PROGRAM MATERIALS
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# Changing Legal Standards for Bringing Gender-Based Pay Disparity Claims in the Second Circuit



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# Second Circuit Clarifies Standard for Gender-Based Pay Disparity Claims

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- An employment litigator at Schlam Stone & Dolan in New York.
- Began career as a complex commercial litigator at Latham & Watkins LLP in Chicago, IL
- Prior member of Weil, Gotshal & Manges LLP's Employment Litigation Practice Group in New York.
- Regularly published in The New York Law Journal and Law360 on employment law topics.
- Personal Note: For years I was a professional bass player in my hometown of New Orleans, LA. I still study and play bass in New York City.

# Roadmap for Today's Discussion

- A bit of history on the Equal Pay Act of 1963 ("EPA") and Title VII of the Civil Rights Act ("Title VII")
- Substantive differences between EPA and Title VII
- Second Circuit's history of applying EPA's prima facie standard to Title VII gender-based pay discrimination claims
- Discussion of *Lenzi v. Systemax,* 944 F.3d 97, 104 (2d Cir. 2019) clarifying that Title VII plaintiffs do not have to meet EPA standard
- Guidance for Employers

# Equal Pay for Equal Work

- In the modern workplace, there is little disagreement that women should be paid the same as men (and vice versa), all else being equal.
- There are two federal statutes, both passed in the 1960s, that were designed to protect employees from discrimination in the workplace.
  - Equal Pay Act of 1963 (specific to gender-based discrimination)
  - Title VII of the 1964 Civil Rights Act (covers a variety of discrimination including gender-based)
- The EPA and Title VII have many similarities and differences.
  - Different legal standards
  - Different procedural requirements
  - Different remedies

# Title VII vs. Equal Pay Act

- Title VII is the principal federal statute prohibiting employment discrimination. Title VII is a broad statute that prohibits the following types of discrimination:
  - Race, color and national origin
  - Religion
  - Sex, including gender and pregnancy
- The EPA is narrower than Title VII and prohibits sex-based discrimination in the payment of wages for equal work.
  - Unlike Title VII, which covers all forms of gender discrimination, the EPA is generally limited to pay disparities.

# Title VII vs. Equal Pay Act

- Historically, when it comes to gender-based discrimination, Title VII and the EPA are frequently confused.
- In 1963, Congress passed the EPA "to remedy what was perceived to be a serious and endemic problem of [sex-based] employment discrimination[.]" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, (1974).
- Title VII, passed in 1964, initially did not include a reference to discrimination on the basis of sex (it was believed covered by EPA).
- Two days before Title VII was voted on, the House of Representatives added sex discrimination.

# Key Differences Between EPA and Title VII

| Provision | Equal Protection Act | Title VII |
|---|---|---|
| **Covered Employers** | The EPA uses the same definition of employer as the FLSA (29 C.F.R. § 1620.8).<br><br>The same group of employers covered under the **Fair Labor Standards Act** (FLSA), including:<br><br>All private employers who are either engaged in **interstate commerce** or employed by an **enterprise engaged in commerce.**<br><br>Most public employers (29 U.S.C. § 203(d)(e)). | Most private employers with at least 15 employees.<br><br>Any other person, including state and local government employers, with at least 15 employees. (42 US.C. §§ 2000e-(a) and (b).)<br><br>Most US government agencies, departments, and government corporations as employers. (42 U.S.C. § 2000e-16(a).) |

# Key Differences Between EPA and Title VII

| Provision | Equal Protection Act | Title VII |
|---|---|---|
| **Individual Liability** | An individual, such a supervisor or corporate officer, may be personally liable if that individual acts directly or indirectly in the interests of the employer in relation to an employee (see, for example, *Riodan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987); *Donovan v. Agnew*, 712 F.2d 1509, 1510-11 (1st Cir. 1983)). | Individuals are not personally liable under Title VII (see, for example, *Tomka v. Seiler Corp*., 66 F.3d 1295, 1313 (2d Cir. 1995)). |
| **Exhaustion of Administrative Remedies** | There is no requirement that a plaintiff exhaust administrative remedies, and instead a plaintiff may go straight to court (29 U.S.C. § 216(b); *Ososky v. Wick*, 704 F.2d 1264, 1265-66 (DC Cir. 1983)). | An individual claiming discrimination, harassment, or retaliation must exhaust their administrative remedies by filing a charge of discrimination, harassment, or retaliation before commencing a civil action in court. |

