No. 15-15623

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRUCILLA COOPER,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of California,
No.3:13-cv-2870
Hon. Jacqueline Scott Corley, United States Magistrate Judge

BRIEF OF AMICUS CURIAE THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Statement of Interest

The U.S. Equal Employment Opportunity Commission ("Commission") is the federal agency charged by Congress with responsibility for enforcing our nation's prohibitions on employment discrimination, including the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) ("EPA"). As a federal agency, the Commission is authorized to participate as amicus curiae in the courts of appeals. Fed. R. App. P. 29(a). In the instant matter, the district court applied legal standards and analysis to the plaintiff's EPA claim that are at odds with the statute as well as the jurisprudence of this Court and the Supreme Court. Given the importance of the correct interpretation and application of the EPA to the Commission's ongoing enforcement efforts, the Commission respectfully offers its views to this Court.

Statement of the Issues[1]

I. Whether the district court erred in concluding that United established as a matter of law its affirmative defense to Cooper's EPA claim when the court disregarded Cooper's argument that the source of the pay disparity between her and her male colleagues was United's

[1] The Commission expresses no opinion on any other issues presented in this appeal.

failure to reconcile the pay disparity over the nine years Cooper served as a security supervisor.

II. Whether the district court applied an incorrect analytical approach to Cooper's EPA claim when it permitted United to satisfy its burden of proof as to the affirmative defense only by producing an explanation for the pay disparity and then shifted the burden of proof to Cooper to establish that United's asserted reason was pretextual.

Statement of the Case

I. Statement of Facts

United hired Drucilla Cooper in 1997 as a security officer at its San Francisco Maintenance Hub. Excerpts of Record ("EOR.") 6. In January 2002, United promoted Cooper to Supervisor of Security Officers. EOR.16. During the relevant period, Cooper supervised the day shift, while one male supervisor handled the evening shift and another male supervisor handled the overnight shift. EOR.16.

United conceded for purposes of summary judgment that Cooper and her male colleagues performed substantially equal jobs, EOR.15; their pay, however, was far from equal. When United promoted Cooper to security supervisor in 2002, it gave her a raise to the bottom of the

salary scale, $42,696. EOR.556-57; *see also* EOR.16 (the salary scale for security supervisors was from $42,700 to $72,500). In 2011, at the end of her tenure as a security supervisor, Cooper's salary had risen to $56,112. EOR.556.

Cooper's pay was at all times substantially lower than that of her male colleagues. One of those male colleagues, "Employee 2," had been a United employee since 1989, and became a security supervisor in 2003, one year later than Cooper. EOR.17. However, Employee 2's starting salary was $63,000—over $20,000, and almost 50%, more than the starting salary United gave Cooper just one year earlier for the same job, and roughly $16,000 higher than Cooper's 2003 salary of $46,932. EOR.17, 583. In the following years, their pay disparity continued, and in 2011, after Cooper had been performing the job for nine years and Employee 2 had been performing the job for eight years, Employee 2's salary was still more than $10,500 higher than that of Cooper. EOR.556, 583 (Cooper's 2011 salary was $56,112; Employee 1's 2011 salary was $66,768).

United explained that "Employee 2 accepted the supervisor position after being furloughed from his higher grade and higher paying

supervisor position in another department, and took a pay cut in doing so." EOR.16. United did not, however, offer an explanation for why the pay disparity continued, and was so significant, eight years after Cooper and Employee 2 had been performing the same job.

United hired another male security supervisor, "Employee 1," in March 2008, when Cooper had already been working in the position for six years. EOR.16. Employee 1's starting salary was $58,008—several thousand dollars higher than Cooper's $42,696 starting salary and even her 2008 salary of $51,924. EOR.16, 556, 579. United claimed that Employee 1's salary was set pursuant to a policy that "targeted external hires toward the middle of the range," resulting in a salary offer of $58,008. EOR.16. However, although Cooper had been working in that same job for over six years, in the first half of 2008 her salary was $51,924, and after June 1, her salary was $53,676—roughly $4,500 less than her newly-hired male colleague. EOR.16, 556. Again, United offered no explanation for why the pay disparity continued unabated three years later, into 2011, when Employee 1's pay rose to $61,980 while Cooper's pay lagged behind by almost $6,000 even though she had

performed the job six years longer than her higher-paid male colleague. EOR.556, 579.

