DRAFT FOR DISCUSSION

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California Gender Pay Equity Task Force – Definitions Subcommittee Chart of Substantially Similar Work Case Examples 12/20/2016

Case Fact Summary	Case Analysis	Application to CA Equal Pay Act
1. Brennan v. South Davis Community Hospital, 538 F.2d 859 (10th Cir. 1976) Court affirmed trial court's decision that Defendant violated the EPA. Secretary of Labor claimed employer paid female aides less than male orderlies, and female maids less than male janitors. The employer defended the difference in pay for orderlies by pointing to extra tasks they performed, including weighing patients, catherizing male patients, assisting in the ER and intensive care unit, setting up traction devices, CPR, and using the autoclave and transporting heavy items, including oxygen tanks. The court found, however, that some of these duties took a short time to perform, and aides at times either assisted orderlies in these other tasks or performed them as well. Employer argued the janitors performed tasks requiring more effort, such as operating a floor stripping machine, filling another machine, carrying garbage cans to an outside receptacle, and removing snow. The court	Appellate Court interpreted "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" to mean "substantial equality of skill, effort, and responsibility as the jobs are actually performed." Overly fine distinctions in the tasks at issue will not render the jobs unequal. The Court stated if the higher paid job involves additional tasks that require extra effort, consume a significant amount of time, and have economic value, then jobs do not entail equal effort. The court found that the additional duties performed by orderlies were not significant enough to justify a pay difference. "Generally, the tasks called 'extra duties' …did not require greater skill, effort or responsibility in any significant amount or degree…." "Differences in the kind of effort expended but not significant in amount or degree will not support a wage differential." "[W}e need not find precise identity of functions before an equal work determination is possible…." "The occasional or sporadic performance of an	• Court takes a less rigid approach and rejects "overly fine distinctions in tasks" • Court fails to find that extra duties that take up insignificant amounts of time can justify a pay differential • Example of a more composite approach

found, however, that these tasks did not take a long time to complete, and maids also performed additional work that janitors did not, such as cleaning bathrooms and making beds.	activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort." The court concluded that the janitors' extra tasks were too insubstantial to render the jobs unequal.	
2. Ewald v. Royal Norwegian Embassy, 82 F. Supp. 3d 871 (D. Minn. 2014) Trial Court found that Defendant violated the EPA. Plaintiff and her male co-worker were hired as two high-level staff of the "New Model Consulate" of Norway located in Minnesota. She held the Higher Education and Research position and he held the Innovation and Business position. She was paid about $30K less than he. The evidence demonstrated that the positions were overlapping, key, equally important, sharing the same goal, and had almost identical responsibilities. The employer argued that the difference in pay was due to the need to "get the right person" for the business position, that he negotiated higher pay, and the market supported paying the business position more. The court rejected each of these defenses.	The court found that the two positions were substantially equal under the EPA. "The positions required the same levels of skill, effort, and responsibility and entailed similar duties." The Court relied on these factors: the selection criteria for the two positions was nearly identical, the same job structure (reporting, funding, salary range, same position level), substantially similar vision statements, and job duties. Regarding the prima facie case, the court reasoned: "Whether two jobs are substantially equal requires a practical judgment on the basis of all the facts and circumstances." "Neither job classifications nor titles are dispositive for determining whether jobs are equal." "Likewise, merely because two jobs are in different departments is not determinative of a lack of substantial equivalence, although in some instances it may indicate different job content." "…for the purposes of the Equal Pay Act, the fact finder must consider the overall job…."	• Court makes a judgment based on all of the facts and circumstances • Court considers "the overall job"
3. Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409 (9th Cir.	The court evaluated only the skill component of the EPA and noted that "because the skills	• Court focuses on "skill," not other job-related circumstances and

1988). The court affirmed the lower court's grant of summary judgment in favor of the defendant because the plaintiffs, female maintenance administrators, failed to show their jobs were substantially equal to those performed by male test desk technicians.	necessary for the two jobs are not substantially equal, we need not analyze whether there is a material issue of fact concerning effort, responsibility, or working conditions." Test deck technicians performed a series of tests, identified the source of a problem, and determined a solution for it. Maintenance administrators, however, used a computerized testing device that automatically identified the problem and proposed a solution. As a result, the test desk technicians used more analytical and puzzle-solving skills and the positions were not equal.	factors (e.g., effort and responsibility) • NOT a "composite" approach • Example of strict application and narrow definition of "equal work" with high burden placed on plaintiff
4. Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3d Cir. 1977) The court affirmed a directed verdict in favor of defendants because plaintiffs, female bench assemblers, failed to show that they performed substantially equal work as male heavy assemblers.	The court noted that nothing in the legislative history of the EPA supported the idea that the requirements of equal skill, effort, responsibility, and working conditions could be aggregated to establish job equality so that differences in one element could be offset by compensating differences in another element. The positions were not equal because one involved more physical effort, while the other involved more mental effort. The court found that if the jobs had truly involved equal effort, they would have involved equal physical and equal mental effort: “But if the primary content of the compared positions were in fact substantially the same, then it would seem unnecessary to have to balance mental against physical effort to support the conclusion that the total effort involved was substantially equal;	• Court rejects a balancing approach, where a strong showing of one factor could compensate for a weaker showing of another • Example of strict application and narrow definition of “equal work”

