The Differing Court Approaches To Pay Equity Questions

By Ryan Glasgow, Meredith Gregston and Drei Munar
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Pay equity is a hot topic for employee retention and compliance.[1]

This principle of equal pay for equal work has been mandated since the Equal Pay Act of 1963 and reiterated in Title VII of the Civil Rights Act of 1964.

But more recently, legislators at the federal, state and local level have increased their focus on pay equity and pay transparency initiatives.

Because of this legislative activity, pay equity has also received increased attention from the plaintiffs bar, and in recent years, pay equity lawsuits have been brought with increasing frequency.

Against this backdrop, employers face the tough task of navigating an increasingly complex patchwork of pay equity laws in order to achieve fair and legally compliant compensation practices, while ensuring that their compensation decisions can reflect the reality of a workforce with differing job positions, responsibilities and performance outcomes.

This brings us to one of the principal questions in a pay equity claim: What is "equal work"?

To prove a claim under the Equal Pay Act, an employee must show that the jobs being compared are "substantially equal."

Unlike the EPA, there is no requirement under Title VII that the jobs being compared must be substantially equal; instead, Title VII focuses on "similarly situated" employees. At the state level, different variations of these standards proliferate.[2]

Who Counts as a Comparator Performing Equal Work for Greater Pay?

In assessing a pay discrimination claim on the basis of a protected characteristic — like sex, sexual orientation, gender, gender identity or expression, race, color, ethnicity, national orientation, religion, creed, familial status, marital status, veteran status, domestic victim status, disability and/or age — one commonality between all jurisdictions is the courts' focus on comparators, or individuals who are not members of a plaintiff's protected class.

For example, in Freyd v. University of Oregon in 2021, the U.S. Court of Appeals for the Ninth Circuit considered the case of a female professor who brought an EPA suit against a state university for pay discrimination.[3] The Freyd court held that the plaintiff professor's four comparators were appropriate comparators because they all performed a "common core" of tasks and did "substantially equal work."[4]

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The court reached this conclusion despite the fact that the comparators performed different research, did not teach the same courses, did not supervise the same doctoral students, did not manage the same centers, and obtained different types of funding.

According to the Ninth Circuit, it was the "overall job" and not "its individual segments" which formed the basis for comparison.[5] Freyd, therefore, cautions against drawing overly fine distinctions in deciding whether a plaintiff and her comparators perform "substantially equal work."[6]

In a different, albeit similar, pay discrimination case, the U.S. Court of Appeals for the Fifth Circuit considered the question of comparators, but reached a different conclusion under Title VII.

As noted above, a pay discrimination plaintiff in a Title VII case must prove, among other things, that other similarly situated employees outside the plaintiff's protected class were treated more favorably.

In Saketkoo v. Administrators of Tulane Education Fund, the Fifth Circuit in 2022 held that the cited comparators did not share the plaintiff professor's research responsibilities, section assignments or historical performances. As a result the Fifth Circuit held that the plaintiff could not establish a case of sex discrimination under Title VII.[7]

Even when courts are analyzing the same pay discrimination statute, the courts take different approaches to the comparator analysis.

For example, in contrast to the Ninth Circuit's focus in Freyd on a common core of tasks and an employee's overall job under the EPA, in January in Polak v. Virginia Department of Environmental Quality, the U.S. Court of Appeals for the Fourth Circuit held that in making a finding of substantially equal work under the EPA, the "[s]imilarity of work is not enough."[8]

Rather, according to the Fourth Circuit, the proffered "comparator [needs] to have performed work 'virtually identical' (or the apparent synonym, 'substantially equal') to the plaintiff's in skill, effort, and responsibility."[9]

Polak considered the case of a female coastal planner who worked for a state environmental agency.

While the plaintiff and her male comparator — also a coastal planner — were both members of the same working team, worked closely together, and collaborated on issues of planning, grant progress, and program performance, the Fourth Circuit concluded that only "the general description of their work was similar."[10]

Like the plaintiff and her comparators in Freyd, the plaintiff and her comparator in Polak had different responsibilities involving different projects. The Fourth Circuit made several key observations.

First, the plaintiff's and her proposed comparator's background, experience, and the subject matter for which they were tasked differed.

Second, the Polak court reasoned that "Polak could not have full comparative knowledge of both [her comparator's] job and hers, as they each performed their work simultaneously in different contexts and on distinct projects to which each were assigned."[11]

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As a result, the Fourth Circuit held that the plaintiff and her comparator did not perform "equal work," but acknowledged that they did perform "similar work."

Importantly, the Polak court noted "the differences in the actual worked performed and the level of complexity involved were significant enough that their work cannot be fairly described as 'substantially equal' or 'virtually identical,' as required to establish a claim under the Equal Pay Act."[12]

As a result, unlike the Ninth Circuit, a "common core of tasks" is not enough to meet the EPA's substantially equal standard in the Fourth Circuit.

Similar to the Fourth Circuit in Polak, in 2002 the U.S. Court of Appeals for the Tenth Circuit held in Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. that the equal work requirement of the EPA is "not to be construed broadly."[13]

According to the Tenth Circuit, "[l]ike or comparable work does not satisfy this standard, and it is not sufficient that some aspects of the two jobs were the same."[14]

What Are Some Defenses to Pay Discrimination Claims?

