Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2021-053

JULY TERM, 2021

Christopher A. DelBrocco* v. State of Vermont et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 228-4-18 Wncv
		Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the civil division's decision granting summary judgment to his former employer, the State of Vermont, on plaintiff's claim that the State engaged in sex-based pay discrimination in violation of the Vermont Fair Employment Practices Act (VFEPA). We affirm.

The following facts are not in dispute. In March 2015, plaintiff was hired to work within the Agency of Human Services (AHS) IT Project Management Office (PMO) with the formal classification of IT Project Manager IV. The PMO, which was managed by IT Director Paul Pratt, was tasked with planning and implementing IT software, hardware, and networks that supported AHS's delivery of benefits to the public. Plaintiff's initial starting wage was $29.05 per hour, which was the entry wage specified for the position by the State classified employee pay plan, and corresponded to pay grade 28, step 1. Plaintiff agreed that he was hired by AHS to work with a focus on vendor management.

In September 2015, Pratt hired Helen Tanona to work as a lead or senior project manager within the PMO. Tanona's formal job classification was IT Project Manager IV. Her initial starting wage was $44.34 per hour, which was the wage specified by pay grade 28, step 13 of the State classified employee pay plan and was the result of her approved hiring through the State's hire-into-range policy.

According to Pratt's affidavit, which the State submitted in support of its motion, a project team typically consists of one or more project managers, one of whom will serve as lead or senior project manager, as well as business analysts, vendor managers, and other technical staff. The work of a lead or senior project manager is to plan and supervise the work of an organization's employee project team and contracted vendors for the project according to applicable project management standards and to achieve the goals and objectives within the project's defined scope, schedule, and budget. The role of a vendor manager is more focused: vendor managers assist in preparing requests for proposals and soliciting bids or quotes from outside contractors; provide support in contract negotiations with those contractors; monitor and report on the contractors' progress, including reviewing invoices; and serve as communications liaisons between the employer and the contractors. Generally, vendor managers assigned to work on a project team

will be indirectly supervised by the senior project manager, but vendor managers would never supervise a senior project manager.

In 2015, Pratt was asked to form a dedicated vendor management team in the PMO, which would support the work of the PMO's project managers but not handle the work or responsibilities of a project manager. There is no State of Vermont job classification for a vendor manager position. Accordingly, the agency decided to hire three limited-service vendor managers, one team leader and two subordinate vendor managers, under the job classification IT Project Manager IV. Pratt hired John Kohlmeyer to serve as team leader and hired plaintiff as one of the subordinate vendor managers.

After he was hired, plaintiff was assigned as a vendor manager in AHS's Integrated Enrollment and Eligibility (IE) program. The goal of the IE program was to provide a centralized web-based platform for the public to apply for AHS's various benefits and services. As vendor manager, plaintiff communicated between the project managers and outside vendors. He was indirectly supervised by the lead project and program managers assigned to the IE program at various times.

After Tanona was hired in September 2015, she was initially assigned to manage the AHS implementation of a State-wide learning management system that provided computer-based training for State employees and the State-wide adoption of the Microsoft Office 365 cloud-based software suite, as well as an AHS-specific grant management software system that was terminated in early 2016 due to insufficient funding. In these roles, Tanona indirectly supervised several AHS employees and contractors assigned to her teams. On the learning management system project, she performed the role of a lead project manager, overseeing the project scope, schedule, budget and expenditures, staffing, risk management, quality assurance and stakeholder communications. In 2016, she was promoted to the role of program manager and received a new classification of IT Project Manager V, at which point she was assigned overall project management responsibility for the IE program.

In May 2016, shortly after Tanona was promoted, plaintiff transferred to a different position with the AHS Central Office. He eventually left State employment in November 2017. In April 2018, plaintiff filed a complaint in the civil division of the superior court alleging that the State violated VFEPA by paying him substantially less than Tanona. He also alleged that the State made fraudulent misrepresentations regarding its hire-into-range policy; defamed him during an internal investigation of his wage discrimination claim; and was negligent in its implementation of the hire-into-range policy. The State moved for summary judgment on all claims. The trial court concluded that plaintiff had failed to provide evidence showing that he and Tanona performed equal work and therefore failed to make out a prima facie case of pay discrimination. The court determined that plaintiff's fraud and defamation claims were barred by sovereign immunity and official privilege, and that there was no enforceable legal duty to support a negligence claim. It therefore granted summary judgment to the State. This appeal followed.

