

1999 WL 1012948
United States District Court, E.D. Pennsylvania.

Noreen P. KEMETHER
v.
PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.
No. CIV. A. 96-6986. Nov. 8, 1999.

Opinion
FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER

YOHN.

Plaintiff Noreen Kemether brought this action under Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Pennsylvania Equal Rights Amendment ("ERA") alleging that the Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") discriminated against her based on her gender by refusing to give her the opportunity to officiate high school boys' interscholastic basketball games. After trial from December 7 to, December 18, 1998, the jury returned a verdict against the defendant on all counts and awarded damages in the amount of \$314,000. Presently before the court is plaintiff's request for equitable relief.

FINDINGS OF FACT

I. The Parties

1. Defendant Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") is a statewide "voluntary membership association of public and private secondary schools" organized as a non-profit corporation. N.T., Dec. 12, 1998, at 101 (Def.'s Admissions)..
2. PIAA's executive and administrative body is its Board of Control, which has "general control over all interscholastic athletic relations and athletic contests in which a member school of [PIAA] participates." Pl.'s Ex. 3, PIAA Const. art. VI, § 1, art. VIII, § 1(A).
3. The eighteen members of PIAA's Board of Control include thirteen school district professional employees serving as representatives of the eleven PIAA districts. The other five members represent the following: the junior high/middle school representatives of the PIAA District Committees; the Pennsylvania School Boards Association; the official members of the District Committees; the Pennsylvania State Athletic Directors' Association; and the Pennsylvania Association of Secondary School Principals. Advisors to the Board include representatives of the Pennsylvania Department of Education (appointed by the Secretary of Education); the Pennsylvania Association of School Administrators; the Private Schools' Steering Committee; and the chairman of the Girls' Athletic Steering Committee. See Pl.'s Ex. 3, PIAA Const., art. VI, § 2; N.T., Dec. 10, 1998, at 104 (Cashman testimony); N.T., Dec. 11, 1998, at 102 (Def.'s admissions).

4. PIAA's membership comprises approximately 1,300 Pennsylvania high schools and junior high schools, both public and private. These schools are divided into eleven geographic units known as districts. See Pl.'s Ex. 3, PIAA Const. art. V; N.T., Dec. 10, 1998, at 203 (Ruoff testimony).

5. PIAA's District I includes approximately eighty schools, comprising seven leagues. The eight Delaware County schools which comprise the Del Val Athletic Association ("Del Val League"), are part of District I. See N.T., Dec. 10, 1998, at 203–04 (Ruoff testimony); N.T., Dec. 7, 1998, at 131 (Kemether); N.T., Dec. 14, 1998, at 7 (Williams Testimony).

6. The Del Val League schools and their school districts receive federal financial assistance. These schools (and their respective school districts) are as follows: Chester (Chester Upland); Chichester (Chichester); Interboro (Interboro); Sun Valley (PennDelco); Academy Park (Southeast Delco); Harriton (Lower Merion); and Penn Wood (William Penn). See N.T., Dec. 14, 1998, at 7 (Williams testimony); N.T., Dec. 14, 1998, at 84 (Cashman testimony); Pl.'s Ex. 3, § III at 1–18; Pl.'s Ex. 121–25.

7. PIAA employs at least fifteen employees. PIAA member schools belonging to the Del Val League employ at least fifteen employees. See N.T., Dec. 9, 1998, at 241–44; N.T. Dec. 11, 1998, at 99 (stipulating that both PIAA and member schools are statutory employers for purposes of Title VII and Title IX).

8. PIAA receives approximately 70.5 percent of its revenue from gate receipts that it collects at playoff and championship games, some of which are held at publicly owned facilities. See N.T., Dec. 11, 1998, at 102–03 (Def.'s admissions). PIAA also receives approximately 4.4 percent of its revenue in the form of fees paid by the member schools, and an additional 11.9 percent from fees paid by officials registered with PIAA. See *id.* at 103.

9. PIAA is governed by the PIAA Constitution and By–Laws. See N.T., Dec. 11, 1998, at 101 (Def.'s admissions).

10. To become a member of PIAA, a school must submit with its membership application "a resolution of approval executed by the School Board or the Board having jurisdiction over the applicant school" stating "that in all matters pertaining to interscholastic athletic activities, the school shall be governed by the Constitution and By–Laws of the P.I.A.A." Pl.'s Ex. 3, PIAA Const., art. III, § 2; accord, N.T., Dec. 11, 1998, at 101 (Def.'s admissions).

11. PIAA promulgates policies and rules that are "binding upon member schools." N.T., Dec. 11, 1998, at 101 (Def.'s admissions).

12. PIAA requires its member schools to use only sports officials that are registered and on active status with PIAA to officiate athletic contests in which the teams from those schools participate. See N.T., Dec. 10, 1998, at 107 (Cashman); Pl.'s Ex. 3, By–Laws, art. XIV, § 1.

13. PIAA has the power "to determine the method and the qualifications for the registration of officials; to determine their powers and duties; and to make and apply necessary penalties and forfeits for the control of such officials." N.T., Dec. 10, 1998, at 110 (Cashman); Pl.'s Ex. 3, Const., art. VII, § 1(F).

14. Dr. Robert Lombardi has been PIAA's Associate Executive Director since 1993 and was its Assistant Executive Director from 1988 to 1993. He is responsible for providing "leadership in developing and maintaining the ... athletic officials' program in the Commonwealth of Pennsylvania." Pl.'s Ex. 112. He has day-to-day responsibilities over the officials' program. See N.T., Dec. 10, 1998, at 39–41 (Lombardi); Pl.'s Ex. 112.

15. To become a PIAA-registered basketball official, an applicant must pass a statewide examination administered by PIAA. See N.T., Dec. 11, 1998, at 103 (Def.'s admission); N.T., Dec. 10, 1998, at 111 (Cashman); Pl.'s Ex. 3, Bylaws art. XIV, § 2. Additionally, the applicant must pay an application fee. See Pl.'s Ex. 8 at 7–8 (1996 Athletic Officials' Manual), Pl.'s Ex.9 at 1–3 (1992 Athletic Officials' Manual).

16. PIAA requires its registered basketball officials to pay dues to PIAA; to wear a uniform prescribed by PIAA, which includes an emblem patch provided by PIAA that identifies the official as a "PIAA official"; to apply game rules approved by PIAA; to cooperate with PIAA when called upon to do so; to conduct themselves "in the best interests of PIAA"; to submit written reports to PIAA of their conduct in games when requested by PIAA; and to comply with all regulations pertaining to sports officials that are adopted by the Board of Control. See N.T., Dec. 7, 1998, at 110–11, 127–28 (Kemether); N.T., Dec. 10, 1998, at 124–26 (Cashman); N.T., Dec. 11, 1998, at 103 (Def.'s admissions); Pl.'s Exs. 3, 8, 9.

17. PIAA requires its registered basketball officials to become members of a PIAA chapter of basketball officials and to attend six chapter meetings and a rules interpretation meeting in a PIAA officials' chapter each year. See N.T., Dec. 10, 1998, at 112–113 (Cashman); N.T., Dec. 11, 1998, at 103 (defendant's admission); Pl.'s Exs. 8, 9.

18. Through their annual dues paid to PIAA, PIAA-registered officials receive liability insurance from the National Federation of Interscholastic Officials Association. See N.T., Dec. 7, 1998, at 127 (Kemether); N.T., Dec. 10, 1998, at 41–42 (Lombardi); Pl.'s Ex. 2 (Oct. 1995 Officials' Newsletter).

19. The conduct of all PIAA-registered officials is governed by the "PIAA Code of Ethics Pertaining to High School Athletics," which was approved by PIAA's Board of Control. See N.T., Dec. 10, 1998, at 126 (Cashman); Pl.'s Ex. 3, Bylaws; Pl.'s Ex. 8 at 32; Pl.'s Ex. 9 at 29.

20. PIAA has the power to discipline registered officials, by dropping them from its registered list, suspending them or placing them on probation, for any of the reasons set forth under Article XIV of the PIAA Bylaws. This power covers their conduct in both regular season and playoff games. See N.T., Dec. 7, 1998, at 126 (Kemether); N.T., Dec. 10, 1998, at 113–118, 124 (Cashman); Pl.'s Ex. 3, Bylaws, art. XIV, §§ 5–7; Pl.'s Ex. 8 at 11–12, 33–34; Pl.'s Ex. 9 at 7–8, 30–31.

21. PIAA requires PIAA member schools to use an official contract form developed by PIAA, entitled "Contract for Officials Under PIAA Rules," whenever they hire PIAA-registered officials to officiate their athletic contests. See N.T., Dec. 11, 1998, at 104 (Def.'s admissions). PIAA has the authority to enforce these contracts with officials and to impose penalties on schools or to discipline officials who violate such contracts. See N.T., Dec. 10, 1998, at 107–109, 124 (Cashman); Pl.'s Ex. 3, Bylaws, art. XI, § 3, art. XII, § 2; art. XIV, § 4.

22. If two schools fail to agree upon the assignment of officials fifteen days prior to the date of a game between them, PIAA requires the school principals to notify the PIAA District Chairperson, and the Chairperson then appoints the officials. If the game is between schools in two different districts, the PIAA Executive Director appoints the officials. See Pl.'s Ex. 3, Bylaws, art. XI, § 8; N.T., Dec. 8, 1998, at 8 (Kemether); N.T., Dec. 10, 1998, at 142–45 (Cashman).

23. As a disciplinary measure, PIAA has on occasion taken over the job of assigning officials to games involving the two offending schools. See N.T., Dec. 10, 1998, at 145–46, 160–62 (Cashman).

24. Under PIAA rules, if member schools hire assignors to assign PIAA-registered officials to their games, those assignors are prohibited from accepting fees from officials in return for assignments. See N.T., Dec. 8, 1998, at 7 (Kemether); N.T., Dec. 10, 1998, at 146 (Cashman); Pl.'s Ex. 3, Rules & Regulations, at 2; Pl.'s Ex. 8 at 15; Pl.'s Ex. 2 (Oct. 1996 Newsletter).

25. PIAA's rules further require that the assignor's fee, if any, be paid by the schools. See Pl.'s Ex. 2; Pl.'s Ex. 3, Rules & Regulations, at 2; Pl.'s Ex. 8 at 15.

26. PIAA's Board of Control has not “accord[ed] the right of any league or organized group of member schools to establish maximum fees for officials.” Pl.'s Ex. 8 at 15; Pl.'s Ex. 9 at 11.

