
**Federal Court Report**

**Black Male Employee’s Equal Pay Act Claim Advances**

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An employer's failure to show that its reason for a wage disparity explained the disparity, rather than being a possible explanation, was enough for an Equal Pay Act claim to go forward.

The plaintiff, a Black man, worked as an analyst for the employer. The employer then hired a white woman to the same position but at a much higher salary than the plaintiff. Over the next several years, the plaintiff's pay stagnated while the female employee's rapidly increased.

Initially, following the employer's policy, the plaintiff submitted for an "equity adjustment" to his salary. After the employer's failure to adjust his salary, the plaintiff filed a wage discrimination claim and claims that the employer retaliated against him by revising a job posting he had previously been encouraged to apply for. After the revision, the plaintiff was deemed no longer qualified for the position. The district court granted summary judgment on all claims.

The plaintiff had filed wage discrimination claims under the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964, claiming sex and race discrimination. For EPA claims, courts apply a three-step analysis. First, plaintiffs must show that an employer pays different wages to employees of the opposite sex and that those wages are for the same work under similar working conditions. Second, the employer must prove "that the wage differential is justified under one of the four affirmative defenses" under the EPA. Third, the plaintiff must demonstrate that the employer's explanation is pretextual.

The appeals court concluded both employees were doing the same tasks and earning different wages, so the employer was required to establish a justification under one of the four defenses. The employer chose the fourth defense: that "a factor other than sex" was the justification for the wage differential. "A factor other than sex" is a legitimate justification where the payment is made due to that factor. In other words, if an employer chooses this defense, it must submit evidence that the alleged reason in fact *does* explain the wage disparity, not just that it *could* explain the disparity. The employer argued that the disparity was the result of several factors unrelated to race or sex, including the female employee's experience, qualifications and performance.

The employer's policies provide that performance ratings and responsibilities may impact salary and pay equity, but the employer did not offer any evidence to prove they in fact impacted the plaintiff's salary and pay equity.

Instead, the employer offered inconsistent testimony and failed to provide processes or metrics used to set salaries. Further, one of the plaintiff's supervisors indicated that equity adjustments were based upon external and internal market rates, not performance. The appeals court held that the record did not show beyond dispute that the female employee's education and higher performance ratings—or any other specified factors—were the reason for the plaintiff's lower salary, so summary judgment was inappropriate.

The court then analyzed the Title VII claim, noting that the employer had satisfied the lower burden of articulating a business explanation supported by some evidence. However, the court pointed to the employer's changing rationale as evidence of pretext. There was no evidence that distinctions between the two employees motivated their salary discrepancies, and the employer's witnesses were inconsistent regarding whether performance impacted either employee's base pay. The court reversed the grant of summary judgment on this claim as well.

Lastly, the appeals court analyzed the retaliation claim. The plaintiff's male supervisor had encouraged him to apply for a job that was posted. After the plaintiff filed his discrimination complaint, his female supervisor pulled the job posting and changed it to require a bachelor's degree, which she knew the plaintiff did not have.

The lower court granted summary judgment because the plaintiff did not prove a causal connection between protected activity and the adverse action. The appeals court reversed and held that since the employer did not dispute causation, the district court should not have granted summary judgment on that ground.

*Briggs v. University of Cincinnati*, 6th Cir., No. 20-4133 (Aug. 26, 2021).

**Professional Pointer:** This case reminds employers to establish and follow policies and procedures on setting and increasing salaries and bonuses. Employers should also have objective metrics they can use to set salaries and bonuses.

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