

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02471-WYD-MJW

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

LUCY MARSH,
NANCY EHRENREICH,
KRIS McDANIEL-MICCIO, and
CATHERINE SMITH,

Intervenors,

v.

UNIVERSITY OF DENVER,

Defendant.

COMPLAINT IN INTERVENTION

Plaintiff-Intervenors Nancy Ehrenreich, Kris McDaniel-Miccio, and Catherine Smith for their Complaint in Intervention state as follows:

INTRODUCTION

1. This is a sex-based wage discrimination suit brought by the U.S. Equal Employment Opportunity Commission (“EEOC”) to seek redress for female Full Law Professors, including Nancy Ehrenreich, Kris McDaniel-Miccio, and Catherine Smith (“Plaintiff-Intervenors”), who are compensated substantially less than male Full Law Professors by their employer, Defendant University of Denver (“DU”). After issuing a determination finding reasonable cause to believe

that Defendant violated Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, and the Equal Pay Act, in regard to DU’s pay practices, the EEOC filed this lawsuit against Defendant on September 30, 2016.

PARTIES

2. The EEOC is a federal agency charged with enforcing federal anti-discrimination laws, including Title VII, 42 U.S.C. § 2000e *et seq.*, as amended.

3. Plaintiff-Intervenors Ehrenreich, McDaniel-Miccio, and Smith are residents of the State of Colorado.

4. Plaintiff-Intervenor Lucy March is a resident of the State of Colorado.

5. DU is a Colorado nonprofit corporation having its principal place of business in the City and County of Denver.

6. DU’s principal office is 2100 S. University Boulevard in Denver, Colorado 80208.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 28 U.S.C. § 1331 and specifically under Title VII.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because the employment practices and other conduct alleged to be unlawful were committed in the District of Colorado.

9. At all relevant times, DU was covered by the definition of “employer” set forth in 42 U.S.C. § 2000e(b) of Title VII.

SPECIFIC ALLEGATIONS

10. DU is engaged in the business of higher education.

11. DU operates the University of Denver Sturm College of Law (“Law School”).

12. As of October 2013, excluding the Law School Dean at the time, DU employed 25 tenured Full Law Professors, of which 16 were male and 9 female.

13. The 9 female Full Law Professors included Lucy Marsh, Nancy Ehrenreich, Kris McDaniel-Miccio, and Catherine Smith, all of whom are still employed by DU.

14. Full Law Professors are tenured, which means that they have a right to continuous reappointment until they resign or retire and may be terminated under only a limited set of conditions pursuant to a specific set of procedures that include appeal rights.

15. All Full Law Professors are responsible for teaching courses, producing legal scholarship, and providing service to DU, the public, and the legal profession, and are evaluated in these three areas, i.e., their teaching, scholarship, and service.

16. Despite their laudable performance in each of these areas, Plaintiff-Intervenors were and continue to be paid less than the mean annual salary for male Full Law Professors.

17. In July 2013, Lucy Marsh filed charge of discrimination number 541-2013-01830, in which she claimed that DU paid her and other female Full Law Professors less than similarly-situated males.

18. The EEOC identified 9 female Full Law Professors – a list that included Plaintiff-Intervenors – over the course of its administrative investigation who it alleged were subject to a sex-based pay disparity.

19. On August 27, 2015, the EEOC issued a Letter of Determination in which it found “reasonable cause to believe that there is a violation of Title VII in that there appears to be a continuing pattern or practice at the Sturm College of Law, dating back to as early as 1973, of compensating female law professors less than their male counterparts.”

20. Furthermore, the EEOC observed in its Letter of Determination that, “[DU] was aware of these pay disparities at least as of December 2012, but took no action to ameliorate this disparity, in effect intentionally condoning and formalizing a history of wage disparity based on sex.”

21. The EEOC attached a Schedule A to its Letter of Determination in which it listed nine persons aggrieved, including Lucy Marsh and the three Plaintiff-Intervenors, along with their prospective wage increases, backpay owed from September 2012 through August 2015, liquidated damages, and total damages.

22. This lawsuit followed the failure of EEOC-facilitated conciliation.

23. Upon information and belief, Defendant continues to pay Plaintiff-Intervenors less than similarly-situated male employees.

Plaintiff-Intervenor Nancy Ehrenreich

24. Plaintiff-Intervenor Nancy Ehrenreich earned her B.A. magna cum laude from Yale University and J.D. cum laude and LL.M. from the University of Virginia.

