

“Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act”

**Testimony of
Deborah Thompson Eisenberg, Associate Professor of Law
Director, Center for Dispute Resolution
University of Maryland Francis King Carey School of Law**

**Before the Senate Committee on Health, Education, Labor, and Pensions
United States Senate
April 1, 2014**

SUMMARY

The Paycheck Fairness Act is critical legislation that addresses several gaps in the Equal Pay Act. Federal equal pay laws have become an empty promise for many women who experience pay discrimination. This Act sets forth a balanced approach—with both proactive strategies and a more workable legal remedy—that will ensure “equal pay for equal work.”

Most importantly, the Act amends the “any factor other than sex” defense—a gaping loophole which has swallowed the “equal pay for equal work” rule in some cases—with the common sense fairness notion that a wage disparity between two employees who perform the same jobs should be based on a bona fide factor related to the job or business. This standard is already used in a majority of federal courts and has been adopted by the Equal Employment Opportunity Commission. Two federal circuits have interpreted this defense as “anything under the sun,” even if unrelated to the job or business. The idea that differences in pay should relate to the job and business is not only a matter of basic fairness; it is simply smart business. The Act leaves it to the employer’s sole discretion *which* factors should be used to determine pay.

Second, the Act recognizes, to paraphrase Justice Brandeis, that “sunshine is the best disinfectant.” Pay secrecy has allowed unlawful pay disparities between men and women performing the same jobs to flourish, undetected and undeterred. To address this problem, the Act prohibits employers from retaliating against employees who ask about or discuss wage information and facilitates the collection and study of pay data so we better understand the causes of pay discrimination. This reinforces that the law’s requirement of equal pay for equal work cannot be ignored simply because no one knows about unlawful pay disparities. It will motivate employers to correct unjustified pay disparities *before* they turn into fodder for litigation. The Act also creates an award for employers who demonstrate best practices and encourages negotiation training for women and girls. These provisions provide a balanced, proactive approach to combating wage discrimination.

Third, the Act addresses the difficulties that women have in remedying the multiple harms of pay discrimination by allowing compensatory and punitive damages in appropriate cases and permitting employees to join together in a class action to address systemic violations. These provisions will put gender pay discrimination on equal footing with federal law regarding pay discrimination based on race under 42 U.S.C. § 1981 and be a stronger deterrent against the subset of employers that flout the nation’s equal pay laws.

Chairwoman Mikulski and members of the Senate Committee on Health, Education, Labor and Pensions, I am honored to have the opportunity to testify before you in support of the Paycheck Fairness Act. This issue is important to me as a scholar who has studied the current failure of federal law to provide a workable remedy for most women who experience pay discrimination in the modern economy; as a former employment litigator and now mediator who has witnessed first-hand the profound impact that compensation discrimination has on women, and the difficulties they have seeking a remedy for that harm; and as a proud mother of two daughters.

The Paycheck Fairness Act is critical legislation that expresses our nation's commitment to equal pay for equal work and addresses several gaps in the Equal Pay Act. It should be passed for four main reasons:

1) Most importantly, the Paycheck Fairness Act amends the “any factor other than sex” defense—a gaping loophole which has swallowed the “equal pay for equal work” rule in some jurisdictions—with the common sense fairness notion that a wage differential between two employees who perform the same jobs should be based on a bona fide factor related to the job or business. This standard is already working well in a majority of federal circuit courts and has been adopted by the Equal Employment Opportunity Commission, but two federal circuits have interpreted this defense to mean “anything under the sun,” even if unrelated to the job or business. The idea that differences in pay should bear some relation to the job and business should be an uncontroversial proposition. It is not only a matter of basic fairness (for all employees) and equal opportunity for women; it is simply smart business and good corporate governance for an employer to be more thoughtful about how its pay awards relate to the job and business.

2) The Paycheck Fairness Act recognizes, in the words of Justice Brandeis, that “sunshine is the best disinfectant” by prohibiting employers from retaliating against employees who simply ask about, discuss, or disclose wage information. As described below and in my scholarship, pay secrecy has allowed unlawful pay disparities between men and women performing the same jobs to flourish, undetected and undeterred. The Act also facilitates the collection and analysis of pay data so we better understand the causes of pay discrimination. It will reinforce that the law’s requirement of equal pay for equal work cannot be ignored simply because no one knows about unlawful pay disparities. And it will motivate employers to correct unjustified pay disparities before they turn into fodder for federal litigation. This is a balanced, proactive approach.

3) The Paycheck Fairness Act provides an incentive for voluntary compliance and the development of best practices by employers by establishing a National Award for Pay Equity in the Workplace, while empowering women and girls with negotiation training so they can better navigate the often difficult and risky process of salary negotiations.

4) The Paycheck Fairness Act addresses the difficulties that women have in remedying the multiple harms of pay discrimination by providing compensatory and punitive damages and permitting them to join together in a class action to address systemic violations. These provisions will put gender pay discrimination on equal footing with federal law regarding pay discrimination based on race under 42 U.S.C. § 1981 and be a stronger deterrent against the subset of employers that flout the nation’s equal pay laws.

At the outset, I want to dispel some common myths about the Paycheck Fairness Act.

Myth #1: This will open the floodgates to frivolous lawsuits by “jack-pot” trial lawyers

Opponents who suggest that this legislation will somehow open the floodgates to frivolous EPA claims by “trial lawyers” do not understand (or are not being forthright) about the realities of equal pay litigation. In addition to being expensive and extremely difficult to win, pursuing an employment discrimination lawsuit can damage a plaintiff’s mental and physical health and often results in career suicide. In addition, this area of the law is complicated and tends to be litigated on both the employee and management sides by sophisticated attorneys who understand that most plaintiffs in federal employment discrimination cases do not prevail, and that employers will win most cases at the summary judgment stage.

