

No. 22-7001

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SHENIQUA L. WATSON — PETITIONER

vs.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES —
RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT -
RICHMOND, VIRGINIA

PETITION FOR WRIT OF CERTIORARI

SHENIQUA L. WATSON

4611 DEMAREE COURT

HENRICO, VIRGINIA 23231

(804)-920-2602

IV

QUESTION(S) PRESENTED

Question 1:

The District Court for the Eastern District of Virginia Richmond Division and the United States District Court of Appeals for the Fourth Circuit accepts veteran status/military experience as a “factor other than sex” under the Equal Pay Act of 1963. Title VII of the Civil Rights Act of 1964: Veteran’s Special Rights or Preference: sec. 2000e-11. [Section 712] - Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans and the Equal Employment Opportunity Commission’s position is, to qualify as a valid “factor other than sex” affirmative defense, veteran status should be job-related and applied nondiscriminatorily.

Can veteran status be used as a “factor other than sex” affirmative defense for a job that does not require military service experience?

Question 2:

Can education be used as a “factor other than sex” affirmative defense for a job that has no mandatory higher education requirements?

Question 3:

Can employers segregate substantially equal comparators within the same department location, title and pay band during salary analysis?

Question 4:

Is the District Court for the Eastern District of Virginia Richmond Division and the United States District Court of Appeals for the Fourth Circuit interpretation of the Equal Pay Act statutes language “substantially equal” as “virtually identical” permissible?

Question 5:

Whether the courts erred in holding that Watson could not establish a prima facie case of discrimination under the EPA where the plaintiff made an initial showing that the defendant 1) paid different wages to employees of the opposite sex 2) performed equal work on a job requiring equal skill, effort and responsibility 3) under the same working conditions.

Question 6:

Whether a judge can refuse to review and acknowledge cited evidence?

Question 7:

When does legal error become judicial misconduct?

V

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Sheniqua L. Watson v. Virginia Department of Agriculture and Consumer Services, District Court for the Eastern District of Virginia Richmond Division No. 3:19-cv-00466-JAG, Judgement entered March 12, 2021.
- Sheniqua L. Watson v. Virginia Department of Agriculture and Consumer Services, the Fourth Circuit, No. 21-1337, United States District Court of Appeals for the Fourth Court, Judgement entered September 15, 2022.

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Title VII of the Civil Rights Act of 1964

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EEOC website - Policy Guidance on Veterans' Preference Under Title VII:

<https://www.eeoc.gov/laws/guidance/policy-guidance-veterans-preference-under-title-vii>

US Army website - Policy Guidance on Veterans' Preference Under Title VII:

https://home.army.mil/meade/application/files/7015/9862/6725/Policy_Guidance_On_Veteran_Preference.pdf

Judicial Conduct Reporter, VOLUME 36, NO. 3 • FALL 2014: Pro se litigants in the code of judicial conduct by Cynthia Gray:

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Supreme Court Press - Petition of the Month, July 2019:

Zoe Spencer v. Virginia State University Unequal Pay Resulting from Prior Salary History. The Supreme Court Press “Petition of the Month”™ for July 2019 is Zoe Spencer v. Virginia State University, Supreme Court Dkt. No. 19-30, an appeal coming out of the United States Court of Appeals for the Fourth Circuit. The petition was filed pro se by the petitioner Zoe Spencer, Professor in the College of Humanities and Social Sciences at Virginia State University.

<https://supremecourtpress.com/Petition-of-the-Month/ZoeSpencer-Petition-082019.html>

App. 35a page 85:

<https://supremecourtpress.com/images/Petition%20of%20the%20Month/ZoeSpencer/Zoe%20Spencer%20Petition%20E%20File%20Complete.pdf>

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A_____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported _____ at ; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

1. JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was September 15, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 13, 2022 _____ and a copy of the order denying rehearing appears at Appendix D

☐ An extension of time to file the petition for a writ of certiorari was granted to and including (date) on _____ (date) in Application No. _____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____ A copy of that decision appears at Appendix _____

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

☐ An extension of time to file the petition for a writ of certiorari was granted to and including (date) on _____ (date) in Application No. — —

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964

Title VII, prohibits discrimination in "compensation" based on race, color, religion, sex, national origin, age, disability, or protected activity. The term "compensation" includes any payments made to, or on behalf of, an employee as remuneration for employment. All forms of compensation are covered, including salary, overtime pay, bonuses, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in wages between men and women who perform substantially equal jobs, employers must raise wages to equalize pay but may not reduce the wages of other individuals.

VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. [Section 712]

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

To prove a Title VII, pay discrimination claim, a plaintiff must establish that: (1) she was a member of a protected class; (2) her job performance met the employer's legitimate expectations; (3) she was subjected to adverse employment action; and (4) similarly situated employees were treated more favorably. If these elements are met, the employer must articulate a legitimate, nondiscriminatory reason for paying the plaintiff less. Unlike EPA claims, the burden of proof remains with the plaintiff in Title VII claims. If the employer articulates a legitimate, nondiscriminatory reason for the pay discrepancy, the plaintiff must prove that the employer's proffered reason is just pretext for sex discrimination. An employee can prove pretext by showing that the employer's proffered reason was: (1) factually baseless; (2) not the employer's real reason; or (3) insufficient to motive the employment action.

Once the employee establishes a prima facie case of disparate treatment discrimination, the burden shifts, in accordance with McDonnell Douglas, 411 U.S. 792 to the employer to articulate a legitimate, non-discriminatory reason for the action. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The complainant then has the burden of proving by a preponderance of the evidence that the reason offered by the Agency is a pretext for a discriminatory motive.

Unlike the EPA, there is no requirement under Title VII that the jobs must be substantially equal.

Equal Pay Act

The EPA makes it unlawful for an employer to “pay wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d)(1); (an employer “paying a wage rate differential” cannot attempt to comply with EPA by “reducing the wage rate of any employee”). Once the plaintiff has made this showing, the employer can avoid liability only by proving that the different payment to employees of opposite sexes was made pursuant to one of four statutory affirmative defenses: (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.” *Id.* See also *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 120-21 (4th Cir. 2018) (employer relying on EPA’s statutory affirmative defense must meet “heavy” burden of showing proffered reasons in fact explain the wage disparity).

The Equal Pay Act of 1963, amending the Fair Labor Standards Act of 1938, protects against wage discrimination based on sex. The Equal Pay Act (EPA) protects both men and women. The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. The jobs need not be identical, but they must be substantially equal. Job content (not job titles) determines whether jobs are substantially equal.

Policy Guidance on Veterans' Preference Under Title VII - EEOC-CVG-1990-14

The federal government and virtually all of the states grant some form of employment preference to veterans. Veterans' preference laws have traditionally been justified as measures designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations. However, as a result of long-standing federal statutes, regulations, and policies that have excluded women or sharply limited women's eligibility to serve in the armed forces and also of the fact

that women have never been subjected to a military draft, only a very small percentage of veterans are women and, consequently, veterans' preference statutes operate overwhelmingly to the advantage of men.

Despite their potential for adversely affecting the employment opportunities of women, veterans' preferences accorded pursuant to statute are not subject to challenge under Title VII by virtue of the exception provided in Section 712 of the Act.⁶ That section states:

Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Voluntary Preferences

In contrast to the foregoing, however, where an employment preference is conferred upon veterans on the employer's own initiative and is not mandated by statute, the discriminatory impact of the preference is not shielded from scrutiny under Title VII. As the language of Section 712 makes clear, the deference provided by that section applies only to veterans' preferences that are created by law and not to those that are voluntarily accorded to veterans by employers. Falling outside the terms of Section 712, voluntary preferences are subject to Title VII adverse impact analysis.

After reviewing the history of restrictions placed on women's access to military service, the **Commission** concluded:

The impact of any employment policy favoring veterans of the armed services is clear: women have far fewer opportunities to become veterans. In this case, the blanket, neutral policy of according veterans' credit for military experience, irrespective of whether that experience is related to the job in question, operates to discriminate against women generally.

Commission Decision No. 77-40, CCH ¶ 6591 at 4462.

The **Commission's** position on this issue remains as set forth in Commission Decision Nos. 77-27 and 77-40. Where an employer voluntarily accords veterans any form of employment preference, without statutory authorization, the protections contained in Section 712 are inapplicable. Consequently, where the evidence shows that the veterans' preference has an adverse impact on female employees or applicants for employment, the preference constitutes sex discrimination violative of Title VII unless the employer can show that the preference serves, in a significant way, the legitimate employment goals of the employer. See *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115, 50 EPD ¶ 39,021 (1989), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 EPD ¶ 8137 (1971).

Because veteran status is so closely connected to sex, however, it is the Commission's position that, if such status bears no relationship to the requirements of the job or to the individual's performance of the job, the employer will probably not be able to sustain the defense. Cf. Commission's EPA Interpretations, 29 C.F.R. § 1620.21 (1989) ("head of household" status). Generally, to qualify as a valid factor other than sex, veteran status should be job-related and applied nondiscriminatorily. See EEOC Compl. Man. § 708, EPA Defenses (particularly §§ 708.5 and 708.6).

