EEOC COACHES' SALARIES ENFORCEMENT GUIDANCE

SUMMARY/BACKGROUND

Key Points:

- Effective date: October 29, 1997
- Explains EEOC's analyses of sex discrimination for coaches' salaries under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.
- Updates and supersedes 1989 policy.
- Includes examples that illustrate discussions.

On October 29, 1997, the U.S. Equal Employment Opportunity Commission (EEOC) issued "enforcement guidance" (Guidance) on coaches' salaries (a one-page outline follows this summary). The EEOC is an independent federal agency that enforces, among other laws, the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964. Title VII is a much broader law that prohibits many types of employment discrimination in addition to compensation, some of which may affect compensation (e.g., hiring, promotion, limiting opportunities), on several bases (e.g., sex, race, religion). As enforcement guidance, this document does not have the same force of law as agency regulations. However, courts are likely to cite to the Guidance unless they decide that the Guidance is an unreasonable interpretation of the statute.

The 1997 Guidance supersedes the EEOC's 1989 policy, although policy covered by both documents is substantially the same. The 1997 Guidance provides the EEOC's position on some court cases decided in the 1990s, explains certain routine civil rights principles, and includes useful examples to illustrate the points in the Guidance. In particular, the examples show how general principles are applied to different fact situations, including the differences between the unacceptable "market rate" defense and the acceptable "marketplace value" defense for different salaries. The caution for the acceptable marketplace value defense is that the institution must be able to show that it has based a higher salary for a specific individual on facts related to that individual.

The Guidance clarifies that wages, subject to review under the EPA, include "the types of nonmonetary benefits that coaches may receive, such as cars, country club memberships, memberships in professional organizations, paid trips to meetings, and low interest loans and mortgages[.]"

The Guidance confirms that coaching jobs for different sports can be "substantially equal" under the EPA and for Title VII purposes. Some cautions are provided for jobs determined to be substantially equal: for example, inconsequential differences in jobs cannot justify different pay. Higher pay cannot be justified because an individual has other skills not required to perform the specific job. Also, the fact that a male head coach has one or even two more assistants than a female head coach does not necessarily demonstrate that the male coach has a more responsible position.

Institutions may have difficulty defining which coaching positions are substantially equal. The Guidance lists what to review—equal skills, equal effort, equal responsibility, and similar working conditions—but does not explain how to measure each factor. This may be unavoidable. The Guidance quotes the regulation: "What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined" but "the broad remedial purpose of the law must be considered." Furthermore, "As in all EPA cases, the skills, efforts, and responsibility required by the positions, as well as the conditions under which the jobs are performed, must be evaluated and compared on a case by case basis." "Because employment

practices vary from school to school, each factual situation must be examined in detail." The Guidance acknowledges in its examples that the men's and women's basketball coaching positions may be the same on one campus but different on another campus. Again, the examples in the Guidance may assist in identifying substantially equal jobs.

In several examples, the Guidance clarifies that discrimination in one context cannot justify discrimination in another context, including for salary differentials. The EEOC specifically rejects consideration of discrimination in society at large; however, discriminatory practices either at the plaintiff's institution or at an institution from which a plaintiff or comparator was recruited, may not be the basis for justifying a salary differential.

When the jobs in question are identified as substantially equal, institutions may proffer four EPA defenses for different salaries—a seniority system, a merit system, a system measuring quantity and quality of production, and a differential based on any factor other than sex. The Guidance discusses the common justifications advanced under the fourth defense—any factor other than sex, which include: revenue production; competition for the individual; salary based on a prior salary; salary linked to the sex of the student-athletes; the male coach's superior experience, education, and ability; and the male coach's additional duties.

The Guidance acknowledges that revenue production, in certain cases, may constitute a defense under the EPA, but warns that the EEOC would carefully analyze this defense. Analyses may include evaluation of whether an institution provides equivalent publicity and marketing support that help produce revenue. The EEOC also acknowledges the approach for compliance under Title IX, that the total program rather than sport-to-sport comparisons are conducted for non-salary issues. In analyzing alleged discrimination in conditions of employment, the EEOC will apply the Title IX principle that different support is acceptable if the treatment in the overall program is not discriminatory. In other words, an institution that emphasizes men's basketball and provides publicity and promotions to men's basketball, which may in turn affect salaries, does not have to provide the same level of support to women's basketball. The institution may emphasize another women's team, for example, volleyball, and meet the Title IX requirements, thus providing an acceptable justification under the EPA and Title VII. The Guidance also acknowledges that teams may be in different developmental stages, so identical treatment might not be appropriate or required.

A useful discussion explains that the unacceptable "market rate" defense is based on an employer's assumption that women will accept jobs for less pay. The acceptable "marketplace value" defense is based on qualifications and actual competition for a specific individual.

The Guidance suggests that prior salary as a defense should be used with great caution. The EEOC will consider whether institution officials: consulted with the previous employer to determine the basis for prior salary; determined whether the prior salary was an accurate indication of the employee's ability; did not rely solely on prior salary; and, if officials bargain, whether they bargain with both female and male employees. The Guidance clarifies that even if an institution consults with the previous employers and sets the man's salary higher than the woman's salary as a consequence of those consultations, a difference in salaries is not justified if the woman's prior salary was influenced by sex discrimination.
Again, this does not refer to societal discrimination against women in athletics. It means that the institution of the woman's prior employment may have discriminated in policies or practices, may have discouraged her from participating in speaking engagements or fundraising efforts that the prior institution used to justify higher salaries for men, or may have failed to provide publicity and marketing support for her team and herself as coach comparable to that provided to men's teams, thus affecting her salary.

The Guidance is most discouraging about using the sex of the athletes as "a factor other than sex" to justify different salaries and threatens, more than once, that the EEOC would refer an institution proffering this defense to the Office for Civil Rights for a Title IX athletics investigation. It is confusing to consider a factor other than sex and yet refer to the sex of the athletes. A factor other than sex means other than the sex of the coach. A finding of sex discrimination in employment has to be based on the sex of the coach and not the sex of those being coached. For example, a man who coaches men's basketball and a man who coaches women's basketball may be paid vastly different salaries, and there is no sex discrimination in employment because the sex of the coaches is the same (nonetheless, a Title IX concern is possible regarding coaching services to students). The Guidance does not clarify this point. To do so might encourage an institution to hire only men to coach both men's and women's teams so as to avoid sex discrimination in employment claims. However, if women are not permitted to apply, that would violate Title VII.

Superior experience, education, and ability may justify pay disparities if distinctions are relevant to the job and not gender-based. Additional duties are also an acceptable defense for higher wages if the higher pay is related to the extra duties, and the opportunity to perform the extra duties is available to both men and women.

The EEOC summarizes its Guidance by stating that the burden is on the plaintiff to show that, although salaries are disparate, the jobs are substantially equal. An institution can be found liable unless it can prove that the reason for unequal pay falls within one of the EPA's four affirmative defenses.

