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The Regents of the University of Colorado
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Claim #: 23-0001

CITATION AND NOTICE OF FINE FOR VIOLATIONS OF COLORADO EQUAL PAY FOR EQUAL WORK ACT

I. Introduction

On March 8, 2023, the Colorado Division of Labor Standards and Statistics ("Division") issued a Notice of Complaint ("NOC") to the University of Colorado Boulder ("the Employer") concerning individual claim 2879-22 (the "Complaint"). The Complaint alleged that the Employer violated Part 2 of the Equal Pay for Equal Work Act, C.R.S. § 8-5-101, et. seq. ("the Act") and the Act's implementing Equal Pay Transparency Rules, 7 CCR 1103-13 ("EPT Rules"), by failing to provide notice of one or more promotional opportunities, as required by the Act and the EPT Rules. Specifically, the Complaint alleged that the required notice was not provided for: 1) the position of Interim Chair of the Department of Women and Gender Studies ("DWGS") filled in June 2021 and 2) the position of permanent Chair of the DWGS filled in October 2021 (Appx. A at DLSS 6-8.) This claim was withdrawn by the claimant and closed on April 14, 2023 (Appx. B).

On April 10, 2023, the Division issued a Notice of Investigation ("NOI") informing the Employer that the Division would continue investigating the allegations in the Complaint in a Division-initiated investigation (Appx. C at DLSS 49-53.) The Employer responded to the NOI on April 17, 2023 ("First NOI Response") (*Id.* at DLSS 54-60.) The Employer initially admitted noncompliance with the Act and EPT rules, and committed "to voluntarily remedying failures to post positions for department chairs in accordance with the Act and the EPT rules" and that it would "examine its practices and procedures for selecting department chairs to ensure current and ongoing compliance with the Act and EPT Rules." (*Id.* at DLSS 59.) A week later, in its April 25, 2023 revised NOI response ("Revised NOI Response"),[1] the Employer retracted this promise and instead claimed that while "the University did not post the chair positions," "these positions, as with any chair positions, are not promotions or promotional opportunities and do not fall under the posting requirements of the Act or the EPT Rules." (*Id.* at DLSS 65-71.)

Upon review and consideration of all available evidence and the Employer's legal argument, the Division determines that the Employer violated the Act and EPT Rules, and issues this Citation and Notice of Fine is pursuant to the Act, C.R.S. § 8-5-101, et seq. and the Equal Pay Transparency ("EPT") Rules, 7 CCR 1103-13.

[1] This response is addressed to the Colorado Civil Rights Division ("CCRD"), apparently in error.

<u>II. Applicable Law</u>

On and after January 1, 2021, the Act, Part 2 (C.R.S. §§ 8-5-201 and 202) requires all Colorado employers to:

1) "[M]ake reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision";
2) Provide compensation and benefits information "in each posting for each job"; and
3) "[K]eep records of job descriptions and wage rate history for each employee for the duration of the employment plus two years after the end of employment[.]"

These statutory provisions of the Act are applied and enforced by the Equal Pay Transparency Rules, including Rule 4.2:

> 4.2 Opportunities for promotion: An employer is required to make "reasonable efforts" to "announce, post or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision." C.R.S. § 8-5-201(1).
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> 4.2.1 When required. A "promotional opportunity" exists when an employer has or anticipates a vacancy in an existing or new position that could be considered a promotion for one or more employee(s) in terms of compensation, benefits, status, duties, or access to further advancement.
>
> 4.2.2 Contents. A communication announcing, posting, or otherwise making a promotional opportunity known must be in writing and include at least (A) job title, (B) compensation and benefits per Rule 4.1, and (C) means by which employees may apply for the position.
>
> 4.2.3 Methods. An employer makes "reasonable efforts" with any method(s) by which all covered employees (A) can access within their regular workplace, either online or in hard copy, and (B) are told where to find required postings or announcements. If a particular method reaches some but not all employees, such as an online posting not accessible to those lacking internet access, an alternative method shall be used for such employees.
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> 4.2.4 Qualifications. Employers must notify all employees of all promotional opportunities, and may not limit notice to those employees it deems qualified for the position, but may state that applications are open to only those with certain qualifications, and may screen or reject candidates based on such qualifications.

