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**Gina M. Chang, Esq., Subcommittee Chair
Jennifer L. Baugh, Esq.
Matthew J. Caccamo, Esq.
Janet M. Hogan
Wildman, Harrold, Allen & Dixon LLP
225 West Wacker, Suite 3000
Chicago, Illinois 60606
(312) 201-2000**

**Corbett Anderson, Esq.
U.S. Equal Employment Opportunity
Commission
1801 L Street, NW
Washington, D.C. 20507
(202) 419-0724**

**Ericka Guthrie Dorsey, Esq.
American Federation of Government
Employees
Women's & Fair Practices Departments
80 F. Street, NW
Washington, DC 20001
(202) 639-6943**

**Tyler M. Paetkau, Esq.
Betsy Carroll, Esq.
Bingham McCutchen LLP
Silicon Valley Office
1900 University Ave.
East Palo Alto, CA 94303
(650) 849-4810**

**Michael J. Sciotti, Esq.
Hancock & Estabrook, LLP
1500 MONY Tower I
P.O. Box 4976
Syracuse, New York 13221-4976
(315) 425-3502**

**Cynthia Marcotte Stamer, Esq.
Epstein Becker Green Wickliff & Hall PC
500 North Akard, Suite 2700
Dallas, Texas 75201-3320
(214) 397-4340**

**Domenick Vita, Esq.
553 Martling Avenue
Tarrytown, NY 10591
(914) 649-3349
domenickvita@yahoo.com**

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I. INTRODUCTION

The equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d) (“Equal Pay Act” or “EPA”), require an employer to provide equal pay for men and women who perform equal work within an “establishment,” unless the difference is based on a factor other than sex. Because the EPA is part of the Fair Labor Standards Act (“FLSA”), the FLSA procedural rules apply to EPA claims.

To establish a *prima facie* case, a plaintiff must demonstrate that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974). If a *prima facie* case is established, the burden shifts to the employer to prove that the wage differential is justified by a preponderance of the evidence under one of four affirmative defenses: (1) a seniority system; (2) a merit system; (3) a system pegging earnings to quality or quantity of production; or (4) any factor other than sex. See 29 U.S.C. §206(d)(1)(i)-(iv).

Equal Pay Act claims are often combined with Title VII claims of sex discrimination in compensation. Courts, however, have found different essential elements and standards of proof for the two statutory claims.

II. THE EQUAL PAY ACT’S COVERAGE

Gaul v. Zep Manufacturing Co., 2004 U.S. Dist. LEXIS 1989, 2004 WL 234370 (E.D. Pa. Jan. 30, 2004)

Plaintiff, a manager for a manufacturer and supplier of industrial and institutional maintenance and sanitation products, sued for gender discrimination and retaliation under Title VII, the Equal Pay Act, and the Pennsylvania Human Relations Act, and for breach of contract. She claimed that because of her gender, Defendant promoted a less qualified male to a position for which she had applied and then subsequently demoted her and retaliated against her.

Defendant moved for judgment on the pleadings, arguing that the EPA does not recognize a cause of action for discriminatory failure to promote. The District Court for the Eastern District of Pennsylvania held that the EPA neither prohibits nor provides for a failure to promote claim. Dismissing her EPA claim, the court stated that she failed to make out a *prima facie* case because she did not allege that her employer paid lower wages to her than to males for substantially equal work.

Rapson v. Development Authority of Peachtree City, 2004 U.S. Dist. LEXIS 12588 (N.D. Ga. Jan. 30, 2004)

Plaintiff, the former director of an amphitheater, sued her former employer, a development authority, under the Equal Pay Act and Title VII, claiming that Defendant paid a higher salary to the male director of its tennis center and then retaliated against

her in violation of Title VII when she complained about it. The District Court adopted the magistrate judge's recommendation to grant Defendant's summary judgment motion.

Plaintiff alleged that she received unequal pay in comparison to the male director of the tennis complex, a former collegiate tennis player and coach who held advanced certifications as a tennis professional. The tennis director received a lower base salary, plus commissions on tennis lessons and a share of the pro shop's profits. Plaintiff asked her supervisors to increase her compensation to be comparable to the tennis director's. In response, Defendant proposed that Plaintiff could operate the amphitheater as an independent contractor, which could have significantly increased Plaintiff's earnings, but Plaintiff rejected this offer. Defendant then hired a consulting company to survey the two positions, and followed its advice to offer Plaintiff a ten-step salary structure for her position and a raise. Plaintiff also rejected this proposal, and Defendant instead gave Plaintiff the largest pay increase she had received during her employment. Later that year, Plaintiff complained that she believed the difference in wages was because of gender. A few months later, Defendant removed some of Plaintiff's job responsibilities. Plaintiff resigned her position several months later because of the alleged pay disparity.

The magistrate first rejected Defendant's argument that the EPA claim should be denied because Plaintiff and her comparator did not work at the same establishment. The magistrate noted that the Fifth Circuit recognized that a single establishment can include operations at more than one job site where there is centralized control and administration of the different sites. The magistrate found that a reasonable person could infer that the amphitheater and tennis center constituted the same establishment because Defendant controlled both sites, employed both directors, presumably held them to similar performance standards, created the comparator's job description and was in the process of creating Plaintiff's, set pay for both positions, supervised both directors, and consolidated management of both sites under one person—the comparator.

Ultimately, however, the magistrate concluded that the undisputed facts showed the positions were not substantially equal and that the pay disparity resulted from factors other than sex. The magistrate found that the two positions required different skills—Plaintiff's job was to book and promote concerts, while the comparator's job was to teach tennis, manage other tennis pros, and promote the tennis center. The magistrate also found that the two positions required different levels of effort and responsibility—Plaintiff managed only four employees at a facility that at its busiest was open only six months of the year for five hours a day, whereas the comparator managed twenty-five employees at a facility open 364 days of the year for fourteen hours a day during the week, twelve hours on Saturdays, and eight hours on Sundays. In addition, the positions did not have like responsibility; the tennis director bore some of the risk of the complex's financial success, while Plaintiff bore none of the amphitheater's risk. The court said that although the positions were superficially similar in title and managerial tasks, they were not similar enough to support Plaintiff's claims. The magistrate also found that the different compensation structures and the difference in what the market would pay for the two different jobs accounted for the difference in pay.

Alexander v. Chattahoochee Valley Community College, 303 F. Supp. 2d 1289 (M.D. Ala. Feb. 23, 2004)

Plaintiff, a college admissions director, sued the college and its president under the Equal Pay Act, Title VII, § 1981, § 1983, and state law. She sought a declaratory judgment, a pay raise, back pay, allowances, seniority, and retirement benefits to which she believed she was entitled, plus costs and fees.

The district court denied Plaintiff's motion to withdraw her jury demand. Federal Rule of Civil Procedure 39(a)(2) provides that a court may order that a trial be without a jury if it finds that the Constitution or federal statutes do not confer the right to a jury trial. The court noted that although Plaintiff sought equitable relief and generally there is no right to jury trial for equitable relief, the court must look first to whether Congress has provided a right to jury trial. The EPA confers the right to a jury trial for private plaintiffs seeking backpay against defendants other than the federal government because Congress made the EPA enforceable under the Fair Labor Standards Act, which courts have long held gives plaintiffs the right to a jury trial.

Schrader v. Kenneth Tomlinson, 311 F. Supp. 2d 21 (D. D.C. Mar. 30, 2004)

Plaintiff, a broadcast technician, sued an entity of the federal government for discrimination under Title VII and the Equal Pay Act, alleging *inter alia*, that Defendant paid her less than her male coworker. Defendant moved to dismiss her EPA claim for lack of subject matter jurisdiction based on 28 U.S.C. § 1346(a)(2) ("the Little Tucker Act"), which limits the District Court for the District of Columbia to hearing federal question non-tort civil actions or claims against the United States with amounts not exceeding \$10,000. Defendant argued that although Plaintiff did not assert a claim for a certain amount in her complaint, the court could infer from the pleadings and exhibits that her claim exceeded \$10,000. Because the court found that Defendant had established that Plaintiff's claim exceeded \$10,000 and Plaintiff had not presented any evidence to the contrary, it dismissed the EPA claim for lack of subject matter jurisdiction, as the Court of Federal Claims had sole jurisdiction over the claim.

Hamlett v. John Ashcroft, 2004 U.S. Dist. LEXIS 8819, 2004 WL 813184 (N.D. Tex. Apr. 15, 2004)

Plaintiff, a Department of Justice employee, filed three complaints against her employer with the EEOC. The administrative judge appointed to hear the charges decided in favor of the employer. The EEOC then affirmed the administrative judge's decision and denied Plaintiff's motion for reconsideration.

Acting *pro se*, Plaintiff then filed suit in federal court against the Attorney General and the EEOC Chair as representatives of the EEOC, alleging violations of the Constitution, Title VII, the Equal Pay Act, and the Administrative Procedure Act. Defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The magistrate recommended dismissal of the EPA claim with prejudice. The magistrate noted that Plaintiff had failed to provide allegations that the EEOC was

her employer and that it had violated the EPA. The magistrate further noted her failure to allege in her amended complaint that the Department of Justice, which was her employer, had violated the EPA.

Morris v. Fordham University, 2004 U.S. Dist. LEXIS 7310, 2004 WL 906248 (S.D.N.Y. Apr. 28, 2004)

Plaintiff, the male head coach of a university's women's basketball team, sued the university, alleging Title IX and Equal Pay Act violations, breach of contract, breach of the covenant of good faith and fair dealing, and fraud. On the EPA claim, Plaintiff alleged that the university paid him less than his comparative counterpart, the head coach of the men's basketball team who was less or equally experienced and performed the same duties and functions. Plaintiff argued that he had standing to bring an EPA claim because he held a position traditionally held by women and associated with female athletes.

The District Court for the Southern District of New York granted Defendant's motion to dismiss as to each claim except for the Title IX claim. The court dismissed Plaintiff's EPA claim because his identified comparator, the men's basketball coach, was male. The court held that the plain language of the EPA, as interpreted by the Second Circuit, requires a plaintiff bringing an EPA claim to identify a comparator of the opposite gender, and therefore his claim was insufficient as a matter of law.

Harbuck v. United States, 378 F.3d 1324 (Fed. Cir. Aug. 10, 2004)

Plaintiff, an electronics mechanic for the U.S. Air Force, brought suit in the District Court for the Middle District of Georgia, claiming violations of Title VII, the Equal Pay Act, and the Privacy Act and seeking declaratory, injunctive, and monetary relief. Both her Title VII and EPA counts alleged that the Air Force paid more to males doing substantially the same work as Plaintiff. A year later, the district court granted Plaintiff's motion to transfer the EPA count to the Court of Federal Claims. Plaintiff then filed a complaint under the EPA in the Court of Federal Claims that reiterated the same allegations from the EPA count of the complaint originally filed in the district court. Months later, the district court dismissed the remainder of the complaint. As noted in the 2004 EPA Report (p.2), the Court of Federal Claims granted Defendant's motion to dismiss the complaint for lack of jurisdiction under the Tucker Act, 28 U.S.C. § 1500, which denies the Court of Federal Claims jurisdiction over claims pending in any other court in any suit against the United States. The Court of Federal Claims held that the complaint before it was the "same claim" as her claim in the district court, precluding the court from hearing her case.

The Court of Appeals for the Federal Circuit affirmed the dismissal of the EPA claim. The court held that Plaintiff had the "same claim" because: (1) under the transfer statute, 28 U.S.C. § 1631, the EPA claim filed in the Court of Federal Claims was considered filed on the same day on which she originally filed it in the district court; (2) the Title VII and EPA claims arose from the same operative facts; and (3) Plaintiff sought the same relief of money damages. The court further rejected Plaintiff's

argument that the claims were different because the Title VII complaint was based more on an allegation that the Air Force failed to promote her to a level that it promoted men. The court decided that the two theories she relied on were different manifestations of the same underlying claim that the Air Force discriminated against women by paying them less than men. Finally, the court rejected Plaintiff's contention that dismissal would be unjust, noting that she should have initially filed in the Court of Federal Claims and that the court did not have the authority to create an "unfairness" exception to the Tucker Act. The court did not address the merits of the EPA claim.

Cetina v. Super Target, 2004 U.S. Dist. LEXIS 21930, 2004 WL 2434416 (N.D. Tex. Nov. 1, 2004)

Plaintiff, an employee at Super Target, filed a claim against Target Stores, Inc. and team leader Rick Fischer, alleging that they violated the Equal Pay Act. The United States District Court for the Northern District of Texas held that Plaintiff failed to establish a *prima facie* case of discrimination based on violation of the EPA when she failed to: 1) state a claim under the Texas Constitution, and 2) allege any act of unequal pay. The District Court also dismissed Cetina's complaint against Defendant Fischer because Fischer was not an employer in his capacity as team leader.

Birch v. Cuyahoga County Probate Court, 2004 U.S. App. LEXIS 24736 (6th Cir. Dec. 1, 2004)

The Sixth Circuit affirmed the dismissal of Plaintiff's Equal Pay Act, Title VII and retaliation claims but reversed the district court's dismissal of Plaintiff's sex-based wage discrimination claim under the Ohio Civil Rights Act.

Plaintiff, a female magistrate in the Release of Assets Department of the Cuyahoga County Court of Common Pleas Probate Court, sued the Probate Court and the Presiding Judge (Judge Donnelly) for race and sex discrimination under Title VII and the Ohio Civil Rights Act, retaliation, violations of the EPA, age discrimination, and for intentional infliction of emotional distress.

In 1998, a study of the magistrates' salary levels in each division of the Court of Common Pleas was conducted as part of a state-wide survey of magistrate positions. The survey showed that the average salary of female magistrates was lower than the average salary of male magistrates and that the highest paid female magistrate was earning less than the lowest paid male magistrate. Plaintiff's salary was the lowest of all magistrates. After learning the results, the four female magistrates requested and met with Judge Donnelly.

Judge Donnelly told Plaintiff that certain departments in the Probate Court had more responsibility and therefore, justified higher salaries compared to her position in the Release of Assets department. Judge Donnelly also allegedly told her that he relied on "the men to do the important work of the court." Plaintiff alleged that after this meeting, she was denied spill-over work from the front office and that her work was subjected to greater scrutiny in retaliation for complaining about her salary.

The District Court granted Defendants' motion for summary judgment on her EPA claim holding that the Plaintiff's position was not substantially equal to the higher-paid magistrate positions and that the wage differential was justified on the basis of seniority and merit. Plaintiff appealed.

