COACHES IN COURT: LEGAL CHALLENGES TO SEX DISCRIMINATION IN COLLEGE ATHLETICS

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I. INTRODUCTION

On April 16, 2013, Coach Beth Burns was the head coach of the women's basketball team at San Diego State University.[1] Her team had just finished up a record-setting season, and she "had just been named Mountain West Conference Coach of the Year, WBCA NCAA Division I Region 7 Coach of the Year, and a finalist for NCAA Division I National Coach of the Year."[2] She had served as head coach continually since 2005, having been hired back to the position she previously held from 1989-1997.[3] Burns was one year into a five-year contract renewal at a $220,000 annual base salary with opportunities for additional compensation based on merit.[4]

When she arrived at her athletic director's office that day, for what she believed to be her annual performance review, she had no idea that it would be her last day on the job.[5] Burns later describes being shocked and blindsided by athletic director Jim Sterk's real purpose for the meeting: to present Burns with three options: "resign, retire, or be fired."[6] She was equally shocked by the

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[1] Complaint at 3, Burns v. San Diego State Univ. et al., No. 37-2014-00003408-CU-CO-CTL (Cal. Super. Ct. filed Feb. 19, 2014).
[2] *Id.* at 6.
[3] *Id*. at 3.
[4] *Id*. at 4.
[5] *Id*. at 2.
[6] *Id*.

reason Sterk presented.

Sterk presented that Burns had purportedly "struck a subordinate"—her assistant coach Adam Barrett.[7] A video that was slid under Sterk's door shows Burns and Barrett seated next to each other at a bench on the sideline.[8] At two different points during the game, Burns made contact with Barrett, bringing her hand down on his clipboard and seemingly elbowing him, in moments following baskets by the opposing team.[9] Burns would later describe the video as showing "insignificant" and harmless contact made in the heat of the game and coaching the team.[10] Even Barrett did not perceive the contact to be malicious in any way.[11] Nevertheless, the video served as the university's official rationale for terminating a successful coach "for cause" in the middle of her contract.[12] Sterk claimed it was part of a pattern of aggression towards her coaching staff, notwithstanding Burns's record of positive performance evaluations and commendations from university officials.[13]

Blindsided is also how some described the firing of successful University of Iowa head field hockey coach Tracey Griesbaum.[14] When she was asked to meet with athletic director Gary Barta on August 4, 2014, the fourteen-year veteran head coach knew that the department had received an anonymous complaint that Griesbaum intimidated and verbally abused her players.[15] But a university investigation cleared her of wrongdoing and she had discussed with her boss her plans for moving forward.[16] Days later, however, Barta informed Griesbaum that she was fired at the start of her season and in the middle of her contract.[17]

Though the timing of the decision could have seemed shocking since it was so soon after the seemingly favorable resolution of the anonymous complaint, it may not have been so surprising to anyone following the trend at Iowa.[18] In the time period of Barta's employment, the athletic department "pushed out or fired"

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[7] *Id*. at 2.
[8] Mark Zeigler, *Former SDSU AD Sterk Takes Stand in Burns Trial*, SAN DIEGO UNION TRIB. (Sep. 13, 2016), http://www.sandiegouniontribune.com/sports/aztecs/sdut-sdsu-beth-burns-trial-jim-sterk-2016sep13-story.html.
[9] The video is posted here. Mark Zeigler, *Burns' Lawsuit v. SDSU Finally Goes to Trial*, SAN DIEGO TRIB. (Aug. 27, 2016), http://www.sandiegouniontribune.com/sports/sdut-sdsu-beth-burns-wrongful-termination-trial-begins-2016aug27-story.html.
[10] *Burns*, No. 37-2014-00003408-CU-CO-CTL, at 7.
[11] Zeigler, *supra* note 8.
[12] *Burns*, No. 37-2014-00003408-CU-CO-CTL, at 7.
[13] Zeigler, *supra* note 8.
[14] Annie Brown, *A Man's Game: Inside the Inequality that Plagues Women's College Sports*, REVEAL NEWS (May 5, 2016), https://www.revealnews.org/article/a-mans-game-inside-the-inequality-that-plagues-womens-college-sports/.
[15] Complaint at 15, Griesbaum v. The Univ. of Iowa et al. (Dist. Ct. Iowa filed Feb. 29, 2016); *see also* Brown, *supra* note 14. Though the accessible version of Griesbaum's complaint lacks a registered "CL" number, the action is available here: https://assets.documentcloud.org/documents/2800035/Tracey-Griesbaum-Filing.pdf
[16] Brown, *supra* note 14.
[17] *Id*.
[18] *Id*.

six female coaches and the highest-level female administrator.[19] The athletic department provided various explanations for the fate of all these female coaches, including player complaints, like in Griesbaum's case, or failure to produce enough wins.[20]

However, some attribute the lack of competitive success to the department's failure to support the women's teams with adequate resources, and also point out that neither complaints against male coaches nor their success records were scrutinized similarly.[21] Some of these female coaches were replaced with male coaches who were paid significantly higher salaries than their predecessors, and when female coaches were replaced by other women, those women were paid less.[22] In this context, Griesbaum's termination, unfortunately, may be not so "shocking" after all.

Shannon Miller's women's hockey team at the University of Minnesota-Duluth ("UMD") was in the middle of a winning streak and had a national ranking when athletic director Josh Berlo called her to a meeting on December 9, 2014.[23] There, Miller learned from Berlo that her employment contract would not be renewed at the end of the season in June, nor would the contracts of any of the women's hockey staff.[24] Berlo's explanation was that "the decision was 'strictly financial'" and that the university could not afford to retain one of the most successful coaches in hockey.[25]

This surprised Miller, because prior to this time, Berlo had not indicated to Miller that he was not considering nonrenewal,[26] nor had he raised ahead of time the possibility of alternative ways to address the financial situation, such as a salary reduction.[27] Miller reported that if one had been offered, she would have taken a salary reduction to save her job, as she had during hard times in the past.[28]

The media also found Berlo's explanation surprising. One reporter pointed out that after replacing Miller with another coach, the university would only save "maybe $65,000."[29] Miller already earned less than her men's team counterpart, and ran her successful program on a smaller operating budget[30]—facts that further obscured the foreseeability of Berlo's "strictly financial"

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[19] *Griesbaum*, at 9; *see also* Brown, *supra* note 14.
[20] *Griesbaum*, at 10-14.
[21] *Id*. at 6-7.
[22] *Id*. at 12-14.
[23] Complaint at 5, Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015).
[24] *Id*.
[25] *Id*.
[26] *Id*. at 6.
[27] *Id*. at 5-6.
[28] Kate Fagan, *Minnesota-Duluth Doesn't Want Wildly Successful Hockey Coach . . . Wait, What?*, ESPNW (Dec. 18, 2014), http://www.espn.com/espnw/news-commentary/article/12046227/minnesota-duluth-want-wildly-successful-hockey-coach-wait-what.
[29] *Id*.
[30] *Id*. ("Miller will make approximately $215,000 this season. Yes, she is the highest paid women's college hockey coach in the country [and deservedly so], but her base salary is still $20,000 less than UMD men's coach Scott Sandelin. Also, the operating budget for women's hockey was already about $275,000 less than that of the men's program."). *Id*.

decision. Along with two other female UMD coaches who left or were forced out around the same time as Miller, Miller claims that the athletic department was a hostile working environment for female coaches, especially those, like Miller and her colleagues, who are gay.[31]

These three cases serve as examples of some of the ways that sex discrimination operates in the working environment of college athletics. These coaches are not alone. A recent study found that forty percent of female college coaches believe they have experienced sex discrimination in the workplace.[32] Thirty-three percent believe that they do not have the freedom to ask their departments to address gender bias without being punished for doing so.[33] Female coaches were twice as likely as male coaches to perceive that their "performance was evaluated differently because of gender (15% versus 6%)."[34]

It is likely that employment discrimination is a contributing factor to the significant gender gap in the ranks of college athletics' career professionals, where women are outnumbered at every rung of the leadership ladder, from assistant coach to head coach to administrator to athletic director.[35] The dearth and decline of women among the ranks of college coaches is particularly notable in contrast to rising number of opportunities women have in virtually every other profession.[36] Advocates and scholars are trying to understand and address the reasons behind women's absence in college coaching. They are doing so not only to help women who are or aspire to be coaches or who hold other positions of leadership, but because the presence of female leadership in the highly visible and consumed context of sport has tremendous power to mitigate the gender stereotypes that undermine women's access to leadership in the political, business, and other contexts as well.[37]

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[31] Complaint at 20-22, 37-38, Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015).

