

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION

LYNETTE HANSING,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF CORRECTIONAL EDUCATION,

Respondent.

THIS MATTER is before the Board on Respondent's Motion for Summary Judgment. Having reviewed the motion and attachments thereto, Complainant's Response and attachment, and the applicable law, the administrative law judge enters the following order.¹

This opinion will not address procedural issues raised by Respondent in its motion, since the case is disposed of below on the merits, and because the undersigned has previously addressed the issues raised in a prior order.

Standard of Review.

Summary judgment is appropriate when the undisputed material facts show that the moving party is entitled to judgment as a matter of law. David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996). The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Hicks v. City of Watonga, Okla., 942 F.2d 737, 743 (10th Cir. 1991).

Once the moving party has met its burden, the nonmoving party must demonstrate that genuine issues remain for trial "as to those dispositive matters for

¹ It is noted that both parties filed additional pleadings. These were not considered, as they were filed after decision had been reached. Further, the Board rules do not provide for replies, and Respondent failed to file a motion to consider its reply. Board Rule 8-42, 4 CCR 801 (2001). Lastly, Complainant's Supplement was untimely, not provided for in Board rule, and unaccompanied by a motion.

which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

The nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. Id. A factual issue is genuine if the evidence is such that a reasonable jury [or administrative tribunal] could return a verdict for the nonmoving party. Marks v. U.S. West Direct, 988 F.Supp. 1371, 1373 (D.Colo. 1998).

The record has been viewed in the light most favorable to Complainant. Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995). Complainant, who attaches only a five-page excerpt of her deposition to her brief, has failed to set forth specific facts demonstrating that there is a genuine issue of fact for hearing.

Material Facts.

Respondent proffers the following facts via affidavit of Eric Brookens in support of its motion for summary judgment.

1. Brookens was responsible for hiring Complainant in 1996 and Jeff Hay in 1998. He had no role in hiring Rawn Swarbrick.
2. In 1996, Complainant applied for a Teacher I position in special education at the Buena Vista Correctional facility of the Department of Corrections ("DOC").
3. Brookens interviewed Complainant and one other "qualified male applicant," Fred McMurray, for the position.
4. In March, 1996, Brookens offered the position to Complainant, at entry level. Complainant requested credit in the form of a higher starting salary for her 12 years of special education teaching experience in the Buena Vista public school system.
5. Respondent's hiring policy at that time was to hire applicants only at the entry level or "step one" salary, unless there existed "recruiting difficulties or the applicant possessed exceptional qualifications sufficient to merit a higher beginning salary." There is no policy requiring mandatory "credit" for past experience.
6. Brookens discussed Complainant's request with Al Weber in Personnel. He determined that there existed no recruiting difficulties nor did she possess exceptional qualifications for the open position.

7. Brookens declined to offer a higher salary to Complainant. Complainant accepted the position and commenced employment as a Teacher I on April 1, 1996. The position constituted a pay increase for her.
8. Brookens remained Complainant's immediate supervisor until April 1999.
9. In April 1997, after obtaining state certification, Complainant sent Brookens a letter requesting a salary increase. In August, 1997, they mediated the issue. During the mediation session, Complainant mentioned a former male employee, Rawn Swarbrick, who had been hired as a special education Teacher I by DOC at above entry level.
10. Brookens was not involved in the hiring of or salary negotiations with Swarbrick. Swarbrick was hired specifically for the Youth Offender Systems program. He was hired at a higher than entry level salary because he had "substantial and significant prior experience dealing with youthful offenders. He also had a special education license and Colorado Principal's license, which was deemed valuable for the administrative start-up of a high school education program." Swarbrick transferred to another state agency in February 1997.
11. At the end of the 1997 mediation, Brookens maintained his belief that Complainant's salary was appropriate.
12. Complainant has received all customary salary increases since her April 1996 hire, including cost of living increases and salary increases for postgraduate course work.
13. In or about July of 1998, DOC began to implement a new hiring policy and philosophy to remain competitive with the growing marketplace and economy. While DOC maintained its policy of hiring applicants at entry-level, it abolished the previous "step system" and replaced it with a more flexible pay structure. This pay structure allowed for minimum and maximum monthly salary ranges for a given position, as well as for an increased entry level salary up to "job rate" (the salary which 75% of those in the position earned). This new salary structure provided those approving new hires and salaries more leeway in negotiating starting salary increases than previously, in special situations or under unusual circumstances.
14. Brookens hired Jeff Hay in 1998, offering him an above minimum