OUTLINE — EEOC* COACHES' SALARIES ENFORCEMENT GUIDANCE

I. A plaintiff must:

- identify a comparator, that is, another individual with the same employer whose job is "substantially equal" to the plaintiff's
- identify at least one person (not a hypothetical person) of the opposite sex with a substantially equal job; if there is more than one, comparison is to their average pay
- establish that individual of opposite sex was paid more for a substantially equal job

II. Substantially equal jobs are those that require:

equal skills

- includes such factors as experience, training, education, ability
- abilities not necessary to perform the job and to the skills being taught are not relevant

equal effort

- for coaches this may include: teaching/training; counseling/advising students; general program management; budget management; fundraising; public relations; and recruiting (college level)
- analyses will not be limited to like sports

equal responsibility

- may include size of the team, number of assistants, and demands of event and media management
- includes actual duties performed—institution must afford opportunity for male and female coaches to take on responsibilities in a nondiscriminatory fashion
- mere difference of one or two assistants does not automatically demonstrate more responsible position, especially if assistants are assigned discriminatorily

similar working conditions

- most coaches work under similar working conditions

III. If plaintiff identifies a comparator with a substantially equal job, and the plaintiff is paid less, an employer may justify different salaries with any one of four acceptable defenses, which are:

a seniority system
a merit system
a system measuring quantity and quality of production (rarely relevant to coaching) a differential based on any factor other than sex

- may include revenue production if support for producing revenue is equitable
- may include marketplace value where justified by specific competition for a specific individual
- may include prior salary if prior salary nondiscriminatory
- may consider sex of athletes coached—only if women are equally considered for coaching men's teams (this defense may invite OCR investigation)
- may include experience, education, and ability
- may include additional duties if opportunity for additional duties is not discriminatory

Title VII may permit relief when the Equal Pay Act does not. For example, if a woman is underpaid in a unique position and the employer would have paid her more if she were a man, the employer may violate Title VII.

* EEOC Enforcement Guidance issued October 29, 1997. The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.

EEOC COACHES' SALARIES ENFORCEMENT GUIDANCE–FULL TEXT

EEOC	NOTICE	Number 915.002
		Date 10/29/97

1. *SUBJECT*: Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions.
2. *PURPOSE*: This enforcement guidance sets forth the Commission's position on the application of the Equal Pay Act and Title VII to sex discrimination in the compensation of sports coaches in educational institutions.
3. *EFFECTIVE DATE*: Upon issuance. [Note issue date above of October 29, 1997.]
4. *EXPIRATION DATE*: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.
5. *ORIGINATOR*: Coordination and Guidance Programs, Office of Legal Counsel.
6. *INSTRUCTIONS*: File after Section 633 of Volume II of the EEOC Compliance Manual.
7. *SUBJECT MATTER*:

I. *Background*

Recent studies show substantial differences in salaries paid to head and assistant coaches of women's and men's teams in educational institutions. For example, according to a recent National Collegiate Athletic Association study, men's sports receive 60% of the head coaches' salaries and 76% of the assistant coaches' salaries in Division I institutions.[1] A confidential survey of 87 universities recently conducted by the University of Texas athletic department supports these findings, showing dramatic differences in salaries paid to men's and women's coaches.[2] The coaches of men's teams also often receive better benefits than coaches of women's teams. 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.[3]

These demonstrated pay disparities between the coaches of men's and women's teams are of concern to the Equal Employment Opportunity Commission (EEOC) because the overall pattern of employment of coaches by educational institutions is not gender-neutral. Women by and large have been limited to coaching women, while men coach both men and women. For example, in 1996, 47.7% of the head coaches of women's intercollegiate

[1] NCAA Gender Equity Study 14 tbl. 9 (1997). Even in the smaller and less competitive Division III institutions, 58% of dollars spent on head coaches' salaries go to men's teams and 72% of assistant coaches' salaries are spent on men's teams. *Id*. at 99 tbl. 9.

[2] Jim Naughton, *A Confidential Report Details Salaries of Athletics Officials*, Chron. Higher Educ., March 28, 1997, at A49. According to the figures in the survey, in 1996-97, the median personnel expenditure for men's athletics was more than $1.9 million, while the median personnel expenditure for women's sports was $431,282. *Id*. Based on a review of the results from eight national gender equity studies, in 1996 GAO reported similar findings. Intercollegiate Athletics: Status of Efforts to Promote Gender Equity 3, 13, 14 (GAO/HEHS-97-10, October 1996) (hereinafter 1996 GAO Report). *See also* Joseph P. Williams, *Lower Pay for Women's Coaches: Refuting Some Common Justifications*, 21 J.C. & U.L. 643, 647 n.26 (1995) (hereinafter Williams) (coaches of women's sports face pay disparities not only in intercollegiate sports, but also at the high school level).

[3] Intercollegiate Athletics: Compensation Varies for Selected Personnel in Athletic Departments 12, 22 (GAO/HRD-92-121, August 1992) (hereinafter 1992 GAO Report).

teams at NCAA schools were females, but only about 2% of the head coaches of men's teams were females.[4] At the high school level, as of 1990, more than 40% of girls' teams were coached by men, but only 2% of boys' teams were coached by women.[5] While claims of compensation discrimination in coaching can arise in a number of factual contexts, they often arise where women coaches of women's teams allege that men coaches of men's teams earn greater compensation in violation of the law.

Important questions are raised regarding the proper analysis of these pay disparities under both Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e *et seq*., and the Equal Pay Act (EPA), 29 U.S.C. § 206 (d)(1).[6] There are only a limited number of cases that apply Title VII and/or the EPA to questions of pay discrimination in coaching and a number of them either present unique facts or, in the Commission's view, include incomplete analyses of the law. Moreover, there are many misconceptions which are often raised in considering these pay disparities.[7] The EEOC is issuing this guidance in order to set out the proper framework for applying the EPA and Title VII to claims of gender inequity in the compensation of coaches.[8]

II. *Legal Analysis*

The Equal Pay Act prohibits employers from paying employees at a rate less than employees of the opposite sex at the same establishment "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ." 29 U.S.C. § 206(d)(1). The jobs need not be identical, but only substantially equal. 29 C.F.R. § 1620.13(a).

Title VII forbids discrimination because of sex "against any individual in hiring [sic] or "with respect to his compensation, terms, conditions, and privileges of employment. . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it an unlawful practice for an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . ." 42 U.S.C. § 2000e-2(a)(2). Both sections are applicable to charges of wage discrimination.

---

[4] R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal Study - Nineteen Year Update 1977-1996* (Brooklyn, N.Y.: Brooklyn College, 1996) (hereinafter Acosta & Carpenter). As noted by the GAO in a 1992 report, all the positions of athletic director, head football coach, and head coach for men's basketball in NCAA Division I schools were held by men, except at one school, where a woman was the athletic director. 1992 GAO Report at 2.

[5] Empowering Women in Sports 6 (The Feminist Majority Foundation's Task Force on Women and Girls in Sports, 1995).

[6] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. (1982) [sic], which prohibits sex discrimination in educational programs and activities receiving federal financial assistance, also applies to coaches' claims of sex discrimination. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (Title IX was meant to reach the discriminatory employment practices of educational institutions as well as discriminatory policies directly affecting students). There is a split in authority regarding whether Title VII preempts Title IX employment claims by individuals for damages. *Compare Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 357 (1996) (Title VII preempts Title IX claims of individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions) *with Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 204-06 & n.1 (4th Cir. 1994) (Title IX reaches employment discrimination claim for damages).

