

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LINDA SCHULTZ,

Plaintiff,

v.

DEPARTMENT OF WORKFORCE  
DEVELOPMENT,

Defendant.

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OPINION AND ORDER

09-cv-274-slc

On October 21, 2010, this court entered an order granting in part and staying in part the Department's motion for summary judgment on plaintiff Linda Schultz's claim brought under the Equal Pay Act, 29 U.S.C. § 206(d). *See* dkt. 104. The stayed portion of the order related to Schultz's unequal pay claim based on the greater salary paid by the Department to her successor, A. Nelse Grundvig. In its initial motion for summary judgment, the Department submitted only limited evidence related to Grundvig because Schultz had not named him as a comparator in her complaint. In the October 21 order, I granted Schultz's motion to amend her complaint to add Grundvig, but also granted the Department the opportunity to file an amended motion for summary judgment with respect to Grundvig. *Id.* at 28-29. The Department accepted the court's offer and filed an amended motion for summary judgment.

As explained below, I am granting the Department's amended motion because it is undisputed that Grundvig has additional job duties that demand more skill, effort and responsibility than the duties assigned to Schultz when she held the position. In addition, Schultz has failed adequately to put into dispute the Department's contention that it paid Grundvig more because he had better qualifications.

I incorporate by reference the facts found in the October 21 order, some of which I repeat below for context. From the parties' proposed findings and the record, I find the following facts to be undisputed and material for the purposes of deciding the instant motion:

## FACTS

Plaintiff Linda Schultz worked for the Department of Workforce Development from 1971 until she resigned in December 2008. From approximately 1997 until her resignation in December 2008, Schultz held the position of Chief of the Labor Market Information section. In that position, Schultz was responsible for the organization and direction of the LMI section. Schultz supervised 11 clinical staff and six professional staff, she worked with the United States Department of Labor regarding certain programs managed by her section, and she reported to the Bureau Director. Schultz was supervised by Richard Denis, who in turn was supervised by Division Administrator Ronald Danowski. At the time she resigned, Schultz was earning roughly \$66,000 a year.

Schultz's section managed the Bureau of Labor Standards' federal-state cooperative programs and other data collection activities. The federal-state cooperative programs under Schultz's supervision were the Quarterly Census of Employment and Wages, Local Area Unemployment Statistics, Mass Layoff Statistics, Current Employment Statistics and Occupational Employment Statistics wage programs. Employees under Schultz's supervision assembled a variety of reports, analyses and surveys to meet the expectations of the federal government with respect to these programs, and to provide data that was required by the Department. Much of the work done by Schultz's section was prescriptive and routine. For example, one of Schultz's responsibilities was to supervise the quarterly census of employment

ages, a function defined by the Bureau of Labor Statistics with stringent guidelines on how to do it. Schultz also supervised a nurse wage survey that was limited in duration. In addition to supervising the data collection activities for the department, Schultz also directed original research, analyzed contracts, produced reports used to monitor agency performance and responded to data requests from the Secretary, Governor and state legislature.

Schultz supervised a unit that provided information to the Projections Unit. The Projections Unit is part of the Office of Economic Advisors, an office located within the Office of the Secretary and not managed or supervised by Schultz. The Projections Unit took the data provided by Schultz's unit, analyzed it and published projections of the likely numbers of openings for a given occupation.

In 1996, Schultz began working part-time as a receptionist at Epic Systems, Inc., a private employer in Dane County, while retaining her job at the Department. Denis and Danowski acceded to an alternate work schedule for Schultz in which she began her workday at the Department at 6:00 a.m. and left around 3:15 p.m. so she could get to her job at Epic. It appears from Schultz's time records that she also took most Friday afternoons off, although most weeks she put in extra hours Monday through Thursday so that she still worked roughly 40 hours a week at the Department. *See* *dk.* 136, *ex.* A. Schultz cannot recall any situations that arose at the Department after she had left for the day for Epic in which her absence had posed a problem.

On December 30, 2008, Schultz resigned from her position. Because of a state hiring freeze at the time, the Department was unable to seek a replacement for Schultz until

approximately October 2009, at which time it posted the position and advertised the opening on national labor market information job posting sites.

