

Pay Equity Among College Coaches: A Summary of Case Law Since *Stanley* and Administrative Guidance

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INTRODUCTION

The issue of gender equity in the compensation of college coaches remains a vitally important issue more than a decade after the seminal case of *Stanley v. USC*.¹ This article will provide an overview of the laws and regulations governing pay equity, an update of case law dealing with the issue, and a practical guide for administrators in identifying and addressing pay equity issues in the athletic environment.

LEGAL FRAMEWORK

Several laws are relevant to the analysis of whether the compensation of coaches is equitable or discriminatory based on a coach's gender – the Federal Equal Pay Act of 1963² (prohibiting discrimination in the payment of wages), its state law equivalent (if applicable), Title VII of the Civil Rights Act of 1964³ (prohibiting sex discrimination in employment), its state law equivalent, and Title IX of the 1972 Education Amendments.⁴

Equal Pay Act

The Equal Pay Act (EPA)⁵ is a federal wage law. However, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal employment discrimination laws, actually oversees compliance with this law. Under the EPA, an employer cannot pay an employee of one sex less than it pays an employee of the other sex where both employees are performing equal work under similar working conditions on jobs

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¹ 13 F.3d 1313 (9th Cir. 1994).

² 29 U.S.C. § 206(d).

³ 42 U.S.C.A. §§ 20003 et seq.

⁴ 20 U.S.C. § 1681-1688.

⁵ 29 U.S.C. 206(d)

requiring equal skill, effort, and responsibility.⁶ One exception to this rule is pay disparities based on a factor other than sex.⁷

In a claim for a violation of the EPA, a plaintiff must show that he or she (1) worked in the same establishment as another employee of the opposite sex, (2) received a wage unequal to that of his or her co-worker, (3) for work which required equal skill, effort, and responsibility, (4) which was performed under similar working conditions.⁸

The employer may defend against this initial showing by challenging one or more of these elements. Alternatively, the employer may escape liability if it can prove that the pay disparity is the result of (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) another differential based on any factor other than sex.⁹

Although a claim under the EPA involves a comparison between two or more positions, the jobs being compared do not have to be identical, just substantially equal.¹⁰ It is necessary to look at whether the jobs are substantially equal in terms of relative skills, efforts, and level of responsibility.¹¹ The working conditions are also an important aspect of this analysis.¹²

When looking at the relative skills of the positions, one considers the employee's experience, training, education, and ability.¹³ Relative effort involves a review of the physical and mental exertion associated with the job.¹⁴ When assessing responsibility, one looks at the employee's accountability and the relative importance of the job.¹⁵

In order to assist employers with an understanding of the law, the EEOC has issued regulations that discuss how to interpret the language contained in the EPA¹⁶. The EEOC issued also a policy statement on the EPA's applicability to athletic coaches.¹⁷ Since the decision in *Stanley*, there are many cases where courts have interpreted the various provisions of the EPA as they relate to pay equity and athletics.

Because a claim under the EPA is a wage and hour violation, the usual statute of limitations is two years.¹⁸ If the employer engages in a willful violation of the EPA, the limitations period extends to three years for purposes of calculating the amount of back pay owed to an employee.¹⁹ In addition, if the court finds a willful violation, it will ordinarily require

⁶ 29 U.S.C. 206(d)(1)

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Stanley v. USC*, 13 F.3d. 1313, 1321 (9th Cir. 1994).

¹¹ 29 U.S.C., *supra* note 6.

¹² <http://www.eeoc.gov/types/epa.html>

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See* 29 C.F.R. 1620 et seq.

¹⁷ EEOC Notice No. 915.002. 10/29/07.

¹⁸ 29 U.S.C. 255(a).

¹⁹ *Id.*

the employer to pay double the amount of damages actually incurred as a penalty for having engaged in willful violation of the Act.²⁰ An employer may also be required to pay the employee's attorney fees in the event the employee prevails.²¹ State law equivalents of the federal EPA contain longer statutes of limitations and additional damages provisions.²²

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee in the terms and conditions of employment based on, among other things, the employee's gender.²³ Thus, Title VII provides broader protection than the EPA because it reaches all aspects of the employment relationship, including pay. Pay disparities under Title VII can be justified if based on one of the exceptions under the EPA.²⁴ As a practical matter, however, the assertion of a pay equity claim as a Title VII claim allows the focus to shift from a strict comparison of the equivalent positions, as required under the EPA, to a more generalized analysis of the comparative treatment given to the occupants of the respective positions.

