



## Pay Equity Litigation – Even winning can be expensive!

Insights

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The 3rd Circuit's affirmation of summary judgment in a pay equity case after ten years of litigation shows that even non-meritorious claims can be time-consuming and costly. As many who have been involved in lawsuits know, they typically are costly and sometimes move about as swiftly as a tortoise on the back of a snail covered in molasses. And, unfortunately—and especially for defendants in employment-related cases—the longer they last typically the more expensive they are to defend.

Barring any further appeal, the 3rd Circuit Court of Appeals, on November 6, 2017, finally put an end to a lawsuit filed against Pennsylvania State University by pharmacological professor Joan Y. Summy-Long over ten years earlier for pay discrimination and retaliation, by affirming the district court's ruling granting summary judgment in Penn State's favor on all counts.

Summy-Long started working at Penn State in 1969, received her Ph.D. in 1978, was promoted to associate professor in 1983, was granted tenure in 1984, and became a full professor in 1992. In 1999, Summy-Long and a female colleague formed the Women's Faculty Group and, shortly thereafter, identified salary equity for women as a concern, and raised the issue to administrators. Soon after, Penn State commissioned two studies of its College of Medicine; the second by an independent expert, which found a non-statistically significant difference between male and female faculty members' pay for the 2001-2002 academic year. While the study drew no conclusions as to what caused that difference, Penn State nonetheless increased its female faculty members' salary by 3.8%.

In the following years, Penn State maintained, Summy-Long underperformed her male colleagues in a number of ways, including, but not limited to, her limited publications, her failure to obtain external grant funding, her failure to renew an important grant, and her refusal to accept a committee chair position. Consequently, her salary remained lower than her male counterparts who did not have her performance issues.

On June 2, 2006, Summy-Long filed her lawsuit against Penn State and related entities and individuals in the United States District Court for the Middle District of Pennsylvania, claiming pay discrimination on a number of legal theories, as well as retaliation. After over ten years of litigation (during which Summy-Long hired and fired five attorneys), the United States District Court for the Middle District of Pennsylvania, on December 27, 2016, granted summary judgment on all counts in Penn State's favor, and Summy-Long appeal appealed.

**Pay Discrimination under Title VII of the Civil Rights Act.** The 3rd Circuit agreed Summy-Long failed to present any admissible evidence showing either (1) circumstances giving rise to an inference of sex discrimination in pay, or (2) Penn State's legitimate, non-discriminatory reason for paying her less than her male counterparts—her limited publications and deficient grant activity—was false and a pretext for discrimination. The Court agreed the study showing a pay disparity in 2001-2002 was irrelevant to what happened in later years and, in any event, was not in any way probative of whether the decision to pay her the salary she was paid was motivated by discriminatory animus, noting the limitations of statistical data for making such a showing. Finally, the Court agreed Summy-Long had waived any right to bring a disparate impact claim (which she only raised for the first time on summary judgment) which, in any event, also would fail on its merits.

**Pay Discrimination under the Equal Pay Act.** The 3rd Circuit similarly agreed Summy-Long had failed to present admissible evidence showing an Equal Pay Act violation. To prevail on such a claim, a plaintiff first must show employees of the opposite sex were paid more for performing work under similar conditions that required substantially equal skill, effort, and responsibility. If she can do so, the burden then shifts to the employer to show the pay differential at issue resulted either from (1) a bona fide seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) some other differential based on any factor other sex (i.e., the catch-all provision). Ultimately, the Court found Summy-Long's pronounced performance deficiencies meant she could not establish any appropriate comparators and, even assuming she could, Penn State's merit-based compensation system and justification was sound.

The Court affirmed summary judgment on Summy-Long's other claims against Penn State as well.

In his 107-page opinion on summary judgment, the District Judge quoted T.S. Eliot several times, and included colorful analogies to explain his view of Summy-Long's case:

One might analogize that Plaintiff set out to build a magnificent home, a home full of intricate designs whose construction required a certain precision, strategy, and skill. However, over the course of ten years, the Plaintiff, for whatever reasons, fired five different architects and raised picayune issues that further delayed construction and sometimes, even halted it altogether.

It can come as no surprise now looking back that the final product remains unfinished, a conglomerate of distinct styles and divergent priorities. Yet, even the most ornate blueprints, if not the beneficiary of proper care, can disappoint the builder in the long run—particularly if, as here, she has quite plainly lost sight of that ultimate goal years ago.

While the analogy may be apt, it does not account for the impact Summy-Long's designs and actions had on the defendants in the case—namely, the requirement that they expend extensive time, resources, and legal fees over a ten-year period to defend against her legal claims. While this case may be an outlier insofar as the time these cases tend to take to run their courses, it highlights the fact that defending pay equity cases—even those lacking in merit and warranting summary judgment—can be very time-consuming and expensive. While employers cannot entirely eliminate

judgment—can be very time-consuming and expensive. While employers cannot entirely eliminate the risk of such claims, they would be well-served to take any and all reasonable steps they can to reduce such risk, including by affirmatively conducting pay equity audits to identify and rectify any potentially illegal pay gaps.

Visit [Pay Equity](#) for a list of attorneys who are members of the Fisher Phillips Pay Equity Practice Group.

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