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Universities, Colleges and the Equal Pay Act: The Fourth Circuit Analyzes a Salary Dispute in *Stag v. Board of Trustees*

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UNIVERSITIES, COLLEGES AND THE EQUAL PAY ACT: THE FOURTH CIRCUIT ANALYZES A SALARY DISPUTE IN *STRAG V. BOARD OF TRUSTEES*[1]

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The Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), like other laws affecting employment relationships, presents particular challenges for universities and colleges as employers. The Act was enacted in 1963, as an amendment to the Fair Labor Standards Act of 1938, in order to remedy the problem of sex discrimination in wage setting.[2] Application of the Act can be straightforward when pay practices are overtly discriminatory; for example, in *Corning Glass Works v. Brennan*,[3] the Supreme Court affirmed a holding that an employer had violated the Act when, among other things, the employer had maintained separate male and female seniority lists.[4]

When the employer is a college or university, however, more complex concerns come into play.[5] A convincing argument can be made that federal courts should show some measure of deference to the academic standards and values employed in a university's internal processes,[6] because colleges and universities differ from other employers in several important respects. In principal, unlike other employers, academic institutions are called upon by society to preserve intellectual freedom and to advance intellec-

1. 55 F.3d 943 (4th Cir. 1995)

2. *See* Pub. L. No. 88-38, 77 Stat. 56 (1963).

3. 417 U.S. 188 (1974).

4. *Id.* at 193-94. In *Corning Glass Works*, male employees changing shifts retained higher wages under a "red-circling" agreement. *Id.* at 194. "Red-circling" is the retention of an employee's prior salary upon being transferred to a lower-paid position. *See* 29 C.F.R. § 1620.26 (1988).

5. *See generally* Ritter v. Mount St. Mary's College, 738 F.2d 431 (4th Cir. 1984) (discussing risk of infringement upon college's First Amendment rights presented by action under the Equal Pay Act), *aff'd*, 814 F.2d 986 (4th Cir. 1987).

6. *See* Zahorik v. Cornell Univ., 729 F.2d 85, 92-93 (2d Cir. 1984) (discussing factors that make a tenure decision unique); Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) (courts should refrain from inferring discrimination from a comparison among candidates).

tual inquiry. One federal court has described the delicate balance between eliminating discrimination and preserving academic freedom as follows:

> A university's prerogative to determine for itself on academic grounds who may teach is an important part of our long tradition of academic freedom. Although academic freedom does not include the freedom to discriminate, this important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments.[7]

The special concerns affecting colleges and universities in the context of an Equal Pay Act claim were highlighted in the Fourth Circuit's opinion in *Strag v. Board of Trustees*.[8] In *Strag*, the Fourth Circuit affirmed the district court's grant of summary judgment, holding that the plaintiff, a female mathematics instructor at Craven Community College, had failed to establish a prima facie case under the Act because she could not show that she was performing work substantially equal in skill, effort, and responsibility to a selected male comparator under similar working conditions.[9] Further, the court went on to observe that summary judgment was proper because, even if the plaintiff had properly established a prima facie Equal Pay Act case, the college had proved by a preponderance of the evidence that the salary disparity was based on a factor other than sex.[10]

Thurza Strag was hired at Craven Community College (hereinafter referred to as "the college") as a mathematics instructor in 1987. She possessed a master's degree and had nine years of teaching experience at the college level. Strag's starting salary at the college was $16,200 per year, which was $1,020 less than she had earned at her prior position at East Carolina University. Strag stated that she voluntarily took the pay cut because she no longer wished to make a 100-mile-per-day commute from her home to the East Carolina University campus. Strag's $16,200

7. *Lieberman*, 630 F.2d at 67. Although the excerpted language refers to tenure decisions, and occurs in a discussion of a Title VII claim, rather than an Equal Pay Act claim, a similar level of concern is present with respect to salary determinations under the Act, because a college or university's ability to bid competitively for faculty members will affect the quality and dimensions of its academic programs. 354 U.S. 234, 263, 77 S. Ct. 1203, 1218 (1957) (citations omitted)

8. 55 F.3d 943 (1995).

9. *Id.* at 950.

