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"Closing the Gap: Equal Pay for Women Workers"
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Chairman Kennedy, Ranking Member Enzi and members of the Committee, thank you for this opportunity to testify on behalf of the National Women's Law Center on "Closing the Gap: Equal Pay for Women Workers." More than forty years after enactment of the Equal Pay Act of 1963, equal pay for women is not yet a reality in our country. While progress toward that goal has been made, women working full-time year-round still earn only about 77 cents for every dollar earned by men – and women of color fare significantly worse. There is not a single state in which women have gained economic equality with men, and gender-based wage gaps persist across every educational level.

The evidence shows that these gaps cannot be dismissed simply as the result of women's choices or qualifications. Indeed, substantial evidence demonstrates that discrimination and barriers that women face in the workforce must shoulder blame for the wage disparities women endure.

Because these gaps are neither fixed nor immutable, there is much that Congress can do to realize the promise of the Equal Pay Act. In particular, Congress should expeditiously enact the Paycheck Fairness Act introduced by Senator Clinton and Representative DeLauro, and the Fair Pay Act, introduced by Senator Harkin and Representative Holmes Norton. These bills strengthen current laws against wage discrimination and require the government to step up to its responsibility to prevent and address pay disparities. Enactment of these bills is critical to ensure that women have the tools necessary to achieve the pay equity that has too long been denied them.

The Wage Gap Reflects Sex Discrimination

The wage gap cannot be dismissed as the result of "women's choices" in career and family matters. In fact, recent authoritative studies show that even when all relevant career and family attributes are taken into account – attributes that themselves could reflect underlying discrimination – these factors explain at best a minor portion of the gap in men's and women's earnings.

- A 2003 study by U.S. Government Accountability Office (then the General Accounting Office) found that, even when all the key factors that influence earnings are controlled for —

demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure — women still earned, on average, only 80% of what men earned in 2000.[1] That is, there remains a 20% pay gap between women and men that cannot be explained or justified.

- One extensive study that examined occupational segregation and the pay gap between women and men found that, after controlling for occupational segregation by industry, occupation, place of work, and the jobs held within that place of work (as well as for education, age, and other demographic characteristics), about one-half of the wage gap is due solely to the individual's sex.[2]

Studies like these are borne out by case after case, in the courts and in the news, of suits brought by women charging their employers with wage discrimination. The evidence shows that sex discrimination in the workplace is still all too prevalent. Recent examples of pay discrimination cases include:

- In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boys' network for promotions that prevented women's career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because "God made Adam first." Another woman alleged that when she applied for a raise, her manager said, "Men are here to make a career, and women aren't. Retail is for housewives who just need to earn extra money."[3] The Ninth Circuit recently reaffirmed the case as a class action on behalf of more than 1.5 million women who are current and former employees of Wal-Mart.[4]

- In February 2007, a federal judge approved a $2.6 million settlement against Woodward Governor Company for gender discrimination with respect to pay, promotions and training. The EEOC sued the global engine systems and parts company on behalf of female employees working at two of the company's plants. Pursuant to the terms of the agreement, an outside individual will oversee the company's implementation and compliance, including the development of written job descriptions for the positions at issue as well as performance appraisals and a compensation review process.[5]

- In 2004, on the eve of trial, investment house Morgan Stanley agreed to settle a sex discrimination class action filed by the Equal Employment Opportunity Commission alleging that the investment firm paid women in mid- and upper-level jobs less than men, passed women over for promotions, and committed other discriminatory acts. Although it denied the allegations, Morgan Stanley did agree to pay $54 million to the plaintiffs and to take numerous other actions to prevent discrimination in the future.[6]

- In 2004, Wachovia Corporation admitted no wrongdoing but agreed to pay $5.5 million to settle allegations by the U.S. Office of Federal Contract Compliance Programs that it engaged in compensation discrimination against more than 2,000 current and former female employees over six years.[7]

