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Sex Discrimination and the Equal Pay Act in Athletic Coaching

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SEX DISCRIMINATION AND THE EQUAL PAY ACT IN ATHLETIC COACHING

INTRODUCTION

In 1992, a woman earned only 71 percent as much as her male counterpart, while minority women faired even worse, earning only 59 percent of the wages of white males.[1] In the area of sports, a realm traditionally dominated by males and backed by the greater popularity and social acceptance of male participation, these disparities are compounded even further. Thus, a female coaching a female team faces the uphill battle not only of less interest in her sport, as compared with her male counterpart, but also of wage disparity between her compensation and the male's compensation.

Hoping to address the issue of wage disparity in general, in 1963 Congress enacted the Equal Pay Act[2] which prohibited discrimination in wages based on the gender of employees who perform equal work. This article examines how this particular legislation has combated wage disparities between males and females in the field of athletic coaching. The focus will be on sustaining valid claims under the Equal Pay Act as well as the subsequent case law interpretation of the statute as applied to athletic coaching. Next, the article considers the recent case of Stanley v. University of Southern California[3] and how it is an example of both consistency and inconsistency in interpretation of the Act. Finally, the article concludes with a brief look at the proposed Fair Pay Act of 1994, an

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1. Opening Statement of Rep. Eleanor Holmes Norton (D-DC) 1994 DLR 139 d27, July 22, 1994.

2. 29 U.S.C. § 206. The statute reads, in relevant part, as follows:

> 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: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d).

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

attempt to strengthen the Equal Pay Act, and its potential impact on athletic coaching.

I. ESTABLISHING A VIOLATION UNDER THE EQUAL PAY ACT

Congress enacted the Equal Pay Act as an amendment to section 6 of the Fair Labor Standards Act of 1938.[4] The statute sought to remedy the endemic problem of sex discrimination in wage setting by requiring equal pay for men and women who perform equal work.[5] The legislative history of the statute reveals that when Congress enacted the Equal Pay Act, it substituted the word "equal" for "comparable" to show that the jobs involved should be virtually identical, that is, they would be very much alike or closely related.[6] This modification also clarifies the point that the Equal Pay Act does not enact a "comparable worth" standard for compensation.[7] Hence, calculating the value of a female secretary and a male mechanic to an employer is not what the Act is intended to address. Rather, the proper situation is comparing the wages of a male and female performing the same job for the same employer.

In order to make out a prima facie case under the Act, a plaintiff must show "that an employer pays different wages to employees of opposite sex 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'"[8] The jobs held by employees of the opposite sex need not be identical, rather they must only be "substantially equal."[9] 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.[10] Thus, primary duties are

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4. 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986).

5. Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard For The Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1086 (1989).

6. Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 171 (5th Cir. 1975) (*quoting* Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973).

7. EEOC v. Madison Community Unit Sch. Dist. No. 12, 818 F.2d 577, 580 (7th Cir. 1987) ("[I]t is plain that Congress did not want to enact comparable worth as part of the Equal Pay Act of 1964."); AFSCME v. State of Washington, 770 F.2d 1401, 1404 (9th Cir. 1985) ("It is evident from the legislative history of the Equal Pay Act that Congress, after explicit consideration, rejected proposals that would have prohibited lower wages for comparable work, as compared with equal work."); *see also* 109 CONG. REC. 9197 (1963) (Congressman Goodell, one of the Act's sponsors remarked,"[w]e do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal").

8. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (*quoting* 29 U.S.C. § 206(d)(1)). *See also* Brock v. Georgia Southwestern College, 765 F.2d 1026, 1032 (11th Cir. 1985).

9. *Corning*, 417 U.S. at 203-04, n.24.

10. *Brock*, 765 F.2d at 1032. *See also* Mulhall v. Advance Security, Inc., 19 F.3d 586, 592 (11th Cir. 1994) ("only the skills and qualifications actually needed to perform the jobs are considered"); Hein v. Oregon College of Education, 718 F.2d 910, 914 (9th Cir. 1983); Peltier v. City of Fargo,

examined in the "substantially similar" inquiry rather than the prior experience of employees performing those duties.[11]

After satisfying this "descriptive" component, a plaintiff must satisfy the "geographic" component of the statute, that is, he or she must compare himself or herself with the employees working in the same "establishment."[12] The term "establishment" is defined by the Secretary of Labor as a "distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business."[13] However, courts have been reluctant to apply this narrow construction of "establishment." Instead, courts have acted liberally and recognized that central control and administration of disparate job sites can support a finding of a single establishment for purposes of the Equal Pay Act.[14] Particularly important to establishing a single "establishment" are centralized control of job descriptions, salary administration, and job assignments or functions.[15]