On appeal, Defendants argued that Plaintiff was exempt for EPA purposes because she was not subject to Ohio's Civil Service laws and because she either served on the personal staff of an elected state official (Presiding Judge Donnelly) or was an appointee on the policy-making level. The Appellate Court ruled that Plaintiff was exempt from the Equal Pay Act's coverage because of the "personal staff" and "policy maker" exemptions. The Fair Labor Standards Act (and thus the EPA's) protections do not extend to an individual:

- (i) who is not subject to the civil service laws of the state, political subdivision, or agency which employs him; and
- (ii) who:
 - (I) holds a public elective office of that state, political subdivision, or agency,
 - (II) is selected by the holder of such an office to be a member of his personal staff, [or]
 - (III) is appointed by such an officeholder to serve on a policymaking level.

29 U.S.C.A. §203(e)(2)(C).

The Appellate Court ruled that Plaintiff was exempt from EPA coverage as a member of Judge Donnelly's personal staff because: (1) Donnelly was an elected official and Plaintiff, like all other magistrates at the Probate Court, served at his pleasure; (2) Plaintiff was personally accountable only to Judge Donnelly; (3) Plaintiff, like all probate magistrates, represented both the Probate Court and Judge Donnelly in the eyes of the public; (4) Judge Donnelly exercised a considerable amount of control over Plaintiff's position because he had the power to hire, fire and supervise her performance, controlled her pay raises, relied on her to perform work he was not available to do, and relied on Plaintiff's recommendations in carrying out court business; (5) Plaintiff reported directly to Judge Donnelly – she was an immediate subordinate; and (6) Plaintiff had an intimate working relationship with Judge Donnelly because their respective duties were heavily interdependent.

The Appellate Court ruled that Plaintiff was also exempt from coverage based on the "policy making employee" exemption. The Appellate Court concluded that by resolving disputes and recommending dispositions to Judge Donnelly, Plaintiff effectively made policy for the Probate Court and therefore, she was exempt from the statute's protections.

III. COURT ENFORCEMENT

A. Arbitration

Haynes v. Arcadia Financial Ltd., 2004 WL 2095644 (D. Minn. Sept. 16, 2004)

The United States District Court for the District of Minnesota granted Defendant Arcadia's motion to stay proceedings and compel arbitration, holding that the company's arbitration policy and signed acknowledgment of the 2002 and 2003 employee handbooks that included a binding arbitration clause constitute a valid agreement to arbitrate. The court also ruled against Plaintiff's assertion that Defendant Arcadia waived its right to arbitrate when it "engaged in conduct inconsistent with its rights" and that conduct resulted in prejudice against Plaintiff. The inconsistent conduct identified by Plaintiff was Arcadia's failure to mention the arbitration agreement when it removed the case to federal district court and filed an answer. But the court found that Defendant put Plaintiff on notice three months after the case was removed. The court also placed emphasis on the fact that Defendant raised the issue of the arbitration agreement prior to any discovery being conducted and therefore found that there was no prejudice against Plaintiff.

B. Employees of the States

Mehus v. Emporia State University, 295 F. Supp. 2d 1258 (D. Kan. Jan. 15, 2004)

Plaintiff, the head coach of a state university women's volleyball team, sued the university under Title VII, Title IX, and the Equal Pay Act, claiming that the university: (1) paid her a lower salary and benefits and awarded her smaller, less frequent salary increases and benefits than similarly situated male employees; (2) denied her upgraded positions and promotions; (3) classified her job in a way that denied her the chance to have the same twelve-month contract as similarly situated male employees, to receive compensation commensurate with her experience and education, and to receive valuable employment rights and privileges; and (4) forced her to work under terms, conditions, and privileges that were less beneficial and desirable and were more onerous than those of similarly situated male employees. Defendant filed several motions, including a motion to dismiss the EPA claim on the ground that Congress's abrogation of the state's sovereign immunity under the EPA was unconstitutional.

In a case of first impression in the Tenth Circuit, the District Court for the District of Kansas held that the Eleventh Amendment did not shield the university from EPA claims. The court's analysis focused on: (1) whether Congress unequivocally expressed its intent to abrogate Eleventh Amendment immunity; and (2) whether Congress acted pursuant to a valid grant of constitutional authority. The court first found that the plain language of the EPA contains a clear intent to abrogate the states' Eleventh Amendment immunity, noting that the statute defines an "employer" to include a public agency and defines an "employee" to include an individual employed by a state, its subdivision, or interstate governmental agency. As for whether Congress had acted properly, the court noted that as long as Congress could have, as an objective matter,

enacted the EPA under a constitutional provision granting it power to abrogate, it need not have declared that it had enacted the EPA with the intent to legislate pursuant to that constitutional authority. The court, persuaded by cases from the Fifth, Sixth and Seventh Circuits, held that Congress had authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity under the EPA because the abrogation was congruent with the EPA's anti-discriminatory aims.

The court also rejected the argument that it should dismiss the EPA claim on the ground that Alden v. Maine, 527 U.S. 706 (1999), shielded Defendant from suit. The court held that Alden was irrelevant to the case because unlike in Alden, the statute at issue was an exercise of Congress's power under the Fourteenth Amendment (not Article I) and the suit was filed in federal court (not state court).

See also case summary in Section IV.B.

Visnikar v. Department of Environmental Protection, 2004 U.S. Dist. LEXIS 3645, 2004 WL 438688 (W.D. Pa. Jan. 27, 2004)

Plaintiff worked for Defendant as a geologist for several years. During this time, Defendant gave Plaintiff the responsibility to train two less senior male geologists. Plaintiff received strong performance reviews, and requested a promotion. Defendant denied the promotion request, and Plaintiff filed a grievance with her union. Two years later, Defendant reclassified the higher position so that it required a license that Plaintiff did not have. At the same time, Defendant promoted the two male employees Plaintiff had trained to this higher position; both held licenses.

Plaintiff alleged violations of Title VII, the EPA, the Pennsylvania Human Rights Act and 42 U.S.C. § 1983. The court observed that Defendant's argument that the Eleventh Amendment barred Plaintiff's EPA claim against Defendant, a government agency, "border[ed] on frivolous." But it still granted Defendant's summary judgment motion with respect to the EPA claim. The court found that Defendant had shown that the pay disparity between Plaintiff and her alleged comparators was a result of a collective bargaining agreement. As such, Defendant sufficiently showed that that pay disparity was because of a factor other than sex.

C. Employees of the Federal Government

Thomeczek v. Les Brownlee, 320 F. Supp. 2d 884 (E.D. Mo. Apr. 29, 2004)

Plaintiff alleged that, as Acting Director of Personnel Records for the Army, she was paid less than three male employees who had served as Director because they were paid at GS-14 level and she was paid at a GS-13 level. The U.S. District Court for the Eastern District of Missouri granted summary judgment to Defendant, finding that Plaintiff's Equal Pay Act claim was time barred. Plaintiff filed her complaint on June 12, 2003, but the most recent allegedly discriminatory paychecks she received were in June of 2000. The court noted that, under the EPA, the statute of limitation is generally two years, but is extended to three years if the violation was willful, meaning the employer

acted with knowledge or reckless disregard for whether it was violating the law. Thus, Plaintiff could defeat summary judgment only if there was a genuine fact issue as to willfulness. The court held that Plaintiff could not because she failed to produce any evidence of her employer's state of mind at the time it issued the June 2000 paychecks.

IV. THE *PRIMA FACIE* CASE

A. Different Wages to Employees of the Opposite Sex

Saiz v. Southwestern Bell Tel. Co., 2004 U.S. Dist. LEXIS 2639, 2004 WL 396244 (S.D. Ind. Jan. 22, 2004)

The court granted Defendant Southwestern Bell's motion for summary judgment and dismissed Plaintiff's disability discrimination and EPA claims. Plaintiff alleged that Defendant violated the EPA when it transferred him from the position of residential customer service representative to a senior reports clerk position at a lower rate of pay. The court found that Plaintiff failed to state a claim under the EPA in that he did not allege he was paid less than a female performing a substantially similar job with substantially similar skills. Instead, Plaintiff alleged that in his position as senior reports clerk, he was not paid at the same rate of pay of his former residential customer service representative position.

Downes v. JP Morgan Chase & Co., 2004 U.S. Dist. LEXIS 10510, 2004 WL 1277991 (S.D.N.Y. June 8, 2004)

Plaintiff brought discrimination claims against Defendant in the District Court for the Southern District of New York under ERISA, the EPA, COBRA, and New York state law. Each of her claims stemmed from allegations that her employer misclassified her as a consultant or independent contractor in order to avoid paying her benefits. Plaintiff's EPA claim alleged generally that male employees with similar skills and responsibilities were paid higher wages than she was.

Defendant moved to dismiss each of Plaintiff's claims. Defendant asserted that Plaintiff failed to adequately plead her EPA claim by not indicating the specific positions that her similarly situated male co-employees occupied when they were paid higher wages and the time period during which this alleged disparity in pay existed. The court rejected the motion to dismiss on these grounds, finding that Plaintiff had met the liberal pleading standard for the time being by putting Defendant on notice of the essence of her claim. The court warned, however, that Plaintiff must put forward more specifics to avoid summary judgment on the EPA claim.

In response to Defendant's argument that Plaintiff's EPA claims were time-barred, the court also held that Plaintiff's EPA claim survived the motion to dismiss but that recovery would be permitted only for violations occurring within the applicable limitation period.

Jones v. Boeing Co., 2004 U.S. App. LEXIS 18105, 2004 WL 1900576 (8th Cir. Aug. 26, 2004) (unpublished)

Plaintiff-Appellant, Emma Jean Jones, brought a claim under the EPA against her former employers, The Boeing Company and McDonnell Douglas Corporation. The District Court granted summary judgment in favor of Defendants. In her appeal to the Eighth Circuit, Jones did not raise her EPA claims, and therefore, the court, in a footnote, ruled in favor of Defendants' argument that Jones' EPA claim was waived. In the same footnote, the Eighth Circuit affirmed the District Court's dismissal of Jones' EPA claim as Jones did not claim that she was paid less than similarly situated men.

B. Equal Work on Jobs Requiring Equal Skill, Effort, and Responsibility

Wiseman v. Whayne Supply Co., 2004 U.S. Dist. LEXIS 376, 2004 WL 62498 (W.D. Ky. Jan. 12, 2004)

Plaintiff filed several claims of discrimination, including under the Equal Pay Act. Plaintiff alleged that her employer paid Plaintiff less than her male colleagues who performed similar work. Plaintiff was placed in the position of Facility Environmental Specialist in 1995 and became the first and only person at Defendant to hold this position. Defendant later eliminated Plaintiff's position and incorporated her job into the position of Manager of Regulatory Compliance. This new position not only regulated Defendant's compliance with respect to the Environmental Protection Agency regulations (as was Plaintiff's responsibility), but also regulated DOT, OSHA and MSHA compliance.

The court held that Plaintiff failed to identify a male employee with substantially similar duties. The court observed that the circumstances of Plaintiff's unique job "make allegations of an equal pay violation difficult to sustain." In addition, the court held that all the proposed comparison employees required greater skill and responsibility than her position. Thus, Plaintiff failed to establish a *prima facie* case.

Rapson v. Development Authority of Peachtree City, 2004 U.S. Dist. LEXIS 12588, 2004 WL 1944846 (N.D. Ga. Jan. 30, 2004)

See case summary in Section II.

Gokay v. Pennridge Sch. Dist., 2004 U.S. Dist. LEXIS 2127, 2004 WL 257085 (E.D. Pa. Feb. 5, 2004)

Plaintiff worked for a school district as its human resources director and legal counsel. The superintendent acknowledged to the school board that both Plaintiff and the male business administrator, who did not have a law degree, were under-compensated. Both received raises, and one year later, the business administrator received a second raise of fourteen percent as an incentive not to leave for another position. At the same time, Plaintiff received a six percent raise. Plaintiff alleged that the superintendent told her that the difference in the raises was because two board

members thought a woman in Plaintiff's position should receive less pay than a man in the same position. Two former teachers corroborated this statement. Plaintiff resigned her position. Defendant hired a male replacement without a law degree for the human resources director portion of Plaintiff's former job, at a significantly higher salary (more than \$10,000 per year) than Plaintiff's.

Plaintiff brought claims under the EPA, Title VII and the Pennsylvania Human Relations Act. In support of her EPA claim, Plaintiff offered her successor as a comparator. The court found that the record indicated that the duties and responsibilities of the successor male human resources director entailed the same duties as Plaintiff with the exception of the additional responsibilities she incurred due to her legal training. Defendant argued that a comparison of the two was improper because the successor held several years' experience as a school district administrator, whereas Plaintiff had no prior experience in the field. However, the court found that this factor did not speak to whether Plaintiff had satisfied her *prima facie* case, but instead to whether Defendant could offer the affirmative defense that the pay differential was due to a factor other than gender. Because Plaintiff had parallel education to her replacement, because she had additional legal responsibilities, and because her replacement's experience was in a different position, the court found that the issue of this affirmative defense should go to the jury. Further, the court relied upon evidence of alleged statements indicating opposition to paying Plaintiff wages equivalent to those paid to a man.

Klindt v. Honeywell Int'l, Inc., 303 F. Supp. 2d 1206 (D. Kan. Feb. 19, 2004)

Plaintiff worked for Defendant as a "Production Technician II," but performed some tasks of the next higher-ranking position, "Electronic Technician." When two Electronic Technician positions became open, Defendant advertised the openings internally and stated that it would prefer, but not require, a person with an associate degree or equivalent military or technical school training. Defendant interviewed Plaintiff, who is female, and three male employees for the position. Of the four applicants, Plaintiff, who did not have an associate degree, received the lowest scores on the written examination and the skills evaluation part of the interview. Defendant promoted two of the male applicants, both of whom held associate degrees. Before Defendant announced the promotions, Plaintiff's supervisor told Plaintiff that she was lucky to have a husband with a good job to support her, because some of the male employees struggled to support their families. Shortly after Plaintiff did not receive the promotion, she resigned.

Plaintiff claimed discrimination under Title VII, the ADEA and the EPA. She alleged constructive discharge, discrimination in the promotion process and wage discrimination. The court granted summary judgment for Defendant on the wage discrimination claims under the EPA, Title VII and the ADEA. Plaintiff alleged that she performed substantially equal work to that of the male Electronic Technicians, because she performed some of the Electronic Technician tasks despite her lower-ranking title. Although the Production Technician II position and the Electronic Technician position were not substantially equal, because Plaintiff performed extra tasks, the court assumed

the males were adequate comparators for the purposes of the summary judgment motion. However, Defendant showed that the pay disparity between Plaintiff and her alleged comparators was because of the rank of the employees, which Defendant determined by education, technical ability and other factors unrelated to gender.

