

Articles

THE ENTRENCHMENT OF THE GLASS SNEAKER CEILING: EXCAVATING FORTY-FIVE YEARS OF SEX DISCRIMINATION INVOLVING EDUCATIONAL ATHLETIC EMPLOYMENT BASED ON TITLE VII, TITLE IX AND THE EQUAL PAY ACT

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I. INTRODUCTION

Athletic departments are still permeated by the “ole-boy” paradigm. This article examines whether inroads have been made in assimilating women into the staffing equation at educational institutions, as athletic directors, coaches of both male and female student-athletes, or in other roles involving interscholastic or intercollegiate athletic activities. In addition to the contract law¹ and labor law aspects² that oversee the interplay between employers and employees, a number of federal civil rights laws govern educational athletic employment relationships.³ During the 1960s and 1970s, Congress enacted three federal statutes that provide for gender equity: Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (“Title VII”),⁴ the broadest civil rights statute, aimed at preventing discrimination in employment based on sex, race, national origin, and religion; the Equal Pay Act of 1963 (“Equal Pay Act”);⁵ and Title IX of the Education Amendments of 1972 (“Title IX”).⁶ This article explores the trifecta of

1. See, e.g., *Deli v. Univ. of Minn.*, 578 N.W.2d 779 (Minn. Ct. App. 1998) (reversing trial court’s decision awarding damages based on claim for promissory estoppel brought by former women’s gymnastics coach).

2. See *In re Van Scoy*, 695 N.Y.S.2d 834 (N.Y. App. Div. 4th Dept. 1999) (determining whether non-selection of certified teacher to vacant interscholastic coaching position was subject to arbitration); *State Sys. of Higher Educ. v. Pa. Labor Relations Bd.*, 737 A.2d 313 (Pa. Commw. Ct. 1999) (concerning union seeking to bargain on behalf of college coaches); *Cranberry Area Sch. Dist. v. Cranberry Educ. Ass’n*, 713 A.2d 726 (Pa. Commw. Ct. 1998) (regarding allegation of violation of collective bargaining agreement filed by teacher not selected for position of athletic director). See generally John L. Pulley & Welch Suggs, *Coaches Will Be Coaches?*, CHRON. HIGHER EDUC., May 16, 2003, at A40 (examining behavior of coaches at University of Alabama and Iowa State University). For a discussion of the Equal Pay Act, see *infra* note 70.

3. This article is a companion piece to an earlier article. See Diane Heckman, *Educational Athletic Employment and Civil Rights: Examining Discrimination Based on Disability, Age and Race*, 18 MARQ. SPORTS L. REV. 101 (2007) (profiling athletic employment at educational institutions and its interaction with federal statutory civil rights laws prohibiting discrimination based on disability, age, and race). The accompanying appendix to that article details the major attributes of the various federal civil rights statutes, including the three gender equity statutes examined herein. See *id.* at 168-69 (detailing specifics of federal gender equity statutes).

4. 42 U.S.C. §§ 2000e to 2000e-17 (2010). President Lyndon B. Johnson, a Southern Democrat from Texas, was instrumental in gaining passage of this statute. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* (2002) (focusing on Johnson’s tenure in U.S. Senate). See also Family and Medical Leave Act, 29 U.S.C. §§ 2601-2619 (2010) [hereinafter FMLA] (promoting goal of equal employment opportunity for women and men) (not profiled herein); *Mellen v. Trs. of Boston Univ.*, 504 F.3d 21 (1st Cir. 2007) (examining certain accompanying FMLA regulations).

5. 29 U.S.C. § 206(d) (2010).

6. 20 U.S.C. §§ 1681-1688 (2010).

federal statutory civil rights laws prohibiting sex discrimination and their influence on athletic employment at public and private educational institutions. At issue is whether these statutes – enacted to prevent discrimination due to one’s gender and to achieve gender equity – have met the underlying goal of eradicating societal stereotypes⁷ and breaking through the glass sneaker ceiling,⁸ especially involving employment in sports enterprises in America, including the academic sports arena. The exposition focuses on cases brought by athletic directors, coaches, physical education teachers, officials and other athletic department support staff within the last forty-five years.⁹ Part II provides an overview of the underlying federal laws and attendant general considerations that they implicate.¹⁰ Part III introduces the salient aspects of the three federal gender equity statutes.¹¹ Part IV addresses the sex discrimination cases involving athletic department employees, categorized according to whether they involved intercollegiate or interscholastic athletic departments.¹²

II. FOUNDATIONAL CONSIDERATIONS IN CIVIL RIGHTS LAWSUITS

The following aspects should be examined for each statute:

Public Entities: Application of Sovereign Immunity. Sovereign immunity insulates a governmental entity from being sued or being liable for any damages.¹³ A primary consideration in any lawsuit is establishing that the court has jurisdiction over the parties. Today, the most significant issue pertaining to the federal civil rights laws is whether the Eleventh Amendment to the U.S. Constitution precludes private citizens from suing states or arms of the states in federal courts for monetary redress based on violations of Constitu-

7. See, e.g., Peggy Orenstein, *Girls Will Be Girls*, N.Y. TIMES, Feb. 10, 2008, § 6 (Magazine), at 17 (describing how publishing industry’s attempts to produce adventure how-to manuals for young girls in response to similar book targeted at boys have produced different visions of feminism for new generations of young women). “Those volumes were inspired by ‘The Dangerous Book for Boys,’ a gilt-embossed paean to old-school adventure that has nearly two million copies in print and caused a furor among the mothers of daughters who resented the implicit ‘Girls Keep Out’ sign nailed to its cover.” *Id.*

8. See *infra* text accompanying notes 96, 450.

9. This article does not focus on cases premised solely on the Fourteenth Amendment Equal Protection Clause. See U.S. CONST. amend. XIV (setting forth Equal Protection Clause).

10. See *infra* notes 13-30 and accompanying text.

11. See *infra* notes 31-106 and accompanying text.

12. See *infra* notes 107-436 and accompanying text.

13. See, e.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999) (stating sovereign immunity bars suits against states absent state consent).

tional or federal statutory provisions.¹⁴ The Eleventh Amendment recognizes the sovereignty of states. It states, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁵ The Supreme Court has interpreted the Eleventh Amendment to foreclose Congressional actions that will impact the states’ treasuries, unless the state or “arm of the state” has consented to the lawsuit or the actions of Congress, in enacting the specific legislation, meet the Fourteenth Amendment nexus test.¹⁶ In *Tennessee v. Lane*,¹⁷ the Court underscored the power of Congress as to the latter, recognizing, “[t]his enforcement power, as we have often acknowledged is a ‘broad power indeed.’ . . . We have thus repeatedly affirmed that ‘Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.’”¹⁸

Congress has passed a number of federal civil rights laws that may provide protection for educational employees and students. They can be divided into two categories. The first category covers those federal statutes that apply based on the entities’ receipt of federal funds (federal-funding predicates), which would include Title IX. The second category covers those statutory provisions that apply based on the entities’ identity and actions (activity-based predicates), which would include Title VII and the Equal Pay Act. It is commonplace for every state or putative state entity to argue

14. See, e.g., *id.* at 713 (“[T]he Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.”).

15. U.S. CONST. amend. XI. See generally Diane Heckman, *The Impact of the Eleventh Amendment on the Civil Rights of Disabled Educational Employees, Students and Student-Athletes*, 227 EDUC. L. REP. 19 (2008) [hereinafter Heckman, *The Impact of the Eleventh Amendment*] (concerning whether litigants can sue public schools, colleges, and universities under federal statutes without violating states’ immunity under Eleventh Amendment).

16. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) (1988), unconstitutional). But see *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding Eleventh Amendment barred federal court from granting relief for § 1983 constitutional claim brought directly against state).

17. 541 U.S. 509 (2004).

18. *Id.* at 518 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (citations omitted) and *Nev. Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003)). *Hibbs* dealt with the FMLA, 29 U.S.C. §§ 2601-2654 (1993), and the examination was predicated upon a classification based on the individual’s sex. See Heckman, *The Impact of the Eleventh Amendment*, *supra* note 15, at 44 (discussing holding in *Hibbs*).

violation (and protection) of the Eleventh Amendment when sued for violation of federal civil rights laws.¹⁹ The Supreme Court has addressed this issue with regard to some of the civil rights statutes.²⁰ Thus, it becomes critical to inquire whether entities such as public schools (K-12) and public colleges and universities are deemed “arms of the state.”²¹ The Eleventh Amendment’s application to each of the federal statutes will be examined separately.²² Both *Mis-*

19. See Heckman, *The Impact of the Eleventh Amendment*, *supra* note 15, at 20 (citing federal cases where courts have upheld Eleventh Amendment immunity of state entities against private lawsuits).

20. See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004) (dealing with Title II of Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134 (2000) [hereinafter ADA]); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (discussing Title I of ADA, 42 U.S.C. §§ 12111-12117); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (dealing with Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) [hereinafter ADEA]). See also Heckman, *The Impact of the Eleventh Amendment*, *supra* note 15, at 25-26 n.33 (detailing how Supreme Court pronounced overreaching by Congress).

21. See *Morris v. Wallace Cmty. Coll.-Selma*, 125 F. Supp. 2d 1315, 1334 (S.D. Ala. 2001), *aff'd*, 34 F. App'x 388 (11th Cir. 2002) (unpublished opinion) (“[W]hether an entity other than the state itself partakes of the state’s Eleventh Amendment immunity depends on whether it is an ‘arm of the state.’”) (quoting *Mt. Heathy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). The district court found that the Alabama community college was an arm of the state of Alabama and was thus entitled to Eleventh Amendment immunity as to the § 1983 action advanced. *Id.* at 1335. See also *Williams v. Dist. Bd. of Trs. of Edison Cmty. Coll.*, 421 F.3d 1190 (11th Cir. 2005) (finding community college was deemed “arm of the state” of Florida); *Miccosukee Tribe v. Fla. State Athletic Comm’n*, 226 F.3d 1226, 1233 (11th Cir. 2000) (addressing factors used to determine whether defendant will be deemed “arm of the state” and commenting on “fiscal autonomy” factor); *Hall v. Med. Coll. of Ohio*, 742 F.2d 299, 301-02 (6th Cir. 1984) (concerning an Ohio medical school and using nine-point analysis to determine if entity was an “arm of the state”); *Wells v. Bd. of Trs. of Cal. State Univ.*, 393 F. Supp. 2d 990, 995 (N.D. Cal. 2005) (ruling that “[t]he defendant, California University System, is an instrumentality of the state of California”); *Davis v. Kent State Univ.*, 928 F. Supp. 729, 732 (N.D. Ohio 1996) (“It is well settled that public colleges and universities are considered to be arms of their respective state governments and thus immune from suit.”); *Bailey v. Ohio State Univ.*, 487 F. Supp. 601, 606 (S.D. Ohio 1980) (finding Ohio State University to be “arm or alter ego” of Ohio); Heckman, *The Impact of the Eleventh Amendment*, *supra* note 15, at 31-32 (discussing whether particular educational institutions are “arms of the state”); Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 556 n.24 (2003) [hereinafter Heckman, *Glass Sneaker*] (indicating feasibility of asserting Title IX claim against state entity depends on whether entity is “an arm of the state” and including factors determinative of that classification). *But see Kovats v. Rutgers, the State Univ.*, 822 F.2d 1303, 1312 (3d Cir. 1987) (concerning Rutgers University, identified as New Jersey public university).

22. Qualified immunity is not a significant consideration herein as defendant-employees would not be proper party defendants pursuant to either Title VII or Title IX, where the emphasis is on seeking redress from, respectively, either the actual employer or the recipient of federal funds. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages inso-

*Mississippi University for Women v. Hogan*²³ and *Nevada Department of Human Resources v. Hibbs*²⁴ dealt with gender-based classifications. The first opinion was premised on the Fourteenth Amendment's Equal Protection Clause, while the second was based on the Family and Medical Leave Act (FMLA), another federal statute.²⁵ Whether the Court will use the *Hibbs* opinion as the foundation to sanction the ability of private plaintiffs to sue states in federal courts based on Title VII, the Equal Pay Act, and Title IX remains to be seen.

Pre-lawsuit considerations. The potential plaintiff must also review whether the party can go directly to court to obtain relief for alleged transgressions or whether the individual must first pursue and exhaust administrative remedies. Certain statutes require that the individual first pursue the administrative route. For example, Title VII requires that a potentially aggrieved individual first file an administrative complaint with the Equal Employment Opportunity Commission ("EEOC").²⁶ Additionally, different statutes of limita-

far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). See also *Wrighten v. Glowski*, 232 F.3d 119 (2d Cir. 2000) (holding district court's dismissal of Title VII claim was proper because "individuals are not subject to liability under Title VII"). For a further discussion of Title VII and Title IX, see *infra* notes 387-388 and accompanying text referring to *Goins* case.

23. 458 U.S. 718 (1982).

24. 538 U.S. 721 (2003).

25. The Fourteenth Amendment directs:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. See also FMLA, 29 U.S.C. §§ 2601-54 (2010) (establishing federal statute for equal protection of gender in employment).

26. See 42 U.S.C. § 2000e-5(e)(1) (2010) (requiring filing "within [180] days after the alleged unlawful employment practice occurred). The filing period may be extended to 300 days where the individual has filed a claim with an appropriate state agency. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (addressing Title VII statute of limitations concerns). Congressional legislation followed to rectify the Court's decision, entitled the Lilly Ledbetter Fair Pay Act of 2009, allowing for the extension of the applicable statute of limitations for certain federal civil rights statutes, including Title VII and the Equal Pay Act. See 42 U.S.C.A. § 2000a (West 2009) (amending Title VII to allow 180-day statute of limitations to reset with each new discriminatory practice). As the Seventh Circuit Court of Appeals explained,

As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in [the individual's] EEOC charge. This rule serves the dual purpose of affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion, and of giving the employee [sic] some warning of the conduct about which the employee is aggrieved.

tions may apply depending on the specified statute at issue.²⁷ Failure to properly pursue or exhaust administrative remedies or file a timely complaint based on the statute of limitations involved can be fatal for all plaintiffs.

Grounds. The grounds for advancing employment-related claims against defendants for adverse employment actions include: failure to hire; failure to provide equitable compensation, conditions, or benefits; failure to promote; demotion; wrongful termination; or retaliation for engaging in protected activities.²⁸ With athletic departments, a common scenario in these cases is the hiring of a new athletic director, who upon taking office or soon thereafter, cleans house. Generally, the shuffling or termination of employees is accomplished through “reorganizations” of the athletic department. Routinely, most employees do not have specific terms for the length of their employment, and as such, they fall into “at-will employment,”²⁹ whereby an employer may terminate the individual’s employment for any reason, provided it does not violate the Constitution or other federal or state statutes generally prohibiting discrimination based on certain factors.³⁰ The legal challenge is whether such reassignments or firings are permissible or based

Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994). *See also* Rallins v. Ohio State Univ., 191 F. Supp. 2d 920, 927 (S.D. Ohio 2002) (discussed *infra* notes 210-231). *But see* 20 U.S.C. §§ 1681-1688 (indicating Title IX does not impose pre-administrative agency filing requirement).

27. *See, e.g.*, AB *ex rel.* CD v. Rhinebeck Cent. Sch. Dist., 224 F.R.D. 144, 153 (S.D.N.Y. 2004) (borrowing state law for computation of Title IX’s statute of limitations).

28. *See* 42 U.S.C. § 2000e-2(a) (2010) (delineating conduct that constitutes unlawful employment practices). For a further discussion of the grounds for advancing employment-related claims against defendants for adverse employment actions, see *infra* notes 44-45 and accompanying text.

29. *See, e.g.*, Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 300 (N.Y. 1983) (addressing New York’s position on at-will employment of allowing termination for any reason). “To do so would alter our long-settled rule that where an employment is for an indefinite term, it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason.” *Id.* (citation omitted).

30. *See, e.g.*, Hall v. Ford, 856 F.2d 255, 259 (D.C. Cir. 1988) (citing Rankin v. McPherson, 483 U.S. 378 (1987) (concerning First Amendment’s freedom of speech protection for employees)). *See generally* U.S. CONST. amend. XIV (providing protection pursuant to the Equal Protection Clause and Due Process Clause). *See also* Strasburger v. Bd. of Educ., Hardin Cnty. Cmty. Unit Sch. Dist. No. 1, 143 F.3d 351, 356-60 (7th Cir. 1998) (examining claim of former teacher, athletic director and basketball coach alleging his termination violated Fourteenth Amendment procedural due process and was not proper reduction-in-force); Katterhenrich v. Fed. Hocking Local Sch. Dist. Bd. of Educ., 700 N.E.2d 626, 634-37 (Ohio Ct. App. 1997) (discussing complaint of public school teacher alleging violation of Fourteenth Amendment, along with other grounds, for failure to hire him as athletic director).

upon illegal discrimination. The specific federal civil rights statutes are examined in the next section.

III. FEDERAL STATUTES GOVERNING SEX DISCRIMINATION

When sex discrimination occurs in athletic employment, the question that arises is under what federal statutes can the case be pursued. Title VII³¹ “prohibits sex discrimination in the terms and conditions of employment and is applicable to most public and private employers, including educational employers.”³² The Equal Pay Act, which also covers educational employees, bars pay or compensation discrimination, based on an individual’s gender.³³ Title IX is the federal gender anti-discrimination statute, applicable to educational programs and activities that receive federal funds.³⁴ Title VII and the Equal Pay Act apply to all employers of a certain size whose activities affect interstate commerce, while Title IX jurisdiction is based upon the defendant receiving federal funds.³⁵ Both Title VII and Title IX provide parallel protection by prohibiting sex discrimination, including sexual harassment.³⁶ These statutes prohibit such

31. 42 U.S.C. § 2000e-2 (2010).

32. Diane Heckman, Jackson v. Birmingham Board of Education: *Supreme Court to Review Whether There is a Title IX Cause of Action by an Athletic Department Employee for Retaliation*, 194 EDUC. L. REP. 1, 1 (2005) [hereinafter Heckman, Jackson v. Birmingham Board of Education].

33. See 29 U.S.C. § 206(d) (2010) (prohibiting gender discrimination in employment compensation).

34. See 20 U.S.C. §§ 1681-1688 (2010) (outlining prohibitions against gender discrimination for educational programs and activities receiving federal funding).

35. For an analysis of the applicability of Title VII, the Equal Pay Act, and Title IX, see *supra* notes 32-34 and accompanying text. For further discussion of Title VII, see *infra* note 39.

36. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (determining that Title VII prevents employers from “requiring people to work in a discriminatory hostile or abusive environment”). See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-810 (1998) (addressing sexual harassment in workplace). In *Brierly v. Deer Park Union Free School District*, the court stated:

The analysis of the hostile working environment theory of discrimination is the same under the ADEA as it is under Title VII. Under both statutes, an actionable hostile work environment means a workplace ‘permeated with discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victims’ employment and create an abusive working environment.’

359 F. Supp. 2d 275, 293 (E.D.N.Y. 2005) (citations omitted) (quoting *Brennan v. Metro. Opera Ass’n, Inc.*, 192 F.3d 310, 318 (2d Cir. 1999)). See *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745 (2d Cir. 2003) (applying *Harris* analysis). This article does not profile cases asserting Title VII sexual harassment raised by athletic department employees, as opposed to regular, non-harassment Title VII sex discrimination or retaliation cases. For a discussion of sexual harassment issues, see Diane Heckman, *On the Eve of Title IX’s 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 592-614 (1997) [hereinafter Heckman,

discrimination through reliance on either a *quid pro quo* harassment or hostile environment theory.³⁷ It is controverted, however, whether Title IX may be relied upon to pursue traditional educational employment cases.³⁸

A. Title VII of the Civil Rights Act of 1964

The principal mandate of Title VII³⁹ directs:

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

Sex Discrimination in the Gym and Classroom] (traversing litigation landscape involving Title IX and examining whether Title IX imposes notice requirement in cases pertaining to amateur athletics not involving sexual harassment). See generally Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223 (2009) [hereinafter Heckman, *Title IX and Sexual Harassment Claims*] (discussing Title IX and sexual harassment in athletics); Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 MARQ. SPORTS L.J. 175 (2003) [hereinafter Heckman, *Is Notice Required?*] (analyzing notice requirements of Title IX in non-sexual harassment athletic actions).

37. See Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 1 n.4 (explaining in employment context that “[q]uid pro quo harassment refers to the request for a sexual-based action in return for a favorable employment action”). “Hostile environment occurs where the academic environment would become, in essence, so contaminated by adverse unwanted sexual harassment as to make the employment an anathema.” *Id.* at 1 n.5. In *Whittaker v. Northern Illinois University*, the Seventh Circuit stated, “this statute prohibits employers from ‘requiring people to work in a discriminatorily hostile or abusive environment.’” 424 F.3d 640, 645 (7th Cir. 2005) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). The court noted that the derogatory and sexist terms in which the plaintiff’s supervisors referred to her were done outside her presence and she was unaware of the remarks during her employment with the University. See *id.*

38. For a discussion of whether Title IX may be relied upon to pursue educational employment cases, see *infra* notes 107-113 and accompanying text.

39. 42 U.S.C. §§ 2000e to e-17 (2010) (covering rules of employment). Title VII was extended to educational institutions. See 42 U.S.C. § 2000e (defining “educational institutions”). The Equal Employment Opportunity Act also sets forth the goal “[t]o further promote equal employment opportunities for American workers.” Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The statute covers those employers with fifteen or more employees working for twenty or more calendar weeks per year. See 42 U.S.C. § 2000e(b) (explaining meaning of employer under statute). For the implementing regulations, see EEOC Enforcement Guidance, 29 C.F.R. § 1604 (2007). See generally Diane Heckman, *Lowrey v. Texas A&M University System: Title IX vis-à-vis Title VII Sex Discrimination in Educational Institutions*, 124 EDUC. L. REP. 753 (1998) [hereinafter Heckman, *Lowrey v. Texas A&M University System*] (discussing differences between Title VII and Title IX); Heckman, *Sex Discrimination in the Gym and Classroom*, *supra* note 36, at 592-614 (addressing Title VII hostile environment sexual harassment).

(2) to limit, segregate, or classify his employees or 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.⁴⁰

Title VII also bars unequal pay on the basis of sex.⁴¹ The statute allows an employer to take certain actions, provided they are based on a *bona fide* occupational qualification reasonably necessary to the operation of the particular business or enterprise.⁴² This Act also provides a qualified exemption for religious educational institutions.⁴³

In order to establish a Title VII *prima facie* case, the plaintiff must demonstrate: (1) that the individual is a member of a protected class, (2) that the individual was qualified for the job, (3) that the individual suffered an adverse employment action taken by the defendant, and (4) circumstances existed to support an infer-

40. 42 U.S.C. § 2000e-2(a) (discussing "Employer practices"). In *Lowrey v. Texas A&M University System*, the Fifth Circuit determined that demotion constituted an adverse employment action. See 117 F.3d 242, 254 (5th Cir. 1977) (holding plaintiff had right to state retaliation claim under Title IX); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 552 (N.D. Ga. 1979) (finding plaintiff, professional woman golfer, stated Title VII cause of action charging discrimination by having to use male "back" tees, which were positioned farther back from women's "front" tees). The statute also addresses "[s]eniority or merit system[s]; quantity or quality production; ability tests; [and] compensation based on sex and authorized by minimum wage provisions." See 42 U.S.C. § 2000e-2(h); EEOC Enforcement Guidance, 29 C.F.R. § 1604.3 (2010) (identifying separate lines of progression and seniority systems).

41. See 42 U.S.C. § 2000e-2(h) ("[i]t shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29."). Courts have indicated, however, that there is a different burden of proof depending upon whether the individual is pursuing a violation of Title VII or the Equal Pay Act. See, e.g., *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000) (describing different burdens of proof). For the implementing regulation, see EEOC Enforcement Guidance, 29 C.F.R. § 1604.8 (2010) (showing relationship of Title VII to Equal Pay Act).

42. See, e.g., 42 U.S.C. § 2000e-2(e) (concerning "[b]usinesses or enterprises with personnel qualified on basis of religion, sex, or national origin and educational institutions with personnel of particular religion"). This subsection directs that it is not unlawful for an employer to hire, employ, classify, or refer an employee "[o]n the basis of his religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" *Id.* § 2000e-2(e)(1).