In analyzing employment discrimination claims under Title IX, courts have looked to Title VII standards. *See*, *e.g.*, *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1082 (1997); *Murray v. N.Y. Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995); *Preston*, 31 F.3d at 207; *Lipsett v. Univ. of Puerto Rico* , 864 F. 2d 881, 896-97 (1st Cir. 1988); *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 316-17 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987). The Department of Education, not the Equal Employment Opportunity Commission, enforces Title IX. Unlike Title VII, Title IX imposes no administrative exhaustion requirement, so individuals may file Title IX claims directly in court.

[7] For example, one commonly held view is that certain teams, typically including football and men's basketball, are highly profitable and provide financial support for an institution's other teams, including the women's teams. As a result, it is argued that the coaches of these teams are entitled to higher salaries. However, the facts show that most educational athletic programs, including football and basketball, are not profitable. *See infra* note 25.

[8] On February 8, 1989, the Commission issued Policy Guidance: Equal Pay Act Cases Involving Sports Coaches. This guidance supersedes the 1989 guidance.

A claim of unequal pay can be brought under either statute, as long as the jurisdictional prerequisites are met. There is considerable overlap in the coverage of the EPA and Title VII, although the two statutes are not identical. Principally, Title VII prohibits wage discrimination, not just unequal pay for equal work. Thus, an employment practice that would violate Title VII would not necessarily violate the EPA. Any violation of the EPA, however, is also a violation of Title VII. 29 C.F.R. § 1620.27(a).

In analyzing whether pay discrimination exists in educational coaching positions, two additional general points should be kept in mind. First, the jobs should be analyzed functionally, i.e., in terms of what the actual job requirements are, and not simply with regard to the particular physical skills which are being taught or coached. Accordingly, it is possible for jobs coaching different sports to be "substantially equal" for purposes of the Equal Pay Act and for coaches of different sports to be appropriate comparators under Title VII.[9] Second, pay discrimination cannot be justified if the differences relied on for the proposition that the two jobs are not substantially equal are themselves based on discrimination in the terms and conditions of employment.[10] In analyzing whether there is discrimination in the terms and conditions of employment, the Commission will apply the Title IX principle that the support provided to particular teams at an educational institution (and thus to their coaches) may differ so long as the treatment of the men's and women's programs overall, is nondiscriminatory.[11]

The Guidance will first address the EPA and then turn to Title VII.

---

[9] Courts have found substantial equality in cases involving: female coaches of girls' basketball and male coaches of boys' basketball, *Burkey v. Marshall County Bd. of Educ*., 513 F. Supp. 1084, 1091-92 (N.D. W. Va. 1981); male "boys' hardball coach" and female "girls' softball coach," *Brennan v. Woodbridge Sch. Dist*., 8 EPD ¶ 9640 (D. Del. 1974); and a female intramural sports coach and a male coach of the men's basketball team, *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1035 (11th Cir. 1985). In *EEOC v. Madison Community Unit Sch. Dist. No. 12*, 818 F.2d 577, 583-584 (7th Cir. 1987), the court found equality between the coaches of several like sports (boys' and girls' tennis, boys' and girls' track, and boys' baseball and girls' fast-pitch softball), but set aside the district court's findings of equality between different girls' and boys' sports. The court explained that "there is no objection in principle to comparing different coaching jobs," but concluded that the record before it did not support a finding of cross-sport equality. In particular, the court noted that the male coaches of different boys' sports received different salaries and one of the female plaintiffs was paid the same wage as one of the male coaches of a boy's [sic] team. So long as the evidence does not demonstrate that the differences in salaries are based on discriminatory factors, this fact-based approach is consistent with the EEOC's analysis set forth in this document. *See*, *infra*, *note* 10 and accompanying text. However, the mere fact that the potential male comparators are paid different salaries does not defeat an Equal Pay Act claim.

[10] *See Burkey v. Marshall County Bd. of Educ*., 513 F. Supp. at 1092 (disparity in male and female coaches' salaries violated Title VII and the EPA; to the extent there were any differences in responsibility between male and female coaches, "they were based solely upon Defendants' policy of discriminating against women *Saxonburg Ceramics*, 314 F. Supp. 1139, 1146 (W.D. Pa. 1970) (employer may not exclude women from task and then use fact that they are not performing that task to justify paying men more). *See also Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 734 (8th Cir. 1982) (in Title VII case, the school district claimed that male coaches were entitled to higher salaries because of longer term contracts and higher extra duty stipends than female coaches. But as pointed out by the court, "the assignment of extended term contracts and extra duty stipends to particular coaching assignments is itself subject to employer discrimination on the basis of sex.").

[11] The Department of Education's guidance regarding Title IX's applicability to athletics makes it clear that the relevant inquiry under that statute is whether there is equity between the men's and women's athletics programs overall, rather than between particular sports. As the guidance explains, ". . . there is no provision for the requirement of identical programs for men and women and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women. . . .[In addition], the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities [citation omitted] . . . . Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer." Title IX and Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71,413, 71,422 (1979). Based on this principle, the Commission will not find discrimination in the terms and conditions of employment where male and female coaches of like sports are treated differently if the institution does not discriminate in the terms and conditions of the employment of men's and women's coaches, overall. *See also* Section 3.a., *infra*.

A. Equal Pay Act

1. Selecting Comparators

Under EPA analysis, the first step is to identify male and female comparators so that their jobs may be analyzed to determine whether they are substantially equal. In selecting comparators, a plaintiff cannot compare herself or himself to a hypothetical male or female; rather, a plaintiff must show that a specific employee of the opposite sex earned higher wages for a substantially equal job.[12] There may be a single comparator, or there may be more than one comparator. A plaintiff satisfies his or her initial burden by identifying a single comparator although an institution may proffer other comparators for consideration.[13] As in all EPA cases, the skills, efforts, and responsibility required by the positions, as well as the conditions under which the jobs are performed, must be evaluated and compared on a case by case basis.[14] Along with identifying a comparator(s), it is the plaintiff's burden to demonstrate that jobs s/he has profered are, indeed, substantially equal to that of the plaintiff. Because employment practices vary from school to school, each factual situation must be examined in detail.

EXAMPLE:

> A woman coaches field hockey. She earns $30,000 per year. She contends that her job is substantially equal to the jobs of the men who coach lacrosse ($40,000 salary), boys' volleyball ($50,000 salary), and baseball ($60,000 salary). The criteria of skill, effort, responsibility, and working conditions should be examined for each of the positions to determine whether her job is substantially equal to the job of any or all of the three male coaches.

2. Are the Jobs Substantially Equal?

Once the comparators have been identified, the next step is to determine whether the jobs are substantially equal. "What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined" but "the broad remedial purpose of the law must be taken into consideration." 29 C.F.R. § 1620.14(a). Accordingly, insignificant or inconsequential differences do not prevent jobs from being equal. Although the analysis of whether the jobs are substantially equal is broken down into the four elements enumerated in the statute, the focus should remain on overall job content [sic]

---

[12] *See*, *e.g.*, *Pollis v. New Sch. for Social Research*, 913 F. Supp. 771, 784 (S.D.N.Y. 1996) (doubtful whether statistics alone tending to show a difference between average salaries paid to male and female professors can prove prima facie case).

