

2016

## You Haven't Come a Long Way, Baby: The Courts' Inability to Eliminate the Gender Gap Fifty-Two Years After the Passage of the Equal Pay Act

Morgan A. Tufarolo

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Tufarolo, Morgan A. (2016) "You Haven't Come a Long Way, Baby: The Courts' Inability to Eliminate the Gender Gap Fifty-Two Years After the Passage of the Equal Pay Act," *Journal of Gender, Social Policy & the Law*: Vol. 24: Iss. 2, Article 5.  
Available at: <http://digitalcommons.wcl.american.edu/jgspl/vol24/iss2/5>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# YOU HAVEN'T COME A LONG WAY, BABY: THE COURTS' INABILITY TO ELIMINATE THE GENDER WAGE GAP FIFTY-TWO YEARS AFTER THE PASSAGE OF THE EQUAL PAY ACT

MORGAN A. TUFAROLO\*

|   |     |
|---|-----|
| I. Introduction .....   | 306 |
| II. Background .....  | 309 |
| A. The Prima Facie Elements of an Equal Pay Act Claim .....   | 309 |
| 1. Equal Effort, Responsibility, and Skill .....  | 309 |
| 2. Interpreting the Meaning of 'Equal' .....  | 310 |
| B. Circuit Splits Concerning Affirmative Defenses, Primarily<br>"Factors Other Than Sex" .....  | 311 |
| C. Possibility Versus Plausibility .....  | 313 |
| III. Analysis .....   | 314 |
| A. Circuit Splits Concerning Equal Pay Act Claims Should be<br>Resolved by Implementing a Broader Interpretation of the<br>Equal Pay Act Because There is a Lack of Consensus for<br>Judges and Confusion on Equal Pay Act Proceedings for<br>Parties. .... | 314 |
| 1. Congress and Circuits Should Follow the Fifth Circuit's<br>Meaning of 'Equal Work,' and Comparable Work<br>Should be Added to that Definition to Open Up the<br>Possibilities of More Equal Pay Act Claims.....  | 315 |

---

\* Morgan received a BA in English from the University of Tampa where she graduated magna cum laude. She is currently a student at American University Washington College of Law and expects to graduate with her JD in 2017. She would like to thank her family for sticking by her through this process, especially her mom, Nancy Tufarolo, who fielded countless late night phone calls and reassured her endlessly, as well as her dog, Gatsby, who always managed to reduce her stress levels with much needed puppy love. She would also like to thank her friends, especially Liz Wheeler and Aly Mance, for always providing encouragement when she needed it most. Lastly she would like to give a massive thank you to the staff of the *Journal of Gender, Social Policy & the Law*; without them this article would not have been possible.

306 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:2

- a. “Equal” Should be Interpreted as “Comparable,” via the Fifth Circuit’s Reasoning. .... 317
- b. Various Interpretations of ‘Equal’ in Relation to Equal Pay Act Claims Must be Eliminated. .... 319
- c. Focus on Congress’ Intent of the Meaning of ‘Equal’ Should Also be Taken into Consideration in Equal Pay Act Claims. .... 326
- 2. Congress and Circuits Should Come to a Consensus on the Meaning of “Factors Other Than Sex” Because the Phrase is Interpreted as a Catchall for Employers, Where Instead it Should be Narrowly Monitored as it is in the Second Circuit. .... 328
- B. The Prima Facie Elements of an Equal Pay Act Claim Should..... 333
- Not be Hindered by the Issue of Possibility Versus Plausibility .... 333
- Because it Bars Claims. .... 333
- IV. Conclusion..... 335

I. INTRODUCTION

The Equal Pay Act states that no employer shall discriminate on the basis of sex by paying employees of opposite sexes different wages for equal work on jobs that require near identical skill, effort, and responsibility, and are performed under equal working conditions.<sup>1</sup> Although Congress enacted the Equal Pay Act fifty-two years ago, the wage gap still exists today.<sup>2</sup> The wage gap has become a statistical indicator that is used to measure the status of women’s wages compared to men’s; the most current data from 2014 shows that women earned 78.6 percent as much as their male counterparts.<sup>3</sup> Often employers reason that the gender wage gap spurs from the life choices women make, the degrees

1. See 29 U.S.C. § 206(d)(1) (2007) (detailing the rules and regulations for employers concerning equal pay for employees regardless of their sex).

2. See Christianne Corbett & Catherin Hill, *Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation*, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, 2 (2012), <http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf> (asserting that one third of the pay gap between men and women is still unexplained).

3. See *Gender Wage Gap Again Narrows Slightly, Remains Statistically Unchanged*, NATIONAL COMMITTEE ON PAY EQUITY, <http://www.pay-equity.org> (last visited Jan. 3, 2016) (noting that the wage gap only narrowed by 0.3 of a percent from 2013 to 2014).

they choose to pursue, and the job fields they enter into.<sup>4</sup> Employers often blame the gender wage gap on a woman's choice to have children; however, a man's decision to start a family frequently has no impact on his salary or career.<sup>5</sup>

While these fallacies exist to provide society with a reason for the wage gap, employers' explanations tend to cover up a much uglier truth: women face a seven percent wage disparity immediately after graduating college.<sup>6</sup> All factors accounted for, and ten years after graduation, full-time female workers were found to have a 12 percent unexplained difference in their earnings compared to equally situated males.<sup>7</sup> This evidence proves that even between equally qualified and educated men and women, men continue to earn more than their female counterparts in most fields.<sup>8</sup>

While statistics alone provide a bleak outlook on the gender wage gap, court decisions set an even gloomier stage.<sup>9</sup> Once a plaintiff makes out a prima facie case under the Equal Pay Act, the burden then shifts to employers to justify the lower wage through one or more affirmative defenses, including a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any "factor other than sex."<sup>10</sup> Court opinions often find that the

---

4. See *The Simple Truth About the Gender Pay Gap*, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, 8 (2015), [http://www.aauw.org/files/2015/02/The-Simple-Truth\\_Spring-2015.pdf](http://www.aauw.org/files/2015/02/The-Simple-Truth_Spring-2015.pdf) (noting that women go into lower paying professions, such as teaching, making up for part of the wage gap).

5. See *id.* (describing that employers are less likely to hire mothers compared to childless women, and when employers do make an offer to a mother, they offer her a lower salary than they do childless women).

6. See *id.* at 8 (detailing that after accounting for college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status, a seven percent difference in the earnings of male and female college graduates one year after graduation was still unexplained).

7. See *The Simple Truth About the Gender Wage Gap*, *supra* note 4, at 8, 9 (stating that a wage gap still remains between men and women whose education and career paths are the same because men are more willing to negotiate their starting salaries).

8. See Corbett, *supra* note 2, at 8 (noting that among business majors, women earned just over \$38,000, while men earned just over \$45,000, showing a vast pay discrepancy).

9. See *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 249 (2d Cir. 2014) (dismissing a case when similarly situated female attorneys with the same job title as their male counterparts failed to prove their claim of unequal pay as plausible, rather than possible).

10. See 29 U.S.C. § 206(d)(1)(2007) (explaining the affirmative defenses available

differential based on any “factor other than sex” is a theoretical catchall where employers find arbitrary ways to justify a woman’s lower pay.<sup>11</sup> Therefore, courts have concluded that to successfully establish a “factor other than sex” defense, an employer must prove that it had a legitimate business reason for implementing the gender-neutral factor that resulted in the pay difference.<sup>12</sup> Although courts tend to find more frequently for employers in disparate pay cases, the Equal Employment Opportunity Commission (EEOC) continues to represent women who are discriminated against in the workforce; in 2011, monetary awards for sex based discrimination cases resolved through the EEOC totaled just over \$145 million.<sup>13</sup>

This Comment argues that the Equal Pay Act has not resulted in the change it meant to implement, and the continuing wage disparity between men and women proves this. Part II of this Comment summarizes the various approaches different circuits take to resolve Equal Pay Act claims, especially in relation to the affirmative defenses employers are allowed, as well as modification of the elements necessary for a prima facie Equal Pay Act case, and the effect that the *Iqbal* and *Twombly* possibility versus plausibility paradox has had on Equal Pay Act claims.<sup>14</sup> Part III argues that circuits should follow the reasoning of the Fifth Circuit’s substantially equal definition to evaluate Equal Pay Act claims, that the original language “comparable character” that was previously in the Equal Pay Act should be reenacted so as to allow for more successful Equal Pay Act claims, and that the affirmative defenses, especially the “factor other than sex,” should be strictly monitored by the courts so as to prevent arbitrary dismissal of Equal Pay Act claims.<sup>15</sup> Part IV concludes that the Equal Pay Act was meant to implement equal wages for men and women employed in similarly situated positions, and that courts should mirror the Second and

---

to employers who pay a woman less than a man).

11. See *Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999) (holding that the Long Island Railroad’s use of policies for implementing a lower pay wage for a female employer could rationally be found as gender-based discrimination).

12. See *E.E.O.C. v. J.C. Penny Co.*, 843 F.2d 249 (7th Cir. 1988) (noting that 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).

13. See *Corbett*, *supra* note 2, at 11 (documenting that in 2011 the EEOC received more than 28,000 complaints of sex discrimination, including wage disparities, which is an increase of about 18 percent compared with a decade earlier).

14. See *infra* Part II.

15. See *infra* Part III (arguing that the terminology of the Equal Pay Act should be changed from “equal” to “comparable” to allow for more claims to survive dismissal and to help circuits come to a more uniform consensus of the meaning of the Equal Pay Act and how to evaluate claims that fall under it).

