SHATTERING THE EQUAL PAY ACT'S GLASS CEILING

*Deborah Thompson Eisenberg**

This Article provides the first empirical and rhetorical analysis of all reported Equal Pay Act (EPA) federal appellate cases since the Act's passage. This analysis shows that as women climb the occupational ladder, the manner in which many federal courts interpret the EPA imposes a wage glass ceiling, shutting out women in non-standardized jobs from its protection. This barrier is particularly troubling in light of data that shows that the gender wage gap increases for women as they achieve higher levels of professional status.

The Article begins by examining data regarding the greater pay gap for women in upper-level jobs. To evaluate the EPA's effectiveness to address pay discrimination for these workers, the Article provides an overview of empirical trends in EPA appellate case law. The analysis shows that courts increasingly dismiss EPA cases at the summary judgment stage, despite the fact-intensive nature of the claims, and that women in non-standardized professional and managerial jobs are less likely to prevail. The Article examines the two competing notions of "equal work" present in EPA case law and proposes a more effective prima facie standard that better accommodates women in non-traditional jobs. The Article then identifies narratives underlying EPA cases that may allow pay discrimination to flourish for women in upper-level jobs, including the expansion of certain defenses into exceptions that swallow the equal pay rule, the presumption of incompetence and lower value for women (even at the executive level), and secret pay processes that facilitate pay disparities. The Article analyzes these narratives in light of other psychological and business research and proposes new remedial models to shatter the EPA's glass ceiling and ensure the promise of equal pay.

TABLE OF CONTENTS

* Visiting Assistant Professor of Law, University of Maryland School of Law. The author thanks Paula Monopoli, Richard Boldt, Martha Ertman, David Gray, Leslie Meltzer Henry, Pete Smith, and the participants at the University of Maryland Faculty Development Workshop for their helpful comments. The author also thanks Kurt Meyer and Alice Johnson, and Susan McCarty at the University of Maryland School of Law library for all of their valuable research and citation help.

I. INTRODUCTION

THE Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[1] and the Lilly Ledbetter Fair Pay Act[2] that abrogated it, put the issue of pay discrimination in the political spot-

1. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). In *Ledbetter*, the Court held that the time for filing a charge of discrimination in disparate-treatment pay cases with the Equal Employment Opportunity Commission (EEOC) begins at the time of the pay-setting decision and that each paycheck that follows from that discriminatory act does not trigger a new EEOC charging period. *Id.* at 628. The Court found that "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her." *Id.* In a dissenting opinion, Justice Ginsburg explained that the majority's requirement that a charge be filed immediately for each and every discriminatory pay decision did not comport with the realities of pay discrimination, which may not become apparent until after the passage of time. *Id.* at 645 (Ginsburg, J., dissenting). She wrote:

> Pay disparities occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

light.[3] *Ledbetter* focused narrowly on the statute of limitations for filing a charge of compensation discrimination under Title VII.[4] There is an important back story to *Ledbetter* that has not received as much scholarly attention: the limited remedial power of the Equal Pay Act (EPA) for women, like Lilly Ledbetter, who break into managerial positions in nontraditional, male-dominated fields but receive substantially less pay than their male peers.[5]

This Article explores how the EPA fails to prevent wage discrimination for women in professional or leadership positions in the modern workplace. To evaluate the EPA's effectiveness, it examines the results of all reported EPA federal appellate cases. The empirical analysis of EPA case law shows that as women achieve higher levels of occupational status, the EPA imposes a "glass ceiling,"[6] shutting out women in non-stan-

---

Id. Given the secret and cumulative nature of most pay discrimination, and the reluctance of many women to complain, "[i]t is only when the disparity becomes apparent and sizable, *e.g.*, through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain." *Id.* Therefore, "[h]er initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex." *Id.*

2. Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (2009) (codified at 42 U.S.C. 2000e-5 (2006) and scattered sections of 29 U.S.C.). Under the Lilly Ledbetter Fair Pay Act, a person may file a charge of discrimination for pay discrimination within 180 (or, in some states that have work sharing agreement with the EEOC, 300) days of any of the following: (1) "when a discriminatory compensation decision or other practice is adopted;" (2) "when an individual becomes subject to a discriminatory compensation decision or other practice," or (3) "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. 2000e-5(e)(3)(A) (2006). The Act defined the time for filing claims of discrimination in compensation under three statutes: Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (2006), the Age Discrimination in Employment Act, 29 U.S.C. § 626(d) (2006), and the Americans with Disabilities Act, 42 U.S.C. § 12111 (2006).

3. *See, e.g.*, Heidi Brown, *Equal Payback for Lilly Ledbetter*, FORBES, Apr. 28, 2009, http://www.forbes.com/2009/04/28/equal-pay-discrimination-forbes-woman-leadership-wages.html; Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, http://www.nyimes.com/2009/01/30/us/politics/30ledbetter-web.html.

4. 42 U.S.C. § 2000e-5(f)(1) (2006).

5. For articles examining other implications of *Ledbetter*, see Jason R. Bent, *What the Lilly Ledbetter Fair Pay Act Doesn't Do: "Discrete Acts" and the Future of Pattern or Practice Litigation*, 33 RUTGERS L. REC. 31 (2009) (analyzing the issue of when the EEOC charge filing period beings to run where the plaintiff alleges a pattern or practice or unlawful discrete acts of discrimination); Deborah L. Brake, *What Counts as "Discrimination" in* Ledbetter *and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657 (2008) (exploring the implications of *Ledbetter* for equal protection); Tristin K. Green, *Insular Individualism: Employment Discrimination After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353 (2008) (analyzing the insular individualism in *Ledbetter* and mapping its potential consequences for antidiscrimination law); Paula A. Monopoli, *In a Different Voice: Lessons from* Ledbetter, 34 J.C. & U.L. 555 (2008) (examining pay disparities for women in academia, particularly the issue of salary confidentiality); Charles A. Sullivan, *Raising the Dead: The Lilly Ledbetter Fair Pay Act* (Seton Hall Publ. Law, Working Paper No. 1418101, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418101 (analyzing the impact of the Ledbetter statute on limitations issues in Title VII claims).

6. Glass ceiling "refers to situations where the advancement of a qualified person within the hierarchy of an organization is stopped at a lower level because of some form of discrimination" based on a protected characteristic such as sex, race, ethnicity, disability, or

dardized jobs from its protection. This glass ceiling is particularly troubling in light of data that shows that the gender wage gap *increases* for women as they climb the economic ladder and achieve higher levels of professional accomplishment.[7]

Ledbetter experienced this glass ceiling with her EPA claim.[8] Ledbetter sued Goodyear for pay discrimination under both Title VII and the EPA.[9] The pay disparity between Ledbetter and the male area managers "ranged from fifteen to forty percent."[10] Her "salary was less than the *lowest paid* male in the same job and department, and substantially less than men with equal or less seniority."[11] Ledbetter's compensation was so low that it sometimes fell below the *minimum* salary for a manager established by the company pay policy.[12] Yet, the job descriptions and duties for all managers were the same.[13] Each manager supervised approximately the same number of employees.[14]

Despite the identical job duties and supervisory responsibilities, the magistrate judge focused on the "particular purpose" and "different products" made by each business center in which the managers worked.[15] The magistrate concluded that "some specialized skill was required for Area Managers to supervise employees in different business centers."[16] The magistrate held that Ledbetter had not made a prima facie showing of equal work and limited the comparators that she could use based on different "skills" that managers might need in different departments.[17]

In contrast to the EPA prima facie standard, Goodyear conceded that Ledbetter was "similarly situated" to all other managers under Title VII.[18] The magistrate dismissed the Title VII claim based on Goodyear's defense regarding Ledbetter's performance.[19] The district judge found

---

sexual orientation. Glass Ceiling, http://en.wikipedia.org/wiki/Glass_ceiling (last visited Jan. 23, 2010). "It is believed to be an unofficial, invisible barrier that prevents women and minorities from advancing in businesses." *Id.*

7. *See infra* Part II.

8. Brief for the Petitioner at 4, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074), 2006 WL 2610990.

9. *Id.* (internal citations omitted).

10. *Id.*

11. *Id.*

12. *Id.* When Ledbetter was hired, she made the same compensation as her five male comparators. Ledbetter Exhibit No. 201, Area Manager Base Salary Comparison Chart (on file with author). When she retired in 1998, she was earning a base salary of $44,724.00, but her comparators were receiving substantially more, ranging from $55,679.16 to $59,028.00. *Id.*

13. Magistrate Judge's Report & Recommendation at 25, Ledbetter v. Goodyear Tire & Rubber Co., No. CV 99-JEO-3137-E (N.D. Ala. Apr. 3, 2002).

14. *Id.*

15. *Id.*

16. *Id.* The only evidence to which the magistrate cited for this conclusion was Ledbetter's deposition testimony that "she had to learn the exact procedure for building tires when she went to the Radial Light Truck division, because some of those she would be managing had never built tires before." *Id.*

17. *Id.* at 26.

18. *Id.* at 18.

19. *Id.* at 21.

that the magistrate inappropriately made credibility determinations at the summary judgment stage and reinstated the Title VII claim for trial.[20] The judge adopted the magistrate's report in all other respects, including the dismissal of the EPA claim.[21]

The jury awarded Ledbetter $3,843,041.93, which the district court judge reduced to $360,000.[22] Goodyear appealed, arguing that the Title VII claim was untimely filed.[23] Ledbetter did not cross-appeal the entry of summary judgment on the EPA claim.[24] The lower court's dismissal of a large portion of the EPA claim based on the prima facie standard made Ledbetter's counsel concerned that the Eleventh Circuit would not respond favorably to the claim.[25] Additionally, unlike Title VII, compensatory and punitive damages are not available under the EPA.[26] Weighing the EPA's tougher prima facie standard, and greater damages potential under Title VII, Ledbetter's counsel believed they were on more solid appellate ground by simply defending the Title VII victory.[27]

In *Ledbetter*, Justice Alito, writing for the majority, remarked: "If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts."[28] The Court asserted that the district court dismissed the Title VII and EPA claims "on the same basis"—the employer's defense regarding her performance.[29] As shown above, Justice Alito was only partially correct: the court had also dismissed the EPA claim based on the standard that the compared jobs be "equal."[30]

Like Ledbetter, many women either abandon EPA claims on appeal or experience disappointing results if they pursue EPA claims.[31] This Article explores how the EPA provides limited remedial power against wage discrimination in the modern economy, especially for women in professional or leadership positions. The EPA was drafted to cover women working in manufacturing jobs who perform tasks identical to the person adjacent to them on the factory floor.[32] Rather than adapting the EPA to

---

20. Mem. Op. on Objections to the Magistrate Judge's Reports & Recommendation at 1-2, Ledbetter v. Goodyear Tire & Rubber Co., No. CV99-C-3137-E (N.D. Ala. July 31, 2002).

21. *Id.* at 3.

22. Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 WL 25507253, at *1-2 (N.D. Ala. Sept. 24, 2003).

23. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1171 (11th Cir. 2005).

24. *Id.* at 1171 n.7.

25. Telephone Interview with Jonathan Goldfarb, Counsel for Lilly Ledbetter (July 6, 2009) (interview notes on file with author). The Eleventh Circuit has a record and reputation of being one of the federal circuits "most hostile to employment discrimination plaintiffs." Kevin M. Clermont & Steward J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 119 (2009).

26. *Compare* 42 U.S.C. § 1981a (2006), *with* 29 U.S.C. § 206(d) (2006).

27. Telephone Interview with Jonathan Goldfarb, *supra* note 25.

28. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 640 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

29. *Id.* at 640 n.9.

30. Magistrate Judge's Report & Recommendation at 26, Ledbetter v. Goodyear Tire & Rubber Co., No. CV 99-JEO-3137-E (N.D. Ala. Apr. 3, 2002).

31. *See infra* Part III.A.

32. *Id.*

the realities of the modern workplace, courts have, over time, interpreted the requirement that the jobs be equal so restrictively that plaintiffs today rarely satisfy the prima facie standard.[33] When they do, courts often accept employers' conclusory claims that the market dictated the inequitable pay or that the male employee was somehow more valuable, even when market data is either non-existent or contradicts the employers' claims.[34] In short, the EPA is increasingly becoming an empty promise, unworkable and ineffective to remedy wage discrimination for many women.

Much of the scholarship on pay discrimination has focused on the concept of comparable worth, "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[35] The comparable worth movement started in the 1980s to highlight the concentration of women in lower-paying jobs and the inequitable values placed on "women's work" (such as nursing or secretarial services) versus "men's work" (such as truck driving and electrical services).[36]

This Article proposes that new models are needed to attack the gender wage gap in the modern age. The economy is changing rapidly. Women are increasingly entering diverse occupations and attaining increased representation in managerial and professional positions that were unthinkable when the EPA was passed. To be sure, occupational segregation still exists,[37] and women remain underrepresented in managerial positions.[38]

---

33. *See infra* Part III.C.1.

34. *Id.*

35. Washington v. Gunther, 452 U.S. 161, 166 (1981).

36. *See, e.g.*, Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REFORM 7 (1986); Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315 (2007); Mayer G. Freed & Daniel D. Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078 (1984); Gail C. Kaplan, *Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth into Employer Liability Under Title VII*, 21 LOY. L.A. L. REV. 305 (1987); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986); Daniel N. Kuperstein, Note, *Finding Worth in the New Workplace: The Implications of Comparable Worth's Reemergence in the Global Economy*, 24 HOFSTRA LAB. & EMP. L.J. 363 (2007); Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358 (1995); *see also Gunther*, 452 U.S. at 166 n.6 (citing comparable work scholarship).

37. *See infra* Part II.

38. A 2008 survey of Fortune 500 companies found that:

> Women held 15.2 percent of board of director positions, compared to 14.8 percent in 2007. Women of color held 3.2 percent of all board director positions . . . . The number of women audit and compensation committee chairs continued to lag behind the overall representation of women board directors, even as women's share of nominating/governance committee chairs continued to keep pace with their share of all directorships.

Press Release, Catalyst, Catalyst 2008 Census of the Fortune 500 Reveals Women Gained Little Ground Advancing to Business Leadership Positions (Dec. 10, 2008), *available at* http://www.catalyst.org/press-release/141/catalyst-2008-census-of-the-fortune-500-reveals-women-gained-little-ground-advancing-to-business-leadership-positions.

But as many professions become more integrated, and as women achieve higher levels of leadership status in their fields, the law should ensure non-discriminatory pay within the same occupations. The EPA is failing to achieve that goal. The EPA's prima facie standard—which requires that the jobs be equal in terms of skill, effort and responsibility[39]—is not a workable standard for women in non-standardized, upper-level jobs and excludes large numbers of women. Further, Title VII, under which plaintiffs bear the burden of proving discriminatory intent,[40] hampers the ability of women to challenge wage disparities.

This Article seeks to understand the reasons for the EPA's increasing powerlessness by analyzing the doctrinal and narrative trends at work in EPA case law. The Article considers how the EPA could be amended to break the wage glass ceiling and provide a remedy more consistent with the realities of today's workplace, proceeding as follows: Part II summarizes the data regarding the gender wage gap, which is substantially larger for women in professional or managerial positions. Part III provides background about the EPA's purpose and standards and describes empirical trends in all reported federal appellate EPA cases since the Act's passage. This Part also analyzes the two competing visions of "equal work" evident in EPA cases and proposes a "comparable work" prima facie standard that better accommodates the changing demographics and realities of the modern workplace. Part IV presents a rhetorical analysis of other narrative themes found in EPA cases to better understand the reasons for the EPA's modern ineffectiveness and the potential causes of the greater pay gap for upper-level women. This Part integrates other sociological and business scholarship to better understand these narratives and craft reforms. Finally, Part V concludes the Article.

II. WAGE GAP FOR WOMEN AT THE TOP

The gender composition of the modern labor force is drastically different from that of the 1960s, when Congress passed the EPA. Women are entering (and may soon dominate) occupations that once employed only men. Over the last several decades, women have made substantial entry into professional, managerial, and executive occupations. For example, "[i]n 2007, women accounted for about 51 percent of all persons employed in management, professional, and related occupations, somewhat more than their share of all employed workers (46 percent)."[41] Thirty-three percent of all lawyers, and forty-three percent of all judges, magistrates, and other judicial workers, are women,[42] and their numbers are

39. *See* 29 U.S.C. § 206(d)(1) (2006).

40. *See infra* Part III.C.3.b.

41. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 1011, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2008), *available at* http://www.bls.gov/cps/wlf-databook-2008.pdf [hereinafter BUREAU OF LABOR STATISTICS, 2008 DATABOOK].

42. *Id.* at 30 tbl.11.

increasing.[43]

The proportion of women enrolled in law school increased from 8.6% in the 1970–1971 academic year to 46.9% in 2007–2008.[44] Women comprise 30% of physicians and surgeons, 53.3% of pharmacists, and 48.4% of veterinarians.[45] In 1982–1983, women comprised less than one-third (31.4%) of medical students.[46] In 2007–2008, women represented 48.3% of all medical school students.[47]

Women are also becoming better educated than men.[48] In 2006–2007, women earned 62.2% of all associate's degrees, 57.4% of all bachelor's degrees, 60.6% of all master's degrees, 50% of all professional degrees, and 50.1% of all doctoral degrees.[49] "Among 2007 high school graduates, young women (68 percent) were slightly more likely than young men (66 percent) to be enrolled in college in October 2007."[50]

Despite these educational gains, professional, managerial, and executive women are not earning compensation levels comparable to their male peers.[51] In fact, the pay gap between women and men *increases* with the level of educational attainment and years of work experience.[52] A recent study found that just one year out of college, "women working full time earn only 80 percent as much as their male colleagues earn."[53] The wage gap widens over time: "Ten years after graduation, women fall farther behind, earning only 69 percent as much as men earn."[54] The study found that, "[c]ontrolling for hours, occupation, parenthood, and other factors normally associated with pay, college-educated women still earn less than their male peers earn."[55]

The wage gap also exists for some of the best educated women: university professors.[56] A study of faculty salaries by the American Association

---

43. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 1002, WOMEN IN THE LABOR FORCE: A DATABOOK 29 tbl.11 (2007), *available at* http://www.bls.gov/cps/wlf-databook-2007.pdf (stating that 32.6% of all lawyers and 35.5% of all judges, magistrates, and other judicial workers, were women in 2007).

44. Am. Bar Ass'n, First Year and Total J.D. Enrollment by Gender: 1947-2008, *available at* http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf. Women reached a high of 50.4% of all law school enrollment in 1992–1993. *Id.*

45. BUREAU OF LABOR STATISTICS, 2008 DATABOOK, *supra* note 41, at 31 tbl.11.

46. ASS'N OF AM. MED. COLLS., U.S. MEDICAL SCHOOL APPLICANTS AND STUDENTS 1982-83 TO 2007-08, at 3 (2008), *available at* http://www.aamc.org/data/facts/charts1982to2007.pdf. Women comprised just under half (49.6%) of medical school students in 2003–2004. *Id.*

47. *Id.*

48. *See* Nat'l Ctr. for Educ. Statistics, Fast Facts, http://nces.ed.gov/fastfacts/display.asp?id=72 (last visited Jan. 23, 2010).

