Printed by: lanitaorr@gmail.com. Printing is for personal, private use only. No part of this book may be reproduced or transmitted without publisher's prior permission. Violators will be prosecuted.

Riser v. QEP Energy
776 F.3d 1191 (10th Cir. 2015)

OPINION BY CIRCUIT JUDGE KELLY:

Plaintiff-Appellant Kathy Riser brought suit in federal district court in Utah alleging that Defendant-Appellee QEP Energy Company (QEP) discriminated against her on the basis of gender . . . in violation of the Equal Pay Act (EPA) [among other claims]. The district court granted summary judgment to QEP on all claims. . . . [W]e . . . reverse . . . and remand [on her Equal Pay Act claim].

Background

Ms. Riser, a fifty year old woman, began working at Questar Exploration and Production Company (Questar) in 1997 and was promoted to the position of Administrative Services Representative II in 2003. Her listed job responsibilities included managing a fleet of over 250 vehicles and performing various facilities-management duties. She subsequently took on several additional duties, including managing construction projects in several states. During this time, Ms. Riser was the only Questar employee performing fleet management and facilities management duties.

On July 1, 2010, QEP was spun off from Questar and became its own independent company. At QEP, Ms. Riser continued to perform the same duties that she had been performing since 2003. In September 2010, Tyler Bench became Ms. Riser's direct supervisor.

When Ms. Riser began working at QEP, she was paid $22.11 per hour. In March 2011, this was increased to $22.78, or $47,382 annualized. Shortly after QEP was spun-off, it developed a pay classification system for employees based on industry compensation data. The system consisted of 15 different grades, and Ms. Riser's position was designated as a Grade 5. This classification was based on QEP's knowledge of the tasks that administrative assistants typically perform; Ms. Riser's actual job responsibilities were not considered. Twice Ms. Riser asked Mr. Bench to change her title and salary, but she received no response.

Mr. Bench and his boss, Tom McKendrick, stated they received several complaints from QEP management about Ms. Riser's unsatisfactory performance on a project in North Dakota and her general nonresponsiveness. Nevertheless, Mr. Bench's evaluation of Ms. Riser for the year 2010 stated that she met or exceeded expectations in all regards. During the duration of Ms. Riser's employment with QEP, she never received a verbal reprimand, written warning, suspension, probation, or any other form of discipline.

In May 2011, QEP created a new position titled "Fleet Administrator," in part because Ms. Riser had logged 541 hours of overtime in the prior fourteen months performing both fleet administration and facilities management duties. Ms. Riser provided a description of her fleet administration responsibilities, which was used to establish a description of the new position. QEP classified the position as a Grade 7, with a recommended annual salary of $62,000. In June 2011, QEP hired Matthew Chinn, a thirty-nine year old male, as Fleet Administrator and paid him $29.81 per hour, or $62,000 annualized. Ms. Riser trained Mr. Chinn for the job until her termination in September 2011. QEP asserts that Mr. Chinn took over Ms. Riser's fleet management duties along with other duties, including coordinating vehicle maintenance on a centralized basis, generating vehicle reports for employees in the field, and implementing a new natural gas vehicle program. However, Ms. Riser stated she was in the process of implementing these programs at the time Mr. Chinn was hired. Mr. Bench stated that any changes to the fleet administration position dealt with *how* the job was performed; the core functions of the position remained intact.

After Mr. Chinn was hired, Ms. Riser's job focused on managing QEP's facilities and construction projects at field offices. Mr. Bench and Mr. McKendrick stated they continued to receive complaints about Ms. Riser's work on the North Dakota construction project, which was behind schedule. None of these complaints were conveyed to Ms. Riser. And, QEP's legal counsel submitted multiple certified letters to the North Dakota contractor expressly blaming him for delays to the project. In August 2011, QEP began discussing a new "Facilities Manager" position and spoke with Jason Bryant, a thirty year old male, about the position. Mr. Bryant previously had been working as the project manager for a company that was remodeling QEP's Denver offices.