When reviewing a decision granting summary judgment, we apply the same standard as the trial court. Vt. Human Rights Comm'n v. State, 2015 VT 138, ¶ 14, 201 Vt. 62. That is, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "In determining whether a dispute over material facts exists, we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999).

Like its federal analog, the VFEPA prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions." 21 V.S.A. § 495(a)(7). In applying the VFEPA, Vermont courts follow the framework established by federal courts in interpreting the federal Equal Pay Act. Vt. Human Rights Comm'n, 2015 VT 138, ¶ 19.

To establish a prima facie claim of sex-based pay discrimination under the VFEPA, a plaintiff must show that the employer "pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " Id. ¶ 18 (quoting Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974)). If the plaintiff meets the burden of establishing a prima facie case, the burden then shifts to the employer to demonstrate one of the defenses set forth in the statute. See 21 V.S.A. § 495(a)(7)(A) (stating that employer may pay different wage rates pursuant to seniority or merit system, system in which earnings are based on productivity, or "[a] bona fide factor other than sex."). An employee may rebut such evidence with evidence that the employer intended to discriminate and that the asserted defense is merely a pretext for discrimination. Vt. Human Rights Comm'n, 2015 VT 138, ¶ 19.

Plaintiff argues that the trial court erred in granting summary judgment to the State because there is a genuine dispute regarding whether he and Tanona performed equal work. We disagree. It is true that plaintiff and Tanona shared the same formal job classification of IT Project Manager IV.[1] "Job descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling." Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 288 (4th Cir. 1974); see also Fallon v. State of Ill., 882 F.2d 1206, 1208 (7th Cir. 1989) (explaining that to make prima facie case of pay discrimination, plaintiff "must establish, based upon actual job performance and content—not job titles, classifications or descriptions that the work performed is substantially equal" (quotation and alteration omitted)). As we have explained,

> [i]n comparing the jobs performed by plaintiff and [the comparator], the inquiry focuses on the primary duties of each job. Equal jobs must have a common core of tasks. Equal work does not mean that the jobs must be identical; rather, they must be substantially similar. The statute explicitly applies to jobs that require equal skills, and not to employees that possess equal skills. Thus, under the [VF]EPA, we compare the jobs, not the individual employees holding those jobs. In comparing two jobs, abilities of persons in the positions are not relevant.

Ballard v. Univ. of Vt., 166 Vt. 612, 614 (1997) (mem.) (citations and quotations omitted).

Viewed in the light most favorable to plaintiff, the record shows that he and Tanona performed substantially different work during the approximately nine months that they shared the

[1] Plaintiff argues that in his deposition testimony, a State human resources representative agreed that in general, jobs with the same classification are "substantially similar in terms of complexity with requirements and all the skills, experience, whatever all those factors are." As noted above, job titles and classifications are not determinative of whether individuals perform equal work. Furthermore, this statement was made in the context of plaintiff's questions about why Tanona was hired at a greater salary than Kohlmeyer, who was classified at pay grade 30, and is therefore not particularly relevant to whether Tanona and plaintiff performed equal jobs.

same job title. Plaintiff's work focused exclusively on the vendor management aspect of a single AHS project, while Tanona had more general responsibility for managing entire AHS projects. As the lead project manager for the learning management system, Tanona oversaw the project scope, schedule, budget and expenditures, staffing, risk management, quality assurance and stakeholder communications for all aspects of the project—not just vendor management. She also indirectly supervised other employees, which plaintiff did not do. Plaintiff has therefore failed to meet his burden of establishing that he was paid less than Tanona for equal work.