49. *Id.*

50. BUREAU OF LABOR STATISTICS, 2008 DATABOOK, *supra* note 41, at 3.

51. *See id.*

52. *Id.*

53. JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUC. FOUND., BEHIND THE PAY GAP 2 (2007), *available at* http://www.aauw.org/research/upload/behindPayGap.pdf.

54. *Id.*

55. *Id.*

56. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS'N OF UNIV. PROFESSORS, AAUP FACULTY GENDER EQUITY INDICATORS 11-12 (2006), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndica-

of University Professors found that across all ranks and institutions, the average salary for women faculty was 81% of the amount earned by men, and that even women of the same faculty rank earned 88% of their male peers' earnings.[57]

In the legal arena, a 2008 survey by the National Association of Women Lawyers (NAWL) found that "[a]t every stage of practice, men outearn women lawyers"[58] and the income disparity accelerates and "increases as women move up the law firm ladder."[59] NAWL found that "[m]ale associates earn, on average, a median income of about $175,000 and female associates earn, on average, a median income of about $168,000."[60] Women earn $14,000 less than men at the of-counsel level, $23,000 less at the non-equity partner level, and $87,000 less at the equity partner level.[61] One study of University of Michigan law school graduates found that fifteen years after graduation, women earned approximately 60% of their male classmates' earnings.[62]

The gender wage gap is evident across many professional and management occupations. Female physicians and surgeons fare even worse than their lawyer sisters, earning only 59.1% of the incomes earned by their male peers.[63] Female medical scientists make 62.3% of their male peers' earnings.[64] Women in management occupations earn only 72% of the earnings of comparable men.[65] Women accountants and auditors make 72.3% of their male peers' compensation, and female financial managers, 63%.[66]

A wage gap also exists for female CEOs in the profit and non-profit sectors. One study found that "[f]emale CEOs [in privately held firms] earn 46% less than their male counterparts, after adjusting for age and education."[67] An analysis of 2006 tax filings for more than 58,000 charita-

---

tors2006.pdf. The latest data from the U.S. Department of Labor shows that the ratio of women-to-men earnings for postsecondary teachers is 84.8%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 1017, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008, at 15 tbl.2 (2009), *available at* http://www.bls.gov/cps/cpswom2008.pdf [hereinafter BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008].

57. WEST & CURTIS, *supra* note 56, at 11.

58. NAT'L ASS'N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE THIRD ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2008), *available at* http://www.nawl.org/Assets/Documents/2008+Survey.pdf.

59. *Id.* at 14.

60. *Id.* at 13.

61. *Id.* at 13-14.

62. Mary C. Noonan et al., *Pay Differences Among the Highly Trained: Cohort Differences in the Male-Female Earnings Gap in Lawyers' Salaries* 3 (Nat'l Poverty Ctr. Working Paper Series, Paper No. 03-1, 2003), *available at* http://www.npc.umich.edu/publications/working_papers/.

63. BUREAU OF LABOR STATISTICS, 2008 DATABOOK, *supra* note 41, at 58 tbl.18.

64. *Id.* at 57.

65. *Id.* at 55.

66. *Id.* at 55-56.

67. Rebel A. Cole & Hamid Mehran, *What Do We Know About Executive Compensation at Privately Held Firms?* 33 (Fed. Reserve Bank of N.Y., Working Paper No. 314, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156089; *see also* Marianne Bertrand & Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS.

ble groups in the non-profit sector found that female CEO's of non-profit organizations "earned 34.8% less than their male counterparts," although the median salary increases for female CEOs slightly outpaced those for men at organizations of most sizes.[68]

Although a gender wage gap exists for women in lower-wage occupational categories, it tends to be smaller than that of their professional and executive sisters. For example, female cooks earn 90.5% of the earnings of their male peers;[69] female food preparation workers, 91.3%;[70] personal and home care aides, 85.9%;[71] office clerks, 94.2%;[72] bookkeepers, 90.2%;[73] bus drivers, 88.1%;[74] and janitors and building cleaners, 81.7%.[75] There are even a few jobs in which women's earnings are on par with, or slightly above, men's earnings.[76] There also remain some blue-collar jobs in which the pay gap is extremely large.[77] Across most of the occupational spectrum, however, women who are among the best educated and have achieved the highest levels of professional status experience a more substantial pay gap than women in lower-wage jobs.

To be sure, occupational segregation still exists, with women dominating professions such as nursing, teaching, and social work, and men dominating professions such as construction and production work.[78] The recent recession could lead to drastic changes in the gender composition of the workforce, including decreased occupational segregation by sex. The biggest job losses in the current recession have occurred in male-dominated sectors such as manufacturing and construction,[79] while de-

---

& LAB. REL. REV. 3, 3 (2001) (using ExecuComp data set and finding that high level women executives earned about 45% less than men and that women managed smaller companies and were less likely to be CEO, Chair, or Company President).

68. Eric Frazier, *Raises for Female Executives Match Those for Men, but Pay Gap Persists*, CHRON. OF PHILANTHROPY, Oct. 2, 2008, at 6.

69. BUREAU OF LABOR STATISTICS, 2008 DATABOOK, *supra* note 41, at 59 tbl.18.

70. *Id.*

71. *Id.* at 60 tbl.18.

72. *Id.* at 62 tbl.18.

73. *Id.* at 61 tbl.18.

74. *Id.* at 66 tbl.18.

75. *Id.* at 60 tbl.18.

76. These include postal service clerks (female:male earning ratio of 104.7%), special education teachers (103%), ticket agents and travel clerks (100.5%), and data entry keyers (102%). *Id.* at 57 tbl.18, 61-62.

77. These include, for example, production occupations (women earn 69.1% of men's pay), personal care and service occupations (69.6%), and laundry and dry-cleaning workers (68.5%). *Id.* at 60 tbl.18, 64-65 tbl.18.

78. *Id.* at 1, 30-31 tbl.11, 34 tbl.11, 36 tbl.11. The data does not necessarily support the notion that male-dominated professions necessarily pay more than female-dominated professions. For example, compare the median weekly earnings for female-dominated professions such as social workers ($757), registered nurses ($1,989), secretaries and administrative assistants ($599), and elementary and middle school teachers ($865) to the median weekly earnings in male-dominated professions, such as industrial truck and tractor operators ($519), construction laborers ($514), carpenters ($615), electricians ($805), and installation, maintenance, and repair occupations ($749). *Id.* at 57-58 tbl.18, 61-63 tbl.18, 67 tbl.18.

79. Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 6, 2009, at A1 (reporting that 82% of job losses during the recession have befallen men). The Bureau of Labor Statistics reports that three-quarters of the job losses

mand continues to be high in traditionally female-dominated occupations, such as health care.[80] As a result of these dynamics, occupations that traditionally have been dominated by a certain gender may become more integrated.[81] For example, some men who have lost jobs in the manufacturing industry have switched to fields like teaching and nursing.[82]

One would expect that a gender wage gap would not exist in traditionally female-dominated occupations or that the gap would favor women rather than men because women have more experience in those fields. Yet, when men enter traditionally female occupations, they typically earn more than their female counterparts. For example, female registered nurses earn 86.6% of male registered nurses' salaries, and female secretaries and administrative assistants earn 83.4% of their male peers' salaries.[83] An effective pay discrimination remedy is therefore needed even within traditionally female-dominated professions, and not simply across segregated occupations.

Why is there a greater wage gap for women who have achieved higher levels of professional status? Why do men earn more even in traditionally female-dominated occupations? Although the reasons for the wage gap have been the subject of considerable debate, many studies show that an unexplained gender pay gap exists even after controlling extensively for "choice" factors such as education, actual work experience, training, and family characteristics.[84] As one study found: "Too often, both wo-

---

from the beginning of the recession have been in "manufacturing, professional and business services, and construction." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT EMPLOYMENT STATISTICS HIGHLIGHTS: JUNE 2009, at 6 (2009), *available at* http://www.bls.gov/ces/highlights062009.pdf [hereinafter BUREAU OF LABOR STATISTICS, JUNE 2009 EMPLOYMENT STATISTICS].

80. BUREAU OF LABOR STATISTICS, JUNE 2009 EMPLOYMENT STATISTICS, *supra* note 79, at 16; BUREAU OF LABOR STATISTICS, 2008 DATEBOOK, *supra* note 41, at 2.

81. The Department of Labor reports that "many jobs that were nontraditional for women in the 1988 were no longer nontraditional for women in 2008. Some of these occupations were purchasing managers; chemists; physicians; lawyers; athletes; postal service mail carriers; bailiffs, correctional officers, and jailers; and butchers and other meat, poultry, and fish processing workers." Women's Bureau, U.S. Dep't of Labor, Quick Facts on Nontraditional Occupations for Women (Apr. 2009), http://www.dol.gov/wb/factsheets/nontra2008.htm.

82. *See, e.g.*, Allison Linn, *Changing Economy Has Many Changing Jobs*, MSNBC.COM, Mar. 24, 2009, http://www.msnbc.msn.com/id/29640225/ns/business-stocks_and_economy/ (reporting that one man switched from a well-paying factory job to teaching, and another switched from banking to nursing).

83. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008, *supra* note 56, at 17 tbl.2, 23 tbl.2.

84. *See Equal Pay for Equal Work: New Evidence on the Persistence of the Gender Pay Gap: Hearing Before the S. J. Econ. Comm.*, 111th Cong. 3-4 (2009) (statement of Randy Albelda, Professor of Economics and Senior Research Associate, Center for Social Policy, University of Massachusetts) (noting that many economists have studied the gender wage gap and "[n]o matter how sophisticated and complex their models, they *always* find that some portion of the wage gap is unexplained by the sets of variables for which they can measure differences between men's and women's education levels, work experiences, ages, occupation or industry in which they work, or region of the county they reside"); Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap*, ECONOMISTS' VOICE, June 2007, at 106 (showing that, after controlling for education, experience, occupation and industry, women working full-time earned 83.5% of what men did, as compared to 81.6% without

men and men dismiss the pay gap as simply a matter of different choices, but even women who make the same occupational choices that men make will not typically end up with the same earnings."[85] Recently, a salary data company named Payscale.com analyzed its database to determine whether the gender to wage gap could be explained by outside factors, such as company size, geographic location, or educational level.[86] Payscale.com found that outside factors explained much of the pay gap for women who earned less than $100,000 a year, but that women earned only 87% of comparable men's salaries even after controlling for outside factors for jobs paying more than $100,000 a year.[87]

Of course, these statistics are broad numbers, and there is a danger in reading too much into them. But, they are consistent with the experience of many women—especially those in higher level positions—who seek a remedy for pay discrimination under the EPA and discover that the promise of equal pay does not apply to them.

III. THE EQUAL PAY ACT: FROM BUILDING BLOCK TO GLASS CEILING

A. "Too Little, Too Late": The Passage of the EPA

The idea of equal pay for equal work "dates from the early days of the factory system when women were introduced to industrial labor."[88] A federally appointed Industrial Commission spoke out in favor of equal pay for equal work as early as 1898.[89] During World War I, the National War Labor Board (NWLB) set forth a principle: "If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength."[90] During World War II, the War, Navy, and Labor Departments agreed on an equal pay policy requiring

---

any adjustments); Joni Hersch, Sex Discrimination in the Labor Market 1, 77 (2006) (concluding that sex discrimination remains a possible explanation of the unexplained gender wage gap). As Professor Hersch describes:

> Women earn less than men, and no matter how extensively regressions control for market characteristics, working conditions, individual characteristics, children, housework time, and observed productivity, an unexplained gender pay gap remains for all but the most inexperienced of workers. If the unexplained pay disparity sometimes favored women and sometimes favored men, there would be no reason for concern. Unexplained residuals are a fact of life in regression analysis. But systematically and without exception finding that women earn less than men raises some questions.

Id. at 77.

85. Dey & Hill, *supra* note 53, at 2-3.

86. Posting of Catherine Rampell to N.Y. Times Economix Blog, *Women Earn Less Than Men, Especially at the Top*, http://economix.blogs.nytimes,com/2009/11/16/the-gender-pay-gap-persists-especially-for-the-rich/ (Nov. 16, 2999, 17:25 EST).

87. *Id.*

88. Bureau of Nat'l Affairs, Equal Pay for Equal Work: Federal Equal Pay Law of 1963 3 (1963).

89. *Id.*

90. *Id.*

that wage rates for women and men should be the same.[91] In 1945, the NWLB issued an "equal pay order," which stated that companies did not need to seek the NWLB's approval for "[i]ncreases which equalize the wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations."[92]

The concept of equal pay for equal work was not codified in federal law until the EPA passed in 1963. The EPA was the first federal sex discrimination law, preceding Title VII by one year. At that time, women constituted only one-third of the workforce and wage discrimination based on sex was blatant.[93] In one study in 1961, 33% of employers "said they had a double standard pay scale for men and women officeworkers."[94] According to a 1962 Labor Department survey, "91 job orders listed different wages for men and women."[95]

The EPA attacked the "false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work."[96] Supporters had been pushing for an equal pay bill for decades.[97] To gain passage, legislators stripped the bill of many meaningful standards. The prima facie standard was changed from "work of comparable character" to "equal" work.[98] The bill was incorporated into the Fair Labor Standards Act[99] and subject to all FLSA exemptions.[100] This excluded women employed as outside salesmen, in professional, executive and administrative positions, or in industries such as "agriculture, hotels, motels, restaurants, and laundries."[101] Adopting the FLSA remedial scheme also meant that class actions are not permitted.[102] A plaintiff may bring an action on behalf of herself and all others similarly situated, but each affected employee must "opt-in" to the case by

---

91. *Id.*

92. *Id.*

93. AMERICAN WOMEN: THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 45-46 (Margaret Mead & Frances Balgley Kaplan eds., 1965) (reporting that women constituted 32% of all workers in 1960 and that many studies substantiated "[t]he existence of differentials in pay between men and women for the same kind of work").

94. 109 CONG. REC. 9199 (1963) (statement of Rep. Green). He continued: "[A] job for an order clerk in a machine manufacturing industry would pay a male worker $100 a week, but a woman worker only $56 to $60 a week." *Id.*

95. *Id.*

96. *Id.* at 9212 (statement of Rep. Donohue).

97. *See id*. at 9204 (statement of Rep. Pepper) (noting that he had introduced equal pay bills since 1945); *id*. at 9202 (statement of Rep. Kelly) (noting that she had been introducing equal pay legislation since 1953).

98. CARL E. VAN HORN & HERBERT A. SCHAFFNER, WORK IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, POLICY AND SOCIETY 187-88 (2003).

99. 29 U.S.C. §§ 201-19 (2006). The FLSA sets a federal minimum wage, *id.* § 206, requires that employers pay 1.5 times an employee's regular hourly wage for all hours worked over forty hours, *id.* § 207, and prohibits child labor, *id.* § 212.

100. 109 CONG. REC. 8391, 9193 (1963) (statement of Rep. St. George).

101. *Id.*

102. 29 U.S.C. § 216(b) (2006). Under the FLSA, typical class actions are not permitted. *Id.* Each individual plaintiff must file a consent form to "opt-in" to the action. *Id.*

filing a consent form.[103] Unlike Title VII, however, EPA plaintiffs do not have to file a charge with the EEOC prior to bringing suit in court.[104]

Many legislators lamented that the final EPA was not as strong as it needed to be to combat wage discrimination.[105] Representative St. George noted, "It is a little bit too little and, of course, it is too late. But on the other hand it is the best thing we can get at this time."[106] Representative Dwyer commented, "There are a number of weaknesses in this bill which I believe unwisely limit the scope of its application and unnecessarily encumber its enforcement."[107] Representative Dent warned that removing the "comparable work" standard would limit the EPA's effectiveness.[108] He stated, "[L]et us not enter into this day's voting without knowing exactly that the bill does not accomplish its true purpose."[109]

In its final form, the EPA requires that employees of opposite sexes in the same establishment[110] receive equal pay for equal work. An employee satisfies her prima facie case by proving that she[111] and other male employees were paid different compensation for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[112] All three factors—skill, effort, and responsibility—must be satisfied.

At the prima facie stage, the analysis focuses on the positions themselves, not the characteristics of the individuals working in those jobs.[113] The unique characteristics or qualifications of individuals holding the jobs may "operate as a defense to liability rather than as part of a plaintiff's prima facie case."[114]

Upon establishment of a prima facie case, discrimination is presumed, and the burden shifts to the employer to prove that the wage differential

---

103. *Id.*

104. *Id.*; *cf.* 42 U.S.C. § 2000e-5 (2006) (requiring that plaintiffs file a charge of discrimination with the EEOC prior to filing Title VII claims in court).

105. See the remarks of Representative St. George, 109 CONG. REC. 8391, 9193 (1963) ("[I]n the meantime, we are going to have to have these bills which will help, which will do a little, which will get a foot in the door . . . ."), and Representative Sullivan, *id.* at 9205 ("It does not go far enough, in my opinion, but, as far as it goes, it is a good bill.").

106. *Id.* at 9193 (statement of Rep. St. George).

107. *Id.* at 9199 (statement of Rep. Dwyer).

108. *Id.* at 9200 (statement of Rep. Dent.).

109. *Id.*

110. The plaintiff and her comparator(s) must work in the same "distinct physical place of business," but in "unusual circumstances" they may work in separate locations if the employer has a centralized administrative process for hiring and making compensation decisions. 29 C.F.R. § 1620.9 (2009).

111. The pronoun "she" is used throughout this Article, but male employees may bring claims under the EPA for pay disparities with female employees, and many have done so. See, for example, *Stanziale v. Jargowsky*, in which a male plaintiff prevailed over summary judgment where the employer failed to prove that different experience caused the wage disparity. 200 F.3d 101 (3d Cir. 2000).

112. 29 U.S.C. § 206(d)(1) (2006).

113. Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1533 (11th Cir. 1992).

114. *Id.* at 1533 n.18; *see also* Mulhall v. Advance Sec., Inc., 19 F.3d 586, 594 n.18 (11th Cir. 1994) ("[I]ndividual employee qualifications are relevant only to defendant's affirmative defenses.").