STATEMENT OF THE CASE

The Fourth Court erred in holding that the plaintiff could not establish a prima facie case under Title VII and the EPA because, the plaintiff and ten comparators did not have similar "experience, education and qualifications."

Factual and Procedural Background:

Sheniqua Watson worked as a Registrations Analyst for the Virginia Department of Agriculture and Consumer Services (VDACS) a Commonwealth of Virginia state agency responsible for Virginia's agricultural sector, environmental protection and consumer protection programs. VDACS is organized into five units the Commissioner's Office, the Division of Animal and Food Industry Services, the Division of Commodity Services, the Division of Consumer Protection and the Division of Marketing and Development. Watson initially worked in VDACS Office of Pesticide Services in the Division of Consumer Protection. The Office of Pesticide Services (OPS) certifies pesticide applicators, registers pesticide products and licenses pesticide businesses. From 2005 – 2009 as a part time Assistant Business Licensing Specialist, Watson processed pesticide business licensing applications and pesticide product registration applications. After several unsuccessful attempts towards applying for full-time employment with VDACS in various departments (11-13-2006, 06-29-2007, 08-22-2007, 01-02-2008 and 07-14-2008) Watson applied and was promoted June 25, 2009 to full-time salaried as an OPS Certification Specialist processing Commercial A, Commercial B and Reciprocal applications for those interested in becoming licensed to apply pesticides in the state of Virginia. Vickie Rengers was the OPS Certification Specialist position predecessor. The position was an internal recruitment open only to current VDACS employees, preferred candidates were to have previous work experience within a regulatory agency or direct experience with pesticide laws and regulations. Minimum educational requirement was a high school diploma. The hiring salary was advertised as, pay band 3 and

commensurate with relevant experience. Watson's part-time hourly rate was \$13.37 per hour. Despite the position offering a salary commensurate with experience, Watson having four years direct related experience and was already performing the positions duties in addition to her primary business licensing duties, Watson was not offered an increase in pay. The full-time salary offered to Watson was \$27,810, equating to the \$13.37 an hour she was already earning as a wage employee. Watson believed the same equitable terms afforded to the previous Certification Specialist Vickie Rengers, would be afforded to her. As of November 25, 2005 Rengers was earning \$38,271 in the position Watson subsequently was hired in to. Watson was denied the same support required to provide to Vickie Rengers by office staff in the Office of Pesticide Services and Watson was informed by a colleague, Sherri Boardley, staff was instructed not to assist Watson, the reasoning, to avoid errors. Watson questioned the lack of support several times in 2012 (Plaintiff exhibit 5, 101a) and on January 24, 2013 questioned via email (Plaintiff exhibit 6, 107a and defendant exhibit Cole Declaration, Attachment G, 185a) why she was on the lower end of the \$23,999 to \$49,255 pay band, Watson's annual salary was then \$29,785. Rengers had been promoted to Team Lead and was now Watson's supervisor and responded back on January 25, 2013, with the Human Resources Director Linda Cole and OPS Program Manager Liza Fleeson copied. Rengers indicated that Watson's pay was justified, the maximum pay was \$36,621 with eighteen years of service, the position did not require a degree therefore Watson's education was not considered and denied an internal salary alignment. After Watson questioned her low salary and lack of support the OPS office environment became increasingly hostile and Watson began applying for other positions within VDACS.

Watson applied and interviewed with Michelle Townsend (Team Leader) and Michael Menefee (Program Manager) for one of three Registration Analyst licensing specialist positions on March 19, 2013 advertised by the Virginia Department of Agriculture and Consumer Services, Office of Charitable and Regulatory Programs (OCARP) (Plaintiff exhibit 11, 121a). Despite being a Certification Specialist in the Office of Pesticides at VDACS and processing pesticide product registrations, pesticide business license applications and pesticide applicator applications for the last nine years since 2005, Watson was denied a Registrations Analyst position.

Watson continued to be denied support in OPS, filed a grievance in December 2013 and asked to be transferred to a comparable position which was granted. In January 2014 the grievance respondent and former Consumer Protection Division Director Andres Alvarez, transferred Watson to the Office of Charitable and Regulatory Programs as a Registrations Analyst.

Registration Analyst advised organizations and charities seeking to solicit for funds and donations in the state of Virginia on how to properly register and to do so with either a form 100 or form 102 to obtain licensure. Registrations Analyst received, reviewed, made determinations, and processed form 102. Registration Analyst work closely with individual charities and organizations as they are consultants and advise applicants throughout the entire application process by mail, by phone and email until all applicable required documentation has been received to complete the processing of form 102. Registration Analyst responsibility also includes assisting charities and organizations in the annual renewal process of their charitable license and processing form 102 renewal applications. Registration Analyst processed extension request for annual renewal registration which came in by the thousands by mail and email, answered a call center phone line, processed multiple buckets of mailed registrations daily, performed deposit accounting on registration fees included with the mailed in initial and renewal applications and filed extensively. Watson agreed to and began these duties on January 23, 2014 (Plaintiff Exhibit 21, 134a).

Watson noticed there were several Caucasian, much younger Registration Analyst who were recent college graduates and further did not understand why she did not get hired into one of three available Registration Analyst positions in March 2013. October 22, 2014 during Watson's first annual evaluation with OCARP, Michelle Townsend made Watson the department receptionist. Watson's job title (Registrations Analyst) and salary (\$29,785) was left the same. Michelle Townsend alleged in one section of the evaluation marked as below contributor, that Watson was not processing enough registrations weekly, however two sections of the evaluation was marked extraordinary contributor, three sections were marked contributor and the overall evaluation rating was contributor. Watson's duties were "realigned" to answering a main call center phone line, processing daily buckets of mail, processing FOIA request, processing registration fees/checks/money orders and processing emailed extensions which were all previously shared duties among the Registrations Analyst team. Watson did not agree, appealed to be able to still process registrations to management Michelle Townsend and Michael Menefee in separate meetings, verbally, in writing and complained about the realignment on numerous occasions as Watson viewed this change as a demotion.

Watson filed a second grievance with VDACS, November 17, 2014. The former Division Director and second step resolution mediator Andres Alvarez of Watson's grievance deemed the re-assignment of Watson's duties an "agency need" not poor work performance on December 4, 2014 (Plaintiff Exhibit 17, 130a). On December 17, 2014 the third step resolution mediator Deputy Commissioner Charles R. Green also

deemed the re-assignment of Plaintiff Watson's duties an agency need. (Plaintiff Exhibit 17, 132a).

Watson filed a formal complaint with the Equal Employment Opportunity Commission March 4, 2015 for racial discrimination, unequal pay, and retaliation. Virginia Department of Agriculture and Consumer Services Human Resources Director, Linda Cole responded to the formal complaint with the Equal Employment Opportunity Commission (Plaintiff Exhibit 48, 152a). Cole also asserts that Watson's duties were re-aligned due to an agency need and that Watson's duties were similar in nature to her duties prior to October 23, 2014. Watson received a right to sue letter dated September 28, 2016.

Watson timely filed pro-se with the United States District Court Eastern District of Virginia Richmond Division No. 3:16-cv-00985-MHL-RCY.

Judge Roderick Young recommends to dismiss Watson's case with prejudice for failure to state a claim on 12/22/17. Judge M. Hannah Lauck dismissed Watson's case without prejudice 01/9/2018. February 28, 2018 Watson retained McCree and Ndjatou, PLLC for legal representation.

Watson's attorney advised of a fresh start and timely filed a second charge of discrimination with the United States Equal Employment Opportunity Commission August 1, 2018 alleging race discrimination, unequal pay and retaliation. Watson resigned from VDACS on August 14, 2018, her last day of employment was August 28, 2018. From August 2018 through November 30, 2022 the Richmond Redevelopment Housing Authority (RRHA) was Watson's next employer as a Senior Office Support Specialist working in low-income property management. During salary negotiations RRHA cited a strict adherence to no more than 10% of a previous salary. Watson's new salary was \$34,650 still less than all of her former VDACS Registration Analyst colleagues. Watson received a notice of right to sue letter dated March 26, 2019. MGN Law Group formerly McCree and Ndjatou, PLLC, dissolved as of March 21, 2019. Watson was notified May 1, 2019 the firm was no longer able to represent her. Watson timely filed pro-se with the United States District Court Eastern District of Virginia Richmond Division on June 24, 2019, No. 3:16-cv-00466. The district court granted summary judgement to VDACS March 12, 2021. Watson filed an informal brief on April 22, 2021 with the United States District Court of Appeals for the Fourth Court. The Fourth Court affirmed on September 15, 2021 and mandated on December 21, 2022.

