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110TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 110–783

PAYCHECK FAIRNESS ACT

JULY 28, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1338]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 1338) to amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Paycheck Fairness Act".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Women have entered the workforce in record numbers over the past 50 years.

(2) Despite the enactment of the Equal Pay Act in 1963, many women continue to earn significantly lower pay than men for equal work. These pay disparities exist in both the private and governmental sectors. In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination.

(3) The existence of such pay disparities—

(A) depresses the wages of working families who rely on the wages of all members of the family to make ends meet;

(B) undermines women's retirement security, which is often based on earnings while in the workforce;

(C) prevents the optimum utilization of available labor resources;

(D) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of the several States;

(E) burdens commerce and the free flow of goods in commerce;

(F) constitutes an unfair method of competition in commerce;

(G) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;

(H) interferes with the orderly and fair marketing of goods in commerce; and

(I) in many instances, may deprive workers of equal protection on the basis of sex in violation of the 5th and 14th amendments.

(4)(A) Artificial barriers to the elimination of discrimination in the payment of wages on the basis of sex continue to exist decades after the enactment of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) and the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.).

(B) These barriers have resulted, in significant part, because the Equal Pay Act has not worked as Congress originally intended. Improvements and modifications to the law are necessary to ensure that the Act provides effective protection to those subject to pay discrimination on the basis of their sex.

(C) Elimination of such barriers would have positive effects, including—

(i) providing a solution to problems in the economy created by unfair pay disparities;

(ii) substantially reducing the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance;

(iii) promoting stable families by enabling all family members to earn a fair rate of pay;

(iv) remedying the effects of past discrimination on the basis of sex and ensuring that in the future workers are afforded equal protection on the basis of sex; and

(v) ensuring equal protection pursuant to Congress' power to enforce the 5th and 14th amendments.

(5) The Department of Labor and the Equal Employment Opportunity Commission have important and unique responsibilities to help ensure that women receive equal pay for equal work.

(6) The Department of Labor is responsible for—

(A) collecting and making publicly available information about women's pay;

(B) ensuring that companies receiving Federal contracts comply with anti-discrimination affirmative action requirements of Executive Order 11246 (relating to equal employment opportunity);

(C) disseminating information about women's rights in the workplace;

(D) helping women who have been victims of pay discrimination obtain a remedy; and

(E) being proactive in investigating and prosecuting equal pay violations, especially systemic violations, and in enforcing all of its mandates.

(7) The Equal Employment Opportunity Commission is the primary enforcement agency for claims made under the Equal Pay Act, and issues regulations and guidance on appropriate interpretations of the law.

(8) With a stronger commitment by the Department of Labor and the Equal Employment Opportunity Commission to their responsibilities, increased information about the provisions added by the Equal Pay Act of 1963, wage data, and more effective remedies, women will be better able to recognize and enforce their rights.

(9) Certain employers have already made great strides in eradicating unfair pay disparities in the workplace and their achievements should be recognized.

SEC. 3. ENHANCED ENFORCEMENT OF EQUAL PAY REQUIREMENTS.

(a) BONA-FIDE FACTOR DEFENSE AND MODIFICATION OF SAME ESTABLISHMENT REQUIREMENT.—Section 6(d)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(1)) is amended—

(1) by striking "No employer having" and inserting "(A) No employer having";

(2) by striking "any other factor other than sex" and inserting "a bona fide factor other than sex, such as education, training, or experience"; and

(3) by inserting at the end the following:

"(B) The bona fide factor defense described in subparagraph (A)(v) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment

practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.

"(C) For purposes of subparagraph (A), employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a State. The preceding sentence shall not be construed as limiting broader applications of the term 'establishment' consistent with rules prescribed or guidance issued by the Equal Opportunity Employment Commission.".

(b) APPLICATION OF PROVISIONS.—Section 6(d)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(1)) is further amended by adding at the end the following: "The provisions of this subsection shall apply to applicants for employment if such applicants, upon employment by the employer, would be subject to any provisions of this section.".

(c) NONRETALIATION PROVISION.—Section 15 of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)) is amended—

(1) in subsection (a)(3), by striking "employee has filed" and all that follows and inserting "employee—

"(A) has made a charge or filed any complaint or instituted or caused to be instituted any investigation, proceeding, hearing, or action under or related to this Act, including an investigation conducted by the employer, or has testified or is planning to testify or has assisted or participated in any manner in any such investigation, proceeding, hearing or action or in an investigation conducted by the employer, or has served or is planning to serve on an industry Committee; or

"(B) has inquired about, discussed or disclosed the wages of the employee or another employee."; and

(2) by adding at the end the following:

"(c) Subsection (a)(3)(B) shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under section 6(d) or an investigation conducted by the employer. Nothing in this subsection shall be construed to limit the rights of an employee provided under any other provision of law.".

(d) ENHANCED PENALTIES.—Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is amended—

(1) by inserting after the first sentence the following: "Any employer who violates section 6(d) shall additionally be liable for such compensatory damages or punitive damages as may be appropriate, except that the United States shall not be liable for punitive damages.";

(2) in the sentence beginning "An action to", by striking "either of the preceding sentences" and inserting "any of the preceding sentences of this subsection";

(3) in the sentence beginning "No employees shall", by striking "No employees" and inserting "Except with respect to class actions brought to enforce section 6(d), no employee";

(4) by inserting after the sentence referred to in paragraph (3), the following: "Notwithstanding any other provision of Federal law, any action brought to enforce section 6(d) may be maintained as a class action as provided by the Federal Rules of Civil Procedure."; and

(5) in the sentence beginning "The court in"—

(A) by striking "in such action" and inserting "in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection"; and

(B) by inserting before the period the following: ", including expert fees".

(e) ACTION BY SECRETARY.—Section 16(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(c)) is amended—

(1) in the first sentence—

(A) by inserting "or, in the case of a violation of section 6(d), additional compensatory or punitive damages," before "and the agreement"; and

(B) by inserting before the period the following: ", or such compensatory or punitive damages, as appropriate";

(2) in the second sentence, by inserting before the period the following: "and, in the case of a violation of section 6(d), additional compensatory or punitive damages";

(3) in the third sentence, by striking "the first sentence" and inserting "the first or second sentence"; and

(4) in the last sentence—

(A) by striking "commenced in the case" and inserting "commenced—
"(1) in the case";
(B) by striking the period and inserting "; or"; and
(C) by adding at the end the following:
"(2) in the case of a class action brought to enforce section 6(d), on the date on which the individual becomes a party plaintiff to the class action.".

SEC. 4. TRAINING.

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, subject to the availability of funds appropriated under section 11, shall provide training to Commission employees and affected individuals and entities on matters involving discrimination in the payment of wages.

SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND WOMEN.

(a) PROGRAM AUTHORIZED.—

(1) IN GENERAL.—The Secretary of Labor, after consultation with the Secretary of Education, is authorized to establish and carry out a grant program.

(2) GRANTS.—In carrying out the program, the Secretary of Labor may make grants on a competitive basis to eligible entities, to carry out negotiation skills training programs for girls and women.

(3) ELIGIBLE ENTITIES.—To be eligible to receive a grant under this subsection, an entity shall be a public agency, such as a State, a local government in a metropolitan statistical area (as defined by the Office of Management and Budget), a State educational agency, or a local educational agency, a private nonprofit organization, or a community-based organization.

(4) APPLICATION.—To be eligible to receive a grant under this subsection, an entity shall submit an application to the Secretary of Labor at such time, in such manner, and containing such information as the Secretary of Labor may require.

(5) USE OF FUNDS.—An entity that receives a grant under this subsection shall use the funds made available through the grant to carry out an effective negotiation skills training program that empowers girls and women. The training provided through the program shall help girls and women strengthen their negotiation skills to allow the girls and women to obtain higher salaries and rates of compensation that are equal to those paid to similarly-situated male employees.

(b) INCORPORATING TRAINING INTO EXISTING PROGRAMS.—The Secretary of Labor and the Secretary of Education shall issue regulations or policy guidance that provides for integrating the negotiation skills training, to the extent practicable, into programs authorized under—

(1) in the case of the Secretary of Education, the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins Vocational and Technical Education Act of 1998 (20 U.S.C. 2301 et seq.), the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), and other programs carried out by the Department of Education that the Secretary of Education determines to be appropriate; and

(2) in the case of the Secretary of Labor, the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.), and other programs carried out by the Department of Labor that the Secretary of Labor determines to be appropriate.

(c) REPORT.—Not later than 1 year after the date of enactment of this Act, and annually thereafter, the Secretary of Labor and the Secretary of Education shall prepare and submit to Congress a report describing the activities conducted under this section and evaluating the effectiveness of such activities in achieving the purposes of this Act.

SEC. 6. RESEARCH, EDUCATION, AND OUTREACH.

The Secretary of Labor shall 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, including—

(1) conducting and promoting research to develop the means to correct expeditiously the conditions leading to the pay disparities;

(2) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the media, and the general public the findings resulting from studies and other materials, relating to eliminating the pay disparities;

(3) sponsoring and assisting State and community informational and educational programs;

(4) providing information to employers, labor organizations, professional associations, and other interested persons on the means of eliminating the pay disparities;

(5) recognizing and promoting the achievements of employers, labor organizations, and professional associations that have worked to eliminate the pay disparities; and

(6) convening a national summit to discuss, and consider approaches for rectifying, the pay disparities.

SEC. 7. ESTABLISHMENT OF THE NATIONAL AWARD FOR PAY EQUITY IN THE WORKPLACE.

(a) IN GENERAL.—There is established the Secretary of Labor's National Award for Pay Equity in the Workplace, which shall be awarded, as appropriate, to encourage proactive efforts to comply with this Act.

(b) CRITERIA FOR QUALIFICATION.—The Secretary of Labor shall set criteria for receipt of the award, including a requirement that an employer has made substantial effort to eliminate pay disparities between men and women, and deserves special recognition as a consequence of such effort. The secretary shall establish procedures for the application and presentation of the award.

(c) BUSINESS.—In this section, the term "employer" includes—

(1)(A) a corporation, including a nonprofit corporation;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in any of subparagraphs (A) through (D);

(2) an entity carrying out an education referral program, a training program, such as an apprenticeship or management training program, or a similar program; and

(3) an entity carrying out a joint program, formed by a combination of any entities described in paragraph (1) or (2).

SEC. 8. COLLECTION OF PAY INFORMATION BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Section 709 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–8) is amended by adding at the end the following:

"(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall—

"(A) complete a survey of the data that is currently available to the Federal Government relating to employee pay information for use in the enforcement of Federal laws prohibiting pay discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws; and

"(B) based on the results of the survey and consultations under subparagraph (A), issue regulations to provide for the collection of pay information data from employers as described by the sex, race, and national origin of employees.

"(2) In implementing paragraph (1), the Commission shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination. For this purpose, the Commission shall consider factors including the imposition of burdens on employers, the frequency of required reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for the data collection reports.".

SEC. 9. REINSTATEMENT OF PAY EQUITY PROGRAMS AND PAY EQUITY DATA COLLECTION.

(a) BUREAU OF LABOR STATISTICS DATA COLLECTION.—The Commissioner of Labor Statistics shall continue to collect data on women workers in the Current Employment Statistics survey.

(b) OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS INITIATIVES.—The Director of the Office of Federal Contract Compliance Programs shall ensure that employees of the Office—

(1)(A) shall use the full range of investigatory tools at the Office's disposal, including pay grade methodology;

(B) in considering evidence of possible compensation discrimination—

(i) shall not limit its consideration to a small number of types of evidence; and

(ii) shall not limit its evaluation of the evidence to a small number of methods of evaluating the evidence; and

(C) shall not require a multiple regression analysis or anecdotal evidence for a compensation discrimination case;

(2) for purposes of its investigative, compliance, and enforcement activities, shall define "similarly situated employees" in a way that is consistent with and not more stringent than the definition provided in item 1 of subsection A of section 10–III of the Equal Employment Opportunity Commission Compliance

Manual (2000), and shall consider only factors that the Office's investigation reveals were used in making compensation decisions; and

(3) shall reinstate the Equal Opportunity Survey, as required by section 60-2.18 of title 41, Code of Federal Regulations, designating not less than half of all nonconstruction contractor establishments each year to prepare and file such survey, and shall review and utilize the responses to such survey to identify contractor establishments for further evaluation and for other enforcement purposes as appropriate.

(c) DEPARTMENT OF LABOR DISTRIBUTION OF WAGE DISCRIMINATION INFORMATION.—The Secretary of Labor shall make readily available (in print, on the Department of Labor website, and through any other forum that the Department may use to distribute compensation discrimination information), accurate information on compensation discrimination, including statistics, explanations of employee rights, historical analyses of such discrimination, instructions for employers on compliance, and any other information that will assist the public in understanding and addressing such discrimination.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated $15,000,000 to carry out this Act.

PURPOSE

When President Kennedy signed the Equal Pay Act (EPA) into law in 1963 he observed that the statute "adds to our laws another structure basic to democracy" and "affirms our determination that when women enter the labor force they will find equality in their pay envelope."[1] Forty-five years later, women have made tremendous progress in the workplace.[2] They comprise almost half of this country's workforce and more than 6 million businesses are owned by women.[3] Despite these gains, women continue to be held back by wage discrimination. As a result of loopholes in the law and weak sanctions for violations, the EPA is ineffective in combating unequal pay. Women working full-time year-round earn 77 cents for every dollar earned by a man.[4] The *Paycheck Fairness Act*, H.R. 1338 modernizes the EPA and brings the country one step closer to ensuring that women earn equal pay for equal work.

Pay disparity's long-term impact on women's lifetime earnings is substantial and can cost a woman anywhere from $400,000 to $2 million over her lifetime.[5] H.R. 1338 will strengthen the EPA to make it a more effective means to combat wage discrimination. Specifically the bill: (1) expands the establishment requirement so female employees to look beyond their physical workplace to find a male comparator; (2) extends anti-retaliation protections so employees are free to discuss or disclose salary information; (3) clarifies the affirmative defense of 'any factor other sex'; (4) establishes a grant program to fund training programs for women on employer/employee negotiations; (5) directs the Secretary of Labor to conduct studies and provide information to employers, labor organizations and the general public on ways to eliminate pay disparities; (6) permits the Secretary of Labor to offer technical assistance to employers when carrying out wage evaluations; (7) makes it easier for women to join class action lawsuits ; (8) mandates that the Equal

[1] U.S. Equal Employment Opportunity Commission, "The Equal Pay Act Turns 40," *available* at: *http://www.eeoc.gov/epa/anniversary/epa-40.html.*

[2] 29 USC § 206(d)

[3] U.S. Small Business Association, *Women in Business: A Demographic Review of Women's Business Ownership* (Aug. 2006), *available* at: *http://www.sba.gov/ADVO/research/rs280tot.pdf.*

[4] Jody Feder & Linda Levine, *CRS Report, Pay Equity Legislation in the 110th Congress,* at 1 (May 2, 2008)

[5] Institute for Women's Policy Research, *Memo to John Roberts: The Gender Gap is Real* (2005).

Employment Opportunity Commission (EEOC) survey available pay data and issue regulations to provide for the collection of pay data from employers, which identifies workers by sex, race and national origin; and (9) codifies the use of the Equal Opportunity Survey (EO) by Office of Federal Contract Compliance (OFCCP) for non-construction workers.

COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY AND VOTES IN COMMITTEE

105TH CONGRESS

Senator Thomas Daschle (D–SD) introduced S. 71, the *Paycheck Fairness Act*, on January 21, 1997. The bill had 23 cosponsors and was referred to the Committee on Labor and Human Resources. Congresswoman Rosa DeLauro (D–CT) introduced H.R. 2023, the *Paycheck Fairness Act*, on June 24, 1997. The bill had 95 cosponsors and was referred to the Committee on Education and the Workforce. H.R. 2023 was then referred to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on either bill.