Perez v. Norwegian-American Hospital, 93 Fed. Appx. 910, 2004 U.S. App. LEXIS 4397 (7th Cir. Mar. 5, 2004) (unpublished)

Plaintiff-Appellant appealed the District Court's granting of summary judgment to Defendant on her EPA claim. Plaintiff claimed that she made a *prima facie* case by offering evidence of a male co-worker's comp time, which she was not given. However, affirming the lower court's decision, the Seventh Circuit pointed out that Plaintiff did not make a *prima facie* showing. She failed to offer "evidence of whether their jobs shared a 'common core' of tasks, what work [her male counterpart] performed, under what conditions, how his responsibilities and skills compared to hers or when [he] performed the work for which he received comp time." *Id.* at *19.

Hoban v. Texas Tech Univ. Health Sciences Ctr., 2004 U.S. Dist. LEXIS 4552, 2004 WL 594449 (W.D. Tex. Mar. 12, 2004)

Plaintiff brought suit against Defendant for violation of the Equal Pay Act. Defendant employed Plaintiff as a Responder Coordinator from March 6, 1995, through March 19, 2001 and paid an annual salary of \$30,000. Plaintiff was responsible for such tasks as training and quality assurance of first responders, establishing medical protocols for the fire department, and designing continuing education programs for first responders. For purposes of Plaintiff's EPA claim, Brian Wilson was designated as a comparable employee. Wilson concurrently held three positions during Plaintiff's employment: Education Director, Advanced Cardiac Life Support Coordinator, and Basic Life Support Regional Coordinator. At the time of Plaintiff's resignation, Wilson received an annual salary of \$43,842. After her resignation, Plaintiff filed suit against Defendant alleging that Defendant violated the EPA by providing her with lower pay for her services than comparable male employees. Defendant moved for summary judgment.

In assessing Plaintiff's EPA claim, the court focused its attention on whether Plaintiff and Wilson's positions require equal effort and responsibility. Defendant argued that Plaintiff's and Wilson's positions did not require equal responsibility because Plaintiff voluntarily assumed certain responsibilities. The court rejected this argument and stated that "an employer [need not] formally assign the equal work to the employee; the EPA applies if the employer knowingly allows the employee to perform the equal work." In analyzing whether Wilson's effort or responsibility was substantially greater than Plaintiff's, the court determined that in stripping away job titles and descriptions, a quantitative comparison of the actual responsibilities does not arrive to the conclusion that Wilson's position entitled him to higher compensation than Plaintiff.

In examining Defendant's justification for the wage differential, the court rejected Defendant's argument that the difference in pay was attributable to a seniority system.

The court stated that this defense requires proof of an “organized or established procedure.” The court held that Defendant’s reference to Wilson having an earlier hiring date does not establish his entitlement to a particular wage. In regard to Defendant’s assertion that Wilson had additional duties, the court declared that “payment attributable to additional duties must be established to be bona fide.” In summary, the court held that Defendant did not establish that there were no genuine issues of fact as to whether the duties imposed in Wilson’s positions were the collective equivalent in skill, effort, and responsibility to Plaintiff’s position. As such, Defendant’s motion for summary judgment was denied.

Stith v. Perot Sys. Corp., 2004 U.S. Dist LEXIS 10898, 2004 WL 690884 (N.D. Tex. Mar. 12, 2004)

Plaintiff alleged that Defendant discriminated against her on the basis of her race, sex and age, and retaliated against her for her complaints of discrimination. She brought claims under Title VII, the Age Discrimination in Employment Act and the EPA. With respect to her EPA claim, Plaintiff alleged that thirteen male employees performed equal work. However, four male employees received lower pay than Plaintiff, and Plaintiff failed to present evidence that the other nine had positions with equal skill, effort and responsibility. Because Plaintiff’s claim that these employees performed equal work was conclusory, the court found that she failed to raise a genuine issue of material fact. The court granted Defendant’s motion for summary judgment as to the EPA claim.

Cook v. Hatch Assoc., 2004 U.S. Dist. LEXIS 11741, 2004 WL 1396359 (W.D.N.Y. Mar. 19, 2004)

Defendant hired Plaintiff as a Senior Draftsperson and promoted her to the position of Designer three years later. Despite her title, Plaintiff alleged that Defendant denied her opportunities to perform design work, as well as mentoring and training opportunities related to design, because of her gender. Defendant terminated Plaintiff’s employment as part of a reduction in force at a time when Plaintiff was the only female designer in her department and also the oldest and most senior designer.

Plaintiff brought age and gender discrimination claims against Defendant and alleged violation of Title VII, the ADEA and the EPA. The Magistrate Judge issued a report and recommendation, finding that Plaintiff offered no evidence in support of her EPA claim. Thus, the Magistrate Judge recommended that the court grant Defendant’s summary judgment motion as to this claim

Ramelow v. Board of Trustees of the Univ. of Louisiana Sys., 870 So. 2d 415 (La.App. 3d Cir. Mar. 31, 2004)

The appellate court reversed the jury verdict awarding Plaintiff \$49,156.00, holding that Plaintiff had failed to establish a *prima facie* case of discrimination under the Equal Pay Act. Specifically, the court found that the alleged comparator was not an appropriate comparator because: 1) he worked as interim deputy department head; 2)

he was eligible for merit raises four years before Plaintiff based on his being hired directly into the tenure track where Plaintiff worked first as an adjunct professor and then as an associate professor in the non tenure track; and 3) he worked as assistant head of the chemistry department for three years. Thus, Plaintiff could not prove that they performed substantially the same work.

Horn v. University of Minnesota, 362 F.3d 1042 (8th Cir. Apr. 6, 2004)

Plaintiff-Appellant, a former assistant coach of the University of Minnesota's women's hockey team, appealed the decision of the district court granting Defendant's summary judgment motion on his EPA claim (see last year's report at p. 17). Plaintiff was hired for one of two assistant coach positions posted by the Defendant. However, upon commencing work, Plaintiff accepted a contract with job requirements and a salary that were different from the other assistant coach, a female. Plaintiff further conceded that he and the other assistant coach performed different jobs. As a result, the Eighth Circuit upheld the lower court's decision to grant summary judgment to Defendant for Plaintiff's failure to show that he and the other assistant coach had positions that were substantially equal.

Pfeiffer v. Lewis, 2004 U.S. Dist. LEXIS 10415, 2004 WL 1202886 (N.D.N.Y. Apr. 12, 2004)

Plaintiff worked for Defendant county sheriff's department as a dispatcher/corrections officer. Plaintiff received an informal, provisional appointment to dispatch supervisor, which did not include a pay raise. At that point, the department's Chief Civil Deputy retired, and Plaintiff's supervisors assigned her some of the Chief Civil Deputy's former tasks. In exchange for these additional duties, Plaintiff received additional pay and the part-time position of secretary to the sheriff. However, following a union grievance that alleged that Plaintiff's pay increase violated the collective bargaining agreement, the department and Plaintiff entered into an administrative services agreement under which Plaintiff performed these additional tasks for additional pay for a fixed period of time. When this agreement expired, Plaintiff continued to perform the additional tasks, but the department did not pay Plaintiff any additional compensation. Plaintiff alleged that Defendant engaged in wage discrimination, improperly denied her requests to use sick leave, required her to work a different schedule that included weekends, and subjected her to a hostile work environment on the basis of her gender. Plaintiff filed claims under 42 U.S.C. § 1983, Title VII, the EPA, the New York State Equal Pay Act and the New York State Human Rights Law, and also filed a common law defamation claim.

With respect to Plaintiff's EPA claim, she argued that three positions that male employees held in the department were substantially equal. In its March 17, 2004 opinion, the court found that the corrections officer position was not substantially equal to Plaintiff's dispatcher/corrections officer position because it entailed much greater supervision of inmates, while Plaintiff's primary responsibilities were as dispatcher. Plaintiff had corrections officer responsibilities only when the facility needed assistance with female inmates that a male corrections officer could not provide. In addition, the

positions had different working conditions because Plaintiff primarily worked in a secure control room, while the male corrections officers worked in the cell blocks with the inmates.

Plaintiff raised two other allegedly comparable positions, dispatch supervisor and secretary to the sheriff, in opposition to Defendant's summary judgment motion. The court permitted further briefing, and then analyzed these two positions in its opinion dated April 12, 2004. Although Plaintiff could not show that she actually held the dispatch supervisor title, the court found that there was sufficient evidence to show that Plaintiff performed dispatch supervisor tasks for the case to go to a jury. In addition, Defendant did not submit evidence to rebut Plaintiff's claim that her work was substantially equal to other positions at the same grade, and so a genuine issue of fact remained about whether Plaintiff had offered examples of comparable positions. The court also found that Defendant had not offered enough evidence to rebut Plaintiff's claim that the secretary to the sheriff position was substantially equal. As a result, the court denied Defendant's summary judgment motion.

Calvello v. Electronic Data Sys., 2004 U.S. Dist. LEXIS 8744, 2004 WL 941809 (W.D.N.Y. Apr. 15, 2004)

Plaintiff alleged that Defendant discriminated against her and then terminated her employment in retaliation for her complaints about unequal pay and promotion practices. Plaintiff brought these claims under Title VII, the EPA and the New York State Human Rights Law. She originally brought her claims as a class action, but the trial court refused to certify the class because the applicable statutes of limitations barred many of Plaintiff's allegations. Although the court found that many of Plaintiff's allegations were time-barred, it found that a portion of her unequal pay allegations under the EPA and the New York State Human Rights Law were within the three-year statute of limitations because each paycheck was a discrete, actionable event. However, Plaintiff could not overcome Defendant's summary judgment motion because the only male employee whom she offered as a comparator for her wage discrimination claim was her supervisor, who clearly had different duties and responsibilities.

Lichtenstein v. Triarc Cos., Inc., 2004 U.S. Dist. LEXIS 8610, 2004 WL 1087263 (S.D.N.Y. May 14, 2004)

Plaintiff worked as a tax accountant for Defendant, a holding company. When Defendant divested itself of one of its holdings, it had a reduced need for tax accountants and eliminated Plaintiff's position. At the same time, Defendant chose to retain the tax accountant who managed the taxes for the divested company. The retained tax accountant was the same gender, female, as Plaintiff. Plaintiff alleged discrimination on the basis of her gender, religion and age, retaliation for her previous complaints of discrimination, harassment because of gender and religion and intentional infliction of emotional distress. She claimed Defendant's conduct violated Title VII, the EPA, the New York State Human Rights Law, the New York City Human Rights Law and common law.

In support of her EPA claim, Plaintiff compared herself to three male employees whom she alleged performed equal work. The court found that the first employee, who held a more senior position than Plaintiff, was not an adequate comparator because he prepared more complicated consolidated tax returns, managed Defendant's tax software and worked on Defendant's Securities and Exchange Commission filings. Plaintiff's allegations that she was more competent than the male employee did not change the court's determination that he had materially greater responsibilities. The other allegedly comparable two male employees were employees in a different department; while Plaintiff worked in the Tax Department, the two alleged comparators worked in the Accounting Department. Their work concentrated on SEC documents, while Plaintiff performed mainly tax work. Plaintiff alleged that these two employees' work was equal because her work was more complex than theirs. Again, the court found that the "value" of the work performed by different employees could not make unequal work equal for the purposes of the EPA. Because none of the employees Plaintiff offered as comparators actually performed equal work, Plaintiff could not make a *prima facie* case. The court granted Defendant's summary judgment motion with respect to the EPA claim.

Younts et al. v. Fremont County, et al., 370 F.3d 748 (8th Cir. June 4, 2004)

Plaintiffs-Appellants, administrative assistants for the Fremont County District Attorney's office, brought this appeal of their EPA claims after the District Court granted summary judgment in favor of Defendants. The administrative assistants claimed that each received less in pay than Arnold Emberton, an administrative assistant with the Fremont County Auditor's Office. However, the District Court granted summary judgment after Plaintiffs' failed to "produce evidence of Emberton's actual job duties, the skill, effort and responsibility associated with his job ... or the working conditions under which Emberton fulfills his job duties." *Id.* at *10-*11. In deciding these claims on appeal, the Eighth Circuit examined them independently and affirmed the District Court's holding for Defendants in each case. The Eighth Circuit, however, made an exception for not deciding Plaintiff-Appellant Younts' EPA claim as she died prior to appeal and no motion for a proper substitution was made to continue her case. The Eighth Circuit also made an exception for part of Plaintiff-Appellant Rasmussen's EPA claim for unequal benefits, which was remanded to the district court for a decision. These benefits included Emberton's uniform allowance, use of a cellular phone, and use of a county vehicle, which were benefits not accorded to Rasmussen after she took over his position.

Rowels v. Illinois Dept. of Employment Security, 2004 U.S. Dist. LEXIS 10266, 2004 WL 1243870 (N.D. Ill. June 4, 2004)

Plaintiff alleged that the Illinois Department of Employment Security ("IDES") violated the Equal Pay Act by offering her a starting salary at a lower point on its pay scale than was offered to other male employees. IDES hired Plaintiff on February 18, 1997 as an Intermittent Hearings Referee, a part-time position, with a starting hourly rate at the minimum salary in the pay grade. Between December 1996 and May 1998, IDES hired six other individuals, four women and two men, as Intermittent Hearings

Referees at the same starting pay. For the six years that are relevant to this litigation, 35 Hearings Referees, including Rowels, were hired and all but three were started at the lowest level on the pay scale. The employer's policy provided for hiring at the lowest pay grade but allowed the government agency discretion to increase the starting basis where appropriate based on the candidate's experience. IDES exercised such discretion when it hired Robert Stevenson, Robert Hayes, and Alvin Meyers as full-time Hearings Referees. IDES claimed that its reasons for starting Stevenson, Hayes, and Meyers at a higher pay level than Plaintiff were based entirely on the candidates' professional experience and market factors existing at the time they were hired, market forces at the time IDES was seeking to fill Stevenson's position, and the higher salaries of the candidates with their other employers at the time of hiring. Plaintiff did not dispute these justifications or offer any evidence that they were pretextual. Further, while certain components of Plaintiff's experience favored her, there was no genuine issue of fact that the males, who were hired at higher salaries than Plaintiff, had more relevant experience overall. The court declined to sit as a "super-personnel department" to second-guess the employer's decision to value overall experience most. Accordingly, the court granted summary judgment in favor of Defendant because there existed an undisputed, legitimate, nondiscriminatory reason for the difference in pay.

