

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KATHERINE GOMEZ,
Plaintiff,

v.

EVERGREEN SCHOOL DISTRICT,
Defendant.

Case No. 20-cv-3008 NC

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AFTER BENCH TRIAL**

I. Introduction

Plaintiff Katherine Gomez was the first woman Superintendent of Defendant Evergreen School District in San Jose, California. In this case, Gomez asserts equal pay and employment discrimination claims against the District. At a bench trial, Gomez presented persuasive evidence that the District discriminated against her by compensating her less than her immediate male predecessor, Clifton Black, on the basis of her sex. The District continued this pay disparity, and retaliated against Gomez, when she raised the issue directly with the District's Board. The Court now makes its Findings of Fact and Conclusions of Law under Fed. R. Civ. P. 52(a) and awards compensatory damages of \$2,027,653.46 to Gomez under federal and state law to remedy the District's unequal pay and discriminatory actions.

1 A. Plaintiff's Claims

2 Gomez filed this case on May 1, 2020, after retiring as the District's Superintendent
3 in January 2019. ECF 1, Complaint. The claims tried are summarized here.

4 1. Equal Pay Act, 29 U.S.C. § 206(d)(1)

5 The Federal Equal Pay Act provides:

6 No employer ... shall discriminate ... between employees on the
7 basis of sex by paying wages to employees ... at a rate less than
8 the rate at which he pays wages to employees of the opposite sex
... for equal work on jobs the performance of which requires
equal skill, effort, and responsibility, and which are performed
under similar working conditions.

9 29 U.S.C. § 206(d)(1). "The Equal Pay Act creates a type of strict liability; no intent to
10 discriminate need be shown." *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir.
11 1986) (internal quotation and citation omitted). To establish a claim under the Act, the
12 "plaintiff has the burden of establishing a prima facie case of discrimination by showing
13 that employees of the opposite sex were paid different wages for equal work." *Stanley v.*
14 *Univ. of Southern Cal.*, 178 F.3d 1069, 1073–74 (9th Cir. 1999). The plaintiff bears the
15 burden of showing the jobs being compared are "substantially equal"; the jobs, however,
16 need not be identical. *Id.* at 1074 (internal citations omitted).

17 If the plaintiff establishes a prima facie case, the burden of persuasion shifts to the
18 defendant to prove by a preponderance of the evidence that the disparity in pay is justified
19 under one of the Equal Pay Act's four affirmative defenses. *Hein v. Oregon Coll. of*
20 *Educ.*, 718 F.2d 910, 913 (9th Cir. 1983). A pay disparity is justified only if it is made
21 pursuant to "(i) a seniority system; (ii) a merit system; (iii) a system which measures
22 earnings by quantity or quality of production; or (iv) a differential based on any other
23 factor other than sex." 29 U.S.C. § 206(d)(1). The only justification relevant here is "a
24 differential based on any factor other than sex."

25 Here, it is undisputed that Gomez can establish a prima facie case and that the
26 District articulates sixteen reasons, allegedly based on factors other than sex, to justify the
27 pay differential. These, Defendant asserts, form a defense to the EPA:

28 1. The fiscal environment during Black's tenure allowed for more salary increases and

- 1 higher salaries in general, District-wide.
- 2 2. During Black's tenure, the District was not experiencing declining enrollment,
- 3 while the District was experiencing declining enrollment during Plaintiff's tenure.
- 4 3. During Black's tenure, the District was not funded through a Local Control Funding
- 5 Formula (LCFF).
- 6 4. Black maintained a positive and open relationship with the Board and the
- 7 bargaining units during his tenure, while Plaintiff did not.
- 8 5. Plaintiff negotiated a lower starting salary because she prioritized getting a
- 9 superintendent position more than a high salary and because her total compensation
- 10 was significantly increased due to her longevity pay.
- 11 6. During Plaintiff's tenure, District leadership repeatedly failed to reach an agreement
- 12 with the certificated and classified bargaining units, making it politically and
- 13 fiscally unreasonable for the Board to raise Plaintiff's salary.
- 14 7. During Plaintiff's tenure, the Board prioritized the reintroduction of a variety of
- 15 programs that had been cut due to insufficient funding, such as GATE, libraries,
- 16 assuring student safety through reinstatement of bus routes, reinstatement of middle
- 17 school assistant principals and counselors, arts programs, and vocational programs.
- 18 8. During Plaintiff's tenure, some Board members felt Clif Black's salary was too high
- 19 in the first place, so it did not make sense to pay Plaintiff the same inflated salary.
- 20 9. Plaintiff's performance did not warrant the same salary that was paid to Clif Black.
- 21 10. Plaintiff's handling of the incidents related to Craig Chandler, her subsequent
- 22 personnel decisions related to Lyn Vijayendran and Carole Schmitt and her lack of
- 23 transparency with the Board regarding those incidents/decisions.
- 24 11. Plaintiff did not have any experience working at other school districts, while Clif
- 25 Black did.
- 26 12. The union held a vote of no confidence in Plaintiff during her tenure as
- 27 Superintendent.
- 28 13. Plaintiff began taking steps to close two schools without receiving approval from

1 the Board.

2 14. During Plaintiff's tenure, she repeatedly agreed to the terms of her proposed
3 employment agreement, including compensation.

4 15. The Board was very concerned about raising Plaintiff's pay shortly before Plaintiff
5 was planning to retire because CalSTRS made it clear that doing so would likely
6 subject the District to an audit and potential liability for spiking.

7 16. There were constantly new board members leaving and joining the board. Despite
8 the changes in board members, the board consistently determined that the factors
9 identified herein made it unreasonable to raise Plaintiff's salary more than it did.

