Equal Pay Damages / GW

Here is some background information re: our discussions involving damages under the Equal Pay Act. Mary

From: Mary Smith

Date: March 27, 1998

Re: Statistics on Damage Awards in Employment Discrimination Cases

Attached are two studies that analyze damage awards in employment cases. These studies indicate that punitive damages are awarded in very few cases that reach judgment, and even where punitive damages are awarded, the amounts are either fairly modest or if the amounts are "excessive," they are often reversed, remanded, or otherwise vacated.

The two studies are: Analysis of Damages Awards Under Title VII and Section 1981 (January 1, 1991 - May 1, 1994) (July 6, 1996) and a BNA Report on Jury Verdicts in Employment Cases in California state and federal courts from January through August 1997.

I have also attached a summary of the studies that my intern, Amy Block, prepared.

I. Shea & Gardner Analysis of Damage Awards Under Title VII and Section 1981 (January 1, 1991 - May 1, 1994)

- An analysis of over 1000 reported Title VII and Section 1981 employment discrimination cases decided between January 1991 and May 1994 shows that victims of intentional employment discrimination have not received "excessive" damage awards under Title VII or under Section 1981. The majority of awards have been moderate in size and, in the rare cases where a judge or jury awarded "excessive" damages, the award was often modified by a subsequent court.

- The report reaches the following conclusions:
  (1) Most claims for damages under Section 1981 and Title VII are dismissed before trial on procedural or substantive grounds.

  (2) Of those plaintiffs who prevail at summary judgment or trial, not all receive compensatory or punitive damages. In appropriate instances, only equitable, declaratory, or injunctive relief may be given.

  (3) Of those who receive compensatory and punitive damages, the awards tend to be moderate.

  (4) If an employer engages in extremely outrageous conduct, bigger awards may be given.

  (5) Large compensatory and punitive damage awards are frequently overturned by reviewing courts.

TABLE 1
DAMAGE AWARDS UNDER TITLE VII AND SECTION 1981 (JANUARY 1, 1991 - MAY 1, 1994)

Cases	Total Cases
Plaintiff proved intentional discrimination	**118**
Of the 118:	
Prevailing plaintiffs awarded only equitable relief	76
Prevailing plaintiffs recovered compensatory or punitive damages	28
Prevailing plaintiff held not entitled to damages or equitable relief	2
Relief awarded to prevailing plaintiff cannot be determined	12
Compensatory or punitive damage awards exceeded $50,000	**10**
Of the 10:	
Compensatory or punitive damages awards greater than $50,000 were overturned by reviewing court	6
Compensatory or punitive damage awards greater than $50,000 were permitted to stand	4

Analysis includes over 1000 reported Title VII and Section 1981 employment discrimination cases decided between January 1991 and May 1994. In the majority of these cases, the claims were dismissed before trial or the court or jury ruled that no damages were available under Title VII or Section 1981. Another large percentage of cases were settled, or were reversed or remanded with no further information available

II. Orrick, Herrington & Sutcliffe Analysis of Jury Verdicts in Employment Cases in California State and Federal Courts (January 1991 - August 1997)

- Juries awarded punitive damages to plaintiffs in employment cases in only 10% of the cases tried in California state and federal courts from January 1991 through August 1997, continuing a trend that began in 1991.

- From January through August 1997, the average award in non-termination cases based on total verdicts for sex harassment and sex discrimination claims was $419,756; $207,786 for race; $104,344 for age; and $52,007 for disability discrimination claims.

- In wrongful discharge cases, the average award based on total verdicts was $139,558 in sex harassment and discrimination cases; $486,251 in race cases, $245,949 in age cases; and 239,251 in disability discrimination cases.

- Plaintiffs prevailed in 47% of the non-termination discrimination cases, winning 53 of the 112 cases reported.

- Plaintiffs prevailed in 45% of the wrongful-termination discrimination cases, winning 135 of the 303 cases reported.

TABLE 2
CALIFORNIA JURY VERDICTS IN EMPLOYMENT CASES (REPORTED FROM 1981 - 1997)

Year	Median Jury Award	Average Jury Award	Total Verdicts	Plaintiff Prevailed Number (Percent)
1981	$ 300,000	$ 490,091	18	11 (61%)
1982	136,660	472,946	35	22 (63%)
1983	76,500	238,221	24	13 (54%)
1984	230,000	766,152	29	17 (59%)
1985	252,743	795,343	64	50 (78%)
1986	109,000	268,395	72	42 (58%)
1987	260,500	866,074	80	42 (52%)
1988	120,742	610,613	63	42 (67%)
1989	154,007	341,431	42	28 (67%)
1990	317,135	1,806,034	67	46 (69%)
1991	278,900	449,668	69	37 (54%)
1992	330,000	816,858	81	35 (43%)
1993	250,000	429,315	95	51 (54%)
1994	250,000	457,777	141	79 (56%)
1995	242,479	439,653	106	58 (55%)
1996	184,000	646,013	106	47 (44%)
1997	263,500	606,789	62	28 (45%)

Data on plaintiff win rates and average awards do not reflect cases in which a jury award is reduced or overturned by a trial judge or on appeal.

ANALYSIS OF DAMAGE AWARDS UNDER TITLE VII AND SECTION 1981
(JANUARY 1, 1991 - MAY 1, 1994)

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July 6, 1994

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I. Introduction

A. The Statutory Framework

Employees who allege discrimination or harassment in employment may maintain causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.(1994) (hereinafter "Title VII"), and/or under 42 U.S.C. § 1981 (1994) (hereinafter "Section 1981"). Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. Section 1981 prohibits intentional racial discrimination in the formation and enforcement of employment (and other) contracts.

From the time Section 1981 was enacted, prevailing plaintiffs under that statute have been eligible to receive equitable relief (including appropriate frontpay and backpay) and compensatory and punitive damages. By contrast, until the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994), took effect in November, 1991, employees who sued successfully under Title VII were entitled solely to equitable relief.

The Civil Rights Act of 1991 was designed, in part, to expand civil rights protection by remedying this disparity. The stated purposes of the Civil Rights Act of 1991, are, inter alia, "(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . . and (4) to . . . expand[] the scope of relevant Civil Rights statutes in order to provide adequate protection to victims of discrimination." 42 U.S.C. § 1981a. In accomplishing these goals, the 1991 Act provides that in cases of intentional employment discrimination, compensatory damages are available under Title VII. 42 U.S.C. § 1981a(a)(1). The Act further authorizes punitive damages in Title VII cases where the employer engages in a "discriminatory practice or discriminatory practices with malice, or with reckless indifference to the federally protected rights of aggrieved individuals." 42 U.S.C. § 1981a(b)(1).

In providing for such damages in Title VII cases, however, Congress proceeded with caution. In contrast to the damages provision of Section 1981, which places no statutory limits on the amount of damages available, the Civil Rights Act of 1991 includes statutory caps on compensatory and punitive damages available under Title VII. The cap amounts vary from $50,000 to $300,000 for combined compensatory and punitive damages depending on the size of the employer.

