

Published in *Journal of Legal Economics*, Vol.11, Num.3, Winter 2001-02, pp. 69-85.

The Economist's Role in Equal Pay Act Litigation

By

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INTRODUCTION

The *Equal Pay Act of 1963* prohibits employers from discriminating against employees by paying higher wages to members of the opposite sex who are performing equal work on jobs that require equal skill, effort, and responsibility. Equal Pay Act (EPA) violations usually become part of a multiple count sex discrimination lawsuit.¹ It is not uncommon in Title VII cases for economists to use statistical techniques to prove sex discrimination. However, economists are rarely used in EPA cases. The purpose of this paper is to discuss the economist's role in demonstrating whether a violation of the EPA has occurred.

There are two reasons why economists are seldom used in EPA litigation.² First, there are very few cases filed under the EPA. Between 1985 and 1997, the Equal Employment Opportunity Commission (EEOC) filed 164 cases and resolved 251 lawsuits under the EPA. (Castro 1998) During this same period the EEOC recovered over \$16 million dollars under the EPA itself or in combination with Title VII. These numbers are almost insignificant when compared to the total number of cases and their dollar values that forensic economists participate in. Further reducing the number of economists who testify, is the plaintiff's inability to recover expert fees for non-testimonial services from the defendant.³ A successful EPA plaintiff's suit allows recovery of only \$40 per day for expert testimony.⁴ Small verdict awards and non-recoverable fees have not provided financial incentives to retain economic experts.⁵ This pattern may be changing, however, and would thus provide more opportunities for economists in EPA cases.

Less discrimination in society may be one reason why there are more federal discrimination cases. This counter intuitive outcome occurs as female labor market barriers of entry fall and women earn higher salaries, thus increasing potential benefits of EPA lawsuits. As women enter traditionally higher paying male jobs, benchmarks, necessary in EPA suits, become more available. (Posner 1989)

Courts recognize that there may be more "disgruntled employee" suits about workplace grievances unrelated to gender. The increased costs associated with these cases, when they do not violate anti-discrimination law, put a burden on how the courts allocate resources. The courts have established intricate summary judgment procedures to distinguish between frivolous and meritorious claims. These procedures may lead to granting summary judgment to defendants even when legitimate issues of discrimination dominate the fabricated ones. Economic analysis can be helpful in sorting the legitimate from the frivolous issues in EPA cases.

THE EQUAL PAY ACT

Title VII forbids sex discrimination in employment -- in hiring, firing, promotion, and working conditions. The EPA overlaps Title VII in banning sex discrimination only in the area of pay and compensation in employment. Unlike Title VII, the EPA, which is a provision of the Federal Fair Labor Standards Act (FLSA)⁶, does not require a plaintiff to prove 'an intent' to discriminate.⁷ Because an EPA claim can continue without a Title VII violation, these claims are often "tacked" on to Title VII sex discrimination claims.

The EPA prohibits sex-based pay discrimination for equal work performed on jobs requiring equal skill⁸, effort, and responsibility under similar working conditions. Equal work does not mean jobs have to be identical. (*Lambert v. Genesee Hospital, 1994*) All a plaintiff has to do is show that the jobs are substantially equal.⁹ Two jobs with different requirements may be considered equal under the EPA. However, if one job requires substantially more time, effort, and responsibility or requires more skills to perform than the other job, an EPA violation would be difficult to prove. If two jobs are just comparable, then the "substantially equal" standard is not met. (*Lambert V Genesee Hospital, 1993; Tomka v Seiler Crop., 1995*)

An EPA prima facie case requires the plaintiff to meet three conditions. First, they must show that the defendant paid employees of the opposite sex different wages. Second, they must show the plaintiff performed equal work on jobs requiring equal skill, effort, and responsibility as the employee of the opposite sex. Finally, the plaintiff must establish that both jobs have similar working conditions. (*Corning Glass Works, 1974; Tomka 1995*)

Once the plaintiff establishes a prima facie case, the burden shifts to the employer (defendant) who must show the pay disparity resulted from one of the four permitted factors allowed under the EPA for unequal gender compensation. The permitted factors are (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and (4) any factor other than sex.

