THE PAYCHECK FAIRNESS ACT RESOLVES THE DEBATE AMONG COURTS OVER THE MEANING OF THE "FACTOR OTHER THAN SEX" DEFENSE

Under the Equal Pay Act (EPA), the law that makes it illegal for employers to pay unequal wages to men and women who perform substantially equal work, an individual subject to wage discrimination must initially establish that "(1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Even if the individual makes each of these showings, the defendant employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses—that is, that it has set the challenged wages pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other ***factor other than sex***." 29 U.S.C. § 206(d)(1) (emphasis added).

Despite its broad language and purpose, courts have narrowed and constrained the last defense—a differential based on the factor other than sex—in ways that undermine the Equal Pay Act's fundamental goals. The divide among courts over the interpretation of this vague defense is stark: in some parts of the country employers may justify pay disparities based on anything other than explicit sex-based criteria, even if the reason is entirely unrelated to the business needs of the employer, while other courts and the Equal Employment Opportunity Commission (EEOC) have taken an approach consistent with the goals of the Equal Pay Act and limited the "factor other than sex" defense to factors based on legitimate business reasons.

Many courts and the EEOC have held that the "factor other than sex" defense requires a legitimate business reason. For example:

- *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992) (reversing a district court's decision to dismiss an employee's EPA claim at summary judgment).
    - Cora Aldrich, a female cleaner at an elementary school in the Randolph Central School District, alleged that she performed the same work as male custodians for less pay, and sued under the EPA. *Id.* at 522-23. The District used a job classification system that distinguished between "cleaners," all of whom were women, and "custodians," all of whom were men. *Id.* at 522. Only individuals who placed in the top three applicants on a civil service exam were eligible for a custodian position, which paid higher wages than a cleaner position. *Id.* Randolph argued that its civil service exam and job classification system constituted a "factor other than sex" defense to Aldrich's claim, even if custodians and cleaners performed the same work. *Id.* at 524. The Second Circuit reversed the district court's grant of summary judgment to the employer, concluding that the employer must show that the "factor other than sex" defense was bona fide and business-related, *id.* at 526-27, and noting that "[w]ithout a job-relatedness requirement,

the factor-other-than-sex defense would provide a gaping loophole in the [EPA] through which many pretexts for discrimination would be sanctioned," *id.* at 525.

- *EEOC v. J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1992) (affirming a district court's dismissal of the EEOC's Title VII complaint).
    - The EEOC brought suit under Title VII, challenging the department store's policy of extending insurance coverage to employees' spouses only if the spouses earned less than the employees. *Id.* at 250. Like under the EPA, Title VII sex-based wage discrimination defendants may cite a "factor other than sex" as a defense. The Sixth Circuit held that the "legitimate business reason standard is the appropriate benchmark against which to measure the 'factor other than sex' defense," and that J.C. Penney's determination that "insurance would be more likely to be valuable to a lower-paid spouse, and thus would engender more satisfaction in the employee," was a legitimate business reason for the disparity in benefits. *Id.* at 253.
- *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (remanding a case to a district court to determine whether the defendant's asserted business reasons explained its use of prior salary in setting wages).
    - A class of women agents sued Allstate Insurance Company, arguing that the company's use of an agent's previous salary to set starting pay constituted sex-based pay discrimination under Title VII. *Id.* at 875. Allstate argued that there were legitimate business reasons for using prior pay to set a minimum salary. It argued first that prior salary, when coupled with the employees' opportunity to earn more from commissions, motivated employees to make more sales. *Id.* at 877-78. It also argued that prior salary predicted a new agent's performance. *Id.* at 878. The Ninth Circuit, recognizing that a "factor other than sex" defense must be based on "an acceptable business reason," *id.* at 876, remanded the case to the district court for further factual development to determine whether Allstate's asserted business reasons explained the use of prior salary in setting wages, *id.* at 878.
- *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995) (affirming a district court's decision to dismiss an employee's EPA claim).
    - Barbara Irby, a female investigator for the Monroe County Sheriff's Department in Georgia, asserted that she was paid less than two male investigators performing the same work in violation of the EPA. *Id.* at 953. The Monroe County Sheriff's Department argued that its male investigators were paid more because of a "factor other than sex": experience with their division. The court, asking whether "business reasons . . . reasonably explain" the "factor other than sex," *id.* at 955, concluded that "[u]nique, long-term experience as an investigator in a single division constitute[d] a justification for pay difference . . . as part of the ' . . . factor other than sex' [exception]," *id.* at 957. It noted that the male investigators had "spent approximately five more years in the investigations division and four more years in the Sheriff's Department than ha[d] [the plaintiff]." *Id.* at 956.
- EEOC Compliance Manual (2000), *available at* http://www.eeoc.gov/policy/docs/compensation.html.
    - The Manual requires an employer to "show that the factor [other than sex] is related to job requirements or otherwise is beneficial to the employer's business" and that it is

"used reasonably in light of the employer's stated business purpose as well as its other practices." *Id.* §10-IV(F)(2).

The Seventh and Eighth Circuits have held that employers may pay unequal wages for equal work for *any* reason, even if it is not based on an employer's business needs and not a "good" reason. For example:

- *Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989) (reversing a district court's decision that the State of Illinois violated the EPA and remanding for further findings).
    - Lynda Fallon was employed as a Veterans Service Officer Associate ("VSOA"), a position held exclusively by women. As a VSOA, Fallon was paid less than Veterans Service Officers ("VSO"), a position held exclusively by men. *Id.* at 1207. The district court had found that both positions involved the same work to process veterans' claims: The employees filled out forms, conducted interviews, and engaged in clerical work. *Id.* at 1208-10. The employer argued that VSO's, unlike VSOA's, were required to have been wartime veterans, a factor other than sex that justified the pay differential. *Id.* at 1212. The Seventh Circuit stated that the "factor other than sex" defense "embraces an almost limitless number of factors" and that it need not "be related to the requirements of the particular position in question," nor "be a business-related reason." *Id.* at 1211 (internal quotation marks omitted). Noting that "[e]mployers may prefer and reward experience, believing it makes a more valuable employee, *for whatever reason*," the Seventh Circuit concluded that wartime status could be a defense under the EPA and remanded the case for further findings by the district court. *Id.* at 1212 (emphasis added).
- *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003) (affirming a district court's grant of summary judgment to an employer).
    - Esther Taylor, a female civilian army employee, challenged a salary retention policy that permitted grade-pay employees to keep their higher salaries while performing the duties of lower-grade positions during slow periods of work. *Id.* at 713-15. All employees benefitted from the salary retention policy while working in a lower-grade position, but male employees' previous grade positions were higher than Taylor's, so they benefitted from the policy to a greater extent than she. *Id.* at 713. The Army argued that its policy was based on a "factor other than sex" as it was "intended to retain skilled workers and protect workers' salaries." *Id.* at 716. The Eighth Circuit held that a "factor other than sex" defense need not be wise or even reasonable; rather, the court looked only "for evidence that contradict[ed] an employer's claims of gender-neutrality." *Id.* at 719. Finding no such evidence in the record, it affirmed the district court's grant of summary judgment to the employer. *Id.* at 723.

The Paycheck Fairness Act will resolve this debate between the circuit courts. The Act, which is pending in the 112th Congress, has twice passed the U.S. House of Representatives and fell just two votes short of a Senate vote on its merits in the last Congress. The Act will allow an employer's pay practices to be scrutinized to determine whether they actually serve a legitimate business purpose and whether there are comparable alternatives, rejected by an employer, that will not result in gender-based pay disparities.