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Pay Equity: Two Case Studies In Intercollegiate Athletics

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Gender equity, in athletics, continues to be a lightening rod on campuses across the country as individual institutions struggle to deal with increasing expenses and decreasing resources. A heightened sense of urgency and pressure to provide equitable opportunities was placed upon institutions when the Supreme Court decided in *Franklin v. Gwinnett* (1992) that compensatory damages were available for plaintiffs who use Title IX as a cause of action.

Since the Franklin decision the increased effort and concomitant attention paid to providing equitable participation opportunities for women in intercollegiate athletics has been quite noticeable. The threat of monetary penalties has resulted in conferences (e.g. SEC and Big Ten) requiring their membership to add women teams; current and potential student athletes filing and reaching a settlement with their institutions (e.g. Auburn, Texas, Colgate) and the courts finding for the plaintiff when institutions move to terminate the varsity status of women's teams (e.g. *Cohen v. Brown*, 1993; *Roberts v. Colorado State University* 1993; *Favia v. Indiana University of Pennsylvania,* 1993).

The recent success of plaintiffs and the increased attention focused on gender equity issues/concerns suggest that efforts are being made to ensure equitable apportionment of participation opportunities for females in collegiate athletics (Wilde, 1994). However, until recently two groups were consistently and conspicuously left out of any discussion regarding equity in athletics - female coaches and administrators. The research has focused on the dramatic decline in their numbers at the collegiate level (Acosta & Carpenter, 1992; Hasbrook, 1988; Knoppers, 1987; Lovett & Lowry, 1988). Yet, the issue of pay equity for female coaches and administrators has received only cursory attention.

Two recent cases, *Tyler v. Howard University* (1993) and *Stanley v. University of Southern California* (1994) provide valuable insight into legislation, plaintiff claims, defenses, and legal strategies that are likely to be utilized as more pay equity cases are litigated. However, it is important to note that Stanley was seeking injunctive relief and the court has yet to hear the case based on the merits. Prior to

exploring the details of those two specific cases, it is important to clarify and outline the key causes of action for sex-based wage discrimination cases in general.

Employment discrimination claims in athletics are most likely to be actionable under the Equal Pay Act of 1964, Title VII of the Civil Right Act of 1963, Title IX, and the Equal Protection Clause of the Fourteenth Amendment (using Section 183 of Civil Rights Act of 1871) of United States Constitution.

The Equal Pay Act of 1963

The Equal Pay Act (EPA) of 1963 (29 U.S.C.6206(d) (l) 1982) prohibits an employer from discriminating between employees on the basis of sex,

> . . . by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex ...

The plaintiff must prove that the employer paid different wages to an employee of the opposite sex for equal or "substantially equal" work (Laffey *v. Northwest Airlines. Inc.*, 1976). Employers are prohibited from paying unequal wages to employees of the opposite sex for substantially equal work. The EPA established and courts have affirmed (Schultz *v. Wheaton Glass Co.*, 1970; *Corning Glass Works v. Brennan*, 1974) that job content is measured as equal based on four statutory factors: skill, effort, responsibility, and the working conditions required to perform the job. A defendant can utilize one of four affirmative defenses: seniority system, merit system, system which measure earnings by quantity or quality of production, or pay differential which is based on any factor other than the sex or the employee (29 U.S.C.6206(d) (l) (1982). In sex-based pay discrimination cases, the fourth affirmative defenses (i.e. any factor other than sex) has been a "catch-all defense" which has been utilized by and provided the most success for defendant employers (Luna, 1990). The courts have established that the equality of work does not have to be identical but must be "substantially equal" (*Schultz v. Wheaton Glass Company,* (1970). The Department of Labor regulations, require job content, not job title, be the basis for establishing equality (29 C.F. R.6 800.121 (1980)). As per the Department of Labor ((29 C.F. R.6800.125 - .127, .129 (1980)), equal skill is "based upon the experience, training, education and ability required in performing the job; effort is defined as the amount or degree of physical or mental exertion required to perform the job successfully; and responsibility is judged on the degree of accountability required with emphasis on the importance of the job obligation" (Luna, 1990).

