IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. Equal Employment Opportunity Commission, Plaintiff, v. The George Washington University, Defendant.	Civil Action No. 1:17-cv-01978-CKK

REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION OF DEFENDANT THE GEORGE WASHINGTON UNIVERSITY
TO DISMISS THE COMPLAINT OR, ALTERNATIVELY, STAY PROCEEDINGS

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SUMMARY OF ARGUMENT

The Equal Employment Opportunity Commission (the "Commission" or "EEOC") pleaded this deeply flawed action against the George Washington University ("the University" or "GW") as a failure-to-promote case based on the University's decision to hire Michael Aresco (the Assistant Athletics Director for Operations, Events and Facilities), rather than Sara Williams (the Athletics Director's Executive Assistant), for the position of Special Assistant to the Athletics Director. Faced with irrefutable authority that this failure-to-promote theory fails because Williams never applied for that position—and perhaps recognizing that if the Special Assistant position was, indeed, a promotion, it could not be "equal" under the Equal Pay Act ("EPA")—the Commission essentially abandons the theory, denying that the position was a promotion, and shifts focus to other supposedly discriminatory practices. Even this latest iteration is self-defeating: If, in fact, Williams was performing "less favorable job duties" than Aresco while his "importance" and "opportunities" were "enhanced," EEOC Br. 5, 28, 29, then by definition they were not performing "equal work."

All of this leaves the University and this Court with no clear indication of the basis for the Commission's claims. The Commission has failed to take a firm position on the central issue under the EPA—Williams's and Aresco's core duties. It has sewn confusion as to the adverse actions underlying its Title VII claims. And it has never explained why it thinks any of the University's actions were motivated by sex-based discrimination. Indeed, this hide-the-ball approach appears to be tactical. On the same day the University filed its motion to dismiss, the Commission sent it a letter denying a request for documents under the Freedom of Information Act ("FOIA") on the grounds that disclosure would "reveal the nature, direction, and scope of [its] case" in this lawsuit. Supp. Rozen Decl., Ex. 1 ("FOIA Denial Letter"), at 3. The Commission thus admits it is hiding its theory of liability even after filing this action.

These flaws warrant dismissal not only because the Commission has failed to allege "sufficient factual matter" to "allo[w] the court to draw the reasonable inference that the [University] is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), but also because they impede the basic notice function of pleading: to provide "'fair notice'" to the defendant of the "'grounds upon which [the claims] res[t],'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), so it can "'prepare an adequate defense,'" *Carter v. Bank of Am., N.A.*, 888 F. Supp. 2d 1, 12 (D.D.C. 2012). Without knowing the "nature, direction, and scope of [the Commission's] case," FOIA Denial Letter, at 3, the University could not meaningfully participate in the required conciliation process, and it cannot meaningfully defend itself now. This Court should thus dismiss the Complaint, and should deny leave to amend because amendment would be futile, and the Commission's tactical decision to conceal the nature of its claims reflects bad faith. Alternatively, this Court should stay this action to give the University a fair chance to participate in conciliation after learning the specific allegations against it.

ARGUMENT

I. The Complaint Should Be Dismissed Without Leave To Amend.

A. The Commission's Equal Pay Act Claims Should Be Dismissed Because The Commission Fails To Adequately Allege That Williams And Aresco Performed Equivalent Work.

The Commission fails to justify its barebones approach to pleading what it now casts as its lead claim, alleging pay discrimination under the EPA. The main issue is whether Williams's and Aresco's positions involved "equal work" requiring "equal skill, effort, and responsibility," for which Williams was entitled to equal pay. 29 U.S.C. § 206(d)(1). Yet the Complaint is silent as to the Special Assistant's duties, save for the vague statement that the position involved "high-level administrative support." Compl. ¶ 23. The EEOC's brief focuses on *differences* between the positions, EEOC Br. 12-14, but still fails to name the Special Assistant's duties, and only

sews further confusion as to what duties the Commission believes Williams had. Indeed, to the extent they speak to this issue, both the Complaint and the EEOC's brief suggest that Aresco's position involved more "importan[t]" responsibilities and "enhanc[ed] … opportunities," Compl. ¶ 20, while Williams performed "less favorable job duties," EEOC Br. 28.

Moreover, neither the Complaint nor the Commission's brief reveals what the Commission believes the two positions had in common that could possibly justify pursuing this action. Remarkably, the Commission's view is that none of this is needed. It disclaims any need to allege that the two positions involved "equal skill, effort, and responsibility" as expressly required by the statute. EEOC Br. 18 n.7. That approach flies in the face of this Court's holding that a plaintiff must "allege facts supporting the inference" of "'substantially equal work … requir[ing] substantially equal skill, effort, and responsibility.'" *Clay v. Howard Univ.*, 128 F. Supp. 3d 22, 31 (D.D.C. 2015). The Commission never tries to square its views with the many decisions dismissing EPA claims by plaintiffs who failed to describe adequately the positions or the skill, effort, and responsibility involved. GW Br. 20. The Commission's blanket response—asserting without explanation or citation that each case involved distinct "facts, circumstances, and allegations," EEOC Br. 20—is "perfunctory and undeveloped," and thus forfeited, *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013), and meritless.

The Commission tries to minimize the "equal skill, effort and responsibility" requirement by painting it as mere regulatory guidance on the meaning of "equal work" under 29 C.F.R. § 1620.14, arguing that "[n]othing *in the regulation* indicates" that "equal skill, effort, and responsibility" is a "test" for "assessing pleadings at the motion to dismiss stage." EEOC Br. 18 n.7 (emphasis added). But that test is mandated by *statute*: The EPA's plain text prohibits pay disparities only "for equal work on jobs the performance of which requires equal skill, effort, and

responsibility." 29 U.S.C. § 206(d)(1). Because the Complaint does not plausibly allege that Williams's and Aresco's positions involved equal skill, effort, and responsibility, it was lawful to pay them differently, and the Commission has not stated a claim. Indeed, the allegations of the Complaint are not only "consistent with" with lawful activity, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007), but more consistent with lawful than unlawful activity: The Complaint alleges that Aresco was paid roughly double what Williams was paid for a position the EEOC describes as "providing high-level administrative support to the Director." Compl. ¶ 15(a).

