5. EQUAL PAY ACT

5.01. ESSENTIAL ELEMENTS OF A CLAIM

Plaintiff, who [is a current/was a former] employee of Defendant, has alleged that Defendant violated [his/her] rights under the Equal Pay Act, a statute that is designed to prohibit wage discrimination by employers based on sex.

For Plaintiff to establish [his/her] claim of a violation of the Equal Pay Act against Defendant, Plaintiff must prove all of the following elements by a preponderance of the evidence:

1. Defendant has employed Plaintiff and a [male/female] employee in jobs requiring substantially equal skill, effort, and responsibility;

2. The two jobs are performed under similar working conditions; and

3. Plaintiff was paid a lower wage rate than the [male/female] employee doing substantially equal work.

Plaintiff does not have to prove that Defendant meant to discriminate against Plaintiff because [he/she] is [male/female]. In other words, Plaintiff does not have to prove that Defendant intended to discriminate against [him/her].

Committee Comments

See 29 U.S.C. § 206(d)(1); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1973); *Boyd v. City of Chicago*, 2024 WL 542399, * 2 (7th Cir. Feb. 12, 2024); *David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 230 (7th Cir. 2017); *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006); *Melgoza v. Rush Univ. Med. Ctr.*, 499 F. Supp. 3d 552, 565 (N.D. Ill. 2020) (citing *Warren v. Solo Cup Co.*, 516 F.3d 627, 629 (7th Cir. 2008) ("No proof of discriminatory intent is required.")).

5.02 SUBSTANTIALLY EQUAL

In deciding whether jobs are "substantially equal," you should compare the skill, effort, and responsibility needed to do the work. The jobs do not need to be identical in these areas, so you should ignore minor differences between them.

Committee Comments

See 29 C.F.R. § 1620.14(a); *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 698-700 (7th Cir. 2003); *see also Stopka v. All. of Am. Insurers*, 141 F.3d 681, 685-86 (7th Cir. 1998) ("According to the applicable EEOC regulations, the terms equal skill, equal effort and equal responsibility 'constitute separate tests, each of which must be met in order for the equal pay standard to apply.' 29 C.F.R. § 1620.14(a). Here, the most important focus is on the 'skill' portion of this three-part inquiry."); *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 340-42 (7th Cir. 1988).

The court in *Cullen* stated, "[s]kill includes consideration of such factors as experience, training, education, and ability." *Cullen*, 338 F.3d at 699 (quoting 29 C.F.R. § 1620.15(a)). However, "effort" and "responsibility" are not as thoroughly discussed in the context of what they mean and how the court evaluates these two prongs. The regulations state, "[e]ffort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered in determining the effort required by the job." 29 C.F.R. § 1620.16(a). "Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations." 29 C.F.R. § 1620.17(a).

The court in *Nadeem v. Viscosity Oil Co.*, No. 19-CV-08253, 2021 WL 4318094 (N.D. Ill. Sept. 23, 2021) held:

> Under the Act, "substantially equal work" does not equal identical work. *Epstein v. Sec'y, U.S. Dep't of the Treasury*, 739 F.2d 274, 277 (7th Cir. 1984). "[D]ifferences in skill, effort, or responsibility" do not justify a finding that two jobs are unequal "where the greater skill, effort, or responsibility is required of the lower paid sex." *Lauderdale v. Ill. Dep't. of Hum. Servs.*, 876 F.3d 904, 907-08 (quoting 29 C.F.R. § 1620.14(a)). Job titles are not relevant to the analysis. *Epstein*, 739 F.2d at 277. Rather, assessing "equal work" requires evaluating whether the jobs in question share a "common core of tasks" or whether "a significant portion of the two jobs is identical." *Stopka v. All. of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998). In assessing equal work, "responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation," and

> "effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job." 29 C.F.R. §§ 1620.17(a), 1620.16(a).

Id. at *3.

5.03 EQUAL SKILL

In deciding whether jobs require "equal skill," you should consider whether people need essentially the same experience, training, education, and ability to do the work. Jobs may require "equal skill" even if one job does not require workers to use these skills as often as in another job.

Committee Comments

See 29 C.F.R. § 1620.15(a); *Stopka v. All. of Am. Insurers*, 141 F.3d 681, 685-86 (7th Cir. 1998); *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003).

5.04 EQUAL EFFORT

In deciding whether jobs require "equal effort," you should consider the physical or mental energy that a person must use at work. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered in determining the effort required by the job. "Effort" encompasses the total requirements of the job. "Equal effort" does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort needed to do the jobs, they require "equal effort."

Committee Comments

See 29 C.F.R. § 1620.16(a); *Jenkins v. United States*, 46 Fed. Cl. 561, 564-69 (2000); *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003); *Boriss v. Addison Farmers Ins. Co.*, No. 91-C-3144, 1993 WL 284331 at *6-7 (N.D. Ill. Jul. 26, 1993).