In 2011, in connection with its merger with Continental Airlines, United decided to repost all the security supervisor positions. EOR.7. United did not select Cooper to retain her security supervisor position, while her male colleagues were able to retain their positions. EOR.8-9. United replaced Cooper with "Employee 3" who took over Cooper's job with a salary of $80,009—almost $24,000 more that Cooper's salary in 2011 for exactly the same job, and at a salary level that exceeded the salary range for the position. EOR.17-18. United's explanation for why Employee 3 received such a high salary for the security supervisor position was that his salary had been set in 2009, when he was an external hire, and that despite his furlough in 2011 before he was awarded Cooper's former job and the fact that the security supervisor position constituted a "demotion" compared to his pre-furlough position, the company's practice during its integration with Continental Airlines was not to cut the pay of individuals moving into one-level-lower jobs. EOR.17-18 & EOR.18 n.8.

United had a salary adjustment policy to maintain a certain percentage difference in pay between union and supervisory personnel, but it argued on summary judgment that there was no evidence that it had a policy of equalizing salaries among employees holding the same jobs. EOR.16, District Court Docket No. ("R.") 78 (United's reply memorandum on summary judgment) at 9.

II. District Court Decision

In granting United's motion for summary judgment, the district court first stated, correctly, that a plaintiff establishes a prima facie case by "showing that employees of the opposite sex were paid different wages for equal work," and upon such showing "the burden of persuasion shifts to the defendant to show that the wage differential arose from a factor other than sex." EOR.14 (citing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982)). The court further observed that "a defendant cannot escape liability merely by articulating a legitimate nondiscriminatory reason for the employment action; rather, the defendant must prove that the pay differential was based on a factor other than sex. In other words, the 'factor other than sex'

exception is an affirmative defense." EOR.14-15 (citing *Cnty. of Wash. v. Gunther*, 452 U.S. 161, 170 (1981); *Kouba*, 691 F.2d at 875).

However, after recognizing that United had conceded that Cooper had established a prima facie case, the court announced a different analytical approach, stating that "[t]he question then is whether [United] has met its burden of demonstrating that the pay disparity resulted from a factor other than sex, and if so, whether [Cooper] has demonstrated that [United's] explanation is merely a pretext for discrimination." EOR.15 (citing *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1076 (9th Cir. 1999)).

The court observed that United's explanation for the pay differential was its use of salary bands that set pay depending on whether the employee was an internal or external hire, and would or would not supervise union members. EOR.15. Specifically, the court described United's argument as that "[Cooper's] salary was set based on [United's] practice of setting the salary of Union employees moving into management positions at the lower end of the salary range for the management position," while the salaries of Cooper's three male

comparators were set based on different policies and circumstances. EOR.18.

The court stated that pay differentials attributed to different levels of experience and qualifications "constitute the sort of nondiscriminatory reason sufficient to rebut a prima facie case." EOR.20 (citing *Stanley*, 178 F.3d at 1077). The court added that it would determine "the reasonableness of [United's] practices in light of its stated business reasons, and must find that [United's] business reasons 'do not reasonably explain its use of the factor before finding a violation of the act.'" EOR.20 (quoting in part *Kouba*, 691 F.2d at 878) (other citations omitted).

The court then noted that "[a]t oral argument, [Cooper] only challenged the legitimacy of the business decision with respect to the initial setting of plaintiff's salary."[2] EOR.21. The court then described United's "proffered business reason" for why it set her salary at the

[2] In her summary judgment briefing, however, Cooper argued that United has a policy for bringing supervisors' salaries into parity with each other when a "discrepancy has evolved over time," but "United chose not to employ this process in [Cooper's] case." EOR.177. United's only response to this argument was its assertion that Cooper had no admissible evidence that United has such a salary-leveling policy. R.78 at 9.

bottom of the pay scale, and stated that in so arguing United had "offered a legitimate business reason . . . that has nothing to do with gender." EOR.21. From this, the court concluded that United:

> has therefore demonstrated that the salary differentials between [Cooper] and Employees 1 and 2 are based on a "factor other than sex," . . . namely, a compensation policy that (1) sets employees' salaries at the bottom of the range when they move from a union to management position, (2) places the salary of external hires at the middle of a salary range for a particular position, and (3) requires employees who accept a demotion to accept a salary within the range for the new position even if that is less than their prior or current salary.