A. Table of Comparators

Name	Race/Gender	Title	Employment Dates	Salary
Vickie Rengers	White/Female	Certification Specialist - Administrative and Office Specialist III	Sept. 01, 2001 - May 10, 2008	\$34,141 – \$41,394
Reba Gilliam	White/Female	Administrative and Office Specialist III	2015 -2021 Salaries	\$48,757 - \$60,452
Caly Emerson	White/Female	Registrations Analyst	Sept. 10, 2015	\$39,626
Laura Hare	White/Female	Registrations Analyst - Policy Planning Analyst	December 2013	\$30,000- \$35,190
Lindsay Barker	White/Female	Registrations Analyst	August 2014	\$35,700
Terri Larus	White/Female	Registrations Analyst	April 2013	\$35,000
Heather Hodges	White/Female	Registrations Analyst	October 2013	\$32,619
Xembrelyn Mangrum	Filipina/Female	Registrations Analyst	June 22, 2015	\$35,020
Edievith Pollard	Filipina/Female	Registrations Analyst	May 11, 2015	\$36,771
Ehonam Agbati	African/Male	Registrations Analyst	Nov. 25, 2013	\$31,096 - \$35,936
Joseph Cason	Black/Male	Registrations Analyst	Nov. 25, 2014	\$37,500 - \$42,000
Sheniqua Watson	Black/Female	Certification Specialist – Registrations Analyst	May 2005 – August 2018	\$29,785 - \$31,694
Annie Watkins	Black/Female	Certification Specialist	23 years	\$29,283
Bobbie Lee	Black/Female	Certification Specialist	7 years	\$28,155

Reasons for Granting the Petition

The court erred in holding that Watson could not establish a prima facie case of discrimination under the Title VII and the EPA because she did not have similar experience, education, and other qualifications to ten colleagues when Watson in fact did and record of her work history was submitted. Error specifically occurred on a comparison of Watson versus Joseph Cason's experience whereas fourteen years of his experience was in the military, only four were relevant administrative office experience but he was deemed as having extensive work history superior to Watson's. Also, Ehonam Agbati's college education was used as a pretext but the required education was a high school diploma, higher education was not a requirement.

In *Zoe Spencer v Virginia State University* Judge Henry Hudson refers to two male college professor's (Dial and Shackelford) extensive professional background outside of academia in the army including professional expertise in numerous areas. (*Zoe Spencer v. Virginia State University*, the United States District Court for the Eastern District of Virginia, Civil Action No. 3:16-cv-989 – HEH. This judgement was thereafter affirmed by the United States Court of Appeals for the Fourth Circuit. (*Zoe Spencer v. Virginia State University*, the Fourth Circuit, No. 17-2453).

VDACS Human Resources Director Linda Cole verified that Cason only had four years of office experience that was not a state job interpreting and applying statutory and regulatory requirements:

84. Mr. Cason was hired at a salary of \$37,500, because based on his employment history and his prior salary which was \$39,000. He received a 3.8% decrease in pay due to internal alignment data at the time. Mr. Cason has a high school diploma and 14 years of experience with the US Army and four years in the private sector as a Quality Assurance Specialist. Based on his extensive work history, he is skilled in principles of government regulation and consumer protection, along with a demonstrated ability to interpret and apply statutory and regulatory requirements. Previous experience included conducting internal and external audits to ensure compliance with Medicaid. He also has in depth customer service skills from both his military and private sector experience.

(Defendant Exhibit 1: Declaration of Linda Cole, Joe Cason, 172a – 173a).

In *Sheniqua L. Watson v. Virginia Department of Agriculture and Consumer Services* Judge John Gibney indicated “The evidence also shows that Watson did not have comparable work experience to Cason and Agbati. Cason had an “extensive work history” and it shows a “factor other than sex.” (Appendix K – Memorandum Order, 62a). This judgement was thereafter affirmed United States District Court of Appeals for the Fourth Court (Appendix A · Judgement/Unpublished Opinion, 1a).

Cason began his career in the military in 1/1994 through 8/2008. He worked for YES Behavioral Health (a mental health services facility) from 6/2009 through 5/2013. The Registrations Analyst position asked for considerable knowledge of office standard practices, procedures and office equipment. Also, the ability to interpret and apply statutory and regulatory requirements and policies and procedures to “the licensing, registration and permitting processes.” Evidenced in the advertisement for the Registrations Analyst (Licensing and Registration Specialist) position (Plaintiff Exhibit 20, 133a), Watson’s employee work profile (Plaintiff exhibit 21, 134a – 138a) and Cason’s employee work profile (Defendant exhibit Cole Declaration, Attachment X, 290a – 295a) the Registrations Analyst position did not require military experience/veteran status or contain a legitimate business need for military experience/veteran status.

In *Derrick T. v. Department of Justice*, [96] the Commission found that the Complainant was subjected to discrimination based on his sex (male) and age (48) when he was not selected to serve as Acting Judicial Security Inspector. The Agency argued that the Complainant was not selected because he did not have the proper experience or certification. A young woman was selected for the position instead. The Complainant demonstrated that the Agency’s reasons for his non-selection were pretext for discrimination, as he had in fact previously acted in the position and the certification was not required.

Watson had been processing VDACS, OPS pesticide business license applications, pesticide product registrations and pesticide applicator applications from 2005 – 2014, interpreting and applying statutory and regulatory requirements. The court erroneously opined Watson’s experience did not include interpreting and applying statutory and regulatory requirements between 1995 – 2004, overlooking the direct 2005 – 2014 with VDACS. The position Watson was initially hired for prior to her tenure in the Office of Pesticide Services, required experience in “clerical duties” and did not require experience in interpreting and applying statutory and regulatory requirements. (Defendant exhibit Cole Declaration, Attachment E, 186a). This makes the courts dismissal of Watson’s 1995 – 2004 work experience an error, (Appendix K – Memorandum Order, 59a).

The Certification Specialist position was an internal recruitment (Plaintiff Exhibit 8, 109a), Watson was already performing the duties of that position from the time the position predecessor Vickie Rengers was promoted May 10, 2008 through Watson's official start in the Certification Specialist position, June 25, 2009. At no time during Watson's employment with VDACS was she not qualified for the Certification Specialist or Registrations Analyst positions she worked.

VDACS did not use experience as an affirmative defense in response to Watson's March 4, 2015 (Plaintiff Exhibit 48, 151a) or August 1, 2018 (Plaintiff Exhibit 10, 115a) EEOC complaints.

The U.S. Equal Employment Opportunity Commission has taken administrative notice of the fact that veterans' preferences, by their very nature, have historically placed women as a class at a disadvantage. Concluding the impact of any employment policy favoring veterans of the armed services is clear; women have far fewer opportunities to become veterans. In this case, the blanket, neutral policy of according veterans' credit for military experience, irrespective of whether that experience is related to the job in question, operates to discriminate against women generally.

Because veteran status is so closely connected to sex, however, it is the Commission's position that, if such status bears no relationship to the requirements of the job or to the individual's performance of the job, the employer will probably not be able to sustain the defense. Cf. Commission's EPA Interpretations, 29 C.F.R. § 1620.21 (1989) ("head of household" status). Generally, to qualify as a valid factor other than sex, veteran status should be job-related and applied nondiscriminatorily. See EEOC Compl. Man. § 708, EPA Defenses (particularly §§ 708.5 and 708.6).

The court opted to not consider the OPS Certification Specialist position predecessor, Vickie Rengers as a comparator, mistakenly ruling Watson did not submit evidence proving they both reported to the same management. Watson's evaluations which also served as employee work profiles were submitted, indicates Watson's supervisor and Program Manager's signatures in 2009 and 2010 as Kathleen Dictor and Liza Fleeson. Rengers evaluations which also served as employee work profiles indicate her supervisor and Programs Manager's signatures in 2008 Kathleen Dictor and Liza Fleeson. Both reported to the same management.

The court further opined that Rengers “superior work performance” and “decades of experience” precluded her as a comparator. (Appendix K – Memorandum Order, 65a).

Vickie Rengers salary between the dates of her role as the Office of Pesticide Services Certification Specialist for Commercial Applicators, September 01, 2001 to May 10, 2008 was \$34,141 - \$41,394. Watson’s salary between the dates of her role as the OPS Certification Specialist for Commercial Applicators, June 25, 2009 to January 23, 2014 was \$27,810 - \$29,785. VDACS did not simply pay Watson's predecessor a much greater starting salary; it set the predecessor's salary near the midpoint of the compensation range for Certification Specialist but consistently set Watson's salary at the bottom of the range. A jury could find that prior salary and prior experience alone do not explain VDACS disparate approach to Watson's salary over time. Once Watson established herself as an effective Certification Specialist, prior salary and prior experience would not justify treating her different than the predecessor.

The Registrations Analyst position required a high school diploma, advanced education was a preference. Even if advanced education was a requirement Mangrum’s state application indicates she studied Education in International Studies (defendant exhibit Cole Declaration, Attachment W, 265a) and Pollard’s state application indicates she studied in Nursing, Paralegal Studies, Vocational Education and Elementary Education (defendant exhibit Cole Declaration, Attachment V, 250a) none of which was relevant to the position.