The Commission's contrary view rests on a fundamental misunderstanding of basic employment-law concepts. It argues that under *Swierkiewicz*, "a plaintiff need not plead prima facie elements to satisfy pleading requirements," and thus need not plead equal skill, effort, and responsibility. EEOC Br. 18 n.7. But "*Swierkiewicz* held only that discrimination complaints are subject to the requirements of Rule 8"—the ordinary pleading standard in all actions—rather than a "heightened" standard based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 254 (2d Cir. 2014). The Court explained that *McDonnell Douglas* is an "evidentiary standard" that permits, but does not require, plaintiffs to "rais[e] an inference of discrimination" by proving certain elements, called a "prima facie case," in lieu of "direct evidence" of discrimination. *Swierkiewicz*, 534 U.S. at 510-11. Because a plaintiff may ultimately "prevail" through direct evidence "without proving all the elements of a [*McDonnell Douglas*] prima facie case," *Swierkiewicz* held that the plaintiff need not *plead* those elements. *Id.* at 511. There is, of course, a critical difference between a prima facie case under *McDonnell Douglas*, which need not always be pleaded because it is just one way to prove liability, and the requirement of "equal skill, effort, and responsibility," which is an essential element—indeed, *the* essential element—of liability under 29 U.S.C. § 206(d)(1), and therefore

must be pleaded with sufficient facts to state a plausible claim for relief.

The Commission does not cite a single case in which a similar, equally threadbare EPA claim survived dismissal. The only cases it cites, *Clay* and *Ghayyada v. Rector & Visitors of the Univ. of Va.*, 2011 WL 4024799 (W.D. Va. Sept. 12, 2011), are easily distinguished, confirming that it can find no relevant precedent for denying the University's motion. In *Clay*, this Court held that the plaintiff had adequately pleaded an EPA claim by comparing her wages to those of her "successor" to the *same position*. 128 F. Supp. 3d at 31. There was thus no need to compare the duties of distinct positions. Though the Court mentioned other possible comparators, it never suggested that the allegations about them could survive standing alone. *Ghayyada*, meanwhile, is unpublished and involved a pro se plaintiff. 2011 WL 4024799, at *1. The Commission, by contrast, has been litigating EPA claims for decades and had the benefit here of a thorough investigation—and according to the Commission, "record evidence"—in drafting the Complaint, Dkt. 10-3 ("Letter of Determination"), at 1-3. It must be held to more than the "less stringent standar[d]" for pleadings of a pro se litigant drafted without the aid of a lawyer. *Christmas v. Arc of the Piedmont, Inc.*, 2012 WL 2905584, at *2 (W.D. Va. July 16, 2012).

The Commission's flawed view of the applicable pleading standard explains but cannot justify the sparsity of the Complaint. Its half-hearted, confused attempt to argue that it adequately pleaded equal work succeeds only in highlighting the grounds for dismissal.

1. At the outset, the Commission still fails to identify Aresco's core duties. It names just one—"coordinat[ing] 'administrative staff' members," EEOC Br. 13—without suggesting that this was Aresco's sole core duty. That alone is fatal: It leaves this Court with no way to draw any inference about equal work, and deprives the University of "fair notice" of the alleged duties that are the "grounds" for the EPA claims. *Swierkiewicz*, 534 U.S. at 514.

The Commission tries to paper over this failure by pointing to the "Special Assistant job posting," which it claims was "incorporated by reference in the Complaint." EEOC Br. 10. But the Commission did not allege in the Complaint, and has not argued here, that the duties in the job posting reflect Aresco's "actual job requirements and performance"—the decisive question under the Commission's regulations, 29 C.F.R. § 1620.13(e). Instead, it contends that the position changed over time, EEOC Br. 7, and studiously avoids any representation in the Complaint or its brief that Aresco's duties were the ones listed in the initial posting. Indeed, in its brief, the Commission contends that Aresco was "groom[ed]" for "advancement" with more favorable "employment opportunities," EEOC Br. 5—the exact opposite of equal work.

2. The Commission's allegations regarding Williams's position are also deficient, and only made more deficient by the Commission's change of position in its brief.

The Complaint does not detail Williams's responsibilities as Executive Assistant, and instead lists only some "work [she allegedly] performed," including "leading the [Department's] administrative function" or managing "special projects." Compl. ¶ 15. There is no allegation that she performed those duties regularly throughout her tenure or that they represented a significant part of her job. The Commission's own authorities make clear why this deficiency is fatal: Two positions are equal only if they involve a "'common core of tasks.'" EEOC Br. 16 (quoting *Brinkley-Obu Hughes Training, Inc.*, 36 F.3d 336, 351 (4th Cir. 1994)). "The inquiry focuses on the primary duties of each job, not those which are incidental or insubstantial." *Goodrich v. Int'l Bhd. of Elec. Workers,* 815 F.2d 1519, 1524 (D.C. Cir. 1987). The Commission does not allege that the "work" it claims Williams "performed," Compl. ¶ 15, represented her "primary duties," *Goodrich*, 815 F.2d at 1524. As a result, the allegations, even if true, could mean that Williams managed a *single* "special project[t]" or "le[d] the

administrative function" of the Department for a transitional period while other personnel at the Department were in flux. Compl. ¶ 15(b), (g). Yet in those circumstances, the Commission could not rely on that work to establish Williams's "primary" duties. The Commission cannot artfully plead its way around the requirements of equal work and equal skill, effort, and responsibility by reciting temporary or one-time assignments as "work" Williams "performed."

