

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 WENDY GRAHAM, MARIA HOHN, MIA MASK,
4 CINDY SCHWARZ, and DEBRA ZEIFMAN, on
5 behalf of themselves and all others
6 similarly situated,

Plaintiffs,

23 CV 7692 (CS)

7 -vs-

BENCH RULING

8 VASSAR COLLEGE,

Defendants.

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11 United States Courthouse
12 White Plains, New York
September 12, 2024

13 Before: THE HONORABLE CATHY SEIBEL,
14 United States District Judge

A P P E A R A N C E S:

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1 THE DEPUTY CLERK: All rise. The Honorable Cathy
2 Seibel presiding. Graham v. Vassar College.

3 THE COURT: Good morning, Ms. Dermody. Am I saying it
4 right?

5 MS. DERMODY: Yes, Your Honor. Thank you.

6 THE COURT: And Ms. Lamy, am I saying it right?

7 MS. LAMY: Lamy, Your Honor.

8 THE COURT: Lamy. And Ms. Bendor.

9 MS. BENDOR: Good morning.

10 THE COURT: And let me see. Ms. Olson.

11 MS. OLSON: Good morning, Your Honor.

12 THE COURT: Mr. Lapp.

13 MR. LAPP: Yes, Your Honor. Good morning.

14 THE COURT: And Ms. Papasevastos? Did I get it right?

15 MS. PAPASEVASTOS: Yes.

16 THE COURT: Everybody can have a seat.

17 I am prepared to rule on the pending motion. Does
18 anybody have anything to add that wasn't covered by the papers?

19 MS. OLSON: Your Honor, this is Camille Olson on
20 behalf of Vassar College. I would like to add a couple of
21 points if I may. Very short.

22 THE COURT: Okay.

23 MS. OLSON: I believe it's important to note that when
24 you look at the second amendment -- amended complaint in this
25 action, that there is no paragraph that includes --

1 THE COURT: There is no?

2 MS. OLSON: There is no paragraph that is pled that
3 includes any examples of comparable job duties, comparable skill
4 sets, substantially similar comparable effort, responsibility,
5 or working conditions between any of the names that are included
6 as alleged comparators in any of the five named plaintiffs.

7 Instead, all we really have in the second amended
8 complaint is paragraph 40. It's paragraph 40 that -- in which
9 plaintiffs claim that generally because all associate and full
10 professors engage in teaching, scholarship, and community
11 service to the Vassar community, that they all perform the same
12 job. That is not sufficient, those broad conclusions, to
13 sustain plaintiffs' burden under *Twombly* and *Iqbal*. It's actual
14 job content, actual skill set as opposed to broad
15 generalizations that have to move the claims under *Iqbal* and
16 *Twombly*.

17 THE COURT: I am very familiar with *Iqbal* and *Twombly*,
18 so you can skip that part.

19 MS. OLSON: So plausible, not possible.

20 Here, I want to just address for one moment New York
21 State's Equal Pay Act. That law does not relieve plaintiffs
22 from pleading specific facts under which they rely in their
23 *prima facie* case that certain male professors, who they allege
24 perform substantially similar work actually do so. They must
25 plead the specifics of those facts is as clear under many of the

1 equal pay cases that we have seen. They must plead their
2 specific responsibilities, the conditions of their work, and
3 also the skill sets that they have. The New York State Equal
4 Pay Act requires that once plaintiffs have alleged those facts,
5 that the standard is different under the state Equal Pay Act
6 than the federal Equal Pay Act in terms of how they will be
7 judged as to whether those specific facts show a substantially
8 similar position to one of the five plaintiffs.

9 For all the reasons set forth in the motion papers
10 that we've filed, the college requests that the Court grant its
11 motion to dismiss the third cause of action.

12 THE COURT: Do you want to respond or do you want me
13 to just say why I disagree with the defendant?

14 MS. DERMODY: Thank you, Your Honor. I was just going
15 to say if the Court had questions raised by Ms. Olson's
16 statement, we would be happy to address them, but otherwise, we
17 thought we had addressed those points in the briefs.

18 THE COURT: Yes. I am going to deny the motion, and
19 let me tell you why.

20 First of all, the motion is Vassar College's motion to
21 dismiss the New York Equal Pay Law, or EPL, claim alleged in the
22 second amended complaint, which is ECF No. 40.

