

How the NFL “Protects” Cheerleaders with Discriminatory Policies

*Francine Eichhorn**

Introduction

Jacalyn Bailey Davis is a former cheerleader for the New Orleans Saints (hereafter the Saints or the Team), a National Football League (NFL) team.¹ Davis alleges the Saints fired her after she posted a picture to her private Instagram account of herself wearing a lacey lingerie one-piece outfit.² The outfit was a black body suit which had flowers strategically positioned over her breasts.³ Before she was fired, the Saints also accused Davis of attending the same party as an NFL football player and of receiving messages from NFL players on Instagram.⁴ Davis denied attending the party but did admit to receiving messages from NFL players.⁵ However, Davis stated she never responded to any of the messages from NFL players that she received on her private Instagram account.⁶ The Saints justified the firing based on the reasoning that Davis violated the Team’s anti-fraternization policy, which requires the Saints’ cheerleaders to avoid contact with NFL players not only in person, but online as well.⁷

* JD, May 2020, Saint Louis University School of Law. I would like to thank Professor Marcia L. McCormick for her expertise and guidance throughout this writing process. I would also like to thank my family for all their continuous support and encouragement.

1. Ken Belson, *How an Instagram Post Led to an N.F.L. Cheerleader’s Discrimination Case*, N.Y. TIMES (Mar. 25, 2018), <https://www.nytimes.com/2018/03/25/sports/saints-cheerleader.html> [perma.cc/8AY8-PPBA].

2. See Ahiza Garcia, *NFL Cheerleader Files Complaint over ‘Discriminatory’ Measures Governing Conduct*, CNN (Mar. 26, 2018, 7:34 PM), <https://money.cnn.com/2018/03/26/news/companies/new-orleans-saints-cheerleaders-gender-discrimination/index.html> [perma.cc/9Z5S-2FLB]; see also Joanna Grossman, *NFL Cheerleaders Have to Follow Bizarre, Sexist Rules. But Are They Legal?*, VOX (Apr. 11, 2018, 8:30 AM), <https://www.vox.com/the-big-idea/2018/4/11/17218804/nfl-cheerleaders-sexist-rules-fraternizing-instagram-new-orleans-saints> [perma.cc/53B2-MN24].

3. The photograph was taken by the BBC from Jacalyn Bailey Davis’s Instagram account, but Davis deleted the picture after the article was published. See Marianna Brady, *NFL Cheerleader Says She Was Fired over Instagram Photo*, BBC (Mar. 29, 2018), <https://www.bbc.com/news/world-us-canada-43576681> [https://perma.cc/KKT8-N4X8].

4. See Garcia, *supra* note 2.

5. *Id.*

6. *Id.*

7. See Belson, *supra* note 1.

In response, Davis filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging gender discrimination.⁸ According to her complaint, the Saints' anti-fraternization policy strictly constrains its cheerleaders' behavior outside of working hours to avoid any contact with NFL players. The policy requires cheerleaders to block NFL players on social media, not contact NFL players, not respond to messages from NFL players, and not "like" any NFL players' social media photos.⁹ The policy also bars cheerleaders from following NFL players or NFL coaches on any social media platform.¹⁰ The Saints' cheerleaders must avoid contact in person and online with not only the Saints' players, but all players in the NFL.¹¹ Approximately 2000 players are in the NFL, and the Saints' cheerleaders are required to block all of them on social media platform.¹² Some NFL players even have social media accounts under pseudonyms, and the Saints' cheerleaders are required to block those social media accounts as well.¹³ Davis stated the Saints' cheerleaders were told to remove their last names from their Instagram accounts to avoid NFL players from finding them online.¹⁴

According to Davis's EEOC complaint, the restrictions on contact between the Saints' cheerleaders and NFL players goes beyond social media to govern in-person interactions, including those that are incidental to the cheerleaders' work. The Saints' cheerleaders, per Davis's complaint, are required to avoid making eye contact with NFL players and are supposed to move to the side if they encounter an NFL player in the tunnel that leads into the football stadium.¹⁵ If the Saints' cheerleaders encounter NFL football players in public, Davis noted they must leave the location immediately, even if the player shows up after the cheerleader arrived.¹⁶ Even an exchange of words beyond "hello" is a potential violation of the anti-fraternization policy for the Saints' cheerleaders, according to the complaint.¹⁷

The essence of Davis's case in front of the EEOC was that the Saints' cheerleaders are penalized for violating the anti-fraternization policy, but NFL players are not.¹⁸ The Saints' football players do not have a

8. *Id.*

9. See Garcia, *supra* note 2.

10. *Id.*

11. See Grossman, *supra* note 2.

12. *Id.*

13. *Id.*

14. Brady, *supra* note 3.

15. See Garcia, *supra* note 2.

16. *Id.*; Lauren Stiller Rikleen, *There Are Strict Rules for NFL Cheerleader. The Players? Not so Much*, WBUR (Apr. 4, 2018), <https://www.wbur.org/cognoscenti/2018/04/04/nfl-cheerleader-gender-discrimination-lauren-rikleen> [perma.cc/L3AQ-ZJRB].

17. See Grossman, *supra* note 2.

18. See Belson, *supra* note 1.

limit on whom they can follow on their social media platforms and are not required to block any NFL teams’ cheerleaders on social media.¹⁹

As stated earlier, according to her EEOC complaint, Davis alleges she was fired not only for alleged contact with NFL players in person and online, but also for posting a picture of herself on social media in a one-piece outfit.²⁰ Davis alleges that the Saints’ cheerleaders are subject to termination if they post a picture that the Team considers “semi-nude” or “lingerie.”²¹ The Saints also prohibit cheerleaders from posting any images in Saints attire to social media.²² Again, she claimed that the Saints’ players were not subject to these same restrictions regarding their social media usage.²³ For example, Wil Lutz, a kicker for the Saints, posted a picture to his Instagram account on November 13, 2017, of a nude man streaking across the football field during a game.²⁴ Lutz has played for the Saints since 2016 and posted this picture while employed by the New Orleans Saints.²⁵ If such a picture was posted by a Saints’ cheerleader, that cheerleader would have been subject to termination, according to Davis’s complaint because it is a picture of a nude man. In contrast, Wil Lutz, as of the 2019–2020 football season, is still employed by the Saints and was not punished, to anyone’s knowledge, for posting the picture.²⁶

