IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. THE GEORGE WASHINGTON UNIVERSITY, Defendant.	Civil Action No. 1:17-cv-01978-CKK

EEOC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule of Civil Procedure 7, the United States Equal Employment Opportunity Commission hereby submits this Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss or, Alternatively, to Stay Proceedings, filed over Certificate of Service dated November 7, 2017 (Doc. 10 through Doc. 10-8).

I. INTRODUCTION

"Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'" Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974), quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was to require that "equal work will be rewarded with equal wages." Id.

Here, the University engaged in serious and willful EPA and Title VII violations when it deprived Sara Williams of equal pay for equal work. While Williams worked as the Executive Assistant to the Athletics Director, the University paid her as little as $38,500 and not more than $40,000. But once the University hired a male as Special Assistant to the Athletics Director, it paid him almost twice as much as it had paid Williams. Id. This stark wage disparity resulted in Williams earning almost $40,000 a year less than a male for performing equal work. The University's violations continued thereafter, and included broad-based sex discrimination adversely impacting Williams' compensation, future employment and promotional opportunities, advancement within the Athletics Department, terms and conditions of employment, and otherwise benefitting a male to her detriment because of sex.

The Commission seeks lost wages and other economic relief for Williams, liquidated damages under the EPA, compensatory and punitive damages under Title VII, and permanent injunctive relief to restrain the University from paying female employees lower compensation than their male counterparts for equal work, and otherwise discriminating against females. The Commission also seeks an order requiring the University to institute and carry out policies, practices, and programs which provide equal employment opportunities to females and eradicate the effects of the University's past and present unlawful employment practices.

II. STATEMENT OF FACTS

In the fall of 2014, Defendant hired Sara Williams[1] to work as the Executive Assistant to Defendant's Athletics Director, Patrick Nero. Doc. 1, PID 3, Para 14 (Complaint). As the Athletics Director's Executive Assistant, Williams performed work that included, but was not

[1] When Williams filed her EEOC Charge, she went by her maiden name, Sara Mutalib. Doc. 10-4, PID 2.

limited to: providing high-level administrative support to the Director of Athletics; leading the administrative function of the Athletics Director's office; coordinating administrative staff members; acting as the external face of the Athletics Director's office; functioning as the liaison to external departments for administrative and operational matters; handling project management for special projects in support of key priorities for the Athletics Department; and serving on the senior staff of the Athletics Department. Id., PID 4, Para 15(a)-(h). While Williams worked as the Athletics Director's Executive Assistant, Defendant paid her as little as $38,500, and her pay did not exceed $40,000 a year. Id., PID 4, Para 17.

Approximately one year later, Michael Aresco began performing work in the Administrative Suite of the Athletics Department. Id., PID 4, Para 18. Before Aresco began working in Athletics Department Administration in September 2015, Defendant had not employed him in any administrative position. Id., PID 4, Para 19.

Defendant's Athletics Director, Patrick Nero, treated Aresco more favorably than Williams because of sex. Id., PID 5, Para 20. Such sex-based preferential treatment included, but was not limited to, requiring Williams to train Aresco and to perform his job duties, thus enhancing Aresco's importance and future employment opportunities, and to cover for him when he did not or could not perform his job. Id. For example, the Athletics Director minimized Williams and assigned her to tasks such as running his personal errands. Id. The Athletics Director provided Aresco with promotional opportunities, and otherwise favored him to Williams' detriment. Id. The sex-based preferential treatment of Aresco was part of the Athletics Director's pattern of using power granted to him by Defendant to provide preferential treatment to males, and to minimize or oppose those, like Williams, who are entitled to equal treatment or do not support that preferential treatment or discriminatory conduct. Id., PID 5, Para 20-21.

After moving Aresco to Administration in the Athletics Department in September 2015, and having engaged in a pattern of sex discrimination that enhanced Aresco's future employment opportunities and deprived Williams of equal treatment, Defendant issued a job posting in January 2016. Id., PID 4-5, Para 18-24. In that job posting, Defendant indicated it would hire another person in Administration to serve as an assistant to the Athletics Director. Id. At the time, Williams was already working in Administration as the Athletics Director's Executive Assistant, and had been doing so for nearly a year and a half. Id., PID 3-4, Para 14-15. As the Executive Assistant, Williams performed a variety of work, including but not limited to leading the administrative function of the Athletics Director's office, acting as the Athletics Director's external face and liaison for administrative and operational matters, handling special projects in support of key departmental priorities, coordinating staff, and otherwise functioning in a leadership and senior role in Administration. Id., PID 3-4, Para 14-15. Nevertheless, in the job posting that Defendant issued in January 2016 indicating it would hire another assistant to the Athletics Director, Defendant described work that was substantially equal to the work that Williams was already performing. Id., PID 3-5, Para 14-15, 22-24. In the job posting issued in January 2016, Defendant said the new assistant to the Athletics Director would be called the Special Assistant, as opposed to Executive Assistant, but the Special Assistant job posting described work that was substantially equal to the work Williams already performed as the Athletics Director's Executive Assistant. Id., PID 3-5, Para 14-15, 22-24.

Although Aresco previously had not held an administrative position with the University, Defendant told Williams that it had already decided to hire Aresco for the Special Assistant position. Id., PID 4, Para 18-19, 25. Defendant also dissuaded and deterred Williams from applying for the Special Assistant position. Id., PID 5, Para 26; PID 3-5, Para 14-25. Consistent

with Defendant's admission to Williams that it had already decided to hire Aresco before the selection was made, Defendant hired him as Special Assistant in January 2016, and then paid him approximately $77,500 as Special Assistant. Id., PID 6, Para 28-29. However, while Williams worked as the Executive Assistant and performed substantially equal work, Defendant paid her as little as $38,500 and not more than $40,000. Id., PID 4, Para 14-16; PID 5, Para 23-24; PID 6, Para 29. Even though Williams had already been working as the Athletics Director's Executive Assistant for a year and a half, once Defendant hired a male to work as the Athletics Director's Special Assistant, Defendant paid him almost twice as much as it had paid Williams to perform substantially equal work. Id. This stark wage disparity resulted in Williams earning almost $40,000 a year less than a male for performing equal work. Id.

Defendant's discriminatory conduct did not end when it hired Aresco as the Special Assistant. After grooming Aresco for employment opportunities and advancement in Administration notwithstanding his lack of administrative experience (id., PID 4-5, Para 18-21; PID 6, Para 30), creating another position in Administration to perform substantially the same work that Williams already performed (id., PID 3-6, Para 14-15, 21, 22-26); telling Williams it was futile for her to apply for that position because Defendant had already decided to hire Aresco for it, and otherwise deterring and dissuading Williams from applying for the job (id., PID 5, Para 22-26); hiring Aresco as Special Assistant even though he had never held an administrative position with Defendant (id., PID 4-5, Para 18-26) and then paying him almost twice as much as it paid Williams to perform substantially equal work (id., PID 4, Para 15; PID 5, Para 23-24; PID 6, Para 28-29), Defendant's discriminatory conduct continued to adversely impact Williams (id., PID 6, Para 30). For example, after hiring Aresco and paying him more to work as the Special Assistant than it paid Williams, Defendant granted Aresco subsequent pay raises which adversely

impacted Williams' compensation rate. Id., PID 6, Para 29-30. Further, after Defendant hired Aresco for the Special Assistant position, Defendant's sex-based preferential treatment continued to adversely impact Williams by depriving her of promotional and advancement opportunities that impacted her compensation rate. Id., PID 1; PID 5, Para 20-21; PID 6, Para 30, 31-34; PID 7, Para 35-38.

Williams first complained to the University that she had been subjected to gender discrimination, including disparate pay and other disparate treatment, but the University did not stop, correct, or remedy the discriminatory conduct. Doc. 10-3, PID 3. Williams then filed a Charge of Discrimination with EEOC in October 2016, alleging that the University violated the EPA and Title VII. Doc. 10-4, PID 2. After conducting an investigation, EEOC issued a Letter of Determination concluding that the University had violated the EPA and Title VII, in part, by paying Williams almost $40,000 less per year than it paid Aresco as Special Assistant. Doc. 10-3, PID 2-4. Although the Commission was not required to conciliate the EPA violations before filing those claims in court, on April 21, 2017, EEOC invited the University to join with it in an attempt to eliminate the unlawful practices by informal methods of conciliation. Id., PID 4. The Commission did not file this action until more than five months later, after its efforts did not secure a conciliation agreement on terms acceptable to the Commission. Doc 1; Weinstein Declaration.

In its motion to dismiss, Defendant focuses chiefly on having selected Aresco for the Special Assistant position and paying him more to do that job, and on its argument that the Commission's Complaint insufficiently alleges how such conduct violates the EPA or Title VII. However, Defendant's motion does not address the sex discrimination that continued after Aresco was hired as Special Assistant and it overlooks that, after hiring Aresco for that job, Defendant granted him subsequent pay raises and employment opportunities that adversely impacted

Williams' compensation rate and opportunities for advancement. Indeed, Defendant concedes in its motion that after hiring Aresco as the Special Assistant, it "later renamed" Aresco to be an Assistant Athletics Director in Administration. Doc. 10-1, PID 8 (referring to the Commission's allegation that Defendant engaged in unlawful gender discrimination when it paid Aresco at a higher rate to work as Special Assistant, and adding that Aresco was later renamed "Assistant Athletics Director – Administration"). The description of Assistant Athletics Director in Administration that Defendant has publicly posted on its website indicates that by renaming Aresco as Assistant Athletics Director, Defendant granted him a promotional or advancement opportunity. *https://careerpath.gwu.edu/athletics* (displaying under tab for Athletics Administration Defendant's list of Administration positions including Assistant Athletics Director); *https://www.gwu.jobs/titles/30633* (displaying Defendant's description of Assistant Athletics Director in Administration). This is consistent with EEOC's allegation that Defendant deprived Williams of advancement and promotional opportunities because of sex, and that such treatment continued after Defendant hired Aresco as Special Assistant when it continued to grant him pay raises, employment opportunities, advancement, and other preferential treatment because of sex that adversely impacted Williams' compensation rate and advancement opportunities. Doc 1, PID 1 (Defendant deprived Williams of opportunities and advancement because of her sex and failed to provide her with promotional opportunities); PID 5, Para 20-21 (Defendant treated Aresco more favorably than Williams because of sex, including enhancing his importance and future opportunities while minimizing hers, and providing him with promotional opportunities); PID 6, Para 30 (after hiring Aresco as Special Assistant, Defendant adversely impacted Williams' compensation and advancement by granting Aresco employment opportunities and other preferential treatment); PID 6, Para 31-34; PID 7, Para 35-38 (Defendant unlawfully denied

Williams equal pay, subjected her to disparate pay practices, and deprived her of promotional opportunities, advancement, and equal terms, conditions, and privileges of employment because of sex).

