Case No.: 19-35428

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER JOY FREYD,

Plaintiff-Appellant,

v.

UNIVERSITY OF OREGON, Hal Sadofsky,and Michael Schill,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON, EUGENE
(CV. 6:17-cv-448-MC)

BRIEF OF APPELLANT

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INTRODUCTION

The University of Oregon ("Defendant" or "UO") pays four of its male full professors in the Psychology Department tens of thousands more than it pays the Department's most senior, and perhaps most esteemed, full professor, Plaintiff Dr. Jennifer Freyd. The Department acknowledges a pay gap between its male and female full professors of $30,000 per year on average. The Department Head called Freyd the Department's "most glaring inequity case." Yet UO denied Freyd's request for a raise.

The district court dismissed Freyd's state and federal Equal Pay Act claims because it found that the work of men who hold the same job is not even comparable to Freyd's, much less "substantially equal." The district court's holding would effectively eviscerate application of the Equal Pay Act in higher education, contrary to the holdings of every appellate court to have considered the issue.

UO explained its pay gap by pointing to "retention" raises that it gave to men with competing outside offers. Freyd challenged the way the UO handled these raises as creating a disparate impact on female professors. The district court's summary dismissal of this claim misunderstands the statistical evidence, misconstrues the challenged policy and misinterprets the available defense. Evidence that UO has treated female psychology professors who attempt to

negotiate a raise markedly differently from their male counterparts underscores the disparate impact and suggests intentional discrimination. The district court's failure even to acknowledge this evidence was error.

This case should be remanded for full consideration by a jury at trial.

JURISDICTIONAL STATEMENT

The United States District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The Order and Judgment from which Plaintiff now appeals were entered on May 2, 2019. ER-1-24. Plaintiff filed a timely notice of appeal on May 15, 2019. ER-30; Fed. R. App. P. 4(a)(1). Plaintiff appeals from a final judgment and order that dispose of all the parties' claims.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

(1) Could a jury find that Freyd does substantially equal work to her male colleagues who have the same job in the same department and are held to the same expectations?

(2) Could a jury find that Freyd does work of comparable character to that of her male colleagues who have the same job in the same department and are held

to the same expectations?

(3) Do UO's admissions that its retention raises cause a pay gap for female psychology professors, as well as competent statistical evidence proving it, establish a prima facie case of disparate impact?

(4) Is UO's practice, when giving a psychology professor a retention raise, of failing to adjust salaries of others with similar or more merit and seniority, both a business necessity and job-related as a matter of law?

(5) Does evidence that UO treated female professors negotiating raises differently from male professors doing so, together with evidence that it failed to follow its own salary-related policies, support an inference of intentional discrimination?

STATEMENT OF THE CASE

Professor Freyd is "among the most distinguished members" of the Psychology Department, "arguably the most distinguished." ER-222, 278. As her Department Head explained in a May 2018 review, "she can be credited with originating an entire subfield that focuses on the specific implications of inter-personal and, more recently, institutional trauma" and institutional betrayal. ER-58. She is a Fellow of the American Psychological Association, the Association for Psychological Science, and the American Association for the Advancement of Science. ER-234. One of her colleagues, a comparator in this case, wrote of Freyd:

> [W]here her work is truly extraordinary is in terms of social impact. Her scholarship and advocacy . . . have influenced community attitudes and awareness, as well as public and institutional policies, in ways that few of us in the academy (including myself) can claim (or even aspire to).

ER-28. Dr. Moses, a former Psychology Department Head, says, "Her whole career can be characterized as one of sustained excellence." ER-222.

Freyd is the longest-serving active full professor in the University of Oregon's Psychology Department, with 27 years in rank. ER-232, 449-450. As of November 2017, when this case was filed, Freyd earned between $14,600 and $42,200 less in base salary than four male full professors of psychology. These colleagues were junior to her by 9 to 21 years. ER-449-51.

Freyd and Her Colleagues Do Substantially Equal Work

Full professors of Psychology are required to pursue a program of original research and scholarship in peer-reviewed publications, teach, and serve the Department, University, and profession. ER-112, 159-162. Psychology professors have flexibility to obtain course releases in exchange for research, service duties or administrative duties. ER-164-65. Professors may also be assigned in other departments at a reduced FTE in Psychology. ER-163. Even with this flexibility, all full professors are held to the same standards through monitoring, evaluation, and review of research programs; regular post-tenure reviews; a departmental merit review process; and peer review. ER-159.

Freyd is a senior faculty member in the clinical division of the Psychology Department. ER-232. She conducts research as Principal Investigator of the Freyd Dynamics Lab, where she fundraises, oversees all the research conducted, ensures scientific integrity, and supervises doctoral students, undergraduate students, and a lab manager. ER-232-33. She is highly productive, with three books (her most recent has been translated into seven languages) and hundreds of peer-reviewed publications.[1] ER-234.

Comparator Dr. Phil Fisher, a full professor in the clinical division, conducts research as director of the Center for Translational Neuroscience, where he is responsible for administrative work including applying for federal grants, oversees the budget, and manages and supervises staff and students. ER-282-84.

Comparator Dr. Nicholas Allen, a full professor in the clinical division, conducts research as director of the Center for Digital Mental Health, which, like Freyd's lab, relies more on philanthropic funding than federal grant funding. ER-300. He is also principal or co-investigator on various federal grants, which have responsibilities including managing students, preparing progress reports, and

[1] Strangely, the district court found that Dr. Freyd authored "over 30" peer-reviewed manuscripts. ER-5. In fact, the number is in the hundreds. She has the second-highest H-index in the department, which is a measure of how many publications she authored that have been cited at least that many times, indicating significant influence in the field. ER-234.

managing budgets. ER-298-99. Allen is also highly productive with a substantial record of publications.

In their service roles, Fisher and Allen have both been Director of Clinical Training, which provides a teaching release. ER-165, 285, 300. Freyd's service work includes being an elected Senator to the University Senate, an appointed member of the Senate Executive Committee, and serving on the University Committee to Address Sexual and Gender-Based Violence, which established university-wide policies. ER-236. She also serves as Editor of the *Journal of Trauma & Dissociation*, for which she receives a teaching release. ER-234.

Comparator Dr. Gordon Hall is also a full professor in the clinical division. ER-288, 455. He held a part-time appointment with the Center on Diversity and Community (CoDaC) that reduced the expectations of him in Psychology, but that ended in the spring of 2017. ER-289-290.

Comparator Dr. Ulrich Mayr is a full professor and currently serves as Department Head, an elected and term-limited service role. He continues to fulfill research obligations. ER-82, 170. The Department Head role is separately compensated with a stipend, summer pay, and course releases. ER-73, 134, 447, 451.

Freyd and her male colleagues all supervise and mentor graduate students; serve on thesis and dissertation committees; participate in professional

organizations; and advance their particular research interests. ER-159-62. They all are held to department-specific review criteria with weights for each criterion that vary by rank. ER-184-91.

Retention Practices Create and Reinforce Gender Inequalities

In May 2014, Freyd gave her Department Head, Mayr, a regression analysis[2] of all salaries in the Psychology Department by years since PhD. ER-69-71. She noted a gender disparity in the Department and that her salary fell well below the regression line. *Id*. The Department undertook a required self-study in 2016 which found gender inequity in the salaries of full professors, with women earning on average $25,000 per year less than men. ER-130. The department also underwent an external review that recommended that "[t]he Department should continue pressing for gender equity in terms of pay at the senior levels of the faculty." ER-144.

[2] "A regression analysis is a common statistical tool . . . designed to isolate the influence of one particular factor – e.g. sex – on a dependent variable – e.g. salary." *Hemmings v. Tidyman's, Inc*., 285 F.3d 1174, 1183 n.9 (9th Cir. 2002) (quoting *EEOC v. Gen. Tel. Co. of NW, Inc*., 885 F.2d 575, 577 n.3 (9th Cir. 1989)). Mayr's regression analysis "use[s] a predictor such as years in rank or years since PhD to predict where, for example, somebody's salary should be if that was the only defining factor… And because seniority is so much tied to … the typical progression of raises, it's a pretty good way of . . . gauging whether somebody is approximately where you expect that individual to be. And then if you see deviations, you can discuss whether there are other factors like a particularly high merit or other reasons in place that can be or should be compensated." ER-90.

Upon receiving Freyd's 2014 analysis, Mayr responded that he was "quite aware of the salary spread and who is above and below the regression line. Indeed I can provide at least partial explanations – fully aware that these are [sic] may not 'explain away' a gender bias." ER-73. Mayr did a "more complicated" regression analysis that involved multiple predictors. ER-102. His variables were years since PhD or years in rank, gender, and years since the professor's last major salary/retention negotiation. *Id*. He found that the gender difference either dropped significantly or disappeared. ER-100,103, 363. He did the analysis "over and over again" at multiple points in time, noting that "people float in and out of that window that you are looking at through retirements, through new hires, promotions." ER-103. Even so, "the qualitative pattern essentially stays always the same." Mayr's data showed that faculty who received retention raises have higher salaries than those who did not, and that this has resulted in a gender differential. ER-104.

In its self-study, the Department wrote, "it is important to acknowledge that there is strong evidence of a gender bias both in the availability of outside offers and the ability to aggressively respond to such offers." ER-130. External reviewers likewise wrote, "it is widely-recognized that there is a difference between the genders in terms of seeking outside offers, and if this holds at Oregon, then the bias does have a gender basis." ER-140. Mayr explained to the Deans that "there are

structural differences and actual biases that make it harder for women to participate in [retentions]. In this light, retentions should be viewed as one of the mechanisms that produce gender disparities." ER-146-47.

During the years that Dr. Lou Moses was Department Head (2007-2013), the vast majority of retention negotiations involved men; his experience was that women were less likely to pursue and negotiate job offers and retention deals and that when they did, they were less aggressive than men doing so.[3] ER-226; *see also* ER-270. Moses explained:

> There continues to be something of an 'old boys' network' in higher education such that women are much less likely to come to mind when the powers that be think of stars in the field who might be poached from rival universities. This, even though female professors' records are typically just as strong as those of their male counterparts. There is likely also implicit bias at work. One such bias is the assumption that women are less mobile than men because of family responsibilities, and/or because they are more likely than men to have partners who also work in academia (making recruitment challenging and expensive). In short, the deck is stacked against women with respect to securing strong retention offers that the university administration will consider matching.