[13] *Brock v. Georgia Southwestern College*, 765 F.2d at 1033 n.10. *See also Hein v. Oregon College of Educ.*, 718 F.2d 910, 916 & 918 (9th Cir. 1983) (the use of a single comparator is not prohibited; if there is more than one comparator, "the proper test for establishing a prima facie case in a professional setting such as that of a college is whether the plaintiff is receiving lower wages than the average of wages paid to all employees of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage scale.").

[14] *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 286 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

a. Equal Skills

The skills required of each coach and his or her comparator must be examined, considering "such factors as experience, training, education, and ability." 29 C.F.R. § 1620.15(a). Moreover, skill "*must be measured in terms of the performance requirements of the job*." *Id*. (emphasis in original). Thus, additional training or education or abilities that are not required to perform the job will not be considered in determining whether the jobs are substantially equal.[15]

EXAMPLE:

A man coaches boys' tennis, and a woman coaches girls' tennis. Both coaches also teach physical education classes approximately 50% of the time. Both started at the school the same year, and neither had prior teaching experience. Both have a bachelor's degree in education. The school requires a bachelor's degree, but no prior coaching experience for the job. The man hosts a weekly radio show not related to the tennis program. The fact that the man has the ability to perform on a radio show does not demonstrate that the skills required of the two coaches are not substantially equal, because the man is not required to use his radio announcer's skills to perform as a tennis coach.

b. Equal Effort

To determine whether the coaching jobs require equal effort, the Commission will look at the actual requirements of the jobs being compared, 29 C.F.R. § 1620.16(a), and will not limit its analysis to coaches of like sports. Coaches, regardless of the sport, typically are required to perform the following duties at both the high school and college level: 1) teaching/training; 2) counseling/advising of student-athletes; 3) general program management; 4) budget management; 5) fundraising; 6) public relations; and 7) at the college level recruiting.[16] Some coaching jobs will require other duties such as, for example, the management of staff and event management.

EXAMPLE:

A man coaches the boys' ice hockey team and a woman coaches girls' crew. The coaches spend approximately the same number of hours per year coaching. Both coaches train and counsel approximately the same number of student-athletes, manage comparable team budgets, organize fundraising, engage in public relations, and are responsible for the day to day operations for their programs such as supervising equipment and arranging travel. Despite the fact that the coaches teach different skills to their respective teams, there is not a substantial difference in the amount or degree of effort required to perform the job. Accordingly, the jobs require equal effort under the EPA.

c. Equal Responsibility

"Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." 29 C.F.R. § 1620.17(a). The Commission will look closely at the actual duties performed by the coaches to assess whether differences in responsibility justify unequal pay.

---

[15] *See*, *e.g*., *Hein v. Oregon College of Educ*., 718 F.2d at 914 (female Ph.D. in the physical education department who possessed skills equal to or greater than the male basketball coach, but whose position consisted of 100% lecturing, could not be compared to the basketball coach for EPA purposes because a coaching job plainly requires skills that a noncoaching job does not); *Peltier v. City of Fargo*, 533 F.2d 374, 378-79 (8th Cir. 1976) (higher pay to males than females assigned to writing parking tickets not justified by males' status as police officers where the police officer skills were rarely used on the job).

[16] Creating Gender Neutral Coaches' Employment and Compensation Systems, A Resource Manual 6-8 (Women's Sports Foundation, updated October 1995).

It is important to keep in mind that the jobs need not be identical. In *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1035 (11th Cir. 1985), the employer tried to justify paying the female intramural sports coach less than the male coach of the men's basketball team by arguing that she had less responsibility because she had a smaller budget and did not have to arrange off-campus games. The court, however, recognized that the female coach also had scheduling and budgetary responsibilities, and found that the two positions were substantially equal.[17] Other factors relevant to an analysis of responsibility may include, for example, the size of the team, the number of assistants, and the demands of event and media management. As with the other elements of EPA analysis, the Commission will examine whether the institution has afforded male and female coaches the opportunity to take on responsibilities in a nondiscriminatory fashion.[18]

EXAMPLE:

A woman coaches women's field hockey and a man coaches men's lacrosse. Each team has approximately the same number of athletes. Both coaches train and counsel student-athletes, manage the teams' budgets, organize fundraising, engage in public relations, and are responsible for the day to day operations for their programs such as supervising equipment and arranging travel. Both spend approximately the same number of hours coaching during the school year. The man also has the title of Coordinator of Physical Education, but has only insignificant additional responsibilities. The coaches have substantially equal responsibility in their jobs under the EPA.

EXAMPLE:

At a large university, a man is head coach of football and a woman is head coach of women's volleyball. Both teams compete at the most competitive level and there are substantial pressures on both coaches to produce winning teams. The football coach has nine assistants and the team has a roster of 120 athletes. The volleyball head coach has a part time assistant and coaches 20 athletes. Sixty thousand spectators attend each football game, while 200 attend each volleyball game. The football games, but not the volleyball games, are televised. In comparing the man and woman, the man supervises a much larger staff and a much larger team. In addition, the football team's far greater spectator attendance and media demands create greater responsibility for the man. The football coach has more responsibility than the volleyball coach, and, as a result, the jobs are not substantially equal under the EPA.

The mere fact that a male head coach has one, or even two, more assistant coaches than a female head coach does not necessarily demonstrate that the male coach has a more responsible position for purposes of the EPA. Moreover, if an educational institution has discriminated against a female head coach by failing to provide her with comparable assistant coaching support to what it provides to a male head coach, it cannot justify paying her a lower salary based on the claim that she has a less responsible position.

---

[17] Other courts have found that male and female coaches did not meet the equal responsibilities standard, in addition to the other EPA criteria. For example, in *Stanley v. Univ. of Southern Cal*., 13 F.3d 1313, 1321-22 (9th Cir. 1994), the court found that the men's head basketball coach had greater responsibility than the women's coach where the men's team generated greater attendance, more media interest, larger donations, and produced substantially more revenue. In *Bartges v. UNC-Charlotte*, 908 F. Supp. 1312, 1322-24 (W.D.N.C. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996) (unpublished disposition on affirmance), the court found that the woman who was part-time head softball coach and part-time assistant women's basketball coach failed to prove that her combined responsibilities were substantially equal to several male comparators who had, *inter alia*, full-time positions, responsibility for substantially more athletes, and greater supervisory and other coaching responsibilities. *See also Deli v. Univ. of Minnesota*, 863 F. Supp. 958, 961-62 (D. Minn. 1994) (woman coach had less responsibility where male comparators coached larger teams, supervised more employees, had greater responsibility for public and media relations, and their teams generated substantially more spectator interest and revenue).