Title IX

Title IX of the 1972 Education Amendments prohibits discrimination based on gender in any program or activity that receives federal financial assistance.²⁵ Regulations issued by the Department of Education (DOE) implementing Title IX specifically address employment.²⁶ Section 106.51 contains the general nondiscrimination language: "No person shall, on the basis of sex, ... be subjected to discrimination in employment..." The employment regulations also specifically address compensation: "A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) makes distinctions in rates of pay or other compensation; (b) results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on the jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."²⁷ In other words, Title IX appears to incorporate the EPA criteria and analysis for purposes of a pay equity case. The general nondiscrimination provisions also allow an employee to bring a Title IX sex discrimination claim similar to a claim advanced under Title VII.

In addition to the employment regulations, the regulations issued by the DOE covering athletic programs are relevant. Specifically, Section 106.41(c)(6) identifies the compensation of coaches as a factor that is used to determine an athletic program's overall compliance with Title IX. According to the Policy Interpretation, a violation only occurs where the compensation practice denies male and female athletes coaching of an equivalent quality, nature or availability.²⁸

²⁰ 29 U.S.C. 216(e)(1)(a).

²¹ 29 U.S.C. 216(b)

²² See generally (Maine: 5 M.R.S.A. § 4551; Massachusetts: M.G.L. 151B § 4)

²³ 42 USC 2000e.

²⁴ *Horn v. Univ. of Minnesota*, 362 F.3d 1042, 1046 (8th Cir. 2004).

²⁵ 20 U.S.C. *supra* note 4.

²⁶ See 34 C.F.R. 106.51, *et seq.*

²⁷ 34 C.F.R. 106.54.

²⁸ 34 C.F.R. 106.41(c)(6)

The Policy Interpretation recognizes that nondiscriminatory factors can affect compensation of coaches. These factors include (1) the range and nature of 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 competition.²⁹ Where these factors represent valid differences in skill, effort, responsibility or working conditions, they may justify compensation differences.³⁰ The Policy Interpretation also recognizes that in unique situations, a person's outstanding record may justify an abnormally high salary.³¹ In particular, a compliance assessment will include an examination of the following areas: (1) rate of compensation (per sport, per season), (2) duration of contracts, (3) conditions relating to renewal of contracts, experience, (4) nature of coaching duties performed, (5) working conditions, and (6) other terms and conditions of employment.³²

It is important to note that the above considerations arise in the context of a Title IX compliance assessment of the athletic department as a whole. The discussions do not necessarily represent individual coaching compensation requirements.

EEOC GUIDELINES

In 1997, the EEOC issued a document that is very relevant to this topic, entitled *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*.³³ The document initially references several reports that highlight pay disparities based on one's gender.³⁴ It states that there are only a limited number of cases interpreting the EPA, and that they either present unique facts or incomplete analysis of the law.³⁵ Essentially, the EEOC is directing its investigators to analyze every EPA claim using a comprehensive Title VII approach so that the core EPA factors are not the only factors considered. In addition, the document sets forth examples under each of the EPA factors presenting the types of situations that the EEOC would and would not find permissible.³⁶

VARIOUS EPA STANDARDS

An employee establishes a prima facie case of an EPA violation by demonstrating that his or her employer paid employees of the opposite gender different wages for equal work of jobs that require equal skill, effort, and responsibility, and that occur under similar working conditions.³⁷ The jobs need only be substantially similar.³⁸ The employer may rebut this prima

²⁹ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics; Federal Register, Vol.44, No. 239 - Tuesday, Dec. 11, 1979., VII(B)(3)(e).

³⁰ *Id.*

³¹ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics; Federal Register, Vol.44, No. 239 - Tuesday, Dec. 11, 1979., VII(B)(3).

³² Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics; Federal Register, Vol.44, No. 239 - Tuesday, Dec. 11, 1979, VII(B).

³³ EEOC Notice *supra* note 17.

³⁴ *Id.* at Part I.

³⁵ *Id.*

³⁶ These examples are paragraph long hypotheticals; may not be appropriate to copy them into article; reference can take reader to guidelines.

³⁷ *Stanley*, 13 F.3d. *supra* note 10.

facie case by showing that the disparity in pay is actually due to one of the four exceptions under the EPA.³⁹ These exceptions are affirmative defenses available to the employer and require a preponderance of the evidence.⁴⁰ The employee may still succeed on his or her claim if he or she shows that the employer's proffered nondiscriminatory reason is a pretext for discrimination.⁴¹

Since *Stanley*, other courts have fleshed out the EPA standard. These courts include additional factors that are considered in determining whether there is substantially equal work between the plaintiff and comparator. Further, the courts have elaborated on the broad application of the affirmative defenses allowed. The following section of this article will summarize *Stanley* and its progeny.