The Commission's response reveals a critical error in its decision to bring this action. It claims that under its regulation, 29 C.F.R. § 1620.14(c), "how often Williams performed each job task" is not relevant. That overreads Section 1620.14(c) in a way that cannot be squared with the EPA or the cases applying it. Section 1620.14(c) provides that "the amounts of time which employees spend in the performance of different duties are not the sole criteria" for equal work. But that cannot mean that employees in lower-skilled positions who sporadically or temporarily perform higher-skilled tasks must be paid the same as employees who perform those higher-skilled tasks full time, as their "primary duty." That would not be a plausible interpretation of the statutory requirement of "equal skill, effort, and responsibility," 29 U.S.C. § 206(d)(1), and would improperly compel equal wages even in circumstances where persons of the same sex customarily are paid differently, *contra* 29 C.F.R. § 1620.14(a).

Indeed, courts regularly reject EPA claims where the lower-paid employee "performed some duties" of a higher paid position but "did not perform them with the same frequency." *Nulf v. Int'l Paper Co.*, 656 F.2d 553, 560 (10th Cir. 1981). In *Nulf*, for example, the Tenth Circuit held that a secretary-receptionist who spent "half her time on secretarial and receptionist duties" and the rest on "order desk tasks" did not perform substantially equal work to full-time order-desk employees. *Id*. Similarly, in *Gunther v. County of Washington*, the Ninth Circuit held that female prison guards who spent half of their time guarding prisoners and half performing clerical

duties did not perform work substantially equal to male prison guards who spent most of their time guarding prisoners. 623 F.2d 1303, 1309-10 (9th Cir. 1979). And in *Katz v. School District of Clayton,* the Eighth Circuit held that a teacher's assistant who did not spend the majority of her time teaching did not perform substantially equal work to full-time teachers. 557 F.2d 153, 156 (8th Cir. 1977). These outcomes are obviously correct. Yet there is nothing in the Commission's allegations about "work [Williams] performed"—other than vagueness—to differentiate them from these cases. Vagueness alone will not save the Complaint, which must be more than merely "consistent with" unlawful conduct, where the circumstances alleged are also "in line with" lawful conduct. *Twombly*, 550 U.S. at 554.

3. Faced with the deficiencies in the allegations in its Complaint about Williams's duties, the Commission tellingly changes course, seizing on—and centering its EPA argument on—the University's description of the Executive Assistant position, Dkt. 10-5 ("EA Position Description"), rather than the duties alleged in the Complaint. EEOC Br. 8-10, 12-14.[1] Although the description was not cited in the Complaint, the Commission contends that it is nonetheless before the Court for all purposes because the University cited it. EEOC Br. 10. But the University cited the description only to clarify a statement in the EEOC's Letter of Determination that mischaracterized the description. GW Br. 5 n.3. The EEOC has not alleged that the position description reflects Williams's actual duties. Its brief merely "assum[es]" that the description "is accurate." EEOC Br. 9. Even if allegations in its brief could cure the

[1] The Rozen Declaration inadvertently characterized this document as the "job posting" for the Executive Assistant position. See Dkt. 10-2, Rozen Decl. ¶ 6. The University's brief correctly characterized the document as a "description" of the position. GW Br. 5. Although the EEOC is correct that the University submitted the document to the Commission as a "description" of the position, not as a "job posting," EEOC Br. 8-9 n.3; Suppl. Rozen Decl. ¶ 4, this distinction is not significant at this stage. Indeed, while this Court need not consider the actual posting, it lists the same qualifications and duties, verbatim. Conners Decl., Ex. 1 ("EA Job Posting").

Complaint's deficiencies (*contra Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 165 n.10 (D.D.C. 2014) (Kollar-Kotelly, J.)), that noncommittal "assum[ption]" surely cannot. Instead, the Commission's constantly shifting position deprives the University of "fair notice" of "the grounds upon which [the claims] rest." *Swierkiewicz*, 534 U.S. at 514.

To make matters worse, the Commission grossly mischaracterizes the Executive Assistant position, attempting to add duties that appear nowhere in the Complaint or the description. The "Job Duties" in the description are ordinary secretarial duties: handling the Director's calendar and task list; scheduling meetings, appointments, and travel; filing receipts; submitting expense reports ("tracking expenses"); and filing documents. EA Position Description, at 1. Yet the Commission casts the position as a "management" role with significant "budget responsibilities," EEOC Br. 13, by quoting selectively and out-of-context, conspicuously omitting key words, and drawing unsupportable inferences. For example:

- The position description tasks the Executive Assistant with "[c]oordinat[ing] *with*" (*i.e.*, working together with) "appropriate staff" on specific tasks—"briefings, documenting of donor contacts, and processing out of follow up." EA Position Description, at 1 (emphasis added). The Commission drops the word "with" and says that Williams "is described as *coordinating staff*," implying that she oversees them. EEOC Br. 13-14 (emphasis added). The Commission even suggests that "coordinat[ing] with" staff on these tasks is somehow a *greater* responsibility than the Special Assistant's role in "coordinat[ing] 'administrative staff' members," *id.* at 13—a *general* duty that is not constrained by the word "with" or narrowly limited to specific tasks such as briefings.
- The Commission highlights the position description's statement that the Executive Assistant "'[p]lans and manages' the Athletics Director's 'donor meetings,'" EEOC Br.

13 (quoting EA Position Description, at 1), but ignores the rest of that sentence, which clarifies the position's precise role in planning and managing those meetings: "scheduling appointments and preparing travel itineraries." EA Position Description, at 1.

