

Legal Framework for Pay Discrimination Claims: Equal Pay Act and Title VII

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I. LEGAL FRAMEWORK FOR PAY DISCRIMINATION CLAIMS

A. Overview of Equal Pay Act and Title VII Compensation Discrimination Claims

Both Title VII and the Equal Pay Act of 1963 (EPA) prohibit sex-based discrimination in compensation. The EPA was enacted as § 6(d) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 206(d) (2007). The EEOC regulations interpreting the EPA are codified at 29 C.F.R. pt. 1620 (2005). In addition to the EPA and Title VII, other sources of equal pay protection include Exec. Order No. 11,375,32 Fed. Reg. 14,303 (Oct. 13, 1967), and state equal pay laws. *See* 29 C.F.R. § 1620.28 (2004).

The relationship and interplay between the Equal Pay Act and Title VII cause some confusion in litigating compensation discrimination cases. Specifically, there is a lack of consensus regarding whether gender-based discriminatory pay cases are put through a similar analysis under the Equal Pay Act and Title VII. Although EPA and Title VII claims are commonly raised together in the same suit, there are many key differences between the two laws. It is important to appreciate these key distinctions.

1. Key Differences Between the EPA and Title VII

Although the acts that give rise to an EPA claim can also give rise to a Title VII claim, the EPA's reach is far more limited than Title VII's. First, the EPA is specifically limited to certain sex-based differentials in wages. 29 U.S.C. § 206(d)(1)(2000). It does not prohibit discrimination in other aspects of employment—even those that have compensation-related consequences—such as hiring, firing, promotion, transfer, or other issues.

Second, the EPA's coverage is also limited to those employers subject to the requirements of the Fair Labor Standards Act. 29 U.S.C. § 203(s). Thus, the Act does not apply to certain industries. *Id.*

Third, the EPA is restricted to cases involving equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. 29 U.S.C. § 206(d)(1). The EPA requires the jobs in question to be substantially identical in order to be comparable. *See, e.g., Rapson v. Dev. Auth. of Peachtree City*, No. 3:02-CV-7-JTC, 2004 U.S. Dist. LEXIS 12579, at *10 (N.D. Ga. Mar. 31, 2004) (“The restrictions in the Act were meant to apply only to jobs that are substantially identical or equal.”) (citations and internal quotations omitted). Accordingly, this narrows the scope of claims encompassed by the EPA, resulting in fewer claims being raised under that statute. In 2010, only 1.0% of the charges of discrimination filed with the EEOC raised EPA claims. EEOC Charge Statistics, *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. By 2015, only 1.1% of the charges raised EPA claims. EEOC Charge Statistics, *available at* <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. By contrast, Title VII requires a “more ‘relaxed standard of similarity’ between the jobs” which makes it available to plaintiffs in a broader array of circumstances. *Glover v. Kindercare Learning Ctrs., Inc.*, 980 F. Supp. 437, 443 (M.D. Ala. 1997) (citation omitted).

Fourth, the Act's four affirmative defenses exempt any wage differentials attributable to seniority, merit, quantity or quality of production, or any other factor other than sex. 29 U.S.C. § 206(d)(1).

2. Enforcement Responsibility

Responsibility for enforcing the EPA originally rested with the Secretary of Labor. The Secretary's authority over private, state, and federal employees was transferred to the EEOC pursuant to the Reorganization Act of 1977. 5 U.S.C. 901 *et seq.* Responsibility now clearly rests with the EEOC. *See, e.g., EEOC v. Westinghouse Elec. Corp.*, 765 F.2d 389, 391, (3d Cir. 1985) (Pub. L. No. 98-532 applies to the EEOC's authority to enforce the EPA); *Santos v. Stanley Home Prods., Inc.*, No. 83-0510-F, 1984 U.S. Dist. LEXIS 22076, at *2-3 (D. Mass. Nov. 9, 1984) (EEOC's authority to carry out ADEA functions was conclusively established by Pub. L. No. 98-532.).

Although the government can initiate investigations *sua sponte*, most investigations are conducted in response to complaints lodged by employees. Unlike under Title VII, the EEOC is not required to engage in prelitigation conciliation efforts before bringing an EPA enforcement action. *See* 29 U.S.C. §§ 216(c), 217 (2000). The EPA likewise permits immediate access to a judicial determination of private claims for equal pay; there is no requirement that an aggrieved employee exhaust administrative remedies before filing suit. *See, e.g., Wash. Cty. v. Gunther*, 452 U.S. 161, 175 n.14 (1981) ("[T]he Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts.").

B. Scope of the Equal Pay Act

The EPA, which preceded Title VII by a year, provides:

No employer having employees subject to [the minimum wage provisions of the FLSA] 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

29 U.S.C. § 206(d)(1) (2000).

The EPA permits differences in wages if the differential is caused by (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. 29 U.S.C. § 206(d)(1) (2000).

The EPA specifies that an employer, in attempting to reach compliance with the equal pay requirement, may not "reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (2000). The FLSA's nonpreemption provision explicitly states that no provision of the FLSA excuses noncompliance with any federal or state law establishing "minimum wages" higher than the FLSA. *Id.* § 218(a).

The EPA's reach is more limited than Title VII's. The EPA's prohibitions are limited to certain sex-based differentials in wages. Although the EPA does not define the term "wages," the term is broadly understood to include all forms of compensation. *See, e.g.,* 29 C.F.R. § 1620.10 (2004). It does not prohibit discrimination in other aspects of employment—even those that have compensation-related consequences—such as hiring, firing, promotion, transfer, or other issues. *See, e.g., Grant v. General Motors Corp.*, 908 F.2d 1303, 1311 (6th Cir. 1990) (EPA does not cover a situation in which an employee suffers an allegedly discriminatory transfer to a lower-paying job, because the employee was paid the same rate as other employees in that position.); *Schnellbaeher v.*

Baskin Clothing Co., 887 F.2d 124, 130 (7th Cir. 1989) (a claim of discriminatory promotions is beyond the scope of the EPA, but actionable under Title VII.).

Because the EPA is part of the FLSA, it covers “employees” only as defined in the FLSA. The EPA protects every “employee” engaged in, or employed by an “enterprise” engaged in, commerce or in the production of goods for commerce. 29 U.S.C. §§ 203 (e)(1) & (s)(1)(A)(i) (2000). The FLSA broadly defines “employee” as “any individual employed by an employer,” subject to a few limited exceptions. 29 U.S.C. § 203(e)(1) (2000). An entity “employs” an individual under the FLSA if it “suffer[s] or permit[s]” that individual to work. *Id.* § 203(g). The statute defines “enterprise” as any “related activit[y] performed . . . by any person or persons for a common business purpose[.]” 29 U.S.C. § 203(r)(1) (2000). The EPA also applies to labor organizations that “cause or attempt to cause [a covered] employer to discriminate against an employee in violation of” the statute. *Id.* § 206(d)(2).

The test of employment under the FLSA is one of “economic reality.” See *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961); see also *Iriarray v. Catsimatidis*, 722 F.3d 99, 105 (2d Cir. 2013); *Velez v. Sanchez*, 693 F.3d 308, 315-16 (2d Cir. 2012); *In re Enter. Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462, 467 (3d Cir. 2012); *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 410 (3d Cir. 2012); *Safarian v. Am. DG Energy Inc.*, 622 F. App’x 149, 150 (3d Cir. 2015); *Gray v. Powers*, 673 F.3d 352, 353 (5th Cir. 2012); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 519 (6th Cir. 2011); *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 960 (8th Cir. 2015), cert. denied, 136 S. Ct. 804, 193 L. Ed. 2d 713 (2016). Although an “employee” is distinguishable from an independent contractor, the broad language of the statute covers parties “who might not qualify as such under a strict application of traditional agency law principles.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); see also, *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 449, 123 S. Ct. 1673, 1680, 155 L. Ed. 2d 615 (2003) (adopting non-exhaustive factor test from EEOC Compliance Manual to determine employee status); *Mariotti v. Mariotti Bldg. Products, Inc.*, 714 F.3d 761, 766 (3d Cir. 2013).

C. Scope of Title VII’s Prohibitions against Wage Discrimination

Wage discrimination claims may also be cognizable under Title VII of the Civil Rights Act of 1964. Thus, a plaintiff who alleges wage discrimination but cannot satisfy the demanding EPA standards may still be able to prevail under Title VII, particularly if she shows that the wage disparity was the result of discriminatory intent.

Although not all wage discrimination claims are cognizable under the EPA, according to the EEOC all EPA violations are also Title VII violations. 29 C.F.R. § 1620.27(a) (2005). A few courts agree with that view. See, e.g., *Tademe v. St. Cloud State Univ.*, 328 F.3d 982, 989-90 (8th Cir. 2003) (applying EPA standard to Title VII wage discrimination case); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992) (same standard applies to EPA and Title VII wage discrimination claims). But most courts do not, because, unlike EPA claims, Title VII disparate treatment claims require proof of intent. See, e.g., *Fallon v. State of Ill.*, 882 F.2d 1206, 1213 (7th Cir. 1989) (“Under Title VII, in all but a few cases, . . . the burden of proof remains with the plaintiff at all times to show discriminatory intent. . . . In contrast, ‘the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown.’”) (citations omitted); *Bauer v. Curators of Univ. of Missouri*, 680 F.3d 1043, 1045 (8th Cir. 2012) (“The EPA, a strict liability statute, does not require plaintiffs to prove that an employer acted with discriminatory intent; plaintiffs need show only that an employer pays males more than females.”). In any event, a pay differential “authorized by” the EPA (*i.e.*, justified by one of the EPA affirmative defenses) cannot constitute a Title VII violation. 42 U.S.C. § 2000e-2(h) (2000) (permitting employer to differentiate on the basis of sex in paying wages “if such differentiation is authorized by” the EPA); see *Wash. Cty. v. Gunther*, 452 U.S. 161, 176 (1981) (holding that 42 U.S.C. § 2000e-2(h) does not limit Title VII wage discrimination claims to those

actionable under the EPA but rather merely incorporates the EPA's four affirmative defenses into Title VII); *Murphy v. Ohio State Univ.*, 549 F. App'x 315, 320 (6th Cir. 2013) ("A Title VII claim of wage discrimination parallels that of an [Equal Pay Act] violation insofar as it incorporates the [Equal Pay Act's] affirmative defenses.").

An interesting problem arises when a plaintiff raises a wage discrimination claim based on a comparison between jobs that do not qualify as "substantially equal" under the EPA. The EPA does not prohibit discrimination between employees performing "comparable," but not "substantially equal" work. See, e.g., *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39, (5th Cir. 1973); *Keller v. Crown Cork & Seal USA, Inc.*, 491 F. App'x 908, 912 (10th Cir. 2012) ("Like or comparable work does not satisfy this standard, and it is not sufficient that some aspects of the two jobs were the same."); *EEOC v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 254-55 (2d Cir. 2014) ("While the equal work inquiry does not demand evidence that a plaintiff's job is 'identical' to a higher-paid position, the standard is nonetheless demanding, requiring evidence that the jobs compared are 'substantially equal.'"). In such circumstances, some plaintiffs seek to prove compensation discrimination under Title VII.

D. Making Out a *Prima Facie* Case Under the EPA

Unlike Title VII, which requires a plaintiff to receive a notice of right to sue from the EEOC prior to filing suit in a federal court, the EPA does not include any administrative prerequisites to filing a complaint in court. 29 U.S.C. § 216(b)(2000); see also *Washi. Cty.*, 452 U.S. 161, 175 n.14 (1981).

As with any other term or condition of employment, sex discrimination in regard to compensation may violate Title VII. See, e.g., *Whittle v. GMJ, Ltd.*, No. 05-19944, 2006 U.S. App. LEXIS 14687, at *2 n.1 (11th Cir. June 15, 2006) (Title VII prohibits an employer from discriminating against an employee with respect to compensation on the basis of sex); *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005) (same).

To prove a violation under the EPA, a plaintiff must first establish a *prima facie* case of discrimination by showing: (i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (iii) the jobs are performed under similar working conditions. See *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999).

Once a plaintiff makes out a *prima facie* case under the EPA, she need not prove a discriminatory animus on her employer's part. *Belfi*, 191 F.3d at 136. Instead, the burden of persuasion shifts to the employer to prove the disparity is justified by the one of the four affirmative defenses available to defendants. *Id.*; see also 29 U.S.C. § 206(d)(1)(2000). This construct essentially results in a "strict liability" situation for the defendant, "in that no intent to discriminate need be shown." *Strecker v. Grand Forks Cty. Soc. Serv. Bd.*, 640 F.2d 96, 100-03 (8th Cir. 1980), *overruled on other grounds by Robino v. Norton*, 682 F.2d 192 (8th Cir. 1982). See also *Meeks v. Comput. Assocs. Int'l*, 15 F.3d 1013, 1019 (11th Cir. 1994) ("In contrast to Title VII, the EPA establishes a form of 'strict liability'"). Unlike with Title VII, the burden of persuasion, not just production, shifts to the defendant, and the risk of nonpersuasion rests with the defendant on the ultimate issue of liability. *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078 (11th Cir. 2003) (the burden to prove these affirmative defenses is heavy and the defendant must demonstrate that "the factor of sex provided no basis for the wage differential.") (citation omitted).

Following a showing by the defendant that the disparity is justified by one of the four affirmative defenses provided under the statute, the plaintiff may then counter by producing evidence that demonstrates that the reasons advanced by the defendant are actually a pretext for sex discrimination. See *Belfi*, 191 F.3d at 136; see also *Steger*, 318 F.3d at 1078 ("Once the employer's

burden is met, the employee ‘must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential’”) (*citing Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)).

