SENATE OFFICE OF RESEARCH

Jody Martin, Director

December 9, 2016

MEMORANDUM

TO: Senator Hannah-Beth Jackson, Member, Pay Equity Task Force
Attn: Lisa Gardiner

FROM: Megan Lane ml

SUBJECT: Title VII (Civil Rights Act of 1964) Pay Discrimination Cases as Guidance for Defining Key Terms of California's Equal Pay Act and Other Related Analysis

At your request, I conducted further informal legal research regarding ways to define and interpret key terms of California's Equal Pay Act (EPA). The information in this memorandum does not constitute a legal opinion of this office or any other legislative office. If I can provide further assistance to you, please contact me at (916) 651-1500.

Background on California's Equal Pay Act

California first addressed the concept of equal pay for equal work in the passage of the Equal Pay Act in 1949. The statute prohibited employers from paying different wage rates among the sexes for equal work on jobs requiring equal skill, effort, and responsibility. California's EPA, as amended by SB 358 (Jackson), Chapter 546, Statutes of 2015, also known as the Fair Pay Act, enhances the concept of equal work for equal pay, by replacing the term "equal" with "substantially similar" work. In addition, SB 358 requires that a justification for wage disparity not based on sex be job-related and consistent with business necessity. Further, any factor causing such disparity must be applied reasonably and account for the entire wage differential.

This memo will further examine key terms or phrases in California's EPA and provide guidance primarily from employment discrimination cases under Title VII of the Civil Rights Act of 1964.[1] This research included another review of federal and state equal pay cases. I also examined the legislative history of both the federal Equal Pay Act[2] and the sex discrimination provision of Title VII.[3] Finally, my analysis was informed by a review of a variety of secondary legal sources.

Specifically, this memo addresses two key elements of a plaintiff's prima facie[4] case under California's EPA, "substantially similar" work and work when viewed as a "composite of skill, effort, and responsibility." This brief also will analyze various aspects of the employer defenses to a pay discrimination claim, such as the requirement that justifications for wage disparity be job-related, consistent with business necessity, applied reasonably, and account for the entire wage differential.

Substantially similar work

As discussed in my previous memo to you, there is little case law that addresses or defines the "substantially similar" test required by California's amended EPA. We therefore turn to the job comparison standard from the federal EPA which requires that the jobs be "equal" although courts interpret it as "*substantially* equal." Substantially equal jobs need not be identical but rather share a "common core" of tasks.[5] Under Title VII's sex-based pay discrimination provision, the job similarity test is even more lenient. Due to the broad remedial policy of Title VII to address sex discrimination in employment, the standard for comparison is a mere showing of "similarity" among jobs.[6] In other words, a Title VII plaintiff meets her initial burden of proof by showing

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1 42 U.S.C. §2000e-2.

2 29 U.S.C. §206(d)(1). The legislative history is found in the congressional record and begins at 109 Cong. Rec. 8684 (1963).

3 110 Cong. Rec. 2577 (1964).

4 Prima facie means "at first sight." Black's Law Dictionary, 10th Ed. In the pay discrimination context, a plaintiff has established a prima facie case if there is sufficient evidence to infer that she received lower pay because of her sex.

5 *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871, 937 (D. Minn. 2014) (finding that two advanced positions at a foreign embassy were substantially similar as they shared a significant portion of tasks designed to strengthen exchanges, networks, and overall relations between the United States and Norway).

6 *County of Washington v. Gunther*, 452 U.S. 161, 179 (1981).

that "she occupies a job similar to that of higher paid males."[7] The Equal Employment Opportunity Commission (EEOC) also has applied a relaxed similarity test in its Title VII pay discrimination cases, finding in one case that women holding clerical positions could bring a claim against male colleagues performing craft work.[8] It bears noting however, that while the bar for demonstrating similarity may be lowered under Title VII, the statute requires an additional showing of proof that the employer *intended* to discriminate based on sex in compensation.[9] (In the employment discrimination context, this is known as a claim of "disparate treatment.")

Substantially similar work under the Massachusetts Equal Pay Act

Massachusetts' prohibition on sex-based pay discrimination requires a showing of *comparable* work. Comparable work is further defined as work that is substantially similar.[10] As with California's EPA, the test for similarity first focuses on the overall content of the jobs and whether they share "common characteristics."[11] Recall that the federal EPA similarly asks if the jobs in question share a "common core of tasks." Next, the job analysis under the Massachusetts EPA turns to the question of whether the positions require substantially similar skill, effort, and responsibility and are performed under similar working conditions. This breakdown of job content mirrors that of California's EPA, which requires substantially similar work when viewed as a *composite* of skill, effort and responsibility, and working conditions. Although the Massachusetts statute does not use the term composite, the intent of the statute is the same—to require that substantially similar jobs involve comparable skill, effort, and responsibility, and working conditions. Thus, under both California's and Massachusetts' EPA, the job similarity test is a two-part inquiry. Courts first ask whether the substantive content of

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7 See *Meeks v. Computer Associates International*, 15 F.3d 1013, 1019 (11th Cir. 1994); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992) (finding plaintiff's position as a grocery buyer comparable to other company buyers even though she bought significantly less product).

