Employment Law Conference 2016

Equal Pay Claims
Title VII and Equal Pay Act

Introduction

> Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (U.S. 2007) (Ginsburg, J. dissenting).

The Equal Pay Act was intended as a "broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." *Schultz v. American Can Company - Dixie Products*, 424 F.2d 356, 360 (8th Cir. 1970).

"Median pay for full-time female lawyers was 77.4 percent of the pay earned by their male counterparts, according to data for 2014 released earlier this month by the U.S. Census Bureau." Debra Cassens Weiss, "Full-time female lawyers earn 77 percent of male lawyer pay," http://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations/ (last visited March 28, 2016).

Title VII Pay Claims

Title VII of the Civil Rights Act makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation" because of that individual's sex. 42 U.S.C. § 2000e-2(a)(1).

Prima Facie Case of Pay Discrimination

- In order to establish a prima facie case of pay discrimination under Title VII, a plaintiff need not show that she performed "equal work" to that of higher paid males. *See Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1362-63 (10th Cir. 1997) (*citing County of Washington v. Gunther*, 452 U.S. 161, 168-71, 180-81, 68 L. Ed. 2d 751, 101 S. Ct. 2242 (1981)); *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 411 (10th Cir. 1993) (recognizing that the Supreme Court in *Gunther* held

that the Bennett Amendment of Title VII does not incorporate the EPA's "equal work" requirement).

- Rather, a Title VII pay discrimination plaintiff need only show that she occupied a job "similar" to that of higher paid males. *See Sprague*, 129 F.3d at 1363; *see also Lewis v. D. R. Horton, Inc.*, 375 Fed. Appx. 818 (10th Cir. 2010).

    - The standard for proving a prima facie case of wage discrimination under Title VII (i.e., that the plaintiff held a job "similar" to that of higher paid males) is less stringent than the standard under the EPA (i.e., that the plaintiff held a job "substantially equal" to that of higher paid males). *Riser v. QEP Energy*, 776 F.3d 1191, 1200 (10th Cir. 2015). Accordingly, if a plaintiff is able to prove a prima facie case of pay discrimination under the EPA, then she has also proven a prima facie case of pay discrimination under Title VII. *See eg. Meek v. Swift Transp. Co.*, 2000 U.S. Dist. LEXIS 4918, 19-20 (D. Kan. Apr. 10, 2000)

- Additionally, a female employee in a unique position may bring a Title VII pay discrimination claim even though there are no higher-paid, opposite-sex employees in a similar job. *See County of Washington v. Gunther,* 452 U.S. 161, 101 S. Ct. 2242, 68 L. Ed. 2d 751 (1981).

- "Once a prima facie case is established, the defendant must articulate a 'legitimate, non-discriminatory reason for the pay disparity.' *Sprague v. Thorn Ams.*, 129 F.3d 1355, 1363 (10th Cir. 1997) (*quoting Meeks v. Computer Associates International*, 15 F.3d 1013, 1019 (11th Cir.1994)).

- If the defendant makes that showing, the plaintiff must then "show that the defendant, regardless of the proffered reasons, intentionally discriminated against her. That is, the plaintiff must show that a discriminatory reason more likely than not motivated [the employer] to pay her less." *Id.* (internal quotation and citations omitted). This is the familiar *McDonnell Douglas* analysis applicable to proving claims of discrimination by indirect evidence.

Amendments to Title VII

- Bennett Amendment to Title VII:

> Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color,

> religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

42 U.S.C. § 2000e-2(h).

- The Bennett Amendment incorporated the Equal Pay Act's four "affirmative defenses" into Title VII in sex-based wage discrimination cases, but not the Equal Pay Acts equal work requirement. *See County of Washington v. Gunther,* 452 U.S. 161 (1981). Following its passage, some courts concluded that the Bennett Amendment meant that a finding of liability under the Equal Pay Act automatically led to a finding of liability under Title VII for gender-based pay discrimination. *See Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989) (collecting cases from Sixth, Eighth, and Ninth Circuits holding that Title VII liability is automatic after a finding of Equal Pay Act liability). The Tenth Circuit does not follow that approach. *See eg. Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304 (10th Cir. 2006); *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 411 (10th Cir. 1993).

- Lilly Ledbetter Fair Pay Act. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Supreme Court held that Ledbetter's action was time-barred because the period of time for filing an EEOC charge of discrimination is triggered when the "discrete unlawful practice"—the discriminatory setting of pay—occurs, and that each subsequent pay check issued at that discriminatory rate of pay does not constitute a new violation. *Id.* at 628-629. In response, Congress passed the Lilly Ledbetter Fair Pay Act to abrogate that decision and specifically clarify Title VII's administrative filing requirements with respect to pay discrimination claims.