As when Schultz held the position, the LMI Section Chief job was classified as a “Research Administrator” position under Wisconsin’s civil service scheme. The annual salary range for the position was the same as it had been when Schultz held the post: \$53,000 to \$87,000, depending on qualifications. However, Denis and Danowski had higher expectations for Schultz’s successor and for the LMI section itself. Denis and Danowski sought to expand the section’s role from being merely a “straight line production shop” which functioned mainly to produce data for the United States Department of Labor, to one that performed more economic analysis and produced more economic data and information that could be used not only by the Department of Labor, but also by the state economists and others working in the Department. Denis and Danowski also expected the new section chief to be able to assist the Bureau and Division in providing responses very quickly to requests for state labor market information from the Secretary’s office, including late in the afternoon, and to testify as needed before the state legislature. In addition, they expected the new section chief to be in the office during normal work hours.

Further, in the interim between Schultz’s departure and her replacement, the responsibilities of the position had changed in at least one concrete way: unlike when Schultz held the position, the LMI Section Chief now was responsible for a new, multi-step process developed by the Department to ensure that funds received from the federal government under the Workforce Investment Act were allocated properly throughout the state.

Nine people applied for the job, seven were interviewed. Among those interviewed was A. Nelse Grundvig, who had the highest examination score of the seven applicants who were required to take the exam.<sup>1</sup> After initial interviews, the Department narrowed the field to Grundvig and two others. Joanna Richard, Deputy Secretary for the Department, and Danowski interviewed the three finalists and determined that Grundvig was the best candidate for the LMI Section Chief position. They were impressed with Grundvig's knowledge and work experience in the labor market information field, his management experience, the working relationship he had with BLS and ETA, his answers during the interview and his knowledge of industry sector partnerships, which was a new approach Wisconsin had recently launched. In addition, Grundvig was highly recommended by his past supervisors and others who had worked with him.

Grundvig has a bachelor's of science degree in psychology and a master's of science degree in sociology, with minors in statistics and economics. He worked as a Research Analyst II with the North Dakota Department of Human Services from 1987-1990 and as a Research Analyst III with Job Service North Dakota from 1990-2005. From 2005 until he left to take over Schultz's position, he was manager of the Labor Market Occupation Research Group with the North Carolina Employment Security Commission, where he supervised 16 professional and technicians. Grundvig is a member of the American Academy of Certified Public Managers and a past member of the Board of Directors for the North Carolina Certified Public Managers. He has authored or co-authored numerous publications and applications in the labor market information and other fields, and in 2001 received a national award for the advancement of art

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<sup>1</sup> Two of the applicants did not have to take the exam because they were current state employees in Career Executive positions.

and science of Labor Market Information. He was one of the developers of a software program called ShOW-IT that is used in Wisconsin and in other states across the nation, and has experience in conducting and preparing short- and long-term industrial and occupational labor market projections. Over his 20-plus year career, Grundvig has presented many work-related addresses, including testimony before a state legislature, and he has taught other LMI professionals how to make such presentations. For the past eight years, Grundvig has served as a trainer and board member for the Labor Market Information Training Institute and has trained LMI professionals across the country on the “ins and outs” of Labor Market Information as reported, gathered and used in accordance with the Bureau of Labor Statistics and Employment and Training Administration.

Danowski authorized an initial starting salary offer to be made at the middle to higher end of the salary range. The Department, through Denis, offered Grundvig an annual salary of \$36 per hour, or roughly \$74,000 annually. (Because of mandatory furloughs ordered by the Governor of Wisconsin, this salary offer actually amounted to \$72,576, at least through the end of the 2011 fiscal year.) At the time it made the offer, the Department did not know what Grundvig was earning at his job in North Dakota. Grundvig responded to the Department’s initial salary offer by stating that he was interested in working for the State of Wisconsin, but did not want to take a pay cut. He told Denis that his current salary was \$78,000. Denis told Grundvig that he was not authorized to negotiate salary but would talk to his supervisors and get back to Grundvig. Denis relayed Grundvig’s response to Danowski. Because Danowski did not want to lose Grundvig, he asked and was granted permission from the secretary’s office to raise the offer to \$37.50 an hour. Grundvig accepted.