106TH CONGRESS

Senator Thomas Daschle (D–SD) introduced S. 74, the *Paycheck Fairness Act*, on January 19, 1999. The bill had 31 cosponsors and was referred to the Committee on Health, Education, Labor, and Pensions. Congresswoman Rosa DeLauro (D–CT) introduced H.R. 541, the *Paycheck Fairness Act*, on February 3, 1999. The bill was referred to the Committee on Education and the Workforce and the Subcommittees on Workforce Protections and Employer-Employee Relations.

The Senate Committee on Health, Education, Labor, and Pensions held a hearing on gender-based wage discrimination on June 8, 2000. The hearing, "Examining the Bureau of Labor Statistics Report which Provides a Full Picture of the Gender-Based Wage Gap, the reasons for these Gaps and the Impact this Discrimination has on Women and Families, and the Effectiveness of Current Laws and Proposed Legislative Solutions, and S. 74, to Amend the Fair Labor Standards Act of 1938 to Provide More Effective Remedies to Victims of Discrimination in the Payment of Wages on the Basis of Sex," featured testimony from Dr. Katherine Abraham, Commissioner, Bureau of Labor Statistics; Dr. June O'Neill, professor of economics and finance, Baruch College, Zicklin School of Business; Dr. Heidi Hartmann, Director, Institute for Women's Policy Research; Anita Hattiangadi, economist, Employment Policy Foundation; Barbara Berish Brown, partner, Paul, Hastings, Janofsky & Walker, LLP; Judith Applebaum, vice president and director of employment opportunities, National Women's Law Center; and Gail Shaffer, chief executive officer, Business and Professional Women/USA. Testimony was submitted for the record by Irasema Garza, Director, Women's Bureau, U.S. Department of Labor.

107TH CONGRESS

Senator Thomas Daschle (D–SD) introduced S. 77, the *Paycheck Fairness Act*, on January 22, 2001. The bill had 32 cosponsors and was referred to the Committee on Health, Education, Labor, and

Pensions. Congresswoman Rosa DeLauro (D–CT) introduced H.R. 781, the *Paycheck Fairness Act*, on February 22, 2001. The bill had 196 cosponsors and was referred to the Committee on Education and the Workforce. Once in committee, it was referred to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on either bill.

108TH CONGRESS

Senator Thomas Daschle (D–SD) introduced S. 76, the *Paycheck Fairness Act*, on January 7, 2003. The bill had 20 cosponsors and was referred to the Committee on Health, Education, Labor, and Pensions. Congresswoman Rosa DeLauro (D–CT) introduced H.R. 1688, the *Paycheck Fairness Act*, on April 9, 2003. The bill had 116 cosponsors and was referred to the Committee on Education and the Workforce. The committee referred it to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on any bill.

109TH CONGRESS

On April 19, 2005, Congresswoman Rosa DeLauro (D–CT) introduced the *Paycheck Fairness Act*. The bill had 111 cosponsors and was referred to the Committee on Education and the Workforce. The Committee referred it to the Subcommittees on Workforce Protections and Employer-Employee Relations. The same day that Congresswoman DeLauro introduced her bill, Senator Hillary Rodham Clinton (D–NY) introduced S. 841, the *Paycheck Fairness Act*. The bill had 18 cosponsors and was referred to the Committee on Health, Education, Labor, and Pensions. No further action was taken on either bill.

110TH CONGRESS

On March 6, 2007, Congresswoman Rosa DeLauro (D–CT) introduced H.R. 1338, the *Paycheck Fairness Act*. The bill has 230 cosponsors and was referred to the Committee on Education and Labor, where it was referred to the Subcommittee on Workforce Protections. That same day, Senator Hillary Rodham Clinton (D–NY) introduced S. 766, the *Paycheck Fairness Act*. The bill has 22 cosponsors and was referred to the Committee on Health, Education, Labor, and Pensions.

On Thursday, April 12, 2007, the Senate Committee on Health, Education, Labor, and Pensions held a hearing titled "Closing the Gap: Equal Pay for Women Workers." The hearing examined enforcement of the *Equal Pay Act of 1963, the Fair Pay Act* and the *Paycheck Protection Act*. At the hearing the following people presented testimony: Evelyn Murphy, President, WAGE Project, Inc. and Resident Scholar of the Women's Research Center at Brandeis University; Jocelyn Samuels, Vice President for Education and Employment at the National Women's Law Center; Dr. Philip Cohen, Associate Professor and Director of Graduate Studies for the Department of Sociology at the University of North Carolina; and Barbara Brown, Attorney at Paul Hastings.

On Tuesday, April 24, 2007, the House Committee on Education and Labor conducted a hearing on gender based wage discrimination. At this hearing, "Strengthening the Middle Class: Ensuring

Equal Pay for Women," the Committee heard testimony describing the scope and causes of gender-based wage disparity.[6] Witnesses included: Congresswoman Rosa DeLauro (D–CT); Congresswoman Eleanor Holmes Norton (D–D.C. Del.); Catherine Hill, Research Director for the American Association of University Women; Heather Boushey, Senior Economist at the Center for Economic and Policy Research; Dedra Farmer, Plaintiff in the Wal-Mart sex-discrimination class action lawsuit; and Diana Furchtgott-Roth, Director of the Center for Employment Policy at the Hudson Institute.

On Wednesday, July 11, 2007, the House Labor Subcommittee on Workforce Protections held a legislative hearing on H.R. 1338, "The *Paycheck Fairness Act*." The hearing focused on H.R. 1338 and the wage disparity that exists from the moment men and women enter the workforce—a disparity that only grows over time.[7] Witnesses included: Evelyn Murphy, President, WAGE Project, Inc. and Resident Scholar of the Women's Research Center at Brandeis University; Joseph Sellers, Partner with the law firm of Cohen, Milstein, Hausfeld & Toll, PLLC; Marcia Greenberger, Co-President of the National Women's Law Center; and Camille A. Olson, Partner at Seyfarth Shaw, LLP.

Committee on Education and Labor Full Committee mark-up of the Paycheck Fairness Act

On Thursday, July 24, 2008, the Committee on Education and Labor met for a full committee markup of H.R. 1338. The Committee adopted by voice vote an amendment in the nature of a substitute offered by Chairman Miller and reported the bill favorably as amended by a vote of 26–17 to the House of Representatives.

The Miller amendment incorporates the provisions of H.R. 1338 with the following modifications:

• Adds language to the bill's findings section about the EEOC's role in combating gender-based wage discrimination.

• Narrows the 'any factor other than sex' standard to provide that the bona fide factor defense shall only apply if the employer demonstrates that the such factor is not derived from or based upon a sex-based differential in compensation; is job-related with respect to the position in question; and is consistent with business necessity.

• Changes the establishment requirement from a nationwide standard to a countywide standard and further provides that consistent with EEOC rules and guidance, establishment could be broader than county when, for example, there is a central administrative unit making hiring and pay decisions for employees in different locations.

• Retains the anti-retaliation protections for employees who discuss or disclose wage information but limits when those protections will extend to employees who have access to payroll information as part of an essential function of their job. These employees, such as payroll and human resources personnel, are not protected if they disclose that payroll information to employees who do not otherwise have access to that information. However, their disclosure of

[6] U.S. Census Bureau, U.S. Bureau of Labor Statistics, *Annual Demographic Survey* (Aug. 2006).

[7] The Paycheck Fairness Act (H.R. 1338), 110th Congress, 1st Sess. (2007) (opening statement of Congresswoman Lynn Woolsey [D–CA])

wages will be protected if they: (1) disclose wage information with another employee who also has access to wage information such as their supervisor; (2) disclose their own wages; or (3) disclose wage information in response to or in furtherance of an internal employer or governmental investigation.

• Deletes what was originally Section 7 of the bill, which directed the Secretary of Labor to develop voluntary guidelines for employers to evaluate job categories based on characteristics such as skill, education and responsibility.

Additionally, the following amendments were offered but not adopted:

• Representative Cathy McMorris Rodgers (R–WA) offered an amendment to the amendment in the nature of a substitute which would have substituted the text of H.R. 6025 for the H.R. 1338. The amendment was ruled to be not germane because it did not deal with the subject matter of the underlying bill, which was to address pay discrimination against women.

• Representative Tom Price (R–GA) offered an amendment to the amendment in the nature of a substitute which would have required the Secretary of Labor to conduct a study on how the bill would affect recruitment and hiring by employers. The Price amendment would have delayed implementation of the underlying bill for 90 days while the study was being conducted. The amendment failed by a vote of 17–26.

• Representative Price (R–GA) offered a second amendment to the amendment in the nature of a substitute which would have limited the amount of attorneys' fees that could be awarded in a suit brought under the *Equal Pay Act*. However, attorneys' fees are already limited to only those which are reasonable, and the amendment raised separation of powers issues. The amendment was defeated by a vote of 17–25.

• Ranking Member Howard McKeon (R–CA) offered an amendment to the amendment in the nature of a substitute which would have required the Bureau of Labor Statistics to report to Congress on the price of gasoline and its effect on women workers within 90 days of enactment of the bill. Chairman Miller ruled that Ranking Member McKeon's amendment was not germane; Mr. McKeon appealed the Chairman's ruling, and the McKeon appeal was defeated by a vote of 16–25.

SUMMARY

The *Paycheck Fairness Act of 2007* updates and strengthens the EPA. Due to weaknesses in the law, the landmark 1963 legislation has not lived up to its original purpose. Women working full-time earned just 58.9 cents to the dollar that men earned when the EPA was passed in 1963. The wage gap has narrowed slightly since then—but persists as a significant problem for American women. Today women on average earn just 77 cents to the dollar that men earn.[8] H.R. 1338 is a critical step forward in the fight to eliminate pay disparity which "depresses wages and living standards for employees necessary for their health and efficiency; prevents maximum utilization of the available labor resources; tends to cause

[8] U.S. Bureau of Labor Statistics data on full-time workers, *See*, Feder & Levine, *supra* note 4 at 3.

labor disputes, thereby burdening, affecting, and obstructing commerce; and constitutes an unfair method of competition."[9] Congress has a responsibility to amend the EPA and modernize the law so that it can better achieve its intended purpose.

H.R. 1338 builds upon the EPA and closes numerous loopholes that have enabled unscrupulous employers to evade liability under the law. The bill strengthens the penalties available under the EPA to include compensatory and punitive damages. The bill prohibits retaliation against workers who discuss or disclose salary information[10]; it expands the establishment requirement so that an employee can find a comparator at any workplace in the same county; it clarifies that one of the employer affirmative defenses against a disparity in pay must be related to the job in question and consistent with business necessity; and it reforms the class-action standard so that women with claims of unequal pay will automatically be part of a class action lawsuit unless they chose to "opt-out" of the case.

The bill also strengthens the role government will play in combating wage discrimination. It accomplishes this by increasing the role of the EEOC and the Department of Labor (DOL). H.R. 1338 authorizes additional training for EEOC staff on recognizing and remedying wage discrimination, requires DOL to collect data and codifies the use of the EO Survey by OFCCP for non-construction contractors. Finally, H.R. 1338 authorizes DOL to award competitive grants to be used for salary negotiation education and training programs for women and girls.

STATEMENT AND COMMITTEE VIEWS

The Committee on Education and Labor is committed to protecting the rights of workers in the workplace. Forty-five years after the passage of the EPA, women continue to earn less than men for the same work. The long-term impact of pay disparity on women's earnings is substantial and can cost a woman anywhere from $400,000 to $2 million over her lifetime.[11] Women have been unable to utilize the protections afforded under the EPA because loopholes and ineffective sanctions have all but paralyzed the law. H.R. 1338 strengthens the EPA to more effectively combat wage discrimination. The bill builds upon Congress' efforts forty-five years ago when the EPA was enacted and is another step forward to close the wage gap between men and women.

A. HISTORY OF THE EQUAL PAY ACT

In 1963, Congress first[12] addressed the issue of unequal pay when it passed the EPA as an amendment to the *Fair Labor*

[9] P.L. 88–38.

[10] Section 3(c) 2 provides that employees who have access to wage information of other employees as part of an essential job junction are not protected if they disclose the wages to workers who do not otherwise have access to such information. These employees' wage disclosures are protected if they disclose those wages to an employee who also has access to that information, disclose their own wages, or disclose wages in the or disclose wages in response to or in furtherance of a government or internal employer investigation.

[11] Institute for Women's Policy Research, *Memo to John Roberts: The Gender Gap is Real* (2005).

[12] There was support for "equal pay" dating back to World War I when the War Board enforced regulations requiring pay equity. See: Elizabeth Wyman, *The Current Framework of Sex/Gender Discrimination Law: The Unenforced Promise of Equal Pay Acts: A National Problem*

Continued

Standards Act (FLSA).[13] The purpose of the legislation was broadly remedial to eliminate once and for all gender-based discriminatory pay practices:

> The objective of the legislation is to insure that those who perform tasks which are determined to be equal shall be paid equal wages. The wage structure of all too many segments of American industry has been based on an ancient but out moded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such an outmoded belief can no longer be implemented and that equal work will be rewarded with equal wages.[14]

As with minimum wages, overtime and the protection of child laborers, the EPA enshrined "equal work for equal pay regardless of sex" as another fair labor standard in the FLSA.[15] Other versions of equal pay legislation had been introduced in 1963 and before, but because DOL had already developed "a now familiar system of regulations and procedures for investigation, administration and enforcement," Congress decided that a simple expansion of the FLSA to include pay equity was the "most efficient and least difficult course of action."[16] Upon introduction of the bill, Senator McNamara stated:

> Such a utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation. And second, compliance should be made easier because of both industry and labor's long-established familiarity with existing fair labor standards provisions.[17]

Some legislators felt that the bill legislation did not go far enough but voted for it because it was "a good start * * * in eliminating the unfairness of unequal pay."[18]

In passing the EPA, Congress intended that "men and women doing the same job under the same working conditions * * * [would] receive equal pay."[19] Representative Frelinghuysen elaborated on the standard:

> * * * the jobs in dispute must be the same in work content, effort, skill and responsibility requirements, and in working conditions * * * it is not intended to compare un-

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and Possible Solution from Maine, 55 Me. L. Rev. 23 (2004). In addition, Congress had considered "equal pay" bills as early as 1955, and the Kennedy and the two previous administrations supported equal pay legislation as well. House Committee on Education and Labor, House Report No. 309 (May 20, 1963) *as found in* House Committee on Education and Labor, *Legislative History of the Equal Pay Act of 1963,* U.S. Government Printing Office (December 1963), at 36, 59, 66, 67.

[13] 29 U.S.C. § 206(d).

[14] Senate Committee on Labor and Public Welfare, Senate Report No. 176 (May 13, 1963) *as found in, Legislative History of the Equal Pay Act of 1963, supra note 12* at 42.

[15] Introduction of S. 409, Senator McNamara, House Committee on Education and Labor as *found in, Legislative History of the Equal Pay Act of 1963, supra note* 12 at 1, 10–11.

[16] *Id.*

[17] *Id. See* also: House Report 309, *as found in Legislative History of the Equal Pay Act of 1963, supra note* 12 at 43.

[18] *Id*,at 66.

[19] Comments of Representative Frelinghuysen *as found in, Legislative History of the Equal Pay Act, supra* note 12 at 43.