CASE SUMMARIES

Seminal Case: *Stanley v. USC*⁴²

Marianne Stanley, a former coach of the women's basketball team at the University of Southern California (USC), sued the institution alleging violations under the EPA, Title IX, the California Fair Employment and Housing Act, and the California Constitution.⁴³ Stanley also brought claims of wrongful termination, breach of an implied contract, intentional infliction of emotional distress and conspiracy.⁴⁴ Stanley also sought temporary injunctive relief in the nature of reinstatement to her former position and an increased annual salary.⁴⁵

This case arose out of Stanley's attempts to negotiate a new contract comparable to that of then- men's basketball coach, George Raveling. Stanley initially signed a four-year contract with an annual base salary of \$60,000 and a housing allowance of \$6,000.⁴⁶ About two months prior to the end of her contract, Stanley began to negotiate a new contract with USC athletic director, Mike Garrett.⁴⁷ Stanley asked that her new contract equal that of the men's basketball coach. Garrett came back to Stanley with a counter-offer that did not equal Raveling's contract. Stanley rejected this offer and countered with an offer that would over time increase her salary base to that of the men's basketball coach.⁴⁸ Negotiations continued between Stanley's attorney and Garrett, but no agreement resulted. USC then proceeded to begin the process of hiring a new women's basketball coach.⁴⁹

³⁸ *Id.*

³⁹ 29 U.S.C. *supra* note 6. A seniority system; a merit system; a system which measures earnings by quantity or quality of production; or another differential based on any factor other than sex.

⁴⁰ *Id.* A preponderance of the evidence is the burden of proof in civil cases.

⁴¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁴² *Stanley v. USC*, 13 F.3d. 1313 (9th Cir. 1994).

⁴³ *Id.* at 1318.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1316.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1316-17.

⁴⁹ *Id.* at 1317-18

Stanley filed suit in state court on August 5, 1993.⁵⁰ She sought a temporary restraining order (TRO) that would reinstate her as the women's basketball coach at USC.⁵¹ On August 6, 1993, the court granted Stanley's ex-parte TRO request pending a hearing on her motion for preliminary injunction.⁵² USC removed the case to federal court and scheduled a preliminary hearing for August 26, 1993.⁵³ The United States District Court for the Central District of California denied Stanley's motion for a preliminary injunction.⁵⁴ On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of Stanley's preliminary injunction.⁵⁵ In denying the injunction, the Ninth Circuit provided a comprehensive analysis of an equal pay claim.

The court noted that Stanley was seeking equal pay for equal work.⁵⁶ The court then characterized the relevant legal standards in order to prevail under the EPA: the plaintiff bears the burden of demonstrating that USC discriminated against her based on gender because the plaintiff and a comparator performed equal work on jobs that require equal skill, effort, and responsibility under similar working conditions.⁵⁷ The court also stated that although the jobs do not need to be identical, they must be substantially similar.⁵⁸

After analyzing the facts, the court held that the two basketball coaches' positions in this case were different.⁵⁹ The court found that Raveling's responsibilities required substantial public relations and promotional activities to generate revenue for USC.⁶⁰ The court found that Raveling's efforts in this area resulted in revenue 90 times greater than that generated by the women's team.⁶¹ Raveling needed to have 12 speaking engagements per year, be accessible for media interviews, and participate in fundraising activities that would result in donations and endorsements for USC. Since Stanley's position did not require the same intense level of promotional and revenue-raising activities, the court concluded that there was enough dissimilarity between the two jobs to justify the difference in pay.⁶²

The court found that an employer may consider the marketplace value of the skills of a particular individual when determining salary.⁶³ The USC men's team generated more media interest, larger donations, and substantially more revenue than the women's team. Therefore, USC placed greater pressure on Raveling to promote his team and to win.⁶⁴ The court ultimately concluded that there were significant differences between the coaching positions in the areas of

⁵⁰ *Id.* at 1318.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1318-19.

⁵⁵ *Id.* at 1326.

⁵⁶ *Id.* at 1323.

⁵⁷ *Id.* 1319.

⁵⁸ *Id.* 1323.

⁵⁹ *Id.* at 1321.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1322.

