[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12560
Non-Argument Calendar

D.C. Docket No. 4:18-cv-00409-RH-CAS

JENNIFER SMITH,

Plaintiff-Appellant,

versus

FLORIDA A & M UNIVERSITY BOARD OF TRUSTEES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(October 8, 2020)

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Jennifer Smith, a law professor, appeals the district court's grant of summary judgment in favor of her employer, the Board of Trustees at the Florida Agricultural and Mechanical University ("FAMU"), on her claims of gender discrimination in pay and retaliation under the Equal Pay Act,[1] Title VII,[2] and the Florida Civil Rights Act ("FCRA").[3] This lawsuit is Smith's second one against FAMU for gender discrimination in pay. She brought the first one in 2014 based on her original salary. Smith's claims here, however, center on salary adjustments made by FAMU which applied generally to law professors and occurred *after* the verdict in Smith's first (and unsuccessful) lawsuit. On appeal, Smith asserts that the district court erred by applying collateral estoppel and granting summary judgment on each of her claims. After a full review of the record, we affirm.

I. Background

A. Smith's First Lawsuit

Smith was hired to work in FAMU's law school in 2004. In 2014, she filed a lawsuit against FAMU alleging that the school discriminated against female law professors by paying them less than comparable male law professors. At that time, Smith was an associate law professor with tenure. On July 22, 2015, after a trial, a

[1] 29 U.S.C. § 206(d)(1).

[2] 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a).

[3] Fla. Stat. §§ 760.01(b) and 760.10.

jury found that, although Smith was paid less than several comparator male law professors, sex was not a motivating factor in the determination of Smith's original salary when she began in 2004 ("*Smith I*"). After judgment was entered on the verdict, Smith filed two motions for a new trial and a motion to set aside the judgments.

In August 2015, about two weeks after judgment was entered on the verdict, and unbeknownst to Smith at the time, FAMU finalized an internal pay-inequity study which concluded that, on average, female law professors were paid less than male law professors at FAMU Law. Not long after that, in early 2016, FAMU's law school applied a one-time "salary adjustment" to about one third of the law school faculty. The one-time salary adjustment increased Smith's salary by roughly $10,000. FAMU also made four other changes to faculty salaries that were applied generally. Learning of the pay-inequity study, Smith then filed a motion to set aside the judgment, arguing that the school's one-time salary adjustment demonstrated that FAMU had thereby "been caught" committing "fraud on the court regarding [Smith's] salary inequity case." The district court denied Smith's motion to set aside the judgment. Smith appealed the jury verdict in FAMU's favor and the denials of her post-verdict motions to this Court. *Smith v. Fla. Agric. & Mech. Univ. Bd. of Trs.*, 687 F. App'x. 888 (11th Cir. 2017) (per

curiam). After considering both the 2015 pay-inequity study and FAMU's 2016 one-time salary adjustment, we affirmed, reasoning that

> FAMU's pay-inequity study was based entirely on publicly available data that Professor Smith drew upon in her presentation to the jury. Indeed, she persuaded the jury that she was paid less than comparable male professors. Nor are the remedial measures taken to correct the pay difference a confession that they were the product of gender bias.

Smith, 687 F. App'x. at 889.

B. FAMU's Salary Changes

Because the changes to FAMU faculty salaries since *Smith I* mentioned above are relevant to this appeal, we pause to explain them in greater detail. The changes fell into one of five categories. First, as referenced above, the FAMU law school made a one-time salary adjustment in 2016 which brought all tenured full professors up to at least $140,000 and all tenured associate professors to at least $120,000. But the adjustment was not widespread: it affected only a dozen of FAMU's roughly 36 faculty members. Further, the adjustment applied with equal force to both males and females. According to one of the deans in charge of making the salary adjustment, changes were based exclusively on "rank, tenure status," and "length of time"—not "qualitative factors" such as "reputation, . . . teaching effectiveness, or any other type of subjective criteria that might go into hiring somebody." Second, FAMU gave a university-wide 1% cost-of-living raise to all professors. Third, all FAMU law school professors who did not receive a

promotion or other pay increase between January 1 and June 16, 2016 received a 1% lump-sum bonus. Fourth, associate professors who were promoted to full professor before 2017 received a standard salary increase of 9 percent.[4] Fifth, routine changes to professor salaries reflected the addition or removal of administrative duties or a shift between a 9-month and 12-month schedule.

Pursuant to FAMU's salary changes, Smith received a one-time salary adjustment from $115,278.63 to $125,000, putting her salary above the $120,000 mark for associate professors; a 1% cost-of-living raise; and, upon her subsequent promotion to full professor, a 9% pay increase.[5] She did not, however, receive a 1% lump sum bonus, as she had received a pay increase during the one-time adjustment. And she was not affected by routine administrative or shift changes. Smith's annual salary by the end of 2016 was $136,250.

Regarding the one-time salary adjustment in 2016, two more things are noteworthy. First, there was an earlier draft of this proposal. On August 22, 2016, before the salary adjustments were finalized, the interim dean emailed FAMU officials with a draft of proposed salary adjustments in which Smith's salary was recommended to be increased to $138,000. This figure was very close to the actual

[4] Under a later union contract, the full-professor salary-promotion increase was set at 15 percent for those promoted in 2017 or after.

[5] Smith was promoted to full professor effective August 8, 2016.

salary of the highest paid male associate professor, Jeffrey Brown, who at that time was paid $138,330 and was not subject to the one-time salary adjustment. An associate dean of the law school who was closely involved in crafting that recommendation testified in his deposition that he (and other law school administrators with whom he had collaborated) had at first proposed the $138,000 figure in part because he was attempting at that time to bring all tenured associate professor salaries "a little closer" to Brown's salary. FAMU ultimately decided against raising all tenured associate professor salaries closer to Brown and instead chose to consider his salary as an "outlier." Accordingly, the 2016 one-time adjustment to Smith's salary as a tenured associate professor was instead set at $125,000, which was $5,000 greater than all other tenured associate professors other than Brown. The associate dean testified that Smith received $5,000 more than the other tenured associate professors in part because she had been tenured for a greater length of time, and because of "other factors."

The second noteworthy aspect of the 2016 one-time salary adjustment is FAMU's stated purpose in making it. One of the deans tasked with crafting the adjustment testified that correcting "gender disparity" simply "wasn't the project." In other words, he explained, "[he] didn't begin from the proposition that there was gender disparity." Rather, the adjustment was intended to address "[c]ompensation inequities," the "most obvious" of which was "salary inversion," that is, "when

faculty of lower rank and tenure status earn more than faculty with higher rank and tenure status." Salary inversion at the law school "resulted from the State's inability to provide regular cost of living raises to present or current faculty, combined with new faculty hiring under the economic conditions prevailing on the date of new hiring." And although "[t]here are high end 'outliers' in each category" of rank and tenure status, the one-time salary adjustment "does not attempt to make the level of compensation paid to outliers the norm." Along these lines, the one-time salary adjustment "does not adopt a prohibition against inversion," but rather, "[i]t merely implements a restart" for those salaries that had been affected by inversion in the past. That is to say, "[s]alary inversion may reoccur."

C. Smith's 2016 EOP Complaint

In December 2016, Smith filed a complaint with FAMU's Office of Equal Opportunity Programs ("EOP"), alleging sex-based discrimination and retaliation in violation of FAMU regulations because the law school contemplated but declined to increase her salary to $138,000 during the 2016 one-time salary adjustment. She specifically alleged that FAMU had made the 2016 one-time adjustment "because [FAMU] found pay inequality based upon gender in its August 2015 [pay-inequity] study." She further claimed that she was suffering

from sex discrimination based upon a salary differential between herself and Brown.

The EOP issued a report the ("2017 EOP Report") denying Smith's claims. Therein, the EOP refuted Smith's suggestion that the 2015 pay-inequity study concluded that all pay inequities were based upon gender, stating that "gender was not the sole or primary factor for any disparities in the August 2015 [pay-inequity] study." The EOP further found that there is no evidence that any then-existing disparity between Brown's and Smith's salaries was "due to a discriminatory factor." The EOP reached this conclusion in part because

> Brown was offered a higher salary upon hire in 2009 than complainant was earning at the time. Brown had earned tenure at Northern Illinois University College of Law at the Associate Professor rank. He also had taught for 13 years in the United States, Bulgaria, Macedonia and the Russian Federation prior to coming to FAMU.

In other words, Brown "was paid upon hire according to his outstanding credentials at the time." By comparison, Smith "had limited teaching experience. She had served as a Faculty Lecturer for two weeks at Federal Publications and as a Faculty Instructor for a semester at the Center for Career Education (The George Washington University)." Thus, Smith's allegations were "unsubstantiated."

D. Smith's Second Lawsuit

In July 2018, Smith filed the instant action against FAMU in Florida state court, and FAMU removed the case to federal court. She claimed that FAMU

violated the Equal Pay Act because her current salary was lower than that of other full professor comparators who are male. Smith also claimed that FAMU violated Title VII and the FCRA because "actions" taken by FAMU with regard to pay discriminated against her on the basis of sex. Lastly, she claimed that FAMU retaliated against her "for her 2014 lawsuit" in violation of the Equal Pay Act, Title VII, and the FCRA because she "was negatively treated with regard to the salary increases." The parties eventually filed cross-motions for summary judgment.

The district court granted summary judgment to FAMU. The court first concluded that the *Smith I* judgment, which was entered on July 22, 2015, collaterally estops Smith from asserting that her pay as of that date resulted from sex discrimination. The court then denied Smith's Equal Pay Act, Title VII, and FCRA discrimination claims. In doing so, the court concluded that any current disparity between Smith and her alleged comparators predated the *Smith I* verdict or is explained by completely objective, nondiscriminatory factors. The district court also concluded that FAMU's decision to not raise Smith's salary to match "outliers" such as Brown was consistent with the way it treated other professors of like tenure and rank. Lastly, the district court denied Smith's retaliation claims because there was no affirmative evidence of retaliation in FAMU's post-*Smith I* changes to Smith's pay, but rather, Smith's one-time adjustment to $125,000 could

even be said to be "more generous" than the salary adjustments of some others. After being denied a motion to reconsider, Smith timely appealed.

II. Standards of Review

We review a district court's grant of a motion for summary judgment *de novo*. *Smith v. Haynes P.C.*, 940 F.3d 635, 642 (11th Cir. 2019). We construe the evidence in the light most favorable to the non-moving party, and we will affirm if we find no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1263–64 (11th Cir. 2010).

We review the district court's decision to apply collateral estoppel *de novo* and its findings of fact supporting its determination on issue preclusion for clear error. *Quinn v. Monroe Cty.*, 330 F.3d 1320, 1328 (11th Cir. 2003). We may conclude that a district court's factual finding is clearly erroneous when we possess the definite and firm conviction that a mistake has been committed. *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275 (11th Cir. 2010).

III. Discussion

A. Equal Pay Act Discrimination Claim

Smith contends that the district court erred by granting summary judgment to FAMU on her Equal Pay Act claim because the pay disparity in *Smith I* was not

carried forward, but rather, FAMU "reset" its salary formula through the 2016 one-time salary adjustment. And under FAMU's "new" salary formula, she avers, she should be but is not being paid the same as Professor Brown. We disagree. Even though FAMU's 2016 one-time adjustment "reset" *some* of its faculty member's salaries, the current pay disparity between Smith and Brown is clearly attributable to the preexisting and benign disparity between them from *Smith I*.

An employee establishes a *prima facie* case under the Equal Pay Act by showing that the employer paid differing wages to employees of opposite sexes for "equal work on jobs . . . which require[] equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1); *see Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1077–78 (11th Cir. 2003). Once the employee has established a *prima facie* case, the employer may avoid liability by proving by a preponderance of the evidence that the payments were 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.

29 U.S.C. § 206(d)(1) (emphasis in original). "The burden to prove these affirmative defenses is heavy and must demonstrate that 'the factor of sex

provided *no basis* for the wage differential.'" *Steger*, 318 F.3d at 1078 (quoting *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.1995)). The employee may then rebut the employer's defense by putting forth evidence demonstrating that the employer's alternative bases for the pay disparity were pretextual or offered as a post-event justification for a sex-based differential. *Id.* A district court's factual finding that an employer has demonstrated that sex provided no basis for the pay disparity is reviewed for clear error. *Id.*

Smith cannot establish a *prima facie* case of pay discrimination under the Equal Pay Act. Because Smith is collaterally estopped from asserting that the pay disparity between herself and Brown at the time of the *Smith I* verdict was discriminatory on the basis of sex,[6] she may establish a *prima facie* case of discrimination in the instant case only upon showing that the current disparity was not simply carried forward. She cannot meet this burden. FAMU has made no changes to Brown's or Smith's salary that would suggest that the current disparity

[6] Collateral estoppel, often referred to as issue preclusion, "precludes the relitigation of an issue that has already been litigated and resolved in a prior proceeding." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998) (emphasis added). This type of preclusion differs from that imposed by the doctrine of *res judicata*, which bars the relitigation of entire claims. *Id.* at 1359. Here, the district court did not find, as Smith asserts it did, that her entire "gender pay claim was collaterally barred." Rather, the district court appropriately applied collateral estoppel to preclude her from challenging a specific factual issue decided by the jury in her 2014 trial: whether FAMU's disparate payment of salaries that occurred before the trial was motivated by gender discrimination. The district court nevertheless made clear that Smith was permitted to litigate the issue of whether any new action taken by FAMU after the resolution of *Smith I* was discriminatory.

between them is based on sex in any way. The 2016 one-time salary adjustment affected only a third of FAMU's faculty members—but not Brown's. And no evidence supports the notion that sex in any way contributed to that adjustment. Rather, the adjustment applied evenhandedly to both men *and* women. And the unequivocal testimony from those who engineered the one-time adjustment was that sex was never considered as a factor. Accordingly, we hold that Smith's Equal Pay Act claim fails.[7]

B. Title VII & FCRA Discrimination Claims

Smith also cannot establish a *prima facie* case of sex-based discrimination under Title VII and the FCRA. On appeal, Smith contends that FAMU discriminated against her on the basis of sex by neglecting to apply its "new salary formula" to her during the 2016 one-time salary adjustment in order to bring her salary to $138,000.[8] We disagree.

[7] Smith relies heavily upon *Board of Regents of University of Nebraska v. Dawes*, 522 F.2d 380 (8th Cir. 1975), to challenge the 2016 salary adjustment. *Dawes* is inapposite because there the university explicitly set out to overhaul its salary system by making adjustments based on sex. 522 F.2d at 381. Here, the evidence clearly shows that sex played no part in FAMU's 2016 one-time salary adjustment, or in any other change to faculty salaries since the verdict in *Smith I*.

[8] Smith also contends that the 2017 EOP Report's statement that "gender was not the sole or primary factor for any disparities in the August 2015 study" is dispositive proof that FAMU discriminated against her on the basis of sex in violation of Title VII and the FCRA by paying her less than comparator Brown. This argument fails to appreciate the force of collateral estoppel. The 2015 pay-inequity study examined the exact same data the jury used to conclude that Smith's pay disparity was not based on gender. *See Smith*, 687 F. App'x at 889 ("FAMU's [pay-inequity] study was based entirely on publicly available data that Professor Smith drew upon in her presentation to the jury. Indeed, she persuaded the jury that she was paid less than comparable male professors."). Thus, regardless of how the EOP office characterized the 2015 pay-inequity

Title VII prohibits employers from discriminating "against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The FCRA makes it unlawful for employers to discriminate on the basis of sex. Fla. Stat. § 760.10(1)(a).[9] We review discrimination claims under Title VII and the FCRA that involve circumstantial evidence under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Johnson v. Miami-Dade Cty.*, 948 F.3d 1318, 1325 (11th Cir. 2020) (citing *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387, 1389–90 (11th Cir. 1998)). To establish a *prima facie* case under that framework, a plaintiff must show that she was a qualified member of a protected class and subjected to an "adverse employment action" in contrast to similarly situated employees outside of the protected class. *Butler v. Ala. Dept. of Transp.*, 536 F.3d 1209, 1215 (11th Cir. 2008). To demonstrate an adverse employment action, "an employee must show a serious and material change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232 (11th Cir.2001). Importantly, "the employee's subjective view of the significance and adversity of the employer's

---

study, that study simply cannot overcome the jury's finding in *Smith I* that any pay differential between Brown and Smith at that time was not based on sex.

[9] Florida's unlawful employment practices statute makes it unlawful for an employer to "discriminate against any individual with respect to compensation . . . because of such individual's . . . sex." Fla. Stat. § 760.10(1)(a).

action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Id.*

Here, Smith has not met her burden to show that FAMU committed any materially adverse employment action against her since *Smith I*, and therefore she cannot establish a *prima facie* case of sex-based discrimination. Smith's bald allegation that FAMU did not apply its "new salary formula" to her during the 2016 one-time salary adjustment ignores the evidence. Smith received a nearly $10,000 increase—which resulted in a final salary that was $5,000 greater than any other associate professor who had similarly been affected by the adjustment. Smith's assertion that her salary should have been raised to $138,000 to match Brown falls flat because Brown was not affected by the one-time adjustment. No other associate professor—male or female—received a salary increase to match Brown's. And because the *Smith I* jury determined that the disparity between Brown and Smith's salaries at that time was not based on sex, FAMU was under no obligation to raise her salary to match his. Thus, as compared to every other associate professor who was affected by the one-time adjustment, Smith was not treated adversely. We therefore conclude that Smith's Title VII and FCRA claims necessarily fail.