27. PIAA's member schools set the times, dates and places of the games that PIAA-registered officials work, enter into contracts with those officials, establish the fees and pay those officials for regular season games. See N.T., Dec. 7, 1998, at 127, 131–132 (Kemether); Pl.'s Ex. 40, 42.

28. At a meeting on February 13, 1993, the PIAA Board of Control adopted the “Employment Policy and Assignment of Officials Policy of the Pennsylvania Interscholastic Athletic Association, Inc. (PIAA)” (“EEOC policy”), subject to review by legal counsel. The policy establishes that it will be the practice of PIAA “to seek and employ qualified personnel, to provide equal opportunity for advancement of employees, including upgrading, promotion and training; to provide equal opportunity for the hiring of game personnel; to provide equal opportunity in the assignment of PIAA-registered officials; and will administer these activities in a manner which will not discriminate against any person because of race, color, religion, sex, age, national origin, ancestry, or non-job related handicap or disability.” Def.'s Ex. 76. The EEOC policy also requires PIAA to “recruit, hire and promote for all positions and contest assignments without regard to ... sex ... except where sex is a bona fide occupational qualification; and will take affirmative measures to seek qualified minority group and female job applicants and candidates.” Def.'s Ex. 76; accord, N.T., Dec. 10, 1998, at 153–55 (Cashman).

29. The EEOC policy described in the preceding finding makes no reference to assignment of post-season playoff games, as opposed to regular season games. See Def.'s Ex. 76.

30. PIAA has taken no action to publicize its EEOC policy through any of the various means that it maintains for communications with PIAA-registered officials, including officials' newsletters, the Athletic Officials Manual, or meetings of its chapters of PIAA-registered officials. See N.T., Dec. 10, 1998, at 154–155 (Cashman).

31. Noreen Kemether is a basketball official who has been registered as such with PIAA since November 1990. See N.T., Dec. 7, 1998, at 111 (Kemether).

32. Prior to becoming a basketball official, Kemether played and coached basketball. See *id.* at 111–14.

33. Kemether's basketball officiating experience began in the 1984–85 season with the Philadelphia Board of Women's Officials (“Women's Board”), which assigns officials to girls' basketball games involving Friends schools, the Philadelphia Catholic League, Catholic Academy schools, and Catholic Youth Organization schools. See N.T., Dec. 7, 1998, at 109, 114–19, 121 (Kemether). Kemether also has officiated for the Girls' Catholic League and summer recreational leagues, in the Amateur Athletic Union tournaments, and in college games. See N.T., Dec. 8, 1998, at 69–74 (Kemether).

34. In 1988, Kemether was rated by the Women's Board as qualified to officiate varsity games statewide. See N.T., Dec. 7, 1998, at 118 (Kemether). In 1996, she was evaluated at a college scrimmage involving two Division II teams and was rated as being capable of officiating that level of competition. See N.T., Dec. 11, 1998, at 6–13 (Moore testimony).

35. When Kemether became a PIAA official, she joined the Delaware County Chapter of PIAA Basketball Officials (“Delco Chapter”). See N.T., Dec. 7, 1998, at 110, 123–24 (Kemether).

II. PIAA's Relationship to and Regulation of Chapters and Officials

36. PIAA has established requirements for the formation of PIAA chapters of basketball officials (“chapters”). PIAA must approve all applications and issue all charters for such chapters. See N.T., Dec. 10, 1998, at 135–36 (Cashman); N.T., Dec. 11, 1998, at 103 (defendants' admissions); Pl.'s Ex. 8 at pp. 17–18, 23–30; Pl.'s Ex. 9 at pp. 13–15, 20–27.

37. Under PIAA rules, to be approved as a PIAA Chapter, a chapter must be formed by a minimum of at least fifteen PIAA-registered officials. See N.T., Dec. 8, 1998, at 3–4 (Kemether); N.T., Dec. 10, 1998, at 136 (Cashman); Pl.'s Ex. 8 at 17; Pl.'s Ex. 9 at 13.

38. Every chapter must include the words “Chapter of PIAA Officials” in its name, and must adopt without modification the “Constitution and By-Laws of the Pennsylvania Interscholastic Athletic Association, Inc. Chapters of Registered Athletic Officials,” which was approved by the PIAA Board of Control and reprinted in the PIAA Athletic Officials' Manual. See N.T., Dec. 8, 1998, at 4–5 (Kemether); N.T., Dec. 10, 1998, at 136 (Cashman); Pl.'s Exs. 8 at pp. 23–30; Pl.'s Ex. 9 at pp. 20–27.

39. The purpose of the chapters, as stated in their PIAA-created constitution and bylaws, is “[t]o unite under a common bond, and in various chapters dedicated to a particular sport throughout PIAA, all Pennsylvania Interscholastic Athletic Association, Inc. registered Athletic Officials into a unified State Organization.” Pl.'s Ex. 8 at 23; Pl.'s Ex. 9 at 20.

40. The final authority to interpret the mandated Chapter Constitution and Bylaws rests with the PIAA. See N.T., Dec. 10, 1998, at 136–37 (Cashman); Pl.'s Ex. 8, art. XVI, at 30; Pl.'s Ex. 9, art. XVI, at 27.

41. Under article III of the “Constitution and By–Laws of the Pennsylvania Interscholastic Athletic Association, Inc. Chapters of Registered Athletic Officials, Revised by the Board of Control July 24, 1996,” PIAA may revoke a chapter's charter when the chapter has not demonstrated sufficient growth. See N.T., Dec. 10, 1998, at 47 (Lombardi); Pl.'s Ex. 8 at 24; Pl.'s Ex. 9 at 21.

42. PIAA requires chapters to elect officers, whose titles and duties are defined by PIAA. See Pl.'s Ex. 8 at 17–18, 25–26; Pl.'s Ex. 9 at 13–14, 22–23.

43. PIAA requires chapters to file with PIAA an “End of Year Chapter Summary Report,” and other forms pertaining to membership and status of officials. See N.T., Dec. 10, 1998, at 46–47, (Lombardi); Pl.'s Ex. 8 at 17–18; Pl.'s Ex. 9 at 14; Pl.'s Ex. 103.

44. Chapters, like the officials who belong to them, are bound by the rules and regulations of the PIAA. See Pl.'s Exs. 8, 9; N.T., Dec. 10, 1998, at 135–40 (Cashman).

45. PIAA requires each chapter to have a rules interpreter who must attend a regional rules interpretation meeting conducted by the PIAA each year. That meeting is presided over by the PIAA's statewide rules interpreter for that sport. The Chapter interpreters then are required by PIAA rules to conduct an annual rules interpretation meeting in their chapters. See N.T., Dec. 7, 1998, at 81 (Kemether); Pl.'s Ex. 8 at 18; Pl.'s Ex. 9 at 14–15.

46. PIAA requires chapters to meet at least six times each year. See N.T., Dec. 10, 1998, at 138 (Cashman); Pl.'s Ex. 8 at 26; Pl.'s Ex. 9 at 23.

47. Chapters are required by PIAA rules to record and to report to PIAA the names of PIAA-registered officials who attend their Chapter meetings, including the rules interpretation meeting. See N.T., Dec. 10, 1998, at 46 (Lombardi); Pl.'s Ex. 8 at 17–18, 27; Pl.'s Ex. 9 at 14–15, 24–25.

48. PIAA-registered officials are represented on the PIAA District Committees, the governing bodies of PIAA's districts. These officials' representatives are nominated through the chapters. See N.T., Dec. 10, 1998, at 86–87 (Lombardi); N.T., Dec. 10, 1998, at 220–21 (Ruoff); Pl.'s Ex. 8 at 31, Pl.'s Ex. 9 at 26.

49. PIAA sends to officials documents such as the Athletic Officials Manual, which contain information about the function of chapters. See N.T., Dec. 7, 1998, at 123–24 (Kemether); Pl.'s Exs 8, 9. Some of these materials include information on the assignment of officials. See N.T., Dec. 8, 1998, at 10–15 (Kemether).

50. PIAA uses the chapters to carry out its training mission. See N.T., Dec. 10, 1998, at 45 (Lombardi).

51. One of the responsibilities of the PIAA District I officials' representative is to attend and hold discussions at chapter meetings on topics such as the assignment process. See N.T., Dec. 15, 1998, at 60, 70.

III. The Role of the Delco Chapter in Assigning and Evaluating Officials

52. The Delco Chapter is a chartered chapter of PIAA-registered basketball officials.

53. Until the 1998–99 basketball season, the Delco Chapter had what was essentially a “closed shop” arrangement with Del Val. See N.T., Dec. 11, 1998, at 123–24 (Stephens). Under that arrangement, all or nearly all of the PIAA-registered officials assigned to Del Val basketball games were members of the Delco Chapter. See N.T., Dec. 9, 1998, at 134–35 (Faulkner); N.T., Dec. 9, 1998, at 209 (Scanlan); N.T., Dec. 11, 1998, at 123–24 (Stephens). The person who assigned officials to Del Val games was a member of the Delco Chapter, made his assignments to Del Val games from a Chapter list, got information on the availability of officials for such assignments only from Chapter members, and referred to those assignments as “Chapter Assignments.” N.T., Dec. 9, 1998, at 60–61 (Sheldrake); see also N.T., Dec. 10, 1998, at 21–22 (Watkins).

54. The president of the Del Val League from 1995 through 1998 was not aware of the identity of the assignor or have any contact with the assignor prior to this action. See N.T., Dec. 14, 1998, at 19–22 (Williams). Additionally, he did not know from where the assignor obtained the officials that were assigned to Del Val games. See *id.*

55. Harry Sheldrake, a PIAA-registered basketball official and a member of the Delco Chapter, was selected by the Executive Committee of that Chapter as the “Chapter Assignor.” See N.T., Dec. 9, 1998, at 56 (Sheldrake). By becoming the Chapter Assignor, Sheldrake acquired responsibility for assigning all of the officials who would work Del Val basketball games. See N.T., Dec. 9, 1998, at 56, 60–61 (Sheldrake).