The Saints have responded to Davis’s complaint of gender discrimination by saying the anti-fraternization policy is designed to protect the cheerleaders from NFL “players preying on them.”²⁷ Even if the anti-fraternization policy was put into place to protect its cheerleaders, the policy places the burden to comply with it solely on the cheerleaders.²⁸ According to Davis, the Saints told the cheerleaders that activity—such as liking or commenting on anything posted online about a Saints’ player—would give the NFL players the impression that the cheerleaders were available to the players’ advances.²⁹

Gregory Rouchell of Adams and Reese LLP is the outside legal counsel for the Saints.³⁰ Rouchell stated in response to Davis’s EEOC complaint, “The New Orleans Saints is an equal opportunity employer,

19. *Id.*

20. David Lisko & Paul Punzone, *NFL Cheerleader’s Title VII Claim May Face Legal Hurdles*, LAW360 (Apr. 13, 2018), <https://www.law360.com/articles/1031447/nfl-cheerleader-s-title-vii-claim-may-face-legal-hurdles>.

21. *Id.*

22. See Garcia, *supra* note 2.

23. *Id.*

24. Wil Lutz (@wil_lutz5), INSTAGRAM (Nov. 13, 2017), <https://www.instagram.com/p/BbcToCMBQwq> [perma.cc/4MM5-7VCC].

25. Wil Lutz, NFL, <http://www.nfl.com/player/willutz/2556601/careerstats> (last visited Jan 14, 2020) [https://perma.cc/7ECS-FA78].

26. *Id.*

27. See Belson, *supra* note 1.

28. See Garcia, *supra* note 2.

29. See Brady, *supra* note 3.

30. Eun Kyung Kim, *Former New Orleans Saints Cheerleader Says Her Coaches Called Players “Predators,”* TODAY (Mar. 28, 2018, 1:59 PM), <https://www.today.com/news>

and it denies that Ms. Davis was discriminated against because she is female. The Saints will defend these allegations in due course, and the Organization is confident that its policies and workplace rules will withstand legal scrutiny.”³¹

The NFL has a strict policy against employment discrimination on the basis of sex.³² The NFL’s personnel conduct policy “prohibits any form of unlawful discrimination in employment based on an individual’s race, color, religion, sex, national origin, age, disability, or sexual orientation regardless of whether it occurs in the workplace or in other NFL sponsored settings.”³³

This Note argues that the anti-fraternization policy of the Saints’ cheerleaders with NFL players discriminates against the female cheerleaders based on their sex. The anti-fraternization policy discriminates on its face because it requires only the female cheerleaders to take action to prevent contact with the male NFL players. This article examines the Saints’ anti-fraternization policy in depth, but the Saints are not the only team with this kind of policy. In fact, this Note argues that the NFL’s anti-fraternization policies are problematic, as are the other ways that the NFL structures the cheerleaders’ working environment. The article begins in Part I by giving a background on Title VII. Part II discusses the history of cheerleading and cheerleading in the NFL. Part III applies the relevant laws to Davis’s claim of sex discrimination. Part IV discusses the other inequalities present in the NFL. Part V discusses potential solutions to prevent discriminatory anti-fraternization policies.

I. Title VII

Title VII of the Civil Rights Act makes it unlawful “for an employer to . . . discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”³⁴ In a Title VII claim, a complainant states a claim when she shows that (1) she was a member of a protected class; (2) she was discharged; and (3) a comparable employee outside of her class was treated differently.³⁵

This kind of discrimination has been labelled disparate treatment. Disparate treatment occurs when members of a race, sex, or ethnic

[/former-new-orleans-saints-cheerleader-our-coaches-called-players-predators-t126046](https://former-new-orleans-saints-cheerleader-our-coaches-called-players-predators-t126046)
[perma.cc/3J58-SVAM].

31. *Id.*

32. See Belson, *supra* note 1.

33. *Id.*

34. 42 U.S.C. § 2000e-2 (2018).

35. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (creating a burden shifting framework to prove that protected class was the reason for an adverse employment action that compels an employer to articulate a reason other than protected class); *Russell v. UPS*, 673 N.E.2d 659, 662 (Ohio App. 1996).

group have been denied employment, promotion, membership, or other employment opportunities that are available to other employees or applicants.³⁶ In other words, “the employer simply treats some employees less favorably than others because of their race, color, religion, sex, or national origin.”³⁷ Proof of discriminatory motive is critical in a disparate treatment analysis.³⁸ Discriminatory motive can be inferred from the mere fact of difference in treatment.³⁹ Liability for disparate treatment cases depends on whether the protected trait actually motivated the employer’s decision.⁴⁰

Disparate treatment that is overtly or facially discriminatory can be easier to prove because of the direct evidence explicitly linking an adverse action to a person’s protected class.⁴¹ Disparate treatment can also occur when an employer treats members of a protected class differently, allegedly based on a reason other than membership in that protected class, but the plaintiff shows that the employer’s reason is only a pretext for intentional discrimination.⁴²

Still, the employer may defend a claim of gender discrimination on the basis that gender is a bona fide occupational qualification (BFOQ).⁴³ To prove a BFOQ defense, an employer must show a high correlation between sex and the ability to perform job functions.⁴⁴ Courts reject a BFOQ for sex where sex is merely useful for attracting customers of the opposite sex, but where hiring both sexes will not alter or undermine the essential function of the employer’s business.⁴⁵ Courts consistently construe the BFOQ defense very narrowly.⁴⁶ The BFOQ analysis focuses on the ability of the individual to perform the duties of the particular job.⁴⁷ An employer must establish a nexus between sex and job performance to justify differential treatment based on sex under the BFOQ defense.⁴⁸

II. Cheerleading in the NFL Is a Female-Dominated Sport

Cheerleading has not always been a female-dominated sport; it actually began as all male clubs.⁴⁹ In 1869, Princeton University and

36. 29 C.F.R. § 1607.11 (2019).

37. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 n.15 (1977).

38. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

39. *Id.*

40. *Id.* at 610.

41. Meredith L. Jason, Note, *International Union v. Johnson Controls, Inc.: Controlling Women’s Equal Employment Opportunities Through Fetal Protection Policies*, 40 AM. U.L. REV. 453, 458 (1990).

42. *Id.* at 460.

43. 42 U.S.C. § 2000e-2(e) (2018).

44. *White v. Dep’t of Corr. Servs.*, 814 F. Supp. 2d 374, 385 (S.D.N.Y. 2011).

45. *Wilson v. Sw.t Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

46. *Int’l Union v. Johnson Controls*, 499 U.S. 187, 201 (1991).

47. See Jason, *supra* note 41, at 459–60.

48. *Id.* at 460.

49. *History of Cheerleading*, AM. CHEERLEADER, Feb. 2010, at 26.

Rutgers University played the first intercollegiate football game.⁵⁰ At this game, residents of Princeton's Nassau Hall did a cheer of "Sis Boom Rah!"⁵¹ In the 1880s, an all-male pep club was formed at Princeton, and the pep club created an organized yell.⁵² This organized yell was then introduced at the University of Minnesota in 1884.⁵³ In 1900, the University of Minnesota "introduced the first organized cheerleaders and the first official 'fight song.'"⁵⁴ Women were not welcomed onto the University of Minnesota's team until 1923.⁵⁵ But it was not until the 1940s that cheerleading became a female-dominated sport because many college-aged men were fighting in World War II.⁵⁶ Cheerleading came to the NFL in 1954 when the Baltimore Colts introduced a cheer squad.⁵⁷ The Baltimore Colts' cheerleaders' uniforms consisted of lettered sweaters, ankle or bobby socks, and homemade pom-poms.⁵⁸ In the 1970s, the Dallas Cowboys' general manager reinvented the team's cheerleaders for television.⁵⁹ The Dallas Cowboys' cheerleaders uniforms were changed to royal-blue halter tops, star-spangled vests, hot pants, and white go-go boots.⁶⁰ In 1976, the Dallas Cowboys' cheerleaders performed at Super Bowl X.⁶¹ The exposure of the Dallas Cowboys' cheerleaders on national television created a new trend in cheerleading where an emphasis was placed on dance routines.⁶² Since 1954, only females have been cheerleaders in the NFL.⁶³ However, the Los Angeles Rams made history in 2018 when Napoleon Jinnies and Quinton Person became the first male cheerleaders to be a part of an NFL cheerleading team.⁶⁴

While cheerleading has been a part of the NFL since 1954, it has not been without its controversies. Davis is not the only NFL cheerleader to make a claim of discrimination against an NFL team. Kristan Ann Ware filed a lawsuit against the Miami Dolphins and the NFL, alleging that she was discriminated and retaliated against because

50. *Id.*

51. *Id.*

52. *Id.*

53. SUSAN SALIBA, CHEERLEADING 9 (2004).

54. *Id.*

55. *History of Cheerleading*, *supra* note 49, at 27.

56. *Id.*

57. Ralph Warner, *Male Cheerleaders Set to Make NFL History in 2018*, NFL (Aug. 6, 2018, 7:42 PM), <http://www.nfl.com/news/story/0ap3000000945403/article/male-cheerleaders-set-to-make-nfl-history-in-2018> [perma.cc/K9NG-HX8C].

58. Michelle Ruiz, *Sex on the Sidelines: How the N.F.L. Made a Game of Exploiting Cheerleaders*, VANITY FAIR (Oct. 4, 2018), <https://www.vanityfair.com/style/2018/10/nfl-cheerleaders-history-scandal> [perma.cc/LCE5-MLKG].

59. *Id.*

60. *Id.*

61. *Id.*

62. SALIBA, *supra* note 53, at 14.

63. Warner, *supra* note 57.

64. *Id.*

of her religion and gender.⁶⁵ Ware filed her claim of discrimination in April 2018.⁶⁶ Like Davis, Ware claims that NFL football players are held to different standards regarding social media and expressions of faith.⁶⁷ More specifically, Ware alleged she was told to not discuss her decision to abstain from sex before marriage after posting a picture of her baptism on social media.⁶⁸ As with the conduct rules that are the focus of this article, NFL players are not restricted in what they post to their personal social media accounts and are free to express their religious beliefs.

In the past few years, there has been an increase in litigation between cheerleaders and their NFL teams, not only concerning discrimination but also concerning wages.⁶⁹ In 2018, six former cheerleaders of the Houston Texans filed a law suit alleging brutal working conditions that included harassment and unpaid hours.⁷⁰ In 2013, the Oakland Raiders’ (the Raiders) cheerleaders filed a class action suit against the Raiders claiming they were not being paid minimum wage or overtime and were not being reimbursed for expenses associated with the job.⁷¹ The Raiders agreed to pay over \$1.25 million to over 100 women who were employed as cheerleaders from 2010 to 2013.⁷² The class action against the Raiders sparked an increase in litigation over wages between other NFL teams and their cheerleaders. In 2015, the Tampa Bay Buccaneers, the New York Jets, and the Cincinnati Bengals settled lawsuits with their respective cheerleaders relating to wages.⁷³

If the Raiders’ cheerleaders’ class action suit is taken as an example of what happens when someone decides to speak out, Davis’s claim

65. Scott Gleeson, *Former Dolphins Cheerleader Alleges Religious Gender Discrimination in Lawsuit*, USA TODAY (Apr. 13, 2018, 8:28 AM), <https://www.usatoday.com/story/sports/nfl/dolphins/2018/04/12/dolphins-cheerleader-kristan-ann-ware-law-suit-discrimination/511511002> [https://perma.cc/7C69-KQ6B].

