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COMMENT

PAY EQUITY FOR INTERCOLLEGIATE COACHES: EXPLORING THE EEOC ENFORCEMENT GUIDELINES

I. INTRODUCTION

Since Marianne Stanley’s 1993 lawsuit against the University of Southern California for equal pay, there has been a tremendous increase in the attention that both the courts and educational institutions are giving to the issue of gender-based wage discrimination.1 Studies have shown that there are substantial differences in the salaries paid to coaches of men’s and women’s teams in educational institutions. According to the 1997 National Collegiate Athletic Association’s (NCAA) Gender Equity Study, women earn 40% of the money spent on coaching in high schools and universities.2 At Division I institutions, during the 1996-1997 academic year the highest salary paid to a women’s head basketball coach was $344,000 compared to $900,000 for a men’s basketball coach.3 The median salary for a women’s head basketball coach was $98,400, compared to $290,000 for a men’s head basketball coach.4 Another study found that the average salary for coaches of Division I women’s teams in 2000 was $38,191, while the coaches of men’s teams earned, on average, $61,534.5 Even where women’s coaches receive an equal base salary,6 coaches of

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1. See Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994), cert. denied, 528 U.S. 1022 (1999) [hereinafter Stanley I].

2. Andrea M. Giampetro-Meyer, Recognizing and Remedying Individual and Institutional Gender-Based Wage Discrimination in Sport, 37 AM. BUS. L.J. 343, 356 (2000). The following is a list of average salaries for the coaches of men’s and women’s teams as reported to the NCAA in 1997 (as listed by sport/men’s team coach’s salary/women’s team coach’s salary): Basketball/$99,283/$60,603; Baseball/Softball/ $41,879/$29,027; Gymnastics/$35,675/$38,593; Ice Hockey/$64,214/$24,478; Lacrosse/$35,745/ $26,871; Rowing/$30,838/$22,623; Soccer/$32,275/$27,791; Swimming/$28,121/$26,711; Track/ $27,271/$25,249. Id. at 355 n.67.


4. Id.

5. Jennifer Jacobson, Female Coaches Lag in Pay and Opportunities to Oversee Men’s Teams, CHRON. HIGHER EDUC., June 8, 2001, at A38.

6. Betty Jaynes, CEO of the Women’s Basketball Coaches Association (WBCA), estimates that base salaries are equal in less than 10% of Division I institutions. Vicki Michaelis, Women Coaches
men's teams often receive greater benefits. "A U.S. General Accounting Office (GAO) survey, for example, found that head coaches for women's basketball earned 25% of the average additional benefits earned by head coaches for men's basketball, including such benefits as housing assistance, free transportation, free tickets to sporting events, and club memberships." As a result of these pay disparities there has been an increase in lawsuits by female intercollegiate coaches alleging gender-based wage discrimination claims.

The purpose of this comment is to examine the legal issues involved in intercollegiate coaches’ pay equity claims and explore how the Equal Employment Opportunity Commission (EEOC) Guidelines may benefit female coaches bringing gender-based wage discrimination claims. These Guidelines clarify how the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 apply to gender-based differences in the coaches’ salaries by setting forth a detailed legal analysis of how the EEOC interprets EPA and Title VII claims and by providing factual illustrations of unequal pay scenarios that may or may not violate these statutes. Part II of this comment will outline the federal statutes under which pay equity claims may be asserted. Part III will summarize key gender-based wage discrimination cases brought by intercollegiate female coaches. Part IV will examine the EEOC Guidelines, the impact that they may have on coaches pay equity claims, and the implications that they raise for educational institutions. Finally, Part V sets forth recommendations to help strengthen a coach’s pay equity claim.

II. THE LEGAL FRAMEWORK

There are three federal statutes under which a claim of gender-based wage discrimination can be brought: (1) the Equal Pay Act of 1963, (2) Title VII of the Civil Rights Act of 1964, and (3) Title IX of the Education Amendments of 1972.

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8. Id.
A. The Equal Pay Act

The EPA prohibits employers from paying employees at a wage less than employees of the opposite sex at the same place of employment "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ."12 The plaintiff does not have to prove that the jobs are identical, but rather "substantially equal."13

The first step in establishing a prima facie case is for the plaintiff to identify a specific comparator.14 The comparator must be an identifiable person of the opposite sex who earned a higher salary for performing a substantially equal job.15 The plaintiff must compare himself or herself to this person and show that the comparator earned a higher wage for a substantially equal job.16 To determine if a job is substantially equal, four elements are considered: equal skills, equal effort, equal responsibility, and equal working conditions.17

First, in order to determine equal skills, factors such as "‘experience, training, education, and ability’” are considered.18 These skills are to be measured based on the “performance requirements of the job.”19 Any training, education or abilities “that are not required to perform the job will not be considered in determining whether the jobs are substantially equal.”20 To determine equal effort, one looks at the actual job requirements to determine if the coaching jobs require equal effort.21 When assessing equal responsibility, the actual duties of the coaches are examined to determine if differences in responsibility warrant unequal pay.22 Relevant factors include "the size of the team, the number of assistants, and the demands of event and media management."23 Finally, the EPA assumes that coaches have similar working conditions when the jobs performed require equal skill, effort and

