Seyfarth

Developments in Equal Pay Litigation

2024 UPDATE

By Matthew J. Gagnon and
the Seyfarth Pay Equity Group

Developments in Equal Pay Litigation

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Dear Clients and Friends;

We are pleased to provide you with the latest edition of Seyfarth Shaw's annual analysis of developments in equal pay litigation. This publication provides an overview of significant decisions and recent developments impacting federal and state equal pay litigation and legislation. Our goal is to provide in-depth analysis and commentary regarding these developments so that corporate counsel, human resources professionals, and other corporate decision makers have the up-to-date guidance they need to make informed decisions regarding equal pay issues, including a solid background in the types of issues that often come up in equal pay litigation.

This report is divided into three main sections. The first section discusses equal pay legislation at both the federal and state level, with a special emphasis on how those various legal and regulatory regimes differ and the different legal risks they pose to employers operating in many jurisdictions. The second section contains an in-depth discussion of significant recent court decisions impacting equal pay litigation, including substantive trends and developments in the legal theories and defenses advanced by plaintiffs and employers. The third section discusses significant developments in federal regulation and enforcement of equal pay issues driven by the Equal Employment Opportunity Commission. Equal pay continues to be one of its top enforcement priorities and a significant legal risk for employers.

We hope that our clients and friends will find this reference useful as they navigate these rapidly developing legal issues. Please feel free to contact the author, Matt Gagnon mgagnon@seyfarth.com, or any member of Seyfarth Shaw's Pay Equity Group, with any questions.

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OUR PAY EQUITY PRACTICE

We combine legal expertise with industry-leading statistical capabilities to provide global pay equity solutions that assess and mitigate risk.

Pay equity is at the forefront of legal issues facing employers today. New equal pay, transparency, and reporting laws within the United States and across the globe present new risks and opportunities for employers.

Seyfarth's dedicated Pay Equity Group offers a strategic and data-centered approach to pay equity compliance. Our attorneys, in-house labor economists, and data analysts make complex statistical analyses simple to understand. Seyfarth's deep knowledge of the pay laws and commitment to innovation gives us the tools to help you operationalize equal pay programs and minimize the risk of litigation. If disputes cannot be avoided, Seyfarth leads in managing complex and single plaintiff equal pay litigation.

HOW WE HELP

Seyfarth has more than 20 years of experience handling all aspects of equal pay issues, including counseling employers on best practices across the globe.

- We conduct proactive assessments of compensation using a privileged framework.
- We conduct high-profile investigations related to complaints of pay discrimination.
- When necessary, we bring our unique experience to defend employers in high stakes equal pay litigation.
- We work with employers to craft appropriate remedial measures to mitigate future risks that have been identified during the proactive analysis.
- We work with employers interested in communicating to customers, communities, and employees that they care about pay equality.
- Seyfarth also spearheads employer advocacy around pay issues. Our unparalleled thought leadership and advocacy has included comments and testimony before the US House of Representatives, the US Senate, and various administrative agencies such as the EEOC and OFCCP.

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EQUAL PAY LEGISLATION

A. The Federal Equal Pay Act And Title VII

The Equal Pay Act ("EPA") was enacted by Congress in 1963, one year earlier than Title VII of the Civil Rights Act of 1964 ("Title VII"). It prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."[1] The law recognizes four affirmative defenses: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.[2] The EPA therefore overlaps with Title VII, in that both statutes prohibit discrimination on the basis of sex. However, as discussed below, the EPA diverges from Title VII, both procedurally and substantively, in important ways.

In addition to private litigation, the EPA can give rise to enforcement proceedings brought by the U.S. Equal Employment Opportunity Commission ("EEOC"). For the past decade, the EEOC has identified equal pay as one of the six enforcement priorities in its Strategic Enforcement Plan.[3] Although the number of filings brought under the EPA make up a relatively small percentage of the EEOC's docket, agency personnel have repeatedly reaffirmed its importance as an enforcement priority for the EEOC.

This publication addresses significant developments in equal pay litigation under the federal EPA, Title VII, and similar state laws. Although there is an emphasis on the most recent decisions, in order to provide an up-to-date snapshot of the current state of the case law, the primary aim of this publication is to identify and discuss significant developments in the law, many of which take years to develop.

B. State Equal Pay Legislation

Equal pay has been a prominent issue at the statewide level as well, with numerous states amending their equal pay laws to supplement the federal EPA. California, New York, and Massachusetts were the first states to adopt more onerous equal pay laws over the last few years.[4] Other states soon followed. State equal pay laws differ from the federal EPA in significant ways. For example, on January 1, 2016, the California Fair Pay Act became effective for all employers with California-based employees.[5] It expands upon the protections offered by the federal EPA and Title VII, as well as already-existing California law. Importantly, the California Fair Pay Act allows employees to be compared even if they do not work at the same establishment.[6] This means that an employee's pay may be compared to the pay of other employees who work hundreds of miles away. By comparison, New York's equal pay law also allows employees to be compared even if they do not work at the same establishment, but those comparators must work in the same "geographic region" no larger than the same county.[7]

Unlike the federal EPA, which requires plaintiffs to establish that they performed "equal work" as a comparator of the opposite sex, the California law requires a showing that employees are engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed

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[1] 29 U.S.C. § 206(d)(1).

[2] *Id.*

[3] *See* U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan Fiscal Years 2024 - 2028, Strategic Enforcement Plan Fiscal Years 2024 - 2028 | U.S. Equal Employment Opportunity Commission (eeoc.gov).

[4] 2017 Cal. Legis. Serv. Ch. 688 (A.B. 168) (West); N.Y. Lab. Law § 194 (McKinney); Mass. Gen. Laws Ann. ch. 149, § 105A (West).

[5] Cal. Lab. Code § 1197.5.

[6] *See id.* The California Fair Pay Act expressly removed from the preexisting California pay law statutory exemptions that applied where work was performed "at different geographic locations" and "on different shifts or at different times of day."

[7] NY Lab. Law §§ 194, *et seq*.

under similar working conditions."[8] The new laws enacted in New York and Illinois have similar standards.[9] The Massachusetts Equal Pay Act prohibits differences in pay for "comparable work."[10] Other states apply different standards for comparing the work between a plaintiff and his or her alleged comparators.

State laws also differ with respect to the affirmative defenses available to defendants. California's law requires employers to affirmatively demonstrate that any pay differences are based on one or more of a limited number of factors. It also limits the factors that employers can use to justify pay differentials and requires that the factors be applied reasonably and, when viewed together, must explain the entire amount of the pay differential.[11] The Massachusetts law also creates an affirmative defense for an employer that has: (1) completed a self-evaluation of its pay practices that is "reasonable in detail and scope in light of the size of the employer" within the three years prior to commencement of the action; and (2) made "reasonable progress" toward eliminating pay differentials uncovered by the evaluation.

State laws also differ in terms of the procedural rights and remedies available to plaintiffs and defendants. For example, the California Fair Pay Act allows employees to bring an action directly in court without first exhausting administrative remedies—provided the employee does so within two years (or three if the violation was "willful")—and the employee may recover the balance of wages, interest, liquidated damages, costs, and reasonable attorneys' fees.[12] The California law also extends—from two years to three—an employer's obligation to maintain records of wages and pay rates, job classifications, and other terms of employment.[13] Under the California Fair Pay Act, employers may not prohibit employees from disclosing or discussing their own wages or the wages of others, or from aiding or encouraging other employees to exercise their rights under the law.[14] The New York law includes a similar provision. These anti-pay secrecy requirements echo similar prohibitions under the National Labor Relations Act, the California Labor Code, and an Executive Order that applies to federal contractors.

C. Pay Transparency And Other State And Local Initiatives

In addition to more robust enforcement provisions, as described above, a number of states and local jurisdictions have also begun to experiment with other pay equity initiatives. Those have generally come in the form of salary history bans and pay transparency laws. Salary history bans generally prohibit or limit employers' ability to gather information about a candidate's past salary and/or use that information when making compensation decisions. Pay transparency laws generally require employers to provide pay range information about particular positions to applicants or to include those ranges in job postings. Some of the more onerous laws even require employers to submit reports of demographic and pay data to state agencies. What those state agencies will do with such information is not public knowledge. But some speculate it could be used to target employers for enforcement activity.

State and local salary history bans generally prohibit employers from requesting the salary history of job applicants and limit their ability to consider prior salary when making offers to new hires. Those laws have sometimes been vigorously opposed by various business groups. On February 6, 2020, the U.S. Court of Appeals for the Third Circuit decided *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*,[15] which rejected a number of arguments claiming that those bans infringed on free speech.

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[8] Cal. Lab. Code § 1197.5(b).

[9] NY Lab. Law § 194(1) ("equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions," or "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions"); 820 Ill. Comp. Stat. 112/10(a) ("the same or substantially similar work on jobs the performance of which requires substantially similar skill, effort, and responsibility, and which are performed under similar working conditions").

[10] Mass. Gen. Laws. c. 149 § 105A.

[11] *Id.*

[12] Cal. Lab. Code § 1197.5(h), (i).

[13] *Id.* § 1197.5(e).

[14] *Id.* § 1197.5(k)(1).

[15] *Greater Phila. Chamber of Commerce v. City of Phila.*, 949 F.3d 116 (3d Cir. 2020).

The lawsuit involved the 2017 Philadelphia Wage Equity Ordinance, which, among other things, prohibits employers from inquiring into or relying upon job applicants' prior wage history in establishing starting pay. The ordinance consisted of two provisions: the "Inquiry Provision" and the "Reliance Provision." The Inquiry Provision prohibits an employer from asking about a prospective employee's wage history, and the Reliance Provision prohibits an employer from relying on wage history at any point in the process of setting or negotiating a prospective employee's wage.

Both provisions were upheld by the Third Circuit. Among other things, the court agreed that solving the gender pay gap is a substantial government interest and that the ordinance directly advances that interest.[16] The court found that the City Council relied upon sufficient testimony and studies to support the enactment of the Ordinance, including that: (1) the wage gap is substantial and real; (2) numerous experiments have been conducted, which controlled for such variables as education, work experience, and academic achievement, still finding a wage gap; (3) researchers have long attributed the gap to discrimination; (4) existing civil rights laws have been inadequate to close the wage gap; and (5) witnesses who reviewed the data concluded that relying on wage history can perpetuate gender and race discrimination.[17] This decision is significant because it upheld the ordinance based on many of the same arguments and analysis that support the rationale for salary history bans generally, including the alleged scientific bases of the gender pay gap and the purported failure of existing anti-discrimination legislation to address that issue.

In addition to salary history bans, some states and localities have recently begun enacting legislation that requires employers to be more transparent about compensation. Those laws come in a variety of forms, but they often require employers to provide salary range information to applicants or employees. The assumption underlying such laws appears to be that employees will be able to use this information to advocate for higher pay, which over time could help to narrow the pay gap. Colorado was one of the first states to pass such a law; it requires employers to notify employees of "promotional opportunities." Promotional opportunities are job vacancies that are superior to the job held by at least one employee at the same company. The law mandates that such postings must include a list of information about the position, including detailed compensation and benefits information.[18] In particular, the law requires employers to "make reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision."[19] The law also requires employers to "disclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant."[20]

The Colorado law also requires employers to "keep records of job descriptions and wage rate history for each employee for the duration of the employment plus two years after the end of employment in order to determine if there is a pattern of wage discrepancy."[21] Violations of the job posting requirements are subject to state agency enforcement or a private right of action.[22] In the latter case, the law provides courts the option to provide private litigants with a rebuttable presumption that missing records would have contained information favorable to the employee's claim and an instruction to the jury that failure to keep records can be considered evidence that the violation was not made in good faith.[23]

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[16] *Id.* at 143.

[17] *Id.*

[18] C.R.S.A. § 8-5-201.

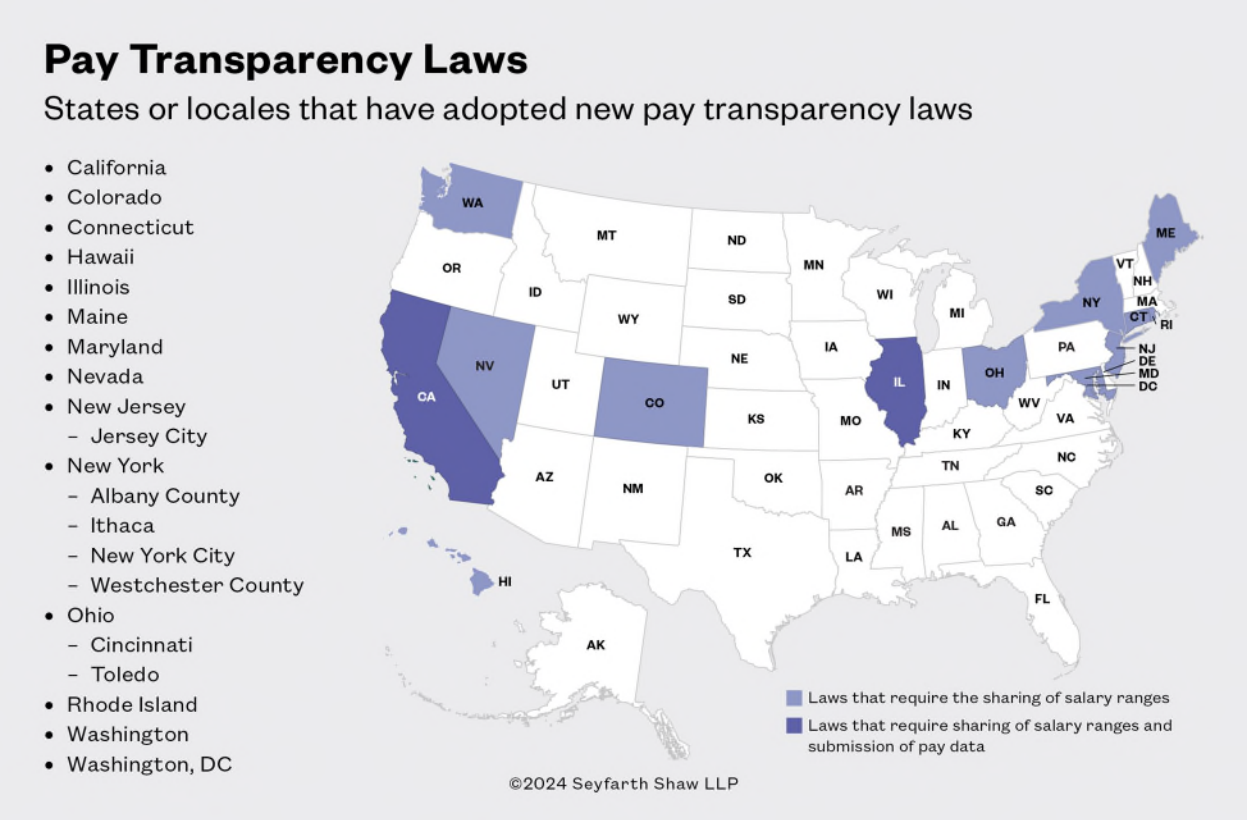
[19] *Id.* § 8-5-201(1).

[20] *Id.* § 8-5-201(2).

[21] *Id.*, § 8-5-202.

[22] *Id.*, § 8-5-203.

[23] *Id.*, § 8-5-203(5). The law states that "the court may order appropriate relief, including a rebuttable presumption that records not kept by the employer in violation of section 8-5-202 contained information favorable to the employee's claim and an instruction to the jury that failure to keep records can be considered evidence that the violation was not made in good faith." *Id.*



This approach to pay transparency has proven quite popular. Many other states are experimenting with similar types of laws. For example, in California, employers must now provide a position's pay scale—a salary or hourly wage range that the employer reasonably expects to pay for a position—in job postings and to third parties that it uses to announce, publish, or otherwise publicize job postings.[24] New York's new law is similar: employers now have to disclose the compensation or compensation range—i.e., the minimum and maximum annual salary or hourly compensation range that the employer believes is accurate—and job description (if it exists) in advertisements for job, promotion, or transfer opportunities that can or will be performed at least partly in the state.[25]

Some states have gone even further, enacting laws that require employers to submit periodic reports of various pay and demographic data about their workforce in a manner very similar to what the EEOC briefly required as Component 2 of the federal EEO-1 pay report. The EEO-1 Report is a survey document that has been mandated for more than 50 years. Employers with more than 100 employees, and federal contractors or subcontractors with more than 50 employees, are required to collect and provide to the EEOC certain demographic information (gender, race, and ethnicity) in each of ten job categories.[26] On February 1, 2016, the EEOC proposed changes to the EEO-1 report, which would have required more detailed reporting obligations of "Component 2 data," specifically, data on employees' W-2 earnings and hours worked.[27] On August 29, 2017, the EEOC announced that the OMB, per its authority under the Paperwork Reduction Act, had stayed the collection of Component 2 data. The OMB's decision was immediately challenged in court.

[24] *See* Cal. Lab. Code § 432.3(c).

[25] N.Y. Lab. Law § 194-b.

[26] For more information, see the EEOC's dedicated website for data collections: https://eeocdata.org/.

[27] *See* U.S. Equal Employment Opportunity Commission, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request*, *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf.

In *National Women's Law Center v. Office of Management and Budget*,[28] the District Court for the District of Columbia held that the OMB's stay was unlawful. Ultimately, the court vacated the stay, holding that it "totally lacked the reasoned explanation that the APA requires."[29] The court issued a series of orders that required the EEOC to complete the Component 2 data collections for calendar years 2017 and 2018.[30] Then, on September 12, 2019, the EEOC issued a Paperwork Reduction Act Notice, wherein it stated that it was not planning to continue using the EEO-1 Report to collect Component 2 data information.[31]

The EEOC's decision to stop collecting Component 2 data settled the matter only briefly. In 2020, states began to enact laws that required employers to submit data reporting that was very similar to the EEOC's rescinded Component 2 data reporting requirements. In 2020, California passed its Pay Data Reporting Law. Under that law, on or before March 31, 2021, and each year thereafter, private employers with 100 or more employees were required to submit a pay data report to the California Department of Fair Employment and Housing that includes the number of employees by race, ethnicity, and sex in ten categories, which track the federal EEO-1 categories.[32] The report must include previous year W-2 earnings and hours worked for all employees and must be searchable and sortable.[33]

In 2021, Illinois amended its Equal Pay Act so that private employers with more than 100 employees in Illinois who are required to file an EEO-1 Report with the EEOC must apply to obtain an equal pay registration certificate from the Illinois Department of Labor.[34] Those employers must then recertify every two years thereafter. The application must include a copy of the business's most recently filed EEO-1 Report.[35] The law also requires employers to compile a list of all employees during the past calendar year, separated by gender, race, and ethnicity, the county in which the employee works, and the date the employee started working for the business, and report the total wages for those employees. Employers must also submit a statement signed by a corporate officer, legal counsel, or other authorized agent, attesting to the company's compliance with the Illinois Equal Pay Act and other federal and state anti-discrimination laws, among other things.[36]

State-level equal pay legislation has developed rapidly over the past few years in ways that touch on many aspects of a company's operations. This trend shows no signs of decelerating.

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[28] *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66 (D.D.C. Mar. 4, 2019). The OMB had justified its stay based on the fact that the data file specifications that employers were to use in submitting EEO-1 data were not contained in the Federal Register notices. *Id.* at 87. According to the OMB, this meant that the public was not given an opportunity to provide comment on the method by which employers were to submit data and that the EEOC's burden estimates did not account for the use of those data specifications. But the court held that the data file specifications merely explained how to format a spreadsheet, they did not change the content of the information collected: "[t]he government's argument therefore focuses on a technicality that did not affect the employers submitting the data." *Id.* With respect to the burden estimates, the court noted that the OMB had not found that the data file would change the EEOC's initial estimates, just that it *may* do so, an assertion the court said was "unsupported by any analysis." *Id.* at 88.

[29] *Id.* at 90.

[30] *See* Order, *Nat'l Women's Law Ctr.*, No. 17-cv-2458 (D.D.C. Apr. 25, 2019), ECF No. 71; *see also* Press Release, U.S. Equal Employment Opportunity Commission, EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection (July 15, 2019), https://www.eeoc.gov/eeoc/newsroom/release/7-15-19.cfm; Order, *Nat'l Women's Law Ctr.*, No. 17-cv-2458 (D.D.C. Apr. 25, 2019), ECF No. 71; Order, *Nat'l Women's Law Ctr.*, No. 17-cv-2458 (D.D.C. Oct. 29, 2019), ECF No. 91; Order, *Nat'l Women's Law Ctr.*, No. 17-cv-2458 (D.D.C. Feb. 10, 2020), ECF No. 102.

[31] Paperwork Reduction Act Notice, 84 Fed. Reg. 48138 (Sept. 12, 2019); *see also* Press Release, U.S. Equal Employment Opportunity Commission, EEOC Holds Public Hearing on Proposed EEO-1 Report Amendments (Nov. 4, 2019), https://www.eeoc.gov/eeoc/newsroom/release/11-4-19a.cfm; Press Release, U.S. Equal Employment Opportunity Commission, EEOC Holds Public Hearing on Proposed EEO-1 Report Amendments (Nov. 4, 2019), *available at* https://www.eeoc.gov/eeoc/newsroom/release/11-4-19a.cfm.

[32] Cal. Gov. Code § 12999. The law requires that a "private employer that has 100 or more employees and who is required to file an annual Employer Information Report (EEO-1) pursuant to federal law shall submit a pay data report to the department covering the prior calendar year . . .." The categories of jobs required to be included in the report are: executive or senior level officials and managers, first or mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, service workers." *Id.* § 12999(b)(1)(A-J).

[33] *Id.*, § 12999(b)(4).

[34] 820 Ill. Comp. Stat. 112/11(a)-(b).

[35] *Id.* 112/11(c)(1)(A).

[36] *Id.* 112/11(c)(1)(B).

RECENT CASE LAW DEVELOPMENTS

Employers' compensation practices are increasingly being challenged in court by aggressive plaintiffs' counsel, the Equal Employment Opportunity Commission, and state agencies. The primary targets for this type of litigation have been companies in the health, education, finance, legal, and technology industries. Those cases continue to reshape the landscape of equal pay litigation across the country.

A. Proving The Prima Facie Case

The federal EPA utilizes a burden-shifting mechanism for establishing liability. First, an employee must establish a prima facie case of discrimination by showing that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[37] State laws can differ with respect to these factors, but most state laws share a similar burden-shifting framework. Employees must first prove the basic elements of a cause of action before the burden shifts to the employer to show that the alleged wage disparity is for some legitimate, non-discriminatory reason. There is no requirement under the federal EPA for a plaintiff to prove any discriminatory intent or animus on the part of the employer.

If the employee establishes a prima facie case, the burden of persuasion then shifts to the employer, which then must establish its defense. Under the federal EPA, the permissible range of legitimate reasons for a wage disparity are explicitly set forth in the statute as four affirmative defenses. They are: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex. The fourth defense, the "factor other than sex" defense is a catchall provision that attempts to account for the wide variety of legitimate non-discriminatory reasons that may exist for paying one employee differently than another employee.

Like the factors used to establish a prima facie case, the affirmative defenses allowed by individual state laws can be different from those established by the federal EPA. However, with some exceptions, most of those affirmative defenses would also qualify as an affirmative defense under the federal EPA's catchall "factor other than sex" defense. Accordingly, this analysis will focus on developments under the federal EPA, while noting significant variations in state law where appropriate.

This burden-shifting framework forms the skeleton of all EPA claims. It is important to note, however, that even if an employer meets its burden to establish an affirmative defense to an employee's prima facie case, the employee still has an opportunity to show that the employer's stated reason for the wage disparity is merely a pretext for discrimination.

[37] Even this skeletal outline of a plaintiff's prima facie case has not escaped judicial scrutiny in recent years. For example, the district court for the District of Columbia recently had to clarify that a prima facie EPA claim consists of only two elements, not three. In *Savignac v. Jones Day*, 539 F. Supp. 3d 107 (D.D.C. Apr. 28, 2021), the court was reconsidering its own earlier decision, which had implicitly adopted a standard that would impose on EPA plaintiffs the initial burden of pleading that they were (1) paid less than employees of the opposite sex, (2) for work on jobs requiring "equal skill, effort, and responsibility" that are "performed under similar working conditions," and (3) that they actually performed "equal work" on the equivalent job. *Id.* at 109. Quoting Justice Frankfurter, the court noted that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late," *id.* (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)), and overturned its earlier decision that had incorrectly applied a three-element test to determine if the plaintiff in that case had met her pleading burden. The court analyzed the language of the EPA closely, noting that it prohibits employers from paying different amounts "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Id.* (quoting 29 U.S.C. § 206(d)(1)). Under plaintiff's interpretation, which was adopted by the court, the part of that clause that appears after "equal work," is meant to define that phrase and is therefore in that sense equivalent to "equal work"; the clause was not intended to state two separate requirements, such that plaintiffs would have to show that they performed equal work and that their jobs were also "equal" or similar as defined by the second part of that clause. *Id.* at 112-13. The court readily acknowledged that this interpretation was "not obvious from the text alone"; nevertheless, it held that that interpretation best accorded with the Supreme Court's seminal decision, *Corning Glass Works v. Brennan*. *Id.* at 112 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)).

1. Establishing A Wage Disparity

The first and most fundamental element of a plaintiff's prima facie case is establishing that a wage disparity exists, i.e., that different wages were paid to employees of a different sex for the same work. In a case that involves just one or a handful of plaintiffs, this might only require the identification of one or more alleged "comparator" employees who were paid at a higher rate. This requirement is often not difficult to meet.

The "One-Comparator Rule". Many courts have held that a plaintiff can establish a wage disparity by comparing themselves to just one member of the opposite sex who is paid more, even where the plaintiff is better paid then other comparable employees of the opposite sex.[38] Other courts have pointed to such situations as tending to disprove the existence of discrimination if, for example, plaintiff was paid more than other comparators of the opposite sex, or if other members of plaintiff's sex were paid more than plaintiff and some members of the opposite sex.[39] This question, whether an equal pay plaintiff may establish a prima facie case by comparing themselves to just one comparator, seems like a straightforward legal issue. But it has given rise to many conflicting decisions among different courts and different circuits.

In 2023, two circuit courts had an opportunity to resolve this issue in their jurisdictions. Both declined to do so. On March 29, 2023, the Eighth Circuit affirmed the district court's decision in *O'Reilly v. Daugherty Systems, Inc.*,[40] but sidestepped the "one comparator" question.[41] The plaintiff in that case had identified at least one male comparator who was paid more than her.[42] Relying on the sheer weight of authority, and without trying to resolve the conflict directly, the court noted that "district courts in this circuit have repeatedly found that plaintiffs fail to establish a prima facie case when the evidence supports that the number of males paid the same or less than the plaintiff significantly outnumbers the number of males paid more."[43] The court concluded that the plaintiff could not base her prima facie case on one comparator: "[Plaintiff] admitted that 10 male employees were either paid less than she or did not perform equal work. Given that alleged comparators that either were paid less did or did not perform equal work

[38] *See, e.g., Newman v. Amazon.com, Inc.*, No. 21-cv-531(DLF), 2022 WL 971297, at *6 (D.D.C. Mar. 31, 2022) (holding that a female plaintiff did not plead herself out of court by pointing to female comparators in addition to males: "An EPA plaintiff need not allege that other female coworkers were paid less than male coworkers. . .. She need only allege that *she* was paid less than male employees who performed similar work") (internal citations omitted); *Gutierrez v. City of Converse*, No. 5:17-cv-01233-JKP, 2020 WL 156707, at *3 (W.D. Tex. Jan. 10, 2020) (acknowledging that the evidence showed that a female firefighter was better paid than all of her male peers with the exception of one, but holding: "[i]t is enough for the plaintiff to show that there is discrimination in pay with respect to one employee of the opposite sex") (quoting *Lenihan v. Boeing Co.*, 994 F. Supp. 776, 799 (S.D. Tex. 1998)); *Allen v. Staples, Inc.*, 84 Cal. App. 5th 188, 194-95 (2022) (holding that plaintiff had established prima facie case by pointing to one comparator, even though employer showed that females in plaintiff's position were paid more than males on average, and that some males were paid less than plaintiff: "Authorities under the federal EPA have held that a plaintiff claiming gender-based pay disparity may establish a prima facie case by showing that she was paid less in salary than a single male comparator").

[39] *See, e.g., Davis v. Inmar, Inc.*, No. 21-cv-03779 SBA, 2022 WL 3722122 (N.D. Cal. Aug. 29, 2022) (granting motion to dismiss equal pay claim because complaint alleged only one male comparator was paid more than plaintiff, without alleging facts that would justify that comparison: "the Complaint compares Davis to a single male employee, without alleging facts to support such a limited comparison"); *Jones v. Jefferson City Pub. Sch.*, No. 2:18-cv-4054, 2019 WL 1118557, at *2 (W.D. Mo. Mar. 11, 2019) (holding that plaintiff's admission that both male and female teachers were paid more than him was fatal to his claim because "if sex-based discrimination is not the reason for disparity in pay, the disparity cannot form the basis of a claim under the Equal Pay Act").

[40] *O'Reilly v. Daugherty Sys., Inc.*, No. 4:18-cv-01283 SRC, 2021 WL 4504426 (E.D. Mo. Sept. 30, 2021).

[41] *O'Reilly v. Daugherty Sys., Inc.*, 63 F.4th 1193 (8th Cir. 2023).

[42] *O'Reilly*, 2021 WL 4504426, at *4. The lower court first took note of apparently inconsistent decisions by the Eighth Circuit on this point. In *Hutchins v. Int'l Bhd. of Teamsters,* 177 F.3d 1076 (8th Cir. 1999), the Eighth Circuit upheld a decision that found a prima facie case where the evidence showed that plaintiff was paid less than twelve male employees, but which also showed that plaintiff was paid more than eight comparable males, and that five other comparable females were paid higher salaries than their male peers. *O'Reilly*, 2021 WL 4504426, at *5; *see also Euerle-Wehle v. United Parcel Serv., Inc.*, 181 F.3d 898, 901 (8th Cir. 1999). On the other hand, in *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001), the Eighth Circuit found that a plaintiff failed to establish a prima facie case under Title VII where the evidence showed that she was paid the same as, or more than, at least some males in the same position. *O'Reilly*, 2021 WL 4504426, at *5.

[43] *O'Reilly*, 2021 WL 4504426, at *5 (citing *Evans v. Autozone Stores, Inc.*, No. 05-cv-1086, 2008 WL 697752, at *10 (W.D. Ark. Mar. 13, 2008); *Garrard v. First Step, Inc.*, No. 1:14-cv-1033, 2015 WL 2248217, at *2 (W.D. Ark. May 13, 2015); *Peniska v. CJ Foods Inc.*, No. 8:19-cv-277, 2021 WL 24729 (D. Neb. Jan. 4, 2021)).

outnumber by a ten-to-one margin the lone alleged comparator who was paid more for equal work, the Court concludes that [plaintiff] fails to establish a prima facie EPA claim."[44]

Upon review, the Eighth Circuit noted that it had been urged by plaintiff "to only compare her job situation to that of [her one chosen comparator]."[45] The court obliged, simply assuming that the facts presented established a prima facie case. The Eighth Circuit ultimately affirmed based on its analysis of the defendant's affirmative defenses, noting that plaintiff's comparator brought skills and experience to the job that she did not possess. The court concluded: "In sum, [defendant's] explanation for the pay differential—the differences in skillsets and experience and the desire to incentivize [plaintiff] to grow in the position—is sufficient to satisfy its burden of proving the pay differential was based on a factor other than sex."[46]

The Second Circuit also declined to decide this issue in *Eisenhauer v. Culinary Institute of America*,[47] a case that is discussed in greater detail, *infra*.[48] The plaintiff in that case had identified only a single relevant comparator to establish her claim under the EPA and the New York Equal Pay Law. The employer argued that the plaintiff could not rely on a single comparator to establish her prima facie case, especially since there were other comparable males who made less than her and other females who made more than other males.[49] Both sides relied on the same Second Circuit case in support of their positions, *Lavin-McEleney v. Marist College.*[50] The court examined the reasoning in that case and concluded: "*Lavin-McEleney*, as well as the discussions from the Fourth Circuit cited by the Second Circuit, show that a plaintiff may identify a single male comparator at the initial stage of the case, as Plaintiff has done here, but can later introduce additional data when addressing the ultimate merits of the case at trial. In each case, the plaintiff was required to identify a single male employee at the initial stage of litigation in order to establish a prima facie burden."[51]

Upon review, the Second Circuit sidestepped this issue entirely. In a footnote, the court acknowledged that the employer had argued that plaintiff "could not have established a *prima facie* case by identifying a single male-comparator employee who earns more than her while ignoring all other employees who perform substantially equal work," and that "[t]he question of how many comparators are necessary to

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[44] *Id.* at *6.

[45] *O'Reilly*, 63 F.4th at 1197.

[46] *Id.*

[47] *Eisenhauer v. Culinary Inst. of Am.*, 84 F.4th 507 (2d Cir. 2023).

[48] *See infra* Part II.C.2.

[49] *Eisenhauer v. Culinary Inst. of Am.*, No. 19-cv-10933 (PED), 2021 WL 5112625, at *4 (S.D.N.Y. Nov. 3, 2021).

[50] *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir. 2001).

[51] *Eisenhauer*, 2021 WL 5112625, at *5. The district court went even further, holding that while a single comparator may be insufficient to prove discrimination as a matter of fact before a jury, it *is* sufficient to establish a prima facie case prior to trial because it would contravene Second Circuit precedent to allow an employer to attack a plaintiff's prima facie case based on the existence of other comparators. To do so, the employer would have to establish as a matter of fact that those comparators were similarly situated to the plaintiff or their comparator. But that question is the province of the jury, and therefore cannot be decided before trial: "Put another way, if Defendant cannot establish the absence of a pay disparity as a matter of law, then Plaintiff's prima facie showing must stand, despite the existence of employees who may serve as counterexamples to wage discrimination at trial." *Id*. at *6. This rather extreme position has generally not been followed, even within the Southern District of New York. For example, in *Kaye v. N.Y.C. Health and Hosps. Corp.*, No. 18-cv-12317 (JPC) (JLC), 2023 WL 2745556 (S.D.N.Y. Mar. 31, 2023), a forensic psychiatrist argued, among other things, that she was paid less than male comparators for the same work. Plaintiff emphasized that the question of whether two positions are substantially equivalent under the EPA is a question for the jury. *Id.* at *14. However, the court held that "[a]s with all questions of fact ordinarily resolved by a jury at trial, . . . the question of whether a plaintiff and an opposite-sex comparator performed substantially equal work may be resolved by the Court on summary judgment unless 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In particular, the court noted that "the Second Circuit has held that summary judgment should be granted to EPA defendants when a plaintiff fails to set forth specific facts showing that substantially equal work was performed by the plaintiff and the identified comparators." *Id.* (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995)). Analyzed in that light, the court concluded that plaintiff had failed to establish a prima facie case because, among other things, she had failed to introduce evidence concerning the actual job content of her comparators' positions vis-à-vis her own, and because the employer had presented evidence showing substantial differences in actual job content. *Id.* at *14-15.

establish a *prima facie* EPA case is a source of disagreement among our sister circuits."[52] However, the court declined to weigh in on the issue, holding that it need not do so because it affirmed the district court on other grounds supported by the record. However, the Second Circuit also noted that the issue was also undecided under the New York Equal Pay Law, but that was a question that should first be answered by the district court: "The *separate* question of how many comparators are necessary to establish a *prima facie* case under New York Labor Law § 194(1) is one that the District Court did not consider. . . . should the District Court decide to invoke its supplemental jurisdiction over [plaintiff's] § 194(1) claim on remand, it must determine whether a single male comparator is sufficient to establish a *prima facie* case under § 194(1)."[53]

This issue continues to divide the district courts. Despite some courts' adherence to the "one-comparator rule," many courts are unwilling to allow an equal pay lawsuit to proceed where the evidence tends to refute an inference of wage discrimination.[54] For example, in *Hatzimihalis v. SMBC Nikko Securities America, Inc.*,[55] another case in the Southern District of New York—decided after the district court's decision in *Eisenhauer* (but before the Second Circuit's decision)—a Vice President of an investment firm alleged that she was underpaid compared to male Vice Presidents in the same investment group. The employer argued that plaintiff could not establish a prima facie case of wage discrimination because her male comparators were both paid less than another female comparator in the same group. Thus the evidence showed that "[employer] paid Plaintiff less than comparable male employees, but it arguably does not show that [employer] paid comparable female employees as a group less than it paid comparable male employees as a group."[56]

The court turned again to *Lavin-McEleney v. Marist College*.[57] In that case, the plaintiff had identified a specific comparator and also submitted a multiple regression analysis that showed that her salary was lower than the salary a male professor with her same characteristics would expect to receive. According to the district court, "in *Lavin-McEleney* the Second Circuit favorably cited the Ninth Circuit's explicit statement of law that a *prima facie* EPA case requires a comparison between the plaintiff's compensation and the average compensation of comparable employees of the opposite sex."[58] The court went on to distinguish a different Second Circuit case, *Talwar v. Staten Island University Hospital*,[59] where the plaintiff had been paid more than two male comparators, but less than another male and one female comparator. The Second Circuit in that case held that the plaintiff had failed to establish a prima facie case because she could not show that females, as a group, were paid less than males.[60] The district court rejected the reasoning of *Talwar*, in favor of what it viewed as the contrary holding in *Lavin-McEleney*.

The court found the latter opinion's holding to be a more plausible interpretation because the EPA prohibits an employer from paying a woman less than it pays comparable men for equal work, regardless of whether or not other women are also paid unequally for performing equal work. "[I]t is unclear why one individual's ability to recover for violations of the EPA should depend on whether other employees' compensation also violated the law: one would expect one woman's being paid the same as comparable men to prevent *her* from recovering under the EPA, but not also to prevent *other* women who *were paid*

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[52] *Eisenhauer*, 84 F.4th at n.83 (citing *Equal Emp. Opportunity Comm'n v. Md. Ins. Admin.*, 879 F.3d 114, 122 (4th Cir. 2018), *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1505 (11th Cir. 1988), and *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983)).

[53] *Id.*

[54] *See, e.g., Shen v. Auto. Club of Mo., Inc.*, No. 4:20-cv-626-SNLJ, 2023 WL 3948859 (E.D. Mo. June 12, 2023) (holding plaintiff failed to establish prima facie case where "her salary was higher than seven other male employees, and she made more than the average salary of all coworkers": "The Eighth Circuit has found that plaintiffs fail to prove their prima facie case when evidence establishes that the female plaintiff was paid just as much or more than male counterparts") (citing *O'Reilly v. Daugherty Sys., Inc.*, No. 4:18-cv-01283-SRC, 2021 WL 4504426, at *5 (E.D. Mo. Sept. 30, 2021)).

[55] *Hatzimihalis v. SMBC Nikko Sec. Am., Inc.*, No. 20-cv-8037(JPC), 2023 WL 3764823 (S.D.N.Y. June 1, 2023).

[56] *Id.* at *5.

[57] *Lavin-McEleney v. Marist College*, 239 F.3d 476 (2d Cir. 2001).

[58] *Hatzimihalis*, 2023 WL 3764823, at *6 (citing *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983)).

[59] *Talwar v. Staten Island Univ. Hosp.*, 610 F. App'x 28 (2d Cir. 2015).

[60] *Hatzimihalis*, 2023 WL 3764823, at *6.

less than comparable men from recovering, too."[61] Accordingly, the court held that it was not necessary for an equal pay plaintiff to show that all women as a group were paid less than all men as a group to establish a prima facie case, rather, "a *prima facie* case requires proof only that the plaintiff was paid less than comparable members of the opposite sex."[62] But the court also appeared to adopt the reasoning that, in a professional setting, a prima facie case requires proof that plaintiff's compensation was less than the average compensation of comparable employees of the opposite sex. According to this court, therefore, the presence of one comparator who was paid more should be enough to establish a prima facie case, provided that the plaintiff can also show that her pay fell below the average of other comparable employees of the opposite sex.

This reasoning is consistent with another recent case, decided by the District Court for the Northern District of California, *Duke v. College of San Francisco*.[63] In that case, the court dismissed the plaintiff's first attempt at pleading an EPA claim because he had not alleged he was paid less than the average of wages paid to females who performed substantially equal work. According to the court, "[t]he proper test for establishing a prima facie case in a professional setting such as that of a college is whether the plaintiff is receiving lower wages than the average of wages paid to all employees of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage scale."[64] Other courts hold to the "one comparator" rule even in these circumstances, expressly rejecting the use of a different test for a professional setting.[65]

Wage Rates or Total Compensation. The question of how to compare compensation can be quite complicated. For example, litigants sometimes dispute whether a court can find a wage disparity based on differences in base salary or wage rate alone, or whether it must also take into account and compare total compensation, including all bonuses, commissions, benefits, and other forms of remuneration. This is yet another seemingly simple legal question, which has bedeviled the courts and given rise to many arguably conflicting decisions.

For example, in *Owens v. American Water Resources, LLC*,[66] the District Court for the Southern District of Illinois dismissed an equal pay claim where the plaintiff earned more in total wages, despite having a lower base salary than her comparator. In that case, the Vice President of Operations of a sewer line warranty provider alleged she was paid less than her predecessor, who worked in the same job, in the same location, and under the same title. Specifically, she alleged that she was making a lower base salary for the entire four years she held the Director of Call Center Operations position. The court rejected this argument, finding that plaintiff's total wages were higher than her predecessor's, despite being paid a lower base salary. Citing the regulatory definition of "wages," the court held: "under the Equal Pay Act, one must compare total compensation amounts, rather than base salaries."[67] Moreover, the court found that plaintiff's total compensation was approximately 7% higher than the average of the other Directors of Operations at the company and held against the plaintiff for this reason: "Thus, a review of the reported

[61] *Id.* at *7.

[62] *Id.*

[63] *Duke v. Coll. of S.F.*, 445 F. Supp. 3d 216 (N.D. Cal. Apr. 10, 2020).

[64] *Id.* at 229 (quoting *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983)).But when the plaintiff amended his complaint to compare himself with the only other Associate Vice Chancellor of Student Affairs who held that position during the relevant time period, the case was allowed to proceed: "When there is only a single opposite-gender employee with similar work, it is appropriate to compare the plaintiff's pay against that of a single employee." *Id.* at 229.

[65] *See, e.g., Mullenix v. Univ. of Tex. at Austin*, No. 1:19-cv-1203-LY, 2021 WL 5881690 (W.D. Tex. Dec. 13, 2021) ("[U]nder Fifth Circuit precedent, a plaintiff need only identify one comparator in a position requiring equal skill, effort, and responsibility under similar working conditions as the plaintiff.") (citing *Weaver v. Basic Energy Servs., L.P.*, 578 F. App'x 449, 451 (5th Cir. 2014); *Vasquez v. El Paso Cnty. Cmty. Coll. Dist.*, 177 F. App'x 422, 425 (5th Cir. 2006); *Gillis v. Turner Indus., Ltd.*, 137 F.3d 1349, (5th Cir. 1998)).

[66] *Owens v. Am. Water Res., LLC*, No. 3:21-cv-01365, 2023 WL 6382368 (S.D. Ill. Sept. 29, 2023).