23 For purposes of the motion, I accept as true the
24 facts, although not the conclusions, set forth in the second
25 amended complaint or the SAC.

1 The facts relevant here, in broad strokes, are that
2 plaintiffs are female current or former full professors at
3 Vassar, which is a private liberal arts college in Poughkeepsie.

4 As explained in paragraph 37 of the SAC, Vassar has
5 three levels of professors: Assistant professors, associate
6 professors and full professors. The tenured professors are the
7 associate and full professors. According to the faculty
8 handbook, tenured professors are expected to engage in
9 "teaching, scholarship and service in the Vassar community."
10 That's in paragraph 40. They also have the same job
11 requirements. "A standard load of five courses per year, with
12 the sixth course off in compensation for the normal expectation
13 of supervision of theses, independent work, community-engaged
14 learning, participation in programs, and participation in
15 departmental and college committees."

16 Annual salary increases have two components: A
17 percentage-based raise and a merit raise. The merit raise is
18 based on a candidate's merit rating on a four-point scale:
19 Distinction gets you three points, high merit gets you two,
20 merit gets you one, and no merit gets you none. Paragraph 44.

21 Vassar promotes faculty hired at the level of
22 assistant professors as follows: First, there is an extension
23 of contract review in the second year; a review for
24 reappointment to a second term as assistant professor in the
25 fourth year; a tenure review for promotion to associate

1 professor in the seventh year; and eligibility for promotion to
2 full professor after six years as an associate professor.
3 Paragraph 37.

4 At each of these reviews, professors are evaluated on
5 materials, including a personal statement, C.V., annual activity
6 reports, and student course evaluations. The faculty
7 appointment and salary committee also reviews a quote-unquote
8 salary part, which contains information about titles, years of
9 service, years in current rank and previous merit ratings.
10 Reviews for tenure and promotion to full professor also consider
11 a teaching portfolio, scholarly activity, a research statement,
12 and recommendations. Paragraph 43.

13 According to data that Vassar shared with *The*
14 *Chronicle of Higher Education*, average salaries for male full
15 professors at Vassar exceed average salaries for female full
16 professors from 2003 to 2022, and that gap has grown over time.
17 Paragraph 24. Average merit rating data from Vassar's Office of
18 Institutional Research likewise reflects a gender disparity.
19 Paragraph 46. Over the years, female professors have voiced
20 their dissatisfaction with the salary gap, but their attempts to
21 work with Vassar to address their concerns have, according to
22 plaintiffs, been largely unsuccessful. Paragraphs 28, 29 and
23 32.

24 Paragraph 29 describes how in 2013 a group of female
25 professors approached Vassar's administration about the data in

1 *The Chronicle of Higher Education*, and that the administration
2 "acknowledged the existence of a disparity in the publicly
3 reported data," but "refused to cooperate with their attempt to
4 close the gap." That's paragraph 29.

5 In 2020, a group of female professors again approached
6 the administration about the pay gap, and at that time Vassar
7 agreed to conduct a pay equity study and later announced equity
8 reviews based on the resulting analysis. According to
9 plaintiffs, some female full professors received a one-time
10 salary raise, which did not nearly suffice to address the pay
11 discrepancy, and most others did not get any adjustment.
12 Paragraphs 30 through 32.

13 Plaintiffs also alleged that Vassar has falsely told
14 women that it will not negotiate salary, and yet has relied on
15 males' allegedly superior performance or better negotiating to
16 justify the salary differential. Paragraph 33.

17 By way of procedural history, the complaint in this
18 case was filed on August 30th of last year. Plaintiffs sued
19 individually and on behalf of others similarly situated alleging
20 that defendant underpays, underpromotes, and unfairly evaluates
21 its female full professors as compared to their male
22 counterparts in violation of Title VII, New York Human Rights
23 Law, and New York Equal Pay Law.

24 On November 27th of last year, we had a pre-motion
25 conference to discuss the defendant's anticipated motion to

1 dismiss, and I granted plaintiffs' leave to amend. The first
2 amended complaint was filed on December 19th of last year. On
3 January 2nd, defendant filed a letter setting forth additional
4 grounds for their anticipated motion, and I directed plaintiffs
5 to confer with the defendants about a schedule for a second
6 amended complaint pursuant to which plaintiffs filed the SAC on
7 January 30th.

