DEFENSES TO SEX-BASED WAGE DISCRIMINATION CLAIMS AT EDUCATIONAL INSTITUTIONS: EXPLORING "EQUAL WORK" AND "ANY OTHER FACTOR OTHER THAN SEX" IN THE FACULTY CONTEXT

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INTRODUCTION

The issue of gender equity has received much attention in the courts and on college and university campuses for the past several years, as male and female professors, athletic coaches, and staff members have sought to avail themselves of gender equity statutes in the employment context. Sex-based wage discrimination cases are based on the idea that men and women performing equal work have an enforceable federal right under the Equal Pay Act of 1963[1] and Title VII of the Civil Rights Act of 1964[2] to receive pay that is equal to that of the opposite sex. While salary differences among men and women persist in higher education[3] despite efforts to equalize such pay disparities, courts are taking a closer look at what "equal work" means for professors and academic administrators.[4] Specifically, courts have become willing to look well beyond the face of a professor's "job description" or "job title" to consider factors that make one faculty position more challenging than another position that appears to be very similar. *Cullen v. Indiana University Board of Trustees*[5] is a recent case that demonstrates

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1. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2000)).

2. Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

3. Martha S. West, *Symposium: Faculty Women's Struggle for Equality at the University of California Davis*, 10 UCLA WOMEN'S L.J. 260, 260–62 (2000) (citing Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 92–93 (1994)).

4. *See, e.g.*, Lavin-McEleney v. Marist Coll., 239 F.3d 476 (2d Cir. 2001); Ramelow v. Bd. of Trs. of the Univ. of La. Sys., 870 So.2d 415, 421 (La. Ct. App. 2004) (holding the professor failed to establish a prima facie case under the Equal Pay Act because the actual jobs performed by the female plaintiff and the male comparator did not require equal skills).

5. 338 F.3d 693 (7th Cir. 2003).

the Seventh Circuit's willingness to examine the skills, efforts, and responsibilities that two jobs sharing the same title actually require. In this note, I will use *Cullen* to illustrate how the Seventh Circuit and other courts will likely approach sex-based wage discrimination claims brought against academic institutions.

In 2000, Deborah Cullen filed a sex discrimination claim against the Indiana University Board of Trustees alleging violations of the Equal Pay Act and Title VII.[6] Dr. Cullen began working at Indiana University in 1990 as director of the respiratory therapy program at a salary of $45,000.[7] The university paid her male predecessor $36,742.[8] By 1998, Dr. Cullen was receiving a salary of $63,240.[9] Meanwhile in 1998, Indiana University hired Sandy Quillen, a male, as program director for physical therapy at a salary of $90,000.[10] Dr. Quillen's female predecessor had been paid $85,696.[11] Using the pay disparity between herself and Dr. Quillen, Dr. Cullen alleged that the university paid a similarly situated male, Dr. Quillen, a higher salary to perform the same job as her own.[12] Cullen argued that the university intended to pay her less because of her gender.[13] The university filed a motion for summary judgment, which the district court granted.[14] In 2002, Dr. Cullen appealed, and the Seventh Circuit affirmed the judgment of the district court.[15] In reaching its decision on the Equal Pay Act claim, the Seventh Circuit examined the levels of skill, effort, and responsibility required of Dr. Cullen's and Dr. Quillen's position before finding that the jobs were unequal.[16] The Seventh Circuit added that even if Dr. Cullen had established that the jobs were equal, she did not refute the university's affirmative defense that the pay disparity was based on factors other than sex.[17] With regard to the Title VII claim, the Seventh Circuit concluded that, for reasons similar to those that explain why the Equal Pay Act claim failed, Dr. Cullen did not present evidence of a "similarly situated" male that the university treated more favorably.[18] Using *Cullen* and other cases, this note aims to identify which tangible and intangible aspects of a professor's job may lawfully be considered when determining faculty salaries so that educational institutions will know which factors other than sex can withstand a sex-based wage discrimination claim.

Part I of this note will review the history and purpose of the Equal Pay Act,

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6. *Id.* at 695.
7. *Id.*
8. *Id.*
9. *Id.* at 696.
10. *Id.*
11. *Id.*
12. *Id.* at 697. Dr. Cullen, the plaintiff, must compare her salary to that of a "comparator," another employee of the opposite sex. In this case, the comparator is Dr. Quillen. Dr. Cullen must prove that her job requires equal skill, effort, and responsibility to that of Dr. Quillen. *See infra* Part II.E. for further explanation of the term comparator.
13. *Id.*
14. *Id.* at 695.
15. *Id.*
16. *Id.* at 699–700.
17. *Id.* at 702–03.
18. *Id.* at 704.

outline the prima facie case under the Equal Pay Act, and describe the relationship between the Equal Pay Act and Title VII. Part II will examine what constitutes equal work for faculty members under the Equal Pay Act by discussing various court decisions involving academic institutions. In particular, this note will analyze what facts courts have taken into consideration in addressing a plaintiff's prima facie case against a college or university under the Equal Pay Act. Part III assumes a plaintiff has proven a prima facie case under the Equal Pay Act and analyzes which factors other than sex courts have recognized as defenses or justifications to pay differentials in faculty salaries. This note concludes with a discussion of how the law might address pay disparities among professors and other faculty members in the future.

I. OVERVIEW OF EQUAL PAY ACT

A. Background

The Equal Pay Act was enacted in June 1963, as the first federal statute of the twentieth century addressing the issue of discrimination in the employment arena.[19] The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938 and was originally enforced by the United States Department of Labor.[20] President Carter's Reorganization Plan No. 1 of 1978,[21] however, reassigned enforcement of the Equal Pay Act to the Equal Employment Opportunity Commission ("EEOC"), the agency that is also responsible for interpreting and enforcing Title VII of the Civil Rights Act of 1964.[22]

The scope of the Equal Pay Act is limited to pay discrimination between men and women.[23] Although the purpose of the Act was to remedy historical discrimination against women, the Act applies equally to men and women.[24] The Equal Pay Act provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the

19. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 4.02 (1988) (citing H.R. Rept. No. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 687).

20. *Id*.

21. 3 C.F.R. § 321 (1978).

22. PLAYER, *supra* note 19, § 4.02.

23. *Id*. § 4.01.

24. *See* Bd. of Regents v. Dawes, 522 F.2d 380 (8th Cir. 1975) (holding that the University of Nebraska violated the Equal Pay Act and unlawfully discriminated against the male professional employees of the college of agriculture and home economics when it implemented a formula for determining a minimum salary based on education, experience and merit for females but then refused to implement the same formula for determining the minimum salaries of males); 29 C.F.R. § 1620.1(c) (1987) ("Men are protected under the Act equally with women. While the [Equal Pay Act] was motivated by concern for the weaker bargaining position of women, the Act by its express terms applies to both sexes.").

> performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .[25]

To establish a prima facie case of wage discrimination under the Equal Pay Act, a plaintiff must prove: "(1) higher wages were paid to [an employee of the opposite sex within the same establishment], (2) for equal work requiring substantially similar skill, effort and responsibilities, and (3) the work was performed under similar working conditions."[26] If the plaintiff can establish a prima facie case, then the burden shifts to the employer to justify the unequal pay for the equal work by proving one of the four statutory affirmative defenses listed in the next paragraph.[27] Numerous courts have struggled with defining the reach of the statutory terms, especially the term "equal work," as well as the four defenses expressly set forth in the statute.