10 2. Title VII

11 Title VII makes it unlawful for an employer "to discriminate against any individual
12 with respect to his compensation, terms, conditions, or privileges of employment, because
13 of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a).
14 It is therefore broader than the Federal Equal Pay Act. Nonetheless, the elements of a
15 denial of equal pay are the same under both Title VII and the Equal Pay Act. *See Roberts*
16 *v. W. Airlines*, 425 F. Supp. 416, 428 n.23 (N.D. Cal. 1976).

17 Title VII, unlike the Federal Equal Pay Act, requires proof of discriminatory intent.
18 *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) (stating that "the
19 EPA and Title VII are not the same," in part because "the EPA does not require . . . proof
20 of intentional discrimination"), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L.
21 No. 111-2, 123 Stat. 5 (2009); *Maxwell*, 803 F.2d at 446 (observing the EPA "creates a
22 type of strict liability" and "no intent to discriminate need be shown").

23 The analysis of a disparate treatment claim under Title VII is governed by
24 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under the *McDonnell*
25 *Douglas* burden-shifting framework, a plaintiff must first establish a prima facie case of
26 discrimination, then the burden shifts to the defendant to articulate a legitimate
27 nondiscriminatory reason for its employment decision. *Llamas v. Butte Cmty. Coll. Dist.*,
28 238 F.3d 1123, 1126 (9th Cir. 2001). In order to prevail, the Plaintiff must then show that

the employer's purported reason for the adverse employment action is merely a pretext for a discriminatory motive. *Id.*

3. California Denial of Equal Pay, Cal. Labor Code § 1197.5

To succeed on this claim, Plaintiff must prove each of the following:

(i) That Plaintiff was paid less than the rate paid to a person of the opposite sex working for the Evergreen School District; (ii) That Plaintiff was performing substantially similar work as the other person, considering the overall combination of skill, effort, and responsibility required; and (iii) That Plaintiff was working under similar working conditions as the other person. Thereafter, the burden shifts to Defendant to identify "bona fide factors other than sex."

This [bona fide factor other than sex] shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.

4. California's Fair Employment and Housing Act (FEHA), Cal. Gov. Code § 12940(a)

In order to establish a prima facie case of gender discrimination under FEHA, "the plaintiff must provide evidence that: (1) she was a member of a protected class, (2) she was qualified for the position she sought or was performing competently in the position she held, (3) she suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive, e.g., similarly-situated individuals outside her protected class were treated more favorably." *Day v. Sears Holdings Corp.*, 930 F. Supp. 2d 1146, 1161 (C.D. Cal. 2013).

Only after the plaintiff establishes a prima facie case of gender discrimination under FEHA does the burden shift to the employer to "articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct." *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003), *as amended*, (Jan. 2, 2004). An "employer 'need not persuade the court that it was actually motivated by the proffered [legitimate] reason.'" *Anderson v.*

Valspar Corp., No. 10-cv-03182-GEB, 2013 WL 552001, at *8 (E.D. Cal. Feb. 12, 2013) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993)). Instead, the employer need only articulate the reasons for the adverse action. *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)).

II. Findings of Fact

The Court finds these facts from the bench trial:

1. Plaintiff Katherine Gomez served as Superintendent of Evergreen School District ("District") from 2011 to 2019. Gomez was the first female superintendent in District history. Her immediate predecessor was Clifton Black from 2005-2011. Black is male.
2. Gomez had over thirty years' experience, all at Evergreen School District, as a teacher, English Language Development specialist, assistant principal, principal, director, assistant superintendent, and finally superintendent. Black had similar work experience. **Neither of them had been a superintendent in any district prior to their appointment at Evergreen.**
3. Black's initial base salary on July 1, 2005, was \$180,250. Ex. 223. But on March 14, 2006, the District gave him a 3% retroactive increase to his hire date because the union received a 3% increase. Hill, V2, 374:7-376:16, Exs. 2-28, 57; Black, V3, 560:3-8. Including auto, life, and annuity benefits, his starting compensation was \$191,194.88. *Id.* Adjusted for inflation, his salary would have been \$222,474.21 in 2011, when Gomez was hired. Ex. 2-27.
4. Black also received various perks associated with his role that Gomez did not receive. These included an auto allowance and auto maintenance cost. Ex. 2-5.
5. It is undisputed that Black's role and Gomez's role required substantially equal and similar skills, responsibility, effort, and were performed in similar working conditions.

6. Gomez's base annual salary upon becoming superintendent in 2011 was \$180,000. Ex. 12. This was a salary she believed was reasonable at the time. Gomez, V2, 441-442. From 2011-2014, the District paid her \$180,000 annually. Ex. 2-26(g). Effective June, 2014, she received a 3.25% raise to \$185,850. Effective June 2015, she received a raise of 3.0% to \$191,426. Gomez received no further raises. Ex 2-9 at 9.
7. Gomez's first contract was from July 1, 2011, to August 8, 2012. Her second contract was from August 9, 2012, to June 11, 2014. Her third and final contract was from June 12, 2014 and rolled over to her retirement in January 2019. ECF 263 at 81.
8. In 2013-14, Gomez did not seek a salary increase after difficult union negotiations. Gomez, V2, 391:15-392:16.
9. The Evergreen School Board ("Board") was in charge of determining superintendent compensation and evaluating superintendent performance.
10. Over the course of Gomez's tenure, the Board's membership configuration changed several times. Jim Zito was on the Board during her entire tenure.
11. During the time that she was superintendent, the Board never provided Gomez with job or performance-related reasons for differentials in pay between her and Black. Gomez, V2, 355:5-14, Zito, V1, 32:24-33:2; Fischer, V1, 143:25-144:2; Alvarez, V2, 236:20-22.
12. During both Gomez's and Black's tenure, the District faced significant fiscal challenges, including declining student enrollment. Ex. 229 (2017 letter re: declining enrollment); Ex. 232 (2012 letters showing revenues down).
13. Gomez was evaluated by all members of the Board yearly during her tenure with the following exceptions: she was not evaluated in 2013-2014, nor her last year 2018-2019. In addition, she was evaluated twice in 2017-2018.
14. She was evaluated by each board member in various categories on a numeric scale of 1-5, with 5 being the strongest. Each member also provided

1 written commentary.

