

FACULTY TITLE VII AND EQUAL PAY ACT CASES IN THE TWENTY-FIRST CENTURY

NORA DEVLIN

Abstract

The ever-evolving nature of case law means that even as scholars have been examining the issue of gender pay disparity in academia since at least 1977, there is always more to be written. Employees alleging gender-based pay discrimination may pursue two causes of action for filing claims under federal law: under the Equal Pay Act of 1963 (EPA) and under Title VII of the Civil Rights Act of 1964 (Title VII). This paper discusses these two causes of action, their treatment in the courts in cases with college faculty plaintiffs, and what issues these cases raise for faculty and universities. Finally, the paper examines how the case law might be used to shape policies that better protect both faculty and universities.

Nora Devlin is a PhD student in Higher Education at Rutgers University's Graduate School of Education. Nora has an EdM in Social and Philosophical Foundations of Education from Rutgers University and a BA in Sociology and Spanish from the Templeton Honors College at Eastern University.

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Nora can be reached at nora.devlin@rutgers.edu.

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Introduction

The ever-evolving nature of case law means that even as scholars have been examining the issue of gender pay disparity in academia since at least 1977,¹ there is always more to be written. Employees alleging gender-based pay discrimination may pursue two causes of action for filing claims under federal law: under the Equal Pay Act of 1963² (EPA) and under Title VII of the Civil Rights Act of 1964 (Title VII).³ This paper discusses these two causes of action, their treatment in the courts in cases with college faculty plaintiffs, and what issues these cases raise for faculty and universities. Finally, the paper examines how the case law might be used to shape policies that better protect both faculty and universities.

I. Causes of Action for Gender Pay Disparity for Faculty

When employees encounter gender-based pay discrimination, there are currently two causes of action offered to them by the federal government: the EPA, and Title VII. This paper examines those cases that have been adjudicated since the year 2000. In 2007, the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,⁴ which severely limited employees' access to relief. The Supreme Court's decision in *Ledbetter* forced plaintiffs to file suit against their employers within a specified window after the first violation of the law only.⁵ For two years, *Ledbetter* made it nearly impossible for plaintiffs to file their lawsuits in a timely manner, as often they waited to file suit until they had exhausted every possible internal remedy or had waited to see if the situation would be worked out on its own. Congress passed the Lilly Ledbetter Fair Pay Act of 2009⁶ (FPA) to clarify the intent of the law. With the passing of the FPA, violations are now viewed as discrete acts with each paycheck issued, making Title VII and Equal Pay Act filings timely as long as at least one paycheck was paid during the statute of limitations.

Since this legislation was not enacted until 2009,⁷ some of the cases examined in this paper took place before this important decision. While only a few cases brought by professors were affected by the change in law from 2007–2009, this is nonetheless an important distinction to make.

1 Ester Greenfield, *From Equal to Equivalent Pay: Salary Discrimination in Academia*, 6 J. LAW & EDUC. 41 (1977).

2 EQUAL PAY ACT OF 1963, 29 USC (1963).

3 CIVIL RIGHTS ACT OF 1964, 42 USC 2000-e2 (1964). While relief for gender pay discrimination may also be available under state law, this paper will focus on the federal causes of action available to all faculty.

4 *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 US 618 (2006).

5 For claims about unequal pay for equal work, a plaintiff would have to file within 180-300 days (depending on the statute) of the employee being made aware of this pay disparity, or of the first paycheck that violated the law.

6 LILLY LEDBETTER FAIR PAY ACT OF 2009, 123 STAT. 5 (2009).

7 Although it was retroactive to the date of the *Ledbetter* decision. See *id.* §6 (2009)

The next two subsections describe what Title VII and EPA claims consist of, the burdens for the plaintiff and the defense, and the standards used by the courts to evaluate these claims. Subsection C gives a short comparison of the two causes of action and discuss how they are distinct.

A. Title VII Claims

Title VII claims broadly consist of claims against discriminatory employment actions or practices. Title VII offers a remedy for discrimination on the basis of sex/gender, race, color, religion, or national origin.⁸ In this paper we are looking at claims of discrimination based on sex/gender, although sometimes plaintiffs sue for discrimination on the basis of multiple factors (e.g., gender and religion, or gender and national origin).

In Title VII wage discrimination claims, a plaintiff may establish discrimination through either direct evidence or circumstantial evidence. Rarely do universities or their administrators record declarations (audio, visual, or written) that female professors shall be paid less than comparable males out of prejudice, so most Title VII claims utilize circumstantial evidence.⁹ Title VII disparate treatment¹⁰ cases use the *McDonnell Douglas* burden-shifting evidentiary framework.¹¹ As the court explained in *Scroggins v. Troy University*, “A *prima facie* case of disparate treatment in wages claim is established if the plaintiff demonstrates (1) she belongs to a protected class, (2) she received lower wages than similarly situated comparators outside of the class, and (3) she was qualified to do the job.”¹² Once the burden to put forth a *prima facie* case is met by the plaintiff, the burden shifts to the defense to show they did not discriminate. After the employer produces evidence of a “legitimate non-discriminatory reason” for the salary differential, the plaintiff must show that the employer’s reason is a pretext for discrimination.¹³

B. Equal Pay Act Claims

Equal Pay Act claims, like Title VII wage discrimination claims, first require the plaintiff to make out a *prima facie* case. Unlike Title VII, EPA claims require an appropriate comparator of another gender to show that the compensation varied by gender despite “equal work on jobs the performance of which requires equal

8 Title VII of the CIVIL RIGHTS ACT OF 1964, *supra* note 3 at §2000e-2(a).

9 That said, direct evidence of (intentional) discrimination is a viable method for meeting the burden. See Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENVER U. L. REV. 873, 886 (2014).

10 This article does not discuss any disparate impact cases, thus discussion of the establishment of disparate impact claims is beyond the scope of this article. The question of whether some of the cases discussed (e.g., *Reiff v. University of Wisconsin-System*, *infra* note 17.) may have been stronger if they had been argued as disparate impact rather than disparate treatment cases is not addressed in this article but is a question worthy of consideration.

11 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See for example, *Finch v. Xavier University*, 689 F. Supp. 2d 955 (2010).

12 *Scroggins v. Troy University*, Civil Act. No. 2:13CV63-CSC (WO) 1, 22 (2014).

13 *Texas Dept. of Community Affairs v. Burdine*, 450 US 248, 255 (1980).

skill, effort, and responsibility, and which are performed under similar working conditions.”¹⁴ Statistical evidence can also be used to bolster the claim, though it is not required. Once the plaintiff establishes a *prima facie* case the burden shifts to the employer to prove that the differential is justified under one of the four statutory defenses.¹⁵ There are four defenses applicable in EPA wage discrimination cases; “an employer may lawfully differentiate between a male and female employee engaging in equal work if the pay differential is the result of (1) a seniority system, (2) a merit system, (3) a system that ‘measures earnings by quantity or quality of production,’ or (4) ‘any factor other than sex.’”¹⁶ The most common defense is the fourth affirmative defense—any factor other than sex.¹⁷ Finally, if the defense provides a legitimate non-discriminatory explanation for the wage differential, the burden is shifted once more to the plaintiff to provide evidence that the defense’s explanation is in fact a pretext.

C. Commonalities and Contrasts in EPA and Title VII Claims

While the two causes of action are similar, they differ in substantive ways. Title VII is written to include many kinds of discriminatory employment actions (not just compensatory) and across multiple arenas (not just gender), thus it is a more broadly written statute. As already stated, Title VII offers two options by which the plaintiff can establish her *prima facie* case, whereas EPA claims must be established using comparators.¹⁸ Similarly, under Title VII a plaintiff is entitled to compensatory and punitive damages,¹⁹ but EPA plaintiffs are only entitled to compensatory damages. Finally, under the EPA there is a high standard for what constitutes an appropriate comparator—especially for professional job classes because the jobs must be virtually identical based on §206(d)(1) as quoted in I.B. above—whereas there is no statutory requirement for a comparator under Title VII, thus it is more lenient.²⁰ Nevertheless, the difference in standards for comparators is slight enough that in the cases discussed here wherein the plaintiff filed wage

14 EQUAL PAY ACT OF 1963, *supra* note 2, at §206(d)(1).

15 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE *infra* note 17 at 772.

16 EQUAL PAY ACT OF 1963, *supra* note 2 at §206(d)(1) as quoted in Andrew Brenton, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Be Replaced with a System for Accrediting Employers for Their Antidiscriminatory Employment Practices Comment*, 26 WIS. J. LAW GEND. SOC. 349 (2011).