"is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[115] The EPA imposes "a form of strict liability on employers who pay males more than females for performing the same work—in other words, the plaintiff . . . need not prove that the employer acted with discriminatory intent."[116] Applying an exemption is a matter of affirmative defense; if the employer cannot meet the burden of proof, then the plaintiff prevails as a matter of law.[117]

A prevailing plaintiff may recover the pay differential for two years—or three years if she proves a willful violation—plus attorneys' fees and costs.[118] The backpay award may be doubled as liquidated damages.[119] Compensatory and punitive damages are not available under the EPA.[120]

Congress eliminated the white-collar exemption for the EPA in 1972,[121] allowing professional, executive, and administrative employees to bring claims under the EPA. But it did not modify the "equal work" prima facie standard. Consequently, as shown in the next section, plaintiffs in non-standardized jobs have a difficult time showing that they can even compare themselves to their peers.

B. Empirical Analysis of EPA Appellate Case Law

1. Methodology

The database examined to evaluate the remedial effectiveness of the EPA for this Article included all published federal appellate and Supreme Court decisions that have considered an EPA claim.[122] To identify such cases, the term "Equal Pay Act" was searched in the reported federal courts of appeal library on Westlaw. The result included 756 cases. From there, a case was excluded if it: (1) involved an EPA claim that had been dismissed or abandoned at the district court level and was not at issue on appeal; (2) involved pleadings or immunity issues at the motion to dismiss stage; (3) made only passing mention of the EPA;[123] or (4) involved only a Title VII pay claim, unless the court analyzed the prima

115. 29 U.S.C. § 206(d)(1) (2006).
116. Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1310-11 (10th Cir. 2006).
117. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).
118. 29 U.S.C. § 216(b) (2006).
119. *Id.*
120. *Id.*
121. The amendment was passed as part of an omnibus bill aimed at postsecondary education. *See* Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 213(a)(1) (2006)).
122. Federal courts of appeal cases were used for the empirical analysis because they establish the standard of review that lower courts and arbitrators must follow. In addition to the empirical review of federal circuit cases, the conclusions in this Article are based on research of federal district court and arbitration cases that involved plaintiffs in executive or supervisory jobs. Many of those district court and arbitration cases are also discussed throughout the Article.
123. Some FLSA cases, for example, cite to EPA cases for remedial issues, such as limitations or liquidated damages.

facie standard as if it were an EPA claim.[124] To avoid double counting, decisions that concerned a single case that had been appealed multiple times were combined.[125] The resulting data set included 197 published appellate cases and one Supreme Court case. All cases were entered into an Excel database and coded for analysis.[126]

2. The Numbers

The most striking trend evident in the analysis is the relatively low number of appellate cases for a statue that is forty-six years old. The Supreme Court has interpreted the EPA only once, in *Corning Glass Works v. Brennan*,[127] which has led to conflicting interpretations among the circuits about the proper scope of "equal work" and the contours of acceptable employer defenses. The relative dearth of federal EPA litigation raises the question whether women are simply discouraged from filing or appealing EPA claims. Some attorneys may feel more comfortable working with Title VII's burden-shifting framework or may be concerned about satisfying the EPA's stricter prima facie standard.[128]

Categorizing plaintiffs by type of position worked revealed that 115 worked in non-supervisory roles,[129] 37 worked in mid-level manager or supervisory roles,[130] 23 were university professors,[131] and 23 were professionals or executives.[132] Non-supervisory plaintiffs had a success rate of 57%, winning on appeal 65 times and losing 50 times. Mid-level supervi-

---

124. In *Washington v. Gunther*, the Court held that the Bennett Amendment made the EPA's defenses applicable to Title VII, but not its prima facie standard. 452 U.S. 161, 171 (1981). Thus, the Title VII cases included are typically prior to *Gunther*. Some courts, however, still confuse EPA and Title VII standards. *See, e.g.*, Ebert v. Lamar Truck Plaza, 878 F.2d 338 (10th Cir. 1989).

125. For example, *Shultz v. First Victoria National Bank*, 420 F.2d 648 (5th Cir. 1969); *Hodgson v. American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1971); and *Hodgson v. First Victoria National Bank*, 446 F.2d 47 (5th Cir. 1971), were combined because they were the same case. The Supreme Court's decision in *Corning Glass Works v. Brennan* was used rather than the two lower court cases it reviewed, *Brennan v. Corning Glass Works*, 480 F.2d 1254 (3d Cir. 1973) (overruled), and *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973) (affirmed).

126. The categories tracked were as follows: circuit, year, plaintiff's position, executive type, job category, type of job, employer type, whether employer was private/public, stage of disposition (summary judgment or trial), disposition (actual court action), whether employee or employer won on appeal, type of defense asserted, type of comparator, whether the prima facie standard was satisfied, and type of counsel (DOL, EEOC, or private).

127. 417 U.S. 188 (1974).

128. *See infra* Part III.C.3.b for an explanation of why the EPA has a more appropriate burden-shifting framework for pay discrimination than Title VII.

129. "Non-supervisory workers" included those who did not have any supervisory responsibility. All cases are listed in Appendix A.

130. "Mid-level supervisors and managers" included those who had supervisory responsibility but did not work at the highest management levels of the organization. *See* Appendix B.

131. "Professors" included all levels of instructors at colleges and universities. *See* Appendix C.

132. "Professionals and executives" included individuals who hold professional degrees or licenses and those who worked at top leadership or management positions and had policy-making responsibility. *See* Appendix D. This category corresponds to those executive, administrative, and professional employees who are exempt from the overtime re-

sors won 18 times, and lost 19 times, a success rate of 49%. Professors lost 15 times, and won 8 times, a success rate of 35%. Professionals and executives won 9 times, and lost 14 times, a success rate of 39%. Supervisory, executive, and professional groups had a combined success rate of 42%.

EPA plaintiffs of all types are substantially more likely to lose their cases on appeal in the current decade than at any other time. For example, in the 1970s, employees won on appeal 23 times and lost 16 times, a success rate of 59%. In the 1980s, employees won on appeal 32 times and lost 29 times, a success rate of 52%. In the 1990s, employees won 29 times and lost 24 times, a success rate of 55%. From 2000 to 2009, however, employees have won EPA claims 16 times and lost 29 times, a success rate of only 35%.

TABLE 1: EMPLOYEE SUCCESS RATE ON APPEAL BY DECADE

Decade	Total Cases	Employee Win	Employer Win	Employee Success Rate
1970-79	39	23	16	59%
1980-89	61	32	29	52%
1990-99	53	29	24	55%
2000-09	45	16	29	35%

As to type of comparator used by plaintiffs, 90% compared themselves to existing co-workers, 4.6% compared themselves to predecessors, and 5% compared themselves to successors. One case involved both successor and predecessor comparators.[133] Plaintiffs with predecessor comparators were most likely to win, with a success rate of 89%. Plaintiffs with successor comparators were least likely to win, with a success rate of 40%. In cases involving co-worker comparators, the success rate was 49%.

Even though evaluation of EPA claims is supposed to be fact-intensive,[134] courts are increasingly rejecting cases at the summary judgment stage rather than permitting claims to be decided at trial. In the 1970s, 97% of the EPA claims under review had been decided in the district court by a bench or jury trial. In the 1980s, 92% of claims were decided at trial. In the 1990s, 42% of claims were decided at trial. From 2000 to 2009, only 31% of reported appellate cases had been decided at trial in the district court. Given the fact-intensive nature of an EPA case—at

quirements of the FLSA, *see* 29 C.F.R. § 541.0, and who were exempt from the EPA until 1972.

133. Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994).

134. *See* Brobst v. Columbus Servs. Int'l, 761 F.2d 148, 156 (3d Cir. 1985) ("Given the fact intensive nature of the inquiry, summary judgment will often be inappropriate [in EPA cases].").

both the prima facie case and affirmative defense stages—summary judgment should rarely be granted.

TABLE 2: STAGE AT WHICH CASE IS DECIDED IN DISTRICT COURT PRIOR TO APPEAL

Decade	Motion for Judgment/ Directed Verdict	Summary Judgment	Post Jury Verdict or Bench Trial
1970-79	0	1	38
1980-89	0	5	56
1990-99	3	28	22
2000-09	1	30	14

The actual disposition on appeal over time also shows some interesting trends. Table 3 shows that appellate courts in general are more likely to affirm than reverse the outcome in the district court. In the early years of the EPA, appellate courts were more likely to reverse a jury or bench trial verdict than they were in the decades 1990–1999 and 2000–2009. In the first decade of EPA litigation, the appellate courts reversed 18% of jury verdicts for employees, and 45% of jury verdicts for employers. In the most recent decade, the appellate courts affirmed all verdicts that resulted from trials in the district court. Of course, significantly fewer cases are now decided at trial. From 2000 to 2009, the courts of appeal affirmed grants of summary judgment for the employer by the district courts 92% of the time.

These results show the tremendous impact that summary judgment practice in the district courts is having on a plaintiff's ability to prevail on EPA claims. To confirm the trend in favor of summary judgment shown in appellate decisions, I examined the dispositions of all reported district court cases that considered whether to grant an employer's motion for summary judgment based on the EPA's prima facie standard or an affirmative defense from December 30, 1999 through December 30, 2009.[135] In the 99 reported cases that evaluated summary judgment motions for EPA claims, the district court granted summary judgment to the employer 71 times, or 72% of the time. District courts found disputed factual issues that precluded summary judgment in only 28 cases, or just 28% of the time.

The circuits that are most hostile to EPA claims are the Seventh, where plaintiffs have a success rate of only 24%, and the Eighth, where plaintiffs have won 39% of the time. As discussed below, these are the circuits that have the most restrictive interpretation of the EPA's "equal work" prima facie standard and are also the circuits that have the most liberal interpretation of the "factor-other-than-sex" affirmative defense. The circuits

135. Cases were excluded if the summary judgment issue focused on other legal issues, such as the immunity of a state employer or the issue of whether the plaintiff was an "employee" of the defendant.

TABLE 3: DISPOSITION ON APPEAL

Disposition	1970-79	1980-89	1990-99	2000-09
Affirmed jury or bench trial verdict for employee	14	27	16	11
Affirmed jury or bench trial verdict for employer	11	23	2	3
Reversed jury or bench trial verdict for employee	3	2	2	n/a
Reversed jury or bench trial verdict for employer	9	4	1	n/a
Affirmed grant of directed verdict for employer	1	n/a	2	1
Reversed grant of motion for judgment for employer	n/a	n/a	1	n/a
Affirmed grant of summary judgment for employer	1	4	18	25
Reversed grant of summary judgment for employer	n/a	1	9	5
Reversed judgment notwithstanding the verdict	n/a	n/a	2	n/a

that are friendliest to EPA claims are the Sixth, where plaintiffs have a success rate of 85%, and the D.C. Circuit, where the success rate is 75%.

The EPA may be enforced by either private litigants or the government.[136] In 1978, the power to enforce the EPA was transferred from the Department of Labor (DOL) to the EEOC in order to consolidate the enforcement of all anti-discrimination laws under one agency.[137] The number of EPA appellate cases brought by the government has dwindled to nothing. There were twenty-five appellate cases brought by the DOL in the 1970s, one in the 1980s, and one jointly litigated with the EEOC in the 1990s. In the 1980s, fourteen appellate cases involved the EEOC as a plaintiff, many of which were cases that the EEOC took over for the DOL.[138] In the 1990s, there were only four EPA appellate cases involving the EEOC. In the past decade, there have been no EPA appellate cases in which the EEOC was a plaintiff.

Plaintiffs need not exhaust administrative remedies by filing with the EEOC prior to filing an EPA case in court, but the number of EPA complaints received by the EEOC has declined.[139] EPA charges have consti-

136. *See* 29 U.S.C. § 216(b) (2006).

137. Reorganization Plan No. 1 of 1978, 45 Fed. Reg. 19,807 (May 9, 1978) (to be codified in scattered sections of 29 U.S.C.).

138. *See, e.g.*, EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243 (8th Cir. 1981); EEOC v. Whitin Mach. Works, Inc., 635 F.2d 1095 (4th Cir. 1980).

139. In FY 1997, the EEOC received 1,134 EPA complaints. EEOC, Equal Pay Act Charges, FY 1997-FY 2008 (Mar. 11, 2009), http://www.eeoc.gov/stats/epa.html. In FY 2007, the EEOC received 818 complaints and it moved up slightly to 954 complaints in FY 2008. *Id.*

TABLE 4: SUCCESS RATE ON APPEAL BY CIRCUIT

Circuit	Employee Win	Employer Win	Employee Success Rate	Total Cases
First	4	6	40%	10
Second	8	4	67%	12
Third	5	4	56%	9
Fourth	10	7	59%	17
Fifth	10	10	50%	20
Sixth	11	2	85%	13
Seventh	7	22	24%	29
Eighth	15	23	39%	38
Ninth	5	5	50%	10
Tenth	9	6	60%	15
Eleventh	12	7	63%	19
D.C.	3	1	75%	4
Federal	0	1	100%	1

tuted approximately 1% of the EEOC's total charge docket for every year from fiscal year (FY) 1997 through FY 2008.[140] This is not to say the EEOC is doing nothing: the number of EPA charges that had outcomes favorable to the charging party (known as "merit resolutions") increased from 14.8% in FY 2007 to 26.8% in FY 2008, and the monetary benefits that the EEOC recovered in EPA cases (through mediation, settlement, or conciliation) increased from $2.4 million in FY 1997 to $9.6 million in FY 2008.[141] Nevertheless, the number of suits filed by the EEOC at the district court level that include EPA claims has been extremely small in recent years. The EEOC filed no cases with EPA claims in FY 2008, and the greatest number of EPA cases it filed in a single year since 1997 was fourteen cases in 2001.[142]

This decline in agency enforcement of the EPA is a disturbing trend. The DOL and EEOC have greater investigative power to reveal and prosecute systemic pay discrimination than individual employees. The success rate of appellate plaintiffs represented by a government agency in EPA claims is 73%, but for private plaintiffs it is only 44%.[143] The EEOC, although severely understaffed and underfunded,[144] has more liti-

140. EEOC, Charge Statistics: FY 1997 Through FY 2008 (Mar. 11, 2009), http://www.eeoc.gov/stats/charges.html.

141. *Id.*

142. EEOC, EEOC Litigation Statistics: FY 1997 Through FY 2008 (Mar. 11, 2009), http://www.eeoc.gov/stats/litigation.html.

143. Plaintiffs represented by an agency won thirty-three times and lost twelve times. Private plaintiffs won sixty-seven times, and lost eighty-five times.

144. *See* Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 KAN. L. REV. 1, 6 (2001).

gation muscle than the average private plaintiff's attorney.[145]

The empirical trends described here raise several questions. First, why are women in professional and supervisory positions more likely to lose their cases than non-supervisory plaintiffs? Second, why do modern appellate courts appear to be less hospitable to EPA claims of all types? Third, do the underlying narratives of these wage discrimination cases offer any insights as to the reasons for the gender wage gap more generally? Finally, what can be done to provide a more meaningful deterrent against, and effective remedy for, pay discrimination? The next sections analyze the doctrinal and narrative threads at work in EPA cases that may be undermining the effectiveness of the EPA and permitting wage disparities to flourish for women in upper-level jobs.

C. A Tale of Two EPAs: Competing Visions of "Equal Work"

The EPA's legislative history evinces opposing visions of "equal work." Congressman Goodell stated that "the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other."[146] The floor manager for the bill in the Senate took issue with that view, stating: "[I]t is not the intent of the Senate that the jobs must be identical. Such a conclusion would obviously be ridiculous."[147] As one court remarked: "The legislative history thus contains ammunition both for those who would insist on a very narrow reading of 'equality,' and for those who would urge a more expansive understanding of the term."[148]

"[E]qual can be read both narrowly and expansively," and courts have interpreted the term in different ways.[149] One court characterized an employer's insistence that the positions be equivalent in all respects as "taking the 'equivalency' concept to a 'logical' but an illogical conclusion."[150] Other courts have required that the positions be virtually identical.[151] Under the EPA's regulations, the compared jobs need not be identical, but only "substantially equal."[152] The EEOC counsels that what constitutes equal skill, effort, or responsibility "cannot be precisely defined" but should be interpreted considering "the broad remedial purpose of the law."[153]

---

145. Some have recommended that enforcement of the EPA be returned to the DOL because it has greater investigative resources and is taken more seriously by employers than the EEOC. Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 Lab. Law. 155, 174-75 (1999) (recommending that enforcement of EPA be returned to the DOL because it has more investigative resources and its power to conduct unannounced "sweeps" in targeted industries is feared by employers).

146. 109 Cong. Rec. 8686 (1963) (statement of Rep. Goodell).

147. *Id.* at 9219 (statement of Sen. McNamara).

148. Thompson v. Sawyer, 678 F.2d 257, 271 (D.C. Cir. 1982).

149. *Id.*

150. Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983), *aff'd on liability*, 749 F.2d 1501 (11th Cir. 1985).

151. *See infra* Part III.C.1.

152. 29 C.F.R. § 1620.13(a) (2009).

153. *Id.* § 1620.14(a).

The prima facie standard in the EPA was developed based on prevailing pay practices in the 1960s. "American industry used formal, systematic job evaluation plans to establish equitable wage structures in their plants."[154] These job evaluation plans:

> took into consideration four separate factors in determining job value—skill, effort, responsibility and working conditions—and each of these four components was further systematically divided into various subcomponents. Under a job evaluation plan, point values are assigned to each of the subcomponents of a given job, resulting in a total point figure representing a relatively objective measure of the job's value.[155]

Thus, Congress's intent in defining the equality of jobs based on skill, responsibility, effort, and working conditions was to incorporate "the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act."[156]

The manufacturing concepts on which the EPA was crafted are awkward—if not completely archaic—when applied to our modern, service-oriented, digital economy. For example, the compared jobs must be performed under "similar working conditions."[157] This encompasses "surroundings," which "measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker," and "hazards," which "take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause."[158] The jobs must also be within the same "establishment," which "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business."[159] The regulations are pervaded by examples of manufacturing or hourly wage jobs,[160] but do not contain examples of employees working in professional or managerial positions.

Compensation structures have also drastically changed since the 1960s. First, as Katherine Stone explains, the workplace in the digital age is not based on formal hierarchical structures and centralized decision-making, but on notions of flexibility.[161] "The decentralization of authority and the flattening of hierarchy means that decisions are delegated to a wide range

154. Corning Glass Works v. Brennan, 417 U.S. 188, 199 (1974).

155. *Id.* Such job evaluation plans are also the foundation of the comparable worth concept.

156. *Corning Glass Works*, 417 U.S. at 200.

157. 29 C.F.R. § 1620.18(a) (2009).

158. *Id.*

159. *Id.* § 1620.9.

160. *See, e.g.*, *id.* § 1620.14(c) (referring to "jobs on different machines or equipment"); *id.* § 1620.16(b) (using as examples checkers in grocery store and assembly line to explain "effort"); *id.* § 1620.17(b)(2) (using as an example sales clerks); *id.* § 1620.17(b)(3) (using as an example an employee "turning out the lights in his or her department at the end of the business day").

161. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165 (2004).

of people who are permitted to use their individual, often idiosyncratic, discretion."[162] Many salaries, especially at higher levels, are individually negotiated. Rather than the lock-step compensation plans of the industrial era, many job sectors today follow a "winner-take-all" approach, paying disproportionately large salaries to individuals perceived to be top performers.[163] These trends have exacerbated internal pay inequities.[164]

Second, compensation structures are much more complex today. Pay often consists of base salary plus bonuses, stock option grants, severance pay, signing bonuses, and other components. At many companies, the criteria by which pay, especially certain bonuses and stock options, will be awarded are opaque and not clearly defined, which leads to more ad hoc, discretionary decisions. Subjective processes put women at a disadvantage and increase internal pay disparities.[165]

Given these changing realities, how should the concept of equal work be applied to jobs in the modern economy? With only one Supreme Court case construing the EPA and regulations centered on manufacturing and clerical work, courts have developed two conceptions of the term "equal": (1) a strict approach to equality that requires that the jobs be fungible, "cookie cutter" images of each other; and (2) a pragmatic approach to equality that focuses on whether the core functions or general purpose of the job is substantially similar. These approaches are described below.

1. The Strict Approach to Equality

For many courts, executive and professional women are still exempt from the EPA.[166] Under the strict view of equality, managerial jobs simply cannot be proper comparators. As Judge Posner once remarked:

> The proper domain of the Equal Pay Act consists of standardized jobs in which a man is paid significantly more than a woman (or anything more, if the jobs are truly identical) and there are no skill differences. An example might be two sixth-grade music teachers, having the same credentials and experience, teaching classes of roughly the same size in roughly comparable public schools in the same school district.[167]

Another district court judge put it more bluntly, stating that a senior vice president of finance's claim that she had a job equal to that of other senior vice presidents "cannot be taken seriously":

---

162. *Id.*

163. *Id.* at 267-68.

164. *Id.*

165. These issues are examined in Part IV.

166. An insightful Note reviews the history of the white-collar exemptions under the EPA and FLSA and shows how these conceptions about New Deal legislation continue to influence courts' interpretation of the EPA. *See* Juliene James, Note, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873 (2004).

167. Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771-72 (7th Cir. 2007).

> These are Senior Vice Presidents in charge of different aspects of Defendant's operations; these are not assembly-line workers or customer-service representatives. In the case of such lower-level workers, the goals of the Equal Pay Act can be accomplished due to the fact that these types of workers perform commodity-like work and, therefore, should be paid commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims.[168]

Many other courts have likewise interpreted the prima facie standard strictly and rejected claims that managerial positions and executives in different departments can be compared under the EPA.[169] A prime example of the strict approach to equality for upper level jobs is *Wheatley v. Wicomico County*.[170] There, the two plaintiffs were the director and deputy director of the county emergency services department.[171] Both women had the highest seniority among department heads and their performance records were exemplary.[172] The plaintiffs argued that they performed management responsibilities substantially similar to that of the other department heads, "with the exception being the subject matter of the department."[173] All of the directors performed the same management functions: supervising subordinates, preparing payroll and scheduling, hiring and firing, conducting staff meetings, attending department head meetings, addressing the County Council, preparing budgets, answering to the County Administrative Director, maintaining county facili-

168. Georgen-Saad v. Tex. Mut. Ins. Co., 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002). This case was not appealed.

169. Ratts v. Bus. Sys., Inc., 686 F. Supp. 546, 550 (D.S.C. 1987) (holding the female vice president of marketing and communications could not be compared to four other male vice presidents, all of whom earned substantially more than plaintiff); *see also* Merillat v. Metal Spinners, Inc., 470 F.3d 685 (7th Cir. 2006) (holding a senior buyer was not equal to male managerial employee); Berg v. Norand Corp., 169 F.3d 1140 (8th Cir. 1999) (holding a female department manager was not equal to male department managers, who earned on average $6,000 to $8,000 more); Stopka v. Alliance of Am. Insurers, 141 F.3d 681 (7th Cir. 1998) (holding a female vice president was not equal to male vice presidents); Sprague v. Thorn Ams., Inc., 129 F.3d 1355 (10th Cir. 1997) (holding that assistant manager jobs were comparable, but not equal, and that "equal work" should not be construed broadly); Orahood v. Bd. of Tr., 645 F.2d 651 (8th Cir. 1981) (holding a female assistant director of institutional studies did not establish equal work with a male assistant controller at the university); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir. 1980) (affirming a finding that a female insurance marketing manager did not perform equal work with a male sales account executive), *cert. denied*, 449 U.S. 1042 (1980); Sensibello v. Globe Sec. Sys. Co., No. 81-4052, 1984 WL 1118 (E.D. Pa. Jan. 10, 1984) (holding female branch/regional manager of security company did not establish equal work with other managers); Serpe v. Four Phase Sys., Inc., 33 Fair Empl. Prac. Cas. 169 (N.D. Cal. 1982) (holding a female international marketing specialist did not establish equal work with three male international marketing employees, or with two account managers), *aff'd and rev'd in part on other grounds*, 718 F.2d 935 (9th Cir. 1983); Hauck v. Xerox Corp., 493 F. Supp. 1340 (E.D. Pa. 1980) (holding female sales representative did not show equal work with male sales representatives), *aff'd*, 649 F.2d 859 (3d Cir. 1981).

170. 390 F.3d 328, 330 (4th Cir. 2004).

171. *Id.*

172. Brief of Appellant at 3, 20, *Wheatley*, 390 F.3d 328 (No. 03-2406), 2003 WL 25486838.

173. *Id.* at 5.

ties and property, and otherwise managing their departments.[174] Despite these common management functions, female department heads earned about 80% of what the male directors earned.[175] The plaintiffs earned approximately $25,000 less than the male directors and deputy directors.[176] Most of the female directors, including the plaintiffs, also had salaries that fell below the mid-point of the pay grades in which they were classified.

A former Director of the Department of Corrections testified in support of the plaintiff Director's case, stating that plaintiff's job was more demanding and entailed more responsibility than his job, but that he was nevertheless paid more.[177] He stated, "I've never seen anyone slighted like Ms. Wheatley was slighted."[178]

The district court entered judgment as a matter of law for the employer.[179] The Fourth Circuit affirmed because the departments performed "completely different functions."[180] The court stated: "Granted, at a high level of abstraction these positions all require directors to do the same thing—supervise, coordinate, and organize. But, the EPA demands more than a comparison of job functions from a bird's eye view."[181] The court "decline[d] to hold that having a *similar* title plus *similar* generalized responsibilities is equivalent to having *equal* skills and *equal* responsibilities."[182]

In interpreting "equal" so restrictively, many courts have imposed a glass ceiling on the EPA. As shown above, courts are increasingly dismissing EPA claims—at the summary judgment stage—based on the perceived failure of upper-level plaintiffs to satisfy the prima facie standard. Under this strict view of the EPA, only lower-wage women who work in standardized, assembly-line, or hourly wage jobs may state claims; women who achieve leadership positions in their companies simply are not protected by the EPA. As described in the next section, the EPA and its regulations require a more flexible interpretation of "equal."

2. The Pragmatic Approach to Equality

Under the pragmatic approach to equality, the determination of whether "two jobs entail equal skill, equal effort, or equal responsibility requires a practical judgment on the basis of all the facts and circumstances of a particular case."[183] The "court must compare the jobs in question in light of the full factual situation and the broad remedial pur-

174. *Id.*
175. *Id.* at 8.
176. *Id.* at 10.
177. *Id.*
178. *Id.*
179. *Wheatley*, 390 F.3d at 332.
180. *Id.* at 333.
181. *Id.*
182. *Id.* at 334.
183. EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243, 1245 (8th Cir. 1981) (citing 29 C.F.R. §§ 800.114-.132).

pose of the statute."[184] Courts following the pragmatic approach apply the regulatory definitions of responsibility, effort, and skill and evaluate the positions on an aggregate level to determine if the overall functions of the job are the same.

The controlling definitions of "responsibility, effort, and skill" permit differences in degree and subject matter. For example, "responsibility" means the "*degree* of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[185] Similarly, differences in the type of effort are irrelevant:

> Where jobs are otherwise equal under the EPA, and there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, *the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs*. Differences only in the kind of effort required to be expended in such a situation will not justify wage differentials.[186]

Likewise, the regulation defining "skill" speaks in terms of the "the amount or degree of skill" required for the compared positions, rather than a specific set of skills.[187]

Under the pragmatic approach, equal responsibility may be found where, for example, executives share the same reporting structure to the CEO and engage in similar managerial responsibilities.[188] In *Mulhall v. Advance Security, Inc.*,[189] for example, the court found that two executives had equal responsibility because both reported directly to the company president, "and both had ultimate responsibility as corporate heads for their divisions."[190] It was irrelevant that this responsibility was exercised in different ways in different subject areas. "One vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily."[191] Even though the

184. *Id.*

185. 29 C.F.R. § 1620.17(a) (2008) (emphasis added).

186. 29 C.F.R. § 1620.16(a) (2008) (emphasis added).

187. *Id.* § 1620.15(a).

188. *See, e.g.*, Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 578-79 (8th Cir. 2006) (holding Vice Presidents who did not perform the same job both had a high "degree of accountability" in preparing different auditing reports with little supervision, and so the level of responsibility was the same); Mulhall v. Advance Sec., Inc., 19 F.3d 586, 592-93 (11th Cir. 1994) (finding that executives had equal responsibility because both reported directly to the company president, "and both had ultimate responsibility as corporate heads for their divisions"); Denman v. Youngstown State Univ., 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008) (holding that plaintiff General Counsel and the rest of a university president's cabinet performed substantially equal work because they "were in the same job grade and job family" and each was "responsible for supervising and overseeing a particular [albeit different] area of the university"); Rinaldi v. World Book, Inc., No. 00 C 3573, 2001 WL 477145, at *9 (N.D. Ill. May 3, 2001) (finding that Vice Presidents in different departments were equal because "all were Vice-Presidents, and all three individuals had administrative responsibilities" and "thus, a common core of tasks is established").

189. 19 F.3d 586, 592-93 (11th Cir. 1994).

190. *Id.* at 594.

191. *Id.* at 595.

specific duties differed, the degree of accountability and responsibility was the same.

"Effort" is perhaps easier to apply to white-collar jobs than manual labor jobs. Whereas some of the earliest EPA cases found unequal effort because the men performed more strenuous tasks,[192] it is difficult to distinguish non-supervisory jobs in terms of "physical or mental exertion." For example, one court found that the level of effort required to do two different vice president jobs was the same where "[b]oth were required to apply the same base of banking knowledge to their jobs . . . . [B]oth were required to work after-hours and both represented the Bank at public functions."[193]

Under the pragmatic approach, "skill" is evaluated based on the amount of education involved and the core executive or professional abilities needed for the jobs. Do the positions require the same educational credentials, such as a college or professional degree? Even if the jobs differ with respect to subject matter on a micro-level, are the same general problem-solving, analytical, and supervisory abilities required for the positions? For example, one court found equal skill among two bank vice presidents where the plaintiff had more practical working experience and both had attended the same banking schools and computer training.[194] The court disregarded the employer's defense based on the male vice president's college degree because "all the skills needed at the Bank were on-the-job acquired."[195]

Courts using the pragmatic approach find that working in different departments does not defeat the equality of jobs.[196] For example, in *Crabtree v. Baptist Hospital of Gadsden, Inc.*,[197] the plaintiff "was the first and only female" executive at a hospital.[198] She was also the lowest-paid executive.[199] The male executives made an average of $24,180.50 more.[200]

192. *See, e.g.*, Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 578 (8th Cir. 2006) ("The inquiry as to whether two jobs are equal is a factual one: . . . effort refers to the physical or mental exertion necessary to the performance of a job."); Marshall v. Bldg. Maint. Corp., 587 F.2d 567 (2d Cir. 1978) (holding male "heavy duty" cleaners performed more strenuous work than female "light duty" cleaners).

193. *Simpson*, 441 F.3d at 578-79; *see also* Mulhall v. Advance Sec., Inc., 19 F.3d 586, 592-93 (11th Cir. 1994) (finding that the employer failed to show that vice president positions were distinguishable in terms of required effort).

194. *Simpson*, 441 F.3d at 578.

195. *Id.*

196. *See, e.g.*, Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1033-36 (11th Cir. 1985) (holding that teaching different subjects as well as teaching physical education, but with different coaching duties, were equal positions); EEOC v. Shelby County, 707 F. Supp. 969, 983 (W.D. Tenn. 1988) (holding that a cashier and exhibit custodian were comparable despite differences in duties because "there is little difference between the degree of responsibility required"); Usery v. Johnson, 436 F. Supp. 35, 38-42 (D.N.D. 1977) (holding sales clerks in different departments equal); Brennan v. Sears, Roebuck & Co., 410 F. Supp. 84, 95 (D. Iowa 1976) (holding that division managers performed equal work).

197. 749 F.2d 1501 (11th Cir. 1985).

198. Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400, at *5 (N.D. Ala. Dec. 7, 1983), *aff'd*, 749 F.2d 1501 (11th Cir. 1985).

199. *Id.* at *8.

200. *See id.*

The employer argued that the plaintiff needed to show that her job was equivalent in every respect to the other jobs.[201] The trial court found: "Because none of [the hospital's] Assistant Vice Presidents had the same areas of responsibility or the same number of employees under their direct supervision, there would be no way for [plaintiff] in this case to determine the 'equivalency' insisted upon by" the hospital.[202] The court examined equality of the job in conjunction with the size of the disparity itself, concluding:

> From the evidence here the difference in pay between the male officers and the single female officer was so disparate that it cannot be attributed to anything but sexual discrimination or to an indifference to the requirement of equal treatment of the sexes in employment. In fact and in law, these amount to the same thing.[203]

More recently, in *Denman v. Youngstown State University*, the court held that plaintiff general counsel and the rest of a university president's cabinet performed substantially equal work because they "were in the same job grade and job family," and each was "responsible for supervising and overseeing a particular [albeit different] area of the university."[204] In *Rinaldi v. World Book, Inc.*, the court found vice presidents in different departments were equal because "all were Vice-Presidents, and all three individuals had administrative responsibilities. Thus, a common core of tasks is established."[205] In *Simpson v. Merchants & Planters Bank*, the court held that vice presidents who did not perform the same job were nevertheless substantially equal.[206]

A pragmatic approach to equal work is also seen in the EEOC's description of how to determine whether coaching positions are equal under the EPA.[207] Under this notice, differences among coaching positions do not necessarily defeat their comparability. The EEOC explains that coaches—regardless of the skills they may have in a particular sport or the specific skills taught to the students—typically perform the same basic coaching duties, such as "1) teaching/training; 2) counseling/advising of student-athletes; 3) general program management; 4) budget management; 5) fundraising; 6) public relations; 7) and . . . recruiting."[208] Thus, whether someone has lacrosse skills or volleyball skills, the positions may be compared if the overall skill, effort, and responsibility necessary to perform the common coaching duties are equivalent. The EEOC should issue similar pragmatic guidance for upper-level positions.[209]

---

201. *Id.*
202. *Id.*
203. *Id.* at *9.
204. 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008).
205. No. 00-C-3573, 2001 WL 477145, at *9 (N.D. Ill. May 3, 2001).
206. 441 F.3d 572, 578 (8th Cir. 2006).
207. EEOC, Notice Number 915.002 (Oct. 29, 1997), *available at* http://www.eeoc.gov/policy/docs/coaches.html.
208. *Id.* at II(A)(2)(b).
209. The EEOC should also modernize the EPA's regulations to include examples of professional and supervisory workers. The regulations are pervaded by examples of manu-

Employers often try to defeat a prima facie showing under the EPA by cataloguing a long list of disparate duties performed by the male employees. In cases involving lower-level jobs, courts have been more skeptical of employer attempts to defeat the comparability of jobs based on alleged "differences" in the work performed, so long as the basic core functions of the job are essentially the same.[210] In cases involving non-supervisory jobs, courts typically disregard different duties where they do not otherwise diminish the overall responsibility, effort, and skill of the compared positions.[211] Courts construing lower-wage jobs also require employers to prove that the allegedly different tasks have an economic value commensurate with the pay differential.[212] For example, courts construing lower-wage jobs have found that allegedly extra duties did not have the economic value the employer attributed to them because all men received the extra pay and not just those performing extra duties.[213]

In cases involving upper-level plaintiff employees, however, courts more readily find that positions cannot be compared because of asserted differences in job duties without carefully examining whether the com-

---

facturing or hourly wage jobs but do not contain examples of employees working in professional or managerial positions. *See, e.g.*, 29 C.F.R. § 1620.14(c) (2009) (referring to "jobs on different machines or equipment"); *id.* § 1620.16(b) (using examples of checkers in grocery stores and assembly line workers to explain "effort"); *id.* § 1620.17(b)(2) (using as an example sales clerks); *id.* § 1620.17(b)(3) (using as an example an employee "turning out the lights in his or her department at the end of the business day").

210. Pursuant to 29 C.F.R. § 1620.20 (2009):

> Additional duties may not be a defense to the payment of higher wages to one sex where the higher pay is not related to the extra duties. The Commission will scrutinize such a defense to determine whether it is bona fide. For example, an employer cannot successfully assert an extra duties defense where:
>
> (a) Employees of the higher paid sex receive the higher pay without doing the extra work;
>
> (b) Members of the lower paid sex also perform extra duties requiring equal skill, effort, and responsibility;
>
> (c) The proffered extra duties do not in fact exist;
>
> (d) The extra task consumes a minimal amount of time and is of peripheral importance; or
>
> (e) Third persons (i.e., individuals who are not in the two groups of employees being compared) who do the extra task as their primary job are paid less than the members of the higher paid sex for whom there is an attempt to justify the pay differential.

211. For example, in *Brewster v. Barnes*, the court held that the different tasks performed by male officers did not diminish the "common core of tasks" performed by all correctional officers: "Like the male corrections officers, [plaintiff] spent one hundred percent of her time fulfilling the duties of a corrections officer." 788 F.2d 985, 991 (4th Cir. 1986). In *Hodgson v. Fairmont Supply Co.*, the court held that the sixteen extra duties performed by the male clerks did not justify a higher salary because they had the same common core of duties as the female clerks, and the extra duties were infrequently performed, illusory, or required essentially the same skills and effort as jobs performed by women. 454 F.2d 490 (4th Cir. 1972).

212. *See, e.g.*, Soto v. Adams Elevator Equip. Co., 941 F.2d 543 (7th Cir. 1991) ("Differences in responsibility must be substantial to be significant in the EPA context.").