[67] *Id.* at *10.

total compensation for [plaintiff] and [predecessor] does not establish that [predecessor] received higher compensation as required under the Equal Pay Act."[68]

But in *Sempowich v. Tactile Systems Technology, Inc.*,[69] an appeal that was joined by the EEOC as *amicus curiae* in favor of plaintiff, the Fourth Circuit reversed a decision where the lower court had rejected an equal pay claim because the plaintiff was paid more in total compensation than her comparators.[70] According to the Fourth Circuit, "[t]he text of the Equal Pay Act unambiguously states that an employer may not 'discriminate . . . between employees on the basis of sex by paying wages to employees . . . *at a rate* less than the *rate* at which he pays wages to employees of the opposite sex.'"[71] There was no need to consider the regulatory definition of "wages" because the statute clearly puts its emphasis on wage rates. But even so, the Fourth Circuit held that the district court had misinterpreted the definition: "The term 'wages' includes commissions because, just as with salary, an employer could not pay commissions to a female employee at a lower rate than a similarly situated male employee. This does not mean that all types of remuneration should be combined into one lump sum when comparing the earnings of a male and female employee."[72]

Similarly, in *Wiler v. Kent State University*,[73] the District Court for the Northern District of Ohio held that an equal pay claim must be based on a difference in base compensation rather than total compensation. In that case, a female head coach of a university's field hockey team alleged that her employer violated the EPA and Title VII by paying her less than her male counterparts. But her claim was based on the fact that other coaches at the same university earned a higher total compensation, which was the sum of their pay, performance bonuses, and camp income.[74] The court held that the proper inquiry in the Sixth Circuit focuses on rates of pay, rather than total compensation, which in this case meant coaches' base salaries and bonus rates, not camp income, because coaches had no obligation to run a camp, and the compensation earned from camps varied depending on factors over which the university had no control.[75] "Where an employee exercises a significant degree of discretion or control over earning a portion of her income, that portion cannot comprise part of the common denominator for the base rate of pay. A contrary conclusion risks incentivizing strategic behavior for artificial or leverage purposes."[76]

Non-Wage Components of Compensation. Questions also frequently arise regarding what types of compensation should be compared to establish a wage disparity, and even what counts as "compensation" at all. A plaintiff's reliance on less clear-cut bases of compensation can create problems of proof that may result in dismissal.[77] For example, in the high-profile case, *Morgan v. U.S. Soccer*

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[68] *Id. See also Schrof v. Clean Earth, Inc.*, No. BPG-22-cv-1533, 2023 WL 3763984 (D. Md. June 1, 2023) (holding that outside salesperson had adequately alleged a wage disparity even though she and all outside salespeople were subject to the same commission plan, because she alleged males who met their goals received 20% commission and overages, while she did not).

[69] *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643 (4th Cir. 2021).

[70] In that case, a regional sales manager for a medical device manufacturer alleged she was paid less than a male comparator when comparing base salaries. The district court held that she failed to establish a prima facie case of pay discrimination because she was actually paid more than her comparator when comparing total compensation, meaning base salary plus commissions. *Sempowich v. Tactile Sys. Tech., Inc.*, No. 5:18-cv-488-D, 2020 WL 6265076, at *23 (E.D.N.C. Oct. 23, 2020). The court applied the EEOC's definition of "wages," which includes all payments made to an employee whether provided as base salary, bonus, or any other form of compensation. *Id.* Plaintiff argued that including her incentive compensation would frustrate the purpose of the EPA because it would require "harder work for commissioned employees with lower base salaries to achieve equal pay." *Id.* The court rejected that argument, holding that the EEOC's definition of wages comports with the text of the EPA and Supreme Court and Fourth Circuit precedent. *Id.* at *23-24.

[71] *Sempowich*, 19 F.4th at 655 (quoting 29 U.S.C. § 206(d)(1)) (emphasis in original).

[72] *Id*.

[73] *Wiler v. Kent State Univ.*, 637 F. Supp. 3d 480 (N.D. Ohio 2022).

[74] *Id*. at 484.

[75] *Id*. at 491.

[76] *Id*. Using that metric, the court eliminated all but one of plaintiff's chosen comparators because they were not paid at a higher rate than plaintiff, even though they earned higher total compensation. *Id.* at *492-93. The court left it to the jury to decide whether the final comparator's position was truly equal to plaintiff's position and whether the university had established its "factor other than sex" defense. *Id.* at 496.

[77] *Williamson v. Digital Risk, LLC*, No. 6:18-cv-767-Orl-31EJK, 2020 WL 434954, at *5 (M.D. Fla. Jan. 28, 2020) (refusing to dismiss some discrimination claims, including a claim under Title VII, because plaintiff had introduced direct evidence of intentional

Federation, Inc.,[78] a group of professional women's team players alleged they were paid less than male professional soccer players employed by the same organization. The compensation for women's team and men's team players was determined by different collective bargaining agreements ("CBAs"). The women's team players alleged that their CBA provided for lower bonuses than the men's team.[79] The employer pointed to players' total compensation, arguing that when compared on a cumulative and average per-game basis, the facts showed that the women's team players were paid more in total compensation than the men's team players.[80] The court found that the women's team players' focus on bonuses ignored the other benefits provided by their compensation arrangement, including guaranteed annual salaries and severance pay that the male players did not receive.[81] The court concluded that "[t]o consider these bonus provisions in isolation would run afoul of the EPA, which expressly defines 'wages' to include all forms of compensation, including fringe benefits."[82]

A pay disparity does not have to be based on the wage or salary components of compensation. Differences in benefits, such as the use of a company car, can also form the basis of an equal pay claim. For example, in *Pate v. Medical Diagnostic Laboratories LLC*,[83] a senior sales executive for a pharmaceutical laboratory alleged she was paid less than male employees in the same position, even though they earned the same base salary, because they were given a company car while she was not. The employer argued that its refusal to provide a car to plaintiff was justified by several gender-neutral reasons. The court agreed, noting that the use of a company car was not automatic, that both male and female employees regularly received cars, and that "none of the eight listed male employees who received company cars had the same combination of short tenure, deficient performance, and location as plaintiff."[84] The court concluded that "individual comparisons between employees both male and female who received cars, do not create a genuine issue of material fact as to defendant's gender neutral justifications for providing company cars, particularly given the variety of gender-neutral factors and the overall pattern of male and female recipients."[85]

When a disparity in benefits forms the basis of a gender discrimination claim, it is obviously critical that a plaintiff establish their right to those benefits.[86] This issue is poised to become especially important for

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discrimination, but with respect to her EPA claim, holding that the plaintiff had failed to produce evidence that male employees were entitled to a larger percentage of commissions than she received: "Plaintiff has not argued, much less shown, that the male employees were in fact paid more than her").

[78] *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020).

[79] *Id.* at 652.

[80] *Id.* at 653.

[81] *Id.* at 654.

[82] *Id.* (citing 29 C.F.R. § 1620.12(a); 29 C.F.R. § 1620.11(a)). The Court also rejected plaintiffs' reliance on an analysis of what they might have been paid if they had been compensated under the same terms as the men players' CBA. "This approach—merely comparing what each team would have made under the other team's CBA—is untenable in this case because it ignores the reality that the [men players] and [women players] bargained for different agreements which reflect different preferences, and that the [women players] explicitly rejected the terms they now seek to retroactively impose on themselves." *Id.* at 655. The court found that the history of negotiations between the women players and their employer showed that they had rejected an offer to be paid under similar terms as the men's team and instead opted for different terms that provided benefits to the women players that were difficult to value: "One of the defining features of the [women players'] CBA is its guarantee that players will be compensated regardless of whether they play a match or not. This stands in stark contrast to the [male players'] CBA, under which players are only compensated if they are called into camp to play and then participate in a match. It is difficult to attach a dollar value to this 'insurance' benefit, and neither party attempts to do so here." *Id.*

[83] *Pate v. Med. Diagnostic Labs. LLC*, No. 7:19-cv-126-FL, 2021 WL 965906 (E.D.N.C. Mar. 15, 2021).

[84] *Id.* at *17.

[85] *Id. See also Perdue v. Rockydale Quarries Corp.*, No. 7:18-cv-00416, 2019 WL 2216527, at *6 (W.D. Va. May 22, 2019) (holding that a female supervisor had adequately alleged a pay disparity based on her claim that she was allowed to use a company vehicle only for business travel while her male predecessor in the same position had been allowed to use a company vehicle for business travel and his commute to work: "While [employer] may ultimately disprove these allegations or establish that the alleged disparity was justified by a reason other than gender, the court concludes that the allegations are sufficient to withstand the defendant's motion to dismiss").

[86] *See, e.g., Barney v. Zimmer Biomet Holdings, Inc.*, No. 3:17-cv-616 JD, 2021 WL 3212383, at *10 (N.D. Ind. July 29, 2021) (holding that the denial of severance benefits to a female Senior Vice President was enough to establish a prima facie case, but that ultimately plaintiff had failed to establish that the denial was due to her gender because, under the company's policies, she was not entitled to severance: "[employer] has put forth evidence that the difference in severance benefits was based on a factor other than

employers and employees in the wake of the Supreme Court's seminal decision, *Bostock v. Clayton County, Georgia*,[87] which held that Title VII prohibits discrimination on the basis of sexual orientation or gender identity as forms of sex discrimination. That decision has rendered many workplace issues newly relevant, including the question of who qualifies for spousal benefits. For example, in *Doe v. Catholic Relief Services*,[88] a data analyst for a religiously aligned organization alleged he was underpaid because certain health benefits were denied to his spouse even though they were provided to others in the same position. The plaintiff was a man married to a man. He claimed it was a violation of the EPA, among other laws, to provide health benefits to women employees that covered their male spouses while denying those benefits to males spouses of male employees.[89] The religious organization employer argued that it retained its religious character by, among other things, maintaining a code of conduct and administering its employee benefits program consistent with its religious values. Those values prevented it from providing spousal benefits to employees' same-sex spouses.[90] Citing the *Bostock* decision, the court held: "When an employer discriminates against an employee based on sexual orientation, 'it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.'"[91]

The court denied the employer's several attempts to remove itself from the purview of Title VII and the EPA due to its religious affiliation. With respect to Title VII's exception for employees of religious entities, the court held that the relevant provision, § 702(a), was meant to allow religious organizations to hire only individuals of the same religion; it did not provide blanket protection for religious organizations to discriminate against those who do not share particular beliefs or standards of conduct tied to its religious identity. "A plain reading of § 702(a) reveals Congress's intent to protect religious organizations seeking to employ co-religionists, but the reading urged by [employer] would cause a relatively narrowly written exception to swallow all of Title VII, effectively exempting religious organizations wholesale."[92] The court also held that the employer was not protected by the Religious Freedom Restoration Act ("RFRA").[93] The court noted that the Supreme Court had left open the question of Title VII's interaction with RFRA. The court then reasoned that the plain language of RFRA was directed at restricting activities of the government that might substantially burden the free exercise of religion.[94] "This court finds as a matter of law that RFRA restricts the government rather than private parties, and so [employer] may not assert RFRA as an affirmative defense against [plaintiff's] claims."[95] Finally, the court held that both Title VII and the EPA were generally applicable laws that did not selectively burden religiously motivated conduct while exempting comparable secularly motivated conduct, and so did not violate the Free Exercise clause of the First Amendment. The court concluded: "Our Constitution's solicitousness of religious exercise is not *carte blanche* for any religious institution wishing to place itself beyond the reach of any neutral and generally applicable law."[96] The court certified two questions for decision by the Maryland Supreme Court: whether the Maryland Equal Pay for Equal Work Act prohibits discrimination on the basis of sexual orientation, and whether the Maryland Fair Employment Practices Act allows certain religious organizations to discriminate because of sexual orientation.[97] This is only one case defining *Bostock's* impact on the American workplace. Employers should expect many more decisions like this, which attempt to define how that decision will reshape workplace policies and practices.

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sex; specifically, the difference was based on how the employees left their employment with [employer]. [Plaintiff] has not put forth evidence to place the facts surrounding that rationale in dispute").

[87] *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644 (2020).

[88] *Doe v. Catholic Relief Servs.*, 618 F. Supp. 3d 244 (D. Md. 2022).

[89] *Id*. at 250.

[90] *Id*. at 249.

[91] *Id*. at 252 (quoting *Bostock*, 590 U.S. at 665).

[92] *Id*. at 253.

[93] *Id.* at 253-54. That statute provides that "a person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* (quoting 42 U.S.C. § 2000bb-1(c)).

[94] *Id*. at 254.

[95] *Id*.

[96] *Id*. at 256.

[97] *See Doe v. Catholic Relief Servs.*, No. 20-cv-1815, 2023 WL 155243 (D. Md. Jan. 11, 2023).

Wage Discrimination or Promotion Discrimination. Because it is often the case that higher pay accompanies promotions, pay discrimination claims are often combined and conflated with promotion discrimination claims. But those are different theories of discrimination, governed by different statutory schemes. Although both types of claims can be brought under Title VII, only pay discrimination claims can be brought under the EPA. A failure to recognize and respect this difference can be fatal to a plaintiff's case.

For example, in *Williams v. State of Illinois*,[98] a Special Assistant to the General Counsel for the former Governor of Illinois alleged she was discriminated against under, among other laws, the EPA, based on the fact that comparable male employees were promoted ahead of her and were therefore paid more.[99] The court granted the employer's motion to dismiss the EPA claim, noting that the complaint alleged that both male and female employees had been promoted over her.[100] The court held that those facts contradicted what was needed to establish a viable theory of liability, and that plaintiff had thereby pleaded herself out of court. "Because the Equal Pay Act requires an allegation that different wages are paid to employees of another sex for equal work, the allegation that other women were promoted—and the absence of an allegation that men were paid more for equal work—defeats the Equal Pay Act claim."[101] The dismissal was without prejudiced to plaintiff's right to amend her complaint.

Similarly, in *Brown-Edwards v. Marshall*,[102] a Special Agent in a department of the state Attorney General (an investigatory role) alleged she was discriminated against due to her race and gender when she was repeatedly passed over for promotion to Senior Special Agent.[103] She pointed to a comparator who had been promoted to the Senior Special Agent position and earned more in salary as a result.[104] The court granted summary judgment to the employer on her EPA claim for two reasons. First, the court held that "she has not shown—and cannot show—that she and [comparator] performed substantially similar work as their positions had different job titles, different job responsibilities, and were in different divisions of the OAG."[105] Second, and more fundamentally, the court held that the plaintiff could not base an EPA pay discrimination claim on what was, in essence, a Title VII promotion discrimination claim. "An employer's failure to promote and discriminatory pay practices are discrete actions that must be challenged and asserted separately."[106] Because the promotion decision happened outside the statute of limitations for her Title VII claim, she could not bring that claim. Nor could she rely on the continuing violation doctrine to revive it, because that doctrine does not extend the statute of limitations for discrete discriminatory acts, such as a failure to promote. "Simply put, [plaintiff] cannot disguise an untimely failure-to-promote claim as a pay discrimination claim merely because she was paid less than she would have made had she been promoted."[107]

Even if an equal pay plaintiff could have had a viable equal pay claim at one time, intervening promotions can vitiate that claim unless the plaintiff can show that their pay remained below that of their comparable peers in the new positions they were promoted into. For example, in *Jeffords v. Navex Global, Inc.*,[108] a Senior Vice President based her pay discrimination claim on a spreadsheet that she inadvertently received in 2013, when she was still a Vice President. The spreadsheet contained salary information for all of her employer's employees. She believed that spreadsheet showed a pay disparity between herself and similarly-situated male colleagues.[109] She relied upon that spreadsheet as proof of her equal pay claim. The court held that her claim was time-barred because it accrued when she received the

[98] *Williams v. State of Ill.*, No. 1:21-cv-02495, 2022 WL 952745 (N.D. Ill. Mar. 30, 2022).
[99] *Id*. at *1.
[100] *Id*. at *4.
[101] *Id*.
[102] *Brown-Edwards v. Marshall*, No. 2:20-cv-876-RAH, 2023 WL 121450 (M.D. Ala. Jan. 6, 2023).
[103] *Id*. at *2.
[104] *Id*. at *4.
[105] *Id*. at *10.
[106] *Id*. at *11.
[107] *Id*.
[108] *Jeffords v. Navex Global, Inc.*, No. 3:21-cv-00414-SB, 2023 WL 2986722 (D. Ore. Feb. 17, 2023).
[109] *Id.* at *1.

spreadsheet seven years earlier: "It was at this time—more than seven years before her termination—that [plaintiff] knew or had reason to know of the alleged pay disparity."[110] Moreover, the court held that even if every paycheck since that date had triggered a new statute of limitations—under the continuing violation doctrine—that could not save plaintiff's claims because she had been promoted several times since that date, and "[t]here is no evidence in the record that [plaintiff] was paid less than her male colleagues for the same work in any of her subsequent roles at [employer]."[111]

Statistics and Other Methods of Proof. Litigants may sometimes turn to statistics to buttress their case, using them to establish that a wage disparity is due to discrimination, even for single plaintiff cases. But unless the meaning of such statistics is clear, courts may still fall back on a simple comparison of salaries among plaintiffs and their comparators. For example, in *Atta v. Cisco Systems, Inc.*,[112] a female marketing department employee alleged she was paid less than male employees in the same pay grade who worked in the same department. She wanted the court to infer discrimination from the fact that her male workers' compensation ratios, on average, exceeded the women's ratios. The court was unwilling to draw that conclusion from the statistics she presented. Among other things, the court held that "statistics may be a piece of circumstantial proof bolstering an inference of discrimination, but to be useful, the statistics must clearly show actual differences in treatment, and their usefulness therefore 'depends on all of the surrounding facts and circumstances.'"[113] The court then compared plaintiff's salary with those of her male comparators and found that she had been paid more than two male comparators in her first year in their pay grade, and that other differences in pay were explained by other non-discriminatory factors of the employer's compensation system.[114]

Proving Wage Disparities in Class and Collective Actions. In class and collective actions, the identification of a wage disparity is even more complex. The use of statistics to show disparities in pay across employee groups is often critical in such cases. For example, in *Spencer v. Virginia State University*,[115] the Fourth Circuit affirmed a decision that rejected an attempt by a tenured Associate Professor in the Department of Sociology to use statistics to establish that she was paid less than term-appointed Associate Professors in other departments.[116] The court noted the unique features of academia that present special challenges for the EPA claimant: "[p]rofessors are not interchangeable like widgets. Various considerations influence the hiring, promotion, and compensation of different professorial jobs."[117] The Fourth Circuit noted that, in the academic context, "work is an exercise in intellectual creativity that can be judged only according to intricate, field-specific, and often subjective criteria."[118] Accordingly, an EPA plaintiff must provide the court with more than broad generalities to establish a claim.[119] The Fourth Circuit held that plaintiff's expert had failed to identify a general disparity between the pay of men and women at the university: "[h]is efforts revealed no statistically significant disparity within each 'school.' If anything, this evidence undermines [plaintiff's] claimed inference of discrimination."[120]

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[110] *Id.* at *10.

[111] *Id.*

[112] *Atta v. Cisco Sys., Inc.*, No. 1:18-cv-1558-CC-JKL, 2020 WL 7384689 (N.D. Ga. Aug. 3, 2020).

[113] *Id.* at *26 (quoting *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977)).

[114] *Id.*

[115] *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019).

[116] The district court had held, among other things, that the plaintiff had failed to establish that those positions were the same, noting that: "the functional responsibilities that comprised 'teaching a class' and the skillset required in doing so varied across all three departments." *Spencer v. Va. State Univ.*, No. 3:16-cv-989-HEH, 2018 WL 627558, at *9 (E.D. Va. Jan. 30, 2018). But the court also held that the analysis performed by plaintiff's own expert showed that the university did not suffer from any systemic gender-related wage disparity. *Id.* at *10. Among other things, plaintiff's expert found that plaintiff's comparators were overpaid in comparison to their peers, including both male and female faculty members, and that there was not a statistically significant level of male faculty being paid more than their female counterparts by school. *Id.* The district court concluded that the "absence of systemic discrimination combined with improper identification of a male comparator suggests a failure to establish a prima facie case." *Id.* (quoting *Stag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 950 (4th Cir. 1995)).

[117] *Spencer v. Va. State Univ.*, 919 F.3d 199, 204 (4th Cir. 2019).

[118] *Id.* at 205.

[119] *Id.*

[120] *Id.* at 206.

In *Bridewell-Sledge v. Blue Cross of California*,[121] a California state court based its denial of class certification on a close analysis of the parties' competing expert reports.[122] The court held that plaintiffs' expert had failed to apply the proper criteria for assessing the potential wage differential under the California Fair Pay Act because the law only prohibits such wage disparities for employees doing "substantially similar work" when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.[123] The court rejected plaintiffs' expert's model, and denied class certification, holding that it "does not properly analyze the pay rates of putative class members and juxtapose those against employees who perform *substantially similar* work."[124]

Similarly, in *Kassman v. KPMG LLP*,[125] the court rejected an employees' attempt to use statistics to prove classwide wage discrimination because the statistical analysis could not adequately account for the differences among individual employees' job duties and working conditions. Plaintiffs' expert performed a regression analysis and found statistically significant differences in compensation between men and women, controlling for job level, experience, education, job location, and performance ratings.[126] But the employer's expert concluded that no statistically significant disparity exists when employees are appropriately classified according to specialized job categories.[127] The court concluded that plaintiffs had failed to establish that pay and promotion practices are uniform across the company, so there was no reason to rely on aggregated, nationwide statistics.[128]

New Theories of Wage Discrimination. Some plaintiffs have quite openly attempted to expand the boundaries of wage discrimination claims, arguing that they were unfairly paid even if they were unequivocally paid *more* than comparators of the opposite sex. For example, in *Traudt v. Data*

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[121] *Bridewell-Sledge v. Blue Cross of Cal.*, No. BC477451, 2018 Cal. Super. LEXIS 3879 (Cal. Super. Ct. Aug. 28, 2018). Plaintiffs' expert performed a regression analysis that sought to take account of race, sex, years of company services, age, and educational attainment to conclude that males were paid more relative to females in a manner that was both large in absolute magnitude of the pay differential, and statistically significant.

[122] *Id.* at *39. California courts may consider statistical evidence as "indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Id.* at *26 (quoting *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 333 (Cal. 2004)). Even though there is no requirement under the California Fair Pay Act or the federal EPA for plaintiffs to prove intentional discrimination or discriminatory animus, courts often allow the use of evidence—including expert statistical evidence—that would tend to demonstrate intentional discrimination. *See also Storrs v. Univ. of Cincinnati*, No. 1:15-cv-136, 2018 WL 684759, at *3 (S.D. Ohio Feb. 2, 2018) ("[Plaintiff] may present facts and argument regarding sex discrimination to the extent these facts (1) prove the elements of her EPA claim, (2) demonstrate that [employer] acted willfully, and (3) rebut [employer's] affirmative defense that the discrepancy was based on a factor 'other than sex.' Although intentional discrimination is not an element of an EPA claim, courts typically allow evidence that demonstrates that the defendant acted willfully or suggests that the defendant's affirmative defense is pretextual.") (emphasis omitted) (citing *Boaz v. Fed. Express Corp.*, 107 F. Supp. 3d 861, 891 (W.D. Tenn. 2015) ("Although intent to discriminate is not a requisite element for making out an EPA claim, a showing of discriminatory motivation may be used to demonstrate that an affirmative defense on which the employer relies is in fact pretextual.") (quotation omitted); *Simpson v. Merchs. & Planters Bank*, 441 F.3d 572, 580 (8th Cir. 2006)).

[123] *Bridewell-Sledge*, 2018 Cal. Super. LEXIS 3879, at *44.

[124] *Id.* at *47 (emphasis in original). Plaintiffs' expert had attempted to control for location and job category using the EEOC's EEO-1 categories to establish that any two individuals within the same EEO-1 category were performing "substantially similar work." *Id.* at *44-47. The employer's expert opined that because there are only ten such categories, they would, by necessity, tend to group employees within the same category who are demonstrably not performing "substantially similar work" within the meaning of California law. The employer's expert noted, among other things, that "over 80 percent of the records in [plaintiff's expert's] analytic file fall into a *single* EEO-1 occupational category, [plaintiff's expert's] model has effectively no statistical control to situate employees with respect to their skill, effort and responsibility." *Id.* at *45. Without the use of any statistical methodology to assess statutory violations on a class basis, the court would have to "individually review a class member's status and assess whether those employees perform 'equal work' under 'similar working conditions' or 'substantially similar work when viewed as a composite of skill, effort, and responsibility.'" *Id.* at *48.

[125] *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252 (S.D.N.Y. 2018). In that case, plaintiffs sought to bring a class and collective action on behalf of more than 10,000 female Associates, Senior Associates, Managers, Senior Managers/Directors, and Managing Directors within the company's Tax and Advisory Functions from 2009 to the present. *Id.* at 259.

[126] *Id.* at 263-64.

[127] *Id.* at 265. Rather, the data "reflects a heavier concentration of men in higher compensated units and heavier concentration of women in lesser compensated units." *Id.*

[128] *Id.* at 282. Moreover, because the employer allowed individual managers discretion over pay decisions, the court held that "there is no (non-discretionary) uniform causal mechanism for determining pay and promotion operating across the Proposed Collective. This means that there are likely 1,100 defenses to justify why the 1,100 opt-ins were paid as they were. Adjudicating the claims of the proposed collective in a single action would give rise to obvious procedural difficulties and could not assure fair treatment of any party involved." *Id.* at 288.

Recognition Corp.,[129] a female sales representative alleged she was paid less than similarly-situated males because her employer had improperly diverted her commissions to other employees, while this had not happened to male employees. The employer paid sales employees according to an incentive plan that included a salary component and a target amount of incentive compensation, which would vary depending on whether and to what extent they met their sales quotas.[130] Although plaintiff admitted that the incentive plan was not inherently discriminatory, and the court found that she had failed to provide evidence of a male comparator in the same position who was paid more than her, plaintiff nevertheless based her discrimination claim on her allegations that some of the credit and commissions she had been owed were given to another female employee.[131] The court held that this could not support an EPA claim because "Plaintiff provides no evidence that her circumstances were nearly identical to those of a better-paid employee who is not a member of the protected class, because the alleged 'better-paid employee' is a member of the same protected class."[132] Moreover, the court held that plaintiff failed to establish that the "diversion" of commissions she complained of did not happen to male employees as well: "the evidence provided by Defendant indicates that, on occasion, both male and female employees received 'adjustments' to their total sales numbers prior to incentive awards being calculated."[133] Accordingly, her theory did not support any relief under the EPA.

Many times, the more esoteric theories of wage discrimination involve plaintiffs who were actually paid more than their comparators. Plaintiffs have attempted many theories to try to shoehorn such facts into an equal pay claim, often with little success. In *Black v. State of Ohio Industrial Commission*,[134] a state agency's Chief Legal Counsel brought an equal pay claim based on a comparison with her successor in the same position. The problem, however, was that plaintiff's final rate of pay was higher than her successor's at the time he was hired. At the motion to dismiss stage, the plaintiff had skirted this inconvenient fact by alleging that, although her successor was hired at a lower wage, the employer had quickly increased his pay above hers. The court ruled at the time that "[a]n employer cannot evade liability under the Equal Pay Act merely by paying a male successor a 'starting' wage below that of a female predecessor, only to turn around and increase his pay above that of hers."[135] But this theory did not pan out. Although plaintiff's successor did receive a raise soon after hire, his new wage was still less than plaintiff's final wage. Plaintiff also argued that her successor's wages were increased more quickly than hers, noting that in her first three years on the job, her pay increased by 10.3% overall, for an annual increase of 3.4%, whereas her successor's pay was increased by 14.7% overall, for an annual increase of 4.9% in his first three years on the job.[136] The court rejected this argument, noting that plaintiff's slower increase was explained by factors other than sex; namely, a pay freeze imposed by the governor during a portion of her employment, and other political factors that allowed for a faster increase during her successor's tenure.[137]

Similarly, in *Moore v. Penfed Title, LLC*,[138] the court rejected a plaintiff's Title VII wage discrimination claim based on his theory that he was not paid enough *above* comparators who held positions with less responsibility than him: "[Plaintiff] cannot make out the fourth *prima facie* element of a Title VII unequal compensation discrimination claim with respect to his overall salary. His argument boils down to an objection that he was not awarded enough of a premium above all other . . . employees for his unique role within the organization. In this respect, the Court will not second guess [employer's] compensation

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[129] *Traudt v. Data Recognition Corp.*, No. 3:21-cv-02703-M, 2023 WL 3220196 (N.D. Tex. May 2, 2023).

[130] *Id.* at *2.

[131] *Id.* at *3.

[132] *Id.*

[133] *Id.*

[134] *Black v. State of Ohio Indus. Comm'n*, No. 2:21-cv-2987, 2023 WL 5935650 (S.D. Ohio Sept. 12, 2023).

[135] *Id.* at *11.

[136] *Id.* at *12.

[137] *Id.*

[138] *Moore v. Penfed Title, LLC*, No. 1:20-cv-0867, 2021 WL 2004785 (E.D. Va. May 18, 2021). In that case, a Vice President of a credit union alleged he was discriminated against on multiple grounds, including with respect to compensation. Proceeding under Title VII, the plaintiff alleged that he was paid "a relatively low salary" due to discrimination against him, that he was wrongfully denied a 5% year-end bonus, and that his supervisor refused to give him a performance evaluation that would have allowed him to receive a bonus or merit increase. *Id.* at *3.

decisions absent a *prima facie* showing of compensation discrimination."[139] Similarly, in *Wentzel v. Williams Scotsman Inc.*,[140] although the court held that the plaintiff had established that the work of two Account Executives was "substantially equal," summary judgment was granted to the employer because it turned out that plaintiff actually earned more money than her male comparator.[141] The plaintiff argued that she had to work significantly harder than her male comparator in a manner that was disproportionate to her additional compensation. The court held that: "[e]ven assuming that [plaintiff] had to work *harder* than [comparator] for her pay, she was still paid *more*. The EPA's very text precludes a claim under these circumstances."[142]

2. Showing That Work Is "Equal" Or "Substantially Similar"

To establish a prima facie case under the federal EPA, an employee must establish that they were paid less than an employee of the opposite sex—often referred to as a "comparator"—for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[143] This "equal work" requirement can present some significant hurdles to putative plaintiffs, especially those hoping to certify sprawling collective or class actions. Some states, however, have adopted arguably different standards, such as California's standard: "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working

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[139] *Id.* at *5.

[140] *Wentzel v. Williams Scotsman Inc.*, No. 18-cv-02101-PHX-SMB, 2020 WL 1158547 (D. Ariz. Mar. 10, 2020). The plaintiff was the only female Account Executive employed at a modular office space provider. Her comparator was the only other Account Executive working at the same office, who was male.

[141] *Id.* at *3-4.

[142] *Id.* at *4 (emphasis in original). *See also Rodriguez v. City of Corpus Christi*, No. 2:21-cv-00297, 2023 WL 6149914 (S.D. Tex. Aug. 7, 2023) (rejecting plaintiff's argument that she was underpaid compared to her comparator—even though she earned more than him in absolute compensation—because his salary was a higher percentage of the market average after employer said all executive employees would receive raises such that they would earn 90-95% of the market average: "[plaintiff] has not cited any authority for her theory that pay relative to the market rate is the proper factor to consider, as opposed to absolute pay"). *But see King v. Provo City*, No. 2:23-cv-219-DAK-DBP, 2024 WL 170687 (D. Utah Jan. 16, 2024) (allowing equal pay claim to survive motion to dismiss, even though plaintiff was paid the same as her alleged comparator: "If seniority is relevant to Defendants' defense, it can be equally relevant to [plaintiff's] prima facie claim. At the pleading stage, [plaintiff] does not know the pay of every other officer in the department. She knows only the pay of one other officer. She alleges that [employer] paid her and [comparator] the same despite the fact that she has four years more experience as a sergeant and that under [employer's] pay policy that should not be the case.").

[143] 29 U.S.C. § 206(d)(1). For a time, Federal employees were required to meet an even higher threshold for proving a prima facie case because controlling Federal Circuit Court authority imposed an extra requirement—that plaintiffs establish that the alleged pay differential was "based on sex." *See, e.g., Gordon v. U.S.*, 903 F.3d 1248, 1254 (Fed. Cir. 2018), *vacated as moot*, 754 Fed. App'x (Fed. Cir. 2019) (affirming the dismissal of two Veterans Affairs physicians' federal EPA claims because they had not established that the alleged pay differential was "based on sex"; i.e., plaintiffs must also show that the "pay differential between the similarly situated employees is 'historically or presently based on sex,'" but plaintiffs had not done so and could not "satisfy this requirement merely through an inference drawn from the statutory elements of the prima facie case under the EPA") (quoting *Yant v. U.S.*, 588 F.3d 1369, 1372 (Fed. Cir. 2019)). This extra element of a prima facie case, which only existed in the Court of Federal Claims, was finally overruled in 2023. In *Moore v. U.S.*, 66 F.4th 991 (Fed. Cir. 2023), the Court of Appeals for the Federal Circuit reshaped the elements of an EPA plaintiff's prima facie case so that they match the elements as articulated by the Supreme Court and every other circuit court, noting that "[e]very other circuit articulates an EPA claimant's prima facie case the same (or materially the same) way as the Supreme Court." In discussing the extra element added by the *Yant* case, namely, a showing that the pay differential "is either historically or presently based on sex," the court found it problematic in several ways. First, the court held it is "simply extraneous in view of the Supreme Court's articulation of an EPA claimant's prima facie case." *Id.* at 996. But secondly, the court held that it violates the principle that an EPA plaintiff need not prove intentional discrimination. According to the Federal Circuit Court of Appeals, "[h]aving to prove—*on top* of a pay differential across sexes for equal work—that the differential is 'based on' sex is tantamount to having to prove that it's *because* of sex, which is tantamount to having to prove intentional discrimination. *Id.* (emphasis in original). Finally, the court also held that the extra element distorted the parties' respective burdens of proof because "[o]nce an EPA claimant carries the burden on the (properly understood) prima facie case, it becomes the *employer's* burden to prove—as an affirmative defense—that the pay differential has a permissible *non-sex-based* justification." *Id.* (emphasis in original). Accordingly, the court "took the opportunity" to defenestrate the extra element articulated in *Yant*, concluding: "To make out a prima facie EPA case, a claimant bears the burden to 'show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'' . . . *Yant* is overruled to the extent it is inconsistent with the foregoing." *Id.* at 997 (citing and quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

conditions."[144] Other states apply a "comparable character," standard, or other standards that are arguably more or less lenient than the "equal work" or "substantially similar work" standards.[145] The exact meaning of these standards is far from a settled matter, even with respect to the federal EPA, which has been in place since 1963.

Actual Job Duties or Content. The requirement that a plaintiff show that they performed the same or similar work as their chosen comparators is often the most significant obstacle to a plaintiff's prima facie case. Some industries are naturally more amenable to this kind of defense than others. For example, several courts have noted how difficult it can be to compare professionals in the academic and medical fields.

For example, in *Goulet v. University of Mississippi*,[146] a university professor alleged she was underpaid compared to her male colleagues, even though she was the highest paid non-chair faculty member in her department. She sought to maintain her equal pay claim by pointing to faculty members in other departments as comparators, arguing that "her contract is not with the Department of Biology, but rather with the university and the Department of Biology is part of the university, not a stand-alone entity."[147] The court held that this argument was contrary to the law in the Fifth Circuit because "[d]ifferent job levels, different skill levels, previous training and experience: all may account for unequal salaries in an environment free from discrimination."[148] With respect to one comparator who was the former chair of plaintiff's department, the biology department, but now worked as a professor in the university's School of Pharmacy, the court observed: "This professor . . . is therefore not even in the same school as the plaintiff, much less the same department, and he works under a different supervisor."[149] Plaintiff's arguments with respect to comparators in the Department of Chemistry and Biochemistry were similarly rejected because they work "in a different department and under a different supervisor than the plaintiff."[150]

This is consistent with the Ninth Circuit's conclusion in *Freyd v. University of Oregon*, even though the court in that case reversed the district court's grant of summary judgment in favor of the employer.[151] The district court in that case acknowledged the unique complexities that attach to the notion of "equal pay for equal work" in the university setting, noting that the nature of the academic setting allowed different professors within the same discipline to choose to follow different paths of knowledge and to pursue endeavors that create different and unique value to the institution.[152] The Ninth Circuit later reversed that aspect of the district court's decision, holding that a reasonable jury could hold that plaintiff and her comparators share the same "overall job," noting that they are all full professors in the Psychology Department and "all conduct research, teach classes, advise students, and 'serve actively on

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[144] *See* Cal. Lab. Code § 1197.5(a).

[145] *See, e.g.,* Md. Code Ann. Lab. & Empl. §§ 3-304(b)(1)(i).

[146] *Goulet v. Univ. of Miss.*, No. 3:22-cv-89-NBB-JMV, 2023 WL 4707134 (N.D. Miss. July 24, 2023).

[147] *Id.* at *2 (internal quotations omitted).

[148] *Id.* (quoting *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1138 (5th Cir. 1983)).

[149] *Id.* at *3.

[150] *Id.*

[151] *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1221 (9th Cir. 2021). In that case, a university professor of psychology alleged she was paid less than other professors at the same university for performing the same work. Plaintiff had become concerned that the salary inequities in her department were related to gender and, in particular, that her salary was below that of male professors in the same department with less seniority. *Freyd v. Univ. of Or.*, 384 F. Supp. 3d 1284, 1289 (D. Or. May 2, 2019). However, the university decided not to offer her a raise after concluding that she was compensated at a higher rate than the majority of professors in the College of Arts and Sciences, and that any discrepancy with respect to her salary versus her male colleagues was attributable to retention raises and significant differences in job duties. *Id*.

[152] *Freyd v. Univ. of Or.*, 384 F. Supp. 3d 1284, 1288 (D. Or. May 2, 2019). The court also held that a university must offer competitive salaries in order to attract top faculty while at the same time maintaining a fair compensation system for all professors. *Id.* In particular, the court held that senior professors and professors who take on introductory courses and devote extra time to advising and other roles that make up the bread and butter of a university education, may be paid according to a pay scale that has not kept up with the market demand that influences how much a university has to pay to attract top talent. *Id.* The district court then analyzed plaintiff's comparators in detail, holding with respect to each one that the differences in their job duties and other related activities, as well as their frequency and success with respect to the submission of grant applications, justified the salary discrepancies among those professors. *Id.* at 1291-94.

departmental, college, and university committees and in other roles in service to the institution.'"[153] Notably, however, the Ninth Circuit's reasoning applied to professors within the same academic discipline and department; it did not extend to all professors across the university regardless of academic field or department.[154]

In *Goodwin v. Grisham*,[155] the director of a state Educational Retirement Board alleged, among other things, that she was paid less than the male State Investment Officer, which she alleged were comparable positions. The court held otherwise, basing its analysis on the relevant statutes and regulations relating to those positions, which demonstrated that those jobs were not equal in terms of the type of work they entailed. Among other things, the court found that the State Investment Officer was primarily responsible for managing and investing public money, but that was "not so unambiguously the heart of the ERB Director's duties."[156] The court dismissed plaintiff's complaint, concluding: " Simply put, [plaintiff's] allegations suggest the ERB Director is a manager with some investment oversight, while the State Investment Officer is an investor with some management duties. It follows that the skill set demanded and the pool of talent drawn from would be distinct enough to anticipate differences in compensation."[157]

Attorneys and other legal professionals have also found it difficult to establish this element of a prima facie case. For example, in *Tolton v. Jones Day*,[158] the District Court for the District of Columbia held that associate attorneys of a large law firm did not necessarily perform equal work as other associates in the same class year if they did not work in the same geographic area or the same practice group. Similarly, in *Smith v. Office of the Attorney General, State of Alabama*,[159] the District Court for the Middle District of Alabama held that the work of criminal investigators who focused on different types of crimes did not perform equal work. The court held that the plaintiff failed to establish a prima facie case of wage discrimination because her work investigating crimes of violence against women and children were "a different animal entirely" than the public corruption and similar crimes that were investigated by her chosen comparators in the Special Prosecutions Division.[160] And in *Dass v. City University of New*

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[153] *Freyd*, 990 F.3d at 1221. The Ninth Circuit also noted that the university itself regularly compares faculty members when making salary decisions. Responding to an argument in a dissenting opinion, the court held that "the granularity with which the dissent picks through the facts would gut the Equal Pay Act for all but the most perfunctory of tasks. The Equal Pay Act, however, is 'broadly remedial,' and should be so 'construed and applied' as to be 'workable across the broad range of industries covered by the Act.'" *Id.* at 1222.

[154] *See also EEOC v. George Washington Univ.*, No. 17-cv-1978, 2019 WL 2028398, at *4 (D.D.C. May 8, 2019) (denying an employer's motion to dismiss even though the complaint at issue did not explicitly allege how the positions at issue were equal with respect to skill, effort, and responsibility, holding that the complaint "straightforwardly pleads that [plaintiff] was paid less as Executive Assistant than [comparator] was paid as a Special Assistant for substantially the same job responsibilities"); *EEOC v. Univ. of Miami*, No. 19-cv-23131-Civ-Scola, 2019 WL 6497888, at *2 (S.D. Fla. Dec. 3, 2019) (denying a motion to dismiss claims brought by professors in the same department because the EEOC had supported its claims of pay discrimination with numerous allegations relating to the professors' job duties, such as teaching classes and publishing books and articles, and allegations that the female professor had two more years of teaching experience and had published more works, and because the EEOC had alleged that both professors were in the same department and had been promoted to full professor at the same time after a review by the same committee based on the same criteria).

[155] *Goodwin v. Grisham*, No. 1:21-cv-00483-JHR-KK, 2023 WL 3569067 (D.N.M. May 19, 2023).

[156] *Id.* at *7.

[157] *Id.* at *8.

[158] *Tolton v. Jones Day*, No. 19-cv-945 (RDM), 2020 WL 2542129 (D.D.C. May 19, 2020). In that case, a group of female attorneys alleged a variety of theories of sex discrimination against their former law firm employer. The court held that some of the plaintiffs had alleged sufficient facts to state an EPA claim, while others did not. In particular, the court did not credit plaintiffs' allegations that they were not paid "Cravath market pay" because they had failed to allege that all of the employer's offices around the country operated in the same "market," or that the market they were referring to would have applied to offices outside of New York. *Id.* at *30. But the court did allow the claims of some plaintiffs to proceed where they plausibly alleged that they earned less than male comparators who were at their same level and performed similar work. *Id.*

[159] *Smith v. Office of the Att'y Gen., State of Ala.*, No. 2:17-cv-00297-RAH, 2020 WL 4015622 (M.D. Ala. July 16, 2020). In that case, an investigator with the Office of the Attorney General of Alabama alleged she was paid less than male comparators who worked in a different division of the same office.

[160] *Id.* at *7. The court held that a distinction should be made between general training and education required for an investigator position generally versus the specific training and expertise required of certain investigators. "A lawyer or detective trained for or mostly familiar with one—and who has excelled in that particular area of law—will not necessarily possess the expertise required to thrive in the other, at least without some extended and specialized training." *Id.* The different levels of skill required meant that those jobs were not "virtually identical" as the EPA requires. *Id.* at *8.

York,[161] the district court for the Southern District of New York dismissed an EPA complaint because its allegations of other forms of discrimination undercut plaintiff's claim that she was "similarly situated" to other employees who did not suffer such discrimination. The plaintiff's complaint was self-defeating because it acknowledged that the plaintiff, an Athletic Director, performed tasks and responsibilities outside the scope of an Athletic Director's responsibilities and had a smaller staff than other Athletic Directors.[162]

The variety of factual circumstances or job duties that courts have relied upon to find that work was not "equal" for purposes of an EPA violation are as wide and vast as the American workplace itself. Differences in outcome often come down to the facts plaintiffs or employers can successfully marshal in their favor. To take just a few recent examples: one court decided that newsroom photographers performed equal work, despite variations in the type and amount of video editing required by their individual jobs because, among other things, their performance evaluations showed that they were required to produce similar types of video projects as their comparators.[163] Another held that, even though plaintiff and her alleged comparator held the same job title, their work was not sufficiently similar because her comparator was handling about six or seven different clients and six or seven different service lines compared to plaintiff's one, and managed more revenue and supervised more employees than plaintiff.[164] Moreover, many courts have been willing to dismiss a plaintiffs' allegations at the pleading stage, where the complaint makes conclusory or boilerplate allegations of similarity without describing job details in sufficient detail.[165]

Formal Job Classifications and Hierarchies. Most often, courts look to specific job duties to determine whether employees' work is truly equal, and they will discount formal corporate hierarchies or pay grades if they do not reflect the true nature of the work performed by employees. But where such differences are

[161] *Dass v. City Univ. of N.Y.*, No. 18-cv-11325 (VSB), 2020 WL 1922689 (S.D.N.Y. Apr. 21, 2020). In that case, a female Athletic Director of a community college alleged she was paid substantially less than other Athletic Directors in the same university system. *Id.* at *1. The Court held that her allegations were insufficient, noting that "Plaintiff's allegations reveal that all of the other Athletic Directors referenced in the complaint worked at different colleges in the CUNY system, which has twenty-five different educational institutions," and that she "does not allege any facts suggesting that her position, experience, skills, and responsibilities were substantially equal to those of the male Athletic Directors at these different CUNY schools, or that she performed equal work." *Id.* at *6.

