

4-17-2012

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Recommended Citation

Joanna L. Grossman, *The Lady in Red: Equal Pay Day and the Continuing Problem of Gender-Based Pay Discrimination* Verdict (2012)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/944

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Verdict

April 17, 2012

Joanna L. Grossman

The Lady in Red: Equal Pay Day and the Continuing Problem of Gender-Based Pay Discrimination



You may not even know that today is a holiday. It's neither a federal holiday, nor one made up by Hallmark to sell cards. Today is Equal Pay Day, a day designated by the National Committee on Pay Equity (<http://www.pay-equity.org>) (NCPE) since 1996 to signify how long into a new year—the date is usually mid-April—a woman must work to earn what her male counterparts had already earned by the end of the previous year. Equal Pay Day also falls on a Tuesday, to signify when men need to start every workweek to end up with the same pay as women by the end of that week. And today, we should all be wearing red, the official color of Equal Pay Day, to signify that women's paychecks are "in the red."

Equal Pay Day is one of many reminders that pay discrimination remains an important source of gender inequality—one that threatens women's independence and financial security throughout their entire working lives and into retirement. Women continue to make less than 80 cents for every dollar men make, a disparity that cannot be accounted for by labor force commitment, voluntary job choices, or time off to care for children. Indeed, virtually every economist who has crunched the numbers, regardless of his or her ideological slant or background, has concluded that the gender wage gap is at least partially created by pay discrimination—which means paying women less to do the same job simply because they are women.

Despite the entrenched reality of the wage gap, efforts to close it have been largely unsuccessful. And people like Wisconsin Governor Scott Walker (who may well, as my co-columnist John Dean argues (<http://verdict.justia.com/2012/04/06/good-luck-wisconsin-youve-got-a-classic-authoritarian-governor>), have a troubling "classic authoritarian" personality) would be happy to see it grow larger. Walker just signed into a law a bill repealing the state's 2009 Equal Pay Enforcement Act (EPEA), which had allowed employees to seek damages in state court for gender-based pay discrimination. In this column, I'll consider the current status of the gender wage gap, some of the obstacles to remediation of pay discrimination claims, and efforts to bolster (or inhibit, as in Wisconsin) women's right to equal pay.

The Persistence of the Gender Wage Gap

The gender wage gap—the fact that women earn less than men—is a persistent and well-documented reality in the United States. Researchers disagree about the size of the wage gap, but not about its existence or significance. Most estimates hold that a woman, on average, earns less than 80 cents for every dollar a man earns. The wage gap is much larger for African-American women and Latina women, who earn even less than white women do, when compared with white men.

The wage gap exists at every level of earnings. The percentage gap is highest at the top of the spectrum—female “physicians and surgeons” earn only 63 percent compared with men in the same category—but it is perhaps most significant at the bottom of the spectrum, where even the male wage is startlingly low.

The gap between men’s and women’s wages lasts throughout the employment lifecycle. Indeed, it grows over time. Middle-aged women are earning even less, relative to their male counterparts, than they were at the beginning of their careers. When earnings over a multi-year period are aggregated, the gap seems even more striking. One study found that in their fifteen prime earning years, women earned only 38 percent of what men earned.

As women have increased their labor force commitment, shouldn’t this gap have disappeared? One might think so, but the numbers do not reflect this. Although the wage gap has narrowed from the 1970s measure of 59 cents on the dollar to today’s 75-80 cents on the dollar, the bulk of the change occurred in the 1980s and little progress has been made since. (A [chart compiled by NCPPE \(http://www.gao.gov/new.items/d1210.pdf\)](http://www.gao.gov/new.items/d1210.pdf) shows how slow the progress has been in reducing the wage gap.)

