Moving Women Forward
On the 50th Anniversary of
Title VII of the Civil Rights Act
A Three-Part Series

Part Three: A Gender Wage
Gap That Won't Close
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Herma Hill Kay, Professor of Law at University of California Berkeley School of Law
Joanna Grossman, Professor of Law at Hofstra University School of Law
Katherine M. Kimpel, Sanford Heisler LLP
Jeannette Cox, Professor of Law at University of Dayton School of Law
Linda Hamilton Krieger, Professor of Law at University of Hawaii at Manoa William S. Richardson School of Law
Leslye Orloff, Professor of Law and Director of the National Immigrant Women's Advocacy Project at American University Washington College of Law
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Moving Women Forward: Executive Summary

All I want is to be human, and American, and have all the same rights, and I will shut up.

Martha Griffiths, former member of the U.S. House of Representatives from Michigan and a chief proponent of adding sex as a protected class to Title VII of the Civil Rights Act of 1964.

When Martha Griffiths, a member of the House of Representatives, fiercely advocated for a last-minute amendment to Title VII of the Civil Rights Act of 1964 to include a prohibition of workplace discrimination based on sex,1 the world was a different place. Women were excluded outright from many workplaces. Employers could lawfully pay women less for the same work and fire them once their pregnancies became obvious. Sexual harassment was blatant. Marriage and weight gain and getting older were grounds for termination in some industries, for women anyway.

The amendment adding “sex” as a protected category to Title VII, just two days before Congress voted on the bill, was a tremendous opportunity for the women’s movement. Fifty years after passage of the Civil Rights Act of 1964, we ask:

Has Title VII of the Civil Rights Act of 1964 Improved Women’s Economic Opportunity and Security?

Equal Rights Advocates takes a hard look at that question in this Report. Founded in 1974, ERA grew up with the Civil Rights Act of 1964. Over our 40-year history, ERA has relied on Title VII to pursue groundbreaking cases to end sex discrimination in the workplace. Our early equal protection pregnancy discrimination cases before the U.S. Supreme Court, like Geduldig v. Aiello (1974),2 buoyed passage of an amendment to Title VII to confirm the law’s prohibition against pregnancy discrimination as a form of sex discrimination (the Pregnancy Discrimination Act of 1978).3 ERA also led cases to combat workplace sexual harassment (Miller v. Bank of America),4 the exclusion of women from male-dominated fields like firefighting (Davis v. San Francisco),5 and pay and promotion discrimination (Dukes v. Wal-Mart Stores).6 ERA has fielded calls from tens of thousands of women across the country with concerns about discrimination and harassment at work.

The stories of our many clients, recent data from the Equal Employment Opportunity Commission, and input from the nation’s top gender equity experts all informed this Report.

The answer to whether Title VII has improved women’s economic opportunities and security depends on which women are the subject of the question. This Report focuses on low-wage women workers and women of color. Troubling statistics drive this focus. Women are nearly two-thirds of minimum wage workers in this country.7 They are nearly twice as likely as men to be employed in occupations that pay poverty wages.8 African-American women and Latinas are even more likely than women as a whole to be employed in lower-paying service occupations and significantly more likely to be among the working poor.9 Women with children remain concentrated in low-wage jobs and are paid substantially less than fathers or men and women who are not parents.10

This Report is a three-part series that examines: sexual harassment and violence, discrimination against pregnant workers and working mothers, and the gender wage gap.

The first obstacle examined in this Report – sexual harassment and violence in the workplace – has been largely ignored as an economic issue despite its devastating impact on a large number of working women. Sexual harassment compromises the economic security of women workers because women who are harassed are often denied or deterred from promotions, fired, or
THREE PERSISTENT BARRIERS TO EQUAL OPPORTUNITY FOR WOMEN:
- sexual harassment and violence
- discrimination against pregnant workers and working mothers
- the gender wage gap

forced to leave their jobs, regardless of whether they file a complaint. And millions of women workers who rely on customer tips to support themselves and their families (particularly in states where the tipped minimum wage is just $2.13 per hour) too often face the impossible choice of enduring sexual harassment or losing income critical to their survival.

The second part of this Report examines discrimination and lack of accommodation for pregnant workers and caregivers. It is a problem that is only getting worse. The number of pregnant women who are fired or laid off has actually grown over the past two decades and is especially high for African-American women and Latinas. Pregnant women and new mothers working in low-wage jobs are heavily burdened by discrimination. Low-wage workers are filing a disproportionate number of pregnancy discrimination charges, and the discrimination these women face has long-term negative effects on their earning capacity and economic stability.

The third installment of this Report addresses the gender wage gap – a glaring and measurable example of persistent sex discrimination in the American workforce. The wage gap between male and female workers has remained stagnant for over a decade and closed by only about 14 cents in the last five decades. Women working full-time earn on average 78 cents for every dollar paid to male workers, and women of color fare even worse. Despite laws prohibiting discrimination, most women and men work in different fields that are highly segregated by gender, and “women’s work” continues to be worth less than work done mostly by men.

How Has Title VII Succeeded? How Has It Failed?

The cases, stories, and data examined in this Report reveal a law that has bright spots as a tool in the movement for women’s equality, but one that has its blind spots, too. In many ways, advocates seized the opportunity presented by the last-minute addition to Title VII prohibiting sex discrimination. We have enforced the law to protect and advance opportunities for women and used it to successfully challenge sex discrimination in hiring, pay, promotion, and other working conditions. Title VII can be credited, in part, for the radical increase in women’s and mothers’ participation in the workforce and labor market. Women now make up nearly half the workforce and have entered almost every profession.

But today, as Dukes v. Wal-Mart Stores and subsequent retail cases demonstrate, entire industries remain infected by sex discrimination and other unfair practices. Today, ERA represents women shipyard workers in Norfolk, Virginia who suffer from blatant discrimination and harassment in their workplace, where they are outnumbered by men 16 to 1. Many are women of color who have been denied raises and higher-paying jobs despite decades of service and exemplary qualifications. It is a workplace where women are commonly called “whores” and other slurs, and where supervisors and senior managers alike participate in or turn a blind eye to this rampant sexual harassment.

Why Are We Lagging in 2015?

Title VII was not designed to address many of the barriers to economic security for women that still exist today, such as a lack of paid leave and poor access to affordable, quality child care. Moreover, while we have enjoyed some tremendous victories in the courts, judicial misinterpretations of Title VII have held back progress for many women workers in significant ways. Fundamental obstacles also remain to even accessing the protections of Title VII for far too many workers, leading to widespread under-enforcement in low-wage industries and occupations. Few women know their rights or can access a qualified lawyer to represent them when they need legal help. Many are fearful of retaliation or are too financially vulnerable to challenge discrimination at all. Others have been stopped by attacks on workers’ ability to challenge discriminatory practices collectively through class actions.
These gaps and obstacles pose serious threats to the economic security of women in this country. And while we are heartened by the efforts of partners nationwide to enforce Title VII, including for women of color and low-wage women workers, we cannot wait another 50 years for workplace equality. A recent poll shows that more than 70 percent of Americans believe that women’s contributions to our national economy are essential.\textsuperscript{19} A significant 90 percent of American voters favor policies that would help women get equal pay for equal work and raise wages for women and families.\textsuperscript{20} This polling data reflects the consensus documented in a number of reports released over the past year: Americans want women to be treated fairly in the workplace and will support policies to even the playing field for working women and their families.\textsuperscript{21}

How Will We Seize on Today’s Moment of Opportunity for the Women’s Movement?

Fifty years after Title VII’s historic passage, the time has come once again to revolutionize the judicial system to better protect women workers. This Report’s three sections detail specific recommendations for policymakers, administrative agencies, advocates, and employers to get this process started. These recommendations include suggestions for improving the enforcement of Title VII and to correct flagrant misinterpretation of the law’s provisions. We also make recommendations on how to fill Title VII’s gaps through a series of policy initiatives that take a holistic approach to improving the economic security of women in this country today.