# Key Differences Between EPA and Title VII

| Provision | Equal Protection Act | Title VII |
|---|---|---|
| **Availability of Remedies** | Remedies for wage discrimination claims are the same for violations of the FLSA and include:<br>1. Lost wages.<br>2. Liquidated damages.<br>3. Attorneys' fees and costs. | Remedies include:<br>1. Back pay.<br>2. Front pay.<br>3. Other injunctive and equitable relief, such as reinstatement.<br>4. Attorneys' fees and costs |
| **Caps on Damages** | N/A | Compensatory and Punitive Damages caps depending on the size of the employer (50k to 300k). |

# Title VII vs. Equal Pay Act

- To establish a prima facie claim under the EPA the plaintiff must show:
  - (1) **the employer pays different wages to employees of the opposite sex**;
  - (2) **the employees perform equal work** on jobs requiring equal skill, effort, and responsibility; and
  - (3) **the jobs are performed under similar working conditions in the same establishment.** *See, e.g., E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 255 (2d Cir. 2014).
  - To establish a prima facie claim for gender-based discrimination under Title VII you must generally show the employer "discriminated against any [employee] with respect to his [or her] compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).
    - Disparate treatment
    - Disparate impact
    - Pattern or practice
    - Cat's Paw

# Second Circuit Courts Conflate EPA and Title VII Standards

- *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995)
  - Female employee brought suit against her former employee and three male co-employees, asserting, among others, claims of hostile environment sexual harassment and retaliatory discharge in violation of Title VII unequal pay claim under the EPA.
  - In upholding dismissal of the Title VII pay disparity claim, the court stated that "A claim of unequal pay for equal work under Title VII . . . is generally analyzed under the same standards used in an EPA claim." *Id.* at 1312. But that under Title VII, the plaintiff must also show evidence of discriminatory animus in order to make out a prima facie case of intentional sex-based salary discrimination.

# Second Circuit Courts Conflate EPA and Title VII Standards

- *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995)
  - For the next 24 years, New York courts used the statement that "A claim of unequal pay for equal work under Title VII . . . is generally analyzed under the same standards used in an EPA claim" to require plaintiffs bringing Title VII gender-based pay claims to meet the EPA standard.
  - Recall that under the EPA a plaintiff is required to show
    - (1) the employer pays different wages to employees of the opposite sex;
    - (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and
    - (3) the jobs are performed under similar working conditions. *See*, *e.g.*, *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 255 (2d Cir. 2014).

# Second Circuit Courts Conflate EPA and Title VII Standards

- *Heap v. County of Schenectady*, 214 F. Supp. 2d 263, 270-71 (N.D.N.Y. 2002)
  - The district court granted summary judgement on an EPA *and Title VII* pay disparity claim after finding that plaintiff had not made out a *prima facie* case because she did not show that her job and that of the comparator were *substantially equal*.

- *Mauze v. CBS*, 340 F. Supp. 3d 186, 206 (E.D.N.Y. 2018)
  - The district court granted summary judgment on EPA *and Title VII* pay disparity claims after find that plaintiff did not show "that she received unequal pay for equal work. . . . Nor has she shown that her job was 'substantially equal in skill, effort, and responsibility' as those of her alleged comparators, or that they are 'performed under similar working conditions.'"
- In both cases, the court simultaneously dismissed the EPA and Title VII claims after only analyzing whether the plaintiff met the EPA standard for bringing a gender-based pay disparity claim.

# Who is Left Out?

- We have established that the EPA is more restrictive than Title VII so the question is: If Second Circuit courts have been applying EPA's more limited standard to Title VII claims, what claimants are left out?
- The paradigmatic example of gender-based pay discrimination that was precluded prior to the *Lenzi* court's clarification was when an employer hired a woman for a unique position—one for which there are no comparators performing "substantially equal work"—but paid her less than the employer would if a man held the same position.
- Under the Equal Pay Act's standard, that employee would have no means of seeking restitution under the act, because without any employee performing "substantially equal" work in the same establishment, she could not make out a prima facie case.

