Mississippi College Law Review

Volume 40 | Issue 1 Article 12

Fall 2022

MORE THAN FIFTY YEARS AFTER THE ENACTMENT OF FEDERAL LAWS FORBIDDING DISCRIMINATION IN PAY, THE WAGE DISPARITY BASED ON SEX CONTINUES: FOCUSING ON THE CIRCUIT COURTS' DIFFERING INTERPRETATIONS OF "FACTORS OTHER THAN SEX"

Audrey K. Hurt
Mississippi College School of Law

Custom Citation
40 Miss. C. L. Rev. 199 (2022)

MORE THAN FIFTY YEARS AFTER THE ENACTMENT OF FEDERAL LAWS FORBIDDING DISCRIMINATION IN PAY, THE WAGE DISPARITY BASED ON SEX CONTINUES: FOCUSING ON THE CIRCUIT COURTS' DIFFERING INTERPRETATIONS OF "FACTORS OTHER THAN SEX"

Audrey Kelly Hurt[*]

Table of Contents

[*] Audrey Kelly Hurt is a May 2022 graduate of Mississippi College School of Law. She would like to give her utmost thanks to Professor Judith Johnson for her patience, guidance, and extensive knowledge throughout the drafting and publication process. Finally, Audrey would like to show her appreciation for her husband, Collin Hurt, and her family and friends for their undying support during the last three years of law school and during the drafting of this Comment.

I. INTRODUCTION

Despite the adoption of legislation such as Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, a wage disparity continues to exist between males and females, with women earning eighty-two cents for every dollar earned by a man under the raw gender-pay gap.[1] Though the gap has narrowed in recent years, the reduction rate is significantly lower, with little to show for it—a gap still exists.[2]

Because legislation intended to diminish the disparity is not working, additional measures should be taken. Title VII and the Equal Pay Act both prohibit sex-based discrimination in the payment of wages to male and female employees.[3] Following the adoption of the Equal Pay Act [hereinafter EPA], which includes four affirmative defenses, Congress enacted the Bennett Amendment to Title VII, which has been interpreted as applying those same defenses to claims brought under Title VII.[4] Of the four defenses available under both Title VII and the EPA, the fourth defense, "factors other than sex" [hereinafter FOTS], has created significant controversy among courts.[5] Despite legislative efforts to universally define FOTS, no such definition has been adopted. A more stringent interpretation of the defense is therefore necessary to eliminate the still-prevalent pay disparity.

The broad scope of this fourth affirmative defense available to employers under the EPA and Title VII allows for inconsistency in its interpretation and is responsible, at least in part, for the continued existence of wage discrimination. Without a prescribed means of application—specifically, a stricter means of application—employers are more readily absolved from liability under the FOTS defense. The best solution to this problem is for Congress to adopt a more stringent approach to the FOTS defense under the Equal Pay Act of 1963—an approach which would apply to Title VII, as well. However, with little headway being made in the legislation regarding pay equity, this Comment proposes instead that courts adopt the job-relatedness standard that multiple circuits already apply for

---

[1] *The State of the Gender Pay Gap in 2021*, https://www.payscale.com/data/gender-pay-gap (last visited August 11, 2021). Under the uncontrolled gender pay gap equation, accounting for additional factors besides gender, including education, experience, location, and industry, women earn ninety-eight cents for every dollar males earn.

[2] *Id*.

[3] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

[4] Washington County v. Gunther, 452 U.S. 161, 174-75 (1981).

[5] Jack A. Friedman, *Real Gender-Neutrality for the Factor-Other-Than-Sex Defense*, 11 N.Y.L. SCH. J. HUM. RTS. 241, 242-43 (1994).

the FOTS defense. Part II of this Comment explores the background of discrimination laws in the United States and focuses on legislation, both adopted and proposed, surrounding wage discrimination. Part III specifically analyzes the requirements under the EPA's burden-shifting analysis, taking into consideration the Act's legislative history and the lack of consistency among circuit courts in interpreting the FOTS defense. Part IV concludes by suggesting reformation for, and solutions to, ongoing wage discrimination in America and urges that the FOTS defense be amended to redefine FOTS.

II. BACKGROUND

A. The Equal Pay Act of 1963 and Title VII

The Equal Pay Act of 1963 was the first federal legislation to address wage discrimination on the basis of sex.[6] It was an amendment to the Fair Labor Standards Act [hereinafter FLSA] and provides a more narrow approach to discrimination in the workplace than the Civil Rights Act of 1964.[7] The purpose of the EPA amendment was "to prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."[8] It is widely acknowledged that the purpose of the Act is "to put an end to historical wage discrimination against women."[9] The Supreme Court has stated that "the [EPA] is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."[10] As discussed below, if the FOTS defense is interpreted to easily permit pay discrepancies, the EPA will not be fulfilling its goal of ending wage discrimination against women.

The Act applies only to those cases in which a pay disparity exists between men or women who perform work that is substantially equal in all material aspects.[11] Congress acknowledged at the outset of the proposed amendment that the presence of wage differentials:

> (1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the

[6] Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM. J.L. & Soc. Probs. 225, 229 (1994).

[7] *Id*.

[8] *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

[9] Rizo v. Yovino, 887 F.3d 453, 461 (9th Cir. 2018), *cert. denied*, 141 S.Ct. 189 (U.S. 2020).

[10] Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974).

[11] *See*, Bowden, *supra* note 6.

> maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.[12]

The bill sought to eliminate the disparity, proposing that the following be added as § 206(d)(1):

> no employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[13]

The EPA analysis is a burden-shifting analysis.[14] According to the language of the Act, in order for a plaintiff to make a case under the EPA, he or she must show "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions.'"[15] The plaintiff has the initial burden of proof which, if met, shifts to the defendant-employer to raise one of four affirmative defenses available as an exception to the general statutory provision.[16] The defendant has both the burden of proof and the burden of persuasion to

---

[12] *Id.*
[13] *Id.*
[14] *See Corning Glass Works*, 417 U.S. at 195.
[15] *Id.*
[16] *Id.* at 195-96.

show that one of the four affirmative defenses applies to the claim.[17] In asserting an affirmative defense to the employee's prima facie case, the employer must not only persuade a reasonable factfinder that the evidence presented *could* explain the difference, but that the evidence *does* explain the difference.[18] It is important that the defendant employer demonstrate that the raised defense is the reason for the pay disparity that exists between male and female employees.[19] A claim brought under the EPA does not require that discriminatory intent be shown—effectively making the EPA a strict liability statute.[20]

The Act lists the four exceptions that an employer may bring as affirmative defenses: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; and (4) a differential based on any other factor other than sex.[21] While the first three affirmative defenses are more specific, the fourth affirmative defense leaves room for interpretation by the courts.[22] This lack of consistency leaves plaintiffs uncertain of the outcome of a case brought under the EPA, reducing the number of claims brought under the Act.[23] Therefore, the interpretation of this broader, fourth defense leaves much controversy surrounding the effectiveness of the EPA in eliminating the gender wage gap in the United States.

Like the EPA, Title VII to the Civil Rights Act of 1964 prohibits sex-based wage discrimination.[24] As discussed above, claims brought under the EPA require a showing of equal work.[25] Conversely, Title VII does not require proof of equal work.[26] For this reason, at least in part, most sex-based wage discrimination claims are brought under Title VII because of a different and often lower burden of establishing a prima facie case by the plaintiff. This only furthers the EPA's failure in reducing the gap.[27]

The Civil Rights Act of 1964 provides a broad scope of protection for preventing discrimination based on race, sex, religion, color, and national origin, providing that:

---

[17] Peter Avery, *The Diluted Equal Pay Act: How Was it Broken? How Can it be Fixed?*, 56 RUTGERS L. REV. 849, 851 (2004).

[18] U.S. EEOC v. MD Ins. Admin., 879 F.3d 114, 121 (4th Cir. 2018).

[19] *Id*.

[20] *See* Avery, *supra* note 17.

[21] *Corning Glass Works*, 417 U.S. at 196.

[22] *See* Bowden, *supra* note 6.

[23] *Corning Glass Works*, 417 U.S. at 233-34.

[24] *Gunther*, 452 U.S. at 166-67.

[25] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

[26] *Gunther*, 452 U.S. at 168.

[27] *Id*. at 170.

> [i]t shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[28]

In order to bring a claim under Title VII, an individual plaintiff may prove discrimination using either the disparate treatment or disparate impact theory.[29] However, because of broad interpretations of the defenses to sex-based wage claims, the disparate impact theory may not be available for these claims.[30] This unavailability is based, at least in part, on the interpretation of how Title VII intersects with the earlier EPA.

Initially, the proposed version of the Civil Rights Act of 1964 only applied to discrimination based on race, color, religion, or national origin, but the bill was amended shortly before the floor vote to include discrimination on the basis of sex as well.[31] When concerns surrounding the relationship between Title VII and the EPA arose, the Bennett Amendment was proposed to reduce the inconsistencies in interpretation.[32] The Bennett Amendment provides that:

> [i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.[33]

In *Washington County v. Gunther*, the Court addressed the relationship between the two pieces of legislation.[34] In *Gunther*, the Court had to determine whether sex-based wage discrimination claims brought under Title VII were limited only to those claims of equal pay for equal

---

[28] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. As used in this context, an employer is a person (1) who is engaged in commerce (2) with at least fifteen employees (3) for each working day for at least twenty calendar weeks, either in the current or preceding calendar year. *Id.* § 2000e(b).

[29] *Id*. § 2000e-2.

[30] *Gunther*, 452 U.S. at 170.

[31] *Id.* at 172.

[32] *Id*. at 173.

[33] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h).

[34] *Gunther*, 452 U.S. at 167.

work.[35] The Court noted that where Congress has not explicitly provided an interpretation, the courts should interpret Title VII broadly so that discrimination may be reduced.[36] Consequently, the Court held that Title VII does *not* preclude claims where equal pay for equal work is not shown, concluding instead that the Bennett Amendment incorporated only the four affirmative defenses available under the EPA into Title VII.[37]

The Court reached this decision by determining that the phrase "such differentiation is authorized" under the EPA[38] was meant to incorporate the affirmative defenses of the EPA into Title VII because this pay differential was authorized.[39] Since there is little legislative history for the Bennett Amendment, the Supreme Court decided that the purpose of the Bennett Amendment must have been to guarantee that courts interpreted claims brought under both Title VII and under the EPA consistently.[40]

Thus, the Court determined that Title VII, unlike the EPA, does not require that a member of the opposite sex be paid a higher wage than the individual bringing a discrimination suit for *equal work*.[41] However, because of the Bennett Amendment, the wage rate may be based on "seniority, merit, quantity or quality of production, or any other factor other than sex."[42]

Circuit courts have interpreted the FOTS defense differently; some have applied a gender-neutral test while others have applied a legitimate business-reason test.[43] Under the business-reason test, referred to in the Ninth Circuit as the job-relatedness standard,[44] the employer must show that a factor other than sex which serves as a legitimate business purpose led to the wage discrepancy.[45] Under the gender-neutral test, factors determining wages need only be based on a facially gender-neutral factor and applied neutrally to employees.[46] The Supreme Court has weighed in favor of this interpretation in dicta.[47] In *Gunther*, as discussed above, the defendant County of Washington argued that the Bennett amendment