17 See for instance, *Allender v. University of Portland*, 689 F. Supp. 2d 1279 (D.Or. 2010); FINCH V. XAVIER UNIVERSITY, *supra* note 11; *Sauceda v. University of Texas at Brownsville*, 958 F. Supp. 2d 761 (S.D. Tex. 2013); *Reiff v. Board of Regents of the University of Wisconsin-System*, No. 13-cv-192-jdp, 2014 WL 4546041 (W.D. Wisc. 2014); *Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968 (D. Minn. 2001); *Kovacevich v. Kent State University*, 224 F 3d 806 (6th Cir. 2000).

18 Sandra J. Perry, *Equal Pay Act cases in higher education*, 12 J. INDIVID. EMPLOY. RIGHTS 21, 22 (2005).

19 42 U.S.C. §1981a

20 EQUAL PAY ACT OF 1963, *supra* note 2, at §206(d)(1). For a comparison of the two, see also Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU REV 17 (2010); See appendix B, comparison chart in G. Siniscalco et al., American Bar Association, *Developments in Equal Pay Law: The Lilly Ledbetter Act and Beyond*, (2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_007.authcheckdam.pdf (last visited Nov 26, 2017).

discrimination claims under both Title VII and the EPA, there were no instances of a difference in the judge's application of the legal standard between the two claims.²¹

II. Summary of Cases

In the late 1990s into the year 2000, two public universities attempted to use a sovereign immunity defense against EPA and/or Title VII claims. In both *Varner v. Illinois State University*²² and *Anderson v. State University of New York*²³ the defendants claimed that congress did not have constitutional authority to require state universities to adhere to the EPA or Title VII. The sovereign immunity defense was rejected by the courts, and the cases set the precedent that public universities are in fact answerable in court for their sex-based wage discrimination.²⁴ A search of the Westlaw, Hein Online, and Google Scholar databases found close to 20 cases of professors suing their university employers under Title VII and/or the EPA for wage discrimination since 2000. This section provides brief summaries for a sampling of these cases by circuit.

A. Sixth Circuit

In *Elberger v. University of Tennessee Health Science Center*, plaintiff Andrea Elberger brought a class-action suit against the University of Tennessee Health Science Center (UTHSC) under the EPA.²⁵ Elberger was hired as an assistant professor in anatomy and neurobiology in 1985. She was promoted to associate professor in 1986, and to full professor in 1993. In 1990, she first discovered that she was in the bottom 25 percent of salaries of associate professors in her department. For over 20 years she discussed the issue of sex-based pay disparity with her department chair, dean of the college of medicine, and the executive vice chancellor. Despite the raises Elberger received over this period, in 2012 she discovered that she was the lowest paid full-professor in the department. While investigating gender pay disparities as chair of a Dean's subcommittee on the status of women, she found data that showed that the pay inequities in other departments in the college of medicine were nothing short of egregious; "in 2012, the mean pay disparities among female and male professors in the following departments were: 1) in Pathology, \$127,637.90; 2) in Anatomy and Neurobiology, \$50,515.00; 3) in Physiology; \$44,357.40; 4) in Pharmacology, \$37,930.40 and 5) in Microbiology, Immunology & Biochemistry,

21 There were instances of Title VII discrimination claims not based on wages (e.g., for failure to promote decisions) that were combined with EPA claims, see *Cullen v. Indiana University Bd. of Trustees*, *infra* note 57.

22 *Varner v. Illinois State University*, 226 F. 3d 927 (7th Cir. 2000).

23 *Anderson v. State University of New York*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000).

24 For further information and an explanation of the courts' reasoning, see Thane Somerville, *The Equal Pay Act as Appropriate Legislation under Section 5 of the Fourteenth Amendment: Can State Employers be Sued Notes and Comments*, 76 WASH. LAW REV. 279–312 (2001).

25 *Elberger v. Univ. of Tennessee Health Sci. Ctr. Coll. of Med.*, 2013 WL 12049105, at 1 (W.D. Tenn. 2013). Note: neither the ampersand nor the capitalization in this quote represent the style of this journal, copyeditor, or author. Rather than stating [sic] after every error, we hope you will accept this general apology for the errors in the cited sentence. I speculate the judge cited from a university document listing the departments as above.

\$26,632.30.”²⁶ Elberger alleged that the failure to address the systemic issue of pay inequity that she repeatedly brought to the administration’s attention meant that all women professors within the college of medicine should be entitled to relief. The court found that the suit ought to be limited only to the five departments with disparities over \$25,000 as shown conclusively by the statistical data provided (reproduced above).²⁷ Furthermore, despite the twenty-year history of discrimination experienced by the plaintiff, the statute of limitations restricts the suit to discriminatory pay within the last three years, so only female faculty in the five departments who were employed at UTHSC within the last three years would be recognized as “similarly situated.”²⁸

*Finch v. Xavier University.*²⁹ In this case, summary judgment was denied for Xavier University for both procedural and factual reasons. The plaintiffs (Finch and Michels) alleged that in violation of Title VII and the EPA, they had been paid \$34,000 and \$38,000 less, respectively, than their primary comparator, the chair of their department.³⁰ The chair position could not be used as an appropriate defense since Finch had served as chair and only received an additional stipend of less than \$3,000, and could show evidence of this tradition.³¹ The defense’s argument in this regard was not against the comparator, but rather served as their affirmative defense. The affirmative defense that the comparator held his degrees longer than the plaintiffs, that he was recruited from another university, that he had more experience than the plaintiffs, and that as chair he had more responsibilities than the plaintiffs, all relied completely upon unsworn statements from other faculty members, so it was not considered during the motion for summary judgment. It is unclear why the university would rely on these statements as their defense. Furthermore, in addressing whether there were factual disputes, the court recognized the need for the affirmative defense not to be simply a pretext for discrimination. The court concluded:

Plaintiffs have adduced evidence that traditionally Defendant paid no more than a \$3,000 bonus or stipend to the Department chair to perform those extra duties. Accepting that fact as true for purposes of summary judgment, Defendant paid [comparator] DeSilva a \$31,000 to \$35,000 premium solely for his education and experience. A reasonable juror could question whether DeSilva’s educational and professional background was that much more valuable than Plaintiffs’ background to justify that substantial differential in pay.³²

26 *Id.* at 2.

27 *Id.* at 5.

28 *Id.* at 5.

29 FINCH V. XAVIER UNIVERSITY, *supra* note 11.

30 *Id.* at 968.

31 *Id.* at 968.

32 *Id.* at 968.

The court posits that a reasonable juror might compare the CVs of the plaintiffs and the comparator and wonder if the pay disparity may in fact be pretextual. This reasoning by a judge stands out among other court cases examined for this article, because it considers the plaintiff's and comparator's qualifications at face value and weighs them against the evidence of the plaintiff's experience and education. The judge's reasoning is also interesting in that by suggesting that a jury is able to make such determinations, this decision falls out of line with the tradition of academic deference.³³ The fact that the defense in *Finch*³⁴ did not argue that DeSilva was an inappropriate comparator was important to the court's decision to deny the motion for summary judgment; perhaps if the defense did have evidence beyond unsworn affidavits, it could have been used to throw out the comparison with DeSilva.

In *Kovacevich v. Kent State University*³⁵ the Sixth Circuit Court of Appeals established one important precedent and re-affirmed an already established precedent regarding summary judgment. In this case, the school of education at KSU was awarding merit increases (as a sum, rather than percentage) according to a facially-neutral system. A committee of peers would rank faculty applications in their department according to their teaching and scholarship. The peer rankings were then sent to the departmental chairperson who (without knowing who was who) would assign dollar amounts to the applicants. The dean would then be given the list and dollar amounts, and would have full discretion to adjust the recommended amounts or award additional pay to the applicants. While it appeared to be a neutral system, in fact, the system was disproportionately favoring male faculty. In the plaintiff's case, the dean repeatedly reduced her award to the minimum possible amount, and at least once denied her any merit pay, against her chairperson's recommendation. A jury found that the defense's claims of neutrality were not sufficient to withstand the plaintiff's evidence that the system was simply pretextual (it was highly subjective and in the hands of one dean), and thus the precedent that facially neutral systems can in fact be discriminatory was set. In addition, *Kovacevich* affirmed the "Suggs-Wilson-Fields line of cases"³⁶ which establishes that once a case proceeds to trial on the merits, a revisiting of the case should only address a review of the "ultimate question of discrimination" and not the elements of a prima facie case.³⁷

B. Seventh Circuit

In *Reiff v. Board of Regents of the University of Wisconsin System*, the district court for the Western District of Wisconsin examined the issue of what can be considered a discriminatory compensation decision that would entitle a plaintiff to back pay until that date (even if it falls outside of the statute of limitations

33 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 145 (Fifth ed. 2013).

34 *FINCH V. XAVIER UNIVERSITY*, *supra* note 11.

35 *KOVACEVICH V. KENT STATE UNIVERSITY*, *supra* note 17.

