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PAY EQUITY FOR COACHES AND ATHLETIC ADMINISTRATORS: AN ELEMENT OF TITLE IX?

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In this Article, Professors Osborne and Yarbrough address the issue of gender discrimination in the compensation of coaches and athletic administrators. They discuss the application of the Equal Pay Act of 1963 and Title VII to pay inequity claims and conclude that both have proven to be inadequate as a means of addressing the problem. Professors Osborne and Yarbrough then present Title IX as a way of countering the problem of gender discrimination in the compensation of coaches. They also discuss the prospects for gender equality in compensation by considering several cases addressing the issue. Finally, they offer recommendations both to help claimants prevail in pay equity claims and to help universities avoid such claims.

INTRODUCTION

In 1972, Congress passed Title IX of the Education Amendments Act.¹ Title IX has become known as the champion of equal opportunity for women in sports. The impact of Title IX has not been positive for all women in sports, however, particularly female employees in intercollegiate athletics. Although participation of girls and women in athletics has dramatically increased, opportunities for women in athletics-related employment have actually decreased.²

In 1972, women coached more than ninety percent of women's teams.³ Today, only forty-seven percent of the coaches of women's

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1. 20 U.S.C. § 1681 (1994).

2. R. Vivian Acosta & Linda Jean Carpenter, *A Longitudinal Study—Nineteen Year Update: 1977–1996*, at <http://bailiwick.lib.uiowa.edu/ge/Acosta/womensp.html> (last visited Jan. 25, 2001) (on file with the *University of Michigan Journal of Law Reform*); cf. Welch Suggs, *Uneven Progress for Women's Sports*, CHRON. HIGHER EDUC., Apr. 7, 2000, at A52 (describing annual survey results showing increasing but uneven support for women's athletics).

3. Acosta & Carpenter, *supra* note 2.

teams are women, down from forty-nine percent in 1994.⁴ According to a study by R. Vivian Acosta and Linda Jean Carpenter, 6,580 head coaching jobs existed for women's teams in the NCAA in 1996, but women held only 3,138 of those jobs.⁵ Although 209 women's teams were added between 1994 and 1996, there was a net loss of nine female coaches.⁶ Women are also limited to coaching women's teams—only two percent of head coaches of men's teams are women.⁷ Additionally, women hold 61.1% of the 5,902 paid assistant coaching positions for women's teams and 51.3% of unpaid assistant coaching positions for women's teams.⁸

There are several explanations for why women are not getting or keeping more jobs as coaches. The massive increase in the number of girls participating in sport and the rapid addition of women's intercollegiate teams has resulted in a lack of sufficiently qualified women in the marketplace to fill all available positions.⁹ Additionally, because few women had the opportunity to participate in competitive athletics prior to Title IX, men have long had a competitive edge in the job market as it relates to coaching experience.¹⁰ The lack of female role models in coaching may have discouraged girls from becoming coaches, as has the long-standing prejudice of female physical educators against competitive sports for women.¹¹ Finally, men who want to coach for men's teams view coaching women's teams as an entree into the competitive collegiate coaching ranks.¹²

Female coaches have also had to hurdle the obstacle of the male athletic director.¹³ Male administrators have historically hired more men than women: colleges and universities with male athletic directors have women in forty-six percent of the head coach positions for women's teams; those with a female athletic director have women in fifty-six percent of these positions.¹⁴

4. Annelies Knoppers, *Gender and the Coaching Profession*, in *WOMEN, SPORT, AND CULTURE*, 119, 119 (Susan Birrell & Cheryl Cole eds., 1994).

5. Acosta & Carpenter, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Cf. id.* (cataloging the rapid decrease in the percentage of female coaches, although the absolute number has risen since the passage of Title IX).

10. *Cf. Knoppers, supra* note 4, at 122–26 (analyzing the myriad factors that conspire to depress job opportunities for female coaches).

11. *See id.* at 120.

12. *Id.* at 123.

13. Acosta & Carpenter, *supra* note 2.

14. *Id.*

The employment figures are even worse for women who aspire to be athletics administrators. Only 18.5% of all women's intercollegiate athletics programs are headed by female administrators.¹⁵ There is an average of less than one female administrator per school within the administration of women's athletics programs, and 7.4% of Division I programs, 39% of Division II programs, and 28% of Division III programs have no female administrators.¹⁶ Even at the Division I level, women rarely hold policymaking positions.

