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EQUAL PAY ACT CASES IN HIGHER EDUCATION

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ABSTRACT

This article reviews case law dealing with the Equal Pay Act as it applies to claims of pay discrimination by faculty in higher education. Elements of the cause of action, the four statutory defenses, and the need for a proper comparator of the opposite sex are discussed, as well as the use of statistical evidence, the statute of limitations and continuing violations, whether the Equal Pay Act abrogates the Eleventh Amendment immunity of the states, and the results of several universities' internal gender equity pay studies.

It has been more than forty years since the passage of the Equal Pay Act, which was designed to eliminate pay discrimination based on sex by requiring equal pay for equal work [1]. Although women's pay has increased since 1963, women still find that they earn on average only 78 percent of what men earn annually in the United States [2]. Faculty women in higher education similarly earn about 80 percent of what male faculty earn [3, p. 29]. There are two reasons for the overall lower salaries for faculty women compared to faculty men. One is that women are more likely to be employed at the lower paid rank of nontenure track lecturer or in unranked positions. The second is that women are more likely to be employed at associate and baccalaureate colleges where salaries are lower than at institutions that confer graduate degrees [3].

Not only do faculty women earn less on average than faculty men in higher education, but also in specific instances, faculty women have found that they are paid less than comparable male faculty of the same rank in their same institutions. In these situations, the Equal Pay Act may be violated. To understand whether an Equal Pay Act violation may have occurred, this article discusses the elements of

the prima facie case, including the importance of identifying an appropriate male comparator at the institution. The four statutory defenses are discussed, with emphasis on the two most common defenses in higher education cases, which are the existence of a merit pay system that justifies the differences in salary, and factors other than sex that explain the differences in salary. Statistical evidence used to show discrimination, the statute of limitations and the concept of a continuing violation, and the abrogation of Eleventh Amendment immunity are also discussed. Several universities' internal gender equity studies are cited, concluding with suggestions for faculty and administrators that may help identify and avoid Equal Pay Act violations [4].

EQUAL PAY ACT PRIMA FACIE CASE

The Equal Pay Act of 1963 [1] (EPA) was an amendment to the Fair Labor Standards Act [5]. Employers subject to the Fair Labor Standards Act are prohibited from discriminating in pay on the basis of sex for equal work, subject to four defenses.

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . . [5, §206(d)(1); 6].

According to the U.S. Supreme Court, the EPA was intended to remedy an endemic problem of underpayment of women for equal work based "on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same" [7, at 195].

To establish a prima facie case of EPA discrimination, the plaintiff [8] must show that:

1) she receives less pay than employees of the opposite sex;
2) the employees perform equal work in positions that are substantially equal in skill, effort, and responsibility; and
3) the positions are performed under similar working conditions

Intent to discriminate is not an element of the cause of action [9]. The Fourth Circuit has held that the plaintiff must specify a particular male comparator as part of the prima facie case [10]. Certainly, evidence of a particular male employee paid more than a woman working in a substantially equal position with equal job responsibilities and conditions is one way of establishing the first element of the prima facie case. However, statistical evidence of pay disparity between the sexes in substantially the same positions may also be used to help establish the prima facie case.

Once the prima facie case has been made [11, 12, 13], the burden then shifts to the employer to prove by a preponderance of the evidence that the wage differential is justified under one or more of the four affirmative defenses provided under the EPA. These affirmative defenses include 1) a seniority system; 2) a merit system; 3) a system that measures earnings by quantity or quality of production; or 4) any other factor other than sex [1]. In cases involving faculty in higher education, once the prima facie case has been shown, the college or university typically defends by arguing that a merit system or a factor other than sex accounts for the pay differential.

If the employer successfully carries this burden, the plaintiff will lose unless she can show that the defenses offered by the employer are a pretext for unlawful discrimination. For example, the plaintiff may introduce evidence that the merit system used by the university allowed individuals to exercise personal bias or to ignore the stated criteria for making merit pay decisions, thus creating a material issue as to whether the merit system defense is a pretext [12]. Similarly, a university's reliance on unwritten or arbitrary criteria could be a pretext rather than a legitimate factor in awarding pay based on merit. For example, a difference in grants generated by the faculty members to justify a difference in pay could be a pretext if the evidence showed no campuswide or departmental policy showing that grant generation had previously been used as a wage-setting criterion [14].

NEED FOR A MALE COMPARATOR

Because the EPA makes it unlawful to pay employees of one sex less than employees of the opposite sex doing essentially the same work, the plaintiff must be able to compare her salary to that of a similarly situated male employee and show that she is paid less. It is important that the comparator's education, experience, discipline, relative seniority, and job duties be as similar as possible to those of the plaintiff. The more differences between the plaintiff and the male comparator, the more it may appear that the difference in salary is due to these factors, rather than sex discrimination. If there is no male comparator at all, the plaintiff will not be able to make a prima facie case [10]. The plaintiff "may not compare herself to a hypothetical male with a composite average of a group's skill, effort, and responsibility, but must identify a particular male for the inquiry" [10, at 206].

Ideally, the plaintiff will be able to identify one or more male comparators from within her own department with similar education, skills, and working conditions who are being paid more than she. A plaintiff may also use her successor as her male comparator [15]. As an example, in a typical university college of business, there are separate departments teaching the functional areas of business including accounting, management, marketing, finance, and economics. Law is a required subject, according to the Association to Advance Collegiate Schools of Business [16], the international accrediting body, although separate departments of law are

rare. Law is usually housed in one of the functional areas, such as management or finance. If a female law professor were part of the department of management in the college of business, she would ideally compare her salary to one or more male law professors in her department, rather than management professors.

Does the male comparator within the same department have to teach the same courses as the plaintiff? Not according to *Brock v. Georgia Southwestern College*, where female faculty in the Business Administration Division who taught education courses were paid less than male comparators in the division who taught administration courses [17]. The court stated that "[v]irtually all teachers in a higher education setting will teach different courses" [17, at 1033]. Since they were in the same discipline, the court held that a plaintiff can make a prima facie case "by showing that the teachers compared are in the same discipline and that their job is to teach classes to students in that discipline [17, at 1033].

When no such comparator within the same department or discipline exists, the plaintiff can identify a male comparator from another department and attempt to show that they have the same or comparable education, skills, responsibilities, and job conditions. In *Lavin-McEleney v. Marist College*, the plaintiff was an associate professor of criminal justice with no male comparator in criminal justice [18]. Both plaintiff and the college presented expert testimony and statistical evidence at trial. The experts agreed to control for five independent variables in their multiple regression analysis: rank, years of service, division, tenure status, and degrees earned. The professor's expert testified that departmental differences within divisions were not associated with differences in salary. Based on these five variables, two psychology professors were deemed the closest comparators [19]. One comparator was a woman and one was a man, both earning more than the plaintiff. The court found that it was a jury question whether the male comparator's job and the plaintiff's were substantially equal for purposes of the EPA, and in this case, there was sufficient evidence for the jury to so find [18]. The jury awarded the professor $117,929.98 which included back pay, liquidated damages, attorneys fees, and costs.

