99-9324(L)

99-9368 (XAP)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 99-9324(L); 99-9368 (XAP)

BARBARA LAVIN-McELENEY,

Plaintiff-Appellee,

-against-

MARIST COLLEGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE

IN SUPPORT OF DEFENDANT-APPELLANT AND FOR REVERSAL OF JUDGMENT ON THE EQUAL PAY ACT CLAIM

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The American Council on Education ("ACE") respectfully submits this brief as amicus curiae pursuant to Rule 29 of the Federal Rules of Appellate Procedure. ACE urges that the judgment of the District Court for the Southern District of New York be vacated, and that the Equal Pay Act claim be dismissed. Both parties have consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

ACE is a nonprofit national educational association founded in 1918. ACE's membership includes approximately 1,800 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher education affairs, ACE seeks to promote the interests of all members of the academic community--students, faculty, administration, and the institutions themselves. ACE participates as an amicus curiae only on rare occasions when a case presents issues of substantial importance to higher education in the United States. This is such a case.

The Amicus views this proceeding with great concern because affirmance of the decision below sets a dangerous precedent, contrary to what the Equal Pay Act provides, contrary to established precedent, contrary to what Congress intended in enacting the Equal Pay Act, and contrary to the policy of judicial non-interference in the decision making of academic institutions. Affirmance of the decision below will impair the ability of institutions of higher education to attract and retain the

best scholars, and threatens to expose them to the constant prospect, cost and disruption of judicial reproof.

SUMMARY OF THE ARGUMENT

Like any employer, colleges and universities need the ability to exercise a certain amount of discretion in how to accomplish business objectives, including how much to pay faculty members. And, like other employers, colleges and universities are essentially "price-takers" in the marketplace for employees. These institutions need the ability to compete against other institutions and the private sector to obtain the best faculty. Insofar as a college's or university's ability to attract and retain the best faculty directly affects both the quality and the dimensions of the education and academic programs, academic institutions absolutely require the ability to exercise discretion in regard to faculty compensation.

Colleges and universities require even greater autonomy and freedom from judicial interference and "second-guessing" of decisions than do employers generally. First, in the academic world, questions of promotion and compensation may be far more complex than in the commercial world. Second, issues of "national importance" are at stake when the "employer" under the Equal Pay Act is a college or university because academic institutions are called upon by society to play a unique and important role -- preservation of intellectual freedoms and advancement of intellectual inquiry that is deemed essential to a free society. The

prerogative of a college or university to determine for itself not only who may teach, but also how much it will pay for academic services, is an important part of our long tradition of academic freedom. The right of colleges and universities to academic freedom and autonomous decision making means very little if, by exercising it, colleges and universities suffer, or risk, judicial reproof.

ACE is alarmed by the decision below because the district court drastically departed from settled precedent by: (1) permitting the plaintiff, Barbara Lavin-McEleney ("Plaintiff"), to make out a prima facie case, notwithstanding that she failed to identify any actual male comparator, but only "hypothetical" comparators, defined by a statistical formula; (2) permitting Plaintiff to use flawed and unreliable statistical evidence that failed to control for nondiscriminatory causes for salary disparities, including differences in the market rate of associate professors in various academic disciplines; and (3) denying Marist College's motion for even judgment though CUPA salary survey and other peer surveys and testimony regarding Plaintiff's performance being only "average" established a "factor-other-than-sex" defense under the Equal Pay Act which was not shown to be pretextual by Plaintiff.

STATEMENT OF THE CASE

ACE adopts the statement of the case set forth in the brief of the defendant-appellant.