C. Retaliation Claims

Smith maintains that the district court erred by finding that FAMU did not retaliate against her for litigating her case in *Smith I*. She contends that FAMU retaliated against her by neglecting to adjust her salary to the $138,000 initially considered by FAMU before it finalized the amounts for the 2016 one-time salary adjustment because such amount would have more closely approximated Brown's $138,330 salary. As with her discrimination claims, we disagree that this decision by FAMU constitutes a materially adverse action.

The Equal Pay Act provides that it is unlawful to "discriminate against any employee because such employee has filed any complaint." 29 U.S.C. § 215(a)(3). Likewise, Title VII and the FCRA also prohibit employers from retaliating against an employee because she has "opposed any . . . unlawful employment practice." 42 U.S.C. § 2000e-3(a); Fla. Stat. § 760.10(7). Smith may establish her *prima facie* case of retaliation under all three statutes by proving (1) that she engaged in statutorily protected activity, (2) that she suffered a materially adverse action, and (3) that the adverse action was causally related to the protected activity. *See Honrsby-Culpepper v. Ware*, 906 F.3d 1302, 1314 n.9 (11th Cir. 2018) (Equal Pay Act); *Jefferson v. Sewon America, Inc.*, 891 F.3d 911, 924 (11th Cir. 2018) (Title VII); *Alvarez*, 610 F.3d at 1268, 1271 (FCRA). "[I]n the context of a Title VII retaliation claim, a materially adverse action 'means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Note that this is a "more liberal view of what constitutes an adverse employment action" than in the discrimination context. *Id.*; *see also id.* at n.14. We have recognized that "employer actions that 'deprived [the employee] of compensation which he otherwise would have earned clearly constitute adverse employment actions for purposes of Title VII [retaliation].'" *Shannon v. Bellsouth Telecomm., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) (alteration in original) (quoting *Bass v. Bd. of Cty. Comm'rs*, 256 F.3d 1095, 1118 (11th Cir. 2001)). Such deprivations can include denials of pay raises to which an employee is entitled. *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000), *overruled on other grounds by White*, 548 U.S. 53.

Here, it is undisputed that Smith's involvement in her 2016 case constituted "protected activity." But like her discrimination claims, Smith cannot show that she suffered an adverse action as a result of that protected activity. The record is void of any evidence that she was entitled to receive the same salary as Brown after the jury in *Smith I* concluded that the salary discrepancy between them was not motivated by gender discrimination. Smith makes much of one of the proposed drafts of the 2016 one-time adjustment which would have put her at the $138,000 mark. But, as the district court noted at the hearing on the motion for

summary judgment, this figure was merely a "suggestion" in the midst of a lengthy process and was ultimately discarded. FAMU cycled through over ten drafts of proposed changes to faculty salaries. To say that any one of those drafts entitled Smith to a specific salary would be absurd. *See Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) (stating plainly that the federal courts "do not sit as a super-personnel department that re-examines an entity's business decisions." (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991))). Further, there is no evidence that FAMU discarded the proposal for $138,000 for an improper reason. Smith therefore fails to show she suffered an adverse action and thus cannot make a *prima facie* case of retaliation.

IV. Conclusion

Accordingly, we **AFFIRM** the district court's grant of summary judgment. We also **DENY** Smith's motion to supplement the record.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 08, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-12560-AA
Case Style: Jennifer Smith v. Florida A & M University
District Court Docket No: 4:18-cv-00409-RH-CAS

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against the appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JENNIFER SMITH,

Plaintiff,

v. CASE NO. 4:18cv409-RH-CAS

FLORIDA AGRICULTURAL & MECHANICAL UNIVERSITY, BOARD OF TRUSTEES,

Defendant.

_____/

ORDER GRANTING SUMMARY JUDGMENT

The plaintiff Jennifer Smith is a law professor at the Florida A&M University College of Law. She filed this action against the FAMU Board of Trustees ("FAMU") asserting she suffered discrimination in pay based on her gender and in retaliation for earlier complaints of gender discrimination. She asserted claims under the Equal Pay Act, the Civil Rights Act of 1964 as amended, and the Florida Civil Rights Act. FAMU moved for summary judgment. Ms. Smith moved for partial summary judgment on liability. The motions were fully briefed

and orally argued. A ruling in FAMU's favor was announced on the record at the conclusion of the argument. This order briefly summarizes the ruling.

I

On a summary-judgment motion, disputes in the evidence must be resolved, and all reasonable inferences from the evidence must be drawn, in favor of the nonmoving party. The moving party must show that, when the facts are so viewed, the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A summary-judgment motion cannot be used to resolve in the moving party's favor a "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

II

This is Ms. Smith's second action against FAMU asserting gender discrimination in her pay as a law professor. In the first action, after a full and fair trial, the jury returned a verdict for FAMU.

The jury found that gender was not a motivating factor in the determination of Ms. Smith's original salary at the College of Law in 2004. The jury found that Ms. Smith was paid less than at least one male professor for work requiring substantially equal skill, effort, and responsibility and performed under similar working conditions. But the jury found that the difference in compensation was caused by factors other than gender.

The jury returned its verdict on July 22, 2015. Judgment was entered on the verdict. The judgment was affirmed on appeal. That judgment is binding on Ms. Smith in this action. The judgment collaterally estops Ms. Smith from asserting that her pay as of July 22, 2015 resulted from gender discrimination. *See, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998).

The Equal Pay Act addresses work requiring substantially equal skill, effort, and responsibility and performed under similar working conditions. *See* 29 U.S.C. § 206(d)(1); *Corning Glass Works v. Brennan*, 417 U.S. 188, 203-04 (1974); *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992). This order refers to employees performing such work as similarly situated. An employer cannot pay an employee of one gender less than a similarly situated employee of the opposite gender, subject to four exceptions listed in the statute. The only exception at issue here is for a pay disparity based on factors other than gender.

Because it is settled, for purposes of this action, that differences in pay between Ms. Smith and similarly situated male professors as of July 22, 2015 were based on factors other than gender, Ms. Smith could prevail on her Equal Pay Act claim only on a finding that she has been paid less than at least one similarly

situated male professor *and that the pay disparity was not simply carried forward from July 22, 2015*.

Title VII prohibits an employer from considering gender as a motivating factor in setting pay. *See* 42 U.S.C. § 2000e-2(a)(1). Because of the prior verdict, Ms. Smith can prevail on her Title VII claim only by showing that gender was a motivating factor in a pay decision *made or implemented after July 22, 2015*.

An employer cannot retaliate against an employee for asserting a claim under either the Equal Pay Act or Title VII. Ms. Smith can prevail on a retaliation claim by showing that her earlier claim was a motivating factor in a decision adversely affecting her pay, including in a decision not to provide a raise or to provide a raise of a lower amount than would otherwise have been provided.

The analysis under the Florida Civil Rights Act follows the federal analysis.

III

FAMU has made only limited changes in law professors' pay since July 22, 2015. In these changes, no woman has been treated worse than any man. And Ms. Smith has not been treated worse than any similarly situated person, male or female. The evidence confirming these facts is clear, undisputed, and irrefutable.

The only changes in pay for law professors since July 22, 2015 can be divided into five categories.

A

The College of Law made a one-time salary adjustment in 2016. The adjustment conformed to the following precepts.

First, a salary could only be increased, not decreased. This was the rule for men and women alike.

Second, every associate professor whose salary was under $120,000 was raised to at least that amount. This was done for men and women alike. This was an effort to deal with what FAMU called salary inversion—offers to new professors going up faster than pay of onboard professors. The only associate professor who got a raise to a higher salary was Ms. Smith. Her salary was increased to $125,000. She was the longest-serving associate professor at that time. Giving the longest-serving associate professor a higher raise than others was not improper—and even more clearly was not an instance of gender discrimination or retaliation against the professor who got the higher raise.

Third, every full professor whose salary was under $140,000 was raised to at least that amount. This was done for men and women alike. This again was an effort to deal with salary inversion. The only full professors who got a raise to a higher salary were Rhonda Reaves and Patricia Broussard—both women. Their salaries were raised to $148,308 and $145,000. This plainly was not an instance of

gender discrimination against the women who got the higher raises. And this did not affect Ms. Smith.

In sum, the 2016 adjustment decreased no professor's salary and increased all professors at the same level—associate or full—to the same amount, except that three women, including Ms. Smith, received a higher raise. The adjustment was not an instance of gender discrimination or retaliation against Ms. Smith.

B

All FAMU employees in the College of Law and elsewhere, men and women alike, received a 1% cost-of-living raise. Ms. Smith received the same 1% raise as everyone else. This was not an instance of gender discrimination or retaliation against Ms. Smith.

C

All FAMU professors in the College of Law and elsewhere received a 1% lump-sum bonus unless they received a promotion or other pay increase during a specified period—between January 1 and June 16, 2016. This was true for men and women alike. Ms. Smith did not receive the bonus because she received a pay increase—to $125,000 as set out in subsection A above—during the specified period. Gender and retaliation had nothing to do with it.

D

Professors who were promoted—as from associate professor to full professor—received standard percentage increases of 9% or, under a later union contract, 15%. When Ms. Smith was promoted, the standard percentage was 9%. She received the 9% raise. Professors who were promoted later, after the union contract changed, received 15%. Gender and retaliation had nothing to do with it.

E

Finally, there were routine changes reflecting the addition or deletion of administrative duties or a professor's shift between a 9-month schedule and a 12-month schedule. Gender and retaliation had nothing to do with it. And these changes did not affect Ms. Smith.

IV

The bottom line is this. This record—like the record in the prior case—presents a genuine factual dispute about whether gender was a factor in Ms. Smith's pay prior to July 22, 2015. The jury in the first case resolved that issue in FAMU's favor, finding that her pay as of that time resulted from factors other than gender. This record is clear—there is no genuine dispute—about whether gender has been a factor since July 22, 2015. It has not. FAMU has kept in place since that time the prior pay structure, determined by the jury to be nondiscriminatory toward Ms. Smith, with only nondiscriminatory, nonretaliatory changes.

In asserting the contrary, Ms. Smith says, in effect, that the 2016 one-time pay adjustment was a de novo resetting of all salaries, rendering prior salaries irrelevant. That is plainly not so. Nobody's pay was decreased, and indeed most salaries stayed the same. No consideration at all was given to subjective factors—things like scholarship—that no law school would leave out of a complete reworking of salaries. The assertion that this was a completely new salary setting is nonsense. And not surprisingly, the assertion is contrary to the undisputed testimony of those involved in the process.

Finally, Ms. Smith notes that the individuals spearheading the 2016 pay adjustment initially recommended that Ms. Smith's salary be increased not just to $125,000—higher than any other associate professor's adjustment—but to $138,000, matching the existing salary of associate professor Jeffery Brown. Perhaps unsurprisingly, the recommendation was not accepted—it was out of line with the rest of the 2016 pay adjustments.

The jury's verdict established that the reason for Mr. Brown's higher existing pay was a factor other than gender. There is no reason to believe that, had Ms. Smith not filed the earlier lawsuit, she would have received a raise to $138,000. The raise to $125,000 fit with—indeed, was more generous than—the treatment of other associate professors affected by salary inversion at that time.

There is no evidence that retaliation had anything to do with the failure to provide Ms. Smith a greater raise.

V

For these reasons and those set out on the record of the summary-judgment hearing on May 30, 2019,

IT IS ORDERED:

1. The defendant's summary-judgment motion, ECF No. 63, is granted.

2. The plaintiff's summary-judgment motion, ECF No. 64, is denied.

3. The clerk must enter judgment stating, "This action was resolved on a summary-judgment motion. It is ordered that the plaintiff Jennifer Smith recover nothing on her claims against the defendant Florida Agricultural & Mechanical University Board of Trustees. The claims are dismissed on the merits."

4. The plaintiff's motion to strike, ECF No. 72, is denied.

5. The defendant's motion in limine, as amended, ECF Nos. 76 and 85, is denied as moot.

6. The clerk must close the file.

SO ORDERED on June 2, 2019.

s/Robert L. Hinkle
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JENNIFER SMITH,

Plaintiff,

v. CASE NO. 4:18cv409-RH-CAS

FLORIDA AGRICULTURAL & MECHANICAL UNIVERSITY, BOARD OF TRUSTEES,

Defendant.

_____/

ORDER DENYING THE MOTION TO RECONSIDER

This gender pay discrimination case was resolved by summary judgment in favor of the defendant Florida Agricultural & Mechanical University Board of Trustees ("FAMU"). The plaintiff Jennifer Smith has moved to reconsider—in effect, to alter or amend the judgment.

The order of June 2, 2019 explained the summary-judgment ruling. Part of the explanation was this: a 2015 verdict in a gender pay discrimination case between these same parties established that Ms. Smith's pay as of that time was not discriminatory. This was a straightforward application of collateral estoppel,

sometimes referred to as issue preclusion. And the record establishes that Ms. Smith has suffered no pay discrimination since that time.

For the most part, Ms. Smith's motion to reconsider repeats arguments that were made and rejected earlier. That is not the proper purpose of a motion to reconsider. Only one of Ms. Smith's assertions warrants further discussion.

Ms. Smith says collateral estoppel should not be applied when injustice would result. Ms. Smith says, in effect, that injustice would result from applying collateral estoppel here because the 2015 verdict was wrong—that her pay as of that time was discriminatory.

If collateral estoppel could be avoided whenever a party said the earlier ruling was wrong, the doctrine would be meaningless. The whole point of collateral estoppel is to avoid litigating again a question that was already definitively resolved. When the conditions for application of collateral estoppel are satisfied, the earlier ruling ordinarily is binding. *See, e.g.*, *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1318-19 (11th Cir. 2012) (applying collateral estoppel despite the first-case loser's contention that circumstances changed after the first-case judgment).

The 2015 verdict resolved a straightforward factual question: whether Ms. Smith's pay as of that time was based on gender or factors other than gender. This case does not present the kind of unique circumstances that would allow her to

relitigate that question. *See generally* 18 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4426 (3d ed. Apr. 2018 update). The 2015 judgment on the verdict is binding, notwithstanding Ms. Smith's assertion that the jury got it wrong.

Even assuming, though, that a court has some level of discretion to decide that an earlier ruling was wrong and that applying collateral estoppel would be unjust, I would not exercise the discretion in Ms. Smith's favor here. FAMU has offered substantial reasons for the differences between Ms. Smith's pay and the pay of others. The jury decided gender was not a factor in those differences as of 2015. That was not an unjust verdict. It was instead the considered verdict of a properly constituted jury after a full and fair trial. Ms. Smith has suffered no discrimination since that time. In asserting the contrary, she says only that FAMU has failed to correct its past discrimination—discrimination the jury found did not exist.

In sum, Ms. Smith has pointed to nothing that was missed in the June 2 order. The ruling was and still is correct. For these reasons and those set out in the

June 2 order,

IT IS ORDERED:

The motion to reconsider, ECF No. 96, is denied.

SO ORDERED on June 19, 2019.

s/Robert L. Hinkle
United States District Judge

An Analysis of Instructional Faculty Salary Equity in the Florida Agricultural and Mechanical University College of Law

Prepared by the Florida A&M University Office of Institutional Research

August 2015

Introduction

This report presents the findings from an analysis of instructional faculty salaries within the Florida Agricultural and Mechanical University (FAMU) College of Law. The study was conducted at the request of the university's Provost, and in response to recently raised concerns about potential salary inequities within the college. This study is not intended to advise on potential salary inequities relating to any specific individual instructional faculty member within the College of Law. Rather, its purpose is to provide insights into potential macro level disparities that may be contributed to by a number of factors. Moreover, it is important to note that salary outliers at either end of the pay spectrum do not necessarily imply systemic discrimination as an array of internal and external factors may contribute to variations in salaries. Some of these factors cannot be modeled, and determinations about their potential impacts require a more in-depth qualitative analysis. These include factors such as faculty performance, prior professional experience and prior salary history, among others (University of Louisville, 2014).

The remainder of this study is organized as follows. In Section 1 we present an overview of instructional faculty and salaries within the College of Law. This is followed in Section 2 by a description of the methodological approach and data used in the statistical analysis. Empirical results from the statistical analysis are presented in Section 3. Finally, in Section 4 we provide a summary of findings and potential next steps that may be helpful to both the university and College of Law's leadership teams in identifying and remedying potential inequities.

Section 1: Overview of FAMU 2014-15 College of Law Instructional Faculty and Average Salaries

The study sample for this analysis was comprised of all full-time instructional faculty who were employed in the College of Law during the 2014-2015 academic year. The university's official employee data file reports that forty-two (42) instructional faculty were employed in the FAMU College of Law during the 2014-15 academic year. Table 1 provides a breakdown of all College of Law instructional faculty by rank and gender for the specified time period.

Table 1: 2014-15 College of Law Instructional Faculty by Rank and Gender

Rank	# Female	% All COL Inst. Faculty	% of Rank	#Male	% All COL Inst. Faculty	% of Rank	Total
Professor	5	11.90%	35.71%	9	21.43%	64.29%	14
Assoc. Professor	10	23.81%	71.43%	4	9.52%	28.57%	14
Assistant Professor	0	0.00%	0.00%	1	2.38%	100.00%	1
Instructor	10	23.81%	76.92%	3	7.14%	23.08%	13
Total	25	59.52%	59.52%	17	40.48%	40.48%	42

Average and median salaries for instructional faculty in the college were computed by gender and rank. As Table 2 shows, for the 2014-15 academic year the average and median salaries for male College of Law instructional faculty exceeded those of female instructional faculty at both the Professor and Associate Professor ranks. The average salary for males holding the rank of Professor exceeded the average for females at the same rank by $17,691. However, the median salary for male College of Law faculty at the rank of Professor exceeded the female median by a smaller margin of $5,008.