Fifth Circuits' approaches to appropriately address and evaluate Equal Pay Act claims so as to reduce the gender wage gap.<sup>16</sup>

## II. BACKGROUND

### A. *The Prima Facie Elements of an Equal Pay Act Claim*

To prove a violation of the Equal Pay Act a plaintiff must first establish a prima facie case of discrimination by showing the following: the employer pays different wages to employees of the opposite sex; the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and the jobs are performed under similar working conditions.<sup>17</sup> Much confusion still exists as to the meaning of the word "equal" within the act, and contradictory judgments often result from the interpretation of the word.<sup>18</sup> The Equal Pay Act states

No employer . . . shall discriminate . . . on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.<sup>19</sup>

#### 1. *Equal Effort, Responsibility, and Skill*

The Fifth Circuit Equal Pay Act cases provide the fairest and most correct evaluation of equal work for equal pay.<sup>20</sup> The Fifth Circuit compared male and female sales persons job responsibilities and pay by citing to two cases that address the same factual issue but resulted in

---

16. See *infra* Part IV (concluding that for the Equal Pay Act to effectively help employees who are suffering from unequal pay due to their gender, courts must resolve the meaning of equal, define exactly what "factors other than sex" consist of, and more justly adjudicate the plausibility verses possibility standard).

17. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 189 (1974) (stating the elements of a prima facie case for an Equal Pay Act claim to make it clear for plaintiffs bringing suit).

18. See *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39 (5th Cir. 1973) (stating that although the standard of equality is clearly meant to be taken as higher than mere comparability, and as lower than absolutely identical, there still remains an area of equality under the Equal Pay Act which is ambiguous, especially in relation to "equal skill, effort, and responsibility").

19. See 29 U.S.C. § 206(d)(1) (1963).

20. See *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 723 (5th Cir. 1970) (asserting that males and females should have been paid the same amount for doing equal work).

conflicting decisions.<sup>21</sup> While deciding an Equal Pay Act claim, the Sixth Circuit discussed the meaning of equal work for equal pay, finding that both male and female employees' work was equal since they both cared for patients, bathed patients, distributed food trays, fed patients, took temperatures, and changed clothes and bed linens, and thus should have been compensated with equal pay.<sup>22</sup> The Third Circuit also found that female aides and male orderlies performed equal work and deserved equal pay.<sup>23</sup>

However, the Tenth Circuit found that an issue of material fact existed as to whether a female employee's work was substantially equal to that of male employees.<sup>24</sup> The court decided that a trier of fact could conclude that the female employee was simply more efficient, upholding a more lenient standard of substantially equal work.<sup>25</sup>

## 2. *Interpreting the Meaning of 'Equal'*

As guidance for equal work, the Fifth Circuit noted that jobs do not entail equal effort, even though they entail most of the same routine duties.<sup>26</sup> If the more highly paid job includes additional tasks which (1) require extra effort, (2) consume a significant amount of time of all those whose pay differentials are to be justified in terms of them, and (3) are an

---

21. See *Brennan*, 479 F.2d at 239 (comparing *Schultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424 (N.D. Tex. 1969), *rev'd sub nom.* *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970) (male orderly's position equal to that of female aide) with *Hodgson v. Good Shepard Hosp.*, 327 F. Supp. 143, 144 (E.D. Texas 1971) (male orderly position not equal to female maid) to show that courts interpret the meaning of "equal" differently in similar cases).

22. See *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981) (finding that Congress did not intend the phrase "equal work" to require that the jobs be identical, but rather that only substantial equality of skill, effort, responsibility, and working conditions is required).

23. See *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) (finding that there are problems of construction with the Equal Pay Act's language and that legislative history and the bills that preceded it yield little guidance in the understanding of its provisions).

24. See *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (finding that a female employee's job was substantially equal to a male employee's job, and that job differences that are not significant will not support a wage differential).

25. See *id.* at 1197-98 (finding the two jobs were similar enough to warrant equal pay and the work performed was identical). *But see* *Sprague v. Thorn Am. Inc.*, 129 F.3d 1355, 1364 (10th Cir. 1997) (holding that the court does not construe the equal work requirement of the Equal Pay Act broadly).

26. See *Brookhaven Gen. Hosp.*, 436 F.2d at 725 (stating that employers cannot confuse the purpose of the Equal Pay Act by calling for extra effort only occasionally, or only from a few male employees).

economic value commensurate with the pay differential, then the differential is justified.<sup>27</sup> However, the Tenth Circuit decided a case concerning the duties of a secretary, and found that the secretary's job was not equal to the work done at the order desk.<sup>28</sup> The court reasoned that since the secretary was hired as a receptionist, since a significant portion of her duties involved secretarial-receptionist work, and since only some of the duties she performed were also performed by order desk employees, but not as frequently, the work was not substantially equal.<sup>29</sup>

*B. Circuit Splits Concerning Affirmative Defenses, Primarily "Factors Other Than Sex"*

An evaluation of the different circuits in relation to Equal Pay Act claims proves that each circuit decides these cases differently. For example, the Sixth Circuit found for employees 85 percent of the time, while the Seventh Circuit only found for the employee 24 percent of the time.<sup>30</sup> The varied treatment of Equal Pay Act claims in each Circuit makes it confusing for plaintiffs bringing these claims: the meaning of the Equal Pay Act and precedent set out in major Supreme Court cases becomes misconstrued in favor of the employer rather than using the Equal Pay Act to support undercompensated employees.<sup>31</sup>

---

27. *See id.* (providing circumstances in which unequal pay would be justified); *see also* Brennan v. S. Davis Cmty. Hosp., 538 F.2d 859, 863 (10th Cir. 1976) (determining that both female aides and male orderlies were primarily involved in basic patient care and that any differences in duties did not involve significantly greater amounts of skill, effort, or responsibility).

28. *See* Nulf v. Int'l Paper Co., 656 F.2d 553, 561 (10th Cir. 1981) (holding that order desk employees engage in different jobs than secretaries, allowing for differences in pay).

29. *See id.* (declaring that "it is the overall job, not its individual segments, that must form the basis of comparison" (quoting Gunther v. County of Washington, 602 F.2d 882, 887 (9th Cir. 1979))).

30. *See* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 34 (2010) (noting that the Seventh and Eighth Circuits have the most restrictive interpretation of the Equal Pay Act'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).

31. *See id.* at 30 (lamenting that the final Equal Pay Act is not as strong as it needs to be to combat wage discrimination by citing Representative Dent's warning that removing the "comparable work" standard would limit the Equal Pay Act's effectiveness); *see also* Winkes v. Brown Univ., 747 F.2d 792, 796 (1st Cir. 1984) (finding that a female professor received an offer from a different institution and the University had sought to match that offer to retain her by giving her a raise). *But see* Belfi v. Prendergast, 191 F.3d 129, 139 (2d Cir. 1999) (finding that when a male employee came onto the job and his salary far surpassed plaintiff's, the employer's justification of paying the new employee more to entice him to take the job in a

As *Corning Glass Works v. Brennan* demonstrates, courts also struggle with reconciling when a “factor other than sex” can and should be addressed, what the term means, and what Congress intended it to mean.<sup>32</sup> The *Corning Glass Works* court interpreted the meaning of the “factor other than sex” affirmative defense as recognizing that the language of the Equal Pay Act specifies many factors that may be used to measure the relationships between jobs and a difference in pay, while other courts did not reach the same conclusion.<sup>33</sup> The court in *Denman v. Youngstown State University* concluded that the pay differential of a female employee whose contract was not renewed was not based on a “factor other than sex,” thereby narrowing the factor other than sex defense in the Northern District of Ohio.<sup>34</sup> The same issue was also addressed in a Second Circuit case in *Aldrich v. Randolph Center School District*, where a female employee was being kept from a custodial position and pay grade because of a civil service examination.<sup>35</sup> The Ninth Circuit also addressed “factors other than sex” in *Maxwell v. City of Tucson* and found that Congress added the phrase to the Equal Pay Act as a “broad general exception” so that employers would be able to implement gender-neutral job evaluations and classification systems.<sup>36</sup> However, the court found that the need must be legitimate.<sup>37</sup>

---

competitive market was not legitimate).

32. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974) (stating that Congress incorporated words having a special meaning within the field regulated by the statute so as to overcome objections that statutory definitions were vague).

33. See *id.* at 201 (finding that the most telling evidence of congressional intent of the Equal Pay Act is the amended definitions of equal work; “skill,” “effort,” “responsibility,” and “working conditions”).

34. See *Denman v. Youngstown State Univ.*, 545 F. Supp. 2d 671, 678 (N.D. Ohio 2008) (stating that to be entitled to summary judgment, the defendant must prove that no genuine issue of material fact exists as to whether pay is due to a “factor other than sex.” In this case the court found that a reasonable jury could determine that sex played a role in the \$10,000-\$40,000 wage difference).

35. See *Aldrich v. Randolph Cent. Sch. Dist.*, 63 F.2d 520, 526-27 (2d Cir. 1992) (holding that the job classification system did not show grounding in legitimate business considerations and therefore was not a “factor other than sex,” and could not be used as an affirmative defense to pay cleaners less than custodians, unless legitimate business reasons could be shown).

36. See *Maxwell v. City of Tucson*, 803 F.2d 444, 447-48 (9th Cir. 1986) (holding that the City of Tucson failed to show how the reclassification of a woman’s position to the lower level was based on a real change in duties and responsibilities when she was actually directing a municipal program identical to that of her male predecessor, but at a lower salary level).

37. See *id.* at 448 (determining that no legitimate need existed to pay a female employee less because the jobs were identical).