The Equal Pay Act identifies four defenses to sex-based wage discrimination. Different pay for apparently equal work does not violate the Act if the pay disparity is made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[28] The first three defenses are rather non-controversial, but the fourth defense has generated a tremendous amount of litigation.[29] Accordingly, this note will focus on the fourth defense, particularly as it relates to faculty salaries.

B. Relationship to Title VII of the Civil Rights Act of 1964

The Equal Pay Act and Title VII of the Civil Rights Act of 1964 overlap in that they both prohibit sex-based wage discrimination.[30] Moreover, both statutes have the same broad purpose of abolishing stereotypes that relegate men and women to certain pre-ordained roles in the workplace.[31] Title VII, however, is much broader in scope than the Equal Pay Act. While the Equal Pay Act reaches only pay discrimination between men and women, Title VII prohibits discrimination in employment on the basis of race, color, national origin, sex, and religion.[32] Title VII also applies to all employment terms and conditions, not just pay.[33] This note will discuss only the section of Title VII that prohibits discrimination "against any individual with respect to his compensation . . . because of such individual's . . . sex . . . ."[34]

Because both the Equal Pay Act and Title VII cover equal pay, a plaintiff

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25. 29 U.S.C. § 206(d)(1) (2000).

26. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 698–99 (7th Cir. 2003) (quoting Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 685 (7th Cir. 1998)).

27. *Id*. at 702.

28. 29 U.S.C. § 206(d)(1)(i)–(iv) (2000).

29. *See, e.g.*, Wallace v. Bd. of Regents of the Univ. Sys. of Ga., 967 F. Supp. 1287 (S.D. Ga. 1997); Univ. & Cmty. Coll. Sys. of Nev. v. Farmer, 930 P.2d 730 (Nev. 1997).

30. 4 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS § 20.06 (2003).

31. *Id.*

32. PLAYER, *supra* note 19, § 4.03.

33. COOK & SOBIESKI, *supra* note 30, § 20.06.

34. 42 U.S.C. § 2000e-2(a) (2000).

charging sex-based wage discrimination will often join a Title VII claim together with an Equal Pay Act claim in a single suit.[35] Allowing a plaintiff to bring a claim under Title VII and the Equal Pay Act essentially gives the plaintiff two opportunities to recover for the alleged sex-based wage discrimination. There are, however, important differences between the two statutes, which dictate whether a plaintiff may bring an action under one or both statutes.[36]

One of the main differences between the two statutes is that the Equal Pay Act and Title VII have dissimilar proof requirements for establishing a prima facie case. For example, to establish a prima facie case of sex discrimination under Title VII,[37] when the plaintiff proceeds under the *McDonnell Douglas*[38] framework, the

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35. PLAYER, *supra* note 19, § 4.03.

36. First, the coverage of the Equal Pay Act extends to employees "engaged in commerce" or in the "production of goods for commerce" regardless of the employer's size. HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 8.2 (1997). In contrast, Title VII covers an employer if it has fifteen or more employees. *Id.* § 3.3, at 151. Therefore, if a plaintiff's employer has less than fifteen employees, the plaintiff can bring a claim only under the Equal Pay Act.

Second, a private plaintiff does not need to exhaust state or federal administrative remedies before proceeding to court under the Equal Pay Act. *See, e.g.*, County of Wash. v. Gunther, 452 U.S. 161, 175 n.14 (1981) ("[T]he Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts."). Title VII, on the other hand, requires that the EEOC try to eliminate an unlawful practice through informal methods of conciliation first. 42 U.S.C. § 2000e-5(b). Thus, the Equal Pay Act does not require any prior administrative filing or informal conciliation while Title VII does.

Third, the Equal Pay Act and Title VII have different proof requirements. *See supra* Part I.A–B.

Fourth, the statute of limitations for an Equal Pay Act claim is two years, or three years if the violation is "willful." 29 U.S.C. § 255(a) (2000). Under Title VII, however, the plaintiff has 180-day or 300-day administrative filing deadlines. 42 U.S.C. § 2000e-5(e) (2000).

Finally, the two statutes provide different remedies. The Equal Pay Act does not permit a private plaintiff to obtain injunctive relief. Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1031–32 (7th Cir. 2003); Lyon v. Temple Univ., 507 F. Supp. 471, 475 (E.D. Pa. 1981). A private plaintiff, however, may recover liquidated damages under the Equal Pay Act in an amount equal to the unpaid wages. 29 U.S.C. § 216(b) (2000). In addition, attorney's fees are available to the prevailing plaintiff in a private Equal Pay Act suit. *Id.* In a Title VII action, a plaintiff may obtain injunctive relief, back pay, and attorney's fees, but not liquidated damages. *See* 42 U.S.C. § 2000e-5(g), (k) (2000). Also, the Civil Rights Act of 1991 added compensatory and punitive damages for intentional or "disparate treatment" violations under Title VII. 42 U.S.C. § 1981a(a) (2000). Although the remedies provided by the Equal Pay Act and Title VII are separate and distinct, a plaintiff may not obtain duplicative recovery for the same injury. PLAYER, *supra* note 19, § 4.03. A plaintiff may, however, receive the greater of the two amounts of back pay. *Id.*

37. Note that the elements for a Title VII discrimination case change depending on the nature of the claim. To prove a disparate impact discrimination claim under Title VII, for example, a plaintiff must prove that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

38. McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973). The *McDonnell Douglas* framework applies in single-motive cases where only one reason, either discriminatory or nondiscriminatory, caused the adverse employment action. In addition to the *McDonnell Douglas* framework, there is another framework for bringing a sex discrimination claim under Title VII. The second framework is explained in *Price Waterhouse v. Hopkins*, and it applies in mixed-

plaintiff must prove: (1) the plaintiff was a member of a protected class, (2) the plaintiff was meeting the employer's legitimate expectations, (3) the plaintiff suffered an adverse employment action, and (4) the employer treated a similarly situated employee of the opposite sex more favorably.[39] If the plaintiff establishes a prima facie case, then the burden of production shifts to the employer to present legitimate nondiscriminatory reasons for the disparity.[40] If the employer presents legitimate reasons, then in order to prevail the plaintiff must prove that the proffered reasons are pretext for discrimination.[41]

Because Congress incorporated the Equal Pay Act's statutory defenses into Title VII, an employer can justify a pay disparity under Title VII if it is based upon seniority, merit, productivity, or any other factor other than sex.[42] Thus, if a college or university can prove that an affirmative defense under the Equal Pay Act justifies a salary differential, then the college or university would presumably also prevail under Title VII.[43] Accordingly, the remainder of this analysis will focus on the Equal Pay Act.