> related jobs, or jobs that have been historically and normally considered by the industry to be different.[20]

At the same time, "equal pay for equal work" did not mean that the jobs in question had to be identical. They were to be similar in terms of "work content, effort, skill and responsibility requirements and in working conditions."[21]

In addition, the floor debate made clear that under the EPA, discrimination against one individual would be actionable and a showing of a pattern and practice of discrimination would not be required. Senator McNamara stated:

> It is inconceivable that this Congress should write legislation that would permit selective discrimination which, without doubt, would occur mostly likely against those individuals who are least able to protest. It is certainly the intent of the Senate that an employer will have violated this act if he discriminates against one employee, just as he will violate it if he discriminates against many.[22]

While the EPA was aimed at eradicating wage differentials based on sex, it was not intended to limit other kinds of pay inequity not based on gender. As such, even though the employee might show that the employer's wages were unequal as compared to a man, the EPA does provide employers with affirmative defenses to justify the differences in pay if such differences are based on: (1) seniority systems; (2) merit systems; (3) systems that measure earnings by quality or quantity of production; or (4) "any factor other than sex."[23]

While the last affirmative defense was written broadly, Congress intended that any proffered reason for a pay differential be a *bona fide* one. In addition, the drafters made sure that the employer was shouldered with the burden of proving the legitimacy of its practice,[24] making clear that these affirmative defenses were never intended to "shield employers who have a plan or system in place that is devised to evade the law."[25]

B. EPA, TITLE VII, AND SECTION 1981

On July 2, 1964, President Lyndon Johnson signed the *Civil Rights Act of 1964*[26] into law. The Act was historic legislation prohibiting discrimination in employment, among other things, on the basis of race, color, religion, national origin and sex.[27] While the EPA and Title VII—passed only one year apart—both prohibit sex discrimination in pay and provide overlapping coverage, there are

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[20] *Id.* at 11.

[21] Representative Frelinghuysen, "jobs in dispute must be same in work content, effort, skill and responsibility requirements and in working conditions." *Id.* at 83; Representative Powell, *citing* the International Labor Organization Constitution which provides "men and women should receive equal remuneration for work of equal value." *Id.* at 11; Representative Dwyer, referring to the "same kind of work" *Id,* at 61; Representative Donohue referring to "similar jobs." *Id.* at 68; Senator McNamara, "it is not the intent of the Senate that jobs must be identical." *Id.* at 91. *See also*, 29 C.F.R. § 1629.13 defining equal work as work that is "substantially equal."

[22] *Id.* at 16, 81.

[23] 29 U.S.C. § 206(d)(1).

[24] *Legislative History of the Equal Pay Act, supra* note 12 at 16.

[25] *Id.*

[26] P.L. 88–352.

[27] 42 U.S.C. § 2000e et. seq.

distinct differences between the application of Title VII and the EPA in sex-based wage discrimination cases.[28]

Statute of Limitations/Exhaustion of Administrative Remedies: Under the EPA, an aggrieved person has 2 years (or 3 years in a case of a willful violation) from the date of any instance of unequal pay to file a claim in court.[29] Under Title VII, a worker must file her claim within 180 days of a violation.[30] Specifically, following the Supreme Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Company, Inc.*,[31] in cases of pay discrimination, she must file her charge within 180 days of the employer's decision to pay her a salary based on sex (rather than, as long-standing law had held, 180 days after each discriminatory paycheck).

Burden of Proof: When alleging discrimination under the EPA, an employee is required to show that a man and a woman working in the same establishment and doing substantially the same job are receiving unequal pay. However, she does not bear the burden of proving that the employer intentionally committed wage-based gender discrimination. Once the employee has made a showing of unequal pay, the burden of proof shifts to the employer to show that the pay inequity is not due to gender discrimination.[32]

By contrast, under Title VII a plaintiff must typically prove that the employer intentionally discriminated against her, and she retains the burden of proving discrimination throughout the case. However, unlike an EPA complainant, a Title VII plaintiff is not required to demonstrate that she performed substantially the same (or equal) work as higher paid males, so long as she has other evidence of discrimination such as proof that a man worked fewer hours or evidence that she would have been paid more had she been a man.[33]

Damages: A plaintiff who successfully proves wage discrimination under the EPA can only recover backpay, and unless the employer can show that it acted in good faith, an equal amount in liquidated damages.[34] Conversely, under Title VII a plaintiff is entitled to backpay, compensatory damages,[35] as well as punitive damages[36] for "intentional" wage discrimination.[37] Title VII damages compensatory and punitive damages do have monetary "caps," which vary depending on the size of the employer.[38] However, in no event may these damages exceed $300,000.[39]

Section 1981: While it does not cover sex-based discrimination, Section 1981 is worth comparing as well. Passed as part of the Civil Rights Act of 1866, Section 1981 forbids discrimination on the

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[28] Feder & Levine, *supra* note 4 at 8. In terms of coverage, under EPA all employees are covered so long as the employer has at least $500,000 in annual revenue. 29 U.S.C. § 203(s)(1)(A)(ii). Under Title VII, employees who work for an employer with fewer than 15 employees will fall outside of Title VII's requirements. 42 U.S.C. § 2000e(b).

[29] 29 U.S.C. § 255.

[30] 42 U.S.C. § 2000e–5(e)(1). This deadline is extended to 300 days if the charge is also covered by a state or local antidiscrimination law. *Id.*

[31] 127 S. Ct. 2162 (2007).

[32] "Overview of the Equal Pay Act," AAUW.*Www.aauw.org/advocay/laf/lafnetwork/library/payequity*__epa.efm.

[33] *Id.*

[34] 29 U.S.C. § 216.

[35] Feder & Levine, *supra note* 4 at 6, which state that compensatory damages include such items as pain and suffering, medical expenses and emotional distress.

[36] *Id.* Punitive damages may be recovered when the employer acted with malice or reckless indifference.

[37] *Id.*

[38] *Id.*

[39] *Id.*

basis of race or national origin in the making and enforcement of contracts.[40] Such contracts may be between employee and employer or between businesses. Plaintiffs in Section 1981 cases may recover compensatory and punitive damages. But, unlike Title VII, those damages are not limited. Under current law, an employee receiving unequal pay for equal work on the basis of race may recover punitive damages without an arbitrary statutory limit, for example, but one receiving unequal pay on the basis of sex cannot.

C. WOMEN CONTINUE TO EARN LESS THAN MEN

While progress has been made, "equal pay for women is not yet a reality in our country."[41] As previously noted a woman working full-time, year-round earns 77 cents for every dollar a male earns.[42] Pay disparity can be even worse for minority women. Compared to men, African American women earn 66 cents to the dollar; Latinas earn 55 cents to the dollar; and Asian-American women earn slightly more than 80 cents to the dollar.[43] Each year, pay inequity causes American families to lose $200 billion in income, resulting in an annual loss to each working woman's family of more than $4,000.[44]

In April 2007, the American Association of University Women (AAUW) released a study finding that not only do men earn more than women at the outset of their careers, but the wage gap grows wider as women age.[45] Women one year out of college make 80 percent of what men earn, and 10 years later, make only 69 percent.[46] As compared to men with only a high school diploma, women with graduate degrees earn only slightly more ($41,995 compared to $40,822).[47]

Many argue that the wage gap is the result of 'women's choices,' including the choice of college major and occupation.[48] However the AAUW study found that different choices do not fully explain the pay gap:

> [AAUW's] analysis showed that men and women's different choices can explain only some of the wage gap. After controlling for factors like experience, educational attainment, enrollment status, GPA, institution selectivity, age, race/ethnicity, region, marital status and children, a five percent difference in the earnings of male and female col-

[40] 42 U.S.C. 1981(a).

[41] Closing the Gap: Pay Equity for Women Workers, Hearing Before the U.S. Senate Health, Education, Labor and Pensions Committee Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Jocelyn Samuels, Vice President for Education and Employment, National Women's Law Center, at 1) [Hereinafter Samuels' Testimony].

[42] *Supra* note 6.

[43] Perspectives on Wage Inequality and Workplace Solutions, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Business and Professional Women/USA and Business and Professional Women's Foundation at 4) (Hereinafter Business and Professional Women's Testimony).

[44] *Equal Pay for Working Families, National and State Data on the Pay Gap and Its Costs*, A Joint Research Project of the AFL–CIO and the Institute for Women's Policy Research at 1 (1999).

[45] Judy Goldberg Day and Catherine Hill, *Behind the Pay Gap*, Association of American University Women (AAUW) (April 23, 2007).

[46] *Id.*

[47] Business and Professional Women's Testimony at 3.

[48] Strengthening the Middle Class: Ensuring Equal Pay for Equal Work, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Heather Boushey, Senior Economist at the Center for Economic and Policy Research, at 1) [hereinafter Boushey Testimony].

lege graduates is unexplained. It is reasonable to assume that this difference is the product of discrimination.

Furthermore, AAUW's analysis showed that in almost every field in which women work, those working full-time earn less than men, although the size of the gap varies.[49] Controlling for this similar set of factors, ten years after graduation there is a twelve percent difference in the earnings of recent male and female college graduates that is unexplained and attributable only to gender.[50] The General Accounting Office (GAO) in a 2000 study came to a similar conclusion and found that women on average earn only 80 percent of what men earn, even after considering factors that can impact earnings such as marital status, race, children and income, work patterns such as experience and hours worked.[51] The 20 percent pay gap between men and women was unexplained.[52]

Pay disparity increases and follows women throughout their careers. A Carnegie Mellon University study[53] found that male students who graduated with masters degrees earned starting salaries approximately $4,000 higher than their female counterparts. Professor Deborah Brake offered this example in her testimony before the Committee: if a 22-year-old man initially earns $30,000 and the female earns $25,000 and they receive identical 3-percent annual raises, the pay gap would widen to $15,000 by the time the workers reach 60, with a total difference of $361,171 over their employment lives. If the male earns 3-percent annual interest on the difference, the total disparity would be $568,834.[54] Moreover, this pay gap not only impacts women's annual earnings but also has a significant impact on her retirement savings, including employer pension plans, percentage-based employer contributions to retirement savings plans and even Social Security.[55]

The wage gap is a threat to this country's middle class and the loss of women's income represents a "huge loss to the economy in unrealized consumption and investment, as well as reduced tax revenues to governments at all levels."[56] With seventy percent of all mothers in the labor force,[57] and with married mothers typically providing over one-third of the family income,[58] now more than ever, women's participation in the labor market is necessary for families to survive.[59] While more families have a working wife, family income has failed to grow as much as it did in the decades just after World War II.[60] Prior to the early 1970's, a married-couple's family income grew by 3 percent per year on average and in-

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[49] Strengthening the Middle Class: Ensuring Equal Pay for Equal Work, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Catherine Hill, Research Director at the American Association of University Women, at 1) [hereinafter Hill Testimony].

[50] *Id.* at 4.

[51] United States General Accounting Office, *Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings*, GAO–04–35 (Oct. 2003).

[52] *Id.*

[53] Linda Babcock and Sara Laschever, "Women Don't Ask: Negotiations and the Gender Divide" (2003). *See also, The Lilly Ledbetter Fair Pay Act of 2007*, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Deborah Brake, Law Professor at the University of Pittsburgh Law School, at 2) [hereinafter Brake Testimony].

[54] Brake Testimony, at 2.

[55] *Id.*

[56] *Id.*

[57] Boushey at 3. Id. at 5.

[58] Boushey Testimony, at 4. *See also*, Bureau of Labor Statistics 2005.

[59] *Id.*

[60] *Id.*

come growth was about the same for families with and without a working wife. However, since then, income for married-couple families without a working wife grew at an annual average rate of just 0.1 percent, while the income growth for families with a working wife grew by less than one-percent.[61]

a. Pay discrimination is difficult to detect

In today's workplace, pay discrimination is often extremely difficult to detect: "Unlike most personnel actions, the results of which are readily evident to many employees, the levels of compensation paid to an employee are rarely known to co-workers."[62] Employees typically do not have access to information which would raise a suspicion of pay discrimination, and workplaces often discourage, if not outright prohibit, discussions between employees about salaries.[63] As Justice Ginsburg observed in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, "comparative pay information * * * is often hidden from the employee's view."[64] Employee compensation is regularly kept confidential by employers and may only be known by the individual employee, payroll staff and manager(s).[65] In addition, many employers have policies prohibiting salary discussions.[66] One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers.[67] Only one in ten employers has adopted a pay openness policy.[68] Finally, for those employees who do know what their colleagues earn, they often lack information about the contributing factors that might influence pay levels, including performance, education and/or training.

Pay discrimination is rarely accompanied by circumstances suggestive of gender discrimination.[69] Disparate pay might not begin with a woman's initial salary determination but can readily develop with a decision to increase the pay of male colleagues. While employees are normally aware of which employees receive promotions, they are less likely to know when colleagues receive a pay raise.[70] For example, an employee who receives a three-percent raise would have no reason to suspect pay discrimination when she does not know about the raises her colleagues earn.[71]

Discussions about wages are necessary to identify pay disparity, "absent ready access to the pay levels of their co-workers and the factors that led to those pay levels, most employees lack the knowledge needed to make a viable claim of pay discrimination under the EPA."[72] Once a lawsuit is filed, discovery of wage data is available to help aggrieved employees develop their case; however, in order

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[61] *Id.* at 4–5.
[62] The Paycheck Fairness Act, H.R. 1338, Hearing Before the Education and Labor Committee, Subcommittee on Workforce Protections, 110th Cong. 1st Sess. (written testimony of Joseph M. Sellers, Cohen Milstein, Hausfeld & Toll PLLC at 15). [Hereinafter Sellers Testimony].
[63] *Id.*
[64] *Ledbetter* v. *Goodyear Tire & Rubber Co.,* 127 S.Ct. 617 (2007) (Ginsburg, J. dissenting). See also, Sellers Testimony at 15.
[65] Sellers Testimony.
[66] *Id.*
[67] The *Lilly Ledbetter Fair Pay Act of 2007*, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, at 3) [hereinafter Henderson Testimony].
[68] *Id.*
[69] Brake Testimony at 4.
[70] *Id.*
[71] *Id.* at 5.
[72] Sellers Testimony at 16.

to learn more about employee salaries, however women need to have some basis to file suit in the first place. However, because employees lack knowledge about pay levels and the reasons behind different employer pay decisions "only a small percentage [of claims] make specific allegations of pay discrimination."[73]

b. Lack of data on pay disparity

Data collection is a critical component understanding what is really happening with women's wages workplace. In addition, sufficient data about pay discrimination is an invaluable tool for those agencies—such as the EEOC and the OFCCP—charged with enforcing employment discrimination laws such as the EPA. However, experts agree that these agencies have minimal information about gender-based disparities in pay.[74] Additionally, the Bush Administration has halted (or attempted to halt) many of the data collection initiatives already in place for collecting information about women and men's wages.

Bureau of Labor Statistics (BLS) Employment Statistics: For over forty years, BLS has been collecting data on female workers and comparing them to their male counterparts. This data has formed the basis for its monthly report on the employment situation.[75] In 2005 BLS stopped collecting this data, citing employer inconvenience.[76] In response, Congress passed (and the President signed into law) the 2006 Labor HHS appropriations bill,[77] which contained a provision mandating BLS to continue to collect data on women workers.[78] This language was retained for FY07 through a continuing resolution[79] and is also part of the 2008 Labor-HHS Appropriations bill passed by both the House and Senate but vetoed by the President.[80]

Recognizing the value of collecting these statistics, the *Paycheck Fairness Act* requires BLS to continue to gather these statistics.

Equal Employment Opportunity Commission (EEOC): The EEOC was created by the *Civil Rights Act of 1964,* and was given litigation enforcement authority in 1972.[81] Experts agree that enhanced data collection by the EEOC, whose mission is to eliminate unlawful employment discrimination by the enforcement of anti-discrimination laws, is essential.[82] The *Paycheck Fairness Act* requires the

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[73] Sellers Testimony. *See also,* Equal Employment Opportunity Commission, EEOC Litigation Statistics FY 1997 to FY 2006, *Available at http: www.eeoc.gov/stats/litigation.html* (out of 403 suits filed in 2006, only 10 included EPA claims).