1. What Is Unequal Pay?

Under the EPA, comparisons between male and female employees must be between their respective rates of pay, rather than their total compensation. 29 U.S.C. § 206(d)(1) (2000); *see Jones v. St. Jude Med. S.C., Inc.*, 823 F. Supp. 2d 699, 755 (S.D. Ohio 2011), *aff’d*, 504 F. App’x 473 (6th Cir. 2012) (no *prima facie* case where the plaintiff’s base salary and commissions were equal to or greater than her male colleagues’ rates); *see also EEOC v. Health Mgmt. Grp.*, No. 5:09-CV-1762, 2011 WL 4376155, at *3 (N.D. Ohio Sept. 20, 2011) (plaintiffs making more than their comparator did not defeat an EPA claim where the plaintiffs’ base salaries and commission rates were lower than their male counterparts).

2. What Is Equal Work?

To make out a *prima facie* case under the EPA, the plaintiff must prove that the two jobs being compared require substantially equal skill, effort, and responsibility and are performed under similar working conditions. *See* 29 U.S.C. § 206(d)(1) (2000); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (non-comparability of jobs defeats an EPA claim). This is the crucial issue in most EPA litigation.

The EPA requires the plaintiff to demonstrate the equality of jobs within an establishment. This statutory standard requires proof that the jobs being compared require equal skill, effort, and responsibility, as well as proof that these jobs are performed under similar working conditions. 29 U.S.C. § 206(d)(1) (2000); *see, e.g., Katz v. Sch. Dist.*, 557 F.2d 153, 156 (8th Cir. 1977) (“[T]wo employees are performing equal work when it is necessary to expend the same degree of skill, effort, and responsibility in order to perform the substantially equal duties which they do, in fact, routinely perform with the knowledge and acquiescence of the employer.”).

The leading case is *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970). In *Wheaton Glass*, the Third Circuit held that, even though “female selector-packers” did not perform certain tasks that “male selector-packers” performed, the work in general was “substantially identical,” and the two jobs could be compared under the EPA. *Id.* at 266-67. The court reasoned that “Congress in prescribing ‘equal’ work did not require that the jobs be identical, but only that they must be substantially equal.” *Id.* at 265; *accord Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995) *abrogated on other grounds, Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

The “substantial equality” test of *Wheaton Glass* has often been cited, but (as discussed below) not always consistently applied. *Compare Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258-59 (5th Cir. 1972) (per curiam) (Congress substituted “equal work” for “comparable work” and intended a “substantial identity of job functions;” equal work not found) *with Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973) (the standard is higher than mere comparability and lower than absolute identity; equal work found).

Nevertheless, certain principles seem firmly established. Courts have had no difficulty, for example, in finding that it is the content of the job, not the formal job description, that is controlling. *See, e.g., Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533-34 (11th Cir. 1992) (looking to the duties required and performed, not the job description); *Fallon v. State of Ill.*, 882 F.2d 1206, 1209-10 (7th Cir. 1989) (same); *Maxwell v. City of Tucson*, No. 83-1765, 1984 WL 21130, at *3-4 (9th Cir. July 3, 1984) (same). Similarly, the relevant question (at least for liability purposes) is whether sex-based discrimination exists at all, not the degree of discrimination. *See, e.g., Hodgson v. Am. Bank*

of Commerce, 447 F.2d 416, 420 (5th Cir. 1971) (the EPA prohibits any difference in wages paid to the respective sexes, unless justified by a statutory exception). Although courts generally compare contemporaries—*i.e.*, a female being paid less than a comparator male—most courts have held that the Act also may be applied to successive incumbents in a single job. *See, e.g., Chymore v. Far-Mar-Co.*, 709 F.2d 499, 502-03 (8th Cir. 1983) (the EPA analysis was applied to the plaintiff's immediate predecessor and prior non-immediate predecessors). Some courts have allowed comparisons of non-immediate successors. *See Clay v. Howard Univ.*, 128 F. Supp. 3d 22, 31 (D.D.C. 2015) (acknowledging that “there is scant case law addressing the use of a non-immediate successor as comparator for salary purposes, and the issue is intensely fact-specific” (citations omitted), before finding that the plaintiff could include a non-immediate successor as one of a number of comparators). Similarly, the fact that a higher-paid male employee leaves his job does not cure an EPA violation. In *Jehle v. Heckler*, 603 F. Supp. 124, 126 (D.D.C. 1985), for example, a male program analyst had been paid a higher salary while performing substantially the same work as a female program analyst. The Department of Health and Human Services argued that his departure was a defense to an EPA claim, because no pay inequity remained after the male employee left. The court found that a violation had occurred when the plaintiff and the male program analyst were both performing essentially the same work for unequal pay and that the violation would be continuing until the plaintiff received the same pay as the male program analyst had received before his departure. *Id.*

Courts are divided on whether a plaintiff must compare herself to all similarly classified male employees, or whether she may choose one or more comparators. *Compare Goodrich v. Int'l Bhd. of Elec. Workers*, 815 F.2d 1519, 1524 (D.C. Cir. 1987) (“It is now established in this circuit that the plaintiff need not compare herself to all similarly classified male employees, but may choose one or more among those allegedly doing substantially equal work.”), and *Kennedy v. Va. Polytechnic Inst. & State Univ.*, 781 F. Supp. 2d 297, 301 (W.D. Va. 2011) (“[T]he Court cannot grant summary judgment based solely on the salaries of comparators proffered by the defendant, because plaintiffs may properly designate comparators for the Court to consider.”), with *Morrow v. L & L Products, Inc.*, 945 F. Supp. 2d 835, 846 (E.D. Mich. 2013) (“The proper test for establishing a *prima facie* case in a professional setting ... is whether the plaintiff is receiving lower wages than the average of wages paid to all employees of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect that wage scale.”), *Rizzo v. Yovino*, Case No. 1:14-cv-0423-MJS, 2015 WL 9260587, at *6 (E.D. Cal. Dec. 18, 2015) (same), *Moccio v. Cornell Univ.*, 889 F. Supp. 2d 539, 571 (S.D.N.Y. 2012), *aff'd* 526 F. App'x 124 (2d Cir. 2012) (finding no EPA violation where the plaintiff only chose some similarly situated males as comparators, but earned more than other similarly situated males), and *Dukes v. Wal-Mart Stores, Inc.*, No. 3:01-cv-02252-CRB, 2015 WL 3623481, at *4 (N.D. Cal. June 10, 2015) (plaintiff cannot “pick and choose a person [she] perceives is a valid comparator who was allegedly treated more favorably, and completely ignore a significant group of comparators who were treated equally or less favorably than [she]” (citations omitted)). *See also Butler v. N.Y. Health & Racquet Club*, 768 F. Supp. 2d 516, 530-31 (S.D.N.Y. 2011) (holding that one or two “isolated examples” of unequal pay is not enough to make out a *prima facie* case (even though a health club may not constitute a “professional venue”), but that a comparison of 13 men is “barely” sufficient).

Courts are not willing, however, “to engage in wholesale reevaluation of any employer’s pay structure in order to enforce [plaintiff’s] own conceptions of economic worth.” *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 285 (4th Cir. 1974). For example, in *Baumgardner v. ROA Gen., Inc.*, 864 F. Supp. 1107 (D. Utah 1994), two female employees sued their employer under the EPA, alleging that a former male employee’s job responsibilities “were no more complicated” than theirs. The court held that this argument “contemplates a claim of comparable worth which is inadequate to support an Equal Pay Act claim.” *Id.* at 1109. One court rejected the contention that all employees of a company should be considered to perform equal work for the limited purpose of

comparing benefit packages. *See Beavers v. Am. Cast Iron Pipe Co.*, 751 F. Supp. 956, 966 (N.D. Ala. 1990), *rev'd and vacated in part on other grounds*, 975 F.2d 792 (11th Cir. 1992).

The existence of an employment contract has been held not to be a categorical bar to a claim under the EPA. *See Van Heest v. McNeilab, Inc.*, 624 F. Supp. 891, 895 (D. Del. 1985). However, in many jobs where individual contracts exist, it may be difficult to establish a *prima facie* case due to the individualized nature of the jobs.

Against that background, an allocation-of-proof system has emerged. The plaintiff—either the government or an individual—bears the initial burden of proving a *prima facie* case that the employer pays an employee of one sex more than an employee of the other sex, for performing equal work. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 188 (1974) (stating the plaintiff must show “that an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”) (internal quotations omitted). As the Seventh Circuit has said, this initial burden of proof carries with it the obligation to show that “(1) higher wages were paid to a male employee, (2) for equal work requiring substantially similar skill, effort and responsibilities, and (3) the work was performed under similar working conditions.” *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 698-99 (7th Cir. 2003) (citation omitted). It is inappropriate to consider affirmative defenses in evaluating the plaintiff’s *prima facie* case. Once the initial burden is sustained, the burden shifts to the employer to show that the wage differential is justified by one of the Act’s four defenses. *See, e.g., Gokay v. Pennridge Sch. Dist.*, No. 02-8482, 2004 U.S. Dist. LEXIS 2127, at *11-12 (E.D. Pa. Feb. 5, 2004) (rejecting defendant’s argument that comparator’s prior salary and experience are relevant in determining whether plaintiff has met her burden of demonstrating equality of work).

The practice of red-circling pay rates presents legal issue. In *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), the employer had “red circled” the higher rates being paid existing male employees, but paid all new hires, male and female, at a lower rate. The Supreme Court concluded that this was no defense because equalization of the rates on the effective date of the Act would have placed all employees at the higher, red-circled rate. *Id.* at 208-09. However, an employer’s policy of temporarily preserving the higher wage of an employee who is displaced into a lower classification constitutes a legitimate “factor other than sex,” immunizing a resulting wage disparity. *See* 29 C.F.R. § 1620.26 (2005) (when an employee is displaced into a lower classification, his/her wage rate can be maintained without causing an EPA violation if the rate was preserved for a reason “unrelated to sex”). Some courts even have approved a red-circling policy when the employee may benefit from it indefinitely. *See, e.g., Blocker v. AT&T Tech. Sys.*, 666 F. Supp. 209, 214 (M.D. Fla. 1987) (holding there is no violation where the red-circling policy provides an indefinite benefit to the transferred employee since his position with AT&T had been eliminated during the company’s massive reorganization in the mid-1980s). *But cf. Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 596 (11th Cir. 1994) (asserting that red-circling could not be used to confer higher wages on new hires).

Difficulties have arisen where an employer consolidates work previously performed in a higher-paid, predominantly male classification, with work previously performed in a lower-paid, predominantly female classification, and pays all employees at the lower rate. Females paid the lower rate in the consolidated job may claim a violation of the Equal Pay Act, particularly if it can be shown that the two jobs were substantially equal all along. *See Brobst v. Columbus Servs. Int’l*, 761 F.2d 148, 157 (3d Cir. 1985) (remanding for a determination of whether the jobs had been substantially equal before consolidation); *Morgado v. Birmingham-Jefferson Cty. Civil Def. Corps*, 706 F.2d 1184, 1188-89 (11th Cir. 1983) (the traditional distinctions between jobs became less clear over time).

Failure of an EPA claim is not necessarily determinative of an entire lawsuit; a Title VII violation may be found on facts that do not establish a violation of the Equal Pay Act. *See, e.g., Wash. Cty. v.*

Gunther, 452 U.S. 161, 168 (1981) (deciding the plaintiff may state a claim under Title VII without needing to establish that she performed “equal or substantially equal work”). Such claims—of sex discrimination in compensation in what may be unequal work for EPA purposes—are considered, *infra*, in the Title VII discussion.

a. “Equal skill, effort, and responsibility”

Although the statute by its terms imposes the requirement that jobs involve “equal skill, equal effort, [and] equal responsibility,” and although the EEOC has said that those “terms constitute separate tests, each of which must be met in order for the equal pay standard to apply,” courts frequently do not break their analyses down by individual criterion. 29 C.F.R. § 1620.14(a) (2005); *see, e.g., Conti v. Universal Enters., Inc.*, 50 F. App’x 690, 696 (6th Cir. 2002) (noting that to determine substantial equality “an overall comparison of the work, not its individual segments” is necessary) (quoting *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981)). Rather, in determining whether jobs are substantially equal, courts focus on overall job content. *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002) (“Whether two jobs are substantially equal ‘requires a practical judgment on the basis of all the facts and circumstances of a particular case’ including factors such as level of experience, training, education, ability, effort, and responsibility.”) (quoting *Buettner v. Eastern Arch Coal Sales, Co.*, 216 F.3d 707, 719 (8th Cir. 2000)). In *Buntin v. Breatbitt County Board of Education*, 134 F.3d 796 (6th Cir. 1998), the Sixth Circuit said that “[w]hether the work of two employees is substantially equal ‘must be resolved by the overall comparison of work, not its individual segments.’” *Id.* at 799 (citation omitted).

The equality of one factor is generally not sufficient to make out an EPA claim. Thus, in *Kellett v. Glaxo Enterprises, Inc.*, the district court suggested that Congress could not have intended the EPA’s “effort” prong to ensure that every worker receives the same compensation as her supervisor so long as she works equally hard. *Kellett v. Glaxo Enters., Inc.*, 66 Fair Emp.Prac.Cas. (BNA) 1071, 1075 (S.D.N.Y. 1994) (rejecting plaintiff’s claim that her job was substantially equal to that of her supervisor, despite his greater responsibilities as fund manager). Similarly, in *Conigliaro v. Horace Mann School*, No. 95 CIV. 3555 CSH, 2000 U.S. Dist. LEXIS 556, at *20-22 (S.D.N.Y. Jan. 19, 2000), the court found that the plaintiff’s assertion that she worked harder was irrelevant to the question of whether she and her comparator performed “substantially equal” work. In *Atkinson v. Washington International Insurance Co.*, No. 92 C 8430, 1995 U.S. Dist. LEXIS 1865, at *41-42 (N.D. Ill. Feb. 14, 1995), the court rejected an account executive’s claim that she was performing the work of a higher-level executive, concluding that the plaintiff’s supervisory duties over other employees did not make her job substantially equal to that of the regional vice president, who, unlike the plaintiff, had responsibility for revenue generation and sales as well as supervisory duties.

Many cases, even those involving similar duties, turn on the question of equality of effort required. An oft-cited test for determining equality of effort appears in the Fifth Circuit’s decision in *Hodgson v. Brookhaven General Hospital*:

[J]obs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differential.