13. EEOC Guidelines, supra note 7, at II (citing 29 C.F.R. § 1620.13(a) (2002)).
14. Id. at II.A.1.
15. Id.
16. Id. at II.A.2.
17. Id. at II.A.2.a-d.
18. Id. at II.A.2.a (quoting 29 C.F.R. § 1620.15(a) (2002)).
19. Id.
20. Id.
21. Id. at II.A.2.b.
22. Id. at II.A.2.c.
23. Id.
Once the plaintiff identifies a comparator, shows the jobs are substantially equal, and proves that he or she is paid less, he or she has established a prima facie case of discrimination and the burden shifts to the employer to prove one of the Act’s four exceptions apply. Under the EPA, disparity in pay is acceptable 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.” Educational institutions often successfully defend unequal pay claims brought under the EPA by asserting that the pay differential is based on a “factor other than sex.” If the defendant cannot prove that the pay disparity falls within one of the EPA’s four affirmative defenses, it is liable.

A plaintiff’s remedy under the EPA is two years back pay and “an additional amount equal to back pay as liquidated damages in cases in which the employer failed to show good faith.”

B. Title VII

A claim of unequal pay for equal work can be brought under Title VII of the Civil Rights Act of 1964 in addition to the EPA. Title VII prohibits an employer from discriminating against employees in a protected class, including sex, in the terms and conditions of employment. Title VII is broader than the EPA because it protects all aspects of employment, not just wage discrimination. In addition, Title VII does not require the jobs to be substantially equal.

While the requirements for a general Title VII claim are clear, the elements of a prima facie pay equity claim under Title VII are unsettled. Generally, if the only discrimination asserted under Title VII is an equal pay

24. Id. at II.A.2.d.
26. Id.
28. Id.
29. Id. at 359-60.
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violation, the court will analyze it using the EPA framework. For Title VII unequal pay claims, the plaintiff's burden of proof is the same as under the EPA, and all the defenses available under the EPA apply as well. However, if sex discrimination beyond unequal pay is alleged, the traditional Title VII framework is applied to analyze the claim.

To establish a prima facie case under Title VII, the plaintiff must show that: "(1) [she] is a member of a protected class; (2) [she] was qualified for and occupied a particular position; (3) despite [her] qualifications, [she] was treated less favorably than [her male] counterpart; and (4) the circumstances [of the treatment] gave rise to an inference of [unlawful] discrimination." The burden then shifts to the defendant to show a nondiscriminatory reason for the differential treatment. Finally, the burden shifts back to the plaintiff to show that discrimination was actually the basis for the reason stated by the employer.

A plaintiff may wish to bring a Title VII claim rather than an EPA claim because the jobs do not need to be substantially equal and the plaintiff may recover up to $300,000 in compensatory damages, plus punitive damages and attorney's fees.

C. Title IX

Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in any program or activity that receives federal financial assistance. The operation of educational institutions is included in the terms "program" and "activity." Title IX regulations specifically address compensation. The relevant regulations 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

34. Id.
35. EEOC Guidelines, supra note 7, at II.B.1.
37. Id. at 177.
38. Id.
39. Id.
40. Id. at 178.
42. Id. § 1687 (2000).
43. 34 C.F.R. § 106.54 (2002).
working conditions.\footnote{44}

It appears that the EPA framework for analyzing wage discrimination claims is incorporated by Title IX.\footnote{45}

When assessing whether an athletic program is in compliance with Title IX, the compensation of coaches is a relevant factor.\footnote{46} There is a violation of this section only where one can show that the coach’s compensation “denies male and female athletes coaching of an equivalent quality, nature or availability.”\footnote{47}

While the statute does not expressly provide for a private suit for damages, the Supreme Court has held that Title IX implies a private right of action.\footnote{48} However, the courts disagree as to whether Title IX is applicable to cases of employment discrimination. In \textit{Lakoski v. James},\footnote{49} the Fifth Circuit held that “Title VII ‘provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions,’ thereby preempting claims brought pursuant to Title IX.”\footnote{50} Other courts disagree, allowing Title IX claims and holding that the Title VII framework should be applied to Title IX claims.\footnote{51}

When bringing a Title IX unequal pay claim, coaches must assert that the difference in compensation is due to the sex of the team coached rather than the sex of the coach.\footnote{52} Under this theory, either a male or female coaching a women’s team could bring a claim, alleging that the pay disparity was discrimination based on coaching a women’s team. However, if a coach is claiming that his or her unequal salary is discrimination based upon gender, the claim should be brought under either the EPA or Title VII. While a brief overview of Title IX has been provided, the focus of this comment is on gender-based wage discrimination claims brought under either the EPA or Title VII.

\footnote{44. Janet Judge et al., \textit{Pay Equity: A Legal and Practical Approach to the Compensation of College Coaches}, 6 SETON HALL J. SPORTS L. 549, 557 (1996) (quoting 34 C.F.R. § 106.54(b)).}
\footnote{45. \textit{Id.}}
\footnote{46. 34 C.F.R. § 106.41(c)(6) (2002).}
\footnote{47. Judge, \textit{supra} note 44, at 558 (emphasis omitted).}
\footnote{48. \textit{Id.} at 559 & n.59 (citing Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992)).}
\footnote{49. 66 F.3d 751 (5th Cir. 1995), \textit{cert. denied}, 519 U.S. 947 (1996).}
\footnote{50. Judge, \textit{supra} note 44, at 559 (quoting Lakoski, 66 F.3d at 753).}
\footnote{51. \textit{Id.}; see also Terry W. Dodds, \textit{Equal Pay in College Coaching: A Summary of Recent Decisions}, 24 S. ILL. U. L.J. 319, 324 n.35 (2000).}
\footnote{52. Cathryn L. Clussen, \textit{Title IX and Employment Discrimination in Coaching Intercollegiate Athletics}, 12 U. MIAMI ENT. & SPORTS L. REV. 149, 150 (1994).}
III. CASE LAW EVALUATING INTERCOLLEGIATE COACH PAY EQUITY CLAIMS

In recent years female coaches have relied on one or more of the above federal statutes to bring claims of gender-based wage discrimination against defendant universities and athletic directors. This section will summarize the key cases to better understand how courts are evaluating pay equity claims brought by intercollegiate coaches.