ARGUMENT

I. PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE

The Equal Pay Act provides, in pertinent part, that no employer may pay employees wages at a rate less than the rate at which he pays wages to employees of the opposite sex "for equal work," except where the differential is based on "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). A plaintiff bringing an Equal Pay Act claim must establish a prima facie case of wage discrimination by demonstrating that: (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions. Aldrich v. Randolph Cent. School Dist., 963 F.2d 520, 524 (2d Cir.), cert. denied, 506 U.S. 965 (1992). An Equal Pay Act plaintiff "must show not only that she is being paid lower wages than her male comparator, but also that she is performing work substantially equal in skill, effort and responsibility to her comparator under similar working conditions," i.e., the male job comparator must be properly selected. Strag v. Board of Trustees, 55 F.3d 943, 949 (4th Cir. 1995). However, actual job performance and content, rather than job descriptions, titles or classifications, are determinative. Spaulding v. University of Washington, 740 F.2d

686, 697 (9th Cir.), cert. denied, 469 U.S. 1036 (1984). Thus, each claim that jobs are substantially equal necessarily must be determined on a case-by-case basis. Id.

Once the plaintiff makes out a prima facie case, the burden shifts to the employer to justify the wage differential by proving that the disparity results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

A. It Was Clearly Erroneous For The Magistrate Judge Not To Dismiss Plaintiff's Equal Pay Act Claim Based On Plaintiff's Failure To Identify An Actual Male Comparator Who Performed A Substantially Equal Job

The establishment of a prima facie case under the Equal Pay Act essentially hinges on the plaintiff's ability to identify a particular comparator for purposes of her inquiry, who is not a hypothetical person, nor a "composite" co-employee. A plaintiff's failure to identify a specific comparator who performs substantially equal work is fatal to the plaintiff's Equal Pay Act claim. In Houck v. Virginia Polytechnic Inst., 10 F.3d 204 (4th Cir. 1993), a plaintiff brought an Equal Pay Act claim alleging that men in her department received higher pay than she did despite having the same skill, effort, and responsibility, and working conditions. Based upon the fact that the plaintiff failed to compare herself to a particular male comparator, but instead compared herself to a hypothetical male comparator, the district court dismissed her suit for failing to establish a prima facie case under the

Equal Pay Act. The Fourth Circuit Court of Appeals affirmed dismissal of the suit on the ground that the plaintiff failed to establish a prima facie case:

> In order to establish a prima facie case under the Equal Pay Act, the plaintiff must show that she receives less pay than a male co-employee performing work substantially equal in skill, effort, and responsibility under similar working conditions. This comparison must be made factor by factor with the male comparator. The plaintiff may not compare herself to a hypothetical male with a composite average of a group's skill, effort, and responsibility, but must identify a particular male for the inquiry.

Id. at 206 (emphasis added).

In Bartges v. University of North Carolina, 908 F. Supp. 1312 (W.D.N.C. 1995), aff'd, 94 F.3d 641 (4th Cir. 1996), the court granted the University's motion for summary judgment as to the plaintiff's Equal Pay Act claim because the plaintiff failed to make a prima facie showing of unequal pay for equal work based upon failure to identify an actual comparator. "[Bartges] has made the very comparisons with hypothetical or composite males that cannot be used to prove a violation of the Equal Pay Act." Id. at 1324.

In the case at bar, Plaintiff failed to identify any actual male comparator performing work substantially equal in skill, effort and responsibility, under similar working conditions. (A 217, 219). Plaintiff only compared herself to hypothetical male faculty members with the same rank, years of service, tenure status, in the same academic division. While in this age of "virtual reality,"

creating hypothetical comparators may have a certain panache, the Equal Pay Act requires real people, performing real functions, in real employment settings. Plaintiff thus failed to state a prima facie case.

B. Statistical Evidence Showing That Various Male Faculty Earned Higher Salaries Than Plaintiff Cannot Support A Prima Facie Case Under the Equal Pay Act Absent A Showing That the Jobs Are Substantially Equal

The district court abused its discretion in according Plaintiff's expert's testimony and statistical evidence probative weight. "The court's role is one of a gatekeeper to exclude invalid and unreliable expert testimony." Bickerstaff v. Vassar College, 196 F.3d 435, 449 (2d Cir. 1999), reh'g denied, 1999 U.S. App. LEXIS 34520 (2d Cir. 1999). Insofar as the comparators were associate professors working in different disciplines and departments, the statistical evidence failed to control for nondiscriminatory causes, such as differences in market value between Criminal Justice and other academic disciplines.[1] As this Court noted, without a showing of causation between the challenged practice and the alleged disparities,

