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## Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases

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## THE OVERUSE OF SUMMARY JUDGMENT IN EQUAL PAY CASES

### I. INTRODUCTION

For this symposium about the overuse of dispositive motions in employment discrimination cases, this article provides an empirical analysis of summary judgment practice in Equal Pay Act (EPA or the “Act”) cases on the front lines of the trial courts. As every first-year law student should know, a court may grant summary judgment under Federal Rule of Civil Procedure 56 only if there is “no genuine dispute as to any material fact.”<sup>1</sup> Courts have recognized that because of the “fact intensive nature” of the equal pay inquiry, “summary judgment will often be inappropriate” for equal pay claims.<sup>2</sup> Although—in theory—most equal pay claims should survive summary judgment, an analysis of 500 recent EPA cases shows that—in practice—federal district courts summarily dismiss most equal pay claims.

Resolution of equal pay claims involves two significant factual questions. First, at the prima facie stage, the fact-finder must determine whether the plaintiff and a comparator employee received different compensation for “equal work on jobs the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions.”<sup>3</sup> Second, if the plaintiff satisfies the prima facie standard, discrimination is presumed and the burden of persuasion shifts to the employer to prove that the pay disparity actually resulted from (and is not theoretically justified by) one of four affirmative defenses: “(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.”<sup>4</sup>

The parties in equal pay cases typically dispute the key material facts at issue: Are the two jobs substantially equal in terms of the skill, effort, and responsibility required for the work? What actually caused the pay disparity and is that defense credible? Even though grants of summary judgment in equal pay cases should be rare given the material factual disputes that pervade such issues, it has become more difficult over the past decade for plaintiffs in pay discrimination cases to survive summary judgment.

In a prior study of federal reported appellate cases involving equal pay claims, I found that there was a dramatic decrease in plaintiff success rates on equal pay claims since the Act’s passage, partly because of the impact of summary judgment practice.<sup>5</sup> For example, employees prevailed on only 35% of federal equal pay claims during the period from 2000 to 2009, down from an employee success rate of 55% in the 1990s, 52% in the 1980s, and 59% in the 1970s.<sup>6</sup> Appeals of summary judgment decisions were rare in the first two decades of the Act’s existence—only six out of the one

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1. FED. R. CIV. P. 56(a).

2. *Brobst v. Columbus Servs. Int’l*, 761 F.2d 148, 156 (3d Cir. 1985).

3. 29 U.S.C. § 206(d)(1) (2006).

4. *Id.*

5. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 34 (2010).

6. *Id.* at 33.

hundred reported equal pay appellate cases between 1970 and 1989 involved an appeal of a summary disposition. Beginning in 1990, however, most of the equal pay cases on appeal involved summary judgment decisions by the district court (fifty-eight out of ninety-six cases), rather than an appeal from a trial verdict.<sup>7</sup> More troubling, appellate courts rarely overturned grants of summary judgment by the district courts, affirming 92% of them.<sup>8</sup> In other words, the study of reported appellate equal pay cases suggested that district courts were granting most employer motions for summary judgment on equal pay claims, and that appellate courts were affirming nearly all of those dismissals. But my prior analysis of how federal appellate courts treated equal pay claims in reported cases begged the question of what was really happening on the front lines of the federal district courts.

This article fills that gap, taking a peek below the appellate level to evaluate how trial courts are handling employer motions for summary judgment on equal pay claims. I compiled and analyzed a database containing all federal district court decisions—both published and unpublished—that considered whether to grant summary judgment to an employer on an equal pay claim over a little more than a decade, from 2000 to 2011.<sup>9</sup> The analysis shows that, with a handful of exceptions, dismissing equal pay claims at the summary judgment stage is the *modus operandi* for most federal courts. Courts granted 68% of employer motions for summary judgment on equal pay claims—meaning that only about one-third of equal pay claims survived the summary judgment “starting gate.” In many cases, judges improperly granted summary judgment when disputes of material fact existed regarding the *prima facie* standard of “equal work” and the credibility of the employer’s defenses. In other cases, the very structure of the Equal Pay Act—especially courts’ overly strict interpretation of the “equal work” standard and liberal application of the “factor other than sex” defense—caused the claim to fail.

The article proceeds as follows: Part II describes the methodology used for the case study. Part III.A examines summary judgment grant rates based on a number of basic demographics: whether the case was published or unpublished; whether the case involved multiple plaintiffs; and whether the plaintiff was male or female. Part III.B analyzes whether summary judgment grant rates varied based on the geographic location of the court or the political party or gender of the deciding judge. Part IV provides an overview of the summary judgment outcomes in equal pay cases and examines the potential reasons for the high rate of summary dismissals. Part V concludes with thoughts about how to reverse the trend of trial by motion rather than by jury in equal pay cases.

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7. *Id.* By comparison, appeals of equal pay cases rarely involved summary judgment decisions in the 1970s (one summary judgment appeal; thirty-eight trial appeals) and 1980s (five summary judgment appeals; fifty-six trial appeals). In the 1990s, the appeals involved three motions for judgments or directed verdicts, twenty-eight summary judgment decisions, and twenty-two trials.

8. *Id.*

9. The study covers eleven years, but is sometimes referred to as covering a “decade” throughout this article.

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### II. METHODOLOGY AND DATABASE OVERVIEW

The database for this case study included all published and unpublished cases in the Westlaw database that involved consideration of a summary judgment motion on a claim under the EPA from January 1, 2000 to December 31, 2011. The final database included 500 equal pay claims: 363 unpublished decisions and 137 published decisions. This is the largest database of equal pay claims ever compiled and analyzed.

I included unpublished decisions because most courts do not publish their summary judgment decisions in equal pay cases. As Elizabeth Schneider and Nancy Gertner point out in their article for this symposium, the failure of courts to publish their decisions—especially their denials of employer motions for summary judgment—can skew employment discrimination case law to focus on the “bad claims” for which summary judgment was granted.<sup>10</sup>

An overview of the database broken down by year is reflected in Table 1.

**Table 1: Total Claims in the Database, Unpublished and Published**

Year	Total Unpublished	Total Published	Total
2000	20	9	29
2001	21	9	30
2002	13	20	33
2003	20	7	27
2004	22	11	33
2005	43	7	50
2006	41	2	43
2007	53	11	64
2008	39	11	50
2009	29	15	44
2010	30	14	44
2011	32	21	53
<b>Totals</b>	<b>363</b>	<b>137</b>	<b>500</b>

Each case was reviewed carefully for sixty different criteria about the court and the outcome. The criteria consisted of four general categories of information about the equal pay claims: (1) all basic demographic information about the case;<sup>11</sup> (2) information about

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10. Elizabeth M. Schneider & Hon. Nancy Gertner, “Only Procedural”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 777 (2012–2013).

11. The demographic case information included: case citation, the court district division, the state district, the federal appellate circuit in which the district fell, whether the decision was published, the year of the decision, and whether multiple plaintiffs asserted claims in the same case.



the plaintiff;<sup>12</sup> (3) information about the deciding judge;<sup>13</sup> and (4) the disposition on the equal pay summary judgment motion, including the court's specific findings about the two key stages in the analysis: the plaintiff's prima facie showing of "equal work" and the employer's affirmative defenses for the pay disparity. The quantitative information about the outcome in each case was recorded in an Excel database for analysis.

I tracked ten criteria related to the prima facie case. The first and most basic was whether the court found that the plaintiff had satisfied the EPA's prima facie standard. In addition, I recorded the reasons the court may have found the prima facie standard insufficient, such as an improper comparator; limitations issues; no proof of a pay disparity; no showing of substantially equal effort, responsibility, or skills among the compared positions; or a lack of similar working conditions for the comparators. I also assessed whether the court cited or analyzed the critical statutory prima facie factors of "skill, effort, and responsibility" in the decision.

I evaluated twelve categories related to the employer's affirmative defenses. First, I recorded the broad affirmative defense asserted by the defendant: merit system, seniority system, or a factor other than sex. These defenses were broken down into smaller segments to track the court's treatment of different kinds of justifications for pay disparities, including: performance, a collective bargaining agreement, red circle rates,<sup>14</sup> a factor other than sex, the length of service of the plaintiff, "market forces" or business judgment, a formal salary plan, prior or negotiated salary of the plaintiff and her comparator(s), and the qualifications of the plaintiff.