In support of its motion, Defendant filed several documents all of which it claims the Court may consider as incorporated in EEOC's Complaint. Doc. 10-1, PID 10, n.1; PID 11, n.2. Defendant argues the Court should consider Williams' Charge of Discrimination (Doc. 10-4) and EEOC's Letter of Determination (LOD) (Doc. 10-3). Additionally, Defendant urges the Court to rely on what it calls "the University's official description of Williams' position," which it filed as Exhibit 3 (Doc. 10-5), because it was incorporated by reference in the Complaint. Doc 10-1, PID 12 (identifying Exhibit 3 as the University's description of the Executive Assistant position); Id., n.2 (identifying the Executive Assistant description as the University's official description[2] of Williams' position that is incorporated by reference in the Complaint).[3] Significantly, Defendant

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[2] Defendant suggests, incorrectly, that the LOD says Defendant's Exhibit 3 is "the University's official description[]" for Williams' position, and the University otherwise mischaracterizes the LOD. Doc. 10-1, PID 11-13 ("The letter [of determination] also asserted that Williams' and Aresco's positions were sufficiently similar to support a pay discrimination claim because, according to the Commission, the University's official descriptions listed both positions as providing, at the broadest level of generality, 'high-level administrative support to the Director of Athletics.'") The LOD does not say that the Executive Assistant description was an official University job description – it is Defendant who identifies it as the official description of Williams' job. Further, Defendant says that, "according to the Commission" the Executive and Special Assistant positions were similar because the University's documents listed the jobs as providing high-level administrative support at the broadest level of generality. Doc. 10-1, PID 11-13. The LOD does not say that the University's documents describe the jobs as the same at the broadest level of generality. Doc. 10-3, PID 3. Instead, the LOD says that the University's documents describe both jobs as providing high-level administrative support to the Athletics Director, "and otherwise indicate that the jobs were so similar as to support a finding of unequal and discriminatory pay in violation of the EPA and Title VII." Id.

[3] In the Rozen Declaration, defense counsel mistakenly identifies Defendant's Exhibit 3 as "a true and correct copy of the University's job posting of the 'Executive Assistant to the Director of Athletics and Recreation' position, as submitted to the U.S. Equal Employment Opportunity Commission on January 23, 2017 in connection with the investigation of Charge No. 570-2017-

concedes not only that the Executive Assistant description is the University's official description of that position in the abstract, but also that it is the University's official description of the job Williams held. Doc. 10-1, PID 12 (referring to Defendant's Exhibit 3 as the "University's description of *Williams' job*") (emphasis added). As detailed below, assuming that the University's self-described official description of Williams' job is accurate, that document contradicts the University's central defense – that Williams deserved lower pay than Aresco because she performed lower-level work and served in a less important capacity.[4]

Defendant claims that its official description of Williams' job "listed her main duty as providing *ordinary* 'administrative support' such as '[o]versee[ing] [Nero's] calendar' and planning his travel, Ex. 3, Job Posting, Executive Assistant to the Director of Athletics and Recreation – not '*high-level* administrative support.'" Doc. 10-1, PID 12 (emphasis in original). That is demonstrably incorrect. The Executive Assistant description does not include the phrase "main duty," nor does it include the word "ordinary." Doc. 10-5. As detailed below, the document lists responsibilities far beyond overseeing a calendar and planning travel. The description contains several bullet points under the heading Job Duties. Id. In a fraction of a single sentence,

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00064." Doc. 10-2, PID 2, Para 6. However, the University did not submit that document to the Commission as a job posting – it was submitted as the Executive Assistant position description. Weinstein Declaration; Ex. B to Weinstein Declaration (Executive Assistant description). Defendant now says that document is the University's description of Williams' job. Doc. 10-1, PID 12.

[4] Whether employees perform equal work is not dependent on job classifications or titles. 29 CFR §1620.13. Instead, that must be determined by applying the EPA to the specific facts involved. Id. Relevant factors include the job performed and the bona fide, non-discriminatory, job requirements. Id. Here, the University says that Defendant's Exhibit 3 is its official description of Williams' job, and not merely a recitation of her job classification or job title.

within a bullet point comprised of multiple sentences, the document mentions overseeing a daily calendar. Id. But that bullet point also says that Williams coordinated not only communication between the Athletics Director, the Athletics Department staff, and others throughout the University, but also that she coordinated workflow between the Director, department staff, and beyond the department throughout the campus. Id. Similarly, the document mentions responsibility for planning and managing travel, but in the same bullet point it also says that Williams was responsible for planning and managing donor meetings, documenting and processing follow-up on donor contact, and coordinating with appropriate staff on briefings. Id. Five separate bullet points follow, each of which describes work far beyond overseeing the daily calendar and planning travel, including responsibility for assisting in management of budget and financial matters, interfacing with internal and external constituents, serving as the interface between the Athletics Director and colleagues beyond the department, beyond the University, serving as the interface between the Athletics Director and the Athletics Conference, assisting with hiring and management, and other work duties as assigned. Id.

Although Defendant says that its Executive Assistant description is properly before the Court because that document was incorporated by reference in the Complaint (e.g., Doc. 10-1, PID 12, n.2), Defendant did not file the Special Assistant job posting that was incorporated by reference in the Complaint and described at Paragraphs 22 through 24. Doc. 1, PID 5, Para 22-24. But if the Court should consider documents incorporated by reference into the Complaint in ruling on Defendant's motion, then it should also consider Defendant's Special Assistant job posting. Doc. 10-1, PID 10, n.1 (documents incorporated in the Complaint are properly before the Court for purposes of Defendant's motion to dismiss); Id., PID 12 & n.2 (the University's official description of Williams' position is properly before the Court because it was incorporated by reference in the

Complaint). That document is no surprise to Defendant –the University submitted it to the Commission on January 23, 2017 as the Special Assistant job posting. Weinstein Declaration, Ex. B to Weinstein Declaration (Exhibit Index).

The Commission attaches the Special Assistant job posting to this opposition with the Weinstein Declaration. Weinstein Declaration; Ex. B to Weinstein Declaration (Special Assistant job posting). The Special Assistant posting did not disclose the pay rate for the Special Assistant job, nor did it include a range of pay. Id. According to the posting, the Special Assistant job was open for only three days, from January 5 to January 8, 2016, and it was restricted to internal applicants from the Athletics Department. Id.

A comparison of the University's Executive Assistant description and the Special Assistant job posting (the job for which Aresco was hired), refutes the University's claim that it justifiably paid Williams less than Aresco because she performed ordinary administrative support by overseeing a daily calendar and planning travel, while Aresco performed more important, wide-ranging, or higher-level work. As detailed below, the University describes the Special Assistant as performing work that Williams also performed (and for which she was paid less), but the University also describes the Executive Assistant's responsibilities as more wide-ranging, leadership oriented, and impactful on a broader scale than the Special Assistant. Differences 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. 29 CFR §1620.14. That the lesser-paid employee performed additional duties does not justify a pay disparity. Brinkley-Obu, 36 F.3d 336, 352 (4th Cir. 1994); EEOC v. Whitin Mach. Works, Inc., 635 F.2d 1095, 1096 (4th Cir. 1980); Glunt v. GES Exposition Services, Inc., 123 F.2d 847, 856 (D.Md. 2000), quoting Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987)

("an employer cannot avoid the Act by the simple expedient of loading extra duties onto its female employees – unless it pays them more.") "[A] serious question would be raised where such an inequality, allegedly based on a difference in job content, is in fact one in which the employee occupying the job purportedly requiring the higher degree of skill, effort, or responsibility receives the lower wage rate." 29 CFR §1620.13(d). The University's position and its own documents suggest that serious question arises here.

The University describes Williams' job as facilitating the effective division of labor such as coordinating workflow between the Director, Athletics Department staff, and campus colleagues. Doc. 10-5, PID 2 ("Coordinate communication and workflow between Director of Athletics and Recreation and Department staff members and campus colleagues.") The Special Assistant Job Posting does not indicate responsibility for coordinating workflow between the Athletics Director and the Athletics Department, let alone responsibility for coordinating workflow between the Director, Athletics Department staff, and colleagues throughout the campus. The University describes Williams as having the responsibility of coordinating with appropriate staff on briefings, a term generally used to denote meetings or conferences where confidential or sensitive information often is conveyed. While the Special Assistant is described as coordinating with administrative staff, the Job Posting does not say that the Special Assistant is responsible for coordinating with staff on briefings nor does it mention briefings. The University describes Williams as being the outward facing representative of the Athletics Department not only to other departments, but also to persons beyond the University including those in the athletic Conference.[5] She is also described as someone who serves as the administrative interface not only between the

[5] The University is a member of the Atlantic 10 Conference, a collegiate athletic conference. *http://www.atlantic10.com*.