- The Commission remarkably casts "filing financial receipts and tracking expenses," EA Position Description, at 1, as "working on financial … matters" and "having budget responsibilities," EEOC Br. 13, falsely implying a degree of skill and responsibility far beyond the skill required for those specific clerical tasks.
- The Commission argues that Williams "serv[ed] in a leadership role by 'assisting with the hiring and management of student employees and interns.'" EEOC Br. 13 (quoting EA Position Description, at 1) (alteration omitted). But "assisting" with those functions could mean scheduling interviews and entering time worked, not leadership. The EEOC has not made any allegations about *how* Williams assisted in hiring and management.
- The position description states that the Executive Assistant "[c]oordinate[s] communication and workflow" between the Director, Department staff, and campus colleagues, EA Position Description, at 1, which could mean moving paperwork between the Athletics Director and others. *Id.* Yet the Commission somehow takes that to mean Williams was responsible for "the effective division of labor" in the Department. EEOC Br. 12. Nothing in the Complaint or position description supports that inference.
- The position description describes the Executive Assistant as an "administrative interface" between the Director, the University, and Athletics Conference colleagues. EA Position Description, at 1. Yet the Commission describes Williams more broadly as "*the* interface" between those constituencies—adding "the" and dropping "administrative"—and as "the outward facing representative" of the Department, EEOC Br. 10 (emphasis

added), implying exclusive authority to speak for the Department, rather than merely answering the phone and helping others with "administrative" matters such as scheduling. In short, to make the Executive Assistant position look like the Special Assistant position, the Commission has to close one eye and squint.[2]

4. The Commission exacerbates these deficiencies by taking a backwards approach to showing that the two positions are equal. Rather than explain why Williams's alleged duties involved equal skill, effort and responsibility to Aresco's, the Commission's argument is that Williams did not "deserv[e] lower pay than Aresco," because her job was "more wide-ranging, leadership oriented, and impactful on a broader scale" than his. EEOC Br. 9, 11. In other words, the Commission believes it can state an EPA claim based solely on allegations that Williams and Aresco performed *different* work and a subjective determination about which position involved "greater skill, effort, or responsibility." *Id.* at 11.

Congress specifically refused to adopt the Commission's approach. In enacting the EPA, Congress "carefully considered and ultimately rejected" a version of the statute that would have required employers to offer equal pay for "comparable work." *Cty. of Wash. v. Gunther*, 452 U.S. 161, 184 (1981) (Rehnquist, C.J., dissenting) (citing legislative history not refuted by the majority). Recognizing that this standard would have "involve[d] both governmental agencies

[2] The Commission's suggestion that the University somehow mischaracterized its Letter of Determination, EEOC Br. 8 n.2, borders on the absurd. As the University explained, the letter described Williams's and Aresco's positions "as providing, at the broadest level of generality, 'high-level administrative support to the Director.'" GW Br. 5 (quoting Letter of Determination, at 2). The Commission objects that the letter "does not *say* … broadest level of generality." EEOC Br. 8 n.2 (emphasis added). That misses the point. What the letter does say—that both positions provided "high-level administrative support," Letter of Determination at 2—is so vague, and at such a broad level of generality, as to be meaningless, and certainly insufficient to support an EPA claim or to "inform the [University] about the *specific* allegation" so as to permit conciliation, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1655 (2015) (emphasis added).

and courts in the impossible task of ascertaining the worth of comparable work, an area in which they have little expertise," *id.*, Congress instead chose to require equal pay only for "equal work," 29 U.S.C. § 206(d)(1). "By substituting the term 'equal work' for 'comparable work,' … Congress manifested its intent to narrow the applicability of the Act" from claims based on positions with "comparable skill and responsibility" to those based on "a substantial identity of job *functions*." *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972) (emphasis added); *see also Goodrich*, 815 F.2d at 1524 (jobs "must be more than merely 'comparable'"). Congress thus made clear that it "did not intend for courts to compare the value of different jobs." *Koster v. Chase Manhattan Bank, N.A.*, 609 F. Supp. 1191, 1193 (S.D.N.Y. 1985). Courts have therefore rejected efforts to prove "equal work" by comparing the "skill, effort, responsibility, and working conditions" of jobs with different "content." *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175 (3d Cir. 1977).

The Commission contends, however, that pursuant to its regulations, "[d]ifferences in skill, effort, or responsibility do not justify a finding of unequal work under the EPA where the lesser-paid employee is the one who is required to perform a job of greater skill, effort, or responsibility." EEOC Br. 11 (citing 29 C.F.R. § 1620.14). But that does not mean that the Commission can state an EPA claim based entirely on differences between two positions. To the contrary, the Commission's cases (EEOC Br. 11-12) make clear that this principle comes into play only *after* the plaintiff has shown that the positions at issue share a "common core of tasks." *Brinkley-Obu*, 36 F.3d at 351. In *Brinkley-Obu*, for example, the plaintiff showed equal work with evidence that "she was performing the … position that [her comparator] had performed." *Id.* at 352. The Fourth Circuit thus affirmed a jury finding of liability even though the plaintiff "also perform[ed] … additional responsibilities" that were "greater and more difficult." *Id.*

Although the court concluded that those "additional duties … d[id] not remove the claim from the ambit of the Equal Pay Act," it never suggested that the plaintiff could prove her claim based on those "additional duties" alone. *Id*. Similarly, in *Riordan v. Kempiners*, the Seventh Circuit held that the same principle permits a supervisor to prove an EPA claim by comparison to her subordinates if "the *only difference* in work between the supervisor and the supervised is the supervisory responsibilities of the former." 831 F.2d 690, 699 (7th Cir. 1987) (emphasis added). Even if that meant that additional supervisory duties cannot *defeat* liability, it also means those duties cannot by themselves *establish* liability without a showing that the duties of the supervisor and supervised are otherwise equal. The same is true here: Even if this Court could look past any duties performed uniquely by Williams and not by Aresco, the Commission would still need to plausibly allege that Williams and Aresco shared the same core tasks.