8 I'm not going to take the time to discuss the legal
9 standards set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, and *Bell*
10 *Atlantic vs. Twombly*, 550 U.S. 544. We are all familiar with
11 it. It requires that the claims be plausible.

12 The New York EPL, which is found at New York Labor Law
13 Section 194, provides as follows: "No employee with status
14 within one or more protected class or classes shall be paid a
15 wage at a rate less than the rate at which an employee without
16 status within the same protected class or classes in the same
17 establishment is paid for: A, equal work on a job the
18 performance of which requires equal skill, effort and
19 responsibility, and which is performed under similar working
20 conditions; or B, substantially similar work when viewed as a
21 composite of skill, effort and responsibility and performed
22 under similar working conditions." That's New York Labor Law
23 Section 194, Subsection 1.

24 The parties dispute whether the federal Equal Pay Act,
25 or EPA, precedent is applicable to the instant motion. The

1 Second Circuit has previously held that an equal pay claim under
2 Labor Law Section 194 is analyzed under the same standard
3 applicable to the federal EPA. See *Talwar vs. Staten Island*
4 *University Hospital*, 610 F.App'x 28 at 30, note 2, the summary
5 order from 2015. See also *Tulino vs. City of New York*, 2018 WL
6 1568970 at page 3, S.D.N.Y. March 27, 2018. Under that
7 standard, the plaintiff must show that: "One, the employer pays
8 different wages to employees of the opposite sex; two, the
9 employees perform equal work on jobs requiring equal skill,
10 effort and responsibility; and three, the jobs are performed
11 under similar working conditions." That's *Talwar* at 30. To
12 avoid dismissal, the complaint "must include sufficient factual
13 matter, accepted as true to permit the reasonable inference that
14 the relevant employees' job *content* was substantially equal."
15 Conclusory allegations that jobs are substantially equivalent
16 will not suffice. *Faughnan vs. Nassau Health Care*, 2021 WL
17 1566138 at page 7, Eastern District March 18, 2021, quoting *EEOC*
18 *vs. Port Authority*, 768 F.3d 247 at 256. And the emphasis on
19 the word "content" is in the original.

20 This requires the plaintiff to "establish that the
21 jobs compared entail common duties or content and do not simply
22 overlap in titles or classifications." That's *EEOC* at 255.

23 By the way, any case quotations today omit internal
24 quotation marks, citations, alterations, and footnotes unless
25 otherwise noted.

1 Plaintiffs argue that this standard, which requires
2 specific allegations of job content, no longer applies to New
3 York EPL claims in light of a 2019 amendment that broadened the
4 statute beyond the "equal pay for equal work" standard -- which
5 mirrored the federal EPA standard -- and included "substantially
6 similar work." In plaintiffs' view, this amendment eased the
7 pleadings standard for plaintiffs asserting violations of the
8 New York EPL as compared to the federal EPA. Defendant, in
9 contrast, asserts that the amendment "did nothing to alleviate
10 the minimal pleading standards that plaintiffs must meet here."
11 That's in ECF No. 41 at page 10.

12 I agree with plaintiffs. When the New York
13 legislature amended the EPL in 2019, it "expanded existing pay
14 equity provisions to include equal pay for substantially similar
15 work." That's from the Introducer's Memorandum in Support from
16 the Bill Jacket, 2019 S.B. 5248, Chapter 93 at page 5. That
17 phrase "substantially similar" work does not appear in the
18 federal standard. As the legislature made clear, at pages 5 to
19 6, the "purpose of this amendment is to protect more employees
20 against pay discrimination" by reducing the "excessive burden of
21 proof" imposed by the "equal pay for equal work" standard. To
22 apply the heightened "equal work" standard to the instant motion
23 would thus disregard the clear intent of the New York
24 legislature and treat the statute as if it had not been amended.