The pay inquiry email from Watson to Vickie Rengers with Human Resources Director Linda Cole included, response was: “based on your employee work profile and the requirements of your position a college degree is not a requirement and cannot be used to offer or justify a higher salary.”

(Plaintiff Exhibit 6, 107a and Defendant exhibit Cole Declaration, Attachment G, 185a).

Watson held four customer service administrative based positions between 1995 and 2004 and her VDACS employment interpreting and applying statutory requirements as it pertained to registrations, licensing and permitting practices started in May 2005. There were multiple exhibits from both Watson and the defendant confirming this. (Plaintiff exhibit 37, 149a, Defendant exhibit Cole Declaration, Attachment C, 177a and 181a, Defendant exhibit Cole Declaration Attachment D, 183a).

Error also specifically occurred on a comparison of Watson and Caly Emerson, Lindsay Barker and Laura Hare as well as Heather Hodges, as they were all still in high school when Watson began working for VDACS in 5/2005. This made it impossible for them to have more experience interpreting and applying statutory requirements in a regulatory agency.

- Defendant exhibit Cole Declaration, Attachment T, 230a, verifies Barker's end date from Amelia County High as 6/2008.
- Defendant exhibit Cole Declaration, Attachment U, 245a, verifies Emerson's end date from Varina High School as 6/2007.
- Defendant exhibit Cole Declaration, Attachment R, 216a, verifies Hare's end date from Richmond Academy as 6/2008.
- Additionally, Defendant exhibit Linda Cole Declaration, Attachment Q, 203a, verifies Hodges end date from Maggie Walker Governor's School as 6/2005.

Watson began working administratively in 1995 and began working for VDACS interpreting and applying statutory requirements as it pertained to registrations, licensing and permitting practices in 5/2005. In contrast these are the state agency start dates of Larus, Barker, Emerson, Pollard and Mangrum in their starts interpreting and applying statutory requirements:

- Larus started with VCU Medical Center 5/2007 (Defendant exhibit Cole Declaration, Attachment P, 191a).
- Barker began an internship with Virginia Tech 1/2011 (Defendant exhibit, Cole Declaration, Attachment T, 232a).
- Emerson began working for the Department of Professional and Occupational Regulation 10/2011 (Defendant exhibit, Cole Declaration, Attachment U, 246a).
- Pollard began working for the Department of Health Professions 2/2009 (Defendant exhibit, Cole Declaration, Attachment V, 252a).
- Mangrum began working for the Department of Environmental Quality 3/2014 (Defendant exhibit, Cole Declaration, Attachment W, 269a).

The court erred in determining Larus, Barker, Emerson, Pollard and Mangrum had more relevant work experience. This is factual and not a matter of disagreement as the court arbitrarily opined.

Evidenced in the 3/22/21 Memorandum Order granting Summary Judgement to VDACS 133a, the court dismissed and ignored "cited" evidence. Plaintiff Exhibit 20, 133a is an advertisement for the Registrations Analyst (Licensing and Registration Specialist) position. The court dismissed this evidence as a flyer giving a generic

description of what the position entailed. The court dismissed Plaintiff exhibit 21, 134a the employee work profile Watson signed and agreed to, stating it says nothing about the responsibilities of the other Licensing and Registration Analyst. Each of them had their own employee work profiles that were identical to Watson's in the breakdown of employment responsibilities.

- Watson's Office of Charitable and Regulatory Programs employee work profile, (Plaintiff exhibit 21, 134a).
- Larus' Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment P, 197a – 198a.
- Cason's Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment X, 290a – 291a.
- Mangrum's Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment W, 275a – 276a.
- Pollard's Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment V, 259a – 260a.
- Emerson's Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment U, 239a – 240a.
- Barker's Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment T, 234a – 235a.
- Agbati Office of Charitable and Regulatory Programs employee work profile is evidenced in Defendant exhibit Cole Declaration, Attachment Y, 301a – 302a.

Each show virtually identical location and department, same pay band and exact same:

Position Purpose:

Processes, reviews and recommends decisions regarding applications for issuance or renewal of registrations, permits and licenses submitted by individuals and organizations that are subject to the provisions of the Virginia Solicitation of Contributions Law or the Virginia Charitable Gaming statute. Applies departmental policies and procedures to answer questions from regulants and the public. Resolves related complaints.

A. Core Responsibilities:

Seeks to obtain compliance by businesses, organizations, and individuals with licensing permitting, and registration requirements in the Charitable Solicitation statute, the Regulations Governing the Solicitation of Contributions, the Charitable Gaming Statute, and the Charitable Gaming Regulations.

- Analyzes license, permit or registration requests, along with supporting documentation, within an average of 30 days of receipt.
- Accurately applies statutory or regulatory requirements during the review process of licenses, permits or registrations.
- In a professional manner, notifies non-compliant regulants of their deficiencies and advises them of appropriate corrective action.
- When applicable, ensures that surety posted by regulated entities is correct in form and amount.
- Discusses recommendations to approve or deny license, permit or registration to Supervisor and communicates decision to registrant.
- Appraises and seeks guidance from supervisor of any significant problems or unfamiliar issues encountered during the licensing, permitting or registration processes.
- Maintains and updates all applicable records, Maintains accurate documentation and complete notes concerning all regulatory activities, and when required, generates meaningful reports.

The defendant did not submit Watson's OCARP employee work profile into evidence as the plaintiff did, that would further prove her job was the same as all the other Registration Analyst.

VDACS two mixed-motive justifications for Watson's realignment/change in duties have been inconsistent prior to and throughout this litigation. The two reasonings, failing to process 50 registrations a week and it was an agency need. This supports Watson's argument that VDACS acted pretextually. Watson and VDACS presented all her annual evaluations as evidence that undermined VDACS justifications.

Overall Results Assessment and Rating Earned:

- Performance Evaluation end date August 30, 2009 (Contributor)
- Probationary Progress Review end date June 25, 2010 (Contributor)
- Performance Evaluation end date August 31, 2010 (Contributor)
- Performance Evaluation end date August 31, 2011 (Contributor)
- Performance Evaluation end date August 31, 2012 (Contributor)
- Performance Evaluation end date August 31, 2013 (Contributor)
- Performance Evaluation end date August 31, 2014 (Contributor)
- Performance Evaluation end date August 31, 2015 (Contributor)
- Performance Evaluation end date August 31, 2016 (Meets Expectations)
- Performance Evaluation end date August 31, 2017 (Meets Expectations)

Judge Gibney deemed the realignment a non-adverse employment action in his March 12, 2020 Opinion (Appendix F: 30a – 31a) but describes the realignment in summary judgment (Appendix K: 61a) as “drastically altered” by VDACS.

The constructive demotion/ involuntary change in duties is presented as an agency need, essential and an equitable realignment when VDACS was trying to avoid the liability of an unfair demotion to the EEOC. In contrast the duties were then presented as unsubstantially equal work responsibilities when VDACS was trying to avoid the liability of Watson identifying comparators in an equal pay claim. This mixed-motive framework establishes that discrimination was present despite what could be construed as a lawful reason for the realignment in Watson's work duties.

Salaries were pre-determined upon hire before work performance or proficiency measurement occurred. VDACS does not have a seniority system, a merit system or a system that measures earnings by quantity or quality of production, sales or revenue.

Judge Gibney's use of how Watson and the Registrations Analyst comparators performed in relation to one another is irrelevant. This is why the "factor other than sex" was chosen and skewed information in regards to Watson's experience, qualifications and education has been relayed and is in question. The change in Watson's duties during her 10/2014 evaluation was pretext. The Office of Charitable and Regulatory Programs did not want Watson's presence in their department which is why she was turned down for one of three Registration Analyst positions available that Watson applied and interviewed for in March 2013 (Plaintiff exhibit 11 – 121a). The department was forced to take Watson as a Registrations Analyst off a grievance/ requested transfer in January 2014, demoting her to the department secretary less than a year later. After Watson's resignation that position was never re-filled with someone acting in the capacity of department receptionist, those duties were shifted to the assistants VDACS hired for Registration Analyst shortly after Watson's re-alignment/demotion. VDACS routinely provides less favorable employment opportunities to Black women and deprives them of advancement and opportunities made available to non-Black women. VDACS assigned Watson to a less favorable position to constructively make her resign.

