NO. _____

In the Supreme Court of the United States

ZOE SPENCER,

Petitioner,

v.

VIRGINIA STATE UNIVERSITY and KEITH T. MILLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Courts of Appeals diverge on whether and under what circumstances prior salary may constitute "any other factor other than sex" under the fourth "catch all" exception of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) and, correspondingly, under the Bennett Amendment § 703(h) to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a)(1). Despite this divergence, nearly all circuits that allow wage differentials, based upon the prior salary exception, adhere to this Court's precedent that salary differentials be related to bona fide job evaluation systems. *See, Corning Glass Works v. Brennan*, 417 U.S. 188, 201, 94 S.Ct. 2223 (1974). In the Fourth Circuit's opinion below, "prior service" or rather the prior salary equation, as "a factor other than sex," upon which the opinion relied, was not based upon a bona fide job evaluation system *Id.*; and thus, defied this Court's authority in *Corning* and exacerbated the entrenched circuit split in a manner that prospectively undermines the legislative intent of the Equal Pay Act.

In furtherance of resolving the "prior salary question" presented to this Court in a recent petition for a writ of certiorari, *Yovino v. Rizo*, 586 U.S. ___ (2019) per curiam, and addressing the Fourth Circuit's impingement upon the Seventh Amendment, the questions presented are:

1. Is prior salary a factor other than sex? If so:

2. Whether the Equal Pay Act intends prior salary, as a "catchall exception," to be excluded from *bona*

fide job related systems and the other three statutory exceptions.

3. Whether the Petitioner's Seventh Amendment right to a jury trial was violated when the Fourth Circuit misapprehended summary judgment standards in light of Supreme Court precedent.

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PETITION FOR WRIT OF CERTIORARI

Dr. Zoe Spencer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's amended panel decision (March 26, 2018) is reproduced at Pet.App.1a. The district court's opinion (January 30, 2018) is reproduced at Pet.App.16a. The Fourth Circuit's denial of rehearing or rehearing en banc (April 15, 2019) is reproduced at Pet.App.56a.

JURISDICTION

The Fourth Circuit denied Spencer's petition for rehearing and rehearing en banc on April 15, 2018 (Pet.App.56a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. VII**

  The Seventh Amendment provides:

  In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

- **29 U.S.C. § 206(d)**

  The Equal Pay Act, 29 U.S.C. § 206(d), provides:

  (d) Prohibition of sex discrimination (1) No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall

not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

- 42 U.S.C. § 2000e-2(a)(1)

  Title VII of the Civil Rights Act 1964, 42 U.S.C. § 2000e-2(a)(1), provides:

  It shall be an unlawful employment practice for an employer-(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

INTRODUCTION

In July 2014, Virginia State University (VSU) hired two terminated non-academic male Administrators from VSU, who were not tenured and had no experience in the professoriate, to the rank of Associate Professor. In setting the males' salaries for their new positions, then Provost, Weldon Hill, a male, simply reduced the males' prior salaries from the twelve months they were contractually obligated to work as Administrators to the nine months they would be contractually obligated to work as Associate Professors (9/12ths prior salary equation). (Pet.App.8a). This formula established starting salaries of $119,738.00 and $105,446.00 per year for each male, which created a salary disparity of $49,698.00 and $35,406.00 between Spencer, a tenured Professor with four years vested at the Associate Professor rank, who was earning $70,040.00 per year, and the newly hired men. (Pet.App.2a).

Upon learning of the new entry level salaries of the lesser qualified males, Spencer sent an email to President Keith Miller, also a male, Provost Hill, and the VSU Administration requesting a salary increase to that of the new hires based on her seniority, superior qualifications, and merit as a tenured professor. When the Administration failed to respond, she sent a follow up email complaining that the salary differential, and the University's failure to increase her salary to that of the males, would constitute wage discrimination on the basis of sex in violation of the Equal Pay Act. Less than a month after her complaint, Provost Hill denied her request, which prompted this action.

Dr. Zoe Spencer brought this suit under the Equal Pay Act and Title VII alleging wage discrimination and retaliation on the basis of sex. The district court dismissed on summary judgment. The Court of Appeals for the Fourth Circuit affirmed. In the panel's sole reliance upon the "University's explanation," that "while Spencer asserts that the difference in pay was due to her sex . . . Shackleford and Dials' jobs differed from Spencer's and, as former administrators, their pay was set at a prorated portion of their previous salaries," the Fourth Circuit concluded that she failed to establish Shackleford and Dial as "appropriate comparators" and "unrebutted evidence shows that the University based Shackleford's and Dial's higher pay on their prior service as University administrators, not their sex." (Pet.App.2a).

In relying upon a mere mathematical calculation of a previous salary to affirm a prior salary defense, based on deference given to "prior service" that was

unrelated to the job/work of Associate Professor, the Fourth Circuit untethered "prior salary" from the other three clear statutory exceptions and defied the Act's intent that "factors other than sex" be related to bona fide job evaluation plans. *See Corning*, 417 U.S. at 201. In such, the Fourth Circuit created a precedent that expands the legislative intent of the catchall provision, and diminishes the employer's burden of showing that the proffered explanation for the wage differential is justified by a bona fide job evaluation system. *Id.* The opinion below contravenes *Corning*, exacerbates the circuit split, and oversteps its own precedent in *EEOC v. Maryland Insurance Admin.*, 879 F.3d 114 (4th Cir. 2018).

The deeply entrenched circuit conflict on the prior salary exception requires this Court's attention. Given the conflict between the Fourth Circuit's ruling and this Court, its sister circuits, the intra-circuit conflict, and the pressing national issue that the prior salary question presents, this case is a worthy vehicle to address it.

The Supreme Court should grant certiorari to provide supreme authority on whether prior salary may be "a factor other than sex," and; if so, to provide authority and guidance on the standard that must guide the lower courts' reliance upon a prior salary defense in order to establish consistency between the circuits and preserve the congressional intent of the EPA. It should also use certiorari to correct the Fourth Circuit's misapprehension of summary judgment standards and allow Spencer's case to proceed to a jury trial.

STATEMENT OF THE CASE

A. Statutory Background

The history of patriarchy and gender roles in America is fundamental to the ongoing issue of gender equity in the workforce. In 1848, when the Women's Suffrage Movement convened in Seneca Falls, depending on the binary intersection of race and gender, women were either being systematically excluded from the workforce or systematically forced to provide free labor under institutional enslavement. While the Civil Rights Act of 1866, provided that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens" 42 U.S.C. § 1981(a), both Black women and White women were still relegated to the gendered exclusion that persisted during that era.

In 1870, the House narrowly passed an amendment to an appropriations bill prohibiting gender discrimination in the compensation of federal clerks[1], but that amendment did not address the broader issue of gender wage discrimination across industries. In 1938, Congress passed the Fair Labor Standards Act, 29 U.S.C. § 203 (FLSA) which was pivotal to addressing working conditions and wages in general. But, the FLSA did not address the specific issue of gender equity.

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[1] National Women's Law Center, https://nwlc.org/blog/equal-pay-history-fight-continues/ (Last Visited 5/28/19)

In 1942, the National War Labor Board unsuccessfully "endorsed policies to provide equal pay for women who were replacing male workers at war."[2] But gendered biases and stereotypes about women's roles, ability, productivity, place, and worth in society continued to underscore the conditions for salary inequity in the workforce.

This was the national issue Congress sought to address when it convened the Eighty-Eighth Congressional Session to enact the Equal Pay Act of 1963 as an amendment to the FLSA (1938). Therein, Congress recognized the historic " . . . 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." S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963) [417 U.S. at 195]. This court affirmed:

> 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 solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." *Id.*

As "originally introduced," the Equal Pay bills considered in the House and Senate "required equal pay for 'equal work on jobs the performance of which requires equal skills'" and included "only two excep-

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[2] National War Labor Board, https://www.jstor.org/stable/3309286?read-now=1&seq=1#page_scan_tab_contents (Last Visited 5/23/2019).

tions—for differentials 'made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.'" S. 882, 88th Cong. § 4 (1963); S. 910, 88th Cong. § 4(a) (1963); H.R. 3861, 88th Cong. § 4(a) (1963); H.R. 4269, 88th Cong. § 4(a) (1963). [417 U.S. 199]. However, in response to industry representatives arguing that the Act was too restrictive, Congress expanded the statutory language, but not in a way that stripped the Act from its legislative intent. The Equal Pay Act, 29 U.S.C. § 206(d)(1) thus sets forth:

> No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

To achieve the equal pay objective with consideration and parity:

> In response to evidence of the many families dependent on the income of working women, Congress included in the Act's statement of purpose a finding that 'the existence . . . of

> wage differentials based on sex . . . depresses wages and living standards for employees necessary for their health and efficiency.' Pub.L. 88-38, § 2(a) (1), 77 Stat. 56 (1963). And Congress declared it to be the policy of the Act to correct this condition. § 2(b) [417 U.S. 206].
>
> Congress thus established:
>
> That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. 29 U.S.C. 206 (d)(1) [417 U.S. 188, 207]. The purpose of this proviso was to ensure that to remedy violations of the Act, '[t]he lower wage rate must be increased to the level of the higher.' H.R. Rep. No. 309, supra, at 3. *Id.*

While the Act addressed discrimination on the basis of sex, the intersection of race and gender still precluded Black women's protection under the Act, until the Civil Rights Act of 1964 provided the racial pathway for a gendered inclusion and protection under both the EPA and Title VII. More than fifty five years later, women are still challenging the "endemic problem" of wage discrimination on the basis of sex,[3] at the intersection of race, ethnicity, and class.

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[3] According to the American Association of University Women (AAUW), in 2017, women were paid an average of 80 percent of what White, non-Hispanic men were paid. This rate decreased based on race and ethnicity. https://www.aauw.org/2018/08/01/i-am-worth-more-zoe-spencer-on-fighting-racism-and-sexism-in-academia/ (Last Visited 6/7/19)

B. Factual & Procedural Background

1. Dr. Zoe Spencer, an African American *female*, received her Ph.D. in Sociology from Howard University in 2005. She was an Instructor and an Assistant Professor at Cheyney University from 2005-2008. She was hired in the Department of Sociology and Criminal Justice at the rank of Assistant Professor at Virginia State University in 2008. Between 2008 and 2017, Spencer achieved the rank of Associate Professor in 2010, tenure in 2013, and advanced to the distinguished rank of Professor in 2017, with stellar ratings, through the University's promotion and tenure review process. (Pet.App.114a, 133a-134a). Spencer has conducted research, published peer reviewed articles, chapters, and manuscripts, served on numerous University committees including serving as Faculty Senate Chair. (Pet.App.129a-130a). She has served on dissertation and thesis committees both internally and externally, engaged in community service, recruitment activities, presented at numerous professional conferences, and is the highest performing professor in her Department. Spencer has consistently received teaching and service awards, outstanding teaching evaluations, and her courses regularly surpass capacity. (Pet.App.131a-135a; 63a-64a, 67a).

2. VSU is a teaching institution (Pet.App.73a) and binding uniform University policies established in the Virginia State University Faculty Handbook (Faculty Handbook and Handbook) apply to all VSU collegiate faculty regardless of rank, discipline, or department, and include: the criteria and requirements for promotion and tenure, hiring, salaries, and an established standard faculty workload and core work

responsibilities. (Pet.App.88a). The handbook establishes teaching, research/scholarly/creative work, and service as the sole bases for evaluations. The handbook establishes that salaries shall be set based on the average salaries of peers at that rank. (Pet.App.58a-60a).

3. In April 2012, as Chair of the Faculty Senate, Spencer presented a "Gender Equity Task Force (GETF) snapshot" to former President Keith Miller and his cabinet, including then Provost Weldon Hill, that complained of gender equity in pay and a male dominated Administration of which Hill and the two male comparators were a part. (Pet.App.143a; 81a-82a; 64a-65a).

4. Provost Hill disagreed that gender was a factor in the pay equity issue and began a pattern of retaliation against Spencer that elevated in November 2012, when Spencer shared the "GETF Snapshot" with members of the Board of Visitors (BOV), which included delaying Spencer's overload pay, referring to her as a bitch, and threatening to "play the end game" because Spencer went public about gender equity issues and retaliation. (Pet.App.144a-147a; 82a-83a).

5. In July 2014, two non-academic and untenured Administrators, Cortez Dial and Michael Shackleford's contracts were terminated by the BOV. (Pet.App.136a-138a). At the request of President Miller, Hill "hired" the two males as Associate Professors, "perhaps as an act of friendship," (Pet.App.77a-78a) and appointed them to Departments (Education and Mass Communication) that had no relationship to their degrees, experience, or qualifications. (Pet.App.80a-81a). Dial did not possess a Ph.D. in Mass Communication and

Shackleford did not possess an Ed.D. in Pk-12 Administration. Neither male had any full time experience teaching at any rank, at any college or University (Pet.App.121a; 138a-139a); nor had they produced any research, publications, or service in the teaching area or otherwise. (Pet.App.114a-119a; 85a-86a).

Hill set their salaries based on 9/12ths of their prior twelve month salaries, which established the starting salaries of $119,738.00 and $105,446.00 respectively. (Pet.App.73a-74a; 94a-97a). Their standard contracts (EWP's) stipulated standard work responsibilities applicable to all collegiate faculty at VSU (Pet.App.96a; 68a), and the hiring form (A-21), signed by Hill, specified the work responsibilities as "teaching/ teaching and research only." (Pet.App.129a, 131a). The males did not go through the standard hiring process, or tenure and promotion review to achieve the rank of Associate Professor (Pet.App.85a; 95a), and their academic qualifications for teaching were not vetted by the University, as they had none. (Pet.App.148a-149a).

6. According to the Handbook, Administrators are not entitled to de facto tenure or transfer to faculty ranks and serve at will. (Pet.App.76a). There are no retreat rights, unless an Administrator formerly achieved tenure. (Pet.App.110a; 77a-78a) And, there is no 9/12ths prior salary policy for tenured or untenured Administrators. Hill testified that there was no such policy, and in all other instances established starting salaries based on the average of peers at that rank. (Pet.App.59a; 78a-79a). Despite this knowledge, Hill advised the Board of Visitors (BOV) that both the practice of transferring the men to faculty

ranks and the 9/12th's calculation was policy. (Pet. App.140a-143a). Hill testified that he applied this practice to other Administrators; however, VSU's former BOV member, Terone Green, testified that during his tenure on the Board of Visitors, seven Administrators' contracts were terminated, including one woman, and no other Administrator, besides Shackleford and Dial, were given that favor. (Pet. App.150a-151a). Dr. Joyce Edwards, Chair of Sociology and Criminal Justice testified the same. (Pet.App. 57a-58a).

7. In July 2014, Spencer sent a letter to Administration requesting a salary increase to that of the two males based on her superior experience, qualifications, and merit as an Associate Professor. (Pet. App.65a-68a). Initially Provost Hill stated he would accept the recommendation of Spencer's Chair, Dr. Edwards, a female, and the Dean of the School of Liberal Arts and Education, Andrew Kanu, a male. Dr. Edwards approved Spencer's request for a salary adjustment and testified that when she discussed Spencer's request with Dean Kanu, he informed her that the Provost asked him not to support her. (Pet.App.68a-69a). Spencer later complained that the salary disparity constituted wage discrimination on the basis of sex under the EPA. (Pet.App.114a-119a). The Provost ultimately denied Spencer's request for a salary increase. (Pet.App.69a).

8. Each semester, Spencer taught more classes, course preparations, and an extraordinarily higher student load than her comparators. (Pet.App.100a-107a; 92a-93a). Even after she achieved the rank of full Professor, with stellar peer evaluations, she continued

to earn significantly less than the men. Spencer, Shackleford, and Edwards' testimonies all affirmed a common core of tasks for teaching. (Pet.App.121a-126a; 61a-64a; 88a-92a).

9. Before filing this case, Spencer hired Dr. Robert Kreiser, an expert in higher education policy with over 30 years of experience working with the American Association of University Professors (AAUP), and Joseph Rosenberg an expert economist. The Kreiser report found that VSU's placing non-academic and untenured Administrators in faculty positions at the rank of Associate professor earning 9/12ths of their prior unrelated salaries did not comport with national practices in higher education and substantially violated the University's own hiring, promotion, and salary policies, and SACS credentialing guidelines. (Pet.App. 70a-71a).

The Rosenberg report found with a confidence interval of 97.5% that, Dial and Shackleford were overpaid by $36,469 and $47,846 per year greater than would be expected based on the objective characteristics for relative peers, and the expected characteristics relative to the standards of the EPA. (Pet.App.7a-8a).

10. On December 19, 2016, Spencer filed a complaint for wage discrimination and retaliation under the Equal Pay Act and Title VII in the U.S. District Court for the Eastern District of Virginia in Richmond.

11. On January 30, 2018, the District Court issued a Memorandum Opinion setting forth its reasoning for granting summary judgment. The District Court held that Shackleford and Dial were not proper comparators because, they were former administrators, each had different departmental responsibilities and

their "experience outside of academia" included long careers in military leadership. The District Court held that the "Plaintiff does not suggest that she has served in the administration of a university or that she has an extensive relevant professional background outside academia;" in its conclusion that "in contrast to Dial and Shackleford, Plaintiff never held an administrative position, and therefore Defendants could not have set her salary as a percentage of a prior administrative salary. Therefore, because the alleged comparators' salaries were set using their prior salary . . . and there is no indication that the practice was used to discriminate, the Court finds that Defendants have successfully established a credible 'factor other than sex' justification." (Pet.App.35a, 38a-40a).

12. On March 18, 2019, the Fourth Circuit affirmed summary judgment and on March 26, 2019, the Fourth Circuit filed its amended opinion.

13. The Fourth Circuit first concluded that "though Spencer establishes a pay disparity, she fails to present evidence that creates a genuine issue of material fact that Shackleford and Dial are appropriate comparators." The Fourth Circuit analysis of the equal work requirement relied upon hypothetical distinctions based on a "market force" analysis in the Engineering Department, which was not at issue; dismissed handbook policy and the common core of tasks as vague; and, exalted the alleged additional duties of Spencer's comparators, in concluding that Spencer had not met her prima facie burden of establishing the equal work requirement (Pet.App.4a-6a). Ultimately, however, the panel held that even if Spencer met her prima

facie burden, there was "no dispute that the wage difference at issue resulted from the University setting Shackleford's and Dial's pay at 75% of their previous salaries as administrators . . . Even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity."(Pet.App.9a-10a).

14. On March 29, 2019, Spencer filed a pro se petition for rehearing and rehearing en banc. In the petition for rehearing and rehearing en banc, Spencer raised the issue that the 9/12ths prior salary rule contravened this Court's precedent in *Corning* and subverted stare decisis; the opinion did not rely upon a proper application of circuit and sister circuit precedent to the facts in its conclusion on equal work; and the opinion contravened the legislative intent of the Act.

15. On April 15, 2019, the Fourth Circuit issued a one page order denying petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The statutory interpretation of the fourth catchall exception of the Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv) "any other factor other than sex"–provides the foundation for prior salary as an affirmative defense under both the EPA and Title VII. The ambiguity and generality of the statutory language of the catchall exception has created conflict and divergence between the circuits on whether prior salary constitutes a factor other than sex, either at all, along with other factors, or alone; and, on whether the Act intends the catchall exception to be related to, or independent of, the other three exceptions.

In holding that an employer can establish a prior salary defense based upon a mathematical calculation of a "previous salary" from an unrelated job (Pet.App. 2a), the Fourth Circuit strayed wildly from this Court's clear guidance that wage differentials be based upon "bona fide job evaluation plans" in order to "fall "outside of the purview of the Act," *Corning*, 417 U.S. at 201, and abandoned each of its sister circuits' precedent. Absent correction, the panel's opinion affirming a prior salary defense for a wage differential in the position of Associate Professor, that is based solely upon the males' unrelated non-academic "prior service" as Administrators, destabilizes the value and integrity of the academic profession and undermines the congressional intent of the Act by upholding the "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*, 417 U.S. at 195.

This case-which ultimately turns on the question of prior salary-provides an exceptional opportunity to address the question and the conflict it has posed. It also affords this Court the opportunity to correct the Fourth Circuit's gross misapprehension of summary judgment standards.

I. THE FOURTH CIRCUIT'S OPINION BELOW DISREGARDS *CORNING* AND REMOVES PRIOR SALARY, AS A CATCHALL EXCEPTION, FROM THE LEGISLATIVE INTENT OF THE EQUAL PAY ACT.

The Fourth Circuit's opinion below conflicts with the clear guidance of this Court in *Corning* in a way that removes prior salary, as a catchall exception, from the legislative intent of the Equal Pay Act. The aim of the Act is clear, provide equal pay for equal work on jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions." *Id.* The Act establishes four exceptions for wage differentials. The first three are clear statutory exceptions that are based on a "seniority system, merit system, or a system that measures the quantity and quality of production." *Id.*

The use of the term "system" is not happenstance. The statutory language of the Act reflects Congress' intent . . . "to use these terms to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside of the purview of the Act." *Corning*, 417 U.S. at 201.

It is the ambiguity in the fourth catchall exception that has created conflict and inconsistency in the courts' statutory interpretation of the provision. When referenced and cited out of context, as the opinion below has (Pet.App.8a-9a), the fourth catchall provision, "or any other factor other than sex" may, on its face, be interpreted to infer "any other factor" in general, which would support prior salary alone as "a factor other than sex." However, if the catchall exception is read so broadly, as the Seventh, Eighth, and Fourth Circuits have, any alleged "neutral" "prior salary" justification that does not directly reference sex could serve as a "factor other than sex," which would render the Act useless in its intent. *Corning* establishes: "The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve. If . . . the work performed by women . . . was equal to that performed by men . . . the company became obligated to pay the women the same base wage as their male counterparts." *Corning*, 417 U.S. at 208.

The panel's reading of the catchall exception in isolation, then, is inapposite. The Rehnquist Court's Canon's of Statutory Construction require a statute to be read as a whole and the court to "harmonize the provisions of the statute, including those that appear to conflict . . . The statutory exceptions are to be read narrowly." Thus, the canons of *noscitur a sociis* and *ejusdem generis* are apposite to the statutory construction of the provision.[4] *See Caminetti v. United*

[4] The Rehnquist Courts Canons of Statutory Construction http://www.ncsl.org/documents/lsss/2013PDS/Rehnquist_Court_Canons_citations.pdf (Last Visited 6/11/19).

States, 242 U.S. 471 (1917), ("When the language of a statute is plain . . . there is no occasion . . . for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.")

The legislative intent of the Act makes clear that a "factor other than sex" was intended to be based on a "well defined" "bona fide job evaluation" system. *Corning* at 417 U.S. at 201. Applying the maxim of *noscitur a sociis* would, in that way, require prior salary to be closely related to the preceding statutory exceptions. *See, Virginia v. Tennessee*, 148 U.S. 503, 519 (1823).

Interpreting the "catchall provision" within the context of the legislative history of the Act also provides guidance. As *Corning* buttressed, as originally introduced, the Equal Pay bill only provided "two exceptions—for differentials "made pursuant to a seniority or merit increase system . . . " *Id.* As the bill expanded to include a general exception, the Senate Committee report provided illustrative examples of what the general exception would cover: "seniority systems . . . based on tenure," "merit system[s]," "piece-work system[s] which measure either the quantity or quality of production or performance," and "[w]ithout question," "other valid classification programs. . . . " *See Corning*, 417 U.S. at 201 *quoting* S. Rep. No. 88-176, at 4 (1963). These examples were not untethered from the three clear exceptions.

Contrarily, in both its decision on the prior salary exception and the equal work requirement, the Fourth Circuit opinion below (Pet.App.6a) contravenes *Corning*

in its disregard for authority on the "established and applied bona fide job rating system" that absolutely governs "legitimate academic judgments" of professors' "intellectual/creative" work and potential for hiring and salary decisions, promotion and tenure, and merit increases in higher education nationally-the promotion and tenure criteria/review.[5] *See, Univ. of Pa. v. EEOC*, 493 U.S. 182, 190, 193, 199 (1990). In contradiction, the panel erroneously affronts Spencer's tenure (seniority) and her progressive promotions to full Professor (merit) (Pet.App.2a); and repudiates her peer reviewed excellence in teaching and her "better or more work" in research and publishing (Pet.App.4a-6a), in favor of paying deference to the males' unrelated and undefined "prior service" as administrators. The panel then gives deference to their unsupported additional duties to undermine Spencer's years of amassed productivity in the professoriate, in affirming the University's defense for setting and maintaining the unrelated prior salary advantage of her lesser/ unqualified male comparators.

