"The Failure of Existing Employment Laws to Close the Gender Wage Gap"

Testimony of

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Chairman Harkin and members of the Senate Committee on Health, Education, Labor, and Pensions, I appreciate the opportunity to come before you today to discuss the inadequacy of existing employment discrimination laws to close the longstanding gender wage gap that continues to undermine the ability of women to support their families. Today more than ever, American women need and deserve strong legal protections from pay discrimination.

We now have abundant evidence that the gender wage gap persists and is not on track to close any time soon.[1] This gap exists at every level of earnings, from teacher's assistants, where the female median salary of $15,000 is 75% of the male median salary of $20,000, to physicians, where the female median salary, $88,000, is 63% of the male median salary, $140,000.[2] As economists debate how much of the gender wage gap is explained by discrimination, one incontrovertible truth emerges: even when non sex-based factors are accounted for—factors such as age, education, years of work, hours worked, job tenure, occupation and jobs held—a substantial portion of the gender wage gap remains and is only explainable by sex.[3] The bills now under consideration, the Paycheck Fairness Act and the Fair Pay Act, would help strengthen the ability of our

existing employment discrimination laws to more effectively address the gender wage gap.

Background: The Equal Pay Act Sets a Very High Burden on Employees to Prove Unequal Pay for Equal Work

Both the Paycheck Fairness Act and the Fair Pay Act would make changes to the Equal Pay Act of 1963.[4] In considering these bills, it is important to understand how the Equal Pay Act applies. Employees must meet a strict standard to establish a prima facie case of unequal pay under the Act. The Equal Pay Act applies only to unequal pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." This turns out to pose a high hurdle for employees invoking the Act. In order to establish a violation, an employee must first identify a higher-paid comparator of the opposite sex who performs substantially the same job, as measured by skill, effort, responsibility and working conditions.[5] This standard has been construed strictly, in ways that make it difficult for employees to identify comparators doing substantially equal work.[6]

For example in one representative case, the plaintiff, a senior vice-president of finance, failed to establish a prima facie case under the Equal Pay Act in comparing her pay to that of the company's other senior vice-presidents.[7] The courts' analysis left little room for meeting the "substantially equal" requirement for jobs that are managerial or executive in nature. The court described the Equal Pay Act as having greater applicability to "lower-level workers" who perform "commodity-like work" than to higher level jobs which are necessarily more unique.[8] Likewise, a different court found the jobs of an insurance company's male vice-presidents different in substance from the company's only female vice-president, who was paid less than all of the company's male

vice-presidents.[9] The court ruled that the jobs involved different responsibilities, even though they shared "a common core of substantially similar tasks" in managing divisions, the plaintiff managed the largest division, and the company's official salary administration program ranked all of the vice-presidents equally.[10] In fact, it seems a plaintiff can even lose an Equal Pay Act case due to job differences that give her *more* responsibility than her higher-paid male colleagues.[11]

The degree of similarity required by courts makes it difficult for women to identify comparators even in jobs that seem very similar.[12] The strictness with which courts approach the equal work requirement has led one legal scholar, who conducted an empirical review of all reported federal appellate cases decided under the Act, to conclude that the Equal Pay Act as interpreted by the courts is not broad enough to reach "non-standardized jobs" in the modern economy.[13]

In discussing the strictness of how courts approach Equal Pay Act claims, I do not mean to endorse the cases cited or the overly narrow approach to job similarity taken—indeed, in my view, many of these cases are wrongly decided. However, it is important for Congress to understand a key aspect of the legal background in this area: establishing a prima facie case under the Equal Pay Act is no easy matter. It is very difficult for employees to establish a violation of the Act, and the plaintiff who does so has proven that her employer has paid her less than a man for performing a job that is the same in virtually all respects.

1. The "Same Establishment" Requirement of the Equal Pay Act Further Narrows the Ability of Employees to Prove Pay Discrimination

Not only must the employee show that the employer paid her less for performing substantially the same work as a male employee; she and her male comparator must also

work in the "same establishment."[14] This can be an obstacle for an employee who seeks to compare her job to a male employee who does the same work in a different physical location.[15] The term "same establishment" is not defined in the Fair Labor Standards Act, but the Supreme Court has interpreted it to mean "a distinct physical place of business."[16] In order for different physical sites to be counted as part of the same establishment, thereby allowing the use of comparators at different physical locations, the plaintiff must prove "unusual circumstances," such as the exercise of centralized control in one location over important aspects of running the entire business.[17]

This showing of unusual circumstances requires proof that the employer maintains centralized control over decisions such as hiring employees, setting salaries, and assigning employees to various worksites.[18] While a plaintiff who works in a branch office of a company with one central administration may be able to meet this standard and identify comparators at other branch offices, many companies are organized so that different branches exercise control over important elements of the job relationship at that site, such as hiring, setting salaries, and job assignments.[19] As more employers move to a decentralized structure, this standard is likely to become increasingly difficult to meet.[20]

While it makes sense to have different pay scales for employees in different parts of the country where there are different costs of living, the current "same establishment" requirement goes well beyond accommodating such regional differences. The Paycheck Fairness Act would alleviate this problem by allowing the use of comparators who work for the same employer at different physical locations in the same county or similar political subdivision of a State, taking a more commonsense approach to pay inequality among persons who do equal work for the same employer.

