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1 MS. BAZIS: Good morning, Your Honor. Jeanette
2 Bazis from Greene Espel appearing for the University.

3 MS. SWENSON: Good morning, Your Honor. Katherine
4 Swenson of the Greene Espel Law Firm, also appearing for the
5 University.

6 THE COURT: Good morning to everyone.

7 What I'd like to do is -- who is going to take the
8 lead for the plaintiffs today? Mr. Siegel?

9 MR. SIEGEL: Your Honor, I'm going to take the
10 lead for Plaintiff Miller.

11 THE COURT: Okay. So what I'd like to do is start
12 by just clarifying what claims we have in the case and that
13 we don't have in the case with respect to all three
14 plaintiffs. So should I talk to one of you or a couple of
15 you about that?

16 MR. SIEGEL: I can do that.

17 THE COURT: Okay. Why don't you go to the podium
18 then, Mr. Siegel. And, as I said, I'd like to start by just
19 being clear on what's in the case and what's not in the
20 case.

21 I think we've agreed that all of your state-law
22 claims are barred by the 11th Amendment, except you don't
23 concede that with respect to the Equal Pay for Equal Work
24 claim; is that correct?

25 MR. SIEGEL: Your Honor, we've actually had some

1 time to reconsider that issue, and we would now concede that
2 all of the state-law claims are barred by the 11th Amendment
3 and request that the Court remand them to state court.

4 THE COURT: Okay. That seems like a wise
5 concession to me. The language you cite in the Equal Pay
6 For Equal Work Law case, it's indistinguishable from the
7 language and other laws that have been held to be
8 insufficient to waive the 11th Amendment immunity.

9 So your state-law claims are gone. That leaves
10 your federal-law claims. And under federal law, of
11 course -- you don't have an age claim under federal law,
12 none of the plaintiffs? Do you agree with that?

13 MR. SIEGEL: Yes.

14 THE COURT: Okay. And, also, you don't have a
15 sexual-orientation claim. I know the Seventh Circuit has
16 recently become the first circuit to find that Title VII
17 embraces sexual-orientation claims, but I have real clear
18 Eighth Circuit precedent to the contrary, and I'm bound to
19 follow that precedent until the Eighth Circuit changes it.
20 Do you agree with that?

21 MR. SIEGEL: I understand what the Court is saying
22 certainly. I would like to be heard on that issue, because
23 we believe, on the basis of *Price Waterhouse v. Hopkins* and
24 other cases particularly relied on in the Seventh Circuit's
25 *Hively* decision, that discrimination based upon relied sex

1 includes discrimination against persons based upon their
2 failure to comply with certain gender stereotypes, which
3 was, of course, the precise issue.

4 THE COURT: Right. And I understand the argument,
5 and I've read the Seventh Circuit opinion. I just can't do
6 anything about it while I have precedent. So I would
7 consider you to have preserved that argument, and you can
8 make your argument to the Eighth Circuit and see if you can
9 persuade them to join the Seventh Circuit. But I don't
10 think there would be much point in you making the argument
11 today. I'm bound by the contrary Eighth Circuit precedent.
12 And all you can do is preserve the issue and try to persuade
13 the Eighth Circuit to change its mind. So that being the
14 case then, we have basically sex-based claims -- "sex"
15 meaning gender-based claims and national origin-based
16 claims.

17 So I have kind of a big picture. This is more out
18 of curiosity than anything else, and you don't even have to
19 answer it if you don't want, but I'm wondering why you're in
20 federal court. Reading your briefs it seems to me your
21 strongest argument is probably sexual-orientation
22 discrimination. Indeed, the story that you tell in your
23 brief is the purge of lesbian coaches in the fall of late
24 2014 and early 2015, and I can't do anything for you on
25 sexual orientation. I'm just curious as to -- given that

1 that seems to be the strongest of your claims why you're in
2 the court that can't do anything with the strongest of your
3 claims?

4 MR. SIEGEL: Well, Your Honor, we're certainly
5 prepared to meet that eventuality. We think that our sex
6 claims are also strong even without the attached issue of
7 sexual orientation.

8 THE COURT: But you can make those sex claims in
9 state court. There's nothing that I can do for you that a
10 state court can't do for you except, I guess, Title IX
11 retaliation. But here you can only litigate part of your
12 claims. In state court you could litigate all of your
13 claims. It's a sincere question. I'm not trying to
14 criticize you or anything else.

15 When I read your brief, it reads like primarily a
16 brief about sexual-orientation discrimination, and federal
17 law doesn't recognize a cause of action, at least in the
18 Eighth Circuit right now, for sexual-orientation
19 discrimination.

20 MR. SIEGEL: Your Honor, I think that's a very
21 fair point. I don't disagree with you. I want to say --
22 and perhaps this is our fault as plaintiffs' counsel, but we
23 were, frankly, a little surprised that we were advised of
24 the state's objection to this Court's jurisdiction over the
25 state claims at this late stage in the litigation. I would

1 have assumed that if that's the point they wish to make,
2 they would have made it in the context of a Rule 12(b)
3 motion and we would have been facing those issues long ago
4 instead of now when we're obviously close to trial.

5 THE COURT: Have you given any consideration to
6 dismissing your federal claims and having your state -- as
7 you know, I'm late to this case. This was Judge Kyle's
8 case. Was this removed from state court, this case?

9 MR. SIEGEL: No, it was not. It was filed in this
10 court.

11 THE COURT: So it wouldn't be a remand. I have no
12 court to remand it to. You would have to refile in state
13 court. Okay. That takes care of my question, then.

14 So let's just be clear before we talk about the
15 individual plaintiffs. My understanding is at this point
16 then, given what I've said, we have a Title VII claim of --
17 let's start with Coach Miller. We have a Title VII claim
18 for her non-renewal based on sex, and we have a Title VII
19 claim for her non-renewal based on national origin. We have
20 a Title VII claim for hostile environment based on sex. I
21 couldn't tell from your brief, are you making a
22 hostile-environment claim based on national origin or only a
23 non-renewal claim based on national origin?

24 MR. SIEGEL: Merely a non-renewal claim.

25 THE COURT: Okay. And then we have a Title IX

1 claim for retaliation -- a Title IX retaliation claim and an
2 Equal Pay Act claim. Do I have that right with respect to
3 Coach Miller then?

4 MR. SIEGEL: Yes.

5 THE COURT: Then with respect to Coach Banford, we
6 have a Title VII claim for the non-renewal of her Hockey
7 Operations position based on sex, and a Title VII claim for
8 the non-renewal of her Hockey Operations position based on
9 national origin, correct?

10 MR. SIEGEL: Your Honor, I would state that it's
11 the termination in whole with respect to Ms. Banford's case.
12 When she was advised in December of 2014 that she was being
13 terminated, she was advised that she was terminated from her
14 entire position, which includes --

15 THE COURT: Yeah, I know it said that. I thought
16 the evidence in the record was overwhelming, however, that
17 UMD at all times intended to renew her as a softball coach.
18 I know you focused upon that one sentence, but looking at
19 the whole record evidence on this, it seems very clear to me
20 that from the beginning they intended to renew her as a
21 softball coach. And they, in fact, did offer her a job as a
22 softball coach. So on that issue you're going to lose, just
23 on that factual issue of whether they intended to renew her
24 as a softball coach.

25 So they did non-renew her for the Hockey

1 Operations position. She turned down the offer of her being
2 renewed for the softball coach position. And that's what
3 I'm not clear about. I know that you are claiming Title VII
4 sex and national origin with respect to the non-renewal of
5 hockey. Are you claiming that she was constructively
6 discharged from her softball position?

7 MR. SIEGEL: We don't make that claim, but I would
8 like to add a clarifying point, which is that at the time
9 Ms. Banford received the letter advising her that her
10 employment would not continue, she had a year left on her
11 contract. So unlike the situation with Ms. Miller, it
12 wasn't a non-renewal per se. It really was a termination.

13 THE COURT: Okay. I don't want to get too far in
14 the weeds at this point. By all means, we'll talk about
15 this later. I'm just trying to identify what we have up
16 front.

17 So you are not making a constructive-discharge
18 claim with respect to the softball position; is that
19 correct?

20 MR. SIEGEL: Correct.

21 THE COURT: Okay. I know you're making a
22 hostile-environment claim under Title VII on the basis of
23 sex. Are you making one on the basis of national origin, as
24 well?

25 MR. SIEGEL: No.

1 THE COURT: Okay. So you are making a Title IX
2 claim for retaliation. And then are you making an Equal Pay
3 Act claim or not with respect to Coach Banford?

4 MR. SIEGEL: Candidly, our Equal Pay Act claim
5 goes to Coach Miller.

6 THE COURT: Okay. So just to be clear then, so
7 with respect to Coach Banford, we have a Title VII claim for
8 sex discrimination based on the non-renewal of her hockey
9 position, a Title VII claim for national-origin
10 discrimination based on the non-renewal of her hockey
11 position, a Title VII claim for hostile environment on the
12 basis of sex, and a Title IX claim for retaliation, correct?

13 MR. SIEGEL: Correct, Your Honor.

14 THE COURT: Okay. And then with respect to Coach
15 Wiles, I know you're making a Title VII claim for sex
16 discrimination based on constructive discharge, a Title VII
17 claim for hostile environment on the basis of sex, a Title
18 IX claim, a retaliation claim, and an Equal Pay Act claim.
19 Have I got that right with respect to Coach Wiles?

20 MR. SIEGEL: Yes, Your Honor.

21 THE COURT: Okay. That is what I wanted to do up
22 front.

23 You're prepared to talk about Coach Miller in any
24 event?

25 MR. SIEGEL: Yes.

1 THE COURT: As long as you're up there, why don't
2 we talk about Coach Miller.

3 MR. SIEGEL: Okay.

4 THE COURT: So Coach Miller's first claim is this
5 Title VII claim, that the reason she was non-renewed was
6 because of sex.

7 Now, there's a lot of briefing, and I've read the
8 briefing, and I'm familiar with most of the arguments. Both
9 sides, let me just press you on what concerns me about your
10 position.

11 MR. SIEGEL: All right.

12 THE COURT: What concerns me about your position
13 with respect to Coach Miller is what I've already referred
14 to, is your brief tells a story of someone who was basically
15 a successful coach at UMD and was doing well, was paid well,
16 and everything was great. And the whole time, of course,
17 she's a woman. And then this new athletic director comes in
18 the spring of 2013, and he then -- and, of course, I'm not
19 saying this myself, I'm characterizing your arguments -- and
20 he starts evincing evidence of being hostile to people who
21 are gay, and that hostility leads to this, I think you call
22 it a purge of lesbian coaches in the fall of 2014, and Coach
23 Miller gets caught up in this purge.

24 MR. SIEGEL: That's correct.

25 THE COURT: That sounds like a sexual-orientation

1 claim. It doesn't sound like a sex claim.

2 So how is there enough evidence to go to the jury
3 and tell the jury that the but-for cause of Coach Miller's
4 non-renewal was not her sexual orientation, which is what
5 the brief talks about, but in fact her gender?

6 MR. SIEGEL: Okay. So with respect to the Title
7 VII claim, we want to talk about two main themes here.
8 Okay?

9 First of all, with respect to the comparison in
10 the way she is treated as compared with the way in which the
11 men's hockey coach, Scott Sandelin, is treated, as I see
12 that, that's a straight-up comparison, male versus female.
13 Obviously, the issues of pay are there. Scott Sandelin is
14 paid more.

15 Secondly, if you look at records of the two
16 coaches, Coach Miller's over her career was extensively
17 better than Coach Sandelin's. She won 70 percent of her
18 games. We recite in the papers all of the honors, and
19 post-season tournament wins, and so on.

20 THE COURT: What do I do about -- in terms of the
21 comparison with Coach Sandelin -- and I agree with you -- in
22 terms of who's the better coach, I think it's clearly a jury
23 issue. You know, you can make a case that Coach Miller had
24 a better record than Coach Sandelin. They make the case
25 that -- they make the what-have-you-done-for-me-lately

1 argument. There's something to that in athletics. It often
2 is what have you done for me lately. I think a jury could
3 find that they were equally good coaches. I think a jury
4 could find that Coach Miller was a better coach. I think a
5 jury could find at the time that Coach Sandelin was the
6 better coach. That's going to be for the jury. So whatever
7 happens today, it's not going to be me that makes that
8 decision.

9 They do make two arguments that do give me some
10 pause. One is they say that Coach Sandelin -- one argument
11 only has to do with pay, but they say Coach Sandelin had
12 more responsibilities, that he had to generate attendance,
13 he had to generate revenue. His team was helping to fund
14 Coach Miller's team. Coach Miller's team wasn't helping to
15 fund his team. And because he has more responsibilities, he
16 is not a comparator. They cite the cases mostly from the
17 '90s, I think, on comparing coaches. What do I do with
18 that?

19 MR. SIEGEL: I would say two things about that,
20 Your Honor. Number one, if you look at their contracts and
21 their responsibilities under their contracts, they have the
22 same duties. So, you know -- and I know this also relates
23 to the Equal Pay Act claim, but on paper they had the same
24 duties.

25 Now, there's an argument being made, as the Court

1 indicated, regarding duties to generate attendance and
2 revenues. One, there's a factual question as to whether
3 Scott Sandelin had that duty. The program that he coached
4 had that duty. But what we think is important is the extent
5 to which he received support in terms of communications,
6 public relations, facilities management, and so on to help
7 fill the hockey rink and to generate revenue for the hockey
8 team. And he was very equivocal about that issue. When I
9 took his deposition, he said, yes, the program has that, but
10 that was not my particular responsibility. So I think that
11 the argument that the University makes regarding his
12 increased duties at best creates a question of fact
13 regarding those duties.

14 The other issue in terms of -- I'm not sure if the
15 Court is interested in this question regarding the whole
16 idea of salary interpreted from the perspective of cost per
17 game won, which is, in our view, a false argument. It's a
18 nice creation for the purposes of this litigation. But from
19 a lot of --

20 THE COURT: Isn't the evidence that it was created
21 before Coach Miller was non-renewed?

22 MR. SIEGEL: Certainly there's a claim of that.
23 Certainly it was not shared with Coach Miller or her counsel
24 at the time until well after the termination. So we don't
25 know exactly when it was that Mr. Berlo sat down and figured

1 it out.

2 We do know from the declaration of Art Cobb that
3 some of the numbers that go into that calculation were
4 incorrect; and that, in fact, looked at as a factor of
5 salary, Coach Sandelin was paid more per victory than Coach
6 Miller was.

7 So that's a point, but I think the bigger point on
8 that issue is that if you are trying to figure out as an
9 athletic department how much it's costing you to win games,
10 then you have to look at the total costs of the particular
11 sport program to say, well, we won so many games and the
12 cost of the program was whatever it was. And, in fact, UMD
13 put approximately 50% more into the men's hockey program as
14 compared to the women's hockey program.

15 So if we're looking at that cost-benefit analysis,
16 the cost of winning men's hockey games was vastly more than
17 the cost of winning women's games.

18 And please stop me if I'm going --

19 THE COURT: You know, what matters for our
20 purposes today isn't whether it was a competent analysis but
21 whether it was a sincere analysis. I'll talk with the
22 University's attorneys about this when I talk to them. I
23 think it is hard for me to grant summary judgment to the
24 University on this sex-discrimination claim -- Coach
25 Miller's sex-discrimination claim about her firing or her

1 non-renewal. These aren't construction workers. They're
2 not assembly line workers. I can't compare Mary's 15
3 widgets per hour with John's 16 widgets per hour. I don't
4 think I, as the judge, can say one coach was better or worse
5 than the other.

6 What I'm mostly concerned about with your claim is
7 you do something that I think is a mistake for plaintiffs'
8 employment lawyers, and you're not the first or the last to
9 do this, which is you're not picking a horse. So you're
10 arguing that the but-for causation was sex, and the but-for
11 causation was age, and the but-for causation was sexual
12 orientation, and the but-for causation was national origin,
13 and the but-for causation was Title IX retaliation. They're
14 not all true. And if you stand before the jury and try to
15 argue all five bases, they're going to give you zero of the
16 bases.

17 It seems to me your best horse is sexual
18 orientation, and because that's your best horse, that the
19 sex seems kind of a weak claim to me, maybe not so weak that
20 I can dismiss it on summary judgment. Because of federal
21 law, you're kind of going to be litigating this on not your
22 best turf to use an athletic analogy. You are going to make
23 this a visiting game, rather than a home game, I think. But
24 that's your decision, it's not mine. It's not a legal
25 question.