25 To be sure, there are courts that continue to apply

1 the federal EPA standard to New York EPL claims even after the
2 2019 amendment. See, for example, *Santiago vs. Acacia Network*,
3 634 F.Supp.3d 143 at 155, S.D.N.Y. 2022; *Robinson vs. De Niro*,
4 2023 WL 4862772, at pages 22 to 23, S.D.N.Y. May 25, 2023; and
5 *Shamciyan vs. Acacia*, 2023 WL 6214546 at page 7, S.D.N.Y.
6 September 24, 2023. But as plaintiffs correctly note in pages 8
7 to 9 of their opposition, these cases rely on pre-amendment case
8 law equating the federal and state standards. Notably, these
9 cases do not acknowledge the 2019 amendment. It appears that
10 these courts overlooked the amendment, rather than determining
11 after consideration of the amendment that the same standard
12 should continue to apply.

13 That the state and federal standards now differ is
14 illustrated by *Eisenhauer vs. Culinary Institute of America*, 84
15 F.4th 507, a Second Circuit case from 2023. In that case, the
16 Second Circuit addressed the "factor other than sex" defense
17 under the New York EPL, which was amended in 2016 to include a
18 job-relatedness requirement absent from the federal EPA's
19 analogous defense. The *Eisenhauer* court remanded for the
20 district court to "consider the divergent requirements imposed
21 by the EPA and the New York Labor Law Section 194(1)" and it
22 cautioned against evaluating EPA and EFL claims under the same
23 time standard. That's *Eisenhauer* at 525 to 26. This motion
24 does not involve the same provision, as defendant points out,
25 but *Eisenhauer* does explain how the EPL was amended in 2019 as

1 relevant to the instant motion. At footnote 90, it said as
2 follows: "The provision now covers both equal work on a job,
3 the performance of which requires equal skill, effort, and
4 responsibility, and which is performed under similar working
5 conditions, and substantially similar work when viewed as a
6 composite of skill, effort and responsibility and performed
7 under similar working conditions." And in that quote the "and"
8 is emphasized in the original.

9 Also at Note 83, the *Eisenhauer* court notes that how
10 many comparators are necessary to establish a *prima facie* case
11 under 194(1) is a separate question. As in *Eisenhauer*, I may
12 not overlook that the state statute is now broader than its
13 federal counterpart.

14 Accordingly, the federal EPA standard does not govern
15 whether plaintiffs have sufficiently pleaded substantially
16 similar work under the EPL, which I now consider. And I find
17 that plaintiffs adequately plausibly allege that defendant paid
18 them less than their male counterparts for substantially similar
19 work.

20 In the SAC, plaintiffs assert that all tenured faculty
21 members engage in teaching, scholarship, and service in the
22 Vassar community, and have the same job requirements regardless
23 of whether they perform this work at the full or associate
24 professor level. Paragraph 40. This includes that standard
25 load of five courses per year, and the normal expectation of

1 thesis supervision, independent work supervision, community-
2 engaged learning, participation in programs, and participation
3 in departmental and college committees. Paragraph 4.
4 Plaintiffs then provide lists of male professors each of whom
5 are compensated more than plaintiffs despite shared job titles
6 and responsibilities. Paragraphs 50, 56, 61, 66 and 71. These
7 lists supplement allegations in the SAC of male professors whom
8 Vassar promoted considerably faster than plaintiffs. See, for
9 example, paragraphs 52 and 56.

10 To the extent that plaintiffs rely on general job
11 descriptions and high-level identification of comparators, I
12 agree with defendant that these allegations are likely
13 insufficient to state a claim under the federal "equal work"
14 standard, which mirrors Subpart (a) of the EPL. See *Dass vs.*
15 *CUNY*, 2020 WL 1922689 at page 7, S.D.N.Y. April 21, 2020, which
16 dismissed an EPA claim where a CUNY athletic director alleged
17 only "CUNY's Athletic Director's responsibilities included, but
18 were not limited to, oversight of and support for the athletic,
19 academic, social and disciplinary concerns of student-athletes,
20 devising and executing budgets; and directing athletic
21 programming and services." Also *Suzuki vs. SUNY College at Old*
22 *Westbury*, 2013 WL 2898135 at page 4, E.D.N.Y. June 13, 2013,
23 which dismissed an EPA claim where the plaintiff alleged only
24 that SUNY paid her and other female professors less than they
25 paid male employees, even though they performed equal or

1 superior work and had equal or better qualifications and
2 experience. And *Khwaja vs. Jobs to Move*, 2021 WL 4927140 at
3 page 4, S.D.N.Y. March 26, 2021, which dismissed under the
4 federal standard -- dismissed an EPL claim, but using the
5 federal standard, where the allegation was just that plaintiff
6 and his counterpart had the same title and responsibilities and
7 duties.