This bold and comprehensive approach to boost and equalize economic opportunity and security for women is gaining traction. In 2013, U.S. House of Representatives Minority Leader Nancy Pelosi (D-CA) and U.S. Representative Rosa DeLauro (D-CT) unveiled a policy platform called \textit{When Women Succeed, America Succeeds: An Economic Agenda for Women and Families}. The agenda outlines a broad set of federal policy initiatives to advance the economic security of working families by promoting fair pay, family-friendly workplaces, and universal child care. The momentum for similar agendas is growing strong at the state level too. Minnesota, for example, recently passed the \textit{Women’s Economic Security Act},\textsuperscript{21} which strengthens fair pay laws and expands protections for pregnant workers. Equal Rights Advocates has joined a chorus of partners calling for a sweeping women’s economic agenda in California that will lead the nation in its inclusion of initiatives to meet the basic needs of impoverished women and families.

The work of our movement is not done. Let us draw inspiration from Title VII’s 50th Anniversary and push ahead now to reach its intended goal – to create and protect workplaces in which all workers have a chance to contribute, participate, and flourish, no matter their sex.

Onward,

\textit{Noreen Farrell}

Executive Director
Equal Rights Advocates
October 9, 2014
For over 14 years, Equal Rights Advocates and co-counsel have represented women workers at Wal-Mart and Sam’s Club stores who are challenging practices that depress women’s wages in retail and many other sectors: Paying women less for the same work. Passing them over for raises and promotions in favor of men with less experience. Channeling women away from departments that offer better promotion opportunities (like hardware and electronics). Failing to post management openings. Despite presenting strong evidence of discrimination, the plaintiffs in *Dukes v. Wal-Mart* were denied the chance to prosecute their claims as a class. The repudiation of class claims in the Wal-Mart case — and others like it in recent years — has especially troubling implications for low-wage workers, who often must rely on collective action to bring about real change in their workplaces.
Fifty years after the passage of the Civil Rights Act of 1964, the fight for fair pay for women in the workplace remains fierce. Support for equal pay polls higher than ever. Women are persistently voicing concern about pay practices across industries, from former Goodyear Tire employee Lilly Ledbetter, whose pay discrimination case led to a law in her name, to former New York Times Executive Editor Jill Abramson, whose termination after she raised pay disparity concerns raised a firestorm. U.S. Census data confirms that the substantial gap between the average annual earnings of men and women working full time has barely budged over the past decade. This stubborn figure has sparked fierce debates over the pay ratio’s meaning and significance, prompted renewed calls for policy reform at the federal and state levels, and inspired women’s advocates to come together to identify innovative solutions and find ways to coordinate efforts to combat the gender wage gap at state and local levels. President Obama has thrown his weight behind fair pay, issuing executive orders on Equal Pay Day in 2014 to expand the Department of Labor’s power to collect compensation data and prohibit federal contractors from discriminating or retaliating against employees or applicants for discussing their pay.

When Title VII of the Civil Rights Act of 1964 was passed 50 years ago to prohibit, among other things, pay discrimination based on sex, the workplace was in dire need of reform. In 1960, close to 40 percent of women over the age of 16 were working outside the home, but newspapers still published separate job listings for men and women, explicitly categorizing jobs according to sex. Higher-level jobs were listed almost exclusively under “Help Wanted-Male,” and it was perfectly legal for employers to run ads for identical jobs under the male and female sections—but provide separate (and very unequal) pay scales.

Not until the passage of the Equal Pay Act (EPA) on June 10, 1963, which became effective on June 11, 1964, did it become illegal to pay women lower rates for the same job strictly on the basis of their sex. At the time of the EPA’s enactment, women working full time, year-round in the United States earned an average of less than 59 cents for every dollar earned by men—a number that hardly budged for the next 20 years. And when Title VII passed the following year, barring discrimination in employment “because of… sex,” employers could no longer legally refuse to hire women on the basis of their gender or formally relegate women to only lower-level positions.

Many advocates believed that the two-power punch of Title VII and the EPA would quickly knock out the gender wage gap caused by decades of blatant discrimination across all professions. Unfortunately, we remain distressingly far from that goal.

Women broke many barriers in the years following Title VII’s passage. They began participating in the workforce in greater numbers, charted new territory in fields previously closed, and began to march toward greater equity in pay. Slowly, but steadily, women’s share of income started to catch up with men’s.

But after a few decades of fairly steady progress, women’s march toward pay equity slowed and, in the mid-1990s, flattened out. Since the mid-’60s, the wage gap between men and women has been closing at an average rate of about half a penny a year. Women working full-time, year-round earn, on average, 78 cents for every dollar earned by men. And the gap is even worse for women of color, especially African Americans and Latinas. Full-time workers in these groups earned an average of just 64 and 56.5 cents, respectively, for every dollar earned by white, non-Hispanic men in 2013. If we continue to move at this pace, most women working today will not live or work long enough to see the wage gap close.

As we move beyond the 50th anniversary of Title VII, the lack of progress on closing the gender wage gap prompts consideration of the following questions:

- What has Title VII done to curb practices that contribute to the wage gap?
- How has Title VII failed to address the causes and factors contributing to the wage gap?
- What can be done, both within and beyond Title VII, to overcome these challenges?

Many factors contribute to the gender wage gap. This part of our report focuses on the segregation of women into lower-paying fields and jobs and the under-enforcement of Title VII due to pay secrecy, inadequate access to pay information, and other barriers.
Title VII’s Bright Spots: Progress in the Fight for Fair Pay

Title VII vastly improved upon the principle of equal pay for equal work established by the EPA by covering forms of discrimination affecting women’s earnings that were not covered by that law. It outlawed sex-based discrimination at all stages and in all aspects of employment, including hiring, promotion, and termination, enabling women to tackle a key contributor to the gender wage gap: their exclusion from higher-paying jobs within employers and industries. Under Title VII, an employee can challenge not only unequal pay between men and women performing substantially equal work, but also discriminatory practices that lead to unequal compensation, such as steering women to lower-paid jobs than men or maintaining “glass ceilings” (artificial barriers to the advancement of women that result in female workers earning less pay).

WHAT CONTRIBUTES TO THE GENDER WAGE GAP?

Many factors contribute to the gender wage gap, which is the average wage disparity between all full-time male and female workers, across jobs and industries:

- Women are paid less than men in nearly every occupation for the same work;
- Women are segregated into female-dominated jobs, which typically pay less than male-dominated jobs requiring similar skill and effort;
- Widespread pay secrecy policies prevent workers from discovering disparities;
- Discrimination relating to pregnancy and caregiving responsibilities depresses women’s pay;
- Wage theft (e.g., being paid less than the minimum wage or being forced to work off the clock) takes a hard hit on women, who comprise two-thirds of the minimum wage earners in this country.

Title VII’s capacity to narrow the wage gap was strengthened when courts recognized that the law prohibits employers from allowing gender stereotypes to influence employment decisions, even when those stereotypes are applied in the absence of a formal policy of discrimination against women. In the landmark case of Price Waterhouse v. Hopkins (1989), the Supreme Court held that discriminating against an employee based on her non-conformity to certain gender norms constituted actionable sex discrimination under Title VII. The plaintiff in that case had been denied partnership at the national accounting firm where she worked because she was deemed too “aggressive” and did not behave in the “feminine” way that some of her colleagues thought she should. Since Price Waterhouse, women have successfully used Title VII to challenge similar discriminatory practices that lead to the clustering...
of women into “pink-collar ghettos” – lower-status departments and lower-paid positions190 – within many occupations and across a wide variety of industries, from pharmaceutical sales191 to financial services192 to supermarkets.193

The strength of Title VII lies not only in its prohibition of employment practices that intentionally or expressly treat women worse than men because of their sex,194 but also in its bar of policies and practices that appear gender-neutral but have a disproportionately negative impact on women with respect to their pay or other terms and conditions of employment.195 Beginning in the late 1970s and early 1980s, courts began relying on Title VII to strike down facially neutral “requirements” that were excluding women (and racial minorities) from jobs but were not, in fact, job-related. Examples of such requirements include minimum height and weight standards that shut women out of many higher-paying jobs in traditionally male-dominated occupations and industries like correctional counseling,196 law enforcement,197 and bus driving198 for years after the passage of Title VII.