Title VII of Civil Right Act of 1964

Another cause of action which can be utilized in sex-based wage discrimination cases/suits is Title VII of the Civil Right Act of 1964. In its current form, Title VII

(42 U.S.C.6 2000 - 2 (a) (1) (2) (1982)) provides that,

> It shall be an unlawful employment practice for an employer: -(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or 2) to limit, segregate, or classify his employees of applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII was originally aimed at prohibiting racial discrimination in employment. In an effort to cause the defeat of the bill, gender-based discrimination was included under the coverage of Title VII via an amendment that added the word "sex" (110 Congressional Record 2577 ,1964). In an effort to clarify the interpretative relationship between the EPA and Title VII, Senator Bennett "inserted a memorandum in the 1965 Congressional Record (Luna, 1990). What has come to be called the Bennett Amendment, was offered by the Senator in an effort to assure that the EPA was not nullified (Greenlaw & Kohl, 1994). "Virtually every federal court through 1979 which ruled on the relationship between the Bennett Amendment and the EPA held that sex-base wage discrimination claims must first meet the EPA criteria" (Luna, 1990).

In *County of Washington v. Gunther*, (1981) the Supreme Court "rejected such a far-reaching interpretation of the Bennett Amendment, ruling that the Bennett Amendment does not bar a claim of sex-based wage discrimination merely because the employees failed to establish the equal work requirement of the Equal Pay Act. The Court construed the Bennett Amendment to incorporate into Title VII only the affirmative defenses of the Equal Pay Act" (Perry, 1991, p. 159). In other words, in *Washington v. Gunther*, the Supreme Court clarified that Title VII cases do not have to satisfy the narrow prima facie case requirements of the Equal Pay Act. Such a narrow interpretation (EPA prima facie requirement for Title VII cases) "would have precluded all pay equity suits except those alleging unequal pay for equal work" (Perry, 1991, p. 159).

In order for a plaintiff to establish a Title VII prima facie case of discrimination (Cook v. Colgate. 1992), they must establish: a) the defendant was subject to the provisions the statute, b) the plaintiff is entitled to protection of the statue, and c) the plaintiff has not been provided the benefits of the statute. If the plaintiff is able to establish these three conditions, the burden then shifts to the defendant who must come forward with evidence of legitimate nondiscriminatory reasons for its conduct. In turn, if the defendant is able to do this, and in order for the plaintiff to prevail, the plaintiff must show that the reasons advanced by the defendant are pretextual or a cover up for a discriminatory decision. In this context, it is important to note that *County of Washington v. Gunther* (1981) established that Title VII incorporated only the four affirmative defenses against a wage discrimination claims (e.g. seniority system, merit system, system that measure quantity or quality of work or differential is based on "factor other than sex") and not the 'equal work standard.'

Title IX of Education Amendments Act of 1972

The third key cause of action for plaintiffs in sex-based wage discrimination cases in athletics is Title IX of the Education Amendments of 1972. It is beyond the scope of this article to address the multiple events, cases, and pieces of legislation that helped to shape how Title IX is interpretted and enforced today. However, relative to Title IX's effectiveness in gender discrimination in athletic employment cases, it is appropriate to provide cursory analysis of the legal ramifications of those three key cases and the impact the Civil Rights Amendment of 1987 can have on employment discrimination cases.

Prior to the *Grove City v. Bell* (1984) decision, the courts had been split over how to interpret/apply Title IX. Some courts had ruled that only those programs or activities which directly received federal financial assistance were required to comply with Title IX -'program-specific' approach. At the same time, other courts were ruling that if any program or activity within an institution received federal monies then every program/activity must abide by Title IX -- 'institution-wide' approach. In *Grove City v. Bell* (1984), the Supreme Court ruled in favor of the 'program-specific' approach which severely limited the applicability of the statute relative to athletic departments/programs. The Civil Rights Restoration Act of 1987 "... clarified that entire institutions and agencies are covered by Title IX ... if any program or activity within the organization receives federal aid" (Pub L. No. 100-259, 102.28 (1988)).