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motive cases where in addition to the discriminatory motive, a nondiscriminatory motive may have also caused the adverse employment action. 490 U.S. 228, 260 (1989), *modified by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified as amended at 42 U.S.C. § 2000e-2(m) (2000)). Under the *Price Waterhouse* framework, the plaintiff must prove that discriminatory intent was a motivating factor leading to the adverse employment action. 490 U.S. at 258. Once the plaintiff meets this burden, the defendant may avoid a finding of liability by proving that it would have taken the same action anyway, in the absence of the impermissible motivating factor, because it had a nondiscriminatory reason for taking the adverse employment action. *Id*. Stated another way, the defendant must prove that its alleged nondiscriminatory reason was a determinative cause for the adverse employment action. *Id*. at 244–45. *Desert Palace, Inc. v. Costa* clarifies the *Price Waterhouse* framework by saying that the plaintiff must prove by any available evidence, whether direct or circumstantial, that discriminatory intent was a motivating factor contributing to the adverse employment action. 539 U.S. 90, 99–100 (2003).

39. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 704 (7th Cir. 2003) (citing Johnson v. Zema Sys. Corp., 170 F.3d 734, 742–43 (7th Cir. 1999); Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 561 (7th Cir. 1998)).

40. *Cullen*, 338 F.3d at 704 (citing Johnson v. Univ. of Wisconsin-Eau Claire, 70 F.3d 469, 478 (7th Cir. 1995)).

41. *Id*.

42. *See* 42 U.S.C. § 2000e-2(h) (2000). Title VII states:

> It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of [the Fair Labor Standards Act of 1938 as amended by the Equal Pay Act].

42 U.S.C. § 2000e-2(h) (2000). This is the so-called Bennett Amendment. It effectively incorporates the Equal Pay Act's four affirmative defenses into the statutory regime for Title VII for wage discrimination claims. County of Wash. v. Gunther, 452 U.S. 161, 168 (1981).

43. *See* 42 U.S.C. § 2000e-2(h) (2000). *See also* Chang v. Univ. of R.I., 606 F. Supp. 1161, 1187 (D.R.I. 1985) ("Thus, an employer who proves that a controverted salary differential is the product of a valid exemption to the Equal Pay Act absolves itself of liability therefor under Title VII as well.").

II. EQUAL WORK

In a sex-based wage discrimination claim under the Equal Pay Act, the plaintiff must prove that a person of the opposite sex is paid more for performing "equal work." The equal work requirement is the most complicated element of the plaintiff's cause of action,[44] and parties have frequently litigated its meaning.[45] Although the Act uses the word "equal," the Act does not require that jobs be identical because that would allow employers to circumvent the equal pay requirement.[46] Rather, the plaintiff has to "show that the jobs compared are substantially equal, 'based upon actual job performance and content—not job titles, classifications or descriptions.'"[47] Therefore, "job titles and job descriptions are relevant, but not controlling."[48] To determine whether work is equal, courts focus on the duties that an employee actually performs.[49] For example, one district court concluded that the plaintiff failed to prove equal work because "[t]here was no evidence comparing the relative teaching loads at the relevant period; nothing was offered to explain the expectations directed at faculty members regarding research, publication, committee service, or any other of those extra-curricular activities which obviously make up the job content of a college professor."[50] Under the Act, the jobs must involve equal skill, effort, and responsibility, and the jobs must be performed under similar working conditions.[51] The applicable EEOC regulations indicate that the terms equal skill, equal effort, and equal responsibility "constitute separate tests, each of which must be met in order for the equal pay standard to apply."[52]

A. Skill

The positions in question for equal pay must involve the same level of skill.[53] In assessing skill required for the performance of a job, the comparison is between positions, not a comparison of skills possessed by individuals.[54] "Skill includes

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44. COOK & SOBIESKI, *supra* note 30, § 20.14[A].

45. *See, e.g.*, Howard v. Lear Corp. Eeds & Interiors, 234 F.3d 1002 (7th Cir. 2000); Peters v. City of Shreveport, 818 F.2d 1148, 1155 (5th Cir. 1987); Hoban v. Tex. Tech. Univ. Health Scis. Ctr., No. EP-02-CA-345(KC), 2004 WL 594449 (W.D. Tex. Mar. 12, 2004); Hofmister v. Miss. State Dep't of Health, 53 F. Supp. 2d 884 (S.D. Miss. 1999).

46. PLAYER, *supra* note 19, § 4.11. *See also* 29 C.F.R. 1620.13(a) (2004) ("The equal work standard does not require that compared jobs be identical, only that they be substantially equal.").

47. Markel v. Bd. of Regents of the Univ. of Wis. Sys., 276 F.3d 906, 913 (7th Cir. 2002) (quoting EEOC v. Mercy Hosp. & Med. Ctr., 709 F.2d 1195, 1197 (7th Cir. 1983)) (internal citations omitted).

48. PLAYER, *supra* note 19, § 4.11.

49. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1461 (7th Cir. 1994).

50. Thomasko v. Univ. of S.C., Coastal Carolina Coll., No. CIV.A.82-1840-2, 1985 WL 6455 (D.S.C. 1985).

51. 29 U.S.C. § 206(d)(1) (2004).

52. Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 686 (7th Cir. 1998) (quoting 29 C.F.R. § 1620.14(a) (2004)).

53. 29 C.F.R. § 1620.14(a).

54. *See id*.

consideration of such factors as experience, training, education, and ability."[55] A skill that is not needed to meet the requirements of the job, however, should not be considered in determining equality of skill.[56] For example, the Seventh Circuit in *Cullen* explained that no facts suggested that Dr. Quillen's position, as the physical therapy program director, required more academic degrees than Dr. Cullen's position, as the respiratory therapy program director.[57] Nonetheless, the positions themselves involved different levels of skill because Dr. Quillen's position required the creation of a new graduate program while Dr. Cullen's position did not.[58] Similarly, the Eighth Circuit in *Horner v. Mary Institute*[59] found different skill requirements between two positions of physical education teachers because one teacher was required to teach courses selected by someone else while the other teacher was required to develop and implement a physical education curriculum.[60] Thus, two positions may be superficially similar and still not be substantially equal.

In *Spaulding v. University of Washington*,[61] the nursing faculty plaintiffs argued that they performed substantially equal work to that performed by faculty members in other departments—such as social work, urban planning, speech and hearing, health services, architecture, and environmental health—because all these jobs require preparation and teaching of courses, advising of students, committee work, research and publication, and community service.[62] The Ninth Circuit agreed with the nursing faculty plaintiffs that "teaching is teaching," but concluded that the plaintiffs did not show substantial equality because the other departments placed different amounts of emphasis on research, training, and community service.[63]

B. Effort

The equal pay standard applies to jobs that require equal effort to perform.[64] "Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job."[65] In determining the level of effort, courts should consider whether a job causes mental fatigue.[66] For instance, the Seventh Circuit in *Cullen* agreed with the district court that the effort required for Dr. Cullen (the plaintiff) to secure outside funding by means of grants for the respiratory therapy department was less than the effort required for Dr. Quillen (the comparator) to create Master's and Doctoral courses of study in the physical

55. *Id.* § 1620.15(a).

56. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 699 (7th Cir. 2003) (citing COOK & SOBIESKI, *supra* note 30, § 20.15[B], at 20-123–124).

57. *Id.*

58. *Id.*

59. 613 F.2d 706 (8th Cir. 1980).

60. *Id.* at 714.

61. 740 F.2d 686 (9th Cir. 1984).

62. *Id.* at 696–97.

63. *Id.* at 698.

64. 29 C.F.R. § 1620.16(a) (2004).