2 15. Gomez's ratings were initially quite strong. In 2011-2012, her first
3 evaluation, she received all 4s and 5s from all Board members. Ex. 13. In
4 2012-13, her performance evaluation reflected an average of 4 in all
5 categories except for fiscal health, where it was 3.6. Ex. 18-1. In the 2014-
6 15 evaluation, Alvarez and Board members Vince Songcayawon and Sylvia
7 Arenas rated Gomez all 4s and 5s. Alvarez, V2, 244:1-17; Ex 24.

8 16. In 2016, Gomez began raising concerns about equal pay and her ratings
9 declined.

10 17. At the beginning of her Superintendent tenure, a district teacher, Chandler,
11 molested several students. Gomez took reasonable steps to identify and
12 remedy outdated student safety policies in the District.

13 18. Gomez was never found to be at fault for her handling of the Chandler affair
14 by the Board, and the Board never gave that as a reason for her disparate
15 salary, or lack of salary increase. Alvarez, V2, 243:2-10; Fischer, V1, 146:2-
16 147:3.

17 19. In 2013, after a contentious negotiation, the Teachers' Association took a
18 vote of no confidence in Gomez. Wheatley, V2 328: 12-13. Wheatley, then
19 head of the district Teachers' Association, testified that the Union eventually
20 moved on from the incident. *Id.* at 330.

21 20. After the vote of No Confidence, Jim Zito read a statement in support of
22 Gomez. During Gomez's tenure, the Board never cited difficult relations
23 with the union as a reason for unequal pay.

24 21. In 2015, at Gomez's request, the District conducted a study comparing the
25 salary and benefits of positions in the Evergreen School District to those in
26 other comparable districts. The study was released on July 13, 2015.

27 22. The study was prepared by School Services of California, a well-respected
28 consulting firm. The study showed Evergreen School District ranked last on

Superintendent compensation compared to all six comparable districts in the study. Trial Ex. 23. It is disputed to what extent these numbers included longevity pay and other benefits.

23. In 2016, Gomez made a proposal to the Board regarding her own salary as well as that of Assistant Superintendents Nellie Yang and Dan Degura. Ex. 31.

24. On June 14, 2016, Gomez met with Evergreen School District Board of Trustees members to discuss her salary proposal, and during this meeting, she reminded them of the compensation study and the fact that she was underpaid in her position. ECF 1 and 14, ¶ 28.

25. On June 27, 2016, Gomez again brought up her unequal pay compared to Black during negotiations with the Board. *Id.* ¶¶ 29, 30.

26. In 2016, Zito and Songcayawon, another member of the Board, volunteered to be on an ad hoc subcommittee of the Board regarding Gomez's compensation in order to make recommendations to the rest of the Board. Zito, V1, 58:4-10, 59:7-9; Mace, V3, 649:6-650:3.

27. Gomez met with the ad hoc committee to discuss her salary proposal. On June 27, 2016, she sent a memo to Zito and Songcayawon with a comparison chart of her and Black's compensation.

28. The ad hoc committee asked Gomez for even more comparators, which Yang and Gomez provided. Their pay was still lower than similarly situated administrators at other districts. Yang, V1, 183:16-184:19; Gomez, V2, 397:14-24.

29. Zito and Songcayawon recognized this. Yang, V1, 185:20-25. They made recommendations to increase Gomez's pay to a lesser extent than she was seeking. Ex 31-2.

30. On October 13, 2016, Gomez reported in a closed session Board meeting that the Board was paying her unequally. Gomez recommended a transparent

1 salary scale to alleviate the inequity.

2 31. There was conflicting testimony about what occurred in a closed session
3 Board Meeting that same day. The Court finds the testimony of Sylvia
4 Alvarez more credible than that of Jim Zito and Bonnie Mace. Alvarez and
5 Gomez recount as follows.

6 32. After Gomez had left, Zito stated that the reason “the two female Board
7 members want to increase Gomez’s pay was because they had the same thing
8 between their legs.” Alvarez, V2, 248: 5-11.

9 33. At that point, Alvarez and Arenas left the room. Bonnie Mace and Zito
10 remained in the room.

11 34. When Alvarez and Arenas came back in the room, Zito was sitting with his
12 head down. Bonnie Mace had her hand over Zito’s hand. Mace indicated
13 that Zito was sorry and that she would conduct the negotiation thereafter. *Id.*
14 at 21-25.

15 35. Shortly thereafter, Alvarez told Gomez about Zito’s comment. Gomez, V2,
16 398:9-19.

17 36. This was not the only instance of Zito treating women disrespectfully. While
18 some witnesses testified that they had not observed Zito behave in a sexist
19 manner, Brian Wheatley, former head of the Evergreen Student Association,
20 testified that Zito’s behavior towards women was a “constant problem”
21 which he heard about on multiple occasions. Wheatley, V2, 317-318.

22 37. The Court finds Wheatley’s testimony in this regard credible because of the
23 consistency with which he met with school staff and heard their concerns.

