RECENT DEVELOPMENTS UNDER THE EQUAL PAY ACT

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Burr & Smith, LLP practices multi-party, collective and class action litigation in employment discrimination, wage and hour, and public accommodations law.

I. Interaction of the Equal Pay Act and Title VII

A. Administrative Prerequisites

Although the EEOC is responsible for enforcing the Equal Pay Act (EPA), unlike Title VII, the EPA has no requirement of filing administrative complaints and awaiting administrative conciliation efforts. County of Washington v. Gunther, 452 U.S. 161, 175, n.14 (1981); see also, 29 U.S.C. §§216(c), 217.

Recent Cases[3]

[No cases were identified within the relevant time period.]

B. Coverage

The Equal Pay Act ("EPA") is part of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 206(d). Therefore, there is no requirement that the employer have fifteen employees. Instead, the EPA covers employees on the same basis as the FLSA. An individual is covered by the FLSA if a true employment relationship exists between the individual and the employer, the employer meets the requirement of individual or enterprise coverage, and the work is performed in the United States. Enterprise coverage exists if two or more of the employer's employees are engaged in interstate commerce and the enterprise has an annual gross volume of sales or

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[3] This paper provides synopses of Circuit Court cases addressing Equal Pay Act claims from January 1, 2000 through January 31, 2003. The cases are provided in reverse chronological order, by Circuit.

business done of $500,000. 29 U.S.C. § 203(s)(1); see 29 C.F.R. Part 779. Individuals who are not employed by a covered enterprise may also be covered if they are engaged in interstate commerce or work in activities closed related and directly essential to the production of goods in commerce. See 29 C.F.R. Part 776.

Recent Cases

[No cases were identified within the relevant time period.]

C. Employer

An employer under the EPA (FLSA) is defined as "any person acting directly or indirectly in the interests of an employer in relation to an employee." 29 U.S.C. § 203(d). Under the FLSA, "employ" includes "to suffer or permit to work." This definition has resulted in the creation of the "economic reality test" for determining employee status under the FLSA. Kearns, The Fair Labor Standards Act, Chap. 3, § II.B. The economic reality test seeks to determine whether "the individual is economically dependent on the business to which he renders service… or is, as a matter of economic fact, in business for himself." Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989). Under the economic realities test, individuals who are substantially involved in decisions affecting the terms of the plaintiff's employment may be held individually liable for EPA violations. See e.g., Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983); Riordan v. Kempiners, 831 F.2d 690, 694-95 (7th Cir. 1987); Donavan v. Sabine Irrigation, 695 F.2d 190, 194-95 (5th Cir.), cert. denied, 463 U.S 1207 (1983).

Recent Cases

[No cases were identified within the relevant time period.]

D. Statutes of Limitations

When the FLSA was initially enacted, no limitations period was provided and civil actions brought under the FLSA were governed by state statutes of limitations. However, in 1947, as part of Congress' response to the Supreme Court's expansive reading of the FLSA, Congress enacted the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 216, 251-262. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 131-32 (1988). The Portal-to-Portal Act requires that an action be commenced within two years, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. 255(a). Originally the Portal-to-Portal Act contained a two-year statute of limitations period that did not distinguish between willful and non-willful violations. However, in 1966, with little explanation in the legislative history, Congress enacted the three-year exception for willful violations. See Richland Shoe, 486 U.S. at 132. The plaintiff has the burden to prove a defendant's conduct is willful, and does so by showing that "the employer knew or showed reckless disregard of the matter of whether its conduct was prohibited by the [EPA.]." Richland Shoe, 486 U.S. at 132-33. If an employer is deemed to have acted reasonably in determining its legal obligations, its action cannot be deemed willful. Id., at 135 n. 13. However, an employer's

failure to make a determination that a practice violates the FLSA supports a conclusion of recklessness. Sakas v. Settle Down Enterprises, Inc., 90 F.Supp.2d 1267, 1278 (N.D. Ga. 2000).

Recent Cases

In Lavin-Mceleney v. Marist College, 239 F.3d 476 (2d Cir. 2001), the Second Circuit affirmed a judgment awarding plaintiff back pay and liquidated damages on her EPA claim and denied the plaintiff's appeal of the trial court's use of a special verdict form. The court rejected the plaintiff's argument, on cross-appeal, that the verdict form erroneously instructed the jury not to consider her Title VII claim if it found, as it did, that any violation of the EPA was not willful. Id. at 482. While recognizing the requirement that claims under the EPA and Title VII must be construed in harmony and the absence of an intent requirement under the EPA, the court stated that it is not clear that a finding of no willfulness under the EPA precludes a finding of intent under Title VII. Id. However, because the Second Circuit has never plainly adopted a rule of "non-equivalence," the court determined that the special verdict form did not constitute plain error. Id.

In Becker v. Gannett Satellite Information Network, Inc., 2001 U.S. App. LEXIS 10574 (4th Cir. March 1, 2001), the Fourth Circuit affirmed summary judgment for the employer on a female news editor's claim that she was paid less than her fellow male editors. The court held that Becker's EPA claims were filed outside of the EPA's statute of limitations. Id. at 7. It rejected her continuing violations argument because she could not show a violation within the statute of limitations and rejected her equitable tolling argument for lack of evidence her employer had deceived her from realizing she had a potential cause of action. Id. at 7-8.

In Ameritech Benefit Plan Committee, et al., v. Communications Workers of America, 220 F.3d 814, 824 (7th Cir. 2000), the Seventh Circuit affirmed summary judgment for Ameritech on Equal Pay Act claims of female Ameritech employees. The female employees had been denied credit toward pension benefits for maternity leave periods taken prior to 1979. Id. at 817. As a result, their pension benefits were lower than those of male employees who had not taken pregnancy or maternity leaves. Id. The court held that the employer had met its burden to prove that the disparity in pensions resulted from its Net Credited Service ("NCS") system, which amounted to a *bona fide* seniority system or "a factor other than sex." Id. at 824, *citing* 29 U.S.C. § 206(d)(1). The court also held that the females claims were time barred because they were not presented within two years of their accrual, but rather "many years after the initial decision not to adjust the employees' time in service for pre-1979 pregnancy leaves" which had been made in 1994. Id. In doing so, the court rejected the employees' contention that Ameritech's continued use of pre-1979 NCS computations was a fresh violation of the statute. Id.

In Snider v. Belvidere Township, 216 F.3d 616 (7th Cir. 2000), the Seventh Circuit affirmed summary judgment for the employer on a plaintiff's EPA claim. The plaintiff was a residential deputy assessor who alleged in her complaint that her employer hired a less experienced and qualified assessor at a salary higher than her own. The court held she failed to state a claim under the EPA because she received a forty cent raise on the same day the male's employment began, which increased her salary above his starting pay. Id. at 619. The court

declined to consider whether she was disparately paid with respect to a second male assessor because she did not reference that employee's pay or allege it violated the EPA in her Complaint and so was now time-barred from doing so. Id. at 619.