In the more employer friendly Seventh Circuit, the court found that a proper job reclassification within the framework of a position and pay classification system qualifies under the “factor other than sex” affirmative defense.<sup>38</sup> Through this defense, the employer is able to determine the legitimate organizational needs and changes that the Ninth Circuit did not find apparent in *Maxwell v. City of Tucson*.<sup>39</sup> The Seventh Circuit also found in *Dey v. Colt Construction & Development Co.*, and *Covington v. Southern Illinois University* that prior wages constitute as a “factor other than sex” in Equal Pay Act claims, and therefore found that the employer was justified in the salary disparity.<sup>40</sup>

### C. Possibility Versus Plausibility

In one of the more recent Equal Pay Act cases concerning equal pay for equal work, a group of female attorneys filed suit against their employer, the Port Authority of New York and New Jersey, in an unsuccessful effort to prove that the male attorneys were unfairly compensated at a higher pay rate than the female attorneys.<sup>41</sup> While the Second Circuit cited that the lack of actual content of the work performed by the attorneys was the reason for the dismissal of the claim, the court focused heavily on plausible claim standards in an effort to prove that the EEOC did not meet its pleading standard.<sup>42</sup> The court continuously asserted that the EEOC did not bring enough plausible information to assert a claim; however, the EEOC alleged that the claimants and comparators had the same job code.<sup>43</sup> The

---

38. See *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261-62 (7th Cir. 1985) (holding that the employer’s reorganization was a legitimate reason for the pay differential based on “factors other than sex”).

39. See *id.* (determining that finding against the employer would force employers to either forego legitimate organizational planning, or to hire only someone of the same sex whenever an employee left his or her job or was fired at a critical time).

40. See *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1449 (7th Cir. 1994) (finding that although a male successor was paid more than his female predecessor, prior wages counted as a “factor other than sex” under affirmative defenses for employers); *Covington v. S. Ill. Univ.*, 816 F.2d 317, 322 (7th Cir. 1987) (concluding that the Equal Pay Act does not preclude an employer from carrying out a policy which, although not based on employee performance, has in no way been shown to undermine the goals of the Equal Pay Act).

41. See *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 252, 256 (2d Cir. 2014) (noting that while the EEOC carried out its investigation, nothing about the actual content of the work done by the dozens of attorneys either within or across practice areas at the Port Authority was addressed).

42. See *id.* at 253 (stating that *Twombly* and *Iqbal* require that a complaint support the viability of its claims by pleading sufficient nonconclusory factual matter to set forth a claim that is plausible on its face, not just simply possible).

43. See *id.* at 259 (holding that since the EEOC’s allegations were conclusory they

EEOC also argued that the attorneys were paid within the bounds of an attorney “maturity curve” based on years of legal experience, were evaluated according to the same performance criteria, and were not limited to distinct legal divisions.<sup>44</sup> These arguments are valid when bringing an Equal Pay Act claim and the EEOC’s case should not have been dismissed.<sup>45</sup>

### III. ANALYSIS

#### *A. Circuit Splits Concerning Equal Pay Act Claims Should be Resolved by Implementing a Broader Interpretation of the Equal Pay Act Because There is a Lack of Consensus for Judges and Confusion on Equal Pay Act Proceedings for Parties.*

Patterns are developing across the decisions made in various federal courts, and these decisions continue to conflict with one another.<sup>46</sup> Often, courts confuse the meaning of equal work, some ruling that work of comparable character is suitable, while others state that equal work is not a standard to be interpreted broadly.<sup>47</sup> With confusion among circuits pertaining to the definition of a word such as “equal”, it seems that courts are purposefully confusing their parties so as to bar future Equal Pay claims without giving a clear precedent as clarification.<sup>48</sup> The result of such actions unfairly leaves underpaid workers with no further recourse, and employers are legally allowed to continue to pay certain employees less

---

did not meet the requisite level of facial plausibility).

44. See *id.* at 258 (finding that although the EEOC provided information regarding the similarities of the attorneys’ jobs, it was not enough to bring a claim).

45. See *id.* at 254-55 (stating the prima facie elements of an Equal Pay Act claim).

46. See *Denman v. Youngstown State Univ.*, 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008) (establishing that an employee proved a prima facie case of sex-based pay discrimination when females were not awarded raises, but equally situated male workers were). *But see Sprague v. Thorn Am. Inc.*, 129 F.3d 1355, 1364 (10th Cir. 1997) (holding that the employee did not demonstrate that she occupied substantially the same position or performed substantially the same tasks as the assistant managers, and therefore her Equal Pay Act claim failed).

47. See *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 723, 724-25 (5th Cir. 1970) (finding that although the employer contends that roles of orderlies and aides were substantially distinguishable in terms of “secondary and tertiary” duties, the jobs still reflected equal work because the duties were similar). *But see Nulf v. Int’l Paper Co.*, 656 F.2d 553, 561 (10th Cir. 1981) (noting that when significant amounts of time are spent on different tasks the jobs are no longer considered equal).

48. See *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 256 (2d Cir. 2014) (stating that a three year investigation conducted by the EEOC still did not unearth any relevant information pertaining to an Equal Pay Act claim, resulting in the case’s dismissal).

money than equally situated employees of a different gender because a court refuses to speak on the direct definition of a word, but can quash a case for failure to meet the definition of an undefined word.<sup>49</sup>

Courts also differ on the meaning of the phrase “factor(s) other than sex,” which provides certain circuits with exceptions and broad catchalls for employers seeking affirmative defenses in Equal Pay Act claims; for example, in the Seventh Circuit in *Covington v. Southern Illinois University*, the court states that “factors other than sex” were prevalent in the case of a female assistant professor who was paid less than her male predecessor because Southern Illinois University’s salary retention policy happened to qualify as a policy other than sex.<sup>50</sup>

*1. Congress and Circuits Should Follow the Fifth Circuit’s Meaning of ‘Equal Work,’ and Comparable Work Should be Added to that Definition to Open Up the Possibilities of More Equal Pay Act Claims.*

In *Corning Glass Works v. Brennan*, the employer argued that the opposing counsel failed to prove that the employer ever violated the Equal Pay Act because day shift work was not performed under similar working conditions as the night shift work.<sup>51</sup> However, the court in *Corning Glass Works* took into consideration four separate factors in determining job value: skill, effort, responsibility, and working conditions, which is very similar to the congressional intent reflected in the Equal Pay Act itself.<sup>52</sup> The Court decided that the day shift staffed by women who were paid less was in fact equal to the night shift staffed by men who were paid more.<sup>53</sup> At this juncture, the employer requested that the Court differentiate

---

49. See *Nulf*, 656 F.2d at 561 (stating that since Congress rejected the equal pay for “comparable work” concept, it was then a substantial identity of job functions that Congress sought to address, and not simply comparable skill and responsibility, which the Act reads).

50. See *Covington v. S. Ill. Univ.*, 816 F.2d 317, 322 (7th Cir. 1987) (finding that the Equal Pay Act does not preclude an employer from establishing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied, or has a discriminatory effect, even though discrimination is a moot point in Equal Pay Act claims).

51. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974) (finding that while a person not employed in the industrial business might assume that time of day worked reflects one aspect of a job’s “working conditions,” the term has a different and much more specific meaning in the language of industrial relations).

52. See *id.* (determining that “working conditions” in an industrial sense involves two sub factors, surroundings and hazards).

53. See *id.* at 203 (stating that the day and night shift jobs in this instance are of equal work considering surroundings and hazards).

between jobs that the employer itself had always equated.<sup>54</sup> Circuit courts should replicate the Supreme Court's approach to equal work because it fairly drew conclusions between the employer's own working condition similarities and differences and evaluated those against the facts of the case and the meaning of the Equal Pay Act.<sup>55</sup> As *Corning Glass Works* demonstrates, an employer cannot hide behind the guise of working conditions as a reasonable excuse for a pay differential when every element of the work performed is in fact equal, other than the time of day.<sup>56</sup>

The Court in *Corning Glass Works* also touched on Congress' intent of equal work, and the varying opinions from both the Second and Third Circuits.<sup>57</sup> While the Second Circuit found that shift differentials should be excluded as a broad general exception for differentials in determining equal work, the Third Circuit found that in comparing work of one employee to the work of another, standing as opposed to sitting, pleasantness of surroundings, periodic rest times, hours worked, and differences in shifts should all be considered as part of the working condition factor when determining pay.<sup>58</sup> By imposing the logic used and the consensus reached in *Corning Glass Works*, more courts could fairly evaluate Equal Pay Act claims and have a distinct understanding of the meaning of "equal."<sup>59</sup> However, many courts are reluctant to incorporate this line of reasoning and believe that the Equal Pay Act should not revert back to its previous interpretation of equal, which meant work was comparable, or "substantially equal," in nature and working conditions.<sup>60</sup>

---

54. See *id.* at 204 (holding that the Equal Pay Act does allow for nondiscriminatory shift differentials to influence pay rates).

55. See *id.* at 202 (finding that while there are many factors which may be used to measure the relationship between jobs and a variance in wages, nowhere in any of the employer's definitions of working conditions is time of day stated as relevant to a difference in pay).

56. See *id.* at 203 (holding that the performance of the inspection work by the employees, whether day or night, is of equal character as defined by the Equal Pay Act).

57. See *id.* at 198 (comparing the meaning of equal pay across different circuits).

58. See *id.* at 188 (noting that when the case had multiple branches in different circuits before it was consolidated, the Second Circuit modified and found for the employee, while the Third Circuit found for the employer).

59. See *id.* at 199 (commenting that at the conception of the Equal Pay Act, equal pay for equal work was more readily stated in principle than reduced to statutory language, and therefore was more malleable in definition and applicable to a broad range of jobs).