2. The "Factor Other than Sex" Defense Excuses Far Too Much Pay Inequality

Once an employee proves that she was paid less for performing a job equal to that of a male comparator in the same establishment, the employer may avoid liability by establishing one of four affirmative defenses: that the wage disparity is based on (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex. It is the fourth defense that has become increasingly problematic.

Early in the Act's history, the Supreme Court took a searching approach to this defense, admonishing that a disparity based on market forces—e.g., the fact that women's labor brings a lower wage in the open market—was not a "factor other than sex" under the Act.[21] In that case, the Court rejected the employer's defense that male nightshift workers were paid more because they demanded more money than the female dayshift workers to perform substantially the same work.[22] The Court was on firm ground in doing so, since the Equal Pay Act was enacted precisely to address biases in the market that valued women's labor less than men's labor.[23] Despite this auspicious beginning, lower courts have increasingly opened the door to a broader "factor other than sex" defense that accepts virtually any superficially gender-neutral explanation for paying women less.

Over the years, stark differences have emerged in how lower courts interpret the factor other than sex defense. The courts most skeptical of equal pay claims have allowed employers to justify pay disparities based on anything other than explicitly sex-based criteria or intentional discrimination against women, even if the purportedly gender-neutral reason is lacking in a solid business justification. For example, the

Seventh Circuit has refused flat-out to undertake any inquiry into whether there is a business justification or legitimate business reason for the employer's explanation for the disparity under the "factor other than sex" defense.[24] That court has described the defense as "embrac[ing] an almost limitless number of factors, so long as they do not involve sex," even if they are not "'related to the requirements of the particular position in question,' nor…even…business-related.'"[25] Likewise, the Eighth Circuit has pointedly refused to require an acceptable business reason underlying the employer's assertion of a factor other than sex.[26] Contrary to this view, several circuit courts and the EEOC have taken a more searching approach to the factor other than sex defense, limiting it to factors based on legitimate business reasons.[27] Other courts have yet to take a clear stand on the question.[28]

The allowance of any non-sex-based factor to justify a wage disparity, however unconnected to the job at issue or unrelated to the needs of the business, has the potential to eviscerate the protections of the Equal Pay Act. As the Second Circuit recognized, "[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."[29] It would allow employers to rely on factors that are sex-linked and perpetuate the suppression of women's wages, without regard to the responsibilities of the jobs or the qualifications of the employees who fill them.[30]

One area in which this dispute over the scope of the defense plays out is the question of whether employees' prior salaries may be used to justify a current pay disparity for employees doing equal work. Some courts allow this as a "factor other than sex" without further scrutiny. For example, the Seventh Circuit allows employers to base

pay differentials on prior salary without any further justification.[31] Some courts even in those circuits that do require an acceptable business reason have expressed blanket approval of the use of prior salary without any inquiry into whether that differential is related to the skills and responsibilities needed to do the present job, or whether prior salaries reflect any differences in the skills and qualifications of the employees in those jobs.[32] Other courts have been more circumspect about reliance on prior salary to justify a present salary differential, requiring the employer to show that its reliance on prior salary was justified by sufficient business reasons.[33] These courts have recognized that reliance on prior salary to set current pay risks perpetuating ongoing pay discrimination against women, since women on average earn less than men.

The Paycheck Fairness Act would take sides in this dispute, ensuring that gender gaps in pay are not simply perpetuated by employers who set starting salaries based on employees' prior pay. Employers would have to prove that the differential in prior salary was not itself sex-based, and was job-related for the job in question and consistent with business necessity. This is an eminently fair standard and necessary to the vitality of the Equal Pay Act. Employers should not reflexively incorporate differences in prior salary when they hire male and female employees with similar experience and qualifications to do the same job. Otherwise, the Equal Pay Act will become little more than a rubber-stamp of the very wage disparities it was enacted to address.[34]

Another issue on which the dispute over the scope of the defense has emerged is the role of salary negotiations in justifying a pay differential under the "factor other than sex" defense. Courts generally have allowed employers to rely on differences in how employees negotiate their salary to support pay disparities under the defense.[35] However,

a wealth of recent research suggests cause for concern about interpreting the defense so broadly.