43. See *id.* § 2000e-2(e)(2) (explaining employment practices of educational institutions); *id.* § 2000e-1 (describing "[a]pplicability to foreign and religious employment").

ence of discrimination by the defendant.⁴⁴ An individual may establish that intentional discrimination occurred either: (1) through discriminatory animus “by direct evidence, or (2) by an indirect or inferential method of proof.”⁴⁵

Discrimination cases rarely proceed based upon direct evidence.⁴⁶ Most cases rely on the latter, utilizing the *McDonnell Douglas-Burdine* (“*McDonnell Douglas*”) burden-shifting standard, derived from two Supreme Court decisions, to establish the employer’s discrimination against the employee.⁴⁷ The plaintiff (the aggrieved employee, potential employee, or former employee) would generally first:

[c]reate an inference of discrimination by establishing a prima facie case by a preponderance of the evidence. Defendants [the employers] then have a burden of produc-

44. See *Atkinson v. Lafayette Coll.*, No. Civ. A. 01-CV-2141, 2003 WL 21956416, at *5 (E.D. Pa. July 24, 2003) (unpublished opinion) (listing elements plaintiff is required to show). See also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (requiring adverse action to be “tangible” or “material,” further defined as “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”); *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 647-48 (7th Cir. 2005) (“Simply put, a suspension without pay that is never served does not constitute an adverse employment action. . . . Of course, ‘adverse job action is not limited solely to loss or reduction of pay or monetary benefits.’” (citation omitted)); *Nichols v. Caroline Cnty. Bd. of Educ.*, No. Civ. JFM-02-3523, 2004 WL 350337, at *4 (D. Md. Feb. 23, 2004) (unpublished opinion) (“These allegations of discrimination . . . [observing this teacher more frequently than other teachers and conducting observations in classes outside [the teacher’s] area of certification] . . . do not constitute the kind of ‘adverse employment actions’ necessary to make out a prima facie case of disparate treatment under Title VII.”). One author reported,

Plaintiffs in sexual-harassment suits prevail in only 21 percent of their appeals before the Fourth Circuit, according to a recent Cornell Law Review article. They win, in contrast, 80 percent of the time in the New York-based Second Circuit, which is dominated by Democratic appointees, and 39 percent of the time nationwide.

Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine), at 38, 44, available at <http://www.nytimes.com/2003/03/12/magazine/the-power-of-the-fourth.html>.

45. *Glover-Dorsey v. Univ. of Tex. Med. Branch at Galveston, Tex.*, 147 F. Supp. 2d 656, 662 (S.D. Tex. 2001) (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995)) (denying defendant’s motion for summary judgment concerning nurse’s claim that University terminated her on basis of her race).

46. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973) (explaining method used in precedent).

47. See *id.* (setting forth principal elements required in Title VII lawsuits); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (concerning plaintiff’s obligation to rebut proffered reason advanced by defendant-employer for adverse employment action); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 502 (1993) (showing application of test).

tion to offer a legitimate, nondiscriminatory reason for the employment decision. In order to prevail, plaintiffs finally must demonstrate that defendants' articulated reason was merely a pretext for discrimination. The ultimate burden of proving [the] . . . discrimination always remains with plaintiffs.⁴⁸

As one court summarized, "The plaintiff may prove pretext by showing either that: (1) the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the [adverse employment action by the defendant], or (3) the proffered reason [offered by the defendant] was insufficient to motivate the [adverse employment action]."⁴⁹ The plaintiff's burden in establishing a prima facie case is relatively modest or minimal, and the defendant employer's burden of demonstrating a legitimate non-discriminatory reason for its action "is not a particularly steep hurdle."⁵⁰ A plaintiff may show pretext by "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons."⁵¹

Once the plaintiff has established a prima facie case by a preponderance of the evidence, the burden of production shifts to the defendant, who may assert that the reason for the defendant's action was due to a legitimate non-discriminatory factor.⁵² Following that action, the plaintiff could assert that the defendant's reason

48. *Austin v. Cornell Univ.*, 891 F. Supp. 740, 746 (N.D.N.Y. 1995) (citing *Equal Emp't Opportunity Comm'n v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2d Cir. 1994)) (applying *McDonnell Douglas* standard to ADEA claims); *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1211 (10th Cir. 2008) ("This structure [*McDonnell Douglas*] requires the plaintiff to first establish a prima facie case of discrimination. . . . Should the plaintiff succeed in proving a prima facie case, the employer must provide a legitimate and facially non-discriminatory reason for its decision. . . . Finally, if the employer satisfies this burden, the plaintiff must establish that the defendant's reasons were a pretext for discrimination.").

49. *Rallins v. Ohio State Univ.*, 191 F. Supp. 2d 920, 929 (S.D. Ohio 2002) (citing *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)).

50. *Brierly v. Deer Park Union Free Sch. Dist.*, 359 F. Supp. 2d 275, 291 (E.D.N.Y. 2005).

51. *Id.* at 291-92 (citing *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999)).

52. *See Austin*, 891 F. Supp. at 746 (targeting defendant's burden of production).

was pretextual—in essence, the action was used to cover up the real reason, which was discriminatory.⁵³

Individuals may establish their claims by either disparate impact or disparate treatment.⁵⁴ The disparate impact theory applies when an employment practice is neutral on its face but, in practice, more severely influences one group to its detriment.⁵⁵ For example, if a public school had a rule requiring all physical education teachers to be at least six feet tall, such a requirement would operate to exclude a much higher proportion of female applicants than male applicants. This policy would be problematic because there would be no legitimate reason for such a requirement.

Under the disparate treatment theory, it is necessary to prove intentional discrimination – discriminatory intent (*animus*) or motive – on the part of the employer.⁵⁶ For example, it would be problematic if, during an interview, a male athletic director told a

53. See, e.g., *Atkinson v. Lafayette Coll.*, No. Civ.A. 01-CV-2141, 2003 WL 21956416, at *5 (E.D. Pa. July 24, 2003) (unpublished opinion) (indicating that “[s]ummary judgment is appropriate on behalf of the employer if the employee fails to meet her burden at either the *prima facie* or pretext stage of the framework”).

54. See 42 U.S.C. § 2000e-2(k) (directing elements of disparate impact treatment); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 342, 335 n.15 (1977) (explaining disparate treatment theory).

55. See 42 U.S.C. § 2000e-2(k) (showing burden of proof in disparate impact cases). “The disparate impact theory had been codified in the Civil Rights Act of 1991 following the decision by the Supreme Court in *Wards Cove Packing Co. v. Atonio*.” Michael Corey Dawson, Comment, *A Change Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must Be Eliminated*, 9 SETON HALL J. SPORT L. 551, 569 (1999) (citing *Atonio*, 490 U.S. 642 (1989)). See *Int’l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

Claims of disparate treatment may be distinguished from claims that stress ‘disparate impact.’ The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Id. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971) (giving examples of theory). See also Diane Heckman, *Tracking Challenges to NCAA’s Academic Eligibility Requirements Based on Race and Disability*, 222 EDUC. L. REP. 1, 11 n.63 (2007) [hereinafter Heckman, *Tracking Challenges*] (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (plurality opinion)) (“[F]acially neutral employment practices that have a significant adverse effect on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”).

56. See *Griggs*, 401 U.S. at 426 (showing intricacies of differing theories); *Int’l Bhd. of Teamsters*, 431 U.S. at 325 (requiring intentional discrimination by employer); *Wynn v. Columbus Mun. Separate Sch. Dist.*, 692 F. Supp. 672, 681 (N.D. Miss. 1988) (“Insofar as plaintiff, a protected class member under Title VII, applied for an available position for which [she] was qualified and which was filled by a lesser qualified and non-protected male, the court holds that [the plaintiff] ‘has made out a *prima facie* case of sexually-motivated disparate treatment.’”).

female applicant for the position of the head varsity football coach that she had no business applying for the job as females are unsuited to the position.⁵⁷ Certain defenses may be asserted in a Title VII disparate treatment action, including that the employers' actions were based on bona fide occupational qualifications⁵⁸ or were permitted affirmative actions.⁵⁹

Title VII explicitly prohibits retaliation.⁶⁰ There must be a causal link between the protected activity and the adverse action taken by the subject employer against the employee.⁶¹ In *Burlington Northern & Santa Fe Railway Co. v. White*,⁶² the Roberts Court ruled that in a Title VII retaliation case, the plaintiff "must show that a reasonable employee would have found the challenged action materially averse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"⁶³

57. See, e.g., *Biver v. Saginaw Twp. Cmty Schs.*, 805 F.2d 1033, 1986 WL 18062 at *5 (6th Cir. 1986) (unpublished opinion) (describing male school superintendent's indication that "hell would freeze over" before he would hire a woman to coach boy's interscholastic team).

58. See 42 U.S.C. § 2000e-2(e) (describing bona fide occupation qualification). For example, there are weight limitations for jockeys. For application of seniority or merit systems, see 42 U.S.C. § 2000e-2(h).

59. See *id.* § 2000e-5(g)(1) (describing appropriate affirmative action); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90 (2003) (concerning jury instructions in Title VII case commenced by female warehouse worker and heavy equipment operator based on proffered mixed motives where both legitimate and illegitimate reasons were used by employer in making adverse employment decision against employee). Relying on 42 U.S.C. § 2000e-2(m), the Court stated, "We held that direct evidence [of discrimination] is not required." *Id.* at 92. See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989) (concerning woman's Title VII claim premised on her being denied partnership at accounting firm). The Court indicated that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." *Id.* at 242.

60. See 42 U.S.C. § 2000e-3(a) (discussing discrimination for making charges, testifying, assisting, or participating in enforcement proceedings).

61. See *Atkinson v. Lafayette Coll.*, 2003 WL 21956416 at *9 (E.D. Pa. July 24, 2003) (unpublished opinion), *aff'd*, 460 F.3d 447 (3d Cir. 2006) (noting that aggrieved individual must assert: (1) that individual engaged in activity protected by Title VII, (2) that employer took adverse employment action against individual, and (3) that there was causal connection between participation in protected action and adverse employment action).

62. 548 U.S. 53 (2006).

63. *Id.* at 68. Justice Alito was not pleased with the standard the majority employed, opining that "under the majority's test . . . employer conduct that causes harm to an employee is permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination." *Id.* at 77 (Alito, J., concurring). He underscored, "The majority's interpretation has no basis in the statutory language and will, I fear, lead to practical problems." *Id.* at 73. See also *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1213 (10th Cir. 2008) (noting that second prong of Title VII retaliation case "is replaced

Originally, Title VII had limited remedies, which were expanded by passage of the Civil Rights Act of 1991.⁶⁴ There is a cornucopia of potential remedies to redress violations, such as injunctive relief and monetary relief, which may encompass traditional compensatory damages, back pay (for lost wages incurred up to the issuance of a final judgment), front pay (for prospective lost wages), and potential punitive damages.⁶⁵ Title VII permits compensatory and punitive damages based on a tier system: the more employees a company has, the greater amount of money that can be awarded, with a maximum of \$300,000 in damages.⁶⁶

The Supreme Court has not rendered a decision since *Seminole Tribe of Florida v. Florida*,⁶⁷ which determined whether the Eleventh Amendment shields state actors for violation of Title VII. However, the Court opined on the issue as to provisions previously in existence prior to the Civil Rights Act of 1991 changes. In *Lipsett v. University of Puerto Rico*,⁶⁸ the First Circuit determined that a private

with the requirement (2) that a reasonable employee would have found the challenged action materially adverse – that is, that the action might dissuade[] a reasonable worker from making or supporting a charge of discrimination. . . .” relying on *Burlington*) (internal quotations omitted).

64. See 42 U.S.C. § 1981a(b) (2010) (effective Nov. 21, 1991) (discussing compensatory and punitive damages). Title VII provides that “in the case of a respondent who has more than 500 employees in each of twenty or more calendar years in the current or preceding calendar year, [compensatory damages awarded shall not exceed] \$300,000.” *Id.* § 1981a(b)(3)(D). Punitive damages are permissible if the offending party acted “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” *Id.* § 1981a(b)(1). See also *United States v. Burke*, 504 U.S. 229, 238 (1992) (noting Title VII remedies).

65. See 42 U.S.C. § 2000e-5(g)(1) (“Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [EEOC]. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.”); *Prine v. Sioux City Cmty. Sch. Dist.*, 95 F. Supp. 2d 1005, 1014 (N.D. Iowa 2000) (allowing front pay for at-will female employee but restricting duration).

66. See 42 U.S.C. § 2000e-5(g)(1) (discussing damages); *Pollard v. E.I. DuPont*, 532 U.S. 843, 844 (2001) (ruling that monetary amounts attributed to front pay would not count toward maximum compensatory damages); *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475, 1475 (S.D.N.Y. 1992), *approved as modified*, 998 F.2d 60 (2d Cir. 1993) (concerning female umpire, who alleged sex discrimination in not being selected as Major League Baseball umpire). The Second Circuit held that the Civil Rights Act of 1991 did not apply retroactively to allow Postema the right to a jury trial or for compensatory and punitive damages for claims that arose before the effective date of the Civil Rights Act of 1991, as Act pertained to Title VII. See *id.* at 1489-90. See generally Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the “Equal Opportunity” Standard*, 1994 DETROIT C. L. REV. 953, 999 (1994) [hereinafter Heckman, *The Explosion of Title IX Legal Activity*].

67. 517 U.S. 44 (1996). See *supra* text accompanying note 16.

68. 864 F.2d 881 (1st Cir. 1988). See also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 445 (1976) (noting that “[t]he Eleventh Amendment . . . and the principle of state

citizen could pursue an action for damages premised on Title VII against a state, “[r]easoning that Title VII’s express authorization of damages actions against a state abrogates the [E]leventh [A]mendment barrier.”⁶⁹

B. Equal Pay Act of 1963

The Equal Pay Act⁷⁰ circumscribes “[s]ex discrimination in the compensation afforded employees [when it is] at a rate less than

sovereignty which it embodies are limited by the enforcement provisions of s 5 of the Fourteenth Amendment”) (referencing *Hans v. Louisiana*, 134 U.S. 1 (1890)). The action in *Fitzpatrick* contested provisions of the Connecticut Employees Retirement Act. *See id.* (discussing Connecticut Employees Retirement Act).

69. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 885 n.6 (1st Cir. 1988) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). In *Lipsett*, the Supreme Court expressly stated, “But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” *Id.* at 456. As a result, the Court recognized, “We think that Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.” *Id.* This case concerned provisions in existence prior to the Civil Rights Act of 1991, which was amended to allow for compensatory benefits, whereas previously, the Act permitted only equitable relief for Title VII claims. *See id.* (discussing amendment of Civil Rights Act). For other decisions finding that Title VII abrogates Eleventh Amendment immunity pertaining to states, see *Yoonessi v. State Univ. of N.Y.*, 862 F. Supp. 1005 (W.D.N.Y. 1994), *leave to appeal denied*, 56 F.3d 10 (2d Cir. 1995) (concerning physician) and *Stein v. Kent State Univ. Bd. of Trs.*, 994 F. Supp. 898 (N.D. Ohio 1998), *aff’d*, 181 F.3d 103 (6th Cir. 1999) (concerning speech pathologist who alleged violation of First Amendment freedom of speech).

70. 29 U.S.C. § 206 (2010). *See id.* (setting forth requirements governing compensation accorded to employees by employers, including minimum wages plus overtime considerations). Certain professional, executive or administrative employees may be exempt from some of the particular provisions. *See id.* (exempting certain individuals from Act). The Equal Pay Act is part of the Fair Labor Standards Act of 1938 [hereinafter FLSA]. 29 U.S.C. §§ 200-213 (2010) (detailing Equal Pay Act). It remains to be seen whether coaches will be deemed executive employees and thus exempt from overtime compensation. *See Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir. 1999), *reh’g denied*, 199 F.3d 441 (5th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000) (holding athletic trainers at Texas public school were unable to seek overtime pay pursuant to FLSA because they were exempt professionals). The court, in reaching its decision, examined 29 U.S.C. §§ 213(a)(1), 541.3. *See* 29 U.S.C. § 213(a)(1) (exempting employees “employed in a *bona fide* professional, administrative, or executive capacity”); 29 C.F.R. § 541.3 (setting forth test to determine if employees were deemed “professionals”). *See generally* Lisa A. Bireline Sarver, *Coaching Contracts Take on the Equal Pay Act: Can (and Should) Female Coaches Tie the Score?*, 28 CREIGHTON L. REV. 885 (1995) (examining University of Nebraska’s coaching contracts for coaches of men’s and women’s basketball teams); Gregory Szul, *Sex Discrimination and the Equal Pay Act in Athletic Coaching*, 5 DEPAUL-LCA J. ART. & ENT. L. & POL’Y 161 (1995). Two of former Congresswoman Edith Green’s (D-Or.) achievements were spearheading the Equal Pay Act and Title IX. *See* Women in Congress, Edith Starrett Green, Representative from Oregon,

the rate at which the employer pays wages to employees of the opposite sex,”⁷¹ under certain explicit conditions. The Act states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, 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.⁷²

An employee of one sex is required to prove that the employer pays different wages “to employees of different sexes for equal work on jobs the performance of which require *equal skill, effort and responsibility*, and which are performed under *similar working conditions*.”⁷³ As one commentator summarized,

[T]he jobs held by employees of the opposite sex need not be identical; rather they must be “substantially equal.” In attempting to establish a *prima facie* case, the plaintiff bears the burden of showing that the jobs held by male and female employees are substantially equal, not that the skills and qualifications of the individual employees holding those jobs are equal.⁷⁴

The plaintiff is required to identify another position (known as the “comparator” position) in which members of the opposite sex were

profiles/profile.html?intID=92 (last visited Apr. 5, 2011) (detailing Green’s accomplishments).

71. Heckman, *The Explosion of Title IX Legal Activity*, *supra* note 66, at 999.

72. 29 U.S.C. § 206(d)(1). *See also* Equal Employment Opportunity Comm’n v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 577 (7th Cir. 1987) (finding Equal Pay Act is not a comparable worth statute).

73. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (emphasis added).

74. Szul, *supra* note 70, at 162. *See also* Brock v. Ga. Southwestern Coll., 765 F.2d 1026, 1032 (11th Cir. 1985) (“It is important to bear in mind that the *prima facie* case is made out by comparing the jobs held by the female and male employees and showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding these jobs.”).

paid more favorably.⁷⁵ Once a prima facie case is established, then the defendant-employer must prove that the wage disparity was based on one of the following permitted exceptions: “(1) [a] seniority system; (2) a merit system; (3) a pay system based on quantity or quality output; or (4) a disparity based on any reason other than sex.”⁷⁶ The last of the four defenses is the one most frequently asserted in athletic employment sex discrimination cases.

The Equal Pay Act was subsequently amended to allow an individual to sue any employer, including public entities.⁷⁷ The Equal Pay Act prohibits retaliation.⁷⁸ Unlike Title VII, there is no administrative pre-filing requirement under the Equal Pay Act.⁷⁹ This statute allows for compensatory damages, which may be doubled if the violation by the employer is willful.⁸⁰ In 1997, the EEOC

75. See 29 U.S.C. § 206(d)(1) (explaining plaintiff’s burden of proof to prove discrimination). The fact finder will be required to review whether the positions are substantially equal in order for the comparison between the two employees to occur. See *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 480 (2d Cir. 2001) (establishing it is question of fact for jury to determine if comparator advanced by plaintiff is satisfactory). The Second Circuit gave its imprimatur to the jury’s acquiescence to the comparison of a criminal justice professor, the female plaintiff, to a male psychology professor, even though he was in another department entirely. See *id.* (discussing reasoning of case). However, both the departments of criminal justice and psychology were in the same division, and the plaintiff was the only assistant professor of equivalent seniority in her department and one of only three in her division. See *id.* at 480-81 (distinguishing present case from prior precedent). The jury had awarded the professor over \$100,000 in damages. See *id.* (discussing jury verdict). In *Hein v. Oregon College of Education*, the Ninth Circuit stated, “The Act does not prohibit variations in wages; it prohibits *discriminatory* variations in wages.” 718 F.2d 910, 916 (9th Cir. 1983) (emphasis in original). The court reasoned:

We believe that 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.

Id. The court further instructed, “The jobs held by employees of opposite sexes need not be identical, but they must be ‘substantially equal.’” *Id.* at 912 (citations omitted).

76. *Sobba v. Pratt Cmty. Coll. & Area Vocational Sch.*, 117 F. Supp. 2d 1043, 1049 (D. Kan. 2000).

77. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, (redefining term “employer”).

78. See 29 U.S.C. § 215(a)(3) (describing Equal Pay Act’s impact on retaliating acts).

79. See *id.* (noting unlawfulness of discharging employee because employee failed to file complaint, failed to institute proceeding, testified in such proceeding, or will testify in such proceeding).

80. In *Perdue v. City University of New York*, the particular New York district court held, “A violation of the EPA is willful if ‘the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.’” 13 F. Supp. 2d 326, 333 (E.D.N.Y. 1998) (citations omitted).

promulgated new guidelines predicated on application of Title VII and the Equal Pay Act, which addresses coaches at educational institutions.⁸¹ There has been scant judicial review of the document.⁸²

The Supreme Court has yet to entertain an Eleventh Amendment challenge concerning the Equal Pay Act. In *Kimel v. Florida Board of Regents*,⁸³ the Supreme Court, in a divided opinion, found that another civil rights statute, the ADEA, did not abrogate the Eleventh Amendment immunity to allow state employees to commence private lawsuits in federal courts seeking monetary remedies against certain state entities, including Alabama State University and Florida State University.⁸⁴ There is a consensus among the federal circuit courts that Congress intended to abrogate Eleventh Amendment immunity when enacting the Equal Pay Act in opinions rendered both post-*Kimel*⁸⁵

81. See Enforcement Guidance on Sex Discrimination on Compensation of Sports Coaches in Educational Institutions, 29 C.F.R. §§ 1604-1607 (2010), available at <http://www.eeoc.gov/policy/docs/coaches.html> [hereinafter EEOC Enforcement Guidance] (stating guidelines for coaches at educational institutions under both Title VII and the Equal Pay Act); see also Heckman, *Lowrey v. Texas A&M University System*, *supra* note 39, at 764-65 (discussing this document).

82. See *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 802 (S.D. Ohio 1998), *aff'd*, 194 F.3d 1315 (6th Cir. 1999) (containing first judicial reference to EEOC Guidelines in Title IX athletics employment case); Heckman, *Glass Sneaker*, *supra* note 21, at 603-07 (discussing *Weaver* case).

83. 528 U.S. 62 (2000).