[3] This observation is consistent with findings of researchers studying women and negotiation, who have found it is more socially and professionally risky for women to negotiate for higher pay than for men. *See, e.g.* Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (2003); Hannah Riley Bowles, Linda Babcock, & Lei Lai, *Social incentives for gender differences in the propensity to initiate negotiations: Sometimes it does hurt to ask*, 103 Org. Behav. And Hum. Decision Processes 84-103 (2007); Hannah Riley Bowles & Linda Babcock, *Are outside offers an answer to the compensation negotiation dilemma for women?* 2009 Academy of Management Proceedings 1, 1-6 (2009).

ER-226.

The Department's data bear out Moses' observation. Among 26 retention cases for tenure-track faculty from 2007 through 2017, only five involved women (19%). Only two of the five negotiations with women resulted in raises or research funds that were enough to induce them to stay (40%), whereas 14 of 21 negotiations with men did (67%). ER-202-06, 466-69. At the full professor level, no woman has had a successful retention negotiation in the last ten years. ER-466-67.

Men who undertook retention negotiations received hefty raises. In 2017, Allen received a raise of over $23,000 per year along with $400,000 in research funds and sponsorship of a Center, all before he had even gone for a second interview. ER-209, 467. UO gave Fisher $1.2 million in new research funds when he was under consideration for an outside position. ER-97, 205-06. Fisher did not ask for a raise at that time because he had just received a nearly $40,000 raise and other support in another retention negotiation a few years before. ER-218-20, 467, 468-69. UO gave Hall a raise of over $20,000 in 2014 when he did not have an offer from the competing school, nor did he have the support of the Department Head for retaining him. ER-92, 464.

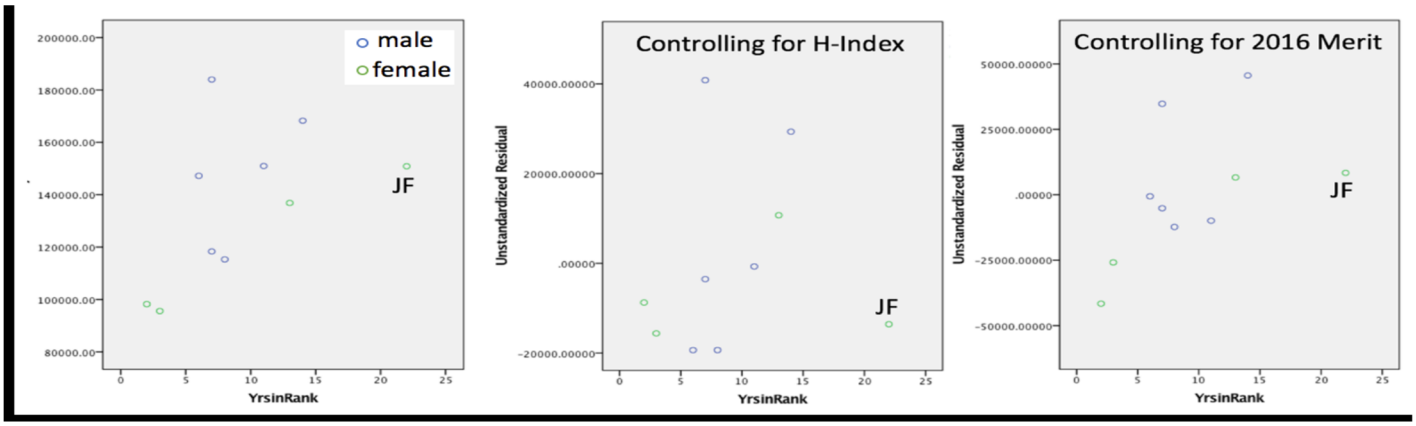
By contrast, when Dr. Baldwin sought a retention raise when she was a finalist for a prestigious position, UO said it would not consider it because she did

not yet have the job offer. ER-265. Aware that UO had given "pre-emptive" raises to men before they had an offer, Baldwin pointed out that she was being treated differently. ER-266-68. Associate Dean Sadofsky eventually offered her a raise of $10,000 with no research support, substantially less than men in the same position. ER-267-68.

Department Head Mayr Advocated for a Raise for Freyd, But UO Refused

On December 6, 2016, Department Head Mayr sent a memo to Deans Sadofsky and Marcus, titled "Gender pay equity in Psychology." ER-146-47. He wrote:

> [W]e are trying to come to grips with a considerable gender inequality among our full professor salaries. When controlling for years in rank, men earn on average $30 k more than women. . . . This difference has been remarkably stable across recent years that included substantial changes in our faculty roster . . . Also, the picture does not change fundamentally when taking out the highest-paid full professor (Phil Fisher) as an outlier (remaining gender difference of 22 k), when controlling for h-index (remaining difference=22 k), or for the 2016 merit ratings (remaining difference=18 k).



He went on to ask that the Deans "immediately address our most glaring inequity case":

> Jennifer Freyd is currently the most senior faculty member in the department. She is a widely recognized leader in her field with impact beyond the academy (e.g., see her invitation to the White House 2 years ago). As the included figures show, her salary is 18k less than that of her male peer closest in rank (who is still 7 years her junior). When taking in consideration impact or merit, this difference further increases to 40-50 k (see figures).

Id. Mayr asked for a 12% raise for Freyd. *Id*. Freyd echoed the request for parity. ER-240. Mayr reported back to the Department that he was lobbying to address the "blatant gender inequities" in salaries. ER-148.

Associate Dean Hal Sadofsky and Dean Andrew Marcus refused the requests.

Procedural History

Professor Freyd filed this action on March 21, 2017. ER-359. She asserted ten claims under federal and state law, all rooted in the discriminatory pay. Defendants moved for summary judgment on November 16, 2018. ER-360-61. The district court granted summary judgment on all of Plaintiff's claims on May 2, 2019. ER-1-24.

Over the summer of 2019 one of Plaintiff's comparators, Allen, sought to inform the court of additional information. On September 11, 2019, Plaintiff filed a motion in the district court under Rule 62.1 seeking relief from judgment to allow the district court to consider this new evidence. ER-362. Plaintiff has also filed with

this brief a motion to certify state law questions concerning the interpretation of O.R.S. § 652.220, Oregon's recently-amended equal pay law, to the Oregon Supreme Court.

SUMMARY OF THE ARGUMENT

Freyd and four male full professors of Psychology all have the same job with the same underlying duties and the same expectations, evaluated according to the same criteria. They all have the skills necessary to hold the job, exert substantially equal effort to perform it, and fulfill a common core of responsibilities for the Department, the University, and the profession. One of those responsibilities is to carry out an innovative and ground-breaking research program in an area of the professor's choosing. While this requirement inevitably results in differences in how each professor meets it, it does not change the underlying responsibility of the job. A reasonable jury could find the work "substantially equal" within the meaning of the Equal Pay Act, and such a finding is consistent with cases and regulations defining the scope of the law.

Oregon's newly-amended Equal Pay Act is broader and more protective than the federal, requiring equal pay for work "of comparable character." Though the district court acknowledged a difference, it erroneously applied federal cases interpreting federal law to dismiss these claims. The UO itself regularly compares

the work of Psychology professors through its established merit review process. A jury could also find that the work is comparable.

The district court dismissed Freyd's disparate impact claim under Title VII, holding that the "sample size" of professors was too small for a meaningful statistical analysis. This holding defied Ninth Circuit precedent and overlooked the longitudinal nature of the data presented, which allowed for enough observations to derive statistical significance. The practice that Plaintiff challenges is not retention raises *per se*, as the district court characterized it, but rather the UO's practice of giving raises without also adjusting the pay of other faculty of comparable merit and seniority. This failure to address pay equity (which their own policies say they should consider) is neither a business necessity nor job-related. Moreover, Plaintiff presented evidence of an alternative practice, one that UO has used in the past, that would address the disparate impact.

Finally, Plaintiff presented evidence that UO grants significant raises to male but not female full professors of Psychology who have sought them. This, plus evidence that UO failed to follow its own policies with respect to salaries and discrimination, demonstrates pretext and raises an inference of intentional discrimination.

ARGUMENT

I.
Standard of Review

On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017). The court must not weigh the evidence or determine the truth of the matter; rather, it must accept as true the nonmoving party's version of the facts and draw all reasonable inferences in her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A dispute is genuine where "a reasonable trier of fact could resolve the issue in the non-movant's favor." *Fresno Motors v. Mercedes Benz USA*, 771 F.3d 1119, 1125 (9th Cir. 2014). Even where the facts are undisputed, summary judgment is improper if "divergent ultimate inferences" may be drawn from them. *Id*.

II.
The Work of Freyd and Other Psychology Full Professors Requires Substantially Equal Skills, Effort and Responsibility and Individual Differences Should Be Weighed By A Jury.

The district court erred in holding that Freyd does not do "substantially equal" work as men who hold the same job. Under the Equal Pay Act, the plaintiff has the burden of showing that the employer has paid different wages to employees

of different sexes for doing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). The jobs compared need not be identical, only "substantially equal," taking into account "the broad remedial purpose of the law." 29 C.F.R. §§ 1620.13(a), 1620.14(a); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."). The question of whether two positions are substantially equal under the Equal Pay Act is a question of fact for the jury. *See Hein v. Or. Coll. of Educ.,* 718 F.2d 910, 913 (9th Cir. 1983) (noting that whether two jobs are substantially equal is a question of fact); *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 480 (2d Cir. 2001) ("Whether two positions are 'substantially equivalent' for Equal Pay Act purposes is a question for the jury.").

A. **The Lower Court Failed to Apply Leading Case Law and Regulations Describing Substantially Equal Work.**

Freyd and the four male professors who earn more than she all have the same job title within the same department and have the same performance requirements. Three of the four are in the same clinical subspecialty. This differs from every one of the cases upon which the district court relied, all of which compared individuals in different jobs or different departments. *See Spaulding v.*

Univ. of Wash., 740 F.2d 686, 697 (9th Cir. 1984) (holding that finding that faculty at School of Nursing did not perform substantially equal work to faculty in other departments was not clearly erroneous); *Forsberg v. Pac. Nw. Bell Tel. Co*., 840 F.2d 1409, 1416 (9th Cir. 1988) (holding that Test Desk Technician job involved different skills from Maintenance Administrator job); *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1075 (9th Cir. 1999) (assuming genuine question of fact as to whether coach of women's basketball team had substantially equal responsibilities as coach of men's basketball team); *Hein v. Or. Coll. of Educ*., 718 F.2d 910, 914, 918-20 (9th Cir. 1983) (holding that men's basketball coach did not have a substantially equal job as associate professor of physical education, but that professors within the education department were substantially equal).