The panel further abandons *Corning* and the legislative intent of the EPA in its holding that:

> Here, there is no dispute that the wage difference at issue resulted from the University

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[5] Recognizing § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. "This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (*i.e.*, tenured) academic positions." *See* H.R. Rep. No. 92-238, pp. 19-20 (1971).

> setting Shackleford's and Dial's pay at 75% of their previous salaries as administrators . . . Even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity. (Pet.App.9a-10a).

First, since the males' qualifications do not bear on their seniority, merit, or productivity as Associate Professors, *Corning* would preclude the panel's blanket reliance upon an imprudent decision, made by males, to overpay two males, based upon an erroneous application of a "prior salary practice," as a "non sex based explanation" under the Act; because, the prior salary explanation does not so convincingly eliminate sex as a motivating factor in the "imprudent decision" to overpay the men. *Md. Ins. Admin.*, 879 F.3d at 123. Moreover, *Corning* would preclude the panel's reliance upon a simple mathematical calculation of an unrelated "previous salary" as an affirmative defense, because the University does not so compellingly prove that the calculation was based on a "bona fide job related system."

The panel's blanket deference underestimates *Corning*'s instruction that the burden is on the employer to show that a wage differential is justified under the statutory exceptions of the Act. (Emphasis added). *Corning*, 417 U.S at 197 *citing A. H. Phillips. Inc. v. Walling*, 324 U.S. 490, 493 (1945), (other citations omitted). Thus, while the 9/12ths formula explains how the wage disparity was formed; it equally fails to explain how it is justified under the Act.

The panel's erroneous opinion subverted its own precedent in *Md. Ins. Admin.*, which correctly held:

> . . . This statutory language requires that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity. 879 F.3d at 121, *citing Stanziale*, 200 F.3d at 107-08; *Mickelson*, 460 F.3d at 1312.

This Court also reified the legislative intent of the EPA in *Gunther* when it affirmed: "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." 109 Cong. Rec. 929 (1963) (statement of Rep. Goodell, principal exponent of the Act), 452 U.S. 161 (1981) [452 U. S. at 171]. In this manner, *Gunther* is not distinguishable from *Corning* in its adherence to the statutory language of the EPA, "established and applied . . . bona fide . . . systems."

The Fourth Circuit also snubs *Gunther*, quoting *DeJarnette*, in holding, "we do not sit as a 'super-personnel department weighing the prudence of employment decisions' made by the defendants." (Pet.App.10a). It misjudges its role. Under *Gunther*'s authority, the University's "erroneous and purposeful misapplication" of a "practice" (Pet.App.12a) would not stand as "an employer that has established and applied a bona fide job rating system," and is thus

not outside of the purview of the Act or the court's scrutiny.

The Fourth Circuit's contrary conclusion is irreconcilable with the plain import of this Court's decision in *Corning* and does not stand against the legislative intent of the Act. A correct reading of *Corning* and *Gunther*, and adherence to its own precedent in *Md. Ins. Admin.*, would have precluded the Fourth Circuit's reliance upon the "9/12ths prior salary practice" as a "factor other than sex."

II. THE COURT SHOULD RESOLVE THE AMBIGUITY IN THE STATUTORY INTERPRETATION OF THE CATCHALL EXCEPTION AND THE CIRCUIT CONFLICT ON PRIOR SALARY AS AN AFFIRMATIVE DEFENSE.

A. The Statutory Interpretation of the Catchall Exception Impacts the Circuit Conflict on the Prior Salary Defense.

While the Courts of Appeals were already critically divided on the prior salary defense, the Fourth Circuit's opinion below overreached the dichotomous boundaries of all of its sister circuits. The Fourth Circuit then denied en banc review, exacerbating an already ingrained circuit split with its two opposing opinions and its refusal to recognize the disunion the opinion below created with its own precedent.

Jim Yovino recently petitioned this court to establish authority and resolve circuit conflict on the question of prior salary in *Yovino v. Rizo*, 586 U.S. __ (2019) per curiam. This Court granted certiorari, but reversed *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc) on its second question, leaving the question

of prior salary unresolved. Before this Court overturned *Rizo*, re-establishing *Kouba*'s precedence however, the late Honorable Judge Reinhardt authored an eloquent en banc opinion that must not be discarded. Therein, he applied a lengthy analysis of the canons of *noscitur a sociis* and *ejusdem generis* to challenge the validity of the prior salary defense. *Rizo*, 887 F.3d at 461-463. The en banc opinion held: "To accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed," and thus, more determinatively joined the Fifth Circuit in its conclusion that: "prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages." *Id.* at 460. Before *Rizo*, as it stands now, the Fifth Circuit was the only circuit that definitively held that prior salary cannot be an affirmative defense, especially when there is evidence of "pretext and the explanation is easily rebutted." *Siler-Khodr v. The University of Texas Health Science Center San Antonio et. al.*, 261 F.3d 542, 549 (2001).

The Second, Sixth, Tenth, and now again, the Ninth Circuits, allow a prior salary defense as a part of a mixed motive standard. For example, *Kouba*, allows a prior salary defense when the prior salary is related to a legitimate job related purpose; specifically, "when the employer uses other predictors of the new employee's performance, attributes less significance to prior salary once an employee has proven himself, and whether the employer relies more heavily on salary when the prior job resembles the job of sales agent." *Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 878 (9th Cir. 1982). This decision aligns

with the Second, Sixth, and Tenth Circuits which also establish that prior salary can be an affirmative defense when: "the differential in pay is rooted in legitimate business related differences, such as work responsibilities and qualifications for the particular positions at issue," *see Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 525 (2d Cir. 1992), and "when in using a prior salary defense, 'sex is nowhere a factor.'" *See, Beck-Wilson v. Principi*, 441 F.3d 353, 365, 366 (6th Cir. 2006); *See also Riser v. QEP Energy, Inc.*, 776 F.3d at 1199 (10th Cir. 2003).

The Eleventh Circuit is more cautious in its agreement with its sister circuits. For example, in its long standing precedent in *Glenn*, the Eleventh Circuit held that the "so-called" salary "policy" was not a policy, but a "practice" and the prior salary defense was meritless because the "factor other than sex" exception applies only when the disparity results from "unique characteristics of the same job." (Emphasis added). *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988); *See also Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). The Fourth Circuit's ruling in *EEOC v. Md. Ins. Admin.*, concurs with *Glenn* in establishing that even the use of the State's "standard salary schedule" Md. Code, State Pers. & Pens. § 2-601 does not constitute a "factor other than sex," in setting initial salaries for lateral transfers based on prior step and grade, because while the schedule may be "facially neutral, MIA exercises discretion each time it assigns a new hire to a specific step and salary range based on its review of the hire's qualifications and experience." *EEOC v. Md. Ins. Admin.*, 879 F.3d 117,123 (4th Cir. 2018).

Conversely, the Seventh Circuit's broad reading of the catchall exception is unyielding in affirming that prior salary may be an affirmative defense without any further justification, while the Eighth Circuit even considers prior salaries from unrelated jobs in setting new salaries. For example, in *Lauderdale v. Ill. Dep't of Hum. Servs.*, 876 F.3d 904, 908 (7th Cir. 2017), the Seventh Circuit held, prior salary is a factor other than sex "even if the Department did not strictly follow the pay plan in determining what increase was appropriate." In *Taylor v. White*, 321 F.3d 710, 717 (8th Cir. 2003), the Eighth Circuit applied "salary retention policies," even when those policies "may perpetuate preexisting salary disparities by basing employees' current salary on prior salaries for other positions." *Id.* at 718. It held that a "neutral salary retention policy" is a factor-other-than-sex defense, regardless of the "wisdom or reasonableness" of the employer's decision. *Id.* at 719.

The Fourth Circuit's opinion below holds that a simple mathematical calculation of the prior salaries alone, is a "non sex based explanation," even if the University "erroneously or purposely misapplied" the practice. (Pet.App.6a and 12a).

The inconsistency between the circuits has created an adverse impact on the way in which employment practices shift across jurisdictions and dichotomize employer versus employee interests. The Seventh, Eighth, and now the Fourth Circuits' even broader reading of the "catchall exception" gives wide latitude to the discretion of employers to assert a prior salary defense without a "bona fide" job-related justification, which dangerously impinges the intent of the Act.

While employers advocate for the autonomy to rely upon prior salary without the courts' intervention, employers fail to concede that prior salary is generally inextricably linked to the qualifications, seniority/ experience, merit, skill, and the potential for production that an employee brings to a new position. In that instance, prior salary is tethered to the other statutory exceptions and need not be given a legal autonomy to stand alone.

Prior salary, either alone, or along with a faulty standard for making a determination on whether prior salary may stand as an affirmative defense, as a matter of law, absolutely threatens an employee's protection under the Act and the Seventh Amendment, by limiting her ability to survive at the motion to dismiss and summary judgment stages when a defendant merely proffers a "prior salary" defense without bearing any burden of showing that the justification was related to a bona fide job related system. A lingering history of wage disparity, racialized gender and gender role stereotypes, and patriarchal biases that still influence some courts' reluctance to strictly adhere to the statutory language and legislative intent of the EPA illustrate how case law might dilute the original intent of the Act, over time, without supreme guidance.

The unaddressed circuit conflict has consequently prompted state legislators to address the issue of prior salary and the discriminatory impact that it has on women in the workforce particularly. As of May 2019, sixteen states have bans on employers requesting prior salary information. Two have banned the pro-

hibition of such.[6] And, the Third Circuit is addressing the constitutionality of the ban.[7] This creates, yet, another level of conflict and divide on the issue.

The Fourth Circuit's opinion below provides a textbook example of the potential discriminatory impact that faulty case law, on "prior salary practices" that undermine the legislative intent of the EPA, might have on this nations producers–particularly working women–who do not have the financial and political resources to command this Court's attention to prove they were aggrieved by pre-textual prior salary defenses, or the stamina to litigate to this end, in this highly adversarial climate, despite the incredibly taxing odds.

The issue of prior salary is a grave matter of public, judicial, and legislative interest that may reach a tipping point if the statutory language of the catchall exception remains ambiguous, and the statutory interpretation of the exception relative to prior salary remains inconsistent. This Court must be the supreme authority that guides the law of the land on the issue of prior salary.

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[6] Salary History Bans. https://www.hrdive.com/news/salary-history-ban-states-list/516662/ (Last Visited 6/18/19).

[7] The Baton Passes Back to the East Coast: Prior Salary Ban Passed in Delaware and Philadelphia Law Suit Challenging Prior Salary Ban Back On. https://www.seyfarth.com/publications/OMM062317-LE (Last Visited 6/18/19).

B. This Case Is a Worthy Vehicle for Resolving the Circuit Conflict.

"As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest." *Univ. of Pa. v. EEOC*, 493 U.S. 193 (1990).

It is undisputed that Spencer is a full Professor with years of experience in teaching, and "more or better work" in research, and publishing (Pet.App.2a and 8a). It is undisputed that, in July 2014, Shackleford and Dial received employment contracts for the job of Associate Professor at starting salaries of $119,738.00 and $105,446.00 per year, paling Spencer's salary of $70,040.00. (Pet.App.2a). It is undisputed that neither male brought previous experience as a collegiate faculty member at any rank. It is undisputed that while Spencer agrees that a 9/12ths formula was used to establish their starting salaries (Pet.App.2a), Spencer disputes the existence of a 9/12ths prior salary policy and the validity of its application in setting the salaries of her two comparators (Pet.App.10a).

The panel opinion below affirms "there is no dispute that the wage difference at issue resulted from the University setting Shackleford's and Dial's pay at 75% of their previous salaries." (Pet.App.8a). This undisputed fact alone renders the panel's ruling on equal work and "appropriate comparators" irrelevant because the males had performed no prior work as Associate Professors before their starting salaries were set, and the salaries remained disparate even after Spencer continued to outperform them in advancing

to the rank of full Professor (Pet.App.2a). Accordingly, answering the question of whether prior salary alone constitutes a factor other than sex would answer Spencer's question of liability.

First, the decision below starkly contrasts the Fifth Circuit in *Siler-Khodr* because the Fifth Circuit expressly rejects prior salary as an affirmative defense under the EPA and Title VII, especially when there is "evidence of pretext and the prior salary defense is easily rebutted." 261 F.3d. 549. The Fourth Circuits decision affirming summary judgment based on the prior salary exception would not stand in the Fifth Circuit.

The Eleventh Circuit in *Glenn* also citing the Ninth Circuit in *Kouba*, established, "this court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense. *See Glenn*, 841 F.2d at 1571 n.9 ("*Kouba [v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982)] . . . would permit use of prior salary where the prior job resembled the sales agent position and where Allstate relied on other available predictors." *See also*, *Irby* ("[i]f prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated." 830 F.Supp. at 636.).

The Second, Sixth, and Tenth Circuits agree and allow a prior salary defense as long as it is coupled with other job related factors, which include: predictors of the comparators performance, qualifications and work responsibilities for the position in question (emphasis added), and on "whether the employer relies more heavily on salary when the prior job resembles

the job . . . " in question. *See, e.g. Aldrich*, 963 F.2d 520, 525. *See also*, *Price*, 856 F.2d at 1506. Thus, the language in the Second, Sixth, Ninth, Tenth, and Eleventh Circuits are consistent in the requirement that prior salary be related to qualifications for "the same job," "the position in question," or "unique characteristics of the same job" in order to qualify as an affirmative defense. *See e.g., Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988).

The panel opinion below ignores this sister circuit precedent in erroneously holding that the unrelated former roles entitled the males to higher salaries and precluded them from being appropriate comparators in the "position in question." (Pet.App.2a). In so doing, the panel disregarded the established guideline that, "the important comparison in determining whether the "equal work" requirement is met "is the comparison of the jobs, not the people performing the jobs." *See* EEOC Compliance Manual No. 915.003, § 10-IV(E) (Dec. 5, 2000). Consequently, the Fourth Circuit critically erred in laboring over an improper comparison.

In ruling on whether the wage differential at issue was justified under the Act, the comparison before the court was never that of a lowly professor to exalted former administrators; but rather a comparison of an accomplished tenured professor to entry level professors, who had yet to perform any professorial work to compare to hers, but were hired to the professoriate at advanced ranks with starting salary advantages that paled hers. Thus, the Fourth Circuit's decision would not stand in its sister circuits either.

Further, the opinion below and *Md. Ins. Admin.*, are not distinguishable, which render them incon-

gruous. *Md. Ins. Admin.* sides with the Eleventh Circuit in its holding that even though "MIA uses a facially gender-neutral compensation system, MIA still must present evidence that the job-related distinctions underlying the salary plan, including prior state employment, in fact motivated MIA to place the claimants and the comparators on different steps of the pay scale at different starting salaries." 879 F 3d. at 123. The panel's opinion below holds, "but even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity." If the Fourth Circuit rejected the reliance upon a bona fide state salary system to set initial salaries in *MIA*, the circuit's reliance upon an erroneously applied "practice" in this instance severely undercuts its own precedent.

While the language of the Seventh and Eighth Circuits' decisions in *Lauderdale* and *Taylor* may appear to support the Fourth Circuit's decision below (Pet.App.10a), the elements are distinguishable. Despite its broad reading of the exception, *Lauderdale* still relies upon the same or similarity of previous positions and an established pay policy "whether they followed it or not." 876 F.3d 908. *Taylor* also relies upon an established "salary retention policy" even in its lack of consideration for whether the job qualifications from prior jobs were related to the position in question. 321 F.3d 710. The Fourth Circuit's decision below relies upon neither.

In the opinion below, the Fourth Circuit single-handedly subverted the doctrine of stare decisis; created an intra-circuit conflict; and now joins the entrenched

circuit split at two opposing ends of the divide, further exacerbating the Courts of Appeals' rift on this pressing national issue. This case begs for an exercise of this Court's supervisory powers under Rule 10 (a) and (c).

III. THE FOURTH CIRCUIT'S DECISION IS ERRONEOUS.

First, the Fourth Circuit opinion (Pet.App.10a) erroneously holds that the provision of the EPA requires, "that the wage disparity not be based on a factor other than sex . . . Spencer's claim fails . . . " To the contrary, if the wage disparity is not based on a factor other than sex, it is impermissible, and she prevails. In a precedential case law, such a critical error, that rewrites the statutory provision, and is not merely dictum, is grave.

Moreover, contrary to the Fourth Circuits opinion that the Petitioner did not raise genuine issues of material fact, she disputed many key facts and presented voluminous evidence that the panel simply ignored and discarded. "Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Daubert*, 509 U.S. 579, 587 (1993).

First, the panel misapprehends that while neither party disputes that the 9/12ths salary equation was used to establish the salaries, there is dispute on whether the 9/12ths practice was ever a policy or a practice, and whether "the act of friendship" (Pet. App.77a-78a) between men was the motivating factor in applying it. The opinion completely rejects the

genuine dispute Spencer raises in stating, "according to her, the University's historical practice only applied to administrators who were previously tenured faculty." (Pet.App.13a). It ignored the Handbook, the testimony of Green, Kreiser, and Hill himself that affirms that no 9/12ths policy existed, even though Hill misrepresented its existence to the BOV. (Pet.App.76a-78a; 70a-71a; 140a-143a).

Further, the panel completely disregarded the clear policies established in the Faculty Handbook that define the qualifications for Associate Professors and the workload for all collegiate faculty at VSU regardless of rank, discipline, or department in its holding that Spencer failed to provide evidence of the equal work requirement as defined in the standard contract (EWP). (Pet.App.7a-8a, 12a; 96a; 68a). The panel then trampled over the factual dispute over whether Spencer's "more or better work in research and publishing" and "teaching more undergraduate students" outweighed her comparators alleged additional duties (Pet.App.7a); disregarded the testimonies of Spencer and her comparators on the vast common core of tasks for teaching; and discarded the testimony of Green and Edwards who affirmed that they believed Spencer was far more qualified and entitled to her salary increase request based on her superior experience and merit as a tenured professor. (Pet.App. 151a; 65a-68a).

In so doing, the panel failed to consider, that, even in adverse decisions, the vast national case law in higher education establishes tenure, teaching, research/publications/scholarly activities, and service as the sole bases for the work, merit/tenure, and

salaries of professors. *See e.g., Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990); *See also, e.g.*, *Kumar v. Bd. of Trustees, University of Mass*, 774 F.2d 1 (1st Cir. 1985); *Bickerstaff v. Vassar College*, 196 F.3d 435, 456 (2d Cir. 1999); *Adams v. University of North Carolina–Wilmington*, 640 F.3d 550, (4th Cir. 2011); *Herster v. Bd. Of Supervisors of Louisiana State Univ.*, 887 F.3d 177, 185 (5th Cir. 2018); and *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984). In its determination that Spencer's research and publications did not arise to the alleged additional duties of her comparators then, the opinion below destructively establishes new and contradictory case law in higher education.

The panel also errs in concluding that Spencer's regression analysis must prove systematic discrimination in order to be credible. (Pet.App.7a-9a). Spencer is only required to prove that there is a wage disparity between her and a similarly situated comparator, which, in addition to proving pretext, was the sole intent of her expert analysis. *Md. Ins. Admin.*, 879 F.3d at 122. Consequently, the panel discarded the testimony of Rosenberg which ignored both this Court's instruction in *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (citation omitted); and *Daubert*, 509 U.S. 579, 588 (1993), and its sister circuit precedent on the sufficiency of a regression analysis in proving discrimination and pretext. *See*, *Lavin-Mceleney v. Marist College*, 239 F.3d 476, 480-481 (2d Cir. 2001).

If the Fourth Circuit had adhered to this Court's direction, it could not have affirmed summary judgment, as a matter of law, on either her EPA or Title VII claims. If the evidence is construed in Spencer's

favor, as it must be, a jury could easily find that the 9/12ths prior salary policy defense is pretext and the sex of the decision makers and comparators motivated the decision to overpay the men (Pet.App.77a-78a). It could find that the comparators former roles bore no relationship to the position of Associate Professor and Spencer's superior qualifications, experience, merit, and productivity entitled her to the requested salary increase. (Pet.App.114a-119a). A jury could also easily find that the additional responsibilities that the panel relied upon (Pet.App.7a) do not explain a $35,000.00 and $49,000.00 salary disparity.

Moreover, a reasonable jury could find VSU's own BOV member, Green, a disinterested witness, and in such find that his testimony regarding Hills statements, "fuck her," she can wait to get paid," directly after she shared the GETF report with the BOV, which caused her considerable financial strain, and Hills comment, "I should have never hired the bitch," provided credible evidence of a pattern of sex-based retaliatory animus toward Spencer for her gender advocacy. (Pet.App.140a-143a). A reasonable jury could then infer that Edward's testimony that Hill asked Dean Kanu not to support Spencer's salary increase request was credible in establishing evidence of an intentional discriminatory and retaliatory intent. (Pet.App.68a-69a).

In reaching its conclusion that Spencer had not met her prima facie burden of establishing equal work, the Fourth Circuit confused prima facie and affirmative defense standards. *See Corning*, 417 U.S. 197, *see also Md. Ins. Admin.*, 879 F.3d at 122., and remarkably ignored this Courts long standing precedent that "our

holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The panel clearly failed to adhere to this Court's clear instruction that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor," *Tolan v. Cotton, supra*, 134 S.Ct. 1861 (2014).

Moreover, by disregarding this Court's authority which clearly establishes that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation," *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), *see also, e.g.*, *Wright v. West*, 505 U.S. 277, 296, the Fourth circuit's opinion affirming summary judgment on Spencer's EPA and Title VII claims, based on its blanket acceptance of the University's 9/12ths prior salary explanation (Pet. App.2a, 12a), infringed upon the jury's function "to infer the ultimate fact of discrimination from the truth or falsity of the employer's explanation" and violated Spencer's Seventh Amendment right.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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JUNE 28, 2019

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OPINION OF THE FOURTH CIRCUIT (MARCH 18, 2019)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ZOE SPENCER,

Plaintiff-Appellant,

v.

VIRGINIA STATE UNIVERSITY;
KEITH T. MILLER,

Defendants-Appellees.

No. 17-2453

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Henry E. Hudson, Senior District Judge.
(3:16-cv-00989-HEH-RCY)

Before: WILKINSON, FLOYD, and RICHARDSON, Circuit Judges.

RICHARDSON, Circuit Judge:

Dr. Zoe Spencer, a sociology professor at Virginia State University, sued the University under the Equal Pay Act and Title VII for paying her less than two male professors, allegedly because she is a woman.

Spencer earned about $70,000 per year—a median salary when compared to the men who were also full

professors in the Department of Sociology, Social Work, and Criminal Justice. But Spencer's lawsuit proposes comparing her pay to that of two former University administrators, Drs. Michael Shackleford and Cortez Dial, who each earned over $100,000 per year as professors in other departments. While Spencer asserts that the difference in pay was due to her sex, the University provides a different explanation: Shackleford's and Dial's jobs differed from Spencer's and, as former administrators, their pay was set as a prorated portion of their previous salaries.

After discovery, the district court granted summary judgment for the University (and its former president, Dr. Keith Miller). We affirm. Though Spencer establishes a pay disparity, she fails to present evidence that creates a genuine issue of material fact that Shackleford and Dial are appropriate comparators. In any event, unrebutted evidence shows that the University based Shackleford's and Dial's higher pay on their prior service as University administrators, not their sex.[1]

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[1] We review the district court's grant of summary judgment de novo. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No II)*, 892 F.3d 624, 645 (4th Cir. 2018). After considering the evidence and all fair inferences in the light most favorable to the nonmovant, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "To survive summary judgment, 'there must be evidence on which the jury could reasonably find for the nonmovant.'" *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

I. Equal Pay Act

Spencer first claims that the disparity between her salary and her chosen comparators' violates the Equal Pay Act. The statute forbids the University (like other employers) from:

> Discriminat[ing] . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages 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, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

29 U.S.C. § 206(d)(1). To prove a violation of the Act, Spencer must make an initial (*i.e.*, prima facie) showing of three elements: (1) the University paid higher wages to an employee of the opposite sex who (2) performed equal work on jobs requiring equal skill, effort, and responsibility (3) under similar working conditions. *EEOC v. Maryland Ins. Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

This initial showing permits an inference that a pay disparity was based on sex discrimination. *Maryland Ins. Admin.*, 879 F.3d at 120. The inference of discrimination stands even without the support of any evidence of discriminatory intent. *Id.* Only once this inference exists does the burden shift to the

employer to show that the pay differential was based on a factor other than sex. *Id.*

Spencer's choice of Shackleford and Dial as comparators establishes the first element of her initial showing—the existence of a wage differential. By choosing two of the highest-paid professors at the University, Spencer ensured that her wages were much lower. Yet that same decision to pick Shackleford and Dial precludes her from establishing, as the second element requires, that she and they performed "equal" work requiring "equal skill, effort, and responsibility."