84. See *id.* (interpreting 29 U.S.C. §§ 621-634).

85. For educational cases vacating the decisions and remanding Equal Pay Act cases for further consideration in light of *Kimel*, see *State Univ. of N.Y., Coll. at New Paltz v. Anderson*, 120 U.S. 929 (2000), *vacating* 169 F.3d 117 (2d Cir. 1999) (considering Equal Pay Act claim involving tenured female professor who taught in Communications Department), *on remand*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000) (concluding Equal Pay Act did abrogate Eleventh Amendment immunity for state entities); *Ill. State Univ. v. Varner*, 528 U.S. 1110 (2000), *vacating* 150 F.3d 706 (7th Cir. 1998) (concerning claim by female tenure-track faculty alleging violation of Title VII and Equal Pay Act), *on remand*, 226 F.3d 927 (7th Cir. 2000) (ruling Equal Pay Act did foreclose Eleventh Amendment immunity to protect state university and waiving issue of whether Title VII also resulted in same determination on appeal), *cert. denied*, 533 U.S. 902 (2001). For other cases supporting that the Equal Pay Act abrogated any Eleventh Amendment immunity, see *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542, 551 (5th Cir. 2001) (concerning female professor alleging Title VII and Equal Protection Act violations), *reh'g en banc denied*, 292 F.3d 221 (5th Cir. 2002). Two judges dissented from this determination, reasoning that the Equal Pay Act failed the congruence and proportionality test that the Supreme Court had imposed. See *id.* at 224 (Smith, J. & DeMoss, J., dissenting) (dissenting from denial of rehearing en banc), *cert. denied*, 537 U.S. 1087 (2002). See also *Morris v. Wallace Cmty. Coll.-Selma*, 125 F. Supp. 2d 1315, 1342 (S.D. Ala. 2001) (concluding Eleventh Amendment would not bar Equal Pay Act suit by private individual against state college) (citing *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 818-819 (6th Cir. 2000) (finding Equal Pay Act did abrogate Eleventh Amendment immunity and that Eleventh Amendment immunity trumped ADEA in this case brought by female university professor under assort-

and pre-*Kimel*,⁸⁶ although this determination is not unanimous.⁸⁷

C. Title IX of the Education Amendments of 1972⁸⁸

Title IX prohibits sex discrimination at educational institutions that are recipients of federal funds.⁸⁹ The main provision of the

ment of discriminatory statutes)), *aff'd*, 34 F. App'x 388 (11th Cir. 2002) (unpublished opinion)); *Morris v. Fordham Univ.*, No. 03 Civ. 0556 (CBM), 2004 U.S. Dist. LEXIS 7310 (S.D.N.Y. Apr. 28, 2004) (bringing sex discrimination claim under Title IX); Bill Alden, *Court Finds 11th Amendment No Barrier to Equal Pay Claim*, N.Y. L.J., Mar. 1, 1999, at 1 (analyzing Eleventh Amendment and Equal Pay Act claims).

86. For pre-*Kimel* cases supporting the right of private individuals to sue states, see *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965, 967-968 (8th Cir. 1999); *Ussery v. La. ex rel. La. Dep't of Health & Hosps.*, 150 F.3d 431, 435, 437 (5th Cir. 1998), *cert. dismissed*, 526 U.S. 1013 (1999); *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833, 842 (6th Cir. 1997).

87. See *Mercado v. Puerto Rico*, 214 F.3d 34, 36 (1st Cir. 2000) (indicating that Equal Pay Act was part of FLSA, but holding Puerto Rico immune from individual federal damages actions under FLSA); *Larry v. Bd. of Trs. of Univ. of Ala.*, 996 F. Supp. 1366, 1367 (N.D. Ala. 1998) (refusing to accord Supreme Court decisions rendered prior to revisions of Civil Rights Act of 1991, which allowed for monetary damages to govern in determining infringement of Equal Pay Act with Eleventh Amendment). *Cf.* *Alden v. Maine*, 527 U.S. 706 (1999) (noting that state probation officer challenged overtime provisions of FLSA, wherein Court found that part of FLSA, 29 U.S.C. §§ 203(x), 216(b), did not trump Eleventh Amendment protection for state entities).

88. 20 U.S.C. §§ 1681-1688 (2010).

89. For specific implementing regulations pertaining to employment, see 34 C.F.R. § 106.41(c)(4)-(5) ("Equal opportunity") (addressing ability of student-athletes in separate extracurricular athletic programs for males and females to be afforded equal opportunity through the availability, assignment, and compensation of coaches); *Id.* § 106.7 ("Effect of employment opportunities") (stating compliance must still occur even if fewer opportunities exist for members of one sex); *Id.* § 106.51 ("Employment") (mandating general guidelines for employment); *Id.* § 106.52 ("Employment criteria") (governing use of specific employment criteria); *Id.* § 106.54 ("Compensation") (requiring equality of compensation for equal work); *Id.* § 106.55 ("Job classification and structure") (disallowing impermissible job classifications). See Lisa Goodnight, *AAUW Celebrates 38th Anniversary of Title IX with Calls for Greater Enforcement*, AAUW.ORG, June 22, 2010, http://www.aauw.org/media/pressreleases/titleIX_38_062210.cfm (analyzing Title IX). Title IX was modeled on another civil rights statute, Title VI of the Civil Rights Act of 1964. See 42 U.S.C. § 2000d (2000) [hereinafter Title VI] (prohibiting certain discrimination on the basis of race). The author herein profiles a number of recent Title IX athletic-related decisions. For a detailed exposition of earlier foundation Title IX cases, see Heckman, *The Explosion of Title IX Legal Activity*, *supra* note 66; Heckman, *Sex Discrimination in the Gym and Classroom*, *supra* note 36, at 592-618 (exploring athletic employment); Diane Heckman, *Title IX Tapestry: Threshold and Procedural Issues*, 153 EDUC. L. REP. 849 (2001) [hereinafter Heckman, *Title IX Tapestry*]; Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997) [hereinafter Heckman, *Scoreboard*]; Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 UNIV. MIAMI ENT. & SPORTS L. REV. 1 (1992)

Title IX statute mandates, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance”⁹⁰ The three *prima facie* elements required to be demonstrated by a plaintiff are: “(1) an educational program or activity is involved;⁹¹ (2) the defendant entity is a recipient of federal funds;⁹² and (3) discrimination occurred on the basis of sex in the provision or non-provision of the educational program or activities.”⁹³ The Supreme Court ruled that a student must place the educational institution on notice in cases involving Title IX sexual harassment.⁹⁴ Whether an employee of an educational institution would also be required to place the educational institution on notice that an employment-related violation occurred as a condition precedent to the commencement of a Title IX lawsuit not involving sexual harassment or in a Title IX case involving retaliation is unclear.⁹⁵ June

[hereinafter Heckman, *Women & Athletics*]. See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (concerning Title IX harassment suit brought by parents on behalf of student).

90. 20 U.S.C. § 1681(a) (2010).

91. *Id.* See also Heckman, *Title IX Tapestry*, *supra* note 89, at 855-56 (addressing in detail recent case law concerning Title IX threshold and procedural issues including whether an “educational” program or activity was involved).

92. 20 U.S.C. § 1681(a) (2010). See *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984) (holding that Title IX applied to private college where students received federally funded aid). *But see* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (legislatively overturning *Grove City* decision). See generally Heckman, *Title IX Tapestry*, *supra* note 89, at 854-55 (exploring this issue).

93. 20 U.S.C. § 1681(a) (2010). See Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 2-3 (discussing this issue).

94. See Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 3 n.10 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)). In *Simpson v. University of Colorado at Boulder*, the Tenth Circuit became the first circuit to address an exception to the notice requirement, concluding that a funding recipient can be said to have

“intentionally acted in clear violation of Title IX,” when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient. Implementation of an official policy can certainly be a circumstance in which the recipient exercises significant “control over the harasser and the environment in which the harassment occurs.”

500 F.3d 1170, 1178 (10th Cir. 2007) (citations omitted). See generally Heckman, *Is Notice Required?*, *supra* note 36; Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. L. REP. 1 (2004) [hereinafter Heckman, *Peer Sexual Harassment*] (tracking Title IX history concerning category of sexual harassment claims).

95. See Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 3-4 (discussing notice in Title IX sexual discrimination actions by employees).

23, 2010, marked the thirty-eighth anniversary since President Richard M. Nixon signed Title IX into law. Despite this lengthy passage of time, the “glass sneaker” persists as to “participation opportunities and benefits for female athletes and the low participation opportunities for females in athletic departments, including coaching [positions].”⁹⁶

Title IX prohibits retaliation, although, unlike other civil rights statutes, this provision is found in the applicable regulations.⁹⁷ Title IX does not direct an administrative pre-filing requirement before initiating a lawsuit.⁹⁸ The Supreme Court has upheld a private right of action seeking compliance with Title IX, even though the statute did not explicitly indicate whether an individual could assert a private Title IX cause of action.⁹⁹ While the Court has ruled on multiple issues pertaining to students, the Court has yet to examine whether an employee of a covered employer may assert a Title IX claim outside of the retaliation context.¹⁰⁰

Presently, the Supreme Court has not explicitly ruled on whether the Eleventh Amendment prohibits plaintiffs from pursu-

96. Heckman, *Glass Sneaker*, *supra* note 21, at 552-53 n.2. *See also* Heckman, *Women & Athletics*, *supra* note 89, at 63 (“Instead of the glass ceiling women face in the business world, they have a glass sneaker in the sports world.”).

97. *See* 34 C.F.R. § 106.51 (2010) (prohibiting retaliation from employers or schools after receiving complaint of gender discrimination); *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1211 (10th Cir. 2008) (detailing Title IX prima facie retaliation case); *infra* notes 395-401 and accompanying text (concerning *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005)). In *Legoff v. Trustees of Boston University*, the Massachusetts district court stated, “Title IX prohibits retaliation against those who complain of violations of the act . . . Such complaints need not be formal complaints to an enforcement agency, but also include internal acts of opposition to discrimination, including merely voicing concerns to superiors within the university.” 23 F. Supp. 2d 120, 128 (D. Mass. 1998).

98. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 706 (1979) (discussing lack of pre-filing requirement).

99. *See id.* (describing Title IX enforcement procedures).

100. *See id.* (involving case commenced by medical student); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005) (ruling athletic department employee can commence a Title IX retaliation claim); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (allowing a private right of action by an elementary student in a sexual harassment case involving peer sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (impliedly sanctioning a private right of action by a high school student in sexual harassment case involving a teacher); Heckman, *Title IX Tapestry*, *supra* note 89, at 852-53 (“Title IX provides no express statutory language conferring the right of an aggrieved party to bring a lawsuit to secure its protections.”); Heckman, *Is Notice Required?*, *supra* note 36 (summarizing myriad Supreme Court rulings on Title IX); Heckman, *Peer Sexual Harassment*, *supra* note 94, at 1 (presenting category of Title IX sexual harassment claims).

ing Title IX lawsuits against states or arms of the state.¹⁰¹ While not automatically protective, as the statute must still comport with meeting the Fourteenth Amendment nexus test, Title IX is buttressed by the Civil Rights Remedies Equalization Act (“Equalization Act”) and by being premised on the Spending Clause to the U.S. Constitution.¹⁰² In *Gebser v. Lago Vista Independent School District*,¹⁰³ a sexual harassment case involving actions at a public high school, the Supreme Court referred to the Equalization Act’s application to Title IX.¹⁰⁴ However, the Court did not specifically address whether this public school district was an “arm of the state.”¹⁰⁵ The circuit courts have not supported an Eleventh Amendment defense by state universities.¹⁰⁶

101. See *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 441 F.3d 1287, 1303 (11th Cir. 2006) (describing Supreme Court precedent regarding Eleventh Amendment and Title IX). In *Williams*, the Eleventh Circuit stated, “Williams correctly notes that Congress validly abrogated the states’ immunity from Title IX suits . . . This is why the Eleventh Amendment did not bar the direct Title IX action against [the University of Georgia], [the University of Georgia Athletic Association], and the Board of Regents.” *Id.* at 1303. The case involved a Title IX peer sexual harassment case brought by a female student against the University of Georgia and other defendants due to the alleged conduct committed by two male members of the Division I men’s basketball team and a male football player on the Division I football team. See *id.* at 1293 (discussing sexual harassment claim). The appellate court highlighted that:

[h]ere, however, Williams is trying to use [42 U.S.C. § 1983] to bring a Title IX claim. Congress has not abrogated states’ immunity from § 1983 suits. Nor has [University of Georgia] or the Board of Regents waived its Eleventh Amendment immunity. Therefore, the Eleventh Amendment bars Williams’ § 1983 claims against [University of Georgia] and the Board of Regents.

Id. at 1303 (citations omitted).

102. See 42 U.S.C. § 2000-7(a)(1) (2010) (setting out lack of state immunity under Title IX). The statute states:

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973, [T]itle IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

Id.

103. 524 U.S. 274 (1998).

104. See *id.* at 274 (noting Equalization Act’s application to Title IX).

105. See *id.* (omitting mention of public school as “arm” of state).

106. See, e.g., *Williams*, 441 F.3d at 1303 (illustrating application of Eleventh Amendment); *Lipsett v. Univ. of P.R.*, 745 F. Supp. 793, 795 (D.P.R. 1990) (determining University of Puerto Rico was arm of Puerto Rico and then inquiring

IV. CASE LAW INVOLVING ATHLETIC DEPARTMENT EMPLOYEES

A. Sex Discrimination Involving Employment
in Educational Institutions

An unintended antagonism arose due to the lack of clarity between Title VII and Title IX. There are three potential types of Title VII actions for employees covered by the statute: (1) a Title VII adverse employment claim not involving sexual harassment (deemed a regular discrimination claim), (2) an action predicated on sexual harassment, and (3) an action based on retaliation.¹⁰⁷ It remains to be seen if employees covered by Title IX can also assert all three types of claims. The Supreme Court has ruled that students have a cause of action as to non-harassment Title IX claims and also for claims based on sexual harassment, and the Court recently addressed whether an employee may assert a Title IX retaliation claim, ruling in the affirmative.¹⁰⁸

This inquiry is important because Title IX contains more favorable aspects compared to the Title VII paradigm.¹⁰⁹ Under Title IX, there is no administrative filing requirement before commencing litigation, the statute of limitations is generally more favorable, and there is no cap on damages, compared to a \$300,000 cap in Title VII litigation.¹¹⁰ There is a lack of uniformity, however, as to whether an employee may assert a Title IX cause of action when seeking damages for sex discrimination:

Conflicting lower court decisions have yielded a number of options: (a) there is no Title IX cause of action for sex

whether state had nonetheless abrogated Eleventh Amendment protection); *Davis v. Kent State Univ.*, 928 F. Supp. 729, 732 (N.D. Ohio 1996) (“It is well-settled that public colleges and universities are considered to be arms of their respective governments and thus immune from suit.”); *Pederson v. La. State Univ.*, 912 F. Supp. 892, 906 (M.D. La. 1996) (discussing Eleventh Amendment defense articulated by state universities), *aff’d in part, rev’d in part*, 201 F.3d 388 (5th Cir. 2000), *opinion vacated and superseded on reh’g*, 213 F.3d 858 (5th Cir. 2000).

107. See 42 U.S.C. § 2000(e) (2010) (listing types of Title VII actions).

108. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005) (ruling that athletic department employee can commence Title IX retaliation claim); *Canon v. Univ. of Chi.*, 441 U.S. 677, 711-17 (1979) (allowing Title IX private cause of action); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (ruling on sexual harassment claim against teacher); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 629 (1999) (addressing peer sexual harassment).

109. See Heckman, *Glass Sneaker*, *supra* note 21, at 136 (comparing Title IX to Title VII); Heckman, *Lowrey v. Texas A&M University System*, *supra* note 39 (presenting expanded discussion of differences and advantages when comparing pursuit of Title IX lawsuit versus seeking remediation based on Title VII litigation, especially regarding procedural elements and compensatory damages allotted).

110. See Heckman, *Lowrey v. Texas A&M University System*, *supra* note 39 (noting Title IX statute of limitations).

discrimination involving employment . . . ; (b) there is a Title IX cause of action . . . An affirmative decision may result in additional permutations: (d) Title VII standards will be applied when a Title IX cause of action is alleged; (e) Title VI . . . standards will be applied; . . . or (f) Title IX standards will be applied.¹¹¹

For example, one court opined that Title VII's *McDonnell Douglas* burden-shifting methodology should also apply to Title IX "disparate treatment and retaliation employment" cases.¹¹²

There is even a lack of uniformity when comparing two subgroups of non-athletic department employees compared to athletic department employees. As to the latter group, the courts are more willing to entertain a Title IX claim, even if Title VII or Title VI standards are borrowed to reach a substantive determination. Thirty-three years after the initial passage of Title IX, the Rehnquist Court ruled that an athletic department employee can commence a Title IX retaliation claim in *Jackson v. Birmingham Board of Education*.¹¹³

B. Gender Equity Case Law

When Title IX came to fruition in the early 1970s, the general athletic department model depicted a male athletic director, who oversaw many male coaches, and perhaps a few female coaches. It was not uncommon for the male athletic director to be the former football coach. While women exclusively coached female teams on the interscholastic and intercollegiate levels, no women coached any male teams, regardless of the level.¹¹⁴ With the formation and expansion of women's teams on the collegiate level, a woman

111. Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 7-8. *See also* Heckman, *Glass Sneaker*, *supra* note 21, at 136 (citing case law on equalizing resources to male and female teams and finding that resources were eliminated from male teams rather than afforded to female teams). *See, e.g.*, *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2973463, at *15 (E.D. Ark. Oct. 9, 2007) (unpublished decision) ("*Jackson* should not be read to expand private rights of action under Title IX to include claims of employment discrimination which have no connection to the private rights of action that relate to claims by students against funding recipients.").

112. *See* *Brierly v. Deer Park Union Free Sch. Dist.*, 359 F. Supp. 2d 275, 290 (E.D.N.Y. 2005) (citing *AB ex rel. CD v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 153 (S.D.N.Y. 2004) (describing *McDonnell Douglas* burden-shifting methodology)).

113. 544 U.S. at 171.

114. *See* Shelley H. Bradford & Christopher M. Keshock, *Female Coaches and Job Stress: A Review of the Literature*, 43 C. STUDENT J. 1 (Mar. 2009), available at http://findarticles.com/p/articles/mi_m0FCR/is_1_43/ai_n31415099/ (discussing dearth of female coaches in NCAA athletics during 1970s).

would be hired to run the women's intercollegiate athletic program. However, she would still be required to report to the overall head athletic director, a man. As salaries for coaching women's teams continued to slowly, but steadily, rise, the number of women coaching female teams revealed an inverse pattern, with more men taking over the jobs of coaching female student-athletes. The data reveals no appreciable increase in the number of women coaching all-male teams, whether on the interscholastic or intercollegiate level, despite this extended passage of time.¹¹⁵

Claimants filed numerous lawsuits alleging sex discrimination involving athletic department employees in intercollegiate and interscholastic programs pursuant to a number of civil rights laws, including Title VII, the Equal Pay Act,¹¹⁶ Title

115. For a further discussion of research on female coaching trends, see *infra* notes 124-133 and accompanying text.

116. On the intercollegiate level, see *Horn v. Univ. of Minn.*, 362 F.3d 1042 (8th Cir. 2004) (affirming district court's grant of summary judgment on behalf of defendants concerning male assistant women's hockey coach's Equal Pay Act claim); *Reinhart v. Ga. State Univ.*, No. 1:95-CV-204-FMH (N.D. Ga. 1996), *aff'd*, 119 F.3d 11 (11th Cir. 1997) (granting University's motion for summary judgment where men's basketball coach alleged reverse discrimination based on intended reduction in his pay to match salary of women's basketball coach); *Sennewald v. Univ. of Minn.*, 847 F.2d 472, 472 (8th Cir. 1988) (alleging sex-based discrimination in case involving failure to promote coach); *Brock v. Ga. Southwestern Coll.*, 765 F.2d 1026, 1027 (11th Cir. 1985) (suggesting violation of Equal Pay Act involving female in physical education department, who was also part-time women's basketball coach, where college did not renew either of her employment contracts; jury trial had awarded her \$8,000 in lost income and \$475,000 in general damages); *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 911 (9th Cir. 1983) (discussing Equal Pay Act violation regarding female public school teachers); *Mehus v. Emporia State Univ.*, 326 F. Supp. 2d 1221, 1223 (D. Kan. 2004) (advancing assertions of both Equal Pay Act and Title VII claims by female coach of women's volleyball team, where the coach claimed the University denied her the ability to raise revenue); *Lewis v. Smith*, 255 F. Supp. 2d 1054 (D. Ariz. 2003) (involving male assistant coach for women's basketball team at Arizona State University claiming Equal Pay Act violation); *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791, 792 (E.D. Va. 1980) (rejecting female coach's discrimination claim); *Legoff v. Trs. of Bos. Univ.*, 23 F. Supp. 2d 120, 120 (D. Mass. 1998) (denying defendants' motion to dismiss the complaint instituted by female former women's softball and assistant field hockey coaches, who alleged violations of Equal Pay Act and Title IX, claiming they were paid less than male athletic department employees and had more responsibilities); *Lowrey v. Tex. A&M Univ. Sys.*, 11 F. Supp. 2d 895, 895 (S.D. Tex. 1998) (challenging non-elevation of female coach to athletic administrative position as violating Title VII, Equal Pay Act and Title IX). See also Terry W. Dodds, *Equal Pay in College Coaching: A Summary of Recent Decisions*, 24 S. ILL. U. L.J. 319, 339 (2000); Dave O'Brien, Tim O'Brien & Vickie Sarfo-Kanitanka, *Pay Equity Among College Coaches: A Summary of Case Law Since Stanley and Administrative Guidance*, 6 WILLAMETTE SPORTS L.J. 29 (2009) (addressing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994), and subsequent case law, along with the EEOC Enforcement Guidance, *supra* note 81 (discussing EEOC guidelines)).

On the interscholastic level, see *Oates v. District of Columbia*, 647 F. Supp. 1079, 1079 (D.D.C. 1986), *aff'd*, 824 F.2d 87 (D.C. Cir. 1987) (determining rationale for

IX,¹¹⁷ and other laws.¹¹⁸ The majority of courts allow individuals involved with extracurricular athletics to assert Title IX causes of action.¹¹⁹ Other courts have taken a partially restrictive position.

hiring decision of head football coach); Equal Employment Opportunity Comm'n v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 579-80 (7th Cir. 1987) (addressing Equal Pay Act and Title VII claims on behalf of female coaches); Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 736 (8th Cir. 1982) (concluding school district discriminated on basis of sex in violation of Title VII); Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42, Nos. 90-1269-A, 91-808-A (W.D. Okla. 1992) (unpublished opinion) (focusing on employee's civil rights claims); Wynn v. Columbus Mun. Separate Sch. Dist., 692 F. Supp. 672, 672 (N.D. Miss. 1988) (holding that school district discriminated by failing to promote female teacher to athletic director); Minor v. Northville Pub. Schs., 605 F. Supp. 1185, 1185 (E.D. Mich. 1985) (dismissing female teacher's complaint that alleged rate of pay for female coaches was less than rate of pay for male coaches); Burkey v. Marshall Cnty. Bd. of Educ., 513 F. Supp. 1084, 1084 (N.D. W.Va. 1981) (portraying discrimination claim against school that precluded female teacher from coaching boys' sports teams); Hill v. Nettleton, 455 F. Supp. 514, 514 (D. Colo. 1978) (ruling that university had employed discriminatory tactics in failing to renew plaintiff's contract); Kenneweg v. Hampton Twp. Sch. Dist., 438 F. Supp. 575, 575 (W.D. Pa. 1977) (rejecting plaintiff's claim of sex discrimination); Jackson v. Armstrong Sch. Dist., 430 F. Supp. 1050, 1052 (W.D. Pa. 1977) (delineating plaintiffs' grounds for dismissal and procedural posture of this Title VII and Equal Pay Act case).

117. See Heckman, *Glass Sneaker*, *supra* note 21, at 589-611 ("III. Equal Opportunity in Athletic Employment") (discussing sex discrimination cases commenced by athletic department employees, including ones by coaches and athletic directors); Heckman, *Title IX Tapestry*, *supra* note 89, at 850 n.7 (listing other athletic employment-related sex discrimination cases); Heckman, Lowrey v. Texas A&M University System, *supra* note 39, at 754 n.4 (listing additional relevant cases); Heckman, *Scoreboard*, *supra* note 89, at 421-22 n.143 (listing cases commenced by coaches and athletic directors seeking relief based on sex discrimination); Heckman, *Sex Discrimination in the Gym and Classroom*, *supra* note 36, at 592-614 ("V. Equal Opportunity in Athletic Employment") (evaluating discrimination in curricular and athletic settings); Heckman, *The Explosion of Title IX Legal Activity*, *supra* note 66, at 998-1018 ("VI. Equal Opportunity on Behalf of Coaches and Athletic Directors" notes increase in Title IX litigation); Heckman, *Women & Athletics*, *supra* note 89, at 41 n.187 (reporting decline in female coaches).