⁶⁴ *Id.*

public relations skills, credentials, experience and qualifications, along with substantial differences in their responsibilities and working conditions.⁶⁵

Courts Interpreting the EPA After *Stanley*
Harker v. Utica College of Syracuse University⁶⁶

In this case, Phyllis Harker sued Utica College alleging violations of Title VII, Title IX, and the Equal Pay Act. In her pay equity claim, she alleged that she earned less than similarly situated male employees.⁶⁷ Harker initially received \$25,000 for coaching basketball and other teaching duties and earned another \$3,000 for coaching women's softball. Going into her fourth year, she met with James Spartano, the athletic director at Utica, to discuss her recruiting efforts. After determining that Harker was not adequately recruiting and that she had tumultuous relationships with her players, Spartano notified Harker that her contract would not be renewed. During this meeting, Harker complained about the inequities that existed between the terms of her employment and that of the men's basketball coach, Edwin Jones. Knowing that her contract would soon terminate, Harker submitted a letter of resignation and subsequently sued.⁶⁸

Harker met her prima facie case of showing wage discrimination under the EPA by showing that Utica paid Jones a different salary than her, the jobs performed required equal skill, effort, and responsibility, and occurred under similar conditions.⁶⁹ The burden then shifted to the Utica to show that it had an affirmative defense and that the reason for the pay disparity satisfied at least one of the four exceptions. Utica claimed that the difference in salary was attributable to the variations in education, experience and length of service with Utica College.⁷⁰ Utica successfully rebutted Harker's prima facie case by establishing a legitimate reason for the wage differences by showing Jones' increased education, experience, and service with Utica College compared to that of Harker.⁷¹

Since Harker failed to rebut reasons for the difference in pay, the court granted summary judgment for Utica. The court pointed out that once Harker met her prima facie case, Utica was entitled to use individualized qualifications as legitimate grounds for differences in pay.⁷²

Bartges v. University of North Carolina at Charlotte⁷³

This case was before the court on a motion for summary judgment by the University of North Carolina at Charlotte (Charlotte). Ellyn Bartges, a part-time women's assistant basketball and softball head coach, filed claims under the EPA, Title VII, and Title IX as well as state law claims.⁷⁴ Bartges, originally hired as a volunteer assistant, was promoted to a part-time paid

⁶⁵ *Id.* at 1323.

⁶⁶ *Harker v. Utica College of Syracuse University*, 885 F.Supp. 378 (N.D.N.Y 1995)

⁶⁷ *Id.* at 382.

⁶⁸ *Id.* at 382-84.

⁶⁹ *Id.* at 389.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 391.

⁷³ *Bartges v. Univ. of North Carolina at Charlotte*, 908 F.Supp.1312 (W.D.N.C. 1995)

⁷⁴ *Id.*

assistant, and eventually offered the head softball coaching position at Charlotte despite having no head coaching experience in that sport. Charlotte dismissed Bartges from her part-time assistant coaching job with the women's basketball team when it decided to hire a full-time assistant coach. Bartges was one of three finalists interviewed for the full-time position but did not end up getting the job. She continued to be the head coach of the softball team but later made some questionable decisions regarding fundraising. The athletic department reprimanded her. Bartges then submitted her resignation and sued.⁷⁵

The court determined that Bartges did not meet her prima facie case because she did not show that she received lower pay for performing work equal in skill, effort, responsibility, and working conditions.⁷⁶ The male coaches that Bartges claimed were comparators did not perform jobs which required the same skill, effort and responsibility or equal working conditions. The court did not consider part-time positions comparable to full-time positions.⁷⁷ In addition, the court stated that where a potential comparator performs additional duties for pay, the non-coaching duties should not factor into the analysis.⁷⁸ Finally, the court reiterated that, where a sport is a major revenue generator, that position would carry further obligations. This qualifies as creating a difference in working conditions concerning the equal-pay analysis.⁷⁹

Charlotte's affirmative defenses were based on Bartges' limited experience in coaching, the relative importance of the sport that she coached in Charlotte's program, and the prevailing wages in her sport.⁸⁰ The court stated that any of Charlotte's reasons for terminating Bartges were legitimate factors, other than sex, that legitimized the decision of the university.⁸¹

Weaver v. Ohio State University⁸²

In this case, Karen Weaver, a former Ohio State University (Ohio State) field hockey coach sued, claiming violations of Title IX, Title VII, and the EPA. Specifically, plaintiff alleged that she was fired because of her gender and that she was paid a lower salary than the men's ice hockey coach who held a similar position.⁸³

Courts seldom find equality of work amongst coaches of different sports.⁸⁴ When determining whether men's and women's coaching positions are equal, courts look at a number of factors including: team size, number of assistant coaches, recruiting responsibilities, amount of spectators attending events, community interest in the sports, the amount of revenue generated by a sport, the degree of responsibility in the area of public and media relations and promotional

⁷⁵ *Id.* 1317-1320.