Explaining the Wage Gap: Discrimination Clearly Plays a Role

According to an article in The Daily Beast, the lead supporter of the effort to repeal Wisconsin’s EPEA, state senator Glenn Grothman, insists that any wage gap that exists between men and women can be explained entirely by women’s greater involvement in childrearing, at the expense of their careers. In a two-lawyer marriage, Grothman speculates, the male lawyer is “working 50 or 60 hours a week, going all out,” while the female lawyer is taking “time off,” raising kids, and “not go, go, go.” When the male lawyer ends up with a \$200,000 salary, while the female lawyer ends up with a \$40,000 salary, this is, Grothman suggests, because there was “a different sense of urgency in each person.”

Grothman also conjectures that men and women have different goals in life, which can also explain the wage gap: “[M]oney is more important for men,” he argues. In support of his wild conjecture, Grothman cites Ann Coulter, who he claims has “looked at this” and proven that marriage, and the gender-role divisions that ensue, explains the entirety of the wage gap.

Coulter’s baseless reassurances aside, every economist who has examined wage gap data has concluded that it persists to some degree even when all plausible explanations are controlled for. Accordingly, no reasonable person can come to any valid conclusion but one that holds that some portion of the gap must be attributed to pay discrimination.

For example, part of the wage gap is sometimes attributed to differing degrees of labor force attachment between men and women. (This is another way to phrase Grothman’s theory that men care more about money and jobs, while women care more about raising children.) Yet, women who work year-round and full-time during at least 12 of 15 consecutive years still earn only 64 percent of what men with a similar attachment to the labor force earn.

Likewise, differences in the number of hours worked also fail to explain the gender disparity in wages. Hour-for-hour, women earn less than men.

Differences in educational attainment provide similarly little by way of explanation. The wage gap only goes down a percent or so when comparing men and women with similar levels of college education.

Even in the aggregate, these differences do not explain the bulk of the wage gap. When studies simultaneously control for multiple variables such as education, occupation, hours worked, and time away from the workplace

because of family care responsibilities, a significant gender gap still remains.

Beyond the statistical analyses, other evidence also supports the persistence of pay discrimination. Studies have shown, for example, that employers penalize women for expected leave-taking beyond the leave most women actually take. There is also a well-documented “wage premium” for married men—probably reflecting the assumption that married men are more stable and have an incentive to work harder to provide for their families—and, correspondingly, a wage penalty for women with children, regarding the converse assumptions that are applied to such women as a class (they will prioritize children first, work second).

The EEOC, which enforces federal anti-discrimination laws including Title VII and the Equal Pay Act, collects millions every year from employers in administrative proceedings that are brought to challenge pay discrimination. Major companies have settled multi-million-dollar lawsuits for pay discrimination. In fiscal year 2011, the EEOC collected \$23 million in settlements of Equal Pay Act claims. (EEOC statistics are available [here \(http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm\)](http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm).)

For all these reasons, there is absolutely no question that pay discrimination still exists, nor any question that it has harmful effects on women. Even a small pay disparity early in a career can blow up into an enormous one over time, particularly when raises are doled out as a percentage of salary.

Pay Discrimination Law: The Equal Pay Act

A public service announcement from the late 1960s (available [here \(http://www.youtube.com/watch?v=Mtq9RHRDWuA\)](http://www.youtube.com/watch?v=Mtq9RHRDWuA) on YouTube) tunes in to Batman and Robin tied up while a bomb ticks ominously in the background.

Fortunately, Batgirl barges in. Batman yells, “Quick, Batgirl, untie us before it’s too late.” But Batgirl tells them, “It’s already too late. I’ve worked for you a long time, and I’m paid less than Robin.”

“Holy discontent,” says Robin, surprised by Batgirl’s uppity remark. As for Batman, he tells Batgirl that this is “no time for jokes.” Batgirl persists: “It’s no joke. It’s the federal equal pay law: Same employer means equal pay for men and women.” Now, Batgirl has Robin’s attention; he exhorts, “Holy Act of Congress!” But Batman is not so impressed and tries to put Batgirl off, asking if we can “talk about this later.”

The scene ends as the narrator asks: “Will Batgirl save the dynamic duo? Will she get equal pay? Tune in tomorrow or contact the wage and hour division listed in your phone book under the U.S. Department of Labor.”