[32] WOMEN'S SPORTS FOUNDATION, BEYOND X'S & O'S: GENDER BIAS AND COACHES OF WOMEN'S COLLEGE SPORTS 2 (2016), https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/beyond-xs-osfinal-for-web.pdf. For other, earlier examples of alleged discrimination against female coaches, *see generally* Erin Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1 (2010).

[33] *Id*. (The report also concluded that, "Overall, 31% of female coaches and 20% of male coaches in this study believed that they would 'risk their job' if they spoke up about Title IX and gender equity. LGBTQ female coaches were the most apt to fear raising concerns about Title IX and gender equity, with 34% believing they would risk their jobs if they spoke up.") *Id*. at 3.

[34] *Id*. at 2.

[35] Vivian Acosta & Linda J. Carpenter, *Women in Intercollegiate Sport: A Longitudinal Study Thirty-Seven Year Update* A-C (2014), acostacarpenter.org. According to most recent data, women occupy 43.4 % of head coach positions in women's sport, and 2 to 3.5% of head coach positions in men's sports. *Id*. at A ("Only 22.3 percent of athletic directors are female."). *Id*. at B ("11.3% of athletics departments have NO female anywhere in the administration."). *Id*. at C.

[36] NICOLE M. LAVOI, A FRAMEWORK TO UNDERSTAND EXPERIENCES OF WOMEN COACHES AROUND THE GLOBE, IN WOMEN IN SPORTS COACHING (LaVoi, ed. 2016).

[37] LAVOI, *supra* note 36; *see* Erin Buzuvis, *Barriers to Leadership in Women's College Athletics*, *in* INTRODUCTION TO INTERCOLLEGIATE ATHLETICS 272 (Eddie Comeaux ed., 2015); *see also* Pamela Bass, *Second Generation Gender Bias in College Coaching: Can the Law Reach That Far?*, 26 MARQ. SPORTS L. REV. 671, 672 (2016) ("The more women see other women in these [leadership] roles [in sports and elsewhere], the more they can aspire to be like them and have

There are many reasons that contribute to the absence of female coaches.[38] One common explanation is that coaching jobs may be particularly incompatible with family and childcare responsibilities that disproportionately fall to women.[39] This argument is often presented as a defense of the status quo, since universities themselves did not cause, and are not obligated to solve, social inequities external to athletics.[40] Relatedly, many point to women themselves as the cause of the decline and dearth of female coaches by choosing to prioritize family over a career. Still, however, such choices are modulated by socially constructed gender roles, which women internalize as well as men. Admittedly, it is difficult to apply legal remedies to address gender inequality within the family, and to challenge the role of social expectations about women's role in the family on their otherwise agentic decisions to pursue careers that are more conducive to that role.

Yet there is obviously much more to the explanation for the lack of female coaches than the role of family responsibilities. Stories like those of Burns, Griesbaum, and Miller—none of which involved a conflict between coaching and family responsibility—demonstrate other explanations for the departure of women from coaching as well. These stories, most likely, also deter current and potential coaches from pursuing leadership positions in women's sport. These cases, along with others that are similar, demonstrate how female coaches and athletic administrators (or women who aspire to those positions) are uniquely vulnerable to biases, implicit or otherwise, that result from the cultural association between masculinity and characteristics like leadership and competency as a male.[41] This not only holds back women in women's sport, but makes it difficult to impossible for female coaches to cross over into coaching men.[42] As a result, nearly all female coaches are additionally vulnerable to the bias that comes from working with female athletes, whose athletic endeavors are taken less seriously by athletic departments.

Though many male coaches of women's teams also experience this form of bias, female coaches additionally experience bias because of their own sex. Additionally, intersections of these gender stereotypes with stereotypes about women of color, about lesbians, and about aging may explain why lesbians and

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female role models. In addition, the more men and women see women in these roles, the more they can eliminate equating leadership exclusively with men.").

[38] *See* LAVOI, *supra* note 36; Buzuvis, *supra* note 37, at 278-81.

[39] *See* Pat Borzimarch, *Number of Women Coaching in College Hockey Dwindling*, N.Y. TIMES (Mar. 17, 2012), http://www.nytimes.com/2012/03/18/sports/in-college-hockey-female-coaches-often-skate-away-from-demands-of-the-job.html; *see also* Dana H. Benbow, *Why has Number of Women Coaches Fallen since Title IX?*, USA TODAY (Feb. 23, 2015), http://www.usatoday.com/story/sports/college/2015/02/23/women-college-coaches-title-9-ix/23917353/.

[40] *Id*.

[41] *See supra* notes 1, 23, and 35 (showing the cultural associations between masculinity, leadership, and competency).

[42] *See* Shane Miller, *Tear Down This Wall: Why Men's College Sports Need More Female Coaches*, 22 SPORTS L.J. 127, 129 (2015).

successful veteran coaches are so often targeted[43] for termination and why women of color are particularly underrepresented.[44]

Additionally, the stories of Burns, Miller, and Griesbaum also illustrate the potential for legal challenges aimed at evoking damages, institutional change, and public exposure. In all three cases, the coaches involved insisted that their terminations resulted from gender bias, and in Miller's case, intersecting sexual orientation and age discrimination. All three of them sued their universities: Burns's case went to trial in September 2016, and a jury found in her favor and awarded her $3.35 million in damages;[45] Miller sued the University of Minnesota-Duluth along with two co-plaintiffs, fellow coaches, who also allege to be victims of athletic department's sexism;[46] and Griesbaum's lawsuit against Iowa is still pending,[47] as are the other two. This Article provides a brief overview of legal protections that are most relevant in these and similar cases. It uses the three cases described above as examples to illustrate four of the most notorious aspects of sex discrimination in college athletics employment: double standards, retaliation, discrimination in compensation, and intersectionality. It explains how each of these may be challenged using various federal and state law.

II. OVERVIEW OF RELEVANT DISCRIMINATION LAW

This section provides a brief overview of the law that is most relevant to employment discrimination claims by female coaches and athletic administrators.

A. Disparate Treatment Claims Under Title VII and Title IX

Title VII of the Civil Rights Act of 1964[48] is a federal law that prohibits employers from discriminating against employees on the basis of sex, as well as race, national origin, and religion. Title IX of the Education Amendments Act of 1972 prohibits sex discrimination by educational institutions that accept federal funds.[49] Both statutes permit individuals to sue for disparate treatment on the

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[43] NICOLE M. LAVOI, A FRAMEWORK TO UNDERSTAND EXPERIENCES OF WOMEN COACHES AROUND THE GLOBE, *in* WOMEN IN SPORTS COACHING (LaVoi, ed. 2016) (explaining that lesbian and veteran coaches are targeted).

[44] Buzuvis, *supra* note 37, at 277 (showing that women of color particularly underrepresented).

[45] Mark Ziegler, *Judge Tentatively Upholds Burns Verdict*, SAN DIEGO UNION TRIB. (Dec. 1, 2016), http://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burnstrial-20161201-story.html.

[46] *See* Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015).

[47] Griesbaum v. The Univ. of Iowa et al. (Dist. Ct. Iowa filed Feb. 29, 2016). Just prior to this article going to press, the University of Iowa agreed to pay a total of $6.5 million to settle both the lawsuit of Coach Griesbaum as well as separate litigation filed by Griesbaum's partner, former Iowa associate athletic director Jane Meyer. Coach Griesbaum's share of settlement is reportedly $1.5 million. Erin Jordan, University Pays $6.5 Million in Meyer, Griesbaum Case, The Gazette (May 19, 2017), http://www.thegazette.com/subject/news/higher-education/university-of-iowa-pays-6-million-in-meyer-griesbaum-cases-20170519.

[48] 42 U.S.C.S. § 2000e-2(a).