To keep Black women in a perpetual cycle of the lowest paid, VDACS compared their salaries amongst one another instead of equally/also amongst their non-Black female colleagues essentially segregating comparators salaries. The predecessor of Watson's Commercial Certification Specialist position was Vickie Rengers who was White. The Commercial Certification Specialist processed Commercial A, Commercial B and Reciprocal applications amongst other duties and had a heavier workload. Annie Watkins processed Registered Technician applications and Bobbie Lee processed Recertification courses, both were Black and worked in the Office of Pesticide Services. There is also a Pesticide Business Licensing Specialist Reba Gilliam who is White who should have been listed as a comparator. Watson, Rengers, Gilliam, Watkins and Lee were all Administrative and Office Specialist III, pay band 3, working for the same managers and working in the same location/department (Plaintiff exhibit 4, 99a and Plaintiff exhibit 5, 101a, Office of Pesticide Services phone directories).

12. When Ms. Watson became a full-time salaried employee, VDACS offered, and Ms. Watson accepted, a starting salary equivalent to her wage position, as per agency practice Watson accepted this initial salary offer, so there was no negotiation. Ms. Watson's \$13.37 hourly rate of pay as a wage employee translated into a salary of \$27,810. This salary was well above the minimum salary of \$23,999 for a Pay Band 3, the pay band associated with Ms. Watson's position.

13. The starting salary offered and accepted considered internal equity within the work unit. Staff performing similar duties and who held the same job title and pay band were Bobbie Lee and Annie Watkins. Ms. Lee had approximately 7 years of service with the Commonwealth and her annual salary was \$28,155 and Ms. Watkins had 23 years of service with the Commonwealth and her annual salary was \$29,283. It would not have been equitable to bring Ms. Watson in at a higher salary as she had less experience.

33. The comparators used when Ms. Watson was hired were Ms. Lee and Ms. Watson, listed above. Comparing Ms. Watson to the list she uses is challenging because she was not “hired” for those positions. Her wage starting salary was the maximum advertised rate and her starting salary as a classified employee was equitable compared to the knowledge, skills, and abilities of Lee and Watkins.

39. Though Ms. Watson and Ms. Rengers each held the position of Licensing and Registrations Specialist (at different times), due to their differing length of Commonwealth service, they brought different salaries to the position with them, and therefore made different salaries within the same pay band when each held that position. Neither of their salaries was based on race, nor are any VDACS employee salaries based on an employee’s race.

(Defendant exhibit 1 Linda Cole Declaration, 158a, 162a and 164a).

Management and Human Resources representative Linda Cole also indicated:

“The VDACS average for this role is \$36,621 with 18 years of service.”

(Plaintiff exhibit 6, 107a and Defendant exhibit Cole Declaration, Attachment G, 185a)

Length of service is a pretext, VDACS does not have a seniority system. After 23 years of service Annie Watkins was only making \$29,283 as the Registered Technician Certification Specialist. The predecessor of Watson’s Commercial Applicator Certification Specialist position Vickie Rengers, was making between \$34,141 - \$41,394 during her time in the position from September 01, 2001 to May 10, 2008. Rengers started at VDACS in 1980, through 2001 that’s 21 years of service. During Watson’s fourteen years with VDACS her salary range was \$27,810 - \$31,694. Reba Gilliam was making \$48,757 in 2015 to \$60,452 as of 2021. VDACS has never had a vested interest or made real efforts towards equitable pay for all. In Watson’s 2018 EEOC complaint, in her response VDACS Human Resources Director Linda Cole grouped Watson (Black female), Agbati (African male), Cason (Black male), Mangrum (Filipina female) and Pollard (Filipina female) all together in one “similarly

situated” category she titled “minority.” (Plaintiff exhibit 10, 116a). In 2009 the internal alignments in the Office of Pesticide Services were segregated, only comparing Watson, Lee and Watkins lowest paid salaries to one another excluding White higher paid similarly situated Certification Specialist comparators and in 2018 male, female, multiple races of Registration Analyst were just minorities.

B. Disparate Treatment

Hare (Defendant exhibit Cole Declaration, Attachments R, 215a and S, 228a and Defendant exhibit 1 Linda Cole Declaration, 155a)

The Laura Hare section 52, 166a. indicates she applied for a Registrations Analyst position in 2013 in section 53, 166a – 167a Linda Cole indicates Ms. Hare was hired at \$30,000 because there were two previous unsuccessful recruitment efforts for the position and that the position was hard to fill. Based on Hare’s Bachelor of Science degree she was given a salary exception. Plaintiff Exhibit 11, 121a, is three Licensing and Registrations Specialist/Registration Analyst positions that were advertised February 21, 2013 by OCARP Program Manager Michael Menefee. Watson was already processing registrations and licensing applications for almost ten years since May 2005 with VDACS Office of Pesticide Services. Watson applied and interviewed for one of the Registration Analyst positions on March 19, 2013 with Michelle Townsend and Michael Menefee verified in Plaintiff exhibit 11, 123a. Watson was rejected and not offered one of the three positions. Hare applied for a Licensing and Registrations Specialist/Registrations Analyst position October 28, 2013 (Defendant exhibit Linda Cole Declaration Attachment R, 222a). She had no experience interpreting and applying statutory and regulatory requirements

A salary exception was given to Hare under false pretenses, eligible more qualified candidates such as Watson had applied to the Registrations Analyst position in 2013, the position was not hard to fill. Hare was privy to a salary exception empathizing that her previous three internships were unpaid and her last paid job only paid \$8.50 hr./\$17,680 annually so starting her at the Licensing and Registration Specialist starting salary of \$24,479 would be unjust (Defendant exhibit Cole Declaration, Attachment S, 228a). Hare was paid \$5,521 above the minimum and an increase in pay when she was promoted six months later in April 2014 from a Registrations Analyst to a Policy and Planning Specialist.

Watson was given no leniency or empathy as Hare was and was told by management which included VDACS Human Resources Director Linda Cole that a position that

did not require a college degree does not justify a higher salary (Plaintiff exhibit 6, 107a and Defendant exhibit Linda Cole Declaration Attachment G, 185a).

Additionally Judge Gibney deemed Hare more qualified in the Appendix K Memorandum Order Summary Judgement, 67a as having more relevant and advanced education. The Registrations Analyst just as the Certification Specialist position did not “require” a college degree.

A large part of a four-year degree includes a “core curriculum” and electives making an applicant’s education pertinent regardless of the major. Core curriculum subject examples are mathematics, science/biology and English/literature, all of which Watson acquired. Many skills a professional, unbiased hiring manager deem as important does not involve a specific curriculum but rather encompass “soft skills.”

Soft skills include but are not limited to skills such as oral communication, written communication, teamwork, adaptability, problem solving, time management, work ethic and interpersonal skills which are useful across all industries. Watson attained these core curriculum courses as well as soft skills beneficial to qualifications needed to perform each positions job duties. This is why Watson considered her college education as relevant to some compacity in her employment endeavors at VDACS.

Judge Gibney opined that (Hare, Barker, Pollard and Mangrum) had more relevant or advanced educational background when the minimum requirement was a high school diploma. (Appendix K - Memorandum Order Summary Judgement, 67a).

Neither Pollard nor Mangrum had educational backgrounds related to agriculture, consumer protection or environmental stewardship.

Pollard’s education was not relevant to the Registrations Analyst position. On her Commonwealth of Virginia application for employment she indicated she obtained a Master of Arts in Vocational Education/Home Economics in the Philippines and obtained credits in Paralegal Studies from J. Sargeant Reynolds Community College (Defendant exhibit Linda Cole Declaration Attachment V, 251a).

Mangrum’s education was neither relevant to the Registrations Analyst position. On her Commonwealth of Virginia application for employment she indicated she obtained a degree in International Studies in the Philippines (Defendant exhibit Linda Cole Declaration Attachment W, 265a).

The Registrations Analyst position did not require a college degree. A high school diploma is required and higher education is a preference.

VDACS Human Resources Director Linda Cole reasoned not considering Watson's education as a pay factor during her employment history, in her response to the EEOC complaint Watson filed August 1, 2018 because Watson's Fine Arts bachelor degree was not related to agriculture, consumer protection and environmental stewardship, (Plaintiff Exhibit 10, 116a).

Watson was denied an internal alignment on January 25, 2013 by management and Linda Cole in Human Resources, she was told that based on her employee work profile and the requirements of the Certification Specialist position a college degree is not a requirement and cannot be used to offer or justify a higher salary, (Plaintiff exhibit, 107a and Defendant exhibit Linda Cole Declaration Attachment G, 185a). This is clearly disparate treatment, to accept non-agricultural/ non-consumer protection educational degrees from Pollard and Mangrum but not from Watson as well as a clear indicator of pre-text.

In Agbati v. Virginia Department of Agriculture and Consumer Services, No. 3:19-cv-512. Appendix L the Declaration of Michael Menefee, 69a. Michael Menefee (the Program Manager both Watson and Agbati reported to) confirms in section 40, 78a. that former Team Leader Alyssa Royer met with Agbati to inform him he was not clearing the number of registrations expected of him. Agbati was hired November 25, 2013, this occurred six years into his employment in 2018. Agbati's duties were not realigned, he was not constructively demoted as Watson was.

