

# Pepperdine Gay Bias Case — A Loss And A Win For Plaintiffs

By **Ronald Katz** August 14, 2017, 1:27 PM EDT

Sexual stereotyping in sport has been occurring for literally millennia. It is therefore not reasonable to expect that it will suddenly end. Rather, halting progress has been the pattern. That pattern continued last Friday when two lesbian basketball players who were thrown off Pepperdine's women's basketball team lost their discrimination case against the university, which is located in Malibu, California. Despite the loss, however, the fact that the case was permitted to go to trial represented a major blow against sexual stereotyping.



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There is evidence of sexual stereotyping in sport at least as far back as 776 B.C., when women were not permitted to compete in the ancient Olympic Games. That prohibition lasted until the ancient Olympic Games ended in 393 A.D. When the Olympic Games resumed 1503 years later in 1896, women were still not permitted to compete. The founder of the modern Olympics, Baron de Coubertin, was infamously quoted as saying that female competition would be “impractical, uninteresting, unaesthetic, and incorrect.”

One important reason for this discriminatory practice was the belief at the time that athletic competition would impair female reproductive capabilities. This false and unscientific belief has been disproven multiple times since females have been allowed to compete. For example, the first winner of the Olympic marathon, Joan Benoit Samuelson, stated in 2016 on the 50th anniversary of female competition in the Boston Marathon that “[i]t was thought that running would do us bodily harm, and we would never bear children. Now here I am: 150,000 miles and two children later, I’m still running. And I’m cheering on a daughter.”

Before the passage of Title IX, which, among other things, equalized opportunity for men and women in college sports, the stereotyping of women was aptly described by one of the co-authors of Title IX, former Sen. Birch Bayh, D-Ind.: “We are all familiar with the stereotype of women as pretty things who go to college to find a husband ... marry, have children, and never work again. The desire of many schools not to waste a ‘man’s place’ on a woman stems from such stereotyped notions. But the facts absolutely contradict these myths about the ‘weaker sex’ and it is time to change our operating assumptions.”

Although there was still some officially sanctioned sexual stereotyping in sport regarding female participation in contact sports after Title IX was enacted in 1972, such stereotyping was greatly ameliorated. Despite the fact that women have now made progress in being able to compete in contact sports, sexual and other types of stereotyping still exist in sport, and the Pepperdine case highlighted these issues.

For example, in his opening statement, the players’ lawyer played a clip of Pepperdine’s president explaining the religiously affiliated university’s denial of recognition to an LGBT organization. The president stated that such recognition was “just not mission-supportive” and that “mission matters most at Pepperdine University.” That is classic stereotyping: In other words, no matter the purpose of

not recognizable. More importantly, it is not recognizable solely because of who is involved: LGBT people.

Another example is the testimony of the captain of the basketball team, who testified that the two lesbians had an “attitude.” Such emotionally charged words are commonly applied to groups that are subject to discrimination.

The now-former coach of the Pepperdine women’s basketball team confirmed such stereotyping in his testimony, stating his concern about lesbians on the team as follows: “If there’s a breakup, there’s a fight, there’s the potential for a negative impact on the team as a whole.” Unexplained is how such incidents are any different with non-LGBT people.

It is certainly conceivable, for example, that two players on the women’s basketball team would be competing for the same male off the court and that that would have a negative impact on the team. Heterosexual breakups also have the potential of negative impacts on the team, as do myriad other events in peoples’ personal lives. That is precisely why we should separate personal from work concerns. There is no reason at all — except stereotyping — to single out lesbians for behavior relating to social relationships and problems that all people have.

The judge in the jury trial seemed to imply the appropriateness of separating the personal from the professional when he posed a question to one of the witnesses, a now-former assistant coach on the team, while she was being cross-examined under oath by one of the lawyers representing Pepperdine. The assistant coach was testifying how she had heard that the plaintiffs were dating, and she reported that to the coach. The judge then asked, “So why not just, if you’re dealing with a personality issue or something happening on the court — why not just say, ‘Conform your conduct and be a good team player, and whatever personal business you have, leave it at home.’”

Despite the above evidence and commentary, the jury decided that there was insufficient evidence to render a verdict against Pepperdine. Of course, much goes into that decision that is particular to this case — credibility of the witnesses, for example.

One thing that will persist after the case, however, is the court’s decision that sexual orientation discrimination is covered by Title IX’s prohibition of discrimination “because of sex.” In a motion decided by the court in December 2015, the holding was that “It is impossible to categorically separate ‘sexual orientation discrimination’ from discrimination on the basis of sex or from gender stereotypes ... to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.”

The court directly targeted sexual stereotyping when it stated in the above decision that the focus of a Title IX case is not the sexual history of the victim: “A plaintiff’s ‘actual’ sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis. This is especially true given that sexuality cannot be defined on a

homosexual or heterosexual basis; it exists on a continuum. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *Stan. L. Rev.* 353, 380-381 (200).” The court specifically references the “Kinsey scale,’ which conceived of sexual orientation as a continuum with six ratings.”

The verdict last Friday was very important for the plaintiffs and for Pepperdine. What is more significant regarding sexual stereotyping in sport, however, is that the case was allowed to proceed to trial on the theory that sexual orientation discrimination falls under the “because of sex” language of Title IX.

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