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[1] The higher average salaries of male faculty is attributable to market factors, rather than discrimination on the basis of sex. Dr. Marilyn Poris, Director of Institutional Research, testified that her studies of the salaries paid to professors at Marist disclosed that Marist's female faculty members have chosen disciplines that, on average, are lower paid in the marketplace. (A 411-412). Plaintiff's salary was higher than the average paid to other Criminal Justice professors in similar institutions in the Northeastern United States. (A 452-549). Nor was there evidence that Plaintiff attempted to change to another academic discipline, which would have commanded a higher salary.

"employers [would be] potentially liable for the myriad of innocent causes that may lead to statistical imbalances." Id.

Courts have not allowed plaintiffs to use such statistical evidence for the purpose of making out a prima facie case under the Equal Pay Act absent a showing that the jobs, in actual job content, are substantially equal. Thus, in Bickerstaff, the plaintiff's regression analysis was deemed to be so incomplete as to be inadmissible as irrelevant, because the analysis did not even purport to account for two major variables of salary determinations, teaching and service. Bickerstaff, 196 F.3d at 449.

In Spaulding, the Ninth Circuit held that statistical evidence showing that various male faculty earned higher salaries than the nursing faculty plaintiffs could not support a prima facie case absent a showing that the work performed by the male faculty in other departments or disciplines was substantially equal to the work done by the plaintiffs:

> . . . most important, it did not adequately evaluate the actual work performed by various faculty members. We agree with the district court's observation that the nursing faculty's statistical evidence "either ignores the central fact disputed in this lawsuit, which is whether or not the work done by plaintiffs is substantially equal to the work done by male faculty with whom they compare themselves, or it presumes equality." The statistical evidence may demonstrate a pay disparity, but a difference in pay between jobs which women primarily hold and jobs which men primarily hold does not state a prima facie Equal Pay Act case if the jobs are not substantially equal.

Spaulding, 740 F.2d at 698.

And in Pollis v. New School for Social Research, 913 F. Supp. 771 (S.D.N.Y. 1996), the court held that the statistical evidence was not admissible to support a prima facie case under the Equal Pay Act. Id. at 785. The court noted that "[w]ith respect to causes of action alleging unequal pay for equal work, it is doubtful whether statistics tending to demonstrate a difference between the average salaries paid to male and female employees can satisfy plaintiff's prima facie burden, and "held that a plaintiff cannot make out a prima facie case under the Equal Pay Act simply by "compar[ing] herself to a hypothetical male with a composite average of a group's skill, effort and responsibility." Id. at 784.

In Melanson v. Rantoul, 536 F. Supp. 271 (D.R.I. 1982), the court refused to permit a female art professor to compare her salary to the average salary of male associate professors at the university for purposes of showing that her salary was consistently lower than the average. The court instead required that "[t]he comparison to be made must be the plaintiff's salary levels with those of similarly situated males in the teaching structure." Id. at 287.

Because disparities in salaries can be explained by differences in the market value of various disciplines, or other non-sex-based factors, Plaintiff's statistical evidence showed what Marist paid various faculty, but not that Marist discriminated on the basis of sex in the wages paid to faculty.

C. Plaintiff Identified Improper Male Comparators Who Were In Different Disciplines And Departments Than The One In Which Plaintiff Was Employed

Under the Equal Pay Act, jobs requiring different skills are not substantially equal. Hein v. Oregon College of Education, 718 F.2d 910, 914 (9th Cir. 1983). In the college or university setting, courts have dismissed Equal Pay Act claims for failure to make out a prima facie case where the comparators identified were from different academic disciplines.

In Spaulding, the Ninth Circuit rejected the plaintiffs' argument that "teaching is teaching," such that differences in training and education were irrelevant to whether the jobs were substantially equal. Rather the Ninth Circuit observed that "[c]learly, training in an academic field is necessary to a job as a university faculty member in that field." Spaulding, 740 F.2d at 698. The fact that a comparator is in a different discipline from the plaintiff shows the jobs are not equal under settled precedent.