EOR.21. As for Employee 3—Cooper's replacement—the court stated in a footnote that United permitted him to keep the higher salary from his prior job despite being demoted into Cooper's former position because, as United argued, during the process of combining with Continental Airlines, "'it was determined that this would be the most efficient and practical way of addressing a person's salary when he or she moved into a new position.'" EOR.21 n.10 (citation omitted).

The court then stated that "[t]he burden thus shifts to [Cooper] to produce specific evidence sufficient to raise an inference that 'the business reasons given by [United] do not reasonably explain [its] use of

that factor.'" EOR.21 (quoting *Kouba*, 691 F.2d at 878). The court noted that Cooper's only argument here was that "United has a methodology for adjusting salary discrepancies between men and women . . . which it should have applied to her," but the court rejected this argument as lacking evidentiary support. EOR.21-22. The court added that what little inadmissible evidence there was on this point "supported an inference that no such policy was in place due to [United's] 2004 bankruptcy." EOR.22. Stating that Cooper "cannot create a dispute of fact without any evidence that actually creates a dispute," the court concluded that she "has failed to present any evidence supporting a reasonable inference that [United's] compensation policy is simply a pretext for discrimination; she has therefore failed to meet her 'burden of demonstrating a material fact regarding pretext in order to survive summary judgment.'" EOR.22-23 (quoting *Stanley*, 178 F.3d at 1076).

Summary of the Argument

When the district court granted summary judgment to United on Cooper's claim of unequal pay under the EPA, it failed to hold United to the correct summary judgment evidentiary standard, and

correspondingly erred by ignoring Cooper's argument that the pay disparity was attributable to United's failure to reconcile the pay disparity over the nine years Cooper served as a security supervisor. For United to have secured summary judgment based on the EPA's affirmative defense—a matter for which United would bear the burden of proof at trial—it had to present sufficient evidence to compel any reasonable jury to conclude that the pay disparity between Cooper and her less-tenured male colleagues was the result of "a differential based on any other factor other than sex."

United offered an explanation for the disparity in Cooper's and her male colleagues' initial salaries, based on pre-hire criteria. However, pre-hire qualifications or other criteria that inform starting salaries become less and less relevant to employees' pay over time, and United offered no explanation for why the pay disparity between Cooper and her male colleagues continued for so many years—it only offered an explanation for why it accorded her and her male colleagues different starting pay. Accordingly, the district court erred when it ignored United's failure to present any evidence on this point. Similarly, the court erred when it penalized Cooper for not presenting evidence that

United in fact had a salary-equalizing policy, as it was United's burden to prove the continuing pay disparity existed for a non-sex-based reason.

The district court also erred when, after United provided its explanation for the pay disparity, it shifted the burden to Cooper to establish that United's explanation was pretextual. Under the EPA, once the plaintiff has established a prima facie case the burden of proof shifts to the defendant to establish the EPA's affirmative defense—here, that the pay disparity was in fact the result of a differential based on any other factor other than sex. However, the district court instead analyzed the case according to the proof framework developed for analyzing individual discrimination claims under Title VII of the Civil Rights Act of 1964, where the plaintiff always bears the ultimate burden of proof and the employer bears only the burden of production as to its explanation for the challenged action. That Title VII analytical model, however, is inapplicable to claims under the EPA where the burden of proof shifts to, and remains with, the defendant to prove that the pay disparity is the result of a differential based on a factor other than sex.

Argument

I. United failed to present sufficient evidence to entitle it to summary judgment on the question of whether the ongoing pay disparity between Cooper and her male colleagues was pursuant to a differential based on any other factor other than sex.

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). "To establish a prima facie case of wage discrimination [under the EPA], a plaintiff must show that the employer pays different wages to employees of the opposite sex for substantially equal work." *EEOC v. Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *see also Hein v. Or. Coll. Of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983) (same). Moreover, "'[t]he Equal Pay Act creates a type of strict liability; no intent to discriminate need be shown.'" *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Strecker v. Grand Forks Cnty. Soc. Serv. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980) (en banc)).