The law that is being advertised in this clip is the centerpiece of the federal effort to eradicate pay discrimination. Enacted in 1963, the Equal Pay Act guarantees equal pay for equal work for men and women who do the same job for the same employer.

The Equal Pay Act is an important source of protection against pay discrimination. A plaintiff may challenge an ongoing violation of the Equal Pay Act at any time, and may seek recovery for the prior two years of discrimination (or three years, if the violation is “willful”).

The Act, however, has some limitations. For example, it allows for several affirmative defenses even when unequal pay is proven. One such affirmative defense is based on the contention that the wage gap is due to “a factor other than sex.” And what can count as such a factor has been broadly construed to include factors that are themselves the product of sex discrimination sometimes such as prior salary.

Moreover, an employee cannot win an Equal Pay Act claim without a comparator—that is, an actual man to whom she can point who is working for the same employer, doing the same job, and earning more than she is. A woman who holds a unique job in a workplace, or simply holds a job that is not the exact equivalent of any job performed in that workplace by a higher-earning man, will have no hope of prevailing under the Equal Pay Act, even if it can clearly be proven that the employer paid her less because of her sex.

The Equal Pay Act does not permit awards of compensatory or punitive damages. Prevailing plaintiffs are

limited to backpay and certain other, more limited types of relief. This limitation is why state laws—like the one Wisconsin just repealed—play an important supplementary role in enforcing equal pay mandates. Before the Wisconsin law was enacted, Wisconsin had a disproportionately large gender-based wage gap as compared to other states. But its ranking had begun to improve, perhaps as employers took note of the state’s equal pay requirements. (The National Partnership for Women and Families has compiled a state-by-state analysis of the relative severity of the wage gap [here \(http://www.nationalpartnership.org/site/PageServer?pagename=issues_work_epd_map\)](http://www.nationalpartnership.org/site/PageServer?pagename=issues_work_epd_map).)

Pay Discrimination: Title VII and the *Goodyear* Case

In addition to the Equal Pay Act, Title VII also prohibits pay discrimination. Moreover, Title VII encompasses a broader-range of cases than the Equal Pay Act does. Title VII prohibits employers from taking any employment action “based on sex,” which includes decisions that set salaries or grant raises. Thus, any adverse pay decision in which sex was taken into account can be challenged under Title VII.

Title VII has its own limitations, one of which was revealed by Lilly Ledbetter’s pay discrimination lawsuit against her employer, Goodyear Tire & Rubber Co. Ledbetter successfully proved that Goodyear had discriminated against her on the basis of her sex multiple times when setting pay and raises. She was the only female production supervisor at her plant and was paid substantially less than the lowest-paid male supervisor. But her employer argued that the pay discrimination didn’t matter because Ledbetter had waited too long to file her claim.

The statute of limitations issue that Goodyear raised was litigated all the way up to the U.S. Supreme Court. Unfortunately, the Court sided with Goodyear, adopting a very narrow construction of Title VII’s statute of limitations.

To understand the Court’s decision, a bit of background is in order: The EEOC is an administrative agency that must receive discrimination claims before they can be filed in court. Those claims must be filed with the EEOC within 180 or 300 days (whether it is 180 or 300 depends on the state). But when does that 180-day or 300-day period begin to run? According to the Court, it begins to run on the date of the original decision to pay a woman less because of her sex.

In so ruling, the High Court rejected an alternative regarding when the statute-of-limitations clock begins to tick: a paycheck accrual rule. Under that rule, which the EEOC and all federal appellate courts had adopted previously, every paycheck containing a discriminatory amount of pay would trigger a new period for purposes of the statute of limitations.

The Ledbetter Act’s Passage

The Court’s ruling in the Ledbetter case stirred up a political firestorm. Congress immediately began debating a bill to restore the pre-*Ledbetter* rule on the statute of limitations for Title VII claims. Although former President George W. Bush had refused to sign such a bill, President Barack Obama signed the Lilly Ledbetter Fair Pay Act into law during his first week in office. (Deborah Brake and I provide a full analysis of the *Ledbetter* case, the Congressional response, and the litigation aftermath [here \(http://writ.news.findlaw.com/grossman/20090928.html\)](http://writ.news.findlaw.com/grossman/20090928.html).)

The Ledbetter Act was an important fix for the Supreme Court’s bad ruling. But it only brought equal pay law back to where it had started. Equal pay laws have been on the books for almost 50 years, and yet the problem of gender-based pay discrimination continues more or less unabated.

While the Ledbetter Act Represents Progress, Employees Still Must Realize That Their Pay Is Discriminatory in Order to Invoke the Act

One reason for the persistence of gender-based pay discrimination is the difficulty that employees face in learning that pay discrimination has occurred in the first place. Pay decisions are largely made in secret. Even though it is illegal to do so, many employers have policies prohibiting employees from discussing pay with their co-workers. (The National Women’s Law Center [has compiled a fact sheet](#))

(<http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf>) about the problem of pay secrecy.) Moreover, many pay decisions are not obviously or inherently adverse: An employee might not even realize that a starting salary or a raise decision reflects discrimination at all, without information that is unavailable to him or her—information, for example, about how the decision was made, or how other similarly-situated or slightly senior or junior employees were treated. There are also complicated cognitive biases at work, which lead women to expect lower pay (and thus not to suspect discrimination) and to downplay the possibility that discrimination is the explanation for an adverse employment outcome. (Deborah Brake and I examine studies about obstacles to perceiving and challenging discrimination [here \(http://writ.news.findlaw.com/grossman/20070904.html\)](http://writ.news.findlaw.com/grossman/20070904.html).)

Procedural Obstacles Should Also Be Eliminated in Order to Ensure True Pay Equality

Even when pay discrimination is obvious or is discovered, both the Equal Pay Act and Title VII impose procedural obstacles that make it difficult for the victim to enforce her substantive rights. Affirmative defenses, unusually short statutes of limitations, and lack of access to information that is necessary to prove discrimination are just some of the obstacles that hinder enforcement of equal pay laws. Many victims also choose not to pursue administrative or judicial remedies because they fear retaliation by their employers.

Beyond the fix contained in the Ledbetter Act, Congress should consider lengthening the statute of limitations for discrimination claims and raising the cap on damages (which hasn't been adjusted, even for inflation, in 20 years). These simple, straightforward changes would give employees a fair shot at taking advantage of the substantive rights against pay discrimination that the law purports to grant them.

More broadly, though, Congress should focus on other means to eradicate pay discrimination and the more complicated problem of occupational segregation (in society's eyes, there are still "men's jobs" and "women's jobs," and the "women's jobs" pay less), which accounts for a great deal of the gender wage gap. A **recent GAO report** (<http://www.gao.gov/new.items/d1210.pdf>) found that while women represent 49 percent of the overall workforce, they comprise 59 percent of the low-wage workforce.

The Bottom Line: We Need Stronger Fair Pay Laws, or the Gender-Discriminatory Pay Gap Will Persist

Women do not get paid less because they prefer lower-paying jobs, or because they take their work less seriously. They do get paid less because they suffer from intentional pay discrimination. Studies have shown this beyond a shadow of a doubt, and it is too late in the day to reasonably disagree.

Moreover, fair pay laws are not, as Glenn Grothman argues, too burdensome for employers, who are asked simply to look to employees' performance and not their gender when determining starting salaries, raises, and bonuses. Fair pay laws are, however, too burdensome for the class of people they purport to protect—the employees. Even provable pay discrimination goes unremediated because of procedural obstacles to enforcement, and much pay discrimination goes completely undiscovered. Equal Pay Day is a reminder that unequal pay, despite Batgirl's best efforts, is not a relic of the past. It is alive and well—and in need of superhero-style rescue by Congress, state legislatures, the EEOC and analogous state agencies.



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