---

[35] *Id*. at 163.
[36] *Id.* at 178.
[37] *Id*. at 168.
[38] *Id*. at 167.
[39] *Id*. at 168-69.
[40] *Id*. at 170.
[41] *Id*. at 168.
[42] *Id*.
[43] *See* Avery, *supra* note 17 at 864-66.
[44] *Rizo*, 887 F.3d at 460.
[45] *Id*. at 461; *see* Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982).
[46] *Id*. at 462; *see also* Strecker v. Grand Forks Cnty. Soc. Serv., 640 F.2d 96 (8th Cir. 1980).
[47] *See* Smith v. City of Jackson, Miss., 544 U.S. 228 (2005); *Gunther*, 452 U.S. at 172.

required the plaintiff to prove equal work under Title VII as well as under the EPA.[48] One of the bases for this argument was that the first three affirmative defenses are already available for Title VII claims and that the fourth defense, FOTS, is implied in Title VII's prohibition of discrimination on the basis of sex.[49] As noted, the Court disagreed with the County, finding that the Bennett Amendment was intended to resolve conflicting applications of Title VII and the EPA—regardless of the availability of the same defenses in Title VII.[50] In addition, the Court said that adding FOTS to Title VII might change how a sex-based wage claim is prosecuted under Title VII cases—a decision they said they were not making.[51] However, in citing an example of such a change, the Court implied that disparate impact might not apply to a sex-based wage claim because FOTS could be a neutral factor.[52] This was clearly dicta because the decision did not depend on an interpretation of FOTS.

In *Smith v. City of Jackson*, the Supreme Court discussed FOTS more explicitly and said—also in dicta—that because of the application of the fourth affirmative defense, employers could rely on both reasonable and unreasonable factors other than sex.[53] In *Smith*, the plaintiff-employees of the city of Jackson argued that the City violated the Age Discrimination in Employment Act of 1967 [hereinafter ADEA] because it gave greater salary increases to younger police officers than those over forty years old.[54] In their claim, the plaintiffs argued both a disparate-treatment and disparate-impact claim under the ADEA.[55]

The Court had to decide whether disparate impact applied at all to the ADEA.[56] In deciding this issue, the Court had to determine whether the "reasonable factors other than age" [RFOA] defense for the ADEA meant any neutral factor—which would preclude disparate impact—or whether the factor had to be justified as reasonable. In concluding that disparate impact applied to the ADEA, the Court acknowledged the difference between the RFOA defense under the ADEA and the FOTS defense under the EPA.[57] The Court noted that the language of the ADEA's RFOA defense differs from the FOTS defense, which does not have

[48] *Gunther*, 452 U.S. at 168 (1981).
[49] *Id*. at 169-70.
[50] *Id*. at 170.
[51] *Id*. at 170-71.
[52] *Id*. at 178-80.
[53] *See Smith*, 544 U.S. at 239.
[54] *Id*. at 230.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 237.

reasonableness language.[58] The Court said in dicta that this indicated the FOTS defense includes *any* factor other than sex, not only those factors that are reasonably justified, as the RFOA would require.[59]

Because the Supreme Court has only opined on the meaning of FOTS in dicta, the majority of the defense's interpretations of FOTS have been determined by the circuit courts, some of whom have decided that FOTS means literally *any* factor other than sex, while others have applied a more stringent test, requiring that the FOTS presented be job-related.

Expressing the first of these two views of FOTS, *Kouba v. Allstate Insurance Company*, described in greater detail below, was frequently cited as a case analyzing the FOTS defense as a defense requiring some justification.[60] However, *Kouba* was overruled in 2018 by *Rizo v. Yovino*.[61]

The appellate court in *Rizo* applied a stringent job-related interpretation of FOTS, concluding without hesitation that FOTS includes "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."[62] In overruling *Kouba*, the court noted that prior salary may not be used as a factor, determining that the court in *Kouba* erred in allowing prior salary to be considered a FOTS.[63]

In *Rizo*, the plaintiff was hired by the defendant's school system as a math consultant.[64] Prior to being hired, the plaintiff had worked as a math teacher in another school system and the defendant determined her new salary using her prior salary as a basis.[65] Rizo filed suit claiming that she was discriminated against on the basis of her sex, as she was paid less that her male counterparts for equal work.[66] The court reasoned that it is inconsistent with Congress's intention in enacting the EPA to include in the legislation an exception that allows employers to pay differing salaries for reasons related to sex and because of sex.[67] Accepting any other definition (such as any facially neutral factor), the court noted, would "perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed."[68] Instead, the FOTS defense was understood from legislative history to be included in the EPA because employers feared that their

[58] *Id*.
[59] *Id*.
[60] *Kouba*, 691 F.2d at 873.
[61] *Rizo*, 887 F.3d at 468.
[62] *Id.* at 460.
[63] *Id*. at 467-68.
[64] *Id*. at 458.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 459.
[68] *Id*. at 460.

legitimate business reasons for setting pay would not fall within the more specific three defenses listed prior.[69]

While its conclusion was overruled, much of the court's reasoning in *Kouba* is still relevant to the EPA argument, and its rationale may still be used by other courts in defining FOTS. In *Kouba*, the court considered whether factors that traditionally discriminated against women, such as using prior salary to determine current salary, are prohibited under the EPA.[70] The court said that the Act does not explicitly prohibit the use of prior salary, but it is a factor that would have a disparate impact on women based on historical wage discrimination.[71] Thus, in order to qualify as a factor other than sex to satisfy the fourth affirmative defense, use of prior pay must sufficiently advance the business interests of the current employer.[72]

The court said that the Act's legislative history indicates two competing policy concerns that Congress faced in adopting the legislation: the need to uphold a private-enterprise system while establishing a fairness in pay between men and women.[73] If applied correctly, the Act's burden-shifting analysis and four affirmative defenses are a solution to these competing interests.