The database contained thirty-five collective action cases involving multiple plaintiffs. The EPA does not permit class actions.<sup>15</sup> Instead, each plaintiff must separately "opt in" to a collective action.<sup>16</sup> This makes it more difficult for plaintiffs to join together in a group action to challenge systemic pay discrimination by an employer.<sup>17</sup> The collective action structure can raise the costs of discovery and discourage claims by plaintiffs who may be too frightened to go on public record with a lawsuit against her employer.<sup>18</sup>

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12. The plaintiff information included: the plaintiff's position, the category of the work, the type of executive function, if any, the plaintiff performed, whether the plaintiff was male or female, and whether the case involved claims by multiple plaintiffs.

13. This included: the judge's name and gender, the president who appointed the judge, and the political party of the appointing president.

14. According to the EPA's regulations, "[t]he term 'red circle' rate is used to describe certain unusual, higher than normal, wage rates which are maintained for reasons unrelated to sex." 29 C.F.R. § 1620.26(a) (2012). The regulation provides an example in which an employer transfers an employee who develops a disability or illness to a less demanding job but at the same pay rate, which may be "red circled" as non-discriminatory because it was not based on sex, even if that employee is now being paid more than other employees who perform the same task. *Id.*

15. 29 U.S.C. § 216(b) (2006).

16. *Id.*

17. For a discussion of the differences between a class action and collective action, and the disincentives for plaintiffs to join a collective action, see Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 269 (2012).

18. *Id.* at 270.

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The largest collective action in the database involved eight plaintiffs.<sup>19</sup> In most of the collective action cases (twenty-four), the courts analyzed the plaintiffs' claims as a whole unit.<sup>20</sup> In eleven cases, the court analyzed each of the plaintiffs' claims separately.<sup>21</sup> For these eleven cases, I tracked the treatment of each claim, resulting in some cases appearing in the database multiple times. For the analysis that follows, I therefore refer to the results for each "claim" rather than the results in each case.

Because EPA claims are often filed together with other types of Title VII discrimination claims, I also tracked how the court ruled on any Title VII counts filed in the same action. This allowed for the analysis of subtle differences in the court's treatment of Title VII and EPA pay claims. The *prima facie* standards and burdens of proof for pay discrimination claims under Title VII and the EPA are slightly different.<sup>22</sup> Whereas the EPA has a stricter "equal work" *prima facie* standard, the Title VII *prima facie* threshold is a more lenient standard of "similarly situated." The same affirmative defenses under the EPA can be used by employers to defeat

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19. *EEOC v. Cash & Go, Ltd.*, No. Civ.A. C-04-416, 2005 WL 1527663 at \*1 (S.D. Tex. June 28, 2005).
  20. *Hawks v. Forest River, Inc.*, No. 3:09-CV-532-CAN, 2011 WL 5434241 (N.D. Ind. Nov. 8, 2011); *Mothershead v. Bd. of Sch. Comm'rs*, Civ. Action Nos. 10-0038-KD-C, 10-0285-KD-C, 2011 WL 5076521 (S.D. Ala. Oct. 26, 2011); *Moore v. Freeman*, No. 1:00-CV-72, 2001 WL 34079300 (E.D. Tenn. July 23, 2011); *Kennedy v. Va. Polytechnic Inst. & State Univ.*, 781 F. Supp. 2d 297 (W.D. Va. 2011); *Bush v. Orange Cnty. Corr. Dep't*, 597 F. Supp. 2d 1293 (M.D. Fla. 2009); *Ebbert v. Nassau Cnty.*, No. 05-CV-5445 (FB)(AKT), 2009 WL 935812 (E.D.N.Y. Mar. 31, 2009); *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711 (S.D. Tex. 2009); *Detholoff v. Buchanan*, No. CV 05-140-PCT-MHM, 2008 WL 4277643 (D. Ariz. Sept. 16, 2008); *Gonzalez v. Caviness Beef Packers, Ltd.*, No. 2:07-CV-33-J, 2008 WL 2600010 (N.D. Tex. July 1, 2008); *Galvan v. Caviness Packing Co.*, 546 F. Supp. 2d 371 (N.D. Tex. 2008); *Byra-Grzegorzczak v. Bristol-Myers Squibb Co.*, 572 F. Supp. 2d 233 (D. Conn. 2008); *Defurio v. Elizabeth Forward Sch. Dist.*, CA No. 05-1227, 2007 WL 2752176 (W.D. Pa. Sept. 19, 2007); *Prewett v. Ala. Dep't of Veterans Affairs*, 533 F. Supp. 2d 1160 (M.D. Ala. 2007); *Cox v. Office of Att'y Ethics of the Supreme Court of N.J.*, Civ. No. 05-1608(AET), 2006 WL 3833470 (D.N.J. Dec. 29, 2006); *Ekekhov v. AON Serv. Corp.*, No. 05C99, 2006 WL 2349982 (N.D. Ill. Aug. 9, 2006); *Little v. Cobb Cnty.*, No. 1:03-CV-3973WSD, 2006 WL 839401 (N.D. Ga. Mar. 30, 2006); *Dillow v. Wellmont Health Sys.*, No. 2:03-CV-451, 2005 WL 3115424 (E.D. Tenn. Nov. 21, 2005); *Moncrief v. Daro Realty, Inc.*, No. Civ.A. 03-762GK, 2005 WL 1119794 (D.D.C. Apr. 28, 2005); *Fagen v. Iowa*, 301 F. Supp. 2d 997 (S.D. Iowa 2004); *Alford v. Cosmyl, Inc.*, 209 F. Supp. 2d 1361 (M.D. Ga. 2002); *Kozlowski v. Fry*, 238 F. Supp. 2d 996 (N.D. Ill. 2002); *Rinaldi v. World Book, Inc.*, No. 00C3573, 2001 WL 477145 (N.D. Ill. May 3, 2001); *Albrant v. Heartland Foods, Inc.*, No. C03-4031-PAZ, 2004 WL 1854203 (N.D. Iowa Aug. 19, 2004); *Arthur v. Coll. of St. Benedict*, 174 F. Supp. 2d 968 (D. Minn. 2001).
  21. *Price v. N. States Power Co.*, Civ. No. 09-1921(DWF/LIB), 2011 WL 338451 (D. Minn. Jan. 31, 2011); *Rollins v. Ala. Cmty. Coll. Sys.*, 814 F. Supp. 2d 1250 (M.D. Ala. 2011); *Randall v. Rolls-Royce Corp.*, 742 F. Supp. 2d 974 (S.D. Ind. 2010); *Finch v. Xavier Univ.*, 689 F. Supp. 2d 955 (S.D. Ohio 2010); *Prise v. Alderwoods Grp., Inc.*, 657 F. Supp. 2d 564 (W.D. Pa. 2009); *Hernandez v. Caviness Packing Co.*, No. 2:07-CV-142-J, 2008 WL 2404963 (N.D. Tex. June 13, 2008); *EEOC v. EGS Elec. Grp., LLC*, Civ. Action No. H-05-2945, 2007 WL 869529 (S.D. Tex. Mar. 21, 2007); *Arnott v. Archway Mktg. Servs.*, Civ. No. 05-2173(DSD/JJG), 2007 WL 274831 (D. Minn. Jan. 26, 2007); *EEOC v. Cash & Go, Ltd.*, No. Civ.A. C-04-416, 2005 WL 1527663 (S.D. Tex. June 28, 2005); *Velez v. QVC, Inc.*, 227 F. Supp. 2d 384 (E.D. Pa. 2002); *Lederer v. Argonaut Ins. Co.*, No. 98 CV 3251, 2000 WL 126933 (N.D. Ill. Jan. 28, 2000).
  22. *See Brewster v. Barnes*, 788 F.2d 985, 987 (4th Cir. 1986) (holding defendant liable for pay discrimination under the Equal Pay Act, but not under Title VII).

Title VII claims.<sup>23</sup> In addition, plaintiffs in Title VII disparate treatment cases bear the ultimate burden of proving that the employer intentionally discriminated in the terms and conditions of employment based on sex. In contrast, if a plaintiff makes a *prima facie* showing under the EPA, the burden of persuasion shifts to the employer to justify the pay disparity, and intentional discrimination need not be shown.<sup>24</sup>

I also recorded the outcome on any other type of non-pay Title VII discrimination claim in each case, such as sexual harassment, failure to hire or promote, retaliation, or other types of disparate treatment.<sup>25</sup> I tracked this for two reasons: first, I wanted to know whether plaintiffs were perhaps prevailing on summary judgment for some of their discrimination claims, even if they failed to prevail on the EPA claim. Second, I hoped to identify cases in which the EPA pay discrimination claim may have been added as a “kitchen sink” approach to pleading—in other words, where the heart of the case involved some other type of discriminatory treatment and the plaintiff lacked sufficient evidence of pay discrimination when she filed the complaint.

### III. QUANTITATIVE RESULTS: SUMMARY DISPOSITION OF EPA CLAIMS IS THE MODUS OPERANDI

This Part describes the quantitative results of the study. Section III.A describes the overall rates of summary judgment dispositions on equal pay claims. Part III.B examines the database from different angles to determine the rates of summary disposition based on court geography, the political party of the president who appointed the judge, and the gender of the judge.

#### A. *The General Picture*

For the period from January 1, 2000 to December 31, 2011, federal district courts granted summary judgment against 68% of equal pay claims (341 out of 500), and denied 32% of summary judgment motions (159 out of 500), which is reflected in Chart 1 below. The summary judgment grant rate was similar, but slightly lower, in published opinions (66%, or 90 out of 137 claims) than in unpublished decisions (69%, or 251 out of 363 claims).

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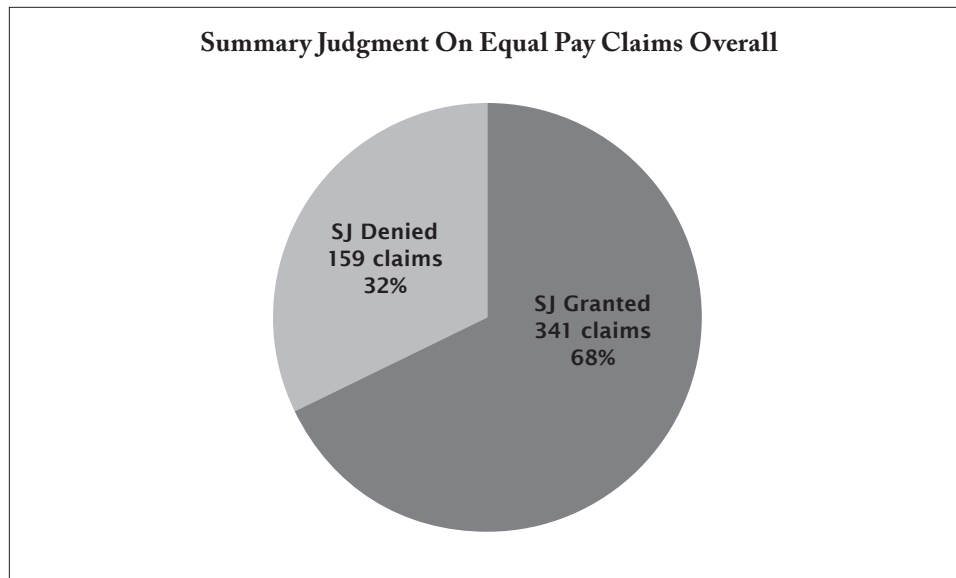
23. *Cnty. of Washington v. Gunther*, 452 U.S. 161, 168–71 (1981) (holding that the EPA’s affirmative defenses apply to Title VII pay discrimination claims).

24. *See Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 344 (4th Cir. 1994) (explaining the differences between the burdens of proof for claims under the EPA and Title VII); *see also Sinclair v. Auto. Club of Okla., Inc.*, 733 F.2d 726, 729 (10th Cir. 1984) (“Discriminatory intent is not an element of a claim under the [EPA].”).

25. The other types of Title VII claims tracked for summary judgment disposition, if applicable to the case, included: hostile work environment, failure to promote, failure to train, failure to hire or rehire, terms and conditions of employment (where a more specific allegation is not discernable from the decision), constructive discharge, demotion or suspension, termination or discharge, retaliation, disparate treatment, failure to appoint or reappoint, pattern or practice of discrimination, disparate impact, and sexual harassment. For each of these types of claims, the column recorded “Y-G” if the plaintiff asserted that type of claim and the court granted summary judgment and “Y-D” if the plaintiff asserted that type of claim and the court denied summary judgment.

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**Chart 1: Overall Rate of Summary Judgment Grants and Denials on Equal Pay Claims**



Judges did not grant summary judgment as frequently on equal pay claims brought together in one collective action. In those cases in which multiple plaintiffs filed pay discrimination claims against the same employer, the court denied 56% of summary judgment motions and granted 43%. For the 443 cases in which individual plaintiffs asserted claims, courts denied 29% of summary judgment motions and granted 71% of summary judgment motions. The higher rate of summary judgment denials in EPA collective action cases suggests that judges may be more likely to find factual disputes precluding summary judgment<sup>26</sup>—or at least have more doubt about an employer’s asserted defenses—when multiple plaintiffs bring equal pay claims against the same employer in one case.<sup>27</sup>

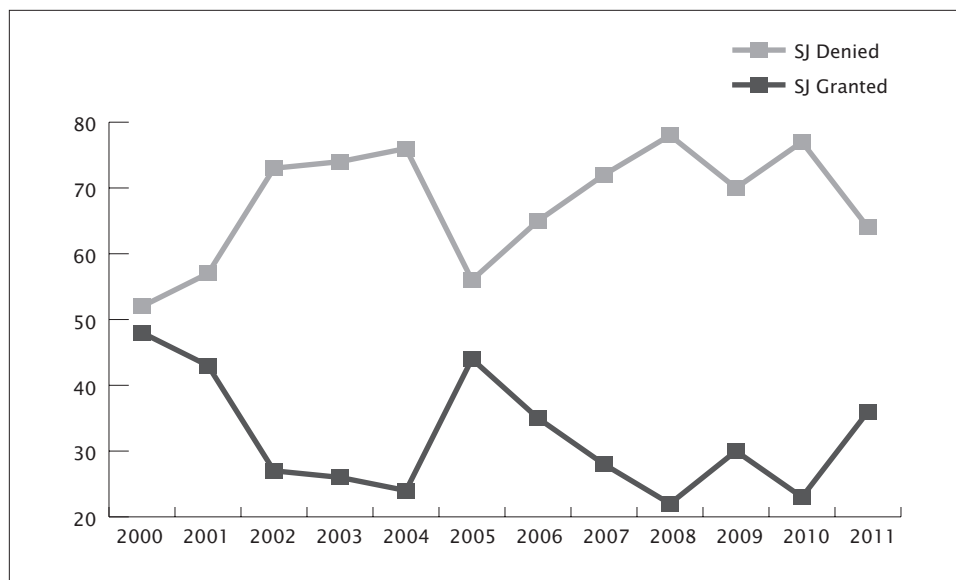
26. See, e.g., *Kennedy v. Va. Polytechnic Inst. & St. Univ.*, 781 F. Supp. 2d 297, 301–02 (W.D. Va. 2011) (“While Virginia Tech has proffered evidence indicating that it made its pay determinations without regard to gender, Plaintiffs’ evidence that (1) several male comparators earned higher salaries than Plaintiffs’ and (2) that Virginia Tech made these salary determinations based, in some small part, on subjective criteria would allow a reasonable jury to infer that Virginia Tech’s actions were illegal. Because there is a chance, however large or small it might be, that a reasonably [sic] jury could find in Plaintiffs’ favor on the EPA claim, summary judgment is improper.”); *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 731 (S.D. Tex. 2009) (finding that the employer’s justifications for pay disparities were not “altogether convincing” and that fact issues precluded summary judgment on EPA claim).

27. Of course, this hypothesis is undermined a bit by the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in which the U.S. Supreme Court expressed doubt that an employer’s discretionary pay and promotion system could promote a common policy of pervasive discrimination for a class of 1.5 million current and former Wal-Mart employees. See Eisenberg, *supra* note 17. But *Wal-Mart* involved a mammoth national class action under Title VII, not a collective action under the EPA. *Wal-Mart* also focused solely on the procedural issue of class certification and did not address the merits of plaintiffs’ claims.