On September 8, 2011, QEP terminated Ms. Riser. QEP stated that Ms. Riser was terminated because of her unsatisfactory performance on the North Dakota project. QEP did not give Ms. Riser any warning or place her on suspension or probation prior to termination. * * * Shortly thereafter, QEP hired Mr. Bryant as Facilities Manager, which QEP classified as a Grade 7 position. Mr. Bryant accepted QEP's offer of $66,000

For Classroom Use Only

Printed by: lanitaorr@gmail.com. Printing is for personal, private use only. No part of this book may be reproduced or transmitted without publisher's prior permission. Violators will be prosecuted.

per year after previously declining its offer of $62,500. Mr. Bryant's primary duties were: (1) managing construction projects, including at the Denver corporate office; (2) managing the Denver facility; (3) maintenance and security at field offices; and (4) supervising employees at QEP's Denver office.

Discussion * * *

A. Equal Pay Act

The EPA prohibits wage discrimination "between employees on the basis of sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The district court held that Ms. Riser's EPA claim failed on two grounds. First, Ms. Riser could not establish a prima facie case of pay discrimination because she did not establish that her job was "substantially equal" to either Mr. Chinn or Mr. Bryant's job. Second, even if Ms. Riser could establish a prima facie case of pay discrimination, her claim would fail because the wage disparity was the product of QEP's gender-neutral pay classification system, a factor other than sex. We disagree on both grounds.

1. Prima Facie Case

To establish a prima facie case of pay discrimination under the EPA, a plaintiff must demonstrate that: "(1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances." QEP does not dispute that the conditions of Ms. Riser's employment were basically the same as Mr. Chinn or Mr. Bryant's or that Ms. Riser was paid less; it simply argues that Ms. Riser's job was not "substantially equal" to the jobs of Mr. Chinn or Mr. Bryant.

Work is "substantially equal" for purposes of the EPA if it requires "equal skill, effort, and responsibility." This determination turns on the actual content of the job—not mere job descriptions or titles. * * * "Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." That said, we have consistently held that jobs that are merely alike or comparable are not "substantially equal" for purposes of the EPA.

Genuine disputes of material fact exist as to whether Ms. Riser's work was "substantially equal" to Mr. Chinn's. First, Mr. Chinn's fleet administration duties were carved directly out of Ms. Riser's duties. Ms. Riser performed all of the fleet administration duties for QEP, then Mr. Chinn was hired and took on these responsibilities. Ms. Riser even discussed her fleet administration responsibilities with Mr. Bench to prepare Mr. Chinn's job description and trained him to perform these duties until her termination. As Mr. Bench explained, there were no tasks on Mr. Chinn's job description that Ms. Riser was not previously responsible for performing; the core functions of the fleet administration job remained the same.

The district court found that Mr. Chinn performed two duties beyond Ms. Riser's: he "developed a natural gas vehicle program" and "centralized the maintenance functions of the fleets." But, Ms. Riser stated she had begun implementing these programs prior to Mr. Chinn's hiring. Whether Ms. Riser was performing these duties is precisely the type of factual dispute that renders summary judgment inappropriate. QEP contends that the jobs were not substantially equal because Mr. Chinn spent 100% of his time performing fleet administration duties, whereas Ms. Riser spent roughly 33% of her time on such duties and the remaining 67% of her time performing facilities-management duties. But, the fact that a female employee performed additional duties beyond a male comparator does not defeat the employee's prima facie case under the EPA. ("[D]ifferences in skill, effort or responsibility . . . do not justify [a finding that two jobs are not equal under the EPA] where the greater skill, effort, or responsibility is required of the lower paid sex.")

Nevertheless, QEP relies on several cases for the proposition that employees do not perform equal work for purposes of the EPA where "significant amounts of time are spent on different tasks." But the nature of the jobs at issue in these cases was such that, where male comparators spent more time performing the relevant tasks, that necessarily entailed more responsibilities. Not so here, where Ms. Riser performed the entirety of fleet-administration tasks that were eventually passed to Mr. Chinn. QEP has not presented evidence that the additional time Mr. Chinn spent on fleet administration necessarily meant he performed more work. Although Ms. Riser only spent 33% of her time performing fleet administration duties, a reasonable trier of fact might conclude that she was simply more efficient than Mr. Chinn at managing QEP's fleet. That is a question for the trier of fact.