60. See *id.* at 200 (indicating that courts criticized the beginning drafts of the Equal Pay Act as "unduly vague and incomplete" as it related to the definition of equal work).

a. *“Equal” Should be Interpreted as “Comparable,” via the Fifth Circuit’s Reasoning.*

The difficulty with defining the word “equal” was also addressed correctly in *City Stores*, where the Fifth Circuit took care to evaluate the job responsibilities of male and female clothing salespeople.<sup>61</sup> The court identified that both genders were responsible for marking and fitting clothes as well as selling items to customers, and that the differences between marking cuffs, crotches, and waistbands of men’s suits and adjusting hemlines, shoulders and waists of women’s dresses were wholly insubstantial.<sup>62</sup> The employer argued that the jobs were different in nature, but evidence in trial indicated that the employer knew otherwise.<sup>63</sup> *City Stores* emphasizes that restrictions apparent in the Equal Pay Act as labeling jobs equal only when they are virtually identical are actually meant to apply only to jobs that are substantially identical or equal, leading to the definite possibility of confusion in interpreting the meaning of “virtually identical” and “substantially identical.”<sup>64</sup>

The meaning of “equal” in *Corning Glass Works* leans much closer to “substantially identical,” and therefore allows for a looser interpretation as it was applied to the case.<sup>65</sup> Although not identical to the decision in *City Stores*, the Fifth Circuit defends its decision by asserting that legal concepts, such as the definition of the word “equal” under the Equal Pay Act, are predisposed to interpretation only through contextual study, and a case-by-case basis.<sup>66</sup> This idea of a case-by-case basis is both beneficial

---

61. See *Brennan v. City Stores Inc.*, 479 F.2d 235, 237, 241 (5th Cir. 1973) (explaining that the slightest of variations in job tasks does not eliminate the equality of the job or call for a differential in pay).

62. See *id.* (finding when jobs entail the same fundamental work, but with different descriptions, such as sewing men’s cuffs or women’s hemlines, the jobs are still substantially equal).

63. See *id.* at 241 (describing that statements from the Administrator and the Labor Department’s Interpretative Bulletin both took the position that the job of selling men’s clothing was equal to selling women’s).

64. See *id.* at 238 (noting that when Congress enacted the Equal Pay Act, it substituted the word “equal” for “comparable” to show that the jobs involved should be very much alike, or closely related to each other; also construed as “virtually identical”).

65. See *id.* at 237-38 (finding that the marking and fitting duties as well as the sales responsibilities of the men and women at the store were of equal character, and should therefore be compensated the same amount).

66. See *id.* at 239 (declaring that “semantic distinctions” such as “substantially equal,” “essentially the same,” “sufficiently similar,” or “equivalent” do not indicate that a court has applied an incorrect standard or definition of equality, especially as it applied to comparing jobs at the store in question).

and burdensome.<sup>67</sup> It allows for a looser interpretation of the word “equal,” which could help provide employees alleging unfair pay differentials more success with passing the summary judgment stage and even eventually winning cases; however, it simultaneously provides a source of confusion for employees who are trying to understand the definition of a term that is integral to the essence of their claim.<sup>68</sup>

The Fifth Circuit in *Brookhaven General Hospital* also addressed the meaning of equal work when it determined that work is not equal in effort if the job entails additional tasks which “(1) require extra effort, (2) consume a significant amount of time from of all those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differential.”<sup>69</sup> The Fifth Circuit properly applied this approach when it decided that similarly situated male orderlies and female aides were unfairly paid different salaries because the tasks performed, the responsibility given, and the skills necessary for both positions were substantially equal.<sup>70</sup> This method of approaching Equal Pay Act claims is the most logical and straightforward; the Act itself calls for equal pay for jobs that entail similar working conditions, as well as equal skill, effort, and responsibility.<sup>71</sup> The court also noted that the overall controlling factor of the Equal Pay Act is job content, which is defined as the actual duties that the employees are called upon to perform, not just the job descriptions prepared by the employer.<sup>72</sup> This line of reasoning helped to push the aides’ case forward through summary judgment because the court decided to rely on the testimony of the employees as to what their daily tasks encompassed, leading to a more informative perspective of the aides’ daily tasks, and giving insight into the equal skill, effort, and

---

67. *See id.* (dismissing any flaws with ambiguous terminology and allowing for confusion regarding the meaning of “equal” to persist).

68. *See Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 723 (5th Cir. 1970) (holding that equal work calls for equal pay). *Compare id.* (finding that the work performed by a male orderly is equal to that of a female aide), *with Hodgson v. Good Shepard Hosp.*, 327 F. Supp. 143, 143 (E.D. Texas 1971) (holding that a male orderly position is not equal to a female aide and their pay should not be equal).

69. *See Brookhaven Gen. Hosp.*, 436 F.2d at 725 (providing the equal effort criteria necessary to consider when evaluating an Equal Pay Act claim).

70. *See id.* at 723, 725 (noting that even the employer conceded that the duties which occupied the better part of the time of both groups of employees demanded equal skill, effort, and responsibility).

71. *See id.* at 722 (describing that the elements of an Equal Pay Act prima facie case must be met prior to the merits of the case being evaluated).

72. *See id.* at 724 (illustrating that the testimony in this case established that some aides did more than what was noted in their job description, which may or may not fairly describe all that the job entails).

responsibility of both gender's positions.<sup>73</sup>

This method of investigation and understanding used by the Fifth Circuit is necessary to hear Equal Pay Act claims that are brought to trial, and allows for a larger number of cases to satisfy the prima facie standard, making it possible for more women to assert Equal Pay Act claims without being dismissed.<sup>74</sup> The Fifth Circuit also noted that Equal Pay Act claims should not be abandoned because a man's bargaining power is greater than a woman's, resulting in the man earning more because he demanded it and his employer granted it.<sup>75</sup>

*b. Various Interpretations of 'Equal' in Relation to Equal Pay Act Claims Must be Eliminated.*

The ruling of a U.S. District Court in Texas, however, found that the jobs of male orderlies and female aides were vastly different in skill, responsibility, working conditions, and effort because of the various additional tasks placed on the orderlies, making the pay differential acceptable.<sup>76</sup> Orderlies were distinguished as requiring a higher skill set for being trained in male catheterizations, application and removal of casts, correct methods of lifting patients particularly in critical, obese, or geriatric patients, and sterile procedures.<sup>77</sup> The court also found that orderlies were required to demonstrate more effort in terms of lifting, handling equipment, moving, turning, and transporting patients, and that these tasks were an integral part of their daily work.<sup>78</sup> The court also found that the orderlies' responsibility was greater than that of the aides because an orderly works throughout the hospital, including in emergency rooms, not just on a designated floor, as the aides do.<sup>79</sup> Lastly, the court found that orderlies

---

73. *See id.* at 725 (focusing on the individual tasks performed over and above routine patient care, it became clear that the tasks performed only by aides required as much skill as the most skilled tasks performed by orderlies, and that the additional duties assigned to both groups involved 'substantially equal' responsibility).

74. *See id.* (determining that the trial judge was correct to not only place her reliance on job descriptions provided by employers, but also on employee testimony).

75. *See id.* at 726 (asserting that the hospital's argument that it paid orderlies more because it could not get them for less is moot).

76. *See Hodgson v. Good Shepard Hosp.*, 327 F. Supp. 143, 149 (E.D. Texas 1971) (holding that the evidence clearly established a substantial difference between the position of aide and orderly so equal pay was not required).

77. *See id.* at 147 (noting that higher wages were acceptable for orderlies because their skill set was more demanding).

78. *See id.* (justifying higher pay for orderlies because they exerted more effort).

79. *See id.* at 148 (demonstrating that the aide does not have substantially identical and equal responsibilities to that of the orderly since the orderly has greater responsibility in several areas of the job, specifically male catheterizations).

had different working conditions than aides, and that the orderlies were subjected to a more taxing and demanding work environment that entailed disagreeable contact with the very ill, severely injured and dying, the unruly and violent, and addicts.<sup>80</sup>

All of these reasons taken together seem to satisfy the point that orderlies performed more tasks that consumed a significant amount of time, and thus warranted a higher pay; therefore the definition of equal was appropriately applied.<sup>81</sup> However, discrepancy with laws cited in the Fifth Circuit become prevalent in the court's opinion when the court notes that the frequency of these tasks being performed by orderlies can range anywhere from once or twice a week to five times a day.<sup>82</sup> Such a vast difference in occurrence and timing of unequal tasks begins to question the validity of how often they actually occur, and whether a higher pay is warranted.<sup>83</sup> Although the court alluded to the expert testimony of qualified experts in the field of Job Evaluation and Personnel Engineering, the facts provided as to how frequently these extra tasks were performed were weak, the holding drawn from them was conclusory, and more attention should have been paid to the Fifth Circuit's interpretation.<sup>84</sup> Finally, the court noted that it is not enough to simply show that the work done by both orderlies and aides is similar or comparable: it must be substantially identical.<sup>85</sup> This reasoning creates a higher threshold for Equal Pay Act claims and results in decisions for the employer since substantially identical work is very difficult to prove.<sup>86</sup>

---

80. *See id.* (asserting that working conditions of such an unpleasant caliber were rarely ever confronted by aides, and therefore additional pay for the orderlies was permissible).

81. *See Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970) (holding that work is unequal if extra tasks are required that consume a significant amount of time).

82. *See Good Shepard Hosp.*, 327 F. Supp. at 148 (conceding that the extra work performed by the orderlies is not conducted at identifiable times or places because the additional work is not readily separable from the orderlies' other job duties, but noting that this should not matter and the tasks should not be considered incidental or occasional).