213. Schultz v. Am. Can Co.–Dixie Prods, 424 F.2d 356, 361 (8th Cir. 1970); *see also* Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285-86 (4th Cir. 1974) (holding that higher pay was not related to extra duties when some men received higher pay without doing the extra work), *cert. denied*, 420 U.S. 972 (1975).

mon core of the positions nevertheless requires substantially the same degree of responsibility, effort, and skill, or whether the alleged differences have an economic value attributed by the employer.[214] Rather, courts are more likely to accept that upper-level jobs are not comparable based on employers' blanket claims that work in different departments simply cannot be compared.[215] Depending on the facts involved, these assertions may be true, but they do not necessarily defeat the comparability of the jobs for EPA purposes. As one court recently held, "To grant summary judgment on the basis of an identified distinction, without requiring proof of a qualitative difference, essentially nullifies the burden of proof on this issue."[216]

3. The Need for a New Prima Facie Standard

Although the EPA requires a pragmatic interpretation of "equal work" and some courts have used it, the empirical survey of EPA cases described above shows a trend towards more restrictive application of the EPA's prima facie standard. Our economy has shifted from standardized manufacturing jobs at one centralized worksite to service and digital jobs at scattered work locations. Women are entering many professions and achieving leadership roles, but the pay gap widens for them when they reach higher-level positions. The EPA needs a more flexible prima facie standard that accommodates these new realities and provides a more effective pay discrimination protection for all women. The EPA was revolutionary for its time. But as shown by the empirical survey above, the "equal work" standard has rendered the EPA ineffective for a large segment of the modern workforce and has imposed a wage glass ceiling for women in upper-level or supervisory positions.

a. A Return to the "Comparable Work" Standard

Congress need not reinvent the wheel in order to change the EPA's prima facie standard. Indeed, it can go back to original concepts. The EPA as initially drafted prohibited unequal pay for "comparable work."[217] Many state equal pay statutes likewise base their prima facie standard on work of a "comparable" character. For example, under the Maryland Equal Pay Act, a plaintiff must show that she and a male comparator "perform work of comparable character or work on the same operation, in the same business, or of the same type."[218] Arkansas's statute

214. *See, e.g.*, Sims-Fingers v. Indianapolis, 493 F.3d 768 (7th Cir. 2007); Wheatley v. Wicomico County, 390 F.3d 328 (4th Cir. 2004) (holding directors in different departments could not be compared); Magistrate Judge's Report & Recommendation at 25, Ledbetter v. Goodyear Tire & Rubber Co., No. CV 99-JEO-3137-E (N.D. Ala. Apr. 3, 2002).

215. *See, e.g.*, *Sims-Fingers*, 493 F.3d at 772; *Wheatley*, 390 F.3d at 333.

216. Vehar v. Cole Nat'l Group, Inc., 251 F. App'x 993, 1001 (6th Cir. 2007) (rejecting the employer's argument that differing education and experience levels between plaintiff and her comparator explained the wage differential).

217. *See supra* Part III.A.

218. MD. CODE ANN., LAB. & EMPL. § 3-304(a) (LexisNexis 2008).

simply requires "comparable work."[219] Massachusetts uses the phrase "work of like or comparable character or work on like or comparable operations."[220] Idaho,[221] Maine,[222] North Dakota,[223] Oklahoma,[224] and South Dakota[225] use "work on jobs [which] have comparable requirements relating to skill, effort and responsibility." West Virginia[226] and Oregon[227] use "work of comparable character, the performance of which requires comparable skills."

As the empirical analysis of EPA case law shows, the imposition of an "equal work" standard has excluded large portions of the workforce from its protections. As more women work in supervisory and professional jobs, the EPA may become a dead letter, applicable only to a narrowing field of standardized manufacturing positions. "Equal pay for equal work" would apply only so long as women remain in lower-wage positions, but not when they achieved higher-level occupations or supervisory jobs. Amending the EPA to require "work of like or comparable character" would solve the wage glass ceiling issue by permitting supervisors or executives in different departments—who perform comparable managerial tasks and hold similar levels of responsibility and authority—to state a prima facie case.

Compare, for example, *Wheatley v. Wicomico County*, in which the court held that department heads of different municipal divisions could not be compared under the federal EPA,[228] to the result in *Bureau of Labor & Industries v. Roseburg*, which decided a claim involving supervisors of different department divisions under Oregon law.[229] The plaintiff in *Roseburg* was a transit coordinator who alleged that her job was comparable to those of three male public works department employees: the shop superintendent, the maintenance foreman, and the water foreman.[230] The court affirmed a finding by the Oregon Commissioner of the Bureau of Labor and Industries that the plaintiff's job was "substantially similar" to the jobs performed by the three male supervisors.[231] Specifically, the jobs:

---

219. ARK. CODE ANN. § 11-4-610(a) (2002).

220. MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2008).

221. IDAHO CODE ANN. § 44-1702(1) (2003).

222. ME. REV. STAT. ANN. tit. 26, § 628 (2007). *See generally* Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 ME. L. REV. 23 (2003).

223. N.D. CENT. CODE § 34-06.1-03 (2004).

224. OKLA. STAT. ANN. tit. 40, § 198.1 (West 1999).

225. S.D. CODIFIED LAWS § 60-12-15 (2004).

226. W. VA. CODE ANN. § 21-5B-3(1)(a) (LexisNexis 2008).

227. OR. REV. STAT. § 652.220(1)(a) (2007).

228. 390 F.3d 328, 332-34 (4th Cir. 2004); *see supra* notes 176-81 and accompanying text.

229. 706 P.2d 956, 959-60 (Or. App. 1985).

230. *Id.* at 959.

231. The court noted that the "similarly situated" standard is stricter than a "comparable work" standard. *Id.* Either standard, however, would be more workable and effective than the EPA's "equal work" standard.

> involved skills which could be gained on-the-job, while working up through the ranks over time. They required technical skills which were substantial. They involved equivalent combinations of substantially similar supervisory, long-range planning, budget-preparing and other administrative skills, efforts and responsibilities. The working conditions for each position involved difficulty.[232]

Given these similarities in supervisory tasks, the court found that the positions could be compared even though the supervisors' work involved different types of tasks.

A recent arbitration case[233] involving a female Chief Technology Officer (CTO) at a technology company provides another example of the "comparable work" standard's ability to better accommodate upper-level positions.[234] The claimant CTO earned substantially less than the men on the executive team: her annual salary increases were smaller, her annual bonuses in some years were half that paid to her male peers, and her cumulative stock option grants were about one-half to one-quarter of the amount granted to the male executives.[235] Indeed, the company marketed itself as a technology company, and she was leading the technology function. She arguably should have been paid *more* than her male executive peers. The company conceded that her performance was excellent, and she led the largest department that was critical to the business.[236] The arbitrator ruled against her on the federal EPA claim, finding that the specific skills and responsibilities required for the different departments did not satisfy the substantially equal standard of the EPA.[237] In contrast, the arbitrator ruled in her favor under the Maryland EPA's "work of comparable character" standard.[238] Even though the executives led different departments and may have had different specialized skills related to their departments, their central executive and managerial functions constituted work of comparable character.

These state laws are not comparable worth statutes; they still require proof of comparable *work*. That is, there must be common similarities between the jobs. This approach presents a factual question about the nature of the work, not a value question about the intrinsic "worth" of the job.

In contrast, the Fair Pay Act pending in Congress proposes a comparable *worth* standard, prohibiting pay disparities in the same establishment for jobs dominated by one sex, as compared to jobs dominated by the

---

232. *Id.* at 959-60.

233. Many executive employees have contracts that contain mandatory arbitration provisions. This may be another reason that the number of federal appellate cases involving senior executives is so small.

234. Ventura v. Bill Me Later, Inc., Am. Arbitration Ass'n, Case No. 16 166 00549 07 (Interim Award) (on file with author). The author was claimant's counsel.

235. *Id.* at 2.

236. *Id.* at 4-6.

237. *Id.* at 17.

238. *Id.* at 27-32.

opposite sex, "for work on equivalent jobs."[239] The comparable worth model is not the best approach for a statutory remedy for pay discrimination. First, codifying the conception that some jobs are "female-dominated" and others are "male-dominated" perpetuates the idea that some jobs are the domain of women and others of men. Second, comparable worth would not provide a remedy, for example, for a nurse or elementary school teacher claiming that a man was brought in to do the same job at a higher pay rate than women because these are female-dominated jobs.

Third, although comparable worth can be a powerful political mobilizing force to raise consciousness about pay inequities, applying the concept in litigation has proved to be unworkable,[240] and courts are hostile to the notion.[241] Comparable worth analysis requires a complex job evaluation study that ranks each position based on a long list of factors to determine if the jobs are "equivalent" in value.[242] Unless a company has actually conducted a job evaluation study, there will be no data on which to base a comparable worth analysis.[243] Further, most compensation consultants will not work for plaintiffs. Even if they did, most plaintiffs cannot afford such a comprehensive analysis and lack access to the data necessary to perform it.

b. Title VII Is Not an Adequate Remedy

Title VII is not an adequate remedy to attack pay discrimination in most cases. Title VII requires that the plaintiff prove intent, and the employer bears only the burden of production, rather than the ultimate burden of persuasion.[244] And proving a discrimination case of any kind is extremely difficult. As one court noted:

> Employment discrimination and retaliation, except in the rarest cases, is difficult to prove. It is perhaps more difficult to prove such cases today than during the early evolution of federal and state anti-discrimination and anti-retaliation laws. Today's employers, even those with only a scintilla of sophistication, will neither admit dis-

239. Fair Pay Act of 2009, S. 904, 111th Cong. (2009). The Act also expands protection based on race and national origin, but discussion of those topics is beyond the scope of this Article.

240. Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1234-40 (describing hurdles in implementing comparable worth in the courts and opportunities presented by the standard in political and organizing strategies).

241. *See, e.g.*, Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007) (citing courts that have rejected comparable worth); Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986) (rejecting comparable worth); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (same).

242. *See supra* note 36 (citing comparable worth articles that describe the job evaluation process).

243. If a company has conducted a job evaluation study and the company intentionally pays the women less than the study recommends because of their sex, while paying the men more, then a Title VII claim would be available. *See* Clauss, *supra* note 36, at 12. Such cases were not uncommon in the early days of Title VII. *Id.*

244. *See* Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 344 (4th Cir. 1994) (explaining the differences in the burdens of proof for Title VII and the EPA).

> criminatory or retaliatory intent, nor leave a well-developed trail demonstrating it.[245]

Proving pay discrimination is especially challenging. First, unlike hiring and promotions, pay decisions are often made in secret,[246] and psychological research has shown that decisionmakers typically undervalue employees if they are women rather than men.[247] Legal scholars have examined cognitive psychology research to show how unconscious biases can lead to discrimination.[248] When the decisionmaking processes surrounding pay are opaque and guided by subjective factors, unconscious biases are more likely to reduce women's wages.[249]

Second, the employer has a monopoly on the information used to make the pay decision and should have the burden of proving the reasons for that decision. Employees are typically not privy to the decisionmaking process, and records of the reasons underlying pay decisions rarely exist unless the company has an established compensation system. It is therefore easier for an employer to craft post hoc excuses for pay disparities to mask discrimination.[250] Indeed, some plaintiffs prevail on EPA claims but lose on Title VII claims due to insufficient evidence of intent.[251]

---

245. Parada v. Great Plains Int'l of Sioux City, Inc., 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007).

246. Tom Krattenmaker, *Compensation: What's the Big Secret?*, HARV. MGMT. COMM. LETTER, Oct. 2002, at 3.

247. *See* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE 98-100 (2007) (reviewing studies that show that "people's prejudices can powerfully influence the ways in which they respond to men and women without their realizing it"); Claudia Goldin & Cecilia Rowe, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000) (reporting that when auditions for an orchestra were conducted with the performers behind a screen, women were substantially more likely to advance out of the preliminary selection round); Rhode, *supra* note 240, at 1219-20 (discussing studies).

248. *See, e.g.*, Barbara S. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

249. BABCOCK & LASCHEVER, *supra* note 247, at 119-20 ("[W]omen fare better when an evaluation process is more structured, includes clearly understood benchmarks, and is less open to subjective judgments." (citing S. FISKE & S.E. TAYLOR, SOCIAL COGNITION (1984); M.E. Heilman, *The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool*, 26 ORG. BEHAV. & HUMAN PERFORMANCE 386 (1980))).

250. In some cases, there is evidence of gender-based comments or other discriminatory actions that can help to prove intent in Title VII cases. For example, Lilly Ledbetter testified that her supervisor "threatened to give her poor evaluations if she did not succumb to his sexual advances." Brief for the Petitioner, *supra* note 8, at 5-6. When she questioned him about poor evaluations, he responded that it was "a lot easier to downgrade you. * * * You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me." *Id.* at 6; *see also* Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 340 (4th Cir. 1994) (employer told plaintiff to be an engineer or a "mama"). For higher level jobs, however, such "smoking gun" evidence is rare.

251. *See, e.g.*, Fallon v. Illinois, 882 F.2d 1206, 1217 (7th Cir. 1989) ("It is possible that a plaintiff could fail to meet its burden of proving a Title VII violation, and at the same time

In contrast to Title VII, the EPA puts the burden of proving an affirmative defense on the employer. "Discriminatory intent is not an element of a claim under the [EPA]."[252] This is especially appropriate in compensation cases because unconscious biases may infect informal processes and employers are better able to demonstrate the reasons for their pay decisions.

c. Size Matters

Changing the EPA's prima facie standard to a comparable or similar work standard raises another issue. As written, the EPA requires that compensation be equal, to the penny. "Any wage differential between the sexes, no matter how small and insignificant, is sufficient under the statutory prohibition."[253] Plaintiffs are more likely to prevail, however, when the wage disparity is large because employers have a harder time explaining it away.[254] In cases that involve professional plaintiffs and multiple comparators, courts have averaged the pay of various positions.[255]

Courts generally are hesitant to apply the equal pay standard to women in higher-level positions, in which variability in pay is more common than it is for workers on standardized, hourly wage scales. This is especially true where the wage disparity is relatively marginal, such as a few hundred dollars.[256]

---

the employer could fail to carry its burden of proving an affirmative defense under the Equal Pay Act."); Brewster v. Barnes, 788 F.2d 985, 987 (4th Cir. 1986) (holding defendant liable for pay discrimination under EPA, but not under Title VII).

252. Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 729 (10th Cir. 1984).

253. Hodgson v. Am. Bank of Commerce, 447 F.2d 416, 420 (5th Cir. 1971).

254. *See, e.g.*, Peltier v. City of Fargo, 533 F.2d 374, 378-79 (8th Cir. 1976) (finding a 50% discrepancy in salary between male and female car markers); Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983) (finding average disparity between male and female executives "so disparate that it cannot be attributed to anything but sexual discrimination or to an indifference to the requirement of equal treatment of the sexes in employment"), *aff'd*, 749 F.2d 1501 (11th Cir. 1985).

255. *See, e.g.*, Hein v. Or. Coll. of Educ., 718 F.2d 910, 916 (9th Cir. 1983) (holding that the proper test in a professional setting is whether plaintiff is receiving lower wages than the average wage of all employees of the opposite sex performing substantially equal work).

256. *See, e.g.*, Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007) ("[I]n determining whether equal pay is being paid for equal work, the size of the pay differential, though not determinative, is highly relevant. . . . The smaller the differential, the more likely it is to be justified by a small difference in the work. The pay differential between the plaintiff and [her comparator] is less than 2 percent, and we do not see how anyone could say that her work and his are so far equal that it should be inferred that he is overpaid relative to her."); Brousard-Norcross v. Augustana Col. Ass'n, 935 F.2d 974, 979 (8th Cir. 1991) ("Where the plaintiff's salary is marginally smaller than one comparator and marginally larger than another comparator, in a setting such as this where legitimate factors upon which to base salary differentials (e.g., scholarly work and teaching performance) can result in finely calibrated evaluations, a submissible Equal Pay Act claim has not been established."); Flockhart v. Iowa Beef Processors, Inc., 192 F. Supp. 2d 947, 971 (N.D. Iowa 2001) ("To find that the circumstances before the Court—a five-cent differential by two male employees over a period of two years—violates the Equal Pay Act would circumscribe employer personnel decisions beyond that contemplated by the Act.").

If Congress adopts a more pragmatic prima facie standard for the EPA, it should consider a more flexible approach to the equal pay requirement as well. For example, the law could have a sliding scale: the more similar the job, the more the pay needs to match in monetary value. Thus, standardized, hourly-wage jobs would require more exact parity in pay. For higher-level jobs that involve comparable or similar work, the law should permit marginal variations in pay. Such a concept is included, for example, in the Fair Labor Standards Act for "de minimis" amounts of work activity that do not need to be included in the calculation of "hours worked" that must be compensated by the employer.[257] "Marginal" is, of course, a relative concept. There is the potential for abuse if the law permits variations without clear guidance about what marginal means. And even marginal differences can add up to huge disparities over time.[258] Nevertheless, such a standard would balance concerns about compensation flexibility and discourage quibbling about small amounts while ensuring the promise of fair pay for women at all levels of the occupational spectrum.

IV. RHETORICAL ANALYSIS OF EQUAL PAY CASE LAW

EPA cases contain narratives that offer insights about other causes of the gender wage gap and wage glass ceiling.[259] This Part explores those narratives, analyzes them against the backdrop of other sociological, legal, and business research, and proposes additional reforms to attack the wage glass ceiling in a more comprehensive and proactive way.

A. The Elevation of "the Market" Over the Promise of Equal Pay

Many judges believe that pay disparities result from rational market forces and that markets have no intent.[260] They protest that courts are ill-equipped to scrutinize employer defenses in EPA cases because they pre-

257. *See* 29 C.F.R. § 785.47 (2009) ("In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.").

258. Babcock & Laschever, *supra* note 247, at 6 (explaining how a $5,000 difference in a starting salary can add up to a half-million dollar disadvantage by retirement, assuming each worker received a 3% annual salary increase).

259. Analyzing case narratives is important because what courts say "influences more broadly how people not involved in the immediate legal contest understand that reality." Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749, 1757 n.23 (1990). *See generally* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989).

