Second Circuit Holds EPA "Factor Other Than Sex" Affirmative Defense Need Not Be Job-Related

A Practical Guidance® Article by
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- Second Circuit holds that "factor other than sex" affirmative defense to Equal Pay Act claim does not need to be job-related.
- New York Labor Law § 194(1)'s "*bona fide* factor other than status within one or more protected class or classes" defense does require that the *bona fide* factor be *job-related* to the position in question.
- Other circuits still require that the "factor other than sex" be justified by a "legitimate business reason."

In Eisenhauer v. Culinary Institute of America, No. 21-2919-CV (2d Cir. Oct. 17, 2023), the U.S. Court of Appeals for the Second Circuit clarified that the federal Equal Pay Act (EPA) does not require employers to show that a "factor other than sex" defense must be job-related. This was a notable decision, as it reversed a long-held understanding of the EPA and could have a significant impact on equal pay litigation.

In this decision, the circuit court ultimately determined that to establish the EPA's "factor other than sex" defense, a defendant must prove **only** that the pay disparity in question results from a differential based on any factor except for sex. In contrast, New York Labor Law's "*bona fide* factor other than sex" defense requires a defendant to prove that the pay disparity in question results from a differential based on a job-related factor.

Background

The plaintiff, a female professor at the Culinary Institute of America, alleged that the defendant violated the EPA and New York Labor Law §194(1) by compensating her less than a male professor carrying a similar course load. In its defense, the defendant asserted that a "factor other than sex"—its sex-neutral compensation plan, which incorporates a collective bargaining agreement (CBA) and employee handbook—justified the pay disparity. The plaintiff argued that the compensation plan could not qualify as a "factor other than sex" because it creates a pay disparity unconnected to differences between her job and her colleague's job.

The compensation plan requires fixed pay increases triggered by time, promotion, and degree completion, but does not provide for "equity" adjustments. All faculty members receive the same percentage increase in their salaries each year, and because the plaintiff and her male colleague were hired at different salaries, a pay disparity existed between the two employees. Notably, the plaintiff did not contend that her starting salary, which was lower than her male comparatorccs starting salary, was the product of sex-based discrimination. The plaintiff argued, however, that the defendant's compensation system was unlawful because it failed to include any mechanism for adjusting an employee's pay based on an individualized assessment of her merit.

On the employer's motion, the district court evaluated the plaintiff's state and federal law equal pay claims under the same "factor other than sex" standard and granted summary judgment in favor of the employer on both claims. The district court reasoned that the plaintiff had established a *prima facie* case of sex-based pay discrimination, but the employer had justified the pay disparity with its compensation plan, which was a «factor other than sex.» The court further determined that the plaintiff failed to show a pretext for discrimination. The plaintiff appealed.

Appellate Review

EPA Claim

The EPA provides four affirmative defenses to its prohibition of pay disparities based on sex: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

The circuit court considered the 30-year-old case Aldrich v. Randolph Central School District, which held that a facially sex-neutral job-classification system alone is insufficient to constitute a "factor other than sex," citing concern over potential pretexts for discrimination. In *Aldrich*, the defendant sought to justify the pay disparity between the plaintiff, a cleaner, and two male custodians. Custodians were required to a take a civil-service examination, where cleaners did not, and accordingly, the defendant paid cleaners less. The *Aldrich* court rejected that a sex-neutral job-classification system could explain a sex-based pay differential "without more," noting that Congress intended for job classification systems to serve as a factor other than sex defense when the job classification system "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."

The *Eisenhauer* court declined to follow the job-relatedness analysis provided by *Aldrich*. In reviewing the meaning of "any factor other than sex," the circuit court found that the meaning of the test to be plain: "'any other factor other than sex' means 'every' 'additional' factor 'except for' those based (intentionally or unintentionally) on sex. Accordingly, to establish the EPA's 'factor other than sex' defense, a defendant must prove that the pay disparity in question results from a differential based on any factor except for sex." Again, departing from *Aldrich*, the court held that there was nothing in the legislative history to suggest that the term must be job-related or limited in any way.

Ultimately, the circuit court determined that no reasonable jury could find that the pay disparity between the plaintiff and her male colleague was based on sex and affirmed the district court's summary judgment as to the EPA claims.

New York Labor Law Claim

New York's Equal Pay law, New York Labor Law § 194(1), is similar to the EPA. As amended in 2019, § 194(1) prohibits pay discrimination on the basis of "status within one or more protected class or classes" instead of sex alone. The exceptions to this prohibition are again similar to that of the EPA, with the catchall defense being "a *bona fide* factor other than status within one or more protected class or classes." Differing from the federal standard, however, the New York law requires that the *bona fide* factor must be *job-related* to the position in question. In other words, a defendant must show that the pay disparity results from a differential based on a job-related factor.

