NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Lumpy LLC, d/b/a Chilly Bombers, Defendant.	No. CV-06-0830-PHX-SRB **ORDER**

This matter arises out of an alleged disparity in compensation paid to former Lumpy LLC employee Christine Sedita as compared to two other male employees, Jeff Majerle and Patrick Zacek. Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), claims that this disparity resulted from discrimination on the basis of Ms. Sedita's pregnancy and her gender and, therefore, was in violation of both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Pending before the Court is Defendant Lumpy LLC's Motion for Summary Judgment (Doc. 44).

I. BACKGROUND

In 1992, Majerle's, a restaurant and bar, opened in downtown Phoenix, Arizona. That same year, Majerle's hired Jeff Majerle to work the door. Subsequently, Mr. Majerle worked his way up to a management-level position and when Majerle's opened a location in Glendale, Arizona in 1999, Mr. Majerle became the general manager of the new location.

In 2004 the Glendale Majerle's location severed its connection to the downtown Majerle's and is now know as Chilly Bombers.

Defendant hired Ms. Sedita in 1999 as a hostess. After approximately three months of work, Ms. Sedita became a server and, shortly thereafter, a waitress. In February 2002 Ms. Sedita began working as a bartender and later that year assumed some management duties. Generally, she worked five shifts a week which consisted of four bartending shifts and a single shift, on Friday night, as the manager. Also, she assumed some management duties while bartending depending on whether Mr. Majerle was present, or if he needed assistance with certain tasks. At all times prior to April 2004, Ms. Sedita was subordinate to Mr. Majerle, who retained the authority to direct the operations of the business, including supervising Ms. Sedita. Mr. Majerle was responsible for the day-to-day operations of the business and did not generally consult with John Cook, the majority owner of Defendant, prior to making important business decisions.

As the principal manager, Mr. Majerle was a salaried employee and he received $1,540 every two weeks along with health insurance benefits. Mr. Majerle was also a partial owner of the business, holding approximately a seven percent interest. By contrast, Ms. Sedita was an hourly employee, however, she also received health benefits. Only management-level employees received health benefits from Defendant. Ms. Sedita was paid a nominal wage for her bartending time because most of her compensation came in the form of tips. On Friday evenings when Ms. Sedita was managing, she received increased compensation to offset the lack of tip income.

In January 2004, Ms. Sedita informed Mr. Majerle that she was pregnant and that she no longer wished to bartend. To accommodate Ms. Sedita, Mr. Majerle permitted Ms. Sedita to transition into a full time management position and he placed her on a wage of ten dollars per hour to defray lost tips. In early April 2004, Mr. Majerle resigned without notice and Ms. Sedita, as the only remaining manager, immediately assumed many of his responsibilities. Within days of Mr. Majerle's departure, Ms. Sedita approached Mr. Cook and requested an

increase in pay to reflect her additional job responsibilities. Mr. Cook offered to raise Ms. Sedita's hourly wage to twelve dollars per hour, and she accepted the offer.

On May 17, 2004, Defendant hired Patrick Zacek as the night time manager. Mr. Zacek's compensation was set at a rate of $1,000 every two weeks. As a salaried employee, Mr. Zacek did not have to punch a time clock and there are no records to show the hours that he actually worked. In the period following Mr. Zacek's hiring, Ms. Sedita managed the establishment during the daytime hours while Mr. Zacek managed the evening hours. Mr. Zacek also performed an entertainment program called "Name That Tune" on Tuesday and Saturday evenings. Mr. Zacek was compensated separately for this show at a rate of $300 per show. On these evenings, Mr. Cook would manage during the show and then either hand management duties back to Mr. Zacek following the show or continue to manage until closing time. As a salaried employee, Mr. Zacek received paid time off for sick days and vacation leave. During the time that Ms. Sedita and Mr. Zacek were concurrently employed by Defendant, Mr. Zacek took at least three vacation days.

Ms. Sedita voluntarily terminated her employment with Defendant in September 2004. From these facts, Plaintiff alleges that Defendant discriminated against Ms. Sedita by under-compensating her due to her gender and her pregnancy and, therefore, violated both the Equal Pay Act of 1963 ("EPA"), codified as Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Defendant denies these allegations and responds that any disparities in pay were the result of material differences in the job duties of Ms. Sedita, Mr. Majerle, and Mr. Zacek. Thus, Defendant contends that the pay rates were justified and were the result of legitimate business decision making, and were made without regard to Ms. Sedita's pregnancy or her gender. Finally, Defendant contends that the compensation and benefits paid to Ms. Sedita were in an amount equal to or greater than that paid to Mr. Zacek, and, thus, Ms. Sedita cannot claim that she has been unfairly compensated.