10. *Id.* at 950-51.

salary was an "on scale" salary, authorized under the college's Salary Plan.[11]

The same year the college also hired Linwood "Buddy" Swain as a biology instructor. Swain possessed a master's degree and had twenty-four years of secondary school teaching experience. Swain's starting salary at the community college was $33,000, a higher salary than the $28,391 he had earned the previous year as a teacher at New Bern High School. If Swain had remained at New Bern High School for the next school year, his salary would have exceeded $30,000. Swain's salary was awarded under a "Special Salary Designation" contained in the college's Salary Plan. The "Special Salary Designation" permitted the college to go "off scale" when it could not obtain an exceptionally qualified teacher with an ordinary "on scale" salary.[12]

Six years later, in September 1993, Strag filed a complaint seeking back pay and injunctive relief in the United States District Court for the Eastern District of North Carolina under the Equal Pay Act.[13] Strag selected Swain as her sole professional "comparator" for purposes of her Equal Pay Act claim.[14]

The Equal Pay Act provides as follows:

> No employer having employees subject to any provision 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.[15]

Under the Act, in order to establish a prima facie case, the plaintiff bears the burden of showing that she: (1) receives lower pay than a male co-employee; (2) for performing work substantially equal in skill, effort, and responsibility under similar work-

11. *See generally Strag*, 55 F.3d at 946 (discussing facts of case).
12. *Id.* at 947.
13. 29 U.S.C. § 206(d)(1) (1982).
14. *See id.* at 947.
15. 29 U.S.C. § 206(d)(1) (1982).

ing conditions.[16] This comparison must be made factor by factor with an opposite-sex comparator.[17] Thus, the establishment of a prima facie case under the Equal Pay Act essentially hinges on the selection of a proper comparator.[18]

In the *Strag* case, the college argued that Swain was not a proper comparator for Strag's Equal Pay Act claim. The Fourth Circuit agreed, concluding that Strag's choice of Swain as a comparator was improper because:

1) Swain was employed by the college's Biology department, whereas Strag was employed by the Mathematics department, two departments requiring different skills and responsibilities;

2) Swain had more responsibilities than Strag because he not only taught normal lecture classes, but also instructed lab classes, which required extra preparation. For example, Swain was responsible for preparing for extra classes, supervising lab assistants, and writing and grading extra exams. In addition, these lab classes generally lasted longer than lecture classes;

3) Swain was the only full-time instructor for several science courses, including biology, botany, zoology, and genetics, whereas Strag shared responsibility for the courses she taught with other math teachers, and did not teach many of the advanced math courses.[19]

Under these facts, the court observed that Strag failed to meet her burden of showing that she performed work substantially equal in skill, effort, and responsibility under working conditions similar to Swain's.[20] Indeed, Strag "did no more than prove

16. *Strag*, 55 F.3d 943, 948 (4th Cir. 1995); Houck v. Virginia Polytechnic Inst., 10 F.3d 204, 206 (4th Cir. 1993). *See also* Chance v. Rice Univ., 984 F.2d 151, 153 (5th Cir. 1993) (discussing requirements for a prima facie case under the Equal Pay Act); Schwartz v. Florida Bd. of Regents, 954 F.2d 620, 623 (11th Cir. 1991) (same). A finding of intentional sex discrimination is not required to sustain liability under the Equal Pay Act in the Fourth Circuit. *See* Bartges v. University of North Carolina at Charlotte, 908 F. Supp. 1312, 1322 n.2 (W.D.N.C. 1995) (citing Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 344 n.17 (4th Cir. 1994)); Brewster v. Barnes, 788 F.2d 985, 993 n.13 (4th Cir. 1986).

17. *Strag*, 55 F.3d at 948; *Houck*, 10 F.3d at 206. The plaintiff must identify a particular comparator for purposes of her inquiry, and may not compare herself to a hypothetical or "composite" co-employee. *Strag*, 55 F.3d at 948; *Houck*, 10 F.3d at 206.

18. *Strag*, 55 F.3d at 950; *see also* Soble v. University of Maryland, 778 F.2d 164, 167 (4th Cir. 1985) (plaintiff must show that the comparison she is making is an appropriate one).