"The [EPA] also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes 'is 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.'" *Corning*, 417 U.S. at 196; 29 U.S.C. § 206(d)(1). Once the plaintiff has made out a prima facie case under the EPA, the burden of proof—not mere production—shifts to the defendant "to show that the differential is justified under one of the Act's four exceptions." *Id.* That is, the employer's assertion of one of the four statutory exceptions to liability "is a matter of affirmative defense on which the employer has the burden of proof." *Corning*, 417 U.S. at 197; *see also Maxwell*, 803 F.2d at 446 ("'These exceptions are affirmative defenses which the employer must plead and prove.'" (citing *Kouba*, 691 F.2d at 875); *Kocacevich v. Kent State Univ.*, 224 F.3d 806, 826-27 (6th Cir. 2000) ("The burden for proving that a factor other than sex is the basis for a wage differential is a heavy one.").

Accordingly, to secure summary judgment on the basis of its affirmative defense under the EPA, United had to establish that the

evidence, viewed in the light most favorable to Cooper as nonmovant, was so one-sided in United's favor that no rational jury could find other than for United, i.e., that the ongoing salary disparity between Cooper and her male colleagues was based on a factor other than sex. *See, e.g., Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party."); *Stanziale v. Jargowsky*, 200 F.3d 101, 108 (3d Cir. 2000) (noting that "where, as here, employers seek summary judgment as to the Equal Pay Act claim, they must produce sufficient evidence such that no rational jury could conclude but that the proffered reasons actually motivated the wage disparity of which the plaintiff complains," adding that it is the defendant's burden "to establish this fact 'so clearly that no rational jury could find to the contrary'") (citation omitted).

In granting United summary judgment, the district court failed to adhere to this standard. Where an employer seeks to defend against an EPA claim by relying on the "factor other than sex" defense, the employer must establish that it actually used and applied in good faith

a factor not based on sex that served as the basis for the challenged pay differential. *See Kouba*, 691 F.2d at 876-77 (assessing the employer's explanation for the pay disparity against a "pragmatic standard, which protects against abuse yet accommodates employer discretion . . . the employer must use the factor reasonably in light of the employer's stated purpose as well as its other practices"; the employer's explanation must constitute an "acceptable business reason"), *see also Warren v. Solo Cup Co.*, 516 F.3d 627, 630 (7th Cir. 2008) ("The [employer's] justification 'must also be bona fide. In other words, an employer cannot use a gender-neutral factor to avoid liability unless the factor is used and applied in good faith; it was not meant to provide a convenient escape from liability.'") (citation omitted); *Stanziale*, 200 F.3d at 107-08 (interpreting the "made pursuant to" language of the EPA's affirmative defense "as requiring that the employer submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity") (emphasis in original).

The requirement that the employer prove that the factor other than sex is bona fide and not a post-hoc attempt to explain away a pay differential is also reflected in the Commission's Compliance Manual section on compensation discrimination. "While [the fourth] defense encompasses a wide array of possible factors, the employer must establish that a gender-neutral factor, applied consistently, in fact explains the compensation disparity." EEOC Compliance Manual Chapter 10: Compensation Discrimination, No. 915-003, at 10-IV.F.2 (Dec. 5, 2000) ("Compliance Manual"), *available at* http://www.eeoc.gov/policy/docs/compensation.html.

United offered an explanation for initially setting Cooper's pay so much lower than the starting salaries of her male colleagues. However, it never explained why it failed to equalize their pay over time, long after the criteria United identified as relevant for setting initial pay became irrelevant to the salary level appropriate for longstanding employees performing equal work. United did not argue that Cooper's pay continued to lag so far behind that of her less-tenured male colleagues because of a disparity in job performance, budgetary/economic concerns, or any other permissible post-hire

criteria. Thus United failed to offer evidence that explained the disparity—not in starting salaries, but in their pay after years on the job.

The Commission has long recognized that "continued reliance on pre-hire qualifications is less reasonable the longer the lower-paid employee has performed at a level substantially equal to, or greater than, his or her counterpart." Compliance Manual, at 10-IV-F.2.a. Rejecting employers' reliance on pre-hire qualifications or criteria to justify, long after hiring, providing higher pay for men but lower pay for women doing equal work, is consistent with this Court's recognition in *Kouba* that an employer "cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason." 691 F.2d at 876. For over time, between equally-performing employees, reliance on pre-hire criteria becomes less and less acceptable a business reason to justify lower pay for the female employee.