[49] 20 U.S.C. § 1681(a).

basis of sex.[50] Some federal courts have held that plaintiffs may not use Title IX in cases where Title VII is available,[51] thus foreclosing Title IX's application to cases challenging sex discrimination by an educational-institution employer. But where Title IX is available, it offers a few advantages over Title VII. Title IX imposes no cap on compensatory damages, while Title VII limits such relief to $300,000 in most cases.[52] Additionally, Title IX does not require a plaintiff to exhaust administrative remedies before filing suit. In contrast, a Title VII plaintiff must first file a complaint with the EEOC or equivalent state agency and get the agency's approval to sue. The deadline for filing such an administrative complaint under Title VII is much sooner than for filing a lawsuit under Title IX, which may also pose an obstacle for some plaintiffs.

B. Administrative Complaints

Discrimination that violates Title IX may also be challenged by filing an administrative complaint with the Department of Education's Office for Civil Rights, instead of, or in addition to a lawsuit. As an example of a lawsuit with a parallel administrative complaint, Miller and others have filed an administrative complaint about the University of Minnesota-Duluth since initiating a lawsuit against the institution in federal court.[53] Because there are no requirements that the complainants have standing—that is, personally experience the discrimination that they allege—the administrative complaint is more likely than the lawsuit to force UMD to reconcile with the argument that the institution violated students' rights under Title IX when they replaced a women's team's successful and experienced coach with someone less credentialed and less expensive.[54] Similarly, athletes at Iowa filed a complaint with OCR alleging that Griesbaum's

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[50] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992).

[51] *See e.g.,* Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995); Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 861–62 (7th Cir. 1996).

[52] 42 U.S.C. § 1981a(b)(3). Title VII on the other hand is a more reliable statute for pursuing punitive damages, which many courts have found to be unavailable under Title IX. *See*, e.g., Mercer v. Duke Univ., 50 F. App'x 643 (4th Cir. 2002); Lalowski v. Corinthian Sch., Inc. et al., No. 10 C 1928, 2012 WL 245203, at *4 (N.D. Ill. Jan. 26, 2012). *But see* Katrina Pohlman, *Have We Forgotten K-12? The Need for Punitive Damages to Improve Title IX Enforcement*, 71 U. PITT. L. REV. 167, 168 (2009) (arguing that courts have erred in interpreting Title IX to foreclose punitive damages).

[53] Complaint at 1-12, Kolls et al. v. Univ. of Minn. Duluth, (filed Nov. 30, 2015).

[54] *Id*. at 3. Title IX requires universities to provide equal treatment to its men's and women's athletic programs. Regulations that delineate the factors in which equal treatment is evaluated include "opportunity to receive coaching" and "assignment and compensation of coaches" 34 C.F.R. § 106.41(c)(5)-(6). According to OCR, a compensation disparity constitutes unequal treatment if it "den[ies] male and female athletes coaching of equivalent quality, nature, or availability." Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71416 (Dec. 11, 1979).

termination deprives them the opportunity to receive coaching.[55]

If OCR determines that the complaint alleges facts that, if true, would constitute violations of Title IX, it will investigate the complaint. The agency's investigation may generate findings that support the allegations of the complaint, which will theoretically trigger the process for withholding the institution's federal funding. The threat of withholding invariably motivates institutions to reach a resolution with the agency instead. A resolution agreement typically requires the institution to correct the Title IX violations that OCR has found and to commit to the agency's monitoring and oversight for several years to ensure that those corrections occur.

C. Retaliation

Title IX and Title VII both prohibit employers from retaliating against employees who complain about or challenge sex discrimination. Title VII's antiretaliation provision protects an employee who opposes unlawful employment discrimination,[56] while Title IX protects an even broader range of whistleblower conduct. In 2005, the Supreme Court held that Title IX's general ban on sex discrimination included retaliation against a high school girls' basketball coach who had complained about the inferior treatment of his team.[57] By ruling in the coach's favor, the Court confirmed Title IX retaliation plaintiffs need not have personally been affected by the discrimination they were punished for having challenged so long as the complained-of discrimination is covered by Title IX.[58] Thus, Title IX protects coaches and administrators from retaliation when they object to sex discrimination affecting matters related to their own employment, such as compensation or working conditions, as well as sex discrimination affecting athletes.[59] Additionally, many states have laws that, like Title VII, prohibit employers from retaliating against employees who oppose unlawful employment practices or unlawful practices in general.[60]

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[55] Complaint at 1-27, Ackers et al. v. Univ. of Iowa, (filed Jan. 28, 2015), *available at* https://assets.documentcloud.org/documents/2800034/Office-of-Civil-Rights-Complaint-of-Student.tx.

[56] 42 U.S.C. § 2000e-3(a) (2012) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.") *Id.* Both references to "this subchapter" delineate the scope of Title VII's retaliation provision as being limited to violations of Title VII itself.

[57] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

[58] *Id*.

[59] As noted earlier, some courts insist that where both statutes apply, Title VII provides the exclusive remedy. *See supra* note 52 and accompanying text. But since Title VII does not apply to retaliation based on non-employment related discrimination, Title IX is always available to coaches who were punished for complaining about sex discrimination affecting athletes. 42 U.S.C. § 2000e-3(a) (2012).

[60] *See, e.g.,* National Conference of State Legislatures, *State Whistleblower Laws*, 1, 1-4 (2010), http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx.

D. State Laws

Many states have employment discrimination laws that provide identical or stronger protection for plaintiffs who have experienced adverse employment action motivated by discrimination. In all three of the cases described in the article, the plaintiffs utilized state laws instead of, or in addition to, Title IX and Title VII: Griesbaum and Burns sued their employers under the Iowa Civil Rights Act and the California Fair Employment and Fair Housing Act respectively, in lieu of raising claims under federal law; while Miller utilized a combination of the Minnesota Human Rights Act, Title IX, and Title VII.[61] It may be advantageous in some cases to rely on, or at least include, federal law claims even where those laws do not provide any additional protection beyond what is available under state law.[62]

Specifically, including a federal claim provides the plaintiff with the opportunity to file suit in federal court. Federal courts' jurisdictions cover larger geographic areas and contain more potential jurors than a local state court jurisdiction. Filing suit in federal court could therefore be strategic in cases where the local jury pool is likely to have alumni or employment ties to the university defendant and possibly be biased in favor of its athletic department.[63] Conversely, state law claims are more advantageous than Title IX and/or Title VII in some cases. For example, California's Fair Employment and Housing Act has no cap on damages,[64] while Title VII caps punitive and compensatory damages.[65] As noted earlier, Title IX does not cap compensatory damages, but it may not be available in jurisdictions that consider Title VII the exclusive remedy for sex discrimination in the academic workplace.[66] Also, Title IX appears to limit punitive damages.

E. Equal Pay Act

The Equal Pay Act is federal law that requires employers to provide what

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[61] *See* supra notes 1, 15, 23 and accompanying text.

[62] A case with a federal law claim may always be filed in federal court. The federal court will then exercise supplemental jurisdiction over additional state claims the lawsuit also raises. If the lawsuit does not include a federal claim, it may only be filed in federal court if the plaintiff and defendant are from different states and the amount in controversy exceeds $75,000. 28 U.S.C.A. § 1332.

[63] Since Minnesota state law provides at least as much employment discrimination protection as Title IX and Title VII, it seems likely that Miller's lawsuit included federal claims along with state law claims for this reason. Minnesota has only one federal district court, so any potential jury could include residents from anywhere in the state. However, it is possible to file in state court and still avoid filing in the university's local jurisdiction. For example, Griesbaum's lawsuit—though in state court—was filed in Polk County where the Board of Regents is headquartered, rather than Johnson County, where the University of Iowa is located. Other plaintiffs, however, might not have the opportunity to file suit in a non-local state court venue and might view federal court as their only opportunity to mitigate the risk of juror bias.

[64] *See* 2 DAVID SAUNDERS, CALIFORNIA ATTORNEY'S GUIDE TO DAMAGES § 3.105 (2016).

[65] 42 U.S.C. § 1981a(b)(3).