[74] The Paycheck Fairness Act, H.R. 1338, Hearing Before the Education and Labor Committee, Subcommittee on Workforce Protections, 110th Cong. 1st Sess. (written testimony of Evelyn Murphy, President of the WAGE Project) [hereinafter Murphy Testimony]. The Paycheck Fairness Act, H.R. 1338, Hearing Before the Education and Labor Committee, Subcommittee on Workforce Protections, 110th Cong. 1st Sess. (written testimony of Marcia Greenberger, Co-President of the National Women's Law Center) [hereinafter Greenberger Testimony].

[75] *BLS Plans to Drop Data on Women From Payroll Survey Creates 'Firestorm'*, BNA Daily Labor Report (March 7 2005).

[76] "BLS has found that employers often to not have gender information in the same place they have earnings information." *Statement of Commissioner Kathleen Utgoff, supra* note 76.

[77] PL–109–149 (December 2006).

[78] The 2007 Labor-HHS appropriations bill was passed as part of a Continuing Resolution, and this provision went unchanged. The provision is contained in the 2008 Labor-HHS Appropriations bill passed by both the House and Senate but vetoed by the President.

[79] H.J. Res.20, which then became P.L. 110–5 on February 15, 2007.

[80] H.R. 3043.

[81] EEOC, *35 Years of Ensuring the Promise of Opportunity, available* at: *http://www.eeoc.gov/abouteeoc/35th/history/index.html*

[82] National Women's Law Center, Comment Letter on Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey (March 28, 2006) (letter on file with author).

EEOC to survey existing data and determine what additional data is needed to enhance enforcement of the law.

Office for Federal Contract Compliance programs (OFCCP): OFCCP is unique in that it is required by law to affirmatively conduct reviews to ensure that contractors with federal contracts are in compliance with equal employment measures, including Executive Order 11246, which prohibits discrimination in employment on the basis of race, color, religion, national origin and gender. About one-fifth of the labor force works for an employer who contacts with the federal government.[83]

Equal Opportunity Survey: The EO Survey was developed over three Administrations to ensure nondiscrimination in federal employment. It was intended to track employment data and to improve the enforcement of anti-discrimination requirements—including gender-based wage discrimination—of federal contractors.[84] Prior to the EO survey, OFCCP conducted targeted compliance reviews. Because of limited resources, OFCCP only reviews approximately four percent of contractors each year.[85]

The EO Survey was designed to enable OFCCP to be far more effective in detecting and remedying wage discrimination and in encouraging self-awareness and self-evaluation among contractors as a means of increasing compliance.[86] It was developed to query employers on an annual basis (to be eventually sent to at least one-half of all contractors each year) about their affirmative action program activities, their personnel actions (e.g. hires and promotions) and their compensation of full-time employees, all aggregated by job group, race and gender.[87]

The first survey was sent out in 2000 during the Clinton Administration, but the Bush Administration which took office soon after, did not take any action on the surveys that were returned and did not follow-up on those surveys that were not returned.[88] In 2003 and 2004, it sent out fewer and fewer surveys until 2005, when it failed to send out any at all. In January 2006, the OFCCP proposed eliminating the EOC survey altogether.[89] *The Paycheck Fairness Act* would codify this very important enforcement tool for the OFCCP.

Standards in Conducting Systematic Wage Discrimination Analysis: As a way of measuring more effectively whether or not employers were engaged in gender-based wage discrimination, the Clinton Administration developed a methodology to be used in the OFCCP's compliance reviews. The OFCCP asked employers to provide data on its pay levels (or pay grades), and then using the data, compared wages based on race, ethnicity and gender. If there were any pay disparities, the OFCCP requested employers to correct them.

Generally, employers were not supportive of this analysis, arguing that differences in wages between men and women did not necessarily prove that they were engaging in gender-based discrimination. As a result, the Bush Administration published a formal guid-

[83] *Id.*
[84] *Id.*
[85] *Id.* at 2.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] 71 Fed. Reg. 3373 (Jan. 20, 2006).

ance document that expressly prohibited OFCCP from using a "pay grade" analysis in conducting its compliance reviews. Under this guidance, OFCCP is required to conduct time-consuming analyses, including the gathering of anecdotal evidence before determining that a contractor is engaging in wage discrimination.[90]

The *Paycheck Fairness Act* acknowledges that the "pay grade" analysis is a useful tool (even if it does not prove wage discrimination, it indicates some evidence of it), and simply provides that OFCCP, ought to be allowed to use it, along with other tools, when performing compliance reviews. This section does not impose the "pay grade" methodology as the sole means the OFCCP can use in determining if contractors for federal contracts are in compliance, but encourages its use in conjunction with other tools.

c. Women are less likely to negotiate

Further contributing to the wage gap is the failure of high numbers of women to negotiate for higher salaries and promotions: "most women hardly negotiate when they get a job offer * * * because they look at the offer as the goal, not the beginning of a relationship."[91] While negotiation is a contributing factor to the wage gap, it does not justify gender-based pay discrimination. As the Supreme Court noted: "Congress enacted the *Equal Pay Act* * * * recognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor."[92]

Researchers have found there are several reasons women fail to negotiate for themselves in the workplace.[93] Women often do not promote their own interests, choosing instead to focus on others and believing that employers will recognize and reward them for good work. In addition, the culture in many workplaces ostracizes women who are ambitious and advance themselves. A study[94] conducted by Harvard University and Carnegie Mellon University examined the starting salaries of MBA men and women who recently graduated from top business schools. Researchers noted that there was no difference between the salaries negotiated by men and women in jobs where "compensation standards were relatively clear to potential hires."[95] However, in jobs where salaries were not clear, "male MBAs negotiated salaries that were $10,000 higher, on average, than those negotiated by female MBAs."[96]

The wage gap which occurs with the initial salary remains with a female worker throughout her career; over a 30-year career with an annual 3 percent raise, a woman loses $600,000.[97] The study did find, however, that women tend to be more successful when negotiating on behalf of others. Put in the position of negotiating for another employee, women were able to secure compensation that was 18 percent greater than what they negotiated for themselves.[98]

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[90] 71 Fed. Reg. 35124 (June 16, 2006).

[91] Pallavi Gogoi, For Women, a Failure to Negotiate, *Business Week (April 22, 2005)* (quoting Lee E. Miller, co-author of *A Woman's Guide to Successful Negotiation*).

[92] *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 206 (1974)(citing the 2nd Circuit decision, 474 F.2d 226, 234 (1973).

[93] Linda Babcock, *Nice Girls Don't Ask,* Harvard Business Review (Oct. 2003).

[94] Dina W. Pradel, Hannah Riley Bowles and Kathleen McGinn, *When Gender Changes the Negotiation*, Harvard Business School (Feb. 13, 2006).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

Researchers concluded that the hesitation women have in advocating for themselves is not unreasonable. Women who initiate negotiations with their employer are responded to differently than men, and "both men and women were likely to subtly penalize women who asked for more * * * "[99]

While all employees have an economic incentive to negotiate, women are more likely to consider the risk involved and "those risks are higher for women than for men."[100] Employers have a responsibility to ensure that men and women are compensated equally for equal work. Consequently, if a man asks for a raise or negotiates a higher salary during the hiring process, women who perform the same or a substantially similar job should have their compensation levels adjusted accordingly. Furthermore, programs must be created to help strengthen the negotiation skills of girls and women. Linda Babcock one of the authors of the Carnegie Mellon study has begun a pilot project with the Girl Scouts creating a new 'badge' for negotiation. This project seeks to help girls learn negotiating by observing adults, practicing themselves and teaching negotiation skills to others.[101] H.R. 1338 authorizes the Secretary of Labor to award competitive grants aimed at training girls and women on negotiation skills, an important tool in ending gender-based wage discrimination.

D. THE EQUAL PAY ACT HAS BEEN INEFFECTIVE IN ERADICATING PAY DISPARITY

A plaintiff raising a claim under the EPA carries a heavy burden of proof in establishing a case for gender-based discrimination. To make out a *prima facie* case, she must not only show that a pay disparity exists between employees of the same "establishment," but she must also identify specific employees of the opposite sex holding equal positions who were paid higher wages.[102] Courts will look to whether the work between the plaintiff and her comparator(s) was "equal or substantially equal * * * considering such factors as skill, effort, responsibility and working conditions."[103]

While a plaintiff does not have to demonstrate the work was identical, she has to show that it is somewhere between similar and identical. As such, the meaning of "equal work" has generated significant uncertainty about what a woman must demonstrate when comparing herself to a co-worker in order to satisfy this standard.[104] Courts often compare "superficial features of the jobs and overlook fundamental similarities that are masked by trivial differences."[105]

In addition, the courts have tended to define "equal work" very strictly despite the clear intent of Congress that the EPA be remedial and that "equal work" means similar not identical.[106] In her testimony before the House Subcommittee on Workforce Protec-

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[99] Shankar Vedantam, *Salary, Gender and the Social Cost of Haggling*, WASH. POST (July 30, 2007) at A07.

[100] *Id.*

[101] "*PROGRESS and Girl Scouts Create New Badge to Teach Negotiation Skills*," available at: *http://www.heinz.cmu.edu/whatsnew/archives/2006/girl—scouts.html* (last visited July 22, 2008).

[102] Greenberger Testimony at 5.

[103] Sellers Testimony at 3.

[104] *Id.*

[105] *Id.* at 4.

[106] Wyman, *supra* note 12, *See* also, Greenberger Testimony.

tions, Marcia Greenberger, co-president of the National Woman's Law Center cited *Angelo* v. *Bacharach Instrument Company*[107] as one of many examples. In that case female "bench assemblers" in light assembly alleged that they were paid less than men who were classified as "heavy assemblers." An engineering expert testified—along with the women—that the jobs were substantially the same in terms of "skill, effort and responsibility." Despite this, the court held that the jobs were comparable but not equal.[108]

a. Establishment

The EPA states that to assert a claim, a plaintiff must find a male comparator within the same physical location is paid more; and courts have interpreted this provision strictly.[109] Plaintiffs must "demonstrate that pay disparity exists between employees in the same "establishment"—that is, a distinct physical place of business rather than * * * an entire business or "enterprise" which may include several separate places of business."[110] This means that an employer who has two stores in nearby towns can legally pay the male manager in store A more than female manager in store B despite the fact that they do the exact same job.

The establishment requirement contributes to the difficulty that plaintiffs face when asserting an EPA claim. It limits the ability of women to bring an EPA claim, since many times, women might not have a true comparator in their physical workplace. Today's employers are much different than they were forty-five years ago when the EPA was first enacted. Many have multiple facilities at which the same jobs are performed, and some locations may have only one person in a certain position (i.e. manager, or supervisor).

The establishment requirement has particularly inhibited the ability of women who occupy higher level positions in the workplace to assert an EPA claim. In these cases, employers have been able to successfully assert that women in higher-level positions have unique job duties and therefore have no comparator in the same establishment.[111] In fact, as one commentator noted, women in "administrative, managerial and executive positions have experienced a high rate of dismissal of their EPA claims because their jobs are more easily viewed as unique and therefore lack an appropriate comparator."[112]

This is clearly illustrated by the court's decision in *Georgen-Saad* v. *Texas Mutual Insurance Company.*[113] In that case, the complainant was a senior vice-president of finance who was being paid less than the other senior-vice presidents in the company. The court rejected the Georgen-Saad's claim that any of the positions required "equal skill, effort and responsibility," and elaborated:

> According to Defendant, there are no male comparators working in a position requiring equal skill, effort, and re-

[107] 555 F2d 1164 (3rd Cir. 1977).

[108] *Id. See as well: Noel* v. *Medtronic Electromedics, Inc.*, 973 F. Supp 1206 (Dist. Co. 1997), where a plaintiff failed to prove her prima facie case (substantial identity of job functions) when she showed that some but not all of her and her male comparator's job functions were identical.

[109] *Meeks* v. *Computer Ass'n Int'l*, 15 F. 3rd 1013, 1017 (courts presume that multiple offices are not a single establishment unless unusual circumstances are demonstrated.)

[110] Samuels Testimony at 5 (citing *Meeks* v. *Computer Ass'n Int'l*, 15 F.3d at 232).

[111] Sellers Testimony at 15. (citing Juliene James, *The Equal Pay Act in the Courts: A De-Facto White-Collar Exemption*, 79 N.Y.U.L. REV. 1873 (2004)).

[112] *Id.*

[113] 195 F. Supp. 2d 853 (W.D.Tex. 2002).

> sponsibility under similar working conditions. The Court agrees. The sealed exhibits filed with Defendant's Motion for Summary Judgment include job descriptions for the Senior Vice Presidents of Investments, Insurance Services, Underwriting Services, Underwriting and Policy Holder Services, Public Affairs, Internal Audit, Benefits/Loss Prevention, Administration, Data Processing Services, and Branch Operations/Marketing.
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> The assertion that any one of these jobs requires "equal skill, effort, and responsibility" as Plaintiff's Senior Vice President of Finance position cannot be taken seriously. These are Senior Vice Presidents in charge of different aspects of Defendant's operations; these are not assembly-line workers or customer-service representatives. In the case of such lower-level workers, the goals of the *Equal Pay Act* can be accomplished due to the fact that these types of workers perform commodity-like work and, therefore, should be paid commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to *Equal Pay Act* claims.[114]

In 1986, the EEOC issued regulations interpreting the definition of establishment under the EPA.[115] The regulation in part provides that an establishment can encompass more than a single physical establishment when the employer has a central administrative unit charged with making salary and employee decisions. In *Grumbine* v. *United States*[116] the Court held that for purposes of the EPA, 'the establishment' was the Civil Service in its entirety and that a woman could not be paid less than a man merely because she worked in a different location."[117]

The plaintiff in *Grumbine* was a Regional Counsel of Customs Service working in Baltimore, Maryland and was the only female among the nine Regional Counsels. The counsels were spread out among nine regions; however the eight males were paid more than the one female counsel. Consequently, the plaintiff raised a claim of pay discrimination under the EPA. The government argued that the Regional Counsels each worked in different "establishments" for purposes of the EPA. The court rejected this defense and

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[114] *Id.* at 856.

[115] 29 C.F.R. 1620.9 provides: (a) Although not expressly defined in the FLSA, the term "establishment" had acquired a well settled meaning by the time of enactment of the Equal Pay Act. It refers to a distinct physical place of business rather than to an entire business or "enterprise" which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment. (b) In unusual circumstances, two or more portions of a business enterprise, even though located in a single physical place of business, may constitute more than one establishment. For example, the facts might reveal that these portions of the enterprise are physically segregated, engaged in functionally separate operations, and have separate employees and maintain separate records. Conversely, unusual circumstances may call for *two or more* distinct physical portions of a business enterprise being *treated as a single establishment*[emphasis supplied]. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions. Barring unusual circumstances, however, the term "establishment" will be applied as described in paragraph (a) of this section.

[116] 586 F.Supp. 1144 (D.C. 1984). Note, the U.S. Claims Court in *Molden* v. *U.S.,* 11 Cl.Ct. 604 (1987) distinguished the D.C. court's application of establishment nationwide. It stated that: "*Grumbine* adopted an evaluation on a nationwide basis in order to give effect to the legislative purpose of providing equal pay for equal work. In contrast, defendant has acknowledged in the case at bar that plaintiffs have demonstrated equal skill, effort, and responsibility with other employees in the two Chicago offices." As a result "there [was] no need to expand the definition of an "establishment" to include the Civil Service in its entirety as in *Grumbine*."