B. Shea & Gardner 1990 Damages Study

In 1990, while the bill which was ultimately enacted as the Civil Rights Act of 1991 was pending before Congress, attorneys at Shea & Gardner analyzed the compensatory and punitive damage awards in Section 1981 employment discrimination cases decided from 1980 to 1990. Because courts have consistently held that Title VII and Section 1981 are "parallel bases of relief" and require the "same elements of proof" (see, e.g. Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231, 1233-34 (5th Cir. 1989)), the study assumed that the pattern of awards under Section 1981 would be indicative of those expected under Title VII if compensatory and punitive damage remedies were permitted. The study, thus, looked at the frequency with which compensatory and punitive damages were awarded under Section 1981 and at the size of those awards in order to forecast the potential impact of amending Title VII to permit compensatory and punitive relief.

The results of the 1990 Shea & Gardner study, set forth in a report dated March 14, 1990, indicated that victims of intentional employment discrimination had not received "excessive" damage awards under Section 1981. To the contrary, the study showed that the majority of awards under that statute were moderate in size, and, in the rare cases where a judge or jury awarded "excessive" damages, the award was often modified by a subsequent court.

C. Purposes of the Study

Congress is once again considering amending Title VII. Legislation entitled "The Equal Remedies Act" is currently pending before Congress, seeking to remove the statutory caps placed on compensatory and punitive damages by the Civil Rights Act of 1991. Proponents of the legislation contend that caps are not necessary to control courts and juries and that fears of excessive compensatory and punitive damage awards are unjustified. In order to assist in testing this contention, Shea & Gardner has performed a follow-up study that picks up where its previous study left off. We have reviewed compensatory and punitive damage awards in reported[1/] Section 1981 cases from 1991 to 1994 and have analyzed such awards in Title VII cases decided after the Civil Rights Act of 1991 was adopted. The results of this study confirm those of the previous study. They show:

1/ The study does not include jury verdicts unless they were reported at the district court level or on appeal. While we acknowledge that this omission makes the study less complete, there was no systematic way to access and summarize these verdicts. Accordingly, while we believe that the trends highlighted in this report are indicative of trends in Title VII and Section 1981 decisions, both reported and unreported, individual unreported cases which support or contradict these trends may not be included.

(1) Most claims for damages under Section 1981 and Title VII are dismissed before trial on procedural or substantive grounds.

(2) Of those plaintiffs who prevail at summary judgment or trial, not all receive compensatory or punitive damages. In appropriate instances, only equitable, declaratory or injunctive relief may be given.

(3) Of those who receive compensatory and punitive damages, the awards tend to be moderate.

(4) If an employer engages in extremely outrageous conduct, bigger awards may be given.

(5) Large compensatory and punitive damage awards are frequently overturned by reviewing courts.

II. Discussion

Our research included over 1000 reported Title VII and Section 1981 employment discrimination cases decided between January, 1991 and May, 1994.[2/] In the majority of these, the claims were dismissed before trial or the court or jury ruled that no damages were available under Title VII or Section 1981. Another large percentage of cases were settled, or were reversed or remanded with no further information available.

Accordingly, our research revealed 118 cases in which the plaintiffs succeeded in proving that the employer engaged in unlawful discrimination. In 12 of these cases, the court concluded that the plaintiff was entitled to damages, but the type of damages was not specified. See, e.g., Hill v. Board of Supervisors of Stafford County, 1993 U.S. App. Lexis 15162 (4th Cir. June 22, 1993). In 76 of the cases in which judgment was entered for the plaintiff, as set forth in Appendix B, the plaintiff did not receive compensatory

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2/ As noted above, unreported decisions are not included in this study.

or punitive damages, but merely received backpay, frontpay or other equitable, declaratory or injunctive relief.[3/] See, e.g. Ross v. Buckeye Cellulose Corp., 980 F.2d 648 (11th Cir. 1993). In two cases, liability was found, but the court determined that no damages of any sort were appropriate. See Frederick v. Reed Smith Shaw and McCray, 1994 U.S. Dist. Lexis 1809 (E.D.Pa. Feb. 18, 1994); Prunty v. Arkansas Freightways, Inc., 16 F.3d 649 (5th Cir. 1994) reh'g en banc denied, 1994 U.S. App. Lexis 10164 (5th Cir. Apr. 18, 1994). In the remaining 28 cases, as set forth in Appendix A, courts held that plaintiffs were entitled to recover compensatory and/or punitive damages as follows:

Compensatory Damages Only:	14 cases
Punitive Damages Only:	3 cases
Both Compensatory and Punitive Damages:	11 cases.

3/ While the study did not include Title VII cases decided before the Civil Rights Act of 1991 was enacted, it does include several cases which were decided after November 21, 1991 (the date the Civil Rights Act of 1991 became effective) in which the conduct at issue occurred before the 1991 Civil Rights Act was passed. In the majority of such cases, the court declined to apply the Civil Rights Act of 1991 retroactively. Accordingly, only equitable relief was available. In others, the court declined to opine whether the Civil Rights Act of 1991 was retroactive but awarded equitable relief only without further comment. In others, the court awarded a lump sum without specifying whether the damages were intended as equitable relief or as compensatory or punitive damages. In still others, the court held that the Civil Rights Act of 1991 was retroactive and permitted the award of punitive and compensatory damages. This latter category case has been overruled by the Supreme Court decisions in Landgraf v. USI Film Products et al., 114 S.Ct 1483 (1994) and Rivers v. Roadway Express, Inc., 114 S.Ct 1510 (1994) (in which the Court held that the Civil Rights Act of 1991 was not retroactive). The award amounts may, nonetheless, be useful to predict the kinds of awards which will be made in cases where the conduct occurred after the Civil Rights Act was enacted.

Thus, during the period of our study, courts held that plaintiffs were entitled to compensatory damage awards under Title VII or Section 1981 in 25 reported cases involving 47 "claims"[4]. Of these, the amount of damages was ascertainable from published opinions in 24 cases involving 46 successful Title VII or Section 1981 claims. Also during this period, courts held that plaintiffs were entitled to punitive damage awards in 14 reported cases involving 17 successful Title VII and Section 1981 claims. Of these, the amount of the award was ascertainable from published opinions in 12 cases involving 15 Title VII or Section 1981 claims.[5]

The compensatory damage awards ranged from nominal damages of $1 to a maximum single compensatory damage award of $250,000. Of the 46 claims in which the amount of the compensatory damage award can be determined, 40 involved awards less than or equal to $50,000.[6] Of these, one involved a nominal damage award of $1.

There were only six claims for which a court awarded compensatory damages to a single plaintiff in excess of $50,000. Of these six claims, three were remanded or reversed by a reviewing court as set forth in Appendix C. See Carter v. Sedgwick

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4/ Some of the cases had more than one plaintiff or more than one defendant.

5/ When an award was made in a case which includes Title VII or Section 1981 and other state and federal law claims, and the decision failed to specify the grounds on which the award rests, we have treated it as an award under Title VII or Section 1981.

