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A NEW DEFENSE TO THE OLD DEFENSES? THE EEOC EQUAL PAY ACT GUIDELINES

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I. INTRODUCTION

The Athletic Department has become of increasing concern to colleges and universities because of the conflicts that have arisen between the economic and holistic value of athletic programs to educational institutions and the ever encroaching federal and state regulations concerning gender equity. The initial disputes that arose in this context concerned the equal access to athletics by both male and female athletes. These disputes have been repeatedly resolved in favor of female athletes being afforded the same opportunities as male athletes.

During the pendency of these athlete anti-discrimination cases, the courts also wrestled with lawsuits instituted by female coaches alleging that they were being paid less than their male counterparts in violation of the federal Equal Pay Act (EPA), Title VII, and Title IX. Most of these challenges were rebuffed by the courts on the ground that the work being performed by the respective sexes was not equal—often citing private market factors directly influencing the respective rates of compensation, and thus, justifying the higher rate of pay to male coaches.

On October 29, 1997, the Equal Employment Opportunity Commission (EEOC), the federal administrative body charged with the enforcement and regulation of the federal anti-discrimination laws, released a new set of guidelines for use by its field offices directly addressing the pay equity issue among college and university coaches. These Guidelines will affect the existing gender-equity legal terrain and raise considerable practical implications for colleges and universities.

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II. THE LEGAL FRAMEWORK

The federal anti-discrimination statutes applicable to the employment of coaches are: (1) the federal Equal Pay Act,[1] enacted in 1963 as an amendment to the Fair Labor Standards Act; (2) Title IX of the federal Education Amendments of 1972;[2] and (3) Title VII of the federal Civil Rights Act of 1964.[3]

A. Equal Pay Act

The Equal Pay Act requires an employer to provide "equal pay for equal work."[4] Specifically, the Act mandates that "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."[5]

For an employee to establish a claim for relief under the Act, the employee must show that an employer pays a lower wage to a male/female counterpart for equal work on a job that requires equal skill, effort and responsibility, and the job is performed under similar working conditions.[6] Significantly, an Act claimant need not establish that the female coach's job and the male coach's job are identical; the Act merely requires a showing that the jobs are "substantially equal."[7]

The burden then shifts to the defendant institution to justify, by a preponderance of the credible evidence, the wage difference through one of the defenses enumerated in the Act. The path usually taken by a defendant institution in rebutting the plaintiff's *prima facie* showing is to justify the wage disparity through the "factor-other-than-sex" defense. Of the enumerated defenses to the "equal pay, equal work" notion of the Act, the one most heavily litigated is the "factor-other-than-sex" defense.[8] A substantial portion of the recently released Guidelines is devoted to this defense.

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1. Equal Pay Act 29 U.S.C. § 206(d) (1995).
2. Education Amendments of 1972 20 U.S.C. § 1681 (1995).
3. Civil Rights Act of 1964 42 U.S.C § 2000(e), *et seq.* (1995).
4. 29 U.S.C. § 206(d) (1995).
5. Janet Judge et al., *Pay Equity: A Legal and Practical Approach to the Compensation of College Coaches*, 6 SETON HALL J. SPORT L. 549, 552 (1996).
6. *See* Houck v. Virginia Polytechnic Inst. and State Univ., 10 F.3d 204 (4th Cir. 1993).
7. *See* Stanley v. University of S. Cal., 13 F.3d 1313, 1321 (9th Cir. 1994) (quoting Hein v. Oregon College of Educ., 718 F.2d 910 (9th Cir. 1983)).
8. *See* Judge, *supra* note 5, at 552.

B. *Title IX*

By contrast, Title IX of the Educational Amendments of 1972, prohibits gender discrimination by any program or activity receiving federal financial assistance.[9] The terms "program" and "activity" include "all of the operations of . . . a college [or] university. . . ."[10]

The regulations interpreting Title IX essentially mimic the language of the Equal Pay Act, such that employers must provide equal pay for equal work.[11] And although the showing required to state a Title IX claim is very much unresolved, a preliminary review of the case law and commentary seems to suggest that the Title VII framework will be applicable in a Title IX pay equity case.