If the plaintiff sustains these burdens, the defendant assumes the burden of proving that the difference in pay is justified by one of the four exceptions in the Equal Pay Act: (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 factor other than sex.[16] A defendant must show that the factor of sex provided no part of the basis for the wage differential.[17]

II. COURT'S ATTEMPTS TO DEVELOP NEUTRAL FACTORS IN ASSESSING "EQUAL WORK" IN COACHING

Women in athletic coaching have attempted to use the Equal Pay Act to

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533 F.2d 374, 377 (8th Cir. 1976); EEOC v. McCarty, 578 F. Supp. 45, 47, n.1 (D. Mass. 1983); 29 C.F.R. § 800.125.

11. *Mulhall*, 19 F.3d at 592.

12. *Id.* at 590.

13. 29 C.F.R. § 1620.9(a) (1993).

14. Brennan v. Goose Creek Consolidated Indep. Sch. Dist., 519 F.2d 53, 57 (5th Cir. 1975); *see also* Marshall v. Dallas Indep. Sch. Dist., 605 F.2d 191, 193 (5th Cir. 1989) (all schools in a district under the control of a central administrative office constitute a single establishment); American Fed'n of State, County and Municipal Employees v. County of Nassau, 609 F. Supp. 695, 706 (E.D.N.Y. 1985) (a significant functional relationship between the work of employees in disparate locations gives rise to the finding of a single establishment under the EPA; geographic considerations are merely one factor in the analysis); Grumbine v. United States, 586 F. Supp. 1144, 1148 (D.D.C. 1984) (establishment is not automatically determined by geography but depends partially on degree of centralized personnel administration); Alexander v. University of Michigan-Flint, 509 F. Supp. 627, 629 (E.D. Mich. 1980) (single establishment existed where administrative office had authority to hire, fire, and set wages).

15. *Mulhall*, 19 F.3d at 590. *See also* Brownlee v. Gay and Taylor, Inc., 642 F. Supp. 347, 352 (D. Kan. 1986).

16. 29 U.S.C. § 206(d)(1). These exceptions are considered affirmative defenses, thus, the defendant bears the burden of persuasion as opposed to merely the burden of production. *Mulhall*, 19 F.3d at 591, n. 11.

17. 29 U.S.C. § 800.142; *Brock*, 765 F.2d at 1036.

equalize their wages with their male counterparts.[18] As a general proposition, an ideal plaintiff would be in a situation where she and her "comparator," her male counterpart, perform the same job, for the same employer, with the same responsibilities, having the same experience, and with similar teams.[19] In turn, courts are delegated the task of making factual comparisons and drawing legal conclusions on whether sex discrimination exists.

In *Brock v. Georgia Southwestern College*,[20] the Eleventh Circuit Court of Appeals specifically compared the jobs of plaintiff, Mary Reeves, and a comparator, Robert J. Voight. The plaintiff taught skill and classroom courses in the Physical Education Division of the College, and coached, organized, and supervised the intramural athletics program. Her male counterpart, Voight, also had classroom duties in the same Physical Education Division, and coached the intercollegiate basketball team.[21] Testimony indicated that the teaching duties of the two were "fairly similar," so the question turned on whether Voight's coaching job involved more responsibility than plaintiff's.[22] Responsibility involves the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.[23] The court in *Brock* held that the plaintiff's duties of scheduling, obtaining referees, administering a $2,500 budget, and supervising a number of different intramural sports involving hundreds of students constituted "substantially equal responsibility" to Voight's duties of scheduling games, transporting his team, being responsible for them on trips, and administering a budget of $8,000.[24] Also significant was testimony indicating that the intramural program was just as important as the intercollegiate program because it fulfilled the needs of more students, and that there was "not a great deal of pressure" on Voight as the basketball coach.[25] Hence, plaintiff was entitled to compensation on an equal basis with Voight, her male counterpart.

Jacobs v. College of William and Mary[26] illustrates a situation where a court did not find a violation of the Equal Pay Act. Here, plaintiff Eloise A. Jacobs, the female head coach of the women's basketball team, brought an action under the Equal Pay Act seeking to be compensated equally with her male counterpart, the men's basketball coach, William Parkhill.[27] In denying her claim, a Virginia

18. Actions brought by plaintiffs under the Equal Pay Act invariably also include causes of action under Title VII, Title IX, and various tort remedies such as wrongful discharge. In order to maintain focus and clarity, this Article does not review these claims due to their different requirements, standards of proof, and rationales.