Equality under the Act is a demanding threshold requirement. It requires a comparator to have performed work "virtually identical" (or the apparent synonym, "substantially equal") to the plaintiff's in skill, effort, and responsibility. *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332-33 (4th Cir. 2004). Similarity of work is not enough; the Act explicitly distinguishes between the work itself (which must be "equal") and the conditions of work (which need only be "similar"). 29 U.S.C. § 206(d)(1). The Act does not provide courts with a way of evaluating whether distinct work might have "comparable" value to the work the plaintiff performed. *See Wheatley*, 390 F.3d at 333; *see also Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007) (Posner, J.) (explaining that, when trying to identify "comparable" pay for unequal work, there are "no good answers that are within the competence of judges to give"). Instead, the Act's inference of discrimination may arise only when the comparator's work is equal to the plaintiff's.

In alleging this necessary equality, a plaintiff may not rely on broad generalizations at a high level of abstraction. *Wheatley*, 390 F.3d at 332. But Spencer

attempts just such an impermissibly general comparison. In Spencer's view, all University professors perform equal work because they all perform the same essential tasks: preparing syllabi and lessons, instructing students, tracking student progress, managing the classroom, providing feedback, and inputting grades. *See* Appellant's Brief at 9. The performance of these tasks, Spencer posits, requires the same skills: studying, preparing, presenting, discussing, and so forth. *See id.* at 9-10. But these tasks and skills are shared by middle-school teachers and law-school professors, pre-algebra teachers and biomedical-engineering professors.

This attempted comparison ultimately relies on the common title of "professor" plus some generalized responsibilities (*e.g.*, teaching students). Yet we have rejected an analogous claim that jobs with the same title and only vaguely corresponding responsibilities can be considered equal. In *Wheatley* we concluded that the plaintiffs, supervisors in a county's emergency-services department, failed to meet their burden to show that supervisors in different departments performed equal work because they could not demonstrate that the different jobs were equal in skill and responsibility. 390 F.3d at 334; *see also Sims-Fingers*, 493 F.3d at 771. Spencer's case suffers from a near-identical flaw.

Spencer's bird's-eye view is particularly unpersuasive given the inherent features of academia. Professors are not interchangeable like widgets. Various considerations influence the hiring, promotion, and compensation of different professorial jobs. *Cf. Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984) (discussing the tenure process). As a result, faculty salary decisions

require a complex balancing of factors. Among other things, those decisions account for the differences in skill and responsibility attendant to different jobs. For instance, an engineering professorship requires different skills, effort, and responsibility than professorships in other fields, such as sociology. Evidence offered by Spencer proves this very point: The University systematically pays engineering professors more than humanities professors. J.A. at 136. This reflects differences in skill along with market forces that compensate engineers more highly. This market reality confirms that Spencer's broad generalizations about tasks and skills, which apply to virtually all teachers, fail to satisfy her burden to show equal work.

In contrast to Spencer's generalized tasks and skills, a litany of concrete differences underscore that Spencer does not perform work equal to that of Shackleford and Dial. First, Shackleford and Dial taught in different departments than Spencer did. While comparisons might be drawn between some departments, any such comparison requires the plaintiff to articulate with specificity why the work performed and skills needed by a professor in one department are virtually identical—and not just generally related or of comparable worth—to those in another. As our precedents recognize, the differences between academic departments generally involve differences in skill and responsibility. *See Strag v. Bd. of Trustees, Craven Cmty. Coll.*, 55 F.3d 943, 950 (4th Cir. 1995) (finding that the Biology and Mathematics departments required instructors to have different skills and responsibilities); *Soble v. Univ. of Maryland*, 778 F.2d 164, 167 (4th Cir. 1985) (finding that the specialized nature of certain university departments called for

distinct skills); *cf. Wheatley*, 390 F.3d at 332-33 (recognizing job-related differences for directors of different county government departments).

There are still more differences. Along with serving in different departments, the three professors taught at different class levels at the University. Spencer taught mainly undergraduate courses, while Shackleford and Dial taught more graduate courses. And Shackleford also supervised doctoral dissertations. Contrary to Spencer's assertion, the fact that the University credited hours spent supervising dissertations in a similar manner to hours spent teaching regular courses does nothing to establish the equivalency of supervising dissertations and teaching undergraduates. Nor did the professors work equal hours, as the record shows that Shackleford and Dial worked more than Spencer did week to week.[2]

None of this is to say that the Equal Pay Act cannot apply in the higher-education context. But in that context—one where the work is an exercise in intellectual creativity that can be judged only according to intricate, field-specific, and often subjective criteria—Spencer must provide the court with more than broad generalities to meet her burden. She must present evidence on which a jury could rely to decide that she, Shackleford, and Dial had equal jobs, not just that they all performed vaguely related tasks using

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[2] Spencer paradoxically argues that other differences between her work and that of her chosen comparators render her work equal. For example, Spencer asserts that she conducted research and published while Shackleford and Dial did not. This evidence cannot save her claim given the differences already discussed. Piling on differences—even those suggesting that Spencer did better or more work—does nothing to prove equality of work.

nominally comparable skills. That is, there must be evidence showing the jobs were equal in the strict sense of involving "virtually identical" work, skill, effort, and responsibility, not in the loose sense of having some comparative value. *Wheatley*, 390 F.3d at 333.

Despite all of these issues, Spencer claims her expert, Joseph Rosenberg, found "that Shackleford and Dial were significantly overpaid in comparison to Spencer." Appellant's Brief at 44 (emphasis added). Not only is this irrelevant to establishing equal work, this claim is a bit misleading: Rosenberg asserted that Shackleford and Dial were overpaid relative to all other professors, both men and women.[3]

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[3] Spencer's brief asserts that Rosenberg:

> used four independent variables to account for the skill, effort, and responsibility required of professors at [the University], taking into account experience, departmental affiliation, faculty rank, and whether the professor was a Chair or Dean. Rosenberg found, at a 97.5% confidence interval, that Shackleford and Dial were significantly overpaid in comparison to Spencer even when accounting for the different departments in which they taught.

Appellant's Brief at 44 (citations and emphasis omitted). Contrary to Spencer's characterization, Rosenberg's report does not appear to take departmental affiliation into account, instead only accounting for the broader category of "school," each of which encompasses several departments. And there is another flaw, though immaterial given the report's other shortcomings: Rosenberg's expert report does not account for Spencer's comparators' prior work in the administration, even though everyone appears to agree that their prior administrative experience determined their salaries. *Cf. Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (noting that administrators are gen-

In addition to looking at her chosen comparators, Spencer's expert tried to identify a general disparity between the pay of men and women at the University. But his efforts revealed no statistically significant disparity within each "school." If anything, this evidence undermines Spencer's claimed inference of discrimination. *See Strag*, 55 F.3d at 950 (suggesting that "isolated incidents or random comparisons demonstrating disparities in treatment may be insufficient to draw a *prima facie* inference of discrimination without additional evidence that the alleged phenomenon of inequality also exists with respect to the entire relevant group of employees" (quoting *Houck v. Virginia Polytechnic Ins.*, 10 F.3d 204, 206-07 (4th Cir. 1993)).

Despite her expert's efforts, Spencer's generalized claims cannot establish that she engaged in equal work, which categorically dooms her attempt to establish wage discrimination under the Equal Pay Act. *Cf. Wheatley*, 390 F.3d at 334 (a plaintiff may not "indiscriminately aim at all department supervisors collectively, and then expect to meet the EPA standard" for equal work).

But even if Spencer could meet her initial burden, her claim would still fail because the University established that the salary difference was based on a "factor other than sex." 29 U.S.C. § 206(d)(1)(iv). As the defendant, the University bore the burden of establishing this affirmative defense. *Maryland Ins. Admin.*, 879 F.3d at 120. Granting summary judgment on this ground required the district court to find that

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erally paid higher salaries than teachers and that these higher salaries persist when administrators move back to teaching).

the proffered reason did in fact explain the wage disparity, not merely that it could. *Id.* at 121.

Here, there is no dispute that the wage difference at issue resulted from the University setting Shackleford's and Dial's pay at 75% of their previous salaries as administrators. In practice, the University generally paid former administrators who became professors "9/12ths" of their administrator salary. This practice appears to rest on the theory that professors work nine months out of the year, while administrators work year-round. Indeed, Spencer admits that her comparators' pay during their short stints as University professors was set according to the 9/12ths practice. Appellant's Reply Brief at 16 ("Shackleford and Dial's salaries were set entirely on their prior salaries as administrators.").

In response to the University's explanation, Spencer claims that the 9/12ths practice should not have been used to calculate Shackleford's and Dial's salaries. According to her, the University's historical practice only applied to administrators who were previously tenured faculty. But even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity. *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 272 (4th Cir. 2005) ("We do not sit as a 'super-personnel department weighing the prudence of employment decisions' made by the defendants." (quoting *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)); *Smith v. Univ. of North Carolina*, 632 F.2d 316, 346 (4th Cir. 1980) ("[The] law does not require, in the first instance, that employment be rational, wise, or well-considered—only

that it be nondiscriminatory." (quoting *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1156-57 (2d Cir. 1978)).

The Equal Pay Act is a powerful tool, permitting an employee to prevail on a wage discrimination claim with no evidence of intentional discrimination. But this tool must be tempered by adherence to its provisions. Doing so requires that the work performed by the plaintiff and her comparators be equal and that the wage disparity not be based on a factor other than sex. Spencer's claim fails on both requirements.

II. Title VII

Having rejected Spencer's Equal Pay Act claim, we must separately consider her claim of Title VII sex-based wage discrimination. Under Title VII of the Civil Rights Act of 1964, an employer cannot "discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Title VII, in contrast to the Equal Pay Act, requires establishing intentional discrimination. A Title VII plaintiff may make this showing of intentional discrimination using direct or circumstantial evidence. Alternatively, the plaintiff may use the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "to develop an inferential case" of discriminatory intent. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1017 (4th Cir. 1996).

A prima facie pay-disparity case under *McDonnell Douglas* requires a plaintiff to establish (1) she is a member of a protected class, (2) she was performing her job satisfactorily, (3) an adverse employment action occurred, and (4) the circumstances suggest an unlawfully discriminatory motive. *See McDonnell*

Douglas, 411 U.S. at 802; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Where, as here, the prima facie case of wage discrimination is based on comparators, the plaintiff must show that she is paid less than men in similar jobs. *See Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 343 (4th Cir. 1994).

Title VII requires the compared jobs to be only "similar" rather than "equal," as required under the Equal Pay Act. *See id.* While there is no bright-line rule for what makes two jobs "similar" under Title VII, courts consider "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications—provided the employer considered these latter factors in making the personnel decision." *Bio v. Fed. Express Corp.*, 424 F.3d 593, 597 (7th Cir. 2005) (internal quotation marks omitted); *see also Herster v. Bd. of Supervisors of Louisiana State Univ.*, 887 F.3d 177, 185 (5th Cir. 2018) (stating that a "variety of factors are considered when determining whether a comparator is similarly situated, including job responsibility, experience, and qualifications."). While Title VII's "similarity" requirement demands less of plaintiffs than the Equal Pay Act's "equality" requirement, it is not toothless: the plaintiff must provide evidence that the proposed comparators are not just similar in <u>some</u> respects, but "similarly-situated <u>in all respects</u>." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992). For the same reasons we discussed above, Spencer's broad generalizations

cannot even show sufficient similarity to meet her burden under Title VII.[4]

Even if we concluded that Spencer had established a prima facie case of Title VII wage discrimination, her case still could not withstand summary judgment. Once a plaintiff establishes a prima facie case, the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory explanation for the wage disparity. *Guessous v. Fairview Prop. Investments, LLC*, 828 F.3d 208, 216-17 (4th Cir. 2016); *Maryland Ins. Admin.*, 879 F.3d at 120 n.7. Here, the University satisfies this requirement through its practice of paying administrators 9/12ths of their previous salary. Just as this practice satisfies the Equal Pay Act's "factor other than sex" affirmative defense, it qualifies as a legitimate, nondiscriminatory explanation under Title VII. *Cf. Cty. of Washington v. Gunther*, 452 U.S. 161, 169 (1981) (recognizing that the Bennett Amendment to Title VII incorporates the four affirmative defenses from the Equal Pay Act).

Having proffered a nondiscriminatory explanation, the University shifts the burden back to Spencer to prove that the explanation is merely pretextual for invidious discrimination. *Guessous*, 828 F.3d at 216. Spencer cannot supply any evidence of this. Since the touchstone of discrimination is treating two groups differently based on characteristics only one possesses, it is vital for Spencer to provide evidence that the

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[4] Just as in the Equal Pay Act context, Spencer's expert does not help her to establish a prima facie case here. While a plaintiff may use statistics to suggest a discriminatory motive, Spencer's expert found no statistical evidence that the University paid women less than men.

University has used the 9/12ths policy to pay men more than women. Instead, Spencer merely argues that the University misapplied the 9/12ths policy to Shackleford and Dial. But again, even if the University "erroneously or even purposely misapplied the . . . policy, it is not proof of unlawful discrimination." *Dugan v. Albemarle Cty. Sch. Bd.*, 293 F.3d 716, 722 (4th Cir. 2002).

As a final note, Spencer also alleges that the University, and its former provost, engaged in unlawful retaliation because of her complaints about pay disparities. As the district court noted, the facts supporting most of these allegations are exceedingly weak, and the allegations themselves are mostly conclusory. *See Spencer v. Virginia State Univ.*, No. 3:16-cv-989, 2018 WL 627558, at *14-17 (E.D. Va. Jan. 30, 2018). Even if Spencer's characterization of the behavior is accurate, Spencer offers insufficient evidence that each action was both material and undertaken because of her complaints about salary equity. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse . . . [meaning] it might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'"). That is not to say no one harbored animus toward Spencer, but a personal conflict alone does not constitute retaliation. *Cf. Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000) ("But Hawkins presents no facts that tend to show this allegedly disparate treatment was due to race rather than Price's admittedly low regard for Hawkins' individual performance."). Because the district court correctly found

that Spencer cannot establish a prima facie case of retaliation, we do not address the merits of the University's defenses.

Accordingly, the judgment of the district court is

AFFIRMED.

MEMORANDUM OPINION OF DISTRICT COURT OF VIRGINIA (JANUARY 30, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY, ET AL.,

Defendants.

Civil Action No. 3:16cv989—HEH

Before: Henry E. HUDSON, United States District Judge.

Plaintiff Dr. Zoe Spencer ("Plaintiff") filed this suit against Defendant Virginia State University ("VSU") and Defendant Dr. Keith T. Miller ("Dr. Miller") (collectively "Defendants"), alleging that Defendants violated the Equal Pay Act, 29 U.S.C. § 206(d), *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, in the course of various employment actions taken against Plaintiff. (2d Am. Compel., ECF No. 44.) This matter is now before the Court on Defendants' Motion for Summary Judgment (ECF No. 74), filed on October 24, 2017.

All parties filed memoranda supporting their respective positions. (ECF Nos. 76-78.) The Court dispensed with oral argument because the facts and legal contentions were adequately presented in the materials before it, and oral argument would not have aided in the decisional process. E.D. Va. Local Civ. R. 7(J). On November 28, 2017, the Court issued an order granting Defendants' motion and dismissing Plaintiff's action with prejudice (ECF No. 87), and further identified that the Court would subsequently file a memorandum opinion explaining its reasoning. This reasoning is set forth below.

I. Background

At the outset, the Court notes that Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Memorandum in Opposition," ECF No. 77) fails to include a specifically captioned section listing all material facts as to which she contends are genuinely in dispute, as required by ED. Va. Loc. Civ. R. 56(B)[1] and consistent with Fed. R.

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[1] Local Rule 56(B) provides:

> Each brief in support of a motion for summary judgment shall include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted,

Civ. P. 56(c)(1). Instead, Plaintiff has set forth her own version of the material facts without identifying the facts among those cited by the Defendants that she disputes. Under the Local Rules, a court in this situation may accept those facts identified by the movant as undisputed to be admitted, as well as assume admitted those facts not disputed by reference to the record. E.D. Va. Loc. Civ. R. 56(B); *see JDS Uniphase Corp. v. Jennings*, 473 F.Supp.2d 705, 707 (E.D. Va. 2007). Despite Plaintiff's failure to comply with the plain language of Local Rule 56, the Court has made a reasonable effort to discern which material facts are genuinely disputed by examining the citations to the record in Plaintiff's Memorandum in Opposition. Where appropriate, however, the Court reserves the right to consider Defendants' statement of facts as undisputed, as permitted by the Local Rules and Fed. R. Civ. P. 56(e).

The Court has concluded that the following factual recitation represents the undisputed material facts for the purpose of resolving the summary judgment motion:

VSU is organized into six colleges, which are further divided into various departments. (Palm Decal. ¶ 12, ECF No. 76-1; Kanu Decl. ¶ 5, ECF No. 76-2.) Two of the six colleges are the College of Education and the College of Humanities and Social Sciences. (Palm Decl. ¶ 12.)

> unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

E.D. Va. Loc. Civ. R. 56(B) (emphasis added).

The College of Education focuses on the preparation of educational professionals. (Corley Decl. ¶ 4, ECF No. 76-3.) It is divided into five departments, including the Department of Educational Leadership, which is a combination of the former Department of Administrative and Organizational Leadership and the Department of Doctoral Studies. (*Id.* ¶ 6.) The Department of Educational Leadership's senior-level preparation program aims to teach students how to lead a school that is both effective and efficient. (*Id.* ¶ 7.) Further, the department's doctoral program allows as many as twelve graduate-level students to pursue a Doctorate in Educational Administration and Supervision. (*Id.*)

The College of Humanities and Social Services is divided into nine departments, two of which are the Department of Sociology and Criminal Justice ("Sociology") and the Department of Mass Communications and Communications Services ("Mass Communications"). (Kanu Decl. ¶¶ 5-6, 8.) The Department of Sociology contains both bachelor's and master's degree programs. (*Id.* ¶ 7.) The Department of Mass Communications allows students to specialize in several areas, including public relations. It offers a Bachelor of Arts in Mass Communications, which requires all students to complete an internship in a professional setting. (*Id.* ¶ 9.) Further, the Department of Mass Communications promotes the professional expertise of its faculty and staff in numerous areas including public relations. (*Id.* ¶ 11.)

Plaintiff earned her master's degree in Social Work in 1992 and earned her Ph.D. in Sociology in 2005, both from Howard University. (2d Am. Compl. ¶ 37.) She began as an Assistant Professor in the

Sociology Department at VSU in 2008 before she was promoted to Associate Professor in 2010 and granted tenure in 2013. (*Id.* ¶ 38; Spencer Dep. 115:8-10, ECF No. 77-10.) In the fall of 2013, VSU allowed Plaintiff to teach in China for a semester, during which time she received her regular salary and a $10,000 stipend. (Spencer Dep. 313:19-315:2; 2d Am. Compel. ¶ 101.) Provost Weldon Hill was among the individuals at VSU that signed off on both Plaintiff's tenure and her request to teach abroad. (Spencer Dep. 115:11-20, 314:15-315:2.) Plaintiff was promoted to Full Professor in 2017. (*Id.* at 213:10-12.)

From 2011 to 2013, Plaintiff's salary was $68,500 per academic year. (2d Am. Compel. ¶ 50.) Plaintiff's salary increased to $70,040 from 2013 to 2016. (*Id.*) Her current salary as a full professor is $71,441. (*Id.*) Amongst the salaries for the other full professors in the Sociology Department, Plaintiff's salary is the same as that of one male professor, higher than those of one male and one female professor, and lower than those of one male and one female professor. (Spencer Dep. 218:11-219:4.) During her time as an Associate Professor, Plaintiff's salary similarly fell in the middle of the salaries of her colleagues at the same rank. (Kanu Decl.¶ 13.)

Throughout her tenure at VSU, Plaintiff has taught several different undergraduate courses in the Sociology Department, such as Sociology of Marriage and Family, Social Psychology, and Contemporary Hip Hop and the Prison Industrial Complex, and one graduate-level course. (2d. Am. Compl. ¶¶ 41-45.) Plaintiff estimates that she works approximately thirty hours per week. (Spencer Dep. 52:2-9.) Plaintiff has

never served in an administrative capacity either at VSU or any other entity. (*Id.* at 240:1-2.)

In 2014, VSU denied Plaintiff's request for her salary to be raised to the pay-level of Colonel Cortez Dial and Dr. Michael Shackleford. (Hill Dep. 267:17-269:4.) VSU made this decision after determining that Plaintiff's salary was in the middle of those similarly ranked professors within her department. (*Id.*) Dr. Joyce Edwards, the chair of Plaintiff's department, recommended that Plaintiff receive a salary increase. (Edwards Dep. 164:21-165:16.) However, Dr. Edwards acknowledged that the denial was likely due to VSU's concern that increasing Plaintiff's salary would lead to a domino effect amongst all faculty members at the associate professor rank. (*Id.*)

Dial's educational background includes a Bachelor of Science degree in Communication Science from Northern Illinois University in 1974, a Master of Science degree in Education from University of Southern California in 1978, a MBA from Webster University in 1985, and a Doctorate in Education from VSU in 2013. (Dial Dep. 14:8-13, 164:21-165:15; Exs. 1-4, ECF No. 76-6.) Dial joined the Army in 1974, and during his service he held several different positions in public affairs and personnel. (*Id.* at 47:1-6; Def. Supp. Resp. 1st Int. ¶ 15, ECF No. 76-7.) He was promoted to full colonel in 1997 before ultimately retiring in 2003. (Dial Dep. 47:7-8, 132:16-18.)

Following Dial's retirement from the Army, VSU hired him as Director of Residence Life. (*Id.* at 21:8-11.) In 2004, Dial began serving as VSU's Chief of Staff, and he held that position until June 2014. (*Id.* at Ex. 6.) As Chief of Staff, Dial fulfilled several administrative and supervisory roles under the direc-

tion of VSU's president. (Def. Supp. Resp. 1st Int. ¶ 8.) During his time as Chief of Staff, Dial also taught several courses at VSU such as an undergraduate course in mass communications and a graduate-level course titled Crisis Communications. (Dial Dep. 160:1-4, 160:22-162:3.) In the summer of 2013, Dial informed the President of VSU that he intended to step down as Chief of Staff to pursue teaching opportunities. (*Id.* at 170:6-12.)

After Dial announced his interest in teaching, the Chair of the Mass Communications Department, Dr. Ishmail Conway, approached him and said "We'd really like you to stay here for one more year at least." (*Id.* at 170:13-22.) Ultimately, Dial accepted a position as a term-appointed Associate Professor in the Mass Communications Department. (*Id.* at 170:6-14, 192:15-18; Kanu Decal. ¶ 14.) The position came with a nine-month contract that paid $105,446, which was 75% of the twelve-month salary he received as Chief of Staff. (Def. Supp. Resp. 1st Int. ¶ 6.) From 2016 to 2017, his salary increased to $107,556. (2d Am. Compl. ¶ 67.) Dial's salary as a term appointment exceeded the salaries of many tenured faculty at VSU, male and female, and it was higher than that of all other faculty within the Sociology Department. (Kanu Decl. ¶ 14.)

From 2014 to 2017, Dial taught six semesters of courses at both the undergraduate and graduate levels, such as Crisis Communications, Graduate Media Internship, Media Management, and Special Topics in Media. (2d Am. Compl. ¶¶ 60-63.) Dial also performed tasks such as advising students and assisting student groups, promoting the Mass Communications Department to Army Logistics University at Fort Lee, working

with the NCO academy at Fort Lee, and serving as the coordinator of the Mass Communications Department Internship Program. (Dial Dep. 186:19-189:4; Def. Supp. Resp. 1st Int. ¶ 20.) In this capacity, he helped create an internship with Minor League Baseball, and further developed, maintained, and reviewed internship sites. (Dial Dep. 189:1-2; Def. Supp. Resp. 1st Int. ¶ 20.) Dial left the faculty at the end of the 2017 academic year. (Dial Dep. 237:12-18.)

Shackleford's educational background includes a bachelor's degree in Business Administration from VSU in 1972, a MBA from Florida Institute of Technology in 1977, and a Doctorate in Education from George Washington University in 2003, which included completing a dissertation on the "Impact of Remedial Math on Retention and Graduation Rates at an HBCU." (Shackleford Dep. 13:9-15, 16:8-9, ECF No. 77-11.) Shackleford served in several leadership positions in the Army prior to retiring in 1996. (*Id.* at 33:16-35:9, 55:5-11.)