65. *Id.*

66. *Id.*

therapy program, which was on probation when Dr. Quillen was hired.[67]

In *Mehus v. Emporia State University*,[68] the district court further explained that "[i]f the difference in effort is only in the kind of effort required, not the amount or degree, a wage differential is not justified."[69] The district court in *Mehus* had several reasons for finding that genuine issues of material fact existed regarding the question whether the head basketball and volleyball coach positions required substantially equal effort.[70] Among the court's reasons was the fact that the university had not provided any evidence that coaching a broadcast sport required more effort than coaching a sport that was not broadcast, or that coaches who had to participate in radio programs exerted substantially more effort than coaches who did not.[71] In addition, the court noted that the record had no evidence that "ticket sales, or large numbers of fans, require basketball coaches to exert substantially more effort than coaches with no ticket sales and fewer fans."[72]

C. Responsibility

For purposes of equal pay analysis, the positions must also impose the same level of responsibility.[73] In conducting this analysis, the Seventh Circuit in *Cullen* looked at "the duties actually performed by each employee."[74] The Seventh Circuit reasoned that Dr. Quillen's position involved greater responsibility because he created and launched a graduate program, supervised 116 students and six faculty members, and generated six times the tuition that Dr. Cullen's program produced.[75] Meanwhile, Dr. Cullen was not required to initiate a new graduate program, and she had to supervise only fifty-seven students and three faculty members.[76] The Seventh Circuit noted, moreover, that the most important factor in this responsibility comparison was the difference in tuition revenue because the department would not be able to operate without a thriving physical therapy program, and this imposed additional pressure and responsibility on the physical therapy director.[77]

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67. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 699 (7th Cir. 2003).

68. 222 F.R.D. 455 (D. Kan. 2004).

69. *Id.* at 475.

70. *Id.*

71. *Id.*

72. *Id.*

73. 29 C.F.R. § 1620.14(a) (2004).

74. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 700 (7th Cir. 2003) (quoting Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1461 (7th Cir. 1994)).

75. *Id.*

76. *Id.*

77. *Id.* (citing Stanley v. Univ. of Southern Cal., 13 F.3d 1313 (9th Cir. 1994) (holding that university's men's basketball coach had additional pressure to win because the men's program generated ninety times more revenue than the women's program, which imposed greater responsibility and created different working conditions for the men's coach). *But see* EEOC, *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, EEOC Notice No. 915.002, at 9, *available at* http://www.eeoc.gov/policy/docs/coaches.html (Oct. 29, 1997) [hereinafter EEOC Guidelines] (stating that the EEOC will "carefully analyze an asserted defense that the production of revenue is a factor other than sex to determine whether the institution has provided discriminatorily reduced support to a female

In *E.E.O.C. v. TXI Operations*,[78] the district court stated, "Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[79] The district court found substantial differences in job responsibility between Julie Fundling, the plaintiff, and Wes Schlenker, the male comparator,[80] even though both Fundling and Schlenker were attorneys in TXI's legal department, and they both reported to Robert Moore, TXI's general counsel.[81] The district court concluded that Fundling and Schlenker had different levels of responsibility because Fundling admitted that Schlenker handled more complex legal matters, and Schlenker had served as General Counsel during Moore's two-month leave of absence whereas Fundling "never had the responsibility to act as the general counsel on TXI's behalf."[82]

D. Similar Working Conditions

The jobs must be performed under similar working conditions in order for the Equal Pay Act to require equal pay.[83] "The mere fact that jobs are in different departments . . . will not necessarily mean that the jobs are performed under dissimilar working conditions."[84] Similar working conditions entail surroundings and hazards.[85] In *Cullen*, for example, the Seventh Circuit found that Dr. Cullen and Dr. Quillen were working under similar conditions because no evidence suggested that they were exposed to different physical surroundings or hazards in performing their duties.[86]

Unlike *Cullen*, *Pfeiffer v. Lewis County*[87] is an example of a case in which the court found that two positions, the dispatcher/correction officer ("D/CO") position and the full-time corrections officer ("CO") position, were performed under dissimilar working conditions.[88] The court in *Pfeiffer* reasoned that the two positions had dissimilar working conditions, particularly the hazards associated with each position, because "the COs worked directly with the inmates in the cell blocks, whereas the D/COs work primarily in the secure control room."[89]

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coach to produce revenue for her team.") The EEOC will, therefore, inquire whether the university has provided considerably more support to the man than the woman in raising revenue. *Id.* According to these EEOC guidelines, a university cannot consider revenue as a factor other than sex to justify a wage disparity if the plaintiff and the comparator of the opposite sex are not given the same support to enable him or her to raise revenue.

78. No. 3:03-CV-1868-P, 2005 WL 81712 (N.D. Tex. Jan. 13, 2005).

79. *Id.* at *8 (quoting 29 C.F.R. § 1620.17(a) (2004)).

80. *Id.*

81. *Id.* at *2.

82. *Id.* at *8.

83. 29 C.F.R. § 1620.18(a) (2004).

84. *Id.*

85. *Id.* ("'Surroundings' measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and their frequency. 'Hazards' take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause.")

86. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 700 (7th Cir. 2003).

87. 308 F. Supp. 2d 88 (N.D.N.Y. 2004).

88. *Id.* at 101.

89. *Id.* (internal citation omitted).

E. Comparator

A plaintiff must identify a particular "comparator" of the opposite sex and prove that the comparator's job required equal skill, effort, and responsibility to that of the plaintiff, and that both jobs were performed under similar working conditions.[90] Several equal pay claims brought against colleges and universities have failed because the plaintiffs have not been able to produce evidence that they performed work equivalent to that of their comparators.[91] Although statistical evidence of a gender-based salary disparity among comparable professors may contribute to a plaintiff's case, the plaintiff is still required to identify a specific comparator of the opposite sex.[92] In other words, a plaintiff cannot compare himself or herself to a hypothetical comparator with a composite average of a group's skill, effort, and responsibility.[93]

III. FACTORS OTHER THAN SEX

Assuming a professor is able to establish a prima facie case, the college or university has the burden of rebutting the presumption of gender discrimination by proving one of four statutory affirmative defenses: seniority, merit, productivity, or a factor other than sex.[94] The college or university may avoid liability for unequal pay if it can submit evidence that undercuts the plaintiff's proof of the prima facie elements, or if it can prove one of the four defenses under the Equal Pay Act. The focus of this note is on the fourth affirmative defense, which permits a pay differential "based on any other factor" as long as that factor is one "other than sex."[95] "Any other factor other than sex" is open-ended. As one court explained,

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90. Lavin-McEleney v. Marist Coll., 239 F.3d 476 (2d Cir. 2001) (citing Strag v. Bd. of Trs., 55 F.3d 943, 948 (4th Cir. 1995)).