24 38. At the same 2016 meeting, the Board orally agreed to provide Gomez a 4.5%
25 increase to July 1, 2016, after negotiations were over with the union.
26 Alvarez, V2, 398-399. This agreement was never formally reduced to
27 writing or formally approved by the Board. Zito, V1, 57:10-58:3; Gomez,
28 V2, 340:6-341:9.

39. In June 2017, a new Board reneged on that agreement and instead proposed a 2% retroactive increase to July 1, 2016. Alvarez, V2, 399: 2-4. Gomez did not accept.

40. Mace and Zito testified that there was a policy of giving Gomez the same raises as the bargaining units. However, there was no clause to that effect in any of her contracts.

41. In fact, as depicted in the chart below, Gomez's raises were rarely consistent with raises given to bargaining units.

	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
ETA Increases	0	0	3%	3.25%	4%	2%	0.50%	1.50%	2.50%
CSEA Increases	0	0	3%	3.25%	4%	2%	0.50%	1.50%	2.50%
Management Increases	0	0	3%	3.25%	3%	2%	0.50%	1.50%	2.50%
Gomez Increases	0	0	0%	3.25%	0%	3%	0%	0%	0%

42. According to Mace, there was some concern among some members of the Board about the "optics" of giving Gomez a raise given the District's fiscal situation. Ex 31.

43. Mace further testified that the District was advised to be careful of salary increases and that the Board was concerned that significantly raising Gomez's salary shortly before her retirement could subject the district to liability for pension spiking.

44. After a new Board reneged on the oral agreement in 2017, Gomez tried without success to negotiate a salary.

45. During these negotiations, the District agreed to provide a 2% increase retroactive to July 2016 and a 2.5% increase retroactive to July 2017, but only if Gomez agreed to modify her three-year contract to only one year,

1 which then would be renewed only at the Board's discretion based on a
2 satisfactory performance review. Gomez declined the offer.

3 46. On September 7, 2017, Gomez's representative advised the District's
4 attorney that she would be filing a Department of Fair Employment and
5 Housing (DFEH) complaint regarding the unequal pay and requested that
6 attorney instruct the District not to retaliate.

7 47. On December 21, 2017, three and a half months after she informed the Board
8 of her intent to file a DFEH Complaint, it wrote her an unwarranted negative
9 mid-year performance evaluation that evaluated based on previous year goals
10 as opposed to the ones currently in effect. Ex. 40.

11 48. In 2017-18, Gomez also received an end of year review. This was written by
12 Zito in his capacity as Board president but was issued on behalf of the Board
13 and was signed by other Board members. It was a different format than the
14 yearly evaluations Gomez had received. *Id.* It contained some facts that
15 were false and misstated Gomez's record. Ex. 48; Gomez, V2, 405:10-417:8,
16 *see* 48-13 and 48-14 (dual immersion proposed), 48-23 and 48-26 (facility
17 master plan presented), 48-45 and 48-49 (facility use recommendations
18 made), 48-59 and 48-60 (proposals to increase revenue made, including
19 parcel tax.).

20 49. Comparing the given context and content of that review, the Court concludes
21 that that review was a punitive and discriminatory response to Gomez's
22 complaints about unequal pay.

23 50. On June 15, 2017, Gomez wrote to the Board that she would accept its one-
24 year contract in exchange for an increase to \$200,000 retroactive to 2016 and
25 \$215,000 in 2018. Gomez, V2, 341:10-342:14; Ex. 58.

26 51. As a result of the unequal pay and discrimination, Gomez has suffered
27 physical and emotional distress in the form of significant weight loss and
28 other physical symptoms. This distress led Gomez to retire earlier than she

otherwise would have. Gomez, V2, 435-36

52. From 2013 to 2019, Yang provided a positive certification that the District would meet its financial obligations. Yang, V1, 187:23-189:8; Ex. 206, The County approved these certifications. The District admits that its budget increased from 2009 to 2018. ECF 1 and 14, ¶ 39.

53. A Superintendent salary of \$180,000 would be like 18 cents to \$100, a “very small” percentage of the \$100 million budget. Yang, V1, 172:9-17. Fischer testified that the Superintendent salary was “very small” in the budget, and “to think you can save money in that position, is not valid,” and a 10% increase would be “peanuts” and not affect the District. Fischer, V1, 149:2-22.

54. In July 2020, the Board hired new Superintendent Emy Flores at a base salary of \$256,957, the “going rate,” despite the deficit and declining enrollment. Zito, V1, 33:3-17, 33:22-34:19, 35:6-16.

III. Conclusions of Law

A. Equal Pay Act

Gomez has established a prima facie case under the Federal Equal Pay Act.

Because Plaintiff has established her prima facie case, the burden of persuasion shifts to Defendant to prove by a preponderance of the evidence that the disparity in pay is justified under one of the EPA’s four affirmative defenses. *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983). Under the EPA, a pay disparity is justified only if it is made pursuant to “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1).

The District offered no evidence or argument that the disparities in Gomez’s pay were due to a system that relied on seniority or that measured earnings by quantity or quality of production, nor by a merit system. Instead, as alluded to above, the District puts forth sixteen reasons allegedly based on factors other than sex. At trial, the District’s

case focused on (1) the District's fiscal condition during Gomez's tenure; (2) alleged performance issues; and (3) concerns about "pension spiking" immediately prior to Gomez's retirement. The Court will take each of those in turn.