1 With all these coaches, they're all women, they're
2 all known to be women, they all have a lot of success at
3 UMD, they all seemed quite happy at UMD for a long time.
4 And then, as you tell the story, what starts really changing
5 is the spring of 2013 when the new athletic director starts.
6 And the problem is that, in your view, he's homophobic.
7 And, in fact, when Coach Wiles goes and complains, she's not
8 complaining that he's sexist. She's complaining about him
9 being a homophobe, is what she's complaining about.

10 Now you're going to have to go into federal court
11 and win a case saying gender was the but-for cause of Coach
12 Miller's non-renewal. You know, you can probably -- we'll
13 probably try that claim, but I'm not sure that's your best
14 claim.

15 MR. SIEGEL: Your Honor, I completely understand
16 what the Court is saying. I also appreciate what you
17 indicated regarding saying to a jury that it was gender,
18 gender orientation, nationality, age and/or retaliation, and
19 I can assure you we're not going to be doing that. I
20 believe that this is a case about gender, not about national
21 origin or age.

22 THE COURT: Yeah, just as somebody who was born
23 and raised in Duluth, that lived there and went to college
24 there, the Canadian discrimination -- you go to the Miller
25 Hill Mall on a weekend and you can't tell a Canadian from a

1 Duluthian. I wouldn't lead with that claim. I know there's
2 been a couple remarks in the record, and I don't know -- I
3 think they deny making the remarks. If they made the
4 remarks, I suspect they were probably poor attempts at
5 humor. That's another one, I wouldn't lead with that if I
6 was you at trial.

7 Let me ask you about this, to get back to the
8 issue of whether there's enough evidence of sex
9 discrimination here. You rely upon this shifting
10 explanations, which is a standard thing to rely upon. They
11 say that the focus on the financial aspects of describing
12 the reasons for the non-renewal publicly, that that was all
13 at Coach Miller's behest. She's the one who asked them to
14 portray it as being financial and, essentially, that she's
15 trapping them here because out of consideration for her they
16 portrayed it the way she wanted and now she's trying to use
17 that to hurt them in this litigation. What is your response
18 to the University's argument?

19 MR. SIEGEL: Well, we look at a series of
20 interactions first involving Coach Miller and Assistant
21 Athletic Director Finnerty, and Athletic Director Berlo, and
22 then involving Chancellor Black through the summer/fall into
23 the winter of 2014, in fact, to the first of the year where
24 Ms. Miller's recollection of their conversations is that
25 they referred solely to the issue of finances, and that it

1 wasn't until after the non-renewal was announced publicly on
2 December 9th and there was a huge firestorm of opposition
3 and concern expressed in the media, in the state
4 legislature, everywhere, that Chancellor Black for the first
5 time, I think it was on January 14th, suggested that there
6 were other issues and later says that there were other
7 issues, again, primarily with the media. And then it
8 gradually morphs into a decision that had nothing to do with
9 finances when Mr. Berlo says when I deposed him that I would
10 have fired her even if she agreed to work for \$80,000. And
11 I think that was a very telling comment. I mean, besides a
12 comment that reflects a change in rationale for the
13 decision, I think it was also a comment which, not on paper
14 perhaps, but in realtime reflects the hostility and
15 prejudice when he said he wouldn't have her work for 80,000
16 a year.

17 THE COURT: I know that some of these meetings
18 were taped. Do we have a -- and I apologize for not
19 knowing, but the record is in boxes back in my chambers and
20 I, obviously, haven't been able to read everything -- do we
21 have a tape recording of the key meeting between Coach
22 Miller and Mr. Berlo?

23 MR. SIEGEL: We do.

24 THE COURT: I haven't, obviously, read the
25 transcript. Is there reference to performance there or is

1 it pretty much just focused on finances?

2 MR. SIEGEL: Coach Miller asks Mr. Berlo is there
3 something else? Is there something else you want to tell
4 me? She says, I'm a big girl, I can take it. He says, No.
5 He says, We know you're -- I don't know if it's great coach,
6 but we know who you are as a coach. And she was pushing him
7 for another explanation, something to argue about, because
8 she was prepared to argue if the issue of performance had
9 come up, but it did not.

10 THE COURT: Okay. Is there anything more you want
11 to say about the non-renewal of her coaching contract in
12 your claim that that was based on sex? And then next we'll
13 talk about hostile environment after that.

14 MR. SIEGEL: You know, if there's a smoking gun in
15 this case, Your Honor, I think it revolves around the
16 conversations with Linda Kinnear from Human Resources,
17 Mr. Berlo, and Mr. Finnerty in December of 2014 where
18 Mr. Finnerty, on behalf of Mr. Berlo, is inquiring about
19 five individuals, all of whom are women. And, by the way,
20 because the exhibit is -- it's not totally clear, but I
21 think it is clear, not only about the assistant coaches and
22 the strength coach of the hockey team and Ms. Banford, but
23 also about Ms. Wiles where in Ms. Kinnear's response to
24 Mr. Finnerty she says, You previously inquired about SL and
25 AW. "AW" is Annette Wiles. "SL" is the reversal of the

1 initials of Linda Schuler. So in that conversation they are
2 talking about five female coaches, not including Ms. Miller
3 who is about to be non-renewed publicly, so six female
4 coaches.

5 To the Court's earlier point, we believe this is
6 the entire universe of gay female coaches at the University
7 at that time, and they are all being discussed for
8 non-renewal. And Ms. Finnerty (sic) responds and writes to
9 Mr. Berlo, You know, we may have a problem here. These are
10 all women. She doesn't talk about sexual orientation. They
11 are all women. There are no men. And then Mr. Berlo joins
12 the conversation in an email and says, Well, actually, we
13 were talking about terminating a male coach, and there was
14 an administrator as well who -- I believe he's referring to
15 the gentleman who was forced to resign after he threatened
16 to punch Ms. Banford in the face. And Mr. Berlo also says,
17 Let me assure you this has nothing to do with sex. But I
18 think that interaction is really the smoking gun in this
19 case. And it shows that by December 2014, Mr. Berlo was
20 determined to rid the department of a sub group, a large sub
21 group of the female coaches.

22 THE COURT: Okay. With respect to the
23 non-renewal, you do have this claim on national origin. Do
24 I understand you to be saying that you probably aren't going
25 to pursue that claim -- that is, that the but-for cause of

1 her non-renewal was that she was Canadian?

2 MR. SIEGEL: Correct.

3 THE COURT: Okay. Let's talk about hostile
4 environment then. As I've told you, I think you probably
5 have a triable claim over the non-renewal. With the hostile
6 environment, though, I'm not thinking this is one of Coach
7 Miller's better claims.

8 Let's just start by looking at the 300-day period.
9 I understand that as an evidentiary matter we can look
10 beyond that, but I want to just start with the 300-day
11 period. I'm looking for a single kind of severe or
12 pervasive type of harassment that's sex based that's going
13 on in those 300 days other than, of course, her being
14 non-renewed. But with respect to Coach Miller, I just
15 didn't see it in the record. I think she wasn't put on the
16 Strategic Planning Committee in May of 2014. And other than
17 that, what is there that's severely and pervasively
18 harassing her at this time when, in fact, she wants her job?
19 She wants to stay. She is kind of fighting for her job
20 back. Where is the hostile environment?

21 MR. SIEGEL: I do believe that the exclusion from
22 the Strategic Planning Committee is a key event in the case.
23 And Ms. Miller's testimony is that she felt shut out. She
24 simply felt that she was not being treated as a valued
25 member of the Athletic Department. Despite the fact that

1 she is the coach of the only women's team at UMD that is a
2 Division I team, she's not included. Mr. Berlo is not
3 interested in speaking with her.

4 There's the incident on 12-23 --

5 THE COURT: Okay. Just let me stop you there.
6 But with this committee thing, the way UMD portrays this --
7 and I didn't see you disagreeing about that -- is that seven
8 of the twelve head coaches were invited to the initial
9 committee; some men, some women; five of them were not, some
10 men, some women. Hard for me to find (a) that that's sex
11 based and (b) it's just not severe or pervasive.

12 I know you're an experienced lawyer and you know
13 this: Every single employee in every single workplace has
14 things happen that tick them off, that make them mad. I'm a
15 federal judge and you should try to deal with the GSA over
16 like our -- we all have things. It doesn't mean that it's
17 severe or pervasive. We're all expected to take some bumps
18 and bruises, rude behavior, inconsiderate actions. That's
19 part of it. This kind of I didn't get on this committee
20 strikes me as being that latter type of thing, not kind of
21 the -- if you look at what the Eighth Circuit has held as
22 not severe or pervasive, this falls far below that even. So
23 I don't think that gets her there.

24 What else do you have in that 300-day period that
25 you think you would call so severe and pervasive that it

1 affected the conditions of her employment?

2 MR. SIEGEL: We have evidence that Mr. Berlo --
3 and I hear where the Court is going, so I don't want to
4 waste the Court's time, or anyone else's, arguing an issue
5 that is likely to be resolved against me. But the
6 perspective is the perspective of the victim, as well as the
7 reasonable person observing what's going on. And, in part,
8 Ms. Miller's claim is based upon the contrast in the way she
9 was treated once Mr. Berlo shows up.

10 She was honored. I mean, she went to the White
11 House five times. She was hired by a chancellor who thought
12 that women's sports were a necessary part of building the
13 prestige, reputation, and support of UMD and brought Shannon
14 Miller from the Canadian Olympic Team for that purpose. And
15 she was for quite a few years, despite bumps in the road,
16 treated with the respect that she deserved, and which was a
17 whole part of the transaction for her coming to UMD. And
18 then, all of a sudden, she's no longer there. She has to
19 fight for her job. She has to fight for respect. When
20 someone working with her in the Public Relations Department
21 sends out a press release or a story idea talking about her
22 history and championships and so on, that decision is
23 countermanded by Mr. Berlo who orders the individual
24 involved not to send out those press releases.

25 So, yes, I understand that it's a steep hill to

1 climb in terms of Eighth Circuit law on this issue, but from
2 her point of view, she felt that she was in a hostile and
3 intimidating work environment.

4 THE COURT: Okay. In terms of the Title IX
5 retaliation claim, this seems to me like a case that will
6 probably -- that's a claim we'll probably have to try, as
7 well. I mean, it seems uncontested that Coach Miller is
8 regularly raising Title IX complaints. And she, of course,
9 is non-renewed in the midst of these Title IX complaints, so
10 we have very close temporal proximity.

11 The argument that if we do try this claim you're
12 going to have to face at trial and the only thing that gives
13 me pause about letting this claim go to trial is, as I
14 understand it, Coach Miller is advocating for equality and
15 is complaining about inequality for years, you know, going
16 back a decade or more, and yet is treated well there by and
17 large. I don't mean every day is heaven, but, by and large,
18 she's treated well. And, of course, she's renewed and she
19 gets raises. Whether she is the first highest-paid coach or
20 the highest-paid coach, she's a highly-paid coach despite
21 the fact that she is a constant advocate for Title IX and
22 for equality. So what changes, right? So if year after
23 year after year she's doing X and it's not affecting her
24 negatively, how does the jury conclude that the reason that
25 she was non-renewed is because she continued to do the same

1 thing she'd been doing for years and years and years without
2 negative consequences?

3 MR. SIEGEL: Well, again, I think we go back to
4 the change in administration at the University. I haven't
5 mentioned Chancellor Black specifically in this context, but
6 the evidence at trial will be that Chancellor Martin
7 protected Coach Miller and occasionally intervened on her
8 behalf when necessary. And, also, although she had
9 differences with prior athletic directors, they didn't rise
10 to the level of hostility.

11 In my experience, and I know I'm not here to
12 testify, but in big-time college athletic departments, the
13 coaches of the major sports are in charge and the athletic
14 director is the facilitator. That's the way it works. And
15 that's the way it worked at UMD with respect to Coach Miller
16 until Mr. Berlo shows up. And he took these complaints in a
17 less friendly fashion.

18 We believe that when you look at the constellation
19 of factors that led to Coach Miller's demise, that these
20 issues are not as distinct as being over 50 or being a
21 Canadian, but being a woman who is attracted to other women
22 does not conform to gender stereotypes, and who complains
23 about the rights of women athletes combined to cause Coach
24 Berlo to decide that it's time to make a change.

25 So we think the complaints fit into the pattern

1 that we're talking about, not that they are distinct. And
2 we also think we can prove, pretty overwhelmingly, that
3 these complaints were not only sincerely felt, but that they
4 were objectively valid complaints about --

5 THE COURT: Well, you don't have to do that to
6 make out a retaliation claim. They just have to be sincere
7 complaints. Whether they're right or wrong is irrelevant.

8 Okay. Let me ask you, lastly, about the Equal Pay
9 Act. And we started talking a little bit about this. Coach
10 Sandelin is, obviously, the comparator on which you're
11 relying. They essentially make two arguments for why he's
12 not a fair competitor or his higher salary does not violate
13 the Equal Pay Act. One we talked about, is they say his
14 increased responsibilities. The other that does give me
15 some pause is this market value argument. Their argument is
16 that while Coach Miller was the -- that simply you have to
17 pay more for men's hockey coaches than women's hockey
18 coaches, and that while Coach Miller was the highest paid or
19 second highest paid hockey coach in America, Coach Sandelin
20 was like, I can't remember, sixth of eight in the conference
21 or something like that. What do you do with that? It seems
22 true that men's hockey coaches make more than women's hockey
23 coaches, and that compared to their colleagues, Coach Miller
24 was very highly paid and Coach Sandelin was not.

25 MR. SIEGEL: Well, I want to say a couple of

1 things about it. One is that the United States Supreme
2 Court has made it very clear that the purpose of the Equal
3 Pay Act is to address the historic inequity and imbalance
4 between men's and women's pay so that it may very well be
5 true, probably uncontestable, that male coaches make more
6 money than women coaches.

7 It's a little bit of a tangent, but one of the, I
8 would say, less wonderful results of Title IX is that as the
9 pay for coaches of women's athletic teams increases, you
10 have more and more men taking those jobs, which is a factor
11 that people have noticed. But the historic imbalance is
12 not, for purposes of the Equal Pay Act, a justification.

13 THE COURT: I've only had one or two Equal Pay Act
14 claims in my judicial career. I just don't even know the
15 answer to this: Is it a defense to an Equal Pay Act claim
16 that you had to pay market and market for men was higher
17 than market for women?

18 MR. SIEGEL: Actually, that particular defense is
19 roundly critiqued and rejected by the courts, that you have
20 to pay more.

21 THE COURT: Okay.

22 MR. SIEGEL: And the other point I want to make
23 about the market value argument -- and Donna Lopiano, our
24 Title IX expert says this in her declaration -- is that
25 argument may make sense if it's legal or lawful or not at

1 the time of an initial hire, that while we're hiring a coach
2 to coach our men's team and we have to pay him X dollars
3 more than we pay the women's coach because otherwise he
4 won't come. I mean, that's really the market value
5 argument, which may or may not be true, it may or may not be
6 lawful, but I believe this is relevant here because, you
7 know, there's not evidence that Scott Sandelin ever gave UMD
8 an ultimatum and said pay me more than Shannon Miller or I'm
9 headed to St. Cloud or wherever. So to the extent to which
10 that argument is made, I think there's a factual basis for
11 challenging its validity and applicability in this case.

12 THE COURT: Okay. I don't have any more questions
13 for you about Coach Miller, but let me just invite you to
14 say anything more you wanted to say about her claims at this
15 point.

16 MR. SIEGEL: Yeah, in light of the Court's
17 questions, I believe I've said what I need to say.

18 THE COURT: Okay. I'll give you a chance to come
19 back up after I talk to the University's attorneys in case
20 there's anything more you wanted to say.

21 MR. SIEGEL: Great. Thank you.

22 THE COURT: Thank you.

23 Who has Coach Miller? You're Mr. Pramas?

24 MR. PRAMAS: Pramas.

25 THE COURT: I'm sorry. Mr. Pramas.

1 So, Mr. Pramas, let's walk through -- Mr. Siegel
2 was very helpful in clarifying what's in the case and what's
3 not in the case at this point, so let's walk through Coach
4 Miller's claims that are in the case, first being her claim
5 that the reason she was not renewed was her sex.

