A Timely Analysis of Legal Developments

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In This Issue:

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According to the Eighth Circuit Court of Appeals in *Drum v. Leeson Electric Corp.*, an employer cannot necessarily rely on a male applicant's negotiation skills to show that the difference between his wages and those of a comparable female employee were based on a factor other than sex and not in violation of the Equal Pay Act.

Good Salary Negotiation Skills Do Not Justify Pay Disparities

By Holly M. Robbins

On May 15, 2009, U.S. Court of Appeals for the Eighth Circuit held in *Drum v. Leeson Electric Corp.*, No. 08-1678, that an employer had not satisfied its burden of proving that a wage disparity between a male and a female employee was based on a factor other than sex merely by showing the male employee had negotiated a higher salary, *i.e.*, where the male had benefited from a market-driven pay situation. In reaching its decision, the Eighth Circuit reversed a grant of summary judgment for the employer on the plaintiff's claims under the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and the Missouri Human Rights Act.

Background

Plaintiff Tammy Drum began working for the predecessor of the defendant, Leeson Electric Corp., in 1990. In 2005, she was promoted to Human Resources Manager with a salary of $41,548. After receiving another promotion into a different position, her salary was $45,600. The company hired a male replacement Human Resources Manager from outside the organization. He negotiated a higher salary of $62,500, which approximated the market rate for a human resources manager at that time. Ms. Drum subsequently sued Leeson, asserting claims of sex discrimination in violation of the Equal Pay Act (EPA), Title VII, and the Missouri Human Rights Act. The district court granted summary judgment in favor of the company, but the Eighth Circuit reversed.

The Eighth Circuit's Decision

The court of appeals found that Ms. Drum satisfied her burden of proving that Leeson paid her lower wages than a male employee for performing equal work. Once she had made this showing, the burden shifted to Leeson to establish a defense. In this case, Leeson sought to show that it made the pay decision on a factor other than sex, asserting that the replacement was the best candidate and that he required (*i.e.*, negotiated) an annual salary of $62,500. The court held that this defense was insufficient to justify the pay differential, noting that it justified only the replacement's salary, not Ms. Drum's salary.

The company attempted to compare its situation to another Eighth Circuit decision, *Horner v. Mary Institute*, in which a male coach was justifiably paid more than a female coach. There, however, the male coach's salary was the outlier (higher than the market rate), and the defendant proved that the male's salary was justified by his experience and ability, which made him the best person for the job. In *Drum*, where the female employee's salary was the outlier (lower than the market rate), the court held that the company needed to justify her salary as part of its defense.

The company attempted to justify Ms. Drum's salary by looking to her prior salary. It asserted that her salary resulted from a previous hiring policy that had set salaries at a rate slightly under industry averages; while the replacement was hired under a new "broad band salary structure." The court, however, was concerned that Leeson's defense relied on the "market force theory" to justify lower wages for female employees, just because the market might support such wages. Such "market force" defenses have been upheld by some courts and rejected by others. Courts that have rejected the theory have essentially concluded that relying on "the market" without greater explanation and justification has the effect of continuing the pattern of sex disparities that the EPA was intended to address.

What Should Employers Do?

This case provides a cautionary tale to employers as they set salaries for new and existing employees. When engaging in the hiring and salary negotiation process, employers must be mindful of the salary history of those employees who hold or have held the same job. It is not enough that one employee is a better negotiator than another. Employers must be able to point to skills, experience, or other factors not related to gender that justify a salary differential. An employer that wants to hire a similarly qualified employee for a position at a higher rate of pay than his or her predecessor or than current employees in the same position, may need to make retrospective and prospective salary adjustments for other employees.

At the same time, certain market-driven differences may be acceptable in specific situations. To be acceptable, however, an employer needs to rely on more than a broad "the market made me do it" defense. It must instead look to distinctions between the candidates (other than gender) to justify the market impact. Those could include greater years of experience, more job knowledge, adeptness in a particular skill needed by the employer and other similar factors. The market also can be used to differentiate one position from another, but if the positions are the same, the market defense is less useful, if useful at all.

And What About the Future?

The analysis above is likely to become much more significant if, as it seems likely, the Paycheck Fairness Act currently pending in Congress is passed. That law will further limit the available defenses under the EPA and require much more careful analysis of comparative pay by employers. Concerned employers may wish to discuss with counsel how they can prepare now both to address the issues raised by the Eighth Circuit and for the even greater scrutiny of the Paycheck Fairness Act, if and when it becomes law.

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