E. Burdens of Proof

The burdens of proof under the EPA differ from the familiar McDonnell Douglas burden shifting used in individual Title VII cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

1. *Prima Facie* Case:

A *prima facie* case of an EPA violation is shown if an employer "pays different wages to employees of opposite sexes "for equal work on jobs ... [requiring] equal skill, effort, and responsibility, and which are performed under similar working conditions.' " Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974)(quoting 29 U.S.C. § 206(d)(1)); Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539, 547 (11th Cir.1991). In order to establish an EPA claim, the plaintiff need not prove that the defendant acted with discriminatory intent. Mitchell v. Jefferson Co. Bd. Of Ed., 936 F.2d 539, 547 (11th Cir. 1991).

Recent Cases

In Lavin-Mceleney v. Marist College, 239 F.3d 476 (2d Cir. 2001), the Second Circuit affirmed a judgment awarding plaintiff back pay and liquidated damages on her EPA claim. The plaintiff was the only assistant professor in the defendant's criminal justice department and one of only three in her division. Id. at 481. The employer contended that the plaintiff failed to identify a higher-paid male professor in her department and that she impermissibly compared herself to a male employee statistical composite rather than an actual male employee. Id. at 480. The court held that the plaintiff validly identified a specific male comparator in a job outside her department and that the jury had reasonably found the jobs to be "substantially equal" based upon expert evidence. Id. at 481. Furthermore, the court held that statistical evidence of a gender-based salary disparity among comparable professors properly contributed to plaintiff's case in conjunction with her identification of a specific male comparator. Id. at 481. By extrapolating from a pool of the entire faculty at Marist, the court ensured that plaintiff could not create an impression of an Equal Pay Act violation, by comparison to a single male, where no widespread gender discrimination existed. Id.

In Gerbush v. Hunt Real Estate Corp., 2000 U.S. App. LEXIS 29010 (2d Cir. November 9, 2000), the Second Circuit affirmed summary judgment for the employer on the EPA claim of a former employee of a real estate company. Without stating the reasons for its decision, the court summarily affirmed the district court's finding that the plaintiff, a former branch manager, did not satisfy the elements of a *prima facie* case under the EPA by demonstrating that she and her comparators (male branch managers) performed equal work on jobs requiring equal skill, effort, and responsibility, and that the jobs were performed under similar working conditions. Id. at 2-3.

In Stanziale v. Jargowski, 200 F.3d 101 (3rd Cir. 2000), the Third Circuit reversed summary judgment for the employer on a male plaintiff's EPA claim against Monmouth County Board of Health. In its analysis, the court stated that EPA claims are analyzed under a two-step burden-shifting paradigm, specifically differentiating their analysis from those of Title VII or ADEA claims done under the burden-shifting framework of McDonnell Douglas. Id. at 107. The court stated that after a plaintiff establishes her *prima facie* case by demonstrating that employees of the opposite sex were paid differently for equal work, the burden of persuasion shifts to the employer to demonstrate the applicability of one of the Act's four affirmative defenses. Id. The EPA requires the employer not merely to articulate a reason that could explain the disparity, but the one that in fact motivated the disparity. Id. at 108-09. While the court observed that the employer had proffered explanations which could explain the disparity, it held that the record was missing evidence that demonstrates that the disparity was in fact made based upon "any factor other than sex." Id. at 108.

In Becker v. Gannett Satellite Information Network, Inc., 2001 U.S. App. LEXIS 10574 (4th Cir. March 1, 2001), the Fourth Circuit affirmed summary judgment for the employer on a female news editor's claim that she was paid less than her fellow male editors. The court distinguished between a plaintiff's burden under the EPA to show the employer paid more to an employee of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions…" and a plaintiff's more "relaxed" burden under Title VII under which she need only show that "the job she occupied was similar to higher paying jobs occupied by males." Id. at 8-9. The court held Becker failed to demonstrate that any male had an editorial job comparable to her own, because their coverage and writing responsibilities were substantially different. Id. at 10.

In Conti v. Universal Enterprises, Inc., 2002 U.S. App. LEXIS 20189 (6th Cir. September 20, 2002), the Sixth Circuit acknowledged that unlike the EPA, in a wage claim under Title VII, the plaintiff need not identify a male comparator who held a substantially similar job position. If the plaintiff cannot identify a male comparator, the plaintiff must come forward with circumstantial or direct evidence the defendant discriminated against her in terms of her salary based on sex. The court held that the plaintiff must do more than point to discrepancies in pay between male and female employees in the company.

In Lewis v. State of Oklahoma, 2002 U.S. App. LEXIS 12687, **31 (6th Cir. June 18, 2002), the Sixth Circuit acknowledged that unlike Title VII, in an EPA case, the employer carries the burden of persuasion regarding the affirmative defenses.

In Brune v. BASF Corp., 2000 U.S. App. LEXIS 26772 (6th Cir. October 17, 2000), the Sixth Circuit reversed summary judgment on an employee's wage discrimination claim under the EPA. The employee was a chemist who alleged she was paid a lower wage than another chemist. Id. at 13. The employer's affirmative defense was that it paid the male a higher salary because it had hired him away from a competitor and because he received higher performance evaluations. Id. The appellate court held the lower court had erroneously required the employee to rebut the employer's justifications, stating that those justifications were affirmative defenses on which the defendant bore the burden of proof. Id. The appellate court stated that the lower court should have required the employer to demonstrate that there was no genuine issue as to whether the

difference in pay was due to a factor other than sex. Id. at 14. However, the employer had presented no evidence of the male's former higher salary or market conditions, and so failed to meet its burden of proving the affirmative defense of nongender-based wage differential. Id.

In Lacey v. Robertson, 2000 U.S. App. LEXIS 15427 (6th Cir. June 21, 2000), the Sixth Circuit affirmed summary judgment for the employer on the EPA and Title VII claims of a *pro se* male plaintiff. The court held that when an EPA claim and a Title VII claim arise out of the same set of facts, both stating a claim of wage discrimination, that the "standards of liability under the two statutes are sufficiently similar" that the disposition with respect to the two claims should be the same. Id. at 5. Lacey was a substance-abuse counselor who alleged that two similarly situated females were paid higher. The court applied a McDonnell-Douglas/Burdine a disparate-treatment analysis to plaintiff's EPA claim. Id. at 6. The court held that the employer "articulated a legitimate, nondiscriminatory reason for its differing pay rates, i.e., that the comparator employees had greater levels of education and prior experience that than the plaintiff, and that the plaintiff failed to raise a genuine issue of material fact concerning whether the employer paid him less due to gender. Id. at 8.

