IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

AMERICAN SUPERIOR FEEDS, INC. d/b/a BLUEBONNET FEEDS,

Defendant.

Case No. CIV-02-911-T

ORDER

On March 5, 2003, Defendant filed its motion for summary judgment. On April 11, 2003, Plaintiff filed its response and objection. On May 2, 2003, Defendant was granted leave to file the reply brief which it had previously filed. (Doc. No. 36.) The matter is at issue.

A. Standard of Review.

Summary judgment is appropriate if the pleadings and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F. 2d 202, 204 (10th Cir. 1977). The movant bears the initial burden of demonstrating the absence of a material fact requiring judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

If the movant carries this initial burden, the nonmovant must then set forth "specific facts" outside the pleadings and admissible in evidence that would convince a rational trier of fact to find

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for the nonmovant. Fed.R.Civ.P. 56(e). Such evidence includes reference to affidavits, deposition transcripts, or specific exhibits. Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, 506 U.S. 1013 (1992). "The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the district court." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664 (10th Cir. 1998). Although the district court has the discretion to go beyond the referenced portions of the supporting material, it is not required to do so. Id.

In a case such as this arising under the Equal Pay Act ("EPA"), 29 U.S.C. §206(d),

> To establish a prima facie case under the Equal Pay Act, [Plaintiff] has the burden of proving that "(1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; [and] (3) the male employees were paid more under such circumstances." Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1364 (10th Cir.1997) (quoting Tidwell v. Fort Howard Corp., 989 F.2d 406, 409 (10th Cir.1993)).

Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222, 297 F.3d 1146, 1149 (10th Cir. 2002). The Court should not

> construe the "equal work" requirement of the EPA broadly, [as the] . . . failure to furnish equal pay for "comparable work" or "like jobs" is not actionable. Rather, in order to prevail in such an EPA action, the jobs "must be 'substantially equal' in terms of 'skill,' 'effort,' 'responsibility,' and 'working conditions.'"

Sprague, 129 F.3d at 1364-65 (citing Nulf v. Int'l Paper Co., 656 F.2d 553, 560 (10th Cir. 1981)). "'Like' or 'comparable' work does not satisfy this standard, and '[i]t is not sufficient that some aspects of the two jobs were the same.' Ferroni, 297 F.3d at 1149 (citing Nulf, 656 F.2d at 560).

> If a prima facie case is so established under the EPA the *defendant* must undertake the burden of *persuading* the jury that there existed reasons for the wage disparity which are described in the [EPA]." Tidwell, 989 F.2d at 409 (emphasis in original).

> If the defendant fails in this respect, the plaintiff will prevail on her *prima facie* case. Id. Thus, under the EPA, "the onus is on the employer to establish that the pay differential was premised on a factor other than sex." . . . Id.

Sprague, 129 F.3d at 1364 (citing Tidwell, 989 F.2d at 409) (emphasis in original). The District Court of Kansas has described the Defendant's burden as: "an employer seeking summary judgment on an Equal Pay Act claim must present sufficient evidence such that no rational jury could conclude but that the proffered reasons actually motivated the wage disparity of which the plaintiff complains." E.E.O.C. v. Swift Transportation Co., Inc., 120 F.Supp.2d 982, 986 (D. Kan. 2000) (citing Stanziale v. Jargowsky, 200 F.3d 101, 108 (3rd Cir. 2000)).

In this action, Plaintiff alleges Defendant willfully violated the EPA by paying wages to Linda Denison, a former Transportation Manager for Defendant, at a rate less than the rate paid to male Transportation Managers who performed substantially equal work under similar working conditions. Defendant has apparently conceded, for purposes of this motion, that Plaintiff can establish a *prima facie* case of a violation of the EPA as Defendant did not argue that Plaintiff could not prove that Ms. Denison was performing substantially equal work under basically the same conditions but receiving less money than the male Transportation Managers. Sprague, 129 F.3d at 1364. Rather, Defendant argues that the pay differential was based upon factors other than sex. Tidwell, 989 F.2d at 409.

B. Undisputed, Material Facts.

The only issues presented by Defendant's brief are whether the difference in pay was based on factors other than gender and whether Defendant's alleged violation of the EPA was willful. Therefore, the Court will recite only the facts material to those limited issues. As appropriate in

resolving a motion for summary judgment, the recited facts are either uncontroverted or, when controverted, viewed in the light most favorable to the non-moving party.