In every year of the last decade, courts granted summary judgment on a majority of equal pay claims. But the ratio of grants and denials has not been static over time. The decade started in 2000 with roughly an equal percentage of summary judgment motions denied (48%) as granted (52%). The percentage of summary dispositions shot up starting in 2002, with 73% granted, and reached highs of 78% of summary judgment motions granted in 2008 and 77% granted in 2010. The percentage of summary dispositions started to decline again in 2011, falling back to 64%.

Chart 2 plots the percentage of summary judgment motions granted and denied for equal pay claims in each of the past eleven years. The dip down to a 56% grant rate and a 44% denial rate in 2005 may be partly explained by a collective action brought by the Equal Employment Opportunity Commission in *EEOC v. Cash & Go, Ltd.*, in which a magistrate judge denied summary judgment on the claims of eight area managers.<sup>28</sup> The volume of claims in this one case increased the summary judgment denial rate. If the case is counted as one denial—rather than eight separate denials of the eight plaintiffs' claims—the results for 2005 would be more consistent with other rates: summary judgment denials in 33% of cases and grants in 67% of cases.

**Chart 2: Percentage of Summary Judgment Motions Granted and Denied Each Year, 2000–2011**



Less than 1% of the claims in the database (forty-eight claims) were brought by male plaintiffs. Summary judgment was granted on 85% of the claims of male plaintiffs, with summary judgment denials for only seven claims. Out of the 452 claims brought by female plaintiffs, summary judgment was granted for 60% (or 300 claims).

28. *EEOC v. Cash & Go, Ltd.*, No. Civ.A. C-04-416, 2005 WL 1527663, at \*1 (S.D. Tex. June 28, 2005).

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In sum, although the decade started with a relatively even split between summary judgment denials and grants, the overall rate of summary dismissals of equal pay claims has skyrocketed over the past eleven years. The next section examines whether summary judgment outcomes vary based on the state or circuit in which the court falls, the political party of the President who appointed the judge, or the gender of the deciding judge.

### *B. Summary Judgment is the Norm Regardless of Court Demographics*

#### *1. Court Geography*

With a few exceptions, federal district courts in all geographic areas granted summary judgment on equal pay claims a majority of the time.

The courts that handled the greatest number of equal pay claims included the Northern District of Illinois (thirty-eight claims), the Southern District of New York (twenty-seven), the Southern and Northern Districts of Texas (twenty each), and the Middle District of Alabama (nineteen). The summary judgment rates for these jurisdictions are fairly similar to the overall results, with the glaring exception of the dramatically differing rates between the Northern District of Texas, which denied summary judgment for 60% of equal pay claims and granted it for 40% of claims, and its sister court in the Southern District of Texas, which granted summary judgment for 95% of equal pay claims and denied it for only 5% of claims. The summary judgment record for these districts is reflected in Table 2.

**Table 2: Summary Judgment Disposition in Districts Deciding Greatest Number of Equal Pay Claims**

District	Summary Judgment Granted		Summary Judgment Denied		Total Claims
	Number	Percent	Number	Percent	
M.D. Ala.	15	79%	4	2%	19
N.D. Ill.	29	76%	9	24%	38
S.D.N.Y.	19	70%	8	30%	27
S.D. Tex.	8	40%	12	60%	20
N.D. Tex.	19	95%	1	5%	20
<b>Total</b>	<b>90</b>	<b>73%</b>	<b>34</b>	<b>27%</b>	<b>124</b>

Because many divisions had fewer than ten cases, I grouped courts together both by state and by the federal circuit appellate jurisdiction in which they fell. The district courts falling within the Ninth (81%), Fourth (78%), and Eleventh (74%) Circuits granted summary judgment on equal pay claims most often. The U.S. District Court for the District of Columbia decided only six claims, and granted summary judgment on all but one. The district courts falling within the Third Circuit comprised the

only group that denied summary judgment motions for a majority of equal pay claims, albeit a very slight majority (53% of claims). The district courts within the Eighth Circuit had a fairly even ratio in the opposite direction from the Third Circuit: denying 42% of summary judgment motions and granting 58%. The results by circuit grouping are reflected in Table 3.

**Table 3: District Court Summary Judgment Disposition on Equal Pay Claims by Federal Circuit**

Federal Circuit	Summary Judgment Granted		Summary Judgment Denied		Total Claims
	Number	Percent	Number	Percent	
First	8	73%	3	27%	11
Second	44	72%	17	28%	61
Third	22	47%	25	53%	47
Fourth	25	78%	7	22%	32
Fifth	50	68%	23	32%	73
Sixth	35	69%	16	31%	51
Seventh	50	72%	19	28%	69
Eighth	28	58%	20	42%	48
Ninth	17	81%	4	19%	21
Tenth	14	61%	9	39%	23
Eleventh	43	74%	15	26%	58
D.C.	5	83%	1	17%	6
<b>Total</b>	<b>341</b>	<b>68%</b>	<b>159</b>	<b>32%</b>	<b>500</b>

If all divisions within each federal district are grouped together, the only two states in which federal district courts denied summary judgment on the majority of equal pay claims were Iowa (60% denied) and Kansas (56% denied). The states with the highest rate of granting summary judgment on equal pay claims were Arizona (88%), Louisiana (85%), and Michigan (85%). The breakdown of summary judgment disposition by state (including the District of Columbia and Puerto Rico), for those states that considered more than five equal pay claims, is reflected in Table 4.



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**Table 4: District Court Summary Judgment Disposition on Equal Pay Claims by State<sup>29</sup>**

State	Summary Judgment Granted		Summary Judgment Denied		Total Claims
	Number	Percent	Number	Percent	
Alabama	20	74%	7	26%	27
Arizona	7	88%	1	12%	8
Arkansas	5	56%	4	44%	9
Connecticut	4	67%	2	33%	6
D.C.	5	83%	1	17%	6
Delaware	4	57%	3	43%	7
Florida	9	64%	5	36%	14
Georgia	14	82%	3	18%	17
Illinois	33	73%	12	27%	45
Indiana	13	76%	4	24%	17
Iowa	4	40%	6	60%	10
Kansas	4	44%	5	56%	9
Louisiana	11	85%	2	15%	13
Maryland	7	78%	2	22%	9
Michigan	11	85%	2	15%	13
Minnesota	8	62%	5	38%	13
Mississippi	4	50%	4	50%	8
Missouri	9	69%	4	31%	13
New Jersey	4	67%	2	33%	6
New York	39	72%	15	28%	54
Ohio	13	68%	6	32%	19
Oklahoma	5	71%	2	29%	7
Oregon	4	57%	3	43%	7
Pennsylvania	15	44%	19	56%	34
Puerto Rico	5	83%	1	17%	6
South Carolina	5	63%	3	37%	8
Tennessee	8	53%	7	47%	15
Texas	35	67%	17	33%	52
Virginia	7	78%	2	22%	9
Wisconsin	4	57%	3	43%	7
<b>Total</b>	<b>316</b>	<b>68%</b>	<b>152</b>	<b>32%</b>	<b>468</b>

29. Table 4 includes only those states in which the federal district courts considered greater than five equal pay claims.



District Courts in many states considered five or fewer claims and granted summary judgment on every equal pay claim considered, including: California (two), Idaho (one), North Carolina (five), New Mexico (one), Nebraska (one), Nevada (one), New Hampshire (one), West Virginia (one), and Washington (two). Massachusetts considered four claims, with an even split between summary judgment denials and grants. Colorado and South Dakota district courts each considered two claims, granting summary judgment on one claim and denying it on the other. The district courts in Utah and Kentucky granted summary judgment on three claims, and denied summary judgment once.<sup>30</sup>

In sum, with the exception of the districts of Iowa and Kansas, federal courts across the nation granted summary judgment on a majority of equal pay claims. As the Honorable Mark Bennett of the U.S. District Court for the District of Iowa has explained, too many federal judges are inappropriately granting summary judgment “in a shocking number of employment discrimination cases.”<sup>31</sup> It is no surprise that Judge’s Bennett’s district—the U.S. District Court for the Northern District of Iowa—has one of the highest summary judgment denial rates, given his professed “love, respect, and passion for trial by jury.”<sup>32</sup> If other federal judges followed Judge Bennett’s example of reserving the resolution of disputed material facts for the jury, equal pay claims likely would survive summary judgment more often.