In 1977, for example, ERA settled Mueller v. Greyhound Lines West, a Title VII case challenging the bus company's policy of excluding qualified women from driver positions through the use of minimum height and weight requirements. The resolution of the case led to the elimination of those requirements and the establishment of female hiring goals.199

Over the decades, Title VII has also helped to ensure that strength and physical abilities tests used to screen and rank candidates in physically demanding occupations are actually related to job requirements and do not act as de facto bars to women obtaining those jobs.200 Just last year, women relied on Title VII to successfully challenge the Chicago Fire Department’s physical ability test, obtaining settlements that opened up those well-paid public-safety jobs to more women.201

Recent cases also illustrate Title VII's continued promise as a tool to challenge gender pay inequity within occupations that employ large numbers of women such as retail sales, where the gender wage gap is the largest among the 20 most common occupations for women.204 For example, women workers in Scott v. Family Dollar Stores205 recently relied on Title VII to challenge not only systemic intentional discrimination but also facially neutral pay and promotions policies that were having a disproportionately negative impact on women's earnings. These policies included a mandatory salary range for store managers that locked in prior pay disparities between men and women who held the same job.206

Title VII has helped women make significant progress in better-paying occupations that used to be highly male-dominated, such as mail carriers, photographers, physicians, dentists, and lawyers, which has helped to reduce the overall gap in men’s and women’s earnings.207 The law also has helped some women punch significant holes in the “glass ceiling” – the circumstances and conditions that block women’s advancement to higher-level leadership positions within the workplace.208 The percentage of “managers” who are women has risen from just 15 percent in 1960 to 40 percent in 2009.209 Moreover, today women fill more than half of all professional and management positions,210 though these higher-paying supervisory and management positions still manifest many of the largest pay differences between men and women.211

While Title VII has opened up new occupations and fields to working women, significant obstacles remain to achieving equality of opportunity and fair pay. We now turn to those barriers and blind spots, which are especially pronounced for low-wage women workers and women of color.

Title VII’s Blind Spots: Why Fair Pay Remains Elusive for Many Women

The continued disparity between men's and women's earnings results in the loss of hundreds of thousands of dollars over the average woman's lifetime.212 Recent research shows that the average woman loses more than $434,000 over her life due to the gender wage gap.213 Women of color are faring worse. The gender wage gap translates into annual losses of $18,650 for African-American women and $24,111 for Latinas.214

Closing the Gap by Breaking the Glass Ceiling

After the Dukes v. Wal-Mart suit was filed, the company stopped its widespread practice of allowing managers to selectively notify male employees about promotion opportunities. The company now posts job openings in its management-training program, in which employees must complete in order to advance into more high-paid management positions.
Title VII has not sufficiently dismantled the many employment practices and labor market conditions that contribute to the gender wage gap, particularly the segregation of women into lower-valued and lower-paid jobs. Enforcement barriers ranging from pay secrecy policies that hide discrimination to continued attacks on the class action device as a mechanism to prosecute Title VII cases leave low-wage women workers particularly vulnerable.

**Title VII Has Not Dismantled the Persistence of “Women’s Work.”**

Title VII has not stopped the overpopulation of women in “pink ghetto” jobs, nor has it ended the devaluation of women-concentrated fields, even when the jobs require the same levels of skill, education, effort, and experience as similar jobs dominated by men. Today, women remain clustered in lower-paying occupations and disproportionately concentrated in the lowest-paid positions across many segments and sectors of the labor market. The fact that women now comprise two-thirds of the minimum wage workforce is another sign that “women’s work” is widely undervalued.

Most working mothers in female-headed households are concentrated in low-wage jobs in the service and retail sectors, such as health aid, cashier, or maid, where workers’ pay rates hover close to the minimum wage and where typically no benefits, such as health insurance or paid sick days, are provided. Title VII has not been an effective tool to stop the funneling of women into these undervalued jobs and occupations, nor has it been able to change the fact that jobs predominantly held by women are consistently paid less than those predominantly held by men.

U.S. Census data confirms that many occupations which were highly female-dominated in the mid-to-late 1960s have stayed that way: over 95 percent of secretaries, dental hygienists and assistants, pre-kindergarten and kindergarten teachers, and child care workers are still female. While women continue to be overrepresented in clerical, service, and health-related occupations, many blue-collar and mechanical jobs, including supervisory positions, in industries like construction, transportation, and the “uniformed trades” (i.e., law enforcement and firefighting) remain extremely sex-segregated in the opposite way, with women comprising less than 5 percent of the workforce.

Overall, male-dominated occupations pay more than occupations of similar skill levels that are dominated by women. And while women’s median earnings are lower than men’s in nearly all occupations, whether performed predominantly by women, predominantly by men, or a more even mix of men and women, the fact that male-dominated occupations tend to pay more than those dominated by women is a major reason for the persistence of the gender pay gap. Because so much of “women’s work” continues to be devalued, these jobs attract few men – which, in turn perpetuates the overrepresentation of women in the lowest-paying occupations, like clerical positions in which some nine out of 10 employees are female.

As long as women and men continue to funnel into different fields and “women’s work” continues to be paid less than men’s, Title VII and other equal pay laws will remain limited in their capacity to close the gender wage gap.

**WHAT’S THE FIX?**

The doctrine of “comparable worth” posits that compensation for jobs chiefly held by women should be the same as for jobs filled chiefly by men if the jobs have equal value, even if the nature of work performed is not the same. Though not adopted by the courts, some states and other governmental entities have embraced the doctrine in setting wages for public employees. Research has shown that comparable worth policies can be effective in narrowing the gender wage gap, especially when they require more than a “one-shot” fix and instead call for regular assessments and adjustments to keep gender-based pay disparities in check. State and local governments, as well as private employers, should consider integrating comparable worth principles into existing compensation policies and guidelines. Employers should also develop tools to measure the effectiveness of their pay equity policies to close salary gaps between their employees.
Gender Stereotyping Continues to Exclude Women from Some Work.

Although Title VII has allowed women to make headway into certain industries and occupations that were previously closed to them entirely, women continue to be underrepresented at all levels of higher-paid, traditionally male-dominated occupations, particularly in leadership roles within those fields. From professional occupations like law, academia, and engineering, to blue-collar fields like the construction trades and mining, women in the United States continue to face entry barriers and steep uphill climbs to promotion and advancement in many fields.

For example, while the percentage of women in management jobs overall has increased in the decades since Title VII’s passage, women’s share of these leadership roles has not kept up with their rates of participation in the labor force overall. Women in the U.S. lag far behind women in most industrialized countries in this regard: one recent study that surveyed 6,700 business leaders found that the United States ranked in the bottom ten (37th out of 45 countries examined) for the percentage of women in senior management positions, with women occupying just 22 percent of those roles here – versus 41 percent of those roles in Russia.

Construction jobs provide another example. While construction is a significant part of the U.S. economy, with construction occupations accounting for over 5 percent of total civilian employment, women have consistently held only a tiny fraction of jobs in this field – only 2.6 percent of workers employed in “construction and extraction occupations” in 2013 were women. Women who do enter the trades commonly face sex discrimination and harassment, behaviors that may then exacerbate women’s exclusion from these occupations. These conditions persist despite Title VII’s express prohibition on sex-based discrimination and even though the federal government has mandated affirmative action to increase the employment of women by federal contractors and the enrollment of women in the apprenticeship programs that are the main pathway to employment in the skilled construction trades.