Alan Tibbs was promoted to Transportation Manager in 1992 and served in that position until 1996. Prior to the promotion, Mr. Tibbs was paid $15,600 and, upon receiving the promotion, was paid approximately $30,000.00. Mr. Tibbs had no-post secondary school education. While he testified to possessing general maintenance skills (fixing "flats or air leaks"), he denied having specialized mechanical skills. He had a commercial drivers license ("CDL") and oversaw a fleet of thirteen trucks. At the time of his promotion, he had no experience with respect to the paperwork requirements of the job. At one point, Mr. Tibbs was paid $40,000.00. However, at the end of his tenure, he was paid $35,000.00.

Larry Denison[1] was the next Transportation Manager. He served in that position from June 1, 1996 to February 1, 1998. Prior to assuming the duties of Transportation Manager, Mr. Denison was paid $26,000.00 per year. Upon receiving his promotion, he was paid $32,000.00 per year. Like Mr. Tibbs, Mr. Denison had no post-secondary education or other training. At the time of his promotion, Mr. Denison had no experience with respect to the paperwork requirements of the job and was trained by Ms. Denison.

Larry Dillinger was the next Transportation Manager. He served in that position from January 26, 1998[2] to October 21, 1998. Prior to the promotion, Mr. Dillinger was earning approximately $39,000 to $40,000 per year and, after the promotion, was paid $41,000 per year. Mr.

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[1] Larry Denison is the son of Linda Denison, the Complainant in this case.

[2] The parties do not explain the apparent one week overlap between Mr. Denison's and Mr. Dilinger's employment as Transportation Manager.

Dillinger testified he had no post-secondary education; however, he testified he had experience maintaining and repairing trucks and trailers. Mr. Dillinger had a CDL and oversaw a fleet of thirteen trucks.

Linda Denison was promoted to Transportation Manager on October 22, 1998. Prior to the promotion, she was paid $16,700 and, upon receiving the promotion, was paid $28,200.[3] Ms. Denison testified she did not have a CDL at the time she was employed as Transportation Manager, although she had previously had a CDL. Ms. Denison testified she could identify maintenance or repair needs but had no experience performing such tasks.[4] Ms. Denison supervised a fleet of 10 - 15 trucks. Ms. Denison testified she had nearly six years experience in the transportation department at the time of her promotion and had, in fact, trained the three male Transportation Managers in certain aspects of the job.

C. Equal Pay Act.

Defendant offers four justifications for the difference between Ms. Denison's pay and the male Transportation Manager's pay. The first is the salary the employee was paid immediately before becoming Transportation Manager. The second is Defendant's financial condition at the time of Ms. Denison's promotion. The third is relative qualifications of the various Transportation

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[3] Ms. Denison testified she was paid $28,000 per year plus a commission of 10% of the net profits. According to Ms. Denison's undisputed testimony, the commission never exceeded $200 per year.

[4] No other Transportation Manager testified to performing maintenance or repair on Defendant's fleet. Rather, it appears all actual maintenance or repair was performed by or under the supervision of Elmer Jones.

Managers. The fourth asserted justification is the size of the fleet of delivery trucks managed by the Transportation Managers.[5]

1. *Employee's Prior Salary*:

Defendant first argues it did not violate the EPA because each Transportation Manager's salary was based on what the individual was paid before the promotion. In support, Defendant offers the affidavit of Mark Urbansky who stated:

> The policy at Bluebonnet . . . insofar as salary issues when an employee was promoted, was that an employee's salary was increased based upon the employee's immediate past salary and the employee's immediate past position, and said salary was not based upon the employee's predecessor in the position to which the employee was promoted. Salary increases in such situations were at all times gender neutral.

(Defendant's Motion, Exhibit C, ¶ 6.) However, when deposed, Mr. Urbansky testified the criteria he applied to determine the Transportation Managers' salaries were subjective and could be based on a review of personnel records, income, duties and personalities.

Defendant's arguments regarding former salaries do not, however, support its premise. The undisputed facts show that Mr. Tibbs received a 92.31% increase in his salary when he was promoted to Transportation Manager; Mr. Denison received a 23.08% increase in his salary when he was promoted to Transportation Manager; Mr. Dillinger received a 2.5% increase in his salary when he was promoted to Transportation Manager; and Ms. Denison received a 68.865% increase in her salary when she was promoted to Transportation Manager. Thus, the percentage increase

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[5] In its April 29, 2003, reply brief, Defendant does not respond to Plaintiff's arguments. Rather, Defendant simply reasserts that it believes it has offered gender neutral explanations for the differences in pay. However, as noted herein, Defendant is not entitled to summary judgment on the EPA claim by simply offering a gender neutral explanation for the differences in pay. See Sprague, 129 F.3d at 1364.

varied widely among the four employees. Likewise, the raw salary numbers lack any type of consistency: Mr. Tibbs was paid $30,000; Mr. Denison was paid $32,000; Mr. Dillinger was paid $41,000; and Ms. Denison was paid $28,200. Defendant offers no explanation of how each employee's salary increase was based on his or her immediate past salary or position.