Athletics Director and the University, but also between the Director and "Conference colleagues, among others." Doc. 10-5, PID 2. The University describes Williams as responsible for writing and sending correspondence on behalf of the Athletics Director to both internal and "external constituents." Doc. 10-5, PID 2. In the Special Assistant Job Posting, there is no similar reference to interfacing or communicating with the athletic Conference or outside constituents. Williams is also described as working on financial and business matters, including planning and managing donor contact and assisting in the management of the Athletics Director's budget. She is described as someone who "[p]lans and manages" the Athletics Director's "donor meetings" and "[c]oordinates with appropriate staff on briefings, documentation of donor contact, and processing out of follow up." Doc. 10-5, PID 2. The Special Assistant Job Posting does not describe any responsibility for planning and managing meetings with donors, or coordinating with appropriate staff on briefings or handling donor documentation and follow up. The University describes Williams as having budget responsibilities – specifically, to "[a]ssist in management of Athletics Director budget by processing and filing financial receipts and tracking expenses in coordination with Department of Athletics and Recreation Business Office." Doc. 10-5, PID 2. The Special Assistant Job Posting does not describe any responsibility for assisting with the management of budget matters, including working with the business office to track expenses – indeed, the word budget is not even used in the Special Assistant Job Posting. Williams is described as serving in a leadership role by "assist[ing] with the hiring and management of student employees and interns." Doc. 10-5, PID 2. The Special Assistant is not described as having any hiring or management responsibilities. While the Special Assistant job posting says that position coordinates "administrative staff" members, it does not say that the Special Assistant coordinates any staff outside Administration. Williams is described as coordinating staff throughout the

Athletics Department and the University – not just in Administration. She is also described as coordinating communication and workflow with "Department staff members and campus colleagues[,]" coordinating with "appropriate staff" on briefings, coordinating with business office staff, and serving as the administrative interface with "University and Conference colleagues, among others." Further, Williams is described as having additional work duties, as assigned, while the Special Assistant job posting includes no similar provision.

III. LEGAL STANDARDS FOR RULE 12(b)(6) MOTION

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief[]." Fed.R.Civ.P. 8(a)(2).

> Ordinarily, a plaintiff need not plead detailed factual allegations, as the rule simply "'contemplate[s] [a] statement of circumstances, occurrences, and events in support of the claim presented[.]' Twombly, 550 U.S. at 555, n.3 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, at 94 (3d ed. 2004). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 563. However, a plaintiff is not required to plead in his complaint all elements of a prima facie case, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002), nor is he required to "plead law or match facts to every element of a legal theory." Rouse v. Berry, 680 F. Supp. 2d 233, 236 (D.D.C. 2010).

Young v. District of Columbia Housing Authority, 31 F. Supp. 3d 90, 99 (D.D.C. 2014) (agreeing with the defendant that the complaint was sparse on details, but finding that the plaintiff met his burden of pleading sufficient facts). "In evaluating a 12(b)(6) motion to dismiss for failure to state a claim, the court must construe the complaint 'in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." Hettinga v. United States, 677 F.3d 471, 476 (D.C. Cir. 2012). In evaluating a 12(b)(6) motion to dismiss for failure to state a claim, the court must construe the complaint 'in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged. Hettinga v. United States, 677 F.3d 471, 476 (D.C. Cir. 2012).

It is not necessary for the plaintiff to plead all elements of her prima facie case in the complaint. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-12 (2002) ("[t]he prima facie case under McDonnell Douglas . . . is an evidentiary standard, not a pleading requirement."). "At the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case." Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 493 (D.C. Cir. 2008), citing Swierkiewicz, 534 U.S. at 510-11.

A complaint needs to plead "only enough facts to [nudge] a claim to relief . . . across the line from conceivable to plausible[]." Twombly, 550 U.S. at 570. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Young, 31 F. Supp.3d at 100, quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. The plausibility standard does not require probability but instead asks for more than a sheer possibility that a defendant has acted unlawfully. Twombly, 550 U.S. at 556. A complaint may survive even "if recovery is very remote and unlikely" or even where the claims are "doubtful in fact" if the factual matter alleged is "enough to raise a right to relief above the speculative level." Id. at 555-56. Moreover, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" Young, 31 F. Supp. 3d at 100, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561(1992), quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990)).

Here, the Commission has satisfied the federal pleading standard. But if the Court

disagrees, the Commission respectfully requests that the Court grant the agency leave to amend pursuant to Rule 15(a)(2) instead of dismissing the Complaint. Fed.R.Civ.P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.") See Foman v. Davis, 371 U.S. 178, 182 (1962) (reversing denial of leave to amend).

A. DEFENDANT'S EPA VIOLATIONS

The EPA prohibits a covered employer from discriminating between employees on the basis of sex by paying wages to employees within that establishment at a rate less than the wages paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions in the same establishment. 29 U.S.C. §206(d)(1). The EPA does not require the plaintiff to prove intent.[6] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); see also Beck-Wilson v. Principi, 441 F.3d 353, 360 (6th Cir. 2006).

To show that her employer paid a male employee a higher wage to perform "equal work," a female employee need not prove that the jobs being compared are identical. To establish that element of the EPA, she need only show that the jobs are "substantially equal." 29 CFR §1620.13(a); Brinkley-Obu Hughes Training, Inc., 36 F.3d 336, 351 (4th Cir. 1994) ("substantially equal *i.e.* whether the jobs have a common core of tasks. . . .")

Once the plaintiff meets her burden, the burden of proof shifts to the employer to prove that the pay disparity is justified under one of the EPA's four exceptions. Corning Glass Works, 417 U.S. at 196. The employer's burden to justify the pay disparity is a heavy one. To fulfill its burden, the employer must submit evidence from which a reasonable jury could conclude not

[6] That is not to say that evidence of discriminatory intent is irrelevant under the EPA. Indeed, it may be relevant to a variety of matters raised in EPA litigation including the employer's attempt to justify a pay disparity.

merely that its proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity. Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000); EEOC v. Swift Transp. Co., Inc., 120 F. Supp. 2d 982, 986 (D. Kan. 2000). Where the plaintiff establishes pay disparity and the employer fails to satisfy its burden to prove that an exception applies, an EPA violation is established. Corning Glass Works, 417 U.S. at 197; Brinkley-Obu, 36 F.3d at 344.

The bulk of Defendant's motion focuses on its argument that the Commission's Title VII claim is barred because Williams did not apply for the Special Assistant job posting (even though the Commission specifically alleged that she was told it would be futile to do so and was otherwise deterred and dissuaded from applying), but Defendant does not argue that the EPA claim should be dismissed for that reason. Doc. 10-1, PID 24-27. Nor could it. The EPA does not require a lower-paid female employee to prove that she applied for the job for which the employer paid a male higher wages. 29 U.S.C. §206(d)(1).

Instead, Defendant argues that the Court must dismiss the EPA claim under Rule 12(b)(6) solely because the Commission has failed to provide a short and plain statement of the claim showing that it is entitled to relief, as required by Rule 8. Doc. 10-1, PID 24-27. Defendant says the Commission is required to "allege facts supporting the inference" that it paid Williams less than Aresco to perform work that constitutes equal work under the EPA. Doc. 10-1, PID 25. But the Commission has done that, as demonstrated above in Section II. Williams and Aresco worked as assistants to the same Athletics Director and performed equal work, yet Williams was paid approximately $40,000 less per year, a wage gap that widened when Defendant gave Aresco subsequent raises and employment opportunities, advancement, and other preferential treatment that adversely impacted Williams' compensation rate and opportunities for advancement. The

Commission is not alone in describing Williams as performing the same work that Defendant claims justified Aresco's higher pay – in its self-described official description of Williams' job, the University described her as performing work that is at least equal to the work described in the Special Assistant job posting. In fact, the University's description of Williams' job shows that she performed work that required greater skill, effort. and responsibility than the work Aresco was hired to perform.

Defendant cites 29 CFR §1620.14 as authority[7] but that regulation supports the Commission's position. In interpreting the statute, and particularly the terms equal skill, effort, and responsibility, the regulation says the broad remedial purpose of the EPA must be taken into consideration. Id. What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined, but that equal does not mean identical. 29 CFR §1620.14(a). Importantly, even where differences in skill, effort, or responsibility exist, the employer cannot justify the pay disparity "where the greater skill, effort, or responsibility is required of the lower paid sex." Id. Further, while Defendant urges the Court to dismiss the Commission's EPA claim because it does not allege how often Williams performed each job task, such as what portion of a day, week, or month was spent on each task (Doc 10-1, PID 26), the regulation Defendant relies on says: "In determining whether employees are performing equal work within the meaning of the EPA, the

[7] Defendant relies on that regulation's reference to equal skill, effort, and responsibility as a test that must be met. Doc. 10-1, PID 25. Nothing in the regulation indicates there is such a test under Rules 8 or 12(b)(6), and Defendant cites no authority for the idea that such a test applies when assessing pleadings at the motion to dismiss stage. Even assuming for the sake of argument that alleging equal skill, effort, and responsibility is a prima facie element of an EPA claim, the Supreme Court has made clear that a plaintiff need not plead prima facie elements to satisfy pleading requirements. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-12 (2002) (plaintiff need not plead the prima facie elements); see also, Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 510-11 (D.C. Cir. 2008) (at the motion to dismiss stage, a district court cannot throw out a complaint even if the plaintiff did not plead prima facie elements).

amounts of time which employees spend in the performance of different duties are not the sole criteria." 29 CFR §1620.14(c) (determining equality of jobs cannot be set up solely on the basis of a percentage of time; a finding that one job requires employees to expend greater effort for a certain percentage of their working time than employees performing another job will not in itself establish that the two jobs are not equal).