The Commission cannot meet that burden even at the pleading stage. Indeed, its attempt to do so contradicts its own allegations that the Department "assign[ed] Williams less favorable job duties," while "grooming" Aresco for greater responsibility. EEOC Br. 5, 28. Even accepting the Commission's position in its brief that the relevant comparison is between the Executive Assistant job description and the Special Assistant job posting, the Special Assistant's duties go far beyond those of the Executive Assistant position. According to those documents:

- The Special Assistant "[l]ead[s] the administrative function" of the Director's office. The Executive Assistant has no comparable duties.
- The Special Assistant "[c]oordinat[es] administrative staff members," implying leadership responsibilities, whereas the Executive Assistant merely "coordinate[s] *with*" others, *i.e.* works with others, on a narrow set of tasks.
- The Special Assistant is tasked with "[m]aintaining the external face" of the office. The

Executive Assistant is merely an "*administrative* interface" with specific constituencies.

- The Special Assistant manages special projects. The Executive Assistant does not.
- The Special Assistant is described as "[s]enior [s]taff." The Executive Assistant is not.

Dkt. 15-1, Ex. B-6 ("SA Job Posting"), at 1-2 (emphasis added); EA Position Description, at 1. The Commission has never alleged that those unique duties of the Special Assistant were Williams's *core duties*.

The Commission falls back on its conclusory allegations of "equal work," and that "Williams and Aresco worked as assistants to the same Athletics Director and performed equal work." EEOC Br. 17. But it does not deny that "mere conclusory statements … do not suffice." *Iqbal*, 556 U.S. at 678. And just four pages later—attempting to distinguish *Port Authority*—it disclaims any argument that "that Williams was entitled to equal pay because she and Aresco were both assistants." EEOC Br. 21. Just as *Port Authority* rejected the EEOC's argument that "'attorneys are all the same,'" *id*., neither are all assistants the same. Because there is nothing more to the EPA claims, those claims should be dismissed.

B. The Commission's Shifting Title VII Claims Should Also Be Dismissed.

On its Title VII claims, the Commission again pivots from the now-discredited theories of liability underlying its Letter of Determination and Complaint, leaving only doubt and confusion about the basis for the Commission's claims.

Williams's original Charge cast her allegations as based on failure to promote, alleging that she was "discriminated against on the basis of sex … in violation of Title VII" when "a male coworker … was … promoted" to a higher-paying position for which she believed she was "as qualified, if not more qualified." Dkt. 14-1 ("Charge of Discrimination"), at 1. That remained the Commission's theory in its Letter of Determination, which expressed the Commission's view

that the University had "discriminat[ed] against [Williams] because of gender when [it] failed to select [her] for … the Special Assistant position." Letter of Determination at 3. The Complaint gives every indication that the Commission is pursuing the same failure-to-promote theory: It again alleges that the University "discriminated against [Williams] by failing to provide her with promotional opportunities," and the only possible "promotional opportunity" mentioned in the Complaint is the "Special Assistant job posting." Compl. ¶¶ 24, 38. The University could hardly be faulted for believing—both in drafting its motion to dismiss and in responding to the Commission's conciliation offers—that despite Williams's failure to apply to the Special Assistant position, the Commission viewed this primarily as a failure-to-promote case.

In its brief, however, the Commission appears to abandon its original failure-to-promote claims. To be sure, the Commission continues to complain that the University "hired Aresco as Special Assistant" after Williams was allegedly "deterred and dissuaded … from applying for the job." EEOC Br. 22. But it also vehemently denies that the Special Assistant position was a "promotion," curiously contending that to defeat the Commission's claims, it is the *University* that must "fil[e] … evidence proving that the Special Assistant job posting offered Williams a promotion." *Id.* at 24. The Commission then accuses the University of attempting to "transform the … Title VII pay discrimination allegations into a failure-to-promote claim." *Id.* at 24-25. All of this suggests that the Commission is *not* pursuing a failure-to-promote claim. That would be a welcome concession for the University but for the Commission's continued attempt to claim injury as a result of the University's promotion of Aresco, *id*. at 27, and to quarrel with the University's grounds for dismissing the claims based on that promotion, *id.* at 25-26, without offering any basis other than the failure-to-promote claim. All of this is consistent with the Commission's statement in denying the University's FOIA request that it does not intend to

"reveal the nature, direction, and scope of [its] case." FOIA Denial Letter, at 3. The result is to deprive the University of "fair notice" of the "grounds" for the Commission's claims, *Swierkiewicz*, 534 U.S. at 514, leaving it unable to "'prepare an adequate defense,'" which both compels dismissal of the Title VII claim, *Carter*, 888 F. Supp. 2d at 12, and underscores why the University has been deprived of a meaningful opportunity to conciliate.

The Commission accordingly devotes most of its argument to refuting a point that it concedes the University "does not even advance": that the Title VII *pay-discrimination* claim should be dismissed because Williams did not apply for the Special Assistant job. EEOC Br. 24. But the University raised Williams's failure to apply solely as a basis for dismissing the *failure-to-promote* claim that until the Commission's brief appeared to be its principal claim against the University. The University's argument for dismissing the pay-discrimination claim under Title VII is different: That claim is based on the same equal-pay-for-equal-work theory as the Commission's EPA claim, and thus must be reviewed "'under the same standard.'" GW Br. 17.[3] The Commission ignores that argument in contending that the University "does not claim that the Commission has failed to sufficiently allege unlawful pay disparities under Title VII." EEOC Br. 24. As a result, it never addresses the key point: If the EPA claim is dismissed, the Title VII pay-discrimination claim must be dismissed as well "for the same reason." GW Br. 17.