In support of this, one writer argues that the vague language of this fourth affirmative defense—compared to the stringent and specific nature of the other defenses—reduces the defendant's burden in the burden-shifting framework and makes it easier for employers to discriminate against women in wage distribution.[74] In order to combat the ease of this discriminatory behavior, another author argues that because Congress placed a restriction on the exceptions—requiring that they be based on a factor other than sex—a higher emphasis is placed on the fairness of pay rather than the upholding of a private enterprise system.[75] This weighs in favor of a more stringent interpretation of FOTS than mere gender neutrality.[76]

The fact that no single approach has been determined hinders the goal of eliminating the gender wage gap and allows for conflicting opinions in the circuit courts. Because of the variances in interpretation, legislation is necessary to guide lower courts' decision-making in regard to sex-based wage discrimination. While there have been multiple amendments

[69] *Id*. at 464.
[70] *Id*. at 468.
[71] *Id*.
[72] *Id*.
[73] *Id.* at 463.
[74] *See* Avery, *supra* note 17, at 868.
[75] *Id.*
[76] *Id.*

proposed to Congress regarding sex-based wage discrimination, only one amendment, the Lily Ledbetter Fair Pay Act of 2009, has been enacted.[77] Further, the amendment provides guidance only on the timing of bringing a sex-based wage-discrimination claim.[78] Because this Act is limited in scope, more legislation is needed. However, all such legislation has failed, as evidenced by the most recently proposed Paycheck Fairness Act in 2021, discussed below.[79]

B. Proposed Amendments to the Equal Pay Act

The remaining amendments are proposed to the Equal Pay Act: First, following the EPA, in 2019 the Paycheck Fairness Act aimed to amend the FLSA.[80] The Fair Pay Act of 2019 was subsequently introduced to combat the continued existence of the gender wage gap.[81] Finally, the Paycheck Fairness Act, originally introduced in 2019 as explained above, was reintroduced in 2021.[82]

---

[77] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[78] *Id*.

[79] The Lily Ledbetter Fair Pay Act of 2009 was proposed in order "to amend Title VII of the Civil Rights Act of 1964." Lilly Ledbetter Fair Pay Act of 2009, PL 111-2, 111th Cong. §1 (2009). The pivotal case that preceded the Lily Ledbetter Fair Pay Act was *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court discussed the time for filing a charge of employment discrimination. 550 U.S. 618, 621 (2007). In determining that the time for filing begins at the time the discriminatory act takes place, the Court held that a discriminatory charge "must be filed within a specified period (either 180 or 300 days, depending on the state)" after the discriminatory act occurred. *Id*. at 621-24. A claim filed outside of this time frame is not considered timely and may not be brought to the court. *Id*. at 624. The Act specifically aimed to amend § 2000e-5, supplementing the Act with: "For the purpose of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice." *Id*. While this amendment is important in expanding the possibility of bringing wage discrimination claims, the amendment does not involve the defense against a wage discrimination claim. Specifically, the amendment does not help clarify the fourth defense, from which most controversy arises.

[80] Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).

[81] Fair Pay Act of 2019, H.R. 2039, 116th Cong. (2019).

[82] Paycheck Fairness Act, H.R.7, 117th Cong. (2021).

1. Paycheck Fairness Act of 2019

The Paycheck Fairness Act was introduced in order to amend the FLSA "to provide . . . remedies to victims of discrimination in payment of wages on the basis of sex . . . ."[83] The amendment was introduced following the determination that the Equal Pay Act of 1963, as adopted, was not effective, and it accordingly proposed that amendments be made in order to protect those subject to wage discrimination based on sex.[84]

The Paycheck Fairness Act proposed an amendment to strike the "any factor other than sex" defense.[85] Instead, it proposed a bona fide factor defense, to apply where an employer demonstrates that the factor the differential is based off of (1) is not derived from a sex-based differential; (2) is job-related; (3) is consistent with business necessity; and (4) is responsible for the entire differential in wage rates between the male and female employee.[86] Therefore, the Act aims to clarify the interpretation of the FOTS defense by providing a much more narrow defense in its place, indicating the criteria such a factor must satisfy.

The House bill provides evidence suggesting that women continue to earn lower wages than males for equal work, despite the enactment of the EPA.[87] The bill further states that "after controlling for educational attainment, occupation, industry, union status, race, ethnicity, and labor-force experience roughly [forty] percent of the pay gap remains unexplained."[88] The effect of such disparity (1) minimizes the wages of working families who require the wages of all members in order to survive, (2) reduces women's retirement security, (3) reduces women's economic potential, (4) burdens commerce, (5) produces unfair competition in commerce, (6) causes labor disputes, (7) disrupts fair marketing practices, and (8) deprives employees of equal protection on the basis of sex, which violates the Fifth and Fourteenth Amendments to the United States Constitution.[89] After the failed attempt at amending the EPA by means of the Paycheck Fairness Act, the Fair Pay Act of 2019 was proposed with a