91. *See* Fisher v. Vassar Coll., 70 F.3d 1420, 1452 (2d Cir. 1995); Strag v. Bd. of Trs., 55 F.3d 943, 950 (4th Cir. 1995) (rejecting a comparison between plaintiff's mathematics department and a male professor's biology department without proving that the two positions were substantially equal in skill, effort, and responsibility); Soble v. Univ. of Md., 778 F.2d 164, 167 (4th Cir. 1985) (rejecting a comparison between plaintiff and assistant professors outside the dentistry school); Spaulding v. Univ. of Wash., 740 F.2d 686, 697–98 (9th Cir. 1984) (rejecting a comparison between the school of nursing and other schools in the university); Pepper v. Miami Univ., 246 F. Supp. 2d 854, 861 (S.D. Ohio 2003) (rejecting a comparison between plaintiff and male professor comparator because plaintiff made no effort to establish the equality of their work); Fitzgerald v. Trs. of Roanoke Coll., No. CIV.A.95-1049-R, 1996 U.S. Dist. LEXIS 16419 (W.D. Va. Aug. 29, 1996) (rejecting comparison between professor in fine arts department and a professor in the history department because no evidence indicated that the skills and responsibilities were sufficiently similar).

92. *Lavin-McEleney*, 239 F.3d at 481–82 (allowing the use of statistical analysis to establish gender-based discrimination and to calculate damages, after identifying a specific male comparator); *Cullen*, 338 F.3d at 701 (requiring plaintiff to identify a specific male comparator, and then allowing statistical evidence of a gender-based salary disparity among comparable professors to contribute to plaintiff's case).

93. *See Lavin-McEleney*, 239 F.3d at 481; Houck v. Va. Polytechnic Inst. & State Univ., 10 F.3d 204, 206 (4th Cir. 1993); Pollis v. New Sch. for Soc. Research, 913 F. Supp. 771, 784 (S.D.N.Y. 1996).

94. *See* 29 U.S.C. § 206(d)(1) (2000).

95. *Id.* § 206(d)(1)(iv) (2000).

the fourth exception to equal pay "is a broad 'catch-all' exception [that] embraces an almost limitless number of factors, so long as they do not involve sex."[96] The factor does not need to relate to the requirements of the position in question.[97] In general, as courts think it is not their place "to second-guess the employer's business judgment, [courts] ask only whether the factor is bona fide, whether it has been discriminatorily applied, and in some circumstances, whether it may have a discriminatory effect."[98] Although any number of things could, in principle constitute "any other factor other than sex," the history of college and university-related litigation under the Equal Pay Act reveals that only a few "other factors other than sex" have been asserted in defense of equal pay. This section will separately discuss the most frequently offered factors under the catch-all exception to equal pay in faculty salary.

A. Experience, Education and Training

In establishing equal work as part of the prima facie case, a court will compare the skills required by the job, not the skills possessed by the individual employees. A difference in experience, education and training, however, is relevant as an affirmative defense if the experience or education relates to the responsibilities and duties that the employees must perform in their jobs.

Indiana University recently asserted this affirmative defense in *Cullen*.[99] The Seventh Circuit in *Cullen* stated, "Education is a relevant consideration in determining whether disparate salaries exist for reasons other than sex."[100] Dr. Cullen, the plaintiff, held a Bachelor of Science degree in Respiratory Therapy, a Master of Arts in Education, and a Doctor of Education degree.[101] In comparison, Dr. Quillen, the male comparator, held five degrees, including a Ph.D. in Sports Medicine.[102] The Seventh Circuit concluded that education was a valid reason other than sex for the pay disparity because Dr. Quillen held more degrees in his discipline.[103]

In *Strag v. Board of Trustees*,[104] Craven Community College introduced

96. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (quoting Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989)).

97. *Id. But see* Univ. & Cmty. Coll. Sys. of Nev. v. Farmer, 930 P.2d 730, 737 (Nev. 1997) (holding that "the proper legal standard underlying the factor-other-than-sex defense requires, at a minimum, that an employer demonstrates a business-related reason for the wage disparity"); Aldrich v. Randolph Ctr. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) (noting that the defendant must establish a legitimate business reason for satisfying the factor other than sex defense); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988) (same); Maxwell v. City of Tucson, 803 F.2d 444, 447 (9th Cir. 1986) (noting that the defendant must establish organizational needs to satisfy the factor-other-than-sex defense); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) (noting that sex-based wage differential must be based on an acceptable business reason).

98. *Dey*, 28 F.3d at 1462 (citing Fallon v. State of Ill., 882 F.2d 1206, 1211 (7th Cir. 1989)).

99. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 702 (7th Cir. 2003).

100. *Id.* (citing Covington v. Southern Ill. Univ., 816 F.2d 317, 323 n.9 (7th Cir. 1987)).

101. *Id.* at 696.

102. *Id.* at 702.

103. *Id.* at 702–03.

104. 55 F.3d 943 (4th Cir. 1995).

affidavits to show that teaching experience and reputation were the gender-neutral reasons for the pay differential between the plaintiff and the comparator.[105] In this case, the Fourth Circuit found that differences in experience accounted for part of the wage differential because Thurza Strag, the plaintiff and mathematics instructor, had nine years of teaching experience, whereas Linwood Swain, the male comparator and biology instructor, had twenty-four years of teaching experience.[106] Additionally, Swain was very well known in the community for his innovative teaching methods, which incorporated state-of-the-art technology that other teachers did not use, and he had been awarded the Outstanding Biology Teacher in the state of North Carolina.[107] Craven Community College also argued that because Swain was better known than Strag, having him on the staff would attract more students to the college.[108] In all, the Fourth Circuit concluded that the college had proven that the salary differential was based on factors other than sex.[109]

In *Covington v. Southern Illinois University*,[110] Patricia Covington, an assistant professor of art, sued the university alleging sex-based wage discrimination for paying her less than her male predecessor, Donald Lemasters.[111] The Seventh Circuit affirmed the district court's finding that the university had met its burden of proving that the wage differential was due to a factor other than sex because the salary that Lemasters last earned was based on his five years of experience at Southern Illinois.[112] In contrast, Covington had little teaching experience when she was hired.[113] The Seventh Circuit also considered the fact that Lemasters had a masters degree in music, a degree that qualified him for promotion and tenure at the university.[114] Covington, on the other hand, was in the process of completing a masters degree in education, a degree that did not qualify her for tenure or promotion within the School of Art.[115] Thus, the Seventh Circuit in *Covington* accepted experience and education as factors other than sex that explained the disparity in salary.

B. Revenue Generation

Cullen is a recent case in higher education law to recognize revenue generation as a legitimate factor other than sex that can explain a pay disparity in faculty salary. The Seventh Circuit concluded that the pressure imposed on Dr. Quillen, as the director of the physical therapy program that generated six times as much revenue in tuition as Dr. Cullen's respiratory therapy program, was another factor

105. *Id.* at 951.
106. *Id.* at 945–46.
107. *Id.* at 951.
108. *Id.*
109. *Id.*
110. 816 F.2d 317 (7th Cir. 1987).
111. *Id.* at 318.
112. *Id.* at 321.
113. *Id.* at 324.
114. *Id.*
115. *Id.*

that explained the difference in salaries.[116] The Seventh Circuit emphasized the fact that the physical therapy program generated nearly 30% of the tuition revenue of the school of allied health sciences, and that the school relied on this revenue to sustain itself.[117] Based on the court's holding in *Cullen*, another college or university could arguably justify a wage differential between one faculty member who is responsible for a department that generates more revenue in tuition and another faculty member of a different sex who does not have the added responsibility of generating a substantial portion of the revenue.