[18] The Commission notes that two of the cases discussed in the preceding footnote - *Bartges v. UNC-Charlotte*, 908 F. Supp. 1312 and *Deli v. Univ. of Minnesota*, 863 F. Supp 958 - did not address the question of whether discrimination in terms and conditions of employment improperly contributed to the differences in the jobs which were used to justify the pay disparities at issue. The plaintiff in *Stanley* attempted to make such an argument, but the court was not convinced by the proof presented. *Stanley v. Univ. of Southern Cal*., 13 F.3d at 1323 (the minimal evidence offered in support of proposition that the university's failure to allocate funds for the promotion of womens' [sic] basketball was discriminatory was unpersuasive). As result, these cases provide no support for an educational institution when the differences in the jobs are due to discrimination in terms and conditions of employment.

d. Similar Working Conditions

Most coaches work under similar working conditions for purposes of the EPA. "Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions." 29 C.F.R. § 1620.18(b).[19]

3. Does One of the Affirmative Defenses Apply?

After the plaintiff makes out a prima facie case by identifying a comparator or comparators and demonstrating that the jobs are substantially equal, s/he must demonstrate that s/he is paid less wages.[20] Once this is accomplished, the burden shifts to the employer to demonstrate that one of the four exceptions to the Act applies to the positions in question.[21] The EPA provides a defense for differential pay if it is based on: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. 29 U.S.C. § 206(d)(1). Defenses of pay differentials based on seniority or merit systems will apply as they do in other EPA cases.[22] The defense based on production standards, as typically interpreted, will have little, if any, applicability to coaching.

The "factor other than sex" defense, however, raises particular questions with regard to coaching cases. As a general matter, an employer who uses this defense must show that the factor of sex is not an element underlying the wage differential either expressly or by implication.[23] The employer must also show that the wage differential is based on factors related to the performance of the business, in this case, the educational institution.[24] The Commission is aware of the following justifications that have been advanced as factors other than sex in order to justify pay differentials in coaching: (a) the male coach produces more revenue for the school than the female coach; (b) the male coach must be paid higher wages in order to compete for him; (c) salary is based on prior salary; (d) salary is linked to the sex of the student-athletes rather than the sex of the coach; (e) the male coach has superior experience, education, and ability; and (f) the male coach has more duties. This guidance will address each in turn.

---

[19] Dissimilar working conditions will be found where there are substantial differences in "surroundings," which measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and their frequency; or in "hazards," which refers to physical hazards regularly encountered, their frequency, and the severity of injury they can cause. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974). *Accord* 29 C.F.R. § 1620.18 (a).

[20] Under the EPA, "wages" includes the following:

> all forms of compensation . . . whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name.

29 C.F.R. § 1620.10. It is also unlawful to discriminate with regard to a fringe benefit, which "includes, e.g., such terms as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such concepts." 29 C.F.R. § 1620.11(a) and (b). Thus, the types of nonmonetary benefits that coaches may receive, such as cars, country club memberships, memberships in professional organizations, paid trips to meetings, and low interest loans and mortgages, are treated as wages under the EPA.

[21] These are affirmative defenses, for which the employer has the burden of persuasion. *Corning Glass Works v. Brennan*, 417 U.S. at 196-97.

[22] *See*, *e.g.*, *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995) (county sheriff's department did not have "seniority system" justifying pay disparities where no identifiable standards for measuring seniority were systematically applied and observed); *Brock v. Georgia Southwestern College*, 765 F.2d at 1036 (college "merit system" that operated in informal and unsystematic manner did not qualify as defense).

[23] EEOC Compliance Manual, Section 708.3 (BNA) 708:0003. *See Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1189 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984) (requirements for exceptions "not met unless the factor of sex provides no part of the basis for the wage differential").

[24] EEOC Compliance Manual, Section 708.2 (BNA) 708:0003. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525-27 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992) (school district must prove job classification system based on legitimate business considerations).

a. Revenue as a Factor Other Than Sex

Some educational institutions have sought to justify pay disparities in favor of male coaches with the argument that the male coach produces more revenue (and/or is expected to produce more revenue) for the school than the female coach.[25] In certain cases, this may constitute a defense under the EPA.[26]

The Commission recognizes that many variables affect the amount of revenue that is actually produced by any given team or coach and that many of these variables are not within an institution's direct control. Moreover, certain men's and women's teams are in different developmental stages and identical treatment might not be appropriate or required.[27] However, the Commission is also aware of the studies showing that women's athletic programs historically and currently receive considerably less resources than men's programs.[28] Accordingly, the Commission will carefully analyze an asserted defense that the production of revenue is a factor other than sex to determine whether the institution has provided discriminatorily reduced support to a female coach to produce revenue for her team.[29] If this is the case, it would constitute discrimination in the terms and conditions of employment which cannot then be used to justify a pay disparity under the EPA.[30]

---

[25] As a threshold matter, it is important to clarify the meaning of "revenue-producing" in the educational sports context: it is typically an entirely different concept from "profit-making." In particular, the determination of whether a team is "revenue-producing" looks only to income which may be generated by ticket sales, concessions, guarantees, or any other source, while an analysis of whether a team is "profit-making" would consider both income and expenses. The great majority of educational athletic programs, at all levels, do not generate profits for their institutions. Williams at 656. Football is not offered or is not profitable in 91% of all NCAA member institutions, and basketball is not profitable in a majority of NCAA institutions, with the exception of Division I-A. With respect to Division I-A basketball, 34% of the programs have an average debt of $238,000 a year. *Id*. at 656-57. *Accord* John C. Weistart, *Can Gender Equity find a Place in Commercialized College Sports?*. 3 Duke J. Gender L. & Pol'y 191, 207 (1996) (hereinafter Weistart); Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics* , 3 Duke J. Gender L. & Pol'y 51, 90 (1996); Jim Naughton, *A Book on the Economics of College Sports Says Few Programs are Financially Successful* , Chron. Higher Educ., Oct. 11, 1996, at A57 (only 41 of 106 Division I-A institutions make money from their football programs, with only 31 earning more than $1 million a year; remainder lose money). Few, if any, high school teams are profit-making.

[26] In cases in which the courts found that revenue was a factor other than sex, there was insufficient evidence to support findings, or the court did not consider the argument, that the differences in revenue were related to underlying discrimination by the universities. *See supra* note 18, discussing *Stanley v. Univ. Of Southern Cal*., 13 F.3d at 1323; *Bartges v. UNC-Charlotte*, 908 F. Supp. at 1327; *Deli v. Univ. Of Minnesota*, 863 F. Supp. at 961.

[27] *See supra* note 16 and accompanying text.

[28] *See*, *e.g*., Amy Shipley, *Most College Funding Going to Men's Sports*, Wash. Post, April 29, 1997, at E1 (reporting on 1997 NCAA Study). The NCAA Study found that 23% of the total average operating expenses for intercollegiate athletics went to women's programs at Division I schools. NCAA Study 14 tbl. 9.

[29] The Commission will not credit simple assertions that lower resources and support are appropriate for women's teams because, based on societal preferences, they have less "revenue potential." To the contrary, it has been demonstrated that interest in women's sports increases when resources are invested in promoting and marketing these sports. Williams at 687. *See also* Weistart at 228 (wrong to assume which sports interest women and how popular they will be; for example, recent women's Final Four basketball tournament sold out).

