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Lynn Urkov Thorpe, Esq.

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Preventing Unfair Gender Pay Discrepancies Is an Ongoing Responsibility

By Lynn Urkov Thorpe, Esq.

A recent decision by the Seventh Circuit Court of Appeals (covering Illinois, Indiana, and Wisconsin) serves as a reminder for employers to review their compensation policies and the manner in which they are applied to ensure that they can demonstrate that any disparities are based on factors permitted by law. The employer in [*King v. Acosta Sales and Marketing, Inc.*](#), 2012 WL 807199 (7th Cir., March 13, 2012), did not make that showing and as a consequence, the Seventh Circuit sent the case back to the lower court for trial.

Susan King was hired by Acosta Sales and Marketing, Inc. ("Acosta Sales" or the "Company") as a business manager in 2001. Her starting salary was \$40,000.01. When she quit six years later, in 2007, her salary was \$46,850.23. During her employment, there were 20 business managers, eight of whom were female. All of the men were paid more than all but one of the women. The sole woman who garnered that compensation attained a \$60,000 salary after six years on the job while the men exceeded that salary at a faster rate. The Company

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acknowledged that Ms. King was one of its most successful sales executives, and it ranked Ms. King's performance on par with a male who was paid almost three times as much as she was paid.

The Equal Pay Act requires the same wages for men and women for equal work on jobs, the performance of which requires equal skill, effort, and responsibility and that are performed under similar working conditions. An exception is permitted where payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality production, or a difference based on any other factor other than sex. That exception is permissible, too, under Title VII. An employer asserting this final exception (that the difference is due to any other factor other than gender) bears the burden of persuading the court or jury that it was this factor - and not gender - that was the reason for the pay differential.

Acosta Sales claimed that the difference in pay between Ms. King and her male counterparts was based on education and experience. While the district court accepted this explanation at face value, the Seventh Circuit did not. Instead, it concluded that Acosta Sales had to prove - and not merely assert - that education and experience accounted for the difference. The burden of proof was different under Title VII, but there, too, the Seventh Circuit reversed the district court and concluded that Ms. King had raised sufficient facts to demonstrate that the Company's explanation may have been false.

The Court acknowledged that starting salaries may indeed be different based on education and experience. However, that should not impact pay increases once the employee is employed. Judge Easterbrook, who authored the decision, stated, "if men arrive at Acosta with higher salaries because of education, but men and women were equally good on the job, women should get more rapid raises after employment and salaries should tend to converge." But that did not happen at Acosta Sales. To the contrary, the salaries diverged. Ms. King - one of Acosta Sales' top performers - only received a \$7000 increase in her salary over a period of six years. One of her male counterparts received a \$14,000 increase in three years. Another male who was hired at Ms. King's starting salary reached a \$60,000 salary within two years. Ms. King's salary, which never reached \$48,000, was thus far less over a much longer period of time than the salaries of her male counterparts. The general manager for Acosta Sales who set the salaries testified that the process to set salaries was subjective, but he did not provide reasons as to why he set any business manager's salary as he did. Under these circumstances, the Court concluded that a reasonable juror could agree with Ms. King and conclude that the difference was due to sex discrimination.

As this case demonstrates, it is a good idea to periodically review your pay policies to confirm that employees are treated equitably and that differences, if any, are based on factors other than sex. Although employees may start employment at different salaries, salary increases and earnings after the

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beginning of employment should be based on objective, post-hiring performance measures whenever possible, and employers should be prepared to justify any differences with legitimate, work-related criteria.

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