Other courts have agreed. In *King v. Acosta Sales & Marketing, Inc.*, 678 F.3d 470, 473-74 (7th Cir. 2012), the Seventh Circuit rejected the employer's attempt to defend a pay disparity between men and

women on the grounds of pre-hire qualifications or criteria—from experience and education, to prior salary—long after the female employees had been hired, and when they had been performing their jobs adequately for several years. In that case, the employer set pay scales that included a target median salary, but it paid most women less than the low end of the pay scale while it paid men either above the top of the pay scale or above the median. *King*, 678 F.3d at 475.

The Seventh Circuit recognized that, even supposing that "education and experience (which imply greater pay at other firms, with which [the employer] is competing for talent) explain some or even all of the difference in the *starting* salaries" between male and female employees, "if men arrive at [the employer] with higher salaries because of education, but men and women are equally good at the job, women should get more rapid raises after employment and the salaries should tend to converge." *Id.* at 474 (emphasis in original). "There is no reason why [prehire qualifications or criteria] should explain increases in pay while a person is employed . . . [as] [c]hanges in salary at most firms depend on how well a person performs at work." *Id.* Employers may "pay extra to people with better credentials . . . but this is compatible

with salary convergence during employment." *Id.* Instead of converging over time, though, the salaries of men and women diverged, and the divergence "[couldn't] be explained by education and experience at the time of hire, which should matter less as years pass on the job." *Id.* at 475. The divergence was compounded by the men receiving higher raises as well. *Id.* at 474-75. The Seventh Circuit concluded that the employer "had no explanation for how men's salaries had become so far out of line . . . [but the plaintiff] has an explanation—sex discrimination." *Id.* at 475.

Here, similarly, there is no explanation from United as to why Cooper's pay remained significantly lower than her male colleagues throughout her nine-year tenure as a security supervisor. The district court rejected Cooper's argument on this point based on the court's conclusion that she lacked evidence that United had a policy of correcting pay discrepancies among its employees. EOR.21-22. But in so doing, the court impermissibly shifted to Cooper the burden of proof as to United's affirmative defense by requiring her to disprove United's explanation for the pay disparity. As this was United's affirmative defense, it bore the heavy burden of offering sufficient evidence of why

it continued, year after year, to pay Cooper less than all of her male, less-tenured colleagues, to compel any reasonable jury to conclude that the pay disparity was based on a factor other than sex. *See Corning*, 417 U.S. at 197; *Kocacevich*, 224 F.3d at 826-27; *Maxwell*, 803 F.2d at 446.

Furthermore, as in *King*, the evidence here is insufficient to compel the conclusion that the reason Cooper's pay was so much lower than that of her male colleagues throughout her entire tenure as a security supervisor—and not just when United first hired her and her male colleagues into their positions—was a differential based on a factor other than sex. Therefore, United was not entitled to summary judgment.

United promoted Cooper to security supervisor in 2002 and gave her a raise to the bottom of the salary scale, $42,696 (the salary scale for security supervisors was from $42,700 to $72,500). EOR.16, 556-57. At the end of her tenure as a security supervisor, her salary had risen to $56,112. EOR.556.

Employee 2 became a security supervisor in 2003, one year later than Cooper, at a starting salary of $63,000—over $20,000 more than

the starting salary United gave Cooper for the same job, and roughly $16,000 higher than Cooper's 2003 salary of $46,932. EOR.17, 583. In the following years, the pay disparity continued, and in 2011, after Cooper had been performing the job for nine years and Employee 2 had been performing the job for eight years, Employee 2's salary was still more than $10,500 higher than Cooper's salary. EOR.556, 583.

United has offered no explanation of why, although Cooper and Employee 2 performed the same job for nearly a decade, the male employee was still being paid more than $10,500 more than she, for the same work, so many years after each had been hired.

United claimed that when it hired Employee 1 in 2008, it set his salary pursuant to a policy that "targeted external hires toward the middle of the range," resulting in a salary offer of $58,008. EOR.16, 579. However, although Cooper had worked in that same job for over six years, in the first half of 2008 her salary was $51,924, and after June 1, her salary was $53,676—roughly $4,500 less than her newly-hired colleague. EOR.16, 556. Moreover, in 2011, Employee 1's pay rose to $61,980 while Cooper's pay lagged behind by almost $6,000,

even though she had performed the job six years longer than her male colleague. EOR.556, 579.

