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### Eighth Circuit Pushes Back Against Using More Experienced Comparators in EPA Claims



In *O'Reilly v. Daugherty Systems*, the U.S. Court of Appeals for the Eighth Circuit<sup>[1]</sup> ruled that, for purposes of the Equal Pay Act (EPA) claim, greater experience can serve as a legitimate reason for a pay differential on March 29, 2023. Affirming the district court's grant of summary judgment for the defendant, the Eighth Circuit held that differences in skillset and experience between a plaintiff and a single comparator can establish that a pay disparity between them was based on a factor other than sex, an affirmative defense to an EPA claim. The recent decision adds one more notch in the developing question of what constitutes a legitimate reason for pay differences under the EPA.

#### ***O'Reilly v. Daugherty Systems***

The plaintiff, Tamara O'Reilly, began working for Daugherty Systems as a senior manager in 2014 with a starting base salary of \$135,000. Within three years, after several pay raises and promotions, O'Reilly's base salary had moved up to \$200,000 and she received the title of director/client partner. That same year, Daugherty Systems hired Drew Davis as a new director/client partner, offering him a starting base salary of \$275,000. However, despite the topline \$75,000 difference in base salary, the actual difference between O'Reilly's annual pay and Davis's was under \$10,000, because, unlike Davis, O'Reilly received overtime compensation and had a substantially higher incentive compensation plan.

As directors/client partners, O'Reilly and Davis not only shared identical job titles but performed duties that were "substantially the same." Because of the identical job titles and considerably equal roles, the Eighth Circuit agreed with O'Reilly that she was able to make a prima facie showing of an EPA violation.

The Eighth Circuit next turned to the question of whether legitimate reasons for pay differences existed, addressing the employer's stated claim that Davis's experience and unique client relations skills dictated the salary difference. On this inquiry, the panel did not find O'Reilly's evidence sufficiently strong to overcome Daugherty's affirmative defense. While O'Reilly attempted to show that she had unique skills warranting equal

pay, the court emphasized that O'Reilly was newer to the role of client relations and that Daugherty had intentionally made an investment in O'Reilly by elevating her despite her inexperience. Noting that Eighth Circuit precedent allows for education or experience as a "permissible factor" for pay disparities, the court held that the district court had properly granted summary judgment to Daugherty because "no reasonably jury" could find for the plaintiff.

## Takeaway

The decision in *O'Reilly v. Daugherty Systems* is an important reminder that the courts accord some flexibility to employers to account for various differences in experience and skill in making pay decisions. Many recent changes in state law (i.e., California's Fair Pay Act) have narrowed the test for employers to prove that salary differences are based on factors other than sex. The Eighth Circuit's decision is a useful reminder that employers with documented and legitimate reasons for pay differences are able to prevail in court. Moreover, in affirming the district court's grant of summary judgment on the issue, the Eighth Circuit's decision is notable for showing that an employer's reasoning for pay differences may not necessarily be required to confront a jury. The U.S. Court of Appeals for the Second Circuit will soon be addressing a similar issue in *Eisenhauer v. Culinary Institute of America*, 2d Cir., No. 21-02919. Like the Eighth Circuit, its predecessor case, *Eisenhauer v. Culinary Inst. of Am.*, No. 19 CIV. 10933 (PED), 2021 WL 5112625 (S.D.N.Y. Nov. 3, 2021), held that although the plaintiff could allege a prima facie violation of the EPA, a nondiscriminatory basis existed for the pay disparity, defeating the plaintiff's EPA claim at the summary judgment stage. Depending on the final outcome of that case, we may see further variance amongst the circuits on the question of whether an employer's reasoning for pay differences must be decided by a jury.

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[1] The Eighth Circuit has appellate jurisdiction over federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

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