[30] A closely analogous situation arises when employers establish requirements for promotion, but discriminate against women or minorities by preventing them from satisfying the requirements. *See*, *e.g*., *Palmer v. Baker*, 905 F.2d 1544, 1547-48 (D.C. Cir. 1990) (court found probative evidence of promotion discrimination where evidence that employer's discrimination in the granting of awards and assignments and in evaluations disadvantaged women seeking promotions); *Wilmore v. City of Wilmington*, 699 F.2d 667, 675 (3d Cir. 1983) (racially discriminatory assignment of administrative jobs affected results of promotional tests in favor of whites and to detriment of minorities); *Jensen v. Eveleth Taconite Co*., 824 F. Supp. 847, 870 (D. Minn. 1993) (experience as a step-up foreman was prerequisite for promotion to foreman, but no woman had ever been promoted to step-up foreman; "by tying promotions to foreman to step-up foreman experience, [employer] tainted its promotions to foreman with the sex-bias evident in its promotions to step-up foreman").

EXAMPLE:

> A man coaches men's basketball, and a woman coaches women's basketball at a large university. The man and woman have similar backgrounds in terms of education and experience. The teams have approximately the same number of athletes and play the same number of games. The university pays the man fifty percent more than the woman. It defends the differential as a factor other than sex on the grounds that the man raises substantially more revenue than the woman. However, an investigation shows that the university provides substantially more support to the man to assist him in raising revenue than it provides to the woman. In addition to three assistant coaches, it provides him with staff dedicated to his team to handle marketing and promotional activities, to schedule media interviews and speaking engagements and to handle the sports information function. The woman is allocated one less assistant coach and no dedicated marketing or sports information staff although she has requested it. Instead, she must rely on the staff that is generally available in the Athletic Department. In addition, the man receives a bigger budget for paid advertising than the woman. She has sought to enhance her team's revenue potential by working with her assistant coaches to schedule interviews and speaking engagements, develop promotions for specific games and start a booster club. However, she has not been successful in raising significant additional revenue. Revenue is not a factor other than sex that would justify the wage disparity since the woman is not given the equivalent support to enable her to raise revenue.

Consistent with the Title IX principle that equity in educational athletics is analyzed on a program-wide rather than sport-specific basis, the Commission will not find discrimination in the terms and conditions of employment if resources necessary for attracting spectators and producing revenue are non-discriminatorily made available to the men's and women's coaches, overall, even if the male and female coaches of two similar sports are treated differently. Thus, in the preceding example, if the university had provided another woman coach with resources comparable to those it provided to the male basketball coach to enable her to raise revenue for her team, revenue could be a factor other than sex and constitute a defense to the claim brought by the woman basketball coach.

EXAMPLE:

> At a university, men coach the men's basketball and gymnastics teams, and women coach the women's basketball and gymnastic teams. Coaching the men's and women's basketball and gymnastics teams requires equal skill, effort, and responsibility and occurs under substantially equal working conditions. The men's basketball team and the women's gymnastics team, however, earn substantially greater revenue for the school than the women's basketball team and the men's gymnastics team. The university allocates the resources necessary to enable the coaches of men's basketball and women's gymnastics to create and sustain their teams as revenue-generating programs in a manner that does not discriminate on the basis of sex. The university supports comparable marketing programs for men's basketball and women's gymnastics, sets up weekly media interviews for both coaches, and provides the teams equal access to a sports information staff. Based on the increased revenue they produce, the coaches of the men's basketball team and the women's gymnastics team receive the same salary, which is more than the salary of either the women's basketball or men's gymnastics coaches. The university can successfully defend the difference in salary based on the difference in revenue, which is a factor other than sex.

b. Marketplace as a Factor Other Than Sex

Employers have also asserted that the marketplace is a factor other than sex, arguing that they must pay a male coach higher wages than they pay a female coach in order to compete for him. The Commission has distinguished the "marketplace value" defense from the "market rate" defense. The "market rate" defense, which has been rejected by the courts and the Commission, is based on the employer's assumption that "women are available for employment at lower rates of pay due to 'market' factors such as the principle of 'supply and demand.'" [31] The "marketplace value" defense is not gender-based but rather is based on the employer's

[31] EEOC Compliance Manual, Section 708.6(c) (BNA) 708:0036. *Accord Corning Glass Works*, 417 U.S. at 204-205 (Court rejected employer's defense of lower female wage on the basis that men would not work at women's rate and that it reflected market in which employer could pay women less than men); *Brock v. Georgia Southwestern College*, 765 F.2d at 1037 ("the argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [EPA] was designed to eliminate . . . .") (emphasis in original).

consideration of an individual's value in setting wages. Such consideration will qualify as a factor other than sex only if the employer can demonstrate that it has assessed the marketplace value of the particular individual's job-related characteristics, and any salary discrepancy is not based on sex.[32] Sex discrimination in the marketplace which results in lower pay for jobs done by women will not support the marketplace value defense.

EXAMPLE:

A mid-sized college hires a man as head basketball coach for its men's team. It pays him a starting $100,000 base salary because "that is the going rate" and what the salary for that position has "traditionally" been. This is twice the salary earned by the women's basketball coach (a woman) even though the men's and women's coaching jobs are substantially equal. However, the man's higher salary is not justified by any particular type of experience, expertise or skills required to coach the men's team but not the women's team. Nor does the particular man hired have job-related skills whose marketplace value would justify the higher salary. The college merely assumed it would need to pay $100,000 to a coach for the men's team. "Marketplace" is not a factor other than sex.

EXAMPLE:

A college is recruiting a coach for its men's gymnastics team which it is seeking to improve and bring up to the higher competitive level of its women's team. One of the applicants, a man, has had experience at another college in making a success of its previously unsuccessful men's gymnastics team. The college initially offers to pay him the same salary it pays the coach of the women's gymnastics team, because the jobs are substantially equal. The applicant reports that he has received higher salary offers from two other schools and is included to accept one of those offers. The college may offer him the higher salary because his unique experience and ability make him the best person for the job and because a higher salary is necessary to hire him. "Marketplace" is a factor other than sex.[33]

c. Reliance on the Employee's Prior Salary as a Factor Other Than Sex

Employers have also argued that basing an employee's salary on his or her prior salary is a factor other than sex justifying a wage differential for equal jobs. However, using prior salary alone may perpetuate lower salaries traditionally paid to women that are based on sex discrimination.[34] Where, for example, women have been prevented from competing for the higher paying jobs coaching men's teams, an employer cannot rely on prior salary to defend its pay disparities. [35] These concerns are particularly applicable in analyzing whether there is pay discrimination in coaching salaries. Wages in athletic programs may not be subject to normal market pressures, but rather may be affected by non-economic factors. Cultural and social factors may have artificially inflated men's coaches' salaries, and may cause them to be sustained at a discriminatorily high rate.[36]

---

[32] EEOC Compliance Manual, Section 708.6(c) (BNA) 708:0038. *Accord Brock v. Georgia Southwestern College*, 765 F.2d at 1037 ("Merely claiming that teachers of certain subjects or with certain qualifications are worth more does not explain away discrepancies absent an explanation of how those factors actually resulted in an individual employee earning more than another - especially when the evidence shows that women with equal or greater qualifications who taught the same subjects were paid less"; "'any credibility that the market force defense might have is diminished by the fact that those charged with hiring did not inform themselves of the market rates of particular expertise, experience, or skills.'" (quoting 489 F. Supp. at 1331)).

[33] *See*, *e.g.*, *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (defense successful where employer took into consideration marketplace value of male employee's greater experience and ability).