A. Stanley v. University of Southern California

Marianne Stanley is the former women's basketball coach at the University of Southern California (USC). Her lawsuit against USC alleging violations of the EPA, Title IX, and California law is regarded as the most significant case to address pay inequality for female collegiate coaches.\(^{53}\) Stanley’s dispute with USC has produced two decisions by the Ninth Circuit Court of Appeals.

In *Stanley I*,\(^ {55}\) the Ninth Circuit upheld the district court’s denial of Stanley’s motion for a preliminary injunction, stating that Stanley had failed to show a likelihood of success on the merits of her claim for pay equity.\(^ {56}\) This suit arose after Stanley’s contract was not renewed by USC following unsuccessful contract negotiations.\(^ {57}\) Stanley was seeking a contract equal to that of the men’s basketball coach, George Raveling, and USC was unwilling to pay this amount.\(^ {58}\)

Stanley filed suit against USC seeking reinstatement to her former position and an increased salary, among other things.\(^ {59}\) Because Stanley was seeking equal pay, the court set forth the legal standards that must be satisfied under the EPA.\(^ {60}\) After comparing the two coaching positions, the court concluded that the two jobs were not substantially equal as required by the EPA.\(^ {61}\) Additionally, the court relied on the fact that Stanley did not have the same experience or qualifications related to public relations and revenue generation.

\(^{53}\) 13 F.3d 1313.
\(^{54}\) Id. at 1318.
\(^{55}\) Id. at 1313.
\(^{56}\) Id. at 1326.
\(^{57}\) Id. at 1316-18.
\(^{58}\) *Stanley*, 13 F.3d at 1317.
\(^{59}\) Id. at 1318.
\(^{60}\) Id. at 1321.
\(^{61}\) Id. at 1323.
as Raveling.\textsuperscript{62} Finally, the court found that the difference in pay was justified because of "significant differences in job pressure, the level of responsibility, and in marketing and revenue-producing qualifications and performance" and therefore the EPA was not violated.\textsuperscript{63} As a result, the court concluded that Stanley had not proven a likelihood of success on the merits and affirmed the district court's denial of Stanley's preliminary injunction motion.\textsuperscript{64}

Stanley II is the Ninth Circuit's decision affirming the district court's summary judgment in favor of USC on all of Stanley's claims, including equal pay.\textsuperscript{65} Reviewing the same facts examined in Stanley I, in the light most favorable to Stanley, the court found no issues of material fact regarding any issues asserted by Stanley.\textsuperscript{66} The court applied the EPA's substantially equal analysis to Stanley's equal pay claims; however, it did not resolve the issue of whether the jobs were substantially equal.\textsuperscript{67} Rather, the court found it undisputed that Raveling had greater experience and qualifications and these were valid "factors other than sex" justifying the pay disparity.\textsuperscript{68} The court arrived at this decision based on the following facts: Raveling had thirty-one years coaching experience, coached a men's Olympic basketball team, was national coach of the year twice and PAC-10 coach of the year twice, had nine years of marketing and promotional experience, and authored books on basketball.\textsuperscript{69} In contrast, Stanley had only seventeen years of coaching experience prior to coaching at USC, she never coached an Olympic team, never published a book about basketball, and had no marketing or promotional experience outside of what she learned as a coach.\textsuperscript{70} The court found that Stanley failed to raise a genuine issue of material fact as to this defense and granted summary judgment in favor of USC.\textsuperscript{71}

While Stanley's lawsuits were unsuccessful, as the next two cases show other female coaches have brought successful gender-based wage discrimination claims.

\textsuperscript{62} Id. at 1321-22.
\textsuperscript{63} 13 F.3d at 1326.
\textsuperscript{64} Id.
\textsuperscript{65} Stanley v. Univ. of S. Cal., 178 F.3d 1069 (9th Cir. 1999), cert. denied, 528 U.S. 1022 (1999) [hereinafter Stanley I].
\textsuperscript{66} Giampetro-Meyer, supra note 2, at 365-66.
\textsuperscript{67} Stanley, 178 F.3d at 1074-75.
\textsuperscript{68} Id. at 1075.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 1077.
Molly Perdue, "former women's basketball coach and women's sports administrator at Brooklyn College, brought suit against Brooklyn College [and] the City University of New York" (collectively CUNY) alleging gender discrimination on a variety of theories including violations of the EPA and Title VII. In 1997, a jury found "willful violation of the EPA" and intentional discrimination in violation of Title VII. CUNY moved for judgment as a matter of law for insufficiency of evidence regarding the EPA and Title VII intentional discrimination verdicts and for a new trial.