starting salary. He based this offer on his 11 years of experience in the correctional setting, the pay cut he would face if he were to take the special education Teacher I position at DOC, Canyon City, and the new hiring policy. None of these factors were applicable to Complainant at the time of her hire. Brookens explained this to Complainant "on numerous occasions." The pay range for the position was \$2,991.00 to \$5,138.00; job rate was \$4,574.00. Brookens offered Hay a starting salary of \$3,250.00.

15. Hay commenced employment on January 1, 1999 at \$3,250.00 per month. At that time, Complainant's monthly salary was \$3,463.00.

Complainant's response contains no rebuttal of any of these material facts presented by Respondent, with this exception: Complainant states in her sworn deposition testimony attached to her response that the other applicant for her position was not qualified to teach special education. She avers on that basis that there was a recruiting difficulty at the time of her hire. However, Complainant fails to produce any specific evidence of Mr. McMurray's actual job qualifications, the job requirements for the Teacher I position, or any other independent corroborating, documentary proof that would support this claim at hearing. Further, she fails to rebut Brookens' statement that he interviewed McMurray for the position.

Complainant provides no information regarding the specific qualifications and employment and educational background of any of the individuals hired into the Teacher I special education position, male or female.

Legal Discussion.

This case involves Complainant's allegation of wage discrimination based on sex under the Colorado Anti-Discrimination Act, at section 24-34-402(1)(a), C.R.S. That provision states in part, "It shall be a discriminatory or unfair employment practice: (a) For an employer to . . . discriminate in matters of compensation against any person otherwise qualified because of . . . sex." The Board has subject matter jurisdiction pursuant to section 24-50-125.3, C.R.S. Complainant also cites Director's Procedure P-3-1 and Board Rule R-9-3, which mandate equitable and fair treatment of similarly situated employees in compensation, and bar discrimination on the basis of sex, respectively.

Complainant bases her legal arguments primarily on the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, which is appropriate under Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997).

A. Equal Pay Act.

The Equal Pay Act ("EPA") is violated when an employer discriminates "between

employees 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. Section 206(d)(1).

Respondent argues that Swarbrick's pay level is irrelevant as a matter of law, since he was hired in 1993 and left DOC in February of 1997, prior to the time Complainant raised the wage discrimination issue. However, "[t]he law is clear that an Equal Pay Act violation may be established even though employees whose pay is the subject of comparison perform substantially equal work at different times." Kenworthy v. Conoco, Inc., 979 F.2d. 1462, 1467 (10th Cir. 1992). In Kenworthy, evidence regarding wages of a former employee prior to 1981 was found to be relevant to the plaintiff's wage claim concerning her pay in the years following 1981. Further, as Complainant points out, 29 CFR Section 1620.13(b)(5) states, "It is immaterial that a member of the higher paid sex ceased to be employed prior to the period covered by the applicable statute of limitations period for filing a timely suit under the EPA. The employer's continued failure to pay the member of the lower paid sex the wage rate paid to the higher paid predecessor constitutes a prima facie continuing violation. Also, it is no defense that the unequal payments began prior to the statutory period." Respondent's argument that Swarbrick's wages paid from 1993 - 1997 should not be considered is therefore rejected.

Respondent further argues that the fact that Complainant earns more than Hay defeats her equal pay claim. However, "the EPA, as a matter of law, does not require a plaintiff to show that she was paid less than every male employee." Merrill v. Cintas Corp., 941 F.Supp. 1040, 1044, n. 4, citing EEOC v. White and Son Enterprises, 881 F.2d 1006, 1009 (11th Cir. 1989). Complainant's claim is that Respondent is paying Hay at a higher wage rate by starting him at above entry-level. The fact that his precise amount of pay does not exceed hers is immaterial. See 29 CFR Section 1620.12.

