New Rulings Show Job Duties Crucial To Equal Pay Act Claims

By **Fiona Ong and Lindsey White** (February 16, 2023)

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The Equal Pay Act requires equal pay for work requiring "equal skill, effort and responsibility" under "similar working conditions," regardless of sex.

Two recent cases emphasize the point that it is an employee's actual responsibilities, and not just their job title, that are critical to a claim of pay discrimination under the EPA. These cases also offer some lessons for employers in avoiding and in defending EPA claims.

The Equal Pay Act

The EPA prohibits disparities in pay between a man and a woman who perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions."[1]

Following this statutory language, the U.S. Supreme Court has established a burden-shifting analysis for EPA claims.[2]

A plaintiff makes a prima facie case by establishing that an employee of the opposite sex who performed equal work under similar conditions was paid more. If the plaintiff makes that showing, the burden shifts to the employer to establish that any of the following factors, as set forth in the EPA, explain the wage disparity:

- A seniority system;
- A merit system;
- A system based on quantity or quality of production; and
- A differential based on any other factor than sex.

The employer must prove that the difference in pay actually was motivated by one of these factors, and not that it merely might be explained by one of them.

What Is 'Equal Work'?

When determining whether work is "equal," most courts have held the fact that jobs share a common core of duties is not dispositive. As the U.S. Court of Appeals for the Fifth Circuit noted in 1970 in Hodgson v. Brookhaven General Hospital:

> [J]obs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) are of economic value commensurate with the pay differential.[3]

Recently, in Polak v. Virginia Deptartment of Environmental Quality,[4] the U.S. Court of Appeals for the Fourth Circuit rejected a female employee's EPA claim on this basis. Stressing that "equality under the Act is a demanding threshold requirement," the Fourth

Circuit observed that "similarity of work" is insufficient.

According to the Fourth Circuit, "it is generally not enough to simply show that the comparator holds the same title and the same general responsibility as the plaintiff." These "broad generalities" cannot support an EPA claim.

Rather, the work must be "virtually identical" or "substantially equal" to the plaintiff's with regard to the required skill, effort and responsibility.

And this is where the plaintiff failed in the case at issue. Both the female employee and the male comparator held the title of "coastal planner," and were generally responsible for executing federally funded state programs for coastal management.

They served on the same team reporting to the same supervisor. The employees worked closely together and collaborated on planning, grant progress and program performance.

The male employee had expertise in coastal hazards, sea level rise and shoreline erosion that the female employee lacked, and was assigned to projects that required such expertise. He also had other program management and organizing responsibilities that the female employee did not share. Similarly, she had several grant management and organizing responsibilities that he did not.

The Fourth Circuit determined that, based on his experience, the male employee was doing "different and more complex assignments" than the female employee. Accordingly, it found that he was not an appropriate comparator for purposes of an EPA claim.

Similarly, in Pendergraft v. Board of Regents of Oklahoma Colleges,[5] the U.S. Court of Appeals for the Tenth Circuit recently rejected a male graduate assistant coach's EPA claim, noting that the female graduate assistant coach to whom he compared himself performed very different work.

The female coach was a high school softball coach with years of experience and knowledge. The male coach, on the other hand, had never coached at the college or high school level, but had coached his daughter's youth travel softball team.

The male coach's employment lasted only a matter of days, during which he participated in unofficial visits for two high school recruits. In contrast, the female coach was involved in "a variety of functions for the softball program," including identifying and monitoring potential recruits, planning and coordinating training sessions, organizing lodging, transportation and meals for team travel, scouting opposing teams for game day preparation, and field maintenance. Her greater responsibilities warranted, in the Tenth Circuit's view, higher compensation.

Notably, however, the U.S. Court of Appeals for the Ninth Circuit appears to apply a rather more lenient approach to defining equal work under the EPA. In Freyd v. University of Oregon,[6] the Ninth Circuit in 2021 asserted that "'[s]ubstantially' equal does not necessarily mean 'identical.'"

According to the Ninth Circuit, "the crucial finding on the equal work issue is whether the jobs to be compared have a 'common core' of tasks," and, if so, "the court must then determine whether any additional tasks, incumbent on one job but not the other, make the two jobs 'substantially different.'"

In its analysis, the Ninth Circuit stated that, "[i]t is the overall job, not its individual segments, that must form the basis of comparison." This appears somewhat contrary to the Fourth and Tenth Circuit's focus on the additional tasks.

What Is Required to Support an EPA Claim?

In both Polak and Pendergraft, the plaintiffs believed that they performed equal work to those with whom they compared themselves, and they relied upon their own testimony in support of their claims.

In reviewing the testimony of the female coastal planner in Polak, however, the Fourth Circuit noted that she "could not have full comparative knowledge" of both jobs, as the work was being performed "simultaneously in different context and on distinct projects."

Rather, the Fourth Circuit credited the assessment of the employees' manager, who it found to have a "superior perspective" of both the similarities and the differences between the jobs in question.