II. LEGAL STANDARDS AND ANALYSIS

A. Request to Strike or, Alternatively, Not Consider Defense Exhibit 7

Plaintiff argues that Defense Exhibit 7 should be stricken, or, in the alternative, not be given consideration because it lacks foundation and contains inadmissible hearsay. (Pl. EEOC's Resp. to Def.'s Mot. for Summ. J. ("Pl.'s Resp.") at 11 n.2.) "To be considered by the court, 'documents must be authenticated by and attached to an affidavit that meets the requirements of [Rule] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.'" *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir. 1989) (quoting *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir.1987)); Fed. R. Civ. P. 56(e); *see Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (holding that to comply with the foundation and authentication requirements of Rule 56, documents "are required to be authenticated by affidavits or declarations of persons with personal knowledge through whom they could be introduced at trial"). Accordingly, "[a] document which lacks a proper foundation to authenticate it cannot be used to support a motion for summary judgment." *Hal Roach Studios*, 896 F.2d at 1551.

Exhibit 7 consists of two brief documents purporting to be "Consolidated System Time Period Summar[ies]" which contain sales data from time periods relevant to this litigation. Assuming that the contents of these documents would otherwise be admissible, Defendant was required to submit an affidavit or declaration by some individual possessing personal knowledge of the notes, through whom the document could be properly introduced into evidence. Defendant did not submit the required affidavit or declaration, and therefore has failed to lay the foundation necessary to authenticate the document in the manner required. Exhibit 7 has not been authenticated and, accordingly, will not be considered by the Court. Additionally, all statements made in reference to, or reliance upon, Exhibit 7 will not influence the Court's decision.[1]

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[1]The Court will not address Plaintiff's argument that Exhibit 7 is inadmissible hearsay because the document has been stricken for lack of foundation.

B. Motion for Summary Judgment

Summary judgment is appropriately granted when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to show an absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57 (1986) (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment). In deciding a motion for summary judgment, the Court views the evidence of the non-movant in the light most favorable to that party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255.

1. The Equal Pay Act

The EPA states that:

> No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

29 U.S.C. § 206(d)(1). "In an Equal Pay Act case, the plaintiff has the burden of establishing a prima facie case of discrimination by showing that employees of the opposite sex were paid different wages for equal work." *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1073-74 (9th Cir. 1999). A plaintiff fulfills her burden of establishing that the two positions required "equal work" by demonstrating facts that support a conclusion that the jobs are "substantially equal." *Id.*; *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983). To satisfy the "substantially equal" analysis, "the plaintiff need not demonstrate that the jobs in question are identical." *Id.* at 1074.

In EPA cases, the Ninth Circuit uses a two-step "substantially equal" analysis. *Id.* First, the court inquires whether the two positions being compared "have a 'common core' of tasks, i.e. whether a significant portion of the two jobs is identical." *Id.* If the "plaintiff establishes such a 'common core of tasks,' the court must then determine whether any additional tasks, incumbent on one job but not the other, make the two jobs 'substantially different.'" *Id.*

In this case, Plaintiff alleges that Ms. Sedita was paid less than two male employees, Mr. Majerle and Mr. Zacek, for what Plaintiff believes was "substantially equal" work. The Court will make each comparison separately.

a. Jeff Majerle

In the months leading up to Mr. Majerle's departure, there is no question that his job responsibilities extended well beyond Ms. Sedita's duties. Thus, Plaintiff does not claim that Ms. Sedita was paid less for equal work while Mr. Majerle was working for Defendant. Rather, Plaintiff limits its argument to the time period directly following Mr. Majerle's resignation, when Ms. Sedita assumed additional job duties to compensate for the unexpected resignation of her former boss. Plaintiff believes that Ms. Sedita's job duties in April 2004 were "substantially equal" to Mr. Majerle's duties prior to his departure. This position, however, is unsupported by the facts and the Court concludes that viewing the evidence in the light most favorable to Plaintiff, no material issue of fact exists regarding the substantial equality of these two positions.

Ms. Sedita and Mr. Majerle, as manager and general manager respectively, had jobs that required them to perform a common core of tasks. They were both responsible for managing the day-to-day operations of the restaurant, employee scheduling, customer service, liquor ordering, vendor interaction, payroll issues, and other operational responsibilities. Thus, when comparing Ms. Sedita's duties in April 2004 to Mr. Majerle's duties as the general manager, Plaintiff has established that the two positions required a common core of tasks. Having established a common core of tasks, Plaintiff has the burden

of demonstrating that no additional duties, specific to one job and not the other, make these two positions substantially different.