C. *Title VII*

Title VII of the Civil Rights Act of 1964, prohibits discriminatory employment practices, not limited to rates of pay, based on the race, color, religion, *sex* or national origin of the employee or applicant.[12]

Title VII differs most notably from the Equal Pay Act in that Title VII is much broader, sweeping within its purview all aspects of the employment relationship, and not limited to wages as is the EPA. The proofs under both acts for pay equity issues are similar, with all of the defenses to a pay equity case available under the EPA similarly available under Title VII.

For a coach to state a pay equity claim under Title VII, the aggrieved coach must establish that: (1) the coach is a member of a protected class; (2) the coach was qualified for and occupied a particular position; (3) despite the coach's qualifications, he/she was treated less favorably than a male/female counterpart; and (4) the circumstances gave rise to an inference of discrimination.[13] Upon such a showing, the burden shifts to the defendant institution to proffer a legitimate nondiscriminatory reason for the disparate treatment.[14] The burden then shifts back to the aggrieved coach to establish that the institution's articulated reason was merely a pretext for discrimination.

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9. 20 U.S.C. § 1681 (1995).
10. 20 U.S.C. § 1687 (1995).
11. 34 C.F.R. § 106.51, *et seq.* (1995).
12. 42 U.S.C. §2000(e), *et seq.* (1991).
13. *See id.*
14. *See id.*

Title VII provides a claimant with two avenues for attacking pay inequity among male and female coaches.[15] A Title VII claimant may establish sex-based discrimination in compensation through either a disparate treatment or disparate impact theory.[16] The essential difference between the two theories is that under the latter it need not be shown that there was discriminatory intent by the institution in compensating male and female coaches at disparate levels. A showing that a facially neutral employment practice has a significantly disparate impact on the protected class, *e.g.*, female coaches, will suffice.[17]

Although the *prima facie* showing required in a general Title VII claim is well-settled, the elements of a *prima facie* pay equity case under Title VII remain unresolved.[18] Generally, however, the authorities seem to support the position that if a particular coach's claim is limited to an equal pay violation, a court will analyze it under the EPA standard. Anything beyond an equal pay claim will be analyzed under the traditional Title VII rubric.[19]

The practical effect of proceeding under Title VII is that it is much broader than the EPA, with unlike coaching positions being proper comparators.[20] In addition to the $300,000 compensatory damages cap, a Title VII claimant may be entitled to punitive damages and counsel fees.[21]

E. Representative Cases

The analytical framework utilized by the courts in addressing pay equity claims, at least prior to the promulgation of the recent EEOC Guidelines, is encapsulated in a few notable cases.[22]

These cases, like most pay equity cases, began with a female coach being paid less than a male coach at the same institution. The female coach brings a claim, pursuant to the above-mentioned statutes, alleging equal work for unequal pay. The defendant institution generally rebuts the female coach's *prima facie* showing by offering evidence that the jobs

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15. *See generally* Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987).

16. *See id.*

17. *See* Connecticut v. Teal, 457 U.S. 440 (1982).

18. *See* Sharon R. Vinick, *Wage Discrimination Claims Brought Under Title VII: Must a Plaintiff Meet the Standards of the Equal Pay Act?*, 47 THE EMPLOYEE ADVOCATE 100 (Spring, 1997 Supp.).

19. *See id.*

20. 29 U.S.C. 206(d).

21. *See* Judge, *supra* note 5, at 554.