Clearly, sex discrimination plays a major role in producing and sustaining the wage gap for women. It is thus hardly surprising that public opinion surveys consistently show that ensuring equal pay is among women's top work-related priorities. For instance, nine in 10 women responding to the "Ask a Working Women Survey" conducted by the AFL-CIO in 2004 rated "stronger equal pay laws" as a "very important" or "somewhat important" legislative priority for them.[8] Similarly, a January 2007 national survey of 1000 unmarried adult women by Women's Voices Women Vote found that 73% of respondents said that support for pay equity legislation would make them "much more likely" to support a Congressional candidate.[9]

Current Law Is Inadequate to Address the Wage Gap

In 1963, President Kennedy signed the Equal Pay Act into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At its core, the Equal Pay Act bars employers from paying wages to an employee at an establishment

> at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . .[10]

Under the EPA, a plaintiff must establish a *prima facie* case by showing 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."[11] If the plaintiff succeeds in demonstrating each of these requirements, 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."[12]

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.[13]

Unfortunately, and for several reasons, the Equal Pay Act has failed to meet Congress' remedial goals. First, the substantive standards of the law – both with regard to a plaintiff's *prima facie* case and with regard to an employer's affirmative defenses -- have been applied by courts in ways that make it difficult to demonstrate a violation of the law, even in cases where wage disparities are based on sex. Second, the remedies and procedures available to plaintiffs under the Equal Pay Act are insufficient to ensure the effective protection of this critical anti-discrimination law. Moreover, the law is simply inadequate to respond to wage disparities produced by the significant occupational sex segregation that still exists in numerous industries today. Finally, both because employers often fail to disclose – and because the government

refuses to collect – information on pay disparities, it is exceedingly difficult for individuals or enforcement agencies to take effective enforcement action against discriminating businesses.

Plaintiffs Must Meet a High Burden to Make Out a Prima Facie Case

The plaintiff's *prima facie* burden is a demanding one. For example, plaintiffs must demonstrate that the pay disparity exists between employees of the same "establishment" – that is, "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business."[14] Indeed, courts "presume that multiple offices are not a 'single establishment' unless unusual circumstances are demonstrated."[15]

In addition, as one court recently noted, the plaintiff's showing under the Equal Pay Act:

> is harder to make than the prima facie showing [in other cases]. . . because it requires the plaintiff to identify specific employees of the opposite sex holding positions requiring equal skill, effort and responsibility under similar working positions [sic] who were more generously compensated.[16]

Although the jobs for which wages are compared need not be identical, moreover, they must be substantially equal – a comparison which typically can be satisfied only after courts have performed what one commentator has called a "very exacting inquiry."[17] Notwithstanding the remedial purposes of the law, courts have narrowly defined what they will consider to be "equal" work. In *Angelo v. Bacharach Instrument Company*,[18] for example, female "bench assemblers" in light assembly alleged they were paid less than their male counterparts who were classified as "heavy assemblers."[19] Both the women and men, as well as an industrial engineering expert, testified that the men's and women's jobs at the plant were substantially the same with respect to skill, effort, and responsibility.[20] Despite this testimony, the court held that the positions were "comparable," but not equal.[21] As one commentator has stated, therefore,

> "despite the admonition contained in the federal regulations that 'insubstantial differences' should not prevent a finding of equal work, the courts have not 'reach[ed] beyond comparisons of virtually identical jobs, which in a workforce substantially segregated by gender, provides women with a very limited substantive right indeed.'"[22]

For all of these reasons, plaintiffs must meet a particularly heavy burden to proceed with an Equal Pay Act claim. But even plaintiffs who successfully make out a *prima facie* case of unequal pay for equal work face challenges from courts that have construed an employer's affirmative defenses in ways that defeat the basic purposes of the law.

Interpretation of the "Factor Other Than Sex" Defense Has Created Loopholes in the Law

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.[23] Court interpretations of the last of these affirmative defenses, however – the defense that a pay differential between equal jobs is

based on a "factor other than sex" – have in some instances opened the door to a perpetuation of the very sex discrimination the Equal Pay Act was designed to outlaw.

