# PAY EQUITY: A LEGAL AND PRACTICAL APPROACH TO THE COMPENSATION OF COLLEGE COACHES

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## I. INTRODUCTION

During the last three years, the issue of gender equity has received a tremendous amount of attention in the judicial and collegiate arena. This trend has been the consequence of at least two recent developments. First, in response to an increasing number of lawsuits instituted by disgruntled female athletes, courts have found that there exist implied private rights of action and damages provisions under Title IX, a gender parity statute that had lain virtually dormant since its enactment in 1972.[1] As a result, many schools have either sought to increase their athletic opportunities for women or at the very least, increase the support given to existing female programs. Secondly, female coaches of these female programs have sought to avail themselves of a variety of gender equity statutes in the employment context.[2] These suits have helped to define those tangible and intangible aspects of the college coaching position that colleges may lawfully consider when deciding the relative compensation packages for coaches of their male and female programs. This recent surge of litigious female athletes and coaches is not surprising. The courts have increasingly shown an intolerance for inequitable opportunities in the high school and collegiate athletic arena.

This paper explores the recent developments in the pay equity context and seeks to provide a practical framework for institutions attempting to address their pay equity concerns in the collegiate context. Part II of the Article outlines a variety of laws under which pay equity claims have been asserted and outlines the legal framework for each law. Part III of the Article applies the legal framework to several federal and state cases. Finally, Part IV offers practical guidelines for determining reasonable pay and for avoiding pay equity claims.[3]

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1. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1995).

2. *See, e.g.,* Tyler v. Howard Univ., Civil Action No. 91-11239 (D.C. Sup. Ct. June 24, 1993). Sandra Tyler, the women's basketball coach at Howard University, brought suit alleging a variety of claims, including violations of the EPA, Title VII and Title IX. *Id.* After a jury trial, she was awarded $2.4 million in damages. *Id.* The judge subsequently reduced the award to $1.1 million. *See also* Stanley v. University of So. Cal., 13 F.3d 1313 (9th Cir. 1994) (holding that coach failed to show that she was entitled to same pay as head coach of men's team in light of difference in responsibilities, qualifications, and experience).

3. Although much of the focus of this Article is on collegiate athletics, please note that high schools are also subject to many of the same state laws. No one institution is exempt.

## II. The Legal Framework

There are a variety of laws which may be invoked by plaintiffs hoping to prove that their compensation is inequitable or discriminatory on the basis of the coach's gender: the Federal Equal Pay Act ("EPA") of 1963[4]; Title VII of the Civil Rights Act of 1964, as amended[5]; Title IX of the Education Amendments of 1972;[6] and comparable state laws. In the public sector, constitutional claims may also serve as authority, such as the denial of equal protection and violations of due process.[7] Because the state and constitutional claims often mirror the underlying federal statutory claims, they are not thoroughly examined herein.

### *1. Equal Pay Act*

The Equal Pay Act ("EPA") was enacted in 1963 as an amendment to the federal Fair Labor Standards Act ("FLSA").[8] Because the EPA was drafted as a wage and hour law, the De-

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4. 29 U.S.C. § 206(d) (1995). The statute provides in pertinent part:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is make pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or equality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

*Id.*

5. 42 U.S.C. § 2000e, *et seq.* (1995).

6. 20 U.S.C § 1681 (1995). Title IX provides in pertinent part:

No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

*Id.*

7. *See, e.g.*, 42 U.S.C. § 1983 (1995), *cf.*, Davis v. McCormick, 898 F. Supp. 1275 (C.D. Ill. 1995) (invoking the protections of due process and the First Amendment in high school discrimination case).

8. 29 U.S.C. § 206(d) (1995). Because the EPA claim is considered a wage and hour violation, the usual statute of limitations is two years. *Id.* However, if the employer is found to have engaged in a willful violation, the limitations period will be extended to three years. *Id.* If a willful violation is found, the court will ordinarily require the employer to pay double the amount of damages actually incurred as a "penalty" for having engaged in a willful violation. *Id.*

partment of Labor was initially vested with jurisdiction. In 1978, however, EPA claim enforcement was transferred to the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing the federal anti-discrimination employment laws.

The EPA is a relatively straightforward statute.[9] With some exceptions, an employer cannot pay an employee of one sex less than is paid to an employee of another sex where both perform equal work under similar working conditions on jobs requiring equal skill, effort and responsibility.[10] The cases decided under the EPA have grappled with defining the scope of these terms as well as the four exceptions expressly set forth in the statute.[11] One such exception, pay disparities based upon a factor other than sex, is perhaps the most litigated aspect of the EPA.[12]

In order to make out a prima facie showing of an EPA violation, the injured employee must demonstrate that he or she worked in the same establishment as a co-worker of the opposite sex; received a wage unequal to that of his or her co-worker; for work which required equal skill, effort and responsibility; and which was performed under similar working conditions.[13] Provided the employee is able to clear this prima facie hurdle, he or she automatically raises an inference of gender discrimination which must be rebutted by the employer in order to avoid liability.[14] The employer may rebut this inference by submitting proof that challenges any or all of the prima facie elements. Alternatively, the employer may escape liability if it can prove one of the four defenses or exceptions to the Act's coverage. These exceptions included pay disparities resulting from one of the following: a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or another differential based on a factor other than sex.[15]

As a threshold matter in EPA cases, courts must compare

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9. *See supra* note 4 and accompanying text.
10. *Id.*
11. *See infra* notes 67-151 and accompanying text.
12. *Id.*
13. *See* LAURIE E. LEADER, WAGES AND HOURS, Sec. 10.03-10.04 (Matthew Bender 1995).
14. *Id.*
15. *Id.*

two or more positions and determine whether the plaintiff has identified another position involving "equal work" which is compensated at a higher level.[16] The plaintiff need not show that the jobs are identical, but merely that they are substantially equal.[17]

The focus of this article, however, is prevention. There are several sources of information that will help the educational institution, as an employer, understand and apply the EPA's coverage before a complaint is filed. First, the EEOC has issued regulations which provide the official agency interpretation of the language contained in the Act.[18] Second, the EEOC has issued a policy statement on the applicability of the EPA to sports coaches.[19] Third, and most important, are the many cases in which courts have interpreted the various provisions of the EPA.[20] Several recent cases in particular shed considerable light on the factors institutions should consider when evaluating the compensation packages offered to its coaches. These key cases are outlined in Section III below.

### 2. *Title VII*

Title VII of the Civil Rights Act of 1964,[21] as amended, prohibits an employer from discriminating against an employee in the terms and conditions of employment on the basis of the employee's sex, among other things.[22] Whereas the EPA focuses only on pay equity, Title VII is much broader in that it reaches all aspects of the employment relationship, including pay.[23] Like the EPA, pay disparities under Title VII are justifiable if they are based upon a seniority system, a merit system, a sys-

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16. *See* 29 C.F.R. § 1620.15 (1986).

17. *Id.* In other words, the plaintiff must show that the relative skills, efforts and level of responsibility, along with the working conditions under which the duties are performed, are substantially equal. *Id.* Courts have defined this analysis even further. *Id.* Skill involves a consideration of such factors as the employee's experience, training, education and ability. *Id.*

18. *See* 29 C.F.R. § 1620 (1986).

19. *EEOC Policy Statement on EPA Coverage of Sports Coaches,* FAIR EMPLOYMENT PRACTICES MANUAL, Aug. 8, 1988, at § 405:5607.

20. *See infra* notes 67-151 and accompanying text.

21. 42 U.S.C. § 2000e-2(a)(11) (1995).

22. *See, e.g.,* Americans With Disabilities Act, 42 U.S.C. § 12111 *et. seq.* (West 1996). Other protected categories include race, color, and religion. *Id.* Other federal laws have added age and disability as protected categories.