Grundvig began working as LMI Section Chief in June 2010. Grundvig and two members of his staff provide monthly briefings to the Deputy Secretary, the Director of the Office of Economic Advisors, the Department's Public Information Officer and other high-ranking members of the Department about actual and projected unemployment rates within the state. In September 2010, when Department Secretary Roberta Gassman was preparing a presentation for the U.S.-E.U. Roundtable on New Skills for New Jobs sponsored by the United States Department of Labor, she sought Grundvig's input on occupational projections and their use in setting strategic workforce policies. Grundvig is authorized to use a personal digital assistant for instant and after-hours communication. He often provides same-day responses to after-hours inquiries made by the Bureau, the Division and the Office of the Secretary.

#### OPINION

As noted in the previous order on summary judgment, to prove a violation of the Equal Pay Act, Schultz first must establish a prima facie case of unequal pay by showing that: 1) higher wages were paid to a male employee; 2) she and the male employee performed equal work requiring equal skill, effort, and responsibility; and 3) the work was performed under similar working conditions. *Cullen v. Indiana Univ. Board of Trustees*, 338 F.3d 693, 698 (7th Cir. 2003). If Schultz meets this burden, then the burden shifts to the Department to show that the pay disparity was justified in one of four ways: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) any factor other than sex. *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 793-94 (7<sup>th</sup> Cir. 2007); *Fallon v. Illinois*, 882

F.2d 1206, 1211 (7th Cir. 1989). The EPA does not require proof of discriminatory intent. *Cullen*, 338 F.3d at 698.

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." *Sides v. City of Champaign*, 496 F.3d 820, 826 (7<sup>th</sup> Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7<sup>th</sup> Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7<sup>th</sup> Cir. 2007). Even so, this tilt toward the nonmoving party does not extend to drawing inferences supported only by speculation or conjecture. The nonmovant must do more than show "some metaphysical doubt as to the material facts;" she must provide specific facts showing that there is a genuine issue for trial. *Singer v. Raemisch*, 593 F.3d 529, 533 (7<sup>th</sup> Cir. 2010).

## **I. Prima Facie Case**

The parties agree that Grundvig is a proper comparator, that he was paid higher wages and that he and Schultz worked under similar conditions. They dispute, however, whether the facts are sufficient to permit a reasonable inference that Schultz performed work of equal skill, effort and responsibility as the work now being performed by Grundvig.

To meet her prima facie burden, Schultz need not show that her job and Grundvig's are identical in all respects; only she need show that the jobs are substantially equal. In determining



whether two jobs are equal, the crucial inquiry is “whether the jobs to be compared have a ‘common core’ of tasks, i.e., whether a significant portion of the two jobs is identical.” *Cullen*, 338 F.3d at 698 (7th Cir. 2003) (quoting *Fallon v. Illinois*, 882 F.2d 1206, 1209 (7th Cir. 1989) (citations and quotation marks omitted). If the plaintiff establishes a common core, then the court must ask whether any additional tasks make the jobs “substantially different.” *Id.* (citation and quotation marks omitted).

Schultz has met her burden of establishing that the jobs have a common core. After all, Grundvig was hired to perform the same job and to manage the same section that Schultz did. Like Schultz had been, Grundvig is responsible for overseeing the LMI Section, including management of the Bureau of Labor Standards’ federal-state cooperative programs and other data collection activities. Like Schultz, Grundvig supervises the various employees in the section, ensures that the necessary reports are produced on time and responds to data requests from the Secretary, the Governor and the state legislature. Danowski testified that some of the duties performed by Schultz and Grundvig overlap, and Grundvig agreed that, at least upon reviewing their respective position descriptions, there was a significant overlap in duties.

Notwithstanding this common core, the record clearly shows that Grundvig holds significant additional responsibilities beyond those held by Schultz. Grundvig is responsible for the Allocation Developer duties, which Schultz concedes she did not perform when she held the LMI Section Chief position. Grundvig is expected to perform more in-depth analysis and economic modeling of labor market information and to explain that data to others in the Department, as opposed to the mostly prescriptive and routine data gathering that Schultz performed for the Department of Labor. Grundvig provides monthly briefings to high-ranking

members of the Department about state unemployment rates and is expected to testify before the state legislature as needed; it is undisputed that Schultz performed neither of these tasks. Further, unlike Schultz, who was permitted to leave work at 3:15 every day, Grundvig is expected to work normal full-day business hours and he is expected to be available to respond to inquiries from the Secretary and others in the Department at all times of the workday, including the late afternoons. There are other differences, but these are enough to establish that the Section Chief position as performed by Grundvig requires more skill, effort and responsibility than the Section Chief position as it had been performed by Schultz.