There are a number of cases where male comparators from other departments were not found to be sufficiently similar in education, skills, responsibilities, or job conditions. In *Strag v. Board of Trustees*, the plaintiff was an instructor in mathematics, while her selected male comparator was an instructor in biology [20]. Both had master's degrees when they were hired in 1987. The plaintiff was hired at $16,200 per year, while her male comparator was hired at $33,000 per year. The court found that the plaintiff failed to establish her prima facie case because her selected male comparator was not sufficiently similar. The evidence showed that they worked in different departments, which required different skills and responsibilities. Her male comparator, in particular, had greater responsibilities than the plaintiff because he taught lab classes as well as lecture classes, supervised lab assistants, wrote and graded extra exams, and was the only full-time instructor for several different science courses. The court stated that the

plaintiff had failed to make her prima facie case "because she failed to identify an appropriate comparator *in her own department* [emphasis added] against whom her starting salary could be properly compared by the district court" [20, at 950].

In *Spaulding v. University of Washington*, the nursing faculty members were unsuccessful in trying to compare their salaries to those of males in other parts of the university, such as health services, social work, architecture, urban planning, environmental health, speech and hearing, rehabilitative medicine, and pharmacy practice [21]. The evidence showed that various departments within the university placed varying degrees of emphasis on research, training, and community service. In addition, the nursing faculty's statistical evidence did not adequately account for prior job experience, rank, multiple degrees, or the actual work performed by various faculty members [21].

The court found no EPA violation merely because members of a discipline, such as nursing with predominantly female faculty, were paid less than members of other disciplines with predominantly male faculty, absent proof that the jobs were substantially equal. In fact, some of the plaintiffs in this case were male, which indicated that the real issue was lower pay for nursing as a discipline, a comparable-worth issue, rather than lower pay for female faculty members performing substantially the same job as male faculty members. While the court rejected the plaintiffs' argument that "teaching is teaching," the court similarly rejected the university's contention that jobs from different academic disciplines can never be substantially equal [21].

Part-time instructors cannot use a full-time instructor as a proper male comparator. The duties of a part-time instructor are clearly less demanding than those of a full-time instructor, in terms of number of courses taught and research expectations [22].

MERIT PAY SYSTEM AS A DEFENSE

> What constitutes a merit system may not be . . . obvious. A merit system, to be recognized as valid, need not be in writing. Notwithstanding the absence of a writing requirement, a merit "system" must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. Moreover, to be recognized, it would seem that an unwritten merit system must fulfill two additional requirements: the employees must be aware of it; and it must not be based on sex [23, at 725].

A good example of a written merit system that satisfied the requirements that employees be evaluated systematically according to predetermined criteria is *Willner v. University of Kansas* [24]. The University of Kansas changed its method of determining salary increases based on merit in its College of Liberal Arts and Sciences in 1977, and the new method was determined to constitute a valid merit system [24]. Prior to 1977, merit raises were recommended by the department

chairpersons to the dean of the college. After 1977, each department's faculty selected three of their members to constitute a committee to make the merit recommendations. The committee voted on the procedures that would be used to determine the recommendations. The evaluation forms used by the faculty committee, the faculty handouts explaining the merit system, and minutes from faculty meetings where the system was discussed, were all introduced at trial to support the contention that a valid merit system existed and was applied systematically and fairly [24].

Even if the university has a formal merit system, it can operate in such a manner as to allow pay discrimination based on sex to occur. A jury will be entitled to take into account any evidence of irregularities in the administration of the merit system, and any biases of the persons involved in the administration of the system [25]. In *Kovacevich v. Kent State University*, the plaintiff applied for merit increases eight times [12]. She was given merit increases seven out of eight times, but received the minimum award each time. On two occasions, the dean of the college reduced the chairperson's recommendation for her, and on one occasion, the dean disallowed the award entirely. By the time the plaintiff retired, she was earning almost $6,000 less per year than her male comparator [12].

The jury found in her favor on the EPA claim, although the district court granted judgment as a matter of law to the university. In overturning the judgment, the court of appeals stated that the jury could have found that the difference in pay was due to sex, in spite of the university's merit system. The trial evidence revealed that although department chairs made recommendations to the dean about merit increases, those recommendations could be supported, increased, or decreased by the dean. The dean also withheld a substantial portion of the merit pool and could use it at his/her discretion [12].

The plaintiff's statistical evidence showed that during the relevant period, 40 percent of the male faculty in the department received above-average merit awards, while only 23 percent of the female faculty did so. Top salary earners in the department were disproportionately men, even though 47 percent of the faculty members in the department were women. Based on the statistical evidence and evidence of how merit awards were made, the court believed that the plaintiff had created a genuine issue of material fact whether the difference in pay was due to sex, or a factor other than sex [12].

A college or university need not have a formal merit system in order to show that factors such as outstanding service to the university, administrative duties, publications, research, supervision of doctoral students, and performance account for the differences in pay among faculty members [26]. As long as these justifications are "not overly subjective so as to render them incapable of being rebutted, they are legitimate factors to be considered [26, at 623; 27].

In *Brock v. Georgia Southwestern College*, the college conceded during oral argument that its merit system did not qualify under the Eleventh Circuit's requirement of a system that "presents a means or order of advancement or reward

for merit" [17, at 1036]. The U.S. District Court made the following finding about the college's merit system:

> Here, the merit system operated in an informal and unsystematic manner. No teachers were aware of any system and evaluations were carried out by the Dean and division heads on an *ad hoc* subjective basis. Salary and raise decisions were based on personal, and in many cases, ill-informed judgments of what an individual or his or her expertise is worth [28, at 1330].

Although the college conceded it had no defensible merit system, the court held that it could have justified the differences in salary based on factors other than sex, if it could have shown which superior qualities were being rewarded in the higher paid faculty members. However, the college had no explanation of what the superior qualities might have been because the female faculty members appeared to have qualifications equal or superior to the male comparators [17]. Although the court's opinion on specific back pay awards is unpublished, the successful plaintiffs were earning $1,500-6,000 less than their male comparators.