19. Most, if not all, comparisons occur with a female coaching a female team and a male coach coaching a male team.

20. 765 F.2d 1026 (11th Cir. 1985).

21. *Id.* at 1035.

22. *Id.*

23. 29 C.F.R. § 800.129.

24. *Brock*, 765 F.2d at 1035. Of note, the court pointed out that the difference in budgets was not "significant enough" to overturn the district court under the clearly erroneous standard of review. *Id.* at 1035, n. 21.

25. *Id.* at 1035.

26. 517 F. Supp. 791 (E.D. Va. 1980).

27. The plaintiff in *Jacobs* also attempted to use the men's baseball coach, and the assistant

District Court delineated what it considered to be controlling factors.[28] First, Parkhill, the male coach, devoted a substantial amount of time, effort, and skill in recruitment that required extended travel and absence from home, while Plaintiff did not engage in these types of activities.[29] Moreover, Parkhill's employment extended to twelve months as compared to nine months per year for the plaintiff.[30] Likewise, Parkhill coached in a Division I program while plaintiff's team played in a small college league.[31] The most important fact though was that men's basketball was a revenue producing sport and women's basketball was not.[32] Based on these criteria, the court concluded from the undisputed evidence that Parkhill had greater responsibility and was required to exercise greater skill in his job.[33] Therefore, the court held that there was "no showing of any salary differential for . . . positions which were substantially equal . . . ."[34]

Finally, the case of *EEOC v. Madison Community Unit Sch. Dist. 12*[35] represents another jurisdiction's attempt to assess "equal work" in coaching. *EEOC* involved two female plaintiffs, Luvenia Long and Carol Cole.[36] Long, a coach on the girls tennis team, used the male coach of the boys' tennis team as a comparator. On the other hand, Cole, who coached the girls' volleyball, basketball, and softball teams, used the male coach of the boys soccer team and the male coach of the boys' baseball team as comparators.

In an opinion by Judge Posner, the Seventh Circuit affirmed the district court's conclusion that the jobs of coaching the girls' tennis team and coaching the boy's tennis teams are "sufficiently alike to be equal" such that the school district violated the Equal Pay Act.[37] Controlling factors included similarities in skill, effort, and responsibility needed. The fact that the male coach spent more time at his job than the female coach was offset by the fact that he had more assistant coaches. Moreover, the court reasoned that revenue production was not an important factor here, as only one team, men's basketball, was a revenue producer and the plaintiffs did not use the men's basketball coach as a comparator.[38]

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men's basketball coaches as bases for comparing her allegations of unequal pay. Her comparisons with these individuals met with similar fate. *Id.*

28. The court characterized the differences in skill, effort, and responsibility between plaintiff and her male counterpart as "numerous" and granted the defendant judgment n.o.v. *Id.* at 797.

29. Both engaged in telephoning, writing, and responding in recruitment efforts, so in effect, these responsibilities canceled each other out. *Id.*

30. *Jacobs*, 517 F. Supp. at 797.

31. *Id.* at 798.

32. *Id.*

33. *Id.*

34. *Id.*

35. 818 F.2d 577 (7th Cir. 1987).

36. Four women claimed to be victims of sex discrimination, but these two intervened in the EEOC's suit against the school district in Madison, Illinois. *Id.* at 579.

37. *Id.* at 583.

38. *Id.*

Cole's claim suffered a different fate, as the appellate court vacated the district court's findings of Equal Pay violations in her case. In part, this decision rested on the fact that Cole's comparators consisted of coaches of different sports. Because the Madison school district treats coaching a different sport as a different job, irrespective of the sex of the coach, proper findings were needed on remand to determine whether wage differences in different sports were based on sex. In effect, the appellate court remanded all the cases where the district court made findings by comparing different sports.[39]

Thus, EEOC stands for the proposition that in terms of athletic coaching, a court will require, when possible, that coaches in the same sport be used as comparators. Thus, a female head coach of a women's basketball team would more easily make a prima facie showing of sex discrimination under the Equal Pay Act by comparing her compensation with a male coach of a basketball team, as opposed to a male coach of a soccer team.[40]

III. STANLEY V. USC: IS IT CONSISTENT WITH NEUTRAL FACTORS

A. Facts and the Lower Court Opinion

Stanley v. University of Southern California[41] represents a court's most recent exploration of the Equal Pay Act and athletic coaching. It may also be the highest profile case in this area given the fact it involved two "big-time" athletic programs, the men's and women's basketball teams at the University of Southern California (USC).