Gender stereotypes operate outside of traditionally male-dominated sectors as well. Extensive social, psychological, and organizational behavior research documents the ways in which unconscious racism and sexism, and consequent stereotyping, operate in employment decision-making. As former Secretary of Labor Robert B. Reich put it: “Subtle but pervasive patterns of discrimination dominate the public, private and nonprofit sectors of society because of a ‘myopia’ on the part of many white male managers who ‘unthinkingly discriminate’ without having any idea they are doing so.” Unfortunately, Title VII has not adequately dismantled these persistent and often hidden forms of gender bias that contribute to the exclusion of women from higher-paid jobs in male-dominated industries and occupations.
**WHAT’S THE FIX?**

- **Encourage employers in male-dominated industries to give women visible roles and ensure they have a voice in setting policies and making decisions about hiring, compensation, and promotion.** Women’s invisibility perpetuates stereotypes and bias, which then feeds into their continued exclusion from male-dominated fields. It also influences women’s pay.

- **Enact and fund legislation like the Women & Workforce Investment for Nontraditional Jobs Act, or the Women WIN Jobs Act, which would improve and expand the 17-year-old Women in Apprenticeship and Nontraditional Occupations (WANTO) program at the Department of Labor to help recruit, prepare, place, and retain women in all kinds of high-demand, high-wage nontraditional jobs.**

- **Open up girls’ access to education and training in traditionally male-dominated fields:** Increase STEM (science, technology, engineering, and mathematics) offerings and programs targeting children at younger ages and require each school to have a retention plan for keeping girls in STEM programs and classes as they continue through school.

- **Adopting policies that the encourage girls in STEM, including the Getting into Researching, Learning & Studying STEM Act of 2014, recently introduced by Congressman Jerry McNerney (CA).**

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**Title VII Does Not Eliminate or Prohibit Poverty Wages.**

As a result of occupational segregation and ongoing discrimination, women are disproportionately represented in the low-wage workforce in this country. In fact, women in the United States are twice as likely as men to be employed in occupations that pay poverty wages. And even though Title VII prohibits discrimination based on race as well as sex, the law unfortunately has not diminished the impact of race on the likelihood that women live – and work – in poverty: African-American and Latina women are even more likely than women as a whole to be employed in lower-paying service occupations and significantly more likely to be among the working poor. This is the case even though African-American women historically have had higher rates of labor force participation than white women and continue to have the highest labor force participation rate among all racial groups of women workers. Title VII was not designed to address the decreasing value of the minimum wage – which has failed to keep up with inflation or productivity gains. The diminishing value of the minimum wage disproportionately affects women, who make up nearly two-thirds of minimum wage workers, and especially black and Latina women, who are more than twice as likely as white men to work in jobs that pay at or below the minimum wage. Similarly, Title VII has not yet been used to attack the tipped minimum wage for restaurant workers and others in the service industry, which has been locked at the abysmal rate of $2.13 per hour for over 20 years. The tipped minimum wage hits women especially hard, since they comprise over two-thirds of the workers who rely on tips to make ends meet.

In addition, many female-dominated occupations, such as home health care and domestic service, have been historically excluded or exempted from laws that provide for minimum wages, overtime pay, and protection from discrimination. It is therefore not surprising that the gap in poverty rates between men and women workers is wider in this country than anywhere else in the Western world.

To make matters worse, low-wage working women are highly vulnerable to wage theft (e.g., failing to pay workers for all hours worked or failing to pay overtime pay for overtime hours). And, as a practical matter, when women are struggling to make ends meet and to support their families on poverty-level wages, it is that much more difficult for them to speak out against or pursue legal action to challenge employment practices that deny them fair pay.
Title VII Does Not Guarantee Access to the Information Needed to Challenge Discriminatory Hiring Practices

Several years ago, ERA investigated a company whose employment patterns at facilities across the country looked strikingly similar: in location after location, women were concentrated in administrative and office positions and were nearly absent from warehouse and driver positions, which paid substantially more. ERA found out that postings for those higher-paid jobs included a 100-lb. lifting requirement, even though longtime employees confirmed they could not recall ever having to lift such heavy loads. Meanwhile, the employer insisted that the segregation of its workforce was the result of self-selection: women simply did not apply for or want the higher-paid warehouse jobs. Though ERA suspected discrimination, the case proved to be very difficult. Without a lawsuit pending, the employer had no obligation to produce pay and hiring data to ERA, and the efforts to find deterred applicants to serve as plaintiffs hit a dead end. The outcome was frustrating but not atypical, given that most job seekers are reluctant to serve as plaintiffs in protracted litigation against a potential employer.

Social science evidence suggests that hiring discrimination plays a considerable role in keeping women out of certain jobs or channeling them into predominantly female, lower-paid positions. Recent studies have confirmed that, even today, employers in fields as diverse as science, classical music, and restaurants are less likely to hire and more likely to offer lower pay to female candidates than male candidates when shown identical resumes or presented with the same application materials.

Hiring is generally the earliest stage in the employment process at which an employer’s decisions and actions can be challenged as discriminatory, and Title VII prohibits any employment practice that intentionally or unintentionally segregates or discriminates against employees or job applicants based on sex. One would therefore expect to see it frequently used to challenge hiring practices and decisions that generate or perpetuate gender-based segregation in the workforce. But in fact, hiring discrimination complaints are relatively rare, comprising less than 1.8 percent of all sex discrimination charges with the EEOC between 2010 and 2013.

Hiring claims are uncommon because applicants lack the data they need to bring them. Prior to filing a case and conducting formal discovery, it is often not possible for an individual to find out whether the position was filled, who ultimately was hired, how much pay that person was offered, and who made or approved the hiring decision. Additionally, in today’s Internet age, many initial screening and even some hiring decisions are based on documents and social media searches rather than in-person interviews. This adds to the imbalance of information, which makes it difficult for workers to know whether they have been discriminated against. Challenging a pattern or practice of hiring discrimination that harms many women is even more challenging: absent costly class action litigation, it is often not possible to obtain the statistical data generally needed to show that women are substantially underrepresented in a given workforce, because employers are not legally required to maintain records about the bases or outcomes of every hiring decision or to make them publicly available.

Another reason why hiring cases remain relatively uncommon and difficult to prove is the rise of the “difference in interest” (or “lack of interest”) defense, which allows employers sued under Title VII to justify statistical differences in hiring patterns based on often untested or theoretical assumptions and generalizations about certain groups’ preferences and tendencies — assumptions that are themselves often based in gender and/or race stereotypes. A typical example of how this
defense has been applied to Title VII sex discrimination claims can be found in EEOC v. Sears, Roebuck & Co. In that case, saleswomen were concentrated in Sears’ apparel and cosmetics departments while the company’s higher-paying commission sales jobs were filled almost entirely by men. Deferring to the employer’s explanation for why few women had applied for these jobs, the Seventh Circuit concluded that women’s “lack of interest” explained the disparity.

WHAT’S THE FIX?
Increase Access to Pay Data
• Require employers that already file EEO-1 reports to maintain records and report on job applicants and pay rates, not just demographic breakdowns of their existing workforce. While federal contractors are required to collect demographic data on applicants, the large private employers who are required to submit demographic data about their employees to the EEOC each year (in the form of “EEO-1” reports) do not have to record or report applicant information. This could be changed.
• Empower the EEOC to investigate and follow up on the data it collects. Data on actual rates of pay provide more valid measures of an employer’s compensation policies and the impact of those policies on the distribution of earnings across the workforce as a whole. If the EEOC gathered actual payroll records and pay rate information, as opposed to merely collecting pay band data, its ability to monitor compliance with and rigorously enforce anti-discrimination laws with respect to compensation would be greatly enhanced. The EEOC should work in conjunction with the Office of Federal Contract Compliance Programs of the U.S. Department of Labor (OFCCP) to prepare a comprehensive plan for using earnings data so that it can effectively implement expanded data collection.

WHAT’S THE FIX?
Increase Use of Testers
• Give EEOC authority and funding to use testers in employment discrimination investigations to help fill the existing enforcement void. Because the scope of the EEOC’s legal authority to conduct testing investigations in the employment context is currently unclear, Congress should take action to ensure that the EEOC has the power to use and prosecute cases using testers under either its pattern-and-practice enforcement authority or its general power to investigate actions on behalf of individual charging parties, which goes beyond simply acting as a proxy for victims of discrimination. The EEOC also has a right of action to vindicate the public interest in preventing employment discrimination and to seek injunctive relief to prevent and eliminate unlawful employment practices. The EEOC could play an especially important role in bringing hiring cases because it may seek systemic relief for a class of employees under Title VII without satisfying the requirements for class certification under Federal Rule of Civil Procedure 23.