The Division provides additional guidance and interpretation in INFO #9[2] which explains that "a vacancy in a new position," for which notice is required, exists when an employer gives an existing employee a new position, by either changing their title and pay, or by materially changing their authority, duties, or opportunities.

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[2] Appx. D. The Interpretive Notice & Formal Opinion ("INFO") #9: Equal Pay for Equal Work Act, Part 2: Transparency in Pay and Opportunities for Promotion and Advancement has a new version, effective January 1, 2024, now found in INFO #9 and #9A located at cdle.colorado.gov/infos.

The Act identifies certain situations where the promotional opportunity notice requirement does not apply in EPT Rule 4.2.5, including in relevant part:

> 4.2.5 Exceptions.
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> * * *
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> (C) Temporary, acting, or interim hires. No immediate promotion posting is required to fill a position on a temporary basis for up to six months where the hiring is not expected to be permanent, e.g., an acting or interim position. If the hire may become permanent, the required promotion posting must be made in time for employees to apply for the permanent position.

The Act and EPT Rules do not recognize other exceptions relevant to this investigation.

The Act provides that upon finding that an employer has violated the promotional opportunity notice requirements of Part 2, the Division may "order the employer to pay a fine of no less than five hundred dollars and no more than ten thousand dollars **per violation**."[3] "An employer's failure to comply with section 8-5-201(1) for **one promotional opportunity** is considered **one violation**."[4] Where an employer's conduct also violates the EPT Rules,[5] it triggers additional statutory fines of **at least** $100.00 per day pursuant to C.R.S. § 8-1-140(2), which imposes such fines when an employer "fails, neglects, or refuses perform **any duty** lawfully enjoined within the time prescribed by the director" or "to obey any **lawful order** made by the director," which includes "any decision, **rule, regulation, requirement,** or standard promulgated by the director."[6]

Past citations and orders under the Act and the EPT Rules are available at the Division's keyword-searchable decisions site (cdle.colorado.gov/decisions-appeals-resources-faqs), which includes past decisions.[7]

III. Analysis

The Division finds, based on all evidence in the record — the Complaint, the First NOI Response, and the Second NOI Response — that the Employer violated Part 2 of the Act and the EPT Rules by failing to provide the required notice for the DWGS Chair promotional opportunities.

In its First NOI Response, the Employer admitted the substantive allegations in the Complaint (Appx. C at DLSS 59.) Specifically, the Employer "admit[ted] to the allegations as set forth in Section I . . ." (*Id.* at DLSS 59.) Section I of Employer's First NOI Response (*id.* at DLSS 58) mirrored the NOI (*id.* at DLSS 50) and read:

> [T]hat the employer failed to provide notice of one or more promotional opportunities, as required by the Act and the EPT Rules. Specifically, … that the required notice was not provided

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[3] C.R.S. § 8-5-203(4) (emphasis added).

[4] C.R.S. § 8-5-203(2)(b) (emphasis added).

[5] When the same action violates two provisions (*e.g.*, the Act and the EPT Protection Rules), it amounts to two violations supporting separate fines. Similarly, when the same conduct interferes with multiple rights or violates multiple statutes, the conduct incurs multiple fines. However, in this case, the Division exercises its discretion to impose only one concurrent fine for actions violating multiple provisions; any such fine is warranted as long as supported by any one of the findings of a violation.

[6] C.R.S. § 8-1-101 (defining "order" to include both "special orders" (specific to a case, workplace, etc.) and "general orders" (a statewide requirement by rule): "(9) 'General order' means an order of the director applying generally throughout the state to all persons, employments, or places of employment.... All other orders of the director shall be considered special orders..… (11) 'Order' means any decision, rule, regulation, requirement, or standard promulgated by the director.").