5.05 EQUAL RESPONSIBILITY

In deciding whether jobs involve "equal responsibility," you should consider how accountable someone is in doing [his/her] job, including how much authority an employee has and the importance of [his/her] job. You should consider the level of authority delegated to Plaintiff as compared to the employee[s] who [is/are] paid more, including whether Plaintiff and the employee[s] who [is/are] paid more were equally expected to direct the work of others, to represent Defendant in dealing with customers or suppliers, and any consequences to the employer of effective performance in the respective jobs.

Committee Comments

See 29 C.F.R. § 1620.17 (providing examples of factors to be considered in assessing equal responsibility including supervisory authority and authority to make decisions independently or with material impact on the business); *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 960-961 (8th Cir. 1995); *Dean v. United Food Stores, Inc.*, 767 F. Supp. 236, 241 (D.N.M. 1991); *Jenkins v. United States*, 46 Fed. Cl. 561, 564 (2000); *see also Fallon v. State of Ill.,* 882 F.2d 1206, 1209-1210 (7th Cir. 1989) (explaining differences in supervisory responsibility required "must be substantial" to show positions were unequal); *Cullen v. Indiana Univ. Bd. of Trs.*, 338 F.3d 693, 700 (7th Cir. 2003) (explaining "management of a department twice the size of [plaintiff's] is indicative of greater responsibility" but that the "most significant factor" was "differential in tuition revenue generated by each program" under plaintiff's and comparator's respective supervision in finding "positions do not have equal levels of responsibility").

5.06 JOB TITLES

In deciding whether two jobs are "substantially equal," you should consider the actual job requirements. Job classifications, descriptions, and titles are not controlling.

Committee Comments

See 29 C.F.R. § 1620.13(e); *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 345-48 (7th Cir. 1988); *Epstein v. Sec'y, U.S. Dep't of the Treasury*, 739 F.2d 274, 277 (7th Cir. 1984); *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 698 (7th Cir. 2003) ("In determining whether two jobs are equal, the crucial inquiry is 'whether the jobs to be compared have a 'common core' of tasks, i.e., whether a significant portion of the two jobs is identical.'") (citing *Fallon v. Illinois*, 882 F.2d 1206, 1209 (7th Cir. 1989)).

5.07 RATES OF PAY

In deciding whether Plaintiff was paid less than [his/her] coworker[s] for equal work, you can consider evidence about how much Plaintiff's coworker[s] earned, even if the coworker[s] worked in a different department. When comparing the amount Plaintiff was paid with the amount Plaintiff's co-worker[s] [was/were] paid for equal work, the proper point of comparison is wage rate, rather than total compensation.

[A Plaintiff can demonstrate a difference in wage rate by showing a difference in the rate of any element of pay, including benefits or bonuses.]

Committee Comments

See 29 C.F.R. § 1620.12(a); 29 C.F.R. § 1620.19; *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643, 655 (4th Cir. 2021) ("This critical portion of the [Equal Pay Act] says nothing about total wages; it places all the emphasis on wage *rates*." (emphasis in original)); *Hopkins v. Stericycle Inc.*, No. 22 CV 1349, 2024 WL 1092684, at *6 (N.D. Ill. Mar. 13, 2024); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994); *see also Power v. Barry Cnty., Mich.*, 539 F. Supp. 721, 722-23 (W.D. Mich. 1982) (defining comparable worth theory).

5.08 COMPARABLE TIME PERIODS

Plaintiff must prove that at least one [male/female] employee received more pay than Plaintiff for substantially equal work. In comparing Plaintiff's work and pay with other employees, you are not limited to comparing Plaintiff to individuals that performed substantially equal work at the same time as Plaintiff. You may consider employees who performed substantially equal work before or after Plaintiff.

Committee Comments

See 29 C.F.R. § 1620.13(b)(4); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 343 (4th Cir. 1994); *Lovell v. BBNT Sols., LLC*, 299 F. Supp. 2d 612, 615 (E.D. Va. 2004).

5.09 INTENT

Plaintiff does not have to prove that Defendant meant to discriminate against Plaintiff because [he/she] was [male/female].

Committee Comments

A plaintiff need not prove an intent to discriminate in an Equal Pay Act case. *See Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 698 (7th Cir. 2003); *Varner v. Ill. State Univ.*, 226 F.3d 927, 932 (7th Cir. 2000) ("Under the Equal Pay Act, an employer is potentially subject to liability without a showing of discriminatory intent."); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985) ("[T]he Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown."). The Committee, therefore, views this instruction as helping to avoid confusion, particularly in cases that contain both an Equal Pay Act claim and a Title VII claim, where a plaintiff normally must prove intent. *See Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

5.10 AFFIRMATIVE DEFENSES

Even if Defendant paid Plaintiff less than [male/female] employees for substantially equal work, you should find in favor of Defendant if Defendant proves by a preponderance of the evidence that the difference was because of:

1. A seniority system that is not based on an employee's sex;

2. A merit system that is not based on an employee's sex;

3. A system based on the quality or quantity of each employee's production; or

4. [*Describe any factor other than sex on which Defendant claims its pay differential was based*].