83. *See Brookhaven Gen. Hosp.*, 436 F.2d at 725 (dictating that employers may not misinterpret the Equal Pay Act so much as to call for extra effort only occasionally, but still permit a wage discrepancy because extra effort is exerted sometimes).

84. *See Good Shepard Hosp.*, 327 F. Supp. at 147 (noting that qualified experts found, through surveys and investigation, that major differences existed between the jobs of aides and orderlies).

85. *See id.* (holding that the work of orderlies and aides is not substantially identical because the orderlies engage in more substantial work than the aides).

86. *See Brennan v. City Stores Inc.*, 479 F.2d 235, 238 (5th Cir. 1973) (commenting that Congress' change to the Equal Pay Act to replace "comparable" with

In *Brennan v. South Davis Community Hospital*, both female maids and aides brought an Equal Pay Act claim against their employer alleging that the work of the female maids and aides was equal to the work of the male orderlies and janitors, respectively.<sup>87</sup> The Tenth Circuit applied the same reasoning as the lower court, agreeing that employers should not be allowed to skirt the proper meaning of the Equal Pay Act by drawing “overly fine” distinctions in the tasks at issue.<sup>88</sup> The court applied the logic that higher pay is not related to extra duties when the extra task calls for a marginal amount of time and is of small importance, when the extra duties do not actually exist, or when employees of the opposite sex also perform duties of equal skill, effort, and responsibility.<sup>89</sup> A decision was made on the grounds of “substantially equal,” rather than “identical,” and this allowed the female maids and aides to prevail in their claim.<sup>90</sup> The Tenth Circuit’s logic resonates with that of the Fifth Circuit, and encourages Equal Pay Act claims to survive dismissal, leaving open a broader meaning of “equal” work.<sup>91</sup> The Fifth and Tenth Circuits’ reasoning that jobs can be compared on a lower threshold of equality is the kind of shift that the Supreme Court should implement to encourage Equal Pay Act cases from dismissal.<sup>92</sup>

Additionally, the court considered equal effort to mean similar “physical or mental exertion” needed for the performance of a duty, rather than an identical duty.<sup>93</sup> The court determined that occasional or infrequent performance of a duty that happens to require extra effort, either physically

---

“equal” altered the meaning of the bill and created a higher and more difficult threshold to meet).

87. See *Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859, 863 (10th Cir. 1976) (holding that the employer violated the Equal Pay Act because men and women were not paid equal wages for equal work).

88. See *id.* at 861 (finding the employer’s extra task approach unfounded and incorrectly applied to the facts of the case).

89. See *id.* at 862 (determining that the male orderlies’ extra duty of catheterization needs to be evaluated as part of the entire job, just as maids encounter extra duties).

90. See *id.* (stating that “[w]hen jobs are substantially equal, a minimal amount of extra skill, effort, or responsibility cannot justify wage differentials”).

91. See *id.* at 863 (holding that both aides and orderlies were involved in basic patient care and any differences in job duties did not involve significantly greater amounts of skill, effort or responsibility).

92. See *id.* at 861 (commenting that the best approach for determining if work is equal is a case-by-case analysis because different circumstances call for different interpretations of the statute).

93. See *id.* at 864 (noting that although extra effort may be exerted in different ways in two jobs, this does not allow for a difference in pay).

or mentally, could not by itself justify unequal effort or unequal pay; however, significant amounts of time spent on different tasks may not be considered equal effort.<sup>94</sup> Therefore, the occasional snow shoveling, carrying of large garbage cans, filling of soda machines, and handling of a larger floor cleaner did not call for a higher salary for the janitors than the maids because the effort exerted through these activities was equal to the effort the maids exerted in their own job duties.<sup>95</sup> By allowing a more open interpretation of “equal” rather than “identical,” the Tenth Circuit mirrored the Fifth Circuit, and was able to effectively conclude that the similar work done by female maids and aides was justifiably equal and deserving of the same pay grade as their male janitor and orderly counterparts.<sup>96</sup>

The Tenth Circuit also decided *Nulf v. International Paper Co.*, and the court reached a different opinion as to the equality of work done by a secretary in comparison to order desk employees.<sup>97</sup> While the court noted that equal work is not to be construed broadly, in the same paragraph it also used the terms “substantially equal,” rather than identical, still keeping true to its more liberal interpretation of equal work.<sup>98</sup> Although the court’s decision in *Nulf* seems counterintuitive in relation to *Brennan v. South Davis Community Hospital*, the court reasoned that the secretary who complained of unequal pay did not spend a significant amount of time doing order desk tasks, and that her secretarial job consumed at least fifty percent of her time.<sup>99</sup> To further explain its logic, the court noted that even if aspects of two jobs are similar, that is not enough to form a basis of comparison for equal pay.<sup>100</sup> This decision reflects *Brennan v. South Davis Community Hospital* because it follows the logic that when significant amounts of time are spent on different tasks, the jobs are inherently unequal

---

94. *See id.* (finding that all of the work performed by both the maids and janitors was within the general cleaning function and minute variances in effort did not allow for unequal pay).

95. *See id.* (finding that maids also did jobs the janitors did not, such as changing drapes, cleaning bathrooms, stripping beds, cleaning mattresses, and making beds).

96. *See id.* at 860 (asserting that maids and aides should be equally compensated to janitors and orderlies because the work done by each is equal).

97. *See Nulf v. Int’l Paper Co.*, 656 F.2d 553, 560 (10th Cir. 1981) (finding that a secretary was not erroneously paid less than desk order employees because their work was not equal).

98. *See id.* (commenting on Congress’ disapproval of “comparable work” and “like jobs,” but still allowing a “substantially equal” standard).

99. *See id.* (stating that because the complainant was spending half of her time on non-order desk duties, it cannot be determined that her job was substantially equal to the order desk job).

100. *See id.* at 561 (holding that the overall job is the only basis to be considered for equal pay, not individual parts).

and therefore do not necessarily require equal pay.<sup>101</sup>

*Sprague v. Thorn Americas Inc.*, a case decided by the Tenth Circuit after *Nulf*, continued to implement the “substantially similar” job requirement in Equal Pay Act claims.<sup>102</sup> A female secretary, Sprague, took on additional responsibilities, including conducting meetings and updating products; however, she did not receive a higher pay.<sup>103</sup> While Sprague argued that her employer paid males in positions similar to hers higher wages, the court found that her job differed significantly from males in other departments because her department produced less than one-tenth of the revenues of the departments managed by the male assistant managers.<sup>104</sup> Since Sprague’s job duties entailed far less responsibility than the male assistant managers given the smaller size of her department and her position was that of a secretary, rather than an assistant manager, her work was “merely comparable” rather than “substantially equal,” and could not support an Equal Pay Act claim.<sup>105</sup>

Another case out of the Tenth Circuit, *Riser v. QEP Energy*, again upheld the standard of “substantially equal” work being the basis for equal pay.<sup>106</sup> Riser, a female employee, sued her employer based on the reasoning that younger men who took over job responsibilities very similar to hers were paid higher wages than she was.<sup>107</sup> While deciding the case, the court acknowledged the importance of equal skill, effort, and responsibility the jobs held, and that the determination of each element must be based on the actual content of the job, not only the job description

---

101. See *Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859, 862 (10th Cir. 1976) (noting that jobs that involve different tasks which consume substantial amounts of time are not equal because the duties and responsibilities are more encompassing).

102. See *Sprague v. Thorn Am. Inc.*, 129 F.3d 1355, 1365 (10th Cir. 1997) (finding that a woman’s position was not “substantially equal” to that of the male assistant managers).

103. See *id.* at 1364 (noting that these additional responsibilities were also performed by Assistant Product Managers in other departments who received higher wages).

104. See *id.* (reasoning that the difference in revenues between the departments indicated that the tasks and functions performed by Sprague were dissimilar in level of experience and level of complexity, rendering her job unequal to her male counterparts).

105. See *id.* at 1365 (stating that the “equal work” requirement of the Equal Pay Act should not be construed broadly so that failure to provide equal pay for “like jobs” is not actionable).

106. See *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (holding that job differences that are “not significant in amount or degree will not support a wage differential.”) (quoting *S. Davis Comm. Hosp.*, 538 F.2d at 862).

107. See *id.* at 1194 (describing that Riser’s salary was \$47,382 annually, while a male Fleet Administrator was hired on at \$62,000 annually).

or title.<sup>108</sup> This job content determination is the appropriate way to decide the equality of the jobs and their pay because job titles and descriptions can be misleading, whereas actual job duties portray the whole scope of the job.<sup>109</sup> Since the new jobs that were given to men with a higher pay contained duties that were carved directly out of Riser's own duties, the court was correct in determining—regardless of Riser's job description—that Riser's performance was equal to that of her male counterparts.<sup>110</sup> Because a reasonable jury could find that Riser's job was "substantially equal" to both the Fleet Administrator and the Facilities Manager in skill, effort, and responsibility, the Tenth Circuit, while following the logic of the Fifth Circuit, correctly held that equal pay was required for Riser.<sup>111</sup>

The Third Circuit also addressed "equal work" in *Shultz v. Wheaton Glass Co.*, where male and female selector-packers were paid unequal wages for the same work.<sup>112</sup> The company's employer attempted to defend the wage differential on the fact that male employees had sixteen additional tasks and also did the work of snap-up boys, making the jobs substantially different.<sup>113</sup> However, the court found that the male selector-packers only spent eighteen percent of their total time on this work and the work was forbidden to women.<sup>114</sup> In addition, it was not found that every male selector-packer performed the extra work; extra work was done by some male selector-packers only when the extra sixteen tasks were not performed by snap-up boys.<sup>115</sup> The Third Circuit correctly found that even if all male

---

108. *See id.* (reasoning that simply because Riser's job title was not "Fleet Administrator" or "Facilities Manager" did not preclude her from equal pay for the same work).