22. *See* Stanley, 13 F.3d 1313; Harker v. Utica College of Syracuse Univ., 885 F.Supp. 378 (N.D.N.Y. 1995); Bartges v. University of N.C. at Charlotte, 908 F.Supp. 1312 (W.D.N.C. 1995).

are not equal or "substantially similar" because the male position is more profitable for the institution or entails more responsibility, including increased media pressure, more public appearances, greater level of competition, increased public relations and promotional activities, and greater revenue gains for the institution from the male coach's position. Thus, defendant institutions have been able to defeat pay equity claims by offering market force evidence to justify salary disparities.[23]

The analytical framework in pay equity cases permits a defendant institution to introduce market force evidence as a defense, historically pointing to market-related factors and arguing that a particular sport deserves greater funding and a higher paid coach because of its revenue producing ability, or that there is greater community interest in the higher funded sport. The important inquiry now becomes whether this framework, and more importantly the heretofore available defenses, will remain available following the promulgation of the Guidelines. It becomes evident that this framework is now suspect.

F. State Law Considerations

Coaches asserting a pay equity claim generally proceed under these federal statutes. However, institutions must be aware that a pay equity claimant may also proceed with state law claims which may offer greater protection than the federal statutes. The import of state law, in the pay equity context, is significant when one examines the remedies available. By way of example, under New Jersey's Law Against Discrimination (LAD),[24] a prevailing pay equity claimant will be entitled to compensatory damages, and may be entitled to punitive damages and attorney's fees. Notably, the LAD does not contain a damages cap provision.[25]

III. EEOC COACHING PAY GUIDELINES

On October 29, 1997, the EEOC approved and issued Notice No. 915.002, entitled "Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions," in an effort to set forth the EEOC's position with regard to pay equity cases brought by collegiate coaches pursuant to Title VII and the EPA.[26]

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23. *See* Stanley, 13 F.3d 1313; Harker, 885 F.Supp. 378; Bartges, 908 F.Supp. 1312.

24. N.J. STAT. ANN. 10:5-1 to -49 (West 1995).

25. *See id.*

26. *See* Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions, EEOC Notice No. 915.002, Empl. Prac. Guide (CCH) ¶ 5527 (Oct. 10, 1997).

The Guidelines alter the pay equity legal terrain in two material respects, placing greater burdens on defendant educational institutions in justifying pay disparities among opposite sex coaches.[27]

As explained above, there exists a difficulty in comparing, for EPA purposes, very unlike sports, *e.g.*, men's basketball and women's crew. Early in the Guidelines, the EEOC points out that "it is possible for jobs coaching different sports to be 'substantially equal' for purposes of the Equal Pay Act and for coaches of different sports to be appropriate comparators under Title VII."[28] Thus, the first material alteration, or more appropriately according to the EEOC, "clarification," is that different sports may be the proper focus of comparison in pay equity cases.[29]

The second material change is where previously defendant institutions could successfully raise the defense that coaching jobs are not "substantially equal" by pointing to varying terms and conditions of employment and market-related conditions. This defense is no longer available unless the institution can establish that the pay disparity is not based on societal or market discrimination.

The entire policy and premise of the Guidelines can be summed up in one phrase: "equality of opportunity." Consistent with this notion, the EEOC has instituted several changes to the legal framework to be utilized by the EEOC, and in its optimistic opinion, by the courts.[30] Where, prior to the promulgation of the Guidelines, a defendant institution was able to defend a pay equity case by establishing that jobs were not "significantly similar" through evidence of market-related forces, the inquiry can no longer end with that showing. A defendant institution must now establish, in addition to the market-related forces, that the market-related forces themselves are not premised on discriminatory underpinnings.[31] This requirement will place a substantial burden on defendant institutions in these cases. Notably, a defendant institution must now establish not only that it is not basing its rate of pay on discriminatory motives, but must also establish that the market itself has not been influenced by vestiges of societal discrimination.[32]

To this end, the Guidelines alter the EPA analysis in several respects. First, in considering whether jobs are "substantially similar," the focus must remain on the overall job, and the attendant skills, effort and re-

27. *See id.*
28. *Id.*
29. *See id.*
30. *See id.*
31. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
32. *See id.*

sponsibilities necessary to perform the job.[33] The equal skills analysis must focus only on those skills necessary to performance of coaching-related duties. According to the EEOC, "additional training or education or abilities that are not required to perform the job will not be considered in determining whether jobs are substantially equal."[34] The example provided by the EEOC is where a male men's tennis coach has the ability to perform on a radio show, whereas the female women's tennis coach does not. According to the EEOC, "[t]he fact that the man has the ability to perform on a radio show does not demonstrate that the skills required of the two coaches are not substantially equal, because the man is not required to use his radio announcer's skills to perform as a tennis coach."[35] The additional skill sought to be compensated must be logically connected to the normal skills attendant to coaching at the collegiate level.