United offered no explanation of why, despite having salary adjustment policies for reasons such as maintaining a certain percentage difference in pay between union and supervisory personnel, and despite Cooper's successful job performance for some six years, it failed to adjust her salary to achieve parity with her male colleague.

In addition, United's conferring such a high salary upon Employee 3 to perform Cooper's job strongly suggests that United had no legitimate business reason for failing to equalize her pay with that of her other male colleagues during her tenure in the position. Employee 3 took over Cooper's job in 2011, at a salary of $80,009, a pay rate that exceeded the salary range for the position and was almost $24,000 more than Cooper's 2011 salary of $56,112. EOR.17-18. United has not offered any argument that its failure to equalize the pay of Cooper with her male colleagues was reasonable based on budgetary or similar economic reasons, and its willingness to pay Employee 3 some 30% more than it had just been paying Cooper to do exactly the same job strongly indicates that no such reasons existed. *See Kouba*, 691 F.2d at

876-77 (holding that the employer "must use the [claimed non-sex-based] factor reasonably in light of the employer's stated purpose as well as its other practices," and the employer's explanation must constitute an "acceptable business reason").

This evidence all suggests there was no legitimate reason for United's failure to pay Cooper, over time, in line with her male colleagues, and United has not provided any explanation for perpetuating this disparity. It is more than sufficient to support a reasonable fact-finder's conclusion that United has not satisfied its substantial burden of proof on its affirmative defense. On this record, the evidence is not so one-sided in United's favor that any reasonable jury would be compelled to conclude that continuing to pay Cooper substantially less than her male colleagues throughout her tenure as a security supervisor was due to a "differential based on any other factor other than sex," sufficient for the company to prevail on summary judgment.

II. The district court erred in applying a Title VII-style "pretext" analysis to Cooper's EPA claim.

The district court's analysis of Cooper's EPA claim confused the different standards applicable to claims of pay discrimination under two different statutes—the EPA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Here, it is undisputed that Cooper established a prima facie case under the EPA. Accordingly, as explained above, to avoid liability United had to prove that the disparity between Cooper's pay and that of her male co-workers was based on one of the four permissible factors enumerated in the statute. *See supra*, at 13-15. To prove this defense, United was required to "affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun*, 509 F.3d at 984.

The district court, however, appears to have analyzed United's affirmative defense to Cooper's EPA claim under a different proof scheme—namely, that set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for Title VII individual disparate treatment claims. The court did this by permitting United to satisfy its burden by merely "offer[ing] a legitimate business reason" for the pay disparity, and imposing the ultimate burden of proof on Cooper to establish, as is required under the Title VII/*McDonnell Douglas* framework, that

United's proffered reasons were "simply a pretext for discrimination." EOR.15, 22. This was error.

Under the Title VII/*McDonnell Douglas* approach, a plaintiff must prove that the contested employment action was motivated by the plaintiff's sex, and, in contrast to the EPA, the ultimate burden of proof never shifts from the plaintiff to the defendant. *See, e.g.*, *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1155-56 (9th Cir. 2010); *see also Spaulding v. Univ. of Wash.*, 740 F.2d 686, 691, 696-97, 699-700 (9th Cir. 1984) (recognizing the distinct analytical approaches required for EPA and Title VII claims), *overruled on other grounds*, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987). Under Title VII, the defendant bears only a burden of production, not proof, and may satisfy this burden by responding to the plaintiff's prima facie case with evidence suggesting a legitimate, nondiscriminatory reason for its action—but "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 253-54; *see also Hawn*, 615 F.3d at 1155 (under Title VII/*McDonnell-Douglas* analysis, "[i]f plaintiffs establish a prima facie case, '[t]he

burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action'") (citation omitted).

