2nd Circuit Reaffirms Limitations On Statistical Evidence In Pay Equity Cases

Insights
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As pay equity litigation heats up across the country, the 2nd Circuit Court of Appeals issued a January 26 decision that should help employers in New York, Connecticut, and Vermont combat claims brought under the federal Pay Equity Act (EPA). The decision in *Chiaramonte v. The Animal Medical Center* limits plaintiffs' ability to use statistical evidence of pay disparity between the sexes, by itself, to prove an EPA claim, reaffirming and expanding upon the principle first set out by the 2nd Circuit in a 2001 decision.

While the decision is helpful to New York employers, it remains to be seen whether courts interpreting New York's Achieve Pay Equity Act, which just celebrated its one-year anniversary last month, will take the same limiting approach to statistical evidence. After all, the state statute is much more employee-friendly than its federal counterpart, and could lead courts to arrive at different conclusions when faced with pay equity claims in New York.

Background On The EPA
The EPA prohibits employers from paying different wages to employees of different sexes for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." In order to set forth a *prima facie* case under the EPA, a plaintiff must demonstrate:

- the employer pays different wages to employees of the opposite sex;
- the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and
- the jobs are performed under similar working conditions.

Ultimately, a plaintiff must show that the jobs compared are "substantially equal," in that they entail "common duties or content, and do not simply overlap in titles or classifications." Broad generalizations resulting from job titles, classifications, or divisions, without more, will not be sufficient to set forth a *prima facie* case.

Appeals Court: Comparator Did Not Perform "Substantially Equal" Work
The plaintiff in *Chiaramonte* was a veterinarian at defendant's animal hospital who alleged she was unfairly being paid less than her male counterparts and brought a pay equity lawsuit. The District

Court for the Southern District of New York dismissed her EPA claim, and she appealed.

The 2nd Circuit rejected her contention that her "better-paid male colleagues performed substantially equal work" just because they were all department heads with similar credentials and significant responsibilities. The key point for the appeals court was that the plaintiff "overlooked the material differences in the congruity of job content."

Ultimately, the court of appeals was swayed by the evidence that she was the veterinarian equivalent of a general practitioner performing basic treatments, despite her title as a department head, while the alleged comparators she pointed to were specialists and department heads of their specialties. In fact, the evidence showed that she would refer patients to the alleged comparators if more complex procedures were necessary.

The appeals court also found that she carried a relatively low patient load compared to the alleged comparators, did not supervise interns as the other department heads did, and provided little scholarly research. Because of these significant differences, the 2nd Circuit held that it could "not embrace the principle that the work of all veterinarians is equivalent, thereby ignoring distinctions among the different specialties in veterinarian medicine" and the other differences between the plaintiff and the alleged comparators.

Statistical Evidence Could Not Salvage Plaintiff's Claim

Once the appeals court rejected the argument that the alleged comparators performed "substantially equal" work to plaintiff, it turned to plaintiff's contention that evidence of "across-the-board discriminatory pay" was sufficient for plaintiff to set forth a *prima facie* case of an EPA violation. The appeals court reasoned that whether "other female veterinarians are paid less than male veterinarians, without more, cannot suffice to establish that, because of sex alone, plaintiff was indeed paid less than males who performed substantially equal work."

The appeals court relied on its 2001 decision in *Lavin-McEleney v. Marist College*, where it held that an expert's regression analysis to isolate the effect gender had on company-wide pay could be used to support an EPA claim "in conjunction with plaintiff's identification of a specific male comparator." In that case, unlike in *Chiaramonte*, the plaintiff identified a male comparator who performed substantially equal work and was better paid.

Once the plaintiff in *Lavin-McEleney* identified such a specific comparator, the 2nd Circuit reasoned that it could be advantageous to either the plaintiff or the defendant to expand the statistical analysis:

The problem with comparing plaintiff's pay only to that of a single male employee is that it may create the impression of an Equal Pay Act violation where no widespread gender discrimination exists. Moreover, in the calculation of damages, such a comparison may either grant the plaintiff a windfall where the male comparator is paid particularly well, or improperly limit her recovery

where the male comparator, though better compensated than she, is paid less than the typical man of substantially equal skill, effort, and responsibility.

However, the *Lavin-McEleney* decision still warned against substituting a statistical compilation for an actual male comparator, pointing out that it cannot be the sole factor to justify an EPA claim.

Takeaways

The 2nd Circuit's *Chiaramonte* decision makes clear that the key element to any EPA claim brought in New York, Connecticut, or Vermont will be whether the plaintiff can identify a comparator of the opposite sex who is better paid and who performs "substantially equal" work. Once a suitable comparator is identified, then plaintiff will then be free to employ statistical analysis in whatever ways he or she deems most advantageous to the case.

Moreover, a plaintiff's effective use of statistical analysis could put the defendant employer in the position of having to defend a potentially statistically significant pay differential on a larger scale then if the plaintiff only identifies one or a few comparators and chooses not to use statistical analysis. Of course, without a specific comparator who performs "substantially equal" work, even the most advanced and helpful statistical analysis will not save a plaintiff's case.

Although employers in the 2nd Circuit will most benefit from the 2nd Circuit's analysis in *Chiaramonte* and *Lavin-McEleney*, other federal courts of appeal – most notably the Sixth (hearing cases arising from Ohio, Kentucky, Michigan, and Tennessee) and 7th Circuits (Illinois, Indiana, and Wisconsin) – have cited to *Lavin-McEleney*'s reasoning with approval.

Conversely, the benefit to employers of the 2nd Circuit's reasoning in these cases may be somewhat muted for New York employers because of the state's one-year-old Achieve Pay Equity Act (APEA). Although the major differences between the APEA and its federal counterpart relate largely to restricting employers' affirmative defenses (in addition to adding prohibitions on rules requiring confidentiality of employee salary, expanding the geographic pool of potential comparators, and increasing damages), there have not yet been any notable cases analyzing the statute and thus it is difficult to predict how a court would view the role of statistical evidence in proving such a case.

The APEA's structure – prohibiting unequal pay for work requiring equal skill, effort, and responsibility, and which is performed under similar working conditions – suggests that a *prima facie* case under the APEA will likely to continue to track the EPA, but it is far from certain. Moreover, even if the APEA standard for setting forth a *prima facie* case continues to track the EPA, it is unclear whether courts analyzing an APEA claim will also continue to forbid plaintiffs from the sole use of statistical evidence to satisfy that standard. Until a plaintiff attempts to use statistical evidence in an APEA case, whether the 2nd Circuit's reasoning in *Chiaramonte* and *Lavin-McEleney* extends to APEA claims will remain unknown.

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