[83] Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).
[84] *Id.*
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id.*
[89] *Id*. The Fifth Amendment to the United States Constitution provides that "No person shall…be deprived of life, liberty, or property, without due process of law… ." U.S. Const. amend. V. The Fourteenth Amendment provides that "No State shall…deprive any person of life, liberty, or property, without due process of law…" U.S. Const. amend. XIV, § 1.

similar purpose: to eliminate the gender wage gap and to prohibit sex-based wage discrimination.[90]

2. Fair Pay Act of 2019

Following the Paycheck Fairness Act, the Fair Pay Act of 2019 was introduced in the House in order to prohibit discrimination in the payment of wages on the basis of sex.[91] The Act was introduced because of the continued existence of wage disparity in equivalent jobs between employees of different sexes, races, or national origins.[92] Similar to the Paycheck Fairness Act, the Fair Pay Act of 2019 proposed to include an amendment which would eliminate the "factor other than sex defense," prohibiting instead a wage differential for employees for work in equivalent jobs unless the differential is based on a "bona fide factor other than sex…such as education, training, or experience" (unless the factor is job-related or furthers a legitimate business interest purpose).[93]

As evidence of the need for this amendment, the House bill reported that wage differentials exist in nearly all occupations. However, traditionally-male-dominated jobs pay higher wages than traditionally-female-dominated jobs requiring the same skill, effort and responsibility under similar working conditions.[94] The proposed Act provided statistical information: In 2015, a full-time white female employee earned eighty cents for every dollar a full-time male earned; the gender wage gap can therefore be said to exist across racial and educational lines.[95] While sixty-two percent of the disparity is attributed to factors other than sex, a thirty-eight percent gap is not accounted for statistically, leading one to conclude that discrimination on the basis of sex is responsible for the gap.[96]

3. Paycheck Fairness Act of 2021

In January 2021, the Paycheck Fairness Act was reintroduced to the House of Representatives and passed the House in April 2021. The Act was introduced to amend the FLSA, as in 2019.[97] Like the Act proposed in 2019, the Paycheck Fairness Act of 2021 was an amendment to strike the

[90] Fair Pay Act of 2019, H.R. 2039, 116th Cong. (2019).
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Paycheck Fairness Act, H.R. 7, 117th Cong. (2021).

"any factor other than sex" defense.[98] The language of the two Acts is identical in nature.[99] As the 2019 amendment aimed to do, this Act seeks to clarify the interpretation of the FOTS defense by providing a narrower defense in its place.

The Act failed in the Senate on June 8, 2021 by a 49-50 vote, with one Senator abstaining.[100] So long as Congress continues to defeat equal-pay legislation redefining FOTS, it is not likely that we can expect helpful legislation surrounding the issue in the near future; the interpretation of FOTS must therefore be left to the courts.

III. INCONSISTENCY OF JUDICIARY TO UPHOLD PURPOSE OF THE EQUAL PAY ACT

As discussed above, the gender wage gap continues to exist, at least in part, because of the courts' inability to consistently apply the EPA and Title VII FOTS defense. In failing to uniformly apply this defense, the judiciary similarly fails to uphold the EPA's goal of mitigating pay discrimination based on gender.[101] In analyzing these inconsistencies, this Article will look more specifically at the burden-shifting analysis under both the EPA and Title VII. First, the Article will briefly discuss the plaintiff's burden of establishing a prima facie case. The Article will then compare the plaintiff's burden to the defendant's burden. Next, it will discuss two approaches that courts take in interpreting the FOTS defense: the gender-neutral test and the job-relatedness theory. Finally, the Article will conclude with suggestions for how to reduce the inconsistencies—first at the legislative level, then within the court system—all while achieving the purpose of the EPA generally.

A. *Plaintiff's Burden: Prima Facie Case under the Equal Pay Act and Title VII*

To bring a claim under the EPA, the plaintiff must show, "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions.'"[102]

---

[98] *Id*.

[99] *Id*.

[100] Paycheck Fairness Act, H.R. 7, 116th Cong. §1 (2019); 167 Cong. Rec. S3,981) (2021) (cloture motion).

[101] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

[102] *Id.*

In acknowledging the equal pay for equal work requirement under the EPA, the plaintiff in *Brennan v. Prince William Hospital Corporation* brought suit against the defendant-hospital, claiming that male orderlies and female nurses' aides were not paid in conformance with the EPA.[103] While the district court dismissed the claim for a failure to show the two positions were considered equal work, the court of appeals reversed, finding that the district court gave 'undue significance' to the job differences.[104] The question, the court said, is whether the plaintiff proved "substantial equality of skill, effort, and responsibility as the jobs are actually performed."[105] While the existence of additional tasks may, in the court's opinion, be responsible for the pay disparity, it may not be used by an employer to "mask the existence of wage discrimination based on sex."[106] In contrast to this argument by an employer, a plaintiff may then show that the increased pay is not related to the existence of additional tasks and is therefore not justified.[107] Despite the fact that the work performed by both the aides and orderlies in question was not identical, the court held that the EPA does not require *identical* work, but equal work.[108] In finding this, the court noted that the basic, routine tasks of the male and female positions were equal, and therefore satisfied the equal work requirement under the EPA.[109]

Unlike the EPA, under Title VII the plaintiff generally has to establish a prima facie case of disparate treatment in pay in the usual manner of doing so. Generally, the plaintiff must prove a prima facie case under *McDonnell Douglas Corporation v. Green*.[110] The plaintiff, who bears the initial burden, is not required to show equal work.[111] The burden then shifts to the defendant, although courts differ on whether the burden is one of production or persuasion at this point, as discussed briefly below.[112]

The Fifth Circuit describes these burdens, stating that a plaintiff makes a prima facie case, "by showing that an employer compensates employees differently for equal work."[113] The defendant then "show[s] by

---

[103] *See, e.g.*, Brennan v. Prince William Hospital Corp., 503 F.2d 282, 284-85 (4th Cir. 1974).