19. *Strag*, 55 F.3d at 950.

20. *Id.*

that she and Swain are paid different salaries."[21] Thus, she did not put forth a sufficient prima facie case under the Equal Pay Act.

The result in *Strag* falls firmly within the Fourth Circuit's established jurisprudence with regard to Equal Pay Act claims when a college or a university is the employer. In nearly every case in which the Fourth Circuit has analyzed an Equal Pay Act claim in the higher education context, the court has affirmed either a grant of summary judgment, or a dismissal of the action, based on the plaintiff's failure to establish a prima facie case. For example, in *Houck v. Virginia Polytechnic Institute*,[22] the plaintiff, a professor in Virginia Tech's College of Education, failed to make a prima facie case because she failed to identify any individual comparators at all. "She did not compare teaching loads other than to state that her load was low and that other faculty members taught more students . . . . [S]he failed to identify and compare herself in any way to any male receiving a higher level of compensation."[23] Thus, because the plaintiff in *Houck* did not single out an actual comparator instead of a hypothetical one, dismissal of her suit was proper.[24]

Similarly, in cases where the plaintiff has identified a specific comparator, but the comparison clearly is an unsuitable one, the Fourth Circuit has not hesitated to uphold summary judgment in the college or university's favor. For example, in *Ritter v. Mount St. Mary's College*,[25] summary judgment in the college's favor was proper where the plaintiff, an untenured faculty member, attempted to designate the Chair of the Department of Education as a comparator in connection with her Equal Pay Act claim.[26] Likewise, the plaintiff in *Soble v. University of Maryland*[27] failed to put forth a prima facie case under the Equal Pay Act, because the evidence showed that she did not perform work substantially equal in skill, effort, and responsibility to that performed by her chosen comparator. The plaintiff in *Soble* was a tenured professor in the university's School of Dentistry, who taught in the School's Department of Oral Health Care Delivery. She possessed a

21. *Id.*
22. 10 F.3d 204 (4th Cir. 1993).
23. *Id.* at 206.
24. *Id.*
25. 814 F.2d 986 (4th Cir. 1987).
26. *Id.* at 993.
27. 778 F.2d 164 (4th Cir. 1985).

Master of Social Work and a Ph.D. in Education Psychology. The only other non-dentist in the School of Dentistry was a man with a Masters in Business Administration who taught dental management and organization and carried a considerably heavier teaching load than Soble. Thus, the district court's grant of summary judgment in the university's favor was proper.[28]

A similar result was reached in a 1993 Fifth Circuit case where the employer was a university, *Chance v. Rice University*.[29] In *Chance*, the plaintiff, an English professor, failed to establish a prima facie claim when she chose as her comparator the Chair of the English Department.[30] A plaintiff's failure to establish a prima facie case under the Equal Pay Act in the context of a college or university also is illustrated in a case decided by the United States District Court for the Eastern District of Virginia, *Jacobs v. College of William and Mary*.[31] In *Jacobs*, the plaintiff, a women's basketball coach at the college, failed to establish a prima facie case under the Act because the evidence showed that the men's basketball coach had greater responsibilities.[32] In order to establish a case of discrimination, the court noted,

> it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation, and while the jobs in question need not be identical, they must be substantially equal.[33]

In other words, the Act

> requires "factual support of an accusation that the employer paid the aggrieved employee wages at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work

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28. *Id.* at 167.

29. 984 F.2d 151 (5th Cir. 1993).

30. *Id.* at 152-53. In addition, in *Chance*, the University's defensive position may have been enhanced by its extensive internal review processes. For example, the court noted that in response to the plaintiff's initial allegations of discrimination, Rice officials reviewed her past internal evaluations, and asked other scholars, both within and outside Rice, to critique her published works. *Id.* at 152. The university also presented as evidence two reports prepared by its Commission on Women, a group formed by Rice's president to investigate matters involving Rice's female employees. *Id.* at 153 n.10. The result in *Chance* indicates that effective internal investigation of employment disputes can decrease the likelihood of liability flowing from such matters.

31. 517 F. Supp. 791 (E.D. Va. 1980), *aff'd* 661 F.2d 922 (4th Cir. 1983), *cert. denied*, 454 U.S. 1033 (1985).