The case involved Marriane Stanley, the head coach of the women's basketball team at USC from 1989 to 1993. When the expiration date on her first four year employment contract was approaching, Stanley began negotiations with Michael Garrett, the school's athletic director, for a new contract.[42] Although the evidence is disputed as to exactly what statements are attributable to each party during negotiations, Stanley admitted in her declarations that she told Garrett that she "was entitled to be paid equally with the Head Men's Basketball Coach" because of her outstanding record and the success of the women's basketball program.[43]

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39. *Id.* at 584.

40. The court did say that differences in sports do not preclude application of the Equal Pay Act. *Id.* ("[T]here is no objection in principle to comparing different coaching jobs"). Challenges under the Equal Pay Act have also been made under a different rubric. Specifically, in Deli v. University of Minn., 1994 U.S. Dist. LEXIS 13394 (July 18, 1994), the plaintiff, the former head coach of the women's gymnastics team, alleged that the defendant paid her less than head coaches of several men's athletic teams in violation of the Equal Pay Act. She claimed this discriminatory pay differential was based not on *her* gender, but on the gender of the *athletes* she coached. The court rejected her claim based on *EEOC*, reasoning that "the EPA prohibits discrimination based on the gender of the claimant only and does not reach compensation differentials based on the gender of student athletes coached by a claimant." Deli v. University of Minn., 1994 U.S. Dist. LEXIS 13394 at *7.

41. 13 F.3d 1313 (9th Cir. 1994).

42. *Id.* at 1316.

43. *Id.* Garrett alleged in an affidavit that Stanley "wanted a contract that was identical to that

These negotiations led Garrett to offer Stanley a three year contract raising her annual salary from the current $60,000 to $80,000 in the first year, $90,000 in the second year, and $100,000 in the final year of the three year contract.[44] According to Garrett, Stanley called this offer "an insult."[45] As a counter-offer, Stanley requested a three-year contract which would compensate her at an annual rate of $96,000 for the first 18 months and then increase her compensation to the same level as Raveling for the last 18 months.[46] Garrett rejected this counter-offer.[47] After exchanging another futile offer and counter-offer, a process in which Stanley accused Garrett of refusing to "negotiate in good faith," Garrett communicated to Stanley that all of his offers were off the table, and that he was in the process of seeking another coach. At that point, Stanley's original four year contract had expired.

On August 5, 1993, Stanley filed a lawsuit based, *inter alia*, on the Equal Pay Act, and applied for a temporary restraining order (TRO) requiring USC to install her as head coach of the women's basketball team.[48] The gravamen of Stanley's multiple claims against USC was her contention that she was entitled to pay equal to that provided to Coach Raveling for his services as head coach of the men's basketball team because the position of head coach of the women's team "requires equal skill, effort, and responsibility, and is performed under similar working conditions."[49] The district court concluded that Stanley had failed to demonstrate a likelihood of success on the merits of her claim that she had been denied equal pay for equal work because she failed to present facts indicating that USC was guilty of sex discrimination in the negotiations for a new contract.[50]

B. The Appellate Court Opinion

On appeal, the Ninth Circuit court proceeded with a factual comparison of the responsibilities of Coach Stanley and Coach Raveling in their respective positions. The standard, again, required the plaintiff to show discrimination in wages "between employees on the basis of sex . . . for equal work, on jobs the performance of which requires equal skill, effort, and responsibility, and which are per-

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between USC and Coach Raveling." *Id.* George Raveling was the men's basketball coach at USC.

44. *Id.* The contract proposal also consisted of a renewal of Stanley's $6,000 housing allowance as well as a increase in the salary of her assistant coaches. *Id.*

45. *Id.*

46. *Id.* at 1316-17. The appellate court did not state Raveling's salary anywhere in it's opinion. The district court did view Raveling's contract in camera when considering Stanley's motion for a preliminary injunction.

47. *Id.* at 1317.

48. *Id.* at 1318. Like many plaintiffs who allege violations of the Equal Pay Act, Stanley also set forth claims based on Title IX, 20 U.S.C. § 1681(a) (1988), and other state law claims. These will not be discussed as this article focuses only on the Equal Pay Act.

49. *Id.* at 1319 (*citing* Appellant's Opening Brief at 34).