260. *See, e.g.*, Wernsing v. Dep't of Human Servs., 427 F.3d 466, 469 (7th Cir. 2005) ("The Equal Pay Act forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent. To the extent other circuits believe that employers must disregard wages set in markets, they have adopted a variant of the comparable-worth doctrine—the view that wages must be based on 'merit' rather than forces of supply and demand.").

sume that these disparities are justified by the market. As Judge Posner wrote: "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give."[261]

Other legal scholars have discussed the idea that courts do not scrutinize employers' decisions regarding upper-level jobs as much as they do for lower-level jobs. Elizabeth Bartholet examined how courts in Title VII cases involving allegations of racial discrimination in employment selection methods show greater deference and apply less scrutiny for upper-level jobs.[262] Deborah Rhode has noted that judges are reluctant to interfere with employer discretion in cases involving upper-level jobs: "Many members of the bench may feel special sympathy toward professionals with whom they identify and selection processes from which they have benefited. Upper-level employment litigation 'confronts courts with their own worlds.' To many judges, the more prestigious the position, the more substantial the costs of intrusiveness."[263]

For many judges, the issue of compensation for upper-level jobs is especially off-limits. For example, in *Wheatley v. Wicomico County*, the court stated that finding that all department heads were equal:

> would deprive compensation structures of all flexibility and deny employers the chance to create pay differentiations that reflect differing tasks and talents. In passing the EPA, Congress embraced "the principle of equal pay for equal work regardless of sex." Congress did not authorize the courts "to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth." There is no question that [plaintiffs] are valuable assets to Wicomico County. But it is not the job of the courts to discard Congress' studied use of the term "equality" and set the price for their services.[264]

Similarly, in *Georgen-Saad v. Texas Mutual Insurance Co.*, the court stated that employers' decisions regarding senior executive pay should not be scrutinized:

> In cases such as these, no judge or jury should be allowed to second guess the complex remuneration decisions of businesses that necessarily involve a unique assessment of experience, training, ability, education, interpersonal skills, market forces, performance, tenure, etc. Requiring Defendant and other companies to either pay senior executives the same amount or to come to court to justify their failure to do so is simply beyond the pale. In a perfect world, we would be able

261. Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007).

262. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982).

263. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1193-94 (1988). *See generally* Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267 (1994).

264. 390 F.3d 328, 334 (4th Cir. 2004) (citations omitted).

> to grasp the complexities of such calculations and produce a formula that would bring forth the exact amount that any person should be paid at any moment in time. We do not live in such a world.[265]

One court voiced misgivings about the recurrent theme that courts should keep their hands off salary, promotion, and hiring decisions involving professors at universities.[266] The court noted that, in contrast, "[i]n 'blue collar' employment situations courts have tended to view subjective criteria with suspicion."[267]

There are several problems with the market narrative. First, the very purpose of the EPA is to overcome the discriminatory market forces that caused wage inequality. The earliest EPA cases consistently held that the fact that a woman may have less bargaining power than a man to demand a higher salary does not constitute a valid defense under the EPA.[268] The market itself perpetuates and exacerbates discriminatory pay rates. Under the EPA, the abstract notion of "the market" does not trump the promise of equal pay.[269]

Second, courts should not accept a market defense where the employer has not presented empirical market data justifying the pay rates. In cases in which the employer shows that it conducted an objective, professional survey of market rates and applied the survey recommendations in a nondiscriminatory way, market data may be a valid defense. In most cases, however, such market data does not exist. Rather, employers typically rely on their own subjective belief about what the market requires. Courts should not accept ad hoc, subjective conclusions about the market when the employer did not actually review market data to establish pay rates. As Martha Chamallas has written, "Courts should shift to a more empirically neutral stance recognizing that wages may or may not be a function of the market, depending on the political or cultural practices of the particular organization."[270]

---

265. 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002).

266. *Id.* n.14.

267. Sweeney v. Bd. of Trs., 569 F.2d 169, 176 (1st Cir. 1978).

268. Corning Glass Works v. Brennan, 417 U.S. 188, 207 (1974) ("The whole purpose of the Act was to require that these depressed wages [of women] be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex 'constitutes an unfair method of competition.'"); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) ("[U]se of the 'market force' theory, i.e. a woman will work for less than a man, is not a valid consideration under the Act."); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 286 (4th Cir. 1974) (finding "the availability of women at lower wages than men" to be "precisely the criterion for setting wages that the Act prohibits"); Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973) (stating that there is "no excuse" for hiring female workers at a lower rate "simply because the market will bear it"); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970) (finding that an employer's greater bargaining power with women "is not the kind of factor [other than sex] Congress had in mind" in enacting the EPA).

269. *See* Siler-Khodr v. Univ. of Tex. Health Sci. Ctr., 261 F.3d 542, 547 (5th Cir. 2001) (stating that the market forces defense simply perpetuates discrimination).

270. Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 596 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)).

Some recent EPA cases have rejected market defenses where employers failed to show how they used market information. For example, in *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, the court denied the employer's motion for summary judgment where it advanced a "market forces" argument to explain the pay disparity between a male and a female attorney.[271] The court explained that "[a] court should not accept a 'market forces' defense unless the employer can rationally explain the use of market information."[272] In *Drum v. Leeson Electric Corp*., the court reversed a grant of summary judgment where the market data showed that the male comparator's salary was consistent with the market rate for his position, but the plaintiff's salary was significantly lower than the market rate for her position.[273] Since the plaintiff's salary was the outlier, the court held that the employer "must justify her salary to prove the differential is based on a factor other than sex."[274]

A third problem with the market defense is that one magic market rate rarely exists for a particular job. If a company wants to determine market rates, there are myriad modern salary surveys, some of which are considered more reputable and reliable than others.[275] These surveys include data collected and aggregated from those companies that participate in the survey.[276] Companies must pay a fee to participate in the surveys, and must contribute their salary information to the survey company.[277] A competent market analysis typically requires that companies hire professional compensation consultants to analyze the data and the positions for which salary information is desired.[278] There are many human agency factors that can affect the structure and outcome of a market compensation analysis, which can allow subjective judgments and unconscious biases to influence the results. For example, results will vary based on the accuracy and comprehensiveness of the survey data used, the companies selected as comparators, and the job positions that are compared.[279] Companies can also choose to assign extra "points" to certain employees for a variety of arbitrary or work-related factors that may alter the range of pay.[280] Given all of these discretionary variables, the idea that there is one market rate—unaffected by subjective and potentially discriminatory variables—for any one position is false. Instead, there may be a range of

271. 922 F. Supp. 985, 993-94 (D.N.J. 1996).
272. *Id.* at 993.
273. 565 F.3d 1071, 1073 (8th Cir. 2009).
274. *Id.*
275. *See, e.g*., Surveys, http://www.salary.com/compensation/surveys/index.asp (last visited Jan. 28, 2010).
276. *See id.*
277. *Id.*
278. *Id.*
279. Telephone Interview with Alan W. Smith, Jr., Former CEO, Watson Wyatt Compensation Consulting (July 9, 2009) (interview notes on file with author); *see* NELSON & BRIDGES, *supra* note 270, at 194-96 (describing how a salary survey itself may be shaped by organizational politics and concluding that the market is "socially constructed" by the employer).
280. Telephone Interview with Alan W. Smith, *supra* note 279.

market comparables, and companies must make subjective judgments about which point on the market range to pay a particular employee. Thus, to say that markets have no intent does not mean that a particular salary decision cannot be tainted with discrimination.

A fourth problem with market defenses is that, even when empirical market data is presented by the employer, courts do not scrutinize it as closely as other employer defenses. In many cases, the market data on which employers rely actually show discriminatory patterns.[281] Sociologists Robert Nelson and William Bridges studied the record in four prominent pay discrimination cases and found that courts "uncritically accepted employers' assertions that they were following the market when they set wages for predominantly female jobs at lower rates than predominantly male jobs."[282] In many EPA cases in which employers conducted salary surveys or developed salary systems, women are found to be paid *below* the recommended salary ranges for their positions, and the men are paid *above* those ranges.[283]

The market narrative on which some courts rely to justify their refusal to compare non-standardized jobs under the EPA may be motivated by the hostility that many courts have to the "comparable worth" concept. Some judges may fear that if they allow upper-level positions to be covered by the EPA, they will be endorsing comparable worth. For example, in *Sims-Fingers v. Indianapolis*, the Seventh Circuit held that a female park manager's job could not be compared to her nine male park managers' jobs because the nine men were in charge of larger parks or parks that had additional amenities.[284] Writing for the court, Judge Posner remarked: "[W]hen jobs are heterogeneous a suit under the Equal Pay Act is in danger of being transmogrified into a suit seeking comparable pay—a theory of liability for sex discrimination under Title VII that has been rejected by this and the other courts to consider it."[285]

This judicial concern about "comparable worth" in the EPA context is misguided. Scrutinizing an employer's proffered market defense does not mean that courts have to make judgments about an employee's worth in the abstract. Courts and juries are well equipped to require employers to produce evidence about the reason for the pay disparity—whether it is a merit system or empirical market data—and evaluate that evidence.

---

281. *See* NELSON & BRIDGES, *supra* note 270 (showing how market data on which employers relied in four pay discrimination cases actually revealed a pattern of discrimination against women employees).

282. Chamallas, *supra* note 270, at 580.

283. For example, the plaintiffs were paid below the mandated salaries for their positions in the company salary plan. *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting); Wheatley v. Wicomico County, 390 F.3d 328, 331 (4th Cir. 2004); Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 686 n.5 (7th Cir. 1998). In the arbitration case discussed previously, the market review conducted by the employer's expert compensation consultant showed that the claimant was paid *below* market range for her position, but that certain male executive peers were paid *above* the market range for their positions. *See supra* notes 234-39 and accompanying text.

284. 493 F.3d 768. 770-71 (7th Cir. 2007).

285. *Id.* at 771.

The EPA requires that courts closely scrutinize the employer's proffered reasons for the pay disparity to determine whether any alleged differences in the work have an economic value commensurate with the differential.[286] Courts do this not by imposing their own value on the jobs at issue, but by evaluating the validity and credibility of employer pay practices on a broader scale. If, for example, an employer claims that a pay disparity between a female Chief Financial Officer and a male Chief Marketing Officer exists because the CMO performs advertising work and the CFO does not, the court should examine whether other male members of the executive team also receive higher pay without doing advertising work. If an employer claims that pay disparities resulted from the market, courts should require the employer to show that the "market" on which the employer relied was not simply a subjective hunch about market rates, but was based on concrete empirical data that was reviewed and analyzed in conjunction with a professional compensation consultant while establishing pay rates. In addition, courts should be mindful of the human agency factors involved in a market salary survey that can cause discriminatory results. Courts that accept vague, unsupported claims that the market caused a pay differential are not properly scrutinizing the employer's affirmative defense as required by the EPA.

B. The "Any Reason Under the Sun" Defense

The attitude that compensation decisions for upper-level positions are above the law is especially problematic in EPA cases because of its fourth affirmative defense—"any factor other than sex."[287] In EPA cases that involve non-supervisory jobs, courts typically reject defenses based on subjective judgments about an employee's relative "worth." For example, under the "merit system" and "seniority system" affirmative defenses of the EPA, employers must prove the existence of a system with objective standards and must show that the system was applied in a non-discriminatory manner.[288] Courts have recognized that permitting a defense to pay disparities based on assertions of "merit" and "performance," "if not strictly construed against the employer, could easily swallow the rule."[289]

---

286. 29 C.F.R. § 1620.20 (2009).

287. 29 U.S.C. § 206(d)(1) (2006).

288. Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1036 (11th Cir. 1985) (rejecting the employer's defense, which was based on "personal, and in many cases, ill-informed judgments of what an individual or his or her expertise is worth" because "[m]erely claiming that teachers of certain subjects or with certain qualifications are worth more does not explain away discrepancies absent an explanation of how those factors actually resulted in an individual employee earning more than another") (quoting the trial court's opinion)). EEOC v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980) (explaining that a merit system "must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria," and if not in writing, the system "must also fulfill two additional requirements: the employees must be aware of it; and it must not be based upon sex").

289. Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970); *see also* Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) ("Subjective evalu-

In cases involving lower-level jobs, courts also strictly construe the "factor-other-than-sex" affirmative defense against the employer and are suspicious of subjective or amorphous claims about the plaintiff's lower "worth" and the alleged need for employer discretion in setting compensation. Take the example of *Keziah v. W.M. Brown & Son, Inc.*, which involved a claim by a non-supervisory sales representative.[290] The employer attempted to explain a salary differential based on the male comparator's "experience and customer base."[291] The Fourth Circuit, however, found that the record as a whole demonstrated that the company failed to prove that the salary differential resulted from "any factor other than sex."[292] The employer in *Keziah* argued—without objective factual support—that the male comparator was somehow "worth more" and had more future potential.[293] The Fourth Circuit found that "[o]ne of the things undermining the company's defense is the pure subjectivity of the salary-setting process."[294] The salaries in *Keziah* were based on the supervisor's "subjective evaluation of the individual worth of [the plaintiff] and [the male comparator]."[295] The court found that the company in *Keziah* "failed to show the existence or application of any salary guidelines or concrete standards for determining salary."[296] Therefore, the court held that the "pure subjectivity of the process," combined with the lack of any clear explanation or support for the supervisor's evaluations, meant "that the company failed to prove that the salary differential was based on a factor other than sex."[297]

---

ations of the employer cannot stand alone as a basis for salary discrimination based on sex.").

290. 888 F.2d 322, 324 (4th Cir. 1989).

291. *Id.* at 325.

292. *Id.*

293. *Id.* at 325-26.

294. *Id.* at 326.

295. *Id.*

296. *Id.*

297. *Id.*; *see also* EEOC v. White & Sons Enters., 881 F.2d 1006, 1009-10 (11th Cir. 1989) (holding that employer's factor-other-than-sex defense failed because the company had no written or objective system of setting wages).

In a majority of circuits[298] and under the EEOC's interpretation,[299] the employer is not permitted to rely on literally *any* other factor, but only a factor that is job-related and adopted for a legitimate business reason.[300] As courts have explained, "[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned."[301]

The circuits that have required that the factor other than sex be job-related and adopted for a legitimate business reason have involved non-supervisory positions (such as clerical work, sales agents, or custodians) or government jobs (a deputy sheriff).[302] They have not involved professional or executive jobs in a private corporate setting. In contrast to the majority approach developed in the non-supervisory context, consider the interpretation of the factor-other-than-sex defense in a case involving a

298. *See* Steger v. Gen. Elec. Co., 318 F.3d 1066, 1078-79 (11th Cir. 2003) ("Because the evidence showed that the salary retention plan was justified by 'special exigent circumstances connected with the business,' and because there was no evidence which rebutted GE's explanation, the district court did not err in submitting the matter to the jury or in denying Steger's motion for judgment as a matter of law." (quoting Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995)); Belfi v. Prendergast, 191 F.3d 129, 136 (2d Cir. 1999) ("To successfully establish the [factor-other-than-sex] defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential."); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) ("[A]n employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense."); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1992) ("[The factor-other-than-sex] defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988) ("[The factor-other-than-sex] exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business."); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) ("The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.").

299. EEOC, Directives Transmittal No. 915.003, § 10.IV.F.2. & nn.65-66 (Dec. 5, 2000), *available at* http://www.eeoc.gov/policy/docs/compensation.html#N_65_ ("An employer . . . must show that the factor is related to job requirements or otherwise is beneficial to the employer's business [and] the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.").

300. For articles regarding the "factor-other-than-sex" defense, see Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 739-49 (1986) (discussing the Bennett Amendment and the fourth affirmative defense); *see also* Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085 (1989); Ana M. Perez-Arrieta, Note, *Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context*, 31 J.C. & U.L. 393 (2005).

301. Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992).

302. *See, e.g.*, Belfi v. Prendergast, 191 F.3d 129 (2d Cir. 1999) (clerical work); Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995) (deputy sheriff); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir. 1992) (custodian); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982) (sales agent).

supervisory employee: *Dey v. Colt Construction & Development Co*.[303] In *Dey*, the court described the "factor-other-than-sex" defense as "'a broad catch-all exception [that] embraces an almost limitless number of factors, so long as they do not involve sex.' The factor need not be 'related to the requirements of the particular position in question,' nor must it even be business-related."[304] The Seventh and Eighth Circuits have adopted *Dey*'s approach of deferring to the employer under the fourth affirmative defense regardless of the justification's reasonableness or relation to the job and business at issue.[305] For these courts, "the wisdom or reasonableness of the asserted defense" is irrelevant.[306] As one court opined, the EPA "does not authorize federal courts to set their own standards of 'acceptable' business practices. The statute asks whether the employer has a reason other than sex—not whether it has a 'good' reason. Congress has not authorized federal judges to serve as personnel managers for America's employers."[307]

If presented with this issue, it appears unlikely that the Supreme Court would follow the majority view. In *Smith v. Jackson*, which held that disparate impact claims are cognizable under the Age Discrimination in Employment Act,[308] the plurality noted that in the EPA, "Congress barred recovery if a pay differential was based 'on any other factor'—*reasonable or unreasonable*—'other than sex.'"[309] Given this language, it may only be a matter of time before the Court adopts the minority view that the "factor other than sex" literally means any factor at all (other than an admission of sex discrimination).[310] If this happens, any defense asserted by the employer—no matter how unreasonable or far-fetched—must be accepted by the courts. This would also affect Title VII pay claims, for which the EPA's defenses are applicable.[311]

Congress should amend the EPA to clarify the contours of acceptable business defenses for challenged pay disparities. One option is to eliminate the "factor-other-than-sex" defense altogether and follow the example of some state equal pay statutes that provide a list of specific

303. 28 F.3d 1446 (7th Cir. 1994).

304. *Id.* at 1462.

305. *See id.*; Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003).

306. *See Taylor*, 321 F.3d at 719 (citing Covington v. S. Ill. Univ., 816 F.2d 317, 322-23 (7th Cir. 1987)).

307. Wernsing v. Dep't of Human Servs., 427 F.3d 466, 468 (7th Cir. 2005) (citations omitted).

308. 544 U.S. 228. 240 (2005).

309. *Id.* at 239 n.11 (emphasis added). This portion of the opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

310. Management attorneys have noted the language in *Smith*. *See* William E. Doyle, Jr., *Implications of* Smith v. City of Jackson *on Equal Pay Act Claims and Sex-Based Pay Discrimination Claims Under Title VII*, 21 LAB. LAW. 183 (2005); *see also* Respondent's Post-Hearing Brief, Ventura v. Bill Me Later, Inc., Am. Arbitration Ass'n, Case No. 16 166 00549 07 (Interim Award) (on file with author) (arguing that *Smith* means a factor other than sex does not need to be reasonable or business related).

311. *See* Washington v. Gunther, 452 U.S. 161, 168-71 (1981) (holding that the EPA's affirmative defenses apply to Title VII claims for compensation discrimination).

affirmative defenses that may justify a pay differential.[312] This list could include factors that commonly and legitimately justify pay differentials, such as more years of experience, a demonstrated record of higher performance, or greater job responsibility. But, as with the other EPA defenses, the employer would bear the burden of proving that a certain factor or factors actually produced the pay disparity, and did not simply theoretically justify it.

The other option is for Congress to codify the majority view that the factor other than sex must be reasonable and business-related. This approach is proposed in the Paycheck Fairness Act, now pending in Congress.[313] Such an amendment is especially important for workers at higher levels, for whom amorphous claims that the market dictated the pay disparity are common.

C. Presumption of Incompetence and Lower Value

Many courts are skeptical of discrimination plaintiffs before they learn anything about the nature of the claims. There is a presumption in many discrimination cases that only the poorest performers complain of such things. As one district court judge wrote:

> [T]he very best workers are seldom employment discrimination plaintiffs due to sheer economics: Because the economic costs to the employer for discrimination are proportional to the caliber of the employee, discrimination against the best employees is the least cost effective. Rather, discrimination and retaliation plaintiffs tend to be those average or below-average workers . . . for whom plausible rationales for adverse employment actions are readily fabricated by employers with even a meager imagination.[314]

EPA cases involving professional and executive women shake up these notions because they are not average workers. Many have stellar performance records and impressive credentials that equal or exceed that of

---

312. For example, the Maryland EPA does not include a catch-all defense. The affirmative defenses are limited to:

> (1) a seniority system that does not discriminate on the basis of sex; (2) a merit increase system that does not discriminate on the basis of sex; (3) jobs that require different abilities or skills; (4) jobs that require the regular performance of different duties or services; or (5) work that is performed on different shifts or at different times of day.

Md. Code Ann., Lab. & Empl. § 3-304(b) (LexisNexis 2008).

313. *See* Paycheck Fairness Act, H.R. 12, 111th Cong. § 3 (2009). The bill provides:

> The bona fide factor defense . . . shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.

Id.

314. Parada v. Great Plains Int'l of Sioux City, Inc., 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007) (citations omitted).

their male peers. Even then, another narrative pervading EPA cases is the notion that women who have achieved managerial positions nevertheless have less value. They are less important—if not the *least* important—executives in the company.[315] If the plaintiff has impressive credentials, the male comparator is even more impressive and has a better reputation.[316] Even if the plaintiff is in most aspects an equal member of the executive team, her managerial responsibilities are simply support functions and, unlike her male peers, are not part of the core business of the company.[317]

For example, in *Stopka*, the plaintiff was a vice president leading her employer's largest division in terms of number of employees.[318] She shared similar managerial functions as other division heads.[319] Under the company's Salary Administrative Program, all division vice presidents were ranked equally.[320] Even though she was among those with the greatest tenure, she was paid significantly less than male vice presidents, and indeed, was paid less than several other men who were neither division heads, full vice presidents, nor elected corporate officers.[321] She even earned less than the minimum salary mandated for executives by the salary program.[322]

The company defended the gross disparity on the grounds that Ms. Stopka did not have responsibility for the core business aspects of the insurance company.[323] The company said that it found its salary program to be "unworkable" and used it only as a guideline.[324] The court accepted the company's defenses and found that the male vice presidents performed work that was "substantially more important to the operation of the company."[325]

---

315. See, for example, *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037 (11th Cir. 1985), in which a college claimed that male teachers were "worth more" and had superior qualities, and *Ratts v. Business Systems, Inc.*, 686 F. Supp. 546, 551 (D.S.C. 1987), in which a CEO testified that the plaintiff occupied the "lowest level of vice president positions."

316. *See, e.g.*, Chance v. Rice Univ., 984 F.2d 151, 153 n.10 (5th Cir. 1993) (plaintiff professor's credentials were "not as impressive" as those of her department colleagues); Am. Arbitration Ass'n, Arbitration Award (2004) (Klein, Arb.), 2004 AAA Employment LEXIS 182 (finding that claimant had "very significant achievements" but higher pay was justified because of the male comparator's "unusually high level of accomplishment, experience, and reputation").

317. *See, e.g.*, Stopka v. Alliance of Am. Insurers, 141 F.3d 681 (7th Cir. 1998) (finding that a female executive was not part of the "core business" even though she led the largest department); Goodrich v. Int'l Bhd. of Elec. Workers, 815 F.2d 1519, 1525 (D.C. Cir. 1987) (finding that male union contract analysts performed equal work with plaintiff the majority of the time, but that they also had other tasks that consumed little time but were "significant and essential to the operation and mission" of the union).

318. *Stopka*, 141 F.3d at 685.

319. *Id.*

320. *Id.*

321. *Id.* at 685-86.

322. *Id.* at 686 n.5.

323. *Id.* at 686.

324. *Id.* at 686 n.5.

325. *Id.* at 686.

In many EPA cases, this may, of course, be true. But, this repeated narrative of lower worth raises important questions that may point to underlying causes of the gender wage gap. Are women being steered towards executive roles that are supportive in nature rather than core business opportunities? Why did these women believe that they were equal contributors on the executive team, only to learn in litigation that they were perceived simply as a back office support function? Are women receiving the training and opportunities for advancement they need to be successful, or are they being hampered by other administrative work tasks that their male peers do not need to perform?[326] Are they being equitably rewarded for their work, or is there an expectation that women will be satisfied with less? Employers should proactively evaluate their compensation systems and examine these issues.

D. Pay Secrecy

Modernizing the EPA's standards will help to crack the wage glass ceiling. It will cause employers to take internal pay equity more seriously and provide a more effective remedy for women at all occupational levels. But nearly a half-century of litigation under the EPA and Title VII shows that litigation—although a powerful catalyst for social change—can be a clumsy instrument of reform. Litigation is expensive, disruptive for employers, and psychologically and professionally damaging for most women.[327] Although we need an effective EPA to express and enforce our nation's commitment to equal pay, other changes are needed to shatter the wage glass ceiling.

An important first step is to lift the shroud of secrecy on compensation. Modern compensation structures tend to be secret. Most workers have no idea what the controlling criteria is for their pay awards and do not know what their peers make. Many employers have strict pay confidentiality policies, the violation of which can lead to termination, even though such policies violate the National Labor Relations Act.[328] As Justice Ginsburg noted in *Ledbetter*, compensation discrimination is often "hidden from sight."[329] Some women are fired when they insist on knowing

---

326. Consider the example of the female executive officer at the hospital in *Crabtree*:

> No other officer of the hospital was required to turn in timecards. Crabtree was required to type her own Inspection Control reports. No other officer had to type his own reports. Crabtree was the only officer without a secretary primarily responsible to the officer. She was denied permission to attend a workshop although male officers were allowed to attend. No other officer was not afforded an opportunity for input into the evaluation of a proposed new telephone system.

Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983), *aff'd*, 749 F.2d 1501 (11th Cir. 1985).

327. *See* Rhode, *supra* note 263, at 1196 (explaining the considerable "costs of litigation, both in personal and financial terms").

328. *See* Rafael Gely, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. Pa. J. Lab. & Emp. L. 121, 122 n.2, 124-25 (2003).

329. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649-50 (2007) (Ginsburg, J., dissenting) (citing Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1008-09 (10th Cir.

the salaries of their male counterparts.[330] Many women do not discover gross pay disparities until they, for example, receive anonymous letters,[331] review proxy statements,[332] or become publicly ridiculed by their co-workers.[333]

A related theme in EPA cases involving executives is that the man simply negotiated a higher salary. For example, in *Balmer v. HCA, Inc.*, the male comparator was allowed to negotiate his starting salary, but the plaintiff was not permitted to negotiate her salary.[334] Nevertheless, the court found no EPA violation and honored the employer's promise of higher pay to the male employee, to the detriment of the law's promise of equal pay.[335]

In their groundbreaking work, *Women Don't Ask*, Linda Babcock and Sara Laschever show that most women do not negotiate compensation

---

2002) ("[P]laintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her coworkers' salaries."); McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 296 (1st Cir. 1998) ("[P]laintiff worked for employer for years before learning of salary disparity published in a newspaper.")).

330. *Crabtree*, 1983 WL 30400.

331. Lilly Ledbetter received an anonymous letter informing her of pay disparities. *See* Katie Putnam, Note, *On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 WM. & MARY J. WOMEN & L. 685, 689 (2009).

332. Margaret Heffernan, the former CEO at CMGI, told this story:

> For years, I was the only woman CEO at CMBI. But it wasn't until I read the company's proxy statement that I realized that my salary was 50 percent of that of my male counterparts. I had the CEO title, but I was being paid as if I were a director.

BABCOCK & LASCHEVER, *supra* note 247, at 104.

333. In one case, the plaintiff "accidentally left her pay stub in plain view, and some of her colleagues began laughing and making negative remarks about her pay." Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 785 (7th Cir. 2007).

334. 423 F.3d 606, 609 (6th Cir. 2005).

335. *Id.* at 615; *see also* Reznick v. Associated Orthopedics & Sports Med., P.A., 104 F. App'x 387, 391-92 (5th Cir. 2004) (finding no EPA violation where a male surgeon negotiated higher compensation level in his initial employment contract than the plaintiff); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (finding no EPA violation where a male comparator negotiated a higher salary); EEOC v. Home Depot U.S.A., Inc., No. 4:07CV0143, 2009 WL 395835, at *10 (N.D. Ohio Feb. 17, 2009) (finding a valid factor other than sex where male employees were able to negotiate higher starting salaries than the plaintiff); Hardwick v. Blackwell Sanders Peper Martin, L.P., No. 25-859-CV-W-FJG, 2006 WL 2644997, at *3-4 (W.D. Mo. Sept. 14, 2006) (holding an EPA claim untimely and noting that even if it were timely, the male comparator had negotiated a higher salary and the plaintiff did not negotiate). *But see* Mulhall v. Advance Sec., Inc., 19 F.3d 586, 596 (11th Cir. 1994) (rejecting the employer's defense that wage disparities resulted from negotiations surrounding the purchases of comparators' businesses); Glodek v. Jersey Shore State Bank, No. 4:07-CV-A-2237, 2009 WL 2778286, at *9 (M.D. Pa. Aug. 28, 2009) (rejecting negotiation defense at the summary judgment stage and stating: "Though salary demands are not entirely irrelevant, it would be inequitable to permit defendant to shelter itself from liability by stating that one individual received greater compensation than another simply because he or she requested it"); Day v. Bethlehem Ctr. Sch. Dist., No. 07-159, 2008 WL 2036903, at *9 (W.D. Pa. May 9, 2008) (mem. op.) (rejecting the school district's defense at the summary judgment stage that male comparators negotiated salaries that were higher than the standard salary scale); Klaus v. Hilb, Rogal & Hamilton Co., 437 F. Supp. 2d 706, 723-24 (S.D. Ohio 2006) (denying summary judgment where the employer defended a $36,000 wage disparity based on the male comparator's negotiation of higher salary).

rates and other important aspects of their daily lives.[336] They advise that women should "ask for it" and negotiate higher pay.[337] Studies show that if women are armed with knowledge about comparable wage rates, they are more likely to be able to negotiate equitable starting salaries or raises to help prevent pay disparities.[338]

There is one significant problem. Unless wage rates are published, women do not know what to demand. As discussed above, employers have a monopoly on the relevant information. Professional salary studies are not available to individuals, who must rely on informal networking and incomplete data from a variety of sources.[339] Women may not have access to the same network of professionals that men do to determine potential pay ranges.[340] Publishing pay data would help to lessen the pay gap by promoting better salary negotiation between employees and employers.

Publishing pay data would have other benefits. Employers who know that their pay scales will be public will be less likely to "play favorites" or permit inexplicable inequities to persist. Employers are more likely to maintain lopsided pay scales if the lower paid employee simply does not know that her peers are getting paid substantially more. Having a transparent pay system and publicly available rates will help to reduce the gender wage gap by arming all employees with the knowledge needed to negotiate for a fair wage rate. This may be one reason that there is a smaller wage gap for women who work for more standardized, hourly rates: everyone knows what the pay rate is, and the employer is unable to vary that rate for discriminatory reasons. Indeed, the pay gap is substantially smaller for federal government workers, who have publicly reported wages.[341]

Business scholars have shown that lifting the shroud of secrecy on pay has organizational benefits. For example, Edward Lawler has shown that managers employed by firms with secret pay plans tend to overestimate the pay of managers at their own level and one level below them, and they underestimate the pay of managers one level above them.[342] Such

---

336. BABCOCK & LASCHEVER, *supra* note 247.

337. *Id.* at 4.

338. *See id.* at 55, 66-67, 151-52.

339. In a follow-up book, Babcock and Laschever recommend that women gather wage information from a vast array of trade journals, website sources, and personal and professional networks. LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE NEGOTIATION TO GET WHAT THEY REALLY WANT 91-92 (2009).

340. BABCOCK & LASCHEVER, *supra* note 247, at 167.

341. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-279, WOMEN'S PAY: GENDER PAY GAP IN THE FEDERAL WORKFORCE NARROWS AS DIFFERENCES IN OCCUPATION, EDUCATION, AND EXPERIENCE DIMINISH 3 (2009), *available at* http://www.gao.gov/new.items/d09279.pdf (finding that "[f]rom 1988 to 2007, the gender pay gap . . . declined from 28 cents to 11 cents on the dollar" and that for each year "all but about 7 cents of the gap can be accounted for by differences in measurable factors such as the occupations of men and women and, to a lesser extent, other factors such as years of federal experience and level of education").

342. Edward Lawler, *Managers' Perceptions of Their Subordinates' Pay and of Their Superiors' Pay*, 18 PERSONNEL PSYCHOL. 413 (1965); *see also* Liz Wolgemuth, *Why Do You*

perceptions may make managers more dissatisfied with their own pay as well as less productive and less motivated to work.[343]

Compensation systems are powerful extrinsic motivators.[344] Requiring published pay data will encourage companies that rely on subjective, ad hoc processes—which tend to undervalue women and invite discrimination—to develop more effective systems guided by clear, objective standards that serve the goals of increased employee motivation and loyalty, greater productivity, and internal pay equity.[345] As Justice Brandeis once said, "sunshine is the best disinfectant."[346]

In addition to eliminating pay secrecy, employers should reexamine their pay scales to ensure that they are guided by well-defined performance criteria, consistent application, and centralized oversight. These principles would serve multiple goals, including internal pay equity. Recent recommendations by The Conference Board Task Force on Executive Compensation in the wake of executive pay scandals urge companies to review their executive compensation plans to ensure that they comply with several guiding principles that—if applied to pay schemes below the CEO level as well—may also attack the gender wage gap for upper level women.[347] The Conference Board reaffirms the importance of pay transparency, clearly defined and understandable pay schemes, and centralized oversight. The Conference Board recommends, for example, that:

Keep Your Salary Secret?, U.S. NEWS & WORLD REP., June 19, 2008, http://images.usnews.com/money/careers/articles/2008/06/19/why-do-you-keep-your-salary-secret.html (interview with Lawler).

343. *Id.*

344. *See* Karen Hopper Wruck, *Compensation, Incentives and Organizational Change: Ideas and Evidence from Theory and Practice*, *in* BREAKING THE CODE OF CHANGE 269, 305 (Michael Beer & Nitin Nohria eds., 2000) ("Well-designed compensation systems help communicate the definition of outstanding performance and tie an individual's success to progress toward that goal. In doing so, they help align individuals' goals with those of the organization, and help individuals learn how they can best contribute to performance.").

345. The Paycheck Fairness Act proposes that the EEOC:

> complete a survey of the data that is currently available to the Federal Government relating to employee pay information for use in the enforcement of Federal laws prohibiting pay discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws.

Paycheck Fairness Act, H.R. 12, 111th Cong. § 8 (2009). The law should go even further. Employers should be required to report all pay data for their employees and contractors, with the gender of the workers noted. This reporting could be accomplished when reporting tax information for W-2s and 1099s, or the EEO-1 form could be revived and revised to require the reporting of individual and aggregate pay data by sex, race, ethnicity, and other applicable categories. The information could be published on the DOL's website. The DOL would not be setting the wage rates, but it would merely report the data, segregated by employer type, size, and location.

346. United States v. Hubbard, 650 F.2d 293, 330 (D.C. Cir. 1980).

347. THE CONFERENCE BOARD, CONFERENCE BOARD TASK FORCE ON EXECUTIVE COMPENSATION (2009), *available at* http://www.conference-board.org/ectf. The Conference Board is a global non-profit, nonpartisan independent membership organization of business executives that "creates and disseminates knowledge about management and the marketplace to help businesses strengthen their performance and better serve society." *Id.* at 2.

> All boards should examine their executive pay practices and take action to ensure that there are strong links between performance and compensation, . . . that they demonstrate effective oversight of executive pay, that there is transparency with respect to the executive compensation decision making processes, and that board and shareholder dialogue is available to resolve executive compensation issues.[348]

The Conference Board also recommends that companies minimize the potential for controversial pay practices that can result from hiring and negotiating with outside candidates and urges companies not to engage in pay practices simply because they think other companies are doing it. The Conference Board advises that "'Everyone else does it' or 'It is market practice' are not sufficient justifications" for controversial pay practices.[349] Likewise, employers that eliminate ad hoc, highly subjective, and amorphous pay processes will foster greater pay equity and fairness for all workers.

V. CONCLUSION

As women achieve higher professional and leadership status, they are encountering a significant gender wage gap that, in many cases, is much greater than that encountered by their sisters in blue-collar employment. For women in upper-level jobs, however, the EPA provides less protection or relief. Courts are increasingly interpreting the EPA so restrictively that many plaintiffs cannot satisfy a prima facie standard that the jobs are "equal." Even if they make that showing, the acceptance by courts of unsupported claims about the market or other non-job-related factors are undermining the promise of equal pay. Modern-day subjective compensation practices increase the risk of pay inequality, but courts are often reluctant to scrutinize them.

This Article seeks to understand the reasons for the EPA's wage glass ceiling and offers proposals to break that barrier. Without change, the EPA will be rendered an "empty shell" for many women. And as Congresswoman Dwyer stated in the original debates regarding the EPA: "I can assure you that women would not be inclined to welcome an empty shell of a bill—legislation with a title but with no substance. This would be a heartless deception, and Congress would only be fooling itself if it should follow such a course."[350]

348. *Id.* at 7.
349. *Id.* at 20.
350. 109 CONG. REC. 9200 (1963) (statement of Rep. Dwyer).

APPENDIX

A. Cases Involving Non-Supervisory Workers

Brennan v. Corning Glass Works, 417 U.S. 188, 199 (1974) (inspectors); Yant v. United States, 588 F.3d 1369 (Fed. Cir. 2009) (nurse practitioners); Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 989 (5th Cir. 2008) (administrative assistant); Warren v. Solo Cup Co., 516 F.3d 627, 628 (7th Cir. 2008) (laborer); Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 785 (7th Cir. 2007) (laborer); Holland v. Sam's Club, 487 F.3d 641, 643 (8th Cir. 2007) (forklift driver); Beck-Wilson v. Principi, 441 F.3d 353, 356 (6th Cir. 2006) (nurse practitioner); Wernsing v. Dep't of Human Servs., 427 F.3d 466, 467 (7th Cir. 2005) (investigator); Miller v. Auto. Club of N.M., Inc., 420 F.3d 1098, 1103 (10th Cir. 2005) (laborer); Sandoval v. Boulder, 388 F.3d 1312, 1317-18 (10th Cir. 2004) (call center director); Younts v. Fremont County, 370 F.3d 748, 751 (8th Cir. 2004) (administrative assistant); Taylor v. White, 321 F.3d 710, 712 (8th Cir. 2003) (office worker); Steger v. Gen. Elec. Co., 318 F.3d 1066, 1069 (11th Cir. 2003) (collectors); Gu v. Boston Police Dep't, 312 F.3d 6, 8 (1st Cir. 2002) (senior analysts); Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222, 297 F.3d 1146, 1148 (10th Cir. 2002) (business agents); Hunt v. Neb. Pub. Power Dist., 282 F.3d 1021, 1024 (8th Cir. 2002) (clerk); Fyfe v. Fort Wayne, 241 F.3d 597, 599 (7th Cir. 2001) (laborer); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 185 (4th Cir. 2000) (craftsman); Broadus v. O.K. Indus., Inc., 226 F.3d 937, 939 (8th Cir. 2000) (laborer); Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 922 (7th Cir. 2000) (grocery store workers); Wollenburg v. Comtech Mfg. Co., 201 F.3d 973, 975 (7th Cir. 2000) (production supervisor); Stanziale v. Jargowsky, 200 F.3d 101, 104 (3rd Cir. 2000) (sanitation worker); Belfi v. Pendergast, 191 F.3d 129, 132 (2d Cir. 1999) (office engineer); Hutchins v. Int'l Bhd. of Teamsters, 177 F.3d 1076, 1079 (8th Cir. 1999) (union organizer); Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1359 (10th Cir. 1997) (market analyst); Timmer v. Mich. Dep't of Commerce, 104 F.3d 833, 835 (6th Cir. 1997) (analyst); AFSCME v. Nassau, 96 F.3d 644, 645 (2d Cir. 1996) (detention aides); McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 507 (8th Cir. 1995) (clerk); Krenik v. County of Le Sueur, 47 F.3d 953, 956 (8th Cir. 1995) (maintenance assistant); EEOC v. Cherry-Burrell Corp., 35 F.3d 356, 358 (8th Cir. 1994) (buyer); Loyd v. Phillips Bros., Inc. 25 F.3d 518, 521 (7th Cir. 1994) (bookbinder); Gandy v. Sullivan County, 24 F.3d 861, 862 (6th Cir. 1994) (safety director); Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1014 (11th Cir. 1994) (technical writer); Lambert v. Genesee Hosp., 10 F.3d 46, 50 (2d Cir. 1993) (duplicator); Lowe v. Southmark Corp., 998 F.2d 335, 336 (5th Cir. 1993) (leasing representative); Weiss v. Coca-Cola Bottling Co. of Chic., 990 F.2d 333, 334 (7th Cir. 1993) (laborer); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 522 (2d Cir. 1992) (custodian); EEOC v. Romeo Cmty. Schs. & AFSCME, 976 F.2d 985, 986 (6th Cir. 1992) (custodian); Beavers v. Am. Cast Iron Pipe Co., 975 F.2d 792, 801 (11th Cir. 1992) (machinist); Mi-

randa v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1522 (11th Cir. 1992) (buyer); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1466 (10th Cir. 1992) (clerk); Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539, 540 (11th Cir. 1991) (printing operator); Soto v. Adams Elevator Equip. Co., 941 F.2d 543, 545 (7th Cir. 1991) (clerk); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1391 (4th Cir. 1990) (teachers); EEOC v. Detroit Health Dep't, 920 F.2d 355, 356 (6th Cir. 1990) (medical technologists); EEOC v. Del. Dep't of Health & Soc. Servs., 865 F.2d 1408, 1411 (3d Cir. 1989) (nurses); Waters v. Turner, Wood & Smith Ins. Agency, Inc., 874 F.2d 797, 798 (11th Cir. 1989) (customer service representative); Ebert v. Lamar Truck Plaza, 878 F.2d 338, 338 (10th Cir. 1989) (laborer); Fallon v. Illinois, 882 F.2d 1206, 1207 (7th Cir. 1989) (veteran service officer); EEOC v. White & Son Enter., 881 F.2d 1006, 1007 (11th Cir. 1989) (laborer); Keziah v. W.M. Brown & Son, Inc., 888 F.2d 322, 326 (4th Cir. 1989) (sales representative); Forsberg v. Pac. Nw. Bell Tel. Co., 840 F.2d 1409, 1411 (9th Cir. 1988) (maintenance administrators); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1568 (11th Cir. 1988) (clerks); Price v. Lockheed Space Operations. Co., 856 F.2d 1503, 1504 (11th Cir. 1988) (technical writer); Goodrich v. Int'l Bhd. of Elec. Workers, 815 F.2d 1519, 1521 (D.C. Cir. 1987) (analyst); Peters v. Shreveport, 818 F.2d 1148, 1150 (5th Cir. 1987) (police communication officers); Brobst v. Columbus Serv. Int'l, 824 F.2d 271, 272 (3d Cir. 1987) (maintenance worker); Gosa v. Bryce Hosp., 780 F.2d 917, 918-19 (11th Cir. 1986) (clerk); Brewster v. Barnes, 788 F.2d 985, 987 (4th Cir. 1986) (correctional officer); Jones v. Flagship Int'l, 793 F.2d 714, 716 (5th Cir. 1986) (EEO officer); Marcoux v. Maine, 797 F.2d 1100, 1101 (1st Cir. 1986) (correctional officer); EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 400 (9th Cir. 1985) (tellers); Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1254 (7th Cir. 1985) (administrator); EEOC v. Maricopa County Cmty. Coll. Dist., 736 F.2d 510, 511 (10th Cir. 1984) (clerk); Laffey v. Nw. Airlines, Inc., 740 F.2d 1071, 1075 (D.C. Cir. 1984) (flight attendants); McKee v. McDonnell Douglas Tech. Serv. Co., 700 F.2d 260, 262 (5th Cir. 1983) (data encoder); EEOC v. Ctrl. Kan. Med. Ctr., 705 F.2d 1270, 1272 (10th Cir. 1983) (custodian); Clymore v. Far-Mar-Co, Inc., 709 F.2d 499, 500 (8th Cir. 1983) (clerk); EEOC v. Mercy Hosp. & Med. Ctr., 709 F.2d 1195, 1196 (7th Cir. 1983) (custodian); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1130 (5th Cir. 1983) (EEO officer); Hein v. Or. Coll. of Educ., 718 F.2d 910, 912 (9th Cir. 1983) (teachers); Thompson v. Sawyer, 678 F.2d 257, 263 (D.C. Cir. 1982) (bindery workers); Hill v. JC Penney Co., 688 F.2d 370, 372 (5th Cir. 1982) (seamstress); Kouba v. Allstate Ins. Co., 691 F.2d 873, 874-75 (9th Cir. 1982) (sales agent); Orahood v. Bd. of Trs. of Univ. of Ark., 645 F.2d 651, 653 (8th Cir. 1981) (analyst); Odeomes v. Nucare, Inc., 653 F.2d 246, 248 (6th Cir. 1981) (nurses' aide); EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243, 1244 (8th Cir. 1981) (clerk); Saltzman v. Fullerton Metals Co., 661 F.2d 647, 649 (7th Cir. 1981) (clerk); Horner v. Mary Inst., 613 F.2d 706, 708 (8th Cir. 1980) (teacher); EEOC v. Aetna Ins. Co., 616 F.2d 719, 721 (4th Cir. 1980) (office workers); EEOC v. Ke-

nosha Unified Sch. Dist., 620 F.2d 1220, 1222 (7th Cir. 1980) (custodian); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 63 (5th Cir. 1980) (buyer); EEOC v. Whitin Mach. Works, Inc., 635 F.2d 1095, 1096 (4th Cir. 1980) (office workers); Campbell v. Von Hoffman Press, Inc., 632 F.2d 69, 69 (8th Cir. 1980) (laborer); Strecker v. Grand Forks County Soc. Serv. Bd., 640 F.2d 96, 99 (8th Cir. 1980) (administrator); Marshall v. Sch. Bd., 599 F.2d 1220, 1221 (3d Cir. 1979) (custodian); Marshall v. Dallas Indep. Sch. Dist., 605 F.2d 191, 193 (5th Cir. 1979) (custodian); Ruffin v. L.A. County, 607 F.2d 1276, 1278 (9th Cir. 1979) (correctional officers); Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 569 F.2d 1033, 1035 (8th Cir. 1978) (bank tellers); Marshall v. Sec. Bank & Trust Co., 572 F.2d 276, 279 (10th Cir. 1978) (tellers); Marshall v. Bldg. Maint. Corp., 587 F.2d 567, 569 (2d Cir. 1978) (custodian); Marshall v. Kent State Univ., 589 F.2d 255, 255 (6th Cir. 1978) (custodian); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1166 (3d Cir. 1977) (laborer); Katz v. Sch. Dist., 557 F.2d 153, 155 (8th Cir. 1977) (teacher); Usery v. Richman, 558 F.2d 1318, 1319 (8th Cir. 1977) (cook); Usery v. Columbia Univ., 568 F.2d 953, 955 (2d Cir. 1977) (custodian); Ridgway v. United Hospitals-Miller Div., 563 F.2d 923, 925 (8th Cir. 1977) (nurse); Peltier v. Fargo, 533 F.2d 374, 376 (8th Cir. 1976) (law enforcement); Brennan v. S. Davis Cmty. Hosp., 538 F.2d 859, 860-61 (10th Cir. 1976) (laborer); Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 437 (D.C. Cir. 1977) (flight attendants); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 150 (3d Cir. 1976) (beauticians and custodians); Brennan v. Owensboro-Daviess County Hosp., 523 F.2d 1013, 1014 (6th Cir. 1975) (nurses); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 898 (5th Cir. 1974) (tellers); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285 (4th Cir. 1974) (nurses' aides); Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 591 (3d Cir. 1973) (retail sales); Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1044 (5th Cir. 1973) (store clerks); Brennan v. City Stores, Inc., 479 F.2d 235, 237 (5th Cir. 1973) (retail salespeople); Hodgson v. Miller Brewing Co., 457 F.2d 221, 222 (7th Cir. 1972) (technician); Hodgson v. Square D Co., 459 F.2d 805, 807 (6th Cir. 1972) (machine operator); Hodgson v. Sec. Nat'l Bank of Sioux City, 460 F.2d 57, 58 (8th Cir. 1972) (teller); Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256, 1257 (5th Cir. 1972) (nurse aide); Hodgson v. Brookhaven Gen. Hosp., 470 F.2d 729, 730 (5th Cir. 1972) (nurse aide); Hodgson v. First Nat'l Bank, 446 F.2d 47 (5th Cir. 1971) (tellers); Shultz v. Wheaton Glass Co., 421 F.2d 259, 261 (3d Cir. 1970) (packer); Shultz v. Am. Can Co.-Dixie Prods., 424 F.2d 356, 358 (8th Cir. 1970) (machine operator).

B. Cases Involving Mid-Level Supervisors and Managers

Drum v. Lesson Elec. Corp., 565 F.3d 1071 (8th Cir. 2009); Bearden v. Int'l Paper Co., 529 F.3d 828, 830 (8th Cir. 2008) (supervisor); Sims-Fingers v. Indianapolis, 493 F.3d 768, 769 (7th Cir. 2007) (municipal park manager); Brown v. Fred's Inc., 494 F.3d 736, 729 (8th Cir. 2007) (retail

assistant manager); Merillat v. Metal Spinners, Inc., 470 F.3d 685, 687 (7th Cir. 2006) (senior buyer); Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304 (10th Cir. 2006 (marketing service representative); Grabovac v. Allstate Ins. Co., 426 F.3d 951, 953 (8th Cir. 2005) (business consultant); Balmer v. HCA, Inc., 423 F.3d 606, 609 (6th Cir. 2005) (claims supervisor); Horn v. Univ. of Minn., 362 F.3d 1042, 1043 (8th Cir. 2004) (assistant coach); Lawrence v. CNF Transp., Inc., 340 F.3d 486, 489-90 (8th Cir. 2003) (sales executive); Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1021 (7th Cir. 2003) (program administrator); Markel v. Bd. of Regents, 276 F.3d 906, 909 (7th Cir. 2002) (account manager); Rodriguez v. Smithkline-Beecham, 224 F.3d 1, 2-3 (1st Cir. 2000) (manager); Howard v. Lear Corp., 234 F.3d 1002, 1003 (7th Cir. 2000) (human resources coordinator); Berg v. Norand Corp., 169 F.3d 1140, 1143 (8th Cir. 1999) (manager); Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1072 (9th Cir. 1999) (coach); Euerle-Wehle v. United Parcel Serv., Inc., 181 F.3d 898, 899 (8th Cir. 1999) (package manager); Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 942 (1st Cir. 1995) (supervisor); Tomka v. Seiler Corp., 66 F.3d 1295, 1300 (2d Cir. 1995) (account manager); Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1449 (7th Cir. 1994) (controller); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 339-40 (4th Cir. 1994) (manager); Tidwell v. Fort Howard Corp., 989 F.2d 406, 408 (10th Cir. 1993) (supervisor); EEOC v. Delight Wholesale Co., 973 F.2d 664, 666-67 (8th Cir. 1992) (sales manager); Brownlee v. Gay & Taylor, Inc., 861 F.2d 1222, 1224 (10th Cir. 1988) (manager); EEOC v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 578 (7th Cir. 1987) (coach); Feazell v. Tropicana Prods., Inc., 819 F.2d 1036, 1039 (11th Cir. 1987) (supervisor); Maxwell v. Tucson, 803 F.2d 444, 445 (9th Cir. 1986) (director); Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 728 (10th Cir. 1984) (director); Epstein v. Sec'y, U.S. Dep't of Treasury, 739 F.2d 274, 276 (7th Cir. 1984) (administrative officer); Morgado v. Birmingham-Jefferson County Civil Def. Corps., 706 F.2d 1184, 1186 (11th Cir. 1983) (program administrator); Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983) (manager); EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1073-74 (4th Cir. 1982) (supervisors); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1280 (8th Cir. 1980) (manager); Pearce v. Wichita, 590 F.2d 128, 130 (5th Cir. 1979) (manager); Christopher v. Iowa, 559 F.2d 1135, 1135 (8th Cir. 1977) (stock room supervisor); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 168 (5th Cir. 1975) (manager); Brennan v. J.M. Fields, Inc., 488 F.2d 443, 444 (5th Cir. 1974) (supervisor).

C. Cases Involving University Professors

Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 695 (7th Cir. 2003); Lavin-McEleney v. Marist Coll., 239 F.3d 476, 478 (2d Cir. 2001); Siler-Khodr v. Univ. of Tex. Health Science Ctr., 261 F.3d 542, 544 (5th Cir. 2001); Kovacevich v. Kent State Univ., 224 F.3d 806, 812 (6th Cir. 2000); Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 117 (2d Cir. 1997);

Smith v. Va. Commonwealth Univ., 84 F.3d 672, 674 (4th Cir. 1996); Strag v. Bd. of Trs. Craven Cmty. Coll., 55 F.3d 943, 945 (4th Cir. 1995); Fisher v. Vassar Coll., 70 F.3d 1420, 1428 (2d Cir. 1995); Chance v. Rice Univ., 984 F.2d 151, 152 (5th Cir. 1993); Houck v. Va. Polytechnic Inst. & State Univ., 10 F.3d 204, 205 (4th Cir. 1993); Brousard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974, 975 (8th Cir. 1991); Schwartz v. Fla. Bd. of Regents, 954 F.2d 620, 622 (11th Cir. 1991); Wu v. Thomas, 847 F.2d 1480, 1482 (11th Cir. 1988); Covington v. So. Ill. Univ., 816 F.2d 317, 318 (7th Cir. 1987); Berry v. Bd. of Supervisors, 783 F.2d 1270, 1271 (5th Cir. 1986); EEOC v. McCarthy, 768 F.2d 1, 2 (1st Cir. 1985); Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1030 (11th Cir. 1985); Bd. of Regents v. Dawes, 522 F.2d 380, 381 (8th Cir. 1975); Soble v. Univ. of Md., 778 F.2d 164, 165 (4th Cir. 1985); Spaulding v. Univ. of Wash., 740 F.2d 686, 691 (9th Cir. 1984); Winkes v. Brown Univ., 747 F.2d 792, 793 (1st Cir. 1984); Sweeney v. Bd. of Trs. of Keene State Coll., 569 F.2d 169, 171 (1st Cir. 1978); Keyes v. Lenoir Rhyne Coll., 552 F.2d 579, 580 (4th Cir. 1977).

D. Cases Involving Professionals and Executives

Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 575 (8th Cir. 2006) (assistant VP); Ingram v. Brink's, Inc., 414 F.3d 222, 224 (1st Cir. 2005) (branch supervisor); Wheatley v. Wicomico County, 390 F.3d 328, 332 (4th Cir. 2004) (department head); Tenkku v. Normandy Bank, 348 F.3d 737, 739 (8th Cir. 2003) (VP); Buettner v. Arch Coal Sales Co., 216 F.3d 707, 706-11 (8th Cir. 2000) (VP, secretary, and general counsel); Ryduchowski v. Port Auth. of NY & NJ, 203 F.3d 135, 137 (2d Cir. 2000) (engineer); Brinkley v. Harbour Rec. Club, 180 F.3d 598, 602-03 (4th Cir. 1999) (general manager); Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796, 797 (6th Cir. 1998) (director of pupil personnel); McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 140 F.3d 288, 295 (1st Cir. 1998) (department head); Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 683 (7th Cir. 1998) (VP); Arrington v. Cobb County, 139 F.3d 865, 868 (11th Cir. 1998) (assistant fire chief); Lindale v. Tokheim Corp., 145 F.3d 953, 954 (7th Cir. 1998) (mechanical engineer); Bragg v. Navistar Int'l Transp. Corp., 164 F.3d 373, 375 (7th Cir. 1998) (engineer); Byrd v. Ronayne, 61 F.3d 1026, 1027 (1st Cir. 1995) (attorney); Irby v. Bittick, 44 F.3d 949, 952 (11th Cir. 1995) (deputy sheriff); Mulhall v. Advance Sec., Inc., 19 F.3d 586, 588 (11th Cir. 1994) (VP); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1377 (10th Cir. 1994) (principal); Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 160 (4th Cir. 1992) (VP); Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 835 (3d Cir. 1992) (associate counsel); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 340 (7th Cir. 1988) (executive management); Crabtree v. Baptist Hosp. of Gadsden, Inc., 749 F.2d 1501, 1501 (11th Cir. 1985) (assistant VP); Padway v. Palches, 665 F.2d 965, 966 (9th Cir. 1982) (principal); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1053 (2d Cir. 1978) (chemist).