[7] Anonymous v. Monigle, Equal Pay for Equal Work Act Case #0902-21 (Citation dated Dec. 2, 2021).

for: 1) the position of Interim Chair of the Department of Women and Gender Studies, which was filled in June 2021 and 2) the position of permanent Chair of the Department of Women and Gender Studies which was filled in October 2021.

The Employer further stated that it "commits to voluntarily remedying failures to post positions for department chairs in accordance with the Act and the EPT rules" and would "examine its practices and procedures for selecting department chairs to ensure current and ongoing compliance with the Act and EPT Rules." (Appx. C at DLSS 59.) After reviewing the First NOI Response, the Division emailed the Employer on April 18, 2023, requesting additional information to satisfy the NOI requirement to "explain in detail the specific actions you will take to ensure current and ongoing compliance with the Act and EPT Rules." (*Id.* at DLSS 61-64.)

A week later, in its Revised NOI Response (*id.* at DLSS 65-71), the Employer retracted its commitment to compliance, but did not retract its admission that "the University did not post the chair positions." (*Id.* at 69.) Instead, it argued that "these positions, as with any chair positions, are not promotions or promotional opportunities and do not fall under the posting requirements of the Act or the EPT Rules." (*Id.*) The Employer argues that "chair openings are not subject to the posting requirements under the Act and the EPT rules, because these are temporary, additional duties being added to a faculty member's job duties for a finite period of time" and as such are not "promotional opportunities" subject to EPT Rule 4.2 (*Id.*) The Employer further states that these positions include "temporary additional remuneration or stipends for an existing faculty member during a limited period of additional work . . ." (*Id.* at 70.) The Employer further notes that its own CU Boulder Job Posting Requirements page does not require posting of chair positions, which it describes as "[a] secondary appointment for a current full-time faculty employee." (*Id.*)

The Revised NOI Response attaches as Exhibit 1 the in-effect DWGS "BYLAWS and OPERATING POLICY" ("DWGS Bylaws") (Appx. C at DLSS 72-82). The DWGS Bylaws further describe the duties of a chair position (*Id.* at 72.) They also state that "**The chair's term shall typically be three years,** renewable once for a full or partial term." (*Id.* (emphasis added).)

The Employer admits that no notice was provided to current employees for the interim and permanent chair positions for the Department of Women and Gender Studies, and it is undisputed that:

- On May 25, 2021, the chair of the DWGS announced an intent to resign the position effective June 30, 2021.
- On June 21, 2021, the Employer announced the identity of the faculty member who would be serving as DWGS Interim Chair.
- On October 5, 2021, a different faculty member was chosen by the Employer for the permanent DWGS Chair position.
- No notice was provided for either the interim or permanent position.

The Employer's argument hinges on its interpretation that these positions are not promotional opportunities because they are time-limited. This contention is without merit.

The Employer's own Revised NOI Response and the DWGS Bylaws confirm that the DWGS chair positions at issue (1) represent a material change in duties; (2) result in a change in title; and (3) include an increase in pay, through "stipends" or otherwise. The chair positions are thus "promotional opportunities" for any employees for whom they would represent a promotion — based on the change in duties alone, but especially in light of the increased compensation and change in title.

Characterizing chair positions as temporary because they last for a "finite period of time" does not exempt them from the Act's coverage. **All** jobs are "finite" in time, because even the most stalwart employee is themselves "finite." The narrow exclusion in EPT Rule 4.2.5(C) applies not to positions that will end **someday**, or even on a specific day, but to those that will end **in six months** — with notice required if and when those positions are expected to last longer than six months. The Employer makes no claim that its permanent chair positions are for under six months, and the DWGS Bylaws indicate a "typical" term of "three years." Indeed, the Employer recognized the longer expected tenure of the DWGS Chair position by hiring an **interim** chair who filled this position for about 3.5 months before being replaced by the permanent chair. Accordingly, the Employer's chair positions that are expected to last longer than six months are not temporary, acting, or interim positions excluded from the Act's notice requirements.