23. *See* Gunther v. County of Wash., 452 U.S. 161 (1981) (Title VII reaches claims of sex-based discrimination which are not covered by the EPA).

tem which measures earnings by quantity or quality of production, or a differential based on any factor other than sex.[24] Thus, an employer who demonstrates that a salary differential is the product of an exemption under the EPA also absolves itself from liability under Title VII.[25]

Title VII applies to any employer engaged in an industry affecting commerce who has employed fifteen or more employees on each working day in twenty or more calendar weeks in the current or preceding year.[26] The Act is administered by the EEOC. The EEOC is empowered to investigate claims of discrimination and issue opinions as to whether or not it finds reasonable grounds to believe that discrimination occurred.[27] Although the EEOC may commence court actions, individual plaintiffs generally initiate their own claims. Colleges should note that unlike the EEOC, state agencies charged with administering the state law equivalents of Title VII may have actual enforcement authority and may award damages in addition to their investigatory powers.[28]

Until the passage of the Civil Rights Act of 1991,[29] a plaintiff in a Title VII case did not have the right to a jury trial and was entitled only to damages in the form of back pay and equitable relief.[30] Under the 1991 Act, however, a plaintiff in a Title VII case may now recover up to $300,000 in compensatory and punitive damages for intentional discrimination.[31] Furthermore, the 1991 Act permits a trial by jury if compensatory or punitive damages are being sought.[32]

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24. *Id.*; *see also* 42 U.S.C. § 2000e-2(h) ("It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29."). *Id.*

25. *See* Chang v. University of R.I., 606 F. Supp. 1161, 1187 (D.R.I. 1985) (Selya, J.).

26. 42 U.S.C. § 2000e(b) (defining the word "employer").

27. The EEOC does not impose penalties or awards. Actual enforcement of the law is accomplished through court action.

28. *See, e.g.*, Massachusetts Commission Against Discrimination, which has actual enforcement authority over state law claims.

29. P.L. 102-166 (1991).

30. The plaintiff may also be entitled to front pay in certain circumstances. BARBARA LINDEMANN SCHLEI AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1434-1436 (BNA 1983). As to equitable relief, the plaintiff may be awarded such remedies as reinstatement or promotion. 42 U.S.C. § 2000e-5(g)(1).

31. The actual amount that is recoverable is dependent on the size of the employer. 42 U.S.C. § 1981a(b)(3).

32. A "prevailing party" in a Title VII case may also ask that the court award attorney's fees. 42 U.S.C. § 2000e-5(k).

There are certain procedural requirements for a Title VII claim. Ordinarily, a charge of discrimination must be filed with the EEOC or the state equivalent within 180 days of the alleged act of discrimination. In certain instances, the filing time may be extended to up to 300 days.[33] In order to proceed with a Title VII sex discrimination claim, an aggrieved employee ordinarily is required to exhaust her administrative remedies.[34] However, after a specified period of time, (and if there has been no disposition by the EEOC), the employee may request a "right to sue" letter which allows her to opt out of the administrative process and initiate a court action. That action, however, must be commenced within ninety days of receipt of the "right to sue" letter.[35]

In collegiate sports, the most visible pay equity issues have involved female basketball coaches alleging that they have been treated differently by an athletic department on the basis of gender.[36] If the sole discrimination action asserted under Title VII is an equal pay violation, the court may analyze the claim using the same criteria used to analyze an EPA claim.[37] However, if the claim of sex discrimination goes beyond an equal pay claim, the court will employ the traditional Title VII analysis. Because direct evidence of intentional discrimination is rare, the Supreme Court has recognized that circumstantial evidence may support a Title VII discrimination case.[38] In order to lessen the initial burden on the plaintiff, the Court has crafted a three-tiered burden shifting framework within which discrimination cases are evaluated.[39]

First, the plaintiff must establish a *prima facie* case of discrimination. In the female coach/pay equity context, the plaintiff must show by a preponderance of the evidence that: she is a member of a protected class; she was qualified for and occupied a particular position; despite her qualifications, she was treated less favorably than her male counterpart; and, the circumstances of the treatment give rise to an inference of unlaw-

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33. 42 U.S.C. § 2000e-5(e).
34. 42 U.S.C. § 2000e-5(c), (f).
35. 42 U.S.C. § 2000e-5(f)(1).
36. *See infra* notes 67-151 and accompanying text.
37. *See Chang*, *supra* note 25, at 1188 n.16.
38. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); St. Mary's Honor Center v. Hicks 113 S. Ct. 2742 (1993).
39. *Id.*

ful discrimination. If plaintiff can establish this *prima facie* case, the burden of proof shifts to the employer to articulate a legitimate nondiscriminatory reason for the differing treatment. The fact that the reason offered by the employer may be wrong or even absurd is irrelevant as long as the treatment of the employee was based on the reason proffered and not on discrimination. Once the employer articulates a non-discriminatory reason, all inference of discrimination raised by plaintiff's *prima facie* case disappears, and plaintiff must once again carry both the burden of production and persuasion to show that discrimination was the basis for the employer's decision.[40]

As a practical matter, a plaintiff may choose to frame her pay equity claims as a Title VII claim to avoid the court's strict comparison of the "equivalent" positions under the EPA. Unlike the EPA, Title VII claims are subject to a generalized analysis of the comparative treatment of the respective employees.

### 3. *Title IX*

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any program or activity that receives federal financial assistance.[41] The statute does not exclusively target intercollegiate athletics, but rather addresses discrimination throughout educational institutions.[42] In this regard, the key terms which trigger the protection of Title IX are "program" and "activity."

Prior to 1988, universities argued that only the specific institutional program or activity that actually received federal financial assistance was subject to the law's requirements.[43] To support their position, the universities relied on *Grove City College v. Bell*,[44] which held that Title IX was "program-specific" and applied only to those programs actually receiving fed-

40. In other words, the employee is required to prove by a preponderance of the evidence that the reasons offered by the employer were not the real reasons and were a "pretext" for discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

41. *See* Title IX, *supra* note 1,6 and accompanying text.

42. *Id.*

43. *See* Hillsdale College v. Department of Health, 626 F.2d 418 (6th Cir. 1982), *rev'd and remanded,* 466 U.S. 901 (1984) (in light of Supreme Court decision in Grove City College v. Bell, 465 U.S. 555 (1984)); *on remand,* 737 F.2d 520 (1984) (ordering that original decision be vacated and cause remanded to the Reviewing Authority for reconsideration in light of *Grove City*); *see also*, University of Richmond v. Bell, 543 F. Supp. 321 (E.D.Va. 1982).

44. 465 U.S. 555 (1984).

eral funds.[45] In 1988, however, Congress overturned the *Grove City* decision and overrode a presidential veto when it enacted the Civil Rights Restoration Act.[46] Among other things, the Act expressly provided that the mandate of Title IX enveloped each and every subdivision of a university that received federal financial assistance.[47]

Regulations issued by the Department of Education in the Title IX arena specifically address employment.[48] The regulations concerning compensation provide that the institution may not make or enforce policies or practices which distinguish wages or other compensation on the basis of gender, or result in such distinctions for equal work on jobs which require "equal skill, effort, and responsibility, and which are performed under similar working conditions."[49]

In this way, Title IX appears to incorporate the EPA criteria and analysis for pay equity cases.[50] However, the general non-discrimination provisions also allow an employee to bring a Title IX gender discrimination claim similar to that advanced under Title VII. In *North Haven Board of Education v. Bell*,[51] the Supreme Court held that Title IX's general non-discrimination language may be construed to include "employees" within the scope of its coverage.[52] The Court also upheld the validity of the regulations issued by the Department of Education covering employment.[53]

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45. Bennett v. West Texas State Univ., 799 F.2d 155 (5th Cir. 1986) (department which received no direct federal funding was not covered by Title IX); O'Connor v. Peru State College, 781 F.2d 632, 642 (8th Cir. 1986).

46. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 120 Stat. 28 (1988) (codified at 20 U.S.C. § 1687). The Act did not specifically target athletic programs; however, "the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletics." Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993); *see also* Croteau v. Fair, 686 F. Supp. 552, 553 n.1 (E.D. Va. 1988).