[104] *Id*. at 285.

[105] *Id*.

[106] *Id*. at 285-86.

[107] *Id*.

[108] *Id*. at 291.

[109] *Id*.

[110] McDonnell Douglas Corp. v. Green 411 U.S. 792, 802 (1973).

[111] *Gunther*, 452 U.S. at 178; King v. Univ. Healthcare Syst. L.C., 645 F.3d 713, 723 (5th Cir. 2011).

[112] *Id.*; *see, e.g.*, Wilder v. Stephen F. Austin State Univ., No. 9:20-CV-00040-ZJH, 2021 WL 3288303, at *6 (E.D. Tx. Aug. 2, 2021).

[113] *King*, 645 F.3d at 723.

a preponderance of the evidence that the differential in pay was made pursuant to one of the four enumerated exceptions."[114]

The court describes the relationship between these burdens under the EPA and Title VII, stating that:

> The allocation of burdens in EPA and Title VII claims, however, differ in a way that may, in some cases, result in an employee prevailing on her EPA claim but not her Title VII claim. Specifically, where a plaintiff makes an adequate prima facie case for both an EPA and a Title VII claim, the defendant bears the burden of *persuasion* to prove a defense under the EPA, whereas it has only a burden of *production* to show a legitimate nondiscriminatory reason for its actions under Title VII, with the ultimate burden of persuasion remaining with the plaintiff. As such, where the defendant proffers a reason for its pay differential other than sex but does not prove that reason by a preponderance of the evidence, the plaintiff will succeed on an EPA claim while still bearing the burden of persuasion under Title VII.[115]

As discussed above, it is not clear whether a plaintiff may bring a disparate impact claim, because if the FOTS defense is interpreted as any neutral factor other than sex, disparate impact would be precluded.[116] However, if the FOTS must be justified, the plaintiff may be able to prove a case of disparate impact.[117] It is likely that the case would be similar to a disparate impact case under the ADEA.[118] The Court acknowledged in *Smith* that Congress was aware of the relationship between the ADEA and the EPA, stating that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[119] Therefore, assuming disparate impact is allowed, it will be probably interpreted consistently with *Smith*.[120] To satisfy her burden, the plaintiff would have to prove a prima facie case that the FOTS asserted by the defendant-employer has a disparate

---

[114] *Id*.
[115] *Id*. at 724.
[116] *Gunther*, 452 U.S. at 172; *see supra* discussion accompanying notes 53-59.
[117] *Id*.
[118] *Smith*, 544 U.S. at 239.
[119] *Id*. at 233.
[120] *Id*. at 240.

impact.[121] The defendant would then have the burden of persuasion to prove FOTS.[122] The plaintiff would not have the ability to prove a less discriminatory alternative.[123]

B. *Defendant's Burden: Available Affirmative Defenses*

Following the plaintiff's burden of establishing a prima facie case under the EPA, the defendant shoulders the burden of persuasion.[124] The employer bears the burden of showing that the pay discrepancy between males and females is the result of a factor other than sex or one of the other three available affirmative defenses.[125] The courts have determined that "[a]n employer [must] submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity."[126]

Some courts have recognized a difference in a burden-shifting analysis under Title VII, as opposed to the EPA. For example, the Fifth Circuit has held that an employer has the burden of both persuasion and production under the EPA.[127] The burden of persuasion shifts under the EPA from the plaintiff to the defendant.[128] However, where a wage discrimination claim is brought under Title VII, the Fifth Circuit has said that the *McDonnell Douglas* framework must be followed; after a defendant articulates a defense, the burden of production then shifts back to the plaintiff—who bears the burden of persuasion throughout the case—to show pretext.[129] In other words, the defendant does not bear the burden of persuasion to prove a defense under Title VII as he does under the EPA. This may be another obstacle to the plaintiff's ability to prosecute a wage discrimination case. However, the main concern of this Comment is that where a defendant asserts an affirmative defense, courts generally analyze the FOTS defense differently. They use two different tests, creating inconsistent decisions and uncertainty among plaintiffs bringing claims under the EPA.[130] This inconsistency appears to contribute to the continued

---

[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] *See* Avery, *supra* note 17.
[125] *Kouba*, 691 F.2d at 873.
[126] *Rizo*, 887 F.3d at 460.
[127] *King*, 645 F.3d 713 at 724 (citing Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1136-37 (5th Cir. 1983)).
[128] *Plemer*, 713 F.2d at 1136.
[129] *See, e.g.*, *King*, 645 F.3d at 724.
[130] *See* Bowden, *supra* note 6.

pay discrepancy between male and female employees. As mentioned above, the two methods of application are the gender-neutrality test and the legitimate-business purpose test.

1. Fourth Affirmative Defense "Factor Other Than Sex": Gender Neutrality Requirement

As stated, the Supreme Court has not directly ruled on this issue. However, the Supreme Court has indicated in dicta that the "any other factor other than sex" means just that— any factor other than sex.