- The Ledbetter Act states:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title [42 USCS §§ 2000e et seq.], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by

> application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 USCS § 2000e-5(e)(3)(A).

- In *Gianfrancisco v. Excelsior Youth Ctrs., Inc.*, Judge Brimmer concisely explained the Ledbetter Act as follows:

> The Ledbetter Act was enacted to extend the accrual period for asserting claims with regard to discriminatory compensation decisions. It ensures that the period during which a plaintiff may file a charge of discrimination renews each time an employer makes a discriminatory wage decision under Title VII. The Ledbetter Act addresses the problem identified by the dissent in *Ledbetter*, that the 300-day accrual limitation strips a plaintiff of a remedy because a plaintiff is usually unaware that discrimination motivated a compensation decision until it is too late.
>
> The Ledbetter Act deems each paycheck issued pursuant to a discriminatory pay structure an independent, actionable employment practice.

Gianfrancisco v. Excelsior Youth Ctrs., Inc., 2012 U.S. Dist. LEXIS 97363, *13-14 (D. Colo. July 13, 2012) (internal citation omitted).

Procedural Issues

- The same procedural issues that apply to any Title VII claim apply to claims for pay discrimination under Title VII.
    - Coverage: Title VII is only applicable to employers with fifteen or more employees.
    - Administrative Exhaustion: Any employee seeking to pursue a Title VII pay discrimination is first required to file a charge of discrimination with the EEOC or the Colorado Civil Rights Division (CCRD). The charge of discrimination must be filed within 300 days (EEOC) or 180 days (CCRD) of the discriminatory practice. As noted above, the Ledbetter Act makes any payment of wages a potential discriminatory act, thus starting a new window for filing a charge in each pay period.

Damages under Title VII

- A successful plaintiff in a Title VII pay discrimination case may be entitled to recover back pay, front pay, compensatory damages, punitive damages, and attorneys fees.

- Compensatory damages under Title VII are subject to the following caps based on the size of the employer:

  For employers with 15-100 employees: $50,000
  For employers with 101-200 employees: $100,000
  For employers with 201-500 employees: $200,000
  For employers with more than 500 employees: $300,000

  42 U.S.C. § 1981a(b)(3). Those caps on compensatory damages do not include front pay, back pay, interest on back pay, attorney's fees, or costs.

Equal Pay Act Claims

The Equal Pay Act prohibits employers from discriminating among employees on the basis of sex by paying higher wages to employees of the opposite sex for equal work. The Act states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (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: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 USCS § 206(d)(1).

- Unlike discrimination claims under Title VII, plaintiffs pursuing Equal Pay Act ("EPA") claims are not required to prove that the employer acted with discriminatory intent. *Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 729 (10th Cir. 1984) ("Discriminatory intent is not an element of a claim under the Act.").

- In order to establish a prima facie case of discrimination under the EPA, a plaintiff must prove that:

> (1) the plaintiff was performing work which was substantially equal to that of employees of the opposite sex, taking into consideration the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) employees of the opposite sex were paid more under such circumstances.

Mickelson v. New York Life Ins. Co., 460 F.3d 1304, 1311 n.5 (10th Cir. 2006).

- "[C]omplete diversity between plaintiffs and comparators is not required to state a prima facie case under the EPA." *Beck-Wilson v. Principi,* 441 F.3d 353, 362 (6th Cir. 2006); *see also Murtaugh-Cooke v. U.S.*, 85 Fed. Cl. 352, 341 (2008) ("Furthermore, the similar treatment of other employees of a different gender cannot defeat a plaintiff's prima facie showing that she received different pay than a similarly-situated employee of the opposite sex.") (citations omitted).

    - However, there are some cases which cite this rule, then go on to deny plaintiffs a remedy under the EPA due to comparisons of integrated pools of employees. *See eg. Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968, 976 (D. Minn. 2001) ("The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects both male and female employees equally, there can be no EPA violation. *See Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373 (10th Cir. 1994). Plaintiffs cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.").

- "[W]here an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex but receives a lower rate of pay than the person replaced, a prima facie violation of the EPA exists." 29 CFR 1620.13(b)(2); *see also Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726 (10th Cir. 1984) (finding an EPA violation for female employee who was paid less than her male predecessor).

- Work is "substantially equal" for purposes of the EPA if it requires "equal skill, effort, and responsibility." 29 U.S.C. § 206(d)(1).