In 1974, 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.[24] Despite this unequivocal holding, however, courts in the Seventh Circuit recited a "market forces" defense recently as last year.[25]

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. 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. In a case decided just last month, for example, one federal district court accepted the argument that higher pay for the male comparator was necessary to "lure him away from his prior employer." According to the court, "salary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as 'a factor other than sex.'"[26] Similarly, another district court stated that

> [O]ffering 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.[27]

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).[28]

The problem with these cases is their failure 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. Some courts have applied a similarly blinkered approach to evaluating the legitimacy of an employer's claim that a man's greater experience or education justifies a higher salary. In *Boriss v. Addison Farmers Insurance Company*,[29] for example, the court 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. According to the court, it "need not explore this issue [of whether a college degree was a prerequisite for the position] as the Seventh Circuit has ruled 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.'"[30] 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.[31]

Cases such as these undermine both the spirit and analytical approach of the Equal Pay Act. What was intended to be an affirmative defense for an employer – a defense that demands that the employer carry the burden of proving that its failure to pay equal wages for equal work is based on a legitimate reason – has instead been converted by these courts into a requirement merely that an employer articulate some ostensibly nondiscriminatory basis for its decision-

making. Because these bases can so easily mask criteria that are at bottom based on sex, the courts' failure to engage in searching analysis circumvents the burden Congress intended employers to bear.

The Equal Pay Act's Procedures and Remedies Offer Insufficient Protection for Women Subjected to Wage Discrimination

Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages, successful plaintiffs who challenge sex-based wage discrimination under the Equal Pay Act may receive only back pay and, in limited cases, an equal amount as liquidated damages. Even where liquidated damages are available, moreover – in cases in which the employer acted intentionally and not in good faith – the amounts available to compensate plaintiffs tend to be insubstantial.

These limitations on remedies not only deprive women subjected to wage discrimination of full relief – they also substantially limit the deterrent effect of the Equal Pay Act. Employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure. The class action currently pending against Wal-Mart illustrates precisely this problem. In that case, Wal-Mart refrained from any examination of the pay of its male and female employees, even though a discrete inquiry into the pay for male and female occupants of a mid-level management job revealed disparities that the company elected not to evaluate further. While such conduct would certainly be taken into account in assessing the availability of punitive damages under statutes that permitted such relief, it is largely irrelevant in calculating remedies under the Equal Pay Act.

Procedures for enforcing the Equal Pay Act also hamstring plaintiffs attempting to prove systemic wage discrimination through the use of class actions. Class actions are important because they ensure that relief will be provided to all who are injured by the unlawful practice. But the Equal Pay Act, which was enacted prior to adoption of the current federal rule governing class actions,[32] requires that all plaintiffs opt *in* to a suit. Unlike in other civil rights claims, in which class members are automatically considered part of the class until they choose to opt *out*, Equal Pay Act plaintiffs are subjected to a substantial burden that can dramatically reduce participation in wage discrimination cases.

Current Law Does Not Address Wage Disparities Premised on Occupational Sex Segregation

Far too many occupations in the United States remain dominated by one gender. Ninety-five percent of child care workers are female, while 95% of mechanical engineers are male. Similarly, while 99% of dental hygienists are women, 99% of roofers are men. In female-dominated fields, moreover, wages have traditionally been depressed and continue to reflect the artificially suppressed pay scales that were historically applied to so-called "women's work." Maids and housecleaners, for example, 87% of whom are female, make about $3,000 less each year than janitors and building cleaners, who are 72% male.[33]

Current law simply does not provide the tools to address this continuing devaluation of traditionally female fields. Courts have refused to interpret the Equal Pay Act and Title VII of the Civil Rights Act of 1964 to address this chronic problem.[34] But it is this occupational sex-

segregation – and the wage disparities associated with it – that is partially responsible for the wage gap women face today.

Current Sources of Information on Wage Disparities are Inadequate to Identify, Target or Remedy Problems

Individuals are significantly handicapped in their ability to enforce their rights under the Equal Pay Act by the inaccessibility of information about the wages paid to their coworkers. Far from making such information readily available, in fact, numerous employers penalize employees who attempt to discuss their salaries or otherwise glean information about their colleagues' pay.

Relevant federal enforcement agencies have not only failed to fill this gap, but have, in the case of the Department of Labor, affirmatively undermined the government's ability to identify and remedy systemic wage discrimination. In September of last year, the Department's Office of Federal Contract Compliance Programs (OFCCP) published a final rule that guts the Equal Opportunity Survey, a critical enforcement tool developed over the course of two decades and three administrations to better allow OFCCP to identify and investigate federal contractors most likely to be engaging in pay discrimination.[35] Without the Equal Opportunity Survey – the only enforcement tool for the collection of wage data by sex – the federal government now requires *no* submission of pay information. This refusal to collect relevant data deprives the government of any means to systematically monitor pay disparities or efficiently enforce the anti-discrimination laws.

<u>The Paycheck Fairness Act and Fair Pay Act Would Remedy the Deficiencies of Current Law</u>

The Paycheck Fairness Act and the Fair Pay Act would respond, in appropriate and targeted ways, to precisely the problems discussed previously in this testimony that have undermined the effectiveness of current law. Among other provisions, the Paycheck Fairness Act would:

- **Improve Equal Pay Act Remedies**
  The Act toughens the remedy provisions of the Equal Pay Act by allowing prevailing plaintiffs to recover compensatory and punitive damages. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available. As a result, it will eliminate the unacceptable situation of an employer defending a denial of equal pay to a woman of color as based on her gender rather than her race.

- **Facilitate Class Action Equal Pay Act Claims**
  The Act allows an Equal Pay Act lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure. This would conform Equal Pay Act procedures to those available for other civil rights claims.

- **Improve Collection of Pay Information by the EEOC**
  The Act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex,

and national origin of employees. These data will enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

- **Prohibit Employer Retaliation**
  The Act prohibits employers from punishing employees for sharing salary information with their co-workers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.

- **Close the "Factor Other Than Sex" Loophole in the Equal Pay Act**
  The Act would tighten the "factor other than sex" affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance − such as differences in education, training, or experience.

- **Eliminate the "Establishment" Requirement**
  The Act clarifies that a comparison need not be between employees in the same physical place of business.

- **Reinstate Pay Equity Programs and Enforcement at the Department of Labor**
  The Act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the Office for Federal Contract Compliance Programs.[36] The Act also directs implementation of the Equal Opportunity Survey.

The Fair Pay Act would extend the reach of the equal pay laws in the following ways:

- **Providing Equal Pay for Equivalent Jobs**
  The Act would equalize wage disparities between jobs that are segregated on the basis of sex, race, or national origin, but require equivalent skills, effort, responsibility, and working conditions.

- **Protecting Victims of Wage Discrimination**
  Similar to the Paycheck Fairness Act, the Fair Pay Act provides punitive and compensatory damages to victims of wage discrimination. It also prohibits retaliation against individuals who exercise their rights under the law.

- **Requiring Employer Record Keeping**
  The Act requires all employers to keep records of the methods they use to set employee wages. Employers must also provide yearly reports to the EEOC that describe their workforce by position and salary as well as gender, race, and ethnicity.

Conclusion

In less than two weeks, the nation will mark Equal Pay Day – the annual shameful reminder that women must wait nearly four months into the year to earn as much as men earned the previous year. This wage gap is real and cannot be dismissed as the result of women's

choices in career and family matters. Even when women make the same career choices as men and work the same hours, they still earn less.

The consequences of this wage discrimination are profound and far-reaching. Pay disparities cost women and their families thousands of dollars each year while they are working and thousands in retirement income when they leave the workforce. It is long-past time for Congress to act to ensure that the promise of equal pay becomes a reality.