For the women who do hold jobs as coaches or administrators in intercollegiate athletics, there are salary issues to battle. It is well documented that there is a gender gap in salaries in the United States; women are paid seventy-six cents for every dollar that men make.¹⁷ This gender gap widens in college athletics, with women earning only sixty-two percent of what men make.¹⁸ College athletic programs allocate over sixty-five percent of budget funds dedicated for salaries to male head coaches of men's sports, and they allocate seventy-six percent of the funds available for assistant coaches to men's sports.¹⁹ Coaches of men's teams also receive better benefits packages than coaches of women's teams, and other advantages, such as coaches' broadcasting opportunities and shoe contracts, are not readily available for coaches of women's teams.²⁰ These trends and figures indicate an overall pattern of gender discrimination in the employment of athletics coaches and administrators in higher education.

Why does such blatant pay discrimination continue to exist? The legislation most often relied upon in intercollegiate athletics wage discrimination cases, the Equal Pay Act of 1963²¹ and Title VII of

15. *Id.*

16. *Id.*

17. Donna Leinwand, *Women's Salaries: Difference of Pay or Difference of Opinion?*, GANNETT NEWS SERV., Sept. 7, 1999, available at 1999 WL 6974404.

18. Suggs, *supra* note 2, at A52.

19. *Id.*

20. *Id.*

21. The Equal Pay Act (EPA) requires that:

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 made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality 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

the Civil Rights Acts of 1964,²² have proven to be inadequate protection against such discrimination. Unfortunately, because of the lack of success of plaintiffs under these legislative regimes, there is a dearth of litigation and little that can be interpreted as trends or even articulable standards for such litigation.²³

In October 1997, the United States Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title IX and the Equal Pay Act, issued a notice entitled *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*²⁴ (Guidelines). Observing the significant disparities between the salaries of coaches of men's intercollegiate teams and those of women's teams, the EEOC promulgated the Guidelines in order to set "forth the Commission's position on the application of the Equal Pay Act and Title VII . . . to claims of gender inequity in the compensation of coaches."²⁵

Under the Guidelines, the actual requirements of the job, rather than job titles or descriptions, are determinative.²⁶ Further, "pay discrimination cannot be justified if the differences relied on for the proposition that the two jobs are not substantially equal are themselves based on discrimination in the terms and conditions of employment."²⁷ In addition to these general requirements, the Guidelines address the particularized requirements of the Equal Pay Act and Title VII separately.²⁸

not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1994).

22. Title VII of the Civil Rights Acts of 1964 establishes:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

23. *EEOC Notice 915.002, Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, EEOC Compl. Man. (CCH) ¶ 5527, at 4456-4467 (Oct. 29, 1997), available at <http://www.eeoc.gov/docs/coaches.html> [hereinafter EEOC Guidelines] ("There are only a limited number of cases that apply Title VII and/or the EPA to questions of pay discrimination in coaching and a number of them either present unique facts, or, in the Commissioner's view, include incomplete analyses of the law.").

24. *Id.*

25. *Id.* at 4456-57.

26. *Id.* at 4457.

27. *Id.* at 4457-58.

28. EEOC Guidelines, *supra* note 23, at 4458, 4466.

Because the EEOC has no enforcement responsibility for pay discrimination claims brought by coaches of women's teams on the basis of anything other than gender inequity, the analysis of the Guidelines stops there. Further, Title VII and the Equal Pay Act (EPA) do not address the problem of discrimination against a male coach of a women's sport who has been discriminated against because of the sex of the student-athletes he coaches. In that situation, the plaintiff may be able to rely on Title IX.

While Title IX could be interpreted to reach more broadly than Title VII and the EPA, courts have generally circumscribed Title IX's efficacy by importing restrictive standards from those other statutes.²⁹ The Guidelines are also limited by the underlying statutes, but there is hope that they will influence the courts' narrow interpretation of these statutes and provide a realistic remedy for gender discrimination in collegiate coaching. Courts could seek to effectuate the underlying policy of the Guidelines by interpreting Title VII, Title IX, and the EPA more generously. While coaches and administrators should work together to achieve the broad goals of gender equity, coaches who believe that they have been discriminated against should carefully choose their claims and anticipate defenses. Likewise, schools should take steps to understand the law and eliminate gender-biased policies to insulate themselves from lawsuits.

This Article addresses the issue of gender discrimination in the compensation of coaches. Part I discusses the application of the Equal Pay Act of 1963 to claims of gender discrimination in the form of unequal pay to male and female coaches. Part II considers the utilization of Title VII in claims of gender discrimination as manifested by pay differentials between the salaries of male and female coaches. Part III presents Title IX as a means for addressing the problem of gender discrimination in the compensation of coaches. Part IV discusses the prospects for gender equality in the salaries of coaches by considering several cases concerning the issue. Finally, Part V offers several recommendations both to help claimants be successful in bringing a pay equity claim and to help universities avoid such claims.