[162] The court concluded that "Plaintiff's claim cannot proceed on these bare allegations of general job descriptions and her belief that other Athletic Directors were 'similarly situated,' especially given the specific factual allegations indicating that Plaintiff's position, and job responsibilities, were unique." *Id.* at *7.

[163] *See Galligan v. Detroit Free Press*, 436 F. Supp. 3d 980, 993 (E.D. Mich. 2020) (holding that newsroom photographers' work was equal despite different amounts of time spent editing different levels of video projects: "given the substantial overlap in overall work performed by [plaintiff and comparator], the one modest difference concerning percentage of time that each of them spent editing photos does not compel a finding, as a matter of law, that [plaintiff and comparator] do not perform equal work," but finding that their work was different than reporters in the same newsroom). *See also Crain v. Judson Indep. Sch. Dist.*, No. SA-16-cv-832-XR, 2018 WL 5315219, at *11 (W.D. Tex. Oct. 26, 2018) (granting summary judgment to employer where "Plaintiff's job as an aide did not require him to possess professional teaching skills and that other aides and supervisors at Adventure Club were not professional teachers. Adventure Club employees were subject to a different employee manual than ACE teachers. As noted by [employer], Plaintiff's own summary-judgment evidence demonstrates that Adult & Community Education and Adventure club were separate departments and that Adult & Community Education employees such as [comparator] were paid different rates than the Adventure Club employees"); *Stephens v. Bd. of Trs. of the Univ. of S. Fla.*, No. 8:17-cv-53-T-23AAS, 2018 WL 4823125, at *3 (M.D. Fla. Oct. 4, 2018) (holding that clinical physician had failed to establish "equal work" because plaintiff's own argument "about the termination of her administrative stipends—compensation for non-clinical work—renders invalid a comparison between [plaintiff] and her male colleagues. [Plaintiff] spent half her time on non-clinical work; her male colleagues spent all their time on clinical work.").

[164] *Whitlock v. Williams Lea, Inc.*, No. 16-cv-6347, 2019 WL 1382267, at *5 (N.D. Ill. Mar. 27, 2019) (finding that although Senior Account Managers shared common general duties of supervising direct and indirect reports for one or multiple clients across various service lines and ensuring delivery of the contract services, plaintiff's comparator's work was not equal because he supervised many more clients and employees: "[p]erhaps the differences that [employer] identified are somehow insignificant—like maybe it did not take much effort to supervise employees, so the difference in the number of supervisees was insignificant to the job—but [plaintiff] has not provided any such evidence").

[165] *See, e.g., Kairam v. West Side GI, LLC*, 793 F. App'x 23, 26 (2d Cir. 2019) (upholding district court's dismissal of EPA claim brought by physician plaintiff because "[t]he [complaint] alleges details about [plaintiff's] position, including, among other things, that she analyzed patterns to see whether particular doctors were experiencing problems with particular insurers," and "analyzed denials to improve billing procedures," but with respect to her comparator, she merely alleged that he was paid to run a practice that "involved administrative duties at [the same employer]").

supported by actual differences in job duties, levels of responsibility, credentials, or merit, such classification schemes can be a powerful defense to an equal pay claim.

For example, in *Downes v. Board of Trustees of Illinois State University*,[166] a female university Full Professor alleged that she was underpaid compared to other professors at the same university.[167] Specifically, she pointed to six other male Full Professors as comparators, all but one of whom had a higher salary. However, the Court held that she had failed to establish a prima facie case because, among other things, some of those comparators held the honorary designations, "University Professor" or "Distinguished Professor," in addition to being Full Professors. To receive such designations, professors must meet specific requirements, such as "national recognition for research, production, or leadership in creative or scholarly activities," having been "identified by students, colleagues, or external agencies as an outstanding teacher," or "contributed significant public service in accord with their academic discipline."[168] Each Professor earning such a designation would receive a bump up in base salary and additional money to fund their future activities, among other things. The other comparators plaintiff had identified had served in an administrative position, such as Department Chair or a Director of an academic center, which also came with salary increases. The plaintiff "testified that she has not been nominated for either honorary distinction and does not believe she meets the qualifications to receive them," and had not held a Chair or Director position. Accordingly, the court held that plaintiff had failed to establish a prima facie case under the EPA because her comparators "have positions distinguishable from [plaintiff], in that they require different skills, effort, and responsibility."[169]

However, in *Heatherly v. University of Alabama Board of Trustees*,[170] the Eleventh Circuit upheld a decision holding that a job evaluation system, on its own, could not establish a prima facie EPA violation. The Eleventh Circuit agreed with the district court in refusing to credit plaintiff's claim that the employer valued all jobs within the same pay grade equally, noting that the salaries within plaintiff's own pay grade ranged widely.[171] After comparing plaintiff's job duties versus those of her comparators side-by-side, the Eleventh Circuit concluded that, "a reasonable juror could not find that [plaintiff] engaged in work that was substantially similar to that performed by her alleged comparators."[172]

Courts' tendency to look beneath formal job classifications cuts both ways; plaintiffs can sometimes use this to show they performed equal work to comparators in a more advanced pay grade or level. For

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[166] *Downes v. Bd. of Trs. of Ill. State Univ.*, No. 19-cv-1411, 2023 WL 2472859 (C.D. Ill. Mar. 10, 2023).

[167] *Id.* at *8.

[168] *Id.* at *8-9.

[169] *Id.* at *9. The court went on to hold that, even if she had established a prima facie case, her employer had established its affirmative defenses. Among other things, the university was able to point to market factors to explain the pay disparity by showing that Plaintiff's comparators had been started at higher starting salaries because they had completed their Ph.Ds and had prior teaching experience and multiple publications at their time of hire, which are factors commonly awarded in the education industry: "The parties agree that it is common in the education industry for new faculty to be hired at a higher salary than tenured faculty. When referring to market forces in this context, it means [defendant] must compete to get new talent with Ph.Ds. as Assistant Professors." *Id.* Finally, the court pointed to the defendant's merit system for awarding pay increases, which evaluated professors in terms of teaching, research, and service. The court noted that "While [Plaintiff] does not dispute any of her performance evaluations and she often received above standard ratings, many of the other Full Professors consistently received higher performance ratings than [Plaintiff]." *Id.*

[170] *Heatherly v. Univ. of Ala. Bd. of Trs.*, 778 F. App'x 690 (11th Cir. 2019). In that case, the Director of Human Resources for a university brought a federal EPA claim alleging she was paid less than three male employees in director-level positions. Plaintiff argued that the university used a job evaluation system, the Mercer System, to establish pay grades for different jobs based on such factors as knowledge and experience, job complexity and creativity, and physical demands and working conditions, in accordance with standards determined by the university. *Heatherly v. Univ. of Ala. Bd. of Trs.*, No. 7:16-cv-00275-RDP, 2018 WL 3439341, at *13 (N.D. Ala. July 17, 2018). Because the use of that system established the same pay grade for her position versus those of her male comparators, she argued that this established the "equal work" prong of her prima facie case. *Id.* The court disagreed, holding that binding precedent forced it to look at actual job content to determine whether the skill, effort, and responsibility required is substantially equal; it could not merely rely on a job evaluation system. *Id.* Moreover, because the job evaluation system allowed for wide salary ranges even within the same pay grade, this showed that "an employee's categorization into a pay grade does not pinpoint that employee's exact salary and that multiple employees within the same pay grade may have and earn varying salaries." *Id.* at *14.

[171] *Heatherly*, 778 F. App'x at 692.

[172] *Id.* at 693.

example, in *Gallaway v. Rand Corp.*,[173] a Contract Administrator at a research organization alleged she was paid less than male Contract Administrators in her same department, even though she was employed at the second level of a four-level system, but compared herself to male employees in the third level. The Court concluded that a reasonable jury could find that she performed equal work as her male comparators because "[t]here is evidence that she performed the same duties and required the same substantive level of supervision as the CA IIIs in the same department where [comparators] worked, and she handled a case load heavier than all CAs in the department."[174] However, in *Badgerow v. REJ Properties, Inc.*,[175] the Fifth Circuit held that plaintiff had failed to point to evidence that her job circumstances were "nearly identical" to her proffered comparators.[176] "Because [plaintiff] points us to no evidence of how her job duties compared to the senior AFAs' initial job duties, she cannot use the alleged disparity between her salary and the senior AFAs' starting salaries to further her wage discrimination claim."[177]

Same Duties; Different Levels of Responsibility. Sometimes courts will look to employees' different levels of responsibility or expectations to determine they perform different jobs, even where their job duties are the same or similar. This can be the case, for example, when one employee is part-time and another is full-time, or where one is temporary and the other is permanent.[178] In *Martley v. City of Basehor*,[179] for example, a male City Administrator alleged he had been discriminated against when his employer paid more to his female successor. Although plaintiff and his comparator worked at the same job, plaintiff worked in a part-time capacity while his comparator/successor was full-time. The plaintiff also worked as the Police Chief while serving part-time as the City Administrator, and the evidence showed that his first responsibility was to be the Police Chief, and he was only serving temporarily as the City Administrator until a new full-time Administrator could be hired.[180] And although the duties and responsibilities of the City Administrator did not change from plaintiff's tenure to his successor's tenure, the scope of the work and expectations of plaintiff were different due to the fact that he was also serving

[173] *Gallaway v. Rand Corp.*, No. 2:18-cv-01379-RJC, 2020 WL 1984312 (W.D. Pa. Apr. 27, 2020). The employer maintained four levels of Contract Administrators. The four levels had the same job description but were supposed to differ in terms of the level of complexity of the work and the amount of supervision required, as well as the prerequisites for levels of education and years of work experience. *Id.* at *2. The employer introduced evidence that showed that there were at least three female Contract Administrators at the third level who earned more than Plaintiff based on their experience and the increased responsibilities of that level, and that no Contract Administrator at the second level earned more than Plaintiff. *Id.* at *11. However, the Contract Administrator Team Lead testified that plaintiff performed the same duties and required the same level of supervision as third level Contract Administrators. Statistics also verified that plaintiff handled the most awards and the highest aggregate total of grant money of all Contract Administrators. *Id.* at *12.

[174] *Id.* at *12.

[175] *Badgerow v. REJ Props., Inc.*, 974 F.3d 610 (5th Cir. 2020). In that case, a female financial advisor working at a franchise financial advisory firm alleged she was paid less than other male assistant financial advisors. She was paid on a salary draw plus commission basis, meaning that she had to repay her salary draw by deducting it from commissions earned. She alleged that other male assistant financial advisors were paid on a salary plus commission basis, meaning that they were able to keep their salary on top of their commissions. The court granted summary judgment in favor of the employer, however, because plaintiff's comparators all had significantly more seniority than plaintiff and had significantly larger books of business than plaintiff, who was new to the business. Moreover, those comparators to whom plaintiff was most similar had, in fact, been paid on the same salary draw plus commission basis as plaintiff. *Badgerow v. REJ Props., Inc.*, 383 F. Supp. 3d 648, 664 (E.D. La. 2019).

[176] *Id.* at 617.

[177] *Id. See also Wilson v. Wilkie*, No. 2:18-cv-515, 2020 WL 2128613, at *8 (S.D. Ohio May 5, 2020) (finding that a Recreation Assistant paid at a GS-5 level of the General Schedule of federal government salaries failed to show that he performed substantially equal work to employees serving in the same position but at the GS-6 level: "Plaintiff's engaging veterans in informal games and conversation is not substantially equal to the structured therapies provided by the GS-6s, who used their prior experience as nursing assistants to monitor veterans' cognitive and physical limitations and work with the Recreation Therapists to modify the veterans' care plans accordingly").

[178] For an example of differences between temporary and permanent employees, *see, e.g., Mayorga v. Marsden Bldg. Maint., LLC*, No. 4:20-cv-00371, 2022 WL 887234 (S.D. Iowa Feb. 24, 2022) (holding that a temporary employee hired as a general cleaner, whose job duties included "sweeping, mopping, dusting, vacuuming, restocking restrooms, and trash disposal," had not established a prima facie case by comparing herself to a permanent employee: "The record reflects that Plaintiff's pay was determined by factors other than sex: she was a temporary employee and not fully trained"); *see also Santiago v. Meyer Tool Inc.*, No. 1:19-cv-032, 2022 WL 3908954 (S.D. Ohio Aug. 30, 2022) (rejecting plaintiff's argument that male comparators did equal work from the simple fact that they would sometimes fill in for her when she was not at work: "The question is what skills, effort, and responsibility the male machinists possessed to perform *their position*," and, "Plaintiff provides no specific evidence of the male machinists' skills, efforts and responsibilities, and, thus, the Court is unable to make an overall comparison between Plaintiff and the comparators").

[179] *Martley v. Basehor*, No. 2:19-cv-02138-HLT, 2022 WL 16714127 (D. Kan. Nov. 4, 2022).

[180] *Id*. at *6.

as Police Chief.[181] The court held that this was sufficient to establish that the positions were not equal: "although the job description for City Administrator did not change from [plaintiff] to [comparator], the expectations for the job did change, along with the effort required, and it changed because [plaintiff] worked the job part-time and [comparator] worked it full-time."[182]

Similarly, in *Presnell v. Sharp Electronics Corp.*,[183] a General Sales Manager ("GSM") alleged she was discriminated against with respect to pay, among other things, pointing to five male GSMs as comparators. The court first found that there was one compensation plan for all GSMs.[184] For at least some of the years at issue, the plaintiff was paid more than all but one of the other male GSMs. And the one who made more money was given additional compensation for continuing to directly supervise sales employees after the employer did not hire a Sales Manager to replace him when he became a GSM. Plaintiff, on the other hand, did not retain any direct responsibility over sales employees. But she did retain direct responsibility over account managers (not a direct sales position), which she argued made her level of responsibility comparable to the comparator GSM.[185] The court disagreed, noting the high bar required of EPA plaintiffs to show equal work: "the Fourth Circuit has specifically held that the EPA requires that the two comparators have 'virtually identical' / 'substantially equal' jobs."[186] By that standard, the extra responsibilities undertaken by plaintiff's comparator made their jobs unequal, and was also sufficient to establish the employer's "factor other than sex" defense. The court concluded: "even if [employer] should have paid [plaintiff] some extra money because of her additional responsibility for 'enterprise account managers,' that fact is irrelevant to the clear conclusion that [comparator's] and [plaintiff's] jobs were meaningfully *different* and thus not 'equal' under the EPA."[187]

Same Job; Different Time Period or Circumstances. Because the evaluation of "equal" or "similar" work is so fact-specific and often difficult to prove, plaintiffs often attempt to rely on various proxies to establish that requirement. One shortcut that is sometimes successful is to compare plaintiff's pay with a predecessor who held the same position. This will often be sufficient to establish equality of work, unless there have been changes in duties or levels of responsibility. In *Kling v. Montgomery County, Maryland*,[188] for example, the court held that an EPA plaintiff can establish a prima facie case by comparing her work and job responsibilities to a comparator's position and responsibilities *from the past*—even those that are well before the statute of limitations for her claim—and even if the comparator no longer holds that position. The court held it is consistent with the purpose of the EPA "to consider the wages that a

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[181] *Id*. at *8.

[182] *Id*. *But see Kent-Friedman v. N.Y. State Ins. Fund*, No. 18-cv-4422(VM), 2023 WL 6292693, at *15 (S.D.N.Y. Sept. 27, 2023) (holding that the fact that an employee was serving as an Assistant Director temporarily in an acting capacity could not justify paying that employee less than person who was eventually hired into that role permanently, noting that the plaintiff had served in the Acting role for two years and had done so with the expectation that it would lead to a permanent position, which evidence was "sufficient to create an issue of material fact as to whether [plaintiff's] service in the Acting Assistant Director role was, for EPA purposes, truly temporary").

[183] *Presnell v. Sharp Elecs. Corp.*, No. 5:21-cv-00107-KDB-DCK, 2022 WL 17683126 (W.D.N.C. Dec. 14, 2022).

[184] *Id*. at *7.

[185] *Id*.

[186] *Id*.

[187] *Id*. (emphasis in original). *See also Miller v. Sam Hous. State Univ.*, No. H-15-cv-2824, 2019 WL 4758357 (S.D. Tex. Sept. 30, 2019), which held that a tenure-track Assistant Professor had failed to establish her job responsibilities were substantially similar to her chosen comparator, another Assistant Professor in the same field, because her comparator had elevated job responsibilities and was a licensed psychologist with clinical supervisory responsibilities. *Id*. The university showed that during the time that plaintiff did not have that license, it was required to devote extra resources to assist her, such as assigning a licensed psychologist to help supervise her students. *Id.* The district court concluded: "[b]ecause [comparator] did not require those extra resources in supervising his students, their work was not equal." *Id.* That decision was reversed in 2021, however, and even reassigned to a different district court judge, after the Fifth Circuit called into question the comments and actions of the district court throughout the course of the litigation, holding that "the [district court's] discovery restrictions suffocated any chance for [plaintiff] fairly to present her claims." *Miller v. Sam Hous. State Univ.*, 986 F.3d 880, 892 (5th Cir. 2021).

[188] *Kling v. Montgomery Cnty., Md.*, 324 F. Supp. 3d 582 (D. Md. 2018). In this case, a Hispanic Liaison for the Montgomery County Police Department requested a reclassification of her position to a higher pay grade, pointing to a male county employee who she alleged held a similar position at a higher pay grade. *Id.* at 588. After the county pointed out that the male comparator's current position included significant contract monitoring, training, and other responsibilities beyond plaintiff's role, she pointed to the position the comparator held from 2004-2008. *Id.* at 591-92. Although the court held that the plaintiff's current position and the male comparator's earlier position "share a common core of tasks," the court still found differences in roles and responsibilities that precluded plaintiff's prima facie case. *Id.* at 595-96.

comparator previously received for substantially similar work; the Court should not have to disregard a gender-based discrepancy in salaries simply because the higher paid position has evolved or no longer exists."[189]

The different statutes of limitations for EPA and Title VII claims can be critical when plaintiffs attempt to compare themselves to past positions. In *Boatright v. U.S. Bancorp*,[190] a Managing Director of a financial services firm alleged, under the EPA and Title VII, that she had been paid less than a male comparator. The court held that she could not establish a prima facie case under the EPA because, during the entire relevant time period for that statute, her chosen comparator was her superior, having been promoted to chief of the group in which she was employed.[191] As her superior, it was clear that his job was not substantially equal to hers.[192] Title VII, however, has a longer statute of limitations. For some of the relevant period, plaintiff and her male comparator shared the same Managing Director job tile. This was enough to establish that he was a proper comparator under the minimal burden required by Title VII.[193] Nevertheless, the court held that plaintiff had failed to show discriminatory animus, as required by Title VII but not by the EPA, finding that the differences in pay and resources between her and her comparator were not sufficient to establish animus.[194]

Successors or replacements in the same position can also be useful comparators to establish the "equal work" requirement.[195] However, just as with predecessor comparators, the job must have remained the same since it was held by plaintiff. Courts are cognizant of the fact that the duties of a job can sometimes change simply because a different person, with different capabilities, holds the position.

For example, in *Polak v. Virginia Department of Environmental Quality*,[196] the Fourth Circuit held that employees' different levels of expertise and experience allowed one to take on different roles and responsibilities that made his work unequal to a female colleague who was not qualified to take on those roles, even though they worked in the same position as team members under the same supervisor. In that case, a "coastal planner" of a state environmental agency alleged that she was paid less than a male employee she "worked closely with" and about whom she "believed . . . had the same position and that they were doing essentially the same work."[197] However, their supervisor testified that plaintiff's

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[189] *Id.* at 592. *See also Powell v. New Horizons Learning Solutions Corp.*, No. 17-cv-10588, 2018 WL 6571216, at *5 (E.D. Mich. Dec. 13, 2018) ("If a female employee is paid less than a male predecessor, the Sixth Circuit permits claims of unequal pay.") (citing *Conti v. Am. Axle*, 326 Fed. App'x 900, 914 (6th Cir. 2009)).

[190] *Boatright v. U.S. Bancorp*, No. 18-cv-7293, 2020 WL 7388661 (S.D.N.Y. Dec. 16, 2020).

[191] *Id.* at *12.

[192] Among other things, plaintiff's supervisor "served as the leader and supervisory principal of the San Francisco office and supervised all employees of the [group]. He was in charge of monitoring the performance of all employees and evaluating them. Additionally, he was charged with developing and implementing the [group's] revenue generation strategies." *Id.*

[193] The court noted that they shared the same title and internal grade within the employer's hierarchy, occupied the same level on the company's organization chart, and had the same job description when hired. *Id.* at *16.

[194] *Id.* A prima facie case under Title VII also requires the plaintiff to show facts giving rise to an inference of discriminatory animus, an intent requirement that is not required by the EPA. Although plaintiff had pointed to several allegedly discriminatory remarks, including that Washington, D.C. had "bad ... neighborhoods" and was "unseemly," that the former Chairman of Goldman Sachs "grew up in a really bad neighborhood," and that "the Obamas are disgusting," the court held that those statements were "race and gender neutral": "[a]n employer or supervisor can comment that an urban area has bad neighborhoods or compliment a bank Chairman for having achieved success despite having come from a less privileged background without—by such comments—taking on the burden to justify (even through a burden of production) an adverse employment action for an employee." *Id.* at *16-17. Moreover, "an employer or supervisor may make derogatory, but race and gender neutral, comments about a political figure including a President of the United States without giving rise to an inference of discrimination." *Id.* at *17.

[195] *See, e.g., Spencer v. Austin*, No. 19-cv-7404, 2021 WL 4448723, at *9-10 (N.D. Ill. Sept. 28, 2021) (holding that plaintiff sufficiently alleged that she and her comparator performed equal work because her comparator was her replacement in the same position, rejecting the employer's arguments that the plaintiff and her replacement had different job titles and could not have worked in "similar working conditions" because their tenures did not overlap, noting that comparators are compared based on actual job duties and performance, rather than titles, and because "employees need not overlap to serve as useful comparators"); *Mooberry v. Charleston S. Univ.*, No. 2:20-cv-769, 2022 WL 123005, at *7 (D.S.C. Jan. 13, 2022) (finding that plaintiff established a prima facie case where she pointed to her successor as coach of the women's volleyball team as her comparator and where, "[u]pon a review of the record and in a light most favorable to the non-moving party, the Court finds that Plaintiff was required to perform all the additional duties outlined in [comparator's] contract").

[196] *Polak v. Va. Dep't of Envtl. Quality*, 57 F.4th 426 (4th Cir. 2023).

[197] *Id.* at 428.

comparator had "expertise in coastal hazards, sea level rise, and shoreline erosion," which plaintiff did not have, and that allowed him to take on roles and responsibilities that plaintiff was not qualified to perform.[198] The supervisor testified that "because of his background and experience, [comparator] was doing different and more complex assignments than those given to [plaintiff]," which included working on "more challenging issues" and "more difficult and complex grant applications."[199] Accordingly, the court held that plaintiff had not met her burden to establish the requisite level of equality between her job and her comparator's: "To be sure, [plaintiff] and [comparator] performed *similar* work. But the differences in the actual work performed and the level of complexity involved were significant enough that their work cannot be fairly described as 'substantially equal' or 'virtually identical,' as required to establish a claim under the Equal Pay Act."[200]

Similarly, in *Miller v. Levi & Korsinsky, LLP*,[201] a lawyer alleged she was paid less, and on different, less favorable terms, than two comparator lawyers in the same law firm. The court held that the plaintiff could not rely on those lawyers as comparators because of the significant difference in terms of experience and work history between her and those other lawyers. Among other things, the two other lawyers had been successful partners at other significant law firms before joining their current firm, whereas plaintiff had never been a partner.[202] Accordingly, the court held that: "Plaintiff has not shown that her 'length of experience' or her prior positions render [comparators] appropriate comparators with sufficient shared employment characteristics."[203] Moreover, even if she had been able to establish a prima facie case, the court held that the significant difference in prior experience provided a non-pretextual justification for the alleged pay disparity: "It is reasonable, and often expected, that when a person transitions to a new place of employment, that person will leverage prior success and experience to negotiate larger compensation at the new place of business."[204]

Methods of Proof. Sometimes an equal pay case will turn on the methods of proof used to establish equality of work. Some plaintiffs have attempted to make out a prima facie case by trying to establish a general pattern of discrimination through the use of statistics. But these attempts tend to miss the point of the "equal work" analysis, which is a determination of qualitative rather than quantitative difference. In *Chavez v. Lewis & Lewis, Inc.*,[205] for example, a scale operator alleged various forms of discrimination, including sexual harassment, failure to promote, retaliation, and wage discrimination claims. The crux of her wage discrimination claim was that she was paid less because her employer did not allow her to advance in her position by, for example, training her or allowing her to drive trucks, which her male supervisors allegedly told her was a job "for the guys."[206] She also alleges that her male supervisors obstructed her ability to advance to different grades or to receive raises. In support, she introduced statistical evidence that compared the average wages and raises given to female employees versus those given to male employees to show a disparity in treatment.[207] The court held that plaintiff's claims were essentially that she was denied certain opportunities for advancement because of her gender, which are not violations of the EPA: "While Plaintiff attempts to differentiate between 'promotion' and

[198] *Id.* at 430-31.

[199] *Id.* at 431.

[200] *Id.* at 432 (emphasis in original). The District Court for the Southern District of Ohio came to a similar conclusion in *Flannery v. Riverside Research Inst.*, No. 3:18-cv-412, 2021 WL 1192526 (S.D. Ohio Mar. 30, 2021). In that case, an employee who had held several positions at a scientific research company alleged a history of wage discrimination based on, among other things, the fact that she was paid less as a Technical Researcher than the male employee who had taken that position after she was transferred to a different position. *Id.* at *1. The court held that plaintiff's male comparator was able to use his enhanced skills to perform functions plaintiff could not do: "As part of his job duties as a Technical Researcher, [comparator] used his computer programming skills and, more specifically, his familiarity with the Matlab program, to perform coding simulations to assist in determining whether proposed solutions for various scientific problems could work outside the laboratory." *Id.* at *5. Moreover, plaintiff had provided no evidence to dispute the employer's claim that the Technical Researcher position was changed prior to the comparator's hire such that it required the programming skills that plaintiff did not possess. *Id.* at *6.

[201] *Miller v. Levi & Korsinsky, LLP*, No. 20-cv-1390(LAP), 2023 WL 6293940 (S.D.N.Y. Sept. 27, 2023).

[202] *Id.* at *5.

[203] *Id.*

[204] *Id.* at *6.

[205] *Chavez v. Lewis & Lewis, Inc.*, No. 21-cv-0095-F, 2022 WL 3645204 (D. Wyo. July 25, 2022).

[206] *Id.* at *12.

[207] *Id.*

'opportunity for advancement' this is merely semantics. Title VII, not the EPA, affords the remedy for allegations that Defendants discriminated against her in preventing opportunity for advancement by denying her the requisite training."[208] The court also rejected plaintiff's statistical averages, holding that it fails to compare employees that are similarly situated with respect to the work they perform. The court held that "[e]mployees are not similarly situated simply by 'Division' classification. . . .," rather, the law requires, "consideration of whether the employees were performing 'substantially equal' work considering the skills, duties, supervision, effort and responsibilities of the jobs, as well as whether the conditions where the work was performed were 'basically the same.'"[209] Accordingly, the court held that the averages were simply not probative evidence to satisfy an EPA claim.

Plaintiffs also often turn to "pay bands" or other hierarchical levels within an organization to try to establish that employees within the same band or level perform equal work. Some plaintiffs have had success using such proxies, especially to survive motions to dismiss at the beginning of a lawsuit. For example, in *Baker-Notter v. Freedom Forum, Inc.*,[210] the court held that a company's own internal salary review was sufficient to demonstrate comparability among jobs sufficient to survive a motion to dismiss.[211] When the case reached the summary judgment stage, the analysis was much more searching. The court first held that: "The 'equal pay' prong of the *prima facie* case is not seriously in dispute here, as the parties agree that [plaintiff] earned more than two other directors in the Operations department . . . and earned less than one . . . ."[212] But the court found the responsibilities of plaintiff and her comparator extended over different aspects of the business and therefore "had vastly different content with respect to skills and responsibilities."[213] This was not contested by plaintiff; instead, plaintiff argued that she had a more demanding job than her comparator.[214] But the court held that this argument was outside the scope of what it could remedy under the EPA, noting: "The Supreme Court has declined to endorse the theory of 'comparable worth' in EPA cases, 'under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.'"[215] While a court could be called upon to determine whether two jobs are substantially equal, asking a court to determine how much salaries of two unequal jobs should differ "strains the competence of the litigation process."[216]

Federal vs. State Requirements. One of the most significant open questions in equal pay litigation is how courts will interpret the "substantially similar" standard that was created by several new state laws, as compared to the "equal work" standard found in federal law. At least one court has held that there is no daylight between those standards, despite the slight difference in wording. In an unpublished opinion, *Pak v. Github, Inc.*,[217] the California Court of Appeal for the First District held that the new California standard was actually meant to realign California law with the federal standard. In that case, a former associate general counsel alleged she was underpaid compared to her boss, the general counsel, and another female comparator who did not share plaintiff's Asian heritage, a vice-president of law and policy.

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[208] *Id*. at *14.

[209] *Id*.

[210] *Baker-Notter v. Freedom Forum, Inc.*, No. 18-cv-2499 (RC), 2019 WL 4601726 (D.D.C. Sept. 23, 2019). In that case, a Senior Director of Operations for a political nonprofit organization in Washington DC alleged various claims against her employer, including under the EPA. The nonprofit moved to dismiss, arguing that plaintiff had utterly failed to plead facts sufficient to show that the skills, effort, and responsibilities required of her position and her alleged male comparators were substantially equal. *Id.* at *9. The district court held that plaintiff's obligation at the motion to dismiss stage was low; she was not required to "show" anything, but only to allege with some plausibility facts sufficient to state a claim for relief. *Id.*

[211] *Id.* at *9. The complaint pointed to the nonprofit's own salary survey, which was performed for the alleged purpose of uncovering salary discrepancies. The court held that this was sufficient to suggest that the jobs surveyed were at least comparable: "courts should not require so much detail about similarity at the front end of a lawsuit as to make equal pay laws largely inapplicable to this class of employees." *Id*.

[212] *Baker-Notter v. Freedom Forum, Inc.*, No. 18-cv-2499 (RC), 2022 WL 798382, at *7 (D.D.C. Mar. 15, 2022).

[213] *Id*. at *8.

[214] *Id*. at *9.

[215] *Id*. (quoting *Washington Cnty. v. Gunther*, 452 U.S. 161, 166 (1981)).

[216] *Id*. (quoting *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007)).

[217] *Pak v. Github, Inc.*, No. A159585, 2021 WL 3660375 (Cal. App. Aug. 18, 2021).

The court held that the 2016 revision to California's equal pay law "did not materially alter the definition of 'equal work' or the analysis of that issue reflected in prior state and federal cases," but instead, "the amended standard was very close to that which has long been applied by courts under the federal Equal Pay Act."[218] Rather than changing the standard applied under the federal EPA, the court held that the law "simply brought that section in line with case law under the federal EPA."[219] Applying that standard, the court held that plaintiff failed to establish that her comparators performed substantially similar work. Among other things, it found that the general counsel had been at the company for much longer, had performed admirably in his role, and always had considerably more responsibility than plaintiff.[220] The court found similarly with respect to plaintiff's other comparator, noting that the vice president of law and policy performed different work than an associate general counsel, that she had "broad responsibilities in management, policy work, and legal projects," and, "had significantly more managerial responsibility."[221] The court concluded: "The undisputed facts demonstrate both [general counsel comparator] and [vice president comparator] had greater and substantially different responsibilities than [plaintiff]. When viewed as a composite of skill, effort, and responsibility, [plaintiff] did not perform substantially similar work to either comparator."[222]

Similarly, in *Jirek v. Astrazeneca Pharmaceuticals LP*,[223] the District Court for the Northern District of Illinois applied the same standard to analyze the pleading requirements under the federal and Illinois equal pay statutes. In that case, a group of female pharmaceutical sales representatives attempted to sue on behalf of themselves and other similarly-situated female sales representatives, alleging that they were paid less than male sales representatives. In reviewing the complaint on the employer's motion to dismiss, the court first held that "because the statutes are 'nearly identical . . . claims brought under the IEPA and EPA are analyzed the same way.'"[224] The court then found that the complaint failed to allege claims under either statute because plaintiffs failed to identify any higher paid male comparators who performed equal work within the geographic limitations set by the federal EPA (same "establishment") or the Illinois EPA (same county). Plaintiffs argued that they were not required to identify individual comparators at the pleading stage, and instead based their allegations on the findings of a Conciliation Agreement the employer had entered into with the OFCCP, which found that female sales employees were paid less based on their sex.[225] But the court held this was insufficient to meet plaintiffs' burden to establish a prima facie case, which requires, among other things, that plaintiffs show they performed "equal work" as compared to their comparators. "While Plaintiffs' Complaint contains a high-level description of the responsibilities of sales employees generally, this description does not contain enough detail for the Court to ascertain Plaintiffs' 'actual job duties.'"[226] The court noted that the complaint did not mention the nature of plaintiffs' customers (i.e., large academic medical centers vs. solo providers), the complexity of the therapies they sold, or the related training and education needed to sell such products. Moreover, the OFCCP's findings that female Level 4 Specialty Care Sales Representative positions were paid less than men could not save their complaint because "having a 'similar position' or the 'same job classification' does not, in itself, mean that all employees holding that position performed 'equal work,' which is what the statute requires."[227]

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[218] *Id.* at *4 (citing 29 U.S.C. § 206(d)).

[219] *Id.* at *5.

[220] *Id.* at *5-6.

[221] *Id.* at *7.

[222] *Id.* at *8.

[223] *Jirek v. Astrazeneca Pharmaceuticals LP*, No. 21-cv-6929, 2023 WL 415547 (N.D. Ill. Jan. 25, 2023).

[224] *Id.* at *2.

[225] *Id.* at *3.

[226] *Id.* at *4.

[227] *Id. See also McLaughlin v. Cook Cnty.*, 2023 IL App. 1st 221869, at *5 (Ill. App. Ct. 2023) (holding that "claims brought under the [Illinois EPA] are analyzed the same way as claims brought under the federal Equal Pay Act," and applying the same standard to both to determine that "plaintiff did not perform equal work requiring substantially similar skill and responsibilities as [comparator's] position"); *Boyd v. City of Chi.*, No. 20-cv-710, 2023 WL 3627708 (N.D. Ill. May 24, 2023) (holding that "[t]he Illinois Equal Pay Act and the federal Equal Pay Act are evaluated using the same standards," and finding that plaintiff "has not established that [comparator] is an adequate comparator for purposes of the EPA," because even if one were to accept that their jobs "share a 'common core' of tasks, [comparator] has additional duties that make the two jobs 'substantially different'").

EPA vs. Title VII Claims. Finally, plaintiffs who pursue their claims under both the EPA and Title VII—and the employers who defend against those claims—must be cognizant of the different standards applied to determine proper comparators under those statutes. Many courts have held that the EPA and Title VII pay discrimination claims should often be decided the same way.[228] However, the Second Circuit recently clarified an important substantive difference between these statutes. In *Lenzi v. Systemax, Inc.*,[229] the plaintiff had alleged violations of the EPA and Title VII related to the setting of her compensation. The district court dismissed her claims, holding that her Title VII claims, like claims brought under the EPA, required her to show "positions held by her purported male comparators [were] substantially equal to her position."[230] Plaintiff could not make this showing because she was the only employee who held her job title and duties. The Second Circuit clarified that "a Title VII plaintiff alleging a discriminatory compensation practice need not establish that she performed equal work for unequal pay," as is required by the EPA.[231] "[A]ll Title VII requires a plaintiff to prove is that her employer 'discriminate[d] against [her] with respect to [her] compensation . . . because of [her] . . . sex."[232] Discriminatory pay claims can be brought successfully under Title VII even if the plaintiff cannot show a purported comparator of the opposite sex earned more.[233]

But these differences in law are not always enough to save a plaintiff's prima facie case; the standard under Title VII is not toothless. For example, in *Calicchio v. Oasis Outsourcing Group Holdings, L.P.*,[234] a Chief Human Resources Officer alleged she was paid less than males who worked in other roles that reported directly to the CEO: the Executive Vice President and Chief Financial Officer, the Chief Operating Officer, the Chief Sales Officer, and the Chief Information Officer. The court held that the plaintiff could not state a prima facie case of wage discrimination under the EPA based on those comparators: "While Plaintiff and each of the comparators are high-level executives, the record shows they undertook distinct primary tasks and maintained differing portfolios of responsibility."[235] The court recognized that "Plaintiff's failure to establish a *prima facie* case under the EPA reflects a persistent problem faced by members of protected classes serving in high-level executive positions."[236] The court then analyzed plaintiff's claim of gender discrimination under Title VII, noting that "[i]t is true that the burden of showing the similarity of work performed by a female plaintiff and a male comparator is 'more relaxed' under Title VII than under the EPA."[237] However, under Title VII, plaintiff still had to show that she and her proffered comparators were similarly situated in all material respects. The court held that she was not "similarly situated" under Title VII's standard because she did not share the same employment history; her comparators had worked for the employer decades longer than plaintiff, "a difference in employment history that alone prevents them from being 'similarly situated' to Plaintiff."[238]

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[228] *See, e.g., Gallaway v. Rand Corp.*, No. 2:18-cv-01379-RJC, 2020 WL 1984312, at *14 (W.D. Pa. Apr. 27, 2020) (holding that the analysis regarding the third and fourth elements of a Title VII pay discrimination claim were "aided in large part by the reasoning as to the Equal Pay Act claim, *supra.* As to the third prong, there is a genuine dispute of material fact that Plaintiff suffered an adverse action when she was paid less than her male comparators who performed similar duties. . . . As to the fourth prong, there is sufficient record evidence to allow a reasonable factfinder to conclude that Plaintiff's performance of the same duties under the same level of supervision gives rise to an inference of unlawful discrimination").

[229] *Lenzi v. Systemax, Inc.*, 944 F.3d 97 (2d Cir. 2019).

[230] *Id.* at 108 (internal citations omitted).

[231] *Id.* at 110.

[232] *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)). The Second Circuit acknowledged that its earlier opinions may have confused the district court; it previously held that "[a] claim of unequal pay for equal work under Title VII . . . is generally analyzed under the same standards used in an EPA claim." *Id.* at 109 (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995)).

[233] *See also Balchan v. City Sch. Dist. of New Rochelle*, No. 21-cv-04798 (PMH), 2023 WL 4684653 (S.D.N.Y. July 21, 2023) (finding that plaintiff had pled enough facts to establish a prima facie case under Title VII, but not under the EPA because "in the Title VII context and 'at the motion to dismiss stage,' evidence of similarly situated comparators 'is not necessary,' while her "Equal Pay Act claim fails because she does not allege any facts about actual job duties of the comparators discussed"; similarly, her New York State Human Rights Law claim survived because the 2019 amendment to that law aligned it with the standard under Title VII) (citations omitted).

[234] *Calicchio v. Oasis Outsourcing Group Holdings, L.P.*, 584 F. Supp. 3d 1215 (S.D. Fla. 2021).

[235] *Id.* at 1234. Among other things, the court held that the duties and skills of a Chief Human Resources Officer differed materially and were narrower than her comparators' positions.

[236] *Id.* at 1238.

[237] *Id.* at 1245 (quoting *Rollins v. Ala. Comm. Coll. Sys.*, 814 F. Supp. 2d 1250, 1267 (M.D. Ala. 2011)).

[238] *Id.* (quoting *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1228 (11th Cir. 2019)).

On appeal, the Eleventh Circuit affirmed the decision of the district court, noting that "Title VII and the EPA have different burdens of proof," and that, "[u]nder Title VII, 'there is a relaxed standard of similarity between male and female-occupied jobs, but a plaintiff has the burden of proving an intent to discriminate on the basis of sex.'"[239] The court also compared the burden imposed on plaintiffs seeking to overcome an employer's proffered explanation for a wage disparity. Under the EPA, a plaintiff "can show pretext by demonstrating weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the proffered reason for the employment action such that a reasonable factfinder could find them unworthy of credence."[240] Under Title VII, on the other hand, a plaintiff has an alternative to the *McDonnell Douglas* framework, which allows a plaintiff to "survive summary judgment if she presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination.'"[241] The court affirmed the denial of both claims. However, in the Title VII context, that failure went to plaintiff's prima facie case, rather than the issue of pretext: "[Plaintiff] failed to establish a prima facie case by showing a convincing mosaic of intentional discrimination. The evidence relied upon is subjective and would not allow a jury to infer intentional discrimination."[242]

B. Significant Class And Collective Action Decisions

Unlike the EEOC, which can bring lawsuits on behalf of a class of aggrieved individuals without meeting the requirements for class certification, private litigants must establish that their equal pay lawsuits can be decided on a collective or class-wide basis. The procedures for establishing a collective action under the federal EPA are governed by the opt-in procedures of the Fair Labor Standards Act ("FLSA"). Those procedures can confer a significant litigation advantage to plaintiffs because the standard applied at the conditional certification stage is much more lenient than the standards applied to certify a class action under Rule 23 of the Federal Rules of Civil Procedure or its state-law analogues.

1. Recent Cases Involving Collective Action Certification

Section 216(b) of the FLSA allows an action under the EPA to proceed "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[243] The only statutorily-mandated procedural prerequisite to bringing a collective action is that: "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[244] Although § 216(b) is silent as to how the collective action certification issue should be analyzed, most district courts use a two-step approach.[245] At the conditional certification stage, the court does not make any final decisions as to whether a collective action is appropriate. At the more onerous second-stage analysis, the court will ultimately consider the important facts learned through discovery to determine which putative plaintiffs, if any, are similarly situated to the existing plaintiffs.[246]

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[239] *Calicchio v. Oasis Outsourcing Group Holdings, L.P.*, No. 21-12854, 2022 WL 2761720, at *3 (11th Cir. July 15, 2022) (quoting *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992)).

[240] *Id*. The court affirmed the district court's judgment on that claim because, among other things, the plaintiff failed to identify affirmative evidence to establish pretext, and instead relied on subjective testimony. *Id*.

[241] *Id*. (quoting *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019)).

[242] *Id*. at *4.

[243] *See* 29 U.S.C. § 216(b) (providing a private right of action "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated").

[244] *Id.*

[245] *See Knox v. John Varvatos Enters., Inc.*, 282 F. Supp. 3d 644, 652-53 (S.D.N.Y. 2017) (citing *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165 (1989); *Braunstein v. E. Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir. 1978); *Damassia v. Duane Reade, Inc.*, No. 04-cv-8819(GEL), 2006 WL 2853971, at *2 (S.D.N.Y. Oct. 5, 2006)).

[246] *Id.* at 654.

Two Frameworks For Aggregate Litigation Of Equal Pay Claims

Private aggregate litigation under the federal EPA is governed by the judicially-created opt-in procedures of the Fair Labor Standards Act, while private litigants suing under Title VII must meet the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure. Those are starkly different procedures that can and often do lead to significantly different consequences and outcomes for employers.