To state a prima facie case under the Equal Pay Act, a plaintiff need not prove discriminatory intent. Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726, 729 (10th Cir. 1984). She must demonstrate that (a) she was performing work substantially equal to male employees considering the skills, duties, supervision, effort and responsibility of the jobs; (b) the conditions where the work was performed were basically the same; and (c) the male employees were paid more [at a higher rate] under such circumstances. Marks v. U.S. West Direct, 988 F.Supp. 1371, 1374 (D.Colo. 1998); 29 USC Section 206(d)(1). If these elements are proved, the burden shifts to the employer to prove that there were reasons for the wage disparity, including a seniority system, a merit system, a pay system based on quantity or quality of output, or a disparity based on any factor other than gender. Id.; 29 USC Section 206(d)(1)(i) - (iv).

Respondent has not argued that Complainant has not asserted a *prima facie* case under the EPA. The record demonstrates that Complainant, Swarbrick, and Hay were all hired as Teacher I's in special education at DOC; that the conditions of the work

were basically the same, and that Swarbrick and Hay were paid at a starting rate higher than Complainant. For purposes of this opinion, it is concluded that Complainant has established a *prima facie* case under the EPA.

Respondent asserts that any wage disparities between the two men and Complainant are based on numerous factors other than gender, and offers Brookens' affidavit in support of this assertion. Swarbrick was hired for a new program, the Youth Offender Systems ("YOS") program, by virtue of his "substantial and significant prior experience dealing with youthful offenders." Swarbrick also possessed "a special education license and Colorado Principal's license, which was deemed valuable for the administrative start-up of a high school education program." Affidavit of Brookens, Exhibit A to Respondent's Motion. Respondent also attaches Complainant's deposition testimony regarding "the difficulty of working in prisons," which corroborates Respondent's position that prison experience is an important extra qualification for special education teachers working for DOC.

Respondent's brief further indicates that YOS had recruiting difficulties at the time of Swarbrick's hire. While this is not contained in Brookens' affidavit, Complainant fails to rebut this assertion either in her brief or via sworn testimony.

In fact, Complainant makes no factual allegations at all concerning the circumstances of Swarbrick's hire. Nor does she provide rebuttal of Respondent's assertions regarding same.

Complainant had no experience working in the uniquely challenging setting of a prison at the time of hire. She was not hired into a new institution requiring specialized experience working with youthful offenders. She did not possess a Colorado Principal's license, nor would it apparently have been helpful in her position at Buena Vista Correctional facility.

The special circumstances of Swarbrick's hiring at YOS do establish that the wage rate disparity was based on factors other than gender. Complainant has provided no information rebutting the existence or significance of these circumstances. Therefore, she has failed to raise a genuine issue of material fact with respect to Respondent's affirmative defense under 29 USC Section 206(d)((1)(iv) ("a differential based on any other factor other than sex.")

Turning to Jeff Hay, Brookens' affidavit asserts that he hired him above entry level for a number of reasons, most notably his eleven years of teaching experience in the correctional setting and the fact that the job would constitute a pay cut for him. Brookens also cites the new pay system at DOC which allowed managers increased flexibility in negotiating starting salaries up to "job rate." Complainant again provides no information rebutting this sworn testimony.

When Complainant took the position at DOC it represented an increase in pay.

Hay faced a decrease in pay in taking the DOC position, and he possessed eleven years of teaching experience in a correctional setting, which was of obvious value to DOC. These circumstances constitute legitimate non gender related reasons for offering him a rate of pay slightly higher than entry level.

Complainant claims that at the time she was hired, there was a recruiting difficulty in filling her position. The only support for this contention is her assertion that McMurray was not qualified for the position. However, Brookens testified in his affidavit that he interviewed McMurray, and Complainant fails to rebut this testimony. McMurray's interview for the position creates a rebuttable presumption that he was qualified for it. Further, Complainant fails to provide any specific information regarding the minimum qualifications for the position, or McMurray's credentials. Given this dearth of information, Complainant's vague assertion does not establish an issue of fact for hearing regarding a recruiting difficulty at the time of her hire.

