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THE HIGH COST OF DISCRIMINATION: DU PAYS \$2.66 MILLION TO FEMALE LAW PROFESSORS

I. UNIVERSITY OF DENVER SETTLES EEOC PAY DISCRIMINATION LAWSUIT

“We never thought that an institution dedicated to teaching about justice, equality under the law, and professional ethics would discriminate against us in pay simply because we were women,” said Professor Nancy Ehrenreich in a media conference last month.¹ Professor Ehrenreich was one of the seven female full professors at the University of Denver Sturm College of Law (the university or the law school) who joined in the pay discrimination lawsuit brought by the Equal Employment Opportunity Commission (EEOC) against the university.²

On May 17, 2018, almost six years after former Dean Marty Katz announced that the law school was paying male and female professors unequally,³ the university reached an agreement with the female professors, including Professors Lucy Marsh, Nancy Ehrenreich, K.K. Duvivier, Catherine Smith, Celia Taylor, Joyce Sterling, and Kris McDaniel-Miccio. Professor Sheila Hyatt, who also participated in the case, died this year of pancreatic cancer and settled with the university separately before her death.

In Colorado, women earn on average eighty-four cents for every dollar men earn.⁴ In the legal profession, full-time female lawyers earn seventy-seven cents for every dollar full-time male lawyers earn.⁵ The EEOC argued that, in paying all female full professors less than all male full professors, the university violated Title VII of the Civil Rights Act of 1964⁶ and the Equal Pay Act of 1963,⁷ which both prohibit sex-based pay discrimination. The university denied that it violated the law. In a letter to students on May 17, 2018 regarding the settlement, Chancellor Rebecca Chopp said, “[w]hile confident in our legal position, we made this

1. Facebook Live Video: DU Law Female Professor Pay Settlement, THE DENVER CHANNEL (May 17, 2018), <https://www.facebook.com/DenverChannel/videos/10155862597133271/UzpfSTE5MjE4MjI0OjEwMTA0NTQxMjg2MTUzMTMz/>.

2. EEOC et al. v. University of Denver, Case No. 1:16-cv-02471-WYD-MJW.

3. See *infra* Part II.

4. Victoria Carodine, *Colorado Gender Wage Gap Sixth Smallest in Nation, Study Finds*, 5280, April 10, 2018.

5. Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 361 (2013).

6. 42 U.S.C. § 2000e-2 (2006).

7. 88 Pub. L. 38, 77 Stat. 56.

decision because of a strong desire to heal our community and move forward together.”⁸

The university and the EEOC settled the lawsuit with a consent decree that will be in effect for at least five years,⁹ and was approved by District Court Judge Wiley Y. Daniel. The consent decree contains five basic components.

A. Back Pay and Compensatory Damages

First, the university will pay the professors \$2.66 million for partial back pay and compensatory damages. This monetary award will make up for some of the pay the female professors lost over their combined 141 years¹⁰ of teaching at the law school, during which time the EEOC argues they were not paid equally to their male counterparts. Additionally, the \$2.66 million award will compensate the professors for their pain and suffering incurred during this six-year battle with their employer. All the professors who joined in the case are currently employed by the university.

B. Increased Salaries for the Plaintiff Professors

Second, the university will increase the seven female full professors’ salaries.

C. Transparency

Third, the law school will publish salary and compensation information annually to tenure, tenure-track, and contract faculty, and will hire an independent labor economist to conduct an annual pay equity study. The salary and compensation information will be published on a password-protected internal website. The website will not contain names but will contain information such as salaries, dates-of-hire, and demographics.

D. Objective Evaluation Criteria

Fourth, the law school will announce in advance the standards and criteria it will use to evaluate raises each year and will work with an independent consultant to analyze its compensation structure.

E. Strengthened Anti-Discrimination Policies

Fifth, the law school will work with the independent consultant to implement more robust anti-discrimination policies. It will run an anti-

8. Letter from Rebecca Chopp, Chancellor of the University of Denver to All Students (May 17, 2018) (on file with author).

9. The term of the consent decree is six years, but compliance by the university will reduce it to five.

10. See Facebook Live Video: DU Law Female Professor Pay Settlement, *supra* note 1.

discrimination informational campaign for employees and will conduct anti-discrimination training. The independent consultant will provide regular compliance reports to the EEOC and the university. The court will maintain jurisdiction over the case during the term of the consent decree.

F. An Opportunity to Become a Model Law School

Charlotte Sweeney, a private attorney who represented several of the professors who joined the lawsuit, said that this settlement was an opportunity for the law school to set an example for best practices in pay equity.¹¹

"Ideally, if DU uses this in the right way, they could become the model of what legal institutions could be," Ms. Sweeney said.¹² Ms. Sweeney gave the example of Colorado State University, which discovered a pay inequity problem within the university and, instead of covering up the problem, created a pay equity committee to address it.

The university should do even more than what is required by the consent decree to forge the path for other universities and law schools on the road to pay equity.

