



# Federal Appeals Court Breathes New Life Into Pay Equity Claim, While Imposing Higher Standard On Employers

Insights

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The 4th Circuit Court of Appeals just forced a public employer back into court to defend itself against a pay equity claim after a lower court had dismissed the lawsuit and cleared the employer from wrongdoing. In resurrecting the claim on behalf of three female employees, the appeals court created a more rigid standard of proof that will make it harder for employers to win pay equity claims and should incentivize businesses to examine their own compensation practices.

The January 5 decision aptly demonstrates that courts are still struggling with interpreting the 1963 Equal Pay Act (EPA), the federal statute that prohibits employers from paying employees less than other employees based on their gender. Although the decision came in a case against a public state agency, the EPA applies equally (pun intended) to private employers as well as state agencies, so the 4th Circuit's tough interpretation regarding the employer's burden in these cases may be equally applied to those employers in the private sector.

The case began when the Equal Employment Opportunity Commission (EEOC) brought an action on behalf of three female fraud investigators against a Maryland state agency. When the EEOC announced the suit in April 2015, it sent a strong signal that it would closely scrutinize salary disparities to determine whether they violated the anti-discrimination requirements of the EPA.

The claim centered on the fact that the state agency utilized a standard state salary schedule to determine a new hire's pay rate. The schedule provided for initial grade levels that include 20 "steps" within each grade level to identify the actual compensation. Assignment to the initial step includes consideration of prior work experience, professional designations, licenses, and certifications. Despite this detailed rubric, the three women were hired at lower starting salaries than several comparators the EEOC identified and continued to earn less than these male comparators during their employment.

The lower trial court dismissed the case in 2016, holding that the comparators identified by the EEOC were not valid comparators because they were hired at higher steps than the claimants, and, alternatively, the disparities were attributable to the males' relative experience and qualifications and therefore consistent with the state agency pay standards. The lower court agreed with the defendant that its reasons for the salary disparities showed that its actions were not discriminatory.

On appeal, no one disputed that the claimants were paid less than the male comparators, including their starting salaries. Rather, the employer (unsuccessfully) argued that the males were not valid comparators because they had been hired at higher steps on the pay scale than the females, and that it had established that any pay disparity was based on “gender-neutral reasons involving the comparators’ prior experience and credentials that each claimant lacked.” The EEOC, on the other hand, argued that the male comparators were properly identified and that the employer had not shown that the disparity in pay was not due to the comparators’ credentials and work experience. The 4th Circuit (which hears cases out of Maryland, North Carolina, South Carolina, Virginia, and West Virginia) agreed.

In a 19-page decision (not to mention a 16-page dissent) the appeals court found that the EEOC had established the necessary elements for an EPA case and that “genuine issues of material fact exist regarding whether the pay disparity was due to factors other than gender.” Specifically, the court found the males were proper comparators in this case. It went on to say that although “qualifications, certification, and employment history” may support a defense that the pay difference is based on “any factor other than sex,” and these factors “*could* explain the wage disparity,” the EPA requires more than a showing that a factor other than sex *could* explain or *may* explain the disparity. Instead, the court said, “The EPA requires that a factor other than sex *in fact* explains the salary disparity.” Thus, it is not enough that an employer may put forth evidence that “might” explain that the pay disparity is not based on gender, but must put forth evidence that “does” explain the reason for the disparity. The case was sent back to the lower court for further proceedings.

Notably, the appeals court was not persuaded by the fact that other males were hired in at the same level as the female investigators and found this did not necessarily negate the elements of the EPA claim. This is important for employers to note where they have some males paid the same or less than females, and they may be under the belief this would protect them in a lawsuit. That was not a sufficient protection in this case.

Two important takeaways for employers defending EPA cases:

- comparators may be cherry-picked so that accurate job titles and descriptions become even more critical; and
- employers must be prepared to show that its non-discriminatory factors used in compensation decisions were actually applied to the specific facts at issue.

Pay equity lawsuits are popping up in all industries, in every jurisdiction, and under the federal EPA as well as state laws. The burgeoning litigation blizzard means that attorneys and courts will be looking further afield for guidance in how to prosecute, defend, and decide these cases. The 4th Circuit, typically a fairly employer-friendly jurisdiction, took a surprisingly hard stance in this case. Because the opinion will likely be cited by attorneys and judges in EPA cases in other jurisdictions, employers across the country should review this decision closely and adapt as necessary.

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