CLASS ACTIONS:	COLLECTIVE ACTIONS:
Governed by Rule 23 of the Federal Rules of Civil Procedure or analogous state laws	Governed by 29 U.S.C. § 216(b)
Applies to numerous areas of law and can relate to actions asserted under federal or state statutes (but not the federal EPA)	Applies only to actions filed under the Fair Labor Standards Act ("FLSA"), Equal Pay Act ("EPA"), and Age Discrimination in Employment Act ("ADEA")
Generally a more rigorous and challenging certification process in which plaintiffs must satisfy several criteria to support their class action allegations	Certification requirements are often not as rigorous as those of a class action—§ 216(b) only requires that collective action members be "similarly situated"
Certification requirements under Rule 23(a) include: (1) Numerosity; (2) Commonality; (3) Typicality; (4) Adequacy of Representation	Most courts have adopted a two-tiered analysis in determining collective certification wherein step 1 is a lenient, pre-discovery analysis, and step 2 is a more demanding, post-discovery determination
Rule 23 class action members are "in" unless they affirmatively "opt out," which tends to lead to higher participation as compared to collective actions	§ 216(b) requires members of the collective action to affirmatively opt in by filing an individual consent to join, which tends to lower participation as compared to class actions

The plaintiff's burden at the conditional certification stage is quite low. A plaintiff need "merely provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist."[247] "[C]onditional certification in the first step requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan."[248] If they succeed in doing so, the court will allow notice to be sent to each putative member of the collective action, which gives them an opportunity to join the lawsuit. The case then proceeds as a conditionally certified collective action, containing the named plaintiff(s) and all "opt-ins" who chose to join the case, until defendants are again given the opportunity to challenge certification at the decertification stage. Many employers think this two-stage process gives EPA plaintiffs a significant strategic advantage because the relatively lenient standard applied at the conditional certification stage provides an easier route to expand a case into a class-like proceeding. And as any employer who has been involved in employment class action litigation knows, once a case is certified—even conditionally certified as a collective action—the burden, costs, and stakes of that litigation increase dramatically.

[247] *Bouaphakeo v. Tyson Foods*, 564 F. Supp. 2d 870, 892 (N.D. Iowa 2008) (quoting *Salazar v. Agriprocessors, Inc.*, No. 07-cv-1006–LRR, 2008 WL 782803, at *5 (N.D. Iowa Mar. 17, 2008)).

[248] *Id.* (quoting *Young v. Cerner Corp.*, 503 F. Supp. 2d 1226, 1229 (W.D. Mo. 2005)); *see also Dietrich v. Liberty Square, L.L.C.*, 230 F.R.D. 574, 577 (N.D. Iowa 2005) ("Courts have held that plaintiffs can meet this burden by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan that violated the law.").

The nature and extent of the evidence provided in support of conditional certification will often determine the outcome. But the burden is not high; just a few declarations from named or putative plaintiffs and a few policy documents will often suffice.[249] For example, in *O'Neil v. Bloomin' Brands Inc.*,[250] a former manager and managing partner at two locations of a nationwide restaurant chain, along with three opt-in plaintiffs, alleged that she and similarly-situated female employees were paid less than their male colleagues in the same positions. They sought conditional certification of a state-wide collective action of all female managers and managing partners at each of four restaurant brands owned and operated by the same employer and, among other things, equitable tolling of putative opt-ins' claims.[251] The court applied a relatively higher standard to deciding the issue of conditional certification, a so-called "modest plus" standard, which is sometimes applied in cases where the parties have already completed some significant discovery, as was the case here.[252]

The plaintiffs supported their claim with four affidavits from female managers who worked at two different restaurant chains, each of which alleged gender-based pay discrimination, as well as their own testimony of having witnessed such discrimination against other female managers.[253] They also introduced evidence of common compensation practices, such as "compensation ranges" that the employer established for its restaurants and "Manager Hiring Guidelines."[254] In response, the employer introduced testimony from its Senior Vice President of Human Resources and regional Joint Venture Partners, who oversee individual brands within a specified geographic region, who said that the employer's guidelines and other compensation policies do not mandate any particular pay decisions. The court rejected this argument, holding that, "even if JVPs are allowed to (and do) deviate from the guidelines, the guidelines still show that [employer] exerts influence over its many restaurants."[255]

Moreover, the court held that plaintiffs had put forward evidence to show that the proposed collective action was sufficiently similarly situated to warrant conditional certification: "As already noted, [plaintiff] submitted several affidavits from managers at different of Defendants' restaurants, and she further brings forward evidence of [employer] job postings that show extensive overlap between the job duties of a 'Managing Partner,' 'Restaurant Manager,' and 'Senior Manager' at locations in Illinois, Michigan, and Indiana.. . . These documents show that [plaintiff] at least arguably performed similar duties as a manager and a managing partner during her employment with [employer restaurant chain] as other employees with those titles, satisfying her more lenient burden at the first step of the certification inquiry."[256] The court held this was sufficient to meet even the "modest plus" standard and conditionally certified the proposed collective action. The court then denied Plaintiff's requests for equitable tolling of putative opt-ins' claims to account for the time it took the parties and the court to brief and decide conditional certification, because "the ordinary lapse of time between briefing and ruling," does not constitute "an extraordinary circumstance" warranting tolling. However, the court did equitably toll the limitations period from the date of its decision, holding that the "imposition of a delay, tilts slightly in favor of equitable tolling," because it was "partially but not entirely within [the parties'] control," and because "Defendants will not be unfairly prejudiced because [plaintiff's] complaint included collective allegations when she first filed it at the inception of this case."[257]

Similarly, in *Spatz v. Lee's Summit R-7 School District*,[258] a group of Field Technology Specialists, Elementary School Principals, and Elementary School Assistant Principals of a school district sought

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[249] *See, e.g., Bertroche v. Mercy Physician Assocs., Inc.*, No. 18-cv-59-CJW, 2018 WL 4107909, at *3 (N.D. Iowa Aug. 29, 2018) (granting conditional certification, holding that the plaintiff was not required to show at that stage that the wage disparity was due to discrimination, nor that other potential plaintiffs are "similarly situated"; rather, it was enough merely to show that other potential plaintiffs exist who may have been discriminated against based on their gender, which defendants' own data showed).

[250] *O'Neil v. Bloomin' Brands Inc.*, No. 22-cv-4851, 2023 WL 8802826 (N.D. Ill. Dec. 19, 2023).

[251] *Id.* at *1.

[252] *Id.* at *4.

[253] *Id.*

[254] *Id.* at *5.

[255] *Id.*

[256] *Id.*

[257] *Id.*at *8.

[258] *Spatz v. Lee's Summit R-7 Sch. Dist.*, No. 4:20-cv-448-RK, 2021 WL 5625408 (W.D. Mo. Nov. 30, 2021).

conditional certification of a collective of similarly situated female employees of the district. Noting the lenient standard applicable at the conditional certification stage, the court relied on grievances filed by four elementary Principals and four salary review requests filed by Assistant Principals, as well as sworn affidavits from four of the plaintiffs, and found these were sufficient to show that "the District had a common policy of crediting education, experience, and tenure differently when making salary placement determinations, depending on the sex of the applicant or employee."[259] And in *De Block v. Speedway LLC*,[260] a female general manager, who was seeking to represent a collective action of all female general managers nationwide, presented as evidence, among other things, her own deposition testimony and sworn declarations from five present or former female general managers, in addition to a few company forms, including the Compensation Manual.[261] The court held that those documents were sufficient at the conditional certification stage to meet the modest factual showing necessary to establish that individuals employed as general managers performed equal jobs: "Plaintiff has shown sufficient facts for a conditional finding that salaried Speedway general managers are similarly situated with regards to the allegations, both by having similar duties and responsibilities across Speedway stores and by being subject to a common compensation policy."[262]

The crux of the matter, however, is whether a plaintiff can establish a common policy that led to the alleged EPA violations. If an employer can marshal enough evidence of its own to show that no such common policy exists, then certification can be defeated, even at the conditional certification stage. For example, in *Winks v. Virginia Department of Transportation*,[263] an Architect/Engineer for the Virginia Department of Transportation alleged she was paid less than male employees and sought to conditionally certify a collective action of the approximately 60 Architect/Engineers, out of approximately 400, who are women. The court rejected plaintiff's bases for conditional certification, holding that "[w]ith over fifty-three different sub-categories, the employees in the Architect/Engineer I position have significant differences in crucial details like day-to-day responsibilities and skill requirements," and noting that the employer "maintains that it considers thirteen factors when considering an appropriate salary for each individual plaintiff," that it "uses a market-based pay system to ensure that salaries are competitive in each locality," and that "[e]ach local [employer] office determines a salary range that is competitive and individualized to the person and the position."[264] The Court concluded that "[t]he decentralized and individualized nature of pay determinations alone is sufficient to demonstrate the absence of a common policy implemented throughout all of [employer's] offices."[265]

For collective actions that would encompass plaintiffs who work in different physical "establishments"—different stores or office locations, for example—the critical questions for certification often center around corporate hierarchy and decision making. Where a plaintiff can establish that critical compensation decisions were made by one group in one location, courts may allow such a claim to proceed as a collective action. For example, in *Vasser v. Mapco Express, LLC*,[266] two female convenience store

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[259] *Id.* at *4. Conditional certification was denied with respect to the teacher plaintiffs, however, because they had not submitted any evidence to support their claim for collective relief and relied solely upon the allegations in the complaint. *Id.* at *4-5. "Teacher Plaintiffs do not support their claims with anything more than the averments in the Third Amended Complaint. . . . Teacher Plaintiffs' claims are unsupported by affidavits or other evidence showing personal knowledge, identifiable facts, or a legal connection that would indicate hearing their cases together with those of the Elementary School Assistant Principal and Technology Specialist Plaintiffs would promote judicial efficiency." *Id.* at 5.

[260] *De Block v. Speedway LLC*, No. 20-cv-824, 2021 WL 4818310 (E.D. Pa. Oct. 15, 2021).

[261] *Id.* at *2.

[262] *Id.* The court rejected the employer's argument that plaintiff could not have met her burden because it applied a facially neutral compensation policy, which the employer argued gave it a presumption of fairness that plaintiff must overcome. The court rejected this argument, holding that objection went to the merits of plaintiff's case and was not appropriately argued in opposition to conditional certification. *Id.* at *3.

[263] *Winks v. Va. Dep't of Transp.*, No. 3:20-cv-420-HEH, 2021 WL 2482680 (E.D. Va. June 17, 2021).

[264] *Id.* at *2-3.

[265] *Id.* at *3. The court also pointed to the recent decision in *Abe v. Virginia Department of Environmental Quality*, wherein the Fourth Circuit held that the use of salary history can justify a pay disparity: "This standard requires a specific showing that a plaintiff's reduced salary is due to her status as a female, and cannot be attributed to variations in prior salary history, job responsibilities and qualifications, location, or other factors." *Id.* (citing *Abe v. Va. Dep't of Env't Quality*, No. 3:20-cv-270, 2021 WL 1250346, at *4 (E.D. Va. Apr. 5, 2021)). Accordingly, an employer's use of salary history is not only permissible, but is also a factor that makes conditional certification of a collective action less appropriate.

[266] *Vasser v. Mapco Express, LLC*, No. 3:20-cv-00665, 2021 WL 2661136 (M.D. Tenn. June 29, 2021).

managers brought claims on behalf of a putative collective action comprised of female store managers who worked in hundreds of chain locations across several states. The court first held that the female employees had adequately alleged an EPA claim, despite the fact that comparable employees would have worked at other chain locations. The Court held that the plaintiffs had alleged that the employer has 'a rigid top down, hierarchical corporate structure,' with a 'top down wage policy,'" which was enough at the motion to dismiss stage to show that the multiple chain locations constituted a single establishment under the EPA.[267] The court relied on the same reasoning to conditionally approve a nationwide collective action.[268]

However, in *Goins v. United Parcel Service Inc.*,[269] a group of 18 named plaintiffs sought to bring a nationwide class action on behalf of all female employees of the employer for, among other things, sex-based wage discrimination. The complaint floundered at the pleading stage, however, because the court held that plaintiffs had failed to allege the facts necessary to show that each putative class or collective action member worked in the same "establishment," as required by the federal EPA. The court noted that the federal EPA allowed for "unusual circumstances," where employees who work in geographically separate locations could nevertheless be held to be working in the same establishment, but held that "plaintiffs fail to allege sufficient facts showing that the 'unusual circumstances' necessary to consider multiple sites part of the same 'enterprise' are present."[270] The court found, among other things, that plaintiffs failed to allege facts that would show that "the thousands of [employer] facilities nationwide, where employees are governed by several collective bargaining agreements and supervised by hundreds of thousands of managers, embody the 'unusual circumstance' that is the exception to the rule of EPA claims being limited to a single establishment."[271] Accordingly, the court dismissed the EPA and California EPA claims that were brought on behalf of a collective and a class, respectively.

Some courts will refuse to conduct the "establishment" analysis at all at the conditional certification stage. For example, in *Santiago v. Information Resources, Inc.*,[272] two plaintiffs sought conditional collective action certification of all female analysts, consultants, principals, vice presidents, and senior vice presidents who worked in or out of the employer's New York office. One of the Plaintiffs, a consultant, alleged she was paid 10% less than male consultants for the same work. She sought to represent a broad collective action of other female employees of various job titles, arguing that the employer subjected female employees to "biased treatment and standards due to their gender," and permitted "a culture that 'marginalized' women and limited their career opportunities."[273] The court noted the relatively lenient standard governing conditional certification, as well as the early procedural posture of the case,

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[267] *Id.* at *3.

[268] *Id.* at *4. The court stressed that a plaintiff's burden at the conditional certification stage is a "low bar," and credited Plaintiff's allegations that the employer exercised "'centralized, top-down compensation authority,'" which was an "'incubator for pay inequality.'" *Id. See also Finefrock v. Five Guys Ops., LLC*, 344 F. Supp. 3d 783, 789-91 (M.D. Pa. 2018) (holding that plaintiffs had provided a sufficient modest factual showing that the employer could be considered a single establishment for purposes of the EPA, pointing to the employer's nationwide job descriptions and policies, the frequency with which plaintiffs had transferred store locations, and the fact that final compensation decisions were approved by the central office, and also concluding that those same factors allowed for conditional certification of a nationwide collective action: "[b]ecause the focus of the inquiry at this conditional certification stage is not whether there was an actual violation of law, but rather whether the proposed Plaintiffs are similarly situated, the court finds that Plaintiffs have met their modest factual burden"); *Gambino v. City of St. Cloud*, No. 6:18-cv-869-Orl-31TBS, 2018 WL 5621517, at *8 (M.D. Fla. Oct. 11, 2018) (holding that city employees worked within the same "establishment," noting that the Eleventh Circuit recognizes that "[u]nder appropriate circumstances, multiple offices may constitute a single establishment for EPA purposes") (citing *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1979)).

[269] *Goins v. United Parcel Serv. Inc.*, No. 21-cv-08722-PJH, 2023 WL 3047388 (N.D. Cal. Apr. 20, 2023).

[270] *Id.* at *13.

[271] *Id.*

[272] *Santiago v. Info. Res., Inc.*, No. 20-cv-7688(AT)(SN), 2022 WL 476091 (S.D.N.Y. Feb. 16, 2022).

[273] *Id.* at *2. The employer, a data analytics and market research company, organized its employees into separate departments, each focused on a different client industry, and according to three progression levels based on their competencies and skills acquired through experience and training. Employees' salaries are based on factors such as business needs, employee duties and responsibilities, education, certification and licensure, training, and market salary reference data, and they are negotiable. Salary increases and bonuses are based on a performance evaluation system.

which prevented it from delving too deeply into fact or credibility determinations.[274] While the court acknowledged that there was some limited authority to suggest that courts must engage in the establishment analysis at the conditional certification stage, it held that this was an issue of fact and declined to do so. Instead, it limited its analysis to a review of the employer's website, which suggests that the employer had only one location in New York.[275] The court ultimately granted conditional certification, but only with respect to the consultant position.[276]

Even if plaintiffs are successful in obtaining conditional certification of a collective action, that collective action may later be decertified after discovery has revealed substantial differences among collective action members, which makes certification through trial untenable, or that compensation decisions are not as centralized as was claimed. In particular, if an employer can show that the relevant compensation decisions were made at the local level, or with significant input from local managers, that can sometimes defeat certification of sprawling collective actions that extend beyond a single establishment.

For example, in *O'Reilly v. Daugherty Systems, Inc.*,[277] the District Court for the Eastern District of Missouri conditionally certified a collective action of female consultants and support staff of an information technology consulting services company who complained that they were paid less than similarly situated male employees performing equal work. On the strength of Plaintiffs' evidence, the court concluded they had met their burden of providing "substantial allegations" that the employer "had a single decision, policy, or plan to pay female employees less than male employees doing the same work."[278] But the court later decertified the collective action after discovery revealed that the employees who opted into the case lacked the similarity necessary to proceed to trial as a collective action.[279] The court found that the evidence "does not support the existence of a single, FLSA-violating policy because [employer] did not impose a top-down compensation structure; rather, compensation decisions occurred at the branch level."[280] This was fatal to the plaintiffs' attempt to proceed collectively because, without that, the alleged violations of law were too varied to form the basis of a collective action: "Plaintiffs' compensation was determined by their supervisors in consultation with their branch managers, and the composition of the compensation depended on their department code, role, and title, which resulted in some plaintiffs receiving incentive bonuses while others could not. Thus, any purported compensation policy affected plaintiffs differently depending on role, title, location, etc."[281]

Even within a single establishment, a compensation policy that is particularized with respect to each collective action member can defeat certification, because each plaintiff's claims would rest on their

[274] The court held: "[the employer's] argument that Plaintiff cannot assert plausible EPA claims, 'much less' obtain conditional certification, fails," because, "Courts do not weigh the merits of a plaintiff's claim at the conditional certification stage of EPA litigation, and "[employer] also cannot defeat Plaintiff's motion by attacking her credibility," because, "on a motion for conditional certification, the Court will not make credibility determinations." *Id*. at *4.

[275] *Id*.

[276] Although the Plaintiff alleged she had conversations with other employees—including one who claimed to have access to the employer's payroll data—they had not provided sufficient detail about those conversations to show they had personal knowledge of any position other than her own: "Plaintiff's use of 'Consultants' to refer to all levels of [the employer's] employees, . . . also unnecessarily muddies the waters. It is unclear whether [Plaintiff's] near weekly conversations about pay disparity were only with consultants or also with employees of other levels. It is similarly unclear whether the female principal with access to [employer's] payroll data said that [employer] paid only female consultants less or *all* female employees less." *Id*. at *5 (emphasis in original).

[277] *O'Reilly v. Daugherty Sys., Inc.*, No. 4:18-cv-01283 SRC, 2020 WL 1557174 (E.D. Mo. Mar. 31, 2020).

[278] *Id.* at *3. Plaintiffs had presented the court with two declarations that alleged that the employer used a centralized decision-making process to set compensation for all employees, regardless of job title, salary grade, or geographic location. They had also presented an employee handbook and limited compensation data that showed that male employees were the top earners in some or all departments in the St. Louis, Atlanta, Minneapolis, Dallas, and Chicago branches. *Id.* at *2-3.

[279] *O'Reilly v. Daugherty Sys., Inc.*, No. 4:18-cv-01283 SRC, 2021 WL 4514293 (E.D. Mo. Sept. 30, 2021).

[280] *Id.* at *7.

[281] *Id.* Although the employer's corporate leadership was involved in approving total salary adjustments for each branch, individual compensation decisions were the result of a collaboration between local branch managers and the employee's supervisors: "supervisors provide compensation recommendations to the branch managers, who can then approve the recommendation without corporate approval." *Id.*

particular circumstances, rather than one overarching unlawful policy.[282] But if plaintiffs can show that the members of the collective action were subjected to the same discriminatory compensation structure, those claims may be allowed to proceed to trial on a collective basis. For example, in *Cartee-Haring v. Central Bucks School District*,[283] a schoolteacher alleged she was paid less than male teachers at the same level. The salaries of teachers in the school district at issue were set by a salary grid, which contained increasing "steps" along the vertical y axis and educational levels listed horizontally across the x axis. The steps reflected the number of years of experience the teacher had been teaching in public schools in Pennsylvania. The educational levels reflected the level of education the teacher had received.[284] Based on her 14 years of experience teaching in Pennsylvania public schools, the plaintiff should have been placed in step 15. But she had been placed in step 1. Seven other teachers in the district also testified that they were placed in the wrong step or educational levels when they began teaching for the district.[285]

The Plaintiff had never sought conditional certification of her putative collective action, but eventually sought final collective action certification of all female teachers who were employed by the district from 2000 to the present who were subject to the district's salary schedules.[286] The court held an evidentiary hearing, wherein eight teachers testified in favor of certification. The court found this sufficient to allow the case to proceed to trial as a finally certified collective action: "The testimony given at the evidentiary record made clear that Plaintiff established, by a preponderance of the evidence, that several women were similarly situated to Plaintiff in that they were also female educators, employed by the District, who were subjected to the same District Salary Schedules."[287]

Another issue that often comes up in the context of collective action certification is the concept of equitable tolling. Unlike a class action, the claims of putative members of a collective action continue to waste away until they join the case as opt-in plaintiffs. Under certain circumstances, the doctrine of equitable tolling can be used to grant putative opt-ins the tolling they would have received if they had joined the lawsuit at an earlier date. It is usually premised on an argument that putative members of the collective action were somehow prevented from receiving notice of the lawsuit or acting on their rights. Most courts have found the doctrine inapplicable to the claims of absent collective action members.

For example, in *Dixon v. Edward D. Jones & Co., L.P.*,[288] the employer filed a motion to dismiss the complaint and also sought to stay discovery pending the outcome of that motion. The court granted the stay, holding that the employer had shown a likelihood of success on the merits of that motion, and that class or collective-wide discovery would be a substantial hardship.[289] Plaintiffs sought equitable tolling,

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[282] *See, e.g., Bertroche v. Mercy Physician Assocs., Inc.*, No. 18-cv-59-CJW-KEM, 2019 WL 4307127, at *26-28 (N.D. Iowa Sept. 11, 2019) (granting the employer's motion to decertify the collective action where discovery revealed that the employer's compensation scheme was designed to account for each physician plaintiff's different medical and business decisions, which would result in different total compensation amounts, and so plaintiffs and opt-ins could not be similarly situated to each other for purposes of proceeding as a certified collective action: "the different ways in which physicians operate their medical practices can serve to differentiate them from one another such that they should not be able to proceed collectively," and the dissimilarities among plaintiff's medical practices weighed in favor of decertifying the collective action: "because the compensation scheme looks at the specific factual situation of each physicians' practice, pursuing this avenue would require each plaintiff to present evidence that is specific to her medical practice").

[283] *Cartee-Haring v. Cent. Bucks Sch. Dist.*, No. 20-cv-1995, 21-cv-2587, 2022 WL 3647819 (E.D. Pa. Aug. 24, 2022).

[284] *Id*. at *1.

[285] *Id*. at *4. Plaintiff also identified 26 male teachers who were placed at a higher step than their years of experience or education would warrant.

[286] *Id*. at *5.

[287] *Id*. at *6. The court also held that the alleged discriminatory payments were a continuing violation, meaning that the statute of limitations begins to run on the date of the last occurrence of discrimination, rather than the first. This meant that plaintiffs' statute of limitations was tied to their last paycheck, rather than to their date of hire, which is when the discriminatory payment allegedly began. *Id*. at *7. "Unequal payment constitutes a continuing violation when an 'employer's continued failure to pay the member of the lower paid sex the wage rate paid to the higher paid sex occurs. It is no defense that the unequal payments began prior to the EPA's statutory period." *Id*. (quoting 29 C.F.R. § 1620.13(b)(5)). The employer immediately sought to appeal the court's statute of limitations ruling, but the court held that it had not established its right to an interlocutory appeal. *Cartee-Haring v. Cent. Bucks Sch. Dist.*, No. 20-cv-1995, 21-cv-2587, 2022 WL 16553376 (E.D. Pa. Oct. 31, 2022).

[288] *Dixon v. Edward D. Jones & Co., L.P.*, No. 4:22-cv-00284-SEP, 2022 WL 4245423 (E.D. Mo. Sept. 15, 2022).

[289] *Id*. at *3.

arguing that the stay would prejudice putative members of the collective action because their claims would continue to waste during the pendency of the stay. But the court noted that this was an argument advanced for the benefit of parties who are not yet in the case; the plaintiffs who were already in the case would suffer no diminishment in their suit because their claims were already tolled. The court refused to consider the rights of absent parties: "Because possible future collective members are not 'non-moving parties' to this motion, the Court will not base its determination on speculation about how such unknown individuals might be affected by the stay."[290]

The court reasoned that equitable tolling was an extreme and disfavored remedy.[291] In order to obtain equitable tolling, a litigant must show that she has been pursuing her rights diligently, but that some extraordinary circumstance stood in her way.[292] But it is the person who is seeking the benefit of tolling who must show that; the court held it was impossible for the plaintiffs already in the case to show that for putative plaintiffs who had not yet joined: "In determining whether future putative plaintiffs have diligently pursued their rights, it would make little sense for the Court to consider the diligence of a plaintiff who has already filed suit and is not in need of tolling."[293] Moreover, there is nothing about a stay of discovery that would prevent putative members of the collective action from joining the suit: "Equitable tolling is to be granted rarely, and only in extraordinary circumstances. Plaintiffs have not identified any reason that a stay of discovery will bar any person with a viable EPA claim against Defendants from asserting that claim. Therefore, applying the doctrine of equitable tolling here would render the practice routine."[294]

2. Recent Cases Involving Class Action Certification

When plaintiffs proceed under state equal pay statutes, they must meet the more rigorous standards applicable to federal Rule 23 class actions or similar state-specific class action requirements. If they can meet those standards, however, they are often rewarded with a much larger class, because those classes are "opt-out" classes rather than "opt-in" classes. Under the collective action mechanism of the EPA, if putative members of the collective action do not opt into the lawsuit, then they are not a part of the collective action. Class actions, on the other hand, automatically include every employee who meets the class definition unless they affirmatively choose to opt out. When combined with the arguably more lenient standards for establishing a prima facie case that are available under some state equal pay statutes, this can provide powerful incentive for plaintiffs to pursue a class action under state law, rather than the federal EPA.

The most significant recent development in equal pay class action litigation was the class certification decision issued in a massive equal pay case, *Ellis v. Google, Inc.*[295] In that case, four named plaintiffs brought a class action alleging that their employer had systematically underpaid over ten thousand women employees as compared to men performing the same work. Plaintiffs' amended complaint narrowed their proposed class to female employees who worked in any of 30 separate positions, which plaintiffs categorized into six job "families."[296] They also alleged that the employer maintained a company-wide policy for setting starting salary that included consideration of an employee's prior salary. According to plaintiffs, that policy perpetuates a historical pay disparity that exists between men and women and

[290] *Id*. at *4 (quoting *Physicians Home Health Infusion, P.C. v. UnitedHealthcare of the Midwest, Inc.*, No. 4:18-cv-01959 PLC, 2019 WL 4644021, at *3 (E.D. Mo. Sept. 24, 2019)).

[291] *Id*. at *6.

[292] *Id*. at *7.

[293] *Id*.

[294] *Id*. at *9.

[295] *Ellis v. Google, LLC*, No. CGC-17-561299, 2021 WL 4169813 (Cal. Super. Ct. May 27, 2021).

[296] Am. Compl. ¶¶ 2-3, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Jan. 3, 2018). The court initially held that plaintiffs' class definition was simply too broad in that it failed to allege a common policy or course of conduct applicable to the entire class. Without such a policy, it was impossible to identify class members who had valid claims from those who did not, rendering plaintiffs' proposed class unascertainable. *See* Order Sustaining Def. Google Inc.'s Dem. to Pls.' Class Action Compl. At 4, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Dec. 4, 2017).

caused female employees to receive a lower starting salary than men in the same job position and level.[297]

The Superior Court of California, San Francisco County, granted class certification. The employer argued that even if employees shared the same job code, they were not necessarily performing substantially similar work because they work across many different domains and product areas. The court disagreed, basing its decision on the standard under the California EPA and the standard applied at the class certification stage. The Court held that the "substantially similar" standard does not require that jobs be identical or require exactly the same duties.[298] Moreover, at the class certification stage, it was enough that Plaintiffs and Google had proffered common evidence to argue their positions—directly contrary to each other, to be sure—but nevertheless "common" in the sense that both sides argued their positions largely through the use of expert opinion analysis of the employer's pay data.[299]The court held that "[t]he [California] EPA does not require that each and every plaintiff identify one specific individual as comparator."[300]

Citing a defendant's due process right to assert and prove individual affirmative defenses, the employer argued that the additional requirements that exist under California law to establish a "factor other than sex" defense would make it impossible to decide their affirmative defenses on a class-wide basis: "[employer] argues that it has a due process right to explain the bona fide reasons why certain employees are paid differently than others, including the critical nature of a particular role or the exceptional education or experience of a hire."[301] The court rejected this argument. While a defendant may have a right to assert its affirmative defenses, it does not have a due process right to litigate an affirmative defense as to each individual class member. Rather, the employer would have to prove its affirmative defenses using a statistical model of proof that relies on "representative testimony, sampling, or other procedures employing a statistical methodology."[302]

The *Ellis* decision is significant for many reasons, but from the perspective of equal pay litigation, it is perhaps most noteworthy in that it was certified under one of the newly enacted state law analogues of the federal EPA. And the court expressly based its decision on features of that new law, including the

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[297] Am. Compl. ¶¶ 40-41, *Ellis*, No. CGC-17-561299. The court upheld the class definition in the amended complaint, finding that "Plaintiffs allege that [employer] has a company-wide policy for setting compensation that includes considering an employee's prior salary in deciding her starting salary and/or job level," and that those allegations "are sufficient at this stage to demonstrate that common issues of law and fact predominate over individualized questions." Order Overruling Def.'s Dem. to First Am. Compl. and Den. Alternative Mot. to Strike, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Mar. 27, 2018).

[298] *Ellis*, 2021 WL 4169813, at *4.

[299] *Id.* at *5. Remarkably, the plaintiffs' theory that the employer's policy of using prior salary history to set starting salaries did not factor heavily into the court's decision as to the California EPA claims. But the court did rely on that policy to certify the disparate impact claims brought under the California Fair Employment and Housing Act. Under that theory of discrimination, an employer violates the law if it implements a facially neutral policy that has a disparate impact on employees of one gender. The court held that the use of prior salary history was that facially neutral policy: "Plaintiffs contend that they will be able to show, based on common evidence, that [employer's] pattern and practice of assigning women to lower salary levels at the outset of their employment than it assigned comparably educated and experienced men had a disparate impact on women because women had lower prior pay." *Id.* at *6.

[300] *Id.* at *8. As noted above, this issue is far from certain under the federal EPA. The *Ellis* court cited a Sixth Circuit decision, *Beck-Wilson v. Principi*, in support of this point. But in that case, the court specifically noted that "[e]ach of the plaintiffs has identified a specific male . . . who she alleges is performing substantially equal work but who is receiving higher pay for his work." 441 F.3d 353, 363 (6th Cir. 2006). The Sixth Circuit also held that an EPA claim does not necessarily fail just "because each [plaintiff] has not identified 'one specific individual who constitutes a *perfect* male comparator.'" *Id.* (quoting *Wheatley v. Wicomico County*, 390 F.3d 328, 334 (4th Cir. 2004) (emphasis in original). But punting on the question of whether two employees are *sufficiently comparable* is quite a bit different than what the *Ellis* court appeared to hold, i.e., that it is not necessary for each plaintiff to identify specific comparators to establish a prima facie case.

[301] *Ellis*, 2021 WL 4169813, at *5. The California version of the EPA imposes some additional requirements (as compared to the federal EPA) on employers who hope to rely on the EPA's catchall "factor other than sex' affirmative defense. In California and several other states, an employer can only assert that a wage disparity is due to a factor other than sex if that factor is, among other things, not itself derived from a sex-based differential in compensation, is job related, and is consistent with business necessity. *See* Cal. Lab. Code § 1197.5(a)(1)-(3).

[302] *Ellis*, 2021 WL 4169813, at *10. This is a hotly contested issue of class action procedure driven by competing interpretations of the Supreme Court's seminal decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

arguably different test for determining proper comparators, i.e., the "substantially similar" standard as opposed to the "equal work" standard that appears in the federal EPA.

Other California courts have also granted class certification to equal pay plaintiffs litigating under California's revised equal pay statute, although not necessarily basing their opinions on any new features of that law. Recently, in *Rasmussen v. The Walt Disney Co.*,[303] the Superior Court of California for Los Angeles County certified a class of women employed by any Disney-related company in California within a certain selection of job codes or job families listed in the class definition. Although the court mentioned the California EPA's "substantially similar" standard, it did not base its certification decision on that standard, instead holding that, "[w]hether comparison [sic] drawn by Plaintiffs meets the substantially similar requirement will be for the ultimate fact finder to resolve."[304] Moreover, resolution of the case would involve weighing the parties' competing expert analyses, which the court reasoned, "would be common evidence applicable to the class."[305] The employer argued that its affirmative defenses would not be amenable to resolution by common expert evidence, as it would have the opportunity with respect to each member of the class to show that any alleged wage disparity was attributable to bona fide, gender-neutral factors. But the court held this was a problem of manageability, rather than the issues of commonality and predominance with which class certification is concerned. This question could therefore be put off for another day: "While the Court will further address the manageability issue later, the predominance of commonality factor stands as no impediment to class certification of the EPA claims."[306]

Notably, the court denied class certification under California's state-law analogue to Title VII, holding that plaintiffs' disparate treatment and disparate impact theories would require them to establish that a single policy or practice caused the alleged discrimination, which was not amenable to the same forms of common proof as their EPA claim: "in order to demonstrate commonality for the FEHA claims, it is not enough for Plaintiffs to show they disproportionately are paid less than men like under the EPA claims. Instead, Plaintiffs must show that the reason behind that discrimination is the same for all class members, that is causation; in other words, to establish a prima facie case under the FEHA theory, Plaintiffs must not only establish that the neutral practice and the adverse impact is amenable to common proof, but also that the disparity was caused from the specified practice."[307] As with the *Ellis* case, plaintiffs attempted to do so by pointing to an alleged common policy of relying on prior salary (or salary expectations) to set starting pay, which plaintiffs argued worked to the detriment of already wage-disadvantaged or otherwise undercompensated women. But plaintiffs hoped to rely on statistics to make this case for them, which the court held they could not do: "by using a statistical analysis as primary evidence of disparate impact, Plaintiffs' argument essentially relies on bootstrapping; that is, the impact provides the common thread as to the reason for the discrimination."[308] Accordingly, class certification was denied with respect to those claims.

Of course, the class certification analysis has long been a part of wage discrimination cases brought under Title VII and its state law analogues. For example, in *Abbananto v. County of Nassau*,[309] the District Court for the Eastern District of New York certified a class pursuing sex-based wage discrimination claims, even though the class was comprised of both women and men. In that case, male and female Police Communications Operators ("PCOs") and Police Communications Operators Supervisors ("PCOSs") alleged that their predominantly female workforce was paid less than the predominantly male Fire Communication Technicians ("FCTs") and Fire Communications Technicians Supervisors ("FCTSs"), despite performing nearly identical work.[310] The court found that common questions bound the class together, even though the class was made up of both male and female PCOs and PCOSs.[311] The court

[303] *Rasmussen v. The Walt Disney Co.*, No. 19STCV10974, 2024 WL 454493 (Cal. Super. Ct. Jan. 30, 2024).
[304] *Id.* at *4.
[305] *Id.*
[306] *Id.* at *5.
[307] *Id.*
[308] *Id.* at *6.
[309] *Abbananto v. Cnty. of Nassau*, No. 19-cv-1102(GRB)(JMW), 2022 WL 326982 (E.D.N.Y. Feb. 3, 2022).
[310] *Id.* at *1.
[311] *Id.* at *6.

held that Title VII applies not just to those discriminated against directly, but also to those who suffer the effects of discrimination directed at others: "Under Plaintiffs' theory of this case, Defendant's challenged system applies to—and therefore aggrieves—*all*, rather than just female, PCOs and PCOSs, creating common questions sufficient to satisfy commonality."[312]

Statistics often play a critical role in class or collective certification decisions. For example, in *Ahad v. Board of Trustees of Southern Illinois University*,[313] the court initially conditionally certified a collective action of female faculty physicians, but later denied plaintiff's request for class certification of the same claims under the Illinois Equal Pay Act, Title VII, and the Illinois Civil Rights Act.[314] Plaintiff's expert had shown that female physicians were paid less at a statistically significant level than similarly situated male physicians.[315] But the court held that this statistical disparity, by itself, was not enough to warrant class treatment; plaintiff must establish the "glue" that can produce a common answer to the questions of whether and why compensation for female physicians is lower than male physicians.[316] The court noted that plaintiff had "not presented any argument that objective factors considered by the Department Chairs or the Dean in determining compensation resulted in the pay disparity."[317] Plaintiff's statistical evidence alone, "does not and cannot show whether a common cause existed regardless of the statistically significant showing of pay disparities based on gender."[318] Later in the case, the court decertified the collective action as well, holding that plaintiff had failed to identify a common policy that caused the alleged discrimination.[319]

A recent case, *United Probation Officers Association v. City of New York*,[320] demonstrates the challenges putative class action plaintiffs face when attempting to bring such claims on a class basis, and the use

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[312] *Id. But see Haggan v. Google, LLC*, No. 518739/2022, 2023 WL 7130793, at *3 (N.Y. Sup. Ct. Oct. 26, 2023) (denying final approval of class action settlement that combined gender and race-based pay discrimination claims: "Here, the proposed class representatives . . . have failed to demonstrate that their gender discrimination claims are typical of the proposed class and/or how they can effectively represent proposed class members with whom they lack commonality, such as Black, LatinX, Native Americans or Alaskan male [employer] employees with potential racial-based discrimination claims"); *Miller v. City of N.Y.*, No. 15-cv-7563, 2018 WL 2059841, at *4-5 (S.D.N.Y. May 1, 2018) (dismissing the claims of a class of over 2,000 female school crossing guards who alleged they were paid less than traffic enforcement agents due to the "stark differences in training, job requirements, and job responsibilities" between the two positions," noting that (1) traffic enforcement agents undergo ten times more training than school crossing guards; (2) they are full-time employees who can be required to work nights, weekends, and overtime, whereas crossing guards are part-time employees who work no more than five hours per day; (3) they have greater responsibilities, including issuing summonses and testifying in court; and (4) they work at different, often busier intersections and sometimes at night); *Bloise v. City of N.Y.*, 768 F. App'x 103, 138 (2d Cir. 2019) (upholding *Miller*, concluding: "the [school crossing guard] and [traffic enforcement agent] jobs are not substantially equivalent, as [traffic enforcement agents] must fulfill more requirements, undergo more training, perform all responsibilities, and labor under different and more hazardous working conditions").

[313] *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-cv-03308, 2017 WL 4330377 (C.D. Ill. Sept. 29, 2017). The court was satisfied that plaintiffs had met their minimal burden to obtain conditional certification at step one of the process because all faculty physicians performed the same job duties involving patient, teaching, and administrative functions. *Id.* at *4.

[314] *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 15-cv-3308, 2018 WL 4350180 (C.D. Ill. Sept. 12, 2018).

[315] *Id.* at *9.

[316] *Id.* at *10.

[317] *Id.*

[318] *Id.* at *11 (emphasis in original).

[319] *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 15-cv-3308, 2019 WL 1433753 (C.D. Ill. Mar. 29, 2019). The plaintiff was allowed to proceed to trial on her individual claim; the court later held, among other things, that "triable issues of fact exist regarding whether [plaintiff's] and her male comparators' jobs had a 'common core' of tasks," and that the employer had not carried its burden to establish that its merit-based system was a sex-neutral reason for the disparity in pay. *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 15-cv-3308, 2021 WL 6118239, at *4, 6 (C.D. Ill. Dec. 23, 2021). *See also Knox v. John Varvatos Enters., Inc.*, 282 F. Supp. 3d 644 (S.D.N.Y. 2017). In *Knox*, the District Court for the Southern District of New York conditionally certified a collective action of female sales associates. The defendant, a retailer with 22 stores throughout the United States, was alleged to have discriminated against female sales associates by providing male sales associates—and only male sales associates—a $12,000 annual allowance to purchase the Company's branded clothing to wear to work. *Id.* at 651. The district court held that the plaintiffs had "easily made" their modest factual showing establishing that they and the putative collective action of women sales associates are similarly situated for purposes of conditional certification. *Id.* at 654. Critical to the court's analysis was the fact that plaintiffs were able to point to a written dress policy that was applied across all 22 retail locations, which stated that all male employees received a clothing allowance. *Id.* at 654-55. A trial was held on plaintiffs' claims in early 2020. On January 12, 2021, the Court affirmed the verdict of the jury in favor of plaintiffs and refused to grant defendant judgment as a matter of law or a new trial on critical issues of liability, but did allow for a new trial on issues of compensatory and punitive damages. *Knox v. John Varvatos Enters., Inc.*, No. 17-cv-772 (GWG), 2021 WL 95914 (S.D.N.Y. Jan. 12, 2021).

[320] *United Probation Officers Ass'n v. City of N.Y.*, No. 21-cv-0218 (RA), 2022 WL 875864 (S.D.N.Y. Mar. 24, 2022).

they may attempt to make of statistics and other expert evidence to overcome those challenges. In that case, a union that represents hundreds of current and former probation officers, and five female probation officers, sought to represent a class of probation employees, alleging that female probation officers of color were discriminated against in terms of pay and promotions in violation of title VII.[321] The employer's collective bargaining agreement with the union set minimum and maximum salaries for probation officers at different levels, established a schedule governing pay increases, and set pay rates for new hires. Plaintiffs alleged that the employer had kept probation officers' pay at the lowest end of the salary range and had reduced their opportunities for paid overtime.[322] They also alleged, among other things, that male probation officers were paid more than female probation officers at each tier of that position. Plaintiffs supported that allegation with the findings of an expert, who purportedly found that white male probation officers earned more than their counterparts, but admitted that those results did not take into account the officers' titles.[323] The gravamen of plaintiffs' complaint was that white males with the same tenure as probation officers, and the same educational levels, were promoted to higher and better-paid positions as supervising probation officers at a higher rate than women of color.[324] The employer sought dismissal.

The court first held that Plaintiffs could not rely on the continuing violation doctrine to extend the statute of limitations applicable to their promotion claims: "an 'allegation of an ongoing discriminatory policy does not extend the statute of limitations where the individual effects of the policy that give rise to the claims are merely discrete acts.'"[325] Looking to the merits, the court held that plaintiffs had failed to allege a discriminatory promotion claim because their statistics were based on a comparison of the wrong populations. Only Probation Officers who achieve one of the three highest scores on an exam are eligible for promotion. "If Plaintiffs had alleged that female Probation Officers of color who were not promoted were *eligible* for such promotions, these statistics might well provide the foundation for a viable claim. But without any such allegations, the Court cannot rely on these statistics alone to infer either a pattern or practice of discrimination or that any disparate impact on women of color was *caused* by a particular policy or practice."[326]

The court held that plaintiffs' pay discrimination claims were timely because they had received paychecks within the limitations period, and each payment was a discrete discriminatory act.[327] Turning to the merits, the court held that plaintiffs had failed to allege any kind of discriminatory pay claim, whether based on discriminatory treatment or adverse impact theories, because they failed to allege facts sufficient to show they were paid less or that they performed jobs equal to their male comparators: "Merely stating that the Administrative Staff Analyst job requires less 'skill, knowledge and ability' articulates just part of this requirement: it does not provide a sufficient description of the responsibilities, requirements, or working conditions of Administrative Staff Analy[sts] that would allow the Court to plausibly infer that they perform equal work to Probation Officers."[328] Even with respect to Probation Officers who share the same title, Plaintiffs failed to allege anything more than conclusory assertions that the court was not bound to accept as true.[329] Nor could plaintiffs' statistics salvage those claims, because those statistics did not break salary disparities down by title: "Plaintiffs' expert economist concluded that the pay disparities he identified were largely attributable to race and gender disparities in job title—indeed, that job title disparity by race and gender *results in* a salary disparity by race and gender."[330]

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[321] *Id*. at *1.

[322] *Id*. at *2.

[323] *Id*. at *3.

[324] *Id*.

[325] *Id* at *5 (quoting *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 157 (2d Cir. 2012)). The court held that doctrine was inapplicable to class-wide pattern-or-practice claims that are based on discrete acts, as they were in this case, because "[p]ay discrimination is a discrete act that occurs each time an individual is paid wages that have been lowered as a result of a discriminatory practice or decision." *Id.* And failure to promote is also treated as a discrete act even if it occurs as part of a class-wide pattern or practice. *Id.*

[326] *Id*. at *7 (emphasis in original).