32. *Id.* at 798.

33. *Id.* (citing Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 171 (5th Cir. 1975)).

on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar conditions."[34]

In *Bartges v. University of North Carolina at Charlotte*,[35] the United States District Court for the Western District of North Carolina explicitly applied the Fourth Circuit's holding in *Strag* in granting summary judgment to the University of North Carolina at Charlotte (UNC-C), in connection with an Equal Pay Act claim made by a female former part-time head softball coach and part-time assistant basketball coach.[36] In Bartges, the plaintiff alleged that specific employees, the Head Baseball Coach, the Head Volleyball Coach, the Head Golf Coach, and the Assistant Men's Basketball Coaches, performed substantially equal work under substantially similar conditions.[37] The district court disagreed, concluding that the plaintiff had failed to put forth a prima facie claim because several key differences in responsibilities and expectations distinguished her working conditions from those of her comparators:

1) The Head Baseball Coach was responsible for a thirty-two-member team, whereas Bartges was responsible for a fifteen-member softball team;

2) The Head Baseball Coach was a full-time position (and also required supervision of another full-time coach), whereas Bartges' position as Head Softball Coach was part-time;

3) Likewise, the Head Volleyball Coach also was a full-time position;

4) With respect to a comparison with the Head Golf Coach, Bartges failed to show how any comparison supported her claim, because she was paid more for her coaching work than either of the two individuals who held the position of Head Golf Coach during the time she worked at UNC-C;

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34. *Id.* (quoting Ammons v. ZIA Co., 448 F.2d 117, 120 (10th Cir. 1971)). *See also* Fisher v. Vassar College, 70 F.3d 1420, 1452 (2d Cir. 1995) (plaintiff acknowledged that male comparator "had responsibilities she did not share"); Stanley v. University of Southern California, 13 F.3d 1313, 1321 (9th Cir. 1994) (male comparator's responsibilities "differed substantially from the duties imposed upon [the plaintiff]"); Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 979 (8th Cir. 1991) (no prima facie case under Equal Pay Act where plaintiff's salary was $24.00 more than one comparator's and $150.00 less than the other's).

35. 908 F. Supp. 1312 (W.D.N.C. 1995).

36. *Id.* at 1323-24.

37. *Id.* at 1322.

5) Bartges was a part-time Assistant Coach of the women's basketball team, whereas the Assistant Coach positions for the men's team are full-time positions; and

6) The university's uncontested evidence showed that men's basketball was the most marketable and largest revenue producing sport at UNC-C; thus, the men's basketball Assistant Coach positions entailed greater public relations, recruiting, and other coaching responsibilities, as well as more pressure to produce winning teams.[38]

In addition, the district court went on to observe that, in attempting to combine her two part-time positions to justify comparison to other full-time positions, Bartges "has made the very comparisons with hypothetical or composite males that cannot be used to prove a violation of the Equal Pay Act."[39] Because Bartges failed to identify an appropriate male comparator, summary judgment in the university's favor was proper.[40]

As may be seen in *Strag* and the other cases discussed above, it is difficult for a plaintiff in an Equal Pay Act action in a college or university setting to establish a prima facie claim under the Act. However, assuming a plaintiff in such a case has sufficiently established a prima facie case of salary discrimination under the Equal Pay Act, the burden shifts to the employer to prove, by a preponderance of the evidence, that the pay differential is justified by the existence of one of the four exceptions set forth in the statute: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex.[41] If the burden of any of these affirmative defenses is successfully carried by the employer, "the plaintiff's claim must fail unless the plaintiff can satisfactorily rebut the defendant's evidence."[42]

In *Strag*, even though the plaintiff was not able to establish a prima facie case under the Act, the court nonetheless went on to examine whether the pay differential between Strag and Swain was justified under one of the four statutory exceptions.[43] The

38. *Id.* at 1323.

39. *Id.* at 1324 (citing Strag v. Board of Trustees, 55 F.3d 943, 948 (4th Cir. 1995)).

40. *Id.* at 1324.