6 One of the issues that I didn't raise with
7 Mr. Siegel, but you raised in your brief, was whether a
8 non-renewal can be an adverse employment action. And it
9 looks to me like there isn't any case law in the Eighth
10 Circuit binding me on that issue. And I just have to say
11 looking at kind of the explanations out there, why wouldn't
12 a non-renewal be an adverse action? I realize there's not a
13 contractual right of renewal, but when you talk about a
14 workplace where non-renewals are part of the practice of the
15 workplace, where essentially a non-renewal in the workplace
16 is viewed as almost a firing, why wouldn't that be an
17 adverse action for Title VII purposes?

18 MR. PRAMAS: I guess I just want to clarify, and I
19 think the Court already clarified it with the question. I
20 mean, we tend to loosely say she was non-renewed. That
21 isn't the case here. She had a contract that expired in
22 June of 2015. There was no right to renewal within the
23 contract. We simply made the decision that we did not want
24 to give her an additional contract.

25 We're not claiming, and it's not the University's

1 position, that our decision not to offer her a contract
2 means that we sort of have a license to violate Title VII.
3 That's not our position.

4 Our position is she had no legal expectation to
5 receiving a salary or employment after June of 2015. And
6 that's important in the context of deciding whether the
7 plaintiff can come forward with sufficient evidence to
8 create a fact question as to whether the University's
9 reasons for deciding not to offer her a new contract were
10 pretext, that we were insincere, and that we were really --

11 THE COURT: I'm not sure I understand the
12 distinction you're making. Suppose that Mr. Berlo had
13 written her a letter in December and said when your contract
14 expires in June, we are not going to be offering you a new
15 contract and it's because you're a woman, period. That
16 would violate Title VII?

17 MR. PRAMAS: Yes, it would. Yeah.

18 THE COURT: Okay. So that's, essentially, what
19 the plaintiffs say has happened, not that you wrote the
20 letter, but that's the reason he didn't renew her.

21 So how do I -- you know, we're here -- I'm going
22 to tell you something that I know you know, which is I'm not
23 here today to say whether your defenses are good or bad or
24 whether a jury will accept them or not, but just whether I
25 can grant you summary judgment. Okay?

1 So the way I see this non-renewal is we have a
2 men's hockey coach and a women's hockey coach. They seem
3 like comparators to me. Comparators don't have to be
4 perfect. They have to be sufficiently similar to be
5 comparators. If we had a high school debate team here, I
6 could assign one team to argue Coach Miller was the more
7 accomplished coach and another to argue that Coach Sandelin
8 was the more accomplished coach, and they'd both have plenty
9 of ammunition for their arguments. I could see a jury
10 thinking one was better, the other was better. They were
11 both very good coaches. Yet one is not renewed and the
12 other is renewed. Why isn't that under *McDonnell Douglas*
13 enough to at least get to the jury?

14 MR. PRAMAS: I hope the Court doesn't mind, my
15 answer is long on that question.

16 THE COURT: We'll see how long and we'll see how
17 much I mind.

18 MR. PRAMAS: Okay. Very broadly, there are two
19 sort of answers to that. One is that the fact dispute is
20 not over a material fact. It's black-letter law that the
21 Court does not sit as a super personnel department deciding
22 whether the decision was the right one or the wrong one.
23 It's perfectly legal to be wrong.

24 Coaches -- pro coaches who have a long series of
25 success hit a rough patch get replaced. Maybe the general

1 manager made a good decision. Maybe the general manager
2 made a bad decision. In college Division I, Bobby Bowden at
3 Florida State are plenty of examples. Maybe the athletic
4 director or the president of the university made a good
5 decision, maybe a bad decision. And that's where -- to the
6 extent there are fact disputes, that's the fact dispute:
7 you made a good decision to get a new coach instead of Coach
8 Miller. You made a bad decision. That leads to --

9 THE COURT: I understand that part of it. The
10 argument they're making is that a jury could find that
11 despite her being a better coach, she was fired and the male
12 coach was not. And I believe that a jury could find that.

13 Now, I agree the jury can't hold UMD liable just
14 because it disagrees with their judgment about whether this
15 is a good coach or a bad coach. But if a jury finds you
16 have two people and they're comparators and one is doing a
17 better job and she's the one who gets fired and the guy not
18 doing as good a job is the guy that doesn't get fired,
19 that's exactly what *McDonnell Douglas* looks like.

20 MR. PRAMAS: This sort of leads to the second
21 point, is that -- I guess there is a sub A and a sub B.

22 THE COURT: Okay.

23 MR. PRAMAS: The sub A is the question about
24 whether Coach Sandelin is really a comparator. And the sub
25 B is whether there's sufficient evidence of pretext that it

1 could get to the jury. Let me start with what I call the
2 sub A --

3 THE COURT: Okay.

4 MR. PRAMAS: -- Coach Sandelin. His contract did
5 not expire in June of 2015. His contract expired in 2016.
6 When the time came to look at Coach Sandelin's contract, his
7 team had qualified for the NCAA Tournament a number of times
8 since his last contract was given to him following the 2011
9 season. His record at that point, NCAA record, post-season
10 record was 7 and 3. His record was different. He was
11 evaluated with great emphasis given to the fact that he's
12 getting his team to the NCAA Tournament. They're winning
13 NCAA Tournament games. And it's also a different period of
14 time. It's a year later.

15 So there's differences that UMD valued as to why
16 they decided let's give Coach Sandelin a new contract, look
17 at the recent track record of success Coach Sandelin is
18 having, and the feeling was he earned it.

19 THE COURT: Your argument doesn't mean he is not a
20 comparator. I don't think it makes him out not to be a
21 comparator. It may justify your treatment of him, better
22 than Coach Miller, but it doesn't really go to a comparator.
23 If it did, you could never find a comparator for a coach
24 because you can always -- any coach in any sport you can
25 always find the other and you can say, you know -- like it's

1 done in these briefs, right? When the coaches had a lot of
2 success on the field, we hear about how successful they have
3 been on the field. When they haven't, we hear about how
4 great the graduation rate is for the players. I mean,
5 there's always --

6 So, again, I get back to could a jury hearing
7 their case for Coach Miller decide that Coach Miller was a
8 better coach, a more accomplished coach than Coach Sandelin,
9 and I think a jury could. And if a jury could find that,
10 they could also then find that she was treated more poorly
11 than Coach Sandelin and conclude it was because of her sex.

12 MR. PRAMAS: Here when the record's viewed, that
13 sort of gets to my sub B argument, is there isn't any
14 evidence that UMD stated reasons why they weren't giving her
15 a contract. We're pretext.

16 And what's important about this factual record is
17 there isn't a dispute about what did he -- sort of the he
18 said/she said things. Because all the important
19 conversations were secretly recorded by Coach Miller, we
20 know exactly what he said and she said. And the audio
21 files, as well as the transcripts, of those conversations
22 have been provided as part of the record. And there you
23 have a record where the previous year's written job
24 evaluation is referencing the need for more competitive
25 success. You have the recorded conversations where concerns

1 about her performance are being raised in more than one
2 meeting.

3 THE COURT: Well, I confess, as I said, I haven't
4 read the transcript, but my law clerk did read the
5 transcript of the, was it, December 9th conversation, and he
6 said it's pretty much all about finances. There really
7 isn't much said about performance in that conversation.

8 MR. PRAMAS: Right.

9 THE COURT: And the initial public announcements
10 are all about finance. One of the classic markers of
11 pretext is shifting explanations.

12 MR. PRAMAS: And there isn't a shifting
13 explanation.

14 THE COURT: You went from finance to non -- we
15 started with pure finance, and we ended up with finance
16 being barely mentioned after several months.

17 MR. PRAMAS: That's chronologically not how it
18 occurred. In the spring -- the summer of 2014, the various
19 performance concerns are addressed with Coach Miller. Then,
20 in the beginning of the season, UMD has consecutive series,
21 two at home against the Gophers, Wisconsin. UMD goes 1-4-1
22 in those three series and that prompts Athletic Director
23 Berlo to do what's been referred to as the "Moneyball"
24 spreadsheet. From the metadata of the spreadsheet we know
25 that was created in October 2014. And the results of that

1 were startling to Mr. Berlo, and that sort of reinforced
2 what had been happening over a number of years. UMD's
3 women's hockey team was not competitive against Minnesota,
4 Wisconsin, and even North Dakota.

5 THE COURT: This is all your argument to the jury,
6 but none of this was mentioned when Coach Miller kept asking
7 why am I not being renewed.

8 MR. PRAMAS: Then in December there is the
9 meeting. It's after the decision has been made. At this
10 point, UMD doesn't feel the need to sort of pile on. I
11 mean, the decision has been made, so they try to put the
12 best face on it. They do talk about performance, do talk
13 about finances. And predominantly, I would admit, in
14 December it's finances. But this is not a case of shifting
15 rationale. The rationale is discussed all the way through.

16 They decide, consistent with sort of UMD's
17 philosophy of criticize in private, praise in public, and as
18 a favor to Coach Miller that they weren't going to emphasize
19 publicly the performance.

20 THE COURT: But the point I'm emphasizing is that
21 both in private and in public they were saying the same
22 thing in December - finances. They weren't telling Coach
23 Miller something different, according to what the law clerk
24 told me about the recording. He said it pretty much was
25 about finances. And that she, in fact, was pressing him:

1 Is it anything but finances? And they were saying no, no,
2 you're a great coach. We just can't afford you.

3 MR. PRAMAS: I guess I would disagree with that
4 characterization.

5 THE COURT: Okay. Well, I'll listen to it myself.

6 MR. PRAMAS: That's fine.

7 More importantly, right around the time of the
8 termination decision, in the press release there's an email
9 to Mr. Siegel where it's explained that there was a
10 performance component of the decision, and it references
11 when that was explained to Ms. Miller as well.

12 So even in December the performance rationale is
13 being discussed. The reason why, you know, initially they
14 are deciding to do Ms. Miller a favor and not in the media
15 emphasize the various performance-related decisions or
16 concerns that were addressed privately is just out of that
17 philosophy. Then they were getting hammered in the media,
18 including by Ms. Miller. That's when they raised things
19 with the media that they had raised with Ms. Miller
20 previously. So there isn't a shifting rationale.

21 And, more importantly, the press release is not
22 inconsistent with UMD's concern that they were not getting a
23 good return on investment. UMD made the decision because it
24 did not feel it should pay a top-of-the-market rate for
25 average to below average results, which is what they had

1 been getting for a number of years.

2 They made the decision that a new coach could best
3 turn around the program, which in hindsight did occur. And
4 the replacement coach -- also a woman, also publicly
5 identified as gay. So the whole record does not show that
6 gender or sex is the motivating factor, the but-for cause
7 for why the change in coaches was made. The record viewed
8 in its entirety shows that UMD sincerely believed a change
9 in coaches would be best for the women's hockey program.
10 And although the plaintiff may disagree, and that's where
11 there may be some dispute of fact, there still isn't
12 evidence of pretext sufficient to make that a triable issue
13 of fact.

14 THE COURT: Okay. Anything more you want to say
15 on that issue?

16 MR. PRAMAS: Yes, just with respect to an argument
17 that the plaintiffs seemed to emphasize in their brief, and
18 that is somehow the fact that the assistant coaches were
19 also let go as part of the coaching change somehow shows
20 gender discrimination. But even the plaintiffs' expert
21 concedes in Division I sports in particular, when you let
22 the head coach go, you let the assistant coaches go because
23 the new head coach should be able to pick his own
24 assistants.

25 THE COURT: We'll return to that when we talk

1 about Coach Banford. But what about the broader point that
2 in this period of time there are six, basically, coaches or
3 assistant coaches that are let go and they're all women?

4 MR. PRAMAS: Well, the head coach of women's
5 hockey, Ms. Miller, is let go for reasons we've discussed.

6 The two assistant coaches, it's more of a product
7 of who coached -- the assistant women's coaches, the women's
8 hockey team, that's just a product of who Coach Miller
9 hired. They happened to be women. If they were men --
10 because they were Miller's assistant coaches, they would
11 have been non-renewed so that the new head coach could hire
12 her own assistants, one of whom also ended up being a woman
13 as well.

14 Then you have Ms. Banford. It was always the
15 intention to retain Ms. Banford as head coach of the
16 softball team. It was merely, again, to allow the head
17 coach to pick her own Director of Hockey Operations. I'm
18 not sure who the other two are.

19 They did say Ms. Wiles' contract -- we can get
20 into it with Ms. Wiles. There was an email where they are
21 finding out -- where Mr. Berlo is trying to find out some
22 information about contracts. The email doesn't indicate
23 that they're seeking to get rid of each person named in the
24 email.

25 So if you go one by one, by my count, if we

1 include Ms. Miller, her two assistants, and Ms. Banford as
2 Director of Hockey Ops, that's four. I'm not sure where we
3 get to the six. The strength and conditioning coach, a
4 woman, part of the GLBT community. The athletic trainer,
5 Communications Director, all women, part of the GLBT
6 community. They're retained. The new women's hockey coach,
7 as I've already pointed out, woman, gay. The new softball
8 coach, a woman. The new basketball coach, a woman. Again,
9 especially if you look at it from a gender or sex-based
10 discrimination complaint, the fact that the assistant
11 coaches and the Director of Hockey Ops were women, it was
12 just the nature of who they worked for, who they reported
13 to -- Ms. Miller -- not because they were women.

14 THE COURT: Okay. Anything more on the
15 non-renewal decision that you wanted to say?

16 MR. PRAMAS: No.

17 THE COURT: Okay. And then on the
18 hostile-environment claim. As you heard in my discussion
19 with Mr. Siegel, I have a hard time finding enough evidence
20 to get to the jury on the hostile environment with respect
21 to Coach Miller. I assume you agree. Is there anything you
22 wanted to add to what you've heard us talking about?

23 MR. PRAMAS: I have nothing I need to add.

24 THE COURT: Okay. In terms of the Title IX
25 retaliation, so here's the -- you know, I take it the

1 University doesn't dispute, at least for our purposes today,
2 that Coach Miller consistently engaged in protected activity
3 under Title IX during much of her career at UMD. Is that
4 correct?

5 MR. PRAMAS: For purposes of the motion, we don't
6 dispute that. We do agree that she did raise a number of
7 complaints throughout her time at UMD.

8 THE COURT: So we have somebody who throughout her
9 time at UMD, including the time around when the decision is
10 made not to renew her, is engaging in protected activity.
11 We have the decision not to renew her. How do I say on a
12 motion for summary judgment that a reasonable jury can't
13 find that the two aren't connected?

14 MR. PRAMAS: I think for reasons that you were
15 alluding to, as far as there was nothing in 2014 different
16 from what she had been doing at least going back to 2009.

17 THE COURT: There was a new athletic director as
18 of 2013.

19 MR. PRAMAS: Right. But there's no evidence that
20 he was upset by her reports or anything of that nature.
21 There's no evidence in the form of emails where he's
22 expressing any sort of angst about what she is complaining
23 about, no conversations, no eyewitnesses. There's no
24 evidence that complaints she had been making for a number of
25 years were a motivating factor in the non-renewal decision.

1 And I put great weight on the Court's observation,
2 similar to mine, that they are saying it was because she was
3 Canadian, because she was older, because she was a woman, et
4 cetera. Now they're saying, well, it's because she raised
5 complaints. Mr. Berlo testified that pretty much every
6 single coach he has ever supervised has always said I don't
7 have enough, I should be getting more, why are other
8 programs getting more. That's sort of -- when you're the
9 athletic director, you hear that from every single head
10 coach. So it didn't bother him that Coach Miller is saying,
11 you know, I could really use a little bit more money for
12 recruiting, it would be great if I had a little bit more
13 money for whatever, and I know that the men's hockey team is
14 getting that, can I get that too. To him that's consistent
15 --

16 THE COURT: Well, it's different with a coach
17 saying with more money I can do X and I'd like to have more
18 money and a coach saying the law requires me to be funded at
19 an equal rate, and I'm not being funded. You're violating
20 the law. One is protected activity and one is not protected
21 activity.

22 MR. PRAMAS: Right, and I don't know that
23 Ms. Miller's complaint is to the latter. But, in any event,
24 those sort of concerns that Ms. Miller is raising to the
25 Athletic Director, that's what he's hearing all the time, is

1 I want more, I think I deserve more as the head coach
2 speaking. And that's not why he's saying oh, I need a new
3 women's hockey head coach. I've already been through the
4 reasons why UMD made the decision. But there's an absence,
5 complete absence of evidence that that motivated Mr. Berlo
6 or Chancellor Black in any way when they made the decision
7 about Coach Miller.