Table 2: College of Law Average and Median Salary by Rank (2014)

Rank	Male			Female			All		
	#	Average Salary	Median Salary	#	Average Salary	Median Salary	#	Average Salary	Median Salary
Professor	9	$ 158,085	$ 151,847	5	$ 140,394	$ 146,839	14	$ 151,766	$ 150,087
Assoc. Professor	4	$ 117,777	$ 112,685	10	$ 109,142	$ 109,510	14	$ 111,609	$ 109,556
Asst. Professor	1	$ 99,880	$ 99,880	0	-	-	1	$ 99,880	$ 99,880
Instructor	3	$ 75,518	$ 79,280	10	$ 78,088	$ 81,000	13	$ 77,495	$ 81,000

The average salary for male Associate Professors exceeded that of female Associate Professors in the college by $8,635. In a pattern similar to that observed at the Professor rank, while the median salary for male Associate Professors exceeded that of female Associate Professors in the College of Law during the 2014-15 academic year, at $3,175 the margin was smaller than the margin between the average salaries.

During the 2014-15 academic year only one instructional faculty member in the College of Law held the rank of Assistant Professor. As such, there is no basis for gender-based comparisons at this rank. It is, however, worth noting that the number of instructional faculty at the rank of Assistant Professor has declined dramatically from ten (10) during the 2010-11 academic year to just one (1) during the 2014-15 academic year.

With respect to full-time instructional faculty in the College of Law at the Instructor rank, the average salary for women exceeded that of males by $2,570. The margin of difference for median salaries was smaller, however, with the median salary of female instructors in the College of Law exceeding that of males by $1,720.

When assessing salary equity, comparisons based on average salaries are likely to be influenced by outliers as greater weight may be given to salaries at the lower and higher extremes. Comparisons based on median values are less prone to the effects of extreme values and may provide a more accurate basis for comparing salaries.

The following series of charts provide some historical perspective on trends in average salaries for the College of Law instructional faculty. As Chart 1 shows, while average salaries for male and female College of Law faculty holding the Professor rank were relatively close during the 2009-2010 academic year, the following years were characterized by growth in the average salaries of male professors, and relative stasis in the averages for females at that rank.

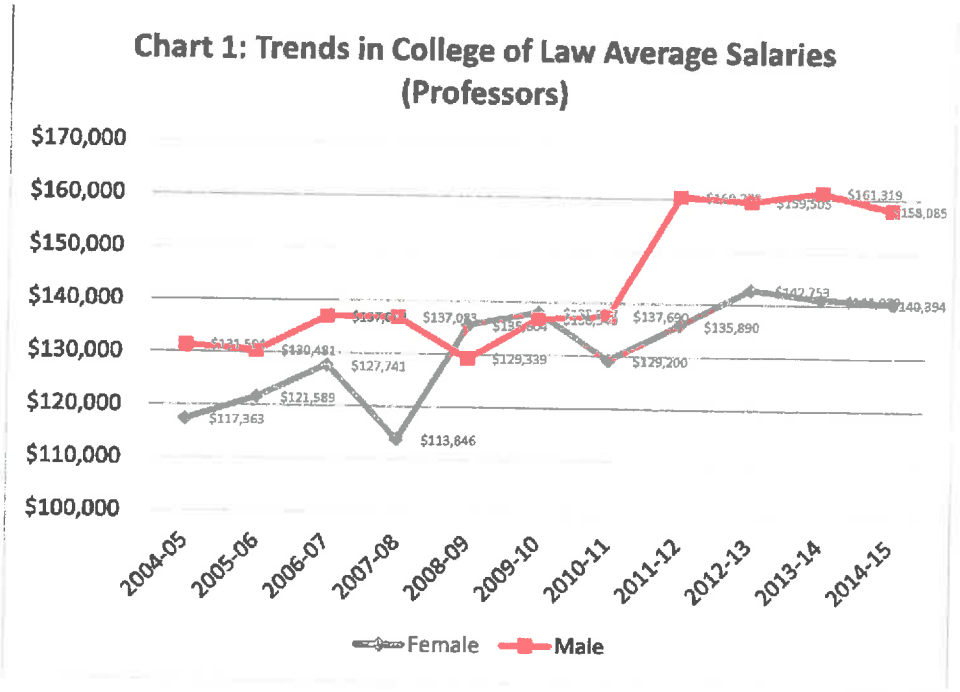


Chart 2 below shows that average salaries for male College of Law instructional faculty at the Associate Professor rank have historically been higher than the average salaries of their female counterparts. The gap between the average salaries of male and female faculty at the Associate Professor rank appears to have narrowed some in the 2014-15 academic year.

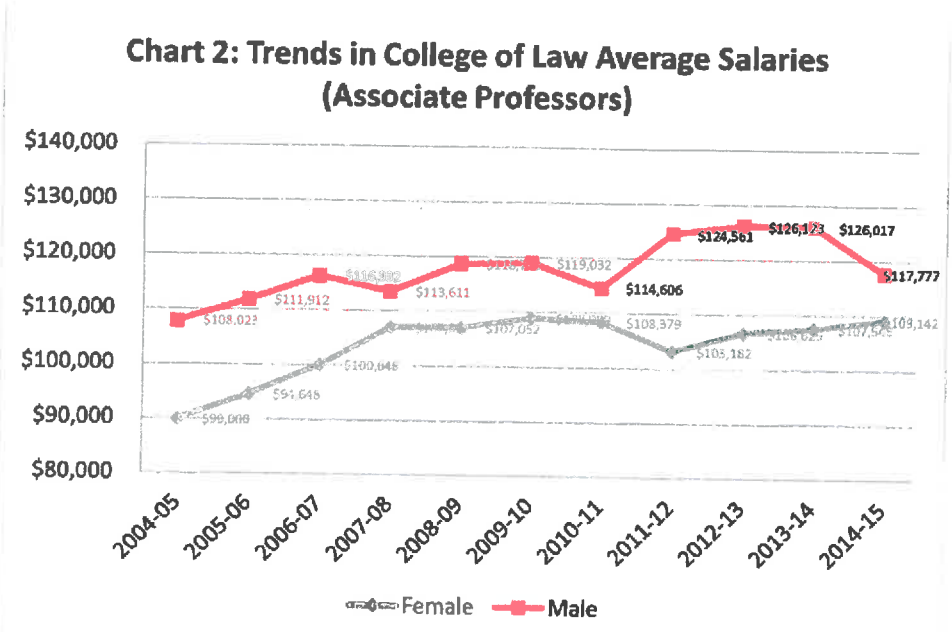


Chart 3 below displays the historical trend in average salaries at the Assistant Professor rank. In 2011 the number of assistant professors in the College of Law decreased to 4 from 10 the previous year. This reduction appears to be attributable in part to the attrition of one (1) one instructional faculty member at that rank, and the promotion of five (5) others to the rank of Associate Professor. Three (3) of the five promoted faculty were female. Each of the faculty promoted from Assistant Professor to Associate Professor experienced salary increases of approximately 9%.

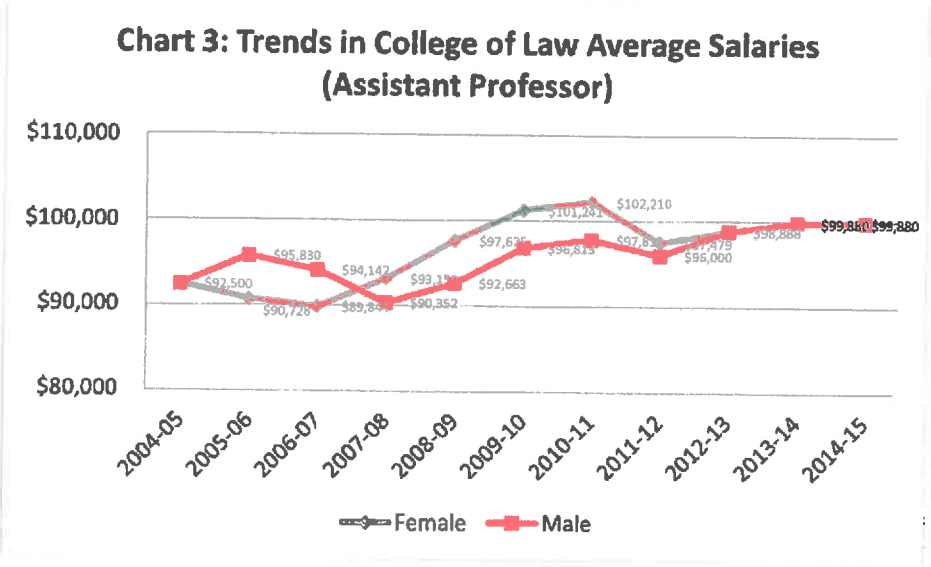
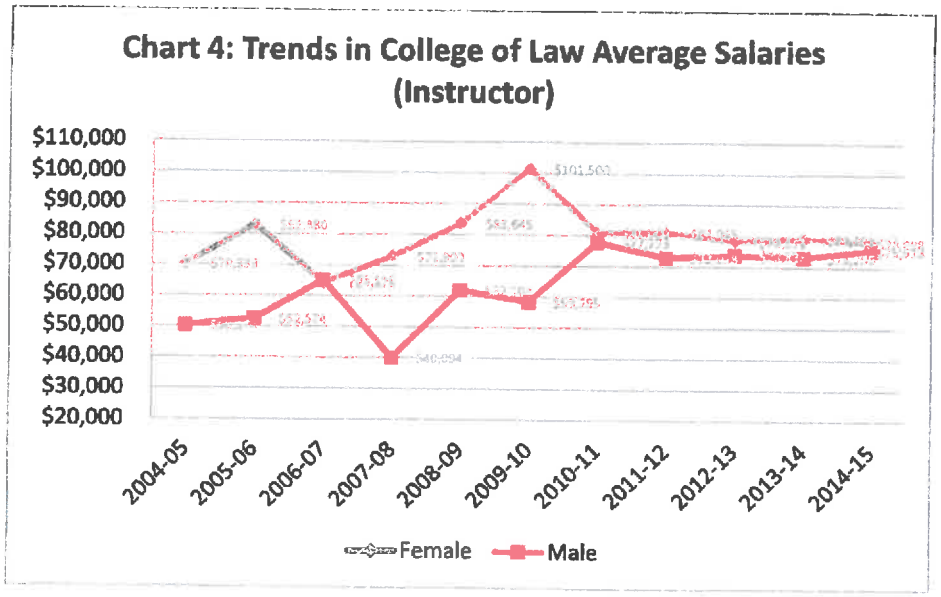


Chart 4 provides a historical snapshot on average salaries for male and female instructional faculty at the Instructor rank in the College of Law. While the chart shows that the average salaries for female faculty have historically been higher than those of males, these differences appear to have decreased in recent years.



While these data are suggestive of gender-based disparities in salaries for instructional faculty at the Professor and Associate Professor ranks within the College of Law, they provide only a basis for inference and empirical exploration for potential contributions of gender and other factors to such disparities. The remainder of this analysis is dedicated to detailing and discussing findings from the OIR's empirical investigation into factors that might influence salaries within the FAMU College of Law.

Section 2: Methodology

The study sample for this analysis was comprised of full-time, tenure and non-tenure earning instructional faculty within the College of Law during the 2014-2015 academic year. The College of Law Dean was excluded from the analysis due to the typically higher administrative responsibilities and lower teaching loads associated with that position, and because academic Deans are excluded for the purpose of reporting instructional faculty to the American Association of University Professors (AAUP) and other organizations which collect information on instructional faculty. Instructional faculty holding administrative titles of Associate Dean, however, were included in the analysis because they are commonly included in reporting instructional faculty (i.e. AAUP). Because the study analyses potential disparities within rank, Assistant Professors were also excluded since only one faculty member held that rank during the study observation period.

Multiple regression is the most commonly used statistical technique for analyzing faculty salary equity. While an array of predictors can be used, the most commonly used predictive variables in such models include: years of experience (years since terminal degree); seniority (years at the institutional), education level (highest degree earned) and discipline (Emory University Office of Institutional Research, 2002); Other independent variables used in faculty equity studies may include gender, race, administrative positions, and tenure status (University of Louisville Office of Institutional Research, 2014).

Due to the small sample size, a series of stepwise multiple regression models were run. Unlike a standard multiple regression model where all variables would be entered into a model (and formal hypotheses for the effects of each variable would be posited), the focus of a stepwise regression model is predicting the effects of the best combination of predictors on the dependent variable.

In a stepwise multiple regression model, predictor variables are entered into the model one at a time based on their estimated magnitude of contribution to the prediction equation. Additional variables are added only to the extent that they attain a level of statistical significance within the model. The addition of variables ends when no additional variables add anything of statistical significance the regression equation. Accordingly, there is a potential that not all independent variables listed in the regression command will be included in the final estimation equation.

For the current study, salary and demographic data for instructional faculty within the College of Law were extracted from the university's official fall 2014 employee data file. Since

there was only one (1) instructional faculty member in the College of Law at the rank of Assistant Professor, that rank was excluded from the analysis. Accordingly, only data for full-time instructional faculty carrying the ranks of Professor, Associate Professor and Instructor were included for model estimation purposes. The resulting study sample included fourteen (14) College of Law instructional faculty at the Professor rank, fourteen (14) instructional faculty at the Associate Professor rank and thirteen (13) instructional faculty carrying the rank of Instructor.

Four models were run to estimate the effects of various variables on salary equity within the College of Law. The first model estimated the effects of a series of independent variables on College of Law tenure-earning instructional faculty salaries. This included faculty at both the Professor and Associate Professor ranks. Again, because there was only one instructional faculty member in the College of Law at the Assistant Professor, relationships between the selected independent variables and salary could not be modeled. Additionally, because publication productivity may be an important factor in determining salaries for faculty at the Professor and Associate Professor ranks, and because data on the publication productivity of Instructors were not available, Instructors were excluded from this model.

The remaining three models estimated the effects of a series of independent variables on salaries within each rank (Professor, Associate Professor and Instructor) individually. Descriptions of the models' dependent and independent variables follow below:

Dependent Variable:

The dependent variable used in each of the models was the annual salary for each faculty member. The salaries for all ranked instructional faculty whose annual contracts were for durations other than nine (9) months were converted to nine-month equivalent salaries in accordance with the methodology endorsed and used by the American Association of University Professors (AAUP).

Independent Variables:

The following is a listing and description of independent variables used in each of the multiple regression models.

1. **Gender:** The analysis uses a dichotomous dummy variable coded with a value of "1" for female and "0" for male faculty;
2. **Years in Rank:** This is a continuous variable captures the total number of years that a faculty member has held his/her current rank;
3. **Years Since Hire:** This is a continuous variable which captures the amount of time that an individual has been employed by the university;
4. **Years since Highest Degree:** This continuous variable which indicates the amount of time since the attainment of highest degree is used as a proxy for professional experience;
5. **Years Tenured:** This variable is a continuous measure which accounts for the amount of time that a faculty member has been tenured. For

faculty members in the study that have not yet earned tenure, the value for this metric is 0.

6. **Rank:** Dummy variable identifying College of Law instructional faculty members as either "Professor" or "Associate Professor." **This variable is used in Model 1 only,** and "Professors" serves as the comparison group for analysis purposes.
7. **Administrative Role:** Dummy variable identifying College of Law instructional faculty serving in administrative capacities (e.g. Associate Deans). The variable was coded "0" if the faculty member did not serve in such a capacity and "1" if they did.
8. **Number of Publications:** Continuous variable measuring the number of publications since the year 2000.

Section 3: Empirical Results

Model 1: Joint Model for Tenure Earning Faculty (Professors and Assoc. Professors)

Summary statistics for each of the continuous variables used in Model 1: Professor and Associate Professor are presented in Table 4a.

Table 4a: College of Law Salary Equity Study Sample (2014-15)

Variable	Obs	Mean	Std. Dev.	Min	Max
Salary (2014-15)	28	131,688	26,352	86,727	187,430
Years Since Degree	28	23.61	9.88	4.00	45.00
Years in Rank	28	3.92	2.91	0.03	8.97
Years Tenured	28	3.83	4.44	0.00	13.03
Years Since Hire	28	7.43	3.66	0.03	13.05
Publications	28	6.57	5.46	0.00	20.00

1. Includes Instructional Faculty at Professor and Assoc. Professor Ranks only;
2. Excludes College of Law Dean

Table 4b presents regression coefficients for Model 1 (Professors and Associate Professors). Independent variables in the model with significance levels of .1 or lower ($P < .1$) are denoted in Table 4b with asterisks as noted. The model suggests that rank, years in rank and number of publications played significant roles in determining salaries. Not surprisingly, rank influenced instructional faculty salaries within the College of Law with the model estimating that instructional faculty at the Associate Professor rank earned on average $30,304 less than full Professors in the college ($P < .01$).[1] Years in rank had a positive effect with each additional year within rank accounting for on average for approximately $1,853 in additional salary when controlling for other factors ($P < .1$). The number of publications also appears to have had a positive effect with each unit increase in the number of publications accounting for $1,487 when controlling for other factors ($P < .05$). With respect to gender, the model found that on average

[1] Assistant professors were excluded due to the fact that only one full-time instructional faculty member in the College of Law held that rank during the 2014-15 academic year. Instructors were not included as data on their publications were not available and accordingly could not be incorporated into the model.