To the extent the Commission now contends that it has alleged *other* unlawful pay practices not premised on equal work, there is no hint of those claims in the Complaint. The only other University actions that the Complaint mentions as alleged adverse actions are those

[3] Even under a distinct standard, the Commission's pay discrimination claim would still fail because the Commission has not alleged "a transparently sex-biased system for wage determination," *Gunther*, 452 U.S. at 178-79, or any other basis for inferring that the Executive Assistant position's salary was determined as a result of sex-based discrimination. Indeed, there are no facts alleged supporting discrimination at all. GW Br. 12.

addressed in the University's motion: failing to promote Williams to Special Assistant, and assigning her less favorable job duties. Compl. ¶¶ 20, 22-26, 38. Neither are "pay" practices. And while the Commission now points to its allegation that continued preferential treatment of Aresco after he was hired as Special Assistant "adversely impact[ed] [Williams's] compensation rate and opportunities for advancement," *id*. ¶ 30; *see* EEOC Br. 26, that is far too vague to give "fair notice" of the "grounds" for the Commission's claims, *Swierkiewicz*, 534 U.S. at 514, and far too "conclusory" to merit any weight at the motion to dismiss stage, *Iqbal*, 556 U.S. at 678. The Complaint's "fail[ure] to identify opportunities wrongly denied to [Williams] with any specificity" compels dismissal. *Manuel v. Potter*, 685 F. Supp. 2d 46, 66-67 (D.D.C. 2010).

If the Commission's point is that Williams's "compensation rate and advancement opportunities" were impaired because she was assigned unfavorable job duties such as training Aresco and running errands, Compl. ¶¶ 20, 38; EEOC Br. 29, it has not alleged any facts to support that conclusory allegation. That allegation is also directly at odds with the EPA claim, which alleges that despite these alleged unfavorable job duties, Williams performed certain duties of the Special Assistant position. The Commission fails to explain why also performing additional duties would negatively impact Williams's compensation or opportunities, and it does not deny that assigning Williams these tasks is otherwise not actionable, *see* GW Br. 14-16.

The Commission's brief identifies two additional actions after Aresco was hired—"'renam[ing]'" Aresco as "Assistant Athletics Director" (the name of his prior position) and allegedly "grant[ing] [him] subsequent pay raises," EEOC Br. 29—but neither was adverse to Williams. The former (the title change) is not in the Complaint, and no one would read the Complaint as alleging that the latter (allegedly increasing Aresco's salary) was an adverse action against Williams. The idea that either action could "adversely impac[t] Williams's

compensation rate," *id.* at 26, makes no sense. The Commission never explains that outlandish theory and fails to cite a single case finding liability under Title VII on that basis.

To the extent the Commission still intends to pursue a failure-to-promote claim based on the University's selection of Aresco rather than Williams as Special Assistant, the University's grounds for dismissing that claim are not "moot" (as the Commission contends, EEOC Br. 23), and the claim must be dismissed. The Commission's contention that the position was not a promotion bars any argument that this hiring decision was an "adverse employment action," as required for liability. *Baloch v. Kempthorne*, 550 F.3d 1191, 1196 (D.C. Cir. 2008). And as explained in the University's motion, GW Br. 8-14, Williams's failure to apply for the position also warrants dismissal of any claim premised on hiring Aresco rather than Williams.

Though the University cited more than a dozen cases holding that failure to apply for a position defeats a failure-to-promote claim—including six at the motion to dismiss stage, two of which were from this Court—the Commission addresses only one, *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998). Relying on *Barrett v. Forest Laboratories, Inc.*, 39 F. Supp. 3d 407 (S.D.N.Y. 2014), the Commission argues that *Brown* was abrogated by *Swierkiewicz*'s holding that a plaintiff need not plead a prima facie case under *McDonnell Douglas*, 534 U.S. at 510. EEOC Br. 25. But *Barrett* expressly declined to "determine the … relationship between *Brown* and *Swierkiewicz*," and it recognized that "several courts in [the same] District" have continued to "rel[y] on *Brown* [after *Swierkiewicz*] to dismiss failure-to-promote claims where [the] plaintiff failed to allege that he or she applied for an open position." 39 F. Supp. 3d at 442.

The Commission has no response to the many post-*Swierkiewicz* cases the University cites (GW Br. 8-12)—including *Magowan v. Lowery*, 166 F. Supp. 3d 39, 69 (D.D.C. 2016), and *Guerrero v. Vilsack*, 134 F. Supp. 3d 411, 435-36 (D.D.C. 2015). *See also Gaskins v. Williams*

& Connolly LLP, 779 F. Supp. 2d 1, 8 n.7 (D.D.C. 2011) ("In the absence of evidence that plaintiff actually applied for this position, the court does not consider this as a basis for plaintiff's claim."). Those decisions are consistent with *Swierkiewicz* because applying for the position is not only part of a prima facie case; it is "a *sine qua non* requirement" for a failure-to-promote claim. *Melendez v. SAP Andina y del Caribe, C.A.*, 518 F. Supp. 2d 344, 357 (D.P.R. 2007).

Even if there are circumstances when that requirement may be relaxed, the Commission has not alleged them here. Its main case on this issue—*International Brotherhood of Teamsters v. United States* (EEOC Br. 25)—confirms that a "nonapplicant" claiming failure-to-hire still "must show that he was a potential victim of unlawful discrimination," *i.e.*, "that he was deterred from applying for the job by the employer's discriminatory practices," and "that he would have applied for the job had it not been for those practices." 431 U.S. 324, 367-68 (1977). *Teamsters* found that an "extended pattern and practice of discrimination" could deter an employee from applying, but even then, required a showing that each individual claimant would have applied. Here, by contrast, the Commission has not adequately pleaded *any* unlawful discrimination towards *anyone* prior to the posting of the Special Assistant position, GW Br. 14, let alone that such discrimination is the reason Williams did not apply. The Commission has no response; its "fail[ure] to address" the argument "concede[s]" the point. *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003).