B. Title VII Wage Discrimination.

Complainant also relies on the disparate treatment theory of intentional discrimination under Title VII of the Civil Rights Act of 1964. Under this theory, Complainant must first present a *prima facie* case of sex discrimination. The burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for its employment decision. If the employer meets this burden, at the summary judgment stage the Complainant then must "establish a sufficient possible inference of discriminatory intent by demonstrating that there is a genuine dispute as to whether the reasons offered for the challenged employment decision were pretextual -- e.g. that they were not the true motivating reasons defendant professed them to be." Randle v. City of Aurora, 69 F.3d 441, 455 (10th Cir. 1995); Colorado Civil Rights Com'n v. Big O Tires, Inc., 940 P.2d 397, 400 (Colo. 1997).

"A person alleging a Title VII wage discrimination claim must show, as part of his *prima facie* burden, that he was paid less, or given a lesser raise, than other similarly situated non-protected class employees." Amro v. Boeing Company, 232 F.3d 790 (10th Cir. 2000). Complainant concedes in her brief that an employee is similarly situated if the employee deals with the same supervisor and is subject to the same standards governing performance evaluation and discipline. Arambaru v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997). Here, Brookens hired both Complainant and Hay, but had no involvement at all in the hiring of Swarbrick. Moreover, Swarbrick was hired into the Youth Offender System, which serves the unique needs of youthful offenders.

Complainant offers no evidence rebutting either the fact that Swarbrick was hired by a completely different set of individuals, or the special circumstances existing at YOS at the time of his hire. These two facts establish that Complainant was not similarly situated to Swarbrick at the time of hire. She therefore fails to establish a *prima facie* case under Title VII with respect to Swarbrick.

Complainant has established a *prima facie* case of wage discrimination based on gender with respect to Jeff Hay. He was hired by the same individual at a pay rate higher than Complainant, for the same job. Respondent's argument that Complainant's excess amount of pay defeats her *prima facie* case is rejected. She was hired at a lower pay rate, and that is sufficient to establish that she was "paid less" than Hay.

Respondent has proffered more than one legitimate, nondiscriminatory reason for offering Hay a higher pay rate than Complainant. Hay possessed 11 years of teaching experience in three different correctional facilities. Respondent considered him "to be specialized in the field," according to its brief. Further, it states, "Experience in a correctional setting, unlike experience in the normal classroom setting, is considered highly desirable by DOC given the unique challenges that one faces working with the prison population in a confined and highly structured setting." In addition, Hay faced a pay cut if he joined DOC, and the new pay structure enabled Brookens to offer him a higher than entry level salary in order to better meet his salary needs.

Complainant may defeat summary judgment if, as stated above, she can "establish a sufficient possible inference of discriminatory intent by demonstrating that there is a genuine dispute as to whether the reasons offered for the challenged employment decision were pretextual -- e.g. that they were not the true motivating reasons defendant professed them to be." Randle, 69 F.3d at 455. Proving pretext may be accomplished either directly by showing that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id. at 451.

Complainant has failed to offer any evidence demonstrating that Respondent's reasons for offering Hay a higher starting salary are unworthy of credence. She fails to rebut Respondent's assertion that Hay's eleven years of correctional experience deemed him a specialist in the field, or that such experience is highly desirable given the unique and challenging demands of working with a prison population. Nor does she rebut Respondent's assertion that the job constituted a pay cut for Hay. This is a critical fact that did materially affect the conditions under which Respondent offered Hay a higher starting salary. When Complainant was hired, her new starting salary at DOC constituted an increase in pay.

