion of a subordinate or student as sexual harassment, to be willing to report sexual harassment, or to direct blame away from the victim, whereas women's scores on these variables did not vary as a function of program participation . . .

First, the men's negative responses to the sexual harassment intervention may have been due to the inadequacy of a 30-minute program to address an issue as important as sexual harassment . . .

[T]he men's responses may have been an effort at self-preservation intended to defend and protect against a perceived attack on them . . . Furthermore, the male participants' reduced willingness to report or recognize blatant forms of sexual harassment and their heightened tendency to blame the victim may illustrate a backlash . . . against sexual harassment laws and policies. Such responses may reflect a discomfort with sexual harassment policies that seem to shift power to women that has traditionally belonged to men, namely, the power to define social reality.\textsuperscript{117}

Of course, this study does not suggest that noneducation is preferred to education: "The results of this study should raise awareness among those who are attempting to intervene in organizations that there are inherent dangers in cutting corners when developing sexual harassment programs."\textsuperscript{118} Again, the unique characteristics of a professional sports setting should come into play when thinking about what types of harassment education would be most helpful. The Vice President of Human Resources and Diversity for the Minnesota Twins "sought out special training for athletes when she realized the harassment training available for rank-and-file employees often didn't cover issues encountered

\textsuperscript{116} See Shereen G. Bingham & Lisa L. Scherer, The Unexpected Effects of a Sexual Harassment Educational Program, 37 APPLIED BEHAV. SCI.125, 145 (June 2001).

\textsuperscript{117} Id. at 142–44.

\textsuperscript{118} Id. at 145.
by professional ballplayers.” The solution was hiring an employment attorney to discuss the specific challenges that professional athletes face; “[t]hey’re around each other so often; it’s hard for them to tell what’s appropriate conduct and what’s not . . . . If two ballplayers are telling dirty jokes everyone may seem okay with it. Same if they’re interacting with a [female] member of the media and everyone is playing little tricks on her, like dropping their towels when she walks into the locker room.”

The takeaway message from these training sessions is that “[i]n today’s environment, they have to behave as if behavior is videotaped and played on the 10 o’clock news—because it could very well happen . . . . The player has to realize he is a representative of the team.” By recognizing the specific challenges that arise in the professional sports world, the Twins’ program presents a unique and effective approach to preventing player misconduct, where traditional sexual harassment training may fail.

D. MONEY TALKS: IMPOSING FINES FOR MISCONDUCT

Another option, which admittedly takes the reactive rather than proactive approach, would be to impose steeper fines and penalties on players who harass members of the media. Brett Favre’s fine for not cooperating fully with the Commissioner’s investigation of the Jenn Sterger incident was only $50,000—about 0.38% of the $13 million dollar salary he received while with the Jets. When considered as a percentage of his income, $50,000 hardly seems like a punishment at all. Players are fined almost as much for on-field infractions like unnecessary roughness. One author proposes that for “minor” violations of the NFL’s code of conduct, players be “subject to a one to four game suspension with a fine of no more than $100,000. For more serious offenses, a player would receive a suspension of four to eight games and a fine no larger than $250,000.”

A similar fines-plus-suspensions structure could be effective in both

120. Id.
121. Id.
122. Favre Fined $50,000, supra note 61.
disciplining and deterring harassment of members of the media. However, the effectiveness and fairness of such an approach would depend on providing players with adequate notice and the opportunity to appeal, as well as clear guidelines to follow in their interactions with the media. While some organizations have specific policies dealing with the media, there is room for improvement and expansion across the board.

E. SETTING THE BAR: MAJOR LEAGUE BASEBALL’S POLICIES ON MEDIA-ATHLETE INTERACTION

Major League Baseball has extensive regulations dealing with how players and teams must treat the media and how members of the media are expected to behave in the clubhouse. The Major League Baseball Players Association Basic Agreement (Agreement) makes it clear that reporters are to be allowed into the clubhouse almost immediately following games—within ten minutes after the final out of the game “absent unusual circumstances that require a team meeting.” The Agreement also sets minimum time amounts that reporters must have access to teams: “[t]he working media’s access following a game shall be for a period no longer than one hour unless reasonable access to players is not provided during that time; provided, however, that card-carrying members of the Baseball Writers Association of America will have unlimited access after the post-game opening of the clubhouse.” Additionally, while the teams may keep some areas—like the trainer’s room and players’ lounge—closed to reporters, “it is vital these areas not be used as a sanctuary for players seeking to avoid the media. It is very important to our game that ALL players are available to the media for reasonable periods and it is the player’s responsibility to cooperate.”