FACTORS OTHER THAN SEX AS A DEFENSE

Factors other than sex can encompass any reason for paying one employee more than another, as long as that reason is not based on sex. Those factors can include individual merit, a salary retention policy, differences in relevant education, outside offers, and market forces.

Individual Merit

Individual merit as a factor other than sex can be confused with an employer merit system because both are likely to share the same elements. For example, superior teaching performance, greater research and/or grant productivity, meritorious service, and prior experience are all factors other than sex that are also valid elements of a merit system. Even if the employer cannot establish the existence of a valid merit system, it can show that similar lawful factors justify the difference in salaries between the plaintiff and her male comparator(s).

In *Strag v. Board of Trustees*, the court found that even if plaintiff had made out a prima facie case, which she did not, the college sufficiently showed that factors other than sex justified the difference between the male biology teacher's salary of $33,000 and the plaintiff's salary as a math teacher of $16,200 [20]. Those factors included the biology teacher's twenty-four years of teaching experience, compared to the plaintiff's nine years; the biology teacher's salary at his previous high school teaching job would have been $30,000 for the school year and he was unwilling to take a pay cut, whereas plaintiff had previously been earning $17,220 and was wiling to take a pay cut to reduce her commute to work; the biology teacher was well-known as a teacher, innovative in course development, and used state-of-the-art technology in class, which other teachers did not do [20].

Salary Retention Policy

In *Covington v. Southern Illinois University*, the university established that its salary retention policy was a factor other than sex that explained why a male instructor with a degree in music, but assigned to work in the school of art as an advisor, earned more than a female instructor in the school of art [29]. The university's salary retention policy assured faculty members that their salaries would not be reduced if they moved into another area of the university where salaries might be lower [30]. The male comparator was hired into the school of music to replace an instructor who entered the military. When the instructor returned from his military assignment, the male comparator was transferred to the school of art as an art advisor, but his salary remained the same, pursuant to the university's policy, and he was paid out of the school of music's budget [29].

The plaintiff who worked in the school of art alleged that she earned less than the male comparator. The court determined that the university's policy was a valid factor other than sex, which explained why the male comparator made more money. The court concluded that the EPA did not preclude an employer from having such a policy, which was aimed at improving employee morale, although not based on employee performance. If the policy were not discriminatorily applied, it would not appear to undermine the purposes of the EPA [29].

Differences in Relevant Education

Differences in relevant education among individuals in their respective disciplines can be a valid reason other than sex that supports a pay differential. In *Cullen v. Indiana University Board of Trustees*, the female director of the respiratory therapy program was paid significantly less than the male director of the physical therapy program [31]. The difference in salary ranged from less than $20,000 in 1999 to more than $30,000 in 2001. The female director held three degrees, but neither of her graduate degrees was in the field of respiratory therapy. The male director held five degrees, including a Ph.D. in sports medicine that was directly related to his position as director of the physical therapy program. The court stated that the male director "clearly holds more degrees with a focus in his respective discipline," and that this consideration supported the university's position that his greater salary was based on a factor other than sex [31, at 702; 32].

Outside Offers

Outside offers that are met by the university to keep a faculty member can be a factor other than sex. In *Winkes v. Brown University,* a male professor contended that he earned less than a female professor in his art history department, in violation of the EPA [33]. Initially, both plaintiff and his female comparator were paid the same amount, $18,000 per year. Shortly after the female comparator achieved tenure, she received an offer from Northwestern University for $25,000.

This series of events occurred shortly after a consent decree was entered against Brown University wherein Brown agreed to exercise all reasonable means to increase the number of tenured female professors, a fact that the *Winkes* court called an "unfortunate coincidence" [33, at 792].

Brown matched the Northwestern offer, so that the female comparator was earning $25,000, and the male plaintiff was given a raise to $19,500. In the EPA suit, Brown defended on the basis that it had a de facto policy of responding to outside offers, and that such a policy was a valid factor other than sex, which justified the pay differential. Although the lower court had found that the outside offer was acceded to without bargaining to keep a female tenured professor based on gender [34], the court of appeals disagreed [33].

In reviewing the evidence, the court of appeals noted that the details of the Northwestern offer were discussed with the female professor and the positions were found to be comparable. Since she seemed willing to move in response to the offer, there was no room to negotiate if Brown wanted to keep her as a professor. There was no dispute that she was highly qualified, particularly in terms of her scholarly productivity, that she had been recently tenured, and was eligible for raises based on her tenure as well as the annual raise. There was uncontraverted testimony that outside offers were the only way that substantial merit increases were ever obtained by faculty members. Although outside offers were not always met, there was a customary de facto practice of responding to outside offers by awarding a merit increase [33]. *Winkes* has been described as standing as authority in the First Circuit for the proposition that "upgrading an individual's pay to match or forestall an outside offer can comprise a valid defense under the fourth exception to the EPA. But, to obtain the benefits of this holding, there must be at least some evidence that an offer existed and that the university had a policy of trumping external offers in that fashion [35, at 1243].

The court was also concerned with the "rock and a hard place" position Brown University faced. Although the court called the consent decree "coincidental," it also believed that it faced a potential violation of the consent decree if the university lost a tenured female professor or faced a potential violation of the EPA. "A university is, of course, not free of the Equal Pay Act, but when it is confronted with possibly opposing pressures or obligations, some of which involve the difficult subject of gender, it must be allowed substantial room to maneuver, rather than find itself between the devil and the deep blue sea" [33, at 797]. If any case involving an outside offer looked as if it was matched because of the gender of the offeree, the Brown University case would be the one, and yet, the court found sufficient nongender-based factors to justify the pay differential [33].

Market Forces

Market forces can be a factor other than sex that supports a pay differential, as long as the market forces relate to differences in the disciplines or positions, and

not to the gender of the individuals [36, 37]. Although many courts have stated that market forces alone cannot justify any pay differential, those courts are referring to markets that place a greater value on the work of a man than of a woman [38, 39]. However, "if the market forces accord different values because of 'other factor[s] other than sex' [they] may be relied upon as a defense; as a result, market forces themselves have no intrinsic value in Equal Pay Act analysis. To the extent market forces recognize inherent differences in jobs, those differences themselves must be examined" [39, at 1579; 40].

In *Cullen v. Indiana University*, the university argued that market forces at the time of hire required it to pay the director of physical therapy significantly more than what it was then paying the plaintiff, who was the director of the respiratory therapy program [31]. The physical therapy program generated about six times as much revenue as the respiratory therapy program, but was on probation at the time of hire of the new director. The applicant pool was small; hence the university argued that it had to pay a significant salary to attract a competent director to take over the foundering program. In addition, the evidence showed that salaries in physical therapy at the time of hire were about $18,000 more than salaries in respiratory therapy. Finally, the court noted that it was appropriate for the university to consider what the candidate was earning in his previous employment in setting his salary upon hire [31].