[The factor other than sex must be a factor that actually motivated the employer's decision as to the disparity in pay, not just one that could explain the disparity now. If Defendant does not prove this factor by a preponderance of the evidence, you should find in favor of the Plaintiff.]

Committee Comments

See 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.20. The Committee does not anticipate that a court would charge the jury on each of the factors. Instead, the court should instruct the jury on only those factors that are relevant to the case. *See Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989).

Where the employer relies on a factor other than sex to explain the differential and there is a dispute about whether that factor actually motivated the employer's decision making, it may be appropriate to add the bracketed additional language. *See E.E.O.C. v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018) (The employer must "submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity." (emphasis in original)); *Rizo v. Yovino*, 950 F.3d 1217, 1222 (9th Cir. 2020) (en banc); *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000); *see also Brock v. Georgia Sw. Coll.*, 765 F.2d 1026, 1037 n.23 (11th Cir. 1985) ("[T]he appellants hold the burden of proving to the trier of fact that this is not just an ex post facto attempt to find differences between male and female faculty and then use those differences to explain unequal pay."), *overruled on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

The Committee notes that there is a split of authority among the circuits as to whether prior salary alone constitutes a sufficient factor other than sex. The Seventh Circuit has said that it is sufficient. *Wernsing v. Dep't of Hum. Servs., State of Ill.*, 427 F.3d 466, 469 (7th Cir. 2005). Other circuits do not agree. *See Boyer v. United States*, 97 F.4th 834, 841 (Fed. Cir. 2024) (describing split of authority).

5.11 DAMAGES

If you find in favor of Plaintiff, then you should award Plaintiff damages consisting of the difference between Plaintiff's pay and the pay of the [male/female] employee[s] who did substantially equal work during comparable time periods.

If you award damages, they should reflect the following time period: [*Relevant dates*] [Up to two years from the date the claim accrued, unless the Plaintiff contends that the violation was willful and you agree under Instruction 5.12, in which case the time period is up to three years from the date on which the claim accrued.]

Committee Comments

See 29 U.S.C. § 206(d)(3). The appropriate period for damages depends on whether the violation was willful. Willful conduct extends the statute of limitations governing the Equal Pay Act claim, and thus recovery of actual damages, from 2 years to 3 years from the date on which the claim accrued. *See* 29 U.S.C. § 255(a). Accordingly, this instruction will need to be modified to reflect whether the Plaintiff contends that the violation was willful.

A Plaintiff who proves an Equal Pay Act violation also receives liquidated damages unless the Defendant proves that its failure to comply with the Equal Pay Act was in good faith, and that it had reasonable grounds for believing that its actions did not violate the statute. *See E.E.O.C. v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577, 586 (7th Cir. 1987) ("To extend the statute of limitations a plaintiff must prove a willful violation; to avoid double damages the defendant must prove that he was acting in the sincere and reasonably grounded belief that his conduct was lawful, and if he proves this the district court 'may, in its sound discretion'—not must—award only single damages. 29 U.S.C. § 260."); *see also Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

By statute, the question of the Defendant's good faith is one for the court, not the jury. If the jury concludes that the violation was willful, however, the court must award liquidated damages. *E.E.O.C. v. City of Detroit Health Dep't*, 920 F.2d 355, 358 (6th Cir. 1990) ("[T]he finding of a willful violation by the jury is inconsistent with the implicit finding by the judge that the [defendant] acted in good faith and with reasonable grounds for believing that its acts or omissions were not a violation of the Equal Pay Act.").

5.12 WILLFULNESS

If you find in favor of Plaintiff, you must then decide whether Defendant willfully violated the Equal Pay Act. To show this, Plaintiff must prove by a preponderance of the evidence that Defendant knew that it was violating the Equal Pay Act or was indifferent to whether its actions violated the Equal Pay Act, and not simply that Defendant was aware that it was discriminating in pay.

Committee Comments

See Eighth Circuit Manual of Model Civil Jury Instructions 7.21 (2023); *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001) ("A defendant's negligent mistake concerning the lawfulness of her conduct does not suffice to make that conduct 'willful', but a reckless mistake, in the criminal law sense of indifference to whether the conduct violates the law, does."); *see also McDonald v. Vill. of Palatine, Ill.*, 524 F. App'x 286, 289 (7th Cir. 2013) (citing *EEOC v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577, 585 (7th Cir. 1987) (finding "that violation of Equal Pay Act is willful if defendant knew it was violating law or was indifferent to that possibility.")).