The EEOC has concluded that there are definite and identifiable general skills required for coaching at the collegiate level, regardless of the sport.[36] Through this reasoning, the EEOC may now compare unlike sports for EPA and Title VII purposes.

Consistent with the "equality of opportunity" notion, the EEOC has concluded that, regardless of the levels of responsibility of the respective coaches, each coach, regardless of gender, must be afforded the same or substantially similar opportunities to assume the same level of responsibility.[37] Once this equal opportunity has been provided, a difference in rates of compensation may be justified. The example provided by the EEOC involves a male men's football coach and a female women's volleyball coach.[38] The football coach has nine assistants and a roster of 120 athletes. The volleyball coach has a part-time assistant and 20 athletes. The football team draws an average attendance of sixty thousand spectators, while the volleyball team draws two hundred spectators. Only the football games are televised. According to the EEOC, the level of responsibility attendant to the football coach's job, with greater supervisory responsibility and media demands, renders the jobs substantially unequal and thus, justifies a pay disparity.[39]

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33. *See id.*
34. *Id.*
35. *Id.*
36. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
37. *See id.*
38. *See id.*, example at ¶4460.
39. *See id.*

Two caveats to the foregoing analysis deserve mention. The first is that the institution cannot, by its own action, create the disparate levels of responsibility and then assert as a defense to a pay equity claim that the lesser degree of responsibility justifies a pay differential.[40] The second is that for the purposes of establishing that the female coach received wages unequal to those of her male counterpart, the EPA includes in its definition of wages, "all forms of compensation," including non-monetary benefits such as "cars, country club memberships, memberships in professional organizations, paid trips to meetings, and low interest loans and mortgages. . . ."[41] The import of this finding is that, although a general compensation scheme may be established whereby all coaches receive a base salary, for example $50,000.00, with certain benefits provided to various coaches at varying levels, including a talk show or endorsements, a violation of the EPA will occur unless the opportunity for each such benefit is offered nondiscriminatorily.

The Guidelines also discuss the traditional defenses used by educational institutions in defending pay equity cases and their continuing viability, or lack thereof.[42] As explained above, the fourth affirmative defense under the EPA, the "factor other than sex" defense, is the focus of the Guidelines. The Guidelines point out that "an employer who uses this defense must show that the factor of sex is not an element underlying the wage differential either expressly or by implication."[43]

The "factor other than sex" defenses discussed by the Guidelines include: (1) the "revenue" defense, which enables an institution to justify a pay disparity by arguing that the male coach generates more revenue than the female coach; (2) the "marketplace" defense, whereby an institution justifies pay disparities by arguing that it must pay a particular coach more in order to compete in the marketplace for this coach; (3) the "prior salary" defense, whereby institutions place reliance on prior salary in determining the appropriate current salary level; (4) the "sex-of-athletes" defense, which involves an institution's tying of levels of compensation to the sex of the athletes being coached; (5) the "prior experience" defense, which enables a school to justify pay disparities based on the particular coach's prior experience, education and ability; and (6) the "additional duties" defense, which allows a pay disparity to

40. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
41. 29 U.S.C. § 206.
42. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
43. *Id.*

exist where one coach is paid more for performing additional job-related duties.[44]

A. Revenue Defense

The theme running through the EEOC's analysis of these defenses is that the defenses will be more carefully scrutinized to ensure the "equality of opportunity" ideal. For example, the revenue defense is no longer viable unless the school can establish that the female coach was provided the same opportunities as the male coach to become a revenue producer.[45] In addition to this showing, a school must now rebut the EEOC's guiding premises that "women's athletic programs historically and currently receive considerable less resources than men's programs,"[46] and that societal preferences or discriminatory notions concerning women may not in any way serve as a basis for pay disparities.[47]