Rest assured: most women do not want to sue their employers—they want the law to express a stronger commitment to equal pay for equal work so employers will have an incentive to pay them fairly without the need for litigation. Moreover, employee-side attorneys who handle employment discrimination cases tend to do this work out of a sense of a public interest mission as a “private attorney general,” enforcing our nation’s equal opportunity laws. Filing “frivolous” cases will not keep the lights on in their law offices. The idea that attorneys would put their law licenses and reputations on the line by filing “frivolous” cases—and that our smart federal judges would allow those “frivolous” cases to proceed to a jury, and then juries would award astronomical damages for unmeritorious claims—is a fantastical red herring.

Myth #2: This Changes the “Equal Work” Standard into “Comparable Worth”

Nothing in the Paycheck Fairness Act permits the concept of “comparable worth” to be used in the EPA. The prima facie standard of “equal work” remains.

Myth #3: The Government Will Interfere in Pay Decisions

Employers are already obligated under the Equal Pay Act and Title VII to refrain from pay discrimination and ensure equal pay for substantially equal jobs. The problem is that pay secrecy and the lack of effective workable remedies has allowed unlawful pay discrimination to flourish undetected and unaddressed in some workplaces. The Paycheck Fairness Act reaffirms our commitment to equal pay for equal work by encouraging employers to give more attention to ensuring that their pay practices honor that promise—but it leaves pay decisions entirely up to the employer’s sole discretion.

To be clear: this Act does not get the government involved in wage-setting at all. The Act does not dictate to employers which factors should be used in setting pay. It merely requires that pay decisions bear some relation to the job and business. This is not only about basic fairness for employees performing the same jobs and equal opportunity for women: it is simply smart business. As generally accepted in the executive compensation context, it is good corporate governance to relate pay to performance and the goals of the job and business. In addition to helping to reduce the gender pay gap, studies have also shown that employees who understand how pay is determined are more likely to be productive and loyal to their employers.¹

As described below, in some industries there is an “anything goes” approach to wage setting—facilitated by pay secrecy—that has permitted wildly divergent and unfair pay rates between employees doing the same job. We can, and must, do better than that if “equal pay for equal work” is ever going to be a reality.

The rest of my testimony explains how pay discrimination manifests itself in the modern economy, describes how existing equal pay laws have failed to provide an effective remedy for women who experience pay discrimination, and examines how the Paycheck Fairness Act will

help to deter pay discrimination against women.

1. Status of Women's Wages in Today's Market

Equal pay laws have undoubtedly increased women's earning power and encouraged most employers to take pay equity seriously. Yet, the pay gap between men and women who perform substantially equal jobs remains widespread, persistent, and systemic in our economy. The rhetoric about the "gender pay gap" tends to be heated and polarizing but one thing is clear: study after study that has examined the pay gap has demonstrated that unexplained pay disparities between men and women performing substantially equal jobs remain even after controlling for so-called "choice" factors—such as education, years of work experience, age, hours worked, occupational field, and jobs held.²

I have written about how the gender pay gap is more complex—and in many job categories much worse—than the aggregate statistic that women who work full-time, year round earn about 77 cents for every dollar earned by their male peers.³ The overall wage gap is only the tip of the iceberg. The problem is even more alarming when one examines data regarding men and women who have similar qualifications and perform similar jobs, especially women who try to climb the economic ladder and move into higher-paying jobs.

Women at every wage level and in nearly every industry experience a wage gap.

Consider these statistics:

- Women in the ten largest low-wage occupations are paid an average of about 10 cents less than men in those occupations for full-time work.⁴
- Although women generally are becoming better educated than men—earning more college and advanced degrees—women with higher education levels experience a *greater* pay gap than women who have less educational attainment.⁵
- Contrary to the notion that more education and experience will decrease the wage gap, the disparity *increases* for women who attain the highest levels of education and professional achievement, such as lawyers (female lawyers earn 74.9% as much as their

male peers),⁶ physicians and surgeons (64.2%),⁷ securities and commodities brokers (64.5%),⁸ accountants and auditors (75.8%),⁹ and managers (72.4%).¹⁰

- A wage gap exists for men and women who have the same education and enter the same jobs at the start of their careers. For example, a recent study of starting salaries of graduates of medical residency programs in New York found that male physicians made on average \$16,819 more than their female cohorts. The regression models in the study controlled for ten variables that could potentially affect wage rates, including specialty choice, practice setting, work hours, geographic location, and other characteristics.¹¹ According to the researchers, “We honestly tried everything we could to make it go away, but it wouldn’t.”¹²
- The wage gap between men and women performing the same jobs starts small, but balloons throughout their careers. A regression analysis by the American Association of University Women found that, after controlling for choice factors that could affect pay, about one-quarter of the pay gap (5%) remained for recent college graduates—that is, men and women with exactly the same education entering the same job at the same time—but ten years after graduation the unexplained pay gap grew to 12%.¹³
- Some say that the gender pay gap can be explained because men work more hours than women. But women who work the greatest number of hours experience a higher disparity.¹⁴
- The wage gap exists even in professions in which women have long dominated, such as education,¹⁵ nursing,¹⁶ social work,¹⁷ and clerical work.¹⁸

In sum, fifty years after the passage of the Equal Pay Act, pay discrimination is still a serious problem for too many women in America. Based on my research and experience, I believe there are several reasons this is still happening.