In Strag, the Fourth Circuit affirmed summary judgment in favor of a college where the plaintiff, a Mathematics instructor, attempted to make out a prima facie case with a male comparator who was a Biology instructor. The court found that the jobs were not substantially equal, noting not only the fact that they worked in different disciplines and departments, but also that the male comparator had more responsibilities than the plaintiff, teaching not only lecture classes, but also lab classes, which required extra preparation and lasted longer than lecture classes. 55

F.3d at 950. See also Soble v. University of Maryland, 778 F.2d 164 (4th Cir. 1985) (holding that a male professor hired to teach in a department other than the one by which the plaintiff was employed did not constitute a proper male comparator because different departments in universities require distinctive skills that foreclose any definitive comparison for purposes of the Equal Pay Act); Lamphere v. Brown Univ., 491 F. Supp. 232, 237 (D.R.I. 1980), aff'd, 685 F.2d 743 (1st Cir. 1982) (recognizing in the Title VII context that "more than trivial differences in treatment [ ] may very well be the result of differing needs of the department and differing economic factors for various disciplines").

Even where two faculty are in the same department, their jobs still may not be substantially equal because differences exist between jobs within the same department or discipline. For example, in Hein, the Ninth Circuit found that a female associate professor in physical education did not have a job substantially equal to her comparator, a male associate professor in physical education, because the male comparator not only taught physical education, but also coached men's varsity basketball. As the Ninth Circuit aptly noted: "[a] coaching job plainly requires skills that a noncoaching job does not." 718 F.2d at 914.

This Court has also recognized that even with comparators in the same discipline and department, the jobs may not be substantially equal. In Fisher v. Vassar College, 852 F. Supp. 1193, 1232 (S.D.N.Y. 1994), the plaintiff, an assistant professor in the biology department of Vassar College brought an Equal

Pay Act claim, identifying as her comparators two male colleagues also in the biology department. Importantly here, this Court held that the district court's finding that "the job of an assistant professor in the biology department is essentially the same with regard to skills required, effort involved and responsibility afforded to the instructor regardless of the specific courses being taught by that instructor" was clearly erroneous, and dismissed the Equal Pay Act claim. Fisher v. Vassar College, 70 F.3d 1420, 1453 (2d Cir. 1995).

In this case, Plaintiff showed only that she is being paid lower wages than various males within the college, or against a hypothetical comparator, but did not show that she performed work substantially equal in skill, effort and responsibility to her comparators under similar working conditions. Given that her comparators worked in different departments, and disciplines, which require different skills and training, the Magistrate Judge erred by adopting the superficial approach that "teaching is teaching." The court allowed Plaintiff to compare "apples with oranges," even though the Equal Pay Act does not. That Plaintiff should have her Equal Pay Act claim dismissed based upon her failure to identify a comparator who is not hypothetical nor outside her discipline is neither unfair nor leaves Plaintiff without a remedy. Even without an Equal Pay Act claim, Title VII was still available to Plaintiff, and, indeed, better suited and more amenable to addressing Plaintiff's wage discrimination claim than the Equal Pay Act. See

Hein, 718 F.2d at 916 n. 5 (describing the Equal Pay Act as "a simple mechanism" unsuited to complicated salary determinations, in contrast to Title VII).

II. MARIST ESTABLISHED ITS "FACTOR-OTHER-THAN-SEX" DEFENSE

Even if Plaintiff made her prima facie showing, once the plaintiff makes out a prima facie case, the burden shifts to the employer to justify the wage differential by proving that the disparity results from one of the defenses enumerated in the Equal Pay Act. See 29 U.S.C. § 206(d)(1). This Court has held that "an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense." Aldrich, 963 F.2d at 526.

In support of its "factor-other-than-sex" defense, Marist offered testimony that it relied on data compiled by the College and University Personnel Association ("CUPA"), as well as its own compilation of salaries paid at comparable schools in the Northeastern United States to determine faculty compensation levels. (A 395-400; A 1295-96; A 1304-05; A 1833-1842; A 2072-2077; A 545; A 2051-52; A 1444).