[327] *Id*.

[328] *Id*. at *8.

[329] *Id*. at *9.

[330] *Id*. at *10.

C. Disproving Discrimination: Employers' Affirmative Defenses

Under the burden-shifting framework applicable to the federal EPA, if a plaintiff successfully establishes a prima facie case, the burden shifts to the employer to establish one of the four statutory affirmative defenses, *i.e.*, that the pay disparity is justified by: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any other factor other than sex.[331]

1. Proving A Factor Other Than Sex

Under the federal EPA, the most common factor relied upon to justify a pay disparity is the catchall "factor other than sex" defense. Employers often point to factors such as levels of education, training, or other qualifications, productive output or performance, and other individually specific differences as factors that justify pay disparities. The defense is intentionally broad, and so the factors that employers raise under the framework of this defense tend to be quite broad and varied as well.

Employers often attempt to justify pay disparities by pointing to their compensation systems, arguing that pay disparities are the result of where employees stand within the compensation hierarchy. For example, in *Borovicka v. United States*,[332] a female attorney in the Federal Deposit Insurance Corporation's legal division alleged she was discriminated against when her employer set her base salary lower than that of a male colleague.[333] The court concluded that the employe had adequately justified the salary differential because the initial and final salary offers made to plaintiff and her alleged comparator "were consistent with the FDIC's Pay Administration Program and implementing Guide to Pay Setting, as well as the agency's Standard Operating Procedures (SOP) for Pay Setting Procedures for Corporate Graded (CG) Positions (SOP Pay Setting Procedures)."[334] Those guidelines generally recommended setting new employee's salaries at the minimum end of a designated range, but allowed for some discretionary upward adjustments to account for relevant experience. The evidence established that these procedures were followed. Both plaintiff and her comparator were initially offered salaries at the low end of the advertised pay range and then given an opportunity to provide documents justifying a higher starting salary.[335] The evidence showed that plaintiff's pay was set due to a list of well-documented gender-neutral factors, including guidance from Human Resources personnel, plaintiff's previous pay rate, and her relative lack of government experience and experience in federal sector labor and employment law.[336] The court concluded that the employer "met its burden of amply demonstrating [plaintiff's] starting base salary was decisioned on properly asserted and contemporaneously documented gender-neutral considerations."[337]

Similarly, in *Niekamp v. State of Missouri*,[338] The court found in favor of the employer because plaintiff's pay was set by the state's Office of Administration's Uniform Classification and Pay System. That system

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[331] 29 U.S.C. § 206(d)(1).

[332] *Borovicka v. United States*, 168 Fed. Cl. 534 (Fed. Cl. 2023).

[333] *Id.*at 543. Although the employer argued that plaintiff had failed to establish a prima facie case because she could not identify adequate comparators who were paid more than her, the court ignored those arguments because the employer had ignored them in its opening brief and had moved for summary judgment only with respect to its affirmative defenses. Accordingly, the only issue in dispute was whether the employer had met its burden to establish that the alleged pay disparity was due to a factor other than sex.

[334] *Id.* at 544.

[335] *Id.*

[336] *Id.* at 545.

[337] *Id.* at 546.

[338] *Niekamp v. State of Mo.*, No. 20-cv-04075-WJE, 2022 WL 4543207 (W.D. Mo. Sept. 28, 2022). In that case, a female investigator in the state's prosecution unit alleged an EPA violation due to the fact that she was paid less than her male predecessor in the same role. Although her claim was based on Title VII, the court applied the principles of the EPA to resolve her claim: "A gender-based discrimination claim under Title VII, 42 U.S.C. §§ 2000e-2(a)(1) . . . is governed by the standards of the Equal Pay Act, 29 U.S.C. § 206(d)." *Id.* at *4.

established salaries for each position and set initial pay rates based on qualifications and permanent position-related factors, such as working conditions or physical location of work, and/or recruitment or staffing needs.[339] Although plaintiff was paid less than three other male colleagues, those employees were at a different pay grade according to the salary system: "Defendants have adequately proved that [plaintiff] was at a lower pay grade than those three male colleagues because of her prior work experience and as the result of working in different divisions."[340] And in *Akerson v. Pritzker*,[341] the Bureau of the Census posted a recruiting bulletin that sought candidates to be Partnership Specialists at four salary grade levels. The bulletin specified that candidates must submit separate applications for each grade level.[342] The plaintiff in that case applied only for a position at the second-lowest pay grade. Her chosen comparator applied for the same position at a higher pay grade. He was paid more even though his position involved substantially the same, if not identical, responsibilities.[343] The court held that "Defendant's employment practice of hiring and compensating individuals based on the job grade he or she applies for constitutes a legitimate factor independent of sex."[344]

However, in *Kent-Friedman v. New York State Insurance Fund*,[345] a female Supervising Attorney for a state agency, who was temporarily appointed to an Acting Assistant Director position, alleged she was paid less than the person who was eventually hired into the same role as a permanent Assistant Director, in violation of the EPA. The employer argued that the pay disparity was justified by the fact that the agency did not have the discretion or authority under state law to increase plaintiff's salary, because she officially still held the title of Supervising Attorney.[346] The court rejected this argument outright, noting that the employer could not hope to rely on state law restrictions to justify a pay disparity that was illegal under federal law: "Even if [agency] did not have discretion under *state* law to increase [plaintiff's] salary for acting as Assistant DCI Director while she remained in a competitive class job, *federal* law forbids [agency] from paying women employees less than men on the basis of mere job titles."[347]

The employer argued that it had applied the state law in good faith and in a gender neutral manner, noting that several employees, both male and female, had served in various roles in acting capacities without receiving any increase in pay or official change to their civil service title.[348] The court rejected this argument as well, holding that it "amounts to a claim that two prima facie EPA violations cancel each other out if they are inadvertent and are committed respectively against a woman and a man."[349] Although the court agreed that the uniform application of gender-neutral personnel policies can constitute an acceptable factor other than sex, it can only do so if it evidences that a pay differential is the result of some other non-sex factor. In other words, the uniform application of a policy must be a mechanism through which some other gender-neutral factor operates, e.g., a policy that pays more for certain types of experience or that treats employees differently based on date of hire. The court pointed out the absurdity of the contrary conclusion, reasoning: "Indeed, if the uniform application of a facially neutral policy could be an end in itself for EPA purposes, a policy whose inadvertent result is less pay for women

[339] *Id*. Plaintiff argued that she should have been paid more than her predecessor because she had more transferable experience from working in the state's Attorney General's Office. But the court found that her experience did not make her eligible for within-grade salary advancement per the operation of the salary system, and held that the court would not sit as a "super-personnel department that reexamines an entity's business decisions." *Id* (quoting *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003)).

[340] *Id*.

[341] *Akerson v. Pritzker*, No. 12-cv-10240-PBS, 2021 WL 2295522 (D. Mass. June 4, 2021).

[342] *Id.* at *1.

[343] *Id.* at *9.

[344] *Id.* at *10. The plaintiff had not asserted that she was denied the opportunity to apply for her position at a higher grade level, and she plainly had not. Moreover, the employer was able to show that there was at least one female hired into the same position at the same pay grade as plaintiff's chosen comparator. *Id.* at *9.

[345] *Kent-Friedman v. N.Y. State Ins. Fund*, No. 18-cv-4422(VM), 2023 WL 6292693 (S.D.N.Y. Sept. 27, 2023).

[346] *Id.* at *12.

[347] *Id.* at *13.

[348] *Id.* at *16.

[349] *Id.*

would be immune from the EPA for no other reason than that the policy was followed, even if no factor other than sex could explain its discriminatory effect."[350]

While arguments based on corporate hierarchy or classification systems can be successful, it is critical for the employer to adhere rigorously to its system. At least one court recently held that an employer's honest mistake in classifying its employees will not serve as a defense to an equal pay claim.[351] Moreover, the reliance on a banded compensation system as a "factor other than sex" is sometimes undermined by the fact that most compensation systems allow for a level of discretion within different pay bands, and some allow the system to be bypassed entirely. In those cases, courts will sometimes find that employers have not established that the compensation system fully explains the pay disparity.

For example, in *Barthelemy v. Moon Area School District*,[352] nine male public school teachers alleged they were paid less than similarly situated female teachers in the same school district. The crux of the employer's defense was the step-wise compensation program, which was determined by a collective bargaining agreement.[353] Although the employer school district was able to show with respect to each comparator that there were various reasons why those comparators may have been hired above-step, the court could not say, at the summary judgment stage, that any of those proffered reasons actually justified the wage disparity.[354] And in *Melgoza v. Rush University Medical Center*,[355] the employer argued that the pay discrepancy alleged by an Assistant Vice President of a medical center was due to factors other than sex; in particular, it argued that it pays Assistant Vice Presidents according to a pay grade system that is determined based on job description, responsibilities, skills, and education.[356] However, the court found that the pay grade system did not explain the pay differential: "[e]ven assuming for the sake of argument that [employer's] grading system applied to all AVPs, [employer] does not explain how that system resulted in the actual salary differentials."[357]

But where the evidence clearly demonstrates a business-related justification for how discretion was applied in setting compensation within a banded compensation system, the use of that discretion should not preclude an employer from relying on that compensation system as a defense to an equal pay claim.

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[350] *Id.* at *17.

[351] In *Johnson v. Canyon Cnty., Idaho*, No. 1:19-cv-364-BLW, 2020 WL 5077731 (D. Idaho Aug. 27, 2020), four female Licensed Practical Nurses alleged they were paid less than their male counterparts for equal work. The employer argued that the salary differential was the result of a mistake, whereby one of plaintiffs' male comparators was assigned a code for a Registered Nurse when he was hired and was paid more as a result of that mistake. The court held that the "factor other than sex" affirmative defense had to be read in light of the other three affirmative defenses, which all relate to job experience, job qualifications, and job performance, and were therefore exceptions that were job-related. But the employer's mistake could not be considered job-related: "Blind adherence to a classification number is actually the opposite of a job-related factor because it is blind to anything akin to job experience, qualifications, or performance." *Id.* at *3. *See also Spiewak v. Wyndham Destinations, Inc.*, No. 20-cv-13643 (KMW-EAP), 2023 WL 869309, at *5-6 (D.N.J. Jan. 26, 2023) (holding that employer that paid plaintiff on an hourly basis, when it had paid her predecessor in the same position on a salary basis, had failed to establish its affirmative defense, even though the employer argued that plaintiff's predecessor's salary was a mistake: "Succinctly stated, while Defendant contends that it erroneously paid [predecessor comparator] a salary, testimony revealed that neither [supervisor nor HR manager] could confirm when the 'erroneous' salary payments began or ended. Moreover, while Defendant claims the salary issue was corrected, the cited record evidence, [HR manager's] testimony, contradicts this contention").

[352] *Barthelemy v. Moon Area Sch. Dist.*, No. 2:16-cv-00542, 2020 WL 1899149 (W.D. Pa. Apr. 16, 2020).

[353] *Id.* at *2. According to the district's compensation policies, individual teachers were placed into different "steps" and "lanes," depending on their experience and level of education. There were also unwritten guidelines for lateral hires that would allow, in some circumstances, for individual teachers to be hired "above-step." The employer articulated five reasons that might justify hiring a teacher with an above-step compensation: (1) an "acute" need to hire teachers with certain certifications or skillsets; (2) a need to fill sudden vacancies; (3) a need to secure the best possible "rock star" teachers; (4) a candidate's excellent credentials or experience and their ability to negotiate a higher salary; and (5) the economic reality at the time of hiring. *Id.* at *4.

[354] However, those discretionary elements meant that plaintiffs were not entitled to summary judgment either: "While this hiring method seems to permit a level of discretion that could allow for sex-based discrimination, it is the province of the jury to determine when, how, and if at all the District did *in fact* base its decisions on nondiscriminatory factors." *Id.* at *21 (emphasis in original).

[355] *Melgoza v. Rush Univ. Med. Ctr.*, No. 17-cv-6819, 2020 WL 6565235 (N.D. Ill. Nov. 9, 2020).

[356] *Id.* at *7. The court found that some positions were not graded. Rather, the medical center sometimes identified a position as "admin/tech manager 28," which did not have any minimum or maximum salary associated with it. *Id.*

[357] *Id.*

For example, in *Lochner v. Wisconsin Department of Agriculture, Trade, and Consumer Protection*,[358] a state civil service employee alleged she was discriminated against with respect to compensation because she was paid less than comparable male employees. The crux of her dispute was that some male employees with less seniority were hired at higher starting salaries under the state's broadbanding pay structure, while she was repeatedly denied discretionary equity or retention adjustments to keep her salary on par with her peers.[359] The state's broadbanding program allowed state agencies some latitude with respect to setting salaries for new hires, rather than requiring a single, rigid minimum rate. The program was intended to give state agencies a better ability to attract new hires by paying them higher starting salaries based on factors such as, special need, private competition, and unique qualifications.[360]

The problem with this approach is that it can lead to "salary compression," meaning that "newer staff are paid similar to or higher than long-term staff; and no mechanism within the state compensation system existed to go back and re-set the salaries of all employees in the class."[361] The state attempted to address this problem by allowing the payment of discretionary equity and retention adjustments, but there was a finite amount of money allocated to such raises, and they were supposed to be granted on the basis of seniority and in consideration of the impact such awards may have on internal equity.[362] This resulted in the plaintiff being denied many such awards, even though it meant her salary was falling below other, newer hires.[363] Nevertheless the court found in favor of the employer, holding that it had met its burden to show that broadbanding was required in order to meet its recruitment needs: "Even if the court were to engage in second-guessing with the benefit of hindsight, [employer's] demonstrated success in recruiting and filling the open WMPSS positions with exceptionally qualified recruits would appear to have vindicated [employer's] judgment."[364] Moreover, the court found that salary compression that resulted from broadbanding was not inherently discriminatory because senior male colleagues were impacted similarly or worse. "On this record, had [plaintiff] been a man and everything else remained the same, neither [plaintiff's] nor the new hires' starting salaries would have been different."[365]

Economic concerns, such as competitive pressures to attract top talent, as well as financial difficulties and corporate cutbacks, are often relied upon as factors other than sex. For example, in *Williams v. Alabama State University*,[366] the former Athletic Director for a university alleged that her former employer violated the federal and Alabama EPA when it hired her successor, a male, at a higher salary than she had received when she served in that role.[367] The employer had listed the position with the same salary that plaintiff had been paid, but also mentioned that it was "negotiable." The new Athletic Director demanded a higher salary plus incentives; the employer relented on the salary request and some, but not all, of the incentive requests.[368] The employer argued that the incoming Athletic Director's more advanced education (a Ph.D.) and experience justified the higher salary; plaintiff argued that those considerations were irrelevant to the position.

The court sided with the employer, holding that "[u]nder the EPA, education and experience are 'acceptable factors other than sex' if they are not used as 'pretext for differentiation because of gender.'"[369] While plaintiff was free to challenge the employer's rationale for that decision when arguing pretext, the employer's burden was only to "demonstrate by the preponderance of the evidence that 'sex

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[358] *Lochner v. Wisc. Dep't of Agric., Trade, and Consumer Prot.*, No. 19-cv-878-wmc, 2022 WL 3355262 (W.D. Wisc. Aug. 15, 2022).

[359] *Id*. at *1.

[360] *Id*. at *2.

[361] *Id*. at *3.

[362] *Id*. at *10.

[363] *Id*.

[364] *Id*. at *9.

[365] *Id*. at *10.

[366] *Williams v. Ala. State Univ.*, No. 2:22-cv-48-ECM, 2023 WL 4632386 (M.D. Ala. July 19, 2023).

[367] *Id.* at *2-3.

[368] *Id.* at *3.

[369] *Id.* at *4 (quoting *Irby v. Bittick*, 44 F.3d 949, 956 (11th Cir. 1995)).

provided no basis for the wage differential.'"[370] Because the employer had presented evidence of objective and legitimate factors other than sex justifying the pay differential, it had met its burden to establish a "factor other than sex" defense. Plaintiff attempted to establish pretext, arguing that the incoming Athletic Director's education and work experience were not relevant to the position. But the court held that her opinion was irrelevant because it was clear that her employer had, in fact, relied upon those factors in setting starting salaries: "it is immaterial whether [plaintiff] agrees with the Defendants' subjective business decision to consider [incoming Athletic Director's] Ph.D. and work experience in setting his salary. No evidence rebuts '*the fact*' that they considered [his] higher degree and greater relevant work experience than [plaintiff's]."[371]

Similarly, in *Nazinitsky v. Integris Baptist Medical Center, Inc.*,[372] the court found that the employer's practice of paying physicians based on the market value range of their medical specialty was a legitimate factor other than sex.[373] Although that alone did not account for the entire salary difference—because each physician is compensated within a range associated with their medical specialty—that, coupled with the physicians' different levels of experience, added up to a bona fide factor other than sex: "[plaintiff's] specialty placed her in a lower compensation range than her male comparators—creating a wage disparity—and her lack of experience increased that disparity even further."[374]

Legitimate economic concerns can even include an employer's concern about internal pay equity. In *Korty v. Indiana University Health, Inc.*,[375] the court held that an employer's own attempts at promoting internal pay equity could be a "factor other than sex" defense. In that case, a specialist medical staff quality and peer review nurse at a statewide healthcare organization alleged pay discrimination when her employer hired her replacement at a higher salary.[376] The court first held that it was entirely reasonable for the employer to have considered the replacement's prior salary in its salary offer.[377] The court also held the employer was justified in raising the replacement's salary due to its consideration of internal equity concerns. Among other things, the employer had reviewed the pay rates of ten other clinical care nurse quality coordinators in different regions of the state, finding that all were female and most had been paid more than plaintiff.[378] The court therefore concluded that "[t]here is no doubt at all that internal equity

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[370] *Id.* at *5 (quoting *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078 (11th Cir. 2003)).

[371] *Id.* at *7.

[372] *Nazinitsky v. Integris Baptist Med. Ctr., Inc.*, No. 19-cv-043-R, 2020 WL 1957914 (W.D. Okla. Apr. 23, 2020). The court assumed without deciding that she had met her burden to establish that she performed work that was substantially equal to her alleged comparators. *Id.* at *4. It then considered the employer's affirmative defense that her salary had been based on two factors other than sex: (1) a bona fide, gender-neutral pay classification system based on marketplace value; and (2) employee experience. *Id.*

[373] *Id.*

[374] *Id.* at *5. On appeal, the Tenth Circuit found that the market compensation for the specialists plaintiff was comparing herself to was higher than that provided for her specialty. According to the court's calculations, that difference alone accounted for roughly 40% of the alleged wage differential. *Nazinitsky v. Integris Baptist Med. Ctr., Inc.*, 852 F. App'x 365, 368 (10th Cir. 2021).The court then concluded that the remaining part of the differential was explained by differences in levels of work experience: "Common sense tells us as much here. [Plaintiff] was a first-year physician and is comparing herself to physicians with at least seven years' more experience." *Id. See also Martin v. Delta Cnty. Mem'l Hosp. Dist.*, No. 19-cv-1339-STV, 2021 WL 6112878, at *12 (D. Colo. Dec. 23, 2021) (holding that a hospital successfully argued it had to pay a male physician a higher salary due to the more difficult market conditions at the time he was hired: "Based upon the uncontradicted evidence that [comparator's] pay was based upon market conditions and not sex, the Court concludes that no rational jury could find that the pay differential between [comparator] and [plaintiff] were based upon sex."); *Barnett v. Roanoke Cnty. Sch. Bd.*, No. 7:20-cv-663, 2021 WL 5611317, at *8 (W.D. Va. Nov. 30, 2021) (holding that employer adequately justified pay disparity on the basis of the "sense of urgency" that surrounded plaintiff's comparator teacher's hiring, including the "late timing of the vacancy and the impending start of the school year," and that the only other finalist for the position withdrew from consideration).

[375] *Korty v. Ind. Univ. Health, Inc.*, No. 4:21-cv-33-PPS, 2022 WL 17830485, at *4 (N.D. Ind. Dec. 21, 2022).

[376] Her replacement was chosen from within the company, and he was in a position that paid more than plaintiff's position. The employer wanted to hire the replacement, however, and so it subjected his starting salary to a number of reviews, including an internal equity review, to see what it could offer as a starting salary based on market range, internal equity, and the replacement's knowledge, skills and abilities. *Id*. at *2. The replacement negotiated for an even higher salary, which the employer agreed to. The employer documented its reasons for offering the higher salary to the replacement, noting that he had obtained a number of pay raises in his prior position and was therefore starting at a higher rate. *Id*. at *3.

[377] *Id*. at *4.

[378] *Id*. at *6.

was considered in determining [comparator's] salary, and it is a sex-neutral basis for coming up with his salary."[379] Accordingly, the court held that the plaintiff had failed to show a sex-based wage differential.

The variety of ways that economic considerations intrude upon employers' compensation decisions, and the ways that those decisions will be viewed by a court, are difficult to categorize or generalize about. Business considerations vary widely. To take just a few recent examples: In one case, the Eighth Circuit held that a school district had adequately explained the fact that plaintiff's job had been targeted for downsizing because the subject that plaintiff taught did not appear on statewide testing and therefore did not require two programmers, and because the director of fine arts could handle both elementary and secondary fine arts programming.[380] In another recent case, a court held that an employer had justified a pay disparity between the current occupier of a position as compared to her predecessor where it was clear that the plaintiff's position was temporary; the court held that the temporary nature of a position may constitute a factor other than sex to justify an otherwise illegal pay disparity provided that the position was temporary in fact, and that the employee in that position knew it was temporary.[381] And another court held that, in order to stay competitive to attract talent from the private sector, the salary hiring guidelines put in place by the USPS could justify a pay disparity where those guidelines allowed for an offer to be made that was up to five percent higher than a new hire's private sector salary.[382]

Employers should beware, however, that fine-grained differences between employees—while perhaps legitimate as "factors other than sex"—will often not be weighed and decided by a court prior to trial. Those decisions are often left for the jury, meaning that employers face the unpalatable prospect of a jury trial, even if they have a meritorious defense.[383] Courts can be reluctant to interpret the "factor other than

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[379] *Id*. Although the implication of the court's reasoning is that plaintiff's salary must have been set too low, when compared to the employer's own internal equity analysis, the court held that she "was hired at a different point in time, and with different work experience than [comparator]," and that it did not know anything about the employer's budget when plaintiff was hired several years earlier, "or whether she tried to negotiate a higher salary (like [comparator] did), or if she accepted what she was initially offered." *Id*.

[380] *Routen v. Suggs*, 772 F. App'x 377, 378-79 (8th Cir. 2019) (holding that plaintiff's sex was not a reason for her pay cut or the reduction in the length of her contract because the evidence at trial showed that the school district had taken these actions because of economic and administrative concerns, rather than discrimination).

[381] *Cavazos v. Hous. Auth. of Bexar Cnty*., No. SA-17-cv-00432-FB, 2019 WL 1048855, at *7 (W.D. Tex. Mar. 5, 2019) (holding that the temporary nature of a position may constitute a factor other than sex to justify an otherwise illegal pay disparity, but denying summary judgment because the evidence did not establish as a matter of law that plaintiff's performance as an interim Executive Director could be considered a temporary reassignment because, among other things, she had been told that she was the search committee's second-choice candidate and that she would be automatically selected if the first choice-candidate declined (which he did)).

[382] *Ruiz-Justiniano v. U.S. Postal Serv*., No. 16-cv-1526 (MEL), 2018 WL 3218363 (D.P.R. June 29, 2018) (holding that salary guidelines in place at the time of the female comparator's hire, which allowed her to be given an offer up to five percent higher than her private sector salary and was intended to allow USPS to stay competitive in outside hiring, justified pay disparity and was not pretext). *See also Terry v. Gary Cmty. Sch. Corp*., 910 F.3d 1000, 1010 (7th Cir. 2018) (holding that a salary freeze provided an adequate justification for a pay disparity because: "there is nothing from which we may reasonably infer that there were ways to circumvent the salary freeze, and that because the District did not take such measures, the District was simply choosing not to increase [plaintiff's] salary."); *Reddy v. Ala. Dep't of Educ.*, No. 2:16-cv-01844-SGC, 2018 WL 4680152, at *6-7 (N.D. Ala. Sept. 28, 2018) (holding that employer adequately justified pay disparity between two physicians on the basis of those physicians': (1) different levels of relevant experience; (2) different levels of clinical practice experience; (3) different medical specialty; and (4) prior salary history); *Hayes v. Deluxe Mfg. Ops. LLC*, No. 1:16-cv-02056-RWS-RGV, 2018 WL 1461690 (N.D. Ga. Jan. 9, 2018) ("[Employer] has shown that the pay disparity between [plaintiff] and her male comparators was based on increases in the starting hourly wage over the years, market considerations, merit-based increases, and consideration of an applicant's experience and qualifications, and it has therefore offered factors that were not based on sex and 'are sufficient to sustain its burden to show that the salary disparity does not result from sex discrimination.'") (quoting *Schwartz v. Fla. Bd. of Regents*, 954 F.2d 620, 623 (11th Cir. 1991)).

[383] *See, e.g., Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1363 (11th Cir. 2018) (reversing summary judgment and emphasizing employer's "heavy burden" to establish that a factor other than sex can account for the pay differential where plaintiff's salary had consistently been set at the low point of the compensation range, even after she had established herself in the position and demonstrated that she was an effective arbitration manager, and where plaintiff had presented evidence that the employer's managers' decisions were influenced by sex bias and that they took sex into account when making personnel decisions: "affidavit testimony establishes that sex-based pay disparities were common at [employer], that the managers refused to remedy the disparities, and that the managers repeatedly exhibited an unwillingness to treat women equally in the workplace"); *Gonzales v. Cnty. of Taos*, No. 17-cv-582-F, 2018 WL 3647206, at *15 (D.N.M. Aug. 1, 2018) (refusing to weigh an employer's "other factors" at the summary judgment stage, and holding that relative levels of experience and qualifications "are questions of fact for a jury to decide and are not appropriate for summary judgment"); *Ackerson v. Rector & Visitors of the Univ. of Va.*, No. 3:17-cv-11, 2018 WL 3209787, at *7 (W.D. Va. June 27, 2018) (holding that two university administrators were paid at different rates because of their

sex" defense in a way that provides an easy path out of litigation for employers. Although broad in terms of what it will recognize as legitimate bases to justify a pay disparity, the defense ultimately hinges on a fact and case-specific analysis that allows for few bright line rules. That provides an advantage to plaintiffs and plaintiffs' lawyers because, when facing the cost and uncertainty of trial, many employers may choose to settle at an inflated value rather than continue to defend a lawsuit on the merits.

2. Additional State Law Requirements To Establish The Factor Other Than Sex Defense

As with the standards for establishing a prima facie case, the affirmative defenses allowed to a defendant under state laws may, arguably, vary from what is allowed under the federal EPA. For example, under the California Fair Pay Act, the "factor other than sex" defense is subject to some additional requirements. Under California's statute, a defendant must demonstrate "[a] *bona fide* factor other than sex, such as education, training, or experience."[384] The statute further clarifies that "this factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity."[385] The California statute also requires that any affirmative defense must be "applied reasonably" and "account for the entire wage differential."[386] Finally, the statute explicitly excludes the use of prior salary as a justification for a wage disparity.[387] Most of these additional requirements were enacted in 2015 and became effective on January 1, 2016. The courts are still working out how they should be interpreted and applied, and how exactly they depart from the federal requirements. Relevant, helpful decisions have been few and far between.

In *Eisenhauer v. Culinary Institute of America*,[388] the Second Circuit addressed a relatively narrow distinction between federal and state EPA laws. In that case, a female professor at a college and culinary school brought claims under the federal and New York EPA statutes, alleging she was paid less than a male professor who managed a similar course load. Plaintiff and her comparator had been hired at different salaries, and that pay disparity increased over time due to the to the sex-neutral terms of a compensation plan, which, among other things, gave the same percentage increase to professors' salaries each year.[389] The plaintiff argued that the plan could not be a "factor other than sex" because it created a pay disparity that was unconnected to any differences between her and her comparator's job. The Second Circuit framed this question as asking whether the federal EPA requires an employer to show that the factor is related to the job in question.[390]

The Second Circuit held that no such requirement exists under the federal EPA. In so holding, the court clarified its earlier precedent, *Aldrich v. Randolph Central School District*,[391] which held that a facially sex-neutral job-classification system alone is insufficient to constitute a "factor other than sex."[392] In *Aldrich*, the Second Circuit held that a job-classification system may only serve as a factor other than sex "when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related *differences in work responsibilities and qualifications for the particular positions at*

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different credentials, experience, and achievements, but holding that while such "potential differences in qualifications, certifications, and employment history *could* explain the wage disparity between the claimants and [comparator], the EPA requires that a factor other than sex *in fact* explains the salary disparity") (emphasis in original).

[384] Cal. Lab. Code § 1197.5(a)(1)(D).

[385] *Id.* The statute further clarifies that "business necessity" means "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential." *Id.*

[386] *Id.* § 1197.5(a)(2-3).

[387] *Id.* § 1197.5(a)(4).

[388] *Eisenhauer v. Culinary Inst. of Am.*, 84 F.4th 507 (2d Cir. 2023).

[389] *Id.* at 512.

[390] *Id.*

[391] *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992).

[392] *Eisenhauer*, 84 F.4th at 515.

issue."[393] The *Eisenhauer* court clarified that this requirement was only applicable to job-classification systems because "a *job*-relatedness requirement is necessary to ensure that a *job*-classification system is not a pretext for sex discrimination," because, *"Jobs* are, after all, the principal feature of *job*-classification systems."[394] Based on clear textual exegesis, the Second Circuit concluded that there is no job-relatedness requirement for the factor other than sex defense under the federal EPA: "The requirement that a 'factor other than sex' be job related appears nowhere in the EPA's text and, in our view, conflicts with the statute's plain meaning."[395]

But the same is not true under the New York EPA. When the New York legislature amended the New York equal pay statute, it added a provision that required a "factor other than sex" to be "job-related with respect to the position in question," among other things.[396] The Second Circuit explained: "the EPA's 'factor other than sex' defense imposes no such requirement. By contrast, under New York Labor Law § 194(1), to establish the 'factor other than sex' or 'status' defense, a defendant must prove that the pay disparity in question results from a differential based on a job-related factor."[397]

The Second Circuit remanded the case back to the district court to reconsider its decision in light of the different standards under the federal and New York EPA statutes. This was despite the fact that the district court had found in favor of the employer even after applying the more stringent standard the Second Circuit held was in error, i.e., the district court held that the "factor other than sex" relied upon by the employer was in fact job related: "The parties appear to agree, and the evidence shows, that the disparity between the initial salaries was due to non-discriminatory, business-related reasons."[398] Nevertheless, the Second Circuit faulted the district court for evaluating the federal and New York EPA claims under the same standard: "The District Court evaluated [plaintiff's] EPA and §194(1) claims 'under the same standard.' Until January 2016, this approach may have been the proper one. Since at least January 2016, however, the relevant standards have differed at least because §194(1) has included a job-relatedness requirement."[399]

In another recent case, *Edelman v. NYU Langone Health System*,[400] the district court for the Southern District of New York held that the recent changes to New York's equal pay law meant that some defenses were off the table in New York. In that case, a physician alleged she was paid less than male physicians working in the same subspecialty. For physicians hired out of private practice, the employer's usual practice was to negotiate salary while taking into account the assumption of the debts from their private practice. The employer argued, among other things, that it had to match plaintiff's comparators' private practice salaries.[401] The court held that prior salary can reflect legitimate, non-discriminatory differences in the value that one employee contributes compared to another. But the court noted the recent changes to New York's equal pay law, which prohibits the use of prior salary as a means of setting starting salary: "If prior salary always justified unequal pay, the EPA would entrench rather than remedy pay inequalities. New York bars employers from engaging in salary-matching for that very reason, in an effort to enforce

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[393] *Id.* (quoting *Aldrich*, 963 F.2d at 525) (emphasis in original).

[394] *Id.* at 516-17 (emphasis in original).

[395] *Id.* at 518-19. The Second Circuit lamented the ambiguity its own decision had introduced into the law, explaining that decisions from the Second Circuit and other circuits have given some litigants the mistaken impression that the federal EPA's language says more than it does. As the *Eisenhauer* court acknowledged, "[t]he term [factor other than sex] has sowed needless uncertainty and confusion among our sister circuits." *Id.* at 517. Among those is the Ninth Circuit, which—according to the Second Circuit—erroneously found in its famous decision, *Rizo v. Yovino*, an ambiguity in these unambiguous words, which led it to misapply canons of statutory construction and, ultimately, to read a "job-relatedness" requirement into the federal EPA where none belonged. *Id.* at 521.

[396] *See* N.Y. Lab. Law 194(1)(iv).

[397] *Eisenhauer*, 84 F.4th at 525.

[398] *Eisenhauer v. Culinary Inst. of Am.*, No. 19-cv-10933(PED), 2021 WL 5112625, at *7 (S.D.N.Y. Nov. 3, 2021).

[399] *Eisenhauer*, 84 F.4th at 525.

[400] *Edelman v. NYU Langone Health Sys.*, No. 21-cv-502(LGS), 2022 WL 4537972 (S.D.N.Y. Sept. 28, 2022).

[401] *Id*. at *6. The employer also argued that the difference in pay was justified by the fact that the physicians' salaries were based on negotiations that took account of their productivity while in private practice: "[Employers] argue that these negotiations are sex-neutral and backed by a 'legitimate business reason' because they could not otherwise recruit doctors from private practice." But the court held that the employer's explanation could not account for why plaintiff was paid less per unit of productivity than her comparators. *Id*. at *5.

the EPA."[402] Because the employer had not explained how the differences in physicians' prior salaries reflected any difference in value, the court rejected its attempt to use prior salary as a justification for the wage disparity.[403]

In late 2023, the Southern District of New York had a chance to review this holding in light of the Second Circuit's guidance in *Eisenhauer*, when the parties moved for judgment as a matter of law after a trial that found for the employer on plaintiff's equal pay claims.[404] The court first noted the change wrought by the Second Circuit, noting that although, "[g]enerally, 'an equal pay claim under New York Labor Law § 194 is analyzed under the same standards applicable to the federal Equal Pay Act,"[405] after *Eisenhauer*, "the employer 'must prove that the pay disparity in question results from a differential based on a job-related factor. . . . By contrast, the EPA's 'factor other than sex' defense imposes no such requirement.'"[406] The court also noted the Second Circuit's admonishment that district courts should "analyze a plaintiff's '[NY EPA] claim as altogether distinct form her EPA one.'"[407]

Yet the court made no effort to distinguish between the New York EPA and the federal EPA when determining the "equal work" prong of plaintiff's prima facie case. After citing a long line of precedent, which mostly predated New York's ostensible change to a "substantially similar" standard, the court concluded that "the evidence at trial establishes that Plaintiff did not perform equal work to [comparator] because their positions did not require substantially equal effort." Among other things, it was simply a fact that plaintiff's comparator's contract required a higher degree of productivity, as measured by RVUs—i.e., the numbers the employer used to represent, in relative terms, the time and effort required to perform a medical procedure—which "required him to expend significantly greater effort than Plaintiff's position did."[408] Notably, the court came to the same conclusion when considering plaintiff's claims under the NY EPA, because, it held, the "equal work inquiry" is "'critical' for unequal pay claims under the [NY EPA]."[409] Accordingly, the court came to the same conclusions and relied on the same reasoning for both statutes: "As explained above, Plaintiff failed to show that her position required equal effort to [comparator's], given his significantly higher RVU target. Plaintiff therefore has not shown that her job and [comparator's] job demanded equal work for purposes of her [NY EPA] claim."[410]

That was not the case with the employer's factor other than sex defense, however. Although the court came to the same conclusion—that the employer had established its defense—it was careful to analyze the issue under the new standard applicable to NY EPA claims, noting that "New York law specifies that such a factor must 'be job-related with respect to the position in question and . . . be consistent with business necessity.'"[411] Among other things, the court had held, with respect to plaintiff's federal EPA claim, that the employer hospital's geographical demand for a very strong and capable physician in plaintiff's comparator's specialty justified the pay disparity because he was needed to "fill a hole" in its network. Turning to plaintiff's NY EPA claim, the court had no trouble finding that this reason was both

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[402] *Id*.

[403] *Id*. The court came to a different conclusion regarding plaintiff's Title VII claim, however, due to the different burden-shifting regime employed by that statute. The court explained: "In the EPA context discussed above, Plaintiff's prima facie case caused the burden of persuasion to shift to Defendants, and they failed to meet that burden for purposes of summary judgment. Under Title VII, on the other hand, Defendants bear only a burden of production, to proffer a non-discriminatory reason for the disparate pay, and they have met it." *Id*. at *9. The court further explained that, "under the EPA a pay disparity is sufficient for liability unless the defendant can prove that the reason for the disparity is non-discriminatory," but under Title VII, "disparate pay gives rise to liability only if the plaintiff can prove that the reason was discriminatory." *Id*. In other words, Title VII requires a plaintiff to show the additional element of discriminatory intent. Plaintiff failed to establish that because she had not shown that the employer implemented its salary-matching practice with the intent to discriminate against women. In fact, the evidence showed that plaintiff's salary was initially set at a time when the employer had assumed she was male, before learning her gender. *Id*. That evidence was sufficient to defeat a showing of discriminatory intent.

[404] *Edelman v. NYU Langone Health Sys.*, No. 21-cv-502(LJL), 2023 WL 8892482 (S.D.N.Y. Dec. 26, 2023).

[405] *Id.* at *7 (quoting *Wu v. Good Samaritan Hosp. Med. Ctr.*, 815 F. App'x 575, 581 n.5 (2d Cir. 2020)).

[406] *Id.* (quoting *Eisenhauer*, 84 F.4th at 525).

[407] *Id.* (quoting *Eisenhauer*, 84 F.4th at 525).

[408] *Id.* at *8.

[409] *Id.* at *10 (quoting *Woods-Early v. Corning Inc.*, 2023 WL 4598358, at *4 (W.D.N.Y. July 18, 2023)).

[410] *Id.*

[411] *Id.* (quoting NYLL § 194(1)(iv)(B)).

job-related and consistent with business necessity because the employer hospital had shown that there was a particular need for a physician of plaintiff's comparator's specialty and experience level, to launch a new rheumatology practice at one of its facilities, where they had patients they "needed to take care of."[412] The different requirements under the NY EPA were a distinction without a difference.

Most other courts that have had to address potential differences between state and federal laws have chosen simply to ignore them, interpreting the requirements of the new state laws consistently with federal law. For example, in *Basting v. San Francisco Bay Area Rapid Transit District*,[413] the District Court for the Northern District of California held that the employer established the factor other than sex defense under both federal and California law. That case involved an employer that classified its non-represented employees into various pay bands. It commissioned a study of its compensation practices, the result of which was that the employer bumped salaries to the midpoint of a pay band for all employees who had two or more years of service within a classification.[414] The court found that the study's recommendations had been applied equally to all non-represented employees regardless of gender, and therefore qualified as a legitimate factor other than sex that explained the pay disparity under both the federal law and California's revised statute.[415] "As arbitrary as the two-year bright line cut off might appear to [plaintiff], [employer's] uniform criteria for increasing the salaries of the other directors in [plaintiff's] office (i.e., two men and one woman) constitutes an acceptable 'differential based on any other factor other than sex.'"[416]

On March 10, 2023, the Ninth Circuit affirmed the lower court's decision.[417] After reviewing the record, the Ninth Circuit held that the district court had properly concluded that plaintiff was paid less than her male colleagues because she had not been in her job for two years, while they had: "After [employer] hired a consultant to advise [employer] on how to make its non-union salaries more competitive, the consultant recommended across-the-board pay bumps for non-union employees who had been in their role at [employer] for at least two years—the period of time the consultant viewed as a good proxy for proficiency in a job."[418] Accordingly, the Ninth Circuit held that this was sufficient reason to show that the pay discrepancy was not based on sex: "Because any reasonable jury would conclude that [employer] adopted its one-time pay bump for certain employees exclusively for a reason other than sex, [employer] is entitled to summary judgment on [plaintiff's] federal and state equal-pay claims."[419]

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[412] *Id.* (internal citations omitted).

[413] *Basting v. S.F. Bay Area Rapid Transit Dist.*, No. 20-cv-5981-SI, 2021 WL 5771137 (N.D. Cal. Dec. 6, 2021).

[414] *Id.* at *1. The plaintiff had only been in her classification for 18 months and so did not receive a salary increase. Her comparators had all received salary increases because they had been in their classification for at least two years at the time the study was conducted. *Id.*

[415] *Id.* at *2.

[416] *Id.* at *3 (quoting 29 U.S.C. § 206(d)(1)). The court held that this defense hit all of the additional elements of the defense mandated by California's new law. The factor was not based on sex because the study recommendations were applied uniformly, it was job related because the two-year rule was used as a proxy for proficiency within a classification, and it was related to business necessity because "[employer] decided on a one-time pay bump based on the two-year cutoff in order to implement the [study's] recommendation in a financially viable manner." *Id.* at *4.

[417] *Basting v. S.F. Bay Area Rapid Transit Dist.*, No. 22-15556, 2023 WL 2445695 (9th Cir. Mar. 10, 2023).

[418] *Id.* at *1.

[419] *Id.* at *2. *See also Rowe v. Google LLC*, No. 19-cv-8655 (LGS), 2022 WL 4467194, at *5 (S.D.N.Y. Sept. 26, 2022) (denying female Technical Director's motion for summary judgment on "factor other than sex defense" under the New York EPA, where employer could justify hiring her at a level 8, while hiring some of her male peers as level 9's using the same interview criteria and job description, based on evidence from a recruiter explaining the employer's reasons, including pertinent experience, which had been approved by two Senior Vice Presidents); *Gardner v. Wells Fargo Bank, N.A.*, No. 2:19-cv-0207-TOR, 2021 WL 2931341, at *7-8 (E.D. Wash. July 12, 2021) (holding employer had established an affirmative defense under Washington's new equal pay law, which requires employers to show that a wage differential is due to a bona fide job-related factor that is consistent with business necessity, is not based on or derived from a gender-based differential, and accounts for the entire differential, where salary disparity was justified by comparator's sales experience and connections with local realtors for referrals: "[comparator's] pay difference was 'based in good faith on a bona fide job-related factor or factors.' Plaintiff did not demonstrate any connections to local realtors, which was a concern raised by [supervisor] during his initial review of Plaintiff's application. Moreover, it is undisputed that another male colleague, [other comparator], was paid the same wages as Plaintiff for the same position").

3. Challenging The Factor Other Than Sex: Salary History And Beyond

At its core, equal pay litigation is about how employers set and adjust salary levels. In a free and competitive marketplace, starting salary must take some account of applicants' prior salary. If employers cannot meet or exceed that salary, they risk losing applicants to other employers who will. One issue that comes up frequently in equal pay litigation, therefore, is whether and to what extent an employer can justify a pay disparity by pointing to employees' prior salaries at the time they were hired. Many employers take the commonsense view that they must start higher-paid applicants at a higher salary, or those applicants will not take the job. On the other hand, some courts and commentators have argued that paying employees based on past earnings only perpetuates a systemic gender pay gap. It is therefore invalid as a factor other than sex, because female employees' prior salaries may have been kept artificially and unfairly low compared to their male peers. One of the key trends driving equal pay litigation today is whether and to what extent an employer can rely on a factor other than sex defense when that factor may itself be tainted by discrimination.

Rizo v. Yovino[420] is a significant decision bearing on this issue.[421] The district court in that case held: "[A] pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose."[422] The Ninth Circuit agreed, holding that "setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination,"[423] and: "[t]he express purpose of the act was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the act and perpetuate the very discrimination the EPA aims to eliminate."[424]

The Ninth Circuit's decision in *Rizo* adds to a growing split among the Courts of Appeals on this issue. The Seventh Circuit came to an arguably different conclusion in *Lauderdale v. Illinois Department of Human Services*.[425] Its prior decisions had consistently held that a difference in pay based on the difference in what employees were previously paid is a legitimate factor other than sex under the EPA.[426] Relying on that precedent, the Seventh Circuit held that a pay discrepancy that was created in reliance on

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[420] *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017), *aff'd en banc*, 887 F.3d 453 (9th Cir. Apr. 9, 2018), *rev'd*, 139 S.Ct. 706 (2019).