118. See Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978) (allowing compensatory and punitive damages to professor in Physical Education Department whose contract was not renewed based on her failure to obtain doctorate within allotted period, where same requirement was not imposed on male professors, predicated on Title VII discrimination); Countiss v. Trenton State Coll., 392 A.2d 1205, 1208 (N.J. 1978) (contending female instructor in physical education department was denied tenure based on her gender in violation of state law, N.J. STAT. ANN. § 10:5-17 (prohibiting sex discrimination in employment)); New Paltz Cent. Sch. Dist. v. N.Y. State Div. of Human Rights, 577 N.Y.S.2d 510 (N.Y. App. Div. 3d Dept. 1991) (determining that refusal of school district to appoint female high school teacher to coach boys' tennis team because of past excessive absenteeism was not pretext for sex discrimination pursuant to N.Y. EXEC. LAW § 298 (McKinney 1990)). See also Heckman, *Scoreboard*, *supra* note 89, at 421-22 n.143 (discussing female collegiate coaches).

119. See Heckman, Jackson v. Birmingham Board of Education, *supra* note 32, at 8 n.48 (listing cases that were litigated espousing Title IX violations, irrespective of success of claims).

For example, in *Lowrey v. Texas A&M University System*,¹²⁰ the Fifth Circuit found that employees at post-secondary institutions are restricted to asserting only Title VII claims, rather than both Title IX and Title VII sex discrimination claims.¹²¹ However, the *Lowrey* court allowed a Title IX retaliation claim to go forward.¹²² In 2005, the Supreme Court allowed an employment Title IX retaliation claim to proceed in *Jackson*.¹²³

Despite the strong federal statutes, women continue to be underrepresented as athletic department personnel. Specifically, there is a dearth of females coaching males on the collegiate level. There is also a declining percentage of women coaching female athletes on the intercollegiate level. The percentage of women in positions as collegiate athletic administrators, sports information directors, or athletic trainers are also minimal. During 2010, Brooklyn College professors emeritus R. Vivian Acosta and Linda Jean Carpenter issued a new installment in their long-time study, *Women in Intercollegiate Sport: A Longitudinal, National Study*.¹²⁴ The study illustrated that women were participating in post-secondary athletic employment positions at a high percentage; however, the figures

120. 11 F. Supp. 2d 895 (S.D. Tex. 1998).

121. See 117 F.3d 242, 244 (5th Cir. 1997), *on remand*, 11 F. Supp. 2d 895 (S.D. Tex. 1998) (case settled Nov. 1998) (assessing overlap of Title IX and VI claims).

122. See *id.* (noting procedural posture of case). In *Lowrey*, the Fifth Circuit allowed a separate Title IX claim for retaliation indicating, “[w]e conclude that 34 C.F.R. § 100.7(e) creates an implied private right of action for retaliation under title IX.” *Id.* at 253.

123. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 167 (2005) (introducing cause of action).

124. See R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study – Thirty Three Year Update 1977-2010*, available at <http://www.acostacarpenter.org/2010pdf%20combined%20final.pdf> [hereinafter Acosta & Carpenter 2010 Study] (reporting findings of studies and summarizing women’s roles in collegiate sport coaching at National Collegiate Athletic Association [hereinafter NCAA] member-schools); R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study – Thirty One Year Update 1977-2008*, available at <http://webpages.charter.net/womeninsport/2008%20Summary%20Final.pdf> [hereinafter Acosta & Carpenter 2008 Study] (indicating overall treading water or even downward trend for women in NCAA athletic employment positions); R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study - Twenty Nine Year Update 1977-2006*, available at http://webpages.charter.net/womeninsport/AC_29YearStudy.pdf [hereinafter Acosta & Carpenter 2006 Study] (detailing development in women in NCAA sports coaching capacities); R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study - Twenty Seven Year Update 1977-2004*, available at http://webpages.charter.net/womeninsport/AcostaCarp_2004.pdf [hereinafter Acosta & Carpenter 2004 Study] (assessing female participation in NCAA member colleges and universities and finding “depressed representation of women as head coaches and as head administrators of their programs”).

indicated an overall treading water or even downward trend for women in these positions.¹²⁵

The 2010 installment revealed significant data concerning NCAA member-institutions (where member-schools are placed into one of three divisions: Division I, Division II, and Division III). First, only 19.3% of head athletic administrators of women's programs are women, which represents a decrease from 21.3% in 2008.¹²⁶ In 2010, only 9% of these women held positions at the high profile Division I schools, reflecting an unimpressive increase from 2002, when the percentage was 8.4%.¹²⁷

Second, the 2010 report found that only 42.6% of coaches of women's teams for all three divisions (Divisions I, II and III) are women, and women represented approximately 2-3% of coaches of men's teams – a statistic that has remained relatively static despite the fact that more than three decades have elapsed since Title IX's passage.¹²⁸ This overall coaching figure represents the lowest representation of females as head coaches in Title IX's history.¹²⁹ The breakdown for women coaching women's teams for each division was as follows: 44% for Division I, 34.4% for Division II, and 46.1% for Division III.¹³⁰ In 2010, females comprised 57.6 % of assistant

125. See Acosta & Carpenter 2010 Study, *supra* note 124 (depicting recent trends in women's employment in post-secondary athletic positions).

126. See *id.* at Administration 1 (reporting decrease of female coaches since 2008); Acosta & Carpenter 2008 Study, *supra* note 124, at Executive Summary 1 (listing percentage of female coaches). This data reflects women's participation in Division I, II, and III athletic programs.

127. See Acosta & Carpenter 2010 Study, *supra* note 124, at Administration 1 (summarizing minimal increase in female representation at Division I colleges and universities); Acosta & Carpenter 2004 Study, *supra* note 124, at 23 (noting 2002 statistics for Division I colleges and universities).

128. See Acosta & Carpenter 2010 Study, *supra* note 124, at Executive Summary 2 (reporting percentage of female coaches in Division I, Division II, and Division III); Acosta & Carpenter 2008 Study, *supra* note 124, at Executive Summary 2 (depicting percentage of female coaches in collegiate athletics).

129. See Acosta & Carpenter 2008 Study, *supra* note 124, at Executive Summary 2 (indicating only 42.6% of coaches were women). The 2004 study reported that "44.1% of the coaches of women's teams are females, very slightly up from 44% in 2002." Acosta & Carpenter 2004 Study, *supra* note 124, at 2.

130. See Acosta & Carpenter 2010 Study, *supra* note 124, at Coaches 2 (noting that in 2008, figures were, respectively, 44.4% (Division I), 33.5% (Division II), and 46.6% (Division III)); Acosta & Carpenter 2008 Study, *supra* note 124, at Coaching 2 (noting that in 2006, figures were, respectively 43.9% (Division I), 36.2% (Division II) and 44.4% (Division III)); Acosta & Carpenter 2004 Study, *supra* note 124, at 13 (noting that in 2004, figures were, respectively 44.9% (Division I), 39.4% (Division II), and 46% (Division III)).

coaches for all divisions, a rather static figure compared to the 57.2% in 2004.¹³¹

Third, there was an overall increase in the number of female head athletic trainers, from 25.5% in 2000 to 30% in 2004, but this number decreased to 28% in 2010.¹³² Finally, in 2010, women represented 11.9% of head sports information directors, down from 12.2% in 2004.¹³³

The lack of significant progress is illustrated by the fact that, in 1999, Stephanie Ready became only the second female to coach a Division I men's basketball team, as an assistant coach at Coppin State College, located in Maryland.¹³⁴ It was only in March 2002 that Melanie Davis became the first woman to referee a NCAA Division I men's basketball tournament game.¹³⁵

A review of the following cases demonstrates how difficult it is for females or coaches of women's teams to successfully advance a sex discrimination claim in the courtroom. Coaching proficiency may be tied to the number of games or contests won, so that coaches are routinely terminated for failure to have winning seasons. However, rather than using that criteria, a common thread asserted by the educational institutions is that the athletic department employees, advocating on behalf of gender equity for female student-athletes or potential student-athletes, were strident, argu-

131. See Acosta & Carpenter 2010 Study, *supra* note 124, at Assistant Coaching 5 (indicating that "there are 11,058 paid assistant coaches for women's teams This is the highest ever The number of unpaid assistant coaches for women's teams remained stable over the last two years with the total hovering around 837 [individuals]."); Acosta & Carpenter 2004 Study, *supra* note 124, at 21 (reporting 2004 statistics).

132. See Acosta & Carpenter 2010 Study, *supra* note 124, at Athletic Training 1 (listing percentage of schools with female head athletic trainers).

133. See Acosta & Carpenter 2010 Study at Sports Information Director 2 (listing percentage of schools with female sports information directors).

134. Stephanie Ready would subsequently enter the record books in 2001 by becoming the first female coach in the National Basketball Association [hereinafter NBA] by becoming a coach of a North Carolina Granville team, a NBA developmental team. See Career Corner: Stephanie Ready, NBA.COM, http://www.nba.com/canada/career_ready_111201.html (last visited Apr. 5, 2011) (providing overview of Ready's career).

135. See Associated Press, *Tourney Has Woman Ref for 1st Time*, NEWSDAY (N.Y.), Mar. 16, 2002, at A34 (reporting Davis's first game as tournament referee). In 2002, Ria Cortesio became the first female to umpire a Major League Baseball exhibition since Pam Postema officiated in 1989. See Associated Press, *Cortesio 1st Woman Ump in Exhibition Since 89*, NBC SPORTS, Mar. 29, 2007, <http://nbc.com/id/17863740/%3Ca%20href=> (reporting Cortesio's first game as umpire); see also *supra* note 66 (addressing Postema's lawsuit).

mentative, or difficult to work with.¹³⁶ This behavior was then used, along with other factors, to advance an objective business reason for the individual's termination from the athletic department.

1. *Intercollegiate Athletic Departments*

a) Athletic Directors and Coaches

(1) Unequal Pay or Failure to Hire or Promote

There have been a plethora of lawsuits commenced by coaches of women's teams, whether male or female, or by women seeking to obtain or retain positions as athletic directors.¹³⁷ On the intercollegiate level, a coach's inability to generate revenue for a particular team derailed Equal Pay Act claims for a number of women. As the Ninth Circuit stated, "We are also of the view that the relative amount of revenue generated should be considered in determining whether responsibilities and working conditions are substantially equal."¹³⁸ Due to the long history of men's collegiate sports, especially NCAA Division I basketball and football, these teams have been able to raise revenue through gate receipts, substantial television revenue through favorable broadcasts contracts with the networks and cable stations, and merchandising. Women's teams were handicapped due to their relatively recent emergence onto the athletic landscape. Women coaches' Equal Pay Act claims also proved futile due to the failure to provide a suitable comparator. The NCAA presently requires that both the men's and women's teams for certain sports be on the same level, such as Division I, II or III.

136. See, e.g., *Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1115 (E.D. Cal. 2006) (referencing defendant's argument that plaintiff was difficult to work with).

137. For other gender equity cases involving coaches, see *Cal. Nat'l Org. for Women & Zimmerman v. Evans*, No. 728548 (case settled 1994) (concerning associate athletic director at San Jose University); *Huffman v. Gordon*, No. 701610 (Cal. Super. Ct. Orange County Dec 22, 1992) (case settled 1995) (concerning women's volleyball coach at California State University at Fullerton); *Suwara v. Day*, No. 659577 (Cal. Super. Ct. San Diego 1992) (case settled 1994) (concerning women's volleyball coach at San Diego State University); *State v. Regents*, No. EM94-289 (4th Dist. Ct. Minn. Jan. 30, 1995) (case settled) (concerning women's volleyball coach at University of Minnesota); *Dugan v. State*, No. 95-6250-HO (D. Or. 1995) (concerning claim of women's softball coach at Oregon State University where jury had originally awarded plaintiff approximately \$1 million in damages, which was reduced to \$724,000); *Maudie v. Ind. Univ. of Pa.*, No. 93-0817 (W.D. Pa. 1993) (case settled) (concerning women's softball coach and women's assistant basketball coach). See also Heckman, *Scoreboard*, *supra* note 89, at 421-22 (examining case in which women's athletic coordinator at Tarleton State University alleged Title IX employment discrimination).

138. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1323 (9th Cir. 1994). There was extensive litigation involved with this case.

Despite the competitiveness of NCAA Division I coaching, coaches of women's teams, regardless of the sex of the coach, in general, have not been successful asserting violations of the Equal Pay Act.¹³⁹

This first case represents the nascent emergence of women as college coaches, usually women's basketball coaches, in male-dominated athletic departments. Colleges and universities had three years after the 1975 implementing regulations came into effect to achieve Title IX equity.¹⁴⁰ Despite a jury verdict in favor of the former women's basketball coach and director of women's intramurals in *Jacobs v. College of William and Mary*,¹⁴¹ based on the Equal Pay

139. For a further discussion of Equal Pay Act cases, see *supra* note 116 and accompanying text. See also *Stanley*, 13 F.3d at 1323 (discussing generation of revenue as related to working condition equality); *Stanley v. Univ. of S. Cal.*, No. CV93-4708 (C.D. Cal. Mar. 10, 1995) (granting defendants' motion for summary judgment in its entirety), *aff'd*, 178 F.3d 1069, 1075-76 (9th Cir. 1999) (delineating factors for analysis). For another case involving a collegiate basketball coach, see *Morris v. Fordham Univ.*, No. 03 Civ. 0556 (CBM), 2004 U.S. Dist. LEXIS 7310, at *1 (S.D.N.Y. Apr. 28, 2004) (unpublished opinion) (dismissing Equal Pay Act for male coach of women's basketball team). The court stated, "Under the plain language of the statute, and as interpreted by this Circuit, the identification of a comparator employed by the same employer and of the opposite gender is an indispensable requirement for a plaintiff bringing an Equal Pay Act claim." *Id.* at *13. See also *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998) (involving former women's basketball coach and women's sports administrator at Brooklyn College, where trial court allowed only her Title VII and Title IX retaliation claims to go forward, but not Title IX employment sex discrimination claim). The jury had awarded the plaintiff approximately \$359,920 in damages, along with \$339,399.60 in legal fees. See *id.* at 331 (noting damages for Title VII and Title IX retaliation claims). See also *Tyler v. Howard Univ.*, No. 91-CA11239 (D.C. Super. Ct. Sept. 15, 1995) (rejecting Equal Pay Act claim by women's basketball coach). A jury previously awarded the coach an amount in excess of \$1 million, including \$600,000 for breach of Title IX and a District of Columbia statute, and upon review, the court ordered a remittitur for the sum of \$250,000 for breach of these two statutes. See *id.* (comparing case at hand to prior holding). See also *Harker v. Utica Coll. of Syracuse Univ.*, No. 93-CV-1504 (EJS) (GJD), 1995 WL 274015, at *1 (N.D.N.Y. Apr. 24, 1995) (unpublished opinion) (involving former college women's basketball and softball coach, who unsuccessfully asserted violation of Title IX, Title VII and Equal Pay Act based on nonrenewal of her coaching contract). As to the Equal Pay Act, the district court noted that she had failed to rebut a legitimate reason for the men's basketball coach having a higher salary due to his nine years of seniority, which plaintiff did not possess. See *id.* at *11 (rejecting plaintiff's discrimination claim). See also *Reinhart v. Ga. State Univ.*, No. 1:95-CV-204-FMH (N.D. Ga. 1996) (granting University's motion for summary judgment), *aff'd*, 119 F.3d 11 (11th Cir. 1997) (reviewing men's basketball coach reverse discrimination claim based on intended reduction in pay to match women's basketball coach's compensation). The Equal Pay Act statute directs "[t]hat an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rates of any employee." 29 U.S.C. § 206(d)(1).

140. 34 C.F.R. §§ 106.1-71 (2010).

141. 517 F. Supp. 791 (E.D. Va. 1980) (involving female women's varsity basketball coach alleging discrimination on basis of sex and age).

Act, the trial judge entered the final judgment in favor of the College.¹⁴² A Virginia district court concluded that the female coach failed to establish that the position of the men's basketball coach was equivalent to her position as coach of the women's basketball team in establishing an Equal Pay Act violation.¹⁴³ Not surprisingly, when comparing the resumes of both coaches, the women's basketball coach indicated she had not played intercollegiate basketball (in the pre-Title IX era).¹⁴⁴ William Bruce Parkhill, the head men's basketball coach at the time, had a twelve-month contract, as compared to Eloise Jacobs, who had only a nine-month contract.¹⁴⁵ The court paid special attention to the fact that the NCAA Division I men's team was a revenue-producing team and its coach did more traveling for recruiting athletes.¹⁴⁶

In *Hein v. Oregon College of Education*,¹⁴⁷ the Ninth Circuit determined that the question of whether two jobs are substantially equal pursuant to the Equal Pay Act must be decided on a case-by-case basis.¹⁴⁸ Hein, an assistant professor in the physical education department, taught and did not coach.¹⁴⁹ Her comparator was the men's basketball coach, who spent three-quarters of his time teaching and one-quarter coaching.¹⁵⁰ The Ninth Circuit found that the physical education professor failed to make out a *prima facie* case.¹⁵¹ The court stressed that "a *prima facie* case is not made by showing that the employees of opposite sex possess equivalent skills. The statute explicitly applies to jobs that require equal skills, and not to employees that possesses equal skills."¹⁵² In this lawsuit, a second woman, who coached the state college's women's volleyball and track teams, also used the men's basketball coach as her comparator.¹⁵³ Although the *Jacobs* court had earlier rejected a compar-

142. *See id.* at 802 (agreeing with defendant that plaintiff was not selected for "newly-created position as full-time female varsity basketball coach" for non-discriminatory reasons and rejecting plaintiff's age discrimination claim).

143. *See id.* at 797 (noting that men's basketball is revenue producing sport).

144. *See id.* at 796 (providing overview of plaintiff's career and educational background).

145. *See id.* at 797 (describing differences in compensation and working conditions between men's head coach and women's head coach).

146. *See id.* (indicating requirement of extensive travel).

147. 718 F.2d 910 (9th Cir. 1983).

148. *See id.* at 913.

149. *See id.* at 914 (describing plaintiff's position with school).

150. *See id.* (featuring the men's basketball coach's position with school).

151. *See id.* at 921 (stating that it was erroneous to conclude that *prima facie* case was made).

152. *Id.*

153. *See id.* at 915 (portraying background of women's volleyball coach).

ison of the men's basketball coach to the women's basketball coach, the Ninth Circuit allowed this comparator where there was no evidence attesting to any revenue-generating ability by the Oregon's men's basketball coach for his program.¹⁵⁴ A different result would occur in the next case.

In *Stanley v. University of Southern California*,¹⁵⁵ the Ninth Circuit Court affirmed the denial of the plaintiff's request for a preliminary injunction ordering the University to restore her as the women's basketball coach.¹⁵⁶ Originally, the athletic director offered Marianne Stanley, the women's basketball coach, a three-year contract.¹⁵⁷ Stanley sought a compensation package equivalent to that afforded to George Raveling, the nationally known men's basketball coach.¹⁵⁸ Stanley proffered a counteroffer, which was rejected.¹⁵⁹ The University ended up offering her a one-year deal that required a response by a certain date, which she reportedly did not accept.¹⁶⁰ With the expiration of Stanley's original contract and her alleged non-timely acceptance of the University's last offer, the school then hired Cheryl Miller, a former outstanding USC women's basketball player with no head coaching experience.¹⁶¹ Stanley then sued seeking reinstatement to her position, along with compensatory damages.¹⁶² The Ninth Circuit found that Stanley suffered no Equal Pay Act violation due to her lower salary package because the men's basketball coach had a longer resumé, raised more revenue with his team, engaged in more public relations activities, and had a better marketing background.¹⁶³ The appellate court found these

154. See *supra* text accompanying note 143 (referring to *Jacobs*). See also *Hein*, 718 F.2d at 915 (revealing record as empty as to men's basketball coach being required to generate income for scholarships or season tickets).

155. 13 F.3d 1313 (9th Cir. 1994).

156. See *id.* at 1316, 1322-23. Dr. Andrew Zimbalist, a nationally known economist in the field of sports, testified as one of the plaintiff's expert. Dr. Donna Lopiano, former head of the Women's Sports Foundation and past women's athletic director at the University of Texas, also testified on Stanley's behalf. See Heckman, *Glass Sneaker*, *supra* note 21, at 599-600 (discussing *Stanley*).

157. See *Stanley*, 13 F.3d at 1316 (describing terms of three-year contract offered).

158. See *id.* (noting plaintiff wanted to be paid the same as men's basketball coach).

159. See *id.* (explaining terms of rejected counter-offer).

160. See *id.* (recounting terms of University's one-year offer and its purported rejection).

161. See Jeanne Klein, *Equal Pay Claim Against USC Rejected*, 137 DAILY TROJAN 6 (June 23, 1999), available at <http://www.usc.edu/student-affairs/dt/V137/N06/01-equal.06c.html> (reporting outcome of *Stanley* case).

162. See *Stanley*, 13 F.3d at 1318 (describing procedural history of case).

163. See *id.* at 1326 (affirming that law and facts did not support Stanley's claims).

factors were decisive even though Stanley's coaching record with her team exceeded that of her counterpart, usually the *sine qua non* aspect for coaches.¹⁶⁴ Stanley would ultimately go on to coach in the Women's National Basketball Association.¹⁶⁵ Thus, although fourteen years elapsed from the *Jacobs* district court decision to the *Stanley* Ninth Circuit decision, where it had become commonplace for NCAA Division I schools to have women's basketball teams, usually with women coaches, there was still no adjustment by the courts for these women coaches to receive injunctive relief or compensatory damages when the coaches of the men's basketball teams received more money for coaching the same sport.

In *Sennewald v. University of Minnesota*,¹⁶⁶ Charlene Sennewald, the assistant women's softball coach at this Division I program, was unsuccessful in her lawsuit alleging that the failure to make her position full-time constituted a failure to promote, based on Title VII sex discrimination.¹⁶⁷ The Eighth Circuit supported the trial court's determination that the University's reason not to classify her position as a full-time position was a programmatic decision.¹⁶⁸ The court rejected her argument that an increase from part-time to full-time constituted a promotion and a salary decision because the

164. See *Stanley v. Univ. of S. Cal.*, No. CV93-4708 (C.D. Cal. Mar. 10, 1995) (unpublished opinion) (granting defendants' motion for summary judgment in its entirety), *aff'd*, 178 F.3d 1069 (9th Cir. 1999) (affirming lower court's entry of summary judgment). The factors were again delineated in this opinion. See *id.* at 1075-76 (discussing defendant's need to show factor other than sex).

165. See *Coaches – Marianne Stanley*, WNBA.COM, http://www.wnba.com/coachfile/marianne_stanley/index.html (last visited Apr. 5, 2011) (providing biography of Stanley).

166. 847 F.2d 472 (8th Cir. 1988). For other cases concerning women's softball coaches, see *Hankinson v Thomas Cnty. Sch. Sys.*, 257 F. App'x 199 (11th Cir. Dec. 3, 2007) (interscholastic team); *Legoff v. Trs. of Boston Univ.*, 23 F. Supp. 2d 120 (D. Mass. 1998) (intercollegiate team); *Bartges v. Univ. of N.C.*, 908 F. Supp. 1312 (W.D.N.C. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996) (concerning suit filed by women's Division I softball coach claiming that she was victim of Title VII sex discrimination); *Dugan v. State*, No. 95-6250-HO (D. Or. 1995) (intercollegiate team); *Maudie v. Ind. Univ. of Pa.*, No. 93-0817 (W.D. Pa. 1993) (interscholastic team).

167. 847 F.2d at 472. Parenthetically, in separate cases, two former University of Minnesota gymnastics coaches, Katalin Deli and her husband, Gabor Deli, unsuccessfully alleged violation of Title IX, based on their terminations. See *Deli v. Univ. of Minn.*, 863 F. Supp. 958 (D. Minn. 1994) (granting defendant-university's motion for summary judgment involving Katalin Deli). The jury had originally awarded the plaintiff \$675,000, which was overturned on appeal. See *Deli v. Univ. of Minn.*, 578 N.W.2d 779 (Minn. Ct. App. 1998); *Deli v. Univ. of Minn.*, No. 3-93-501 (D. Minn. Aug. 18, 1994) (Magnuson, J.) (granting defendant-university's motion for summary judgment involving Gabor Deli). See also *Horn v. Univ. of Minn.*, 362 F.3d 1042 (8th Cir. 2004).