436 F.2d 719, 725 (5th Cir. 1970) (footnote omitted). At least one court has compared the actual effort that the employees put into their work, in addition to the effort required by their positions. *See Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871, 943 (D. Minn. 2014) (taking into account

that the plaintiff actually expended greater effort than her comparator, even though the jobs required equal effort).

Conversely, the inequality of one factor will defeat a plaintiff's EPA claim. For instance, the Ninth Circuit has emphasized that, where the skills required by two jobs are not equivalent, arguably compensating disparities in effort, responsibility, or working conditions cannot be used to contend that the jobs as a whole are equal. *See, e.g., Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414-16 (9th Cir. 1988) (citing *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175-76 (3d Cir. 1977) ("differences in responsibility between two jobs [cannot] be offset by competing differences in the skill required so as to make the two jobs equal")).

That jobs are titled or classified differently does not preclude an otherwise valid claim, but, by the same token, citing similar job titles or descriptions does not, without more, prove substantial equality. *See, e.g., Conti v. Universal Enters., Inc.*, 50 F. App'x 690, 696 (6th Cir. 2002) (holding that resolution of an EPA claim "depends not on job titles or classifications but on actual job requirements and performance"). However, courts do not completely disregard differing job titles. *See Parr v. Nicholls State Univ.*, Civil Action No. 09-3576, 2011 WL 838903, at *4 (E.D. La. Mar. 3, 2011), *aff'd* 518 F. App'x 275 (5th Cir. 2013) (taking into account that a Dean and Acting Dean typically have different responsibilities and authority, and that, while exceptions to that rule exist, the plaintiff did not show why those titles should be ignored in her case). Similarly, that two jobs are performed on different machines does not necessarily disprove substantial equality. *Flockhart v. Iowa Beef Processors, Inc.*, 192 F. Supp. 2d 947, 970 (N.D. Iowa 2001) ("[T]itle alone is not indicative of whether two jobs require equal work.").

The EPA's threshold focus is on whether the *jobs require* equal skills, not whether the *employees possess* equal skills. *See* 29 C.F.R. § 1620.15(a) (2005) ("Possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill."); *e.g., Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003) (relevant comparison for *prima facie* case "is between positions, not individuals"). However, at least one court has taken into account the training, education, and experience of the plaintiff and comparators. *See Foco v. Freudenberg-NOK Gen. P'ship*, 892 F. Supp. 2d 871, 878-79 (E.D. Mich. 2012), *aff'd* 549 F. App'x 340 (6th Cir. 2013) (finding that the plaintiff did not perform equal work to that of her male comparators when the comparators possessed higher degrees and/or more experience than the plaintiff). Thus, the initial consideration is whether the content, rather than the performance, of the two jobs is substantially identical. *See Fallon v. State of Ill.*, 882 F.2d 1206, 1209 (7th Cir. 1989) (noting that the crucial issue is whether the jobs to be compared have a "common core," *i.e.*, whether a significant portion of them is identical). Similarly, the correct comparison is between the *type* of skills that each job requires, rather than the *level* of skills. *See Rexroat v. Ariz. Dept. of Educ.*, No. Civ. 11-1028-PHX-PGR, 2013 WL 85222, at *4 (D. Ariz. Jan. 8, 2013).

That some aspects of two jobs are the same does not mean that the jobs overall are substantially identical. *See, e.g., Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146, 1149 (10th Cir. 2002) (noting that "it is not sufficient that some aspects of the two jobs were the same" and finding that plaintiff's job was not substantially equal to male counterparts) (citation omitted). On the other hand, "insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs" will not render them unequal. *See* 29 C.F.R. § 1620.14(a) (2005); *see also Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002) (quoting same and noting that "same is true for insubstantial or minor differences in supervisory responsibility").

In analyzing whether jobs involve "equal skill, effort, and responsibility," the plaintiff must first establish that his or her position and that of his or her comparator share a "common core" of tasks. *See, e.g., Conti v. Universal Enters., Inc.*, 50 F. App'x 690 (6th Cir. 2002) (holding that the plaintiff did

not perform substantially equal work to one of her comparators since he performed several duties she did not perform). Then, the issue becomes whether any additional tasks make the jobs substantially different. *See, e.g., Jenson v. PCC Structural, Inc.*, No. CV 01-162-BR, 2002 U.S. Dist. LEXIS 25529, at *6 (D. Or. July 22, 2002) (applying Ninth Circuit's two-step analysis for determining substantial equality, which inquires (1) whether the jobs to be compared have a "common core of tasks" and (2) if they do, whether "additional tasks" associated with one job but not the other make them substantially difficult). Where a comparator's job involves additional job duties, or the work is more difficult, a court may determine that the plaintiff has failed to prove his or her case. *See Heap v. Cty. of Schenectady*, 214 F. Supp. 2d 263 (N.D.N.Y. 2002) (two jobs were not substantially similar where comparator had additional duties, such as managing the department and supervising employees). However, time spent on additional tasks will not justify a wage disparity if the tasks are insubstantial, temporary, or do not consume a significant portion of the comparator employee's time. *See* 29 C.F.R. § 1620.20(d) (2005). Applying this standard, the courts have reached divergent results, depending on the facts, in cases involving packers in manufacturing plants, operators, warehouse workers, health care workers, bank tellers and clerks, salespersons, custodians and janitors, assemblers, and others.

In general, plaintiffs are more likely to succeed if any extra duties that exist do not require a significant percentage of the employee's working time; if the extra duties cannot be shown to require significant additional effort or skill; or if others performing such duties on a regular basis are not paid at the higher rate. On the other hand, if the reverse is true, the employer is more likely to succeed. *See, e.g., Johnson v. Fed. Exp. Corp.*, 996 F. Supp. 2d 302, 321 (M.D. Pa. 2014), *aff'd* 604 F. App'x 183 (3d Cir. 2015) ("[T]he record evidence of a separate set of skills required to function as a courier is sufficient to make the courier and service agent positions unequal."). The employer is particularly likely to prevail in cases where the extra duties can be segregated by time and place, and a higher rate is paid only for time spent on those duties. *See, e.g., Wirtz v. Rainbo Baking Co.*, 303 F. Supp. 1049, 1052 (E.D. Ky. 1967) ("[T]here could be no effective enforcement of the equal pay provisions if differentials between sexes were permitted for all hours worked because of the substantially different working conditions and responsibilities ... performed at identifiable times and places.") (citation omitted). But an employer cannot avoid liability simply by assigning nominal or sporadic extra duties to employees of one sex. *See Marshall v. Bldg. Maint. Corp.*, 587 F.2d 567, 570 n.3 (2d Cir. 1978) ("Employers may not be permitted to frustrate the purposes of the Act by calling for extra effort only occasionally, or only from one or two male employees, or by paying males substantially more than females for the performance of tasks which command a low rate of pay when performed full time by other personnel in the same establishment.") (quoting *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970)). Additional tasks do not make for substantially different work if the comparator is paid separately for those duties. *See Puchakjian v. Township of Winslow*, 804 F. Supp. 2d 288, 296 (D.N.J. 2011).

If women perform *more* duties than their comparators, courts may find the jobs to be substantially equal. *See Riser v. QEP Energy*, 776 F. 3d 1191, 1197 (10th Cir. 2015), *aff'd in part, rev'd in part on other grounds*, 776 F.3d 1191 (10th Cir. 2015) ("[T]he fact that a female employee performed additional duties beyond a male comparator does not defeat the employee's *prima facie* case under the EPA."). As one court explained, "it is axiomatic that the fact that males performing jobs with less responsibility receive higher pay is sufficient to establish [female] plaintiff's *prima facie* case." *Wachter-Young v. Ohio Cas. Group*, 236 F. Supp. 2d 1157, 1162-63 (D. Or. 2002) (citing 29 C.F.R. § 1620.14(a) ("differences in skill, effort or responsibility which might be sufficient to justify a finding that two jobs are not equal ... if the greater skill, effort, or responsibility has been required of the higher paid sex, do not justify such a finding where the greater skill, effort, or responsibility is required of the lower paid sex")). A minority of courts, however, have held that a plaintiff's extra duties defeat the substantial equality of jobs necessary to make out an EPA claim. *See, e.g., Lewis v. Smith*, 255 F. Supp. 2d 1054, 1059 (D. Ariz. 2003) (plaintiff failed to establish *prima facie* case that

jobs were substantially equal where plaintiff performed “additional and more valuable duties” than his comparator).

In assessing whether jobs involve equal effort, a court may rely on the opinion testimony of lay witnesses who have regularly performed the jobs. *See, e.g., EEOC v. Harper Grace Hosps.*, 689 F. Supp. 708, 715-16 (E.D. Mich. 1988) (the opinion testimony of the housekeepers/comparators who had regularly performed the plaintiffs’ jobs was allowed by the court and had “probative value”). However, an employee’s unsubstantiated opinion that the employer harbored a discriminatory attitude is not admissible evidence. *See Feazell v. Tropicana Prods., Inc.*, 819 F.2d 1036, 1038, 1041 (11th Cir. 1987).

In contrast to the equal effort cases, relatively few cases have focused on the equal “responsibility” criterion. In *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 453 (D.C. Cir. 1976), the court rejected a contention that male “purser” had greater responsibility than female “stewardesses,” finding that both had the primary responsibility of customer service. *Id.* By contrast, the court in *Ruffin v. Los Angeles County*, 607 F.2d 1276, 1279-80 (9th Cir. 1979), held that the jobs of “corrections officer” and “deputy sheriff” were not substantially equal because the sheriffs had greater authority and responsibility than the corrections officers. *Id.*

In *Hooper v. Total System Services, Inc.*, 799 F. Supp. 2d 1350, 1362 (M.D. Ga. 2011), the court held that the comparator had significantly more responsibility than the plaintiff given that he was in charge of 128 employees to the plaintiff’s 46, and had an annual expense budget of \$15 million, compared to \$2 million. In *Shoffner v. Talecris Biotherapeutics, Inc.*, No. 5:10-CV-406-FL, 2012 WL 525550, at *16-17 (E.D.N.C. Feb. 16, 2012), the court held that the comparator’s position had more responsibility because his region generated several times the amount of revenue of the plaintiff’s, and therefore the employer had a much larger economic stake in the comparator’s work. Employers can legally determine how best to reflect this difference in “economic impact.” *Id.* at *17; *see also Westrich-James v. Dallas Morning News, Inc.*, Civil Action No. 3:07-CV-1329-G, 2012 WL 4068982, at *6 (N.D. Tex. Sept. 17, 2012) (no *prima facie* case where the plaintiff only alleged salary differences between her and male employees in different zones with substantially different responsibilities). In evaluating responsibility, courts also take into account whether either employee was in a position of authority over the other, and whether either of them managed other employees. *See Enwald*, 82 F. Supp. 3d at 943-44.

In *Welde v. Tetley, Inc.*, 864 F. Supp. 440, 456 (M.D. Pa. 1994), the court held that the plaintiff’s job did not require the same degree of “responsibility” as that of her comparator. The court found significant, among other things, the fact that the plaintiff had received an award for excellence, indicating that the plaintiff’s performance went beyond the employer’s expectations for that position, not that a higher degree of responsibility had been assigned to the plaintiff’s position. *Id.*; *cf. Hoban v. Tex. Tech Univ. Health Sci. Ctr.*, No. EP-02-CA-245(KC), 2004 U.S. Dist. LEXIS 4552, at *8 (W.D. Tex. Mar. 12, 2004) (fact that plaintiff “voluntarily assumed” additional duties does not defeat EPA claim predicated on additional responsibility); 29 C.F.R. § 1620.13 (2005) (“[T]he EPA applies if the employer knowingly allows the employee to perform the equal work.”).

Some courts have considered a difference in the volume of work to be a key factor under the heading of “effort,” while others have viewed it as pertaining more to relative “responsibility.” *Compare Christopher v. Iowa*, 559 F.2d 1135, 1138 (8th Cir. 1977) (comparing a male supervisor of the university’s central stockroom and a female supervisor of the chemistry department stockroom; the former job required greater effort in handling a greater volume of receiving goods) *with Moltban v. Temple University*, 442 F. Supp. 448, 453 (E.D. Pa. 1977) (comparing female university blood bank administrator and male directors of hematology and pathology; the male directors filled multiple roles, and their work required greater responsibility).

For an employer to prevail, differences in job responsibilities must be real; a nominal designation of an employee as a “supervisor” will not protect an employer from an Equal Pay Act claim. *See, e.g., Hill v. J. C. Penney Co.*, 688 F.2d 370, 373-74 (5th Cir. 1982) (affirming the district court’s finding of an EPA violation despite the fact that the plaintiff, a seamstress, used her “supervisor” as the comparator; the supervisor’s annual evaluations made no mention of the supervisory nature of his position and he was rated on the same type of form used to rate the plaintiff). Similarly, conclusory allegations of greater future responsibility—such as those based on an employer’s subjective evaluation of an employee’s career potential—have been rejected. *See, e.g., Marshall v. Sec. Bank & Tr. Co.*, 572 F.2d 276, 279 (10th Cir. 1978) (holding the employer’s subjective evaluations of various employees’ career potential to become “executives” was not a valid ground for the pay disparity). An employer’s claim that a comparator “was meant” to have different responsibilities is also inconsequential if, in fact, the comparator’s and the plaintiff’s actual responsibilities were the same. *See Corpes v. Walsh Constr. Co.*, No. 3:14-CV-181 (MPS), 2015 WL 5331725, at *5 (D. Conn. Sept. 14, 2015). At least one court has used the plaintiff’s statement that she would not have been interested in doing the comparator’s job herself to show that the plaintiff’s role was different from the comparator’s. *See Wojciechowski v. Nat’l Oilwell Varco, L.P.*, 763 F. Supp. 2d 832, 850-51 (S.D. Tex. 2011).