8 Under the Eighth Circuit, you need more than
9 temporal proximity in order to have a triable issue of fact.
10 But even here I don't see the temporal proximity because
11 when in 2014 was the complaint? Because there have been
12 plenty of Eighth Circuit cases where a plaintiff will say,
13 well, I made a complaint a few months ago and then, you
14 know, a few months later an adverse action was taken.
15 There's just an absence of evidence on the causation, some
16 link between the protected activity and the adverse action.

17 So it's not so much the jury has anything that
18 they could infer from. The jury would have to be
19 essentially inventing it from whole cloth because of the
20 absence of evidence that that played any role in the
21 decision not to give Coach Miller a new contract.

22 THE COURT: Okay. Let me turn last to the Equal
23 Pay Act claim. You make two main arguments why Coach
24 Sandelin is not a comparator. One is you say that he has
25 different responsibilities because he's expected to generate

1 attendance and revenue, and Coach Miller was not. And I'm
2 wondering, does that -- except insofar as it may generate
3 more media interviews, does it really distinguish their
4 duties? I mean, the fact that men's hockey attracts more
5 attendance and more revenue seems to me it doesn't have a
6 whole lot to do with what the coach does. It just has to do
7 with society, that the general public is more interested in
8 men's sports than the women's sports. How does that really
9 in a material way distinguish the duties of Coach Miller
10 from the duties of Coach Sandelin?

11 MR. PRAMAS: Well, one aspect that the Court
12 already touched upon is there are more demands on Coach
13 Sandelin's time for media promotional efforts.

14 Also, for instance, when Coach Sandelin is trying
15 to schedule non-conference opponents, a big component is
16 will the team I'm scheduling help boost attendance.
17 Whereas, the women's hockey coach doesn't have to worry when
18 scheduling non-conference opponents whether that opponent
19 will draw people to come to watch the game. So that's
20 another difference in responsibilities where Coach Sandelin
21 has an aspect of his decision-making, an overlay where he is
22 sort of responsible for helping to generate revenue that not
23 only covers the costs of men's hockey but covers the costs
24 of a lot of other sports as well. So it's differences in
25 promotion, where he has to put his time. He's pressed

1 thinner, an overlay factor, a criteria that a lot of the
2 decisions he has to make aside from sort of promotional
3 attendance revenue generating.

4 For recruiting, for instance, the pool of hockey
5 players for men's hockey is much larger than women's hockey
6 players. You're competing against the NHL for players,
7 against junior hockey leagues for players. You have players
8 who leave early to go to the NHL even if you get them to
9 UMD. So recruiting is a lot more expensive and a lot more
10 time-consuming.

11 And so even though there are the same job titles,
12 the responsibilities, the skills are different. It's not
13 the same job. And that's consistent with the law under the
14 Equal Pay Act, the *Stanley* decision, which I do recognize is
15 a Ninth Circuit decision, but *Stanley* cites the *Horner* case,
16 which is an Eighth Circuit case. These different levels of
17 responsibility, these differing expectations as to what a
18 head coach has to deliver justifies a pay differential.
19 It's not based on the sex of the coach. It's based on just
20 different expectations of what the coach is expected to do.

21 The other thing to keep in mind, and I realize
22 that sometimes in a shorthand fashion we don't mean things
23 literally, it's not that there's a different market for
24 men's hockey coaches versus women's hockey coaches. There
25 are different markets for the head coach of a men's hockey

1 team versus the market for a head coach of the women's team.

2 THE COURT: Yeah, I understood. If I said
3 something different, I was just misspeaking.

4 MR. PRAMAS: No. And where I'm going with that
5 is, for instance, the head coach of the women's hockey team
6 for the Gophers is a man. The head coach of the women's
7 hockey team for Wisconsin is a man. When North Dakota had a
8 women's hockey team, their head coach was a man. In all
9 three cases those men made less than the male coach of the
10 men's hockey teams at that program. Pretty much throughout
11 Division I hockey the coach of the men's team makes more
12 than the coach of the women's team even when the coach of
13 the women's team is a man. NBA coaches get paid more than
14 WNBA coaches. NHL coaches get paid more than WNHL coaches
15 even when the coach of the women's team happens to be male.
16 So it's not a differential in pay based on sex. It's
17 different simply based on the market. And the law simply
18 does not support the plaintiffs' claim.

19 The *Horner* case, an Eighth Circuit case, says that
20 market value is a non-sex-based determination that can
21 justify a pay differential. So if Ms. Miller happened to be
22 male but coaching the UMD women's hockey program, she would
23 still be the highest-paid coach for a women's hockey team,
24 but she would be getting paid less than Mr. Sandelin, not
25 because of a coach's gender for the women's team. It's

1 simply a different market.

2 You have NHL teams. You have junior league level,
3 especially the USHL or other Tier 1, Tier 2 junior leagues
4 competing for coaches. If you don't pay the head coach of
5 the men's team well, there are lots of other places the
6 men's head coach could choose to go.

7 Furthermore, even after they raised Coach
8 Sandelin's pay in 2011, he's the sixth out of eight
9 compensated coaches within the conference while Ms. Miller
10 was always at or near the top of the market nationally.

11 THE COURT: So do you think it's possible for a
12 women's hockey coach to bring an Equal Pay Act claim and be
13 successful?

14 MR. PRAMAS: I could probably craft a
15 hypothetical. I'd have to think of one.

16 THE COURT: Who would they use as comparators? Go
17 ahead and craft the hypothetical, because I can't.

18 MR. PRAMAS: Yeah, I'm having trouble as well
19 because I'm trying to think of a comparator where -- it
20 would probably have to be some -- geez, I'm having trouble
21 coming up with a hypothetical.

22 THE COURT: So effectively, in your view, someone
23 in Coach Miller's position is effectively unprotected by the
24 Equal Pay Act?

25 MR. PRAMAS: Well, there's not an Equal Pay Act

1 violation that would require protection. The pay
2 differential is not based on the sex or the gender of the
3 head coach in this particular case. It's based on
4 non-sex-based consideration.

5 THE COURT: Or put a different way, it would be
6 impossible for a university to violate the Equal Pay Act in
7 the decision it makes about what to pay its women's hockey
8 coach, for example?

9 MR. PRAMAS: Not necessarily.

10 THE COURT: So how could they violate the Equal
11 Pay Act? Who would be the comparator for the women's hockey
12 coach?

13 MR. PRAMAS: It would possibly have to be other
14 coaches, other than the men's hockey coach, where you could
15 argue that if it's an expectation of a nonrevenue-generating
16 sport, like women's hockey, and then try to compare the
17 salary of the women's head coach to some other person who
18 could be a comparator where one coach is female, one or more
19 other coaches are male and try to construct a comparison or
20 a similarity that way.

21 THE COURT: So the comparator for the women's
22 hockey coach wouldn't be the men's hockey coach. It would
23 be something like the women's track coach or volleyball
24 coach.

25 MR. PRAMAS: Or the men's baseball coach or the

1 wrestling coach or something like that, some other sport
2 coached by a man that way. Or, let's just say, within
3 women's coaches some of the coaches of the women's teams are
4 men. Some of the women's teams head coaches are male, doing
5 the females versus that. You have to find the right
6 comparator.

7 Certainly in this case before the Court
8 Mr. Sandelin is not the proper comparator. In this case,
9 there's not an Equal Pay Act violation as a matter of law
10 based on Eighth Circuit cases, including *Stanley*, which
11 relies on Eighth Circuit authority, which I know is a Ninth
12 Circuit case.

13 THE COURT: Is there anything else you wanted to
14 say about Coach Miller's claims?

15 MR. PRAMAS: No, Your Honor. Thank you.

16 THE COURT: All right. Thank you, Mr. Pramas.

17 Mr. Siegel, anything more you wanted to say?

18 MR. SIEGEL: Yes. Thank you.

19 I wanted to address briefly two issues. One is
20 the pretext issue, which I think relates to both Title IX
21 and the Title VII claims by Ms. Miller. And the following
22 facts, I think, are important: Prior to the 2014-15 season,
23 Ms. Miller and Mr. Berlo talk about prospects going forward.
24 Ms. Miller has had two seasons in which she did not have a
25 winning record in the recent past, and Mr. Berlo says to her

1 this coming season is going to be important for your future.
2 She agrees. And she at that point says, you know, one of
3 the problems I have is a lack of resources, particularly for
4 recruiting and particularly in terms of being able to
5 provide student athletes with fifth-year scholarships, which
6 makes it easier for them to compete and be good students,
7 also the summer school issue. These are things I need, and
8 they are Title IX issues. And he listens, doesn't say much.
9 She starts out the season well. Right? This is really
10 important. I mean, now we have this issue, well, she didn't
11 beat Minnesota. She starts out the season, which is
12 ultimately a winning season, ranked sixth in the country,
13 sixth in the country of 30 some odd teams, women's teams.
14 And we submit that the evidence shows that Mr. Berlo reneged
15 on his commitment to make this year an important year in
16 terms of her future. And we think that goes to the issue of
17 pretext.

18 I wanted to say something about the Equal Pay Act
19 claim again, which also goes to the Title VII salary claim,
20 in light of your conversation with Mr. Pramas.

21 We are not making a comparison between Ms. Miller
22 and an abstract male hockey coach. We're making comparisons
23 between Ms. Miller and Scott Sandelin, who are very similar
24 in many ways, including their tenure, their problems, and
25 their history. Right? And I want to emphasize one aspect

1 of that comparison, because in his deposition I asked Coach
2 Sandelin about whether he faced criticisms, critiques or
3 threats because of a couple of years in which he was not as
4 successful as everyone wished. In fact, sometimes the stars
5 are aligned in these cases and the evidence is very helpful.
6 You know, there were two years -- in one of those years both
7 teams went 50/50, and the other year they both had losing
8 seasons; although, Ms. Miller's season was slightly better
9 than Coach Sandelin's. And this is all described in the
10 Cobb and Lopiano declarations. And Coach Sandelin said to
11 me, he said, No, no one ever said to me, Coach, your job is
12 on the line. You're going to have to improve. Your career
13 is trending downward. He said, I never got that. And as we
14 pursued it -- and although it's a little far off from the
15 conversation today -- Scott Sandelin said, You know, in this
16 business it's very easy to lose a game. A lot of these
17 games are one-goal games, something goes wrong. Or even in
18 the context of a season you could have some key injuries.
19 You could have a player who quits, things like that. You
20 can't make judgments about a coach's success based on a
21 short-term decrease in their coach's productivity. And I
22 think that goes to the Equal Pay Act claim, as well as the
23 pretext issue.

24 THE COURT: Okay. Thank you.

25 We've been going for a while now. Let's take a

1 15-minute break. We'll come back and talk about Coaches
2 Banford and Wiles.

3 THE COURT REPORTER: All rise.

4 (A brief recess was taken.)

5 THE COURT REPORTER: All rise. Court is now in
6 session.

7 THE COURT: Please be seated.

8 All right. I'm ready to turn to Coach Banford's
9 claims. Who is going to take those on the plaintiffs' side?
10 Ms. Van Dyck, is that you?

11 MS. VAN DYCK: That's me.

12 THE COURT: All right. If I could have you at the
13 podium, please. It's good to see you again. I think the
14 last time we saw each other we were on stage, weren't we?

15 MS. VAN DYCK: We were on stage, yes.

16 THE COURT: This is a little smaller audience this
17 time. Let me know when you are ready to go.

18 MS. VAN DYCK: I'm ready.

19 THE COURT: Okay. So with Coach Banford she has a
20 claim that -- as I said, if you want to argue with me about
21 this, that's fine. I thought the evidence in the record was
22 pretty overwhelming that UMD -- I know that they say the
23 words, you know, you are being terminated from both
24 positions and they say we wish you good luck on your future
25 endeavors, whatever, but both their internal correspondence

1 with each other and their external communications with Coach
2 Banford consistently said that they intended to keep her as
3 the softball coach. I mean, I think that seems really clear
4 from the record for me, unless you think I'm missing
5 something.

6 MS. VAN DYCK: I do think you're missing
7 something.

8 THE COURT: Okay. What am I missing?

9 MS. VAN DYCK: Okay. Number one, Jen Banford was
10 not due for renewal. Her contract didn't end until May of
11 2016. So she was terminated. She was terminated with
12 respect to a contract that had two pieces to it. The
13 contract was a 60/40 split. Fifteen percent of her
14 compensation came from the hockey budget. And it was an
15 administrative position. It wasn't a coaching position.
16 She was a director of the Hockey Operations, in addition to
17 being a head softball coach. So what we have here is a
18 situation with a contract that had two pieces to it. The
19 contract was terminated.

20 THE COURT: And to be clear, I agree with you
21 that, as a legal matter, UMD did terminate the contract.

22 MS. VAN DYCK: Correct.

23 THE COURT: I also believe that it was absolutely
24 clear that they intended to offer her a new contract as the
25 softball coach.

1 MS. VAN DYCK: The question becomes what was she
2 told. And what she was told by Berlo was you are our
3 softball coach; well, she was. The question becomes did she
4 believe what he told her when he told her that.

5 She went in January --

6 THE COURT: She was told other things, too, like
7 relax. We're working on the paperwork. We have 60 days.
8 Don't worry. I mean, she consistently sought reassurances,
9 and she was consistently given reassurances.

10 MS. VAN DYCK: She went to Human Resources in
11 January of 2015 to talk to someone other than Berlo, who she
12 had very good reason not to believe, to ask about her
13 contract, and the woman in Human Resources told her that
14 she'd heard nothing about any contract renewal one way or
15 another. In terms of being offered the softball position or
16 any kind of position, she had heard nothing about that.
17 That was in January. Jen believed her. How could Human
18 Resources not know that there's going to be a contract? And
19 we know from --

20 THE COURT: Because the bosses were telling Coach
21 Banford that they had 60 days, and that they were working on
22 something, and that she should be patient and relax, and
23 they would get something to her within the 60 days. I mean,
24 HR gets it after the bosses make the decision. HR doesn't
25 make the decision.

1 MS. VAN DYCK: She was offered a contract at much
2 lower pay.

3 THE COURT: Now, you say that, and I was confused
4 from the briefing on that. If you take out the \$15,000
5 augmentation that she got for her Director of Hockey
6 Operations job and compare what she was paid to coach
7 softball versus what she was paid to coach softball, did
8 they cut her softball only part?

9 MS. VAN DYCK: The softball were fairly
10 comparable. But the question is -- she had a job that was
11 contractual, and it gave her a certain amount of money every
12 year. And how they created it and why they created it, it
13 had a lot to do with wanting to keep this woman in her
14 position yet at UMD. They needed to pay her 50 something
15 thousand a year, which isn't an exorbitant sum of money, to
16 keep her at the University. They did it by creating a job
17 that paid her that amount of money.

18 What's important to consider with respect to her
19 termination for being female, which is the Title VII claim,
20 is what was her job and how much was she getting paid for
21 it. Being head softball coach was one piece of it. It
22 wasn't the total thing, and you have to consider the total
23 job. She had --

24 THE COURT: Yeah, I agree that if she lost her
25 Director of Hockey Operations position because of sex, she

1 has a Title VII claim. Now, what's the evidence that she
2 lost that not because she was gay, not because she opposed
3 practices made illegal by Title IX, not because she was
4 Canadian, but because she was a woman?

5 MS. VAN DYCK: Because she was part of the group
6 of women that were getting eliminated.

7 THE COURT: I mean, in your brief in arguing on
8 behalf of her Canadian discrimination claim you cite three
9 women: Ms. Vasichek, Ms. Phillips, and Ms. Wheeler, who you
10 cite as comparators who were not let go, and they're all
11 women, and they're staying. So if some women are staying
12 and some women are going, that's not a very strong
13 sex-discrimination claim, because sex isn't what's
14 distinguished in the two groups.

15 MS. VAN DYCK: What's distinguishing them with
16 respect to that is the fact that Ms. Banford -- there's this
17 allegation that it was custom and practice that when the
18 hockey coach goes -- and that's the Title VII discrimination
19 based on sex -- that her other assistant coaches go with
20 her. They have to get rid of all of them. I know that that
21 is a stated custom and practice. That doesn't make it
22 legal. That's pretext, because Jen Banford wasn't a hockey
23 assistant coach. She had an administrative position. I
24 know the University is trying to say no, she reported to
25 Shannon Miller. No, she didn't. If you read her job

1 descriptions, you know, even the title of what she did, she
2 reported to what an administrative supervisor because she
3 had --

4 THE COURT: I thought the University cited -- and
5 I could be wrong about this, I read a lot -- they cited
6 deposition testimony in which Coach Banford said that as to
7 her hockey responsibilities, she did in fact report to Coach
8 Miller.