29. See, e.g., *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994).

I. EQUAL PAY ACT OF 1963

The Equal Pay Act prohibits employers from discriminating on the basis of sex between employees at the same establishment who perform equal work in equivalent positions under similar working conditions.³⁰ An employee may have a claim for relief under the EPA if the employee establishes that the employer pays a lower wage to an opposite gender counterpart for equal work on a job that requires equal skill, effort, and responsibility, and is performed under similar working conditions.³¹ The burden then shifts to the employer to justify the wage difference through one of the defenses enumerated in the Act.³² Below are descriptions of each element and defense and illustrations from coaches' pay cases in which the issue is whether a particular element or defense has been proven.

A. *Selecting Comparators*

The first step for the plaintiff is to identify male and female comparators whose jobs may be analyzed to determine whether they are substantially equal.³³ The risk for failure in pre-Guidelines EPA claims most often arose when the plaintiff-coach did not choose the correct comparator.

The plaintiff must identify at least one specific comparator.³⁴ In other words, the claimant must compare her job and salary to that of an actual employee of the opposite sex.³⁵ Coaches of different sports may be used as comparators.³⁶ The plaintiff has the burden of proving that the jobs are substantially equal.³⁷

30. 29 U.S.C. § 206(d)(1) (1994).

31. *Id.*

32. *Id.*

33. EEOC Guidelines, *supra* note 23, at 4458.

34. *See id.*

35. *Id.* (citing *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910, 916, 918 (9th Cir. 1983) (finding that "the use of a single comparator is not prohibited; if there is more than one comparator, 'the proper test for establishing a prima facie case in a professional setting such as that of a college is whether the plaintiff is receiving lower wages than the average of 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 scale.'")).

36. EEOC Guidelines, *supra* note 23, at 4459.

37. *Id.*

1. *Are the Jobs Substantially Equal?*—The analysis of whether jobs are substantially equal is based on four elements: (a) Equal Skills, (b) Equal Effort, (c) Equal Responsibility, and (d) Equal Working Conditions.³⁸ The Guidelines recognize that “[w]hat constitutes equal skill, equal effort, or equal responsibility [under the Equal Pay Act] cannot be precisely defined but ‘the broad remedial purpose of the law must be taken into consideration.’ Accordingly, insignificant or inconsequential differences do not prevent jobs from being equal.”³⁹

a. *Equal Skills*—The EPA states that the skills required of each coach and his or her comparators must be comparable in “experience, training, education and ability.”⁴⁰ In addition, the skills “must be measured in terms of the performance requirements of the job.”⁴¹ “[A]dditional training or education or abilities that are not required to perform the job will not be considered in determining whether the jobs are substantially equal.”⁴²

In *Hein v. Oregon College of Education*,⁴³ a female Ph.D. lecturer in a physical education department, who possessed skills equal to or greater than a male basketball coach in the department but whose position consisted entirely of lecturing, could not be compared to the basketball coach for EPA purposes because a coaching job requires skills that a non-coaching job does not.⁴⁴ In essence, their jobs were not substantially equal and the plaintiff failed to prove an element crucial to her case.

b. *Equal Effort*—The EEOC looks at the actual job requirements of the jobs being compared in order to decide whether these jobs require equal effort.⁴⁵ This analysis does not have to be limited to coaches of like sports.⁴⁶ For example, it is typical for high school and college coaches to be responsible for teaching/training and counseling/advising of student athletes, general program management, budget management, fund-raising, public relations, and recruiting.⁴⁷ If a coach spends approximately the same amount of time coaching a similar number of athletes, managing comparable team budgets, organizing fundraisers, and recruiting,

38. *Id.* at 4458–60.

39. *Id.* at 4458–59 (quoting 29 C.F.R. § 1620.14(a) (2000)).

40. 29 C.F.R. § 1620.15(a) (2000).

41. *Id.*

42. EEOC Guidelines, *supra* note 23, at 4459 (citing *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910 (9th Cir. 1983)).

43. 718 F.2d 910 (9th Cir. 1983).

44. *Id.* at 914, cited in EEOC Guidelines, *supra* note 23, at 4459 n.15.

45. EEOC Guidelines, *supra* note 23, at 4459 (citing 29 C.F.R. § 1620.16(a) (2000)).

46. *Id.*

47. *Id.*

the Guidelines explain that it does not matter if he or she coaches ice hockey or crew, because the positions would require equal effort.⁴⁸

c. Equal Responsibility—The EEOC looks “closely at the actual duties performed by the coaches to assess whether differences in responsibility justify unequal pay.”⁴⁹ Regulations promulgated under the EPA state that “[r]esponsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”⁵⁰ “[F]actors relevant to an analysis of responsibility [of coaches] may include . . . the size of the team, the number of assistants, and the demands of event and media management.”⁵¹