Therefore, when the uncontroverted facts are viewed in the light most favorable to Plaintiff, the Court finds Defendant has failed to demonstrate "that the pay differential was premised on a factor other than sex." In other words, Defendant has not demonstrated that "no rational jury could conclude but that the [employees' prior salaries] actually motivated the wage disparity of which the plaintiff complains." Swift Transportation, 120 F.Supp. at 986.

2. *Defendant's Financial Condition*:

Defendant also argues that its financial condition in October of 1998 dictated Ms. Denison receive a lower salary. (Defendant's Brief, Exhibit C, ¶ 6(a).) However, Defendant's corporate representative[6] and accountant testified Defendant was experiencing heavy financial losses "for years" including the time Larry Dillinger's salary was established.[7] In addition, Plaintiff offers evidence that Defendant used the explanation of "tough times" to deny, in 1992, Ms. Denison's request that she be paid equally to a male employee. (Plaintiff's Brief, Exhibit D.)

Thus, without further explanation from Defendant and viewing the uncontroverted facts in the light most favorable to Plaintiff, the Court finds Defendant has failed to demonstrate "that the pay differential was premised on a factor other than sex." In other words, Defendant has not

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[6] Mr. Doyle Barker testified as Defendant's corporate representative pursuant to a deposition notice issued under Rule 30(b)(6).

[7] Mr. Dillinger was promoted to Transportation Manager approximately nine months prior to Ms. Denison's promotion.

demonstrated that "no rational jury could conclude but that the [Defendant's financial condition in October of 1998] actually motivated the wage disparity of which the plaintiff complains." Swift Transportation, 120 F.Supp. at 986.

3. *Employee's Relative Qualifications*:

Defendant argues Mr. Dillinger was paid more than Ms. Denison because he "had more skills, abilities, and qualifications" as a result of his previous employment. However, Defendant does not identify those skills, abilities or qualifications or describe how they are relevant to the Transportation Manager job. Moreover, Defendant does not offer any skills-based explanation justifying the salary difference between Ms. Denison and Mr. Denison and/or Mr. Tibbs.

While each of the male Transportation Managers had a CDL and infrequently substituted as a truck driver, Defendant offers no compelling evidence that this minor difference in the employees' qualifications actually motivated the salary decision. Moreover, Defendant does not address or otherwise acknowledge that Ms. Denison previously had a CDL (which had lapsed) or otherwise suggest that necessary work was not being performed because Ms. Denison did not have a CDL.

In addition, Defendant argues Ms. Denison lacked maintenance and/or repair experience and therefore the fleet maintenance had to be handled by someone else. (Defendant's Brief, p. 4, ¶ 6(e).) However, the undisputed facts show that only Mr. Dillinger had actual and significant maintenance experience. Mr. Tibbs and Mr. Denison testified their maintenance experience was minimal at best and Ms. Denison testified she could identify the maintenance needs. During Mr. Urbansky's deposition, he testified that the actual maintenance was performed by (or under the direct supervision of) Elmer Jones during the tenure of each of the four Transportation Managers.

Thus, viewing the facts in the light most favorable to Plaintiff, the Court finds Defendant has failed to demonstrate "that the pay differential was premised on a factor other than sex." In other words, Defendant has not demonstrated that "no rational jury could conclude but that the [the employee's relative qualifications] actually motivated the wage disparity of which the plaintiff complains." Swift Transportation, 120 F.Supp. at 986.

4. *Size of Fleet Managed*:

Finally, Defendant argues the pay differential was justified by the difference in the size of the fleet of trucks each Transportation Manager oversaw. Specifically, Defendant argues trucks were sold "immediately prior to" Ms. Denison's promotion. (Defendant's Brief, p. 4, ¶ 6(e).)

However, the testimony of the Transportation Managers show the fleet was relatively the same size during three of the four employee's[8] tenures: Mr. Tibbs testified he was responsible for thirteen trucks; Mr. Dillinger testified he was responsible for thirteen trucks; and Ms. Denison testified she was responsible for ten to fifteen trucks.[9]

Thus, viewing the facts in the light most favorable to Plaintiff, the Court finds Defendant has failed to demonstrate "that the pay differential was premised on a factor other than sex." In other words, Defendant has not demonstrated that "no rational jury could conclude but that the [alleged change in the size of the fleet] actually motivated the wage disparity of which the plaintiff complains." Swift Transportation, 120 F.Supp. at 986.