36 *Id.* at 822.

37 *Id.* at 821.

period).³⁸ The court looked to other circuits' interpretations of the Fair Pay Act, as well as Ginsburg's dissent in *Ledbetter* for guidance; the court ruled that "failure to promote" decisions (in this case, a denial of tenure) do not count as compensation decisions under the EPA or Title VII statutes. In *Reiff*, the plaintiff had experienced serious discrimination prior to her promotion to assistant professor and again while fighting for promotion to associate professor during the 1990's.³⁹ As full professor and the most senior faculty member in her department, she found that she had been paid less than male counterparts and brought suit. The salary data considered within the statute of limitations spanned from 2007–2013, and in only two of those years did salaries remain unchanged. What makes *Reiff* interesting is the kinds of salary adjustments used by the University of Wisconsin (UW). In this case, UW gave College and University Professional Association [CUPA] raises to bring salaries up to 87 percent of the average salary for a professor of that rank in one's discipline.⁴⁰ When the University of Wisconsin system implemented the CUPA raises, they did so according to the professors' PhD specializations rather than the department in which they were employed, which meant that Reiff did not receive a CUPA raise when her comparator did because her PhD was in English literature while her comparator held a PhD in foreign languages. Furthermore, due to bureaucratic inconsistency, the adjustments to the plaintiff's comparator's salaries were unclearly labeled and perpetuated the plaintiff's belief that her salary was unfairly low. In fact, the only truly illegal action that occurred in this case, according to the court, happened well before the statute of limitations, when she was an untenured lecturer and then assistant professor. Despite not actually experiencing wage discrimination as a full professor, she was under the impression that she had been subject to discriminatory pay decisions because of the university's inconsistent accounting practices and seemingly arbitrary implementation of CUPA raises. Reiff was not in the same position to stand up for herself when she was a lecturer or assistant professor as she was once she became full professor; when she had the job security of tenure, she was not as vulnerable to retaliation by her department or institution. Thus, believing she had been discriminated against once again, she brought suit, but ultimately lost.

Packer v. Trustees of Indiana University is an interesting case in which technical issues with evidence played a central role.⁴¹ In this strange case, the plaintiff provided a great deal of evidence to support her Title VII and EPA claims, but the plaintiff's counsel failed to properly cite the evidence in the response to the defense's motion for summary judgment.⁴² In addition, the plaintiff failed to even

38 REIFF V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN-SYSTEM, *supra* note 17 at 5.

39 *Id.* at 1. Plaintiff was told that she could only be employed as a lecturer (from 1990-1994), despite her qualifications for an assistant or associate professor position, because she was a married woman. Essentially, she experienced four consecutive years of failure to promote decisions based on sex discrimination. She was then denied tenure after three years as an assistant professor, but received the promotion the following year in 1998.

40 *Id.* at 2. for explanation, at 10 for discussion.

41 *Packer v. Trustees of Indiana Univ. Sch. of Med.*, 800 F 3d 843 (7th Cir. 2015).

42 Sadly, this was not the only case in which the plaintiff's counsel failed to do their jobs; it was a common occurrence among the cases included here.

address the argument of her *prima facie* case. The appellate court reviewing the summary judgment decision of the district court noted, “in short, Packer not only neglected to address the *prima facie* aspect of her case, but sketched out only a skeletal argument on the matter of pretext. Such cursory treatment amounts to a waiver of the claim.”⁴³ The defense was granted summary judgment; on appeal the plaintiff’s new counsel provided appropriate citations, but the original ruling was upheld. Despite the procedural issue, factual aspects of Packer’s claims are also interesting. Packer claimed that her department chair repeatedly sabotaged her work “by assigning her a series of increasingly insufficient and inappropriate lab spaces and interfering with her efforts to obtain grant money.”⁴⁴ Similarly, in response to the University’s assertions that Packer was underperforming in her research and publications, Packer argued “that there were other male faculty members in the department whose research performance also fell short of expectations but who suffered no adverse consequences.”⁴⁵ It is worth noting that upon appeal Seventh Circuit, Judge Ilana Rovner, affirmed the trial court, but demonstrated a degree of compassion for the plaintiff and her experience with prior (incompetent) counsel that permeated the opinion and made it stand out among other cases.⁴⁶

C. First Circuit

Another unusual case is that of *Lakshman v. University of Maine System*.⁴⁷ In this case, the plaintiff was a male senior scientist at the University of Maine where he claimed to have been frozen into “a low paying, non-faculty position, and out of a faculty appointment.”⁴⁸ Lakshman’s claims of gender discrimination were based upon specific conversations he had with women faculty who discouraged him from applying for tenure track positions in his department because they were slated for women. He failed to meet his *prima facie* burden on the Title VII unequal pay claim, however, because he had no evidence of discriminatory animus. Much of the evidence of discriminatory animus that Lakshman produced failed to fall within the statute of limitations period and therefore was not considered. In *Elberger*, the statute of limitations simply restricted who was eligible for relief and for what time period, whereas in *Lakshman* the statute of limitations barred the plaintiff from producing evidence of discriminatory animus.

43 *Id.* at 852.

44 *Id.* at 846.

45 *Id.* at 846.

46 One idea for an interesting study would be a critical discourse analysis of the opinions of female and male judges for the same courts in EPA or Title VII gendered compensation cases. The language and reasoning used by female judges in these cases stood out to me and could merit further investigation. It would also be interesting to do a meta-analysis of how often female judges in these cases reference other female judges (for instance, do they do so more than male judges reference female judges?).

47 *Lakshman v. University of Maine System*, 328 F. Supp. 2d 92 (D. Me. 2004).

48 *Id.* at 97.

D. Third Circuit

Another unusual case that deals with the statute of limitations, is *Summy-Long v. Pennsylvania State University*.⁴⁹ In this case, the Third Circuit Court of Appeals affirmed the District Court's summary judgment award in favor of Penn State based on, among (many) other reasons,⁵⁰ the plaintiff's failure to provide any numeric or statistical evidence of gender pay disparities from any of the time periods within the statute of limitations (in this case 2003 and onward).⁵¹ While few cases can compare to *Summy-Long* in the time from filing to final disposition, plaintiffs in other cases successfully made claims about wage discrimination spanning multiple decades even if they were not attempting, like *Summy-Long*, to get salary data for as far back as the 1970s.⁵² What really makes this case stand out is the dedication of the plaintiff to refuse to settle for over a decade.

E. Second Circuit

As in *Elberger* and *Summy-Long*, in the Second Circuit case of *Lavin-McEleney v. Marist College*, the plaintiff relied on statistical analysis to make her claim.⁵³ In this case, the plaintiff, a professor of criminal justice, identified an appropriate male comparator using statistical analysis of faculty salaries across the whole college. A regression analysis controlled for five independent variables (rank, years of service, division, tenure status, and degrees earned), and by looking at the plaintiff's peers in each category identified only one appropriate male comparator who fell into the same category as the plaintiff across all five independent variables.⁵⁴ As it happened, the comparator identified by the plaintiff was a psychology professor, but the judge ruled that the statistical expert was able to provide sufficient evidence to convince a reasonable juror that the comparator was appropriate. Furthermore, because the plaintiff provided both statistical evidence of pay inequity using all faculty salaries in addition to identifying an appropriate male comparator, the court felt it was unnecessary to rule on whether just one of the two methods for meeting the burden was sufficient.⁵⁵ A jury found for the plaintiff on the EPA claim, but determined the college's violations were not willful and thus did not find Marist liable for the Title VII claims. The second circuit affirmed the lower court's ruling in its entirety.

49 *Summy-Long v. Pennsylvania State University*, 2017 U.S. App. LEXIS 22134 (3d Cir. Nov. 6, 2017).

50 The plaintiff changed counsel numerous times and requested multiple deadline extensions which delayed the case for over a decade. There were four motions for summary judgement granted, at least in part, by the district court in favor of the university (one prior to *Ledbetter*, three after) the last of which fully dismissed the claim. See *Summy-Long v. Pennsylvania State University*, 226 F. Supp. 3d 371 (M.D. Pa. Dec. 27, 2016); *Summy-Long v. Pennsylvania State University*, 811616 WL 1 (M.D. Pa. Mar. 26, 2009); *Summy-Long v. Pennsylvania State University*, 1253472 WL 1 (M.D. Pa. Mar. 24, 2010); *Summy-Long v. Pennsylvania State University*, 4514312 WL 1 (M.D. Pa. Nov. 2, 2010).

51 *Summy-Long v. Pennsylvania State University*, *supra* note 49 at 2.

52 See *Id.* at 3. Appropriately, the court ruled her request was untimely.

53 *Lavin-McEleney v. Marist College*, 239 F 3d 476 (2nd Cir. 2001).