Following his retirement from the Army, Shackleford joined VSU as Executive Director of Enrollment Management where he worked to grow enrollment through recruitment and retention. (*Id.* at 55:1-4, 19:9-14.) In 2004, Shackleford became the Associate Vice President for Student Affairs and Enrollment Management and later the Vice President for Student Affairs and Enrollment Management. (*Id* at 36:22-37:11.) In that position, Shackleford oversaw several components of the VSU administration including the division related to Judicial Affairs/ Student Conduct, Residence Life, Student Counseling, and Student Organization/Greek Life. (Def. Supp. Resp. 1st Int. ¶ 14.)

In early 2014, Shackleford indicated that he wanted to pursue teaching or work in another capacity at VSU. (Shackleford Dep. 113:16-199:8.) Defendant Dr. Miller, then-president of VSU,[2] approached Shackleford about remaining at VSU in order to help change the student culture. (*Id.* at 115:3-116:4.) Ultimately, Shackleford accepted a position as a term-appointed Associate Professor in Doctoral Studies for the 2014-2015 school year. (Shackleford Dep. 123:1-124:2, 184:3-12; Hill Dep. 88:8-20, ECF No. 77-8.) The position came with a nine-month contract that paid $119,738, which was 75% of the twelve-month salary he received in his administrative position. (Shackleford Dep., Ex. 9, ECF No. 76-9; Hill Dep. 114:17-115:18.) Shackleford's salary as term-appointed Associate Professor in Doctoral Studies exceeded that of many tenured faculty at VSU, both male and female. (Corley Decal. ¶ 8.)

Shackleford taught students at the graduate level, specifically in the education administration doctoral program. (Shackleford Dep. 124:16-126:2, 188:18-21.) One of his primary tasks was to reduce the backlog of doctoral students that had formed due to understaffing. (*Id.* at 125:3-7.) In this capacity, he helped steward doctoral students through the dissertation phase of their degree, which involved helping with selecting dissertation topics, planning the collection of research data, and providing feedback and guidance to assist with completion of the students' dissertation defense. (*Id* at 188:19-21.) Additionally, he served as the co-coordinator for the College of Education Internship

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[2] Dr. Miller served as President of VSU from July 2010 to December 2014. (Palm Decl. ¶ 9.)

Program and as a recruitment officer for the Department of Doctoral Studies, which involved making presentations at schools across the state. (*Id.* at 184:3-12; 217:13-21; Def. Supp. Resp. 1st Int. ¶ 21.) Given these various commitments, Shackleford's typical day ran from 9 a.m. to 10 p.m. and often required working seven-day weeks. (Shackleford Dep. 147:2-16.)

The procedures followed in hiring both Dial and Shackleford deviated from the procedure typically utilized by VSU, but VSU had a practice of prorating the salary of an administrator to a nine-month salary when that administrator moved to the faculty. (Hill Dep. 80:1-4, 115:1-6, 140:9-22; *see also* Mem. Opp. Sum. J. ¶ 19.) VSU utilized a "simple arithmetic calculation" in setting the salaries of Shackleford and Dial as Associate Professors at 75% of their prior salaries as administrators. (Hill Dep. 272:9-15, 277:8-11.) Further, Provost Hill believed that this practice was followed by institutions of higher education across the Commonwealth. (Def. Supp. Resp. 1st Int. ¶ 6.) A regression analysis performed by Dr. Joseph I. Rosenberg found that both comparators were paid more than their similarly situated peers—both male and female. (Rosenberg Dep. 79:10-21, ECF No. 76-10.) Further, Dr. Rosenberg's analysis did not show pay disparity at a "statistically significant level of males over females by school." (*Id.* at 183:13-184:10.)

In addition to her claims of an illegal pay disparity, Plaintiff claims that Defendants took actions that constituted retaliation in violation of the EPA and Title VII. Plaintiff presented the VSU administration with a report on gender-based pay inequity at VSU in April 2012 and further gave a copy of the report to VSU Board Member Terone Green in November 2012.

(Spencer Dep. 254:19-255:15.) Following Plaintiffs presentation, the VSU administration took various steps to further investigate and resolve the concerns highlighted by the report, including allotting over $450,000 for pay increases. (Hill Dep. 182:19-183:4, 185:10-15.)

The majority of the alleged materially adverse employment actions involve VSU's Provost, Weldon Hill. (*See generally* 2d Am. Compl.) Plaintiff alleges that in May 2012 "Provost Hill intentionally delayed signing [Plaintiffs]'s paperwork for her Summer School pay." (2d Am. Compel. ¶ 92.) The delay was caused by Plaintiffs department chair missing a submission deadline due to inadvertently overlooking an email. (Hill Dep. 195:17-19.) In an attempt to accommodate Plaintiff and expedite her receipt of payment, the President of VSU suspended electronic deposit for everybody so that paper checks could be picked up. (Hill Dep. 196:3-5.)

Plaintiff alleges that in December 2012, "Provost Weldon Hill refused to sign [Plaintiffs time sheet in a manner that would have afforded her the opportunity to be paid in time for the holiday break." (2d Am. Compel. ¶ 93.) In response to a board member inquiring about this delay, Provost Hill made derogatory comments about Plaintiff. (Green Dep. 100:10-101:15, ECF No. 77-13.) In the past, Hill had signed paperwork preferentially. (Edwards Dep. 139:7-11, ECF No. 77-9.) VSU and Hill also had a general culture of retaliation if you got on their bad side. (*Id.* at 183:1-5.) A lengthy email exchange identifies that the initial delay in Plaintiff's payment was due to her department chair, Joyce Edwards, not realizing that a form requiring her signature was attached to an email.

(Green Dep., Ex. 3 at 8-17.) Plaintiff experienced a "consistent problem" with receiving her payments throughout her time at VSU. (*Id.* at 11.) At various points throughout the email exchange, it is unclear which corresponding party actually had Plaintiff's payment paperwork. (*Id.;* Spencer Dep. 262:15-263:1.) Provost Hill arranged a meeting with the parties involved in the exchange in order to address the payment delay issue. (Green Dep., Ex. 3 at 8-9.)

Plaintiff alleges that the VSU Provost's Office encouraged a student to file a complaint against Plaintiff with the Office of Civil Rights (OCR) and then failed to support Plaintiff through the OCR investigation. (2d Am. Compl. 1 98-99.) Plaintiff stated "I just assume" when asked how she knew that Provost Hill was behind the student filing the complaint. (Spencer Dep. 304:5-8.) Provost Hill was instrumental in the student being able to participate in commencement exercises despite not having the requisite credit hours to graduate. (*Id.* at 306:7-312:21.)

Plaintiff alleges that Provost Hill referred to her as a "troublemaker" and made a veiled threat against her, saying: "A wise person taught me a long, long time ago, that, 'If you get dragged into a game you do not wish to play, then play the end-game.'" (2d Am. Compel. ¶¶ 90, 94-97.) Plaintiff was told that Provost Hill called her a "troublemaker" but never personally heard him do so. The moniker was, however, used jokingly by her colleagues in the VSU faculty. (Spencer Dep. 264:15-265:8; Edwards Dep. 80:3-6.) The statement Plaintiff believed to be a veiled threat was utilized frequently by Provost Hill as a colloquialism for "just tell me what it is you want. I'm not going to play the game leading up to it." (Hill Dep. 239:2-6.)

Plaintiff contends that Defendants denied her request for a salary adjustment to the pay-level of Dial and Shackleford in September 2014. (2d Am. Compl. ¶¶ 103-111.)

Plaintiff also claims that Defendants failed to bar a student from taking Plaintiff's classes or take any action in response to a threat assessment Plaintiff submitted against a stalking student in August 2015. (2d Am. Compl. ¶ 117.) Upon receiving Plaintiff's information about the threat assessment, VSU forwarded it to the police. (Spencer Dep. 336:18-337:11.) The Vice Provost suggested that the class be taught by somebody other than Plaintiff, and Dr. Joyce Edwards ultimately taught the class. (Edwards Dep. 181:2-7.) Plaintiff did not request that VSU remove the student from her class in order to allow her to teach it nor did she request that VSU take any further action with respect to that student. (*Id.* at 180:17-181:18.)

Plaintiff further maintains that she was slated to give a speech during freshman orientation in January 2016, but Defendants removed her name from the list. (2d Am. Compl. ¶ 118.) Plaintiff states that certain unidentified students told her that the VSU administration took her off a list of speakers. (Spencer Dep. 355:4-358:20; Edwards Dep. 70:11-72:6.)

II. Standard of Review

The standard of review for summary judgment motions is well settled in the Fourth Circuit. Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 411 U.S. 242, 247 (1986); Fed. R. Civ. P. 56(c). The relevant inquiry in a summary judgment analysis is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 411 U.S. at 251-52. In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party. *Id* at 255.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48. Indeed, summary judgment must be granted if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

To defeat an otherwise properly supported motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, "mere speculation," the "building of one inference upon another," the "mere existence of a scintilla of evidence," or the appearance of "some metaphysical doubt" concerning a material fact. *Lewis v. City of Va. Beach Sheriff's Office*, 409 F. Supp. 2d 696, 704 (E.D. Va. 2006) (cita-

tions omitted). The court cannot weigh the evidence or make credibility determinations in its summary judgment analysis. *Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004).

In analyzing motions for summary judgment, it is important to keep in mind that a material fact is one that might affect the outcome of a party's case. *Anderson*, 477 U.S. at 248; *JKC Holding Co. LLC v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *see also Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). A "genuine" issue concerning a material fact only arises when the evidence, viewed in the light most favorable to the nonmoving party, is sufficient to allow a reasonable jury to return a verdict in that party's favor. *Anderson*, 477 U.S. at 248.

III. Discussion

A. Plaintiffs Wage Discrimination Claim under the EPA

1. Legal Framework

The EPA prohibits employers from discriminating on the basis of sex "by paying wages to employees . . . at a rate less than the rate at which he pays wages 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." 29 U.S.C. § 206(d)(1).

To establish a prima facie case of wage discrimination under the EPA, a plaintiff bears the burden of showing: "(1) that her employer has paid different wages to employees of opposite sexes; (2) that said employees hold jobs that require equal skill, effort, and responsibility; and (3) that such jobs are performed under similar working conditions." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 613 (4th Cir. 1999) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)), *overruled on other grounds by Desert Palace v. Costa*, 539 U.S. 90 (2003). This disparity is typically shown by a "factor-by-factor" comparison to a specific male comparator. *Houck v. Va. Polytechnic Inset. and State Univ.*, 10 F.3d 204, 206 (4th Cir. 1993).

A proper comparator for EPA purposes performs work "substantially equal" to that of the plaintiff. *Wheatley v. Wicomoco City.*, 390 F.3d 328, 332 (4th Cir. 2004) (citations and internal quotation marks omitted). Though "application of the [EPA] is not restricted to identical work," *Brennan v. Prince William Hosp. corp.*, 503 F.2d 282, 291 (4th Cir. 1974), "the jobs involved should be virtually identical, that is . . . very much alike or closely related to each other." *Wheatley*, 390 F.3d at 333 (quoting *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973) (emphasis added and internal quotation marks omitted)). This requires more than a mere showing that the plaintiff and the putative comparator share the same job title. *Wheatley*, 390 F.3d at 332. The analysis turns on whether the jobs to be compared share a "common core" of tasks. *Hassman v. Valley Motors,*

Inc., 790 F. Supp. 564, 567 (D. Md. 1992) (cited for this proposition with approval in *Dibble v. Regents of Univ. of Md. Sys.*, 1996 WL 350019, at *3 (4th Cir. 1996) (unpublished opinion)).

However, "jobs do not automatically involve equal effort or responsibility even if they 'entail most of the same routine duties'" *Wheatley*, 390 F.3d at 333 (quoting *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972)). The Fourth Circuit has expressly declined to hold that jobs entail substantially equal work merely because the positions share similar titles and generalized responsibilities. *Id.* at 334. "Skill" for EPA purposes includes "such factors as experience, training, education, and ability." 29 C.F.R. § 1620.15(a); *see also Hassman*, 790 F. Supp. at 567-68. Even jobs that do share a common core of tasks may be considered unequal if the more highly paid job involves additional tasks requiring extra effort or time or contributes "economic value commensurate with the pay differential." *Hodgson*, 454 F.2d at 493 (quoting *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970)).

If a plaintiff successfully establishes a prima facie case of wage discrimination, the burden of production and persuasion shift to the defendant to prove by a preponderance of the evidence that the wage disparity was caused by an enumerated statutory defense. *Brinkley-Obu v. Hughes Training*, 36 F.3d 336, 344 (4th Cir. 1994). These affirmative defenses include: "(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). Should the defendant prove one of these defenses,

"the plaintiff's claim must fail unless plaintiff can satisfactorily rebut the defendant's evidence." *Strag v. Bd. of Trustees*, 55 F.3d 943, 948 (4th Cir. 1995).

2. Analysis

Even viewing the record in the light most favorable to Plaintiff, she has failed to establish a prima facie violation under the EPA. Plaintiff, a tenured Associate Professor in the Department of Sociology, asserts that Dial, a term-appointed Associate Professor in the Department of Mass Communications, and Shackleford, a term-appointed Associate Professor in the Department of Educational Leadership, are proper comparators for her EPA claim. While the positions held by Plaintiff and Dial are housed in different departments within the College of Humanities and Social Services, Shackleford's position is in both a different department and a different college—the College of Education. Notwithstanding the differences in both department and college, Plaintiff contends that she and the two alleged comparators all shared the same routine tasks. In support of this contention, Plaintiff identifies various shared duties, including "preparing] syllabi which reflect course objectives . . . manag[ing] classroom dynamics . . . [and] provid[ing] feedback on assignments." (Mem. Opp. Mot. Sum. J. 13.)

Defendants argue that Plaintiff has failed to establish a prima facie case, because she does not identify appropriate comparators. Specifically, Defendants contend that the Dial and Shackleford taught different subjects in different departments, which entailed distinctive skill, effort and responsibility, and that Plaintiffs attempts at comparison are overly

generalized. Defendants also argue that Dial and Shackleford performed additional duties through their respective roles with internships and the doctoral program.

At the outset, the Court notes that differences in departmental affiliation between Plaintiff and the two VSU employees she identifies does not, as a matter law, prevent those employees from being proper comparators. However, the Fourth Circuit has considered differences in departmental affiliation, despite equality of rank, as a factor weighing against a finding that jobs require equal skill, effort, and responsibility. *See Strag*, 55 F.3d 943; *Soble v. University of Maryland*, 778 F.2d 164 (4th Cir. 1985). The reasoning behind consideration of this factor is that "different departments in universities require distinctive skills that foreclose any definitive comparison for purposes of the Equal Pay Act." *Strag*, 55 F.3d at 950 (citing *Soble*, 778 F.2d 164). Indeed, "rare would be the case where a university professor can demonstrate that a professor from a different department is a valid EPA comparator." *Earl v. Norfolk State Univ.*, No. 2:13cv-148, 2016 U.S. Dist. ALEXIS 35171, at *14-15 (E.D. Va. Mar. 17, 2016).

Further, the EPA requires more than merely examining job duties at a high level of generality. *See Wheatley*, 390 F.3d at 333. In *Wheatley*, plaintiff, a department head, provided as a comparator the head of another department and asserted that the two positions shared the same supervisory duties such as "prepar[ingj] budgets, monitoring] employees, and conduct[ing] meetings." *Id.* at 332. The Fourth Circuit, in affirming the district court's ruling that plaintiff did not identify proper comparators, noted that "the

EPA demands more than a comparison of job functions from a bird's eye view." *Id.* at 333.

Rather than provide the Court with evidence that Dial's and Shackleford's positions were functionally equal to hers in spite of the departmental differences, Plaintiff rests on the same type of overly generalized depiction of shared duties that the Fourth Circuit counseled against in *Wheatley.* 390 F.3d at 333. Accepting such a broad formulation would turn the exception into the rule, rendering nearly every professor in a university as an appropriate comparator for EPA purposes, and stand in stark contrast to Fourth Circuit precedent. *Strag*, 55 F.3d 943; *Soble*, 778 F.2d 164.

Moreover, the record in this case makes clear that the functions performed and the skills required in the positions held by Dial and Shackleford varied significantly from those of Plaintiff. Dial possesses a bachelor's degree in Communication Science, a MBA, and both a master's degree and a doctoral degree in Education. His professional background outside of academia includes nearly thirty years in the Army, where he held several different public relations positions and achieved the rank of Full Colonel, and nearly ten years in the VSU administration as the Director of Residence Life and Chief of Staff. The Department of Mass Communications, which Dial joined, emphasizes professional experience and touts its faculty as having professional expertise in numerous areas including public relations. Dial's extensive professional background enhanced his credentials and contributed to his performance of his day-to-day job responsibilities, including promoting the department to the various institutions at Fort Lee. A requirement for one of the department's degrees was completion of

an internship, and Dial served as the coordinator of the department's internship program—a position that required him to develop, maintain and review internship sites.

Shackleford possesses a bachelor's degree in Business Administration, a MBA, and a doctoral degree in Education, which included a dissertation on the impact of remedial math at HBCU's. Shackleford's professional background included several years in the Army, where he served in multiple leadership positions, and also various positions within the VSU administration, including Executive Director of Enrollment Management and Vice President for Student Affairs and Enrollment Management. The Department of Educational Leadership, which Shackleford joined, focuses on providing students with the skills necessary to efficiently and effectively assume administrative responsibilities. He similarly maintained a significant role in the department's internship program. Shackleford only taught graduate-level courses within the department's doctoral program, which allows students to earn a Doctorate of Education in Educational Administration and Supervision. His position required him to spend significant time assisting students in the dissertation phase of their doctorate. Plaintiff does not suggest that she has served in the administration of a university or that she has an extensive relevant professional background outside academia, nor does she suggest that her position included a significant role with internships or the supervision of students' dissertations. Plaintiff instead directs the Court's attention to portions of the record that suggest overseeing internships and doctoral programs is the "same as teaching a class." (Mem. Opp. Sum. J.

¶¶ 32-33; *see* Dial Dep. 199:18-200:8; Shackleford Dep. 132:9-133:3.) While Plaintiff successfully demonstrates that such duties were not additional to the comparators' generic responsibilities as associate professors, she fails to grasp a significant distinction. When the positions are examined at a lesser degree of abstraction, the functional responsibilities that comprised "teaching a class" and the skillset required in doing so varied across all three departments.[3] *See Wheatley*, 390 F.3d at 334 ("[D]eclin[ing] to hold that having a similar title plus similar generalized responsibilities is equivalent to having equal skills and equal responsibilities.").

Finally, the regression analysis performed by Dr. Joseph I. Rosenberg, Plaintiff's own expert, makes clear that VSU did not suffer from systemic, gender-related wage disparity. While the lack of systemic discrimination, standing alone, may not be sufficient to disprove an EPA violation, the Fourth Circuit has found the "absence of systemic discrimination . . . combined with . . . improper identification of a male

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[3] Plaintiff produces a significant record detailing how the hiring of Shackleford and Dial deviated from the procedures used in hiring most faculty members. She also contends that Dial and Shackleford did not meet the qualifications required for their respective positions. However, the EPA does not empower courts to assess the virtue of every personnel decision, only whether such decision was made in a discriminatory fashion. *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 272 (4th Cir. 2005) ("[Courts] do not sit as a super-personnel department weighing the prudence of employment decisions made by defendants." (citations and internal quotation marks omitted)). The Court's inquiry focuses on comparing the jobs held by Dial and Shackleford to that held by Plaintiff, not assessing the wisdom of VSU's decision to hire Dial and Shackleford into those positions.

comparator" suggests a failure to establish a prima facie case. *Strag*, 55 F.3d at 950. Dr. Rosenberg found that both "comparators" were overpaid in comparison to their peers, but, importantly, he also found that those peers included both male and female faculty members. Further, Dr. Rosenberg stated that his analysis did not show a "statistically significant level" of male faculty at VSU being paid more than their female counterparts by school. This comports with the fact that, in comparison to faculty of equal rank within her own department, Plaintiff's salary is the same as that of one male professor, higher than those of one male and one female professor, and lower than those of one male and one female professor.

Based upon the foregoing information, the Court finds that Plaintiff has failed to establish a prima facie case under the EPA.

Even if Plaintiff could establish a prima facie case under the EPA, Defendants have successfully identified a compelling "factor other than sex" defense within the meaning of 29 U.S.C. § 206(d)(1). The record is clear that VSU utilized a "simple arithmetic calculation" in setting the salaries of Shackleford and Dial as Associate Professors at 75% of their prior salaries as administrators. Moreover, VSU had previously applied this calculation to other administrators it moved to academic faculty positions. Plaintiff does not dispute these facts nor does she contend that she previously held an administrative position that would entitle her to a similar salary calculation.[4] Instead, she asserts that prior salary

[4] Plaintiff attempts to cabin the practice to "retreat rights" whereby an administrator can *return* to a previously held faculty position without losing the administrative salary. She argues

alone cannot justify a pay disparity under the EPA. This Court's research yields no Fourth Circuit authority supporting Plaintiff s contention.

While some courts do require that an employer hiring a new employee point to business reasons that "reasonably explain" the use of prior salary, *see, e.g., Irby v. Bittick*, 44 F.3d 949,955-56 (11th Cir. 1995), other courts such as the Seventh Circuit have found that an employer moving an employee to another position may properly consider that employee's previous salary set by the same employer unless such a policy is applied in a discriminatory fashion or independent evidence establishes that the employer discriminates on the basis of sex when doing so. *See Covington v. S. Ill. Univ.*, 816 F.2d 317,322-23 (7th Cir. 1987); *Earl*, 2016 U.S. Dist. LEXIS 35171, at *7; *Grove v. Frostburg Nat'l Bank*, 549 F. Supp. 922, 937 (D. Md. 1982).

In a situation such as this case, where the defendant seeks to hire a current employee to a new position while retaining the employee's previous salary

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that VSU did not have a policy of transitioning non-renewed administrators that did not previously have tenure to faculty positions at their administrative salary level. However, Plaintiff does not dispute that Provost Hill believed he was following past practice of VSU and the norm in higher education across the Commonwealth in transitioning Dial and Shackleford to faculty positions nor does she argue that Provost Hill knowingly misapplied the salary-retention policy. Therefore, even accepting Plaintiff's characterization of the practice as true, the unnecessary application of the practice impacts the wisdom of the business decision, not its validity under the EPA. *See Smith v. Univ. of NBC.*, 632 F.2d 316, 346 (4th Cir. 1980) ("[T]he law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory." (internal citations omitted)).

level, the Court believes that the approach taken by the Seventh Circuit is appropriate. And, while a facially gender-neutral compensation practice such as this still has the potential to be applied in a discriminatory manner, Defendants clearly did not do so here. In contrast to Dial and Shackleford, Plaintiff never held an administrative position, and therefore Defendants could not have set her salary as a percentage of a prior administrative salary. Therefore, because the alleged comparators' salaries were set using their prior salary set by Defendant VSU and there is no indication that the practice was used to discriminate, the Court finds that Defendants have successfully established a credible "factor other than sex" justification.

Even applying the more restrictive approach, Defendants still satisfy the "factor other than sex" requirement because they identify business reasons that "reasonably explain" using the comparators' prior salary. Namely, Defendants cite portions of the record that make clear Provost Hill set the comparators' salaries not only based upon VSU's past practice of transitioning administrators to faculty positions, but also based upon the practice of institutions of higher education across the Commonwealth. For these reasons, the Defendants have successfully established an affirmative defense to Plaintiff's EPA claim.[5]

Based upon Plaintiffs failure to establish a prima facie case and Defendants' ability to successfully establish an affirmative defense in the event that a

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[5] Plaintiff does not argue and the record does not show that the use of the comparators' prior salaries was a pretext to discriminate.

prima facie case was found, the Court dismissed Plaintiffs EPA claims, found in Counts I and III of her Second Amended Complaint.

B. Plaintiff's Wage Discrimination Claim Under Title VII

1. Legal Framework

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 USC § 2000e-2(a)(1). In examining Title VII claims, courts employ a burden-shifting scheme whereby a plaintiff first bears the burden of establishing a prima facie case, then the defendant bears the burden of presenting a legitimate, non-discriminatory reason for its employment action, and finally the plaintiff bears the burden of showing that the explanation proffered by the defendant was merely a pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999).