Finally, it is unclear why the Employer has referred to its internal job posting policy for "secondary appointment[s]." The Act and EPT Rules are state laws that supersedes the policies and procedures of any individual employer. The Employer's policy demonstrates that its violation of the Act and EPT Rules is systemic and deliberate rather than an oversight or accident. It is not a defense, and certainly doesn't change the fact of the violation.

For the foregoing reasons, the Division finds that the Employer violated C.R.S. § 8-5-201(1) and EPT Rule 4.2.5(C) by failing to provide notice of the DWGS Chair position hired on October 5, 2021. However, a different outcome is required for the Interim Chair position filled in June of 2021 and held until October of 2021 — a term of less than six months. The Division finds that this position was an "interim hire[] …. to fill a position on a temporary basis for up to six months" and was "not expected to be permanent," and was thus excluded from the Act's promotional opportunity notice requirements by EPT Rule 4.2.5(C). The Division thus finds only one violation of the Act and EPT Rules based on the facts at issue in this investigation.

IV. Fines

A. Fines Under the Equal Pay for Equal Work Act

The Act at C.R.S. § 8-5-203(4) provides that the Division "may order the employer to pay a fine of no less than five hundred dollars and no more than ten thousand dollars per violation" of Section 201 of the Act. Pursuant to C.R.S. § 8-5-203(2)(b), "[a]n employer's failure to comply with Section 8-5-201(1) for one promotional opportunity is considered one violation."

The Division finds that a fine above the $500.00 per-violation minimum is appropriate for the Employer's violation of the Act and EPT Rules because it has refused to come into compliance, providing a justification so frivolous that it cannot be squared with any good-faith reading of the Act and EPT Rules. The Employer's frivolous and shifting defenses demonstrate a willful — if not intentional — violation,[8] which the Employer

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[8] *See e.g. McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988) (stating standard for willfulness: "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."); *Herman v. Hector I. Nieves Transp., Inc.*, 91 F. Supp. 2d 435, 443 (D.P.R. 2000) (finding willfulness based on "continuing, unsuccessful - if not frivolous - excuses for not complying with the Act" that are "**not objectively reasonable"**). *See also Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005), holding that willfulness may be shown "where an employer disregarded the very "possibility" that it was violating the statute," and finding willfulness where an employer

> was **on notice of [the law's] requirements, yet took no affirmative action to assure compliance with them**. To the contrary, [it]s actions may more properly be characterized as **attempts to evade compliance, or to minimize the actions necessary to achieve compliance. [The employer] "could easily have**

refuses to cure. In addition, the Employer is a large state university that employs thousands of Coloradans, and has the knowledge and resources to come into compliance with the laws of the state it serves. Under these circumstances, the minimum fine amount is not sufficient as a deterrent. Based on these considerations, **the Division assesses a total fine of $1,000.00 for the Employer's violation of C.R.S. § 8-5-201(1)**.

B. Fines Under § 8-1-140(2) for Violation of the EPT Rules
The Employer committed the above violations of EPT rules,[9] triggering additional statutory fines:

> § 8-1-140. Violation - penalty. … (2) If any employer, employee, or any other person fails, refuses, or neglects to perform any duty lawfully enjoined within the time prescribed by the director or fails, neglects, or refuses to obey any lawful order made by the director or any judgment or decree made by any court as provided in this article 1, for each such violation, the employer, employee, or any other person shall pay a penalty of not less than one hundred dollars for each day the violation, failure, neglect, or refusal continues.