[117] *Id.*

found:[118] "It would hardly make sense to permit an employer to rely on geographic "establishment" concept in defense of an equal pay practice when that employer has itself adopted a uniform, non-geographic pay policy and system."[119]

Courts apply the EEOC regulation to apply establishment can include more than one physical location. In 2000, a court[120] held that a female district sales manager in the Dallas/Fort Worth facility could compare herself other district sales managers in the State of Texas for purposes of the plaintiff's EPA claim. The plaintiff in the case had no comparator in her physical establishment. As a result, the court reasoned that limiting her comparators to a single physical establishment "would effectively permit a large employer with national operations to exempt its managerial staff (each of whom is in charge of a single facility) from the reach of the EPA."[121] The 5th Circuit held that a school district with 182 schools was a single establishment for purposes of an EPA claim[122] as were thirteen elementary schools operated by a single school district near Houston Texas.[123]

Numerous courts have recognized that there is a trend in the law interpreting "establishment" to include all places of business of one corporation or a multi-employer.[124] Under these circumstances the courts have recognized that accountability flows from the decision making structure. It is clear that the single-location establishment interpretation is an unworkable standard in today's workplace and threatens to eliminate a large number of women from the Act's protections.

Recognizing that the single-site establishment has limited women's ability to assert an EPA claim, H.R. 1338 expands where a worker can look to find a comparator. Under the bill, a woman can look to a similarly situated male co-worker anywhere in the same county or similar political subdivision of a state. Workplaces in the same county operate under the same cost of living and labor market conditions. County-wide comparisons are already the law in Illinois under the state's Equal Pay Act.[125] However, consistent with EEOC rules and guidance, including 29 CFR 1620.9, the bill does not restrict courts from applying establishment more broadly than county.

b. Any factor other than sex

Under the EPA, employers can affirmatively defend and justify unequal pay if it is based on: (1) seniority systems; (2) merit systems; (3) systems that measure earnings by quality or quantity of production; or (4) "any factor other than sex."[126] Historically, courts have interpreted the "any factor other than sex" criteria so broadly that it embraces an almost limitless number of factors, so long as they do not involve sex.[127] Consequently, it is the fourth

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[118] *Id.*
[119] *Id.* at 1148.
[120] *Vickers* v. *Intern'l Baking Co.,* 2000 U.S. Dist. LEXIS 17995 (N.D. Tex.).
[121] *Id.* at *15.
[122] *Marshall* v. *Dallas Indep. Sch. Dist.,* 605 F.2d 191, 194 (5th Cir. 1979).
[123] 519 F.2d 53 (5th Cir. 1975).
[124] *Brownlee* v. *Gay & Taylor Inc.,* 642 F.Supp. 347, 350 (D. Kan. 1986); *Vickers* v. *Intern'l Baking Co.,* 2000 U.S. Dist. LEXIS 17995 (N.D. Tex.).
[125] ILL. 93rd G.A., P.L. 93–6
[126] 629 U.S.C. § 206(d)(1).
[127] *See for example: Fallon* v. *Ill,* 882 F. 2d 1206 (7th Cir. 1989); AAUW *supra* note 34.

affirmative defense that has posed the "greatest problems for women pressing an EPA claim,"[128] and employers have been able to prevail in these cases by asserting a range of "other than sex" factors.

Moreover, there is no consensus among the circuit courts as to whether a factor other than sex under the EPA needs to be business related, and the Supreme Court has failed to resolve this issue. It denied certiorari in the case of *Randolph Cent. Sch. Dist.* v. *Aldrich*[129] with three justices dissenting and acknowledging the conflict among the circuits.[130]

To the detriment of an effective *Equal Pay Act*, many courts have found that the "factors other than sex" need not be business-related or even related to the particular position in question. In addition, employers are able to successfully raise factors such as market forces and prior salaries (even if they are based on a discriminatory wage) that in themselves undermine the goals of the *Equal Pay Act*.[131] Marcia Greenberger explains:

> Cases such as these undermine both the spirit and analytical approach of the *Equal Pay Act*. What was intended to be an affirmative defense for an employer—a defense that demands that the employer carry the burden of proving that its failure to pay equal wages for equal work is based on a legitimate reason—has instead been converted by these courts into a requirement merely that an employer articulate some obstensibly nondiscriminatory basis for its decisionmaking. Because their basis can so easily mask criteria that are at bottom based on sex, the courts' failure to engage in searching analysis circumvents the burden Congress intended employers to bear.[132]

To ensure a broadly remedial statute, designed to eradicate the gender pay gap for women and men performing equal work, the *Equal Pay Act*'s affirmative defense of a factor other than sex must be clarified to require that the factor be job-related, not derived or based upon a sex-based differential, and consistent with business necessity. A review of court cases reveals the loopholes that these reforms would fix.

Job-Relatedness: In *Boriss* v. *Addison Farmers Insurance Co.,*[133] the plaintiff brought an EPA claim alleging that in the ten years she worked for the employer as an underwriter, she was paid less than her male colleagues while performing substantially equal work. When comparing the plaintiff to three of her male colleagues, the employer alleged that the difference in pay was due to factors other than sex, including more underwriting experience and a college education, even though a college degree was not a prerequisite for the position.

The court found that the employer successfully met its burden; the difference in pay was due to a "factor other than sex." It noted, but did not consider, the fact that the higher salaries of the male employees were based on the pay they received at their prior em-

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[128] Wyman, *supra* note 12 at34.
[129] 506 U.S. 965 (1992).
[130] *Id.*
[131] *Corning Glass Works* 417 U.S. 188 (1974); Greenberger Testimony at 6.
[132] Greenberger Testimony at 6–7.
[133] 1993 U.S. Dist. LEXIS 10331.

ployment.[134] In the end, it relied on a very broad interpretation of the "factor other than sex" and that the factor need not be related to the "requirements of the particular position in question, nor that it be a 'business-related' reason."[135] All that needs to be evaluated is "whether the factor is discriminatorily applied or if it causes a discriminatory effect."[136]

In addition, the court held that employers can lawfully pay a male more than a similarly situated female employee if the motivation is to induce the male worker to take the job and/or if employers take into account what the employee was making at his prior job. Despite the fact that these situations may result in female employee[s] being paid less, the court stated that none of these situations violate the EPA.

In addition, just this year, in the case of *Warren* v. *Solo Company,*[137] reaffirmed its position that the Defendant need not show that a "factor other than sex" is related to the requirements of the particular position or a "business-related" decision, when it found that unequal pay was justified because the male employee had a college degree and two masters degrees, despite the fact that the degrees were unrelated to the jobs they were both performing.

Derived from or based upon sex-based differentials: In 1974, the Supreme Court held that "market forces"—such as the value given by the market to men's and women's work or the more effective bargaining power that men historically have—*cannot* be cited as a factor other than sex to evade liability.[138] The court in Corning Glass Works noted that the company's decision to pay women less for the same work men performed "took advantage of the market and was illegal under the EPA."[139]

Despite clear direction from the Supreme Court, lower courts, as recently as 2006, have accepted market forces as a defense to a pay disparity. In *Merillat* v. *Metal Spinners, Inc.,*[140] for example, the plaintiff, who had been with the company for nearly 20 years, was promoted to a Senior Buyer position in the materials department. Around that time, the employer created a new position entitled "Vice President of Procurement and Materials Management." While the duties of both jobs were similar, the new position also included managing materials department employees (including the plaintiff). The job was offered to a male with a starting salary of $62,500. At that time, the plaintiff earned $49,800, and she helped to train the new employee for his position.

The *Merillat* plaintiff brought an EPA claim against the employer who asserted the affirmative defense that the pay disparity was due to factors other than sex such as education, experience and market forces. The employer alleged that the plaintiff was paid more, in part because of education and experience, but also because his salary represented the market rate for the position in question. The court agreed and held that the pay disparity was due to factors other than sex, including education, experience and "the market

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[134] *Id.* at 23.
[135] *Id.* citing, *Covington* v. *SIU,* 816 F.2d 317, 321–22 (1987). See also, *Fallon* v. *State of IL,* 882 F.2d 1206 (7th Cir. 1989).
[136] *Id.*
[137] 516 F. 3d 627 (7th Cir. 2008).
[138] 417 U.S. 188 (1974). *See,* Greenberger Testimony at 6.
[139] *Id.*
[140] 470 F.3d 685 (7th Cir. 2006).

forces at the time of [his] hire."[141] The court noted that it had previously "held that an employer may take into account market forces when determining the salary of an employee,"[142] although cautioning in a footnote against employers taking advantage of market forces to justify discrimination.

Similarly, the 3rd Circuit, in the case of *Hodgson* v. *Robert Hall Clothes,*[143] found that the employer was justified in paying the female workers less than the male workers because the "economic benefits to the employer justified a wage differential even where the men and women were performing the same task."[144] In *Hodgson,* the court was comparing the higher wages of male sales people working in the men's department of a store with the lower wages being paid to female sales people working in the ladies' department.

In finding for the employer, the court based its decision on the fact that the men's department was more profitable than the ladies' department even though the products sold by the women were of lesser quality and cost less than the goods sold in the men's department. It concluded: "Without a more definite indication from Congress, it would not seem wise to impose the economic burden of higher compensation on employers. It could serve to weaken their competitive position."[145]

Some courts have also held that it is acceptable for an employer to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by the male workers. In addition, employers can successfully justify paying a male employer more if the higher salary is a business tactic to lure [or retain] an employee.

In *Drury* v. *Waterfront Media, Inc.*[146] the plaintiff was hired as the Director of Project Management, responsible for organizing and managing all corporate projects, at a salary of $85,000 with an annual bonus of $15,000, and $25,000 in stock options (in her previous position, she had earned $85,000). Over a year later she was promoted to Vice-President of Production and Operations with a salary of $95,000 and a bonus potential of $20,000.

However, another vice-president (for customer service) was paid $110,000 with the possibility of a $25,000 bonus and $50,000 in stock options. This difference was the basis of the plaintiff's equal pay claim. In asserting its affirmative defense, however, the employer claimed that it was forced to pay the male vice-president more, not based on any sex-based wage differential but in order to lure him away from his prior employer. The court agreed and held that "salary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as "a factor other than sex."[147]

The same conclusion was reached in *Glunt* v. *GES Exposition Services,*[148] where the plaintiff brought a claim that her employer

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[141] *Id.* at 698.
[142] *Id.* at 697.
[143] 473 F. 2d 589 (3rd Cir. 1973).
[144] *Id,* In addition, in this case females were not allowed to apply to work in the men's department.
[145] *Id.* at 596.
[146] 2007 U.S. Dist. LEXIS 18435 (S.D.N.Y. Mar. 8, 2007).
[147] *Id.*
[148] 123 F. Supp. 2d 847 (D. Md. 2000).

violated the EPA in two ways. First, she alleged that in her capacity as a project coordinator she was paid less than three male co-workers while performing essentially the same function. Second, she alleged that after being promoted to account executive, her employer failed to raise her salary to a level parallel to the starting salaries of the three male account executives. The court found that in each case, factors other than sex justified the employer paying Glunt less than her similarly situated male co-workers.

In its decision the court noted that "offering a higher starting salary in order to induce a candidate to accept the employer's offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity."[149] Furthermore, "prior salary may be one of several gender-neutral factors employed in setting the higher salary of a male coming in from the outside."[150] In cases where a male employee is transferred or reassigned, "it is widely recognized that an employer may continue to pay [a transferred or reassigned employee] his or her previous higher wage without violating the EPA, even though the current work may not justify the higher wage."[151]

Several other court decisions have similarly upheld such pay disparities. In *Horner* v. *Mary Institute*[152] the Eighth Circuit Court allowed a private school to justify paying a male teacher it wanted to hire from the outside more pay because such payment was necessary to secure him for the position. In *Englemann* v. *NBC,*[153] the Court found that "salary matching" was a valid defense to pay disparity; and in Sobol v. Kidder, Peabody & Co.,[154] the Court held that a pay disparity is permissible when an employer paid males more as a "premium to attract and hire talented new bankers."[155]

Finally, in *Kouba* v. *Allstate Ins. Co.,*[156] and *Wernsing* v. *Department of Human Services,*[157] the courts allowed the employer to use prior salaries as a justifiable "factor other than sex." In *Kouba,* the Ninth Circuit found that the employer had shown that the prior salary at issue corresponded roughly to "the employee's ability * * * and predict [ed] a new employee's performance as a sales agent," while in *Wernsing,* the Seventh Circuit upheld the policy of the Illinois Department of Human Services that based its salary levels on prior earnings.

In all of these cases, the courts essentially relied upon "market force" or "prior pay" arguments for pay differentials between men and women without requiring further evidence of the nature of that market force. Such evidence might include, for example, evidence that women's earnings in a given position are not frequently or consistently lower than men's, thereby demonstrating that the lower pay offer to a woman at hiring did not piggy-back on a sex-based differential. While market forces may be a legitimate basis for determining pay, market forces tainted with sex discrimination are not. The broadly remedial purpose of the EPA is undermined where a seemingly gender-neutral excuse for unequal pay between

[149] *Id.* at 859.
[150] *Id.*
[151] *Id.*
[152] 613 F. 2d 706 (8th Cir.)
[153] 1996 U.S. Dist. LEXIS 1865 (S.D.N.Y. 1996).
[154] 49 F. Supp. 2d 208, 220 (S.D.N.Y. 1999)
[155] *Id.*
[156] 691 F. 2d 873 (9th Cir. 1982)
[157] 427 F. 3rd 466 (7th Cir. 2005).

similarly situated employees of opposite sex is based on or derived from a sex-based differential.

Business Necessity: Under Title VII, in order to justify an employment practice that has the effect of discriminating against an employee on the basis of race, color, religion, national origin or sex (a disparate impact case), an employer must assert that the practice is consistent with business necessity. Like a disparate impact case, cases brought under the EPA, do not require a showing of intent. So a practice (which includes the payment of wages) that may be "fair in form but discriminatory in operation"[158] is prohibited under Title VII. The same is true with regard to the EPA.

Both Title VII and the EPA afford the employer opportunities to defend their practices, but as previously explained, the "factor other than sex" defense under the EPA has been interpreted by the courts so broadly that nearly any explanation for a wage differential is acceptable.[159] This is one of the main reasons that the EPA is ineffective.