⁷⁶ *Id.* at 1322.

⁷⁷ *Id.* at 1323.

⁷⁸ *Id.* at 1323.

⁷⁹ *Id.* at 1323-24

⁸⁰ *Id.* at 1324.

⁸¹ *Id.* at 1327.

⁸² *Weaver v. Ohio State University*, 71 F.Supp.2d 789 (S.D. Ohio 1998).

⁸³ *Id.* at 791.

⁸⁴ *Id.* at 800.

activities, and the relative importance of the sport as a whole.⁸⁵ Based on these factors, the court determined that Weaver failed to show that men's ice hockey and women's field hockey are comparable under the Equal Pay Act standards.⁸⁶

The court also noted that the men's ice hockey coach had 20 years of seniority and that Weaver's salary was above the market rate for women's field hockey coaches.⁸⁷ Weaver argued that the market rate defense was not viable because market values were suppressed by discrimination.⁸⁸ However, there was no evidence that discrimination played any role in establishing market rates for field hockey and ice hockey coaches.⁸⁹

Perdue v. City University of New York⁹⁰

Molly Perdue, a former women's basketball coach and women's sports administrator at Brooklyn College, sued the City University of New York, Brooklyn College and several individually named defendants (CUNY). Perdue alleged violations of the EPA, Title VII, Title IX and various other federal laws.⁹¹ At trial, the jury found for Perdue with respect to her EPA claim and her intentional discrimination claims. Specifically, the jury found that CUNY's conduct was a willful violation of the EPA.⁹²

A willful violation of the EPA results in doubling the compensatory award as liquidated damages.⁹³ A violation of the EPA will be willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute."⁹⁴ No showing of intent to discriminate is required.⁹⁵ *Id.*

Applying the factors from *Weaver*, et al.,⁹⁶ the court agreed with the jury's finding that Perdue was doing equal work on jobs requiring equal skill, effort and responsibility as those of her male comparators.⁹⁷ Specifically the court noted that Perdue and her counterparts (the men's basketball coach and men's sports administrator) had similar seasons, the same number of games, the same number of players, the same number of practices, and similar responsibilities such as recruiting, budgeting, awarding scholarships, scouting, preparing for games, and ordering

⁸⁵ *Id.* (citing *Stanley*, 13 F.3d *supra* note 42; *Bartges*, 908 F.Supp. *supra* note 73; *Deli v. Minnesota*, 863 F.Supp 958, 961 (D.Minn. 1994); *Jacobs v. College of William and Mary*, 517 F.Supp 791, 797 (E.D.Va. 1980), *aff'd*, 661 F.2d 922 (4th Cir. 1981).

⁸⁶ *Id.* at 801.

⁸⁷ *Id.* at 801-802.

⁸⁸ *Id.* at 802.

⁸⁹ *Id.* at 802.

⁹⁰ *Perdue v. City of New York*, 13 F.Supp.2d 326 (E.D.N.Y. 1998).

⁹¹ *Id.* at 330.

⁹² *Id.* at 333.

⁹³ *Id.* See also 29 U.S.C. §§ 216, 260.

⁹⁴ *Id.* at 333 (citing *Pollis v. The New School for Social Research*, 132 F.3d 115, 119 (2nd Cir. 1997) (quoting *Reich v. Waldbaum*, 52 F.3d 35, 39 (2nd Cir. 1995)).

⁹⁵ *Id.*

⁹⁶ *Weaver*, 71 F.Supp.2d, *supra* note 82.

⁹⁷ *Perdue*, 13 F.Supp.2d, *supra* note 90, at 334.

equipment.⁹⁸ Additionally, the jury's willfulness finding was justified because CUNY was aware of salary discrepancies between Perdue and her counterpart.⁹⁹

Horn v. University of Minnesota¹⁰⁰

David Horn, the plaintiff in this case, was a man, hired as the second assistant coach of the women's hockey team. After his first season, Horn discovered that he was paid less than the first assistant coach, even though their job descriptions and contracts were practically the same (not including the term of the contract and the salary). Horn pointed this out to the Director of Women's Athletics. Horn claimed that, after he did this, the head coach started treating him unfairly by giving him a poor performance review and recommending that his contract not be renewed. The University of Minnesota (Minnesota), however, offered Horn a new 12-month contract with a salary increase. Horn rejected this offer and left Minnesota.¹⁰¹