54 *Id.* at 478.

55 *Id.* at 482.

F. Eleventh Circuit

In the case of *Scroggins v. Troy University*⁵⁶ the plaintiff failed to establish appropriate comparators for either Title VII or EPA claims,⁵⁷ but because of the clearly discriminatory acts of the associate dean while aware that the plaintiff was filing claims under EPA and Title VII, the plaintiff's claims of retaliation were not dismissed. Scroggins was unable to establish wage discrimination mainly because her education was not equivalent to the education of the other faculty of her rank. The plaintiff held a JD, MS in human resources, BA, and professional human resources certification, while her comparator had earned a PhD in economics. Furthermore, she did not have the same experience as a practicing attorney (both comparators with Juris Doctorates were practicing attorneys for over a decade prior to hire at Troy).⁵⁸

G. Fourth Circuit

Another recent case regarding appropriate comparators is *Spencer v. Virginia State University*.⁵⁹ This case went before the same judge in 2016 (dismissed without prejudice) and again in 2017 (summary judgment for the university denied), with very few changes in the facts presented. The differences between the first opinion and the second are instructive. In the first opinion, the plaintiff identified six male comparators, all of whom were outside of her department,⁶⁰ but failed to demonstrate that they were appropriate comparators under either the EPA or Title VII. In the second case, the plaintiff—only claiming an EPA violation and dropping the Title VII claim⁶¹—presented only two of the previously named six comparators, but was able to show that they had substantially equal jobs using the university's "standard Employee Work Profile (EWP), which establishes a common core of responsibilities for all faculty members."⁶² Furthermore, by focusing on only the two comparators who were clearly underqualified for the post of associate professor, and who were given starting salaries higher than any female faculty member at the entire university, Spencer was able to argue a much more compelling case.⁶³ While in the first opinion, the judge found that the plaintiff failed to show that her comparators were appropriate because she did not

56 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

57 Another example of failure to establish comparators under Title VII and EPA is *Cullen v. Indiana University Bd. of Trustees*, 338 F.3d 693 (7th Cir. 2003). It is only notable in so far as it takes "similarity in name only" to a literal level: the plaintiff, Dr. Cullen, compared herself to a Dr. Quillen with the same title despite entirely different job duties.

58 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

59 *Spencer v. Virginia State University*, 224 F.Supp.3d 449 (E.D. Va. 2016); *Spencer v. Virginia State University*, 2017 WL 1289843 1 (E.D. Va. 2017). In 2018, a third decision was issued in this case by the same judge wherein summary judgment was granted to the defendants (*infra* note 95). Further discussion of this matter appears in section III.A.1 of this article.

60 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *id.* at 453–454.

61 It is not clear why she dropped the Title VII claim. No reason was provided.

62 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 2.

63 *Id.* at 3.

establish that they performed “substantially equal work,”⁶⁴ in the second case the court determined:

When viewing Plaintiff’s [First Amended Complaint (FAC)] in a light most favorable to her, the Court similarly cannot find on the limited record before it that teaching undergraduate courses with a large number of students requires different skills, efforts, and responsibilities than teaching primarily graduate and doctorate-level courses with fewer students. Plaintiff has affirmatively pleaded that “the task of teaching students in various disciplines requires equivalent skill and responsibility” (FAC ¶ 32) and has provided sufficient facts to infer that Shackelford and Dial are proper comparators under the EPA.⁶⁵

This decision could set an important precedent that universities whose faculty handbooks utilize a EWP may find it difficult to claim in court that comparators outside the plaintiff’s department are inappropriate.⁶⁶

The most interesting aspect of this case was how the court changed its ruling regarding the retaliation claim under the EPA between the first and second opinions. In both cases, the court cites dicta⁶⁷ from *Burlington Northern & Santa Fe Ry. Co. v. White*⁶⁸ to distinguish the retaliatory actions taken from “‘petty slights or minor annoyances that often take place at work and that all employees experience.’” *Burlington Northern*, 548 U.S. at 68.⁶⁹ In the 2017 case, the plaintiff was able to demonstrate how the inappropriate actions of the provost, which were entirely written off by the court in the first case as petty slights, had consisted of abuse of power and were indicative of retaliatory animus.⁷⁰ The adverse employment actions, in addition to denying plaintiff’s request for a wage adjustment, included:

(1) intentionally delaying in signing paperwork on two occasions, which prevented Plaintiff from being paid in a timely manner; (2) refusing to assist Plaintiff while she faced a formal discrimination complaint that Defendants encouraged a student to file; (3) making veiled threats to Plaintiff referencing an antagonistic view taken by the VSU Administration against her; (4) refusing to address Plaintiff’s concerns regarding a troubled student who was stalking her; and (5) removing Plaintiff from her role of giving the Freshman Orientation speech without explanation.⁷¹

64 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59 at 457.

65 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 7.

66 This could be especially problematic for universities if well argued in conjunction with the market-forces defense precedent set in *SILER-KHODR V. UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER* (*infra* note 80) and adopted in *SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE* (*supra* note 17).

67 While the court cites the below case, it does not cite the specific quote as dicta as might be expected.

68 *Burlington N. & Sfr Co. v. White*, 548 US 53 (2006).

69 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59 at 461, SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 9.

70 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 9.

71 *Id.* at 9., citations omitted.

This change in the court's judgment on the same actions by the provost was compelled by the plaintiff's newly detailed explanation of how the actions taken by the provost impacted her and her ability to perform at work. As will be discussed in later sections, the plaintiff's claims of retaliation may have seemed crystal clear to someone familiar with the principles of academic freedom and the power differential inherent in the relationship between an associate professor and her provost. This case demonstrates that a district court judge ought not be expected to glean such an understanding from a factual description of events that did not adequately describe the effects on the plaintiff.

H. Ninth Circuit

In another case of disputed comparators, *Allender v. University of Portland*,⁷² the plaintiff alleged that three other associate professors in the economics department, and one full professor, were appropriate comparators. The university contended that the full professor did not perform a substantially equal job to that of an associate professor (the court agreed), and argued that the male associate professors were not similarly situated "because they have greater seniority or service to the university."⁷³ The court concluded that this argument was more appropriately considered as an affirmative defense, so Allender was able to establish her prima facie case under the EPA. The university's affirmative defense (any factor other than sex), was that seniority as well as Allender's performance issues constituted factors other than sex that determined the pay differential between her and her comparators.⁷⁴ In shifting the burden back to the plaintiff, the plaintiff showed that performance issues on their own were insufficient to explain differences in salaries since the salary differential decisions preceded any disciplinary actions.⁷⁵ Similarly, the defendants failed to provide evidence that seniority is used by the university to set wages, and therefore this aspect of their defense failed as well. Finally, because one of the comparators served as dean of the business school, the university averred that his higher salary could be attributed to this service. The university relied on *Hein v. Oregon College of Education*⁷⁶ to argue that the salary differentials based on the unequal starting salaries of Allender and her comparator (Seal) were not violations of the EPA because the original disparity was non-discriminatory. The court demonstrated that this argument presupposed that salary increases were equal for all faculty members, as in *Hein*, when in this case, "The University, however, does not provide raises across the board, but rather assigns raises based on teaching, scholarship and service. Thus the facts here do not resemble the facts in *Hein*, because here, a professor who starts at a lower salary may reduce the wage gap if she outperforms her male colleagues, whereas in *Hein*, the court found that salary increases perpetuated the wage

72 *ALLENDER V. UNIVERSITY OF PORTLAND*, *supra* note 17.

73 *Id.* at 1285.

74 *Id.* at 1286.

75 *Id.* at 1287.

76 *Hein v. Oregon College of Educ.*, 718 F 2d 910 (9th Cir. 1983).

gap.”⁷⁷ In this case, Allender’s clearly superior publication record (20 refereed articles compared to Seal’s four)⁷⁸ was enough to raise the question of whether “Seal’s larger salary is reasonably attributable to his former service as dean”⁷⁹ thus, the court denied the university’s motion for summary judgment.

1. Fifth Circuit

Another instance of a court finding that the university’s affirmative defense failed to be compelling was in *Siler-Khodr v. University of Texas Health Science Center San Antonio*.⁸⁰ *Siler-Khodr* is a notable precedent for two reasons. First, this was one of the cases originally argued in the late 1990s wherein the university defendant tried to claim sovereign immunity in response to an EPA claim. Second, both affirmative defenses offered by the university—that the plaintiff’s grant-obtaining abilities were lesser than her comparator’s, and that market forces dictated her comparator’s higher salary—were deemed insufficient. This case is also notable because the appeal was brought after a jury ruled in favor of the plaintiff, awarding her significant back pay and damages (in excess of \$100,000 in 2001).