Defendant also relies on other authority that supports the Commission. Specifically, Defendant cites Clay v. Howard Univ., 128 F. Supp. 3d 22 (D.D.C. 2015), and identifies Clay as authority on which it chiefly relies. Doc. 10-1, PID 3. But Clay refutes Defendant's position. In Clay, the district court concluded that the plaintiff had adequately pled an EPA violation and denied the defendant's motion to dismiss under Rule 12(b)(6). Clay, 128 F. Supp. 3d at 25. To support the inference that her employer violated the EPA, the plaintiff in Clay alleged that the employer hired a male (Jackson) at a higher salary, and "allege[d] on information and belief that 'other similarly situated males at Howard University also received more pay for the substantially similar work as Ms. Clay.'" Id. at 31 (quoting from a single paragraph of the plaintiff's complaint). The district court's opinion identifies no other EPA allegations or facts supporting the inference that the employer violated the Act. Id., 25-27; 31-33. The defendant, Howard University, argued that the plaintiff did not "add facts to support" her allegations perhaps, as the district court surmised, because the defendant expected to find "more detail" in the complaint. Id. at 31. However, the district court rejected that argument, and found that because the plaintiff alleged that her employer paid Jackson more, and also paid other males more than the plaintiff for substantially similar work, those allegations "are sufficient to support the inference that Plaintiff performed equal work for unequal pay[.]" Id. Accordingly, the district court denied the defendant's motion to dismiss the EPA claim. Id. See also Ghayyada v. Rector and Visitors of the Univ. of Va., Case

No. 3:11-cv-00037, 2011 U.S. Dist. LEXIS 102279, *18-20 (W.D. Va. Sept. 12, 2011) (where male alleged that he 'discovered after July 23, 2010 in my [personnel] file that I was discriminated against with pay based on sex. I had more experience than my female counterpart, but [was] paid less by $.62 an hour[]" he sufficiently alleged that he and the comparator performed work of equal skill, effort, and responsibility under similar working conditions).

Much of the other authority cited to support Defendant's motion to dismiss the EPA claim does not support its position because in many of the cases cited courts assessed EPA claims under summary judgment standards, not under Rule 12(b)(6). See, e.g., Johnson v. District of Columbia, 947 F. Supp. 2d 123 (D.D.C. 2013) (dismissing EPA claim on summary judgment); Musgrove v. Gov't of D.C., 775 F. Supp. 2d 158 (D.D.C. 2011) (granting summary judgment motion); Musgrove v. Govt' of D.C., 458 Fed. App'x 1 (D.C. Cir. 2012) (affirming summary judgment); Gustin v. W.Va. Univ., 63 Fed. App'x 695 (4th Cir. 2003) (affirming summary judgment).

The remainder of the cases cited involved facts, circumstances, and allegations far different from those at issue here. For example, Defendant's reliance on EEOC v. Port Authority of N.Y. & N. J, 768 F.3d 247 (2d Cir. 2014), is misplaced. In affirming the dismissal of the Commission's EPA claim in Port Authority, the appellate court said the Commission alleged disparate pay among attorneys who practiced in various different areas, and said they were entitled to equal pay because they had the same degree, worked under time pressure and deadlines, and used analytical and legal skills "that are generalizable to virtually all practicing attorneys." Id. at 249. After the employer filed its answer, and during a subsequent scheduling conference, the district court expressed its skepticism that the Commission had adequately pled a claim. Id. at 250. The court ordered the parties to engage in discovery to provide additional detail about the Commission's position. Id. In response to interrogatories, the Commission again asserted generally the defendant's attorneys

were entitled to equal pay because they shared characteristics common to all attorneys. Id. at 250-51. The Commission did not, however, say anything about the content of the work done by the attorneys, either within or across practice areas at the Port Authority. Id. at 251. During a subsequent court conference, the district court expressed confusion about the manner in which the Commission had compared the attorneys (e.g., comparing a female attorney who joined the Port with seven years of legal experience to a male attorney who joined the Port with 16 years of legal experience and earned approximately $2,000 more in salary than the female). Id. at 251-52. Finding that there were "extraordinary differences" between those attorneys, the district court asked the Commission during that conference "whether EEOC's theory for its claim was that the attorneys' jobs were equal 'regardless of the[ir] work,' that is, whether the EEOC's theory was that 'an attorney is an attorney is an attorney.'" Id. at 252. EEOC agreed that it was. Id. "In light of the EEOC's 'affirmative position that [Port Authority] attorneys are all the same,'" the district court permitted the Port Authority to file a motion for judgment on the pleadings pursuant to Rule 12(c). Id. at 251. The district court found that the Commission's position that the Port's attorneys were entitled to equal pay because "an attorney is an attorney is an attorney" was insufficient to sustain an EPA claim under the facts of the case, and that the Commission had made no other allegations that could give rise to an inference that the attorneys' jobs required substantially equal work. Id. at 252, 257. The facts are easily distinguishable. In Port Authority, the Commission told the court that the basis for its claim was that all Port Authority attorneys were presumptively the same simply because they were attorneys, regardless of the work they performed. Here, the Commission does not contend that Williams was entitled to equal pay because she and Aresco were both assistants, and all assistants at the University are presumptively the same; instead, it alleges that Williams was paid less to perform specific work.

B. DEFENDANT'S TITLE VII VIOLATIONS

As demonstrated above in Section II, the Commission has pled facts supporting an inference that the University discriminated against Williams because of sex when it groomed Aresco for employment opportunities and advancement in Administration notwithstanding his lack of administrative experience (id., PID 4-5, Para 18-21; PID 6, Para 30), created another position in Administration to perform substantially the same work that Williams already performed (id., PID 3-6, Para 14-15, 21, 22-26); told Williams it was futile for her to apply for that position because Defendant had already decided to hire Aresco for it, and otherwise deterred and dissuaded Williams from applying for the job (id., PID 5, Para 22-26); hired Aresco as Special Assistant even though he had never held an administrative position with Defendant (id., PID 4-5, Para 18-26) and then paid him almost twice as much as it paid Williams to perform substantially equal work (id., PID 4, Para 15; PID 5, Para 23-24; PID 6, Para 28-29). Moreover, Defendant's discriminatory conduct continued to adversely impact Williams after Aresco was hired as Special Assistant. Id., PID 6, Para 30. For example, after hiring Aresco and paying him more to work as the Special Assistant than it paid Williams, Defendant granted Aresco subsequent pay raises which adversely impacted Williams' compensation rate. Id., PID 6, Para 29-30. Further, after Defendant hired Aresco for the Special Assistant position, Defendant's sex-based preferential treatment continued to adversely impact Williams by depriving her of promotional and advancement opportunities that impacted her compensation rate. Id., PID 1; PID 5, Para 20-21; PID 6, Para 30, 31-34; PID 7, Para 35-38. Applying the well-established standards for assessing pleadings at the motion to dismiss stage, Defendant's 12(b)(6) motion to dismiss the Title VII claims must be denied.

Defendant advances two arguments that the facts do not support an inference of sex discrimination sufficiently under Rules 8 and 12(b)(6). The University says that the Commission

fails to allege that it engaged in any adverse employment action, and that failed to allege that it engaged in such conduct because of sex. Doc. 10-1, PID 15. Both assertions are incorrect.

As a threshold matter, Defendant's challenge to the Commission's Title VII compensation discrimination claim rests on its argument that the Commission failed to sufficiently plead an EPA violation. Doc. 10-1, PID 24. Specifically, Defendant contends that EPA standards apply to the Commission's Title VII pay discrimination claim and that both claims are subject to review under the same standard. Id. ("[W]hen a Title VII claimant contends that she has been denied equal pay for substantially equal work, as here, Equal Pay Act standards apply." [. . .] "[The] Title VII claim and the EPA claim are subject to review under the same standard.") (internal citations omitted).

Defendant raises no 12(b)(6) argument that the Commission failed to sufficiently allege pay disparities in violation of Title VII – it argues only that because the Commission failed to sufficiently allege an EPA violation, the Title VII pay discrimination claim must also be dismissed. Doc. 10-1, PID 24. As to the pay disparity between Williams and Aresco, Defendant expressly limits its Rule 12(b)(6) challenge to the EPA, which does not require the Commission to allege or prove that Williams applied for any job. Id.; 29 U.S.C. §206(d)(1).

Given Defendant's position that EPA standards apply to the Commission's Title VII pay discrimination claim on these facts, Defendant's argument that the Title VII claim cannot survive because Williams did not apply for the Special Assistant position is moot, and it must be rejected. The EPA does not require a lower-paid female employee to prove that she applied for a job that paid higher wages, 29 U.S.C. §206(d)(1), and Defendant does not contend that it does. Doc. 10-1, PID 24-27. If, as Defendant insists, both pay discrimination claims must be measured by EPA standards, then the Commission's Title VII pay discrimination claim cannot be dismissed simply because because Williams did not apply to work as Special Assistant.

Although Defendant does not claim that the Commission has failed to sufficiently allege unlawful pay disparities under Title VII standards, if the Court decides to reach that issue it should deny Defendant's motion to dismiss. Defendant cites no authority compelling the Court to dismiss a Title VII claim alleging unlawful disparate pay because the lower-paid employee did not apply for a higher-paying job. Defendant does not even advance that argument. Instead, Defendant self-servingly characterizes the Special Assistant job posting as offering Williams a promotion – which is not surprising given Defendant's argument that, as Special Assistant, Aresco performed higher-level work while Williams provided ordinary support by overseeing a calendar and planning travel. Having cast that job posting as offering Williams a promotion, Defendant erroneously relies on case law assessing Title VII failure-to-promote claims.