47. *See* 20 U.S.C. § 1687 (legislatively overturning the *Grove City* decision).

48. *See* 34 C.F.R. § 106.51, *et. seq.* (West 1995). Section 106.51 of the Code of Federal Regulations contains the general nondiscrimination language: "No person shall, on the basis of sex, . . . be subjected to discrimination in employment . . ." *Id.*

49. 34 C.F.R. § 106.54 (West 1995).

50. *See* Bowers v. Baylor Univ., 862 F. Supp. 142 (W.D. Tex. 1994). Due to Baylor's termination of Bowers in March of 1994, Bowers brought suit under Title IX for discrimination based on her gender. The district court denied Baylor's motion to dismiss and held that a private cause of action for Title IX existed. *Id.*

51. 456 U.S. 512 (1982).

52. *Id.* at 519-523.

53. *Id.* at 536-38.

The regulations issued by the Department of Education regarding athletic programs are also relevant to Title IX's applicability. Specifically, Section 106.41(c)(6) identifies the compensation of coaches as a factor utilized to determine an athletic program's compliance with Title IX.[54] The Policy Interpretation provides that a violation of this provision will be found *only where the compensation practice denies male and female athletes coaching of an equivalent quality, nature or availability.*[55] Proof of this element is essential to a Title IX pay equity case based on an athletic program's requirements.

The Policy Interpretation, in describing the manner in which Title IX compliance may be achieved, states that nondiscriminatory factors can lawfully affect the relative compensation of coaches. For example, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition may justify compensation disparities where these factors represent valid differences in skill, effort, responsibility or working conditions.[56] The Policy Interpretation also recognizes that, in unique situations, a person's outstanding record may justify an abnormally high salary.[57]

It is important to note that these considerations in the Title IX context focus upon the athletic department as a whole.[58] As a result, any claim of discrimination of pay disparity by a coach should theoretically be premised on the employment regulations and not on the considerations expressed within the athletic program compliance provisions. Notwithstanding, an individual employee will still be required to carry the heavy burden of proving that the pay disparity actually has the effect of denying to athletes coaching of an equivalent quality, nature or availability.

Title IX does not expressly authorize a private suit for dam-

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54. *See* 34 C.F.R. § 106.41(c)(6) (West 1995).

55. 44 Fed. Reg. 71413, 71416 (Dec. 11, 1979) (emphasis added).

56. *Id.*

57. *Id.* In particular, a compliance assessment will include an examination of the following areas: rate of compensation (per sport, per season), duration of contracts, conditions relating to renewal of contracts, experience, nature of coaching duties performed, working conditions, and other terms and conditions of employment. *Id.*

58. *See infra* notes 67-151 and accompanying text. They do not necessarily represent individual coaching compensation requirements. *Id.*

ages for employment discrimination. However, the Supreme Court has recognized that there is an implied private right of action under Title IX for students to bring claims of discrimination.[59] The courts currently are divided over the question of whether or not Title VII "provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in [f]ederally funded educational institutions," thereby preempting claims brought pursuant to Title IX.[60] Recent decisions from the Fifth Circuit and the Northern District of Ohio have held that it is Title VII, and not Title IX, that provides a private right of action to employees seeking money damages for alleged gender discrimination by federally funded educational institutions.[61] Other courts have permitted Title IX claims without addressing the preemption issue.[62] Those cases have held that "Title VII principles should be applied to Title IX actions, at least insofar as those actions raise employment discrimination claims."[63] The implications of these rulings in the employment context are significant. Title IX employment discrimination claims are not subject to the same administrative, procedural and exhaustion requirements as Title VII actions. Most importantly, Title IX does not have a damages cap.

### *4. Observations on the Assertion of Claims*

As the prior discussion illustrates, whenever a pay differential exists between a male and female coach within the same sport, the educational institution faces a potential gender dis-

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59. *See* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992) (holding that Title IX is enforceable through an implied right of action).

60. Lakoski v. James, 66 F.3d 751, 758 (5th Cir. 1995); *but see infra* note 61, permitting such claims brought pursuant to Title IX without mention of the issue of preemption; *Lipsett, infra* note 59.

61. *Id.*; *see also* Wedding v. University of Toledo, 862 F. Supp. 201 (N.D. Ohio 1994).

62. *See, e.g.,* Preston v. Commonwealth of Va., 31 F.3d 203, (4th Cir. 1994).

63. Roberts v. Colorado State Bd. of Agric., 998 F. 2d 824, 832 (10th Cir.) (Title VII is "'the most appropriate analogue when defining Title IX's substantive standards.'"), *cert. denied,* 114 S. Ct. 580 (1993); *see also* Cohen v. Brown Univ., 991 F.2d 888, 902 (1st Cir. 1993) (indicating that application of Title VII principles in Title IX employment discrimination actions was "perhaps" appropriate); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988) (holding Title VII concepts apply in Title IX employment discrimination action); O'Conner v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (stating that Title IX employment discrimination claim was duplicative of plaintiff's Title VII claim); 28 C.F.R. § 42.604 (1993). *But see* Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 622 (11th Cir. 1990) (refusing to apply Title VII principles to Title IX) *rev'd on other grounds,* 112 S. Ct. 1208 (1992).

crimination lawsuit under multiple federal and state laws. As indicated in the cases described below, plaintiffs may choose to invoke one or more of these laws depending upon which law is more favorable to their particular set of facts. Hence, the number and types of claims asserted becomes a tactical decision for the plaintiff in his or her case.

As in the gender equity cases, an institution may face immediate financial obligations at the beginning of a pay equity case. For example, if the plaintiff seeks preliminary injunctive relief, the court could require the institution to correct the alleged pay disparity during the course of the case. As a result, the educational institution should review and evaluate the propriety of its compensation practices within the athletic department. Disparities, to the extent that they exist, should be closely scrutinized, and if unjustified, quickly corrected.

## III. Case Summaries

The following represents a summary of the recent caselaw that has emerged in the pay equity arena. After setting forth the background and factual basis upon which each plaintiff sued in this section, an analysis and discussion of the law will follow.

### *1.* Stanley v. University of Southern California[64]

Marianne Stanley, the former coach of the women's basketball team at the University of Southern California, brought suit against the University alleging violations of the EPA, Title IX, and California law.[65] Stanley sought preliminary injunctive relief in the nature of reinstatement to her former position and an increased annual salary.[66]

The Superior Court granted Stanley's *ex parte* temporary restraining order request pending a hearing on her motion for

64. 13 F.3d 1313 (9th Cir. 1994).

65. *Id.* at 1317. Stanley also brought claims of wrongful termination, breach of an implied contract, intentional infliction of emotional distress and conspiracy. *Id.*

66. *Id.* This case arose out of Stanley's attempts to negotiate a new contract comparable to the men's basketball coach, George Raveling. *Id.* at 1316. Stanley was in the final year of a four year contract, during which time she was provided an annual base salary of $60,000 and a housing allowance of $6,000. *Id.* In April, 1993, she began to negotiate a new contract with USC's Athletic Director, Mike Garrett. *Id.* When the negotiations reached an impasse, Stanley filed suit in state court and sought a temporary restraining order to require her reinstatement as the basketball coach. *Id.* at 1313.

a preliminary injunction.[67] The university removed the case to federal court, where the district court reviewed, and subsequently denied, her motion for a preliminary injunction. Stanley appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the denial of the preliminary injunction.[68]

The Ninth Circuit Court of Appeals characterized Stanley's claim as a desire to make the same salary as the men's basketball coach.[69] The court recognized that Stanley sought equal pay for equal work, and set forth the relevant legal standards that she must satisfy in order to prevail under the EPA.[70] Although the positions being compared need not be identical, the court reasoned they must be substantially similar for liability to ensue.[71]

On review, the court analyzed the two basketball coaching positions and concluded that they were not substantially similar.[72] For example, the court found that Coach Raveling's responsibilities required substantial public relations and promotional activities to generate revenue for the university.[73] It also found that Coach Raveling's efforts resulted in revenue ninety times greater than that generated by the women's team.[74] On the other hand, it reasoned, Stanley's position as head coach of the women's team did not require the same level of promotional and revenue raising activitites. As such, the court concluded that this dissimilarity justified a difference in pay.[75]

In its opinion, the court stated that an employer may con-

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67. *Id.* The order required USC to reinstate Stanley at an annual salary of $96,000 (even though her compensation at the expiration of her prior contract was only $68,000 + $6000 housing allowance). *Id.*

68. *Id.* at 1313. Although the appellate court was simply reviewing the district courts denial for possible abuse of discretion, the decision is instructive in that it is the most recent and comprehensive analysis of an equal pay claim. *Id.*

69. 13 F.3d 1313, 1319 (9th Cir. 1994).

70. *Id.* at 1313. The court noted that Stanley bore the burden of demonstrating that USC discriminated against her on the basis of sex because she and Coach Raveling performed equal work on jobs that require equal skill, effort, and responsibility. *Id.*

71. *Id.* at 1321.

72. *Id.* at 1321.

73. *Id.* Coach Raveling was required to conduct 12 speaking engagements per year, to be accessible for media interviews, and to participate in fundraising activities that would result in donations and endorsements for USC. *Id.*

74. 13 F.3d 1313, 1321 (9th Cir. 1994).

75. *Id.*

sider the market value of the skills of a particular individual when determining whether the positions are substantially similar.[76] Raveling's television and movie appearances, it noted, along with his reputation as an author, made him a desirable public relations figure for the university.[77] The men's team also generated more media interest, larger donations, and substantially more revenue than the women's team.[78] Observing these differences, the court concluded that the positions were not substantially equal.[79]

*2.* Deli v. University of Minnesota[80]

After being terminated as the head coach of the women's gymnastics team, Ratalin Deli sued the University of Minnesota under Title VII, the EPA, and Title IX.[81] First, in analyzing Deli's Title VII claim, the United States District Court for the District of Minnesota noted that the statute prohibits discrimination in compensation based upon the gender of the employee and upon the gender of the persons over whom the employee has supervisory responsibilities.[82] Because Deli did not claim that she was discriminated against on the basis of *her* gender, the underlying Title VII claim was found to be deficient and was dismissed.[83]

The court utilized reasoning similar to its Title VII analysis to dismiss Deli's EPA claim.[84] Again, because Deli was contending that the pay differential existed because of the gender of the *athletes* whom she coached, the court found the EPA in-

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76. *Id.* at 1321-22. The court specifically rejected Stanley's contention that revenue generation was irrelevant to a determination of whether the positions were substantially similar. *Id.* at 1322.

77. *Id.* at 1322.

78. *Id.* The court focused on the fact that the men's team generated 90 times the revenue produced by the women's team as evidence of the greater pressure on Raveling to promote his team and win. *Id.*

79. 13 F.3d at 1323. In March of 1995, the district court granted USC's motion for summary judgment and dismissed the case. 1995 U.S. Dist. Lexis 5026 (C.D. Cal. 1995). Although currently under appeal, the decision essentially mirrors the facts, factors and conclusions identified by the Ninth Circuit in the prior decision. *Id.*

80. 863 F. Supp. 958 (D. Minn. 1994).

81. *Id.* at 959. Interestingly, Deli did not claim that she was subjected to discrimination in compensation based upon her gender, but rather she alleged that she was discriminated against based upon the gender of the athletes whom she coached. *Id.*

82. *Id.*

83. *Id.* at 960.

84. *Id.*

applicable and rejected her claim.[85] In so doing, the court cited the *Stanley* case and noted that an employer may pay different salaries to coaches of different genders if the coaching positions are not substantially equal in terms of skill, effort, responsibility and working conditions.[86] Here, Deli chose to compare herself to coaches of the men's football, hockey, and basketball teams. Each of these coaches were responsible for a greater number of athletes than the coach of the women's gymnastics team.[87] In addition, because these teams enjoyed significantly greater attendance and generated substantially more revenue than the gymnastics team, the court opined that the positions were not substantially similar.[88]

With respect to the Title IX claim, the court concluded that it was barred by the applicable statute of limitations.[89] Nonetheless, the court analyzed the merits of Deli's claim, looking to both the Policy Interpretation issued by the Department of Education's Office for Civil Rights[90] and the Investigator's Manual to determine whether or not the differentials in coach's compensation resulted in the denial of equal athletic opportunity.[91] The court found that there was no evidence in this case that the differing compensation levels in any way impacted on the quality, nature or availability of coaching provided to the

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85. 863 F. Supp. 958 (D. Minn. 1984). In short, because the pay differential was based on a factor other than sex, Deli's claim was not actionable. *Id.* at 960.

86. *Id.*

87. *Id.* at 961.

88. *Id.* In addition, the court considered evidence that the other coaches had greater responsibilities for public and media relations than Deli had handled. *Id.*

89. *Id.* at 962. Because Title IX does not itself contain a specific statute of limitations, the court applied the most closely analogous state statute of limitations, the state human rights act, and concluded that the alleged discrimination was beyond the one year statute of limitations. *Id.*

90. 863 F. Supp. at 962. The Policy Interpretation indicates that differences in compensation of coaches will violate Title IX only where the compensation practice or policy denies the male or female athletes coaching of an equivalent quality, nature or availability. *Id.* Moreover, the implementing regulations recognize that unequal expenditures for members of each sex or unequal expenditures for male and female teams will not constitute non-compliance with Title IX. *Id.*

91. *Id.* The Investigator's Manual states:

> If availability and assignment of coaches to both programs are equivalent, it is difficult . . . to assert that the lower compensation for coaches in, for example, the women's program, negatively affects female athletes. The intent of [the regulation implementing Title VII] is for the equal athletic opportunity to be provided to participants, not coaches.

*Id.*; *see also* OFFICE OF CIVIL RIGHTS INVESTIGATOR'S MANUAL 58 (1990).

gymnastics team. For these reasons, the court ruled that Deli's claim under Title IX was deficient.[92] Accordingly, it was dismissed.

*3.* Harker v. Utica College of Syracuse University[93]

Phyllis Harker, Utica College's former women's basketball and softball coach, sued the college, its athletic director and its president under the Equal Pay Act and Title IX alleging gender discrimination and retaliation.[94] The United States District Court for the Northern District of New York found that the coach had set forth a prima facie case of wage discrimination under the EPA.[95] In its defense, the college argued that the male coach had more experience and a greater length of service with the college, thereby justifying the increased salary.[96] Because Harker failed to rebut the college's justifications, the court rejected Harker's claim.[97]

Harker also alleged that the college violated Title IX by discriminating against her in the terms and conditions of her employment.[98] The court ultimately found that the university paid for team warm-ups and that the softball field, used by the women's team, while owned by the City, was only 200 yards from the College Athletic Center and was maintained by the college in a condition superior to the on-campus baseball field.[99] Based on these and other findings, the court granted summary judgment in favor of the college.[100]

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92. *Id.*

93. 885 F. Supp. 378 (N.D.N.Y. 1995).

94. *Id.*

95. *Id.* Harker had to demonstrate that the College pays different wages to her male counterpart; plaintiff and her male counterpart perform equal work on jobs requiring equal skill, effort and responsibility; and the jobs are performed under similar working conditions. *Id.* at 389.

96. *Id.* The court found significant the fact that by the time the plaintiff was hired to coach at the University, the male coach of the men's basketball team had already been coaching at the college for nine years. *Id.*

97. *Id.* at 391.

98. *Harker*, 885 F. Supp. at 391-92. Plaintiff supported her claim with the following allegations: 1) she had to raise money to pay for warm-up clothing for her team; 2) the men's baseball team played on campus while the women's softball team had to use off-campus city facilities; 3) the male coaches got to run summer camps while she was not permitted to do so; 4) the women's teams had to share locker rooms while the men's teams did not; and 5) her teams never received any financial support from the booster club. *Id.*

99. *Id.* at 391-92.

100. *Id.* at 393. The university never told Harker that she could not run a camp, each

*4.* EEOC v. Madison School District[101]

Pay equity cases were also prevalent throughout the 1980's. In *EEOC v. Madison School District,* for example, the EEOC brought suit alleging that the school district discriminated against four female coaches in the middle and high schools because of their gender. Claims were asserted under Title VII, Title IX, the EPA, the Fourteenth Amendment, and 42 U.S.C. § 1983.[102] After a bench trial, the district court issued a detailed opinion tracing the school district's discriminatory treatment of the female coaches and coaches of female sport programs.[103] The court held that the evidence regarding the sports coached, the number of games, the number of students, the length of the season and the time spent in practice led to the conclusion that the "jobs of the various coaches are and were substantially equal."[104] Therefore, the district court concluded that there was a substantial pay disparity based solely upon the individual coach's gender and held the Madison School District liable under both the EPA and Title VII.[105]

On appeal, the Court of Appeals for the Seventh Circuit analyzed the EPA claims and observed that, as the Act does not mandate "comparable worth", it is not a general mandate of gender neutral compensation.[106] The court observed that the Act does not prohibit the payment of different wages for different genders, provided the variance in rate is a result of the need to compensate the one employee for any greater skill, effort, or responsibility which is required by the position and/or

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of the sexes were equally assigned two locker rooms, and Harker received over $7,000 from the booster's club. *Id.*

101. 43 F.E.P. Cases (BNA) 1410 (S.D.Il. 1986), *aff'd,* 818 F.2d 577 (7th Cir. 1987).

102. *Id.*

103. *Id.* For example, the district limited the number of games that females were allowed to coach without imposing similar limitations on the male coaches. *Id.* Moreover, the district provided fewer assistant coaches allotted for the girls' teams than it did for the boys. *Id.* The girl's basketball coach was allowed only one assistant, whereas the boy's coach had three assistants since 1973. *Id.* Relatively similar inequities in the assignment of assistant coaches also existed in volleyball and track. *Id.*

104. *Id.*

105. *Id.* at 1418. The plaintiffs asserted both a disparate impact and disparate treatment claims under Title VII. *Id.* The district court ruled that the plaintiffs failed to prove intentional discrimination and therefore dismissed the disparate treatment claims. *Id.*

106. "Comparable worth" stands for the principle that wages should be based on objective factors rather than market conditions of demand and supply, which may depress wages in jobs primarily held by women as opposed to wages and jobs primarily held by men.

his working conditions. The court characterized this analysis as the first step in determining whether the positions being compared qualified as "equal work."

The court noted that determining whether two jobs are substantially similar depends upon how specifically the court classifies job descriptions.[107] The court analyzed the language of the Act itself and focused upon the term "similar working conditions," observing that those words were not included in the statute. Therefore, with no statutory guide, the court observed that comparing the two jobs in question was a factual determination to be made by the trial judge. In reviewing the district court's decision equating the position of the boy's soccer coach with the girl's volleyball and girl's basketball coaches, the appellate court concluded that this determination was erroneous.

The Seventh Circuit Court of Appeals also considered the district court's analysis of plaintiffs' Title VII disparate impact claim. In order to prevail on a claim of disparate impact, a plaintiff must show that the defendant's facially neutral practice, which may not be intended to discriminate against a protected group, nonetheless has a disproportionate adverse impact on the protected group.[108] In this case, however, the court noted that merely paying different wages for different jobs within a school district to different sexes, while perhaps violative of the EPA, does not reflect disparate impact and is therefore not violative of Title VII.

### *5.* Brock v. Georgia Southwestern College[109]

The 1985 case of *Brock v. Georgia Southwestern College* arose out of alleged pay disparities among the faculty at Georgia Southwestern College.[110] Specifically, Mary Reeves, an in-

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107. For example, if coaching an athletic team is considered a single job rather than a category of separate jobs, the school district would have violated the EPA in this case because it paid female coaches less than male coaches. On the other hand, if coaching the boy's tennis team is a different job from coaching the girl's tennis team there may not be a violation.

108. In other words, under the disparate impact theory, there is no allegation or proof that there was intentional discrimination against a specific group of persons. Instead, the discrimination occurs as the result of some generalized actions.

109. 765 F.2d 1026 (11th Cir. 1985).

110. *Id.* In 1972, the Department of Labor determined that the College violated the EPA with respect to its custodial workers, and the College agreed to pay back wages. *Id.* In 1974-75, the DOL began an investigation of the pay practices among the faculty, and this case was subsequently commenced in 1978. *Id.*

structor in the physical education department, brought suit alleging pay disparities between her and her male counterparts.[111] The district court found a violation based upon the fact that her male counterparts in the Physical Education Department were all paid a significantly higher salary. The court looked to the testimony of the chairperson of the Department, who stated that a male instructor who taught similar classes and served as the men's intercollegiate basketball coach had teaching duties fairly similar to Reeve's and was paid at a higher salary.[112] Thus, the critical comparison came in the analysis of the instructors' other duties.[113]

On appeal, the Court of Appeals for the Eleventh Circuit reiterated that comparative jobs held by employees of the opposite sex need not be identical but substantially equal. The court also made a careful distinction with regard to the elements of an equal pay claim.[114] The actual comparison of the requisite skills and qualifications of the employees holding those jobs is later analyzed in the context of the defendant educational institution's "rebuttal" burden of proof.[115]

In its defense, the College argued that the pay disparity was based on a merit system.[116] The court quickly disposed of this argument, noting that the system actually involved a se-

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111. *Id.* Ms. Reeves came to the college in 1974, and received her Master's degree in 1976. *Id.* Ms. Reeves taught skill and classroom courses and also organized and supervised intramural activities. *Id.*

112. *Id.*

113. *Id.* The district court concluded that the duties and responsibilities associated with coaching the men's basketball team were substantially equal to those performed by Reeves in the intramural program. *Id.* In support of this conclusion, the court noted that the applicable regulations indicate that responsibility is concerned with the degree of accountability required in the performance of the job (with emphasis on the importance of the job obligation). *Id.* The Court pointed to the chairperson's admission that the intramural program was just as important as the intercollegiate program and the fact that the basketball coach was not subject to a great deal of pressure to justify its conclusion. *Id.*

114. 765 F.2d at 1026. The Court held that in order to demonstrate a prima facie case, the plaintiff need only compare jobs held by female and male employees and show that the jobs are substantially equal, not compare the skills and qualifications of individual employees holding these jobs. *Id.*

115. *Id.* at 1036. The court reiterated the various affirmative defenses available to an employer: (1) pay disparity based upon a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex, and emphasized that the determination of whether the pay disparity was justified by one of the four exceptions is a pure question of fact. *Id.*

116. *Id.* at 1036.

ries of subjective determinations based on personal and sometimes ill-informed judgments.[117] Alternatively, the College argued that the pay disparities were based on a factor other than sex.[118] The College argued in a conclusory fashion that the pay disparity was based on the superior qualities of the male employees; however, the evidence showed that the female employees had equal or superior qualifications.[119] Finally, the court also rejected the College's supply and demand argument, in which the college argued that they could pay women less because that is what the market would allow.[120]

Lastly, the court reviewed the district court's finding of a willful violation of the EPA, which extended the applicable statute of limitations period in question from two to three years.[121] The court opined that a violation is willful if the employer knows or has reason to know that his or her conduct is governed by the Act.[122] Because of the College's prior case involving its custodians, there was ample evidence of their knowledge of the Act and its requirements which supported a finding that the College had willfully violated the Equal Protection Act.

*6.* Hein v. Oregon College of Education[123]

In 1983, Hein and other female members of the physical education department brought suit under the EPA alleging that they were paid less than their male counterparts.[124] The female plaintiffs prevailed at trial, yet on appeal, the Court of Appeals for the Ninth Circuit remanded Hein's claim for a comparison of her status with the male instructors within the

117. *Id.* The college conceded that no system existed that presented a means or order of advancement or reward for merit. *Id.*

118. *Id.*

119. 725 F.2d at 1036.

120. *Id.* at 1037. The Court observed that this was precisely the type of "comparable worth" disparity the EPA was meant to address. *Id.* Moreover, the fact that the hiring personnel were unaware of what the market rates were for particular types of experience, expertise or skills undermined the College's credibility on this point. *Id.* The manner in which this argument was presented and the facts of this case may ultimately have led to its rejection in this case. *Id.*

121. *Id.* at 1038.

122. *Id.* The employer's good faith is irrelevant as long as the employer knew that the Act was implicated in its pay practices. *Id.*

123. 718 F.2d 910 (9th Cir. 1983).

124. *Id.* at 913.

department.[125] Similar to other courts analyzing an alleged pay equity violation, the Court emphasized that in determining whether the plaintiff has established a prima facie case, the inquiry is on the comparison of skills required by a particular job. Hein taught physical education classes 100% of the time; however, she was compared to the men's basketball coach who taught physical education classes 75% of the time and spent the remainder of his time coaching.[126]

The court similarly remanded the claim of another plaintiff who was the coach of the volleyball and track teams because the district court compared her job to the men's basketball coach. The court observed that the Act requires a comparison with "employees" of the opposite sex, suggesting that the comparison should be with more than one selectively chosen position and employee.[127]

The claim of a third female plaintiff was also remanded for essentially the same reasons. Importantly, however, the court stated that although the plaintiff had additional administrative duties that the men's basketball coach did not have, this difference did not undermine her equal pay claim.[128] The court opined that such a reading of the Act would result in the encouragement of the assignment of additional duties to all potential plaintiffs.[129] Moreover, the court noted that the Act's regulations provide that such an assignment of additional duties shall be insufficient to remove the plaintiff's position from an equal pay analysis as long as the compared position remains otherwise substantially equal.[130]

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125. *Id.* at 913. The Court reviewed the EPA and its elements and reiterated that the Act embodies the deceptively simple principle that employees doing equal work should be paid equal wages regardless of their sex. *Id.* The Court held that a coaching job requires skills that a non-coaching job does not, and that jobs requiring different skills are not substantially equal under the EPA. *Id.* It noted that the lower court had erred in focusing on whether the employees possess equivalent skills. *Id.* Its inquiry should have focused upon whether the respective jobs require equal skills. *Id.*

126. *Id.* at 914.

127. *Id.* To achieve this end, the Court suggested that the proper test when there may be more than one comparative position is whether the plaintiff is paid less than the average of all wages paid to all employees of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage payment. *Id.*

128. 718 F.2d at 917.

129. *Id.*

130. *See* 29 C.F.R. § 800.122(b). Three additional claims were advanced by teachers outside the physical education department. *Hein*, 718 F.2d at 917. Although the court of

### 7. Horner v. Mary Institute[131]

Horner, a physical education teacher at Mary Institute,[132] brought suit under the EPA claiming that she was paid less than the male physical education instructor, Mr. Dan Casey.[133] Horner and Casey were hired at the same time in early 1974, at a salary of $7,500 each per academic year.[134] Later that year, the administration learned that an instructor at one of its schools would not return to the school in the fall.[135] As a result, the position was offered to a male instructor, Ralph Thorne, who had come to the school highly recommended.[136] Over the next three years, Thorne received annual salary in-

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appeals upheld the conclusion that they had established a prima facie case, it remanded the case for further consideration of whether the salary differential was permissible under the exceptions/affirmative defenses to the EPA. *Id.* The lower court had found the violation based on its conclusion that different starting salaries had later resulted in pay disparities. *Id.* However, the court stated that unequal starting salaries do not necessarily violate the Act if the original inequity is based upon a legitimate factor other than sex. *Id.* Therefore, the court remanded the case with several provisions. First, the EPA allows employers and not judges to make the uncertain decisions on how to accomplish business objectives. *Id.* If the College can justify the disparity, the Court cautioned, a court should be hesitant to reject the college's defense. *Id.* Thus, the Court advised, the judiciary should steer a careful course between excessive intervention in the internal affairs of a university and the unwarranted tolerance of unlawful behavior. *Id.*

131. 613 F.2d 706 (8th Cir. 1980).

132. Mary Institute is a not-for-profit corporation that operated three private schools. *Id.* at 709.

133. *Id.* at 709.

134. *Id.* at 710. Horner had a B.S. degree in physical education, but was not certified to teach in the Missouri public schools. *Id.* She had two years of part-time experience teaching physical education and had taught one full-time summer session of general science to high school students. *Id.* Horner was one of four physical education teachers in the middle and upper schools. *Id.* She was assigned to set-up and implement a gymnastics program, to supervise recess, to coach junior varsity field hockey and varsity tennis and to assist with the school pageant. *Id.* Horner did not have responsibility for curriculum development. *Id.*

135. *Id.*

136. 613 F.2d at 710. Thorne had a B.S. degree in Education and was certified to teach in the Missouri public schools. *Id.* at 711-12. He had two years of full time experience teaching physical education to boys and girls in grades Kindergarten through sixth. *Id.* Thorne was offered the same salary as Horner, but he turned it down on the basis that his current salary was over $8,000 and he would be getting $9,000 during the coming academic year if he stayed in his current position. *Id.* Mary Institute countered with an offer of $9,000 per year and he accepted. *Id.* Thorne was the only physical education teacher at the school to which he was assigned. *Id.* His duties included coaching junior varsity basketball and teaching swimming and physical education. *Id.* He was also responsible for setting up the physical education curriculum. *Id.* Thorne also reported directly to the head of the Beasley School as well as to the head of the physical education department. *Id.*

creases that were between $200 and $800 higher than those received by Horner. In the fourth year, however, Horner received a raise $400 higher than Thorne's.[137]

The Eighth Circuit Court of Appeals analyzed Horner's EPA claim, and after concluding that Mary Institute paid different wages to Horner and Thorne, focused upon the critical inquiry of whether their jobs were substantially equal.[138] The district court held that the jobs were not substantially equal, and that even if they were, the difference in their wages was due to factors other than sex. The Court of Appeals for the Eighth Circuit affirmed the decision.[139]

More importantly, the school also argued, and the court accepted, the fact that the school had attempted to hire Thorne at the same rate of pay as Horner. There was sufficient evidence that the school met Thorne's demand for a higher salary, not because Thorne was male, but because his experience and ability made him the best person available for the job and because a salary increase was necessary to hire him.[140] The court therefore concluded that this type of differential was based on market forces and not on gender.[141]

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137. *Id.* at 711-12. During this time period Horner's performance was considered to be satisfactory while Thorne's was considered to be extremely positive. *Id.* The parents were also very positive about Thorne, which led one parent to donate $30,000 to Mary Institute's endowment fund and another $20,000 for use in its physical education program. *Id.*

138. *Id.* at 713.

139. *Id.* at 706. The appellate court noted that Horner had failed to show that her job required a substantially similar amount of skill, effort and responsibility as Thorne's position. *Id.* The Court further found that although the jobs were superficially identical in that both involved physical education teaching, the evidence showed that the positions were not substantially equal in terms of skill or responsibility. *Id.* For example, Thorne was required to develop and implement a physical education curriculum while Horner was only required to teach courses selected by someone else. *Id.* In addition, because Thorne reported directly to the school's management and to parents on his physical education programs, the Court concluded that his job differed from Horner's in terms of degree of accountability and the importance of the job obligation. *Id.*

140. *Id.* at 714.

141. *Horner,* 613 F.2d at 714. The court observed:

> Although an employer's perception that women would generally work for less than will men is not a justification for paying women less . . . it is our view that an employer may consider the marketplace value of the skills of a particular individual when determining his or her salary.

*Id.* With regard to the differing salaries after hiring, the Eighth Circuit Court of Appeals noted that Thorne's job continued to grow while Horner's remained relatively static. *Id.*

*8.* Burkey v. Marshall County Board of Education[142]

Burkey, a female teacher and coach brought suit against the district alleging Title VII, EPA, § 1983 discrimination.[143] The court found that the school district did not pay her equitably, noting that the male coaches were compensated at approximately twice the rate of pay that Burkey was compensated.[144] The court found that Burkey's position as coach of the girl's basketball team required work, skill, effort and responsibility equal to that required of the male coaches of the boy's basketball team during the same time period.[145] The differences, to the extent that they existed, were found to be insubstantial.[146]

The court allowed Burkey to recover back wages under Title VII to 1973, two years prior to the date that the EEOC charge was filed.[147] Under the EPA, Burkey was entitled to recover double back pay losses from April 1975 through April 1978.[148] In addition, as part of the equitable relief available

142. 513 F. Supp. 1084 (N.D. W.Va. 1981).

143. *Id.* at 1089. The facts surrounding the institution of the suit warrant discussion. In 1973, Burkey and two other female physical education teachers wrote a letter to the school superintendent about the payment of women coaches of girls athletics, yet received no response to the letter. *Id.* In 1974, Burkey and one other physical education teacher filed a grievance with the school district challenging both the alleged discrimination against women coaches and athletes and the athletic policies and practices of the school district. *Id.* The grievance was processed in accordance with the collective bargaining agreement, but was ultimately denied. *Id.* at 1089-90.

In 1975, Burkey filed a Complaint with the West Virginia Human Rights Commission, alleging that she had been discriminated against on the basis of her sex in regard to her coaching duties. *Id.* The charge was cross-filed with the EEOC. *Id.* The EEOC issued a decision stating that there was reasonable cause to believe that Linda Burkey had been subjected to retaliation and discrimination on the basis of her sex in the payment of compensation for her coaching duties. *Id.* In 1977, Burkey filed a third charge with the EEOC claiming that she had again been retaliated against by the school district (for having filed her two earlier charges) by denying her positions as a coach and teacher at another high school within the school district. *Id.*

144. *Id.* at 1091.

145. *Id.* For example, like the male coaches of the boy's basketball team, Burkey was responsible for selecting, training and coaching in interscholastic competition. *Id.* Such responsibilities required a knowledge of the rules of girl's junior high school basketball as well as the knowledge of the proper techniques of coaching and teaching student-athletes. *Id.* Like the boy's team, Burkey held daily practice sessions with her own team over a basketball season of substantially the same length of time as the boy's season, and she was also required to travel with her teams to away games and was responsible for scheduling the games for her teams. *Id.*

146. *Id.*

147. *Burkey*, 513 F. Supp. at 1097-98.

148. *See* 29 U.S.C. §§ 216(c) and 255(a). As a prevailing party, she was also entitled to attorney's fees. *Burkey*, 513 F. Supp. at 1097-98.

under Title VII, the school district was ordered to offer her the next available vacant physical education teaching position in either the junior high or high school grades and to offer her the head coach position for the girl's basketball team at any school where she is also offered a teaching position.

## IV. Discussion

As the above cases demonstrate, although the concept of equal pay for equal work seems simple, the actual application of the legal principles of pay equity to the collegiate athletic environment can be complicated. While pay equity requirements apply to *all* coaching positions, the most notable disparities arise when comparing the salary of a male coach of the men's basketball team to the salary of a female coach of the women's basketball team. Because this has also been the most litigated area, this discussion focuses upon the arguments made by the female basketball coaches and the responses offered by educational institutions.

Female women's basketball coaches who earn less than their male counterparts generally make two arguments in support of their allegations of discrimination. Namely, they argue that men's and women's basketball coaches are doing the same work under the same conditions, and that disparities in pay cannot be justified in terms of increased revenue-generating expectations, increased attendance requirements or increased media coverage of the men's program. The latter argument is based upon the allegation that men's programs are able to generate greater revenue and attendance and garner greater media interest *because* of the historical failure of the university to fund and promote women's basketball.

The traditional duties of a basketball coach of either a men's or women's team include recruiting, planning and running both practices and workouts, scheduling games and making travel arrangements, supervising assistant coaches and other administrative personnel, managing a budget, counseling students, representing the university to the public, dealing with the media and promoting fund-raising efforts. Hence, the threshold legal issue is whether these duties as they apply to the respective programs constitute the same work under the same conditions deserving of the same pay.

Predictably, universities try to justify salary differences on

the basis of the heightened visibility of the men's program. Because of the sport's popularity, the institutions contend that they place expectations upon the men's program above and beyond those placed on the women's program. Accordingly, the coach of the men's program often is subject to greater media and alumni attention and greater pressure than his female counterpart. According to the university, these additional burdens warrant additional compensation. The counter argument, however, attempts to shift the focus away from "the bottom line" by asserting that women should not be penalized for societies' prejudices against women's sports, and that universities, by their historic and flagrant underfunding of women's programs, have in effect perpetuated societies' prejudice. Like the Title IX athlete, female coaches are arguing for equitable treatment despite the financial hardships the university may incur and the numerous business reasons to the contrary. After all, these coaches argue, it has been the university's lack of promotional efforts on behalf of women's basketball, and not the superior abilities of the male coach, that have hampered fan appeal in the athletic arena. Moreover, because women have been effectively shut out of the pool of potential applicants for coaching positions in the high profile male sports, the women coaches argue that they are precluded from cashing in on society's biases in favor of male athletic programs.

Courts have continually rejected this argument, reasoning that societal bias cannot be imputed to the universities. Thus, where universities are able to show that one coach is subjected to greater responsibility and pressure, regardless of whether the pressure is imposed by society or by the institution's financial mandate, the institution may compensate that individual accordingly; to hold otherwise would give the less pressured coach a "free ride". However, this analysis is fact specific. Where the female coach can show that she is subjected to the same or greater responsibility and pressure both on and off the court, she should be compensated at the same or greater level than her male counterpart. The whole analysis, therefore, is markedly different from the traditional discrimination claim.[149]

Female coaches of female sports are subject to all of the

149. For example, female and male teachers, lawyers, and doctors are often are paid differently for a variety of reasons, such as experience and client or generational bias.

same differentials and more. They must contend with the additional and uncontrollable factor of societal bias. Further, most women's sports do not currently have the potential to produce the same amount of fan attendance and revenue as men's sports. Whereas an English teacher, female or male, will not be penalized or rewarded based upon the gender composition of the students they teach, coaches of female or male basketball programs are treated differently by society and by their employer because of the value placed upon the gender of their students. Where this is the case, courts have declined to be proactive: they will not mandate universities to pay the price of societal bias.

Just as the ability to generate attention, visibility and revenue are valued and rewarded skills recognized in the academic environment, recent court decisions have made clear that they are also permissible factors in determining men's and women's basketball coaches' salaries. Hence, for an athletic director to make a business decision to invest additional dollars in the compensation of a coach to help ensure a greater revenue return is plausible and permissible. It is against this backdrop that a solution to the difficulty of pay equity may emerge.

## V. A Practical Approach

The cases summarized above demonstrate that substantive attention must be paid to both the amount of compensation and the manner in which coaches are compensated. In particular, if an educational institution inequitably compensates their coaches, the institution should carefully evaluate the basis for that differential. If the differences are not justifiable based upon the factors described in the cases outlined above, a risk management issue arises. The educational institution must decide if it will assume the risk of litigation or losing the coach if it fails to take immediate action to correct the pay inequity. Whether the educational institution decides to act in this type of compensation review context or in the context of negotiating a contract for a new coach, some practical parameters are helpful for structuring a coach's compensation package.

### *1. Considerations*

In structuring compensation, the EPA provides a useful

guide to help the educational institution avoid any type of pay equity claim or at least place the school in as defensible a position as possible in the event a claim is asserted.[150] Assuming the jobs are substantially similar, the following nonexclusive list of factors may be considered in structuring the respective compensation packages:

a. Experience (in both the coaching field and related fields)
b. Longevity with the employer
c. Education
d. Special Qualifications and Skills (such as revenue generation or public image)
e. Degree of skill, effort and responsibility
f. Additional duties and responsibilities
g. Public relations, promotional and fundraising activities to generate revenue
h. Speaking engagements and accessibility for media interviews
i. Intensity and quantitative amount of promotional/revenue raising activities.
j. Professional involvements/affiliations (such as service on NCAA committees)
k. Public image/relations figure — relative desirability (and hence its impact on the school)
l. Responsibility to generate revenue (based on team performance and other activities)
m. Ability to generate revenue and donations
n. Ability to generate media coverage
o. Productivity
p. Marketplace value of the skills of the particular individual

### 2. *An Alternative*

One alternative that may be employed to avoid a pay equity issue involves the use of a mechanism to better define the traditional terms, conditions and expectations of employment. This approach can be achieved through the use of one comprehensive and detailed contract or two separate contracts. In the latter case, this would entail the development of a base contract which covers the traditional duties of a coach, along with a second contract setting forth additional duties, expectations and compensation. By employing either alternative, an ath-

150. *See supra* note 8 and accompanying text. As explained previously, the EPA prohibits discrimination in wages between employees on the basis of sex for equal work on jobs that require equal skill, effort, responsibility and which are performed under similar working conditions. The jobs being compared need not be identical, but they must be substantially similar. *Id.*

letic administrator is better able to more fairly account for the similarities and differences of the work of the coaches.

Essentially, the base contract covers the normal duties of coaching. Ideally, the salary range would be relatively small and would take into account the traditional components of education, training, skill, experience and success. Marketplace considerations and adjustments may also be incorporated. Whatever factors are used, it is imperative that the basis for any salary differential be fully documented and justified.

The supplemental contract addresses the additional duties, expectations and compensation expected of coaches. In effect, this contract incorporates the entrepreneurial gamble being taken. Essentially, the agreement would address attendance goals, media requirements, extraordinary public relations requirements, revenue generation requirements, apparel or shoe contracts, and summer camps—the traditional sources of extra income. Many of the additional income opportunities, therefore, are available for those coaches who are successful in generating revenue, increasing attendance and gaining media coverage.[151]

Whether the educational institution uses one or two contracts is of little concern as long as the content of the contracts comports with the guidance identified herein. On the other hand, it should be noted that the use of two separate contracts is a useful mechanism to keep the issues relatively simple and straightforward. Easy comparisons among the base contracts can then be made between the performance of the key duties and the amount of compensation received.

## VI. General Guidelines For Avoiding Pay

In addition to the use of a contract and the structuring of a compensation package based upon the permissible criteria outlined above, there are six basic steps that will help an educational institution avoid a pay equity claim:

1. The university and the athletic department must know the prohibitions and requirements of the equal pay and anti-discrimination laws and regulations that apply to its workplace.

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151. It is important to note that while the educational institution may compensate one coach but not the other for the performance of additional duties and responsibilities, it must be careful in offering one coach a series of incentives that it does not offer the other coach.

2. Knowledge of the laws must be translated into employment practices and procedures that comply with the law, particularly at the hiring and firing stages.
3. Athletic administrators must be trained in how to avoid, and how to spot, violations of equal pay and discrimination laws.
4. Athletic administrators must have an effective internal grievance procedure that encourages employees to voice their complaints to employer representatives before going to a lawyer or an outside agency.
5. The university and the athletic department must have clear and strong written policies against illegal discrimination.
6. The university and the athletic department must conduct regular compliance checks to make sure that procedures and personnel comport with the laws, including any new legal developments.

Claim-proofing the workplace will not, of course, guarantee that the educational institution will never have to defend a claim. After all, it takes only one disgruntled coach to file a Title VII or EPA claim, with the complainant showing very little in order to trigger an investigation by an outside agency. Nevertheless, to avoid tying its own hands and needless frustration and fear over the potential for discrimination claims, an educational institution should keep in mind this fundamental principle: no discrimination law, state or federal, requires hiring or retaining an employee who is not validly qualified or who cannot perform the duties of the position. Discrimination laws only prohibit adverse job decisions that are made on the basis of a suspect characteristic.

## VII. Defending Complaints

In the event that you are ever confronted with a complaint of pay equity, there are a variety of actions to consider taking. The ultimate legal and strategic approach to defending a discrimination or pay equity complaint will, of course, depend on the nature of the claim and the facts of each individual case. If the case proceeds through an administrative process, there will likely be a fact finding conference, a hearing, or some other form of investigative review. Regardless of the procedure, every case requires that an employer:

1. Know the issue raised by the claim and the law that controls it, including the defenses available to defeat the claim.
2. Know *all* the facts, even ones that may not be discovered by the investigator or the complainant and that seem only marginally relevant.

a. Review all relevant documents.
b. Interview all potential witnesses, co-workers and supervisors.

3. Respond to any written request for information completely and carefully, tying the responses to the applicable legal framework.
   a. The written responses form the investigator's initial impressions of the case, so they must be answered seriously.
   b. Use the responses to tell your story and to advocate as well as to inform.
   c. Anticipate questions that will be asked at subsequent fact-finding sessions from the written questions and responses.
   d. Consider whether to submit additional information helpful to the defense even if the information is not covered by the request, or whether to hold the information until fact-finding.
4. Prepare thoroughly for the fact-finding conference or any subsequent meeting.
   a. This conference is the prime opportunity to get the complaint dismissed or withdrawn.
   b. Clear up any gaps in the story or the defense before the conference.
   c. Commit time for preparation. Usually more than one preparation session is necessary. Depending on the complaint and the number of witnesses, several preparation sessions may be necessary. Good preparation for fact-finding is the most cost-effective investment in defending a pay equity claim.
5. Understand the nature and the importance of the fact-finding conference.
   a. The investigator, not the parties or their attorneys, generally control the questions to be asked.
   b. Treat the complainant respectfully, no matter how angry or frustrated you feel.
   c. Candor and credibility are essential.
   d. Make sure all points of your defense are covered and are understood by the fact-finder before the meeting ends.
   e. Follow the rules for testifying in any forum: do not volunteer extraneous information; keep answers responsive; press your points firmly but respectfully; and do not be defensive.
6. Review the fact-finder's decision carefully. File disagreements within the time limit.

## VIII. When to Settle, When to Fight

Discrimination and pay equity claims, like any other type of litigation, pose many economic and non-economic considerations for an employer-defendant. Just as meritorious claims

can be defended, so can non-meritorious claims be settled, either to avoid the costs, time or nuisance of defense or for a variety of other sound business reasons. In considering whether to defend or to settle, an educational institution should weigh: the likelihood of prevailing on the merits; the direct cost of litigating the claim, even if the defense is successful; the potential economic damages; the cost of administrative and staff time in defending the claim; the impact of settlement or litigation on the workplace; the effect of publicity that may be generated by litigation; and the impact of settlement or litigation on future claims by others. The question of whether to settle or to litigate can be answered only in the context of each specific case and only after the educational institution has completed a thorough investigation of the applicable facts and law.

## IX. Conclusion

With the recent publicity on gender and pay equity, more informal and formal complaints and actual cases seeking to challenge an educational institution's coaching compensation scheme are sure to follow. The materials presented above have attempted to present the legal framework within which this issue arises and a practical approach to structuring a coach's compensation package to avoid the potential for liability because of unlawful pay practices. While this approach may not prevent a disgruntled coach from pressing the issue, the use of such an approach will allow the institution to comply with the law and at least place the educational institution in as defensible a position as possible in the event a complaint or court case is actually filed.