The court’s response to the market forces defense in *Siler-Khodr* is worthy of further discussion because of the way it shapes the outcome of *Sauceda v. University of Texas at Brownsville*.⁸¹ *Sauceda* is intriguing in both its interpretation of *Siler-Khodr* and further elaboration on the reasoning behind the issues with an affirmative defense based on “market forces.” In an eloquent and philosophical opinion, District Court Judge Hilda Tagle takes extra care to explain the reasoning for the Fifth Circuit’s history of rejecting a market-forces defense. In *Sauceda*, the University argued that the two comparators the plaintiff identified had to be paid higher salaries to attract them to the university, whereas the plaintiff who was already employed by the university did not need to be attracted with higher wages. The district court writes, “to say that an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex because it reflects market forces which value the equal work of one sex over the other perpetuates the market’s sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate.”⁸² The court elaborates on this interpretation of the EPA throughout the discussion of the affirmative defense offered by the university.

The affirmative defense, based on any factor other than sex, consisted of three arguments. First, the university argued that to obtain a professional accreditation

77 ALLENDER V. UNIVERSITY OF PORTLAND, *supra* note 17 at 1288.

78 Of course, there could be nuance here; perhaps Allender published in bottom rung journals and Seal’s four publications were all in the top journals in his field. Still, four compared to 20 is worth questioning.

79 *Id.* at 1288.

80 *Siler-Khodr v. University of Texas Health Science*, 261 F 3d 542 (5th Cir. 2001).

81 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

82 *Id.* at 776.

for the business school they needed to offer higher salaries to attract “academically qualified” (AQ) professors.⁸³ The court, citing *Siler-Khodr* stated that there was evidence that the two comparators were not awarded salaries in accordance with this argument, and therefore, when viewed in the light most favorable to the plaintiff, created a fact issue.⁸⁴ Second, the university asserted “that the salary differential was based on market forces of supply and demand for newly hired accounting faculty, i.e., salary compression or inversion”⁸⁵ and thus assumed this was a non-discriminatory factor other than sex which dictated how salaries were determined. The university asked the court:

to adopt the reasoning of courts outside the Fifth Circuit to conclude that “[a]n employer may take market forces into account when determining the salary of an employee, provided there is no evidence suggesting that the employer took advantage of any kind of market forces that would permit different pay for a male and female for the same position.” *Schultz v. Dep’t of Workforce Dev.*, 752 F.Supp.2d 1015, 1028 (W.D.Wisc.2010) (citations). However, adoption of this proposition would shift the burden of production on this affirmative defense from the defendant to the plaintiff.

In explaining that the burden of production must remain with the defense, the court refers to precedent in the Fifth Circuit. Absent sufficient evidence that market forces do not arise from “outmoded assumptions or stereotypes,” the court states plainly that, “the unseen hand of the market does not enjoy a presumption that it is free from the discriminatory assumptions and stereotypes in the labor market Congress passed the Equal Pay Act to eradicate.”⁸⁶ At first blush, it may seem that this is an unfair or impossible burden to place on the defense—how could one prove that something does not exist? But, as the *Sauceda* court stated, production and persuasion are the burden of the defense. Furthermore, the argument that the labor market—which resulted in such widespread discriminatory pay inequity that legislation like the EPA was required to provide a legal remedy for women—ought not be assumed to be free of prejudice is highly compelling. That said, this precedent, if adopted by other circuits, could be cause for great concern for defendants, especially if applied in a case like *Spencer* where an EWP is used and/or plaintiffs argue for comparators outside of their discipline. Such reasoning could call into question the market value assigned to various fields, which is inextricably tied to the gendered realities of those fields. For instance, a philosopher employed in a philosophy department compared to a philosopher employed in a gender studies department could have a much higher salary and more prestige even when all else is equal; it would be extremely difficult, if not impossible, for a defendant to show that the labor market dictating these salaries is not sexist.

83 *Id.* at 777–778.

84 *Id.* at 778.

85 *Id.* at 778.

86 *Id.* at 780.

While this is not an exhaustive summary of the faculty gender-pay equity cases in the last 17 years,⁸⁷ it represents a wide range of issues, with an emphasis on the more recent themes in pay equity cases. Most of these cases, if not granted summary judgment, were settled prior to (or even during) a jury trial by returning to mediation.⁸⁸

III. Discussion of Current Case law

The current case law for faculty pay equity cases will be examined in the subsections that follow. This section discusses how current case law affects faculty plaintiffs, and then analyzes what the case law means for university defendants.

A. How Current Case law affects Faculty

This subsection examines what the current case law for faculty EPA and Title VII wage discrimination means for faculty plaintiffs and their representatives (e.g., labor unions or employees' counsel). The four themes discussed are, 1) the job of professor, 2) intersectionality, 3) retaliation claims, and 4) time and statutes of limitations.

1. The job of professor

While the job of a professor is often specifically defined in a faculty handbook, many differentiations are made based on one's rank, field, department, or specialization. Nevertheless, there are more commonalities than differences among the job expectations of faculty of the same rank at the same institution; tenure-track faculty are typically evaluated on their teaching, research, and service. Faculty bringing EPA or Title VII wage discrimination cases are better positioned to win their suit if the court views the professoriate as a whole rather than delineating with a great deal of specificity who is an appropriate comparator. In fact, a holistic definition of tenure-track faculty may even prevent wage discrimination in the first place.

For instance, in Reiff,⁸⁹ the CUPA market adjustments that professors received were in accordance with the average pay of a professor in the field in which they received their doctorate rather than with the department in which they were currently employed. This arbitrary differentiation served to undermine any efforts toward equality of pay within a department of both foreign-literature, and English-literature, scholars.

87 See also ARTHUR V. COLLEGE OF ST. BENEDICT, *supra* note 17; CULLEN V. INDIANA UNIVERSITY Bd. OF TRUSTEES, *supra* note 57.

88 In one recent case, the settlement was reached prior to the motion for summary judgment but it still resulted in ABA sanctions for the law school: see Stephanie Francis Ward, *Texas Southern's law school receives ABA public censure after sex discrimination allegations*, ABA JOURNAL, July 20, 2017, http://www.abajournal.com/news/article/texas_southerns_law_school_receives_aba_public_censure_involving_equal_oppo/ (last visited Dec 3, 2017).

89 REIFF V. BOARD OF REGENTS OF UNIV. WISC. Sys. *supra* note 17.

Sometimes the court is willing to accept a statistician's argument that an appropriate comparator exists outside of the department because there is not a single appropriate comparator within the department, as in the case of *Lavin-McEleney*.⁹⁰ On the other hand, in *Elberger*⁹¹ the court determined that "similarly situated" faculty must be employed within the statute of limitations period in the specific five departments where enormous pay disparities were shown using statistical analysis.

Interestingly *Spencer*⁹², which was dismissed and then litigated a year later in a win for the plaintiff, is the most promising case for defining the job of professor; the faculty handbook's Employee Work Profile (EWP) established a common core of responsibilities for all faculty members and made comparisons across fields especially easy; however, it was not until the second decision that the plaintiff used the appropriate language (common core) to persuade the judge that the EWP should be used to determine comparators. Using the EWP, Spencer could show that her comparators performed the same job duties (as listed in the EWP) but out-earned all the female faculty at this rank (and above) while not actually having the appropriate qualifications for the rank. Nevertheless, since the first draft of this article was written this case came before the same judge a third time and the defendants' motion for summary judgment was granted.⁹³ The plaintiff failed on a procedural level and apparently did not present her argument with the appropriate language, again. The court was inclined to side with the university in light of the plaintiff's failure to mention the EWP.⁹⁴

On the other hand, Eisenberg states that claims by those in professional and managerial roles are more likely to fail under the EPA until we can establish a "comparable work" standard that will be more accommodating than the current statutory requirements of *equal* skill, effort and responsibility.⁹⁵ In academia, faculty evaluations are delineated by rank, but all evaluations consider teaching, research, and service. The degree to which each of these areas is valued depends on the institution.⁹⁶ The comparability of faculty positions even across disciplines,

90 LAVIN MCELENEY V. MARIST COLLEGE, *supra* note 53.

91 ELBERGER V. UNIV. OF TENNESSEE HEALTH SCI. CTR. COLL. OF MED., *supra* note 25.

92 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59. In the second decision the language used by the plaintiff mirrored that of the statute to establish the common core of responsibilities of faculty.

93 Spencer v. Virginia State University, 2018 WL 627558 1 (2018).

94 It is possible the university no longer used the EWP, and in the year between the 2017 and 2018 decision many other facts could have changed (for instance, the former administrators may have been paid less than a former female administrator which would have superficially weakened Spencer's case). Nevertheless, this case would still have been strong using the Fifth Circuit precedent that market forces that put males disproportionately in administrative roles leads to disproportionate numbers of males making high salaries among the faculty when they opt to teach; if the commonly accepted "female" career trajectory to professorship is statistically more direct (tenure track only, no administrative experience) and therefore lower paying, then the market forces that push women into such trajectories are sexist.