Harrison-Pepper v. Miami University, 103 Fed. Appx. 596, 2004 U.S. App. LEXIS 13861 (6th Cir. June 25, 2004)

Plaintiff-Appellant, a Miami University tenure track professor, brought an EPA claim, alleging that she received smaller raises than her male counterparts including another tenure track professor hired the same year in the same department. In 1988, Miami University hired Harrison-Pepper as a tenure-track professor. That same year, the University hired another professor in the same department whose salary exceeded Plaintiff's by \$2,000. Plaintiff notified the University of the disparity and they adjusted Plaintiff's salary so it would eventually equal the salary of the other newly hired professor in the same department. In 1995, Plaintiff was promoted to full professor at the University. However, due to an illness and employment decisions on Plaintiff's part, over the course of the next three-and-a-half years, Plaintiff taught just one semester. Plaintiff was unhappy with her salary increases during those years and complained to the University and the EEOC before bringing suit. At the time Plaintiff commenced the action, she was the lowest paid full professor in the department. The district court granted summary judgment in favor of the University and Plaintiff appealed. The district court concluded that Plaintiff failed to meet the *prima facie* case set forth in Kovacevich v. Kent State Univ., 224 F.3d 806, 827, (6th Cir. 2000). In Kovacevich, the Sixth Circuit set out the factors relevant to determining whether professors perform equal work, including hire dates, prior experience, workload requirements, departmental placement and evaluation criteria.

On appeal, the Sixth Circuit found that Plaintiff failed to satisfy the “equal work” requirement because she presented little evidence of the work she performed and no evidence of the work performed by peers. The court stated that even if the district court erred in concluding that Plaintiff failed to establish the “equal work” requirement of a *prima facie* case, the University still demonstrated that no genuine issue of fact existed regarding its justification for pay differences. The University established that there was a merit-based system for awarding raises based on a professor’s “(1) teaching and advising, (2) scholarship and creative activity, and (3) professional service.” The court held that the University’s use of subjective criteria in its merit-based system did not preclude it from constituting an affirmative defense. Further, the court found that Defendant presented sufficient evidence to account for Plaintiff’s raises, including her extended absences. Accordingly, the Sixth Circuit affirmed the lower court’s holding in granting summary judgment to Defendant.

Mehus v. Emporia State Univ., 222 F.R.D. 455 (D. Kan. June 30, 2004)

Plaintiff, head volleyball coach at Emporia State University (“ESU”), brought suit against ESU under the Equal Pay Act and Title VII of the Civil Rights Act of 1964. In regard to her EPA claim, Plaintiff alleged that ESU paid her less than similarly situated male counterparts for equal work requiring similar effort, skill and responsibility, and performed under similar working conditions.

Seeking summary judgment on Plaintiff’s EPA claim, the University argued that Plaintiff could not make out a *prima facie* case. The court first rejected the University’s contention that Plaintiff’s claim was flawed because she compared herself to three different coaches rather than a single male counterpart. Rather, the plaintiff and the defendant may identify one comparator or many, provided that where there is more than one comparator, the proper test is whether the plaintiff received lower wages than the average wages paid to all comparable employees performing substantially equal work and similarly situated with respect to other factors affecting the wage scale, such as seniority.

The court next considered the University’s claim that Plaintiff did not show her job was substantially similar to the other coaches’ jobs. Plaintiff alleged her position was substantially equal to the jobs of Moe (the men’s basketball coach) and Schneider (the women’s basketball coach) because all three of them (1) coach roughly the same number of players for the same number of games per season, (2) supervise the same number of assistant coaches, (3) have one of the top four operating budgets among university sports, and (4) are responsible for recruiting the same number of top notch players. Plaintiff also argued that the University discriminated in its support of the volleyball program by providing fewer resources and media opportunities to volleyball, and not allowing volleyball to charge admission or sell programs. She further argued that the University should be barred from using this discrimination to establish that her job was not substantially equal to the jobs of the comparator male coaches.

In response, the University contended that Plaintiff's job was not substantially equal to that of Moe or Schneider because (1) the NCAA imposes different recruiting restrictions on volleyball and basketball coaches; (2) basketball is broadcast live on radio, while volleyball is not; (3) basketball coaches are required to provide pre-game and post-game radio shows while the volleyball coach is not; (4) in contrast with volleyball, basketball attracts large numbers of fans; (5) the University sold tickets to basketball games but not volleyball games; and (6) basketball coaches have 12-month contracts while Plaintiff has a ten-month contract. In resolving these contentions, the court ruled that substantial equality is evaluated in terms of skill, effort and responsibility based on a practical judgment of all facts and circumstances of the case, including an examination of the skills required by each identified coach and factors such as experience, training, education, and ability. The court held that ESU did not establish as a matter of law that Plaintiff's position required different skills than that of the comparators.

The court then analyzed whether the coaching jobs being compared required substantially equal effort. The court stated that "[e]ffort required by each coach is examined considering the physical or mental exertion needed for the performance of the job" and that a wage differential is not justified unless there is a difference in the amount or degree of effort required. Ultimately, the court determined that there were genuine issues of material fact as to whether the basketball and volleyball coach positions required substantially equal effort.

In analyzing whether the coaching jobs being compared required substantially equal responsibility, the court examined "the degree of accountability required in performance of the job with emphasis on the importance of the job obligation." The court determined that genuine issues of material fact existed as to whether Plaintiff's responsibilities were substantially different from those of the comparators.

In examining whether Plaintiff and the comparators experienced similar working conditions, the court reasoned that "a practical judgment is required in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels." Further, the court defined "working conditions" as physical surroundings and hazards encountered on the job. The court held that ESU provided no evidence that Plaintiff and the comparators were exposed to different physical surroundings or hazards in performing their job duties.

The court also rejected the University's assertion that even if Plaintiff made out a *prima facie* case, the record nevertheless supported dismissal of Plaintiff's claims based on the University's alleged affirmative defense that the difference in pay was based on "factors other than sex." While the University alleged that the pay difference rested on market forces, rather than sex, the court found that the University had failed to introduce evidence demonstrating the basis underlying the University's alleged determination that market forces compelled the higher payments to Plaintiff's male counterparts.

Finally, the court addressed Plaintiff's motions *in limine* seeking the exclusion of certain reports and testimony by Defendants. Specifically, the court excluded the testimony of Defendant's Title VII expert on the grounds that neither compliance with Title IX nor the existence of a legitimate, non-discriminatory reason under Title VII constitute an affirmative defense to EPA liability. The court, however, rejected Plaintiff's request for exclusion of testimony by an economist that a gender equity survey for the NCAA summarizing coach salaries and spending showed that (1) different salaries "imply" different labor markets for coaches in different sports; (2) that the salary paid Plaintiff was higher than would be predicted by linear regression analysis; and (3) there is no evidence of discrimination against Plaintiff.

See also case summary in Section III.B.

Bair v. Indiana Department of Revenue, 2004 U.S. Dist. LEXIS 15413 (S.D. Ind. July 6, 2004)

Plaintiffs, men employed by the state to investigate potential criminal violations of the tax code, sued the state Department of Revenue and Personnel Department for discrimination under the Equal Pay Act, alleging that Defendants paid more to women who had different job titles but who were also employed to investigate potential criminal violations of the tax code. Defendants moved for summary judgment on two grounds. Defendants contended that Plaintiffs had failed to establish that the work was equal because Plaintiffs had not established that their responsibilities were the same as those of the female investigators. Defendants alternatively asserted an affirmative defense that the pay disparity was based on a factor other than sex, namely state legislative action and bureaucratic circumstance.

The District Court for the Southern District of Indiana granted Defendants' motion for summary judgment. The court concluded that while a genuine issue of material fact existed as to whether Plaintiffs and the female comparators performed equal work, Defendants had successfully asserted the affirmative defense. Defendants established that the pay disparity was not based on sex but rather the gender-neutral factor of the application of a new state statute. The statute required the state personnel department to conduct a salary survey of professional, technical, and law enforcement classifications to determine which positions for which it was difficult to recruit and retain employees. As a result, the personnel department then awarded pay raises to the selected positions, which happened to include Plaintiffs' female comparators and other male employees, but not Plaintiffs. The court decided that Plaintiffs had tacitly conceded that the disparity was not based on sex by focusing not on how the disparity originated, but rather on Defendants' failure to correct the disparity when Plaintiffs complained about it.

Fagen v. State of Iowa, 324 F. Supp. 2d 1020 (S.D. Iowa July 8, 2004)

Plaintiffs, eight current and former Health Facilities Surveyors for the Iowa Department of Inspection and Appeals (DIA), sued the state and the DIA under the Equal Pay Act, claiming that Defendants had hired a male at a higher salary to do

substantially equal work. Although the jury found that Plaintiffs had proved that they and the male employee performed substantially equal work, it decided that Defendants had not violated the EPA because Defendants had proved their affirmative defense that the disparity was the result of factors other than sex. DIA had hired the male employee, unlike Plaintiffs, during a time when DIA policy allowed hiring at an advanced pay rate based on an individualized assessment of qualifications and because the male employee had first rejected the job offer and demanded a salary equal to that of his then-current job. During this period of individualized salary assessments, at least three women were offered Health Facilities Surveyor positions at salaries higher than those of Plaintiffs. They were not hired at the same rate as the male comparator, but, unlike him, they had not first rejected the job because of salary. After budgetary constraints put an end to individualized salary assessments, DIA hired at least one male at Plaintiffs' salary level.

In support of their motion to set aside this verdict, Plaintiffs argued alternatively that (1) the court erred in instructing the jury that Defendants could establish their affirmative defense by showing the pay discrepancy between Plaintiffs and the male comparator was based upon "any" factor other than sex, rather than instructing the jury that the discrepancy must be based upon a "legitimate" factor other than sex; and (2) that the court erred in failing to give a jury instruction mandating that neither the payment of higher wages based on market conditions where men tended to earn more in than women generally nor budget constraints are legitimate factors justifying the perpetuation of pay discrimination under the EPA.

The District Court for the Southern District of Iowa denied Plaintiffs' motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and motion for a new trial under Rule 59. The court decided that it had properly denied Plaintiffs' motion *in limine* to exclude evidence in support of Defendants' affirmative defense to the extent the evidence went to the "market conditions." The court noted that DIA did not offer evidence of the policy change and the male comparator's salary demands to argue that it was forced to pay men more than women in order to attract them to the positions. The court had given a jury instruction that Defendants had not met their burden of proof on their affirmative defense if they established that they paid the comparator more than Plaintiffs because market conditions demanded it. The court held that a jury could have reasonably found that Defendants paid the male employee a higher salary based on a factor other than sex and that the jury's decision was supported by the evidence.

The court also decided that it had properly instructed the jury that the affirmative defense could be established by showing that "any" factor—rather than a "legitimate" factor—other than sex was the basis for the pay discrepancy. The court pointed out that Plaintiffs could not challenge the EPA use of "any factor other than sex" language. Furthermore, the court had also instructed the jury that Defendant "must produce evidence and persuade you that the need was valid" The court found that according to Roget's Thesaurus, "legitimate" and "valid" were synonymous. The court held that the jury instructions adequately advised the jury that Defendants' reason for the higher salary had to be a valid reason not based on sex.

Finally, the court held that it had not erred by failing to give a jury instruction stating that budget constraints are not, under the EPA, a legitimate factor other than sex. The court held that even if Plaintiffs had requested such an instruction, the instructions given adequately informed the jury that no justification based on sex could excuse compliance with the EPA, and Defendants had presented evidence that budgetary constraints forced them to end the policy of individualized salary assessments, after which all job candidates regardless of sex were hired at the same salary as Plaintiffs.

Alexander v. Chattahoochee Valley Community College, 325 F. Supp. 2d 1274 (M.D. Ala., July 9, 2004)

Plaintiff, a college administrator, alleged that the college had violated the Equal Pay Act. Noting that the “controlling factor in the court’s assessment of whether two jobs are substantially equal must be actual job content,” the court required that Plaintiff identify a male comparator whose job is substantially similar to hers. The court rejected Alexander’s assertion that she could meet this element. The court likewise found that Plaintiff’s job differed too greatly from the other director jobs for her to show that the jobs were substantially similar under the more “relaxed standard of similarity” required to support a Title VII and section 1983 pay discrimination claim. Accordingly, the court also granted the employer summary judgment on Plaintiff’s section 1983 equal protection claim.

Reznick v. Associated Orthopedics & Sports Med. P.A., 104 Fed Appx. 387, 2004 U.S. App. LEXIS 14318 (5th Cir. July 18, 2004)

Plaintiff-Appellant, a medical doctor specializing in hand, wrist and elbow care, alleged sex discrimination under the EPA, and Title VII of the Civil Rights Act of 1964. The District Court granted summary judgment to Defendant, Associated Orthopedics & Sports Medicine, P.A., and the Fifth Circuit affirmed the District Court’s holding because of Plaintiff’s failure to make a *prima facie* case for either cause of action. With regard to Plaintiff’s EPA claim, Defendant successfully showed that Plaintiff’s position was not substantially equal to a fellow male employee - she was a hand surgeon, while his specialty was in sports medicine - a position which generated more revenue and was reflected in the higher salary he received. Defendant also successfully showed that both Plaintiff and the male counterpart were both independently responsible for negotiating their respective salaries. Their salaries were not only dependent on market forces - sports medicine was in higher demand than hand surgery - but also the result of their respective arm’s length transactions - at which time Plaintiff even had the aid of counsel. Altogether, the Fifth Circuit found sufficient evidence to conclude that Defendant had raised successful affirmative defenses to Plaintiff’s EPA claim, and therefore, even if Plaintiff could make out a *prima facie* case, she still could not prevail.

Webb v. Barnes Group, Inc., 2004 WL 1749519 (N.D.Tex. Aug. 3, 2004)

Plaintiff brought suit against her former employer, alleging employment discrimination under Title VII of the Civil Rights Act and the Equal Pay Act. Plaintiff was a Distribution Center Manager II for Defendant's Dallas facility. In 2001, Defendant consolidated its operations into four facilities and decided that these four facilities would be run by a manager with a title of at least Distribution Center Manager I. Plaintiff's Dallas facility was one of the four facilities remaining after the consolidation. Instead of appointing Plaintiff to Distribution Center Manager I, Defendant appointed another employee to be Distribution Center Manager I. However, Defendant told Plaintiff that they wanted her to continue to work for the Company and that her title, salary, and benefits would all remain unchanged. Plaintiff resigned following Defendant's decision to place another employee in the position of Distribution Center Manager I.