In this case, the court stated that the same standard is used to determine wage discrimination, regardless of whether the claim is raised under Title VII or the EPA.¹⁰² The court held that the assistant coaching positions in this case were not substantially equal because the counterpart coach had greater responsibilities and demanded greater efforts and skill than Horn's position required.¹⁰³ So while the two assistant coaches may have shared some similar duties, the first assistant coach had other duties she was accountable for, differentiating her job from Horn's such that the two positions were not substantially equal under the EPA.¹⁰⁴

Lewis v. Smith¹⁰⁵

Mark Lewis, a former male assistant women's basketball coach sued the Board of Regents of Arizona State University (ASU) alleging gender discrimination under the EPA and Title VII. Lewis' employment was for five years, consisting of consecutive one-year contracts. At the end of his fifth year, the ASU head coach and the ASU athletic director decided not to renew Lewis' coaching appointment. ASU had three assistant coach positions, two non-restricted positions and one restricted position, which limited recruiting duties. Lewis was employed as a non-restricted coach and was paid a lower salary than of one non-restricted coach but higher than the other non-restricted position. In Lewis' last season, a new assistant coach was hired and was given a salary significantly higher than what Lewis earned. Lewis inquired about a pay increase, but ASU ignored his request. Soon thereafter, ASU notified Lewis he was not being offered a new contract.¹⁰⁶

Lewis did not meet the requirements of an EPA claim because he could not show that his job was substantially equal in terms of skill, effort, and responsibility to that of his

⁹⁸ *Id.*

⁹⁹ *Id.* at 335.

¹⁰⁰ *Horn v. Univ. of Minnesota*, 362 F.3d 1042 (8th Cir. 2004).

¹⁰¹ *Id.* at 1044-45.

¹⁰² *Id.* at 1045.

¹⁰³ *Id.* at 1046.

¹⁰⁴ *Id.*

¹⁰⁵ *Lewis v. Smith*, 255 F.Supp.2d 1054 (D.Ariz. 2003).

¹⁰⁶ *Id.* at 1055-57.

counterpart.¹⁰⁷ Lewis engaged in significantly more off-campus recruiting than his counterpart, while his counterpart had greater scouting responsibilities.¹⁰⁸ The court noted that the evidence showed common core tasks, but Lewis' own evidence showed that the two coaches had substantially different levels of responsibility. Thus, Lewis' EPA claim failed.¹⁰⁹ *Id.*

Lewis was able to establish a prima facie case under Title VII because he was given similar or greater responsibilities but was paid less than his counterpart.¹¹⁰ The facts of this case show that it is possible to succeed in a compensation discrimination claim under Title VII but not succeed under the EPA because Title VII provides for broader protections when it comes to the issue of gender-based compensation discrimination. However, the plaintiff has a higher burden of proof in a Title VII claim than under an EPA claim. In a Title VII claim, the plaintiff must also show evidence of intentional discrimination *and* evidence of a wage disparity.¹¹¹ In this case, Lewis presented sufficient evidence to succeed in his Title VII compensation discrimination claim by showing that his job responsibilities, while not substantially equal as a matter of law, were similar to the responsibilities of the other assistant coaching position.¹¹²

In making his prima facie case under Title VII, Lewis also presented evidence that ASU used discriminatory criteria in selecting the new assistant coach.¹¹³ The court determined that, since no male progressed to the interview stage, there was some evidence showing a discriminatory intent to exclude men from the assistant coaching position.¹¹⁴ ASU tried to rebut the claim by asserting a market forces defense, stating that the higher-paid assistant received more money than Lewis because the market for her services was more competitive.¹¹⁵ However, the court rejected the defense because ASU did not establish that the market value for their new assistant's skills was actually higher than the value of Lewis' skills.¹¹⁶ An employer can use an employee's prior salary as a base for a new employee's salary, but the employer must also analyze market value of the employee's skills to establish a proper pay disparity defense.¹¹⁷ Because ASU did not do that, as a matter of law, the court held that ASU could not justify paying the new assistant more based only on her prior salary.¹¹⁸

Mehus v. Emporia State University¹¹⁹

Maxine Mehus, a women's volleyball coach, alleged that Emporia State University (ESU) paid her less than a similarly situated male comparator for equal work.¹²⁰ ESU argued that Mehus had not met her prima facie case because she named more than one comparator.¹²¹

¹⁰⁷ *Id.* at 1059.