168. See *Sennewald*, 847 F.2d at 473-74 (discussing reasoning behind court's decision).

recipient of such an increase has greater responsibility and higher pay. Interestingly, the University compared the women's gymnastics and softball programs, concluding that "the gymnastics program required more coaching, had greater spectator appeal, and was more profitable than the softball program."¹⁶⁹ There was no discussion as to whether coaches of men's teams were also subject to this sport-to-sport comparison when employment decisions were made.

In *Morris v. Wallace Community College-Selma*,¹⁷⁰ Karen Jones Morris, a white female employee, asserted Title VII discrimination claim based on race and sex in not being promoted to the athletic director position.¹⁷¹ Morris also brought a Title VII retaliation claim regarding the non-promotion, an Equal Pay Act claim based on the differential in salary paid to her compared to what certain male employees received, and a Title IX discrimination claim.¹⁷² In 1989, Morris started as a part-time employee in the athletic department; she became a full-time athletic instructor in 1992.¹⁷³ On two occasions, the college did not promote her to athletic director.¹⁷⁴ Instead, the college hired a white male in 1996 and a black male in 1997.¹⁷⁵ The college made the assignments without soliciting applications for the position.¹⁷⁶ Morris also alleged that she was denied summer contracts in earlier years and that the school assigned her to less than full-load summer contracts in more recent years, unlike contracts that similarly-situated males or blacks received.¹⁷⁷

An Alabama district court found that some of Morris's Title VII claims were not of a "continuing violation" variety.¹⁷⁸ Thus, they were dismissed based on failure to timely satisfy the 180-day statute

169. *Id.* at 473.

170. 125 F. Supp. 2d 1315 (S.D. Ala. 2001), *aff'd*, 34 F. App'x 388 (11th Cir. 2002) (unpublished one-line opinion simply affirming the lower court's decision).

171. *See id.* at 1322-23 (detailing plaintiff's Title VII claim).

172. *See id.* (delineating plaintiff's additional causes of action). The court concluded the Eleventh Amendment did not preclude her Equal Pay Act claim, but did not examine its substantive merits. *See id.* at 1342 ("In summary, the Eleventh Amendment is no bar to the plaintiff's Equal Pay Act claim against the College.").

173. *See id.* at 1322-23 (explaining background of case).

174. *See id.* (setting forth causes of action).

175. *See Heckman, Jackson v. Birmingham Board of Education*, *supra* note 32, at 9 (outlining events that occurred).

176. *See Morris*, 125 F. Supp. 2d at 1329 (explaining actions that led to lawsuit).

177. *See id.* at 1326 (discussing summer contract issue).

178. *See id.* at 1324-24 (finding no continuity between violations, as each event led to new cause of action).

of limitations imposed for filing grievances with the EEOC.¹⁷⁹ The court then addressed the timely Title VII claims. The College argued that the case should be dismissed since the plaintiff did not comply with the grievance procedures it had established.¹⁸⁰ In *Faragher v. City of Boca Raton*,¹⁸¹ a leading Title VII sexual harassment case, the Supreme Court concluded that pursuant to Title VII, a defendant may assert, as an affirmative defense, the failure of an employee to take part in an employer's "preventive or corrective opportunities."¹⁸² In *Morris*, the College had in place a procedure for addressing discrimination grievances, which the plaintiff did not pursue.¹⁸³ In a significant ruling, however, this court held that the *Faragher* directive would be restricted to Title VII hostile workplace sexual harassment discrimination, as opposed to non-sexual harassment-based sex discrimination, such as was advanced within.¹⁸⁴

The trial court rejected the College's claim that becoming the athletic director could never be considered a tangible employment action.¹⁸⁵ The court also discarded the College's assertion that the position of athletic director was not a promotion.¹⁸⁶ Additionally, the court concluded that the failure by the school to first accept applications from candidates before selecting the new individual would not insulate this educational employer, stating that "[t]he College cannot avoid liability for unlawful discrimination in that selection process by the simple expedient of naming athletic directors without first accepting applications."¹⁸⁷ According to the decision, the College president chose the first male because he had a more

179. *See id.* at 1324-25 (addressing the continuing violation theory).

180. *See id.* at 1324 (presenting defendant's argument that plaintiff in Title VII sexual harassment cases must follow established grievance procedures to successfully file lawsuit).

181. 524 U.S. 775 (1998).

182. *Id.* at 808. Therein, the Court found the plaintiff's noncompliance with defendant-employer's sexual harassment grievance procedures did not bar her claim as the defendant-employer did not successfully disseminate sexual harassment policy to employees. *See id.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998) (imparting affirmative defense of plaintiff's failure to follow corrective or preventative opportunities established by employer).

183. *See Morris*, 125 F. Supp. 2d at 1328 (discussing defendant's asserted affirmative defense).

184. *See id.* (citing *Faragher v. Boca Raton*, 524 U.S. 775, 807-08 (1998)) (restricting availability of affirmative defense to cases in which plaintiff has not been subjected to "tangible employment action").

185. *See id.* ("In short, the defendants have failed to establish that assignment as athletic director cannot ever, or would not under the relevant circumstances of this action, constitute a tangible employment action.").

186. *See id.* (rejecting one of college's defenses).

187. *Id.* at 1329.

cooperative attitude than the plaintiff. When a former athletic director identified Morris as the most qualified to succeed him, the president allegedly mentioned the plaintiff's "disagreement with [the president's] suggestion to establish a racial quota for the cheerleading squad. . . .", which she coached.¹⁸⁸ The College president also indicated that he wanted an administrator as the athletic director.¹⁸⁹ However, he first offered the position to a chemistry teacher, who lacked any administrative or coaching background.¹⁹⁰ This raised a triable issue of fact as to whether the College acted with discriminatory intent in not promoting Morris to the position.¹⁹¹

The Alabama district court upheld the defendant's Eleventh Amendment sovereign immunity defense, protecting this state college from private suits for monetary damages by individuals pursuant to § 1983 actions.¹⁹² The court denied the defendant's motion for summary judgment on the Title VII claim because the plaintiff raised a triable issue of fact.¹⁹³ Finally, the court concluded that since Title VII provided for a parallel remedy, it precluded the plaintiff's Title IX cause of action.¹⁹⁴ The Eleventh Circuit affirmed these determinations.¹⁹⁵

The Sixth Circuit Court of Appeals rendered decisions in the next two cases where coaches of women's teams were all unsuccessful in pursuing Title IX lawsuits. In *Arceneaux v. Vanderbilt University*,¹⁹⁶ the Sixth Circuit found no Title IX violation based on the

188. *Id.* at 1331. The court noted that only dissatisfaction with plaintiff was the idea that the school establish a racial quota. *See id.*

189. *See id.* at 1329 (setting forth college's primary criterion of obtaining administrator rather than coach to fill athletic director position).

190. *See id.* (discussing facts of 1997 selection for school's athletic director).

191. *See id.* (denying defendant's motion for summary judgment because issue of school's required qualifications for appointment raised).

192. *See id.* at 1335.

193. *See id.* at 1346-47 (stating conclusion of trial court).

194. *See id.* at 1343 (explaining failure of plaintiff's Title IX claim due to existing remedy under Title VII and plaintiff's inability to produce evidence to support different conclusion). The court framed the issue: "The question is however, is not whether Title IX prohibits employment discrimination but whether it provides a private cause of action in favor of an employee to redress such discrimination when the employer is also subject to Title VII." *Id.* The court, in ruling that Title VII precluded the plaintiff's Title IX claim, reasoned, "The Court has discovered no appellate decision clearly and analytically holding that a plaintiff may maintain a Title IX action against her employer for a wrong prohibited, and a remedy provided, by Title VII." *Id.*

195. *See Morris v. Wallace Cmty. Coll.-Selma*, No. 01-10676, 2002 WL 518045 (11th Cir. Mar. 19, 2002) (Table) (unpublished opinion, without written memorandum) (affirming judgment of lower court).

196. No. 00-5691, 25 F. App'x 345 (6th Cir. 2001).

salary paid to Paul Arceneaux, the women's track and cross-country coach at this private university.¹⁹⁷ The Sixth Circuit did not outright reject his Title IX case, but instead applied Title VII standards in reaching its determination.¹⁹⁸ In this non-retaliation case, the appellate court inexplicably underscored, "In the present case . . . Arceneaux simply coaches women; there has been no allegation that [this male coach] was an advocate on behalf of his female student athletes."¹⁹⁹ The opinion contained no judicial discussion of the Title IX regulations pertaining to employment.

The tension involving coaches who advocated for gender equity or raised gender equity concerns on behalf of their student-athletes was at the core of the next case. In *Weaver v. Ohio State University*,²⁰⁰ the terminated Ohio State University women's field hockey coach unsuccessfully charged sex discrimination in violation of Title VII, the Equal Pay Act, and Title IX.²⁰¹ First, Weaver was replaced by another woman, which invalidated her Title VII discriminatory discharge claim.²⁰² Second, Weaver used the men's ice hockey coach and men's basketball coach as her comparators to support her Equal Pay Act claim, which the district court rejected as being dissimilar.²⁰³ The court found the male coaches' ability to raise more revenue than the plaintiff was a significant factor under the Equal Pay Act to justify the differential in compensation provided.²⁰⁴ Third, Ohio State University, a Division I university in the Big Ten Conference, was up for NCAA certification, part of which

197. *See id.* at 349 ("Vanderbilt has articulated legitimate, non-discriminatory reasons for paying him less than some of the other coaches, and Arceneaux has presented no evidence of pretext."); Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 9-10 (discussing cases which cited *Jackson* when arguing discrimination under Title IX by university athletic departments).

198. *See Arceneaux*, 25 F. App'x at 347 (citations omitted) (asserting application of "*McDonnell Douglas* burden-shifting framework used in analyzing discrimination claims arising under Title VII"). The Sixth Circuit also noted that the coach had not been advocating on behalf of his student-athletes. *See id.* at 349.

199. *Id.* at 349.

200. 71 F. Supp. 2d 789 (S.D. Ohio 1998), *aff'd*, 194 F.3d 1315 (6th Cir. 1999).

201. *See id.* at 789 (granting summary judgment in favor of defendant, Ohio State University), *aff'd*, 194 F.3d 1315 (6th Cir. 1999); Heckman, *Glass Sneaker*, *supra* note 21, at 603-07 (discussing *Weaver* holding that there was no evidence that women's field hockey coach had position substantially identical to those coaches of men's teams who were offered multi-year contracts).

202. *See Weaver*, 71 F. Supp. 2d at 793 (finding factual basis for invalidation of plaintiff's Title VII gender discrimination claim).

203. *See id.* at 799-800 (noting men's ice hockey team has longer competitive season and more players than women's field hockey team).

204. *See id.* at 801 (observing larger burden of public relations responsibilities on men's ice hockey coach, along with this coach's greater revenue-producing capability).

entailed an on-campus investigation to ascertain compliance with a gender equity component.²⁰⁵ Weaver participated in the investigation and provided the committee with negative comments concerning gender equity.²⁰⁶ The court rejected the plaintiff's Title IX retaliation charge because the University claimed it did not know of her negative comments about the University's compliance with the NCAA inquiry.²⁰⁷ Finally, the court underscored that the men's lacrosse team used the same inferior practice field assigned to the women's field hockey team.²⁰⁸ The court used Title VII standards for her Title IX retaliation claim, which the Sixth Circuit summarily upheld in affirming the district court's decision.²⁰⁹

The same result was reached in *Rallins v. Ohio State University*,²¹⁰ where an Ohio district court examined whether a female women's head track and field coach established Title VII and Equal Pay Act claims against the state university based on sex discrimination.²¹¹ The court previously dismissed her Title IX claim.²¹² Mammie Annette Rallins, a two-time former Olympian in the sport of hurdling, became the women's cross-country and track and field coach in 1976.²¹³ This position extended across three semesters.²¹⁴ The University hired a new men's track coach in 1989, who led his team to first and second place finishes in the Big Ten Conference and a NCAA top ten ranking, and was awarded a Division I-A coach of the year award, as well as two conference honors for his successful coaching.²¹⁵ The women's team never fared as well under the female coach's tutelage.²¹⁶ In 1993, the University decided to combine the separate teams and appointed the men's coach as the over-

205. *See id.* at 794 (explaining background circumstances behind litigation).

206. *See id.* (noting Weaver's unfavorable comments regarding quality of field hockey team's practice field).

207. *See id.*

208. *See id.* (relating confidential nature of Weaver's comments to NCAA Peer Review Committee and emphasizing men's lacrosse team used the same field).

209. *See Weaver v. Ohio State Univ.*, 194 F.3d 1315 (6th Cir. 1999) (per curiam) (unpublished opinion) (relying on district court's reasoning except making no pronouncement as to any potential Title VII preemption of plaintiff's Title IX claim).

210. 191 F. Supp. 2d 920 (S.D. Ohio 2002).

211. *See id.* at 922 (relaying Rallins' claim of gender discrimination during her employment at Ohio State University).

212. *See id.* (recognizing dismissal of plaintiff's other claims).

213. *See id.* at 923 (detailing Rallins' career history and employment with Ohio State University).

214. *See id.* (indicating that plaintiff's coaching responsibilities spanned "all three seasons of the academic year").

215. *See id.* (stating accomplishments of men's track coach).

216. *See id.* (observing Rallins' lack of similar accomplishments).

all head coach and track coordinator, with the women's coach designated the women's track coach/administrative coordinator.²¹⁷ This position, however, left the plaintiff with fewer responsibilities than before, which she deemed a demotion.²¹⁸ There was an apparent conflict between the two coaches.²¹⁹ During June 1994, the plaintiff left a meeting scheduled to resolve the matter between them and did not return.²²⁰ The University informed Rallins of its decision not to renew her contract in a letter dated June 28, 1994.²²¹ Her employment officially ended on September 12, 1994.²²² She filed an EEOC complaint on August 10, 1994.²²³

First, the court dismissed both her Equal Pay Act and Title VII claims based on the applicable statute of limitations.²²⁴ Second, apart from the procedural determinations, the court nonetheless examined the substantive merits of these claims.²²⁵ The court applied the *McDonnell Douglas* standard.²²⁶ Regarding the termination of the relationship between the parties, the court found that the former track coach satisfied the first three elements for her Title VII claim concerning the non-renewal decision: she was a female, she was terminated from her position, which was an adverse

217. *See supra* notes 124-133 and accompanying text (noting that joining two separate teams for males and females into one coed team was common practice for number of collegiate non-contact teams, such as track and field, tennis and swimming).

218. *See Rallins v. Ohio State Univ.*, 191 F. Supp. 2d 920, 924 (observing plaintiff's diminished responsibilities).

219. *See id.* (discussing complaints made by both the plaintiff and overall track coach about their inability to work together both personally and professionally).

220. *See id.*

221. *See id.* (identifying date of letter relaying University decision to not extend Rallins' contract).

222. *See id.*

223. *See id.* at 924, 927 (relating chronology of plaintiff's termination and filing of EEOC complaint).

224. *See id.* at 931 (holding Rallins' Equal Pay Act claim invalidated under two-year statute of limitations). The court stated that "the Supreme Court has held that the limitations period for filing an EEOC charge begins on the date that the alleged discriminatory decision was made and the plaintiff is notified, rather than at the time that the consequences of the alleged discriminatory act occurred." *Id.* at 927 (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). Thus, the court identified that the limitations period began on August 23, 1993, when the demotion was communicated to the coach. *See id.* Because the coach did not file her EEOC claim within the 300-day period required, the court also declared her Title VII discriminatory demotion claim time-barred. *See id.*

225. *See id.* at 928 (discussing plaintiff's claims and supporting arguments for discriminatory discharge in determining whether she could withstand summary judgment).

226. *See id.* at 929 (ruling *McDonnell Douglas* framework applicable because Rallins possessed "only circumstantial evidence of a discriminatory motive").

employment action, and she was qualified for the position.²²⁷ Lastly, she was required to demonstrate that the University treated her differently from those similarly situated members of the unprotected class.²²⁸ Here, the court found that the plaintiff failed “to even allege that any aspects of her employment situation were nearly identical to those of the male coaches to whom she compared herself.”²²⁹ Thus, the coach failed to establish a prima facie Title VII claim concerning her termination.²³⁰ Finally, the court found that even though her Equal Pay Act claim was untimely filed, she also failed to provide a suitable comparator to go forward.²³¹

In *Sobba v. Pratt Community College and Area Vocational School*,²³² the female coach of the men’s and women’s tennis team at a Kansas community college asserted a Title VII claim against the school for terminating her coaching duties and an Equal Pay Act claim for not paying her a salary comparable to other coaches.²³³ Lee Sobba had also been a residence director at an all-female dormitory for a number of years.²³⁴ The college decided to close this residence hall and asked Sobba to supervise another hall, an all-male dormitory with 125 male students, that had prior disciplinary problems.²³⁵ The plaintiff rejected this assignment.²³⁶ To make the position attractive, the College conditioned the tennis coaching position on acceptance of the residence hall position.²³⁷ The College did not

227. *See id.* (finding plaintiff satisfied first three elements of Title VII prima facie case).

228. *See id.* at 930 (explaining burden of proof for plaintiff in her Title VII sex discrimination claim).

229. *Id.*

230. *See id.* (noting absence of evidence demonstrating that this female coach was “similarly situated” to any other male coaches, thus preventing establishment of prima facie case).

231. *See id.* at 931 (referring to plaintiff’s allegation of being paid wages “substantially disparate to those paid to comparable male coaches at OSU” and that claim was time-barred).

232. 117 F. Supp. 2d 1043 (D. Kan. 2000).

233. *See id.* at 1044-45 (describing grounds for coach’s sex discrimination suit).

234. *See id.* at 1048 (noting that plaintiff previously supervised Porter Hall, which consisted of thirty-three female students).

235. *See id.* at 1047-48 (indicating that Porter Hall was to be converted to office space and the College intended to reassign plaintiff to Novotny Hall).

236. *See id.* at 1048 (summarizing conversation between plaintiff and college president regarding residence hall reassignment).

237. *See id.* (highlighting correspondence from college president stating that coaching position is directly connected to resident hall supervisor position “as a means of making a more attractive compensation package”). The plaintiff’s charged action occurred after the Board of Trustees had already approved her contract as the tennis coach. *See id.* at 1047 (discussing date of action).

renew the plaintiff's coaching position when she balked at the transfer to this other residence hall.²³⁸

An examination of the different sports provided at the state community college revealed that the plaintiff's tennis program used courts located at a public park rather than facilities at the College, had minimal funding for equipment expenses, and required the student-athletes to provide their own tennis rackets.²³⁹ The school's men's rodeo program had the best rodeo facilities in the region.²⁴⁰ Men's and women's basketball, softball, and baseball had more athletic events scheduled, along with larger budgets compared to the tennis team.²⁴¹ In general, all the coaches of teams using college facilities were required to attend to facility preparation as part of their coaching duties.²⁴²

First, the court rejected the school's motion for summary judgment on the Title VII claim, finding that there was a question of fact as to whether the college's proffered reason for dismissing the coach was pretextual.²⁴³ The court also rejected the plaintiff's contention that the school assigned male coaches to "'fluff jobs' like academic advisor, assistant athletic director, and intramural sports director, 'causing male coaches to be more highly compensated without significant additional work,' while women coaches 'were required to work significantly longer hours in real jobs like academic teaching assignments and residence halls'"²⁴⁴ Instead, the court found that the rescission of the offer to coach the tennis team could go forward as to whether it was tied to the residence hall position.²⁴⁵

238. *See id.* at 1048 (mentioning letter from college president informing plaintiff that her residence hall supervisor and coaching contracts would not be renewed as they were tied to one another).

239. *See id.* at 1047 (acknowledging that college does not have its own tennis court and students are responsible for providing key tennis equipment to play).

240. *See id.* (referring to rodeo program's premiere facilities and larger budget during plaintiff's tenure as tennis coach).

241. *See id.* at 1049 (noting College's indication that these programs were considered "major" sports and need for prioritization of athletic programs).

242. *See id.* at 1047 (finding that coaches for softball, baseball, basketball, rodeo, track and cross country were responsible for maintaining fields and other facilities used by respective athletic teams). *See infra* note 247.

243. *See Sobba*, 117 F. Supp. 2d at 1049 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)) (stating that evidence must show "that there is no genuine issue as to any material fact").

244. *Id.* at 1046.

245. *See id.* at 1051-52 (analyzing offer made to plaintiff). The court explained:

Although there is clearly some evidence in the record to support [the College's] assertion, there is also substantial evidence suggesting that the

Second, the court dismissed the plaintiff's Equal Pay Act claim.²⁴⁶ The court ultimately rejected the plaintiff's comparators, which consisted of the cross-country, track, and softball coaches.²⁴⁷ Instead, the court took a rather narrow view concerning comparators, leaving unanswered what coaches of teams offered at this school would have been deemed satisfactory comparators to go forward with the Equal Pay Act claim.²⁴⁸

In *Lamb-Bowman v. Delaware State University*,²⁴⁹ a women's basketball coach, replaced by another woman, was also unsuccessful in pursuing her lawsuit alleging violation of Title VII and Title IX after voicing inequalities between the separate athletic programs provided to male versus female student-athletes.²⁵⁰ The Delaware district court reasoned that the plaintiff had failed to demonstrate that

tennis coaching contract was not in fact tied directly to the residence hall position. . . . [A]ccording to plaintiff, when she told [the president] that she didn't think she wanted the assignment to Novotny Hall, he allegedly told her that he was going to increase the tennis position to a .50 FTE, which suggests that he considered these two positions to be separable.

Id.

246. *See id.* at 1051 (holding that plaintiff did not sustain her allegation of compensation discrimination based on gender).

247. *See id.* at 1049-50 (explaining court's reasoning in rejecting comparators). The court stated:

Plaintiff may well be correct that it is possible for different coaching positions to be 'substantially equal' under the Act. But the evidence cited on summary judgment fails to show that the work plaintiff was performing was in fact substantially equal to the work involved in these other coaching positions. While [the College's] functional description of the various coaching positions may have been essentially the same, there is uncontroverted evidence that the actual work required for these other positions involved skills and responsibilities not required in plaintiff's job.

Id. The court elaborated, "Similarly . . . the head women's softball coach, typically had more athletes to supervise than plaintiff, was responsible for supervising an assistant coach, and was also responsible for a budget more than twice the size of the tennis budget." *Id.* at 1050.

248. *See id.* (continuing with analysis of case without providing examples of appropriate comparators in case at hand, especially, as herein, the plaintiff was coach of both the women's and men's tennis teams).

249. 152 F. Supp. 2d 553 (D. Del. 2001), *aff'd*, No. 01-2045, 39 F. App'x 748 (3d Cir. 2002) (providing a written memorandum opinion) (underscoring that the plaintiff had alleged funding and resource disparities between the men's and women's athletic programs, but remarking, "While such allegations might be relevant to a Title IX claim, they do not satisfy the third element of a prima facie case of sex discrimination under Title VII"). The Third Circuit also concluded the Title VII retaliation claim was unfounded, while registering that the allegations may have violated Title IX, however, those claims were time-barred due to exceeding the Title IX-applied statute of limitation. *See* 39 F. App'x at 751.

250. *See Lamb-Bowman*, 152 F. Supp. 2d at 554-55, 559, 561 (explaining that plaintiff's Title VII and Title IX claims failed in instant case).

she suffered discrimination because of her sex.²⁵¹ In support of its holding, the court noted, “[P]laintiff’s allegations are centered around alleged funding and resource disparities between the women’s and men’s athletic programs Plaintiff has confused discrimination based on her sex with discrimination based on her association with women’s athletics.”²⁵²

(2) Advocating for Gender Equity

The next category of cases involve athletic department employees subject to adverse employment actions for advocating gender equity for female student-athletes (which may have entailed pointing out the deficiencies of the present programs) in light of what the male student-athletes received in terms of athletic scholarships, numbers of athletic opportunities, or benefits and conditions provided. *Weaver v. Ohio State University* fits into this category but was grouped in the earlier section to demonstrate the consistency exhibited by the particular circuit court in reaching a zero to two scorecard for female coaches.²⁵³ In this context, both men and women spoke out about lack of athletic gender equity. While trying to obtain equitable pay may not prove successful, the courts are more sympathetic when the cases concern gender equity advocacy.