Although the Tenth Circuit in Pendergraft did not explicitly state why it found the manager's testimony to be more valid, it did rely on such testimony in discounting the male coach's view of his responsibilities vis-à-vis the female coach's responsibilities.

The courts' position suggests that an employee's own testimony, if contradicted by the rational explanations of management, will likely not be sufficient to support a claim under the EPA.

However, one means by which plaintiffs have successfully asserted EPA claims is by comparison with what a predecessor of the other sex in the position was actually paid. This serves as definitive evidence of equal work.

What Is 'Any Other Factor Than Sex'?

Another interesting point that was raised in the Polak case relates to the catchall factor to justify a legitimate pay differential: "any other factor than sex." Common legitimate rationales under the fourth catchall factor include the type of or years of experience, education and certifications.

But there are others. And in the Polak case, the employer initially relied on the employees' "respective prior pay histories" to justify the challenged pay differential. This justification, however, is quite controversial, and the federal appellate courts are split on whether setting compensation based on prior salary perpetuates sex-based pay discrimination and therefore violates the EPA.

The U.S. Courts of Appeal for the Fourth, Seventh and Eighth Circuits have recognized prior pay as a legitimate justification.[7] The U.S. Courts of Appeal for the Second, Sixth, Tenth and Eleventh Circuits have permitted it in some circumstances.[8]

The U.S. Equal Employment Opportunity Commission and the Ninth Circuit, however, take the position that prior salary alone cannot constitute a differential based on any other factor than sex.[9] The rationale for this position is based on the premise that women have generally been subjected to unlawful pay discrimination by prior employers, which would render prior salary alone a proxy for sex-based consideration.

This issue has become a hot topic in the legislative arena, with an increasing number of jurisdictions banning the use of pay history to set pay — some of which are located within circuits that would otherwise permit this consideration under the EPA. The stated rationale for these laws mimics the EEOC's position on this issue — that the historical gender pay gap perpetuates continuing pay discrimination based on sex.

Takeaways

These recent cases provide some lessons for employers and their counsel regarding EPA claims.

First, they reinforce that actual differences in responsibilities are a legitimate reason for differential pay. But if employees are performing significantly different responsibilities, employers may wish to consider whether they should share the same job title, or perhaps have different numbers indicating progressive levels of responsibility and increased duties, e.g., Accountant I, Accountant II.

Moreover, while it appears that the testimony of managers with knowledge of the employees' job responsibilities is compelling evidence, it may also be helpful for employers to identify, in writing, differing responsibilities of employees — whether through a job description or otherwise. In this way, employers may bolster the credibility of their managers' assertions.

Employers should be aware, however, that state equal pay laws may establish different, more lenient standards for comparators.

For example, Maryland's law utilizes a so-called comparable character standard that is certainly less exacting.[10] Thus, plaintiffs may find more success under state law — and in state courts, which tend to be more employee-friendly — than under the federal EPA.

To the extent that jobs do require equal work, employers should document in writing the justification for the compensation at the time wages are set. Attempting to explain a wage differential with no contemporaneous documentation is likely to be rejected by a court. [11]

And finally, plaintiffs may also assert pay discrimination claims under Title VII of the Civil Rights Act, which utilizes a very different — and, as to this point, more lenient — standard.

Under Title VII, the plaintiff must show that they were subject to discrimination in pay because of sex — which does not necessarily require a showing that there were comparators of the opposite sex in substantially equal positions.

As the U.S. Court of Appeals for the Second Circuit noted in 2019 in Lenzi v. Systemax Inc., "a claim for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production or any other factor other than sex."[12]

Thus, the challenges that face plaintiffs under the EPA may not necessarily bar claims under Title VII.

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[1] 29 U.S. Code § 206(d).

[2] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[3] 436 F.2d 719, 725 (5th Cir. 1970).

[4] 57 F.4th 426 (4th Cir. 2023).

[5] 2023 WL 386644 (10th Cir., January 25, 2023).

[6] 900 F.3d 1211 (9th Cir. 2021).

[7] E.g. Spencer v. Virginia State University, 919 F.3d 199, 202-03 (4th Cir. 2019); Lauderdale v. Ill. Dep't of Hum. Servs., 876 F.3d 904, 908 (7th Cir. 2017); Price v. N. States Power Co., 664 F.3d 1186, 1193-94 (8th Cir. 2011).

[8] Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992); Beck-Wilson v. Principi, 441 F.3d 353, 365 (6th Cir. 2006); Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995).

[9] Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020), cert. denied, 141 S.Ct. 189 (U.S. July 2, 2020).

[10] Md. Code Ann. Lab. & Empl. §§ 3-304(b)(1)(i).

[11] EEOC v. Enoch Pratt Free Library, 509 F. Supp. 3d 467 (D. Md. 2020).

[12] 944 F. 3d 97 (2d Cir. 2019).