95 Eisenberg, *supra* note 20 at 46.

96 Linda A. Renzulli et al., *Pathways to Gender Inequality in Faculty Pay: The Impact of Institution, Academic Division, and Rank*, 34 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 58-72 (2013).

for instance through a union that represents all faculty to the administration, is not theoretically inconceivable; however, per Fowles and Cohen, that “many state executives, legislatures, and now court systems seem to be pursuing an aggressive agenda designed to curb unionization among public employees, especially among those employed in public education”⁹⁷ is cause for concern when it comes to gender equity in pay, since arguments for “market forces” are now consistently trumping the egalitarian logic of unions. Perhaps more hopefully, Melissa Hart argues that conversations about who is comparable to whom miss the mark altogether; “[such a conversation] directs attention to the individual faculty members and away from the structures of the workplace and its system of evaluation.”⁹⁸ For Hart, the first step in remedying wage discrimination is to question how systems and structures promote inequality.

2. Intersectionality

This section briefly discusses the need for an intersectional⁹⁹ approach to discrimination claims brought by professors. The cases described in earlier sections have been primarily brought by white women faculty.¹⁰⁰ Therefore, a concern for faculty of color might be that the case law has grown around the cases that have been brought, and if few cases are brought by women of color (possibly due to their increased vulnerability by being a member of multiple protected classes), then it is a reasonable concern that the law has not yet evolved to accommodate people in a variety of vulnerable positions.¹⁰¹ For instance, we know that black women professors have multiple demands on their time for aspects of work that are much more time consuming than what is expected for white faculty.¹⁰² In the current case law, a university might be able to argue that a black female professor is not comparable to male faculty because of the differences in how their time is spent (e.g., she has more service obligations which are valued less in the evaluation process). The argument that a black woman’s work is *equal* (per the EPA) to the work of a white man in academia would be hard to prove based solely on how their time is allocated, but these facts may support a Title VII discrimination claim.¹⁰³ While

97 Jacob Fowles and Joshua Cowen, *In the Union Now: Understanding Public Sector Union Membership*, 47 ADM. SOC. 574–595, 1 15 (2015).

98 Hart, *supra* note 9 at 884.

99 An intersectional approach has been described and developed by Crenshaw, see Kimberle Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, U CHI LEG. F 139 (1989).

100 One exception is SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

101 Further discussion of this concept can be found in Chapter 7 in VANESSA E. MUNRO, *THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY* (2016).

102 Brenda Lloyd-Jones, *African-American Women in the Professoriate: Addressing Social Exclusion and Scholarly Marginalization through Mentoring*, 22 MENTORING & TUTORING: PARTNERSHIP IN LEARNING 269–283, 274 (2014).

103 Despite the fact that disproportionately foisting service and teaching responsibilities on women of color is sex and race-based discrimination and could constitute a violation of Title VII, it is such a widespread phenomenon and usually happens because of a *lack* of a policy rather than a disparate impact of an existent policy, so it may be very difficult to argue in court. Similarly, as Crenshaw’s theory explains, discrimination claims brought by black women take place at the

such disparate allocations of time could conceivably be treated as pretextual, and perhaps the court's argument in *Sauceda*¹⁰⁴ could be used to demonstrate the sexist and racist assumptions in devaluing teaching and service (on which women and people of color, especially women of color, spend more time than their white male counterparts) over research, it could largely depend on the circuit whether such an argument could actually persuade a court. Similarly, blatant racism may not be recognized as evidence of retaliatory animus when evaluating gender-based wage discrimination claims as in *Lakshman*.¹⁰⁵

3. Retaliation claims

Retaliation against an employee who has filed an EPA or Title VII complaint is explicitly prohibited in the statutes. The EPA states it is unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."¹⁰⁶ When it comes to retaliation claims, the courts have been somewhat inconsistent. There are a couple of clear examples from the cases discussed above. First, retaliation claims can be straightforward and undeniable, as in the case of *Scroggins*¹⁰⁷ the dean did not renew the contract of the plaintiff (an adverse employment action) after the dean was aware of the filings for the EPA claim. Scroggins's claims of retaliation for both the EPA and Title VII survived the university's motion for summary judgment, but her wage discrimination claims did not. In *Finch*¹⁰⁸ the plaintiffs were fired after their filings, and the retaliation claim was clear cut. Yet, there are also examples of retaliation claims that do not persuade the courts even when they may have had legal justification. One example is the *Spencer*¹⁰⁹ case(s) discussed in detail above, where the provost's treatment of the plaintiff was blatantly retaliatory, but in the first opinion the plaintiff did not provide sufficient detail to persuade the judge that the behavior of the provost constituted adverse employment actions.

Finally, in *Lakshman*¹¹⁰ Lakshman's job changed such that he had to report to two supervisors within two weeks of filing his Title VII claim, so there was a prima facie

intersection of race and gender and courts have effectively marginalized black women's experiences by refusing to acknowledge that the intersection in which they exist is in fact a place at all according to the law. Kimberle Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, 1989 U. Chi. Legal F. 139 (1989).

104 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

105 LAKSHMAN V. UNIVERSITY OF MAINE, *supra* note 47 at 112.

106 EQUAL PAY ACT OF 1963, *supra* note 2 at §215(a)(3); See also Title VII's prohibition at 42 U.S.C. § 2000e-3(a).

107 SCROGGINS V. TROY UNIVERSITY, *supra* note 12 at 17.

108 FINCH V. XAVIER UNIVERSITY, *supra* note 11.

109 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59, SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59. In SPENCER V. VIRGINIA STATE UNIVERSITY (2018), *supra* note 94, the plaintiff's evidence was once again insufficient to persuade the judge that the provost had retaliated against her.

110 LAKSHMAN V. UNIVERSITY OF MAINE SYSTEM, *supra* note 47.

case of an adverse employment action. There was also evidence of discriminatory animus—he was repeatedly called an “unhappy person”¹¹¹ and told he would be monitored for bad behavior.¹¹² Nevertheless, Lakshman was still unable to persuade the judge that the reorganization to consolidate resources was just pretext and that the reconfiguration of the entire research science staff was “to retaliate against him alone.”¹¹³ Thus, retaliation claims can be extremely difficult to prove if the university can show that it was not acting in a manner that singled out one employee. Of course, the major question raised is how could a plaintiff, let alone a judge, distinguish between a major reorganization in the same month of filing a complaint—possibly unrelated to the plaintiff’s complaint, and the employer purposefully choosing to reorganize to turn other employees against the plaintiff and create a hostile work environment so that the plaintiff would leave? Any administrator worth their salary would not send incriminating emails about their motives, so a court is apt to side with a clever administration over a vulnerable employee in such a situation.

4. *Time*

The short statute of limitations (between 1–3 years) is extremely problematic for faculty cases for two reasons. First it bars what paychecks can be examined as evidence of a pay disparity, and thus the damages that could be awarded to the plaintiff given a decision in her favor. Second, it also bars any evidence of discriminatory animus outside of the given period. This is especially harmful for faculty members of universities because tenure-track employment requires 5–10 years of employment as an assistant professor with very few relative protections. This is the time period when faculty are most vulnerable to discriminatory actions, and during which time the faculty member would be least likely to report those discriminatory actions.

In *Reiff*, for instance, the plaintiff waited until earning tenure to come forward so that she had some job security and clout in her department. In *Lakshman*¹¹⁴ the faculty member was vulnerable as a non-tenure-track scientist who occupied positions that undervalued his credentials; he waited to see if he could stay at the university to find a tenure-track position to no avail. The fact that professors are most vulnerable at the assistant-professor level means that they are likely to wait to get tenure before reporting their situation. The academic job market has experienced declines in tenure-track faculty positions in recent years,¹¹⁵ and marital and family conditions have differential effects for men and women on the academic job market, leading female pre-tenured faculty to be appropriately

111 *Id.* at 114.

112 *Id.* at 114.

113 *Id.* at 115.

114 *Id.*

115 NATIONAL SCIENCE FOUNDATION, DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES 2015 1 (2017), <https://www.nsf.gov/statistics/2017/nsf17306/static/report/nsf17306.pdf> (last visited Dec 23, 2017).

risk averse.¹¹⁶ In other industries, this time bar may make more sense because promotions are not on a set schedule and the possibility to gain more power or responsibility could conceivably be found by moving laterally to another employer or team/department. This not only could hurt the professional reputation of a faculty member, it is virtually impossible given the declines in the academic job market and the small world of one's discipline. Furthermore, the equivalence of a delay in tenure promotion and failure to promote in the courts is also problematic, since tenure (unlike traditional promotion) is almost guaranteed according to a set schedule if the job duties are performed as expected.

