

**STATEMENT OF
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BEFORE THE
COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
UNITED STATES SENATE
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Mr. Chairman, and distinguished members of the Committee on Health, Education, Labor and Pensions, thank you for the opportunity to appear before you at this important hearing, "A Fair Share for All: Pay Equity in the New American Workplace."

The Problem of Gender Inequality in Employment Compensation

In 1963, Congress passed the Equal Pay Act, amending the Fair Labor Standards Act to address pay inequities based on sex. At that time, Congress denounced sex-based wage discrimination as contributing to depressed wages, underutilization of the labor force, obstruction of commerce, and unfair competition. While the passage of the Equal Pay Act and subsequent year's passage of the Civil Rights Act of 1964 have done much to equalize pay for men and women in this country, in 2010 the pay gap continues to perpetuate the very same problems the Equal Pay Act and Title VII were intended to combat. Much work remains to close the gap, to end gender pay inequity, and to deliver on the promise of equal pay for equal work.

In 2009, Maria Shriver, working with the Center for American Progress, released a groundbreaking report entitled, "A Woman's Nation Changes Everything." This sweeping study of the role of women in our nation's economies and the economies of our families today provided a wealth of insights into the challenges women still face when it comes to earning equal pay for equal work. This report and other recent studies confirm what we at the EEOC have recognized for some time:

The gender wage gap persists. The wage gap is alive and well in America, with the typical full-time, year round female worker making \$.77 for every dollar earned by her male counterpart.¹ The gap is even wider for women of color and people with disabilities, and undocumented immigrant workers often don't even manage to earn minimum wage. Although some of the pay gap can be explained by differentials in experience or as a result of the differences in the occupations men and women typically do, the Shriver Report estimates that about 41% of the pay gap cannot be explained by these factors.²

Caregiver discrimination results in gender pay discrepancies. Women continue to be more likely to bear significant responsibility for providing care to children, elderly family

¹ THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 57-58 (Heathery Boushey and Ann O'Leary, eds., 2009).

² *Id.* at 58.

members, and family members with illnesses or disabilities.³ Discrimination against caregivers in the workplace based on gender stereotypes and presumptions about the competence and commitment of working mothers and others with significant caregiving responsibilities continues to drag down wages for women.⁴ This is an issue I have taken a particular interest in at the EEOC, and I am proud to have been a part of the bipartisan effort to address this kind of discrimination through the Caregiver Guidance⁵ the Commission issued in 2007, and the Best Practices Guide⁶ we issued in 2009.

Part time work leads to lower benefits and pay over both the short term and long term. Women are more than twice as likely as men to work part-time, and they often make the choice to work part time in order to provide care for their children or other family members. According to the Department of Labor Women’s Bureau, 24.6% of employed women worked part time in 2008, the most recent year for which data is available, as compared to only 11.1% of men.⁷ Part time work is less likely to come with benefits such as health insurance or paid time off, and by its very nature, tends to pay less than full time work. Because so much of the way our earnings increase over time is based on raises calculated as a percentage of current salary, the fact that women are more likely to work part time causes the pay gap to accumulate and widen over time.

Gender-based wage discrimination is especially untenable now, as more families come to rely on the income brought in by women workers to make ends meet. Recent studies show that the current economic downturn is resulting in more women serving as the primary breadwinners for their families.⁸ This is because men are losing jobs at a much higher rate than women.⁹ You don’t have to be a mathematician to figure out that where women make 77 cents on the dollar versus their male counterparts, where a father’s wages are lost, an average family can lose over 50% of its income. If there ever was a time to act to remedy the gender pay gap, it is now.

³ See generally Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (discussing women’s continued role as primary caregivers in our society and citing studies).

⁴ See generally Shelley J. Correll, Stephen Benard and In Paik, *Getting a Job: Is There a Motherhood Penalty?*, *AJS* Volume 112 Number 5 (March 2007): 1297–338.

⁵ Equal Employment Opportunity Commission Enforcement Guidance, *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007).

⁶ Equal Employment Opportunity Commission, *Employer Best Practices for Workers with Caregiving Responsibilities* (2009).

⁷ DOL Women’s Bureau, *Employment Status for Women and Men in 2008*, available at <http://www.dol.gov/wb/factsheets/Qf-ESWM08.htm> .

⁸ Heather Boushey and Ann O’Leary, *OUR WORKING NATION: HOW WORKING WOMEN ARE RESHAPING AMERICA’S FAMILIES AND WHAT IT MEANS FOR POLICYMAKERS* (2010).