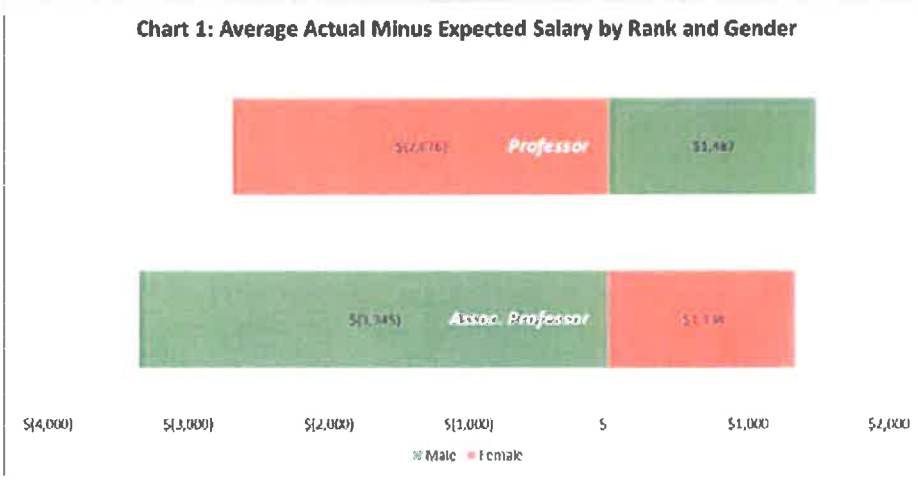
being male accounted for $8,626 in higher salary when compared to females. The difference was not, however, statistically significant in the model.

Table 4b: Model Results (College of Law: Professor and Assoc. Professor)

VARIABLES	(1) Salary
Rank	-30304***
	(6182)
Publications	1487**
	(595.1)
Years In Rank	1853*
	(1025)
Male	8626
	(6454)
Constant	156106***
	(13668)
Observations	28
R-squared	0.747

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Predicted salaries were computed for each individual within the sample. Average predicted values were then calculated by rank and gender. Chart 3 shows the average residuals (average actual minus average predicted salary) by rank and gender for College of Law faculty included in Model 1. The chart shows that at the Professor rank female faculty in the College of law tended to be paid less than the predicted average, while on average male faculty at that rank appeared to be paid over the predicted average The residuals suggested an inverse trend at the Associate Professor rank where women on average were paid over the predicted value while men were on average paid below the expected value.



Model 2: Professors Only

Table 5a presents summary statistics for Model 2: Professors Only.

Table 5a: Model 2 Summary Statistics: College of Law Salary Equity Study Professor Sub-sample (2014-15)

Variable	Obs	Mean	Std. Dev.	Min	Max
Salary (2014-15)	14	151,766	21,249	118,000	187,430
Years Since Degree	14	26.50	11.54	4.00	45.00
Years in Rank	14	4.60	3.05	0.03	8.02
Years Tenured	14	6.59	4.73	0.00	13.03
Years Since Hire	14	8.07	4.10	0.03	13.05
Publications	14	8.00	6.48	0.00	20.00

1. Excludes College of Law Dean

Results from the Professors Only regression model appear in Table 5b below. The model estimated that on average, when controlling for other factors male faculty in the College of Law at the rank of Professor earned $20,199 more than their female colleagues (P < .01). While males outnumbered females by a margin of more than two-to-one at the Professor rank during the analysis observation period, this finding was unlikely a by-product of frequency alone and may have resulted from a number of factors that could not be observed using the available data.

Table 5b: Model Results (College of Law: Professors)

VARIABLES	(1) Salary
Years Since Degree	670.2
	(444.5)
Years Since Hire	-4568**
	(1641)
Male	20199*
	(9277)
Years Tenured	4044**
	(1316)
Constant	131229***
	(12803)
Observations	14
R-squared	0.618

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The number of years tenured also appears to be a significant predictor of salaries at the Professor rank in the College of Law, with each additional year since tenure attainment on average accounting for $4,044 in additional salary (P < .05) when controlling for other factors. The number of years since degree attainment also appeared to have been a significant predictor for salaries at this rank with each additional year since degree attainment accounting for approximately $670 in additional salary. Finally, the stepwise regression model estimated an inverse relationship between salary and years since hire. The model estimates that each additional year since hire accounted for approximately $4,568 less in salary. This finding is likely due to lower salaries offered to instructional faculty during the college's early years coupled with more modest salary increases over time.

Model 3: Associate Professor Model

Summary statistics for and Model 3: Associate Professors, are presented in Table 6a.

Table 6a: Model 3 Summary Statistics: College of Law Salary Equity Study Assoc. Professor Sub-sample (2014-15)

Variable	Obs	Mean	Std. Dev.	Min	Max
Salary (2014-15)	14	111,609	11,066	86,727	136,960
Years Since Degree	14	20.71	7.18	6.00	31.00
Years in Rank	14	3.24	2.70	0.03	8.97
Years Tenured	14	1.08	1.50	0.00	4.02
Years Since Hire	14	6.79	3.17	1.02	11.13
Publications	14	5.14	3.93	0.00	13.00

Statistical results for the Associate Professors model are presented in Table 6b below. With respect to Associate Professors in the College of Law, Model 3 finds that when controlling for other factors included in the model, on average salaries for male instructional faculty were $5,395 greater than that of their female counterparts. However, the difference was not statistically. Following a trend similar to those observed in Models 1 and 2, the number of years since earning tenure appeared to have had a positive effect on salaries. For the Associate Professor sub-sample, each additional year since tenure attainment translated to $3,423 more in annual salary ($P < .01$).

Table 6b: Model Results (College of Law: Associate Professor)

VARIABLES	(1) Salary
Years Since Degree	476.4*
	(235.1)
Years Since Hire	-1641**
	(660.0)
Years In Rank	956.3
	(589.2)
Years Tenured	3423***
	(919.5)
Administrator	-30668***
	(6929)
Male	5395
	(3672)
Constant	106731***
	(6121)
Observations	14
R-squared	0.912

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

While the number of years since tenure had a positive effect in the model, the number of years since hire had a negative effect on salaries for Associate Professors in the College of Law ($P < .1$). Each unit increase in the number of years since being hired at FAMU equated to $1,641 less in salary when controlling for other factors ($P < .05$). As was the case for Assistant Professors, the inverse relationship between time since hire and salary at Associate Professor level may have been, in part, due to more recently recruited faculty being recruited at higher initial salaries while longer-term faculty who started at lower rates may have experienced more constrained salary growth. The number of years since degree attainment appears to have had a significant positive effect on salaries at the Associate Professor rank with each additional year since degree attainment accounting for approximately $476 in additional salary ($P < .1$).

The significant negative effect relating to the effects of administrative assignments was most likely a by-product of the model's small sample size and the fact that only one observation in the sub-sample held any type of administrative assignment during the observation period.

Model 4: Instructors Model

Model 4 which included College of Law instructional faculty at the Instructor rank. Three variables included in the Professors and Associate Professors, Professors only and Associate Professors only models were excluded from the Instructors model. First, the number of years since tenure attainment was excluded from the stepwise model as faculty at the instructor rank are not tenure eligible. The second variable excluded from the model was the number of publications produced due to the lack of data for this metric. Finally, due to the fact that no College of Law faculty at the Instructor rank had any administrative duties within the College, the dummy indicator for this predictor was also excluded. Summary statistics for the variables included in the Instructors stepwise regression model are presented in Table 7a.

Table 7a: Model 4 Summary Statistics: College of Law Salary Equity Study Instructors Sub-sample (2014-15)

Variable	Obs	Mean	Std. Dev.	Min	Max
Salary (2014-15)	13	77,494	8,474	65,455	89,580
Years Since Degree	13	15.62	6.85	5.00	32.00
Years in Rank	13	3.08	2.46	0.03	8.02
Years Since Hire	13	3.74	2.22	.19	8.02

Only one of the four variables included in the Instructors Only stepwise regression model achieved significance. The model estimated a positive and significant relationship between years since hire and average salaries at the Instructor rank with each additional year since hire accounting for approximately $2,062 in additional salary. The positive effect of this variable in the Instructors Only model is likely attributable to the average smaller number of years since hire for instructional faculty at this rank.

VARIABLES	(1) Salary
Years Since Hire	2062*
	(968.3)
Constant	69779***
	(4170)
Observations	13
R-squared	0.292

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Conclusion and Recommendations:

Model 1 (Professors and Associate Professors) suggests that gender, years tenured, and rank played significant roles in determining salaries. With respect to gender, the model found that when controlling for other factors, on average female faculty in the study sample earned less than their male counterparts. The number of years since tenure attainment was positively correlated with salaries at this rank. At the same time, the number of years since hire was negatively correlated. This is likely attributable to lower initial salaries for longer serving faculty coupled with modest salary increases over time. Unsurprisingly, the model found higher salaries on average for Professors when compared to instructional faculty at the Associate Professor rank.

Focusing exclusively on College of Law faculty at the Professor rank, the results from Model 2 suggest that in general female faculty at the Professor rank in the FAMU of College earned less than their male counterparts. Notwithstanding these findings, the extent to which gender alone explains these differences is unclear. While the data and findings resulting from this analysis suggest that gender-based salary disparities exist within the College of Law at the Professor rank, a more in-depth qualitative analysis examining additional factors that could not be modeled due to sample size or data availability in university data files is recommended.

Model 3 (Associates Professors) finds that on average females earn less than their male counterparts. The difference is not, however, statistically significant in the model. The number of years since hire does appear to be an important factor for explaining salary disparities at this rank. Lower hiring salaries coupled with modest salary increases over time for longer serving faculty at this rank is the likely explanation for this pattern. It may also be mediated by the number of years since earning tenure.

The Instructors Only Model (Model 4) suggests that the number of years since hire appears to be the most important factor in determining salaries at the Instructor Rank. While female instructional faculty members at the Instructor rank have historically had higher average salaries than their male counterparts, gender does not appear to be a significant predictor of salaries at the Instructor rank.

The consistent findings relating to the positive effects of tenure on faculty salaries are not surprising. Tenure attainment suggests that a faculty member has satisfied a number of academic and professional demands. It is also worth noting that this metric may have masked the influences of other factors such as years in rank and years since degree due to the small sample size. Given the quantitative limitations imposed by a small sample size, and the limited amount of data available in official university data files, the OIR recommends that the College of Law

engage in a qualitative assessment factors that have historically contributed to initial salary offers, as well as to pay increases for faculty within the college.

It is worth noting that four instructional faculty in the study sample were hired after the College of Law attained accreditation in 2009. This included two instructional faculty at the rank of Professor (one male and one female), and two at the Associate Professor rank (one male and one female). In each case, salaries for newly hired male faculty exceeded those of female hires. Again, these variations may be due to effects that could not be modeled in the current analysis. In any case, an in-depth analysis accounting for variations in faculty productivity and workloads, prior professional experience, pre-hire salary history, publication productivity, instruction quality and community service among others may provide additional context for understanding differences in FAMU College of Law instructional faculty salaries.

References

1. Emory University Office of Institutional Research (2001). An Analysis of Faculty Gender Equity Issues at Emory University. Prepared for the PCSW Faculty Concerns Committee.

2. University of Louisville Office of Institutional Research (2014). Using Hierarchical Linear Modeling (HLM) to Determine Faculty Salary Outliers. *Presented at the AIR Annual Forum, Orlando, FL, May 27-30 2014.*

DOCKET NO. 19-12560-AA

United States Court of Appeals

for the

Eleventh Circuit

JENNIFER SMITH,

Plaintiff/Appellant,

v.

FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY BOARD OF TRUSTEES,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO: 4:18-cv-00409-RH-CAS
(Hon. Robert Hinkle)

INITIAL BRIEF OF APPELLANT

STEPHEN M. SMITH
STEPHEN M. SMITH & ASSOCIATES, LLC
1425 North Broad Street
Suite 201
New Orleans, LA 70119
(504) 947-1400
stevesmithlaw@aol.com

JENNIFER M. SMITH
LAW OFFICE OF JENNIFER SMITH
13506 Summerport Village Parkway
Suite 108
Windermere, FL 34786
(321) 200-4946
jensmithesq@aol.com

Counsel for Plaintiff/Appellant

Counsel Press (804) 648-3664 * (800) 275-0668

Jennifer Smith v. Florida Agricultural and Mechanical University Board of Trustees, No. 19-12560

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, Jennifer Smith, an individual, hereby discloses the following pursuant to this Court's Interested Persons Order:

1. The name of each person, attorney, association of persons, firm, law firm, partnership and corporation that has or may have an interest in the outcome of this action --- including subsidiaries, conglomerates, affiliates, parent corporations, public-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

   A. Dennis Jackson Martin & Fontela, P.A.-Counsel for Appellee

   B. Florida Agricultural & Mechanical University Board of Trustees– Appellee

   C. Stephen M. Smith & Associates, LLC – Counsel for Appellant

   D. Law Office of Jennifer Smith – Counsel for Appellant

   E. Maria Santoro -Counsel for Appellee

   F. Jennifer Smith – Appellant/Counsel for Appellant

   G. Stephen Smith – Counsel for Appellant

2. The name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings.

   A. None

3. The name of every other entity which is likely to be an active participant in the proceedings, including the debtor and members of the creditors' committee (or twenty largest unsecured creditors) in bankruptcy cases:

A. None

4. The name of each victim (individual or corporate) of civil and criminal conduct alleged to be wrongful, including every person who may be entitled to restitution:

A. Jennifer Smith

5. Actual or Potential Conflicts of Interest:

Professor Jennifer Smith

1) knows the Honorable Charles Wilson;
2) attended law school with the Honorable Robin Rosenbaum in 1989-1991, but does not know her personally; and
3) served on the Eleventh Circuit as a federal judicial law clerk in 1992-1993 under the Honorable Joseph Hatchett and sat in oral arguments or meetings with some or all of the following judges who served on the bench during that time:
    a. Judge Anderson
    b. Judge Black
    c. Judge E. Carnes
    d. Judge Dubina
    e. Judge Edmondson
    f. Judge Fay
    g. Judge Hull
    h. Judge Marcus
    i. Judge Tjoflat

Otherwise, we are unaware of any actual or potential conflict of interest involving any other member of the Court and will immediately notify the Court in writing on learning of any such conflict.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not believe oral argument is necessary.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Plaintiff-Appellant Professor Jennifer Smith ("Professor Smith" or "Plaintiff") appeals from a final judgment entered pursuant to a decision by the United States District Court for the Northern District of Florida dismissing all of Plaintiff's claims under Fed. R. Civ. P. 56.

JURISDICTIONAL STATEMENT

This case arises under the Equal Pay Act of 1963, 29 U.S.C. § 206, *et. seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq*. and the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes. This is a civil action over which the District Court had original jurisdiction pursuant to 28 U.S.C. §1331. Plaintiff appeals from a final decision of the District Court, and, therefore, this Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291. Plaintiff filed a timely notice of appeal on July 1, 2019. This appeal is from a final judgment that dismisses all of Plaintiff's claims, which include gender discrimination in pay and retaliation, in this action against the sole defendant, Florida Agricultural & Mechanical University Board of Trustees ("the University" or "Defendant").

STATEMENT OF ISSUES

I. Collateral Estoppel

Does Professor Smith's unsuccessful challenge of her original (hire) salary under gender discrimination laws against her employer collaterally estop her from challenging a subsequent salary equity adjustment applied to both sexes under the same laws?

II. Retaliation

Did the District Court err in finding no retaliation existed where the University recommended a reset (increase) of Professor Smith's salary consistent with its new salary formula and prior to implementation reduced the recommended increase within days or weeks of Professor Smith filing a motion for a new trial and contended the reduction was due to budget constraints and a novel "outlier theory"?

STATEMENT OF THE CASE

I. Nature of the Case

This is a gender pay equity and retaliation case that the District Court found to be collaterally barred, where after the first lawsuit, the employer devised and implemented a salary equity adjustment using a new method for setting employee salaries and reset Professor Smith's salary in a manner that was inconsistent with the employer's new salary formula and in violation of gender discrimination and retaliation laws.

This is the second lawsuit about gender inequality in pay and retaliation initiated by a university law professor, Professor Smith, against a state university, Florida A&M University. After Professor Smith lost her first equal pay case in 2015 ("*Smith I*"), the University completed a salary equity study, which suggested that gender played a significant role in setting faculty salaries, resulting in women being paid significantly less than men. The University contends that it reset faculty salaries to correct salary inversion, but not gender disparities, and increased the salaries of several male and female faculty, including Professor Smith's, based on different criteria than its hiring criteria, which were litigated in *Smith I*.

In 2018, Professor Smith filed the instant lawsuit ("*Smith II*") under the same statutes against the same defendant, asserting that the 2016 reset of her salary with the new criteria/formula/factors (the salary equity adjustment) was

discriminatory and retaliatory. The District Court dismissed *Smith II*, finding that the gender pay claim was collaterally barred and the retaliation claim was a closer call, but ultimately had no merit.

II. Course of Proceedings and Disposition Below

Professor Smith brought an equal pay and retaliation action against the University on July 30, 2018 in state court. On August 29, 2018, the University filed a notice of removal to the United States District Court for the Northern District of Florida.

On September 7, 2018, the University filed a request for judicial notice to take notice of the prior proceedings between the parties.[1] (Doc. 4). The District Court granted the request. (Doc. 10). The University filed a motion to dismiss on September 11, 2018 based on *res judicata* and collateral estoppel. (Doc. 6). The District Court construed the motion as a motion to dismiss or for summary judgment and denied the motion on November 15, 2018, finding that Professor Smith's complaint was not collaterally estopped. (Doc. 17).

On February 3, 2019, Professor Smith filed a motion for summary judgment. (Doc. 28). On March 7, 2019, the District Court denied the motion for summary

[1] This request included the following prior proceedings: *Smith v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, Northern District of Florida Case No. 4:14-cv-540-RH/CAS; *Smith v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, Eleventh Circuit Court of Appeals File Nos. 15-14613 and 16-15582; and *Smith v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, 687 Fed. Appx. 888 (11th Cir. 2017).

judgment, but issued a show cause order to the University that the University must expressly state the "factors other than sex" that explain the pay disparities between Professor Smith and comparable men by March 21, 2019. (Docs. 44, 45). The University filed its reasons on March 21, 2019 and amended the document on April 4, 2019. (Docs. 53, 58).