56. Until at least 1994, Sheldrake understood himself to be an assignor acting on behalf of the Delco Chapter. See N.T., Dec. 9, 1998, at 56, 61 (Sheldrake). He was listed as such on the Delco Chapter's list of officers—that list includes the “Chapter Assignor” among the Chapter's officers and as a member of its Executive and Evaluation committees. See Pl.'s Ex. 45; N.T., Dec. 9, 1998, at 57–58 (Sheldrake). Sheldrake also referred to himself, in documents that he distributed to officials and others, as the “Chapter Assignor.” See N.T., Dec. 9, 1998, at 61 (Sheldrake); Pl.'s Ex. 66. Sheldrake referred to his assignments of Delco Chapter members to Del Val games as “Chapter assignments.” See N.T., Dec. 9, 1998, at 61; Pl.'s Ex. 66; see also Pl.'s Ex. 134. He also used the Chapter name and the PIAA name and logo on various documents that he distributed to officials and schools in his role as Chapter Assignor. See Pl.'s Exs. 63, 66.

57. In the past, Delco Chapter bylaws listed the Chapter Assignor as an officer of the chapter. This was changed only after Kemether filed her charge of discrimination with the EEOC. See N.T., Dec. 9, 1998, at 235 (Watkins).

58. The assignors, who assigned Del Val games and who were members of the Delco Chapter, were held out to Chapter members as, and were understood by those members to be, the Chapter's assignors. See, e.g., N.T., Dec. 15, 1998, at 26 (White); N.T., Dec. 7, 1998, at 130 (Kemether); N.T., Dec. 8, 1998, at 170–71 (Thrasher); N.T., Dec. 11, 1998, at 48 (Ciminera).

59. Harry Sheldrake served as the Chapter Assignor from 1984 through the 1995–96 basketball season. James Faulkner took over as assignor from Sheldrake for two years covering the 1996–97 and 1997–98

basketball seasons. He was replaced by William Stephens. See N.T., Dec. 9, 1998, at 55, 60, 97, 101 (Sheldrake); N.T., Dec. 9, 1998, at 142 (Faulkner); N.T., Dec. 11, 1998, at 112 (Stephens).

60. When Sheldrake retired from assigning, he recommended Faulkner for the assignor position and the Del Val League accepted that recommendation without any interview or independent evaluation of Faulkner. See *id.* at 60. (Sheldrake); N.T., Dec. 9, 1998, at 133 (Faulkner); N.T., Dec. 14, 1998, at 21 (Williams).

61. For a number of years, the Delco Chapter maintained an evaluation system operated by officers and members of the Chapter. The purpose of this system was to rate various members of the Chapter as being qualified to officiate boys' junior varsity ("JV") or varsity high school basketball games. See N.T., Dec. 8, 1998, at 30–31 (Kemether); N.T., Dec. 8, 1998, at 175–76 (Thrasher).

62. PIAA officials have been aware that some of the chapters had evaluation systems. See N.T., Dec. 10, 1998, at 5–6 (Watkins); N.T., Dec. 10, 1998, at 52–53 (Lombardi); N.T., Dec. 10, 1998, at 135 (Cashman). The Delco Chapter specifically contacted PIAA concerning its evaluation system and was told that it could operate the evaluation system if it wished to do so. See N.T., Dec. 10, 1998, at 5–6 (Watkins). PIAA adopted no rules or policies and took no actions to preclude such activity by its chapters of basketball officials. In fact, PIAA has assisted such chapters in running their evaluation systems by providing sample evaluation forms from PIAA headquarters for the chapters' use. See N.T., Dec. 10, 1998, at 52–53 (Lombardi).

63. The Delco Chapter's evaluation system was managed by its Evaluation Committee (the "Evaluation Committee" or "Committee"). The Committee ranked certain officials in the Chapter as being qualified to officiate boys' varsity or junior varsity games based upon the Committee members' observations and input from other officials. That input from other officials usually was provided on evaluation or rating cards, called "game reports." See N.T., Dec. 9, 1998, at 75–76 (Sheldrake); N.T., Dec. 9, 1998, at 136–37 (Faulkner); N.T., Dec. 9, 1998, at 194 (Scanlan); Pl.'s Ex. 35.

64. The Evaluation Committee was composed entirely of male officials. See N.T., Dec. 9, 1998, at 194–96 (Scanlan); Pl.'s Ex. 45.

65. The Chapter Assignor, Sheldrake, was a member of the Evaluation Committee. See Pl.'s Ex. 45. He attended and participated in the meetings of the Committee and gave input on the rating of officials. See N.T., Dec. 9, 1998, at 226 (Watkins).

66. The Evaluation Committee evaluated only male officials for potential assignment to boys' varsity and junior varsity games. See N.T., Dec. 9, 1998, at 140, 142 (Faulkner); N.T., Dec. 9, 1998, at 197–99 (Scanlan); N.T., Dec. 9, 1998, at 226–28 (Watkins).

67. The Committee never evaluated Kemether or rated her with respect to the type or level of games that she was qualified to work. No one ever submitted game reports on her. See N.T., Dec. 9, 1998, at 204 (Scanlan).

68. The Evaluation Committee developed a list of male officials who were ranked as qualified to officiate boys' varsity or junior varsity games. See N.T., Dec. 9, 1998, at 63–64, 70 (Sheldrake); N.T., Dec. 9, 1998, at 136–39 (Faulkner); N.T., Dec. 9, 1998, at 192–93 (Scanlan); Pl.'s Ex. 27. The list was entitled “Delco Chapter PIAA Referee Evaluation List” (hereinafter the “Evaluation List” or the “List”). See Pl.'s Ex. 27; N.T., Dec. 8, 1998, at 30–31 (Kemether).

69. The Evaluation List included the names of forty-six officials, all men, who were rated as qualified for boys' varsity. The second page of the Evaluation List included an additional fifty-three officials, also all men, who were rated as qualified for “top” junior varsity and junior varsity. See N.T., Dec. 8, 1998, at 31–33 (Kemether), Pl.'s Ex. 27. The following statement appeared at the bottom of the second page: “If your name doesn't appear in the above categories your rating is JUNIOR HIGH or you are working girls' varsity/jv.” Pl.'s Ex. 27; N.T., Dec. 8, 1998, at 31 (Kemether).

70. No women appeared on either page of the Evaluation List. See Pl.'s Ex. 27; N.T., Dec. 9, 1998, at 64–65, 68, 130 (Sheldrake); N.T., Dec. 8, 1998, at 32 (Kemether).

71. No equivalent evaluation list existed for officials qualified to officiate girls' games at any level. See N.T., Dec. 9, 1998, at 69–70 (Sheldrake).

72. Male officials who were considered qualified for boys' games also were assigned to girls' games. See N.T., Dec. 8, 1998, at 18–19 (Kemether); N.T., Dec. 8, 1998, at 178 (Thrasher); N.T., Dec. 11, 1998, at 49–50 (Ciminera).

73. The Delco Chapter Executive Committee gave Sheldrake the List and instructed him to follow it in assigning officials to boys' JV and varsity games. See N.T., Dec. 9, 1998, at 63, 66 (Sheldrake). Sheldrake testified that the List was “pretty well binding” on him as the assignor, and that in fact he followed it to the greatest extent possible in assigning officials to games. See N.T., Dec. 9, 1998, at 66–67, 72, 106 (Sheldrake); see also N.T., Dec. 9, 1998, at 202–03, 216–17 (Scanlan).

74. The Del Val League gave no instructions or guidance to Sheldrake or Faulkner with respect to whom the assignors should assign to games. In fact, its president had no knowledge concerning how the assigning was done. See N.T., Dec. 9, 1998, at 59–60 (Sheldrake); N.T., Dec. 14, 1998, at 22–23 (Williams); see also Pl.'s Exs. 40, 42. Del Val had no involvement in the creation of the Evaluation List, which controlled assignments to its games, and the Chapter Assignor did not report to Del Val in his function as such. See N.T., Dec. 9, 1998, at 72–73 (Sheldrake); N.T., Dec. 9, 1998, at 133–35 (Faulkner); Pl.'s Ex. 68. The league had an officials' and assignor's committee, but it had no role except to set the fee paid to the assignors that the Chapter selected, and the committee did not meet for several years at a time. See N.T., Dec. 14, 1998, at 20–21 (Williams).

75. The Evaluation Committee eventually disbanded, at least in part because of this case. See N.T., Dec. 9, 1998, at 76–78 (Sheldrake).

76. After the Evaluation Committee ceased operating, Sheldrake continued to assign officials according to the Evaluation List, assigning boys' varsity and JV games only to the male officials who were rated to

do such games as indicated on the List. See N.T., Dec. 9, 1998, at 78–79 (Sheldrake). According to Sheldrake, once the List was created the only way it would be altered is if one of the officials dropped out, got sick or retired, and another official moved up from a lower level on the list to take his place. See N.T., Dec. 9, 1998, at 67, 71 (Sheldrake).

77. The Evaluation Committee knew that at least one female official, Gerri Thrasher, wanted to work boys' games. Thrasher worked as a PIAA official from 1982 to 1997. After being assigned to girls' JV and boys' junior high games for five seasons, Thrasher spoke to and eventually wrote to the Chairman of the Evaluation Committee, to protest the unequal treatment of women officials by the Chapter and its assignor. See N.T., Dec. 8, 1998, at 177–80 (Thrasher); Pl.'s Ex. 73.

78. Scanlan, the chair of the Evaluation Committee, admitted that women officials “were only going to get assignment to girls' games, regardless of what the evaluations were” of their performance. See N.T., Dec. 9, 1998, at 203 (Scanlan). He also testified that women were welcome to attend boys' scrimmages, in order to be seen and rated, but that if they had done so they only would have been rated for assignment to girls' games, not boys' games. See N.T., Dec. 9, 1998, at 217–18 (Scanlan).

79. Although Kemether signed up for boys' scrimmages, she never actually officiated any of them—either her name was crossed off the list or she received a call from Sheldrake telling her that the scrimmage had been canceled and not to show up. See N.T., Dec. 8, 1998, at 29–30 (Kemether).

80. When Kemether requested assignment to boys' games Sheldrake told her “absolutely not,” and that “girls [female officials] don't do boys' games.” N.T., Dec. 8, 1998, at 22, 28–29 (Kemether). He made similar comments to Thrasher, including commenting on various occasions that he “had plenty of men in the Chapter to do these games,” and that “[a]s long as he was the assignor, [Thrasher] wouldn't work boys' games.” N.T., Dec. 8, 1998, at 189, 192, 203–04 (Thrasher).

81. After learning that a female had worked a boys' game in a holiday tournament, Sheldrake commented to Cathy McWilliams, another female official in the Delco Chapter, “what the hell would a woman be doing a boys' varsity basketball game for when there's plenty of good male officials sitting at home?” N.T., Dec. 10, 1998, at 32 (McWilliams).