[34] EEOC Compliance Manual, Section 708.6(d) (BNA) 708:0040.

[35] *Miranda v. B & B Cash Grocery Store*, 975 F.2d 1518, 1530-31 (11th Cir. 1992) (plaintiff established Title VII claim where employer's justification for paying woman buyer less than men buyers was that buyers' salaries were set according to salary individual was making at time of transfer and men were making more in prior positions; court found women had been excluded from promotion line and had been relegated to lower paying jobs and thus, employer could not rely on an illegitimate market force theory to justify its failure to pay woman same salary as men in her classification.).

[36] *See* Andrew Zimbalist, *Gender Equity and the Economics of College Sports*, *in Advances in the Economics of Sport*, vol 2 (JAI Press, forthcoming 1997) (analyzing market pressures on college athletic programs and concluding that non-economic factors, including gender discrimination, may distort salary levels).

Thus, if the employer asserts prior salary as a factor other than sex, evidence should be obtained as to whether the employer: 1) consulted with the employee's previous employer to determine the basis for the employee's starting and final salaries; 2) determined that the prior salary was an accurate indication of the employee's ability based on education, experience, or other relevant factors; and 3) considered the prior salary, but did not rely solely on it in setting the employee's current salary.[37] Also relevant is whether the employer bargained with the men and women employees over salaries. If the employer offers to bargain with men, for example, by offering a salary range as opposed to a specific dollar amount, it must treat women similarly. Lack of bargaining will cast doubt on the employer's argument that it had to offer the male employee a higher salary to compete for him.[38]

EXAMPLE:

> A college advertises for coaches for its men's and women's basketball teams. The jobs are substantially equal. A man applies to coach the men's team. The college hires him and pays him $100,000 per year solely because that was the salary he earned in his prior coaching position. It hires a woman for the women's team coach job, and sets her annual salary at $50,000 solely because that was her salary at her last coaching job. The employer did not consult with either the man's or woman's previous employer to determine the basis for either's initial or final salary or whether either's prior salary accurately reflected their ability based on education, experience, or other relevant factors. Based on these facts, prior salary is not a factor other than sex. Moreover, there is evidence that the woman's prior employer prevented women from competing for the higher paying jobs coaching men's teams. Thus, even if the employer had consulted with the prior employer as to the basis for the man's salary, since the woman's prior salary was influenced by sex discrimination, it is not a factor other than sex.

d. Sex of Athletes as a Factor Other Than Sex

Frequently, the sex of the coach is linked to the sex of the student-athletes, with female coaches limited to coaching female athletes and earning less than male coaches of male athletes.[39] If there is evidence of such a denial of equal opportunity at the institution where a salary discrepancy is being challenged, the Commission will not accept the defense that the sex of the student-athlete is a factor other than sex justifying a salary disparity since it is not a gender-neutral factor.[40]

This will be so even if both men and women coach the women's teams for it is the virtual exclusion of women from jobs coaching men's teams that demonstrates that the sex of the athletes is *not* a factor other than sex.[41]

---

[37] EEOC Compliance Manual, Section 708.6(d) (BNA) 708:0041-708:0042.

[38] *Id*. at 708:0042.

[39] *See supra* notes 1-5 and accompanying text.

[40] *See EEOC v. Madison Community Unit Sch. Dist. No. 12*, 818 F.2d at 585 ("An employer cannot divide equal work into two job classifications that carry unequal pay, forbid women to compete for one of the classifications, and defend the resulting inequality in pay between men and women by reference to a `factor other than [the] sex' of the employees."); *Bence v. Detroit Health Corp*., 712 F.2d 1024, 1031 (6th Cir. 1983), *cert*. *denied*, 465 U.S. 1025 (1984) (employer may not avail itself of "factor other than sex" defense where "segregation [of male and female employees into men's and women's departments] *plus* application of a lower commission rate *only* to those who sold memberships to women effectively locked female employees, and only female employees, into an inferior position regardless of their effort or productivity.") (footnote omitted, emphasis in original). While the court in *Deli v. Univ. of Minnesota* , 863 F. Supp. at 961, accepted the defense that a pay differential based on the sex of the student athletes is a "factor other than sex," it did so without any analysis of whether women coaches were hired predominantly to coach female athletes. In the absence of such analysis, the Commission finds the district court's reasoning unpersuasive.

If an employer defends coaches' pay disparities based on the sex of the athletes coached, the Commission may refer the case to the Department of Education Office of Civil Rights to investigate whether the employer discriminated against students on the basis of sex in violation of Title IX.

[41] *See Wynn v. Columbus Mun. Separate Sch. Dist* ., 692 F. Supp. 672, 681-82 (N.D. Miss. 1988) (limiting athletic directorship to football coach discriminated against women where football coach position was limited to men, even though other male coaches were also excluded from the position along with women coaches).

e. Experience, Education, and Ability as Factor Other Than Sex

Superior experience, education, and ability may justify pay disparities if distinctions based on these criteria are not gender-based. Determinations whether the reasons are bona fide and not gender-based must be made on a case by case basis.[42]

EXAMPLE:

At a university, a man coaches the men's baseball team and a woman coaches the women's softball team. Their jobs are substantially equal. Both have had approximately the same number of years of experience as coaches. The man sold insurance for five years after college and before becoming a coach. The fact that the man may have developed certain general skills through selling insurance does not put him in a different position from the woman for purposes of setting coaches' pay. The employer is not entitled to pay the man more for this experience.

EXAMPLE:

At a college, a man coaches cross-country track and a woman coaches volleyball. Their jobs are substantially equal. The man has a bachelor of arts degree and has coached at the college level for two years. The woman has a bachelor of arts degree and has coached at the college level for ten years. If the employer bases salary on experience, the employer may pay the woman more than the man based on her greater experience.

f. More Duties

Additional duties are a defense to the payment of higher wages to one sex only if the higher pay is related to the extra duties.[43] The school cannot offer men and women coaches the opportunity to take on additional duties in a discriminatory way and then use the discriminatory distribution of duties to justify disparate pay.[44]

EXAMPLE:

At a college, a man coaches the men's soccer team and a woman coaches women's field hockey. Both coaches train the student-athletes, counsel team members, manage the team's budget, organize fundraising, engage in public relations, and are responsible for the day to day operations for the program, such as supervising equipment and arranging travel. The college funds pre-season practice for the men's team; it does not, however, fund pre-season practice for the women's team, although the coach has requested this opportunity for her team. The coaches receive the same basic salary.

---

[42] For example, in *Harker v. Utica College of Syracuse Univ*., 885 F. Supp. 378 (N.D.N.Y. 1995), a former women's basketball and softball coach claimed that the men's basketball coach was making more money in violation of the EPA; in 1992-93, he earned $34,814 compared to her $29,916. The court found that under the EPA, the jobs were substantially equal. The court did not accept the defendant's defense that the male coach had more education (masters over a B.A.), but did find the male coach's length of service to be a legitimate reason for the wage differential - the male had nine years of experience at the college level at the time the plaintiff was hired. As stated by the court, "defendants are entitled to use individualized qualifications as legitimate grounds for wage differences provided that such qualifications are not gender based." *Id*. at 391.