The business necessity defense originated in the case of *Griggs* v. *Duke Power Co*,[160] decided in 1975. In that case, the Supreme Court determined that an employment practice, which resulted in the exclusion of black employees from certain jobs could only be justified in the case of business necessity ("The touchstone is business necessity.").[161] However, because the Court also introduced the concept of "job relatedness," and appeared to use the two concepts interchangeably, there was some confusion over the years as what the correct standard should be.[162] This culminated in the case of *Wards Cove Packing Co., Inc. et. al.* v. *Antonio et. al.*,[163] where the Court abandoned the concept of business necessity altogether:

> * * * the dispositive issue is whether a challenged practice serves, in a significant way the legitimate employment goals of the employer [citations omitted]. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification will not suffice * * * At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensible" to the employer's business.[164]

Congress responded, with the passage of the *Civil Rights Act* of 1991, which overturned *Wards Cove Packing* and its brethren and enshrined the business necessity defense into law in Title VII disparate income cases.[165] Under 42 U.S.C. 2000e(o)(1)(B) business necessity requires employment practices to "bear a significant relationship to a business objective of the employer."[166] For the pur-

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[158] *Griggs* v. *Duke Power,* 515 F.2d 86 (4th Cir. 1975).
[159] AAUW *supra note* 34.
[160] 401 U.S. 424 (1971).
[161] *Id.* at 431.
[162] *See:* Earl M. Maltz, *The Legacy of Griggs* v. *Duke Power Co.:* A Case Study in the Impact of a Modernist Statutory Precedent, 1994 Utah L. Rev. 1353(1994) at pp. 1371–1372.
[163] 490 U.S. 642 (1989)
[164] *Id.* at 659.
[165] 42 U.S.C. § 2000e(o)(1).
[166] In 42 U.S.C. § 2000e(o)(1)(A), Congress also established the business necessity standard in case of employment practices involving selection: "the practice must bear a significant relation-

Continued

poses of showing business necessity, "unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required."[167] Subsequent cases applying the business necessity standard illustrate that the more rigorous showing an employer must make to justify disparate treatment furthers the remedial purposes of Title VII.[168]

The *Paycheck Fairness Act* seeks to strengthen the EPA by insisting that the "factor other than sex defense * * * be confined to business practices shown to serve compelling and legitimate interests of the employer."[169] Requiring an employer to show that a job is consistent with business necessity applies a term that is already specifically defined in civil rights law[170] and thereby provides workers and employers with a known legal standard for assessing pay disparities.

c. Class actions

The EPA requires plaintiffs to affirmatively 'opt-in' to a class action lawsuit. This is contrary to other employment discrimination laws, which allow women with a pay discrimination claim within a certified class to 'opt-out' of a multiple-claim case pursuant to Rule 23 of the Federal Rules of Civil Procedure.[171] Title VII, for example, provides for claimants to 'opt-out' of multi-party claims.[172]

Allowing plaintiffs to opt-out, rather than requiring them to affirmatively opt-in, is important. The current EPA rule excludes women who may not be aware they have a claim and also excludes women who may even be aware they have a claim but are afraid that they will be retaliated against in the workplace if they affirmatively opt in. H.R. 1338 puts claimants under the EPA in the same position as other victims of discrimination who automatically become part of a class-action unless they affirmatively opt-out of the class.[173]

d. Damages

Damages under the original EPA are limited to backpay and liquidated damages in the form of double back pay. No compensatory or punitive damages are available, and liquidated damages may only be recovered if the employer fails to demonstrate good faith and reasonable grounds for believing it was in compliance with the Act.[174] By contrast, Title VII of the *Civil Rights Act* (Title VII) per-

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ship to successful performance of the job." Since EPA cases involve wages and wage scales, it is highly unlikely that a circumstance will arise where this definition will be applied.

[167] 42 U.S.C.§ 2000e(o)(2).

[168] *Lanning* v. *SEPTA*, 308 F. 3d 286 (3rd Cir. 2002); *United States* v. *Delaware,* 2004 U.S. Dist. LEXUS 4560 (D. Del 2004).

[169] Sellers Testimony.

[170] 42 U.S.C. § 2000e(o)(1).

[171] Sellers Testimony at 10.

[172] 42 U.S.C. § 2000e–2(n).

[173] Sellers Testimony at 11

[174] ". . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended [*29 USCS §§ 201* et seq., generally; for full classification, consult USCS Tables volumes], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act [*29 USCS § 216*]." 29 USCS § 260. In addition, one commentator has stated that even when "liquidated damages are unavailable . . . the amounts available to compensate plaintiffs tend to be insubstantial." Greenberger Testimony at 7.

mits successful complainants to recover compensatory and punitive damages.

EPA sanctions are inadequate and "deprive women subjected to pay discrimination of full relief."[175] In addition, they do nothing to deter future discrimination in the workplace and are often viewed by employers simply as the cost of doing business. Joseph Sellers, testifying before the Subcommittee on Workforce Protections in July 2007, explained:

> The remedy fails to provide an adequate incentive for employers to engage regularly in the examination of their own compensation practices and to investigate and address any pay disparities that may be detected. Even the payment of lost wages doubled where an employer has failed to demonstrate it acted in good faith permits employers to tolerate the risk that employment practices resulting in gender-based pay disparities will be detected and challenged, as they can compute precisely the economic exposure and determine whether it is a tolerable cost of doing business.[176]

Damages under Title VII are capped and can be no more than $300,000.[177] These caps do little to further the actual purpose of punitive damages, which is to punish the defendant and deter future misconduct by the defendant and others similarly situated.[178] As such, the *Paycheck Fairness Act* does not limit damages in this regard.

The unfairness of damage limitations is illustrated in *Brady* v. *Wal-Mart Stores,* Inc.[179] where the plaintiff Patrick Brady brought a suit against Wal-Mart and the store manager, alleging violations of the American with Disabilities Act (ADA) and the New York Human Rights Law. In his suit, Brady, who has cerebral palsy, claimed Wal-Mart subjected him to adverse work conditions and a hostile work environment based on his disability. The jury agreed with Brady and awarded him a settlement for back pay and emotional pain and suffering, and $5 million award in punitive damages. Unfortunately, the ADA's remedies are capped and the judge was required to reduce the award to $300,000.[180] In his opinion, Judge Orenstein stated that his ruling "respects the law, but it does not achieve a just result,"[181] especially for one of the biggest companies in America.[182]

Punitive damages, especially uncapped punitive damages, are necessary to deter unscrupulous businesses from harming workers and consumers to gain a competitive advantage.[183] Often, without punitive damages, a business may treat its labor violations as

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[175] *Id.*

[176] Sellers Testimony.

[177] *Id.*

[178] *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence;* Ruggles, Vanessa; Connecticut Public Interest Law Journal; Vol. 6:1 at 147 (2006) citing *Kemezy* v. *Peters,* 79 F.3d 33, 34 (7th Cir. 1996) (noting that "deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages")

[179] 2005 U.S. Dist. LEXIS 12151 (2005).

[180] *Id.*

[181] *Brady, 2005 U.S. Dist. LEXIS 12151,* at 10, aff'd 2008 U.S. App. LEXIS 13850 (2d Cir.).

[182] *Supra note* at 180.

[183] *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data; Rustad,* Michael; Iowa Law Review; 78 at 12 (1992–1993).

merely a cost of doing business. Furthermore, empirical studies conducted by the US Department of Justice's Bureau of Justice Statistics estimated that from 1991–92 and in the years 1996 and 2001, punitive damages were awarded in less than one percent of all civil actions.[184] Juries awarded punitive damages in only 5.7 percent of tort and contract cases when the plaintiff prevailed at trial.[185] The Department of Justice also studied awards made in the nation's seventy-five largest counties in 2001 and found that out of seventy products liability cases, plaintiffs received punitive damages in only three cases. Out of three-hundred and eleven medical malpractice cases, plaintiffs received punitive damages in just fifteen cases.[186]

There is precedent for uncapped damages against employers who discriminate;[187] damages awarded under Section 1981 for race or national origin discrimination are not subject to statutory limitations.

Still, even in those cases, courts generally do not award unjustifiable or excessive damages and base relief based on sound factors, such as the willfulness or egregiousness of the violation[188] and the effectiveness of damages as a deterrent.[189] Because decisions are made by each court on a case by case basis, courts are able to strike the needed balance between assessing penalties based upon particular facts and circumstances and assessing the severity of the discrimination.[190]

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[184] Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties,* Bureau of Justice Statistics Special Report NCJ 154346 (July 1995) [hereinafter "Bureau of Justice Statistics July 1995"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties, 1996,* Bureau of Justice Statistics Bulletin, NCJ 173426 (Sept. 1999) [hereinafter "Bureau of Justice Statistics September 1999"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001,* NCJ 202803 (Apr. 2004) [hereinafter "Bureau of Justice Statistics April 2004"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001,* NCJ 206240 (Nov. 2004) [hereinafter "Bureau of Justice Statistics November 2004"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties,* 2001, NCJ 208445 (Mar. 2005) [hereinafter "Bureau of Justice Statistics March 2005"]

[185] Brief of *Amici Curiae* in support of respondent in *Philip Morris USA* v *Mayola Williams* No. 05–1256 at 5.

[186] *Id* at 9.

[187] 42 U.S.C. § 1981.

[188] Court found it improper to award punitive damages in the absence of evidence of egregious conduct, willfulness, or malice on the part of the employer. *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.* 816 F2d. 1104 (6th Cir. 1987)

[189] The appellate court reduced the punitive award amount when it found that the employer's discriminatory act was minor and quickly remedied. Circuit court reasoned that a higher amount would remove monetary incentive to remedy minor violations, and would remove incentive from escalating minor discrimination into major discrimination. *Lust* v. *Sealy,* Inc., 383 F3d. 580 (7th Cir. 2004); *See also, Jones* v. *Western Geophysical Co.,* 761 F.2d 1158 (5th Cir. 1985) (Employer who has been found to have engaged in racial discrimination need not pay punitive damages to plaintiff if said employer is taking steps to eliminate discrimination, and if evidence against employer is, at times, ambiguous and does not necessarily lead to the conclusion that the employer behaved maliciously in practice of racial discrimination); *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.,* 816 F.2d 1104 (6th Cir. 1987) (holding that it was improper to award punitive damages to employee alleging race discrimination without evidence that employer acted egregiously, willfully, or maliciously in failing to promote an plaintiff because of his race); *Stephens* v. *South Atlantic Canners,* Inc., 848 F.2d 484 (4th Cir. 1988) (holding that extraneous materials submitted to the jury relating to discharged employee's infractions warranted reversal of punitive damages issued against his former employer in his discriminatory discharge case brought under 42 USCS § 1981 and Title VII.); *Edward* v. *Jewish Hospital,* 855 F.2d 1345 (8th Cir. 1988) (Court denied reducing punitive damages award of $25,000 to reflect reduction in actual damages from $50,000 to $1 nominal damages because of lack of a general proportionality rule requiring nominal damages to invalidate punitive damages award.)

[190] The Court distinguished the need to address levels of discrimination in terms of appropriate amount for recovery, reasoning that a higher amount would remove monetary incentive to remedy minor violations, and would remove incentive from escalating minor discrimination into major discrimination. *Lust* v. *Sealy, Inc.,* 383 F3d. 580 (7th Cir. 2004)

The Paycheck Fairness Act provides for uncapped damages and as such "redresses the deficiencies in the remedies available under the EPA [and] eliminates a shortcoming of the EPA that has long diminished in its value as a vehicle for addressing unlawful pay disparities."[191] Longstanding judicial discretion under § 1981 directly addresses these concerns of frivolous and excessive claims for relief.[192]

e. Retaliation for discussing or disclosing salary information

The EPA does not explicitly protect employees who discuss or disclose salary information. As previously noted, many employers discourage and may even have workplace policies against the sharing of salary information. This makes it extremely difficult to detect pay discrimination. For example, Lilly Ledbetter was paid less than her male co-workers for years but she did not realize it. A company policy prohibited her from discussing her pay with her co-workers. The only reason she discovered the pay discrimination when someone sent her an anonymous note.[193]

The National Labor Relations Act (NLRA) prohibits retaliation against employees[194] who share salary information for the purposes of union organizing. Section 7 protects the right of employees to join a union and "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *"[195] Concerted activity includes the right to discuss wages, hours and other terms and conditions of employment.[196] It also bans blanket prohibitions on discussing wages.[197] Even with the National Labor Relations Board's recent turn to roll back worker protections, this basic rule has been upheld.[198] However, supervisors are not protected under the NLRA and can be prevented and reprimanded for discussing and/or sharing salary information.

Under the FLSA, employers are prohibited from retaliating against employees who seek to assert their rights under the Act.[199]

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[191] Testimony of Joseph Sellers at 14.

[192] See generally, *Jones* v. *Western Geophysical Co.*, 761 F.2d 1158 (5th Cir. 1985) (Employer who has been found to have engaged in racial discrimination need not pay punitive damages to plaintiff if said employer is taking steps to eliminate discrimination, and if evidence against employer is, at times, ambiguous and does not necessarily lead to the conclusion that the employer behaved maliciously in practice of racial discrimination); *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir. 1987) (holding that it was improper to award punitive damages to employee alleging race discrimination without evidence that employer acted egregiously, willfully, or maliciously in failing to promote an plaintiff because of his race); *Stephens* v. *South Atlantic Canners, Inc.*, 848 F.2d 484 (4th Cir. 1988) (holding that extraneous materials submitted to the jury relating to discharged employee's infractions warranted reversal of punitive damages issued against his former employer in his discriminatory discharge case brought under 42 USCS § 1981 and Title VII.); *Edward* v. *Jewish Hospital*, 855 F.2d 1345 (8th Cir. 1988) (Court denied reducing punitive damages award of $25,000 to reflect reduction in actual damages from $50,000 to $1 nominal damages because of lack of a general proportionality rule requiring nominal damages to invalidate punitive damages award.)

[193] *Ledbetter supra* note 65.

[194] 29 U.S.C. § 152(3)

[195] 29 U.S.C. § 157

[196] *Id.*

[197] 29 U.S.C. 158(a)(1) provides that it is an unfair labor practice for an employer to interfere, retrain or coerce employees in the exercise of the rights guaranteed in section 157.

[198] *See, Northeastern Land Services, Ltd.* 352 NLRB No. 89 (June 27, 2008) ([Respondent's] confidentiality provision is unlawful * * * the provision, by its clear terms, precludes employees from discussing compensation). See also, Dickens, Inc. and Wenqing Lin. 352 NLRB No. 84 (May 30, 2008)([the employer] admitted * * * he instructed employees not to discuss their bonus with other, recently hired employees * * * such comments reasonably tend to coerce employees in the exercise of Section 7 rights).

[199] 29 U.S.C. § 215(a)(3) provides that it shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any com-

Continued

As such, this protection extends to a woman claiming an EPA violation who has filed, instituted, initiated or participated in any capacity in a proceeding under or related to [the Act].[200] However, in some cases interpreting the anti-retaliatory provision[201] the courts have limited the protection afforded by anti-retaliation provisions, particularly when they find that an aggrieved worker has not stepped outside her role representing the employer.

For example, in *McKenzie* v. *Reinberg's Inc*,[202] the plaintiff alleged that she was fired in violation of the FLSA's anti-retaliation provision because she questioned whether her employer was in compliance with the overtime provisions of the FLSA. The plaintiff was a personnel director who, as part of her job, monitored compliance with state and federal wage and hour laws. After attending a training on the FLSA, she determined that her employer was likely in violation of law's overtime provisions. She brought this to her employer's attention and was fired as a result.[203] The court held that because McKenzie merely articulated her concerns about the wage and hour violations with her employer:

> [she] did not engage in activity protected under § 215(a)(3). To qualify for the protections the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activity that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.[204]

The Sixth Circuit reached a similar—and misguided—conclusion in *Crawford* v. *Metropolitan Government of Nashville,*[205] when it limited the reach of the Title VII anti-retaliation provision by finding that its protections did not extend to internal investigations. In that case, the plaintiff alleged she was fired because, in the midst of an internal investigation conducted by the employer she made statements to the in-house investigator about sexual harassment by another employee. The court in ruling against the plaintiff, misinterpreted the Title VII provision when it held that employer initiated investigations are not covered under the Act.

Protecting employees who participate in employer initiated investigations does not "expand" the law ("expanding the purview of the participation clause to cover such investigations would simultaneously discourage them.").[206] As such, the decision in *Crawford* is contrary to the principle that "employee actions [should] receive the broadest protections from retaliation, protecting employees from

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plaint or instituted or caused to be institute any proceeding under or related to this Act generally; for full classification, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee.

[200] 29 U.S.C. § 215(a)(3)

[201] *Id.*

[202] 94 F.3d 1478 (1996)

[203] *See also: Hagan* v. *Echostar*, 529 F.3d 617 (2008) where the Court found that the plaintiff was not protected for participating in activities that "are neither adverse to the company nor supportive of adverse action to the company." The Court stated that "in order to be protected must step out of role of representing the company by either filing or threatening to file an action adverse to the employer, by actively assisting other employees in asserting FLSA rights or by otherwise engaging in activities that reasonably could be perceived as directed toward the assertion of rights protected by the FLSA."