The job obligations of the comparator positions do not have to be identical.⁵² In *Brock v. Georgia Southwestern College*,⁵³ an employer attempted to justify paying a female intramural sports coach less than the male coach of the men’s basketball team by arguing that she had less responsibility because she had a smaller budget and did not have to arrange off-campus games.⁵⁴ The court recognized, however, that the female coach also had scheduling and budgetary responsibilities and found that the two positions were substantially equal.⁵⁵

In the absence of proof of equal responsibility, however, the Guidelines state that “the Commission will examine whether the institution has afforded male and female coaches the opportunity to take on responsibilities in a nondiscriminatory fashion.”⁵⁶ For example, the Guidelines state that “if an educational institution has discriminated against a female head coach by failing to provide her with comparable assistant coaching support to what it provides to a male head coach, it cannot justify paying her a lower salary based on the claim that she has a less responsible position.”⁵⁷

d. Similar Working Conditions—The EPA assumes that “employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar

48. *Id.*

49. *Id.*

50. 29 C.F.R. § 1620.17(a) (2000).

51. EEOC Guidelines, *supra* note 23, at 4459–60.

52. *Id.* at 4459.

53. 765 F.2d 1026 (11th Cir. 1985).

54. *Id.* at 1035, *cited in* EEOC Guidelines, *supra* note 23, at 4459.

55. *Id.*, *cited in* EEOC Guidelines, *supra* note 23, at 4459.

56. EEOC Guidelines, *supra* note 23, at 4460.

57. *Id.*

working conditions.”⁵⁸ However, disproportionate pressure to win or generate revenue has been successfully used in cases to show differences in working conditions for coaches.⁵⁹

If the complainant has proved his or her prima facie case by selecting the appropriate comparators, by demonstrating that the jobs are equal, and by demonstrating that the plaintiff earns less in wages than his or her counterpart, then the burden shifts to the defendant to prove affirmative defenses to the allegations.⁶⁰

In *Wallace v. Board of Regents*,⁶¹ a male coach alleged violations of the Equal Pay Act and Title VII where, after he was fired from his coaching position for NCAA violations, his female replacement received higher pay than he had previously received. The court dismissed Wallace’s claim because he had not established a prima facie case on his EPA and Title VII claims.⁶² Specifically, his female replacement’s non-coaching duties at the university were very different from those that he had while he worked there; for this reason, there was no evidence that Wallace had been intentionally discriminated against merely because the university paid his replacement a higher salary.⁶³

B. Affirmative Defenses

To successfully oppose a claim under the EPA, the defendant has to demonstrate that his or her conduct falls into one of the exceptions to the Act. The EPA allows differential pay if it is based on: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”⁶⁴ If the employer—in our context, the college or university—satisfies the burden of proving an affirmative defense, the defendant prevails.⁶⁵

The “factor other than sex” defense has proven quite successful for Equal Pay Act defendants.⁶⁶ It is important to note that “an employer who uses this defense must show that the factor of sex is not

58. 29 C.F.R. § 1620.18(b) (2000).

59. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1321 (9th Cir. 1994).

60. EEOC Guidelines, *supra* note 23, at 4460–61.

61. 967 F. Supp. 1287, 1292 (S.D. Ga. 1997).

62. *Id.* at 1295.

63. *Id.*

64. 29 U.S.C. § 206(d)(1) (1994).

65. *See* 42 U.S.C. § 2000(e)(2)(h) (1994); EEOC Guidelines, *supra* note 23, at 4465–66.

66. *See infra* Part I.B.1–6.

an element underlying the wage differential either expressly or by implication."⁶⁷ The following justifications have been asserted by educational institutions to justify paying male coaches more than comparable female coaches:

- (a) the male coach produces more revenue for the school than the female coach;
- (b) the male coach must be paid higher wages in order to compete for him;
- (c) salary is based on prior salary;
- (d) salary is linked to the sex of the student-athletes rather than the sex of the coach;
- (e) the male coach has superior experience, education, and ability; and
- (f) the male coach has more duties.⁶⁸

1. *Revenue as a Factor Other than Sex*—Historically, courts have allowed this argument as a defense to claims of pay inequity, construing the expectation and pressure to generate revenue as an additional responsibility that justifies pay differences.⁶⁹ The Guidelines caution, however, that revenue is affected by many variables, many of which are “not within an institution’s direct control.”⁷⁰ The EEOC further recognizes that “women’s athletic programs historically and currently receive considerably less [sic] resources than men’s programs.”⁷¹ Thus,

the Commission will carefully analyze an asserted defense that the production of revenue is a factor other than sex to determine whether the institution has provided discriminatorily reduced support to a female coach to produce revenue for her team. If this is the case, it would constitute discrimination in the terms and conditions of employment which cannot then be used to justify a pay disparity under the EPA.⁷²