Penalties under § 8-1-140(2) apply to violations of duties mandated by Division-promulgated rules — including duties mandated by the EPT Rules. Penalties under § 8-1-140(2) apply to any failure (a) "to perform **any duty** lawfully enjoined within the time prescribed by the director" or (b) "to obey any lawful **order** made by the director," which includes "any decision, rule, regulation, requirement, or standard promulgated by the director" (C.R.S. § 8-1-101(11)).

Just as the Act's statutory fine amount is set by Division discretion within the broad statutory range ($500.00 to $10,000.00), Section 140(2) requires a per-violation fine set by Division discretion above the $100.00 statutory minimum. For the reasons explained in the preceding section, the Division assesses a **fine of $1,000.00 for the Employer's violation of EPT Rule 4.2** for the reasons explained in the preceding section.

However, the Division exercises its discretion and orders the Employer to pay a **single concurrent fine of $1,000.00**, and to demonstrate compliance with Part 2 of the Act, as set forth in the following section. The Division notes that **if the Employer does not correct its violative practices, the Division will investigate the provision of notice for both past and future department chair promotions, and will assess larger fines for any violations found**.

Fine payment is due no later than seven weeks from the date of the issuance of this Citation — February 8, 2024. Payment can be made through an electronic payment if arranged in advance with the Division, or by mailing or hand delivering a check made out to the Colorado Division of Labor Standards and Statistics to 633 17th Street, Denver, CO 80202.

> **inquired into" the meaning of the relevant [statutory] terms and the type of steps necessary to comply therewith. … It failed to do so.**

(emphasis added) (citation omitted).

[9] When the same action violates two provisions (*e.g.*, the Act and the EPT Protection Rules), it amounts to two violations supporting separate fines. Similarly, when the same conduct interferes with multiple rights or violates multiple statutes, the conduct incurs multiple fines. However, in this case, the Division exercises its discretion to impose only one concurrent fine for actions violating multiple provisions; any such fine is warranted as long as supported by any one of the findings of a violation.

V. Order to Comply

To redress the above-detailed ongoing violation of labor statutes and rules ("the Violations") and to effectuate compliance, the Employer is ordered as follows:

A. No later than January 1, 2024, for all Employer positions (not limited to the DWGS):

1. **Provide** notice of all promotional opportunities (or "job opportunities" pursuant to 2024 amendments to the Act and EPT Rules), including all department chair positions, as required by the Act and the EPT Rules.
2. Include in all job postings (or job opportunity notices) compensation and benefits information as required by the Act and EPT Rules.

B. Monitor its compliance with the Act and EPT Rules for a period of twelve weeks (the "Compliance Monitoring Period"). During this period, the Employer must:

1. Require the following personnel actions be reported to a designated reviewer or reviewers before they become effective, to determine if they constitute a "promotional opportunity" requiring notice under the Act:
   a) hires;
   b) department chair appointments;
   c) changes in pay other than standard raises (e.g. cost of living pay increases) applied to all employees of the Employer, all employees within a work unit, or all employees with a specific tenure;
   d) changes in job title;
   e) changes in grades, seniority tier, or other designation indicating an employee's degree of seniority, authority, performance, or compensation (e.g. moving out of probationary or temporary status, or from a junior to a senior position); and
   f) changes in department, team, unit, or other workgroup designation.
2. Maintain a record (e.g., a spreadsheet) of each personnel action identified in (1) above indicating:
   a) the employee's name or other unique identifier;
   b) the nature of the action;
   c) the date the action was reported;
   d) the date the action was reviewed;
   e) the name of the reviewer;
   f) whether the action was determined to be a "promotional opportunity," and the reason for the determination;
   g) how and to whom (by job title/group, not individual names) notice was effected for promotional opportunities; and
   h) the final effective date of the action.
3. Preserve documentation of all notices of promotional opportunity provided to employees, including documentation showing when and how this notice was provided. For example, a dated screenshot of a jobs board, or a copy of an employee email with recipients indicated in the email or a separate distribution list.
4. **No later than two weeks after the end of the Compliance Monitoring Period, the Employer must provide the Division**:
   a) A declaration, signed under penalty of perjury by a person with the authority to make

binding statements on behalf of the Employer, confirming that the Employer has fulfilled all of the compliance monitoring requirements in this Order to Comply; and
b) All documentation preserved as required by the terms of this Citation (requirement (2) above).