Pay Secrecy Impedes Title VII Enforcement by Employees and the EEOC.
Lack of information about employee wages also impedes enforcement of Title VII by individual workers and enunciates the EEOC, whose authority to collect and/or require disclosure of workforce compensation data from private employers is limited. Without access to such information, it is nearly impossible to identify discriminatory patterns and practices with regard to compensation.

Neither the EPA nor Title VII creates an affirmative right to obtain information about other employees – even where it would be necessary for a woman to determine whether she is being paid less than a similarly situated male colleague. Moreover, the federal law that protects some employees from retaliation for sharing or discussing salary information with other employees, the National Labor Relations Act, has loopholes that allow employers to penalize many employees who discuss their wages. Only a handful of states expressly prohibit employers from retaliating against employees who disclose their wages.
Title VII depends heavily on individuals enforcing their own rights by bringing complaints. Yet employers frequently discourage or prohibit their employees from inquiring about, discussing, or disclosing wage information with other employees. Poor access to
information about pay, coupled with employees’ general fear of losing their jobs or hurting their reputation at work if they inquire or complain about pay disparities, contributes to chronic under-enforcement of Title VII and other equal pay laws.  

**WHAT’S THE FIX? THE PAYCHECK FAIRNESS ACT**

The Paycheck Fairness Act, proposed federal legislation that has been rejected several times in recent years, would strengthen equal pay protections for workers in several important ways, including:

1. narrowing the catch-all defense of “any factor other than sex” defense to equal pay claims,
2. prohibiting employer retaliation against employees who share information about their pay,
3. making it possible to bring class actions under the EPA,
4. improving remedies available to workers who prove they were not paid equally, and
5. improving the collection of pay data by the EEOC, to enhance the federal government’s ability to detect violations of laws prohibiting pay discrimination and to take enforcement action.

Title VII Has Not Opened Up Pathways to the Courthouse for Low-Wage Women Workers.

As with other factors contributing to occupational segregation and the persistent gender wage gap, the under-enforcement of Title VII with respect to hiring and other employment practices has a particularly strong negative impact on low-wage women workers, who are disproportionately women of color. The enforcement void in hiring cases (the difference between the optimal and actual number of cases brought) is greatest with respect to those involving lower-skilled, entry-level jobs.

The enforcement void in cases challenging pay and hiring discrimination, which impedes women’s access to higher wage jobs, has become particularly acute recently as a result of troubling court decisions that have upheld mandatory forced arbitration of employment claims and weakened the ability of employees to collectively challenge discriminatory employment practices through class action lawsuits. Class actions serve a vital role in Title VII enforcement, especially for low-wage workers who fear retaliation if they act alone and who cannot afford to file individual cases. Often the victims of pay secrecy policies, many low-wage workers lack the information they need to detect patterns of discrimination before a class suit is filed.
For example, in the *Dukes v. Wal-Mart* case, it was only after ERA client Betty Dukes filed her lawsuit that she learned that women working at Wal-Mart stores across the country were paid less and denied promotions, despite having higher performance evaluations and more experience than their male co-workers. Particularly because class actions are often the only means by which low-wage workers can obtain injunctive relief to address widespread injustices, it is imperative to support policy reform that will ensure the longevity of this device that is so critical to Title VII's continued vitality.

**Conclusion**

Significant anniversaries of the Equal Pay Act and the Civil Rights Act have forced politicians, advocates, media pundits, and the general public to take notice of the sizeable gender wage gap which has not narrowed in a decade. A coordinated effort is needed to remove barriers to Title VII enforcement, advance new policies to strengthen our equal pay laws, and tackle the gender stereotypes that perpetuate occupational segregation and depress women's wages. We cannot afford to wait another 50 years for fair pay.

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### WHAT'S THE FIX?

**Support Legislation to Restore Class Action Rights**

After the Supreme Court's decision in *Dukes v. Wal-Mart* Stores came down, the Equal Employment Opportunity Restoration Act of 2012 (EEORA) was introduced to clarify and restore employees' right to challenge discriminatory employment practices as a group under Title VII and other civil rights laws. While efforts to enact the EEORA so far have not been successful, its passage would ensure that:

- Regardless of the size of the employer or number of employees involved, workers are once again able to band together to fight unlawful discrimination;
- Workers can join together to challenge discriminatory subjective employment practices, such as when unlawful bias systematically taints personnel decisions left to managers' discretion;
- Employers' written nondiscrimination policies are only considered as support for their defenses in cases where those policies are consistently and effectively implemented; and
- Courts can exercise discretion in setting the appropriate monetary relief due to victims of discrimination, a critical remedy under Title VII and other civil rights laws.

**Stop Mandatory Arbitration from Eviscerating Workers' Civil Rights**

Enforcement actions brought by workers stepping up as “private attorneys general,” either individually or as a group, are critical to Title VII's effectiveness in eradicating workplace discrimination. The spread of mandatory, forced arbitration and class action bars in the employment context poses a serious and growing threat to the continued vitality of many labor protections and civil rights laws by taking away workers’ ability to bring such actions in a public forum (the courts), or to bring them collectively anywhere. Congress should enact legislation, like the Arbitration Fairness Act, which would help to reverse this trend by making it unlawful for employers to impose forced arbitration on employees as a condition of getting or keeping their jobs.
Seizing the Moment: Summary of Part Three Recommendations

To address persistent unfair pay and promotion practices in the workplace, a broad set of measures and actions is needed to move women forward on this 50th Anniversary of the Civil Rights Act of 1964. These suggested actions will correct misinterpretations of Title VII, improve enforcement of this law and others designed to advance women at work, and fill policy gaps that leave too many without the help and protection they need to enjoy economic security and equal opportunity.

1. Policymakers should enact broad women’s economic security policy agendas at the federal and state levels, like the federal When Women Succeed, America Succeeds Agenda introduced by House Democrats and the recently-passed Minnesota Women’s Economic Security Act. The agendas should take a comprehensive approach with initiatives to meet the basic needs of women in poverty, raise income, open pathways to quality jobs, improve workplace fairness, and improve access to high quality and affordable child care.

2. Policymakers should reintroduce and pass the Paycheck Fairness Act, which would amend the Equal Pay Act to prohibit employers from retaliating against employees for discussing their pay. The PFA would also close loopholes in existing equal pay laws, improve the government’s ability to enforce those laws, and increase the remedies available to workers who prevail on equal pay claims.

3. Policymakers should take steps to ensure one fair wage for all workers by increasing the federal minimum wage and abolishing the tipped minimum wage, which is as low as $2.13 per hour in some states.

4. Policymakers should support legislation like the Women & Workforce Investment for Nontraditional Jobs Act, or the Women WIN Jobs Act, which would improve and expand the 17-year-old Women in Apprenticeship and Nontraditional Occupations (WANTO) program at the Department of Labor to help recruit, prepare, place, and retain women in all kinds of high-demand, high-wage nontraditional jobs.

5. Policymakers should pass the Pregnant Workers Fairness Act. This federal act would require employers to provide reasonable accommodations to pregnant employees unless doing so would pose an undue hardship to the business. The law would allow more women to keep their jobs without the interruptions that depress wages.

6. Policymakers should pass the Equal Employment Opportunity Restoration Act or similar legislation to eliminate some of the obstacles to class certification erected by recent Supreme Court and federal court decisions.

7. Policymakers should adopt legislation to ensure that more girls have access to education in STEM (science, technology, engineering, and math) fields. Bringing more women into these fields will reduce the gender wage gap.

8. The Department of Labor should enforce laws designed to ensure women’s equal access to and advancement opportunities in male-dominated construction trades. The DOL’s Office of Federal Contract Compliance Programs (OFCCP) should proceed with sex discrimination and affirmative action guidelines for federal contractors under Executive Order 11246, as these regulations have not been updated in over 30 years.