[1] U.S. General Accounting Office, Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2, GAO-04-35 (Oct. 2003), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-04-35 (last visited Feb. 26, 2007).
[2] *See* Kimberly Bayard, Judith Hellerstein, et al., *New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data*, 21 J. Labor Economics 887, 904 (2003).
[3] Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit*, San Francisco Chronicle, Apr. 29, 2003, at B1, *available at* sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL (last visited Feb. 26, 2007).
[4] Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007), *available at* http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/$file/0416688.pdf?openelement (last visited Feb. 26, 2007).
[5] The court consolidated the EEOC's case with a class action by employees alleging race discrimination against African Americans, Hispanics, and Asians with regards to pay, promotions, and training. The terms of the settlement provide that $2.4 million will go to plaintiffs with race-based claims. Press Release, Judge Approves $5 Million Settlement of Job Bias Lawsuits Against Woodward Governor (Feb. 20, 2007), *available at* http://www.eeoc.gov/press/2-20-07.html (last visited Mar. 27, 2007).
[6] Press Release, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit (July 12, 2004), available at http://www.eeoc.gov/press/7-12-04.html (last visited Feb. 25, 2007).
[7] *See* Office of Federal Contract Compliance Programs, U.S. Dep't of Labor v. Wachovia Corp., Case No. 2001-OFC-0004 (U.S. Dep't of Labor Office of Admin. Law Judges, Sept. 21, 2004), *available at* http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=205183) (last visited Feb. 26, 2007); *Wachovia to Pay $5.5M in Discrimination Case*, Tampa Bay Business Journal, Sept. 24, 2004, *available at* http://tampabay.bizjournals.com/tampabay/stories/2004/09/20/daily37.html (last visited Feb. 26, 2007).
[8] AFL-CIO, Ask a Working Woman Survey Report, 9 (2004) *available at* http://www.aflcio.org/issues/jobseconomy/women/speakout/upload/aawwreport.pdf (last visited Feb. 23, 2007).
[9] Memorandum from Greenberg Quinlan Rosner Research to Women's Voices Women Vote, 13 (Feb. 12, 2007) (on file with the National Women's Law Center).
[10] 29 U.S.C. § 206(d).
[11] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).
[12] 29 U.S.C. § 206(d)(1).
[13] Corning Glass Works, 417 U.S. at 195.
[14] Ingram v. Brink's, Inc., 414 F.3d 222, 232 (1st Cir. 2005) (citing 29 C.F.R. § 1620.9).
[15] Meeks v. Computer Ass'n Int'l, 15 F.3d 1013, 1017 (11th Cir. 1994) (citing 29 C.F.R. § 1620.9(a)).
[16] Ingram, 414 F.3d at 232 (citations omitted).
[17] Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It be Fixed?*, 56 RUTGERS L. REV. 849, 858 (Spring 2004).
[18] 555 F.2d 1164 (3d Cir. 1977).
[19] *Id.* at 1166.
[20] *Id.* at 1167-1170.
[21] *Id.* at 1176.
[22] Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 ME. L. REV. 23, 34 (2003) (quoting Jennifer M. Quinn, *Visibility and Value: The Role of Job Evaluation in Assuring Equal Pay for Women*, 25 LAW & POL'Y INT'L BUS. 1403, 1439 (1994)).
[23] Avery, *supra* note 17, at 868.
[24] Corning Glass Works, 417 U.S. at 205 (noting that the company's decision to pay women less for the same work men performed "took advantage" of the market and was illegal under the EPA). *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).

[25] 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).
[26] Drury v. Waterfront Media, Inc., No. 05 Civ. 10646, 2007 WL 737486, at *9 (S.D.N.Y. Mar. 8, 2007).
[27] 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)).
[28] 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).
[29] No. 91 C 3144, 1993 WL 284331 (N.D. Ill. July 26, 1993).
[30] 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)).
[31] *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.").
[32] FED. R. CIV. P. 23.
[33] Bureau of Labor Statistics, 2006: Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, *available at* http://www.bls.gov/cps/cpsaat39.pdf (last visited April 10, 2007).
[34] *See, e.g.,* AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
[35] The Act refers to a regulation the Office of Federal Contract Compliance Programs (OFCCP) rescinded on September 8, 2006. *See* DOL, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey, 41 C.F.R. § 60.2.
[36] The Paycheck Fairness Act would overturn the DOL's 2006 decision to narrow the scope of its investigations into systematic wage discrimination. *See* DOL, Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35,124 (June 16, 2006).