"As a Concept, Pay Equity Seems Simple in Its Application…"

BY LYNETTE PACZKOWSKI • JUNE 24, 2019

So began a decision out of the United States District Court for the District of Oregon last month, which dismissed a lawsuit brought by Jennifer Freyd, professor of psychology at the University of Oregon, against the University and two University officials. In the lawsuit, Freyd alleged that although her own department chair identified a "glaring" pay gap between her and the men she works with, nothing has been done to equalize her pay.

In 2016, the University's psychology department conducted a self-study. One of the findings of the study was that there was a "significant [gender] equity problem with respect to salaries at the full professor level." The average annual difference between male and female full professors was about $25,000. The department also engaged a committee of outside professors to perform an external review. That study also noted the "gender disparity in faculty salaries at the full professor level."

The reason for the disparity, according to both studies, was retention raises given to professors who pursued outside offers. The self-study noted that this was concerning, as "it is not obvious that the frequency of retention negotiations is a strong indicator of overall productivity." Thereafter, the department sought ways to bridge the pay gap, but the University failed to take action.

According to Freyd's suit, department salaries are to be based on seniority and merit, with merit being a combination of research, teaching and service. She alleged that there are six male full professors in her department, all junior to her in years of service, and all with a lower h-index score (a measure of a published researcher's productivity and impact) than hers. Her salary, however, is lower than three of the male full professors, and she is paid nearly the same as a fourth male colleague, who is substantially junior.

In dismissing the case, the Court justified the pay gap by differentiating the kind of work the men in the psychology department perform and focusing on the retention raises they had secured over the years.

As to the nature of the work, the Court found that of the four comparators identified by Freyd, some had titles that

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brought additional job responsibilities; for example, the department head who performed both financial and supervisory work and the department's director of clinical training. Perhaps more surprisingly, the Court also used the amount of federal research funding received to distinguish the nature of the work performed.

The Court ruled that "[w]hen determining whether two jobs are substantially similar, '[a]ctual job performance and content, rather than job descriptions, titles or classifications, is determinative.' Depending on the requirements of the grant in question, federal grant recipients may have substantial additional duties and responsibilities above and beyond those borne by full professors who receive no federal funds. As with all comparisons between jobs, the court must evaluate the positions on a case-by-case basis. Professor Freyd's argument that a professor's job duties are limited to service, research and teaching misses the mark. By focusing only on the alleged job duties, Professor Freyd overlooks the actual day-to-day work and responsibilities of her alleged comparators."

Client Tip: While titles and job responsibilities have previously been held to be a basis other than sex, here the Court relied on duties that may be owed to an independent funding source, not to the University, to justify a gender pay gap at the University. We will be watching this case closely to see if Freyd appeals and, if she does, how the Ninth Circuit rules.

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