To establish that her unequal wages were due to discrimination, Perdue provided substantial evidence about her responsibilities as the women's basketball coach and women's sports administrator. Perdue used men's basketball coach Rob Kestenbaum and men's sports administrator Mark Reiner as comparators. The court found that Perdue proved that her job was substantially equal to the job performed by each of these men. In comparison to Kestenbaum, Perdue coached "the same season, the same number of games, the same number of players, and the same number of practices." In addition, both were responsible for recruiting and managing "team budgets, scholarships, assistant coaches, scouting of opponents, game preparation, and ordering of equipment...[and] the supervision, guidance, and counseling of athletes, and for team conduct." The court also found that there was sufficient evidence to support the jury's determination that Perdue performed the equivalent duties as the women's sports administrator as Reiner did as the men's sports administrator. The approximate salaries of Perdue, Kestenbaum, and Reiner, respectively, from 1990 to 1992, were: $43,000, $40,000, and $70,000. Despite performing a job substantially equal to both Kestenbaum and Reiner combined, her salary was more than $66,000 less than their combined salaries each year. The court concluded that there was

73. Id. at 330.
74. Id. at 331.
75. Id.
76. Id. at 333-34.
77. Perdue, 13 F. Supp. 2d at 333-34.
78. Id.
79. Id.
80. Id.
81. Id.
83. Id.
sufficient evidence for the jury to conclude that Perdue had established a prima facie case under the EPA. Specifically, "she performed equal work on jobs requiring equal skill, effort and responsibility as those performed by both Kestenbaum and Reiner, under similar working conditions, for less pay." The court also found sufficient evidence to support the finding that CUNY's EPA violation was willful.

Next, examining the validity of Perdue's Title VII intentional discrimination claim, the court stated that Perdue must show that "she was treated less favorably than comparable male employees in circumstances from which a gender-based motive could be inferred." The court found the record to be "replete" with evidence sufficient to sustain the jury's verdict that CUNY intentionally discriminated against Perdue because of her sex in violation of Title VII. Additionally, the court found that the evidence supporting Perdue's EPA claim also related to her Title VII intentional discrimination claim. As a result of Perdue's favorable jury verdict, she was awarded $85,000 in compensatory damages pursuant to Title VII, $134,829 in back pay, and $134,829 in liquidated damages (based on the willfulness finding) pursuant to the EPA, plus attorney's fees and costs provided for by both the EPA and Title VII.

C. Lowrey v. Texas A&M University System

Jan Lowrey, former women's basketball coach at Tarleton State University (TSU), filed a lawsuit against TSU (part of the Texas A&M University system) alleging gender discrimination in pay under the EPA and Title VII and retaliation under Title VII and Title IX. The district court denied TSU's motion for summary judgment on Lowrey's claims of pay discrimination under Title VII and the EPA, finding issues of material fact existed on these claims. The disputed issue was whether Lowrey received equal pay while employed as Women's Athletic Coordinator. Lowrey compared her job to Jim Johnson. Each served as Women's and Men's

84. *Id.* at 334.
85. *Id.* at 335.
86. *Id.* (quoting Luciano v. Olsten Corp., 110 F.3d 210, 215 (2d Cir. 1997).
88. *Id.*
91. *Id.* at 902-03.
92. *Id.* at 921.
93. *Id.* at 908.
Athletics Coordinator, respectively, head coach, and instructor. The court considered Lowrey’s EPA and Title VII unequal pay claims together because of their similarity. Lowrey presented evidence that Johnson received increased pay when he received the Athletic Coordinator position, but that Lowrey did not receive such a pay increase when she received her Athletic Coordinator position. In addition, the evidence showed that Johnson was paid from the Athletics Administration Budget but that Lowrey was not, even though they held similar positions. As a result of contrary interpretation of the evidence, the court found that factual issues existed regarding the equality of Lowrey’s compensation for being Women’s Athletic Coordinator. Therefore, the court denied summary judgment on Lowrey’s pay discrimination claims.

Many other coaches have brought gender-based wage discrimination claims; however, like Stanley, their claims are often unsuccessful because institutions have found great success in raising the affirmative defense that “factors other than sex,” specifically revenue raising, justify the pay disparity. Perdue and Lowrey’s favorable decisions can be distinguished from Stanley and other unsuccessful pay equity suits; revenue generation was not raised as a justification for the pay disparity because neither the men’s nor women’s team generated revenue. For the most part, the statutes that apply to pay equity claims have not been successful in alleviating the pay disparity among coaches of men’s and women’s teams. The EEOC believes that the courts have engaged in an incomplete analysis of these laws and misconceptions are often raised when considering the reasons for the pay disparities. As a result, the EEOC has issued guidelines to clarify how the EPA and Title VII apply to gender-based pay disparities.

IV. THE EEOC GUIDELINES


94. Id.
95. Lowrey, 11 F. Supp. 2d at 906.
96. Id. at 908.
97. Id.
98. Id. at 909.
99. Id. at 921.
100. EEOC Guidelines, supra note 7, at II.A.3.
101. Id. at 1.
102. Id.
The purpose of the EEOC Guidelines is to set forth the Commission's position regarding the application of the EPA and Title VII to gender-based wage discrimination claims brought by intercollegiate coaches. The reasons for drafting the EEOC Guidelines involved concerns by the EEOC that overall employment of coaches in educational institutions is not gender neutral and that where courts have applied Title VII and the EPA to gender-based wage discrimination claims, there has been an incomplete analysis of the law.