However, in *Siler-Khodr v. University of Texas Health Science Center*, the market forces defense was held not to be the real reason for the pay disparity between the plaintiff and the male comparator hired into her department [14]. Theresa Siler-Khodr was hired in 1976 as an assistant professor by the University of Texas Health Center. She held a Ph.D. in biochemistry, specializing in reproductive endocrinology. By 1986, she was tenured and promoted to full professor [14].

In 1989, the university hired Dr. Sydney Shain [hereinafter Sydney]. The university admitted that he was hired in an effort to keep his wife, Dr. Rochelle Shain [hereinafter Rochelle], who was one of four Ph.D. researchers in the department. Rochelle had approached her department chair and informed him that her husband wished to leave his position at a private research foundation where he earned $80,000 per year. The university offered Sydney a position at a salary of $83,000 per year. At that time, Siler-Khodr was earning $64,354 [14].

Both Siler-Khodr and Sydney Shain held Ph.D.s in biochemistry, conducted laboratory research in reproductive endocrinology, published the results of research, supervised departmental fellows, taught classes, and were supervised by the same faculty member. The department chair admitted at trial that they had essentially the same duties and responsibilities. In addition, Siler-Khodr presented two statistical studies of hundreds of faculty members at the university during a single year that tended to show that women earned less than men [14].

The university offered two affirmative defenses: that Sydney brought more grant money into the university than Siler-Khodr, and that market forces and

Sydney's prior salary were factors other than sex that justified his higher salary. The department chair testified that grant generation was the single most important criterion he used to allocate raises. However, the evidence showed no such policy existed in the department or anywhere on campus. Although the evidence was conflicting about how much grant funding each person had obtained, it was clear that raises had been granted to each in years when no grants had been obtained. Since the jury found in Siler-Khodr's favor, the court concluded that the jury could have found the grant generation affirmative defense was a pretext [14].

The market-forces defense was based on the university's argument that it had to pay Sydney $83,000 in 1989 because other companies would have been competing with them for Sydney's services. He was already earning $80,000 at his former employment. The university argued that market forces required the university to pay more than what he was earning at his prior employment. However, the court found that the motivation for hiring the male was to keep his wife employed at the university. The market did not necessarily require such a high salary to attract a competent candidate [14].

USE OF STATISTICAL EVIDENCE TO SHOW DISCRIMINATION

Statistical evidence is often used to help show that disparities in pay are due to sex, and not factors other than sex. Statistics can also help establish the prima facie case when the plaintiff's male comparator comes from a different discipline or department, and statistics can be used to help calculate damages [41]. The Supreme Court has held that statistical evidence may be admitted as evidence of discrimination if the statistical model accounts for the major factors at issue in the case [42]. Admissible statistical evidence may range from multiple regression analysis of hundreds of faculty members, universitywide, within a single year [14], to raw data about salaries of workers in various departments without any analysis of variables [15].

Admissible statistical evidence may be more or less probative of whether pay discrimination based on sex has occurred, depending on the thoroughness of the study and the inclusion of all the appropriate variables that might lawfully influence pay. Omission of some variables from regression analysis may make the evidence less probative, but the analysis may still be admissible [42]. In *Smith v. Virginia Commonwealth University*, a group of male professors contended that the salary equity study relied upon by the university to give female faculty members raises was flawed [43], so that the raises violated Title VII [44] and were not within the Weber guidelines [45] for affirmative action plans [43]. In assessing the validity of the evidence, the court found that the multiple regression analysis study did not account for salary differentials created by faculty who were paid more while they worked as administrators, and then kept their higher salaries when they returned to teaching. It also did not account for amount of time actually spent teaching, versus the lapse of time since the professor had begun teaching.

Nonetheless, those flaws bore on the probative value of the study, not its admissibility. Therefore, summary judgment for the university was improper [43].

Statistical evidence may be inadmissible when the major factors used to determine merit pay are not included in the study, or when the study is based on too small a sample over too long a period of time, or includes data that is not used to determine salary. In *Bickerstaff v. Vassar College*, the court found the plaintiff's multiple regression analysis flawed because it omitted two of the three major variables upon which merit raises were given—teaching and service [46]. In *Pollis v. The New School for Social Research* [9], the plaintiff's sample of only eight professors over a twenty-year period was held to be too small a sample over too long a period of time [47]. In *Kovacevich v. Kent State University*, plaintiff's study of salary trends in the entire university, rather than the department in issue, was properly excluded from consideration because distribution of merit awards was determined at the college level [12].

Lavin-McEleney v. Marist College is a good example of a case using statistical analysis to support the use of a male comparator outside the plaintiff's department, since no comparable male existed in her department, and to show that she was paid less than the male comparators [41]. Barbara Lavin-McEleney was hired to teach criminal justice at Marist College, a four-year undergraduate college, in 1976. She was tenured in 1981-82, and promoted to associate professor in 1984-85. She received every across-the-board and merit-based salary increase for which she was eligible. Nevertheless, she contended that the raises she received over the years were discriminatory [48]. She was not promoted to full professor [41, 48].

She brought her complaints to the attention of the administration in 1989 and again in 1992. The college created a committee to study pay disparities at the college, and its report was issued in 1994. Thereafter, she filed a formal request to have her salary reviewed for gender disparity. Although the administration reviewed her complaint and found that her salary was fair, she contended she was never informed of this decision. She filed her EPA and Title VII claims after receiving her right-to-sue letter from the EEOC [41].

Because there was no male comparator within the department of criminal justice, she identified a male comparator within the department of psychology. At the time, the male comparator was earning $46,168 while plaintiff was earning $44,900. To support her claim that the psychology comparator was justified, the plaintiff's expert testified that his statistical method, multiple regression analysis, controlled for the five independent variables likely to influence salary: rank, years of service, division, tenure status, and degrees earned. After controlling for these variables, the multiple regression analysis showed that female professors were paid significantly less than comparable male professors [41].

The college's own statistical expert, using similar multiple regression analysis, showed a disparity based on gender, but argued that the disparity could be explained by chance. Another expert testified, based on content analysis of nationwide education compensation data, that the differences in salary were

explained by a "masked variable," that being differences in salaries paid in different departments. She testified that the gender difference was explained by the fact that women chose to teach in disciplines like criminal justice, which paid less than disciplines favored by men [41].

Since there was only one male comparator, both the plaintiff's and the college's experts used the entire college faculty as a sample size and extrapolated from those professors to predict what a male professor with qualifications similar to those of the plaintiff across all five variables would earn. Both experts arrived at figures within $50 of each other: $50,640 and $50,696 [41].