In addition to mandating access, the Players Association Agreement contains specific prohibitions against mistreatment of members of the media; “[p]hysical abuse or threats directed to members of the media... by baseball personnel will not be tolerated. Disciplinary action, including fines and suspensions, will be considered in any cases that arise.” Additionally, the Agreement lays out requirements for journalists’ behavior: “[w]hile in the clubhouse, members of the media are expected to conduct themselves in a professional manner and to respect the privileges

128. Id. at 205.
129. Id.
130. Id. at 206.
131. Id.
132. Id.
and environment of restricted areas and working press areas at all times. Any media member in violation of this conduct policy is subject to revocation of his or her privileges and may be subject to immediate ejection.”

The Agreement further states that “[a]ny club whose personnel violate these regulations will be disciplined. Any member of the media who violates these regulations will lose his or her accreditation.”

**F. ROOM FOR IMPROVEMENT: THE NATIONAL FOOTBALL LEAGUE’S MEDIA POLICY**

The NFL’s media policy focuses mainly on access, requiring that members of the media be allowed in to the locker rooms ten to twelve minutes after the conclusion of the game. Unlike the MLB Players’ Association Agreement, the NFL’s policy does not address how players are to treat the media, or how reporters are expected to behave. It does, however, require that each club have a mandatory meeting during training camp to discuss media and public relations, and “[t]he required playbook section on player public relations responsibilities, the importance of good media and community relations, plus league and club policies should be discussed.” Additionally, “[e]ach club is required to conduct a media training session each year prior to the start of the regular season for all players and coaches . . . . These mandatory training sessions will be held in addition to the annual team training camp . . . described above.” The policy states that “all accredited media must be given access to player and coach interviews at designated times of the practice week, following games, and during training camp and minicamp . . . . Barring individual members of the regularly accredited media from any of the above sessions for what is perceived as ‘unfair coverage’ or any similar reason is not permitted.” The policy provides that “[v]iolations of the above procedures will be considered conduct detrimental to the league and will be subject to disciplinary action by the commissioner.”

Missing from the policy is any mention of how, specifically, the players are expected to conduct themselves during interviews or while members of the press are present.

**G. CODES OF CONDUCT: THE NATIONAL BASKETBALL ASSOCIATION’S POLICIES**

The NBA Players Association Collective Bargaining Agreement contains almost nothing about media relations, save for one provision that

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133. MLB Agreement, supra note 127 at 207 (emphasis in original omitted).
134. Id.
136. Id. at § 15.
137. Id. at § 16.
138. Id. at § 10.
139. Id. at “Violations.”
states that “[a]ll players shall be required each Season to attend and participate in one media training session conducted by their Teams and/or the NBA. If a player, without proper and reasonable excuse, fails or refuses to attend a media training session, he shall be fined $20,000.”

While a clear-cut media access policy was difficult to find, sportswriter Rich Walcoff reports that “[g]one . . . are the days when reporters gathered in front of Michael Jordan’s locker as he returned from the showers wearing just a towel. Now, most NBA stars don’t meet the media until they are fully clothed.” This suggests that players are given adequate time to shower and change following games, which could be helpful in letting players decompress before the media is allowed to interview them.

Interestingly, the NBA has promulgated a “Fan Code of Conduct” which is to be “posted prominently in all NBA arenas, and public address announcements concerning some of its key elements will be made during each NBA game.” The Code of Conduct requires that, “[p]layers will respect and appreciate each and every fan . . . . Guests will be treated in a consistent, professional and courteous manner by all arena and team personnel . . . . Guests will enjoy the basketball experience free from disruptive behavior, including foul or abusive language or obscene gestures.” While there is no comparable policy on how athletes are expected to interact with the media, provisions from the Fan Code of Conduct could easily be translated to a media relations policy.