Courts have differed in analyzing what might be called the “a fortiori” argument. This arises where a position entailing real supervisory responsibility is not comparable to, but is paid less than, the positions nominally subordinate to it. In the typical case, a female supervisor complains that her male subordinates received higher wages than she did. Some courts have accepted this argument, even though the jobs by definition are not equivalent. *See, e.g., Riordan v. Kempiners*, 831 F.2d 690, 699 (7th Cir. 1987) (“[W]here a female supervisor is paid less than the workers she supervises and the only difference in work . . . is the supervisory responsibilities of the former, the Act applies.”). However, at least one court has held that, even if the plaintiff carried greater responsibilities and duties and yet was paid lower wages, there still was insufficient equality of the jobs to state an EPA claim. *See Pajic v. CIGNA Corp.*, 56 Fair Emp.Prac.Cas. (BNA) 1624, 1627 (E.D. Pa. 1990) (denying relief on the ground that the male comparators’ jobs were substantially different from those of the plaintiffs despite the fact that the plaintiffs had “a broader range of [managerial] duties” and responsibilities). In these circumstances, however, there might well be a Title VII violation. The latter case draws on the fundamental principle that a female plaintiff may not prevail under the EPA by comparing her job to another that is not substantially equal to her own, even if she proves sex-based wage discrimination, and even if she was denied the better-paying position because of her sex. *See, e.g., Wash. Cty. v. Gunther*, 452 U.S. 161, 181 (1981) (even though the at-issue jobs were not equal, and thus no EPA action lies, the female plaintiffs could claim intentional sex discrimination in wage differentiation under Title VII). Such a case may normally be brought only under Title VII.

Proving comparative skills and responsibilities is most difficult when executive or professional employment is at issue. *See, e.g., Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002) (“[T]he practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims. In cases such as these, no judge or jury should be allowed to second guess the complex remuneration decisions of businesses that necessarily involve a unique assessment of experience, training, ability, education, interpersonal skills, market forces, performance, tenure, etc.”). Colleges and universities have been especially prolific sources of EPA litigation. In *Monroe-Lord v. Hytche*, 668 F. Supp. 979, 995 (D. Md. 1987), *aff’d*, 854 F.2d 1317 (4th Cir. 1988), the court stated that comparisons among college faculty members should be confined to a single—or, at most, a closely comparable—academic department. Similarly, the Ninth Circuit, although rejecting a university’s argument that jobs from different academic disciplines never can be substantially equal, held that the absence of substantial equality may be established by demonstrating that separate disciplines require a different emphasis on research, training, and community service. *See Spaulding v. Univ. of Wash.*, 740 F.2d 686, 697-99 (9th Cir. 1984). Subjective evaluations of scholarly work and teaching performance can also result in finely calibrated salary differentials. *See Broussard-Norcross v.*

Augustana Coll. Ass'n, 935 F.2d 974, 979 (8th Cir. 1991). See also *Scroggins v. Troy Univ.*, Civil Act. No. 2:13CV63-CSC, 2014 WL 766315, at *7 (M.D. Ala. Feb. 26, 2014) (a tenure-track assistant professor subject to research, publication, and other requirements and a non-tenured lecturer without such requirements are not appropriate comparators).

In the athletic context, courts disagree about whether comparisons may be made between coaches of the same sport (e.g., men's and women's basketball). Compare *EEOC v. Madison Cmty. Unit School District*, No. 12, 818 F.2d 577, 584 (7th Cir. 1987) (allowing a comparison of coaches in the same sport; violation found) with *Stanley v. University of Southern California*, 13 F.3d 1313, 1321 (9th Cir. 1994) (the positions of men's and women's basketball coach involved substantially different work). But courts uniformly recognize that no comparison may be made across the lines of both gender and discipline (e.g., women's volleyball and men's soccer). See, e.g., *Madison Cmty. Sch. Dist. No. 12*, 818 F.2d at 587; cf. *Sobba v. Pratt Cmty. Coll. & Area Vocational Sch.*, 117 F. Supp. 2d 1043 (D. Kan. 2000) (discussing the position of men's and women's tennis coach is not comparable to other coaching positions, including cross country and track and field coach and women's softball coach).

b. “Performed under similar working conditions”

Few cases have turned on whether work was performed under similar working conditions. The seminal case is *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). *Corning Glass Works* addressed whether work performed by night-shift inspectors was “performed under similar working conditions” as that performed by day-shift inspectors, so as to justify a shift premium. *Id.* The company's own job evaluation system did not differentiate between day and night work, and yet the company insisted that it could lawfully pay the shift premium. In deciding whether the working conditions of the two shifts were similar, the Court first noted the background against which the EPA was adopted, explaining that Congress intended to “incorporate into the new federal act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act.” *Id.* at 201. Interpreting the phrase “working conditions” in light of that principle, the Court held:

While a layman might well assume that time of day worked reflects one aspect of a job's “working conditions,” the term has a different and much more specific meaning in the language of industrial relations. As Corning's own representative testified at the hearings, the element of working conditions encompasses two subfactors: “surroundings” and “hazards” “Surroundings” measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. “Hazards” take into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of “working conditions” is not only manifested in Corning's own job-evaluation plans but is also well accepted across a wide range of American industry.

Id. at 202 (citations and footnotes omitted). Nowhere in any of these definitions is time of day worked mentioned as a relevant criterion. The fact of the matter is that the concept of “working conditions,” as used in the specialized language of job evaluation systems, simply does not encompass shift differentials. *Id.* *Corning Glass Works* did not, however, make unlawful all shift differentials in pay—only where, as there, the differential was discriminatory:

This does not mean, of course, that there is no room in the Equal Pay Act for nondiscriminatory shift differentials. Work on a steady

night shift no doubt has psychological and physiological impacts making it less attractive than work on a day shift.

Id. at 204.

Based on the facts in *Corning Glass Works*, the Court held that the shift differential there served as added payment based on sex rather than added compensation for more demanding night work. *Id.* Following *Corning Glass*, the EEOC and some courts have interpreted the term “similar working conditions” to encompass two subfactors: (1) surroundings, and (2) hazards. *See* 29 C.F.R. § 1620.18(a) (2005).

Courts have also considered the situs in which work is performed in analyzing working conditions. In *Usery v. Columbia University*, 568 F.2d 953, 960-61 (2d Cir. 1977) (noting that male “heavy cleaners” job could not be equated with female “light cleaners,” even though the males did much work that was similar to the females’; much of the males’ work was at night and off campus), the court held that work performed away from the employer’s main campus was not performed under the same conditions as work performed principally on campus. Government regulations are to the same effect. *See* 29 C.F.R. § 800.132 (2005). But in *Wetzel v. Liberty Mutual Insurance Co.*, 449 F. Supp. 397, 405 (W.D. Pa. 1978), the court held that the differences between working conditions for male claims adjusters working in the field and female claims adjusters assigned to work in an individual office were legally insignificant.

Courts also look to what departments, offices, or companies oversee the plaintiff and the comparator. *See Shaffer v. Fayette Cty. of Pa.*, Civil Action No. 14-309, 2016 WL 687118 at *12 (W.D. Pa. Feb. 19, 2016) (plaintiff and comparator did not work under similar working conditions when one worked for the Public Defender’s office and the other for the District Attorney, and each office operated in accordance with its own policies and budgetary restraints).

E. Making Out a *Prima Facie* Case Under Title VII

Under Title VII, the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), applies. A wage-discrimination Title VII plaintiff need only show that (1) she was a member of a protected class; (2) that she was qualified for the job in question; (3) that she was paid less than men for the same work; and (4) the employer’s adverse employment decision occurred under circumstances that raise an inference of discrimination. *See Belfi*, 191 F.3d at 140. However, in contrast to the EPA, a Title VII disparate treatment plaintiff must also produce evidence of discriminatory animus or intent in order to satisfy her *prima facie* case. *See Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 292 F.3d 221, 225 (5th Cir. 2002) (“Unlike the showing required under Title VII’s disparate treatment theory, proof of discriminatory intent is not required to establish a *prima facie* case under the Equal Pay Act”). After a plaintiff has made out a *prima facie* case under Title VII, the burden shifts to the employer to “articulate some legitimate, nondiscriminatory reason” for the adverse employment decision. *McDonnell Douglas*, 411 U.S. at 802. The plaintiff, however, maintains the ultimate burden of proving that the employer’s articulated reason was pretextual. *See, e.g., Elgabi v. Toledo Area Reg’l Transit Auth.*, No. 3:05 CV 7092, 2006 U.S. Dist. LEXIS 32833, at *9 (N.D. Ohio May 24, 2006), *aff’d*, 228 F. App’x 537 (6th Cir. 2007) (“In a Title VII action, the plaintiff always maintains the ‘ultimate burden of persuasion.’”) (citation omitted).

Non-EPA wage discrimination cases are based on the conventional theories of Title VII discrimination. In most Title VII compensation cases, the touchstone is intent. *See, e.g., Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 525 (7th Cir.1994) (a Title VII plaintiff must prove the intent to discriminate, specifically the “actual desire to pay women less than men because they are women”). Courts generally find wage discrimination claims cognizable only when they allege intentional discrimination; most courts do not recognize disparate or adverse impact claims based on wage

disparities, unless the disparities can be linked to a specific discriminatory practice. *See, e.g., Int'l Union, United Auto., Aerospace and Agr. Implement Workers v. Michigan*, 886 F.2d 766, 769; *American Fed'n of State, Cty., & Mun. Emps. AFL-CIO (AFSCME) v. Wash.*, 770 F.2d 1401, 1406 (9th Cir. 1988) (holding that adverse impact theory was inapplicable to wage discrimination claims not involving specific practices applied at particular points in job selection process); *Prieto v. City of Miami Beach*, 190 F. Supp. 2d 1340, 1353 (S.D. Fla. 2002) (“disparate treatment claims require a showing of discriminatory intent, generally disparate impact claims do not”). Also, plaintiffs may use statistical proof to make out their claim. *See Siler-Khodr*, 261 F.3d at 547 (5th Cir. 2001) (Title VII claim could be established by use of statistics). However, many plaintiffs now claim that excessively subjective decisionmaking is a specific practice sufficient to satisfy their obligation. In *Velez v. Novartis* case, the plaintiffs’ disparate impact claim survived to trial, notwithstanding Novartis’ argument that plaintiffs had not proven that Novartis had a highly subjective decisionmaking process that had an adverse impact on women. No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010). In *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court expressed the limitations of such a theory:

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory — since “an employer’s undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.” But the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation — and surely most managers in a corporation that forbids sex discrimination — would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355 (2011) (internal citation omitted).

A plaintiff’s burden to produce similarly-situated comparators is less onerous in Title VII wage claims than in EPA claims. *See Daniels v. UPS, Inc.*, 701 F.3d 620, 637 (10th Cir. 2012) (holding that a plaintiff failed to produce a similarly-situated comparator for either Title VII or the “stricter standard” of the EPA). Differences in job duties, experience, and other factors affect whether a comparator is similarly situated. *Id. Woodard v. TWC Media Sols., Inc.*, No. 09-CV-3000 (BSJ)(AJP), 2011 U.S. Dist. LEXIS 1536, at *38-39 (S.D.N.Y. Jan. 3, 2011) (granting summary judgment for the defendant because the comparator was not similarly situated given the difference in performance reviews between the plaintiff and comparator).

A number of courts have recognized wage discrimination claims under a Title VII disparate treatment theory, even in cases where plaintiffs cannot show substantially equal work. *See, e.g., Hildebrandt v. Illinois Dep’t of Natural Res.*, 347 F.3d 1014, 1031-32 (7th Cir. 2003) (acknowledging plaintiff made out a *prima facie* case of wage discrimination under both Title VII disparate treatment and EPA theories).

Under some circumstances, a disparate treatment claim might be available to remedy wage differentials between comparable, but not substantially equal, positions. If, as in *Gunther*, it is alleged that an employer normally sets wages based on its own survey of job “worth,” but, because of intentional discrimination, pays wages to female employees below those said to be warranted by the survey, a classic *prima facie* disparate treatment case arguably is stated. Such a claim does not require a showing of “comparability” between male and female jobs because the plaintiff is not attempting

to show discrimination by comparing the “worth” to the employer of dissimilar jobs, but rather by comparing an employer’s conduct toward male employees with its conduct toward female employees. Ready comparability of jobs may help facilitate proof, but it is not an element of the cause of action in a Title VII disparate treatment case. *See, e.g., Gunther v. Washington Cnty.*, 623 F.2d 1303, 1321 (9th Cir. 1979) (“In most cases, an equal work theory will provide the most practical method of establishing a *prima facie* case of wage discrimination.”; in a disparate treatment case, “evidence of comparable work” will be relevant, though “not alone . . . sufficient to establish a *prima facie* case”), *aff’d*, 452 U.S. 161 (1981).

Some courts have permitted circumstantial proof of intentional sex-based wage discrimination. *See, e.g., Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992) (allowing circumstantial proof; “the ‘direct evidence’ standard . . . eviscerates the standards and burdens for a Title VII case Incorporating the ‘direct evidence’ standard would only help clever, but venal, employers who discriminate against women and are not compliant enough to admit it directly.”). *But see Gunther*, 452 U.S. at 204 (Rehnquist, J., dissenting) (arguing that direct evidence of intentionally depressed wages is required). Some courts have drawn inferences of wage discrimination from discrimination in promotion, transfer, or hiring. *See, e.g., Orabood v. Bd. of Trs. of Univ. of Ark.*, 645 F.2d 651, 656 (8th Cir. 1981) (discriminatory refusal to reclassify); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 950 (10th Cir. 1980) (“gross discrimination” against the female plaintiff seeking promotion because of her sex). One court even has inferred an intent to discriminate from, among other things, an employer’s failure to undertake a job evaluation survey. *See Taylor v. Charley Bros. Co.*, 25 Fair Emp.Prac.Cas. (BNA) 602, 614 (W.D. Pa. 1981) (providing that intent is inferred from lack of job evaluation study, job segregation, discriminatory hiring, and oral statements). Courts have inferred discrimination when employers base wages on an employee’s job title rather than on duties performed. *E.g., Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (inferring discrimination where a plaintiff’s “pay grade was not based on the duties she was actually performing, but on the duties administrative assistants typically perform—despite the fact [that the plaintiffs] supervisors knew she was not performing administrative assistant duties”). With respect to job analyses, a more common approach is that stated in *Connecticut State Emps. Ass’n v. Connecticut*, 31 Fair Emp.Prac.Cas. (BNA) 191 (D. Conn. 1983), which rejected the notion that the judiciary in Title VII suits should be engaging in a subjective analysis of the value of different jobs. The court held that it would be relevant to whether intentional wage discrimination existed if the employer had determined certain different jobs to have equivalent value and paid the predominantly male jobs more anyway. *Id.* at 193. Absent other evidence, courts generally do not infer discriminatory intent from “a comparison of wages in dissimilar jobs.” *Pollis v. New Sch. For Soc. Research*, 132 F.3d 115, 123 n.4 (2d Cir. 1997). Further, that “an evaluation process contains some subjective components” will not, standing alone, support an inference of discriminatory intent. *Taylor v. White*, 321 F.3d 710, 717 (8th Cir. 2003) (quoting *Elliott v. Montgomery Ward & Co.*, 967 F.2d 1258, 1263 (8th Cir. 1992)).