25. DU hired Ehrenreich to teach at the Law School in 1989.

26. Ehrenreich received tenure from DU in 1996 and became a Full Law Professor in 2002.

27. Ehrenreich created and continues to teach a Race, Class, and Reproductive Justice seminar, which was one of the first such law school courses taught in the U.S.

28. In 1997 and 1998, without any additional remuneration or credit, Ehrenreich co-taught a ground-breaking clinical course on intimate partner violence, the Battered Women's Clemency Reform Project, that ultimately resulted in four grants of clemency by then Colorado Governor Roy Romer.

29. In addition to the courses listed above, Ehrenreich has taught the following courses at the Law School: Criminal Law, Torts, Jurisprudence, and Gender and the Law.

30. Over her career, Ehrenreich has been a highly effective and appreciated professor. She was nominated for a DU-wide teaching award in spring 2015 and received the Law Stars teaching award in spring 2017.

31. As a scholar and public intellectual, Ehrenreich has been a leading voice on reproductive issues, drawing attention to the importance of an intersectional approach that includes low-income women and women of color.

32. Over the span of her career, Ehrenreich has produced 21 scholarly publications, as well as several blog posts, op-ed pieces, and magazine articles. Her work has appeared in renowned journals, including the Yale Law Journal, the Duke Law Journal, the Harvard Civil Rights-Civil Liberties Law Review, and the Michigan Journal of Race and Law.

33. Ehrenreich's book, The Reproductive Rights Reader: Law, Medicine, and the Construction of Motherhood, was published in 2008 by NYU Press. This edited volume, for which she also wrote a lengthy introduction, has been used in law and undergraduate courses across the country.

34. The Law School has recognized Ehrenreich's scholarly accomplishments and promise by awarding her a William F. Beaney Memorial Research Fellowship, the Hughes Rudd Fellowship, and a DU Professorship Grant.

35. Ehrenreich has made significant service contributions to DU, including: constituting and serving as the first chair of DU's university-wide Sexual Harassment Board; serving on the Law School's Curriculum Committee, Curriculum Reform Committee, Admissions Committee, and the Strategic Planning Committee; chairing the Lateral Appointments Committee and serving several times as a member of the general Appointments Committee; helping to organize and plan a series of annual conferences at the Law School called the Legal Theory Symposium Series; chairing the Faculty Development Committee; and serving on the Faculty Executive Committee and several performance review committees charged with assessing her colleagues.

36. In April 2004, Ehrenreich was invited to deliver the DU-wide Provost's Lecture entitled "Home and Security."

37. Nationally, Ehrenreich: served for ten years as a member of the national board of Latina and Latino Critical Legal Theory, Inc., including serving as national co-chair of the organization for three of those years; served for several years on the national board of the Society of American Law Teachers; and is a founding member and active participant in the work of the Rocky Mountain Collective on Race, Place, & Law.

38. Several male Full Law Professors who DU hired between one and 10 years after Ehrenreich, currently earn more than \$40,000 more annually than Ehrenreich.

Plaintiff-Intervenor Kris McDaniel-Miccio

39. Plaintiff-Intervenor McDaniel-Miccio earned, with the highest distinction: her B.A. at Marymount College of Fordham University, her M.P.A from the University of New York's Rockefeller College, her J.D. at Antioch University School of Law, and both her LL.M. and Doctor of the Science of Law from Columbia University School of Law.

40. DU hired McDaniel-Miccio to teach at the Law School in 2002.

41. McDaniel-Miccio came to DU with considerable teaching experience, including her time as a lecturer at the City University of New York School of Law, a visiting clinical professor of law at Albany Law School, and a tenured associate professor at Western State University Law School. Prior to law school, McDaniel-Miccio was a university lecturer in gender studies and political theory at the University of New York.

42. At the time that she was hired by DU, McDaniel-Miccio had also been practicing law for a number of years as an assistant district attorney in Bronx County in the Appellate and Supreme Court departments and as the founding director and attorney in charge of the Center for Battered Women's Legal Services of Sanctuary for Families, Inc. in New York City where she litigated precedent-setting cases and authored key legislation.

43. McDaniel-Miccio received tenure from DU in 2006 and was promoted to Full Professor of Law in 2009.

44. Over the course of her career with DU, McDaniel-Miccio has taught Criminal Law, Criminal Procedure, Jurisprudence, Family Law, Topics in Jurisprudence: Colonization, Topics in Jurisprudence: Law and Religion, a seminar on domestic violence, a seminar on the holocaust, and a comparative course (U.S. and Ireland) on marriage equality and religion.