Genuine disputes of fact also exist as to whether Ms. Riser's job was substantially equal to Mr. Bryant's. The parties agree that Mr. Bryant, like Ms. Riser, managed construction projects at QEP's field offices. Mr. Bryant took over management of the construction projects in North Dakota and Pinedale, Wyoming, that Ms. Riser had been managing at the time of her

DO NOT COPY
mitchrisq@gmail.com

Printed by: lanitaorr@gmail.com. Printing is for personal, private use only. No part of this book may be reproduced or transmitted without publisher's prior permission. Violators will be prosecuted.

termination. Further, Mr. Bench testified that prior to Ms. Riser's termination, she performed *all* of the listed responsibilities QEP assigned to the facilities manager position. Nevertheless, QEP contends Mr. Bryant had four additional responsibilities.

First, QEP asserts that Mr. Bryant's direct supervision of an employee at the Denver office was a significant difference between his duties and Ms. Riser's. But this duty consumed under 5% of Mr. Bryant's time, and he did not have the authority to fire or change the employee's compensation without Mr. Bench's approval. Further, QEP neglected to even list this responsibility amongst the Facilities Manager's duties. And, although Ms. Riser had no direct reports, she did have supervisory responsibility over employees at QEP field offices.

Second, QEP asserts that Mr. Bryant's management of construction projects at QEP's Denver office rendered his job unequal to Ms. Riser's. But Mr. Bryant himself testified that the Denver remodeling project began in November 2011—two months after QEP terminated Ms. Riser. The fact that Mr. Bryant worked on a construction project—one similar in nature to those Ms. Riser had previously managed—that began after Ms. Riser's tenure with QEP ended does not show their respective positions were different.

Third, QEP points towards Mr. Bryant's facilities management of the Denver office. But Ms. Riser performed similar tasks for the Salt Lake City office, and QEP cites no evidence showing that these tasks required different amounts of skill, knowledge, or responsibility.

Finally, QEP argues that Mr. Bryant performed security and maintenance duties at field offices. But Mr. Bryant stated that his involvement in facilities management of QEP field offices was "[s]lim to none." As this court has held, job differences that are "not significant in amount or degree will not support a wage differential." We think a reasonable jury could find the skill, effort, and responsibility required to perform Ms. Riser's job was "substantially equal" to that required to perform Mr. Bryant's.

Finally, we note that QEP's argument that Ms. Riser has no comparator appears especially disingenuous. QEP essentially bifurcated Ms. Riser's position, assigning the tasks she was performing to the two positions of Fleet Administrator and Facilities Manager, which were then filled by male employees compensated at significantly higher rates.

2. QEP's Affirmative Defense

Once a plaintiff has established a prima facie case of discrimination under the EPA, the defendant must show the pay disparity was justified by one of four permissible reasons: "(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." To meet this burden, an employer must "submit evidence from which a reasonable fact-finder could conclude not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity." At the summary judgment stage, this means an employer must "prove at least one affirmative defense so clearly that no rational jury could find to the contrary."

A bona-fide, gender-neutral pay classification system constitutes a "factor other than sex" under the EPA. However, 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." QEP paid Ms. Riser $47,382 annually, Mr. Chinn $62,000 annually (31% more than Ms. Riser), and Mr. Bryant $66,000 annually (39% more than Ms. Riser). QEP argues the pay differential between Ms. Riser and Mr. Chinn was based on QEP's bona-fide, gender-neutral pay classification system that was based on compensation data in the industry. Further, QEP maintains the pay differential with respect to Mr. Chinn is explained in part by QEP's desire to pay him the same amount he received at his prior job. Similarly, it argues Mr. Bryant's elevated salary was due to his initial rejection of QEP's offer of $62,500. QEP asserts that these facts conclusively establish that any difference in pay was based on a "factor other than sex." We disagree.