	equal effort on jobs having substantially the same primary content would seem to mean substantially equal mental effort and substantially equal physical effort. Although mental effort might perhaps be weighed against physical effort to show the insignificance of incidental differences between two positions having substantially the same primary content, the counterbalancing in this case did not purport to serve such a limited purpose."	
5. Byrnes v. Herion, Inc., 764 F. Supp. 1026 (W.D. Pa. 1991). The court entered judgement for the defendant because the plaintiff, the former Chief Accountant, failed to show she performed work equal to that of the male predecessor to her role. Plaintiff handled 25 to 30% of her predecessor's work after his departure. The predecessor had more years of experience than the plaintiff, and he performed duties not performed by plaintiff.	The court found that the overlap between the plaintiff's position and her predecessor's was "merely comparable" and insufficient to give rise to an inference that the positions were equal. Plaintiff did not assume the core of her predecessor's responsibilities or duties. The predecessor also had more experience and education that justified the pay differential between them.	• Court focuses on responsibility, not on other job-related factors like skill and effort • Court applies the responsibility prong narrowly and does not acknowledge the shared responsibilities between plaintiff and the comparator • Example of strict application and narrow definition of "equal work"
6. Beall v. Curtis, 603 F. Supp. 1563 (M.D. Ga. 1985). The court found that the defendant university health system did not violate the EPA, because the plaintiff nurse practitioners had not established that the work they performed was substantially equal to that performed by a male physician's	The court found that the "testimony revealed little difference in the ability of plaintiffs and [the male comparator] to handle general medical problems; in fact . . . plaintiffs appear to have greater ability in handling gynecological complaints. . . [The male comparator] had more experience in trauma management." The male	• Court applied the definition of "equal work" strictly and narrowly • Court focused on skill and responsibility and did not take a composite approach that would have also examined effort and working conditions.

assistant. Experts testified that "with regard to medical diagnosis generally, the education and training received by the six plaintiffs were not substantially equal to, or even comparable to, the training received by the physician's assistant. . . plaintiffs had less medical expertise and ability in making a diagnosis and in initiating appropriate treatment." However, Plaintiffs had "greater ability in handling gynecological complaints."	physician's assistant had greater experience in trauma and diagnosis, which plaintiffs would not be able to achieve through experience alone. As a result, while the effort and working conditions were similar, the skill and responsibility between them were not and plaintiffs' claim failed.	
7. EEOC v. Mercy Hospital & Medical Center, 709 F.2d 1195 (7th Cir. 1983). The court affirmed the finding that defendant hospital did not violate the EPA by paying its male custodial employees (Tech IIs) more than female custodial employees (Tech Is), because the higher-paying positions filled by males required the use of heavy equipment and greater physical exertion. As the court explained, "the position of Tech I entails the performance of general housekeeping duties such as light dusting, wet and dry mopping, the vacuuming of patient rooms and staff offices, as well as the collection of trash in plastic bags. Tech III personnel perform essentially the same tasks as the Tech Is, with the notable exception of assisting Tech IIs with the more thorough "check-out" cleaning function, performed when a patient	The court upheld the district court's finding that the males used more physical exertion in operating floor maintenance equipment, including larger and heavier mops, polishers, and scrubbers. Additionally, the jobs performed by males required moving heavy pieces of furniture. As a result, those positions were not equal to the ones occupied by females, which required only light dusting, wet and dry mopping, vacuuming, and collecting trash.	• Court did not review skill or responsibility, and instead focused primarily on effort • Not a composite approach • Example of strict and narrow application of "equal work"

checks out of the hospital. The district court found, however, that the work performed by Tech IIs was significantly more strenuous than that performed by the other Tech positions. In particular, the court recognized that Tech IIs are responsible for the operation of electric floor maintainers, e.g., buffers, strippers, scrubbers, and carpet shampooers, in addition to maintaining the Hospital's hallways and other public areas."		