It is undisputed that Plaintiff's discipline, Criminal Justice, is one of the lowest paid disciplines in private colleges and universities. (A 1193). CUPA data shows that Criminal Justice ranked third lowest in average salary among the 81 disciplines surveyed, ahead of only English Composition and Administrative and

Secretarial Services. See Alison Schneider, *Law and Finance Professors Are Top Earners in Academe, Survey Finds*, CHRON. HIGHER EDUC., May 28, 1999, at A14.[2] This evidence was not disputed, and established a factor other than sex which justifies Marist's paying Plaintiff less than Plaintiff's comparators, all of whom were in disciplines that the survey showed commanded higher salaries in the marketplace.

"Unequal wages that reflect market conditions of supply and demand are not prohibited under the Equal Pay Act." Weaver v. Ohio State Univ., 1998 U.S. Dist. LEXIS 22477 (S.D. Ohio 1998), aff'd, 194 F.3d 1315 (6th Cir. 1999) (granting summary judgment where there was testimony that the market rate differed between field hockey and ice hockey, affidavit concerning the market rate for coaches' salaries in the Big Ten, as well as the NCAA Texas Survey, which collects statistics from eighty-five Division 1-A schools across the country). In Horner v. Mary Institute, 613 F.2d 706 (8th Cir. 1980), the Eighth Circuit stated that employers may consider market place value when determining how much to pay employees:

> Although an employer's perception that women would generally work for less than men is not a justification for paying women less, it is our view than an employer may

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[2] The Chronicle of Higher Education is published by the Association of College and University Professors. (A 277). It annually publishes CUPA survey data of the salaries of college and university professors, the very data relied upon by Marist in determining faculty compensation and in reviewing Plaintiff's salary complaints. (A 496-497).

> consider the market place value of the skills of a particular individual when determining his or her salary.

Id. at 714. See also Covington v. Southern Ill. Univ., 816 F.2d 317 (7th Cir. 1987), cert. denied, 484 U.S. 848 (1987) (education and experience of male professor were non-gender based reasons sufficient to justify wage disparity); Winkes v. Brown Univ., 747 F.2d 792 (1st Cir. 1984) (matching outside offer was a legitimate "factor other than sex").

In addition, Marist offered testimony of its President, Dr. Dennis Murray, that another reason that Plaintiff did not receive a higher salary is that her performance was "average—and, therefore, not deserving of an adjustment for outstanding performance." (A 452-459). Plaintiff's statistical evidence did not control for differences in salary that resulted from merit, as that is determined by the college. Differentials based on merit are not prohibited under the Equal Pay Act. Plaintiff did not show that either reason was pretextual, and based on the evidence, no rational jury could find to the contrary. As such, Marist was entitled to judgment because it established its "factor-other-than-sex" defense.

III. POLICY CONSIDERATIONS SUPPORT ALLOWING COLLEGES AND UNIVERSITIES DISCRETION IN SALARY DETERMINATIONS AND FREEDOM FROM JUDICIAL INTERFERENCE AND SECOND-GUESSING OF DECISIONS

A. Courts Should Not Substitute The Business Judgment Of Any Employer, Least Of All The Business Judgment Of Colleges And Universities

As the Ninth Circuit observed, "[e]very employer constrained by market forces must consider market values in setting his labor costs," and are "price-takers" in the sense that they must "deal with the market as a given." Spaulding, 740 F.2d at 708. Perhaps for this reason, when enacting the Equal Pay Act, Congress still "want[ed] the private enterprise system . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it," and did not want bureaucrats and judges second-guessing employers' business decisions. 109 CONG. REC. 9197-98 (1963).