66. *Id.*

67. *Id.*

68. *Id.*

69. See Lisko & Punzone, *supra* note 20.

70. *Male Cheerleaders Join 2 NFL Squads amid Complaints and Lawsuits*, CBS News (Sept. 12, 2018), <https://www.cbsnews.com/news/male-cheerleaders-join-nfl-los-angeles-rams/>; Tony Dokoupil, *Ex-Cheerleaders Sue Houston Texans, Allege Brutal Working Conditions and Harassment*, CBS NEWS (June 1, 2018, 6:38 PM), <https://www.cbsnews.com/news/ex-cheerleaders-sue-houston-texans-allege-brutal-working-conditions-and-harassment-2018-06-01>.

71. See Robin Abcarian, *Cheerleaders’ Wage-Theft Lawsuit to Cost Oakland Raiders \$1.25 Million*, L.A. TIMES (Sept. 4, 2014, 3:07 PM), <https://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html>.

72. *Id.*; Vic Tafur, *Raiderettes Get Payouts from \$1.25 Million Settlement*, S.F. CHRON. (May 10, 2017, 4:49 PM), <https://www.sfchronicle.com/raiders/article/Raiderettes-get-1-25-mil-in-settlement-11136363.php>.

73. Rebecca R. Ruiz, *Jets Become Latest N.F.L. Team to Settle a Wage Lawsuit Filed by Cheerleaders*, N.Y. TIMES (Jan. 27, 2016), <https://www.nytimes.com/2016/01/28/sports/football/jets-become-latest-nfl-team-to-settle-a-wage-lawsuit-filed-by-cheerleaders.html>.

could achieve a similar result. The Raiders' cheerleaders' class action suit increased wages of not only their team's cheerleaders, but several other teams' cheerleaders as well. Davis's claim of discrimination, likewise, could lead to more equal treatment of NFL cheerleaders and NFL players, sparking the change that is needed to get rid of outdated, discriminatory NFL practices.

Many differences between the job of cheerleaders and football players besides just gender exist. The Saints' cheerleaders have less prestigious jobs compared to the NFL football players.⁷⁴ The cheerleaders are more easily replaced than NFL players.⁷⁵ Additionally, the Saints' football players and the cheerleaders occupy two separate hierarchical systems in the Saints' organization.⁷⁶ The football players are also unionized, and the cheerleaders are not.⁷⁷ Union protections, however, cannot fully justify the disparity. Nor should the fame or unique abilities of the football players account for such drastic differences in treatment. The football players should at least be subject to the same or a very similar anti-fraternization policy. Davis's complaint attracted a large amount of publicity. The publicity, amplified by #MeToo, should make other NFL teams and businesses in general take a hard look at their anti-fraternization policies with the aim of decreasing their potential liability and creating an equal environment free of discrimination.

III. The Saints' Anti-Fraternization Policy May Be Held to Discriminate on the Basis of Sex Because It Applies to a Job Category Held Almost Exclusively by Women and Reinforces Sex Stereotypes

The Saints' anti-fraternization policy applies only to cheerleaders. The policy itself does not distinguish between sexes, distinguishing instead between job titles, but historically, only females were cheerleaders and only males were football players. Thus, when the Saints referred to cheerleaders, Davis can argue that it meant females, and, when it referred to football players, it meant males. In other words, although the policy does not mention sex, Davis may argue that it still discriminates based on sex because it only applies to the female cheerleaders. The Saints' anti-fraternization policy would be facially discriminatory if it replaced the job titles with the sexes associated with cheerleaders and football players.

Because the job of cheerleader was segregated by sex, historically, in my opinion, the Saints' anti-fraternization policy discriminates based on sex. Where a policy will, practically, only effect one sex, that policy has been considered to be discriminatory. For example,

74. See Grossman, *supra* note 2.

75. *Id.*

76. See Lisko & Punzone, *supra* note 20.

77. See *id.*

in *International Union v. Johnson Controls*, the Supreme Court found Johnson Controls’ fetal-protection policy to be facially discriminatory because it did not apply to the reproductive capacity of male employees in the same way that it applied to that of female employees.⁷⁸ The Saints’ anti-fraternization policy is similar to the policy at issue in *Johnson Controls* because it requires only the female cheerleaders to take action to prevent contact of any kind with NFL players, while the male NFL players are not limited by a similar policy.⁷⁹ Further, the anti-fraternization policy is not sex-neutral because the Saints’ cheerleaders, all female, are the only parties that receive penalties for violating the policy, while the Saints’ players, all male, are not held to the same standards.⁸⁰ Essentially, the Saints require the members of their cheerleading squad to “be fully responsible for ensuring that they pose no temptation to the players by avoiding any social interaction with them in any setting.”⁸¹

The Saints have responded to Davis’s discrimination complaints by saying that the anti-fraternization policy is not discriminatory because it is designed to protect the cheerleaders from NFL players preying on them.⁸² The Saints told their cheerleaders that liking or commenting on anything posted online about a Saints’ football player would give the football players the impression that the cheerleaders were available to the football players’ advances.⁸³

No matter how good the intentions are behind an anti-fraternization policy that affects only one sex, an employer cannot escape discrimination liability by arguing that they lack animus. Again, the *Johnson Controls* case is instructive. In that case, the Supreme Court considered a policy of excluding women capable of bearing children from jobs that exposed them to lead, which had been adopted as a way to protect those women and their potential offspring.⁸⁴ The lower courts had held that because of the policy’s benign motive, the policy was sex-neutral and should be analyzed using the disparate impact framework for discrimination, which is more deferential to employers.⁸⁵ The Supreme Court rejected the premise that the policy was neutral, holding instead that the policy was discriminatory because it did not apply to the reproductive capacity of male employees in the same way it applied

78. 499 U.S. 187, 199 (1991) (banning fertile women but not fertile men from most jobs).

79. See Garcia, *supra* note 2.

80. See Belson, *supra* note 1.

81. See Lauren Stiller Rikleen, *There Are Strict Rules for NFL Cheerleader: The Players? Not so Much*, WBUR (Apr. 4, 2018), <https://www.wbur.org/cognoscenti/2018/04/04/nfl-cheerleader-gender-discrimination-lauren-rikleen>.

82. See Belson, *supra* note 1.

83. Brady, *supra* note 3.

84. *Johnson Controls*, 499 U.S. at 191–92.