# *Lenzi v. Systemax*

- In *Lenzi*, a female former vice president of risk management, Danielle Markou, sued her employer, Systemax, as well as the chief executive officer and chief finnancial officer, for violations of various laws include the EPA and Title VII.
- Markou's allegation was simple:  had she been a man, Systemax would have paid her more for her duties.
- However, there were no other men doing "substantially similar" work.  So Markou brought in statistical evidence that men at other organizations who were doing similar work made more money than she did.

# *Lenzi v. Systemax* – District Court

- The district court, citing *Tomka*'s reference to Title VII claims "generally" being analyzed the same as EPA claims, granted summary judgment on the EPA and Title VII pay claims.
- The court stated that she did not "demonstrate that the positions held by her purported comparators are substantially equal to her position."
  - This is a clear reference to the EPA standard with no attention paid to the fact that EPA and Title VII are two separate claims.
- By this point the union of the EPA and Title VII standard was so complete, that Markou did not even distinguish between the two statutes in summary judgment briefing.

# *Lenzi v. Systemax* – Second Circuit Appeal

- Markou appealed the summary dismissal of her Title VII and EPA Claims
- The Second Circuit reversed dismissal on the EPA claim and used the opportunity to clarify the prior ruling in *Tomka*.
- First, the court addressed Markou's failure to challenge Defendant's argument that Title VII pay discrimination claims required a showing that Markou's position was "substantially equal" to positions held by comparators within the same organization.
- The Second Circuit recognized that "[s]uch a concession ordinarily precludes a party from advancing a different argument on appeal." As the court put it, however, "[w]e exercise our discretion here to clarify an important, purely legal issue."

# *Lenzi v. Systemax* – Second Circuit Appeal

- Next, the court acknowledged the ruling from *Tomka* that"[a] claim of unequal pay for equal work under Title VII . . . is generally analyzed under the same standards used in an EPA claim," and that this statement is commonly used by district courts in their analyses of Title VII pay discrimination claims.
- The court then briefly reviewed the finding in *Tomka* noting that the court also made it clear in *Tomka* that EPA and Title VII plaintiffs faced different legal burdens.
- The court also referred back to a 1976 case where the D.C. Circuit noted that "the provisions of both acts should be read in pari materia, and neither should be interpreted in a manner that would undermine the other." *Laffev v. Nw. Airlines, Inc.*, 567 F.2d 429, 446, (D.C. Cir. 1976).

# *Lenzi v. Systemax* – Second Circuit Appeal

- The court noted it wanted to "take this opportunity to clarify" that a Title VII pay discrimination plaintiff need not established "equal work for unequal pay . . . Title VII makes actionable *any* form of sex-based compensation discrimination."
- The court stated that while an employer may discriminate by paying women less than man for the same work, "it by no means follows that this is the only way" an employer might discriminate.
- Indeed, an employer may '"hire a woman for a unique position' but then pay her less than it would 'had she been male.'" But, "grafting the [Equal Pay Act's] equal-work standard onto Title VII would mean 'that a woman who is discriminatorily underpaid would obtain no relief … unless her employer employed a man in an equal job in the same establishment, at a higher rate of pay.'"

# Guidance for Employers

- By ruling that Title VII claims do not require a plaintiff to proffer evidence of a comparator within the same organization earning more money while doing substantially equal work, employees may be emboldened to bring more Title VII claims on weaker sets of facts in the Second Circuit.
- Employers should be mindful that, although it is still the case that EPA and Title VII claims are often analyzed together, it should not obscure the fact that the laws have important substantive differences.
- Employers performing equal pay audits of setting employee compensation should not restrict their analysis to internal comparisons.
  - Particularly for smaller organizations or those with employees in highly specialized roles where there may not be internal comparators.