C. **Refrain from retaliating against employees** for any actual or perceived protected activities including but not limited to the following:
1. Requesting, using, inquiring into, informing anyone of, opposing a perceived violation of, or expressing a complaint or concern as to, any rights within the scope of this investigation; or
2. Participating, cooperating, or assisting, in any manner, in any investigation proceeding, or hearing, as to any rights within the scope of this investigation.[10]

Violations before the deadlines for effecting compliance may be deemed unlawful in any subsequent investigation. If the Employer fails to correct its violative practices, the Division may initiate an expanded investigation both past and future violations, and will assess larger fines for any violations found.

VI. Notice of Appeal and Other Rights

If you disagree with this determination, you may appeal it. Pursuant to the EPT Rules, 7 CCR 1103-13, Rule 3.7.1, by incorporation of Rule 6 of the Wage Protection Act Rules, 7 CCR 1103-7, the Employer has 35 calendar days from the date this determination was issued to request an appeal hearing with the Division. To obtain a copy of the Hearing Request Form and related instructions: go online (go to cdle.colorado.gov/wage-claim-appeal-faqs); ask us to send you a copy (email cdle_ls_appeals@state.co.us or call (303) 318-8442); or pick up a copy in-person (633 17th Street in Denver, 2nd floor). You may also be able to file an appeal through our online portal (the Appeal FAQs webpage has information on whether and how you can file your appeal through the portal). Whichever method you choose, it is your responsibility to meet the deadline. If no hearing request is received within 35 calendar days, this is the final decision of the Colorado Department of Labor and Employment.

If you believe any documents or information the Division provided to you, including this determination and any prior or accompanying documents, contain "[t]rade secrets, privileged information, [or] confidential commercial, financial, geological, or geophysical data" (C.R.S. § 24-72-204(3)(a)(IV)), you must designate each specific item you believe qualifies within twenty (20) days of the receipt of the document or information. Please provide a detailed written explanation along with any further documentation demonstrating that the identified information is a trade secret, proprietary, or privileged.[11] If you do not designate this determination within 20 calendar days, or if

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[10] E.g., C.R.S. § 8-4-120 (2022) (forbidding retaliation against exercise of rights under "any ... law or rule related to wages or hours"); Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules ("Colorado WARNING Rules"), 7 CCR 1103-11, incorporating the Act and Article 4 of Title 8, C.R.S., at Rules 1.1-1.2.

[11] C.R.S. § 7-74-102(4) defines a trade secret as:

> the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, address, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a 'trade secret' the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Whether information is a trade secret depends on (*Harvey Barnett, Inc. v. Shidler*, 143 F. Supp. 2d 1247 (D. Colo. 2001)):

> 1) the extent to which the information is known outside the business; 2) the extent to which the information is known to those inside the business; 3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; 4) the saving effected and the value to the holder in having the information as against competitors; 5) the

the Division determines that it does not qualify for nondisclosure under C.R.S. § 24-72-204(3)(a)(IV), the Division will treat this determination as a public record pursuant to the Colorado Open Records Act, C.R.S. § 24-72-201 et seq., and may publish the determination on its website. If you choose to designate this determination or other documents as trade secret or otherwise confidential, the Division will review your response, and alert you of the final decision.

Please contact the undersigned by email if you have questions about this letter or about how to respond. To learn more about Division services, or to find copies of applicable statutes or rules, go to www.coloradolaborlaw.gov.

Pay and Promotion Transparency Investigations
Division of Labor Standards and Statistics
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Colorado Department of Labor and Employment

amount of effort or money expended in obtaining and developing the information; and 6) the amount of time and expense it would take for others to acquire and duplicate the information.