Prior to Mr. Majerle's departure, he was responsible for the overall functioning of the business. In this capacity, Mr. Majerle was responsible for all staffing decisions, the overall economic success and financial management of the establishment, and all operational aspects of the business. According to Mr. Cook, when Mr. Majerle hired, fired, or disciplined an employee he would not consult with Mr. Cook. (Def.'s Separate Statement of Facts in Supp. of its Mot. for Summ. J. ("DSOF"), Ex. 5, Dep. of John Cook ("Cook Dep.") at 22:10-21.) Mr. Cook testified that Mr. Majerle "was running the whole restaurant" and that he was responsible for "making sure that financially [Defendant was] . . . keeping afloat." (DSOF, Cook Dep. at 79:5-15.)

Plaintiff's argument is premised on its belief that once Mr. Majerle left, someone must have been filling in for those duties and logically the only person who could have done that was Ms. Sedita. While this is one logical conclusion, it is not supported by the evidence, and it is not the only reasonable one. The evidence shows that in the power vacuum that ensued, Mr. Cook stepped in and took a more hands-on approach to the business. Critical evidence of this is the fact that Mr. Cook hired Mr. Zacek on April 17, 2004, approximately two weeks after Mr. Majerle quit. If Ms. Sedita had assumed the role of general manager, then likely she would have been involved in that hiring decision; she was not. Furthermore, the evidence shows that Mr. Cook took an active roll in the management of the business following Mr. Majerle's departure. Uncontroverted evidence shows that Mr. Cook managed the restaurant at a minimum for two nights a week while Mr. Zacek performed his "name that tune" show. This lies in sharp contrast to his position prior to April 2004, in which he performed few duties related to the operation of the business. Additionally, Ms. Sedita has not alleged that she had the authority to hire or fire employees. Plaintiff has only alleged that Ms. Sedita "would provide input on personnel decisions like hiring and firing" while Mr. Majerle was still employed by Defendant. (Pl.'s Statement of Facts in Opp'n to Def.'s Mot. for Summ. J. ("PSOF") ¶ 28.) Providing input for personnel decisions and actually making

those decisions are disparate levels of responsibility. Moreover, Plaintiff has not come forth with any evidence to show that she had any authority to make personnel decisions in the time period relevant to this EPA claim: after Mr. Majerle's departure.

The Court concludes that Mr. Majerle's overall responsibility for Defendant's business distinguishes his position from the job duties performed by Ms. Sedita, making those two positions "substantially different." Thus, Plaintiff has failed to generate a material issue of fact regarding the substantial equality of Ms. Sedita's work beginning in April 2004 as compared to Mr. Majerle's work prior to his resignation.

b. Patrick Zacek

Mr. Zacek was hired by Defendant to manage the evening shift while Ms. Sedita retained primary responsibility for managing the daytime shift. First, the Court examines whether these two positions involved a common core of tasks. Defendant has not taken the position that these two jobs require a dissimilar core of tasks, thus, the Court moves to the second step of the analysis. Defendant's argument seeks to demonstrate that Mr. Zacek's position requires additional effort and, therefore, does not qualify as "equal work." As described by Defendant, Mr. Zacek's position required additional effort in terms of food, customers, alcohol, and money, and also dictated that Mr. Zacek work longer hours. Plaintiff responds that Ms. Sedita had substantial job duties during the day, regardless of whether there was an increased amount of business in the evenings.

To support its claim that Mr. Zacek was responsible for substantially greater sales of alcohol and food, and that he was responsible for handling larger sums of money, Defendant relies on Exhibit 7 to its Statement of Facts. The Court, however, has determined that Exhibit 7 may not be considered, thus, Defendant must use other evidence to support this contention. Defendant has offered additional testimony to support its position that the volume of business was higher in the evening, but the Court cannot make a determination, based upon the evidence before it, concerning the extent of this increase in business. As additional evidence of increased effort, Defendant contends that Mr. Zacek worked longer hours and therefore merited higher pay. This position has been challenged by Plaintiff

through the introduction of testimony concerning Mr. Zacek's participation in "Name That Tune," his vacation time and other paid time off, and the absence of any records indicating the time that he actually worked. Thus, Plaintiff has offered evidence that tends to controvert Defendant's claim that Mr. Zacek consistently worked hours beyond those worked by Ms. Sedita. Based upon the evidence before it, the Court cannot accurately determine the hours worked by Mr. Zacek, and Plaintiff has successfully created a fact question as to whether he really did work in excess of fifty hours per week as claimed by Defendant.

Plaintiff disputes whether the evening manager actually expended additional effort, and further contends that Ms. Sedita had substantial duties during the day that counterbalanced any increase in business experienced in the evenings. To support this, Plaintiff has offered the testimony of Kathy Ruiz, Defendant's former Business Manager, who has stated that Ms. Sedita's "duties included opening the restaurant, banking, payroll, liquor ordering, liquor payments, training, dealing with vendors, and answering several business phone calls. These are very critical and significant responsibilities in the restaurant business that Patrick Zacek just did not have." (PSOF, Ex. 7, Decl. of Kathy Ruiz ¶ 9.)