With respect to Plaintiff's EPA claim, Plaintiff compared her work and pay to that of three male Distribution Center Managers located at Defendant's facilities in other states. Defendant argued that Plaintiff's comparison was flawed because multiple facilities did not constitute a single "establishment" as required by 29 C.F.R. § 1620.9(a). However, the court stated that "where an employer has integrated operations and a centralized administration, a business with multiple physical locations may be considered a single "establishment." In examining the issue of "equal work" in the light most favorable to Plaintiff, the court found that Plaintiff established a *prima facie* case of pay discrimination under the EPA. As such, Defendant had the burden to prove that the wage differential was justified. Defendant asserted that any alleged pay differentials were justified by the Company's merit system for pay and by factors other than sex. The court found that Defendant's compensation system was largely merit based, incorporated performance reviews, and was administered systematically and objectively. Therefore, the court held that Defendant provided a legitimate nondiscriminatory reason for its pay practices and Plaintiff did not show any additional evidence of pretext. Defendant's motion for summary judgment was granted as to Plaintiff's pay discrimination claims.

Perkins v. The Intercept Group, Inc., 2004 U.S. Dist. LEXIS 16298, 2004 WL 1836987 (N.D. Tex., Aug. 16, 2004)

The court granted Defendant's summary judgment motion, dismissing the unequal pay and retaliation case brought under the EPA and FLSA. Plaintiff alleged he was unfairly compensated for overtime hours while other shift supervisors were being compensated at a higher rate of pay for the same responsibilities. Plaintiff, however, failed to show that he was treated differently than any other comparator employee with respect to overtime pay.

Albrant v. Heartland Foods, Inc., 2004 U.S. Dist. LEXIS 16451, 2004 WL 1854203 (N.D. Iowa Aug. 19, 2004) (unpublished)

Female employees employed by Team America and leased to Heartland to work in the Packaging Department sued Heartland and Advance Foods. They alleged that Heartland's paying lower wages to employees hired to work in the Packaging Department than those wages paid to employees hired to work in the Processing Department violated the Equal Pay Act. All but one of the employees hired to work in the Packaging Department were female while all the employees hired to work in the Processing Department were male. Heartland argued that significant differences in job duties and responsibilities justified the lower wage for Processing Department employees. However, Plaintiffs argued the duties and responsibilities of the two positions were essentially the same and that they regularly performed duties in the Processing Department, but were paid for the work at the lower Packaging Department wage rate.

To establish a *prima facie* case of pay discrimination, the court stated that Plaintiffs must show Heartland paid male workers more than it paid to Plaintiffs for equal work in jobs performed under similar conditions that required equal skill, effort, and responsibility. Plaintiffs presented evidence that that they routinely worked in the Processing Department, but they were paid the lower Packaging Department wage, and that male employees employed in the Processing Department routinely worked in the Packaging Department, but continued to receive the higher Processing Department wage. The court held that there was an issue of fact whether the jobs performed in the two departments were performed under similar conditions, and were roughly equal in skill, effort, and responsibility. Where a triable issue of fact existed relative to the equivalency of the work, a triable issue of fact also inherently existed regarding Heartland's claimed affirmative defense that the pay differential was based on factors other than sex.

The court granted summary judgment in favor of Advance Foods, holding that occasional communications with employees on Advance Foods letterhead was insufficient to rebut all other evidence that Plaintiffs were employed by Heartland, and not Advance Foods.

Cuffee v. Dover Wipes Co., 334 F. Supp. 2d 565 (D. Del. Sept. 7, 2004)

Plaintiff, a male employee, brought an action alleging employment discrimination based on age, race, and gender in violation of Title VII, the ADEA, and the Equal Pay Act. During Plaintiff's tenure with Defendants, Plaintiff was promoted to a "Warehouse Operations Leader" and earned \$38,395 per annum. When he was promoted, Plaintiff replaced an operations manager who was paid \$80,000 per annum. While employed as an operations leader, Plaintiff requested a raise and was denied an increase. Shortly thereafter, Plaintiff was removed from his operations leader position and Plaintiff became a material resource technician. After only one day as a material resource technician, Plaintiff went on medical leave and eventually resigned his position with Defendants. Plaintiff later filed suit, claiming that that while he was employed as an

operations leader, he was paid less than other employees performing the same work, he was denied a raise, and he was demoted in retaliation for his complaints alleging discrimination.

In analyzing Plaintiff's EPA claim, the court stated that "jobs being compared must be substantially similar, but carry different wages to violate the EPA." However, inconsequential differences in job requirements cannot justify paying a lower salary to an employee of one gender. In support of Plaintiff's claim, Plaintiff asserted that his job was substantially similar to that of the female operations manager whom he replaced. The court found sufficient evidence that Plaintiff and the operations manager he replaced performed the same work and had the same job responsibilities. The court also rejected Defendants' argument that the pay difference was attributed to the fact that Plaintiff was a technician and not a manager. Thus, with respect to Plaintiff's EPA claim, the court denied Defendants' motion for summary judgment.

Barra v. Rose Tree Media Sch. Dist., 2004 Pa. Commw. LEXIS 702, 858 A.2d 206 (Pa. Commw. Ct. Sept. 17, 2004)

The Commonwealth Court of Pennsylvania remanded Plaintiff's EPA claim to resolve the issue of whether Plaintiff performed substantially the same work with the same skill, effort and responsibility under the same working conditions but at a lower wage. The lower court had erred in dismissing the claim without first determining whether Plaintiff stated a *prima facie* case.

Shrader v. Palos Anesthesia Assocs., 2004 U.S. Dist. LEXIS 19194, 2004 WL 2167909 (N.D. Ill. Sept. 24, 2004)

Plaintiff, an anesthesiologist, sued her former employer and its president for wage discrimination and retaliation under the EPA. Plaintiff claimed that two of her bonuses were lower than her male counterparts on account of her sex. The District Court held that as to her earlier disputed bonus, Plaintiff was unable to state a *prima facie* case under the EPA because a reduction in hours she took just before the bonus was awarded proved that her job did *not* require the same level of effort as similarly situated males who received a higher bonus after working more hours. Further, even if she could make out a *prima facie* case of discrimination, Defendant had shown that its decision was based on factors other than her sex - namely Plaintiff's reduction in working hours.

As to Plaintiff's later disputed bonus, the District Court again found Defendant provided a non-discriminatory reason for giving Plaintiff a lower bonus - she was preparing to leave the company. Further, there was no evidence of bonuses being awarded for past work alone and there was foundation for Plaintiff's boss to believe she was leaving. Accordingly, the evidence proffered by Defendant provided enough basis for an affirmative defense against the *prima facie* claim made by Plaintiff for her later disputed bonus. As stated by the district court, the "Seventh Circuit does not even require that the reason for the pay differential be related to the requirements of the position or that it be business related at all, as long as the factor is bona fide and

applied in good faith.” *Id.* at *16, citing Markel v. Bd. of Regents of Univ. of Wis. Sys., 276 F.3d 906, 913 (7th Cir. 2002) and Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir, 1989). The court similarly rejected Plaintiff’s retaliation claim because she complained about her reduced bonus to a hospital physician not affiliated with her employer. Thus, her activity was not protected, and, in any event, her employer did not know of it before it terminated her employment. As a result, the district court granted summary judgment to Defendants.

Hamilton v. Spraying Sys. Inc., 2004 U.S. Dist. LEXIS 19398, 2004 WL 2191330 (N.D. Ill. Sept. 28, 2004)

Plaintiff alleged that Defendant Spraying Systems, Inc. paid her lower wages than her male counterparts. Plaintiff claimed “that male employees who have been promoted to Setup/Operator Trainee, and whom SSCO. had employed for the same or less amount of time than her, earned a higher base salary for performing substantially the same work.” *Id.* at *43. The District Court found that Plaintiff satisfied the first element of her *prima facie* claim under the EPA by finding at least one other male employee who was paid more in the Setup/Operator Trainee position than she was. However, the District Court found that Plaintiff was not successful in establishing the second and third elements of her *prima facie* case, as she did not “establish whether she was performing equal work requiring equal skill, effort and responsibilities as her comparators or that the work performed by her comparators was done under similar working conditions.” *Id.* at *47. Plaintiff proceeded to proffer a showing that Defendant did not provide this evidence, to which the court instructed that “[i]t is not the Defendant’s burden to produce such evidence.” *Id.* at *50. Accordingly, the District Court granted summary judgment on Plaintiff’s EPA claim in favor of Defendant.

Walker v. Metropolitan Pier & Exposition Authority, 2004 U.S. Dist. LEXIS 19452, (N.D. Ill. Sept. 28, 2004)

Defendant employed Plaintiff as a Level II Network Systems Engineer. Plaintiff alleged that she was paid less than a male employee with the same job and that she was retaliated against for complaining about this pay discrepancy, both in violation of the EPA. According to the court, Plaintiff failed to make her *prima facie* case because both she and the other Level II Network Systems engineer performed different tasks - she was a computer networking specialist, while he was a computer hardware specialist. Moreover, her male counterpart had additional qualifications and more extensive experience with computer hardware, further justifying the pay differential. The court also rejected Plaintiff’s retaliation claim because the retaliatory conduct she alleged – paying her less than the male co-employee – occurred prior to her complaints about sex discrimination. Plaintiff’s failure to state a *prima facie* case for the difference in wages and her failure to show any evidence of retaliatory conduct led this court to dismiss her EPA claims.

Davenport v. Indiana Masonic Home Foundation, Inc., 2004 U.S. Dist. LEXIS 20254, 2004 WL 2278754 (S.D. Ind. Sept. 30, 2004)

The court rejected Plaintiff's EPA claim for failure to state a *prima facie* case. Plaintiff's role in assisting in Home Foundation's benefits services and safety committee operations was not substantially the same as the comparator's role because the comparator was primarily responsible for directing and coordinating the benefits services and safety committee. "Regardless of how valuable an assistant may be to the overall operation, an assistant does not exercise equal responsibility and is not held to the same degree of accountability as a person with the primary responsibility for the task." The court held that Plaintiff failed to look at whether there was equal skill, effort and responsibility as required under 29 U.S.C. §206(d)(1). The court also held that with respect to Plaintiff's argument that she was required to perform additional duties that required more skill, effort and responsibility than her comparators, Plaintiff failed to put forth any evidence in support of this claim.

Richards v. Eldorado National Company, 2004 U.S. Dist. LEXIS 21205 (D. Kan. Oct. 22, 2004)

Plaintiff, a Human Resources Director for a mid-size passenger bus manufacturer, sued her former employer alleging she was disciplined, paid less and terminated because of her sex. The court found there were genuine issues of material fact about whether the employer used a system based on factors other than sex to set and increase salaries and precisely how the alleged system operated.

Plaintiff was hired in 1997 to work in payroll, accounting and personnel. In December 1998 she was promoted to HR Director. As the HR Director, Plaintiff was responsible for maintaining personnel and attendance records, tracking and maintaining distribution of benefits, and managing employee relations issues, OSHA compliance and workers compensation. She was not responsible for hiring or firing.

Initially, Plaintiff was paid on an hourly basis and she received a "hitch bonus" of \$3 per bus completed. In 2001, Plaintiff's pay shifted from an hourly to an annual salary of \$30,000 and her hitch bonus was increased to \$6 per bus. During her employment, six male supervisors/managers received hitch bonuses of at least \$9 per bus. (The hitch bonus was based upon the number of buses sold and delivered each month. Salaried and hourly employees were eligible for the hitch bonus, which was intended as an incentive for employees who were not eligible for "production bonuses" (bonuses based on sales dollar volume).) Some management employees also received "MIP" bonuses. The company had no written criteria for these bonuses and they were generally based on employee contribution to the company, experience, knowledge, skills and abilities. The president of the company and three other managers determined whether MIP bonuses were paid to management employees. Plaintiff never received an MIP bonus.

In late 2000, following a Department of Labor audit, management classified the HR Director position as a member of lower management. Plaintiff disagreed, believing her position should be in middle management. All individuals in middle management were males and paid higher salaries than Plaintiff. In 2001, Plaintiff requested a raise in her salary to at least \$65,000 per year. Plaintiff stated that while her pay was relative to other HR professionals in the local job market, she was underpaid relative to other employees at Defendant.

When Plaintiff was terminated as a result of a reduction in force, she sued alleging she was disciplined, paid less and terminated because of her sex. Defendant first argued that Plaintiff's pay was reasonable compared to the pay of lower management and HR professionals in the surrounding area. In denying Defendant's motion for summary judgment, the court stated that Plaintiff compared herself to middle management, not lower management, and that Defendant had not argued or established that her work was not substantially equal to the work of male production supervisors in middle management. The court further stated that Plaintiff had presented evidence to meet her *prima facie* burden: her expert concluded that the HR director position should have been classified as middle management; when Defendant hired a new HR director in 2003, he was classified as middle management and received an MIP bonus; and all members of middle management were male and received higher salaries than Plaintiff.

Additionally, the court ruled that although Defendant argued that Plaintiff's salary was based on non-discriminatory factors such as her experience and responsibilities, Defendant had not explained how specific factors such as seniority and product knowledge determined middle management salaries and therefore, there was a genuine issue of material fact about whether Defendant used a system based on factors other than sex to set and increase salaries and/or how the alleged system operated.

Underwood v. Sears, Roebuck & Company, 2004 U.S. Dist. LEXIS 23469 (D. Del. Oct. 25, 2004)

Plaintiff, the manager of the women's apparel department who was terminated in a reduction in force, sued her former employer seeking reinstatement and alleging that she had been paid less than two other department managers.

Plaintiff was an assistant store manager ("ASM") and the manager of women's apparel. She was one of 13 ASMs in the Prices Corner store. She alleged that she was paid less than two male department managers: Grossman, manager of Brand Central, and LaFreeda, operations manager.

The court ruled that Plaintiff's and LaFreeda's positions were not comparable because they did not have the same level of responsibility. LaFreeda was essentially a store manager with responsibility for the entire store while Plaintiff was a department manager with responsibility for a single department. The court stated that although Plaintiff had some experience in areas for which LaFreeda was responsible (e.g.,

payroll budgeting, unloading at the docks, profit & losses), her experience was limited to her department and that did not equate to LaFreeda's responsibility for the entire store.

