WORKPLACE JUSTICE

THE PAYCHECK FAIRNESS ACT: CLOSING THE "FACTOR OTHER THAN SEX" LOOPHOLE TO STRENGTHEN PROTECTIONS AGAINST PAY DISCRIMINATION

When the Equal Pay Act 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 Equal Pay Act's passage in 1963, women were paid a mere 59 cents to every dollar paid to men. Although the Equal Pay Act and other civil rights laws have helped to narrow the gender wage gap, stronger legal protections are necessary to help to close the significant disparities that remain.

Today, women working full time, year-round typically are paid only 80 cents for every dollar paid to their male counterparts – and compared to white, non-Hispanic men, women of color face even larger wage gaps.[1] Study after study shows that those disparities cannot be fully accounted for by factors such as differences in education, work experience, industry or occupation.[2] And unfortunately, some courts have opened loopholes in the Equal Pay Act, interpreting it in ways that undermine its basic goal. The Paycheck Fairness Act (H.R.7, S. 270) would update and strengthen the Equal Pay Act in several critical ways, including by closing the "factor other than sex" loophole.[3]

A "Factor Other Than Sex"

In cases brought under the Equal Pay Act, a plaintiff has the substantial initial burden of establishing that she is being paid less than a male employee for performing substantially equal work, requiring equal skill, effort and responsibility under similar working conditions. If she makes this showing, an employer still may avoid liability for pay discrimination by proving that a wage disparity is justified by one of four affirmative defenses.[4] One of the affirmative defenses is that the difference in wages is based on a "factor other than sex."

Some courts have interpreted the "factor other than sex" defense in ways that create a large loophole in the guarantee of equal pay for women. In contrast, other courts have recognized that the Equal Pay Act requires that any "factor other than sex" that justifies paying a woman less than a man for the same work must be closely tied to an employer's business needs. The Paycheck Fairness Act would resolve this uncertainty in the law and ensure that employers would no longer be able to justify paying women less for the same work as men based on faulty and invalid justifications that are not related to the job or any business necessity.

Relying on Prior Salaries

Often employers will base a job applicant's starting salary on what he or she made at a prior job, rather than the applicant's relevant skills, training, or experience.[5] This can lead to an employee with equal or superior qualifications making less than another employee in the same position, simply because she happened to make less in her prior job. And it can mean that the pay discrimination and disparities that a woman, and particularly a woman of color, faces at one job can follow her to the next and result in lower pay throughout her career.[6]

Expanding the Loophole

When Marybeth Lauderdale began serving as the Superintendent of the Illinois School for the Deaf (ISD) in 2006, her starting salary was $77,388. Her male counterpart at the Illinois School for the Visually Impaired (ISVI) earned a starting salary of $93,336. He left his position to become the Superintendent of a local school district, where he received a higher salary. When he returned to the ISVI in 2008 as Superintendent, the State relied on his current salary from the school district to set his new salary at $121,116. In 2010, the Superintendent positions were merged and Lauderdale

was selected to serve as the Dual Superintendent for the ISVI and the ISD. Despite her expanded responsibilities and attempts to negotiate a higher salary, she still was paid $15,000 less than her male colleague. When Lauderdale filed an Equal Pay Act claim, the state argued that that the pay disparity was the result of the state's compensation system, which automatically relied on an individual's prior salary when determining pay, even when an employee received a new title or took on more responsibilities. The district court judge agreed and dismissed Lauderdale's suit, concluding that relying on prior salary in setting pay is a permissible "factor other than sex."[7]

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 Sparrock's 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.[8]

Applying Scrutiny to Employer Justifications[9]

Kathy Riser sued her employer, QEP Energy, for violating the Equal Pay Act after it created two new positions based on her duties, hired two men for the positions, and paid them each a higher salary. After Riser trained one of the new hires, she was fired. QEP Energy argued that the pay disparity between Riser and the two new male hires was justified by factors other than sex: its gender-neutral pay classification system and the prior salaries of the male comparators. The Tenth Circuit rejected these arguments, holding that while a gender-neutral pay classification system can constitute a "factor other than sex," such a system serves as a defense only where any resulting difference in pay is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular position at issue."[10] In this case, Riser's pay grade in the system was not based on the duties she was actually performing. Similarly, the Court rejected QEP Energy's claim that the male comparators' prior salary provided a legitimate explanation for the pay disparity. The Tenth Circuit held that employers cannot rely solely upon prior salary to justify a pay disparity, and reversed the lower court's grant of summary judgment on Riser's Equal Pay Act claim.