⁹ Heather Boushey, *Women Breadwinners, Men Unemployed*, available at http://www.americanprogress.org/issues/2009/07/breadwin_women.html (July 20, 2009).

EEOC's Role in Enforcing Equal Pay Laws

The EEOC's role in enforcing the nation's equal pay laws is a central one. EEOC is the primary enforcement agency for both the Equal Pay Act and Title VII's prohibitions on compensation discrimination. We have further jurisdiction to address pay discrimination under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act. The EEOC has issued a Compliance Manual Chapter of Compensation Discrimination which provides detailed guidance and instructions for investigating and analyzing claims of compensation discrimination under each of the statutes enforced by the EEOC.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 which supersedes the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* *Ledbetter* had required a compensation discrimination charge to be filed within 180 days of a discriminatory pay-setting decision (or 300 days in jurisdictions that have a local or state law prohibiting the same form of compensation discrimination), an unrealistic expectation given the secrecy that usually surrounds pay decisions.

The Ledbetter Act restores the pre-*Ledbetter* position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began. As noted in the Act, it recognizes the "reality of wage discrimination" and restores "bedrock principles of American law."

Recent Private Sector Charge Receipt Trends and Litigation

Over the past thirteen years (from FY 1997 through FY 2009), the EEOC has received a total of 30,312 charges alleging sex-based pay discrimination in violation of the EPA and/or Title VII. This is an average of 2,332 charges per fiscal year (out of an average of 82,022 total charges per fiscal year over the same period).

Over the last three fiscal years, the EEOC has experienced a 30% increase in gender-based wage discrimination charges. Most recently, in FY 2009, the EEOC received 2,252 sex-based pay discrimination charges out of a total of 93,277 total charges. Of those, 944 charges alleged violations of the EPA, specifically (roughly one percent of total receipts). Through our administrative enforcement process alone in 2009, the EEOC obtained almost \$19 million in monetary benefits for victims of wage discrimination. Settlements and judgments obtained in litigation make this figure even greater. A number of reasons may account for the relatively small number of wage claims the EEOC receives, but the single biggest challenge the EEOC faces in identifying wage discrimination is the secrecy that surrounds pay information in the workplace.

Many workers operate under strict instructions not to discuss their pay with their co-workers, and fear retaliation if they go against those instructions. For this reason, many people earn less for potentially discriminatory reasons for many years without knowing it, just as Lilly Ledbetter did until an anonymous co-worker left her a note telling her the salaries of some of her male peers.

These policies that prevent workers from discussing pay create a serious barrier to charge filing under our equal pay laws.

We also face broader systemic barriers in the private sector due to inadequate data on wages. While some data is available in the aggregate, federal agencies have very little in the way of company specific wage data in the private sector, and this hinders systemic enforcement efforts by the Commission in the realm of wage discrimination.

Notwithstanding these challenges the EEOC has litigated and resolved a number of important wage discrimination cases in recent years. These include:

- *EEOC v. Woodward Governor Company* (filed 10/4/06) – A Title VII/EPA lawsuit filed by the EEOC’s Chicago District Office alleging, among other claims, that defendant discriminated against females, blacks, Hispanics and Asians with respect to compensation. This was resolved 2/16/07 for \$9,674,489.
- *EEOC v. Morgan Stanley* (filed 9/10/2001) – A Title VII lawsuit filed by the EEOC’s New York office alleging discrimination against women in compensation, promotions, and terms and conditions of employment. The case was resolved on 7/12/2004 for \$54 million.
- *EEOC v. Tavern on the Green* (filed 9/24/07) – A Title VII lawsuit filed by the EEOC’s New York District Office alleging, among other claims, that defendant discriminated against females, Blacks, and Hispanics with respect to wages when they complained of harassment. This was resolved on 6/3/08 for \$2,200,000.
- *EEOC v. New York State Department of Corrections* (filed 3/29/07) – An EPA lawsuit filed by the EEOC’s New York District Office alleging that defendant discriminatorily transferred at least 13 female employees from workers’ compensation leave to less lucrative maternity leave on or before the birth of their children without determining whether the underlying work-related injuries were ongoing. This was resolved on 5/20/08 for \$971,961.

The EEOC is currently actively engaged in 14 cases in which wage discrimination is alleged. Five of those cases involve EPA claims. These include:

- *EEOC v. Southeastern Telecom Inc.* (filed 9/22/09) – A Title VII/EPA case filed by the EEOC’s Memphis District Office alleging that Charging Party, an account executive, was discharged after complaining of sex discrimination in commissions in violation of Title VII and the EPA.
- *EEOC v. The Health Management Group* (filed 7/29/09) – A Title VII/EPA case filed by the EEOC’s Philadelphia District Office alleging that defendant, a weight loss enterprise, failed to pay Charging Party and another employee equal wages because of their sex, female.

EEOC's Role in Enforcing Federal Sector Equal Pay Laws

The EEOC plays an important role in enforcing equal pay laws for federal employees through our federal sector hearings program, our federal sector appeals, program, and our federal sector training programs.

Federal sector pay discrimination complaints are relatively rare, due in part to the transparency of the GS pay scale. There were 44 EPA complaints filed against federal agencies in FY2008 out of a total of 16,752, 40 EPA complaints out of a total of 16,363 in FY 2007, and 33 such complaints out of 16,723 total complaints in FY 2006. In any given year, approximately .2% of all complaints filed by federal employees allege EPA claims.

Since FY 2006, the EEOC's Office of Federal Operations has issued approximately 59 decisions on appeal in which an EPA violation was asserted. Of these, only four cases resulted in a finding of discrimination based on pay.

As in the private sector, gender based compensation discrimination claims can also be made under Title VII. In FY 2008, there were 388 complaints alleging discrimination on the basis of gender under Title VII that raised pay-related discrimination issues. In FY 2007, that number was 366, and in FY2006, it was 364. From October 2006 through the end of February 2010, the EEOC issued approximately 300 appellate decisions raising wage-related discrimination (on the basis of gender and other protected traits) under Title VII.

In March 2009, the Government Accountability Office issued a Report entitled: "Women's Pay: Gender Pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education and Experience Diminish." This report found that while a pay gap between men and women in the federal workforce still exists, it has narrowed considerably since the 1980s. Between 1988 and 2007, the gender pay gap declined from 28 cents to 11 cents on the dollar. The GAO also found that much of the gap was explained by measurable factors such as occupations, experience and education. However, 7 cents of the gap could not be accounted for in its study.

The GAO study suggests several factors that may be contributing to the lessening of the gender pay gap in the federal government. These include the fact that some occupational categories have become better integrated by gender, the decline in the clerical workforce, and the fact that men and women have increasingly similar levels of education and federal work experience.

The EEOC is committed to working with federal agencies to eliminate pay discrimination in federal employment, so the federal government can truly set the standard for fair pay in this country, and serve as a model workplace for others to follow.

Looking Forward

There remain many challenges on the road ahead, and the EEOC stands ready to work with Congress to successfully meet these challenges. I was very pleased by the House's passage last year of the Paycheck Fairness Act, and I am encouraged that the Senate is holding this hearing today in order to bring attention to the important issues addressed by this legislation. I would

also like to thank this Committee for their leadership on the issue of pay equity. This hearing provides an opportunity to bring attention to the issue, and to the legislation in the Senate.

The Paycheck Fairness Act provides essential tools toward realizing the promise of equal pay, and I look forward to working with the Senate to strengthen and move forward on this important legislation soon.

Passage of this legislation would make it easier to establish violations of the Equal Pay Act, by clarifying the affirmative defense for “factors other than sex,” and refining the “establishment” requirement to comply with commonsense notions of how employers set wages.

The Paycheck Fairness Act would enhance the EEOC’s data collection capabilities, allowing us to detect violations of the law and more readily engage in targeted enforcement of equal pay laws.

The bill would also enhance remedies to allow for compensatory and punitive damages, putting gender based pay discrimination on a more equal footing with pay discrimination on other bases such as race. It would further allow class action claims to proceed under the EPA under the Federal Rules of Civil Procedure.

Last month, the President announced the establishment of a National Equal Pay Enforcement Task Force “to improve compliance, public education, and enforcement of equal pay laws.” The EEOC is a key participant in this Task Force, actively coordinating with our colleagues in the Department of Justice Civil Rights Division, at the Department of Labor, and at the Office of Personnel Management to ensure the most rigorous possible enforcement of our federal equal pay laws. Our work would undoubtedly be strengthened by the passage of the Paycheck Fairness Act, a bill President Obama has strongly supported since his tenure in the Senate.

Conclusion

I’d like to thank you again for inviting me here today to testify on this very important issue. I look forward to your questions.