In *Atkinson v. Lafayette College*,²⁵⁴ a female athletic director (and the first female athletic director of a coed NCAA Division I-AA college) asserted violations of Title VII and Title IX when she was denied tenure and claimed retaliation in the form of termination from her job when she had advocated for gender equality within the athletic department.²⁵⁵ The college awarded the former male athletic director tenure as Professor of Physical Education and Athletics after being in the position for five years.²⁵⁶ In 1989, the Col-

251. *See id.* at 561 (“Plaintiff has not demonstrated that she suffered retaliation because she complained of discrimination based on sex.”).

252. *See id.* at 559 (ascribing plaintiff’s Title VII discrimination claim focused on wrong kind of discrimination).

253. 71 F. Supp. 2d 789 (S.D. Ohio 1998), *aff’d*, 194 F.3d 1315 (6th Cir. 1999). For a discussion of *Weaver*, see *supra* notes 200-209 and accompanying text. *See also* *Lamb-Bowman v. Del. State Univ.*, 39 F. App’x 748 (3d Cir. 2002). For a discussion of *Lamb-Bowman*, see notes 249-252 and accompanying text.

254. No. CIV.A. 01-CV-2141, 2003 WL 21956416 (E.D. Pa. Jul. 24, 2003).

255. *See id.* at *4 (E.D. Pa. Jul. 24, 2003) (granting defendant college’s motion for summary judgment); *Atkinson v. Lafayette Coll.*, 653 F. Supp. 2d 581, 590 (E.D. Pa. 2009) (granting defendant college’s motion for summary judgment). For another case regarding Title IX retaliation, see *Brooks v. S. Univ.*, No. 2003-CA-0231, 2004 WL 1632915, at *1 (4th Cir. 2004) (unpublished opinion) (concerning claim of Title IX retaliation brought by another women’s basketball coach based on alleged sexual harassment committed against her by men’s basketball coach at Southern University at New Orleans).

256. *See Atkinson*, 2003 WL 21956416, at *1 (stating facts of case).

lege hired the plaintiff, pursuant to an appointment letter, as Director of Athletics and Professor and Head of Physical Education and Athletics.²⁵⁷ The letter specifically indicated that the term was at the pleasure of the College president and its board of trustees.²⁵⁸ While the initial period of employment ran from January 29, 1990, through June 30, 1992, the letter also informed her that “following that period . . . [she] would be subject to the procedures for due notice as apply to the faculty which would ensure [her] a minimum of one year’s notice.”²⁵⁹ During January 1996, the plaintiff “began raising issues of gender equality in the context of the College’s athletic budget by submitting various plans to ensure compliance with Title IX to a committee of the College’s Board of Trustees.”²⁶⁰ She alleged during November 1998 that she was physically threatened by her supervisor, a dean of one of the divisions, for her advocacy.²⁶¹ During April 1999, the college ended her supervision of the intramural and recreation programs.²⁶²

On November 4, 1999, the College president informed the athletic director of her termination, which would not be effective for another year and a half due to the school’s due process notice provisions.²⁶³ She rejected a buyout offer and continued to work until the expiration date of June 30, 2001.²⁶⁴ The college then awarded the position to the male associate athletic director.²⁶⁵ The alleged reason for the plaintiff’s termination was her deficient leadership and management skills.²⁶⁶ The plaintiff believed she was a tenured

257. *See id.* (detailing information in letter sent to plaintiff).

258. *See id.* (showing defendant had discretion as to termination date of plaintiff’s position).

259. *Id.* (citation omitted).

260. *Id.* at *2. *See Atkinson*, 653 F. Supp. 2d at 584-86, 589 (footnote omitted) (explaining that during January 1999, Board of Trustees decided to retain school’s NCAA Division I status and launched capital campaign to raise monies to fund positions of head women’s soccer coach, head women’s lacrosse coach, and full-time women’s softball coach).

261. *See Atkinson*, 2003 WL 21956416, at *2 (outlining plaintiff’s complaints against defendants).

262. *See id.* (discussing defendant’s treatment of plaintiff regarding termination of job).

263. *See id.* (mentioning unfair treatment plaintiff claimed she suffered).

264. *See id.* at *2 n.3 (mentioning offer made by defendant to plaintiff); *id.* at *2 (describing plaintiff’s response to defendant’s buyout offer).

265. *See id.* at *2 n.4 (noting defendant hired man to fill plaintiff’s previously-held position).

266. *See id.* at *2 (discussing defendant’s reason for firing plaintiff).

employee and, as such, could not be terminated without cause.²⁶⁷ The College denied the plaintiff's request for a hearing.²⁶⁸

First, as to her Title VII sex discrimination claim, the College did not contest the first three elements of a *prima facie* case, but the College did assert that the plaintiff failed to satisfy the fourth element.²⁶⁹ The plaintiff claimed that similarly situated male employees were treated more favorably.²⁷⁰ The Pennsylvania district court rejected her four categories of "comparators" as being "markedly [sic] different" from the plaintiff's situation and therefore not probative.²⁷¹ In dismissing her Title VII claim for discrimination, the court stated, "[n]o reasonable jury could find that Atkinson's gender played a role in her termination, in the denial of her claim that she had lifetime tenure, or in the denial of her request for a faculty appeal."²⁷²

Second, the court dismissed the plaintiff's Title VII retaliation claim for failing to raise this issue when she filed her administrative complaint with the EEOC.²⁷³ Moreover, according to the Pennsylvania trial court, "[t]he Third Circuit has established . . . that allegations involving retaliation for opposition to disparities between women's and men's athletic programs do not violate Title VII."²⁷⁴

Third, the trial court previously partially dismissed her Title IX retaliation claim and did not otherwise address the retaliation claim in this opinion.²⁷⁵ The district court ultimately granted the defen-

267. *See id.* at *3 (relaying plaintiff's view of her position and reason for requesting internal hearing from defendants).

268. *See id.* (showing defendant believed plaintiff to be incorrect about plaintiff's tenure).

269. *See id.* at *6 (presenting defendant College's argument). The court summarized:

In this case, Defendant Lafayette College does not dispute the first three elements of Plaintiff's *prima facie* case. Rather, Lafayette argues that Plaintiff cannot make out a *prima facie* case of gender discrimination because she cannot satisfy the fourth element, that is, she has not come forward with 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.'

Id. (citation omitted).

270. *See id.* (recognizing fourth prong of *prima facie* case and plaintiff's claim to satisfy prong).

271. *See id.* (detailing court's reason for finding plaintiff failed to satisfy fourth element).

272. *Id.* at *8.

273. *See id.* at *10 (describing plaintiff's claim regarding Title IX retaliation).

274. *Id.* at *9 (citing the unpublished opinion rendered in *Lamb-Bowman v. Del. State Univ.*, No. 01-2045, 39 F. App'x 748, 750 (3d Cir. 2002)).

275. *See id.* at *4 (highlighting court already previously granted defendant's motion for partial dismissal of retaliation claim); *Atkinson v. Lafayette Coll.*, No.

dant's motion for summary judgment in its entirety.²⁷⁶ Atkinson appealed.²⁷⁷

The Third Circuit affirmed the lower court's determinations, with the exception of the Title IX retaliation claim, based on *Jackson*.²⁷⁸ On remand, the Pennsylvania district court borrowed from Title VII jurisprudence to analyze the Title IX retaliation case.²⁷⁹ The court summarized the three elements needed to satisfy a prima facie case: (1) protected activity; (2) a materially adverse action; and (3) a causal link between the two.²⁸⁰ As to the first element, the court noted that "[w]hile informal complaints about unlawful discrimination may suffice as protected activity . . . 'the message must at a minimum convey the speaker's express or implicit protest of discriminatory practices that violate the federal anti-discrimination statutes' '[A] general complaint of unfair treatment is insufficient to establish protected activity.'"²⁸¹ The court considered the plaintiff's actions for two major time periods, with the first period spanning from January 1990 to May 1998.²⁸²

Although the court was sympathetic that the structuring of the athletic department during the time frame did violate Title IX, the court determined that her activities during that period failed to qualify as "protected conduct" based on the Supreme Court's First

CIV. A. 01-CV-2141, 2002 WL 123449 (E.D. Pa. Jan. 29, 2002) (unpublished opinion) (recognizing granting of partial dismissal of plaintiff's retaliation claim).

276. *See Atkinson*, 2003 WL 21956416, at *12 (holding court granted defendant's motion for summary judgment).

277. *See Atkinson v. Lafayette Coll.*, 460 F.3d 447, 449 (3d Cir. 2006).

278. *See id.* at 455 (holding that "[t]he district court's ruling dismissing Atkinson's claim under Title IX is reversed and remanded in accordance with *Jackson*" and affirming in all other respects); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (allowing for coach's claim of Title IX retaliation against recipient of federal funds). The appellate court vacated this part of the lower court's decision and remanded the case for further proceedings consistent with *Jackson*. *See Atkinson v. Lafayette Coll.*, 653 F. Supp. 2d 581, 592-93 (E.D. Pa. 2009) (granting defendant's motion for summary judgment, applying Title VII framework to the Title IX claim, and finding plaintiff failed to establish the necessary causation and pretext).

279. *See Atkinson*, 653 F. Supp. 2d at 594 (citing *Dawn L. v. Greater Johnstown Sch. Dist.*, 3:06-19, 2008 WL 2620170, at *4 (W.D. Pa. July 2, 2008)) (explaining elements necessary to prove prima facie case of retaliation). "In allowing claims for retaliation under Title IX, the Supreme Court has nonetheless neglected to provide a scheme by which they may be analyzed." *Id.*

280. *See id.* at 595 (quoting Title VII, 42 U.S.C. §§ 701-713, 2000e to 2000e-17) (setting forth three-pronged test for retaliation).

281. *Id.* at 595-96 (citations omitted).

282. *See id.* at 596 (discussing court's consideration of plaintiff's actions during two different time periods due to extensive duration over which case spanned).

Amendment free speech decision rendered in *Garcetti v. Ceballos*.²⁸³ In *Garcetti*, the Court “enunciated the general proposition that, in order to state a retaliation claim, complaints made *within* the scope of an employee’s job cannot constitute protected [free speech] conduct.”²⁸⁴ The *Atkinson* court noted that “*Garcetti*’s broader holding has since been expanded”²⁸⁵ Thus, this trial court applied the Supreme Court’s 2006 holding in *Garcetti* to determine whether certain speech rendered during 1980-1988 was now deemed “protected speech.”²⁸⁶ The trial court also borrowed from free speech retaliation jurisprudence to issue its Title IX opinion, taking into account the Court’s 2005 holding in *Jackson* on remand.²⁸⁷

In *Peirick v. Indiana University-Purdue University at Indianapolis Athletic Department*,²⁸⁸ an unusual case where the state university terminated a female women’s tennis coach based on her alleged abusive language toward her players, the issue was whether the type of discipline afforded her, compared to male coaches, transgressed Title VII and the Equal Pay Act.²⁸⁹ The Seventh Circuit, in vacating the district court’s determination, concluded it was a question of fact as to whether the plaintiff’s termination violated Title VII.²⁹⁰ The court concluded that the women’s tennis coach could be com-

283. 547 U.S. 410 (2006). See *Atkinson*, 653 F. Supp. 2d at 596 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)) (excluding plaintiff’s activity from “protected conduct” because retaliation complaints that employee made were based on speech about events that were not outside scope of her job duties as Athletic Director nor were they adverse to College). See *infra* note 403.

284. *Atkinson*, 653 F. Supp. 2d at 596 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421-24 (2006)) (emphasis added).

285. *Id.* The *Garcetti* holding, which was limited on its facts to government employees, has been expanded into a “more general proposition that in cases where it is a third party who is attempting to help the alleged victim of discrimination assert her rights, protected activity is limited to activity that is adverse to the company, or outside the employee’s normal employment role” *Id.* (citations omitted) (internal quotation marks omitted).

286. See *id.*

287. See *id.* at 592-93 (noting that the case was remanded to the trial court for proceedings consistent with *Jackson* because the original ruling had come prior to *Jackson*).

288. 510 F.3d 681 (7th Cir. 2007). The Eleventh Circuit ruled the members of the Board of Trustees were entitled to Eleventh Amendment immunity concerning the plaintiff’s ADEA claim. See *id.* at 697.

289. See *id.* at 690 (discussing allegations pertaining to female coach). It is uncommon for female coaches to be accused of improper language toward their student-athletes in comparison to case law involving male coaches charged with using abusive, improper, or expletive-laden language.

290. See *id.* at 693-94 (finding University’s conduct created question of fact regarding adequacy of its explanations for terminating Peirick). The Seventh Circuit utilized the *McDonnell-Douglas* standard. See *id.* at 687.

pared to the men's tennis coach and the men's soccer coach, but not to the men's golf coach.²⁹¹

The next two cases examine the actions of male coaches advocating on behalf of gender equity for females at California public universities. The former track coach at Humboldt State University claimed Title IX retaliation, among other causes of action, in *Wells v. Board of Trustees of California State University*.²⁹² David Wells was the coach of the men's and women's cross country and track and field teams from 1980 through 2004, with one-year contracts that were renewed annually, until his last one, which expired during March 2004.²⁹³ "In late 1998 and early 1999, Wells learned that women's sports were disproportionately funded relative to men's sports in violation of Title IX."²⁹⁴ In late 1998 and early 1999, Wells raised the issue with the University, which led to an internal investigation conducted by a faculty member, who found a Title IX violation.²⁹⁵ On or about June 1, 2001, student-athletes filed an

291. *See id.* at 689-90 (discussing "similarly situated" analysis for Title VII purposes).

292. 393 F. Supp. 2d 990 (N.D. Cal. 2005) (determining whether certain claims under 42 U.S.C. § 1981 could proceed against University and individually-named defendants, but not discussing substantive merits of coach's Title IX claim), *on further motion*, 2006 WL 2583679, at *7-*11 (N.D. Cal. Sept. 7, 2006) (finding no First Amendment freedom of speech retaliation or Title IX retaliation). *See Morris v. Fordham Univ.*, No. 03 Civ. 0556 (CBM), 2004 U.S. Dist. LEXIS 7310 (S.D.N.Y. Apr. 27, 2004) (analyzing Title IX claim). In *Morris*, a pre-*Jackson* case, the court ruled that the male head coach of the women's intercollegiate basketball team did not have standing to assert a Title IX claim concerning alleged lack of gender equity on behalf of his students. *See id.* at *10 (noting lack of standing). However, the coach could assert such a claim in his individual capacity. *See id.* The court stated, "The prohibition of discrimination 'on the basis of sex' is broad enough to encompass a prohibition of discrimination against [the] plaintiff on the basis of the sex of the players whom he coached." *Id.* at *11. However, the court would ultimately dismiss the plaintiff's Equal Pay Act claim and the Title IX claim based on failure to meet the Title VII requirements. *See id.* at *13 (dismissing plaintiff's Equal Pay Act claim for failure to identify comparator of opposite gender, employed by same private university employer, as evidence of gender-based wage disparity).

293. *See Wells v. Bd. of Trs. of Cal. State Univ.*, 393 F. Supp. 2d 990, 992-93 (N.D. Cal. 2005) (featuring plaintiff's tenure at Humboldt State University).

294. *Id.* at 993. Parenthetically, Title IX does not require equal funding when separate athletic teams are provided for men and women; instead, Title IX requires necessary funding. *See* 34 C.F.R. § 106.41(c) (2010).

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Id.

295. *See Wells*, 393 F. Supp. 2d at 993 (identifying plaintiff's initial discovery of Title IX violation and University's internal investigation). The decision noted that

administrative complaint with the Office for Civil Rights (“OCR”) of the U.S. Department of Education, charged with oversight of discrimination claims involving educational institutions.²⁹⁶

The California district court found no violation of the coach’s First Amendment free speech rights when he lost his job after speaking out about the purported lack of gender equity concerning the women’s teams in this pre-*Garcetti* case.²⁹⁷ Second, the trial court applied Title VII standards to ascertain whether Title IX retaliation occurred in this post-*Jackson* case.²⁹⁸ The court granted the University summary judgment on its Title IX claim.²⁹⁹ The Court found that the former athletic director, who was no longer in that position when the University did not renew the coach’s contract, did not take any adverse action against the coach.³⁰⁰ In this case, because of its internal investigation, it is submitted that the entire University administration would have been on notice about the lack of purported gender equity.³⁰¹ Nonetheless, the court exonerated the school, however, because the specific athletic director was no longer in place.³⁰² A sister California district court, however, did not hold to this reasoning in another similar case.³⁰³

In *Burch v. Regents of the University of California*,³⁰⁴ another post-*Jackson* case, the male coach of the Division I men’s wrestling team at the University of California-Davis alleged that the school engaged

“[i]n August, 2001, Diane Milutinovich was commissioned to prepare a gender equity report for [the university].” *Wells*, No. C 05-02073 CW, 2006 WL 2583679, at *4 (N.D. Cal. Sept. 7, 2006).

296. *See Wells*, 393 F. Supp. 2d at 993 (describing Wells’s and students’ actions in response to discovery of Title IX violation).

297. *See Wells*, No. C 05-02073 CW, 2006 WL 2583679, at *21 (“Any adverse action occurring after May 20, 2003, would not support an inference of retaliation based on [p]laintiff’s Title IX speech.”).

298. *See id.* at *11 (citing *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1125 (E.D. Cal. 2006)) (reporting how, in absence of Supreme Court guidance on how to evaluate Title IX retaliation claims, courts have relied on Title VII precedent and analysis).

299. *See id.*

300. *See id.* (finding that neither former Athletic Director nor Dean of College of Professional Studies took action adverse to plaintiff).

301. *See id.* (noting that school immediately instigated internal investigation following OCR notice of alleged Title IX violation).

302. *See id.* (recognizing that despite the University’s internal investigation, plaintiff had insufficient evidence to prove that University knew of his Title IX conduct).

303. *See Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1128-32 (E.D. Cal. 2006) (rejecting school’s claims that school decided not to renew coaching contract prior to coach’s Title IX advocacy).

304. 433 F. Supp. 2d 1110 (E.D. Cal. 2006).

in Title IX retaliation.³⁰⁵ The coach also claimed that because he publicly opposed the school's sex discrimination and advocated for female student-athletes to participate in wrestling, the school improperly terminated him and thus violated his First Amendment right to free speech.³⁰⁶ Michael Burch, a part-time employee with the athletic department, inherited a losing wrestling program when he started in 1995.³⁰⁷ Annually, the University offered him a one-year coaching contract.³⁰⁸ The University did not renew his last contract, offered for the 2000-01 academic year, even though Burch led the team to its first winning season in 20 years.³⁰⁹ The University claimed that the reasons for the termination did not pertain to Burch's support of female athletes.³¹⁰ During the plaintiff's employment, the athletic department reviewed the coaching positions to decide which ones would be upgraded from part-time to full-time positions.³¹¹ The University reported that Burch expressed strong displeasure when he learned that his coaching position was not selected for the upgrade.³¹²

305. *See id.* at 1111-12 (stating claims at issue).

306. *See id.* at 1111-12, 1116 (summarizing facts of case); Dodds, *supra* note 116, at 339 (discussing unreported case of Dugan v. Or. State Univ., No. 95-6250-HO (D. Or. 1995), in which women's softball coach at Oregon State University asserted violations of Title VII, Equal Pay Act, and First Amendment's free speech clause).

307. *See Burch*, 433 F. Supp. 2d at 1112 (recognizing team's performance prior to Burch's assuming head coaching duties).

308. *See id.* (describing employment contract practice between Burch and University).

309. *See id.* (summarizing University's decision not to review Burch's coaching contract, despite his success with team). For another case brought by a coach with a successful winning record, see *Flood v. Bd. of Trs. of Fla. Gulf Coast Univ.*, No. 2:08-V-30 (M.D. Fla. Jan. 2008) (declaring female volleyball coach with twenty-two years experience, who was placed on probation, asserted a Title IX retaliation violation, as well as a defamation claim against the University). Jaye Flood became the head women's volleyball coach in 2004. *See id.* (discussing Flood's career). During her tenure at the state university, she compiled a winning record with 80 wins and merely 13 losses. *See id.* She alleged that male coaches received multi-year contracts compared to the female coaches. *See id.* (claiming sex discrimination). The school premised its action based on the coach's job performance. *See id.* (discussing school's basis for action).

310. *See Burch*, 433 F. Supp. 2d at 1114-15 (discussing allegations of plaintiff being difficult to work with, potentially violating NCAA recruiting guidelines, and promising some recruits potential athletic scholarships when such scholarships would not be forthcoming until subsequent academic year).

311. *See id.* at 1114 (describing University's alleged efforts to comply with Title IX by upgrading some female coaching positions to full-time).

312. *See id.* at 1113 (informing Burch believed he should have been paid more throughout his coaching career at University). According to Pam Gill-Fisher, Associate Athletic Director, she informed Burch of the University's decision to upgrade female coaching positions to full-time in an effort to comply with Title IX, which prevented them from upgrading Burch's position. *See id.* at 1114 (deciding

The plaintiff offered a different explanation. Although the wrestling team was a men's team, female student-athletes were allowed to practice with the team, provided they filled out certain paperwork, until the athletic department put a firm cap on the team.³¹³ Three of the female wrestlers then filed an administrative complaint with the OCR on April 24, 2001.³¹⁴ The coach claimed that this legal action along with his own advocacy led to the University's non-renewal of his contract.³¹⁵ The University responded that it had made its determination to terminate the plaintiff on April 24, 2001, before becoming aware of the OCR complaint.³¹⁶ Nevertheless, the University actively prepared to negotiate its contract with Burch through May 2001, during which time the coach asserted that he sought to have the women reinstated to his team.³¹⁷ The University explained that it was department policy not to indicate a non-renewal decision until a month before the prior contract's expiration date, which, in this case, would have been June 30, 2001.³¹⁸

In its analysis of the case, the California district court noted that the Supreme Court in *Jackson* "did not . . . provide guidance on how to evaluate a Title IX retaliation claim."³¹⁹ The court thus

to upgrade female coaches). In response, Burch allegedly used an expletive regarding Title IX and "stormed" out of Gill-Fisher's office. *See id.* (detailing Burch's actions).

313. *See id.* at 1116 n.7 (specifying parameters of women's wrestling program); *id.* at 1117 (laying out athletic department's ban on women's wrestling and ensuing reactions).

314. *See id.* at 1117 (reporting female wrestlers filed complaint with OCR on April 24, 2001). The OCR is administratively responsible for investigating Title IX claims in response to administrative complaints filed or through conducting its own compliance reviews. *See Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 961-63 (9th Cir. 2010) (identifying lawsuit commenced by the female former members of this intercollegiate wrestling team coached by Burch, subsequent to OCR filing, and whether these litigants were first required to place their university on notice of putative Title IX violation, in case not involving sexual harassment); *Brust v. Regents of the Univ. of Cal.*, No. 2:07-CV-1488, 2007 WL 4365521, at *9 (E.D. Cal. Dec. 12, 2007) (same) (case settled).

315. *See Burch*, 433 F. Supp. 2d at 1116 (giving other alternatives for coach's dismissal).

316. *See id.* at 1128 (offering defendant's argument for why it did not renew coach's contract).

317. *See id.* at 1117 (listing the coach's actions to help reinstate women's wrestling team).

318. *See id.* at 1128 (portraying defendants' position that justified in not telling coach of intent not to renew contract by saying it was school policy to delay disclosure until date of renewal).

319. *Id.* at 1125. The court, in citing *Jackson*, noted, "In establishing this right, the Court observed that while Title VII, . . . another discrimination law, explicitly provides for a detailed retaliation cause of action, Title IX very generally prohibits discrimination—so much so that its broad language encompasses an implicit claim for retaliation." *Id.*

elected to utilize the Title VII standards when reviewing Burch's retaliation claim.³²⁰ The court found that the plaintiff's representation did not amount to a discrimination complaint.³²¹ The trial court explained that "because establishing a women's wrestling team, as opposed to more varsity opportunities for women in general, was not required to comply with Title IX, the court cannot say that defendants should have interpreted plaintiff's inexact complaints as complaints of discrimination."³²²

When educational institutions provide separate programs for men and women, the institutions must provide equal opportunities, including accommodating the interests and abilities of both sexes.³²³ The Title IX paradigm does not require provision of any specific teams or sports.³²⁴ Moreover, when the sport is a contact sport composed of members of one sex, the school may prohibit individual members of the other sex from participating or even trying out.³²⁵ Nevertheless, the court ruled that the plaintiff could use other indicia to support his cause of action and ultimately refused to grant the defendants' motion for summary judgment on the Title IX retaliation claim.³²⁶

As to the plaintiff's First Amendment free speech claim, the court found the evidence "suggest[ing] that [Burch's] participation in public protests accusing UCD of Title IX discrimination might have been the event that actually secured his termination" to be

320. *See id.* at 1125-26 (using *McDonnell Douglas* standard of analysis).