VII. TACKLING THE PROBLEM: PUTTING IT ALL TOGETHER TO FORM A COMPREHENSIVE MEDIA POLICY

In recognizing the unique challenges that face professional athletes and organizations, a hybrid approach is probably the best solution to the athlete-media problem. First, education is necessary. As evidenced by the Minnesota Twins’ experience, normal workplace harassment training isn’t enough. Teams should tailor their programs to meet the needs of their players and account for the differences between professional sports and most other occupations.

Additionally, all professional sports organizations should create and systematically enforce a specific policy on how athletes and staff are expected to treat members of the media, and vice versa. The MLB Players’ Association Basic Agreement represents the most comprehensive league-wide media policy. The MLB’s regulations should become a model for

141. Walcoff, supra note 55.
143. Id.
144. See discussion supra section VI.C., page 236–37.
other sports leagues, organizations, and teams. These policies, however, need to go beyond access and general standards of professionalism. Teams must expressly lay out what will be considered inappropriate conduct, and what the consequences are for harassing a reporter, in order to ensure that the expectations are clear, that the integrity of the team and the league are upheld, and that members of the media are respected. The policy should encompass both the behavioral guidelines from the NBA's fan policy and the MLB Players Association media policy.

The "physical abuse or threats" provision of the MLB Basic Agreement should be expanded to include insults, unwelcome sexual advances, or any other hostile conduct, including but not limited to: inappropriate jokes, unwelcome physical contact, intentional indecent exposure, catcalls, or offensive comments about a reporters' physical appearance, race, gender, or sexual orientation. The policy should also include more general statements requiring that athletes treat members of the media with respect and professionalism, as the NBA Fan Code of Conduct does. Policies dealing with reporters' behavior could be pulled directly from the MLB Basic Agreement, quoted in full above, which requires that members of the media "conduct themselves in a professional manner" and are subject to ejection from the clubhouse for violating the policy.145

The policy should also clearly set out the consequences for violations of the media policy. As discussed above, a combination of meaningful fines and suspensions could be one way to get players' attention. The effectiveness of such a policy, however, would depend on actual enforcement. If the leagues fail to punish players uniformly, the deterrent effect of the seemingly harsh consequences for mistreatment of reporters will be significantly weakened.

Providing athletes and members of the media with notice of such policy is imperative. Not only should every player and member of the media be provided with a copy of the athlete-media policy, but the policy should also be posted and visible in locker rooms, clubhouses, and other areas where players and member of the media are likely to encounter each other.

Changing access policies could also help to temper athletes' frustration with being faced with a barrage of reporters as soon as they return to the locker room. As Gary Thorne aptly points out, "[a]thletes want some room. Reporters flock to every dressing room hours before games. They hang around hoping for stories. They roam the playing surface and pile on the latest incident... until the issues are beaten to a pulp."146 Extending the typical ten minute cooling off period even to twenty minutes would

145. MLB Agreement, supra note 127 at 207 (emphasis in original omitted).
146. Thorne, supra note 4.
provide a little more time for athletes to regroup, shower, and decompress after an emotionally charged win or loss.

VIII. THE END GAME: CONCLUDING REMARKS

Allowing players to get away with disrespecting members of the media does a disservice to the teams and organizations that the players are charged with representing. For better or for worse, professional athletes are public figures, and the public pays attention to what they say. Progress has been made, though. Following the Ines Sainz incident, the New York Jets invited the president of the Association for Women in Sports Media (AWSM), Amy Mortiz, to participate in a training session about media relations.\textsuperscript{147} Mortiz said that while “[w]e are of course happy the Jets followed through on their promise to include AWSM as they address media access issues . . . This remains an ongoing process.”\textsuperscript{148} Indeed, there is more work to be done. The athletes, however, are not alone in this process—the media, too, should look at their role in the conflict, and work with, rather than against the players to come to an agreement.

\textsuperscript{147} AWSM Joins Jets for Educational Session, ASS’N FOR WOMEN IN SPORTS MEDIA (Nov. 30, 2010) http://awsmonline.org/awsm-joins-jets-for-educational-session/.
\textsuperscript{148} Id.
Who is suspicious?†

Jon Lau*

† This drawing is inspired by the killing of Trayvon Martin and the protests that occurred in the wake of his death.