9 MS. VAN DYCK: She has stated over and over that
10 she reported -- it was an administrative position, and it is
11 an administrative position. I mean, there's no other way to
12 describe it. She didn't coach anybody in hockey. She was
13 not an assistant coach. She did not report to Shannon
14 Miller in the sense that that was her supervisor. Did she
15 communicate with Coach Miller because she was doing things
16 like organizing events, and funding, and the academic piece
17 for the student athletes? Well, of course she communicated
18 with Shannon Miller. I mean, that was the coach of the team
19 that had overall responsibility for the team. So, yes,
20 there was a lot of communication back and forth, and Jen
21 Banford did discuss these things with Coach Miller.

22 THE COURT: When she was hired as Director of
23 Hockey Operations or when her position changed to
24 incorporate that -- I don't remember if the briefs told me
25 this -- who made that decision, that she would get that job?

1 MS. VAN DYCK: I believe -- and I could be
2 incorrect about this -- but that was made in, like, 2009, I
3 believe, when her position expanded. It was the renewal
4 after the first contract. And that decision would have been
5 made by whoever -- and his name escapes me -- was in charge
6 of renewing that contract at that time. It was not
7 Mr. Berlo, and it was not --

8 THE COURT: But Coach Miller was the coach then?

9 MS. VAN DYCK: She would've been, yes.

10 THE COURT: Did Coach Miller have any role in the
11 decision to appoint Coach Banford to be her director or the
12 Director of Hockey Operations?

13 MS. VAN DYCK: I have no knowledge of that.
14 That's not something that was discussed in the record that
15 I'm aware of.

16 THE COURT: Okay. So with respect to the
17 non-renewal or the firing of Coach Banford from her hockey
18 responsibilities, we had a couple things with respect to
19 Coach Miller that we don't have with respect to Coach
20 Banford. With respect to Coach Miller, we had her
21 comparison with Coach Sandelin.

22 MS. VAN DYCK: Correct.

23 THE COURT: And we don't have that kind of
24 comparison with respect to Coach Banford.

25 We also have Coach Banford within a couple months

1 being given an offer to stay at the University, which we
2 don't have with respect to Coach Miller.

3 With respect to Coach Banford, we do have a
4 consistency in the University's explanations. As far as I
5 can tell, whether you believe them or not, they have always
6 explained the hockey decision as being wanting to let the
7 new hockey coach have her choice of people. We have some
8 inconsistency in Coach Miller's.

9 So when that jury goes back into the room and
10 deliberates, what is it that's going to allow them to say,
11 as I started by saying, that the reason that they decided to
12 non-renew -- I'm using the wrong term, but fire her from her
13 Director of Hockey Operations position was not because of A,
14 B, C, and D, it was because of her gender as a female? What
15 is the evidence on which the jury is going to be able to tie
16 that?

17 MS. VAN DYCK: That she's female.

18 THE COURT: She is a woman. Right. We need more
19 than that.

20 MS. VAN DYCK: That the rationale being offered
21 for terminating her in particular doesn't add up to the
22 reason that was given, which is that they get to choose
23 their hockey assistant coaches, which she was not.

24 THE COURT: Okay.

25 MS. VAN DYCK: I mean, that's a distinction with a

1 difference.

2 THE COURT: Is there any other thing on which the
3 jury -- I'm not downplaying that at all; I'm just trying to
4 make sure. So we have the fact that she's female and the
5 fact that you don't believe that the
6 clearing-the-deck-for-the-new-coach argument holds water.
7 Is there anything else that the jury could rely on in
8 finding that there was sex discrimination?

9 MS. VAN DYCK: The length of time that it took to
10 make the offer. The letter itself, because it was a
11 termination. It said you're terminated from everything, and
12 that's really the issue.

13 There's no major overt act the same way there is
14 with Shannon Miller, other than the ESPN Radio Show, which
15 kind of brought everything to the head.

16 THE COURT: Okay. With respect to her claim, can
17 I just ask -- I don't remember if this was in the briefs --
18 was Coach Banford replaced as Director of Hockey Operations
19 by someone when the new coach came in?

20 MS. VAN DYCK: I believe she was.

21 THE COURT: Was it a male or a female? Do you
22 recall?

23 MS. VAN DYCK: I don't recall. There was a
24 position, because she was encouraged to apply for it.

25 THE COURT: Right. I remember that.

1 I can't remember what Mr. Siegel told me. With
2 respect to Coach Miller, he said they're not going to pursue
3 the Canadian origin claim. Is Coach Banford pursuing her
4 Canadian origin claim?

5 MS. VAN DYCK: No, she's not.

6 THE COURT: With respect to the hostile
7 environment -- and I think Mr. Siegel told me you're not
8 claiming there's a constructive discharge of her from her
9 softball coach. Obviously, there was a legal discharge when
10 the letter was sent.

11 MS. VAN DYCK: Correct.

12 THE COURT: But you do claim hostile environment.

13 So, you know, looking again -- I know legally we
14 can look broader than this, but I want to just kind of look
15 at that 300-day period. I'm telling you honestly I'm kind
16 of on the fence about this. There's a long list of things
17 here that Coach Banford was clearly unhappy with: slow
18 expense reimbursements, equipment held hostage on multiple
19 occasions, fights over the use of the field (Malosky Field),
20 Nygaard's comment after the ESPNw thing came out about
21 wanting to punch her in the nose or the face or whatever it
22 was. The two things I'm struggling with is, one, to what
23 extent are those evidence of sex discrimination? Sex, as
24 you know, it can't just be that you are harassed. The
25 harassment has to be tied to sex in our case. And,

1 secondly, whether this stuff rises to that severe or
2 pervasive enough level.

3 Putting UMD's case -- you know, as I talked about
4 with Mr. Siegel, every workplace has bumps. You've been
5 around Minnesota as long as I've been around Minnesota. The
6 University seems to specialize in tumultuous workplaces. We
7 read about it all the time in the paper. The Athletic
8 Department seems to be particularly good even among
9 University departments having tumultuous workplaces, which
10 is understandable. The pressure those people are under,
11 their competitive nature, the sometimes blurred reporting
12 lines, you can understand why it would create ingredients
13 for lots of disagreements. Why isn't this just sort of the
14 day-to-day bumps and bruises of life in a big college
15 athletic department? You're going to have fights about who
16 gets to use the equipment or who gets to use the field or
17 whether the budget is enough or not enough. And what does
18 any of this have to do with sex, as opposed to just the kind
19 of stuff that all coaches in all programs fight with the
20 administrators about?

21 MS. VAN DYCK: I think we need to look at the
22 environment in the microcosm of time that you are referring
23 to. In doing that -- this is an issue that has to do with
24 how the case is going to be tried -- you can't separate and
25 isolate these women as if they're in little test tubes.

1 They are all in this athletic department at the time all of
2 the tumult about firing Shannon Miller is going on. All of
3 them are in there. They are all dealing with Josh Berlo.
4 They are all dealing with a situation where in Jen's case
5 she got terminated and she's waiting to know about whether
6 she's going to get a contract and, if so, what it says. The
7 other women that have contracts that need to be renewed
8 aren't getting them. By the University's admission even at
9 the time Annette Wiles resigned, she still didn't have an
10 offer at that time.

11 THE COURT: Was that just for the women coaches or
12 were the men coaches also having their offers --

13 MS. VAN DYCK: The evidence I have is the women's
14 coaches, other than a statement by Josh Berlo that, well, I
15 hadn't gotten any of them out. That's the only evidence
16 that we have.

17 But the whole Shannon Miller episode, which was
18 very tumultuous, was alleged to be and there's evidence that
19 it was gender based, and that was the pervasive environment
20 at the time. When you add all these other items to that
21 list that Jen Banford herself experienced --

22 THE COURT: What is the evidence that it is gender
23 based? I agree, as I talked about earlier today, that there
24 is evidence from which a jury could conclude that Miller's
25 dismissal was gender based. But what would the evidence --

1 it's possible to have Miller's dismissal being gender based
2 but not the dismissal of her associate coaches. I mean, the
3 two decisions have to be looked at separately. What is the
4 evidence that -- well, I'm sorry, with respect to the --
5 we're talking about the environment now. With respect to
6 the environment -- again, so when they have a fight over
7 scheduling the field or when they have a fight over whether
8 you get the clipboards until the former assistant returns
9 her keys and stuff, if Banford had been male, rather than
10 female, those fights wouldn't have happened, those kinds of
11 things wouldn't have happened, what's the evidence of that,
12 as opposed to this is the kind of stuff that happens in
13 athletic departments all the time?

14 MS. VAN DYCK: That's the fact question. I mean,
15 she's complaining about things that she wasn't complaining
16 about before. So in her eyes they rose to a higher level.
17 In UMD's eyes they're saying, well, there's an explanation
18 for this, and there's an explanation for that, and there's
19 an explanation for that. They're not saying she always
20 experienced all of these things. If you add them all up, it
21 was consistently her team, and her softball equipment, and
22 all of this type of things that were getting targeted. And
23 it made it more difficult for her as a woman to get her job
24 done.

25 There's no evidence that this is the same as

1 everything she had before at all in the record. And the
2 inference from that is that, no, this was different and
3 that's why she ended up complaining about it.

4 THE COURT: When did she start experiencing what
5 you believe to be a legally actionable hostile environment?

6 MS. VAN DYCK: Oh, I believe that it began --
7 there was a hostile work environment for Jen Banford before
8 Josh Berlo arrived, and that had to do with some of the
9 earlier material. She was collecting the mail, and there
10 was a lot of hate mail and that type of material.

11 THE COURT: But that was sexual-orientation-based
12 hate mail.

13 MS. VAN DYCK: Yes. And, as you know, we're
14 preserving that argument, because I don't know how you -- I
15 understand you divide the two, but I understand the Eighth
16 Circuit process. But the sense was that there was -- and I
17 think Mr. Siegel referred to it -- there was cover for it
18 because the women were getting backed up by the athletic
19 directors and also the chancellor, and that all changed.
20 That all changed in 2013. And a hostile work environment
21 where there are things that are going on and you feel like
22 you're getting backed up and you say something, that's bumps
23 and bruises. You know, you have a remedy if there's a
24 problem and it's taken care of. You feel supported.
25 Sometimes you don't even need to go to that authority to

1 deal with it because everybody knows it's going to get taken
2 care of. In 2013 that all changes.

3 Jen Banford put together a list of things. And
4 the evidence is that, to her knowledge, it wasn't happening
5 in the same way in the same sequence and the same intensity
6 to the men as it was happening to her as a woman, and that's
7 the evidence.

8 THE COURT: Okay.

9 MS. VAN DYCK: Plus simply the discharge, you
10 know. That fell in that window, as well.

11 THE COURT: Okay. On the Title IX retaliation
12 claim, I take it that you would say that Banford's position
13 was similar to Miller's, which was that she was consistently
14 complaining about what she perceived to be Title IX
15 violations --

16 MS. VAN DYCK: Correct.

17 THE COURT: -- before, during, and after the time
18 they dismissed her and, therefore, you would have very close
19 temporal proximity.

20 There are a bunch of complaints. It appears that
21 starting in February of 2015, she sort of ramped up the
22 complaining, took it kind of to a more formal level and was
23 -- but, of course, all that is after she decides not to
24 accept their offer as the softball coach. So I don't know
25 what I could find to be retaliation for that chunk of the

1 Title IX advocacy, because it's all after she's already
2 decided she is to turn down the softball offer.

3 Is the record clear that prior to February of 2015
4 -- Mr. Pramas, when he was talking about Coach Miller, said
5 where in the record is this complaint? Is it clear that
6 prior to 2015 Coach Banford was pretty consistently -- on a
7 routine weekly, monthly, whatever basis -- complaining about
8 disparities between the men's programs and women's programs?

9 MS. VAN DYCK: The evidence is just in
10 Ms. Banford's testimony that she complained. What you're
11 describing in February of 2015 -- and I believe you used the
12 term ramped it up -- it was the first time she formally
13 complained about a hostile work environment to her
14 supervisor, Finnerty, and an EOAA complaint was filed, a
15 formal complaint was filed. And in that complaint she
16 complained about all kinds of things formally that she had
17 complained about earlier that were not taken care of.

18 THE COURT: I guess a lot of what she was
19 complaining about predated February 2015, right?

20 MS. VAN DYCK: Correct. Correct. She just made
21 the formal complaint after. But a lot of the events
22 predated it, including the Nygaard ones.

23 THE COURT: Okay. And then, lastly, with respect
24 to her Equal Pay Act claim, I think Mr. Siegel told me she
25 is not pursuing an Equal Pay Act claim?

1 MS. VAN DYCK: Correct.

2 THE COURT: Is there anything more you wanted to
3 say about Coach Banford's claims?

4 MS. VAN DYCK: I believe we have covered it. I
5 would reserve my right --

6 THE COURT: You don't even have to reserve it.
7 You can come back up.

8 Ms. Bazis, are you covering Coach Banford?

9 MS. BAZIS: I am, Your Honor. Thank you. Good
10 morning.

11 THE COURT: Good morning.

12 So let's work our way through these claims. We
13 have this Title VII claim based on sex for the non-renewal.
14 And as you've heard me talk with Ms. Van Dyck about, I
15 believe that Ms. Banford's claim is not as strong as Coach
16 Miller's claim. Coach Miller has some things that she can
17 argue that we don't have. But what Ms. Van Dyck is,
18 basically, saying is you still have the fact that
19 Ms. Banford is female. You have the fact that her "firing"
20 is coming -- I'm using "firing" in quotes -- her "firing" is
21 coming in the wake of what I believe to be a firing of the
22 head coach that a jury could find to be gender based. And
23 you have the fact that she's being fired with a group of
24 people, all of whom are women, even catching the attention
25 of HR, which is a little worried -- getting a little nervous

1 because this group of people are all women. Why isn't that
2 enough to let the jury take a look at that claim?

3 MS. BAZIS: A number of reasons, Your Honor. I
4 mean, first of all, the fact that it was all women on
5 Ms. Miller's staff is a function of the fact that she hired
6 gay Canadian women to be on her staff. Again, had they been
7 men, you know -- there's no evidence in the record to show
8 again any animus on the basis of gender toward Ms. Banford.
9 There's no stray remarks. There's no allegations that she
10 ever heard any animosity toward women focusing on that piece
11 of it. And there's absolutely no evidence contrary to the
12 stated reason, that they wanted to give the new head coach a
13 chance to select her own staff.

14 THE COURT: Well, Ms. Van Dyck says that the
15 reason itself doesn't withstand scrutiny because while it
16 would maybe with respect to the assistant coaches,
17 Ms. Banford is not an assistant coach. She's just an
18 administrator similar to some other administrators that were
19 not let go, didn't report to Coach Miller, and so it falls
20 apart. If the jury were to look closely at the explanation,
21 it would fall apart.

22 MS. BAZIS: Well, looking at the totality of the
23 evidence, there is record evidence about how her dual
24 appointment as Hockey Operations Director and Head Softball
25 Coach came about. There is an email from Ms. Miller making

1 that announcement in 2009. She negotiated that with the
2 then AD, Mr. Nielson, and that's Exhibit 62.

3 THE COURT: The "she" is Coach Miller?

4 MS. BAZIS: Coach Miller negotiated that piece of
5 it with Nielson. It recounts a meeting that she had with
6 Mr. Nielsen where he agreed to this director assignment and
7 the then \$10,000 and later \$15,000 augmentation, because it
8 was recognized that that did go above and beyond normal --
9 I'll back up. Normal Division II coaches, the record shows
10 they all had about 25 percent other duties because the
11 coaching position wasn't full-time given the seasons. So
12 they all had 25 percent other duties. And she had some
13 hockey administrative duties prior to that. But this was a
14 step up, and it was recognized that this was bigger than
15 that normal piece that DII head coaches had warranting the
16 \$15,000 -- or \$10,000 and \$15,000 augmentation negotiated by
17 Ms. Miller. And when you look at her position description,
18 that was associated with that contract, which is Exhibit 65.