¹⁰⁸ *Id.* at 1060.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1060.

¹¹² *Id.* at 1061.

¹¹³ *Id.* at 1061-62.

¹¹⁴ *Id.* at 1061.

¹¹⁵ *Id.* at 1063.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Mehus v. Emporia State Univ.*, 222 F.R.D. 455 (D.Kan. 2004).

¹²⁰ *Id.* at 471.

¹²¹ *Id.* at 473.

The court, however, found that naming more than one counterpart was not a fatal flaw to asserting a prima facie case and overruled ESU's motion for summary judgment on that basis.¹²²

ESU then argued that Mehus' job and the jobs of her counterparts were not substantially equal work.¹²³ The court found that ESU had not presented evidence to show that plaintiff's position required different skills than her counterpart's positions.¹²⁴ ESU argued that coaching basketball requires greater effort than coaching volleyball because there are different NCAA recruiting rules for basketball and volleyball, basketball is broadcast on the radio, basketball coaches are required to do pre- and post-game radio shows, basketball attracts more fans, and basketball coaches have 12-month contracts.¹²⁵ However, the court found that ESU provided no evidence that the differences in NCAA recruiting and coaching a broadcast sport required more effort than coaching volleyball.¹²⁶ Nothing in the record supported ESU's claim that coaching basketball required more effort than coaching volleyball.¹²⁷

Similarly, the court found that nothing in the recorded supported ESU's contention that the volleyball and basketball positions required substantially different responsibilities.¹²⁸ In terms of working conditions, the court stated that, although ESU listed some differences between the positions' working conditions, these differences did not impose different working conditions on Mehus and her male counterparts.¹²⁹ Finally, the court found that the record created a genuine issue of material fact as to whether ESU used a merit system to set and increase salaries for its coaches, so the court also denied summary judgment on that ground.¹³⁰

Hankinson v. Thomas County School System¹³¹

Cara Hankinson, a varsity softball coach at a Thomas County, Georgia high school sued the county, claiming that the school violated the EPA by paying her less than it paid the male baseball coach. The District Court for the Middle District of Georgia found that Hankinson did not establish a prima facie case under the EPA because she failed to show that coaching softball was substantially similar to coaching baseball.¹³² However, the Eleventh Circuit Court of Appeals found that the *differences* between the jobs could potentially be offset by the fact that the baseball coach had more qualified assistants¹³³. This created a genuine issue of material fact sufficient to reverse the district court's EPA finding.¹³⁴

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 475

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 476.

¹²⁹ *Id.*

¹³⁰ *Id.* at 477.

¹³¹ *Hankinson v. Thomas County School System*, 257 Fed.Appx. 199 (11th Cir. 2007).

¹³² *Id.* at 200.

¹³³ *Id.* at 201

¹³⁴ *Id.* at 202.

So while there were factual differences in the jobs being compared, the court found that there were other reasons that these differences could potentially be offset, allowing for a finding that the jobs were substantially similar.¹³⁵

ADMINISTRATIVE TIPS

A proactive review of determining whether problems or issues exist in this area of the law can be a daunting task. In many situations, there are so many coaches, hired at many different times, under varying terms and arrangements that figuring out where to begin an analysis of the issue is a confusing process. Outlined below are tips that will help guide employers through the review process.

Review the EADA Report

Begin by looking at the last few EADA reports. Look at the average salaries of the head and assistant coaches for the men's and the women's teams. Although the reports do not factor in the gender of the coach, this public information provides a starting point for review. Finally, look at the worksheets used in preparing this summary information.

Compile the Hiring/Employment Documents

Compile for review an employment contract, letter of hire or appointment, or other type of hiring document. Also, gather annual notices regarding current salary and benefits for every coach. The process of compiling this information shows which coaches have employment contracts versus coaches with other hiring arrangements. This will allow the employer to note such things as duration of contracts, compensation and benefits packages, bonus eligibility, and terms and conditions of employment.

Obtain Job Descriptions

If the coaches' duties are not set forth in the employment contract or letter of appointment, or other relevant documents, obtain copies of the job descriptions for the positions. Even if the duties are briefly discussed, it is advisable to obtain and review it.

Obtain Compensation Information

Ask the payroll office to provide a record of all compensation paid to the coaches. This provides an easy-to-read report that is useful in identifying potential issues of inequity.

Obtain All Compensation/Benefits Outside of Salary

Gather information on the amounts paid for benefits such as health, life, and disability insurance. Also, gather information on courtesy cars, club memberships, tickets to games and events, and any other miscellaneous forms of compensation.