Revenue generation also arises in cases involving athletic coaches in college sports programs. One such case is *Stanley v. University of Southern California*.[118] In this case, however, the University of Southern California ("USC") discussed revenue generation as evidence of a difference in job responsibilities and working conditions rather than as an affirmative defense. Accordingly, the Ninth Circuit in *Stanley* compared the responsibilities of the head coaches of the women's and men's basketball teams.[119] The men's coach was required to perform public relations and promotional activities, such as outside speaking engagements and interviews with the media, to generate revenue for the university.[120] These activities contributed to the men's team's ability to generate ninety times the revenue that the women's team was able to generate.[121] Because the women's coach was not required to perform the same level of "promotional and revenue-raising activities," the Ninth Circuit found that the difference in responsibilities was a reason for the pay differential.[122] Essentially, the head coaches had the same title, but they had different levels of responsibility, and the jobs therefore constituted unequal work. The court stated, "revenue generation is an important factor that may be considered in justifying greater pay."[123] In *Stanley*, the Ninth Circuit concluded that plaintiff did not prove her prima facie case.[124] Specifically, the Ninth Circuit found that the pay disparity between the men's and women's coaches salaries was due to the differences in responsibilities and working conditions rather than the gender of the coach.[125] Nevertheless, a different outcome might have resulted if the women's coach had, for example, proven that the university allocated more resources to the men's basketball team, thereby enabling it to generate more revenue.[126]

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116. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 703 (7th Cir. 2003).

117. *Id*. at 700.

118. 13 F.3d 1313 (9th Cir. 1994). For a discussion of the Title IX aspects of this case, see Catherine Pieronek, *Title IX and Gender Equity in Science, Technology, Engineering, and Mathematics Education: No Longer an Overlooked Application of the Law*, 31 J.C. & U.L. 291, 325 (2005).

119. *Id*. at 1321.

120. *Id*.

121. *Id*. The women's basketball team produced $50,262 in revenue during Coach Stanley's four years while the men's team produced $4,725,784 during the same four years. *Id*. at 1322.

122. *Id*. *See* Jacobs v. Coll. of William & Mary, 517 F. Supp. 791, 797 (E.D. Va. 1980) (noting that the duty to generate revenue shows that coaching jobs are not substantially equal).

123. *Stanley*, 13 F.3d at 1323.

124. *Id*.

125. *Id*.

126. *See* EEOC Guidelines, *supra* note 77, at 10.

C. Salary Retention Policy

A salary retention policy allows an employee to transfer to a new position within the college or university while retaining his or her prior pay, even if the employee's prior pay is more than the pay rate for the new position. Employers generally use salary retention policies to retain qualified employees or to induce employees to transfer to positions where they are most needed.[127] Federal regulations call salary retention policies "red circle" rates and state:

> [M]aintaining an employee's established wage rate, despite a reassignment to a less demanding job, is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be 'red circled' in order to comply with the [Equal Pay Act].[128]

In *Covington v. Southern Illinois University*,[129] the university argued that its policy of retaining the salary of employees who change assignments within the university was a factor other than sex that justified a pay disparity between two professors who performed the same work.[130] The university also explained that its reason for the salary retention policy was to promote employee morale.[131] The Seventh Circuit agreed with the university's argument and held that "[t]he present employer should be permitted to consider the wages it paid an employee in another position unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex."[132] Thus, a college or university that has a policy of not reducing salaries when faculty members transfer to other positions may offer this as a factor other than sex in explaining a pay disparity, but the policy must apply to all transfers and must not have a discriminatory effect.[133]

Although a salary retention policy such as the one in *Covington* may constitute

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127. *See* Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988).

128. 29 C.F.R. § 1620.26(a) (2004).

129. 816 F.2d 317 (7th Cir. 1987).

130. *Id.* at 321–22.

131. *Id.* at 322.

132. *Id.* at 323. *But see Glenn*, 841 F.2d at 1571 (rejecting *Covington* because "it ignores that prior salary alone cannot justify pay disparity"). The fear is that "a factor like prior salary . . . [can] be used to capitalize on the unfairly low salaries historically paid to women." Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982). These cases suggest that "the policy of considering an employee's prior salary in setting his or current wage . . . may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a previous employer." *Covington*, 816 F.2d at 322. *Covington*, however, can be distinguished from these cases because the salary retention policy in *Covington* considered what the university paid the professor in a previous position at the university. It did not consider what a previous employer paid the professor.

133. If a plaintiff can prove that a college or university's salary retention policy has a discriminatory effect, then the plaintiff could challenge the policy by bringing a disparate impact claim under Title VII. *See supra* note 37.

a factor other than sex, an employee's starting salary standing alone does not constitute a factor other than sex. For example, the Ninth Circuit in *Hein v. Oregon College of Education*[134] held that pay disparities based on unequal starting salaries do not violate the Equal Pay Act if the employer can show the original pay differential was based on a legitimate factor other than sex.[135] In *Hein*, the Ninth Circuit remanded the case to the district court to determine whether the employer could show that at the time of hiring, "the male comparators deserved higher salaries than their respective female counterparts based on the abilities or capabilities of the teachers or the needs of the institution."[136] The Ninth Circuit further instructed that the principal question for each plaintiff should be: "Can [the employer] justify a starting wage lower than her comparator?"[137] The unequal starting salary must not be based upon cultural and social influences that artificially inflate the salary of one gender and not the other.[138] Thus, if the employer can justify unequal starting salaries based on a legitimate factor other than sex, then a court will likely allow unequal starting salaries to explain later pay differentials.

D. Policy of Responding to Outside Offers

Professors commonly use attractive offers from other colleges and universities to negotiate higher salaries from their current employers. If the current employer wants to keep the professor, the institution will match the offer or present a more attractive compensation package. As expected, colleges and universities have used outside offers as a factor other than sex to explain pay disparities, especially when the comparator receives a higher salary because he or she has obtained an outside offer.

In *Winkes v. Brown University*,[139] for example, Brown offered evidence of a "de facto policy of responding to outside offers from other universities when it desired to keep the professor and his or her qualities merited such action."[140] This issue arose when Catherine Wilkinson-Zerner, the comparator and associate professor who had recently been awarded tenure in the art department at Brown, received an offer from Northwestern University for an equivalent position at a significantly higher salary.[141] Brown's chairman told the provost about the offer and recommended that Brown match the offer because the position at Northwestern was comparable in every regard except salary.[142] The art department chairman also informed Brown's provost that, in his opinion, there was nothing to negotiate and that Brown should match Northwestern's offer because Zerner seemed willing

134. 718 F.2d 910 (9th Cir. 1983).
135. *Id*. at 920.
136. *Id*.
137. *Id* at 921.
138. *See id*.
139. 747 F.2d 792 (1st Cir. 1984).
140. *Id*. at 793.
141. *Id*.
142. *Id*. at 793–94.

to move.[143] Then in an effort to convince Brown's provost that Zerner was a "desirable faculty member," the art department's chairman told the provost about the quality of Zerner's performance and qualifications.[144] After these discussions, Brown offered to match Northwestern's salary, and Zerner accepted Brown's offer to stay.[145] The plaintiff in this case, Rudolf Winkes, was the only other associate professor in the art department.[146] Winkes brought an Equal Pay Act claim against Brown University challenging the pay differential between him and Zerner, the comparator, as based solely on gender.[147] Brown University raised several defenses, one of which was a policy of responding to outside offers.[148] The First Circuit found that although Brown did not always match outside offers, Brown had, in effect, a de facto practice of awarding merit raises to faculty members who received outside offers and whom Brown wanted to keep.[149] The dissent in *Winkes* raised questions about Brown's lack of negotiations with Zerner and about the speed in which Brown responded to Northwestern's offer, but the majority in *Winkes* held that Brown's de facto policy of responding to outside offers from other universities constituted a pay differential based on a factor other than sex.[150]

E. Market Forces at Time of Hire

Courts have rejected pay disparities on the basis of market forces when an employer takes advantage of a situation where women are willing to work for less than men, or where women are paid less than men merely because the market will allow it.[151] For these reasons, courts are wary about the market-forces or market-value argument as a factor other than sex. This section discusses one case in which the market-forces argument failed and then analyzes other cases in which the market-forces argument prevailed.