Complainant correctly states that pretext may be shown through the employer's general policy and practice with respect to minority [or female] employment, disturbing procedural irregularities, and the use of subjective criteria. However, Complainant offers no evidence at all concerning Respondent's general practice with respect to women employees' starting salaries for the Teacher I special education position. Notably absent from Complainant's response is any information concerning the other women that were hired into the Teacher I special education position at step one. Did any of these women have prior experience in a prison setting that was not credited? What exactly were the women's qualifications at the time of hire, and how did they compare with those of Hay? Without this information, it is impossible to draw a

meaningful comparison of Respondent's treatment of male and female Teacher I candidates.

Complainant argues that she has created a genuine issue of material fact regarding pretext in four different ways: 1. she was treated "far more critically than the male comparators who were given credit for prior experience"; 2. Respondent has not applied the new hiring philosophy in its treatment of Complainant; 3. Respondent has used highly subjective factors in this situation; and 4. Respondent's claim that another employee was also considered at the time Complainant was hired is "suspect."

None of these arguments creates a genuine issue of pretext in this case. Complainant's first argument is essentially that she was similarly situated to Hay but was treated differently. Disparate treatment of similarly situated employees can constitute strong evidence of pretext, as in Big O Tires, supra (disparate discipline for nearly identical misconduct). See also Elmore v. Capstan, Inc., 58 F.3d 525, 530 (10th Cir. 1995). However, here, Complainant and Hay were differently situated at the time of hire: Complainant took a pay raise, whereas Hay took a pay cut. Complainant offered no prison experience, while Hay offered eleven years of prison experience. Complainant was hired under the old step system, and Hay was hired under the new pay system that encouraged more flexibility in starting salaries.

Complainant's second argument fails, since Respondent cannot apply a hiring philosophy to her. She is not being hired for a new position. Complainant's third argument regarding subjectivity also fails to raise a genuine issue of pretext. Use of subjective factors can create an inference of pretext, such as when a candidate is "objectively better qualified than the [individual] chosen." Bodaghi v. Department of Natural Resources, 995 P.2d 288, 300 (Colo. 2000). While hiring and salary determinations are somewhat subjective, there is nothing subjective about the fact that Hay faced a pay cut and Complainant faced a pay raise when coming to work for DOC. Further, it does not appear subjective to the undersigned that the workplace demands of teaching convicted prisoners are different (i.e., more challenging) than those of teaching children in public school. (If Brooken had cited Hay's "leadership" or "interpersonal" qualities, this would have raised a genuine issue as to whether his proffered reasons were pretextual.)

Complainant's last argument is that Respondent's claim that it "considered" another employee at the time of her hire is "suspect." Brooken's affidavit testimony that he interviewed McMurray for the position stands un rebutted by Complainant. McMurray's interview raises an inference that he was qualified for the position. Complainant's vague statement in her deposition that McMurray was not qualified for the position, with no specific corroborating evidence to support it, fails to raise a genuine issue as to whether there was a recruiting difficulty in filling her position.

One of the most powerful ways of demonstrating pretext is by showing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the

employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence." Bullington v. United Air Lines, Inc. 186 F.3d 1301, 1317 (10th Cir. 1999). Complainant has not alleged that Respondent has changed its story or provided conflicting reasons for starting Hay at a higher pay rate. In fact, Brookens states in his affidavit that he has "explained all of this [Hay's special circumstances] to Ms. Hansing on numerous occasions."

In summary, Complainant has failed to provide any evidence that could demonstrate Respondent was more likely motivated by sex in refusing to credit her teaching experience, or that its reasons for failing to do so are unworthy of credence. She therefore has failed to raise a genuine issue of fact on the issue of pretext, and would be unable to prevail at hearing on her intentional discrimination claim.

WHEREFORE, Respondent's motion for summary judgment is granted, and this case is dismissed with prejudice.

Dated this _____ day
of September, 2001, at

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203
303-894-2136

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the

Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of **September, 2001**, I placed true copies of the foregoing **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly
1776 Lincoln Street, Suite 1014
Denver, Colorado 80203

Vonda Hall
CAPE
1145 Bannock Street
Denver, Colorado 80204

and in the interagency mail, to:

Emily V. Pastorius
Assistant Attorney General
Office of the Attorney General
Employment Section
1525 Sherman, 5th Floor
Denver, CO 80203

Andrea Woods