50. *Id.* at 1321.

formed under similar working conditions.[51] The court required each of these components to be substantially equal for there to be a valid claim under the Equal Pay Act.[52]

In comparing responsibility, the court noted that Raveling's duties as head coach require substantial public relations and promotional activities that generate revenue for the University.[53] In addition, Raveling was required to conduct twelve outside speaking engagements per year, to be accessible to the media, and to participate in certain activities that raise revenue for the school's athletic department.[54] While Coach Stanley engaged in similar behavior, the court reasoned that the "quantitative dissimilarity in responsibilities justifies a different level of pay for the head coach of the women's basketball team."[55]

As a corollary, the appellate court reasoned that Coach Raveling had substantially different qualifications and experience related to his public relations and revenue-generation skills than Coach Stanley.[56] This included educational training in marketing, greater tenure at USC, greater experience in the coaching profession, and greater national exposure.[57] Because employers may reward professional experience and education without violating the EPA,[58] Raveling's greater experience was one factor that justified his higher salary.

According to the court, Raveling's greater national exposure translated into another factor which justified unequal pay, since an employer may consider the marketplace value of the skills of a particular individual when determining his or her salary.[59] This proposition accords with the view that unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.[60]

Finally, the court looked to the fact that the men's basketball team generated 90 times more revenue than the women's team.[61] This led the court to conclude that USC placed greater pressure on Coach Raveling to promote his team and win.[62] Thus, Stanley's job required a different level of responsibility and was performed under different working conditions as to fail the "substantially equal"

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51. 29 U.S.C. § 206(d)(1) (1988).

52. *Stanley*, 13 F.3d at 1321 (*citing* Forsberg v. Pacific Northwest Bell Tel., 840 F.2d 1409, 1414 (9th Cir. 1988)).

53. *Id.* at 1321.

54. *Id.*

55. *Id.* The court also cited Horner v. Mary Inst., 613 F.2d 706, 713-14 (8th Cir. 1980), for the proposition that a "court may consider whether job requires more experience, training, and ability to determine whether jobs require substantially equal skill under the EPA. For a contrary view, see *Brock*, 765 F.2d at 1032. *See also Mulhall*, 19 F.3d at 592 ("[O]nly the skills and qualifications actually needed to perform the jobs are considered").

56. *Stanley*, 13 F.3d at 1322-23.

57. *Id.* This included having two best-selling novels published, performance as an actor, and appearances on national television.

58. Soto v. Adams Elevator Equip. Co., 941 F.2d 543, 548, n. 7 (7th Cir. 1991).

59. *Horner*, 613 F.2d at 714.

60. *Stanley*, 13 F.3d at 1322 (*citing* EEOC, 818 F.2d at 580).

61. *Id.* at 1321.

62. *Id.* at 1322.

inquiry under the Equal Pay Act. In so holding, the court explicitly rejected Stanley's argument that the difference in revenue should be ignored, and instead labeled revenue generation "an important factor" that may be considered in justifying greater pay.[63] In sum, the appellate court held that Stanley's and Raveling's jobs contained significant differences such that they were not "substantially equal" for purposes of the Equal Pay Act.[64]

C. Analysis

The decision in *Stanley* was both inconsistent and consistent to precedent interpreting the Equal Pay Act. The *Stanley* court appeared to place too much reliance on Coach Raveling's prior experience. Brock, *Jacobs*, and *EEOC* did not discuss experience as a factor in Equal Pay Act analysis. Instead, those cases focused on factual comparisons between job responsibilities, skill, and effort. At a minimum, the court's reasoning in *Stanley conflicts* with the Eleventh Circuit's reasoning in *Mulhall* which stated that "comparators' prior experience is not relevant to the 'substantially similar' inquiry."[65] The *Mulhall* decision, which was rendered after *Stanley*, emphasized the point that "in Equal Pay Act cases, we compare the jobs, not the individual employees holding those jobs."[66] *Stanley* appears to be the first case with respect to athletic coaching in which experience is an important factor in Equal Pay Act analysis.[67]

Stanley also brings the factor of revenue production into greater focus. The court's reasoning indicates that in cases involving major universities such as USC, the need for revenue, and the coach's ability to generate it, would appear to be a factor which makes one job inherently more difficult than the other. Ironically this may lead to a situation where coaches in small universities, high schools, and junior high schools would be more able to prove violation of the Equal Pay Act than coaches at large universities due to the fact that the former

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63. *Id.* at 1323. Stanley made two other arguments on this point: (1) that the failure to allocate funds in the promotion of the women's basketball team demonstrated gender discrimination; and (2) that this disparate promotion caused the differences in spectator interest and revenue production. *Id.* The court rejected the first for lack of sufficient evidence and characterized USC's greater allocation of resources to the men's team as a business decision. *Id.* It rejected Stanley's second argument on the notion that societal discrimination in preferring to witness men's sports in greater numbers cannot be attributed to USC. *Id.*

64. *Id.*

65. *Mulhall*, 19 F.3d at 592. This case did not involve coaching but rather executives within a security company. Nevertheless, it provides a sharp contrast with *Stanley*.