Accordingly, the Title VII/*McDonnell Douglas* proof scheme is not applicable to, and is incompatible with, claims brought under the EPA. Since the defendant must actually prove a nondiscriminatory reason for its allegedly discriminatory action under the EPA, and not merely articulate an explanation as is the case under the *McDonnell Douglas* framework, *see Corning*, 417 U.S. at 197; *Maxwell*, 803 F.2d at 446, the question of discrimination is settled at the point the defendant meets, or fails to meet, its burden, and there cannot be any further "proof" of discrimination. By its nature, the pretext phase of the *McDonnell Douglas* analysis presupposes that the defendant has not proven that it acted in a nondiscriminatory manner—otherwise there would be no possibility for a plaintiff to prove the defendant's explanation was untrue and discrimination was the true motive. As such, the *McDonnell Douglas* analysis—as apparently employed by the district court on summary judgment in this case—is flatly inconsistent with the

requirement in EPA claims that the defendant bear the ultimate burden of proving the truth of its asserted defense.

The Supreme Court, this Court, and other courts have held unambiguously that a different proof scheme applies to EPA cases than to Title VII cases. In *Gunther*, the Supreme Court acknowledged the differences between sex-based unequal-pay claims under Title VII and the EPA. 452 U.S. at 170-71. The Court specifically recognized that "[t]he structure of Title VII litigation, including presumptions, burdens of proof, and defenses" was "designed differently" than the EPA's fourth affirmative defense, given the differences between Title VII's "broadly inclusive" prohibition on discrimination and the narrower approach reflected by the fourth affirmative defense to the EPA. *Gunther*, 452 U.S. at 170-71; *see also Burdine*, 450 U.S. at 253 (under Title VII/*McDonnell Douglas* approach, "[t]he nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

In *Spaulding*, which involved pay disparity claims brought under both the EPA and Title VII, this Court applied different analytical approaches, respectively, to claims brought under these statutes. This Court recognized that in the EPA context, once the plaintiff establishes a prima facie case of unequal pay for substantially equal work, the burden of proof shifts to the defendant to "attempt to show that the payment of different wages is based on . . . a factor other than sex." *Spaulding*, 740 F.2d at 696-97 (citations omitted). This Court did not impose a subsequent burden on the plaintiff to prove the employer's reason for the pay disparity was pretextual. *Id.* Instead, it limited its application of the *McDonnell Douglas* approach, and its pretext requirement, to the Title VII claim. *Id.* at 699-700. This Court also stated that it was rejecting part of the plaintiffs' argument because the "cases relied upon by the [plaintiffs] are not cases under the Equal Pay Act, but, rather, are cases arising under Title VII and involve the allocation of burdens in a disparate treatment claim." *Id.* at 697.

Other courts have followed suit. For example, in *King*, an EPA and Title VII case, the Seventh Circuit addressed this question, holding that the *McDonnell Douglas* framework's requirement that the plaintiff

prove that the employer's proffered explanation for its action is a pretext for discrimination has no application to claims brought under the EPA. The court held that the district court "made a legal error" on summary judgment when it only required the employer to "articulate . . . potentially explanatory variables, without proving that they *actually* account for the [pay] difference," and placed the burden on the plaintiff to prove that such explanations were pretextual. *King*, 678 F.3d at 474 (emphasis by court). Instead, the court held, "[t]hat's part of the burden-shifting approach under Title VII, but is not the way the Equal Pay Act is written." *Id.* (citation omitted). As the court explained:

> An employee's only burden under the Equal Pay Act is to show a difference in pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." An employer asserting that the difference is the result of a "factor other than sex" must present this contention as an affirmative defense—and the proponent of an affirmative defense has the burdens of both production and persuasion.

Id. (citing 29 U.S.C. § 206(d)(1)).

In applying the *McDonnell Douglas* framework to Cooper's EPA claim, the district court cited to this Court's decision in *Stanley*.

EOR.15, 22-23. The *Stanley* Court appears to have relied upon this Court's mention of "pretext" in *Maxwell* to suggest it is appropriate to apply the Title VII/*McDonnell Douglas* framework in EPA cases. *See Stanley*, 178 F.2d at 1075-76 (citing *Maxwell*, 803 F.2d at 446, for the proposition that "the employee may prevail by showing that the employer's proffered nondiscriminatory reason is a 'pretext for discrimination,'" and then citing *Burdine*, a Title VII case, for the proposition that the plaintiff "bears the burden of demonstrating a material fact regarding pretext in order to survive summary judgment"); *see also Maxwell*, 803 F.2d at 446 (mentioning that "[a]lthough discriminatory intent is not part of the employee's prima facie burden under the [EPA], an employee may rebut the employer's affirmative defense with evidence that the employer intended to discriminate, and that the affirmative defense claimed is merely a pretext for discrimination," but not shifting the burden to the plaintiff as in *McDonnell Douglas* and requiring the EPA plaintiff to prove pretext) (emphasis added).