On appeal, the circuit court determined that the district court erroneously reviewed the plaintiff's EPA and § 194(1) claims under the same standard, and that her claims should have been separately analyzed in order to consider § 194(1)'s job-relatedness requirement. Due to this, the circuit court vacated the summary judgment as to the § 194(1) claim and remanded the issue to the district court.

Bottom Line for Employers

The Second Circuit's decision is significant because it arguably makes it easier for employers to defend against equal pay claims brought under federal law. As detailed in the concurrence in *Eisenhauer*, under the previous understanding of the EPA, employers had to show that a pay disparity was based on a legitimate, business-related reason, such as seniority, experience, or education. However, under the Second Circuit's ruling, employers may be able defend against equal pay claims by showing that the pay disparity is based on a factor other than sex, even if that factor is not job-related.

As further noted in the concurrence, the plaintiff failed to argue that defendant's facially neutral system perpetuates an initially unlawful disparity, thus she failed to establish a viable claim. Even if the plaintiff could have argued that the defendant's compensation plan failed to include a mechanism for adjusting pay upon individualized merit, the EPA requires no such individualized assessment. Instead, the EPA provides affirmative defenses that rely on factors that serve as a proxy for the employee's value to the employer, such as seniority or experience.

Notably, at oral argument, the Second Circuit showed interest in the question of whether a plaintiff could prevail by comparing herself to just one comparator of the opposite sex, or if it was necessary to show there was some other aggregate measure of pay of comparable males, such as average pay, in which her pay was disparate. In the *Eisenhauer* decision, the Second Circuit left that question open because it decided the case on other grounds. However, the opinion

recognizes the circuit split on this fundamental issue, and such awareness is important for employers to keep in mind.

The *Eisenhauer* holding is not a clear escape hatch for employers, however, considering decisions in other circuits which require that the factor other than sex be justified by a "legitimate business reason," or by the New York standard, which requires that the *bona fide* reason be job-related. To safeguard against similar claims, employers should ensure that any pay differentials that are premised upon the catchall "any other factor other than sex" should be job-related and reflect legitimate business objectives.

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Practice Notes

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- Title VII and Equal Pay Act Comparison Chart

Cases

- Eisenhauer v. Culinary Inst. of Am., 84 F.4th 507 (2d Cir. 2023)

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Thelma Akpan represents employers in both state and federal court in various aspects of employment law, including pay equity, internal investigations, discrimination, harassment, retaliation, breach of contract and defamation claims, including counseling and alternative dispute resolution. Thelma has successfully litigated cases from inception through summary judgment, as well as through arbitration.

Thelma is a member of Littler's Pay Equity Core and Assessment Groups, where she advises employers on federal, state and city issues related to pay equity, as well as conducting privileged Pay Equity Assessment for domestic and multinational companies, using Littler's Pay Equity Assessment™ for employers. Thelma also provides training sessions to employers and trade groups regarding pay equity wage and hour considerations.

Before joining Littler, Thelma was a litigation associate at a national law firm with an emphasis on labor and employment, products liability, premises liability and complex commercial litigation. During law school, she was the notes and executive editor of the Connecticut Journal of International Law, and an extern at the National Labor Relations Board, Region 34.

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Katelyn W. McCombs counsels and represents employers in a broad range of employment law matters before federal and state courts, administrative tribunals such as the Equal Employment Opportunity Commission, and other state and local agencies. She defends employers in both single-plaintiff and class action employment disputes, including:

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Katelyn also regularly provides advice and counseling to clients, including developing and drafting employee handbooks and personnel policies.

Katelyn has focused her career on representing companies with their litigation and counseling needs. She has experience litigating cases through summary judgment, in arbitration, and on appeal. Katelyn has defended both single plaintiff cases and class and collective actions. Her experience working with a broad range of national, regional, and local employers has also given her important insight into various industries, understanding into specific issues faced by employers, and how to navigate such issues. She has experience advising employers of all sizes on their handbook policies in an effort to help them avoid litigation.

Prior to joining Littler, Katelyn was a litigation associate at a regional defense firm. While in law school, she was as a teaching assistant for the Legal Analysis, Writing, and Research class and the Microtrade Development Clinic. She also served as an extern for the U.S. Department of Veterans Affairs and the Forsyth County District Attorney's Office.