

GOOD SPORTS, INC.

Title IX and Gender Equity Specialists

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SUMMARY OF EEOC COACHES' SALARIES POLICY

Written By Valerie M. Bonnette
for Clients of *Good Sports, Inc.*

On October 29, 1997, the U.S. Equal Employment Opportunity Commission (EEOC) issued "enforcement guidance" on coaches' salaries. The EEOC enforces, among other laws, the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964. Title VII is a much broader law that prohibits many types of employment discrimination in addition to compensation, some of which may affect compensation (e.g., hiring, promotion, limiting opportunities), on several bases (e.g., sex, race, religion). A copy of the Guidance is enclosed for your information. The discussion below concerns specific points from the Guidance. We have also included a one-page summary of the EEOC's Guidance for your reference.

Although the EEOC states specifically (in footnote 8) that this 1997 Guidance supersedes its 1989 policy, in our opinion, the 1997 Guidance breaks no new ground. The 1997 Guidance provides useful elaboration on some points, provides the EEOC's position on some of the court cases of the 1990s, puts in writing for the public some routine civil rights principles, and includes some very useful examples emphasizing the points in the Guidance. We strongly recommend reading the examples, which may be particularly helpful in illustrating how general principles are applied to different fact situations, such as the differences between the unacceptable "market rate" defense and the acceptable "marketplace value" defense for different salaries (pages 18-20). The caution for the acceptable marketplace value defense is that the institution must be able to show that it has done its homework and based a higher salary for a specific individual on facts related to that individual. For additional examples, the footnotes to the Guidance reference some recent court cases and interesting instances in which the EEOC does not agree with a U.S. district court's analysis of issues.

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

Pages 7-14 of the Guidance dwell on determining whether jobs, including coaching positions for similar and dissimilar sports, may be "substantially equal" under the Equal Pay Act. The Guidance confirms that coaching jobs for different sports can be "substantially equal" for EPA and Title VII purposes. Some cautions are provided regarding jobs determined to be substantially equal. Inconsequential differences in jobs cannot justify different pay. Higher

pay cannot be justified because an individual has other skills not required to perform the specific job. Also, the mere fact that a male head coach has one or even two more assistants does not necessarily demonstrate that the male coach has a more responsible position.

It can be a serious challenge for institutions to define which coaching positions are substantially equal. The Guidance lists what to review - equal skills, equal effort, equal responsibility, and similar working conditions - but falls short of explaining how to measure each issue. This may be unavoidable - the Guidance quotes the regulation noting that, "What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined" but "the broad remedial purpose of the law must be considered." Furthermore, "As in all EPA cases, the skills, efforts, and responsibility required by the positions, as well as the conditions under which the jobs are performed, must be evaluated and compared on a case by case basis." "Because employment practices vary from school to school, each factual situation must be examined in detail." The Guidance acknowledges in its examples that the men's and women's basketball coaching positions may be the same on one campus but different on another campus. Again, the examples in the Guidance provide a good starting point for identifying substantially equal jobs.

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

The Guidance, after discussing what may constitute substantially equal jobs, mentions the four EPA defenses for different salaries - a seniority system, a merit system, a system measuring quantity and quality of production, and a differential based on any factor other than sex. Pages 15 to 25 of the Guidance discuss the common justifications advanced under the fourth defense - any factor other than sex. These include revenue production, competition for the individual, salary based on a prior salary, salary linked to the sex of the student-athletes, the male coach's superior experience, education, and ability, and the male coach's additional duties. We have summarized these issues below.

The EEOC acknowledges that revenue production, in certain cases, may constitute a defense under the EPA, but warns that it will carefully analyze this defense. Analysis may include evaluation of whether an institution provides equivalent publicity and marketing support that help produce revenue. The EEOC also acknowledges the approach for compliance under Title IX, that the total program rather than sport-to-sport comparisons are made for non-salary issues. In analyzing alleged discrimination in conditions of employment, the EEOC will apply the Title IX principle that different support is acceptable as long as the treatment in the overall program is not discriminatory. In other words, an institution that emphasizes men's basketball and provides publicity and promotions services to men's basketball, which may in turn affect salaries, does not have to emphasize and provide the same level of support to women's basketball. The institution may choose to emphasize another women's team, for example, volleyball, and meet the Title IX requirements and thus provide an acceptable

justification under the EPA and Title VU. The Guidance also acknowledges that teams may be in different developmental stages so identical treatment might not be appropriate or required.

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

Prior salary as a defense should be used with great caution. The EEOC will consider whether institution officials- consulted with the previous employer to determine the basis for prior salary; determined whether the prior salary was an accurate indication of the employee's ability; did not rely solely on prior salary; and, if it bargains, whether an institution bargains with both female and male employees. The Guidance goes on to clarify that even if an institution consults with the previous employers and sets the man's salary higher than the woman's salary as a consequence of those consultations, a difference in salaries is not justified if the woman's prior salary was influenced by sex discrimination.

Again, this discrimination does not refer to the general societal sex discrimination against women in athletics. It means that the institution of the woman's prior employment may have discriminated in employment policies or practices, may have discouraged her from engaging in speaking engagements or fundraising efforts that the prior institution used to justify higher salaries for men, or may have failed to provide publicity and marketing support for her team and herself as coach comparable to that provided to men's teams, thus affecting her salary. Determining whether prior salary was nondiscriminatory for the female applicant presents a particular challenge. However, it may be appropriate to inquire about the basis for the prior salary, the ability and experience of the individual, and whether women could compete for positions coaching men's teams.

The EEOC is most discouraging about using the sex of the athletes as "a factor other than sex" to justify different salaries and threatens more than once in the Guidance to refer an institution proffering this defense to the Office for Civil Rights for a Title IX athletics investigation. The important distinction in the EEOC's discussion is that the denial of equal opportunity for students must be at the institution. The analysis would involve determining whether women are given an equal opportunity to apply to coach men's teams at the institution and at institutions from which it is recruiting coaches.

This is fairly confusing when talking about a factor other than sex and yet referring to the sex of the athletes. A factor other than sex means other than the sex of the coach. A finding of sex discrimination in employment has to be based on the sex of the coach and not the sex of those being coached. For example, a man who coaches men's basketball and a man who coaches women's basketball may be paid vastly different salaries and there is no sex discrimination in employment because the sex of the coaches is the same (nonetheless, a Title IX concern is possible regarding coaching services to students). The EEOC does not clarify this point as to do so might encourage an institution to hire only men to coach both men's and

women's teams so as to avoid sex discrimination in employment claims. However, if women are not permitted to apply, that would violate Title VII.

Superior experience, education, and ability may justify pay disparities if distinctions based on these criteria are relevant to the job and not gender-based. Determinations on whether the reasons are bona fide and not gender-based must be made on a case by case basis. Additional duties are also an acceptable defense for higher wages if the higher pay is related to the extra duties, and the opportunity to perform the extra duties is available to both men and women.

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

As Guidance, this document does not contain the same force of law as agency regulations. However, the courts are very likely to cite to this Guidance unless detecting legally insufficient reasoning. While this summary should not be taken as legal advice, we hope that the above comments and the enclosed one-page summary are helpful.