Plaintiff vigorously objects that "senior" or "lead" project manager was not Tanona's formal title. This fact is not disputed and is not determinative of whether plaintiff and Tanona had equal jobs. See Brennan, 503 F.2d at 588. Rather, Pratt and Kohlmeyer used the terms "senior" or "lead" to describe the functional role that Tanona played, which was a more general supervisory role than the typical project manager. Contrary to plaintiff's assertions, their use of these informal terms to characterize Tanona's position does not amount to perjury.[2]

Plaintiff contends that Pratt's and Kohlmeyer's assertions that Tanona played a senior role are contradicted by Tanona's testimony that she was not the lead project manager of the learning management system for the entire State, but rather managed the AHS component of the project. He also points to her testimony that she did not have financial responsibilities within two of her projects, the Office 365 implementation and the aborted grant management system. Therefore, he argues, she could not have been a lead project manager as that role is defined by Pratt and Kohlmeyer. However, plaintiff does not genuinely dispute that Tanona was assigned to oversee the implementation of the learning management system within AHS, and in that capacity oversaw the work of others and fulfilled other lead-project-manager-type functions including budgeting and expenditures. Further, the fact that the other two projects did not involve financial responsibilities does not mean that she did not perform other managerial functions. Plaintiff argues that Tanona's projects were small in dollar value compared to his. There is no evidence of the dollar value of Tanona's projects, but even if true this fact does not necessarily indicate that the projects were less complex or involved less skill, responsibility, or oversight.

Plaintiff contends that he led the IE program vendor selection, and in that role performed equal or possibly greater work than Tanona, including project-manager-type work such as creating a work project breakdown and a budget and communicating with AHS executives. It is undisputed, however, that plaintiff's work related solely to vendor management aspects of the project. He was not given general responsibility to oversee the entire IE program—rather, Tanona was later assigned this role after her promotion. Plaintiff conceded that he did not do any work that involved monitoring or controlling aspects of a project that were unrelated to outside vendors, such as tracking other State employees' hours, or creating project-wide budgets.

Plaintiff argues that when attempting to hire plaintiff's replacement, Pratt stated that the IT Project Manager IV/Vendor Manager position required a person "with specialized vendor management skills over and above those of a standard IT project manager IV." This statement does not, as plaintiff argues, undercut Pratt's assertion in his affidavit that plaintiff's vendor manager role did not share the same amount of skill, effort, and responsibilities as Tanona's lead project manager role. Pratt did not address the latter role at all and his statement about the vendor manager position says nothing about Tanona's responsibilities in her position.

[2] Plaintiff points to various minor inconsistencies in the Pratt and Kohlmeyer affidavits which he argues render the affidavits inadmissible. To the extent relevant here, the affidavits are made on personal knowledge and set forth facts admissible in evidence, and therefore may be relied upon for summary judgment. Alpstetten Ass'n, Inc. v. Kelly, 137 Vt. 508, 515 (1979).

Finally, plaintiff maintains that he did indirectly supervise other project managers and State employees, and that the State's assertion to the contrary creates a genuine factual dispute that must be resolved by a jury. In support of this contention, he cites his own affidavit, an email from Kohlmeyer stating plaintiff had been assigned as a vendor manager in the IE program and that Kohlmeyer had "tasked [plaintiff] to assume the [vendor manager] role as lead in facilitation of the BAFO/Vendor Selection," and a June 2015 Vendor Management Standard Operating Procedure. None of these documents is sufficient to create a genuine dispute of fact on this issue. Plaintiff's assertions in his affidavit that he "supervis[ed] a large number of personnel and contractors" and "supervised several state employees and contractors" are simply too vague to create a dispute of fact. The only specific individual plaintiff identifies as having supervised was a contracted third-party counsel, but plaintiff does not point to any other evidence in the record that supports this assertion. Kohlmeyer's statement that plaintiff would be leading facilitation of vendor selection does not imply that plaintiff would be supervising others in that role. And the Vendor Management Standard Operating Procedure does not list supervision of State employees as one of a vendor manager's responsibilities. We therefore decline to disturb the judgment on this basis.

Because the evidence presented shows that plaintiff and Tanona performed substantially different work, plaintiff failed to establish a prima facie case of pay discrimination under the VFEPA. The trial court therefore appropriately granted summary judgment on that claim.[3]

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
William D. Cohen, Associate Justice

[3] Plaintiff also argues that the trial court erred in granting summary judgment to the State on his defamation and negligence claims. However, plaintiff's failure to oppose the State's motion for judgment as to these claims effectively waived them, and we therefore do not address them on appeal. See Progressive Ins. Co. v. Brown, 2008 VT 103, ¶¶ 8-9, 184 Vt. 388 (holding that insurer which had opportunity to raise arguments in its opposition to motion for summary judgment and failed to do so waived arguments on appeal).