A defendant's burden of proof is reduced by this broad approach to the defense. Instead of having to show that the factor responsible for the pay disparity fell within a specific criterion, such as job-relatedness, the defendant employer must merely show that the factor other than sex which is responsible for the pay disparity is facially gender-neutral.[131] The defendant need not show a business purpose for the act's being deemed discriminatory by the plaintiff; he need only assert *any* factor which is not facially discriminatory. This interpretation has been determined by the Ninth Circuit to be "incompatible with the [EPA]" and as "tolerat[ing] all but the most blatant discrimination."[132]

In *Kouba*, the plaintiff argued that the defendant's defense of its discriminatory practice resulted from its reading of FOTS to mean "any factor that does not refer on its face to an employee's gender or does not result in all women having lower salaries than men."[133] Further, courts have openly disfavored this "catchall" interpretation of the FOTS defense, explaining that doing so would allow a defendant "to defend a sex-based salary differential on the basis of the very sex-based salary differentials the Equal Pay Act was designed to cure."[134]

While the Supreme Court has, in dicta, weighed in favor of this gender-neutral test and the broad application of the FOTS defense under both the EPA and Title VII, the interpretation fails to uphold the purpose of the EPA. The EPA aims to prevent pay discrepancy based on gender, but by lessening the defendant's burden, employers can avoid liability under the EPA or Title VII using the FOTS defense. This allows for sex-based wage discrimination to continue due to the disproportionate ease of defendants in satisfying their burden under the burden-shifting analysis.

The Seventh Circuit articulated its requirement that the employer offer, not necessarily a "good reason" for the wage differential, but a bona

---

[131] *See* Avery, *supra* note 17, at 864.
[132] *Kouba*, 691 F.2d at 876.
[133] *Id.*
[134] *Rizo*, 887 F.3d at 457.

fide, gender-neutral justification for the differential, applied in good faith.[135]

Similarly, the Eighth Circuit, in analyzing the legislative history of the FOTS defense, argued that defense's history supports a broad interpretation following the three specific defenses listed before it.[136] The court stated that it was "reluctant to establish any per se limitations to the 'factor other than sex' exception by carving out specific, non-gender-based factors for exclusion from the exception."[137]

2. Fourth Affirmative Defense "Factor Other Than Sex": Job Relatedness & Business Reason Requirement

The Supreme Court has seemingly approved the gender-neutral interpretation of FOTS in dicta, as noted above.[138] In one of those cases, *Smith v. City of Jackson,* the case was brought under the ADEA, which requires a reasonable factor other than age as a defense to age discrimination.[139] The Court held that the reasonable-factor-other-than-age defense may not be any neutral factor but must be reasonable—presenting, in dicta, a contradiction to the FOTS defense which likely does not.[140] Contrary to the reasonable-factor-other-than-age defense available under the ADEA, under both the EPA and Title VII, as written, FOTS does not include the word "reasonable" in the statute.[141] Multiple circuit courts, however, including the Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits, have rejected the interpretation described in *Smith*, instead applying the more stringent legitimate business-purpose test or job-relatedness test.

Kouba v. Allstate Insurance Company is significant to the analysis of the legitimate business purpose test, which requires that the defendant have a legitimate business purpose for the claimed discriminatory factor. Although the court's treatment of the FOTS defense under this test was overruled by *Rizo v. Yovino, Kouba* provides one method to analyze FOTS, which was cited for many years. In *Kouba*, the court noted that the FOTS defense requires a showing that the employer had an acceptable business

[135] Warren v. Solo Cup Co., 516 F.3d 627, 630 (7th Cir. 2008); *see also* Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989).

[136] Taylor v. White, 321 F.3d 710, 717-18 (8th Cir. 2003); *see also* Strecker v. Grand Forks Cnty. Soc. Serv., 640 F.2d 96 (8th Cir. 1980).

[137] *Id.* at 718.

[138] *See supra* discussion accompanying notes 47-59.

[139] *Smith*, 544 U.S. at 239.

[140] *Id.*

[141] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

reason for its actions.[142] The factor responsible for the pay disparity must advance the business interests of the employer.[143]

In *Kouba*, the defendant-employer, Allstate Insurance Co., computed new insurance agents' salaries based on their "ability, education, experience, and prior salary."[144] During training, agents received the minimum of that compensation, but upon completion of training, agents received the remaining compensation and commissions earned during the course of the training program.[145] This resulted in women earning less than their male-agent counterparts.[146] The plaintiff argued that the use of prior salaries in determining compensation is discriminatory; Allstate contended that the use fell within the FOTS exception.[147] In justifying its holding, the Ninth Circuit pointed out that the EPA is concerned only with business practices and that allowing an employer to use a factor that "rests on some consideration unrelated to business" would be contrary to the purpose of the EPA.[148] But the court further acknowledged the reverse of that argument, stating that "a factor used to effectuate some business policy is not prohibited simply because a wage differential results."[149]

As discussed in detail, the Ninth Circuit applies a stringent, job-relatedness test, defined in *Rizo*, that overrules *Kouba*'s[150] holding that a factor such as prior salary would not be acceptable due to the historical systemic discrimination in pay between men and women.[151]

Similarly, in *Aldrich v. Randolph Center School District* the Second Circuit determined that in order to establish a factor other than sex under Title VII and the EPA, an employer must prove that "a bona fide business-related reason exists for using a gender-neutral factor that results in a wage differential."[152]

The Fourth Circuit, in *EEOC v. MD Insurance Administration*, also followed a stringent interpretation of FOTS and held that "qualifications, certifications, and employment history fall within the scope of the fourth affirmative defense."[153]

---

[142] *Kouba*, 691 F.2d at 873.
[143] *Id*.
[144] *Id*. at 874.
[145] *Id*. at 874-75.
[146] *Id*. at 875.
[147] *Id*.
[148] *Id*. at 876.
[149] *Id*.
[150] *Id.* at 873; *Rizo*, 887 F.3d at 457.
[151] *Id*.
[152] *See* Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992).
[153] 879 F.3d 114, 123 (4th Cir. 2018).