With regard to Grossman's position as Brand Central Manager, the court ruled that these positions might be comparable because both were sales managers operating under the same job description, many of Defendant's employees regarded all sales positions as equivalent, and each manager was responsible for a store department. The court stated that although Grossman had additional responsibilities besides in-store sales, it was not clear that those responsibilities rendered the positions not equivalent. However, in granting summary judgment for Defendant on the EPA claim, the court held that Defendant provided a reason other than gender for Grossman's higher salary. Defendant argued that they had recruited Grossman from another store because they needed a "top-notch" Brand Central sales manager and that Grossman had negotiated his pay increase because the Brand Central department at the Prices Corner store was larger than his previous store and his commute would be longer. Plaintiff did not refute this evidence.

Sandoval v. Boulder Regional Communications Center, 2004 U.S. App. LEXIS 22721, 2004 WL 2445575 (10th Cir. Nov. 2, 2004)

Plaintiff-Appellant rose through the ranks of the Boulder Regional Communications Center (BRCC) first as a 9-1-1 dispatcher, then on to being appointed to the position of Director. Sandoval filed suit alleging employment discrimination on the basis of sex and constructive discharge after allegedly being passed over for a position as the Executive Director of the BRCC, and then, after closure of the BRCC, being rejected for a new position as Director of the Boulder City Police Department communications center - the highest ranked position open to a civilian, with a salary equaling the salary she was making at the BRCC. Sandoval sought relief under Title VII of the Civil Rights Act of 1964, the EPA, and the Colorado Anti-Discrimination Act, along with other state law claims. The District Court granted summary judgment in favor of Defendants on all Sandoval's claims. Sandoval appealed only as to Defendant, the City of Boulder, which ran the BRCC and was Sandoval's employer through her ascent at the BRCC. The Tenth Circuit affirmed.

On appeal, in analyzing Plaintiff's EPA claim, the court stated that in order to establish a *prima facie* case, Plaintiff had to show that: "(1) she was performing work that was substantially equal to that of male coworkers, with 'equality' being measured on the basis of the skills, duties, supervision, effort, and responsibilities of the jobs; (2) the conditions where the work was performed were essentially the same, and (3) the male employees were paid more." Plaintiff compared her income to that of a captain in the Boulder County Sheriff's Department. The court rejected this comparison because Plaintiff and the captain were not employed by the same organization and did not perform equal work. Plaintiff also used the Executive Director of the BRCC as a comparator. The court also rejected this comparison because Plaintiff was never employed by the BRCC and Plaintiff never held the Executive Director position. Additionally, Plaintiff argued that her salary should be compared to an unidentified "experienced white male." The court declined to consider this argument because this

argument was not presented before the District Court. Thus, the court affirmed the District Court's entry of summary judgment for the City.

Thomson v. Mentor Graphics Corporation, 2004 U.S. Dist. LEXIS 23676 (Ore. Nov. 12, 2004)

Plaintiff, an attorney, sued her former employer claiming that Defendant paid her less than her male predecessor, wrongfully and constructively terminated her, and defamed her. The District Court of Oregon granted Defendant's motion for summary judgment on all counts.

Plaintiff was hired as a contracts administrator in February 1994. Several months later, Defendant hired another contracts administrator, Chuck Tryon. He had 6 years of contract administration experience but was not a lawyer. For some time, both negotiated customer agreements and reported to the same manager. In late 1994 or early 1995, Tryon was promoted to Director of Worldwide Contracts. As a director, he spent approximately 20 hours per week managing the worldwide contracts staff. The remainder of his time was spent on third-party negotiations and other non-management duties, including working on technology licensing deals and distribution agreements and spinning off at least one of Defendant's distributors into an independent sales organization. During her employment, Plaintiff was promoted several times and by 1994 held the position of Senior Counsel. In that position, the only people she supervised were individuals assigned to assist her with administrative tasks.

In 2001, Tryon left the position of Director of Worldwide Contracts. Plaintiff took over the contract management duties of his position and her title was changed to Senior Counsel and Worldwide Contracts Manager. The remainder of his duties were split among several other employees. Around this same time, Plaintiff raised the issue that her pay was less than Tryon's pay and that she should be given a director's title and increased pay grade. Although her supervisor raised her pay over the next year, she did not receive the title of director.

In preparing her 2003 annual appraisal, Plaintiff's manager asked her for names of individuals he should contact to solicit input regarding her performance. Several of those individuals provided negative feedback concerning her contract management skills. In May 2003, Plaintiff's manager told her that he was cutting her hours nearly in half and prepared paperwork to rehire a former employee as Senior Counsel and Manager of Worldwide Contracts. Plaintiff took a medical leave for stress that same day and ultimately resigned in July 2003.

In determining that Plaintiff failed to establish a *prima facie* case under the Equal Pay Act and/or the Oregon Equal Pay Act, the District Court followed the Ninth Circuit's two step analysis for determining if the jobs being compared are "substantially equal": (1) whether the jobs to be compared have a common core of tasks; and (2) whether any additional tasks incumbent on one job but not the other make the two jobs substantially different. The District Court ruled that the jobs were not "equal" or "comparable" because although Plaintiff assumed the contract management functions previously

performed by Tryon, she did not assume a substantial number of other duties (which amounted to about one-half of Tryon's job functions) that he had performed.

Birks v. Jack Ingram Motors, Inc., 2004 U.S. Dist. LEXIS 25308 (M.D. Ala. Nov. 16, 2004)

Plaintiff worked as a Finance & Insurance (F & I) Manager for a car dealership. After a work-related confrontation with a male F & I Manager, Plaintiff left work without permission but later returned, giving Defendant a list of pay differences between male and female employees. The employer denied the discrepancies and discharged her. Plaintiff sued, alleging that Defendant paid her less than two similarly situated male F & I Managers in violation of the Equal Pay Act and Title VII and that Defendant engaged in retaliation. Plaintiff also asserted a state law claim for slander.

The F & I Managers assisted customers in the financing and insurance paperwork associated with the purchase of vehicles. Although the managers worked in different buildings and were responsible for different brands of automobiles, their primary duties were the same, with the exception that Plaintiff also handled secondary finance deals for the entire dealership. The court ruled that the secondary finance deals were incidental to Plaintiff's duties and because the primary duties of the job were the same, Plaintiff established her *prima facie* case.

Defendant raised two affirmative defenses for the pay differential. First, Defendant argued that Plaintiff's lower salary was due to her failure to close more secondary deals thereby earning those smaller commissions. Plaintiff, however, showed that she was paid differently from what the two male managers were paid, and that there was a different pay scheme. Neither male received any compensation for secondary sales and both were paid higher monthly base salaries and a higher percentage of the F & I Group's pooled commission, which resulted in larger gross earnings for them. In ruling that Defendant failed to meet its burden of proving this defense, the court stated that Plaintiff's lower salary was not simply the result of her failure to perform a certain number of secondary sales but rather the result of an entirely different pay scheme.

Defendant's second affirmative defense was that the pay differential was the result of a factor other than sex – the males had greater experience than Plaintiff. Defendant argued that by the time Plaintiff began working for Defendant, the males had been working for 3 years and 2 years respectively. Additionally, prior to their employment at Defendant, both males had worked as F & I Managers at another car dealership while Plaintiff had no prior experience as an F & I Manager. Plaintiff argued that an internal company memo indicated that each F & I Manager would receive a "1/3 equal share" of the F & I Group Commission and since there had been no differentiation of the F & I Commission prior to her employment the fact that commission percentages were not distributed equally after her employment was proof of gender bias.

In granting Defendant's motion for summary judgment, the court ruled that Plaintiff never argued that her experience was commensurate with the male comparators and that she failed to present any evidence that she had equal or more experience in the field of financing and insurance car deals. The court also ruled that Plaintiff failed to provide any evidence of pretext that would indicate that the different percentage commissions were anything other than Defendant's effort to compensate greater experience. The court also stated that the Plaintiff provided no evidence that the even split of the F & I commission among prior managers prior to her employment was anything other than the result of those managers' comparable professional experiences.

Lorenzen v. GKN Armstrong Wheels, Inc., 2004 U.S. Dist. LEXIS 23624 (N.D. Iowa Nov. 22, 2004)

Plaintiff, a press operator, sued her former employer alleging sex discrimination in violation of the Equal Pay Act and Title VII, disability discrimination and wrongful discharge in violation of Iowa public policy. The District Court granted Defendant's motion for summary judgment on the EPA claim.

Defendant evaluated Plaintiff's performance 60 days after her hire and about every 90 days thereafter. At each evaluation, Plaintiff received an "average" score and the usual single bump in pay. Plaintiff claimed that her supervisor "promised" her a "double bump" at her next review. However, prior to her next review, Plaintiff was injured on the job. She was returned to work with a 10 pound lifting restriction and placed on "light duty" which consisted of sweeping floors, cleaning, answering the phone, and driving a forklift.

In August 2001, when Plaintiff received her delayed evaluation, she received an "average" evaluation and a single bump in pay instead of the expected "double bump." Although the reasons were disputed, Plaintiff left work early following this review to "determine if she could continue working for the company." She did not tell anyone that she would not be coming back and she did not return or call in any excuse to work for the next 3 days. Pursuant to company policy, she was considered to have voluntarily quit.

Plaintiff sued, claiming that she had not received the promised "double bump" at her last evaluation while a similarly situated male, Brian Aanonson, had. Defendant argued that Aanonson was not "similarly situated" because he had greater responsibility and performed various jobs that Plaintiff did not, that he had more seniority, and that he had significantly more production output.

The court noted that both parties made "woefully deficient" submissions in support of their contentions of whether Aanonson performed substantially equal work but received a larger raise. According to the court, the only proof Plaintiff supplied were "conclusory allegations about the similarity of the jobs" and Defendant "provided only equally conclusory assertions that Aanonson did more and better work" than Plaintiff

and “had more and different responsibilities . . . or had seniority that would warrant a double bump under company policy.” The court noted that Defendant did not provide any objective documentation of Aanonson’s superior performance and that this left the court “with a dilemma over which side should lose on the Equal Pay Act claim.”

The court ruled that because the only proof of job equivalence Plaintiff provided were conclusory allegations, she had not met her burden of proving that she was paid less than male employees for substantially equal work. The court also ruled that Plaintiff had not met her burden as the non-moving party resisting a motion for summary judgment to “designate specific facts showing that there is a genuine issue for trial,” and that was fatal to her EPA claim.

Wheatley v. Wicomico County, Maryland, 2004 U.S. App. LEXIS 24288 (4th Cir. Nov. 22, 2004)

Plaintiffs, a female Director (Sandra Wheatley) and a female Deputy Director (Jane Grogan), of the Wocomico County, Maryland, Emergency Services Department, sued Defendant, claiming that male supervisors were paid more than female department supervisors for substantially equal managerial work.

The Fourth Circuit affirmed the District Court’s decision granting Defendant’s motion for judgment as a matter of law on employees’ Equal Pay Act claim and dismissing the employees’ Title VII claim.

In 1999, Wicomico County commissioned a study to evaluate its compensation schedule for all employees. As a result of the study, the County reconfigured its pay schedule. The new plan created 22 salary grades. Grade assignments were based on 7 criteria: education, job complexity, scope and impact, supervision, working relationships, working environments and physical demands.

Once jobs were assigned a grade, individual salaries were determined using a mathematical formula. Within each grade there was a minimum, maximum and mid-point salary. Wheatley’s job was originally classified as grade 16, though it was reclassified to a grade 17 after she filed a compliant. Grogan’s job was classified as a grade 13. As a result of the reclassification, both received approximately 18% pay increases, but both of their salaries were set below the mid-point of their respective grades.

At trial, Plaintiffs offered evidence showing a pay disparity between male and female department leaders and, that while they were assigned salaries below the mid-point, all male directors and deputy directors were given salaries above the grade mid-points. Plaintiffs also attempted to show that aside from a difference in subject matter, all department managers performed the same general duties: supervised subordinates, conducted staff meetings, prepared budgets, answered to the County Council, and otherwise managed their departments.

Defendants moved for judgment as a matter of law and during argument on the motion, Plaintiffs' counsel articulated a new theory of the case: that Plaintiffs performed work substantially equal to the work performed by male employees assigned the same grades. On this theory, Plaintiffs pointed to male employees in their respective grades. The trial judge ruled that he would not consider this theory since it was raised after all Plaintiffs' evidence had been submitted and he granted Defendants' motion for judgment as a matter of law. Plaintiffs appealed.

The Appellate Court ruled that Plaintiffs had failed to establish that their jobs and the jobs of other department heads carried substantially equal responsibilities. The court found it significant that different county departments performed completely different functions and that Plaintiffs had failed to identify a particular department head with an equal budget or workforce size. The court stated that "in choosing a proper comparator position, Plaintiffs cannot indiscriminately aim at all department supervisors collectively and then expect to meet the EPA standard of 'substantial equality [in] skill, effort [and] responsibility.' . . . The inquiry must be more specific. The comparison to the male employee has to be made 'factor by factor' and cannot be made to a hypothetical male with a composite average of a group's skill, effort and responsibility."

The Appellate Court declined to address the Plaintiffs' EPA argument raised during Defendants' motion for judgment, stating it was raised too late in the case.

Mowdy v. Employee Retirement System of Texas, 2004 U.S. App. LEXIS 24374 (5th Cir. Nov. 23, 2004) (unpublished)

The Fifth Circuit affirmed the District Court's grant of summary judgment on all counts. Plaintiff claimed that he was paid less than female co-workers for performing equal work on jobs that required substantially equal skill, effort and responsibility. The Appellate Court ruled that Plaintiff had failed to establish a *prima facie* case because he had failed to show that he performed substantially equal work to that of his female co-workers.

Trainor v. SBC Services, 2004 U.S. Dist. LEXIS 25891 (N.D. Ill. Dec. 17, 2004)

Plaintiff, a payroll tax manager, sued her former employer alleging race and sex discrimination, violation of the Equal Pay Act, breach of contract and fraud. The District Court denied Defendant's motion to dismiss with respect to the Equal Pay Act claim.

Ameritech hired Plaintiff in 1996 as a general accountant in the Corporate Finance Group. In 1998, Plaintiff voluntarily transferred to the position of Payroll Tax Manager in the Ameritech Payroll Center. In 1999, Ameritech merged with SBC and Plaintiff was informed that her position would be eliminated when the payroll center closed following the conversion of the payroll systems in January 2001. Defendant's severance plan stated that an employee would receive severance benefits if his or her employment was "terminated during the 24-consecutive-month period immediately following a change in control."

