

**4 PJI 13 | EQUAL PAY ACT - 29 USC §206(D) (1) AND (3)**

In this case, [Plaintiff] claims that [Defendant] violated a federal law called the Equal Pay Act. This law is designed to prevent sex-based wage discrimination by employers.

To succeed on [his/her] claim, [Plaintiff] must prove the following four facts by a preponderance of the evidence:

First: [Defendant] is an employer;

Second: [Defendant] has employed [Plaintiff] and a [male/female] employee in jobs requiring substantially equal skill, effort, and responsibility;

Third: The two jobs are performed under similar working conditions.

Fourth: [Defendant] paid [Plaintiff] a lower wage than the similarly situated [male/female] employee.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

[The parties have agreed that [Defendant] is an employer subject to the Equal Pay Act's provisions. You should consider that a proven fact.] For the second element, you must consider whether [Plaintiff]'s job required substantially equal skill, effort, and responsibility as the [male/female] employee's job. You should compare the jobs - not the individual employees holding those jobs. The two jobs do not have to be identical. Rather, the law requires proof that the two jobs be "substantially equal" in skill, effort, and responsibility. Insignificant or trivial differences can be disregarded. The important comparison is the two jobs' actual work or performance requirements - not the job titles, classifications, or descriptions.

To decide whether the jobs require substantially equal "skill," you should consider factors such as the level of education, experience, training, and ability required to perform the two jobs.

Remember - you are comparing jobs, not employees, so the fact that the [male/female] employee has a qualification that [Plaintiff] does not have is only relevant if that qualification is necessary for the [male/female] employee's job.

To decide whether the jobs require substantially equal "effort," you should compare the amount of physical and mental exertion needed to perform each job. You should weigh duties that result in



mental or physical fatigue and emotional stress, or factors that alleviate fatigue and stress, to assess the relative effort involved. Equal effort does not mean that employees must use effort in the same way. If there is no real difference in the amount or degree of effort it takes to perform each job, the jobs require equal effort. But if one job requires additional tasks that take more time and effort, the two jobs do not require substantially equal effort.

To decide whether the jobs involve substantially equal "responsibility," you should consider the degree of accountability that each job requires. You may consider factors such as:

- (a) whether the employees are expected to direct or supervise the work of others;
- (b) whether the employees are authorized to represent [Defendant] in dealing with customers, suppliers, or other third parties; and
- (c) the potential consequences to [Defendant] of inadequate or improper performance of the jobs [, which may include possible damage to valuable equipment, possible loss of business or productivity, and the possibility of incurring legal liability to third parties].

For the third element, [Plaintiff] must prove that the jobs are performed under similar working conditions. Note that the test here is whether the working conditions are "similar" - they do not need to be substantially equal. To decide whether relative working conditions are similar, you should consider the physical surroundings or the environment in which the work is performed, including the elements to which employees may be exposed. You should also consider travel requirements as well as any work hazards, including the frequency and severity of any risks of injury.

For the fourth element, [Plaintiff] must prove that [Defendant] paid [him/her] a lower wage than [his/her] [male/female] counterpart. To determine this, you should consider all forms of compensation including wages, salary, profit sharing, expense accounts, monthly minimums, bonuses, uniformcleaning allowances, hotel accommodations, use of a company car, gasoline allowances, and fringe benefits.



[Including Affirmative Defense: If you find that [Plaintiff] has proved each element [he/she] must prove, you must decide whether [Defendant] has established [his/her/its] affirmative defense.

To establish [his/her/its] affirmative defense, [Defendant] must prove by a preponderance of the evidence that the difference in the amount of pay between the jobs was not because of [Plaintiff]'s sex but was the result of a [seniority system/merit system/system measuring earnings by quantity or quality of production/describe factor other than sex upon which [Defendant] relies].

[Plaintiff] claims that the difference in pay was not the result of a [seniority system/merit system/system measuring earnings by quantity or quality of production/describe factor other than sex upon which [Defendant] relies] and that [Defendant]'s reason for the difference is only an excuse for paying higher wages to [men/women] for equal work.

If you find that [Defendant] has established its affirmative defense, your verdict must be in favor of [Defendant], and you will not decide the issue of [Plaintiff]'s damages. But if you find that [Defendant] has not established its affirmative defense, you must decide the damages issue.]