The District reminds the Court that this is not the typical Equal Pay Act case because Gomez and Black were hired at different times and in somewhat difficult circumstances. But the statute does not require that the comparators be working at the same time. The question is whether the reasons given by Defendant for the unequal pay are pretextual or not job related. *See Simmons v. New Pub. Sch. Dist. No. Eight*, 251 F.3d 1210, 1217 (8th Cir. 2001) (male paid more and hired six years after female was a violation of the EPA).

The District emphasized that there were fiscal difficulties during Gomez's tenure that did not exist during Black's. The Court finds this reason to be both pretextual and not job-related. *Rizo v. Yovino*, 950 F.3d 1217, 1224–27 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 189 (2020). The strongest evidence of pretext came in the testimony of Bonnie Mace. While Mace has always been concerned about finance, there is a marked difference, in tone and content, between how she spoke about fiscal issues in her evaluations during Gomez's tenure and how she spoke about them in her declarations prepared in anticipation of litigation. Mace, V4, 684-694.

Mace also testified that the Board was told that they should be careful about raising administrator salaries. *Id.* at 644:4-10. With regard to the fiscal concerns the District was facing, the Court credits the testimony of Nellie Yang, the person most familiar with the District's budget, who testified that limiting the salary of a single district official would have a minimal impact on the overall budget and would not be an efficient way to address fiscal concerns. Yang, V1 at 189:10-20, 192:1-5.

With respect to Gomez's alleged performance issues, the Court concludes that the issues cited by Evergreen are pretextual because Gomez was never told during her tenure that her performance was the reason for disparate pay. Additionally, the Board generally, and Zito specifically, became significantly more critical of Gomez's performance once

1 they became aware of her equal pay concerns and DFEH complaint.

2 The Court is similarly unpersuaded by the particular examples of allegedly subpar
3 performance emphasized by the District at trial. First was the Chandler incident. The
4 record indicates that Gomez handled that case and its aftermath reasonably, with an eye
5 towards the safety and well-being of students and staff, and an understanding of the need
6 to update district policies where they had become outdated. To be sure, reasonable minds
7 could differ about how to handle this situation, but there was no indication at the time that
8 this was the reason for the unequal pay. In fact, Gomez received high marks for her
9 handling of the incident on her yearly evaluation at the time. Alvarez, V2, 243:2-10;
10 Fischer, V1, 146:2-147:3. Gomez also instituted mandatory reporting training for the first
11 time. Zito, V1, 108:4-22; Gomez, V2, 359:25-360:9; Alvarez, V2, 243:6-25.

12 The other alleged performance issue raised at trial was Gomez's handling of
13 possible school closures. Specifically, Mace and Zito testified that she spoke to the
14 community about the potential closure of the Dove Hill and Laurelwood schools without
15 Board approval. However, the record indicates that she sent an email to the Board
16 informing them of her intent to discuss school closure and soliciting concerns but received
17 no responses. Alvarez, V2, 261:22-262:4, Gomez, V2, 337: 11-24. More to the point,
18 there is no evidence from during Gomez's tenure that this contributed to the Board's
19 compensation decisions.

20 A further rationale emphasized by the District at trial was "pension-spiking."
21 Pension spiking is a practice of giving an employee a significant raise shortly before
22 retirement so as to inflate the amount of pension that employee receives. Mace and Welch
23 both testified that the District had concerns about this practice. Welch, V3, 552: 5-20; V3
24 656:12-657:10.

25 The Court notes that even if spiking was a legitimate concern articulated by the
26 Board at the end of Gomez's tenure, that concern would only, at best, account for the
27 District's decisions during the very end of her tenure. What's more, spiking is not a
28 defense to unequal pay, and it stands to reason that the District would not need a last-

minute increase if it had been paying Gomez equally throughout her tenure. Even with respect to her final year, the Court is unpersuaded that a genuine concern about spiking drove the Board's salary decision. More likely from the evidence is that the Board refused to raise her salary following her complaints about pay.

Finally, throughout the litigation, the District has evinced particular concern for "optics." Various Board members spoke of community pushback if the superintendent were to receive a raise at a time when the District was facing community criticism. Mace, V2, 592:12-593:7. There was also a need to be mindful of an actual or perceived gap between what administrator and teacher pay. Mace, V3, 627-628. To be sure, a Board must be mindful of public perception of its decision-making. But, to state the obvious, poor "optics" are not a job-related rationale and do not form a defense to an Equal Pay Act claim. Therefore, the Court is unpersuaded that any of the "Sixteen Reasons" that the District puts forward rebut the prima facie case, either individually or taken as a whole.

Assuming, however, that Defendant were able to rebut the prima facie case, the burden shifts back to Plaintiff to show that the reasons given were pretextual. Plaintiff can show pretext in two ways: (1) "indirectly by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable," or (2) directly, "by persuading the court that a discriminatory reason more likely motivated the employer." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (internal citations omitted); *see also Mayes v. Kaiser Found. Hosps.*, 2014 U.S. Dist. LEXIS 76297, 2014, at *11 (E.D. Cal. Jun. 2, 2014).

Here, the Court finds pretext in each of those two ways. First, the Court finds pretext in the differences between the way that Gomez's performance was spoken about by members of the Board during her tenure as superintendent versus the rationales proffered by the District during the trial process. Second, the Court is persuaded that discrimination directly pervaded aspects of Board decision-making. While the entire Board might not have shared the discriminatory intent displayed by Zito in 2013, the entire Board signed off on and ratified the false and unwarranted evaluations in 2017-2018.

To be clear about the parameters of this decision, it was not a violation of the Equal Pay Act to give Gomez an initial salary of \$180,000 because, correctly or not, she agreed that that payment was reasonable. Nor will the Court hold the District responsible for the Gomez' choice to voluntarily forgo an offered raise in 2013-2014. But, particularly once the District became aware of the compensation study in 2015, the Board consistently took steps to deny her raises equal to that of her predecessor even when others were getting them at the same time. For the years following 2015, Plaintiff has carried her burden to show that the District and the Board violated the Equal Pay Act.