85. *Id.* at 193–94.

to that of female employees.⁸⁶ Johnson Controls' policy was concerned with the harms that may occur to the unborn offspring of only its female employees.⁸⁷ Johnson Controls' policy allowed only fertile men, not fertile women, to choose whether they wanted to risk their reproductive health for a particular job.⁸⁸ In reaching its conclusion, the Court held that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."⁸⁹ The purported lack of maliciousness behind the Saints' anti-fraternization policy does not give the team the right to create discriminatory policies.⁹⁰

As in *Johnson Controls*, the Saints are not allowing some of their employees, their cheerleaders, to make their own choices concerning their own safety. The Saints insinuate that the football players are potentially dangerous and that the anti-fraternization policy is, in effect, to protect the cheerleaders. However, the Saints' cheerleaders should be able to make their own choices on whether to risk their safety, or the Saints should alter the anti-fraternization policy to apply to the NFL players also and thus be facially neutral and not discriminate on the basis of sex. If safety is really the issue, the Saints could focus on the player or players who pose a potential safety risk. Instead of the Saints protecting the cheerleaders from this danger, they should remove the dangerous players all together. In other words, the cause of the safety risk is what needs to be focused on. The Saints are worried about the side effects but are not worried about the source. It is more efficient to stop the harm from its source than trying to dilute the effects of the harm.

Another way that the anti-fraternization policy might be viewed as discriminatory is that its application only to cheerleader stereotypes, not only the female cheerleaders but also the male NFL players. A gender stereotype is "a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by or performed by women and men."⁹¹ The subject of an employment practice cannot be based on stereotypes of employees' gender. In *Price Waterhouse v. Hopkins*, the Supreme Court held that an employer engages in impermissible gender discrimination when making employment decisions based on the idea that women "cannot be aggressive," a notion based on the stereotype that women should be passive or

86. *Id.* at 197–98.

87. *Id.* at 198.

88. *Id.* at 199.

89. *Id.*

90. See Brady, *supra* note 3.

91. *Gender Stereotyping*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx> [<https://perma.cc/C28L-LP5H>] (last visited Mar. 8, 2019).

submissive.⁹² In *Price Waterhouse*, Hopkins was denied admission to the firm’s partnership because she was not perceived as feminine enough.⁹³ Hopkins was also advised that to improve her chances for partnership the following year, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁹⁴ The Supreme Court found that stereotyped remarks, like these, can be evidence that gender played a part in discriminatory acts.⁹⁵ Women are generally stereotyped as being in need of protection, while men, especially athletes, are generally stereotyped as being aggressive.⁹⁶ Another stereotype of male athletes is that they dominate over women.⁹⁷

Anti-fraternization policies are often defended because they protect female employees from male employees. The Saints defended the policy as intended to protect female cheerleaders from male NFL players preying on them.⁹⁸ The use of the word “prey” here is significant. The Merriam-Webster dictionary definitions of the verb “prey” include, “to make raids for the sake of booty; to seize and devour prey; to commit violence or robbery or fraud; and to have an injurious, destructive, or wasting effect.”⁹⁹ The verb “prey” paints a picture of aggression and conquest.

The Saints’ defense of its anti-fraternization policy plays heavily into gender stereotyping. The Saints profess concern that the cheerleaders will be preyed upon by the NFL players, which seems to rest on the gender stereotype that females are weak and need to be protected but are also careless and invite harm. The Saints are essentially telling the cheerleaders that they are asking for harassment if they allow the NFL players to follow them on social media or even allow the NFL players to talk to them. Pictures that a cheerleader decides to post to her social media are in no way invitations to harassment.

92. 490 U.S. 228, 235; Erin E. Goodsell, *Toward Real Workplace Equality: Non-subordination and Title VII Sex-Stereotyping Jurisprudence*, 23 WIS. J.L. GENDER & SOC’Y 41, 45 (2008).

93. 490 U.S. at 235.

94. *Id.*

95. *Id.* at 251.

96. See generally Syda Kosofsky, Note, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN’S L.J. 209, 218–26 (1993) (describing stereotypes connected with sports and masculinity and their effect on women); Jacqueline McDowell & Spencer Schaffner, *Football, It’s a Man’s Game: Insult and Gendered Discourse in The Gender Bowl*, 22 DISCOURSE & SOC’Y 547 (2011) (analyzing a reality television program called, *The Gender Bowl*, which featured a full-contact football game between women and men); see also Nina Passero, *Effects of Participation in Sports on Men’s Aggressive and Violent Behaviors*, NYU APPLIED PSYCHOL. OPUS, https://wp.nyu.edu/steinhardt-appsych_opus/effects-of-participation-in-sports-on-mens-aggressive-and-violent-behaviors (last visited May 14, 2020).

97. See Passero, *supra* note 96.

98. See Belson, *supra* note 1.

99. *Prey*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prey> (last visited Mar. 8, 2019) [<https://perma.cc/47LG-YY3L>].

The NFL players are adults who should not think that a certain type of social media post or eye contact means that a cheerleader is asking for harassment.

Further, because using the verb “prey” emphasizes the male stereotypes of being aggressive and emphasizes male dominance over women, the Saints’ rationale for the policy suggests that either the Saints are worried about NFL players being aggressive or that the team believes it is potentially dangerous for the cheerleaders to be around the NFL players. The proffered Saints defense to its anti-fraternization policy is a classic example of gender stereotyping.

If NFL teams believe female cheerleaders need to be protected from aggressive male NFL players, it would make more sense to require the football players to be subject to the anti-fraternization policy’s burdens as well. The NFL at club level or a league level should start by banning the bad behavior in addition to an anti-fraternization policy that is applied evenhandedly, to all job categories. To ensure cheerleaders are not “preyed upon” by NFL players, NFL teams should make sure that both are going out of their way to avoid contact with each other. A policy like this would also prohibit football players from initiating contact with cheerleaders, especially if the teams are worried that the football players will prey on the cheerleaders.