The Commission's only other case on this issue, *Barrett*, is also distinguishable. *Barrett* held that the plaintiff stated a failure-to-promote claim based on allegations that "management" dissuaded her from applying for a position. EEOC Br. 25. Here, by contrast, the Commission has not alleged that "management" or anyone with hiring authority dissuaded Williams from applying for the Special Assistant position. The Complaint alleges only that "Defendant's

personnel" told Williams that the University had decided to hire Aresco before it posted the position and thus "dissuaded" Williams from applying. Compl. ¶¶ 25-26. While the Commission now says that "*Defendant* told Williams" that Aresco was preselected, EEOC Br. 4 (emphasis added), that is not what the Complaint says. It is "well settled law that a plaintiff cannot amend its complaint by the briefs in opposition to a motion to dismiss." *Kingman Park*, 27 F. Supp. 3d at 165 n.10. There is no allegation that the "personnel" were supervisors whose actions are attributable to the University—indeed, the Commission does not deny that the "personnel" could even be Aresco himself. Similarly, while the Commission now contends it "alleged futility," EEOC Br. 25, it never alleged this. The Complaint does not even say that Aresco was preselected, just that Williams was told this—and not even necessarily by someone in the know. This is not a matter, as the Commission suggests, of "describ[ing] what evidence [the Commission] will use to prove [its] allegation[s]." *Id.* at 26. The Commission cannot rely on an unattributed statement without alleging it was true or attributable to the University.

In any event, the EEOC has no persuasive excuse for its fundamental failure to allege *anything* in the Complaint from which this Court can plausibly infer that any of the University's actions were motivated by sex-based discrimination. The Commission argues that under *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015), an "inference of discriminatory intent … can arise from more favorable treatment of employees not in the protected group." EEOC Br. 27-28. But the Complaint falls short of the allegations found sufficient in *Littlejohn*, which included specific facts suggesting that the plaintiff was demoted and replaced with a "less qualified" employee. 795 F.3d at 313. The Commission does not allege that Aresco was less qualified, nor does that follow from its allegation that he was not "employed by [the University] in any administrative position" before September 2015, Compl. ¶ 19—an allegation that glosses

over the undisputed fact that Aresco's prior position was as Assistant Athletics Director in the University's Athletics Department. GW Br. 4. Setting aside conclusory allegations of discriminatory intent—and the baseless and unseemly allegation, which the Commission does not even attempt to defend, that the Athletics Director was driven by a desire to "gain access" to males, Comp. ¶ 21—there is nothing in the Complaint to differentiate the University's action from any routine, non-discriminatory decision to hire one person rather than another.

This Court should therefore dismiss the Commission's Title VII claims.

C. This Court Should Deny Leave To Amend.

The Commission requests that if this Court dismisses the Complaint, it "grant the agency leave to amend." EEOC Br. 15-16. This Court "may, in its discretion, deny leave to amend in cases of 'undue delay, bad faith or futility of amendment.'" *Carty v. Author Sols., Inc.*, 789 F. Supp. 2d 131, 135 (D.D.C. 2011) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alteration omitted). Based on those considerations, leave to amend should be denied.

To start, amendment would be futile because it is apparent that the Commission's claims lack merit and that the decision to bring this action was premised on both legal error and a skewed view of the facts. The Letter of Determination makes clear that the Commission elected to bring EPA and Title VII pay-discrimination claims against the University based on its comparison of the Special Assistant job posting and the Executive Assistant position description. Letter of Determination at 2 (stating that those documents "contradic[t]" the University's position because they "describe both jobs as providing high-level administrative support"). Even setting aside the Commission's refusal, to date, to allege that either document represents the actual duties of those positions, the Commission's brief demonstrates that its comparison is flawed: The Commission has plainly misconstrued the duties in the Executive Assistant position description, and it overlooked significant differences between the duties described based on its

subjective and erroneous view of which duties deserved greater pay. Meanwhile, the Commission's constantly shifting approach to its Title VII claims proves that it is grasping at straws. Now that the Commission has disclaimed its meritless failure-to-promote claim based on the selection of Aresco as Special Assistant, it lacks any specific allegation that could possibly warrant further litigation. And even if Williams was subjected to an adverse employment action, the Commission has never identified any reason to believe that the University acted with discriminatory intent. While the Letter of Determination alluded to "record evidence" that the Commission failed to disclose, the Commission now denies that it has any secret record evidence not identified in the letter. EEOC Br. 35-36. If so—that is, if the factual allegations in the Complaint are the only relevant facts the Commission has identified—there is no point in prolonging this litigation, since the Commission cannot state a plausible claim on that basis.

On the other hand, if the Commission does have additional reasons to believe Williams and Aresco performed equal work, or that the University discriminated against Williams based on sex, its tactical refusal to reveal them in the Complaint also warrants denying leave. When a plaintiff is "aware of the facts alleged in the proposed amendment" but "fail[s] to include them in the complaint" as a "tactical maneuve[r] to force the court to consider various theories seriatim," "denial of leave to amend on grounds of bad faith may be appropriate." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 599 (5th Cir. 1981) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 332-33 (1971)); *see also Quinn for CryptoMetrics, Inc. v. Scantech Identification Beams Sys., LLC*, 2017 WL 2124487, at *2 (W.D. Tex. May 15, 2017). This Court should not reward the Commission's tactical refusal to "reveal the nature, direction, and scope of [its] case," FOIA Denial Letter, at 3, with another bite at the apple.