The jury returned a verdict in favor of the plaintiff on her EPA claim, awarding her a total of $117,929.98, including back pay, liquidated damages, attorneys' fees and costs. Since the actual male comparator earned less than the statistical projection, the plaintiff's damages were increased to match those of the statistical model [41].

On appeal, the court of appeals affirmed the decision. As to use of the statistical model, in conjunction with an actual male comparator, the court held that,

> under the circumstances of this case, regression analysis, based on a larger pool of male employees and that controlled for differences within each variable as between the plaintiff and members of the male pool, properly supported plaintiff's case and was appropriately employed to calculate damages. In so holding, we note that, because plaintiff both identified a male comparator and provided statistical evidence of gender-based discrimination, we need not decide whether either type of evidence standing alone would have been sufficient to prove discrimination under the Equal Pay Act [41, at 482].

STATUTE OF LIMITATIONS AND CONTINUING VIOLATION

The EPA has a two-year statute of limitations, which is extended to three years if the violation is willful [1, §255(a)]. A willful violation occurs if the employer either knew or showed reckless disregard of whether its conduct was prohibited by the EPA [9, 49]. Willful violations subject the employer to liquidated damages, which gives the plaintiff double the amount of her compensatory damages. Complaints by a faculty member to the university that her salary is too low compared to that of male faculty members can be enough to make violation willful if no remedy is made by the university [9].

For many years, the prevailing view was that every paycheck that delivered less than equal pay for equal work was a continuing violation of the EPA [9, 50, 51, 52]. This view was based on the Supreme Court's opinion in *Bazemore v. Friday*, a pattern and practice racial discrimination case under Title VII, where Justice Brennan stated that " [e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII" [42, at 395-396]. Even though a plaintiff may have

been hired at a discriminatory pay rate many years before she filed suit under the EPA, she could still sue under the theory that each paycheck reflected a continuing violation. However, she could recover only those damages that had accrued during the relevant statutory limitations period [51, 53, 54, 55]. For example, in *Pollis v. The New School for Social Research*, the plaintiff established a willful violation of the EPA, but was permitted only to recover back pay for the three years prior to the filing of her EPA suit, even though she established that her salary had been below that of comparable males for 19 years [9, 56].

However, *National R.R. Passenger Corp. V. Morgan*, a recent Supreme Court decision, clarified when the statute of limitations begins to run [57]. *Morgan* clarified that an "unlawful employment practice" under Title VII means discrete discriminatory or retaliatory acts, and that each act begins a new statutory period within which the plaintiff must timely file her claim. Discrete discriminatory acts include failure or refusal to hire, failure to promote, denial of transfer, denial of tenure, and discharge, each of which occurs on a specific date and starts the statutory clock running. Related discrete acts are not converted into a single, continuing, unlawful practice allowing acts outside the statutory period to become actionable [58]. *Morgan* appears to distinguish its prior holding in *Bazemore v. Friday*, where the Court held that each paycheck under a discriminatory salary structure is actionable, even though the discriminatory salary had begun well before the statute of limitations would have run out [42].

In applying *Morgan* to EPA cases, most courts support the view that if the existing salary structure is not discriminatory, a plaintiff has only the statutory period following hire to bring a claim that she was hired at too low a salary compared to the appropriate male comparator. Once the statutory period has passed, plaintiff cannot claim that each paycheck is a continuing violation of the EPA, unless she can argue equitable tolling of the statute, discussed below. If the salary structure is discriminatory, as in *Bazemore*, then each paycheck is part of a continuing violation, although damages may be sought only for the appropriate statutory period [42].

In *Inglis v. Buena Vista University*, the university changed its compensation system following a study of its compensation practices, done at its behest, by the consulting firm of McGladrey & Pullen [59]. The plaintiffs in the case did not challenge the current compensation system, but rather challenged the prior compensation system under which they were hired. That system had been suspended in 1997 and replaced with the new system in 1999. Applying *Morgan*, the court held that the plaintiffs' claims were time-barred. Although the plaintiffs' salaries remained below those of their male comparators after the neutral compensation system was adopted in 1999, that was a lingering result of the university's former and time-barred discriminatory salary structure, and therefore not actionable. [59, 60, 61, 62].

Morgan does not abrogate the concept of equitable tolling of the statute of limitations. A plaintiff who is not aware of her discriminatory starting salary may be able to bring her claim many years later, since the statute of limitations would begin running on the date she learned of the discriminatory salary, and not on the starting date. Such were the facts in *Goodwin v. General Motors Corp*. [63]. The plaintiff in *Goodwin* was not aware of the discriminatory nature of her salary until a printout of salaries appeared on her desk. At that point, she became aware that her colleagues were paid more than she, although she had suspected that such was the case. She filed her case within the statute of limitations which, based on the discovery rule, began running on the date the printout appeared on her desk. *Goodwin* was decided about six months before *Morgan* was handed down, but a later court has characterized *Goodwin* as falling within the equitable tolling doctrine that *Morgan* expressly recognized [59].

ABROGATION OF ELEVENTH AMENDMENT IMMUNITY

While the EPA was enacted in 1963 to cover private employers, Congress amended the EPA in 1974 to apply to the states, and therefore, cover public employers. Because the EPA is a federal statute, federal courts have jurisdiction to hear EPA cases. However, the Eleventh Amendment to the Constitution protects states from suits by individuals [64]. If a public employer were sued in federal court under the EPA, in essence, the state would be sued by an individual in apparent contravention of the Eleventh Amendment.

However, the Supreme Court has held that the Eleventh Amendment immunity for the states can be abrogated by Congress if Congress expresses a clear intention to so abrogate that immunity, and if Congress acts within its powers under the Fourteenth Amendment [65]. The Fourteenth Amendment, in pertinent part, protects persons from denial of equal protection of the laws by the states [66]. Therefore, a federal statute such as the EPA might be a valid abrogation of Eleventh Amendment state immunity if the harm that Congress sought to abate by the statute was a denial of equal protection of the laws under the Fourteenth Amendment.

In *Kimel v. Florida Board of Regents*, the Supreme Court held that the Age Discrimination in Employment Act [67] was not a valid exercise of Congress' power to abrogate the states' Eleventh Amendment immunity under the Fourteenth Amendment, even though it had been Congress' intent to do so [65]. In light of *Kimel*, several lower courts have considered whether the EPA was a valid exercise of Congress' power to abrogate the states' Eleventh Amendment immunity. Thus far, all courts to have considered the question have concluded that it did [12, 14, 68], although the Supreme Court has not squarely addressed the immunity question for the EPA. Until the Supreme Court takes an Equal Pay Act

case and confronts the abrogation question squarely, the issue will remain in some doubt [69].

INTERNAL GENDER EQUITY PAY STUDIES

Several institutions of higher education have conducted internal salary studies, usually at the urging of women faculty members on their campuses. Some of the study results are controversial. For example, the Massachusetts Institute of Technology did an internal salary study in 1994 after fifteen tenured female faculty members in the sciences began to collect evidence of inequitable distribution of laboratory space and resources among male and female faculty members [70]. Their work resulted in the creation of a Committee on Women Faculty in the School of Science that documented these inequities. As a result of that study, which was not reported until 1999, M.I.T. gave salary increases to female faculty members, provided discretionary research funding and more laboratory space, and renovated offices and labs.

These changes were not well-known, even on M.I.T.'s campus, until March 1999, when M.I.T. released *A Study on the Status of Women Faculty in Science at M.I.T.*, summarizing the activities of the committee and the changes that resulted. The study included comments by the president of the university acknowledging that pay discrimination had occurred. However, the released study did not include any statistical evidence to support the findings, so as to protect the confidentiality of the women who participated, and to prevent retaliation [72].

Largely, M.I.T. has been praised for admitting the discrimination and doing something about it [73], although there were reports of critical commentaries lamenting the lack of statistical evidence in the report to back up the findings [74]. The criticism came primarily from the conservative Independent Women's Forum in the form of two reports that called the findings "junk science," and which examined the publication records of the women in M.I.T.'s biology department and asserted that the male biology faculty members had stronger publication records than the female biology faculty members [75, 76].

University of Wisconsin at Madison conducted a salary survey in 1992 and concluded in its Gender Equity Study of Faculty and Pay that women's salaries were 1.6 percent to 6 percent lower than those of their male colleagues. The study controlled for rank, but compared salaries across all disciplines. Because men tended to dominate the higher-paid disciplines like engineering and women tended to dominate the lower-paid disciplines in the humanities, male salaries were naturally higher on average than women's salaries. Moreover, the study did not examine whether merit made a difference in the salary disparity. Similar to the M.I.T. study, the University of Wisconsin study was criticized as being "fundamentally flawed" [77, p. B5].

The UW at Madison 1992 salary survey prompted a further pay-review plan that compared the salaries of 117 women faculty members to male faculty members

with similar education, training, and academic ranks. The later study resulted in pay raises totaling $200,000 for forty-two women faculty members. The median raise was $5,000 [78].

The University of California at Davis conducted its own gender equity study at about the same time as the M.I.T. study [79]. The U.C. statistical study showed that 74 percent of the women were paid below the mean for faculty salaries, based on the length of time since obtaining the doctorate and length of time teaching at U.C. [80]. While the administration initially proposed that the Academic Senate's Committee on Academic Personnel review individual women's files to determine whether adjustments were necessary, a controversy erupted over whether the administration should perform the reviews itself, or whether the senate faculty committee should do so [80]. There was also an attempt to stop the entire review process until another statistical study was done, which was narrowly defeated in a faculty vote [80]. Ultimately, thirty-eight of the seventy (54%) women faculty whose files were reviewed by the Committee on Academic Personnel received a merit increase, compared to thirteen of fifty-eight (22%) men faculty whose files were reviewed [80].

Professor Martha West, a law professor at U.C. Davis, has stated that controversies at universities over salary equity studies are part of a growing resistance that did not exist a decade ago when women made up less than 15 percent of the faculty [80]. As women comprise a greater proportion of the faculty, their portion of what may be a zero-sum game becomes more significant, and perhaps more contentious. Other universities that have salary equity studies publicly available include Georgia Institute of Technology [81], Stanford University [82], University of Michigan [83], and the University of South Florida [84].

CONCLUSION

Many faculty women have sued their colleges or universities for Equal Pay Act violations. If the faculty member has a reasonable male comparator and/or appropriate statistical evidence tending to show discrimination on account of sex, she can probably make out a prima facie case. The two most likely defenses, merit systems and factors other than sex, will preclude liability for the university, unless the factfinder believes that these defenses are, in fact, a pretext for unlawful discrimination. A successful case under the Equal Pay Act allows recovery for two years of compensatory damages, unless the violation is willful, in which case damages can extend back three years, plus an equal amount as liquidated damages. Successful litigants can also recover costs and attorneys' fees.

Women faculty members should be cognizant of the typical salaries paid in their disciplines, as well as in their departments or divisions. Admittedly, this can be difficult in a private university where salary information is not publicly available. Raising the issue of unfair compensation based on sex can put the university on notice of a possible violation of the EPA, allowing for the longer three-year statute

of limitations for willful violations if no action is taken by the university. Each paycheck delivering less salary than that of an appropriate male comparator may be considered a continuing violation if the compensation system in use is discriminatory. However, if the compensation system in use is not discriminatory, but the plaintiff is suffering from the lingering effects of a discriminatory starting salary or other discrete discriminatory event, she must file suit within the appropriate time period after that event; otherwise, her claim will be time-barred. Years of back pay can be lost by failing to bring a prompt claim.

The "market-forces defense" may not protect a university when a new faculty member is hired at a salary higher than those of existing faculty members. Universities could find themselves liable under the EPA for salary compression that occurs when faculty members have been with the institution for a long period of time. On the other hand, universities should be able to argue that the market reflects differing salaries for faculty members in different disciplines, if in fact those market differences exist, in order to explain why a faculty member in one discipline is paid more or less than one in another.

Universities should be cognizant of salary distribution among their male and female faculty members, seek to correct instances of unfair compensation, and act promptly on requests for salary review by faculty members. Merit-pay systems should be reviewed for consistency and relevance to the performance behaviors expected. The Equal Pay Act was intended to bring women's pay to par with that of men in substantially the same jobs. Diligence by department chairs, deans, and higher-level administration can significantly reduce unfair compensation from occurring and can lessen the likelihood of successful litigation against the university [85].

ENDNOTES

1. Equal Pay Act, 29 U.S.C. §206(d)(1).
2. U.S. Dept. of Labor, Bureau of Labor Statistics, September 2003, Report 972, http://www.bls.gov/cps/cpswom2002.pdf
3. "Inequities Persist for Women and Non-Tenure-Track Faculty," Gender Equity Index 4, *Academe*, pp. 21-98, March-April 2005.
4. While many Equal Pay Act cases also include a cause of action based on TITLE VII of the Civil Rights Act of 1964, this article focuses on the Equal Pay Act component of the cases.
5. Fair Labor Standards Act, 29 U.S.C. §201, *et.seq*.
6. The 1963 EPA covered only private employers. State employers were added in 1974.
7. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).
8. Although both men and women are protected by the EPA, the cases overwhelmingly involve female plaintiffs. Therefore, references to "plaintiff" herein will be feminine unless otherwise indicated.
9. *Pollis v. The New School for Social Research*, 132 F. 3d 115 (2d Cir. 1997).
10. *Houck v. Virginia Polytechnic Institute*, 10 F. 3d 204 (4th Cir. 1993).

