

April 27, 2021

Dear Members of the University Senate:

The purpose of this letter is to provide clarification and corrections to erroneous statements made in resolution US20/21-10, titled: “*The UO Senate opposes any further efforts by the UO Administration to limit the availability of the Equal Pay Act’s protections in professional settings.*”

Because there was misinformation contained in the resolution as presented on April 23, 2021, this document is intended to provide the Senate with accurate information. As this pertains to ongoing litigation, neither I nor other members of the president’s senior staff will engage in the discussion of the resolution during the senate meeting.

At the outset, it should be made clear that the **University of Oregon wholeheartedly supports the principle of equity, in terms of gender, race, and ethnicity in pay and all aspects of university life.** We also understand that our employees—of all races, ethnicities, and genders—are our most important resource and we are committed to doing all we can, consistent with the law, to retain them. It is because of these twin commitments that the UO filed a petition for *en banc* review with the Ninth US Circuit Court of Appeals in *Freyd v. University of Oregon*.

The core of the resolution seems directed at persuading the university not to pursue further review of the summary judgment decision in the United States Supreme Court. Such persuasion is misplaced, as the university has decided to proceed to trial in this matter and not to seek Supreme Court review at this stage.

Additional points of clarification and correction:

- **The record of retention offers impacting salaries campus-wide in recent years has shown that women and faculty of color are the majority of those who have been offered retention raises when facing outside offers.** A curtailment of the university’s ability to adjust salaries of those faculty members who are being recruited by outside institutions would materially harm our ability to achieve diversity. Professor Jennifer Freyd’s claims that women faculty are less likely to seek or entertain outside offers lacks evidentiary basis. The evidence presented in the trial court was undisputed that, within Prof. Freyd’s department, women who had outside offers were always offered a retention package. Prof. Freyd’s sworn testimony agreed that she could not think of a woman who sought a retention offer and did not receive one. Without the ability to engage in retention negotiations the university stands to lose its most important faculty members, including, most importantly, its most prominent female faculty and faculty of color, who are among the most heavily recruited faculty members.
- **The university in no way believes that it is a “business necessity” to engage in practices with discriminatory results, as stated in the resolution.** On the contrary, the university believes and operates knowing that discrimination is wrong and is prohibited on the basis of gender. The university’s position in the lawsuit Prof. Freyd filed is that there is no discriminatory impact resulting from retention practices on the campus

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and, to the extent the experience in the psychology department showed that more men than women were successfully retained, any gender imbalance was fully justified by the need to retain our most successful faculty members, regardless of gender. The university used an independent consultant, selected jointly by the university and the faculty union, to carry out a comprehensive analysis of pay disparity among tenure-related faculty. That [study](#) showed no gender bias in the UO pay practices campus-wide. In addition, until a recent retirement, the highest paid faculty member in the department (and among the highest in the university) was a woman.

- **The university did not argue that the “Equal Pay Act’s requirement of nondiscrimination does not apply to professors of the same rank and seniority, because their jobs are not similar enough,” as stated in the resolution.** The resolution presents a complete misrepresentation of the university’s argument. The university responded to the claim brought by Prof. Freyd under a law that requires that the actual duties of a job be substantially equal and requires an evaluation of the day-to-day responsibilities. The university simply pointed out the substantial differences between the daily job duties of Prof. Freyd and the four male professors she chose as her comparators. The university’s core argument in its defense is that the two-judge majority that ruled in Prof. Freyd’s favor ignored long-standing precedent when it simply stated that the “common core tasks” all professors share entitled Prof. Freyd to a jury trial, ignoring long-standing precedent that requires the court to inquire as to what the job duties of the five faculty members in question truly are. This decision abdicated the court’s duty to go beyond the “common core” to see if Prof. Freyd had produced sufficient evidence that, in light of all the duties of each job, each professor has substantially the same duties. For example, the two-judge majority ruled that, since a male professor in psychology runs a “center” and Prof. Freyd runs a “center,” a jury could possibly decide that the two professors’ duties are substantially similar, thus ignoring the fundamentally different nature of the two “centers” in question and the vastly different duties their administration impose on each faculty head (and neglecting to acknowledge that, at the time the case went to court, Prof. Freyd had a lab, but not a center). This ruling ignores the fact that the day-to-day duties of full professors often diverge substantially, as do the duties of the five professors Prof. Freyd presented in her case
- **The university did not argue that “gender differences in pay caused by the way it handles retention raises are necessary to ‘retain talent,’ and that it would be too expensive to take account of retention raises and pay equitable salaries to all faculty,” as stated in the resolution.** The university believes the ruling was wrong as a matter of law, on the basis of decades of precedent, and that the language of the opinion could create a dangerous precedent that would require the university to defend itself before a jury anytime a faculty member claimed that a “common core” set of tasks entitled him or her to the same salary as a colleague. It was Prof. Freyd’s burden to show that the university had a readily available alternative for meeting its objective of retaining top faculty; she presented the plan that the university could raise salaries for all faculty every time it makes a retention offer. The university persuasively showed that such an alternative was unreasonable given the funding constraints it faces.
- **The Court of Appeals did not rule that the university is incorrect in its arguments;** it held that a jury should decide. The university believes that the trial judge was correct in ruling that Prof. Freyd did not present enough