QEP's compensation system classified Ms. Riser's position as a Grade 5, Mr. Chinn's as a Grade 7, and Mr. Bryant's as a Grade 7. But, Ms. Riser's pay grade was not based on the duties she was actually performing, but on the duties administrative assistants typically perform—despite the fact Ms. Riser's supervisors knew she was not performing administrative assistant duties. Ms. Riser was never asked by anyone at QEP about the skills or qualifications needed for her position. Moreover, she twice requested for her pay grade to be reevaluated, to no avail. Given the fact that Ms. Riser performed the bulk of the responsibilities performed by Mr. Chinn and Mr. Bryant combined, a reasonable trier of fact could certainly question how 31% and 39% pay gaps could be explained by "legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."

QEP is correct that an individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex. However, the

DO NOT COPY
© Cengage Learning

Printed by: lanitaorr@gmail.com. Printing is for personal, private use only. No part of this book may be reproduced or transmitted without publisher's prior permission. Violators will be prosecuted.

EPA "precludes an employer from relying solely upon a prior salary to justify pay disparity." The 31% disparity between Ms. Riser and Mr. Chinn's pay cannot be justified simply by Mr. Chinn's prior salary. Likewise, a company's decision to pay an elevated salary to an applicant after he rejected a lower offer can constitute a factor other than sex. But this, at most, accounts for $3500 per year of the pay disparity between Ms. Riser and Mr. Bryant—nowhere near the full $18,618.

In short, we cannot say that QEP has "prove[n] at least one affirmative defense so clearly that no rational jury could find to the contrary." Thus, we reverse the district court's grant of summary judgment to QEP on Ms. Riser's EPA claim.

CASE QUESTIONS

1. What were the legal issues in this case? What did the court decide?
2. What was the basis for the court's conclusion that the plaintiff and her two male comparators engaged in equal work?
3. What factors other than sex were cited by the employer? Why were they not sufficient to avoid a trial?
4. Do you agree with the decision in this case? Why or why not?
5. What should this employer have done differently in terms of its compensation practices?

In short, *employers should be prepared to account for pay decisions, particularly when males and females performing similar jobs in the same workplace are paid differently.* Defending pay decisions is much easier if employers *establish and consistently apply specific job-related criteria for making those decisions.* Employers should *avoid basing pay decisions on the pay level in a prior position or on demands made in negotiations unless these actually reflect the abilities of the individuals in question.* Finally, *if pay discrimination exists, it must be remedied by raising the pay of the lower paid individual(s).*

Salary History

Regardless of the uncertainty surrounding prior salary as a factor other than sex under the Equal Pay Act, there is consensus that use of this factor tends to disadvantage women given their generally lower pay. A number of cities (e.g., San Francisco, New York) and states (e.g., Oregon, Delaware) have recently enacted, or are in the process of enacting, bans on employers asking job candidates about their salary history and/or using salary history as a basis for compensation offers.[81] The San Francisco statute, which is effective July 2018, bans both salary history inquiries and employer reliance on prior salary as a factor in employment or pay offers.[82] Additionally, employers are prohibited from disclosing an employee's past salary to prospective new employers without the employee's written authorization, unless the information is publicly available (as it would be for many public-sector employees). The statute permits job candidates to voluntarily disclose prior salary information as part of pay negotiations after an initial offer has been made by the employer.

Pay Secrecy Policies

Shhh! **Pay secrecy policies** discourage employees from sharing information about their pay and sometimes go as far as to require the termination of employees who violate the policies. A 2010 study found that 19 percent of surveyed employees worked in organizations with formal pay secrecy policies.[83] Informal practices of discouraging discussion of pay among

[81] Robert Nichols and Eric Lai. "A Growing Number of State and Local Governments Ban Salary History Inquiries to Prospective Employees." *Workplace Law Report* (August 25, 2017).

[82] Joyce E. Cutler. "San Francisco Says No to Salary History Inquiries." *Labor Relations Week* 31 (July 26, 2017), 878.

[83] National Women's Law Center. "Combating Punitive Pay Secrecy Policies." April 12, 2011. Viewed April 13, 2011 (http://www.nwlc.org).

DO NOT COPY