[421] In that case, a county employee challenged the county's practice of using prior salary to determine starting salaries. *Id.* at 1163. The county used a salary schedule to determine the starting salaries of management-level employees, which used prior salary to determine starting salaries. *Id.* To determine the step on which a new employee would begin, the county considered the employee's most recent prior salary and placed the employee on the step that corresponds to his or her prior salary, increased by 5%. *Id.* Because the plaintiff's prior salary was below the Level 1, Step 1 salary, even when increased by 5%, she was automatically started at the minimum salary level. *Id.* at 1164.

[422] *Rizo v. Yovino*, No. 1:14-cv-0423-MJS, 2015 WL 9260587, at *9 (E.D. Cal. Dec. 18, 2015).

[423] *Rizo v. Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020).

[424] *Id.* at 1219. In concurring opinions, two judges said their colleagues should have taken the more moderate approach of some other circuits. Judge Margaret McKeown said the policy did not justify the disparity between plaintiff's pay and that of her male coworkers, but salary history "may provide a lawful benchmark" for setting pay if considered alongside other factors such as education and training. *Id.* at 1234. Judge Consuelo Callahan also concurred, joined by Judges Tallman and Carlos Bea. She stated that an employer should be permitted to use past salary as a factor in setting pay, as long as its use "does not reflect, perpetuate, or in any way encourage gender discrimination." *Id.* at 1241.

[425] *Lauderdale v. Ill. Dep't of Human Servs*., 876 F.3d 904 (7th Cir. 2017). In this case, the Seventh Circuit held that the Illinois pay plan for state employees did not violate the EPA by basing pay increases, at least in part, on an employee's prior salary. The Department had conceded that plaintiff had established a prima facie case under the EPA because she had taken over the same responsibilities as her predecessor but was paid less. *Id.* at 907-08. She was therefore paid less for work that was equal to, if not more demanding than, the work performed by her male predecessor. However, the Department argued that the pay discrepancy was based on non-discriminatory bases, including the employees' prior salaries. *Id.* at 908-09.

[426] *Id.* at 908 (citing *Wernsing v. Dep't of Human Servs*., 427 F.3d 466, 468 (7th Cir. 2005); *Dey v. Colt Constr. & Dev't Co.*, 28 F.3d 1446 (7th Cir. 1994); *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), and *Covington v. S. Ill. Univ*., 816 F.2d 317 (7th Cir. 1987)).

prior salaries is not a violation of the EPA unless sex discrimination led to the lower prior wages.[427] The Eighth Circuit has also followed this line of reasoning.[428]

Other Circuits have held differently. For example, in *Irby v. Bittick*,[429] the Eleventh Circuit held that "[w]hile an employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone, as the district court correctly found, there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience."[430] The Tenth Circuit has also held that prior salary cannot stand alone as a defense to an EPA claim. In *Angove v. Williams-Sonoma, Inc.*,[431] a male retail employee argued that the district court had impermissibly applied a "market factor" theory to evaluate his claim, arguing that it is impermissible to justify a wage disparity solely upon the "going market rate" for employees of a certain gender.[432] The Tenth Circuit held that this theory only arises where an employer purports to rely on the "going rate" for employees based on their gender.[433] Although setting an employee's salary based solely on what the market would pay male versus female employees would clearly violate the EPA, there was no evidence to suggest that is what happened.[434] The Tenth Circuit concluded that "where an employer sets a new employee's salary based upon that employee's previous salary and the qualifications and experience the new employee brings, the defendant has successfully invoked the Act's affirmative defense."[435] This is because "the EPA only precludes an employer from relying *solely* upon a prior salary to justify pay disparity."[436]

This issue also divides the district courts. Many have declined to follow the reasoning of the Ninth Circuit in *Rizo*. For example, in *Boyer v. U.S.*,[437] a female clinical pharmacist at a VA hospital brought wage discrimination claims against her employer, alleging that a male coworker in the same position, who had less experience, was hired after her with a higher starting pay rate. The employer argued that the regulations that govern federal pay determinations were a "factor other than sex" that explained the pay

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[427] *Id.* at 909. *See also Korty v. Ind. Univ. Health, Inc.*, No. 4:21-cv-33-PPS, 2022 WL 17830485, at *4 (N.D. Ind. Dec. 21, 2022) ("The Court acknowledges that 'basing pay on prior wages could be discriminatory if sex discrimination led to the lower prior wages.' But [plaintiff] has not made that showing at all—nowhere has she shown that [comparator's] previous salary was inflated based upon his sex.") (internal citations omitted) (quoting *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017)).

[428] *See Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). In *Taylor*, a female civilian employee of the Army alleged that her pay at a lower pay grade than her male peers was a violation of the EPA. *Id.* at 713. The Army sought summary judgment, arguing that the pay disparity was the result of its non-statutory salary retention policy that was intended to retain skilled workers and protect workers' salaries. *Id.* at 716. The employee argued that, as a matter of law, an employer should not be allowed to rely on prior salary or a salary retention policy as a defense under the EPA because those factors would permit the perpetuation of unequal pay structures. *Id.* The Eighth Circuit examined the Circuit split and, in particular, adopted the reasoning of the Ninth (before *Rizo*) and Seventh Circuits in *Kouba* and *Covington*, respectively, over that of the Eleventh Circuit. *Id.* at 718-19. The Eighth Circuit concluded: "we believe a case-by case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the catch-all 'factor other than sex' affirmative defense. To conduct a reasonableness inquiry into the actions of the employer or to limit the application of a salary retention policy to only exigent circumstances would, we believe, unnecessarily narrow the meaning of the phrase 'factor other than sex.'" *Id.* at 720.

[429] *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

[430] *Id.* at 955 (citing *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 n.9 (11th Cir. 1988)).

[431] *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500 (10th Cir. 2003).

[432] *Id.* at 507. The employee relied on prior Eleventh Circuit and Supreme Court precedent, *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 596 n.22 (11th Cir. 1994) and *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). In *Corning Glass Works*, the Supreme Court rejected an argument that an employer's higher wage rate for men on the night shift was permissible, holding that: "The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which [employer] could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." 417 U.S. at 204-05.

[433] *Angove*, 70 F. App'x at 508.

[434] *Id.*

[435] *Id.*

[436] *Id.* (emphasis in original). The Sixth Circuit has also adopted the reasoning of the Eleventh and Tenth Circuits. *See Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App'x 452, (6th Cir. 2017); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005), *abrogated on other grounds by Fox v. Vice*, 563 U.S. 826 (2011).

[437] *Boyer v. U.S.*, 159 Fed. Cl. 387 (Ct. Fed. Cl. 2022).

disparity.[438] The court first examined the split among the circuits regarding the use of prior salary to set starting salary, summarizing it as follows: "the circuits are split between prior salary alone being an acceptable factor other than sex (Fourth and Seventh), prior salary being an acceptable factor when combined with other factors (Eighth, Tenth, and Eleventh), and prior salary never being an acceptable factor to consider (Ninth)."[439] The court held that it would not follow the lead of the Ninth Circuit and had no need to resolve the circuit split: "the Court does not need to conclusively decide whether prior salary alone is a factor other than sex in order to rule on Plaintiff's motion. At this juncture, the Court only needs to determine, which it easily does, that it is not going to follow the Ninth Circuit's decision in *Rizo*."[440] This was because the court found that the employer had relied on factors other than prior salary to set the comparator's starting salary; namely, pharmaceutical skills and education.

The court then went on to consider federal government regulations, noting that federal employees are started at the minimum salary step of the appropriate grade under the GS system unless an upward departure is required because the candidate has some unusually high or unique qualifications, or if the government has a special need, or if the candidate's *existing pay* is unusually high. The court construed this language as meaning that federal regulations allowed existing or prior pay to be used to determine starting pay. "As was discussed above, the Court presumes Congress meant what it said in permitting federal GS pay rate determinations based on a candidate's 'existing pay *or* unusually high or unique qualifications': under the GS system, existing or prior pay *alone* may be used in determining pay above the minimum rate of the appropriate grade."[441] The court would not assume that Congress "essentially acted contrary to the EPA's intent three years after its passage," and would not invoke an interpretation that would "require the Court to read the two statutes as conflicting with one another."[442]

Some district courts rejected the Ninth Circuit's reasoning due to prior precedent in their circuit. This leaves open the possibility that the law could shift if and when it is considered by the Court of Appeals. For example, in *Abe v. Virginia Department of Environmental Quality*,[443] the Eastern District of Virginia was presented with the following question: "Does using prior salary as a factor in setting an employee's starting salary constitute a per se violation of the Equal Pay Act . . .?"[444] In that case, four named plaintiffs and twenty opt-in plaintiffs argued that the court should adopt the reasoning of the Ninth Circuit in *Rizo* and hold that prior salary history can never constitute a "factor other than sex" under the EPA, either alone or in combination with other factors.[445] The court declined, noting that the Fourth Circuit "has not delineated the precise circumstances under which an employer may rely on prior salary as an affirmative defense in an EPA case."[446] But also noting that, in *Spencer v. Virginia State University*, the Fourth Circuit "has clearly indicated that it does not prohibit an employer from doing so."[447]

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[438] *Id*. at 390.

[439] *Id*. at 403.

[440] *Id* at 405.

[441] *Id*. at 408-09.

[442] *Id*. at 409.

[443] *Abe v. Va. Dep't of Env't Quality*, No. 3:20-cv-270, 2021 WL 1250346 (E.D. Va. Apr. 5, 2021).

[444] *Id*. at 1. In that case, four named plaintiffs and twenty opt-in plaintiffs alleged that their employer's "past practice of using pay history to determine new hire's salary perpetuates the gender wage gap and violates the EPA." *Id*.

[445] *Id*. at 2.

[446] *Id*.

[447] *Id*., at 2-3 (citing *Spencer v. Va. State Univ*., 919 F.3d 199, 202-03 (4th Cir. 2019) (emphasis in original). The court noted that *Spencer* involved a female sociology professor who alleged she had been discriminated against in terms of her compensation because she was paid less than two comparable male professors whose salary was set as a percentage of their previous salaries as administrators at the same university. The Fourth Circuit determined that the university's decision to set starting salaries for those purported comparators in that way established that the alleged pay differential was due to a factor other than sex. The court in *Abe* interpreted this to mean that "at minimum, the Fourth Circuit does not prohibit employers from raising prior salary as an affirmative defense in an EPA case." *Id*. at 3. The court further rejected plaintiffs' argument that the employer should at least have to prove that its use of salary history is job-related, as they argued the Fourth Circuit held in another case, *EEOC v. Maryland Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018). The *Abe* court sidestepped the issue. It held that it was not necessary to resolve that question to decide the narrow issue before the Court; namely: "May [defendant] raise prior salary as an affirmative defense?" *Abe*, 2021 WL 1250346, at 4. Based on the Fourth Circuit's decision in *Spencer*, the Court held that it could and denied Plaintiff's motion to strike the

Similarly, in *McKinley v. United Parcel Service Inc.*,[448] the employer argued that pay differentials were justified because it had paid plaintiff within the pay bands applicable to her positions. But plaintiff tried to recast this as a defense based on her prior wages, noting that "the Seventh Circuit has held that basing pay on prior wages could be discriminatory if sex discrimination led to the lower prior wages."[449] She pointed to an alleged sexist comment made by a former manager in 1994 that she "chose a family over a career," and the fact that she was not promoted for eighteen years. But the court found that she had not provided sufficient evidence to show that her past wages were a result of sex discrimination: "The evidence submitted by [employer] supports that it closely followed its pay band structure to determine compensation for its employment positions," that "[plaintiff] was given raises in-line with the [employer] pay band for Part-Time Supervisors and that upon being promoted to a Specialist, her hourly pay rate increased to be consistent with the Specialist pay band," and that "[employer] paid [plaintiff] at the top of the pay band for her position before she was promoted to a Specialist."[450] Relying on *Lauderdale*, the court concluded that the employer's use of pay bands was a legitimate neutral factor accounting for the pay disparity because plaintiff was paid according to the pay band of her current and prior positions.[451]

Other courts have rejected *Rizo* on more prudential grounds, reasoning that a higher prior salary could reflect, in some instances, that an applicant is bringing more experience and skills to the position. For example, in *Smith v. IVM Solutions, L.L.C.*,[452] a female parts manager for a roadway herbicide application provider alleged she was paid less than a male parts manager.[453] However, the court found that plaintiff's comparator's higher pay was justified by a combination of his experience and his prior pay. In particular, the court found that the employer valued his knowledge of the exact same parts that he would oversee as parts manager, due to his years of experience in the "niche market" of herbicide application.[454] Moreover, his hourly pay rate prior to becoming a parts manager was higher than plaintiff's due to the financial incentive offer he received to induce him to leave his former employer.[455] The plaintiff attempted to establish that the employer's reasons were merely a pretext for discrimination, arguing that the employer was not well aware of her experience prior to being hired. But the court found this failed to show discriminatory intent: "disputing whether [employer] knew the specifics of [plaintiff's] prior work history when determining her pay as parts manager does not give rise to an inference of pretext, especially when nothing in the record suggests [employer] was motivated by discriminatory animus."[456]

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employer's affirmative defense that was based on prior salary. *See also McGee v. Va. Dep't of Envtl. Quality*, 624 F. Supp. 3d 616, 632 (E.D. Va. 2022) (noting that "[t]his Court has previously held that employers may raise prior salary as an affirmative defense in EPA cases as a 'factor other than sex,' and holding that defense was met where plaintiff's comparator's salary was set because the employer, "knew that his private sector job probably paid more," and even raised its initial offer after his prior employer offered a salary increase to entice him to stay).

[448] *McKinley v. United Parcel Serv. Inc.*, No. 1:19-cv-2548-TWP-DLP, 2021 WL 4477830 (S.D. Ind. Sept. 30, 2021).

[449] *Id.* (internal quotations omitted).

[450] *Id.* at *16.

[451] *Id.* Some courts have allowed prior salary history to be considered in connection with theories of "salary compression," i.e., a pay discrepancy that is the result of later-hired employees starting at a higher salary, which widens over time as a result of regularly scheduled percentage pay increases. *See, e.g., Kellogg v. Ball State Univ.*, No. 1:18-cv-2564-TAB-TWP, 2020 WL 707846, at *2-3 (S.D. Ind. Feb. 12, 2020) (holding that the Seventh Circuit allowed theories of "salary compression" as a justification for wage disparities, pointing to the Seventh Circuit's reasoning contrary to *Rizo*, and finding that employer's reliance on salary compression qualifies as a factor other than sex that "comports with current Seventh Circuit precedent"), *rev'd on other grounds,* 984 F.3d 525 (2021); *Stice v. City of Tulsa*, No. 17-cv-261-CVE-FHM, 2018 WL 3318894, at *2-5 (N.D. Okla. July 5, 2018) (holding that "salary compression" could be a factor other than sex—explaining that a system of percentage-based salary increases provides a non-discriminatory explanation for the differences in pay—and holding that neither *Rizo*, nor the Tenth Circuit has held that the use of prior salary history can never be a consideration to justify a pay disparity, just that it cannot be the *only* consideration, but ultimately rejecting employer's motion for summary judgment because that explanation was "not so convincing that any rational jury would find in favor of defendant on plaintiff's EPA claim") (citing and quoting *Angove v. Williams–Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir. July 8, 2003)).

[452] *Smith v. IVM Solutions, L.L.C.*, No. 1:21-cv-162-RAH, 2022 WL 16701100 (M.D. Ala. Nov. 3, 2022).

[453] *Id*. at *3-4.

[454] *Id*. at *5.

[455] *Id*.

[456] *Id*. *See also Thomas v. Gray Transp., Inc.*, No. 17-cv-2052-KEM, 2018 WL 6531661, at *7 (N.D. Iowa Dec. 12, 2018) (holding that male dispatcher who had worked for the company as a driver manager and had kept his previous salary when he became a dispatcher meant that the comparator's "prior work (and salary) for [employer] establish that his higher salary was based on a factor

Equal pay plaintiffs have tried to expand upon the logic of the "prior salary" line of cases to attack other factors other than sex, arguing they are inherently discriminatory and thus invalid as a defense. One factor that has increasingly been challenged is the idea that some employees are better negotiators than others. For example, in *Duncan v. Texas Health & Human Services Commission*,[457] an employer attempted to justify a salary disparity by arguing that a male comparator had been able to negotiate a higher salary due to his particularly valuable work experience and higher private sector salary.[458] The court rejected that argument, holding that "a reasonable factfinder could reject [employer's] position that the salary disparity was the result of a factor other than sex and find [employer] discriminatorily applied its negotiation policy by allowing [plaintiff] greater latitude to negotiate."[459] And in *Briggs v. University of Cincinnati*,[460] the Sixth Circuit reversed a decision that allowed negotiation as an affirmative defense, finding that the evidence did not support it as a reason for the pay differential at issue: "The inconsistencies between [Director of Compensation's] deposition testimony and his other statements create issues of fact as to whether [comparator's] starting salary was the result of her prior salary, her demand for a higher salary, or other factors."[461]

Despite these recent challenges, many courts continue to recognize that negotiations with an employee can constitute a legitimate factor other than sex. For example, in *Baker v. Upson Regional Medical Center*,[462] a black female physician alleged she was paid less than her white male colleague, even though she provided more services, worked more hours, and consistently had equal or better outcomes.[463] At issue was the different bonus structure plaintiff received as compared to another physician in the same subspecialty. The employer argued that the different bonus structures were justified because they were the result of contract negotiations that were unique to each physician, during which plaintiff was represented by a lawyer.[464] After examining the course of the negotiations in detail, the court held that the employer had met its burden to establish the "factor other than sex" defense. "Ultimately, the record provides that Defendants relied on multiple factors other than sex to set Plaintiff's bonus structure differently. It looked at the two physicians' differing levels of experience, their certifications (or in Plaintiff's case, lack thereof), their prior production, and it determined that this structure would allow Plaintiff to ramp up her new practice. Indeed, the fact that Defendant agreed to change Plaintiff's bonus structure after she initiated negotiations further weakens Plaintiff's claim."[465] In particular, the court held that the plaintiff had failed to show that her bonus compensation plan had been set lower because she is a woman, thus defeating her EPA claim.[466]

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other than sex"); *Ouzts v. Leebos Stores, Inc.*, No. 1:16-cv-277, 2018 WL 4495217, at *3 (W.D. La. Sept. 19, 2018) ("[I]t is undisputed that in order to recruit [comparator], [employer] agreed to pay [comparator] the same salary and vacation he had been earning at Coca-Cola. [Comparator's] significant prior experience and demand that his Coca-Cola compensation package be matched are legitimate, non-discriminatory factors that fall within the catch-all exception.").

[457] *Duncan v. Tex. Health & Human Servs. Comm'n*, No. 17-cv-23-SS, 2018 WL 1833001 (W.D. Tex. Apr. 17, 2018). In that case, two female nurses and one male nurse applied and were hired into the same nursing position but at different salary levels. *Id.* at *1. The employer's usual practice was to offer each applicant the minimum starting salary for the position and begin salary negotiations from there. *Id.* However, the male applicant was offered a higher salary initially because of his higher private sector salary. *Id.* at *2. The female employees argued that the male employee was paid more solely because of his gender and his prior salary. *Id.* at *3.

[458] *Id.*

[459] *Id.* at *4. The court noted that "it is an open question in the Fifth Circuit whether negotiation even qualifies as a 'factor other than sex,'" noting that "several circuits have found that employers may not seek refuge under the 'factor other than sex' exception where the defendant's sole justification for a pay disparity is an applicant's prior pay." *Id.* at *4 n.3 (citing *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *rev'd*, 139 S. Ct. 707 (2019)).

[460] *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 512-13 (6th Cir. 2021).

[461] *Id.* at 512.

[462] *Baker v. Upson Reg'l Med. Ctr.*, No. 5:20-cv-00283-TES, 2022 WL 816470 (M.D. Ga. Mar. 17, 2022).

[463] *Id.* at *4. The parties agreed that the plaintiff had established a prima facie case due to the different bonus structures and the fact that they performed a similar job under similar working conditions. *Id.* at *7

[464] *Id.*

[465] *Id.* at *10.

[466] *Id. See also Briggs v. Univ. of Cincinnati*, No. 1:18-cv-552, 2020 WL 5760437, at *7 (S.D. Ohio Sept. 28, 2020) (holding that the employer had established that the wage disparity was the result of a factor other than sex because, among other things, plaintiff's comparator refused to take the position for less than a salary that was already higher than plaintiff's at the time of hire. The court held that the university's proffered reasons to explain the wage disparity, including the comparator's salary negotiations and higher

Employers should expect equal pay plaintiffs to continue to challenge factors other than sex that they believe are tainted by discrimination. Those arguments are sometimes successful. For example, in *Spiewak v. Wyndham Destinations, Inc.*,[467] a timeshare Sales Manager alleged she was paid less than male comparators in the same position in violation of New Jersey's EPA and Law Against Discrimination ("NJLAD"), which is analyzed similarly to a Title VII claim. The employer argued that plaintiff's lower compensation was the result of the straightforward application of its Compensation Plan, which applies to all Sales Managers.[468] But plaintiff argued that the employer had discriminated against plaintiff in terms of the factors and circumstances that impacted her ability to perform under the Compensation Plan: "Plaintiff concedes that she was paid pursuant to the same Compensation Plan, however, she contends that Defendant impacted her commission compensation by consistently assigning her less, and less seasoned, Sales Representatives."[469] Among other things, plaintiff was able to show that she was consistently assigned fewer Sales Representatives than her male counterparts, and with a greater proportion of them assigned to a less-lucrative market.[470] She was also able to marshal evidence to rebut the employer's attempts to show that all such assignments were made in a gender-neutral manner. On the NJLAD claim, the court denied summary judgment to the employer, concluding: "Plaintiff has identified facts and affirmative evidence to contradict or show inconsistencies with the proffered reasons and show that Defendant did not act for non-discriminatory reasons."[471]

Similarly in *Dixon v. Edward D. Jones & Co., L.P.*,[472] a female financial advisor alleged she was discriminated against in pay due to the discriminatory operation of the employer's asset and office sharing plan. Under that plan, senior financial advisors can transfer assets to more junior advisors to increase their portfolio capacity to manage more lucrative assets.[473] More junior financial advisors depend on the asset transfers from more senior advisors, so lack of access to those transfers in an advisor's career can impair their income and advancement opportunities. The plaintiff alleged that those asset transfers disproportionately went to white male financial advisors with equal or less experience. The employer sought to dismiss the complaint, alleging it was defective on its face because it did not allege that the employer paid different rates to male and female advisors and/or because the facts, as alleged, showed that the employer paid its employees under a system that measures the quality and quantity of production, i.e., an affirmative defense under the EPA.[474] The court agreed with plaintiff that this was a mischaracterization of the complaint, which begged the central question of the case: "whether assets under management' are, in fact, an 'objectively verifiable criterion' on which to base compensation, . . . or those assets are allocated in a way that improperly favors male employees—in favor of Defendants."[475]

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prior salary, were recognized as legitimate justifications by the Sixth Circuit), *rev'd*, 11 F.4th 498 (6th Cir. 2021); *Grigsby v. AKAL Security, Inc.*, No. 5:17-cv-6048-DGK, 2018 WL 3078769, at *7 (W.D. Mo. June 21, 2018) (holding that salary negotiations, without more, established an employer's affirmative defense, concluding: "there are no facts which would allow a fact finder to find that [employer's] decision to pay [plaintiff] more than [comparator] in the Director of Airport Operations position was based on gender because his salary was set through negotiations and he was the best available person for the job, necessitating a higher pay"); *Smith v. Office of the Att'y Gen., State of Ala.*, No. 2:17-cv-00297-RAH, 2020 WL 4015622 (M.D. Ala. July 16, 2020) (finding that employer met its burden to establish that wage disparity was due to factor other than sex where the evidence showed that male comparators had "made it known that they had no interest in positions at the OAG if their overall compensation was not commensurate with what they were earning at the FBI").

[467] *Spiewak v. Wyndham Destinations, Inc.*, No. 20-cv-13643 (KMW-EAP), 2023 WL 869309 (D.N.J. Jan. 26, 2023).

[468] *Id.* at *8.

[469] *Id.* at *9.

[470] *Id.*

[471] *Id.* at *10. The District Court for the Northern District of Illinois came to a similar conclusion in *Douglas v. Alfasigma USA, Inc.*, No. 19-cv-2272, 2021 WL 2473790 (N.D. Ill. June 17, 2021). In that case, a pair of sales representatives alleged, among other things, that they were underpaid compared to their male colleagues. The employer argued that the complaint was self-defeating in that it acknowledged that the male comparators were given more favorable sales territories. "[Employer] argues that Plaintiffs have pled themselves out of court by alleging that [supervisor] gave them unfavorable territory compared to their male counterparts. . .. [Employer] basically reads the complaint as an admission that Plaintiffs were less productive than their male counterparts." *Id.* at *10. But plaintiffs had alleged that taking away their sales opportunities was part of the discriminatory pattern they faced. The Court explained that "[t]aking away sales opportunities cannot defeat a sex discrimination claim when taking away sales opportunities was an act of sex discrimination." *Id.* at *11.

[472] *Dixon v. Edward D. Jones & Co., L.P.*, No. 4:22-cv-00284-SEP, 2023 WL 2755266 (E.D. Mo. Mar. 31, 2023).

[473] *Id.* at *1.

[474] *Id.* at *3.

[475] *Id.* at *4.

Because at the pleading stage the court is bound to draw reasonable inferences in favor of plaintiffs, it rejected the employer's arguments, holding that a more searching inquiry into the employer's pay practices would be needed before it could reach a conclusion.

4. Other Affirmative Defenses

A "factor other than sex" is the most commonly asserted defense in equal pay litigation. The other defenses are available, however, and they can be just as successful. If employers choose to justify a pay disparity based on a seniority or merit system, or on a system that bases pay on the quantity or quality of output, they must be careful that those systems are well documented and communicated to employees. A system that appears ad hoc or that is inconsistently applied risks being met with skepticism by a court.

Merit Systems. A merit system is perhaps the second most frequently relied upon defense, because many employers tie compensation increases to performance metrics. For example, in *Shen v. Automobile Club of Missouri, Inc.*,[476] a software developer alleged that she was paid less than male employees in the same role. The employer pointed to its merit system, i.e., its system of administering performance evaluations, which was used to determine salary increases and bonuses. The court first recognized that "[a] merit system must be known to employees, must not be based on sex, and must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria."[477] The court then held that the employer's merit system met those requirements. Among other things, the court found that the employer's system: "utilize[ed] non-gender based performance factors to determine an employee's rating," and left supervisors "little leeway" to make small adjustments to evaluations because "pay performance calculations were performed within a calculation tool and all recommendations had to be approved by upper management."[478] The court also rejected plaintiff's arguments that the merit system was biased, finding that "no one at [employer] ever made derogatory comments about her gender or told her they were making an employment decision based on her gender," and that "the undisputed facts show that plaintiff made more salary than the average male employee and more than half the males had lower salaries than plaintiff."[479] Accordingly, plaintiff failed to rebut defendant's showing that the alleged pay disparity was the result of a legitimately implemented merit system.[480]

Similarly, in *Mullenix v. University of Texas at Austin*,[481] a tenured law professor alleged she was underpaid compared to her male comparators. The court held that the EPA allows an employer to pay two comparable employees different salaries if that difference arose from a merit system that rewards workers for outstanding experience, training, and ability, so long as the resulting salary differential is not based upon sex.[482] Such a merit system must be administered "at least systematically and objectively," while permitting some level of subjectivity as to the weighing of nondiscriminatory factors.[483] The court held that the employer had established its "merit system" affirmative defense because the evidence showed that faculty salaries were set according to performance ratings set by a Budget Committee according to written standards.[484] The court then evaluated the history of pay raises in the context of that system and concluded that: "Because the University has provided uncontroverted summary judgment

[476] *Shen v. Auto. Club of Mo., Inc.*, No. 4:20-cv-626-SNLJ, 2023 WL 3948859 (E.D. Mo. June 12, 2023).

[477] *Id.* at *8 (quoting *Price v. N. States Power Co.*, 664 F.3d 1186, 1193 (8th Cir. 2011)).

[478] *Id.*

[479] *Id.*

[480] *Id.*

[481] *Mullenix v. Univ. of Tex. at Austin*, No. 1:19-cv-1203-LY, 2021 WL 5881690 (W.D. Tex. Dec. 13, 2021).

[482] *Id.* at *6.

[483] *Id.*

[484] *Id.* at *7. The Committee's work was guided by the "Standards For Law School Performance Evaluation of Tenured and Tenure-Track Faculty," which requires that evaluations of tenured faculty are based on three key metrics: research and scholarship, teaching, and service. The Standards explain the meaning of those terms and how faculty will be evaluated with respect to each of them. *Id.* It provided a performance rating for each faculty member, which was translated into a raise by the Dean in consultation with the Budget Committee. *Id.* at *9.

evidence that the Budget Committee and the Dean determined faculty members' pay raises on the basis of a merit system, the University has raised a valid affirmative defense under the Equal Pay Act."[485]

Proper documentation and consistent application of such systems are critical to establishing these defenses. Lack of either can prove fatal to such defenses. For example, in *Toole v. Lakeshore Ear, Nose, and Throat Center, P.C.*,[486] an African American head and neck surgeon alleged she was paid less than her white male counterparts due to her gender and race. The employer attempted to argue that the alleged pay disparities were the result of its merit system and/or a system that measures earnings by quantity or quality of production. And, in fact, the court found that "[i]t is undisputed that the Executive Committee used an objective mathematical formula based on Payments from insurance, Medicare/Medicaid and patients to determine compensation."[487] But the court held that a reasonable jury could find that such a system did not meet the requirements of a merit defense because the"[employer's] own admissions counter this affirmative defense."[488] The employer's President testified that pay was not based on quality or merit because they were unaware of any appropriate metric to assess merit.[489]

Similarly, in *Brunarski v. Miami University*,[490] the court held that a merit system that used vague criteria that were inconsistently applied could not justify a wage disparity.[491] Given the lack of evidence that the university's factors had been communicated to professors prior to their use, and that they deviated from the standard factors used for other raises, the court held that the university "must show that there was an actual legitimate business purpose of [employer] for its focus on these factors to the exclusion of other factors typically considered when awarding a merit raise under the standard factors."[492] However, in *McCarty v. Purdue University*,[493] an employer justified a pay disparity by arguing that the plaintiff's comparator had started at a higher salary because he had previously worked for the employer.[494] That initial pay difference grew over time due to the employer's merit ranking system.[495] The court was persuaded by the fact that plaintiff's poor performance was consistently documented and communicated to her: "It is clear that [comparator's] salary was impacted by his successful experience during the nine

[485] *Id.* at *16. In an earlier decision, the court also excluded plaintiff's expert witness, a social science researcher, who sought to provide "social framework" testimony regarding the operation of stereotypes and bias that can lead to workplace discrimination against women. *Mullenix v. Univ. of Tex. at Austin*, No. 1:19-cv-1203-LY, 2021 WL 4304815, at *2 (W.D. Tex. Sept. 21, 2021). The court held, among other things, that there was simply too great an analytical gap between the general research the expert relied upon and the specific conclusions he was offering about the case. *Id.* at *6.

[486] *Toole v. Lakeshore Ear, Nose, and Throat Ctr., P.C.*, No. 21-cv-11850, 2023 WL 3794507 (E.D. Mich. June 2, 2023).

[487] *Id.* at *12.

[488] *Id.*

[489] *Id.*

[490] *Brunarski v. Miami Univ.*, No. 1:16-cv-311, 2018 WL 618458 (S.D. Ohio Jan. 26, 2018). In that case, two female university professors alleged they were paid less than comparable men. Among other things, the university attempted to justify the pay disparity as the result of a merit-based system. *Id.* at *10. The employer argued that plaintiffs' comparators received larger merit raises because of their involvement in study abroad programs and because of exceptional performance. *Id.*

[491] The court held that the university had failed to establish this affirmative defense because, among other things, the standards for awarding so-called "super-merit" raises were vague and contradictory. *Id.* at *11. There was no evidence to show that the factors cited by the university had been used previously to award super-merit raises or any other type of raise. *Id.* Moreover, the court found that the university's application of the factors ostensibly used to justify the super-merit raises were not "commensurate with satisfaction" of those factors. *Id.*

[492] *Id.* at *12. Although the university had articulated a legitimate reason for those factors, "the same could be said for almost any individual factor it chose to now focus on that somehow relates to teaching, research, or service." *Id.*

[493] *McCarty v. Purdue Univ.*, No. 4:19-cv-43 JD, 2021 WL 3912564 (N.D. Ind. Sept. 1, 2021).

[494] *Id.* at *3.

[495] If an employee ranked in the bottom 10%, they would not be given a merit increase that year. Plaintiff ranked in the bottom 10% each year but one, whereas her comparator never ranked in the bottom 10% and in fact was ranked in the top 25% multiple years. He therefore received a merit increase each year. Moreover, the facts showed that in the one year when plaintiff did not rank in the bottom 10%, she did receive a merit increase. But it was less, in percentage terms, than what her comparator received, due to their different performance rankings that year. *Id.*

years before [plaintiff] began employment. The Court finds this to be a reasonable differential that is not based on sex and does not believe a reasonable jury could conclude otherwise."[496]

Seniority Systems. Although not as often relied upon as a defense, seniority systems are treated similarly to merit systems. In *Duke v. City College of San Francisco*,[497] an administrator at a community college alleged he was paid less than a female counterpart who performed the same work. However, the court held that his chosen comparator had been an employee with the college for over three years before being hired into the same position as plaintiff. The court concluded that "Defendant has submitted undisputed evidence showing that [comparator] had already been a[n] . . . employee for three years before she was hired to perform the same role as plaintiff . . .. Thus, within the [employer] system, [comparator] had seniority, and it was permissible for her to receive a higher salary than plaintiff."[498]

As with a merit system, consistency and proper documentation are key. For example, in *Donovan v. Nappi Distributors*,[499] a female Wine Purchasing Manager for a beverage distributor alleged she was paid less than her male predecessor in the same position. The employer argued that her predecessor's higher pay was justified by his significantly greater experience and seniority than plaintiff at the company.[500] The court held that the employer had failed to establish its affirmative defense by the standard applicable to EPA affirmative defenses, i.e., by a preponderance of the evidence. While it was undisputed that plaintiff's predecessor had significantly more experience in the industry, the employer's failure to document the impact of its "seniority system" doomed its defense: "while [employer] claims seniority influences the different compensation, the record is devoid of any documentation supporting a 'seniority system' and its corresponding salary calculation."[501] Accordingly, the court held that there was sufficient dispute of material fact for a reasonable jury to find that seniority was merely a pretext for its compensation decisions.[502]

As with the factor other than sex defense, plaintiffs have sometimes challenged these defenses on the grounds that they are inherently discriminatory. For example, in *Spellers v. United States*,[503] an employer argued that plaintiff's and her comparators' difference in pay was due to the government's highly structured and regulated merit system and therefore could not be due to gender.[504] Plaintiff attempted to contest this, arguing that the merit system could not function properly because a discriminatory review

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[496] *Id.* at *5. *See also Summy-Long v. Pa. State Univ.*, 715 F. App'x 179, 183 (3d Cir.). In that case, the Third Circuit affirmed dismissal of a female physician's wage claim because, among other things, numerous items in the record "reflected a lack of academic performance in comparison to her colleagues." *Id.* Among other things, she had been urged to increase publications and to obtain external funding to support her research. She also "failed to apply to renew her National Institute of Health grant even after being reminded repeatedly for three years by her superior." *Id.* The court held that this evidence established that "[t]he difference in [her] salary compared to her male coworkers resulted from, among other things, her lack of publications and failure to obtain external funding." *Id.*

[497] *Duke v. City Coll. of S.F.*, No. 19-cv-6327-PJH, 2021 WL 1966599 (N.D. Cal. May 17, 2021).

[498] *Id.* at *8.

[499] *Donovan v. Nappi Distribs.*, No. 2:21-cv-70-JAW, 2023 WL 7702137 (D. Me. Nov. 15, 2023).

[500] *Id.* at *95.

[501] *Id.* at *96.

[502] *Id.* The same court came to a similar conclusion in another case brought against the same employer. In *Tourangeau v. Nappi Distributors*, 648 F. Supp. 3d 133 (D. Me. 2022), a female wine sales representative alleged she was underpaid compared to her male peers because she was paid at a 2% commission rate while they were paid at a 3% rate. At the time she was hired, her employer was in the process of reducing the pay scale of some of its sales representatives to better align with industry norms and to lower payroll costs. *Id*. at 149-50. The new commission rates applied to new hires; more senior sales representatives were "grandfathered in," so their rate structure would not be impacted. The plaintiff was both the first female wine sales representative and the first wine sales representative to be hired at the 2% rate. *Id.* at 208. The court held that a jury could reasonably conclude that the employer's decision to offer a lower rate to plaintiff was due to discrimination, particularly because it had not introduced evidence of the more senior male representatives' professional experience. Without such evidence, the Court was "unable to determine whether seniority justified this initial pay discrepancy." *Id.*

[503] *Spellers v. U.S.*, 157 Fed. Cl. 171 (Ct. Fed. Cl. 2021). In that case, a female computer scientist sued the Department of the Navy, alleging she was paid less than male co-workers for the same work. The plaintiff had been paid at the GS-11 equivalent pay band, while her comparators had been paid at a GS-13 level. *Id.* at 173. When plaintiff and her peers were transitioned to a new personnel management system, her pay was flagged by the system as too low. *Id.* She was given a large raise to help her catch up with her peers. Thereafter, she received modest pay increases, but still remained at the GS-12 level for several years. *Id.* at 174.

[504] The employer pointed to its sophisticated and gender-neutral merit-based system, called the NAVAIR Science and Technology Reinvention ("STRL") Personnel Management Demonstration Project.

process corrupted the inputs fed into the system, including about her actual duties and performance.[505] The court found those arguments were based on nothing more than speculation: "Because plaintiff acknowledges that the STRL pay system is facially gender-neutral when functioning as intended and with good data, . . . she has conceded the viability of defendant's affirmative defense."[506]

Quality and Quantity of production. The "quality and quantity of production" defense is especially important for sales positions, since sales employees are often compensated on commission. For example, in *Spurbeck v. Wyndham Worldwide*,[507] a timeshare sales representative alleged male sales representatives were paid more for the same work. The sales representative position was subject to performance metrics that tracked the eligible dollar value of the vacation ownership (timeshare) interest sold divided by the number of tours that the sales representative saw in a month.[508] Plaintiff argued that her employer gave male employees more opportunities to sell and more perks to help them sell.[509] The court found no credible evidence to suggest that male employees were treated more favorably with respect to their ability or opportunity to earn more under the same commission schedule. But more importantly, the court held that "[e]ven if Plaintiff had or was able to show evidence of a pay disparity, she would need to contend with Defendants' evidence that indicates that Sales Representatives were paid the same commission rate."[510] The court held that, because the employer used the same commission schedule to pay all sales representatives, it had adequately shown that its commission-based compensation plan was a system which measures earnings by quantity or quality of production.[511]

But in *Bandokoudis v. Entercom Kansas City, LLC*,[512] the court rejected the "quality and quantity of production" defense due to the lack of clear evidence as to how it was applied consistently to all employees. In that case, a woman working as on-air talent for a radio station alleged she was paid less than another morning radio host who was male.[513] The employer argued that it pays its on-air talent according to a system that measures the quantity or quality of production; the male host's ratings and revenue were higher and he was more successful in securing advertisers.[514] But it had not introduced any evidence to establish that those were the criteria used to determine plaintiff's comparator's pay. This was fatal to the "quantity and quality of production defense: "Without evidence of a system applied equally to Plaintiff *and* [comparator], Defendant fails to meet its burden with respect to this affirmative defense."[515]

5. Pretext

Even if an employer succeeds in establishing one of the enumerated affirmative defenses, a plaintiff may still succeed on an equal pay claim if he or she can show that the proffered reason for the wage disparity

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[505] *Id.* at 177.

[506] *Id.* (internal citations omitted).

[507] *Spurbeck v. Wyndham Worldwide*, No. 2:20-cv-00346-RFB-NJK, 2022 WL 717925 (D. Nev. Mar. 9, 2022).

[508] *Id.* at *2. Failure to meet minimum sales quotas could subject an employee to immediate termination. The plaintiff was eventually terminated for failing to meet sales quotas. *Id.*

[509] *Id.* at *7.

[510] *Id.* at *9.

[511] *Id. See also Cuthbertson v. First Star Logistics, LLC*, 638 F. Supp. 3d 581, 594 (W.D.N.C. 2022) (granting summary judgment for employer relying on "quantity and quality of production defense," where "Plaintiff concedes commissions were determined based on the profitability of agents recruited, and she has not presented any evidence to contradict Defendant's commission calculations based on quality of work recruiting profitable agents," and "Defendant's unrebutted evidence demonstrates that any difference in commission payments for Plaintiff and her male counterparts was due to individual performance based on both quantity and quality of those recruited").

[512] *Bandokoudis v. Entercom Kansas City, LLC*, No. 2:20-cv-02155-EFM-GEB, 2022 WL 1460008 (D. Kan. May 9, 2022).

[513] The court first held that the plaintiff had adequately established that the two radio hosts' positions were comparable: "it is undisputed that Plaintiff and [comparator] were both "on-air talent," . . . during the same morning daypart. . . . Further, Plaintiff has provided sworn testimony that the duties and responsibilities of Plaintiff's and [comparator's] shows were the same, that the skills and effort required to hosts the shows were the same, that the supervision of the shows was essentially the same, and that the conditions of Plaintiff's and [comparator's] employment were the same." *Id.* at *4.

[514] *Id.* at *4, 7. But the court held that, rather than evidence of any real system, the employer had merely cited "its Operations Manager's amorphous explanation of what he considers in determining salaries." *Id.* at *7.

[515] *Id.* (emphasis in original).

is merely a pretext for discrimination. Inconsistent application of work policies, as well as shifting and inconsistent testimony regarding the proffered justifications, are red flags that can lead to a finding of pretext. Most often this is considered by courts as the final step of the burden-shifting scheme applicable to EPA claims, meaning that the burden shifts back to plaintiff to establish pretext. But a few recent decisions have cast the exact nature of the burden shifting regime in doubt under both federal and state law, at least in some jurisdictions.

In *Wilder v. Stephen F. Austin State University*,[516] the District Court for the Eastern District of Texas held that EPA plaintiffs never bear the burden to establish pretext. In that case, a female professor alleged she was paid less than a similarly situated male professor. The employer argued that it had hired plaintiff's comparator at a higher salary because he had replaced a tenured Full Professor whereas plaintiff had replaced an Assistant Professor, so there was more money in the budget to pay a higher salary when plaintiff's comparator was hired.[517] Plaintiff argued that this explanation was a pretext. Noting the differences in proving pretext under the *McDonnell Douglas* framework versus the framework applied under the EPA, the court held that, under the EPA, the defendant always keeps the burden of production and persuasion after a plaintiff has established a prima facie case.[518] Accordingly, the impetus was on the employer to prove that the pay disparity can be explained by factors other than sex. The court held that it had not done so. Among other things, the court noted that the employer had chosen not to fix the known pay disparity when it was discovered: "There are genuine factual disputes about whether [employer] violated the EPA, and a jury could even decide that [employer] willfully violated the Act in light of the fact that the university chose not to fix a wage gap over the course of two academic years."[519]

Patel v. Tungsten Network, Inc.,[520] addressed this issue under California's EPA statute. In that case, a client relationship manager brought suit under the California EPA and the California Fair Employment and Housing Act ("FEHA"), alleging pay discrimination.[521] The court first granted the employer's motion for summary judgment on the FEHA claim because it had met the requirements of the *McDonnell Douglas* burden-shifting framework applied to such claims.[522] The court came to a different conclusion regarding plaintiff's claim under the California EPA, specifically because of the heightened standard for a "factor other than sex" defense under that statute.[523] It held that a defendant in a California EPA claim must do

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[516] *Wilder v. Stephen F. Austin State Univ.*, 552 F. Supp. 3d 639 (E.D. Tex. 2021).