66. *Id.*

67. Experience, nevertheless, would seem to be a relevant factor based on the "any factor other that sex" defense to the Equal Pay Act. Certainly, a reasonable person would admit that a male coach with twenty years experience would deserve a higher salary than a female coach with two years experience, even assuming their jobs are *exactly* equal. Moreover, it would appear that greater experience would incorporate itself into the market for coaches, as coaches with more experience would be in greater demand than inexperienced ones. Experience would also tend to be evidence of greater skill, a factor in the EPA equation. Hence, the *Stanley* decision has merit on this point.

do not depend on the school's athletic teams to produce revenue. Indeed, it appears that if the revenue producing factor had been excluded, and the won-loss record included, *Stanley* may have been decided differently.

The court's reluctance to use won-loss record as a criteria is also of relevance. The plaintiff introduced evidence of her success, she had been named PAC-10 Coach-of-the-Year in 1993, in support of her contention that she deserved a salary equivalent to that of Coach Raveling.[68] The court's omission of this factor in it's analysis is consistent with interpretation of the Equal Pay Act to the extent that the Act seeks to equalize wages in *jobs* which are substantially equal in responsibility, skill, and effort.[69] On the other hand, the opinion failed to account for the possibility that Coach Stanley's superior won-loss record demonstrated greater skill and effort, two important factors under the Equal Pay Act, choosing instead to focus on the differences in responsibility between the male coach and the female coach. The court's failure to compare skill and effort, as reflected by success of the respective basketball programs, appears inconsistent with the Equal Pay Act.

D. The Fair Pay Act of 1994, a Legislative Attempt at a Remedy

The Fair Pay Act of 1994 amends the Fair Labor Standards Act of 1938, of which the Equal Pay Act is an amendment, by extending the protections of the Equal Pay Act to race and national origin. It requires employers to pay equal wages for equivalent work performed by employees, irrespective of their race, gender, or national origin.[70] The proposed amendment defines "equivalent jobs" as "jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."[71] As a qualification, differentials in payment are still permitted if made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity or quality of production.[72] However, the language of the amendment has been carefully crafted as to exclude the "any other factor than sex" exception that exists within the current Equal Pay Act.

The Fair Pay Act also goes beyond the nominal boundaries of the Equal Pay Act. The Equal Pay Act is restricted to cases of unequal wages for equal work. It does not extend to dissimilar work that is of equal value to an employer akin to a "comparable worth" standard.[73] The Fair Pay Act of 1994 would remedy this omission through the "equivalent work" formulation.

As applied to coaching, the Fair Pay Act would appear to be marginal in effect. The addition of race and national origin would not address the problem of sex discrimination in wages of coaches, although admittedly it may open up a

68. *Stanley*, 13 F.3d at 1322, n.2.
69. *See supra* note 10 and accompanying text.
70. H.R. 4803, 103rd Cong., 2d Sess. § (G)(1)(A) (1994).
71. H.R. 4803, § 3(B)(4)(B).
72. *See* H.R. 4803, § (G)(1)(A).
73. *See supra* note 7 and accompanying text.

new can of worms as black coaches and white coaches seek equal compensation. Moreover, the deletion of the final affirmative defense to the Equal Pay Act also would appear to be ancillary. In most cases where allegations under the Equal Pay Act fail, plaintiffs fail to state their prima facie case of demonstrating "substantially equal jobs." For the most part, the affirmative defense of the wage disparity being based on "any factor other than sex" is not as an important part of the analysis as the factual "substantially equal" comparison.

CONCLUSION

Whether under the Equal Pay Act or the Fair Pay Act, female coaches like Marriane Stanley will in all likelihood continue in a struggle to earn equal compensation with their male counterparts. Ultimately their campaign will probably depend less on their actual talents as coaches, but instead, more on the popularity of female athletics. Only then will they command salaries more commensurate with their male counterparts.

Gregory Szul