19 The position description and other position
20 descriptions describe the fact that she reports to
21 Ms. Miller, and it describes far more than administrative
22 duties. And that's in the record. It's a page-and-a-half
23 long, so I won't try to detail it here. But I encourage
24 Your Honor to look at that. So, yeah, it was negotiated by
25 Ms. Miller.

1 Ms. Banford was very clear in her deposition that
2 she got daily oversight and daily direction from Ms. Miller
3 in that position. And who did her evaluation is the
4 distinction that Ms. Banford tries to make, who did her
5 written evaluation, which was Mr. Berlo.

6 THE COURT: You cited to me a sentence out of
7 Coach Miller's deposition where she says something like
8 yeah, an incoming coach wants to pick her own people. Was
9 she pressed at all in her deposition as to whether the
10 Director of Hockey Operations position is the kind of
11 position an incoming coach would want to be able to select
12 her own person?

13 MS. BAZIS: She wasn't asked that question that I
14 recall, not specifically. She was talking about how
15 integral her assistant and her staff was.

16 THE COURT: And do you believe the evidence in the
17 record is clear enough that a judge on summary judgment can
18 decide that Ms. Banford's position was more like, say,
19 Ms. Wheeler's or -- I forget the names of the other two --
20 and less like the two assistant coaches, that a jury could
21 not find the explanation to be pretextual as it applies to
22 Ms. Banford?

23 MS. BAZIS: Absolutely, Your Honor. The record is
24 extremely clear. Ms. Banford states that Ms. Wheeler,
25 again, who was a woman and who identified as LGBT, that

1 she -- Ms. Banford said that she reported to Mr. Nygaard in
2 her position as the female women's hockey Sports Information
3 Director and that she reported to the head soccer coach in
4 her position as an assistant soccer coach. There's no
5 question about that. There's no dispute about that. And
6 that's consistent with what Mr. Berlo said. But she has
7 made that admission already.

8 Jacqueline Phillips, you've got her appointment
9 notice, Exhibit 552. She is an assistant athletics trainer,
10 and her position description indicates that the assistant
11 athletic trainer reports to the head athletic trainer. And
12 the same with Ms. Vasichek. And Mr. Berlo explained why
13 that is. You don't want strength and conditioning coaches
14 and athletic trainers reporting to a head coach because, in
15 terms of the safety and welfare of the student athletes,
16 they want them reporting to the head of that Sports Medicine
17 Department. So I don't think there's any factual dispute in
18 the record, no material dispute.

19 THE COURT: And the third person, she was, like, a
20 strength coach or something?

21 MS. BAZIS: Strength and conditioning coach. So
22 there's Jacqueline Phillips and Julianne Vasichek, both of
23 whom were assigned under the assistant athletic trainer
24 position description.

25 THE COURT: Okay. Is there anything more you

1 wanted to say about the non-renewal of Ms. Banford?

2 MS. BAZIS: I don't want to beat a dead horse.
3 You seem to be in complete agreement with me that the record
4 is overwhelming that there was always an attention --

5 THE COURT: I don't remember using those terms,
6 but I'm leaning your way at least on those.

7 MS. BAZIS: I think you may have used the word
8 "overwhelming," but thank you. I'll stand corrected on
9 that.

10 THE COURT: On the hostile-environment claim, you
11 know, it's the common kind of case that we face as judges
12 where we have an employee who is in a member of a protected
13 class -- in this case female -- who has had a whole bunch of
14 things that she is unhappy with happen to her and she's
15 perceived the environment is being hostile to her. And what
16 I said to Ms. Van Dyck is the same thing I'll say to you, is
17 I am struggling with whether there's enough here. I'm
18 leaning towards saying that these look to me more like the
19 bumps and bruises of a typical workplace than severe and
20 pervasive conditions, so severe and pervasive that they are
21 affecting the conditions of employment, but there is a lot
22 of stuff here.

23 I'm also kind of struggling to see how this is
24 connected to the fact that Ms. Banford is female, that Coach
25 Banford is female. I don't know if you want to say anything

1 other than that you think --

2 MS. BAZIS: I think walking through it is really
3 helpful, and that's what I did in preparing the brief and
4 preparing for today.

5 THE COURT: Okay. Sure.

6 MS. BAZIS: So let's look at the 300-day period.
7 So that's July 14th, 2014. So the first thing she complains
8 of is last year's invoices were billed to this year because
9 the paperwork wasn't received. Okay. You've got Exhibit
10 112. So, yeah, it was bought in May, but the invoice didn't
11 come until July. There's no evidence contrary to the fact
12 that that's University policy. And the evidence shows it
13 was done with respect to orders by male coaches, too. That
14 one is out.

15 The equipment issue. She says in the fall of 2014
16 that the baseball jerseys were withheld until her assistant
17 returned the key, and that was told to her by a woman named
18 Sherri. There's no indication that that was based on her
19 gender at all. It seems very reasonable, certainly not
20 severe behavior.

21 There was the December 2014. Mr. Nygaard, the
22 record shows, received a request from Mr. Berlo, the AD,
23 that the articles that were posted on Twitter be removed.
24 And that was the ESPN article that was derogatory to the
25 University of Minnesota about Ms. Miller's non-renewal, and

1 also a New York Times article in the same vain. So
2 Mr. Nygaard calls his report, Ms. Wheeler, and says, I want
3 those down. Okay. A, that's not directed toward
4 Ms. Banford at all, and certainly not severe, and very
5 reasonable. That violated University of Minnesota's policy,
6 which is in the record, that tweets from the University have
7 to be positive. And that was posted by -- the record shows
8 they were posted by Ms. Banford.

9 Then we've got Mr. Nygaard's statement. Again, no
10 reasonable person could view that as anything other than a
11 distasteful expression of frustration. And the only person
12 that heard that and that alleged it to be true -- of course,
13 he denies it, but we're accepting that as true -- said,
14 well, he was frustrated on Monday morning that he was
15 inundated by the press on Sunday on his only day off, and
16 that was why he said it. So she didn't hear it. It was
17 reported to her long after the fact. And she didn't report
18 any hostile interactions by Mr. Nygaard directly with her.
19 That doesn't get you there.

20 She talks about Mr. Windinger, who was the Chief
21 of Sports Medicine, the athletic director -- Assistant
22 Athletic Director for Sports Medicine and Jack digging
23 himself into a student-athlete treatment plan. That entire
24 email exchange is there. He was extremely respectful and
25 just really disgusted with the fact that a female athlete

1 had come to him with concerns about going back into play
2 with a recent concussion. You can see that for yourself.

3 She mentions a comment that Mr. Windinger made
4 about her contract in the athletic training room to the
5 extent, oh, Jen Banford has until 4:00 p.m. today to decide.
6 That's certainly not hostile, nor severe.

7 And then she declined her offer on February the
8 9th. After that there was just a couple of things. There
9 were the -- she was asked to -- I'm sorry, Mr. Nygaard asked
10 the Sports Information Director to unblock certain followers
11 that were on the Twitter account that Ms. Wheeler and
12 Ms. Banford had blocked. Again, that's not severe, not
13 based on gender.

14 There was one instance in February where for a
15 couple of weeks women's hockey equipment was withheld
16 because of some issues. You can see in the record they were
17 over budget, and Mr. Finnerty was working with them. Again,
18 nothing gender based there, and really no way a reasonable
19 jury could infer a gender --

20 THE COURT: In the course of discovery was it
21 explored whether similar things had happened to male coaches
22 at the University similar to the withholding of equipment or
23 things like that?

24 MS. BAZIS: Anytime that there was discovery on
25 it, it was found that there was equal treatment when there

1 were similar issues, for instance, with the fiscal year
2 invoices received in the new fiscal year.

3 THE COURT: Okay. Let me ask last about the Title
4 IX retaliation claim. As I said, it's kind of a similar
5 claim to Coach Miller's, which is you have someone -- I take
6 it the University would agree that Coach Banford did engage
7 in protected activity at least at some point or you say she
8 never engaged in any protected activity?

9 MS. BAZIS: She never engaged in protected
10 activity -- well, there was the 2010-11 mail, so the stuff
11 preceding 2011 and backwards. That is barred by the statute
12 of limitations, so that would be --

13 THE COURT: Well, that isn't Title IX activity,
14 though.

15 MS. BAZIS: No. No.

16 THE COURT: My recollection is -- and I lose track
17 of all the grievances --

18 MS. BAZIS: There's a lot in the record.

19 THE COURT: -- but in February she writes this
20 letter and she -- I don't want to be that specific because
21 my memory is not that good. After she turns down -- I think
22 it started with the day she turned down the offer to be the
23 softball coach, she at least ramps up, more formalizes
24 various complaints she has. My recollection is that most,
25 if not all of them, are complaints that she had made in some

1 way earlier, and that she was basically summarizing
2 complaints she'd made earlier, and that at least some of the
3 complaints were, her view, that women's programs were not
4 being treated as well as men's programs, like with respect
5 to the scheduling of the fields.

6 MS. BAZIS: So her first complaint was a verbal
7 complaint to Mr. Finnerty on February 9th, which is the day
8 she turned down the softball coach offer, and that was about
9 Mr. Windinger making a comment -- I'm sorry, about
10 Mr. Nygard's comment and about Mr. Windinger. Those were
11 the only things she raised there.

12 Then there was her March -- Mr. Finnerty a couple
13 days later reminded her I asked you to put it in writing so
14 we could do an appropriate investigation. She does that on
15 March 5th and then follows up with another on March 31st.
16 So that was her first protected conduct. And most of the
17 things that she complains about predate that altogether.
18 There's just a few things that happened in February, which
19 was the two times that she changed the dates of the softball
20 games with the other coach.

21 THE COURT: So are you saying that before December
22 when the decision is made to fire her from the hockey
23 operations part of it the University does not believe she
24 engaged in any Title IX protected activity?

25 MS. BAZIS: Correct. Even if you look at her

1 declaration, she doesn't say that she did. All she says in
2 her declaration was that she had complained about field
3 conditions. Now, she never says that she complained about
4 field conditions that they were unequal between men and
5 women. She never says that. She only says she complained
6 about field conditions.

7 And we see that in her -- that Mr. Berlo, it's
8 very clear in the record, had invited her to submit a top
9 ten list back when he first arrived in May 2013, and she
10 does that in June. She talked about the field conditions.
11 And what does he do? He makes sure that that spring she has
12 her first game, after 99 games, on campus. He devises a
13 brilliant plan of having softball play on Malosky Field,
14 which is turf, because before that the men's and women's
15 teams had to play off campus. And that's clear from the
16 record. So she never claimed gender inequities prior to
17 that.

18 THE COURT: The men's baseball team also played
19 off campus?

20 MS. BAZIS: Correct. That's in the record in
21 Mr. Finnerty's deposition. The field conditions in Duluth
22 just didn't allow for it.

23 THE COURT: Anything else you want to say about
24 Coach Banford's claims?

25 MS. BAZIS: I think I'm done, Your Honor. Thank

1 you.

2 THE COURT: Okay. Ms. Van Dyck.

3 MS. VAN DYCK: Just a few things, Your Honor.

4 THE COURT: Sure. Could I have you back at the
5 podium, please. Can you just start, before you get through
6 your list, as to where do I find the Title IX protected
7 activity prior to December of 2014? Where do I find
8 evidence of that?

9 MS. VAN DYCK: You have to rely on the EOAA
10 materials in the record that she didn't file until March, I
11 think, of 2015 that summarize what she said, complaints she
12 had made before. That's where you're going to find it.
13 It's her testimony that she had complained about them.

14 THE COURT: Okay. We'll take a look at that then.

15 MS. VAN DYCK: Because, otherwise, what we've got
16 here is a situation in which, apparently, there were no
17 bumps and bruises because she never said anything to anybody
18 for all these years, and that's contrary to her testimony.

19 THE COURT: Well, she could have complained about
20 things that weren't Title IX violations. That's what I was
21 trying to focus on.

22 MS. VAN DYCK: Correct.

23 I wanted to get back to you on a couple questions
24 you had asked me. I had a chance to go look through some
25 things.

1 THE COURT: Okay.

2 MS. VAN DYCK: And it was Ms. Miller's idea to --
3 she wanted a director of operations because the men's team
4 had a full-time director of operations for the hockey team.
5 So she was pushing for one. And he was appointing Jen
6 Banford part time. The AD at that time asked Miller to take
7 Banford for that period of time and he would work towards a
8 full-time position. That was how that whole thing got set
9 up.

10 THE COURT: Okay.

11 MS. VAN DYCK: And you also asked me about
12 Ms. Banford's replacement, whether that person was male, and
13 the answer to that question is she was replaced by a male
14 who was given a full-time job.

15 THE COURT: Full-time Director of Hockey
16 Operations?

17 MS. VAN DYCK: Correct.

18 THE COURT: Okay.

19 MS. VAN DYCK: And that's it.

20 THE COURT: Okay. Thank you, Ms. Van Dyck.

21 Last, let us turn to Coach Wiles. Who is handling
22 Coach Wiles on the plaintiffs' side?

23 MS. VAN DYCK: I am.

24 THE COURT: I'll have you right back up. Just let
25 me know when you're ready to go, Ms. Van Dyck.

1 MS. VAN DYCK: I'm ready.

2 THE COURT: So with Coach Wiles we have -- hers is
3 a constructive-discharge claim because she quit.

4 MS. VAN DYCK: Correct.

5 THE COURT: And it's, obviously, closely tied to
6 her hostile-environment claim on the basis of sex. So let
7 me tell you what my impression was reading the materials,
8 and you tell me why my impression is wrong.

9 My impression is, is that Coach Wiles was doing
10 pretty well at UMD and, in fact, was getting along fairly
11 well with Mr. Berlo until the Coming Out Day speech, and
12 that she has consistently -- that is, Coach Wiles has
13 consistently pointed that as the point at which something
14 changed because of -- I know the whole story about he said
15 he was out of town, and then he was in town, and he said it
16 wasn't his thing, that whole thing. All that, though, is a
17 sexual-orientation issue. It's not sex. And then the
18 relationship cools off at that point, as Coach Wiles tells
19 this story. And then what seems to me to really trigger
20 things is these surveys and these exit interviews. Coach
21 Wiles -- I'm going to be reading between the lines here, but
22 it looks to me like she thought she had a pretty good
23 relationship with her players, and that it was really very
24 upsetting for her when she got those first fall of -- I'm
25 sorry, spring of 2014 results. That's what seems to have

1 set her kind of reeling, and that's what sent her down the
2 hall to HR. And even when she's going down the hall to HR
3 and she's mad and she's complaining about Berlo, at least
4 what I read in the briefs, she's not saying he doesn't like
5 me because I'm a woman. She's saying I think he's
6 homophobic. And then that next set of student input
7 materials comes. That would be, what, 2015? Spring of
8 2015? And, obviously, they are very, very negative.
9 Whether they're fair or not, whether they're scientifically
10 valid or not, they obviously are very upsetting to her. But
11 that seems to have really -- she seems to have had some
12 psychological vulnerability as it was, that she had some
13 issues of her own she was struggling with, and that seems to
14 have really affected her, and she quits. Now, that seems to
15 be the story I'm reading in the briefs. And that story has
16 got a possible sexual-orientation claim in it, but it
17 doesn't have a sex claim in it. Where is the evidence of
18 sex discrimination in any of this?

19 MS. VAN DYCK: The sex discrimination is part and
20 parcel, of course, with the sexual orientation.

21 THE COURT: I mean, that's your view, and it's the
22 Seventh Circuit's view, but it's not the view I'm allowed to
23 take today.

24 MS. VAN DYCK: Of course, the Seventh Circuit has
25 been taken up.

1 THE COURT: I know it's before them. Right.

2 MS. VAN DYCK: It's before the en banc group, yes.

3 I want to start with the first complaint that was
4 made, and that does begin with in May of 2014 when Berlo
5 basically asks student athletes to complete these surveys,
6 which had never been done before.

7 THE COURT: Right. But he's asking all athletes
8 in all programs, right?

9 MS. VAN DYCK: Correct.

10 THE COURT: It's not sex based. The male-coached
11 athletes are being asked the same questions as the
12 female-coached athletes.