On April 15, 2019, both parties filed cross-motions for summary judgment. (Docs. 63, 64). In May 2019, the District Court ordered limited supplemental memoranda on a minor portion of the salary equity process. (Doc. 75). On May 24, 2019, both parties submitted their responses. (Docs. 86, 87). On May 30, 2019, the District Court heard the parties on their motions and ruled in favor of the University. (Doc. 90). On June 2, 2019, the District Court issued its order, denying Professor Smith's motion and granting the University's motion, finding that Professor Smith was collaterally estopped from bringing her gender discrimination claim and there was no retaliation. (Doc. 91). The clerk of court entered a judgment on June 4, 2019. (Doc. 92).

Professor Smith filed a motion for reconsideration on June 14, 2019. (Doc. 96). The District Court denied the motion on June 19, 2019. (Doc. 97). Professor Smith filed her notice of appeal on July 1, 2019. (Doc. 99).

III. Statement of Facts

The Parties

After serving as a federal judicial law clerk for a judge on the United States Court of Appeals for the Eleventh Circuit and becoming a partner six years later with a large, international law firm, Professor Smith, a woman, joined the Florida A&M University College of Law in 2004 as a law professor. (Doc. 62-5 – Pg 188).

She applied for tenure and received a promotion in the 2009-10 school year, which was the year that Darryll Jones ("Dean Jones") joined the faculty as associate dean for research and faculty development and professor of law. (Doc. 68-1 – Pg 27; Doc. 62-5 – Pg 188). Dean Jones later became interim dean. (Doc. 68-1 – Pg. 28).

When Dean Jones arrived in 2009, there was much hatred and distrust among the University law faculty because the junior faculty felt like the senior and founding faculty were trying to hold junior faculty back from advancing; the school was in chaos; and there were several "cold wars" going on. (Doc. 65-2 – Pgs 33, 36-37). Dean Jones perceived Professor Smith as the "protagonist" – the leader or most vocal of the junior faculty who were dissatisfied with what was happening at the law school. (Doc. 65-2 – Pgs 32-34). Founding and non-founding faculty did not get along; there was no mentorship; there was no communication;

senior faculty would consider junior faculty presenting a work in progress for constructive critique and development as a final work and hold it against them. (Doc. 65-2 – Pgs 32-33).

Dean Jones testified that Professor Smith arrived at the law school with "top" credentials, having clerked at the Eleventh Circuit and been a "big law" partner. (Doc. 65-2 – Pgs 38-39; Doc. 62-6 – Pg 20; Doc. 28-5 – Pgs 2-5). When Professor Smith applied for tenure and submitted her applications for promotion, women were consistently being denied promotion. (Case 15-14613 – Pgs 100-05). Dean Jones testified that the law faculty retention, promotion and tenure ("RPT") rules at the law school were "a moving target." (Doc. 66-1 – Pg 45). This was known on the main campus in Tallahassee. (Case 15-14613 – Pgs 100-01). Professor Smith received tenure in April 2010 and was finally promoted to full professor in August of 2016 because Dean Jones felt like it was his responsibility to be "intellectually honest" about her fourth application because the rationale for denial was logically inconsistent with the prior applications and her scholarship was as qualified as others who were promoted. (Doc. 65-2 – Pgs 25-27, 44; Doc. 62-5 – Pg 188).

Since August 2016, Professor Smith is a tenured full professor at the law school. (Doc. 62-5 – Pg 188). The University is a state university in the Florida university system. (Doc. 1-1 – Pg 3).

The First Action (*Smith I*)

In July 2014, Professor Smith filed a complaint against the University for gender discrimination and retaliation ("first action" or "*Smith I*"). (4:14-cv-540-RH/CAS Doc. 1 – Pgs 6-23). She asserted that (1) as a female associate professor, male associate professors were paid more than she and other female associate professors; and (2) she was retaliated against for complaining about gender-based unequal pay by being denied promotion to full professor. (4:14-cv-540-RH/CAS Doc. 1 – Pgs 6-23). These two issues were decided in favor of the University on July 27, 2015. (Doc. 64-1-Pgs 28-34; 4:14-cv-540-RH/CAS Doc. 93).

First Post-Trial Motion in *Smith I*

On August 25, 2015 and pursuant to Fed. R. Civ. P. 59, Professor Smith filed a motion for new trial. (4:14-cv-540-RH/CAS Doc. 100). The District Court denied the motion. (4:14-cv-540-RH/CAS Doc. 109). Professor Smith filed a notice of appeal on October 15, 2015. (4:14-cv-540-RH/CAS Doc. 112).

A New Administration & the Salary Equity Adjustment

In the middle of *Smith I* and before going to trial in 2015, the University obtained a new provost, Marcella David ("Provost David"), who requested a salary equity study before, during or after *Smith I*. (Doc. 67-2 – Pg 11). While *Smith I* was proceeding, the University completed or was completing the salary equity study as a result of the recently raised concerns of salary inequities (Doc 67-2 – Pg

11), which suggested that "gender, years tenured, and rank played significant roles in determining salaries." (Doc. 67-2 – Pg 22 ¶ 1; Doc. 65-1 – Pgs 44-45; Doc. 67-1 – Pg 30).

Nathan Francis ("Mr. Francis"), the University employee in the Office of Institutional Research who put the study together, testified that the salary equity study was compiled using official employee files and number of employees' publications/scholarship, and that there appeared to be a salary disparity between genders. (Doc. 62-3 – Pgs 24-26).

As a result of the salary equity study, in the fall of 2015 Provost David told Deans Green and Jones to review faculty salaries to see if they can "do something for salary equity." (Doc. 67-1 – Pgs 14-15, 26-27). Provost David found the law faculty salaries to be illogical, and she directed Deans Jones and Green to get "some sort of logic to your salary structure" and deal with the perceived salary equity issue at the law school. (Doc. 68-1 – Pgs 41-42; Doc. 67-1 – Pg 15).

To correct the illogical salaries, the University created a committee, with Deans Jones and Green as principles of the effort, along with Dr. Gita Pitter ("Dr. Pitter") and her staff. (Doc. 68-1 – Pg 41). Even though all the salaries were not changed, all faculty salaries were reviewed applying objective criteria for an adjustment. (Doc. 65-2 – Pg 48; Doc. 68-1 – Pgs 52-53; Doc. 93 – Pg 34).

Dean Jones acknowledged that gender played a significant role in faculty salaries before they were reset, and he knew gender was a perceived problem. (Doc. 65-1 – Pgs 46-48). Dean Jones testified that he did not address gender in the salary equity adjustment because he believed he would have to look at qualitative factors, such as faculty credentials; however, he "hoped that [salary equity adjustment] would address the perception that gender discrimination existed at the law school," but he was not seeking to correct a gender disparity. (Doc. 65-1 – Pgs 45, 48). Dean Green, who worked alongside Dean Jones in the salary equity adjustment, testified that Dean Jones considered many factors, including resumes, curriculum vitae and hiring packets. (Doc. 67-1 – Pgs 22-24). In addition, when Dean Jones reset Professor Smith's salary to $138,000, he was aware of her "top" credentials, but claimed that was not a factor in his recommending her for an increase to $138,000. (Doc. 68-1 – Pg 61; Doc 65-2 – Pgs 20, 40; Doc. 28-5 – Pgs 2-5). In addition, months before the salary study was completed and immediately before *Smith I* was litigated, Dean Jones compiled a list of faculty publications, which established that Professor Smith has over three times the number of publications than Professor Jeffrey Brown ("Professor Brown"), a male comparator. (Doc 62-3 – Pgs 28-29, 156, 165, 177).

To reset the salaries, Deans Jones and Green followed the instructions given to them by Dr. Pitter in the Office of Academic Affairs/Provost's Office. (Doc.

68-1 – Pgs 51-53; Doc. 67-2 – Pgs 36-37, 50-51). First, they normalized all faculty salaries by bringing the 12-month and nine-month salaries to comparable numbers on a nine-month scale; second, they put the salaries in order by salary, based on rank, to see where associate professors salaries exceeded full professors; and third, they looked within each rank to determine where adjustments needed to be made based on rank, time in rank and years tenured. (Doc. 65-2 – Pgs 14-15). They implemented a base of $120,000 for tenured associate professors and $140,000 for tenured full professors to eliminate salary inversion and compression. (Doc. 66-1 – Pgs 16-17; Doc. 28-2 – Pgs 14-15[2]). Implementing the base salaries, alone, cured the salary inversion. (Doc. 65-1 – Pgs 19, 23; Doc. 66-1 – Pgs 16-17; Doc. 28-2 – Pgs 14-15). No faculty salaries were decreased. (Doc. 93 – Pg 29; Doc. 67-2 – Pg 51).

Based on this new salary structure implemented in early 2016, Professor Smith, then a tenured associate professor, was entitled to and recommended for an increase to $138,000, whereas every other tenured associate professor was found to be entitled to an increase to $120,000 (Doc. 67-1 – Pg 44; Doc. 28-2 – Pgs 9-12). According to Deans Jones and Green, Professor Smith was comparable in tenure time to Professor Brown, a tenured associate professor who was earning $138,500, and senior to everyone else, and it seemed right to increase Professor Smith's

[2] This document only mentions curing salary inversion, defined as lower ranked faculty earning more than higher ranked faculty.

salary to $138,000 given the goal to make tenured associate professors paid equally. (Doc. 67-1 – pgs 42-47; Doc. 66-1 – Pg 34; Doc. 65-2 – Pg 20; Doc. 68-1 – Pgs 45-46, 61 con't in Doc. 65-1 – Pg 2). Each of the tenured associate professors received the recommended increase to $120,000. (Doc. 67-1 – Pgs 47 - 50). The University's recommendation of $138,000 for Professor Smith was later reduced to $125,000, even though she was considered comparable to Professor Brown based on the new salary formula in rank, tenure and length of tenure. (Doc. 67-1 – Pgs 42-43; Doc 65-1 – Pgs 4, 15; Doc. 62-2 – Pg 149). The additional $5,000 that Professor Smith received than the other tenured associate professors was partly explained by Dean Green as the time when Professor Smith became tenured, but Dean Jones testified that he did not "know why she got an extra five." (Doc. 67-1 – Pgs 49-51; Doc. 68-1 – Pg 46). Deans Green and Jones claimed to have had numerous other inchoate salary drafts (Doc. 65-2 – Pgs 46-47), but only forwarded a few as concrete recommendations because other drafts never became documents. (Doc. 67-1 – Pgs 42-46).

As the reason for subsequently decreasing Professor Smith from $138,000 to $125,000, the University contends: (1) that it did not have the money ("budget constraints") but conceded it could find the money (Doc. 65-1 – Pg 34) and (2) that it did not intend to match the "outliers" – the higher paid faculty. (Doc. 65-1 – Pg 3). All the highly paid faculty ("outliers") are men – Professor Brown (tenured

associate professor) and Professors Ronald Griffin and Jeremy Levitt (tenured full professors). (Doc. 65-1 – Pgs 3-4; Doc 66-2 – Pg 33; Doc. 66-2 – Pgs 25-26). According to Dean Jones, Provost David believed that the male outliers were probably paid more than they needed to have been offered in the first place. (Doc. 65-2 – Pg 16). The only tenured associate professor, indeed the only professor, recommended to receive a salary to match an outlier was Professor Smith. (Doc. 67-1 – Pg 44; Doc. 68-1 – Pg 45). At the time that Professor Smith's salary was recommended to be increased to $138,000, Professor Brown was not identified as an outlier. (Doc. 67-1 – Pg 43). Dean Pernell testified that Professor Brown was hired based on being a potential "emerging scholar." (Doc. 62-6 – Pgs 35-36; Doc. 62-6 – Pg 87). However, Dean Pernell testified that Professor Brown "has not emerged as a scholar... he had the potential of doing that… but he has not achieved that level of scholarship… he hasn't published… consistent with the potential suggested [in the hire letter (Doc. 62-6 – Pgs 35-36; Doc. 62-6 – Pg 87)]." Dean Pernell also consistently evaluated Professor Brown lower than Professor Smith, who was consistently evaluated as a top performer. (Doc. 62-6 – Pgs 74-85).

Professor Smith's recommended salary was reduced from $138,000 to $125,000 very soon after she filed a motion for a new trial on August 25, 2015. (4:14-cv-540-RH/CAS Doc. 109; Doc. 65-1 – Pgs 11-12).

> *Q: Now, what happened between August 28 and September 22 to make that [reduction from $138,000 to*

$125,000] happen?

Jones: I don't recall specifically…

Dean Jones did not know who decreased Professor Smith's recommended salary, but Provost David presumably made salary decisions from Dean Jones' recommendations. (Doc. 62-2 – Pg 18). Dean Jones only remembered that he was told that outliers' salaries of Brown and Levitt could not be matched. (Doc. 65-1 – Pg 12). On August 26, 2015, Professor Smith's recommended salary was $138,000 in a chart described with an attached email as "revised" and "final". (Doc. 28-2 – Pgs 9-12). And according to Dean Jones' August 21, 2015 memorandum, there was money in the budget to fund the recommended salaries, which would include Professor Smith's recommended salary of $138,000. (Doc. 67-2 – Pgs 36-37).

Termination and Confession

During *Smith I*, Provost David called Dean Jones about being the interim dean. (Doc. 65-2 – Pgs 2-3). Dean Jones considered himself "duty bound to the Law School and the University." (Doc. 28-5 – Pgs 6-9). Provost David appointed Dean Jones as the interim dean, and he was under the belief that Provost David intended to appoint him the permanent dean of the law school. (Doc. 65-2 – Pgs 2-3). However, after *Smith I*, Provost David did not appoint Dean Jones as the permanent dean. (Doc. 65-2 – Pgs 2-5). As a result, Dean Jones was disappointed

and indignant. (Doc. 65-2 – Pgs 4, 35). Dean Jones expressed his indignation in an email to the faculty about how Felecia Epps ("Dean Epps"), who was selected as the permanent dean, was not qualified. (Doc. 65-2 – Pg 5). In response, Provost David called Dean Jones "screaming and hollering and basically threaten[ed]" him and then fired him as associate dean. (Doc. 65-2 – Pg 5). Dean Jones testified: "the revenge that Professor David took out on me was to have me fired from my position as Associate Dean"… "Provost David caused me to be fired because of this memo that I wrote." (Doc. 65-2 – Pgs 6, 8). Dean Jones further testified that he thought it was possible "the University could retaliate for a woman being aggressive and speaking up"…because "it happened to me"… "I do not put it past the University to watch as somebody is being retaliated against because they've done it to me." (Doc. 65-2 – Pgs 9-10).

When he was not selected as the permanent dean, Dean Jones confessed to Professor Smith after the *Smith I* trial that before the trial, the University was aware that women were significantly underpaid as compared to men at the College of Law by up to $30,000, and 2) the Plaintiff was unfairly denied promotion to full professor years earlier. (Doc. 1-1 – Pg 5). Dean Jones told Professor Smith about the salary equity study, confirming the gender pay disparities, and in December 2015, he wrote a memorandum to Provost David pointing out the obvious and "inescapable" "Catch-22" in which the University was now trapped for its

inconsistencies in the University's assessment of Professor Smith's fourth promotion application to full professor by failing to follow its own RPT rules. (Doc. 1-1 – Pgs 5-7; 4:14-cv-540-RH/CAS Doc. 118-2 – Pgs 21-23; Doc. 67-2 – Pgs 10-24). As a result of Dean Jones' confession, Professor Smith filed a public records request after *Smith I* to obtain the salary study. (Doc. 1-1 – Pg 6).

Second Post-Trial Motion in *Smith I*

On December 16, 2015, pursuant to Fed. R. Civ. P. 60(b), Professor Smith filed a second motion for a new trial after not being recommended for promotion to full professor in 2015 for the completely opposite rationale that the University testified in court as to why she was denied promotions in 2010 and 2013 as explained in Dean Jones' memorandum to Provost David. (4:14-cv-540-RH/CAS Doc. 118). Simultaneously, Professor Smith filed a motion to reconsider the denial of her motion for a new trial she filed in August 2015. (4:14-cv-540-RH/CAS Doc. 118). The District Court denied both motions. (4:14-cv-540-RH/CAS Doc. 119).

University Equal Opportunity Program Complaint

On December 15, 2016, Professor Smith filed a complaint with the University's Equal Opportunity Program (EOP) to give FAMU the opportunity to correct the salaries, based on gender disparities, as suggested in the salary equity study. (Doc. 67-2 – Pgs 2-3). In its 2017 EOP Investigative Report, the University

concluded – that "gender was not the sole or primary factor for any disparities in the August 2015 study." (Doc. 67-2 – Pg 5). The University's witness, Carrie Gavin ("Ms. Gavin"), who authored the 2017 EOP Investigative Report, but was not involved in applying the criteria for the salary resets, testified as well that "gender was not the sole or primary or the leading factor for any disparities in the August 2015 study." (Doc. 67-2 – Pgs 33-34). Mr. Francis testified that the salary equity study revealed that "[t]here appear to be significant differences around gender." (Doc. 62-3 – Pgs 30-31).

In the pre-trial conference of Barbara Bernier ("Professor Bernier"), a former University law professor who also sued for gender discrimination in pay, Judge Hinkle stated the following to University counsel about the EOP in her case with the same incriminating language:

> Judge Hinkle: One thing that the investigation says is, the reasons for her salary… inequity is not solely or primarily due to a discriminatory factor. With all due respect, this is a law school. Somebody should know that the test of a Title VII violation is not whether race is the sole of primary factor. It cannot be a motivating factor at all, right?
>
> University counsel: It can be a mixed motive, if there is suspicion --
>
> Judge Hinkle: It's against the law under Title VII for it to be a motivating factor at all, right? … [I]f race is a motivating factor in a decision, if gender is a motivating factor, it's against the law.