Resolving all of the factual disputes in favor of Plaintiff, the Court concludes that there exists a genuine issue of material fact as to whether Ms. Sedita and Mr. Zacek performed jobs that were substantially equal. Even assuming that the evening manager was responsible for additional business volume, the Court cannot say that this increased business was so substantial that it completely outweighs the additional tasks that Plaintiff contends were part of Ms. Sedita's daytime responsibilities. The balancing of the daytime managerial duties versus the evening managerial duties to determine whether they constitute "equal work" is properly reserved for a jury where, as is the case here, Plaintiff has come forward with evidence that would permit a reasonable fact finder to conclude that those positions were "substantially equal."[2]

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[2]Defendant offers a second argument directed at Plaintiff's EPA claim as it pertains to Ms. Sedita and Mr. Zacek. Although Ms. Sedita was paid a lower wage than Mr. Zacek,

2. Title VII

Title VII of the Civil Rights Act of 1964 states that "[it] shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "The term[] 'because of sex'. . . include[s] . . . on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes." *Id.* at § 2000e(k). Generally, where a plaintiff alleges Title VII discrimination the court applies the *McDonnell Douglas* burden shifting analysis to determine whether the plaintiff has made out a prima facie case of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). However, "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Id.* (holding that "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite

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Defendant argues that Ms. Sedita actually receive greater overall compensation, in the form of wages and benefits, than those paid to Mr. Zacek. While this argument may be legally supported, it is significantly undermined by the facts offered by Plaintiff. Defendant argues that it paid $360 a month in heath benefits on Ms. Sedita's behalf and that no such benefits were paid for Mr. Zacek. While this may be true, Plaintiff has offered testimony in support of its position that all management level employees were offered health benefits, and that Mr. Zacek declined these benefits because he was insured through a separate source.

Notwithstanding the issue of health benefits, Plaintiff has introduced other facts that, if believed, would establish additional compensation for Mr. Zacek. First, Mr. Zacek was a salaried employee and, as such, he received paid time off and paid sick leave. Plaintiff alleges that Mr. Zacek took advantage of this leave on more than one occasion. Next, Plaintiff alleges that Mr. Zacek received tip income in addition to his salary. Finally, it is impossible for this court to quantify Mr. Zacek's hourly rate to make an effective comparison with the hourly rate earned by Ms. Sedita because there are no records of Mr. Zacek's hours, and the hours suggested by Defendant have been controverted by Plaintiff. On summary judgment, the Court must take the non-moving party's facts as true, and, therefore, the issue of whether Ms. Sedita was actually compensated at a rate lower than Mr. Zacek is properly determined at trial.

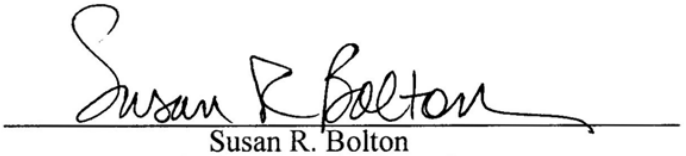
the unavailability of direct evidence.'" (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979))).

In this case, Plaintiff has offered direct evidence of discrimination in the form of testimony that Mr. Cook told Ms. Sedita that she could renegotiate her salary after her pregnancy. (*See* PSOF ¶¶ 59-62.) If believed, this demonstrates that Defendant made assumptions about a pregnant employee's ability to perform her job based upon stereotypical judgments about pregnancy. Such considerations cannot form a legitimate basis for an employment decision. The Court must accept Plaintiff's evidence as true on summary judgment, and therefore regards as fact that Mr. Cook made the statements alleged.

Defendant offers little argument concerning Plaintiff's Title VII claims. In Defendant's Motion it argues that Plaintiff's Title VII claim must fail because she cannot establish that she suffered any adverse employment action. No legal argument is offered by Defendant to support the position that discriminatory under-compensation is not an adverse employment action. Plaintiff has alleged that Ms. Sedita was compensated at a rate below that afforded to her male counterparts. This alleged discriminatory compensation constitutes an adverse employment action. Defendant's Reply limits its Title VII analysis to three sentences and fails to respond to the argument offered in Plaintiff's Response. Defendant's single position is without merit and summary judgment is denied on Plaintiff's Title VII claims.

IT IS ORDERED granting in part and denying in part Defendant's Motion for Summary Judgment (Doc. 44). Summary judgment is granted on Plaintiff's Equal Pay Act claim as it relates to Mr. Majerle only. Summary judgment is denied on Plaintiff's Equal Pay Act claim as it relates to Patrick Zacek and is denied on Plaintiff's Title VII claim.

DATED this 1st day of February, 2008.



Susan R. Bolton
United States District Judge