The sex discrimination provisions of Title VII and the EPA are construed in harmony. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 (4th Cir. 1989). A wage discrimination claim under Title VII can be proved through direct or circumstantial evidence. *Brinkley-Obu*, 36 F.3d at 343. Under the circumstantial evidence framework, a plaintiff may establish a prima facie case of disparate treatment by demonstrating that: "she is female, *i.e.*, a member of a protected class, and that the job she occupied was similar to

higher paying jobs occupied by males." *Id.* (citing *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992)). The Fourth Circuit has suggested that a Title VII disparate treatment claim employs a "relaxed standard of similarity between male and female-occupied jobs" in comparison to an EPA claim. *Id.* However, a plaintiff in a Title VII claim bears the additional "burden of proving an intent to discriminate on the basis of sex." *Id.*

Should a plaintiff successfully state a prima facie case, the burden of production shifts to the defendant to show that the employment decision was made for a non-discriminatory reason. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cir. 2004). The affirmative defenses provided for under the EPA, *see supra* pp. 15-16, are incorporated into Title VII. 42 U.S.C. § 2000e-2(h); *City. of Wash. v. Gunther*, 452 U.S. 161, 168 (1981); *see McDougal-Wilson v. Goodyear tire & Rubber Co.*, 427 F. Supp. 2d 595, 604 (E.D.N.C. 2006). In the event that the defendant successfully establishes an affirmative defense, the plaintiff can only prevail by showing that the defendant's proffered explanation was mere pretext and "that the defendant was actually motivated by discriminatory intent." *Brinkley-Obu*, 36 F.3d at 344.

2. Analysis

Much like her EPA claim, Plaintiffs Title VII claim evolves from the 2014 appointment of Dial and Shackleford to the faculty at greater salaries than her own and VSU's subsequent denial of her salary increase request in the same year. (2d Am. Compel. 133-37.) For the reasons described above in relation to her EPA claim, Plaintiff has failed to identify

appropriate comparators that would allow the Court to determine that she received less pay than men in similar positions.

Even applying a "relaxed standard of similarity" to Plaintiffs Title VII claim and accepting Dial and Shackleford as appropriate comparators, she has still failed to carry her burden of showing a discriminatory intent. Plaintiffs reliance on derogatory comments that Provost Hill made about her well over a year prior and in a context unrelated to her request for a pay raise is unavailing. *See Hill*, 354 F.3d at 286 (noting that "statements . . . unrelated to the decisional process itself [do not] suffice to satisfy the plaintiffs burden of proving discrimination" (internal quotations omitted)). Plaintiff also cites the fact that Provost Hill had received her report on gender-related pay disparity at VSU when he set Dial and Shackleford's salaries. However, this merely suggests that Provost Hill did not follow the recommendations made in Plaintiffs report. Lastly, Plaintiff directs the Court to the opinion of Dr. Joyce Edwards that Provost Hill was vindictive to both men and women, but more so to women.[6] This generalized opinion, to the extent that it is admissible, is insufficient to establish that Provost Hill acted with a discriminatory intent in denying Plaintiff's request for a salary increase.

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[6] Dr. Edward's testimony also identifies sexist comments that Provost Hill allegedly made to three unidentified male colleagues in the context of Dr. Edwards becoming a department chair. (Edwards Dep. 61:17-63:7.) Not only were these statements made more than two years prior and in a context unrelated to the decisional process, they are also inadmissible hearsay that the Court cannot consider. *Greensboro Prof'l Fire Fighters Ass 'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

Plaintiff asks the Court to draw inferences from evidence that is either unrelated or irrelevant to the employment decision at issue. Plaintiff has simply failed to demonstrate a prima facie claim of a discriminatory intent.

Notwithstanding Plaintiffs failure to carry her initial burden, the undisputed record would be more than sufficient to rebut a prima facie case. As identified above with regard to Plaintiffs EPA claim, Defendants successfully established "factor[s] other than sex" that justify their actions. Those factors include the use of a sex neutral equation to set the comparators' salaries at 75% of their previous administrative salary, VSU and the other institutions of higher education in the Commonwealth following this established salary-retention practice, and the comparators' vast professional experience and contributions as associate professors.

Dr. Edwards, who personally recommended that Plaintiff receive a salary increase, also acknowledged that the denial was due to VSU's concern that granting an increase in Plaintiff's case would lead to a domino effect amongst all faculty members of that rank. VSU denied Plaintiffs request for a salary increase after determining that Plaintiffs salary was squarely in the middle of similarly ranked faculty—both male and female—within her department. The VSU administration took steps to remedy the concerns raised by Plaintiff's report on gender-related pay disparity by allocating over $450,000 for pay increases. Moreover, in the two years preceding Plaintiffs request for a salary increase, Provost Hill, whom Plaintiff relies on to show intentional discrimination, approved both Plaintiff's request to spend a semester teaching in

China while receiving her regular salary and a $10,000 stipend and Plaintiff's request for tenure.

This context shows that Defendant had a valid, non-discriminatory reason for its decision, and it undermines Plaintiff's contentions to the contrary. Further, Plaintiff has failed to make any credible showing of pretext in rebuttal. Accordingly, Plaintiff's Title VII claim found in Count IV of her Second Amended Complaint was dismissed.

C. Plaintiff's Retaliation Claim Under the EPA and Title VII

1. Legal Framework

"The antiretaliation provision [of the EPA] seeks to secure [the] primary objective [of promoting a workplace where individuals are not discriminated against because of their sex] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). To properly state a retaliation claim under the EPA and Title VII, a plaintiff is required to show: (1) that she engaged in a protected activity; (2) that Defendants took some adverse employment action against her; and (3) that a causal connection existed between the protected activity and the adverse action.[7] *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 218 (4th Cir.

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[7] The Court observes that the same standard is utilized for assessing both EPA and Title VII retaliation claims. *See Kennedy v. Va. Polytechnic Inst. & State Univ.*, 781 F. Supp. 2d 297, 303 (W.D. Va. 2011); *Harrison v. Frincipi*, Civil Action No. 3:03-1398, 2005 WL 4074516, at *7 (D. S.C. Aug. 31, 2005).

2007); *Williams v. Cerberonics*, 871 F.2d 452, 457 (4th Cir. 1989) (citing *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985)). Much like with a wage discrimination claim under Title VII, once a plaintiff establishes a prima facie case the burden shifts to the defendant to "proffer evidence of a legitimate, nondiscriminatory reason for taking the adverse employment action." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001).

For a plaintiff to establish that she engaged in a protected activity in satisfaction of the first element, she must show that she "has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the EPA. 29 U.S.C. § 215(a)(3). The Fourth Circuit has noted that the term protected activity "encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities." *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998).

With regard to the second element, the Supreme Court has held that a materially adverse employment action is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (citations and internal quotation marks omitted)).

A materially adverse employment action does not include—and the law cannot immunize an employee from—"those petty slights or minor annoyances that often take place at work and that all employees experience." *Id* Courts must conduct a fact-specific analysis in each case to determine whether an em-

ployer's actions would have deterred a reasonable employee from seeking protection under the EPA. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."); *see also Burlington Northern*, 548 U.S. at 69 ("[A] legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others'" (quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005)).

So, for example, "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." *Burlington Northern*, 548 U.S. at 69 (citing *Washington*, 420 F.3d at 662 (finding that a "flex-time" schedule was critical to an employee with a disabled child)). Similarly, "[a] supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.*

In order to satisfy the third and final element of a retaliation claim, a plaintiff must plausibly allege that her employer took a materially adverse employment action *"because* the plaintiff engaged in a protected activity." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998).

Stated succinctly, a plaintiff must plead a plausible causal connection between the first and second elements.

In the absence of direct evidence, temporal proximity between the protected activity and the adverse employment action can give rise to an inference of causation. *See Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). The Fourth Circuit has suggested that a two-and-a-half month gap between the protected activity and the adverse employment action may be sufficient to weaken an inference of causation based on temporal proximity alone. *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003); *see also Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." (internal quotation marks and citation omitted)); *Dowe*, 145 F.3d at 657 ("A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two."). In the absence of close temporal proximity, other evidence of "retaliatory animus" from the intervening period may be used to prove causation. *Lettieri*, 478 F.3d at 650.

2. Analysis

At the outset, the Court notes that Plaintiff provides limited citations to the record in support of her retaliation claims. The Court is not inclined to scour the record in search of facts that Plaintiff could

potentially cite to dispute Defendants' stated record. Plaintiff rests her retaliation claims "on the cited evidentiary materials." (Mem. Opp. Sum. J. 30.) In line with Federal Rule of Civil Procedure 56 and Plaintiffs own averments, the Court will confine its analysis to the record cited. On that record, the Court finds that Plaintiff has failed to state a prima facie claim of retaliation.

The record shows that Plaintiff engaged in two instances of protected activity that could potentially serve as the basis for a retaliation claim: she presented the VSU administration with a report on gender equity at VSU in April 2012, and she gave a copy of the report to VSU Board Member Terone Green in November 2012.[8]

With these instances of protected activity in mind, the Court turns to the second element. Plaintiff identifies seven incidents of alleged retaliation;[9] however, it is unclear from her Complaint or Memorandum in Opposition whether she contends that each incident is a discrete materially adverse employment action or merely evidence of a pervasive retaliatory

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[8] Plaintiff's Memorandum in Opposition identifies two additional instances of protected activity—the April 2015 filing of a complaint before the Equal Employment Opportunity Commission and the May 2015 filing of her initial EPA complaint. The Court need not consider these instances of protected activity because, as seen below, no materially adverse employment actions occurred after 2014.

[9] To the extent that Plaintiff's Complaint identifies other incidents not addressed here, Plaintiff has failed to identify for the Court any evidence that would support her claims that such incidents occurred.

animus necessary to prove causation. Each of these incidents is addressed below.

a. Hill's Intentional Delay Signing Paperwork for Summer School Pay in May of 2012

Although a delay in payment could, in the abstract, constitute an action that would dissuade a reasonable employee from challenging a discriminatory action, Plaintiff does not direct the Court to any evidence establishing that the delay was intentional or at all attributable to the VSU administration or Provost Hill. Moreover, the record establishes that the delay was caused by the chair of Plaintiffs department inadvertently missing a submission deadline. The president of VSU suspended electronic deposit for the entire faculty in an attempt to accommodate Plaintiff. Thus, there is no evidence that the delay was either intentional or caused by Provost Hill and the VSU administration as Plaintiff alleged.

b. Hill's Intentional Delay Signing Paperwork for Overload Pay in December of 2012

In support of Plaintiffs speculation that Provost Hill was responsible for this delay in payment, she directs the Court to: 1) contemporaneous, derogatory comments made by Provost Hill about Plaintiff; 2) testimony that Hill signed paperwork preferentially; and 3) testimony that Hill and VSU had a general culture of retaliation.

The lengthy email exchange between various parties in the VSU bureaucracy attempting to resolve Plaintiff's payment issue makes clear that the initial

delay in Plaintiff's payment was attributable to Plaintiffs department chair again inadvertently failing to timely submit the required paperwork. This email exchange also shows that Provost Hill arranged a meeting in early January 2013 to address the delinquent payments with the relevant parties. For her part, Plaintiffs own testimony confirms that it was unclear which corresponding party actually had her paperwork. Moreover, Plaintiffs own email in the exchange reveals that timely receipt of payments was a "consistent problem" she experienced in multiple semesters at VSU predating her asserted protected activity.

Plaintiff therefore does not identify any evidence showing that Provost Hill or the VSU administration intentionally delayed signing her paperwork in retaliation for her actions. Instead, she urges the Court to craft a mosaic of inferences to reach such a conclusion. The record evidence clearly reveals that the initial delay in Plaintiff's payment was inadvertent and attempts to take corrective action were unfortunately unavailing. The Court does not discount the frustration that this incident caused, but the retaliation provisions of the EPA and Title VII do not immunize an employee from every inconvenience that she may experience in the course of her employment. Again, the record is devoid of any factual basis to attribute such delay to gender-based animus.

c. VSU's Failure to Assist Plaintiff With a Formal Discrimination Complaint in May 2013

Plaintiff fails to identify any evidence demonstrating that the VSU administration was responsible

for a student filing a formal discrimination claim against her with the Office of Civil Rights ("OCR") or that the degree of support she received from VSU during the ensuing investigation differed from that given to similarly-situated faculty members. She attempts to link Provost Hill to the OCR complaint through his subsequent granting of an accommodation for the student who made the complaint, which allowed that student to participate in graduation proceedings. However, Plaintiffs own testimony confirms that she "just assume[d]" somebody in the Provost office was responsible for the complaint. Such assumptions fall short of the mark.

d. Hill's Communications With Plaintiff

Plaintiff was told that Provost Hill called her a "troublemaker" but never heard him do so. Plaintiffs colleagues, however, jokingly referred to her by the term. Additionally, Provost Hill explained that a comment Plaintiff regarded as a veiled threat was actually a colloquialism he frequently used to say "just tell me what it is you want. I'm not going to play the game leading up to it." The Court is hesitant to conclude that a reasonable employee would be discouraged from challenging discriminatory conduct based on these statements. Moreover, Plaintiff does not direct the Court to any portion of the record that shows a causal connection between these statements and any protected activity.

e. VSU's Denial of Plaintiff's Salary Increase in September of 2014

Based on the record at hand pertaining to Plaintiffs EPA and Title VII claims, it is clear that the denial of

Plaintiffs request for salary adjustment constituted a materially adverse employment action. Plaintiff, however, fails to show that the denial was causally connected to any form of protected activity.

The denial of Plaintiffs salary increase occurred nearly two years after Plaintiff last engaged in protected activity. Therefore, the temporal proximity between Plaintiff's protected activity and the denial of the salary increase is insufficient to produce an inference of causation on its own. Thus, Plaintiff must rely on additional evidence of a "retaliatory animus." The incidents described above, even when aggregated, do not rise to that level. In *Lettieri*, *a* female employee complained to her human resources department about gender discrimination by her superiors. 478 F.3d at 650-51. Following this, the plaintiff was relieved of her job responsibilities, divested of control over the sales team, and prohibited from setting prices and meeting directly with important clients. *Id.* The Fourth Circuit concluded that "[t]hese intervening events—which occurred regularly after Lettieri's complaint and can reasonably be viewed as exhibiting retaliatory animus on the part of [defendants]—are sufficient to show a causal link between Lettieri's complaint and her termination." *Id.* at 651. The immediate case at hand is easily distinguishable.

Here, three of the incidents Plaintiff identifies—the two delayed payments and the OCR complaint—were either not attributable to Defendants, resolved expeditiously, or both, and therefore cannot establish a retaliatory animus. The "troublemaker" comment and the email sent by Provost Hill that Plaintiff viewed as a veiled threat at best represent a strained personal

relationship that is similarly insufficient to show retaliatory animus.

Even if these incidents were sufficient to support an inference of retaliation, Defendants have identified a non-discriminatory reason for denying this salary increase that would be sufficient to rebut a resulting prima facie case. As described above with regard to Plaintiff's EPA and Title VII claims, Shackleford and Dial were retained at 75% of their administrative salaries based upon Provost Hill's understanding of VSU's practice and the general practice of institutions of higher education within the Commonwealth of Virginia. Plaintiff had no administrative history that would allow for a similar calculation.

f. VSU's Failure to Address Plaintiff's Concerns About a Troubled Student in August of 2015

After receiving Plaintiff's threat assessment of a troubled student, VSU forwarded the information to the campus police. In addition, the VSU administration suggested that another faculty member teach the class with the troubled student. Ultimately, the chair of Plaintiff's department taught the class, and Plaintiff did not request that VSU take any further action. The record does not show anything adverse to Plaintiff stemming from VSU's handling of this situation.

g. VSU's Prevention of Plaintiff Giving a Freshman Orientation Speech in January of 2016.

Plaintiff states that certain unidentified students told her that the VSU administration took her off a list of speakers for freshman orientation. The Court

cannot consider these inadmissible statements in ruling on summary judgment since the declarants were neither identified nor subject to examination. *Greensboro Prof? Fire Fighters*, 64 F.3d at 967. Consequently, Plaintiff has failed to establish that she suffered any arguable adverse employment action in January 2016, let alone a material one.

Because these incidents do not rise to the level of actionable retaliation, either individually or collectively, Plaintiff's retaliation claims in Counts II and V of her Second Amended Complaint were dismissed for lack of evidentiary support.

IV. Conclusion

Based on the foregoing, Defendants' Motion for Summary Judgment (ECF No. 74) was granted as to all counts.

The Clerk is DIRECTED to send a copy of this Memorandum Opinion to all counsel of record.

/s/ Henry E. Hudson
United States District Judge

Date: Jan. 30, 2018
Richmond, VA

ORDER OF THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING (APRIL 15, 2019)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ZOE SPENCER,

Plaintiff-Appellant,

v.

VIRGINIA STATE UNIVERSITY;
KEITH T. MILLER,

Defendants-Appellees.

No. 17-2453

(3:16-cv-00989-HEH-RCY)

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Floyd, and Judge Richardson.

For the Court

/s/ Patricia S. Connor
Clerk

DEPOSITION OF JOYCE MOODY EDWARDS PH.D—RELEVANT EXCERPTS (SEPTEMBER 1, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY, ET AL.,

Defendants.

Civil Action No. 3:16-cv-00989-HEH

[Transcript Excerpts; P. 26]

MR. ROBINSON: Objection.

A. Shackleford's—Michael Shackleford was removed as vice president of student affairs, and the provost then put him in another department.

Q. Do you know of any other instances of that happening, where the president will call up the provost and the provost in turn will suggest a candidate for the department?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. What was that case?

A. Cortez Dial.

Q. What happened there, to the best of your knowledge?

MR. ROBINSON: Objection.

Q. You can answer.

A. He was just removed from one position and had—just inserted into a department.

Q. Okay. Have you heard of any other cases of that happening, that—when I say that, where the president will call up the provost and then the provost in turn will suggest a candidate for the department?

A. No.

[. . .]

[Transcript Excerpts; P. 39]

Okay. Any other cases where you have heard of Virginia State hiring somebody who didn't have a terminal degree, hiring somebody as an assistant professor who didn't have a terminal 13 degree in the area that they were teaching?

MR. ROBINSON: Objection.

A. No.

Q. What about as an associate professor, are you aware of Virginia State ever hiring somebody as an associate professor who didn't have a terminal degree in the area they were teaching in?

A. No.

MR. ROBINSON: Objection.

[. . .]

[Transcript Excerpts; P. 40]

Q. Okay. Is it true that Virginia State has a standard employee work profile for faculty members?

A. Yes.

MR. ROBINSON: Objection.

Q. Is that the same across departments?

A. Basically, yes, it is the same.

[. . .]

[Transcript Excerpts; P. 42]

Has that been your experience in—at Virginia State, that salary increases within rank are based on merit/performance ?

Yes.

[. . .]

[Transcript Excerpts; P. 44]

It says here new faculty salary shall be based upon their proposed rank and previous experience at other institutions of higher education.

Has that been—I know we went over some of this before, but has that been your experience at Virginia State University?

A. That approved rank—I mean that salary is based on their—

Q. —proposed rank and previous experience at other institutions of higher education?

MR. ROBINSON: Objection.

A. In my department.

Q. Okay. You have said—what about other departments, are you aware of any differences?

MR. ROBINSON: Objection.

A. As I said, people come in negotiating, and your negotiation is based on your previous experience and your proposed rank

Q. Have you ever heard of somebody negotiating a higher salary based on nonacademic experience—

A. No.

MR. ROBINSON: Objection

Q. You never heard of somebody coming in and argued for a higher salary based on managerial experience?

A. No.

[. . .]

[Transcript Excerpts; P. 49]

Q. Okay. Is it fair to say that all the collegiate/instructional faculty members at Virginia State have the same common core of responsibilities?

A. Yes.

Q. Okay. What—

MR. ROBINSON: Objection.

Q. To the best of your knowledge, what are those responsibilities, what is the common responsibilities of faculty members?

MR. ROBINSON: Objection.

Q. You can answer.

A. Facilitating, imparting knowledge, maintaining classroom decorum, keeping office hours, meeting classes. Those are basically, you know, the teaching aspect of faculty.

Q. So, to the best of your knowledge, is it fair to say that all faculty members at Virginia State University must prepare syllabi which reflect course objectives?

A. Yes.

MR. ROBINSON: Objection.

Q. What about preparing lessons, activities and lectures that serve to impart knowledge to students?

A. Absolutely.

MR. ROBINSON: Objection.

Q. What about instructing their students through the use of varying pedagogical methods such as lectures, technology, practical classroom experiences, group discussion and media, is that a task that is common to faculty members at Virginia State University?

MR. ROBINSON: Objection.

A. Yes, that's a part of teaching preparation.

Q. Okay. What about keeping track of whether students are retaining knowledge and meeting the objectives and outcomes of the course

[. . .]

[Transcript Excerpts; P. 52]

going to be—it is going to be written, so I got the sense that—so just so I am going to ask that again, just so that it looks clean in the record.

What about advising majors, is that a responsibility that is common to all faculty members at Virginia State University?

MR. ROBINSON: Objection.

A. Yes.

Q. What about maintaining office hours, is that a responsibility that is common to all faculty members at Virginia State University?

A. Yes.

MR. ROBINSON: Objection.

A. It's in the handbook, you must.

Q. Okay. What about providing feedback on assignments, is that a responsibility that is common to all faculty members at Virginia State University?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. What about inputting mid term and

[. . .]

[Transcript Excerpts; P. 54]

Q. —at Virginia State?

A. Yes, you must prepare.

Q. What about presenting their subject in an interesting and challenging manner?

A. I would hope, yes.

Q. Okay. What about engaging in class discussions, is that a responsibility that is common to professors at Virginia State University?

A. It is, it is common.

Q. Okay. What about preparing tests and exams that fairly cover the subject taught, is that a responsibility that is common to professors at Virginia State University?

A. Yes.

MR. ROBINSON: Objection.

Q. Okay. What about promptly grading tests and exams, is that a responsibility that is common to professors at Virginia State University?

A. Yes.

Q. Okay. And we discussed office hours before, right, that's mandated by the handbook; right?

A. Yes.

[. . .]

[Transcript Excerpts; P. 67]

Q. Then you have been her department chair for 6 years; is that right?

A. Yes.

Q. What has been your assessment of Zoe Spencer's performance as a faculty member?

A. Stellar. Zoe is the ultimate professor. As far as teaching is concerned, students love her. As soon as her classes go on the schedule, they fill. There are times, many times when she will come to me

and say well, can you allow five more people in a class or whatever,

[. . .]

[Transcript Excerpts; P. 68]

So would you rate her performance as 10 being among the highest-performing faculty members 11 that you oversee?

MR. ROBINSON: Objection.

A. Yes, it is definitely the highest in my department.

Q. That's based on the quality of the teaching and the enthusiasm the students have for her?

A. And student evaluations, yes.

Q. So what about research, has Zoe's research been strong?

A. Yes. Yes. She publishes. She attends conferences, she presents at conferences, so yes, her research and her community service is even stronger.

Q. Okay. When you say—is that—that's, in terms of research, that's relative to the other faculty members at Virginia State, she publishes and presents more than they do in general?

MR. ROBINSON: Objection.

A. Generally.

[. . .]

[Transcript Excerpts; P. 74]

Q. Were you aware that Zoe chaired a gender equity task force in 2012?

A. Yes.

Q. Were you aware that she gave a presentation to the Board of Visitors, the president?

A. I knew she gave it to the president, maybe the president's cabinet, I am not sure it was ever presented to the board.

[. . .]

[Transcript Excerpts; P. 158]

Q. Do you remember what the grounds were for Dr. Spencer's request for a salary adjustment?

A. That the salaries in—that Dr. Shackleford and Cortez Dial's salary had been adjusted. No. They had been appointed with the salary that they had.

Q. Right. That—that they were appointed with the higher—much higher salary than hers?

A. Yes.

MR. PETERS: If we can mark this as an exhibit.

(Recess from 1:16 p.m. to 2:22 p.m.)

BY MR. PETERS:

Q. All right. So we were—before we came 20 off the record, we were talking about when Dr. Spencer petitioned for an increase in her salary, and it looks like in July of 2014, and it looks like at the time that she made this request, and do we have—at the time—I also introduced another document that showed that she was requesting an increase to a base of 105,000 a year with consideration for additional compensation to 125 per year.

And do you remember—do you recognize this document, the VSU 77?