The re-establishment of the institution-wide interpretation of Title IX (vis a vis the Civil Rights Act of 1988), in conjunction with the Supreme Court's decision in *North Haven Board of Education v. Bell* (1982), set the stage for the filing of employment discrimination cases in athletic employment. *North Haven v. Bell*, (1982) established that Title IX is a viable cause of action for employees in education while in 1979, the Supreme Court ruled in *Cannon v. University of Chicago* that Title IX provided a private right of action. The combination of these 2 cases and the institution-wide interpretation afforded by the Civil Rights Act of 1987 (1988 Amendments) meant that Title IX provided another viable cause of action for employment discrimination cases in educational institutions.

Section 1983 of the Civil Rights Act of 1871 (utilized to enforce 14th Amendment of United States Constitution

In addition to these pieces of legislation (e.g. EPA, Title VII and Title IX), it has been suggested that a constitutional challenge using the equal protection clause of the fourteenth amendment might be the most effective legal theory to utilize in an effort to provide pay equity for male and female coaches of same-sport teams (Dessem, 1980). Section 1983 of the Civil Rights Act of 1871 "... provides a vehicle for obtaining a remedy for violations of other federally protected rights. Section 1983 is most frequently used to enforce rights governed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution which prohibits discrimination based on gender. Thus sex discrimination involving state action violates the Equal Protection Clause and Section 1983 provides a remedy for

such violations. Under the Equal Protection Clause, discriminatory state action based on gender is allowed only if it is necessary to achieve 'important governmental objectives' and the discriminatory action is substantially related to the achievement of those objectives" (Henson, 1992).

The EPA, Title VII, Title IX, and Section 1983 collectively have the potential to provide the plaintiff employee with an effective cause of action with which to challenge sex-based discrimination in higher education employment cases. However, the lack of case law in this area means that their viability has yet to be clearly established or negated. Thus, the claims made by the plaintiff and the defenses put forth by the defendants in *Tyler v. Howard* and *Stanley v. USC* have the potential to be truly instructive. The fact that *Tyler v. Howard* is being appealed and that Stanley was seeking injunctive relieve (note: plaintiff intends to go to trial based on the merits of the case later in 1995), means that both cases are relevant because the basic focus of the critical arguments put forth by the plaintiffs and defendants will not fundamentally change.

Tyler v. Howard University - Plaintiff's Claims

The plaintiff, Sanya J. Tyler, was the Associate Director of Intercollegiate Athletics (via a continuing appointment) and the Head Women's Basketball Coach at Howard University when she filed her claim against the University, the President, the Vice President for Student Affairs, and the former Head Men's Basketball Coach. She sought " . . . permanent injunctive and declaratory relief, as well as, damages for conspiracy, defamation, civil rights violations, tortuous interference with prospective advantages and personal injuries sustained by the Plaintiff individually and in her positions with Howard University . . ." (Complaint, p.1) .

Relying on the Equal Pay Act of 1963 (EPA) and District of Columbia Human Rights Law and the Fair Labor Standards Act of 1938, (as amended by the EPA), the Plaintiff claimed that Howard University paid females disparate wages and benefits compared to male employees for equal work. " . . . Howard University has had (and continuing to date) a policy or practice of excluding females and employees from occupying certain high level jobs in the Athletics Department and restricting female employees to part time jobs and paying them disparate wages and benefits . . ."

(Complaint, p. 3). She claimed that as the Head Women's Basketball Coach, she was paid a lower salary and benefits than the Head Men's Basketball Coach, and Head Men's Football Coach at Howard University "although she is performing the same duties and has shown better results" (Complaint, p. 4). She had requested that her salary and benefits be increased so they would equal those given to the Head Men's Basketball and Football Coaches but Howard University had refused. The plaintiff stated that she " . . is due and owing a sum of money equal to the salary and benefits Plaintiff would have received had there not been a discriminatory policy, custom or practice and Plaintiff had been paid equal pay for her equal work... [I]n addition, Plaintiff is entitled to and is seeking a like sum of penalties, plus reasonable attorney's fees and costs of this action" (Complaint, p. 4).