## 2. *Political Party of the President Who Appointed the Judge*

Prior research has found that Republican-appointed district court judges were significantly more likely to grant summary judgment on Title VII employment discrimination claims.<sup>33</sup> This was not true for the cases in this study, which showed that district court judges appointed by both Republicans and Democrats granted summary judgment on a majority of equal pay claims. As reflected in Table 5, district court judges appointed by Republican Presidents granted summary judgment on equal pay claims slightly less frequently—for 67% of claims, than judges appointed by Democrats, who granted summary judgment against 72% of equal pay claims. Federal magistrate judges denied summary judgment more often than Article III federal district court judges, granting summary judgment on 58% of equal pay claims.

30. Any state that is not mentioned did not have any cases in the database. The states that did not have any equal pay cases in the database were: Alaska, Hawaii, Maine, Montana, North Dakota, Rhode Island, Vermont, and Wyoming.

31. Hon. Mark W. Bennett, *Essay: From the “No Spittin’, No Cussin’ And No Summary Judgment” Days of Employment Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685 (2012–2013).

32. *Id.* at 707.

33. John Friedl & Andre Honoree, *Is Justice Blind?: Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases*, 38 CUMB. L. REV. 89 (2008) (finding in random sampling of district court Title VII decisions that plaintiffs in employment discrimination cases have a substantially greater chance of surviving summary judgment if the judge was appointed by a democratic President rather than a republican President, with republican appointees more likely to favor employers).

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**Table 5: District Court Summary Judgment Disposition on Equal Pay Claims by Political Party of the Appointing President**

Appointing Party	Summary Judgment Granted		Summary Judgment Denied		Total Claims
	Number	Percentage	Number	Percentage	
Republican	172	67%	83	33%	255
Democrat	134	72%	51	28%	185
<b>Total</b>	<b>306</b>	<b>70%</b>	<b>134</b>	<b>30%</b>	<b>440</b>

Table 6 breaks down summary judgment disposition on equal pay claims by the appointing President. With the exception of judges appointed by Ronald Reagan and Barack Obama, granting summary judgment was the general practice for judges regardless of their appointing President. Particularly telling are the similar summary judgment rates among judges appointed by George W. Bush (71% granted), Bill Clinton (72% granted), and George H.W. Bush (70% granted). These judges came to the bench during and after the 1990s—a time when the use of summary judgment in employment discrimination cases began to skyrocket because of two significant developments. First, the U.S. Supreme Court decided a trilogy of cases in 1986—*Matsushita v. Zenith Radio Corp.*,<sup>34</sup> *Anderson v. Liberty Lobby*,<sup>35</sup> and *Celotex Corp. v. Catrett*<sup>36</sup>—which “provided impetus and encouragement to district courts to grant summary judgment more frequently.”<sup>37</sup> Second, Congress amended Title VII in 1991 to permit jury trials and compensatory damages, which increased Title VII filings and judicial hostility toward employment discrimination claims.<sup>38</sup> Federal judges and scholars have explained how the confluence of these factors led to an explosion of summary judgment practice in the federal courts—making the dismissal of employment discrimination cases on summary judgment the general practice rather than the exception.<sup>39</sup> As former U.S. District Court Judge and Professor Nancy

34. 475 U.S. 574 (1986).

35. 477 U.S. 242 (1986).

36. 477 U.S. 317 (1986).

37. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 537 (2010).

38. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 72–73 (1999) (arguing that courts became increasingly hostile to Title VII harassment cases after filings of such claims increased after 1991); Anand Swaminathan, *The Rubric of Force: Employment Discrimination in the Context of Subtle Biases and Judicial Hostility*, 3 THE MODERN AM. 21, 26 (2007) (discussing judicial hostility toward employment discrimination cases during the 1990s).

39. See Bennett, *supra* note 31, at 697–700; Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941 (1998) (“Its flame lit by *Matsushita*, *Anderson*, and *Celotex* in 1986, and fueled by overloaded dockets of the last two decades, summary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes.”).

Gertner has reported, she was even encouraged in her federal judge training to use summary judgment to “get rid” of employment discrimination cases.<sup>40</sup>

The only group of judges who denied summary judgment more often than they granted it were those appointed by Barack Obama, but this set consists of only three cases.<sup>41</sup> President Obama made the issue of equal pay a priority, making his first major piece of legislation the Lilly Ledbetter Fair Pay Act.<sup>42</sup>

**Table 6: District Court Summary Judgment Disposition on Equal Pay Claims by Appointing President**

Appointing President	Summary Judgment Granted		Summary Judgment Denied		Total Claims
	Number	Percentage	Number	Percentage	
Barack Obama	1	33%	2	67%	3
George W. Bush	65	71%	26	29%	91
Bill Clinton	103	72%	41	28%	144
George H. W. Bush	51	70%	22	30%	73
Ronald Reagan	41	59%	28	41%	69
Jimmy Carter	28	80%	7	20%	35
Gerald Ford	7	78%	2	22%	9
Richard Nixon	8	62%	5	38%	13
Lyndon Johnson	1	100%	0	0%	1
John F. Kennedy	1	50%	1	50%	2
<b>Total</b>	<b>306</b>	<b>70%</b>	<b>134</b>	<b>30%</b>	<b>440</b>

### 3. *Gender of the Judge*

As reflected in Table 7, female judges granted summary judgment on equal pay claims at a much lower rate (61%) than male judges (70%).<sup>43</sup> Female magistrate judges denied summary judgment for 65% of claims, as compared to a 33% summary

40. Hon. Nancy Gertner, Address to the Employment Law Conference, Massachusetts Bar Association (May 7, 2007) (“When I was a ‘baby judge’ I attended a training session. The trainer was to address employment discrimination cases. He began his presentation with: ‘Here’s how you can get rid of these cases. . . .’”).

41. After the study period, federal judges appointed by President Obama granted summary judgment on equal pay claims more frequently, granting summary judgment on more than nineteen claims and denying summary judgment for at least four claims.

42. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009); *see also* Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, [http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?\\_r=0](http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?_r=0).

43. Table 7 includes all Article III federal district court judges, plus seventeen female federal magistrate judges, and forty-three male federal magistrate judges.

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judgment denial rate for male magistrate judges. Among Article III judges, female district court judges appointed by Republican Presidents had the highest rate of summary judgment denials (35% of claims), followed closely by female district court judges appointed by Democratic Presidents, who denied summary judgment for 33% of the claims they considered.

Male Article III judges appointed by Republican judges, who considered the most claims in the database (215 claims), had a much better summary judgment denial rate (32% of claims) than male judges appointed by Democratic Presidents, who denied summary judgment on only 25% of the 128 equal pay claims they considered. This may be partly explained by the large number of claims that were considered by male Reagan appointees (64 claims), who denied summary judgment on 42% claims. Compare that to more recent male appointees by George W. Bush, who denied summary judgment for 26% of claims, and male judges appointed by Bill Clinton, who denied summary judgment for 28% of claims. As described above, those judges who came to the bench during or after the 1990s tended to grant summary judgment on equal pay claims at a higher rate.

It is difficult to pinpoint the reason that female judges are more likely to deny summary judgment on equal pay claims. Overall, they are more likely to find disputes of material fact that preclude summary judgment. As compared to their male counterparts, compare the summary judgment records of women appointed as district court judges by George W. Bush, who denied 37% of summary judgment motions (7 out of 19 claims), and women appointed by Bill Clinton, who denied 30% of summary judgment motions (14 out of 46 claims). Of course, the news is not completely good here: although they deny summary judgment more frequently than their male brethren, female judges are dismissing the majority of equal pay claims at the summary judgment stage. Their more favorable summary judgment record, however, demonstrates the importance of appointing more women, regardless of political affiliation, to the federal judiciary.

**Table 7: District Court Summary Judgment Disposition on Equal Pay Claims by Gender of Judge**

Gender of Judge	Summary Judgment Granted		Summary Judgment Denied		Total Claims
	Number	Percentage	Number	Percentage	
Male	271	70%	115	30%	386
Female	70	61%	44	39%	114
<b>Total</b>	<b>341</b>	<b>68%</b>	<b>159</b>	<b>32%</b>	<b>500</b>

#### IV. WHY IS SUMMARY JUDGMENT GRANTED SO OFTEN ON EQUAL PAY CLAIMS?

The key question for policymakers and employee advocates, of course, is *why* summary judgment is granted on the vast majority of equal pay claims—typically regardless of the characteristics of the judge and geographic location of the court. Could it really be that reasonable juries could not find pay discrimination in most equal pay cases? Is there something about the structure of the EPA itself that prevents so many plaintiffs from reaching a jury in these cases?