Defendant's argument should be rejected, in part, because it relies solely on argument of counsel and is refuted by the University's Special Assistant job posting and its description of Williams' job. Defendant filed no evidence proving that the Special Assistant job posting offered Williams a promotion, nor would it be proper for the Court to consider such evidence at this stage. While Defendant filed Williams' Charge, it alleges in relevant part that the Special Assistant job posting was intended for a male coworker who was being promoted to the position. Doc. 10-4, PID 2. The Charge does not say that the posting described a job that would have been a promotion for Williams. Id. Moreover, a comparison of the University's own documents permits the Court, drawing on its judicial experience and common sense, to reasonably infer that the Special Assistant position, as posted, would not have been a promotion for Williams. The facts properly before the Court support the inference that Williams' job involved higher-level work than the University described in the Special Assistant posting. On these facts, Defendant cannot unilaterally (and in hindsight) transform the Commission's Title VII pay discrimination allegations into a failure-to-

promote claim by labeling it as such. The federal standards require notice pleading, and they are intended to avoid civil cases turning on technicalities or, in the University's case, self-serving labels that are refuted by record evidence. Johnson v. City of Shelby, ___ U.S. ___, 135 S.Ct. 346, 346-47 (2014) (federal pleading rules call for a short and plain statement of the claim showing the pleader is entitled to relief and the basic objective of the rules is to avoid civil cases turning on technicalities); see also Easaw v. Newport, 253 F. Supp. 3d 22 (D.D.C. 2017).

Moreover, much of Defendant's analysis, and citation to the record and authority, is inaccurate and does not support dismissal of the Title VII claim. For example, Brown v. Coach Stores, Inc., 163 F.3d 706 (2d Cir. 1998), chief among Defendant's cited authority, was decided before Swierkiewicz which either "abrogate[s] the case's holding entirely" or calls its reasoning into question. Barrett v. Forest Labs, Inc., 39 F. Supp. 3d 407, 441-42 (S.D.N.Y. 2014) (plaintiff sufficiently stated a claim where she discussed an opening with management, he emphasized that she was competing against two well qualified candidates who were male, and she understood his statements to mean that he was advising her not to apply). Further, even if the failure-to-apply argument were appropriate and relevant on these facts, the Commission sufficiently alleged futility and deterrence, and that the Athletics Director had an established pattern of providing preferential treatment to males to the detriment of those entitled to equal treatment. Doc. 1, PID 5, Para 21-26. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 365-66 (1977). Defendant says incorrectly that the Commission has not alleged futility, but the Commission did allege it. Before Defendant selected Aresco as Special Assistant, its personnel told Williams that it had already been decided to hire Aresco for that position. Doc. 1, PID 5.[8] Defendant says the

[8] Defendant also argues that even if the University had filled the Special Assistant position before it was posted, that would not be enough to state a Title VII claim. Doc. 10-1, PID 20. This straw-man argument is unpersuasive. The Commission does not rest its Title VII claim solely on

Commission's Complaint must also describe what evidence it will use to prove that allegation, but that is not the test. Swierkiewicz, 534 U.S. at 510-11 ("the prima facie case . . . is an evidentiary standard, not a pleading requirement[]"); Holmes-Martin v. Leavitt, 569 F. Supp. 2d 184, 193 (D.D.C. 2008) (notice pleading requires that the plaintiff plead facts to support a claim, not those that establish it). For example, Defendant says the Commission's allegation is insufficient because it only cites what "an unnamed source of undetermined credibility" allegedly said. Doc. 10-1, PID 20. The federal pleading standard does not require a plaintiff to describe what evidence she will use to prove her allegations, such as those that bearing on witness credibility. In ruling on a motion to dismiss, the Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of a plaintiff. Thomas v. FAA, Civil Action No. 05-2391, 2007 U.S. Dist. LEXIS 5260, *5 (D.D.C. Jan. 25, 2017).

Further, the Commission alleges that after Defendant paid Aresco more than Williams to work as Special Assistant, it continued to grant him sex-based preferential treatment which adversely impacted Williams' compensation rate and opportunities for advancement. Doc. 1, PID 6, Para 30; Id., PID 6-7, Para 35-42. As to these Title VII allegations, Defendant's argument that Williams failed to apply for the Special Assistant position is irrelevant and unpersuasive. The Commission has not alleged that Defendant posted those advancement opportunities, nor does Defendant claim it did. Further, the Commission does not allege that those advancement opportunities were offered to Williams, nor does Defendant claim they were. To the extent that such discriminatory conduct adversely impacted Williams' compensation rate under Title VII,

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its allegation that before selecting Aresco as Special Assistant, Defendant told Williams the University had already decided to hire him for that job. Moreover, as Defendant concedes evidence that the University did so is relevant where it logically supports an inference of discriminatory intent. Id. Here, it does.

Defendant contends that EPA standards apply and it has failed to raise a meritorious challenge to the EPA claim under Rule 12(b)(6). To the extent that such discriminatory conduct adversely impacted Williams' promotional and advancement opportunities even after Aresco was paid more as Special Assistant, the Commission has alleged such facts and Defendant raises no relevant and persuasive argument that they are insufficient to state a Title VII claim. See e.g., Doc. 1, PID 1 & PID 6-7, Para 37-38 (Defendant unlawfully discriminated against Williams by paying her lower compensation, *and* failing to provide her with promotional opportunities and advancement because of sex; Defendant not only engaged in disparate pay practices based on sex, but also failed to provide Williams with promotional and advancement opportunities because of sex); PID 4, Para 20-21 & PID 6-7, Para 37-42 (Defendant enhanced Aresco's importance and future opportunities, provided him with promotional opportunities, and otherwise favored him to Williams' detriment because of sex) Doc. 1, PID 6, Para 30 (after paying Aresco more than Williams to work as Special Assistant, Defendant's preferential treatment continued to adversely impact Williams' compensation rate *and* opportunities for advancement).

Defendant's only remaining 12(b)(6) challenge to the Title VII claims is that the Commission, 1) failed to allege that assigning Williams less favorable job duties, requiring her to train Aresco, ordering her to run the Athletics Director's personal errands, and otherwise subjecting her to less favorable treatment exposed Williams to objectively tangible harm; and 2) failed to allege that Defendant engaged in such conduct because of sex. Doc. 10-1, PID 21-23. That argument must be rejected. As detailed above, the Commission's Complaint identifies a variety of ways in which Defendant discriminated against Williams, and alleges that the University did so because of sex. On a motion to dismiss, a plaintiff's Title VII allegations need only give plausible support to a minimal inference of discriminatory intent, which can arise from more

favorable treatment of employees not in the protected group. Littlejohn v. City of N.Y., 795 F.3d 297, 311-23 (2d Cir. 2015). The Commission has sufficiently alleged that the University discriminated based on sex and that its discriminatory conduct is actionable.

The D.C. Circuit defines actionable harm under Title VII to include actions that affect the "terms, conditions, or privileges of employment or future employment opportunities in such a way that a reasonable trier of fact could find 'objectively tangible harm.'" Niskey v. Kelly, 859 F.3d 1, 14 (D.C. Cir. 2017) (suspension of security clearance, even though initially with pay, was actionable harm under Title VII). "Prohibited discrimination, in other words, is not rigidly confined to 'hirings, firings, promotions, or other discrete incidents.'" Id. at 14-15, quoting Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006). See also Forkkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (reassigning employee to a job with significantly different responsibilities can constitute an adverse employment action). "Actions short of outright firing can be adverse within the meaning of Title VII, but not all lesser actions by employers count. As we wrote in Brown, 199 F.3d at 457, '[m]ere idiosyncrasies of personal preference are not sufficient to state an injury.'" Forkkio, 306 F.3d at 1130. In contrast with mere idiosyncrasies, "reassignment with significantly different responsibilities, or . . . a significant change in benefits" generally indicates an adverse action. Id. at 1131. An employee suffers an adverse employment action if she experiences "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." Id.

Defendant claims the Commission failed to allege that assigning Williams less favorable job duties, requiring her to train Aresco, ordering her to run the Athletics Director's personal errands, and otherwise subjecting her to less favorable treatment exposed Williams to objectively

tangible harm, and that the Commission failed to allege that Defendant engaged in such conduct because of sex, but that is not true. The Commission specifically alleged that Defendant treated Aresco more favorably because of sex, and it paired the unfavorable job duties assigned to Williams, including tasking her with personal errands, requiring her to train Aresco, and making her cover for him when he failed to complete job duties, with the allegation that Defendant enhanced Aresco's importance and future opportunities and provided him with promotional opportunities to Williams' detriment. Doc. 1, PID 5, Para 20. Further, the Commission alleged that such preferential treatment continued to adversely impact Williams' compensation rate and advancement opportunities, even after Defendant paid Aresco more as Special Assistant (id., PID 6, Para 28-29), and alleged that Defendant engaged in such conduct because of sex (id., PID 7, Para 38).

In its motion, Defendant does not deny that it granted Aresco subsequent pay raises after it hired him as Special Assistant nor does it deny that he was granted other promotional or advancement opportunities. To the contrary, Defendant says that after hiring Aresco as Special Assistant it "renamed" him Assistant Athletics Director. Doc. 10-1, PID 8. Based on the University's description of that position on its website, the Court can reasonably infer, drawing on its "judicial experience and common sense," that in renaming Aresco Assistant Athletics Director, Defendant granted him, at a minimum, an opportunity for advancement.