B. How Current Case law affects Universities

The following section discusses how current case law affects universities. Two themes that emerged from the cases in this note: systemic fixes and failures, and time, are examined.

1. Systemic fixes and failures

The systematic application of some facially-neutral policies can sometimes lead to gender bias in pay. For instance, according to Hart, *Kovacevich* is instructive in exemplifying the idea that universities can have a facially-neutral system of merit pay that in application is biased against women.¹¹⁷ Similarly, some ways of correcting for pay disparities like the CUPA market raises in *Reiff* can actually cause disparities where previously they did not exist. The case law is not currently uniform across the circuits, so a university may be putting itself at risk by awarding systemic pay increases or implementing other system-wide changes¹¹⁸ without carefully examining the ways in which it could be perpetuating gender bias.¹¹⁹ That said, the trend of the courts to relegate structural challenges to a footnote, "as the EPA's statutory requirements push the court into the one-to-one comparisons that dominate the opinion" means the decision is more often than not in favor of the university in these kinds of cases.¹²⁰

2. Time

An extremely problematic aspect of the EPA and Title VII cases in academia has to do with the social construction of time in higher education. Faculty are on a tenure clock from the day they are offered their assistant professor position. When encountering structural barriers to one's success or wellbeing, a professor on the tenure track must repeatedly weigh the risks of coming forward or waiting

116 Nicholas H. Wolfinger, Mary Ann Mason & Marc Goulden, *Problems in the Pipeline: Gender, Marriage, and Fertility in the Ivory Tower*, 79 J. HIGH. EDUC. 388 (2008).

117 Hart, *supra* note 9 at 885.

118 See *ARTHUR V. COLLEGE OF ST. BENEDICT*, *supra* note 17 in which a merger of two colleges created two tuition remission benefits packages, one which favored men. Summary judgment was granted to the university, but it should serve as a warning.

119 For an example of how bias in the awarding of merit pay can be studied, see Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AMERICAN JOURNAL OF SOCIOLOGY 1479-1526 (2008).

120 Hart, *supra* note 9 at 883.

until they have tenure to address the issue. Unfortunately, the case law for wage discrimination does not favor those who wait. Recovery for discrimination that professors have experienced in the past may be barred by the statute of limitations.¹²¹ Therefore, administrators and faculty alike need to be aware of the kind of psychological toll it takes on faculty who are “waiting around” for tenure to report bias incidents and discrimination. Similarly, universities must be prepared to provide support for faculty who experienced a history of discrimination that was not considered at trial.

Because litigation is so time consuming, universities must also consider how to ensure the supervisors or administrators involved in a faculty EPA or Title VII claim are acting appropriately throughout the entire time when the statute protects the plaintiff. In *Scroggins*¹²² it seems the university counsel was not consulted at all when an overzealous dean made the university liable for retaliation. On the other hand, in the decade long saga in *Summy-Long*¹²³ the defendants clearly documented their attempts to work with and assist the plaintiff such that the university was granted summary judgment at every stage.

IV. Policy Recommendations

This section discusses what possible policy changes could be made to further protect faculty and universities from future instances of wage discrimination and the possible resulting litigation.

A. *Protecting the Faculty*

The following subsections discuss ideas to consider when crafting policy in higher education that protects faculty from wage discrimination. The first section raises questions around stereotypes, the second, around power differentials, and the third discusses the issues surrounding statutes of limitations.

1. *Recognizing how stereotypes are engendered in the academy*

The first step in protecting faculty through policy is to recognize how gender stereotypes are embedded in the structure and made salient in the social realities of the academy. Work assignments, for instance, are an example of how implicit bias manifests itself in the academy; women are disproportionately asked to serve on committees, and take on extra teaching and mentoring work.¹²⁴ This is not solely

121 See LAKSHMAN V. UNIVERSITY OF MAINE SYSTEM, *supra* note 47; SUMMY-LONG V. PENNSYLVANIA STATE UNIVERSITY, *supra* note 49; REIFF V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN-SYSTEM, *supra* note 17.

122 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

123 SUMMY-LONG V. PENNSYLVANIA STATE UNIVERSITY 2016, *supra* note 50 at 379-383.

124 ADALBERTO AGUIRRE JR., WOMEN AND MINORITY FACULTY IN THE ACADEMIC WORKPLACE: RECRUITMENT, RETENTION, AND ACADEMIC CULTURE. ASHE-ERIC HIGHER EDUCATION REPORT, VOLUME 27, NUMBER 6. JOSSEY-BASS HIGHER AND ADULT EDUCATION SERIES. 51 (2000), <https://eric.ed.gov/?id=ED447752>. Cassandra M. Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RES HIGH EDUC 672-694 (2017).

the work of the university to fix, despite the court's explanation in *Sauceda*.¹²⁵ Nevertheless, it could be instructive to train administrators and committee members or other decision makers on the differences in expectations of women and men in the academy, (and how things change when race factors in). Calling decision makers' attention to the ways in which "leadership" opportunities are assigned to women and men faculty could hopefully result in thinking about how such decisions affect others.¹²⁶ This is essential to preventing further bifurcation of job duties or specializations, and therefore to ensuring that women faculty can identify appropriate male comparators even if the department has historically held gendered expectations (e.g., women do more advising/teaching, while men do more research/grant proposing).

2. *Drawing specific attention to power differentials*

The *Spencer* cases¹²⁷ raise important concerns about the way the court understands academic hierarchies and governance and the impact this has on pay. In *Spencer (I)*¹²⁸ the court did not understand the inappropriate behavior of the provost towards the plaintiff, an associate professor. The nature of the relationship between provost and professor was not actually addressed in either opinion; the plaintiff showed the interactions were problematic by further expounding on how they affected the plaintiff. Nevertheless, a simple lesson on the structure of academia should have been more than enough to draw the court's attention to the extreme power differential between any associate professor and a provost. Such power when wielded spitefully or simply ignorantly can be used to manipulate or misapply all sorts of policies regarding pay, including refusing to sign timesheets, preferentially awarding pay increases, and, as in the case of *Scroggins*, refusing to renew a contract.¹²⁹ It would be in the best interest of the faculty for the university to spell out in an employee handbook specifically what constitutes abuse of power (e.g., acts of willful disregard for policy and procedure to the faculty member's detriment; public humiliation; repeated failure to return contact) by an administrator (or faculty member) so that employees can be kept accountable for their actions by the governing board or their own supervisor (e.g., the president). An explicit statement on the expectations of senior administrators to perform their duties in ways that prioritize equity (e.g., do not single out any one faculty member on a task force) and to not tolerate or enact discriminatory actions, policies, or preferences could serve to educate judges on the power differentials inherent to a provost- or vice president-associate professor relationship. Without such explicit statements, faculty plaintiffs seem to struggle to convince the courts how actions taken by a supervisor three levels removed are abnormal and discriminatory by virtue of the fact that they happened at all.

125 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

126 Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU LAW REV. 515 (2013).

127 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59, SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59.

128 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59.

129 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

3. Continuing violations and statutes of limitations

The Ledbetter act indicates that each paycheck is a separate violation, but inherent in this reasoning is that each wage discriminatory paycheck does not constitute a “continuing violation.”¹³⁰ In other words, you are only litigating the period 2–3 years before filing suit for an EPA claim, and 300 days for a Title VII claim. However, it is unclear from the cases within the last 20 years, how the courts might deal with the issue of the tenure clock. Research has shown that the introduction of gender-neutral, tenure-clock-stopping policies have a disproportionately negative impact on women.¹³¹ This means that women are even more vulnerable as assistant professors because their likelihood to get tenure in universities with gender-neutral policies is much lower than if parental leave (for instance) were only available for women. This is due to the fact that men are more likely to publish in the top five journals in their field during the clock-stopping period, whereas women are not.¹³² Thus, not only is there a disincentive for women to use precious time pre-tenure fighting for equal wages, but if they do make use of the clock-stopping procedures it would likely lengthen the time spent as assistant professor before receiving a promotional raise, thereby increasing inequality among those who stop the clock and those who do not. Furthermore, if increases in salary are based on percentages and a male and female assistant professor hired the same year both take parental leave, but the male decides to go up early for tenure due to his productive leave, the tenured male will not only earn more the first year he goes up for tenure, but every subsequent year as well. While it is possible the courts could be persuaded that our hypothetical female professor could make up the difference through a merit pay policy (if available at her institution), it is also possible that with good research and expert witnesses these policies could be challenged as in *Kovacevich*.¹³³ If, hypothetically, this female assistant professor had filed a claim prior to earning tenure because the males in her department all earned more than she, and they were subsequently tenured while she remained an assistant, presumably they would not be appropriate comparators under the EPA (thus also most likely under Title VII) simply by occupying different ranks. While she may still be able to argue a disparate impact claim under Title VII, as I have already said, it would be challenging.