For complex reasons, men and women tend to differ in their approach to salary negotiations, and, importantly, employers tend to differ in how they respond to the men and women who do attempt to negotiate their salary. Behavioral researchers Linda Babcock and Sara Laschever, widely recognized experts in the field of gender differences in negotiation, found that among Carnegie Mellon University graduates, 57% of the men, but only 7% of the women, negotiated for a higher starting salary.[36] The applicants who negotiated received salaries that were an average of 7.4% higher than those who did not negotiate—a difference that corresponded almost exactly to the gap in the male and female graduates' starting salaries. Their subsequent research replicated these findings, and corroborated other research finding that men are significantly more likely than women to negotiate higher salaries.[37]

These findings must be evaluated in light of complementary research suggesting that women face a greater likelihood of being penalized by employers when they do attempt to negotiate salary. As Babcock and her fellow researchers found, "sometimes it hurts to ask."[38] In a series of experiments, they found that men and women triggered different reactions when they attempted to negotiate for more money. Women who used identical "scripts" as men to ask for more money were penalized by male evaluators, who were then less inclined to work with the women who had asked for more money. Their research suggests that women are less likely to negotiate salary at least in part because they accurately perceive a risk from negotiating, a risk that is both gender-specific and all too real.[39]

Given this reality, an employer who uses differences in negotiation to justify a disparity in paying men and women for equal work should have the burden to prove that this difference is not itself based on sex. In several of the cases in which courts have allowed employers to rely on negotiation to justify a pay disparity, the employer reacted differently to the men and women who tried to negotiate, rewarding men for negotiating while treating women's salaries as non-negotiable.[40] Moreover, employers should shoulder a substantial burden to justify pay disparities stemming from differences in salary negotiation by male and female employees who have similar qualifications and are hired to do equal work.[41] At a minimum, employers should have to demonstrate that the difference is related to the job in question and consistent with business necessity.

The Paycheck Fairness Act would help close what has become a gaping loophole in the Equal Pay Act's promise of a nondiscriminatory wage. The bill would limit the "factor other than sex" defense to ensure that an employer's reason for paying women less is a bona fide one, such as differences in education, training or experience, that it is not based upon or derived from a sex-based differential in compensation, and that it is job-related and consistent with business necessity. This language is borrowed from Title VII's disparate impact framework, under which facially neutral practices that disadvantage workers based on sex, race, color, religion or national origin must be shown to be job-related and consistent with business necessity. This standard has been the law in Title VII cases since 1971, when *Griggs v. Duke Power Co.* was decided, and was later codified in the Civil Rights Act of 1991, and courts have a wealth of experience applying this standard in a way that is fair to both employees and employers. The other three

existing defenses to Equal Pay Act claims would continue to apply unchanged, excusing pay differentials that are based on merit, seniority, or quantity or quality of production.

3. Existing Federal Laws Provide Inadequate Remedies for Gender-Based Pay Discrimination

Currently, employment discrimination law sets up a hierarchy of remedies for employees who experience different kinds of pay discrimination. Although full and uncapped remedies are available to victims of pay discrimination on the basis of race, no federal statute provides complete remedies to women who are paid less because of their sex. Under the Equal Pay Act, an employee may recover only the amount of her unlawfully withheld wages (up to two years' back pay, or three years' back pay for "willful" violations) and an equal amount in "liquidated damages."[42] Title VII of the Civil Rights Act of 1964 also prohibits discrimination in compensation, and a woman who wins a Title VII pay discrimination claim may obtain somewhat better relief under that statute, since Title VII authorizes compensatory and punitive damages. However, here too her relief will be cut short. Title VII caps damages at very modest levels. For example, in Lilly Ledbetter's case against Goodyear, the jury awarded over $3.5 million for Goodyear's egregious discrimination. However, the trial court was forced to cap Ms. Ledbetter's damages at $300,000, the statutory limit for combined compensatory and punitive damages applicable to large employers such as Goodyear.[43] As a result, the jury's award was reduced to $360,000, the maximum allowable combined compensatory and punitive damages, plus an award of $60,000 in back pay—a relatively small sum considering the seriousness of Goodyear's misconduct, the deterrent value of such an award against a company like Goodyear, and the longstanding harm of the pay

discrimination that continues to this day to follow Ms. Ledbetter into her retirement in the form of a lower pension.

In contrast, a claim for pay discrimination on the basis of race is actionable under a different statute, 42 U.S.C. §1981, which bars race discrimination in the making and enforcement of contracts, including employment contracts. A successful pay discrimination claimant under section §1981 receives the full panoply of legal remedies, including uncapped compensatory and punitive damages.

This inequity in remedies for discrimination Congress has declared unlawful is not justified by any principle of fairness or justice. Moreover, it puts employees in a position of having to finely parse their claims into either sex- or race-based claims, with significant consequences for how the claim is categorized. Women of color face a particular bind. A woman of color who is underpaid compared to white male employees would be better off categorizing her claim as one based on race rather than sex, even though the discrimination may combine elements of both, or fit better as a gender claim. The employer, on the other hand, may be able to limit its remedies if it can convincingly argue that she was paid less because of her gender and not because of her race, thereby restricting her to the much more limited remedies available under the Equal Pay Act and Title VII. The law should not take such a rigid approach to these categories, nor should it place a lower priority on eradicating pay discrimination based on gender.

I am aware that some opponents of amending the Equal Pay Act to authorize compensatory and punitive damages have called the law a "strict liability" statute, not deserving of a damages remedy. I strongly take issue with this characterization. The Equal Pay Act is not a "strict liability" law in any legally correct sense of that term.

Strict liability was developed in tort law to allocate responsibility for harm in certain instances notwithstanding the absence of a breach of the duty of care owed by the defendant. The idea behind it is that some endeavors (such as harboring wild animals or working with extremely hazardous materials) are so inherently dangerous that defendants should be responsible for any harm they cause even if they are not negligent or otherwise at fault.