It appears that the Guidelines have added a new dimension to the analytical framework under the EPA. Not only must an institution establish the revenue defense, but it must also establish that the underpinnings of the revenue defense are unrelated to societal discrimination.[48] This is indeed a heavy burden. Thus, it is important to recognize that if an institution uses the revenue defense, it must be prepared to make a showing that the revenue discrepancy in no way relates to: (1) institutional discrimination in opportunity, or (2) societal discrimination.[49]

One important caveat to this mandate is that the Guidelines state they will be following the Title IX standard, whereby equality of opportunity is to be measured across the spectrum of men and women coaches as a whole and not restricted to comparing individual disparately treated coaches.[50] Thus, an institution may prevail on a pay equity claim where it can establish that opportunities were made available to men and women coaches alike, regardless of individual disparities amongst coaches.

B. Market Place Defense

A further example of the "equality of opportunity" ideal is manifested in the EEOC's analysis of the "marketplace defense." The Guidelines draw an initial distinction between what they term the

44. *See id.* at 4461.
45. *See id.* at 4461(a).
46. *Id.*
47. *See id.*
48. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
49. *See id.*
50. *See id.*

"marketplace defense" and the "market rate defense," with the latter explicitly unavailable to a defendant institution because it is not gender neutral.[51] The market rate defense is grounded in notions of supply and demand and essentially argues that women are available at a lower rate of compensation than similarly qualified men.[52] The Guidelines make clear that such discriminatory market forces cannot form the basis for a defense to a pay equity claim because acceptance of such a theory permits societal discrimination to invade the nondiscriminatory atmosphere required in an educational institution.[53]

By contrast, the marketplace defense is gender neutral, and considers the marketplace value of the coach's job-related characteristics, thus rendering any pay discrepancy nondiscriminatory.[54] Thus, institutions cannot use societal discrimination as a factor in levels of compensation and cannot use such discrimination as a defense in a pay equity case.[55] This concept merely serves to reinforce the underlying policy that rates of compensation must be directly tied to job specific skills.[56]

Educational institutions should not fear, however, with regard to recruiting highly qualified coaches. The Guidelines make clear that if a particular coach is paid in excess of that coach's opposite sex counterpart based on proven ability, and such ability is fetching a greater salary in the marketplace, this coach can be disparately compensated because the marketplace has determined, based on nondiscriminatory factors, that this coach's "unique experience and ability make him [or her] the best person for the job and because a higher salary is necessary to hire him [or her]."[57] According to the Guidelines, under these circumstances the marketplace has determined, based on nondiscriminatory factors, and incidentally, factors directly related to the job requirement, that a coach deserves a higher rate of pay.[58] Of course, this may be a fiction because an educational institution cannot realistically undertake a market analysis to determine what factors were relied upon by the market in arriving at a coach's rate of compensation.[59] The one difficulty for institutions, created by this consideration, is that institutions will need to consider

51. *See id.*
52. *See id.*
53. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
54. *See id.*
55. *See id.*
56. *Id.*
57. *See id.*
58. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527.
59. *See id.*

whether the factors that have created the market price have nondiscriminatory underpinnings.[60] It leaves one to wonder whether the EEOC has the ability to determine, with any degree of specificity, the factors employed by the market in setting the price being demanded by the commodity, in this case a collegiate coach.

C. Prior Salary Defense

In a related issue, the Guidelines analyze whether prior salary may serve as a gender neutral factor in explaining salary differentials.[61] The Guidelines recognize that institutions have utilized this argument as a defense against pay equity claims in the past, but comment that its viability is now suspect.[62] According to the Guidelines, "using prior salary alone may perpetuate lower salaries traditionally paid to women that are based on sex discrimination."[63] In other words, reliance cannot be placed on prior salary in determining the appropriate level of current salary because the prior salary may have been a product of historical discrimination against female coaches. The effect, according to the EEOC, is that the salaries of male coaches may have become artificially inflated as a result of disciminatory cultural and social factors.[64] Essentially, the EEOC has undertaken the task of attempting to withdraw discriminatory market factors from the consideration of coaches' salaries.