Neither the district court nor Defendants cited a single case holding that two professors in the same higher education department or program, at the same level, have unequal jobs for purposes of the Equal Pay Act. To the contrary, numerous cases considering facts nearly identical to those here hold that plaintiffs established a prima facie case or, at a minimum, that substantial equivalence is a question for the jury. *See Hein*, 718 F.2d at 919 (holding that professors in the same block program within the education department performed substantially equal work, despite differences in other duties); *Allender v. Univ. of Portland*, 689 F. Supp. 2d 1279, 1285-86 (D. Or. 2010) (holding that jobs of associate professors in

economics department of business school are substantially equal); *Siler-Khodr v. Univ. Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542, 544 (5th Cir. 2001) (upholding jury finding that full professors in the department of obstetrics/gynecology had substantially equal jobs); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 827 (6th Cir. 2000) (reversing district court's judgment as a matter of law on substantially equal work and holding that a reasonable juror could find that professors in college of education were "roughly comparable professionally"); *Brock v. Ga. Sw. Coll.*, 765 F.2d 1026, 1033–34 (11th Cir. 1985) (holding that plaintiff meets burden of showing substantially equal work where teachers compared are in the same discipline and that their job is to teach classes to students in that discipline); *Winkes v. Brown Univ.*, 747 F.2d 792, 793 (1st Cir. 1984) (holding that associate professors in art history department held "jobs that were comparable with respect to skill, effort, responsibility, and working conditions"); *Sauceda v. Univ. Tex. Brownsville*, 958 F. Supp. 2d 761, 774-75 (S.D. Tex. 2013) (holding that plaintiff established a prima facie case that her work as associate professor in the business school was substantially equal to another associate professor and a visiting professor, because the school expected them to meet "similar expectations"); *Klein v. NYU*, 786 F. Supp. 2d 830, 850 (S.D.N.Y. 2011) (holding that jury could find that professors in same department performed the same job).

Other courts have gone farther, holding that professors in different departments hold substantially equal jobs for equal pay purposes. *See Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 480-81 (2d Cir. 2001) (upholding jury finding that professor of criminal justice had equal skill, effort and responsibility as professor of psychology); *Chang v. Univ. of R.I.*, 606 F. Supp. 1161, 1226-28 (D.R.I. 1985) (holding that all professors in all departments do equal work and commenting that, "confronted with an alleged case of discrimination between a female in one department and a male in another department, the defendants invariably claimed that equivalency was wanting. This contention . . . blatantly misconstrues the concept of equivalency under the Equal Pay Act").

Instead of following cases with similar facts, the lower court emphasized that faculty positions provide significant freedom for employees to pursue their own interests and craft their own daily responsibilities, making each person unique. But focusing on what each individual brings to the job is not the correct test. Rather, "[t]he statute explicitly applies to jobs that require equal skills, and not to employees that possess equal skills." *Hein*, 718 F.2d at 914. The law demands an examination of the underlying skills, requirements and expectations of the position. *See Kovacevich*, 224 F.3d at 827 (holding that reasonable juror could find substantial equality where professors "undert[ook] the same workload requirements while there; work[ed] within the same department; and [were]

evaluated under the same criteria by the same FAC [Faculty Advisory Committee] in the same years"). In *Allender*, for example, Judge Papak rejected the argument that because male comparators performed more service to the University, their work was not substantially equal to the female plaintiff's. 689 F. Supp. 2d at 1285. What mattered was the underlying expectations of the University common to all, and "the facts show that the University requires equal skill, effort and responsibility from all associate professors" in the department. *Id.*

The same is true here. Department policies set out the expectations in detail, and every full professor is subject to the same evaluation as to whether she or he has met those expectations at regular intervals through post-tenure reviews and the Department's internal merit review process.

The lower court also misread the law to consider "the value of the work" performed by each comparator. ER-5; *see also* ER-2 (stating erroneously that federal law requires employers to ensure men and women are paid the same for work of "comparable value"). The concept of "comparable value" has been soundly rejected as the touchstone for an Equal Pay Act claim for decades. *See Spaulding v. Univ. of Wash.*, 740 F.2d 686, 706-07 (9th Cir. 1984) (rejecting comparable worth theory and refusing to recognize a prima facie case of discrimination based on men and women receiving different pay for work of "equal value to the employer").

Even in mistakenly focusing on the "value" of the work performed, the district court failed to take heed of the significant value that Freyd's work has brought to the UO, to the profession, and to society. The district court rendered Freyd's work nearly invisible while it focused only on the men who are her comparators. Thus it took almost no notice of her considerable acclaim in the field as a researcher and theoretician, the UO's own recognition that she has originated an entire subfield within the discipline (ER-58), or that her work has effectively changed the way the entire profession thinks about trauma. ER-233-34. It treated Freyd as a good teacher and a "good campus citizen" in the functioning of the university (ER-3), when in fact she is "one of the main theoretical contributors and intellectual forces" in her field. ER-107.

B. EEOC Regulations Detail How To Evaluate Skills, Effort and Responsibility.

EEOC regulations describe how to approach an "equal work" analysis under the Equal Pay Act: "What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration." 29 C.F.R. § 1620.14(a). A key principle is that "in determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in

setting the wage levels for such jobs." *Id*. If apparent differences between jobs "have not been recognized as relevant for wage purposes," then "the facts as a whole" might show "that the differences are too insubstantial to prevent the jobs from being equal in all significant respects under the law." *Id*.

Regulations go on to expand on the meaning of each element of the test.

1. The Skills Required of Psychology Professors Are Substantially Equivalent.

The element of skill includes consideration of factors like experience, training, education, and ability. 29 C.F.R. § 1620.15(a). "If an employee must have essentially the same skill in order to perform either of two jobs," the two jobs will qualify as requiring equal skill, "even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job." *Id*.

The job of full professor of Psychology at UO requires the same education, training, experience and abilities – *i.e.,* skills – from all who hold the position. The Department's policies detail the requirements for promotion and tenure and specific cons*id*erations for merit reviews. ER-179-81, 184-191. All are held to the same standards of training and education: a doctorate in the field and years spent in training as assistant and associate professor performing outstanding research,

teaching psychology, and publishing.[4] ER-184-191. Candidates for full professor "are expected to have a national or international reputation in their areas of specialty (as indicated for example by memberships on editorial boards, associate editorships, or invitations to talks)," ER-191, which is a higher level of experience and ability than professors at the associate level. *See Allender*, 689 F. Supp. 2d at 1285 (finding that job of associate professor in economics is substantially equal to other associate professors in economics, but not substantially equal to full professor).

Freyd and her comparators all have met the necessary education, training, experience and ability requirements to become full professors of psychology. Freyd, meanwhile, has achieved recognition with numerous awards and fellowships (ER-234) that denote a higher level of skill and ability in her profession that her comparators do not share. *See* 29 C.F.R. § 1620.14(a) ("differences in skill, effort or responsibility which might be sufficient to justify a

[4] The skill element is one of the reasons Plaintiff did not, and cannot, compare herself for Equal Pay Act purposes to professors in other disciplines or at other levels, contrary to the district court's comment. ER-13. Other disciplines require different degrees and training from that necessary to become a full professor of Psychology, and those positions require different skills. *See Spaulding v. Univ. of Wash.*, 740 F.2d 686, 698 (9th Cir. 1984) (upholding district court decision that differences in training and education in different academic fields meant that positions as faculty in school of nursing required different skills from faculty in other departments).

finding that two jobs are not equal . . . do not justify such a finding where the greater skill, effort, or responsibility is required of the lower paid sex.").

The lower court focused on minor differences in the skills of individuals. For example, it found that Allen's use of brain scanning in his research "requires specialized expertise and the supervision of technological staff," which Freyd does not do. But regulations make clear that using different machines or equipment does not render jobs unequal within the meaning of the statute. 29 C.F.R. § 1620.14(c). Moreover, no evidence exists that use of this technology requires specialized expertise from Allen. He is not the one who performs the scans or interprets the images himself; he has technical staff who do that work. ER-299. Allen's role is to recruit participants, ensure consent, ensure proper handling of ethical issues involved, and oversee the process and the staff. *Id*. Defendants presented no evidence that these tasks involve meaningfully different skills from those necessary for Freyd to recruit participants in her studies, ensure they consent, ensure proper handling of the ethical issues involved, and oversee the process and the staff conducting the surveys on which her research relies. Nor is there any evidence that use of brain imaging machines is a consideration in setting the base pay for Allen's position, suggesting the apparent difference is "too insubstantial to prevent the jobs from being equal in all significant respects under the law." 29 C.F.R. §1620.14(a).

2. Freyd Expends at Least as Much Effort as Her Comparators.

Determining equal effort between two jobs concerns "the measurement of the physical or mental exertion needed for the performance of a job." 29 C.F.R. § 1620.16(a). Even where effort is exerted in different ways on two jobs, the difference in kind of effort does not make the efforts unequal. 29 C.F.R. § 1620.16(b). Effort "encompasses the total requirements of a job" in light of factors including the degree of mental fatigue and stress. 29 C.F.R. § 1620.16(a).

While Defendants presented evidence addressing the effort involved in managing a federal grant or serving as Director of Clinical Training, they presented no evidence that those roles involve more mental fatigue and stress than Freyd exerts. To the contrary, Plaintiff presented evidence showing that although the way the effort is exerted may differ, the quantity of Freyd's effort is the same or more. "Applying for a grant is not more time consuming, nor is it qualitatively different, from much of the other work that academic faculty do. It is not, for example, more work than writing a journal article." ER-239. Former Department Head Moses explained:

> The university administration makes an additional claim that the four male faculty members who are paid substantially more than Professor Freyd have all taken on various administrative roles that demand a lot of time and effort, and that these additional roles partly account for the large salary discrepancies. What the administration entirely fails to acknowledge, however, is that Professor Freyd has taken on similarly time-consuming, effortful, and important roles. . . . These roles entail

> the same or more skill, effort, and responsibility as the roles her colleagues fulfill.