11. Once the prima facie case has been made and the case proceeds to a full trial on the merits, the sufficiency of the prima facie case should not be an issue on appeal. Rather, the appeal should focus on the ultimate question of discrimination.
12. *Kovacevich v. Kent State University*, 224 F. 3d 806 (6th Cir. 2000).
13. *Lavin-McEleney v. Marist College*, 239 F. 3d 476 (2d Cir. 2001).
14. In *Siler-Khodr v. University of Texas Health Science Center*, 261 F. 3d 542 (5th Cir. 2001), petition for writ of certiorari denied, 537 U.S. 1087, 123 S. Ct. 694 (2002), both the plaintiff and her male comparator worked in the Department of Obstetrics and Gynecology, had Ph.D.s in biochemistry, primarily conducted laboratory research regarding reproductive endocrinology, published the results of research, supervised departmental fellows, taught classes, and were supervised by the same professor. Nevertheless, the plaintiff was paid $20,000 less than her male comparator.
15. *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983).
16. http://www.aacsb.edu
17. *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985).
18. *Lavin-McEleney v. Marist College*, 239 F.3d 476 (2d Cir. 2001).
19. While criminal justice and psychology were in different departments, they were housed within the same division.
20. *Strag v. Board of Trustees*, 55 F.3d 943 (4th Cir. 1995).
21. *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984).
22. *Dibble v. Regents of the University of Maryland System*, unpublished opinion of the 4th Cir. Ct. of App., 1996.
23. *EEOC v. Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980), citations omitted.
24. *Willner v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988).
25. *Ryduchowski v. Port Authority of NY*, 203 F.3d 135 (2d Cir. 2000).
26. *Schwartz v. Florida Board of Regents*, 954 F.2d 620 (11th Cir. 1991); this case is one of the few brought by a male plaintiff. He alleged that female faculty members in the college of education were paid more than male professors.
27. *cf. Morgado v. Birmingham-Jefferson County Defense Corps.*, 706 F.2d 1184 (11th Cir. 1983), where the Eleventh Circuit required a "system," which "presents a means or order of advancement or reward for merit." 706 F.2d at 1188-89.
28. The district court's opinion was published as *Marshall v. Georgia Southwestern College*, 489 F. Supp. 1322 (M.D. Ga. 1980).
29. *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987).
30. This policy was somewhat like "red circle rates," a War Labor Board expression to describe higher than normal rates paid to a worker for valid reasons. For example, a skilled employee transferred to a less-demanding job because of a reduction in force may be paid at his/her earlier, higher pay rate in order to have that worker available if needed again at his/her former job. *EEOC v. Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980).
31. *Cullen v. Indiana University Board of Trustees*, 338 F.3d 693, 2003 U.S. App. LEXIS 14990 (7th Cir. 2003).
32. The court discussed various affirmative defenses raised by the university, even though the court held that the plaintiff had not made out a prima facie case under the EPA [31].
33. *Winkes v. Brown University*, 747 F.2d 792 (1st Cir. 1984).
34. *Winkes v. Brown University*, 1983 U.S. Dist. LEXIS 15200 (Dist. R.I. 1983).

35. *Chang v. University of Rhode Island*, 606 F. Supp. 1161, 1985 U.S. Dist. LEXIS 21062 (D.R.I. 1985).
36. *Stanley v. University of Southern California*, "An employer may consider the marketplace value of the skills of a particular individual when determining his or her salary," 13 F.3d 1313 at 1322 (9th Cir. 1994).
37. *Ross v. University of Texas at San Antonio*, disparities accounted for by market factors, 139 F.3d 521 at 526 (5th Cir. 1998).
38. *Glenn v. General Motors Corp.*, "This Court and the Supreme Court have long rejected the market force theory as a 'factor other than sex'," 841 F.2d 1567 at 1570 (11th Cir. 1988).
39. *Beall v. Curtis*, "Nor does any influence of 'market forces' alone justify pay differentials. The Equal Pay Act was intended to counteract those market forces that placed a different value upon the work of persons of different genders," 603 F. Supp. 1563 at 1579, 1985 U.S. Dist. LEXIS 21559 (M.D. Ga. 1985).
40. In *Beall*, the court found a significant difference in the statutory authority granted to physician's assistants versus nurse practitioners. The male physician's assistant could perform any function he was qualified to perform under the supervision of the physician, while the female nurse practitioner plaintiff was required by statute to function under written protocols mutually agreed upon between the nurse and physician. The greater statutory authority allowed the physician's assistant was a factor other than sex that justified a higher salary than that of the nurse practitioner.
41. *Lavin-McEleney v. Marist College*, 239 F.3d 476 (2d Cir. 2001).
42. *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000 (1986).
43. 84 F.3d 672 (4th Cir. 1996).
44. 42 U.S.C. §2000e-2(a)(1).
45. *United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721 (1979).
46. *Bickerstaff v. Vassar College*, 196 F.3d 435 (2d Cir. 1999).
47. Nevertheless, the plaintiff in this case won her EPA claim.
48. She did not allege that her hiring salary was discriminatory.
49. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S. Ct. 1677 (1988).
50. *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992).
51. *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164 (8th Cir. 1995).
52. *Goodwin v. General Motors Corp.*, 275 F.3d 1005 (10th Cir. 2002).
53. *Gandy v. Sullivan County*, 24 F.3d 861 (6th Cir. 1994).
54. *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994).
55. *EEOC v. McCarthy*, 768 F.2d 1 (1st Cir. 1985).
56. Because the violation was willful, Pollis' damages were doubled, pursuant to the EPA's liquidated damages provision.
57. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Morgan was a Title VII case involving alleged racial discrimination.
58. However, the Court noted that hostile environment claims are different. Although a plaintiff in a hostile environment case must still be filed within the appropriate statutory period after an unlawful employment practice has occurred, the court may review all conduct related to the hostile environment, including those acts beyond the statutory period.
59. *Inglis v. Buena Vista University*, 235 F. Supp.2d 1009, 2002 U.S. Dist. LEXIS 24128 (N.D. Ia. 2002).