The effect of this determination is that a substantial burden will be placed on institutions using prior salary as a factor to, at a minimum, conduct a thorough investigation of the considerations in determining a particular coach's salary.[65] This investigation, according to the Guidelines, must include: (1) consultation with the prior employer to determine the basis for the coach's starting and ending salary; (2) a determination that the salary paid by the prior employer was an accurate indication of the coach's ability, based on factors relevant to the position for which the coach is being hired; (3) arriving at an appropriate salary level where prior salary is but one factor, and in no way determinative of the current salary; and (4) if there is bargaining over salary levels, such opportunity to bargain must be provided to all coaches, male or female.[66] The Guidelines do not make clear or otherwise offer suggestions

60. *See id.*
61. *See id.* at 4463(a).
62. *See id.*
63. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527 at 4463(a).
64. *See id.*
65. *See id.*
66. *See id.* at 4464.

on how this information will be obtained. This raises a problem for institutions because prior employers are under no obligation to produce such information.

The important theme to extract from the Guidelines with regard to the revenue defense, the marketplace defense, and the prior salary defense is that the EEOC will not permit an educational institution to perpetuate societal discrimination against female coaches or allow such discrimination to form the basis for justifying salary differentials.[67]

D. Sex-of-athletes Coached Defense

The next defense the Guidelines address involves an institution's tying of levels of compensation to the sex of the athletes being coached, with coaches of male athletes historically receiving greater compensation. In this regard, the Guidelines make clear that the sex of the athletes being coached is an inappropriate factor to consider in determining salary because such consideration is not gender-neutral.[68]

E. Additional Defenses

The remaining defenses considered by the Guidelines include: (1) pay disparities based on prior experience, education and ability; and (2) additional duties as justification for pay disparities.[69] In regard to the "prior experience" defense, the Guidelines remain consistent with its gender-neutral focus and find that the prior experience defense remains viable, provided the factors relied upon are not gender-based.[70] If prior experience is to be used to justify a pay disparity, the prior experience relied upon must be in a job that developed a skill directly related to coaching.[71]

The example provided by the Guidelines involves a male coach that sold insurance for five years prior to accepting a coaching position.[72] Although the male coach may have developed certain general skills in the insurance business, those skills are not directly related to the job of coaching, and cannot legitimately form the basis for paying the male coach more than a similarly situated female coach who lacks the prior insurance experience.[73] However, a male coach with ten years coaching

67. *See id.*
68. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527 at 4464(c).
69. *See id.* at 4465(e).
70. *See id.*
71. *See id.*
72. *See id.*
73. EEOC Notice 915.002, Empl. Prac. Guide (CCH)¶5527 at 4465(e).

experience and a female coach with two years of coaching experience will justify paying the male coach more.

The "additional duties" defense remains viable provided the extra compensation is directly related to the extra duties.[74] Again, consistent with the "equality of opportunity" theme, the additional duties defense is unavailable where a female coach is not provided the opportunity to assume additional duties, or where the additional duties are made available in a discriminatory fashion.[75] By way of clarification, the Guidelines cite to EEOC Regulations that provide additional duties may not justify unequal pay where: (1) the additional work is not actually performed by the male coach; (2) the female coach performs additional duties that require equal skill, effort and responsibility; (3) the extra duties require only minimal effort or are of peripheral importance; or (4) third persons actually perform the additional duties and are paid less than the male coach.[76] The Guidelines provide that additional duties cannot be created for the male coach such that the duties are illusory.[77]

IV. Legal Effect of Administrative Prounouncements

The Guidelines, and the questions they raise, cannot be effectively considered without an understanding of how courts treat a federal agency's guidelines. Historically, courts have given considerable deference to a federal agency's interpretation of the statute it is charged with enforcing, provided that interpretation is reasonable and consistent with the statute's purpose.