First, it is my firm belief that most employers try to comply with the law and do not set out to *intentionally* discriminate against women. Nevertheless, there is no question that pay discrimination remains. In some cases, that discrimination is as blatant as it was during the 1960s, with some employers professing that men deserve to be paid more. For example, women who worked at Walmart reported that managers told them that male employees would always make more because “God made Adam first, so women would always be second to men” and “[y]ou don’t have the right equipment. . . . [Y]ou aren’t male, so you can’t expect to be paid the

same.”¹⁹ When one plaintiff asked her manager why a male co-worker in the same position was making \$10,000 more per year, the manager told her to bring in her household budget so he could decide whether she deserved as much as the man.²⁰ Examples of these sexist attitudes exist in other pay discrimination cases.²¹

Second, the stereotype that working mothers do not need to be paid as much, and that working fathers deserve more pay, sometimes creeps into the wage setting process, often unconsciously. Working mothers tend to experience a “motherhood penalty” in wages that cannot be explained by human capital or occupational factors.²² In one study, participants evaluated application materials for a pair of same-gender, equally qualified job candidates who differed only on parental status.²³ The study found that “mothers were judged as significantly less competent and committed than women without children.”²⁴ In addition, “[t]he recommended starting salary for mothers was \$11,000 (7.4%) less than that offered to nonmothers, a significant difference.”²⁵ In contrast, fathers were offered significantly higher salaries than nonfathers.”²⁶

It is a fallacy today to think that mothers are not working to support their families. A recent study found that a huge majority of middle-income mothers work forty or more hours per week.²⁷ About half of all mothers work full-time.²⁸ Two-thirds of the 21.7 million working mothers are part of a dual-earner family, but one-third—or 7.5 million mothers—“were the sole job-holders in their family, either because their spouse was unemployed or out of the labor force, or because they were heads of households.”²⁹ During the recession, “families where the mother was the only job-holder increased.³⁰ As a recent Congressional report concluded, “[m]ore than ever, families depend on mothers’ work.”³¹

A third factor that lowers women’s wages is that compensation decisions in today’s economy tend to be wholly discretionary on the part of certain managers, without company

guidance about how pay should be determined and work rewarded. The more discretionary and subjective the process for setting pay—which tends to be the case for management and professional occupations—the greater the gender pay gap. I saw this in an equal pay case I litigated on behalf of a Chief Technology Officer at a technology start-up. Her base salary was less than all of the men on the executive team, but the disparities in discretionary components were extreme: her bonuses were only about one half, and her stock options awards only about one-quarter, of the awards given to all of the men on the executive team.³²

A large body of social science research demonstrates that sex-stereotyping and unconscious cognitive biases influence pay decisions that are based on subjective, arbitrary, or discretionary assessments.³³ In addition, studies show that significant gender differences in salaries will occur in “high ambiguity” industries—those in which employees are not well informed about the appropriate amount to request during salary negotiations.³⁴ A study of MBA students entering their first jobs found that women who entered industries in which salaries were more ambiguous “accepted salaries that were 10 percent lower on average than did the men.”³⁵ This is also reflected in wage statistics. Although a gender wage gap exists in nearly every occupation and industry, it tends to be the lowest for more standardized, low-wage jobs for which the compensation structures are well-defined and non-negotiable.

The problem is that wages in the modern economy are more likely to be the product of a negotiation process, conducted under conditions of pay secrecy with little to no guiding company standards. Rather than the lock-step compensation plans of the industrial era, many job sectors today follow a “winner-take-all” and “anything goes” approach to setting pay. These trends have exacerbated internal pay inequities, resulting in wildly divergent salaries for individuals performing essentially the same jobs.³⁶

These dynamics disproportionately disadvantage women's pay. Negotiation experts explain that unconscious gender-stereotypes are more likely to skew results against women when compensation decisions are informal and unguided. Studies show, however, that if pay processes are more transparent and women have adequate information during the negotiation process, gender pay disparities may be reduced or eliminated altogether.³⁷

2. Current Federal Law Fails to Provide an Effective Remedy for Pay Discrimination

My scholarship has analyzed how the Equal Pay Act (EPA), which the Paycheck Fairness Act amends, currently provides an empty promise for many women who experience pay discrimination. Although evaluation of equal pay claims is supposed to be fact-intensive,³⁸ modern courts increasingly dismiss cases at the summary judgment stage rather than permitting the claims to proceed to a jury trial. In a study I conducted of all cases in which federal district courts considered whether to grant summary judgment on an EPA claim over the last decade (from January 1, 2000 to December 31, 2011), only about one-third survived summary judgment.³⁹ In other words, the merits of equal pay claims rarely make it before juries and most women who file equal pay cases are stopped at the summary judgment "starting gate." In addition, employees whose cases make it to an appellate level are less likely to prevail on equal pay claims today than at any other time since the EPA's passage.⁴⁰

There are several reasons for the EPA's ineffectiveness in the modern economy:

The Prima Facie Hurdle: The EPA requires that employees of opposite sexes at the same establishment receive equal pay for equal work. To state a claim under the EPA, plaintiffs must first meet a very strict "prima facie" threshold standard. A plaintiff must show that he or she performs substantially "equal work on jobs the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions."⁴¹ My

research has explained that this prima facie standard has been interpreted by some courts so strictly that it leaves many women in the modern economy—especially those in non-standardized or upper-level jobs—outside of the EPA’s protection.⁴² The Paycheck Fairness Act does not change the substantially equal work standard and it is likely to continue to be stumbling block for most plaintiffs in EPA cases.