A. Yes.

Q. Do you remember looking at it at the time that it was sent, reviewing it at the time it was sent?

A. Yes.

Q. Okay. And were you ever asked to provide your input into whether the request should be granted for Dr. Spencer?

A. Yes.

Q. What was your response, if you recall?

A. I supported her request.

Q. Okay. Was that based on her merit as a professor?

A. Yes. Well, based on her merit and the standard that had been set with the higher salary.

Q. Right. It was your belief that that should be—that Dr. Spencer should have the benefit of the salary, the higher salaries that had been given to Shackleford and Dial?

A. Yes.

Q. Okay. And that was—did you believe that Dr. Spencer was, based on her merit as a professor, was equally, if not more entitled, to that salary than Shackleford and Dial were?

A. Yes.

Q. Why is that?

A. Because based on her merit. As I said, she had been teaching, and her service and her scholarship.

Q. Okay. Based on your understanding—so you were personally familiar with all of that, right, as her department chair?

A. Yes.

Q. Okay. And based on your understanding of her—and did she routinely—did she teach a lot of classes and a lot of students in the department?

A. Yes.

Q. Okay. More than other professors in the department, would you say?

A. Well, as I said, class limits are usually at 45 or 50, we reduce them to 45. They're usually at 50. And whatever her class limit is, she always reaches maximum capacity before registration closes, and then even after—after we come back, when registration opens again, I am usually petitioned to open her classes.

Q. Okay. By this time, Dr. Spencer was an associate professor; is that right?

A. Yes.

Q. Did you feel that the skill, effort and responsibility required of her position as an associate professor was equal to, if not greater, than the skill, effort and responsibility required of Dr. Shackleford and Dr. Dial?

A. I did.

Q. Okay. And that was—was that based on the fact that they were essentially working at the same job?

A. Prior?

Q. Similar jobs?

A. No.

MR. ROBINSON: Objection.

A. No. It was based on the fact that, as a faculty person, as I said, the EWPs are very similar, and the fact that she had been teaching, and based on her service and her research.

Q. Okay. So were you aware of the outcome of Dr. Spencer's request for the salary increase?

A. Yes.

Q. Okay. What happened?

A. She met with Dr. Hill, the dean and Sachiko Goode, and Dr. Hill informed her that he would not honor the request.

[. . .]

[Transcript Excerpts; P. 163]

Q. Did you do anything else to support her efforts to get a higher salary at Virginia State?

A. I spoke to the dean.

Q. Okay.

A. I spoke to the dean, informing him that she had requested a salary, and I told him why I would support her salary increase, and at the time I asked would he support her salary increase, and he told me that he was asked not to.

Q. Okay. He was asked not to?

A. Yes.

Q. Did he say who asked him not to?

A. Dr. Hill.

[. . .]

[Transcript Excerpts; P. 258]

Okay. So if we can—so now, you said before that the complaint about Shackleford and Dials' salaries, there was questioning about whether it was a gender complaint. For Zoe Spencer, was it a gender complaint?

MR. ROBINSON: Objection.

Q. You can answer.

A For her, yes.

Q. Okay. What about for—you said you spoke to women in the School of Education regarding—

A. Uh-huh.

Q. —and they complained about Shackleford's salaries?

A. Yes.

Q. Did—Did it have a gender component for them as well or no?

MR. ROBINSON: Objection.

A. They saw it as, yes, they saw it as gender.

Q. What about the Mass Comm's professors who complained about Cortez Dial, were those men or women?

A. Women

Q. Okay. Did it have a—their complaints have a gender component too?

A. Yes.

[. . .]

DEPOSITION OF B. ROBERT KREISER PH.D— RELEVANT EXCERPTS (AUGUST 29, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY, ET AL.,

Defendants.

Civil Action No. 3:16-cv-00989

[Transcript Excerpts; P. 43]

A. Well, as I say in my report, I have been retained as an expert in customs and practices in American colleges and universities by counsel for Dr. Zoe Spencer, the plaintiff in this litigation.

Q. So let me ask you again, what were you asked to do?

A. I was asked to prepare a report in which I assessed the extent to which, if the administration in its handling of certain aspects of this case relating to appointments of faculty—faculty members, SACS accreditation, academic freedom, whether there were departures from AAUP-re-

commended standards in the way in which these matters were handled. I was not asked to deal with the claims of discrimination made by Professor Spencer in this litigation.

Q. And you—

A. Can I add to that? It was not just whether they violated the normative standards that I described in my report but whether they also failed to abide by their own policies, which I found to a very substantial extent was the case.

[. . .]

[Transcript Excerpts; P. 76]

A. I am prepared to testify that to the extent that the actions taken to appoint these two underqualified or unqualified individuals, in my perception anyway—

Q. Well, let's stop. Let's come back to that. Go ahead.

A. To the extent that the administration's appointment of these two individuals—I will delete the adjectives—these two individuals to these—their respective positions in contravention of normative standards and the policies of VSU, to the extent that those appointments contributed to further or creating—resulted in disparate treatment with respect to salaries, then, yes, there's a connection between the two.

[. . .]

DEPOSITION OF WELDON HILL PH.D— RELEVANT EXCERPTS (AUGUST 17, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY, ET AL.,

Defendants.

Civil Action No. 3:16-cv-00989-HEH

[Transcript Excerpts; P. 24]

Q. Yeah, the last salary you had.

A. Okay. Actually, I'd have to look at a W-2 to know for sure because there were increases along the way. But I can tell you the last one that I remember was $189,500.

Q. Okay. Is it your understanding that administrators made more than faculty members at Virginia State University in general?

A. In higher education in general, and same is true at Virginia State.

[. . .]

[Transcript Excerpts; P. 25]

Q. Sure. What about at the—is there a level of administrators called the President's Cabinet at Virginia State?

A. Yes.

Q. Okay. And a President's Cabinet-level administrator, would they make substantially more than the average faculty salary? Is that fair to say?

MR. ROBINSON: Objection.

A. The average faculty salary at Virginia State University—average faculty; that is, all ranks, all departments, all everywhere—is $65,000. That range would be anywhere from about $45,000 to $120,000 for average nine-month faculty salaries.

It's difficult to compare those to administrative salaries, which are, first of all, twelve-month salaries. It's difficult to compare the two. It's almost like apples and oranges, you know.

[. . .]

[Transcript Excerpts; P. 30]

Q. Sure. With Virginia—so Virginia State was classified as a teaching institution?

A. A Master's 1, yeah, in Carnegie terms; but largely a teaching institution

[. . .]

[Transcript Excerpts; P. 40]

Q. Okay. And how did you determine what Dr. Dial's salary would be in his role as an associate professor in mass communications?

A. Using the same nine-twelfths method that I used with Dr. Shackleford and other administrators who returned to faculty or went to faculty positions.

Q. Okay. So in other words, you took his salary for serving as a President's Cabinet-level administrator, and you transferred the nine-month amount of that salary and used that as his salary as a professor of the Department of Mass Communications; is that right?

A. Correct. Associate professor.

[. . .]

[Transcript Excerpts; P. 43]

Was there—was it—so when you say there were no criteria for setting faculty salaries, you mean that there were no policies and no pay scale in place?

A. There was no pay scale in place.

Q. What?

A. You're right; there's no pay scale in place.

Q. Okay. And would you say—when you say there were no policies in place regarding how faculty salaries were set at Virginia State—is that right?

A. There are no policies with regard to the amount of faculty salary.

[. . .]

[Transcript Excerpts; P. 52]

MR. ROBINSON: I am not sure why hiring policies would be relevant, but—and I don't know where you have asked for the hiring policies.

MR. PETERS: You don't understand how the hiring policies would be relevant when we spent about—we have had two depositions mostly taken up with how the individuals were hired?

MR. ROBINSON: Again, I don't think that's relevant. Your claims—this client --this plaintiff's claim is that she was not compensated comparable to other male employees. It has nothing to do with hiring policies.

[. . .]

[Transcript Excerpts; P. 56]

Q. HR policies. These are HR policies that relate to hiring, right?

MR. ROBINSON: Objection.

Q. You can answer. Do they relate to hiring?

A. The process for hiring; I want to reiterate that.

Q. Okay. So they relate to—well, they are policies, right? So they—of course they relate to process.

A. Yes.

Q. They're policies relating to hiring, right?

A. Uh-huh.

Q. Okay. Can you answer "yes," please.

A. Yes.

[. . .]

[Transcript Excerpts; P. 59]

You'd already have an HR file. So if somebody's moving from—was there—were the duties of the faculty members the same as the duties of administrators at Virginia State University?

A. No.

[. . .]

[Transcript Excerpts; P. 64]

Q. Okay. So we were talking before, what—the fact that your—so is there anything in those HR policies that speaks to people being transferred from administrative positions to faculty positions?

A. Not to my knowledge.

[. . .]

[Transcript Excerpts; P. 65]

govern the type of paperwork you need before you make the faculty hire, and they also provide the procedures—the job search procedures that you go through with respect to interviewing candidates, right?

A. Yes, if there are candidates, yes. And the hiring procedures do cover faculty, classified staff and other staff as well.

Q. Okay. Is there anything else that you can recall in those HR policies governing the 11 hiring of faculty?

MR. ROBINSON: Objection.

A. Not to my knowledge, no.

Q. Okay. So what about the Faculty Handbook? Did you regard these policies as binding when you're hiring an associate professor that is—the guidelines set forth and the procedures set forth for hiring associate professors in the Faculty Handbook, did you regard those as binding --

MR. ROBINSON: Objection.

Q. —when you were the provost?

[. . .]

[Transcript Excerpts; P. 66]

A. Yeah, the policies in the Faculty Handbook are binding.

[. . .]

[Transcript Excerpts; P. 70]

Were there any policies that you are aware of relating to placing administrators in faculty positions when they were—when they cease their duties as administrators?

A. In the Faculty Handbook?

Q. Anywhere.

A. There are none in the Faculty Handbook. And there were not any to my recollection.

[. . .]

[Transcript Excerpts; P. 77]

Q. Okay. But—and so this is something that you're suggesting that it's—calling around and seeing if there are any positions for administrators who have been let go, that's something that the president does out of respect and perhaps friendship

with the terminated administrator, sort of as a courtesy, right?

A. Yes. The person could have been terminated or they could have resigned and said, I'd like a faculty position, yeah.

[. . .]

[Transcript Excerpts; P. 80]

Q. Okay. Was there any sort of—and was there any sort of competitive hiring process around this appointment of Dr. Shackleford or no?

A. No.

[. . .]

[Transcript Excerpts; P. 114]

Q. Why is that? Why did you just look at the School of Education?

A. Because he had a Doctor of Education degree, a terminal degree in the field. And that was the first place I started. If I had not—if I had been unsuccessful there, I might have looked somewhere else.

Q. Okay. You could have looked outside the School of Education, right?

A. Yeah, had I not been successful.

Q. Okay. Was there any other instance where—so then—so then I asked you before I think we had gotten up to the point where—so what about the salary at which Dr. Shackleford was hired as an associate professor in the School of Education? How was that salary determined?

A. Using a practice that we had done for many, many persons; that is, nine-twelfths. In other words, divide the salary by the monthly amount and multiply it by the new monthly amount. So you divide by twelve, multiply by nine, and it comes out to nine-twelfths, or 75 percent.

Q. And when you say that that was taken as his salary, what was his previous—was his previous position Vice President of Student Affairs?

A. Correct.

Q. Okay. Was that a President's Cabinet-level position?

A. Correct.

Q. Okay. So you took his salary as Vice President of Student Affairs and adjusted it to a nine-month amount; is that right?

A. Correct.

Q. Okay. Was that something that Dr. Shackleford had requested to the best of your knowledge?

A. Not to the best of my knowledge.

[. . .]

[Transcript Excerpts; P. 116]

A. Yes.

Q. Okay. And in those cases—and you said before—in setting faculty salaries, did you generally consider the years of experience for the faculty member?

A. It depends, but yes.

Q. Okay. Was it your understanding that Dr. Shackleford had previous faculty experience?

A. Yes. He had taught a course or two for me.

Q. Okay, but experience actually serving as a faculty employee, was it your understanding that he had that sort of experience?

A. Not at—

Q. In serving a full-time faculty position?

A. Oh, I see. Not at Virginia State.

[. . .]

[Transcript Excerpts; P. 119]

testified before that the amount of faculty salaries is not governed by any written policy; is that right?

A. Right. There is not a salary administration plan, correct.

[. . .]

[Transcript Excerpts; P. 136]

Q. Okay. Do you remember—so there's not many you specifically remember that applied to the Department of Doctoral Studies, any specialized accrediting—

A. Correct. There is only one that applies—one generic one at the university that applies to doctoral studies, and that is that the dissertation director gets credit for one credit hour per dissertation he or she directs.

Q. Okay. Is that in the Faculty Handbook or is that somewhere else?

A. That is in the Faculty Handbook.

[. . .]

[Transcript Excerpts; P. 143]

Q. Why is that? Why did you just look at the School of Education?

A. Because he had a Doctor of Education degree, a terminal degree in the field. And that was the first place I started. If I had not—if I had been unsuccessful there, I might have looked somewhere else.

Q. Okay. You could have looked outside the School of Education, right?

A. Yeah, had I not been successful.

[. . .]

[Transcript Excerpts; P. 152]

Q. Okay. Did you feel that—did you agree with her that there were issues regarding pay equities between men and women at Virginia State University?

A. My own sense of it was that there was issue—there were issues with pay equity without respect to gender.

[. . .]

[Transcript Excerpts; P. 195]

Q. Okay. Now, you've testified before that you disagreed with several aspects of the Gender Equity Task Force presentation that Dr. Spencer gave, right?

MR. ROBINSON: Objection.

A. With some things about it, yeah.

Q. Okay. Did Dr. Spencer ever complain to you about a delay in her receiving pay in time for the holiday break in 2012?

A. I don't remember the exact circumstances, but, yes, I do remember her complaining about pay coming in time for—it was something; I don't remember what it was.

[. . .]

[Transcript Excerpts; P. 212]

Q. Okay. But you told me you had fielded—you might have fielded calls from board members about Dr. Spencer's previous complaint about not having been paid on time, right?

MR. ROBINSON: Objection.

A. It would have been from a board member. From time to time Mr. Green would call about one thing or another.

[. . .]

[Transcript Excerpts; P. 238]

Q. Well, I mean, the one thing—I guess to clarify it, "If you get dragged into a game that you do not wish to play, then play the end-game.", what did you mean by that?

A. Yeah, that's a colloquialism I use all the time. It means: Just tell me what it is you want. I'm not going to play the game leading up to it; just tell me what it is you want and I can say yes or no.

Q. Okay. Why didn't you just say that, what you just said?

MR. ROBINSON: Objection.

A. I don't know. That's something I say.

[. . .]

DEPOSITION OF CORTEZ DIAL
—RELEVANT EXCERPTS
(AUGUST 11, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY, ET AL.,

Defendants.

Civil Action No. 3:16-cv-00989-HEH

[Transcript Excerpts; P. 169]

Q. Could have been? All right. And then at a certain point did you stop serving as the chief of staff at Virginia State University?

A. I did.

Q. Okay. Can you describe how that happened?

A. Yes. I wanted to go back to the faculty or go to the faculty full time. I had a discussion with the president and tried to do it in August of 13 because I was about to finish my degree once I had—you know, saw the end of the tunnel. And the department had asked me to come do that and made that offer to me. And so—

Q. Which department?

A. Mass Communication Department.

[. . .]

[Transcript Excerpts; P. 172]

Q. Okay. Were you aware of the hiring process for associate professors in the Faculty Handbook, or no?

A. No.

Q. So you don't recall having any interaction with the Departmental Hiring Committee for Mass Communications other—

A. No.

Q. Do you recall having any interaction with the University Hiring Committee with regard to your appointment as associate professor at Virginia State University?

A. I never had any association with any committee for any position I had at Virginia State.

[. . .]

[Transcript Excerpts; P. 178]

Okay. What about afterwards? Did you publish anything—have you published anything from 2013 until the present day?

A. No.

Q. Okay. What about—again, we talked about a lot of the experience that you had had of being a Public Affairs officer. Was there any other—was there any research that you conducted as an

academic specifically in the field of Mass Communications?

A. Can you give me an example of what you mean? It would help if you would define for me what you deem to be research.

Q. I guess research in the sense that a professor would do research, academic research, discipline-oriented Mass Communications, discipline-oriented—

A. Okay.

Q. I understand that "research" can be a broad term.

A. Very broad. And that's why I hesitate to answer, because I don't want to tell you something wrong. I'm not trying to mislead you. But I conduct detailed research on every single class I teach. I try to conduct research on every single student that I have, particularly at the graduate level, right, as well as the undergraduate level. And the reason I want to teach freshmen, and asked to, because that helps me be a better graduate teacher, right, because I'm an old guy. I don't know how students think. So staying with 18-year-olds who are coming out of high school makes me a better professor for my 25- and 26- and 27-year-olds.

DEPOSITION OF MICHAEL SHACKLEFORD —RELEVANT EXCERPTS (AUGUST 10, 2017)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY, ET AL.,

Defendants.

Civil Action No.: 3:16-cv-00989

[Transcript Excerpts; P. 15]

Q. Can you identify that document for us?

A. The transcript from George Washington University doctorate program.

Q. Is that a full and complete copy, to the best of your knowledge, of your transcript from George Washington University?

A. Yes.

Q. Okay. And these are the classes that you took and the academic work that you did to get your Doctor of Education Administration—or your Doctor of Education?

A. Yes.

Q. Okay. It says there that the major-your major was higher education administration. Is that accurate?

A. Yes.

Q. Okay. And it says here that—so it was all—is it fair to say that all of your study at George Washington University was in the area of higher education administration?

A. Yes.

[. . .]

[Transcript Excerpts; P. 132]

Q. Okay. Did anybody ever talk to you about whether the University Handbook governed your employment as an associate professor?

A. No one ever talked to me about that.

Q. Okay. And your understanding is that some of the policies in the University Handbook might govern faculty members too, right?

A. Yes.

Q. Okay. And so in your role as—in your role as an associate professor at Virginia State University, you described your primary responsibilities would have been classroom responsibilities, right?

MS. EBANKS: Object to form.

Q. You can answer.

A. Classroom, as well as internships that would be out of the classroom, but anything related to completing the academic requirement.

Q. Sure. So basically imparting knowledge to the students in the subject field, right?

MS. EBANKS: Object to form.

A. (No verbal response.)

[Transcript Excerpts; P. 133]

Q. And that would have included preparing syllabi for the courses?

A. Yes.

Q. It would have included preparing lessons, activities, and lectures to impart knowledge to the students, right?

A. That's right.

Q. It would have included instructing the students through varying pedagogical methods such as lectures, technology, and practical classroom experiences, right?

A. Yes.

Q. It would have included keeping track of whether students are retaining knowledge and meeting the objectives and outcomes of the course, right?

A. Yes.

Q. And it would have, through, for example, exams, projects, presentations, practical experiences, writing assignments, group work, service, and other activities, right?

A. Yes.

Q. It would have included managing the

[Transcript Excerpts; P. 134]

. . . dynamics of the classroom, right?

A. Yes.

Q. It would have included potentially assisting students with the course material, right?

A. Yes.

Q. And maybe—sorry—it would have included maintaining regular office hours, right?

A. Yes.

Q. And you maintained regular office hours when you were an associate professor, right?

A. Yes.

Q. And it would have involved providing feedback on assignments, right?

A. Yes.

Q. And your duties as an associate professor included inputting midterm and final grades, right?

A. Yes.

Q. And it also, as we saw here, it included attending contractually mandated functions such as Fall Convocation, Founders Day, Honors Convocation, Spring Commencement, and other ceremonial events, right?

[Transcript Excerpts; P. 135]

A. Yes.

Q. And also potentially, you know, going to faculty meetings and department meetings and stuff like that, right?

A. Yes.

Q. And you went to department meetings, right?

A. Yes.

Q. And they had department meetings in the Department of Administrative and Organizational Leadership, right?

A. Yes.

Q. And when you were an associate professor, you went to all those meetings, right?

A. Yes.

Q. And so when you were fulfilling those responsibilities that we just described, did you study and prepare for the class presentations and lectures?

A. Yes.

Q. Did you try to present your subject in an interesting and challenging manner?

[Transcript Excerpts; P. 136]

Q. So your first semester there in fall

A. Yes.

Q. Did you engage in class discussions with students?

A. Yes.

Q. Did you prepare tests and exams that attempted to fairly cover the subject taught?

A. Yes.

Q. Did you attempt to promptly grade tests and exams?

A. Yes.

Q. And we discussed before that you maintained regular office hours for the students, right?

A. Yes.

Q. So about how many students did you teach during the time you were an associate professor?

A. I think the first semester I had–I started with ten. I ended with eight. Then I picked up—the second semester I picked up dissertations, so I had picked up fifteen as part of the internship. Then I had seven dissertations.

[Transcript Excerpts; P. 137]

. . .2014, you taught one class, right?

A. I taught one—I taught one class—. . .

[. . .]

[Transcript Excerpts; P. 161]

Q. But the requirements of teaching classes and reviewing dissertations and that sort of thing, that was very different from what you had been doing, is it fair to say, as the vice president of Student Affairs?

MS. EBANKS: Object to form.

A. The requirements for teaching class was different than what I had to do as vice president for Student Affairs.

[. . .]

[Transcript Excerpts; P. 183]

Q. Okay. And so going back to your—we were starting to talk about your responsibilities as an

associate professor in the Department of Doctoral Studies. In the spring of—and you said that in the fall of 2014, you taught a 500 Level class, right? Or you taught a class in the fall of 2014; is that right?

A. I didn't teach 500. I taught 700 Level classes.

Q. You taught a 700 Level class. And you said in your first semester you taught an internship course, right?

[. . .]

[Transcript Excerpts; P. 184]

A. I was—I was co-teacher in an internship program.

[. . .]

[Transcript Excerpts; P. 08]

. . . a dissertation committee, you had to have—you had to have a doctorate; is that right?

A. That's correct.

Q. And did it have to be a doctorate in a particular field, or no?

A. It didn't have to be a doctorate in a particular field, but you had to demonstrate expertise in the subject matter that you were being asked to serve on the committee for.

Q. So something like the subject matter being school administration of a K through 12 school; is that right?

A. Didn't have to be that, but in this case CTE is at the K through 12 level.

Q. Okay. In all of the dissertations that you served on, where you served on the committee, those all involved—the subject area of them was all something to do with pre-K through 12 education?

MS. EBANKS: Object to form.

Q. You can answer.

A. I don't remember, but my best guess would be yes.

[Transcript Excerpts; P. 209]

Q. Yes? Okay. Looking again at your appointment letter from 2014, which I think is this document here–

A. Okay.

Q. —it says that the term appointment for the academic year, August 11, 2014, to May 5th, 2015, inclusive, at a salary of 119,738. So that was your salary as an associate professor in the Department of Doctoral Studies, right, for that year?

A. I'm going to assume yes. That's what's on here.

Q. That's not inconsistent with your recollection, right?

A. It is not.

Q. Okay. And they say, "This salary will be payable in twenty-four semi-monthly installments beginning September 16, 2014, and ending September 1, 2015."

So does that reflect a nine-month contract where payment's spread out over the entire year?

[Transcript Excerpts; P. 210]

A. That's what they do.

(Shackleford Deposition Exhibit 13 was marked for identification and is attached.)

Q. Take a moment to read this. Do you recognize this document that's been marked as Exhibit Number 13?

A. I'm not going to say I recognize it, but this seems like what I should have received.

Q. To the best of your knowledge, this is the contract that you received from Virginia State University to serve as an associate professor during the 2015-2016 academic year?

MS. EBANKS: Object to form.

Q. You can answer.

A. Yeah. This is the contract that would have run from the fall of '15 to the spring of '16.

Q. Okay. And it says that your salary was 119,738. Do you know how that salary was arrived at?

A. I do not.

Q. Okay. To the best of your knowledge, does that represent nine-twelfths of the salary that . . .

[Transcript Excerpts; P. 211]

. . . you had been receiving as the vice president for Student Affairs?

MS. EBANKS: Object to form.

A. I do not know because I had no discussion related to the salary at all.

Q. And it says that, "Your duties and responsibilities will be defined for you by the chairperson of your department and approved by the dean of your school and the provost. These will involve the load of scheduled teaching for the academic year, supplementary activities related to the educational program of the university, and include a reasonable share of committee work, regular attendance at the meetings of the departmental faculty, school faculty, general faculty, staff meetings, and required participation in designated academic ceremonies such as Fall Convocation, Founders Day, Honors Convocation, Spring Commencement, and other ceremonial events." Does that reflect your understanding of your job responsibilities as associate professor in the Department of Administrative and Organizational. . . .