To isolate the reason why summary judgment was granted by a court, I examined the court's reasoning with respect to the two key stages of analyzing an equal pay claim: (1) the prima facie case and (2) the employer's affirmative defenses. In addition, I tracked whether the plaintiff brought other types of Title VII discrimination claims together with the EPA claim as a way to try to determine whether the case focused centrally on pay discrimination, or whether the equal pay claim was a weaker claim tacked on to a complaint that primarily concerned another type of discrimination.

##### *A. The Key Barrier: The Prima Facie Standard*

A plaintiff satisfies the prima facie standard under the EPA by showing that she and an employee of the opposite sex<sup>44</sup> received unequal pay for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which were performed under similar working conditions.”<sup>45</sup> All three factors—skill, effort, and responsibility—must be satisfied. The compared jobs need not be identical in all respects, but only “substantially equal.”<sup>46</sup> The Act's implementing regulations counsel that what constitutes substantially equal work “cannot be precisely defined.”<sup>47</sup> As explained by one federal circuit court, the “court must compare the jobs in question in light of the full factual situation and the broad remedial purpose of the statute.”<sup>48</sup> At the prima facie stage, the analysis focuses solely on the compared jobs, not on the individuals holding those jobs.<sup>49</sup>

As described above, the prima facie standard under the EPA is defined in broad terms and requires an intricate factual examination of the compared jobs to determine whether the performance of the work requires substantially equal “skill, effort, and responsibility.” The regulatory definitions of these terms allow for differences in the type of work performed. For example, determining “equal responsibility” requires an examination of the relative degree of accountability and importance of the job function

44. The comparator can be a current co-worker or a predecessor or successor who performed substantially equal work.

45. 29 U.S.C. § 206(d)(1) (2006).

46. 29 C.F.R. § 1620.13(a) (2011).

47. *Id.* § 1620.14(a).

48. *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1245 (8th Cir. 1981) (citing 29 C.F.R. § 1620.114–132 (2011)).

49. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992); *see also* *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 594 (11th Cir. 1994) (“[I]ndividual employee qualifications are relevant only to defendant's affirmative defenses.”) (quoting *Brock v. Ga. Sw. Coll.*, 765 F.2d 1026 (11th Cir. 1985)).

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to the employer: “The equal pay standard applies to jobs the performance of which requires equal responsibility. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”<sup>50</sup>

The definition of “equal effort” likewise requires a factual judgment about the amount and degree of exertion required to perform the jobs in question. Jobs can be equal even if the effort is exerted in different ways:

The jobs to which the equal pay standard is applicable are jobs that require equal effort to perform. Where substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Effort 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. “Effort” encompasses the total requirements of a job. Where jobs are otherwise equal under the EPA, and there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort required to be expended in such a situation will not justify wage differentials.<sup>51</sup>

Finally, the regulations explain “equal skill” based on the “amount or degree” of skill:

The jobs to which the equal pay standard is applicable are jobs requiring equal skill in their performance. Where the amount or degree of skill required to perform one job is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Skill includes consideration of such factors as experience, training, education, and ability. *It must be measured in terms of the performance requirements of the job.* If an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the EPA as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job. *Possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill.* The efficiency of the employee’s performance in the job is not in itself an appropriate factor to consider in evaluating skill.<sup>52</sup>

In prior scholarship, I have argued that the EPA’s *prima facie* standard has become a stumbling block for women filing equal pay claims.<sup>53</sup> Rather than using a pragmatic assessment of the “substantially equal” standard—which permits some

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50. 29 C.F.R. § 1620.17(a) (2011).

51. *Id.* § 1620.16(a).

52. 29 C.F.R. § 1620.15(a) (2011) (emphasis added).

53. Eisenberg, *supra* note 5, at 46–52.



differences in the compared jobs—some courts have required strict identity among the compared jobs or imposed their own vision of “equal work” without applying the EPA’s regulatory definitions. The analysis of recent district court cases confirms this concern. For nearly half of the claims in the database (247 out of 500, or 49%), the court found that the plaintiff had failed to make a prima facie showing of equal work and granted summary judgment on the claim.

Most courts—especially in the unpublished decisions—granted summary judgment with only a cursory explanation and little-to-no analysis of the equal work standard. I determined the extent to which the court cited or analyzed the statutory factors of substantially equal skill, effort, and responsibility. Only 15% (76 out of 500) of the opinions analyzed the equal work factors comprehensively by citing the regulatory definitions and applying them systematically to the compared positions.<sup>54</sup> In these cases, the ratio of summary judgment denials and grants was more equal, with courts denying 45% of motions and granting 55%. Another 229 cases cited or briefly mentioned some portion of the equal work regulatory standard, but did not analyze and apply the factors in a comprehensive way.<sup>55</sup> Summary judgment was granted in the cases that “somewhat” analyzed the equal pay factors 63% of the time, and denied 37%.

For the remaining 195 cases that did not cite or analyze the components of the equal work standard at all, summary judgment grants were considerably higher: 79% of claims.<sup>56</sup> In some of these cases, the lack of reference to the regulatory standards can be explained because, in eighteen cases, the defendant did not dispute that the plaintiff satisfied the prima facie showing and, in twenty-two cases, the court assumed that the plaintiff met the equal work standard.

The finding that courts denied summary judgment more frequently when they actually cited or described the EPA’s regulatory definitions instructs that plaintiffs should ensure that they educate the court about the regulatory definitions of substantially equal skill, effort, and responsibility. Plaintiffs should explain to the court why factual disputes on these broad concepts should be decided by the jury, and why a reasonable jury could find that the compared jobs satisfy each prong of skill, responsibility, and effort. Without proper grounding in the nuanced, fact-intensive regulatory definitions of “equal work,” courts may be more likely to apply their own judgments about what constitutes “equal work.” Or—at the employer’s urging—courts may err on the side of requiring strict equality of the jobs in all respects.

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54. For examples of decisions in which courts described the nuanced factual nature of the equal pay standard and cited the regulatory definitions of equal skill, responsibility, and effort, see *Wildi v. Alle-Kiski Med. Ctr.*, 659 F. Supp. 2d 640 (W.D. Pa. 2009), *Griffiths v. Winnebago Indus., Inc.*, 369 F. Supp. 2d 1063 (N.D. Iowa 2005), and *Brickey v. Empls. Reassurance Corp.*, 293 F. Supp. 2d 1227 (D. Kan. 2003).

55. For examples of cases in which the court analyzed the equal pay factors to some extent, see *Rollins v. Ala. Cmty. Coll. Sys.*, 814 F. Supp. 2d 1250 (M.D. Ala. 2011), *Denman v. Youngstown State Univ.*, 545 F. Supp. 2d 671 (N.D. Ohio 2008), and *Garner v. Motorola, Inc.*, 95 F. Supp. 2d 1069 (D. Ariz. 2000).

56. See, e.g., *Converse v. Okla. City*, 649 F. Supp. 2d 1310, 1320 (W.D. Okla. 2009); *Rallins v. Ohio State Univ.*, 191 F. Supp. 2d 920 (S.D. Ohio 2002).

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Consider the example of a district court case from the Western District of Texas, *Georgen-Saad v. Texas Mutual Insurance Co.*, in which the judge said that an equal pay claim by a female senior vice president of finance could “not be taken seriously.”<sup>57</sup> Although a pragmatic application of the substantially equal standard under the Act may apply to executives in different departments,<sup>58</sup> the district court judge applied his own conception of appropriate executive pay, reasoning that subjecting high-level compensation to scrutiny was “simply beyond the pale.”<sup>59</sup> He wrote:

In cases such as these, no judge or jury should be allowed to second guess the complex remuneration decisions of businesses that necessarily involve a unique assessment of experience, training, ability, education, interpersonal skills, market forces, performance, tenure, etc. Requiring Defendant and other companies to either pay senior executives the same amount or to come to court to justify their failure to do so is simply beyond the pale. In a perfect world, we would be able to grasp the complexities of such calculations and produce a formula that would bring forth the exact amount that any person should be paid at any moment in time. We do not live in such a world.<sup>60</sup>

In this case, the judge’s own belief that senior executive pay should be “off limits” from scrutiny flew in the face of the requirements of the EPA. Under the fact-based standard in the Act, a reasonable jury could indeed conclude that, despite working in different departments, these senior executives were performing work that required substantially equal skill, effort, and responsibility, and could reject the employer’s purported reasons for paying a female executive less than the men on the executive team. Of course, a reasonable jury could also agree with the judge’s assessment that these positions were not substantially equal. The point is that a district court judge should not be making factual judgment calls about whether compared jobs require substantially equal skills, effort, and responsibility at the summary judgment stage.