More specifically, NFL teams can adapt the current anti-fraternization policy to require the football players take an active role in preventing contact both in person and online. These changes could hold the party who sent the message or initiated contact, online or in person, responsible and not punish the person who did not initiate any form of contact. Again, if the Saints are so worried about the cheerleaders’ safety that the Team instructs them to ensure “that they pose no temptation to the players by avoiding any social interaction with them in any setting,”¹⁰⁰ it would make more sense to place punishment on the NFL players if they succumb to temptation. This policy would prevent an innocent person, like Davis, from being terminated for reasons out of her control.

Since these anti-fraternization policies apply only to cheerleaders and reinforce sexual stereotypes, they are not neutral, and teams that are using them may need to show that women’s conformance to this policy is a BFOQ.¹⁰¹ In other words, they may have to show that the anti-fraternization policy is “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹⁰² The beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is

100. See Rikleen, *supra* note 16.

101. See 42 U.S.C. § 2000e-2(e) (2018).

102. *Id.*

sex discrimination and thus may be defended only as a BFOQ.¹⁰³ The BFOQ standard is exacting, but safety can make sex a BFOQ in some circumstances. In *Dothard v. Rawlinson*, the Supreme Court considered a policy that prohibited women from being employed in penitentiaries in certain positions where they could come into contact with male inmates.¹⁰⁴ Alabama’s penitentiaries, when the plaintiff applied for a position, were described as “peculiarly inhospitable . . . for human beings of whatever sex.”¹⁰⁵ The Supreme Court found that because Alabama’s penitentiaries were so violent, inmates who were sex offenders or “other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.”¹⁰⁶ This risk of violence and to security more generally would put other correctional officers and other inmates at risk.¹⁰⁷ This risk of danger to third parties made sex a BFOQ.¹⁰⁸ This type of safety exception is limited to instances in which sex actually interferes with the employee’s ability to perform the job, though.¹⁰⁹ The potential danger to a woman herself does not justify discrimination.¹¹⁰ Additionally, the need for sex to be considered must be linked to the job in a way that goes to the essence of the employer’s business. That was satisfied in *Dothard* because protecting inmates was the essence of a correctional officer’s job, but it was not satisfied in *Johnson Controls* where the third parties to be protected were the female employees’ potential offspring.¹¹¹ Protection of offspring was not a necessary component to the production of batteries.¹¹²

Under these precedents, it does not appear that the anti-fraternization policy at issue could satisfy the BFOQ standard. It is a stretch to argue that the anti-fraternization policy’s differential treatment based on sex is required to protect third parties from harm or that it establishes a nexus between sex and job performance. Teams have defended the anti-fraternization policy as protecting the female cheerleaders from the male NFL players. However, potential danger to an employee herself does not justify discrimination.¹¹³ Nor have any third parties at risk even been identified. Further, there is not a strong correlation between the sex of the cheerleaders, anti-fraternization, and the functions of their jobs. There is no reason why the male foot-

103. *Int’l Union v. Johnson Controls*, 499 U.S. 187, 200 (1991).

104. 433 U.S. 321, 325–26 (1977).

105. *Id.* at 334.

106. *Id.* at 335–36.

107. *Id.* at 336.

108. *Id.* at 336–37.

109. *Int’l Union v. Johnson Controls*, 488 U.S. 187, 202 (1991).

110. *Id.*

111. *Id.* at 203–04 (citing *Dothard*, 433 U.S. at 335).

112. *Id.*

113. *Id.* at 203.

ball players cannot also play a role in preventing online and in-person contact with the female cheerleaders.

Another way the Saints might rebut the presumption of discrimination is by arguing that the policy is gender-neutral because it does not differentiate on the basis of sex within the job category of cheerleader. However, the EEOC has found that sex discrimination does not require an actual disparity of treatment of men and women in the same job classification. In *Neal v. American Airlines, Inc.*, a stewardess was terminated six months after she got married.¹¹⁴ The stewardess's contract contained a clause that American Airlines could terminate a married stewardess's employment at any time six months after her marriage.¹¹⁵ When *Neal* was decided, only females were employed as stewardesses.¹¹⁶ American Airlines argued that if only one sex was in a particular job classification, then the rules related to that job could not be discriminatory on the basis of sex.¹¹⁷ The court disagreed, stating that "it is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirement of the job."¹¹⁸ Further, the EEOC found in *Neal* that the relevant question was whether all employees of the airline were subject to the same restrictions, not just the stewardesses.¹¹⁹

Because, as noted previously, men can technically become cheerleaders for an NFL team, the Saints might argue that the anti-fraternization policy is not sex-based. The Saints can point to its current cheerleading squad as an example, in fact. Jesse Hernandez is the first male cheerleader that was welcomed to the New Orleans Saints' cheerleading squad for the football season of 2018.¹²⁰ As a cheerleader, he may be subject to the same anti-fraternization policy as the formerly all-female New Orleans Saints cheerleading squad. Further, the New Orleans Saints can argue that women could technically become football players. There is no outright ban against women being drafted into the NFL.¹²¹ Like for male cheerleaders, potential female NFL players may be subject to the same policy (or lack thereof) as the current male NFL players.

114. 1 CCH EMPL. PRAC. GUIDE ¶ 6002 (EEOC 1968).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* *Neal* may seem to have less relevance today because no-marriage requirements have largely been eliminated. And in many states, marital status discrimination is separately prohibited. As of 2015, twenty-one states "prohibit marital status discrimination in housing, employment, or both." Courtney Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 808 (2015).

120. David Williams, *NFL's First Male Dancers Will Hit the Sidelines this Season*, ST. LOUIS

POST-DISPATCH (Aug. 7, 2018), https://www.stltoday.com/sports/professional/nfl-s-first-male-dancers-will-hit-the-sidelines-this/article_c66f0aba-7946-58a7-a98a-d9f27af55f72.html [<https://perma.cc/8XVH-XDND>].

121. See Lisko & Punzone, *supra* note 20.

Although Jesse Hernandez may be subject to the same anti-fraternization policy as the Saints’ all-female cheerleading squads were in previous seasons, there is an argument against applying the same policy to Jesse Hernandez. The motivation behind the current anti-fraternization policy is to protect the Saints’ cheerleaders from NFL players, which, again, is highly stereotyped based on gender. Since the motivation stems from gender stereotypes, it might not be equally enforced with mixed genders.¹²² There is a possibility that the anti-fraternization policy will not be extended to male cheerleaders because they do not need the same “protection” as female cheerleaders.