Furthermore, while the Ledbetter act is good insofar as it ensures the statute of limitations doesn't run out two years after the first discriminatory payment decision is made, it is problematic because it means that it is very easy to dismiss prior discriminatory acts. The statute of limitations on discriminatory acts to show prejudice or intent should not be the same as that which affects how much money

130 Justin M. Swartz, Jennifer L. Liu & Nantiya Ruan, “Time after time”: Compensation litigation under the Lilly Ledbetter Fair Pay Act, 12 (2010), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_008.authcheckdam.pdf (last visited Nov 26, 2017).

131 HEATHER ANTECOL, KELLY BEDARD & JENNA STEARNS, EQUAL BUT INEQUITABLE: WHO BENEFITS FROM GENDER-NEUTRAL TENURE CLOCK STOPPING POLICIES? 124 (2016), <http://ftp.iza.org/dp9904.pdf> (last visited Nov 26, 2017). Please note, tenure-clock policies vary by institution and some institutions may have clock-stopping policies beyond those discussed in this article.

132 *Id.* at 24.

133 KOVACEVICH v. KENT STATE UNIVERSITY, *supra* note 17.

one is entitled to. One, perhaps radical, way that policy could protect faculty beyond the current law would be to acknowledge the power of administrators to right past wrongs within an institution. For instance, implementing an institutional policy of making amends when a new administration comes in, could potentially be extremely helpful in honoring the experiences of faculty and welcoming conversation about how to fix the mistakes of the past that may still influence the present.

B. Protecting the University

When it comes to policy implications, the most likely changes to be made are those that protect the university from liability. This section discusses the recommendations for policy changes that could potentially protect the university from EPA and Title VII litigation brought by faculty. Most of these policy recommendations are for internal university policies; however, some scholars have made recommendations for federal policy changes to improve or transform the EPA statute, for instance by offering incentives for equal pay rather than punishment for failing to do so.¹³⁴ Each of the three subsections offers suggestions for how policy might address the respective issue.

1. First do no harm

One scenario a university must consider is how they will respond to evidence that demonstrates a gender-wage gap. Melissa Hart suggests an approach to this scenario that she calls “first do no harm.”¹³⁵ Per Hart, when an employer encounters a disparity in wages, they could be “barred from offering raises which exacerbate the disparity.”¹³⁶ Instead, the employer must offer raises that either maintain or diminish inequality in pay. While this could be extremely problematic if not uniformly applied across the university, an institution-wide implementation, given the proper democratic process, may actually work to undermine the systems which have previously increased inequality over time.

2. Expectations of administrators

As discussed in section IV.A.2. above, one extremely important way for universities to protect themselves from liability is to ensure the proper training and conduct of their administrators. Administrators are responsible, not only to ensure that the statutes are followed so that there are no instances of retaliation, but also to ensure that the policies and procedures are fair and equitably applied. Administrators who are trained on how facially neutral policies can easily be used as vehicles for legitimizing favoritism or nepotism also learn how to promote transparency and accountability in their salary structures, incentive pay systems, and other accounting procedures. Despite the degree of transparency inherent to

134 Brenton, *supra* note 16. I see two main issues with moving to incentive-based statutes rather than punitive statutes. First, there are few incentives powerful enough to pull universities from the academic molasses to make systemic changes. Second, it is essential when dealing with all victims of discriminatory practices to provide recourse for making employees whole.

135 Hart, *supra* note 9 at 891.

136 *Id.* at 891.

running public universities, there are still plenty of gray areas that employees are not made aware of (e.g., the balance or yearly allotment of another professor's research account).

Because many administrators are given a great deal of power over their reports (faculty and/or staff) it is essential that they be properly trained in what to do when faced with a claim of discrimination. Failure to act in accordance with the statute (as in *Scroggins*¹³⁷) is a completely preventable liability that universities need not risk. Yet, the conduct of their administrators in their interpersonal dealings with faculty is certainly something for which the university should be held liable. Therefore, a policy that also strictly delineates expectations of professional conduct for those with power over other employees is integral to ensuring administrators are held responsible for any misconduct and to absolve the university of liability for their behavior. Importantly, such a policy would acknowledge the potential for a misuse of power by irresponsible administrators and provide a procedure to protect all parties. This kind of policy could be used to ensure that conduct like that of the provost in *Spencer*¹³⁸ would be not tolerated, and in enforcing such a policy the university would also show support for its staff and professoriate.

3. *Transparency and consistency*

Finally, it is essential to have transparency and consistency when it comes to salaries, across-the-board raises, and merit-pay schemes. In private institutions this is especially important since there is no mandate that they make any information about salaries publicly available. This issue was raised in multiple articles on the cases within legal academia.¹³⁹ Scholars agree that there is insidious gender bias in assuming the moral rectitude of prior salary decisions that remain secret even after gender inequity comes to light.¹⁴⁰

When issues of wage discrimination bubble to the surface in a private institution, it is the duty of that institution to conduct a thorough review of past policies. One example of this approach took place at MIT, which was generally successful but took more than four years of work, according to Perry.¹⁴¹ The MIT approach included an internal salary study and an internal audit of the distribution of laboratory space, resources, and offices which resulted in "salary increases to female faculty members, [additional] discretionary research funding and more laboratory space, and renovated offices and labs."¹⁴² Nevertheless, MIT did not share the actual salary data or statistics that led them to do this work in the first place, and in its failure to do so has been critiqued for its lack of transparency, despite its eventual pursuit of equality.¹⁴³

137 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

138 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59.

139 Hart, *supra* note 9; Paula A. Monopoli, *The Market Myth and Pay Disability in Legal Academia*, 52 IDA. REV 867 (2016).

140 Hart, *Id.* at 890; Monopoli, *Id.* at 875.

141 Perry, *supra* note 18 at 36.

142 *Id.* at 36

143 *Id.* at 36

For public universities, transparency may be less of an issue, but the need for consistency is as urgent and important as ever. For example, in *Reiff* the court accorded considerable deference to the defendant who claimed the raises awarded the plaintiff and comparators were all part of the same scheme, given the fact that “neither the faculty salary letters nor the Rate and Jobcode History consistently use the same labels to identify the increases received by faculty members.”¹⁴⁴ While this kind of systemic breakdown will not sound uncommon to those familiar with the public university’s bureaucratic structures, it is no less problematic because it is familiar. In fact, it is all the more concerning that the inconsistency in reporting could be plainly understood by an employee to imply that she is undervalued compared to her male peers. The university’s transparency mandate is not simply a responsibility to the public but also to the faculty and staff it employs; transparency without consistency is not transparency at all. Policies that keep universities accountable for their consistency in reporting and documentation through periodic internal or external audits are essential to the pursuit of pay equity and the public mission of the university.

V. Conclusion

In sum, this article explored the implications of faculty wage-discrimination case law for faculty and universities, and it offered suggestions for possible policy adjustments to better protect faculty and universities. The case law discussed offers both reasons to be hopeful and concerned. This article did not discuss state statutes or protections for employees or universities, which may help illuminate what has or has not worked in terms of offering the protections recommended in the discussion section. Still, there are important differences in how the circuit courts have addressed the issues of equal pay for faculty that exemplify how these federal protections are not equally applied. While the court in *Sauceda*¹⁴⁵ provided a much-needed explanation of how the market defense has been used to justify gender discrimination, the debate over what factors remain legitimate causes for pay differentials continues in the courts.¹⁴⁶ Nevertheless, most courts have yet to recognize the gendered funneling of female faculty into less valuable feminized disciplines as a cause for pay disparities in a gender-conscious market. Had Saucedá’s comparator been outside her discipline, who knows if the court would have allowed the market forces defense?

Finally, there are still issues with statutes of limitations as they apply to a professoriate whose jobs are not secure for years. While the jobs of faculty filing an EPA or Title VII suit may be more secure under statutory protection, retaliation is a risk very few would be willing to take pre-tenure. And for universities, the temptation to ignore systemic injustices because it is easier than attempting an institution-wide fix too often leads to overlooking the responsibility they have to their employees. As exemplified in the cases since 2000, there are aspects of

144 REIFF V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN-SYSTEM, *supra* note 17 at 10.

145 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

146 Kaplin & Lee *supra* note 33 at 447.

the EPA and Title VII statutes that weaken their ability to protect faculty from discriminatory pay. In addition to advocating for new legislation to strengthen the protection offered to victims of discrimination, universities have the opportunity to model the values of equity, democracy, and human dignity by creating internal policies that protect their employees.