This Court's statement in *Maxwell* that an employee "may" rebut the employer's evidence with her own, including evidence that the

employer's explanation is merely a pretext for discrimination, is best understood as relating to a fact-finder's determination as to whether the employer's proffered justification is true—specifically, whether the employer satisfied its burden to prove that the pay disparity is due to its use of a factor other than sex. This is particularly so given *Maxwell* itself defines the term "pretext" not in the sense of proof of discriminatory intent as in the *McDonnell Douglas* paradigm, *see Burdine*, 450 U.S. at 256 (noting that in the pretext stage of the *McDonnell Douglas* analysis under Title VII, the plaintiff's burden of proof "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination"), but instead as "whether the employer has 'used the factor reasonably in light of the employer's stated purpose as well as its other practices,'" *Maxwell*, 803 F.2d at 446 (quoting in part *Kouba*, 691 F.2d at 876-77).

It seems likely that in *Stanley* this Court used the term "pretext" in the same way, since it said "[w]here the defendant demonstrates that a pay differential was based on a factor other than sex" the employee may still prevail by showing that reason is a pretext. *Stanley,* 178 F.2d at 1075. In this sense, this Court's use of the term "pretext" in *Maxwell*

and *Stanley* goes to the veracity of the employer's offered justification, but it does not represent the term-of-art "pretext" stage of the *McDonnell Douglas* framework.

The Commission urges this Court to take this opportunity to clarify the law on the proper burdens of proof borne by the parties to an EPA claim, as the distinction between the burdens of proof in Title VII and EPA pay discrimination claims is a meaningful one. We note that following *Stanley*, numerous unpublished EPA decisions of this Court have stated incorrectly that the plaintiff bears the burden to prove the employer's explanation is pretextual. *See, e.g.*, *Negley v. Judicial Council of Cal.*, 458 F. App'x 682, 684 (9th Cir. 2011) (unpubl.) (in an EPA case, citing *Stanley* for the proposition that the employer's burden is to "produce a reason for the difference in pay that is based on a factor 'other than sex,'" that "[o]nce the employer has done so, the burden shifts back to the plaintiff to show the employer's offered reason for the pay difference is a pretext for discrimination," and holding that the plaintiff's "unequal pay claim fails for the additional reason that she has not met her burden of providing evidence to show that [the defendant's] non-discriminatory reason . . . was pretextual"); *Clemente*

v. Or. Dep't of Corr., 315 F. App'x 657, 658 (9th Cir. 2009) (unpubl.) (in an EPA and Title VII case, citing *Stanley* and *Maxwell* for the proposition that "[i]n order to survive summary judgment on her pay discrimination claim, [the plaintiff] must therefore offer sufficient evidence to create a triable issue of fact as to whether the [defendant's] proffered nondiscriminatory reasons for the disparity between her starting salary and that of her male coworker . . . are pretextual," and making no distinction between the different burdens of proof under each statute); *Baron v. Arizona*, 270 F. App'x 706, 712-13 (9th Cir. 2008) (unpubl.) (citing *Stanley* for the proposition that in an EPA case the plaintiff "bears the burden of "demonstrating a material fact regarding pretext in order to survive summary judgment"); *Cruze v. City of Glendale*, 69 F. App'x 376 (9th Cir. 2003) (unpubl.) (citing *Stanley* as supporting the conclusion that summary judgment for the employer was appropriate because the plaintiff "failed to raise a genuine issue of fact regarding pretext").

Conclusion

For the foregoing reasons, the Commission respectfully requests that this Court reverse the district court's grant of summary judgment

to United on Cooper's EPA claim and remand the case for further proceedings.

Statement of Related Cases

There are no known related case pending in this Court.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the type-volume requirements set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,816 words, from the Statement of the Issues through the Statement of Related Cases, as determined by the Microsoft Word 2007 word processing program, with 14-point proportionally spaced type for text and 14-point proportionally spaced type for footnotes.

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I certify that on August 17, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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