The burden shifting process allows the defendant to persuade the court to dismiss the case by showing there are legitimate reasons for the pay disparities.¹⁰ The plaintiff can preempt the "permitted factor" defense by incorporating the defendant's economic

arguments into their proof of a prima facie case. In essence, if the plaintiff behaves like a defense economist they can rebuff the “permitted factor” defense.

The 'other than sex' defense is often used because it is the most broadly worded permitted factor for pay differentials under the EPA. The statute does not define what these other factors are, nor does it provide a standard for determining what qualifies as a "factor other than sex." Courts have found experience, prior salary, education, skills that the employer deems useful to the position, and a proven ability to generate higher revenue for the employer's business all to be acceptable ‘factors other than sex’. (*Scott, v. Sulzer 2001*; *Mullenix v. Forsyth 1996*; *Dubowsky v. Stern, Lavinthal, Norgaard & Daly, 1996*).

MARKET FORCES

The EEOC guidelines discuss that revenue generation and marketplace value may or may not be "factors other than sex" that justify pay disparity. A plaintiff may contest the employer’s non-discriminatory explanation for the wage differential by producing evidence showing that the business reasons are a pretext for sex discrimination. (*Belfi v Prendergrast, 1999*; *Christiana v Metropolitan Life Ins. Co, 1993*) "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has use [d] the factor reasonably in light of the employer's stated purpose as well as its other practices.” (*Aldrich v. Randolph, 1992*)

The courts have sent mixed signals on this issue. If defendants can show that there are too many intangibles (market forces being just one) used in determining employee salaries, then a motion for summary dismissal, as a matter of law, may be successful.¹¹ Market forces can be subjective; as long as they are subjective about agreed-upon standards applicable to all employees.

EPA suits brought by female college sport coaches show that market forces are not as easy to demonstrate in college sports where male sports, like basketball and football, generate income for the university. EEOC guidelines (*EEOC 199*; *Giampetro-Meyer 2000*) questions the defense that the market requires male coaches be paid more than female coaches because of the possibility that the marketplace itself is not gender-neutral. The plaintiff’s argue that since the premier male sports generate more revenue than female sports males should be paid more than females. The EEOC looks at resource allocation between female and male coaches in generating that revenue. Holding all things constant (the number of assistant coaches, the amount of funds available for marketing and promotional activities and other sports information functions). If female coaches are not given the same resources to enable them to raise revenue then revenue is not a permitted factor defense for the gender wage disparity.

In essence, the amount of revenue generated per dollar spent on the sport must be examined. If a female is generating the same revenue for each dollar spent, then the pay disparity is due to discrimination. If the revenue generated per dollar spent on the sport is less, then the pay disparity would be an acceptable market factor other than sex. This

analysis may be a persuasive argument in other industries or occupations where the defendant claims that revenue generation requires them to pay males more than females.

The “other than sex” defense¹² requires the employer to show “it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential”. (*Belfi 1999*) In other words, the employer must show that the qualification is “job-related.” (*Tomka v Seiler Crop 1995*)

EPA claims fail when plaintiffs do not compare their salary to at least one other employee (called a comparator) to prove a wage disparity. (*Houck v. Virginia Polytechnic Inst. 1993*) Courts generally compare jobs between the plaintiff and the comparator, not necessarily the individual holding the job. Only those skills and qualifications required to perform the job are considered.¹³

EXPLAINING THE WAGE GAP BETWEEN PLAINTIFF AND COMPARATOR

The first condition of an EPA prima fascia case requires the plaintiff to show that members of the opposite sex were paid different wages. A plaintiff will claim the gap exists because of sex discrimination, while a defendant will try to show the gap occurs for reasons other than sex. The wage gap between the comparator and the plaintiff might be explained by reasons having nothing to do with the EPA claim. Since EPA claims are often “tacked” on to Title VII lawsuits, a plaintiff might be predisposed to wrongly interpret the wage gap as being caused by sexual discrimination. Defendants also wrongly¹⁴ try to defend the gap using the “other than sex” defense. However, there may be legitimate economic explanations for the gap that have nothing to do with sex discrimination or legitimate business reasons. The method of measuring earnings can influence the size of the wage gap.

A. Hourly Earnings (*Quantity of work*)

The widely reported statistic that women earn 74 percent of men’s wages, as well as the inference, by political groups¹⁵ and the popular press, that this difference is due to sex discrimination may wrongly influence a plaintiff’s perspective on the reason for the wage gap. Often ignored are the many studies showing that much of the gap can be explained through human capital factors. (U.S. Department of Labor Bureau of Labor Statistics 2001; Hittiangadi 1998; Council of Economic Advisers 1998) Hausman (2001) suggests that any remaining wage gap, after adjusting for human capital factors, is due to differences in promotion-seeking behavior between males and females, not discrimination. Hausman claims that males are more likely to apply for promotions than females because females make career decisions based on other non-monetary factors while males are more concerned with status and monetary awards.¹⁶

Plaintiffs must consider all economic factors to successfully prove the wage disparity is due to discrimination. Failure to do so provides the opportunity for the defendant to use the “other than sex” defense to raise the possibility that the wage gap is due to economic

factors. If this defense is successful, the plaintiff's EPA case will fail. Thus, unlike personal injury or wrongful death cases where defendants might be hesitant about retaining an economist (Spizman, 1995), the opposite may occur in EPA cases. In other words, plaintiffs might not retain an economist while defendants have an incentive to hire an economist.

The gender pay gap depends on whether income is measured hourly, weekly or yearly. The plaintiff's behavior of "tacking" on EPA claims to Title VII might cause them to neglect the unit measurement issue. This is especially true if the plaintiff does not retain an economist. The plaintiff might examine yearly income and simply infer that the difference must be due to discrimination. After all, the plaintiff will reason, if discrimination is going on (which she must believe because of the Title VII suit) and she is doing the same job as the comparator but yearly incomes differ, what other reasons besides discrimination can explain the income differences? The plaintiff, by ignoring this measurement issue, provides the defendant an opportunity to show the gap may be due strictly to measurement differences.

Nationally, the wage gap between females and males is reduced when hourly wages are compared. In 1999 women earned 72.2 percent of men when comparing annual earnings. Using weekly earnings the ratio was 76.5 percent. The ratio is 83.8 percent when comparing hourly earnings. (U.S. Department of Labor Women's Bureau 2001; Wall 2000) Women tend to work fewer hours than men,¹⁷ potentially making non-hourly comparison problematic. For every male working less than 35 hours per week there are 2.25 females doing so. In this group, women earn 115 percent of what men earn. (U.S. Department of Labor bureau of Labor Statistics 2001) This ratio is almost reversed (2.35 men for each woman) when working more than 41 hours per week. Women's earnings as a percent of men's earnings declines as overtime occurs. Consequently, the number of hours worked is a factor that must be considered in an EPA suit. Changing the unit of measurement for income from weekly to hourly reduces the gender gap nationally by 31%. (Wall 2000)

The plaintiff can avoid these issues by comparing hourly wages (rather than weekly or yearly wages) of the comparator. If the gap still exists after hourly comparisons, a powerful defense argument is removed. If the plaintiff does not show that the gap exists, even after comparing hourly wages, then the defendant can make a persuasive claim that the gap would disappear if hourly earnings were compared.

While this approach appears obvious to an economist familiar with gender issues, it is not so obvious to those who are either not familiar with such gender issues or who are inexperienced in EPA cases.¹⁸ Defendants may be unfamiliar with these issues and wrongly try to explain the gap as being due to 'other things'. The court might not find these 'other things' as persuasive as the unit of measurement approach.

The "substantially equal" standard of the EPA can be addressed by comparing the number of hours worked between the plaintiff and the comparator. For example, if one works 40 hours per week, while the other works 35 hours, are they "substantially equal"?

A plaintiff paid by the hour may choose a salaried comparator and both may still be doing "substantially equal" work. Overtime premiums can explain why the plaintiff might have the same yearly income as the comparator while working fewer hours, thus refuting the 'substantially equal' argument. If the plaintiff does not work any overtime, then a gap can exist in the hours worked if the comparator works more than 40 hours per week without receiving any overtime pay. Suppose the comparator's yearly salary is \$42,000 but works an average of 45 hours per week. His hourly wage rate is \$17.95. If the plaintiff's yearly income is \$37,336 then she can argue, all things held equal, that the difference is due to discrimination.¹⁹ However, if she only works 2080 per year (40 hours per week) her hourly wage is also \$17.95. There is no difference in hourly pay if the salaried comparator works 5 extra hours per week. It is not difficult for a salaried employee to work more than 8 hours per day. Hecker (1998) shows that the average number of hours worked per week varies for different occupations, some of which are salaried and some of which are hourly. For example, the salaried employee may not take full lunch or rest breaks to which hourly workers are entitled. Salaried workers might arrive fifteen minutes early every day and stay an extra fifteen minutes. Hourly workers would be paid extra for doing this. Salaried workers may be required to work extra during emergencies or when a coworker is not available. Part of the responsibility of a salaried employee, that an hourly worker does not have, is to be available when problems and emergencies occur. Salaried workers do not receive additional compensation when they work more than forty hours per week; hourly employees do.

If both the plaintiff and comparator are salaried, it is incumbent upon the plaintiff to show they worked the same number of hours in order to nullify this part of the defense. If both employees were hourly workers it is simple to compare their hours worked. If the plaintiff bases the gap on yearly income and the comparator averages 43 hours per week while the plaintiff only works on average 40 hours per week, then the wage gap may disappear if hourly pay is considered. If the plaintiff does not examine hourly earnings, then the defendant can suggest the reason was because a fear that it would show no wage gap. With proper questioning on cross-examination, it would not be difficult to have the plaintiff admit that the gap can be due to these reasons.

Performance evaluations that show high absenteeism by the plaintiff when the plaintiff does not get paid for missed days may also explain the wage gap. Female workers who have primary child care responsibility may miss more days of work and thus receive less yearly income than the comparator. Waldfogel (1997) shows that childless women earn almost the same income as males (95 percent), implying that motherhood, not gender, contributes to the pay gap. Having children in the home explains 53 percent of the gender pay gap. A defendant might look at performance evaluations and try to show that the plaintiff was absent from work more than the comparator and as a result, her pay was docked. The absenteeism, especially if family rearing is involved, can be a powerful defense argument. The plaintiff can preempt this defense argument by showing absenteeism is not unusual. Jacobsen and Levine (1995) point out the negative impact on pay for women who leave the labor force at childbirth. Has this been a factor in the EPA case, which might explain part of the wage gap of the comparator?

Multiple regression analysis can also be used to demonstrate if the wage gap is due to discrimination. Controlling for appropriate independent variables can determine whether there are earning differences between comparable men and women.²⁰ If the plaintiff does not do this, then the defendant can ask "is it possible if using multiple regression analysis" that the difference in wages can be due to factors other than sex?

B. Education and experience (Merit, Seniority)

Part of the wage gap between a plaintiff and comparator may be due to different levels of education and experience. While both may have the same degree (associate, bachelors etc.) their college majors may differ. Hecker (1998) shows that the gap is reduced by nine percentage points (almost one-third) when adjustments are made for women's age, level of degree and field-of-study. If additional adjustments are made for occupations, the gap is further narrowed. A particular major (say accounting) would require less on-the-job training for an accounting position than would a history major. If the comparator had an accounting degree while the plaintiff did not, the plaintiff would required more on-the-job training in order to perform the job that the comparator already had training for. This could be reflected in a pay differential. Differences in educational backgrounds can explain some of the differences in pay, especially starting pay. Blau and Kahn (2000), after adjusting for hourly wages, show that one-third of the remaining gap is due to differences in human capital variables.

Job experience is an important factor in determining pay scales. If the plaintiff did not have any job experience prior to working at the current position, one could argue that the defendant provided any accumulated training. If the comparator had more job experience prior to working for the defendant then these differences in experience can be reflected by differences in pay scales between the two.

Blau and Kahn (2000) show another 29 percent of the wage gap (after adjusting for hourly wages and education) is explained by industry, occupation and union status. Another 31 percent of the wage gap is explained after adjusting for hourly data and 33 percent is explained after adjusting for education. Consequently, only 6.2 cents of the gender wage gap is unexplained. (Wall 2000) The defendant will argue the possibility that 100% of the difference between the plaintiff and comparator's wages can be explained by these factors. Did the plaintiff examine this data and are they aware that these studies exist?

VALID MERIT SYSTEM

In order to prove a violation of the EPA, a plaintiff may want to show that the pay raises they received were less than the pay raises received by the comparator. The defendant may want to use the merit system defense to disprove this. If there is a valid merit system, causing discrepancies in pay increases between the comparator and the claimant, there is no violation of the EPA. In *Ryduchowski v. Port Authority (2000)* the court for the first time examined the "proper contours" of the EPA's merit system defense. The *Ryduchowski* court used rulings from other circuits and concluded that a valid merit

system must have an organized and structured procedure so employees are evaluated systematically according to predetermined criteria. The court also stressed that employees must know of the existence of the merit system, and it cannot be based on gender. If the merit system is not valid, pay increase discrepancies can violate the EPA.

Even if compensation were based on a predetermined structured and organized criteria, the *Ryduckowski* court reasoned that "without systematic evaluation, a valid merit system cannot be said to exist." Thus, if a company has a means of evaluating merit then the merit system might constitute a bonafide reason for the pay difference. But there must be a systematic evaluation of all the workers; otherwise, a valid merit system defense will not provide an employer with a safe harbor under the EPA.²¹

CONCLUSION

As more women obtain jobs that are comparable to men's jobs, Title VII sex discrimination cases will begin to include more Equal Pay Act violations as part of the overall lawsuit. The legal system must have an accurate understanding of economic factors that might cause the gender wage gap. Failure to understand these factors may cause the plaintiff to wrongly tack an EPA claim on a Title VII lawsuit. This paper provides insights into how both parties to a EPA dispute can use economic analysis to examine if the gender pay gap is due to sex discrimination. If not, then the disputants can forgo the EPA suit and devote their resources to the underlying issues of the claims. If the defendant concludes that the pay gap is due to sex discrimination then a costly trial can be avoided.

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¹ Plaintiffs, in addition to filing a EPA and Title VII, of the Civil Rights Act of 1964, suits may file for intentional interference with employment contracts, libel and slander plus discrimination under various state laws.

² For an excellent example of how economist have been used in EPA cases see *Lavin v Marist College* 2001.

³ *West Virginia University Hospital v Casey* (1991). does not allow for fee shifting for non-testimonial services of an expert.

⁴ Under 28 U.S.C. § 1821 courts may not award expert fees in excess of \$40 per day for testimony.

⁵ It appears that the cost of an expert responding to discovery or being deposed can recover only those costs from the defendant. (*Bridges v. Eastman Kodak Co., 1996, Beckford v Irvin, 1999*)

⁶ If employees are subject to the minimum wage provisions of the Fair Labor Standards Act, they are also protected by the EPA.

⁷ While intent is not necessary for a successful EPA suit, willfulness does make a difference in the amount of recovery for back pay. If the plaintiff shows a willful violation of the EPA the plaintiff can recover damages for up to three years of back pay before the filing occurred. Without the willfulness back pay can only be recovered for two years. See 29 U.S.C. §255(a).

⁸ EPA administrative regulations interprets "skill" as the "experience, training, education, and ability required in the performance of a job." 29 C.F.R @ 1620.15(a).

⁹ The standard for judging "substantial equality" is "job content and not job title or description." (29 C.F.R. @ 1620.13(e); *Ottaviani v. State Univ. of New York at New Paltz, 1988*) The "substantial equality" analysis starts with a comparison of the jobs in question. "In substantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." (29 C.F.R. @ 1620.14(a)). Courts have ruled that because job descriptions within one firm are similar does not mean the jobs are the same. (*Lang v Kohl's food Stores, 2000*)

¹⁰ This burden-shifting framework is similar to that used in Title VII claims. However, in a Title VII case, the burden of persuasion always remains with the plaintiff. When the plaintiff establishes a prima facie case under EPA the defendant has the burden of persuasion not the plaintiff.

¹¹ In *Dubowsky (1996)*, a former female associate of a law firm claimed sexism was the reason for her pay difference with allegedly males of equal qualifications. The defendant made a motion for summary dismissal, which was rejected.

¹² The courts recognize that a defendant will not leave information in their personal files showing that they would have a discriminatory intent against the plaintiff. It is unlikely that there will be a 'smoking gun'. For this reason the courts do not view circumstantial evidence as inherently weaker than direct evidence. (*Rosen v. Thornburgh 1991; United States v. Sureff 1994*).

¹³ Prior experience of the employees is not necessarily relevant to the court's job. Job titles may be considered in the salary comparison, but those titles cannot control the final outcome of the suit. (*Mulhall v. Advance Sec, 1994*)

¹⁴ The word wrongly is used because if the gap disappears by changing the unit of measurement then any argument that the defendant tries to make is false.

¹⁵ The AFL-CIO, National Organization for Women and the National Committee on Pay Equity are the biggest proponents of the argument that women are paid 74 cents for every dollar a man earns. The popular press reports the pay gap when these groups have Equal Pay Day rallies.

¹⁶ She then asks the following question. "If a male seeking to increase his wages obtains a better-paying offer from a competing firm, and his current employer matches it to avoid losing him, must it then raise the

salary of equally qualified female employees? Or if, during salary negotiations, women settle for less than men, is it discrimination to let them do so?"

¹⁷ The average workweek for nonagricultural wage and salary female workers 16 years and older in 1995 was 35.8 hours while for men it was 42.1 hours. The gap widens even more when we look at ages 25 to 54. It's closest between ages 16 and 24. (Rones, Llg, and Gardner 1997)

¹⁸ This can be the vast majority of both plaintiff and defendant's lawyers given the small numbers of EPA cases.

¹⁹ It is important to remember that the very nature of a Title VII case predisposes the plaintiff to believing that there is discrimination at the work place. Thus it would be logical, from plaintiff's point of view, to automatically assume a yearly difference in pay is also due to discrimination.

²⁰ In *Lavin-Mceleney v Marist College* (2001) both the defendant and plaintiff used multiple regression analysis controlling for rank, years of service, division, tenure status and degrees earned. Both economists found a gender gap, their opinions differed in the statistical significance of the gap. While this case was for a college professor the independent variables can be things such as years of service with company, years of service prior to working for company, years of training and or education among other variables can be used.

²¹ The jury, in *Ryduckowsk*, found that the dispute was only over a point eight percent difference between the merit increases of plaintiff and her comparator yet the defendant did not establish their affirmative defense of a valid merit system. The United States Court of Appeals for the Second Circuit agreed with the jury.