Utilizing Title IX (in conjunction with the D.C. Code Section 11-921 and the D.C. Human Rights law), the Plaintiff claimed Howard University discriminated on the basis of sex relative to " . . . the facilities, accommodations and equipment provided to its female student athletic program in general and its women's basketball program in particular" (Complaint, p. 5). Howard University's refusal of repeated requests for additional paid Assistant Women's Basketball Coaches (full and part time) and comparable or equal locker room facilities and equipment, even though the men's athletic/ basketball program had both, was offered by the Plaintiff of evidence of sex discrimination. Further, Sanya Tyler claimed that because of her sex and protected activities, (she had spoken out on behalf of equal treatment, opportunities and benefits for women's athletics at Howard University), the defendants had denied her a promotion to the Athletic Director's (AD) position, were in fact trying to force the Plaintiff from her continuing appointment position as Associate AD, and were failing to negotiate in good faith regarding the full time position as Head Women's Basketball Coach.

In addition the Plaintiff claimed that the defendants, " . . . have wrongly created and published false and malicious statements that Plaintiff is not a good employee and other derogatory statements concerning the Plaintiff's job performance and sexual orientation . . . as a result, Plaintiff has suffered embarrassment, humiliation and harm to her reputation and honor and has been wrongfully denied equal pay, a promotion and opportunities to advance with Defendant Howard University as have male employees similarly situated." (Complaint, p. 10).

Tyler v. Howard University - Defendants Answer

In challenging the Plaintiff's claim that Howard University had violated the EPA, the Defendants argued that the Plaintiff had failed to prove that the job of women's basketball coach was substantially equal to that of the men's basketball coach. The defendants asserted that "the two jobs are not substantially equal" (Motion for a Judgment Notwithstanding the Verdict, July 30,1993, p. 8).

As support the defendants argued that the two jobs did not require equal skills, effort, or responsibilities. As evidence, the defendants pointed to the fact men's basketball at Howard University is a revenue producing sport and the need to generate revenue creates extra and unique pressure for that coach in contrast to the coach of the women's team. "Due to the potential for generating such significant sums of money for the University, there is greater scrutiny placed on the Coach. This heightened scrutiny carries with it extra effort plus pressure and accountability for the person in that position " (Motion for a Judgment Notwithstanding the Verdict, July 30,1993, p. 10).

In addition, the defendants claimed that the differences in the salaries for the coaches of their male and female teams was a result of market forces. "The reality of market forces has been recognized as a legitimate business concern in analyzing alleged violations of the Equal Pay Act (Kouba. et al. v. Allstate Insurance Co., 1982)" (Motion for a Judgement Notwithstanding the Verdict, July 30, 1993, pad). In arguing that the EPA had not been violated, the defense argued that "factors other than sex" were the cause of the pay differential. Beside market forces and the

pressure to generate revenue (i.e. a business policy), the defendants offered that the differences in the skills, abilities, and experiences of the male coach, in comparison to Tyler, further established that the two jobs were not substantially equal. They cited the professional background of the male coach, (e.g. NBA player for 10 years, NBA assistant coach, authored a book about basketball, provided color commentary for basketball games on television) as a reflection of the differences in the skills and abilities needed to meet the expectations and pressures aligned with the job of head men's basketball coach.

Relative to Title IX, the defendants argued that the plaintiff failed to establish a violation (Motion for a Judgement Notwithstanding the Verdict, July 30, 1993, p.15). They relied exclusively on the reasons utilized in arguing against the plaintiffs claims of an EPA violation.

Upon returning a verdict in favor of the plaintiff, the jury, following explicit guidelines provided by the judge, awarded the plaintiff $2,398,000. The Court merged different financial remedies because they overlapped (*North Haven v. Bell* 1982) and provided "different remedies for the same wrong" (Memorandum and Order for Entry of Judgment, June 29, 1993, p. 2). As a result, the court awarded the Plaintiff a money judgment against Howard University in the amount of $1,040,000. In a separate judgment award, the Court held the plaintiff was entitled to $54,000 from Altha Williamson, on the defamation claim. In addition, Howard University was ordered to pay the plaintiff's attorney fees, post-judgment interest at the statutory rate, and costs. The court's decision is in the process of being appealed by Howard University and by Altha Williamson.