109. *See id.* (noting that Riser logged 541 hours of overtime in fleet administration and facilities management duties, neither of which were in her job description or title).

110. *See id.* at 1197 (finding that Riser performed the entirety of fleet-administration tasks that were passed to a male employee with the title Fleet Administrator).

111. *See id.* at 1198 (holding that QEP divided Riser's position and assigned the tasks she was performing to the two new positions, which were then filled by male employees compensated at notably higher pay rates).

112. *See Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 263 (3d Cir. 1970) (finding that the male selector-packers earned twenty-one and a half cents per hour more than females for equal work).

113. *See id.* at 262 (stating that additional tasks such as lifting more than thirty-five pounds, stacking cartons, and locating glassware in the warehouse were performed by men).

114. *See id.* at 263 (holding that there was no finding of fact as to what percentage of time was spent by male selector-packers either on average or individually in performing this different work).

115. *See id.* (finding that no basis exists for an assumption that all male selector-packers performed any or all of these sixteen additional tasks).

selector-packers did perform the sixteen additional tasks an inadequate basis for the differential in wages paid to the male and female workers would still exist.<sup>116</sup> The court also determined that if some female selector-packers were unwilling or unable to do the work of snap-up boys, then a wage differential between the male and female workers might be justified.<sup>117</sup> However, the court found that this could also mean that there may have been male selector-packers who were unwilling or incapable of doing the work of snap-up boys, thereby removing any justification for the wage differential.<sup>118</sup>

The Third Circuit correctly reasoned that the motive behind the employer's pay plans was to keep women in a subordinate role.<sup>119</sup> While evaluating the basis for the lower wages of the female selector-packers compared to the males, the court turned to the wording of the Equal Pay Act.<sup>120</sup> The court found that the Equal Pay Act (as it was in 1970 and still is today) provided inadequate guidance "in the construction of its provisions in concrete circumstances."<sup>121</sup> The court addressed the history of the Equal Pay Act and noted that Congress chose to specify equal pay for "equal" work even though Congress was aware of the National War Labor Board's regulations from World War II that required equal pay for "comparable" work.<sup>122</sup> Equal pay for "comparable" work would set a looser standard for Equal Pay Act claims and would allow more cases to survive dismissal.<sup>123</sup> However, Congress was not prepared to implement such a standard.<sup>124</sup> Instead, the court noted that Congress did not require

---

116. *See id.* (finding that the additional sixteen tasks were only justified at a pay rate of two cents more per hour, rather than the twenty-one-and-a-half cents per hour that male selector-packers were paid over the women selector-packers).

117. *See id.* at 264 (noting that no investigation as to whether the female selector-packers could perform the work of snap-up boys ever transpired).

118. *See id.* (determining that simply because some of the male selector-packers were willing and able to do the work of snap-up boys did not justify that all males received twenty-one-and-a-half cents more per hour than all females).

119. *See id.* (inferring this by the 10 percent differential between male and female selector-packers, and the two cents difference between snap-up boys and female selector-packers).

120. *See id.* (noting that there are problems of construction with the Equal Pay Act because terms are exceedingly ambiguous).

121. *See id.* at 265 (finding that at the time, the Equal Pay Act had not been authoritatively construed by the Supreme Court).

122. *See id.* (determining that the National War Labor Board's regulations were only meant to show the feasibility of administering a federal equal pay policy).

123. *See id.* (holding that comparable work standards would give employees more freedom in asserting Equal Pay Act claims).

124. *See id.* (noting the National War Labor Board's decisions were not meant to be

jobs to be identical, as some circuits may interpret the Equal Pay Act, but only that jobs be substantially equal.<sup>125</sup>

*c. Focus on Congress' Intent of the Meaning of 'Equal' Should Also be Taken into Consideration in Equal Pay Act Claims.*

The Equal Pay Act was not fashioned to dispute entirely different jobs; the assumption that differences would “necessarily be apparent” in various job classifications was obvious, therefore warranting varied pay scales.<sup>126</sup> However, the Third Circuit correctly states that Congress’ intention was not to allow artificially created job classifications which did not substantially differ from the genuine job classification to be an escape for employers.<sup>127</sup> Therefore, the female selector-packers were correct in asserting that their job classifications were very nearly identical, and at the least substantially equal to the male selector-packers, and should have been compensated equally.<sup>128</sup>

In *Odomes v. Nucare, Inc.*, the Sixth Circuit decided that that male orderlies were unfairly paid more than female aides.<sup>129</sup> The orderlies were engaged in a primarily male dominated training program and their employer attempted to explain the unfair wage differential through the training program.<sup>130</sup> However, the court correctly found that the training program was an illusory “post-event justification” for unequal pay for equal work given the fact that most of the tasks the orderlies and aides performed were substantially equal.<sup>131</sup> Both the orderlies and aides performed patient care as their primary job function, which included bathing patients, distributing food trays, feeding, taking temperatures, and

---

guiding principles for the Equal Pay Act).

125. *See id.* (holding that any other interpretation of the Equal Pay act would destroy its “remedial purposes” of eliminating gender wage discrepancies).

126. *See id.* (reasoning that when the Equal Pay Act was initially created, it was not meant to equate unlike jobs, as they would be substantially different (or unequal) by nature).

127. *See id.* at 265-66 (finding that such an allowance would render the content of the Equal Pay Act useless).

128. *See id.* 267 (holding that no adequate findings exist that could be made to support or justify the wage differential).

129. *See Odomes v. Nucare, Inc.*, 653 F.2d 246, 247 (6th Cir. 1981) (finding that justifications for unequal pay for equal work were illusory because the jobs were substantially similar).

130. *See id.* at 251 (noting that training programs which appear to be available only to employees of one sex, as is the case here, will be carefully examined to determine whether such training programs are legitimate).

131. *See id.* at 251 (finding that the work of the nurse aides and orderlies consisted primarily of the same tasks).

changing clothes and bed linens.<sup>132</sup> The employer contended that the work of the orderlies and aides were not equal in accordance with the Equal Pay Act, and therefore the unequal wages were justified.<sup>133</sup> The employer argued that male orderlies not only cared for patients, but they also performed heavy lifting chores and that at least one orderly provided security to an otherwise all female nightshift.<sup>134</sup> The court rejected this argument and found that female aides were also equally capable of the heavy lifting that was required, and orderlies were simply there to provide assistance with lifting if it was necessary, and most of the time it was not.<sup>135</sup> In addition, when an orderly performed security checks of the premises, one or more aides generally accompanied him, proving that aides were just as involved in work-related duties that were initially thought to only pertain to men.<sup>136</sup> Given the circumstances, the Sixth Circuit was properly able to determine that the jobs performed by the aides and orderlies were substantially equal because the tasks were very similar, and each gender was capable and willing to perform them.<sup>137</sup>

Other courts could have construed the meaning of the Equal Pay Act more narrowly; finding that the additional training, the necessity of having a male orderly on duty for security, and the occasional additional tasks warranted a higher pay for the male orderlies.<sup>138</sup> An interpretation of that sort would limit the number of Equal Pay Act claims that could be argued, making a far stricter limitation on the equality of work, rather than just “substantially” equal.<sup>139</sup> Since the Sixth Circuit found that the jobs

---

132. *See id.* at 249 (commenting on the fact that orderlies bathed less numerous male patients, the nurse’s aides bathed more numerous female patients, and orderlies performed additional tasks that aides performed when no orderly was available).

133. *See id.* at 250 (describing Nucare as contending that the primary and only duty of the aides was patient care, although it is conceded that patient care also was the primary duty of the orderlies).

134. *See id.* at 250 (noting that testimony of the orderlies asserted that they did little or nothing that the aides did not do).

135. *See id.* at 251 (indicating that aides and orderlies helped each other perform the same tasks).

136. *See id.* (suggesting that this extra task that was given as a reason for an increased wage for male orderlies was an illusory cover up, since female aides accompanied the orderlies).

137. *See id.* (finding that additional duties are either too insubstantial in amount or too inconsistently assigned, and therefore the two jobs were equal).

138. *See id.* at 250 (indicating that one of the most frequently litigated questions is whether additional small tasks require the necessary effort to make the jobs substantially unequal).

139. *See id.* (noting that the issue of equality of work must be resolved by an overall comparison of the work, not its individual segments).

performed by the male orderlies were also as effectively and frequently performed by female nurse's aides, the court correctly evaluated the meaning of "substantially equal" work, which mirrored Congress' intent.<sup>140</sup>

2. *Congress and Circuits Should Come to a Consensus on the Meaning of "Factors Other Than Sex" Because the Phrase is Interpreted as a Catchall for Employers, Where Instead it Should be Narrowly Monitored as it is in the Second Circuit.*

"Factors other than sex" were addressed in *Belfi v. Prendergast*, where a female Long Island Railroad employee was paid significantly less than her male peers.<sup>141</sup> The Second Circuit noted that under the Equal Pay Act, although a plaintiff must make out a prima facie case, she does not need to prove a discriminatory animus on her employer's part.<sup>142</sup> The employer's four possible affirmative defenses include (1) a seniority system; (2) a merit system; (3) a system which measures earning by quantity or quality of production; or (4) a differential based on any factor other than sex.<sup>143</sup> Both the Sixth and Second Circuits have held that 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."<sup>144</sup>

After an employer identifies an affirmative defense, the plaintiff may counter it by producing evidence that the reasons the defendant seeks to advance are actually a pretext for sex-discrimination, as the employee in *Belfi* did.<sup>145</sup> The employer asserted a combination of seniority and "factors other than sex" to explain the wage differential between the female railroad employee and her male peers.<sup>146</sup> However, the Second Circuit found that

---

140. *See id.* (determining that Congress did not intend through the use of the words "equal work" that the jobs must be identical).