[66] *Supra* note 53.

in summary amounts to equal pay for equal work.[67] To prevail on an Equal Pay Act claim, a plaintiff must demonstrate that another employee of the opposite sex was paid more than someone doing a job requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions" – in other words, jobs that are "substantially equal."[68] The employer can counter this showing by establishing valid, nondiscriminatory reasons for any such disparity, such as seniority or merit, unless these reasons are a demonstrable pretext.[69] Relatedly, Title VII also permits challenges to disparate treatment in the terms and conditions of employment, which includes compensation. Unlike the Equal Pay Act, Title VII does not require a plaintiff to prove that she is paid less than a male employee doing equal work if there is other evidence that the plaintiff's compensation was influenced by discriminatory factors.[70]

F. Antidiscrimination Law and Intersectionality

U.S. civil rights law takes a categorical approach to discrimination. Statutes that prohibit discrimination in employment, education, and other contexts either prohibit discrimination because of a specific characteristic, such as sex under Title IX,[71] or age under the Age Discrimination in Employment Act,[72] or an enumerated list of characteristics, such as Title VII's focus on race, sex, religion, and national origin.[73] When two or more types of discrimination occur simultaneously, plaintiffs may challenge each ground individually. For example, it may be the case that an employer treats Black employees unfavorably compared to White employees, and that it treats female employees unfavorably compared to male employees. In such a case, a Black female plaintiff who experiences discrimination can challenge both grounds by including multiple, separate counts of discrimination in her complaint.[74]

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[67] The Equal Pay Act provides in relevant part: "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 ... 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." 29 U.S.C. § 206(d)(1).

[68] *Id*.

[69] For example, if the defendant claims to pay the comparator more because of some credential that is not otherwise a factor in setting compensation for members of the plaintiff's sex who have that credential, that claim may appear to be a pretext.

[70] For this reason, unlike the EPA, Title VII is a potential source of recourse for paying male coaches less because they work in women's athletics. *See* Morris v. Fordham Univ., No. 03 CIV. 0556 (CBM), 2004 WL 906248, at *3–4 (S.D.N.Y. Apr. 28, 2004) (dismissing Equal Pay Act claim of male coach of women's basketball team who attempted to compare his salary to the coach of men's basketball team).

[71] 20 U.S.C. 1681(a).

[72] 29 U.S.C. § 621.

[73] 42 U.S.C. § 2000e-2(a).

[74] In theory, filing multiple claims enhances the plaintiff's chances of winning, or at least, surviving motions to dismiss on the pleadings or summary judgment. However, there is reason to believe that complaints alleging multiple separate counts of discrimination fare worse than those who litigate based on a single theory. Minna J. Kotkin, *Diversity and Discrimination: A Look at*

Antidiscrimination protection is less effective, however, at challenging discrimination that is only apparent when two or more categories are combined.[75] Sex discrimination will be difficult to prove if the employer generally extends equal treatment to women, except for those who are Black. Race discrimination will be difficult to prove if the employer generally treats Black employees equally, unless they are women. Because antidiscrimination laws do not expressly permit challenges to discrimination based on the combination of separate categories, plaintiffs whose claims are exclusively intersectional have fewer opportunities for legal recourse.

When discrimination based on sexual orientation intersects with sex discrimination, plaintiffs may face the additional obstacle that is the absence of any federal law that expressly prohibits discrimination on basis of sexual orientation as such. Unless they are litigating in one of the twenty-one states that have such protection enumerated under state law,[76] their only recourse is to challenge it as sex discrimination under Title VII or Title IX. This works reasonably well for some sexual orientation discrimination that coincides with discrimination on the basis of gender nonconforming appearance and behavior, which courts have generally come to accept as an aspect of sex discrimination.[77] However, most courts, with some exception,[78] consider the mere fact of someone's homosexuality to be outside the realm of actionable sex discrimination.[79] Thus, the many gay and lesbian employees who conform to stereotypes in their appearance and behavior, perhaps in an effort to avoid

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Complex Bias, 50 WM. & MARY L. REV. 1439, 1457-59 (2009) ("This may occur because the multiple claimants present a paradox in that without a doctrinal structure from which to analyze complaints of this sort, judges seem to treat them as the child who cried wolf."). *Id*. at 1458.

[75] Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation,* 45 LAW & SOC'Y REV. 991, 1017 (2011) (concluding after empirical research that "antidiscrimination law provides less protection in cases that involve intersecting bases of discrimination"). *Id*.

[76] ACLU, *Non-Discrimination Laws: State by State Information-Map*, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map (last visited Apr. 5, 2017).

[77] *See* Equal Emp't. Opportunity Comm'n. v. Boh Bros. Constr. Co., L.L.C., 731 F.3d 444 (5th Cir. 2013); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3rd Cir. 2009); Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004); Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864 (9th Cir. 2001); Schmedding v. Tnemec Co., Inc., 187 F.3d 862 (8th Cir. 1999).

[78] *See* Videckis v. Pepperdine Univ., 150 F. Supp.3d 1151 (C.D. Cal. 2015); Centola v. Potter, 183 F. Supp.2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms."). *Id*. The EEOC also adopts this theory. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10, (EEOC July 16, 2015) (holding that "allegations of discrimination on the basis of sexual orientation [necessarily] state a claim of discrimination on the basis of sex").

[79] *See* DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979); Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) (rejecting gay plaintiff's sex discrimination claim because he "failed to allege that he did not conform to traditional gender stereotypes at work"); *see also* Erin Buzuvi*s, A Reasonable Belief: In Support of LGBT Plaintiffs' Title VII Retaliation Claims*, 91 DEN. U. L. REV. 929, 935 (2014).

discrimination[80], face a considerable barrier to successfully challenging sexual orientation-related discrimination under federal law.

III. DOUBLE STANDARDS AS DISPARATE TREATMENT

Each of the three cases profiled in this Article challenge some way in which female coaches are held to a different standard than their male counterparts. First, Miller's case illustrates a double standard about the value of female coaches; namely, that their success is not as highly valued as the success of their male coaches. When UMD athletic director Berlo told Miller that they could not afford to keep her, he was arguably imposing a penalty on Miller for her success—a penalty that is virtually unheard of in men's sport.[81] Athletic departments expect coaches to have winning seasons and win championships. A coach that is successful by these measures is therefore more marketable, and more costly to hire or retain. It is not uncommon in men's sports like football and basketball to be hired away from competitors at million-dollar salaries. In thirty-nine states, the highest paid state employee is a football or men's basketball coach.[82]

Yet, as Miller's case illustrates, female coaches are uniquely subject to the possibility that they may lose their job for being too successful, since her salary reflected the market value of her successful record and vast experience. Miller's complaint illustrates the double standard within the University of Minnesota-Duluth by pointing out the pay disparity between her and her male counterpart, the men's hockey team head coach Scott Sandelin. Sandelin's annual salary was over $93,000 higher than Miller's, despite Sandelin having a lower career winning percentage (.506 compared to Miller's .707) and fewer national championships (one to Miller's five).[83] Yet it was Miller, not Sandelin, who the university fired for costing too much, even though Sandelin cost the university more, and he produced fewer wins and championships despite receiving a higher operating and recruiting budget.[84]

UMD's rationale also implies an additional double standard in how the athletic department values it athletes, as well as its coaches. For the athletic

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[80] *See*, e.g., Kathryn J. Schmidt, Lesbian Identity Management in Workplace Contexts: "Don't Ask, Don't Tell" in Mainstream Organizations (2008) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill).

[81] Rachel Blount, *Minnesota Duluth Women's Hockey Coach Shannon Miller Says Dismissal Violates Title IX*, STAR TRIB. (Feb. 13, 2015), http://www.startribune.com/sports/gophers/291785391.html.

[82] Cork Gaines, *The Highest Paid Public Employee in 39 US States is Either a Football or Men's Basketball Coach*, BUS. INSIDER (Sep. 22, 2016), http://www.businessinsider.com/us-states-highest-paid-public-employee-college-coach-2016-9.

[83] Complaint at 7, Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015).

[84] *Id*. at 7. Miller alleged that she was told Sandelin had an unlimited budget for recruiting, while hers was $26,000. The men's team operating budget exceeded that of the women's team by $273,590, despite only having three more players. The men's team received more coaching and management staff, more academic support, and even more meals. *Id*. at 7-9.

department to achieve its objective of saving money for the university, it would have to replace Miller with a new coach who is considerably less expensive.[85] Since pay is commensurate with merit, this rationale confirms the university's intent to scale back the quality of coaching made available to female athletes. Indeed, Miller's replacement, an assistant coach much earlier in her career than Miller, had no head coach experience and far less experience overall.[86] It is impossible to find an example at Minnesota-Duluth or elsewhere of a men's team whose successful veteran coach was fired specifically so the university could hire someone, instead, with less experience.

