

Investigating (Sex-Based) Pay Discrimination



Press Releases

7/17/18

- **National Association for The Education Of Young Children To Pay \$41,777 To Settle EEOC Equal Pay Lawsuit**
- ***Professional Membership Organization Paid Female Associate Editor Lower Wages Than Male Counterpart, Federal Agency Charged***

Press Release

8/6/18

- **EEOC Sues Kansas School District For Paying Female Principal Less Than Male Principals**
- ***Unified School District 245 Violated Equal Pay Act, Federal Agency Charges***

What To Expect

- Identifying a prima facie case (EPA & Title VII)
- Analyzing Respondent defenses
- Resolving pay disparities (remedies)

No complainant required

AT EEOC:

- EPA Directed Investigation (without an individual charge)
- Title VII Commissioner's Charge

Title VII

- Charging Party belongs to a protected group (sex, Female)
- She was paid less than male(s)
- She and the male(s) are similarly situated
- Respondent cannot explain the difference, there is direct evidence of sex discrimination, or the explanation is in fact a pretext for discrimination

EPA Prima Facie Case

- Unequal wages (intent not required)
- Employees are of the opposite sex
- Work requires substantially equal skill, effort, and responsibility
- Work performed under similar working conditions within the same establishment

Investigating Equality of Jobs

- Examine position descriptions but REMEMBER, job titles and descriptions are not determinative
- On-site investigations
- Identify common core of tasks
- Assess the value of tasks not in common

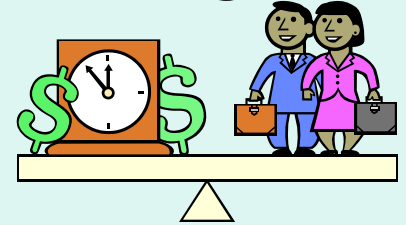
Equal Skill, Effort, Responsibility

- Equal work vs. Identical work
- *DO NOT BE DISTRACTED BY:*
 - Different customers
 - Different accounts
 - Different products
 - Different departments
 - Different cases



- *Ellison v. U.S.*, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cas. (BNA) 955 (Cl. Ct. 1992)
- *Hatton v. Hunt*, 780 F. Supp. 1157 (W.D. Tenn. 1991)
- *Dubowsky v. Stern, Lavinthal*, 922 F. Supp. 985 (D.N.J. 1996)
- *McMillan v. Mass. SPCA*, 140 F.3d 288 (1st Cir. 1998)
- *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994)
- *Denman v. Youngstown State University*, 545 F.Supp.2d 671 (N.D. Ohio 2008)

Compensation is More than Wages



- Components of pay:
 - Hourly pay, base salary, overtime pay, commissions, bonuses, signing bonus, severance, premium pay
- Benefits
 - Stock options, profit sharing, retirement benefits;
 - Medical/life/accident insurance;
 - Uniforms/cleaning/travel/car allowances;
 - Vacation/sick/holiday leave or pay.



Who are the comparators?

- Can make one-on-one comparisons
EEOC v. Maryland Ins. Admin., 879 F.3d 114 (4th Cir. 2018):
- Concurrent employment is not required
- Can compare salary of female plaintiff to the average salary of males
Hein v. Or. Coll. of Educ., 718 F.2d 910, 916 (9th Cir. 1983)
- Can compare average salaries of females to average salary of males
Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976)

Defenses to the Equal Pay Act

- (i) a seniority system;
- (ii) a merit system;
- (iii) a system which measures earnings by quantity or quality of production; or
- (iv) a differential based on any other factor other than sex.

Any other factor other than sex

- Green eyes
- Education
- Training & ability
- Experience
- Negotiation
- Prior salary
- Market factors



Negotiations/Market/Prior Salary Defense



- Must closely scrutinize these reasons
- Have the effect of perpetuating past discrimination
 - Assumes that women will work for less
 - Case law to support challenges to these defenses
 - *Drum v. Leeson Electric Corp.*, 565 F.3d 1071 (8th Cir. 2009)
 - *Wildi v. Alle-Kiski Medical Center*, 659 F.Supp.2d 640 (W.D. Pa. 2009)
 - *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995)
 - *Futran v. Ring Radio Co.*, 501 F. Supp. 734, 739 (N.D. Ga. 1980)
 - *Hodgson v. Brookhaven*, 436 F.2d 719 (5th Cir. 1970)
 - *Hatton v. Hunt*, 780 F. Supp. 1157, 1164-65 (W.D. Tenn. 1991)



Recent EPA Case

Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (en banc)

- When Rizo, a math consultant at Fresno County schools was hired, she was offered a salary equal to her most recent salary plus 5%. Years later, when Rizo learned that she was being paid less than her male counterparts, whose salaries had been set using the same policy of adding 5% to their most recent salaries, she sued the county.
- County argued: policy for setting salaries based on applicants' most recent salary is a permissible "factor other than sex" because it is objective, prevents favoritism, ensures consistency, and encourages candidates to accept jobs by offering a 5% raise.

Title VII vs. Equal Pay Act

Title VII

- All administrative prerequisites must be satisfied
- Covers race, color, sex, national origin, religion
- Employer must have at least 15 employees
- Intent required
- Lawsuit to be filed within 90 days NRTS
- Backpay accrues from 2 years prior to date of charge
- Compensatory/Punitive damages available

Equal Pay Act

- No administrative prerequisites
- Covers sex only
- Employer definition does not have the 15 employee minimum
- Strict Liability
- 2 year statute of limitations (3 if willful)
- Backpay accrues 2 years (3 if willful) prior to court-filed complaint
- Liquidated damages available

Potential Retaliation

- Evidence that the employer prohibits employees from talking about their pay:
 - Employment agreements, memos
 - Employee handbooks
 - Disciplinary records
 - Complainant, witness or management statements

What Respondent cannot do



Remedies

EPA

- Backpay (including OT and benefits)
- Liquidated damages (up to backpay amount)
- Injunctive
- Attorney's fees

Title VII

- Backpay
- Compensatory
- Punitive (intentional w/malice or reckless indifference)
- Injunctive
- Attorney's fees

Remedies for Retaliation

EPA – compensatory and punitive

(not subject to statutory caps)

- internal, verbal complaint protected

Title VII – compensatory and punitive v
private employers (subject to statutory caps)

- participation and/or opposition
protected

