



## 4th Circuit Upholds Dismissal Of Higher Ed Wage Discrimination Case

Insights

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In a case that has been very closely watched by the higher education community, Spencer v. Virginia State University, the Fourth Circuit Court of Appeals recently upheld the dismissal of a wage discrimination case by a female professor who claimed she was paid less than male professors.

Dr. Zoe Spencer, a sociology professor, sued the University for pay discrimination under the Equal Pay Act (EPA) and Title VII. Spencer earned approximately \$70,000 per year, which was the median salary when compared to men who were also full professors in her department. However, Spencer did not use them as comparators for purposes of the suit. Instead, she compared herself to two of the highest paid male professors at the University, both of whom teach in other departments and were former administrators with the University. The male professors earned about \$100,000 per year. The Fourth Circuit rejected her claim under both the EPA and Title VII on the grounds that (i) she and her male comparators performed different jobs requiring different skills and responsibilities and (ii) the University's practice of basing the higher pay on the male professors' prior service as administrators was lawful.

This decision is noteworthy both because of the ongoing debate about what constitutes "equal" or "similar" work among faculty in higher education and the split among the Circuits as to whether salary history can justify pay disparities under federal law.

### *EPA Claim Fails Because Spencer Failed To Show Jobs Were Equal*

Spencer argued that the two male professors were appropriate comparators because all professors generally perform "equal" work – preparing syllabi and lessons, instructing students, tracking student progress, managing the classroom and inputting grades. The Court disagreed, finding that Spencer's "broad generalizations at a high level of abstraction" were insufficient as a matter of law to meet her burden of proving that their jobs were "virtually identical."

The Court noted that the generalized skills, duties and responsibilities Spencer relied upon "are shared by middle-school teachers and law professors, and by pre-algebra teachers and biomedical engineering professors" and that "[p]rofessors are not interchangeable widgets." By way of example, the Court said that engineering professorships require different skills, effort and responsibilities than professorships in other fields, such as sociology. In support of its rationale, the

Court noted that the University systematically pays engineering professionals more than humanities professors, consistent with market forces that compensate engineers more highly because of their skill set.

The Court also noted that professors teaching at different levels (undergraduate, graduate and doctoral), like the professors here, often have different responsibilities which preclude the work from being “equal.”

Because the Court found that Spencer failed to show that she and her comparators performed “equal work,” the Court ruled that her EPA claim could not move forward.

### *Title VII Claim Fails For “Similar” Reason*

To proceed on her Title VII claim, Spencer was required to show that the jobs performed by her comparators are “similar” rather than “equal” to hers. The Court ruled that Spencer’s broad generalizations about the type of work both she and her comparators perform was not sufficient to meet this burden and her Title VII case not proceed either. The Court ruled that “[w]hile Title VII’s ‘similarity’ requirement demands less of plaintiffs than the Equal Pay Act’s equality” requirement, it is not toothless: the plaintiff must provide evidence that the proposed comparators are not just similar in some respects, but ‘similarly situated in *all respects*.’”

### *Practice Of Paying Faculty Based On Prior Salary As Administrators Deemed Lawful*

Even though the Court found that Spencer failed to make out a prima facie case under the EPA or Title VII, the Court went on to examine whether the University’s practice of paying faculty who were previously administrators 9/12<sup>th</sup> of their previous salary is a lawful justification for paying male and female faculty differently. The Court held that the practice is lawful under the EPA because prior salary is a factor other than sex. The Court also held that the practice is lawful under Title VII because it is a legitimate, nondiscriminatory explanation for pay differences.

With its decision, the Fourth Circuit aligned itself with the Seventh and Eighth Circuits, both of which have held that salary history constitutes a valid factor other than sex for paying males and females differently under the EPA, and put itself at odds with the Second, Tenth and Eleventh Circuits. The Ninth Circuit is likely to be weighing in on this issue again soon after the United States Supreme Court struck down its ruling in the Rizo v. Yovino case that salary history is not a valid justification for paying males and females differently on purely technical grounds and remanded the case.

If you have any questions about how to ensure your pay practices are in compliance with federal and state law, contact your Fisher Phillips attorney or any member of Fisher Phillips’ Pay Equity Practice Group.

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**Cheryl Pinarchick**  
Regional Managing Partner  
617.532.8215  
[Email](#)

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