8 So I agree that the general allegations in the SAC
9 likely would not pass muster under the federal EPA claim, but as
10 I explained, plaintiffs need only plausibly plead the lesser
11 substantially similar work standard under Part (b) to state a
12 claim under the New York EPL, and plaintiffs allege enough facts
13 in their SAC to meet this burden. They alleged that all tenured
14 professors have the same job requirements, including the same
15 standard load. They identify male comparators who, despite
16 being of comparable seniority and having similar
17 responsibilities, were promoted before and are paid more than
18 plaintiffs.

19 Although plaintiffs have identified their comparators
20 at a fairly high level, "it is not apparent that such a
21 deficiency warrants dismissal." *Brinker vs. Axos Bank*, 2023 WL
22 4535529 at page 11, a case from the Southern District of
23 California from July 13, 2023, which found under California's
24 Equal Pay Act, which is identical to the New York EPL, that
25 pleading comparator job locations, qualifications and length of

1 tenure is not essential to stating a plausible claim.

2 For now, it is enough that plaintiffs identified
3 higher-paid comparators, all of whom are tenured professors of
4 comparable or less seniority with similar course loads and
5 responsibilities. See *Brinker* at 11, which in denying the EPA
6 claim noted that the plaintiff essentially just alleged that her
7 male comparator had similar responsibilities in the bank and
8 performed similar functions.

9 Accordingly, at this early stage, plaintiffs have
10 plausibly alleged that defendant compensated them less than
11 their male counterparts for substantially similar work.
12 Plaintiffs will need more to survive summary judgment, but in
13 the meantime, this ruling should not appreciably affect the
14 scope of discovery, which presumably would involve comparators
15 for the Title VII and HRL claims anyway.

16 So the motion to dismiss is denied. The clerk should
17 terminate motion number 40, and now we have to work on dates for
18 the answer and a discovery schedule.

19 When can the defendant answer the SAC?

20 MS. OLSON: Within 14 days, Your Honor.

21 THE COURT: Okay. That's September 26th. And I would
22 like to enter a scheduling order. Actually, now that I am
23 thinking about it, I think it's probably a better idea to have
24 you conduct discovery under the supervision of a magistrate
25 judge because I imagine there are going to be issues. I don't

1 generally refer discovery to magistrates, and if there are
2 one-off discovery disputes, I keep them; but when I have a case
3 that I can just tell is going to be one of those cases, I refer
4 to the magistrate judge to supervise discovery because I know
5 it's going to be complicated or won't be just a one-off.

6 So you've got Judge Reznik. I am going to refer you
7 to her for discovery, and I will let her enter a scheduling
8 order.

9 And I hope -- I'm sure she will also ask about the
10 prospects for resolving the case, which I hope there are, but if
11 not, I will let her do the heavy lifting of supervising the
12 discovery.

13 Is there anything more we should do this morning?

14 MS. OLSON: Nothing here, Your Honor.

15 MS. DERMODY: Your Honor, for the plaintiffs, we had
16 been talking with Vassar about an overall case schedule. Would
17 you like us to continue to have that dialogue and submit a
18 schedule to you or what is the Court's preference on that?

19 THE COURT: You are with Judge Reznik now. So I am
20 sure she would be delighted to have you folks try and agree on
21 something or make dueling proposals to her, but she will be the
22 one making that call. So you should see a referral from me to
23 her for general pretrial supervision probably up on the docket
24 today, certainly by tomorrow, and I'm sure you will hear from
25 her chambers in very short order, and she will have you in.

1 MS. OLSON: Thank you, Your Honor.

2 MS. DERMODY: Thank you, Your Honor.

3 THE COURT: Good luck.

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12 I, Darby Ginsberg, certify that the foregoing is a
13 correct transcript from the record of proceedings in the
14 above-entitled matter.

15 /s/ Darby Ginsberg

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