The EEOC Guidelines begin by setting forth statistics illustrating pay disparities among the coaches of men's and women's teams in educational institutions. The Guidelines then set forth a detailed legal analysis of how the EEOC interprets the EPA in claims brought by coaches, including examples illustrating various factual situations involving pay disparities that may or may not violate the EPA. Further discussion of how the EEOC interprets EPA violations is discussed below. Finally, the EEOC briefly discusses equal pay claims under Title VII. Essentially, if the Title VII claim is only for unequal pay, the same burdens of proof apply, as well as the same affirmative defenses.

A. Are the Jobs Substantially Equal?

Based on the belief that courts sometimes consider improper factors when determining if the jobs are substantially equal, the EEOC sought to clarify this element of an EPA claim. First, when determining whether pay discrimination exists, the "jobs should be analyzed functionally," comparing actual job requirements, not just the skills being taught. As a result, jobs coaching different sports can be "substantially equal" under the EPA and can be

103. Id. at I; see also Narol & Martin, supra note 31, at 179-89.
104. EEOC Guidelines, supra note 7, at I.
105. Id.
106. Id.
107. Id. at II.A.
108. Id. at II.B.
111. EEOC Guidelines, supra note 7, at II.
“appropriate comparators” under Title VII. \(^{112}\) Second, institutions have successfully justified pay differentials by relying on terms and conditions of employment and market values to establish that the jobs were not “substantially equal.” \(^{113}\) The EEOC will not recognize this defense unless the institution can prove that the pay differential in question is not a result of institutional or societal discrimination. \(^{114}\)

The EEOC Guidelines seek to promote “equality of opportunity.” \(^{115}\) To achieve this goal, the Guidelines clarify the EPA analysis. For example, when determining if jobs are substantially equal, the equal skills considered must focus only on the skills “necessary to perform the job,” not additional training, education or abilities that a coach may have but are not required to perform the job. \(^{116}\) Also, when determining whether a job is substantially equal based on equality of opportunity, the EEOC will consider if the institution has given male and female coaches the opportunity to have equal responsibilities. \(^{117}\)

B. Applicability of Affirmative Defenses

The EEOC believes that “factor other than sex” affirmative defenses are questionable when applied to coaching cases. \(^{118}\) Therefore, the Guidelines seek to clarify what these factors are and in what instances they can and cannot be used to justify pay disparities.

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,

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id. at 180-81.

\(^{117}\) EEOC Guidelines, supra note 7, at II.A.2.c.

\(^{118}\) Narol & Martin, supra note 31, at 182.
education and ability; and (6) the "additional duties" defense, which allows a pay disparity to exist where one coach is paid more for performing additional job-related duties.119

The Guidelines have the greatest impact on the "revenue," "marketplace," and "prior salary" defenses. The EEOC more closely examines whether the amount of revenue that a coach or team produces can justify the pay discrepancy.120 The EEOC recognizes that many variables outside of the institution's control actually affect the amount of revenue produced.121 The Commission noted studies that indicate that, both historically and currently, women's athletic programs have received significantly fewer resources than men's athletic programs.122 As a result, the EEOC places a "heavy burden" on the institution to show that the revenue defense is not related to societal or institutional discrimination.123 If an institution provides discriminatorily-reduced support to aid a female coach in revenue production for her team, the pay disparity cannot be justified by "factors other than sex."124

The EEOC Guidelines provide an example where a university pays a men's basketball coach fifty percent more than the women's basketball coach.125 The university justifies the pay disparity as a factor other than sex because the men's coach raised substantially greater revenue.126 However, an investigation proves that the university provides significantly greater support to the men's coach to assist him in revenue raising.127 The additional support includes additional staff for the purpose of handling marketing and promotional activities and a greater budget for paid advertising.128 In comparison, the women's coach did not receive additional staff or funds.129 According to the EEOC Guidelines, despite the lesser revenue generated by the female coach, revenue is not a factor other than sex that the institution can rely upon to justify pay differences because the women's coach was not provided equivalent support by the institution to aid her revenue raising.

119. Id. at 182-83.
120. EEOC Guidelines, supra note 7, at II.A.3.a.
121. Id.
122. Id.
123. Narol & Martin, supra note 31, at 183.
124. EEOC Guidelines, supra note 7, at II.A.3.a.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
In addition, the EEOC Guidelines warn against problems arising from asserting that market value justifies pay differentials. The EEOC's concern is that the marketplace may not be gender-neutral. The Guidelines state that "sex discrimination in the marketplace which results in lower pay for jobs done by women will not support the marketplace value defense." The EEOC will only consider this defense if the institution can establish that it evaluated the marketplace value of the specific job's characteristics and the differing salaries are not based on sex.

The EEOC Guidelines also express concern regarding the viability of the "employee's prior salary" defense. The Guidelines indicate that relying on prior salary may "perpetuate" the cycle of women traditionally being paid lower salary due to sex discrimination. Specifically regarding athletic programs, there is concern that wages are not based on normal market value, but rather on non-economic "cultural and societal factors." According to the Guidelines, an institution asserting this defense must prove it conducted a thorough investigation when considering the coach's salary. The investigation should include consulting the previous employer to determine starting and final salaries and a determination of the prior salary's accuracy in relation to the coach's abilities, education, and experience. Also, the institution must not rely solely on a coach's prior salary in determining the current salary.

