

**THE ESCAPE CLAUSE:
HOW U.S. EQUAL PAY LAW HAS FAILED WOMEN AND WHY
SOME SUGGESTIONS FOR THE FUTURE**

**by Marcia S. Cohen, Esq.
Marcia S. Cohen, P.A.
111 Second Avenue NE, Suite 706
St. Petersburg, Florida 33701 USA
msc@marciascohen.com**

© 2012 Marcia S. Cohen

The White House Council on Women and Girls was created by President Barack Obama in early 2009 to provide a coordinated federal response to the challenges confronted by American women and girls. As part of its mission, the Council partnered with several government agencies, including the Office of Management and Budget and the Department of Commerce, to create a report on the status of U.S. females. The report particularly highlighted the following significant facts:

Women have made enormous progress on some fronts. Women have not only caught up with men in college attendance, but younger women are now more likely than younger men to have a college or a master's degree. Women are also working more and the number of women and men in the labor force has nearly equalized in recent years. As women's work has increased, their earnings constitute a growing share of family income.

Yet, these gains in education and labor force involvement have not yet translated into wage and income equity. At all levels of education, women earned about 75% of what their male counterparts earned in 2009. In part because of these lower earnings and in part because unmarried and divorced women are the most likely to have responsibility for raising and supporting their children, women are more likely to be in poverty than men. These economic inequities are even more acute for women of color.

Although the U.S. Congress passed the Equal Pay Act in 1963 as an amendment to the Fair Labor Standards Act, it has not proven successful in remedying pay inequality between men and women. The Equal Pay Act of 1963, 29 U.S.C. § 206(d) provides:

(1) No employer ... shall discriminate ... on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to

- (i) a seniority system;
- (ii) a merit system;
- (iii) a system which measures earnings by quantity or quality of production;
- (iv) a differential based on any other factor other than sex.

It is immediately clear that subsection (iv) is an exception which swallows up the rule. The “factor other than sex” affirmative defense has most often allowed employers to escape liability for unequal pay, as it has been altogether too easy for them to fabricate some other reason for the wage disparity. Most U.S. federal courts have interpreted this defense as requiring the employer to show that there was at least a legitimate business reason for the pay differential. Some courts, however, have ruled that a business-related reason was not necessary and that the employer’s justification need not even be wise or reasonable.

THE HISTORY OF U.S. EQUAL PAY LAW

But in 1963, when the Equal Pay Act was passed, there were high hopes that the Act would remedy many years of pay discrimination against women. Caroline Davis, Director of the United Auto Workers Union Women’s Department, then testified before the U.S. Senate that “the aspirations of the people of the world, as expressed in the Declaration of Human Rights, recognized that ‘unequal pay is immoral’”. Ms. Davis compared the United States unfavorably to the 39 nations who had previously accepted the “equal pay for equal work” convention of the International Labor Organization.

Cited in her Senate testimony was the frivolous argument being made by some employers that, since women live longer statistically than men, pension programs cost disproportionately more for women, and hence justify a lower than equal wage. She countered that most of these same employers do not even provide pensions for their workers. Demolishing other rationales advanced for paying women less, such as medical insurance costs and absenteeism associated with motherhood as “pseudo arguments”, Ms. Davis concluded her remarks to the Senate with these stirring words:

Equal pay, equal opportunities, equal rights, so that every American can accept an equal obligation to the community, if established, will ultimately enable the American community to endure. The profits that a few ethically marginal employers make by paying substandard wages will not help the Nation prevail, nor will exploitation based on economic and social discrimination.

When Congress was first debating the need for legislation to remedy pay disparities between men and women, President Dwight Eisenhower told the Congress that “legislation to apply the principle of equal pay for equal work without discrimination because of sex is a matter of simple justice”.

Noble sentiments such as these accompanied the Equal Pay Act's enactment in 1963, but unfortunately, equal pay for women in the United States would prove elusive thereafter, due in no small part to the "escape clause" of the "factor other than sex" defense.

UNSUCCESSFUL IN REMEDYING PAY INEQUITY

This failure of the law to redress pay inequity is illustrated by one court decision (out of many), the case of *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995). In that case, Barbara Irby, a female Sheriff's Deputy in Monroe County, Georgia, sued her employer, Sheriff Bittick, under the Equal Pay Act, because her salary was considerably lower than those of two male Deputies who worked in the same division at the Sheriff's Department. The two male Deputies, Jones and Evans, were initially employees of the City of Forsyth, Georgia, but worked in the investigations division of the Sheriff's Department from 1983 until 1989, when they elected to join the Sheriff's Department as County investigators. Ms. Irby was hired as a Deputy in the Sheriff's Department in 1987 and worked in all three divisions before her permanent assignment to the investigations division in 1989.