8 EEOC Decisions 6300 (1971); (CCH) Employment Practice Guide, 71-1619 Paragraph 6300 at 4539 (1971).

9 *Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999).

10 ALM GL ch. 149, §105A.

11 *Jancey v. School Comm.*, 421 Mass. 482, 488 (1995) (finding that female cafeteria worker positions were not substantially similar to male custodians even though the jobs involved similar skill, effort and responsibility); *Mullenix v. Forsyth Dental Infirmary for Children*, 965 F. Supp. 120, 147 (D. Mass. 1996) (holding that a comparable work analysis of staff associate positions at a nonprofit dental center first requires considering whether the positions share *common* and *important* characteristics such as engaging in research and making scientific contributions).

the jobs are substantially similar and then whether the skill, effort and responsibility required, and working conditions present are comparable.[12]

During the last Pay Equity Task Force meeting, held in October 2016, members discussed the meaning of the phrase substantially similar work "when viewed as a composite of skill, effort and responsibility." Task force members debated whether the intent of this phrasing was to require substantial similarity in regards to the effort, the skill, and the responsibility of each job. Some expressed the view that the term composite implies that the similarity standard is applied to the factors when taken together as a whole (similar to a "totality of the circumstances" test) and not to each factor individually. The term's plain meaning lends itself to this interpretation.[13] They argued that as a matter of policy, California's amended EPA should be flexible enough to find substantial similarity where one job, for example, involves an additional exertion of effort or alternatively, one less responsibility than another.

My legal research included a review of state and federal equal pay law for guidance on interpreting this phrase. Even though the Massachusetts Equal Pay Act uses near identical terminology, I could not find a case that discussed the application of the similarity test to the three factors. I did identify a federal case that speaks to the intent of this phrase. Taking an approach of strict interpretation and relying on the legislative history of the federal Equal Pay Act, the court held that the equality standard applies to each factor separately. Positions are deemed equal if they require "equal skill, equal effort, and equal responsibility . . . "[14] Given the scant case law addressing how to interpret this phrase, California courts may look for guidance from the Fair Pay Act's legislative history. I could identify only one bill analysis that addressed the application of these factors, arguing that the intent of the bill was to consider jobs similar even if they do not share *exactly* the same skills, efforts, and responsibilities. [15]

Employer defenses

Under California's EPA, an employer can assert several defenses to wage disparity between jobs requiring substantially similar work. The first three—a seniority system, a merit system, and a system that measures earnings by the quantity or quality of

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[12] *Jancey v. School Comm.* at 489.

[13] The "plain meaning" rule in law provides that statutes are to be interpreted using the ordinary meaning of the language of the statute.

[14] *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175 (3rd Cir. 1977).

[15] SB 358 Senate Judiciary Committee Analysis, April 6, 2015.

production—are mirrored in the federal EPA, as well as in most state equal pay laws. The SB 358 amendments revised the fourth defense—that the pay differential be based on a "bona fide" factor other than sex—by requiring that its application be consistent with "business necessity." All factors must be applied "reasonably."

"Bona fide" factor other than sex

Title VII's compensation discrimination provision incorporates the four employer defenses found in the federal Equal Pay Act: that the pay disparity is pursuant to a merit system, seniority system, or system that measures earnings by quantity or quality of production, or based on any other factor other than sex. It goes one step further in requiring that the merit or seniority system on which the differential is based be bona fide.[16] A merit or seniority system is bona fide if it measures precisely what it purports to measure.[17] In addition, while Title VII's employer defenses' provision does not spell out a requirement that the defenses be business-related or applied reasonably (as is required by California's amended EPA),[18] courts are applying these additional standards. Similarly, the factor other than sex defense under the federal EPA has been construed to require business necessity.

The factor is reasonably applied

Employer justifications for wage disparity under Title VII cannot be for a discriminatory purpose. This implies some level of reasonableness in how the employment practice is administered. In race-based employment discrimination cases, courts have consistently held that employment practices that perpetuate discrimination are invalid.[19] Courts will analyze the employer's intent in formulating and applying the policy in deciding liability.

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[16] 42 U.S.C. 2000e-2(h) (1976).

[17] *Guardians Ass'n of New York City Police Dept., Inc. v. Civil Service Com.*, 633 F.2d 232, 252 (2nd Cir. 1980).