In wage discrimination lawsuits brought on a disparate treatment theory, courts generally have applied the allocation of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g., Orabood*, 645 F.2d at 656 (deciding statistical data, together with several recommendations that plaintiff be reclassified, sufficient to establish *prima facie* case); *cf. Heagney v. Univ. of Wash.*, 642 F.2d 1157, 1165-66 (9th Cir. 1981) (ruling the trial court erred in excluding relevant statistical report that could support female employee’s claim of disparate treatment). But there is disagreement on some issues. In *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), the employer argued that the standard Title VII rules announced in *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), govern—*i.e.*, the plaintiff at all times bears the burden of proving that the wage differential was because of sex. The Ninth Circuit rejected this argument, holding that once a *prima facie* case has been made out under both the EPA and Title VII, the employer bears the affirmative burden of proving that its actions were justified by one of the EPA’s defenses. *Kouba*, 691 F.2d at 875. Under the Ninth Circuit’s approach, the employer cannot merely come forward with evidence of some business reason and then shift the burden back to the plaintiff to prove pretext; the employer must

show that the factor of sex provided no basis for the wage differential. *Id.* The Sixth and Eighth Circuits appear to have embraced the Ninth Circuit's approach. *See, e.g., Vebar v. Cole Nat'l Group, Inc.*, 251 Fed. App'x 993, 1002 (6th Cir. 2007) ("We are aware that the EPA's and Title VII's burdens of proof are not wholly interchangeable and in the rare, very close case, a plaintiff can succeed on an EPA claim while failing simultaneously to establish a Title VII claim. . . . This circuit, however, has rejected this logic as 'overly technical.'" (internal citations omitted); *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003) (holding that EPA standards govern Title VII claims for sex-based wage discrimination and nothing that "[u]nder the EPA, a defendant cannot escape liability merely by articulating a legitimate non-discriminatory reason for the employment action. Rather, the defendant must prove that the pay differential was based on a factor other than sex.") (citation omitted).

But the Fourth, Seventh, Tenth, and Eleventh Circuits have taken the opposite view. *See, e.g., Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 344 (4th Cir. 1994) ("The allocation of the burdens of proof for claims brought under Title VII and the Equal Pay Act differ significantly. . . . Once the defendant [in a Title VII case] offers a non-discriminatory justification for the wage differential, the burden of persuasion remains on the plaintiff to demonstrate that the proffered explanation is pretextual and that the defendant was actually motivated by discriminatory intent.") (citation omitted); *Fallon v. State of Ill.*, 882 F.2d 1206, 1213 (7th Cir. 1989) (remanding case, concluding that the Equal Pay Act and Title VII require different proof and allocations of the burdens of proof; unlike an Equal Pay Act plaintiff, "when a [Title VII] plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. If that is done, the plaintiff must then prove the proffered reason is a pretext for discrimination. The risk of nonpersuasion, then, is always (except for a few exceptions) on a Title VII plaintiff."); *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 409-10 (10th Cir. 1993) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)) (finding no reason to alter the Title VII order and burdens of proof in sex-based wage discrimination cases; "[t]hus under Title VII once the plaintiff has established a prima facie case the defendant must then produce some evidence, or at least as some cases indicate, articulate a nondiscriminatory reason for the disparate treatment. If this is done, the plaintiff continues or reverts to his or her basic burden to persuade the trier of fact that the defendant, regardless of the reasons advanced, intentionally discriminated against plaintiff."); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1014 (11th Cir. 1994) (reversing district court's judgment on Title VII sex-based wage discrimination claim "because [the court] erroneously held that the jury's EPA verdict compelled it to enter a Title VII discrimination judgment for the plaintiff"; concluding that under Title VII, once an employer meets its "exceedingly light" burden of articulating a nondiscriminatory reason, it is the plaintiff's burden to show that the employer had a discriminatory intent) (citations omitted).

The Fifth Circuit went one step further, holding that a differential is "based on" the factor of sex only if the factor of sex is a "but for" cause of the differential. The court rejected the argument that liability automatically results if the factor of sex plays any part whatsoever in the employer's decision. *See Peters v. City of Shreveport*, 818 F.2d 1148, 1161 (5th Cir. 1987). The First Circuit, however, has suggested that the position that the burden remains with the plaintiff throughout is inconsistent with the Supreme Court's more recent approach to Title VII cases. *See Roderiguez v. Smithkline Beecham*, 224 F.3d 1, 20 n.13 (1st Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)).

Courts disagree about whether discriminatory intent may be inferred from statistical evidence showing that jobs predominantly occupied by females are compensated at lower rates than jobs predominantly held by males. *Compare Heagney*, 642 F.2d at 1165-66 (reversing the exclusion of statistical evidence, but leaving open whether intentional discrimination may be inferred solely from this type of statistical evidence) *with Gunther*, 452 U.S. 161 (holding statistical evidence of comparable work alone not enough to establish prima facie case) *and Spaulding*, 740 F.2d at 700 (stating the difference in salary payments is insufficient, without more, to establish prima facie case). *See also*

Butler v. N.Y. Health & Racquet Club, 768 F. Supp. 2d 516, 533-34 (S.D.N.Y. 2011) (finding no discriminatory intent when “statistical analysis shows that the percentage of male and female [employees] in each pay rate category does not differ substantially from their overall representation” at the company; thus, the percentage of males were not disproportionately compensated at the higher end of the pay scale). This issue becomes especially significant because of employers’ frequent insistence that they are entitled to pay the prevailing market rates. See, e.g., *Am. Fed’n v. Washington*, 770 F.2d at 1405. The “market rate” claim arises in two different contexts. The first is when, in hiring multiple individuals to perform the same job, the employer pays each individual whatever it has to pay in the market for that individual, thus (in some circumstances), leading it to pay women less than men because they had been earning less in their prior jobs and were willing to accept less to take a new job. Absent more, this may violate both the EPA and Title VII. See *Corning Glass Works*, 417 U.S. at 205. The situation often is much more complex, of course, because the employer generally also points to different levels of prior experience, education, etc., from one person to the next, particularly in hiring for jobs that require substantial skill and experience.

A different market-rate issue arises when an employer pays the same rate for all persons holding the same job, but sets the rate in reliance on a market-wage survey for that job. In these circumstances, certain female-dominated job classifications may be paid less if, for whatever reason, the employer can fill its hiring needs for those classifications at a wage lower than that necessary for other, male-dominated job classifications. Courts generally accept the market-rate defense in this second context. See, e.g., *Christensen v. State of Iowa*, 563 F.2d 353, 355 (8th Cir. 1977) (the defendant lawfully paid higher wages to workers in predominantly male physical plant jobs compared to those suggested by its internal job evaluation study because it was necessary in order to match the prevailing local wage). As one court noted (in an age discrimination case):

It is true that an employer cannot defend a discriminatory wage pattern by pointing to the fact that, as a result of discrimination by other employers, blacks or women or members of some other statutorily protected group command lower wages, and it is therefore rational for him to pay them less than he pays white males. . . . But if he does not discriminate on racial or other forbidden grounds but merely pays each worker what that worker is worth in the market, he is not guilty of discrimination merely because, on average, black workers are paid less than white, or female less than male.

Davidson v. Bd. of Governors of State Colleges and Universities for W. Illinois Univ., 920 F.2d 441, 445-46 (7th Cir. 1990) (citations omitted).

A question arises when an employer conducts a survey, not of the market rate for its jobs, but of their “worth” or “comparability.” If such a study suggests that a predominantly male job and a predominantly female job are of comparable worth, but the employer then deviates from the study because of the compulsion of market forces, plaintiffs may seek to argue that such an employer has intentionally discriminated against females and therefore is liable under Title VII. However, courts in these circumstances have tended not to penalize an employer for looking at issues of internal equity. See *Am. Fed’n v. State of Washington*, 770 F.2d at 1406 (state’s reliance on market rates, rather than its own internal job study, which had deemed the jobs to be of comparable worth, did not establish intentional sex discrimination). An employer may also categorize employees according to value to the employer and subsequently assign them to narrower bands of compensation based on market wage. See *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 821-23 (7th Cir. 2011) (affirming denial of class certification; defendant’s two-step practice of determining compensation was not discriminatory; first, it “establish[ed] a broad pay range for each class of employees whom it deem[ed] of equal value[;]” second, it “create[d] within each broad range a narrower range based on prevailing market wages[;]” thus, if there were “more male than female employees in jobs that

command a higher market wage, the average compensation of male employees would exceed that of female employees in the same job category for a reason unrelated to sex discrimination”).

F. Statutory Defenses—Applicable to the EPA and Title VII

A June 12, 1964 amendment to Title VII, known as the Bennett Amendment, provides:

It shall not be an unlawful employment practice under this subchapter 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 206(d) of Title 29.

42 U.S.C. § 2000e-2(h)(2000).

This amendment incorporated the four affirmative defenses of the Equal Pay Act into the structure of sex-discrimination wage claims brought under Title VII. *See, e.g., Peters v. City of Shreveport*, 818 F.2d 1148, 1160 (5th Cir. 1987). Thus, whether under Title VII or the EPA, no liability attaches to a differential pay system if such payments are 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. 29 U.S.C. § 206(d)(1). Further, several courts have held that to successfully establish the “factor other than sex” defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential. *See Belfi*, 191 F.3d 129 (2d Cir. 1999) (*citing Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526-27 (2d Cir. 1992)); *EEOC v. J.C. Penney Co. Inc.*, 843 F.2d 249, 253 (6th Cir. 1988) (“[T]he 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.”) (internal quotations omitted).

1. Differences Pursuant to a Seniority System

A differential based on the date of hire is justified as an attribute of seniority, so long as the differential is applied on a nondiscriminatory basis. *See* 29 U.S.C. § 206(d)(1) (2000); *cf. Mitchell v. Jefferson Cnty. Bd. of Educ.*, 936 F.2d 539, 545-46 (11th Cir. 1991) (a salary schedule that provided annual increases to all employees, but provided no additional rewards for length of service, is not a seniority system under the Equal Pay Act).

There need not be a formal seniority system to employ the defense. *See, e.g., EEOC v. Whittin Mach. Works*, 699 F.2d 688, 689 (4th Cir. 1983) (allowing the seniority system defense although no formal system existed; the district court’s calculation for “compensation for seniority” was affirmed because it provided an “equitable result”); *Puchakjian v. Twp. of Winslow*, 804 F. Supp. 2d 288, 297 (D.N.J. 2011), *aff’d*, 520 F. App’x 73 (3d Cir. 2013) (defendant’s lack of seniority or longevity payment system did not preclude it from asserting seniority or length of tenure based affirmative defense). In *EEOC v. Cleveland State Univ.*, 28 Fair Emp.Prac.Cas. (BNA) 1782, 1792-95 (N.D. Ohio 1982) (holding the de facto seniority system was applied in “a fair and sex-neutral manner”), the court found that certain salary differences were justified by a de facto seniority system based upon years in academia. To invoke this defense, however, some cases hold that the employer must regularly, rather than merely sporadically, consider seniority in setting wages. *See, e.g., EEOC v. Shelby Cnty. Gov’t*, 707 F. Supp. 969, 984 (W.D. Tenn. 1988) (establishing the employer must regularly consider seniority in order for a seniority system to exist).

“Easier” and yet higher-paying jobs, obtained through a bidding procedure in which employees exercise seniority rights, can constitute a form of premium pay protected by the EPA’s

seniority-system exception. *See, e.g., EEOC v. Affiliated Foods, Inc.*, 34 Fair Emp.Prac.Cas. (BNA) 943, 956 (W.D. Mo. 1984) (finding no violation of the EPA since the wage differential has “a bona fide explanation unrelated to sex, which . . . should be classified as a seniority premium earned by [the male] employees” who obtained their positions through a bidding procedure based on seniority entitlements).

Whether an employer has in place a seniority system, as defined by the EPA, is a question of law. *See Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995). Courts are generally reluctant to second-guess employers’ business judgments as to their use of seniority-based pay practices because “[e]mployers may prefer and reward experience, believing it makes a more valuable employee, for whatever reason.” *Harker v. Utica Coll. of Syracuse Univ.*, 885 F. Supp. 378, 390 (N.D.N.Y. 1995) (defendants established legitimate reason for wage difference between male and female coach as male coach had nine years of seniority over female coach); *see also Blount v. Alabama Co-op. Extension Serv.*, 869 F. Supp. 1543, 1554 (M.D. Ala. 1994) (wage differentials were justified primarily by individual employees’ length and history of service).

An employer that relies on a system of basing salaries on employees’ length of service “must be able to identify standards for measuring seniority which are systematically applied and observed.” *Irby*, 44 F.3d at 954 (rejecting “seniority system” defense raised by county sheriff’s department where two male sheriff’s deputies were paid more than deputies who were hired in earlier years even though neither deputy had been promoted). To utilize this affirmative defense, therefore, the seniority system must be applied to all employees unless there are “defined exceptions” that are communicated to and understood by the employees. *See id.* at 955.