C. The Legal Effects of the EEOC Guidelines

In order to seriously consider the impact that the EEOC Guidelines can have on the issue of gender-based wage discrimination, one must first determine how the courts treat a federal agency's guidelines. Historically, when a federal agency is responsible for enforcing a statute, the courts give "considerable deference" to the agency's interpretation of the statute as long as

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130. Id.
131. Id. at II.A.3.b.
132. Id.
133. Id.
134. Id.
135. Id. at II.A.3.c.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
the "interpretation is reasonable and consistent with the statute's purpose."\textsuperscript{141}

In Meritor Savings Bank, FSB v. Vinson, the Supreme Court considered the weight of authority that should be afforded EEOC Guidelines relating to sexual harassment as a form of sex discrimination prohibited by Title VII.\textsuperscript{142} The Court determined that because the Guidelines were an "administrative interpretation of the Act by the enforcing agency,"\textsuperscript{143} the Guidelines "constitute[d] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."\textsuperscript{144}

The Office of Civil Rights (OCR), the body responsible for enforcing Title IX, issued the "Intercollegiate Athletics Policy Interpretation"\textsuperscript{145} (Policy Interpretation), which is similar to the EEOC issuing the Coaching Guidelines. The Policy Interpretation issued by OCR clarified the Title IX regulatory requirements for athletic programs. Specifically, the Policy Interpretation divided athletics into three major categories under which to be analyzed for compliance.\textsuperscript{146}

In Cohen v. Brown University,\textsuperscript{147} the district court recognized that even though a policy interpretation has no legal effect, it should be afforded "substantial deference," especially where it is a "considered" document.\textsuperscript{148} In reviewing the decision, the First Circuit agreed with the district court's conclusion that policy interpretations are entitled "substantial deference" and added that they may be afforded "controlling weight under an appropriate circumstance."\textsuperscript{149}

Many courts have used the three-part test set forth in the Policy Interpretation to determine compliance with Title IX.\textsuperscript{150} As a result, Title IX has resulted in increased athletic participation by women.

\textsuperscript{141} Narol & Martin, \textit{supra} note 31, at 187.
\textsuperscript{142} 477 U.S. 57, 65 (1986).
\textsuperscript{143} \textit{id.} (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).
\textsuperscript{146} \textit{id.}
\textsuperscript{147} 101 F.3d 155 (1st Cir. 1996), cert. denied, 117 S. Ct. 1469 (1997).
\textsuperscript{148} Narol & Martin, \textit{supra} note 31, at 187. "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 investigation of universities, and provided a period of time during which Congress could disapprove of the Interpretation." \textit{id.} at 187-88.
\textsuperscript{149} \textit{id.} at 188.
The purpose of the EEOC Guidelines can be compared to that of OCR’s Policy Interpretation. The EEOC Guidelines seek to clarify the application of the EPA and Title VII to pay disparity for athletic coaches in educational institutions.\textsuperscript{151} The goal of the EEOC Guidelines is to provide “equality of opportunity” to all coaches.\textsuperscript{152} Because the EEOC is trying to remedy the historically different compensation paid to coaches of men’s and women’s teams, the Guidelines are consistent with the purposes of the EPA and Title VII.\textsuperscript{153} As a result, the Guidelines, like the Policy Interpretation, should be considered by courts when analyzing pay equity claims. Perhaps then the coaches of women’s teams will begin to receive equal pay.

V. ANALYSIS

This section begins by looking at the \textit{Stanley} cases from the perspective of the EEOC. Next, it will address the problems that arise in using revenue production to justify pay disparities among male and female coaches. Finally, recommendations will be set forth for coaches who bring gender-based wage discrimination claims.

\textbf{A. Assessing the Weaknesses of the Analysis Applied in \textit{Stanley I} and \textit{II} and how the EEOC Guidelines may have Impacted the Decision}

In \textit{Stanley I}, the court concluded that Stanley and Raveling did not have substantially equal jobs.\textsuperscript{154} In arriving at that conclusion, the court mistakenly considered differences in skills that were not related to the performance of coaching. For example, the court noted that Raveling is a best-selling author and an actor, and found these skills to mean Raveling could draw more media attention.\textsuperscript{155} However, authoring a best-selling book or acting are not skills imperative to performing the requirements of a coaching job.

The EEOC Guidelines provide an example specifically addressing this issue. The example involved the coaches of men’s and women’s tennis, both of whom had the same abilities and experiences except that the men’s coach also hosted a radio show unrelated to tennis.\textsuperscript{156} The Guidelines state that the simple fact that the men’s tennis coach possesses the ability to host a radio talk show does not demonstrate that the coaches’ job skills are not “substantially

\begin{footnotes}
\footnote{151. EEOC Guidelines, \textit{supra} note 7, at I.}
\footnote{152. \textit{Id.}}
\footnote{153. \textit{Id.}}
\footnote{154. \textit{Stanley}, 13 F.3d at 1323.}
\footnote{155. \textit{Id.} at 1321-22.}
\footnote{156. EEOC Guidelines, \textit{supra} note 7, at II.A.2.a.}
\end{footnotes}
equal." The required skills for a tennis coach do not include the ability to host a radio show and therefore that cannot be a skill that is considered to justify paying the male coach a higher salary.