[517] *Id.* at 652-53. Plaintiff argued that this defense should fail as a matter of law, likening it to the discredited "market forces" defense, which attempts to justify a wage disparity on the basis of the different market prices for male workers versus female workers. Or, as the court put it, "defendants cannot avoid liability for paying employees of one sex more than the other by chalking it up to inherently discriminatory market practices." *Id.* at 653. But the court saw differences between that defense and what the employer was asserting in this case. "Saying we had more money available that year' is different from saying 'men are generally paid more in this market.' The former recognizes financial limitations without regard to a prospective employee's sex, while the latter perpetuates a discriminatory industry practice. Therefore, the court is not willing to say that [employer's] budget-line defense constitutes a 'market forces' argument so as to fail as a matter of law." *Id*.

[518] The court did acknowledge that several older cases imply that the burden should shift back to the plaintiff to prove pretext after the defendant met its burden to establish an affirmative defense. But the court held this was wrong, relying on the Fifth Circuit's holding in *Lindsley v. TRT Holdings, Inc.* to conclude that "the court will always consider pretext if the analysis gets that far, but the burden never shifts back to the plaintiff in an EPA claim." *Id.* at 654 (citing *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460, 466 (5th Cir. 2021)).

[519] *Id.* at 655. Other courts in the same circuit have relied on the same Fifth Circuit case to draw the opposite conclusion. *See Mullenix v. Univ. of Tex. at Austin*, No. 1:19-cv-1203-LY, 2021 WL 5881690 (W.D. Tex. Dec. 13, 2021) ("The burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), governs claims under the EPA.") (citing *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460, 466 (5th Cir. 2021)).

[520] *Patel v. Tungsten Network, Inc.*, No. 2:20-cv-7603-SB-JEM, 2021 WL 4776348 (C.D. Cal. Sept. 15, 2021).

[521] *Id.* at *1.

[522] The employer had pointed to differences in experience, qualifications, and education to justify the wage disparity, which the court held was a bona fide, non-discriminatory reason. *Id.* at *4. Under the burden shifting regime applicable to FEHA claims, the *McDonnell Douglas* framework, the burden then shifted back to the plaintiff to establish pretext. The court found that plaintiff failed to do so according to the rather stringent standard applied under *McDonnell Douglas*: "Plaintiff's assertions fail to raise the level of 'substantial, responsive evidence' necessary to show Defendant's bona fide, nondiscriminatory reason for the challenged wage disparity was pretextual." *Id.* at *5.

[523] The court first held that the California EPA should be interpreted in line with the federal EPA with respect to which burden-shifting framework to apply. Prior California precedent had held that the *McDonnell Douglas* framework should apply to California EPA claims. *Id.* (citing *Green v. Par Pools, Inc.*, 111 Cal. App. 4th 620, 626 (2003)). However, the court relied on the more recent decision in *Rizo* to find that: "this burden-shifting test is inapplicable to the federal EPA because 'EPA claims do not require proof of

more than merely "articulate" a legitimate nondiscriminatory reason for a pay disparity, but must instead: "submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity."[524] Applying that framework, the court held that the plaintiff did not need to establish pretext to avoid summary judgment because "summary adjudication on the EPA claim is proper only if Defendant produces 'sufficient evidence such that no rational jury could conclude but that these proffered reasons actually motivated the wage disparity' at issue."[525]

Burden shifting issues aside, establishing pretext is often a highly fact-specific and granular affair.[526] Some courts have focused more heavily on an employer's state of mind to decide the pretext analysis. Evidence of direct discrimination is often enough to cast an employer's stated reasons for a pay disparity in doubt. For example, in *Egelkamp v. Archdiocese of Philadelphia*,[527] the court first held that the employer's proffered justifications could shift the burden of proof back to plaintiff.[528] Plaintiff pointed to comments made by her supervisor that were demeaning to the employer's female General Counsel ("when you hire a female as your general counsel, there's a head problem, an ego problem"), among other things. The court held that although this and other statements were ambiguous and subject to competing interpretations, it was nevertheless enough to send the issue of pretext to the jury: "A reasonable jury, weighing the credibility of the relevant witnesses, could find that [plaintiff] was paid less than [comparator] because of her gender even though there was substantial similarity between their responsibilities and relevant experience. When the record evidence is considered as a whole and reviewed in the light most favorable to [plaintiff], a factfinder could, at minimum, disbelieve the [employer's] reasons for paying [plaintiff] less than [comparator]."[529]

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discriminatory intent,'" and, "[l]ike its federal counterpart, the California EPA also does not require proof of discriminatory intent." *Id.* at *6.

[524] *Id.* at *7 (quoting *Rizo*, 950 F.3d at 1222) (emphasis in original).

[525] *Id.* (quoting *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)). Because the employer could not come up with contemporaneous evidence that it had in fact set plaintiff's and her comparators' salaries according to their different qualifications, the court held that a reasonable juror could conclude that those qualifications do not explain the wage disparity. *Id.*

[526] To name just a few examples, some courts have examined employer's recruitment activities, *see, e.g. Moore v. Baker*, No. 2:18-cv-00311-KD-B, 2020 WL 4934274, at *12 (S.D. Ala. July 20, 2020) (holding that college that had posted for plaintiff's comparator's position on several occasions with different salary ranges, having been unsuccessful in its first attempt with a lower salary, belied the notion of pretext: "considering these facts, expecting parity between a salary needed to retain an employee and a salary needed to recruit an employee with similar experience is not justified") (emphasis in original), or corporate reorganizations, *see, e.g., Anderson-Strange v. Nat'l R.R. Passenger Corp.*, No. 17-cv-1859-RGA, 2019 WL 2438842, at *4-5 (D. Del. June 11, 2019) (rejecting a claim that the reclassification of a manager's position to a lower pay grade was merely pretext for discrimination where it was done pursuant to a restructuring plan, there was no evidence that that plan had been inconsistently applied, and where plaintiffs' proffered comparators managed more stations across a larger geographic territory, and they managed direct reports that were spread across those multiple stations—factors that were consistent with plaintiff's employer's rationale for reclassifying her position into a lower pay grade). Other courts have rejected such defenses for various reasons. *See, e.g., Clark v. Vivant Solar, Inc.*, No. 2:17-cv-144-JNP-JCB, 2020 WL 6873942, at *15 (D. Utah Nov. 23, 2020) (rejecting employer's defense that it needed a regional HR manager who was physically located within plaintiff's geographic territory to allow for regular visits and more face-to-face interactions, finding that, while that could explain the relocation itself, it did not explain why plaintiff was not offered the chance to relocate along with that position); *Emanuel v. Ala. State Univ.*, No. 2:17-cv-658-ALB, 2019 WL 3246398, at *3 (M.D. Ala. July 18, 2019) (rejecting employer's defense that plaintiff's compensation was less than his comparator's due to a "rank adjustment" that was given years earlier to all employees at a time when plaintiff was still an associate professor, but when his comparator was a full professor because: "evidence that the 2009-10 [] Salary Schedule replaced all previous salary considerations demonstrates that there is a genuine issue of material fact as to whether the non-discriminatory reasons offered by [employer] are pretextual"); *Fortenberry v. Gemstone Foods, LLC*, No. 5:17-cv-1608-AKK, 2018 WL 6095196, at *4 (N.D. Ala. Nov. 21, 2018) ("[A] reasonable jury could find that [employer's] inconsistent application of its weekend pay policy and its shifting reasons for why it did not pay [plaintiff] for weekend work show that [employer's] policy is pretext for a gender-based reason for the pay differential.").

[527] *Egelkamp v. Archdiocese of Phila.*, No. 19-cv-3734, 2021 WL 1979422 (E.D. Pa. May 18, 2021).

[528] *Id.* at *6 ("The [employer] contends [comparator] was paid more because he was more qualified, had more years of service with the [employer], and had significant experience with supervising employees and managing departments. . . . It also argues [comparator] had significantly greater responsibilities than [plaintiff]. . . . Taking the [employer's] evidence as true, it points to sufficient facts to meet its relatively light burden.") (internal citations and quotations omitted).

[529] *Id.* at *7.

Absent such evidence, however, courts are often loathe to second guess an employer's motivations. In *Hornsby-Culpepper v. Ware*,[530] for example, the Eleventh Circuit held that the touchstone of the pretext inquiry centers on the employer's beliefs, not the employee's beliefs: "a plaintiff is not allowed to merely recast an employer's proffered nondiscriminatory reasons or substitute her business judgment for that of the employer."[531] Similarly, in *Black v. Barrett Business Services, Inc.*,[532] the court rejected plaintiff's attempt to show that an employer's reasons were a pretext for discrimination because she was not able to present evidence to show discriminatory animus on the part of her supervisors or fellow branch managers.[533] Moreover, the employer was able to show that it had hired other female branch managers at salaries that were higher than plaintiff's salary and higher than other male branch managers, and that there were other male branch managers who, like plaintiff, never received a salary raise, and that it had increased the salaries of other female branch managers over time.[534]

D. Other Important Substantive Decisions Impacting Equal Pay Litigation

1. Retaliation Claims

Because the federal EPA is incorporated into the FLSA, it includes the anti-retaliation provisions of that statute. Section 15(a)(3) of the FLSA states that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has" engaged in protected conduct, such as filing a complaint of wage discrimination.[535] Establishing a causal link between a plaintiff's protected activity and the alleged adverse employment action is often the most difficult burden for a plaintiff to overcome to establish liability on a retaliation claim.

Issues of causation can be quite complex. For example, in *Loos v. County of Perry, Illinois*,[536] a county public defender alleged, among other things, that her employer constructively discharged her when it significantly changed her position and refused to pay her earned benefits.[537] At issue was the employer's

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[530] *Hornsby-Culpepper v. Ware*, 906 F.3d 1302 (11th Cir. 2018). In that case, a County Clerk complained about wage discrimination when she was hired at a lower salary than her predecessor in that position and her request for a higher salary was denied. *Id.* at 1307. The employer provided three non-discriminatory reasons for the lower salary, which involved budgetary constraints and the fact that plaintiff had previously been terminated from that position. *Id.* at 1312-13. Although plaintiff disputed the proffered reasons, the Eleventh Circuit found that she had "failed to point to any affirmative evidence establishing that his proffered reasons were false or a pretext for unlawful sex discrimination." *Id.* at 1314.

[531] *Id*. at 1313 (quoting *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010)). *See also Hall v. Ala. State Univ.*, No. 2:16-cv-593-GMB, 2019 WL 137593, at *11 (M.D. Ala. Jan. 8, 2019) ("Merely questioning the wisdom of a reason is not sufficient as long as the reason is one that might motivate a reasonable employer. . . . Hall's arguments question whether ASU should have relied on [comparator's] experience and success but do not undermine ASU's reliance on those factors. . . . This court cannot conclude, therefore, that a sufficient question of fact as to pretext exists.").

[532] *Black v. Barrett Bus. Servs., Inc.*, No. 1:18-cv-96-CWD, 2019 WL 2250263 (D. Idaho May 23, 2019). In that case, a branch manager of an employee staffing and recruiting company complained she was paid less than equally qualified branch managers at her branch and a nearby branch. The employer argued that plaintiff's comparators were paid more because they had experience she did not have. *Id.* at *6. In particular, the employer pointed to the fact that her comparators had significant experience growing and managing their own businesses. The Company's strategy was to hire branch managers who could successfully build their branch into multi-million-dollar revenue centers. *Id.* at *7.

[533] *Id.* at *8.

[534] *Id.* at *9.

[535] 29 U.S.C. § 215(a)(3). Under the FLSA, an employee has engaged in protected conduct if he or she has "filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." *Id.* What counts as "filing a complaint" is often a contentious issue. For example, in *Burke v. State of New Mexico*, 696 F. App'x 325 (10th Cir. 2017), the Tenth Circuit affirmed the district court's dismissal of, among other things, a retaliation claim brought pursuant to New Mexico's Fair Pay for Women Act because the plaintiff failed to allege that she had engaged in any protected conduct. Analyzing the statute under the rubric of the federal EPA, the Tenth Circuit held that although plaintiff had alleged that she had questioned her superiors about an alleged pay disparity, she had failed to allege that this "questioning" rose to the level of actual objection or opposition to the alleged pay disparity. *Id.* at *2.

[536] *Loos v. Cnty. of Perry, Ill.*, No. 3:20-cv-1107-MAB, 2023 WL 6382364 (S.D. Ill. Sept. 30, 2023).

[537] *Id.* at *15.

decision to change plaintiff's position from a full-time position to multiple part-time positions. The employer—a county—argued that it could not be held liable because the decision had been made by a state employee (a judge). However, the court held that the employer had failed to "cite to any evidence that the Board had no authority to decide whether to change the public defender position from full-time to part-time . . . . [a]nd, the evidence, state law, and logic suggest the Board did have authority to decide the nature of the public defender position."[538] The court noted that the employer county controlled its own purse strings and had authority to decide whether the office of the public defender would even exist.

Nevertheless, the court held in the employer's favor, finding that the plaintiff had failed to demonstrate a sufficient causal link between her protected activity and the alleged retaliatory conduct. Among other things, the plaintiff argued that the county's stated reasons for the change in her position were pretextual. Contrary to the county's argument that switching to part-time public defenders would save money, plaintiff argued that it would in fact cost the county money because it could not obtain reimbursement from the state for all of the part-time positions.[539] The state had allowed the county to seek reimbursement for all part-time public defenders by using only one of the part-timer's names. Given these facts, the court held that plaintiff's arguments ignored the reality that the county had been receiving that reimbursement for all part-timers since the switch was made.[540] The court also rejected plaintiff's claims of a wide-ranging conspiracy, which were premised on the county's alleged botched execution of its strategy to convert one full-time position into several part-time positions, holding that: "In hindsight, it is apparent that [the Judge's] assessment [i.e., the judge who made the decision to switch to part-time public defenders] was plagued by incomplete information and untested assumptions. But even so, that is not enough to establish pretext."[541]

In another recent case, *Carmody v. New York University*,[542] an emergency room physician was able to survive summary judgment by producing evidence that she was terminated in retaliation for her complaints about gender discrimination. The employer argued it was because she had falsified a patient record; she allegedly wrote that she had examined a patient before signing off on the patient's treatment when she had not. However, plaintiff was able to show that what she was accused of doing was common and that other male physicians had not been disciplined after doing something similar.[543] The court held that this evidence was sufficient for a reasonable jury to conclude that prohibited discrimination was at least one of the motivating factors in her termination.[544]

The exact timing of events is often critical to the causation analysis. For example, in *Schottel v. Nebraska State College System*,[545] a college instructor alleged retaliation under Title VII because she was terminated after complaining about pay discrimination. The employer argued that her termination was due to, among other things, how she managed her class. Plaintiff's complaint about pay discrimination was made less than three weeks before her employer started the investigation that eventually led to her termination.[546] Despite this close temporal proximity, the Eighth Circuit held that plaintiff had failed to establish causation because her employer had presented a "'lawful, obvious alternative explanation for the alleged conduct' that renders [plaintiff's] theory of causation based on temporal proximity implausible."[547] Moreover, she had failed to show that the employer's proffered reason for her

[538] *Id.* at *16.
[539] *Id.* at *17.
[540] *Id.* at *18.
[541] *Id.* at *19.
[542] *Carmody v. N.Y. Univ.*, No. 21-cv-8186(LGS), 2023 WL 5803432 (S.D.N.Y. Sept. 7, 2023).
[543] *Id.* at *4.
[544] *Id.* at *5.
[545] *Schottel v. Neb. State Coll. Sys.*, 42 F.4th 976 (8th Cir. 2022).
[546] *Id*. at 983-84.
[547] *Id*. at 984 (quoting *Wilson v. Ark. Dep't of Hum. Servs*., 850 F.3d 368, 373 (8th Cir. 2017)).

termination—the way she managed her classes—was a pretext. The record showed that the decision-maker responsible for the investigation had been unaware of her complaints.[548]

On the other hand, when an adverse action follows closely after a plaintiff's protected activity, this can be powerful evidence to establish a causal link between the two events. For example, in *Donathan v. Oakley Grain, Inc.*,[549] a female employee alleged that her employer terminated her in retaliation for complaining that she had not received bonuses in line with other employees in similar positions, and that new employees were starting at higher rates of pay. Plaintiff was laid off approximately eight days later.[550] The Eighth Circuit held that: "[plaintiff] was terminated from her office position even though [employer] had not included the office position in its seasonal layoffs any of the prior three years that [plaintiff] had worked for the company (or during the years when [plaintiff's] predecessor held the post). Plaintiff's termination occurred despite the absence of negative reviews, and [employer] hired [replacement] to fill the position the very next working day."[551]

Retaliation claims under Title VII and the EPA are often analyzed under the same burden-shifting framework. The outcome under either statute often comes down to the credibility of the employer's reasons for the alleged adverse action. For example, in *Carlson v. Qualtek Wireless LLC*,[552] the court rejected a retaliation claim because it was unwilling to second guess the business judgment of the employer. In that case, a Finance Manager alleged she was refused a promotion and then fired due to her complaints about gender-based discrimination. The court analyzed the claims under Title VII and the EPA the same way, using the *McDonnell Douglas* burden-shifting framework.[553] The evidence demonstrated that the promotion would have required moving to a different state to work at the employer's headquarters, which plaintiff was unwilling to do.[554] Plaintiff argued that the job could be done from anywhere, but the court declined to supplant its judgment for the employer's in that regard: "our concern is not the wisdom of [employer's] internal processes or business judgment in managing its financial team. Our concern is whether [plaintiff] can cite credible evidence [employer] failed to promote her in November 2019 as retaliation for her October 2019 complaint. [Plaintiff] offers none."[555] Similarly, the court was unwilling to second guess the employer's business judgment regarding the restructuring that led to plaintiff's termination: "[Plaintiff] baldly argues the Finance Team restructuring reason is not

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[548] *Id*. The Fourth Circuit came to a similar conclusion in *Coleman v. Schneider Elec. USA*, 755 F. App'x 247 (4th Cir. 2019). In that case, the Fourth Circuit held that "the relevant date is when the decisionmakers learned of [plaintiff's] protected activity," and noted that the adverse action happened more than one year after they learned about Plaintiff's EEOC charge, the alleged cause for retaliation. *Id.* at 250. Moreover, plaintiff had been unable to point to any other evidence of retaliatory animus. The court noted that she had been given an above-average performance review after her EEOC charge, which "undercut[] any inference that [plaintiff's supervisor] acted with retaliatory animus when he issued the disputed performance evaluation." *Id. See also Oulia v. Florida Dep't of Transp.*, No. 18-cv-25110-Scola, 2020 WL 2084998, at *5 (S.D. Fla. Apr. 30, 2020) (granting summary judgment in favor of an employer because, although the plaintiff had complained about unequal opportunity to work overtime to her manager, she had not produced evidence that her manager had communicated that complaint to her supervisor, who was the decision-maker regarding her termination; this was "fatal to her attempted *prima facie* retaliation claim"); *Sharkey v. Fortress Sys., Int'l*, No. 3:18-cv-19-FDW-DCK, 2019 WL 3806050, at *5 (W.D.N.C. Aug. 13, 2019) (granting summary judgment against a female employee who alleged she was terminated after she refused to agree to a new compensation plan that would have reduced her base salary and increased her commission; plaintiff claimed she was terminated because she would not agree to the reduced compensation, but the court held that she was selected for the reduced compensation package *before* she complained about it, even though her termination occurred after); *Yearns v. Koss Constr. Co.*, No. 17-cv-4201-C-WJE, 2019 WL 191656, at *5 (W.D. Mo. Jan. 14, 2019) (holding that the length of time between the alleged protected activity and adverse action showed that the two were not causally connected because her complaint came two months before her layoff: "Even assuming the June 2015 Complaint occurred on the last day of June, over eight weeks passed until her August layoff. This lengthy time period weakens any potential causal link").

[549] *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735 (8th Cir. 2017).

[550] *Id.* at 737. As further evidence of the time-causation connection, the Eighth Circuit noted that ten minutes after Plaintiff put her complaints in an email to the president of the company, the president forwarded her email to plaintiff's manager, and they discussed her complaint by phone. *Id.*

[551] *Id.* at 740-41.

[552] *Carlson v. Qualtek Wireless LLC*, No. 22-cv-125, 2022 WL 3229399 (E.D. Pa. Aug. 10, 2022).

[553] *Id*. at *9. Regarding the failure to promote allegations, the court held that plaintiff failed to demonstrate a causal connection between her complaint about her promotion and the denial of her promotion. Although those events happened within about a month of each other, under Third Circuit precedent, "temporal proximity of greater than ten days requires supplementary evidence of retaliatory motive." *Id*. at *10. Plaintiff had failed to produce such evidence of a retaliatory motive.

[554] *Id*. at *11.

[555] *Id*.

credible . . . and we must deny summary judgment. She looks for a jury and argues the wisdom of [employer's] business judgment; she seemingly would do it differently. But she is not the employer."[556]

On August 9, 2023, the Third Circuit affirmed the district court's decision, holding that the record showed that "[plaintiff] was repeatedly told that the position would require her to be in Pennsylvania and the two men ultimately hired for the position both worked in [employer's] Pennsylvania headquarters."[557] The court also rejected plaintiff's arguments regarding the restructuring. Although plaintiff was terminated just one week after she complained about her bonus, the court found that "documents and testimony corroborate that [the employer] was, in fact, undergoing a company-wide restructuring at the time of [plaintiff's] termination."[558] Moreover, plaintiff was not the only employee who was terminated, others were also affected; the court noted that the Finance Manager position was also eliminated. Given these facts, the court concluded that "temporal proximity does not undermine the legitimacy of [plaintiff's] reasons for her termination."[559]

Some recent decisions have also addressed what counts as "protected activity" under the EPA's anti-retaliation provisions. For example, in *Barnard v. Power Valley Electric Cooperative*,[560] a manager alleged she was placed on administrative leave and later fired after she brought complaints about discrimination to the company's Audit Committee, along with supporting documents and a seven page letter that described alleged sexual harassment and discriminatory pay practices.[561] The court noted that protected activity must be adverse to an employer's interests, i.e., an employee does not engage in protected activity when he or she investigates discrimination on the employer's behalf with the intention of limiting the employer's liability for such discrimination. But that was not the case here. In this case, the court held that "it was sufficiently clear that [plaintiff's] request was adversarial. She asked for a pay raise for herself . . .. Before she was fired, she hired an attorney and told [employer's] counsel, on multiple occasions, that she was considering a lawsuit."[562]

A closely related question is whether protected activity occurred at all. For example, in *Craven v. City of New York*,[563] the court dismissed an EPA retaliation claim because the plaintiff failed to establish she had complained about unequal pay with sufficient particularity to put the employer on notice that a grievance had been lodged against it: "To premise a retaliation claim on an oral complaint to her employer, a plaintiff must allege that her complaint was 'made with a 'degree of formality' and that its content and context provide 'fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of [the employer's] business concerns.'"[564] Although the court acknowledged that plaintiff alleged she had complained about her pay and level of responsibility as compared to other employees, it concluded that "there is no indication that she was actually complaining of conduct that plausibly rises to an Equal Pay Act violation," particularly in light of the fact that she did not mention her alleged comparator when she made those statements to her employer.[565]

Other recent decisions have considered what counts as an "adverse action." For example, in *Noonan v. Consolidated Shoe Co.*,[566] a Content Marketing Coordinator for a shoe distributor alleged she was

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[556] *Id*. at *13.

[557] *Carlson v. Qualtek Wireless LLC*, No. 22-2569, 2023 WL 5094566, at *3 (3d Cir. Aug. 9, 2023).

[558] *Id.* at *4.

[559] *Id.*

[560] *Barnard v. Power Valley Elec. Coop.*, No. 3:18-cv-537, 2021 WL 1383228 (E.D. Tenn. Apr. 12, 2021).

[561] *Id.* at *2-3.

[562] *Id.* (internal citations omitted). The employer also argued that her complaint was too vague. But the court noted that even informal complaints can be protected activity so long as it can reasonably be understood by the employer to constitute a complaint of sex discrimination. *Id.* at *6. The court held that plaintiff's complaint easily met that threshold, noting that "[plaintiff's] seven-page letter detailed how her employees—who were almost all women—had not received pay raises when compared to other employees—who were almost all men—in the company," which came with a complaint about a long history of sexual harassment as well. *Id.* at *7.

[563] *Craven v. City of N.Y.*, No. 19-cv-1486 (JMF), 2020 WL 2765694 (S.D.N.Y. May 28, 2020).

[564] *Id.* at *7 (quoting *Lenzi v. Systemax, Inc.*, No. 14-cv-7509 (SJF), 2015 WL 6507842, at *5 (E.D.N.Y. Oct. 26, 2015)).

[565] *Id.* (quoting *Kent-Friedman v. N.Y. State Ins. Fund*, No. 18-cv-4422 (VM), 2018 WL 6547053, at *2 (S.D.N.Y. Nov. 16, 2018)).

[566] *Noonan v. Consol. Shoe Co.*, 84 F.4th 566 (4th Cir. 2023).

discriminated against with respect to pay and then retaliated against when she complained about it. She alleged that her employer retaliated against her by: (1) threatening to fire her when she complained of discrimination; (2) taking away some of her job responsibilities; and (3) refusing to provide her a letter of recommendation after she was let go (the termination itself was not alleged to be retaliatory).[567] The court first held that the employer's one-off, inaccurate statement to plaintiff that her knowing a co-worker's pay was a fireable offense, even if it could be characterized as a "threat," was not sufficiently adverse to be actionable. Explaining that retaliatory conduct must be "'materially adverse,' which means the plaintiff must show 'significant' harm that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination,'"[568] the court held that "no reasonable juror would conclude that the threat was a significant harm that would have dissuaded a reasonable worker from making a charge of discrimination."[569]

With respect to plaintiff's job responsibilities, the court applied an objective standard, holding that "the record does not support the claim that her reduced responsibilities were *objectively* more desirable or prestigious than her increased responsibilities," that they offered fewer opportunities for promotion or professional development, or that she was demoted either in title or in compensation.[570] The fact that her new responsibilities were subjectively less appealing to her cannot, in and of itself, constitute an adverse employment action. Finally, the court concluded that the reason her employer did not give plaintiff a letter of recommendation is because she did not accept its severance package, which included such a letter as a perk: "Accordingly, even assuming that withholding a letter of recommendation would dissuade a reasonable worker from engaging in protected activity, no reasonable jury could find the necessary "causal link between the two events."[571]

Similarly, in *Talbott v. Public Service Company of New Mexico, PNM*,[572] a manager of Customer Service Revenue alleged she was retaliated against when she was subjected to an investigation, placed on administrative leave, and terminated due to her persistent questions and complaints about being paid less than male managers. The employer argued that the real reason for its actions against plaintiff was due to her conduct during its investigation of an incident involving a cash discrepancy.[573] The court held that the employer's missing cash investigation, by itself, cannot constitute an adverse employment action because she had not been the target of the investigation: "although Defendant placed Plaintiff on administrative leave for allegedly interfering with the investigation, to the extent anyone was the target of the investigation, Plaintiff herself acknowledged that this person was [a different employee] (rather than Plaintiff)."[574] Moreover, although her eventual termination indisputably qualified as an adverse action, the missing cash investigation was an intervening event that broke the causal connection between that protected conduct and her termination: "evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action."[575]

2. Proving An "Establishment"

The federal EPA requires plaintiffs to compare their wages against other employees within the same physical place of business in which they work. According to regulations issued by the EEOC, a single establishment "refers to a distinct physical place of business" within a company; "each physically separate

[567] *Id.* at 571-72.

[568] *Id.* at 575 (quoting *Israelitt v. Enter. Servs. LLC*, 78 F.4th 647, 656 (4th Cir. 2023)).

[569] *Id.*

[570] *Id.* at 575-76.

[571] *Id.* at 576. (quoting *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015)).

[572] *Talbott v. Pub. Serv. Co. of N.M., PNM*, No. 18-cv-1102 SCY/LF, 2020 WL 2043481 (D.N.M. Apr. 28, 2020).

[573] *Id.* at *3-4. Among other things, the employer argued that the plaintiff had not been cooperative with the missing cash investigation and was disruptive with the investigation and her team. She was placed on administrative leave, given a written corrective action, and eventually terminated. *Id.* at *4-5.

[574] *Id.* at *15.

[575] *Id.* at *16 (quoting *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001-02 (10th Cir. 2011)).

place of business is ordinarily considered a separate establishment" under the EPA.[576] The regulations contrast this with the entire business, or "enterprise," which "may include several separate places of business."[577] Courts presume that multiple offices are not a "single establishment" unless unusual circumstances are demonstrated.[578] Not surprisingly, defining the scope of the establishment for purposes of comparing salaries and wages is a frequently contested issue in EPA litigation.

For example, in *Moazzaz v. Metlife, Inc.*,[579] a Senior Vice President and Chief Administrative Officer and Interim Global Head of Digital Strategy alleged she was paid less than male employees with similar-level positions, such as the Head of Japan Operations and Europe, Middle East and Africa Chief Financial Officer.[580] The employer argued that those positions were too geographically separate from plaintiff's position and therefore not within the same "establishment" as defined by the EPA. However, the court held that plaintiff had alleged sufficient facts at the pleading stage to allow the case to proceed based on those comparators. The court noted that "[t]he foreign comparators all appear to be members of [employer's] leadership team," who reported directly to plaintiff and other centralized high-level officers. The court concluded that "[i]t is thus improbable that foreign [employer] personnel, instead of, say, . . . the Head of Human Resources for Global Technology and Operations, would have been responsible for the Head of Asia IT's specific salary."[581]

Courts are often quick to stress that extending an EPA claim beyond a single establishment is the exception rather than the rule, and it requires the existence of "unusual circumstances" that tie together a larger group of employees under some centralized decision-making scheme. For example, in *Winks v. Virginia Department of Transportation*,[582] an employee of a state agency alleged she was paid less than male employees for the same work. The agency argued that those comparators did not work in the same establishment as the plaintiff.[583] The court found that there were no "unusual circumstances" that would justify expanding the usual definition of an establishment as a distinct physical place of business because the agency's nine regional districts operated independently from its central office with respect to whom to hire and what to pay: "The *districts*, not the Central Office, control the duties and assignments of the NPDES Coordinators on a daily basis. Each district functions as a largely independent unit within VDOT, making its own decisions with only high-level oversight from the Central Office. In scenarios with similar facts, courts have repeatedly found that regional offices could not constitute a combined single establishment."[584]

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[576] 29 C.F.R. §1620.9(a).

[577] *Id.*

[578] *See, e.g., Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (holding that evidence did not "demonstrate the level of centralization necessary to justify treating all of the company's technical writers as working at a single establishment" where "the specific salary to be offered a job applicant is determined by the local supervisor"); *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252, 287 (S.D.N.Y. 2018) (finding that pay and promotion decisions were not sufficiently "centralized" to amount to "unusual circumstances" warranting a finding that the many offices and practice areas qualify as a single "establishment" under the EPA because "although [defendant] set generally applicable guidelines, individual pay and promotion decisions were left to the discretion of local practice area leaders," which decisions were "reviewed by firm leadership on an aggregate basis against budget").

[579] *Moazzaz v. Metlife, Inc.*, No. 19-cv-10531 (JPO), 2021 WL 827648 (S.D.N.Y. Mar. 4, 2021).

[580] *Id.* at *5.

[581] *Id. See also Boisjoly v. Aaron Manor, Inc.*, No. 3:21-cv-01621-MPS, 2022 WL 17272372, at *1 (D. Conn. Nov. 29, 2022) (refusing to dismiss at the pleading stage plaintiff's EPA claims on the basis of the employer's argument that her comparators worked at a different "establishment" because such determinations are fact-intensive and should not be made without the benefit of discovery: "[Plaintiff] alleges that [employer] is a central administrative unit that hires employees, sets wages, and assigns the location of employment for its employees. This is enough at the pleadings stage to allow her to take discovery to prove whether unusual circumstances are present") (internal citations omitted); *Vasser v. Mapco Express, LLC*, 546 F. Supp. 3d 694, 700 (M.D. Tenn. 2021) (holding that plaintiffs had adequately alleged that a large chain of gas stations and convenience stores were a single establishment under the EPA because "Plaintiffs allege that [employer] has 'a rigid top down, hierarchical corporate structure,' with a 'top down wage policy.' . . . These allegations are sufficient for an initial finding of a 'single establishment' at the motion to dismiss stage").

[582] *Winks v. Va. Dep't of Transp.*, No. 3:20-cv-420-HEH, 2021 WL 5614764 (E.D. Va. Nov. 30, 2021).

[583] *Id.* at *3.

[584] *Id.* at *4 (emphasis in original).

It can also be important that, unlike the EPA, there is no "establishment" requirement for plaintiffs proceeding under Title VII. In *Lindsley v. TRT Holdings*,[585] the Fifth Circuit reversed and remanded a decision holding that Directors from other locations of the same hotel chain were not proper comparators because they were not part of the same "establishment" where plaintiff worked.[586] The Fifth Circuit held that, although the case did not present the "unusual circumstances" that might warrant departure from the usual rule regarding an "establishment" under the EPA, that analysis does not apply under Title VII or to plaintiff's state law claims. The Fifth Circuit faulted the district court for failing to address that issue in the context of those statutory schemes: "Those statutes contain no 'establishment' requirement. Yet the district court did not address whether [plaintiff] established a prima facie case under Title VII and the Texas Labor Code based on male food and beverage directors at different [employer] locations."[587]

Similarly, in *Black v. Barrett Business Services, Inc.*,[588] the District Court for the District of Idaho held that the plaintiff did not work in the same establishment as all but one of her comparators because the other managers worked at another branch.[589] In the Ninth Circuit, the "establishment" question depends not just on the geographic distance between offices, but also on "the nature of the services provided and the degree of central administration, such as budgeting, hiring, and day-to-day management."[590] The court found that there was no reason to combine the branches in this case, because, among other things, the branches were managed independently, had their own sales and profitability goals, each serviced and solicited distinct clients, and there was never any significant overlap in the daily operations.[591] Accordingly, for purposes of the EPA—but not Title VII—the plaintiff was limited to just one comparator.

3. Identifying The "Employer" Under The EPA

One issue that is frequently litigated in EPA lawsuits is whether one or more entities can be considered the "employer" of the plaintiff. Often that determination depends on what test is used to determine joint employment. Under Title VII, subject to some enumerated exceptions, an "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[592] The EPA uses the broader definition found in the FLSA, which defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[593] An "employee" is defined as "any individual employed by an employer,"[594] and the term "employ" means "to suffer or permit to work."[595] Together, those definitions have been called "the broadest definition . . . ever included in any one act."[596]

Courts interpreting the FLSA's definition have focused on the "economic realities" of the purported employment relationship. The "economic realities" inquiry, in turn, focuses on a number of factors related to control over the employee, including whether the alleged employer: (1) had the power to hire and fire

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[585] *Lindsley v. TRT Holdings*, *Inc.*, 984 F.3d 460, 464 (5th Cir. 2021). In that case, a hotel Food and Beverage Director alleged she was paid less than other Food and Beverage Directors who worked at different outposts of the same hotel chain in different cities in Texas.

[586] *See Lindsley v. TRT Holdings*, No. 3:17-cv-2942-X, 2019 WL 6467256, at *1 (N.D. Tex. Dec. 2, 2019). The Fifth Circuit held that the plaintiff had "put forth a prima facie case of sex discrimination," and stated "[i]f there is a good explanation for that disparity, [employer] is required to put one forth if it wishes to prevail in this litigation. [Employer] failed to do so. Yet the district court granted summary judgment to [employer] anyway." *Lindsley*, 984 F.3d at 464. The court pointed to the fact that plaintiff had established that she was paid less than her predecessors in the same position, and "[n]o more is needed to establish a prima facie case." *Id.* at 467.

[587] *Id.* at 468.

[588] *Black v. Barrett Bus. Servs., Inc.*, No. 1:18-cv-96-CWD, 2019 WL 2250263 (D. Idaho May 23, 2019).

[589] *Id.* at *5.

[590] *Id.* (quoting *Winther v. City of Portland*, 21 F.3d 1119, at *1 (9th Cir. 1994)).

[591] *Id.* at *6.

[592] 42 U.S.C. § 2000e(b).

[593] 29 U.S.C. § 203(d).

[594] *Id.* § 203(e)(1).

[595] *Id.* § 203(g).

[596] *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).

the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.[597] Deciding that issue can be quite complex and often gives rise to significant substantive litigation apart from the actual merits of a lawsuit.

For example, in *Moore v. Baker*,[598] the court allowed a complaint against alleged joint-employers to proceed, holding that the fact-intensive nature of the joint-employer inquiry required discovery and further factual development. In that case, a Director of Student Support Services at a community college sued her employer(s) for reassigning her to a new position as Adult Education Counselor/Student Services Coach.[599] The court first noted that the term "employer" is defined differently under Title VII and the EPA.[600] Plaintiff alleged that the college and the Board of Trustees should be treated as a single employer because the Board of Trustees has the authority to make rules and regulations for the college, including regarding qualifications for faculty and establishing and maintaining an annual salary schedule.[601] Plaintiff also alleged that the college president was directly responsible to the Chancellor and the Board of Trustees for the college's day-to-day operations and serves at the pleasure of the Board of Trustees.[602] The court held that those allegations would suffice at the motion to dismiss stage under both statutes, holding that joint-employment was a fact-specific inquiry best left to summary judgment.[603]

When plaintiffs sue under Title VII or state laws, different tests may be used. For example, in *Noble v. Gould Medical Group, Inc.*,[604] a physician brought a range of discrimination claims under federal, state, and common law. The claims were brought against a group of distinct healthcare entities, which were corporate affiliates of each other, used the same corporate branding, and reported to a single CEO. The court first held that "[t]here is a presumption that separate corporate entities have distinct identities, and plaintiffs bear a heavy burden under both California and federal law when they seek to rebut this presumption and hold multiple corporate entities liable as a single employer."[605] The Plaintiff was relying on an integrated enterprise theory to establish joint liability, which looks to four factors: (1) the interrelation of operations between the two entities; (2) whether they share common management; (3) the degree to which centralized control of labor relations exists; and (4) whether there is common ownership or financial control.[606] But the court noted that the plaintiff had not alleged that the defendant group hired him, set his compensation, or maintained his employment records. Nor did he allege that any entity other than his direct employer imposed any discipline on him. The court concluded: "'The key question in the integrated enterprise inquiry is who is responsible for the employment decisions at issue, and Plaintiff has

[597] *See, e.g., Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d. Cir. 1999).

[598] *Moore v. Baker*, No. 18-cv-311-KD-B, 2019 WL 1374674 (S.D. Ala. Mar. 8, 2019).

[599] *Id.* at *1. The community college subsequently hired a new director of student support services at a higher salary than plaintiff had been paid. *Id.* at *2.

[600] *Id.* at *6. Under Title VII, an employer is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such a person." *Id.* (quoting 42 U.S.C. § 2000e(b)). As noted above, the definition of "employer" under the FLSA/EPA is: "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* at *7 (quoting 29 U.S.C. § 203(d)). The court noted that term is defined more broadly under the FLSA/EPA than under the common law. *Id.*

[601] *Moore*, 2019 WL 1374674, at *6.

[602] *Id.*

[603] *Id.* at *7. Similarly, in *Jafri v. Signal Funding LLC*, No. 19-cv-645, 2019 WL 4824883 (N.D. Ill. Oct. 1, 2019), the Chief Operating Officer of a financial company brought a claim under the federal and Illinois Equal Pay Acts, alleging she was paid less than five of her male subordinates. *Id.* at *1. The complaint was brought against plaintiff's employer entity, as well as affiliated entities and the founder and Managing Partner of the corporate parent of those affiliated entities. *Id*. The employer argued that the complaint failed to allege that the affiliated entities had any control over plaintiff's pay. *Id.* at *4. However, the district court held that, "the allegation that she was employed by these entities is sufficient to plausibly allege that the entities had some control over her pay. This is particularly so when one individual—defendant [founder]—owns all three entities and is alleged to have directed [plaintiff] to move from Illinois to Florida in order to be able to more effectively work for all three entities." *Id.* The district court therefore allowed the case to proceed to discovery in order to determine, among other things, whether each of the defendants had the alleged control over plaintiff's compensation. *Id.*

[604] *Noble v. Gould Med. Group, Inc.*, No. 2:21-cv-01433-MCE-CKD, 2022 WL 3718036 (E.D. Cal. Aug. 29, 2022).

[605] *Id*. at *4 (quoting *Rhodes v. Sutter Health*, No. 2:12-cv-0013 WBS DAD, 2012 WL 1868697, at *6 (E.D. Cal. May 22, 2012)).

[606] *Id*. at *5.

alleged no facts to suggest that [Defendants] played any role in the decisions' alleged in the [complaint]."[607]

Although these joint-employment issues more typically involve different corporate entities, the EPA's definition of an "employer" is broad enough to include individual managers or supervisors who are shown to exercise substantial control over the plaintiff's terms of compensation and work activities.[608] For example, in *Malik v. Wyoming Valley Medical Center*,[609] a physician sought to hold her employer, a medical center, and a manager of the medical center, liable for alleged equal pay violations. At issue was whether she had adequately alleged that the manager was an "employer" under the EPA and the Family and Medical Leave Act ("FMLA"). The court held that she had, because she had alleged that he was a "high-level manager" at the organization, that he personally managed and oversaw her work, that he had the authority to discipline and counsel her, and that he had a hand in her removal from her position, her non-hiring for another position, and her suspension and termination.[610] Viewed in the light most favorable to plaintiff, the court held that those alleged facts "sufficiently alleged that Defendant [manager] exerted supervisory authority over her."[611]

Similarly, in *Gunaldo v. Board of Supervisors of Louisiana State University*,[612] the court held that there were sufficient allegations to establish that the Director of HR of a university could be held liable as an employer. According to the court, the complaint "does plausibly allege that [Director of HR] had some control over [plaintiff's] salary raise, . . . and that [Director of HR] maintained [plaintiff's] employment records . . . ."[613] The court also was satisfied that the complaint alleged that plaintiff had been told that HR was responsible for employee raises, and so it could "reasonably infer that [Director of HR] had at least some control over [plaintiff's] compensation and played a role in raising [plaintiff's] salary by two percent."[614]

Many cases have demonstrated that individual liability is much easier to allege as a *possibility* in a complaint, than it is to prove once the facts are known. For example, in a later case against the same university, *Muslow v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,[615] the district court for the Eastern District of Louisiana originally allowed a complaint to proceed against some members of the university's administration.[616] In that case, the full-time General Counsel

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[607] *Id*. (quoting *Rhodes*, 2012 WL 1868697, at *7).

[608] Some employers have argued that individual liability cannot be alleged along with entity liability, with some success. *See, e.g., Weaver v. Jackson, HMA, LLC*, No. 3:22-cv-151-HTW-LGI, 2023 WL 1787169, at *3 (S.D. Miss. Feb. 6, 2023) (dismissing claim against supervisor because it was a "remedial redundancy," meaning that the plaintiff already has the same claim against the employer under the EPA and, since double recovery for the same alleged acts of discrimination is disallowed, any further relief against an individual would be redundant and subject to dismissal); *but see Cooper v. Colo. Dep't of Corr.*, No. 21-cv-02411-PAB-NYW, 2022 WL 2063229, at *8 (D. Colo. June 8, 2022) (holding that plaintiff's proposed amendment to the complaint to, among other things, add EPA claims against two individual defendants was not futile, noting some precedent to support defendant's argument that an employee "may only assert an Equal Pay Act claim against the entity or her individual supervisors, but not both," but holding that there was a split of authority and lack of clear, binding precedent, such that: "the court cannot conclude that the present state of the law is so clear that it renders Plaintiff's Proposed Claims . . . patently futile").

[609] *Malik v. Wyo. Valley Med. Ctr.*, No. 3:19-cv-01547, 2020 WL 3412692 (M.D. Pa. June 22, 2020).

[610] *Id.* at *3.

