**ANNOTATIONS AND COMMENTS**

 **Elements and Defenses**

 **“Employer”**

Pattern Instruction 4.13 does not define the term “employer,” and the instruction presumes that the issue will not be disputed in most cases. In cases where there is a fact dispute that must be resolved to answer the question whether the defendant is an “employer” within the meaning of the Equal Pay Act (which is part of the Fair Labor Standards Act), the instructions and verdict form should be adapted. Under the FLSA, an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203. “Whether an individual falls within this definition does not depend on technical or ‘isolated factors but rather on the circumstances of the whole activity.” *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008) (internal quotation marks omitted). Pattern Instructions 4.26 and 4.27, *infra*, provide guidance on this issue.

 **The Burden-Shifting Framework**

In an Equal Pay Act (“EPA) case, the plaintiff demonstrates a prima facie case by showing that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring substantially equal skill, effort, and responsibility under similar conditions. *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1077-78 (11th Cir. 2003). If the employee presents a prima facie case, “the employer may avoid liability by proving by a preponderance of the evidence that the pay differences are based on ‘ a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or … any other factor other than sex.’” *Id*. at 1078 (quoting 29 U.S.C. § 206). “The burden to prove these affirmative defenses is heavy and must demonstrate that ‘the factor of sex provided no basis for the wage differential.’” *Id*. (quoting *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)).

“Once the employer’s burden is met, the employee must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential.” *Steger*, 318 F.3d at 1078 (quoting *Irby*, 44 F.3d at 954). “To rebut an employer’s legitimate nondiscriminatory reasons for its adverse action, the employee must produce evidence which directly establishes discrimination or which permits the jury to reasonably disbelieve the employer’s proffered reason.” *Id*. at 1079. “Any believable evidence which demonstrates a genuine issue of fact regarding the truth of the employer’s explanation may sustain the employee’s burden of proof.” *Id*. In other words, the plaintiff has a burden of *production* after the employer meets its burden, but the burden of *persuasion* does not shift back to the plaintiff.

This framework is workable for a summary judgment order, but it is not jury-friendly. Accordingly, Pattern Instruction 4.13 instructs that the plaintiff must prove the elements of the prima facie case. The instruction then instructs on the employer’s burden (and calls it an affirmative defense) and provides a place for the jury to be instructed on the plaintiff’s contention that the employer’s reason for the difference was “only an excuse for paying higher wages to a member of the opposite sex for equal work.”

 **Establishment**

“Comparison” employees must work in the same “establishment” as the plaintiff. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994). “The term ‘establishment’ is defined by the Secretary of Labor as ‘a distinct physical place of business rather than… an entire business or ‘enterprise’ which may include several separate places of business.’” *Id*. at 591 (quoting 29 C.F.R. § 1620.9 (1993)). A single establishment can include operations at more than one physical location. *Id* (citing *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 56 (5th Cir. 1975) (central control and administration of disparate job sites can support finding of single establishment)). However, courts presume that multiple offices are not a single establishment unless unusual circumstances are demonstrated. *Meeks v. Computer Assocs. Int’l*, 15 F.3d 1013, 1017 (11th Cir. 1994); *see also* 29 C.F.R. § 1620.9 (2009) (“[U]nusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.”).

Pattern Instruction 4.13 does not instruct on the “establishment” issue. If there is a jury question on this point, the instruction and verdict form should be modified accordingly.

 **Substantially Equal Skill, Effort and Responsibility**

In evaluating the plaintiff’s case, the plaintiff is not required to prove that the jobs performed are identical; the test is one of substantiality, not identity. Thus, the jury should consider only the skills and qualifications needed to perform the job and should not consider the prior experiences or other qualifications of the other employees. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592 (11th Cir. 1994); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992). Prior experience of other employees may be relevant, however, in determining the employer’s affirmative action defense - - whether the fourth statutory exception (factors other than sex) applies. *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

Pattern Instruction 4.13 breaks this inquiry into three parts: skill, effort, and responsibility.

 **Factors Other than Sex**

Although an employer may not rely on a “general practice” as a factor other than sex, it may consider factors such as the “unique characteristics of the same job;… an individual’s *experience*, training or ability; or… special exigent circumstances connected with the business.” *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (quoting *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988)); *accord Leatherwood v. Anna’s Linen’s Co.*, 384 F. App’x 853, 860 (11th Cir. 2010) (per curiam) (explaining that exigent circumstances include understaffing and the need to lure a new employee from a competitor).

 **Remedies**

“For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of [the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the Fair Labor Standards Act.]” 29 U.S.C. § 206.

 **Amount of Damages**

The measure of damages is the difference between the plaintiff’s compensation and the compensation of the employees of the opposite sex who worked in substantially equal jobs. Where there is more than one employee of the opposite sex who worked in substantially equal jobs, the damages can be calculated by calculating the difference between the plaintiff’s salary and the average salary paid to the workers of the opposite sex. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

 **Willful Violations**

The statute of limitations for Equal Pay Act suits is two years but is increased to three years for “willful” violations. 29 U.S.C. § 255; *accord Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1162 (11th Cir. 2008). To prove willfulness, “the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the [EPA] or showed reckless disregard about whether it was.” *Id*. at 1162-63 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). The question whether an employer willfully violated the EPA is a jury question. *Id*. at 1163.

Pattern Instruction 4.13 includes a willfulness instruction, which is to be used in cases where there is a dispute as to whether the employer willfully violated the EPA.

 **Liquidated Damages**

When the jury assesses compensatory damages for a violation of the EPA, the court must generally add an award of liquidated damages in the same amount. 29 U.S.C. § 216; *accord Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. 2008). There is a good faith defense: if the employer shows “to the satisfaction of the court” that the acts or omissions giving rise to the violation were in good faith and that the employer had reasonable grounds for believing that its act or omission was not a violation of the EPA, then “the court may, in its sound discretion,” reduce or eliminate liquidated damages. 29 U.S.C. § 260. “The employer bears the burden of establishing both the subjective and objective components of that good faith defense against liquidated damages.” *Alvarez Perez*, 515 F.3d at 1163. The good faith defense must be decided by the judge *unless* the jury finds that the employer acted willfully. *Id*. If the jury finds that the employer acted willfully, then the court cannot find that the employer acted in good faith, and the court must award liquidated damages. *Id*. at 1166.

 **Attorney’s Fees and Costs**

Section 216 of the Fair Labor Standards Act is incorporated into the Equal Pay Act, and therefore “the court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” 29 U.S.C. § 216.

 **Prejudgment Interest**

The court cannot award both liquidated damages and prejudgment interest because such an award would constitute double compensation. *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987) (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 715 (1945)).