The liability scheme established by the Equal Pay Act could not be further from a no-fault, strict liability rule. As explained above, an employer is liable under the Act only if the plaintiff succeeds in establishing the very difficult burden of proving that she was paid less than a man for performing substantially the same work, and then only if the defendant fails to prove that the pay disparity was justified by one of four affirmative defenses, including a factor other than sex. In other words, the plaintiff who wins an Equal Pay Act claim has been paid less for doing substantially the same job as a man because of her sex. Critics of the Paycheck Fairness Act who call the Equal Pay Act a "strict liability" law base their claim on the argument that the Equal Pay Act, unlike Title VII, does not require proof of intentional discrimination. However, they make far too much of this difference. Both statutes are asking the same fundamental question in such claims, whether an employee was paid less because of her sex, and proof of an Equal Pay Act violation almost always establishes a Title VII violation as well, without any additional evidence of discriminatory motive.[44] When a plaintiff wins a claim under the Equal Pay Act, she has proven that she is paid less than a man for performing substantially similar work and the employer has failed to show a sufficient justification

for the disparity. This is anything but a "no fault" liability scheme, and the employee who proves such discrimination should be entitled to a complete remedy under the law.

4. The Existence of Title VII Does Not Alleviate the Need for a Strengthened Equal Pay Act

Although there is a fair amount of overlap between Title VII and the Equal Pay Act, as discussed above, the existence of Title VII in no way alleviates the need for a strengthened Equal Pay Act. As an initial matter, some employees will only have access to the Equal Pay Act and not to Title VII due to differences in the scope and procedures of the two statutes.[45] Moreover, even if an employee proceeded under Title VII instead of the Equal Pay Act, the same defenses that apply to the Equal Pay Act, including the "factor other than sex" defense, also apply to Title VII under the so-called "Bennett Amendment."[46] Accordingly, Title VII incorporates the same problems discussed above with respect to the "factor other than sex" defense. Finally, as discussed above, Title VII also provides inadequate remedies to victims of discrimination because of its cap on damages.

5. Better Access to Salary Information is Crucial to the Effective Enforcement of the Equal Pay Laws

Access to salary information is crucial for both individual employees and government enforcement agencies in order to effectively enforce the guarantees of the equal pay laws. Without salary information, employees have no way of knowing if they are paid a discriminatory wage. Employers rarely disclose workers' salaries and workplace norms often discourage frank and open conversations among employees about salaries. Lilly Ledbetter's case is typical in this respect. She worked for Goodyear for many years, unaware that she was paid less than the lowest-paid male manager until she

received an anonymous note disclosing her colleagues' pay. Goodyear's policy of pay secrecy was calculated to keep her and other employees in the dark. Many employers have similar policies and informal practices discouraging the sharing of such information.[47] Currently, both employees and the relevant federal enforcement agencies lack access to the salary information they need to effectively enforce federal pay discrimination laws. Both the Paycheck Fairness Act and the Fair Pay Act would improve access to the pay information that is necessary for both individual and government enforcement of the laws.

6. The Fair Pay Act is Needed to Address an Aspect of the Gender Wage Gap Left Out of Both Title VII and the Equal Pay Act: the Effects of Occupational Segregation and the Devaluation of Women's Labor

The Fair Pay Act would address an aspect of the gender wage gap that existing law does not: the devaluation of jobs predominantly held by women. Neither Title VII nor the Equal Pay Act meaningfully addresses this problem. As noted above, occupational segregation does not fully explain the gap in men's and women's earnings; a substantial wage gap exists even controlling for occupation and job held. But some portion of the gap *is* attributable to the lower levels of pay drawn by workers in female-dominated occupations compared to workers in predominantly male occupations performing of work of equivalent skill, effort and responsibility. Because the Equal Pay Act applies only if male and female employees are paid differently to do substantially the same jobs, it has no application in this setting. While Title VII encompasses a broader set of claims than the Equal Pay Act, it too has a very limited applicability to the suppression of women's wages due to occupational segregation.

In theory, Title VII provides a remedy for employees whose wages are suppressed because they work in jobs predominantly filled by women. To succeed on such a claim, however, the plaintiffs must prove that the employer paid those jobs less precisely because they were held by women, that is, because of intentional discrimination. The leading case is *County of Washington v. Gunther*,[48] in which female prison guards (who guarded female prisoners) claimed pay discrimination because they were paid less than male prison guards (who guarded male prisoners), even though the lower court had found these jobs not to be similar enough for the Equal Pay Act. The plaintiffs argued that the underpayment of the women violated Title VII, and relied on a pay equity study commissioned by the county which had thoroughly analyzed the jobs and recommended that the women guards earn 95% of what the male guards earned. The county did not implement this recommendation and continued to pay the women guards substantially less, a decision that the plaintiffs attributed to discriminatory intent. The Supreme Court allowed the plaintiffs to proceed on this claim under Title VII, but reiterated the requirement that they prove intentional discrimination underlying the decision to pay them less.