Congress' purpose in enacting the Equal Pay Act was to remedy what it 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). The Act embodies the deceptively simple principle that "employees doing equal work should be paid equal wages, regardless of sex." H.R. REP. NO. 309, 88th Cong.,

1st 2d Sess. (1963), reprinted in 1963 U.S.C.C.A.N. 687, 688. At the same time, Congress did not intend for the Equal Pay Act to permit bureaucrats and judges to second-guess employers' decisions as to how to accomplish business objectives. Representative Goodell captured the sentiment of Congress on this score when he said:

> Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point . . . [W]e want the private enterprise system . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

109 CONG. REC. 9197-98 (1963).

Courts also have recognized that under the Equal Pay Act, employers should be accorded some measure of discretion in salary determinations. In Bartges, the court made clear that: (1) "[U]nder the Equal Pay Act, the courts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer who has established and applied a bona fide job rating system so long as it does not discriminate on the basis of sex;" and consequently

(2) the Court will not sit to review the University's personnel and business decisions. Bartges, 908 F. Supp. at 1326.

B. Faculty Compensation Determinations Are Based Upon A Large Number Of Factors That Are Not Easily Susceptible To Outside Review By Courts Or Agencies

There are a number of variables that influence the determination of faculty salaries. As one court observed, "[q]uestions of promotion and compensation in the academic world are rarely as straightforward as they sometimes are in the commercial world" and colleges are "unquestionably justified in considering many subjective criteria in determining such questions." Clark v. Atlanta Univ., 15 FEP Cases 1138, 1140 (N.D. Ga. 1976), aff'd, 548 F.2d 353 (5th Cir. 1977).

Additionally, in the context of faculty compensation, there are "many legitimate factors" which enter into the decision, which are subjective enough in nature to make it difficult, if not impossible, to apply the more objective, "industrial assembly line" rules or standards:

> There are so many legitimate factors which must be considered in determining the salary of a college professor that it would be most difficult, if not impossible, to apply the same rule or standard applicable to industrial assembly line. . . .
>
> The standards set by Colleges and Universities as to qualifications for employment and promotion and salaries and benefits of faculty members are matters of professional judgment and [a] court should be slow to substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.

Keyes v. Lenoir Rhyne College, 15 FEP Cases 914, 922, 924 (W.D.N.C. 1987), aff'd, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977). See also Winkes, 747 F.2d at 797 (noting that resolution of whether the plaintiff and his comparator were of "equal merit" or whether the comparator was "superior" to the plaintiff as a professor was "perhaps [an] unresolvable matter of opinion," which the district court "wisely" did not resolve).

Given the complexity and the subjective nature of employment decisions, generally, and particularly in the context of faculty compensation, numerous courts have recognized that courts are ill equipped to micromanage employers, and have adhered to policies of judicial deference. Bickerstaff, 196 F.3d at 449-50 ("What are first class reviews is not for the district court [or a statistician] to determine. That is, Vassar has a perfect right to decide for itself what its standards are and it may premise promotion on a publication in a journal that the district court thinks is awful"); Dorsett v. Board of Trustees for State Colleges and Univs., 940 F.2d 121, 124 (5th Cir. 1991) ("We have neither the competence nor the resources to undertake to micromanage the administration of thousands of state educational institutions"); Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) (courts should not sit as "Super-Tenure Review Committees"); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("education and faculty appointments at a university level are probably the least suited for federal court supervision").

C. Courts Should Not Infringe On The Academic Freedom Of Academic Institutions To Determine Who May Teach And How Much To Pay Faculty

Although courts have been reluctant to raise academic freedom to the level of a constitutional right, they have always given it great deference. Academic freedom is a freedom deemed essential to protect scholarship and to preserve the integrity of the education process. Academic freedom consists not only in the free exchange of ideas between a professor and students, but also in the educational institution's own autonomous decision-making. The United States Supreme Court has stressed the importance of academic freedom to a free society, and delineated four essential freedoms of a university -- the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) "A university's prerogative to determine for itself on academic grounds who may teach is an important part of our long tradition of academic freedom." Lieberman, 630 F.2d at 67 (2d Cir. 1980). In the context of an Equal Pay Act claim, a university's prerogative to determine for itself how much it will pay its faculty members is no less important to academic freedom insofar as a university's ability to bid competitively for faculty members affects the quality and dimensions of its academic programs, and in effect determines who can and cannot teach at the university. In Winkes, the First Circuit recognized that academic freedom, while not a constitutional right, has long been viewed as a

special concern of the First Amendment, and that the Equal Pay Act claim of a male professor against Brown University was a matter of "national importance." Winkes, 747 F.2d at 797.