IV. DEFENDANT IS NOT ENTITLED TO A STAY AND THE COURT SHOULD REJECT ITS CONCILIATION CHALLENGE

A. NO CONCILIATION EFFORTS ARE REQUIRED UNDER THE EPA

This circuit has held that the EPA "make[]s it clear that 'the Equal Pay Act, unlike Title VII, has no requirement for filing administrative complaints and awaiting administrative

conciliation efforts.'" Ostosky v. Wick, 704 F.2d 1264, 1266 (D.C. Cir. 1983). Although Defendant does not allege that the EPA requires the Commission to attempt conciliation, and says only that Title VII requires it, Defendant ignores this circuit's binding precedent and other cases where courts, including the Supreme Court, have said that the EPA does not require conciliation efforts. See County of Washington v. Gunther, 452 U.S. 161, 175, n.14 (1981) ("the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts[.]"); EEOC v. Home Economy, Inc., 712 F.2d 356 (8th Cir. 1983) (reversing district court's order dismissing the Commission's EPA claim because it allegedly did not conciliate with the defendant, and holding that EEOC is not required to conciliate as a prerequisite to litigation under the EPA). Although the Commission gave Defendant the opportunity to conciliate the EPA violations, it had no legal duty to do so; the agency was not required to engage in conciliation efforts before filing its EPA claims.

B. AS TO THE TITLE VII VIOLATIONS, THE COMMISSION SATISFIED *MACH MINING*

Defendant does not challenge the manner in which conciliation was conducted, nor has it submitted any evidence that would support a relevant conciliation challenge. The University concedes that it cannot rely on anything said or done in conciliation, but argues that is no barrier because its conciliation argument rests on the Commission's purported failure to issue a determination "*before* engaging in conciliation." Doc. 10-1, PID 30, n.6. Defendant's argument must be rejected. The University concedes that the Commission issued a nearly three-page LOD that not only notified Defendant what it did wrong, but also identified specific documents that contradicted the University's position. Defendant has failed to present credible and relevant

evidence to challenge conciliation.[9] Mach Mining, LLC v. EEOC, __ U.S. __, 135 S. Ct. 1645, 1649, 1656 (2015).

In Mach Mining, the Supreme Court strictly limited the judicial review courts may exercise over EEOC's conciliation efforts. To ensure EEOC's compliance with the statutory conciliation mandate, a court may review only whether EEOC: (1) communicated in some way, through conference, conciliation, and persuasion, about an alleged unlawful employment practice in an endeavor to achieve a voluntary compliance, and (2) tried to engage the employer in some form of discussion to remedy the alleged discriminatory conduct. Mach Mining, 135 S.Ct. at 1655-56. "Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute." Id. at 1656. However, a court's review of whether that happened is "relatively barebones" and the court looks only to whether EEOC attempted to confer about a charge, and not what happened during those discussions. Id. As Mach Mining acknowledges, EEOC exercises all the "expansive discretion" granted to the Commission by statute, to decide how to conduct conciliation efforts and when to end them. Id. Review of conciliation matters "can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions." Id. See also, EEOC v. Mach Mining, LLC, Case No. 11-cv-00879-JPG-PMF, 2016 U.S. Dist. LEXIS 5918 (S.D. Ill. Jan. 19, 2016) (Mach II).

[9] Even if Defendant had done so, the only available remedy would be a stay of the Title VII claims, which cannot be ordered before the Court first conducts a factfinding hearing necessary to decide that dispute. Mach Mining, LLC v. EEOC, 135 S.Ct. at 1649. If the Court decides to conduct such a factfinding hearing, EEOC reserves the right to present additional evidence that it satisfied its conciliation obligations as defined by Mach Mining.

Moreover, in Mach Mining the Court rejected the argument that EEOC is required, in its conciliation efforts, to "lay out the factual and legal basis for all its positions. . . ." Mach Mining, 135 S. Ct. at 1653-55. EEOC's pre-suit efforts:

> [N]eed not involve any specific steps or measures; rather, the Commission may use in each case whatever "informal" means of "conference, conciliation and persuasion" it deems appropriate. And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever "unable to secure" terms "acceptable *to the Commission*." All that leeway respecting how to seek voluntary compliance and when to quit the effort is at odds with Mach Mining's bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices – as Mach Mining urges and many courts have done . . . is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Id., internal citations omitted (emphasis in original). Courts have concluded correctly that Mach Mining does not require EEOC to identify, pre-suit, all allegations that are included in a later-filed complaint or in subsequent litigation. See EEOC v. Bass Pro Outdoor World, L.L.C., No. 15-20078, 2016 U.S. App. LEXIS 11031, at **11-12, 26, n.74, 29-30 (5th Cir. June 17, 2016) (EEOC satisfied its pre-suit conciliation obligation in a class case even though it did not provide defendant with any of the names of the 200 aggrieved individuals until after the litigation began); Arizona ex rel. Horne v. Geo Group, Inc., 816 F.3d 1189, 1200 (9th Cir. 2016) (rejecting premise that EEOC must identify and conciliate on behalf of each individual aggrieved employee prior to filing a lawsuit seeking recovery on behalf of a class); EEOC v. Amsted Rail Company, Inc., 14-cv-1292-JPG-SCW, 2016 U.S. Dist. LEXIS 6466, at **16-19 (S.D. Ill. Jan. 20, 2016) (rejecting argument that EEOC failed to satisfy its conciliation obligation because it did not explain its reasons for believing the defendant's practices were unlawful); EEOC v. Jetstream Ground Services, Inc., 134 F. Supp. 3d 1298, 1316 (D. Colo. Sept. 29, 2015) (in assessing whether EEOC

satisfied its conciliation obligation, refusing to consider arguments that, in conciliation, EEOC proposed a settlement fund for aggrieved individuals who had not yet been identified without providing calculations or disclosing bases). See also, Mach II, 2016 U.S. Dist. LEXIS 5918, at **5-6, 11-14 (rejecting the conclusion that an unsupported take-it-or-leave-it demand letter could not constitute an attempt to engage in conciliation and rejecting the notion that EEOC fails to satisfy its conciliation obligation just because it does not provide all the information the defendant requests).

Here, EEOC has submitted sufficient evidence that it communicated in some way, through conference, conciliation, and persuasion, about alleged unlawful employment practices in an endeavor to achieve a voluntary compliance, and tried to engage the University in some form of discussion to remedy the alleged discriminatory conduct. As evidenced by the Weinstein Declaration, and by Defendant's own motion and Exhibits, EEOC satisfied the first prong of Mach Mining by providing a description of what Defendant did, and failed to do, and how it discriminated against Williams. See Mach Mining, 135 S. Ct. at 1655-56; Mach II, 2016 U.S. Dist. LEXIS 5918 at **11-12. The Weinstein Declaration affirms that after issuing the LOD, and before issuing a conciliation failure notice, EEOC engaged in conciliation communications with the University in an attempt to eliminate and remedy the alleged unlawful practices, but that such efforts did not secure a conciliation agreement on terms acceptable to the Commission. See Mach Mining, 135 S. Ct. at 1656; Weinstein Declaration. The Commission did not file this lawsuit until more than five months after it issued the LOD, and after it concluded that its conciliation efforts

had not produced a conciliation agreement acceptable to the Commission.[10] Doc. 1; Weinstein Declaration. The Commission satisfied both prongs of Mach Mining. Id.

Defendant argues that the Commission failed to make conciliation efforts because the agency allegedly would not show Defendant secret evidence from the investigation file. Nothing in the LOD refers to secret evidence or even uses the word secret. Indeed, in the notes allegedly prepared by Defendant's Assistant Vice President Vickie Fair, which include multiple levels of hearsay for which Defendant identifies no exceptions, Fair complains that she asked two Commission staff members for copies of documentation that contradicted the University's arguments, but the Commission did not produce them. But she does not say that the Commission had secret evidence, or claimed to have secret evidence, nor does she use that phrase. Doc. 10-6, PID 6. In fact, as the Commission pointed out in its LOD, Williams did complain to the University that she had been subjected to gender discrimination, including disparate pay and other disparate treatment, but the University did not stop, correct, or remedy the discriminatory practices. Doc. 10-3, PID 3. Having already had an opportunity to investigate Williams' internal complaint, the University's claim that it did not know what evidence she relied on or how it related to her allegations, is unpersuasive. Moreover, Mach Mining does not require EEOC to present specific

[10] Defendant cites no evidence or authority supporting its contention that the Commission rushed out charges based on evidence that it never showed the University. Doc. 10-1, PID 8. The Commission issued a three-page determination in which it said that the University's own documents (that the University provided) supported its conclusion and contradicted the University's position. Further, Defendant cites no evidence or authority to support its contention that the Commission rushed to file this case for the purpose of "proclaiming in a press release" that it had filed three enforcement actions to combat pay discrimination. Doc. 10-1, PID 8; Id., PID 13. The Commission did not file this case until more than five months after issuing its determination, and more than two months after conciliation ended. Doc. 1; Weinstein Declaration. Of course, the Commission did file this action to combat pay discrimination and, specifically, to obtain relief for Williams and restrain the University from engaging in sex discrimination. Such enforcement action is consistent – not inconsistent – with the agency's duty. Moreover, the public is entitled to know that the Commission has filed enforcement actions in the public interest.

evidence supporting its allegations, rather than simply notifying the defendant of the allegedly unlawful practices. EEOC v. Lawler Foods, Inc. Civil Action No. 4:14-CV-03588, 2015 U.S. Dist. LEXIS 167178, **7-8 (S.D. Tex. Dec. 4, 2015). In Lawler, the court found that, at most, the employer's "affidavit shows that the EEOC did not fully disclose all of the evidence uncovered in its investigation of Lawler Foods" but under Mach Mining, the statute "imposes no duty of full disclosure upon the EEOC, and this Court cannot pry into the EEOC's strategic decisions regarding conciliation. . . ." Id. at *8, citing Mach Mining, 135 S. Ct. at 1654.