141. *See Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999) (finding that genuine issues of material fact existed as to whether the employer's reasons for pay disparity were pretextual).

142. *See id.* at 135 (noting that the Equal Pay Act allows employers four affirmative defenses, and that the burden of persuasion shifts to the employer to prove the disparity is justified by one of the defenses).

143. *See id.* at 136 (clarifying that to successfully establish a "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").

144. *See id.* (quoting *EEOC v. J.C. Penny Co.*, 843 F.2d 249, 253 (6th Cir. 1988) holding that the "factor other than sex" defense cannot be used as a catchall for employers).

145. *See id.* at 133, 139 (describing that the employee claims she was underpaid from 1989 to 1994 compared to her male peers).

146. *See id.* at 136 (claiming the gender-neutral application of the Salary Plan as a "factor other than sex").

when the burden of persuasion shifted back to the employee to show that the employer's explanations were a pretext for gender-based discrimination, the court sided with the employee.<sup>147</sup> First, the court determined that the female employee was not paid a new minimum salary for the position that she held.<sup>148</sup> Second, a new male employee was paid more than a female employee, and seniority was given as the explanation.<sup>149</sup> Third, the seniority system was not found to be a legitimate explanation.<sup>150</sup>

The Second Circuit correctly determined that the employer had a different, and improper, justification for every reason why its female employee was paid less than her male counterpart.<sup>151</sup> The court reasoned that the employer's use of policies in the employee's case were unfair because they did not relate to a legitimate business purpose, and left the employee with no way to approach or remedy the obvious wage discrepancy.<sup>152</sup> While the employer asserted "factors other than sex" as a defense, the Second Circuit correctly concluded that a trier of fact could rationally find that the wage discrepancy was motivated by gender-based discrimination.<sup>153</sup> The outcome of this case proves that "factors other than sex" defenses are not meant to be all encompassing, and to allow overly broad definitions of the defense would unfairly preclude employees from bringing claims.<sup>154</sup>

The employer in *Aldrich v. Randolph Central School District* attempted to justify a wage differential between female cleaners and male custodians by the necessity of a civil service examination.<sup>155</sup> The employer asserted

---

147. *See id.* at 138 (finding three reasons that prove genuine issues of material fact exist regarding the pretext).

148. *See id.* (noting the railroad's own rule that an employee hired or promoted to a given position should normally be paid the position's minimum salary).

149. *See id.* (finding that the new male employee had no seniority over the female employee because he was employed after her, yet he was paid more).

150. *See id.* at 138-39 (finding that the seniority rule was not a bar to equal pay for male employees doing the same work).

151. *See id.* at 139 (describing explanations to include lack of seniority, the employee not meeting guidelines for an inequity increase, and the employer's need to attract union workers to management).

152. *See id.* (holding that the employee raised genuine issues of material fact that made it clear the employer was discriminating based on gender).

153. *See id.* (indicating that circumstantial evidence raises questions of fact that may lead a jury to find that the employer also unreasonably applied its policies due to gender).

154. *See id.* (concluding that summary judgment is inappropriate where "factors other than sex" are being utilized as an overly broad defense).

155. *See Aldrich v. Randolph Cent. Sch. Dist.*, 63 F.2d 520, 522 (2d Cir. 1992)

that the civil service examination and classification system was a “factor other than sex” and therefore was a legitimate affirmative defense.<sup>156</sup> In this case, the Second Circuit again properly analyzed the most effective way to determine what “factors other than sex” are in Equal Pay Act Claims.<sup>157</sup> The court determined that the language of the statute recognized many factors that may be used to measure the relationships between jobs and pay disparity, but these factors must be bona fide.<sup>158</sup> The court found that the civil service examination the employers asserted was not enough to stand as a “factor other than sex” as it was only a gender-neutral classification system.<sup>159</sup> While evaluating the facts of the case, the court asserted that Congress’ intent was not that an employee would lose an Equal Pay Act claim after making out a prima facie case of wage discrimination simply because the employer chose to “call one employee a cleaner and another employee a custodian.”<sup>160</sup>

The Second Circuit noted that in the instant case, the employer never proved that the job classification system (i.e., the civil service examination) had any grounding in legitimate business considerations, and therefore it cannot be a “factor other than sex.”<sup>161</sup> To show any possibility that the civil service examination qualifies as a “factor other than sex,” the Second Circuit correctly held that the employer must prove that the exam for custodians and the practice of filling the custodian’s position only from among the top three scorers on the exam are related to performance of the custodian’s job; doing otherwise would allow for a catchall interpretation of the defense.<sup>162</sup> If the employer can prove that the exam justifies the

---

(indicating that the custodian position is a competitive position under civil service rules and applicants must take an examination to be eligible for the job).

156. *See id.* at 522-23 (noting that the female employee who brought the Equal Pay Act claim was never a top scorer on the examination).

157. *See id.* at 524 (declaring that Congress specifically rejected “blanket assertions of facially-neutral job classification systems” as a “factor other than sex” defense).

158. *See id.* at 525 (noting that “only a ‘bona fide job classification program’ where job-related distinctions underlie the classifications will qualify as a ‘valid defense to a charge of discrimination’”).

159. *See id.* (stating that when a differential in pay is rooted in business-related differences in work responsibilities and qualification, then it may be a “factor other than sex”).

160. *See id.* (commenting that such an affirmative defense would provide “a gaping loophole in the statute” through which pretexts for discrimination would be permitted).

161. *See id.* at 526-27 (finding that the district court erred by allowing the employer’s classification system as “literally a ‘factor other than sex’”).

162. *See id.* at 527 (expressing that a female employee was doing custodian’s work and being paid less than male custodians under the guise that the civil service examination allows it).

wage differential because the exam is job-related, then the affirmative defense may stand.<sup>163</sup> However, the employer had only asserted the defense of a “factor other than sex” without any support as to the impact of the exam on job performance.<sup>164</sup>

The reasoning of the Second Circuit was also implemented in the Ninth Circuit’s decision in *Maxwell v. City of Tucson*, where the court properly applied the same “factor other than sex” analysis in the case of a municipal employee who accepted a program director’s position at a reduced salary and then alleged sex-based wage discrimination against the municipality.<sup>165</sup> The major question in the case was whether the employer sustained its burden of proving one of the exceptions to the Equal Pay Act, and the court found that it did not.<sup>166</sup> While the Ninth Circuit found that other circuits have differed on which job classifications qualify under the “factor(s) other than sex” defense, the proper application of the standard entails legitimate business purposes for the reclassification.<sup>167</sup> The court determined that the City failed to meet its burden of proof because the employee presented evidence that the duties and responsibilities of her position had actually increased, while her wages decreased, proving that a finder of fact could logically conclude that the wage disparity was not supported by an affirmative defense.<sup>168</sup>

The Seventh Circuit in *Patkus v. Sangamon-Cass Consortium* analyzed “factors other than sex” in a less fair and more employer-friendly way.<sup>169</sup> The female employee’s male successors, who performed substantially

---

163. *See id.* (articulating that a “factor other than sex” may only be asserted as a defense if there is a legitimate business reason, otherwise the defense is simply discriminatory).

164. *See id.* (holding that since factual issues exist in regards to the civil service examination’s relation to job performance, summary judgment for the employer was improperly granted).

165. *See Maxwell v. City of Tucson*, 803 F.2d 444, 444 (9th Cir. 1986) (finding that the municipality failed to establish a “factor other than sex” defense to Equal Pay Act allegations).

166. *See id.* at 447-48 (illustrating that the primary purpose of the “factor other than sex” was to permit employers to utilize bona fide gender-neutral job evaluation and classification systems).

167. *See id.* at 445 (noting that the city claimed the reclassification of the job from Director to Administrator justified lower wages because the work load had decreased, therefore falling under the “factor other than sex” defense).

168. *See id.* at 447-48 (describing that legitimate organizational needs would be permitted as a “factor other than sex;” however, in the instant case, the evidence shows no organizational needs or changes to explain the wage disparity).

169. *See Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261-62 (noting that the employee’s evidence did not establish Equal Pay Act violations because the restructuring was considered a plausible affirmative defense).

equal work as the female employee, were paid higher salaries when they took over her position, but the Seventh Circuit did not find this to be a violation of the Equal Pay Act.<sup>170</sup> The court incorrectly reasoned that because the reorganization plan was implemented after the female employee left her position, it did not mean the employer would not have been willing to pay the female employee a higher salary had she stayed in her position.<sup>171</sup> The court neglected the fact that the reorganization and the higher wages were only implemented after the departure of the female employee, and refused to condemn such actions as sex discrimination.<sup>172</sup> By allowing the employer to use the “factor other than sex” catchall excuse, the Seventh Circuit allowed unequal wages to be legally justified by reasoning that employers have the right to change and revise the job-evaluation and pay systems they implement.<sup>173</sup> While the Seventh Circuit raises important points about the need for employers to be able to implement change in their workforce, a reading of “factors other than sex” that is closer to the analysis in the Second Circuit would have provided a less employer biased outcome, and would have reduced the catchall interpretation of the defense.<sup>174</sup>

The Seventh Circuit in *Dey v. Colt Construction & Development Co.* again misapplied the “factor other than sex” defense.<sup>175</sup> The court referred to the “factor other than sex” defense as a catchall exception that “embraces an almost limitless number of factors, so long as they do not involve sex,” and did not find it unfair or illegitimate to leave a large loophole for employers to pass through.<sup>176</sup> While the Second Circuit finds

---

170. *See id.* at 1261 (finding that because the position and pay changes were based on a long-term reorganization plan, they are allowable as “factors other than sex”).