II. THE HISTORY OF PAY DISCRIMINATION IN THE LAW SCHOOL

Before it can move forward to pave the way for pay equity, the law school must first acknowledge its past behavior that contributed to the inequity on which this case was based.¹³ "We need to make sure we learn from our history and we understand the importance of moving forward, not backwards, moving forward, not sideways," said Judge Daniel in the settlement hearing.¹⁴

This case began six years ago. In the midst of discussions about raises for faculty members in 2012, Professor Ann Scales asked Dean Katz whether female professors earned as much as male professors in the law school. Dean Katz then released a memo to the law school faculty in which he stated that the mean salary for female full professors was \$15,589 less than the mean salary for male full professors, and the median salary for female full professors was \$11,282 less than that for male full professors.¹⁵

11. Telephone Interview with Charlotte Sweeney, Attorney, Sweeney & Bechtold, LLC, in Denver, Colo. (June 19, 2018).

12. *Id.*

13. The university denies the claims made by the EEOC in its complaint with respect to the law school's discriminatory practices.

14. Press Release, Equal Employment Opportunity Commission, University of Denver to Pay \$2.66 Million and Increase Salaries to Settle EEOC Equal Pay Lawsuit (June 1, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-1-18.cfm>.

15. Insight with John Ferrugia: Equal Pay for Equal Play (Rocky Mountain Public Broadcasting Station Broadcast May 18, 2017).

When asked in a faculty meeting why female professors earned less than male professors, Dean Katz speculated that female professors did not perform as well as male professors, without having investigated the professors' performances.¹⁶ After the meeting, Dean Katz did not adjust the professors' salaries to bring them up to par with their male colleagues' salaries.¹⁷ In 2013, Professor Marsh filed a charge against the university with the EEOC.

In response to Professor Marsh's allegations of pay discrimination, Chancellor Chopp said in a public release that "her pay continued to lag behind that of her peers over time as a result of her sub-standard performance in scholarship, teaching and service."¹⁸ However, just a few years earlier, in 2010, the university had awarded Professor Marsh the Robert B. Yegge Excellence in Teaching award at Law Stars, the law school's annual alumni fundraising dinner.¹⁹

In 2016, after two years of investigation and talks between EEOC officials, Professor Marsh, and the university failed, the EEOC filed the case against the university.

III. PAY SECRECY FOSTERS DISCRIMINATION

This case highlighted the impact of secrecy on pay discrimination. Professor Marsh, the lead plaintiff and second-longest tenured professor at the law school, had been working for the university for thirty-seven years when she learned that she was paid less than every male full professor in the law school.²⁰ "Pay discrimination flourishes in the dark," said one of the professors who joined in the lawsuit. "In these pay equity cases we often find that women did not know for twenty or thirty years that they were paid less than men"²¹

Unlike public organizations, private institutions are not required to disclose compensation information publicly or internally. Not only do private employers not have an affirmative burden to disclose pay structures, but also in most states they may prohibit employees from discussing pay through pay secrecy policies.²² Therefore, many would-be plaintiffs in pay discrimination actions do not have access to enough information to determine whether they are paid fairly and whether they have the grounds for a pay discrimination case.

16. Compl. ¶ 51.

17. Compl. ¶ 53.

18. John Ingold, *EEOC Accuses DU Law School of Discriminating Against Women Professors*, THE DENVER POST, Aug. 31, 2015, <https://www.denverpost.com/2015/08/31/eec-accuses-du-law-school-of-discriminating-against-women-professors/>.

19. See Insight with John Ferrugia: Equal Pay for Equal Play, *supra* note 15.

20. Compl. ¶ 19–35.

21. See Facebook Live Video: DU Law Female Professor Pay Settlement, *supra* note 1.

22. Pay Secrecy Fact Sheet, U.S. DEPARTMENT OF LABOR WOMEN'S BUREAU, August 2015, https://www.dol.gov/wb/media/WB_PaySecrecy_FactSheet_508.pdf, (demonstrating that only twelve states have laws prohibiting pay secrecy policies).

United States Supreme Court Justice Ginsburg, who dissented in the landmark unequal pay case *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, noted the difficulty of discovering pay discrimination. “Small initial discrepancies may not be seen as meat for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves”, she said.²³

Further, by the time employees discover that they are victims of pay discrimination, their claims may be barred by the statute of limitations or may be restricted by the lack of discovery rules.²⁴

Although cultural norms that discourage discussions of salary amongst colleagues are still prevalent,²⁵ equal pay advocates must lead the way in fostering a culture of pay transparency in their workplaces and in encouraging employers to enact pay transparency policies. And fortunately for Coloradans, employers are prohibited from enacting policies restricting employees’ ability to discuss pay.²⁶

In this case, the terms of the agreement apply only to the law school—not to the broader university—and do not include staff members. The university should use this opportunity to become a leader in combatting pay secrecy and apply the terms of the consent decree relating to transparency to the entire university.

IV. CONCLUSION

This settlement is not only a victory for the female professors who received monetary and injunctive relief, but it is also a victory for equal pay advocates nationwide. The University of Denver now has the opportunity to lead by example in the fight against pay secrecy and to apply the terms of its consent decree to the entire university, not just the law school.

*Shannon Warren**

23. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting).

24. *See Lyons, supra* note 1, at 377–80.

25. Lyons, *supra* note 1, at 381–82.

26. 2008 Colo. S.B. 122.

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