6/ In Berger v. Iron Workers, Reinforced Rodmen et. al, 1994 U.S. Dist. Lexis 5342 (D.D.C. Apr. 14, 1994), the court awarded compensatory damages to 22 class members in amounts ranging from $2500 to $25,000. The total compensatory damage award in Berger was $205,000 but each individual plaintiff's award was relatively small. For purposes of this study, the awards to each class member are treated individually.

County Kansas, 929 F.2d 1501 (10th Cir. 1991) (appellate court dismissed Section 1981 claim for which $100,000 compensatory damages had been awarded and remanded case for determination of whether award could stand on alternative grounds); see also McKnight v. General Motors Corp., 768 F. Supp. 675 (E.D.Wis. 1991) aff'd., 973 F.2d 1366 (7th Cir.) cert. denied, 113 S. Ct. 1270 (1993); Crutcher v. Kentucky, 1992 U.S. App. Lexis. 11374 (6th Cir. 1992). These cases indicate that if a jury or lower court makes an inappropriate compensatory damages award, a reviewing court can and will correct the error.

Punitive damage awards under Section 1981 and Title VII during this period ranged from $1000 to $500,000. Of the 15 claims for which punitive damage award amounts can be determined, five involved awards that were less than or equal to $50,000. Of the ten punitive damage claims for which award amounts exceeded $50,000, five were reversed, remanded or otherwise vacated as set forth in Appendix C.[7] See Mojica v. Gannett, 7 F.3d 552 (7th Cir. 1993) (court reversed $125,000 punitive damage award on the ground that Title VII is not retroactive and Section 1981, under the then governing law, did not apply to failure to promote); see also Keeton v. American Telephone and Telegraph Co., 836 F. Supp. 171 (S.D.N.Y. 1993); McKnight v. General

7/ In Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993), the Eleventh Circuit reversed a district court decision awarding $15,000 compensatory damages and $25,000 punitive damages under Title VII. In Odima v. Westin Tuscon Hotel Co., 991 F.2d 595 (9th Cir. 1993), the Ninth Circuit reversed a lower court decision awarding $10,000 compensatory damages. These are the only reported decisions which appellate courts reversed in which neither compensatory nor punitive damage awards exceeded $50,000.

Motors Corp.[8], 768 F. Supp. 675 (E.D.Wis. 1991) aff'd., 973 F.2d 1366 (7th Cir.) cert. denied, 113 S. Ct. 1270 (1993); Crutcher v. Kentucky, 1992 U.S.App. Lexis. 11374 (6th Cir. 1992); Holland v. First Virginia Banks, Inc, 1991 U.S. App. Lexis 14885 (4th Cir. July 21, 1991).[9]

Of all of the cases reviewed, we found only three cases where a combined compensatory and punitive damage award greater than or equal to $150,000 was permitted to stand. In Daniels v. Pipefitters Ass'n Local Union No. 597, 945 F.2d 906 (7th Cir. 1991) reh'g denied, 1991 U.S. App. Lexis 25688 (7th Cir. 1991), the plaintiff was awarded $181,063.50 in compensatory damages and $150,000 in punitive damages under Section 1981. The court held that the plaintiff's trade union had discriminated against the plaintiff. The court emphasized that this discrimination had occurred in spite of the fact that the plaintiff had joined the union in the first place under a special program designed to remedy a history of similar discrimination.

8/ As noted above, in McKnight, a compensatory damage award greater than $50,000 was also reversed on appeal.

9/ The trial court decision in Holland, reported at 744 F. Supp. 722 (E.D.Va. 1990), indicates that the jury awarded a total of $501,000 in punitive damages against two defendants: $500,000 against the Bank and $1000 against the plaintiff's supervisor at the Bank. The appellate court decision reversing this verdict, reported at 1991 U.S. App. Lexis 14885 (4th Cir. July 21, 1991), indicates that the jury awarded only $51,000 in punitive damages, $50,000 against the bank and $1000 against the supervisor. This disparity is, no doubt, attributable to a typographical error in the appellate court decision. In any case, the jury's punitive damage award was reversed in its entirety on the ground that the plaintiff's retaliatory refusal to rehire claim should not have gone to the jury and that, even if jury consideration was proper, there was insufficient evidence to support such a claim.

In Berry v. Stevinson Chevrolet, 804 F. Supp. 121 (D. Colo. 1992) recons. denied, 828 F. Supp. 827 (D. Colo. 1993), the court, while holding that the Civil Rights Act of 1991 was not retroactive, nonetheless awarded the plaintiff $250,000 compensatory damages on a retaliatory discharge claim under Title VII. The court explained that backpay was not available and other grounds of equitable relief were not sufficient to compensate the plaintiff. The court found that the plaintiff's employer had retaliated against the plaintiff for filing a discrimination charge by having him maliciously prosecuted for forgery.

In United States E.E.O.C. v. AIC Security Investigations, Ltd., 823 F. Supp. 571 (N.D. Ill. 1993), the jury awarded a plaintiff who successfully alleged discrimination on the basis of disability under the Civil Rights Act of 1991, $50,000 in compensatory damages for emotional distress and $250,000 in punitive damages against each of two defendants. These punitive damage awards were subsequently reduced by the district court to $75,000 against each defendant in order to comply with the statutory caps on compensatory and punitive damages under the Civil Rights Act of 1991.[10] The jury found that the plaintiff had been discharged from his position as Executive Director of AIC Security on the basis of his disability, metastasized lung cancer.

10/ The remedies provision of the Civil Rights Act of 1991 applied to plaintiffs bringing claims under the Americans with Disabilities Act (ADA) in addition to those bringing claims under Title VII. While we did not perform a separate search of decisions under the ADA, AIC Security, a disability discrimination case, was the only reported case which came up in our research of Title VII cases in which an award of compensatory or punitive damages under the Civil Rights Act of 1991 was reduced to comply with statutory caps.

The small number of cases with such large compensatory and punitive damage awards indicates their exceptional character. Moreover, although the Civil Rights Act of 1991 prohibits the court from instructing juries on the statutory caps on punitive and compensatory damages[11/], we found only one reported case, United States E.E.O.C. v. AIC Security Investigations, Ltd., mentioned above, in which the court was required to reduce a jury's punitive damages award to fit within cap limits.

III. Conclusion

Our research suggests that since 1991, victims of intentional employment discrimination have not received "excessive" damage awards under Title VII or under Section 1981. Although there are currently no damage caps under Section 1981, and courts are prohibited from instructing juries about the existence of statutory damage caps under Title VII, the awards under these statutes have, nonetheless, been moderate. Fears of "runaway" juries and excessively sympathetic courts have not materialized.

Using past experience with Section 1981 and Title VII damage awards as a guide, it appears that removing statutory damage caps should not lead to any significant increase in the size of Title VII damage awards. Even if Congress passes the "Equal Remedies Act" and removes Title VII damage caps, our research indicates that the majority of Title VII plaintiffs will still receive neither compensatory nor punitive damages. Further, if an employee proves that an employer has engaged in intentional and outrageous conduct, the damage award is likely to be moderate. Finally, if a judge

11/ The statute states, "the court shall not inform the jury of the [statutory cap] limitations" concerning the sum of permissible compensatory and punitive damages. 42 U.S.C. 1981a(c).

or jury makes a comparatively large compensatory or punitive damage award, the award will, as before, be scrutinized carefully and may be reversed or remanded by a reviewing court.