[204] McKenzie, *supra* note 202.

[205] 2006 U.S.APP. LEXIS 28280.

[206] *Id.*

adverse consequences even if their beliefs about discrimination turn out to be factually or legally incorrect, as long as the employees acted in good faith."[207]

A key component in eliminating the wage gap is protecting workers who discuss wages or participate in an EPA suit by ensuring that they can do so without fear of reprimand. Even when employers do not have explicit policies "legal or not, workers are expected to keep their lips sealed about their salaries. It's the unwritten law."[208] As one employer advised other employers "sit down with people, talk to them * * *. be clear: it's not OK to talk salary at the office."[209]

H.R. 1338 protects the rights of employees to discuss and disclose wage information in the workplace and affirms the rights of workers to disclose this information as part of an employer or government investigation. Its provisions are intended to give robust protection to those employees who act to oppose violations of the Act, as well as to provide a shield of protection for the kinds of discussions that will allow employees to uncover unequal pay. However, the bill recognizes that employers may entrust some employees with access to wage information as part of an essential function[210] of their job. These confidential employees will not be protected for disclosing the wages to those who do not otherwise have access. However, they could (1) disclose their own wages; (2) disclose wage issues "up the chain" or "horizontally" if they become aware of potential pay discrimination regarding other employees; or (3) disclose wages in response to or in furtherance of an employer or government investigation or other proceeding under the Act.

SECTION-BY-SECTION ANALYSIS

Section 1 is the short title.

Section 2 contains the findings.

Section 3(a) clarifies the "any factor other than sex" defense by requiring employers to provide non-gender reasons for the difference in wages based on a business justification. To successfully raise this affirmative defense an employer must demonstrate that the disparity is based on a bona fide factor other than sex, such as education, training, or experience, that is: (1) not based upon or derived from a sex-based differential; *and* (2) related to the position in question; *and* (3) consistent with business necessity. Such a defense shall not apply if the employee can then demonstrate that an alternative employment practice exists that would serve the same business purpose without producing the differential, and the employer refused to adopt the alternative.

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[207] Joanna Grossman & Deborah Brake, *The Supreme Court Agrees to Review a Sixth Circuit Ruling that Narrowly Construes Title VII's Protections Against Retaliation*, (Feb. 7, 2008) *available at, http://writ.news.findlaw.com/__scripts/printer—friendly.pl?__page=/commentary/__20080207__*brake.html.

[208] Sacha Cohen, Shhh, They're Talking Salary, USA Today (Dec. 20, 2002) (quoting Lee Miller, Co-author of A Women's Guide to Successful Negotiating), Available at: *http://www.usatoday.com/__money/jobcenter/__jobhunt/salary/__2002-12-20-salary-__talk__x.htm.*

[209] *Id.* (Quoting Bob Lambert, managing partner at Christian & Timbers, Irvine, California).

[210] "Essential job function" as used in the Americans with Disabilities Act, 42 U.S.C. 31211 generally means "the fundamental job duties of the employment position. Factors to be weighed in this determining an essential function include: (1) the reason(s) the position exists; (2) the number of employees whose functions are similar; (3) the specialized nature of the job; and (4) the expertise needed to perform the required functions.

Section 3(a) broadens where a female employee can look to find a male comparator. Employees shall be considered to work in the same establishment if the employees work at workplaces located in the same county or similar political subdivision of a state. In addition, the bill recognizes that establishment, consistent with rules or guidance offered by the EEOC, can be applied more broadly when, for example, there is a central decision making structure that makes the salary and hiring decisions for employees in multiple locations.

Section 3(b) provides that this subsection applies to applicants for employment.

Section 3(c) provides that employers are prohibited from retaliating against employees who share salary information with their co-workers. Employees are protected when they have disclosed, discussed, or inquired about the wages of another employee. In addition, employees are protected if they make a charge, file a complaint or participate in any way in a government initiated or employer initiated investigation, including but not limited to testifying, assisting or participating in anyway an investigation, proceeding, hearing or has served or plans to serve on an industry committee.

Section 3(c) contains limiting language on when the anti-retaliation protections apply extend to employees with access to wage information of other employees as an essential function of their job. These employees such as payroll and human resource personnel would not be protected if they disclose that wage information to individuals who do not otherwise have access to this information. However, they would be protected if: (1) they were disclosing that wage information to someone who also has access to such information; (2) they were disclosing their own wages; or (3) the disclosure was in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing or action under the EPA, including an internal employer investigation.

Section 3(d) provides that compensatory and punitive damages are available in private EPA suits. In addition, class action lawsuits brought under the EPA shall proceed as opt-out class actions in conformity with the Federal Rules of Civil Procedure.

Section 3(e) provides for compensatory and punitive damages and class actions in cases (for minimum wages and unpaid overtime compensation) brought by the Secretary of Labor on behalf of an employee.

Section 4 requires the EEOC and the OFCCP (subject to the availability of funds) to provide training to EEOC employees on pay discrimination.

Section 5(a) authorizes the Secretary of Labor (after consultation with the Secretary of Education) to establish and carry out a grant program to provide negotiation skills training programs for girls and women. The training would help girls and women strengthen their negotiation skills to obtain higher salaries and equal pay.

Section 5(b) requires the Secretary to issue regulations or guidelines integrating negotiation skills training into existing education and work training programs.

Section 5(c) mandates the Secretaries of Labor and Education to submit an annual report to Congress on the grant program.

Section 6 requires the Secretary of Labor to conduct studies and provide information to employers, labor organizations and the public on ways to eliminate pay disparities. This includes conducting and promoting research, publishing and otherwise making available findings from studies and other materials; sponsoring and assisting State and community informational and educational programs; providing information on the means of eliminating pay disparities; and recognizing and promoting achievements and convening a national summit.

Section 7 establishes an annual award entitled the "Secretary of Labor's National Award for Pay Equity in the Workplace" for businesses that demonstrate substantial effort in eliminating pay disparities.

Section 8 requires the EEOC, within 18 months of enactment, to survey pay data already available, and based on the results of the survey, issue regulations to provide for the collection of pay information from employers identified by sex, race and national origin of employees.

Section 9(a) requires the continued collection by the Commissioner of Labor Statistics of gender-based data in the Current Employment Statistics survey.

Section 9(b) sets standards for the OFCCP in conducting systematic wage discrimination analyses and reinstates the Equal Opportunity Survey.

Section 9(c) requires the Secretary of Labor to distribute (or make available) accurate information on wage discrimination.

Section 10 authorizes the appropriation of $15 million to carry out the Act.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 203 of the Congressional Accountability Act (CAA) applies certain rights and protections of the Fair Labor Standards Act of 1938 (FLSA) to covered employees. These rights and protections include the Equal Pay Act protections against *sex discrimination in wages* paid to men and women. The House, Senate, and Instrumentalities of Congress all have slightly different regulations regarding the implementation of the FLSA.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates.

EARMARK STATEMENT

H.R. 1338 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

ROLL CALL

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL #1 **BILL: H.R. 1338** **DATE: 7/24/2008**
AMENDMENT NUMBER: 3 **DEFEATED: 17 AYES / 26 NOES**
SPONSOR/AMENDMENT: PRICE / CONDITIONAL ENACTMENT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO				X
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP				X
Mr. DAVID DAVIS				X
Mr. WALBERG	X			
[vacancy]				
TOTALS	**17**	**26**		**5**

The original vote tally was 16 to 25, but Chairman Miller asked Unanimous Consent to allow for Mr. Wu, Ms. Shea-Porter and Mrs. Foxx's votes to be counted. Mr. Wu and Mrs. Foxx arrived after the first tally of the vote, but Ms. Shea-Porter was in fact present during the first roll call.

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL #2 **BILL: H.R. 1338** **DATE: 7/24/2008**
AMENDMENT NUMBER: 4 **DEFEATED: 17 AYES / 25 NOES**
SPONSOR/AMENDMENT: PRICE / ATTORNEY FEES

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU				X
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO				X
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP				X
Mr. DAVID DAVIS				X
Mr. WALBERG	X			
[vacancy]				
TOTALS	**17**	**25**		**6**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL #3 **BILL: H.R. 1338** **DATE: 7/24/2008**
AMENDMENT NUMBER **DEFEATED: 16 AYES / 25 NOES**
SPONSOR/AMENDMENT: McKEON / APPEAL THE RULING OF THE CHAIR

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU				X
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS				X
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUÑO				X
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP				X
Mr. DAVID DAVIS				X
Mr. WALBERG	X			
[vacancy]				
TOTALS	**16**	**25**		**7**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL #4 BILL: H.R. 1338 DATE: 7/24/2008
AMENDMENT NUMBER PASSED: 26 AYES / 17 NOES
SPONSOR/AMENDMENT: WOOLSEY / FAVORABLY REPORT THE BILL TO THE HOUSE AS AMENDED

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA				X
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. SUSAN DAVIS	X			
Mr. DANNY DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Ms. SANCHEZ	X			
Mr. SARBANES	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. YARMUTH	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Mr. McKEON		X		
Mr. PETRI		X		
Mr. HOEKSTRA				X
Mr. CASTLE		X		
Mr. SOUDER		X		
Mr. EHLERS		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. KELLER		X		
Mr. WILSON		X		
Mr. KLINE		X		
Mrs. McMORRIS RODGERS		X		
Mr. MARCHANT		X		
Mr. PRICE		X		
Mr. FORTUÑO				X
Mr. BOUSTANY		X		
Mrs. FOXX		X		
Mr. KUHL		X		
Mr. ROB BISHOP				X
Mr. DAVID DAVIS				X
Mr. WALBERG		X		
[vacancy]				
TOTALS	**26**	**17**		**5**

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 1338 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 25, 2008.

Hon. GEORGE MILLER,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1338, the Paycheck Fairness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jessica Sherry.

Sincerely,

ROBERT A. SUNSHINE
(For Peter R. Orszag, Director).

Enclosure.

H.R. 1338—Paycheck Fairness Act

H.R. 1338 would authorize the appropriation of $15 million to enhance enforcement of the equal pay requirement established in the Fair Labor Standards Act of 1938. Additionally, the bill would authorize grants to eligible public agencies to provide training to women and girls on negotiation skills. Finally, the bill would direct the Secretary of Labor to conduct research on the means available to eliminate gender-related pay disparities, and would direct the Commissioner of Labor Statistics to continue to collect data on female workers and pay equity between men and women.

CBO estimates that implementing H.R. 1338 would cost $15 million over the 2009–2013 period, assuming appropriation of the authorized amounts. The costs of this legislation fall within budget function 500 (education, training, employment, and social services). Enacting the bill would not affect direct spending or revenues.

Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that establish or enforce any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability. CBO has determined that section 3 of H.R. 1338 would fall within that exclusion because it would enforce

an existing prohibition of sex discrimination by pay. Therefore, CBO has not reviewed that section of the bill for mandates.

The remaining provisions in the bill would impose no mandates on state, local, or tribal governments. Training programs authorized by the bill would benefit state, local, and tribal governments. Likewise, the remaining provisions of this bill contain no private-sector mandates as defined in UMRA.

The CBO staff contact for this estimate is Jessica Sherry. This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause 3(c) of House rule XIII, the goal of H.R. 1338 is to protect employees from wage discrimination.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 1338. The Committee believes that the amendments made by this bill are within Congress' Constitutional authority under Article 1, Section 8, Clause 3 (the Commerce Clause), Amendment V (Due Process) and Section 1 of the Amendment XIV (the Equal Protection and Due Process Clauses).

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 1338. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * * * * *

MINIMUM WAGES

SEC. 6. (a) * * *

* * * * * * *

(d)(1) [No employer having] *(A) No employer having* employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in

such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on [any other factor other than sex] *a bona fide factor other than sex, such as education, training, or experience*: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. *The provisions of this subsection shall apply to applicants for employment if such applicants, upon employment by the employer, would be subject to any provisions of this section.*

(B) The bona fide factor defense described in subparagraph (A)(v) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.

(C) For purposes of subparagraph (A), employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a State. The preceding sentence shall not be construed as limiting broader applications of the term "establishment" consistent with rules prescribed or guidance issued by the Equal Opportunity Employment Commission.

* * * * * * *

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) * * *

* * * * * * *

(3) to discharge or in any other manner discriminate against any employee because such [employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;] *employee—*

(A) has made a charge or filed any complaint or instituted or caused to be instituted any investigation, proceeding, hearing, or action under or related to this Act, including an investigation conducted by the employer, or has testified or is planning to testify or has assisted or participated in any manner in any such investigation, proceeding, hearing or action or in an investigation conducted by the employer, or has served or is planning to serve on an industry Committee; or

(B) has inquired about, discussed or disclosed the wages of the employee or another employee.

* * * * * * *

(c) Subsection (a)(3)(B) shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under section 6(d) or an investigation conducted by the employer. Nothing in this subsection shall be construed to limit the rights of an employee provided under any other provision of law.

PENALTIES

SEC. 16. (a) * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or the unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *Any employer who violates section 6(d) shall additionally be liable for such compensatory damages or punitive damages as may be appropriate, except that the United States shall not be liable for punitive damages.* Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in [either of the preceding sentences] *any of the preceding sentences of this subsection* may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. [No employees] *Except with respect to class actions brought to enforce section 6(d), 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. *Notwithstanding any other provision of Federal law, any action brought to enforce section 6(d) may be maintained as a class action as provided by the Federal Rules of Civil Procedure.* The court [in such action] *in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection* shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action*, including expert fees*. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this act by

an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, *or, in the case of a violation of section 6(d), additional compensatory or punitive damages,* and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages*, or such compensatory or punitive damages, as appropriate*. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages *and, in the case of a violation of section 6(d), additional compensatory or punitive damages*. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in **[**the first sentence**]** *the first or second sentence* of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be **[**commenced in the case**]** *commenced—*

(1) in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plantiff in such action**[**.**]***; or*

(2) in the case of a class action brought to enforce section 6(d), on the date on which the individual becomes a party plaintiff to the class action.

* * * * * * *

CIVIL RIGHTS ACT OF 1964

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

* * * * * * *

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) * * *

* * * * * * *

(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall—

(A) complete a survey of the data that is currently available to the Federal Government relating to employee pay information for use in the enforcement of Federal laws prohibiting pay discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws; and

(B) based on the results of the survey and consultations under subparagraph (A), issue regulations to provide for the collection of pay information data from employers as described by the sex, race, and national origin of employees.

(2) In implementing paragraph (1), the Commission shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination. For this purpose, the Commission shall consider factors including the imposition of burdens on employers, the frequency of required reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for the data collection reports.

* * * * * * *

MINORITY VIEWS

INTRODUCTION

Committee Republicans are united in their support for the simple proposition that equal work should be rewarded with equal pay, irrespective of an employee's sex. Indeed, that very principle has been the law of the land for decades. It is already—as it should be—against federal law to discriminate, in pay or other employment practices, on the basis of sex. To the extent that wage disparities exist and are a product of workplace discrimination, Committee Republicans are committed to eliminating them in order to ensure a fair, productive, and competitive workforce.

In 1963, Congress enacted the Equal Pay Act (EPA) within the Fair Labor Standards Act.[1] The EPA makes it illegal to pay different wages to employees of the opposite sex for equal work. One year later, Congress enacted comprehensive anti-discrimination civil rights protection based on race, color, national origin, religion, and sex under Title VII of the Civil Rights Act.[2] Together, these laws protect against sex discrimination, and provide a range of remedies for victims. In short, the question is not whether sex discrimination in the workplace should be permitted. That question has been answered—Committee Republicans agree that such discrimination should not be tolerated: that is why it is a direct violation of not one but two federal laws.