2. Differences Pursuant to a Merit System

If the employer can show that salary differentials are based upon employee performance, a bona fide merit program can be established. *See* 29 U.S.C. § 206(d)(1) (2000). Some cases hold, however, that in order to be bona fide, a merit system must be administered systematically and uniformly. *Compare Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 901 (5th Cir. 1974) (upholding the defendant’s merit system program as “a systematic, formal system guided by objective, written standards” where females advanced over males as a result) *with Morgado v. Birmingham-Jefferson Cnty. Civil Def. Corps*, 706 F.2d 1184, 1188-89 (11th Cir. 1983) (job descriptions that differentiated between positions but provided no means of advancement or reward based on merit do not constitute the basis for a bona fide merit system) *and Hodgson v. Washington Hosp.*, 9 Fair Emp.Prac.Cas. (BNA) 612, 615 (W.D. Pa. 1971) (the hospital unsuccessfully based different rates for male and female x-ray technicians on a “seniority-merit” system, where the system had not been applied uniformly). Merit systems that rely heavily on subjective impressions are not unlawful, but they may receive closer scrutiny than those where the “merit” that is measured is based on objective criteria that are systematically applied. *Compare Marshall v. Security Bank & Trust Co.*, 572 F.2d 276, 279 (10th Cir. 1978) (higher wages, based upon subjective evaluations that male employees had potential for future promotions, held not justified), *Grove v. Frostburg Nat’l Bank*, 549 F. Supp. 922, 934 (D. Md. 1982) (a bank’s system of evaluating employees was not a merit system because it was neither structured nor based on predetermined criteria; instead, the primary consideration in pay decisions was “gut feeling” about employees by high-ranking officials) *and Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 430 (M.D. La. 1977) (a supervisor’s personal assessment of the plaintiff’s “worth as a manager” and “leadership qualities” did not justify the wage disparity) *with Herman*, 569 F.2d 1033, 1035-36 (8th Cir. 1978) (even though male employees generally received larger raises than female employees, the increases were based on the employees’ performance), *Gerbush v. Hunt Real Estate Corp.*, 79 F. Supp. 2d 260, 264 (W.D.N.Y. 1999), *aff’d mem.*, 234 F.3d 1261 (2d Cir. 2000) (compensation structure that set base salaries for branch managers as percentage of their branch’s anticipated revenues for the upcoming year and pays bonuses based on how much their branch’s revenues exceeded predictions is valid) *and Sobol v. Kidder, Peabody & Co. Inc.*, 49 F. Supp. 2d 208, 220 (S.D.N.Y. 1999) (“A firm’s practice of

paying high revenue generators more than individuals who produce less does not violate the EPA.”) (citations omitted). One court has held that matching a wage offer given to an employee by another employer does not constitute a merit system, even where the offer reflects the value of the employee’s services. *See Winkes v. Brown Univ.*, 32 Fair Emp.Prac.Cas. (BNA) 1041, 1046-47 (D.R.I. 1983), *rev’d on other grounds*, 747 F.2d 792 (1st Cir. 1984).

The merit-system defense also has been ruled unavailable where the employer’s job classification system, as applied to a lower-grade female employee, provides neither means of advancement nor a reward for merit. *See, e.g., Grayboff v. Pendelton*, 36 Fair Emp.Prac.Cas. (BNA) 350, 355 (N.D. Ga. 1984) (a classification system that provides female employees no means of advancement is not a bona fide merit system).

The mere fact that an employer purports to be required to employ a “merit system” does not, without more, satisfy the EPA’s test. Rather, courts have held that such employers must still demonstrate that the system involves regular performance appraisals and that the disparity results from a sex-neutral application of the system’s provisions. *See, e.g., Flory v. Salt Lake Cnty. Sheriff’s Office*, 680 F. Supp. 1504, 1506 (D. Utah 1988) (merely claiming to have a merit system is not enough; in order for an employer’s classification system to be a valid merit system, it must “be an organized and structured procedure whereby employees are evaluated systematically according to a predetermined criteria”) (*citing EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980)); *Lauterbach v. Ill. State Police*, No. 12-CV-03228, 2015 WL 4555548, at *7 (C.D. Ill. July 28, 2015).

An employer’s merit-system defense to a plaintiff’s bonus claim was upheld where a greater number of employees—both male and female—did not receive bonuses, as compared with the four male employees who did receive them, and the employees who received the bonuses worked more hours than the plaintiff. *See Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 679 (S.D.N.Y. 1995).

3. Differences Pursuant to a System That Measures Earnings by Quantity or Quality of Production

Under the incentive system defense, an employer must show the existence of a bona fide incentive system based on either the quantity or quality of the work produced. 29 U.S.C. § 206(d)(1) (2000). In *Bence*, 712 F.2d at 1029, the Sixth Circuit held that the “quantity” test “refers to equal dollar per unit compensation rates.” Thus, there is no discrimination if two employees receive the same rate of pay for the same level of productivity, but one receives more total compensation because that employee produces more. *See id.* In this area, as in others, substance prevails over form and nomenclature. For example, a court will not merely accept an employer’s designation of earnings as “commissions” based on “quantity” of sales but will scrutinize the reality of the payment scheme. *See, e.g., Keziah v. W.M. Brown & Son, Inc.*, 888 F.2d 322, 325 (4th Cir. 1989) (the court scrutinized the employer’s contention that annual payments to its sales representatives were “draws” or “advances against commissions” and found that the payments in fact were “base salaries”).

4. Differences Pursuant to a Differential Based on Any Other Factor Other Than Sex

The EPA also contains a catch-all defense for differentials “based on any other factor other than sex.” *See* 29 U.S.C. § 206(d)(1) (2000). Much litigation has arisen under this section. In *Bence*, 712 F.2d 1024, 1031 (6th Cir. 1983), the court raised, but did not conclusively answer, the vital question of whether the “any factor other than sex” defense encompasses literally “any” factor or whether it is confined to factors traditionally and rationally used in job evaluation systems. *Id.* at 1030-31 (the legislative history of the Act tends to support the broader interpretation) (dictum); *cf. Fyfe v. City of Fort Wayne*, 241 F.3d 597, 600 (7th Cir. 2001) (“We have recognized that the Equal Pay Act’s [factor

other than sex] defense is a broad, catch-all exception that embraces a nearly limitless array of ways to distinguish among employees.”) (*citing Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994)). The employer, a health club, had argued that where sales opportunities were sex-segregated, it was justified in paying lower commission *rates* to women because the membership market for women was larger than that for men, and the employer had a legitimate policy of equalizing the *total remuneration* of its employees. *Bence*, 712 F.2d at 1031. The court rejected this argument because male employees selling memberships did not generate a greater economic benefit for the employer that would justify the commission differences. *Compare id. with Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 597 (3d Cir. 1973) (holding that a payment of higher salary to men assigned exclusively, for legitimate business reasons, to the men’s clothing department was justified; overwhelming evidence existed that the men’s department was more profitable than the women’s). The policy therefore, shunted women into inferior positions “regardless of their effort or productivity.” *Bence*, 712 F.2d at 1031. The Second, Sixth, Ninth, and Eleventh Circuits, but not the Seventh or Eighth, have suggested that this defense applies only to considerations adopted to serve legitimate business purposes.

It similarly remains unsettled whether the defense applies to a practice that has an adverse impact based on sex. Some circuits have interpreted the Supreme Court’s decisions in *Washington Cnty. v. Gunther*, 452 U.S. 161 (1981), and *City of Los Angeles, Dep’t of Water and Power v. Manhart*, 435 U.S. 702 (1978), to hold that disparate impact claims pursuant to the Equal Pay Act are precluded. *See, e.g., Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001) (“The Supreme Court [has] interpreted section 206(d)(1) of the Equal Pay Act to preclude disparate impact claims.”) and *Wernsing v. Department of Human Servs., State of Illinois*, 427 F.3d 466, 469 (7th Cir. 2005) (“[T]he Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate-impact component.”). Others have found the Supreme Court’s stance on this issue less clear. The Sixth Circuit, for example, has held that, even if the practice is lawful under the EPA because of the “factor other than sex” defense, it still may be unlawful under Title VII pursuant to the adverse impact theory. *J.C. Penney Co. Inc.*, 843 F.2d at 253 (where the “factor other than sex” defense bars an EPA claim, the wage disparity still may be unlawful under Title VII based on the adverse impact theory).

In *Deli v. Univ. of Minn.*, 863 F. Supp. 958, 960 (D. Minn. 1994), *overruled on other grounds by Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615 (8th Cir. 1995), the court held that the “factor other than sex” defense pertains to the gender of the plaintiff, not the gender of those supervised or served by the plaintiff. The plaintiff, a former head coach of the women’s gymnastics team, filed suit under the EPA claiming that the university discriminatorily paid her less than the head coaches of several men’s athletic teams. The plaintiff did not contend that the discrepancy in pay was based on her gender but, instead, alleged it was based on the gender of the athletes she coached. Granting the university’s motion for summary judgment, the court held that the “EPA prohibits discrimination based on the gender of the claimant only and does not reach compensation differentials based on the gender of student athletes coached by a claimant. Such compensation differentials are based on a ‘factor other than sex’ and thus are not proscribed by the EPA.” *Id.* at 961.

A contention by the plaintiff that she should have been paid more than a similarly-situated male employee based on factors the employer did not consider when making its compensation decision usually enjoys only limited success. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 616 (4th Cir. 1999) (arguing that employer’s evidence that male comparator had significant industry experience was not rendered pretextual by plaintiff’s evidence that comparator lacked bachelor’s degree and had been terminated from a position listed on his resume). In other situations, however, plaintiffs have successfully demonstrated pretext with evidence that goes beyond a specific challenge to the basis of the employer’s reason for compensating a particular employee of the opposite sex more favorably. *See Lederer v. Argonaut Ins. Co.*, No. 98 CV 3251, 2000 U.S. Dist. LEXIS 935, at *22 (N.D. Ill. Jan. 28, 2000) (denying employer’s motion for summary judgment where “plaintiffs point to [the]

defendant's history of paying male claims analysts more than female claims analysts, paying female supervisors less than their male subordinates, and hostility to their internal complaints of pay differentials"); *Wojciechowski v. Nat'l Oilwell Varco, L.P.*, 763 F. Supp. 2d 832, 853-54 (S.D. Tex. 2011) ("Because of the potentially sexist remark and the inconsistency in Defendant's explanation for the lower wages, summary judgment on Plaintiff's Equal Pay Act claims is not appropriate."), *citing* *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 190 (5th Cir.2001).

a. Training programs

In some cases arising under the EPA, the jobs are admittedly equal—those of bank tellers, for example—but the employer alleges that a difference in pay is based on the higher paid person's participation in a bona fide training program. Such programs, if bona fide, establish a valid defense. *See Saltzman v. Fullerton Metals Co.*, 661 F.2d 647, 652 (7th Cir. 1981) (a bona fide training program is a valid defense); *Odomes v. Nucare, Inc.*, 653 F.2d 246, 251 (6th Cir. 1981) (same).

Some employers have raised this defense essentially as an afterthought. For example, in *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969), the Fifth Circuit disregarded the claimed defense when it found that: (1) the higher paid male employees did not know they were trainees; (2) the program had not been reduced to writing and did not include formal instruction; (3) trainees were assigned to positions according to staffing needs rather than according to a training sequence; and (4) the program had never included a female. *Id.* at 654-55. *Hodgson v. Bebhrens Drug Co.* 475 F.2d 1041 (5th Cir. 1973), was a closer case. There, the program, though informal, did provide for: (1) a regular system of rotation through different jobs; (2) notice of the program on hiring; and (3) some formal instruction. Still, the defense failed; completion of the program did not necessarily mean advancement to the higher paid position, and in any event no woman had ever participated in the program. *Id.* at 1045, 1048.

b. Market rate/Prior salary history

The role played by the "market rate" has been, and continues to be, significant in EPA litigation. In *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), the defendant candidly conceded that it provided higher pay for men because "men would not work at the low rates paid women inspectors" and because such rates "reflected a job market in which [the employer] could pay women less than men for the same work." 417 U.S. at 189. The Supreme Court, although finding it understandable that the company took advantage of such a situation as a matter of economics, nevertheless held that the practice became illegal once the Equal Pay Act was enacted. *Id.*

Similarly, in *Beall v. Curtis*, 603 F. Supp. 1563 (M.D. Ga. 1985), *aff'd mem.*, 778 F.2d 791 (11th Cir. 1985), the court rejected the employer's market forces defense, reasoning that the EPA was intended specifically to counteract those forces in the market that "placed a different value upon the work of persons of different genders." *Id.* at 1579. And a defense claiming differences in rank as a factor other than sex justifying salary differentials is not valid where the employer discriminated against women with respect to rank placement at hire. *Chang v. Univ. of R.I.*, 606 F. Supp. 1161, 1229 (D.R.I. 1985) ("Inclusion of rank as a possible defense to an equal pay claim would be equivalent to permitting [the employer] to profit from its own wrongdoing.").