To establish a prima facie case of discrimination with regard to disciplinary measures a plaintiff must show "(1) that plaintiff engaged in prohibited conduct similar to that of a person of another race, color, sex, religion, or national origin, and (2) that disciplinary measures enforced against the plaintiff were more severe than those enforced against the other person." The similarity between comparators and the seriousness of their respective offenses must be clearly established in order to be meaningful. Lightner v. City of Wilmington, 545 F.3d 260, 265 (4th Cir. 2008)

The prior salaries of several of Watson's comparators were considered but Watson's was not. Watson was earning \$15.66 an hour at Health Management Corporation a subsidiary of Anthem Blue Cross Blue Shield through 08/2004. VDACS did not attempt to match nor consider this salary when she first started with VDACS in 5/2005 or became a full-time employee with VDACS 6/2009 and her salary was left at \$13.82 an hour. (Defendant exhibit Cole Declaration Attachment C, 177a).

Terri Larus

41. Ms. Larus applied for the position of Licensing and Registrations Specialist in 2013 and began working for VDACS on April 25, 2013 as a full-time Licensing and Registrations Specialist (Pay Band 3) at a salary of \$35,000. The hiring salary range for this position was \$23,999 - \$37,500 annually. Her job application and Employee Work Profile are attached as Attachment P, 187a.

42. Ms. Larus was hired at a salary of \$35,000 because when offered the salaried position, she was working as a contractor “temporary worker” in OCRP earning \$16.00 per hour, which calculates to \$33,280 annually. She was offered a 5.2% increase over that hourly rate, which equates to \$35,000 for the salaried position, based on her significant work history at Altria that encompassed 29 years and an ending salary of \$50,000, so her salary history supported the offer of \$35,000. She also had prior experience at VCU in customer service where she scheduled patients and arranged for outpatient services.

(Defendant Exhibit 1: Declaration of Linda Cole, Teri Larus, sections 41 - 42, 164a – 165a).

Larus was a temporary worker starting with VDACS 9/2012 the date of her state application is 4/25/2013. After eight months of employment Larus was “offered” an increase in compensation with higher earnings from a previous employer taken into consideration. Larus had not worked at Altria since 02/2009 and worked two jobs with VCU Health Systems for lesser pay between 07/2010 and 04/2012. VDACS combed down Larus’ application to find the highest paying job and base her salary from there.

Lindsay Barker

60. VDACS hired Ms. Barker at a salary of \$30,000 after determining it to be an appropriate salary that was equitable with the starting salaries of Licensing and Registrations Specialists in the department with relevant work experience and education. Ms. Barker’s previous job paid \$22.50 per hour, which equated to \$46,800 annually so she received a 33% decrease.

62. Ms. Barker received only one pay increase to \$35,700. This increase occurred on August 10, 2015 as the result of a statewide General Assembly pay increase for Commonwealth of Virginia employees.

(Defendant Exhibit 1: Declaration of Linda Cole, Lindsay Barker, sections 60 and 62, 168a). This is inaccurate and erroneous information.

Barker's state application indicates she worked as a General Assembly Fellow for her school Virginia Tech for 10 months (08-2012 to 05-2013) 20 hrs a week this does not equate to \$46,800 annually.

20 hours per week x 43 weeks (ten months) = 860 hours

860 hours x \$22.50 = \$19,350

Lindsay Barker was hired in at \$35,000 verified in a 11/2017 FOIA request to the Virginia Department of Human Resources Management not \$30,000.

(Defendant exhibit Cole Declaration, Attachment T, 230a – 231a)

Caly Emerson

65. Ms. Emerson worked for another state agency before transferring to VDACS as a fulltime Licensing and Registrations Specialist, a Pay Band 3 position, beginning on August 10, 2014 at a salary of \$38,472. Her job application and Employee Work Profile are attached as Attachment U.

66. Ms. Emerson was hired at a salary of \$38,472 because it was determined to be an appropriate salary that was equitable with the starting salaries of other Licensing and Registrations Specialists in the department with relevant work experience and education. Plus, she was earning \$36,640 at the Department of Professional and Occupational Regulation ("DPOR") when she accepted a lateral transfer to VDACS at a 5% increase.

(Defendant Exhibit 1: Declaration of Linda Cole, Caly Emerson, sections 65 - 66, 169a).

Emerson began working part time for state government 10/2011 therefore as of her start as a Registrations Analyst with VDACS September 10, 2015 she had five years' experience interpreting and applying statutory and regulatory requirements and was paid the maximum salary for a Registrations Analyst. Watson had five years direct experience in the Office of Pesticide Services interpreting and applying statutory and regulatory requirements starting 5/2005 and was not given a pay increase when she was promoted to full time 6/2009 in the Office of Pesticide Services. Neither was Watson paid a maximum or even mid-range salary with the Office of Charitable and Regulatory Programs in 2014 with ten years' experience interpreting and applying statutory and regulatory requirements.

Edievith Pollard

71. Ms. Pollard applied to be a Certification and Licensing Specialist in 2014, and worked for VDACS as a full-time classified employee in the Office of Pesticide Services in a Pay Band 3 position beginning on July 25, 2014 at a salary of \$32,864.

72. Ms. Pollard was hired at a salary of \$32,864 because she was earning \$15.30 per hour (equates to \$31,824 annually) as a wage employee with DPOR. Her salary was further justified by her years of experience at DPOR as a Licensing Specialist and at the Department of Social Services. All prior state positions were regulatory in nature and dealt with interpreting and applying complex statutes, rules, regulations, policies and procedures. She has a Master of Arts degree in Vocational Education and an Applied Science Degree in Paralegal Studies.

73. On May 10, 2015, Ms. Pollard made a voluntary competitive transfer to a Licensing and Registrations Specialist in OCRP. Ms. Pollard remained in a Pay Band 3 position, but her salary increased upon her job change to \$35,000. Her salary increased because this was a competitive transfer and was based on her current salary and relevant regulatory work experience that included analyzing applications and determining compliance with the law and regulations as well as significant customer service skills in explaining regulatory requirements. Ms. Pollard's initial job application and Employee Work Profile are attached as Attachment V.

(Defendant Exhibit 1: Declaration of Linda Cole, Edievith Pollard, section 71 - 73, 170a).

Pollard was a part time wage worker with DPOR working 30 hours a week.

30 hours per week x 52 weeks (twelve months) = 1,560 hours

1,560 hours x \$15.33 = \$23,914.80

Pollard was not earning \$31,824 annually as Linda Cole erroneously declared.

(Defendant exhibit Cole Declaration Attachment V, 252a)

Consideration to a non-relevant educational degree and previous wage salary was afforded to Pollard but not Watson.

Xembrelyn Mangrum

77. Ms. Mangrum began working for VDACS as a Licensing and Registrations Specialist on a wage basis at a rate of \$15 per hour (equates to \$31,200 per year) before being hired into a full-time classified position in Pay Band 3 at a salary of \$34,000 on September 10, 2016. Her job application and Employee Work Profile are attached as Attachment W.

78. Ms. Mangrum was initially offered \$31,200, per agency policy of offering the same hourly rate an employee is earning when a wage/hourly employee is hired full-time, but she declined that offer. When an offer is declined, the agency can negotiate, and the agency negotiated with Ms. Mangrum to a starting salary of \$34,000. That salary was determined to be equitable with the other Licensing and Registration Specialists in the division with similar work experience and education.

79. Ms. Mangrum possesses a Bachelor of Arts Degree in international studies and a minor in pre-law. She had experience as a Storm Water Construction Permit Writer with the Virginia Department of Environmental Quality earning \$15.50/hour. Ms. Mangrum also had direct experience in OCRP with about 15 months of experience as a wage employee. This experience provided her with the ability to interpret and apply statutory and regulatory requirements in processing charitable solicitation applications. She also had prior experience in customer service from working in retail operations.

81. Ms. Mangrum received an in-band adjustment due to an internal alignment on March 10, 2020 to \$37,400. She received this adjustment after an internal alignment study was completed because it appeared she had fallen out of alignment due to the hiring of new staff and with the revision of the Commonwealth's Compensation policy that allowed for the study. The Commonwealth's Compensation policy was revised on July 1, 2019 which removed the maximum percentages on salary increases and instead focused on internal alignment. Ms. Mangrum still works for VDACS, in good standing, making \$37,400.

(Defendant Exhibit 1: Declaration of Linda Cole, Xembrelyn Mangrum, sections 77 – 79 and 81, 171a – 172a).

After 15 months working as a part time wage worker for VDACS OCARP division, Mangrum's direct experience was considered. Watson had five years direct experience in the VDACS OPS division interpreting and applying statutory and regulatory requirements and was not given an increase in pay when hired full time in June 2009. Additionally, there is no policy in writing precluding wage workers from receiving an increase in pay when promoted to full time. Pollard was a part time wage worker when she came from DPOR as indicated on her Commonwealth of

Virginia state application (defendant exhibit Cole Declaration Attachment V, 252a) but was given a higher pay.