As evidenced by the correspondence Defendant has filed, the Commission notified the University of its findings and, after doing so, invited the University to join the Commission in its efforts to conciliate. That is also affirmed by the Weinstein Declaration and attached Exhibits. The University disagreed with the Commission's findings, and while repeating unpersuasive arguments that it had already made to the Commission, the University asked the Commission to cease conciliation efforts and reconsider its findings, instead. Doc. 10-6, PID 4. That the University disagreed with the Commission's findings, and preferred to delay conciliation efforts while it continued expressing disagreement with findings, has no bearing on whether the Commission's conciliation efforts satisfy Mach Mining.

Moreover, the EEOC *did identify and describe documents* to the University in the LOD and explained how they contradicted the University's position. Doc. 10-3, PID 2-4. In doing so, it granted the University's request that the agency identify and disclose documents that supported the Commission's conclusions and refuted the University's position. After Fair purportedly asked the Commission to identify and describe such documentation, the Commission issued a nearly three-page LOD in which it provided a detailed explanation of its findings and identified documents. Doc. 10-3, PID 2-4. Those documents included the University's own position

description and job posting. Id. The documents did not come from a secret source, nor was their content a secret to the University – in fact, the University had provided them to the Commission. Doc. 10-1, PID 12, n.2; Id., PID 11. The LOD indicates that while University claimed during the investigation that the Executive and Special Assistant jobs were different, the evidence did not support its position. Doc. 10-3, PID 3. As an example, the LOD says the University's position is contradicted by an Executive Assistant description and the Special Assistant job posting that the University submitted to the Commission, both of which indicate that the two jobs were so similar as to support the agency's assessment that Defendant violated the EPA and Title VII. Doc. 10-3, PID 3. The bulk of the LOD makes clear that the University's own documents refuted its position and supported the Commission's findings. Doc. 10-3, PID 2-4. The University's correspondence that Defendant filed, and Defendant's motion to dismiss, show that the University was fully aware of those documents and their significance to the issues raised in Williams' Charge and the investigation. That the Commission's findings are based on the University's own documents and information is no secret.

V. CONCLUSION

For the above and foregoing reasons, Defendants' Motion to Dismiss this action under Federal Rule 12(b)(6) must be denied in its entirety. The Court should conclude that no conciliation efforts were required as to the EPA claims and, as to the Title VII claims, that EEOC satisfied administrative procedures pursuant to the standards announced by the Supreme Court in Mach Mining. In the alternative, if the Court concludes that the Commission has insufficiently pled its claims, the Commission respectfully requests that the Court grant it leave to amend under Federal Rule 15(a)(2) instead of dismissing the Complaint.

Respectfully submitted,

/s/ Kate Northrup
Kate Northrup
Supervisory Trial Attorney
U.S. Equal Employment Opportunity Commission
Baltimore Field Office
George H. Fallon Building
31 Hopkins Plaza, Suite 1432
kate.northrup@eeoc.gov
Telephone: (410) 209-2722
Fax: (410) 209-2221

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of EEOC's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, and attached Exhibits, were electronically filed and thereby served this 29th day of November 2017, upon counsel for Defendant, Jason C. Schwartz, Matthew S. Rosen, and Wendy Miller, Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036.

/s/ Kate Northrup
Kate Northrup
Supervisory Trial Attorney

DECLARATION OF MINDY WEINSTEIN

1. Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

2. I am the Acting Director of the Washington Field Office of the United States Equal Employment Opportunity Commission (EEOC).

3. As the Acting Director, I have authority to enter into informal conciliation efforts and to negotiate and sign conciliation agreements, pursuant to 29 C.F.R. §1601.24. Where the Commission is unable to obtain voluntary compliance, I have the authority, pursuant to 29 C.F.R. §1601.25, to determine that further efforts to do so would be futile or nonproductive and to so notify the respondent/s in writing.

4. On October 19, 2016, Sara Mutalib filed EEOC Charge of Discrimination No. 570-2017-00064 against George Washington University (Respondent). A true and correct copy of EEOC Charge No. 570-2017-00064 is attached as Exhibit A.

5. On January 23, 2017, Respondent submitted to the Commission material which included Respondent's responses to Requests for Information that had been issued by the Commission, Respondent's Position Statement, and Respondent's Exhibit Index with attached Exhibits. A true and correct copy of that Exhibit Index, along with copies of two Exhibits that Respondent submitted with the Index – Respondent's Exhibit 6 (identified as "Special Assistant, Athletics Job Posting") and Respondent's Exhibit 8 (identified as "Executive Assistant Position Description") – are attached as Exhibit B.

6. On April 21, 2017, the EEOC issued a Letter of Determination (LOD) in the matter of EEOC Charge No. 570-2017-00064, finding that Respondent violated the Equal Pay Act of 1963, as amended (EPA), and Title VII of the Civil Rights Act of 1964, as amended (Title VII), and inviting the parties to participate in informal methods of conciliation with the EEOC. A true

and correct copy of the LOD issued regarding EEOC Charge No. 570-2017-00064 is attached as Exhibit C.

7. After issuing the LOD, and before issuing a conciliation failure notice on July 19, 2017, the EEOC engaged in conciliation communications with Respondent in an attempt to eliminate the alleged unlawful practices and reach a just resolution by informal methods of conciliation.

8. Conciliation efforts did not secure from Respondent a conciliation agreement on terms that were acceptable to the Commission, and, on July 19, 2017, a conciliation failure notice was issued concluding that conciliation efforts had been unsuccessful, and that further conciliation efforts would be futile or non-productive. A true and accurate copy of the Notice of Conciliation Failure issued regarding EEOC Charge No. 570-2017-00064 is attached as Exhibit D.

9. I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of November 2017.

Mindy Weinstein
Acting Director

Weinstein Declaration, Exhibit A

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: [ ] FEPA [X] EEOC

Agency(ies) Charge No(s): 570-2017-00064

D.C. Office Of Human Rights and EEOC

State or local Agency, if any

Name (indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Ms. Sara L. Mutalib	(484) 432-0111	[redacted]

Street Address: 250 Woodard Road, Arnold, MD 21012 — City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (Include Area Code)
GEORGE WASHINGTON UNIVERSITY	500 or More	(202) 994-1000

Street Address: 600 22nd Street, N.W., Washington, DC 20052 — City, State and ZIP Code

DISCRIMINATION BASED ON (*Check appropriate box(es).*)

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[ ] RETALIATION [ ] AGE [ ] DISABILITY [ ] GENETIC INFORMATION
[X] OTHER (*Specify*) Equal Pay

DATE(S) DISCRIMINATION TOOK PLACE
Earliest: 03-07-2016 Latest: 03-07-2016
[X] CONTINUING ACTION

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I was hired at George Washington University in the Department of Athletics on September 14, 2014 as the Executive Assistant to the Director of Athletics and Recreation.

On or about January 15, 2016, I became aware of the Department of Athletics Special Assistant job posting. The job description and functions were identical to mine and the position was intended for a male coworker who was being promoted to the position. The starting salary for the position was $37,000 more than my salary. To my knowledge, I am as qualified, if not more qualified than my male counterpart and have since performed the same job functions.

I believe I have been discriminated against on the basis of sex (female), in violation of Title VII of the Civil Rights Act of 1964, as amended. I also believe that I am being paid less than a similarly situated male employee, in violation of the Equal Pay Act of 1963, as amended.

EEOC WASHINGTON FIELD OFFICE 131 M STREET, N.E. WASHINGTON, DC 20507 OCT 19 PM 4:33

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Oct 19, 2016 — Date

Sm talb — Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

Weinstein Declaration, Exhibit B

Sara L. Mutalib v. The George Washington University
EEOC Charge No. 570-2017-00064

EXHIBIT INDEX

EXHIBIT NUMBER	EXHIBIT DESCRIPTION
1	Employee Handbook
2	Organizational Chart
3	FY2017 Merit Memorandum
4	Equal Employment Opportunity Statement
5	Mutalib Resume
6	Special Assistant, Athletics Job Posting
7	Aresco Resume
8	Executive Assistant Position Description
9	Special Assistant, Athletics Position Description

Exhibit 6

Posting Details

I. JOB OVERVIEW

Job Description Summary:	The George Washington University Department of Athletics and Recreation actively engages our students, our campus community, our alumni and our fans through the spirit of healthy living and competition. Located in the heart of our nation's capital, this world-class university aspires to have a world-class athletics and recreation program. We are committed to building and sustaining a program that mirrors the overall excellence of the university, by providing students an unparalleled opportunity for achievement and engaging the larger community as we grow and cultivate the next generation of leaders. The Department of Athletics and Recreation seeks a Special Assistant, Athletics to provide high-level administrative support to Director of Athletics. Responsibilities include: Leading the administrative function of the Office of the Director of Athletics and Recreation. Coordinating administrative staff members (including full-time, part-time, temporary and student staff). Maintaining the external face of the Office of the Director of Athletics and Recreation and acts as liaison to external departments for administrative and operational matters. Acting as a project manager for special projects in support of key priorities for the Department of Athletics and Recreation Serving on the Senior Staff of the Department of Athletics.
Minimum Qualifications:	Bachelor's degree in an appropriate area of specialization plus 2 years of relevant professional experience. Degree requirements may be substituted with an equivalent combination of education, training and experience.
Required Licenses/Certifications/Posting Specific Minimum Qualifications:	
Preferred Qualifications:	4+ years administrative experience in similar role managing a senior executive and/or organization. High proficiency with MS Office Suite. Excellent communication and interpersonal skills and demonstrated experience in dealing with confidential information. Ability to thrive in a fast-paced environment.