The Eleventh Circuit, in *Glenn v. General Motors Corporation*, analyzed the legislative history of the EPA and concluded that FOTS "applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business."[154] While not explicitly stating a job-relatedness standard, the Fourth Circuit therefore limits the factors available under the defense relative to the business. *Rizo* cited *Glenn* as support for its conclusion that the Eleventh Circuit requires "job-related factors."[155]

In citing *Gunther*, the Fifth Circuit made clear that the FOTS defense applies "only where pay differentials are based on a *bona fide* use of 'factors other than sex.'"[156] Additionally, the court held, "[a] practice is not a bona fide [FOTS] if it is discriminatorily applied."[157] In describing a standard, the Fifth Circuit in *Browning v. Southwest Research Insurance*, adopted the Eleventh Circuit's interpretation of FOTS, stating that "[f]actors other than sex include, among other things, employees' '[d]ifferent job levels, different skill levels, previous training, and experience.'"[158]

In *Beck-Wilson v. Principi*, the Sixth Circuit adopted a similarly stringent test, holding 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.'"[159]

The Tenth Circuit has held that the FOTS defense is a bona-fide, gender-neutral pay classification system.[160] But the court limits the defense, stating that "such a classification system serves as a defense only where any resulting difference in pay is 'rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue.'"[161] The test described thus aligns closely with *Rizo*.

In liberal contrast to the standard described in *Rizo*, less stringent district courts located in the Third Circuit have held that

---

[154] Glenn v. General Motors Corporation, 841 F.2d 1567, 1571 (11th Cir. 1988).

[155] *Rizo*, 887 F.3d at 465.

[156] Thibodeaux-Woody v. Houston Comm. College, 593 F. App'x 280, 284 (5th Cir. 2014) (citing *Gunther*, 452 U.S. at 170).

[157] *Id.*

[158] Browning v. Southwest Research Insurance, 288 F. App'x 170, 174 (5th Cir. 2008) (citing Pouncy v. Prudential Ins. Co., 668 F.2d 795, 803 (5th Cir.1982)).

[159] Beck-Wilson v. Principi, 441 F.3d 353, 365 (6th Cir. 2006) (citing EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988)).

[160] Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015).

[161] *Id.*

"[a]cceptable factors other than sex include education, experience, prior salary, or any other factor related to performance of the job."[162]

Under the job-relatedness or business reason definition of FOTS, the defendant is less likely to escape liability when discriminating against an employee based on his or her sex. Congress likely intended such interpretation, considering those factors which are related to job requirements.[163] In arguing this, one scholar claims that the Wage and Hour Division of the Department of Labor (the division that administers and enforces the EPA) has interpreted FOTS to include factors that measure an employee's ability and performance in his or her job.[164]

So long as the courts' interpretations differ, legislation for discrimination on the basis of sex is necessary to universalize courts' application of the FOTS defense and to reduce the wage gap; but this seems highly unlikely. While it is necessary to uphold the purpose of the EPA and the intentions of Congressional agencies, additional efforts at the circuit court level to streamline the interpretation may achieve a similar goal. Requiring that a defendant raise a more specific FOTS defense increases his burden to a level more akin to that of a plaintiff. Under the current legal framework, plaintiffs have a greater burden in establishing a prima facie case and in persuading the court that a defendant's reason for its actions was discriminatory; the defendant, on the other hand, need only raise a defense showing any factor that could have been responsible for its decision to pay the plaintiff a lower salary than her male counterpart.

IV. CONCLUSION

As the court in *Rizo* acknowledged, "the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy."[165] Ultimately, further legislation is necessary to advance the goals of the EPA and to reduce the embarrassment of an ever-present gender wage gap in our society. The Supreme Court opined in dicta that the FOTS defense should be interpreted using a gender-neutrality test; however, such a test hinders the plaintiff by allowing defendant employers greater deference in providing reasons for the disparity. Ideally, to combat this interpretation, Congress must take legislative action in order to further its initial purpose in drafting the EPA.

---

[162] Puchakjian v. Township of Winslow, 804 F. Supp. 2d 288, 295 (D.N.J. 2011).

[163] Nina Joan Kimball, *Not Just Any 'Factor Other Than Sex': An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 323 (1984).

[164] *Id.* at 325.

[165] *Rizo*, 887 F.3d at 456.

Both the Supreme Court and the lower courts need a plain language requirement of a business-reason interpretation of the FOTS defense.

While a defined interpretation at the legislative level is ideal, Congress's recent failed attempts at defining FOTS have made it clear that a legislative solution from Congress is unlikely. It is therefore the responsibility of the courts to do so. In interpreting and applying the FOTS defense, courts should follow the Ninth Circuit's interpretation, requiring that the FOTS responsible for the pay disparity be job-related.

The continued existence of the gender wage gap is due, in part at least, to the differing interpretations of the FOTS defense language by the court system. Depending on the jurisdiction in which an EPA claim is brought, the outcomes are decided differently and inconsistently, leaving plaintiffs with little confidence in bringing a suit against a discriminatory employer.

Instead of following Supreme Court dicta, approving the gender-neutral interpretation of FOTS, the courts should follow the approach that furthers Congress's original goals in enacting the EPA and apply the legitimate business purpose test—requiring that the employer have a legitimate, job-related factor, other than sex, that is responsible for the difference in pay between male and female employees; "*any"* factor will not do. Such an interpretation aids in upholding the EPA's intent to end wage discrimination on the basis of sex, thereby furthering gender equality.