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- LinkedIn: **https://www.linkedin.com/in/chris-dyess-91aa9480/**

Analysis (/newyorklawjournal/analysis/)

# Second Circuit Clarifies Standard for Gende Based Pay Disparity Claims

This article reviews the standard for bringing a Title VII gender-based pay discrimination claim in the Second Circui to the 'Lenzi' ruling and discusses the Second Circuit's clarification of the law in 'Lenzi'. Finally, the article provides s insights for employers given the ruling in 'Lenzi'.

By **Christopher R. Dyess** | March 25, 2020 at 11:45 AM

Equal pay for equal work is the refrain long associated with the laudable goal of ensuring that female employees' salaries are on an equal footing with those of male employees, all else being equal. At the federal level, employees seeking to enforce their rights generally had two avenues of pursuing these claims in court: they could seek redress under the Equal Pay Act of 1963 (the Equal Pay Act) or under Title VII of the 1964 Civil Rights Act (Title VII) and its framework for sex-based pay disparity claims.

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For the past several years, courts in the Second Circuit applied the Equal Pay Act standard to both Equal Pay Act claims and Title VII claims. The Equal Pay Act requires a plaintiff to show they are paid less than another employee of the opposite sex that is in a job that is substantially the same and requires equal skill and responsibility under working conditions that are similar. By conflating the Equal Pay Act's "equal pay for equal work" standard with Title VII, plaintiffs seeking to establish a gender-based pay disparity claim faced a legal standard that amounted to distinction without a difference.

This situation changed on Dec. 6, 2019, when a panel of three Second Circuit judges unanimously held, in what the court described as a clarification of the law, that a Title VII plaintiff need not establish that he or she performed "equal pay for equal work" using the Equal Pay Act standard. See *Lenzi v. Systemax*, 944 F.3d 97, 104 (2d Cir. 2019). Instead the court held that "all Title VII requires [is that] a plaintiff [] prove that her employer 'discriminate[d] against [her] with respect to [her] compensation … because of [her] … sex.'" See *Lenzi*, 944 F.3d 97 at 110; 42 U.S.C. §2000e-2(a)(1). In making this ruling, the Second Circuit likely made it easier for plaintiff attorneys to bring gender-based pay discrimination claims under Title VII.

This article reviews the standard for bringing a Title VII gender-based pay discrimination claim in the Second Circuit prior to the *Lenzi* ruling and discusses the Second Circuit's clarification of the law in *Lenzi*. Finally, the article provides some insights for employers given the ruling in *Lenzi*.

## Background

In 1963, Congress passed the Equal Pay Act, which was the first federal law designed to combat gender-based pay discrepancies. In order to state a claim under the Equal Pay Act, an employee has to establish that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions. See, e.g., *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 255 (2d Cir. 2014). Title VII similarly provides a mechanism for employees to bring gender-based discrimination claims based on pay and benefits. However, the laws have some key differences.

The key difference, and the issue that was addressed by the *Lenzi* court, is that under the Equal Pay Act, an employee must prove that the employee's job is substantially equal to that of a higher-paid opposite sex counterpart, and that the employee and the counterpart work in the same establishment. See *Lenzi*, 944 F.3d 97 at 109-11. In contrast, Title VII has no such requirement, and therefore may provide a "lighter lift" for an employee seeking to prove that their employer violated Title VII. Id.

Prior to *Lenzi*, district courts in the Second Circuit "routinely" conflated the requirements for bringing an Equal Pay Act claim with a Title VII claim by relying on the Second Circuit's prior statement in *Tomka v. Seiler* that "[a] claim of unequal pay for equal work under Title VII … is generally analyzed under the same standards used in an [Equal Pay Act claim.]" 66 F.3d 1295, 1312 (2d Cir. 1995); see also *Mauze v. CBS*, 340 F. Supp. 3d 186, 206 (E.D.N.Y. 2018); *Heap v. County of Schenectady*, 214 F. Supp. 2d 263, 270-71 (N.D.N.Y. 2002); *Dinolfo v. Rochester Tel.*, 972 F. Supp. 718, 722 (W.D.N.Y. 1997).

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By imposing the Equal Pay Act's more stringent standard on Title VII claims, federal courts in the Second Circuit made it more difficult for employees alleging gender-based pay discrimination to bring claims against their employers.