[18] For example, California's EPA explicitly requires that employer defenses be consistent with business necessity, which is defined as an "overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." See Cal. Lab. Code § 1197.5(a)(1)(D).

[19] See *Guardians Ass'n of New York City Police Dept.* at 252 (finding that defendant police department's merit system was invalid as it was based on the administration of an entry-level examination causing barriers to employment for Hispanic and African American officers); *NAACP, Detroit Branch v. Detroit Police Officers Ass'n*, 900 F.2d 903, 909 (1990) (ruling that plaintiff African American police officers could have rebutted the employer's seniority system defense by showing that the practice was administered in an irregular or arbitrary way); and *Carroll v United Steelworkers of America*, 498 F. Supp.

The employer defense is job-related and consistent with business necessity

Under the federal EPA, the majority of circuits and the EEOC interpret the factor other than sex defense to require job-relatedness and business necessity.[20] The leading case from the Ninth Circuit, *Kouba v. Allstate Insurance Company*,[21] established that an employer cannot rely on a factor other than sex "that causes a wage differential between male and female employees absent an acceptable business reason."[22] The court further elaborated the business necessity test in a subsequent decision involving a job classification system defense to a claim of sex-based discrimination. Specifically, the court held that the reclassification of certain jobs is a valid defense to an equal pay act violation if it is for the purpose of serving "legitimate organizational needs and accomplish[ing] necessary organizational changes."[23] The Second Circuit also has required that a job classification defense be rooted in business-related considerations.[24] An acceptable job classification system is founded on necessary differences in work responsibilities and qualifications for particular positions.[25] The Sixth Circuit has extended this approach to the Title VII pay discrimination context, specifically relying on the *Kouba* case (see above). In *EEOC v. J.C. Penney Company*,[26] the court found that the factor other than sex defense "does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."[27] Applying this standard, the court ruled that a head of household requirement for spousal medical insurance coverage was a valid defense as it was established for a legitimate business purpose—to provide the greatest benefit to those who needed the coverage.

976, 985 (1980) (holding that a seniority system negotiated between defendant steel company and the international union established objective standards not rooted in discrimination and was therefore a lawful defense to racial pay disparities).

20 The EEOC guidance is found in Directives Transmittal No. 915.003, §10.IV.F.2 and nn. 65–66 (December 5, 2000), available at https://www.eeoc.gov/policy/docs/compensation.html #2.

21 *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (holding that defendant insurance company's use of prior salary as a factor other than sex to justify a wage differential between male and female sales agents must be business-related to be valid).

22 *Id.* at 876.

23 *Maxwell v. Tucson*, 803 F.2d 444, 446 (9th Cir. 1986).

24 *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 525 (2nd Cir. 1992) (holding that plaintiff cleaner's federal Equal Pay Act claim against a school district for a job classification system that paid custodians more than cleaners should survive absent proof that the system was grounded in legitimate business reasons).

25 *Id.*

26 843 F.2d 249 (6th Cir. 1988).

27 *Id.* at 252.

Some circuits appear reluctant however to apply the business-relatedness test to a factor other than sex defense in cases brought by executives or supervisors.[28] Both the Seventh and Eighth Circuit have declined to question the reasonability of an employer's assertion of business necessity, in essence deferring to the employer's judgment.[29] In fact, the Seventh Circuit has held in at least one case that a factor other than sex "need not be related to the requirements of the position in question, nor must it even be business related."[30] Executive employees in California considering a claim under the Fair Pay Act should take note of this federal trend and how it could influence judicial review by state courts.

The factor other than sex accounts for entire wage differential

My review of state and federal equal pay cases turned up little on the question of how to interpret the requirement under California's EPA that an employer's affirmative defense account for the "entire wage differential." I identified one case brought under the federal EPA and Title VII that directly adopts this standard. In ruling against summary judgment on plaintiff Vice President of Administration's pay discrimination complaint against defendant employer of security services, the Eleventh Circuit held that proving "a factor other than sex" defense is a high burden.[31] This particular defense will fail without a showing that "the factor of sex provided *no* basis for the wage differential (emphasis added)."[32] In other words, the defendant's proffered reason for the pay disparity must explain it in full.

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[28] See Eisenberg, Deborah Thompson, "Shattering the Equal Pay Act's Glass Ceiling," 63 SMU L. Rev. 17, 59 (Winter 2010).

[29] See e.g., *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003) and *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466 (7th Cir. 2005).

[30] *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446 (7th Cir. 1994) (rejecting plaintiff Controller's federal EPA claim of pay discrimination by her construction firm employer).

[31] *Mulhall v. Advance Sec.*, 19 F.3d 586, 589 (11th Cir. 1994).

[32] *Id.* at 590.