[Without Affirmative Defense: If you find that [Plaintiff] has proved each element [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following element of damage, to the extent you find that [Plaintiff] has proved it by a preponderance of the evidence, and no others: the amount of [Plaintiff]'s lost compensation. [Plaintiff]'s lost compensation is the difference between the amount [Defendant] should have paid [Plaintiff] and the amount [Defendant] actually paid [Plaintiff]. Put another way, [Plaintiff]'s lost compensation is the difference between [Plaintiff]'s compensation and the [average] compensation of the [male/female] employee[s] in [a] substantially equal job[s].



[Plaintiff] is entitled to recover lost compensation from the date of your verdict back to no more than two years before [he/she] filed this lawsuit on [date of complaint] [, unless you find that [Defendant] "willfully violated" the Equal Pay Act].

[If [Defendant] knew that [his/her/its] conduct violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [Defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited [his/her/its] conduct, [his/her/its] conduct was not willful. If you find that [Defendant] willfully violated the Equal Pay Act, then [Plaintiff] is entitled to recover lost compensation from the date of your verdict back to no more than three years before [he/she] filed this lawsuit.]

---

### SPECIAL INTERROGATORIES TO THE JURY

---

Do you find from a preponderance of the evidence:

1. That [Plaintiff] and a member, or members, of the opposite sex have been employed by [Defendant] in jobs requiring substantially equal skill, effort, and responsibility?

Answer Yes or No \_\_\_\_\_7

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the two jobs are performed under similar working conditions?

Answer Yes or No \_\_\_\_\_

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [Plaintiff] was paid a lower wage than a member of the opposite sex doing equal work?



Answer Yes or No \_\_\_\_\_

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That the differential in pay between the two jobs was the result of a [seniority system/merit system/system measuring earnings by quantity or quality of production/describe factor other than gender upon which [Defendant] relies]?

Answer Yes or No \_\_\_\_\_

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

[5. That [Defendant] either knew or showed reckless disregard for whether [his/her/its] conduct was prohibited by the Equal Pay Act?

Answer Yes or No \_\_\_\_\_

6. That [Plaintiff] should be awarded damages for lost compensation?

Answer Yes or No \_\_\_\_\_

If your answer is "Yes," in what amount?  
\$ \_\_\_\_\_

SO SAY WE ALL.

DATE: \_\_\_\_\_

\_\_\_\_\_  
Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)



## Annotations and Comments

### I. Elements and Defenses

#### A. “Employer”

Pattern Instruction 4.13 does not define the term “employer,” and the instruction presumes that the issue will not be disputed in most cases. In cases where there is a fact dispute that must be resolved to answer the question whether the defendant is an “employer” within the meaning of the Equal Pay Act (which is part of the Fair Labor Standards Act), the instructions and verdict form should be adapted. Under the FLSA, an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. §203(d). “Whether an individual falls within this definition does not depend on technical or ‘isolated factors but rather on the circumstances of the whole activity.” Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1160 (11th Cir. 2008) (internal quotation marks omitted). Pattern Instructions 4.26 and 4.27, *infra*, provide guidance on this issue.

#### B. The Burden-Shifting Framework

In an Equal Pay Act (“EPA”) case, the plaintiff demonstrates a *prima facie* case by showing that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring substantially equal skill, effort, and responsibility under similar conditions. Steger v. Gen. Elec. Co., 318 F.3d 1066, 1077-78 (11th Cir. 2003). If the employee presents a *prima facie* case, “the employer may avoid liability by proving by a preponderance of the evidence that the pay differences are based on ‘(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) ... any other factor other than sex.’” *Id.* at 1078 (quoting 29 U.S.C. §206(d)(1)). “The burden to prove these affirmative defenses is heavy and must demonstrate that ‘the factor of sex provided no basis for the wage differential.’” *Id.* (quoting Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995)).

“Once the employer’s burden is met, the employee must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential.” Steger, 318 F.3d at 1078 (quoting Irby, 44 F.3d at 954). “To rebut an employer’s legitimate nondiscriminatory reasons for its adverse action, the employee must produce evidence which directly establishes discrimination or which permits the jury to reasonably disbelieve the employer’s proffered reason.” *Id.* at 1079. “Any believable evidence which demonstrates a genuine issue of fact regarding the truth of the employer’s explanation may sustain the employee’s burden of proof.” *Id.* In other words, the



plaintiff has a burden of production after the employer meets its burden, but the burden of persuasion does not shift back to the plaintiff.

This framework is workable for a summary judgment order, but it is not juryfriendly. Accordingly, Pattern Instruction 4.13 instructs that the plaintiff must prove the elements of the prima facie case. The instruction then instructs on the employer's burden (and calls it an affirmative defense) and provides a place for the jury to be instructed on the plaintiff's contention that the employer's reason for the difference was "only an excuse for paying higher wages to a member of the opposite sex for equal work."

### C. Establishment

"Comparison" employees must work in the same "establishment" as the plaintiff. Mulhall v. Advance Sec., Inc., 19 F.3d 586, 590 (11th Cir. 1994). "The term 'establishment' is defined by the Secretary of Labor as 'a distinct physical place of business rather than... an entire business or 'enterprise' which may include several separate places of business.'" Id. at 591 (quoting 29 C.F.R. §1620.9(a) (1993)). A single establishment can include operations at more than one physical location. Id. (citing Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53, 56 (5th Cir. 1975) (central control and administration of disparate job sites can support finding of single establishment)). However, courts presume that multiple offices are not a single establishment unless unusual circumstances are demonstrated. Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1017 (11th Cir. 1994); see also 29 C.F.R. §1620.9(b) (2009) ("[U]nusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.").

Pattern Instruction 4.13 does not instruct on the "establishment" issue. If there is a jury question on this point, the instruction and verdict form should be modified accordingly.

### D. Substantially Equal Skill, Effort and Responsibility

In evaluating the plaintiff's case, the plaintiff is not required to prove that the jobs performed are identical; the test is one of substantiality, not identity. Thus, the jury should consider only the skills and qualifications needed to perform the job and should not consider the prior experiences or other qualifications of the other employees. Mulhall v. Advance Sec., Inc., 19 F.3d 586, 592 (11th Cir. 1994); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1533 (11th Cir. 1992). Prior experience of other employees may be relevant, however, in determining the employer's affirmative action defense - - whether the fourth statutory exception

(factors other than sex) applies. Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988).

Pattern Instruction 4.13 breaks this inquiry into three parts: skill, effort, and responsibility.

#### E. Factors Other than Sex

Although an employer may not rely on a “general practice” as a factor other than sex, it may consider factors such as the “unique characteristics of the same job;... an individual’s experience, training or ability; or... special exigent circumstances connected with the business.” Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (quoting Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988)); accord Leatherwood v. Anna’s Linen’s Co., 384 F. App’x 853, 860 (11th Cir. 2010) (per curiam) (explaining that exigent circumstances include understaffing and the need to lure a new employee from a competitor).

## II. Remedies

“For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of [the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the Fair Labor Standards Act.]” 29 U.S.C. §206(d)(3).

#### A. Amount of Damages

The measure of damages is the difference between the plaintiff’s compensation and the compensation of the employees of the opposite sex who worked in substantially equal jobs. Where there is more than one employee of the opposite sex who worked in substantially equal jobs, the damages can be calculated by calculating the difference between the plaintiff’s salary and the average salary paid to the workers of the opposite sex. Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1534 (11th Cir. 1992).

#### B. Willful Violations

The statute of limitations for Equal Pay Act suits is two years but is increased to three years for “willful” violations. 29 U.S.C. §255(a); accord Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1162 (11th Cir. 2008). To prove willfulness, “the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the [EPA] or showed reckless disregard about whether it was.” *Id.* at 1162-63 (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988)). The question whether an employer willfully violated the EPA is a jury question. *Id.* at 1163.

Pattern Instruction 4.13 includes a willfulness instruction, which is to be used in cases where there is a dispute as to whether the employer willfully violated the EPA.



### C. Liquidated Damages

When the jury assesses compensatory damages for a violation of the EPA, the court must generally add an award of liquidated damages in the same amount. 29 U.S.C. §216(b); accord *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. 2008). There is a good faith defense: if the employer shows “to the satisfaction of the court” that the acts or omissions giving rise to the violation were in good faith and that the employer had reasonable grounds for believing that its act or omission was not a violation of the EPA, then “the court may, in its sound discretion,” reduce or eliminate liquidated damages. 29 U.S.C. §260. “The employer bears the burden of establishing both the subjective and objective components of that good faith defense against liquidated damages.” *Alvarez Perez*, 515 F.3d at 1163. The good faith defense must be decided by the judge unless the jury finds that the employer acted willfully. *Id.* If the jury finds that the employer acted willfully, then the court cannot find that the employer acted in good faith, and the court must award liquidated damages. *Id.* at 1166.

### D. Attorney’s Fees and Costs

Section 216(b) of the Fair Labor Standards Act is incorporated into the Equal Pay Act, and therefore “the court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” 29 U.S.C. §216(b).

### E. Prejudgment Interest

The court cannot award both liquidated damages and prejudgment interest because such an award would constitute double compensation. *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987) (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 715 (1945)).