[Transcript Excerpts; P. 212]

. . . Leadership?

A. Yes, sir.

Q. Okay. And once again it lists the department as the Department of Administrative and Organizational Leadership. We talked about why that was. Was that a department that merged with Doctoral Studies?

MS. EBANKS: Object to form.

Q. You can answer.

A. Yes. Again, I know the department went through several organizational changes or title changes, and I do know that this department existed and Doctoral Studies existed; and I think when they combined them it became Educational Leadership.

. . . But, again, I'm not sure as to what was what, but I do know that there was an initiative to rename the department since they merged the two.

Q. Did you teach over the summer of 2015?

A. I did.

Q. What did you teach in the summer of 2015?

A. I may have teach—I'm thinking I taught—I want to say something about human. . .

[Transcript Excerpts; P. 214]

. . . taught summer school, typically they paid you for summer school.

Q. Okay. And your responsibilities as the professor for that class were to prepare a syllabus, impart knowledge to students, right?

A. Yes.

Q. Okay. All the things that we had discussed earlier, right?

A. Yes.

MS. EBANKS: Object to form.

Q. And then did you teach any other courses in the summer of 2015?

A. I don't think I taught—I don't think I taught any classes for which I was a teacher of record, but I think I may have worked with some of the dissertation students over the summer.

Q. Did you do anything else in your role as associate professor in the Department of Doctoral Studies in the summer of 2015?

MS. EBANKS: Object to form.

Q. You can answer.

A. Continued the recruiting efforts.

[. . .]

[Transcript Excerpts; P. 215]

Q. Okay. What about the fall of 2015? What duties were assigned to you in your role as associate professor in the Department of Doctoral Studies in the fall of 2015?

A. Same duties that we've outlined as well as the recruiting responsibility again.

Q. Okay. When you say "the same duties that we've outlined," what would those include?

A. Teaching, preparing lesson plans, grading, you know.

Q. Sure. That would be preparing syllabi, right?

A. Right.

Q. Preparing lessons, activities, and lectures that serve to impart knowledge to students, right?

A. Right. But I didn't have to do that in that semester because all I had were dissertation students.

[Transcript Excerpts; P. 216]

Q. Okay. And then were you keeping track of whether the students were retaining knowledge and keeping—and meeting the objectives and outcomes of the course?

A. Yes.

Q. Okay. And were you assisting students with the course material?

A. Yes.

Q. Okay. And you were maintaining office hours?

A. Yes.

Q. You were maintaining a lot of office hours, right?

A. Yes.

Q. Okay. You were providing feedback on assignments, right?

A. Yes.

Q. And you're inputting grades?

A. Yes.

Q. And you're attending contractually

[Transcript Excerpts; P. 217]

. . . mandated functions, right?

A. Yes.

Q. And then you were—so what were you–you were advising dissertation students in the Department of Doctoral Studies in the fall of 2015? Fair?

A. What was your question again?

Q. You were advising dissertation students in the fall of 2015?

A. Yes.

Q. Did you teach any classes that semester?

A. No.

[. . .]

DEPOSITION OF ZOE SPENCER —RELEVANT EXCERPTS (AUGUST 8, 2017)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY and DR. KEITH MILLER,

Defendants.

Case No. 3:16-CV-00989-HEH

[Transcript Excerpts; P. 148]

Q. How many classes do you teach?

A. Five.

Q. Did you teach five classes in 2012?

A. Yes.

Q. In 2013?

[Transcript Excerpts; P. 149]

A. Yes.

Q. In—

A. No. In 2013 I was in China for one semester. So one semester, yes, I did.

Q. In 2014?

A. In one semester in 2014 I taught six' classes.

Q. In 2015?

A. Five, yes.

Q. In 2016?

A. Yes, five.

Q. And in 2017?

A. Five.

Q. Do you know how many classes Dr. Dial taught—

A. Four.

Q. —in 2012?

A. Four.

Q. In 2012?

A. Oh, I don't know. He was—I'm sorry.

He was the chief of staff in 2012.

Q. So you don't know how many classes he

[Transcript Excerpts; P. 150]

. . . taught that year, do you?

A. What I know is that his primary responsibility was not teaching classes. His primary responsibility was chief of staff.

Q. But you don't know if he taught or not, do you?

A. His primary responsibility–

Q. I'm not asking what his primary responsibility is.

A. Listen—

Q. I'm asking you to answer the question.

A. —that's outside of the scope of my complaint anyway.

Q. What are you talking about outside of the scope of your complaint? We're the lawyers 16 here.

A. He was the chief of staff in 2012.

That's what I know his responsibilities were.

Q. Let me tell you, Dr. Spencer: What's outside of the scope of this discovery is argued by attorneys, and we can submit that to the court.

I asked you a question. Are you not

[Transcript Excerpts; P. 151]

. . . going to answer it?

A. He was the chief of staff. I know that he was the chief of staff in 2012.

Q. The question is: Do you know if he taught any classes in 2012?

A. To my knowledge, he did not.

Q. Okay. That's the answer. Thank you. In 2013, do you know if he taught any classes?

A. He was the chief of staff in 2013. To my knowledge, he did not.

Q. In 2014?

A. He taught four classes.

Q. How many classes was he—so in 2014 he taught four classes, to your knowledge?

A. To my knowledge.

Q. And you taught six classes?

A. I taught five.

Q. You said you taught six in 2014.

A. Oh, one semester. That was the second semester. First semester I taught five. Second semester I taught six.

[Transcript Excerpts; P. 152]

Q. Do you know how many classes he taught each semester?

A. Four.

Q. Both semesters?

A. Yes.

Q. If you teach the same or more classes at a university, is that the—do you have to put the same skill and responsibility into that as another professor?

A. Say that again.

Q. If you're teaching the same number of classes—let's say he taught five classes and you taught five classes, would that require the same skill and responsibility as you?

A. If we both taught five classes?

Q. Yes.

A. Yes.

Q. It doesn't matter how many students are in there?

A. It does matter, absolutely.

[. . .]

[Transcript Excerpts; P. 158]

Q. What classes do you teach at Virginia State?

A. I teach sociology courses. Do you want me to list them? They're too long to list. Do you want a list?

Q. Sure.

A. Intro to Sociology. I've taught Social Problems. Are you talking about currently or over

[Transcript Excerpts; P. 159]

. . . the span of my career at Virginia State?

Q. Well, let's just go through all of them.

A. Okay. So Intro to Sociology, Social Problems, Marriage and Family.

Q. Okay.

A. Race and Ethnic Relations.

Q. Race and Ethnic?

A. Ethnic Relations, Social Psychology.

Q. Okay.

A. Sociology of the Media, African American Women.

Q. Okay.

A. Sociology of Sport.

Q. Okay.

A. Hip Hop in the Prison Industrial Complex.

Q. Okay.

A. Sociological Theory.

Q. Okay.

A. Research Methodology.

Q. Okay.

[Transcript Excerpts; P. 160]

A. Criminal Justice Research Methods.

Q. Okay.

A. A graduate course, Problems in African American Community.

Q. Okay.

A. Police and Ghettoization.

Q. Is that a separate graduate course?

A. Yes.

Q. Master's level?

A. Yes.

Q. Any of these dissertation level?

A. No.

Q. What was the police one?

A. Police and Ghettoization, Urban Sociology, Sociology of Religion.

There are more. So I want to reserve my right to add to it, but that's all I can think of right now.

Q. When you're talking about the first 12 classes that you went through, they were all undergraduate courses?

A. Yes.

[. . .]

[Transcript Excerpts; P. 166]

Q. So in your 2016 course you had four students in that master's level course?

A. Yes.

Q. How many students did you typically have in your undergraduate level courses?

A. They ranged from 62, depending on how my chair establishes my course load, my student load. They range from 45 as a cap to 50 as a cap to 60 as a cap, and generally my caps go over. So it ranges from maybe 47 to 62 has pretty much been my highest. And that's where they're capped, at 47, 50, and 60—I mean, 45—

Q. So in the fall of 2016 when you had four undergraduate courses ranging from 47 to 62, let's take one of those courses from the fall of 2016. Which undergraduate course did you teach?

A. Marriage and Family, Race and Ethnic Relations, Sociological Theory, and an elective.

Q. Let's take Marriage and Family, how many students did you typically have in your Marriage and Family?

A. 62.

[. . .]

[Transcript Excerpts; P. 168]

Q. So for you, the master's level student—the master's level course, Problems in African American communities, took less time and effort than—

A. I'm sorry. Go ahead.

Q. Took less effort—let's take time out of it—took less effort than your marriage and 8 family course?

A. I can't divorce time and effort, because when I'm talking about—when you're talking about effort, specifically the effort that it takes to grade papers, the effort that it takes to manage classroom dynamics, etc., is going to be—the effort that it takes to even prepare syllabi is going to be different than manage classroom discussions, assist students with the course material, and all of the things that are part of my responsibilities is going to be greater if I have 62 students in a class versus four students in a class.

[. . .]

[Transcript Excerpts; P. 206]

. . . affirmative defenses to discrimination.

Q. What are those?

A. Experience, merit, seniority, and there is one more. I can't remember what it is. But the main ones are experience, merit, and seniority. Oh, and the last one is anything other than related to gender, which is the more broad one. So in dealing with experience, when you're qualifying experience based on the EPA, the experience says

that you cannot consider experience that's outside of the scope of the position that is being questioned.

Q. Where is that codified?

A. You're asking me where it's codified.

It's codified in the EPA and the Title VII documents, and it's also codified in the EEOC regulations.

Q. What regulation?

A. The EEOC regulations.

Q. There's thousands of regulations.

Which one?

A. Well, if I had known I was going to be tested on that, I would have written it down, . . .

[. . .]

[Transcript Excerpts; P. 240]

Q. Have you ever worked in administration?

A. No. I have no desire.

Q. So you don't know what skills and knowledge and experience and effort goes in to do the job of a chief of staff?

A. What I do know—

Q. I'm asking you: Do you know that?

A. No. What I do know is that with reference to my lawsuit, the skills that are required to be a VP of student affairs and the skills that are required to be a chief of staff do not transfer to the skills required to be an associate professor.

[. . .]

[Transcript Excerpts; P. 250]

Q. I just want to make sure we go to the issue. You don't like the fact that Cortez Dial and Dr. Shackleford—Dr. Dial and Dr. Shackleford went—were allowed to move from faculty to administration in your opinion against Virginia State's policy, right?

A. This is not a matter of what I like. No. No. No. You asked me a question. You said you don't like. This is not a matter of what I like. This is a matter of what is right, what is equitable, and what is standard by Virginia State University's own policies and the SACS guidelines.

So it's not a matter of what I like.

What I know is that their removal from administrative positions into associate professor positions violated the EPA and the Title VII because.

. . .

A. What it dictates specifically is it states that when you're speaking about a specific job, that the experience that's considered under the affirmative defenses, the experience—

Q. What affirmative defenses?

A. The affirmative defenses of—that someone else had experience, or work experience, that that work experience has to be directly related to the job in question. And it specifically states in all of the guidelines that you cannot consider unrelated degrees and unrelated work experience to bring to the experience of that job that's in question.

Q. There is nowhere that the EPA says—

A. Oh, it surely does.

MR. PETERS: Objection.

A. It surely does.

Q. And that there are affirmative defenses that say that?

A. No. There are—okay. So there are

[Transcript Excerpts; P. 251]

> . . . they were paid significantly higher salaries than I with less qualifications, less experience, less merit, less credentials.

Q. Let's say they were paid the same salary that you were paid. If they were paid the exact same salary that you were paid and they moved from faculty to administration, would you think that that was discriminatory?

A. It would still—it would still violate the—it would still—absolutely it would be discriminatory. It still violates the practices as established by the university.

Q. What practice established by the university?

A. The policies established.

Q. What policy?

A. The policy that as an FA you are not entitled to retreat rights, and you are not entitled to tenure, and you serve at will, and that there is nothing that says that you're supposed to move from an administrator position to a faculty position without tenure. The people who have been allowed in. . . .

[Transcript Excerpts; P. 252]

. . . the past to move from administrator to faculty positions are the people who held tenure in their department and in their discipline.

Q. Well, let me ask the question of: If Dr. Shackleford and Dr. Dial were female, would that be a violation of policy?

A. Absolutely.

Q. So your position is regardless of whether they are male or female, Virginia State University cannot move faculty members—I mean, administrators into faculty when their contract says that they can't do that?

A. Yes.

Q. So if Virginia violates–Virginia State violates its own policy, that's wrong?

A. Yes.

Q. Okay. Regardless if they're female or male?

A. Regardless if they're female or male, it violates the policy. Where—where–

Q. Go ahead.

A. Where you not only violate the policy, . . .

[Transcript Excerpts; P. 253]

. . . but then where those people are given an advantage—so you can—in violating the policy, that can be discriminatory, but specifically in this case where you violate the policy and you appoint people to a position that's held by a protected class—me—and then you pay people $50,000 and $35,000 more than the protected class—me—then that is discriminatory.

MR. ROBINSON: Do you want to take a 10 break? Okay.

[. . .]

[Transcript Excerpts; P. 280]

. . . things got a little rocky. Specifically in September at board meeting that I attended, the then board rep, Dr. Omojokun, had presented a report to the board where he referred to the gender equity task force and the issue of gender inequity in pay. He kind of glossed over it. He didn't go into detail about it. At the following board meeting in November I approached a board member, Terone Green, about the issue of gender equity. And I also gave him a copy of the gender equity report, because after we gave the presentation and made the recommendation for an ombudsman position, and also encouraged them to do further investigation into the issue of the gender inequity in pay, we assumed that they were going to respond to that.

So after they didn't respond, and after Dr. Omojokun didn't really apprise the board of the issues, then in November I approached board member Terone Green about it and I submitted a copy of the gender equity task force snapshot to him, and told him what my concerns were, and asked him to apprise the board, and asked him to look into it.

Q. So you—what evidence do you have to support that Dr. Hill retaliated against you, except for your perception and feeling that he was angry about you presenting this gender equity report?

A. When the first—the first point is that when I was supposed to get paid, my paperwork didn't—and if you look at the signatures, unless people shifted dates, my paperwork didn't—in spite of me calling and asking Dr. Hill to forward my paperwork, Dr. Hill told me that my paperwork had been forwarded. I did not get paid on the date that I was supposed to get paid. I called Terone Green and I asked Terone Green to intervene, and Terone Green said that he was going to talk to Dr. Hill—because that was your original question. He was

[Transcript Excerpts; P. 281]

. . . going to talk to Dr. Hill about my pay and about my paperwork. I don't know what happened in the conversation. But again, when I talked to Dr. Hill, he told me my paperwork had been forwarded again, and it didn't. So I didn't even get paid on January the 1st.

In the process of talking to the people who would have received the paperwork after and before Dr. Hill, the people who had received it before had signed off on it. The people who were supposed to receive it after never received it. So I think it's a fair assumption to know that that, included with the different tone and the different energy that he was dealing with me and in the glares that I got when I was speaking to Mr. Green about the gender equity task force, I think it's a fair assumption that now I talked—do a gender equity task force, and then I tell the board member about gender equity, and now all of a sudden you're not—you're not forwarding my—my paperwork simply so that I can get paid—not in one pay

period, but I didn't get paid for two. It was the third pay. . .

[. . .]

[Transcript Excerpts; P. 288]

A. For tenure and promotion, our dossiers go through a scrutiny, a chain of scrutiny. The first is we go through the departmental tenure and promotion committee. The second is we go through the chair. We go to the dean, and the dean goes off of the chair's recommendation. And then the dean submits it to the university promotion and tenure committee. And that promotion and tenure committee then reviews the dossier, and then the dossiers are submitted to the provost office.

[. . .]

[Transcript Excerpts; P. 405]

. . . University. Do you have an understanding of the process by which associate professors are hired at Virginia State University?

A. Yes.

Q. Okay. Can you tell me what that is based on, what your knowledge of—

A. I'm sorry.

MR. ROBINSON: Objection.

Q. —what your knowledge of how associate professors are hired at Virginia State is based on?

MR. ROBINSON: Objection.

Q. You can answer.

A. Generally—are you talking about hired or how they're appointed? Generally—

Q. I'm talking about how associate professors are appointed to the faculty at Virginia State University.

MR. ROBINSON: Objection.

A. According to the faculty handbook, the person who is appointed to associate professor should have four years of teaching experience, they. . .

[Transcript Excerpts; P. 406]

. . . should have a record of teaching excellence, they should have a terminal degree in the teaching discipline, and they should be able to contribute to the mission of the university.

Q. Okay. Have you reviewed the credentials of Cortez Dial?

A. Yes, I have.

Q. Okay. Is it your opinion that he satisfies the generally applicable credentials set forth in the faculty handbook for associate professors?

MR. ROBINSON: Objection.

A. No, he does not.

Q. Okay. Why do you say that?

MR. ROBINSON: Objection.

Q. You can answer.

A. Because the faculty handbook and the accrediting body guidelines are very specific about the requirements for teaching in a specific discipline. The principal one is that the individual should

have a terminal degree in the teaching discipline or related field; they should. . .

[Transcript Excerpts; P. 407]

. . . have four years of teaching experience at the university level; they should have a record of teaching and research; and they should be able to contribute to the—to the mission of the university.

Q. Okay. And when you say that you're familiar with the hiring process, in what ways have you participated in the hiring of associate professors at Virginia State University?

A. Generally—

MR. ROBINSON: Objection.

Q. You can answer.

A. Generally professors are not always hired at the associate professor rank, because associate professor comes with tenure and promotion. I've been a part of the hiring process of assistant professors. And in that process the policy is that the chair, in coordination with the department, will submit or put out a job description or a job announcement, as opposing counsel showed in my instance. They would refer to the hiring committee, the departmental hiring committee. The hiring. . .

[Transcript Excerpts; P. 408]

. . . committee would scrutinize applications, they would interview the applicants, and then they would make a recommendation to the chair. The chair would make the recommendation to the dean, and the dean would make the recommend-

ation to the provost, and then the provost would submit it to the president and to the board for approval.

Q. Okay. To the best of your—so you've looked through the documents pertaining to the hiring of Cortez Dial and Michael Shackleford, their appointment as associate professors to the Virginia State University faculty, correct?

A. Yes. Yes, I have.

Q. Okay. Is there any evidence that you've seen in their documents that that normal process was followed?

MR. ROBINSON: Objection.

Q. You can answer.

A. That from what I saw in both the A-21 and in reviewing their credentials, no, the normal process was not followed. Because Dr. Weldon Hill appointed them to those positions. . .

[. . .]

[Transcript Excerpts; P. 410]

Q. Okay. Now, is it your contention that these—that the—based on your knowledge, is it your contention that this was an intentional act, this was an act of intentional discrimination by Virginia State to appoint Michael Shackleford and Cortez Dial to the faculty at the associate professor rank at these salaries?

A. Yes.

MR. ROBINSON: Objection to form.

Q. Okay. Why do you say that?

MR. ROBINSON: Objection to form.

Q. You can answer.

A. As I stated in my various e-mails to them, they were a part of a male-dominated—a male-dominated administration. And because of their male-dominated administration, they appointed them and made concessions for them that they did not, have not afforded to anyone else.

Q. Okay. To the best of your knowledge, was Virginia State University on notice that this would be an intentionally discriminatory act to. . .

[. . .]

[Transcript Excerpts; P. 412]

. . . that right?

MR. ROBINSON: Objection.

A. Yes.

Q. And then I didn't let you—so you've looked over Michael Shackleford's personnel file, right?

A. Yes.

Q. Is it your opinion that Michael Shackleford has the qualifications set forth in the faculty handbook to serve as an associate professor?

MR. ROBINSON: Objection to form.

A. No.

Q. And what is that based on?

MR. ROBINSON: Objection to form.

A. My opinion?

Q. What is your last answer based on? Why don't you believe that based on the faculty handbook and your knowledge of faculty hiring at Virginia State University and at other universities, why doesn't Michael Shackleford have the qualifications to be—to serve as an associate professor in the department of doctoral studies?

[Transcript Excerpts; P. 413]

MR. ROBINSON: Objection to form.

Q. You can answer?

A. Because his degree is not in PK through education, because he did not possess the four years of prior teaching experience, because he did not have a prior record of excellence in teaching and research, and I think that that's probably—and because he didn't go through the hiring process that other faculty members are supposed to go through.

Q. Okay. Now, with respect to—have you ever heard of—so let me get to what you did—what your job responsibilities were at Virginia State University. Was it part—is it part of your job—was it part of your job as an associate professor to teach graduate students?

A. Yes.

Q. Okay. Is it part of your job now as a professor at Virginia State University to teach graduate students?

A. Yes.

Q. Okay. That's a requirement—with

[Transcript Excerpts; P. 414]

. . . respect to when you were an associate professor, that was something that was required of you as an associate professor to teach graduate students; is that right?

A. When my chair appoints or has a need for me to do that, then yes, that becomes a requirement to do it.

Q. Okay. So as a—so are you classified as a collegiate instructional faculty member?

A. Yes.

Q. You've looked through Cortez Dial and Michael Shackleford's personnel files, correct?

A. Yes.

Q. Okay. Are they—were they qualified as collegiate instructional faculty members?

MR. ROBINSON: Objection.

A. Not per the faculty handbook.

Q. Okay. But were they—

A. Or SACS.

Q. Yeah. Were they classified as associate professors?

MR. ROBINSON: Objection.

[Transcript Excerpts; P. 415]

A. Yes. Oh, I'm sorry, you meant were they classified as collegiate when they were transferred to—

Q. Right.

A. Yes, they were.

Q. Okay. When they were—after they were hired as associate professors, they were classified as collegiate instructional faculty members, right?

A. Yes.

MR. ROBINSON: Objection.

Q. They had not been, previous to their appointment, classified as collegiate instructional faculty members, right?

MR. ROBINSON: Objection.

A. No.

Q. Okay. So after they were appointed—so—now, is it your contention that there is a shared common core of tasks that are performed by every collegiate instructional faculty member?

MR. ROBINSON: Objection.

A. Absolutely.

[Transcript Excerpts; P. 416]

Q. Okay. Do those—now, I'm going to read to you a list, and I want you to tell me if this accurately reflects the primary duties that you had as an associate professor at Virginia State University: Prepare lessons, activities, and lectures and serve to impart knowledge to students?

MR. ROBINSON: Objection to—

A. Yeah.

MR. ROBINSON:—the form of the question.

Q. You can answer.

A. Yes.

Q. Instruct their students through the use of varying pedagogical methods such as lectures, technology, practical classroom experiences, group discussion and media?

A. Yes.

MR. ROBINSON: Objection to the form of the question.

Q. Keep track of whether students are retaining knowledge and meeting the objections [sic] and outcomes of the course through exams, projects, . . .

[Transcript Excerpts; P. 417]

. . . presentations, practical experiences, writing assignments, group work, service, and other activities?

MR. ROBINSON: Objection to—

A. Yes.

MR. ROBINSON:—the form of the question.

Q. Manage classroom dynamics?

A. Yes.

MR. ROBINSON: Objection to the form of the.

Q. Assist students with course materials?

MR. ROBINSON: Objection to the form of the—

A. Yes.

MR. ROBINSON:—question.

THE REPORTER: I'm sorry, hold on one second. Can you pause just a second?

THE WITNESS: I'm sorry.

THE REPORTER: It's hard for me to take everyone at the same time.

THE WITNESS: I'm so sorry.

[Transcript Excerpts; P. 418]

MR. PETERS: And I'll note the objection to the rest—the objection to the form of my question as I go through this list, okay? Is that all right?

MR. ROBINSON: I'll object.

MR. PETERS: Okay. Can you save your objection? Can we note them on the record?

MR. ROBINSON: I'll object to each 9 question.

Q. Okay. Advise majors?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. Maintain office hours?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. Provide feedback on assignments?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. I think I've laid—so was it a part of your job as an associate professor at Virginia State University to input midterm and final grades?

[Transcript Excerpts; P. 419]

Q. Can you answer verbally?

A. Yes.

Q. Okay. Was it a part of your job as a professor at Virginia State—as an associate professor at Virginia State University to attend contractual—contractually mandated functions?

A. Yes.

Q. Okay. Were the job responsibilities that I've just described, were those the primary parts of your job responsibilities as an associate professor at Virginia State University?

A. Yes.

Q. Okay. Would that describe the majority of the work done by all associate professors at Virginia State University regardless of discipline?

MR. ROBINSON: Objection—

A. Yes.

MR. ROBINSON:—to the form.