The paradigmatic example of gender-based pay discrimination that was precluded prior to the *Lenzi* court's clarification was when an employer hired a woman for a unique position—one for which there are no comparators performing "substantially equal work"—but paid her less than the employer would if a man held the same position. See *Lenzi*, 944 F.3d 97 at 110. Under the Equal Pay Act's standard, that employee would have no means of seeking restitution under the act, because without *any* employee performing "substantially equal" work in the same establishment, she could not make out a prima facie case. Id.

By conflating the Equal Pay Act standard with the standard required under Title VII, district courts in the Second Circuit were de facto leaving an employee in this scenario without any means of seeking redress under either the Equal Pay Act or Title VII.

## 'Lenzi v. Systemax'

In *Lenzi*, a female former vice president of risk management, Danielle Markou, sued her employer, Systemax, as well as the chief executive officer and chief financial officer, for violations of various laws include the Equal Pay Act and Title VII. See *Lenzi*, 944 F.3d 97 at 102. With regard to her claims of gender-based pay discrimination under the Equal Pay Act and Title VII, Markou alleged that the defendants paid her less than they would have had she been a man. Id. To prove her claims, Markou provided statistical evidence that Systemax paid her below the market rate for her position while at the same time paid her male peers above market rates for their respective positions. Id. at 111-12.

The district court held that Markou failed to carry her initial burden under either the Equal Pay Act or Title VII because she did not "demonstrate that the positions held by her purported comparators are substantially equal to her position." See *Lenzi v. Systemax*, Case No. 14-cv-7509, Dkt. No. 65 at 42-49 (E.D.N.Y. March 9, 2018). As support for this conflation of the Equal Pay Act and Title VII standards, the lower court referred the general proposition from *Tomka* that "[a] claim of unequal pay for equal work under Title VII … is generally analyzed under the same standards used in an [Equal Pay Act claim.]" Id.

The Second Circuit rejected this line of reasoning and instead clarified that a Title VII plaintiff need not show that the position of a comparator is substantially equal to the plaintiff's, as is required under the Equal Pay Act. See *Lenzi*, 944 F.3d 97 at 109-11. While the court recognized that in prior decisions it suggested that gender-based discrimination claims under Title VII are "generally analyzed under the same standard" as Equal Pay Act claims, the court noted that the acts have different legal burdens and one law should not be interpreted in a way that undermines the other. Id.

The court clarified that "one way an employer [can] discriminate against an employee because of her sex is to pay her less than her male peers who perform equal work." Id. at 110. However, "it by no means follows that this is the only way in which an employer might achieve its discriminatory purpose." Id. The court went on

to say another way of discriminating against female employees might be "'hir[ing] a woman for a unique position' but then pay her less than it would 'had she been male.'" Id. As the court noted, "grafting the [Equal Pay Act's] equal-work standard onto Title VII would mean 'that a woman who is discriminatorily underpaid would obtain no relief … unless her employer employed a man in an equal job in the same establishment, at a higher rate of pay.'" Id.

Importantly, the court found that "[s]uch a rule finds no support in the text of Title VII and would be inconsistent with Title VII's broad remedial purpose. Accordingly, the court held that "Title VII does not require a plaintiff alleging pay discrimination to first establish … that she received less pay for equal work." Id.

## Takeaways for Employers

The Second Circuit's decision in *Lenzi* clarified prior Second Circuit precedent regarding the standard for bringing gender-based pay discrimination claims, making claims under Title VII easier for plaintiffs. By ruling that Title VII claims do not require a plaintiff to proffer evidence of a comparator within the same organization earning more money while doing substantially equal work, employees may be emboldened to bring more Title VII claims on weaker sets of facts in the Second Circuit.

Employers with employees in the Second Circuit should be aware of the potential for more substantial liability for gender-based pay discrimination claims. Unlike the Equal Pay Act, under Title VII employees can recover not only lost wages, but also punitive and compensatory damages.

Employers should consider reviewing their compensation practices to ensure consistency across all positions not only with respect to internal pay, but also by comparing the pay of women in unique positions to men in those same positions in other organizations.

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