Three female employees of General Motors -- Sheila Ann Glenn, Patricia Johns, and Robbie Nugent -- worked as "follow ups," ensuring that adequate supplies of tools and operating materials were on hand in the company's plants. They claimed General Motors violated the Equal Pay Act, alleging that they earned less than their male counterparts, and that they received lower starting salaries than men hired around the same time for the position. The district court found that the women established a prima facie case, and rejected General Motors' argument that the pay disparity was justified by a "factor other than sex." General Motors claimed that since the men, unlike the women, had transferred from hourly jobs to salaried positions, its "longstanding, unwritten, corporate-wide policy against requiring an employee to take a cut in pay when transferring to salaried positions" resulted in the pay disparity. The district court rejected this argument, as did the Eleventh Circuit Court of Appeals, observing that the women had been hired at lower starting salaries and continued to be paid less than their male counterparts. On appeal, General Motors also argued that the legislative history of the Equal Pay Act supported its contention that prior salary can be a "factor other than sex." The Eleventh Circuit rejected this argument, noting that the disparity did not result from unique characteristics of the same job; from the men's experience, training, or ability; or from special exigent circumstances connected with the business. The court held that prior salary alone cannot justify a pay disparity.[11]

Relying on Employee Salary Negotiation

Some employers attempt to justify pay disparities between equally-qualified male and female employees doing the same job by arguing that the male employee was simply a more effective negotiator. Relying on negotiation to set salaries tends to work to the disadvantage of female employees; research has documented that employers react more favorably to men who negotiate salaries, while women who ask for higher pay (using the same negotiation strategies as men) are often penalized for violating gender stereotypes.[12]

Expanding the Loophole

Over two years, Lorrie Muriel, a Location Manager for SCI Arizona Funeral Services, received raises increasing her starting salary to $54,363. She then requested and received a transfer to a Funeral Director position, for which she was paid $21 per hour. Daniel Beaver, Muriel's male successor for the Location Manager position, rejected SCI's initial salary offer of $53,000,

and negotiated a starting salary of $58,000. Muriel's male successor to the Funeral Director position, Terry McCormack, was paid $22 per hour. When Muriel filed an Equal Pay Act lawsuit challenging the wage disparity in both positions, SCI argued that in both cases, the disparity was justified by a "factor other than sex," and the court agreed. SCI argued that Beaver, the male successor to the Location Manager position, was paid a higher salary because of his prior salary and because he negotiated. The court did not analyze the requirements of the position or compare Muriel and Beaver's qualifications. With regard to the Funeral Director position, the court accepted without scrutiny SCI's argument that McCormack's higher hourly wage was justified because of his prior earnings, and the urgency of finding a replacement for Muriel. The court dismissed Muriel's case.[13]

Applying Scrutiny to Employer Justifications

Margaret Thibodeaux-Woody was hired for one of two open program manager positions at Houston Community College (HCC) in 2008. During her interview, she was informed of the annual salary for the position and attempted to negotiate for a higher salary. The interviewer told her the salary was non-negotiable, although that was not the case. A male applicant for the same position successfully negotiated a higher salary after his interviewer sent his salary request to Human Resources. When Thibodeaux-Woody filed an Equal Pay Act claim, HCC argued that the salary difference between Thibodeaux-Woody and the male applicant was due to their "approaches" to salary negotiation, which it contended was a "factor other than sex." Although the court declined to decide whether negotiation qualified as a "factor other than sex," it reasoned that such a practice could not be a bona fide "factor other than sex" if it was discriminatorily applied. Because Thibodeaux-Woody was denied the same opportunity to negotiate as her male counterpart, the court allowed her claim to proceed.[14]