45. In 2012, then Dean Katz nominated McDaniel-Miccio for the University Scholar/Teacher of the Year Award, noting in his supporting letter that she is an “extraordinary teacher and a rare blend of activity lawyer, public intellectual and gifted [at] teach[ing].”

46. McDaniel-Miccio has been the recipient of an array of both national and international scholarly awards including a Fulbright Scholar and Teaching Award, the Marie Curie Transfer of Knowledge Award, Fulbright Senior Specialist, the GEMMA Scholar and Teaching Award-Erasmus Mundus, and the Trinity Long Room Interdisciplinary Scholar Award.

47. Furthermore, DU awarded McDaniel-Miccio the Hughes-Ruud Research Professorship, DU Public Good Grant, and DU Internationalization Grant in recognition of her cutting edge scholarship and intellectual bridge building with national and international communities.

48. Starting in 2008, McDaniel-Miccio developed professional relationships with academic institutions in Ireland as a way to build an international bridge between DU, the Law School, and Irish academies, including Queens College, Belfast, University College Dublin, Trinity College Dublin, and NUI Galway.

49. In 2015, McDaniel-Miccio received dual appointments for three years to the Equality Institute of University College, Dublin and the Trinity College Gender and Women Studies Program to continue her research on gender equality in the U.S. and Ireland.

50. In 2015, McDaniel-Miccio was awarded the highly prestigious Irish Law Society Award, UCD Chapter, for Human Rights. Previous recipients include Noam Chomsky, Bill Clinton, Seamus Heaney, Antonin Scalia, and former Republic of Ireland presidents Mary Robinson and Michael Higgins.

51. McDaniel-Miccio has authored 22 law review published articles, seven of which are featured on the Law School's Faculty Highlights and Intellectual Life website, and three book chapters, including works peer reviewed for publication by the Oxford University and Cambridge University Press. Her articles have been published by Harvard, Columbia, and Georgetown in journals on gender, law, and international law.

52. McDaniel-Miccio has lectured and keynoted at myriad conferences and scholarly convocations throughout the U.S. and Ireland, six of which are featured on the Law School's Faculty Highlights and Intellectual Life website.

53. Over four years, McDaniel-Miccio designed and implemented four ground-breaking international conferences on feminist theory and politics in the U.S. and Dublin that attracted attendees from the U.S., Europe, and the Middle East.

54. McDaniel-Miccio has engaged in *pro bono* consulting across the U.S. and Ireland, including with: the Office for the Prevention of Domestic, Sexual and Gender-Motivated Violence, Marriage Equality, and Women's Aid in the Republic of Ireland; the Colorado Coalition Against Domestic Violence, the Colorado Bar Association's Access to Justice Committee and Domestic Violence Task Force, and the Denver Domestic Violence Task Force in Colorado; the New York State Office of the Governor, New York, Kings, and Bronx County District Attorneys' Offices, the New York City Police Department and Child Welfare Departments, the New York State Legislature, Codes Committee, Children and Family Committee, and Legislative Women's Task Force; and, in California, the YWCA of Orange County and California State University at Fullerton's Women's Center.

55. At present, McDaniel-Miccio is creating The Bella Abzug Institute for Gender Equality and Social Justice, which will incorporate interdisciplinary advocacy, research, and scholarship. She has convened a body of scholars, academics, state actors, community and statewide non-governmental organizations, members of the bench and bar from Colorado and New York to assist in the development of the Institute.

56. At DU, McDaniel-Miccio was appointed by the Law School Dean to serve as: chair of the Curriculum, Faculty Development and Mentoring Committees and the International Conference Committee on Feminism and the Law; member of the Multicultural, Appointments, Lateral Appointments, and Student Mentoring Committees; and faculty advisor of the Jewish Law Students and Women and the Law Associations, DU's Law School LGBT student group, and Student Members and Former Members of the Armed Services Association.

57. Outside of DU, McDaniel-Miccio has: been appointed to the District Court Advisory Council for the Denver District Court, the New York State Court of Appeals Taskforce on Domestic Violence and Child Abuse Family and Criminal Taskforce on Orders of Protection, and the New York City Police Department Advisory Board on Hate Crimes; testified before the U.S. Senate's Judiciary Committee on Hate Crimes, and the New York State Assembly's Codes Committee and Committee on Children and Families; and authored key state legislation on domestic violence and hate crimes in New York.

