

Symphony Flutist Premiers Possible New Wave of Pay Equity Claims

by Dennis J. Merley - Thursday, February 21, 2019



Equal pay for equal work has been a standard workplace refrain for many years but the new [Massachusetts Equal Pay Law \(MEPA\)](#) has employers in that state singing a new tune entitled “Equal Pay for *Comparable Work*.” Will Minnesota be playing a similar tune soon?

The MEPA requires Massachusetts employers to pay equal pay for work that is comparable in regard to (1) skill; (2) effort; (3) responsibility; and (4) working conditions. It is the first such statute of its kind in the United States but is already being looked at by other states as a model for how to address pay disparities between the genders in today’s workplace. Minnesota, which already follows the comparable work concept for state and local government employees, may not be too far behind in enacting similar legislation on a state-wide basis.

Law May Be Instrument of Change

As soon as the Massachusetts law took effect, Elizabeth Rowe, principle flutist of the Boston Symphony Orchestra (BSO), filed a lawsuit claiming that she performs work comparable to that of the principle oboist (a man) yet is paid about \$70,000 less. Rowe’s lawsuit alleged that their responsibilities as section are the same and that both also perform as members of the Boston Symphony Chamber Players (a smaller ensemble of principal musicians who perform and record separately from the larger orchestra). In addition, Rowe has been profiled as a soloist more than any other of the principal musicians in the BSO and she has been highlighted many times in the BSO’s marketing campaigns. The lawsuit concluded that the similarity of their positions did not warrant Rowe’s receipt of only 75% of what the principal oboist makes.

The BSO defended on the grounds that the flutist and oboist actually do not perform the same work. They contended that the oboe is a more difficult instrument to play and that the greater

shortage of skilled oboists allows such practitioners to negotiate and command a higher compensation rate. The BSO further argued that differences in promotional duties, instrument cost and many other variables also affect compensation decisions.

Rowe's lawsuit added a retaliation component in regard to the BSO's request that Rowe participate in a National Geographic documentary episode on the topic of blind auditions (the practice of requiring musicians to audition behind a curtain so as to conceal gender, race and other identifying characteristics). Rowe alleged that when she persisted in raising issues of gender disparity in pay, however, the offer to participate in the documentary was rescinded.

The case was expected to establish some guidelines for determining how to compare the four factors set forth above but after the parties submitted to mediation, the matter was settled with a very restrictive confidentiality clause. Thus, we do not yet know how a court will interpret the critical factors and we will have to await future cases.

Bottom Line

Again, this is currently just an issue in Massachusetts but it is important to remember that both the Equal Pay Act and Title VII were enacted in the early 1960's, more than 50 years ago. It would not be at all surprising to see other states, including Minnesota, follow Massachusetts' lead in reevaluating pay equity concepts in light of 50 years of change in the American workplace.

Minnesota employers may want to start thinking about how they might tune up their compensation systems if we adopt the equal pay for comparable work standard.