Stanlev v. University of South California (USC) - Plaintiff's Claims Marianne Stanley, the plaintiff, filed her claim against the University after contract negotiations with the USC Athletic Director, Michael Garrett, did not result in a new contract. This was in large part due to disagreements over whether or not she was entitled to be paid equally with the Head Men's Basketball Coach -- George Raveling. In addition to seeking injunctive relief (TRO-temporary restraining order), and in an effort to be installed as the Head Women's Basketball Coach at USC, she made several sex discrimination claims. Her complaints outlined various federal and state sex discrimination claims, including violations of the EPA, Title IX, the California Fair Employment and Housing Act and the California Constitution. In addition, the complaint alleged common law causes of action including: wrongful discharge, breach of an implied-in-fact employment contract, intentional infliction of emotional distress, and conspiracy. As relief, Stanley sought: a declaratory judgment that USC's conduct constituted sex discrimination; a permanent injunction restraining the defendants from discrimination and retaliation; an award of three million dollars in compensatory damages; and five million dollars in punitive damages (Stanley *v. USC*, 1994).

The district court denied her motion for a preliminary injunction. On appeal, that denial was not overturned by the Ninth District U.S. Court of Appeals. However, the case has yet to be heard based on the merits of the case.

The focus of the plaintiff's multiple claims against USC, beyond seeking injunctive relief, was that she was entitled to be paid equally with the Head Men's

Basketball Coach, George Raveling, since the two positions required equal skill, effort, responsibility and were performed under similar working conditions.

Ninth Circuit Court of Appeals Review

Potential insights into the Ninth Circuits disposition toward such a claim, when it is heard based on the merits, were provided in the court's discussion regarding denial the preliminary injunction. The Ninth Circuit Court of Appeals concluded/ commented that the " . . . evidence offered at the hearing on the motion for a preliminary injunction . . . does not prove gender bias or violate the Equal Pay Act" (Stanley *v. USC*, 1994, p.1030-31)

The Court commented that plaintiff's claims of denial of equal pay (for equal work) was unsubstantiated because Coach Stanley did not " . . . contradict the evidence offered by USC that demonstrates the differences in the responsibilities of the persons who serve as head coaches of the women's and men's basketball teams" (Stanley *v. USC*, 1994, p.1026). The Court felt that the EPA did not apply because her responsibilities did differ from Coach Raveling . Unlike Coach Raveling, she was not required to undertake "substantial public relations and promotional activities for USC. . . to participate in certain activities designed to produce donations and endorsement for USC . . . (and) engage in the same intense level of promotional and revenue-raising activities." (p. 1026). Specifically, the Court referred to the requirements for the men's coach relative to outside speaking engagements, accessibility for media interviews and fundraising activities.

The Court's comments and cases cited suggest that the dissimilarity in responsibilities, skills, and experience, as presented by USC, were both compelling and judicially appropriate. The fact that Raveling had been a coach for 31 years and had qualifications and experience related to public relations and revenue generation skills were offered by USC as evidence that Coach Stanley had substantially different responsibilities, qualifications, training and experience. These differences in combination with the differences in responsibilities relative to PR, promotions and revenue generation were seen by the Court as acceptable justification for the different levels of pay (*Jacobs v. College Williams & Mary*. 1980). Furthermore, it was the Ninth Circuit's opinion that USC could consider the market place value of George Reveling's skills when determining his salary, and as a means of explaining why it differed from Marianne Stanley's salary (Horner *v. Mary Institute*. 1980). Relying on *EEOC v. Madison* Community Unit School District No. 12, 1987, the court commented that, "Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA" (Stanley *v. USC*, 1994, p. 1027). Basically, the Court felt the USC had clearly and effectively established that there were substantial differences in the responsibilities, skills, effort, and working conditions of Coach Raveling relative to those of Coach Stanley.

■ CONCLUSION

There is clearly a lack of case law on pay equity in intercollegiate athletics. However, there are some key similarities in *Tyler v. Howard University* and *Stanley*

v. USC which have the potential to be quite instructive relative to the effectiveness of key causes of action in employment discrimination cases in athletics.