Accordingly, the Guidelines suggest that judges should carefully scrutinize claims that revenue production is an acceptable justification for salary differential and examine that defense within the

67. EEOC Guidelines, *supra* note 23, at 4461.

68. *Id.*

69. See, e.g., *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1323 (9th Cir. 1994), cited in EEOC Guidelines, *supra* note 23, at 4461 n.26; *Bartges v. UNC-Charlotte*, 908 F. Supp. 1312, 1327 (W.D.N.C. 1995), cited in EEOC Guidelines, *supra* note 23, at 4461 n.26; *Deli v. Univ. of Minnesota*, 863 F. Supp. 958, 961 (D. Minn. 1994), cited in EEOC Guidelines, *supra* note 23, at 4461 n.26.

70. EEOC Guidelines, *supra* note 23, at 4461.

71. *Id.*

72. *Id.* at 4461–62.

context of past discrimination to see if there is equality of opportunity for the coach of the women's team to generate revenue sources.⁷³

Traditionally, men's revenue producing sports are supported by a full cast of sports information and marketing specialists who actually do the work that creates the revenue.⁷⁴ Although the courts have not yet come to this conclusion, it could be argued that the position of coach of a women's team is actually more difficult because she is likely to have more personal responsibility for promoting her team.

2. *Marketplace as a Factor Other than Sex*—Employers have asserted this defense by basing the pay differential on marketplace value. Many educational institutions have argued that a coach for a men's team must be paid higher wages than the coach for a women's team in order to compete for the former.⁷⁵ The EEOC has indicated, however, that it distinguishes between arguments about marketplace value and market rate.⁷⁶ The EEOC rejects the market rate defense because it "is based on the employer's assumption that women are available for employment at lower rates of pay due to market factors such as the principle of supply and demand."⁷⁷ The market exists within a society, and because of this the marketplace may be tainted by past discrimination. As noted above, on average, women earn seventy-six percent of men's wages throughout society.⁷⁸ The EEOC remarks:

The marketplace value defense is not gender-based but rather is based on the employer's consideration of an individual's value in setting wages. Such consideration will qualify as a factor other than sex only if the employer can demonstrate that it has assessed the marketplace value of the particular individual's job-related characteristics, and any salary discrepancy is not based on sex.⁷⁹

3. *Employee's Prior Salary as a Factor Other than Sex*—The salary that an employee demands based on his or her prior salary has been used successfully in court as a justification for a pay

73. See *id.*

74. *Id.* at 4461–62 nn. 28–30.

75. *Id.* at 4463.

76. *Id.*

77. *Id.* (citations omitted).

78. Leinwand, *supra* note 17.

79. EEOC Guidelines, *supra* note 23, at 4463 (citations omitted).

differential,⁸⁰ and the logic would seem consistent with the acceptance of the marketplace justification for a pay differential. The Guidelines urge courts not to accept the employee's prior salary as a factor other than sex because wages in athletics programs are not subject to normal market pressures, but are artificially inflated by non-economic factors such as cultural and social bias.⁸¹ This is particularly true because, as noted above, women have been almost completely prevented from competing for the higher paying positions in men's revenue producing sports.⁸²

According to the Guidelines, if the employer asserts the argument that the employee's prior salary is a factor other than sex,

evidence should be obtained as to whether the employer: 1) consulted with the employee's previous employer to determine the basis for the employee's starting and final salaries; 2) determined that the prior salary was an accurate indication of the employee's ability based on education, experience, or other relevant factors; and 3) considered the prior salary, but did not rely solely on it in setting the employee's current salary.⁸³

4. *Sex of Athletes as a Factor Other than Sex*—The Guidelines indicate that "the Commission will not accept as a defense that the sex of the student-athlete is a factor other than sex justifying a salary disparity since it is not a gender-neutral factor."⁸⁴ It is explicitly a factor that depends on sex! This eliminates an obstacle for male coaches of women's teams who traditionally have been unable to bring a pay discrimination claim based upon the gender of the athletes coached rather than the sex of the coach.⁸⁵

5. *Superior Experience, Education, and Ability as a Factor Other than Sex*—It is fairly easy to see how superior qualifications can justify a pay differential, whether comparing coaches of the same or different gender. Courts should determine whether the additional experience, education, or ability is relevant to the job; if it is not,

80. *Id.* at 4462-64.

81. *Id.* at 4464.

82. See Acosta & Carpenter, *supra* note 2.

83. EEOC Guidelines, *supra* note 23, at 4464.

84. *Id.*

85. *Cf. Deli v. Univ. of Minnesota*, 863 F. Supp. 958, 961 (D. Minn. 1994) (exemplifying a typical pre-Guidelines case that limited recovery under the Equal Pay Act to situations where discrimination is based on the gender of the claimant).

pay differentials should not be allowed.⁸⁶ These determinations are made on a case by case basis.