58. In May 2012, McDaniel-Miccio sent a request to the Law School's Dean, Marty Katz, that her pay be compared to other Full Law Professors with the same number of years of teaching to ensure that she was being paid a comparable amount.

59. Katz responded that Full Law Professors' salaries are based on both the number of years since they graduated from law school and their teaching experience. When McDaniel-Miccio asked how these factors were weighed, Katz responded that there was no "clear formula" and referred to the process of determining salaries as "complex" and "evolving."

60. Katz concluded McDaniel-Miccio's salary review by issuing a memorandum stating that her salary was "on target" but failed to include any information to support this result, including the salary ranges for other Full Law Professors with comparable experience despite having offered to share that information with McDaniel-Miccio.

61. McDaniel-Miccio was, therefore, shocked to see that the EEOC had listed her as an aggrieved party in its August 2015 Letter of Determination.

Plaintiff-Intervenor Catherine Smith

62. Plaintiff-Intervenor Catherine Smith earned her B.A. at Wofford College and her M.P.A. and J.D. from the University of South Carolina.

63. After law school, Smith completed two one-year federal judicial clerkships with U.S. Magistrate Judge William M. Catoe, Jr. and Judge Henry Politz, Chief Judge of the Fifth Circuit Court of Appeals.

64. DU hired Smith as an Assistant Professor in 2004. She received tenure in 2007 and became a Full Professor in 2013.

65. In fall 2010, Smith became the Associate Dean of Institutional Diversity and Inclusiveness, a role that she played a major role in crafting.

66. The Associate Dean of Institutional Diversity and Inclusiveness position was one of the first of its kind and has served as a model for other units on DU's campus and other law schools nationwide.

67. Over the course of her career with DU, Smith has taught: Torts; Employment Discrimination; Family Law; Sexuality, Gender and the Law; and Comparative Sexuality and the Law.

68. Smith has been recognized for her superior teaching ability, including receiving the Most Engaging Professor and Most Outstanding Professor awards from the Law School's Student Bar Association in 2012.

69. Since 2002, Smith has published 12 articles, five short essays, five blogs and op-eds, and 10 other publications.

70. Smith's scholarship on the rights of children has generated significant recognition, including:

- a. in 2010, Smith's article, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion – Legitimacy, Dual-Gender Parenting, and Biology*, won the UCLA Law School, Williams Institute's Dukeminier Award as one of the best sexual orientation law review articles of the year;
- b. in 2011, Smith's essay on the rights of children of same-sex parents was one of several selected by the American Association of Law School Section on Gender and Sexual Orientation Identity's writing competition, *On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship*; and

c. her more recent publications on the rights of children have been published in the Washington University Law Review, U.C. Davis Law Review, and the Duke's Journal of Law and Contemporary Problems.

71. Based on her research and scholarly agenda advancing the rights of children, Smith co-authored three amicus briefs on behalf of Scholars of the Constitutional Rights of Children that were filed in the landmark U.S. Supreme Court cases, *U.S. v. Windsor* and *Obergefell v. Hodges* as well as a case in the Fifth Circuit.

72. In recognizing the detrimental impact of same-sex marriage bans on children of same-sex couples, Justice Kennedy cited the Scholars of the Constitutional Rights of Children's amicus brief in the majority opinion of *Obergefell*.

73. The Law School's Faculty Highlights and Intellectual Life website features three of Smith's recent publications and two of her recent presentations at Columbia Law School, Yale Law School, and Texas Southern University.

74. At DU, Smith has served as: chair of the Faculty Appointments Committee in a year when the Law School searched for three legal research and writing faculty and nine tenure-track faculty and the Inaugural Faculty Executive Committee; member of six hiring and search committees, as well as, the Promotion and Tenure (Policy) Committee, Spanish for Lawyers Program Committee, and Budget Committee; and faculty advisor for the Law School's LGBT student group. Smith has also organized numerous campus speakers and academic conferences.

75. Smith has an exemplary record of service to the Law School and greater community and has been recognized accordingly, including as a recipient of the Colorado Women's Bar Association Foundation's "Raising the Bar" Award in 2014, and the recipient of the Haywood

Burns/Shanara Gilbert Award from the Northeast People of Color Legal Scholarship Conference in 2013, which recognizes “a person who has demonstrated a sustained commitment to the advancement of the legal, social, and economic position of People of Color in our society.”

76. In 2016, Smith also received the national Clyde Ferguson Award from the American Association of Law Schools Minority Groups Section in recognition of her accomplishments in teaching and mentoring, service, and scholarship.