By presenting a more refined analysis, however, employers in recent cases have enjoyed success with market forces arguments. Although courts continue to reject the conclusory contention that "women will work for less," cases recognize that the market can play a role in determining the lawful wage for particular persons. *Grayboff v. Pendelton*, 36 Fair Emp.Prac.Cas. (BNA) 350, 356 (N.D. Ga. 1984) (rejecting the employer's defense that she "was willing to accept a lower level," where the female employee was highly qualified for a position at the GS 12 or GS 13 level but was hired only for a lower paying GS 11 level position); *See, e.g., Brinkley*, 180 F.3d at 615 (market rate defense

satisfied where employer “reviewed a resume and salary history, assessed its financial situation, compared its situation with that of other similarly situated entities, and negotiated with [the male comparator] to reach a mutually satisfying agreement as to an appropriate salary,” and followed same procedures when it evaluated plaintiff’s salary). In *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994), the employer attributed the salary differential between the plaintiff and her successor, in part, to the fact that the successor had negotiated a salary higher than originally offered, which was closer to his prior salary. The Seventh Circuit warned that “[s]uch evidence must be considered with some caution, of course, as undue reliance on salary history to explain an existing wage disparity may serve to perpetuate differentials that ultimately may be linked to sex.” *Id.* at 1462 (citation omitted). The court concluded, however, that because additional factors supported the salary differential (i.e., the successor had a master’s degree that related to his job and was hired almost a year after the plaintiff’s last pay raise), summary judgment for the employer was appropriate. *Id.*

The relevance of prior salary history is an issue frequently litigated. Although some cases have said that reliance on prior salary unlawfully perpetuates societal discrimination, others disagree. *See, e.g., Faust v. Hilton Hotels Corp.*, Civil Action No. 88-2640, 1990 U.S. Dist. LEXIS 10595, at *15-16 (E.D. La. Aug. 13, 1990) (reliance on prior salary would unjustly allow employers to perpetuate low wages for women). In *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982), the Ninth Circuit reversed and remanded a district court judgment that held that prior salary may never be a valid “factor other than sex” under the Act. Allstate computed the minimum salary it guaranteed to its new sales agents on the basis of ability, education, experience, and prior salary. *Id.* at 874. A result of this practice was that, on average, female agents were compensated less than their male counterparts. Allstate argued that prior salary was a legitimate tool to use in setting the minimum guaranteed salary for two reasons: if the guaranteed minimum for agents was much higher than the agent’s prior salary, s/he would not be motivated to sell, but would be content with the guaranteed minimum; if the guaranteed minimum for agents was much lower than the agent’s prior salary, s/he would not be willing to take the job with Allstate. *Id.* at 875. Allstate argued that prior salary would accurately predict a new employee’s performance. The plaintiff sued under Title VII on behalf of all agents because, she argued, prior salary drove the lower pay and prior salary was inherently discriminatory. *Id.* at 874. The court of appeal held that the employer must reasonably use salary history in light of its legitimate business interests. The court gave detailed instructions for examining the reasonableness of the employer’s use of prior salary in setting the minimum monthly salary for commissioned sales agents, including: (1) whether the employer also uses other predictors of the new employee’s performance; (2) whether the employer attributes less significance to prior salary once the employee has proven himself or herself; and (3) whether the employer relies more heavily on salary when the prior job resembles the job of a sales agent. *Id.* at 878.

In *Schaffer v. GTE, Inc.*, 40 F. App’x 552 (9th Cir. 2002), the plaintiff alleged that she was paid less than two male counterparts in violation of FEHA. GTE presented evidence that in setting initial salaries, it took into account a new hire’s background and prior salary, and claimed that this was a legitimate, non-discriminatory reason for the pay differential between the male and female employees. The district court granted GTE’s motion for summary judgment on the plaintiff’s pay claim because it showed, and the plaintiff did not rebut, that it had a non-discriminatory reason for the pay gap. The court of appeal affirmed the grant of summary judgment on plaintiff’s pay discrimination claims for the reasons set out by the district court. GTE showed that it paid the plaintiff less than the two comparator men because she had less relevant technical experience than the two men, and her prior salary was significantly lower than the two men’s starting salaries. This constituted a non-discriminatory reason for the difference in pay. GTE could justify difference in pay based on the men’s superior experience in working on a GTE-specific software program, even though proficiency in that software was not mentioned in the job description, because the job description specifically stated that it provided only a “brief outline of the position responsibilities and is not intended to be all inclusive of all aspects of the position.” *Id.* at 556.

Similarly, in *Foco v. Freudenberg-NOK General Partnership*, 549 F. App'x 340, 346 (6th Cir. 2013), the court of appeal affirmed the grant of summary judgment where the record demonstrated that the employer's "explanations for the pay differential are based on the personal knowledge of witnesses familiar with the job duties of the respective positions and the qualifications of the individuals performing in these positions."

In *Price v. Northern States Power Co.*, 664 F.3d 1186 (8th Cir. 2011), employer's merit-based performance evaluation system and red-circling policy of keeping transferee employees' base pay from their previous positions sufficiently established employer's affirmative defenses, since red-circling policy resulted in unequal starting salaries for employees, merit-based evaluation system resulted in different annual raises based on performance, and female employees' annual raises comported with annual raises of male employees who had same performance ratings. The court of appeal mentioned that plaintiffs had to do more than merely point to a raw difference in pay between men and women to prevail, stating that plaintiffs failed "to address the compounding effect that red circled starting salaries and differences in raises could have had on the current salaries. *Id.* at 1193."

In *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015), plaintiff earned a salary of \$47,382 per year, while a male comparator earned \$62,000 per year and another male comparator earned \$66,000 annually. The employer contended that the pay differential was based on the fact that it wanted to pay the male comparator who was making \$62,000 annually the same salary he received at a prior job. It further stated that it decided to pay the other male comparator \$66,000 a year because he rejected the employers initial salary offer of \$62,500. The district court granted summary judgment in favor of the employer, but the court of appeal reversed the district court's grant of summary judgment. The court of appeal stated that though an individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex, the EPA "precludes an employer from relying solely upon a prior salary to justify pay disparity." *Id.* at 1199, citing *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir.2003) (unpublished). With regard to the employer's contention that it paid one male employee a higher salary because he rejected the employer's initial salary offer, the court of appeal further stated that "a company's decision to pay an elevated salary to an applicant after he rejected a lower offer can constitute a factor other than sex." *Id.*, citing *Clayton v. Vanguard Car Rental U.S.A., Inc.*, 761 F. Supp. 2d 1210, 1273-74 (D.N.M. 2010). But this explanation only accounts for the difference between the employer's initial offer and the employee's salary; it does not account for the full pay disparity. *Id.*

In *Lewis v. Smith*, 255 F. Supp. 2d 1054 (D. Ariz. 2003), the plaintiff, a male assistant coach for the ASU women's basketball team, complained after a female assistant coach was given a starting salary that was significantly higher than his salary. The plaintiff sued for gender-based wage discrimination and retaliation under the EPA and Title VII. ASU argued that the new coach was paid more because the "market for her services was more competitive" and that she "needed a higher salary to lure her away from a head coaching job in California." *Id.* at 1062. In support of this, ASU presented evidence regarding the new coach's statements during negotiations, and that she had essentially demanded the higher salary. The district court denied ASU's motion for summary judgment on the plaintiff's Title VII disparate treatment claim (and granted ASU's motion for summary judgment on the plaintiff's EPA claim because the plaintiff did not demonstrate that he and the new coach had "substantially equal" positions). Relying on *Kouba*, the district court held that the evidence presented by ASU was insufficient to establish a "market forces" defense because ASU did not establish that the "market value of [the new coach's] skills was higher than the value of Plaintiff's skills." *Id.* at 1063 (emphasis in original). The court stated, "[m]erely relying on the prior salary of an employee, without analyzing the market value of the employer's skills, is insufficient to establish an equal pay defense." *Id.* at 1063. In addition, "[w]ithout some conclusive and undisputed evidence of [the new coach's] skills, Defendant cannot, as a matter of law, justify paying her more merely because of her prior salary." *Id.*

In *Wachter-Young v. Ohio Cas. Group*, 236 F. Supp. 2d 1157 (D. Or. 2002), the defendant purchased a company and hired all of the company's former employees at the same salary as they were paid by the preceding employer, pursuant to the terms of the purchase agreement between the companies. The defendant made no effort to review or adjust any salaries, although two of the 603 employees rehired received pay increases. The plaintiff, a female claims representative, alleged that she was paid significantly less for doing the same work as her male counterparts, and complained. Eventually, she sued for wage discrimination under the EPA and Title VII. In evaluating whether the defendant had established an affirmative defense of "factor other than sex," the court agreed with the defendant that the purchase agreement was an acceptable business reason for using prior salary. *Id.* at 1064-65. Prior pay can be part of a "mixed motive," but defendant could not rely "on prior pay alone" to explain the differences. *Id.* at 1065. Here, prior pay was one motive, and obtaining the economic benefit of the purchase agreement was the other. *Id.*

In *Garner v. Motorola, Inc.*, 95 F. Supp. 2d 1069 (D. Ariz. 2000), the plaintiff, an engineer, sued Motorola because she was paid significantly less than nine males in her department who were hired at approximately the same time as the plaintiff. Although there were some differences in their job responsibilities, the plaintiff claimed the jobs were substantially similar. After complaining about the pay disparity, the plaintiff received declining performance reviews and was eventually terminated. The plaintiff sued for pay discrimination under the EPA, Title VII and Arizona state law, among other things. Motorola alleged that "factors other than sex" explained the pay difference, and that, in setting employees' salary, Motorola considered years and type of experience, identity of past employers, level and focus of education and degrees, market conditions, past salary, and salary required to entice relocation. Motorola stated that these differences explained away all of the difference in pay between the plaintiff and the cited comparators. The district court found that Motorola provided credible evidence to establish its affirmative defense of "factor other than sex" based on its formula for setting salaries. However, the plaintiff's expert testified that "Motorola's pay factors were not consistently applied, that [similar] males consistently received larger raises once hired, that prior earning power was not applied equitably to females, and that Motorola did not seem to have a bona fide merit system." *Id.* at 1077. On this basis, the court declined to grant Motorola's motion for summary judgment.

In *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995), the plaintiff, a criminal investigator in the sheriff's department, sued for pay discrimination after two male criminal investigators were hired at significantly higher salaries upon transferring from elsewhere in the city government. The defendant argued that the salaries of the two males were set in part due to a seniority system and based on their prior pay, both of which should provide affirmative defenses to the plaintiff's EPA claims. The court of appeal affirmed the district court's grant of summary judgment, finding that although the defendant had not demonstrated a bona fide merit system, and that it couldn't rely on prior salary to justify pay discrepancies, the defendant's assessment of the skills and background of each employee justified the differences in pay. In discussion of use of prior salary as a justification for pay disparity, the court stated that "[w]e have consistently held that 'prior salary alone cannot justify pay disparity' under the EPA." *Id.* at 955.

In *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988), the plaintiffs, three female employees, sued for discrimination under the EPA because they were paid lower salaries than their male equivalents. General Motors argued that the pay differential was caused by its policy against requiring employees to take pay cuts when transferring to salaried positions, which constitutes a "factor other than sex" under the EPA. Men more often transferred from paying positions, resulting in a pay discrepancy between men and women in the job. At trial, the district court judge found for the plaintiffs and awarded damages. The jobs were "substantially equivalent" and defendant failed to prove its affirmative defense of a "factor other than sex." The "policy" cited was not an actual policy, but "merely one aspect of a practice" which unjustifiably resulted in sex discrimination. *Id.* at 1570. The court of appeal affirmed the district court's finding for the

plaintiffs' on their pay claims. The court stated, the "argument that supply and demand dictates that women qua [sic] women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected." *Id.* (citations omitted). Moreover, "[P]rior salary alone cannot justify pay disparity." *Id.* at 1571.

In *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503 (11th Cir. 1988), NASA consolidated 12 service contracts into a single contract. As part of the bidding process on the new consolidated contract, Lockheed hired a number of former subcontractors (including the plaintiff), setting their salaries at the (generally lower) level they had been paid by prior employers. This was done, Lockheed argued, to ensure that it had a low bid to submit to NASA. At the same time, Lockheed implemented a plan to gradually reduce any inequalities that resulted from merging salary structures. The plaintiff worked as a technical writer, drafting step-by-step instructions on the operation of equipment related to space shuttle launches. She was the only African-American in the 25 person group of technical writers, and one of three females. She received lower pay than 22 of her co-writers. When the plaintiff's salary was still so low over a year after Lockheed hired the plaintiff, the plaintiff sued under the EPA and § 1983. The court of appeal reversed the district court's granting Lockheed's motion for a directed verdict on the plaintiff's EPA claims because the plaintiff had produced sufficient evidence to present an EPA case to the jury. The court of appeal noted that Lockheed could rely on prior salary alone; to allow Lockheed to do so "would require this court to contravene Congress' intent and perpetuate the traditionally unequal salaries paid to women for equal work." *Id.* at 1506.

In *Derouin v. Litton Indus. Prods.*, 618 F. Supp. 221 (E.D. Wis. 1984), the court held that a policy of basing a promoted employee's salary on the employee's *pre*-promotion salary was a "factor other than sex" justifying the difference between male and female employees' salaries, even though the policy operated to the disadvantage of persons initially hired at lower salaries. The court observed that there were several non-sex related reasons underlying the employer's policy, including: (1) budgetary control; (2) incentives for employee performance; (3) the ability to compete with other employers for new hires; and (4) the ability to manage distinctions in supervisory salaries between supervisors in different departments. *Id.* at 225. Because the same policy was applied to all employees regardless of sex, and the facts did not reveal that the policy had a significantly greater adverse impact upon women, the court concluded that the policy provided a valid defense to the plaintiff's claims. *Id.* Similarly, a court upheld a compensation decision by Brown University to increase the salary of an associate professor over an opposite sex peer in the same field in order to meet a competing offer from another university. See *Winkes v. Brown Univ.*, 747 F.2d 792, 794 (1st Cir. 1984) (the university matched a female professor's competing offer, which resulted in an increase in the salary of the female over her male peer).

Some cases involve wage differential policies pertaining to those who change jobs within the same employer. In *Covington v. Southern Illinois Univ.*, 816 F.2d 317 (7th Cir. 1987), the Seventh Circuit upheld a differential resulting from a sex neutral policy of maintaining an employee's salary upon a change of assignment within the university. The court reasoned that such a salary retention policy qualifies as a "factor other than sex" because the EPA does not preclude an employer "from implementing a policy aimed at improving employee morale when there is no evidence that that policy is either discriminatorily applied or has a discriminatory effect." *Id.* at 322-23 (the salary retention policy "avoids the serious problem of 'unmerited' pay reductions"); see also *Taylor v. White*, 321 F.3d 710, 717-18 (8th Cir. 2003) (refusing to establish *per se* limitation to the "factor other than sex" defense that would render impermissible an employer's reliance upon a salary retention policy as an affirmative defense; accepting as "factor other than sex" employer's salary retention policy of maintaining a skilled employee's salary upon temporary change of assignment despite fact that temporary assignment may be less demanding or require less skill); *Steger v. General Elec. Co.*, 318 F.3d 1066, 1078 (11th Cir. 2003) (accepting as affirmative defense employer's salary retention policy that employer uniformly applied without regard to sex). But see *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567,

1570 (11th Cir. 1988) (paying persons—mostly males—higher wages because they transferred from higher paying positions is not a legitimate factor). According to the court, an employer should be allowed to take into consideration the wage it paid an employee in another position “unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex.” *Covington*, 816 F.2d at 323. The court in so holding also reaffirmed the Seventh Circuit’s position that a “factor other than sex” need not be related to the requirements of the particular position in question. *Id.* at 322. Similarly, in *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 726 (4th Cir. 1980), the Fourth Circuit held that the exception for any “factor other than sex” permitted the use of different salary setting programs for incumbent employees versus employees recruited from outside the company.