9. The Equal Employment Opportunity Commission should actively enforce laws prohibiting discrimination in hiring by using testers and other targeted strategies. The EEOC should also promote the reform necessary to require employers to provide more data in EEO-1 reports about demographic profiles of job applicants.
Seizing the Moment:
Summary of Part Three Recommendations

10. The Equal Employment Opportunity Commission should proceed with full implementation of the EEOC Strategic Enforcement Plan FY 2013-2016, which focuses on eliminating discriminatory hiring practices, combating discrimination against immigrant workers, fighting gender-based pay discrimination, and deterring workplace harassment.

11. Employers should adapt best practices around fair pay, basing pay decisions on objective and measurable criteria and be transparent about pay rates.

12. Employers should give women visible and leading roles in the workplace, ensuring that women have a voice in setting policies and making decisions about hiring, compensation, and promotion. Women's invisibility perpetuates stereotypes and bias, which exacerbate their exclusion from male-dominated fields and their underrepresentation in positions of leadership and authority across many industries and occupations.

13. Employers should support workers’ rights to organize and act together so they can promote fair workplaces.
Endnotes

Executive Summary

1 The original draft of Title VII of the Civil Rights Act of 1964 would have prohibited workplace discrimination on the basis “race, color, religion, or national origin.” See, e.g., Louis Menand, The Sex Amendment, The NEW YORKER (July 21, 2014), http://www.newyorker.com/magazine/2014/07/21/sex-amendment. Two days before the bill went to a vote in the House of Representatives, the amendment to add sex was introduced by Representative Howard W. Smith, a Democrat from Virginia who was vocally opposed to civil rights for African-Americans. See Robert C. Bird, More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination in the 1964 Civil Rights Act, 3 Wm. & Mary J. Women & L. 137, 150 (1997) (citing 100 Cong. Rec. 2577). While there are several theories about why Smith introduced the sex amendment, it is undisputed that Representative Martha Griffiths’ passionate defense of it contributed to its passage in the House. id. at 139-40, 155-56; see also United States House of Representatives History, Art & Archives, Griffiths, Martha Wright, http://history.house.gov/People/Listing/G/GRIFFITHS-Martha-Wright-%28G000471%29/ (last visited July 31, 2014).


4 600 F.2d 211 (9th Cir. 1979).

5 890 F.2d 1438 (9th Cir. 1989) (affirming consent decree).

6 603 F.3d 571 (9th Cir. 2010), rev’d, 131 S. Ct. 2541 (2011).


9 See U.S. Dep’t of Labor, Bureau of Labor Statistics, supra note 7, at Table 1 (Black and Latina women are more than twice as likely as white women to be living in poverty and more than twice as likely as white men to work in jobs that pay at or below the minimum wage).


14 Latina pregnant women/new mothers, for example, were fired or laid off at nearly double the rate of their white counterparts, and African Americans at nearly one and a half times the rate of their white counterparts. id. at 11, Table 7 (data from 2006-2008).

15 Pregnant women or new school districts—those likely to work in lower-wage jobs—are three times more likely than more educated women workers to be fired upon the birth of their first child. Ann O’Leary, How Family Leave Laws Left Out Low-Income Workers, 29 BERKELEY J. EMP. & LAB. L. 1, 7 (2007).


17 See Diane M. Houston & Gillian Marks, The Role of Planning and Workplace Support in Returning to Work After Maternity Leave, 41 BRITISH J. OF INCL. REL. 197, 199 (2003).


Part Three: A Gender Wage Gap That Just Won’t Close


172 U.S. Senator Barbara Mikulski and Congresswoman Rosa DeLauro reintroduced the Paycheck Fairness Act, S. 84, 113th Cong., on January 23, 2013 (five months before the EPA’s anniversary). See http://www.mikulski.senate.gov/media/pressrelease/1-23-2013-1.cfm. Legislators tried to force a vote on the bill around the time of Equal Pay Day in April – the day in 2013 when the average woman’s earnings finally caught up to the average man’s earnings in 2012 – but were blocked by House Republicans, who voted unanimously against the motion to bring the bill up for a vote. See Laura Bassett, Paycheck Fairness Act Vote Blocked by House GOP, HUFFINGTON POST, April 11, 2013 (updated April 12, 2013), http://www.huffingtonpost.com/2013/04/11/paycheck-fairness-act_n_3063804.html.


176 Not until 1973 did the Supreme Court actually bar employers’ use of sex-segregated “Male Help Wanted” and “Female Help Wanted” columns


179 Women’s labor force participation rate peaked at 60 percent in 1999 but dropped to 58.1 percent by 2011. See Bureau of Labor Statistics, supra note 109, at 1. Women’s earnings as a percentage of men’s also stopped growing, and in recent years they have begun to shrink. The Institute for Women’s Policy Research summarized the overall trend in recent decades:

Progress in closing the gender earnings gap, based on both weekly and annual earnings, has slowed considerably since the 1980s and early 1990s. Based on median weekly earnings, the gender earnings gap narrowed by only 1.7 percentage points during the last ten years (2004 to 2013); in the previous ten year period (1994 to 2003), it narrowed by 3.1 percentage points, and during the ten years prior to that (1984 to 1993), by 9.7 percentage points. Based on median annual earnings, progress in closing the gender earnings has also slowed considerably. If the pace of change in the annual earnings ratio were to continue at the same rate as it has since 1960, it would take until 2058 for men and women to reach parity.

Hegewisch, supra note 18.

180 The Equal Pay Act provides, in pertinent part, that:
No employer having employees subject to any provisions of [the minimum wage sections of the Fair Labor Standards Act of 1938] shall discrimi-
inate, within any establishment in which such employees are employed, between employees 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 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, 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; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.


185 See, e.g., Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 336 (N.D. Cal. 1992) (finding that “sex discrimination was the standard operating

186 42 U.S.C. § 2000e-2 provides that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race color, religion, sex, or national origin.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

187 Depending on the facts of the case, such practices may fall under either or both sections 703(a)(1) and 703(a)(2) of Title VII. See 42 U.S.C. § 2000e-2(a)(1) & (a)(2); Compensation Discrimination in Violation of Title VII, ADEA, or ADA, 2 EEOC Compl. Man. (BNA) at N:915.003 (Dec. 2000), http://www.eeoc.gov/policy/docs/compensation.html. For a study finding that discrimination by employers tends to steer women into lower-paying occupations and men into higher-paying occupations, see David Neumark et al., Sex Discrimination in Restaurant Hiring: An Audit Study, 111 Quarterly J. of Econ. 915-42 (1996).

188 See Dothard v. Rawlinson, 433 U.S. 321, 327-32 (1977) (striking down Alabama Penitentiary System’s minimum height and weight requirements to limit, segregate, or classify employees or applicants for employment by sex).


194 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973), was the first Supreme Court case to define the phrase “because of” as used in Title VII and to set out the burdens and method of proof for an individual disparate treatment case under the law. Since 1973, all federal courts have adopted the order and allocation of proof set forth in McDonnell Douglas for claims of disparate treatment discrimination that are not based on “direct evidence” of discriminatory intent. Id.: see also Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146-49 (2000) (both affirming McDonnell Douglas and addressing the burdens of proof in disparate treatment cases under Title VII).

195 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (applying disparate impact framework in race discrimination case and holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”); see also Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (“Title VII prohibits both intentional discrimination (known as ‘disparate treatment’) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as ‘disparate impact’).”)

196 See Dothard v. Rawlinson, 433 U.S. 321, 327-32 (1977) (striking down Alabama Penitentiary System’s minimum height and weight requirements for correctional counselors where there was no evidence correlating these traits to strength).

197 See Blake v. Los Angeles, 595 F.2d 1367, 1370-71 (9th Cir. 1979) (striking down height requirements used by the Los Angeles Police Department because the requirements were not job-related and had a disparate impact on women).
Notably, it was during the years immediately following these landmark suits, from the 1980s to early 1990s, that the gender wage gap shrank the fastest. See Hegewisch, supra note 18 (noting that the gender earnings gap narrowed by only 1.7 percentage points between 2004 and 2013, compared to 3.1 percentage points in the previous ten-year period (1994 to 2003) and 9.7 percentage points during the ten years prior to that (1984 to 1993)).