77. In November 2012, Smith discovered that the stipend that she was receiving for her role as Associate Dean of Institutional Diversity and Inclusiveness was \$5,000 less than the stipend paid to the male Associate Dean of Scholarship.

78. When Smith brought this to Katz’s attention and asked for her stipend to be adjusted prospectively and retroactively, Katz allegedly raised the issue with Provost Gregg Kvistad.

79. Katz then claimed that Kvistad had authorized DU to make a one-time \$7,500 payment to Smith, which represented half of the total pay discrepancy.

80. When Smith again requested the full pay discrepancy or, in the alternative, credit hour equivalents, Katz refused, citing an alleged directive from the Provost that Smith’s recovery be limited to the one-time payment.

Defendant’s Response to the Gender Pay Gap

81. In December 2012, Katz authored and distributed to the faculty a memorandum that addressed the existing pay gap between female and male Full Law Professors.

82. Shortly after the release of the memo, Katz met with several female Full Law Professors, including Plaintiff-Intervenors Ehrenreich and Smith regarding the pay disparity between male and female Full Law Professors.

83. During this meeting, Katz stated that, “I don’t think the [pay] differential implies there’s necessarily something wrong.”

84. Katz also indicated, without basis, that female Full Law Professors were not performing as well as their male colleagues when he suggested, among other things, that the Law School should address if its female faculty need “support” to succeed at scholarship.

85. Following the distribution of the December 2012 memo, Katz met with Smith and assured her, not only that she was not being paid less than her male counterparts, but that she was “actually making more” than them.

86. Between December 2012 and August 2015, Smith had several discussions with Katz about the pay differential between female and male Full Law Professors in which she encouraged Katz to rectify the disparity; each time, Katz failed to do so.

87. Smith learned that Katz’s assurance that she was being paid more than her male counterparts was not the case when she received a copy of the EEOC’s Letter of Determination in August 2015 in which she was listed as a person aggrieved with significant backpay in an attached schedule.

88. On August 31, 2015, DU released a Statement concerning the EEOC Letter of Determination stating that Marsh was paid less than her peers “as a result of her sub-standard performance in scholarship, teaching and service.”

89. With respect to the other female Full Law Professors, the statement quoted Chancellor Rebecca Chop as “stand[ing] by [DU’s] historical system of evaluation and merit pay.”

90. The statement implied that the remaining female Full Law Professors were being paid less because of performance inadequacies.

91. When Smith approached Katz about this statement and her concern that it reflected poorly on the reputation and career of all of the female Full Law Professors, Katz responded that the Chancellor, not he, was responsible for the statement.

STATEMENT OF CLAIMS

FIRST CLAIM FOR RELIEF

(Sex Discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended,
against Defendant)

92. The foregoing allegations are realleged and incorporated herein by reference.

93. DU subjected Plaintiff-Intervenors to different terms and conditions of their employment based on sex by paying them less than males who occupied similar jobs.

94. DU's conduct discriminated against Plaintiff-Intervenors on the basis of their sex in violation of Title VII.

95. DU's actions toward Plaintiff-Intervenors were done knowingly and intentionally or with reckless disregard of their rights.

96. As a direct and proximate result of DU's actions, Plaintiff-Intervenors have suffered damages, including lost wages and benefits, diminished reputation and other pecuniary losses, and emotional pain and suffering, mental anguish, inconvenience, loss of enjoyment of life, and other non-pecuniary losses.

WHEREFORE, Plaintiff-Intervenors Nancy Ehrenreich, Kris McDaniel-Miccio, and Catherine Smith respectfully request that this Court enter judgment in their favor and order the following relief as allowed by law:

- A. Compensatory damages, including but not limited to those for emotional distress, inconvenience, mental anguish, and loss of enjoyment of life;

- B. Back pay and benefits;
- C. Injunctive and/or declaratory relief;
- D. Punitive damages;
- E. Front pay in the form of prospective salary increases;
- F. Attorney fees and costs of the action, including expert witness fees, as appropriate;
- G. Pre-judgment and post-judgment interest at the highest lawful rate; and
- H. Such further relief as justice allows.

PLAINTIFF-INTERVENORS DEMAND A JURY TRIAL ON ALL ISSUES SO TRIABLE.

Respectfully submitted June 16, 2017.

By: SWEENEY & BECHTOLD, LLC

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CERTIFICATE OF GOOD STANDING

I hereby certify that I am a member in good standing of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2017, a true and correct copy of the foregoing was served via electronic mail to the following addresses:

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