[611] *Id.* at *4. *See also Davis v. Dawgs of St. John, Inc.*, No. 3:20-cv-0112, 2022 WL 17735829, at *23 (D.V.I. Dec. 16, 2022) (refusing to grant motion to dismiss filed by restaurant owners sued in their individual capacity under the EPA, finding that plaintiff had adequately alleged that they "jointly own, operate and/or manage the business known as [restaurant], and that Individual Defendants exercised control over significant aspects of the company's day-to-day functions, including compensation of employees").

[612] *Gunaldo v. Bd. of Supervisors of La. State Univ.*, No. 20-cv-154, 2020 WL 4584186 (E.D. La. Aug. 10, 2020).

[613] *Id.* at *14.

[614] *Id.*

[615] *Muslow v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, No. 19-cv-11793, 2022 WL 1642137 (E.D. La. May 24, 2022).

[616] *See Muslow v. Bd. of Supervisors of La. State Univ.*, No. 19-cv-11793, 2020 WL 6483134, at *11 (E.D. La. Nov. 4, 2020) (finding that plaintiff sufficiently alleged that Vice President of Legal Affairs and General Counsel of university was "employer" of attorneys in its legal department because complaint alleged that he "had power over Plaintiffs' contracts, that he organized legal work at [university], and that he reviewed employee salaries and status. Assuming the veracity of these statements, as is appropriate at this stage, this is enough to allege that [legal officer] was an employer under the FLSA to survive a motion to dismiss, even if the facts established at a later stage of the litigation tell a different tale").

and a part-time staff attorney working for a university's health sciences center sued the university and a handful of individual defendants, alleging they were paid less than various comparators who held other high-level positions. After discovery, the individual defendants each filed motions for summary judgment, arguing that they cannot be considered plaintiffs' employer under the economic realities test.

The court agreed, holding that plaintiff had failed to establish that either the Chancellor or the Vice Chancellor of administration and finance were plaintiffs' employers. Although the Chancellor had the power to fire plaintiffs, there was no evidence to suggest that he could also hire them.[617] Nor could plaintiffs establish that he supervised or controlled plaintiffs' work schedules or conditions of employment, determined their salaries, or maintained their employment records.[618] In particular, the court drew a distinction between the ability to recommend raises versus the authority to determine the rate and method of payment: "the fact that Plaintiffs recognize that [Chancellor] could only recommend raises shows that [Chancellor] did not have the authority to determine the rate of pay or method of payment," and refused to credit plaintiffs' argument that the ability to access university records was equivalent to maintaining those records: "Plaintiffs argue that [Chancellor] satisfies this prong because '[the university] as an institution maintained all employees' HR records which [Chancellor] had access to at any point in his role as Chancellor. Plaintiffs' logic is breathtaking: under this argument, every person who has access to the [university] system would satisfy this prong.'"[619]

On August 24, 2023, the Fifth Circuit affirmed the district court's decision.[620] With respect to the Chancellor, the court held that plaintiffs had failed to allege that he was involved in the rescission of their contracts, and thus affirmed the dismissal of their claims against him: "As an initial matter, [plaintiffs] do not allege that [Chancellor] was involved in the recission of their employment contracts, which is the only alleged retaliatory action that we hold survives summary judgment."[621] With respect to the employer's Deputy General Counsel, the court found that even though he had participated in decisions regarding plaintiffs' termination and drafted their termination letters, this was insufficient to establish individual liability: "being one of several voices contributing to a decision—ultimately made by another individual—to terminate Plaintiffs does not transform him into an employer," and "[r]eviewing employment and termination letters is a regular part of legal counsel's responsibilities, and this does not transform legal counsel into the employer of every person whose termination letter he or she reviews."[622]

But even at the motion to dismiss stage, many courts will not hesitate to dismiss allegations of individual liability that are conclusory or devoid of critical details. For example, in *Caples v. Thiel*,[623] the court dismissed an EPA claim that was brought against four individual defendants rather than plaintiff's actual entity employer. In that case, a female employee alleged she was paid less and did not receive the same benefits, pension, vacation, or full-time status as her male predecessor. The court held that, under Seventh Circuit precedent, individual employees cannot be held liable under the ADA and Title VII.[624] With respect to the EPA, the court held that in order to proceed against an individual defendant, "a plaintiff must not only explain what each defendant did, but must explain how each defendant's actions harmed her."[625] The court granted the defendant's motion to dismiss because plaintiff had failed to allege those facts.

[617] *Muslow*, 2022 WL 1642137, at *32-33.
[618] *Id*. at *33-34.
[619] *Id*. at *34 (internal citations and quotations omitted).
[620] *Muslow v. La. State Univ. & Agric. & Mech. Coll., Bd. of Supervisors*, No. 22-30585, 2023 WL 5498952 (5th Cir. Aug. 24, 2023).
[621] *Id.* at *10.
[622] *Id.*
[623] *Caples v. Thiel*, No. 17-cv-1797-pp, 2019 WL 1116948 (E.D. Wisc. Mar. 11, 2019).
[624] *Id.* at *5.
[625] *Id.* at *6.

4. Statute Of Limitations And Willfulness Issues

The normal statute of limitations for a violation of the FLSA, including a violation of the EPA, is two years. But if a violation is determined to be willful, then a three-year statute of limitations applies.[626] The standard for willfulness under the FLSA is "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[627] It is a plaintiff's burden to establish willfulness, and it is usually the jury that must make that determination. But where the facts are undisputed, a court can make the willfulness determination at summary judgment. And although this issue is usually about the extent, rather than the existence, of liability, there are some occasions when timing issues are especially critical, and the willfulness issue can actually decide the outcome of a case.

For example, in *Cunningham v. Advantix Digital, LLC*,[628] an account manager for an online marketing services company alleged, among other things, that she was paid less than a comparator who was hired around the same time as her, but who had been terminated several years prior. This gave rise to a statute of limitations issue because, as the Court noted, "the last time that the plaintiff was affected by the allegedly discriminatory pay differential between [plaintiff] and [comparator] was in November of 2016 when [comparator] was terminated, . . . and the plaintiff did not file this suit until more than two years later, on January 25, 2019."[629] In order to succeed on her claim, plaintiff would have to establish that the statute of limitations should be extended to three years. The Court held that she failed to show willfulness, explaining that plaintiff "points to no evidence in the record in support of her assertion that [employer] willfully violated the EPA."[630]

Similarly, in *Jones v. Trane US, Inc.*,[631] a management-level employee alleged, among other things, unequal pay and retaliation. At issue was whether plaintiff's EPA claim was barred by the statute of limitations because she had received her last paycheck more than two years prior to her lawsuit. The court first held that neither the filing of an earlier informal complaint, nor filing a charge of discrimination with the EEOC constitutes the filing of a legal claim for purposes of the statute of limitations.[632] The court then rejected her attempt to show a willful violation. The only proof plaintiff had proffered was the mere fact that a pay disparity existed, and the employer knew about it: "for a claim to fall into the category of a willful violation there must be something more than proof of merely a violation of the EPA."[633]

5. Maintaining Privilege Of Internal Investigations

The onset of litigation is often not the first time an employer hears about an employee's equal pay allegations. Often an employee will bring their concerns to company personnel before bringing a lawsuit in court. Employers will often investigate such claims, with the goal of correcting any unjustified pay disparities they may find. Many times, however, an employer's investigation will reveal no evidence of unlawful pay disparities. If the employee rejects the employer's conclusion and decides to sue, the discoverability of the employer's investigation file can become an issue in litigation. Employers that are careful to conduct their investigations under the cover of attorney-client privilege usually withhold some or all of their investigation files from production. But even in those cases, employees will sometimes argue

[626] 29 U.S.C. § 255(a).

[627] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

[628] *Cunningham v. Advantix Digital, LLC*, No. 3:19-cv-0210-G, 2020 WL 1915693 (N.D. Tex. Apr. 20, 2020).

[629] *Id.* at *14.

[630] *Id.* at *15.

[631] *Jones v. Trane US, Inc.*, No. 3:19-cv-0453, 2020 WL 5088211 (M.D. Tenn. Aug. 28, 2020).

[632] *Id.* at *9. *See also Black v. State of Ohio Indus. Comm'n*, No. 2:21-cv-2987, 2023 WL 5935650 (S.D. Ohio Sept. 12, 2023) (holding that time-barred claims cannot be salvaged by comparing a plaintiff's entire tenure of employment to that of her successor; one must base a comparison on the time period available for recovery: "Plaintiff argues that her pay during her first several years as Chief Legal Counsel was unequal when compared to [successor's] pay, but she cannot save the time-barred claim simply by using her successor as the comparator").

[633] *Id.* at *10.

that an employer waived privilege by putting the investigation at issue in the litigation. These issues can lead to highly contentious and fraught discovery disputes.

The details of exactly how an investigation report will be used by the employer in litigation can be dispositive of an employee's claims of waiver. For example, in *Benson v. City of Lincoln*,[634] a female firefighter alleged a range of sex-based discrimination claims against her city employer. In short, plaintiff alleged that another firefighter refused to communicate with her and left her and her crew in a dangerous situation.[635] The employer hired an outside attorney to conduct an investigation. The attorney investigating the incident interviewed plaintiff, the other firefighter accused of misconduct, and several other firefighters who were at the scene of the incident; her report was marked as attorney-client privileged and attorney work product.[636] Its conclusions generally refuted plaintiff's claims of misconduct, leading to plaintiff's termination for, among other things, making false allegations against a fellow firefighter.[637] Although the employer produced the investigation report itself to plaintiff, it withheld the attorney's other communications, documents, and recordings in her investigative file as work-product or attorney-client privileged.

Plaintiff argued that those privileges had been waived because the employer intended to use the report to refute plaintiff's case in litigation. The court first held that "the record reflects no intent on the part of Defendants to use the Investigation or the Investigation Report to support any affirmative defense."[638] According to the court, the employer intended to use the report as evidence of a legitimate, non-discriminatory reason for plaintiff's termination under the *McDonnell Douglas* burden-shifting framework, but could not and/or did not intend to use it to establish any affirmative defense.[639] The distinction between the different burden-shifting regimes under Title VII and EPA was critical to the court's analysis. Under Title VII, "an employer is only required to articulate or produce a legitimate reason for its actions, but the employer does not bear a burden to prove or persuade, only to make a minimal evidentiary showing," whereas "The Eighth Circuit Court of Appeals . . . distinguished the Equal Pay Act, under which the employer bears a burden of persuasion to show one or more of the enumerated justifications other than sex for a pay differential, and Title VII, under which a 'defendant need only articulate a legitimate reason defense.'"[640] Accordingly, the city employer had not waived privilege over its attorney's investigation because it was being offered only to support a denial that is not an affirmative defense: "the fact that an attorney investigates a claim and reports to a corporate client does not waive privilege where 'no actual defense of reliance on the attorney's recommendations or findings is made as a basis of the defense against the claim.'"[641]

However, in *Goulet v. University of Mississippi*,[642] the District Court for the Northern District of Mississippi held that large swaths of an employer's internal investigations of plaintiff's equal pay and other sex-discrimination complaints should be produced because attorney-client privilege had been waived. In that case, six female university professors sought the production of an investigative report compiled by their employer's counsel after they filed a pre-suit internal complaint of discrimination. The employer had relied on that report in its formal response to plaintiffs' charge of discrimination filed with the EEOC. Among other things, the employer had disclosed what it learned from interviewing plaintiff as part of the investigation, as well as other facts learned during the course of the investigation. Stating the blackletter law of waiver or privilege, the court held: "'[t]he attorney-client privilege was intended as a shield, not a

[634] *Benson v. City of Lincoln*, 343 F.R.D. 595 (D. Neb. 2023).

[635] *Id.* at 602.

[636] *Id.* at 602-03.

[637] *Id.* at 603.

[638] *Id.* at 610.

[639] Although the employer's Rule 30(b)(6) witness had testified that the city would rely on the report to establish its good faith defense and other affirmative defenses, the court held that it is attorneys, not witnesses, who decide trial strategy, and that the city was not bound by strategy determinations stated by a witness at a deposition, even of a corporate witness. *Id.*

[640] *Id.* at 612 (citing *Parada v. Great Plains Int'l of Sioux City, Inc.*, 483 F. Supp. 2d 777, 809 (N.D. Iowa 2007) and citing and quoting *Bauer v. Curators of Univ. of Mo.*, 680 F.3d 1043, 1045-46 (8th Cir. 2012)).

[641] *Id.* at 613 (quoting *Stockton v. HouseCalls Home Health Servs., Inc.*, No. 06-cv-357-GKF-PJC, 2007 WL 9782747, at *4 (N.D. Okla. June 15, 2007)).

[642] *Goulet v. Univ. of Miss.*, No. 3:22-cv-89-NBB-JMV, 2023 WL 2603939 (N.D. Miss. Mar. 22, 2023).

sword.' . . . When a litigant places information protected by attorney-client privilege at issue through some affirmative act for the litigant's own benefit, then allowing the privilege to protect against disclosure would be manifestly unfair."[643] Applying those principles, the court held that all but 10 pages of the employer's 64-page investigative report should be disclosed because privilege had been waived "for the reason that the information discussed in that material has already been disclosed by the University and its counsel to third parties—or in light of what has been disclosed, fairness would dictate the balance should be as well."[644]

Similarly, in *EEOC v. George Washington University*,[645] the District Court for the District of Columbia based its waiver decision on the exact use the employer intended to make of its investigation files in litigation. In that case, the EEOC alleged that a woman Executive Assistant to the employer's former Athletic Director was paid less than a male "Special Assistant" for the same work.[646] She filed an internal grievance with the employer's EEO office and a charge with the EEOC. The employer initiated an internal investigation to review the matter, which was initially conducted by non-lawyer staff in the EEO office. The investigation was later handed over to a law firm, which then issued a Confidential Informal Grievance Report.[647] In discovery, the EEOC requested all documents relating to that investigation, but the employer withheld all documents, except the grievance itself, under the auspices of attorney-client privilege and the work product doctrine, arguing that the investigation was done at the behest of the University's Office of General Counsel and, later, the law firm that conducted the investigation.[648]

The EEOC argued that the employer's assertion of a good faith defense to the EEOC's claim for punitive damages put the employer's subjective intentions at issue, thereby waiving privilege over those documents.[649] The employer argued the materials should stay privileged because it had disclaimed an intent to rely on the internal investigation to support its defense.[650] After surveying the law of at-issue waiver, the court applied a narrow interpretation, holding that "a party that has interposed a good faith defense but disclaimed reliance on privileged or protected materials—such as those created in connection with an internal investigation—does not waive protection over those materials."[651] Because the evidence the employer intended to rely on to prove its good faith defense was unconnected to its internal investigation, the court held that the privilege had not been waived: "the [employer's] [good faith] defense relies on evidence that the hiring and compensation decisions at issue here were made in a good faith effort to comply with the law. Importantly, all those decisions predate the internal investigation because 'the [employer] already had hired [comparator] as Special Assistant and already had determined his and [charging party's] pay at the time that the Internal Investigation began.'"[652]

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[643] *Id.* at *4 (citing and quoting *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989)).

[644] *Id.*

[645] *EEOC v. George Washington Univ.*, 342 F.R.D. 161 (D.D.C. 2022).

[646] *Id.* at 166.

[647] *Id.*

[648] The court first had to decide whether the subject materials were privileged at all, given that some of them were created by someone in the EEO office who, while an attorney, was not acting as counsel for the employer with respect to the investigation. The court held that those materials were privileged because that person had contacted the employer's Office of General Counsel within days of receiving the grievance, after determining that litigation was likely. *Id.* at 179. She then received guidance from the employer's in-house lawyers respecting the conduct of the investigation and reported back to them and discussed her findings with them. Under those circumstances, the court held that the entire investigation was done at the direction of counsel, even before the outside law firm became involved, and that a primary purpose of the investigation was the furnishment of legal advice. *Id.*

[649] Under Supreme Court precedent, a defendant in a Title VII case can avoid punitive damages by showing that it engaged in good faith efforts to comply with the statute. According to the EEOC, the assertion of that defense puts an employer's state of mind at issue, and in particular, its intent and knowledge of the law. Under this theory, the employer's investigation materials would reveal its state of mind with respect to the EEOC charge and its knowledge of the applicable law, so the EEOC should be entitled to obtain those documents in discovery. *Id.* at 185.

[650] *Id.* at 167.

[651] *Id.* at 187.

[652] *Id.* at 188-89 (internal citations omitted).

DEVELOPMENTS IN EEOC ENFORCEMENT OF EQUAL PAY ACT CLAIMS

The EEOC is the federal government's most powerful agency for the enforcement of federal anti-discrimination laws in the workplace. Authorized by Congress to wield broad investigative and subpoena powers for the prevention and remediation of unlawful employment practices, the EEOC's enforcement mechanisms cover a range of activities, from individual and systemic claims investigations, conciliation, litigation, and monitoring compliance, to serving as an agent for effecting broader policy change in employment sectors throughout the country. For more than a decade, the EEOC has set forth its top litigation priorities in its Strategic Enforcement Plan. For just as long, that plan has stated that the EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act ("EPA") and Title VII.[653] Most of its cases have revolved around sex-based discrimination. However, the EEOC stressed that it will also focus on compensation systems and practices that discriminate on any protected basis, such as race, ethnicity, age, or individuals with disabilities.[654]

A. Recent Examples Of EEOC Enforcement Activity

The number of EEOC lawsuits alleging equal pay violations has dropped significantly over the past few years. This has led to a decline in legal decisions relating to equal pay issues, at least those involving the EEOC as a party. Equal pay litigation, itself—apart from the EEOC's involvement—continues apace. And the EEOC has been actively attempting to steer the results, even if not as a party plaintiff.

For example, in September 2023 the EEOC filed an amicus brief in favor of reversal of the United States District Court for the Middle District of Alabama's decision in *Williams v. Alabama State University*.[655] In that case, a female Athletic Director of a university alleged she was underpaid compared to her male successor in the same position. Before the university hired her, the plaintiff had earned a Master's Degree in Athletic Administration and worked for two other Division I schools. When plaintiff was hired in 2018, she was given a $135,000 salary with performance incentives. When she asked for a raise the following year, the university denied her request and gave her a one-time $5,000 signing bonus.[656]

Williams resigned in 2021, and the university posted the Athletic Director position again, modifying the education and experience requirements. On education, the posting required "a master's degree, preferably in sports management or sports administration, an MBA or terminal degree." On experience, the posting required "at least seven to ten years of experience in major leadership posts in sports administration and management."[657] The university hired a male as plaintiff's successor, who had a Master's Degree and a PhD. He had never been an athletic director before. But he requested and received a starting salary of $170,000 along with performance incentives. The District Court granted the university's motion for summary judgment on plaintiff's EPA claim. The court held that: (1) the university had met its burden on its affirmative defense because the evidence demonstrated that it could have legitimately relied on plaintiff's successor's higher degree and greater relevant experience to set his higher salary;[658] and (2) plaintiff had not proven pretext because she failed to produce evidence that directly establishes discrimination, or which would permit a jury to reasonably disbelieve the employer's proffered reason.[659]

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[653] *See* U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan Fiscal Years 2024 - 2028, Strategic Enforcement Plan Fiscal Years 2024 - 2028 | U.S. Equal Employment Opportunity Commission (eeoc.gov).

[654] *Id.*

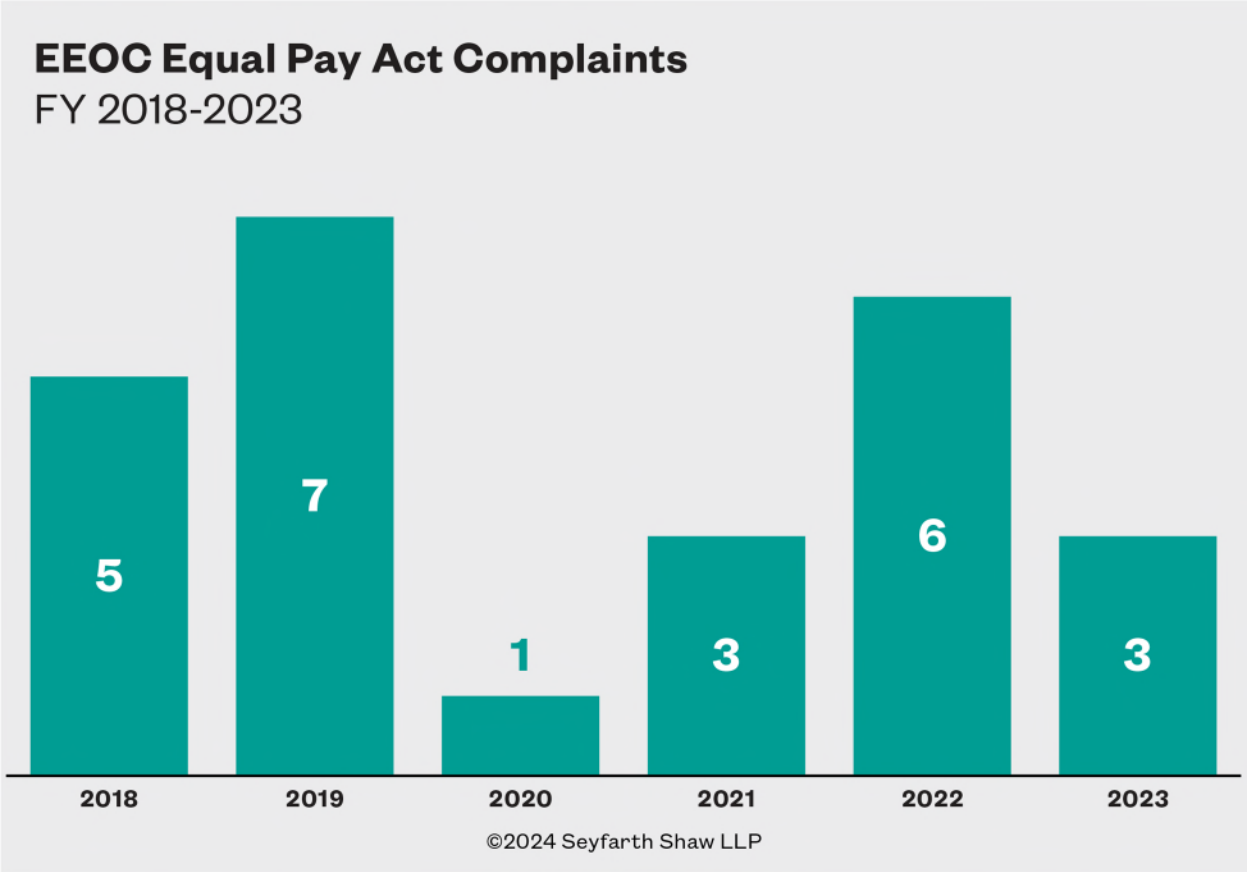
[655] *Williams v. Ala. State Univ.*, No. 2:22-cv-48-ECM, 2023 WL 4632386 (M.D. Ala. July 19, 2023).

[656] *Id.* at *2.

[657] *Id.*

[658] *Id.* at *4.

[659] *Id.* at *7.



The matter was appealed to the Eleventh Circuit, and the EEOC filed an amicus brief attempting to clarify the burden shifting framework under the EPA.[660] According to the EEOC, the EPA's framework is as follows: (1) the plaintiff must establish a prima facie case; (2) the defendant must then prove an affirmative defense that, in fact, caused the difference in pay in order to avoid liability. According to the EEOC, under the EPA, the burden never shifts back to the plaintiff to prove pretext.[661]

Therefore, for the university to prevail, it would need to submit evidence from which a reasonable factfinder could conclude that the proffered reasons do in fact explain the wage disparity (not simply that they *could* explain the disparity, which would be sufficient under Title VII's *McDonnell Douglas* framework). The EEOC points out that this burden is even higher at the summary judgment stage because an employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary.[662] Additionally, under the EPA's framework, the burden does not shift to the plaintiff to prove pretext.[663] According to the EEOC, the District Court's decision to the contrary goes against Eleventh Circuit precedent, and the majority of other circuits also reject the pretext step for EPA claims.[664] In reality, this issue has been hotly disputed among the federal courts, and it is no surprise that the EEOC would want to weigh in to steer the law in an as plaintiff-friendly direction as possible.[665]

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[660] *See* Br. of the EEOC as Amicus Curiae in Support of Appellant and in Favor of Reversal, *Williams v. Ala. State Univ.*, No. 23-12692 (filed Sept. 29, 2023).

[661] *Id.* at 10-13.

[662] *Id.* at 14.

[663] *Id.* at 16-19.

[664] *Id.*

[665] *See, e.g., Wilder v. Stephen F. Austin State Univ.,* 552 F. Supp. 3d 639, 654 (E.D. Tex. 2021) (Noting the differences in proving pretext under the *McDonnell Douglas* framework versus the framework applied under the EPA, the court held that, under the EPA,

The EEOC has also been pushing the law in a more plaintiff-friendly direction with respect to an employer's affirmative defenses. For example, in *EEOC v. Hunter-Tannersville Central School District*,[666] the employer had pled as an affirmative defense that the charging party and her comparator had each negotiated their salaries, and that those negotiations resulted in the alleged salary disparity.[667] The EEOC argued that "there is simply no basis for the proposition that a male comparator's ability to negotiate a higher salary is a legitimate business-related justification to pay a woman less."[668] The court rejected this argument, but noted that other courts had come to different conclusions as to whether salary negotiations, by themselves, could constitute a valid defense to an EPA claim. Given the unsettled nature of the law, the court was unwilling to adopt the EEOC's interpretation at the pleading stage: "The Court finds that the EEOC did not meet its burden to show that the affirmative defense is insufficient because there is a question of law, specifically whether *Aldrich's* job-relatedness requirement would apply to negotiations, which might allow the defense to succeed."[669]

In another recent case, *EEOC v. University of Miami*,[670] the EEOC alleged that a university paid a female professor less than her counterpart who performed the same job. The university had hired the charging party as an associate professor during the same year that it hired a male professor with comparable qualifications for a lower-ranked position in the same department at a higher salary.[671] Thereafter, the university's policy of making fixed pay increases only exacerbated the situation over time, so that by the time they became full professors, the male professor made approximately $28,000 more than the female professor.[672] The university argued that the professors did not perform substantially equal work and that the salary discrepancy could be explained by a factor other than sex.

The court first held that a reasonable jury reviewing the duties of the two professors could conclude that their positions were substantially equal. Although the two professors taught different political science specialties, the court noted that they both had doctorate degrees, generally taught the same number of courses at the introductory and advanced levels, and were subject to the same university requirements regarding teaching and research.[673] The university argued that the salary disparity between the two professors was due to a factor other than sex; namely, they were "market-based," that annual raises were determined by individual performance, and that multiple salary analyses confirmed that there was no relationship between gender and salary at the University.[674] The court could not credit the "market-based" theory due to the absence of credible evidence as to what the market was at the time the two professors were hired. The court was also not convinced that the pay disparity could be explained by disproportionate performance. Although the university claimed the charging party published in less

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the defendant always keeps the burden of production and persuasion after a plaintiff has established a prima facie case: "the court will always consider pretext if the analysis gets that far, but the burden never shifts back to the plaintiff in an EPA claim"); *Mullenix v. Univ. of Tex. at Austin,* No. 1:19-cv-1203-LY, 2021 WL 5881690 (W.D. Tex. Dec. 13, 2021) ("The burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), governs claims under the EPA.") (citing *Lindsley v. TRT Holdings, Inc.,* 984 F.3d 460, 466 (5th Cir. 2021)); *Patel v. Tungsten Network, Inc.,* No. 2:20-cv-7603-SB-JEM, 2021 WL 4776348, at *7 (C.D. Cal. Sept. 15, 2021) (holding that the plaintiff did not need to establish pretext to avoid summary judgment because "summary adjudication on the EPA claim is proper only if Defendant produces 'sufficient evidence such that no rational jury could conclude but that these proffered reasons actually motivated the wage disparity' at issue") (quoting *Stanziale v. Jargowsky,* 200 F.3d 101, 107-08 (3d Cir. 2000)).

[666] *EEOC v. Hunter-Tannersville Cent. Sch. Dist.*, No. 1:21-cv-0352, 2021 WL 5711995 (N.D.N.Y. Dec. 2, 2021).

[667] *Id.* at *3.

[668] *Id.* at *2.

[669] *Id.* at *3.

[670] *EEOC v. Univ. of Miami*, No. 19-cv-23131, 2021 WL 4459683 (S.D. Fla. Sept. 29, 2021).

[671] *Id*. at *6.

[672] *Id*.

[673] *Id*. at *8. The university argued that the two professors were not comparable because of their different areas of specialization, because they published in different journals, and because the male professor had published in more prestigious journals. The court found this evidence unpersuasive because "the professors' specializations within the field of political science do not appear to be dispositive as to the question of substantial job similarity," but "[r]ather, subspecialties are considered when evaluating whether a professor conducted research and was subsequently published in high-ranking journals relevant to their respective specializations." *Id*. The court was ultimately convinced that "the quality of [comparator's] publications and number of cite counts are determinative of this inquiry because the Plaintiff's prima facie case requires a comparison of jobs, not the skills and qualifications of the individuals who hold the jobs." *Id*.

[674] *Id*. at *9.

prestigious journals than the male professor, the Dean had admitted he had not reviewed her salary increases or the reasons for the amounts that had been awarded in each year, thus undercutting the university's explanation.[675]

Moreover, the court did find evidence of gender disparities at the university, including evidence that it placed a higher service requirement on female professors and had proactively increased male professors' salaries to close the gap with female professors, but had not done so for the charging party, despite the fact that her Department Chair had conceded she was "grossly underpaid."[676] Accordingly, the university's motion for summary judgment was denied. This was a significant victory for the EEOC at the time, and the court's decision remains relatively bad precedent for employers. But on March 23, 2022, the court entered judgment in favor of the university after a jury found in its favor after trial on the merits.[677]

The EEOC has also recently taken aim at defenses that rely on written policies regarding salary scales and job categories. For example, in *Enoch Pratt Free Library*, the employer pointed out that it used a Managerial and Professional Society Salary Policy ("MAPS") to determine compensation for newly hired library supervisors.[678] According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.[679] The court held, however, that the MAPS policy left open the possibility that the employer could apply discretion with respect to setting starting salaries.[680] The court concluded that "[the EEOC's comparator] was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary he had received during his first tenure at [employer]. Given these facts, combined with the inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator's] salary."[681] Later, after the conclusion of a five-day bench trial, the court concluded that the employer had violated the EPA.[682] The court held that "implementation of a public pay system alone cannot justify pay disparity in the absence of any other justification," and that "mere reliance on MAPS in combination with the record evidence, does not establish that [comparator] was hired based on a factor other than sex."[683]

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[675] *Id*. at *10.

[676] *Id*. at *11. Turning to the Title VII claim, the court held that "[b]ecause the EEOC has established its disparate pay claim under the more rigorous analysis of the Equal Pay Act, the court finds that it has met its initial burden of showing its prima facie case under Title VII." *Id*. at *12. The court also found that the university met its burden to articulate legitimate bases for the alleged pay disparity, but, for the same reasons that doomed the university's defense to the EPA claim, also held that the EEOC had "advanced sufficient evidence to cast doubt on the University's purportedly legitimate basis for the pay differential," thus meeting its burden to show that those reasons were pretextual. *Id*.

[677] Judgment, *EEOC v. Univ. of Miami*, No. 19-cv-23131-Scola (S.D. Fla. Mar. 23, 2022), ECF No. 203.

[678] *EEOC v. Enoch Pratt Free Library*, No. 17-cv-2860, 2019 WL 5593279, at *3 (D. Md. Oct. 30, 2019).

[679] *Id.* at *6.

[680] *Id.*

[681] *Id.* at *7.

[682] *EEOC v. Enoch Pratt Free Library*, No. 8:17-cv-2860, 2020 WL 7640845 (D. Md. Dec. 23, 2020). The EEOC easily met its burden to establish a prima facie case because the parties stipulated that the comparator's salary was higher than that of each charging party. *Id.* at *8. The employer argued that each library branch differed with respect to circulation size, outreach efforts, and physical footprint, thus rendering the job duties of each library supervisor too dissimilar to support a finding that they performed equal work. The court found, however, that the core job duties were the same, relying in part on evidence that the positions shared the same job description, and supervisors often substituted for one another on a short- or long-term basis without requiring any additional training and without any alteration in pay. *Id.* at *9. The differences among library branches did not defeat the EEOC's case because "none of th[ose] differences translated into *job duties* that differed significantly from one another." *Id.* (emphasis in original). The court also rejected the employer's affirmative defense, holding that the evidence simply did not support the employer's claim that the comparator was hired at a higher salary because he was able to negotiate a higher salary on the strength of his superior qualifications. According to the court, there was no evidence that the comparator had ever negotiated his salary. *Id.* at *10. The MAPS salary system also undercut this defense because, although that system permitted a salary adjustment, it does not alone independently justify paying a male employee a higher wage for performing the same work. The employer's own HR guidance actually cautioned city agencies to be careful when setting starting salaries to the MAPS midpoint, in order to avoid "internal equity issues." *Id.* Yet the employer had not been able to show that it had ever compared salaries to avoid those equity issues, and even failed to do so after one of the charging parties had complained about the disparity. The employer's failure to act on that complaint also led the court to reject its claim that it had acted in good faith, resulting in the court awarding the charging parties liquidated damages on top of their actual damages. *Id.*

[683] *Id.* at *11.

B. EEOC Litigation Of Title VII Equal Pay Claims

As noted above, the EPA overlaps with Title VII, which prohibits a broader range of discrimination on the basis of sex and also prohibits wage discrimination against other protected groups.[684] The interplay between those two statutes has been the source of some interesting decisions over the past few years, including in the context of EEOC litigation. For one thing, Title VII claims are subject to an administrative exhaustion requirement that does not apply to EPA claims. Before a plaintiff can bring a Title VII claim, they must first file a charge of discrimination with the EEOC. The charge generally is a minimalistic form document that identifies the employer, the name of the individual bringing the charge, a general description of the type of discrimination, a brief statement of the harm(s) alleged, and a statement of whether similar proceedings have been instituted by any state or local agency.[685] Nevertheless, the charge is an important document in EEOC litigation because that is what empowers the EEOC to investigate an employer. A question often arises as to whether and to what extent the EEOC can extend its investigation beyond the subject matter of the charge.

For example, in *Seif v. Board of Trustees of Alabama A&M*,[686] a tenured professor brought a wage discrimination claim under Title VII, alleging he was paid less than similarly situated employees due to his race, ethnicity, ancestry, and national origin. The plaintiff had filed a charge of discrimination, but he had only discussed his salary as department Chair in the charge; he did not discuss his salary before he became a Chair. The employer argued that he had not exhausted his administrative remedies with respect to any claim based on his time as a member of the faculty before he made Chair.[687] The court held that the purpose of the exhaustion requirement is to give the EEOC the first opportunity to investigate alleged discriminatory practices. "Given the purpose of the administrative exhaustion requirement, the Eleventh Circuit has held that 'a 'plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'"[688] The court examined the charge and found that it discussed facts relevant to plaintiff's salary before becoming Chair.[689] Accordingly, the court found that the EEOC would have had an opportunity to investigate the employer's alleged discriminatory practices as they related to plaintiff's entire compensation, not just his compensation as Chair: "Excluding a claim related to [plaintiff's] base salary because he used the phrase 'salary as Chair' in his EEOC charge would be to allow 'procedural technicalities to bar claims,' something the Eleventh Circuit has cautioned against.[690]

However, in *Winns v. Exela Enterprise Solutions, Inc.*,[691] the court limited the scope of the EEOC's case based on what was alleged in a charge. In that case, a Customer Service Associate for a technology company alleged a host of discrimination claims against his employer, including various wage discrimination claims. The employer argued that he failed to exhaust administrative remedies for some of those claims. The court acknowledged that "[t]he scope of the plaintiff's court action depends on the scope of the EEOC charge and investigation."[692] The charge specified "equal pay" as the basis for plaintiff's discrimination complaint, but did not specify whether the discrimination was based on race, color, sex, religion, national origin, age, disability, or genetic information. Accordingly, the court held that although plaintiff had exhausted his administrative remedies with respect to his equal pay allegations, he

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[684] Title VII 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," or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," because of such individual's sex. *See* 42 U.S.C. § 2000e-2(a)(1)-(2).

[685] 29 C.F.R. § 1601.12.

[686] *Seif v. Bd. of Trs. of Ala. A&M*, No. 5:15-cv-02374-MHH, 2022 WL 4376730 (N.D. Ala. Aug. 17, 2022).

[687] *Id*. at *6.

[688] *Id*. (quoting *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279-80 (11th Cir. 2004)).

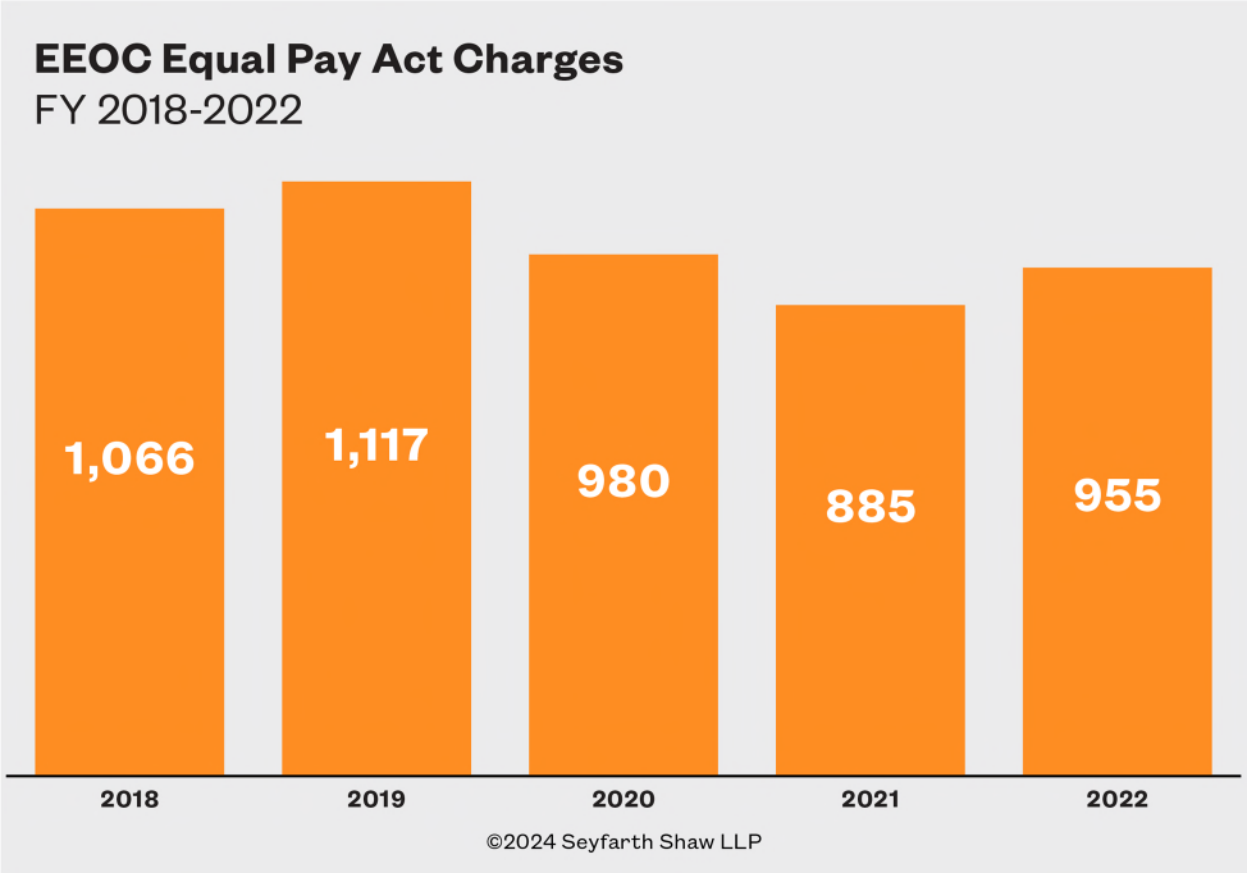
[689] *Id*. at *7 ("Language throughout [plaintiff's] EEOC charge makes clear that his discrimination claim concerns his overall salary—base salary plus $14,400 chair compensation, not simply his $14,400 chair compensation.").

[690] *Id*. (quoting *Gregory*, 355 F.3d at 1280).

[691] *Winns v. Exela Enter. Solutions, Inc.*, No. 4:20-cv-06762-YGR, 2022 WL 4094137 (N.D. Cal. Aug. 17, 2022).

[692] *Id*. at *5.

had not done so to the extent they were based on race discrimination: "By contrast, with respect to the seventh cause of action, it appears to be based upon the allegations concerning equal pay and retaliation. On those grounds, [plaintiff] did not fail to exhaust, however, to the extent he now tries to base this upon theories of race discrimination and harassment, those, he failed to exhaust."[693]



Title VII claims also differ in other, more substantive respects. For example, in *EEOC v. First Metropolitan Financial Service, Inc.*,[694] the EEOC alleged that a financial lending company paid two female Branch Managers less than male Branch Managers. The employer argued plaintiffs did not have substantially similar responsibilities as their male Branch Manager comparators because they had been hired to manage a new branch, which had relatively few outstanding loans, and they therefore had less responsibility compared to managers of more established branches.[695] The court held that, although work in more established branches may have impacted managers' day-to-day responsibilities, the record did not show that those circumstances had any effect on the employer's decisions regarding their pay: "the

[693] *Id.* at *6. *See also EEOC v. Denton Cnty.*, No. 4:17-cv-614, 2018 WL 4951990, at *5 (E.D. Tex. Oct. 12, 2018) ("The determination indicates that the EEOC investigation focused on wage disparity, which reasonably grew out of the charge of discrimination where [charging party] also complained of unequal pay. Neither the charge of discrimination nor the EEOC determination even state that [charging party] was terminated, which is the adverse employment action alleged for both her Title VII claim for retaliation and claim that she was treated less favorably, much less do these documents mention any of the factual allegations to support her claims.").

[694] *EEOC v. First Metro. Fin. Serv., Inc.*, 449 F. Supp. 3d 638 (N.D. Miss. 2020). Although the EEOC initially brought this case as a class action complaint under the EPA and Title VII, it later informed the court that the class of aggrieved parties who had originally joined the suit had been reduced to only two females. *Id.* at 642.

[695] *Id.* at 644.

supposed high demands imposed on [comparator] did not, according to [employer's COO's] deposition, significantly impact [employer's] decision to pay [comparator] a higher base salary."[696]

Turning to the EEOC's Title VII claim, although the two statutes apply different standards for establishing a prima facie case, the court concluded that "[h]aving found that the Plaintiff successfully established a *prima facie* case under the Equal Pay Act, the Court also finds that the evidence used under the EPA burden is sufficient to establish a *prima facie* case under Title VII."[697] The court explained that under the burden shifting scheme of Title VII, "[t]he burden of production now shifts to the Defendant to articulate some legitimate, non-discriminatory reason in light of the four exceptions outlined in the Equal Pay Act."[698] The employer argued that the comparator's salary had been set at a time when it needed to hire someone quickly or close that branch, and the comparator manager had made a "take it or leave it" demand that the company felt compelled to take. The court held that that satisfied the employer's burden under the Title VII burden-shifting scheme "because an employer 'need only articulate—not prove—a legitimate, nondiscriminatory reason,'" to meet its burden of production.[699] However, the employer was not able to rebut the EEOC's claims that those purportedly legitimate reasons were merely a pretext for discrimination; the court found the employer's reasons "highly suspicious" in light of the fact that it had sometimes allowed even larger branches to operate for short periods of time without a manager.[700]

[696] *Id*. The court noted that "equal does not mean identical," and that "[i]n determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs." *Id.* (quoting 29 CFR § 1620.14(a)). The court also denied the employer's attempt to meet one of the statutory exceptions found in the EPA, finding that the differences in training and experience could not justify the wage disparity, nor could the managers' different salary demands and expectations.

[697] *Id.* at 647.

[698] *Id.* at 647-48.

[699] *Id.* at 648 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 258, 258 (1981)).

[700] *Id.* at 648-49.

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