321. *See id.* at 1127 (stating that because plaintiff's complaints did not directly address Title IX prohibited act or omission, plaintiff is less likely to have grounds for relief).

322. *Id.* (explaining importance of analyzing Title IX requirements for specific case). For further discussion of the application of equal opportunity requirements, see *infra* note 325 and accompanying text.

323. *See* OCR Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. pt. 106 (2010); 34 C.F.R. § 106.41(c) (2010) (spelling out requirements for equal opportunity in athletic activities).

324. *See id.* (stating requirements for equal opportunity for athletic departments generally, rather than for specific sports or activities).

325. *See id.* § 106.41(b) ("Separate teams") (listing wrestling among those sports defined as "contact sports" and creating exemptions for normally required equal participation opportunities for such single-sex contact sports teams). However, when females are permitted to participate on the contact sports teams, the schools may not discriminate against them. *See id.* § 106.41(c) (detailing equal opportunity requirement).

326. *See Burch*, 433 F. Supp. 2d at 1130 (finding that questions of material fact precluded court from granting defendants summary judgment on retaliation claim). Courts will not grant summary judgment on a retaliation claim when facts present possibility of claim. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (denying summary judgment on retaliation claim).

“[p]articularly troubling.”³²⁷ Thus, the court also denied summary judgment on the First Amendment claim to certain individually-named defendants sued in their official capacities.³²⁸ On the eve of trial, in January 2007, the parties settled the case for a reported \$750,000.³²⁹

In *Nicholas v. Board of Trustees of University of Alabama*,³³⁰ the Eleventh Circuit addressed a number of specific Title VII sex discrimination claims brought by a male assistant coach of the women’s basketball team, including ones based on disparate treatment and retaliation theories.³³¹ The state university ordered the coach to refrain from contact with his players after an allegation of an improper sexual advance was purportedly made by the coach toward one of the female members of the team, and imposed discipline upon the coach.³³² Separately, the athletic department sought to hire a new head coach for the team. The University ultimately hired a new female head coach, where the plaintiff unsuccessfully applied for the position.³³³ While the appellate court determined the plaintiff established a prima facie Title VII disparate hiring claim, it ruled that the state university proffered legitimate reasons to hire the new female coach.³³⁴ Overall, the coach’s claims of disparate hiring, disparate pay, disparate discipline, disparate treatment, and retaliation were all unsuccessful.³³⁵

327. *Burch*, 433 F. Supp. 2d at 1131 (explaining how court interpreted evidence that Burch was possibly fired due to participating in public protests regarding Title IX discrimination).

328. *See id.* at 1134 (granting summary judgment to University’s Chancellor and denying summary judgment to University and members of athletic department).

329. *See Burch v. Regents of the Univ. of Cal.*, No. 2:04-CV-00038, 2007 WL 315765, at *1 (E.D. Cal. 2007) (identifying settlement amount).

330. 251 F. App’x 637 (11th Cir. 2007).

331. *See id.* at 641 (providing details of Title VII claim filed by plaintiff). The plaintiff claimed disparate pay comparing himself to the female associate head coach of the women’s team, who was also the recruiting coordinator. These differences in responsibilities between the two coaches was enough to defeat the plaintiff’s disparate pay claim, reasoning he failed to put forth “similarly situated” individuals. *See id.* at 642. The same rationale was used in his disparate discharge claim. *See id.* at 643. The coach asserted retaliation based on the University’s eliminating his coaching duties.

332. *See id.* at 640 n.3 (indicating this allegation was unfounded). In December 2001, the University of Alabama-Birmingham hired Nicholas. In September 2003, the school suspended him with pay and removed his coaching duties.

333. *See id.* at 640 (explaining new female coach was hired because of her experience at top women’s basketball program as long-time assistant coach at the University of Virginia).

334. *See id.* at 643.

335. *See id.* (holding that plaintiff failed to show material question of fact existed that defendant’s proffered reasons were pretextual).

b) Other Collegiate Athletic Department Employees

In *Street v. North Carolina State University*,³³⁶ a female academic coordinator in the athletic department at North Carolina State University alleged Title VII sex discrimination and age discrimination, pursuant to the ADEA, due to her termination.³³⁷ Jutta Street began working at the state university during September 1991, providing academic support to members of the football team.³³⁸ As in a number of these cases, a new athletic director was hired, who began in 1995.³³⁹ On January 2, 1996, the University informed Street of her termination, although the institution paid her salary through early April 1996.³⁴⁰

A North Carolina district court granted the University's motion for summary judgment on all claims for two reasons: she failed to satisfy the first condition imposed by the *McDonnell Douglas* framework for Title VII claims in that she:

[could not] establish that her performance met her employer's legitimate expectations, and assuming *arguendo* that she did, the reason advanced by the University [in terminating her] was a legitimate one. The University indicated Street failed to meet deadlines and her two prior supervisors (athletic directors) found her argumentative, confrontational and resistant to supervision.³⁴¹

The court adopted the University's position, noting that "her supervisor's opinion of her work quality is the only one relevant to this case," despite the fact that the football coach indicated Street was "very good at what she did."³⁴² The prior fall season, eight football players under the supervisor's guidance were placed on aca-

336. 1999 WL 1939998 (E.D.N.C. Feb. 19, 1999) (unpublished opinion) (ruling North Carolina State University is part of University of North Carolina). See also *Musso v. Univ. of Minn.*, 105 F.3d 409 (8th Cir. 1997) (concerning demotion and failure to renew the contract for female Director of Sports Facilities, who alleged retaliation).

337. See *Street*, 1999 WL 1939998 at *1 (underscoring she filed complaint with EEOC, received notice of right to sue, and filed her lawsuit within 90-day filing deadline).

338. See *id.* at *1 (conveying Street had conflict with interim director in 1994, but retained position).

339. See *id.* (indicating new director gave Street pay raise even though there were documented concerns about her attitude and performance).

340. See *id.* (detailing circumstances surrounding termination).

341. *Id.* at *3.

342. *Id.*

demic suspension, whereas during the recent fall semester the number of players in this category dropped to two.³⁴³

2. *Interscholastic Athletic Departments*

a) Coaches and Athletic Directors

On the interscholastic level, the issue of whether the applicant for the position of athletic director should automatically be given to the former or current male football coach was raised as to whether this scenario violated the gender equity statutes.³⁴⁴ In *Wynn v. Columbus Municipal Separate School District*,³⁴⁵ a female physical education teacher sued her school district for sex discrimination based on Title VII for failure to hire her as the athletic director.³⁴⁶ Wynn taught at a Mississippi high school since 1963.³⁴⁷ The plaintiff also coached and instituted a number of female teams including volleyball, basketball, and softball.³⁴⁸ The athletic director/head football coach remained in these positions until his retirement in 1969, after which school administrators took over the duties for several years.³⁴⁹ At a 1977 meeting, the school board decided to return to its athletic director/head football coach combined practice, with an allotted twelve month contract, rather than a nine month con-

343. *See id.* (discussing how Street believed she was performing well when fired).

344. *See, e.g.,* Oates v. District of Columbia, 647 F. Supp. 1079, 1079 (D.D.C. 1986), *aff'd*, 824 F.2d 87 (D.C. Cir. 1987) (holding that female physical education teacher unsuccessfully commenced § 1983 action, based on violation of Fourteenth Amendment Equal Protection Clause, where school withdrew its decision to appoint female physical education teacher as high school football coach); Grebin v. Sioux Falls Indep. Sch. Dist., 779 F.2d 18, 18 (8th Cir. 1985) (deciding 43-year-old female with only one semester of regular teaching unsuccessfully charged Title VII sex discrimination and age discrimination, based on 29 U.S.C. § 626, when District hired 27-year-old male with three years teaching experience, who was also coach); Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42, 1992 WL 510991 (W.D. Okla. 1992) (concerning high school football coaching position and asserting violation of Title VII and Civil Rights Act).

345. 692 F. Supp. 672 (N.D. Miss. 1988).

346. *See id.* at 672 (bringing action against school district, trustees, superintendent and high school principal).

347. *See id.* at 674 (identifying she received bachelor's degree in Physical Education from Mississippi University).

348. *See id.* (exploring various responsibilities during her tenure).

349. *See id.* (alerting athletic director had occupied roles since 1961).

tract.³⁵⁰ Not surprisingly, football was the dominant sport and the major revenue producer at the plaintiff's high school.³⁵¹

From 1979 until 1984, a man held the dual position.³⁵² Wynn helped with the football program, in addition to other duties.³⁵³ Upon the male athletic director's resignation, the plaintiff applied for the position as athletic director.³⁵⁴ Once again, the football coach, with only five years of experience, was hired as the athletic director, despite the plaintiff's twenty years of experience.³⁵⁵ Wynn challenged this decision.³⁵⁶ The school district proffered as an expert witness a former coach at a number of southern universities who wholeheartedly supported the appointment of the head football coach as the athletic director, even if it would effectively exclude all women.³⁵⁷

A Mississippi district court concluded that the plaintiff failed to satisfy a Title VII *prima facie* disparate impact claim.³⁵⁸ The court highlighted that "[t]he disparate impact model is designed to test facially neutral, objective employment practices, not the subjective criteria often used to evaluate employees in hiring and job placement decisions."³⁵⁹ The court found this theory was flawed, based on the statistical evidence supplied.³⁶⁰ However, the court found that the plaintiff did satisfy a *prima facie* disparate treatment claim, stating:

350. *See id.* at 674-75 (discussing new contract and reinstatement of combined practice).

351. *See id.* at 675 (underscoring how football produced the most revenue for school).

352. *See id.* at 674 (informing how Bruce served as head football coach and athletic director).

353. *See id.* (claiming she performed many of athletic director's duties).

354. *See id.* at 676 (noting the plaintiff felt she was qualified to perform job of athletic director).

355. *See id.* at 677 (discussing how plaintiff had greater experience, but was passed over for position of athletic director).

356. *See id.* at 672-80 (describing plaintiff's claims and reasoning).

357. *See id.* at 678 (summarizing testimony of expert witness).

358. *See id.* at 680 (listing requirements for *prima facie* case).

359. *Id.* at 683 (citations omitted).

360. *See id.* (claiming that disparate impact model argument is flawed). The court found that the plaintiff was the only individual who fit the relevant class for consideration, and since there was only one individual, that would not suffice to determine statistical significance. *See id.* at 683 ("The statistical significance of one individual in terms of its predictive or inferential value is virtually non-existent."). This legal stance was legislatively reversed by the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-17 (2010) (setting forth Civil Rights Act). The court stated, "Plaintiff has shown no pattern and practice on the part of Columbus Schools of denying all or a significant number of female applicants consideration for the job of Athletic Director." *Wynn*, 692 F. Supp. at 684.

that the discriminatory animus plaintiff seeks to prove, however, may reasonably be inferred from the basis of the defendants' decision not to elect Wynn as Athletic Director. As the defendants' witnesses testified, Wynn was not selected as Athletic Director primarily because the position required that the successful applicant also be able to serve as Head Football Coach, a position for which Wynn did not apply and admittedly could not perform.³⁶¹

Then, the court rejected the school district's articulated reason for having the dual position because of the considerable fund-raising and public contact.³⁶² The court remarked, "Logical and reasonable it [this reason] may be, legitimate and non-discriminatory it is not."³⁶³ The court concluded that the plaintiff had satisfied her Title VII claim of discrimination based on sex.³⁶⁴

In *Jackson v. Armstrong School District*,³⁶⁵ two female varsity and junior varsity basketball coaches unsuccessfully alleged violation of Title VII concerning the compensation and treatment they received compared to coaches of the boys' basketball team.³⁶⁶ The boys' varsity basketball coaches received triple what the girls' coaches were paid: \$972 for a first-year coach of the boys' teams, compared to \$324 for the coaches of girls' teams.³⁶⁷ The female coaches alleged that they had to do more in their capacity, essentially teaching the female players the rudiments of the men's game.³⁶⁸ A Pennsylvania district court determined the pay differential was not due to the sex of the coaches but rather the sex of the participants and, as such,

361. *Wynn*, 692 F. Supp. at 681.

362. *See id.* at 685 (arguing defendants have offered no evidence that head football coach could not continue to perform public relations or fund-raising functions).

363. *Id.*

364. *See id.* at 686 (stating court's holding).

365. 430 F. Supp. 1050 (W.D. Pa. 1977).

366. *See id.* at 1050-51, 1053 (offering factual background of plaintiffs' Title VII claim and holding plaintiffs failed to state claim under that Act).

367. *See id.* at 1051 (comparing salaries paid to girls' basketball coaches and boys' basketball coaches in district).

368. *See id.* at 1052 (featuring argument of female coaches). The court commented:

In reality, considering the disparities in natural ability long nurtured by tradition with the misguided notion now being repressed that the game was meant to be played only by males, a good argument could be made that schooling the feminine gender in such rudiments as dribbling and jump-shooting is indeed more difficult.

Id. Originally, females used a different model than males did when playing basketball. *See id.* (contrasting male and female models).

could not withstand the Title VII challenge.³⁶⁹ The court was satisfied that the women were not denied employment as coaches of the boys' teams, despite the presumed absence of any women coaching the boys' teams.³⁷⁰

A female coach of the girls' interscholastic basketball team alleged Title VII sex discrimination in *Fuhr v. School District of Hazel Park*,³⁷¹ because she was not hired as the boys' basketball coach, which she asserted would have been a promotion.³⁷² Fuhr had been a longtime coach when the school district posted an opening for the position of coach of the boys' basketball team.³⁷³ The district paid the same salary to the coaches regardless of whether they coached boys or girls.³⁷⁴ Only two applicants applied—Fuhr, a female and longtime coach, and a male applicant with less experience.³⁷⁵ Fuhr indicated her intent to continue coaching the girls' team.³⁷⁶ Allowing Fuhr to coach both teams would result in a brief overlap of the seasons because the boys' and girls' teams played at different times of the year.³⁷⁷ The district hired the male coach,

369. *See id.* at 1053 (holding plaintiffs failed to state claim under Title VII and granting summary judgment for defendants).

370. *See id.* at 1052 (setting forth holding of court). The court indicated: It is clear from the statute that the sex of the claimants must be the basis of the discriminatory conduct. Here plaintiffs are not discriminated against because of their sex. They are treated equally with the men who coach women's basketball . . . [P]laintiffs contend that they are denied higher wages and better working conditions because they coach women. While their case may be cited as an example of unfairness in employment it is not built to dimensions compatible with the statutory scheme.

Id.

371. 131 F. Supp. 2d 947 (E.D. Mich. 2001), *aff'd*, 364 F.3d 753 (6th Cir. 2004).

372. *See id.* at 950 (detailing plaintiff's contention that district favored male applicant on basis of sex).

373. *See id.* at 948 (illuminating factual background of case, including plaintiff's history with district and credentials as coach).

374. *See id.* (stating coaches of both girls' and boys' junior varsity basketball teams received additional nine percent of pay, whereas coaches of both girls' and boys' varsity basketball teams received additional eleven percent of pay).

375. *See id.* (portraying plaintiff's background and credentials). The opinion notes that Fuhr's resume included sixteen seasons coaching girls' basketball, twelve seasons coaching boys' basketball, eight seasons as assistant varsity basketball coach, and experience conducting clinics and tournaments. *See id.* This experience was measured against the credentials of the male applicant, which included experience as junior high gym teacher for four years and as coach of freshman boys' basketball team for two years. *See id.*

376. *See id.* at 949 (describing plaintiff's belief that there would be no problem with her coaching both boys' and girls' varsity basketball because she had previously coached both teams simultaneously).

377. *See id.* (stating there is potential overlap in girls' basketball season and boys' basketball season that depends upon girls' performance in state tournament).

indicating that it had a policy of not hiring coaches when there would be an overlap in varsity seasons.³⁷⁸ A Michigan district court agreed that being hired as the boys' basketball coach would have been a promotion, or, in the alternative, the district's failure to hire the female coach satisfied a requisite element for a Title VII case.³⁷⁹ The court denied the school district's motion for summary judgment because an issue of fact existed as to whether the proffered reason was a pretext for sex discrimination.³⁸⁰ The Sixth Circuit affirmed the trial court's decision.³⁸¹

In *Goins v. Hitchcock Independent School District*,³⁸² a female coach of the girls' basketball and volleyball teams initially filed a Title IX lawsuit concerning the funding and treatment of the separate boys' and girls' athletic programs at a Texas high school.³⁸³ The parties settled the matter in 1999, with a school district committee being assigned to address the underlying issues.³⁸⁴ The plaintiff, however, then filed an administrative complaint with the EEOC, asserting that the situation was not ameliorated.³⁸⁵ After filing the action, the female coach claimed that the school district engaged in retaliatory actions toward her, and the coach resigned from her positions.³⁸⁶ She then commenced a lawsuit charging vio-

378. *See id.* at 949, 951 (detailing defendant's decision to hire male coach and argument that district has "non-discriminatory practice" of not allowing same person to coach two sports when seasons overlap).

379. *See id.* at 952 (holding position as boys' varsity coach would have been promotion, meaning district failed to promote plaintiff, and plaintiff made out prima facie case of discrimination).

380. *See id.* at 953 ("Plaintiff, however, has provided sufficient evidence to raise an issue of fact that the defendant's articulated nondiscriminatory reason for its action was pretext for discrimination. Plaintiff, therefore, survives defendant's motion for summary judgment.").

381. *See id.*

382. 191 F. Supp. 2d 860 (S.D. Tex. 2002).

383. *See id.* at 871 (holding plaintiff had not suffered adverse employment action). The court stated that "[a]ctions such as 'decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,' may be extremely important to the plaintiff, but do not rise to the level of a constitutional deprivation." *Id.*

384. *See id.* at 864 (recognizing plaintiff and district settled matter concerning Title IX discrimination in funding of female and male athletic programs, which included agreement to establish committee that would address issues of gender inequality in district's athletic programs).

385. *See id.* (indicating plaintiff's dissatisfaction with continued gender discrimination in district's athletic programs and consequent decision to file complaint with EEOC in 2001).

386. *See id.* at 865 (summarizing district's alleged retaliation against plaintiff, including agreeing to pay her salary equivalent to male coaches but subsequently refusing to follow through, discouraging other employers from offering her employment, and discouraging other district employees from interacting with her).

lations of Title VII and Title IX.³⁸⁷ The particular Texas district court dismissed her Title VII claim against the school district, as well as her Title VII and Title IX claims against particular school employees, sued in their official and individual capacities.³⁸⁸

In *Reed v. Unified School District No. 233*,³⁸⁹ a Kansas district court determined that the female coach of the girls' interscholastic track team did not have a Title VII claim for sex discrimination.³⁹⁰ At a high school track event, the coach provided advice to another school's track athlete.³⁹¹ Reed's team did not have an athlete slated in that event.³⁹² The coach of the other girl's team registered his displeasure with the situation. As a result of this activity, the school district refused to renew the plaintiff's employment contract.³⁹³ The court concluded that the situation did not constitute sex discrimination.³⁹⁴

In *Jackson v. Birmingham Board of Education*,³⁹⁵ the Supreme Court, in a divided opinion, determined that the former male coach of an Alabama girls' interscholastic high school basketball

387. *See id.* at 865-66 (describing plaintiff's Title IX and Title VII claims and their attendant discovery issues).

388. *See id.* at 868-69 (granting defendant's motion to dismiss Title IX and Title VII claims in both official and individual capacities). As to Title IX, the court highlighted there were no Fifth Circuit opinions on the issue, but a plethora of other court opinions examining the non-imposition of liability on individually-named defendants. *See id.* at 869. Second, there is no individual liability for Title VII claims. *See id.* Albeit, the court questioned whether the plaintiff was contractually barred by the terms of the settlement agreement with the school district from bringing a Title IX claim against the school district. *See id.* at 872 n.13.

389. 299 F. Supp. 2d 1215 (D. Kan. 2004).

390. *See id.* at 1219 (describing facts of case and court's granting of defendant's motion for summary judgment on plaintiff's claim that defendant restricted plaintiff's coaching responsibilities and refused to recommend her to other employers on basis of gender).

391. *See id.* at 1220 (describing advice plaintiff gave to another school's athlete regarding her hurdling technique).

392. *See id.* at 1221 (explaining plaintiff knew no athletes from her school were competing in event).

393. *See id.* at 1219 (outlining background of dispute).

394. *See id.* at 1228 (holding employer's decision was not due to plaintiff's gender).

395. 309 F.3d 1333 (11th Cir. 2004), *rev'd*, 544 U.S. 167 (2005), *on remand*, 416 F.3d 1280 (11th Cir. 2005). Justice Sandra Day O'Connor, the first woman to become a member of the Supreme Court, authored the majority decision in *Jackson*. *See id.* (detailing O'Connor opinion). *See* Heckman, *Jackson v. Birmingham Board of Education*, *supra* note 32, at 14-20 (analyzing first intermediate appellate court decision rendered in *Jackson* and exploring potential Supreme Court options). *See* AB *ex rel.* CD v. Rhinebeck Central Sch. Dist., 224 F.R.D. 144 (S.D.N.Y. 2004) (allowing plaintiff's claim of Title IX retaliation to go forward for speaking out about alleged sexual harassment committed by a principal), *on further motion*, 361 F. Supp. 2d 312 (S.D.N.Y. 2005) (granting defendant's motion for summary judgment in part due to non-compliance with applied three-year statute of limitations).

team could pursue a Title IX cause of action for personal retaliation, where he advocated for gender equity on behalf of his student-athletes.³⁹⁶ The Eleventh Circuit previously determined that the coach had no such right.³⁹⁷ First, the Supreme Court, in sanctioning such a retaliation claim, found no impermissible extension of this statute, in light of the opinion rendered in *Alexander v. Sandoval*,³⁹⁸ even though the Title IX regulations, rather than the statute, explicitly prohibited retaliatory acts.³⁹⁹ The Court noted, “We do not rely on regulations extending Title IX’s protection beyond its statutory limits; indeed, we do not rely on the Department of Education’s regulations at all, because the statute itself contains the necessary prohibition.”⁴⁰⁰ Next, the Court addressed whether the coach was prohibited from bringing such a retaliation claim for essentially lacking standing. In allowing this right, the Court stated,

The [Title IX] statute is broadly worded; it does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint Where the retaliation occurs because the complainant speaks out about sex discrimination, the ‘on the basis of sex’ requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.⁴⁰¹

This language essentially protects the whistle-blower advocate, who claims purported violations of Title IX.⁴⁰² The opinion cements the Supreme Court’s imprimatur by allowing this separate Title IX cause of action by athletic department employees to proceed when speaking out about gender inequities that these coaches know are occurring. The decision is important as it protects the athletic department advocate when speaking out about the lack of gender equity suffered by third parties – the student-athletes or prospective student-athletes. How this stance will mesh with the Court’s subse-

396. *See Jackson*, 544 U.S. at 184 (reversing Eleventh Circuit decision by now allowing Jackson to pursue claim).

397. *See id.* at 167 (holding coach had cause of action under Title IX).

398. 532 U.S. 275 (2001).

399. *See Jackson*, 544 U.S. at 178 (explaining lower courts’ incorrect interpretations of Title IX’s private right of action).