ER-223.

Moreover, UO itself determines the equivalence of various activities by authorizing course buy-outs for various types of work. Freyd has a course release for her work editing the *Journal of Trauma & Dissociation*. ER-234. Department policies also allow a course release for service as Director of Clinical Training. ER-165. This is evidence that UO considers service as Director of Clinical Training to entail roughly the same amount of effort as teaching one course or serving as editor of a journal. It also shows that serving as Director of Clinical Training does not add to the overall effort required of the job; it merely substitutes one kind of effort for another. Different kinds of effort do not render the positions unequal. 29 C.F.R. § 1620.16(b).

Because the lower court ignored Freyd's work activities and achievements, it overlooked the clear disputes of fact in the evidence. The question of whether the effort required by the positions is substantially equal is a task for the finder of fact, not the district judge.

3. **Overall Responsibilities of the Job of Psychology Professor Are the Same.**

Regulations explain that "[r]esponsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the

importance of the job obligation." 29 C.F.R. § 1620.17(a). Minor differences in responsibility do not make the equal pay standard inapplicable. *EEOC v. Maricopa Cty. Comm. Coll. Dist*., 736 F.2d 510, 514 (9th Cir. 1984). Where employees' duties are occasionally dissimilar, regulations look to whether the difference is "of a kind that is recognized in wage administration as a significant factor in determining wage rates." 29 C.F.R. § 1620.17(b)(3). If not, the differences "would seem insufficient to justify a wage rate differential" between male and female employees. *Id.*

The district court found that managing a federal grant imposes "responsibilities that are not shouldered by Professor Freyd." ER-13. The court, however, undertook no examination of what Freyd actually does, overlooking the extensive responsibilities that running the Freyd Dynamics Lab entails. Evidence shows that the underlying tasks required of managing a federal grant and managing a research lab are quite similar. Like Fisher and Allen, Freyd is responsible for funding her research, ensuring that the research is performed, and managing graduate students, postdoctoral fellows, and other researchers to ensure that milestones are met. ER-232-33. Like Fisher and Allen, Freyd has to manage the budget for her lab, submit reports to funders, manage and supervise administrative staff, manage the ethical aspects of the research, obtain appropriate institutional review, drive the scientific process, ensure scientific integrity, and handle media

and other communications. *Id*. Like Allen and Fisher, final accountability for the research rests with her. And, like them, handling these responsibilities is a very big part of her work.[5] *Compare* ER-299 and ER-282-84 *with* ER-232-33.

As simply one example, Fisher testified that one of his tasks is "oversight of the development of a novel research model being implemented on a global basis." ER-285. Similarly, Freyd "helped create an open-access scientific survey instrument for national use, which has been requested by hundreds of institutions." ER-237. These two achievements are strikingly equivalent – both developed a new research tool in the field that is enjoying widespread use. The core responsibilities involved in undertaking high quality research apply to Freyd just as they do to those whose research is federally funded.

To the extent some of the responsibilities may differ, regulations ask whether the differences are ones that the employer recognizes as significant in setting wage rates. 29 C.F.R. § 1620.14(a). When it comes to federal grants, UO

[5] The district court found that administrative tasks involved in federally funded research accounts for "42% of the principal researcher's time," though there is no evidence of this time allocation that is specific to any of Freyd's comparators. ER-13. The court undertook no comparison of this time with the time Freyd spends on administrative tasks as Principal Investigator for the Freyd Dynamics Lab, nor did it evaluate whether there are meaningful differences in administrative tasks depending on the funding source. Moreover, "A finding that one job requires employees to expend greater effort for a certain percentage of their working time than employees performing another job, would not in itself establish that the two jobs do not constitute equal work." 29 C.F.R. § 1620.14(c).

policy recognizes "no one-to-one linkage" between receiving a federal grant and a salary increase. ER-68. Moses explained that the heavy emphasis the UO placed on grant funding in defending this case "is certainly very much at odds with the way the Psychology Department has for many years weighted grant funding in its merit determinations for raises, as well as in its tenure and promotion guidelines." ER-224. Responsibility for federal grants is insufficient to find that the job responsibilities are not substantially equal. *See Siler-Khodr,* 261 F.3d at 548 (upholding jury verdict rejecting University defense that comparator was paid more because he brought in more grant money, because there was no evidence that the University had ever used grants as a wage-setting criterion).

The district court also found significant that Hall and Fisher served as Director of Clinical Training, treating this like an extra responsibility that Freyd did not have. Yet the post is considered one service role among many others, and Freyd's service responsibilities – which the court overlooked – are extensive. In addition to editing a prestigious journal, she serves as a University Senator and member of important, University-wide policy-setting committees. Regulations make clear that "an employer cannot successfully assert an extra duties defense where . . . [m]embers of the lower paid sex also perform extra duties requiring equal skill, effort, and responsibility." 29 C.F.R. §1620.20.

Comparing the responsibilities involved in these activities, the degree of

accountability, and the importance of the job obligation is a task for the trier of fact, not the district court judge. But Freyd's colleagues have already weighed in, recognizing her in 2017 with the Wayne T. Westing Award for University Leadership and Service in recognition of her outstanding leadership and service to the university. ER-237. That she is the sole member of the Psychology Department ever to receive that award shows that Freyd's responsibilities in the area of service, and the importance of those obligations, outweigh those of her comparators. Even if the trier of fact found that differences in responsibility exist, they do not justify a finding that the jobs are unequal where, as here, "the greater skill, effort, or responsibility is required of the lower paid sex." 29 C.F.R. § 1620.14(a).

4. Applying the Regulations Shows A Jury Could Find Substantial Equivalence.

Considering each comparator individually shows the district court erred.

Gordon Hall

Hall is a full professor in Psychology, just like Freyd. He does not manage federal grants. He is not the department head. The district court relied on two aspects of Hall's position to find that his job is not substantially equal: his external appointment to CoDaC and his service as Director of Clinical Training. Neither of these shows substantial inequality, but even if they did, Hall has not held either role since the spring of 2017. There is no evidence that Hall's current position

differs in any way from Freyd's.

The last time Hall served as Director of Clinical Training was in 2014, before the statute of limitations for Freyd's EPA claim. Relying on it to find the jobs are not substantially equal was therefore error. Nor does this service role show that the two jobs as a whole are not substantially equal.

Likewise, Hall stepped down from his role with CoDaC in the spring of 2017. Freyd filed this case in 2017 and continues to work alongside Hall. She has a continuing request for an appropriate salary adjustment relative to her comparators. His role at CoDaC thus provides no basis to distinguish Hall from Freyd currently or at any time since spring 2017.

Nor does Hall's previous role with CoDaC make his work as a full professor of Psychology substantially unequal to Freyd's. When Hall held this post, he had a reduced FTE in Psychology. ER-417 (75% appointment in 2013-14). UO treated the position as if he was a part time full professor in Psychology (with reduced expectations) and part time at CoDaC. *Id*.; ER-289. It is appropriate to consider solely his part-time work as a full professor of Psychology when comparing the equality of jobs. *See, e.g., Russell v. Placeware, Inc.*, No. CIV. 03-836-MO, 2004 WL 2359971, at *11 (D. Or. Oct. 15, 2004) (comparing duties and pay rate of part-time employee to plaintiff's full-time duties and pay rate). Hall's base pay rate for the work he did as a Psychology professor remained above Freyd's. Even during

the time when Hall worked part time with CoDaC, there is no reason not to consider his part-time work with the Psychology Department substantially equal to Freyd's position.

Allen

The district court relied principally on Allen's responsibilities managing federal grants to distinguish him from Freyd. But as explained above, the court undertook no examination of Freyd's similar duties and responsibilities in running her lab. Moreover, Allen himself explained that "Freyd's achievements are equal to if not greater than my own," and commented, "based on a balanced assessment of Freyd's academic achievements relative to my own . . . she should expect to earn as much if not more than me in a system where compensation was determined by merit." ER-28.

The court noted that Allen buys out some of his teaching with grant money, but it took no note of the fact that Freyd also buys out of some of her teaching with money from her Journal editorship, making this more a factor of similarity than of difference. The district court also relied on Allen's use of brain scanning technology to find that his job and Freyd's are not substantially equal. As explained above, this is not a valid basis for a finding of substantially unequal work.

Fisher

As with Allen, the district court relied on Fisher's administrative responsibilities around his federal grants to distinguish his job from Freyd's. For the same reasons, this is not enough to show that his skills, effort or responsibilities render his job substantially unequal. The court also relied on Fisher's work as Director of Clinical Training which, as addressed above, was error. Mayr himself created a dispute of material fact on the significance of this role. Arguing to a University investigator that Freyd and Fisher do equal work, Mayr made clear: "Phil Fisher, clinical director, that does not pay him more money and does not change the work he does." ER- 465.

Mayr

The district court relied on Mayr's role as Department Head to find that his position is not substantially equal to Freyd's. This elected position is considered part of the service contribution. It is paid separately from the base salary through a stipend, course releases, and additional summer pay, ER-73, 134, 447, 451, so its duties are not relevant to a comparison of the underlying duties of a full professor, which Mayr continues to fulfill. *See, e.g., Melanson v. Rantoul*, 536 F. Supp. 271, 289 (D.R.I. 1982) (holding that the Chairman duties of male comparator were not relevant because he received a separate stipend for that work, and that plaintiff correctly compared their base salaries).

The lower court emphasized Mayr's supervisory and managerial duties, but

Freyd raised a genuine issue of fact as to whether he is her supervisor. ER-239. Freyd also has supervisory duties over staff in the Dynamics Lab and the Journal she edits, and she has managerial and administrative duties at significant, high-responsibility levels crafting university policies and serving in the University Senate. It is a question of fact for a jury to decide whether Mayr's underlying duties as a full professor, for which he is paid his base salary, are substantially equivalent to Freyd's.

For all these comparators, Freyd presented evidence to create a dispute of fact on the question of substantial equality of jobs. Indeed, Department Head Mayr's admissions alone create a dispute of fact. Mayr protested to a UO-hired investigator that the work of Freyd and her colleagues was substantially equal for purposes of pay determination. The investigator's notes record his comments:

> We all do the same work. Fisher and Allen do not have different job descriptions. There is no institutional mechanism that recognizes the difference of running a grant or being a director . . . In fact, they get the same rates of raises, so they are really treated the same. They get same raises in same way. They cannot be seen as different.