The “Anything Under the Sun” Defense: If a plaintiff survives the strict prima facie standard of showing “equal work,” the burden of persuasion shifts to the employer to prove that the pay disparity actually resulted from one of four affirmative defenses: “(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.”⁴³

Most employers in EPA cases rely on the catch-all “factor other than sex” defense and rarely invoke the first three.⁴⁴ In a majority of circuits⁴⁵ and under the EEOC’s interpretation,⁴⁶ the employer is not permitted to rely on literally *any* other factor, but only a factor that is job-related, adopted for a legitimate business reason, and not based on sex. As courts have explained, “[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned.”⁴⁷ Unfortunately, in a minority of federal circuit courts, that loophole exists.⁴⁸

The Paycheck Fairness Act codifies the majority view that the “factor other than sex” defense does not mean “anything under the sun” other than an admission of sex discrimination. Rather, the factor must be related to the job in question and consistent with business necessity. This amendment is the most important provision of the Paycheck Fairness Act. It will encourage employers to develop more clearly defined compensation systems—guided by any considerations the employer wants—so long as they relate to the business and job. As one

federal judge commented: “The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to the business.”⁴⁹

Some opponents contend that adopting the majority view will somehow threaten the free-market system and turn courts into “super-personnel officers.” That has not happened in the majority of circuits in which this standard has already been operating. In addition, the argument that employers must be able to use vague, ill-defined “market” excuses for pay discrimination among equal jobs is alarming to hear fifty years after the passage of the Equal Pay Act. Indeed, the EPA was designed to alter the compensation market so that employers would not pay women less than men performing substantially equal jobs simply because that was what the “market” required or permitted, or because men asked for more pay than women did.⁵⁰

Given the distinct market purpose of the EPA, early cases flatly rejected “market forces” defenses asserted by employers because they perpetuated the very discrimination that Congress sought to alleviate.⁵¹ Courts noted that the EPA aimed to cure imbalances in the compensation market based on gender. As the Supreme Court stated in *Corning Glass Works v. Brennan*:

The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, *but also as a matter of market economics*, since Congress recognized as well that discrimination in wages on the basis of sex “constitutes an unfair method of competition.”⁵²

Since the EPA was passed, the “market” defense in some EPA cases has evolved into an escape hatch through which many pretexts for gender pay discrimination have been accepted. A common market defense in EPA cases relies on employees’ prior salaries.⁵³ If a man earned more in a prior position with a different employer, and a woman earned less in a prior position

with a different employer, they will be paid based on their prior salaries, regardless of whether they are now performing substantially equal jobs and have comparable qualifications.

Market defenses also rely on negotiation outcomes: the male employee negotiated a higher salary, and the woman either failed to ask for more pay, or was prohibited from negotiating a higher rate.⁵⁴ Negotiation defenses harm women. Studies have shown that employers react more favorably to men who negotiate salaries, and that women may be reluctant to ask for higher pay because they may be penalized for violating gender stereotypes and feel more social pressure to agree to employers' wage offers.⁵⁵ This is compounded by the problem of pay secrecy: employers enjoy a monopoly on pay information and women may not have access to the same networks that men do to determine potential pay ranges.

Consider the following example from an equal pay case that I litigated. Like some companies, the employer had no formal job descriptions or compensation system, which allowed gender pay disparities between employees performing substantially equal jobs to flourish. The supervisors of each department had great discretion to negotiate and set individual salary amounts upon hiring, without guiding criteria. In one department, a female vice president was hired months earlier than two other male vice presidents. All three were hired to do essentially the same work. All had comparable qualifications for the job. The executive vice president who hired them admitted that the female vice president had equal if not better performance and was even appointed a "player lead" to train her male colleagues—yet her pay was substantially lower than her male peers. When asked why he paid his female player-lead less than two men doing the same job, the supervisor defended the disparity based on the employees' prior salaries and their wage negotiations with him.⁵⁶ When asked why he failed to pay similarly qualified vice presidents equal pay for equal work, the supervisor responded:

Because I didn't need to. I mean at the end of the day it was, at the end of the day [sic] – first of all they, they didn't need to see what each other's salaries were. They weren't – it wasn't like we post it on your name tag. So there was no demotivation. [The female vice president] was somewhat aware what the other people were making, so it was, you know, I didn't want to demotivate her, but, *you know, at the end of the day you're paying people, you know, the market rate, you're not necessarily paying them for a job. You know, you're saying what's it take?*⁵⁷

As seen in this example, the “market” on which the supervisor relied was nothing more than a haphazard situational accident, not a fair reflection of the job duties, skill sets, and performance of the employees. The employer paid the worst performer the highest salary simply because he asked for it. The female player-lead who trained her male peers received the lowest salary, simply because her salary at a previous employer was lower than that of her male counterparts. The law requires equal pay for equal work, but pay secrecy enables inequities based on the happenstance of prior salaries—not the skills, responsibility, and effort required for the job—to continue uncorrected. This perpetuates the very discrimination that Congress sought to prevent with the EPA.

In other words, some employers' vague assertions that the invisible hand of “the market” dictated wage rates tend to be mythical covers for paying women less than men to perform substantially equal jobs—for reasons that have nothing to do with actual market compensation data, the job, or the merits of the employees in those jobs. Just as Congress saw through employers' assertions of “market forces” when the Equal Pay Act was passed, Congress should pass the Paycheck Fairness Act to once again confirm that abstract notions of “the market” do not trump the promise of equal pay.⁵⁸

Title VII Also Does Not Provide an Adequate Remedy

Title VII is not a workable remedy for pay discrimination in most cases because of its intent requirement, which is virtually impossible to show in these cases.⁵⁹ Proving a

discrimination case of any kind is extremely difficult. As one federal court noted:

Employment discrimination and retaliation, except in the rarest cases, is difficult to prove. It is perhaps more difficult to prove such cases today than during the early evolution of federal and state anti-discrimination and anti-retaliation laws. Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it.⁶⁰

Proving pay discrimination is especially challenging. First, unlike hiring and promotions, pay decisions are often made in secret,⁶¹ and psychological research has shown that decisionmakers typically undervalue employees if they are women rather than men.⁶² Scholars have shown how unconscious biases can lead to discrimination.⁶³ When the decisionmaking processes surrounding pay are opaque and guided by subjective factors, unconscious biases are more likely to reduce women's wages.⁶⁴

Second, the employer has a monopoly on the information used to make the pay decision and should have the burden of proving the reasons for that decision. Employees are typically not privy to the decisionmaking process, and records of the reasons underlying pay decisions rarely exist unless the company has an established compensation system. It is therefore easier for an employer to craft post hoc excuses for pay disparities to mask discrimination.⁶⁵ For these reasons, the burden-shifting structure of the EPA is more appropriate for pay discrimination claims. Indeed, some plaintiffs prevail on EPA claims but lose on Title VII claims due to insufficient evidence of intent.⁶⁶

In sum, the notion that women already have adequate, well-functioning tools to remedy pay discrimination is belied by the experience of women who have attempted—unsuccessfully—to vindicate the protections of Title VII and the EPA.