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[8] The Court could not locate where Mr. Denison testified regarding the number of trucks for which he was responsible.

[9] The Court also notes that Mr. Urbansky wrote, in what appears to be a letter of recommendation, that Ms. Denison was responsible for a fleet of fifteen to twenty trucks. (Plaintiff's Brief, Exhibit M.)

D. Statute of Limitations.

Defendant requests the Court enter summary judgment in its favor based upon the statute of limitations. The governing statute provides the action:

> may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. §255(a).

It is undisputed that Ms. Denison was terminated on June 1, 2000. Plaintiff commenced this action, relating to Ms. Denison's employment, on June 28, 2002, with the filing of the Complaint. Thus, it is undisputed that the action was not filed within two years after the cause of action accrued and the issue is whether the case arises "out of a willful violation" of the EPA. Defendant argues in its motion for summary judgment that Plaintiff cannot demonstrate a willful violation of the EPA.

According to the Supreme Court, a violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). Although the issue of willfulness is "a mixed question of law and fact," the factual issues predominate. Pabst v. Oklahoma Gas & Elec. Co., 228 F.3d 1128, 1137 (10th Cir. 2000). Plaintiff bears the burden of demonstrating a willful violation. McLaughlin, 486 U.S. at 135.

In this case, Defendant offers the affidavits of Mark Urbansky and Terry Urbansky in support of its argument that any violation of the EPA was not willful.[10] Mr. Urbansky averred he "was

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[10] Defendant also relies heavily on a part of the deposition of Ms. Denison. That colloquy provides:

> Q: The EEOC claims Bluebonnet wilfully violated the Equal Pay Act.

familiar with the Equal Pay Act and did not believe that it had been violated because the pay differential was based upon valid business reasons, which were gender neutral." (Defendant's Brief, Exhibit C, ¶ 25.) Mrs. Urbansky, who was Defendant's personnel director, averred she was "familiar with and worked with state and federal guidelines, rules, regulations and statutes relating to discrimination in the workplace." (Defendant's Brief, Exhibit D, ¶ 10). Mrs. Urbansky also averred that she did not believe the EPA was violated because "the pay differential was based upon business factors . . . and was gender neutral." (Id.)

In response, Plaintiff offers evidence that Ms. Denison complained, on two different occasions, regarding the differences in pay between men and women who performed substantially similar work. (Plaintiff's Brief, Exhibits C & D; Exhibit I, p. 79; Exhibit N, pp. 29-30.) Plaintiff also offers evidence that one of the managers who received Ms. Denison's complaints never reported the complaint to anyone else. (Plaintiff's Brief, Exhibit N, p. 30.) Plaintiff also offers testimony of

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> do you know how they wilfully violated it?
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> MS. ROBERTSON: Objection. Calls for a legal conclusion. Answer it if you know.
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> A. I don't know how to answer it, so I'm not going to answer it.
>
> Q: (By Mr. Mordy) Do you have any evidence that Bluebonnet wilfully violated the Equal Pay Act?
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> A: I think they violated the Pay act. I don't know what the word "wilfully" legally means; so therefore, I don't what wilfully means, but they did violate the Pay Act.
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> Q: Do you know how Bluebonnet knew or showed reckless disregard as to their conduct? Do you have any evidence that they acted in a reckless manner in violating the Equal Pay Act?
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> MS. ROBERTSON: Objection. Calls for a legal conclusion. Answer if you know.
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> Q: I don't know what you're talking about, so I'm not going to answer it.

(Defendant's Reply, Exhibit A, pp. 151-52.) However, Defendants do not explain how Ms. Denison's testimony entitles it to summary judgment.

Defendant's corporate representative demonstrating Defendant did not train its employees in anti-discrimination laws, including the EPA. (Plaintiff's Brief, Exhibit P, pp. 72-73.)

Accordingly, based upon the record and construing the facts in the light most favorable to the non-moving party, the Court finds Defendant has not demonstrated that it is entitled to summary judgment on the issue of whether its alleged violation of the EPA was willful.

CONCLUSION

For the foregoing reasons, "Defendant's Motion for Summary Judgment" (Doc. No. 27) is DENIED.

IT IS SO ORDERED this 14 day of May, 2003.

RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE