

**AMERICAN BAR ASSOCIATION
COMMISSION ON WOMEN IN THE PROFESSION**

Commission on Mental and Physical Disability Law
Commission on Sexual Orientation and Gender Identity
Coalition on Racial and Ethnic Justice
Section of Individual Rights and Responsibilities
Section of Intellectual Property
Section of Litigation
Senior Lawyers Division
Tort Trial and Insurance Practice Section
Bar Association of San Francisco
Beverly Hills Bar Association
National Conference of the Administrative Law Judiciary
National Conference of Women's Bar Association
National Lesbian, Gay, Bisexual and Transgender (LGBT) Bar Association
New York County Lawyers Association
New York State Bar Association
Philadelphia Bar Association
Standing Committee on Legal Aid and Indigent Defendants

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress to enact legislation that would
 2 provide more effective remedies, procedures and protections to those subjected to pay
 3 discrimination, including discrimination on the basis of gender, and would help overcome the
 4 barriers to the elimination of such pay discrimination that continue to exist. Such enhanced
 5 remedies and procedures should include:

- 6
- 7 1. Allowing prevailing plaintiffs to recover compensatory and punitive damages in Equal
 8 Pay Act ("EPA") cases;
 - 9
 - 10 2. Enabling an EPA lawsuit to proceed as a class action pursuant to Rule 23(b)(3) of the
 11 Federal Rules of Civil Procedure;
 - 12
 - 13 3. Prohibiting employers from retaliating against employees for sharing salary information;
 - 14

- 1 4. Permitting an employer to assert an affirmative defense in an EPA action, only where the
2 pay differential between men and women is not related to gender, is related to job
3 performance, and is consistent with business necessity;
4
- 5 5. Allowing wage comparisons between female and male employees in facilities within the
6 same county or similar political subdivision, not merely within the same facility;
7
- 8 6. Enhancing the United States Equal Employment Opportunity Commission's ability to
9 collect and survey pay data from employers; and
10
- 11 7. Reinstating the United States Department of Labor's collection of gender-based data in
12 the Current Employment Statistics Survey.

Report

For decades, the American Bar Association (“ABA”) has strongly opposed discrimination in employment based on race, gender, national origin, and other characteristics irrelevant to individual merit; supported strong enforcement of the civil rights laws; and sought appropriate remedies for victims of discrimination. The anti-discrimination laws that the ABA has endorsed have resulted in extraordinary advances for women in the workplace, and there is much progress to celebrate.

Evidence demonstrates, however, that sex discrimination is still far too pervasive in the workplace and that current anti-discrimination laws are inadequate to address the persistent barriers that women face in employment, in both the private and public sectors. In particular, the promise that women will receive equal pay for equal work – first guaranteed to them in the Equal Pay Act of 1963 (29 U.S.C. § 206(d)) - - has never been fully realized.

The House of Representatives has already passed, and the Senate is presently considering, the Paycheck Fairness Act (S. 182/H.R. 12), which would amend the Fair Labor Standards Act of 1938 (“FLSA”) to provide more effective remedies and procedures for those subject to sex-based wage discrimination, and require the federal government to be more proactive in combating wage disparities. The Paycheck Fairness Act would strengthen the Equal Pay Act of 1963 (“EPA”) by closing certain loopholes that have prevented the EPA from fulfilling Congress’ intent to eliminate discrimination in the payment of wages on the basis of sex.¹ For example, under the pending bill, women who are victims of sex-based wage discrimination would be able to recover compensatory and punitive damages and could also participate in a Rule 23(b)(3) opt-out class action lawsuit. Such remedies are not presently available to those who file EPA lawsuits, even though they are afforded to those who suffer wage discrimination based on race or national origin. Thus, the Paycheck Fairness Act would place victims of sex-based wage discrimination on the same legal footing as others who experience wage discrimination.

It is vitally important that the ABA speak out to support appropriate legislation strengthening the EPA as a means to realize Congress’s intent to eradicate sex-based wage discrimination and achieve the promise of “equal pay for equal work.”

I. SEX-BASED DISPARITIES IN PAY STILL PERSIST

As former ABA President Karen Mathis has written, “America’s fight against workplace discrimination in the last 50 years is an important piece of social and legislative progress. It is the clear goal of Congress, and of society, to make sure that able workers doing the same work are paid equitably regardless of race, sex, or other demographic trait.”² Nonetheless, significant disparities persist between the earnings of women and men, with one study finding that over the course of a career, women earn hundreds of thousands of dollars less than their male counterparts

¹ H.R. 12, Sec. 3 (a), 111th Cong. (2009).

² Karen J. Mathis, *Op-Ed: Congress Needs to Make Its Intent Clear: Equal Pay for Equal Work*, June 1, 2007, available at <http://www.abanet.org/abanet/media/oped/oped.cfm?releaseid=140>.

as a direct result of wage discrimination.³ Notwithstanding the passage of the EPA more than 45 years ago, women in 2008 earned on average only 77 cents for every dollar earned by men.⁴ This differential gets larger as women get older and also increases as women gain more education.⁵ Also, women of color experience even greater pay disparities. In 2008, the median usual weekly earnings for white men were \$825, African-American women \$554, Asian women \$753, and for Hispanic women, \$501.⁶ Moreover, the wage gap between women and men exists across a wide spectrum of occupations, including the legal profession,⁷ at every educational level, and in every State and the District of Columbia.⁸

Wage disparities are of particular concern in light of the present economy, especially for families headed by single parents, 8 of 10 of which are headed by women.⁹ Yet, the median income of female-headed families with children is 57% less than the median income of all families with children.¹⁰ Moreover, wage disparities undermine women's benefits and retirement security, which are often tied to salary.

Congress has recognized the importance to the economy of eliminating these pay disparities. Indeed, the Paycheck Fairness Act passed by the House of Representatives specifically finds that the elimination of pay discrimination based on sex would "substantially reduc[e] the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance," and "promot[e] stable families by enabling all family members to earn a fair rate of pay."¹¹

II. SEX DISCRIMINATION IS A SIGNIFICANT FACTOR IN THE WAGE GAP

Despite the arguments that have sometimes been made, the wage gap cannot be explained solely as the result of "women's choices" in career and family matters. Although the issue is complex, numerous authoritative studies demonstrate that discrimination is a significant factor in

³ Jessica Arons, Center for American Progress Action Fund, *Lifetime Losses: The Career Wage Gap* (December 2008) at 2, 7 available at http://www.americanprogressaction.org/issues/2008/pdf/equal_pay.pdf (finding that a significant career wage gap exists no matter where women live, with the smallest gap being in Vermont, where the median gap, added up across 10-year age groups, equals \$270,000. In 15 states, the disparity tops \$300,000; 22 states pass \$400,000; and 11 states have career gaps over \$500,000).

⁴ U.S. Census Bureau, Current Population Survey, 2009 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2008 – People 15 Years Old and Over by Total Money Earnings in 2008, Age, Race, Hispanic Origin, and Sex, available at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/014227.html.

⁵ http://www.americanprogress.org/issues/2009/01/wage_gap_numbers.html.

⁶ Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2008 (2009)*, available at <http://www.bls.gov/cps/cpswpm2008.pdf>.

⁷ According to the Institute for Women's Policy Research, the median weekly earnings of female lawyers are only 80.5% of those of their male counterparts. Institute for Women's Policy Research, *The Gender Wage Gap by Occupation* (April 2009) at 4, available at <http://www.iwpr.org/pdf/C350a.pdf>.

⁸ National Women's Law Center, *Congress Must Act to Close the Wage Gap for Women: Facts on Women's Wages and Pending Legislation* (April 2009), at 2, available at <http://www.nwlc.org/pdf/PayEquityFactSheetFinal.pdf>.

⁹ U.S. Census Bureau, *Families and Living Arrangements: 2006 (2007)*.

¹⁰ National Women's Law Center, *Women Hit by Economic Downturn Need Quick and Targeted Assistance*, (January 28, 2008), at 1, available at <http://www.nwlc.org/pdf/WomenStimulusFactsheet.pdf>

¹¹ H.R. 12, Sec. 2, 4(C) (ii) and (iii).

the persistent wage gap.¹² A 2003 study by the U.S. General Accounting Office found, for example, that even when all the key factors that influence earnings are controlled for – demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure – women still earned, on average, only 80 percent of what men earned in 2000.¹³ Thus, a 20 percent pay gap remains that cannot be explained or justified other than as a result of sex discrimination. Another extensive study that examined the pay gap between men and women found that about one-half of the wage gap is due solely to the individual's gender.¹⁴

Significantly, the wage gap begins when women first enter the workforce, even before factors such as professional experience, family, or parenthood could be expected to have an impact. In fact, just one year after graduating from college, female graduates working full-time earn only 80 percent of the salary of their similarly educated male peers. Among part-time workers the gap is even larger, with women earning only 73 percent of their male colleagues' salary.¹⁵

Bolstering the conclusions of these studies, numerous recent cases illustrate the prevalence of sex-based wage discrimination. For example, in *EEOC v. Woodward Governor Company*, a federal judge approved a \$2.6 million settlement in a class action lawsuit against Woodward Governor Company for sex discrimination with respect to pay, promotions and training.¹⁶ In December 2008, the Court of Federal Claims found in favor of a plaintiff who had filed an EPA claim against a federal government agency and awarded \$466,000 in back pay and liquidated damages.¹⁷

III. THE EPA PROVIDES INADEQUATE PROTECTION AGAINST SEX-BASED WAGE DISCRIMINATION

The EPA amended the Fair Labor Standards Act and was signed into law by President Kennedy in 1963. The EPA was the first major anti-discrimination statute passed by Congress, and made it illegal for employers to pay unequal wages to men and women who perform substantially equal work. As the Supreme Court has recognized, the Act was designed:

to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the

¹² See, e.g., Council of Econ. Advisors, *Explaining Trends in the Gender Wage Gap* (1998).

¹³ U.S. General Accounting Office, *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2*, GAO-04-35 (Oct. 2003), available at <http://www.gao.gov/new.items/d0435.pdf>.

¹⁴ See Kimberly Bayard, Judith Hellerstein, et al., *New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data*, 21 *J. Labor Economics* 887, 904 (2003).

¹⁵ Judy Goldberg Day and Catherine Hill, *American Association of University Women Educational Foundation, Behind the Pay Gap* (2007), at 10, available at <http://www.aauw.org/research/upload/behindPayGap.pdf>

¹⁶ Press Release, *Judge Approves Settlement of Job Bias Lawsuits Against Woodward Governor* (Feb. 20, 2007), available at <http://eoc.gov/press/2-20-07.html>.

¹⁷ *Cooke v. United States*, 85 Fed. Cl. 325 (Ct. of Fed'l Claims, Dec. 22, 2008).

same.' . . . The solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages.'¹⁸

Congress's intent to ensure equal pay for equal work has not been achieved because the effectiveness of the law has been diluted virtually since its enactment. The EPA predates Title VII and other major civil rights laws that further informed Congress's understanding about how to construct effective anti-discrimination statutes. Also, some courts have watered down the effectiveness of the EPA through restrictive interpretations of the law. Consequently, contrary to Congress' intent, the EPA simply fails to provide effective protection against sex discrimination in compensation.

Under the EPA, an individual subject to wage discrimination must make out a *prima facie* case by establishing that "an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility; and which are performed under similar working conditions.'"¹⁹ This is a demanding standard, which has been further heightened by the stringent proof courts have required for EPA plaintiffs to demonstrate that they perform work equal to that performed by their male colleagues with whom they are being compared for pay purposes. As one appellate court emphasized, a plaintiff's showing under the EPA

is harder to make than the *prima facie* showing [in other cases]. . . because it requires the plaintiff to identify specific employees of the opposite sex holding positions requiring equal skill, effort and responsibility under similar working positions [sic] who were more generously compensated.²⁰

Even if a plaintiff meets this demanding standard, an employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses – that is, that the employer has set the challenged wages pursuant to: "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."²¹

A. Courts Have Undermined the Substantive Standards of the EPA

1. Courts Have Narrowed the Scope of the "Establishment" Requirement

As an element of their *prima facie* case, plaintiffs making EPA claims must demonstrate that a wage disparity exists between employees of the same "establishment".²² Generally, courts define an "establishment" as "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business."²³ Courts

¹⁸ *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

¹⁹ *Id.* at 195.

²⁰ *Ingram v. Brink's, Inc.*, 414 F.3d 222, 232 (1st Cir. 2005) (citations omitted).

²¹ 29 U.S.C. § 206(d)(1).

²² *Id.*

²³ *Ingram v. Brink's, Inc.*, 414 F.3d at 232 (citing 29 C.F.R. § 1620.9).

“presume that multiple offices are not a ‘single establishment’ unless unusual circumstances are demonstrated.”²⁴ But this interpretation precludes the comparison of wages paid in different facilities or offices of the same employer even where the plaintiff has shown, as is required by the elements of the *prima facie* case, that the employer is paying workers different wages for the same work.²⁵ The inability to compare salaries between different facilities is particularly problematic in the case of managers or supervisors, where there are often no similarly situated employees of the opposite sex at the plaintiff’s work location. Courts’ unwillingness to allow EPA plaintiffs to compare their wages to those of male employees performing the same work at other physical locations thus can preclude plaintiffs from making out a *prima facie* case even where the employer does in fact pay them less than similarly situated male employees in other nearby office buildings.

2. Courts’ Broad Interpretations of the “Factor Other Than Sex” Defense Have Created Loopholes in the Law

The first three of the affirmative defenses specified by the EPA -- that a pay disparity is based on a seniority system, a merit system, or a system that bases wages on the quantity or quality of production – are relatively straightforward and have been applied with reasonable consistency by the courts. However, the defense that a pay differential is based on a “factor other than sex” has been interpreted by some courts in a manner that has undermined the fundamental principles of the Act.

In *Corning Glass Works v. Brennan*, the Supreme Court explicitly rejected the use of “market forces” – that is, the value assigned by the market to men’s and women’s work, or the greater bargaining power that men have historically commanded – as a justification for sex-based wage disparities.²⁶ Nevertheless, employers have continued to argue, and some courts have continued to accept, a “market forces” theory to justify pay differentials. For example, in *Merillat v. Metal Spinners, Inc.*, the court endorsed the theory that the different market forces that influence the hiring of a male or female employee – including the prevailing wages specified in trade journals – was a “factor other than sex” sufficient to justify a wage differential.²⁷

Some courts have gone a step further, even permitting employers to raise *any* factor that is not explicitly sex-based, no matter how tangentially the factor is related to a job, as a justification for unequal pay for equal work. The Seventh Circuit, for example, has explicitly stated that it “does not require that the factor other than sex be related to the requirements of the particular position in question, or that it be a ‘business-related reason.’”²⁸

²⁴ *Meeks v. Computer Ass’n Int’l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (citing 29 C.F.R. § 1620.9(a)).

²⁵ See e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).

²⁶ *Corning Glass Works*, 417 U.S. at 205. See also *Siler-Khodr v. Univ. of Texas Health Science Ctr. San Antonio*, 261 F.3d 542, 549 (5th Cir. 2001) (noting that “This court has previously stated that the University’s market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA.” (citations omitted)).

²⁷ *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, n6 (7th Cir. 2006).

²⁸ *Fallon v. State of IL*, 882 F.2d 1206, 1211 (7th Cir.1989) (citing *Covington v. Southern Illinois University*, 816 F.2d 317, 321-22 (7th Cir.1987)).

B. The Law Does Not Protect Employees from Retaliation for Discussing Their Wages

Because pay scales are often confidential, pay discrimination can be particularly difficult to detect. Compounding the problem, significant numbers of employers discourage, and may even prohibit, the sharing of salary information between employees. As a result, workers are often unaware that they are being paid unequally. For example, Lilly Ledbetter was paid less than her male co-workers for years but did not realize it because a company policy prohibited her from discussing her pay with her co-workers. She discovered the pay discrimination only when a colleague sent her an anonymous note informing her of the disparity. According to the Supreme Court, by that time it was too late for her to sue under the EPA.²⁹

C. The Remedies and Procedures of the EPA Are Inadequate

The goals of the EPA are also substantially undermined by the limitations set on the remedies that are available to plaintiffs. Although plaintiffs who successfully challenge wage disparities based on race or ethnicity are entitled under other anti-discrimination laws to receive full compensatory and punitive damages, plaintiffs who prevail in suits alleging sex-based wage discrimination under the EPA can obtain only back pay and, in limited cases where a willful violation is proven, liquidated damages as well.

These limitations have multiple effects. First, the ultimate award of damages for sex-based wage discrimination may be insufficient to adequately compensate the plaintiff. In fact, limits on remedies penalize those who are the most seriously injured -- plaintiffs who suffer the greatest injury as a result of discrimination are the ones most likely to end up not being fully compensated for their losses.

Moreover, these limitations undermine the deterrent effect of the EPA. Limits on the amount for which employers can be liable create perverse incentives, allowing employers to decide that the cost of an adverse verdict in an EPA suit may be less than the savings created by wage discrimination. This defeats the Congressional intent to deter employers from engaging in wage discrimination on the basis of sex.

The EPA's class action procedures are also inadequate to protect women employees whose employer has engaged in systemic wage discrimination. Class actions are important because they ensure that relief will be provided to all who are similarly injured by an unlawful practice. But under the EPA, which was enacted prior to the adoption of Rule 23 of the Federal Rules of Civil Procedure, plaintiffs are required to take affirmative steps to opt *in* to a class action lawsuit. This is unlike other civil rights claims, governed by Rule 23(b)(3), where class members seeking damages are automatically considered part of the class unless they choose to opt *out*. This difference is significant, subjecting EPA plaintiffs to a substantial burden that can

²⁹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Subsequent to the *Ledbetter* decision, the ABA passed a resolution urging Congress to overrule it legislatively. (ABA Report No. 302, August 2007). In January 2009, Congress passed the Lilly Ledbetter Fair Pay Act and President Obama signed it into law. Pub. L. No. 111-2.

dramatically reduce participation in wage discrimination class actions and, once again, frustrating Congressional intent to incentivize employers to provide equal pay for equal work.

D. The Federal Government Has Not Had The Ability To Enforce The EPA Effectively

The federal government has not had the resources and information necessary to challenge violations of the EPA and to effectively monitor employer compliance with its requirements. For example, the federal government currently lacks any means to collect data on employer pay scales and the wages paid to categories of employees based on their race, national origin and gender. In fact, although the Department of Labor established an Equal Opportunity Survey in 2000 to collect compensation data from federal contractors broken down by race, sex, and ethnicity, the Department failed to implement the Survey and ultimately rescinded it altogether in 2006.³⁰ The collection and analysis of such data would have enabled the Office of Federal Contract Compliance Programs ("OFCCP") to detect and remedy wage discrimination and EPA noncompliance.³¹ It also would have improved the likelihood of voluntary compliance by providing employers with a useful tool for self evaluation and accountability.

IV. THE PAYCHECK FAIRNESS ACT REMEDIES THE DEFICIENCIES OF THE EPA

A. The Paycheck Fairness Act Clarifies the Substantive Standards of the EPA

1. The Paycheck Fairness Act Clarifies the "Establishment" Requirement

In order to remedy the courts' overly restrictive interpretation of the "establishment" requirement, the Paycheck Fairness Act clarifies that the "establishment" provision of the EPA allows for reasonable comparisons between female and male employees within clearly defined geographical areas to determine fair wages.³² This sensible change will allow plaintiffs who are being paid less for substantially equal work to bring claims under the EPA which might otherwise have been precluded under current case law.

³⁰ Dept. of Labor Affirmative Action Programs Rule, 41 C.F.R. § 60-2.18 (2009).

³¹ Marc Bendick, Jr., John J. Miller, *et al.*, *The Equal Opportunity Survey: Analysis of a First Wave of Survey Responses* (Bendick & Egan Economic Consultants, Inc., Sept. 2000).

³² The Paycheck Fairness Act defines an "establishment" to include "employees [who] work for the same employer at workplaces located in the same county or similar political subdivision of a State." H.R. 12, Sec. 3(a) (C). The legislation explicitly provides that the definition of establishment "shall not be construed as limiting broader applications of the term 'establishment' consistent with rules prescribed or guidance issued by the Equal Employment Opportunity Commission."

2. The Paycheck Fairness Act Closes Judicial Loopholes Relating to the “Factor Other Than Sex” Defense

Under the Paycheck Fairness Act, an employer relying on the “factor other than sex” defense must show that: (1) the defense is based on a *bona fide* factor, such as education, training or experience, that is not based upon or derived from a sex-based differential; (2) the factor is job-related for the position in question; and (3) the factor is consistent with business necessity. Furthermore, the defense will not apply if the employee can demonstrate that an alternative employment practice exists that would serve the same business purpose without producing a pay differential and that the employer has refused to adopt the alternative. These reasonable changes rely on concepts with which employers are familiar since they mirror the requirements under Title VII.³³

3. The Paycheck Fairness Act Expands Anti-Retaliation Provisions

The Paycheck Fairness Act clarifies that employees are protected from retaliation if they make a charge, file a complaint or participate in any way in a government-initiated or employer-initiated investigation, or if they have served or plan to serve on an industry committee. The Paycheck Fairness Act would also prohibit retaliation against employees who inquire about employers' wage practices or disclose their own wages. Significantly, however, employees whose "essential job functions" involve access to wage information, such as human resources personnel, will be prohibited from disclosing wage information of other employees except in limited circumstances. Such employees are not protected from retaliation if they disclose wage information to individuals who would not otherwise have access to the information, unless the disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding or hearing.

B. The Paycheck Fairness Act Conforms the Remedies and Procedures of the EPA to Those Available Under Other Civil Rights Laws

1. The Paycheck Fairness Act Allows Prevailing Plaintiffs to Recover Compensatory and Punitive Damages

The Paycheck Fairness Act puts victims of sex-based wage discrimination on an equal footing with those who experience wage discrimination based on race or national origin, for whom compensatory and punitive damages are already available.

³³ Under the comparable Title VII “business necessity” standard, an employer must demonstrate that a practice is job-related for the position in question and consistent with business necessity. The final question in the business necessity analysis is whether the employer rejected an alternative employment practice that would both have a less disparate impact and satisfy its legitimate business interest. This standard is familiar to employers and courts, since it has been judicially applied since first announced in 1971 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and was expressly codified in the Civil Rights Act of 1991.

Moreover, providing compensatory and punitive damages to victims of sex-based wage discrimination will not unduly burden employers. In employment discrimination cases based on race or national origin – where such damages are already available – there have not been egregious damage verdicts. The damage awards provided in cases brought under Section 1981 show that juries are using reason and calculated judgment to provide fair redress to those who are the victim of discrimination.³⁴ This is, in part, due to the numerous existing limitations in current law that guard against improperly high verdicts. Punitive damages are awarded only if the employer acted with “malice or reckless indifference” to the plaintiff’s federally protected rights—a standard the Supreme Court has construed very explicitly and narrowly in *Kolstad v. American Dental Assoc.*³⁵ Additionally, a trial judge or appeals court can reduce or vacate any jury award that that is deemed excessive. Finally, there are constitutional limitations, rooted in the Due Process Clause and the requirement that a defendant be on notice regarding the severity of potential penalties, on the amount of punitive damages that a plaintiff can receive.³⁶

2. The Paycheck Fairness Act Allows EPA Cases to Proceed as Opt-Out Class Actions

The Paycheck Fairness Act would provide more effective remedies to combat systemic sex-based wage discrimination. Women who seek to bring class actions under the EPA will be afforded the choice of proceeding with an opt-out class action, like those who have experienced wage discrimination on the basis of race or national origin.

C. The Paycheck Fairness Act Strengthens The Government's Enforcement Mechanisms

1. The Paycheck Fairness Act Reinstates Pay Equity Programs and Enforcement at the Department of Labor

The Paycheck Fairness Act reinstates the collection of gender-based data in the current Equal Opportunity Survey. It sets standards for conducting systematic wage

³⁴ *Pavon v. Swift Transportation Co.*, 192 F.3d 902 (9th Cir. 1999) (affirming jury award of \$250,000 in compensatory damages and \$300,000 in punitive damages as not excessive in light of the evidence); *Brown v. Hillcrest Foods, Inc.*, 2006 U.S. Dist. LEXIS 85090 (W.D.N.C. 2006) (affirming jury award of \$70,000 for emotional pain and mental anguish and \$250,000 in punitive damages because of employer’s overall ‘indifference’ regarding compliance with federal anti-retaliation/anti-discrimination laws).

³⁵ 527 U.S. 526 (1999).

³⁶ In *BMW of North America Inc. v. Gore*, the Supreme Court explained that whether a lack of notice renders a punitive damages award excessive and therefore unconstitutional is determined by: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

discrimination analyses by the OFCCP. Additionally, it directs the implementation of the Equal Opportunity Survey, thereby facilitating the enforcement of the EPA.

2. The Paycheck Fairness Act Improves the Collection of Pay Information

The Paycheck Fairness Act requires the Equal Employment Opportunity Commission ("EEOC") to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. This data will enhance the EEOC's ability to detect violations and improve enforcement of the EPA.

3. The Paycheck Fairness Act Establishes Salary Negotiation Skills Training

The Paycheck Fairness Act would create a competitive grant program to develop salary negotiation training for women and girls.

V. RELEVANT ABA POLICIES

In 1965, the ABA adopted a policy of not discriminating against any person because of race, color, creed or national origin. In 1972, the ABA strongly condemned all forms of discriminatory hiring practices within the legal profession, whether on the basis of gender, religion, race or national origin. In 1972 and again in 1974, the ABA urged ratification of the Equal Rights Amendment to the Constitution.

In 1988, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession. The ABA affirmed the fundamental principle that there is no place in the profession for barriers to the full integration and equal participation of women in all aspects of the legal profession, and the Association called upon members of the legal profession to eliminate such barriers.

In 1995, the ABA endorsed legal remedies and voluntary actions that allow race, national origin, or gender to be taken into account as a factor in order to eliminate or ameliorate discrimination. And in 1998, the House of Delegates urged Congress to provide resources sufficient to enable the EEOC to carry out its Congressionally-mandated duties to investigate, conciliate and, where appropriate, take legal action to enforce laws prohibiting discrimination in an effective, fair and efficient manner.

In 2007, the ABA House of Delegates approved a report urging Congress to pass the Lilly Ledbetter Fair Pay Act to overturn the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* The Paycheck Fairness Act, which builds on the momentum of the Lilly Ledbetter Fair Pay Act, seeks to further the same fundamental goals, which the ABA has supported for decades in its mission to eradicate discrimination in the workplace.

VI. CONCLUSION

The EPA is of fundamental importance in our nation's efforts to eradicate wage discrimination. The intent of Congress to eradicate sex-based wage discrimination in 1963 has not yet been fulfilled, as women continue to earn significantly lower pay than men for equal work. The EPA has not worked as Congress originally intended, and therefore certain improvements and modifications to the law are necessary to provide more effective protection and remedies to those subjected to pay discrimination on the basis of their gender. Such modifications are the necessary next step to ensure that women will finally receive equal pay for equal work.

Respectfully submitted,
Roberta D. Liebenberg, Chair
ABA Commission on Women in the Profession
February 2010

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: The Commission on Women in the Profession

Submitted By: Roberta D. Liebenberg, Chair, Commission on Women in the Profession

1. Summary of Recommendation(s).

The recommendation urges Congress to enact legislation that would provide more effective remedies, procedures and protections to those subjected to pay discrimination, including discrimination on the basis of gender, and would help overcome the barriers to the elimination of such pay discrimination that continue to exist.

2. Approval by Submitting Entity.

The Commission on Women in the Profession has approved the submission of this recommendation.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In 1965, the ABA adopted a policy of not discriminating against any person because of race, color, creed or national origin. In 1972, the ABA strongly condemned all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race or national origin. In 1972 and again in 1974, the ABA urged ratification of the Equal Rights Amendment to the Constitution.

In 1988, the Association recognized that the persistence of overt and subtle barriers deny women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession. The ABA affirmed the fundamental principle that there is no place in the profession for barriers to the full integration and equal participation of women in all aspects of the legal profession, and the Association called upon members of the legal profession to eliminate such barriers.

In 1990, in response to a Supreme Court decision narrowly construing the statute of limitations applicable to claims of discrimination in seniority systems, the Association

urged adoption of legislation to “restore [the Civil Rights Laws] to their status” before the decisions, that is, to provide that the statute of limitations could run from the time an employee is injured by a seniority system.

In 2007, the Association adopted a policy urging Congress to enact legislation amending Title VII of the Civil Rights Act of 1964, to provide that in cases involving discrimination in pay, the statute of limitations from each payment reflecting a disparity attributable to the alleged discrimination, rather than from the initial decision to discriminate.

5. What urgency exists which requires action at this meeting of the House?

On January 9, 2009, the House of Representatives passed the Paycheck Fairness Act (S. 182/H.R. 12) which would amend the Fair Labor Standards Act of 1938 ("FLSA") to provide more effective remedies and procedures for those subject to sex-based wage discrimination, and require the federal government to be more pro-active in combating wage disparities. The Paycheck Fairness Act would strengthen the Equal Pay Act of 1963 ("EPA") by closing certain loopholes that have prevented the EPA from fulfilling Congress' intent to eliminate discrimination in the payment of wages on the basis of sex. The legislation is before the Senate.

6. Status of Legislation. (If applicable.)

See above.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

The Report and Recommendation was referred to the Section of Individual Rights and Responsibilities on October 16, 2009; the National Lesbian, Gay, Bisexual and Transgender (LGBT) Bar Association, the Council for Racial and Ethnic Diversity in the Educational Pipeline, the ABA Commission on Sexual Orientation and Gender Identity, and the Commission on Mental and Physical Disability Law on November 2, 2009; the Beverly Hills Bar Association on November 16, 2009; and the Section of Litigation on November 17, 2009, all of whom agreed to cosponsor. The Report and Recommendation also was referred to the Chairs and Directors of all ABA entities, the presidents of state, local and specialty bar association, and other interested parties and individuals.

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

Roberta D. Liebenberg
 Fine, Kaplan and Black, R.P.C.
 1835 Market Street
 Suite 2800
 Philadelphia, PA 19103
 Phone: 215-567-6565
rliebenberg@finekaplan.com

James R. Silkenat
 Sullivan & Worcester LLP
 1290 Avenue of the Americas
 New York, NY 10104
 Phone: 212 660 3052
jsilkenat@sandw.com

Fatima Goss Graves
 Vice President for Education and Employment
 National Women's Law Center
 11 Dupont Circle, NW, Ste 800
 Washington, D.C. 20036
 Phone: 202-588-5180
fgraves@nwlc.org

Estelle H. Rogers
 3252 S St NW
 Washington, DC 20007-2944
 Phone: 202-337-3332
estellerogers@comcast.net

11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

Roberta D. Liebenberg (PA) 267-249-8051, rliebenberg@finekaplan.com
 James R. Silkenat (NY) 917-626-215, jsilkenat@sandw.com
 Estelle Rogers (DC) 202-352-3197, estellerogers@comcast.net

EXECUTIVE SUMMARY

1. Summary of the Recommendation

The recommendation urges Congress to enact legislation that would provide more effective remedies, procedures and protections to those subjected to pay discrimination, including discrimination on the basis of gender, and would help overcome the barriers to the elimination of such pay discrimination that continue to exist.

2. Summary of the Issue that the Resolution Addresses

Evidence demonstrates that sex discrimination is still far too pervasive in the workplace and that current anti-discrimination laws are inadequate to address the persistent barriers that women face in employment, in both the private and public sectors. In particular, the promise that women will receive equal pay for equal work – first guaranteed to them in the Equal Pay Act of 1963 (29 U.S.C. § 206(d)) - - has never been fully realized.

3. Please Explain How the Proposed Policy Position will Address the Issue

The Paycheck Fairness Act (S. 182/H.R. 12) would amend the Fair Labor Standards Act of 1938 ("FLSA") to provide more effective remedies and procedures for those subject to sex-based wage discrimination, and require the federal government to be more pro-active in combating wage disparities. The Paycheck Fairness Act would strengthen the Equal Pay Act of 1963 ("EPA") by closing certain loopholes that have prevented the EPA from fulfilling Congress' intent to eliminate discrimination in the payment of wages on the basis of sex.

4. Summary of Minority Views

The Commission is not aware of any formal opposition at this time.