NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Paycheck Fairness: Closing the "Factor other than Sex" Gap in the Equal Pay Act

Under the Equal Pay Act, 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."[i] 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."[ii]

Congress intended the Equal Pay Act to serve sweeping remedial purposes. As the Supreme Court has recognized, the Act was designed:

> to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of "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."[iii]

Despite its broad language and purpose, courts have narrowed and constrained the EPA in ways that undermine its fundamental goals. In particular, some courts have read the "any factor other than sex" defense to permit employers to pay discriminatory wages for a limitless number of reasons. The Paycheck Fairness Act, passed by the House of Representatives on January 9, 2009, and currently pending in the Senate, would close the loophole that courts have opened in the "factor other than sex" defense and ensure that employers may not value the work of men and women differently unless there is a legitimate business reason for doing so.

The "Factor Other Than Sex" Defense: A Judicially Created Loophole

Before an employer need even offer an affirmative defense, a plaintiff must make out a prima facie case. This burden is significant, as a plaintiff must identify a comparable male employee who makes more money for performing equal work, requiring equal skill, effort and responsibility under similar working conditions.[iv] If a plaintiff fails to make this showing, the case ends – the employer need not offer any defense at all.[v]

The Equal Pay Act provides four affirmative defenses through which an employer may justify a wage disparity between substantially equal jobs. As a commentator has noted, the first three of these defenses – that a pay disparity is based on a seniority system, a merit system, or a system that bases wages on the quantity or quality of production – are relatively straightforward

ones applied with reasonable consistency by the courts.[vi] The defenses are unchanged by the Paycheck Fairness Act.

The fourth defense – the "factor other than sex" defense – has been more problematic and courts have, despite Supreme Court interpretations to the contrary, applied it in ways that undermine protections against pay discrimination. It is these misinterpretations that the Paycheck Fairness Act is designed to address.

In *Corning Glass Works v. Brennan*, the Supreme Court rejected the argument that "market forces" – that is, the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded – can constitute a "factor other than sex," since sex is precisely what those forces have been based upon.[vii] Corning Glass Works instituted a night shift inspector position at a time when New York and Pennsylvania prohibited female employees from working at night. To recruit male employees to these inspector positions (many men viewed the inspector position, which had historically been a day position composed of only women, as inferior "women's work"), Corning Glass Works paid male employees more than the dayshift, female employees. Corning Glass Works argued that male employees would not perform inspection work unless they received more money than the daytime female inspectors; in other words that the pay differential was not based on sex, it was based on their need to accommodate the male night shift workers. The Court rejected this reasoning, recognizing that the company's decisions to pay women less for the same work men performed "took advantage" of the market and was illegal under the Equal Pay Act.

Despite this unequivocal holding, however, employers have continued to argue and courts have continued to accept, a "market forces" theory to justify pay differentials.[viii] At the same time, moreover, some courts have accepted as "factors other than sex" arguments that seriously undermine the principles of the Equal Pay Act.

First, some courts have, for example, authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers without any analysis as to whether the prior salary itself was inflated because of sex discrimination. Others have abandoned any effort to determine whether the employer's purported "factor other than sex" is in any way related to the qualifications, skills, or experience needed to perform the job. For example:

- In a 2008 case a New York federal district court dismissed the plaintiff's Equal Pay Act claim, holding that "salary matching is permitted under the Equal Pay Act" because "it allows an employer to reward prior experience and to lure talented people from other settings."[ix] The district court came to this conclusion despite the fact that the male and female employees had similar experience and qualifications for the position.

- Similarly, another district court stated 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.[x] Indeed, that court has also stated that "[i]t 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*" (emphasis added).[xi]

- In a case decided in 2007, a federal district court accepted the argument that higher pay for the male comparator was necessary to "lure him away from his prior employer." The court emphasized that "salary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as 'a factor other than sex.'"[xii]

A more demanding showing is appropriate for the "factor other than sex" defense, since the defense by definition is less defined. Although it does not fall into one of the other enumerated defenses – it is not seniority, merit, or quantity of production – the defense must be interpreted consistent with the Equal Pay Act's goal of rooting out pay discrimination. Yet this is precisely what these cases fail to do. For example, the cases fail to recognize that the prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value attached to work performed by men. This is particularly true, like in the case described above, where the employer matches the salary of highly paid male without regard for whether his experience, skills and talents are any different from the lower paid female employee. And like the prohibited "market forces" justification from *Corning Glass Works*, the court's analysis of the prior salaries fails to evaluate whether an employer assertion of more experience, or better credentials are necessary for the position.

Second, some courts have correctly required an employer to identify a legitimate business reason when asserting the "factor other than sex" defense,[xiii] other courts have applied a blinkered approach to evaluating the legitimacy of an employer's claim that a man's greater experience or education justifies a higher salary. These courts have read the "factor other than sex" defense to literally mean any factor – legitimate or not – other than sex. In fact, the Seventh Circuit has gone a step further to presume that a 'factor other than sex' need not be related to the 'requirements of a particular position in question, nor that it be a 'business-related reason.'"[xiv]

- One court, for example, accepted the male comparators' purportedly superior qualifications as a "factor other than sex" justifying their higher salaries without any examination of whether those qualifications were in fact necessary for the job. [xv]

- In fact, at least two circuits have accepted the argument that *any* "factor other than sex" should be interpreted literally and that employers need not show that those factors are in any way related to a legitimate business purpose.[xvi]

The Paycheck Fairness Act Addresses the Judicially Created Loophole

The Paycheck Fairness Act would address this judicially created loophole in the employer affirmative defense. Like Title VII, this provision will allow seemingly neutral practices to be scrutinized to determine whether they actually serve a legitimate business purpose and whether there are comparable alternatives that will not result in gender-based pay disparities.[xvii]

- First, the Act requires that the "factor other than sex" defense be based on a bona fide factor, such as education, training or experience, that is not based upon or derived from a sex-based differential.

- Second, the "factor other than sex" must be job-related to the position in question.

- Third, the "factor other than sex" must be consistent with business necessity.

- In addition, the defense will not apply if the employee can demonstrate that an alternative employment practice exists that would serve the same business purpose without producing a pay differential and the employer has refused to adopt the alternative.

Requiring employers to justify any decision not to value equal worker equally is reasonable in light of the goal of the Equal Pay Act in uncovering discrimination and the unspecific nature of the "factor other than sex" defense. Moreover, the Paycheck Fairness Act does not alter the safeguards embedded in the Equal Pay Act that ensure that employers have appropriate discretion in setting compensation in nondiscriminatory ways. For example:

- The Paycheck Fairness Act does not alter the Equal Pay Act requirement that employees meet an exceptionally high burden before an employer need even offer an affirmative defense. An Equal Pay Act plaintiff must identify a comparable male employee who makes more money for performing equal work, requiring equal skill, effort and responsibility under similar working conditions.

- The Paycheck Fairness Act does not alter the other affirmative defenses available to employers, thus, employers may still pay different wages to male and female employees performing equal work if the pay decision is based on merit, seniority, or quantity of production.

- The Paycheck Fairness Act allows employers to raise the business necessity defense, which is a concept familiar to employers and courts from Title VII.

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In sum, it is critical that Congress address the "factor other than sex" loophole. What was intended to be an affirmative defense for an employer has instead been converted by these courts into a requirement merely that an employer articulate some ostensibly nondiscriminatory basis for its decision-making, even if that reason is ultimately a proxy for sex-based pay. As one court noted, connecting the "factor other than sex" defense to a legitimate business reason will prevent employers "from relying on a compensation differential that is merely a pretext for sex discrimination- *e.g.*, determining salaries on the basis of an employee's height or weight, when those factors have no relevance to the job at issue."[xviii] And although height or weight restrictions are particularly egregious examples, it is critical that the employer defense be sufficiently scrutinized to prevent unchecked pay discrimination. The Paycheck Fairness Act will provide a means to assess whether employers are, as the Equal Pay Act requires, setting wages based on the value of the work of the employee, rather than the employee's sex.

[i] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).
[ii] 29 U.S.C. § 206(d)(1).
[iii] Corning Glass Works, 417 U.S. at 195.
[iv] 29 U.S.C. § 206(d)(1).
[v] An Equal Pay Act plaintiff "must meet the fairly strict standard of proving that she performed substantially similar work for less pay" before the burden shifts to the employer to establish one of the four available affirmative defenses in the Act. *Miranda v. B. & B. Cash Grocery Store*, 975 F.2d 1518 (11th Cir. 1992).
[vi] Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It be Fixed?*, 56 Rutgers L. Rev. 849, 868 (Spring 2004).
[vii] Corning Glass Works, 417 U.S. at 205. See also Siler-Khodr v. Univ. of Texas Health Science Ctr. San Antonio, 261 F.3d 542, 549 (5th Cir. 2001) (noting that "This court has previously stated that the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA." (citations omitted)).
[viii] Merillat v. Metal Spinners, Inc., 470 F.3d 685, 697, n6 (7th Cir. 2006) (noting that the court has "held that an employer may take into account market forces when determining the salary of an employee," although cautioning in a footnote against employers taking advantage of market forces to justify discrimination).
[ix] Sparrock v. NYP Holdings, Inc, 2008 WL 744733, *16 (S.D.N.Y. Mar. 4, 2008).
[x] Glunt v. GES Exposition Services, Inc., 123 F. Supp. 2d 847, 859 (D. Md. 2000) (citing Mazzella v. RCA Global Comm, Inc., 814 F.2d 653 (2d.Cir.1987); Walter v. KFGO Radio, 518 F.Supp. 1309 (D.N.D.1981)).
[xi] Glunt, 123 F. Supp. 2d at 859. But see Lenihan v. The Boeing Co., 994 F. Supp. 776, 798 (S. D. Tex. 1998) ("prior salary, standing alone, cannot justify a disparity in pay"); Equal Employment Opportunity Commission, Compliance Manual Section 10: Compensation Discrimination, at 10-IV(F)(2)(g) (2000), available at http://www.eeoc.gov/policy/docs/compensation.html#10-IV%20COMPENSATION%20DISCRIMINATION (last visited April 10, 2007).
[xii] Drury v. Waterfront Media, Inc., No. 05 Civ. 10646, 2007 WL 737486, at *9 (S.D.N.Y. Mar. 8, 2007).
[xiii] *E.g.*, Belfi v. Pendergrast, 191 F.3d 1229, 136 (2d Cir. 1999) (An employer seeking to rely on the "factor other than sex defense [ ] ... must ... demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential.").
[xiv] Id. at *9 (quoting Fallon v. State of IL, 882 F.2d 1206, 1211 (7th Cir.1989) (citing Covington v. SIU, 816 F.2D 317, 321-22 (7th Cir.1987)).
[xv] *Boriss v. Addison Farmers Insurance Company*, No. 91 C 3144, 1993 WL 284331 (N.D. Ill. July 26, 1993).
[xvi] *See* Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the eighth) and those that required an 'acceptable business reason' is established, and we are not even slightly tempted to change sides.").
[xvii] Under the comparable Title VII "business necessity" standard, an employer must demonstrate that a practice is job related for the position in question and consistent with business necessity. The final question in the business necessity analysis is whether the employer rejected an alternative employment practice that would both have a less disparate impact and satisfy its legitimate business interest. This standard is familiar to employers and courts as it has been judicially applied since 1971 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and was expressly codified in the Civil Rights Act of 1991.
[xviii] Engelmann v. Nat'l Broadcasting Co., Inc., 1996 WL 76107, at *7 (S.D.N.Y. Feb. 22, 1996).