## **II. Affirmative Defenses**

Assuming, *arguendo*, that Schultz could meet her prima facie burden, then the burden would shift to the Department to prove one of four statutory affirmative defenses. See 29 U.S.C. § 206(d)(1); *Dey v. Colt Const. & Development Co.*, 28 F.3d 1446, 1462 (7<sup>th</sup> Cir. 1994) (noting defendant bears burden of proof on affirmative defense). The Department asserts that the pay disparity is due to “a differential based on any other factor other than sex” pursuant to 29 U.S.C. § 206(d)(1)(iv), the catch-all provision that “embraces an almost limitless number of factors, so long as they do not involve sex.” *Fallon*, 882 F.3d at 1211. *See also Varner v. Illinois State University*, 226 F.3d 927, 934 (7<sup>th</sup> Cir. 2000) (“[B]y providing a broad exemption from liability under the Equal Pay Act for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women.”) (citation omitted).

The Department asserts that the pay disparity was based on the following gender-neutral factors: 1) Grundvig's prior salary; 2) market forces; and 3) Grundvig's education and experience. I explained in the previous order why I was not convinced that the Department could rely on the so-called "prior salary defense" to justify the wage disparity here, *see* Op. and Ord., dkt. 104, at 25-28, and I adhere to that view in this opinion. As for market forces, the Department points out that Danowski generally understood Wisconsin's salaries to be lower than those in other states or the private sector, and asserts that this understanding was enough to justify the pay disparity. As Schultz points out, however, the Department has provided no market studies or other information to show that Danowski's information was correct or that Danowski or anyone else involved in hiring him specifically looked at what Grundvig could make in the private sector before it formulated its initial offer. *Cf. Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697 (7<sup>th</sup> Cir. 2006) (market forces was legitimate affirmative defense where CEO enlisted help of search firm and consulted trade journals in determining appropriate market rate for new position). Although I agree with the Department that nothing in the case law suggests that an employer *must* come adduce such specific evidence in order to rely on market forces as an affirmative defense, I am persuaded that *without* such evidence, a defendant cannot obtain summary judgment on this basis. This would be an issue for a jury to sort out at trial.

But the Department *has* demonstrated that there are no facts genuinely calling into question the Department's assertion that Grundvig's higher salary was due to Grundvig's education, analytical skills and experience, which Denis and Danowski believed were perfectly suited to their vision for the newly-expanded LMI Section. Under the EPA, differences in education and experience may be considered factors other than sex. *Merillat*, 470 F.3d at 697;

*Cullen*, 338 F.3d at 702; *Dey*, 28 F.3d at 1462. Grundvig holds a B.S. in psychology and an M.S. in sociology, with minors in statistics and economics; Schultz took some college courses but never obtained a degree. Grundvig worked in the labor market information field in two different states, was a certified public manager, had trained labor market information professionals across the country, authored numerous publications, developed a software program and often has presented addresses concerning employment and the labor market, including testimony before the state legislature. Schultz had spent her entire career in Wisconsin, had not authored any publications, was not skilled in economic modeling, made few, if any, public addresses, and was not a certified public manager. Schultz has not adduced any facts calling into dispute the legitimacy of the Department's contention that Grundvig's skills and experience in the field of labor market information and analysis surpassed her own.

It is also undisputed that Danowski and Denis had a goal of broadening the scope of the LMI Section's work beyond mere data collection and that they sought a new section chief who could implement their goal. Danowski testified that Grundvig's analytical and economic modeling skills, training experience, job experience in other states and his ability to explain labor market information to outsiders was a perfect fit for the Department's expanded vision for the LMI Section and was a factor in the Department's initial salary offer. This plainly is a gender-neutral explanation justifying the wage disparity.

ORDER

IT IS ORDERED that the order staying the portion of the summary judgment motion related to comparator Nelse Grundvig is VACATED. Defendant's motion for summary judgment is GRANTED in its entirety. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 28<sup>th</sup> day of February, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge