

Equal Pay Act — Payment of Wages.

PLF claims DFT violated the Massachusetts Equal Pay Act, which prohibits an employer from paying an employee of one gender less than an employee of another gender for comparable work, without a legal reason for doing so.¹ PLF asserts that DFT unlawfully paid [him/her/them]² a lower wage than [male/female/non-binary, transgender, etc.] employees for comparable work.

To prove this claim, PLF must show that two things are more likely true than not true:

1. DFT employed PLF and female/male employees to do comparable work;³ and
2. DFT paid PLF lower wages than female/male employees for doing comparable work.

Let me explain some of these terms.

¹ G.L. c. 149, § 105A(b), as amended by St. 2016, c. 177, § 2 (eff. July 1, 2018). The statute says, in pertinent part: "No employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work;" The statute does not require proof of intentional discrimination; the statute "creates a form of strict liability." *Jancey v. School Comm. of Everett (Jancey I)*, 421 Mass. 482, 494, 495 (1995).

The statute also prohibits an employer from (1) barring an employee from discussing his or her wages or those of coworkers; (2) asking a prospective employee about his or her salary history; and (3) retaliating against an employee for seeking to enforce, or aiding in the enforcement of, the provisions of § 105A. See G.L. c. 149, § 105A(c).

² Continue to modify pronouns throughout if the case involves a gender other than female or male, for either the plaintiff or the comparison group. In the legislation that became effective in 2018, "gender" is not limited to male and female.

³ "Employee," "employer," and "employment" are defined in G.L. c. 149, § 1.

(a) Prima facie case

(1) Comparable work

Work is “comparable” if it requires substantially similar skill, effort, and responsibility, and if it is performed under similar working conditions.⁴

First, you must consider the skill, effort, and responsibility of the jobs you are comparing in this case.

- “Skill” means the ability, training, experience, and education required to do the job.
- “Effort” means the amount of mental or physical exertion needed to perform the job.
- “Responsibility” means the degree of discretion or accountability involved in the position, including the duties of the job, the amount of supervision given or received, and how much decision-making authority the job has.

When you compare jobs, look at them objectively, from the perspective of a reasonable person. Jobs do not have to be identical to be comparable, but they must be similar in significant ways in the skill, effort, and responsibility involved. A common objective, goal, or purpose is not enough to make jobs comparable. For example, although a school principal and a teacher share a common goal of educating students, the jobs are not comparable because they are not substantially similar in the skill, effort, and responsibility

⁴ G.L. c. 149, § 105A(a). The statute defines “comparable work” as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability.” This definition was added by St. 2016, c. 177, § 2 (eff. July 1, 2018). Before the amendment, the statute did not define “comparable work,” but case law did, under a two-part analysis that asked: (1) whether the “substantive content” of the work was comparable, i.e., “whether the duties” had “important common characteristics”; and, if so, (2) whether the positions “entail[ed] comparable skill, effort, responsibility, and working conditions.” *Jancey I*, 421 Mass. at 489–490. See also *Jancey v. School Comm. of Everett (Jancey II)*, 427 Mass. 603, 606–607 (1998) (concluding that cafeteria workers and custodians did not hold comparable positions, under “substantive content” analysis, when considering “the actual duties of each position, from the viewpoint of an objectively reasonable person, to ascertain whether the jobs are so dissimilar that they are not comparable”).

involved. On the other hand, two teachers may hold positions comparable to each other if, for instance, they teach the same subject to the same grade of students using substantially similar materials and on a substantially similar schedule.

Among the evidence that has been presented to you in this case, you may consider job titles and descriptions, but they alone do not establish whether work is comparable. You must evaluate the skill, effort, and responsibility required of each job.⁵

Second, you must compare the working conditions of the jobs. Working conditions include the physical surroundings or hazards that an employee encounters on the job, such as exposure to extreme temperatures, noise, chemicals, or fumes, including the frequency and severity of such exposure; the days or times that shifts are scheduled; and other environmental circumstances.⁶ With these factors in mind, ask yourself whether the working conditions of the jobs are similar.

Only if you conclude **both** that: (1) the jobs involve substantially similar skill, effort, and responsibility; **and** (2) the jobs involve similar working conditions may you find the work comparable. If you conclude that either one of these things is not true, then the work is not comparable.

(2) Wages

Now let me explain what we mean by “wages” in this case. Under the Equal Pay Act, wages include salary and all other forms of compensation, including fringe benefits. For example, wages include commissions, tips, bonuses, profit sharing, vacation and holiday pay, overtime pay, health and life insurance, retirement benefits, expense accounts, tuition

⁵ G.L. c. 149, § 105A(a); *Jancey II*, 427 Mass. at 606–607.