Because the right of colleges and universities to academic freedom and autonomous decision-making means very little if by exercising it colleges and universities suffer, or run the risk of suffering, the constant prospect of judicial reproof and the financial consequences which judicial reproof entails, the Supreme Court has cautioned against unwarranted judicial interference with educational institution's own autonomous decision-making:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate....

Sweezy, 354 U.S. at 250. According to the First Circuit, Equal Pay Act claims in the university setting posed "a real danger of improper interference with intangible, but important rights." Winkes, 747 F.2d at 797. The First Circuit stated that as a matter of judicial policy, courts resolving Equal Pay Act claims in the university should accord universities some measure of academic freedom and autonomy in determining faculty compensation:

> A university is, of course, not free of the Equal Pay Act, but when it is confronted with possibly opposing pressures or obligations, some of which involve the difficult subject of gender, it must be allowed substantial room to maneuver, rather than find itself between the devil and the deep blue sea. Otherwise, instead of some measure of academic freedom, it will face the constant prospect of judicial reproof.

Id.

Colleges and universities employ thousands of faculty members, across a wide array of academic disciplines. Colleges and universities must compete for faculty members not only against other academic institutions, public and private, but also against the private sector, which often pays higher salaries than academic institutions. Due to market pressures, in order to compete against other academic institutions and the private sector, colleges and universities often must pay higher salaries to faculty members within specific disciplines if they are to attract the best faculty. Consequently, certain disciplines are more highly compensated than others. (A 123; A 278-79). For example, in the current market, a Computer Science professor is likely to command a higher starting salary than a History professor. (A 123; A 1295-96).

If the law permits this Plaintiff to prevail with flawed and irrelevant statistical evidence that "hypothetical" comparators or actual comparators in different disciplines and departments are paid more than she, then there is nothing to prevent every faculty member from doing the same as Plaintiff here, and

bringing claims under the Equal Pay Act. Should courts entertain such claims, as the district court did below, there will be no limit to the number of Equal Pay Act claims to which colleges and universities will be subjected, and no end in sight to the ensuing litigation.

This decision sets a terrible precedent which places academic institutions in a "Catch-22": Either continue basing salary on market and other factors, and suffer the constant risk of litigation from countless potential plaintiffs who are permitted to use hypothetical comparators or any comparator in a higher paying discipline, or attempt to reduce risk of judicial reproof by raising and, in effect, "homogenizing" salaries across all disciplines, and still suffer the risk of judicial reproof because of the Equal Pay Act's proscription on lowering wages. Colleges and universities will be exposed to Equal Pay Act claims, almost without limit, regardless of what they do, and will find themselves expending resources on litigation that could otherwise be spent on education.

In sum, plaintiff did not establish a prima facie case, nor make any showing that Marist's "factors-other-than-sex" were pretextual. This case should not have proceeded to trial in that it is contrary to what the Equal Pay Act provides, and was intended to provide, and contrary to both established precedent and sound judicial policy.

CONCLUSION

For the foregoing reasons, the judgment should be vacated and the Equal Pay Act claim dismissed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B). Using Microsoft Word '95 word processing program the word count is 5,492.

Lawrence R. Sandak (LS-9986)

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

ALECIA J. BLOOM, being duly sworn, says: deponent is not a party to the action, is over 18 years of age, and resides in Summit, New Jersey.

On February 22, 2000, deponent served the within Brief of the American Council On Education As Amicus Curiae, by regular mail, upon:

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by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

ALECIA J. BLOOM

Sworn to and Subscribed before me
this 22nd day of February, 2000.

LICHTEN RACHEL GORDON
NOTARY PUBLIC, State of New York
No. 02LI6025990
Qualified in New York County
Commission Expires June 7, 2001