41. 29 U.S.C. § 206(d)(1) (1982); *Strag*, 55 F.3d at 948; *Houck v. Virginia Polytechnic Inst., 10 F.3d 204, 207 (4th Cir. 1993).*

42. *Strag*, 55 F.3d at 948.

43. *Id.* at 950-951.

court concluded that the college clearly had carried its burden of proving that the salary disparity was based on factors other than sex, the fourth exception under the Act.[44] The college met its burden of showing that the salary differential between Strain and Strag was based on factors other than sex by pointing to the following facts:

1) Swain was extremely well known and respected in the community for his innovative Coastal Biology class;

2) Swain had established a reputation as an excellent and innovative teacher with a great deal of experience;

3) Swain used state-of-the-art technology in his classes which other teachers did not use;

4) Swain had twenty-four years of teaching experience, as compared to Strag's nine years;

5) Swain's salary at the public high school would have been $30,000 for the school year in question, as compared to Strag's $17,220 salary at East Carolina University;

6) Swain was unwilling to take a pay cut in order to teach at the college, whereas Strag was willing to do so in order to avoid a long commute; and

7) Swain was a much better known teacher than Strag, and the administration felt that hiring him would attract more students to the college.[45]

As the Fourth Circuit's language in *Strag* illustrates, under the "broad general exclusion" of the Act's fourth exception, discrimination in compensation that is grounded in "differences based on experience, training, or ability" is not prohibited under the Act.[46] Because so many Fourth Circuit cases interpreting the Equal Pay Act in the college or university context conclude that no prima facie claim exists, there is a paucity of jurisprudence in this circuit regarding the application of the "factors other than sex" exception in this context.[47] Nonetheless, the court's application of the fourth statutory exception in *Strag* echoes similar decisions both within and without the Fourth Circuit. For example, in *Ritter v. Mount St. Mary's College*, the Fourth Circuit observed that "a difference in job qualifications between the plaintiff and the 'job

44. *Id.*

45. *Id.* at 951.

46. *Id.* at 949.

47. *See, e.g.,* Houck v. Virginia Polytechnic Inst., 10 F.3d 204, 207 (4th Cir. 1993) (plaintiff's failure to establish a prima facie claim means that affirmative defense is not before the court).

comparator,' the person or persons to whom the plaintiff chooses to compare her job status, salary, etc. for the purposes of establishing liability on an EPA claim, can constitute a 'factor other than sex.'"[48] The first, second, third, fourth, and seventh factors listed by the court in *Strag* would appear to fall under the rubric of "difference[s] in job qualifications."

The "factors other than sex" defense often is successful for a college or university employer. For example, in a Ninth Circuit case decided in 1994, *Stanley v. University of Southern California*,[49] the court observed that the record showed significant differences between the plaintiff's and the comparator's public relations skills, credentials, experience, and qualifications.[50] Thus, the appellate court affirmed the district court's denial of a preliminary injunction.[51] Similarly, in *Schwartz v. Florida Board of Regents*,[52] the plaintiff, a male professor in the College of Education at Florida State University, sustained his burden of proving that a pay disparity existed, thus shifting the burden to the university to show non-discriminatory reasons for the disparity.[53] Nonetheless, the Eleventh Circuit in *Schwartz* affirmed judgment in the university's favor, based upon the district court's explicit finding that factors other than sex caused the pay disparity:

> The district court's findings of fact require a conclusion that the salary disparity resulted from factors other than sex. The district court found as a fact that discretionary raises given in the disputed years were based upon the following factors: outstanding service to the university, administrative duties, publications, research, supervision of doctoral students, and performance . . . . These factors are not based on sex and are sufficient to sustain an employer's burden to show that the salary disparity does not result from sex discrimination.[54]

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48. Ritter v. Mount St. Mary's College, 814 F.2d 986, 993 (4th Cir. 1987) (citing Equal Employment Opportunity Comm'n v. Aetna Ins. Co., 616 F.2d 719, 722 (4th Cir. 1980)).

49. 13 F.3d 1313 (9th Cir. 1994).

50. *Id.* at 1321-22.

51. *Id.* at 1325-26.

52. 954 F.2d 620 (11th Cir. 1991).

53. *Id.* at 622.

54. *Id.* at 623. The statute's first enumerated affirmative defense, a seniority system, also can be successful for a university or college employer. For example, in Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995), the plaintiff, a female professor denied tenure in the college's Biology department, produced evidence of a consistent salary disparity between herself and a male professor in the same department. *Id.* at 1453. However, the evidence also showed that the male

Just like the Fourth Circuit in the *Strag* case, the district court in *Bartges* examined the university's affirmative defense under the Act's fourth exception, even though the plaintiff had failed to establish a prima facie case under the Act.[55] The court concluded that there was "no genuine dispute concerning whether the wage paid to Bartges result[ed] from factors other than sex within the meaning of 29 U.S.C. § 206(d)(1)(iv) such that the University has not violated the Equal Pay Act."[56] According to the court, any of the three reasons advanced by UNC-C established that the university's treatment of Bartges resulted from factors other than sex:

1) Bartges' qualifications: Bartges attempted to evaluate her salary against the salaries paid to three Assistant Basketball Coaches for the men's team: Melvin Watkins, who had played four years of intercollegiate basketball at UNC-C and who had been coaching at UNC-C for ten years when Bartges first joined the staff; David Pendergraft, who had been an Assistant Coach at East Carolina University for six years before coming to UNC-C; and Kevin Billerman, who had played intercollegiate basketball at Duke University, played and coached professional basketball in Europe, coached high school basketball for eight years, and had been coaching at UNC-C for four years when Bartges first came to the institution. In contrast to these three coaches, Bartges had played basketball in high school but did not play intercollegiate basketball. Her coaching experience consisted of one year as a volunteer Assistant Women's Basketball Coach at Penn State University, and one year as a high school girls' basketball coach.[57]

Similarly, Bartges' qualifications were not comparable to those of the Head Volleyball Coach, James McClellan. Before coming to UNC-C, McClellan had been Head Volleyball Coach at Bellarmine College and had ten years of head coaching experience at Morehead State University. The district court observed that these comparisons indicated "dramatic differences in experience and professional success."[58]

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comparator was placed on tenure track three years before the plaintiff, and remained ahead of her. *Id.* "Since [the male comparator] was more senior than plaintiff, it cannot be deemed unreasonable for Vassar to pay him more money." *Id.*

55. Bartges v. University of North Carolina at Charlotte, 908 F. Supp. 1312, 1324-27 (W.D.N.C. 1995).

56. *Id.* at 1324.

57. *Id.* at 1324-25.

58. *Id.* at 1325.

Bartges also attempted to compare her qualifications to those of two Head Baseball Coaches, Gary Robinson and Loren Hibbs. Robinson had ten years of experience coaching for UNC-C and had three years of experience before he came to the university. Before UNC-C hired Hibbs, Hibbs had six years of coaching experience at Wichita State University, where his team had had an outstanding record of success, including a national championship. In contrast to these baseball coaches, Bartges had played softball in high school, and had played slow-pitch softball during two summers in college, but she had never played intercollegiate softball and had no experience as a softball coach at any level when she was hired for that position.[59]

Based on these facts, the district court in *Bartges* concluded that the university had produced evidence that its "compensation decisions were based [on] the prior playing and coaching experience of its coaches as well as demonstrable success in the coaching field."[60] The court acknowledged that the precise value to be placed on professional qualifications is "somewhat subjective," but quoted *Strag* for the principle that "subjectivity is essentially inevitable in employment decisions; provided that there are demonstrable reasons for the decision, unrelated to sex, subjectivity is permissible."[61] Ultimately, concluded the court, the university was entitled to summary judgment because it had "established that its compensation decisions were based on a factor other than sex within the meaning of 29 U.S.C. § 206(d)(1)(iv)."[62]

2) The relative importance of Women's Softball within the university's sports programs: In support of its motion for summary judgment, the university explained that, because of budgetary constraints, it was forced to prioritize spending within the Department of Athletics. The "high priority" sports were men's basketball, men's baseball, and men's soccer (three men's sports), and women's basketball, women's volleyball, and women's soccer (three women's sports). Other sports, including women's softball, were considered "low priority." All of the high-priority sports had full-time coaches, whereas none of the low-priority sports (men's or women's) had full-time coaches. Thus, the low compensation for the part-time Women's Head Softball Coach is explained by