In order for a plaintiff to prevail utilizing the EPA, they must establish that the defendant is paying different wages to individuals of the opposite sex for work that is equal (Hein *v. Oregon College of Education*, 1983). The *Stanley v. USC* proceedings, to date, suggest that the differences in the areas of responsibilities, skills, efforts, and working conditions (for coaches of men' and women's teams) potentially hinders the EPA from being a truly effective cause of action. Regarding this case the Ninth Circuit was of the opinion that the areas of public relations, promotional activities, and years spent as a coach illustrated how different wages for the coaches of those two teams was justified. "Employers may reward professional experience and education without violating the EPA..." (Soto v. Adams Elevator Equipment Company, 1991). In addition, the Stanley court concluded that the market place value of skills (e.g. coaches of men's team receive higher salaries than coaches of women's teams nationally) and the duty to generate revenue are important factors in justifying greater pay for coaches of male teams.

Though the plaintiff prevailed in *Tyler v. Howard*, it is important to note that the attorneys for the defendants have filed a motion for a judgment not with standing the verdict or in the alternative, a new trial, or in the alternative, for a remittitur. The foundation of that motion is the defendants belief that the plaintiff failed to prove that the top men's and women's coaching positions are substantially equal and therefore the EPA is not a valid cause of action. In the *Stanley v. USC* case the defendants argued that the differences in the pressure to generate revenue meant that the men's coach was under greater scrutiny (i.e. different working conditions); the marketplace dictated greater salaries; and, the skills, abilities and experience of the male coach were not substantially equal to those of the female plaintiff. As evidence in *Tyler v. Howard*, the defendants pointed toward the experiential background of the male coach (e.g. NBA player and coach, author of basketball book, and color commentator for games on television). Further the defendants claimed that the pay differentials was due to "factors other than sex" and that a business policy, related to revenue generation, was the cause of the pay differential. *Kouba v. Allstate Insurance Company* (1982) was cited by the defendants as establishing a precedent that a legitimate business policy was indeed a "factor other than sex" that justified the pay differentials.

The willingness of the Ninth Circuit to accept the arguments of the defendants suggests that perhaps the EPA is not the most effective cause of action. However, since wage discrimination cases in higher education and athletic administration are relatively scarce (in comparison to private industry), the outcome of Howard University's appeal and the *Stanley v.* case (when it is tried on the merits of the case versus seeking injunctive relief) should serve to clarify the potency of the EPA in these types of cases. At this time there is no clear precedent.

The two legal theories for establishing sex discrimination under Title VII are disparate treatment and disparate impact. Disparate treatment in pay equity, and other employment discrimination, cases would require the plaintiff to establish that the employer consciously intended to discriminate. *County of Washington v.*

Gunther (1981) was one of the rare cases where the employee was able to establish such intent. Pamela L. Perry (1991) addressed the difficulties that the plaintiff faces when she wrote, ...the employers can defend against disparate discrimination by explaining that it set pay according to a facially neutral criterion, rather than (the) sex of the employees...by explaining that they set pay by the market, rather than by the sex of the incumbents in similarly situated jobs. Unless the employees can demonstrate the facially innocent explanation to be a pretext for a discriminatory purpose, employees will lose despite the evidence of sex discriminatory pay. (p. 134)

The cases where the plaintiffs successfully utilized the disparate impact theory of Title VII are as rare. It has been said that the, "...disparate impact doctrine requires the courts to examine the business justification for these policies. The courts, however, have strongly resisted this view. Only one court, the district court in *AFSCME v. Washington* (1985) applied (the) disparate impact analysis to challenge sex-based wage discrimination between jobs of different content" (Perry, 1991). Obviously Title VII has a long history of not being an especially effective cause of action in pay discrimination cases. Therefore, it is unlikely that Title VII will be the most effective cause of action in either the Stanley or Tyler cases.