In practice, this is a nearly insurmountable hurdle.[49] For example, in one of the more well-known, large-scale pay discrimination challenges to be brought under Title VII, *AFSCME v. Washington State*,[50] female state employees lost their Title VII challenge to the state's practice of paying substantially lower salaries for jobs predominantly held by women. The plaintiffs failed to show that the state's failure to implement the recommendations of a pay equity study it had commissioned amounted to a discriminatory intent.

And yet, the absence of a demonstrable discriminatory intent in these and similar cases should not be taken to mean that pay differentials between male-dominated and female-dominated jobs involving equivalent work are based on gender-neutral, unbiased market criteria. An analysis of the underlying data in the *AFSCME* case by two sociologists who study large organizations found that the state's pay scales did not passively reflect market wages, but stemmed from a discretionary and subtle sex-stereotyping of jobs that linked the pay of certain women's jobs to benchmarks comprised of other women's jobs, instead of comparing them to more highly paid and more objectively similar male-dominated jobs. The resulting pay differential reflected a sex-stereotyping of jobs and the lesser political clout of women workers in the state's very political and subjective pay-setting process.[51]

In a similar case, female clerical workers lost their Title VII case against a public university because the court found that the lower pay for those jobs compared to male-dominated jobs requiring a similar level of skill was not based on a demonstrable discriminatory intent.[52] However, the same organizational sociologists cited above found, after scouring the records in the case, that the university had rejected a consulting firm's recommendations to close this pay gap because of institutional bias favoring the male workers. In particular, the male workers were more confrontational in their dealings with the university while the clerical workers were more patient and cooperative. As a result, organizational politics and institutional bias led the university to "give selective attention to the demands of workers in predominantly male jobs," resulting in their higher pay.[53] Current law does not reach this kind of institutionalized

gender bias. The Fair Pay Act would bring much-needed scrutiny to these kinds of discriminatory practices.

In conclusion, it is heartening to see this Committee turn its attention to the important issue of pay equity. Both the Paycheck Fairness Act and the Fair Pay Act would go a long way toward strengthening the ability of existing federal discrimination laws to ensure that all American workers are paid a nondiscriminatory wage without regard to gender, race, national origin or religion.

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[1] See Bureau of Labor Statistics, U.S. Dep't of Labor, Highlights of Women's Earnings in 2003, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (women's median weekly earnings were 79.5% of men's in 2003, and 73.6% for college graduates); Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. Rev. 707, 715 (2000) (explaining that most of the progress in narrowing the wage gap since 1970, when it was fifty-nine cents on the dollar, was made in the 1980s, and studies show little additional progress since 1990).

[2] See 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 7, 12 tbl.5, 13 tbl. 6 (May 2004).

[3] See, e.g., U.S. Gen. Acct. Office, Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings, GAO-04-35 at 2 (Oct. 2003) (examining nationally representative longitudinal data set and concluding 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 care responsibilities); Weinberg, supra, at 21 ("There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience…education, and occupation."); Council of Econ. Advisers, Explaining Trends in the Gender Wage Gap 11 (1998) (concluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator, 49 Soc. Prob. 258, 269-70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs); Selmi, supra, at 719-43 (concurring, reviewing data); 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) (differences in men's and women's labor force attachment do not explain the gap); Bureau of Labor Statistics, supra, at 2, 25 tbl. 9, 26 tbl. 10, 35-36 tbl. 15, 37-36 tbl. 16 (differences in hours worked do not explain the gap).