59. *Id.* at 1324-25.
60. *Id.* at 1324-25.
61. *Id.* at 1326.
62. *Id.*

these budgetary constraints, which constitute "reasons unrelated to sex."[63]

3) The prevailing wage and the employment market: The university also argued that the salary of the Women's Softball Coach was shaped by the employment market. In essence, the university stated that, because Bartges had been willing to do the job for the salary she was paid, it did not need to pay her more.[64] The district court agreed with this position, stating that it would "not second guess the University's business decision."[65]

As the cases discussed in this article indicate, many different fact patterns can fit within the broad language of the Equal Pay Act's "factor other than sex" defense:

> The Act's factor other than sex defense is the most broadly worded of all the exceptions to the Equal Pay Act. The statute does not define the scope of the defense; nor does it state a standard for determining what qualifies as a "factor other than sex." As a result, [this affirmative defense] is often the subject of litigation.[66]

Although the meaning of the Act's fourth enumerated exception is not made clear by the Act's language itself, judicial interpretation of the statute has shown that the parameters of the exception are quite broad. For example, it is clear from federal appellate court case law that seemingly subjective factors such as "statements of peer judgments as to departmental needs, collegial relationships and individual merit" can constitute evidence of a factor other than sex in an Equal Pay Act dispute.[67]

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63. *Id.* at 1326-27.

64. *Id.*

65. *Id.* at 1327. In general, consideration of the marketplace value of an employee's skills is an appropriate consideration under the Act. "An employer may consider the marketplace value of the skills of a particular individual when determining his or her salary. . . . Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA." Stanley v. University of Southern California, 13 F.3d 1313, 1322 (9th Cir. 1994). *But see infra* notes 67-69 and accompanying text (discussing risk of perpetuation of market-based disparities in salaries by sex).

66. *See* Jeanne M. Hamburg, Note, *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, 1087 (1989). The Note's author elaborates that "the exception's broad scope originates from Congress' awareness of the impossibility of listing every conceivable factor" for a pay differential. *Id.* at 1096.

67. *See* Brousard-Norcross v. Augustana College, 935 F.2d 974, 976 n.3 (8th Cir. 1991); *see also* Fisher v. Vassar College, 70 F.3d 1420, 1436 (2d Cir. 1995)

As noted above, five of the seven "factors other than sex" set forth by the Fourth Circuit in *Strag* fall within the category of differences in education, training, qualification, or experience. The fifth and sixth factors listed by the court, however, concern Strag's and Swain's salaries before each was hired by Craven Community College. As a general matter, an employer's reliance on prior salary in setting compensation can be helpful, because "a previous employer's pay may sometimes be used as an indicator of market demand, and thus qualifies to excuse an employer from liability under the factor other than sex defense:"[68]

> Reference to previous pay enables [employers] to determine what competitors are paying, so that they can ascertain the salary necessary to "induce" a job candidate to accept an offer of employment, and to make an initial determination of the value of an employee's skills at a time when the employer has not yet had the opportunity to establish the value of those skills.[69]

At the same time, however, reliance on a previous employer's pay as a "factor other than sex" sometimes is suspect, because such reliance can perpetuate market-based disparities, thus undermining the Equal Pay Act's anti-discriminatory purpose.[70] A legal standard embodying use of market value of an employee's services, as indicated by a previous employer's salary, might be tainted by the presence of discrimination depressing one sex's wages.[71] In addition, looking to prior pay as a "factor other than sex" can impose practical difficulties on a defendant, because this

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("[S]enior members of the biology department simply did not like Fisher and did not wish to establish a career-long professional association with her. It is arguable that such grounds alone justified the department's recommendation . . ."); Schwartz v. Florida Bd. of Regents, 954 F.2d 620, 623 (11th Cir. 1991) (subjective business justifications are legitimate factors to be considered). If, however, subjective concerns are a facade for discrimination, or if they are overly subjective so as to render them incapable of being rebutted by the plaintiff, their consideration is impermissible. *See Brousard-Norcross*, 935 F.2d at 976 n.3; *Schwartz*, 954 F.2d at 623.