13 MS. VAN DYCK: In surveys I'm not claiming that
14 that is sex based. Okay? What is sex based is the way it
15 was used with Annette Wiles. She's given a written review
16 that is glowing, above expectations, good coach, dah, dah,
17 dah, dah, dah. Around the time --

18 THE COURT: That's before they got the student
19 evaluations, though. That's the spring of 2014.

20 MS. VAN DYCK: Well, there were surveys and
21 interviews in the spring of 2014, as well.

22 THE COURT: But my recollection, and please
23 correct me if I'm wrong, my recollection is she has a
24 meeting with Berlo, he gives her the positive feedback, but
25 he ends it by saying, of course, we're going to be curious

1 to see what the students say. It was after that meeting
2 that they actually found out that the students had negative
3 input.

4 MS. VAN DYCK: And that was in May of 2014. And
5 the written evaluation, she got a review and it was
6 excellent.

7 Just, like, weeks later, Berlo sends out surveys.
8 And then, like, two or three weeks later, they have this
9 meeting with Berlo, and Strong, and Annette Wiles. And that
10 is where they are saying they were negative. Okay?

11 What's critical about this is how they're used.
12 Number one, the record reflects that when the surveys were
13 sent out to the students, the students were told these will
14 not ever be used with the coaches. This is for us, for
15 internal purposes. The criteria for merit raises or merit
16 increases in your salary had been sent out a few weeks
17 earlier, and they specifically itemize what are you going to
18 be evaluated on in terms of your salary. These surveys,
19 which were in the works, were never listed. And, in fact,
20 with respect to Donna Lopiano's testimony, they are not
21 properly used to evaluate the coach for a variety of
22 reasons. So she had been told that her merit increases had
23 nothing to do with student -- that the student surveys
24 weren't on the list of things you have to do well.

25 So, basically, what Berlo did was use the surveys

1 with respect to Annette Wiles to give her --

2 THE COURT: You say he used them "with respect
3 to." You know, he didn't fire her.

4 MS. VAN DYCK: Oh, no, he didn't.

5 THE COURT: In fact, all the evidence in the
6 record is they were -- despite the, especially in 2015,
7 extremely negative feedback from the students, he was
8 prepared to stand by her and renew her contract. So I don't
9 --

10 MS. VAN DYCK: He did give her an inequitable
11 increase.

12 THE COURT: That is true, and that was corrected.

13 MS. VAN DYCK: And it was gender based. And
14 that's the finding, that it was gender based.

15 THE COURT: And it was corrected. The University
16 found it and the University corrected it.

17 MS. VAN DYCK: But in terms of the environment
18 created by Berlo, he used the surveys and used them with a
19 woman to give her an inequitable pay raise --

20 THE COURT: Is there any evidence --

21 MS. VAN DYCK: -- and compared to a man.

22 THE COURT: Is there any evidence that there were
23 any male coaches that had similarly negative reviews from
24 their athletes?

25 MS. VAN DYCK: I don't know the results of all the

1 surveys, obviously, but there's no evidence that I'm aware
2 of in the record that they were or the other way around
3 either.

4 THE COURT: Okay. You just don't know whether --
5 in other words, do we know of a coach that had similarly
6 negative reviews from their students where Berlo did not
7 confront the coach of that or did not take some action?

8 MS. VAN DYCK: That I'm unaware of, if it's there.
9 I'm pretty familiar with the record.

10 THE COURT: So I have trouble getting my hands
11 around what Coach Wiles' complaint is here. Coach Wiles, it
12 seems to me -- putting aside scientific certainty or
13 whatever, it seems to me that if your students are saying my
14 coach is abusive and unprepared and all these kind of
15 things, an athletic director would want to know that. And
16 an athletic director -- I would think the coach would want
17 the athletic director to say that this is what the athletes
18 are saying. It's something I would think the coach would
19 want to know.

20 MS. VAN DYCK: The coach would in the first
21 meeting, which led to the inequitable pay raise in 2014.
22 She wanted to know more information because she was
23 surprised. She asked, you know, well, can I see the
24 surveys? Can I see what it is they say that is negative?
25 And that was refused her. She was not -- that's how you

1 learn. If that's really your motive --

2 THE COURT: It's common in lots of fields where
3 you survey people you tell them that their specific names
4 and their specific comments won't be shared, but instead
5 they will be aggregated. That's very common.

6 MS. VAN DYCK: I recognize that, but she was not
7 permitted to even know what the specific comments were, even
8 if the identity of whoever said them were --

9 THE COURT: Well, those were the ground rules, and
10 that's what they told the students. I really struggle both
11 -- I understand why it was very upsetting to her. I'm sure
12 it would be to any of us in that position. But I don't get
13 the sex discrimination part of this.

14 Surveys are sent to everybody, all coaches'
15 students. They all come back. There's no evidence that
16 they ignored the negative comments toward men coaches but
17 only used the negative comments toward a women's coach. I'm
18 struggling to understand what this whole exit
19 interview/survey has to do with sex discrimination.

20 Now, I realize, of course, that Berlo used it as
21 an excuse to give her less of a merit raise, which was
22 corrected by the University, and so I can't do anything with
23 respect to that. But other than that, I don't get what this
24 has to do with sex discrimination.

25 MS. VAN DYCK: She's on the list of the women that

1 are being eliminated, which is ironic because I know then
2 the next question is but they wanted to keep her at the end.
3 And our position is that by that time the problem with all
4 the women -- there are only women on this list getting
5 eliminated here had become a nightmare for UMD in the public
6 eye, and that they were doing damage control because, you
7 know, this is someone who, as you point out, had been told,
8 you know, your students -- your athletes, we've got a lot of
9 negative comments about you. That's in 2015. And unlike
10 Jen Banford or Shannon Miller where there's no evidence of
11 any of that, would the University have had some kind of
12 non-pretexual reason to non-renew her? Perhaps. Certainly
13 there's more evidence of it with Ms. Wiles than there would
14 have been with either of the other two that we have in front
15 of you today. But now they're saying no, we were going to
16 renew her contract. Yet at the time she left, 19 days
17 before the end of her contract, she didn't have an offer.
18 She's left with that's pretext. I mean, they did that to
19 cover their rear-end.

20 THE COURT: I just have a hard time finding it
21 with respect to Wiles. As I said, I see the
22 sexual-orientation claim. Your brief, basically, writes it
23 up like a sexual-orientation claim. She seems to get along
24 fine with Berlo up until the Coming Out Day. Even after the
25 Coming Out Day, April of 2014 Berlo gives her, as you say, a

1 glowing review, which is an odd strategy if you're trying to
2 get rid of her or if you're hostile to her because of her
3 sex. Wiles appears to compliment Berlo in the course of the
4 same discussion in the spring of 2014. When Berlo gets this
5 negative student input, if he's looking to get rid of Wiles,
6 you know, he could've done more than take one percent off of
7 her merit increase; he doesn't. When he gets even worse
8 evaluations the next year, he stands by her and he doesn't
9 non-renew her. That would've been the perfect excuse to
10 non-renew her. He doesn't do it.

11 I mean, I just don't see evidence where the jury
12 can say that -- putting aside whether the work conditions
13 were intolerable, which we haven't even gotten to, but that
14 if there were intolerable working conditions, they were
15 created by Berlo for the purpose of forcing Wiles out
16 because she was female. It's a really hard claim to make.

17 MS. VAN DYCK: I understand your position.

18 THE COURT: Okay. Now, with respect to -- I guess
19 the other claim she has -- oh, she has a Title IX
20 retaliation claim, as well. We're sounding like a broken
21 record on these, but, again, is there evidence in the
22 record? My impression/memory of the record is like Coach
23 Miller, Coach Wiles had pretty consistently had to prod the
24 University to meet their obligations under Title IX in her
25 view.

1 MS. VAN DYCK: Correct.

2 THE COURT: That's including, I assume, during
3 these two years?

4 MS. VAN DYCK: Correct. That continued.

5 THE COURT: And the record will support that she
6 was consistently raising Title IX issues with them?

7 MS. VAN DYCK: Yes. There's a list for her as
8 well.

9 THE COURT: Okay. And with respect to the Equal
10 Pay Act claim, she does have a claim, right, because even
11 with that correction, I believe that the University even
12 admits that she was paid a little over two percent less than
13 her male counterpart?

14 MS. VAN DYCK: Correct.

15 THE COURT: Okay. And the University has an
16 argument that what's two percent among friends. But if it
17 was my two percent, I would want it.

18 MS. VAN DYCK: It's two percent. Okay?

19 THE COURT: It's not two dollars. Two dollars
20 might be one thing, but two percent is -- what is your
21 response -- Mr. Siegel addressed this with respect to Coach
22 Miller, but the University makes this market-value argument
23 with respect to Coach Wiles as well, which is the market for
24 coaches of men's basketball teams just is a higher market
25 than the market of coaches for women's basketball teams.

1 And, in fact, Coach Wiles was paid above average when
2 compared to both men and women coaching women's basketball,
3 and Coach Bowen was paid below average when compared to both
4 men and women that are coaching men's basketball and that
5 market value is a defense to an Equal Pay Act claim.

6 MS. VAN DYCK: Well, I find it interesting. It's
7 a conundrum how institutionalizing Title IX violations can
8 never be a violation of the EPA if you're using this
9 marketing defense.

10 THE COURT: Well, what they would say is you have
11 to kind of make an extra step. They're saying it isn't that
12 men coaches are -- higher pay for men coaches is
13 institutionalized over lower pay for women. It's higher pay
14 for those coaching men's programs is institutionalized over
15 higher pay for those coaching women's programs, at least
16 with respect to the revenues.

17 MS. VAN DYCK: Correct. And when I'm saying
18 institutionalizing Title IX, I'm referring with respect to
19 the students and to the sports piece of Title IX. So we
20 institutionalize that at the expense of coaches' EPA claims,
21 I find that rather ironic.

22 THE COURT: Right. I'm not sure "ironic" is the
23 right word, but it's striking. I don't know what I can do
24 with it if the case law supports them. If the case law says
25 if you're in the market for someone to coach a men's team

1 and the market rate is this and you're in the market to
2 coach for a women's team and it's this, if that in fact is a
3 valid defense to the Equal Pay Act claim -- I don't know
4 whether it is; I haven't researched it.

5 MS. VAN DYCK: I think Mr. Siegel commented on
6 this or began to comment on it, and that is with respect to
7 the idea that when you're out there looking for the first
8 time you're looking for someone and you need to pay more to
9 get someone to fill this slot, all right, which is, I think,
10 the real marketplace claim. You've got a new coach. You've
11 got a spot you have to fill. For this particular year --
12 because this changes from year to year, I think, as we all
13 know, depending on all of the various things that go on with
14 coaches -- what's the going rate for the highest you can get
15 or the middle level you can get. And this isn't Division I.
16 This is Division II, which is a different animal than
17 Division I. There aren't as great a disparity. Even though
18 it was a higher-level important sport at UMD, was one of the
19 three important sports there, even though it was Division
20 II, in that situation the first -- when you have to go pluck
21 that person that particular year for that particular slot, I
22 think the case law will support a finding that that is the
23 marketplace solution -- that's the situation in which the
24 marketplace argument can, under certain circumstances, be
25 used legitimately.

1 Over time, and I think this is a -- it makes
2 sense, given the fact that the job duties of a coach is to
3 coach a team, it's to get recruits for the team, it's to win
4 games, it's to build the program in the University, that's
5 what a coach does. The program may have broader
6 responsibilities, and I think you alluded to some of those.
7 It has to do with how do you bring in money, how do you get
8 fans, how do you publicize the team, all of that stuff, and
9 that's what some of the other staff is tasked to do. The
10 coach's primary responsibility is to build the team. And
11 they're involved in recruiting, they're involved in
12 training, they're involved in coaching the kids. Over
13 time -- as Title IX would say, you've got to equalize that
14 over time, including the coach's salary, because the
15 students are entitled to equality there. That didn't happen
16 here. It's like an institutionalization of the disparity,
17 and Ms. Wiles was on the receiving end of it, and that two
18 percent mattered to her.

19 THE COURT: Okay. That I don't blame. Federal
20 judges brought a lawsuit some years ago to get their one
21 percent raises per year, so we would be hippocrates to say
22 that two percent doesn't matter.

23 Is there anything more you want to say about Coach
24 Wiles at this point?

25 MS. VAN DYCK: No, Your Honor. I think you

1 covered everything.

2 THE COURT: All right. Thank you, Ms. Van Dyck.

3 Ms. Swenson, are you the Coach Wiles person?

4 MS. SWENSON: Yes, Your Honor.

5 THE COURT: Sure. Just let me know when you're
6 ready to go.

7 MS. SWENSON: That will make things a little bit
8 easier. All right. Thank you, Your Honor.

9 THE COURT: Okay. So, Ms. Swenson, on Coach
10 Wiles' constructive-discharge claim and her
11 hostile-environment claim, as you heard me in my discussion
12 with Ms. Van Dyck, I think the evidence is pretty weak on
13 behalf of these claims. The story of what's going on here
14 doesn't really seem to have anything to do with sex. The
15 kind of things she's complaining about, like budget fights
16 and not getting on a committee, and the long fight over the
17 Toyota wear-and-tear reimbursement, these really don't seem
18 to be the kind of severe or pervasive things that hostile
19 environment law has in mind. So I'm leaning the
20 University's way on those claims. Is there anything you
21 wanted to add?

22 MS. SWENSON: Yes, there are two things I'd like
23 to address on the hostile work environment and the
24 constructive discharge. The first is related to the
25 constructive discharge, and it's this idea that Ms. Wiles

1 would have to prove that the University had the intention or
2 they were forcing her to quit. And, as you pointed out,
3 after that October 2013 luncheon, Mr. Berlo renewed
4 Ms. Wiles' contract not once, but actually twice. That's
5 one of the things I would like to address later with regard
6 to her allegation that, oh, I didn't get a non-renewal
7 letter. Her appointment was actually automatically renewed
8 at the end of December 2014 because she did not receive a
9 non-renewal notice. But I'll get into that.

10 THE COURT: Okay.

11 MS. SWENSON: In addition, in the record we have
12 supportive text messages from Mr. Berlo throughout
13 Ms. Wiles' last semester. There was the ceremony for her
14 400th win. And his own testimony, as he pointed out, was
15 that he was going to put Ms. Wiles on a performance
16 improvement plan and assign a different sports administrator
17 to women's basketball. She was a good coach, and she was
18 obviously in the midst of some serious personal crises. But
19 the intent was to keep her as coach and to support her.

20 With regard to the instances that you mentioned, I
21 think it's helpful to walk through it just briefly. I'm not
22 going to talk about the luncheon because, as you pointed
23 out, that's at best sexual orientation, and a reasonable
24 employee would not feel that they needed to quit over a
25 stray remark like that.

1 Regarding the spring 2014 student feedback,
2 Ms. Wiles alleges that she was unfairly criticized based on
3 student feedback that was received in spring 2014. And just
4 to clarify the timeline, Your Honor, on April 2nd, that was
5 the date of the glowing written performance evaluation by
6 Mr. Berlo. It also noted that he awaited the student
7 feedback, so it wasn't unqualified. We looked forward to
8 hearing to what your students have to say, because even if
9 you are a fantastic coach with a glowing review, there is
10 always room for improvement.

11 April 23rd, that is when Ms. Strong emailed the
12 seniors on the women's basketball team and all of the other
13 senior athletes in the program -- or at UMD. So there was
14 no distinction.

15 THE COURT: Just to be absolutely clear, the
16 surveys were sent to all the student athletes, right?

17 MS. SWENSON: No. I'm sorry, there's confusion.
18 On April 20 -- the surveys are sent later. I'm talking
19 about the senior exit interview. So that's later.

20 THE COURT: So the surveys are when they are sent?
21 They are sent to all the athletes?

22 MS. SWENSON: Yes. That's correct.

23 THE COURT: All athletes in all programs, right?

24 MS. SWENSON: Yes, sir.

25 THE COURT: Same exact survey? They all go on the

1 same link?

2 MS. SWENSON: Yes. It is a link. And there is a
3 copy of the questions in the record. It is a standard set
4 of questions. It was not tailored in any way toward
5 Ms. Wiles or one coach or another. It was all uniform.

6 THE COURT: Is it the same with respect to exit
7 interviews? Is it the same questions asked of every student
8 in every program?

9 MS. SWENSON: I believe Ms. Strong testified that
10 she had a set of general questions. Her notes revealed that
11 it's a systematic thing that she did.

12 THE COURT: It's all seniors in all programs?

13 MS. SWENSON: Yes.

14 THE COURT: Okay. And is there any evidence in
15 the record that the results of these surveys or exit
16 interviews were used differently for male coaches than
17 female coaches or used any differently for Coach Wiles or
18 anybody else?

