

United States Court of Appeals for the Federal Circuit

LESLIE BOYER,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2022-1822

Appeal from the United States Court of Federal Claims
in No. 1:20-cv-00438-ZNS, Judge Zachary N. Somers.

Decided: March 26, 2024

LACHLAN W. SMITH, Wiggins Childs Pantazis Fisher &
Goldfarb LLC, Birmingham, AL, argued for plaintiff-appel-
lant. Also represented by JON C. GOLDFARB.

KARA WESTERCAMP, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, argued for defendant-appellee. Also repre-
sented by BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M.
MCCARTHY.

DEBRA D'AGOSTINO, The Federal Practice Group,
Washington, DC, for amici curiae A Better Balance, Amer-
ican Medical Women's Association, California Women

Lawyers, California Women's Law Center, Center for Women's Health & Human Rights, Suffolk University, Chicago Foundation for Women, Clearinghouse on Women's Issues, Desiree Alliance, Equal Rights Advocates, Faith Action for All, Feminist Majority Foundation, Hadassah, the Women's Zionist Organization of America, Human Rights Campaign, If/When/How: Lawyering for Reproductive Justice, In Our Own Voice: National Black Women's Reproductive Justice Agenda, In the Public Interest, Indiana Community Action Poverty Institute, International Action Network for Gender Equity & Law, Lawyers Club of San Diego, Legal Aid at Work, Legal Momentum, the Women's Legal Defense and Education Fund, NARAL Pro-Choice America, National Asian Pacific American Women's Forum, National Association of Women Lawyers, National Coalition on Black Civic Participation, National Consumers League, National Crittenton, National Employment Lawyers Association, National Health Care for the Homeless Council, National LGBTQ Task Force, National Women's Law Center, National Womens Political Caucus, Queen's Bench Bar Association of the San Francisco Bay Area, Religious Coalition for Reproductive Choice, Reproaction, Service Employees International Union, Shriver Center on Poverty Law, SisterReach, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Women Employed, Women Lawyers On Guard Inc., Women's Bar Association of the District of Columbia, Women's Bar Association of the State of New York, Women's Institute for Freedom of the Press, Women's Law Center of Maryland, Women's Law Project, Women's Media Center. Also represented by JANEI AU; GAYLYNN BURROUGHS, SUNU CHANDY, PHOEBE WOLFE, National Women's Law Center, Washington, DC.

Before DYK, CHEN, and STOLL, *Circuit Judges*.

DYK, *Circuit Judge*.

Dr. Leslie Boyer brought suit against the United States, claiming a violation of the Equal Pay Act (“EPA”), 29 U.S.C. § 206(d)(1), because the government set her pay unequally compared to a male comparator. The Court of Federal Claims (“Claims Court”) granted summary judgment to the United States on the ground that, under the EPA, an employer may consider a “factor other than sex,” that “Congress permitted the [Veteran’s Administration] to use existing or prior pay alone [as a factor other than sex] in determining pay rates for new appointees,” and prior pay accounted for the differential in this case. J.A. 36. We conclude that the EPA applies equally to the United States as to other employers and that mere reliance on prior compensation standing alone is not an affirmative defense to a prima facie case under the EPA, unless the employer can demonstrate that the prior pay itself was not based on sex. We reverse the grant of summary judgment to the United States and remand for further proceedings consistent with this opinion.

BACKGROUND

I

Dr. Boyer was employed by the Veterans Affairs Medical Center of Birmingham, Alabama (“BVAMC”) as a clinical pharmacist in 2015. Six months later, BVAMC hired a male clinical pharmacist. Both Dr. Boyer and the male comparator were hired according to the federal hiring system, the General Schedule or “GS” system. The federal hiring system sets salary scales by locality, with each federal position assigned a grade. Within each grade, there are a series of steps with corresponding salary increases. To hire an employee over the minimum rate within a particular grade, the agency must make a showing that certain qualities justify that departure, including superior qualifications, special needs of the government, and prior compensation. 5 C.F.R. § 531.212.

At the time of her hiring, Dr. Boyer was appointed as a clinical pharmacist at GS-12, Step 7 with a starting salary of \$115,364. Although the minimum rate in this locality for GS-12 clinical pharmacists was \$96,133 at Step 1, Dr. Boyer was appointed at Step 7 (\$115,364) due, at least in part, because of her prior salary, which was \$115,003. The male comparator was appointed at a GS-12, Step 10, with a starting salary of \$126,223. His prior salary was \$130,000.

There are alleged other differences between the two. Dr. Boyer contends that she was more qualified than the male comparator, having had seven more years of experience after graduating with her doctorate in pharmacy in 1999. She also contends that she had unique mental health work experience as compared to the male comparator. The government argues that the male comparator was more qualified in other ways, having a master's degree in biological sciences in addition to his doctorate in pharmacy and different work experience.

Three years after her hiring, Dr. Boyer discovered the pay discrepancy. She inquired about the differential with Human Resources and eventually, in 2018, filed an Equal Employment Opportunity ("EEO") complaint, alleging wage discrimination. The EEO counselor created an investigative report in 2019 but did not issue any official conclusions or recommendations. Two months later, Dr. Boyer filed suit in the United States District Court for the Northern District of Alabama, alleging a violation of the EPA. *Boyer v. Wilkie*, No. 2:19-CV-00552 (N.D. Ala. transferred Feb. 13, 2020).¹

¹ The parties consented to the jurisdiction of a magistrate judge. ECF No. 11 (May 30, 2019).

II

The Equal Pay Act codifies “the principle of equal pay for equal work regardless of sex.” *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974). The EPA provides that no employer that is subject to the Act shall discriminate between employees of the opposite sex for equal work that requires “equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d)(1). The EPA has four exceptions to this general principle, where a differential is made pursuant to “(i) a seniority 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.” *Id.*

Under the EPA, the plaintiff has the burden of establishing a prima facie case—showing that the employer pays employees of the opposite sex who perform substantially equal work unequally.² *Corning Glass Works*, 417 U.S. at 195. Once established, the burden of proof shifts to the employer to prove that the differential is made pursuant to one of the four affirmative defenses. *Id.* at 196–97; see *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006). If the employer successfully establishes that the differential was made pursuant to one of the four defenses, the

² The Claims Court noted that in *Yant v. United States*, the Federal Circuit affirmed the grant of summary judgment to the government when there was no showing that the salary differential was “either historically or presently based on sex.” 588 F.3d 1369, 1372 (Fed. Cir. 2009). This holding was recently overruled in *Moore v. United States*, which held that a prima facie case under the EPA does not require a showing that a pay differential is either historically or presently based on sex. 66 F.4th 991, 997 (Fed. Cir. 2023) (en banc).

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