In Simmons v. New Public School Dist. No. Eight, 251 F.3d 1210 (8th Cir. 2001), the Eighth Circuit reversed summary judgment for the employer on the EPA claim of an administrator in the school district. The plaintiff sought to compare her salary to that of a male contemporary and to those of males hired to replace her a year after she left. Id. at 1213-14. The plaintiff also complained of Title VII violations, and although her charge of discrimination alleged an EPA violation, her Complaint did not. Id. at 1215. The court merged its consideration of her Title VII and EPA claims, stating that the standards are the same whether the plaintiff proceeds under Title VII or the EPA, when she alleges "unequal pay for equal work on the basis of sex." Id. The court rejected the plaintiff's comparison with her contemporary because although the male's administrator's pay increased at a higher percentage than hers for each school year, the gap between their salaries actually increased in plaintiff's favor to the extent that she was paid more than the male administrator. Id. at 1216. Even though the plaintiff did not allege that she was paid less than her successors in her charge, the court held her claim grew out of the facts in her charge because had the EEOC investigated her claim, it would have considered the pay of her successors. Id. at 1216-17. The court stated that in EPA cases, a plaintiff can meet her *prima facie* burden by comparing her salary to that of predecessors or successors, even those successors who are not immediate. Id. at 1217. Applying the McDonnell- Douglas standard, the court determined plaintiff stated a *prima facie* case under Title VII and the EPA that she was paid less than her successors and remanded the case to the district court for further proceedings. Id.

In Buettner v. Eastern Arch Coal Sales Co., Inc., 216 F.3d 707 (8th Cir. 2000), the Eighth Circuit affirmed summary judgment for the employer on an employee's claim of wage disparity under Title VII, stating that in the Eighth Circuit, the EPA standards apply to Title VII claims of "unequal pay for equal work." Id. at 718-19.

In Prentice v. University of Tulsa, 2002 U.S. App. LEXIS 17902 (10th Cir. August 29, 2002), the Tenth Circuit upheld summary judgment for the employer on an EPA claim based

upon the employee's failure to satisfy her *prima facie* burden to present evidence comparing her wages with those of a male in a comparable position.

In Toth v. Gates Rubber Co., 2000 U.S. App. LEXIS 14374 (10th Cir. June 21, 2000), the Tenth Circuit affirmed summary judgment for the employer on plaintiff's EPA claim based upon the complete lack of any record citations in her appellate brief to establish any element of her *prima facie* case, her rate of pay, or the rate of pay received by the two males allegedly paid more than her. Id. at *16. The court rejected the plaintiff's contention that she had been denied the discovery necessary for her response because she failed to submit an affidavit specifically demonstrating how the requested discovery would provide evidence relevant to the motion for summary judgment. Id. at *17 n.6.

2. Affirmative Defenses

Once a *prima facie* case is demonstrated, to avoid liability the employer must prove by a preponderance of the evidence that the differential is justified by one of four affirmative defenses set forth in the EPA. Corning Glass Works, 417 U.S. at 196-97, 94 S. Ct. at 2229; Mulhall v. Advance Security, Inc., 19 F.3d at 590. Those defenses are: "(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." 29 U.S.C. § 206(d)(1). The employer bears the burden of proof for these affirmative defenses. Corning Glass Works, 417 U.S. at 196-97, 94 S. Ct. at 2229; Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1018 (11th Cir.1994). The burden is a "heavy one," because the "defendants must show that the factor of sex provided *no basis* for the wage differential," Mulhall v. Advance Security, Inc., 19 F.3d 586 (11th Cir. 1994). The employer must show that none of the decision-makers were influenced by gender bias. Anderson v. WBMG-42, 253 F.3d 561, 566 (11th Cir. 2001). If the defendant fails to meet its burden, the court must enter judgment for the plaintiff. Miranda v. B & B Cash Grocery Store, 975 F.2d 1518, 1533 (11th Cir.1992).

Recent Cases

In Rodriguez, et al. v. Smithkline Beecham, 224 F.3d 1 (1st Cir. 2000), the First Circuit affirmed summary judgment for the employer on the EPA claims of a female analytical chemist. The court held that the employer demonstrated that the different pay levels of the plaintiff and her comparators were based upon standing company policies designed to protect salary and grade levels and allow the company to transfer employees to lower level positions without detriment to compensation, both factors other than sex.

In Ryduchowski v. Port Authority of New York and New Jersey, 203 F.3d 135 (2d Cir. 2000), the Second Circuit reversed an order granting judgment as a matter of law to the employer after a jury found that the plaintiff had impermissibly received a lower pay increase than a male comparator. In response to a special interrogatory, the jury found that the Authority failed to establish its affirmative defense of a valid merit system. Id. at 137. The court stated that a merit system must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria; employees must be aware of the merit system, and the merit system must not be gender based. Id. at 142-43. The Authority's merit

system allegedly required consideration of attendance records and positions within salary grade for determination of pay increases. The Fourth Circuit held that the district court was wrong to grant a directed verdict because the jury could reasonably have concluded from the absence of evidence that such information had actually been considered that the Authority failed to properly correlate merit increases to employee evaluations. Id. at 143-44. Evidence of gender prejudice by the plaintiff's supervisors supported the jury's determination that the Authority's evaluation procedures were not systematically applied to all employees. Id. at 144. Finally, the court rejected the employer's contention that the plaintiff's claim should be denied based upon her failure to complain about her evaluation contemporaneously because the EPA contains no requirement that a plaintiff contemporaneously complain to her supervisors about her unequal pay. Id. at 144-45.

In Mowery v. Rite Aid Corp, 2002 U.S. App. LEXIS 14691 (6th Cir. July 17, 2002), the Sixth Circuit upheld a district court's grant of summary judgment against a plaintiff when the employer presented a factor other than sex defense that the comparator's salary was established during a "buyout" of the store where the comparator previously worked.

In Lewis v. State of Oklahoma, 2002 U.S. App. LEXIS 12687, **31 (6th Cir. June 18, 2002), the Sixth Circuit held that the employer was entitled to summary judgment on its factor other than sex defense when it showed that the male comparator was promoted several years prior to the female plaintiff, and the company had a policy of not increasing the salary of an employee when they are initially promoted if the employee was paid at a salary above the starting salary for the position to which the employee was promoted.

In Waggoner v. Supervalu Holding, Inc., 2001 U.S. App. LEXIS 1880 (6th Cir. January 26, 2001), the Sixth Circuit affirmed summary judgment for the employer on plaintiff's EPA claim that she received less pay than similarly-situated men. The court adopted the findings below that the defendant paid plaintiff and its other technical buyers according to a wide variety of skills, experience and other factors unrelated to sex. Id. at 5.

