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Equal Pay Act case gets new life

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In 2-1 decision by a three-judge panel, the U.S. 4th Circuit Court of Appeals (whose rulings apply to all South Carolina employers) reversed a decision to grant summary judgment-meaning the trial court had found there was no case to move forward-in favor of a governmental entity. Instead, the appeals court sent the case back to the trial court for further proceedings based on the majority's assessment of the application of the Equal Pay Act (EPA) to wages being paid by a state agency. The dissenting judge wrote a detailed and scholarly response to the majority's opinion that bears some analysis. The case is published, so it can be cited by employees and their counsels as the standard applicable to an equal pay case in South Carolina.

Background

The Equal Employment Opportunity Commission (EEOC) filed suit on behalf of three female employees of the Maryland Insurance Administration (MIA), alleging salary discrimination under the EPA. The district court granted summary judgment in favor of the employer, and the EEOC appealed.

MIA is an independent state agency that performs various functions related to the regulation of Maryland's insurance industry and the enforcement of its insurance laws. It is subject to the state personnel management system, a merit-based system that establishes job categories based on the general nature of required duties and sets corresponding levels of compensation. Although as an independent state agency MIA is given discretion to set its employees' salaries, it follows the hiring and salary practices of Maryland's Department of Budget and Management, which sets

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forth a standard pay plan salary schedule.

In accordance with the standard salary schedule, when a new employee is hired, MIA assigns her to a grade level matching the position being filled. Each grade level carries an assigned base salary and a specific salary range consisting of 20 separate steps.

After designating a new employee's particular grade level, MIA assigns her to an initial step placement based on previous work experience, relevant professional designations, and licenses or certifications. In selecting a particular step level, it also considers the difficulty of recruiting for the position, and-under Maryland law-awards a new employee credit for any previous years of service in state employment for the purposes of determining that employee's step in the applicable pay grade. Additionally, a Maryland government employee who transfers to a "lateral" position takes her assigned grade and step with her to the new position.

MIA employees work within one of six units, each comprising a different area of insurance regulation. At issue in this case is the fraud investigation division. Fraud investigators are charged with investigating allegations of criminal insurance fraud perpetrated by individuals. Until July 2013, the fraud investigator position was classified at a grade 15 on the standard salary schedule. At that time, based on an internal job study conducted by MIA, the position was reclassified at grade 16. Under the standard salary plan, individuals hired as fraud investigators now are assigned to a step within the grade 16 classification according to their qualifications and work experience.

MIA advertises minimum and preferred qualifications for the position of fraud investigator. To be minimally qualified for hire as a fraud investigator, an applicant must have five years of fraud investigatory experience in such areas as white-collar crime, financial fraud, insurance fraud, and investigations conducted under the supervision of prosecutors or other attorneys. Preferred or desired qualifications for the position include designation as a certified fraud examiner, as well as experience working with attorneys and participation in court or administrative hearings.

Female fraud investigators

The EEOC filed suit on behalf of three former MIA fraud investigators: Alexandra Cordaro, Marlene Green, and Mary Jo Rogers.

MIA hired Cordaro in December 2009. She had worked as a fraud investigator for a federal credit union for over two years and as a criminal investigation and litigation paralegal for 12 years in the Baltimore County State's Attorney's Office. MIA assigned her to grade level 15, step four, with a starting salary of $43,495. By the time she resigned about five years later, she was earning $49,916.

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Marlene Green was hired in November 2010. She held a bachelor's degree from Johns Hopkins University and had more than 20 years of experience working for the Baltimore City Police Department. During that time, she worked for approximately 13 years in an investigative capacity. In the year immediately before to joining MIA, she worked as an investigator for the U.S. Office of Personnel Management and the Office of the State's Attorney for Baltimore County. MIA assigned her to grade level 15, step four, with a starting salary of $43,759. By February 2013, when she resigned from MIA, her salary was $45,503.

Mary Jo Rogers transferred to the fraud investigation division from another position within MIA in July 2011. She had earlier worked for eight years as a police officer and a detective with the Baltimore County Police Department. Immediately before being hired at MIA, she worked for an insurance company as a special investigator and an adjuster. MIA assigned her to grade level 15, step five, with a starting salary of $46,268. By November 2013, her salary was $50,300.

Male fraud investigators

The EEOC's lawsuit against MIA alleged gender-based salary discrimination in violation of the EPA. During the proceedings in the district court, the agency identified as comparators four male fraud investigators: Bruno Conticello, James Hurley, Donald Jacobs, and Homer Pennington.

MIA hired Conticello in November 2010. He held both a bachelor's and a master's degree in criminal justice and had nearly 20 years of investigative experience working for various insurance companies and Maryland's Office of the Inspector General. He also had obtained a certified fraud examiner designation. MIA assigned him to grade level 15, step 10, with a starting salary of $49,842. By late 2012, his salary was $51,561.

James Hurley was hired in November 2006. He most recently had worked as an investigator with an underwriting insurance organization. He also had worked previously with MIA for a total of three years as a fraud investigator and as an investigator in the property and casualty department. Altogether, he had about 10 years of insurance-related investigative experience when he was rehired at MIA in 2006. He also had worked previously as a claim adjuster for several insurance companies and had earned the designation of certified fraud examiner. At the time of his most recent hiring at MIA, he was assigned to grade 15, step six, with a starting salary of $45,298. By the time he left MIA in October 2012, his salary was $49,678.

MIA hired Donald Jacobs in May 2007. He had 11 years of experience as a natural resources officer with the state of Maryland-primarily engaged in conducting marine patrols-and had worked for three years as an investigator in the Office of the Public Defender in Baltimore. This investigatory experience didn't relate to fraud or white-collar crime. His starting salary at MIA was $45,298, based on his assignment to grade level 15, step six. When he left in June 2010, his salary was $47,705.