The Sheriff continued paying Jones and Evans what the City had been paying them, a sum substantially higher than the amount the Sheriff's Department was paying Ms. Irby. It was undisputed that Irby, Jones and Evans performed equal work within the meaning of the Equal Pay Act. The question then became whether Jones and Evans were paid more because of a "factor other than sex". The employer bears the burden of proof of this affirmative defense, and must show that the factor of sex provided no basis for the wage differential.

The *Irby* court first looked at previous court decisions construing the Equal Pay Act, which found that factors other than sex included unique characteristics of the same job, such as an individual's experience, training or ability, as well as "special exigent circumstances connected with the business", citing *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir.), cert. denied, 488 U.S. 948 (1988). As is readily apparent, it could be practically anything.

One thing that it is not, however, is prior salary. As the decision in *Glenn* made clear, "prior salary alone cannot justify pay disparity" under the Equal Pay Act. 841 F.2d at 1571. But if the employer's reason for paying men more than women is a combination of prior salary and experience, for example, the *Irby* court stated that "there is no prohibition on utilizing prior pay as part of a mixed-motive" as a factor other than sex. 44 F.3d at 955.

The mixed-motive reason advanced by the employer in *Irby* was prior salary plus more experience within the investigations division. The court in that case held that this reason was a legitimate factor other than sex justifying the significant pay disparity between Ms. Irby and her male comparators. The inequity in this decision in favor of the employer was noted by the dissenting Judge, who pointed out that two male Deputies had been in the investigations division longer than Jones and Evans, but were paid less than they were, though they were still paid more than Ms. Irby.

This decision is typical of many others when women filed suit against their employers under the Equal Pay Act. It was simply too easy for the courts to find that whatever the employer's reason for the pay disparity was, it was a "factor other than sex". But the hurdles faced by women trying to enforce the law granting them equal pay were not limited to the "factor other than sex" escape clause.

As though these difficulties were not severe enough, in 2007, the U.S. Supreme Court put another obstacle in the path of women's pay equality. Lilly Ledbetter had sued her employer, Goodyear Tire & Rubber Co., under the Equal Pay Act, when she learned that she had been paid less than her male counterparts for many years. The Supreme Court held in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that, since the employer's initial pay decision had been taken years before Ms. Ledbetter discovered the pay inequity, she could not sue her employer under the Equal Pay Act because the decision had not been made within the 180 day statute of limitations before she filed her complaint.

Fortunately, Congress overrode this unjust Supreme Court opinion and passed the Lilly Ledbetter Fair Pay Act of 2009. Pub. L. 111-2. The Act provides that each discriminatory paycheck, not just the employer's first decision to pay the woman unequally, resets the time to file a pay discrimination claim. The Ledbetter Act made it easier for female workers to file pay claims, even if they discover the unequal pay years after it began.

As stated in the case of *Hester v. North Alabama Center for Educational Excellence*, Case No. 08-17037 (11th Cir. 2009), under the Ledbetter Act, an unlawful employment act occurs each time an employee is paid under a discriminatory compensation scheme. So every time a woman is paid less than a male co-worker, the time frame to file a charge alleging pay inequity starts anew. This law applies, not only to claims under the Equal Pay Act, but to claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

This federal law, usually referred to as Title VII, makes unlawful discrimination in employment on the basis of race, sex, national origin, and religion. Most female employees complaining of wage discrimination have brought their claims under Title VII, rather than the Equal Pay Act, because of the "factor other than sex" obstacle, which doesn't apply to Title VII claims. But before the Ledbetter Act, employers defended wage claims by asserting that too much time had gone by since the discriminatory pay decision was made for female employees to have a viable claim. The Ledbetter Act destroys that argument.

Ms. Ledbetter and many other women workers would have learned more quickly that they were being paid less than their male counterparts if most employers had not implemented pay secrecy policies. Many employers forbid their employees to discuss their pay with one another and punish those who do. This roadblock often prevents women workers from discovering that they are not being paid as well as the men who work beside them.

A bill was introduced in Congress that would have remedied this problem. The Paycheck

Fairness Act (S. 797, H.R. 1519) would expand damages under the Equal Pay Act and would amend the “factor other than sex” escape clause. The bill passed the House of Representatives on January 9, 2009, but was prevented from being brought up for debate and vote by a minority of Senators on November 17, 2010. It was defeated once again in the Senate on June 5, 2012.