171. *See id.* (noting that the reorganization was already planned for because it was discussed prior to the female employee’s departure, and the plan would have been implemented with or without the departure of the female employee).

172. *See id.* (holding that the court is barred from finding an Equal Pay Act violation in the absence of some reason to connect the change in personnel to the implementation of the new plan).

173. *See id.* (determining that a holding of the contrary would be to force employers either to “forego legitimate organizational planning or to hire only someone of the same sex whenever an employee left a job at a critical time”).

174. *See id.* 1261-62 (holding that there is little reason to question that the reorganization was a legitimate reason for the pay differential based on “factors other than sex;” how this allows too large a loophole in the Seventh Circuit).

175. *See generally* *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1449 (7th Cir. 1994) (finding that the pay disparity was based on a “factor other than sex” although themes of sex discrimination existed).

176. *See id.* at 1462 (noting that it is not the court’s place to second-guess the employer’s business judgment).

it important to assert that there must be a legitimate business reason for the “factor other than sex” defense, the Seventh Circuit incorrectly concluded that the factor only needs to be bona fide, and that the factor must not be discriminatorily applied or have a discriminatory effect.<sup>177</sup> In the instant case, this logic allowed the employer to pay a lower wage to its female employee, while paying a male employee in the same position a higher wage.<sup>178</sup> Although a more advanced degree may in some situations justify higher wages, the Seventh Circuit did not require, or question, whether the higher degree related to legitimate business reasons for the pay discrepancy, therefore allowing a potentially facially discriminatory pay practice to continue without further investigation.<sup>179</sup>

*B. The Prima Facie Elements of an Equal Pay Act Claim Should Not be Hindered by the Issue of Possibility Versus Plausibility Because it Bars Claims.*

The Second Circuit, while providing useful guidance on how to analyze “factors other than sex,” recently issued a decision in *E.E.O.C. v. Port Authority of N.Y. & N.J.* that seriously hinders the ability of claimants to bring an Equal Pay Act claim.<sup>180</sup> While the female attorneys pled their claim and brought evidence sufficient to prove that they were unfairly paid less than the male attorneys at the Port Authority, the court still concluded that the information was not adequate to find a violation of the Equal Pay Act.<sup>181</sup> The court’s continued concern with the EEOC’s making of “broad generalizations” when comparing the work done by female and male employees lead the court to incorrectly decide that the claim may have been possible, but was not plausible.<sup>182</sup>

---

177. *See id.* (commenting that the court cannot question the company’s decision to pay more for an advanced degree belonging to a man when there is no evidence that it paid women with similar degrees a lesser amount).

178. *See id.* (determining the “factor other than sex” defense was justified because the male employee had more advanced business degrees and the employer had initially offered the male employee less money, but then the salary was negotiated up).

179. *See id.* at 1464 (noting that the court is convinced the male employee’s higher salary was unrelated to his sex).

180. *See generally* *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 248-49 (2d Cir. 2014) (dismissing the case on the basis that despite years of discovery, nothing about the actual content of the work done by the female attorneys was provided).

181. *See id.* at 256 (finding that the EEOC alleged all claims of unequal work for equal pay in a conclusory fashion, therefore providing no basis for the claims).

182. *See id.* at 257-58 (detailing all of the evidence found through discovery to be unreasonable inferences, even though the EEOC found comparators, similarly situated employees, and evidence that the pay disparity was not explained by “factors other than sex”).

For every argument the EEOC made, the Second Circuit had a reason for why all of the testimony and evidence was not sufficient enough to bring an Equal Pay Act claim.<sup>183</sup> The EEOC determined that the same professional degree and admission to the bar was necessary for both female and male sexes, as well as the same physical and mental exertion, the same degree of accountability and supervision, and even the same work location.<sup>184</sup> However, the court ruled that this was all general and broad information that did not prove the work performed by the attorneys was equal.<sup>185</sup> The court relied heavily on analysis from *Twombly* and *Iqbal*, stating that a complaint must support the “viability of its claims by pleading sufficient nonconclusory factual matter to set forth a claim that is plausible on its face.”<sup>186</sup> The court conceded that the equal work inquiry does not demand evidence that a plaintiff’s job is “identical to a higher-paid position, but that the standard is nonetheless demanding,” and it must be proved that the jobs compared are “substantially equal.”<sup>187</sup> The EEOC identified 338 pairs of claimants that shared similar bar admission dates and years of service, who worked in the same division at the same time, yet the Second Circuit did not find this information plausible for an Equal Pay Act claim.<sup>188</sup> Despite evidence to the contrary, the court reasoned that the EEOC’s allegations read as nothing more than a claim that suggests the “sheer possibility” that the Port Authority violated the Equal Pay Act.<sup>189</sup> The Second Circuit’s failure to explicitly state what would have been considered a plausible pleading leaves both complainants and other circuits in confusion and without a legitimate example to base future claims on.<sup>190</sup> The EEOC

---

183. *See id.* at 250 (stating that even though the EEOC compared dates of bar admission, dates of service with the Port Authority, salaries, and divisions to prove the pay discrepancy, the court was still unconvinced by the plethora of evidence).

184. *See id.* at 250-51 (revealing that the EEOC found many similarities between female and male attorneys detailing why they should be compensated equally).

185. *See id.* at 256 (noting that the complainant did not allege “enough facts to state a claim for relief that is plausible on its face”).

186. *Id.* at 253 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (noting that a complaint offering “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do”).

187. *See id.* at 255-56 (determining that the EEOC’s bald recitation of the elements of an Equal Pay Act claim and its assertion that the attorneys at issue held “the same job code” are plainly insufficient to support a claim).

188. *See id.* at 256 (stating that the EEOC failed to demonstrate that all Port Authority attorneys perform “substantially equal” work).

189. *See id.* at 258-59 (commenting that the EEOC has alleged, at most, that some female nonsupervisory attorneys were paid less than some male nonsupervisory attorneys at the Port Authority).

190. *See id.* at 258 (holding that the EEOC’s pleadings cannot be said to contain

provided substantial evidence as to a violation of the Equal Pay Act, yet the Second Circuit refused to review this information, instead claiming that the EEOC did not bring enough facts or provide enough focused information, without providing in its analysis what a proper claim with plausible evidence would look like.<sup>191</sup>

#### IV. CONCLUSION

Bringing an Equal Pay Act claim has become more challenging in recent years as pleading standards have been analyzed with stricter scrutiny.<sup>192</sup> Because of higher pleading standards and circuit courts that have continued to find in favor of employers, employees have recently discovered that challenging wage disparity is a far more difficult task than it should be.<sup>193</sup> If circuit courts could come to a consensus concerning pleading standards, prima facie elements, and the affirmative defenses of Equal Pay Act claims, judges and complainants would have a clearer understanding of what the law calls for, making it easier to state a valid claim.<sup>194</sup>

More specifically, the Supreme Court, circuit courts, and Congress should implement the Fifth Circuit's correct interpretation of equal work.<sup>195</sup> Comparable work should also be placed back into the definition of equal work so that more Equal Pay Act claims would be allowed in courts, moving the equal work standard closer to "substantially equal," and closer to the Fifth Circuit's reading of the definition.<sup>196</sup> The "factor other than

---

enough facts to raise a reasonable expectation that discovery will reveal evidence of illegality).

191. *See id.* at 259 (finding that the EEOC has not plausibly plead that the pay differentials existed despite the attorney's performance of "substantially equal" work, and therefore, without any nonconclusory allegations to support the claim, the EEOC's complaint was properly dismissed).

192. *See id.* at 256 (finding that broad statements are not enough to bring an Equal Pay Act claim because factual assertions must be present and well-grounded in the basis of the complaint).

193. *See id.* (holding that the complaint of wage disparity was properly dismissed even though plaintiffs brought years' worth of collected evidence to prove the unjust wages).

194. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974) (stating that Congress incorporated words having a special meaning within the field regulated by the statute so as to overcome objections that statutory definitions were vague).

195. *See Brennan v. City Stores, Inc.* 479 F.2d 235, 238 (5th Cir. 1973) (finding that the standard for "equal work" is higher than mere comparability, but lower than absolutely identical).

196. *See Corning Glass Works*, 417 U.S. at 199 (noting that the comparable standard was more readily used in the earlier years of the Equal Pay Act, but has since been eliminated to the detriment of Equal Pay Act claims).

336 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:2

sex” defense should also be more narrowly tailored and defined in the way the Second Circuit has derived meaning from it: using it as a legitimate reason for differences in pay, rather than a catchall for employers to find excuses to pay male employees more than females.<sup>197</sup> Failure to reach a consensus on the meaning of equal work, the meaning of “factors other than sex,” or the appropriate pleading standard for Equal Pay Act claims could mar the purpose of the statute, and prevent women from obtaining the wages they are entitled to.<sup>198</sup>

---

197. See *Aldrich v. Randolph Cent. Sch. Dist.*, 63 F.2d 520, 526 (2d Cir. 1992) (stating that when a differential in pay is rooted in business-related differences in work responsibilities and qualification, then it may be a “factor other than sex”).

198. See *Sprague v. Thorn Am. Inc.*, 129 F.3d 1355, 1364 (10th Cir. 1997) (stating that the “equal work” requirement of the Equal Pay Act should not be construed broadly, and therefore failure to provide equal pay for “like jobs” is not actionable).