3. The Paycheck Fairness Act Brings the Equal Pay Act into the Modern Era

In addition to adopting the standard used by a majority of federal circuits for the “factor other than sex” defense, the Paycheck Fairness Act modernizes the Equal Pay Act in other important ways:

a. Widening the “Same Establishment” for the Prima Facie Standard

The Paycheck Fairness Act permits plaintiffs to use comparators who work for the same employer at a different physical location in the same county or similar political subdivision of a state at the prima facie stage. This adapts to the reality that more employers have decentralized structures. Note that this “same establishment” provision relates only to the showing of a prima facie comparator who performs equal work: it would not preclude an employer from defending a pay disparity at the affirmative defense stage based on a job or business-related reason, such as the potential need to pay workers in an urban area of a county a higher wage.

b. Compensating for Non-Economic Harms of Pay Discrimination and Deterring Malicious Conduct

If an employee wins an EPA case, she may recover only the amount of the pay disparity (up to two years of back pay, or three years if a “willful” violation), plus an additional equal amount as liquidated damages. The harms of pay discrimination often extend beyond the actual dollar amount of the pay disparity.

Work is an essential component of how we define ourselves in this country. It brings us a sense of purpose, dignity, and fulfillment. In many cases, women do not discover egregious pay disparities between themselves and male co-workers who perform substantially the same jobs until after many years or even decades of working hard for an employer. When that happens, women often feel betrayed and humiliated. For many women, it eviscerates their sense of identity and impacts their mental and physical health in dramatic ways. Yet, the EPA does not

compensate for these very real harms. Such damages are available for victims of racial pay discrimination under 42 U.S.C. § 1981, and under Title VII for employment discrimination, albeit at very low capped damage levels. The Paycheck Fairness Act recognizes that women who experience pay discrimination should likewise have those damages available to them, where appropriate.

In addition, for those cases in which employers act “with malice or reckless indifference,” the Paycheck Fairness Act permits punitive damages. This enhanced penalty is important for those cases in which proven violations are especially egregious and malicious. As in other employment discrimination cases, such awards are likely to be extremely rare. Nevertheless, their availability will express our strong commitment to equal pay for equal work and be a strong deterrent against future violations.

c. Permitting Class Actions for Systemic Pay Discrimination

Under current law, the EPA does not permit class actions.⁶⁷ Instead, it follows the Fair Labor Standards Act collective action structure, which requires every individual plaintiff to affirmatively “opt-in” to the litigation by filing a signed consent form with the court.⁶⁸ The benefit of this approach is that the preliminary certification standard for a collective action is more lenient than the standard for class certification.⁶⁹ Plaintiffs only need to show that they are “similarly situated” and do not have to satisfy the more demanding prerequisites of Federal Rule of Civil Procedure 23.

The major downside is that a collective action can be considerably more expensive to manage and litigate. For example, rather than having a representative group of plaintiffs answer discovery requests and appear for depositions, defense attorneys often demand answers to interrogatories for and depositions of *every* member of the collective action (and then they seek

to dismiss the claims of those individual plaintiffs who do not respond). This significantly raises the costs of the litigation.

In addition, the opt-in collective action procedure is intimidating for many employees at the initiation of litigation. Although the named plaintiffs may muster up the courage to take a stand on behalf of the collective group, other employees may fear retaliation or be reluctant to go on public record to challenge the employer in court. In this respect, employment class actions are very different from other types of class actions, such as those involving consumer or securities law. Whereas consumers or investors can simply purchase from another company or go without the product in question, many employees do not want to risk unemployment and may not be able to move to another employer if they lose their jobs. For many women, in particular, claiming pay discrimination or suing their employer can be damaging to their future job prospects. A class action procedure will help to protect those women who are similarly harmed by a common discriminatory pay policy or practice but fear that they will be fired if they go on public record against the employer.

Permitting class actions—which are available for most other types of employment discrimination and have a more exacting standard for certification—would provide an important tool to address systemic pay discrimination by the same employer.

d. Using “Sunshine as a Disinfectant” by Encouraging Better Wage Information

Pay secrecy is common in American workplaces. Most workers have no idea how their pay is determined and do not know what their peers make. Many employers have strict pay confidentiality policies, the violation of which can lead to termination, even though such policies violate the National Labor Relations Act.⁷⁰ Some women have been fired for asking about the salaries of their male counterparts.⁷¹ Many women do not discover gross pay disparities until

they, for example, receive anonymous letters on the eve of retirement,⁷² review proxy statements,⁷³ or are publicly ridiculed by co-workers who happen to see how low her paycheck is.⁷⁴

The Paycheck Fairness Act recognizes that a litigation remedy alone—which is reactive, piecemeal, and difficult to achieve—will not fully address the problem of unequal pay for equal work, especially when most pay discrimination remains “hidden from sight.”⁷⁵ Greater transparency about pay practices is needed to encourage compliance without litigation.

To that end, the Paycheck Fairness Act would prohibit employers from retaliating against employees because they simply discuss or inquire about wages in the workplace. The Act also instructs the Department of Labor to “conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women.”

These anti-retaliation and data collection provisions provide a balanced, proactive approach to combating pay discrimination. My scholarship has explained how the compensation market we have now in this country is failing because it lacks one of the key ingredients to a well-functioning, efficient market: information.⁷⁶ Better information and study about existing market pay rates will help women understand their potential value in the marketplace and provide an incentive for employers to address pay disparities among employees who perform similar jobs *before* they turn into fodder for litigation. Greater pay data analysis will help to sharpen our understanding of the causes of the gender wage gap and educate employers about best practices. The Act also provides for training that will empower women and girls with better tools to negotiate salaries and an employer pay equity award that will encourage the development of best practices. These programs will engage both employees and employers in the effort to

reduce the gender pay gap.

In conclusion, the Paycheck Fairness Act takes a balanced, commonsense approach to adjusting the Equal Pay Act to the realities of the modern workplace. Without the Paycheck Fairness Act, the Equal Pay Act will continue to be an “empty shell” for many women who experience pay discrimination. As Congresswoman Dwyer stated in the original debates regarding the EPA in 1963: “I can assure you that women would not be inclined to welcome an empty shell of a bill—legislation with a title but with no substance. This would be a heartless deception, and Congress would only be fooling itself if it should follow such a course.”⁷⁷

Thank you for the opportunity to testify on this important legislation.

¹ See Deborah Thompson Eisenberg, *Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 971-82 (2011).

² See, e.g., DANIEL H. WEINBERG, U.S. DEP’T OF COMMERCE, CENSUS 2000 SPECIAL REPORTS, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 21 (May 2004) (“There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience . . . education, and occupation.”); U.S. GEN. ACCT. OFFICE, GAO-04-35, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS 2 (2003) (concluding based on nationally representative longitudinal data set that women in 2000 earned only 80% of what men earned after accounting for education, occupation, hours worked, and time away from the workplace because of family responsibilities); STEPHEN J. ROSE & HEIDI I. HARTMANN, INST. FOR WOMEN’S POL’Y RES., STILL A MAN’S LABOR MARKET: THE LONG-TERM EARNINGS GAP 9-10 (2004), available at <http://www.iwpr.org/pdf/C355.pdf> (finding that differences in men’s and women’s labor force attachment do not explain the gap); Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay* 10 (Nat’l Bureau of Econ. Research, Working Paper No. 7732, 2000) (finding unexplained residual of 10-15% of total wages, after controlling for other factors that may explain gender wage gap).

³ See Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 23-28 (2010) (“*Shattering*”); *Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 971-82 (2011) (“*Money, Sex and Sunshine*”); *Wal-Mart v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 N. ENG. L. REV. 229 (2012); *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y. L. REV. 815 (2012/13) (“*Overuse of Summary Judgment*”). All of these articles are available at www.ssrn.com/author=1401276.

⁴ JOAN ENTMACHER, KATHERINE GALLAGHER ROBBINS, & LAUREN FROLICH, NAT’L WOMEN’S LAW CTR., WOMEN ARE 76 PERCENT OF WORKERS IN THE 10 LARGEST LOW-WAGE JOBS AND SUFFER A 10 PERCENT WAGE GAP (Mar. 2014), available at

http://www.nwlc.org/sites/default/files/pdfs/women_are_76_percent_of_workers_in_the_10_largest_low-wage_jobs_and_suffer_a_10_percent_wage_gap.pdf.

⁵ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009, at 8 tbl.1 (2010), available at <http://www.bls.gov/cps/cpswom2009.pdf> [2009 HIGHLIGHTS]. Women who earn a bachelor's degree and higher earn 73.1% as much as their male colleagues, whereas those with less than a high school diploma earn 76.4%, and those with a high school diploma, 75.7%.

⁶ *Id.* at 14 tbl.2.

⁷ *Id.* at 16 tbl.2.

⁸ *Id.* at 20 tbl.2.

⁹ *Id.* at 12 tbl.2.

¹⁰ *Id.* at 10 tbl.2. Within the "management occupations" category, the earnings gap was the largest for financial managers (66.6%) and the smallest for lodging managers (84.6%). *Id.* Chief executives also fall in the managers' category, with female chief executives earning 74.5% as much as male chief executives. *Id.*

¹¹ Anthony T. LoSasso, *et al.*, *The \$16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30 HEALTH AFFAIRS 193 (2011).

¹² *Id.* at 201.

¹³ JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUCATIONAL FOUNDATION, BEHIND THE PAY GAP 10 (2007), available at <http://www.aauw.org/learn/research/upload/behindPayGap.pdf> ("If the pay gap is going to disappear naturally over time, we would expect that pay differences among full-time female and male workers after college would be small or nonexistent. . . . Yet one year after college, female graduates working full time earn only about 80 percent as much as male graduates earn.").

¹⁴ 2009 HIGHLIGHTS tbl.5, at 40.

¹⁵ *Id.* at 13-14 tbl.2.

¹⁶ *Id.* at 15-16.

¹⁷ *Id.* at 13-14.

¹⁸ *Id.* at 21-22.

¹⁹ Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities at 26, *Dukes*, 222 F.R.D. 137 (N.D. Cal.) (No. C-01-2252 MJJ) (providing examples of sex-based explanations for pay disparities by Walmart supervisors).

²⁰ *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (June 29, 2011) (statement of Betty Dukes), available at <http://judiciary.senate.gov/pdf/11-6-29%20Dukes%20Testimony.pdf>.

²¹ For example, Lilly Ledbetter's supervisor told her that it was "a lot easier to downgrade you. * * * You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me." Brief for the Petitioner at 4, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074), 2006 WL 2610990 at 6; see also *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 340 (4th Cir. 1994) (employer told plaintiff to be an engineer or a "mama").

²² See Deborah J. Anderson *et al.*, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 273-76 (2003) (finding motherhood wage penalty of approximately five percent for one child and seven percent for two or more children); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219-20 (2001) (finding that interruptions from work, working part-time, and decreased seniority/experience collectively explain no more than about one-third of the motherhood penalty of approximately seven percent per child).

²³ Shelley J. Correll *et al.*, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1297 (2007).

²⁴ *Id.* at 1316.

²⁵ *Id.*

²⁶ *Id.* at 1317.

²⁷ JOAN WILLIAMS, CTR. FOR WORKLIFE LAW & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT 36 (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf>.

²⁸ *Id.* at 1.

²⁹ *Id.* at 2.

³⁰ *Id.* at 3.

³¹ *Id.*

³² I discuss this case in more detail in my scholarship. See *Shattering*, at 48 and *Money, Sex, and Sunshine*, at 992-93.

³³ See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (reviewing cognitive psychology scholarship regarding the nature of human inference and the roles played by cognition and motivation in decisionmaking).

³⁴ Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 396 (2008); Hannah Riley Bowles, Linda Babcock & Kathleen McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951 (2005).

³⁵ *Id.*

³⁶ KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165 (2004).

³⁷ LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK 65 (2003) (“[K]nowledge of what the market will pay for their skills and time can help override women’s inaccurate sense of self-worth.”).

³⁸ *Brobst v. Columbus Servs. Int’l*, 761 F.2d 148, 156 (3d Cir. 1985) (“Given the fact intensive nature of the [Equal Pay Act] inquiry, summary judgment will often be inappropriate [in EPA cases].”).

³⁹ *Overuse of Summary Judgment in Equal Pay Cases*, *supra*, at 821-24.

⁴⁰ In *Shattering the Equal Pay Act’s Glass Ceiling*, I conducted an empirical analysis of every reported case involving an Equal Pay Act claim at a federal appellate circuit court from 1970 to 2009. I found that employees prevailed on equal pay claims only 35% of the time from 2000-09, a substantial decrease from previous decades: employees prevailed on appeal in 55% of EPA cases in the 1990s, 52% in the 1980s, and 59% in the 1970s.

⁴¹ 29 U.S.C. § 206(d)(1) (2006).

⁴² See *Shattering*, *supra*.

⁴³ *Id.*

⁴⁴ *Overuse of Summary Judgment*, at 836.

⁴⁵ See *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078-79 (11th Cir. 2003) (“Because the evidence showed that the salary retention plan was justified by ‘special exigent circumstances connected with the business,’ and because there was no evidence which rebutted GE’s explanation, the district court did not err in submitting the matter to the jury or in denying Steger’s motion for judgment as a matter of law.” (quoting *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)); *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999) (“To successfully establish the [factor-other-than-sex] defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential.”); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) (“[A]n employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense.”); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1992) (“[The factor-other-than-sex] defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.”); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (“[The factor-other-than-sex] exception applies when the disparity results from unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business.”); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (“The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.”).

⁴⁶ EEOC, Directives Transmittal No. 915.003, § 10.IV.F.2. & nn.65-66 (Dec. 5, 2000), *available at* http://www.eeoc.gov/policy/docs/compensation.html#N_65_ (“An employer . . . must show that the factor is related to job requirements or otherwise is beneficial to the employer’s business [and] the factor must be used reasonably in light of the employer’s stated business purpose as well as its other practices.”).

⁴⁷ *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992).

⁴⁸ See *Wernsing v. Dep’t of Human Servs., State of Ill.*, 427 F.3d 466, 470 (7th Cir. 2005) (discussing split between Seventh and Eighth circuits and those circuits that require an ‘acceptable business reason’).

⁴⁹ *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982).

⁵⁰ See *Money, Sex, and Sunshine*, *supra* at 964-71 (describing market purpose of the EPA).

⁵¹ *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974) (“[U]se of the ‘market force’ theory, i.e. a woman will work for less than a man, is not a valid consideration under the Act.”); *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 286 (4th Cir. 1974) (finding “the availability of women at lower wages than men” to be “precisely the criterion for setting wages that the Act prohibits”); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973) (stating that there is “no excuse” for hiring female workers at a lower rate “simply because the

market will bear it”); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970) (finding that an employer’s greater bargaining power with women “is not the kind of factor [other than sex] Congress had in mind” in enacting the EPA); *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973) (noting that Congress passed the EPA “[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor”).

⁵² 417 U.S. 188, 207 (1974) (quoting § 2(a)(5), 77 Stat. at 56) (emphasis added).

⁵³ See Jeanne M. Hamburg, Note, *When Prior Pay Isn’t Equal Pay: A Proposed Standard for the Identification of ‘Factors Other than Sex’ Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1108 (1989) (urging greater scrutiny of prior salary defenses).

⁵⁴ See, e.g., *Balmer v. HCA, Inc.*, 423 F.3d 606, 615 (6th Cir. 2005) (finding no EPA violation where male comparator negotiated higher salary and female employee was not permitted to negotiate starting salary); *Reznick v. Associated Orthopedics & Sports Med., P.A.*, 104 F. App’x 387, 391-92 (5th Cir. 2004) (finding no EPA violation where a male surgeon negotiated higher compensation level in his initial employment contract than the plaintiff); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (finding no EPA violation where a male comparator negotiated a higher salary); *EEOC v. Home Depot U.S.A., Inc.*, No. 4:07CV0143, 2009 WL 395835, at *10 (N.D. Ohio Feb. 17, 2009) (finding a valid factor other than sex where male employees were able to negotiate higher starting salaries than the plaintiff); *Hardwick v. Blackwell Sanders Peper Martin, L.P.*, No. 25-859-CV-W-FJG, 2006 WL 2644997, at *3-4 (W.D. Mo. Sept. 14, 2006) (finding male comparator had negotiated a higher salary and the plaintiff did not negotiate). *But see* *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 596 (11th Cir. 1994) (rejecting the employer’s defense that wage disparities resulted from negotiations surrounding the purchases of comparators’ businesses); *Glodek v. Jersey Shore State Bank*, No. 4:07-CV-A-2237, 2009 WL 2778286, at *9 (M.D. Pa. Aug. 28, 2009) (rejecting negotiation defense and stating “[t]hrough salary demands are not entirely irrelevant, it would be inequitable to permit defendant to shelter itself from liability by stating that one individual received greater compensation than another simply because he or she requested it”); *Day v. Bethlehem Ctr. Sch. Dist.*, No. 07-159, 2008 WL 2036903, at *9 (W.D. Pa. May 9, 2008) (rejecting the school district’s defense at the summary judgment stage that male comparators negotiated salaries that were higher than the standard salary scale); *Klaus v. Hilb, Rogal & Hamilton Co.*, 437 F. Supp. 2d 706, 723-24 (S.D. Ohio 2006) (denying summary judgment where the employer defended a \$36,000 wage disparity based on the male comparator’s negotiation of higher salary).

⁵⁵ LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK* (2003); Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 395 (2008); Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007); Lisa Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators’ Beliefs About Requests for a Higher Salary*, 56 HUM. RELATIONS 635 (2003); B. Gerhart & S. Rynes, *Determinants and Consequences of Salary Negotiation by Male and Female MBA Graduates*, 76 J. APPLIED PSYCHOL. 256 (1991).

⁵⁶ Deposition Transcript at 32-35, 75-80 (Mar. 6, 2008) (on file with author).

⁵⁷ *Id.* at 79-80 (emphasis added).

⁵⁸ See *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr.*, 261 F.3d 542, 547 (5th Cir. 2001) (stating that the market forces defense simply perpetuates discrimination).

⁵⁹ See *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 344 (4th Cir. 1994) (explaining the differences in the burdens of proof for Title VII and the EPA).

⁶⁰ *Parada v. Great Plains Int’l of Sioux City, Inc.*, 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007).

⁶¹ Tom Krattenmaker, *Compensation: What’s the Big Secret?*, HARV. MGMT. COMM. LETTER, Oct. 2002, at 3.

⁶² See BABCOCK & LASCHEVER, *WOMEN DON’T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* 98-100 (2007) (reviewing studies that show that “people’s prejudices can powerfully influence the ways in which they respond to men and women without their realizing it”); Claudia Goldin & Cecilia Rowe, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000) (reporting that when auditions for an orchestra were conducted with the performers behind a screen, women were substantially more likely to advance out of the preliminary selection round).

⁶³ See, e.g., Barbara S. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

⁶⁴ BABCOCK & LASCHEVER, at 119-20 (“[W]omen fare better when an evaluation process is more structured, includes clearly understood benchmarks, and is less open to subjective judgments.” (citing S. FISKE & S.E. TAYLOR, *SOCIAL COGNITION* (1984); M.E. Heilman, *The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool*, 26 *ORG. BEHAV. & HUMAN PERFORMANCE* 386 (1980))).

⁶⁵ In some cases, there is evidence of gender-based comments or other discriminatory actions that can help to prove intent in Title VII cases. For example, Lilly Ledbetter testified that her supervisor “threatened to give her poor evaluations if she did not succumb to his sexual advances.” Brief for the Petitioner, *supra* note 8, at 5-6. When she questioned him about poor evaluations, he responded that it was “a lot easier to downgrade you. * * * You’re just a little female and these big old guys, I mean, they’re going to beat up on me and push me around and cuss me.” *Id.* at 6; *see also* Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 340 (4th Cir. 1994) (employer told plaintiff to be an engineer or a “mama”).

⁶⁶ *See, e.g.*, Fallon v. Illinois, 882 F.2d 1206, 1217 (7th Cir. 1989) (“It is possible that a plaintiff could fail to meet its burden of proving a Title VII violation, and at the same time the employer could fail to carry its burden of proving an affirmative defense under the Equal Pay Act.”); Brewster v. Barnes, 788 F.2d 985, 987 (4th Cir. 1986) (holding defendant liable for pay discrimination under EPA, but not under Title VII).

⁶⁷ 29 U.S.C. § 216(b) (2006).

⁶⁸ *Id.* (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

⁶⁹ *See* Cunningham v. Elec. Data Sys. Corp., 754 F. Supp. 2d 638, 643 (S.D.N.Y. 2010) (internal quotations and citations omitted) (“The similarly situated standard is far more lenient, and indeed, materially different, than the standard for granting class certification under Fed. R. Civ. P. 23.”).

⁷⁰ *See* Rafael Gely, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 *U. PA. J. LAB. & EMP. L.* 121, 122 n.2, 124-25 (2003).

⁷¹ Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983), *aff’d*, 749 F.2d 1501 (11th Cir. 1985).

⁷² Lilly Ledbetter received an anonymous letter informing her of pay disparities. *See* Katie Putnam, Note, *On Lilly Ledbetter’s Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 *WM. & MARY J. WOMEN & L.* 685, 689 (2009).

⁷³ Margaret Heffernan, the former CEO at CMGI, told this story:

For years, I was the only woman CEO at CMBI. But it wasn’t until I read the company’s proxy statement that I realized that my salary was 50 percent of that of my male counterparts. I had the CEO title, but I was being paid as if I were a director.

BABCOCK & LASCHEVER, at 104.

⁷⁴ In one case, the plaintiff “accidentally left her pay stub in plain view, and some of her colleagues began laughing and making negative remarks about her pay.” Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 785 (7th Cir. 2007).

⁷⁵ Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649-50 (2007) (Ginsburg, J., dissenting) (citing Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1008-09 (10th Cir. 2002) (“[P]laintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers’ salaries.”); McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals, 140 F.3d 288, 296 (1st Cir. 1998) (“[P]laintiff worked for employer for years before learning of salary disparity published in a newspaper.”)).

⁷⁶ *See Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination.*

⁷⁷ 109 CONG. REC. 9200 (1963) (statement of Rep. Dwyer).