Burns's and Griesbaum's cases illustrate a different and perhaps more common double standard in college athletics employment: athletic directors expect the male coaches of men's sports to be aggressive and even tolerate their abusive behavior in the pursuit of wins and championships, but they are quick to label aggression in female coaches as abusive and to hold this against them. For example, Griesbaum had a reputation for toughness and holding her players to a high standard.[87] She gave them tough workouts and was strict about team rules.[88] The university claimed to fire Griesbaum because of an anonymous complaint that she verbally abused players and forced them to play injured, claims that have been disputed not only by Griesbaum but by her players, staff and colleagues, and which an internal investigation did not substantiate.[89] But it is possible that Iowa decision makers found these claims of abuse to be plausible because of Griesbaum's toughness and competitive nature—characteristics that are incompatible with expectations of both the coach's and her players' femininity.

Even if Griesbaum was truly abusive in the way that Iowa alleged, it is difficult to imagine Iowa or any university objecting to similar behavior by a male coach of male athletes.[90] Examples like that of Mike Rice, the Rutgers men's basketball coach who was fired after ESPN exposed physically and verbally abusive outbursts,[91] confirm that only in cases involving public exposure and extreme misconduct are male coaches disciplined for abusive conduct towards male athletes. Indeed, Iowa tolerated "male coaches using foul language, screaming at athletes, throwing objects and being ejected from games" according

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[85] Indeed, Berlo did hire Miller's replacement at a "fraction" of Miller's salary and gave her a five-year deal starting at $140,000 per year compared to Miller's $210,000. Bob Collins, *New UMD Hockey Coach's Deal Suggests Firing Really was About Money*, MINN. PUB. RADIO: NEWS CUT (Apr. 4, 2015), http://blogs.mprnews.org/newscut/2015/04/new-umd-hockey-coachs-deal-suggests-firing-really-was-about-money/.

[86] *Id*.

[87] Brown, *supra* note 14.

[88] *Id*.

[89] *See* Griesbaum v. The Univ. of Iowa et al. (Dist. Ct. Iowa filed Feb. 29, 2016)

[90] Though male coaches themselves do not transgress gender norms when they are tough and aggressive, male coaches of female athletes have to contend with the stereotype that female athletes cannot take tough coaching.

[91] Brendan Prunty, *Mike Rice Fired at Rutgers after Abusive Behavior on Practice Tapes Comes to Light*, STAR LEDGER (Apr. 3, 2013), http://www.nj.com/rutgersbasketball/index.ssf/2013/04/mike_rice_fired_at_rutgers_aft.html. He threw basketballs at players' heads and used derogatory language when yelling at players. *Id*.

to Griesbaum.[92] Nor were any of the male coaches reprimanded, let alone terminated, for holding a "punitive workout" so abusive that it resulted in the hospitalization of thirteen football players.[93]

Burns's case also illustrates the double standard in which female coaches are uniquely vulnerable to accusations of abusive behavior. Burns claimed that the video over which she was fired, which showed her "elbowing" an assistant coach, only depicted a harmless act of passion rendered in the context of watching the game.[94] The other team had just scored, so Burns's conduct in that moment could have reflected frustration or anxiety about the game, understandable to any competitive person. But to a viewer influenced by pervasive gender stereotypes, the video may trigger concern because the coach's behavior is a departure from traditional expectations of what is appropriate behavior in women. Any truthful claim[95] that Burns was fired because of this moment of sideline intensity and aggression proves that such behavior is still marked as deviant and problematic in women.

Burns herself underscored this double standard by pointing out in her complaint that no punishment befell a former SDSU football coach who slapped an athlete.[96] Also, at trial, the president of the university inadvertently confirmed this double standard by attempting to equate Burns with the notoriously abusive men's basketball coach, Bobby Knight.[97] The president made this comparison as he was cross examined about his earlier testimony that the video was part of a pervasive pattern of abusive behavior by Burns which he and others had been concerned about even before the video surfaced.[98]

Burns's attorney asked the president to square his claimed concern with various praising and complementary emails he sent Burns during that same time.[99] The president's reply evoked Bobby Knight as an example of how a coach could be praised for winning, even while his abusive behavior was well known.[100] But even the president admitted that Burns did not crack whips or throw chairs at players as Knight was known to have done.[101] The fact that Knight remained employed notwithstanding those incidents,[102] of course, underscores the sex-based double standard that Burns had initially alleged.

As in Griesbaum's example, it is possible that the very thing that made Burns vulnerable to scrutiny for her behavior were the tactics that made her

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[92] *Griesbaum*, at 16.
[93] *Id*. at 17.
[94] *See* Burns, No. 37-2014-00003408-CU-CO-CTL.
[95] The video was arguably pretext for other unlawful motive which was Burns' retaliation for gender equity, as discussed in the next subpart.
[96] Burns, No. 37-2014-00003408-CU-CO-CTL, at 7-8.
[97] Mark Zeigler, *The Real Reason Beth Burns was Fired at SDSU,* SAN DIEGO UNION TRIB. (Sept. 30, 2016), http://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burns-20160929-story.html.
[98] *Id.*
[99] *Id*.
[100] *Id*.
[101] *Id.*
[102] *Id.* (Not even video evidence of Knight choking a player was enough to get him fired. He was eventually fired for grabbing a student's arm in violation of the "zero tolerance" mandate the university imposed after the choking incident.).

effective as a coach. Burns's colleague Steve Fisher, coach of SDSU's men's basketball team, testified at her trial.[103] When Burns's attorney asked him if he thought Burns was "hard" on assistant coaches, Fisher replied, "No. I know Beth. She, like I, is in charge. She's hard and demanding. I think if you're a good coach, you have a presence about you that permeates throughout your program. You want things done. You want things done the right way."[104] Fisher's testimony supports the idea that being "hard" and "demanding" to your staff are attributes of being a good coach; it is how you get things done. Yet for Burns and other female coaches, these characteristics are a liability, as well as a strength. The double standard is also double bind.

Coaches Burns, Miller, and Griesbaum all challenged their athletic department's application of a double standard using some combination of Title VII, Title IX, and their respective state law.[105] These laws require plaintiffs to prove that sex discrimination was a substantial motivating factor influencing the university's decision.[106] But courts have also recognized that employers rarely leave evidence of their discriminatory intent and that they will state publically that the employee's dismissal or other adverse action resulted from some legitimate reason unrelated to sex. For this reason, circumstantial evidence may be sufficient to convince a jury that sex discrimination was the employer's motivation.[107] Evidence that undermines the employer's stated nondiscriminatory reason may convince the jury that discrimination was actually the reason for the employer's decision to terminate the plaintiff's employment or engage in other adverse employment action.[108]

In cases challenging an athletic department's sexist double standard applied to coaches or other department employees, the plaintiff can use the evidence of the department's inconsistent application of a standard to suggest that the employer did not really take the adverse action for the reason that it claims. A jury that does not believe the university's stated rationale may infer that discrimination was instead the motivating factor. Furthermore, a plaintiff may avoid having her case dismissed by including allegations in her complaint that she is a member of a class that is protected under the applicable antidiscrimination law, that she was terminated (or suffered other adverse employment action) from a position which she was qualified for, and that she was treated differently from other employees who are not in the protected class. If these allegations are

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[103] Mark Ziegler, *Steve Fisher Testifies in Beth Burns Trial,* SAN DIEGO UNION TRIB., (Sept. 12, 2016), http://www.sandiegouniontribune.com/sports/sdut-sdsu-beth-burns-trial-steve-fisher-2016sep12-story.html.

[104] *Id*.

[105] *See generally* Burns, No. 37-2014-00003408-CU-CO-CTL. Burns' arguments about the double standard in her case also supported her breach of contract claim because they undermined the university's argument that her termination was for cause. As a litigation strategy, however, Burns' attorneys pressed the retaliation theory, which is the claim that the jury decided in her favor and on which it awarded damages.