The payroll system conversion fell behind schedule and was not completed until January 2003. Plaintiff's employment was terminated on July 11, 2003. Plaintiff's supervisor advised her that she might be eligible for benefits under the severance plan, at the discretion of top level management, even though her termination exceeded the 24-month period outlined in the severance plan.

In July 2003, Defendant offered Plaintiff less than \$15,000 in severance. Had she been terminated within the 24-month period or had top-level management "grandfathered" her into the plan, Defendant would have paid Plaintiff more than \$104,000 in severance. Plaintiff argued that the delay in the payroll system conversion, the failure of top-level management to decide or communicate about her severance pay eligibility and Defendant's decision not to "grandfather" her into the plan were proof of racial and gender animus.

Defendant filed a motion to dismiss Plaintiff's Equal Pay Act claim asserting that she had insufficiently alleged the required elements. Plaintiff claimed that she received lower wages, in the form of severance benefits, than males who performed similar functions in the tax group. The conversion of the tax group had proceeded according to schedule and within the 24-month period outlined in the severance plan. SBC argued that the differential in pay related to the difference in the timing of their terminations, not gender and that Plaintiff had not shown that the higher paid males were similarly situated.

In denying Defendant's motion to dismiss, the court ruled that the Defendant's first argument did not demonstrate an insufficiency in Plaintiff's pleading. The court stated that "orders under Rule 12(b)(6) are not appropriate responses to the invocation of defenses, for plaintiffs need not anticipate and attempt to plead around all potential defenses. Instead, the determination of this issue depends on a more developed evidentiary record."

With regard to SBC's second argument, relying on the termination dates to demonstrate that the employees were not similarly situated, the court denied Defendant's motion to dismiss ruling that Plaintiff's complaint clearly alleged the similarity between the Corporate Tax department and the Payroll Tax group. The court also stated that "SBC's argument begs the question because Plaintiff's theory of the case advances racial and gender animus to explain the speedier termination of Plaintiff's white, male counterparts."

C. Similar Working Conditions

Mehus v. Emporia State Univ., 222 F.R.D. 455 (D. Kan. June 30, 2004)

See case summary in Section IV.B.

V. DEFENSES

Messina v. Sigmatron, 2004 U.S. Dist. LEXIS 3276, 2004 WL 421658 (N.D. Ill. Mar. 4, 2004)

Plaintiff, a former employee, filed a complaint against Defendant on May 25, 2001, alleging sexual harassment, constructive discharge, gender discrimination, and violation of the Equal Pay Act. On August 21, 2001, Defendant filed its answer, but failed to include statute of limitations defenses for the gender discrimination and EPA claims. Additionally, Defendant did not include an “other than gender” affirmative defense for the EPA claim. Defendant moved to amend its answer to include these affirmative defenses.

In its opinion, the court referenced Federal Rule of Civil Procedure 8(a), requiring that a party include any statute of limitations or other affirmative defenses in its answer. The court also stated that despite the limitations of Rule (8)(a), courts allow amendments “when justice so requires.” In assessing whether to allow leave to amend, the court found that Defendant was granted leave to file affirmative defenses almost two years ago and failed to do so despite filing two motions for summary judgment. The court held that permitting Defendant to amend its pleading after a long and unjustified delay, would substantially prejudice Plaintiff and the litigation process. As such, the court denied Defendant’s motion for leave to file affirmative defenses.

A. Seniority System

Hoban v. Texas Tech Univ. Health Sciences Ctr., 2004 U.S. Dist. LEXIS 4552, 2004 WL 594449 (W.D. Tex. Mar. 12, 2004)

See case summary in Section IV.B.

B. Merit System

Parker v. Metro. Transit Auth., 91 Fed. Appx. 321, 2004 U.S. App. LEXIS 3373 (5th Cir. Feb. 23, 2004) (unpublished)

Plaintiff brought suit against her former employer for retaliation under Title VII and violations of the Equal Pay Act. The District Court granted Defendant summary judgment on Plaintiff’s retaliation and EPA claims and Plaintiff appealed. With respect to Plaintiff’s EPA claim, Plaintiff asserted that two male employees were paid more than she was for substantially the same job. The District Court determined that Plaintiff’s claim failed because (1) one of the men had a lower starting salary than Plaintiff, but had received merit increases for which Plaintiff was ineligible because of her poor performance, and (2) the other man performed a job that was different than Plaintiff’s job and for which Plaintiff was not qualified. On appeal, the court held that the District Court was correct in granting Defendant summary judgment with respect to the EPA claim.

Harrison-Pepper v. Miami Univ., 103 Fed. Appx. 596, 2004 U.S. App. LEXIS 13861 (6th Cir. June 25, 2004) (unpublished)

See case summary in Section IV.B.

Mehus v. Emporia State Univ., 222 F.R.D. 455 (D. Kan. June 30, 2004)

See case summary in Section IV.B.

Webb v. Barnes Group, Inc., 2004 WL 1749519 (N.D. Tex. Aug. 3, 2004)

See summary in Section IV.B.

Williams v. Thomson Corp., 383 F.3d 789, 2004 U.S. App. LEXIS 18010 (8th Cir. Aug. 25, 2004)

Plaintiff worked as a reference attorney for the Westlaw division of West Group for approximately four years until she was terminated on February 4, 1998. Following her termination, Plaintiff filed a complaint against Westlaw with the Office of Federal Contract Compliance Programs, claiming that she was discriminated against on the basis of her sex, race, religion, and disability. Plaintiff's complaint was referred to the Equal Employment Opportunity Commission, and on June 17, 1999, the EEOC mailed Plaintiff a right-to-sue letter. On October 21, 1999, Plaintiff brought suit against West Publishing Corporation, The Thomson Corporation, several subsidiaries of Thomson, and various West employees. Plaintiff advanced claims under the Equal Pay Act, Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, the Family Medical Leave Act, and the Minnesota Whistleblower's Act. Defendants moved for summary judgment, requesting that the District Court dismiss several of Plaintiff's claims as time-barred and also dismiss the remaining claims based on their merits. The District Court granted Defendants' motion.

On appeal, the court agreed with the District Court that Plaintiff's ADA and Title VII claims were time-barred. The court also stated that the District Court was correct in concluding that the facts of the case did not warrant an equitable tolling of the statute of limitations. Additionally, the court determined that even if Plaintiff's claims were not time-barred, she did not provide any evidence that West's legitimate reasons for denying her promotions and terminating her were pretextual. The court also found that because of Plaintiff's pattern of late filings, the District Court did not abuse its discretion in striking Plaintiff's affidavit in support of her opposition to Defendants' motion. The court held that Plaintiff failed to raise any triable issues of fact, and as such, Defendants were entitled to summary judgment.

Russell v. Placeware, Inc., 2004 U.S. Dist. LEXIS 21465, 2004 WL 2359971 (D. Ore. Oct. 15, 2004)

A male Plaintiff challenged his pay vis-à-vis three females who he alleged were equally qualified, but paid significantly more. The employer argued, among other things, that its motion for summary judgment should be granted based on two Equal

Pay Act affirmative defenses: a merit system and numerous factors other than sex. The U.S. District Court for the District of Oregon granted summary judgment. As for the merit system defense, the court noted that the defense requires proof of an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. The court held there was a fact issue as to whether the employer's claimed merit system was a pretext for discrimination because the employer did not explain how the merit system resulted in the pay disparity, and for much of the relevant period, Plaintiff's performance ratings were as good as, and sometimes better than, the three female comparators' ratings. Nevertheless, the court granted summary judgment for the employer based on the factor other than sex defense. There was no genuine dispute that one of Plaintiff's female comparators had more meaningful experience and, pursuant to company policy, she retained a higher salary after she stepped down from management. As to the other two female comparators, there was no genuine dispute that their higher salaries were due to the company having a different salary structure for employees in California (where the comparators were located).

C. System Pegging Earnings to Quality or Quantity of Production

No reported cases.

D. Factors Other Than Sex

Visnikar v. Department of Environmental Protection, 2004 U.S. Dist. LEXIS 3645, 2004 WL 438688 (W.D. Pa. Jan. 27, 2004)

See case summary in Section III.B.

Rapson v. Development Authority of Peachtree City, 2004 U.S. Dist. LEXIS 12588 (N.D. Ga. Jan. 30, 2004)

See case summary in Section II.

Klindt v. Honeywell International Inc., 303 F. Supp. 2d 1206 (D. Kan. Feb. 19, 2004)

See case summary in Section IV.B.

Rowels v. Illinois Department of Employment Security, 2004 U.S. Dist. LEXIS 10266, 2004 WL 1243870 (N.D. Ill. June 8, 2004)

See case summary in Section IV.B.

Mehus v. Emporia State Univ., 222 F.R.D. 455 (D. Kan. June 30, 2004)

See case summary in Section IV.B.

Bair v. Indiana Department of Revenue, 2004 U.S. Dist. LEXIS 15413 (S.D. Ind. July 6, 2004)

See case summary in Section IV.B.

Fagen v. State of Iowa, 324 F. Supp. 2d 1020 (S.D. Iowa July 8, 2004)

See case summary in Section IV.B.

Reznick v. Associated Orthopedics & Sports Medicine, P.A., 104 Fed. Appx. 387, 2004 U.S. App. LEXIS 14318 (5th Cir. July 13, 2004)

See case summary in Section IV.B.

Albrant v. Heartland Foods, Inc., 2004 U.S. Dist. LEXIS 16451, 2004 WL 1854203 (N.D. Iowa Aug. 19, 2004) (unpublished)

See case summary in Section IV.B.

Cuffee v. Dover Wipes Co., 334 F. Supp. 2d 565 (D. Del. Sept. 7, 2004)

See case summary in Section IV.B.

Shrader v. Palos Anesthesia Assocs., 2004 U.S. Dist. LEXIS 19194, 2004 WL 2167909 (N.D. Ill. Sept. 24, 2004)

See case summary in Section IV.B.

Hamilton v. Spraying Sys., Inc., 2004 U.S. Dist. LEXIS 19398, 2004 WL 2191330 (N.D. Ill. Sept. 28, 2004)

See case summary in Section IV.B.

Walker v. Metropolitan Pier & Exposition Authority, 2004 U.S. Dist. LEXIS 19452 (N.D. Ill. Sept. 28, 2004)

See case summary in Section IV.B.

Russell v. Placeware, Inc., 2004 U.S. Dist. LEXIS 21465, 2004 WL 2359971 (D.Ore. Oct. 15, 2004)

See case summary in Section V.B.

Richards v. Eldorado National Company, 2004 U.S. Dist. LEXIS 21205 (D. Kan. Oct. 22, 2004)

See case summary in Section IV.B.

Underwood v. Sears, Roebuck & Co., 2004 U.S. Dist. Lexis 23469 (D. Del. Oct 25, 2004)

See case summary in Section IV.B.

Birks v. Jack Ingram Motors, Inc., 2004 U.S. Dist. LEXIS 25308 (M.D. Ala. Nov. 16, 2004)

See case summary in Section IV.B.

Trainor v. SBC Services, 2004 U.S. Dist. LEXIS 25891 (N.D. Ill. Dec. 17, 2004)

See case summary in Section IV.B.

VI. STATUTE OF LIMITATIONS

An EPA action must be commenced within two years of accrual of the underlying claim, or within three years of accrual if the violation is willful.

Manko v. Deutsche Bank, 2004 U.S. Dist. LEXIS 4665, 2004 WL 574659 (S.D.N.Y. Mar. 22, 2004)

Plaintiff filed a complaint with the New York State Division of Human Rights (the "Division") against her employer, alleging that she was discriminated against because she was Russian and subjected to disparate treatment because of her gender. After filing the complaint, Plaintiff sent a letter to the Division detailing incidents of sexual harassment. When the Division dismissed her complaint, she filed an action in the District Court for the Southern District of New York alleging racial discrimination, sex discrimination, age discrimination, religious discrimination, and retaliation under Title VII, the ADEA, and the EPA.

The court dismissed Plaintiff's EPA claims as time-barred by the statute's three-year limitations period. While Plaintiff argued that this limitations period should have been tolled while her case was pending before the Division, the court rejected this, noting that Plaintiff was not required to exhaust all administrative remedies before bringing EPA claims and, thus, should not reap the benefits of delaying EPA claims by including them in state administrative processes.

Calvello v. Electronic Data Sys., 2004 U.S. Dist. LEXIS 8744, 2004 WL 941809 (W.D.N.Y. Apr. 15, 2004)

See case summary in Section IV.B.

Hamlett v. John Ashcroft, 2004 U.S. Dist. LEXIS 8819, 2004 WL 813184 (N.D. Tex Apr. 15, 2004)

See case summary in Section II.

Thomeczek v. Les Brownlee, 320 F. Supp. 2d 884 (E.D. Mo. Apr. 29, 2004)

See case summary Section III.C.

Downes v. JP Morgan Chase & Co., 2004 U.S. Dist. LEXIS 10510, 2004 WL 1277991 (S.D.N.Y. June 8, 2004)

See case summary Section IV.B.

King v. Mount Sinai Hosp. Med'l Ctr., 2004 U.S. Dist LEXIS 15775, 2004 WL 1794505 (S.D.N.Y. Aug. 10, 2004)

Plaintiff, a male hospital clerk, filed suit against Defendant, Mount Sinai Hospital Medical Center, claiming gender discrimination in wages and promotion under Title VII and the EPA. The District Court for the Southern District of New York granted Defendant's motion for summary judgment on all counts.

Plaintiff asserted that two female employees performing the same work under the same conditions were paid a higher salary. Plaintiff also asserted that Defendant failed to promote him after he made general requests to be elevated to a higher job classification. The court quickly disposed of Plaintiff's EPA claim, finding it time-barred because Plaintiff waited five years to file his lawsuit. The court also rejected Plaintiff's Title VII unequal terms of employment claim because Plaintiff put forth no facts showing that the pay differential was due to intentional discrimination.

Woods v. Qwest Information Technologies, 2004 U.S. Dist. LEXIS 18033, 2004 WL 2011354 (D. Neb. Sept. 10, 2004)

Plaintiff, a long-distance phone operator, was hired by Defendant in 1969 but was terminated six months later when she became pregnant. Defendant later re-hired Plaintiff and employed her for over thirty years. In 2000, Defendant adopted a new pension plan but refused to credit Plaintiff for her first six months of service in 1969. Plaintiff filed suit in the District Court for the District of Nebraska, claiming this refusal amounted to gender discrimination under Title VII, the Pregnancy Discrimination Act ("PDA"), the EPA, and ERISA.