Another piece of legislation designed to remedy certain aspects of gender pay inequity is the Fair Pay Act (S. 788, H.R. 1493), which has not yet become law in the U.S. This bill would end wage discrimination against those who work in female-dominated or minority-dominated jobs by establishing equal pay for “equivalent” work. Under this law, employers could not pay those in jobs held predominately by women less than jobs held predominately by men within each company if those jobs are equivalent in value to the employer. The concept of “equivalent value” resembles the idea behind the controversial “comparable worth” theory of the 1970's and 1980's.

The Governor of the State of Washington instituted pay equity studies in 1973 and again in 1979. The results showed that male dominated jobs were paid at least 20% more than female dominated jobs, though these jobs were of equal value to the state. But before the study results became law in Washington, a new Governor failed to implement the recommendations of the study. Consequently, the state public employees union filed suit against the state. Though the federal district court found that the State of Washington had discriminated against its female employees by failing to ameliorate the wage disparities, the state appealed and the U.S. Court of Appeals for the 9th Circuit overturned the lower court decision, stating that Washington had always required their employees’ salaries to reflect the free market, and discrimination was only one cause out of many for the wage disparities. *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985). Though the court ruled against the union, the State of Washington later adopted policies closely allied with the comparable worth concept.

STILL UNEQUAL AFTER ALL THESE YEARS

Thus far, neither bill has become law in the U.S. and the wage gap between men and women continues. According to the National Committee on Pay Equity, women in 1973 earned 56.6% of what men earned. By 2010, the gap had narrowed somewhat. Women then earned 77.4% of men’s earnings. Still women in the U.S. have a long way to go for full wage parity. Economist Evelyn Murphy, President of The Wage Project, estimates that over a working lifetime of 47 years, the current wage gap amounts to a loss in wages for a woman of \$700,000 for a high school graduate, \$1.2 million for a college graduate, and \$2 million for a professional school graduate. These are staggering figures.

The Coalition of Labor Union Women opines that the wage gap still exists because many women continue to be segregated into low-paying occupations. More than half of all women workers hold sales, clerical and service jobs. Studies show that the more an occupation is dominated by women, the less it pays.

In agreement is the Institute for Women's Policy Research, www.iwpr.org. In IWPR #C350a, the Institute notes that occupational segregation by gender is a persistent feature of the U.S. labor market. Only 5.8% of women work in traditionally male occupations and only 4.6% of men work in traditionally female occupations. Even when women work in occupations traditionally held by men, they are paid less than the men in those occupations. Worse still, women are more than twice as likely as men to work in occupations with poverty level wages. Further support for the concern about the effects on women's wages due to gender segregation of jobs is found in the study by Ariane Hegewisch, Hannah Liepmann, Jeffrey Hayes and Heidi Hartmann, "Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap." IWPR Briefing Paper, Washington, DC 2010.

Why should men care whether women receive equal pay? Why should American businesses care? All Americans should care because, not only is it good for women, it is good for the U.S. economy. According to a study conducted by Women Certified, a women's consumer advocacy organization, 41% of women are their families' sole source of income and women contribute 83% of the U.S. gross national product. So pay inequity hurts not only businesses, but families. Congresswoman Anna Eshoo of California points to figures showing that, in more than two-thirds of American families, women are either the breadwinners or the co-breadwinners. "When women are paid less, families have less take-home pay to make ends meet and make the economy grow."

The AFL-CIO study shows that the average 25-year-old woman who works full-time, year-round until she retires at age 65 will earn \$523,000 less than the average working man. And at the current rate of change, working women in the U.S. will not achieve equal pay until after the year 2050.

PROCEDURES FOR COMPLAINING OF WAGE DISCRIMINATION

A woman discovering that she is being paid less than her male co-worker should first go to her employer or its Human Resources department about the discrepancy. Be aware, however, that the employee risks retaliation for alleging that she has been the subject of discrimination.

If the employer is unwilling to rectify the inequality, the female employee may then file a charge with the Equal Employment Opportunity Commission and/or a state human rights agency alleging pay discrimination under Title VII, which protects employees against sex discrimination, as well as the Equal Pay Act. Remedies for pay discrimination under the Equal Pay Act and Title VII are different, so it may be best to make claims under both statutes. It is not necessary to file a charge with the EEOC if the woman is making a claim only under the Equal Pay Act. In that case, she can file suit against her employer immediately after learning of the pay inequality.

A lawsuit alleging pay discrimination may be filed in federal or state court. If the woman has filed a charge with the EEOC under Title VII, she need not wait until the agency has

investigated her claims, but may request a notice of right to sue within the period specified under Title VII. After her receipt of the notice of right to sue, she will have 90 days within which to file a lawsuit against the employer.

