

## **DRAFT FOR DISCUSSION**

This document is drafted solely for discussion during the January 20, 2017 meeting of the Definitions Subcommittee and should not be construed as legal advice or a final recommendation of this subcommittee or the Task Force.

## **DRAFT Memo**

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**Re:** California Gender Pay Equity Task Force – “Substantially Similar” Case Summaries for Definitions Subcommittee

**Date** January 20, 2017

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This memo is to assist the Definitions Subcommittee in its discussion on the phrase “substantially similar when viewed as a composite of skill, effort, and responsibility” as used in California’s Fair Pay Act. This document is drafted solely for discussion during the January 20, 2017 meeting of the Definitions Subcommittee and should not be construed as legal advice or a final recommendation of this subcommittee or the Task Force.

### **1. Job Title Not Determinative**

*E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)

Analysis: Court rejects argument that “an attorney is an attorney is an attorney” and holding that a “successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice”; in order for jobs compared to be “substantially equal,” a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications.

Application: Job title alone is not determinative. Highlights focus on overall “job content” as a “constant in the context of the EPA;” plaintiff must establish that jobs compared entail common duties, requirements and performance, and do not simply overlap in titles or classifications. Court relies on EEOC regulations to define the underlying criteria of skill, effort, and responsibility, measured in terms of the “performance requirements of the job.”

*Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 822–23 (7th Cir. 2011)

Analysis: Job title of “Director of Operations” held by both female employees and some of male comparators who allegedly were paid more for same work, was irrelevant to EPA claim because title covered multitude of positions differing in authority and responsibility; female employees in air and marine engine manufacturing plant failed to identify any male worker who was paid more for substantially same work; jobs not substantially equal.

Application: Assessing skill, effort, and responsibility when mixed within same job title. Court rejects application of “comparable worth”; emphasizes that job title is not determinative for comparator groups in context assessing skill, effort and responsibility when mixed within job title, as a “title covers a multitude of positions differing in authority (such as number of employees supervised) and responsibility.”

## **2. Comparison Based on Totality of Circumstance**

*Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979)

Analysis: work performed by “custodial helpers” and “maids” was not substantially equal where “custodial helpers” worked all months of year and performed work requiring heavier physical labor than seasonal “maids.”

Application: Court emphasizes need to consider all circumstances related to job content. “In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time.” *Id.* at 195.

## **3. Cases Illustrate Fact-Based Variation Within Industry**

- Manufacturing Plants/Operators/Utility Workers

*Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970) (10% wage differential not justified despite fact that male selector-packers spent up to 18% of their time on 16 tasks not performed by females, the work in general was “substantially identical” under EPA).

*Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 361 (8th Cir. 1970) (no justification for paying male night-shift workers more than female day-shift workers; males had to load heavy rolls of paper, but this consumed only small amount of time, and employer’s own pay practices suggested that this was not real reason for disparity).

*EEOC Decision No. 72-1919 (1972) CCH EEOC Decisions ¶ 6370* (any differences between Utility Worker “A” and “B” classifications that existed involved only incidental heavy lifting which would not justify paying males a higher wage than females for work which otherwise required substantially the same skill, effort, and responsibility under Title VII).

*Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 494 (4th Cir. 1972) (male comparator performed 16 tasks not assigned to female complainant, but no showing that additional tasks were performed for significant periods of time).

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*Ingram v. Brinks, Inc.*, 414 F.3d 222, 233 (1st Cir. 2005) (female operations manager’s duties were not substantially equal to those of male assistant manager where, among other things, he had additional budgeting responsibility and was on call 24/7).

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<sup>1</sup> Used to indicate split authority in comparator determination of similar workers.

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*Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175 (3d Cir. 1977) (jobs were not “substantially equivalent” where male assemblers performed heavy assembly work and women performed work requiring “mental-visual effort”).

- Bank Tellers/Clerks

*Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 899, 902 (5th Cir. 1974) (pay differential was justified where exchange teller had more responsibility than note teller; jobs not substantially equal).

*Hodgson v. American Bank of Commerce*, 447 F.2d 416, 423–24 (5th Cir. 1971) (bookkeeper pay differential was justified by extra effort and responsibility in additional duty of posting to general ledger; jobs not substantially equal).

*Nettles v. Daphne Utils.*, No. 13-0605-WS-C, 2015 WL 4910983, at \*6 (S.D. Ala. Aug. 17, 2015) (finding job duties of clerk handling accounts receivable “fundamentally different” than those of clerk handling accounts payable, as latter job “was more difficult, more complex, more time-consuming, and required more skill, effort and responsibility”; jobs not substantially equal).

- Health Care Workers

*Beck-Wilson v. Principi*, 441 F.3d 353, 362–63 (6th Cir. 2006) (comparing pay of physicians’ assistants at Veterans’ Administration facilities—most of whom were men—to that of registered nurses in same facilities—most of whom were women, and concluding jobs were substantially equal; proper focus is on work performed and job requirements rather than on job titles and classifications; focus in determining whether jobs are substantially equal should be on actual job requirements rather than job titles and classifications).

*Brennan v. South Davis Cmty. Hosp.*, 538 F.2d 859, 862 (10th Cir. 1979) (minimal amount of time spent by orderlies performing catheterization of patients each day, even though it was task requiring some skill, did not justify differential in pay between male orderlies and female aides).

*Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 287–88 (4th Cir. 1974) (even though male orderlies performed tasks such as catheterization that female aides did not, opposite was also true; additional tasks did not require higher level of skill and core activities of two jobs were same and consumed majority work time for both positions).