[106] Costa v. Desert Place, 238 F.3d 1056, 1058-59 (9th Cir. 2000). Moreover, to be eligible for monetary damages, the jury must also decide that the university would not have fired her anyway for other, nondiscriminatory reasons. 42 U.S.C. § 2000e-5(g)(2)(B).

[107] 238 F.3d at 1059-60.

[108] *Id*.

sufficient, the employer may attempt to dispute the inference of discrimination by submitting a nondiscriminatory reason for the employee's termination, but the plaintiff may attempt to convince the jury that the evidence supports a conclusion that the employer's reason was actually pretext for discrimination.

This litigation framework is well suited to challenge double standards in the athletic department workplace. Recently, an appellate court in Texas refused to dismiss the case of former University of Texas track and field coach, Bev Kearney, whom the university pressured to resign after learning of the romantic relationship Kearney had with a student athlete ten years prior.[109] The court agreed that Kearney's complaint alleged the necessary elements to allow her to continue to litigation.[110] As both a woman and an African American, Kearney falls in two classes that are protected from discrimination under applicable law (which in her case is Texas state antidiscrimination law). Her forced resignation counts as adverse employment action that may be litigated, and her qualifications for coaching are beyond dispute.[111] More importantly, the court agreed that her allegations in support of a double standard were sufficient, even though the university argued that the examples Kearney provided of its tolerance for sexual relationships between white, male coaches (as well as other university employees) and students were sufficiently dissimilar to support a double standard claim.[112]

However, the court determined that even though the university may continue to dispute the similarities as litigation continues, her allegations were sufficient to require the university to defend itself.[113] This case demonstrates that the litigation framework for disparate treatment claims allow coaches to dispute that the university's stated reason, however compelling, was actually its true motive by alleging, and eventually proving to the jury, that the athletic department treated female coaches differently from male counterparts.

In a similar fashion, it is possible to imagine Griesbaum convincing a jury that the University of Iowa was motivated by sex discrimination if she proves that the athletic director was quick to believe anonymous complaints about her while overlooking similar or more egregious assaults on athletes' welfare by male coaches, as Griesbaum alleges.[114] Griesbaum's case for inferring sex discrimination would be even more compelling if she proves her claims that current athletic director Barta routinely caves to complaints by athletes against

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[109] Univ. of Texas at Austin v. Kearney, No. 03-14-00500-CV, 2016 WL 2659993, at *1-*2 (Tex. Ct. App. May 3, 2016).
[110] *Id*. at *6.
[111] Steve Almasy, *Hall of Fame Track Coach Resigns after Admitting Affair with Athlete,* CNN, (Jan. 1, 2013), http://edition.cnn.com/2013/01/06/sport/texas-track-coach-resigns/. (Kearney led Texas women's track and field to six national championships, and she has been inducted to the coaching hall of fame for track and field). *Id*.
[112] Kearney, No. 03-14-00500-CV, at *6.
[113] *Id*. (Kearney alleged that the athletic department did not discipline a football coach for having a "one night stand" with a student-trainer, nor a male volleyball coach who married one of a his former (female) players. She also alleged more generally a pattern of tolerance of relationships between male faculty members and students). *Id*. at *5-*6.
[114] *See* Complaint at 12-14, Griesbaum v. The Univ. of Iowa et al. (Dist. Ct. Iowa filed Feb. 29, 2016). As noted above, supra note 47, Griesbaum's lawsuit settled prior to trial as this article went to press.

their female coaches.[115]

Similarly, a jury might have a hard time believing that the University of Minnesota-Duluth was simply trying to trim its budget when it fired Miller if it is convinced by her evidence of a double standard.[116] Miller argues that experienced female coaches were considered expendable, while more expensive male coaches, were retained.[117] Moreover, Miller, unlike Kearney, can cast additional doubt on the university's stated rationale with evidence of its implausibility. If evidence shows that the university would not have realized meaningful savings after replacing Miller with someone, or that the university did not attempt other more logical ways to trim costs (such as asking Miller to take a voluntary pay cut), it may be even more likely to dismiss the university's stated rationale and substitute one of sex discrimination in its place.

IV. RETALIATION FOR CHALLENGING SEX DISCRIMINATION

Athletic departments sometimes retaliate against coaches and others who complain about sex discrimination within the department. Victims of retaliation have included female coaches and administrators who have advocated for the rights of themselves and their colleagues for fair pay and other equitable terms and conditions of employment.[118] They have also included female and male coaches of women's teams who have challenged inequitable treatment of their athletes compared to male athletes.

Retaliation is an effective tool for maintaining inequitable conditions in any workplace because it can weed out anyone who advocates for change, while ensuring the silence of employees who remain. But there is also discrimination that can and has been successfully challenged by female coaches and athletic administrators, some of whom have won millions in jury verdicts and settlements.[119]

Burns's case is among them: a jury agreed with the evidence in support of the retaliation claim she brought under California's Fair Housing and Employment law[120] and awarded her a $3.3 million dollar verdict in compensation.[121] Burns challenged the university's assertion that she was fired because of the video, alleging that the video was just the cover story, or pretext, to hide the university's real reason for firing her.[122] Specifically, she alleged that

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[115] *See generally id.*
[116] Complaint at 5, Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015).
[117] *Id*. at 7.
[118] Buzuvis, *supra* note 32, at 31.
[119] *Id.* at 44.
[120] CAL. GOV'T CODE § 12940(h) (West 2016).
[121] Mark Zeigler, *Beth Burns Wins Wrongful Termination Suit vs. SDSU,* SAN DIEGO UNION TRIB., (Sept. 28, 2016), http://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burnsverdict-20160928-story.html.
[122] *Id.* At the end of the trial, Burns's lawyers dropped the "or" and claimed that the video was solely pretext for retaliation. *Id.* This was described as a tactic meant to mitigate the possibility

SDSU fired her because she regularly challenged her department's inequitable treatment of female athletes in relation to male athletes.[123] She had to "fight for the women's basketball team to have clean gear and equipment, a strength coach, and facility time during the off-season," all benefits the men's team enjoyed, and she challenged other inequities as well.[124]

Retaliation cases are often difficult for universities to dismiss prior to trial. A plaintiff must plead, and eventually prove, that she engaged in protected conduct, suffered an adverse employment action, and that there is some causal nexus between those two events.[125] Protected conduct is satisfied by the coach's internal or external complaints about gender inequality, either about her team (for a retaliation case under Title IX) or about the conditions of her employment (for a Title VII or Title IX case).[126] An inference of causation may be sustained on the grounds that the two events happened in a reasonably close time frame.[127]

Burns's jury considered twelve allegations of protected conduct in the form of various complaints about gender inequality affecting her team.[128] The jury found that five of those allegations supported by the evidence, including Burns's allegation that she complained about the men's basketball team receiving a fifth set of game uniforms midway through the season while her team still hadn't received the travel sweats they had requested, qualified.[129] The jury concluded that this protected conduct was the sole cause for the university's decision to terminate her employment.[130] Her $3.35 million award was calculated based on past and future economic losses, such as lost wages and earning potential, as well as $2 million for past and future non-economic damages, such as pain and suffering.[131]

The jury's decision on Burns's retaliation claim illustrates how Miller's case could similarly proceed. As already discussed, the allegations in Miller's case cast doubt on UMD's claim that she was terminated for nondiscriminatory financial reasons. Thus, it is possible to imagine how the allegations in her case, if proven, could establish that retaliation, in addition to (or instead of) disparate treatment motivated the athletic director's decision. Like Burns, Miller and her co-plaintiffs, former softball coach Jen Banford, and former basketball coach

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that the jury might hedge on damages by finding for Burns only on the breach of contract claim. *Id*.

[123] *Id*.

[124] Burns, No. 37-2014-00003408-CU-CO-CTL, at 4.

[125] *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Maniccia v. Brown, 171 F.3d 1364, 1369 (11th Cir. 1999).

[126] Buzuvis, *Sidelined*, supra note 32, at 7.

[127] This requirement is similar under California law, which was the basis for Burns' lawsuit. *See* Fisher v. San Pedro Peninsula Hosp., 214 Cal.App.3d 590, 615 (Cal. Ct. App. 1989) ("The causal link may be established by an inference derived from circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.'") (quoting Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988)).