In Brune v. BASF Corp., 2000 U.S. App. LEXIS 26772 (6th Cir. October 17, 2000), the Sixth Circuit reversed summary judgment on an employee's wage discrimination claim under the EPA. The employee was a chemist who alleged she was paid a lower wage than another chemist. Id. at 13. The employer's affirmative defense was that it paid the male a higher salary because it had hired him away from a competitor and because he received higher performance evaluations. Id. The appellate court held the lower court had erroneously required the employee to rebut the employer's justifications, stating that those justifications were affirmative defenses on which the defendant bore the burden of proof. Id. The appellate court stated that the district court should have required the employer to demonstrate that there was no genuine issue as to whether the difference in pay was due to a factor other than sex. Id. at 14. The court held that the employer failed to meet its burden of proving the affirmative defense because it did not present evidence regarding the male's former salary or the market conditions requiring his hire at a salary higher than that paid to the female. Id.

In Kahn v. Dean & Fulkerson, P.C., 2000 U.S. App. LEXIS 29386 (6th Cir. November 13, 2000), the Sixth Circuit affirmed an order denying partial summary judgment to the plaintiff

and granting summary judgment to the employer on the plaintiff's EPA claim. The plaintiff was an attorney who alleged that different wages were paid to her and a male hired one and one-half years later for substantially equal work. The court concluded that no disputed issues of fact existed as to the fact that the pay differential and bonus distribution were based upon factors other than sex because the plaintiff negotiated a contract that provided compensation under which the firm carried the risk for having to pay expenses, whereas the male comparator accepted a contract under which he shared in the risk of covering expenses. Id. at 26-27.

In Markel v. Board of Regents of the Univ. of Wisconsin, 276 F.3d 906, 913 (7th Cir. 2002), the Seventh Circuit held that a university was entitled to summary judgment on its factor other than sex defense because the university provided evidence that the male account manager's pay was set higher than that of the female account manager because of the number of years he had been employed with the university and because he had formerly been a program director. The court explained that the factor other than sex defense need not be related to the particular position at issue and need not be business-related. Id.

In Fyfe v. City of Fort Wayne, 241 F.3d 597 (7th Cir. 2001), the Seventh Circuit affirmed summary judgment for the employer on an employee's EPA claim, which alleged that the City had paid a female gardener call-in pay (or overtime) for pesticide spraying, a duty the plaintiff, a male gardener, was required to perform during regular working hours. Fyfe's claim was based upon the employer's practice of permitting a female gardener to work overtime, while not permitting him to do so. Id. The court held that, regardless of whether the denial of the opportunity to work overtime satisfies the element of an EPA claim that requires evidence that "different wages were paid to employees of the opposite sex," in this case, there was a legitimate business-related reason based upon a factor other than sex for allowing Fyfe to spray during regular hours (he worked in a greenhouse which required regular spraying) and not permitting the female gardener to do so (she worked in a botanical garden open to the public which only rarely required spraying.) Id. at 600-01.

In Wollenburg v. Comtech Manufacturing Co., 201 F.3d 973 (7th Cir. 2000), the Seventh Circuit affirmed summary judgment for the employer on the EPA claim of a former employee. Plaintiff was a production supervisor who alleged she had been paid at a lower rate than the employer's three other production supervisors. The plaintiff did not dispute that the related experience of the female and one of the males merited a higher salary, but contended that the remaining male's 26 years of experience as a former meat manager did not warrant his higher pay, especially in light of the fact that she had four years experience as a former manager of a Merry Maid subfranchise and extensive non-supervisory manufacturing experience. Id at 976. The court held that it did not have to determine which employee's previous supervisory experience was more relevant because the employer's undisputed judgment to pay a higher-wage for a greater length of supervisory experience is a nondiscriminatory reason for wage disparity. Id.

In Dennis v. Dillard Dep't. Stores, Inc., 107 F.3d 523 (8th Cir. 2000), the Eighth Circuit reversed a jury verdict for the plaintiff on her EPA claim and remanded the case for a new trial. The court held that the trial court had erroneously denied the employer leave, three months before trial, to amend its answer to include its affirmative defense that the alleged pay disparity

was based upon a factor other than sex, namely the lawful "red circling" of the pay of her comparator. Id. at 526. The court stated that the "factor other than sex" defense is a complete defense to liability under the EPA, and that it could not be sure that the jury would have rendered the same verdict had the employer been permitted to present this additional defense. Id.

In Hughmanick v. County of Santa Clara, 2000 U.S. App. LEXIS 417 (9th Cir. January 7, 2000), the Ninth Circuit affirmed summary judgment for the employer on an EPA claim based on the employer's affirmative defense that the disparity in its compensation of the plaintiff and similarly-situated male employees was based upon an agreement during reorganization and a job classification change, which constituted factors other than sex. The court held that its analysis was also dispositive of plaintiff's Title VII claim because "Title VII incorporates the Equal Pay Act defenses, so a defendant who proves one of the defenses cannot be liable under the Equal Pay Act or Title VII. Id. at 3.

In Steger v. General Electric Co., 2003 U.S. App. LEXIS 707, *32 (11th Cir. January 17, 2003), the Eleventh Circuit held that a salary retention plan whereby the employer maintained an employee's prior salary upon a demotion was a factor other than sex even though male managers who were paid higher than female non-managers were demoted at higher salaries to hold the same job positions.

3. Pretext

When the defendant overcomes its burden, the plaintiff must rebut the explanation by showing with affirmative evidence that it is a pretext or offered as a post-event justification for a gender-based differential. Schwartz v. Florida Bd. of Regents, 954 F.2d 620, 623 (11th Cir.1991) (per curiam).

Recent Cases

In Lavin-Mceleney v. Marist College, 239 F.3d 476 (2d Cir. 2001), the Second Circuit affirmed a judgment awarding plaintiff back pay and liquidated damages on her EPA claim. The court held that statistical evidence of a gender-based salary disparity among comparable professors properly contributed to plaintiff's case in conjunction with her identification of a specific male comparator. Id. at 481. By extrapolating from a pool of the entire faculty at Marist College, the court ensured that plaintiff could not create an impression of an Equal Pay Act violation, by comparison to a single male, where no widespread gender discrimination existed. Id.

In Siler-Khodr v. Univ. of Texas Health Science Center of San Antonio, 261 F.3d 542, 546-47 (5th Cir. 2002), the Fifth Circuit held that statistical proof that an employer had a practice or policy toward employees of the claimant's gender allows the court to infer that the actions taken against the plaintiff were merely pretext and that the action was really taken on the basis of the plaintiff's gender in conformance with the general practice of discrimination. The court also found that the plaintiff had overcome the University's defense that the wage disparity at issue was based on the employee's ability to obtain grants because the plaintiff showed that a dean had admitted that there was "no institutionally specified factors for determining annual

compensation" and the university had no policies showing that obtaining grants was a factor in setting the wages of professors. Id. at 548. The court also rejected the employer's defense that it was required to pay the male comparator a higher starting salary in order to keep the comparator's wife working for the university because the comparator testified that his primary reason for accepting the position was to transfer from private industry to a university research position. Id. at 549. Finally, the court rejected the University's defense that it was required to set the comparator's rate at an amount higher that the female professor because of market forces. The court held that the University's market force argument is "not tenable and simply perpetuates the discrimination that Congress wanted to alleviate…" Id.

In Kovacevich v. Kent State University, 224 F.3d 806 (6th Cir. 2000), the Sixth Circuit reversed an order by the trial court granting judgment as a matter of law after trial on plaintiff's EPA claim. The court concluded that a reasonable juror could find that Kovacevich and her male comparator were treated differently for comparable work. The plaintiff introduced evidence that the University's alleged "merit system" rewarded men disproportionately to women. Id. at 827. Noting specific evidence of discretionary decision-making and statistical disparities, the court held that she created a genuine issue as to whether the difference in her pay and the male comparator's was due to sex, or a factor other than sex. Id. at 828.

In Steger v. General Electric Co., 2003 U.S. App. LEXIS 707, *32 (11th Cir. January 17, 2003), the Eleventh Circuit held that evidence of gender bias by a supervisor was properly excluded because the supervisor was not involved in the decision to set the female employee's initial salary. Id. at 35. The court ignored evidence that the supervisor was involved in perpetuating the discriminatory pay of these employees. Id. at *14 n. 7.

F. Eleventh Amendment Immunity

courts have consistently found that the EPA constitutes a proper abrogation of Eleventh Amendment immunity.

Recent Cases

See, e.g., Siler-Khodr v. Univ. of Texas Health Science Center of San Antonio, 261 F.3d 542, 549-51 (5th Cir. 2002).

In Kovacevich v. Kent State University, 224 F.3d 806 (6th Cir. 2000), the Sixth Circuit reversed an order by the trial court granting judgment as a matter of law after trial on plaintiff's EPA claim. First it reexamined its position that the EPA constitutes a proper abrogation of Amendment immunity in light of the Supreme Court's holding in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), concluding, based upon the reasoning in Kimel, that the remedial scheme introduced by the EPA is congruent and proportional to Congress's § 5 enforcement power. Id. at 819. The court found that the statute targets intentional discrimination, that its remedial scheme is proportional to its anti-discriminatory aim, and that it does not prohibit substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection standard. Id. 819-20.

In Cherry v. Univ. of Wisconsin, 265 F.3d 541, 553 (7th Cir. 2001), the Seventh Circuit rejected the University's Eleventh Amendment defense because the EPA targets only "unconstitutional gender discrimination," which reduces the importance of Congressional findings of unconstitutional State action.

In Varner, et al., v. Illinois State University, 226 F.3d 927 (7th Cir. 2000), the Seventh Circuit affirmed the decision of the district court denying the University's motion to dismiss the EPA claims of a class of tenured and tenure-track female faculty members on the basis of Eleventh Amendment immunity. The University had appealed a previous affirmation of the district court's decision by the Seventh Circuit to the Supreme Court which had vacated and remanded the case to the Seventh Circuit for further consideration in light of Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). The court held that the Equal Pay Act is a piece of "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment." Id. at 936.

In Hundertmark v. State of Florida Dep't of Transportation, 205 F.3d 1272 (11th Cir. 2000), the Eleventh Circuit affirmed an order denying a motion to dismiss which claimed that the Eleventh Amendment bars suit against the State of Florida for claims under the EPA. Since the State conceded that Congress sufficiently expressed its intent to subject States to suit under the EPA, the question on appeal was whether Congress enacted the EPA pursuant to a valid exercise of its Section 5 remedial power under the Fourteenth Amendment. Id. at 1274. First the court held that Congress was not required to state the basis for its power to abrogate the State's sovereign immunity in its amendment of the EPA whereby it extended its scope to the States. Id. at 1274. It also held that the EPA's purpose to prevent and combat gender discrimination in the provision of wages is a valid goal of the Fourteenth Amendment. Id. at 1275. Applying the two-part test of congruence and proportionality, the court also held that the extension of the EPA to the States was a valid extension of Congress' powers under Section 5 because Congress identified in its legislation a "widespread and persisting deprivation of constitutional rights" of national import and that the EPA only validly enforces and remedies deprivations of already existent constitutional rights. Id. at 1276-77.

II. "Similarly Situated" Jobs

A plaintiff does not have to prove that the job held by her male comparator is identical; she need only demonstrate that the skill, effort and responsibility required in the performance of the jobs are "substantially equal." Miranda v. B&B Cash Grocery Store, 975 F.2d 1518, 1533 (11th Cir. 1992), quoting 29 U.S. C. §206(d)(1) and Corning Glass Works v. Brennan, 417 U.S. 188, 204 (1974). See also Arrington v. Cobb County, 139 F.3d 865, 876 (11th Cir. 1998)("although formal job titles or descriptions may be considered, the controlling factor in the court's assessment of whether two jobs are substantially equal must be actual job content"). A plaintiff need only show discrimination in pay with regard to one employee of the opposite sex. EEOC v. White and Son Enterprises, 881 F.2d 1006 (11th cir.1989); Meek v. Swift Trans. Co., 83 FEP Cases 1503, 1506-07 (D. Kan. 2000). In analyzing EPA cases, jobs rather than the individual employees holding those jobs are compared, and only the skills and qualifications actually needed to perform the jobs are considered. Mulhall, 19 F.3d at 586. The EPA applies when a plaintiff alleges an inequality between her pay and that of her predecessors and/or

successors. Arrington v. Cobb County, 139 F.3d 865, 876 (11th Cir. 1998); Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796, 799 (6th Cir. 1998); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 349 & n.30 (4th Cir. 1994); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1461-62 (7th Cir. 1994); Hodgson v. Behrens Drug Company, 475 F.2d 1041, 1049 (5th Cir. 1973); 29 CFR §1620.13(b)(2)("where an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex but receives a lower rate of pay than the person replaced, a *prima facie* violation of the EPA exists"). Comparison can also be made between employees employed in equal jobs in the same establishment although they work in different departments. 29 CFR § 1620.19; B & B Cash Grocery Store, 975 F.2d 1518 (11th Cir. 1992)(buyers in different departments of grocery store similarly situated for EPA purposes).