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143. *Id.*

144. *Id.* at 796.

145. *Id.* at 793.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 795.

150. *Id.* at 793.

151. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974). The Supreme Court held that Corning Glass Works violated the Equal Pay Act by paying the male night shift inspectors a separate night shift differential in addition to an already higher base wage than what it paid the female inspectors who performed the same tasks during the day shift. *Id.* at 190. The Court explained:

> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

Id. at 205. *See also* Taylor v. White, 321 F.3d 710, 718 (8th Cir. 2003) (stating that "it is important to ensure that employers do not rely on the prohibited 'market force theory' to justify lower wages for female employees simply because the market might bear such wages"); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570–71 (11th Cir. 1988) (same).

In *Brock v. Georgia Southwestern College*,[152] market forces were held not to constitute a factor other than sex to justify pay differentials between female and male faculty.[153] In *Brock*, the district court had determined that six female faculty members had established a prima facie case of sex-based wage discrimination under the Equal Pay Act against Georgia Southwestern College for paying female faculty members less than male faculty members for "equal work" and that the college had failed to rebut that case.[154] On appeal the college claimed, as an affirmative defense, that it paid professors according to the market's supply and demand.[155] The college argued "the marketplace for higher education dictates different salaries for different individuals based upon simple competition, differences in backgrounds, or differences in subject matter taught."[156] The Eleventh Circuit, however, reasoned that the college could not just assert that certain qualifications or professors of certain subject areas were worth more without explaining how those market forces resulted in one employee earning more than another.[157] The court found the college's argument especially unpersuasive because evidence showed that women with equal or greater qualifications teaching the same subjects were paid less than male comparators.[158] Also, the Eleventh Circuit noted that the college's hiring process was not standardized in any way, for example, by having no salary scales.[159] Instead, the individual professor and the chairperson of each division within the college would simply agree upon the salary.[160]

In *Brock*, the Eleventh Circuit agreed with the district court that:

> any credibility that the market force defense might have is diminished by the fact that those charged with hiring did not inform themselves of the market rates of particular expertise, experience, or skills. The hiring process is devoid of any bargaining over initial salaries, a process one would normally expect in the context of a competing market place.[161]

Thus, the Eleventh Circuit found no basis for the college's reliance on market forces as an affirmative defense to the pay differentials in question.[162] In addition, the court stated: "[t]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected."[163]

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152. 765 F.2d 1026 (11th Cir. 1985).

153. *Id*. at 1037.

154. *Id*. at 1029, 1032.

155. *Id*. at 1037.

156. *Id*. (quoting Appellant's brief).

157. *Id*.

158. *Id*.

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id*. (quoting Marshall v. Ga. Southwestern Coll., 489 F. Supp. 1322, 1331 (N.D. Ga. 1980)).

163. *Id*. (citing Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th

Unlike the employers in *Brock*, other educational institutions have won with the market-forces argument to justify pay differentials. The market-forces argument has succeeded in these other cases in which the market forces were not tied to one sex. For example, the Seventh Circuit in *Cullen* considered the market forces operating at the time of hiring the male comparator as a factor other than sex to explain why the university had "found it necessary" to offer the male comparator a higher salary than what it paid Dr. Cullen.[164] To justify the pay differential, the university described the circumstances in which it hired Dr. Quillen, the male comparator.[165] These circumstances involved a small applicant pool, a physical therapy program that was on probation, and the university's need for a new director who was willing to assume responsibility for a failing department, to try to revive it, and then to create a graduate program.[166] Given these circumstances, the court said, market forces at the time of hire mandated that the university offer a large salary to Dr. Quillen.[167] Most important, the university demonstrated that the market forces were unrelated to Dr. Quillen's gender and that the university offered him a higher salary to persuade him to accept the position.[168]

Similarly, the Eighth Circuit in *Horner v. Mary Institute*[169] found that market forces accounted for the pay differential between Ralph Thorne, the male comparator, and Arlene Horner, the plaintiff.[170] The evidence showed that the headmaster at Mary Institute[171] had tried to hire Thorne at $7,500, which was the starting salary for male and female teachers.[172] Thorne, however, was able to demand a higher salary because he had an offer to teach at another elementary school for $9,000.[173] The Eighth Circuit concluded from this fact that the headmaster matched the $9,000 offer not because of Thorne's gender but because Thorne's "experience and ability made him the best person available for the job and because a higher salary was necessary to hire him."[174] In closing, the Eighth Circuit stated, "an employer may consider the market place value of the skills of a

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Cir. 1970). *See also* Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio, 261 F.3d 542, 549 (5th Cir. 2002) (stating that "the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the [Equal Pay Act]"). *But see* Stanley v. Univ. of Southern Cal., 13 F.3d 1313 (9th Cir. 1994) (holding that "unequal wages that reflect market conditions of supply and demand are not prohibited by the [Equal Pay Act]") (citing E.E.O.C. v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 580 (7th Cir. 1987)).

164. Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 703 (7th Cir. 2003) (citing Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1322 (9th Cir. 1994) and Ross v. Univ. of Tex. at San Antonio, 139 F.3d 521, 526, 549 (5th Cir. 1998)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. 613 F.2d 706 (8th Cir. 1980).

170. *Id.* at 714.

171. Mary Institute is a non-profit corporation that operates three private schools: a lower school for kindergarten through fourth grade, a middle school for fifth through eighth grades, and an upper school for ninth through twelfth grades. *Id.* at 709.

172. *Id.* at 714.

173. *Id.*

174. *Id.*

particular individual when determining his or her salary."[175]

In *Fitzgerald v. Trustees of Roanoke College*,[176] Mary Fitzgerald, an assistant professor in the fine arts department, argued that Roanoke College had violated the Equal Pay Act because the college was paying her less than two male professors who started the same year as Fitzgerald in the college's history department.[177] The district court found that Roanoke College met its burden of proving that the disparity in faculty salary was based on the market demand for history professors versus fine arts professors.[178] The district court rested its finding on the fact that the faculty salary ranges for fine arts and history were based on "published national faculty salary data."[179] A greater demand for history professors the year Fitzgerald was hired resulted in a "correspondingly higher salary in order to attract more qualified candidates."[180] Thus, Roanoke College showed that market demand constituted a factor other than sex that justified the higher pay for the male comparators.