[4] 29 U.S.C. § 206(d)(1).
[5] See Corning Glass Works v. Brennan, 417 U.S. 188 (1974); see generally Harold S. Lewis, Jr., and Elizabeth J. Norman, Employment Discrimination Law and Practice §7.3 (2d ed. 2004).
[6] See, e.g., Houck v. Virginia Polytechnic Institute, 10 F.3d 204, 206 (4th Cir. 1993) (requiring plaintiff to compare her pay to that of an actual male comparator, not a hypothetical male or a composite of male colleagues, and jobs must be equal on a "factor by factor" basis); Miranda v. B&B Cash Grocery Story, Inc., 975 F.2d 1518, 1526 (11th Cir. 1992) (describing the burden on employees to show "substantially similar work" as "a fairly strict standard").
[7] Georgen-Saad v. Texas Mutual Ins. Co., 195 F. Supp.2d 853 (W.D. Tex. 2002). The comparators were senior vice presidents over other aspects of the employer's business.
[8] Id. at 857.
[9] Stopka v. Alliance of American Insurers, 141 F.3d 681 (7th Cir. 1998).
[10] Id. at 685-86.
[11] See Pajic v. Cigna Corp., 56 Fair Empl. Prac. Cas. (BNA) 1624, 1990 U.S. Dist. LEXIS 11588 (E.D. Pa. 1990) (even though male co-workers were paid more for doing less than the female managers, their jobs were not similar enough to allow for an EPA claim).
[12] See, e.g., Howard v. Lear Corp. EEDS and Interiors, 234 F.3d 1002 (7th Cir. 2000) (female human resources coordinator's job was not substantially similar to men's human resources jobs where the men's jobs were in unionized plants with a mix of salaried and hourly workers and plaintiff's job was in a nonunionized plant with only salaried workers); EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987) (male and female coaching jobs at the high school and junior high level were not substantially similar where the jobs involved coaching different sports with different rules).
[13] See Deborah Thompson Eisenberg, Shattering the Equal Pay Act's Glass Ceiling, University of Maryland Legal Studies Research Paper No. 2009-54, 63 S.M.U. L. Rev. 101 (forthcoming, 2010), available at http://ssrn.com/abstract=1521172. This failing is particularly unfortunate because the gender wage gap for managerial and professional employees is even greater than it is for employees generally, and the improvement in this sector has been especially slow. Id. at 108-113; see also Ruben Bolivar Pagan, *Defending the "Acceptable Business Reason" Requirement of the Equal Pay Act: A Response to the Challenges of Wernsing v. Department of Human Services*, 33 J. Corp. Law 1007 (2008) (noting that the gender wage gap in managerial, professional, and related occupations has improved by only about 10% since the 1960s, and citing 2007 Department of Labor report finding that in management, professional, and related occupations, women earn only 73% as much as men).
[14] 29 U.S.C. 206(d).
[15] See, e.g., Thompson v. City of Albuquerque, 950 F. Supp. 1098, 1102 (D. N.M. 1996) (holding that veterinarians at city's animal services division and zoo did not work at the "same establishment" where they are under different city departments); Winther v. City of Portland, Civ. No. 91-1232-JU, 1992 WL 696529 at *5 (D. Or. July 10, 1992) (holding that although the Portland Fire Bureau and Bureau of Emergency Communications were

integrated with respect to a 911 system, they were separate establishments because they were administratively separate and had separate management); EEOC v. State of Del. Dept. of Health and Social Services, Civ. A. No. 83-412-JRR., 1986 WL 15944 at *2 (D. Del. Nov. 7, 1986) (holding "same establishment" to constitute only individual medical clinics and not entire system of clinics); Davis v. Western Elec. Co., No. C-78-65-WS, 1979 WL 15383 (M.D.N.C. July 6, 1979) (justifying a holding of separate establishments because of different management, separate personnel system and no rotation between plants); Gerlach v. Michigan Bell Tel. Co., 448 F.Supp. 1168, 1172 (D.Mich.1978) (holding the local office to be the relevant establishment because although Engineering Layout Clerks occasionally transfer or are loaned to other offices, they are primarily supervised at local offices); Shultz v. Corning Glass Works, 319 F. Supp. 1161, 1164 (W.D.N.Y. 1970) (finding that two plants that were physically connected constituted the "same establishment," but a third plant from which employees do not transfer back and forth did not constitute the "same establishment").

[16] A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945).

[17] 29 C.F.R. 1620.9(a).

[18] 29 C.F.R. 1620.9(b).

[19] Cf. Mulhall, 19 F.3d at 591 (separate locations were part of "same establishment" where plaintiff demonstrated "centralized control of job descriptions, salary administration and job assignments" and project managers at different locations reported to supervisor in central office); Meeks v. Computer Assocs., Int'l, 15 F.3d 1013, 1017 (11th Cir. 1994) (different physical locations were not part of the same establishment where local offices made their own hiring decisions and set specific employee salaries, albeit within a range defined by central administration); Foster v. Arcata Assocs., Inc., 772 F.2d 1453, 1464 (9th Cir. 1985) (physically separate offices of defense contractor were not part of "same establishment" where offices maintained independent management of projects for different customers, had separate budgets, and had delegated authority to make personnel decisions).

[20] Cf. Katherine V.W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace 165 (2004) (discussing the decentralization of authority and flattening of hierarchy in the modern workplace).

[21] Corning Glass Works v. Brennan, 417 U.S. 188 (1974). Cf. City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (indicating that the relative average greater costs of employing one sex would not quality as a factor other than sex); County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981) (in pay discrimination claim under Title VII, which incorporates "factor other sex" defense, describing the fourth defense as applying to "bona fide" factors other than sex).

[22] The Court allowed that working a nightshift as opposed to a dayshift might be a factor other than sex that justified a difference in pay, but in that case the employer had already paid a premium for all nightshift workers; the difference between the male nightshift inspectors and female dayshift inspectors had been superimposed on the existing difference in base pay for night and day workers because of the company's belief that the male workers would demand more pay.

[23] Cf. Deborah Thompson Eisenberg, Shattering the Equal Pay Act's Glass Ceiling, University of Maryland Legal Studies Research Paper No. 2009-54, 63 S.M.U. L. Rev.

101, 138-19 (forthcoming, 2010), available at http://ssrn.com/abstract=1521172 (employers asserting a market defense to Equal Pay Act claims usually do not have actual market supporting their position and instead rely on their own subjective belief about what the market requires; there is "no one magic market rate" for any particular job; instead, "[t]here are many human agency factors that can affect the structure and outcome of market compensation analysis that can allow subjective judgments and unconscious biases to affect the results").

