

2.24A NEW JERSEY EQUAL PAY ACT (Approved 03/2019; revised 11/2019)

NOTE TO JUDGE

This charge is intended for claims of unequal pay brought under the Diane B. Allen Equal Pay Act (New Jersey Equal Pay Act), *N.J.S.A.* 10:5-12(t), which makes it unlawful “[f]or an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility.” *Ibid.*

Prior to the enactment of the New Jersey Equal Pay Act, New Jersey courts recognized three types of pay discrimination claims under the general employment discrimination provision of the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A.* 10:5-12(a): (1) claims of gender discrimination based on unequal pay for equal work; (2) claims of unequal pay for equal work based on a protected characteristic other than gender; and, (3) claims of pay discrimination based on a lesser degree of job similarity than “substantially equal” or “substantially similar” work. *See Grigoletti v. Ortho Pharmaceutical Corp.*, 118 *N.J.* 109-110 (1990); *Bitsko v. Main Pharmacy, Inc.*, 289 *N.J. Super.* 267, 272 (App. Div. 1996). Section 1 of Model Civil Jury Charge 2.24 (now 2.24B) was used for claims of gender discrimination based on unequal pay for equal work. Section 2 of Model Civil Jury Charge 2.24 was used for all other claims of pay discrimination.

Model Civil Jury Charge 2.24B should continue to be used for NJLAD claims of pay discrimination where the claim is not subject to the New Jersey Equal Pay Act. *See Perrotto v. Morgan Advanced Materials*, Civ. No. 2:18-13825 (D.N.J., Jan. 15, 2019), 2019 WL 192903 at *2 (New Jersey Equal Pay Act applies prospectively).

In this case, the plaintiff has made a claim for unequal pay under the New Jersey Equal Pay Act. That law makes it unlawful for an employer to pay any employee who

is a member of a protected class at a rate of compensation that is less than the rate the employer pays to an employee or group of employees who are not members of the protected class for substantially similar work.

Specifically, the plaintiff has asserted that [*he/she*] is [*insert protected class*], and [*his/her*] employer violated the New Jersey Equal Pay Act by paying [*him/her*] lower wages than the wages it paid to (an) employee(s) who (is) are not [*identify protected class*] for substantially similar work.

Defendant claims that plaintiff's job was not substantially similar to the jobs performed by [*his/her/its*] non-*[insert protected class]* employee(s). Further, defendant asserts that [*describe any affirmative defenses*].

I will now instruct you more fully on the issues you must address in this case.

A. Plaintiff's Burden of Proof

For the plaintiff to prevail on [*his/her*] claim against defendant for unequal pay in violation of the New Jersey Equal Pay Act, the plaintiff must prove three elements by a preponderance of the evidence:

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First: [*He/She*] is a member of a protected class. I hereby instruct you that [*insert protected class*] is a protected class under the New Jersey New Jersey Equal Pay Act.¹

Second: Defendant has employed plaintiff and (an) employee(s) who is/are not [*insert protected class*] in jobs requiring substantially similar work;

Third: Plaintiff was paid a lower wage than one or more of the employees doing substantially similar work who are not [*insert protected class*].

I will now give you further instructions on the second two elements. When evaluating whether the plaintiff has established these two elements, you must keep in mind that the plaintiff does not have to prove that defendant meant to discriminate against plaintiff because [*he/she*] is [*insert protected class*]. In other words, the plaintiff does not have to prove intent to discriminate.²

¹ *N.J.S.A.* 10:5-12(t) states : “For the purposes of this subsection, ‘member of a protected class’ means an employee who has one or more characteristics, including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces, for which subsection a. of this section prohibits an employer from refusing to hire or employ or barring or discharging or requiring to retire from employment or discriminating against the individual in compensation or in terms, conditions or privileges of employment.”

² *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 *N.J.* 89, 108-110 (1990); *see also EEOC v. Delaware Dept. of Health and Social Services*, 865 F.2d 1408 (3d Cir. 1989) (interpreting Equal Pay Act); Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018); Federal Jury Instructions of the Seventh Circuit 5.09 (2017 rev.); Eleventh Circuit Civil Pattern Jury Instruction 4.13 (2013). Federal cases interpreting the Equal Pay Act (EPA) are instructive

1. Substantially Similar Work

The New Jersey Equal Pay Act defines “substantially similar work” as work that is substantially similar “when viewed as a composite of skill, effort and responsibility.”³ This inquiry does not focus on job classifications, titles or descriptions.⁴ It is the actual work performed by the employees holding the positions being compared that controls.⁵

In determining whether plaintiff’s job required substantially similar skill, effort, and responsibility as that of the employee(s) who is/are not [*insert protected class*], you must compare the jobs and not the individual employees holding those jobs.⁶ Moreover, it is not necessary that the two jobs be identical; the New Jersey

as the Supreme Court has held that “in a case brought under the LAD presenting a gender discrimination claim based on the payment of unequal wages for the performance of substantially equal work, the standards and methodology of the EPA should be followed.” *Grigoletti*, 118 *N.J.* at 109-110.