⁶ G.L. c. 149, § 105A(a) says that “working conditions” “shall include the environmental and other similar circumstances customarily taken into consideration in setting salary or wages, including, but not limited to, reasonable shift differentials, and the physical surroundings and hazards encountered by employees performing a job.”

reimbursement, use of a company car, gas allowances, and the reasonable value of any rent, housing, or food provided by the employer.⁷

Although all these forms of compensation count as wages, the Equal Pay Act does not allow an employer to pay an employee of one gender a lower salary than an employee of another gender, for comparable work, and make up the difference with, for instance, a bonus. The reason is that the Equal Pay Act prohibits not only the unequal payment of an employee's total wages—taking into account all forms of compensation—but also prohibits the unequal payment of regular salaries for comparable work.⁸ Unequal payment of wages based on gender, whether in terms of total wages or specific salaries, violates the Equal Pay Act.

If you answer “Yes” to Question ___ on the verdict form, which asks whether PLF has proven more likely true than not true that DFT paid PLF lower wages than female/male employees for doing comparable work, then you must proceed to Question ___ on the verdict form. If, however, you answer “No,” then you will have reached a verdict.⁹

(b) Defenses <If defendant raises an affirmative defense>

(1) Permissible reasons for wage disparities¹⁰

DFT asserts that it has a defense to PLF's claim, meaning a legal justification for paying PLF lower wages than female/male employees for comparable

⁷ G.L. c. 149, § 105A(a); *Jancey I*, 421 Mass. at 490–493, citing, among other things, 29 C.F.R. § 1620.10 (1995). See also the most recent version of the federal regulation, 29 C.F.R. § 1620.10 (2023).

⁸ See n. 1, above.

⁹ As discussed in Section (a). Defenses, part (2), below, an employer's self-evaluation of pay disparities between genders may, if certain conditions are met, provide a defense to liability. The failure of an employer to complete such a self-evaluation, however, may not be the basis for any negative or adverse inference against the employer. G.L. c. 149, § 105A(d). Accordingly, the judge should not instruct on self-evaluation unless it has been raised by the employer as a defense.

¹⁰ G.L. c. 149, § 105A(b), says, in pertinent part: “variations in wages shall not be prohibited if based upon: (i) a system that rewards seniority with the employer; provided, however, that

work. DFT claims that the difference in wages was because of *<judge to choose one or more, based on evidence>*:

- A seniority system, meaning a policy for setting employee compensation based on length of service or employee rank or level.¹¹
- A merit system, meaning a policy for setting employee compensation based on job performance.
- A system to account for the quality or quantity of production, sales, or revenue, meaning a policy for setting employee compensation based on employee productivity or ability to generate revenue.
- The geographic location of a job, considering differences in costs of living or labor markets in different places.
- Education, training, or experience that makes an employee more efficient or effective at his or her job.
- Regular or necessary travel requirements, above and beyond normal commuting to and from work.

DFT has the burden of proving such a defense; PLF has no burden to disprove it. DFT must prove that, more likely than not, these reasons [this reason]—and not gender differences—explain[s] why DFT paid PLF lower wages than female/male employees for comparable work.¹²

time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.”

¹¹ As indicated in n.10, above, neither pregnancy leave nor FMLA or similar statutory leave may reduce seniority. If the plaintiff claims defendant’s seniority calculation wrongly violated this principle, the jury should be instructed on the law on this point.

¹² Cf. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), interpreting Federal Equal Pay Act, 29 U.S.C. § 206(d)(1) (once plaintiff carries burden of showing pay differential between genders, burden shifts to employer to show differential is justified under a statutory exception); accord *McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals*, 140 F.3d 288, 298 (1st Cir. 1998).

< What is NOT a defense, if issue raised by the evidence:¹³> [It is not a defense to a violation of the Equal Pay Act that the employer and employee agreed that the employee would work for lower wages than those to which the employee was entitled under the Act.] [It is not a defense to a violation of the Equal Pay Act for an employer to rely on an employee's previous wage or salary history to explain unequal wages.]

As you will see on the verdict form, Question ___ asks whether DFT has proven that the difference between PLF's wages and those of female/male employees for comparable work was because of [permissible reason[s] for unequal pay]. If you answer "Yes" to this question, you will have reached a verdict. If you answer "No," then you must proceed to Question ___.

(2) Employer's self-evaluation of wage disparities

DFT asserts as a defense that, even if PLF has proved that his/her wages were lower than that of female/male employees for comparable work, DFT should not be liable under the Equal Pay Act and that PLF's claim therefore should fail because, within three years before PLF filed his/her claim, DFT completed a self-evaluation of its pay practices in good faith, and has made reasonable progress toward eliminating wage differences based on gender for comparable work.¹⁴

¹³ G.L. c. 149, § 105A(b).

¹⁴ G.L. c. 149, § 105A(d) says, in pertinent part: "An employer against whom an action is brought alleging a violation of subsection (b) and who, within the previous 3 years and prior to the commencement of the action, has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any, in accordance with that evaluation, shall have an affirmative defense to liability under subsection (b) and to any pay discrimination claim under section 4 of chapter 151B. For purposes of this subsection, an employer's self-evaluation may be of the employer's own design, so long as it is reasonable in detail and scope in light of the size of the employer, or may be consistent with standard templates or forms issued by the attorney general."