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*Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1259 (5th Cir. 1972) (per curiam) (affirming finding that male orderlies and female aides did not perform equal work).

- Custodians/Janitors

*Brennan v. South Davis Cmty. Hosp.*, 538 F.2d 859, 862 (10th Cir. 1979) (substantial equality between persons performing job categories of aides, orderlies, maids, and janitors).

*EEOC v. Central Kan. Med. Ctr.*, 705 F.2d 1270, 1272–73 (10th Cir. 1983) (fact that male janitors worked at night while female housekeepers were paid at lower rate and worked during day was not reasonable factor other than sex; substantial equality between jobs).

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*EEOC v. Kenosha Unified Sch. Dist. No. 1*, 620 F.2d 1220, 1225 (7th Cir. 1980) (work of female cleaners and male custodians was not substantially equal; custodians spent large percentage of time performing duties that cleaners did not, and those duties required more skill, effort, and responsibility than duties of cleaners).

*Usery v. Columbia Univ.*, 568 F.2d 953, 960 (2d Cir. 1977) (division of duties was materially different; “heavy” cleaner classification required greater physical exertion than “light” cleaner classification).

*Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979) (discussed above).

- Coaches

*Horn v. Univ. of Minn.*, 362 F.3d 1042, 1045-46 (8th Cir. 2004) (university assistant coaching positions with identical contracts and job descriptions were not substantially equivalent for purposes of Title VII and the Equal Pay Act where the day-to-day responsibilities of one position involved recruiting and public-relations skills and experience but the other involved more “behind the scenes” work; first assistant had increased responsibility and served as public representative of team).

*Stanley v. University of S. Cal.*, 13 F.3d 1313, 1322–23 (9th Cir. 1994) (jobs of men’s and women’s basketball coaches were not substantially equal).

*Jacobs v. College of William & Mary*, 517 F. Supp. 791, 798 (E.D. Va. 1980) (jobs not substantially equal; increased pressure and responsibility of coaching revenue-producing sport justified paying male sports coaches at college more than female coaches), *aff’d mem.*, 661 F.2d 922 (4th Cir. 1981).

- Teachers

*Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 480–81 (2d Cir. 2001) (female professor of criminal justice established prima facie case by comparing herself to other professors throughout Social and Biological Sciences Division of college because plaintiff accurately captured equality of skill, effort, and responsibility of professors in different departments; objective ranking criteria include years of service, division, tenure status, and degrees earned to illustrate skill, effort, and responsibility).

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*Ren v. Univ. of Cent. Florida Bd. of Trustees*, 390 F. Supp. 2d 1223, 1230-31 (M.D. Fla. 2005), *aff'd sub nom.*, 179 F. App'x 680 (11th Cir. 2006) (rejecting discrimination claim of female professor who did not “share[ ] the same supervisor or evaluators” and “held position[ ] in different department[ ]” with more stringent promotional standards (PH-D v. master’s –granted programs) than male professor, and thus was subject to different evaluation process impacting prospects of promotion).

- Park Workers

*Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007) (rejecting Title VII and EPA compensation claims because “jobs of the managers of the different parks in the sprawling Indianapolis park system are nonstandard, mainly because the parks are so different from one another,” and finding that evidence insufficient to establish Title VII violation as well; job of female manager who supervised six-acre park with limited facilities was not equal in terms of skill, effort, and responsibility required to that of male manager who was to oversee much larger park with extensive facilities including pool).

- Sales

*Chapman v Pacific Tel. & Tel. Co.* 456 F Supp 65 (1978) (plaintiffs must prove that an employer paid females less than males for the performance of substantially equal work measured in terms of skill, effort, and responsibility; although the work of predominately female telephone sales supervisors was similar in many respects to that of predominately male premise managers, the similarities were not sufficient to overcome the marked difference in job content, namely that the premise manager position required extensive travel and absence from home; court also found the jobs to differ with respect to effort and responsibility required, but it indicated that these findings were not necessary to its decision).

- Grocery Workers

*Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 923 (7th Cir. 2000) (female deli and bakery workers did not perform tasks substantially equal to those performed by produce workers, who did heavy lifting and exercised discretion about displaying and pricing merchandise).

- Bus Drivers

*Kindred v. Northome/Indus. Sch. Dist. No. 363*, 154 F.3d 801, 804 (8th Cir. 1998) (jobs not substantially equal; female bus driver cannot compare herself to male bus drivers who drove longer routes and received premium pay based on length of route).

- MISC

*Gerbush v. Hunt Real Estate Corp.*, 79 F. Supp. 2d 260, 263 (W.D.N.Y. 1999) (plaintiff failed to establish that her responsibilities as branch manager were substantially equal to responsibilities of higher-paid

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male branch managers who oversaw higher-performing offices that required greater investment of their time), *aff'd*, 234 F.3d 1261 (2d Cir. 2000).

*Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695–97 (7th Cir. 2006) (two jobs are not substantially equal where one employee has broader strategic planning responsibilities and authority over personnel than another employee).

*Bearden v. International Paper Co.*, 529 F.3d 828, 833 (8th Cir. 2008) (plaintiff's position and that of her former colleague were not substantially equal because, among other things, plaintiff's position involved only negotiating contracts and purchasing items while her colleague managed and safeguarded \$17 million in inventory and supervised 11 individuals).

*Christopher v. Iowa*, 559 F.2d 1135, 1135 (8th Cir. 1977) (jobs of stockroom supervisors not substantially equal where one individual supervised departmental stockroom and other supervised university wide stockroom).