ER-465. About himself, he said, "And me, I get a stipend, but if you remove that then there is just my salary." *Id*.

Freyd's Equal Pay Act claim should be remanded to the lower court for a jury to consider substantial equality of jobs.

III.
The District Court Failed to Apply the Correct Standard – Whether the Work Is "Of Comparable Character" – To Freyd's Claims Under O.R.S. § 652.220.

A. The Oregon Equal Pay Act is More Protective Than the Federal Equal Pay Act.

The district court erred in failing to apply the correct standard under state law – whether Freyd's work is "of comparable character" to that of her male colleagues – to her claims under Oregon's equal pay law, O.R.S. § 652.220. Plaintiff, who continues to work for UO and seeks continuing relief, has claims under both *former* O.R.S. § 652.220 (2017), in effect at the time she filed, and the current, amended version of that statute, which went into effect on January 1, 2019. The legislature significantly amended the law to eliminate defenses and expand its protections.[6]

Oregon's Equal Pay Act is textually different from and more protective than its federal counterpart. *Bureau of Labor & Indus. v. City of Roseburg*, 75 Or. App. 306, 309 n.2 (1985) (work of "comparable character" is broader than "equal work"). While the district court acknowledged that O.R.S. § 652.220 is "broader" than federal law, it relied on federal cases to assess Plaintiff's comparators. ER-12-

[6] Plaintiff has filed herewith a request to certify questions of interpretation of the Oregon equal pay law to the Oregon Supreme Court.

14. The legal conclusion it reached – that tenured professors in the same academic department cannot be compared for purposes of O.R.S. § 652.220 – finds no support in Oregon law and effectively renders the Oregon Equal Pay Act inapplicable to tenured faculty in higher education.

Because there is no controlling state law defining "work of comparable character," this Court is required to interpret that term in accordance with the methodology utilized by the Oregon Supreme Court. *See Dias v. Elique*, 436 F.3d 1125, 1129 (9th Cir. 2006). The Oregon Supreme Court interprets a state statute by examining the text of the statute in context, along with "any pertinent legislative history," to determine legislative intent. *Eugene Water & Elec. Bd. v. Pub. Employees Ret. Bd.*, 365 Or. 59, 68 (2019). Where the legislature has not defined a particular term, the court assumes that it intended to give words of common usage their "plain, natural, and ordinary meaning," relying on contemporaneous dictionary definitions when appropriate. *State v. Clemente-Perez*, 357 Or. 745, 756 (2015); *Powerex Corp. v. Dep't of Revenue*, 357 Or. 40, 61-62 (2015).

Webster's New International Dictionary of the English Language (2d ed., 1954), the dictionary contemporaneous with the enactment of O.R.S. § 652.220 in 1955, defines the term "comparable" as "[c]apable of being compared (with); worthy of comparison (to)"; it defines the verb "to compare" as, "[t]o represent as similar, as for the purpose of illustration . . . [t]o examine the character or qualities

of, as of two or more persons or things, for the purpose of discovering their resemblances or differences; to bring into comparison[.]" Pursuant to those definitions, items that are "comparable" are not the same; rather, they share qualities that render them *similar enough* so that they may be compared. The work of two employees thus may be comparable even when not equal or substantially equal.

The 1955 Oregon Legislature understood the "comparable work" standard to require equal pay for male and female employees who did similar work or work of comparable value, even when those employees held different jobs. The concept originated in regulations of the National War Labor Board (NWLB) during World War II, which required equal pay for "comparable work." *Washington Cty. v. Gunther*, 452 U.S. 161, 185 n.1 (1981) (Rehnquist, J. dissenting) (describing history). The Oregon statute was based on a model bill prepared by the women's division of the United States Department of Labor, which utilized the "comparable work" standard from the NWLB. Oregon Senate Bill 2, Minutes of the Meeting of the Labor and Industries Committee (Jan 18, 1955) (statement from Senator Allen).

During the hearings on Senate Bill 2, opponents raised concerns that the work of men and women would be too difficult to compare. *See* Oregon Senate Bill 2, Minutes of the Meeting of the Labor and Industries Committee (Feb 15, 1955) (statement from William Lubersky). One opponent submitted a journal

article to the Committee, in which the author noted that "[w]ork may be 'comparable' without being 'similar,' 'the same' or 'identical[,]'" and that "[j]ob evaluation is not an exact science," with "job contents . . . constantly changing and requiring new evaluations." *Id*.; Vernon Seigler, *Equal Pay for Women Laws: Are They Desirable?* 5 Lab. L. J. 663, 664 (1954). The legislature nonetheless chose to retain the "comparable work" language from the model bill. In doing so, it signaled an intent that the Oregon Equal Pay Act would protect workers from sex-based discrimination when they held different jobs that shared important characteristics, an analysis that would necessarily require searching evaluation by a finder of fact.[7]

Consistent with the text and legislative history, the Oregon Court of Appeals has explained that "[w]ork of comparable character" is not equal but "require[s] . . . that two items have important common characteristics." *Bureau of Labor & Indus. v. Roseburg*, 75 Or. App 306, 309 n.2 (1985). While Oregon courts have not specified which "characteristics" should be considered, extensive amendments to O.R.S. § 652.220, passed in 2017, show that the components need only be "substantially similar," not "substantially equivalent." Adopted for the purpose of

[7] Congress rejected the National War Labor Board's "comparable work" standard due in part to fears that "ascertaining the worth of comparable work" would be an "impossible task." *Washington Cty. v. Gunther*, 452 U.S. 161, 184-86 (1981) (Rehnquist, J. dissenting).

clarifying the standard,[8] the amendments define comparable work as "work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title." O.R.S. § 652.210(12).[9]

Regulations promulgated by the Oregon Bureau of Labor & Industries provide a list of considerations for determining work of a comparable character and emphasize that no single factor is determinative. Considerations for determining comparable responsibility include the degree of decision-making discretion and the employee's level of autonomy. O.A.R. 839-008-0010(1)(d). The analysis turns on what the job "requires," not the particular way that any one individual meets those requirements. O.R.S. § 652.210(12). The analysis is context-specific, in that the "considerations" that will be relevant in one work context will not necessarily be relevant in another.

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[8] Public Hearing on Oregon House Bill 2005, Senate Committee on Workforce at 35:20 (April 26, 2017) (testimony of co-sponsor Representative Ann Lininger that bill "clarifies meaning of comparable work"); Public Hearing on Oregon House Bill 2005, House Committee on Business and Labor at 4:00 (March 13, 2017) (testimony of Kate Newhall that amendments to "work of comparable character" are not intended to substantively change the meaning of that standard).

[9] Although the 2017 amendments were enacted long after the passage of the Oregon Equal Pay Act, they may be considered when analyzing the meaning of the original law. *See Kaiser Cement & Gypsum Corp. v. State Tax Comm'n*, 250 Or. 374, 378–79 (1968).

B. A Jury Could Find that Freyd and Her Male Colleagues Perform Work of Comparable Character.

For the same reasons that a jury could find that Freyd and her comparators do substantially equal work, a jury could find that their jobs are "of comparable character" within the meaning of O.R.S. § 652.220. Surely, the work of all four shares important common characteristics. Perhaps most telling, the work is comparable because the department regularly compares all faculty members for salary purposes through its merit review process.

In the merit review process, each professor submits a report detailing their accomplishments over the rating period. Department policy details the evaluative criteria. ER-181-82. The executive committee and the Department Head give every professor a numerical rating on a 0-4 scale for the major elements of the job – research, teaching, and service. The ratings are averaged to come up with a single merit score for each professor. ER-79, 179. Moses, who was involved in performing or overseeing this process for roughly sixteen years, explained:

> While differing areas of study and ways of completing research can pose some challenges for comparisons, we nonetheless make those comparisons regularly in our documented review processes. In our Psychology Department governance documents, we have explicit, written criteria for merit evaluation that ensure that we all are evaluated by the same standards.

ER-223; *see also* ER-279. This evidence alone shows that the work is, by definition, "of comparable character."

While the court found differences between Freyd and her comparators with respect to sources of funding for research, the assumption of temporary service roles, and the use of technology, among other things, neither Freyd nor her comparators are "required" by their employer to use a particular type of technology, obtain their funding from a particular source, or assume particular leadership roles at particular times. Rather, those differences reflect the common fact that the job of a tenured Psychology professor requires the exercise of considerable discretion and autonomy in developing and executing a unique research agenda and professional profile, which are comparable underlying responsibilities.

Such discretion does not mean that Freyd and her comparators do incomparable work as a matter of law. Instead, the degree of discretion and autonomy are both "important characteristics" of the work that Freyd and her comparators share. *See* O.R.S. § 652.210(12) (comparable work requires "substantially similar . . . responsibility"); O.A.R. 839-008-0010(1)(d) (listing discretion as a potentially relevant factor). No two people will exercise their discretion and autonomy in the same way, but that does not mean that the jobs do not have a substantially similar underlying responsibility.

The district court's interpretation is inconsistent with the meaning of O.R.S. § 652.220 and effectively removes all tenured faculty – and most upper-level

professionals – from the protections of Oregon's Equal Pay Act. That is a result that the Oregon legislature did not intend.

This Court should reverse.

IV.
Plaintiff's Statistical Evidence, As Well As Defendants' Admissions, Show that UO's Retention Raise Practices Have a Disparate Impact on Female Psychology Professors.

Plaintiff presented a prima facie case showing that Defendants' practice of responding to Psychology professors' outside offers through retention raises, without also adjusting the salaries of faculty in the Department of comparable merit and seniority, has a disparate impact on female professors. Plaintiff relied on three separate evidentiary showings: (1) Defendants' admissions; (2) a statistical analysis by Labor Economist Kevin Cahill showing statistical significance; and (3) evidence that the disparity between women and men offered retention raises falls below the four-fifths threshold for finding disparate impact. The lower court rejected Plaintiff's evidence, ignoring the first and finding that the "sample size" was too small for the second or third. This conclusion was in error.

A. Defendants' Admissions Show a Prima Facie Case.

A plaintiff may establish a prima facie case of disparate impact by 1) identifying the specific employment practices being challenged; 2) establishing disparate impact on a protected group; and 3) showing causation. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990). Here, the specific employment

practice being challenged is not granting retention raises *per se*. It is Defendants' practice of giving retention raises to professors who have received or are close to receiving an outside offer, without adjusting the salaries of other professors of comparable merit and seniority.

Evidence of a disparate impact on women in the Department is rife. Department Head Mayr explained to the Deans that "men earn on average $30K more than women" and the Department self-study also noted the pay gap. ER-130, 146. Defendants agree that the reason for this pay gap is the Department's practice regarding retention raises. Associate Dean Sadofsky admitted that the retention raises that he and Dean Marcus recommended had disproportionately benefited men in the Psychology Department, ER-115, and that the "perceived" inequity between women's and men's salaries is the result of retention raises. ER-118.

Department Head Mayr regularly analyzed the salaries in the Department through sophisticated regression analyses and was "quite aware" of the gender differential. ER-73, 103. Mayr's data showed that faculty who received retention raises have higher salaries than those who did not, and the result is a gender differential in pay. ER-104. The Department self-study also identified retention negotiations as the reason for the pay gap. ER-130.

This evidence alone is uncontroverted and is sufficient to meet Plaintiff's prima facie case. *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275 (9th

Cir. 1981) (holding that statistical disparities alone may constitute prima facie proof of discrimination, and a prima facie case is established when statistical evidence of adverse impact is completely uncontroverted). Indeed, Mayr considered and rejected the objection that the population of the Department is too small to draw a meaningful inference. ER-104. After doing the analysis at multiple points in time with changes in the population of the Department, he "concluded that there is a systematic trend that people with outside retention offers have higher salaries than people . . . who haven't had retention situations," resulting in the gender differential in pay. *Id*. The district court utterly disregarded all of this unrebutted evidence.

B. Dr. Cahill's Statistical Evidence of Disparate Impact Had Sufficient Observations to be Reliable.

Plaintiff's second area of evidence meeting the prima facie case was the declaration of labor economist Dr. Kevin Cahill. Cahill performed regression analyses on the salary data for the Department over a ten-year period, 2007-2017. He too found that female full professors earn thousands less than their male counterparts, controlling for years in rank and time trends. The gap is highly statistically significant below the one percent level (p-value of 0.004), *i.e.*, with a 99 percent degree of confidence. ER-246. His findings further show that when controlling for retention raises, gender is no longer a statistically significant

determinant of salaries, strongly suggesting that the gender disparity can be attributed to retention raises. *Id*.

The district court rejected this evidence because, it determined, the "sample size" was too small. This conclusion was mistaken. The data Cahill used is longitudinal, with multiple observations for each professor collected over time. These multiple observations include annual data spanning more than a decade from twenty professors and provide 125 person-year observations for analysis. Standard statistical texts teach that hypothesis testing can be conducted reliably with 125 observations. *See* James H. Stock & Mark W. Watson, *Introduction to Econometrics*, 96-98, (3d ed., 2015).

Defendants submitted a declaration from Dr. Ringold, a Professor of Marketing at Willamette University who was retained to evaluate Cahill's declaration. ER-33-42. While Ringold raised numerous questions about Cahill's analysis,[10] she did not say that it was unreliable because the "sample size" was too small. Instead, she wrote, "[m]ultiple regression models require minimum numbers of observations," and criticized Cahill for not specifying how many observations

[10] Ringold criticized Cahill's declaration for not including indicia of an expert report, but Cahill's declaration was not intended to be an expert report; it was intended only to establish a prima facie case. Under the scheduling order in the case, expert reports were not due until after determination of summary judgment. To the extent that Ringold's declaration raised other disputes, those should have been determined by a fact finder at trial.

his model used. But the answer to that question should have been evident from Cahill's specification of the data set he used: it had 125 observations, plenty for reliable analysis. Not even Defendants' expert challenged Cahill's analysis as having too small a data set.

The district court's misunderstanding of the statistical evidence is evident because the data was not based on a "sample" at all, but on the total population of full active professors in the Department from 2007 to 2017. This distinction between a sample and the population is important because taking draws from a population can invite errors. That is not the case here.

In finding the "sample size" too small, the court pointed to *Morita v. S. Cal. Permanente Medical Grp*., 541 F.2d 217, 220 (9th Cir. 1976), which involved a data set of eight observations, and *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002), which involved six women in a pool of 38 applicants. The number of observations in Plaintiff's evidence, 125, is far larger. Moreover, in *Stout*, the Ninth Circuit did not reject the data set as too small, as the district court did here. It instead assumed that the data was "adequately reliable," and went on to conclude that the evidence from that data did not indicate a substantial statistical disparity. *Id.*

The district court's decision to reject Plaintiff's statistical evidence also usurped the role of the jury. The court relied on *Contreras*, *Morita*, and *Stout* in

rejecting Plaintiff's statistical evidence outright, but none of these cases hold that it is appropriate for a trial court to jettison a plaintiff's statistical evidence at summary judgment. *Morita* and *Contreras* both were appeals after bench trials on a full record. *See Morita*, 541 F.2d at 218; *Contreras v. City of Los Angeles*, No. CV 77-1706-EC, 1977 WL 15509, at *6 (C.D. Cal. Nov. 10, 1977). *Stout* assumed the statistical evidence was adequately reliable but found that it did not show disparate impact. Here, the lower court wrongly chose to weigh the probative value of Plaintiff's statistical evidence as if he were a factfinder. Under *Bouman v. Block*, this was error. 940 F.2d 1211, 1255 (9th Cir. 1991) ("[w]hether the statistics are undermined or rebutted in a specific case would normally be a question for the trier of fact.").

C. The District Court Misinterpreted *Contreras* in Rejecting Plaintiff's Statistical Evidence.

The district court also conflated Plaintiff's statistical evidence of disparate impact on salaries with Plaintiff's third, and separate, set of data demonstrating disparate impact. That evidence compared the number of women who have sought and received retention raises with the number of men who did the same, and shows disparate impact through the four-fifths "rule of thumb." *See Stout*, 276 F.3d at 1124 (explaining that the four-fifths rule finds a disparate impact where the selection rate for women is less than four-fifths of the rate for men).

The district court dismissed both sets of data as if they were the same, writing, "[r]egardless of what Professor Freyd's expert says as to the reliability of the sample size, the rule in the Ninth Circuit is that 'Statistics are not trustworthy when minor numerical variations produce significant percentage fluctuations.'" ER-18. He then went on to criticize four-fifths rule data as vulnerable under this rule, without recognizing that it is a different set of data and a different type of analysis than the first one that Cahill presented. *See Bouman*, 940 F.2d at 1225 (holding that plaintiffs showed disparate impact despite small data set because, although "violation of the 80 percent rule is not always statistically significant," plaintiff's experts also showed statistical significance through several other, generally accepted techniques).

This Court also held in *Bouman* that rejecting the plaintiff's statistical evidence because a small sample may change results under the 80 percent rule, which is exactly what the district court did here, "misinterprets the significance of our statement in *Contreras*." 940 F.2d at 1226. It compared the small data set in *Contreras* – 17 – with the larger numbers in *Bouman* – 79 and 102. It noted that in *Contreras*, there was no showing of statistical significance at the .05 level (or less), while in *Bouman* (and here) there was. "Such a showing indicates that – *taking into account the effect of the small numbers* – the disparity is statistically significant." *Id*. at 1226 (emphasis in original). The same is true here: Plaintiff showed

statistical significance at the .01 level in a data set of 125 observations, which is a 99% confidence interval and sufficient for a finding of disparate impact. *Bouman* explained that, "[r]ather than using the 80 percent rule as a touchstone, we look more generally to whether the statistical disparity is 'substantial' or 'significant' in a given case." *Id*. at 1225.[11] Plaintiff's evidence met this standard and the district court's rejection of this evidence was error.

V.
The District Court Misinterpreted "Job-Related and Consistent with Business Necessity," And Overlooked Freyd's Evidence of an Alternative Practice.

A. The District Court Mischaracterized the Challenged Practice – Failing to Adjust the Pay of Comparable Professors When Giving a Retention Raise – In Crediting Defendant's Defense.

Defendant's burden on its affirmative defense is to prove that the challenged practice is *both* job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The district court erroneously held that UO could meet its affirmative defense by "offer[ing] any business justification" for its retention raise practices, ER-19,[12] and mischaracterized the challenged practice to find that

[11] "Many courts have followed the social science convention which holds that for disparities below a 5% probability level ('P-value'), chance explanations become suspect." *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 323 (N.D. Cal. 1992).
[12] In describing Defendants' burden, the district court relied on *Hardie v. NCAA*, 876 F.3d 312 (9th Cir. 2017), a disparate impact case under Title II of the Civil Rights Act (public accommodations) that follows the burden-shifting paradigm set out in *Wards Cove Packing v. Antonio*, 490 U.S. 642 (1989). Though the *Hardie*

defense met.

In holding erroneously that Freyd challenged the practice of giving retention raises *per se*, the district court easily found that offering salary increases to retain professors is a business necessity. Yet Defendants offered no evidence to show that the additional component of the challenged practice – failing to adjust salaries of other professors at the same rank and comparable merit and seniority – is a business necessity. To the contrary, Plaintiff presented evidence that such a practice is contemplated by both UO and department policy and has been implemented in the past. *See infra* at V.B.; *see also* ER-154, 158, 180, 200-201. This evidence, at a minimum, creates a jury question on business necessity.

The district court also found that Defendants' practice is job-related because some professors receive competing offers due to their job performance, including their ability to attract federal funding. ER-20. This conclusion misinterprets the "job-related" requirement of the affirmative defense. To be job-related, the challenged practice must bear "a manifest relationship to the employment in question" (*Griggs v. Duke Power Co*., 401 U.S. 424, 432 (1971)) and be a

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court explained that the burden-shifting framework for disparate impact in employment under Title VII does not follow *Wards Cove* because that paradigm was abrogated by the Civil Rights Act of 1991 (*see Hardie*, 876 F.3d at 319 n.8), the district court nevertheless relied on the standard articulated in *Hardie*, derived from *Wards Cove*, to describe the burden it applied in its decision on this Title VII claim.

legitimate measure of "important elements of work behavior which comprise or are relevant to the job." *Contreras*, 656 F.2d at 1279 (defining job-relatedness in the context of pre-employment tests). Though the Ninth Circuit's *en banc* opinion in *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) has been vacated due to the death of Judge Reinhardt (*Yovino v. Rizo,* 139 S. Ct. 706 (2019)), and therefore is not binding authority, it provides an illustrative discussion of job-relatedness in the context of an equal pay challenge. Distinguishing job-relatedness from business necessity, Judge Reinhardt wrote that job-related reasons for salary decisions must be "a legitimate measure of work experience, ability, performance, or any other job-related quality." *Rizo*, 887 F.3d at 467.

Receiving a competing offer does not bear a "manifest relationship to the employment in question." *Griggs, supra*. There is no job expectation that professors seek out other jobs, and it is not in UO's interest for professors to do so. ER-153. Plaintiff, along with other women in the Department, have historically felt they would be considered disloyal or unethical if they entertained competing offers and sought a raise – that it would show the opposite of strong job performance. ER-241-42, 270.

The Department itself concluded that receiving competing offers is not a legitimate measure of "important elements of work behavior which comprise or are relevant to the job." *Contreras*, 656 F.2d at 1279. In its required self-study, the

Department explained that retention practices are responsible for creating a striking disparity in pay between female and male full professors. It went on: "This is particularly concerning as it is not obvious that the frequency of retention negotiations is a strong indicator of overall productivity." ER-130. The observation of the self-study, adopted by the entire Department, is nearly the opposite of what the trial court found.

The practice of rewarding a professor with a competing offer without adjusting the salaries of others of comparable merit operates to perpetuate the gender disparities that the Equal Pay Act seeks to prohibit. Rather than use a second-rate surrogate for job performance that reinforces inequities, UO should instead point to the underlying factors for which competing offers is a proxy, and reward strong performance on those factors consistently to all deserving professors.

B. Freyd Presented Evidence of An Effective Alternative Practice That UO Has Used in the Past.

The district court also erred in finding that Freyd did not present evidence of an alternative employment practices that would ameliorate the difference in salaries. Plaintiff did present such evidence. The proposal is one that UO has used in the past and that had the effect of keeping salaries between men and women roughly at parity: when UO gives a retention raise to a Psychology professor, it

should evaluate the resulting salary disparity with others in the same rank with comparable merit and seniority, and give affected individuals a raise.

Former UO Interim President Scott Coltrane gave a hypothetical example of how the retention practice worked when he was Provost:

> The dean would make a proposal: Faculty member X who has an outside offer from this other place that's . . . $20,000 more than we would pay them. Let's offer them 10, but we're going to use another $5,000 to the two people that this person is going to leapfrog so that the equity – so the gaps don't get larger.

ER-154; *see also* ER-158. Coltrane admitted that this could still be done. ER-155. It is consistent with the existing university policy on retention raises. ER-156. It is also consistent with the Department's policies on retention raises, which require a consideration of equity together with merit and, in appropriate cases, a request for added funds to correct inequities. ER-180.

The proposed approach does not require UO always to dedicate the same amount of money as the competing offer, or to distribute it in precisely the proportions in the hypothetical example. UO would decide how much it wanted to give to faculty member X with a competing offer, look at the salaries of other faculty of comparable merit, and adjust accordingly. This is the solution that Allen proposed in his letter addressing this case:

> [T]he best way to overcome these biases is to have a strong and meaningful internal (i.e., within institution) system of addressing

> cases where the external market driven system has produced pay disparities that do not reflect academic merit. Although our University has a system of this type, it is poorly funded and is not capable of meaningfully addressing the challenges created by the biases introduced by the market-based retention offer system.

ER-29. This practice would not have the same disparate impact because female faculty doing substantially equivalent work as their male peers who entertain outside offers would also receive a raise.

The district court erred in mischaracterizing Plaintiff's proposal, in ignoring her evidence, and in granting summary judgment on her disparate impact claim.

VI.

Evidence that Defendants Treat Female Psychology Professor's Seeking a Raise Differently From Male Colleagues Warrants A Jury Trial on Freyd's Disparate Treatment Claims.

Freyd brought claims of disparate treatment under Title VII, Title IX, Or. Const. Art. 1 § 46, and O.R.S. § 659A.030 that are separate from her Equal Pay Act claims. The district court dismissed these claims, holding erroneously either that they require her to show substantial equivalence of work, or that she offered no evidence of intentional discrimination. The first conclusion is a misinterpretation of the law, and the second overlooks significant evidence.

The district court held that in order to establish a prima facie case under *McDonnell-Douglas*, Plaintiff must meet the same standard of substantial similarity in jobs as required by the Equal Pay Act. ER-16. This holding is

incorrect. The United States Supreme Court held in *Washington County v. Gunther*, 452 U.S. 161, 178-79 (1981), that Title VII allows claims for disparate treatment based on discriminatory compensation practices without satisfying the "equal work" standard of the Equal Pay Act.

A plaintiff may show compensation discrimination in the absence of a showing of equal work through the *McDonnell-Douglas* burden-shifting paradigm or other evidence giving rise to an inference of intentional discrimination. *See Lanegan-Grimm v. Library Ass'n. of Portland*, 560 F. Supp. 486, 490 (D. Or. 1983) (clarifying standards under the two claims). Evidence that (1) Freyd is female; (2) she is qualified for her position; (3) she experienced an adverse employment action; and (4) similarly situated men were treated more favorably establishes her prima facie case. *See Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004). Here, Freyd is female, she performs her job exceptionally, and she is paid less than similarly situated men. Like her male peers, she asked for a raise, but unlike them, she was denied it. This evidence establishes a prima facie case of discrimination. *See id.* (holding that employer conduct negatively affecting compensation is an adverse action); *Gillis v. Ga. Dep't of Corr.*, 400 F.3d 883, 887 (11th Cir. 2005) (holding that denial of a raise is an adverse employment action); 42 U.S.C. § 2000e-2(a)(1) (barring discrimination in compensation because of sex). At this stage, the plaintiff enjoys a presumption of

unlawful discrimination and the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the different treatment. *Fonseca*, 374 F.3d at 849.

UO did not address this evidence and simply argued that retention raises are lawful. The district court held that Plaintiff had not shown evidence of discriminatory animus. This was error. Assuming UO would offer its retention raise practices as its non-discriminatory explanation, Plaintiff offered substantial evidence showing pretext and from which a jury could infer intentional discrimination.

The way UO treated female full professors seeking a raise is markedly different from the way it treated males doing the same. UO gave men – Allen, Fisher, and Hall -- substantial raises and/or research support when they were merely under consideration by other institutions. But when Cambridge University was courting Baldwin, she received no offer until she pointed out the different treatment, and even then, the offer made was not enough to induce her to take it.

Other women in the Department had a similar experience. UO tapped full professor of Psychology Dr. Sara Hodges to serve as Associate Dean of the Graduate School in 2017. ER-228-29. In the negotiation for this position, Hodges sought a raise to her base salary. UO turned her down because, they said, it would create problems for her to earn more than a man in the Department, Dr. Elliot

Berkman. ER-230. Berkman not only was an associate professor while Hodges was full, he was also 15 years her junior. *Id*. Yet at the same time, UO was busy giving male professors substantial raises that caused them to earn more than women in their Department who were senior to them.

Like her colleagues, Freyd also asked for a raise. UO turned her down flatly. UO has presented no evidence of a male full professor who asked for a raise and received not even an offer or research funds. This evidence of Defendants' failure to treat female professors the same as male shows pretext and gives rise to an inference of discrimination. *See EEOC v. Boeing Co.*, 577 F.3d 1044, 1053 (9th Cir. 2009) (holding that evidence that defendant treated women differently from male coworkers is probative of pretext and can point to bias).

Plaintiff also provided statistical evidence that shows a clear salary gap between women and men. "Statistical data is relevant because it can be used to establish a general discriminatory pattern . . . . [that] is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Diaz v. Am. Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985).

Plaintiff showed that UO administrators were aware of the gender disparity in the Department and the resulting morale problems, but chose not to take action. At a department faculty meeting in 2016, Sadofsky addressed "the gender equity

issues" with salaries. ER-116. He told the faculty, "I can see that this is a real issue. And I, you know – I'm convinced that there's an issue there. The college is not in a position to address – address it right now." *Id*. In choosing to ignore faculty concerns of sex bias in salaries, the UO ignored its own policies that require reporting of prohibited discrimination. *See* ER-193 (confirming that concerns about gender equity in salaries "should be shared with AAEO and myself [Title IX Officer] as falling within the policy for reporting prohibited discrimination"); ER-116. This alone creates an inference of intentional discrimination. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006) (holding that employer's failure to investigate concern of discrimination could be an attempt to conceal illegitimate motives).

UO failed to follow its own policies regarding salaries in two additional ways. The Dean's Office makes available a 4% raise in connection with post-tenure reviews "to address equity issues with faculty of comparable merit and time-in-rank within the department." ER-67, 119. Yet when Freyd was up for her review, Sadofsky did not consider this added raise, claiming it was because Freyd's salary was not below department or comparable university averages for her rank. ER-114. But these metrics do not account for seniority, and UO policy requires taking seniority into account in considering the equity adjustment. ER-114, 119.

Defendants also failed to follow UO policy governing retention raises. One of the five listed considerations is "implications for internal equity within the unit" (*i.e.*, the department). ER-200-201. The Retention Salary Adjustment form should include a written narrative that "acknowledge[s] any issues concerning compensation equity that may result if the increase is approved." *Id*. Yet Sadofsky had never written or received a Retention Salary Adjustment form addressing equity considerations, and Defendants produced no documents showing that the Deans considered the equity implications of any retention negotiation. ER-57, 113.

In all of these ways, UO failed to follow its own policies when it comes to salaries, showing pretext. *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011) ("A plaintiff may also raise a triable issue of pretext through evidence that an employer's deviation from established policy or practice worked to her disadvantage.").

The totality of evidence is more than enough to raise a genuine issue of fact and should have barred summary judgment on Freyd's claims of disparate treatment. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) ("'When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason.'"). Freyd should not be denied the opportunity for a jury to weigh all evidence as a whole.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand this case for trial.

DATED this 23rd day of September, 2019.