[128] Zeigler, *supra* note 121.

[129] *Id*.

[130] *Id.*

[131] *Id.*

Annette Wiles, allege in their case that they were fired in retaliation for challenging a hostile working environment, which included sexual harassment and harassment on the basis of sexual orientation, as well as challenging discrimination against female athletes.[132]

Griesbaum's case also has a retaliation component to it, though she does not allege that Iowa's decision to terminate her was itself retaliatory.[133] Rather, she argues that Iowa retaliated against her for complaining internally about her termination and her unsuccessful efforts to initiate a university investigation of sex discrimination against coaches.[134] Griesbaum alleges that the university penalized her challenging her own termination by transferring Griesbaum's partner, a high level athletic department official, to a position outside the athletic department, and later firing her.[135] University officials admitted that the reason for transferring Jane Meyer, Griesbaum's partner, was because of her relationship and Griesbaum's threat of litigation.[136] Though it is rare for college athletics retaliation cases to involve reprisals against someone other than the plaintiff who engaged in protected conduct, there is precedent from employment discrimination cases outside athletics for the idea that a retaliation plaintiff experiences adverse employment action when the employer takes adverse action against someone the plaintiff cares about, such as a spouse.[137]

V. DISCRIMINATORY COMPENSATION

Consistent with the general trend of pay inequity between male and female coaches and athletic administrators,[138] two of the three cases that are profiled in this Article raise specific allegations that female athletic department employees were paid less than their male equivalents. First, as part of Griesbaum's allegations of a pattern of sex discrimination in Iowa athletics, she points out that athletic director Barta demoted the female administrator who had held the "number two" position in the department.[139] The male administrator who was inserted as the deputy director received a salary that was $70,000 higher than that female administrator.[140] The female administrator, who is also Griesbaum's partner, is the same administrator who was transferred outside the department and eventually terminated in what Griesbaum alleges was retaliation for complaining internally about her own termination.[141]

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[132] *See* Complaint at 1-45, Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015).
[133] *See* Complaint, Griesbaum v. The Univ. of Iowa et al. (Dist. Ct. Iowa filed Feb. 29, 2016).
[134] *Id.* at 1-26.
[135] *Id.* at 21-22.
[136] Complaint at 7, Meyer v. Univ. of Iowa (Dist. Ct. Iowa filed Nov. 4, 2015).
[137] Thompson v. North American Stainless, 131 S. Ct. 863, 865 (2011).
[138] *See* NICOLE M. BRACKEN, 2004–2010 NCAA GENDER EQUALITY REP. 33, 47, 61, 75, 89 (2011).
[139] *Griesbaum*, at 19. Griesbaum alleges that this course of action violated a longstanding agreement dating back to the merger of the men's and women's athletics department that a male and female administrator would hold the two highest positions of authority in the department. *Id*. at 8.
[140] *Id*. at 9.
[141] *Id*. at 21.

Compared to disparate treatment and especially retaliation claims, female coaches do not have a strong track record of success on the Equal Pay Act; a female coach may have plenty of male counterparts who are paid more, but courts may be reluctant to see their respective roles as "equal work" especially in cases where the comparison is between coaches of different sports, which may obscure the similarities in skill and effort that are required of the job.[142] Even when a female coach is arguing that her pay should be commensurate with the male coach in the same sport, athletic departments may offer other differences between men and women's sports to undermine her attempt at comparison. For example, coaches may have rosters or staff of different sizes or different levels of responsibility. Additionally, even if the coach can establish an appropriate male comparator, the law permits a university's defense that different levels of compensation are warranted by differences between the coaches' experience levels or qualifications.

The EEOC has attempted to clarify the scope of this defense in a guidance document addressing the EPA's application to coaching.[143] According to the guidance, the fact that a men's team generates more revenue than a women's team is not proper justification to pay the men's team's male coach more than his female counterpart if the difference in revenue production is the result of discrimination in the allocation of resources between the men and women's team.[144] The guidance also addresses the argument that a coach's marketplace value is a factor other than sex that can be used to justify paying one coach more for work equivalent to that of his opposite-sex counterpart.[145] According to the guidance, the university employer must be able to "demonstrate that it has assessed the marketplace value of the particular individual's job-related characteristics."[146] Generalizations and stereotypes about the going rate of male versus female coaches will not justify a pay discrepancy for equal work.[147]

For an example of how this can be challenging to female coaches in pay discrimination cases, consider Marianne Stanley's case against the University of Southern California.[148] Stanley, the women's basketball coach, challenged USC's

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[142] U.S. EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS (1997), *available at* https://www.eeoc.gov/policy/docs/coaches.html. According to the EEOC's guidance addressing pay discrimination among colleges, it is proper to compare female and male coaches in different sports as long as the jobs require equivalent skill, effort, and responsibility. *Id*. Still, comparing different sports makes such comparison more challenging for the plaintiff to prove because the plaintiff must neutralize the effect of sport-specific differences on that comparison. *Id*.

[143] *Id*.

[144] *Id*. ("[T]he Commission will carefully analyze an asserted defense that the production of revenue is a factor other than sex to determine whether the institution has provided discriminatorily reduced support to a female coach to produce revenue for her team. If this is the case, it would constitute discrimination in the terms and conditions of employment which cannot then be used to justify a pay disparity under the EPA."). *Id*.

[145] *Id.*

[146] *Id*.

[147] *Id.*

[148] *See* Stanley v. Univ. of Southern California, 178 F.3d 1069 (9th Cir. 1999).

refusal to renew her contract at the same level of compensation as the men's team coach, George Raveling.[149] The university argued that even though the two coaches had the same basic responsibility in coaching the same sport, Raveling's job required more focus on generating revenue, and was under greater scrutiny and pressure from the public and the media.[150] Stanley argued that because those differences themselves derive from the university's own intentional discrimination against women's teams, the university should not be permitted to rely on them to defeat her discrimination claim.[151] However, the court did not resolve whether the men's and women's basketball coaching jobs were equal work under the EPA.[152] Instead, it reasoned that even if the jobs were equal, Stanley's case should still be dismissed because Raveling's additional years of experience, the various honors he had received, plus the fact that he had written a book about basketball, justified paying him more.[153]

If Miller prevails on her EPA case, it will be notable against the backdrop of defeats like Stanley's. Indeed, Miller's case, at least on its face, appears to present a comparison between two coaches of more similar, if not superior qualifications than Stanley compared to Raveling. Miller started as the head coach for women's hockey at UMD two years before Scott Sandelin was hired to coach the men's team. She has a better win-loss record and more championships, as well as experience coaching a national team. It is also unlikely that a court following the EEOC's guidance would accept any justification rooted in the revenue generated by the men's team, since the complaint alleges a demonstrable resource disparity between the men's and women's program. Unless UMD can assert some other neutral factor such as the assessed marketplace value of Sandelin's particular skills (complying with the EEOC policy) it would have to defeat Miller's attempt to compare the skill, effort, and responsibility of the two head coaching positions by arguing that it is in some way harder to coach men's hockey than women's.

Notably, a version of this approach was recently advanced by the University of Tennessee in response to EPA claims by two female strength and conditioning coaches who worked in women's athletics. These coaches sued under the Equal Pay Act (as well as Title VII) to challenge the fact that UT paid them less than male strength and conditioning coaches who worked with male athletes.[154] The university argued that the "complexities of football" justified paying more to male strength and conditioning coaches who work in men's athletics, an argument that illustrates one of the major obstacles that plaintiffs face when challenging athletic department wage discrimination.[155] Football is only ever offered as a men's sport and virtually all college football coaches are men. As long as a university can argue that coaching football presents unique

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[149] *Id*. at 1072-73.
[150] *Id*. at 1072-74.
[151] *Id*.
[152] *Id*. at 1076-77.
[153] *Id.* at 1075-77.
[154] Amended Complaint & Demand for Jury Trial, Moshak et al. v. University of Tennessee, No. 3:12-CV-00534 (E.D. Tenn. 2010).
[155] *Id*.

challenges compared to coaching women's sports, it can offer a nondiscriminatory explanation for paying those coaches more, as well as defeat the comparison argument necessary to sustain an Equal Pay Act claim by female coaches who work in women's athletics.