In *University and Community College System of Nevada v. Farmer*,[181] Yvette Farmer, the plaintiff, compared herself to Johnson Makoba, an African male immigrant.[182] Farmer showed that her starting annual salary was 17.5% less than Makoba's,[183] even though they were both assistant professors of sociology and did comparable work.[184] At the district court level, Farmer received damages for violations of the Equal Pay Act pursuant to a jury verdict, and the University of Nevada, Reno's motion for judgment notwithstanding the verdict was denied.[185] The Supreme Court of Nevada, however, reversed and concluded that Farmer had failed to prove that the pay differential was rooted in gender discrimination.[186] The Supreme Court of Nevada held that the university had succeeded in demonstrating a legitimate business-related reason for the pay disparity.[187] More specifically, the court held that the university had demonstrated that "manifest racial imbalance and market factors" were factors other than sex that explained the pay differential.[188] Most relevant to the court's decision was the fact that "only one percent of the University's faculty were black while eighty-seven percent were white."[189] At the same time, women held about twenty-five percent of the full-

175. *Id*. (citing Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977)).

176. No. CIV.A.95-1049-R, 1996 U.S. Dist. LEXIS 16419 (W.D. Va. Aug. 29, 1996).

177. *Id*. at *2.

178. *Id*. at *12.

179. *Id*. Although the case did not specify the source of the "published national faculty salary data," the facts indicated that the dean of the college consulted the published data and then set the salary ranges for the new faculty. *Id*. at *3.

180. *Id*.

181. 930 P.2d 730 (Nev. 1997).

182. *Id*. at 733.

183. *Id*. The University of Nevada, Reno started Makoba at $40,000 and Farmer at $33,000, a $7,000 difference.

184. *Id*. at 736.

185. *Id*. at 732.

186. *Id*. at 737–38.

187. *Id*. at 737.

188. *Id*.

189. *Id*.

time faculty positions.[190] Considering these statistics, the court held that the university had:

> a bona fide business-related reason for attaining a culturally diverse faculty. It is undisputed that qualified minority applicants, who are in short supply, can command premium salaries in the open market. The search committee elected to avoid an all-out bidding war with other educational institutions by offering Makoba a salary commensurate with his credentials, his minority status, and his overall marketability.[191]

Consequently, the court held that market forces constituted a factor other than sex that dictated a higher salary for the male comparator because there was a short supply of qualified minority applicants, regardless of gender.[192]

In *Fenrick v. Wichita State University*,[193] the district court stated that an employer does not violate the Equal Pay Act when it is forced to pay more in order to "fill a particular need."[194] The court reasoned that because the mathematics department needed another statistician, the university was justified in hiring the male comparator statistician at a higher starting salary than what it paid the female mathematics professor plaintiff.[195] The court held that the college appropriately considered the market demand for statisticians, regardless of sex, in calculating the male comparator's starting salary.[196] Thus, the college in *Fenrick* could rely on market demand as a nondiscriminatory explanation for the salary difference.

F. Miscellaneous

Some colleges and universities offer various, unrelated factors other than sex to explain wage differentials among faculty. *Schwartz v. Florida Board of Regents*[197] illustrates this catch-all category of cases. In *Schwartz*, Florida State University ("FSU") offered six seemingly unrelated factors to justify a pay disparity.[198] In *Schwartz*, a male professor in the college of education brought suit against the Florida Board of Regents for allegedly paying female professors in the college of education a higher salary than comparable male professors.[199] The defendant argued that the salary disparity "resulted from raises given to the faculty based upon service to the university, publication, administrative duties, meritorious

190. *Id.*

191. *Id.*

192. *Id.* A wage discrimination claim under the Equal Pay Act is different from a discriminatory hiring claim under Title VII. For a recent discriminatory hiring case against a university, see *Hill v. Ross*, 183 F.3d 586 (7th Cir 1999). In *Hill*, the court held the university's affirmative action plans could justify its employment decision not to offer a male plaintiff applicant a tenure track position if it could articulate a nondiscriminatory rationale for its decision. *Id.* at 590.

193. No. 83-1891-C, 1988 WL 131641 (D. Kan. Nov. 10, 1988).

194. *Id.* at *8 (citing Ratts v. Bus. Sys., Inc., 686 F. Supp. 546, 552 (D.S.C. 1987)).

195. *Id.*

196. *Id.*

197. 954 F.2d 620 (11th Cir. 1991).

198. *Id.* at 623.

199. *Id.* at 622.

research, supervision of doctoral students, and performance."[200] The Eleventh Circuit rejected Schwartz's argument that these factors were too subjective and could only be relied upon if they were part of a merit system.[201] Instead, the court held that the pay disparity was justified by factors other than sex.[202]

Analyzing FSU's arguments in light of the Seventh Circuit's guidance in *Cullen* suggests that a university, if litigating *Schwartz* today, might want to argue differently from the way FSU organized its arguments in *Schwartz*. *Cullen* clarifies whether a factor refutes an element of the prima facie case or applies as an affirmative defense. Colleges and universities should know whether to assert a factor to disprove the prima facie case or as an affirmative defenses because factors that address the level of skill, effort, and responsibility required for a job, for instance, can defeat the plaintiff's prima facie case outright without even asserting an affirmative defense. In other words, if colleges and universities assert the factors that most appropriately refute the elements of the plaintiff's prima facie case, then the college or university will not have to assert other factors as affirmative defenses because the case will have failed already. Applying the Seventh Circuit's reasoning in *Cullen*, FSU today would want to discuss the comparators' service to the university, administrative duties, and supervision of doctoral students as a response to the plaintiff's prima facie case. Then FSU would reserve only the publication, meritorious research, and performance arguments for the factors other than sex in its affirmative defenses. In view of *Cullen*, colleges and universities should allocate arguments appropriately to either the prima facie case or the affirmative defense rather than group all the arguments together as factors other than sex to justify a pay disparity, as FSU did in *Schwartz*.

CONCLUSION

To refute a sex-based wage discrimination claim under the Equal Pay Act, a college or university may first establish that the plaintiff and the comparator do not perform "equal work." Equal work requires a substantially similar level of skill, effort, and responsibility; and the jobs must be performed under similar working conditions. Second, a college or university can justify a pay differential by proving one of the four affirmative defenses under the Equal Pay Act. In particular, the college or university has to prove that the higher pay was "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[203] The cases discussed in this note show the breadth of the any-other-factor-besides-sex defense. *Cullen*, in particular, illustrates that courts will consider the unique characteristics of professors and faculty members' jobs in appraising the prima facie case as well as affirmative defenses.

This note shows that a college or university may justify a salary differential based on a factor other than sex, such as a difference in experience, education, training, revenue generation, an academic institution's salary retention policy, an

200. *Id.* at 623.
201. *Id.*
202. *Id.*
203. 29 U.S.C. § 206(d)(1)(i)–(iv) (2000).

academic institution's policy of responding to outside offers, or market forces at the time of hire. These factors, however, must reasonably explain the pay disparity, and the factors may not be used as pretext for sex discrimination. Although courts are not likely to intervene in the affairs of a college or university if there are legitimate differences that justify a pay disparity, the courts will not tolerate unlawful behavior. A college or university should consider the factors other than sex discussed in this note when it determines faculty pay and when it needs to defend itself against a sex-based wage discrimination claim.