B. Denial of Equal Pay Under California Law

For the same reasons discussed above, the District has failed to show that the pay disparity between Gomez and her predecessor was justified by a job-related "bona fide reason other than sex." Even if the District has articulated job-related reasons for the disparity, Plaintiff has shown that they were pretextual because they were not raised during Gomez's tenure.

C. Title VII

Title VII, unlike the Equal Pay Act, requires proof of discriminatory intent. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) (stating that "the EPA and Title VII are not the same," in part because "the EPA does not require . . . proof of intentional discrimination"), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

The District argues that Plaintiff failed to show the requisite discriminatory intent on the part of the five-person Board. It notes that a total of ten people made decisions about Gomez's compensation: Jim Zito, Jeff Fischer, Carolyn Clark, Sylvia Alvarez, Vince Songcayawon, Sylvia Arenas, Balaji Venketramen, Leila Welch, Bonnie Mace or Christopher Corpus and that Plaintiff only showed animus on the part of Zito. Further, each Board member testified that no one controlled their vote and they independently analyzed Plaintiff's performance. ECF 93 at 15. For example, when the Board reneged on the oral promise to raise Gomez's salary, that was a decision made by the entire Board,

1 voting as individuals.

2 In response, Plaintiff cites *Poland v. Chertoff*, 494 F3d 1174, 1182-1184 (9th Cir
3 2007) for the proposition that one decision-maker's animus may be attributed to other
4 decision makers. *See also*, California Civil Jury Instruction 2511 (2020) (cited for similar
5 proposition). However, neither *Chertoff* nor CACI 2511 is directly on point because each
6 discusses when the decisions of a supervisor may be attributed to a supervisee. But the
7 record indicates that, although he had a strong personality, Zito was not a supervisor, but a
8 co-equal member of the Board. Therefore, the question becomes whether Zito made any
9 animus-driven decisions which were authorized or ratified by a full Board such that the
10 entire Board was in violation of Title VII.

11 The record elucidates two instances in which Zito was arguably acting on behalf of
12 the entire Board. One was in 2016 when Zito, together with Songcayawon formed a
13 subcommittee to examine the compensation of the superintendent and make
14 recommendations to the entire Board. Although Songcayawon was on the committee as
15 well, some testimony at trial indicated that Songcayawon deferred to Zito, allowing him to
16 communicate his thoughts to the Board. Nonetheless, although the committee made
17 recommendations, those recommendations were independently evaluated by the entire
18 Board, the makeup of which changed over time. On this record, the Court cannot conclude
19 that the Board as a whole displayed discriminatory intent in making its salary decisions for
20 Gomez in 2016.

21 The Court concludes differently with respect to the 2017-2018 evaluation. The
22 Court credits Gomez's testimony that Zito wrote it and that it contains numerous
23 falsehoods and misrepresentations of Gomez's. Unlike in other evaluations, individual
24 board members did not independently evaluate Gomez, instead adopting wholesale Zito's
25 animus driven impressions of Gomez. This evaluation was in an entirely different format
26 and written when Zito was Board president. At this time, the Board knew of Gomez's
27 concerns about her salary, as well as at least one instance of Zito making sexist comments
28 about Gomez. They nonetheless adopted in full Zito's inaccurate and discriminatory

1 accounting of her performance.

2 As a result, Gomez testified that she retired 1-2 years earlier than she intended and
3 suffered significant physical and emotional distress. In issuing that inaccurate and
4 retaliatory evaluation, the Board, acting on behalf of the District, showed discriminatory
5 intent.

6 Accordingly, in that instance, the Board, acting on behalf of the District, violated
7 Title VII.

8 D. California Fair Employment and Housing Act

9 Plaintiff brings two claims under the Fair Employment and Housing Act (FEHA).
10 Cal. Gov. Code § 12940(a). First, she alleges gender discrimination. Second, she alleges a
11 failure to prevent discrimination.

12 For reasons similar to the reasons articulated above, Plaintiff has established a
13 prima facie case of discrimination under FEHA, and the reasons given by the District are
14 either not job-related or are pretextual.

15 With respect to the alleged failure to prevent discrimination, a plaintiff must prove
16 that (1) plaintiff was subjected to discrimination, harassment, or retaliation; (2) defendant
17 failed to take all reasonable steps to prevent discrimination, harassment, or retaliation; and
18 (3) this failure caused plaintiff to suffer injury, damage, loss, or harm. *Aparicio v.*
19 *Comcast, Inc.*, 274 F. Supp. 3d 1014, 1030 (N.D. Cal. 2017).

20 For the reasons explained above, Gomez did suffer discrimination from the Board
21 broadly and Jim Zito specifically. Rather than take reasonable steps to rectify the errors of
22 earlier boards, the Board, acting on behalf of the District, chose to issue false and unduly
23 negative evaluations that caused Gomez to retire early.

24 E. Damages

25 Gomez seeks compensatory damages in the form of backpay wages, pension loss,
26 and emotional distress damages. Specifically, Plaintiff's proposal includes lost wages from
27 Feb. 1, 2015: 2/1/15 to 7/1/15. \$62,018.40 / 12 months = \$5,168.20 per month. \$5,168.20 x
28 5 months = \$25,841. PLUS \$271,363.91 from July 1, 2015 to retirement. Yielding a total

of \$297,204.91. That total is doubled under Title VII for a total of \$594,409.82. The proposal further includes a pension loss of \$1,408,584.97. That total is also doubled pursuant to Title VII for a total amount of \$2,817,169.94. Ex: 2-28-2-30; ECF 90.

By contrast the District asserts that even assuming liability on all claims, the only amount recoverable would be that amount necessary to equalize Plaintiff's pay with the comparator (in this case Clif Black). Second, the only amount recoverable would be the total difference in Plaintiff and Black's pay during the two (or potentially three) year period preceding the filing of Plaintiff's lawsuit. 29 U.S.C. § 255. Plaintiff's expert estimates Gomez's total lost earnings at \$362,181. With respect to pension, the District asserts that at, at most, Plaintiff would be entitled to the difference between her actual pension payments from CalSTRS and the pension payments she would have received if she had been paid the same base salary as Black during the final year of her tenure as Superintendent.

According to the District's expert Dr. Drabkin, Gomez overstates the amount of her lost earnings because of methodological issues in Hill's report. He estimates \$362,181 in lost earnings and \$815,924 in pension for a total of \$1,178,105 for a modified pension, and \$1,163,126 for unmodified.

1. Backpay/Loss of Wages/Pension

The first question is about the appropriate scope of recoverable wages, given the applicable statute of limitations. The District argues that Gomez should receive only that backpay that falls within the two, or possibly three years that fall within the statute of limitations of the EPA. By contrast, Gomez requests backpay beginning in 2015.

Further, the District argues that Gomez has not established a factual basis for backpay. The District argues the "only amount recoverable would be that amount necessary to equalize Plaintiff's pay with the comparator (in this case Clif Black). Second, the only amount recoverable would be the total difference in Plaintiff and Black's pay during the two (or potentially three) year period preceding the filing of Plaintiff's lawsuit. 29 U.S.C. § 255. In this case, the District argues, Gomez did not present evidence of those

1 amounts, so there is no factual basis for the Court to award back pay. ECF 93 at 18.

2 As a preliminary matter, the Court disagrees that Plaintiff did not demonstrate a
3 factual entitlement to some amount of backpay. Plaintiff's damages experts did in fact use
4 Clif Black as a comparator to quantify Gomez's lost wages, although Defendant's expert
5 asserts that that amount is inflated.

6 With respect to the statute of limitations, the District notes that "[n]umerous
7 decisions across a variety of Circuits have held that plaintiffs are not permitted to recover
8 back pay for discriminatory pay periods outside the applicable statute of limitations period.
9 *O'Donnell v. Vencor Inc.* 466 F.3d 1104, 1113 (9th Cir. 2006) (internal citations omitted).
10 Each discriminatory paycheck constitutes a separate violation. *Id.* The same "separate
11 violation" doctrine also applies to claims under the California EPA. *See Jones v. Tracy*
12 *Sch. Dist.*, 27 Cal. 3d 99, 105–07 (1980) (holding that recovery is limited by the applicable
13 statute of limitations).

14 Here, the applicable statute of statute of limitations for a willful violation of the
15 EPA is three years. 29 U.S.C. § 255(a). Courts permit equitable tolling under the EPAs
16 where plaintiff pursued an alternative remedy. *Jones v. Tracy Sch. Dist.*, 27 Cal. 3d 99,
17 108–09 (1980). *See also, Deppe v. United Airlines*, No. 00-cv-03185 CRB, 2000 WL
18 1897296, at *5–6 (N.D. Cal. Dec. 19, 2000) (discussing equitable tolling in federal
19 context). Gomez fulfilled the requirement to pursue an alternate remedy as she timely
20 noticed Defendant of her DFEH claim on February 1, 2018, there was no prejudice as
21 Defendant would not have earlier remedied its violation, and Gomez acted reasonably and
22 in good faith. Gomez argues that her EPA claims should be equitably tolled to February 1,
23 2015, three years before her DFEH complaint, because Defendant knew and disregarded
24 the illegal underpayment for years by then. The Court agrees with Gomez and will
25 calculate lost wages from February 1, 2015.

26 The next question is which framework to use to calculate lost wages. As alluded to
27 above, the two experts, Hill and Drabkin used somewhat different approaches. Having
28 reviewed both reports, the Court agrees that Hill's report somewhat overstates Gomez's

losses. Taking that into account, the Court will award damages as follows.

Backpay from (2/1/15) (Based on Drabkin Table 3)	Pension (Drabkin ¶ 29)	Total (Doubled for Title VII violation)
SY 2014/2015: \$19,051.20 ¹ 2015-2016: \$43,891.89 2016-2017: \$49,444.79 2017-2018: \$54,620.78 2018-2019 (through retirement): \$30,873.07	Modified pension: \$800,945 ²	Lost Wages: \$395,763.46 Modified Pension: \$1,601,890
Total: \$197,881.73		Total: \$1,997,653.46

2. Emotional Distress

Finally, Gomez seeks emotional distress damages under Title VII. All of the evidence of emotional distress comes from Gomez's testimony. Gomez testified that she ground her teeth so much that they were sheared off. Gomez, V3 at 435–36. She also testified that she lost 15 pounds since leaving the District. *Id.* at 436. She also testified that culture of the district changed as a result of Zito's behavior. She felt like she constantly had to be three steps ahead of him. As a result, she experienced stress that was "over and above" what was normal for a superintendent. *Id.* As a result of this, she retired a year or two early. *Id.*

The Court found Gomez, both in demeanor and substance to be a thoroughly credible witness, who handled a difficult situation, both during her tenure and thereafter,

¹ This number represents the loss in the five months between February 1, 2015, when the equitably statute of limitations begins, and July 1, 2015 approximating when the year ended—earlier yearly contracts had inconsistent starting dates. Her third and final contract was from June 12, 2014 and rolled over to her retirement in January 2019 ECF 263 at 81, making it unclear exactly when that year ended. Per Drabkin, Table 3, the net loss for SY 2014-2015 was \$45,722.88. The amount awarded is 5/12 of that amount.

² These calculations are based on a modified pension because Drabkin testified that his review of the documents suggests that Gomez had a modified pension. That testimony was unchallenged. V3, 505:16-17. Hill only testified that it was her standard practice to calculate an unmodified pension.

1 with professionalism and skill. It concludes without trouble that Gomez experienced the
2 situation as stressful and upsetting. The Court also notes, however, that the factual
3 testimony about emotional distress was relatively limited. Having reviewed the entire
4 record, and the relevant caselaw, the Court will award \$30,000 in emotional distress
5 damages.

6 The Ninth Circuit that substantial emotional distress damages awards need not be
7 supported by “objective” evidence and that the subjective testimony of the plaintiff,
8 corroborated by others (including relatives), may be sufficient. *See Passantino v. Johnson*
9 *& Johnson Consumer Prods., Inc.*, 212 F.3d 493, 513–14 (9th Cir. 2000) (noting that case
10 law in Washington state, Ninth Circuit, and Supreme Court does not require emotional
11 distress damages awards to be supported by “objective” evidence and that, in this case,
12 plaintiff's claims of distress were corroborated by husband and sister); *Velez v. Roche*, 335
13 F. Supp. 2d 1022, 1038 (N.D. Cal. 2004). *Chalmers v. City of Los Angeles*, 762 F.2d 753,
14 761 (9th Cir.1985) (upholding emotional damages based solely on testimony); *Johnson v.*
15 *Hale*, 13 F.3d 1351, 1352 (9th Cir.1994) (noting that emotional damages may be awarded
16 based on testimony alone or appropriate inference from circumstances).

17 With respect to state law, the standard is similar. “The law in this state is that the
18 testimony of a single person, including the plaintiff, may be sufficient to support an award
19 of emotional distress damages.” *Knutson v. Foster*, 25 Cal.App.5th 1075, 1096 (2018).
20 *See also*, California Civil Jury Instruction No. 3905A “Damages”, Directions for Use.

21 Accordingly, the Court will award emotional distress damages, but in a lesser
22 amount than Gomez seeks. The \$627,000 that Gomez seeks strikes the Court as
23 inconsistent with the weight of the evidence presented at trial. *Compare Velez v. Roche*,
24 335 F. Supp. 2d 1022, 1041 (N.D. Cal 2004) (allowing \$300,000 jury award where
25 evidence from family of significant clinical depression); *EEOC v. AIC Sec. Investigations,*
26 *Ltd.*, 55 F.3d 1276, 1285 (7th Cir.1995) (upholding \$50,000 awarded to the plaintiff where
27 plaintiff and his family testified that he suffered from depression, rage, and fear resulting
28 from his sudden firing).

1 Reviewing the record as a whole, the Court concludes that an amount less than the
2 \$50,000 given in *AIC* is appropriate. In making this determination, the Court notes that
3 Gomez had an opportunity to expand and substantiate her emotional distress evidence,
4 perhaps by calling Larry Gomez as she had planned, and elected not to do so. Accordingly,
5 the Court will award \$30,000 in emotional distress damages.

6 Gomez's total damages inclusive of lost wages, modified pension, and emotional
7 distress are therefore \$2,027,653.46.

8 **IV. Conclusion**

9 Evergreen School District, through its Board, significantly underpaid its first female
10 Superintendent. Although the Board as a whole may not have had discriminatory intent to
11 begin with, it had many opportunities to rectify the problem. Unfortunately for all
12 involved, rather than negotiate in good faith to come to a fair resolution, the Board chose
13 to punish Gomez for raising legitimate concerns.

14 A School Board does have the responsibility to be fiscally prudent. But, on this
15 record, the Board was penny wise and pound foolish. There is a marked difference
16 between how fiscal factors were portrayed during Gomez's tenure as compared to how
17 they were discussed later in the course of litigation. This difference, combined with some
18 evidence of discriminatory intent, leads the Court to conclude that the District's "Sixteen
19 Reasons" for pay deferential were pretextual. Accordingly, the Court has determined that
20 the District violated California and federal equal pay law. For similar reasons, the Court
21 concludes that the District violated FEHA.

22 If that was all that the record showed about the District's decision-making process,
23 the Court might be reluctant to find intentional discrimination of the type required by Title
24 VII. But the 2017-2018 evaluation of Gomez, prepared by Zito and issued on behalf of the
25 Board, adds to that record. Gomez has proved that Zito made at least one set of blatantly
26 sexist remarks regarding Gomez's gender. To prepare and issue a false and misleading
27 evaluation of Gomez's performance while president of the Board, knowing that she had
28 raised concerns about pay equity, evinces the type of discriminatory intent proscribed by

1 Title VII.

2 Accordingly, Gomez is awarded damages of \$2,027,653.46, against the District, as
3 calculated above.

4 The Court will enter judgment. The parties are reminded that under Fed. R. Civ. P.
5 52(b) on a motion filed no more than 28 days after entry of judgment the Court may amend
6 its findings or make additional findings. Additionally, the Court previously approved the
7 parties' stipulation extending the time to seek fees and costs. ECF 95. The Court
8 encourages the parties to meet and confer in an effort to resolve any disputed post-trial
9 issues.

10 **IT IS SO ORDERED.**

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12 Dated: September 30, 2022

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15 NATHANAEL M. COUSINS
16 United States Magistrate Judge
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