To the extent discernible from the decisions, I also evaluated the reasons courts found that plaintiffs failed to make a *prima facie* showing. For eighty-nine (36%) of the 247 claims in which no *prima facie* case was found, the plaintiff simply failed to make a facial *prima facie* case. I labeled these claims as “weak” because, according to the court’s decision, the plaintiff did not mount even a minimal showing of a comparator of the opposite sex, a pay disparity, or work requiring substantially equal

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57. 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002).

58. See, e.g., *Simpson v. Merch. & Planters Bank*, 441 F.3d 572, 578 (8th Cir. 2006) (holding that vice presidents who did not perform identical jobs were substantially equal); *Crabtree v. Baptist Hosp. of Gadsden, Inc.*, 749 F.2d 1501 (11th Cir. 1985) (finding that assistant vice presidents who had different areas of departmental responsibility could be compared under the EPA); *Denman v. Youngstown State Univ.*, 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008) (holding that the general counsel and the rest of the university president’s cabinet performed substantially equal work, even though they oversaw different areas of the university); *Rinaldi v. World Book, Inc.*, No. 00-C-3573, 2001 WL 477145, at \*9 (N.D. Ill. May 3, 2001) (holding vice presidents in different departments were substantially equal because they had a common core of administrative tasks).

59. *Georgen-Saad*, 195 F. Supp. 2d at 857.

60. *Id.*



skills, effort, and responsibility. In addition, eight claims were dismissed because of statute of limitations issues.<sup>61</sup> In thirty-eight cases, the plaintiff failed to show a pay disparity. It is, of course, odd that a plaintiff would file an equal pay claim without evidence of a pay disparity. One possible explanation for this phenomenon is the prevalence of pay secrecy in the workplace—plaintiffs may not know the full extent of pay disparities until after discovery.<sup>62</sup> These cases are examples of the appropriate use of summary judgment by the court to weed out claims that fail to satisfy basic *prima facie* pleading standards.

For the other 112 claims (45%) for which summary judgment was granted based on the lack of a *prima facie* showing, courts typically cited a laundry list of reasons that the *prima facie* case was insufficient, or simply stated in a conclusory way that the compared jobs did not require equal work, without identifying a specific reason. Some cases were dismissed for multiple reasons (for example, the court found that both the skill and responsibility prongs were not satisfied). For twenty claims, the court found that the plaintiff had identified an improper comparator. The court found a lack of equal effort for 38 claims, a lack of equal responsibility for 104 claims, a lack of equal skill in 72 cases, and no similar working conditions in 15 cases. In other words, plaintiffs had a somewhat easier time convincing the court that the compared jobs required equal *effort* (physical or mental exertion), but courts were less persuaded that the jobs in question required substantially equal *skill*, and were even more skeptical that they entailed equal *responsibility*.

Surviving the *prima facie* threshold is a critical step. In the small slice of cases in which the court found that the *prima facie* standard was satisfied (185 out of 500 claims), summary judgment was denied for 144 claims (79%). This is an important finding because most legislative proposals to amend the EPA focus on narrowing the statute's defenses, not modernizing the *prima facie* standard. For example, the Paycheck Fairness Act,<sup>63</sup> which has come close to passing but continues to fail in Congress, focused primarily on tightening the defenses available to employers under the EPA. It does not, however, address the barrier presented by the *prima facie* threshold.

With most plaintiffs losing equal pay claims at the starting gate, courts typically do not even reach the merits of the employer's defenses. This grassroots picture of what is happening in equal pay litigation argues in favor of a more workable definition of equal work.

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61. The statute of limitations under the EPA is two years, or three years if the plaintiff proves a willful violation. 29 U.S.C. § 255(a) (2006). Unlike Title VII claims, plaintiffs may file EPA claims directly in court and need not exhaust the administrative process with the EEOC. *Id.*

62. For a discussion of pay transparency as a potential tool to reduce pay discrimination against women, see Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951 (2011).

63. H.R. 1519, 112th Cong. (1st Sess. 2011).

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### *B. The Second Barrier: Courts Give Employers the Benefit of the Doubt on Defenses*

If the plaintiff satisfies the prima facie showing under the EPA, pay discrimination is presumed and the burden shifts to the employer to prove that the pay disparity resulted from one of four affirmative defenses enumerated in the Act: “(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.”<sup>64</sup> Although the prima facie standards under the EPA and Title VII are different, the EPA’s defenses are also applicable to Title VII pay discrimination claims.<sup>65</sup>

By far, the most common defense asserted by employers in equal pay cases was the catchall “any factor other than sex” (FOS) defense, which was asserted for 246 claims—nearly half (49%) of the database. Surprisingly, a merit system was asserted for only sixteen claims; a formal seniority system only nine times; and a system which measures earnings by quantity or quality of production zero times. In 202 cases, the employer’s defense was not discernable from the opinion, typically because summary judgment was granted due to the lack of a prima facie case or another reason unrelated to the employer’s defenses.

In the 246 cases in which the employer asserted a FOS defense, summary judgment was denied in 43% and granted in the other 57%. Employers typically asserted a long list of reasons for pay disparities, so isolating a particular type of FOS defense that is more or less successful was a difficult task, particularly given the sparse record offered in many summary judgment opinions at the district court stage. I tracked several different types of common FOS defenses to test their success rates, including: (1) the compared employees’ relative length of service or “informal seniority”; (2) factors that concerned only the qualifications of the plaintiff, such as experience, education, or performance; (3) “market forces” or “business judgment”; and (4) the prior or negotiated starting salaries of the plaintiff and her comparator.

FOS defenses based on the employee’s length of service or “informal seniority” were asserted for only nineteen claims and were typically successful, resulting in summary judgment 68% of the time (thirteen of the nineteen claims). FOS defenses that focused solely on the relative qualifications or performance of the plaintiff and her comparator were present in 124 cases. Courts granted summary judgment in which a qualifications-based FOS defense was asserted 56% of the time, and denied summary judgment on 44% of the claims.

Defenses such as longer service to the company and superior qualifications appeal to common sense and are widely accepted, and often appropriate, reasons for pay disparities in the workplace. Nevertheless, these defenses involve judgment calls about the employer’s credibility that are better resolved by a jury. It can be tempting to give the employer the benefit of the doubt on such justifications. At the summary judgment stage, however, evidence must be viewed in the light most favorable to the

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64. 29 U.S.C. § 206(d)(1) (2006).

65. *Cnty. of Wash. v. Gunther*, 452 U.S. 161, 171 (1981) (holding that the EPA’s defenses are applicable to Title VII pay discrimination claims).

plaintiff, not an employer moving for summary judgment who bears the burden of persuasion on affirmative defenses.

Defenses involving “market forces” and prior salaries are particularly controversial, with some arguing that the EPA prohibits such defenses because they are based on the stereotype that women are willing to work the same jobs for less pay.<sup>66</sup> Courts are split on whether the “factor other than sex” defenses must be job-related and consistent with business necessity, with the EEOC and a majority of circuits holding that they must, and the minority holding the opposite view. The split in authority on the appropriateness of “market forces” defenses is evident in the twenty-five cases in this study in which employers asserted market-based defenses, with courts denying summary judgment for 48% of such claims, and granting it for 52% of them. Similarly, in the seventy-one cases in which the prior salary of the plaintiff and her comparator—or better pay negotiation results by the comparator—were defenses, courts denied summary judgment for 46% and granted it for 53% of claims.