Defendant filed a motion for summary judgment, arguing that Plaintiff's allegations were time-barred. The court denied the motion, holding that the Title VII and PDA limitations periods began running when the Defendant made the allegedly discriminatory decision in 2000 not to credit Plaintiff's first six months of service. Similarly, the court held that Plaintiff's EPA claim was not time-barred because it challenged the method of calculating benefits under the new plan, not the original decision, three decades prior, to terminate Plaintiff for her pregnancy.

Caravetta v. United States, 2004 U.S. App. LEXIS 20902, 2004 WL 2370587 (Fed. Cir. Oct. 6, 2004) (unpublished)

Plaintiff employee filed gender discrimination charges under Title VII and the EPA in the Court of Federal Claims. That court dismissed the Title VII claims as not within its jurisdiction, and similarly dismissed the EPA claim as barred by the three-year statute of limitations. In an unpublished opinion, the United States Court of Appeals for the Federal Circuit upheld the lower court's dismissal of all Plaintiff's claims.

VII. DAMAGES

Lovell v. BBNT Solutions, LLC, 299 F. Supp. 2d 612 (E.D. Va. Feb. 6, 2004)

Plaintiff Linda Lovell brought a motion for reconsideration of an order granting *nisi remittitur* when her back pay damages award for her successful EPA and Title VII claims against Defendant, BBNT Solutions, LLC, was reduced under Rule 60(b) of the Federal Rules of Civil Procedure. The jury had awarded back pay damages for the full two years before the filing of the complaint (if the jury found a willful violation of the EPA, which they did not, it would be three years prior to the complaint being filed). The court reduced the back pay awarded for Plaintiff's EPA claim to reflect back pay from the time her male comparator began working there, which was less than two years from the filing of Plaintiff's complaint. The court's reasoning for this reduction was that her action for wage discrimination did not begin until her only viable male comparator began working there - he was hired away from a competitor at a salary that trumped Plaintiff's with no subsequent raise in her salary from the Defendant. Also, the court asserted, she made more annually than the other (nonviable) male comparators who worked there with her prior to the start of the (only viable) male comparator. And, unlike a successor who is paid more, she is not entitled to the two years of back pay because her male comparator was not a successor employee to her job, but rather hired at a higher wage to perform the same work.

VIII. ADMINISTRATIVE ACTION

No reported cases.

IX. COLLECTIVE ACTION

Under the FLSA, employees may sue on behalf of other similarly situated employees. 29 U.S.C. §216(b). To join an action, each employee must file with the court written consent to become a party to the lawsuit. *Id.*; 29 U.S.C. § 256. Unlike traditional class action suits governed by Rule 23 of the Federal Rules of Civil Procedure, notice to potential class members is not required and parties must "opt in" to participate in the suit rather than "opt out."

No reported cases.

X. RETALIATION

The anti-retaliation provision of the FLSA prohibits employers from discharging or otherwise retaliating against an employee for asserting his or her rights under the EPA. 29 U.S.C. §215(a)(3). Under the anti-retaliation provision, employees can sue for legal or equitable relief “including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). Additionally, the EEOC is authorized to bring action for injunctive relief restraining violations of the anti-retaliatory provision. *Id.* § 217. For “willful” violations, the statute imposes a fine, imprisonment, or both. *Id.* § 216(a).

EEOC v. Sundance Rehab. Corp., 328 F. Supp. 2d 826 (N.D. Ohio July 26, 2004)

The EEOC sought injunctive relief against an employer, claiming that the employer’s policy of requiring its terminated employees to waive their rights to file EEOC charges in exchange for severance payments constitutes retaliation under Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The employer conditioned severance pay on the employee’s signing a separation agreement that contained a waiver of the right to pursue any claim against the employer. If the employee violated the separation agreement, another provision gave the employer the right to seek damages from the employee, including return of severance pay. The EEOC requested that the court permanently enjoin the employer from maintaining its separation agreement or any agreement that retaliates against an employee’s filing of a charge with the EEOC. The parties filed cross-motions for summary judgment.

The District Court for the Northern District of Ohio referred the motions to a magistrate judge, who recommended that summary judgment be granted for the employer. The magistrate found that the EPA, ADEA, and ADA claims and the portion of the Title VII claim relating to non-gender-based discrimination should be dismissed because the EEOC failed to submit evidence about the number of employees the employer laid off, the number who received the severance pay proposal conditioned on the waiver of rights, and whether any other employees qualified to file a charge under the ADEA, ADA, or EPA, or Title VII on the basis of a protected class other than gender. As for the portion of the Title VII claim relating to gender, the magistrate found that the employer’s severance policy was not facially retaliatory and that the EEOC had offered evidence that failed to meet the *McDonnell Douglas prima facie* standard.

The EEOC objected to the magistrate’s report and recommendation, and on *de novo* review, the District Court granted Plaintiff’s motion for summary judgment. The court held that conditioning severance payments on a waiver of the right to file a charge with the EEOC is facially retaliatory in violation of the EPA. Based on ordinary contract law, the court decided that the remainder of the employer’s separation agreement was valid and enforceable. Because the employer’s separation agreement was facially retaliatory, the court did not consider whether the EEOC had satisfied the *McDonnell Douglas* analysis for indirect evidence.

The court permanently enjoined the employer from maintaining a separation agreement that required employees and former employees to waive their right to file a charge with the EEOC or participate in an EEOC investigation or proceeding and from retaliating because of an employee or former employee's right to file a charge with the EEOC or participate in an EEOC investigation or proceeding. The court further ordered the employer to: (1) institute and carry out policies, practices, and programs that provide equal employment opportunities for employees wishing to file EEOC charges or participate in an EEOC investigation or proceeding; (2) reform the separation agreement to permit expressly all employees and former employees to file charges with the EEOC and participate in EEOC investigations or proceedings without losing their severance pay and without violating the separation agreement and pay severance pay with prejudgment interest to any employees from whom it had withheld severance pay because they filed a charge with the EEOC or participated in an EEOC investigation or proceeding; (3) deliver a corrective notice with the reformed separation agreement to any employees from whom it had withheld severance pay because they filed a charge with the EEOC or participated in an EEOC investigation or proceeding; and (4) pay the EEOC's costs of bringing the litigation. Finally, the court tolled the limitations period for filing a charge or claim and ordered that the limitations period would run anew from the date of actual delivery of the reformed notice.

Culver v. Gorman & Co., 2004 U.S. Dist. LEXIS 17071, 2004 WL 1920220 (W.D. Wis. Aug. 23, 2004)

Plaintiff, an assistant property manager, sued the property management company for monetary and injunctive relief under Title VII and the Equal Pay Act, alleging that it terminated her in retaliation for her threat of a sex discrimination complaint.

The District Court for the Western District of Wisconsin granted the employer's motion for summary judgment because it concluded that Plaintiff did not raise a genuine issue of fact that her protected conduct played a role in her termination. The court first analyzed the causation element of the Title VII claim and found that the employer honestly believed that it had terminated her for insubordination, including her refusal to work and criticism of her supervisor. Plaintiff's only evidence of pretext—the suspicious timing of her termination (three days after her first complaint of sex discrimination and within an hour of her second) and her complaints of sex discrimination—did not raise a triable issue of fact on the causation element. The court then held that because the causation analysis is the same under the EPA, her EPA claim must also fail.

Shrader v. Palos Anesthesia Assocs., 2004 U.S. Dist. LEXIS 19194, 2004 WL 2167909 (N.D. Ill. Sept. 24, 2004)

See case summary in Section IV.B.

Walker v. Metropolitan Pier & Exposition Authority, 2004 U.S. Dist. LEXIS 19452, (N.D. Ill. Sept. 28, 2004)

See case summary in Section IV.B.

XI. JURY INSTRUCTIONS

A. Cases

Fagen v. State of Iowa, 324 F. Supp. 2d 1020 (S.D. Iowa July 8, 2004)

See case summary in Section IV.B.

B. Seventh Circuit Court of Appeals Draft Jury Instructions

The Seventh Circuit issued draft jury instructions for an Equal Pay Act case. These instructions can be found at www.ca7.uscourts.gov. A copy is also attached in the appendix.

**FEDERAL CIVIL
JURY INSTRUCTIONS
OF THE
SEVENTH CIRCUIT**

**Prepared by
The Committee on Pattern Civil Jury Instructions
of the Seventh Circuit**

October 2004 Draft

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5. EQUAL PAY ACT

5.01 ESSENTIAL ELEMENTS OF A CLAIM

Plaintiff claims that Defendant violated a law called the “Equal Pay Act.” This law is designed to prevent wage discrimination by employers based on sex. To succeed in this claim, Plaintiff must prove three things by a preponderance of the evidence.

1. Plaintiff did work that was “substantially equal” to male employees at [Defendant’s workplace];
2. Plaintiff and a male employee did their jobs under similar working conditions;
3. Defendant paid Plaintiff less money than a male employee doing substantially equal work.

Committee Comments

See 29 U.S.C. § 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1973); *Fallon v. State of Illinois*, 882 F.2d 1206, 1207 (7th Cir. 1989); *EEOC v. Madison Community Unit School District No. 12*, 818 F.2d 577, 581 (7th Cir. 1987); *Perdue v. City University of New York*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998)

5.02 SUBSTANTIALLY EQUAL

In deciding whether jobs are “substantially equal,” you should compare the skill, effort, and responsibility needed to do the work. The jobs do not need to be identical in these areas, so you should ignore minor differences between them.

Committee Comments

See 29 C.F.R. § 1620.14(a); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 306 (7th Cir. 1988); *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021 (8th Cir. 2002); *Brennan v. South Davis Community Hosp.*, 538 F.2d 859 (10th Cir. 1976); *Klimiuk v. ESI Lederle, Inc.*, 2000 WL 1599251, 84 Fair Empl. Prac. Cas. (BNA) 971 (E.D. Pa., Oct. 25, 2000); *Brennan v. Prince William Hosp., Corp.*, 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975)

5.03 EQUAL SKILL

In deciding whether jobs require “equal skill,” you should consider whether people need essentially the same [experience/training/education/ability to do the work]. Jobs may require “equal skill” even if one job does not require workers to use these skills as often as another job.

Committee Comments

See 29 C.F.R. § 1620.15(a); *Stopka v. Alliance of American Insurers*, 141 F.3d 681 (7th Cir. 1998).

5.04 EQUAL EFFORT

In deciding whether jobs require “equal effort,” you should consider the physical or mental energy that a person must use at work. “Equal effort” does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort needed to do the jobs, they require “equal effort.”

Committee Comments

See 29 C.F.R. § 1620.16; *Jenkins v. U.S.*, 46 Fed.Cl. 561, 83 Fair Empl. Prac. Cas. (BNA) 28 (Fed.Cl., Apr. 28, 2000); *Boriss v. Addison Farmers Ins. Co.*, 1993 WL 284331, 64 Empl. Prac. Dec. P 42,959, 126 Lab.Cas. P 33,011 (N.D. Ill., Jul. 26, 1993).

5.05 EQUAL RESPONSIBILITY

In deciding whether jobs involve “equal responsibility,” you should consider how accountable someone is in doing his or her job, including how much authority an employee has and the importance of his or her job.

Committee Comments

See 29 C.F.R. § 1620.17; *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1988); *Jenkins v. U.S.*, 46 Fed.Cl. 561, 83 Fair Empl.Prac.Cas. (BNA) 28 (Fed.Cl., Apr. 28, 2000); *Krenik v. County of Le Sueur*, 47 F.3d 953 (8th Cir. 1995); *Dean v. United Food Stores, Inc.*, 767 F. Supp. 236 (D.N.M., 1991).

5.06 JOB TITLES

In deciding whether two jobs are “substantially equal,” you should consider the actual job requirements. Job classifications, descriptions, and titles are not controlling.

Committee Comments

See 29 C.F.R. § 1620.13(e); *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir. 1999); *Follas v. Bagley*, 2000 WL 251658, *3 (N.D. Ohio, Feb. 10, 2000).

5.07 RATES OF PAY

In deciding whether Plaintiff was paid less than her male co-worker[s] for equal work, you can consider evidence about how much Plaintiff's co-workers earned, even if the co-workers worked in different departments.

Committee Comments

See 29 C.F.R. § 1620.19; *Power v. Barry County*, 539 F.Supp. 721, 722 (W.D. Mich. 1982) (defining comparable worth theory); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586 (11th Cir. 1994).

5.08 COMPARABLE TIME PERIODS

Plaintiff must prove that at least one male employee received more pay than Plaintiff for substantially equal work. In comparing Plaintiff's work and pay with other employees, you can look at the work and pay of employees who did substantially equal work before or after the Plaintiff.

Committee Comments

See 29 C.F.R. § 1620.13(b)(4); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1985); *Taylor v. Philips Industries, Inc.*, 593 F.2d 783 (7th Cir. 1979).

5.09 INTENT

Plaintiff does not have to prove that Defendant meant to discriminate against Plaintiff because she was female.

Committee Comments

A plaintiff need not prove an intent to discriminate in an Equal Pay Act case. See *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n. 5 (1985) (“the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown”). The Committee, therefore, views this instruction as helping to avoid confusion, particularly in cases that contain both an Equal Pay Act claim and a Title VII claim, where a plaintiff normally must prove intent. See *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

5.10 AFFIRMATIVE DEFENSES

Even if Defendant paid Plaintiff less than male employees for substantially equal work, you should find in favor of Defendant if it proves by a preponderance of the evidence that the difference was because of:

1. A seniority system, or a merit-based system, that is not based on an employee's sex; or
2. A system based on the quality or quantity of each employee's production;
or
3. [*describe any factor other than sex on which Defendant claims its pay differential was based*].

Committee Comments

See 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.20. The Committee does not anticipate that a court would charge the jury on each of the three factors. Instead, the court should instruct the jury on only those factors that are relevant to the case.

5.11 DAMAGES

If you find in favor of Plaintiff, then you should award Plaintiff damages consisting of the difference between Plaintiff's pay and the pay of the male employee(s) who did substantially equal work during comparable time periods.

If you award damages, they are limited to the following time period: [*Relevant dates*]

Committee Comments

See 29 U.S.C. § 206(d)(3).

5.12 WILLFULNESS

If you find for Plaintiff, you must then decide whether the Defendant's conduct was "willful." To show that the Defendant's conduct was willful, Plaintiff must prove by a preponderance of the evidence that Defendant knew, or perceived a risk, that it was violating the Equal Pay Act, and not simply that Defendant was aware that it was engaging in wage discrimination.

Committee Comments

See Eighth Circuit Manual of Model Jury Instructions—Civil (2001) § 5.14.