Recent Cases

In Gu v. Boston Police Department, 312 F.3d 6 (1st Cir. 2002), the First Circuit reviewed a district court's grant of summary judgment on the Equal Pay Act claims of two female plaintiffs. The court held that the male comparator's job was not sufficiently similar because it differed in "at least one significant way" due to the male's responsibility to testify as an expert witness. Id. at 25-26. The court did not discuss how often the male was required to testify as an expert witness. The court also found that another male comparator's department-wide management duties were not sufficiently similar to the females' more limited team wide management duties. Id. at 26. Finally, the court held that one of the females was not comparable to a male employee holding the same job title of senior crime analyst because the male had the additional duties of developing the department's intranet GIS, managing databases, and training other employees in database management. Id. at 26-27.

In Rodriguez, et al. v. Smithkline Beecham, 224 F.3d 1 (1st Cir. 2000), the First Circuit affirmed summary judgment for the employer on the EPA claims of a female analytical chemist who complained of disparity in wages in comparison to two different positions. With respect to the first position, the court held the named plaintiff failed to show that her position was substantially similar because, although there was an overlap in duties, several important functions were omitted from the role of the comparison position. Id. at 13. With respect to the second position, the court found the positions to be substantially dissimilar. Id. at 16. Although the job titles were the same, the comparator had additional managerial and supervisory duties as well as additional fiscal responsibility. Id.

In Lavin-Mceleney v. Marist College, 239 F.3d 476 (2d Cir. 2001), the Second Circuit affirmed a judgment awarding plaintiff back pay and liquidated damages on her EPA claim. The plaintiff was the only assistant professor in the defendant's criminal justice department and one of only three in her division. Id. at 481. The employer contended that the plaintiff failed to identify a higher-paid male professor in her department and that she impermissibly compared herself to a male employee statistical composite rather than an actual male employee. Id. at 480. The court held that the plaintiff validly identified a specific male comparator in a job outside her department and that the jury had reasonably found the jobs to be "substantially equal" based upon expert evidence. Id. at 481.

In Gerbush v. Hunt Real Estate Corp., 2000 U.S. App. LEXIS 29010 (2d Cir. November 9, 2000), the Second Circuit affirmed summary judgment for the employer on the EPA claim of a former employee of a real estate company. The court affirmed the district court's finding that the plaintiff, a former branch manager, did not satisfy the elements of a *prima facie* case under the EPA by demonstrating that she and her comparators (male branch managers) performed equal work on jobs requiring equal skill, effort, and responsibility, and that the jobs were performed under similar working conditions. Id. at 2-3.

In Conti v. Universal Enterprises, Inc., 2002 U.S. App. LEXIS 20189 (6th Cir. September 20, 2002), the Sixth Circuit held that it is insufficient to avoid summary judgment on an Equal Pay Act claim to rely on the plaintiff's conclusory allegations regarding the similarities of the comparators' jobs because the plaintiff must come forward with evidence of the specific job duties she and the comparators performed. The court also held that one comparator's job was dissimilar because unlike the plaintiff his job involved the use of a "highly sophisticated computer program that gives you complete digital tracking of all the functions of the managerial operation." Id. at **18.

In Mowery v. Rite Aid Corp, 2002 U.S. App. LEXIS 14691 (6th Cir. July 17, 2002), the Sixth Circuit held that the district court improperly granted summary judgment in a case in which the plaintiff compared her pharmacist job to those of other pharmacists working for the same employer in other locations. The employer admitted that the primary duties of filling prescriptions and servicing customers were the same in each store. The employer argued that the primary differences in the jobs related to the intensity of the workload and the type of clientele at different stores. The Sixth Circuit reversed summary judgment for the employer because the employer failed to explain how these potential differences impact its wage determinations. The plaintiff was able to show that the highest paid male pharmacists were not located at the "urban" stores and that the essential duties of all pharmacists were the same.

In Kahn v. Dean & Fulkerson, P.C., 2000 U.S. App. LEXIS 29386 (6th Cir. November 13, 2000), the Sixth Circuit affirmed an order granting summary judgment to the employer on the plaintiff's EPA claim. The plaintiff was an attorney who alleged that different wages were paid to her and a male hired one and one-half years later for substantially equal work. The court found that the plaintiff successfully demonstrated that she and the male attorney were engaged in work involving substantially equal skill, effort, responsibility and working conditions. Id. at 19. However, the court concluded that no disputed issues of fact existed as to the fact that the pay differential and bonus distribution were based upon factors other than sex. Id. at 26-27.

In Wolf v. Northwest Indiana Symphony Society, 250 F.3d 1136 (7th Cir. 2001), the Seventh Circuit affirmed summary judgment for the employer on the claim of a male symphony member that the Symphony paid him less similarly-situated female employees in violation of the EPA. Wolf's claim was based upon his contention that the Symphony provided health insurance benefits to female employee's family members, but the record established that the only employees who received such benefits were the finance director and marketing director. Wolf conceded that these employees had different duties than his own as a Production Stage Manager. Id. at 1140. The court affirmed summary judgment based upon the absence of evidence in the record that the jobs required similar skill, effort or responsibility. Id. at 1141.

In Strickert v. Wicker World Enterprises, 2000 U.S. App. LEXIS 19153 (7th Cir. July 31, 2000), the Seventh Circuit affirmed summary judgment in favor of the employer on a male employee's EPA claim. The plaintiff was a night-shift packing supervisor who alleged he was not paid as much as the female general warehouse supervisor. Id. at 2. The employer responded that the position of general warehouse supervisor had more responsibility and that the incumbent warehouse employee had more seniority. Id. The plaintiff's claim failed for lack of evidence to support his contentions that the two positions required similar skills or that he directly supervised more employees based upon his contention that the general warehouse supervisor relied upon assistant supervisors. Id. at 5.

In Benjamin v. Katten Muchin & Zavis, 2001 U.S. App. LEXIS 9442 (7th Cir. April 25, 2001), the Seventh Circuit affirmed summary judgment for the employer on a male paralegal's EPA claim. The court held that Benjamin failed to refute the employer's evidence that the female comparator employee bore responsibilities in the department in addition to those assigned to Benjamin. Id. 18-19. It also rejected his argument that he was more qualified based upon his previous experience as a paralegal, on the basis that the determination of whether two employees perform equal work is a function of whether their jobs involve a "common core of tasks" or whether a "significant portion of their jobs is identical" rather than on the individual qualifications of the employees. Id. at 19.