evidence on this point to merit a trial for this case and the considerable time and expense required to defend itself in court. The two-judge majority of the appellate panel did not find that Prof. Freyd had proven gender discrimination. It expressly noted that it made no such finding, and limited its ruling to the narrow question of whether a jury should render a verdict on that question.

For a more extensive description of the university's position on this matter, please see a [public statement](#) from March 29 (included in full beginning on the following page).

Thank you,



Kevin S. Reed
Vice President and General Counsel

Statement by Kevin Reed, Vice President and General Counsel

March 29, 2021

The University of Oregon wholeheartedly supports the principle of gender equity in pay and all aspects of university life. We also understand that our employees—of all genders—are our most important resource and we are committed to doing all we can, consistent with the law, to retain them. It is because of these twin commitments that the UO today filed a petition for *en banc* review with the Ninth US Circuit Court of Appeals in *Freyd v. University of Oregon*. The UO petition requests that the entire Ninth Circuit review the split decision of a three-judge panel to allow Professor Jennifer Freyd to proceed to trial on three of her ten counts in order to clarify and correctly apply controlling legal precedent.

The UO is committed to following federal and state equal pay laws and adheres to the principle that a person's race, gender, nationality, sexual orientation, religion, or other protected status should not play a role, directly or indirectly, in their compensation. This commitment is demonstrated in a [recently completed comprehensive gender equity study](#), commissioned jointly by the administration and UO's faculty union, which confirmed that there are no systemic biases in the UO's pay practices unfairly denying women on UO's tenure-track faculty equal pay. This study came decades after gender discrimination claims against UO were dismissed after a nine-month trial in *Penk v. Oregon State Board of Higher Education*.

The entire panel in *Freyd* concluded that Professor Freyd had not offered evidence of intentional discrimination. However, the university's petition for a rehearing argues the decision of a two-judge majority, allowing the plaintiff to proceed to trial, misapplied the law. Their decision did not engage in the critical analysis required by longstanding precedent to look beyond a "common core" of tasks all faculty members undertake and examine whether the unique demands of the individual workplaces of senior faculty members with divergent research and program interests make those unique faculty members' jobs not substantially the same. The university also seeks review of the majority's ruling—again contrary to longstanding precedent—that the university's practice of attempting to compete with outside offers for recruited faculty members must be presented to a jury to determine whether it is legally justified. The two-judge majority of the Ninth Circuit ignored decades of clear authority. These errors of law will hamstring efforts by the university to retain their most eminent professors and cause great financial harm to the university. At the core of the decision by the two-judge majority was a determination that the five faculty members being compared all share a "common core" of tasks in their jobs. UO's petition challenges the court's failure (as required by precedent) to look beyond that common core and conduct the required analysis of whether the day-to-day work, tasks, and obligations of each faculty member truly make their jobs "substantially equal" as a matter of law. All five faculty members in this case perform strikingly different day-to-day work.

The University of Oregon is proud of Professor Freyd and her contributions to the field of psychology; however, we cannot allow that admiration to eclipse the fact that the Ninth Circuit's decision is bad law that could come back to haunt the university, our students, and the taxpayers of Oregon. If this decision is allowed to stand, it could limit the ability of all universities to fairly compensate and retain faculty and staff of all genders. We believe that Professor

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Freyd, whose salary was in the top 9 percent of all tenure-track faculty in the College of Arts and Sciences prior to her retirement this year, was fairly compensated and fully supported as a scientist and member of the faculty of the university.

While we will pursue our legal options in the Ninth Circuit, we will also continue efforts to find a path to resolve the remaining issues in this litigation. No one is well served by a legal battle between the university and a respected faculty member who has given much to the university and its students.

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