82. Sheldrake also claimed that boys' games are played at a faster pace than the girls' games, and that in his opinion all male officials are faster than all female officials in the Chapter and thus had superior ability to officiate boys' games. He went so far as to claim that even when he was in his 60's and had disabling arthritis he could move faster than any of the women in the Chapter, and thus, was more qualified than women to officiate boys' varsity games. See N.T., Dec. 9, 1998, at 55, 104–05 (Sheldrake).

83. Sheldrake also testified that he believed there were female officials in the Delco Chapter who were qualified to officiate boys' JV games. Despite their qualifications, he never assigned any of the women to such games. See N.T., Dec. 9, 1998, at 89–90 (Sheldrake).

84. Sheldrake assigned no games to Kemether during her first year in the Delco Chapter. The next two years he assigned her six girls' JV games each season. In the 1993–94 season, after Kemether filed her

EEOC complaint, Sheldrake assigned her three ninth-grade boys' games, one varsity girls' game and five girls' JV games. In the 1994–95 season, he assigned her six girls' JV games and one girls' varsity game. N.T., Dec. 8, 1998, at 13–18, 39–43 (Kemether); Pl.'s Exs. 28, 30, 31, 32.

85. Prior to joining the Delco Chapter, Kemether officiated varsity games for the Philadelphia Women's Board. See N.T., Dec. 8, 1998, at 14 (Kemether). After she joined PIAA, Kemether continued to officiate non-PIAA varsity girls' games. See N.T., Dec. 11, 1998, at 54 (Ciminera). According to various of her colleagues, plaintiff has demonstrated that she is capable of officiating boys' varsity games. See N.T. Dec. 10, 1998, at 32–33 (McWilliams); N.T. Dec. 10, 1998, at 187–94 (Girifalco); N.T., Dec. 11, 1998, at 6–13 (Moore); N.T., Dec. 11, 1998, at 26–29 (Marmon); N.T., Dec. 11, 1998, at 70–71 (Peck).

86. After the 1994–95 season, Sheldrake failed to assign Kemether to boys' games at any level, even though he testified that he believed she had done fine with the games that he had assigned to her. See N.T., Dec. 8, 1998, at 41 (Kemether); N.T., Dec. 9, 1998, at 90 (Sheldrake).

87. Sheldrake never assigned Kemether, Thrasher, or other female officials to boys' JV or varsity games, at least in part because their names were not on the Evaluation List. N.T., Dec. 9, 1998, at 70, 80–81, 82–83 (Sheldrake). Their names could not appear on the List because women officials were never considered for inclusion on the List. See Findings of Fact Nos. 63, 67 *supra*.

88. Sheldrake's successor, James Faulkner, never assigned any female official to a boys' varsity or junior varsity game because he “had enough men to do the games.” N.T., Dec. 9, 1998, at 142–43 (Faulkner).

89. Faulkner had a settled policy and practice of excluding women from consideration for assignment to boys' games. He testified in his deposition and at the trial that he made a conscious effort to assign female officials to the girls' games only, and to assign only men to the boys' games. See *id.* at 142–44.

90. Faulkner further testified that he assigned a female official to a boys' game only once, and only by mistake because the schools changed the gyms and times for the games that he had assigned. See *id.* at 143–44. He also testified that some coaches did not want female officials assigned to their games and that he made a practice of accommodating those requests. See *id.* at 145–46.

91. Faulkner testified that in his view the boys' games generally were faster, and therefore an official would have to move faster to work a boys' game as opposed to a girls' game. When asked, however, whether any women in the Delco Chapter were fast enough to work boys' games he replied: “I never even thought about it. I wouldn't—I wouldn't want to say yes or no to that.” *Id.* at 144–45.

92. Faulkner assigned no games to Kemether during the two seasons (1996–96 and 1997–98) that he assigned officials to Del Val games. See N.T., Dec. 8, 1998, at 50–51 (Kemether); N.T., Dec. 9, 1998, at 146–48 (Faulkner).

93. Some anecdotal evidence exists that the exclusion of women officials from assignment to officiate PIAA boys' basketball games occurred in other chapters in addition to the Delco Chapter. Thrasher was unable to obtain boys' high school assignments from other assignors in other leagues. See N.T., Dec. 8, 1998, at 211–12, 216, 218 (Thrasher); N.T., Dec. 9, 1998, at 49 (Thrasher). A number of male basketball

officials and league officers testified that in their experience officiating in and watching games in Del Val and other leagues within District I they had never seen a female official officiate a boys' JV or varsity game. See N.T., Dec. 9, 1998, at 141–142 (Faulkner); N.T., Dec. 9, 1998, at 188, 205–06 (Scanlon); N.T., Dec. 9, 1998, at 228 (Watkins); N.T., Dec. 11, 1998, at 25–26 (Marmon); N.T., Dec. 11, 1998, at 55 (Ciminera); N.T., Dec. 11, 1998, at 130–32 (Stephens); N.T., Dec. 14, 1998, at 24 (Williams). The 1992–93 and 1993–94 season assignments to boys' JV and varsity games in the PAC Ten League, which is located in PIAA District I, included no female officials. See Pl.'s Exs. 3 (Section IV, pp. 1–7, 33–57); 26. Various female officials testified that they had never been assigned to PIAA boys' JV or varsity games. See N.T., Dec. 8, 1998, at 178–179 (Thrasher); N.T., Dec. 10, 1998, at 30–31 (McWilliams); N.T., Dec. 15, 1998, at 83–84 (Pierce).

94. Robert Ruoff, the current Executive Secretary and former Chairman of PIAA's District I, has had an official connection to PIAA's Central League since 1972, first as principal of two member schools and then as secretary treasurer of the league. He testified that he has never seen a woman officiate a PIAA boys' basketball game anywhere. In fact, the only time he has seen a woman assigned to any boys' game was when he personally recommended the assignment of a woman to officiate a non-PIAA boys' holiday tournament for a local Rotary Club. He explained that the absence of assignments of female officials to boys' games reflects “just a tradition of men working boys' games.” See N.T., Dec. 10, 1998, at 215–17 (Ruoff).

95. PIAA executives were aware of the exclusion of female officials from assignments to boys' games. At a meeting of the Southeastern Chapter of PIAA Basketball Officials, one of the Chapter's officers, a female official named Sandra Girifalco, raised the issue of women working boys' games during a discussion with Dr. Robert Lombardi, the Associate Executive Director of PIAA. See N.T., Dec. 10, 1998, at 65–66 (Lombardi). Dr. Lombardi's response was that if Ms. Girifalco was suggesting that women should be assigned to boys' games that she should “forget about it ... it will never happen.” N.T., Dec. 10, 1998, at 196 (Girifalco). Both the Executive Director of PIAA and Lombardi testified that they have never seen a female officiate a PIAA regular season boys' varsity or JV basketball game. See N.T., Dec. 10, 1998, at 53, 65–66 (Lombardi); N.T., Dec. 10, 1998, at 147–48 (Cashman).

IV. The Relationship Between Schools and Officials

96. The schools pay officials for regular season games. N.T., Dec. 9, 1998, at 46 (Thrasher). The fees are set by the schools and officials have no power to negotiate the amount. See *id.* at 42–44 (Thrasher). The schools do not provide health benefits and do not withhold taxes from officials' paychecks. See *id.* at 43–44 (Thrasher).

97. Schools also set the times, dates, and locations where games will be held, and thus where officials will work. See N.T., Dec. 7, 1998, at 131–32 (Kemether). All of the officiating occurs at the schools. See N.T., Dec. 9, 1998, at 46–47 (Thrasher).

98. Officials do not have any control over which games they will referee beyond alerting the assignor of their general availability, and have no control over the level of game to which they will be assigned. See

N.T. Dec. 14, 1998, at 52–52 (Wisniewski). Officials may, however, reject or accept any game assigned to them for any reason. See N.T., Dec. 8, 1998, at 146–47.

99. Schools evaluate officials and can state whether they want particular officials working for them. See N.T., Dec. 11, 1998, at 129–30 (Stephens). Schools may not, however, interfere with an official's calls during the course of the game. See, e.g., N.T., Dec. 14, 1998, at 40 (Wisniewski).

100. Basketball officials market themselves to various assignors and schools in order to get assignments. See, e.g., N.T., Dec. 14, 1998, at 30.

101. Schools do not have the power to impose additional work on officials and the duration of the relationship between the official and each school lasts only the length of the game. See N.T., Dec. 9, 1998, at 43.

102. The PIAA-mandated contract used by the schools and officials states that officials are independent contractors. See N.T., Dec. 8, 1998, at 145 (Kemether).

V. Assignment of Officials to Post-season Games

103. Regular season games played by PIAA member schools are followed by post-season games in each PIAA District (“District playoffs”). These games lead to a District championship. District champions then play in inter-District playoffs (“State playoffs”) that ultimately lead to a statewide championship game. See N.T., Dec. 8, 1998, at 63–64 (Kemether); N.T., Dec. 10, 1998, at 57–58 (Lombardi).

104. PIAA selects, hires and pays officials for post-season games. See N.T., Dec. 11, 1998, at 104 (Def.'s admissions).

105. PIAA's Districts assign officials to the District playoff games. See N.T., Dec. 10, 1998, at 152 (Cashman); N.T., Dec. 10, 1998, at 205–06 (Ruoff).

106. PIAA's Executive Director or his representative assigns officials to State playoff games. See N.T., Dec. 10, 1998, at 152 (Cashman).

107. Officials who are eligible and recommended for post-season games receive officiating contracts from PIAA. See N.T., Dec. 10, 1998, at 63 (Cashman).

108. The District hires officials for District playoffs on the basis of recommendations from coaches and assignors. See N.T., Dec. 10, 1998, at 208–10 (Ruoff); Pl.'s Ex. 116.

109. The eligibility criteria for District playoffs included working ten regular season varsity games in the previous season and being scheduled to work ten games in the season in which the playoff assignment is received. See N.T., Dec. 11, 1998, at 104 (Def.'s admissions). To be eligible for boys' playoffs, the ten regular season varsity games worked by the official must have been boys' games. For girls' playoff assignments, the ten regular season games must have been girls' games. See N.T., Dec. 8, 1998, at 64–65 (Kemether); N.T., Dec. 10, 1998, at 206, 227 (Ruoff); N.T., Dec. 15, 1998, at 66–68 (Pierce); Pl.'s Ex. 132.

110. The District recommends officials for interdistrict state playoffs games. The eligibility criteria for State playoff games include experience officiating a District playoff game and working ten varsity games in the season for which the State playoff assignment occurs. See N.T., Dec. 10, 1998, at 61–62 (Lombardi); N.T., Dec. 10, 1998, at 153 (Cashman). As with the District post-season games, to be eligible for boys' State playoffs, the ten varsity regular season games worked by the official must have been boys' games, and for girls' State playoff assignments they must have been girls' games. See *id.* at 61. Likewise, for an official to be eligible for boys' State playoffs, that official's District playoff assignments must have been boys' District playoff games and for girls' playoff assignments they must have been girls' District playoff assignments. See *id.* at 61–62 (Lombardi); 12/11/98 at 104 (Def.'s admissions).

111. Until the 1998 season, the selection process for officials for District playoffs commenced with a written request from PIAA's District I, soliciting from the PIAA officials' chapters in the District a list of those officials eligible for District playoffs. The list was to include only those officials who worked ten varsity games in the previous year and who were scheduled to work at least ten in the year in which the recommendations were sought. The chapters were instructed to place the names on two lists, one to identify officials who wanted to work boys' games and the other to identify officials who wanted to work girls' games. See N.T., Dec. 10, 1998, at 206–07 (Ruoff). During the 1998–1999 District representatives solicited eligible officials in person by attending Chapter interpretation meetings, at which the District representatives conveyed these eligibility requirements and requested information from officials regarding their assignments. See *id.* at 210–12.

112. No female official ever has appeared on the list of officials eligible for boys' District playoffs. The lists of eligible officials prepared by the PIAA Chapters and submitted to PIAA District I have included only males as eligible for boys' District playoffs. They have included both male and female officials on the list of officials eligible for girls' District playoffs. See N.T., Dec. 10, 1998, at 207–08 (Ruoff); N.T., Dec. 9, 1998, at 177–79 (Faulkner); Pl.'s Ex. 116.

113. After the lists of eligible officials are compiled, the District sends a request for recommendations to assignors and athletic directors, along with separate ballots for the girls' and boys' District playoffs and separate lists of officials eligible for girls' and boys' playoffs. Assignors and coaches (through the athletic directors) are asked to use the ballots to make recommendations of officials for District playoffs from the list of eligible officials. The girls' coach completes the ballot for girls' District playoffs and the boys' coach completes the ballot for boys' District playoffs. If an assignor only assigns boys' or girls' games, that assignor receives only the ballot and officials' list for whichever category of games that assignor assigns. See N.T., Dec. 10, 1998, at 208–09 (Ruoff); Pl.'s Ex. 116.

114. No female official ever has been recommended for a District I boys' playoff game. Because the lists of officials eligible for boys' playoffs has included only male officials, there could not be a female recommended for the boys' District playoffs. See N.T., Dec. 10, 1998, at 209 (Ruoff); N.T., Dec. 9, 1998, at 177–79 (Faulkner); Pl.'s Ex. 116.

115. Neither Sheldrake nor Faulkner ever recommended a female official for a boys' playoff District game. See N.T., Dec. 9, 1998, at 160–61 (Faulkner); Pl.'s Exs. 70, 116; N.T., Dec. 10, 1998, at 209 (Ruoff).

116. For State playoffs, PIAA's Executive Director sends the District Chairpersons requests for recommendations with separate lists of male and female registered officials. See N.T., Dec. 10, 1998, at 152–53 (Cashman).

117. No female official ever has been recommended for or has officiated a boys' championship game at the State playoff level. See N.T., Dec. 10, 1998, at 60 (Lombardi); N.T., Dec. 10, 1998, at 153 (Cashman).

118. Male officials are recommended and assigned to officiate both boys' and girls' State playoff games. See N.T., Dec. 10, 1998, at 61 (Lombardi).

119. District I makes recommendations for state playoffs from the pool of officials selected for District playoffs. It has recommended only male officials for the boys' State playoffs. N.T., Dec. 10, 1998, at 215 (Ruoff).

120. PIAA's selection procedures and requirements for District and State playoffs effectively incorporate for the playoffs the universal exclusion of female officials from boys' regular season games. Because women officials cannot get assignments to boys' varsity regular season games, they cannot meet the ten-game requirement, and thus cannot become eligible for assignment to any boys' post-season games. See N.T., Dec. 10, 1998, at 94–96 (Lombardi).

VI. Response to Kemether's EEOC Complaint and Federal Lawsuit

121. On October 30, 1992, plaintiff filed a claim of sex discrimination against PIAA with the Equal Employment Opportunity Commission (“EEOC”). See N.T., Dec. 8, 1998, at 33–34 (Kemether); N.T., Dec. 11, 1998, at 100 (defendant's admission); Pl.'s Ex. 33.

122. Then PIAA Associate Executive Director Bradley Cashman received the EEOC complaint and, in turn, delivered it to the executive director. See N.T., Dec. 10, 1998, at 98–99 (Cashman); N.T., Dec. 11, 1998, at 100 (Def.'s admissions).

123. Both Sheldrake and Faulkner knew that Kemether had filed an EEOC complaint at the time that they were in the position to assign games to plaintiff. See N.T., Dec. 9, 1998, at 161–62 (Faulkner); N.T., Dec. 9, 1998, at 98 (Sheldrake). Dr. Lombardi, Associate Executive Director of PIAA, discussed Kemether's EEOC complaint with Sheldrake. See N.T., Dec. 10, 1998, at 54 (Lombardi).

124. During the 1993–94 and 1994–95 seasons, after she filed her EEOC charge, Kemether received several assignments for which she was given the wrong gym or wrong time. She also received several assignments to games which were canceled without notice to her. Prior to the filing of the EEOC charge, games that she turned back or that were canceled were replaced with additional assignments to her. After filing her charge with the EEOC, Kemether testified that she no longer received such replacements. See N.T., Dec. 8, 1998, at 40–43 (Kemether).

125. During the 1994–95 season, Sheldrake changed an assignment to Kemether at Harriton High School from the junior varsity to the varsity game, and failed to advise the school of the change. Kemether received a contract from Harriton for the junior varsity game. When she returned the contract to the

school, she noted on the contract that she had been assigned to and would be working the varsity game. Kemether arrived late for the JV game, but on time for the varsity game. After learning of the incident, Sheldrake claimed that Kemether had been assigned to the JV game and asserted that her actions were inappropriate. See N.T., Dec. 8, 1998, at 44–47, 49–50 (Kemether); Pl.'s Ex. 53.

126. PIAA conducted an investigation of the Harriton incident, informing Kemether that her conduct could result in suspension. See N.T., Dec. 8, 1998, 48–49 (Kemether). Previously, in instances where officials failed to show up at games to which they were assigned due to mistakes or misunderstandings, no PIAA investigation occurred. See N.T., Dec. 9, 1998, at 97–98 (Sheldrake); N.T., Dec. 11, 1998, at 32–34 (Marmon).

127. Following the Harriton incident, Sheldrake refused to give any assignments to Kemether. In the past, Sheldrake had not stopped giving games to other officials who showed up at the wrong place or time for games, or were “chronically late” to games. See N.T., Dec. 9, 1998, at 94–96 (Sheldrake).

128. Faulkner also refused to assign any games to Kemether after he replaced Sheldrake. He admitted at trial that this lawsuit was one reason for that refusal. See N.T., Dec. 9, 1998, at 146–47, 168, 176. Faulkner also admitted that Sheldrake had told him not to assign Kemether to any games. See *id.* at 146 (Faulkner).

129. PIAA rules require PIAA-registered officials to conform at all times to its Code of Ethics and to behave in a professional manner both on and off the basketball court. See Pl.'s Ex. 3, Bylaws at 6, 17.

130. In December 1996, Kemether was officiating a basketball game at Shipley School when she was confronted by John Wisniewski, a PIAA-registered official and then the Vice President of the Delco Chapter. Wisniewski verbally berated Kemether while she was officiating the game, screaming at her “you suck, you're a joke, you want to do boys' games and you can't even do girls' games,” or words to that effect. Wisniewski's verbal abuse was so loud and disruptive that the game had to be stopped and the ball taken back from a player who was at the foul line about to shoot foul shots. See N.T., Dec. 8, 1998, at 55 (Kemether); N.T., Dec. 11, 1998, at 76–78 (Kemether); N.T., Dec. 11, 1998, at 86–88 (Martino).

131. Kemether wrote a letter to PIAA to complain about Wisniewski's conduct. See N.T., Dec. 10, 1998, at 129 (Cashman).

132. The Executive Director of PIAA, testified that his investigation into the incident consisted only of contacting Wisniewski to hear his side of the story. Cashman did not contact any other witnesses, including Dolores Martino who was working the game with Kemether. See N.T., Dec. 10, 1998, at 130–32 (Cashman); N.T., Dec. 11, 1998, at 86–88 (Martino). At trial, Martino confirmed Kemether's version of the incident. See N.T., Dec. 11, 1998, at 86–88 (Martino). Wisniewski admitted that Delores Martino has had no prior dealings with him and to the best of his knowledge has no reason to bear him any grudge. N.T., Dec. 14, 1998, at 49–51 (Wisniewski).

133. Cashman took no action to discipline Wiesniewski or to stop the abusive conduct directed at Kemether. See N.T., Dec. 14, 1998, at 74–75 (Cashman).

CONCLUSIONS OF LAW

I. Effect of the Jury's Findings

1. As the issues underlying plaintiff's claims to equitable relief are the same as those considered by the jury regarding plaintiff's legal claims, I am bound by the findings of the jury to the extent that the verdict could withstand a Rule 50(b) motion. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir.1990) (holding that “in all issues which are common to a claim tried simultaneously to the bench and to a jury, the court is bound by the jury's findings”); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 737–38 (3d Cir.1988) (declaring that Seventh Amendment and principles of issue preclusion mandate that trial court be bound by jury findings where elements of proof for legal and equitable claims are identical).

2. The court has issued a memorandum addressing defendant's motion for post-trial relief (“memorandum opinion”) in which the evidentiary basis for the jury's findings and the applicable law were examined at length.¹ As stated in the court's memorandum, had defendant's Rule 50(b) motion properly been before the court, the motion would have been denied on the merits except with regard to the jury's finding that an agency relationship existed between PIAA and the Delco Chapter. See Mem. Op. at § II.A.1.a.

3. Because the jury's determination regarding agency was not supported by the record, it cannot serve as a basis for injunctive action. Therefore, the following legal conclusions regarding the preceding facts conform to the determinations necessarily made by the jury in order to reach the Rule 50–proof portion of its verdict only.

II. PIAA's Liability for Acts of the Delco Chapter and Assignors

A. The Delco Chapter's Liability for the Acts of the Assignors

4. The jury found that the Delco Chapter was vicariously liable for the acts of the assignors, Sheldrake and Faulkner, because: (1) the assignors were Delco's servant; (2) the assignors had apparent authority to act for Delco; and (3) the assignors were aided in their discrimination of Kemether by their agency relationship with Delco. See Jury Interrogs. Nos. 4–6.

5. Defendant has not contested these determinations in any of its post-trial submissions to the court.

6. Even if the court were not bound by the findings underlying the jury's verdict, it would nevertheless reach the same conclusion based on the evidence in the record and the applicable law discussed below and in greater detail in the aforementioned memorandum opinion regarding defendant's Rule 50 motion.

B. PIAA's Liability for the Acts of the Delco Chapter

7. PIAA's liability for discrimination in the assignment of regular season games is premised upon a finding that PIAA is responsible for, and thus vicariously liable for, the discriminatory acts of the Chapter and the assignors.

8. Such vicarious liability is governed by "the general common law of agency." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2265, 141 L.Ed.2d 633 (1998).

1. Master/Servant Relationship

9. In a master/servant relationship the principal has the power to control the manner and means of the work agreed to be done by the servant. *Jones v. Century Oil U.S.A., Inc.*, 957 F.2d 84, 87 (3d Cir.1992).

10. Thus, for a master/servant relationship to exist between PIAA and the Delco Chapter, (1) PIAA must have the power and authority to evaluate officials and assign them to regular season games; (2) PIAA must have consented to have Delco assign and evaluate officials during the regular season on behalf of PIAA; (3) Delco must have consented to make the assignments and evaluate officials on behalf of PIAA; and (4) PIAA must have the right to control the manner and means by which Delco made the assignments and evaluated the officials.

11. As detailed in the memorandum opinion, the evidence is insufficient to support a conclusion that PIAA and the chapters consented to have the chapters act on behalf of PIAA with regard to the evaluation and assignment of officials. See Mem. Op. at II.A.1.a.iii.

12. As plaintiff has failed to prove that one of the necessary components of a master/servant relationship existed between PIAA and the Delco Chapter, the court concludes that Delco was not PIAA's servant for purposes of assigning and evaluating officials.

2. Aided by the Agency Relationship

13. A master may be found liable for the "torts of servants acting outside the scope of their employment" if the servant "was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency (hereinafter "Restatement") § 219(2)(d) (1958).

14. In cases involving sexual harassment of employees by supervisors, the Supreme Court has held that an employer is vicariously liable under this theory where the harassment resulted in a tangible employment action against the subordinate. See *Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 1157, 2269 (1998) (stating that in sexual harassment case, liability is automatic where supervisor takes tangible employment action against subordinate); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2292–93, 141 L.Ed.2d 662 (1998) (same); see also *Durham Life Ins. Co. v. Evans*, 166 F.2d 139, 152 (3d Cir.1999) (declaring that "sex-based mistreatment by a supervisor ... creates automatic liability when it rises to the level of a tangible adverse employment action").

15. A tangible employment action is one that effects “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Burlington, 118 S.Ct. at 2268.

16. The aided in the agency theory has not been fully developed and the cases decided thus far do not provide the full scope of this theory as it applies in Title VII actions. See Burlington, 118 S.Ct. at 2269 (“The aided in the agency relation standard ... is a developing feature of agency law”).

17. Based on the language of the Restatement and the existing caselaw, PIAA can be vicariously liable for the Chapter's (and its agent assignors') actions if a master/servant relationship existed between PIAA and Delco with respect to some activity other than the assignment and evaluation of officials, the Chapter was aided in its discrimination against Kemether by that relationship, and the Chapter's discrimination resulted in a tangible employment action against Kemether. Id.

18. The findings set forth in paragraphs 36–51 evidence a master/servant relationship between PIAA and the Chapter for purposes of training officials and various administrative tasks. See Mem. Op. at II.A.1.b.

19. Second, by denying Kemether the opportunity to move up through the ranks of officials by limiting her officiating to girls' games, and in some years, not allowing her to officiate at all, the Chapter through its agent assignors effected a tangible employment action. See Findings of Fact Nos. 52–95, supra.

20. Finally, Delco and its assignors' had the ability to take these actions because the Chapter had been placed in the position of authority over the officials with respect to training and other related administrative duties. See Findings of Fact Nos. 36–51, supra.

21. I conclude, therefore, that the Chapter and its agent assignors were aided in discriminating against Kemether with respect to the assignment and evaluation processes by the agency relationship between Delco and PIAA that existed for purposes of training and related administrative duties. See Jury Interrog. No. 2.

3. Apparent Authority

22. Apparent authority arises when a person or entity manifests to third parties that another is the first party's agent. See Restatement §§ 8, 27. Thus, it “is created by and flows from the acts of the principal.” *Fields v. Horizon House, Inc.*, No. 86–4343, 1987 WL 26652, *4 (E.D.Pa. Dec. 9, 1987).

23. For the apparent principal to be liable for the conduct of the apparent agent, there must be “reliance upon, or belief in, statements or other conduct within an agent's apparent authority.” Restatement § 265(1).

24. Vicarious liability on the basis of apparent authority does not require the existence of an agency relationship. See, e.g., Restatement § 265 (referring to liability of “master or other principal” in general rule regarding liability for conduct occurring within apparent authority or employment); Restatement § 27 (discussing creation of apparent authority in terms of principal and agent not master and servant);

see also *American Tele. & Tele. Co.*, 42 F.3d at 1439–40 (citing both New Jersey law and Sixth Circuit opinion and holding that apparent authority arises in “absence of an actual agency relationship”).

25. PIAA has general control over Pennsylvania interscholastic sports including demonstrated control over significant aspects of officiating. See Findings of Facts Nos. 2, 13–21, 23–26, *supra*. Much of the information regarding officials' qualifications, the assigning of officials, and the role of the chapters comes to officials from PIAA or in PIAA documents. See, e.g., Findings of Facts 15–17, 49–51, *supra*. The findings evidence a relationship with and use of the chapters by PIAA that led Kemether to believe that Delco was the agent of PIAA.

26. Kemether testified that she believed that in order to officiate public school games and to expand her refereeing abilities, she had to join PIAA and a local chapter. See N.T., Dec. 7, 1998, at 123. As stated in the memorandum opinion, Kemether reasonably believed the Chapter to be an extension of PIAA, which has a stated policy of equal employment. See Findings of Fact No 28, *supra*. Kemether therefore had reason to expect that she would receive fair and equal treatment in the assignment and evaluation processes if she joined Delco. The discriminatory practices of the assignors and Chapter, however, stymied Kemether's professional growth. See Mem. Op. at II.A.1.c.

27. Based on the foregoing, the court concludes that Delco acted under the apparent authority of PIAA in assigning and evaluating officials and that plaintiff reasonably relied, to her detriment, on the belief that Delco was an agent of PIAA's. Therefore, defendant may be held vicariously liable for the actions of the Chapter and its agent assignors. See Jury Interrog. No. 3.

III. Title VII

A. Kemether as an Employee of Schools and PIAA.

28. As discussed in subsections B and C of this section, the provisions of Title VII invoked in this action govern the interactions between employers, employment agencies, and employees. To come within the scope of these provisions, officials such as Kemether, must be employees of the schools for whom they officiate during the regular season and of PIAA during the postseason.

29. Determining whether Kemether is an employee under Title VII requires consideration of the following factors: the schools' right to control the manner and means of officials' performance; the skills required; whether the schools furnish officials with equipment; the place of work; the duration of the relationship between the parties; whether the schools have the right to assign additional projects to officials; the extent of the officials' discretion over when and how long to work; the method of payment; the officials' role in hiring and paying assistants; whether the work is part of the regular business of the schools; whether the schools are in business; the provision of employee benefits; and the tax treatment of the officials. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). This evaluation must consider the totality of the circumstances—no single factor is decisive. See *id.* at 323.

30. Where the evidence could yield different conclusions as to whether an individual is an employee, the issue is properly presented to the jury to decide. See *Martin v. United Way of Erie County*, 829 F.2d 445, 451 (3d Cir.1987) (holding that existence of evidence on both sides of employee issue created genuine issue of material fact so summary judgment inappropriate on ADEA claim); *Stouch v. Brothers of the Order of Hermits of St. Augustine*, 836 F.Supp. 1134, 1141–42 (E.D.Pa.1993) (same).

31. Evidence existed on both sides of this issue, see Findings of Fact Nos. 96–102, 104–09, *supra*, and so the question of whether Kemether was an employee of the schools was properly before the jury. The court found no basis for disturbing the jury's determination that Kemether was an employee of the schools during the regular season and would be an employee of PIAA's during the postseason. see Mem. Op. at II.A.2, and therefore is bound by that determination when deciding issues of injunctive relief. See Jury Interrog. Nos. 7, 8, 12.

A. Interference with Regular Season Employment Relationships

32. Title 42 U.S.C. § 2000e–2 (a)(1) makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” on the basis of an individual's sex.

33. The phrase “otherwise to discriminate” in this section has been found to encompass the discriminatory interference by one employer with an individual's employment relationship with a third party employer. See, e.g., *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 874–76 (6th Cir.) (defendant denied privileges to private-duty scrub nurse), cert. denied, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991); *Diggs v. Harris Hospital–Methodist*, 847 F.2d 270, 273–74 (5th Cir.), cert. denied, 488 U.S. 956, 109 S.Ct. 394, 102 L.Ed.2d 383 (1988).

34. PIAA-member schools are employers as that term is defined in Title VII, ee 42 U.S.C. § 2000e (b); Finding No. 7. Specifically, they are the employers of athletic officials during the regular season. See Conclusions of Law Nos. 28–31, *supra*.

35. There is substantial evidence, undisputed by defendant, that the Chapter and its agent assignors interfered with Kemether's potential employment with the schools by refusing to evaluate Kemether and limiting her assignments to girls' games and refusing to give her any assignments in some seasons. See Findings Nos. 52–92.

36. Because PIAA is liable for the Chapter's and its agent assignors' conduct, I conclude that PIAA violated § 2000e–2 (a)(1). See Jury Interrog. No. 7.

B. Unlawful Practices of an Employment Agency During the Regular Season

37. Title 42 U.S.C. § 2000–2 (b) makes it “an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual” on the basis of her sex.

38. The term “employment agency,” as used in this provision, “means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.” 42 U.S.C. § 2000e (c).

39. It is the job of assignors to provide schools with officials to officiate games and to match officials with employment opportunities at schools. See Findings of Fact Nos. 52–53, *supra*. In this respect, the Chapter through its agent assignors clearly qualifies as an employment agency as defined above.

40. Sheldrake and Faulkner refused to refer Kemether to employment with the schools, where such employment would involve officiating boys' JV and varsity games, because she is a woman, in violation of 42 U.S.C. § 2000e–2 (b). See Findings of Fact Nos. 80–92, *supra*. As discussed previously, PIAA is liable for the acts of the Chapter and its agent assignors and therefore can be held responsible for their unlawful discriminatory conduct under Title VII. See Jury Interrog. No. 8.

C. Discrimination in the Postseason

41. Under Title 42 U.S.C. § 2000e–2 (a)(1) an employer may not refuse to hire “an individual because of her gender.

42. Proof of discriminatory intent is necessary to state a disparate treatment claim under Title VII as Kemether did here. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. at 1854 n. 15, 52 L.Ed.2d 396 (1977).

43. To establish proof of such intent, the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), is used. Thus, “once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the [employment decision]. If the defendant articulates such a reason, the plaintiff then must prove that the facially legitimate reason was a pretext for a discriminatory motive.” *In re Carnegie Center Assocs.*, 129 F.3d 290, 295 (3d Cir.1997) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252–53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)), *cert. denied sub nom, Rhett v. Carnegie Center Assocs.*, 524 U.S. 938, 118 S.Ct. 2342, 141 L.Ed.2d 714 (1998).

44. PIAA had a set policy that no person could officiate boys' post-season playoff games at either the District or State playoff level unless the individual had officiated ten boys' varsity games during the regular season. See Findings of Fact Nos. 109–10, *supra*. PIAA was aware that some chapters, including the Delco Chapter, did not assign female officials to boys' games and that some schools did not want women to officiate boys' games. See Findings of Fact Nos. 94–95, *supra*. Furthermore, it was evident from the lists of eligible and recommended officials that no female ever met the eligibility requirements set in place by PIAA.

45. Although defendant proffered a non-discriminatory purpose for its eligibility requirement, I conclude, in conformity with the jury's verdict, that PIAA implemented and maintained its ten-game rule, at least in part, as a pretext to perpetuate the practice of having only men officiate boys' JV and varsity games and thereby discriminated against Kemether because of her sex. See Jury Interrog. No. 12.

IV. Title IX

A. Jurisdiction Under Title IX

46. Title IX provides that, “no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681 (a) (1990).

47. It is undisputed by the parties that PIAA is an “education program or activity” as defined in the statute.

48. To come under the auspices of Title IX, an entity must be a recipient of federal funds. Title IX applies “when any part of an educational program receives federal funding.” *Williams v. School District of Bethlehem, Pa.*, 998 F.2d 168, 171 n.3 (3d Cir.1993) (confirming that school's athletic programs were subject to Title IX even though they did not themselves receive federal funds), cert. denied, 510 U.S. 1043, 114 S.Ct. 689, 126 L.Ed.2d 656 (1994).

49. The Supreme Court has provided some guidance as to when an entity qualifies as a recipient for Title IX purposes. For example, the Court has stated that an entity is a recipient if it indirectly receives federal funds that are earmarked for its use. See *Grove City College v. Bell*, 465 U.S. 555, 564–69, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984) (holding that private college was indirect recipient where students paid tuition, room, and board with federal funds earmarked for payment to college). Receiving dues from federal fund recipients such as the member schools, however, is not enough on its own to make an organization such as PIAA subject to Title IX. *National Collegiate Athletic Assoc. v. Smith*, 525 U.S. 459, 119 S.Ct. 924, 929, 142 L.Ed.2d 929 (1999). Furthermore, an entity that merely benefits from federal aid that is directed elsewhere, but does not have independent recipient status, will not be subject to Title IX. *United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986) (stating that recipient as used in statutes such as Title VI, IX, and Rehabilitation Act “covers those who receive the aid, but does not extend as far as those who benefit from it”)

50. In its regulations, the Department of Education has adopted the following definition of recipient for Title IX purposes:

any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2 (h) (1992)(emphasis added). Although not binding law, the Supreme Court has afforded this definition significant deference. See *National Collegiate Athletic Assoc.*, 119 S.Ct. at 929 (stating that Third Circuit had misread definition and “failed to give effect to the regulation in its entirety”).

51. PIAA does not receive funding directly from the federal government and no evidence exists that PIAA receives earmarked federal funding indirectly from any source. Nevertheless, under the definition included in the federal regulations, PIAA is subject to Title IX as an assignee.

52. Neither the statute nor the regulations contain a definition of, and the court has been unable to uncover any cases defining, assignee in this context. Black's Law Dictionary defines the term as “[a] person to whom an assignment is made; grantee.” Black's Law Dictionary 118 (6th ed.1990). An assignment includes “[t]he act of transferring to another all or part of one's property, interest, or rights.” Id. at 119.

53. PIAA-member schools are recipients of federal funds. See Mem. Op. at II.A.3.a. These schools have given to PIAA essentially complete control over and responsibility for interscholastic athletics in the Commonwealth.² PIAA has the power to promulgate rules and policies that are binding on all schools and officials who participate in its athletic contests. See Finding No. 11. Furthermore, PIAA is entitled to the gate receipts from playoff and championship games and membership fees from officials and schools. See Finding No. 8.

54. In this capacity, PIAA does more than merely benefit from federal funds disseminated to the member schools, cf. *Paralyzed Veterans*, 477 U.S. at 607 (holding that airlines were not subject to Rehabilitation Act because airlines did not actually receive federal aid “they only benefit[ted] from the airports' use of the aid”), PIAA actually controls an educational program (athletics) on behalf of a group of federal fund recipients.

55. Given the facts in the above paragraph, PIAA is an assignee of the member schools. As an assignee of federal fund recipients, PIAA is subject to Title IX. See 34 C.F.R. § 106.2 (h).

56. Such a conclusion is supported by the opinions in two cases involving entities similar to PIAA. In *Horner v. Kentucky High School Athletic Assoc.*, 43 F.3d 265, 271–72 (6th Cir.1994), the Court of Appeals for the Sixth Circuit held that the Kentucky High School Athletic Association (“KHSAA”) was a recipient under Title IX where: (1) the state board of education had complete control over the state educational system on behalf of the Department of Education; (2) the Department of Education received federal funds; (3) a state statute designated KHSAA as the board's agent to manage interscholastic athletics; and (4) KHSAA received dues from member schools that were recipients of federal funds.

57. Like PIAA, KHSAA had been granted control of the athletic program by federal fund recipients. Although not described in terms of “assignees,” *Horner* supports the proposition that an entity such as PIAA that has been placed in control of statewide athletics by federal fund recipients will be subject to Title IX.

58. The recent decision in *Cureton v. National Collegiate Athletic Assoc.*, 37 F.Supp.2d 687 (E.D.Pa.1999), further supports this proposition. The plaintiffs in *Cureton*, challenged a rule promulgated by the National Collegiate Athletic Association (“NCAA”) claiming that the rule discriminated against African–American athletes. See *id.* at 689. In denying summary judgment, the court found that the NCAA was subject to Title VI despite the fact that there was no evidence that federal funds paid to member schools

were then received by the NCAA.³ The court determined that the collegiate members of NCAA who receive federal funds had placed the governance and promotion of intercollegiate athletic programs in the hands of a separate entity, the NCAA. *Id.* at 689, 695. Furthermore, the schools had “granted to the NCAA the authority to promulgate rules affecting intercollegiate athletics that the members are obligated to abide by and enforce.” *Id.* at 695. Consequently, the court ruled, “the NCAA [came] sufficiently within the scope of Title VI irrespective of its receipt of federal funds.”⁴ *Id.*

59. Much like the concept of an “assignee,” the theory of Title VI jurisdiction in *Cureton* described above rests heavily upon the idea that federal fund recipients have ceded controlling authority of an educational program to another entity. Additionally, the evidence presented in the instant case mirrors many of the factors cited by the court in *Cureton* to support its conclusion that the NCAA is subject to Title VI. See *Mem. Op.* at II.A.3.a.

60. The court concludes that PIAA is subject to Title IX jurisdiction as an assignee of the member schools who receive federal funds, as having been ceded controlling authority of an educational program in accordance with the decisions in *Horner* and *Cureton*.

B. Discriminatory Conduct—Regular Season

61. The record clearly demonstrates that PIAA through the Chapter and assignors had policies against assigning women officials to boys' JV or varsity games. See Findings of Fact Nos. 52–92, *supra*. Moreover, at least some PIAA officials were aware of these policies and supported them as being in line with the attitudes of the member schools. See Findings of Fact Nos. 90, 94–95, *supra*.

62. The exclusion of Noreen Kemether from participation in the officiating of boys' JV and varsity basketball games on the basis of her sex in accordance with these policies is conduct clearly proscribed by Title IX. See *Jury Interrog.* No. 10.

C. Discriminatory Conduct—Postseason

63. As discussed above with respect to Title VII, PIAA's ten-game rule was intended, in part, to prevent women from officiating boys' JV and varsity games.

64. This rule effectively excluded Kemether from officiating any boys' post-season playoff games for the sole reason that she is a woman. PIAA's rule violates the express prohibition of Title IX and is therefore unlawful. See *Jury Interrog.* No. 14.

V. Retaliation Under Titles VII and IX

65. Title VII prohibits employers and employment agencies from discriminating against any employee “because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e–3.

66. Retaliation against an individual who has challenged a practice under Title IX is similarly prohibited by that statute. See *Preston v. Commonwealth of Virginia (ex rel New River Community College)*, 31 F.3d 203, 206 (4th Cir.1994); *Topal v. Trustees of Univ. of Pennsylvania*, 160 F.R.D. 474, 475 (E.D.Pa.1995) (applying Title VII retaliation standard to Title IX); 34 C.F.R. § 100.7 (e) (1992) (Title VI regulation incorporated into Title IX regulations by reference in 34 C.F.R. § 106.71 (1992)).

67. A claim of retaliation under either statute requires proof that: “(1) [plaintiff] engaged in activity protected by Title VII [or Title IX]; (2) [defendant] took an adverse employment action against her; and (3) there was a causal connection between plaintiff’s participation in the protected activity and the adverse action.” *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir.1997); accord, *Topal*, 160 F.R.D. at 475 (E.D.Pa.1995) (applying Title VII retaliation standard to Title IX).

68. Plaintiff filed an EEOC complaint and subsequent lawsuit against PIAA alleging discrimination on the basis of gender. The record demonstrates that the assignors refused to give Kemether assignments because of the EEOC complaint and this lawsuit. See Findings of Fact Nos. 121–28, *supra*. Thus, all three prongs have been met.

69. As PIAA is responsible for the discriminatory conduct of the Chapter and its agent assignors, I conclude that PIAA retaliated against Kemether in violation of both Title VII and Title IX.

VI. Violation of the Pennsylvania Equal Rights Amendment

A. Regular Season

70. The Pennsylvania Equal Rights Amendment (“ERA”) provides: “Equality under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Pa. Const. art. 1 § 28.

71. The Pennsylvania Commonwealth Court has determined that “[t]he concept of ‘equality of rights Under the law’ ... is at least broad enough in scope to prohibit discrimination which is practiced under the auspices of what has been termed ‘state action’ ” and that “the activities of the PIAA [are] state action in the constitutional sense.” *Commonwealth ex rel. Packel v. Pennsylvania Interscholastic Athletic Assoc.*, 18 Pa.Cmwlt. 45, 334 A.2d 839, 842 (Pa.Cmmw.Ct.1975).

72. As noted previously, the record demonstrates that the Chapter and the assignors had set policies against evaluating female officials and assigning them to officiate boys’ JV or varsity games for the sole reason of their gender. See Findings of Fact Nos.52–92, *supra*.

72. Under the ERA, this policy is subject to strict scrutiny and therefore must be narrowly drawn to meet a “compelling state interest.” *Williams*, 998 F.2d at 179 (applying strict scrutiny).

73. The exclusion of Noreen Kemether and all female officials from participation in the officiating of boys’ JV and varsity basketball games for the sole reason that they are women does not even come close to meeting this standard. The rules and policies applied by the Chapter and assignors clearly run counter to the ERA. See Jury Interrog. No. 9.

74. As PIAA can be held accountable for the actions of the Chapter and its agent assignors, I conclude that PIAA violated Pennsylvania's Equal Rights Amendment.

B. Postseason

75. The Pennsylvania Supreme Court has stated that “the purpose of the equal rights amendment is to eliminate sex as a ‘classifying tool.’ ” Snider v. Thornburgh, 496 Pa. 159, 436 A.2d 593, 601 (Pa.1981). Nevertheless, facially neutral policies may also violate the ERA. See Snider, 436 A.2d at 601 (Pa.1981) (evaluating financial disclosure law under premise that neutral classifications can violate ERA); Pennsylvania Nat'l Org. for Women v. Commonwealth of Pennsylvania Ins. Dept., 122 Pa.Cmwlt. 283, 551 A.2d 1162, 1164–67 (Pa.Comm. Ct.1988), alloc. denied, 522 Pa. 592, 561 A.2d 744 (Pa.1989) (considering whether insurance commissioner's approval of equal rates for men and women for automobile coverage created “de facto” discrimination against women).

76. Thus, where a practice purports to treat men and women equally but has the effect of perpetuating discriminatory practices and thereby placing an unfair burden on women, it too will be subject to strict scrutiny and may be found to violate the ERA.

77. In finding that PIAA's eligibility rule violated the ERA, the jury either did not find PIAA's stated purpose of providing more opportunities for female officials to be compelling or did not find that the rule was drawn narrowly enough to meet that purpose.

78. The rule as applied, runs counter to PIAA's compelling reason and effectively incorporates the discriminatory regular season practices of the Chapter and assignors into the playoff assignment system excluding women from an entire class of officiating opportunities.

79. In accordance with the jury's findings, I conclude that PIAA's ten-game eligibility rule violates the ERA. See Jury Interrog. No. 13.

VII. Relief

80. Title VII provides: “If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate....” 42 U.S.C. § 2000e–5.

81. Equitable relief is also available under Title IX, see Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 73, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (finding that damages in addition to equitable relief are available under Title IX), and the Pennsylvania ERA, see Commonwealth ex rel. Packel, 334 A.2d at 843 (granting declaratory and injunctive relief).

82. Because I conclude that PIAA has intentionally engaged in discriminatory conduct in violation of Title VII, Title IX, and the Pennsylvania Equal Rights Amendment, I invited the parties to submit proposals for equitable relief and held oral argument on the specifics of the proposals.

An order granting appropriate equitable relief is attached.

ORDER

AND NOW, this day of November, 1999, upon consideration of plaintiff's Proposed Findings of Fact and Conclusions of Law Relating to Injunctive Relief, defendant's Proposed Findings of Fact and Conclusions of Law and after oral argument thereon, including the specific content of this order, IT IS HEREBY ORDERED AND DECREED that:

1. The actions of PIAA, its agent the Delco Chapter and its subagents, the Assignors involving or as applied to plaintiff Noreen Kemether, having been found to exclude female officials from assignment to PIAA regular season boys' varsity and junior varsity basketball games and PIAA boys' post-season games, are declared to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and the Equal Rights Amendment to the Pennsylvania Constitution.
2. PIAA, its officers and employees, PIAA's Chapters of Basketball Officials, and their agents and employees who participate in the evaluation of officials and the assignment of officials to PIAA regular season and post-season basketball contests, are enjoined from refusing to assign female officials to boys' basketball games on the basis of their gender, and from otherwise discriminating against female officials on the basis of their gender in any respect, including level, quality and number of assignments and evaluations or ratings.
3. PIAA is order to adopt policies and regulations that apply to its officers and employees, PIAA's Chapters of Basketball Officials, and their agents and employees who participate in the evaluation of officials and the assignment of officials to PIAA regular season and post season basketball contests, that include the following provisions:
 - a. A prohibition of refusals to assign female officials to boys' games on the basis of their gender and of all other discrimination against female officials on the basis of their gender, including level, quality and number of their assignments and evaluations and ratings.
 - b. A requirement that any evaluation system used to evaluate officials be a fair and equitable evaluation system using gender-neutral criteria, and, where practicable, that it include women among the persons performing the evaluations.
 - c. A mechanism for officials to report violations of these requirements to a member of the PIAA executive staff, who shall be designated by PIAA as being responsible for receiving such reports and circulating them in summarized form to the executive officers of PIAA and its Board of Control.
 - d. A requirement that PIAA recommend to member schools that they incorporate the non-discrimination obligations imposed by this Order into any contracts entered into between the school and persons to whom responsibility for the assignment and/or evaluation of officials is delegated by the schools or the leagues the schools have formed.

f. Through the end of the 2006–2007 season, for purposes of their eligibility for assignments to post-season district and interdistrict games, female officials will be deemed to meet any applicable PIAA requirements as to the number of prior regular season and district assignments, without regard to the gender of the players who played in the games to which the female officials were assigned.

g. A prohibition of retaliation against any person who participated in this litigation in any capacity.

4. Defendant PIAA is ordered to implement the aforementioned policies by:

a. Amending PIAA's Bylaws, Rules, and Regulations, Athletic Officials Manual and the mandated Constitution of the Chapters of PIAA Officials, in accordance with the procedures set forth in paragraph 5 of this Order, to incorporate, where appropriate, the policies and regulations set forth in paragraph 3 of this Order.

b. Mailing written notice of all such policies and regulations to all PIAA registered basketball officials, to the principals, athletic directors and basketball coaches of all PIAA member schools, and to all PIAA Chapters of Basketball Officials, within 45 days after final approval by this court of the specific language and placement of such policies and regulations. After approval by the court, the policies and regulations shall be published and disseminated in the PIAA Newsletter and PIAA Officials Newsletter, in the versions next issued after court approval.

c. Mailing written notice to all officials or other persons involved in the selection or recommendation of officials for playoffs of the qualifying requirements that are applicable to female officials through the end of the 2006–2007 season and the manner in which female officials may meet these qualification requirements without assignments to boys' games.

5. PIAA is ordered to submit to the plaintiff and to the court, within sixty (60) days after entry of this Order, a copy of the specific text and placement of the policies and regulations that it proposes to adopt in order to comply with paragraph 4 of this Order. Within thirty (30) days thereafter, plaintiff shall advise PIAA and the court whether she considers these proposals to be in compliance with this Order and a brief memorandum setting forth her position if she does not. Plaintiff shall submit proposed alternative versions or placement of the policies or regulations in dispute. If plaintiff asserts that any of the proposed policies and regulations do not meet PIAA's obligations under this Order, PIAA shall within fifteen (15) days thereafter submit a brief memorandum to the plaintiff and the court explaining why it believes its proposed policies and regulations do comply with the Order. This court thereafter shall approve or reject PIAA's proposed text and placement of the policies or regulations, and may order the adoption of specific language in place thereof. PIAA shall confirm the adoption of the policies and regulations, and disseminate them as required in paragraph 4b of this Order, within forty-five (45) days after they are approved by the court.

6. PIAA, its officers and employees, PIAA's Chapters of Basketball Officials, and their agents and employees, including agents of the Chapters who assign officials to PIAA contests, are enjoined from retaliating against plaintiff or any other person who participated in this action or the trial thereof in any capacity.

7. Either party may request the court to clarify, modify or amend the specific language of this Order within 14 days of the date hereof.

Footnotes

1

Where appropriate, the discussions contained in this earlier memorandum are incorporated herein by reference.

2

PIAA's constitution declares that:

The Board of Control shall have the following powers and duties: A. To have general control over all interscholastic athletic relations and athletic contests in which a member school of this Association participates.

Pl.'s Ex. 3, PIAA Const. art. VII, § 1. Schools seeking membership with PIAA must complete an application that includes

a resolution of approval executed by the School Board or the Board having jurisdiction over the applicant school. The resolution shall state that in all matters pertaining to interscholastic athletic activities, the school shall be governed by the Constitution and By-Laws of the P.I.A.A.

Pl.'s Ex. 3, PIAA Const., art. III, § 2.

3

Title IX and Title VI contain almost identical language (Title IX substitutes "sex" for the words "race, color, or national origin" used in Title VI) and were meant to be interpreted and applied in an identical fashion. See *Cannon v. University of Chicago*, 441 U.S. 677, 696, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) ; *NCAA*, 119 S.Ct. at 928 n.3.

4

The Supreme Court in *NCAA v. Smith* expressly declined to rule on this theory because the Third Circuit had not yet considered it. See *NCAA*, 119 S. CT.. at 930.