If a union represents the affected employee, she may be protected against unequal pay by the National Labor Relations Act if she has engaged in concerted action to complain of or remedy pay violations against other women employees as well as herself. If this is the case, she should therefore contact her union representative.

The most recent U.S. Census showed that women still earn approximately 77% of what men earn. Women workers can be proactive about the continuing wage disparity by following these strategies:

- lobbying their congressmen and congresswomen to pass the Paycheck Fairness Act and other legislation aimed at correcting pay inequity.
- making efforts to learn the pay of all male workers in similar jobs.
- if inequities exist, complain to their employers and request their pay be made comparable to men doing the same work.
- be pro-active in negotiating higher pay when beginning a new job.
- if the employer is unwilling to remedy unequal pay, file charges with the Equal Employment Opportunities Commission and any state equal opportunity agency.
- file lawsuits in state or federal court asking the court for redress of the wage disparity.

Only if U.S. women take action to remedy unequal pay, both on behalf of themselves and their female colleagues, can meaningful equality of compensation be a reality.

**MILLENNIA2015 VARIABLE V23
WOMEN AND GENDER EQUALITY**

ANSWERS TO QUESTIONS

1. Definition of the variable.
In order to achieve true gender equality, U.S. women must receive equal pay for work they perform in jobs substantially similar to their male co-workers.
2. How has this variable influenced women's empowerment in the last 20 years?
The passage of the U.S. Equal Pay Act was meant to equalize the compensation of men and women, but has not achieved its purpose due to a built-in "escape clause", which allows employers to pay men more for the same or similar job due to any "factor other than sex".
3. What is the impact of this variable on U.S. women's daily life?
Many U.S. women are employed in jobs which pay substantially less than male-dominated jobs. Often these women are the sole support of themselves and their children and have much less income with which to feed, clothe and shelter their families. Lower pay also means less chance to progress in their chosen field of endeavor.
4. To what extent can this variable stop the process of women's empowerment?
See answer to question 3.
5. How will this variable modify the status of women's empowerment and their role in society in 2025?
Unequal pay will continue to depress the status of U.S. women's empowerment unless women become more proactive, demand changes in the law, and complain about unequal pay to their employers, federal and state agencies and file lawsuits in federal and state courts.
6. What have U.S. women to lose or gain by this variable?
If women continue to receive lower pay than men, they will continue to have less purchasing power, less status in their chosen professions, less ability to give their families a good life, and less power over their relationships with men. Redress of pay inequity will remedy this situation and women will finally be able to achieve equal status with men in U.S. society.
7. Concrete examples of the variable in assumptions for the future.
The AFL-CIO study shows that the average 25-year-old women who works full-time, year-round until she retires at age 65 will earn \$523,000 less than the average working man. And at the current rate of change, working women in the U.S. will not achieve equal pay until after

the year 2050.

8. Sources, bibliography, links.

The Equal Pay Act of 1963, 29 U.S.C. § 206(d).

Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995).

Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir.), cert. denied, 488 U.S. 948 (1988).

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

Lilly Ledbetter Fair Pay Act of 2009. Pub. L. 111-2.

Hester v. North Alabama Center for Educational Excellence, Case No. 08-17037 (11th Cir. 2009).

The Paycheck Fairness Act (S. 797, H.R. 1519).

Fair Pay Act (S. 788, H.R. 1493).

AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985).

National Committee on Pay Equity, www.pay-equity.org.

The Wage Project, www.wageproject.org.

Coalition of Labor Union Women, www.cluw.org.

Institute for Women's Policy Research, www.iwpr.org.

Ariane Hegewisch, Hannah Liepmann, Jeffrey Hayes and Heidi Hartmann, "Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap." IWPR Briefing Paper, Washington, DC 2010.

American Federal of Labor etc., www.aflcio.org.

Bureau of Labor Statistics, www.bls.gov/bls/wages.htm.

American Association of University Women, www.aauw.org/fairpay/home.htm.

Equal Employment Opportunity Commission, www.eeoc.gov

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

U.S. Census Bureau, www.census.gov.

9. Do you feel personally concerned?
Extremely.
10. Is it a priority for women in the U.S.?
It should be, but I fear not enough.
11. Should it be a priority in future.?
It must be.
12. Are you a woman?
Yes.
13. Your age group.
65+
- 14-1. Where do you come from?
I was born in Chicago, Illinois USA.
- 14-2. Where do you live now?
I now live in St. Petersburg, Florida USA and Paris, France.
- 15-1. The opinion and analysis presented represents my own opinion and analyses by organizations in the U.S., as well as court decisions and legislation from U.S. courts and lawmakers.
- 15-2. Number of people concerned.
Women in the United States and throughout the world.