In Howard v. Lear Corp. EEDS & Interiors, 234 F.3d 1002 (7th Cir. 2000), the Seventh Circuit affirmed summary judgment for the employer on the EPA claim of a female human resources coordinator who compared herself to the company's human resource managers. The employer's other HR managers were employed at various plants which varied in size. Id. at 1004. Plaintiff's plant was one of the smaller facilities employing only salaried workers, which was assigned to a manager along with another small facility which was located nearby. Id. The court held that even if the plaintiff showed that she performed the same "common core of tasks" as other managers at other plants, the evidence demonstrated that her male counterparts were responsible for additional tasks which made their jobs "substantially different," and required increased skill, effort and responsibilities. Id. at 1005. The plants to which the male managers were assigned employed substantially larger numbers of employees, some of which were subject to collective bargaining agreements and paid hourly. Id. The court held that the HR managers at these facilities shouldered substantially greater responsibilities and "headaches." Id.

In Lane v. Kohl's Food Stores, Inc., 217 F.3d 919 (7th Cir. 2000), the Seventh Circuit upheld a jury verdict for the employer on the EPA claims of a class of female grocery clerks who worked in the employer's bakery and deli departments. The court affirmed the trial judge's decision which permitted evidence of the median jobs among the defendant's state-wide stores and excluding "outliers" involving the largest and smallest stores. Id. The court determined with respect to the EPA jury instructions that the phrases "substantially the same" and "substantially equal" were "substantially identical" for the purposes of instructing the jury as to the standard for comparing various jobs. Id. at 925. The court also approved the judge's instruction to the jury that the decision should "not be based upon job titles or performance requirements" but upon "actual job duties and performance requirements." Id.

In Hunt v. Nebraska Public Power District, 282 F.3d 1021 (8th Cir. 2002), the Eighth Circuit reversed an order vacating a jury verdict in favor of the plaintiff on an EPA claim. The plaintiff alleged that she had been performing substantially the same duties as her former male supervisor after his retirement for lower pay. Id. at 1024-25. The employer argued that Hunt's job was not substantially equal to that of her former supervisor because he had performed supervisory responsibilities she had never performed. Id. at 1030. The court held that whether the difference in their supervisory duties involved more than an insubstantial or minor difference in the amount of skill or responsibilities involved a factual inquiry, and that it was not unreasonable for the jury to have concluded the jobs were substantially equal. Id.

In Broadus v. O.K. Industries, Inc., 226 F.3d 937 (8th Cir. 2000), the Eighth Circuit affirmed a judgment entered in favor of the employee's EPA claim after a jury trial. Broadus was the only Operations Coordinator employed at O.K. Industries, and had no immediate predecessor or contemporaneous comparator who engaged in substantially equal work. The court stated that the fact finder appropriately considered the overall jobs, rather than just individual segments of the jobs, when considering whether the employees to whom she compared herself performed substantially the same work. Id. at 942. The court held that under the circumstances of this case, that Broadus appropriately compared herself to non-immediate successors to demonstrate EPA violations. Id.

In Lee v. Arizona Bd. of Regents, 2001 U.S. App. LEXIS 26003 (9th Cir. December 3, 2001), the Ninth Circuit affirmed an order dismissing the plaintiff's EPA claim on summary judgment. The court held that Lee did not establish a *prima facie* case under the EPA because she provided no facts supporting the conclusion that a common core of tasks existed between her duties as a committee chair and the duties of the more highly-compensated position of department coordinator. Id. at 9. She also failed to show why the additional tasks assigned to one of the positions, of supervising, evaluation and hiring, were insufficient to render the positions substantially different. Id.

In Ferroni v. Teamsters, Chauffeurs & Warehousemen, Local No. 222, 297 F.3d 1146 (10th Cir. 2002), the Tenth Circuit affirmed summary judgment for the employer-union on the EPA claim of a former female employee, who performed the duties of an organizer and business agent. The female plaintiffs tried to compare her job duties to those perfomred by male business agents. The court noted that there were significant differences between the positions of organizer and business agent. Id. at 1148. The court held that Ferroni failed to produce evidence to show that her combined duties as organizer and business agent were substantially equal to the duties performed by the male business agents. Id. at 1150.

In Pfahl v. Synthes, 2001 U.S. App. LEXIS 15367 (10th Cir. July 6, 2001), the Tenth Circuit affirmed summary judgment for the employer on plaintiff's EPA claims. The plaintiff was a senior machine operator who made a higher salary than any of the four males holding the same position in her department. However, she contended that she was paid less than another machine operator hired at the same time in another department. The court affirmed judgment for the employer because the plaintiff was hired by a different person in a different department with different machines than her comparator, and the male comparator with whom she sought to compare herself also had extensive previous experience.

In Deflon v. Danka Corp., Inc., 2001 U.S. App. LEXIS 123 (10th Cir. January 5, 2001), the Tenth Circuit affirmed summary judgment on the plaintiff's EPA claim. The plaintiff was a female sales representative who alleged that male sales representatives received a promise of guaranteed commission for their first 120 days, as opposed to females, and that men did not incur "drawbacks" (reductions in the amount of commission for failure to meet quota.) The court held that plaintiff had only established "theoretically" that commission payments were preferable to promises not to draw back, rather than a practice of paying females less than males. Id. at 33. It also held that the plaintiff failed to produce sufficient evidence that the jobs of the male sales representatives required "equal, skill, effort, and performance." [sic] Id. at 34.

In Doolin v. Moffat County, Bd. of Cty. Commissioners, 2000 U.S. App. LEXIS 16478 (10th Cir. July 14, 2000), the Tenth Circuit affirmed summary judgment for the employer on plaintiff's EPA claim. The plaintiff and her comparators were maintenance supervisors for recreational facilities. Id. at 2. The defendant submitted affidavits demonstrating significant differences in the size and scope of the recreational facilities maintained by plaintiff and her comparators and in the extent of their responsibilities. Id. at 5. Plaintiff's "broadly drawn" and "conclusory" allegations that her "primary duties" were similar to those of her co-workers were insufficient to raise a material factual dispute as to whether her position was similar to that of her male co-workers in terms of "skill, effort, responsibility and working conditions." Id. at 5.

III. Class Action Issues

Class actions under the EPA are brought under the FLSA collective action provision, 29 U.S.C. § 216(b). These cases differ from the true class actions under Rule 23 in that in order to participate in the action, the employee must affirmatively opt in to the case by filing a written consent to join form. 29 U.S.C. § 216(b); Garner v. G.D. Searle, 802 F.Supp. 418, 421 (M.D. Ala. 1991); Harrison v. Enterprise Rent-A-Car, Inc., 1998 U.S. Dist. LEXIS 13131, *3 n.1, 4 Wage & Hour Cases 2d (BNA) 1339 (M.D. Fla. 1998). An individual that does not opt in to the litigation is not bound by the court's decision.