Of course, it is possible for plaintiffs to focus the judge or jury's attention on aspects of coaching that are similar regardless of the sport in question and to neutralize some of a university's "football exceptionalism" defense by pointing out that whatever extra challenges there are in coaching football, they are absorbed by larger coaching staff.[156] Nevertheless, such efforts are very fact intensive and challenging to litigate, which may in part explain why the gender gap in college athletics compensation persists. Notably, however, the University of Tennessee chose not to litigate the strength and conditioning coaches' case, instead opting to settle with the three plaintiffs for $750,000 plus attorney fees.[157] Thus, even a university attempting to use the most "exceptional" of men's sports may not have felt comfortable litigating the female coach's EPA claims. An intra-sport comparison may be even weaker.

VI. ADDITIONAL AND INTERSECTION DISCRIMINATION

Miller's complaint argues that sex discrimination occurred in addition to and intersecting with other forms of discrimination, including on the basis of age, sexual orientation, and Canadian national origin.[158] She and her co-plaintiffs allege that the environment of the UMD athletic department was hostile to lesbians. For instance, Miller alleged that the department refused to address harassing mail Miller had received which used language that was derogatory towards lesbians, even though she reported these letters to human resources.[159] She also complained about a co-worker who referred to her as a "dyke[.]"[160] Miller had to address her concerns to the chancellor before human resources took action, and it appeared to Miller that the eventual investigation was conducted in a way that was not sensitive to Miller's request to protect her from retaliatory harassment.[161]

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[156] U.S. EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION, *supra* note 142.
[157] MJ Slaby, *Athletics Department Lawsuit Settlement to Cost UT at Least $1.05M*, KNOXVILLE NEWS SENTINEL (Jan. 4, 2016), http://archive.knoxnews.com/sports/vols/womens-basketball/ut-settles-athletics-department-pay-discrimination-lawsuit-for-750k-28868498-38c3-7a11-e053-0100007f-364143791.html. The plaintiffs had also alleged retaliation for having complained internally about pay inequity. *Id.* Retaliation plaintiffs do not have to prove that the underlying discrimination they challenged was, in fact, a violation of law, so these claims could not have been defeated with the "football exceptionalism" argument. *See, e.g.,* Buzuvis, *supra* note 32. Therefore, it is possible that the retaliation claims provided the plaintiffs with more leverage to evoke a settlement than the pay discrimination claims. *Id.*
[158] Complaint at 31-32, Miller et al. v. Bd. of Regents of the Univ. of Minn., No. 0:15-cv-03740-RHK-LIB, (D. Minn. filed Sept. 28, 2015). The complaint also alleges discrimination on the basis of the coach's Canadian national origin, but this analysis will focus on the other two claims which are more representative of athletic departments more generally. *Id*.
[159] *Id*. at 10.
[160] *Id*. at 10-11.
[161] *Id*. at 11.

Miller's examples of sexual orientation discrimination fit into a broader narrative of hostility towards coaches who are or perceived to be lesbian.[162] Other coaches' legal claims have also contributed to this narrative, such as the litigation and administrative complaints against Fresno State that revealed a pattern of hostility towards lesbian coaches and administrators,[163] or the trial of San Diego Mesa College that involved claims of discrimination against lesbian coaches who were in a relationship with each other.[164]

For various legal reasons, it is difficult to challenge sexual orientation discrimination directly. In hostile environment cases for example, it may be difficult to accumulate enough examples to satisfy the requirement that hostility be "severe or pervasive," especially when juror members lack the perspective of lesbian coaches to recognize homophobia when it is subtle. However, there are a number of examples of lesbian plaintiffs recovering damages or significant settlements for retaliation claims rooted in underlying homophobia, including both the Fresno State and San Diego Mesa plaintiffs discussed above.[165]

Retaliation law does not require the plaintiff to prove that conduct they complained about actually violated the law, as long as they reasonably believed it to be so. Therefore, a plaintiff like Miller could theoretically prevail on her argument that she was retaliated against for complaining about a homophobic hostile environment, even if she does not prevail on her claim that the hostile environment at UMD itself constituted legally actionable sexual orientation discrimination.

Miller and her co-plaintiffs allege discrimination because their compensation was "less per year than their male, straight, American and/or under 40 colleagues for parallel jobs with the same level of responsibilities."[166] The complaint also notes that UMD has not terminated or reduced compensation for any male, straight, under 40 or American head coaches, thus raising the multiple and intersecting aspects of discrimination at play when Berlo fired Miller for ostensibly financial reasons.[167]

The added intersections of age and national origin are interesting to consider because they are among the first public narratives of sex discrimination in college coaching to contain these added elements. The age discrimination element in particular may be representative of a generalizable trend in the athletic department working environment. Professor LaVoi suggests that age discrimination against female coaches is a relatively common phenomenon for various reasons.[168] The veteran status of older female coaches may result in their

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[162] PAT GRIFFIN, STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORTS (1998); Nefertiti Walker & Nicole Melton, *The Tipping Point: Intersections of Race, Sex, and Sexual Orientation in Intercollegiate Sport*, 29 J. SPORT MANAGEMENT 257 (2014); Vikki Krane & Heather Barber, *Identity Tensions in Lesbian Intercollegiate Coaches*, 76 RES. Q. FOR EXERCISE & SPORT, 67, 76 (2005).
[163] *See* Buzuvis, *supra* note 32 at 33-34.
[164] *Id.* at 34.
[165] *Id.* at 42-43.
[166] Miller, No. 0:15-cv-03740-RHK-LIB, at 31.
[167] *Id*. at 7.
[168] LAVOI, *supra* note 36, at 17.

becoming the mouthpiece for concerns about gender equity within the department, and thus more vulnerable to reprisal. It is also likely that they are affected by a double standard in which older female coaches are denied the presumption of competency enhanced by experience that is extended to their same-age male colleagues.[169]

VII. CONCLUSION

The three cases profiled in this Article all add to the complex and emerging narrative of the working conditions for women in college athletics. Because these cases are so recent to have either been filed or tried, they demonstrate that the already-documented dimensions of problems female coaches face[170] are still at play. Additionally, they expose some new (or less well-known) aspects to this dynamic, such as the intersection with age discrimination, as well as a double standard related to the value of female coaches' success. Finally, they demonstrate how the law continues to be leveraged to challenge barriers to women's leadership in college sports.

Admittedly, litigation is a tool that only directly challenges a narrow set of factors that contribute to the overall underrepresentation of women coaches. Discriminatory termination, compensation, and harassment serve to deter and drive women from coaching, but sex discrimination affects women's employment opportunities in athletics in more ways than these. Even institutions that do not intentionally set out to suppress female leadership may engage uncritically in practices that have the effect of foreclosing women's opportunities or deterring them from pursuing leadership positions in college athletics.

For example, institutions may fill open head coach or administrator positions based on personal relationships and without an open search—a practice that ensures existing power structures are replicated to the exclusion of women as well as people of color. For another example, many coaches' and administrators' jobs are structured in ways that make it difficult or impossible to juggle family and domestic responsibilities that disproportionately fall on women.

It is difficult to attack these practices directly via lawsuits, for a variety of reasons.[171] But lawsuits and administrative complaints can focus public attention on these structural problems and contribute documented examples to aid in non-

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[169] *Id*.

[170] *See e.g*., Buzuvis, *supra* note 32.

[171] For example, Title IX and most Title VII challenges require the plaintiff to prove the employer's intent to discriminate. Such intent may be absent or difficult to prove. Even where the law permits plaintiffs to challenge a discriminatory effect without regard to intent, it is difficult to persuasively demonstrate the disparity given the relatively small numbers that would be at play in a case against any individual institutional defendant. Disparities that may demonstrate a discriminatory effect when considered on a national scale–such as the fact that only a quarter of athletic directors are women–cannot be challenged as such in lawsuits that are filed, as they must be, against an individual institution, where the fact that its last three athletic directors have all been male is as persuasive of discrimination as getting three "heads" in a row is of a rigged coin (in other words, not very likely).

legal advocacy. Thus, the pursuit of legal remedies is important not only because it provides for justice and institutional accountability in individual coaches' and administrators' cases, but because it contributes to the broader project of dismantling endemic sex discrimination in college athletics employment.