Recent pay equity cases have focused on the relative job experience of plaintiffs with their purported comparators.

In 2021, in Nazinitsky v. INTEGRIS Baptist Medical Center Inc., the Tenth Circuit dismissed the plaintiff's EPA and Title VII claims because the plaintiff was a first-year physician and her comparators had at least seven years' or more experience.[15]

In 2022, in Schottel v. Nebraska State College System, the U.S. Court of Appeals for the Eighth Circuit dismissed a professor's pay discrimination claims for similar reasons.16 There, the comparator had five years of experience teaching, and 10 years of experience as a caseworker and case manager at a nearby correctional institute.

In contrast, the plaintiff had no teaching experience and only three years' relevant professional experience as a probation officer.[17]

In another ruling from 2022, the Eighth Circuit in Mayorga v. Marsden Building Maintenance LLC dismissed a pay discrimination claim under Iowa state law involving a cleaner for a building maintenance company who was not offered a position in the special services department.[18]

The court held that the pay differential was due to differences in experience. One male comparator operated the relevant machinery for the special services position in a previous special services position with another company. Another male comparator had over a decade of experience in cleaning services and special services combined. In contrast, the plaintiff had only ever worked in general cleaning services.[19]

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Are There Alternatives?

Another 2022 case — Korty v. Indiana University Health Inc. — focused on a more formalized and proactive way to ensure pay equity — the practice of internal equity.[20]

There, the U.S. District Court for the Northern District of Indiana considered the practice of assessing new hires' compensation rates against incumbent employees' pay rates to ensure that current and new employees in the same job code have consistent rates of pay.

In Korty, the employees who hired a new nurse compared the pay rates of 10 other clinical nurse quality coordinators in other job locations. The court held that this practice of internal equity was "a sex-neutral basis for coming up with [the plaintiff's] salary."[21]

As such, any differential in pay was not attributable to sex.

The Korty court also held that an employee's prior salary is also a valid reason "other than sex" to explain a pay differential.[22] However, employers should be cautious in relying on prior salary to justify any pay differentials.

For example, the Ninth Circuit, in its 2018 Rizo v. Yovino ruling, held that "prior salary alone or in combination with other factors cannot justify a wage differential" because, otherwise, employers could "capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum."[23]

The opinion was vacated on unrelated grounds but sheds a light on how some courts will view an employee's prior salary in disputes over pay differentials.[24]

As is evidence from the discussion above, the differences between laws and jurisdictions create a complicated pay equity patchwork for multistate employers to navigate.

To avoid any pitfalls in making compensation decisions, employers may want to take a few practical steps, including:

- Reviewing jobs under the appropriate lens — depending on jurisdiction — to determine comparators;
- Performing proactive, privileged pay equity analyses, thoroughly analyzing indicators in such analyzes;
- Analyzing performance ratings; and
- Training managers not only on compensation philosophies and principles of the company but also how to appropriately have the "tough'" conversations when pay complaints arise.

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Notes

1.) https://www.huntonlaborblog.com/2023/03/articles/equal-fair-play/states-push-pay-reporting-requirements-in-effort-to-ensure-pay-equity/; https://www.huntonlaborblog.com/2023/04/articles/equal-fair-play/pay-disclosure-and-transparency-efforts-across-the-country/; https://www.huntonlaborblog.com/2023/05/articles/employment-policies/pay-equity-a-patchwork-legal-landscape/.

2.) https://www.huntonlaborblog.com/2023/05/articles/employment-policies/pay-equity-a-patchwork-legal-landscape/.

3.) Freyd v. Univ. of Oregon , 990 F.3d 1211 (9th Cir. 2021).

4.) Id. at 1220.

5.) Id.

6.) Id.

7.) Saketkoo v. Administrators of Tulane Educ. Fund , 31 F.4th990, 999 (5th Cir. 2022).

8.) Polak v. Virginia Dep't of Env't Quality , 57 F.4th 426, 430 (4th Cir. 2023).

9.) Id.(emphasis in original).

10.) Id. at 430.

11.) Id.at 431 (emphasis added).

12.) Id. at 432 (emphasis in original).

13.) Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222 , 297 F.3d 1146, 1149 (10th Cir. 2002).

14.) Id.

15.) Nazinitsky v. INTEGRIS Baptist Med. Ctr., Inc. , 852 F. App'x 365, 368 (10th Cir. 2021).

16.) Schottel v. Nebraska State Coll. Sys. , 42 F.4th976 (8th Cir. 2022).

17.) Id. at 982.

18.) Mayorga v. Marsden Bldg. Maint. LLC , 55 F.4th 1155 (8th Cir. 2022)..

19.) Id. at 1161.

20.) Korty v. Indiana Univ. Health, Inc. , No. 4:21-CV-33-PPS, 2022 WL 17830485 (N.D. Ind. Dec. 21, 2022).

21.) Id. at *6.

22.) Id. at *5.

23.) Rizo v. Yovino , 887 F.3d 453 (9th Cir. 2018).

24.) See Yovino v. Rizo , 139 S.Ct. 706 (2019).

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