Obtain Information on Compensation Paid by Foundations and Outside Groups

Some compensation may not come directly from the institution. If such compensation is referenced in the employment contract, it needs to be considered. Ascertain what separate contracts the coach may have with (or may be negotiating with) apparel and footwear manufacturers.

¹³⁵ *Id.* at 201

Compare and Analyze Data that is Compiled

Finally, compare the institution's approach to equity in its compensation of coaches. Organize the information in a way that is easy to understand. A formal spreadsheet or some other format allows for easy reference.

Where Inequities are Identified – Find Basis for Them

If inequities exist, the next step is to ascertain why they exist and if they can be justified. As an employer goes through the process of determining if compensation is equitable, the employer should remember that mere assertions that extra duties somehow justify a disparity in pay are not enough. An employer must ask follow-up questions such as: (1) What are these duties and why do they exist? (2) Are other coaches performing these duties without being compensated? (3) Have these extra duties been offered to the coach of the women's or men's team? (4) Does the coach of the men's or women's team have a greater number of assistants or support staff to help get the duties handled and thus does not require extra compensation?

A university that pays disparate coaching salaries might assert that the men's team coach has greater pressure and responsibility than has the female coach, or vice versa. For example, *Stanley* states that a university may argue that a coach is paid more based on the expectation that they will raise money, cultivate alumni, socialize with boosters, and be more visible in the community.¹³⁶ These realities may constitute a source of additional pressure on the coach, but if they fall equally on the coach of the opposite sex, it is difficult to use it as a basis for justifying the pay disparity. Similarly, if these factors are only a peripheral part of the coach's employment, they will not alone justify a higher salary. If factors for different pay are properly included in the compensation analysis, they can represent legitimate factors supporting a compensation differential. The key to defeating an EPA claim is to collect ample evidence to show that the difference in compensation is warranted.

In addition, an institution may argue that the men's coach commands a higher salary than the women's coach because the market demand requires that the men's team coach be paid more. For example, the men's coach may have to commit to a specific number of speaking engagements a year or do additional fundraising for the university. Universities often argue that competitive compensation packages are necessary to attract the best talent. This "marketplace" defense is defeated by showing that those charged with hiring did not inform themselves of the actual market rates of particular expertise, experience or skills. In other words, "superficial assumptions" that an institution had to pay a "market rate" are insufficient. However, if a university documents its research of the marketplace and its negotiation of the compensation package, this defense can be useful.

If Inequities Exist, Fix Them

If an employer's review shows unjustified inequities, the employer should correct them as soon as possible. The ability to earn bonuses is often easy to correct. The institution should maintain a uniform approach to paying bonuses. Even if the inequities are legally justified, modifying the compensation arrangement equitably may be appropriate.

¹³⁶ *Stanley*, 13 F.3d, *supra* note 42, at 1322.

Role of Human Resources and General Counsel

Input from the Human Resource office and the Legal office is required for any review. The HR office can compile much of the payroll and necessary personnel documents. The Legal office may want the review performed under its direction so it can control access to information generated for the review and protect the information under the attorney-client privilege. For that reason, it is always best to check with the Legal Office before initiating a review of this kind.

Prospective Basis

It is always easier to deal with things on a prospective basis until the employer can find the time to determine if the way things done in the past need to be corrected. Employers should consider the following advice as they move forward:

- Ensure that base salaries are similar. Variations are permissible for training, experience, education, and success.
- Make supplemental salary categories available to both male and female coaches.
- Nevertheless, compensation may differ depending on documented factors such as revenue production disparities, responsibilities, record expectations and resulting pressure differences, and marketplace influences.
- Ensure that coaches are not paid twice for the same job responsibility (e.g., media responsibilities, academic standards).
- Be precise in defining supplemental duties of the coach, and document that performance is actually taking place.
- Negotiate each area of compensation with your coach and document all conversations and demands.
- Assess coaching, administrative and support staffs that are available for coaches before determining that extra compensation is necessary.
- Do not allow coaches to sign contracts directly with any commercial organizations when they involve the use of student-athletes or the university marks (e.g., shoes, apparel or equipment). Contracts should be with the university or athletics department. Negotiations will then determine how the revenue involved is split between the institution and coach.

CONCLUSION

Pay equity concerns are prevalent throughout numerous institutions. A proactive review of any pay equity issue will correct real, or perceived, inequities before they become legal disputes. Institutions are aware that legal disputes oftentimes lead to a negative public perception and are adamant about mitigating any public relation problems.