Wendy Dreves worked as the general manager of the Hudson News retail shop at the Burlington International Airport. When she left the general manager position she was earning $48,230. The male employee who replaced her had fewer years of retail management experience and was given a starting salary of $52,500. Dreves brought an Equal Pay Act lawsuit. The employer argued that factors other than sex explained the pay disparity between Dreves and her male successor; specifically, 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. The court also stated that the 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's case to go forward.[15]

Deferring to "Market Forces" in Setting Pay

Employers often argue that they are simply acting consistently with "market forces" when they pay two employees differently for doing the same work. However, the compensation market has been influenced in numerous ways by sex stereotyping and other discrimination over time.[16] Relying on vague or ill-defined assertions of "market forces" to recruit or pay a man more can perpetuate this discrimination when an employer does not adjust the pay of other employees doing substantially equal work to meet the market.

Expanding the Loophole

Patrice Tavernier was one of 47 CEOs heading regional hospitals for Health Management Associates (HMA). In 2007, she earned $157,000 leading a regional hospital, while Gary Lang, CEO of a smaller hospital, earned $200,000. The gender pay disparity was part of a larger trend in the organization: males CEOs were paid a higher median salary than females CEOs, even though the hospitals headed by females were slightly larger in terms of number of beds. Tavernier brought a lawsuit against HMA which included an Equal Pay Act Claim. The employer argued that it offered Lang a higher salary in part to recruit him to the position. The employer did not adjust Tavernier's salary to match Lang's higher salary. In rejecting Tavernier's Equal Pay Act claim, the court characterized the employer's offer of a higher salary to attract Lang to the position as "market forces," and accepted it as "a factor other than sex" justifying the pay disparity.[17]

Christine Drury was promoted to become one of four vice presidents at Waterfront Media. At the time of her promotion, Drury was the only female vice president, and her salary and bonus were lower than those of the male vice presidents. Drury brought a lawsuit alleging a violation of the Equal Pay Act, among other claims. The district court accepted the employer's argument that

higher pay for the male comparator was necessary to "lure him away from his prior employer.'"[18] The district court dismissed all of her claims.

Applying Scrutiny to Employer Justifications

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 for a period of at least three years than two other male School of Business faculty members who performed substantially equal work. When Sauceda brought an Equal Pay Act lawsuit, the University argued that it had paid these male faculty members more in order to attract them to the school away from other institutions as part of a strategy to 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 University failed to show that the market for new faculty with the qualifications of Sauceda's male colleagues was not shaped by sex discrimination and stereotyping. Sauceda was allowed to proceed to a trial on her claims of unequal pay.[19]

The Paycheck Fairness Act Closes the Loophole

The Paycheck Fairness Act closes the "factor other than sex" loophole by adding a requirement that the factor proffered by the employer be "bona fide," ensuring that the factor actually is neutral and unrelated to sex. The Paycheck Fairness Act makes clear that the "factor other than sex" affirmative defense only excuses a pay differential when that factor is related to the position in question, forwards a business necessity, and accounts for the entire pay differential. In addition, the Paycheck Fairness Act would ensure that if an employee demonstrates that there is an alternative practice that would serve the employer's same business purpose without producing the pay disparity, which the employer has refused to adopt, the employee can succeed in her Equal Pay Act claim. Finally, the Paycheck Fairness Act explicitly prohibits employers from relying on a job applicant's prior salary during the hiring process, so that pay discrimination and disparities do not follow women and people of color from job to job.

Through these robust protections, the Paycheck Fairness Act would help ensure that the Equal Pay Act's promise of equal pay for equal work is not swallowed by a loophole that allows the wage gap to persist.

1 NAT'L WOMEN'S LAW CTR., THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Oct. 2018), http://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/.

2 AMERICAN ASSOCIATION OF UNIV. WOMEN (AAUW), GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE (2012), www.aauw.org/research/graduating-to-a-pay-gap/ (concluding that just one year after graduation, women were paid 82 percent of what their similarly educated and experienced male peers were paid). *See also* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Tends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), http://www.nber.org/papers/w21913.pdf.

3 NAT'L WOMEN'S LAW CTR., HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT (Jan. 2019), https://nwlc.org/resources/how-the-paycheck-fairness-act-will-strengthen-the-equal-pay-act/.

4 29 U.S.C. § 206 (2012). The employer may avoid liability by proving that the pay differential is the product of: 1) a seniority system, 2) a merit system, or 3) a system which measures earnings by quantity or quality of production.

5 The Equal Employment Opportunity Commission (EEOC) Compliance Manual on compensation discrimination has instructed since 2000 that reliance on prior salary alone cannot justify a compensation disparity. The EEOC explains that "permitting prior salary alone as a justification for a compensation disparity 'would swallow up therule and inequality in compensation among genders would be perpetuated.'" U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL, NO. 915.003 § 10-IV.F.2.g (Dec. 2000), https://www.eeoc.gov/policy/docs/compensation.html. *See also* NAT'L WOMEN'S LAW CTR., ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB (Dec. 2018), https://nwlc.org/resources/asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/.

6 *See, e.g., Beck v. The Boeing Co.*, No. C00-0301P (W.D. Wash., consent decree entered 2004), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1072&context=condec. Boeing set the salaries of newly hired employees as their immediate past pay plus a hiring bonus which was set as a percent of their past salary. Raises were also set as a percentage of an employee's salary. Boeing claimed it set pay based on a neutral policy, but since women had lower average prior salaries than men, a class of female employees alleged these pay practices led to significant gender disparities in earnings that compounded over time and could not be justified by performance differences or other objective criteria. *See* Josh Goodman, *Boeing Settles for $72 million*, SEATTLE TIMES, Nov. 12, 2005, http://old.seattletimes.com/html/boeingaerospace/2002619603_boeing12.html.

7 When Lauderdale appealed her case, the Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment for the employer, relying on its prior decision in *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466 (7th Cir. 2005), where the court upheld the State of Illinois's practice of using prior salary to set pay. *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017).

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

9 In 2018, the Ninth Circuit Court of Appeals held that prior salary history is not "a factor other than sex" because "it is not a legitimate measure of work experience, ability, performance, or any other job related quality." *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for a writ of certiorari granted, vacated and remanded on other grounds* (S. Ct. Feb. 25, 2019 (*per curiam*). The Supreme Court later vacated the Ninth Circuit's decision for a procedural reason and did not address the merits of the case.

10 *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015).

11 *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 2018).

12 *See, e.g.*, LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (Princeton Univ. Press, 2003). *See also* 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. PYSCHOL. 600 (2007); Hannah Riley Bowles, Linda Babcock, and Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Dos Hurt to Ask,* 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007); Lisa Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. RELATIONS 635 (2003).

13 *Muriel v. SCI Ariz. Funeral Servs., Inc.*, No. CV-14-0816, 2015 WL 6591778 (D. Ariz. Oct. 30, 2015).

14 *Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App'x 280, 283 (5th Cir. 2014).

15 *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.

16 *See, e.g.*, Philip N. Cohen, *Devaluing and Revaluing Women's Work*, HUFFINGTON POST (May 25, 2011, 3:20 PM), http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.

17 *Tavernier v. Health Mgmt. Assocs., Inc.,* No. CIV.A. 0:10-1753-MBS, 2012 WL 1106755, at *10 (D.S.C. Mar. 1, 2012), *report and recommendation adopted sub nom. Tavernier v. Healthcare Mgmt. Assocs., Inc.*, No. CIV.A. 0:10-01753, 2012 WL 1106751 (D.S.C. Mar. 30, 2012), *aff'd sub nom. Tavernier v. Health Mgmt. Assocs., Inc.*, 498 F. App'x 349 (4th Cir. 2012) (considering only an age discrimination claim). *See also Glunt v. GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847 (D. Md. 2000) (denying summary judgment on Equal Pay Act claim where employer paid female employee less than a male Account Executive subordinate to her, but also accepting employer's argument that paying another male employee a higher salary than plaintiff to defeat a competitor's offer was a factor other than sex).

18 *Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 WL 737486, at *4 (S.D.N.Y. Mar. 8, 2007).

19 *Sauceda v. Univ. of Texas at Brownsville*, 958 F.Supp.2d 761 (S.D. Tex. 2013). The parties settled the case during a jury trial.