³ See *N.J.S.A.* 10:5-12(t).

⁴ See *Brobst v. Columbus Servs. Intern.*, 761 F.2d 148, 155 (3d Cir.1985); Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1.

⁵ First Circuit Pattern Jury Instruction 4.1 Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018); Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1; Federal Jury Instructions of the Seventh Circuit 5.06 (2017 rev.); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 7.20; Eleventh Circuit Civil Pattern Jury Instruction 4.13 (2013).

⁶ Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018); see also First Circuit Pattern Jury Instruction 4.1; Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 7.20; Eleventh Circuit Civil Pattern Jury Instruction 4.13.

Equal Pay Act only requires proof that in the aggregate, the performance of the two jobs demands “substantially similar” skill, effort and responsibility.⁷ The crucial issue is whether the essential aspects of the two jobs being compared are “substantially similar.”⁸ Insignificant, insubstantial, or trivial differences do not matter and may be disregarded.⁹

In evaluating whether the performance requirements of the two jobs are substantially similar, you must consider the “skill,” “effort” and “responsibility” required for these jobs. I will now tell you what is meant by these terms, “skill,” “effort” and “responsibility.”

Skill:

In deciding whether the jobs require substantially similar “skill,” you should consider such factors as the level of education, experience, training and ability necessary to meet the performance requirements of the respective jobs.¹⁰ Jobs may require “similar skill” even if one job does not require workers to use these skills as

⁷ *Grigoletti*, 118 *N.J.* at 102 (collecting cases).

⁸ Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 7.20.

⁹ Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018); *see also Grigoletti*, 118 *N.J.* at 102.

¹⁰ *Grigoletti*, 118 *N.J.* at 102.

often as another job. Remember also that you are to compare the jobs, not the employees.¹¹ Therefore, you should only consider the qualifications and skills necessary to perform the jobs. You should not compare the specific qualifications and individual abilities of the employees who occupy the positions.¹²

Effort:

In deciding whether the jobs require substantially similar “effort,” you should consider the mental, physical and emotional requirements for performing the job. Duties that result in mental or physical fatigue or emotional stress, as well as factors that alleviate fatigue and stress, should be weighed together in assessing the relative effort involved. “Similar effort” does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort to do the jobs, they require “similar effort.” However, if the job of the employee(s) who are not [*insert protected class*] require(s) additional tasks that consume a significant amount of extra time and effort that would not be expected of plaintiff, then the jobs do not require substantially similar effort.¹³

¹¹ Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018).

¹² *Grigoletti*, 118 N.J. at 113; *see also Puchakjian v. Township of Winslow*, 804 F.Supp.2d 288, 295 (D.N.J. 2011).

¹³ Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018); *see also* First Circuit Pattern Jury Instruction 4.1; Eleventh Circuit Civil Pattern Jury Instruction 4.13.

Responsibility:

In deciding whether the jobs involve substantially similar “responsibility,” you should consider the degree of accountability expected by the employer for a person filling the jobs, as well as the amount of preparation required to perform the job duties. You should also take into account such things as the level of authority delegated to the plaintiff as compared to the employee(s) who are not [*insert protected class*], including whether the plaintiff and the comparator employee(s) were similarly expected to direct the work of others, or to represent defendant in dealing with customers or suppliers. Finally, you should consider the consequences to the employer of effective performance in the respective jobs.¹⁴

You should note that “skill,” “effort” and “responsibility” do not constitute separate tests, each of which must be met in order for the equal pay requirement to apply. Rather, the plaintiff must only show by a preponderance of the evidence that [*he/she*] performed work that was substantially similar to the work performed by the employee(s) who is/are not [*insert protected class*] “when viewed as a composite of skill, effort and responsibility.”¹⁵

¹⁴ Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018); *see also* First Circuit Pattern Jury Instruction 4.1; Eleventh Circuit Civil Pattern Jury Instruction 4.13.

¹⁵ *See N.J.S.A.* 10:5-12(t).

Wage Comparison:

With respect to the third element of the plaintiff's claim, the plaintiff must prove that [he/she] was paid a lower wage than defendant paid to one of more of the employees doing substantially similar work who are not [insert protected class]. In deciding whether the plaintiff was paid less than (an) employee(s) who is/are not [insert protected class], you can consider how much the employer paid the other employee(s) for substantially similar work even if the comparator employee(s) worked in a different department or a different facility.¹⁶ In comparing the plaintiff's pay with other employees, you can look at the pay of employees who performed substantially similar work before, during the same time as or after the plaintiff.¹⁷

The fact that another [insert protected group] employee is not a victim of unequal pay does not preclude the plaintiff from prevailing on [his/her] claim.¹⁸ The plaintiff also does not have to show that the defendant paid [him/her] less for substantially similar work than it paid to each employee who is not [insert protected class]. As long as the plaintiff shows that the employer paid [him/her] less for

¹⁶ *N.J.S.A.* 10:5-12(t).

¹⁷ See *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F.Supp. 985, 991 (D.N.J. 1996); Federal Jury Instructions of the Seventh Circuit 5.08 (2017 rev.).