(Doc 28-3 – Pgs 2-4; Doc 93 – Pg 32).

Third Post-Trial Motion in *Smith I*

After receiving and reviewing the salary equity study, on August 15, 2016, Professor Smith filed a Fed. R. Civ. P. 60(d) motion to set aside judgment because the University and its attorneys denied that women professors were paid less than the professors. (4:14-cv-540-RH/CAS Doc. 125 & Doc. 125-1 – Pgs 2-3). The District Court denied the motion. (4:14-cv-540-RH/CAS Doc. 126). Professor Smith filed a notice of appeal on August 19, 2016. (4:14-cv-540-RH/CAS Doc. 127). The two notices of appeal were merged together on appeal. (4:14-cv-540-RH/CAS Docs. 112, 127; Nos. 15-14613 and 16-15582). The parties participated in mediation to settle the appeal, which was not settled.[3] This Court ruled against Professor Smith in May 2017. *Smith*, 687 Fed. Appx. 888.

The Second Action (*Smith II)*

In Professor Smith's 2018 complaint ("second action" or "*Smith II*"), she asserted first: after *Smith I*, she was discriminated against in the salary reset and when she was promoted to full professor; and second: the University retaliated against her because when the University increased faculty salaries, the University reduced the amount that it recommended for Professor Smith pursuant to its new salary formula because Professor Smith was in litigation with the University. (Doc.

[3] Professor Smith intends to file a motion to supplement the record regarding the settlement agreement, which was left out below, to support the retaliation claim.

1-1). The procedural history of *Smith II* is incorporated from Section II above. Ultimately, the District Court granted the University's motion for summary judgment in June 2019. (Docs. 91, 97).

IV. Standard of Review

This Court reviews the grant of a motion for summary judgment *de novo*, applying the same legal standards applied by the District Court and construing the evidence in the light most favorable to the non-moving party. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1263–64 (11th Cir. 2010). The Court must draw all reasonable inferences in favor of the non-moving party. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1326 (11th Cir.1998).

Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it

is material. *Id.* at 248, 106 S. Ct. 2505. This Court reviews *de novo* a district court's determination of collateral estoppel. *See Jang v. United Techs. Corp,* 206 F.3d 1147, 1149 (11th Cir.2000). The District Court's conclusion that an issue was previously litigated is reviewed for clear error. *Quinn v. Monroe County*, 330 F.3d 1320, 1328 (11th Cir. 2003).

SUMMARY OF THE ARGUMENT

I. Collateral Estoppel

Employers cannot discriminate to cure discrimination or for any other reason. Irrespective of whether pay equity was previously litigated or the reason a salary equity adjustment is implemented, it is unconscionable and illogical to believe that the University (or any employer) can devise a new salary formula and reset employee salaries, and the application and implementation of the reset salaries are exempt from challenge under gender discrimination laws to determine whether the new or revised salary formula was applied equally to both sexes. Case law does not support that conclusion. It is also unconscionable and illogical to believe that an employer is exempt from paying women equally to men for equal work by simply labeling higher paid men as "outliers." This is, by any definition, gender discrimination.

The District Court held that Professor Smith was collaterally estopped from litigating her second gender discrimination claim. However, there are intervening –

separate and distinct – controlling facts that occurred after *Smith I* that rendered the issue in *Smith I* not identical and not actually litigated in *Smith II*. Specifically, *Smith I* litigated the disparities in the salaries at the time of hire of Professor Smith and her male comparators on the basis of faculty credentials; conversely, the gravamen of *Smith II* is the discriminatory application of the University's new post-hiring salary formula employed in resetting the faculty salaries using rank, tenure and length of tenure after *Smith I*.

Two cases are instructive. *Bd. of Regents of Univ. of Nebraska v. Dawes*, 522 F.2d 380 (8th Cir. 1975), supports how and why *Smith II* cannot be barred under the doctrine of collateral estoppel. Like the case at bar, *Dawes* also involved: (1) a salary equity study, (2) salary increases and no decreases of some employees but not all employees, and (3) the failure to apply the employer's new salary formula equally among both sexes. The *Dawes* Court found that salary equity adjustments must be applied equally to both sexes. In *Schwartz v. Fla. Bd. of Regents*, 807 F.2d 901 (11th Cir. 1987), this Court found that the professor's settlement of a prior pay lawsuit did not foreclose him from challenging the subsequent salary equity. To do otherwise would insulate an employer from liability for salary gender discrimination if the salary provided at hiring were found to be non-discriminatory. Such a conclusion is not supported by logic, reasoning or legal precedent.

II. Retaliation

The District Court erred in finding that the University did not retaliate by reducing Professor Smith's recommended salary in the salary adjustment before implementation from $138,000 to $125,000. There is no dispute that the initial recommendation to increase Professor Smith's salary reset from $115,000 to $138,000 was appropriately based on the new salary formula. However, the recommendation of $138,000 was reduced to $125,000 very shortly after Professor Smith filed her motion for a new trial in *Smith I*. With no plausible explanation for the reduction, the University asserted that "budget constraints" and its novel "outlier theory" caused it to reduce Professor Smith's recommended salary to $125,000. Budget constraints cannot justify perpetuation of discrimination. *Fagen v. Iowa*, 324 F. Supp. 2d 1020, 1027 (S.D. Iowa 2004). In addition, the University's documents reveal that money was already calculated in the budget for Professor Smith's recommended salary of $138,000 and its witnesses conceded that money could be found. The University's novel defense of "outliers" – where men are paid remarkably more than women – is actually an admission of gender discrimination, rather than a justification for discrimination or a defense to retaliation. In *Jepsen v. Fla. Bd. of Regents*, 754 F.2d 924, 926 (11th Cir. 1985), this Court found that the defendant-university's business necessity defense that it was focused on hiring men because the defendant-university was moving from a

woman's college to co-educational was almost an "outright admission of sex discrimination." Here, therefore, the University's putative "outlier theory" supports Professor Smith's retaliation claim.

ARGUMENT

I. COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

The District Court Erred in Applying Collateral Estoppel (Issue Preclusion) to Professor Smith's Second Lawsuit Where the Controlling Facts and Issues Were Distinct and Separate and Not Actually Litigated or in Existence during the First Lawsuit

Collateral estoppel "recognizes that suits addressed to particular claims may present issues relevant to suits on other claims," *Kaspar Wire Works, Inc. v. Leco Engineering and Mach., Inc.,* 575 F.2d 530, 535 (5th Cir. 1978) [4], and requires that the identical issue in question was actually litigated and necessary to the judgment of an earlier suit. *Hart v. Yamaha–Parts Distrib., Inc.,* 787 F.2d 1468, 1473 (11th Cir. 1986). However, facts that have not occurred cannot be barred under collateral estoppel. *See Dawkins v. Nabisco, Inc.,* 549 F.2d 396, 397 (5th Cir.1977); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015)("The Restatement explains that subject to certain well-known exceptions, the general rule is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the

[4] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (*en banc*), this court adopted as precedent decisions of the former Fifth Circuit Court of Appeals decided before October 1981.

judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' *Restatement (Second) of Judgments,* § 27, p. 250 (1980))".

The party asserting collateral estoppel or issue preclusion must show: (1) the issue at stake is identical to the one involved in the prior litigation; (2) the issue was actually litigated in the prior suit; (3) the determination of the issue in the prior suit was a necessary part of the judgment in that action; and (4) the parties are the same or in privity with each other and the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. *Baloco v. Drummond Co*., 767 F.3d 1229, 1251 (11th Cir. 2014).

However, "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979). *See, e.g., United States v. Certain Land at Irving Place & 16th Street*, 415 F.2d 265, 269 (2d Cir. 1969); *Metcalf v. Commissioner of Internal Revenue*, 343 F.2d 66, 67-68 (1st Cir. 1965); *Alexander v. Commissioner of Internal Revenue*, 224 F.2d 788, 792-793 (5th Cir. 1955); *1B Moore*, ¶ 0.448, pp. 4232-4233, ¶ 0.422[4], pp. 3412-3413. It is fundamental that the principle of collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts remain

unchanged." *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600, 68 S. Ct. 715, 720 (1948). *See CSX Transp., Inc. v. Bhd. of Maint. of Way Employees*, 327 F.3d 1309, 1317 (11th Cir. 2003) ("CSXT need only point to one material differentiating fact that would alter the legal inquiry here and thereby overcome the preclusive effect of *Marquar.*") *See Sewell v. Merrill Lynch*, 94 F.3d 1514, 1518-19 (11th Cir. 1996) (citing *Mike Smith Pontiac, GMC, Inc. v. Mercedes–Benz of N. Am.,* 32 F.3d 528, 532 (11th Cir. 1994) (finding in the Eleventh Circuit, collateral estoppel applies where issues at stake are identical to issues alleged in prior litigation, issues actually litigated in prior litigation and determination of issues in prior litigation was a critical and necessary part of judgment in earlier action), *cert. denied,* 516 U.S. 1044, 116 S. Ct. 702, 133 L.Ed.2d 659 (1996); *Parker v. McKeithen,* 488 F.2d 553, 557 (5th Cir. 1974) (finding well-settled law establishes that facts decided in an earlier suit are conclusively established between parties provided it was necessary to result in the first suit)). Issue preclusion is an affirmative defense that must be proved by the defendant. *Grayson v. Warden*, 869 F.3d 1204, 1223 (11th Cir. 2017).

A. Collateral Estoppel Does not Apply to Professor Smith's Second Lawsuit Because the Issues Are Not Identical and Were Never Litigated or in Existence in the First Lawsuit

If the District Court is not reversed, then employers can discriminate under the guise of curing discrimination in salary equity adjustments. As shown below,

courts have already spoken on this – salary equity adjustments can be challenged under discrimination laws. That the salary equity adjustment was not applied to all employees, did not include decreases in any salaries, or was after a prior challenge to pay equity is irrelevant. That, however, said the District Court, is the "linchpin of [Plaintiff's] case" and the "problem that [Plaintiff needs] to address." (Doc. 93 – Pg 5). But, according to case law, salary equity adjustments must be applied equally – there are no conditions to that.

i. Equal Pay Act

The District Court held that Professor Smith "could prevail on her Equal Pay Act claim only on a finding that she has been paid less than at least one similarly situated male professor *and that the pay disparity was not simply carried forward from July 22, 2015.* (Doc. 91 – Pgs 3-4). The District Court reasoned that *Smith II* salaries are collaterally estopped because "[t]he University did not start over" in resetting salaries. (Doc. 93 – Pg 29). But neither did any of the employers in the cases below where salary equity adjustments were challenged under discrimination laws.

Professor Smith's challenge of her hire salary in 2004, which was litigated based on faculty credentials, is not the identical issue as her challenge of the application of the salary equity adjustment based off of rank, tenure and length of tenure (objective criteria), which adjustment was made and implemented after the

first trial. In *Smith I,* Professor Smith argued that she should be paid the same as three male tenured associate professors, one of which was Associate Professor Brown. In *Smith II,* Professor Smith is arguing that the University created and implemented a new salary formula and changed her salary, and under the new salary formula, she should be paid the same as the male comparator with her same rank, tenure and length of tenure years (new salary formula), and this happens to also be Professor Brown. The University does not dispute this; rather, it advances two reasons (discussed below) why the new salary formula was not applied to Professor Smith. This was not and could not have been litigated in *Smith I* nor is this a pay disparity that was carried forward.

The District Court's rationale for applying collateral estoppel was because, although there was a "substantial adjustment" of faculty salaries, there was not a *de novo* reset of *all* faculty salaries nor a *decrease* of *any* faculty salaries.[5] (Doc. 93 – Pgs 26, 29). Case law reveals that the District Court's rationale is wrong. There does not have to be a reset of *all* faculty salaries or a *decrease* of any faculty salaries – none of the applicable cases involve any of this. That there was a salary equity adjustment – even a one-time salary equity adjustment – is enough to void

[5] Under the EPA, an employer cannot decrease salaries to comply with it. 29 U.S.C. § 206 (d)(1). The District Court noted that union contracts may also prevent decreasing salaries. (Doc. 93 – Pg 26).

the application of collateral estoppel. Salary equity adjustments can be challenged under discrimination laws.

Dawes is instructive. In *Dawes*, the University of Nebraska ("UN") became aware of potential unlawful discrimination against women. *Dawes*, 522 F.2d at 381. UN made salary adjustments to eliminate salary discrimination, based on gender, to avoid loss of federal funds. *Id.* UN formed a committee and concluded that, to eliminate gender-based salary inequities, they would: first, identify comparable jobs; second, assign a monetary value that went into determining salaries; and third, compare the average male salary with the individual female salaries based on the formula from the first two steps. *Id.* The formula determined that 33 of the 125 female employees were receiving less than the formula salary. *Id.* at 382. UN increased the salaries of only the 33 women to the formula level (making only limited changes as in the case at bar – see Doc. 91 – Pg 4) and decreased no salaries (as in the case at bar), and, thus, a number of men were now earning less than the formula salary. *Id.* at 382-83. UN filed a declaratory judgment action to determine the rights of the male professors under the EPA. *Id.* at 381. The issue was: "whether the University unlawfully discriminated against the male professional employees of the College of Agriculture and Home Economics when it sought to equalize salaries paid to the male and female employees of those colleges." *Id.* UN argued that this was a one-time salary adjustment and it would

return to its traditional method of considering faculty credentials, and, thus, there is no violation of the EPA. *Id.* at 383. The court held the following:

> [W]hen a university establishes and effectuates a formula for determining a minimum salary schedule [new salary formula/ground rules] for one sex and bases the formula on a specific criteria, such as education, specialization, experience and merit, it is a violation of the Equal Pay Act to refuse to pay employees of the opposite sex the minimum required under the formula.

Id. at 384.

Here, after *Smith I*, the University completed a salary equity study that suggested that gender is a significant factor in setting faculty salaries. The University claimed that it did not set out to cure the perceived gender issue, but only to solve salary inversion and compression issues, but hoped or assumed the perceived gender issues would be cured nevertheless. Just as in *Dawes*, in which a salary equity adjustment was not tailored to remedy past discrimination, the University claimed that the March 2016 reset of some faculty salaries was a one-time equity adjustment.

Similar to *Dawes*, the University was the one to establish the new salary ground rules or the new salary formula. Under the University's new salary formula for tenured associate professors, like Professor Smith at the time, the University set a base minimum for tenured associate professors at $120,000 then adjusted based on rank, tenure and length of time tenured (third phase of the University's

process).[6] Under this new salary formula implemented in 2016, the University found that Professor Smith's salary should be comparable to that of Professor Brown, whose salary was $138,500. The University recommended Professor Smith for $138,000 consistent with its new salary formula, but before implementation reduced it to $125,000 within days or weeks of her filing a motion for a new trial related to *Smith I*. Professor Smith, like the plaintiffs in *Dawes*, is making less than the new salary formula and a comparable male. This is discrimination and not the same issue that was tried in *Smith I.*

In *Smith II,* the District Court found that Professor Smith cannot challenge the faculty salary reset because "[t]he evidence there and the evidence here would present a disputed issue of fact over whether the disparities between Ms. Smith's pay and the pay of one or more men was based on a factor other than sex." (Doc. 93 – Pg 28). However, the reasons for the disparity from *Smith I* are unknown – all that is known is that the *Smith I* jury found that the pay disparity was "caused by factors other than gender." (4:14-cv-540-RH/CAS Doc. 91 – Pg 3). Here, the University argues that the current pay disparity is because of: (1) "budget constraints" and (2) its novel "outlier theory". Neither of these were defenses in *Smith I* as will be shown below.

[6] This is the part of the salary adjustment that the District Court glossed over. (Doc. 75; Doc. 93 – Pgs 30-31).

The District Court erred. First, the University created the new ground rules for the salary resets. It did not have to include length of tenure, but, because it did, then it must apply the new salary formula equally to both male and female faculty. There is no dispute that applying the formula to Professor Smith means that her salary should have been increased to $138,000. In *Dawes*, the Court said:

> It was the University, not the defendant class, that established the ground rules for determining whether women were being discriminated against. It determined the factors that were considered to be important for that purpose. *It cannot now be heard to complain that some other additional factors must also be considered when the question is one of discrimination against male employees who are being paid less than the formula minimum.*

Dawes, 522 F.2d at 383-84. (emphasis added). Here, the University must apply the new salary formula to Professor Smith as it did initially in recommending her for $138,000. The University did initially apply its new ground rules to Professor Smith by recommending her for an increase to $138,000, but before implementation the University reduced the recommended salary to $125,000. The University added an additional $5,000 to the $120,000 base, but there is no legitimate explanation for it. That her length in years tenured are virtually comparable to Professor Brown is not in dispute. All things being remotely equal, the difference between Professor Smith's $138,000 and Professor Brown's $138,500 would be a $500 differential for his one additional year of tenure at the

University. With rank and tenure being consistent with the other tenured associate professors, then it is length in tenure for which Professor Brown's salary reflects $18,500, yet Professor Smith's near identical time in tenure represents only $5,000 – this is discrimination. Partial equity adjustments are disfavored. *See Jepsen v. Fla. Bd. of Regents,* No. TCA 74-0177, 1983 WL 30285 (N.D. Fla. July 7, 1983), *aff'd*, 754 F.2d 924 (11th Cir. 1985). *See also Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 674 (4th Cir. 1996))("The VCU study controlled for such differences in doctoral degree, academic rank, tenure status, number of years of VCU experience, and number of years of prior academic experience. Any difference in salary after controlling for these factors was attributed to sex."). Here, the salary equity study suggested that "gender, years tenured, and rank played significant roles in determining salaries." When years tenured and rank are controlled, then any difference in salary must be gender. The University seeks to excuse this pay differential by inserting additional factors of "budget constraints" and "outliers" in its new salary formula that it created. This is contrary to *Dawes.* The challenge of whether the University applied its new ground rules to Professor Smith has never been litigated.

