DRAFT FOR DISCUSSION – UPDATED 3.16.17

This document is drafted solely for discussion during the March 16, 2017 meeting of the Definitions Subcommittee and should not be construed as legal advice or a final recommendation of this subcommittee or the Task Force.

Bullet Points re: Definitions

1. Substantially similar work when viewed as a composite of skill, effort, responsibility and under similar working conditions

    - **Look at overall job content/Consider the totality of the circumstances**

        - *Brennan v. South Davis Community Hospital*, 538 F. 2d 859 (10th Cir. 1976) ("[W]e need not find precise identity of functions before an equal work determination is possible…" "The occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort.")

        - *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871 (D. Minn. 2014)
            - Plaintiff and male co-worker were hired as two high-level staff of the "New Model Consulate" of Norway located in Minnesota. She held the Higher Education and Research position and he held the Innovation and Business position. She was paid about $30K less and evidence demonstrated that the positions were equally important and had almost identical responsibilities.
            - Court reasoned that "[w]hether two jobs are substantially equal requires a practical judgment on the basis of all the facts and circumstances . . . [n]either job classifications nor titles are dispositive for determining whether jobs are equal."

        - EEOC Guidance, *available at:* https://www.eeoc.gov/policy/docs/compensation.html
            - "Job content, not job titles or classifications, determines the equality of jobs." *See Katz v. School Dist. of Clayton, Mo.*, 557 F.2d 153, 156-57 (8th Cir. 1977) (teacher's aide performed duties of teacher and job was substantially equal to that of teacher).

        - EEOC Q&A Compliance Manual, *available at:* https://www.eeoc.gov/policy/docs/qanda-compensation.html

- "How do you determine whether employees are similarly situated? The jobs the employees hold should be similar enough that one would expect the jobs to pay the same. This need not be an overly rigid process. The key is what people actually do on the job, not job titles or departmental designations. Skill, effort, responsibility, and the general complexity of the work are guideposts in determining job similarity."

- *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)
  - Focus on overall "job content" as a "constant in the context of the EPA;" plaintiff must establish that jobs compared entail common duties, requirements and performance, and do not simply overlap in titles or classifications. Court relies on EEOC regulations to define the underlying criteria of skill, effort, and responsibility, measured in terms of the "performance requirements of the job."

- *Beck-Wilson v. Principi*, 441 F.3d 353, 359–63 (6th Cir. 2006)
  - "Whether a job is substantially equal for purposes of the EPA, is determined on a case-by-case basis and 'resolved by an overall comparison of the work, not its individual segments.'" (at 359-60)
  - Court compared pay of physicians' assistants at Veterans' Administration facilities—most of whom were men—to that of registered nurses in same facilities—most of whom were women, and concluded jobs were substantially equal.
  - Proper focus is on work performed and job requirements rather than on job titles and classifications; focus in determining whether jobs are substantially equal should be on actual job requirements rather than job titles and classifications.

- *Marshall v. Dallas Indep. Sch. Dist*., 605 F.2d 191, 195 (5th Cir. 1979)
  - Work performed by "custodial helpers" and "maids" was not substantially equal where "custodial helpers" worked all months of year and performed work requiring heavier physical labor than seasonal "maids."
  - Court emphasizes need to consider all circumstances related to job content. "In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle.

This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time." Id. at 195.

- *Conti v. Universal Enters., Inc.*, 50 F. App'x 690, 696 (6th Cir. 2002) (noting that to determine substantial equality "an overall comparison of the work, not its individual segments" is necessary), quoting *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981).

- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002)("Whether two jobs are substantially equal 'requires a practical judgment on the basis of all the facts and circumstances of a particular case' including factors such as level of experience, training, education, ability, effort, and responsibility.") (quoting *Buettner v. Eastern Arch Coal Sales, Co.*, 216 F.3d 707, 719 (8th Cir. 2000).

- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6th Cir. 1998) ("[w]hether the work of two employees is substantially equal 'must be resolved by the overall comparison of the work, not its individual segments.'")

- EEOC v. Port Authority of New York and New Jersey, 786 F.3d 247, 256-258 (2nd Cir. 2014).
  - "A successful EPA claim depends on the comparison of actual job content; broad generalizations drawn from job titles, classifications, or divisions, and conclusory assertions of sex discrimination, cannot suffice."
  - "Job codes, again, say nothing of actual job duties and are thus peripheral to an EPA claim. The use of identical evaluative criteria such as 'project management,' 'communication,' 'flexibility and adaptability,' ad 'attendance,' moreover speaks only to the breadth of the standards used, not to whether the attorneys subject to evaluation face varying workplace demands."

- *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69 (N.D. Cal. 1978) ("The regulations and cases make it clear that it is actual job content, not job titles or descriptions which is controlling.")

- **One for one match between skills, effort, and responsibility not required/if one factor is not substantially similar, that will not necessarily mean the jobs are not substantially similar; must consider other factors**

    - EEOC Guidance
        - "If two jobs generally share a common core of tasks, the fact that one of the jobs includes certain duties that entail a lower level of skill would not defeat a finding that the jobs are equal. For example, if two people work as bookkeepers, and one of the individuals performs clerical duties in addition to bookkeeping tasks, the skill required to perform the two jobs would be substantially equal.. . . On the other hand, if the jobs require different experience, ability, education, or training, then the jobs are not equal. For example, a vice president of a trade association could not show that her work was equal to the work performed by other vice presidents, where they performed key policymaking for the association, a skill that her position did not require." *See Stopka v. Alliance of Am. Insurers,* 141 F.3d 681, 685 (7th Cir. 1998).

    - *Brennan v. Prince William Hospital Corp*., 503 F.2d 282, 285-286 (4th Cir. 1974) ("One of the most common grounds for justifying different wages is the assertion that male employees perform extra tasks. These may support a wage differential if the create a significant variation in skill, effort, and responsibility between otherwise equal jobs.")

    - *Brennan v. South Davis Community Hospital*, 538 F.2d 859, 863 (10th Cir. 1976) ("[W]e need not find precise identity of functions before an equal work determination is possible; only substantial equality of skill, responsibility, and effort and similar working conditions must be shown to preclude a wage differential.")

- **Jobs Titles and Job Descriptions are Relevant, but Not Determinative.**

    - EEOC Guidance:
        - "The fact that jobs are in different departments is not determinative, although in some cases it may be indicative of a difference in job content." *See Strag v. Board of Trustees*, 55 F.3d 943, 950 (4th Cir. 1995) (professorship in Mathematics department of university was not substantially equal to professorship in

Biology department because of difference in skills and responsibilities required by the departments).

- *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)
  - Court rejects argument that "an attorney is an attorney is an attorney" and holds that a "successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice"; in order for jobs compared to be "substantially equal," a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications.

- *Randall v. Rolls-Royce Corp*., 637 F.3d 818, 822–23 (7th Cir. 2011)
  - Job title of "Director of Operations" held by both female and male employees who allegedly were paid more for same work, was irrelevant to EPA claim because title covered multitude of positions differing in authority and responsibility; female employees in air and marine engine manufacturing plant failed to identify any male worker who was paid more for substantially same work; jobs not substantially equal.
  - Assessing skill, effort, and responsibility when mixed within same job title. Court rejects application of "comparable worth"; emphasizes that job title is not determinative for comparator groups in context assessing skill, effort and responsibility when mixed within job title, as a "title covers a multitude of positions differing in authority (such as number of employees supervised) and responsibility."

- *Brennan v. Prince William Hospital Corp*., 503 F.2d 282, 288 (4th Cir. 1974) ("Job descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling.")

- *Ingram v. Brink's, Inc*., 414 F.2d 222, 231 (1st Cir. 2005) ("The EPA is more concerned with substance than title.")

- **Jobs that share a common core of tasks are substantially similar/where majority of the skills, effort and responsibility are substantially similar, so are the jobs**

    - EEOC Guidance:
        - In evaluating whether two jobs are substantially equal, an inquiry should first be made as to whether the jobs have the same "common core" of tasks, i.e., whether a significant portion of the tasks performed is the same. *See Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (critical issue in determining whether two jobs are equal under the EPA is whether the two jobs involve a "common core of tasks" or whether "a significant portion of the two jobs is identical").
        - If a significant portion of the tasks performed in the two jobs is the same, an inquiry should be made as to whether the comparators perform extra duties which make the work substantially different. Jobs with the same common core of tasks are equal, even though the comparators perform extra duties, if the extra duties are insubstantial. *See:*
            - *EEOC v. Central Kansas Med. Ctr*., 705 F.2d 1270, 1272-73 (10th Cir. 1983) (janitors and housekeepers performed equal work; any extra work performed by the janitors was insubstantial or was balanced by additional responsibilities performed by housekeepers).
            - *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (noting that Court of Appeals concluded that extra packing, lifting, and cleaning performed by night inspectors was of so little consequence that the job remained substantially equal to those of day inspectors).
            - *Goodrich v. International Bhd. of Elec. Workers*, 815 F.2d 1519, 1525 (D.C. Cir. 1987) (job of female union employee was not substantially equal to that of males who did the same work because males had additional duties which, though consuming little time, were essential to the operation and mission of the union).

    - *Merillat v. Metal Spinners, Inc*., 470 F.3d 685, 695–97 (7th Cir. 2006)
        - Two jobs are not substantially equal where one employee has broader strategic planning responsibilities, supervisory duties, and authority over personnel than another employee.

        - "In order to determine whether or not two jobs are equal for purposes of EPA, courts look to whether the jobs have a 'common core of tasks, i.e., whether a significant portion of the two jobs is identical; once a plaintiff establishes a 'common core' of tasks, court asks whether any additional tasks make the jobs substantially different" (quoting *Cullen v. Indiana Univ. Bd. Of Trs.,* 338 F.3d 693, 704 (7th Cir.2003).

- **Minor differences in the jobs do not mean jobs are not substantially similar/occasional performance of certain tasks does not necessarily render the jobs sufficiently dissimilar/incidental tasks or tasks that consume only a small amount of time will not render jobs sufficiently dissimilar**

    - EEOC Guidance
        - "[M]inor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal. In comparing two jobs for purposes of the EPA, consideration should be given to the actual duties that the employees are required to perform."

    - EEOC Q&A Compliance Manual:
        - "How similar do jobs have to be under the Equal Pay Act? Under the Equal Pay Act, jobs must be substantially equal, but not identical. Therefore, minor differences in job duties, or the skill, effort, or responsibility required for the jobs will not render them unequal. Also, differences between the people in the jobs are not relevant to whether the jobs are substantially equal, though differences in qualifications could ultimately be a defense to a claim of pay discrimination."

    - OFCCP Sex Discrimination Guidelines Revised 2016 - 41 CFR 60.4(a)
        - "Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others."

    - *Shultz v. Wheaton Glass Co*., 421 F.2d 259, 266 (3d Cir. 1970) (10% wage differential not justified despite fact that male selector-packers spent up to

18% of their time on 16 tasks not performed by females, the work in general was "substantially identical" under EPA).

- *Brennan v. South Davis Cmty. Hosp*., 538 F.2d 859, 862 (10th Cir. 1979) (minimal amount of time spent by orderlies performing catheterization of patients each day, even though it was task requiring some skill, did not justify differential in pay between male orderlies and female aides; court reasoned that disparity is "not justified by performance of extra duties of equal skill effort and responsibility, when supposed extra duties do not in fact exist, or when extra task consumes minimal amount of time and is of peripheral importance.").

- **Look at the day-to-day content of the jobs**

  - *Marshall v. Dallas Indep. Sch. Dist*.,605 F.2d 191, 195 (5th Cir. 1979).
    - Work of "custodial helpers" and "maids" was not substantially equal where "custodial helpers" worked all months of year and performed work requiring heavier physical labor than "maids."
    - Court emphasizes need to consider all circumstances related to job content. "In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time." *Id.* at 195.

  - *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 770 (7th Cir. 2007) (job of female manager who supervised six-acre park with limited facilities was not equal in terms of skill, effort, and responsibility required to that of male manager who was to oversee much larger park with extensive facilities including pool).

  - *Katz v. School Dist*., 557 F.2d 153, 156 (8th Cir. 1977) ("two employees are performing equal work when it is necessary to expend the same degree of skill, effort, and responsibility in order to perform the substantially equal duties which they do, in fact, routinely perform with the knowledge and acquiescence of the employer").

- **This element looks at the jobs themselves, not the people who have those jobs**

    - EEOC Guidance
        - "The important comparison in determining whether the "equal work" requirement is met is the comparison of the jobs, not the people performing the jobs. Thus, a difference between the comparators has no bearing on whether the jobs are equal. The critical question at this point in the analysis is whether the jobs involve equal work. However, a difference between the comparators could qualify as a defense to a compensation disparity."

    - *Miranda v. B&B Cash Grocery Store, Inc*., 975 F.2d 1518, 1533 (11th Cir. 1992) ("A plaintiff establishes a prima facie case by comparing the jobs held by the female and male employees, and by showing that those jobs are substantially equal, not be comparing the skills and qualifications of the individual employees holding those jobs.")

- **Effort may be exerted in different way, but may still be substantially similar**

    - 29 C.F.R. § 1620.17 (Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations.)

    - OFCCP Final Rule (41 C.F.R. § 60-20.4 Discriminatory Compensation)
        - "Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others."

    - *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69-70 (N.D. Cal. 1978) ("Effort is measured by the amount of physical and mental exertion needed for the performance of the job. Responsibility reflects the degree of accountability required in the performance of the job. In this case, involving a comparison of managerial jobs, these two factors are closely related; the greater the responsibility imposed, the greater the exertion necessary to discharge it.")

- **Similar working conditions means the physical surroundings and hazards/does not include job shifts**

    - EEOC Guidance:
        - "While a difference between night and day work is not a difference in "working conditions," it could constitute a "factor other than sex" that justifies a compensation differential. A shift differential operates as a defense only if both sexes have an equal opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve."

    - *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 361 (8th Cir. 1970).
        - No justification for paying male night-shift workers more than female day-shift workers; males had to load heavy rolls of paper, but this consumed only small amount of time, and employer's own pay practices suggested that this was not real reason for disparity.

- **Size of Pay Differential Is Relevant:**

    - *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007) ("In determining whether equal pay is being paid for equal work, the size of the pay differential though not determinative, is highly relevant. The smaller the differential, the more likely it is to be justified by a small difference in the work.")

    - *Lavin-McEleney v. Marist College*, 239 F. 3d 476 (2nd Cir. 2001) ("[W]here multiple comparators exists, the plaintiff is not permitted simply to select the best-compensated male to establish her case, Rather, 'the proper test for establishing a prima facie case in a professional setting such as that of a college is whether the plaintiff is receiving lower wages that the average wages paid to all employees of the opposite sex performance substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage scale.'")

- **Burden of Proof of Prima Facie Case**

    - *Bearden v. International Paper Co*., 529 F.3d 828, 833 (8th Cir. 2008) ("Once an employee has established a prima facie case, the burden shifts to the employer to prove any of four statutory affirmative defenses.")

    - *Beck-Wilson v. Principi*, 441 F.3d 353, 363 (6th Cir. 2006) ("Because the comparison at the prima facie state is of the jobs and not the employees, 'only the skills and qualifications actually needed to perform the jobs are considered.' Factors like education and experience are considered as a defense to an employer's liability rather than as part of a plaintiff's prima facie case.")

- **Affirmative Defense**

    - *Bearden v. International Paper Co*., 529 F.3d 828, 833 (8th Cir. 2008). "Once an employee has established a prima facie case, the burden shifts to the employer to prove any of four statutory affirmative defenses."

    - *Beck-Wilson v. Principi*, 441 F.3d 353, 359-60, 363 (6th Cir. 2006)
        - "Because the comparison at the prima facie state is of the jobs and not the employees, 'only the skills and qualifications actually needed to perform the jobs are considered.' Factors like education and experience are considered as a defense to an employer's liability rather than as part of a plaintiff's prima facie case."
        - "We therefore held that the Equal Pay Act's exception that a factor other than sex can be an affirmative defense, 'does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."

    - *Merillat v. Metal Spinners, Inc*., 470 F.3d 685, 695 (7th Cir. 2006)
        - "Under the EPA, differences in education and experience may be considered factors other than sex."
        - "An employer may take into account market forces when determining the salary of an employee."

2. Wage rates; compensation; wages

    - EPA applies to compensation in all its forms, including but not limited to wages and salaries, bonuses, commissions, and benefits, such as vacation and pension.
        - Jennifer R. and Doris to discuss.
    - EPA typically would not cover other terms and conditions of work, such as promotions, assignment, work hours, overtime worked, harassment, training, lay off, termination, suspension or other employment actions that may be challenged under the Fair Employment and Housing Act.

3. Discussing wages—when can employee whose job includes responsibility connected to compensation discuss wages?

    - HR employees or other employees with confidential access to such information may not disclose wages of others, except if done for the purposes of reporting/complaining about a violation, done in response to formal complaint or charge, in furtherance of an investigation, proceeding, or consistent with a legal duty to disclose such information, or done based on receipt of the information through other means

4. Application to public employers