The FLSA's "collective action" provision allows one or more employees to bring an action "on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); Dybach v. State of Fla. Dept. of Corrections, 942 F.2d 1562, 1566 (11th Cir. 1991); Harrison, 1998 U.S. Dist. LEXIS 13131, * 3 n. 1. "The evident purpose of the Act [FLSA] is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other." Shain v. Armour & Co., 40 F.Supp. 488, 490 (W.D. Ky. 1941).

To serve the "broad remedial purpose" of the FLSA, courts are afforded the power to give notice to other potential class members to "opt in" to plaintiffs' case. Dybach, 942 F.2d at 1567, quoting Braunstein v. Eastern Photographic Lab., Inc., 600 F.2d 335, 336 (2nd Cir. 1975), cert. denied, 441 U.S. 944 (1979). See also Hoffmann-La Roche v. Sperling, 493 U.S. 165 (1989) ("[a] collective action allows … plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources"). Court facilitation of a section 216(b) collective action also serves the goal of "efficient resolution in one proceeding of common issues of law

and fact arising from the same alleged … activity." Hoffmann-La Roche, 493 U.S. at 170. Additionally, early court-authorized notice protects against "misleading communications" by the parties, resolves the parties' disputes regarding the content of any notice, prevents the proliferation of multiple individual lawsuits, assures joinder of additional parties is accomplished properly and efficiently, and expedites resolution of the dispute. 493 U.S. at 170-172; Garner, 802 F. Supp. at 427.

For an opt-in class to be created under section 216(b), an employee need only show that she is suing her employer for herself and on behalf of other employees "similarly situated." Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir.), cert. denied, 117.S.Ct. 435 (1996). Plaintiffs' claims and positions need not be identical to the potential opt ins, they need only be similar. Id.; Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (M.D. Fla. 1994). Plaintiffs need only demonstrate "a reasonable basis" for the allegation that a class of similarly-situated persons may exist. Grayson, 79 F.3d at 1097.

Court facilitated notice to the "class" regarding FLSA collective overtime litigation is warranted when plaintiffs demonstrate that there are others who may wish to opt in and who are "similarly situated" with respect to the job requirements and pay provisions. Dybach, 942 F.2d at 1567-68; Garner, 802 F. Supp. at 419; Hipp v. Liberty Nat'l Life Ins. Co., 164 F.R.D. 574, 575 (M.D. Fla. 1996); Belcher v. Shoney's, Inc., 927 F. Supp. 249, 251 (M.D. Tenn. 1996). The standard for collective action notice "is a 'lenient one.'" Mooney v. Aramco Services Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995); Harrison, 1998 U.S. Dist. LEXIS 13131, *12. "It is considerably 'less stringent' than the proof required pursuant to Fed.R.Civ.P. 20(a) or Fed.R.Civ.P. 23 for class certification." Grayson, 79 F.3d at 1096.

Discovery is not necessary for the court to issue notice. At the notice stage, courts determine whether plaintiffs and potential opt ins are "similarly situated" based upon detailed allegations in a complaint supported by affidavits. Grayson., 79 F.3d at 1097; Mooney, 54 F.3d at 1213-14; Harrison, 1998 U.S. Dist. LEXIS 13131, *8; Brooks v. Bellsouth Telecom, 164 F.R.D. 561, 568 (N.D. Ala. 1995); Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 406-07 (D. N.J. 1998), aff'd. 493 U.S. 165 (1989). Defendant's rebuttal evidence does not bar section 216(b) notice; plaintiffs' substantial allegations need only successfully engage the employer's affidavits to the contrary. Grayson, 79 F.3d at 1099 n. 17.

Once the court makes the preliminary determination that the potential plaintiffs are similarly situated, the case proceeds as a collective action throughout discovery. Harrison, 1998 U.S. Dist. LEXIS 13131, *13; Hoffman v. Sbarro, 982 F.Supp. 249 (S.D.N.Y. 1997); Herrera v. Unified Management, 2000 U.S. Dist. LEXIS 12406, 6 Wage & Hour Cas.2d (BNA) 922 (N.D. Ill. 2000). Discovery is relevant thereafter both as to the merits of the case and to the second step in the collective action procedure, during which the court evaluates conflicting evidence developed in discovery to test the validity of the preliminary decision made at the notice stage. See Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001).

Typically discovery can be limited to a representative sample of the opt-in plaintiffs. McCrath v. City of Philadelphia, 1994 WL 45162 (E.D. Pa. 1994); Atkins v. Mid-America Growers, Inc., 143 F.R.D. 171, 174 (N.D. Ill. 1992). In addition, courts may permit

representative testimony at trial. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); In re Food Lion Effective Scheduling Litigation, 861 F. Supp. 1263(E.D.N.C. 1994).

Recent Cases

In Varner, et al., v. Illinois State University, 226 F.3d 927 (7th Cir. 2000), the Seventh Circuit affirmed the decision of the district court denying the University's motion to dismiss the EPA claims of a class of tenured and tenure-track female faculty members on the basis of Eleventh Amendment immunity. The University had appealed a previous affirmation of the district court's decision by the Seventh Circuit to the Supreme Court which had vacated and remanded the case to the Seventh Circuit for further consideration in light of Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). The court held that the Equal Pay Act is a piece of "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment." Id. at 936.

In Ameritech Benefit Plan Committee, et al., v. Communications Workers of America, 220 F.3d 814, 824 (7th Cir. 2000), the Seventh Circuit affirmed summary judgment for Ameritech on Equal Pay Act claims of female Ameritech employees. The female employees had been denied credit toward pension benefits for maternity leave periods taken prior to 1979. Id. at 817. As a result, their pension benefits were lower than those of male employees who had not taken pregnancy or maternity leaves. Id. The court held that the employer had met its burden to prove that the disparity in pensions resulted from its Net Credited Service ("NCS") system, which amounted to a *bona fide* seniority system or "a factor other than sex." Id. at 824, *citing* 29 U.S.C. § 206(d)(1). The court also held that the females claims were time barred because they were not presented within two years of their accrual, but rather "many years after the initial decision not to adjust the employees' time in service for pre-1979 pregnancy leaves" which had been made in 1994. Id. In doing so, the court rejected the employees' contention that Ameritech's continued use of pre-1979 NCS computations was a fresh violation of the statute. Id.

In Lane v. Kohl's Food Stores, Inc., 217 F.3d 919 (7th Cir. 2000), the Seventh Circuit upheld a jury verdict for the employer on the EPA claims of a class of female grocery clerks who worked in the employer's bakery and deli departments. In reviewing for error at trial on the EPA claim, the court first affirmed the district judge's decision to prevent the plaintiffs' expert witness from testifying where the expert's conclusions were "unreasoned" and did not depend upon acceptable methodology. Id. at 924. The court also affirmed the trial judge's decision which permitted evidence of the median jobs among the defendant's state-wide stores and excluding "outliers" involving the largest and smallest stores. Id.