See, e.g., Equal Emp’t Opportunity Comm’n v. Dial Corp., 469 F.3d 735, 742-43 (8th Cir. 2006) (striking down a strength test for sausage factory workers where the test was not job-related, finding that it was more physically demanding than the actual job and had a gross disparate impact on women); Legault v. Russo, 842 F. Supp. 1479, 1486-87 (D.N.H. 1994) (striking down physical agility test used by fire department where designer admitted that it favored men because it emphasized upper body strength and fire department could not show that it was job-related).


See Ariane Hegewisch & Stephanie Keller Hudbruck, Inst. for Women’s Policy Research, Fact Sheet #C414: The Gender Wage Gap by Occupation, 2013 3 (Apr. 2014), http://www.iwpr.org/publications/recent-publications (noting that the gender earnings ratio for full-time “retail salespersons” in 2013 was 67.5 percent, corresponding to $234 dollars less per week for women).


In their amended complaint, the Scott plaintiffs allege that such policies and practices include, among other things: “a mandatory salary range for Store Managers set annually by the corporate headquarters, which locks in prior disparities between male and female Store Managers’ compensation;” a policy of allowing only corporate Vice Presidents to grant exceptions above the salary range, coupled with a pattern or practice of granting these exceptions “disproportionally in favor of men;” an annual pay raise percentage set by corporate headquarters that corresponds to performance ratings, to which Regional Managers and Divisional Vice Presidents grant “significantly greater” exceptions above the pay raise percentage to men; “built-in headwinds” in the form of corporate-imposed compensation criteria for Store Managers that have a disparate impact on women; and a “dual-system of compensation” policy structured to pay less to persons promoted internally to Store Manager positions than to persons hired from outside the company, which disfavors women. See Scott, 733 F.3d at 110.


See National Equal Pay Task Force, supra note 207, at 6 (citing U.S. Census Bureau data).

Id. (citing Bureau of Labor Statistics data).

Id. at 7, n.21.

See Stephen J. Rose & Heidi Hartmann, Inst. for Women’s Policy Research, Still a Man’s Labor Market: The Long-Term Earnings Gap 9 (2004) (noting that when aggregated over a 15-year period comprising women’s prime earning years, women earn only 38 percent of what men earn); see also Linda Babcock & Sarah Leschever, Women Don’t Ask: Negotiation and the Gender Divide (Princeton University Press 2003) (finding that a 7.6 percent starting pay disparity of $4,000 between a hypothetical male and female employee, followed by 3 percent annual raises, would evolve into a $15,000 annual disparity by age 60, resulting in the loss of a total of $361,171 to the female worker over the course of her employment life, and the gain of over $568,834 by the male employee, assuming he earns just 3 percent interest on the difference).


219 See Hegewisch et al., supra note 207.

220 Moss, supra note 190, at 3 n.12 (citing Christine Jolls, Accommodation Mandates, 53 Stan. L. Rev. 223, 293 Table 3 (2000)).

221 See Hegewisch et al., by supra note 207. Interestingly, this phenomenon is particularly acute in jobs requiring higher educational levels. Id.

222 **Weekly Earnings by Gender Composition of Jobs**

<table>
<thead>
<tr>
<th>Male-Dominated Occupations (75% or more male)</th>
<th>Mixed Occupations (25.1-74.9% female)</th>
<th>Female-Dominated Occupations (75% or more female)</th>
<th>Wage Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low-skilled</td>
<td>$553</td>
<td>$435</td>
<td>$408</td>
</tr>
<tr>
<td>Medium-skilled</td>
<td>$752</td>
<td>$735</td>
<td>$600</td>
</tr>
<tr>
<td>High-skilled</td>
<td>$1,424</td>
<td>$1,160</td>
<td>$963</td>
</tr>
</tbody>
</table>

Id.

224 See Hegewisch & Hudibrug, supra note 204, at 2 (in 2013, women comprised 90 percent of full-time workers in two of the most common clerical occupations, “secretaries and administrative assistants,” and “receptionists and information clerks”).

225 Marianne DelPo Kulow, Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Law—A Necessary Tool for Closing the Gender Wage Gap, 50 Harv. J. on LEGIS. 385, 412-413. Under a comparable worth theory, instead of basing employees’ wage rates on prevailing market forces or ad hoc, subjective criteria, employers would use objective criteria to compare and rank the skills, efforts, responsibilities, and working conditions required for different jobs and then “raise the wages of workers in all jobs or in female-dominated jobs deemed to be underpaid on the basis of the evaluation.” See Elizabeth J. Wyman, The Current Framework of Sex/Gender Discrimination Law: The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine, 55 Me. L. Rev. 23, 49 (2003).

226 See, e.g., American Nurses’ Ass’n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986) (“An employer … that simply pays the going wage …, and makes no effort to discourage women from applying for particular jobs or to steer them toward particular jobs, would be justifiably surprised to discover that it may be violating federal law because each wage rate and therefore the ratio between them have been found to be determined by cultural or psychological factors attributable to the history of male domination of society.”); Fed’n of State, Cnty., & Mun. Emp. v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985) (“Neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job. Other considerations may include the availability of workers willing to do the job and the effectiveness of collective bargaining in a particular industry.”); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (rejecting “comparable worth” theory); see also Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 771 (7th Cir. 2007) (collecting cases that have rejected the “comparable worth” theory).


228 See Bryce Covert, The Radical Movement to Close the Gender Wage Gap That You’ve Never Heard Of, Think Progress (May 1, 2014), http://thinkprogress.org/economy/2014/05/01/3433335/pay-equity-gender-wage-gap/.

229 A “male-dominated” industry or occupation is generally defined as one that contains 25 percent or fewer women in total employment. See Catalyst, Women in Male-Dominated Industries and Occupations in U.S. and Canada (Mar. 2013), http://www.catalyst.org/knowledge/women-male-dominated-industries-and-occupations-us-and-canada#footnoterel1_47mo3uo; see also Hegewisch & Hudibrug, supra note 204, at 1 (defining “male-dominated occupations” as “those in which at least three of four workers are men”).

230 U.S. Equal Emp’t Opportunity Comm’n, Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector 5-6 (2004), http://www.eeoc.gov/eeoc/statistics/reports/glassceiling/index.pdf (noting that while the percent of women officials and managers in the private sector went up from just over 29 percent in 1990 to 36.4 percent in 2002, women’s representation in the labor market overall increased to 48 percent in the same time period).


236 A large body of legal scholarship is devoted to discussing these studies and how these findings have been or could be applied to Title VII cases and other employment discrimination litigation. See, e.g., Judge Nancy Gertrn & Melissa Hart, Implicit Bias in Employment Discrimination Litigation (University of Colorado Law School, Legal Studies Research Paper Series, Working Paper No. 12-07, June 7, 2012); Tristin K. Green, The Radical Movement to Close the Gender Wage Gap That You’ve Never Heard Of, Think Progress (May 1, 2014), http://thinkprogress.org/economy/2014/05/01/3433335/pay-equity-gender-wage-gap/; Benjamin Oppenheimer, Negligent Discrimination, 141 U. Pa. L. Rev. 899, 902-15 (1993).
245 See U.S. Dep’t of Labor, Women’s Employment During the Recovery 5 (May 3, 2011), http://www.dol.gov/_sec/media/reports/FemaleLabor-

246 See Bureau of Labor Statistics, supra note 188, Table 1 (reflecting that Black and Latina women are more than twice as likely as white women to participate in the labor force, compared to 57 percent of White, Latina/Hispanic, and Asian women). However, in 2012, Latina/Hispanic women surpassed Black women as a percentage of the overall workforce, representing 13.7 percent of employees (compared with Black women at 12.8 percent and Asian women at 4.7 percent). See id. at Table 3; see also U.S. Dep’t of Labor, Women’s Bureau Fact Sheet, The Economic Status of Women of Color: A Snapshot (2013), http://www.dol.gov/whd/media/reports/WB_WomenColorFactSheet.pdf.