400. *Id.*

401. *Id.*

402. *See id.* (demonstrating protection given to those who report such violations even if they are not actually victims). However, it would seem that when the team of student-athletes that the athletic department employee is coaching is purportedly being denied statutory gender equity, those inequities would extend to and impact the particular coach.

quent First Amendment free speech decision rendered in *Garcetti* where the Court allowed a state government employee to be disciplined for speaking out on matters connected to the individual's official duties, remains to be seen.⁴⁰³ In *Garcetti*, the critical inquiry was whether the individual spoke out as a citizen or as an employee.⁴⁰⁴ The Court noted, "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it there would be little chance for the efficient provision of public services."⁴⁰⁵

During 2007, in *Potera-Haskins v. Gamble*,⁴⁰⁶ the Montana district court examined the claimed violations of Title VII, Title IX and the First Amendment free speech rights of a terminated women's basketball coach.⁴⁰⁷ The University conducted a review of the women's basketball program during the plaintiff's tenure, and, in an unusual move, informed the coach that she should refrain from retaliating against the players, limit her practice time, and allow the players to talk with the assistant coaches.⁴⁰⁸ Subsequent to this review, the coach issued a number of memoranda – each one identifying her position as head coach – to various administrators at the state university concerning issues involving the team and the athletic department administration.⁴⁰⁹ After further consultation with the coach's players in the spring of 2004, the University issued

403. *See id.* (holding statements made by public officials pursuant to their official duties are not protected by First Amendment). *Compare* *Atkinson v. Lafayette Coll.*, No. CIV. A. 01-CV-2141, 2003 WL 21956416 (E.D. Pa. Jul. 24, 2003) (relying solely on *Garcetti* to decide the coach's Title IX claim) *with* *Bolla v. Univ. of Hawaii*, 2010 WL 5388008, at *10 (D. Haw. Dec. 16, 2010) (involving James A. Bolla, women's basketball coach at state university, who had complained of gender inequities between the men's and women's intercollegiate basketball programs, stating, "[t]he court is not persuaded by *Atkinson*, which did not examine the Supreme Court's *Jackson* decision.").

404. *See Jackson*, 544 U.S. at 415-16 (discussing significance of determining whether person spoke as employee because "government has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.").

405. *Id.* at 418.

406. 519 F. Supp. 2d 1110, 1115-18 (D. Mont. 2007) (granting summary judgment on § 1983 First Amendment claim, dismissing Title IV claim, and denying summary judgment on Title IX claim).

407. *See id.* at 1115 (grappling with issues presented to court in *Potera-Haskins*).

408. *See id.* at 1114 (explaining decision for review of women's basketball program).

409. *See id.* (summarizing coach's response to review directives).

an additional report concerning the coach.⁴¹⁰ Finally, in April 2004, the University terminated the coach from her position.⁴¹¹

First, the trial court granted qualified immunity to all the individually-named defendants on the First Amendment claim.⁴¹² Second, the trial court dismissed the plaintiff's Title VII claim because the plaintiff was not replaced by a man.⁴¹³ The court, however, denied the defendants' motion for summary judgment on the Title IX retaliation claim, finding that it was a question of fact as to whether the coach's termination was due to an underlying just cause for the employer's action or because of her memoranda.⁴¹⁴ The court based its holding on the plaintiff's claim that the defendants retaliated against her due to a sexual discrimination complaint.⁴¹⁵

In *Hankinson v. Thomas County School Systems*,⁴¹⁶ the Eleventh Circuit determined the female softball coach's Title VII claim that a Georgia public high school discriminated against her based on sex was untenable because the school proffered legitimate, non-discriminatory reasons for her termination, which were not pretextual.⁴¹⁷ The court, however, allowed her Equal Pay Act claim to

410. *See id.* (noting that school conducted further interviews with several players and compiled "an additional report regarding dissatisfaction with and concerns about Plaintiff's performance as head women's basketball coach").

411. *See id.* (detailing how only the University's president made ultimate decision to fire women's coach, while the Vice President of Student Affairs concurred in the president's decision).

412. *See id.* at 1117 (deciding that all defendants were entitled to summary judgment on First Amendment claim on qualified immunity grounds).

413. *See id.* at 1118 (explaining that plaintiff did not meet final Title VII requirement that employer must hire male to replace female). A Title VII claim has three elements that the plaintiff must meet: first, the plaintiff must belong to a class protected by Title VII; second, the plaintiff must have been qualified for the job; third, a male with similar qualifications must replace the female who the employer fired. *See id.* (declaring three elements of violation).

414. *See id.* (reasoning that plaintiff's Title IX claim cannot be decided upon summary judgment because "the reason for Plaintiff's termination remains an issue of material fact yet to be resolved").

415. *See id.* (asserting that plaintiff must only demonstrate that defendants wronged her after she complained of sexual discrimination).

416. 257 F. App'x 199 (11th Cir. Dec. 3, 2007).

417. *See id.* at 202 (holding plaintiff failed to rebut defendant's proffered legitimate non-discriminatory reason for termination). The court further stated "the employer's burden at this point is a heavy one; these exceptions constitute affirmative defenses and must be proved by a preponderance of the evidence." *Id.* at 201. *See also* *Dorman v. Webster Cent. Sch. Dist.*, 576 F. Supp. 2d 426, 429-30 (W.D.N.Y. 2008) (finding interscholastic girls' swim team coach, whose contract was not renewed, unsuccessfully sought remediation for violation of Title VII). The District Court for the Western District of New York noted that an "employer's decision not to rehire the employee will not be deemed an adverse employment action, *but only so long as the plaintiff in those circumstances had no reasonable expectation of rehire.*" *Id.* at 429 (emphasis in original). Because the school district had a policy of offering

move forward based on the more favorable salary paid to the boys' baseball coach, compared to the salary she received as the softball coach.⁴¹⁸

b) Other Individuals

In *Kemether v. Pennsylvania Interscholastic Athletic Ass'n*,⁴¹⁹ the plaintiff, a female referee, alleged that the state athletic association did not assign her to referee any boys' interscholastic basketball games.⁴²⁰ Kemether, a lawyer, argued that there were two forms of Title VII sex discrimination committed against her.⁴²¹ First, the plaintiff argued that the state interscholastic athletic association interfered with her employment relationship with the member-association schools, in violation of 42 U.S.C. § 2000e-2(a)(1).⁴²² Second, she contended that the athletic association acted as an employment agency in assigning her to referee certain interscholastic athletic events, which resulted in discrimination against her, in violation of

renewal contracts where the coaches had been favorably reviewed, the court entertained plaintiff's position that she suffered an adverse employment action. *See id.* (analyzing district's renewal policy). The court determined, however, that the District had legitimate, nondiscriminatory reasons for her termination, including: the failure to communicate effectively with players, parents and other coaches; the failure to visit other swimming programs or establish an intramural program during her third year; and, threatening not to attend a year-end team banquet. *See id.* at 430 (noting legitimate nondiscriminatory termination rationale). The coach had allegedly called one of her athletes a "cancer" on the team. *Id.* The coach contested the reasons advanced. *See id.* at 430-31. The plaintiff failed to comport with the defendant's direction not to take her son to practices; which she contended was indicative of gender discrimination as she claimed male coaches brought their children to practices or games. *See id.* at 431 (discussing acts of gender discrimination). However, defendant responded that it was unaware of those purported activities. *See id.* at 432. The court concluded plaintiff failed to show "that gender was a motivating factor in the employment decision." *Id.* at 431.

418. *See Hankinson v. Thomas Cnty. Sch. Sys.*, 257 F. App'x at 201 ("[T]he parties raise genuine issues of fact as to whether field maintenance and generation of revenue were primary duties of the [male] baseball coach.").

419. 15 F. Supp. 2d 740, 756 (E.D. Pa. 1998). *See id.* (noting plaintiff also asserted violation of Pennsylvania Equal Rights Amendment, PA. CONST. art. 1, § 28). The jury had awarded the plaintiff \$314,000 in damages. *See Kemether v. Pa. Interscholastic Athletic Ass'n*, 1999 WL 1012957, at *1 (denying defendant's motion for judgment as matter of law following jury verdict). *See also Heckman, Glass Sneaker, supra* note 21, at 608-09 (discussing Title IX and sex discrimination cases).

420. *See Kemether*, 15 F. Supp. 2d at 752 (detailing plaintiff's complaint where she claimed that she was not allowed to officiate boys' games).

421. *See id.* at 752-53 (explaining that Plaintiff has two theories as to how the athletic association may be liable under Title VII claim).

422. *See id.* at 762 (claiming defendant may be liable for interfering with plaintiff's employment relationships with third parties under Title VII).

§ 2000e-2(b).⁴²³ The defendant-athletic association asserted that neither theory applied as the plaintiff was not an employee under Title VII, but rather an independent contractor.⁴²⁴ While a Pennsylvania district court did not agree with the plaintiff's first argument, the court found a question of fact as to the latter argument.⁴²⁵ The jury ultimately sided with the plaintiff, awarding her compensatory damages.⁴²⁶

3. *Postscript*

The first three cases discussed herein involved female athletic department employees at California State University at Fresno ("Fresno State University"). In July 2007, a California state jury issued a verdict of \$5.85 million in favor of Lindy Vivas, the former women's volleyball coach at Fresno State University, for purportedly speaking out on behalf of female athletes in this post-*Jackson* case.⁴²⁷ In December 2007, another California state jury awarded Stacey Johnson-Klein, the former women's basketball coach at Fresno State University, a verdict in excess of \$19.1 million for her sexual discrimination claim against her former employer.⁴²⁸ In February 2008, within a week after the state trial judge reduced the

423. *See id.* (noting that Title VII requires "an employer" to have at least 15 employees for at least 20 calendar weeks). *See also Kemether*, 1999 WL 1012957, at *11 (asserting discrimination resulted from defendant's actions as employment agency).

424. *See Kemether*, 1999 WL 1012957, at *11 ("Defendant contends that the evidence is insufficient as a matter of law to support a finding of discrimination under either theory because during the regular season, plaintiff was not an employee of or an individual seeking employment with PIAA-member schools, but instead was an independent contractor.").

425. *See id.* (explaining that court left second question for jury to decide).

426. *See id.* at *5 (summarizing jury verdict and award of damages).

427. *See Story Archive: The Lindy Vivas Civil Trial*, THE FRESNO BEE (Jun. 25, 2007), <http://www.fresnobee.com/2007/06/25/68942/story-archive-the-lindy-vivas.html> (reporting on outcome of Vivas's jury trial). After the University terminated Vivas in 2004, she commenced her lawsuit in the California Superior Court at Fresno County. *See id.* (showcasing procedural background of suit). The trial judge reduced the award to \$4.52 million. *See Ken Robison, Vivas Award Cut to \$4.52m: Judge Denies New Trial for Fresno State vs. Fired Volleyball Coach*, FRESNO BEE, Oct. 13, 2007, at A1 (describing trial judge's reduction of jury award). During December 2007, the plaintiff agreed to accept this amount. *See Catherine Mylinh, Vivas Accepts \$4.5M Reduced Settlement*, KSEE24NEWS (Dec. 12, 2007), <http://www.ksee24.com/news/local/12445231.html> (describing plaintiff's acceptance of reduced award).

428. *See Gene Haagenson, Jurors React to Reduced Award for Johnson-Klein*, KFSN-TV/DT (Feb. 9, 2008), <http://abclocal.go.com/kfsn/story?section=news/local&id=5946085> (discussing jury's decision to award Johnson-Klein \$19.1 million). During February 2008, the trial judge reduced the award to \$6.6 million, and the University was planning on appealing this decision. *See id.* (describing reduction of award and university's response).

jury's award, Johnson-Klein accepted the \$6.6 million amount instead of undergoing a new trial.⁴²⁹ A third case involved Diane Milutinovich, a former associate athletic director, who settled a lawsuit against her employer, Fresno State University, for a reputed \$3.5 million in October 2007.⁴³⁰

In July 2007, in another California case, Karen Moe Humphreys, a 1972 Olympic gold medalist in swimming and former coach and athletic administrator at the University of California Berkeley, reached a multi-million dollar settlement with her former employer, which included her reinstatement, after she raised gender equity concerns.⁴³¹ In September 2007, Carmyn James, the women's track coach at the University of Hawaii at Minoa, commenced a Title IX case against her employer in a Hawaii state court while still employed.⁴³² By the end of the year, she agreed to drop her lawsuit, indicating that the University was planning to take steps to ameliorate her concerns about gender equity.⁴³³

Finally, new Title IX regulations, which became effective on November 24, 2006, allow for single-sex classes and extracurricular

429. See *Johnson-Klein Accepts \$6.6 Million Award*, THE COLLEGIAN ONLINE (Feb. 13, 2008), <http://collegian.csufresno.edu/2008/02/13/Johnson-Klein-accepts-66-million-award> (reporting Johnson-Klein's acceptance of the reduced award).

430. See Jill Lieber Steeg, *Lawsuits, Disputes Reflect Continuing Tension Over Title IX*, USA TODAY, May 13, 2008, http://www.usatoday.com/sports/college/2008-05-12-titleix-cover_N.htm (describing Title IX claims against Fresno State, including Milutinovich's settlement).

431. Humphreys commenced her gender discrimination and retaliation claim in a California federal district court. See *Olympic Champion Karen Moe Humphreys and University of California Settle Gender Discrimination Claim*, CALVO FISHER & JACOB LLP (July 20, 2007), <http://www.calvofisher.com/news/20070720-humphreys-uc-settle> (providing information regarding settlement of Humphreys' lawsuit). Humphreys coached at the University of California from 1978 until 1992, at which point she became the University's assistant athletic director for compliance. See Jill Lieber Steeg, *Title IX Q&A with Karen Moe Humphreys* (sic), USA TODAY, May 13, 2008, http://www.usatoday.com/sports/college/2008-05-12-title-ix-qanda_N.htm (summarizing Humphreys's career).

432. See Lauren Smith, *In a Rare Move, Coach Sues University While Still Employed*, CHRON. HIGHER EDUC., Sept. 13, 2007, <http://chronicle.com/article/In-a-Rare-Move-Coach-Sues/122051/> (noting case was instituted while coach was an active employee, which is unusual). See also Heckman, *Glass Sneaker*, *supra* note 21, at 595 ("There was no case law during this period involving female athletic employees who, while employed, alleged Title IX violations on the issue of unequal pay compared to male athletic employees.").

433. See Ferd Lewis, *UH Track Coach Drops Lawsuit*, HONOLULU ADVERTISER.COM (Dec. 9, 2007), <http://the.honoluluadvertiser.com/article/2007/Dec/09/sp/hawaii712090354.html> (reporting James' decision to withdraw her complaint after face-to-face meetings with administrators and her belief University will "do the right thing").

activities for elementary and secondary schools.⁴³⁴ In the commentary accompanying these major changes to Title IX, the OCR explicitly said, “These regulations do not change the prohibitions on sex discrimination in employment.”⁴³⁵ Parenthetically, the new regulations are not “intended to affect or change the longstanding Title IX requirements applicable to athletics, including interscholastic, club, or intramural athletics.”⁴³⁶

V. CONCLUSION

The entrenchment of the glass sneaker continues. The breadth of cases involving women showcases the struggles of women to achieve gender equity in the athletics field, in what was clearly a bastion for males. Despite forty-five years of legal protection, the number of women in positions within athletic departments is not proportional to their representation as citizens nationally. Moreover, the continued lack of hiring women to coach men’s teams constitutes a glaring deficiency that Title VII and Title IX were purportedly intended to help ameliorate.

It is clear that an athletic department employee may advance claims under Title VII or the Equal Pay Act for claims based on employment-related sex discrimination.⁴³⁷ Title VII has been the basis for a number of lawsuits in this area with mixed results.⁴³⁸ While the Equal Pay Act mandates equal pay for those doing equal jobs, surprisingly this federal statute has not proven a successful tool in the arsenal of those seeking equality in athletic employment compensation. Significantly, women have been stymied by the inability to set forth comparators (male coaches) that courts found appropriate, especially on the collegiate level.⁴³⁹ However, the gen-

434. See 34 C.F.R. § 106.34 (2010) (creating exceptions that allow for certain single-sex activities from general rule against gender-based discrimination in public schools). It can be expected that this relatively-recent dramatic change to the Title IX landscape will result in judicial challenges.

435. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,534 (Oct. 25, 2006) (codified at 34 C.F.R. §§ 106.34, 106.35, and resulting in a new § 106.43).

436. *Id.* at 62,539. 34 C.F.R. § 106.41 (2010) (“Athletics”) has undergone no changes since its inception.

437. For a further discussion of the application of Title VII and the Equal Pay Act to gender discrimination in employment, see *supra* notes 39-87 and accompanying text.

438. For a further discussion of lawsuits predicated upon Title VII protections, see *supra* notes 39-69 and accompanying text.

439. See, e.g., *Rallins v. Ohio State Univ.*, 191 F. Supp. 2d 920 (S.D. Ohio 2002) (denying plaintiff’s attempts to compare herself with male coaches because they were not similarly situated); *Sobba v. Pratt Cmty. Coll. & Area Vocational Sch.*, 117 F. Supp. 2d 1043 (D. Kan. 2000) (dismissing plaintiff’s claim in part for failure to

der equity area remains unclear in terms of whether Title IX is a viable legal avenue to claim sex discrimination in a regular employment action not involving sexual harassment. This lack of clarity reigns more than thirty-five years after the statute's enactment. Is a plaintiff consigned to only asserting a Title VII claim when the alleged discrimination concerns a Title IX adverse employment sex discrimination claim? Remarkably, it was only in 2005 that the Supreme Court sanctioned the right of educational employees to commence a lawsuit asserting personal retaliation for advocating about Title IX issues.⁴⁴⁰ The controversy surrounding this issue remains due to the favorable aspects of the Title IX paradigm compared to the more restrictive Title VII requirements.

The Supreme Court's decision in *Garcetti* may also come into play in the gender-advocacy-related cases, where both Title IX and First Amendment free speech grounds are raised by athletic department employees speaking out about a school's failure to satisfy gender equity with the curriculum or extracurricular athletic offerings provided or not provided. It can be expected that these plaintiffs will argue such Title IX-related speech constituted matters of public concern.⁴⁴¹ Despite the favorable *Jackson* decision, the Supreme Court has not addressed whether these same athletic department employees could assert a Title IX cause of action based on an adverse employment action suffered that is not associated with retaliation for their advocacy. This legal limbo remains in place as to whether both Title VII and Title IX claims may be advanced by athletic department personnel. Surprisingly, there has been minimal judicial discussion of the Title IX regulations that specifically cov-

present appropriate comparators); *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789 (S.D. Ohio 1998), *aff'd* 194 F.3d 1315 (6th Cir. 1999) (unpublished table decision) (granting defendant's motion for summary judgment for plaintiff's failure to produce sufficient evidence to show that men's ice hockey and women's field hockey were similarly situated for Equal Pay Act purposes); *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791 (E.D. Va. 1980) (rejecting jury verdict in plaintiff's favor for failure to prove that her employment position was equal to that of higher paid male basketball coach). *But see, e.g., Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681 (7th Cir. 2007) (holding female tennis coach was similarly situated to men's soccer and tennis coaches for purposes of Title VII disparate treatment claim); *Mehus v. Emporia State Univ.*, 326 F. Supp. 2d 1221, 1228 (D. Kan. 2004) (determining that the women's volleyball coach could use both the men's basketball coach and women's basketball coach as comparators).

440. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action.").

441. *See, e.g., Clay v. Bd. of Trs. of Neosho Cnty. Cmty. Coll.*, 905 F. Supp. 1488, 1498 (D. Kan. 1995).

ered educational employment⁴⁴² or the EEOC Enforcement Guidance, drafted as an adjunct for providing guidance concerning coaches.⁴⁴³

Review of these cases also highlighted the ease with which certain courts were willing to sanction lower pay for females when coaching female student-athletes compared to their male counterparts overseeing teams in the same sport composed of male student-athletes. Imbalances in resumes, the ability to raise revenue, and marketing or public relations aspects resulted in the denial of Equal Pay Act claims by women.⁴⁴⁴ Women seeking relief pursuant to the Equal Pay Act are still stifled by the aspect of the raising of revenue for their female teams compared to the ease with which male coaches raise revenue, especially on the collegiate level where a major source of revenue—television broadcasting contracts with major networks—elude those coaching Division I female athletes. Conversely, Title IX devotes no attention to this aspect of revenue raising in ensuring equal athletic opportunities when separate programs are provided for males and females.⁴⁴⁵ Interestingly, while the initiation of Title IX cases generally took off after the 1992 Supreme Court decision in *Franklin v. Gwinnett County Public Schools*,⁴⁴⁶ there was not a similar avalanche of cases commenced by athletic department personnel subsequent to the Title VII broadening of compensatory remedies due to the enactment of the Civil Rights Act of 1991. A bit ironically, the cases also reflect the generous amount of compensatory damages awarded by juries, once the lawsuits reached them, even if the courts later reduced some of the awards for the athletic department employees.⁴⁴⁷

442. See *supra* note 89 (listing applicable Title IX regulations contained in 34 C.F.R. pt. 106, and especially 34 C.F.R. 106.6, which deals with the effects of other statutes, including Title VII).

443. See *supra* notes 81-82.

444. For a further discussion of the legal weaknesses of many Equal Pay Act claims, see *supra* notes 70-87 and accompanying text.

445. See 34 C.F.R. § 106.41(c) (2010) (delineating factors to be considered in determining whether equal opportunities exist and not including television broadcast contracts as factor to be considered).

446. 503 U.S. 60 (1992).

447. For a further discussion of large jury awards, see *supra* notes 427-431 and accompanying text. See also *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-6986, slip op. at 1 (E.D. Pa. 1998) (discussing \$314,000 jury award); *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326, 348 (E.D.N.Y. 1998) (discussing approximately \$800,000 judgment); *Dugan v. Oregon*, No. 95-6250-HO (D. Or. 1995) (discussing approximately \$1 million jury award); *Tyler v. Howard Univ.*, No. 91-CA11239 (D.C. Super. Ct. Sept. 15, 1995) (discussing approximately \$1 million jury award).

The forty-five year span covered has yielded only one Supreme Court opinion, namely *Jackson*, discerning any of the federal gender equity statutes in a case brought by an educational athletic department employee.⁴⁴⁸ Considering the time span involved, there have been an exceedingly low number of published federal appellate court decisions issued addressing sex discrimination involving educational athletic employees advancing any of the three major federal statutes discussed.⁴⁴⁹ Despite a generation of females being afforded the increased benefits of athletic participation in high schools and colleges, the statistics of women involved with NCAA programs in the new millennium still remains woefully low. It remains to be seen whether this generation of women will begin demanding full parity in hiring and attendant benefits afforded. While the days of the male athletic director automatically hiring Paul instead of Paula have evaporated, there still remains an uneven field when it comes to females in the academic sports arena, and women are still overwhelmingly reporting to male athletic directors, who oversee the entire athletic department. Forty-five years later, women are still seeking pay and gender equity in the world of sports. The eradication of the “glass sneaker” ceiling has not come to fruition in educational athletics.⁴⁵⁰

448. See *Faragher v. Boca Raton*, 524 U.S. 775 (1998) (involving Title VII claim brought by female lifeguard working for Florida municipality).

449. See, e.g., *Bartges v. Univ. of N.C.*, 94 F.3d 641 (4th Cir. 1996) (unpublished table decision); *Fuhr v. Sch. Dist. of Hazel Park*, 364 F.3d 753 (6th Cir. 2004); *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep’t*, 510 F.3d 681 (7th Cir. 2007); *Equal Emp’t Opportunity Comm’n v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577 (7th Cir. 1987); *Horn v. Univ. of Minn.*, 362 F.3d 1042 (8th Cir. 2004); *Musso v. Univ. of Minn.*, 105 F.3d 409 (8th Cir. 1997); *Sennewald v. Univ. of Minn.*, 847 F.2d 472 (8th Cir. 1988); *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721 (8th Cir. 1982); *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1999); *Hein v. Or. Coll. of Educ.*, 718 F.2d 910 (9th Cir. 1983); *Brock v. Ga. Sw. Coll.*, 765 F.2d 1026 (11th Cir. 1985); *Oates v. District of Columbia*, 824 F.2d 87 (D.C. Cir. 1987).

450. See Heckman, *Glass Sneaker*, *supra* note 21 (invoking “glass sneaker” metaphor to describe “glass ceiling” phenomenon in collegiate athletics).