G. Remedies

Title VII and the EPA have different remedial structures and authorize different types of remedies. *See, e.g., Hildebrandt v. Illinois Dep’t of Natural Res.*, 347 F.3d 1014, 1031-32 (7th Cir. 2003) (remanding Title VII wage disparity claim in part because of the possibility that plaintiff could recover more under Title VII than she did under the EPA). Nevertheless, EPA suits are often brought in conjunction with Title VII laws, and the difference in remedies loses much of its significance.

Sections 16 and 17 of the FLSA set forth the remedies available for EPA violations. *See* 29 U.S.C. §§ 216-17 (2000). Section 16(a) creates criminal liability for willful violations, but this is rarely invoked. In addition to suits by employees under § 16(b), the government (previously the Secretary of Labor, now the EEOC) has long been permitted to file suit under § 16(c) to collect wages due employees.

1. Front Pay

Title VII allows a front pay remedy, but the EPA does not. *Hildebrandt*, 347 F.3d 1014 (7th Cir. 2003).

2. Back Pay

If a plaintiff can establish that the defendant’s violation of the EPA was willful, she may recover damages for up to three years of back pay prior to filing suit, as compared to two years’ back pay without a showing of willfulness. *See* 29 U.S.C. § 255(a) (2000). Title VII allows only two years’ worth of back pay.

In addition to salary, a plaintiff can recover back pay under the EPA for non-reimbursed expenses if those expenses are linked to the plaintiff’s equal pay claims. *See Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871, 952-53 (D. Minn. 2014) (holding that plaintiff was entitled to back pay for her non-reimbursed travel expenses when her male colleague was approved for reimbursement, but that she was not entitled to back pay for non-reimbursed health insurance benefits when those were denied for reasons other than sex).

Where wage differences are due in part to sex discrimination and in part to lawful factors (*e.g.*, experience), a court may fashion a back pay award that remedies only the discriminatory basis for the disparity. *See, e.g., EEOC v. Whitin Mach. Works, Inc.*, 699 F.2d 688, 689 (4th Cir. 1983) (the district court reached an equitable result when it found that 20% of the male’s higher salary was due to his six years of seniority and then ordered the employer to pay the plaintiffs back pay based on 80% of the male employee’s salary until they too obtained six years of experience in their positions).

The Eleventh Circuit has determined that the “after-acquired evidence” doctrine set forth in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), a case involving an alleged violation

of the ADEA, applies to claims brought pursuant to Title VII and the EPA. *See Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 378 (11th Cir. 1995). As to a discharged employee's claim for lost wages under the EPA in such circumstances, the court concluded that back pay would be calculated up to the date the employer discovered the plaintiff's resume fraud. *Id.* at 379.

3. Liquidated Damages

In addition to lost wages, a successful EPA plaintiff may be entitled to liquidated damages in an amount equal to lost wages. *See* 29 U.S.C. § 216(b) & (c) (2000). But the right to liquidated damages is not absolute. Section 11 of the Portal to Portal Act of 1947, 29 U.S.C. § 260 (2000), authorizes a court to deny liquidated damages, in whole or in part, if the employer proves that it acted in "good faith" and had "reasonable grounds for believing" that its actions did not violate the FLSA.

However, unlike the ADEA, an employer cannot avoid liquidated damages under the EPA just because its violation was not "willful." Although an ADEA determination of willfulness serves both as the basis for an award of liquidated damages and as grounds to extend the limitations period, the EPA refers to "willful" violations only in connection with the statute of limitations. Consequently, a liquidated damages award is an appropriate remedy for an EPA violation unless the employer proves that it acted in good faith and with reasonable grounds to believe that it was complying with the EPA. *See, e.g., Joiner v. City of Macon*, 814 F.2d 1537, 1538-39 (11th Cir. 1987) (an employer who violates the EPA is liable for liquidated damages unless it can prove that its violation was in good faith and based upon reasonable grounds).

The concepts of "willfulness" and "good faith"/"reasonable grounds" would seem to be clearly related. But courts often confuse them, and they also disagree on which standard embraces a higher standard of culpability. Many courts say that where a finding of willfulness is made for purposes of the limitations period, it necessarily precludes a determination that the employer acted in good faith. *See, e.g., EEOC v. City of Detroit Health Dep't*, 920 F.2d 355, 358 (6th Cir. 1990) (the jury's finding of a willful violation is inconsistent with the judge's finding that the employer acted in good faith and with reasonable grounds for believing that its acts or omissions were not in violation of the EPA). Similarly, it does not necessarily mean that the employer acted in good faith simply because the violation is held not willful. *See, e.g., EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 364 (8th Cir. 1994) (although the violation was held not willful, the court did not find that the employer acted in good faith). But other cases suggest that an employer can act willfully and in good faith at the same time. *See, e.g., Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 163 (4th Cir. 1992) (in light of Congress' delegation of authority in Section 260, expressly vesting discretion to award liquidated damages in the hands of the trial judge, the trial court's discretion to award liquidated damages is not constrained by the jury's determination on willfulness for purposes of the statute of limitations).

One court has held that liquidated damages may be awarded for the period during which a discriminatory wage differential existed, notwithstanding a retroactive pay adjustment covering that period. *See Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1099 (D.C. Cir. 1984).

Courts have upheld defenses to liquidated damages liability based on reliance upon a legal opinion, EEOC advice, or a plausible, even if ultimately invalid, wage comparison. *See, e.g., Hill v. J.C. Penney Co. Inc.*, 688 F.2d 370, 375 (5th Cir. 1982) (the employer relied on the advice of counsel in deciding to maintain its policy of paying different wages; this insulated the employer from an award of liquidated damages, but not from a finding of willfulness for limitations period purposes); *See, e.g., EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700, 707 (S.D. Ohio 1990) (reliance on the advice of an EEOC representative constitutes reasonable grounds for an employer's belief that it is in compliance with the EPA); *See, e.g., Chymore v. Far-Mar-Co. Inc.*, 709 F.2d 499, 505 (8th Cir. 1983) (reversing the district court's award of liquidated damages where the employer, in good faith, paid the plaintiff the same wage as her immediate predecessor). *See also Maron v. Va. Polytechnic Inst. & State Univ.*, Civil Action No. 7:08-cv-00579, 2011 WL 2580639, at *3 (W.D. Va. June 29, 2011), *aff'd*

in part, rev'd in part on other grounds, 508 F. App'x (Table) 226, 234 n.4 (4th Cir. 2013) (overt and clear anti-discrimination policies, anti-discrimination training, reviews of available data to ensure that initial salaries conformed to the market, consultation with an in-house compensation analyst, and an Office of Federal Contracts Compliance audit that found no violation of federal law indicate that the employer objectively acted in good faith). But conformity to industry practices, even when coupled with concurrence by a union, may be inadequate. *See Thompson v. Sanyer*, 678 F.2d 257, 282 (D.C. Cir. 1982) (affirming the district court's award of liquidated damages even though the employer contended that it acted in good faith by setting the company's wage rates through negotiations with the union). Ignoring complaints of pay disparity has been held to be probative both of the existence of willfulness and the absence of good faith. In *EEOC v. State of Delaware Dep't of Health & Soc. Servs.*, 865 F.2d 1408 (3d Cir. 1989), the court held that a jury could properly find a willful violation where the defendant's personnel officer was informed of complaints regarding pay disparities but did not investigate them.

Unlike Title VII, under the EPA, liquidated damages for retaliation claims are uncapped. 29 U.S.C. § 206(b)(2000); *see Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 545 (7th Cir. 1991) (EPA permits certain specified remedies "without limitation").

4. Punitive Damages

Unlike under Title VII, punitive damages are generally unavailable under the EPA. *See Guest-White v. Checker Leasing, Inc.*, Cause No. 1:14CV172-SA-DAS, 2016 WL 595407, at *6 (N.D. Miss. Feb. 11, 2016) (not allowing punitive damages because the EPA contains no provision authorizing a punitive award). However, punitive damages may be available in EPA retaliation cases upon a showing of malice or reckless indifference. *See Jones v. Amerihealth Caritas*, 95 F. Supp. 3d 807, 815-18 (E.D. Pa. 2015) (applying analysis of punitive damages for other FLSA violations to an EPA case and holding that punitive damages are available for retaliation claims under the EPA).

5. Compensatory Damages for Pain and Suffering

Plaintiffs generally cannot recover compensatory damages under the EPA. *Hybki v. Alexander & Alexander, Inc.*, 536 F. Supp. 483 (W.D. Mo. 1982). However, some courts have entertained compensatory damages for pain and suffering. *See Ewald*, 82 F. Supp. 3d at 955-56 (stating that it is unclear whether emotional distress damages may be included under the EPA's grant of "legal or equitable relief," but nevertheless concluding that such damages were available under the Minnesota Human Rights Act); *see also Jones*, 95 F. Supp. 3d at 818 (comparing Court of Appeals cases regarding emotional distress damages in FLSA retaliation cases and holding that compensatory damages are available for a retaliation claim under the EPA and FLSA).

6. Prejudgment Interest

Courts have differed on the availability of prejudgment interest on back pay. *Compare Marshall v. Central Kan. Med. Ctr.*, 29 Fair Emp.Prac.Cas. (BNA) 1817, 1825 (D. Kan. 1981) (court awarded prejudgment interest on back pay in a suit by Secretary of Labor, reasoning that defendant had been unjustly enriched by use of the money during the time that female employees were damaged), *aff'd sub nom EEOC v. Central Kan. Medical Ctr.*, 705 F.2d 1270 (10th Cir. 1983) and *Ewald*, 82 F. Supp. 3d at 960 (stating that prejudgment interest is available if the back pay awarded was "reasonably capable of being ascertained at the time of the discriminatory act") (citations omitted) *with Hill v. J.C. Penney Co. Inc.*, 688 F.2d at 375 n.4 (the Fifth Circuit does not allow prejudgment interest in FLSA cases) and *Garner v. G.D. Searle Pharm. & Co.*, Civil Action No. 2:90cv688-MHT, 2013 WL 568871, at *3 (M.D. Ala. Feb. 14, 2013) (the Eleventh Circuit does not allow prejudgment interest in a private FLSA action). However, even those courts allowing prejudgment interest do not grant it in addition to liquidated damages, because the latter eliminates any justification for the former. *See, e.g., Joiner v.*

City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987) (prejudgment interest is not available in addition to liquidated damages; any prejudgment interest awarded by the district court must be credited against the liquidated damages award).

7. Postjudgment Interest

Postjudgment interest should be calculated pursuant to the formula in 28 U.S.C. section 1961. *See Laffey*, 740 F.2d at 1103. Section 1961 applies to “any money judgment in a civil case recovered in a district court” and expressly provides for fluctuations in interest rates.

8. Attorneys’ Fees

The EPA specifically authorizes an award of attorney’s fees and costs to prevailing private parties, as does Title VII. The statute does not, however, mention the recovery of expert witness fees. *See Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1574-75 (11th Cir. 1988) (denying expert fees). Neither section 16(c) nor section 17 provides for recovery of attorney’s fees by the government as a prevailing party.

“Reasonable attorneys’ fees” are often calculated by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate,¹ and then adjusting for certain factors, including the degree of the plaintiff’s success in the action. *See, e.g., Andrews v. City of N. Y.*, 118 F. Supp. 3d 630, 638 (S.D.N.Y. 2015), and *Hall v. Siemens VDO Auto. Elecs. Corp.*, No. 5:06-CV-1208-SLB, 2014 WL 1329553, at *4-5 (N.D. Ala. Mar. 31, 2014). In terms of the “success of the case,” at least one court has taken into account not just the judgment recovered, but also the significance of the legal issue at stake and the public purpose served by the litigation. *See Ewald v. Royal Norwegian Embassy*, Civil No. 11-CV-2116, 2015 WL 1746375, at *7 (D. Minn. Apr. 13, 2015) (considering the public’s interest in “providing a fair playing field in the work world” when determining attorneys’ fees) (citations omitted).

At least one court has found that attorneys are not entitled to a percentage of a class’s “common fund” unless (1) statutory attorneys’ fees are not available, or (2) such a percentage is specified in a contingent-fee agreement. *See Andrews*, 118 F. Supp. 3d at 636.

9. Injunctive Relief

Section 17 of the FLSA allows for injunctive relief. *See* 29 U.S.C. § 217 (2000). Under certain circumstances, at least one court has held that a promotion may constitute a proper remedy for an EPA violation. *See Jehle v. Heckler*, 603 F. Supp. 124, 127 (D.D.C. 1985) (promotion of a female employee to a higher classification, where she had already been performing work required in that classification, could be granted as an EPA remedy even though the statute does not expressly confer such a remedy). According to another court, the EPA in some circumstances may permit a front pay award as a remedy, notwithstanding the different remedial provisions between the EPA and Title VII. *See Thompson v. Sawyer*, 678 F.2d 257, 293 (D.C. Cir. 1982) (analyzing the consequences of the overlapping remedies available to a plaintiff who alleges wage discrimination under both the EPA and Title VII).

¹ The reasonable hourly rate is determined by looking at prevailing market rates in the community for attorneys with similar skills and experience. *Andrews*, 118 F. Supp. 3d at 638.