In a recent Title IX case, the appellate court specifically addressed the force and effect of a Title IX Policy Interpretation issued by the EEOC when it reviewed the district court's determinative reliance on the Policy Interpretation.[78] The District Court reasoned that while a policy interpretation does not have the effect of law, it is entitled to substantial deference, particularly where, as in that case, the Policy Interpretation is a "considered" document.[79] The Policy Interpretation in *Cohen* was a considered document in that it was published for public comment, received more than 700 comments, was published after agency

74. *See id.*
75. *See id.*
76. 39 C.F.R. §1620.20 (1995).
77. *See id.*
78. *See* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1469 (1997).
79. *See* Cohen v. Brown Univ., 879 F.Supp. 185, 198 (D.R.I. 1995).

investigation of universities, and provided a period of time during which Congress could disapprove of the Interpretation.[80]

Cohen recognized that a policy interpretation is not a rule, regulation or order, but a guideline designed to interpret an agency's own regulations and statute it is designed to enforce. It thus follows that where an agency is specifically charged with enforcing and interpreting a particular statute, a policy interpretation is entitled to substantial deference where such interpretation does not conflict with, or derogate, the statute or regulation it is interpreting.[81] In reviewing the substantial deference, the district court in *Cohen* afforded the Policy Interpretation, the appellate court agreed that such interpretations are entitled to substantial deference, even controlling weight under an appropriate circumstance.[82]

In a footnote, the District Court found that it was not addressing the degree of deference to be afforded to an Investigator's Manual.[83] This is significant because the Guidelines lie somewhere between an Investigator's Manual and a "considered" Policy Interpretation. Thus, we are left to determine whether the Guidelines will be afforded controlling weight, or at a minimum, substantial deference. This is determined by considering whether the Guidelines run afoul of the EPA or Title VII, necessitating a consideration of the policies and purposes of these statutes.

The purpose and policy of Title VII is well-established: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . [protected] employees over other employees."[84]

More simply stated: "The purpose of Title VII is not simply to eliminate the appearance of gender inequality, but also to eradicate discriminatory treatment based on gender."[85]

The purpose and policy of the EPA is likewise well-established:

> The . . . purpose [of the Equal Pay Act is] [t]he elimination of those subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work.
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> . . .

80. *See id.* at 198.
81. *See id.*
82. *See* Cohen, 101 F.3d at 173.
83. *See* Cohen, 879 F.Supp. 185, 197 n.27.
84. Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971).
85. E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891, 900 (9th Cir. 1994).

> [The Act] was not laid down simply out of concern about the injustice of discrimination, important as that was. It was also laid down out of concern about the economic and social consequences of disparate wages paid to a major portion of the nation's labor force.[86]

Like the above-mentioned statutes, the purpose of the Guidelines is clear on their face. The Guidelines are an effort to interpret Title VII and the EPA, and the promulgated regulations, to provide "equality of opportunity" to both male and female coaches. The Guidelines make clear that the EEOC is seeking to remedy the historical disparity in compensation between male and female coaches. To this end, the Guidelines are consistent with the purpose and policy of Title VII and the EPA and, therefore, at a minimum will be persuasive authority for courts hearing pay equity cases, and may, in appropriate cases, be afforded substantial deference by the courts. A court will seek guidance from the guidelines, however, only to the extent it believes they are consistent with the purpose and policy of the statute they are interpreting.

V. CONCLUSION

The Guidelines are nothing short of aggressive in their pedagogy. Although they purport as their purpose to provide equality of opportunity amongst those in the coaching ranks, regardless of gender, the Guidelines in fact seek to eradicate past societal discrimination against women that may or may not have resulted in lesser interest in female athletics and concomitant lower salaries to female coaches.

Nevertheless, the true effect of the Guidelines cannot be determined without further examination into relevant countervailing considerations, including the historical judicial deference afforded the decision-making process of educational institutions.

86. Schultz v. First Victoria Nat'l Bank, 420 F.2d 648, 656-657 (5th Cir. 1969).