    - Jobs need not be identical in order to be considered "equal work" under the Equal Pay Act. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265, & n.10 (3d Cir. 1970). Whether a job is substantially equal for purposes of the Equal Pay Act is determined on a case-by-case basis, based on "the actual content of the job—not mere job descriptions or titles." *Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015) (*citing EEOC v. Cent. Kan. Med. Ctr.*, 705 F.2d 1270, 1273 (10th Cir. 1983) *see also Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981) (determining "by an overall

comparison of the work, not its individual segments," that orderlies and nurses aides perform substantially equal work).

- 'Skill' requires consideration of such factors as experience, training, education, and ability. 29 C.F.R. § 1620.15(a). An assessment of 'skill' must be performed in terms of the performance requirements of the job. *Id.*

- Under the Equal pay Act, "effort" is concerned with the measurement of the physical or mental exertion needed for the performance of a job. 29 CFR 1620.16(a). Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered in determining the effort required by the job. *Id.* "Effort" encompasses the total requirements of a job. *Id.*

- 'Responsibility' is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. 29 CFR 1620.17(a).

- If the plaintiff establishes a prima facie case of discrimination under the EPA, the ***burden of proof*** shifts to the defendant to show that payments were made pursuant to one of the four reasons for a wage disparity enumerated in the statute apply. *Tidwell v. Ft. Howard Corp.*, 989 F.2d 406, 409 (10th Cir. 1993).

  - "These reasons are: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; (4) a disparity based on any factor other than sex." *Id.* (citing 29 U.S.C. § 206(d)(1)).

- As these are affirmative defenses, the defendant bears the burden of proof. *See Corning Glass Works*, 417 U.S. at 197; *see also EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 988 (6th Cir. 1992).

- In addressing the EPA's requirement that any disparate wage payments be *"made pursuant to"* one of the four reasons set out in the statute, the Tenth Circuit "requires an employer to submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity." *Mickelson v. New York Life Ins. Co.*, *supra.* (citing *Stanziale v. Jargowsky*, 200 F.3d 101, 107-108 (3rd Cir. 2000).

  - "At the summary judgment stage, this means an employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary." *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (citation and quotation omitted).

- Seniority Systems: A seniority system should be written, and must identify standards for measuring seniority which are systematically applied and uniformly enforced. *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995). Any exceptions to the seniority system should be defined, and "known and understood by the employees." *Id.*

- Merit Systems: "In order to prove the merit system defense, an employer must show that it had in place an organized and structured procedure by which it evaluated employees systematically and in accordance with predetermined criteria." *Murtaugh-Cooke v. U.S.*, 85 Fed. Cl. 352, 347 (2008). "However, compliance with civil service laws alone does not establish a merit system defense." *Id.*, citing *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986).

- Pay Based on Quantity or Quality of Production: This is the incentive system defense. "The 'quantity' test refers to equal dollar per unit compensation rates. There is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more." *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983).

- Any Other Factor Other Than Sex: The "factor other than sex" is broad catch-all affirmative defense that may include a great variety of factors. Prior experience, market factors, salary history, education, and salary classification systems have all been recognized as factors other than sex that could result in a permissible pay disparity.

    - Regardless of the specific factor that may be asserted as a defense, the employer must prove that the "resulting difference in pay is 'rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue.'" *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (*quoting Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992).

Procedural Issues

- The Equal Pay Act is part of the Fair Labor Standards Act (FLSA), and the coverage requirements under the FLSA apply to Equal Pay Act claim. Thus, any employee engaged in or employed by an enterprise engaged in commerce or in the production of goods for commerce is covered by the Equal pay Act. 29 U.S.C. §§ 203 (d), (e), (r), (s). Unlike Title VII, there is no minimum employee threshold for there to be statutory coverage.

- Also unlike Title VII, there is no requirement that an employee exhaust any administrative remedies or file a charge of discrimination prior to commencing an action for violation of the Equal Pay Act.

- Equal Pay Act claims are subject to the same statute of limitations as Fair Labor Standards Act claims. Damages are recoverable for a period of time covering the two years prior to the filing of suit, three years in the case of a willful violation. 29 U.S.C. § 255(a).

Damages

- Under the Equal Pay Act, an employer found to have violated the Act is liable to the employee for the amount of unpaid wages, and an equal amount as liquidated damages, as well as costs and attorneys fees. 29 U.S.C. § 216(b).

- Like wage cases under the Fair Labor Standards Act, employers in Equal Pay Act cases may assert a "good faith" defense to an award of liquidated damages. 29 U.S.C. § 260.

- To eliminate the pay discrimination, an employer of any successful Equal Pay Act plaintiff must provide the employee with an increase in compensation to match the compensation level of the comparator.

- The Equal Pay Act prohibits an employer from lowering wages to remedy a violation—wages must be raised in the case of a violation. 29 U.S.C. § 206.