Furthermore, just as if Professor Smith had settled *Smith I* rather than litigated it, she has the right to participate fairly in any subsequent salary adjustments. This could not possibly have been litigated in *Smith I.* In *Schwartz*,

this Court held that even though the plaintiff, Professor Schwartz, settled his prior pay equity lawsuit against the defendant, plaintiff was not foreclosed from pursuing future EPA and Title VII claims. *Id*. at 906 ("Schwartz is entitled to appropriate systems of salary adjustment that are accorded to other employees" and "Schwartz is correct that the settlement agreement did not constitute a waiver of his future Equal Pay Act or Title VII claims.").

One-time equity adjustments (salary equity adjustments) are changes to salaries that can be challenged under discrimination laws. Case law supports Professor Smith's position that salary fixes can be challenged. *See Rudebusch v. Hughes*, 313 F.3d 506, 523-24 (9th Cir. 2002) (permitting Title VII claims of white, male professors challenging pay equity adjustments for female and minority professors, resulting in a jury verdict for the plaintiffs); *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1018 (8th Cir. 1998) (same, resulting in settlement); *Smith,* 84 F.3d at 677 (same, resulting in settlement); *Ricci v. DeStefano*, 557 U.S. 557, 585, 129 S. Ct. 2658, 174 L.Ed.2d 490 (2009)(involving a disparate impact case, where the Supreme Court held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."). *Cf. Ende v. Bd. of Regents of Regency*

Universities, 757 F.2d 176, 181-82 (7th Cir. 1985)(distinguishing *Dawes* where the existence of sex discrimination was not persuasively established and in *Ende* the increases were tailored to correct past gender discrimination). It is unlikely that *Ende* would survive post-*Ricci,* but here, the District Court found, and the University argued, that the University was not trying to remedy gender discrimination, but rather to remedy salary inversion. Here, the University increased male and female salaries allegedly to remedy salary inversion pursuant to a new salary formula that the University created but did not apply it to both sexes equally. Clearly, the issue in *Smith I* is not the same as in *Smith II*, and one-time salary equity adjustments can be challenged if inequitably applied among men and women. That Professor Smith had a prior suit on pay equity is not determinative.

Second, the different issue is clear when you consider the rationales behind the current salary disparity. The rationales for the disparity in current pay between Professors Smith and Brown after the salary resets are different. In *Smith I*, the jury only found that "factors other than sex" caused the pay disparity between Professors Brown and Smith; in *Smith II*, the University asserts that faculty credentials are the reason for the current pay disparity, but the University witnesses who led the salary equity adjustments, Deans Green and Jones, testified that the University did not apply the new salary formula to Professor Smith – that is, the current pay disparity – is because of "budget constraints" and the novel "outlier

theory." This "outlier theory" is not a defense, but rather an admission of gender discrimination. *See Jepsen*, 754 F.2d and 926.

The District Court said that the "anonymous" reasons for the current salary inequity between Professors Smith and Brown remain from *Smith I* – "They got reduced, but the reasons are still there." (Doc. 93 – Pg 6). This is illogical. The University's reasons – why there is a current pay disparity between Professors Brown and Smith – are because the University did not have the money – "budget constraints" – and Professor Brown was an "outlier" in the tenured associate professor category. In other words, the University's reasons for the current pay disparity are really an excuse as to why its new salary formula was not applied to Professor Smith – no party disputes that under the new salary formula, she should have received an increase to $138,000. More specifically, the University is advancing justifications for why it is not discriminating or retaliating against Professor Smith in the salary equity adjustment. This is a new issue with new facts that were developed after *Smith I.* Neither of the University's excuses of "budget constraints" nor the novel "outlier theory" has been litigated as the rationale for the salary disparity.

Budget constraints cannot justify perpetuation of discrimination. *Fagen,* 324 F. Supp. 2d at 1027. The University has asserted that budget constraints are the rationale for the wide chasm between Professor Smith's and Professor Brown's

current salary. In addition, the University's documents reveal that it took in consideration Professor Smith's recommended salary of $138,000 in the August 21, 2015 memorandum to Provost David dealing with the budget. Within days after that Professor Smith filed her motion for a new trial, and her recommended salary was reduced to $125,000 with no plausible justification to support it. In addition, the University conceded that money can be found, so the excuse of "budget constraints" is clearly pretext for discrimination and retaliation.

The University also creates an illegitimate, novel "outlier" defense. The University identified three men who are making significantly more than the other faculty and termed them "outliers." The University found that these male outliers' salaries should never have been set that high in the first place. The University admits that only men are outliers – there are no women who are significantly earning more than other faculty. It is undisputed that there was a pay differential after the salary equity adjustment between Professors Brown and Smith when they were both tenured associate professors. Professor Smith was the only faculty member recommended to meet an outlier's salary. After the salary equity adjustment, the University must explain the differential by something other than the male faculty, Professor Brown, is the outlier.

In *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009), a female employee sued her employer under the EPA and Title VII for gender

discrimination. The court found that the employer cannot just articulate a legitimate non-discriminatory reason for the different wages between the female employee and male comparator, but the employer must prove that the pay differential was based on a factor other than sex. *Id.* at 1072. There was a pay differential where the male comparator was earning more than the female employee. *Id.* at 1073. The male's salary approximated the market value whereas the female's salary was well under that, and she was the "outlier." *Id.* The court found that justifying the male's salary did not justify the female's salary – "the differential must be explained." *Id.* The employer alleged that the differential was based on the market value of the male's skills, but the court found that the employer's factors other than sex were not proven. *Id.* In addition, prior salary alone cannot justify a pay disparity under the EPA. *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988).

Here, the University said that it reduced Professor Smith's salary to $125,000 because it was not trying to bring her up to the "outlier" – Professor Brown. That is an explanation rather than a legitimately sustainable justification, and certainly not one tied to a business reason. *See Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255–256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In addition, the University identified Professor Smith as the only one

recommended to earn nearly as much as the outlier, Professor Brown. The University's creation of a category of higher paying men as "outliers" is an admission of gender discrimination, rather than a defense. *See Jepsen,* 754 F.2d at 926 ("In its defense Florida State University asserted that during that time period it was moving from a women's college to a co-educational university and the hiring and promotion of male faculty was a major objective. The court observed that the defendant's 'business necessity' defense came 'dangerously close to an outright admission of sex discrimination.'"). Similarly, the unproven market force theory is not a defense. *Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 596 (11th Cir. 1994). There is simply no evidence as to why Professor Smith was not kept at the recommended $138,000 to nearly match Professor Brown's salary level, especially where the University's own documents and assessments reveal she has outperformed him. *Id.* (Finding "[a market force] factor did not explain employer's failure to at some point raise female plaintiff's pay to match or exceed that of comparators when she outperformed one comparator for four out of five years and second comparator during all three years of comparison."). The University has no legitimate explanation for applying the new salary formula to Professor Smith then reducing the salary that results from applying the new salary formula. Under *Dawes,* this is a violation of the EPA. This was not litigated in *Smith I* – these are

new material facts. The only one, to which the new salary formula did not apply for tenured associate professors, was Professor Smith.

Third, it is not clear what the University considered in the salary resets. The District Court also found that the University provided information that some professors have considerably better records on scholarship, more publications and citations to their publications and those things were not factored in the analysis of pay. (Doc. 93 – Pg 31). According to Dean Green and Mr. Francis, these factors "potentially" were considered in the salary resets. Dean Green, who worked alongside Dean Jones in the salary resets, testified that Dean Jones considered a whole bunch of factors, including resumes, CVs and hiring packets. In addition, when Dean Jones reset Professor Smith's salary to $138,000, he was aware of her "top" credentials and publications exceeding Professor Brown's, but claimed that was not a factor in his recommending her for an increase to $138,000. Mr. Francis testified that the salary equity study was compiled using official employee files and their number of publications. Thus, it appears that faculty credentials were part of the reset process. Having considered faculty credentials in *Smith I*, if the University reset salaries using these criteria and reset Professor Smith's salary, then relitigating this would also not be barred under collateral estoppel.

ii. Title VII and FCRA

The District Court found that Professor Smith can prevail on her "Title VII

claim only by showing that gender was a motivating factor in a pay decision *made or implemented after July 22, 2015*." (Doc. 91 – Pg 4). The District Court noted in oral arguments that "Ms. Smith is absolutely right, the law prohibits consideration of gender. If gender is a motivating factor, considering it is against the law." (Doc. 93 – Pg 32). The District Court then notes the remarkable incriminating gender language that the University uses in its documents which indicate that gender was not the "sole or primary" factor of the setting of pay. The University repeatedly uses this incriminating gender language in its documents created after *Smith I*, which is bolstered and affirmed by the recent testimonies of Ms. Gavin and Mr. Francis. The repeated sexist language is no mistake.

Gender cannot be *any* factor in unequal pay. *See Jones v. Westside-Urban Health Ctr., Inc.*, 760 F. Supp. 1575, 1579-1580 (S.D. Ga. 1991) (the burden of proving that a factor other than sex is the basis for a wage differential is a heavy one which is only met if the employer proves that sex played absolutely *no role* in any salary determinations. *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 429 (M.D. La. 1977); *Futran v. Ring Radio Co.,* 501 F. Supp. 734, 738 (N.D. Ga. 1980)). Here, with numerous references to incriminating language indicating that gender was not the sole or primary factor in setting salaries, but perhaps a factor, the District Court did not allow the University to prove that gender was not a motivating factor. The District Court states that the University has not admitted that gender was a motivating

factor (Doc. 93 - Pg 32) – no defendant would – but Professor Smith certainly advanced a *prima facie* case. In *Jones*, the plaintiff presented enough facts to create a material dispute as to whether Jones' sex played *no role* in the decision to continue to pay him less than the comparator. Here, the University has not proved that gender played no role. By the University's own evidence, gender appears to be a motivating factor. This could not have possibly been litigated in *Smith I* because the EOP and salary equity study were created after *Smith I.*

In addition, the University has not shown why it did not apply the new salary formula to her, even though that was recommended and consistent with its own new salary formula. The University witnesses asserted as a justification of not increasing Professor Smith's salary to $138,000 through witness testimony that there were several inchoate drafts of the salary reset, but they were not produced because the numbers never made it into an official document. In fact, there is no explanation for the additional $5,000. Is it because the University does not have the money to increase her salary over $20,000 as it did for Professors Broussard, Taite and Reaves? Is it because she filed a motion for a new trial after *Smith I*? Is it because the University needed room to negotiate a settlement of the appeal of *Smith I*? Is it based on Professor Brown's failure to perform as the University expected? Is it because Professor Smith has outperformed Professor Brown? Or is it because, as the University's documents and witnesses reveal, the University

factored in gender to set faculty salaries? What is clear from the University's documents is that the University calculated Professor Smith's recommended salary of $138,000 in its budget that the University indicated it could afford before it reduced her salary.

B. Collateral Estoppel Should Not Apply Where Additional Evidence in the Second Lawsuit Revealed That the University Used Gender as a Means of Setting Salaries

Collateral estoppel is a discretionary doctrine, not an inexorable command, that should not be employed here to allow the University to continue to violate federal law. There is too much at stake and too much evidence that gender is likely being used to set salaries – the University's own documents and witnesses indicated that.

The District Court's order addressed Professor Smith's argument that collateral estoppel should not be applied when an injustice would result. (Doc. 97). The District Court cited a trademark case, *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1318-19 (11th Cir. 2012) (applying collateral estoppel despite the first-case loser's contention that circumstances changed after the first-case judgment). (Doc. 92 – Pg 2). But this is not just Professor Smith's contention – it is fact. Professor Smith's pay in an equal pay case changed, as well as the method of setting the pay and the rationales behind the current disparity in pay between Professor Smith and her male comparator. There

is nothing more material and essential in an equal pay case than pay. *See Miller* at 1319 (citing *CSX Trans.,* 327 F.3d at 1317: "A party 'need only point to one material differentiating fact that would alter the legal inquiry here and thereby overcome the preclusive effect.'"). This cannot possibly be barred under collateral estoppel.

Notwithstanding that equal pay is one of the most popular topics in America, the District Court states that this case does not present the kind of unique circumstances that would allow Professor Smith to relitigate. (Doc. 97 – Pgs 2-3). There are a handful of federal cases involving salary equity adjustments and all of them favor Professor Smith – salary equity adjustments can be challenged under discrimination laws.

The District Court states that even if it has discretion not to apply collateral estoppel, the Court would apply collateral estoppel nonetheless because the University has offered substantial reasons for the differences in pay and the pay of others; the jury decided only that gender was not a factor in those differences as of 2015; and Professor Smith says only that the University failed to correct its past discrimination that the jury found did not exist. (Doc. 97 – Pg 3). This is not really accurate. As for the substantial reasons – the University said the current pay disparity is because of faculty credentials (which makes no sense after Dean Pernell's testimony about Professor Brown), but the University witnesses said the

current disparity is because of budget constraints and the outlier theory. The District Court seems to believe that the salary equity adjustment is not able to be challenged as discriminatory in its application and implementation. This is contrary to the case law cited above. In addition, Professor Smith is not just saying that the University failed to correct its past discrimination, which is true, and its own documents reveal, but also that there is new, different or additional discrimination in the application and implementation of the salary equity adjustment. *See Dawes and Schwartz*. In assessing the University's substantial reasons, then the District Court apparently found a *prima facie* case and evaluated the University's justifications for the salary disparity – this is not a dismissal under collateral estoppel.

Also, the University's witnesses testified that there were no outliers initially in the salary equity adjustment process – the outlier theory developed later to justify the pay disparity between Professors Smith and Brown, thus that defense is new and was not a part of *Smith I* nor could "budget constraints" have been a part of *Smith I* where the University *defended* paying comparable male faculty *more* than Professor Smith.

The Supreme Court has found that "where important human values are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." *Whole Woman's Health v.*

Hellerstedt, 136 S. Ct. 2292, 2305, 195 L. Ed. 2d 665 (2016), *as revised* (June 27, 2016) (citing *Restatement* § 24, comment f). *See also Jaffree v. Wallace,* 837 F.2d 1461, 1469 (11th Cir. 1988). A discretionary doctrine, like collateral estoppel, should not be used to allow such illegalities to remain – this is fundamentally unfair and egregious. *Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 574 (11th Cir. 2019) ("[C]ollateral estoppel does not apply even though the Secretary may have failed to prevail on this legal issue in a previous proceeding against Williams. Collateral estoppel is a discretionary doctrine that has no application where there has been an intervening change in legal principles."). See also *Restatement (Second) of Judgments*, § 28(2)(b))(stating that relitigation of the issue in a subsequent action between the parties is not precluded where a new determination is warranted in order to avoid inequitable administration of the laws.").

This appears to be such a human issue that the court would decline to use collateral estoppel to allow the University to continue potentially violating federal law. The District Court indicates that the University has not admitted gender was a factor – no defendant would do so – but the University's witnesses, its own salary equity study and other documents certainly strongly suggest that gender played, and continues to play, a role in setting faculty salaries – in violation of federal law. And the University's outlier defense is an admission of gender discrimination, not

a defense. *See Jepsen*, 754 F.2d and 926.

The District Court indicated that it granted the University's motion because there was no full reset/*de novo* review in the March 2016 reset. (Doc. 93 – Pg 29). Following that logic, if the University had the money to increase more salaries, then this case would be on the way to trial. Thus, the University is being rewarded for allowing gender inequities to remain due to an alleged lack of funds to correct the issue. Even the District Court noted that the University acknowledges that the "differences in pay that existed earlier are still there." (Doc. 93 - Pg 6). If so, the gender disparities, due to the University likely considering gender in setting salaries, remain. A judge can decide if a woman deserves equal pay – and these decisions do not just impact one woman. They can become the standard for other cases of discrimination impacting all women, and their daughters and their granddaughters. This is why the application of collateral estoppel to issues of great importance is not favored. But more importantly, the differences in pay that existed in *Smith I* under a different salary formula cannot be the same ones that exist under a completely different salary formula method. Collateral estoppel should not be used to deny equal pay to women or create an "outlier theory" that allows employers to label highly paid men as "outliers" and make them untouchable for discrimination challenges. This is unconscionable and will be a disaster to equal pay laws.

II. RETALIATION

The District Court Erred in Finding that the University did not Retaliate against Professor Smith Where the University Reset Professor Smith's Salary Consistent with Its Own New Salary Formula and Prior to Implementation Reduced Professor Smith's Salary within Days or Weeks of Her Filing a Motion for a New Trial and Contended the Reduction was Due to Budget Constraints and a Novel "Outlier Theory."

Within days or weeks after Professor Smith filed a motion for a new trial, the University reduced her recommended salary in a manner inconsistent with its own new salary formula with explanations that are clearly pretext. This is a *prima facie* case of retaliation with no legitimate non-discriminatory rationale for the University's reduction.

Equal Pay Act, Title VII and FCRA

The District Court stated that the harder case was retaliation. (Doc. 93 – Pg 33). The District Court found that Professor Smith "can prevail on a retaliation claim by showing that the earlier claim was a motivating factor in a decision adversely affecting her pay, including a decision not to provide a raise or to provide a raise of a lower amount than would otherwise have been provided." (Doc. 91 – Pg 4). The District Court erred when it found that the University's failure to provide a raise of Professor Smith's salary to $138,000 was not retaliation. The District Court opined that the $5,000 Professor Smith received more than other tenured associate professors was more generous than how they

were treated. (Doc. 91 – Pgs 8-9). The District Court can only come to that conclusion by viewing the facts in the light most favorable to the University (moving party), which is inappropriate in a motion for summary judgment. Professor Smith was the *only* tenured associate professor who qualified for much more than the minimum $120,000 by the University's own new salary formula. Thus, not increasing her salary to $138,000 under the University's formula is not being more generous to her – it is treating her worse. That is, she is the only tenured associate professor who is not being paid according to her rank, tenure and length of tenure.