[24] Wernsing v. Dept. of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the Eighth) and those that require an 'acceptable business reason' is established, and we are not even slightly tempted to change sides"); id. at 468 ("The statute asks whether the employer has a reason other than sex—not whether it has a 'good' reason."); see also Fallon v. State of Ill., 882 F.2d 1206 (7th Cir. 1989) (there is no requirement that a "factor other than sex" be "related to the requirements of a particular position in question, nor that it be a 'business-related reason.") (citation omitted); see also Boriss v. Addison Farmers Ins. Co., 1993 WL 284331 (N.D. Ill. 1993) (male employees' different qualifications could be a "factor other than sex" even if those qualifications were not related to the job at issue).

[25] Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994); see also Fallon v. State of Ill., 882 F.2d 1206, 1211 (7th Cir. 1989) (suggesting that even a practice with a discriminatory effect might qualify as a "factor other than sex").

[26] Taylor v. White, 321 F.3d 710 (8th Cir. 2003) (stating that "the wisdom or reasonableness" of the factor other than sex is irrelevant). The Court of Federal Claims has also aligned itself with the Seventh and Eighth Circuits on this question. Behm v. United States, 68 Fed. Cl. 395, 400 (Fed. Cl. 2005).

[27] See Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) (requiring a "bona fide business-related reason"); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1992) (stating that the defense "does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason"); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) (factor must be based on "an acceptable business reason"); Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (factor other than sex defense applies "when the disparity results from the unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business"). See also EEOC Compliance Manual, §10-IV(F)(2), Dec. 5, 2000 available at http://www.eeoc.gov/policy/docs/compensation.html (requiring employer to "show that the factor is related to job requirements or otherwise is beneficial to the employer's business" and that it is "used reasonably in light of the employer's stated business purpose as well as its other practices.").

[28] Ruben Bolivar Pagan, Defending the "Acceptable Business Reason" Requirement of the Equal Pay Act: A Response to the Challenges of Wernsing v. Department of Human Services, 33 Journal of Corporate Law 1007 (Summer 2008) (identifying the First, Third, Fourth, Fifth, Tenth and D.C. Circuits as "yet to consider whether the EPA's 'factor other than sex' exception contains an implicit 'acceptable business reason' requirement" and recommending that all circuits join majority view to require an acceptable business reason).

[29] Aldrich, 963 F.2d at 525.
[30] Cf. Engelman v. Nat'l Broadcasting Co., Inc., 1996 WL 76107, at *7 (SDNY Feb. 22, 1996)) (warning that without a legitimate business justification required for the "factor other than sex" defense, an employer could rely on sex-linked factors such as height and weight even if those qualities were unrelated to the job in question).
[31] Wernsing v. Dept. of Human Servs., 427 F.3d 466 (7th Cir. 2005). See also Brinkley v. Harbour Recreation Club, 180 F.3d 598, 617 & n.14 (4th Cir. 1999) (stating that salary history can be a "factor other than sex," and declining to decide whether to super-impose a "job-relatedness requirement" on this defense, while noting a split in the circuits over whether to do so).
[32] See, e.g., Sparrock v. NYP Holdings, Inc., 2008 WL 744733, *15 (S.D.N.Y. Mar. 4, 2008) ("matching an employee's former salary has been found to be a factor other than sex justifying wage differential"); Drury v. Waterfront Media, Inc., 2007 WL 737486, *4 (S.D.N.Y. Mar. 8, 2007) (paying male employee hiring salary to lure him away from prior employer was a factor other than sex); Engelmann v. National Broadcasting Co., Inc., 1996 WL 76107, *10 (S.N.D.Y. Feb. 22, 1996) (also approving salary-matching of employee's salary with a previous employer as a factor other than sex).

[33] See, e.g., Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (rejecting reliance on prior salary alone; prior salary must be connected to experience to justify a present salary disparity); Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir. 1988) (rejecting as a "factor other than sex" employer's decision to pay male clerks more because they transferred from higher paying positions); cf. Kouba v. Allstate, 691 F.2d 873, 878 (9th Cir. 1982) (employer must show reliance on prior salary justified by business reasons particular to the employer's business). The EEOC also places a higher burden on employers relying on prior salary to justify a pay differential. See EEOC Compliance Manual, §10-IV(F)(2)(g), Dec. 5, 2000, available at http://www.eeoc.gov/policy/docs/compensation.html (stating that "[p]rior salary cannot, by itself, justify a compensation disparity," and requiring employer to "prove that sex was not a factor in its consideration of prior salary, and that other factors were also considered," for example, by showing employer "(1) determined that the prior salary accurately reflected the employee's ability based on his or her job-related qualifications; and (2) considered the prior salary, but did not rely solely on it in setting the employee's current salary").

[34] Indeed, because of historic wage patterns and male wage earners' continuing comparative strength in the market, adopting salary-matching or differences in prior salary as "a factor other than sex" is practically a recipe for perpetuating the gender wage gap indefinitely. See Jeffrey Lax, Do Employer Requests for Salary History Discriminate Against Women? 58 Labor Law Journal 47 (2007) (employers frequently use prior salary to set the wages of new employees, a practice which perpetuates women's lower earnings relative to men; therefore, urging Congress to close the loophole that allows employers to invoke such a reason as a factor other than sex); Jeanne M. Hamburg, 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 (1989) (arguing for judicial skepticism toward use prior salary as a factor other than sex).

[35] See Christine Elzer, Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiations is Not a "Factor Other Than Sex" Under the Equal Pay Act, 10 Geo. J. Gender & Law 1, 10-12 (2009) (stating that of the eight published decisions that address negotiation as a factor other than sex, only one, Futran v. Ring Radio Co., 501 F. Supp. 734 (N.D. Ga. 1980), has rejected it as a factor other than sex, and that case also involved direct evidence of discriminatory intent); id. at 10, 13-19 (citing and discussing the cases that have permitted employers to consider salary negotiation as a factor other than sex). See also Day v. Bethlehem Center Sch. Dist., No. 07-159, 2008 WL 2036903 (W.D. Pa. May 9, 2008) ("Although Plaintiffs present a compelling argument as to why the Defendant's factor other than sex, i.e., negotiation, fails as a matter of law, they do not cite any cases directly on point that support their position.").

[36] Linda Babcock & Sara Laschever, Women Don't Ask: Negotiation and the Gender Divide 1-2 (2003).

[37] Id.; Elzer, 10 Geo. J. Gender & L. at 4-9 (describing social science research on the gender divide in negotiations).

[38] Hannah Riley Bowles, Linda Babcock, & Lei Lai, Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask, 103 Organizational Behav. & Hum. Decision Processes 84 (2007).

[39] Id. at 88-100; see also M.E. Wade, Women and Salary Negotiation: The Costs of Self-Advocacy, 25 Psychology of Women Q. 65 (2001); Elzer, 10 Geo. J. Gender & L. at 7-9 (describing this research in greater detail).

[40] See Elzer, 10 Geo. J. Gender & L. at 20 (citing cases).

[41] Cf. Charles B. Craver, "If Women Don't Ask: Implications for Bargaining Encounters, the Equal Pay Act, and Title VII, 102 Mich. L. Rev. 1104, 1116 (2004) (arguing that an employer who succumbs to a male applicant's entreaties for more money than it pays a woman to do substantially equal work presents "the exact situation the enactment was designed to proscribe—the willingness of females to work for less based upon the 'outmoded belief that a man…should be paid more than a woman, even though his duties are the same.'") (citation omitted).

[42] 29 U.S.C. §216.

[43] The limit for smaller employers is even lower, set at $50,000 for employers with fewer than 100 employees, $100,000 for employers with 101-200 employees, $200,000 for employers with 200-500 employees, and $300,000 for all employers with more than 500 employees.

[44] In many courts, proof of an Equal Pay Act violation also establishes a Title VII violation *per se* because proof that the plaintiff was paid less for substantially equal work also proves that she was paid less because of sex in violation of Title VII. Other courts apply Title VII's distinct proof model to pay discrimination claims, with the ultimate inquiry being whether the plaintiff established intentional discrimination. See Lewis & Norman, §7.15. Even in this latter set of courts, however, the same evidence that establishes an Equal Pay Act violation will also generally establish a Title VII violation; however, it is possible, in theory, that a plaintiff bringing both claims in such a court

might win under the Equal Pay Act, but lose under Title VII because of the different allocations of the burden of proof on the question of whether the lower pay was because of sex. See 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.").

[45] See generally Harold S. Lewis, Jr., and Elizabeth J. Norman, Employment Discrimination Law and Practice, §7.2 (2d ed. 2004) (explaining that, unlike Title VII, the Equal Pay Act is triggered by an employer's connection to commerce, with limited exceptions for a few very specific industries, and not by the number of employees); id. at §7.21 (explaining that the EPA has a longer statute of limitations—two years, or three years for a violation that is willful—as compared to Title VII's much shorter limitations period).

[46] 42 USC 2000e-2(h).

[47] *See* Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004) (noting that one-third of U.S. private sector employers have policies prohibiting employees from discussing salaries and that many more communicate informally an expectation of confidentiality with respect to employee salaries).

[48] County of Washington v. Gunther, 452 U.S. 161 (1981).

[49] See, e.g., E.E.O.C. v. Sears Roebuck & Co., 839 F.2d 302, 340-42 (7th Cir. 1988) (stressing the "limited scope" of *Gunther* and holding that only "clear and straightforward" evidence of discriminatory intent would suffice to make out a Title VII pay discrimination claim not based on equal work); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133 (5th Cir. 1983) (in a Title VII claim for pay discrimination not involving equal work, plaintiffs must show a "transparently sex-biased system for wage determination" or "direct evidence" of discriminatory intent).

[50] 770 F.2d 1401 (9th Cir. 1985).

[51] See Martha Chamallas, The Market Excuse, 68 U. Chicago L. Rev. 579 (2001) (reviewing Robert L. Nelson and William P. Bridges, Legalizing Gender Inequality: Courts, Markets and Unequal Pay for Women in America (1999)).

[52] Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

[53] Chamallas at 587 (quoting Nelson and Bridges at 166).