

4 Takeaways From Female Law Profs' Equal Pay Settlement

By **Jacqueline Beaumont**

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Last month, a Colorado federal judge approved a deal in which the University of Denver agreed to institute salary increases and pay \$2.66 million to settle an equal pay lawsuit filed by the U.S. Equal Employment Opportunity Commission on behalf of seven female professors. The EEOC took up the case after investigating a charge of sex discrimination in compensation made by Stur姆 College of Law professor Lucy Marsh. A 2012 letter from the law school had observed pay differences between male and female professors several years before the filing of the complaint. However, the law school did not take steps to address the gap, and further salary increases widened it. Marsh, the lowest-paid professor, then filed a charge with the EEOC.



Jacqueline
Beaumont

The agreement's terms include significant injunctive provisions in a six-year consent decree. Below are four key takeaways from the agreement:

1. Detailed Consent Decrees Remain An Important Enforcement Tool for the EEOC

The consent decree is one of the EEOC's key enforcement mechanisms. Its motivating concept is long-term change to corporate structures through agreed-upon measures of equitable relief. While a consent decree does not require an admission of liability, it is a settlement with strings: The employer must follow continued procedures for compliance. Consent decrees have been used as remedial measures since the civil rights era. Their progress is often confidential, which can impede analysis of their effectiveness, although in other areas such as police department reform there is some evidence that consent decrees have led to fewer lawsuits filed against the entities that have used them.

The breadth of the injunctive relief in consent decrees signed by the EEOC varies. The Institute for Women's Policy Research created a database of 500 consent decrees that became effective during the years 2000 to 2008; of these, they reported only 39 decrees in cases claiming unequal pay based on sex. Some required only basic training, policy revisions and posting of notices. In others, the requirements were more directed, including the creation of new job classification systems, standardized recruitment procedures, and performance appraisal and evaluations schemes.

In Marsh, the goal was long-term pay parity at the law school regardless of sex. Its 34-page consent decree includes the following equitable provisions: (a) an injunction against the university from retaliation against the plaintiffs and from engaging in sex discrimination in compensation; (b) revised university policies and an informational campaign regarding anti-discrimination and complaint reporting procedures; (c) advanced notice to law school professors of evaluation criteria and methods for compensation increases; (d) disclosure of salary and compensation data to tenured, tenure-track and long-term law school faculty; (e) an annual compensation equity study to be made accessible to the EEOC for monitoring; (f) use of an independent consultant to review complaint reports, advise and make

recommendations regarding evaluation criteria to use in a range of compensation setting from salaries to stipends to chair appointments; (h) trainings including orientation on the consent decree to human resources staff, and an annual equal employment opportunity, or EEO, training to all employees of the law school, with particular requirements regarding the amount of time spent on sex discrimination; (i) posting of a notice about the lawsuit; and (j) semi-annual reporting and other record-keeping requirements.

A number of these provisions are particular to the university setting, and contain detailed provisions on timing, training topics and other subjects. This may signal a willingness by the EEOC, and employers, to be more involved in drafting more specific and creative injunctive measures targeted to the precise issues involved in the case.

2. Watch For the Intervenors and Opt-Ins

Equal pay lawsuits may be brought individually, by groups of plaintiffs, or even by representative or class action. The Marsh case was initially brought by a solo plaintiff, professor Lucy Marsh. After the EEOC filed suit, six other professors requested, and were permitted, to intervene in the case. The addition of new complainants has been seen in other sex discrimination and harassment claims brought by law firm partners and actresses. These high-profile employees have significant reputational currency, and may not wish to be the first to make sex-based claims against their employer. However, watch for the intervenors and the opt-ins. With recent increased attention and acknowledgment of unequal treatment of the sexes in the workplace, such high-profile plaintiffs may be more readily willing to join a lawsuit after its initial filing, or may want to see if a particular lawsuit will gain traction or public support before joining in.

3. Insights Into The Evidence (And Economists) Required

Under federal and state equal pay laws, employees have a potential claim if they are paid less than the opposite sex for their work, the performance of which requires equal “skill, effort and responsibility.” The consent decree signed in Marsh requires appointment of at least two nonattorney professionals to quantify these elements. First, the law school will contract with an independent labor economist to conduct the compensation equity study. Second, the law school must use an independent consultant (likely an industrial psychologist) with significant experience in university faculty pay practices and sex-based anti-discrimination laws to make recommendations and advising. The consent decree also requires regular publication of salary and compensation data, which the EEOC will monitor as a measure of compliance.

As a voluntary mechanism, the Marsh consent decree was constructed by both parties. In it, the EEOC is revealing the type of evidence that it feels can be relied upon over the next several years to show that equal pay is being achieved between faculty of both sexes. This evidence could also help the university to present strong defenses against future sex discrimination claims, and create a positive working environment. Both management and employee litigators may wish to take note of the salary review structure and the various reporting requirements in the Marsh deal. These may be helpful measures to look at both pre- and post-litigation.

4. Speaking Truth To Power ... By Power

While the purpose of an unequal pay suit is to seek greater (and fair) pay from the one who holds the purse strings, it is noteworthy that the women who have most recently been the source of high-profile unequal pay claims have tended to be high earners. These individuals are already in many cases making over \$100,000 annually, and some are even part of the unpopular “one percent.” Lately, the headlines in this area have been dominated by plaintiffs who are law firm partners and other highly paid professionals, such as investment bankers, engineers and pharmaceutical sales reps. This trend presents several interesting points for attorneys.

From a management perspective, it is precisely this type of employee, near the middle and upper rungs of management and specialization, who is valued for their individual judgment and skill. These professionals are not typically subject to production quotas that can be easily measured for all employees of a particular grade. Rather, determining compensation for high-level employees can involve many individualized legitimate business factors, such as individualized talent recruitment issues, or acquiring an expert in a key area where the company is lacking. Setting and comparing the compensation of these individuals can be a complex endeavor, and making adjustments to these salaries can be expensive. Nevertheless, the Marsh decision reinforces that, despite the sense that employees are more individualized at the top, employers will be wise to pay particular vigilance to the compensation of their most highly paid professionals. For high earners, one-time pay boosts have the potential to create bigger variances, particularly over time. For example, although the University of Denver took the position that the salary differences of its law school faculty were based on lawful factors, the pay gap grew to \$20,000 between female and male professors, whose average annual salary was a respective \$140,000 versus \$159,700.

From the plaintiffs’ side, highly paid employees tend to be highly credentialed, garnering interest and credibility from jurors and judges. For example, in the Marsh case, several of the lower-paid female professors were ironically leading scholars and founders in the field of feminist legal theory, gender discrimination and gender pay inequities.

Expect the highly paid and highly credentialed to continue to play starring roles in equal pay lawsuits. It remains to be seen, however, whether this trend will trickle to the bottom, where low-wage female employees may be facing smaller disparities, but at greater scale.

Ultimately, the number of EEOC Equal Pay Act charges has remained relatively static over the past 20 years; this may not change any time soon. Regardless, the Marsh deal contains several elements we should expect to see in future high-profile EEOC agreements, which may be helpful guideposts for practitioners.

Jacqueline Beaumont is a shareholder at Call & Jensen.

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