Homer Pennington was hired in August 2007. He had worked in the criminal investigation unit of the Baltimore Police Department for approximately 22 years before joining MIA. He earned the designation of certified arson investigator, but neither his resume nor the record specified the requirements for acquiring

this certification. He was hired at grade level 15, step five, with a starting salary of $45,360. By May 2013, when he left, his salary was $47,194.

Courts' decisions

MIA and the EEOC each requested that the district court rule in its favor without a trial. The court denied the EEOC's request and granted MIA's instead.

In dismissing the EEOC's claim under the EPA, the district court effectively held that the three female fraud investigators had failed to meet their minimally sufficient burden of proof. The court concluded that the male fraud investigators identified by the EEOC weren't valid comparators because they were hired at higher steps than females were. Alternatively, the court held that MIA had shown that the disparity in pay was attributable to the relative experience and qualifications of the male investigators.

The EEOC appealed the district court's grant of summary judgment to MIA.

On appeal, the EEOC asserted that the district court erred in awarding summary judgment in favor of MIA. It didn't appeal the denial of its own request for summary judgment. Rather, it contended only that the district court erred in granting summary judgment to MIA.

The EEOC argued that it made a minimally sufficient showing of an EPA violation by identifying four male fraud investigators who earned higher starting salaries than the three female investigators, who were assigned lower salaries despite performing identical work. In addition, it contended that MIA didn't establish as a matter of law that the disparity in pay was based on the comparators' credentials and previous work experience.

According to MIA, the identified males weren't valid comparators because it hired them at higher steps on its pay scale than the female investigators. Alternatively, it argued that even if the EEOC made a sufficient showing of an EPA violation, MIA established as a matter of law that any pay disparity was based on gender-neutral reasons involving the comparators' prior experience and credentials that each female investigator lacked.

Our readers likely know that the EPA prohibits gender-based discrimination by employers resulting in unequal pay for equal work. The 4th Circuit majority noted that it was reviewing whether the EEOC had made the required showing using a burden-shifting framework. That case of discrimination under the EPA is shown by demonstrating that (1) the employer paid different wages to an employee of the opposite sex (2) for equal work on jobs requiring equal skill, effort, and responsibility, which are (3) all performed under similar working conditions. Under the EPA, the proof standard doesn't require a showing that the employer acted with discriminatory intent.

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Once the required showing has been made, the burdens of production and persuasion shift to the employer to show that the wage differential was justified by one of four affirmative defenses listed in the statute. These affirmative defenses are: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any factor other than gender. To avoid liability, the employer must prove only one of these four affirmative defenses.

In the majority's view, the employer in an EPA case bears the burden of ultimate persuasion, and once a claim has been established, it won't prevail at the summary judgment stage unless it proves its affirmative defense so convincingly that a rational jury couldn't have reached a contrary conclusion.

In its analysis of the comparators, the majority didn't discuss males who were hired at the same time as the employees suing MIA, but it instead allowed the EEOC to reach back to persons who had been in the job for a number of years. It was the majority's view that the employees get to pick their comparators. Once those comparators were selected, though hired earlier than the employees in question, it was an easy jump to state that all performed substantially equal work, but the longer-employed men were paid more money. In fact, the 4th Circuit majority rejected MIA's argument that other men were paid less than the women.

The majority also rejected MIA's use of the state's standard salary schedule and its argument that the comparator's experience and qualifications were appropriate differentiating factors. The majority held that a jury should decide whether MIA in fact objectively weighed the comparators' qualifications as being more significant than the female investigators' qualifications. Its decision overturned the lower court and sent the case back to trial.

Lone dissent

4th Circuit Judge J. Harvie Wilkinson III disagreed with his colleagues. In his dissent, he forcefully articulated that the majority ignored or glossed over the state's Tenth Amendment Constitutional right to allow state law rather than federal law to provide remedies for gender discrimination in all forms, including the pay of a public-sector employer. He observed that by filing suit, the EEOC consigned the state's sovereign interest in its own workforce wholly to the hands of federal authority.

Judge Wilkinson believes that this assertion of federal authority diminished the proper role of states in our constitutional system to an unacceptable extent. This federal control could be pardoned if this were a lawsuit of substance, but he noted this is a thin, slight action. With some clarity, he noted that we have a federal system of government carefully designed to strike a balance between the need for enumerated federal authority and respect for the residual sovereignty of the states. He wrote, "One half of that balance the majority now leaves wholly in shadow. In fact, the majority does not even hint that this suit raises the question of the extent to which Congress's power may constitutionally extend over state civil service systems." The bottom line is that the dissent provides a succinct dissertation of federalism and the state and federal roles under our constitution.

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In his dissent, Judge Wilkinson notes that the majority gets wound up in the question of a minimally sufficient case and misses the question whether there's an issue of triable fact regarding the state's alleged pay inequity. According to Wilkinson, the majority overlooked the fact that a state's interest comes in by way of a Tenth Amendment defense, which it doesn't surrender even in those instances where a statute may be constitutionally applied to it. He agreed with the district court that summary judgment was appropriate in these circumstances and would have affirmed its decision.

Lessons for employers

Although the decision in this case has more immediate effect on public-sector employers, this is another case in which the 4th Circuit has issued an opinion that favors employees over employers-in this writer's mind by failing to address the constitutional discussion set forth in the dissent. You simply need to be aware that the 4th Circuit has changed in its make-up, and there are judges who now sit who appear to be very amenable to finding cases in which the court can write opinions highly favorable to employees.

For more information on the BLR, click here. For more information on the South Carolina Employment Law Letter, click here.