68. Note, *supra*, at 1091 (discussing Horner v. Mary Inst., 613 F.2d 706, 714 (8th Cir. 1980)).

69. Note, *supra*, at 1102.

70. *See* Note, *supra*, at 1102-1103; *see also supra* note 1 and accompanying text.

71. *See* Note, *supra*, at 1103. In other words, the continued presence of a persistent, unexplained market-based differential between men's and women's earnings calls into question courts' ability to rely on the market as a justification for pay disparities. *Id.*

factor places the employer in the position of defending an unequal compensation arrangement that was not of its own making.[72]

Despite these difficulties, the Fourth Circuit in *Strag* applied the "factors other than sex" exception properly; the court did not rely solely upon Strag's and Swain's prior salaries, but looked to other business-related factors that were considered in wage-setting, such as the differences in Strag's and Swain's skills, experience, reputation, and expertise.[73] For university and college employers, it will be relatively simple to avoid over-reliance on prior salary as a "factor other than sex" in Equal Pay Act claims, because, in almost every situation, there will be factors other than prior salary available to the college or university when compensation is set. Factors such as teaching skill, education, experience, research productivity, acquisition of grant money, service on university or college committees, and even seemingly subjective factors such as collegiality, can all provide a defensible basis for an institution's salary-setting decisions.[74]

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72. Note, *supra*, at 1103-04.

73. *See* Note, *supra*, at 1105-1106 (discussing diminishing importance of prior salary over time).

74. As may be seen in the discussion of cases in this article, cases interpreting the Equal Pay Act when a university or college is an employer tend to fall into two types: cases where the plaintiff is a teacher, instructor, or professor; *see, e.g.*, Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995) ("professor" case); Strag v. Board of Trustees, 55 F.3d 943 (4th Cir. 1995) ("professor" case); Houck v. Virginia Polytechnic Inst., 10 F.3d 204 (4th Cir. 1993) ("professor" case); Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 151) ("professor" case); Brousard-Norcross v. Augustana College, 935 F.2d 974 (8th Cir. 1991) ("professor" case); Schwartz v. Florida Bd. of Regents, 954 F.2d 620 (11th Cir. 1991) ("professor" case); Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987) ("professor" case); Soble v. University of Maryland, 778 F.2d 164 (4th Cir. 1985) ("professor" case); and cases where the plaintiff is a coach; Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994) ("coach" case); Bartges v. University of North Carolina at Charlotte, 908 F. Supp. 1312 (W.D.N.C. 1995) ("coach" case); Jacobs v. College of William and Mary, 517 F. Supp. 791 (E.D. Va. 1980) ("coach" case). Arguably, concerns such as academic freedom are less applicable when the employment dispute involves a coach rather than a professor. However, complex professional considerations demanding the exercise of judgment appear to be present for university or college coaches as well as for university or college professors. *See, e.g., Stanley*, 13 F.3d at 1321 (coach required to conduct twelve outside speaking engagements per year, to be accessible to the media for interviews, and to participate in certain activities designed to produce donations and endorsements for the athletic department). Thus, with respect to both coaches and professors, an element of subjectivity will be present in employment decisions. *See Strag*, 55 F.3d at 949 ("professor" case discussing subjectivity); *Bartges*, 908 F. Supp. at 1326 ("coach" case discussing subjectivity). Generally, courts do not distinguish

Assuming that federal courts continue to respect academic freedom, and to show some measure of deference to institutions' internal academic standards, it will be possible for colleges and universities to set salaries in accordance with institutional needs and goals, and to remain well-defended against potential Equal Pay Act claims. However, colleges and universities with pay disparities, whose "factors other than sex" defense proves to be pretextual, may be vulnerable to attacks under the Act.[75]

between the "coach" cases and the "professor" cases when analyzing the Equal Pay Act. *See, e.g., Bartges*, 908 F. Supp. at 1322, 1323, 1226 ("coach" case citing and applying three different Fourth Circuit "professor" cases).

75. *See Brousard-Norcross*, 935 F.2d at 976 n.3 (subjective judgments are to be disregarded if "they are a facade for discrimination"); Note, *supra*, at 1104 (discussing employer's reliance on previous pay as a pretext for discrimination).