248 See Nat’l Women’s Law Ctr., supra note 214, at 1.

249 See Bureau of Labor Statistics, supra note 188, Table 1 (reflecting that Black and Latina women are more than twice as likely as white women to be living in poverty and more than twice as likely as white men to work in jobs that pay at or below the minimum wage).

250 See Drew Desilver, Pew Research Ctr., 5 Facts about the Minimum Wage (Dec. 4, 2013), http://www.pewresearch.org/fact-tank/2013/12/04/5-


254 Annette Bernhardt et al., Nat’l Emp’t Law Project, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities 30-35 (2009), http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1. In addition to finding that female-dominated industries like child care, domestic service, and garment manufacturing had the highest rates of minimum wage and overtime violations, this seminal study of nearly 4,500 low-wage workers in several cities found that undocumented immigrant women suffer these violations at nearly twice the rate of undocumented immigrant men, and more than 2.5 times as often as U.S. citizen women. Id. at 5.


259 However, the “point of entry” in some jobs, such as the skilled trades (occupations in which women continue to be vastly underrepresented) may start even earlier, at the apprenticeship stage. Under the National Apprenticeship Act of 1937, 29 U.S.C. § 50 et seq., apprenticeship programs registered with the U.S. Department of Labor and state apprenticeship programs registered with recognized state apprenticeship agencies are


261 See Debbie Reed et al., Mathematica Policy Research, An Effectiveness Assessment and Cost-benefit Analysis of Registered Apprenticeship in 10 States (July 25, 2012).

262 See Hegewisch & Hudibrug, supra note 204, at 4.

263 See Bureau of Labor Statistics, supra note 188, Table 1 (reflecting that Black and Latina women are more than twice as likely as white women to be living in poverty and more than twice as likely as white men to work in jobs that pay at or below the minimum wage).

264 See Drew Desilver, Pew Research Ctr., 5 Facts about the Minimum Wage (Dec. 4, 2013), http://www.pewresearch.org/fact-tank/2013/12/04/5-


267 See Bureau of Labor Statistics, supra note 188, Table 1.

268 See Rest. Opportunities Ctrs. United, Tipped Over the Edge, supra note 12.

269 Id.
prohibited from discriminating, and required to undertake affirmative action, on the bases of race, color, religion, national origin, and sex. To the extent that an apprenticeship program is part of an employer’s or union’s employment training activities, it is also covered by Title VII. See 42 U.S.C. § 2000e-2(d).


262 To establish a prima facie case of discriminatory failure to hire under Title VII, a plaintiff must show that: (1) she belonged to a protected class; (2) she applied and was qualified for a job for which applicants were sought; (3) despite being qualified, she was rejected; and (4) the position remained open with applications sought from persons having the plaintiff’s qualifications. See McDonnell Douglas, 411 U.S. at 802; accord Morgan v. Fed. Home Loan Mortgage Corp., 328 F.3d 647, 650 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 325 (2003).


264 See, e.g., Butler v. Home Depot, 1997 U.S. Dist. LEXIS 16296, *22-27 (N.D. Cal. Aug. 29, 1997) (denying summary judgment and finding plaintiffs presented sufficient evidence to raise an inference of a pattern or practice of discrimination against women in hiring and promotions by relying on a combination of statistical, sociological, and anecdotal evidence); Stender, 803 F. Supp. at 336 (holding that even where group members fall into stereotypical gender patterns and are uninterested in certain positions, the employer must not discriminate against employees whose interests deviate from the stereotype). Evidence showing a discriminatory or male-dominated work environment and/or that individual women faced discriminatory treatment by the employer – for example, evidence that managers or other decision-makers expressed stereotypical views about women – can support an inference or finding that the employer considered women to be less qualified for certain (traditionally male-dominated) jobs. See Butler 1997 U.S. Dist. LEXIS 16296, at *24.

265 For a comprehensive critique of the interest defense as it has been applied in gender discrimination cases, and the Sears case in particular, see Vicki Schultz, Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1752-54 (1990); see also Harold S. Lewis & Elizabeth J. Norman, Employment Discrimination Law & Practice 236 (2d ed. 2004) (arguing that the “self-selection” premise often works to the plaintiffs’ advantage when an employer asserts a “lack of interest” defense but the actual numbers of hiring disparities contradict the employer’s theoretical estimates about who was interested in the position). See also EEOC v. Gen. Telephone Co. of Northwest, Inc., 885 F.2d 575, 581 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990) (rejecting the majority’s approach in Sears and finding that the decision conflicted with both the purpose of Title VII and holdings of other circuits).

266 EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 322 (7th Cir. 1988).

267 Id.


271 See General Tel. Co. v. EEOC, 446 U.S. 318, 325-26 (1980) (“The private action rights under § 706(f)(1) suggest that the EEOC is not merely a proxy for the victims of discrimination[,]”); accord EEOC v. Hacienda Hotel, 881 F.2d 1504, 1510-12 (9th Cir. 1989).

272 See 42 U.S.C. § 2000e-5(f)(1); Gen. Telephone Co. v. EEOC, 446 U.S. at 326 (“When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”). Section 707(f)(2) of Title VII also establishes that, when a charge is filed and the EEOC concludes on the basis of preliminary investigation that prompt judicial action is necessary to carry out the purposes of Title VII, the agency may bring an action for appropriate temporary or preliminary relief pending final disposition of the charge. 42 U.S.C. § 2000e-5(f)(2).


275 Indeed, EEOC Chair Jacqueline Berrien has acknowledged that the lack of access to “employer-specific pay data broken down by demographic category” (including gender) is a “significant barrier” to the agency’s work to eradicate the “largely invisible” problem of pay discrimination. See Nat’l Research Council, Comm. on Nat’l Statistics, Collecting Compensation Data from Employers 1-6 (Aug. 15, 2012).

276 Under current law employers with 100 or more employees and all government contractors with 50 or more employees and at least $50,000 in contracts must file annual Employment Information (EEO-1) Reports, reporting demographic data about their employees, categorized by race/ethnicity, gender, and job category. See 42 U.S.C. § 2000e-8; 29 C.F.R. § 1602.7. Subsection 2000e-8(e) prohibits the EEOC from
making public the employment data derived from its compliance surveys. This rule against disclosure does not apply to federal government prime contractors or first-tier subcontractors, but all requests for that data must go through the U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP). See EEOC, EEO-1 Frequently Asked Questions, Is EEO-1 data confidential?, http://www1.eeoc.gov/employers/eeo1survey/faq.cfm?renderforprint=1 (last visited July 18, 2014).

277 The Uniform Guidelines on Employee Selection Procedures (UGESP), used by courts to determine if unlawful hiring practices were the basis of a discrimination claim, could help to establish the categories of information sought by an expanded EEO-1 survey. See Society for Human Resource Management, Applicant Tracking: Should all employers collect demographic data on applicants and employees? If so, when? (March 12, 2012), http://www.shrm.org/templatetools/hrqa/pages/shouldemployerscollectdemodataonappsandemployees.aspx.


279 In February 2014, President Obama issued a memorandum directing the Department of Labor to establish new regulations requiring federal contractors to submit data on compensation paid to their employees, including breaking down the data by gender and race. See The White House, Office of the Press Secretary, Presidential Memorandum — Advancing Pay Equality Through Compensation Data Collection (Apr. 8, 2014), http://www.whitehouse.gov/the-press-office/2014/04/08/presidential-memorandum-advancing-pay-equality-through-compensation-data.


284 See supra notes 243-244.


287 See, e.g., Catherine Fisk & Erwin Chemerinsky, The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion, 7 DUKE J. CONST. LAW & PUB. POL’Y 73, 96 (2011) (“The class action is an integral part of the enforcement scheme under both state and federal wage and hour law. In an area of law beset by under enforcement, especially in low-wage sectors, to remove the class action would be to eliminate the only effective mechanism for effectuating these statutes.”).


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