There also seem to be presumptions of heterosexuality in these stereotypes, as in male football players are only interested in female cheerleaders. The Saints assume male football players would not harass men, assuming that harassment is motivated by sexual desire. The stereotypes about male football players include that straight men never desire other men and that men are always straight. The Saints stereotype their football players and make it seem like the players will inevitably “prey” on the cheerleaders because they are interested in their bodies and sexuality. Even if the Saints did think men would harass other men, the justification used for the female cheerleaders suggests they would not be worried about the harassee’s safety. Since the Saints base their policy on highly stereotypical traits, the Saints may think that the male harassee can stand up for himself because men do not need to be protected.

The Saints might also try to rebut the presumption of discrimination by arguing that the applying the anti-fraternization policy does not treat similarly situated employees differently on the basis of sex because the male football players are not comparable employees to the female cheerleaders. In general, the jobs of cheerleaders and NFL players are completely different in their nature and level of prestige.

Even if football players and cheerleaders are not in a similar job classification, an anti-fraternization policy can still be discriminatory under the logic of the *Neal* case discussed earlier, in which the EEOC found that sex discrimination does not require disparity in the same job classification.¹²³ Based on the statements of the team, the anti-fraternization policy seems clearly created to protect female cheerleaders from male football players. But cheerleading is not a job that inherently is risky—at least not risky from injuries caused by football players. Like in *Neal*, the Saints anti-fraternization policy is applied to cheerleaders because they are women, and not because of their job classification as cheerleaders.

122. See Belson, *supra* note 1.

123. 1 CCH EMPL. PRAC. GUIDE ¶ 6002 (EEOC 1968).

IV. Broader Inequalities in the NFL

Anti-fraternization policies are just one part of the discriminatory environment that NFL cheerleaders face. Historically, players have been treated more leniently for policy violations than cheerleaders have.¹²⁴ For example, in 2017, a Saints' wide receiver, Willie Snead, was suspended for three games after receiving charges of driving while intoxicated and failing to maintain proper control of a vehicle.¹²⁵ In 2015, the Saints' tight end, Orson Charles, was suspended for one game after he was accused of a road rage incident that involved Orson Charles pointing a gun at another driver.¹²⁶ Another example occurred in 2016, when a Saints' cornerback, Damian Swann, received no punishment after being arrested for reckless driving and speeding charges.¹²⁷ These are just a few examples of lenient punishment for football players when they violated NFL's policies. Compare these rule violations, all of which involved serious risks to third parties and reflect poorly on the Saints, to the team's treatment of Davis, who wore a lacy body suit on Instagram.

As it can be seen from the Saints' history of punishment, football players have been suspended from football games temporarily for legal charges, while cheerleaders have been fired for allegedly violating the anti-fraternization policy. The way that the Saints punish football players compared to cheerleaders is drastically different. The football players are accused—and even sometimes convicted of crimes—and still avoid termination, while a cheerleader accused or convicted of a crime would almost certainly lose her job.

Women seem to be negatively affected by other aspects of the working environment, as well. For example, consider after-hours conversations to which the cheerleaders might be subjected. Davis alleges that she was fired after being accused of receiving messages from NFL players via her social media account.¹²⁸ Depending on the types of messages that Davis received from the NFL players, she could make an argument for sexual harassment. If Davis did receive inappropriate messages amounting to sexual harassment, the messages would pose a strong

124. See Rikleen, *supra* note 16.

125. Mike Triplett, *Saints WR Willie Snead Suspended Three Games*, ESPN (Sept. 2, 2017), http://www.espn.com/nfl/story/_/id/20536056/willie-snead-new-orleans-saints-suspended-three-games [https://perma.cc/SVV5-PY9T].

126. Mike Triplett, *Saints' Orson Charles Suspended 1 Game for Violating Conduct Policy*, ESPN (July 31, 2018), http://www.espn.com/nfl/story/_/id/13357196/orson-charles-new-orleans-saints-suspended-one-game-violating-nfl-personal-conduct-policy [https://perma.cc/35AM-J88C] (noting that the Saints did not disclose the reason for the suspension).

127. See Jason Butt, *Former Georgia, Saints CB Damian Swann Arrested for Reckless Driving While Going 100 mph*, TELEGRAPH (Mar. 21, 2016, 12:05 PM), <https://www.macon.com/sports/college/university-of-georgia/bulldogs-beat/uga-football/article67316137.html>; see also Rikleen, *supra* note 16.

128. See Garcia, *supra* note 2.

argument for the ineffectiveness of the Saints’ anti-fraternization policy’s focus on cheerleaders alone, especially because the alleged motive behind the Saints’ anti-fraternization policy is to protect the cheerleaders from being “preyed” upon by the NFL players.

Sexual harassment includes

unwelcome 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.¹²⁹

An employer is liable for sexual harassment in the workplace if the employer knows or should have known of the conduct.¹³⁰

Thus, the Saints could be responsible for any sexual harassment of cheerleaders. If the messages were requests for sexual favors or other verbal conduct of a sexual environment and they created a hostile working environment, the Saints would need to reevaluate the Team’s anti-fraternization policy. These messages might more effectively be prevented by targeting their source and requiring the Saints’ players to block cheerleaders on social media and avoid contact with cheerleaders online and in person.

V. Solutions

Davis filed her gender discrimination claim against the Saints shortly after #MeToo gained popularity. #MeToo has had a large impact not only on popular culture but also on how businesses conduct their daily activities.¹³¹ Companies increasingly have added anti-fraternization policies following #MeToo.¹³² Non-discriminatory

129. 29 C.F.R. § 1604.11 (2019).

130. *Id.*

131. #MeToo gained popularity after Alyssa Milano tweeted on October 15, 2017, asking people to reply to her tweet with a “me too” if they had been sexually harassed or assaulted. Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied*, NBC NEWS (Oct 15, 2018, 4:59 PM), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246> [<https://perma.cc/2K8G-UM5U>]. #MeToo’s purpose is to convey to victims of sexual abuse around the world that they are not alone. Vasundhara Prasad, Note, *If Anyone Is Listening, # MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2511 (2018).