Q. Does that—to the best of your knowledge, having reviewed the materials produced in discovery, did Cortez Dial engage in those activities that I've just described as a part of his

[Transcript Excerpts; P. 420]

. . . job as an associate professor at Virginia State University?

A. Yes.

MR. ROBINSON: Objection to form.

Q. Was Michael Shackleford, to the best of your knowledge, based on what you've reviewed as far as the discovery in this case, were those the

primary parts of his job as an associate professor at Virginia State University?

A. Yes.

MR. ROBINSON: Objection.

Q. Okay. Now, what about the skills employed in your job as an associate professor. I'm going to read you a list, and I want you to tell me whether this describes the skills that you employ in your employment as an associate professor at Virginia State University.

Do you study and prepare for class presentations and lectures?

A. Yes.

Q. Okay. Present—do you present your subjects in an interesting and challenging manner?

[Transcript Excerpts; P. 421]

A. Yes.

Q. Okay. Do you engage in class discussions?

A. Yes.

Q. Okay. Do you prepare tests and exams that fairly cover the subject taught?

A. Yes.

Q. Okay. Do you promptly grade tests and exams?

A. Yes.

Q. Okay. Do you maintain office—regular office hours for student consultation and assistants?

A. Yes.

Q. Okay. Does that—are those things that I just mentioned, are those required for all people who serve as associate professors at Virginia State University, regardless of their discipline?

A. Yes.

MR. ROBINSON: Objection.

Q. Okay. To the best of your knowledge having reviewed the materials that were produced in. . .

[Transcript Excerpts; P. 422]

. . . discovery, do those accurately describe the skills that were required of Cortez Dial and Michael Shackleford in their roles as associate professors at Virginia State University?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. Now, in your—was there any–have you seen anything at all in this case or anywhere else that convinces you that Cortez Dial and Michael Shackleford were paid more because they instructed graduate students?

MR. ROBINSON: Objection.

A. No.

Q. Okay. Why do you say that?

A. Because—

MR. ROBINSON: Objection.

Q. Go ahead.

A. Because that's not the pattern of Virginia State University. For example, the departments of business, which has the highest salary, they don't

have a graduate program, and they do not instruct master's or doctoral students. And. . .

[Transcript Excerpts; P. 423]

. . . so the level that you teach does not—is not-doesn't determine your salary.

Q. Okay. Have you ever heard of somebody being approved for a pay increase because they instructed graduate students?

MR. ROBINSON: Objection.

Q. At Virginia State or anywhere else?

A. No.

Q. Okay. What about the need to attract Cortez Dial and Michael Shackleford to Petersburg, Virginia, do you believe that they received the initial salaries that they received as associate professors in order to attract them to Petersburg, Virginia?

MR. ROBINSON: Objection.

Q. You can answer.

A. No.

Q. Okay. Why do you say that, that they were not paid these salaries in order to attract them to Petersburg, Virginia?

MR. ROBINSON: Objection.

A. Because their salaries reflected. . .

[Transcript Excerpts; P. 424]

. . . three-quarters of their administrator salary that had nothing to do with their roles as

professors, and they were already in Petersburg at that time.

Q. Okay. And to the best of your knowledge, how long had Cortez Dial been living in Petersburg, Virginia at the time he received the salary that he received?

A. I don't know if they live in Petersburg. I know that Virginia State University is in Petersburg. I would assume that he lived in the area as long as he worked in—at Virginia State University, which is—I can't remember exactly how long.

[. . .]

[Transcript Excerpts; P. 426]

Q. Have you—you've reviewed Mr. Shackleford's personnel file, right?

A. Yes.

Q. Okay. Did you find on there any. . .

[Transcript Excerpts; P. 427]

. . . notation indicating whether he was eligible for promotion or tenure—

MR. ROBINSON: Objection.

Q. —as an associate professor?

MR. ROBINSON: Objection.

A. No.

Q. Okay. And why do you say that? Was there something on there that would lead you to believe that he was not eligible for promotion or tenure?

MR. ROBINSON: Objection.

A. Yes.

Q. Okay. Did it—in fact, did it say on there that he's not eligible for promotion or tenure?

A. On the A—

MR. ROBINSON: Objection.

Q. Yeah, go ahead.

A. On the A-21 form that was signed by Dr. Hill, it said specifically that he's appointed on a term contract, not a tenure track contract, and that he is not eligible for tenure or promotion.

[Transcript Excerpts; P. 428]

Q. Okay. Did it say anything about what his responsibilities would be as an associate professor?

MR. ROBINSON: Objection.

Q. Okay. You can answer.

A. It said—and I quote—he is responsible for teaching and research only.

Q. Okay. Were you responsible for teaching and research as an associate professor at Virginia State University?

MR. ROBINSON: Objection.

A. Teaching, research, and service, yes.

Q. Okay. So your—what percentage of your activities—of your time as an associate professor are taken up in teaching or research?

A. Because I teach five classes, and sometimes I've taught six, it really is probably 60 percent. However, when I have a strong research agenda; for example, this year I put out a chapter and I put

out two peer-reviewed articles in one year, and I have four presentations just in this semester alone. So for me, this semester it's. . .

[Transcript Excerpts; P. 429]

. . . probably 60 and 50, and I still do presentations. So, I mean, it's over 100 percent.

Q. So I'm asking you what percentage of your time is taken up by teaching and research.

What percentage of your time would you say as a professor at Virginia State is taken up by teaching and research? And I mean your work time.

A. Probably 80 percent.

Q. Okay. So that's the vast majority of what you do is teaching and research, right?

A. Yes.

Q. Okay. What about Cortez Dial, did you review Cortez Dial's A-21, which was produced in this litigation?

A. Yes.

Q. Okay. Did it appear from that, that Mr. Dial was eligible for promotion or tenure?

MR. ROBINSON: Objection.

Q. You can answer.

A. No. The A-21 stated that he was not eligible for tenure or promotion.

Q. Okay. Did it state what Mr. Dial's job. . .

[Transcript Excerpts; P. 430]

. . . responsibilities would be at Virginia State?

MR. ROBINSON: Objection.

A. Unlike Shackleford's, I don't think that it—

Q. Okay.

A. —specified.

Q. Okay. But to the best of your knowledge, he was primarily responsible for teaching, right?

MR. ROBINSON: Objection.

A. Teaching.

[. . .]

[Transcript Excerpts; P. 441]

. . . employed at Virginia State University?

A. Yes.

Q. Okay. What have the—have you ever received a negative performance review at Virginia 5 State University?

A. No.

Q. Okay. Have you—have your—is it fair to say that your performance reviews at Virginia State University have consistently been outstanding?

A. Yes.

Q. Okay. Well, let me get for you—and in here I believe that we have your promotion tenure 2016, 2017, what you received. Is this—can you—do you know—can you describe for—do you know—

MR. ROBINSON: I'm sorry.

MR. PETERS: Let me get a courtesy copy and have it identified for the court reporter.

(Spencer Exhibit Number 16 was marked for identification)

Q. Can you identify what this document is?

[Transcript Excerpts; P. 442]

A. This is the dean's recommendation for my promotion to full professor.

Q. Okay. And so you've seen this before?

A. Yes.

Q. Okay. Was this—to the best of your knowledge, was this document part of what was relied upon to promote you to full professor?

A. Yes.

Q. Okay. Now, if you'll see there the responses to number 2, it says, On the basis of your knowledge rate the applicant in the following three categories. For teaching, what is marked there?

A. Outstanding.

Q. Okay. What about scholarly research/creative activities?

A. Noteworthy.

Q. Are you required as a professor at Virginia State to engage in research?

A. We're not required. That's not the basis for our compensation, but it is the basis for promotion and tenure.

Q. Okay. And how many published articles. . .

[Transcript Excerpts; P. 443]

. . . do you think that you have written in your academic career?

A. To date, I have five. Two are in—are in review. So if they're approved I'll have five peer-reviewed—double blind peer-reviewed articles. I have three peer-reviewed chapters. And I have three manuscripts, which are books.

Q. Okay. So—okay. So what about—to your knowledge in looking through—all right. So let's go down to professional service. What is marked there?

A. Outstanding.

Q. Okay. What about—we get to scholarly research creative activities, what's marked there?

A. On my chairperson's—I don't have one for my dean. For my chairperson's it was noteworthy; but for the promotion and tenure committee the departmental committee, teaching was outstanding, scholarly research was noteworthy, and professional service was outstanding.

Q. Okay. And with respect to what's. . .

[. . .]

[Transcript Excerpts; P. 444]

. . . written under teaching, can you read for us what—so who wrote this, to the best of your knowledge?

A. I don't know. There should be several for my—the university promotion and tenure committee I rank outstanding in all categories. I don't see

that here. The department committee ranked, and then the chair ranked, and then the dean ranked.

Q. Okay. Can you read what's written there under teaching in the document that I just gave to you?

A. That's 662?

Q. Correct.

A. Dr. Spencer's teaching is rated outstanding. I attribute this assessment to her course evaluations, which are all ranked nearly with—all ranked nearly with nearly perfect.

[. . .]

DEPOSITION OF TERONE GREEN
—RELEVANT EXCERPTS
(AUGUST 9, 2017)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ZOE SPENCER,

Plaintiff,

v.

VIRGINIA STATE UNIVERSITY ET AL.,

Defendants.

Case No. 3:16-CV-00989

[Transcript Excerpts; P. 84]

Q. Okay. Did the Board vote on whether or not to reappoint Michael Shackleford as vice president of Student Affairs?

MR. ROBINSON: Objection.

A. Not affirmed.

Q. Okay. So the Board voted not to reappoint Michael Shackleford as vice president of Student Affairs? Can you answer verbally?

A. Correct. Yes.

MR. ROBINSON: Objection.

[. . .]

[Transcript Excerpts; P. 87]

A. I never saw a letter of resignation. And if I—if I recall state statute, if you resign, you have to be—you have to be out of the position 1 for 30 days before you can come back. And so, no.

[. . .]

[Transcript Excerpts; P. 114]

Q. Okay. So were there concerns—you talked about the fact that there were concerns about the performance of Michael Shackleford as vice president of Student Affairs. Were there any others in addition to the fact that enrollment was going to decline severely?

[. . .]

[Transcript Excerpts; P. 115]

MR. ROBINSON: Objection.

A. An allegation that was lodged against him that was asked to be investigated.

That was—what kind of allegation?

A. An allegation that he had—

MR. ROBINSON: Objection.

MR. ROBINSON: Objection.

Q. And that was of concern to the Board in terms of reappointing Michael Shackleford as vice president of Student Affairs?

MR. ROBINSON: Objection.

Q. Answer.

A. That—yeah, a couple of board members Were really concerned by that, and—and—yeah.

Q. Okay. Were there any other issues regarding Michael Shackleford's performance as vice president of Student Affairs at the time that his reappointment was considered by the Board in 2014?

MR. ROBINSON: Objection.

Q. Okay. What about Cortez Dial? Were there any concerns about Cortez Dial's performance as chief of staff?

MR. ROBINSON: Objection.

A. From my perspective, I had concerns because I didn't really understand what he did. When you look at a person, a vice president's portfolio, they have several departments, departments under them. When I got to the university, Dial had athletics and a police department. And at the salary that he was making, I would have expected him to report, you know, as any other person, to the Board, of issues within those areas.

[. . .]

[Transcript Excerpts; P. 120-121]

Q. So your understanding—so you believe that—your understanding was that Cortez Dial, by the time he was—by the end of his tenure as chief of staff was just overseeing the Athletic Department; is that right? That was all that was in his portfolio?

A. Yeah.

Q. You were concerned that he was being overpaid for the actual amount of responsibility that he had as chief of staff, right?

MR. ROBINSON: Objection.

A. Yes, . . .

[Transcript Excerpts; P. 127-128]

. . . Cortez Dial did not have any job responsibilities in the area of teaching, right?

MR. ROBINSON: Objection.

A. Let me go back. He couldn't have really had any teaching responsibilities because he was working on his doctoral degree. And in working on your doctoral degree—I remember him saying that he did a great deal of his work at Dr. Miller's former institution. So I don't know how you can teach and be chief of staff and work on a doctoral degree within an eight-hour time frame.

Okay. Did you ever see anything that suggested that Cortez Dial was a member of the faculty when he was chief of staff at Virginia State 16 University?

MR. ROBINSON: Objection.

A. No.

Q. Okay. Did you understand that Cortez Dial's job as chief of staff—that in his job of chief of staff he had any research responsibilities in the area of mass communications?

A. No. None. He didn't have any, no.

Q. Was your understanding that he had any experience in mass communications, in that academic discipline at all?

A. No, he didn't.

Q. Okay. Now, what about Michael Shackleford? In his role as vice president of Student Affairs, did Michael Shackleford have any teaching responsibilities, to the best of your knowledge?

A. I think only after he left the position.

[. . .]

[Transcript Excerpts; P. 139-140]

. . . Do you remember any communication from the dean of students that Cortez Dial be appointed to the faculty of Mass Communications?

MR. ROBINSON: Objection.

A. No. The only recommendation to appoint Mr. Dial and Dr. Shackleford came from the provost, just strictly from the provost.

Q. When you say "the provost," you're talking about Provost Weldon Hill?

A. Yes.

Q. Okay. What about Michael Shackleford? Did you ever receive a recommendation from the chair of the Department of Education that Michael Shackleford be appointed to that department as a faculty member?

A. No.

[. . .]

[Transcript Excerpts; P. 143-144]

. . . What about regarding their salaries; was there any discussion among the Board of Visitors about what salaries that Shackleford and/or Dial would be appointed at?

MR. ROBINSON: Objection.

A. Weldon—Provost Hill said it was the policy to take an individual who was a 12-month employee and convert their salary to a 9-month, so they would lose three months of the salary. So that's how we came to the salaries for Cortez Dial and Michael Shackleford. I asked for the policy on that—and it was never produced—because I wanted to understand the policy, because I subsequently learned that in some instances, by Dial and Shackleford going into the department—because they were not tenured; they were faculty administrators. So if you were tenured, it was a different—you were viewed differently. A faculty administrator is just a faculty administrator with no real rights or responsibilities.

And so by taking a faculty administrator and putting them into a position, you know, in some instances they were making more than the faculty.

[. . .]

[Transcript Excerpts; P. 148]

. . . And so when Shackleford went down, I think he went from 150,000 to–

Q. . . . maybe?

A. Yeah, which was right at the dean-right at what the dean was. And then it became apparent to me

that that—and others started bringing up the issue that this is—those two moves would cause considerable consternation among faculty members who were qualified in their particular area, qualified and tenured in that particular area, because that's how you realize who—how people got tenure and roles.

Q. So you had faculty members—the concern—so you heard concern—so the concern from faculty members would have been that they had worked their entire careers to become tenured professors in a certain subject area, right, and Shackleford and Dial had not; and yet, Shackleford and Dial were being paid salaries that were far more than they were? Right?

A. (No verbal response.)

Q. Can you answer "yes" or "no"?

A. Yes.

[. . .]

[Transcript Excerpts; P. 153-159]

Q. Okay. How did the subject of appointing them to the faculty come up?

A. Weldon Hill; it was his recommendation that they would be moved from their current positions to staff—faculty positions.

Q. Was the department—was the Board of Visitors told about what departments, what academic departments they would be going into?

A. Yeah, I think so.

Q. Okay. Did the Board of Visitors conduct any review to see whether they were qualified for faculty positions within those departments?

A. No, just recommendation of the provost.

Q. And were those concerns that Dial did not have any experience teaching in the area of mass communications, and Shackleford did not have any experiencing teaching in the area of doctoral studies?

A. Based on what—you've got—

MR. ROBINSON: Objection.

A. . . . to remember when you are sitting there and the provost, who's the number two in charge, gives you the impression that they are qualified to go in those areas, people tend to want to believe what they hear. It's only when you really dig deeper or folks bring other things to your attention do you pay attention to that.

Q. And did anybody at any point bring it to your attention that Shackleford and Dial might not be qualified to hold those faculty positions?

MR. ROBINSON: Objection.

A. Multiple individuals.

Q. Okay. Do you remember, was Dean Kanu one of those individuals?

MR. ROBINSON: Objection.

A. Yes.

[. . .]

[Transcript Excerpts; P. 166]

Q. Sure. But they were going to be faculty members?

A. Faculty.

Q. And they would have primarily teaching and research responsibilities as faculty members?

A. Correct.

Q. Okay. And so did you ever—was the Board ever made aware of issues regarding gender-based inequities in salary?

MR. ROBINSON: Objection.

A. Yes.

[Transcript Excerpts; P. 167]

Q. So can you describe for me how the Board was made aware of gender inequity issues as far as faculty salaries?

A. Dr. Zoe Spencer—Dr. Zoe Spencer did a gender and equity study, and I assumed it was commissioned by the university because of the individuals that were on that. She did that study, and it was presented to the Board in closed session, the results of it.

Q. Sure. And if you could—I'll give you a copy of it.

[. . .]

[Transcript Excerpts; P. 179-181]

. . . you any concern that she was being retaliated against for having provided that report to the Board of Visitors regarding gender inequities in salary?

MR. ROBINSON: Objection.

Q. You can answer.

A. She felt that she was retaliated against, yes.

Q. When do you recall her voicing those concerns to you?

A. Well, not related to necessarily gender equity, I remember a call that I received around about Christmastime. I was sitting in my kitchen; and you know, if you know anything about Dr. Spencer, she's pretty—she's a pretty strong individual, strong, you know, person. And she called me because she was very upset that apparently there had been some salary pay that she was supposed to get but did not 19 receive.

Q. At that time—so this would have been Christmas of 2012?

A. I can't remember. It was Christmas, one of—I don't know what year.

[. . .]

[Transcript Excerpts; P. 184-187]

. . . So I called, after she explained to me that she was promised—I think she'd done—she had taught an adjunct class, and she was due her-due a check December 18th or the 22nd, something like that, around about that time. She didn't get it.

So I called to find out what had happened. I spoke with Weldon Hill. Weldon explained to me, well, the president closed the university down a day early; and as a result of him closing the university down a day early, everybody went home. You know, everything was just stopped.

Nobody processed anything, and nothing was done. And—and I'm like, but, "You know, Weldon, you know, people are expecting, you know, their money for Christmas." And I could relate to that because I was in a similar situation. I had a consulting contract—consulting that I was waiting to get my money for, so I could relate to that, and he was just not sympathetic to that.

Q. Did he say anything negative about Zoe Spencer in that conversation?

MR. ROBINSON: Objection.

Q. You can answer.

A. He said, "Fuck her."

Q. He said—referring to Zoe Spencer?

A. Yeah.

MR. ROBINSON: Objection.

MR. PETERS: Let me mark this as an 19 exhibit.

(Green Deposition Exhibit 3 was marked for identification and is attached.)

MR. PETERS: Here's a courtesy copy.

Q. Does this document reflect your recollection that that conversation took place in December 2012?

A. Yeah, based on your date.

Q. Okay. And so after that, did you hear-in addition to that conversation, did you ever hear Mr. Hill say anything else negative about Zoe Spencer?

MR. ROBINSON: Objection.

A. Yeah.

Q. Okay. Can you describe when that happened?

A. We were talking about something, and he made a statement about he should have never hired 15 the bitch.

[. . .]

[Transcript Excerpts; P. 192-193]

. . . Okay. Was Weldon Hill, to the best of your knowledge, aware that Zoe Spencer was contacting board members and discussing gender equity issues in pay?

A. Yeah, I suspect he was, . . .

[Transcript Excerpts; P. 193-194]

MR. PETERS: Let me introduce this as an exhibit.

(Green Deposition Exhibit 4 was marked for identification and is attached.)

Q. So do you remember receiving this e-mail on or about November 11, 2012?

A. It says I did.

Q. Okay. And was this part of the discussions that Zoe Spencer was having with board members about issues of gender equity in pay?

A. Uh-huh.

Q. Can you answer "yes"?

A. Yes.

[. . .]

[Transcript Excerpts; P. 199-201]

. . . Was part of that reputation based on her work with gender equity and salaries?

A. I think it's just who she is. I think she's just an advocate. She was—I think at one point she was chair of the faculty senate, so she would, you know, advocate issues as a result of that, yeah.

Weldon Hill on multiple occasions expressed annoyance at her, right?

MR. ROBINSON: Objection to form.

Q. You can answer.

A. Yes.

MR. ROBINSON: Objection to form.

Q. You can answer.

A. Yes.

Q. Okay. We talked about the first time when he said—after you made—you had a conversation with Weldon Hill about her pay and getting her pay on time, and you said that his attitude was—he said to you, "Fuck her," basically.

MR. ROBINSON: Objection.

A. Yeah, "She can wait until they get back in January."

And I'm like, "Weldon, I mean, folks need their money. This is December. Why would somebody—why would you make people wait until January to get paid?" I mean, that's just—that's just unconscionable.

Q. Okay. And so did Zoe Spencer ever express the concern to you that Shackleford and Dial—that their appointments were not in read, you know—read that. So I just didn't rely on what she said. I also read the sections that she cited.

[. . .]

Q. Sure. And did you find that her concern about Shackleford and Dial not meeting the SACS guidelines to teach in their discipline had merit?

MR. ROBINSON: Objection.

A. Based on what I read from SACS, yes.

[. . .]

[Transcript Excerpts; P. 262-263]

. . . So to the best of your knowledge, did Cortez Dial have a doctorate in the field of mass communications?

A. No.

[Transcript Excerpts; P. 264-265]

Q. Right. And did you also—did Weldon-did Dr. Hill ever say that Cortez Dial had teaching experience specifically in mass communications or had any graduate background in mass communications besides his military—besides his military 19 experience?

A. No. You've just got to remember he just moved him. He just moved him into an area.

Q. . . . Less than 30? And at any point did the Board of Visitors review Dial or Shackleford's resume to determine whether they had appropriate qualifications to serve on the faculty?

A. No. I never saw any resumes.

Q. Okay. Did you see any other documents attesting to their qualifications?

A. No. It was just—it was just, you 10 know, verbal.

[. . .]

[Transcript Excerpts; P. 269-271]

Q. Okay. And so later it came to your attention that Cortez Dial might not have the requisite experience to be considered qualified pursuant to the SACS guidelines, right?

A. Yes.

Q. Okay. Did it—

A. After reading the SACS guidelines explanation.

MR. ROBINSON: Objection.

Q. Did it ever come to your attention that Michael Shackleford's appointment might not have been consistent with the SACS guidelines for appointment of faculty members?

MR. ROBINSON: Objection.

A. Only after you read the SACS, you know. I would have assumed—I assumed because he had an Ed. D. from Virginia Tech—I think it was from Virginia Tech—and had been in the area, you know, in academics for so long, he was qualified. You know, SACS is very specific. You've got to really—you've got to really understand that they're very specific on credentials and degrees.

[. . .]

[Transcript Excerpts; P. 283]

. . . Was there ever a time when a female administrator was—was there ever a time when the Board decided to not to renew the contract of a female administrator while you were on the Board?

A. There was a female administrator that we were not going to renew; but she got wind that we weren't going to renew her, and she resigned before we did the nonrenewal.

[. . .]

[Transcript Excerpts; P. 284-285]

Q. Ms. Whitaker. Was there ever a discussion about Ms. Whitaker joining the faculty after she resigned or was not going to be renewed as a resident administrator?

MR. ROBINSON: Objection.

Q. You can answer.

A. No.

[. . .]

[Transcript Excerpts; P. 291-293]

Q. So the only two people who were given the option—the only two administrators who had not previously had tenure who were given the option of joining the faculty during your time on the Board of Visitors were Shackleford and Dial?

A. Correct.

Q. There was no overarching practice of moving the administrators who were not renewed to the faculty, right?

MR. ROBINSON: Objection.

Q. You can answer.

A. I asked for that policy. I asked to see that policy, and I was never shown it, I mean, because Weldon gave the impression that that was standard. And

so the university has various policies, so I wanted to see the policy because you also wanted to understand the justification for pay.

Q. And you were not provided with that?

A. No. Never.

[Transcript Excerpts; P. 293-295]

. . . Did you recall that Dr. Spencer's request for pay equalization had merit? Did you believe that it had merit?

A. Yeah, without a doubt. I mean, she was a tenured faculty member.

MR. ROBINSON: Objection. Go ahead.

Q. You can answer.

A. She was a tenured—at the time I think she was a tenured faculty member. She was publishing. She was SACS-qualified in her area.

And yet, she sees somebody dropped in, making a lot more money than her that technically, according to SACS and others, were not qualified. I mean, that's just reading.

Let's remove her from the equation. But if you put Jane Smith in there and you read the rules, I understand the complaint based on SACS.

[. . .]