19 MS. SWENSON: The record shows with regard to
20 providing the actual answers that the students gave, that
21 was not done for anyone. General themes were provided to
22 the coaches depending on what was said by the student
23 athletes.

24 And no doubt it was unpleasant for Ms. Wiles to
25 hear this feedback, but there is no evidence that a male

1 coach, number one, received similar concerning student
2 feedback -- or no man nor woman, actually. Mr. Berlo
3 testified in either at his deposition and at his
4 declarations that no coaches received similarly negative
5 feedback.

6 THE COURT: Okay.

7 MS. SWENSON: So that's not based on sex. That's
8 based on the content of the neutrally-administered surveys
9 and the exit interviews.

10 THE COURT: Okay.

11 MS. SWENSON: So back to the timeline. This is
12 early April. There's a performance evaluation. The exit
13 interviews are then set up.

14 Then the next day, April 24th, Ms. Wiles and
15 Mr. Berlo meet to discuss her written performance review.
16 She signs it.

17 On May 2nd, that's when Ms. Strong on Berlo's
18 behalf sends the survey link to all of the student athletes.

19 Then later in May -- May 16, May 17 -- Mr. Berlo
20 meets with a women's basketball senior at that woman's
21 request with some concerns about Ms. Wiles. The next day he
22 receives an email from a former women's basketball player
23 expressing some concerns. That's when the reappointment
24 notice goes out with the merit increase. And, as Your Honor
25 has noticed, that was corrected by the University, so there

1 was no adverse employment action taken here against
2 Ms. Wiles.

3 And following that reappointment notice, that is
4 when Mr. Berlo, Ms. Strong, and Ms. Wiles met about that
5 student athlete feedback. And Ms. Wiles' handwritten notes
6 show that Mr. Berlo offered her support. He said, We are
7 here to support you and give you what you need.

8 So getting back to the student feedback, it was
9 not based on sex, as we've pointed out. It was derived from
10 neutral things. So no doubt it was unpleasant, even very
11 upsetting for Ms. Wiles to hear this feedback, but it does
12 not rise to the level of harassment or even severe
13 harassment, let alone something objectively intolerable that
14 would force an employee to quit.

15 THE COURT: And it doesn't have anything to do
16 with sex, so --

17 MS. SWENSON: Yes. Exactly.

18 I think the Strategic Planning Committee -- I
19 think Your Honor hit the nail on the head with regard to the
20 Strategic Planning Committee earlier. Ms. Wiles was not
21 part of that initial committee, but neither were other women
22 and other men. And after receiving emails from the Athletic
23 Director asking for volunteers for future iterations of the
24 committee or for additional planning input, she did not
25 respond to those and expressed no interest.

1 You mentioned the budget conflict. If Ms. Wiles
2 was upset by the budgeting process that occurred in the
3 summer of 2014 -- she claimed that she was forced to sign
4 off on a budget that she didn't agree with, but that's all
5 of the coaches, male or female, were required to sign those
6 budgets -- it has nothing to do with Ms. Wiles being a
7 woman.

8 And that's also -- I think there was a -- she had
9 complained that she was asked as a fiscal savings exercise
10 to cut two percent from the budget. That was in March 2015.
11 But it's undisputed that Ms. Wiles was excused from that
12 exercise -- that is, she received special treatment from
13 Mr. Berlo and was not required to do what all of the other
14 coaches, male or female, were required to do.

15 You also mentioned the controversy about the
16 Toyota car overages. All of the affected coaches, men and
17 women, were treated alike. They were allowed to find money
18 in their respective sports budgets to cover those charges or
19 they could pay those charges out of pocket. This was not
20 based on the fact that Ms. Wiles is a woman, and it's
21 certainly not something intolerable when you go over on your
22 car. I think it was excess wear and tear on her vehicle.
23 And to the extent that she might be complaining that the
24 male coaches didn't have to pay out of pocket, that they
25 were able to find money in their budgets, Ms. Wiles did have

1 enough money in the women's basketball budget, particularly
2 in the camp funds, to cover all of those car charges. But
3 she had already paid herself more than \$4,600 out of the
4 camp funds. She had drained that. That's Exhibit 577 that
5 talks about where the money went.

6 What I'd like to clarify, in terms of lack of a
7 renewal letter, Ms. Wiles says that she believed that she
8 was going to be fired because as of the date of her
9 resignation letter -- that's June 1st, 2015 -- she had not
10 received a renewal letter. And I'm using that in quotes.
11 This belief, even if sincere, is not supported by the
12 record.

13 First, Ms. Wiles was not treated differently than
14 other coaches with regard to the lack of a renewal notice.
15 None of the other coaches, male or female, had received one
16 at the time she resigned. Mr. Berlo's declaration has that,
17 as well as an exhibit. Deposition Exhibit 48 talks about
18 the status of things where the delay was due to Human
19 Resources upgrade.

20 Second, and I think this is where we're getting a
21 little tripped up, University policy entitled Ms. Wiles to
22 six months' notice if she was going to be non-renewed. If
23 she didn't get six months' notice, renewal was automatic.

24 So it's not the existence of a renewal letter
25 saying we're renewing your contract that determines if a

1 coach has a job for the next year. It's the lack of a
2 non-renewal notice. And here it's undisputed that Ms. Wiles
3 did not get a non-renewal notice by January 2015. At her
4 own deposition on page 45 she conceded that if the
5 University wanted to get rid of her by the expiration date
6 of her contract in June 2015, they would've needed to have
7 given her notice by January 2015, and they didn't do that.
8 And that's related to the argument that Ms. Wiles was on
9 this list of women who were supposedly going to be fired or
10 gotten rid of. That list happened in the fall of 2014, and
11 then Ms. Wiles did not receive a non-renewal notice. She's
12 different in that respect from Ms. Miller or any of the
13 other women who were claiming that they were non-renewed.
14 It didn't happen. Her appointment was automatically renewed
15 regardless of what Ms. Wiles now says about her subjective
16 understanding of what was going on.

17 Third, even ignoring that her appointment had
18 automatically been renewed, a reasonable employee would not
19 have quit her job on June 1st, 2015. The previous year, as
20 we've talked about, in 2014, Ms. Wiles received a renewal
21 letter on May 21st. So about one year later, on May 26,
22 2015, Athletic Director Berlo sent an email stating that the
23 year-end reviews haven't been done yet, they are going to be
24 scheduled for next week. So next week they're going to do
25 the reviews, and then you can have the process set in

1 motion.

2 But four days later, on June 1st, and 19 days
3 before Ms. Wiles, apparently, thinks her appointment is
4 going to expire, she resigns. A reasonable employee would
5 not react this way to a short delay in a large bureaucracy
6 like the University, especially not where Ms. Wiles had
7 previously received notices of renewal or reappointment in
8 June of previous years. She received a notice on June 8th
9 in 2009, on June 7th in 2010, and on June 15th in 2011.

10 So even if a reasonable employee was concerned
11 about the lack of a renewal notice or otherwise confused as
12 to how the process worked, a reasonable employee would have
13 asked the athletic director. And contrary to page 40 of
14 Ms. Wiles' brief, Mr. Berlo never refused to discuss the
15 status of her renewal with Ms. Wiles. Ms. Wiles chose not
16 to ask him about it.

17 THE COURT: Okay. I didn't understand the thrust
18 of her constructive-discharge claim to be that she was
19 constructively discharged by not getting a renewal letter.
20 It had to do with she was constructively discharged by what
21 she believes to be the abusing and harassing treatment, the
22 list of things you went through. So I appreciate the
23 clarification, but I don't think that was the thrust of her
24 claim.

25 MS. SWENSON: Well, I think alone or cobbled

1 together or even if taken as true, none of the things that
2 have been mentioned with regard to Ms. Wiles today rise to
3 the level of a hostile environment or to something that was
4 --

5 THE COURT: I think that's probably right, at
6 least not one that's based upon sex.

7 Let me ask you about the other claims she makes.
8 That Equal Pay Act claim, I don't think the fact that her
9 claim would be for something like two percent would be such
10 that I would dismiss it as an invalid claim. I have this
11 market-value issue that I need to look at. We've talked
12 about this several times today.

13 MS. SWENSON: I can save you from going into the
14 market-value issue, Your Honor.

15 THE COURT: Okay.

16 MS. SWENSON: When we look at the total
17 compensation for Ms. Wiles' two final years of coaching
18 before she resigned, she was paid more than the men's
19 basketball coach.

20 THE COURT: Okay. Where is that in the record?

21 MS. SWENSON: Sure. That's Mr. Berlo's second
22 declaration, which is ECF 453. For the 2013 to '14 academic
23 year, Ms. Wiles made \$91,000 -- actually \$91,092 against
24 Mr. Bowen's \$88,000. And for the 2014-15 academic year,
25 Ms. Wiles made \$90,737 against his \$89,492.

1 THE COURT: When you say compensation from all
2 sources, that's meaning what?

3 MS. SWENSON: That would include the base salary.
4 It's all in a nice little chart. Base salary, use of the
5 car, anything they got from camp funds through the budget.
6 It's the whole package.

7 THE COURT: Okay. It's all-inclusive for both him
8 and her? It's apples to apples?

9 MS. SWENSON: Yes, Your Honor.

10 THE COURT: Okay. And then with respect to the
11 Title IX retaliation claim, is the University conceding with
12 respect to Coach Wiles or not conceding with respect to
13 Coach Wiles that she engaged in Title IX protected activity
14 in, say, late 2014, early 2015?

15 MS. SWENSON: For purposes of today, certainly
16 Ms. Wiles did make a formal complaint in March of 2015.
17 But, again, none of the things that she -- in terms of
18 retaliation for that, there's no causal connection between
19 her 2015 EOAA --

20 THE COURT: I understand the University's
21 argument. But you agree that in the spring of 2015, she was
22 engaged in Title IX protected activity?

23 MS. SWENSON: Yes, Your Honor.

24 THE COURT: Your view is she didn't suffer any
25 retaliation on account of it?

1 MS. SWENSON: Yes.

2 THE COURT: Right. And I understand that
3 argument.

4 Okay. Anything more you wanted to say about Coach
5 Wiles?

6 MS. SWENSON: No, Your Honor. I think that's it.

7 THE COURT: Okay. Thank you, Ms. Swenson.

8 Ms. Van Dyck, did you have anything more you
9 wanted to say about Coach Wiles?

10 MS. VAN DYCK: Briefly.

11 THE COURT: Sure.

12 MS. VAN DYCK: I want to address the marketplace
13 issue.

14 THE COURT: Okay.

15 MS. VAN DYCK: I will give you a case name in the
16 Eighth Circuit. *Drum v. Leeson Electric Corporation*, 565
17 F.3d 1071. On page 1073 -- it's an Eighth Circuit 2009
18 case -- "Market forces theory cannot be used to justify
19 lower compensation for women."

20 THE COURT: Okay.

21 MS. VAN DYCK: So I think that answers that
22 question.

23 As for the two percent and this whole
24 compensation, there were also charts in expert witness
25 Lopiano's report that would counter that. And the

1 discussion about the two percent is still the two percent,
2 and so I think it's a fact question you can have a look at.

3 THE COURT: Well, Ms. Swenson has referred me to
4 these charts that have all the different compensations. She
5 gave me the total numbers. What's wrong with those charts?

6 MS. VAN DYCK: I believe that Dr. Lopiano did
7 similar calculations and came up with different results.

8 THE COURT: Okay. We'll take a look and see what
9 she did.

10 MS. VAN DYCK: And some of it has to do with what
11 compensation is really compensation to her, as opposed to
12 her program.

13 THE COURT: Okay.

14 MS. VAN DYCK: Okay? I mean, there's a reason
15 there's -- I think you'd have to say that a base salary,
16 plus any bonus, plus any retirement benefits, those would
17 have to be accorded to the individual, but some of the
18 others were not. They're more program charges.

19 THE COURT: Okay.

20 MS. VAN DYCK: And, finally, what I would like to
21 do is talk about the fact that the constructive discharge
22 makes no sense because Josh Berlo was repeatedly telling
23 Ms. Wiles, and she was getting information that the
24 treatment was different. Berlo treated her very poorly
25 until Ms. Miller announced that she was going to sue the

1 University. And at that point, date-wise, then the behavior
2 towards Ms. Wiles and the reconciliation with respect to
3 we're going to give you a new contract changed. And I think
4 --

5 THE COURT: Well, he didn't treat her very poorly
6 the whole time because in the spring of 2014, which is prior
7 to Miller's non-renewal, he gave her a glowing review. And
8 then even after the student feedback came back negative, he
9 still didn't non-renew.

10 MS. VAN DYCK: No, he did not can her, but he
11 discriminated against her on the -- and that was found, that
12 it was inequitable. And I think we just have to take that
13 as a given. It was found to be inequitable. He did
14 discriminate against her, and the finding was based on
15 gender, not on sexual orientation. She was compared to a
16 male in a similarly-situated position. And I think we have
17 to take that as being what the finding was.

18 Other than that, I have nothing further.

19 THE COURT: Okay. Thank you, Ms. Van Dyck.

20 So I also have before me a couple motions that I'm
21 not going to ask you to address today. One is a motion to
22 sever the trials. I'll just make that decision based on the
23 arguments and the papers after I decide what claims survive
24 and what claims do not survive. My inclination is certainly
25 to try everything that remains together, but we'll see what

1 remains before I make a final decision.

2 There's also a *Daubert* motion. I know you filed
3 this before Judge Kyle and, I think, argued it before him.
4 My practice is to not deal with *Daubert* motions until we get
5 to the motions-in-limine stage, particularly when, as in
6 here, the briefing on the summary-judgment motions I don't
7 even remember anybody citing -- it was barely cited at all.
8 There wasn't a lot in the expert report that anybody was
9 relying upon in the summary-judgment motions. So I will
10 revisit that if and when we try the case as part of the
11 motions in limine.

12 Just to give you a preview, I did not read the
13 whole 124-page report. I skimmed it, and I read the briefs
14 about it. And I think most of what's in that report I would
15 not allow this expert to testify to. The plaintiffs, to
16 their credit, recognized that a lot of what she says is not
17 admissible under Eighth Circuit law. I'm not going to let
18 her talk generally about the history of Title IX and about
19 Title IX violations at UMD generally. This isn't a Title IX
20 case, except perhaps for retaliation claims. I will just
21 say, as a general matter, I thought the University's
22 arguments were pretty good as to why much of what's in the
23 report would not be admissible.

24 I do think there are some things -- I think her
25 testimony about the future employment prospects of the

1 plaintiffs, that was probably admissible. Perhaps some of
2 her testimony about how universities respond to financial
3 difficulties and the options available to them, other than
4 firing coaches, might be admissible.

5 But I just want to give the plaintiffs fair
6 warning that I do think most of what's in that report is not
7 stuff I would be inclined to allow her to testify to at
8 trial, but it's hard for me to say until we actually figure
9 out what we're going to be trying.

10 So I will take the claims under advisement. I
11 know you've been waiting for a long time on a decision on
12 that. I'm sorry. I hope you all realize it's nobody's
13 fault here. Judge Kyle's health deteriorated, and we had to
14 make some accommodations. I know you've been waiting a long
15 time for a decision on these motions, so we'll try to get
16 some decisions out soon. Judge Kyle has kindly loaned his
17 law clerk to me and he's leaving us at the end of the year,
18 so that's kind of our hope for a deadline, that sometime
19 before the end of the calender year I'll get you a decision
20 so you will know what's left in the case. If there are
21 claims left to try, we'll get the case set for trial up in
22 Duluth as soon as we can. Okay?

23 MS. VAN DYCK: Your Honor, just for your
24 information, a transcript of the hearing on the Lopiano
25 motion was ordered and done. And I don't know that it was

1 filed, but that might be -- that might --

2 THE COURT: You can go ahead and file it. As I
3 said, I'm not going to make a decision on that motion until
4 we treat it as part of motions in limine when I can actually
5 review it in the context of what we're actually going to be
6 trying. Okay?

7 Thank you, everyone, for your help with the case.

8 THE COURT REPORTER: All rise.

9 (Court adjourned at 11:38 a.m.)

10 * * *

11 I, Debra Beauvais, certify that the foregoing is a
12 correct transcript from the record of proceedings in the
13 above-entitled matter.

14 Certified by: s/Debra Beauvais

15 Debra Beauvais, RPR-CRR

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