II. This Action Should Be Stayed Because the Commission Utterly Failed to Satisfy Its Statutory Obligation To Engage In Conciliation

If the Commission's Title VII claims are not dismissed, this action should be stayed until the Commission meets its conciliation obligations. Contrary to the Commission's assertion, the University *is* "challeng[ing] the manner in which conciliation was conducted," EEOC Br. 30, because it took place without the requisite disclosure that the University needed to participate meaningfully. The Commission's response—based on a flawed reading of *Mach Mining* and a skewed account of the Letter of Determination—cannot excuse the failure to conciliate.[4]

The Commission's flawed belief that *Mach Mining* merely requires it to "communicat[e] in some way … about an alleged unlawful employment practice," EEOC Br. 31, shows that it has failed to take that decision to heart. In fact, the Supreme Court held that the EEOC "must inform the employer about the *specific* allegation" including "what the employer has done." 135 S. Ct. at 1655-56 (emphasis added). Without disclosure of these "essential facts," the "important benefits" of disclosure "would be lost." *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 601 n.18 (1981). While the Commission claims *Mach Mining* "rejected" any requirement that the EEOC "'lay out the factual and legal basis for all its positions,'" EEOC Br. 32 (quoting 135 S. Ct. at 1654), the quoted sentence summarizes part of the employer's position that the Court *did not* specifically reject. The Commission quotes a passage recognizing its "discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions," and the "relief" demanded, *id.*, but none of that gives it discretion in carrying out the threshold requirement to "inform" the employer of the "specific allegations" against it, so as to give the

[4] The Commission also distorts the record by arguing that the "University asked the Commission to cease conciliation efforts." EEOC Br. 35. The University merely asked that "conciliation be held in abeyance until the disposition of [its] reconsideration request." Dkt. 10-6 ("Request for Reconsideration"), at 2.

employer a meaningful "opportunity to remedy the allegedly discriminatory practice." *Mach Mining*, 135 S. Ct. at 1655-56. Indeed, the Commission's own case recognizes that a disclosure "devoid of specifics" is not enough. *EEOC v. Amsted Rail Co.*, 169 F. Supp. 3d 877, 885 (S.D. Ill. 2016). While *Amsted* ultimately found that "other statements" cured the deficiencies in the Letter of Determination, *id.*, the Commission has not identified any such statements here.[5]

Given the Commission's stingy view of its disclosure obligations, it is no surprise that it never disclosed its specific allegations during conciliation. The Letter of Determination focused on a failure-to-promote claim that the Commission now apparently has disclaimed. It never identified the duties that the Commission believed made Williams's and Aresco's positions equal work, or offered any hint as to why the Commission thought the University had acted with discriminatory intent. The Commission purported to make up for this with vague references to "record evidence," but it never provided this evidence, so the University could not fill in the gaps on what was being alleged. The Commission says it "did identify" its record evidence, EEOC Br. 35 (emphasis omitted), but the letter mentions just two documents—the Executive Assistant description and the Special Assistant job posting—while omitting the "record" evidence that the Commission cites, for example, as indicating that "it would have been futile" for Williams to apply for the Special Assistant position, Letter of Determination, at 2—crucial evidence that the University needed to evaluate the Commission's allegations and meaningfully participate in conciliation. The Commission's insistence that it has no "secret evidence"—because it did not

[5] The Commission also cites *EEOC v. Lawler Foods, Inc.*, but that opinion is short on detail on what the Commission disclosed to meet its obligations. 2015 WL 8457816, at *3 (S.D. Tex. Dec. 4, 2015). The Commission's remaining cases—*EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 804-05 (5th Cir. 2016); *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1200-01 (9th Cir. 2016); and *EEOC v. Jetstream Ground Servs., Inc.*, 134 F. Supp. 3d 1298, 1315-16 (D. Colo. 2015)—hold only that in large, pattern-and-practice class actions, the EEOC need not disclose each class member's identity and negotiate each individual claim separately.

use the word "secret," EEOC Br. 34—either is false, or means that the Letter's reference to "record evidence" was a bluff. The latter would mean there is nothing to back up the Complaint beyond the inadequate support in the Letter of Determination. While it is true that the University had an "opportunity to investigate," *id.*—which it took precisely because it takes unlawful discrimination seriously, Request for Reconsideration, at 5—the investigation could not reveal the Commission's thinking. To meaningfully participation in conciliation, the University needs to know the "specific allegation[s]" against it, as *Mach Mining* requires. 135 S. Ct. at 1655-56.[6]

The Commission also argues that it need not conciliate its EPA claims, EEOC Br. 29-30, but even if true, that is irrelevant. The Commission brought those claims together with Title VII claims that it undisputedly must conciliate. To proceed in this Court under the EPA while the parties "simultaneously debate the same issues" through conciliation would be "an inefficient use of both the Court's and the parties' resources." *United States ex rel. Milestone Tarant, LLC v. Fed. Ins. Co.*, 672 F. Supp. 2d 92, 102 (D.D.C. 2009). This Court should thus exercise its "'inherent power to control the disposition of [this case] with economy of time and effort for itself, for counsel, and for litigants'" to stay both claims pending conciliation. *Stone & Webster, Inc. v. Ga. Power Co.*, 968 F. Supp. 2d 1, 11 (D.D.C. 2013) (Kollar-Kotelly, J.).

CONCLUSION

This Court should grant the motion to dismiss, or, in the alternative, stay the action and order the Commission to satisfy its statutory obligation to engage in conciliation.

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[6] The Commission requests a "hearing" on conciliation, EEOC Br. 31 n.9, but identifies no relevant evidence that it could not have simply attached to its brief. Far from requiring a hearing, *Mach Mining* makes clear that "the factfinding necessary to decide" whether the Commission met its conciliation obligations can typically be accomplished based on competing "affidavit[s]" and documentary evidence. 135 S. Ct. at 1656. This case is no exception. Nonetheless, should the Court wish to conduct a hearing to further examine whether the Commission complied with its statutory duty to conciliate, the University would welcome that.

Dated: December 15, 2017

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