To prove this defense, DFT must show that five things are more likely true than not true:

1. DFT completed a self-evaluation of its pay practices;
2. The self-evaluation was reasonable in detail and scope, considering the employer's size;¹⁵
3. DFT completed the self-evaluation within three years before PLF filed his/her claim;
4. DFT conducted the self-evaluation in good faith;¹⁶ and
5. DFT has made reasonable progress toward eliminating wage differences based on gender for comparable work.¹⁷

As you will see on the verdict form, Question ___ asks whether DFT has proven that the five items of DFT's self-evaluation defense are more likely true than not true. For each item, indicate whether DFT has proved that item.

If you answer "Yes," that DFT has proven that all five items are more likely true than not true, then you will have reached a verdict [no liability].

If you answer "Yes" that DFT has proven items 1, 3, 4, and 5, but "No" to item 2—in other words, if you find that DFT proved all items except item 2, and do not find that the self-evaluation was reasonable in detail and scope—then you must proceed to Question ___ [damages, but not liquidated damages].¹⁸

¹⁵ A judge may consider defining "reasonable in detail and scope" in terms of, for example, the number and type of positions analyzed, as well as how comparable positions were identified.

¹⁶ A judge may consider defining "good faith" in terms of, for example, honest, genuine effort to identify wage disparities between employees of different genders for comparable work.

¹⁷ A judge may consider defining "reasonable progress" in terms of, for example, the concrete steps the employer took to address the discovered wage disparities, considering the extent of the disparities and the employer's ability to address them, as well as the timeframe in which the employer took remedial action and how long it might take to end the disparities.

¹⁸ G.L. c. 149, § 105A(d) says, in pertinent part: "An employer who has completed a self-evaluation in good faith within the previous 3 years and prior to the commencement of the action, and can demonstrate that reasonable progress has been made towards eliminating

If you answer “No,” that DFT has not proven either item 1, 3, 4, or 5—or you answer “No” to two or more of those items—then you must proceed to Question ____ [damages, including liquidated damages].¹⁹

(c) Damages²⁰

If you find that PLF has proven more likely than not that DFT violated the Equal Pay Act by paying PLF lower wages than female/male employees for comparable work [*< if applicable >* and that DFT failed to prove the defense that the disparity was permissible and/or that DFT failed to prove the self-evaluation defense to the wage disparity (or proved items 1, 3, 4, and 5, but not item 2)], then you must consider damages, meaning the amount of money that will compensate PLF.

Under the Equal Pay Act, an employer that violates the Act must pay the employee the amount of the employee’s unpaid wages. In other words, DFT must pay the difference between what PLF was actually paid and what female/male employees were paid for comparable work, from the date that

wage differentials based on gender for comparable work in accordance with that evaluation, but cannot demonstrate that the evaluation was reasonable in detail and scope, shall not be entitled to an affirmative defense, but shall not be liable for liquidated damages under this section.”

¹⁹ See note 20, below, for an explanation of how damages work under the statute.

²⁰ G.L. c. 149, § 105A(b), says, in pertinent part: “An employer who violates this section shall be liable to the employee affected in the amount of the employee’s unpaid wages, and in an additional equal amount of liquidated damages. . . . The court shall, in addition to any judgment awarded to the plaintiff, award reasonable attorneys’ fees to be paid by the defendant and the costs of the action.” Thus, if the plaintiff succeeds in proving the defendant violated the statute and the defendant does not prove either defense, then the plaintiff is entitled to damages in the amount of the plaintiff’s unpaid wages doubled (“liquidated”).

If, however, the defendant proves all elements of the self-evaluation defense except for element # 2 (reasonable detail and scope), then the plaintiff is entitled to single damages in the amount of the plaintiff’s unpaid wages. See note 18, above.

Where the plaintiff is entitled to damages, the jury calculates single damages and, if double damages are appropriate, the judge doubles the damages.

PLF began receiving his/her/their comparatively lower wages until today.²¹ It is up to you to determine the amount of those unpaid wages. PLF has the burden to prove that amount to you, using the standard of more likely than not. Although mathematical precision is not required, you may not speculate or guess, when determining the damages amount. The purpose of damages is to compensate PLF for his/her loss, not to reward PLF or punish DFT.

You must not consider any interest in determining the amount of damages. The court will calculate any interest. You also may not consider federal or state income taxes, because any damages in this case may or may not be taxable. Someone else will address any tax considerations, depending on what you decide. In other words, just follow my instructions on what issues to consider. If you go beyond what I have outlined, your verdict may have consequences that you did not intend.

The law allows the lawyers to suggest an amount of damages in their closing arguments, but any suggestions the lawyers make are not evidence and do not set any floor or ceiling on the amount that you may award. It is up to you to determine the amount of damages, based on the evidence and your own judgment.

Question ____ on the verdict form asks, "What is the amount of compensatory damages for backpay that PLF has proven would compensate him/her?" You should enter that amount in both numbers and words, as instructed on the form.

²¹ If there are two or more employees to whom the plaintiff's wages were compared, the unpaid wages are measured by the difference between the plaintiff's wages and an average of the wages of the comparators taken as a group.