In addition, in Stanley I, the court failed to recognize that Stanley had job responsibilities that were equal to Raveling’s responsibilities, including coaching, discipline, recruiting, advising athletes, and managing the team. Instead, the court relied heavily on the fact that Raveling’s position required more pressure to raise revenue. In Stanley II, Stanley argued that any differences in the men’s and women’s coaching positions were based on previous gender-based decisions by the University and therefore should not be relied on to conclude that the jobs are “substantially different.” In a footnote, the court acknowledged the EEOC Guidelines which explicitly state that “pay discrimination cannot be justified if the differences relied on for the proposition that the two jobs are substantially equal are themselves based on discrimination in the terms and conditions of employment.” However, the court declined to answer the question of whether the coaching jobs are substantially equal and ignored the possible discriminatory terms of Stanley’s employment. Instead, the court granted summary judgment to the University, finding the pay differential was based on experience, education, and ability as a factor other than sex. The dissent recognized that the majority opinion ignored the gender discrimination by USC that faced the women’s basketball program:

By focusing on the differences between Stanley’s and Raveling’s qualifications, the majority skips over the many ways in which gender discrimination insidiously affected the University’s treatment of the women’s basketball program and Stanley as its Head Coach. The University’s half-hearted promotion of the women’s basketball program, its intensive marketing of the men’s basketball program, and the formidable obstacles Stanley faced as a woman athlete in a male-dominated profession contributed to this disparate treatment.

The dissent recognized the EEOC’s concern that societal and institutional gender discrimination cannot underlie the institution’s proffered justifications for pay differentials.

157. Id.
158. Stanley, 13 F.3d at 1321.
159. Stanley, 178 F.3d at 1074-75.
160. Id. at 1075 n.1 (quoting EEOC Guidelines, supra note 7, at II).
161. Id. at 1075-77.
162. Id. at 1080.
B. Problems Using Revenue Production to Justify Pay Differentials

Institutions are often successful in asserting that revenue production and the increased pressure on coaches of men's teams justify their greater pay. Revenue production and pressure arguments are used either to show that coaching a men's team and a women's team are "substantially different" or as a factor other than sex justifying paying coaches of a men's team more than the coach of a women's team. The basis of this justification is that the men's coaches are under greater pressure to generate revenue and often do produce more revenue in terms of ticket sales and promotions than the coach of a women's team. While this may be a successful argument in some instances, there are several potential problems with the revenue production and pressure argument.

First, the EEOC Guidelines suggest that the defense of revenue as a "factor other than sex" may be suspect. In Stanley I, the court recognized that revenue generation can justify greater pay. The court found significant the fact that the men's basketball team produced ninety times more revenue than the women's team. According to the EEOC Guidelines, revenue cannot be a factor other than sex justifying pay disparity unless a university has provided the women's coach with an equivalent amount of support to assist her in raising revenue. A court relying on the EEOC Guidelines may find that the real reason for the substantial difference in revenue raised by each coach was a lack of support for women's revenue raising efforts. In light of the EEOC Guidelines, one way for plaintiffs such as Stanley to strengthen their pay discrimination claim is to gather evidence demonstrating how a university supports revenue raising efforts.

Second, revenue production is often determined by factors other than the effort put forth by a coach, which may result from discrimination. Historically, men's sports have been received differently by society at-large, which can account for the greater attendance and revenue from men's sporting events. In addition, the manner in which many schools support their men's (specifically basketball and football) programs can impact the revenue generated.


164. Claussen, supra note 52, at 166-67; Stanley, 13 F.3d at 1321.

165. Stanley, 13 F.3d at 1323.

166. Id.

167. EEOC Guidelines, supra note 7, at II.A.3.a.

168. Claussen, supra note 52, at 167.
As long as male sports are enhanced by attendance of cheerleaders, bands, pep squads, the press . . . scheduled [at] prime time [and] at the most convenient locations, girls’ sports will not be their equal. Thus pressure and the number of spectators may be directly related to the unequal treatment of the two programs.169

The unequal treatment received by women’s sports, historically, is a critical reason why women’s sports have less attendance and generate significantly less revenue. An institution should not be allowed to use the effects of past discrimination as a justification for disparate pay today.

Another problem with relying on revenue to justify pay disparity for college coaches is that intercollegiate athletics are supposed to be an “integral part of the educational program.”170 The focus of intercollegiate athletics is supposed to be on the educational experience and not the amount of money generated by a program, team, or coach. If one considers education and amateurism to be the primary purpose of college athletics, it does not seem appropriate to place such significance on the amount of revenue a coach generates when evaluating salaries. Institutions should be committed to pursuing the “amateur-education” model of sport.171 In this sense, the athlete’s focus is the development of “leadership and teamwork skills” and the coaches are instrumental in imparting these lessons.172 In order to reduce pay disparity among coaches of men’s and women’s teams, institutions must remember the fundamental purpose of intercollegiate athletics is amateurism and education, not the commercialized, revenue-generating machine it has become. The return to the amateur-education school of thought may help to reduce unequal salaries based on the amount of revenue generated.

Courts and institutions should not assume that pay differentials among male and female coaches can be justified on the basis of revenue generation. Courts should adopt the EEOC Guidelines because they seek to promote the underlying policies and purposes of Title VII and the EPA.