II. JOB DETAILS

Campus Location:	Hampton
College/School/Department:	Athletics and Recreation
Family	Administration
Sub-Family	Administrative / Operations
Stream	Individual Contributor
Level	Level 2

Full-Time/Part-Time:	Full-Time
Hours Per Week:	40+
Work Schedule:	Monday-Friday; nights and weekends
Position Designation:	Essential: Employees who perform functions that have been deemed essential to maintaining business or academic operations. Employees are generally expected to work from home during an event and may be asked to physically report to work.
Telework:	No
Required Background Check:	Criminal History Screening, Education/Degree/Certifications Verification, Social Security Number Trace, and Sex Offender Registry Search, Credit
Special Instructions to Applicants:	
Internal Applicants Only?	Yes (Department Specific)
Posting Number:	S005104
Job Open Date:	01/05/2016
Job Close Date:	01/08/2016
If temporary, grant funded or limited term appointment, position funded until:	
Background Screening	
EEO Statement:	The university is an Equal Employment Opportunity/Affirmative Action employer that does not unlawfully discriminate in any of its programs or activities on the basis of race, color, religion, sex, national origin, age, disability, veteran status, sexual orientation, gender identity or expression, or on any other basis prohibited by applicable law.

Posting Specific Questions

Required fields are indicated with an asterisk (*).

1. * Are you currently employed at the George Washington University?
   - Yes
   - No

Documents needed to Apply

Required Documents

1. Resume
2. Cover Letter

Optional Documents

None

Exhibit 8

Executive Assistant to the Director of Athletics and Recreation

Minimum Qualifications:
Associate's degree in an appropriate area of specialization plus 2-4 years of relevant professional experience. Degree requirements may be substituted with an equivalent combination of education, training and experience.

Desired Qualifications:

- Experience supporting a senior executive preferred.
- Strong written and verbal communication skills.
  Ability to perform in fast-paced environment.
- Exceptional attention to detail and organizational skills.
- Proficient with Microsoft Office.
- Ability to maintain confidentiality and demonstrate a commitment to integrity.

JOB DUTIES

- Provide administrative support to the Director of Athletics and Recreation. Oversee daily calendar, scheduling of meetings, and management of task list systems. Coordinate communication and workflow between Director of Athletics and Recreation and Department staff members and campus colleagues.
- Plans and manages Director of Athletics and Recreation travel and donor meetings, scheduling appointments and preparing travel itineraries. Coordinates with appropriate staff on briefings, documenting of donor contact, and processing out of follow up.
- Assist in management of Athletic Director budget by processing and filing financial receipts and tracking expenses in coordination with Department of Athletics and Recreation Business Office.
- Drafts and sends correspondence on behalf of the Director of Athletics and Recreation to both internal and external constituents. Serve as administrative interface between Director of Athletics and University and Conference colleagues, among others.
- Maintains comprehensive files (electronic and paper) and data for office.
- Assist with the hiring and management of student employees and interns.
- Performs other work related duties as assigned. The omission of specific duties does not preclude the supervisor from assigning duties that are logically related to the position.

APPLICANT DOCUMENTS:

Required Documents

1. Resume
2. Cover Letter

Weinstein Declaration, Exhibit C

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

131 M Street, N. E., Suite 4NW02F
Washington, D. C. 20507
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Washington Status Line: (866) 408-8075
Washington Direct Dial: (202) 419-0713
TTY (202) 419-0702
FAX (202) 419-0740
Website: www.eeoc.gov

Charge No. 570-2017-00064

Sara Mutalib
250 Woodward Road
Arnold, MD 21012

Charging Party

George Washington University
2121 Eye Street, NW
Suite 101
Washington, DC 20052

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination on the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and the Equal Pay Act of 1963 ("EPA"). All requirements for coverage have been met.

Charging Party, who was employed by Respondent as the Executive Assistant to the Director of Athletics and Recreation, alleges that Respondent paid her lower wages than a similarly situated male employee based on her sex (female), in violation of Title VII and the EPA. She further contends that Respondent discriminated against her because of sex in violation of Title VII when Respondent selected a male employee for a Special Assistant position in the Department of Athletics and otherwise subjected Charging Party to disparate treatment.

Respondent denies that it discriminated against Charging Party because of her sex. Regarding the Special Assistant position, Respondent admits that it selected Michael Aresco (male) for the position but Respondent contends that Charging Party was less qualified than Aresco for the job. Respondent also contends that Charging Party did not apply for the position. Regarding the alleged disparate pay, while Respondent admits that it paid Charging Party a lower salary than Aresco, Respondent contends that it did not violate the EPA or Title VII in doing so because the Executive Assistant and Special Assistant positions constituted different jobs.

The record evidence shows that Respondent paid Charging Party approximately $39,000/year while she held the position of Executive Assistant the Director of Athletics from August 2014 to December 2016. In that position, Charging Party performed a variety of tasks including providing high-level administrative support to Respondent's Director of Athletics, Patrick Nero.

In approximately September 2015, Respondent moved Aresco into an office near the Director of Athletics, and in the suite of offices where Charging Party worked as the Athletic Director's Executive Assistant. Thereafter, Respondent subjected Charging Party to less favorable treatment than Aresco, including maximizing Aresco's training, role, and opportunities to Charging Party's detriment. For example, some of Charging Party's job duties were taken away from her and given to Aresco. Charging Party was required to train Aresco how to perform various aspects of her job, but she remained responsible for completing duties that Aresco could not or would not complete. During this period, the Athletic Director, Aresco, and others behaved as if Aresco had been pre-selected for a job in Administration. Continuing through Charging Party's departure from the Athletics Department in December 2016, Respondent continued to subject Charging Party to less favorable terms and conditions of employment than Aresco, and to further minimize her employment opportunities to Aresco's benefit.

In January 2016, Respondent issued a formal posting for a job it called "Special Assistant, Athletics." The job posting Respondent provided to the Commission describes the Special Assistant job as one providing "high-level administrative support to the Director of Athletics." The pay range Respondent set for the Special Assistant position was $63,900 – $92,700, substantially higher than the wages that Respondent had been paying Charging Party, since at least August 2014, to work as the Executive Assistant to the Director of Athletics. According to Respondent, it selected Aresco for the Special Assistant position and paid him $77,500/year to perform that job.

The record evidence indicates that Charging Party did complain to Respondent that she had been subjected to gender discrimination, including disparate pay and other disparate treatment, but Respondent did not stop, correct, or remedy the discriminatory conduct.

Regarding Aresco's selection for the Special Assistant job, Respondent's contention that Aresco was better qualified than Charging Party is not supported by the record evidence. While Respondent contends that Charging Party did not apply for the position, record evidence indicates that Charging Party was deterred from submitting an application in response to the Special Assistant posting, and that it would have been futile for her to do so.

Regarding the lower wages paid to Charging Party to work as the Executive Assistant to the Athletic Director, as compared to the wages paid to Aresco to work as Special Assistant to the Athletic Director, Respondent contends that the two jobs were different. The record evidence does not support Respondent's position. For example, Respondent's position is contradicted by the Executive Assistant description and the Special Assistant job posting that Respondent submitted to the Commission, which describe both jobs as providing high-level administrative support to the Director of Athletics, and otherwise indicate that the two jobs were so similar as to support a finding of unequal and discriminatory pay in violation of the EPA and Title VII.

Based on the record evidence obtained by the Commission, there is reasonable cause to believe that Respondent violated the Equal Pay Act when Respondent paid Charging Party lower wages than those paid to Michael Aresco, beginning in at least August 2014 and continuing thereafter to the date Charging Party left the Athletic Department. Further, I find that Respondent has

engaged in violations of Title VII of the Civil Rights Act of 1964, as amended, by: engaging in disparate and discriminatory pay practices because of gender beginning in at least August 2014 and continuing thereafter; discriminating against Charging Party because of gender when Respondent failed to select Charging Party for, or otherwise grant to her, the Special Assistant position and/or the pay, benefits, and opportunities associated with that position; and discriminating against Charging Party because of gender by subjecting her to disparate terms and conditions of employment, including the deprivation of employment opportunities, advancement, and other employment related benefits.

Upon finding that violations have occurred, the Commission will attempt to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of the matter. The confidentiality provisions of Sections 706 and 709 of Title VII apply to information obtained during conciliation discussions.

If Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to the aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation discussion.

You are reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission investigations is also prohibited. These protections apply regardless of the Commission's determination on the merits of the Charge.

On Behalf of the Commission:

4/21/17
Date

Mindy E. Weinstein
Acting Director

Weinstein Declaration, Exhibit D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

131 M Street, N. E., Suite 4NW02F
Washington, D. C. 20507
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Washington Status Line: (866) 408-8075
Washington Direct Dial: (202) 419-0713
TTY (202) 419-0702
FAX (202) 419-0740
Website: www.eeoc.gov

James Keller
Saul Ewing
Centre Square West
1500 Market Street
38th Floor
Philadelphia, PA 19102

RE: Charge number: 570-2017-00064
Sara Mutalib vs. George Washington University

Dear Mr. Keller:

The Equal Employment Opportunity Commission (EEOC) has determined that efforts to conciliate this charge as required by Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act have been unsuccessful. This letter constitutes the notice required by EEOC's Procedural Regulations which provides that the Commission shall notify the parties in writing when it determines that further conciliation efforts would be futile or non-productive.

No further efforts to conciliate this case will be made by EEOC. Accordingly, we are at this time forwarding the case to our legal unit for possible litigation.

On Behalf of the Commission:

FOR

Mindy Weinstein
Acting Director

7/19/2017
Date