In *Harker v. Utica College of Syracuse University*,⁸⁷ although the plaintiff made a prima facie showing of discrimination, the court dismissed the claim on the grounds that the plaintiff failed to rebut the defendant's reasoning behind its pay disparity. The court approved of the defendant's reasons for paying a female coach of the women's basketball team less than a male coach of the women's team where the disparity was due to differences in education, experience, and length of service.⁸⁸

6. *Additional Duties as a Factor Other than Sex*—It is logical to pay someone more if they do more work. An employer cannot pay higher wages if the opportunity to take on additional responsibilities is offered in a discriminatory manner, however.⁸⁹

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Because the Equal Pay Act was an inadequate tool to correct pay disparity for coaches and athletics administrators before the Guidelines, many plaintiffs sought relief under Title VII of the Civil Rights Act of 1964.⁹⁰ Most claims that may be brought under the EPA may also be brought under Title VII. Title VII is more restrictive than the EPA in that it applies only to employers with fifteen or more employees, working twenty or more weeks per year, whose organizations impact interstate commerce.⁹¹ At the same time, Title VII is broader than the EPA because it deals with more than equal pay for equal jobs. As noted by the EEOC, "Title VII covers types of wage discrimination not covered by the EPA. Even where jobs do not satisfy the 'equal work' requirement of the EPA, a claim may be made under Title VII."⁹²

86. See EEOC Guidelines, *supra* note 23, at 4465 (providing contrasting examples in which additional experiences would or would not be relevant to the job, and therefore could or could not be the basis of additional pay).

87. 885 F. Supp. 378, 389 (N.D.N.Y. 1995).

88. *Id.*

89. EEOC Guidelines, *supra* note 23, at 4465 ("The school cannot offer men and women coaches the opportunity to take on additional duties in a discriminatory way and then use the discriminatory distribution of duties to justify disparate pay.").

90. 42 U.S.C. § 2000e (1994).

91. *Id.* § 2000e(b).

92. EEOC Guidelines, *supra* note 23, at 4466.

Under Title VII, it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.⁹³

The EEOC Guidelines provide an example:

[T]he male coaches of the men's baseball and ice-hockey teams receive bonuses for winning seasons while none of the female coaches of the women's teams receive bonuses for winning seasons. Even if the jobs are not substantially equal, it is unlawful for an employer to give men and women different benefits unless it can show that the difference is not based on sex.⁹⁴

To file an employment discrimination suit under Title VII, the plaintiff must establish: 1) the plaintiff is a member of a protected class, 2) the plaintiff was qualified for a particular position, 3) despite the plaintiff's qualifications, he or she was treated less favorably than an opposite gender counterpart, and 4) the circumstances gave rise to an inference of discrimination.⁹⁵ In *County of Washington v. Gunther*,⁹⁶ the Supreme Court held that persons alleging sex-based wage discrimination are not precluded from bringing a Title VII claim where they are unable to show that their jobs are equal to higher-paid positions held by the opposite sex; that is, the "equal work" requirement of the Equal Pay Act is inapplicable in Title VII claims.⁹⁷

After the plaintiff has proven her prima facie case, the burden shifts to the defendant to show legitimate nondiscriminatory rea-

93. 42 U.S.C. § 2000e-2(a).

94. EEOC Guidelines, *supra* note 23, at 4466.

95. *McDonnell Douglas Corp. v. Green*, 792 U.S. 792, 802 (1973).

96. 452 U.S. 161, 181 (1981).

97. EEOC Guidelines, *supra* note 23, at 4466.

sons for the pay differential.⁹⁸ If the defendant institution offers a legitimate nondiscriminatory reason for the pay differential, the burden then shifts back to the plaintiff to establish that the institution's articulated reason was merely a pretext for discrimination.⁹⁹

As is the case when suing under the EPA, Title VII does not address the problem of the man who is paid substantially less because he coaches a women's sport, not because of his own sex.

III. TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972

Title IX of the Education Amendments Act of 1972 was intended to eliminate discrimination based on sex in education. Not until the formal regulations were promulgated and policy interpretations adopted in 1979 were athletics clearly protected by Title IX.¹⁰⁰ A few years later, the United States Supreme Court dealt women seeking opportunities in athletics programs a nearly fatal blow with their decision in *Grove City College v. Bell*,¹⁰¹ which held that Title IX was program-specific and applied only to programs that actually received federal funds. In other words, if the chemistry department in an institution received federal funds, but the athletic department did not, Title IX was inapplicable to the athletic department. The legislation was not a viable legal vehicle for change again until 1988 when Congress enacted the Civil Rights Restoration Act, expressly providing that Title IX encompasses all facets of a university that receives any federal financial assistance in any of its programs.¹⁰²

Title IX is enforced by the Office for Civil Rights of the U.S. Department of Education.¹⁰³ It may be the most effective means of

98. *Id.* (citing 42 U.S.C. § 2000e-2(h) (1994) (noting that the affirmative defenses of the Equal Pay Act would suffice to show nondiscriminatory reasons for the pay differential)).