132. Jena McGregor, *Intel’s CEO Resigned After Violating a No-Dating Rule. More Companies Are Adding Them in the #MeToo Era*, WASH. POST (June 22, 2018, 6:11 AM CDT), <https://www.washingtonpost.com/news/on-leadership/wp/2018/06/22/intels-ceo-resigned-after-violating-a-no-dating-rule-more-companies-are-adding-them-in-the-metoo-era> [<https://perma.cc/L5JQ-ASSM>].

anti-fraternization policies can be a great tool for businesses. A carefully crafted anti-fraternization policy can limit potential quid pro quo harassment.¹³³ Anti-fraternization policies can decrease the potential of sexual harassment claims, ultimately decreasing the amount of money spent by the business defending these claims. Further, carefully crafted anti-fraternization policies can also decrease the risk of favoritism claims.¹³⁴

A less positive effect of #MeToo on workplaces is adoption of the “Pence Rule.” In 2002, Mike Pence stated that he made a point to never dine alone with a woman who is not his wife, or attend events where alcohol might be served without his wife there.¹³⁵ After this statement, the “Pence Rule” was coined to describe when a man declines to be alone with a woman other than his wife.¹³⁶ The Pence Rule is supposed to reduce the risk of sexual harassment liability.¹³⁷ More specifically, the Pence Rule is said to help “upstanding, honorable men avoid creating situations that might be misinterpreted by supposedly hysterical, unstable women, or else contorted by someone looking for a quick payout.”¹³⁸

Businesses have begun imposing rules that limit mixed-gender travel, and male employees have canceled one-on-one meetings with female colleagues.¹³⁹ However, implementing this rule can lead to gender discrimination. Men refusing to be alone with women can hinder women’s future career. Women can lose out on opportunities for career advancement, especially in male-dominated fields and workplaces. In the workplace, one-on-one discussions are typically when a manager discloses important business information.¹⁴⁰ When men refuse to be alone with women, but not other men, these men are gaining a great

133. Seth Howard Borden, Note, *Love’s Labor Law: Establishing a Uniform Interpretation of New York’s “Legal Recreational Activities” Law to Allow Employers to Enforce No-Dating Policies*, 62 BROOKLYN L. REV. 353, 379 (1996).

134. Allen Smith, *Review Your Company Dating Policy in Light of #MeToo Movement*, SOC’Y FOR HUM. RES. MGMT. (Jan. 31, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dating-policy-metoo-movement.aspx> [<https://perma.cc/NA5G-GAK6>].

135. Tara Isabella Burton, *Former Trump Advisor Says the “Pence Rule” Would Have Protected Women from Weinstein. He’s Wrong*, VOX (Oct. 12, 2017, 2:30 PM), <https://www.vox.com/identities/2017/10/12/16463680/pence-rule-weinstein> [<https://perma.cc/RC9A-Q739>].

136. Allen Smith, *Men’s Mentorship of Women at Odds with “Pence Rule,”* SOC’Y FOR HUM. RES. MGMT. (Mar. 15, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/male-mentorship-women-pence-rule.aspx> [<https://perma.cc/6Q2L-PXFZ>].

137. *Id.*

138. See Burton, *supra* note 135.

139. Harris O’Malley, *Treating Men Like Idiots Is the Wrong Way to Stop Sexual Harassment*, WASH. POST (Feb 1, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/01/for-men-in-the-metoo-era-the-mike-pence-rule-is-the-easy-way-out/?utm_term=.8a0da09d6d86 [<https://perma.cc/6L2X-KGX3>].

140. See Smith, *supra* note 136.

potential advantage over the similarly situated women employees.¹⁴¹ Men already dominate the workforce, and the Pence Rule would lead to more success for men and less for women.

Women already face hurdles in the business world. In 2015, the Bureau of Labor Statistics found that women made up 39.2% of the seventeen million people employed in management occupations.¹⁴² Men outnumber women significantly in management positions and as executives.¹⁴³ When men do not want to be alone with a woman, they will be less able to mentor women. Mentoring is viewed by some as a, "necessary stepping stone for women's professional advancement."¹⁴⁴ Not only will women will be harmed if businesses continue to adopt the Pence Rule, but businesses will suffer as well. They will lose out on the full measure of talent available, and there will be an increase in gender discrimination claims, which will lead to an increase in spending to defend these lawsuits. Businesses should adopt gender-neutral policies that do not discriminate against women or men. The gender-neutral policies should place an equal burden on both men and women.

Conclusion

Davis's claim of gender discrimination against the Saints should be taken seriously and should cause the Saints and all NFL teams to view cheerleaders in a different light. The Saints should not view the cheerleaders as inferior to the players. They should be valued as equals, especially in the enforcement of the Saints' anti-fraternization policy. As an economic matter, though, the football players are worth more to a football team than the cheerleaders are. Because the cheerleaders are more expendable than the football players, change will likely be a very slow process. Thus, the law should step in and give all NFL teams legal incentives to change their policies. The Saints appear to view both cheerleaders and football players in a stereotypical light, perceiving the former as needing protection from the aggressive nature of the latter. The Saints' football players outnumber the Saints' cheerleaders, so it would make more sense to place an equal burden on both the team's cheerleaders and its players to avoid contact in-person and online.

Further, cheerleaders should not be punished for receiving messages from NFL players, especially if they do not reciprocate or respond to the NFL players. The best way to prevent fraternization is through a policy that places an equal burden on both the cheerleaders and the football players to avoid contact. In general, businesses should adopt gender-neutral policies that place an equal burden on both men and women.

141. *Id.*

142. *39 Percent of Managers in 2015 Were Women*, U.S. BUREAU OF LABOR STATISTICS (Aug. 1 2016), <https://www.bls.gov/opub/ted/2016/39-percent-of-managers-in-2015-were-women.htm> [<https://perma.cc/Q26C-7UG2>].

143. See Smith, *supra* note 136.

144. *Id.*

