NATIONAL WOMEN'S LAW CENTER
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EMPLOYMENT

FACT SHEET

The Paycheck Fairness Act: Why Women Need Stronger Protections Against Pay Discrimination

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When the Equal Pay Act (EPA) became law more than fifty years ago, it made it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At the time of the EPA's passage in 1963, women earned a mere 59 cents to every dollar earned by men. Although enforcement of the EPA and other civil rights laws has helped to close that wage gap somewhat, significant disparities remain to be addressed. Today, full-time women workers still only earn on average 77 cents for every dollar earned by full-time male workers – and the situation is even worse for women of color. And study after study shows that those disparities cannot be explained away by legitimate factors, such as differences in education or experience.[1]

Women all across the country and in every corner of our economy continue to experience unequal pay for performing the same work as their male colleagues. But the current federal laws that protect against sex-based pay discrimination – the EPA and Title VII of the Civil Rights Act – have been interpreted in ways that undermine their basic goal. In fact, employers have argued that unequal pay is justified for a limitless number of reasons, including reasons that are not related to any legitimate economic interests of the employer and may actually perpetuate sex stereotyping and other discrimination.[2]

Unfortunately some courts have bought into these arguments, and have abandoned any effort to determine whether an employer's "factor other than sex" that purportedly justifies a pay disparity is actually related to the skills or experience needed to perform the job or to the business needs of the employer. They have not considered whether the employer's ostensibly gender-neutral pay practices – like rote salary matching, negotiating starting salaries without assessing relevant experience, and vague recruiting policies – may in fact be the product of underlying sex discrimination.

In other cases, courts have ultimately rejected the efforts of employers to turn the "factor other than sex" defense into a giant loophole in the guarantee of equal pay between the sexes. These courts have recognized the need to tie pay policies to an employer's legitimate business needs – otherwise employers end up replicating outdated notions about what it takes to hire male and female employees. But the uncertainty in the law encourages employers to take the risk of paying women less for performing the same work as men, often for years at a time, based on faulty and invalid justifications.

Matching Prior Salaries Without Any Business Justification – Often employers will base an employee's starting salary on what he or she made at a prior job, without giving consideration to that employee's relative training or experience. This can lead to an employee with equal or superior qualifications making less than a coworker doing the same job simply because she happened to make less in her prior position. And it can mean that the discrimination that a woman faces at one job can follow her and result in lower pay throughout the rest of her career.

- Jenny Wernsing started as an investigator at the Illinois Department of Human Services in 1998. The Department had a policy of matching the prior salary of each new hire and then giving them some amount of a raise – which meant that new employees who came to the Department from positions that paid more landed higher salaries. Based on this policy, Wernsing started at the Department with a monthly salary at the very bottom of the permissible range for

her position. A male colleague hired at the same time to do the same work was paid over $1,000 more per month. The Seventh Circuit Court of Appeals ultimately determined that the Department's policy was a valid factor other than sex that explained the pay disparity, and that the Department did not even need to show that it had any good business reason for this policy. The Court also did not require the Department to demonstrate that its policy of matching prior salaries did not result in sex-based pay disparities present in the broader market being carried over into its workforce. As a result, Wernsing lost her case.[3]

- Christina Sparrock started working at the New York Post as a senior financial analyst in 2002. Her starting salary was $59,000, and by 2004 she was earning a salary of $77,250. However, that year the Post hired another senior financial analyst at a starting salary of $80,000. The court dismissed her Equal Pay Act claim, finding that the employer permissibly paid her less as a result of its decision to match her male coworker's prior salary. The court did not require the Post to show that the male colleague's prior experience prepared him for the senior financial analyst position in a way that warranted his higher pay as compared to Sparrock, or that the higher pay was actually necessary to lure him to the Post. Sparrock's claim was discarded before she even had a chance to present her case to a jury.[4]

Relying on Employee Salary Negotiation Without Any Business Justification – Sometimes employers will try to justify pay disparities between two equally-qualified employees doing the same job by arguing that one employee was simply a more effective negotiator. This tends to work to the disadvantage of female employees, because studies have shown that employers react more favorably to men who negotiate salaries, while women who ask for higher pay (using the same negotiation strategies as men) may be penalized for violating gender stereotypes.[5]

- Janet Day and Paula Lancas were public school teachers who started working for the Bethlehem Center School District in Fredericktown, Pennsylvania in 1999 and 2001, respectively. They were each paid less than a male teacher who started working for the school district at the same time and had significantly less prior teaching experience. The two women filed an Equal Pay Act lawsuit against the school district. The district tried to argue that the male teachers' higher pay was just based on the fact that they had persistently negotiated for higher starting salaries while the women had not. The court accepted that negotiation could be a factor other than sex justifying a pay disparity, but expressed doubt that the alleged negotiation by the two male teachers was actually the real reason for the pay disparity in this case. The women had also tried to negotiate with the school district and had been shot down, the women's education and experience was superior to that of their male comparators, and the school district was very inconsistent in how it tried to explain what led to the pay disparity. The court therefore allowed the claims of Day and Lancas to go forward.[6]