One of the purposes of Title VII is to eliminate “discriminatory treatment based on gender.”173 In addition, the objective of Title VII is to “remove barriers that have operated in the past” resulting in favoring male employees over female employees.174 The purpose of the EPA is to eliminate “subjective

169. Id.
171. Giampetro-Meyer, supra note 2, at 386.
172. Id.
173. Narol & Martin, supra note 31, at 188.
174. Id.
assumptions and traditional stereotyped misconceptions regarding the value of women’s work.” 175 The EEOC Guidelines support these policy objectives by recognizing the need to look at what underlies proffered justifications for pay disparities. 176 The EEOC Guidelines limit the strength of the factors other than sex defense by placing the burden on the defense to show that factors based on sex are not truly motivating pay differences. 177 For example, the EEOC would not allow the defense of revenue generation as a factor other than sex to justify unequal pay where the institution has discriminated against women’s sports by not providing funding comparable to that of men’s sports for promotion and revenue generation. 178 Institutions could be providing decreased funds to support female programs based on traditional assumptions and misconceptions regarding the value of women’s sport; specifically, the assumption that men’s sports are better or more valuable than women’s sports, which is inconsistent with the policy of the EPA. Additionally, decreased funding for women’s sports compared with men’s sports is inconsistent with Title IX.

The major barrier to female coaches’ pay equity claims is the revenue generation defense. The EEOC Guidelines provide the best weapon to weaken this defense by placing greater burdens on the institutions to prove these defenses are not motivated by institutional or societal discrimination. By limiting the effectiveness of these defenses, more coaches may begin to prevail in pay equity claims.

C. Recommendations for Coaches Bringing Gender-Based Discrimination Claims

The EEOC Guidelines, by providing examples of substantially equal jobs and when affirmative defenses are acceptable, help a plaintiff-coach to better understand his or her rights under the EPA and Title VII and should enable coaches to bring stronger claims under these statutes. Additionally, successful pay discrimination cases such as Perdue and Lowrey provide guidance for successful claims. Relying on the EEOC Guidelines and recognizing successful strategies by former plaintiffs, the following are suggestions that may strengthen a female coach’s gender-based wage discrimination claim.

First, the plaintiff must be sure to bring his or her claim under the appropriate statute. For example, if the coach believes the pay discrimination

175. Id.
176. EEOC Guidelines, supra note 7, at II.A.3.
177. Id.
178. Id.
is based on the gender of the team coached rather than on the gender of the coach, the claim should be brought under Title IX. It is important to remember that the EEOC Guidelines are based on a claim brought under either the EPA or Title VII; these are the claims that are the primary focus of this comment. Title VII and the EPA prohibit discrimination based on the coach's gender. Therefore, courts have found that if the plaintiff is not being discriminated against based on his or her gender, but rather the gender of the team coached, a Title VII violation has not occurred. Because the Title IX athletic provisions "focus on the sex of the team as a relevant concern," this statute is likely to be more useful to a coach who believes he or she is being discriminated against solely because of his or her team's gender. If the claim is brought under the EPA or Title VII, but there is no showing that the coach was discriminated against based on his or her gender, the claim will be dismissed. In order to reach the merits of the case, the plaintiff must state a claim under the appropriate statute.

Second, coaches must select the appropriate comparator coach. The comparator's job must be "substantially equal" under the EPA or comparable for purposes of Title VII. However, it is important to remember that the comparator need not coach the same or similar sport because the duties are the focus, not the sport coached. Factors that should be similar include education, experience, size of the team coached, and size of the staff.

Third, coaches should provide complete and detailed information on the duties performed by each coach. The actual duties performed are used to determine if the job responsibilities are substantially equal. The duties performed are more important than the comparator's job title in assessing equal responsibilities. In her successful pay discrimination claim, Molly Perdue provided extensive evidence regarding her duties and responsibilities to prove that she performed a job substantially equal to her male comparators.

Fourth, if the "factor other than sex" affirmative defense is asserted, the plaintiff should try to show that these justifications are actually tied to societal or institutional discrimination. If so, the justifications will not defeat pay

179. Claussen, supra note 52, at 151.
181. EEOC Guidelines, supra note 7, at III.
182. Id.
183. Osborne & Yarbrough, supra note 25, at 248-49.
discrimination claims. For example, if the defense raised is revenue generation as a factor other than sex, the plaintiff should examine how the institution supports the men's and women's team. If the institution raises the defense of the coach's prior salary to justify the unequal compensation, the plaintiff should try to determine if there was bargaining involved in the male coach's higher salary and if there was any investigation by the university regarding the coach's prior salary and the basis therefore.

VI. CONCLUSION

Generally, the EPA and Title VII have not been effective in eliminating pay discrimination for intercollegiate coaches. However, the EEOC Guidelines have the potential to greatly benefit female coaches if adopted or given deference by the courts because they specifically address the most common defenses put forth by institutions and increase their burden in justifying pay disparities. The EEOC Guidelines seek to remedy gender-based wage discrimination by identifying societal gender discrimination that may be underlying the institution's justifications for unequal pay. Because the EEOC Guidelines are consistent with the purpose and policy of the EPA and Title VII, they should at least be persuasive authority for courts analyzing coaches' claims of unequal pay. If courts begin to rely on the Guidelines, female coaches seeking equal pay may find greater success.

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185. EEOC Guidelines, supra note 7, at II.A.3.
186. Id. at II.A.3.c.
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