Joseph Cason

84. Mr. Cason was hired at a salary of \$37,500, because based on his employment history and his prior salary which was \$39,000. He received a 3.8% decrease in pay due to internal alignment data at the time. He received a 3.8% decrease in pay due to interna alignment data at the time. Mr. Cason has a high school diploma and 14 years of experience with the US Army and four years in the private sector as a Quality Assurance Specialist. Based on his extensive work history, he is skilled in principles of government regulation and consumer protection, along with a demonstrated ability to interpret and apply statutory and regulatory requirements. Previous experience included conducting internal and external audits to ensure compliance with Medicaid. He also has in depth customer service skills from both his military and private sector experience.

(Defendant Exhibit 1: Declaration of Linda Cole, Joe Cason, sections 82 through 90, 172a – 173a).

Cason's prior salary was taken into consideration but Watson's prior salary with Health Management Corporation was not.

40 hours per week x 52 weeks (twelve months) = 2,080 hours

2,080 hours x \$15.66 = \$32,572.80 was Watson's prior salary at Health Management Corporation.

(Defendant exhibit Cole Declaration Attachment C, 177a)

On June 25, 2009 you were hired into your current position as a classified Administrative and Office Specialist III, band 3. At that time your hourly rate was \$13.37 and you were hired at an annual salary of \$27.810 which equates to \$13.37 per hour. (Plaintiff exhibit 6, 107a and defendant exhibit Cole Declaration Attachment G, 185a)

Management and Human Resources Director verified Watson's salary was left the same as from her time as a part time wage worker.

Before working at VDACS, Watson worked as a Collections Clerk/Customer Service Representative for Comcast Cablevision from 1995 to 1998, Customer Advocate for Anthem Blue Cross Blue Shield from 1998 to 2000, Emergency Communications Specialist for Security Corporation from 2002 to 2004, and Health Assessment Specialist for Health Management Corporation from 2003 to 2004. (Id at 2-3.) None of these jobs involved interpreting or applying statutory or regulatory requirements.

The evidence also shows that Watson did not have comparable work experience to Cason and Agbati. Cason had an "extensive work history" that included "a demonstrated ability to interpret and apply statutory and regulatory requirements." (ECF No. 36-1 ¶ 84.) Similarly, Agbati had "demonstrated ability to interpret and apply statutory and regulatory requirements," and an educational background that demonstrated his "understanding of the basic principles in non-profit management and fundraising." (ECF No. 36-1 IN 93-94.) This shows that a factor other than sex—namely Cason's and Agbati's prior work and educational experiences—helps explain. (Appendix K – Memorandum Order Granting Summary Judgement to Defendant, 59a and 62a).

VDACS Human Resources Director Linda Cole indicated Cason acquired fourteen years of customer service skills in the US Army and Judge Gibney attributed this to an extensive work history and a factor other than sex affirmative defense. This is violative of the Equal Employment Opportunity Commissions Policy Guidance on Veterans' Preference Under Title VII. (Appendix M – 79a).

Ehonam “Roger” Agbati

93. Mr. Agbati was hired at a salary of \$31,096, because at the time of hire, he was earning \$13.00 per hour (equates to \$27,040 annually) as a contractor “temporary worker” with OCRP. We offered Mr. Agbati a 15% increase, which was the most allowed by policy at the time, because he demonstrated that he could successfully process on average of 48 registrations per week, which is close to meeting the teams’ established goal of an average of 50. His demonstrated ability to interpret and apply statutory and regulatory requirements was the driving factor in offering him this salary.

96. Mr. Agbati received an in-band adjustment due to internal alignment on August 10, 2016 to \$34,889. He received this adjustment because internal alignment data had changed over the years and newer employees were being offered similar or higher salaries than what he had been earning.

(Defendant Exhibit 1: Declaration of Linda Cole, Ehonam Agbati, sections 93 and 96, 174a and 175a).

Watson was denied an internal alignment on January 25, 2013 by management and Linda Cole in Human Resources, she was told that based on her employee work profile and the requirements of the Certification Specialist position a college degree is not a requirement and cannot be used to offer or justify a higher salary,

(Plaintiff exhibit, 107a and Defendant exhibit Linda Cole Declaration Attachment G, 185a). The Registrations Analyst position did not require a college degree, the minimum requirement was a high school diploma.

In Agbati v. Virginia Department of Agriculture and Consumer Services, No. 3:19-cv-512. Appendix L the Declaration of Michael Menefee, 69a. Michael Menefee (the Program Manager both Watson and Agbati reported to) confirms in section 40, 78a. that former Team Leader Alyssa Royer met with Agbati to inform him he was not clearing the number of registrations expected of him. Agbati was hired November 25, 2013, this occurred six years into his employment in 2018. Agbati's duties were not realigned, he was not constructively demoted as Watson was.

Watson discovered at the end of January 2018 her Program Manager in the Office of Charitable and Regulatory Programs, Michael Menefee was emailing weekly "CP Stat Reports" (Plaintiff Exhibit 28, 139a) and had done so for months. This was a report updating staff on the number of registrations the team reviewed and processed as a whole, as well as the expected goal. Watson was not included in these emails. Watson asked a colleague (Xembrelyn Mangrum) to forward as many CP Stat Report emails as possible. There were five Registrations Analyst processing registrations at this time – Caly Emerson, Joseph Cason, Ehonam "Roger" Agbati, Edievith Pollard and Xembrelyn Mangrum. The reports show that not only were the expectations lower than the old, alleged expectation of 50 registrations a week but neither the new expectation of 75 registrations a week goal (raised after the implementation of assistants [who were copied in the emails] to the Registrations Analyst reviewing registrations).

The collective performance of the five Registration Analyst reviewing did not meet any individual expectation the VDACS falsely alleged with Watson (Plaintiff Exhibit 28, 139a):

- September 18, 2017 – Week ending 9-15-2017 Registration review goal 182
Actual registrations reviewed 167
- December 4, 2017 – Week ending 12-1-2017 Registration review goal 306
Actual registrations reviewed 270
- December 14, 2017 – Week ending 12-8-17 Registration review goal 327 Actual
registration reviewed 282
- December 19, 2017 - Week ending 12-15-2017 Registration review goal 297
Actual registration reviewed 242

- January 8, 2018 – Week ending 1-5-2017 Registration review goal 118 Actual registration reviewed 105
- January 30, 2018 – Week ending 01-19-17 Registration review goal 123 Actual registration reviewed 93
- February 5, 2018 – Week ending 02-5-2018 Registration review goal 200 Actual registration reviewed 202
- February 14, 2018 – Week ending 2-9-18 Registration review goal 200 Actual registration reviewed 196

There is no week in these reports where any Registration Analyst reviewed 75 registrations weekly as indicated in their employee work profiles adjusted after Watson's complaints, there was no specific amount of registrations goals on previous employee work profiles. None of their positions were "re-aligned" altered or terminated for not reaching weekly goals. VDACS used weekly registration goals as a pretext to constructively demote Watson into resigning/constructive termination.

The number of registrations processed is not a bona fide merit system but rather a casual expectation, only aggressively enforced when VDACS retaliates against a Registration Analyst asserting work rights as management did to Watson for questioning support and her pay.

C. Substantially Equal vs Virtually Identical

Nothing in the statutory language of Title VII or the EPA states "virtually identical." The United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit have misapplied and skewed the verbiage within the EPA statute "substantially equal" and improperly translated it into a strict "virtually identical" approach.

Under the EPA substantially equal is considered, the job duties must be "closely related" or "very much alike." Thus, minor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal.

The definition of identical is: similar in every detail; exactly alike.

In *Wheatley v. Wicomico County*, Judge Wilkinson opined: "But, the EPA demands more than a comparison of job functions from a bird's eye view.

In enacting the EPA, Congress chose the word "equal" over the word "comparable" in order "to show that the jobs involved should be virtually identical, that is very much alike or closely related to each other."

(Appendix K - Memorandum Order Granting Summary Judgment to Defendant, 61a).

(Zoe Spencer v. Virginia State University, the United States District Court for the Eastern District of Virginia, Civil Action No. 3:16-cv-989 – HEH, Judgement entered January 30, 2018, Page 14). This judgement was thereafter affirmed by the United States Court of Appeals for the Fourth Circuit. (Zoe Spencer v. Virginia State University, the Fourth Circuit, No. 17-2453, Judgement entered March 18, 2019, page 14).

(Evans v. International Paper Co., 936 F.3d 183, 196 (4th Cir. 2019)

(Wheatley v. Wicomico Cty., 390 F.3d 328, 332–33 (4th Cir. 2004)

The courts have been arbitrarily defining “substantially equal” and “virtually identical” in a bias context since 2004.