- Wendy Dreves worked as the general manager of the Hudson News retail shop at the Burlington International Airport from 2003 to 2010. Dreves came to the job with 16 years of retail management experience. Her initial salary was $34,465, and increased to $45,505 when her responsibilities expanded in 2007. At the time that she left the position she was making $48,230. The male employee who replaced her in the expanded position, who had many fewer years of retail management experience, was given a starting salary of $52,500. Dreves brought an Equal Pay Act lawsuit, and her employer tried to get this claim thrown out by arguing that factors other than sex explained the pay disparity between Dreves and her successor. The employer argued that it had to pay the male successor more to induce him to take the job and to relocate his family to a new city, and to satisfy his demands when he negotiated for even more money than initially offered. However, the court determined that the pay disparity could not be explained away by the employer's argument that it had to pay more to obtain a candidate with the necessary experience and qualifications given that Dreves had significantly greater retail management experience. The court also stated that Dreve's successor's need to move his family to take the new job was not related to the job itself or the general business of the company, and so was not a valid justification of the pay disparity. Finally, the court recognized that the successor's ability to negotiate a higher salary was not a business-related justification for paying him more than Dreves for doing the same job. The court therefore permitted Dreves to go forward with her case.[7]

- In 2002 Krishna McCollins was promoted to be the Director of Franchise Development for Physicians Weight Loss Centers of America. For at least a year both her base salary and her commission rate was less than that of a male colleague who also sold franchises. McCollins brought an Equal Pay Act

lawsuit. The employer argued the pay disparity was justified because her male comparator was able to negotiate a higher salary, based on his prior relevant experience making sales to physicians. However, the court determined that there was a critical factual dispute as to whether employer was even aware of the male colleague's prior experience during the salary negotiation. McCollins was given the opportunity to present her case to a jury.[8]

Deferring to Vague Market Forces in Setting Pay – Employers often try to argue that they are simply acting consistently with the "market" when they pay two employees differently for doing substantially the same work. However, the compensation market has been influenced in numerous ways by sex stereotyping and other discrimination over time.[9] Relying on vague and ill-defined assertions of "market forces" to pay a man more can just perpetuate this discrimination.

- Mary Jane Sauceda became an associate professor teaching accounting at the University of Texas at Brownsville's School of Business in 1994. Sauceda was paid $10,000 to $20,000 less annually than two other male School of Business faculty members who performed substantially similar work for a period of at least three years. She brought an Equal Pay Act lawsuit. The University tried to get Sauceda's suit dismissed with the argument that it had paid these male faculty members more in order to attract them to the school as part of a strategy to increase faculty with specific characteristics that would help the school qualify for accreditation. However, the court found that evidence regarding faculty salary levels – such as the school's practice of paying less to non-tenure track professors – could actually be inconsistent with the school's assertion that it paid more purely to attract professors with the necessary qualifications for accreditation. The court also stated that the employer would have to show that the market for new faculty with the qualifications of Sauceda's male colleagues was not shaped by sex discrimination and stereotyping, and it had not. Sauceda was allowed to proceed to a trial on her claims of unequal pay.[10]

The Paycheck Fairness Act (PFA), H.R. 377 and S. 84, would close the loophole created by many courts in the EPA's "factor other than sex" defense, and would ensure that employers stop to confirm that they have a valid business reason whenever they pay a female worker less than a male counterpart who is doing substantially the same work. The PFA will require that an employer's purported factor other than sex must be bona fide, not based upon or derived from a sex-based differential in compensation, job-related to the position in question, and consistent with business necessity before it can be used to justify any pay disparity between women and men. In addition, the PFA will allow an employee to demonstrate that there is an alternative practice that would serve the employer's same business purposes without producing the same pay disparity which the employer has refused to adopt, before the employer can escape accountability for unequal pay.

The Paycheck Fairness Act provides a means to ensure that employers are finally – as the Equal Pay Act and Title VII have long required – setting pay based on the value of the work of the employee, rather than the employee's sex.

1 *See, e.g.,* Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7 (2007); CHRISTIANNE CORBETT & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION (2012).

2 In cases that are brought under the Equal Pay Act, a plaintiff has the high initial burden of establishing that she is being paid less than a male employee for equal work. However, once she meets this burden, the employer must establish one of several affirmative defenses in the law or it will be liable. One of these affirmative defenses is that the pay disparity is based on a "factor other than sex."

3 *Wernsing v. Dep't of Human Servs., State of Ill.*, 427 F.3d 466 (7th Cir. 2005).

4 *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776(SHS), 2008 WL 744733 (S.D.N.Y. Mar. 4, 2008).

5 *See, e.g.*, LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK (2003); Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 395 (2008); Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007); Lisa Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. RELATIONS 635 (2003).

6 *Day v. Bethlehem Ctr. Sch. Dist.*, No. 07-159, 2008 WL 2036903 (W.D. Pa. May 9, 2008). Ultimately the parties in this case agreed to a settlement shortly before a scheduled trial.

7 *Dreves v. Hudson Group (HG) Retail, LLC*, No. 2:11-cv-4, 2013 WL 2634429 (D. Vt. June 12, 2013). Dreves and her employer ultimately reached a settlement in this case.

8 *E.E.O.C. v. Health Mgmt. Group*, No. 5:09-CV-1762, 2011 WL 4376155 (N.D. Ohio Sept. 20, 2011). Eventually the parties agreed to a settlement of this case.

9 *See, e.g.*, Philip N. Cohen, *Devaluing and Revaluing Women's Work*, Huffington Post: The Blog (Feb. 2010), *available at* http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.

10 *Sauceda v. Univ. of Texas at Brownsville*, No. B-11-259, 2013 WL 3899237 (S.D. Tex. July 26, 2013). A jury trial in this case started in January 2014, but the parties ended up reaching to a settlement in the middle of the trial.