night shift, however, is not under different working conditions from the performance of the same work during the day.

The Equal Pay Act does not reach pay differentials for work that is not substantially equal in skill, effort, responsibility, and working conditions.

## Defenses Under the Equal Pay Act

Although a plaintiff may establish that an employer is paying different wages for men and women performing work involving equivalent effort, skills, responsibility, and working conditions, the employer may not be in violation of the Equal Pay Act because the act provides several defenses to claims of unequal pay for equal work. When the pay differentials between the male and female employees are due to a seniority system, a merit pay system, a productivity-based pay system, or "a factor other than sex," the pay differentials do not violate the act.

Employers justifying pay differentials on seniority systems, merit pay systems, or production-based pay systems must demonstrate that the system is bona fide and applies equally to all employees. A merit pay system must be more than an *ad hoc* subjective determination of employees' merit, especially if there is no listing of criteria considered in establishing an employee's merit. Any such systems should be formal and objective to justify pay differentials.

The "factor other than sex" defense covers a wide variety of situations. A "shift differential," for example, involves paying a premium to employees who work during the afternoon or night shift. If the differential is uniformly available to all employees who work a particular shift, it qualifies as a "factor other than sex." But if females are precluded from working the night shift, a night-shift pay differential is not defensible under the act. A training program may be the basis of a pay differential if the program is bona fide. Employees who perform similar work but are in training for higher positions may be paid more than those not in the training program. The training program should be open to both male and female employees unless the employer can establish that gender is a BFOQ for admission to the program. In *Kouba v. Allstate Insurance Co.*,[14] the U.S. Court of Appeals for the Ninth Circuit held that using an employee's prior salary to determine pay for employees in a training program was not precluded by the Equal Pay Act.

The following case is a good illustration of the court's inquiry into the alleged equality of jobs involved in an Equal Pay Act complaint.

## CASE 7.3

### BLACKMAN V. FLORIDA DEPT. OF BUSINESS AND PROFESSIONAL REGULATION

– Fed. Appx. –, 2015 WL 689622 (11th Cir. 2015)

**Facts:** After starting as a typist for the DBPR in 1986, Jill Blackman worked her way up the organization in the Division of Pari–Mutuel Wagering. In 1998, she earned a bachelor's degree in political science and a certificate in public administration. Approximately four years later, she was promoted to her first management position in the DPMW as a Senior Management Analyst II.

[14] 691 F.2d 873 (1982).

When her predecessor, Mr. Royal Logan, retired in 2006, Blackman was promoted to Bureau Chief of Operations. Upon being promoted, she received a 14% raise to a salary of approximately $57,700. Soon thereafter, she received a legislatively-mandated three percent raise, bringing her salary to approximately $59,500. In 2007, however, the state stopped providing legislatively-mandated annual raises, and Blackman's salary remained static until January of 2012, when she received a 3.4% discretionary salary increase to $61,500.

In July of 2010, Blackman viewed a public website with state salary information and learned that the DBPR was paying her less than two male DPMW bureau chiefs and one of her male subordinates. Believing that the differences stemmed from gender discrimination, Blackman submitted a charge of discrimination to the Florida Commission on Human Relations and the Equal Employment Opportunity Commission. After receiving a right to sue letter from the EEOC, she filed a complaint in Florida state court. The DBPR removed the case to federal district court.

Blackman alleged that she was being paid less than five male employees on the basis of her gender in violation of Title VII and the Equal Pay Act, specifically: (1) Logan, the former Chief of Operations and her predecessor; (2) Steven Kogan, the Chief of Investigations; (3) Dewayne Baxley, the Chief Auditing Officer; (4) John Karr, the Regional Program Administrator and her subordinate; and (5) Joel White, a Special Projects Advisor to the DBPR Secretary. The district court granted summary judgment to the DBPR. It concluded that Blackman failed to establish a *prima facie* case of discrimination because her male colleagues, other than Logan, were not proper comparators under Title VII or the EPA due to differences in their job responsibilities and skill sets. In addition, the district court ruled that the DBPR had established legitimate, nondiscriminatory reasons for the pay disparities between Blackman and her male colleagues, including Logan.

**Issue:** Was the disparity between the plaintiff's salary and those of her alleged male counterparts a violation of the Equal Pay Act?

**Decision:** The court held, "We agree with the district court that Mr. Logan, Ms. Blackman's predecessor as Chief of Operations, was a proper comparator under Title VII [and the EPA]. We also agree with the district court, however, that the DBPR provided legitimate, nondiscriminatory explanations for the salary differential between Mr. Logan and Ms. Blackman. First, the record indicates that Mr. Logan, who held a bachelor's degree in business management and a master's degree in management and supervision, had better qualifications for the position than Ms. Blackman, who only had a bachelor's degree in political science. Second, and more importantly, Mr. Logan, unlike Ms. Blackman, benefitted from legislatively-mandated annual raises (which were gender-neutral) during his entire 13-year tenure as Chief of Operations. As a result, Mr. Logan, who was making a salary of $52,780 in 2000, was earning $72,000 at the time of his retirement in July of 2006.

> "Ms. Blackman concedes that it was not discriminatory for her to make less than Mr. Logan when she first started as Chief of Operations. . . . Rather, she argues that her salary in 2012 should have come close to Mr. Logan's 2006 salary, because his salary increased from $52,780 to $72,000 over the course of six years—approximately the same amount of time that Ms. Blackman held the same position. . . . But, as the DBPR correctly argues, Ms. Blackman's salary would have been closer to Mr. Logan's salary at retirement if Ms. Blackman had benefitted from annual legislatively mandated raises from 2007 to 2012. Indeed, had Ms. Blackman received these annual pay raises, as Mr. Logan did, she would have been making approximately $71,000 at the time she filed her complaint in 2012 (assuming a 3% annual increase). In short, the salary difference is a function of the annual raises (and compound interest) from which Mr. Logan benefited, and Ms. Blackman did not."

## 7-2c Procedures Under the Equal Pay Act

The Equal Pay Act is administered by the Equal Employment Opportunity Commission (EEOC). Prior to 1979, it was administered by the Department of Labor, but in July 1979, the EEOC became the enforcement agency. The act provides for enforcement actions by individual employees (Section 16), or by the U.S. Secretary of Labor (Section 17), who has transferred that power to the EEOC.

There is no requirement that an individual filing a suit under the Equal Pay Act must file first with the EEOC. If the EEOC has filed a suit, it precludes individual suits on the