¹⁸ *Grigoletti*, 118 *N.J.* at 111 (citing *Connecticut v. Teal*, 457 *U.S.* 440, 455 (1982)).

substantially similar work than a single employee who is not [*insert protected class*], you should find that plaintiff has met [*his/her*] burden of proving this element of [*his/her*] unequal pay claim.¹⁹

In determining the respective levels of pay, you are to consider all forms of compensation, whether called wages, salary, profit sharing, expense account, use of company car, gasoline allowance, or some other name. Fringe benefits are also included in the comparison of wages under the New Jersey Equal Pay Act, as are vacation and holiday pay and overtime pay.²⁰

B. Defendant's Burden of Proof

NOTE TO JUDGE

Under *N.J.S.A.* 10:5-12(t), an employer who pays a member of a protected class less than employees who are outside the protected class is liable unless the employer can establish one of the three affirmative defenses identified in the statute. The employer may plead multiple affirmative defenses, but need only prove one to prevail. The jury should only be charged on the affirmative defense(s) actually pled by the employer.

¹⁹ *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F.Supp. 985, 990-91 (D.N.J. 1996) (*citing Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir.1994), *cert. denied*, 513 U.S. 919, 115 S.Ct. 298, 130 L.Ed.2d 212 (1994)).

²⁰ Third Circuit Court of Appeals Model Civil Jury Instruction 11.1.1. (October 2018)

1. Seniority System

If the plaintiff has proved each of the three elements of [*his/her*] claim of unequal pay, you must find in the plaintiff's favor unless the defendant proves by a preponderance of the evidence that the difference in compensation is the result of a valid seniority system.

In order to establish that a valid seniority system exists, defendant must show that it uses a system that gives employees rights and benefits that improve the longer they work for defendant.

In determining whether defendant has demonstrated a valid seniority system, you should consider that a valid seniority system ordinarily includes rules that

1. define when the seniority time clock begins ticking;
2. specify how and when a particular person's seniority may be lost;
3. define which time will count toward the accrual of seniority and which will not;
4. specify the types of employment conditions that will be governed by seniority and those that will not.

For defendant to successfully demonstrate a valid seniority system, defendant must regularly consider seniority rather than doing so randomly or on a case-by-case basis, and defendant must apply its system uniformly in its decisions.

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Plaintiff contends that defendant's seniority system was not valid, but rather was a pretext, or excuse, for paying higher wages to employees who are not [*insert protected class*] for equal work. Remember that plaintiff does not have to prove that defendant intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether defendant's seniority system was implemented in good faith or instead was a cover-up for paying higher wages to employees who are not [*insert protected class*] for equal work.

If you find defendant has proved by a preponderance of the evidence that the difference in pay was the result of a valid seniority system, your verdict must be for defendant. If defendant has not proved this defense, then you must find for plaintiff.²¹

2. Merit system

If the plaintiff has proved each of the three elements of his/her claim of unequal pay, you must find in the plaintiff's favor unless the defendant proves by a preponderance of the evidence that the difference in compensation is the result of a merit system.

²¹ Third Circuit Court of Appeals Model Civil Jury Instruction 11.2.1. (October 2018).

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In order to establish the existence of a valid merit system, defendant must show an organized and structured procedure under which employees are systematically evaluated according to established standards that are designed to determine the relative merits of the employees. To be a valid merit system, the system must reward persons because they performed better; the reward must not be based upon their positions, but upon their personal performance. In order to be valid, defendant must inform its employees of the existence of the merit system, either by writing or in some other way, and it must not be based upon discriminatory criteria.

Plaintiff contends that defendant's merit system was not valid, but rather was a pretext, or excuse, for paying higher wages to employees who are not [*insert protected class*] for equal work. Remember that plaintiff does not have to prove that defendant intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether defendant's merit system was implemented in good faith or instead was a cover-up for paying higher wages to employees who are not [*insert protected class*] for equal work.²²

If you find defendant has proved by a preponderance of the evidence that the difference in pay was the result of a valid merit system, your verdict must be for defendant. If defendant has not proved this defense, then you must find for plaintiff.

²² Third Circuit Court of Appeals Model Civil Jury Instruction 11.2.2. (October 2018).

3. Legitimate, Non-discriminatory Factor

If the plaintiff has proved each of the three elements of his/her claim of unequal pay, you must find in the plaintiff's favor unless the defendant proves by a preponderance of the evidence that:

1. The differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
2. The factor or factors are not based on, and do not perpetuate, a differential in compensation based on any characteristic of members of a protected class;
3. Each of the factors is applied reasonably;
4. One or more of the factors account for the entire wage differential; and,
5. The factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor is not deemed to be based on a legitimate business necessity if it is demonstrated there are alternative business practices that would serve the same business purpose without producing the wage differential.²³

²³ *N.J.S.A.* 10:5-12(t).

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If defendant proves all five elements of its defense by a preponderance of the evidence, you must find in favor of defendant. If the defendant fails to meet its burden of proof, you must find in favor of the plaintiff.