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ADDENDUM

Statutes

Equal Pay Act, 29 U.S.C. § 206

> (d) Prohibition of sex discrimination (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title VII Disparate Impact, 42 U.S.C. § 2000e-2(k)(1)(A)(i)

> **(k) Burden of proof in disparate impact cases (1)(A)** An unlawful employment practice based on disparate impact is established under this subchapter only if-- **(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]

Title VII Unlawful Employment Practices, 42 U.S.C. § 2000e-2(a)

> **(a) Employer practices** It shall be an unlawful employment practice for an employer--**(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

Former Oregon Equal Pay Act (2017) Or. Rev. Stat. § 652.220(1)-(2) (amended 2017)

> (1) No employer shall:
>
> 1.
>
> (a) In any manner discriminate between the sexes in the payment of wages for work of comparable character, the performance of which requires comparable skills.
>
> (b) Pay wages to any employee at a rate less than that at which the employer pays wages to employees of the opposite sex for work of comparable character, the performance of which requires comparable skills.
>
> (2) Subsection (1) of this section does not apply where:
>
> (a) Payment is made pursuant to a seniority or merit system which does not discriminate on the basis of sex.
>
> (b) A differential in wages between employees is based in good faith on factors other than sex.

Current Oregon Equal Pay Act, Or. Rev. Stat. § 652.220(1)-(2) (2019)

> (1) It is an unlawful employment practice under ORS chapter 659A for an employer to:
>
> 2.
>
> (a) In any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character.

(b) Pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character.

(c) Screen job applicants based on current or past compensation.

(d) Determine compensation for a position based on current or past compensation of a prospective employee. This paragraph is not intended to prevent an employer from considering the compensation of a current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer.

(2) Notwithstanding subsection (1) of this section, an employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:

(a) A seniority system;
(b) A merit system;
(c) A system that measures earnings by quantity or quality of production, including piece-rate work;
(d) Workplace locations;
(e) Travel, if travel is necessary and regular for the employee;
(f) Education;
(g) Training;
(h) Experience; or
(i) Any combination of the factors described in this subsection, if the combination of factors accounts for the entire compensation differential.

Current Oregon Equal Pay Act, Definitions Or. Rev. Stat. § 652.210(12)

As used in ORS 652.210 to 652.235, unless the context requires otherwise:
. . . .
(12) "Work of comparable character" means work that requires substantially similar knowledge, skill, effort, responsibility and

working conditions in the performance of work, regardless of job description or job title.

Regulations

Equal Pay Act, "Equal Work" – What it Means 29 C.F.R. § 1620.13(a)

In general. The EPA prohibits discrimination by employers on the basis of sex in the wages paid for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions * * *." The word "requires" does not connote that an employer must formally assign the equal work to the employee; the EPA applies if the employer knowingly allows the employee to perform the equal work. The equal work standard does not require that compared jobs be identical, only that they be substantially equal.

Equal Pay Act, Testing Equality of Jobs, 29 C.F.R. § 1620.14(a) and (c)

(**a) In general**. What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration. The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply. It should be kept in mind that "equal" does not mean "identical." Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay. However, differences in skill, effort or responsibility which might be sufficient to justify a finding that two jobs are not equal within the meaning of the EPA if the greater skill, effort, or responsibility has been required of the higher paid sex, do not justify such a finding where the greater skill, effort, or

responsibility is required of the lower paid sex. In determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs. Such an inquiry may, for example, disclose that apparent differences between jobs have not been recognized as relevant for wage purposes and that the facts as a whole support the conclusion that the differences are too insubstantial to prevent the jobs from being equal in all significant respects under the law.

. . .

(c) Determining equality of job content in general. In determining whether employees are performing equal work within the meaning of the EPA, the amounts of time which employees spend in the performance of different duties are not the sole criteria. It is also necessary to consider the degree of difference in terms of skill, effort, and responsibility. These factors are related in such a manner that a general standard to determine equality of jobs cannot be set up solely on the basis of a percentage of time. Consequently, a finding that one job requires employees to expend greater effort for a certain percentage of their working time than employees performing another job, would not in itself establish that the two jobs do not constitute equal work. Similarly, the performance of jobs on different machines or equipment would not necessarily result in a determination that the work so performed is unequal within the meaning of the statute if the equal pay provisions otherwise apply. If the difference in skill or effort required for the operation of such equipment is inconsequential, payment of a higher wage rate to employees of one sex because of a difference in machines or equipment would constitute a prohibited wage rate differential. Where greater skill or effort is required from the lower paid sex, the fact that the machines or equipment used to perform substantially equal work are different does not defeat a finding that the EPA has been violated. Likewise, the fact that jobs are performed in different departments or locations within the establishment would not necessarily be sufficient to demonstrate that unequal work is involved where the equal pay standard otherwise applies. This is particularly true in the case of retail establishments, and unless a showing can be made by the employer that the sale of

> one article requires such higher degree of skill or effort than the sale of another article as to render the equal pay standard inapplicable, it will be assumed that the salesmen and saleswomen concerned are performing equal work. Although the equal pay provisions apply on an establishment basis and the jobs to be compared are those in the particular establishment, all relevant evidence that may demonstrate whether the skill, effort, and responsibility required in the jobs in the particular establishment are equal should be considered, whether this relates to the performance of like jobs in other establishments or not.

Equal Pay Act, Jobs Requiring Equal Skill in Performance, 29 C.F.R. § 1620.15(a)

> **In general**. The jobs to which the equal pay standard is applicable are jobs requiring equal skill in their performance. Where the amount or degree of skill required to perform one job is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job. If an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the EPA as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job. Possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill. The efficiency of the employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill.

Equal Pay Act, Jobs Requiring Equal Effort in Performance, 29 C.F.R. § 1620.16(a) and (b)

> **(a) In general**. The jobs to which the equal pay standard is applicable are jobs that require equal effort to perform. Where substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Effort is concerned with the measurement of the physical or mental exertion

needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered in determining the effort required by the job. "Effort" encompasses the total requirements of a job. Where jobs are otherwise equal under the EPA, and there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort required to be expended in such a situation will not justify wage differentials.

(b) Comparing effort requirements of jobs. To illustrate the principle of equal effort exerted in different ways, suppose that a male checker employed by a supermarket is required to spend part of his time carrying out heavy packages or replacing stock involving the lifting of heavy items whereas a female checker is required to devote an equal degree of effort during a similar portion of her time to performing fill-in work requiring greater dexterity—such as rearranging displays of spices or other small items. The difference in kind of effort required of the employees does not appear to make their efforts unequal in any respect which would justify a wage differential, where such differences in kind of effort expended to perform the job are not ordinarily considered a factor in setting wage levels. Further, the occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort. Suppose, however, that men and women are working side by side on a line assembling parts. Suppose further that one of the men who performs the operations at the end of the line must also lift the assembly, as he completes his part of it, and places it on a waiting pallet. In such a situation, a wage rate differential might be justified for the person (but only for the person) who is required to expend the extra effort in the performance of his job, provided that the extra effort so expended is substantial and is performed over a considerable portion of the work cycle. In general, a wage rate differential based on differences in the degree or amount of effort required for performance of jobs must be applied uniformly to men and women. For example, if all women and some men performing a particular type of job never perform heavy lifting, but some men do, payment of a higher wage rate to all of the men would

constitute a prohibited wage rate differential if the equal pay provisions otherwise apply.

Equal Pay Act, Jobs Requiring Equal Responsibility in Performance, 29 C.F.R. § 1620.17(a) and (b)(3)

(a) In general. The equal pay standard applies to jobs the performance of which requires equal responsibility. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations. The following illustrations in subsection (b), while by no means exhaustive, may suggest the nature or degree of differences in responsibility which will constitute unequal work.

(b) Comparing responsibility requirements of jobs.

…..

(3) On the other hand, there are situations where one employee of the group may be given some minor responsibility which the others do not have (e.g., turning out the lights in his or her department at the end of the business day) but which is not of sufficient consequence or importance to justify a finding of unequal responsibility. As another example of a minor difference in responsibility, suppose that office employees of both sexes work in jobs essentially alike but at certain intervals a male and female employee performing otherwise equal work within the meaning of the statute are responsible for the office payroll. One of these employees may be assigned the job of checking time cards and compiling the payroll list. The other, of the opposite sex, may be required to make out paychecks, or divide up cash and put the proper amounts into pay envelopes after drawing a payroll check. In such circumstances, although some of the employees' duties are occasionally dissimilar, the difference in responsibility involved would not appear to be of a kind that is recognized in wage administration as a significant factor in determining wage rates. Under such circumstances, this difference would seem insufficient to justify a wage rate differential between the man's and woman's job if the equal pay provisions otherwise apply.

Equal Pay Act, Pay Differentials Claimed to be Based on Extra Duties, 29 C.F.R. § 1620.20

> Additional duties may not be a defense to the payment of higher wages to one sex where the higher pay is not related to the extra duties. The Commission will scrutinize such a defense to determine whether it is bona fide. For example, an employer cannot successfully assert an extra duties defense where:
> (a) Employees of the higher paid sex receive the higher pay without doing the extra work;
> (b) Members of the lower paid sex also perform extra duties requiring equal skill, effort, and responsibility;
> (c) The proffered extra duties do not in fact exist;
> (d) The extra task consumes a minimal amount of time and is of peripheral importance; or
> (e) Third persons (i.e., individuals who are not in the two groups of employees being compared) who do the extra task as their primary job are paid less than the members of the higher paid sex for whom there is an attempt to justify the pay differential.

Oregon Equal Pay Act, Work of Comparable Character, Or. Admin. R. 839-008-0010

> (1) As used in ORS 652.210 to ORS 652.235 and these rules, "work of comparable character" includes substantially similar knowledge, skill, effort, responsibility and working conditions as defined or described as follows, with no single factor being determinative:
> . . . .
> (d) Responsibility considerations may include, but are not limited to, the following:
> (A) Accountability, decision-making discretion or impact of an employee's exercise of their job functions on the employer's business;
> (B) Amount, level or degree of significance of job tasks;
> (C) Autonomy or extent to which the employee works without supervision;
> (D) Extent to which the employee exercises supervisory functions; or
> (E) Extent to which an employee's work or actions expose an employer to risk or liability.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-35428

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CERTIFICATE OF SERVICE

I certify that on September 23, 2019, a true copy of the **APPELLANT'S OPENING BRIEF** was served as indicated below:

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