Title VII/FCRA prohibits retaliation against an employee because the employee "has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e–3(a). "To establish a *prima facie* case of retaliation under Title VII, a plaintiff must show that: (1) [s]he engaged in statutorily protected expression; (2) [s]he suffered an adverse employment action; and (3) there is some causal relation between the two events." *Olmsted v. Taco Bell Corp.,* 141 F.3d 1457, 1460 (11th Cir. 1998) (citing *Meeks v. Computer Associates Int'l,* 15 F.3d 1013, 1021 (11th Cir. 1994)). The causal link element is construed broadly so that "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Olmsted,* 141 F.3d at 1460 (quoting *E.E.O.C. v. Reichhold*

Chem., Inc., 988 F.2d 1564, 1571–72 (11th Cir. 1993)). Once a plaintiff has established a *prima facie* case, the employer then has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. *Olmsted*, 141 F.3d at 1460; *Meeks*, 15 F.3d at 1021. The ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff. *Olmsted*, 141 F.3d at 1460. *See also Pennington v. City of Huntsville,* 261 F.3d 1262, 1266 (11th Cir. 2001) (internal quotation marks omitted).

Under the EPA, it is unlawful for any person:

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). The Eleventh Circuit has held that a plaintiff proves a violation of § 215(a)(3) when she can show that the protected activity was the "but for" cause of her [discrimination]. *Reich v. Davis*, 50 F.3d 962, 965–66 (11th Cir. 1995).

Under the new salary formula, the University increased Professor Smith's salary comparable to Professor Brown, who she is comparable in rank and tenure – like the other tenured associate professors – but she was the only one comparable

to him in length of tenure. No other tenured associate professor merited any more than $120,000, based on the University's new salary formula, except Professor Smith. Thus, the others cannot be compared. No other professor was recommended to a salary comparable to any outlier other than Professor Smith. Thus, again, the others cannot be compared here. The University also recommended $138,000 for Professor Smith, then reduced it to $125,000 allegedly due to budget constraints. The facts reveal a different motive.

When Professor Smith's counsel asked what happened between August 28, 2015 and September 22, 2015 when the reduction of her recommended salary of $138,000 was reduced to $125,000, Dean Jones had no explanation for this reduction or the "extra" $5,000 more than other tenured associate professors, and Dean Green said it was because of money. However, what was occurring then was that Professor Smith filed a motion for a new trial on August 25, 2015. The University's documents show that it had included Professor Smith's recommended $138,000 in its budget calculations when the recommendation was made. Within a few days of filing her motion for a new trial, the University reduced Professor Smith's recommended salary from $138,000 to $125,000. This reduction was presumably done by Provost David, whom Dean Jones testified had previously retaliated against him for exercising his legal rights. The causality of the University's knowledge and adverse employment action (not increasing the salary

to $138,000) coupled with the extremely close temporal proximity of it all – within days or weeks – satisfies the merit of her retaliation claim and constitutes a *prima facie* case of retaliation that was not refuted. *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004).

Regarding retaliation, generally, settlement discussions are not admissible except for limited purposes. Fed. R. Evid. 408, which governs admissibility of settlement-related evidence, excludes such evidence only in certain circumstances. Rule 408 expressly allows the use of settlement-related evidence for a number of reasons.[7] Under the rule, the court may admit this evidence for another purpose, such as proving a witness' bias or prejudice, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1353–55 (11th Cir. 2011) (upholding the District Court's decision to admit evidence that defendant acknowledged his responsibility to pay a debt owed to plaintiff). Professor Smith believes, and there is no testimony to the contrary, that her salary was reduced from $138,000 to $125,000 because of her filing a motion for a new trial and the University's ability to have a cushion to negotiate a settlement for an appeal or additional litigation. Otherwise, the University would have maintained her salary increase at $138,000. The evidence establishes that it was not money which caused

[7] See footnote 3.

the University to not increase her salary to $138,000. There is no explanation for the University to have given Professor Smith an additional $5,000 – why not an additional $8,000 or $10,000? Why not the entire amount because the tenured full professors received salary increases with the one-time equity adjustment of over $20,000 – why not for Professor Smith? The District Court says it was "out of line" with the other tenured associate professors' new salary adjustments (Doc. 91 – Pg 8). What was "out of line" was the unexplained, additional $5,000 and what was surely "out of line" was not applying the length of tenure factor the University included in its new salary formula to Professor Smith. But, for Professor Smith's litigation and opportunity for the University to offer her an increase in her annual salary for settlement, Professor Smith's salary increase to $138,000 as a tenured associate professor would not have been reversed. The District Court makes comparisons with other tenured associate professors, but it cannot. The keystone of a claim is not the treatment of others in the protected group; rather it is the treatment of the plaintiff, here Professor Smith. The District Court erred in dismissing Professor Smith's retaliation claim.

The District Court's parting words during the motions hearing were: "And as I say, the Eleventh Circuit doesn't have any problems with reviewing my rulings." (Doc. 93 – Pg 37). After reviewing the judge's impressive affirmation rate, Plaintiff understands the judge's comment in context, but in this case, the District

Court erred and must be reversed.

CONCLUSION

Appellant requests that the Court reverse the District Court's grant of summary judgment to Appellee, grant Appellant's motion for summary judgment on liability, remand the case to the District Court as needed, reverse the award of Court costs and provide other relief as determined.

Respectfully submitted,

/s/ *Stephen M. Smith*
LA State Bar No. 28235
Stephen M. Smith & Associates, LLC
1425 North Broad Street
Suite 201
New Orleans, Louisiana 70119
Telephone: (504) 947-1400
Telecopier: (504) 947-1100
stevesmithlaw@aol.com

/s/ *Jennifer M. Smith*
FL Bar No. 964514
Law Office of Jennifer Smith
13506 Summerport Village Pkwy.
Suite 108
Windermere, Florida 34786
Telephone: (321) 200-4946
Telecopier: (407) 442-3023
jensmithesq@aol.com

Counsel for Appellant

September 9, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

We certify that this filing complies with the type-volume limitation set forth in Fed. R. App. P. 32, Times New Roman 14pt and contains 12,468 words.

/s/ *Stephen M. Smith*
Stephen M. Smith

/s/ *Jennifer Smith*
Jennifer M. Smith

CERTIFICATE OF SERVICE

We hereby certify that on the 9th day of September, 2019, we electronically filed the foregoing with the clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel on record by operation of the Court's electronic filing system.

/s/ *Stephen M. Smith*
Stephen M. Smith

/s/ *Jennifer Smith*
Jennifer M. Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

JENNIFER SMITH,

Plaintiff,

vs. CASE NO.: 4:18-CV-00409-RH-CAS

FLORIDA AGRICULTURAL &
MECHANICAL UNIVERSITY
BOARD OF TRUSTEES,

Defendant.

_____/

Deposition of **DARRYLL KEITH JONES**, held on Monday, April 1, 2019, taken at 315 East Robinson Street, Suite 510, Orlando, Florida 32801, commencing at 9:37 a.m., before Haydee Medina, Court Reporter and Notary Public in and for the State of Florida.

sheet that listed Professor Smith as someone who should have salary of $138,000, you said that was what would happen in a perfect world and that would be your recommendation to make the salaries even, correct?

MS. SANTORO: Object to the form.

Q. So --

A. Well, it would make the salaries even. Yeah.

Q. Okay. So when Professor Smith was only given a salary of $125,000 which is $13,000 less, based on what you have just said, her salary would not be even to what it should be?

MS. SANTORO: Object to the form.

A. Well, I mean, even in the sense of just without regard to qualitative factors if -- we eliminated any qualitative comparisons, then everybody at the -- at similar ranks would be make identical salaries. That's what I mean by a perfect world.

Q. When you recommended that $138,000, there was nobody else recommended at that rate, so where did that rate come from?

MS. SANTORO: Object to the form.

A. Okay. So I didn't recommend, I just put the salaries in the order, and I put the numbers next to each faculty member that would make -- each faculty member of the same rank and tenure status paid equally. It didn't have anything to do with, like I said, qualitative assessment. I'm sorry, what was the -- can you repeat the rest of your question?

Q. There was nobody else that you put at a salary of $138,000, so I'm wondering what that $138,000 come from?

MS. SANTORO: Object to the form.

A. Well, I don't know. It just seemed like the right thing to do given the -- given the goal of trying to make associate professors with tenure paid equally, but I -- I think I understand you question. Why didn't we -- why didn't we make all the associate -- why didn't we put all the associate professors with tenure at a certain -- $138,000? I guess -- and I don't know. I can't -- I can't recall why we did -- or

why we did or did not. It may have had something to do with the length of time at the Law school or something along those lines.

Q. Now, Professor Smith got an extra $25,000 [sic] when she got her salary adjustment. Why is that?

MS. SANTORO: Object to the form.

Q. And extra $5,000.

A. I don't know. I don't know why she got an extra five.

Q. What factors did you use or were used to do the salary readjustments -- or the salary adjustments?

A. As far as I can remember, we used rank and tenure status. We might have used length at the law school. I can't be sure of that, but certainly rank and tenure status.

Q. Rank being whether or not you were full professor, associate tenure, associate tenure earning --

A. Yes.

Q. -- like that? Okay. And then you

Jeffrey Brown; is that correct?

MS. SANTORO: Object to the form.

A. I think so, yeah.

Q. But that never came to fruition, did it?

A. No, it did not as far as I know.

Q. And why is that?

A. Well, in Dr. Pitter's -- and I don't know, but I assume that Dr. Pitter had conversations with Provost David. They -- I mean, we were operating under two constraints or at least one constraint, and the biggest constraint was you're going to find the money for these salary adjustments in -- in your present budget. That is, the university is not going to give you anymore money for salaries, and two, you don't have to -- we can't fix everything in one year. And so if I recall correctly, that was the reason why we only -- we didn't include instructors and even staff on these initial spreadsheets because we knew we couldn't fix everything in one year.

Q. Are you aware that every tenured

associate professor was given the proposed salary adjustment on this sheet except for Professor Smith?

MS. SANTORO: Object to the form.

A. I was not cognizant of that fact, but, you know, the data speaks for itself.

Q. Do you find it odd that she is the only person who was not given what you proposed -- or you and Professor Green proposed to be their nine-month salary?

MS. SANTORO: Object to the form.

A. I don't find it odd, no.

Q. Did you ask why that occurred?

A. Well, I didn't -- I don't know that I asked why, specifically, but I know that at some point Provost David or Dr. Pitter said that they weren't going to try to equalize earlier-hired faculty to what they consider to be outliers, and to consider Professor Brown and Professor Levitt, perhaps Professor Griffin who were all hired by Dean Pernell at later dates, you know, some after 2010 to be outliers.

Q. So when was -- with your outliers

were any of the outliers' female gender?

A. No.

Q. And were all the outliers' people who were making substantially more than other people?

A. I'm not sure that -- I mean, they were making -- they all -- the two outliers, Professor Levitt and Professor Brown, were making more than -- remarkable more than others. That's all -- that's how I'll characterize it.

Q. But based on your proposal, you considered Professor Smith to be equal to Professor Brown, correct?

MS. SANTORO: object to the form.

A. In terms of rank and tenure, I guess perhaps length of service at the Law School.

Q. Is that a yes?

A. Yes.

Q. Now, Professor Smith has more time with the Law School than Professor Brown; isn't that correct?

MS. SANTORO: Object to the form.

A. Yes.

Florida Agricultural and Mechanical University
COLLEGE OF LAW

Excellence With Caring

201 BEGGS AVENUE
ORLANDO, FLORIDA 32801

TELEPHONE: (407) 254-3268
FAX: (407) 254-3213

MEMORANDUM

February 23, 2016

TO: Faculty

FROM: Darryll K. Jones DKJ
Professor of Law

RE: Rationale for Salary Adjustments

Dean Epps announced at the last faculty meeting that the University has adopted a plan to make certain adjustments to faculty salaries. The purpose of this memorandum is to explain the rationale used to determine which salaries were adjusted and how adjustments were calculated. The plan was created and all but approved by December 2015 after consultation between me, in my role as Interim Dean, Associate Dean Green, the Office of Institutional Research, and Provost David. The proposal is not intended as a complete or perfect response to all salary inequities.

Compensation inequities at the College of Law, whether real or perceived, have stunted our growth and need to be addressed if the College is to mature. Different people perceive different inequities, but most agree that the most obvious problem is "salary inversion." Salary inversion occurs when faculty of lower rank and tenure status earn more than faculty with higher rank and tenure status. Inversion can occur for many reasons, but we found that salary inversion at the College of Law resulted from the State's inability to provide regular cost of living raises to present or current faculty, combined with new faculty hiring under the economic conditions prevailing on the date of new hiring. As a result, a later hired faculty member often commanded a higher salary than earlier hired faculty of the same or in some instances lower rank.

The plan is based on comparisons of each faculty member's 9 month compensation. Salaries for faculty on twelve month contracts were converted to 9 month contracts solely to make accurate comparisons. Currently, there are four tenured Professors whose salaries are significantly less than other tenured Professors and in some instances even less or almost the same as tenured and untenured Associate Professors. There are eight tenured Associate Professors whose salaries are less than one or more untenured Associate Professors. There are high end "outliers" in each category. The plan does not attempt to make the level of compensation paid to outliers the norm or a goal for all faculty within the relevant class.

Exhibit 11
Date: 3/8/19
J. Babcock SAB

A-11

To eliminate inversions, the College determined an appropriate minimal amount for each rank and tenure status. The minimal amount in each category is the amount necessary so that no faculty member of lower rank and tenure status is paid more than a faculty of higher rank and tenure status. If each faculty member is paid the minimal amount pertaining to his or her rank and tenure status, salary inversion will be eliminated. The plan does not adopt a prohibition against inversion. It merely implements a restart. Salary inversion may reoccur but it should only do so when a faculty member of lower rank or tenure status demonstrates exceptional performance or qualifications. The plan is not intended to reduce a Dean's sole discretion to recommend merit increases or in any way reduce a Dean's customary role with regard to salary recommendations.

The minimum amount necessary per faculty member to eliminate salary inversion is $140,000 for tenured Professors and $120,000 for tenured Associate Professors. Twelve faculty salaries were adjusted, thereby eliminating all salary inversions. Salaries already at or above the minimum amount for each rank and tenure status were not adjusted even though there are, of course, arguments for adjustments within each class. The plan is intended as a first step to address the most obvious problem first. Adjustments were calculated by subtracting each faculty member's current salary from the minimal amount for the appropriate rank and tenure status. Adjustments therefore ranged from approximately $2,300 to $24,000 annually. The plan makes no salary reductions.

Faculty whose salaries are adjusted will be notified individually and asked to sign a new contract retroactive to January, 2016. Unfortunately, we cannot make retroactive adjustments to benefits except as required by law. For example, the University will not make retroactive contributions based on the adjusted salary for faculty who makes voluntary contributions to a 403(b) plan.

There may be salary inversion issues relating to instructor and other non-tenure track compensation. Unfortunately, there are insufficient resources to address those issues at this time. If resources become available, the College and University will endeavor to address all other salary inversion issues within the faculty. If it appears necessary, Dean Epps will schedule a special faculty meeting so that faculty may ask questions about the plan. Neither she, I nor Associate Dean Green will discuss any particular faculty member's compensation publicly.

cc: Associate Dean Green

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

JENNIFER SMITH,

Plaintiff,

vs. CASE NO.: 4:18-CV-00409-RH-CAS

FLORIDA AGRICULTURAL &
MECHANICAL UNIVERSITY
BOARD OF TRUSTEES,

Defendant.

_____/

Deposition of **REGINALD MICHAEL GREEN**, held on Monday, April 1, 2019, taken at 315 East Robinson Street, Suite 510, Orlando, Florida 32801, commencing at 2:22 p.m., before Haydee Medina, Court Reporter and Notary Public in and for the State of Florida.

Q. Okay. All right. That's all I have. Thank you.

REDIRECT EXAMINATION

BY-MR.SMITH:

Q. When you were speaking about the outliers, I think you motioned three of them?

A. Yes, sir.

Q. All three of the outliers that you mentioned are men, right?

A. Yes, sir.

Q. And how do you become an outlier?

A. I'm going to -- I -- am unsure what you're asking.

Q. How does somebody become an outlier? How did they get there?

MS. SANTORO: Object to the form.

A. That the -- I assume the provost recommended the salary that -- that has placed in my -- placed them above a lot of other faculty. So --

Q. You don't find it odd that they're all men?

MS. SANTORO: Object to the form.

A. I -- to be quite honest, I don't

give it a lot of thought. I am -- salaries come with a whole bunch of factors, and without actually having the responsibility to -- to create those salaries, I wouldn't -- I wouldn't -- it'd be -- it wouldn't be -- it wouldn't be prudent to kind of -- to kind of comment on that.

Q. Question: You said that when you initially made these proposals for salary increases when you were originally working on it, you were given a certain amount of money for the increases; is that correct?

MS. SANTORO: Object to the form.

A. We were -- we were told that we would have to supply the -- we would have to supply the -- we would -- it would have to be something that we would have to cover internally.

Q. Okay.

A. And that's where I --

Q. But ultimately, you all had to submit a request to get the money for the increases, correct?

A. We had to -- we asked for additional