99. *Id.* at 4466 n.46 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993)).

100. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 86.1 (2000).

101. 465 U.S. 555, 574-75 (1984).

102. Janet Judge et al., *Pay Equity: A Legal and Practical Approach to the Compensation of College Coaches*, 6 SETON HALL J. SPORT L. 549, 557 (1996) (citing Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1994)).

103. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.1-3 (2000) (giving the Assistant Secretary for Civil Rights of the Department of Education the power to determine what remedial actions should be taken to overcome the effects of sex based discrimination).

litigating a pay discrimination case involving coaches of women's teams.

The Department of Education recognizes the compensation of coaches as a factor in determining whether athletic programs are in compliance with Title IX.¹⁰⁴ The Department's *Policy Interpretation*¹⁰⁵ states that a violation of the statute will be found if the compensation practices of the university result in differential pay for male and female athletes' coaches of equal quality, nature, or availability. The *Policy Interpretation* lists possible factors that may be determinative of this issue.¹⁰⁶ These factors may justify compensation disparities where valid differences in skill, effort, responsibility, and working conditions are present.¹⁰⁷ However, the *Policy Interpretation* also acknowledges that in special situations, an employee's stellar record may justify a high salary.¹⁰⁸

IV. PROSPECTS FOR GENDER EQUITY IN ATHLETICS

Over the past two decades, litigation for gender equity in the athletics workplace has had several successes, both large and small.

For some time, the courts wavered over whether Title VII provided the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded education institutions, thereby preempting similar claims brought under Title IX.¹⁰⁹ Differences in "administrative, procedural, and exhaustion requirements" and the fact that Title IX actions have no damages cap made this an important consideration.¹¹⁰ The United States Supreme Court settled the issue in *North Haven Board of Education v. Bell*,¹¹¹ ruling that the legislative history of Title IX supported a finding that employment discrimination falls within the scope of Title IX and is therefore compensable under that legislative scheme. Thus, the *Bell* decision gave plaintiffs a potent arrow to add to their quiver of gender equity claims.

104. 34 C.F.R. § 106.41(c)(6) (2000).

105. 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979) (codified at 45 C.F.R. § 86).

106. *Id.* Factors may include: (1) the range and nature of the duties, (2) the experience of individual coaches, (3) the number of participants for particular sports, (4) the number of assistant coaches supervised, and (5) the level of the competition. *Id.*

107. *Id.*

108. *Id.*

109. See Judge et al., *supra* note 102, at 559 (collecting illustrative cases).

110. *Id.*

111. 456 U.S. 512, 529-30 (1981).

Further, while college coaches have often been thwarted in their attempts to achieve gender equity, courts have been more willing to acknowledge sex discrimination in the employment of college professors, high school teachers, and high school coaches. For instance, in *Burkey v. Marshall County Board of Education*,¹¹² which involved a high school teacher, the court struck down a school board policy requiring that all female coaches be paid half the salary of male coaches regardless of the sport they coached. The school board was ordered to give equal pay to female coaches.¹¹³ The court also ordered the board to allow female coaches to supervise boys' teams.¹¹⁴ Courts have been much more reluctant to award remedies to intercollegiate coaches who challenge pay differentials.¹¹⁵ Instead, the prevailing view is that the wage differentials between intercollegiate sport coaches are just part of the cultural context.¹¹⁶

There have been other small successes for gender equity claimants. Recently, in *Stanley v. University of Southern California*,¹¹⁷ although the Ninth Circuit affirmed the district court's grant of summary judgment on all claims in favor of the university, the court decided to reverse an order requiring the claimant to pay litigation costs of \$48,000 because it would deter others from bringing sex discrimination suits. This refusal to award litigation costs was, in itself, a small battle won in the large war on gender discrimination.

A larger success resulted from the litigation in *Lowrey v. Texas A&M University System*,¹¹⁸ where a female coach was demoted as a means of retaliation against plaintiff's participation on a gender equity task force that identified violations of Titles VII and IX at Tartleton University, a school in the Texas A&M university system. The Fifth Circuit held that an individual could assert a private cause of action for retaliation under Title IX.¹¹⁹ However, the court spoke only to this narrow issue and remanded the rest of the decision to the district court.¹²⁰ The remanded case survived summary

112. 513 F. Supp. 1084, 1097 (N.D. W. Va. 1981).

113. *Id.* at 1096.

114. *Id.*

115. Judge et al., *supra* note 102, at 560-73 (examining *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994); *Brock v. Georgia S.W. Coll.*, 765 F.2d 1026 (11th Cir. 1985); *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910 (9th Cir. 1983); *Deli v. Univ. of Minn.*, 863 F. Supp. 958 (D. Minn. 1994)).

116. *Id.* at 573-75.

117. 178 F.3d 1069, 1080 (9th Cir. 1999).

118. 117 F.3d 242, 244-45 (5th Cir. 1997).

119. *Id.* at 254.

120. *Id.*

judgment on the Title VII and Title IX claims and will be one of the first cases to go to trial since the Guidelines were promulgated.¹²¹

V. RECOMMENDATIONS

The EPA and Title VII have not been effective in eliminating pay discrimination in athletics employment. Title IX has the potential to be broader reaching and therefore more effective, but courts have generally limited Title IX by importing restrictive standards from the EPA and Title VII. Despite the outcome of some of these cases, coaches have hope under the EEOC Guidelines. The Guidelines hold the most promise for plaintiffs as they specifically address many of the common defenses used in pay discrimination cases and increase the burden of the defendants in justifying pay disparities. For instance, a court using the Guidelines in *Stanley*¹²² might have required the university to prove that the comparator coach's additional experience was relevant to his actual coaching duties.

A female coach can take measures to enhance her chances of winning a pay discrimination claim. In delicate situations like pay disparity claims, the old adage, "knowledge is power," applies. The following recommendations include helpful tips for female coaches:

1. It is important to select the correct legislative scheme under which to bring suit. If a coach has a pay disparity claim and can provide an appropriate comparator, the Equal Pay Act might afford the greatest possibility of success. If pay disparity relates to bonuses or other compensation, Title VII might be a better choice.
2. Care should be taken to select appropriate comparators in an Equal Pay Act claim. Part-time coaches should be careful to choose part-time comparators. Similarly, the size of the team coached, the size of the coaching staff supervised, and the

121. *Lowrey v. Texas A&M Univ. Sys.*, 11 F. Supp. 2d 895, 909 (S.D. Tex. 1998) (denying the university's motion for summary judgment concerning Lowrey's claims of pay discrimination under Title VII and the Equal Pay Act).

122. See *supra* note 117 and accompanying text.

education and experience of the comparator sport should be similar.

3. Coaches should familiarize themselves with the policies and procedures of the university that could be used as valid affirmative defenses. Gender neutral policies related to seniority, merit, and quantity or quality of production would generally negate a pay discrimination claim.
4. Negotiation and discussion of pay differential concerns may bring about resolution without the need for legal action and the resulting embarrassment to the institution and loss of privacy for the claimant.

There are also measures that a university can take to prevent pay disparity problems in the first place. Female coaches and university counsel can be instrumental in suggesting possible measures to avoid pay disparity issues. Female coaches and administrators should be included in the development and implementation of the university's policies and procedures regarding pay. Janet Judge and her colleagues have established guidelines to help a university avoid pay equity claims:

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.
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 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.¹²³

Another way to prevent pay disparity problems for universities would be to make the duties and responsibilities of coaches explicit in their job descriptions and contracts.¹²⁴ "This approach can be achieved through the use of [a] comprehensive and detailed contract [T]his 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."¹²⁵ This type of contracting allows an administrator to better assess the similarities and differences of the work between and among the coaches under her direction,¹²⁶ and thus can ensure that pay disparities are based upon legitimate factors.

CONCLUSION

Current legislation has not provided an adequate solution for pay discrimination in intercollegiate athletics. Title IX and the recent EEOC Guidelines offer a broader opportunity to litigate gender inequity claims. However, matters such as discrimination against female athletics administrators and pay discrimination based on the sex of athletes are still not specifically addressed.¹²⁷

Pay discrimination claims are serious issues and pay disparity issues between male and female coaches are now in the spotlight. The government, the media, and the courts are taking note of the changing atmosphere at colleges and universities. It can no longer be taken for granted that male and female coaches should receive different compensation because of the revenue generated by their sport. The framework of Title IX implies that it should not be acceptable for women working in athletics to be treated differently from their male counterparts.

It would be in everyone's best interest if the different interest groups worked together to address this problem. If they do not,

123. Judge et al., *supra* 102, at 577-78.

124. *Id.* at 576-77.

125. *Id.* at 576.

126. *Id.* at 577.

127. *See supra* Parts I-III.

more lawsuits will likely appear on the horizon. But if the universities, athletics administrations, and coaches work together to erode gender-based pay disparity between coaches, then perhaps true equality between male and female coaches will not simply be a theoretical concept.