60. Similarly in *Krough v. Cessford Construction Co.*, 231 F. Supp.2d 914, 2002 U.S. Dist. LEXIS 19332 (S.D. Iowa 2002), the court held that a claim for a discriminatory starting wage filed after the statute of limitations was time-barred under *Morgan*, when plaintiff did not challenge the pay structure under which the company continued to operate. Further, the court noted that plaintiff knew of her pay discrepancy for a long period of time, so that equitable tolling was not an issue.
61. *City of Hialeah, Florida v. Rojas*, 311 F.3d 1096, 2002 U.S. App. LEXIS 23252 (11th Cir. 2002), where lingering effects of employer's former illegal policy of classifying Latino employees as temporary for longer periods of time than white employees were not actionable.
62. *Tomita v. University of Kansas Medical Center*, 227 F. Supp.2d 1171, 2002 U.S. Dist. LEXIS 19745, decided after *Morgan* and holding that lingering effects of discriminatory pay constitute continually recurring violations that are actionable under Title VII.
63. *Goodwin v. General Motors Corp.*, 275 F.3d 1005 (10th Cir. 2002), cert. denied, 123 S. Ct. 340 (2002). Goodwin was a racial discrimination case under Title VII.
64. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State (Eleventh Amendment).
65. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct 631 (2000).
66. Section 1 of the Fourteenth Amendment states in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment states that "[T]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
67. Age Discrimination in Employment Act, 29 U.S.C. §621.
68. *Varner v. Illinois State University*, 226 F.3d 927 (7th Cir. 2000).
69. *Varner v. Illinois State University* [68] was specifically remanded from the Supreme Court to consider whether the EPA had validly abrogated the states' Eleventh Amendment immunity in light of *Kimel*. The *Varner* court distinguished the EPA from other federal statutes by finding that "the Equal Pay Act is not aimed at a kind of discrimination (like age or disability) that receives rational basis review. Under the Constitution, gender-based classifications are afforded heightened scrutiny" [68, at 934]. Gender discrimination by a state would require that it serves important governmental objectives and that the means undertaken be substantially related to achievement of those objectives. Because the EPA requires only that the employer offer a legitimate reason for pay disparity between plaintiff and the opposite-sex comparator, the EPA requires less of the states than the Constitution.

    In the 2002 case of *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002), the U.S. Supreme Court held that the tolling provision of the federal supplemental jurisdiction statute [28 U.S.C. §1367(d), which generally tolls the period of limitations for supplemental claims while such claims are pending in federal court and for thirty days after such claims are dismissed] could not toll a state statute of limitations when the federal court lacked jurisdiction because of Eleventh Amendment immunity. Although *Raygor* was an age discrimination case, it contained language that at least one Court of Appeals justice believes places the Equal Pay Act's abrogation of Eleventh Amendment immunity in question. [Justice Smith,

dissenting from the denial of rehearing en banc in *Siler-Khodr v. University of Texas Health Science Center* [14]. The Supreme Court denied certiorari in *Siler-Khodr v. University of Texas Health Science Center* [14].

70. N. Hopkins, "M.I.T. and Gender Bias: Following Up on Victory," *The Chronicle of Higher Education*, B4, June 11, 1999.
71. *A Study on the Status of Women Faculty in Science at M.I.T.*, http://web.mit.edu/fnl/women/women.html#TheStudy
72. S. Smallwood, "Report Questions M.I.T.'s Study on Treatment of Female Professors," *The Chronicle of Higher Education*, 17, Feb. 16, 2001.
73. "What to Do About Gender Bias at Colleges and Universities," Letters to the Editor, *The Chronicle of Higher Education*, B3, July 9, 1999.
74. "M.I.T.'s Study of Its Own Gender Bias is Attacked as 'Junk Science'," *The Chronicle of Higher Education*, A14, January 7, 2000; S. Smallwood, "Report Questions M.I.T.'s Study on Treatment of Female Professors," *The Chronicle of Higher Education*, 17, Feb. 16, 2001.
75. J. Kleinfeld, "M.I.T. Tarnishes Its Reputation with Gender Junk Science," http://www.uaf.edu/northern/mitstudy/#note9back, Dec. 14, 1999.
76. P. Hausman and J. Steiger, "M.I.T. Jumped the Gun to Avoid a Sex-Discrimination Controversy, But Shot Itself in the Foot," *Independent Women's Forum Newsletter*, Feb. 2001, p. 1-12.
77. T. Vanden Brook, "Professor Disputes UW Report Citing Less Pay for Faculty Women," *The Milwaukee Journal*, Nov. 27, 1992, p. B5.
78. "Some UW Women Get Pay Raises to Bring Them in Line with Male Faculty," AP Newswires, Feb. 14, 2002.
79. Gender Equity Study at the University of California at Davis, 1994, http://orpheus.ucsd.edu/women/csw/UC_Davis.pdf *See also*, University of California at Irvine Pay Equity Study Updates 1997-2004 at http://www.evc.uci.edu/issues and University of California at San Diego Faculty Pay Equity Study 1992 at http://orpheus.ucsd.edu/women/csw/UCSD.pdf
80. M. West, "Symposium: Faculty Women's Struggle for Equality at the University of California Davis," *UCLA Women's Law Journal*, Spring 2000, pp. 259-319.
81. Georgia Institute of Technology Report on the Status of Women, 1993-98 at http://orpheus.ucsd.edu/women/csw/GATechreport.pdf
82. Stanford University statement from Provost's committee at http://orpheus.ucsd.edu/women/csw/STANFORD.htm
83. University of Michigan Trends in the Relative Earnings of Tenure Track Faculty: 1973-1995, April 1999 at http://orpheus.ucsd.edu/women/csw/Michigan.pdf
84. Gender Disparities in Salaries of Full Professors at the University of South Florida in 1998: Evidence, Consequences, and Recommendations for Solutions at http://orpheus.ucsd.edu/women/csw/South_Florida.pdf
85. The Committee on Academic Personnel in the University of California, Davis, study recommended the following steps to protect against the exploitation of women faculty: 1) In setting initial salaries, department chairs and deans should guard against exploiting new faculty appointees who may be naïve or lack room for negotiation because of commitment to a spouse. 2) Senate personnel committees, as well as college committees, should carefully examine salary at hire when new faculty appointments are made. 3) Faculty should be better informed about the priority ranking of their files

when going through the merit review process, so that high-performing faculty can ask for an accelerated raise on occasion. 4) All faculty should receive extended reviews at several key promotions during their careers, with departments and personnel committees examining retroactively salary at hire and the need for possible upward adjustments in light of subsequent achievements [80].

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