[43] 29 C.F.R. § 1620.20. As noted in the regulations, the employer cannot successfully claim an extra duties defense if the male coach receives the higher pay without doing the extra work; if the woman coach also performs extra duties requiring equal skill, effort, and responsibility; if the extra duties do not in fact exist; if the extra duties require a minimal amount of time and are of peripheral importance; or if third persons who perform the extra duties as their primary job are paid less than the male coach. *Id*. The issue of extra duties can arise in proving that the jobs are substantially equal and as a defense to a pay differential. *See Brennan v. Prince William Hospital Corp*., 503 F.2d 282, 291 (4th Cir. 1974), *cert . denied*, 420 U.S. 972 (1975) (finding jobs of male orderlies and female aides substantially equal where extra duties performed by orderlies required no significant effort or skill or responsibility, or were also performed by aides).

[44] *See Hodgson v. Behrens Drug Co*., 475 F.2d 1041, 1047 (5th Cir.), *cert. denied* , 414 U.S. 822 (1973) (fact that men and not women participated in a training program was not "factor other than sex" where company excluded women from the training program). *See also supra* note 10.

> The man, however, also gets an additional stipend for the pre-season practice. The fact that the man performs the additional duty of coaching his team during pre-season practice is not a defense under the EPA for paying him higher wages when only his team and not the women's team is given the opportunity.

In summary, to succeed under the EPA, an individual must first demonstrate that the coaching jobs were substantially equal. Once the individual has made this showing, the school will be found liable unless it can prove that the reason for the unequal pay falls within one of the EPA's four affirmative defenses.

B. Title VII

1. Equal Pay Claims

A claim of unequal pay for equal work can be brought under Title VII as well as the EPA.[45] Although burdens of proof are generally not the same under Title VII and the EPA,[46] in a claim of unequal pay for equal work, the same burdens apply. Once the plaintiff establishes a prima facie case of unequal pay for equal work, the burden shifts to the defendant to prove one of the EPA's four affirmative defenses - seniority system, merit system, system based on quality or quantity of production, or any other factor other than sex. 42 U.S.C. § 2000e-2(h). *See also* 29 C.F.R. § 1604.8(b).[47]

2. Other Compensation Discrimination Claims

Title VII covers types of wage discrimination not covered by the EPA. Even where jobs do not satisfy the "equal work" requirement of the EPA, a claim may be made under Title VII. In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Supreme Court held that in a sex-based wage discrimination claim brought under Title VII, the EPA's four affirmative defenses apply, but the EPA's standards of equal pay for equal work do not apply. In other words, plaintiffs do not have to satisfy the equal work standard of the EPA in order to state a claim of wage discrimination under Title VII. According to the Court, to hold otherwise "means that a woman who is discriminatorily underpaid could obtain no relief - no matter how egregious the discrimination might be - unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay." 452 U.S. at 178. Under such a scenario, an employer would not be liable for hiring a woman for a unique position in the

---

[45] *See supra* discussion at II. *Legal Analysis*.

[46] Under traditional Title VII disparate treatment analysis, once a plaintiff makes out a prima facie case, only the burden of articulating a non-discriminatory reason shifts to the defendant; the ultimate burden of proving that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). In contrast, under the EPA, once a plaintiff has established that the work is equal, the burden is on the defendant to prove one of the EPA's four affirmative defenses.

[47] For the same reasons set out in the section addressing the Equal Pay Act, a school's defense that a pay disparity is based on the sex of the athletes coached, and not the sex of the coach, will be rejected under Title VII if the institution has effectively limited women to coaching women's teams. *See supra* notes 39-41 and accompanying text. In cases which have accepted the defense, there has been no evidence or consideration that the institution limited coaching positions for women. *See* , *e.g.*, *Deli v. Univ. of Minnesota*, 863 F. Supp. at 959-60 ("[Plaintiff] does not claim that the Univ.'s motivation for paying her less money than the coaches of men's sports was the fact that Plaintiff was a woman and the coaches of men's sports were men.").

In a Commission Decision, No. 85-15, CCH Employment Practices Guide ¶ 6856, a male coaching girls' junior varsity softball alleged that he was being discriminated against in compensation under Title VII because he coached girls. The Commission, based solely on the charging party's allegation, concluded that he did not state a claim under Title VII. There was no allegation or evidence that coaches of girls' sports were predominantly women and because of that fact, were being discriminatorily compensated. The Commission did not consider whether the school limited coaching positions for women. To the extent that the decision conflicts with this guidance, the decision is overruled.

company and admitting her salary would have been higher if she were male, or for using a transparently sex-biased system for wages where a woman did not hold job equal to those held by men.[48] The Court made clear that the discrimination laws do not permit this result.

EXAMPLE:

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

Thus, a coach may claim that compensation is discriminatory under the EPA and/or Title VII, depending on the facts of the case.

III. *Conclusion*

Both Title VII and the EPA prohibit employers from discriminating on the basis of gender in compensation. The Commission is aware of widespread disparities in the compensation of sports coaches in educational institutions and will analyze cases carefully in accordance with the principles set forth in this guidance.

CHARGE PROCESSING INSTRUCTIONS

1. Charges involving sex discrimination in the compensation of sports coaches in educational institutions should be analyzed under both the Equal Pay Act and Title VII.

2. Under either analysis, it is not necessary that the comparator coach the same or a similar sport. In order to determine whether a particular coach or coaches are appropriate comparators for the charging party, the functional duties of the coaches - not the sports coached - are determinative.

3. Claims that the coaching jobs of the charging party and her/his comparator or comparators are not substantially equal for purposes of the Equal Pay Act or comparable for purposes of Title VII, should be scrutinized to determine whether the asserted differences in the jobs are sufficient to support such a finding. If the differences in the jobs do support such a finding, investigators should then consider whether the differences between coaching jobs are, themselves, the result of discrimination. If they are, such differences will not defeat a claim under either the Equal Pay Act or Title VII.

4. Investigators should also consider whether asserted affirmative defenses, including factors other than sex, are tied to sex discrimination. If they are, the profferred defenses, including "factors other than sex," will not defeat a claim of discrimination.

5. If an employer defends a coaches' pay disparity based on the sex of the athletes coached, or if the investigation otherwise suggests that there may be discrimination against student-athletes, investigators may refer those issues to the Department of Education's Office of Civil Rights to determine whether the employer has discriminated against students on the basis of sex in violation of Title IX.

10-29-97
Date

[signed]
Paul M. Igasaki
Vice Chairman

[48] *See also Int'l. Union of Electrical Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1096-97 (3d Cir. 1980), *cert denied,* 452 U.S. 967 (1981) (allegations that employer had policy of deliberately setting wage rates lower for job classifications predominately filled by females than for classifications predominately filled by men stated claim under Title VII even though men's and women's jobs not the same); *Van Heest v. McNeilab, Inc.*, 624 F. Supp. 891, 898-99 (D. Del. 1985) (female plaintiff failed to state claim under EPA because no man held equal job; stated claim under Title VII because unlike male employees, she did not receive full compensation for her duties, was paid less than the minimum salary for her level, and never received a merit bonus, and fact that males who replaced her were paid much more than she raised inference of discrimination).