The relatively even split between summary judgment grants and denials when employers asserted FOS defenses suggests that courts are rejecting these fact-bound defenses nearly half of the time they are raised at the summary judgment stage. The question is why slightly more than half of these defenses are still being accepted by district court judges at the summary judgment stage given the significant burden on the employer to prove an affirmative defense under the EPA. Many of the cases in which employers asserted “business judgment” as a justification for pay disparities involved factual judgment calls about whether variations in the comparators’ experience and qualifications justified pay disparities. For example, should the fact that a male employee has a higher education be relevant to a low-wage job for which such education is not a required qualification?<sup>67</sup> Can an employer’s financial troubles justify pay disparities that otherwise might violate the EPA?<sup>68</sup> Does the fact that a woman accepts a salary at lower than her market rate, and a man accepts a salary higher than his market rate, justify pay disparities between otherwise substantially equal positions?<sup>69</sup> Resolution of these types of issues is more appropriately left to the jury, which can better evaluate the credibility of the employer’s asserted affirmative defenses.

### *C. Other Title VII Claims*

Plaintiffs asserted a Title VII wage discrimination claim together with their EPA claims in 217 (43%) cases in the database. Courts typically treat EPA and Title VII pay claims the same, granting summary judgment at roughly the same rate for each statute. However, plaintiffs may prevail under one statute and lose on the other. In particular, as described above, if the plaintiff can make a *prima facie* showing under the EPA, the employer’s intent is no longer relevant (as it would be in a Title

66. See Eisenberg, *supra* note 62, at 964–69 (discussing the evolution of market defenses in equal pay cases).

67. Warren v. Solo Cup Co., No. 04-2270, 2006 WL 2460763 (C.D. Ill. Aug. 23, 2006).

68. Shannon v. Hotel Emps. & Rest. Emps. Int’l Union, No. 01 C 9711, 2005 WL 2387689 (N.D. Ill. Sept. 22, 2005).

69. Drum v. Lesson Elec. Corp., 550 F. Supp. 2d 1071 (2008), *rev’d*, 565 F.3d 1071 (8th Cir. 2009).

## THE OVERUSE OF SUMMARY JUDGMENT IN EQUAL PAY CASES

VII case) and so the burden of persuasion then shifts to the employer to prove an affirmative defense.<sup>70</sup> As one district court noted, this can lead to the “curious result” of courts granting summary judgment against Title VII sex discrimination claims, but denying it on Equal Pay Act claims.<sup>71</sup>

Courts granted summary judgment on the Title VII pay discrimination claims 68% of the time (147 claims) and denied it 32% of the time (70 claims). In three cases, the court granted summary judgment on the EPA claim but denied summary judgment on the Title VII claim,<sup>72</sup> and in fifteen cases the court denied summary judgment on the EPA claim but granted summary judgment on Title VII pay discrimination.<sup>73</sup>

A majority of plaintiffs (64%) asserted a non-wage Title VII sex discrimination claim together with the EPA claim. To the extent that the other claim was discernable from the court’s opinion, I tracked both the type of discrimination alleged and the summary judgment outcome for the other Title VII claims.

Because the collection of cases for this database targeted EPA claims, and not Title VII sex discrimination cases more generally, the results do not reflect how district courts have decided summary judgment motions in all Title VII sex discrimination cases over the past decade. But this glimpse of summary judgment dispositions for Title VII claims filed together with equal pay claims paints a very bleak picture for Title VII claims more generally, with summary judgment grant rates of 67% for sexual harassment claims; 73% for retaliation, termination, and demotion claims; 90–100% for disparate impact and pattern and practice claims; and rates exceeding 80% for other types of Title VII claims. Table 8 reflects the summary judgment disposition rates for Title VII claims brought together with equal pay claims.

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70. See *supra* note 21 and accompanying text.

71. *Alford v. Cosmyl, Inc.*, 209 F. Supp. 2d 1361, 1372 n.9 (M.D. Ga. 2002).

72. *Smith v. Voorhees Coll.*, C/A No. 5:05-1911-RBH-B/M, 2007 WL 2822266 (D. S.C. July 14, 2007) (two collective action claims); *Lewis v. Smith*, 255 F. Supp. 2d 1054 (D. Ariz. 2003).

73. *Butler v. N.Y. Health & Racquet Club*, 768 F. Supp. 2d 516 (S.D.N.Y. 2011); *Mayden v. Superior Ambulance Serv., Inc.*, 647 F. Supp. 2d 1014 (N.D. Ind. 2009); *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711 (S.D. Tex. 2009); *Vereen v. Woodland Hills Sch. Dist.*, No. CV 06-462, 2008 WL 794451 (W.D. Pa. Mar. 24, 2008); *Chevola v. Cellco P’ship*, No. 8:06-cv-1312-T-30MAP, 2008 WL 298993 (M.D. Fla. Feb. 1, 2008); *Collins v. Landmark Military Newspapers, Inc.*, Civil No. 2:06cv342, 2007 WL 2301549 (E.D. Va. Aug. 6, 2007); *Hankins v. Title Max of Ala., Inc.*, No. Civ.A.05 AR 00905 S, 2006 WL 4393576 (N.D. Ala. Sept. 26, 2006); *David v. Comtech PST Corp.*, No. CV 03-6480(JO), 2006 WL 2713936 (E.D.N.Y. Sept. 22, 2006); *Dove v. Depuy Orthopedics*, No. 1:03-CV-379RM, 2005 WL 1683980 (N.D. Ind. July 18, 2005); *Cox v. Quick & Reilly, Inc.*, 401 F. Supp. 2d 203 (N.D.N.Y. 2005); *Cuffee v. Dover Wipes Co.*, 334 F. Supp. 2d 565 (D. Del. 2004); *Simpri v. City of New York*, No. 00 Civ. 6712(SAS), 2003 WL 23095554 (S.D.N.Y. Dec. 30, 2003); *Wilks v. Shelby Cnty. Gov’t*, No. 00-2143-G-MI/A, 2002 WL 34672828 (W.D. Tenn. Feb. 5, 2002); *Woods v. Univ. of South*, No. 4:00-CV-16, 2001 WL 34079320 (E.D. Tenn. Nov. 8, 2001); *Hildebrant v. Ill. Dep’t of Nat. Res.*, 132 F. Supp. 2d (C.D. Ill. 2001).

**Table 8: District Court Summary Judgment Disposition of Title VII Claims Brought with Equal Pay Act Claims, 2000–2011**

Type of Title VII Claim	Total	Summary Judgment Denied		Summary Judgment Granted	
		Number	Percent	Number	Percent
Pay discrimination	217	70	32%	147	68%
Retaliation	201	55	27%	146	73%
Termination/discharge	115	31	27%	84	73%
Hostile work environment	108	20	19%	88	81%
Failure to promote	79	14	18%	65	82%
Other disparate treatment	77	6	8%	71	92%
Constructive discharge	29	4	14%	25	86%
Demotion/suspension	11	3	27%	8	73%
Disparate impact	10	1	10%	9	90%
Sexual harassment	6	2	33%	4	67%
Pattern and practice	5	0	0%	5	100%
<b>Total</b>	<b>858</b>	<b>206</b>	<b>24%</b>	<b>652</b>	<b>76%</b>

## V. CONCLUSION

This case study shows that the vast majority of plaintiffs who file equal pay claims in federal district courts are losing their cases at the summary judgment stage. The high rate of summary judgment grants for such fact-intensive claims suggests that summary judgment is being overused by most federal district courts in equal pay cases. There is some room for hope. After the summary judgment grant rate reached a high of 78% in 2008, it declined back to 64% in 2011—after the Lilly Ledbetter Act was enacted and the issue of equal pay for equal work was in the political spotlight.<sup>74</sup>

Nevertheless, this empirical snapshot portends bleak prospects for women who seek court redress for pay discrimination. More legislative attention should be focused on the major hurdles for most women in the EPA cases: the *prima facie* standard of equal work, which many courts interpret too strictly, and the factor other than sex defense, which many courts apply too leniently. Nearly half of all equal pay cases are kicked out on summary judgment because the judge found that the plaintiff failed to meet the *prima facie* threshold. Those that survive that hurdle may then falter based on defenses in which courts sometimes improperly give the employer the benefit of the doubt. Judges should be more mindful of the pragmatic regulatory definitions of substantially equal work under the EPA and allow juries to resolve factual disputes about the nature of the work involved and the credibility of the employer's asserted justifications for pay disparities.

74. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).