It is against this backdrop that Committee Republicans reject H.R. 1388, the so-called "Paycheck Fairness Act." Simply put, H.R. 1338 does little to protect the wages and paychecks of American workers, and far more to line the pockets of the plaintiffs' trial-lawyer bar. The bill radically expands liability and damages under the Equal Pay Act, while dramatically limiting the ability of employers to defend claims of discrimination based on pay disparities that arise from wholly lawful and legitimate business purposes. For these reasons, and as set forth more fully below, Committee Republicans are united in their opposition to H.R. 1338.[3]

THE FLAWED "WAGE GAP" THEORY

Equal pay advocates claim that despite federal law prohibiting discrimination in pay on the basis of gender, female workers are still paid considerably less than male workers, and thus a "wage gap" exists. Advocates commonly support this claim with reference to the most recent census data available, which indicated that in 2005, the average median income for women was $31,858, roughly

[1] *See* 29 U.S.C. § 206(d).
[2] *See* 42 U.S.C. § 2000e *et seq*.
[3] At markup on July 24, 2008, the bill was ordered reported favorably to the House on a party-line vote of 26–17, with all Republicans present voting against favorably reporting the measure."

77 percent of the median income for men, which was $41,386.[4] The Majority argues that this flawed theory makes enactment of H.R. 1338 necessary. Committee Republicans reject that argument.

Pay equity advocates argue that the root cause of pay inequity is the fact that "many women and people of color are still segregated into a few low-paying occupations. More than half of all women workers hold sales, clerical and service jobs. Studies show that the more an occupation is dominated by women or people of color, the less it pays. * * * In other words, certain jobs pay less because they are held by women and people of color."[5] Supporters thus appear to argue that differences in wages between men and women (or minorities) are not caused by intentional discrimination, or the fact that these workers are paid less because of the nature of the jobs they hold, but rather *because* certain jobs are held predominantly by women or minorities, employers systematically undervalue the job and thus "underpay" these workers.

The logic of this assertion is readily discredited. Critics of the wage gap theory note that the "77 percent" figure most frequently cited as evidence of wage discrimination derived by comparing the 2005 full-time (defined as working 35 hours per week or more) median annual earnings of women with men, as compiled by the Census Bureau. If the comparison is men and women who work 40 hours weekly, this data shows women's earnings at 88 percent of men's. Moreover, these statistics do not necessarily take into account education, job title, responsibility, regional labor markets, work experience, occupation, and time in the work force. Critics of the "wage gap" theory note that when economic studies include these major determinants of income, rather than simple averages of all men and women's salaries, the pay gap shrinks considerably.

GAO has reached similar conclusions.. In October 2003, GAO released a report entitled "Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings."[6] GAO's report found that a number of factors are critical to resolving the issue of whether a "pay gap" exists, and notably explained that the agency could not conclude that the "wage gap" was simply a function of wage or sex discrimination. As GAO summarized (emphasis added):

> Of the many factors that account for differences in earnings between men and women, our model indicated that work patterns are key. *Specifically, women have fewer years of work experience, work fewer hours per year, are less likely to work a full-time schedule, and leave the labor force for longer periods of time than men. Other factors that account for earnings differences include industry, occupation, race, marital status, and job tenure.* When we account for differences between male and female work patterns as well as other key factors, women earned, on average, 80 percent of what men earned in 2000. While the difference fluctuated in each year we studied, there was a small but

[4] *See* U.S. Census Bureau, Current Population Survey, 2006 Annual Social & Economic Supplement, PINC–05.

[5] *See* http://www.pay-equity.org/info—Q&A.html.

[6] A copy of the complete report is available at http://www.gao.gov/new.items/d0435.pdf.

statistically significant decline in the earnings difference over the time period.

Even after accounting for key factors that affect earnings, our model could not explain all of the difference in earnings between men and women. Due to inherent limitations in the survey data and in statistical analysis, *we cannot determine whether this remaining difference is due to discrimination or other factors that may affect earnings. For example, some experts said that some women trade off career advancement or higher earnings for a job that offers flexibility to manage work and family responsibilities.*

In conclusion, while we were able to account for much of the difference in earnings between men and women, we were not able to explain the remaining earnings difference. It is difficult to evaluate this remaining portion without a full understanding of what contributes to this difference. *Specifically, an earnings difference that results from individuals' decisions about how to manage work and family responsibilities may not necessarily indicate a problem unless these decisions are not freely made.* On the other hand, an earnings difference may result from discrimination in the workplace or subtler discrimination about what types of career or job choices women can make. Nonetheless, it is difficult, and in some cases, may be impossible, to precisely measure and quantify individual decisions and possible discrimination. *Because these factors are not readily measurable, interpreting any remaining earnings difference is problematic.*

Given the flaws in its advocates' logic, and the absolute lack of definitive evidence that a "wage gap" counsels enactment of sweeping reforms to the Equal Pay Act and other federal laws, Committee Republicans question the premise upon which H.R. 1338 is founded.

SUBSTANTIVE CONCERNS WITH H.R. 1388

Aside from questions as to its necessity, Committee Republicans oppose H.R. 1338 for numerous policy reasons. Among the bill's most objectionable provisions are those described below.[7]

H.R. 1338 radically expands remedies

Perhaps most troubling, H.R. 1338 would expand remedies under the Equal Pay Act to provide for unlimited punitive and compensatory damages to a successful plaintiff, even where there was absolutely no showing that any pay disparity were the effect of intentional "discrimination." In doing so, H.R. 1338 would place claims of discrimination in wages on the basis of sex in a more favorable position than similar claims of pay discrimination under Title VII or the Americans with Disabilities Act, which properly provide for limited compensatory and punitive damages. Indeed, taken in concert with the remedies available under Title VII, remedies for

[7] During Committee consideration of the bill, an Amendment in the Nature of a Substitute was offered by Chairman Miller and adopted by voice vote. Except where otherwise noted, the discussion contained in these Views reflects the provisions of H.R. 1388 as amended.

claims of pay discrimination under H.R. 1388 would be greater than those available under any of our Nation's current civil rights law schemes. This radical expansion of remedies, particularly where they may be assessed without showing any discriminatory intent, is reason enough to oppose this legislation.

H.R. 1338 dramatically limits legitimate and lawful employer defenses

At the same time that it exponentially expands available remedies, H.R. 1338 dramatically scales back an employer's ability to defend itself from claims of "pay discrimination" where disparities arise from wholly lawful business decisions. For example, as reported to the House, H.R. 1338 significantly limits the ability of employers to justify differences in pay on the basis of different work locations (as has been the case throughout the 45–year history of the EPA). Rather, under the bill as reported, an employee can compare his or her pay to any other coworker in the same county or political subdivision (or perhaps more broadly, given the bill's provision allowing for the Equal Employment Opportunity Commission to define "work establishment" even more broadly) in an attempt to prove "pay discrimination." The practical elimination of a legitimate defense available to employers under current law simply fails to recognize economic reality and our market-based economy.

Equally pernicious, H.R. 1388 strictly limits an employer's ability to defend pay differentials which are accounted for by reasons wholly unrelated to an employee's sex. Under current law, an employer can defend itself from a claim of pay discrimination by propounding evidence and convincing a trier of fact that the differential is based not on sex, but on another factor. H.R. 1388 would dramatically curtail the scope of that defense, and require that an employer convince a judge or jury that its reasons were "bona fide" and "job related" or required by "business necessity"—essentially, putting courts in charge of determining what is "fair" pay. Even more egregious, even if an employer persuades the factfinder, an employee is still entitled to argue that there are other ways to address this business need. In short, H.R. 1388 would take core management decisions out of the hands of employers, and place them squarely in the realm of judges, juries, and trial lawyers. This brazen attack on market economies must be rejected.

H.R. 1338 eliminates employers' ability to protect the confidentiality of wage and salary data

H.R. 1338 attempts to further undermine the ability of employers to manage their businesses by adopting broad new "anti-retaliation" provisions relating to discussions of pay or compensation, extending protection far beyond the scope of protection already provided to employees under federal law. Indeed, H.R. 1338 would effectively eliminate the ability of an employer to maintain any policy protecting the privacy and confidentiality of its payroll and wage information, even for supervisory and managerial employees, long considered to be part of the legitimate management of a business. These provisions of the bill will only increase the burden on

the ability of businesses—particularly small businesses—to grow and run their companies, and should be defeated.

H.R. 1338 will lead to more frivolous class action lawsuits

Finally, perhaps nowhere is this bill's true intent—to generate more lawsuits and to line the pockets of trial lawyers—made more evident as in its provisions expanding class action lawsuits. Currently, under the Fair Labor Standards Act, plaintiffs may sue on behalf of themselves and those similarly situated, and pursue a collective action. To ensure that these suits are brought on the basis of merit—and by those who wish to pursue them—employees must "opt in" to these collective suits. H.R. 1388 would reverse that presumption and eliminate those safeguards, instead deeming all potential class members to be joined to a suit, and placing the affirmative burden on these plaintiffs—who may not even know of the suit's existence—to opt out of a claim. These provisions are plainly designed to ensure that plaintiffs' lawyers get the "most bang for their buck" in bringing and pursuing class-action lawsuits, far more than protecting the paychecks of American workers, and should be rejected.

The above represent but a few of the most egregious policy flaws in H.R. 1388.[8] There are numerous others, ranging from the ill-conceived resurrection of flawed statistical models (one of which results in a 93 percent false positive) to the creation of new "negotiation skills" training programs for girls and women which, at best, have yet to be shown necessary, and at worst smack of paternalism. Whether singly or taken as a whole, the provisions of H.R. 1388 should be rejected.

REPUBLICAN AMENDMENTS

Recognizing the fundamental failures of policy contained in H.R. 1338, Committee Republicans did offer a number of amendments during markup to highlight Republican priorities and solutions for working women and men.

During Committee markup of H.R. 1388, Representative Cathy McMorris Rodgers offered an amendment truly aimed at improving the lives and working conditions of American workers, especially women. The McMorris Rodgers amendment would have allowed private sector workers to have the same choice as their public sector counterparts—the option of choosing paid time off in lieu of cash overtime wages. The amendment was identical to the text of

[8] Committee Republicans do applaud the removal of one provision from the text of H.R. 1338 as introduced, namely, those provisions within the bill which would have sought to furtively insert the long-discredited theory of "comparable worth" in federal wage law. Section 7 of the introduced bill would have required the Secretary of Labor to establish formal guidelines to enable employers to evaluate jobs using supposedly "objective" criteria such as educational requirements, skill requirements, independence, working conditions, and responsibility, including decision-making responsibility and de facto supervisory responsibility, but irrespective of market factors or prevailing wage rates. Employers would have been encouraged to follow the guidelines in order to eliminate "unfair pay disparities between occupations traditionally dominated by men or women" and "ensure that women are paid fairly in comparison to men." Although nominally "voluntary," these guidelines were plainly the first step down a slippery slope of "comparable worth" theory. It is not difficult to imagine these guidelines used as evidence to foist liability on employers who did not "voluntarily" meet the Department's idea of "worth," or to show favor or disfavor in government grants, contracting, and the like. They were properly removed from H.R. 1338; Committee Republicans urge that these provisions not be raised again during consideration of this bill.

H.R. 6025, the Family-Friendly Workplace Act, introduced earlier this year by Representative McMorris Rodgers.

The McMorris Rodgers Amendment recognized that many working women, particularly those in lower-wage occupations, find it difficult to balance work and family responsibilities, a situation made worse by the fact that employers are often unable to accommodate employee requests for flexible work schedules because of the 1938 Fair Labor Standards Act.

Current law prohibits private sector employers from offering employees the choice of opting for paid time off as compensation for working overtime hours (often called "comp time"). Comp time is not a new idea; public sector employers and employees have long enjoyed this flexibility. The McMorris Rodgers Amendment would have allowed private sector employers the option of offering their employees the choice of paid time off in lieu of cash for overtime, if—and only if—the employee prefers comp time instead of overtime pay (importantly, an employee would always have been entitled to opt for overtime cash wages). Notwithstanding that it would improve the working conditions of millions of Americans, the McMorris Rodgers Amendment was ruled non-germane, and denied a vote.

To demonstrate just how far afield the Majority has gone with this legislation, Representative Tom Price (R–GA) offered two common-sense amendments during the Committee's consideration of H.R. 1388. The first would simply have delayed the implementation of the Equal Pay Act amendments contained in the bill until the Secretary of Labor examined and reported to Congress (within 90 days) on the bill's effect on employers' ability to hire and retain workers, irrespective of gender. Were the Secretary to determine that the expansion of the Equal Pay Act contained in H.R. 1338 significantly hindered recruitment and hiring, those provisions would not have become effective. The Price Amendment would simply have allowed Congress to know the facts before imposing draconian legislative penalties and threatening jobs and economic livelihood; Democrats unanimously rejected this common-sense approach on a party-line vote.

The second amendment offered by Representative Price underscored the true beneficiaries of this bill—the trial lawyers' lobby. Under the Fair Labor Standards Act (and unchanged by H.R. 1338), a successful plaintiff may recover a "reasonable" attorney's fee. Representative Price's amendment would simply have provided that in no instance would an attorney's fee in excess of two thousand dollars per hour be considered "reasonable." Democrats unanimously rejected the simple proposition that no trial lawyer can "reasonably" be paid a fee of more than two thousand dollars per hour.

Republicans offered a final amendment, reflecting their belief that the time and energy of Congress should be devoted to efforts to truly improve the lives of working Americans. Notably absent from H.R. 1338, is a critical element when it comes to wage disparities and the impact of such disparities on working families: the high price of energy. For that reason, Representative Howard P. "Buck" McKeon, the Committee's Senior Republican, offered an amendment that would have acknowledged that rising energy

costs—which have been shown to disproportionately impact lower-income workers—can exacerbate existing wage disparities.

The McKeon Amendment would have required a study by the Bureau of Labor Statistics on the impact of gas prices on wage disparities, to examine how high gas prices might further erode women's earning and purchasing power. Finally, the McKeon Amendment expressed the sense of Congress that our nation should be taking steps to become energy independent, which would be in our best interest for both national and economic security. Committee Republicans firmly believe that comprehensive energy reforms, including the expansion of environmentally-safe energy production at home, will help bring down gas prices and ease the burden on working families.

Although a Sense of Congress is nonbinding, it expresses congressional priorities. At markup, Democrats made clear that their priority is doing everything in their power to avoid providing real energy solutions for American families. In this Congress, the Majority has categorically refused to take up legislation that would allow for increases in the production of American-made energy. That refusal was once more underscored at markup, where a vote on the McKeon Amendment was blocked by parliamentary procedure, and rejected on a party-line vote. Indeed, it appears clear that Congressional Democrats appear unwilling to even admit that high gas prices are a problem for working families.

CONCLUSION

H.R. 1338 represents fundamentally-flawed policy, and at bottom does nothing to ensure "paycheck fairness." Rather, it is one more effort by the Majority to bestow a token on a favored constituency—trial lawyers—without reason, substance, or a demonstrated need. For these reasons, and all of those set forth about, we oppose enactment of H.R. 1338 as reported from the Committee on Education and Labor.

BUCK MCKEON.
PETE HOEKSTRA.
JOE WILSON.
JOHN KLINE.
CATHY MCMORRIS RODGERS.
KENNY MARCHANT.
THOMAS PRICE.
C. W. BOUSTANY, JR.
VIRGINIA FOXX.
DAVID DAVIS.
TIM WALBERG.

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