Perhaps the greatest potential for successfully litigating a pay discriminations case in athletics lies in the utilization of Title IX as a cause of action. The acceptance, by the Ninth Circuit, of USC's argument that factors other than sex (e.g. skills, responsibilities, etc.) and market forces are the basis for the different wages paid to coaches of males and female teams suggests that both the EPA and Title VII may not be the most effective causes of action. However, as noted by the Ninth Circuit Court, the Stanley case has yet to be heard on the merits of the case at which time the plaintiffs will have another opportunity to convince the court that sex discrimination was the basis for the differences in pay. The plaintiff's are likely at that time to ask the court to take judicial notice that not one male NCAA Division I basketball team (comparable to USC status) is coached by a female and therefore employment discrimination exists. Further they are likely to argue that the differences in pressure to generate revenue is a faulty argument because it is an effort on the part of the defendants to justify present discrimination using historical discrimination (e.g. no females selected to coach male teams). In *Stanley v. USC* (1994), the court felt that the required speaking engagements, presence at fundraising activities, and PR responsibilities were compelling evidence that the head men's and women's coaching positions were substantially different. It would seem that the next logical question should be, "Was the coach of the women's team required to undertake these activities on behalf of the department and the institution?" If she was not, it raises the issue of sex discrimination because apparently she was not given the opportunity to undertake these responsibilities, which in turn served as the basis and justification for the inequitable pay, based on her sex and the sex of the individuals that she coached.

It is important to point out that the *Stanley v. USC* (1994) decision was limited to a review of a denial of a preliminary injunction. In fact the Ninth Circuit stated that it could not "...evaluate the persuasive impact of the evidence that the parties

may bring forth at trial" (p. 1024). In contrast, *Tyler v. Howard University* was decided by a jury trial based on the evidence after the full discovery phase of the trial. In *Tyler* the jury awarded (after the judge merged remedies that factually and legally overlapped) $1,060,000 to the plaintiff. That award was based on the Equal Pay Act, Title IX, and the District of Columbia Human Rights Act. In the plaintiff's reply to defendant Howard University's praecipe referencing the failure of the EPA in the Stanley case, Tyler's attorney (Robert L. Bell) emphasized the fact that the Ninth Circuit decision was limited to the denial of injunctive relief. "Notwithstanding its length, the bulk of the decision in the Stanley case is mere obiter dicta...The leading case in the country on equal pay and gender equity issues is the instant case - *Tyler v. Howard University*". Mr. Bell's opinions are fairly compelling; however, even though the Tyler case might arguably be the "leading case in the country" it is only one case. And, one case at the Superior Court level does not a clear precedent set/ establish.

Pay equity case law in higher education, and athletics in particular, still are relatively "uncharted waters". The court's decision in each new case further shapes the legal guidelines/precedent. In turn, it necessarily impacts how administrators need to think about employment equity and discrimination. In the near future it is highly probable that individual administrators will become the focus of private causes of action against them. Such tactics are likely to be used by the plaintiffs with the belief that the threat of such action would provide the impetus for individuals to more closely examine their selection, hiring, and pay practices. The risk of losing a personal judgment could motivate individual administrators in much the same way that the threat of punitive damages being awarded (e.g. *Franklin v. Gwinnett)* "motivated" many institutions to, for the first time, seriously reconsider how they were implementing Title IX 20 years after its passage.

If other courts in the future share the same mindset as the Ninth Circuit, it is likely that the existence, or lack thereof, and the content of job descriptions and performance appraisals will become more important. These management tools could aid a plaintiff or a defendant in their respective efforts to clearly establish the responsibilities and duties required of a particular position. If the head men's and women's coaching positions are indeed not substantially the same then these differences should be quite evident and easily discernible within the job descriptions and performance appraisals.

Until other pay equity cases in intercollegiate athletics are litigated, and/or *Stanley v. USC* or *Tyler v. Howard* are heard by the Supreme Court, no clear precedent exists. Thus, it will be up to individual administrators and their institutions to do away with pay discrimination. They need to examine the salaries of employees relative to their duties and responsibilities, and the opportunities provided to the individual in that position (e.g. only offering alumni speaking engagements to coaches of male teams) rather than basing salary decisions on the sex of the individual or the students which they teach/coach.

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