In Wheatley v. Wicomico Cty., 390 F.3d 328, 332 (4th Cir. 2004), No. 03-2406 and Zoe Spencer v. Virginia State University, the Fourth Circuit, No. 17-2453 the Plaintiffs worked in different departments adding a complexity to the substantially equal element. In the Wheatley Court it was pointed out that the comparators/ various department heads in that case “performed completely different functions.” Id. at 333. For example, one was in charge of “park maintenance”; another was “responsible for coordinating the dredging of waterways”; and another’s job involved “coordinating resources in the event of a disaster.” Id. Meanwhile, the plaintiffs “operated the 911 call center.” Id. at 330.

Dr. Spencer works in VSU’s Department of Sociology and Criminal Justice, her two comparators worked in the Mass Communications Department and the Department of Doctoral Studies in an academia/ higher education setting. By contrast in Watson’s case, the jobs were literally virtually identical as each employee work profile of the Registrations Analyst indicate the same job location, management each reported to, position description and core responsibilities hence “virtually identical” as the courts allegedly purport. OCARP is a customer service style department where all the Registration Analyst are grouped together in cubicles performing the same job. The District Court for the Eastern District of Virginia Richmond Division and the United States Court of Appeals for the Fourth Circuit refusal to review “cited” evidence is why Watson’s case was compared to cases whereas the Plaintiff and the comparators did not work in the same department.

Watson submitted most of her evidence prior to summary judgement. Plaintiff evidence was filed August 21, 2019. Judge Gibney repeatedly indicated Watson failed to attach exhibits (that were already submitted and on record) to her summary judgement. Further indicating the record had to be searched and the court had no obligation to assist Watson in this way.

Before working at VDACS, Watson worked as a Collections Clerk/Customer Service Representative for Comcast Cablevision from 1995 to 1998, Customer Advocate for Anthem Blue Cross Blue Shield from 1998 to 2000, Emergency Communications Specialist for Security Corporation from 2002 to 2004, and Health Assessment Specialist for Health Management Corporation from 2003 to 2004. (Id at 2-3.) None of these jobs involved interpreting or applying statutory or regulatory requirements. (Appendix K - Memorandum Order Granting Summary Judgement to Defendant, 59a).

The courts refusal to consider Watson's work experience was intentional. For Judge Gibney to have seen this work history he deemed irrelevant, he had to have also seen Watson's work experience starting in 05/2005 with VDACS that shows she did indeed have experience in interpreting and applying statutory and regulatory requirements.

Defendant exhibit Cole Declaration Attachment C, 177a and 181a is Watson's Commonwealth of Virginia state application and resume, Defendant exhibit Cole Declaration Attachment D, 183a is Watson's 2005 VDACS job offer letter and Plaintiff exhibit 37, 149a is Watson's updated resume, all indicate Watson's complete work history.

"Section 206(d) does not authorize courts to set their own standards of 'acceptable' business practices. The statute asks whether the employer has a reason other than sex—not whether it has a 'good' reason."

The courts placed an unreasonable burden on Watson to uncover and prove obvious discriminatory intent and ruled failure in every attempt but accepted every statement of the defendant as true even with contradictory evidence on record.

VDACS Human Resources Director Linda Cole indicated in Defendant Exhibit 1 Linda Cole Declaration, section 47, 165a, that Heather Hodges never worked as a Licensing and Registrations Specialist (Registrations Analyst). Watson indicated in her summary judgment to the district court and her informal brief to the 4th court that Heather Hodges was briefly a Registrations Analyst and a valid comparator. Watson cited that in defendant exhibit Linda Cole Declaration Attachment Q, 202a of Hodges Commonwealth of Virginia application at the top under job title "Registrations Analyst" and on 203a under work experience she was performing the

same duties as Watson, both under the supervision of team leader Michelle Townsend. Despite having evidence and being informed Judge Gibney agreed with Linda Cole's contradictory statements in the Appendix K - Memorandum Order Granting Summary Judgement to Defendant, 64a and did not consider Hodges a potential comparator. The Fourth Court affirmed this.

Watson pointed out the high school graduation dates of Emerson, Barker, Hare and Hodges, as they were all still in high school when Watson began working for VDACS in 5/2005 when Judge Gibney opined Watson had less work experience. This was further disregarded by the Fourth Court.

The start date of each comparator (Judge Gibney opined had more relevant work experience) start in interpreting and applying statutory requirements which were all after Watson's 5/2005 VDACS start date was also disregarded by the Fourth Court.

If a judge continues to commit a legal error after the mistake has been brought to the judge's attention, the judge commits judicial misconduct in addition to legal error.

(Judicial Conduct Reporter, VOLUME 36, NO. 3 • FALL 2014: Pro se litigants in the code of judicial conduct by Cynthia Gray)

REASONS FOR GRANTING THE WRIT

The factor other than sex defense is providing a gaping judicial loophole in the EPA statute through which many pretexts for discrimination is being sanctioned. The District Court for the Eastern District of Virginia Richmond Division and the United States Court of Appeals for the Fourth Circuit routinely accepts military experience/veteran status as a factor other than sex even when there is no business justification, requirement, or legitimate business need for military experience/veteran status.

This is contrary to Title VII of the Civil Rights Act of 1964: Veteran's Special Rights or Preference: sec. 2000e-11. [Section 712] - Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans and the Equal Employment Opportunity Commission's position that, if such status bears no relationship to the requirements of the job or to the individual's performance of the job, the employer will probably not be able to sustain the defense. Generally, to qualify as a valid factor other than sex, veteran status should be job-related and applied nondiscriminatorily. Based on national statistics, veterans' preferences have an adverse impact on women. At onset employers are using ostensibly nondiscriminatory pay rationales to the U.S. Equal Employment Opportunity Commission and not raising concerns of experience

to elude EEOC investigations but using experience under the factor other than sex as a proxy for pay discrimination to the courts knowing the District Court for the Eastern District of Virginia Richmond Division and the United States Court of Appeals for the Fourth Circuit upholds military experience and applies a strict "virtually identical" approach versus the actual intended substantially equal approach.

Women are re-victimized with each of their cases being callously tossed out of court then used against the next victim of compensation discrimination and unequal pay. There is an obvious pattern in *Spencer v. Virginia State University* and *Watson v. Virginia Department of Agriculture and Consumer Services* of applicable work experience and accomplishments of female plaintiffs being discounted, ignored and demeaned and the defenses male comparators being praised for having been in the military with no legitimate business relation to the job. By using these cases against the next equal pay plaintiff, legislative history is being planted by adding to legislative record language that is not intended to promote fair legislative enactment processes but instead to promote judicial interpretations and agendas. Congress intended for the any factor other than sex defense to be gender-neutral.

The use of Cason's military experience against Watson's administrative experience for an administrative job that had no legitimate business need for veteran status perpetuates historic sex discrimination. Cason's veteran status should have only aided in him securing employment and furthering his transition into civilian employment not as a proxy for pay and sex discrimination against non-veterans, specifically women who statistically are disadvantaged in obtaining veteran status which goes against gender-neutrality.

EPA inquiry does not end at the recognition of a "facially neutral" payment system because such a system can hide impermissible gender discrimination, even when a payment system results in glaring pay disparities, as evidenced in the Table of Comparators, chart B. It is no coincidence the defendants three lowest paid comparators were Black women.

"The factor other than sex' defense does not include literally any other factor."

Employers cannot avoid EPA liability by masking their intent in ambiguous policies once an employee makes out a prima facie case that the employer violated the EPA. Otherwise, the most heinous pay practices could be justified by mere ignorance or clever legalese.

Title VII of the Civil Rights Act of 1964 was signed into law 58 years ago on July 2, 1964. The EEOC's Policy Guidance on Veterans' Preference Under Title VII was issued 32 years ago on August 10, 1990. It is long overdue for employers and the courts to collectively adhere to this law/policy and for this loophole to be closed by the

highest court in our nation. This is an urgent matter in protecting employees especially women from legalized discriminatory pay practices.

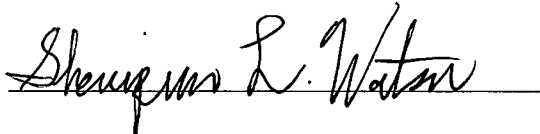
CONCLUSION

A Defendant is entitled to summary judgment if the Plaintiff has failed to raise a "genuine issue as to any material fact" and is entitled under a judgment as a matter of law. If the Plaintiff can put forth any evidence that could reasonably be construed to support a claim, the Plaintiff has created a genuine issue of material fact. In a system where any evidence becomes genuine, a nongenuine issue cannot exist. (6th Cir. 2006). "An employee raising a mixed-motive claim can defeat an employer's motion for summary judgment by presenting evidence--either direct or circumstantial--to 'demonstrate' that a protected characteristic 'was a motivating factor for an employment practice, even though other factors also motivated the practice.'" (quoting 42 U.S.C. § 2000e-2(m)).

Plaintiff need only produce enough evidence, so the record is not "devoid of evidence" that can be reasonably construed to support the Plaintiff's claim.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Shengjun L. Watson", is written over a horizontal line.

Date: March 6, 2023