APPENDIX A

Title VII and Section 1981 Cases in Which Compensatory and/or Punitive Damages Were Awarded

TOTAL=28

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
4/14/94	Berger v. Iron Workers, 1994 U.S. Dist. Lexis 5342 (D.D.C. Apr. 14, 1994) [22 plaintiffs]	$37,290.74		$5000		
		$9413		$5000		
		$35,487		$25,000		
		$71,458		$25,000		
		$45,375		$2500		
		$123,272		$15,000		
		$9047		$5000		
		$18,739		$15,000		
		$70,822		$10,000		
		$39,134		$2500		
		$9140		$2500		
		$9413		$2500		
		$24,435		$2500		
		$33,145		$25,000		
		$30,704				
		$33,636		$15,000		
		$72,937		$10,000		
		$11,686				
		$21,384		$2500		
		$71,803		$5000		
		$13,667		$5000		
		$45,767		$10,000		
		$24,459		$10,000		
		$8250.82		$5000		

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
3/7/94	Turic v. Holland Hospitality, 1994 U.S. Dist. Lexis 4997 (W.D. Mich. Mar. 7, 1994)	$9400		$50,000	$30,000	
2/13/94	Fitzsimons v. J.C. Penney Co., 1994 U.S. App. Lexis 327 (9th Cir. Feb. 13, 1994)			$70,000	$70,000	
1/7/94	Kyle v. Campbell Soup Co., 1994 U.S. Dist. Lexis 757 (9th Cir. Jan. 7, 1994)			$5000		
11/10/93	Keeton v. American Telephone & Telegraph Co., 836 F. Supp. 171 (S.D.N.Y. 1993)				$100,000 (jury award reversed by district court j.n.o.v)	

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
10/21/93	E.E.O.C. v. AIC Security Investigations Ltd., 1993 U.S. Dist. Lexis 15025 (N.D. Ill. Oct. 21, 1993) [2 Defendants]	$20,000		$50,000	$75,000 $75,000 (reduced from jury award of $250,000 against each defendant to comply with statutory caps)	
10/14/93	Bartlett v. U.S., 835 F. Supp. 1246 (E.D. Wash. 1993)	$5770	$108,264	$25,000		$20,784 medical costs
9/27/93	Mojica v. Gannett, 7 F.3d 552 (7th Cir. 1993)			$35,000 (remanded by 7th Cir.)	$125,000 (remanded by 7th Cir.)	
8/4/93	Goldsmith v. City of Atmore, 966 F.2d 1155 (11th Cir. 1993)			$15,000 (11th Cir. reversed)	$25,000 (11th Cir. reversed)	

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
6/16/93	Dombeck v. Milwaukee Valve Co., 823 F. Supp. 1475 (W.D. Wis. 1993)			$25,000		
4/19/93	Odima v. Westin Tuscon Hotel Co., 991 F.2d 595 (9th Cir. 1993)	amount not specified	amount not specified	$10,000		reinstatement; atty's fees
3/3/93	Ray v. University of Arkansas, 1994 U.S. Dist. Lexis 5454 (E.D. Ark. Mar. 3, 1994)	Amount not specified		$10,000		reinstatement; atty's fees and costs
9/24/92	Berry v. Stevinson Chevrolet, 804 F. Supp. 121 (D. Colo. 1992) recons. denied, 828 F. Supp. 827 (D. Colo. 1993) [2 plaintiffs]	$72,822		$250,000		atty's fees and costs

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
8/18/92	Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992)				amount not specified	
6/4/92	Langston v. Daniels, Micheals & Assoc., 1992 U.S. Dist, Lexis 14795 (N.D. Ala. June 4, 1992)	$8155		$35,000		
5/11/92	Crutcher v. Kentucky, 1992 U.S. App. Lexis 11374 (6th Cir. May 11, 1992) [2 plaintiffs]	$10,000 (6th Cir. vacated this award		$6230 $100,000 (6th cir. vacated 2d award)	$67,500 $135,000 (6th Cir. vacated 2d award)	
4/1/92	Westfield v. Illinois Dep't of Labor, 1992 U.S. App. Lexis 5777 (7th Cir. Apr. 1, 1992)	$2600 (plus pre-judgment interest)		$5000		atty's fees and costs
3/5/92	Campbell v. Kansas State University, 1992 U.S. Dist. Lexis 3379 (D. Kan. Mar. 5, 1992)			$1		atty's fees

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
2/19/92	Paxton v. Bearden, 783 F. Supp. 1011 (N.D. Miss. 1992)	$4,880.54		$15,000		atty's fees
12/31/91	Miles v. J.C. Penney Co., 1991 U.S. Dist. Lexis 19781 (E.D. Tex. Dec. 31, 1991)			$15,000		
9/30/91	Daniels v. Pipefitters Ass'n Local Union No. 597, 945 F.2d 906 (7th Cir. 1991), reh'g denied, 1991 U.S. App. Lexis 25688 (7th Cir. 1991)			$181,063.50	$150,000	atty's fees and costs
7/22/91	Geissinger v. City of St. Paul, 1991 U.S. Dist. Lexis 10264 (D. Minn. July 22, 1991)			$25,000	$50,000	

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
7/15/91	McKnight v. General Motors Corp., 768 F. Supp. 675 (E.D. Wis. 1991) aff'd, 973 F.2d 1366 (7th Cir.) cert. denied 113 S.Ct. 1270 (1993)	$55,000 (reversed by district court)		$55,000 (reversed by district court)	$500,000 (reversed by district court)	atty's fees (reversed by dist. court)
7/12/91	Holland v. First Virginia Banks, Inc., 1991 U.S. App. Lexis 14885 (4th Cir. July 21, 1991) [2 defendants]			$20,000 (reversed by 4th Cir.)	$1000 $500,000 (reversed by 4th Cir.)	costs (reversed on appeal)
4/25/91	Taylor v. USAir, 1991 U.S. Dist. Lexis 12386 (W.D. Pa. Apr. 25, 1991)	amount not specified		amount not specified		declaratory relief; injunctive relief;
4/8/91	Carter v. Sedgwick County Kansas, 929 F.2d 1501 (10th Cir. 1991) [2 defendants]	$10,478.05 remanded by 10th Cir.		$100,000 (remanded by 10th Cir.)	$1000 (remanded by 10th Cir.)	

Date	Case Name	Backpay	Frontpay	Compensatory	Punitive	Other
4/3/91	Senigaur v. Beaumont Independent School District, 760 F. Supp. 1200 (E.D. Tex. 1991)			$50,000		
2/20/91	Woods v. Graphic Communications, 925 F.2d 1195 (9th Cir. 1991)				amount not specified	

APPENDIX B

Cases Where Plaintiffs Prevailed on Section 1981 or Title VII Claims But Neither Compensatory nor Punitive Damages Were Awarded Total=76

Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132 (7th Cir. 1992) reh'g en banc denied, 1992 U.S. App. Lexis 19389 (7th Cir. Aug. 19, 1992).

Askin v. Barr, 1992 U.S. Dist. Lexis 14936 (W.D. Mich. July 2, 1992).

Austen v. Hawaii, 1992 U.S. App. Lexis 15465 (9th Cir. June 24, 1992).

Baer v. First Options of Chicago, Inc., 1993 U.S. Dist Lexis 19489 (N.D. Ill. Dec. 10, 1993)

Briscoe v. Fred's Dollar Store, 822 F. Supp. 1353 (E.D. Ark. 1993).

Brower-Coad v. Fundamental Brokers, Inc., 1993 U.S. Dist. Lexis 13825 (S.D.N.Y. Sept. 16, 1993).

Bruhn v. Foley, 824 F. Supp. 1345 (D. Neb. 1993).

Caine v. Sullivan, 1994 U.S. App. Lexis 4831 (9th Cir. Mar. 8, 1994)

Carter v. Bruce Oakley Inc., 1993 U.S. Dist. Lexis 19778 (E.D. Ark. Mar. 4, 1993)

Carter v. Caring for the Homeless of Peekskill, 821 F. Supp. 225 (S.D.N.Y. 1993). (Court set aside jury verdict awarding backpay).

Clarke v. Frank, 960 F.2d 1146 (2d Cir. 1992).

Cornwell v. Robinson, 1994 U.S. App. Lexis 10112 (2d Cir. Feb. 2, 1994).

Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992).

Cuello Suarez v. Puerto Rico Elec. Power Authority, 798 F. Supp. 876 (D.P.R. 1992).

Currie v. Kowaleski, 842 F. Supp. 57 (N.D.N.Y. 1994).

Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991).

Davis v. Kansas City Housing Authority, 822 F. Supp. 609 (W.D. Mo. 1993).

Davis v. Tri-State Mack Distributors, Inc., 981 F.2d 340 (8th Cir. 1992).

Dougherty v. Barry, 820 F. Supp. 20 (D.D.C. 1993)

E.E.O.C. v. Corinth, Inc., 824 F. Supp. 1302 (N.D. Ind. 1993).

E.E.O.C. v. Delight Wholesale, Inc., 973 F.2d 664 (8th Cir. 1992).

E.E.O.C. v. Martin Marietta Corp., 819 F. Supp. 1030 (M.D. Fla. 1993).

E.E.O.C. v. Roanoke Rapids, Inc., 1993 U.S. Dist. Lexis 6131, (4th Cir. Mar. 24, 1993).

E.E.O.C. v. Snyder Doors, 844 F. Supp. 1020 (E.D. Pa. 1994).

Evans v. Ford Motor Co., 768 F. Supp. 1318 (D. Minn. 1991).

Floyd v. Mellon Bank, 1991 U.S. Dist. Lexis 2599 (E.D. Pa. Mar. 6, 1991).

Frazier v. Southeastern Pa. Transportation Authority, 1994 U.S Dist Lexis 1138 (E.D. Pa. Feb. 8, 1994).

Frederick v. Reed Smith Shaw and McCray, 1994 U.S Dist. Lexis 1809 (E.D. Pa. Feb. 18, 1994).

Gallagher v. Wilton Enterprises, Inc., 962 F.2d 120 (1st Cir. 1992).

Gallo v. John Powell Chevrolet, Inc., 779 F. Supp. 804 (M.D. Pa. 1991).

Hansel v. Public Service Co. of Colorado, 778 F. Supp. 1126 (D.Colo. 1991).

Harper v. Godfrey Co., 839 F. Supp. 583 (E.D. Wis. 1993).

Hatcher-Capers v. Haley, 786 F. Supp. 1054 (D.D.C. 1992).

Hukannen v. International Union of Operating Engineers, 3 F.3d 281 (8th Cir. 1993) reh'g en banc denied, 1993 U.S. App. Lexis 29823 (8th Cir. Nov. 17, 1993).

Hutchison v. Amateur Electronics Supply, 840 F. Supp. 612 (E.D. Wis. 1993).

Jackson & Coker, Inc. v. Lynam, 840 F. Supp. 1040 (E.D. Pa. 1993).

Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993).

Johnson v. Sullivan, 1992 U.S. Dist. Lexis 21549 (D.Md. May 4, 1992).

Johnson v. United States Elevator Corp., 779 F. Supp. 465 (E.D.Mo. 1991).

Keys v. U.S. Welding, Fabricating and Manufacturing, Inc., 1992 U.S. Dist. Lexis 13197 (N.D. Oh. Aug. 26, 1992).

Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051 (8th Cir. 1993) reh'g en banc granted, 1993 U.S. App. Lexis 15130 (8th Cir. June 23, 1993).

Kimbrough v. Bowman Transportation, Inc., 920 F.2d 1578 (11th Cir. 1991) vacated and remanded, 929 F.2d 599 (11th Cir. 1991).

Lee v. Farmers Ins. Co., 1992 U.S. Dist Lexis 17116 (D. Kan. 1992).

Madden v. Cisneros, 830 F. Supp. 1251 (E.D. Ark. 1993).

Malone v. California State College, 1993 U.S. App. Lexis 4336 (9th Cir. Feb. 1, 1993) (award reversed and remanded).

Marcing v. Fluor, 1993 U.S. Dist. Lexis 10837 (N.D. Ill. Aug. 2, 1993).

McKenzie v. Cooper, Levins and Pastko, Inc., 990 F.2d 1183 (11th Cir. 1993).

Meeks v. Computer Associates, 15 F.3d 1013 (7th Cir. 1994). (Damage award reversed and remanded).

Miller v. Swissre Holding, Inc., 771 F. Supp. 56 (S.D.N.Y. 1991).

Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992)

Myree v. Local 41, International Brotherhood of Electrical Workers, 1993 U.S. Dist. Lexis 15457 (W.D.N.Y. July 9, 1993).

Nolen v. National Railroad Passenger Corp., 1992 U.S. Dist. Lexis 776 (N.D. Ill. Jan. 28, 1992) rev'd and remanded, 1993 U.S. App. Lexis 23941 (7th Cir. Sept. 14, 1993).

Norris v. Seatrain Shipbuilding Corp., 1992 U.S. Dist. Lexis 6349 (S.D.N.Y. Mar. 20, 1992).

Odom v. Frank, 782 F. Supp. 50 (N.D. Tex. 1991).

Palmiero v. Weston Controls, 809 F. Supp. 341 (M.D. Pa. 1992).

Phetosomphone v. Allison Reed Group Inc., 984 F.2d 4 (1st Cir. 1993).

Prunty v. Arkansas Freightways Inc., 16 F.3d 649 (5th Cir. Mar. 21, 1994) reh'g en banc denied, 1994 U.S. App. Lexis 10164 (5th Cir. Apr. 18, 1994).

Robinson v. Southeast Pa. Transp. Authority, 982 F.2d 892 (3rd Cir. 1993).

Rodgers v. Western Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993).

Ross v. Buckeye Cellulose Corp., 980 F.2d 648 (11th Cir. 1993).

Rupp v. Purolator Courier Corp., 1993 U.S. Dist Lexis 12020 (D. Kan. Aug. 6, 1993).

Salpaugh v. Salpaugh, 4 F.3d 134 (2d Cir. 1993) cert. denied, 114 S. Ct 1189 (1994).

Seibel v. Paolino, 1992 U.S. Dist. Lexis 14488 (E.D. Pa. Sept. 18, 1992).

Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir. 1993) cert. denied, 114 S. Ct. 548 (1993).

Shirley v. Chrysler First Inc., 970 F.2d 39 (5th Cir. 1992).

Snider v. Consolidated Coal Co., 973 F.2d 555 (7th Cir. 1992) reh'g en banc denied, 1992 U.S. App. Lexis 23802 (7th Cir. Sept. 28, 1992) cert. denied, 113 S.Ct. 981 (1993).

Stair v. Lehigh Valley Carpenters Local Union No. 600, 1993 U.S. Dist. Lexis 18753 (E.D. Pa. Jan. 11, 1994).

Stockard v. Red Eagle Resources Corp., 1992 U.S. App. LEXIS 17699 (10th Cir. July 27, 1992).

Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992).

Stukey v. U.S. Air Force, 809 F. Supp. 536 (S.D. Oh. 1992).

Tourtillott v. Maryland Cas. Co., 1993 U.S. Dist. Lexis 12356 (D. Kan. July 16, 1993).

Troutt v. Charcoal Steak House, Inc., 835 F. Supp. 899 (W.D. Va. 1993).

Truskoski v. ESPN, Inc., 823 F. Supp. 1007 (D. Conn. 1993).

Underwood v. District of Columbia Armory Bd., 1992 U.S. Dist. Lexis 1297 (D.D.C. Feb. 10, 1992).

U.S. v. Board of Educ. of Consol. High School D., 983 F.2d 790 (7th Cir. 1993).

Yacoub v. McGovern, 840 F. Supp. 947 (N.D.N.Y. 1993).

APPENDIX C

Cases where Compensatory or Punitive Damage Awards Were Reversed or Remanded

Total = 8

Mojica v. Gannett, 7 F.3d 552 (7th Cir. 1993).	Appellate court remanded award of $35,000.00 compensatory damages and $125,000.00 punitive damages.
Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993)	Appellate court reversed award of $15,000.00 compensatory and $25,000.00 punitive damages.
Keeton v. American Telephone and Telegraph, 836 F. Supp. 171 (S.D.N.Y. 1993)	District court overturned punitive damage award of $100,000.00 in j.n.o.v.
Odima v. Westin Tuscon Hotel Co., 991 F.2d 595 (9th Cir. 1993)	Appellate court reversed lower court decision awarding inter alia $10,000.00 compensatory damages.
Holland v. First Virginia Banks, Inc., 1991 U.S. App. Lexis 14885 (4th Cir. July 12, 1991). [2 Defendants]	Appellate court reversed district court decision awarding $20,000.00 compensatory and $500,000.00 and $1,000.00 punitive damages.
Carter v. Sedgwick County, Kansas, 929 F.2d 1501 (10th Cir. 1991)	Appellate court remanded award of $100,000.00 compensatory and $1,000.00 punitive damages.
McKnight v. General Motors Corp., 768 F. Supp. 675 (E.D. Wis. 1991) aff'd, 973 F.2d 1366 (7th Cir.) cert. denied, 113 S. Ct. 1270 (1993).	District court reversed jury award of $55,000.00 compensatory and $500,000.00 punitive damages.
Crutcher v. Kentucky, 1992 U.S. App. Lexis 11374 (6th Cir. May 11, 1992)	Appellate court vacated award of $100,000.00 compensatory and $135,000.00 punitive damages.

APPENDIX D

Summary of Cases Researched[1/]

Total Number of Cases Where Plaintiff Proved Intentional Discrimination	118
Total Number of Cases Where Prevailing Plaintiffs Were Awarded Only Equitable Relief	76
Total Number of Cases Where Prevailing Plaintiffs Recovered Compensatory or Punitive Damages	28
Total Number of Cases Where Prevailing Plaintiff Held Not Entitled to Damages or Equitable Relief	2
Total Number of Cases Where Relief Awarded to Prevailing Plaintiff Cannot be Determined	12
Total Number of Cases Where Compensatory or Punitive Damage Awards Exceeded $50,000	10
Total Number of Cases Where Compensatory or Punitive Damages Awards Greater than $50,000 Were Overturned by Reviewing Court	6
Total Number of Cases Where Compensatory or Punitive Damage Awards Greater than $50,000 Were Permitted to Stand	4

1/ Our research included over 1000 reported Title VII and Section 1981 employment discrimination cases decided between January, 1991 and May, 1994. In the majority of these cases, the claims were dismissed before trial or the court or jury ruled that no damages were available under Title VII or Section 1981. Another large percentage of cases were settled, or were reversed or remanded with no further information available.

Calendar No. 470

102D CONGRESS
2d Session

SENATE

REPORT
102-286

THE EQUAL REMEDIES ACT OF 1991

MAY 21 (legislative day, MARCH 26), 1992.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2062]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2062) to equalize the remedies available to all victims of intentional employment discrimination, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

59-010

I. Introduction

Nearly thirty years ago, Congress passed the Civil Rights Act of 1964, a landmark piece of legislation designed to end the discrimination that for too long had denied many Americans their fundamental right to equality.

Unfortunately, discrimination has not disappeared from the American landscape. Although much has been accomplished during the past thirty years, discrimination continues to limit the opportunities of blacks, women, people with disabilities, older Americans, and certain religious and ethnic minorities.

Equally unfortunately, the very laws that prohibit discrimination themselves discriminate.

Title VII of the 1964 Civil Rights Act banned discrimination in employment on the basis of race, color, religion, sex, and national origin. Until 1991, it permitted victims of discrimination to obtain only equitable remedies, including reinstatement, declaratory and injunctive relief, and up to 2 years back pay. Title VII did not allow recovery of either compensatory or punitive damages, to make victims whole for the harm caused by discrimination and to punish and deter violators.

In 1975, the Supreme Court interpreted another anti-discrimination statute, 42 U.S.C. sec. 1981, which prohibits discrimination on the basis of race and national origin in the making and enforcing of contracts. The Court held that section 1981 may be used to challenge intentional employment discrimination, and that victims of such discrimination may recover compensatory and punitive damages under section 1981 without artificial limitation.[1]

As a result of the Court's 1975 decision, victims of intentional employment discrimination based on race or ethnicity have been able to bring suit under section 1981 and recover full compensatory and punitive damages. Women, persons with disabilities, and certain religious minorities who suffered identical intentional discrimination, however, have been able to sue only under Title VII, and as a result have been able to recover only Title VII's limited remedies.

Congress recognized that there was no justification for providing different remedies to different victims of identical intentional discrimination. It also recognized that Title VII's limited remedies failed to fully compensate victims of intentional discrimination, deter those who would engage in such discrimination, and punish those who did. As a result, in the Civil Rights Act of 1991 Congress expanded the remedies available to victims of discrimination prohibited by Title VII.

The new damages provision, section 1977A of the Revised Statutes (42 U.S.C. sec. 1981A), allows plaintiffs to recover compensatory and punitive damages in addition to Title VII's equitable remedies. The Civil Rights Act of 1991 ensured that all victims of intentional employment discrimination have a more complete remedy than had been available in the past.

Unfortunately, the political process forced Congress to leave its task unfinished. The 1991 Act contained a number of important

[1] *Johnson v. Railway Express Agency, 421 U.S. 454, 459–60 (1975).*

and controversial provisions. When a compromise was finally reached, it included section 1981A's restrictions on damages. In the interest of securing prompt passage of the Civil Rights Act of 1991, including the portion guaranteeing the right to damages, Congress accepted the restrictions on damages, and left to 1992 the task of providing full, fair, and equal remedies for victims of discrimination.

The compromise damages provision placed arbitrary, fixed ceilings on the amount of damages that victims of discrimination who bring suit under Title VII can recover. The limits range from $50,000 to $300,000, depending on the number of employees who work for the employer or other defendant, and cover future pecuniary losses, all non-pecuniary losses (such as emotional distress or pain and suffering), and punitive damages. These limits apply without regard to the egregiousnes of the defendant's actions, the injuries suffered by the victim, or the need to deter others from engaging in similar actions.

At the time the compromise was agreed to, and before voting on the compromise bill, a number of Senators from both political parties made clear that they opposed limiting the damages available to women, people with disabilities, and religious minorities. They promised to introduce legislations lifting the caps on damages as soon as possible after the Civil Rights Act of 1991 became law, and Majority Leader Mitchell promised to bring the legislation to the floor of the Senate early in 1992. On November 26, Senator Kennedy, joined by 30 co-sponsors, introduced the Equal Remedies Act.

The Equal Remedies Act would remove the Civil Rights Act of 1991's limitations on damages. It would ensure that all victims of intentional employment discrimination can be fully compensated for their injuries, that those who engage in such discrimination can be held fully accountable for their actions, and that a meaningful deterrent exists against such discrimination.

II. Purpose and Summary

In the Civil Rights Act of 1991, Congress created a new statuory provisions, 42 U.S.C. sec. 1981A, under which victims of intentional employment discrimination based on race, color, religion, sex, national origin, or disability can recover compensatory and punitive damages. The Act, however, set fixed limits on the total amount of future pecuniary losses, non-pecuniary losses, and punitive damages a victim may recover.

The limits range from $50,000 to $300,000, depending on the number of employees who work for the defendant. For defendants with 15 to 100 employees, the limit is $50,000; for defendants with 101 to 200 employees, the limit is $100,000; for defendants with 201 to 500 employees, the limit is $200,000; and, for defendants with more than 500 employees, the limit is $300,000.[2]

The Equal Remedies Act removes these arbitrary caps, enabling victims of intentional employment discrimination based on race, color religion, sex, national origin, or disability to recover the full

[2] Defendants with fewer than 15 employees are not covered by Title VII. 42 U.S.C. sec. 2000e(b).

amount of compensatory and punitive damages needed to compensate them for their injuries, punish those who engage in egregious discrimination, and deter those who might engage in such unlawful acts. The Act removes a glaring inequity in current law, under which racial and ethnic minorities are eligible for full legal redress for intentional employement discrimination, but women, certain religious minorities, and people with disabilities are arbitrarily limited in the relief they can obtain by the number of employees on the discriminator's payroll.

III. History of the Legislation

S. 2062 was introduced on November 26, 1991. The bill is sponsored by Senator Edward M. Kennedy, chairman of the committee, and co-sponsored by Senators Durenberger, Mikulski, Packwood, Wirth, McConnell, Wellstone, DeConcini, Adams, Akaka, Baucus, Biden, Bingaman, Bradley, Burdick, Cohen, Cranston, Gore, Harkin, Inouye, Kerry, Lautenberg, Leahy, Levin, Metzenbaum, Mitchell, Robb, Sarbanes, Simon, Wofford, Dixon, Pell, Dodd, Moynihan, and Specter.

The Committee on Labor and Human Resources compiled an extensive record on the need for unrestricted compensatory and punitive damages for all victims of intentional employment discrimination during its consideration of the Civil Rights Act of 1990. As a result, no hearings were held on the Equal Remedies Act.

The committee met to consider S. 2062 on March 11, 1992. No amendments were offered. The bill was reported favorably out of committee by a voice vote.

IV. Background and Need for Legislation

In the Civil Rights Act of 1991, Congress took a significant step forward in the ongoing effort to rid America's workplaces of unlawful discrimination. Before the Act was passed, many victims of intentional discrimination had no meaningful remedy, there was no meaningful deterrent, and those who engaged in egregious discrimination faced no meaningful punishment.

Unfortunately, the 1991 Act only partially cured this problem. Although it gave victims the right to compensatory and punitive damages, it limited that right. As a result, it failed to provide full and equal remedies for all victims of intentional employment discrimination.

The limitations on damages create an unjustifiable hierarchy of victims of intentional employment discrimination. Two people who suffer identical harm may not receive the same remedies, even after separate juries decide that they deserve equal compensation.

For example, if a defendant intentionally discriminates on the basis of disability and a jury assesses damages above the statutory limits, that defendant would not be liable for a full remedy. Similarly, a person who faces sexual harassment at work may not be compensated adequately for the harm she suffered. On the other hand, if the same defendant discriminates in the same manner on the basis of national origin, the victim's recovery would not be artificially limited. No law can remedy injustice if it is unfair on its face.

Congress has created a system which values injuries suffered by women, people with disabilities, and certain religious minorities less than the same injuries suffered by racial or ethnic minorities. Congress could not have meant to condone this two-tiered system of justice. It is unconscionable and must be corrected.

Moreover, the caps deny a full remedy to the most severely injured victims. They apply not only to punitive damages; they also restrict the amount of damages that can be awarded to compensate victims for their proven future pecuniary losses and for their nonpecuniary losses, both present and future. As a result, a victim who needs extensive future medical treatment, who suffered large losses in her future earning power, who suffered permanent damage to her professional reputation, or who suffered severe mental anguish will receive only partial compensation for her injuries.

The caps also protect the worst violators of America's anti-discrimination laws. Employers who engage in less egregious actions and cause more limited injuries will be held fully responsible for the harm they caused. Those who act in the most outrageous and indefensible ways, or cause the most severe harm, will be shielded from full liability.

In addition, by limiting the damages available to victims of intentional discrimination, Congress has enabled employers to "budget" for such discrimination. Knowing that they will not be held fully accountable for their actions, unscrupulous employers have only a limited incentive to ensure that workers are not subjected to discrimination. Such employers can decide whether it is more profitable to rid their workplace of discrimination, or to permit the discrimination and pay only limited damages if they are successfully sued.

The Civil Rights Act of 1991's limitations on damages run contrary to Congress' recent efforts to strengthen protections from discrimination. For example, four years ago in the Fair Housing Amendments Act of 1988, Congress gave victims of housing discrimination the right to sue for full damages. Last fall, it overruled a series of Supreme Court decisions which had limited the reach and effectiveness of various civil rights laws. This is not time to reverse course and abandon those who suffer from unlawful discrimination. Congress must reaffirm the basic principle that those who violate the civil rights laws must be held responsible for their actions, and that those who are victims of discrimination deserve a full and fair remedy. To do anything less ignores the serious threat that discrimination continues to pose for many members of this society.

For all of these reasons, the committee concludes that Congress should remove the limitations on damages contained in 42 U.S.C. sec. 1981A.

V. Committee Views

Section 1981A's limitations on damages deny equal treatment to women, religious minorities, and persons with disabilities.

Section 1981A's limitations on damages send a very clear message to women, people with disabilities, and religious minorities across America: under the very laws that purport to protect them from discrimination, they are not treated as equals, but as second-class citizens.

By limiting the damages available to certain victims of intentional employment discrimination, the law sends the message that the discrimination they suffer is less serious, or less worthy, or less respected, than the discrimination suffered by other groups. This message runs counter to the fundamental principles of equality that underlie America's democratic system of government.

Other victims of intentional discrimination, both inside and outside the workplace, are not subjected to the kind of arbitrary, absolute caps contained in section 1981A. Racial and ethnic minorities who suffer intentional discrimination at the hands of their employers, or any other persons with whom they contract, can recover unlimited compensatory and punitive damages under 42 U.S.C. sec. 1981.[3] Americans who suffer intentional age discrimination in the workplace can recover compensation for their lost past wages and certain other losses, and can recover an equal amount in liquidated damages under the Age Discrimination in Employment Act.[4] Persons who suffer intentional discrimination in the sale or rental of housing can recover unlimited compensatory and punitive damages under the Fair Housing Act.[5] Women and girls who are intentionally discriminated against by educational institutions receiving federal funds can recover unlimited damages,[6] as can people with disabilities, blacks, ethnic minorities, and older Americans who are discriminated against by any recipient of federal funds.[7] Those who suffer intentional violations of their constitutional rights—such as racial or gender discrimination, denial of their voting rights, or denial of their fourth amendment rights to be free from unlawful searches, seizures, or arrests—under color of state law may recover both compensatory and punitive damages under 42 U.S.C. sec. 1983.[8] Indeed, arbitrary caps on damages are rare throughout the nation's civil legal system generally, not just its civil rights laws.

America's civil rights laws express a clear, fundamental principle: those who suffer intentional discrimination deserve full remedies, and those who engage in intentional discrimination must be held fully accountable for their actions.

Section 1981A rejects this basic principle. Its arbitrary limits on damages protect those who break the law and deny equality to those whom the law is supposed to protect. Women, people with

[3] *See Johnson v. Railway Express Agency*, 421 U.S. at 459-60.

[4] 29 U.S.C. secs. 626(b)-(c), 216(b).

[5] 42 U.S.C. sec. 3613(c).

[6] *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992).

[7] The Court's reasoning in *Gwinnett* would apply equally to the Age Discrimination Act, 42 U.S.C. sec. 6102 (prohibiting age discrimination in programs and activities receiving federal funds), the Rehabilitation Act, 29 U.S.C. sec. 794 (prohibiting discrimination on the basis of disability in programs and activities receiving federal funds), and Title VI, 42 U.S.C. sec. 2000d (prohibiting discrimination on the basis of race, color, and national origin in programs and activities receiving federal funds). See *Tanberg v. Weld County Sheriff*, 1992 U.S. Dist. LEXIS 3947 (D. Colo. Mar. 18, 1992) (in light of Supreme Court's holding in *Franklin*, damages are available under Rehabilitation Act).

[8] *See Carey v. Piphus*, 435 U.S. 247 (1978) (compensatory damages, including damages for mental and emotional distress, are available under section 1983); *Corriz v. Naranjo*, 667 F.2d 892, 897 (10th Cir. 1981), cert. granted, 456 U.S. 971, cert. dismissed, 458 U.S. 1123 (1982) ("[o]ne need not look far to find authority for the proposition that substantial damages, both compensatory and punitive, may be awarded for the violation of substantive constitutional rights"); *Spell v. McDaniel*, 824 F.2d 1380, 1440 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988) (upholding compensatory damage award of $900,000).

disabilities, and religious minorities are not second-class citizens, and they must not be forced to accept the second-class remedies included in the compromise Civil Rights Act of 1991.

Unrestricted damages will not lead to a "litigation explosion" or result in excessive awards

Courts use the same standards to examine intentional discrimination claims under section 1981 of the Title VII.[9] As a result, section 1981 provides the most meaningful predictor of the effect of lifting the limitations on damages in section 1981A.

When one examines the history of litigation under section 1981, it becomes apparent that removing the limitations on damages will not lead to either excessive damage awards or an excessive number of claims. A comprehensive nationwide study of cases brought under section 1981 between January, 1980 and December, 1990 found that plaintiffs won only 121 section 1981 cases during this period—an average of only eleven cases per year.[10] In 52 of these 121 cases, the plaintiffs received no compensatory or punitive damages; only back pay, front pay, or other equitable remedies were awarded. Damages were awarded in only 69 cases—an average of approximately six cases per year.

The study was able to determine the amount of damages in 66 of the 69 cases. The plaintiff received $50,000 or less in total compensatory and punitive damages—less than the lowest of the damages caps—in 42 of the 66 cases. Plaintiffs received damages in excess of $200,000 in only two cases during the entire eleven-year period.[11]

Extensive hearings on the Civil Rights Act of 1991 in both the Senate and the House of Representatives produced no evidence of any problems with excessive awards under section 1981. Those who opposed the Act's damages provision did not cite even one decided or settled section 1981 case which they alleged contained an excessive damages award.

There are a number of reasons why victims of discrimination may choose not to file a lawsuit. Plaintiffs who bring employment discrimination lawsuits face a series of daunting hurdles, and put their professional—and often their personal—reputations on the line. To defend against an allegation of discrimination, most employers will expose every real or perceived failure in the victim's professional life, and every real or perceived weakness shown by the victim. Moreover, although Title VII prohibits retaliation against those who file complaints of discrimination, victims who file such complaints may reasonably fear that unscrupulous employers, present or future, will surreptitiously hold their decisions

[9] *Flanagan v. Aaron E. Henry Community Health Services Center*, 876 F.2d 1231, 1233-34 (5th Cir. 1989) ("[w]hen 42 U.S.C. sec. 1981 and Title VII are alleged as parallel bases of relief, the same elements of proof are required for both actions.").

[10] W. White, D. Shelton, and A. Dickerson, Shea & Gardner, "Analysis of Damage Awards Under Section 1981," p. 3-4 (Jan. 23, 1991) (reprinted in "Hearings on H.R. 1, The Civil Rights Act of 1991," Hearings Before the Committee on Education and Labor, House of Representatives, 102nd Cong., 1st Sess., at 906 (1991)). The study was limited to reported decisions. It does not include data on cases that were settled before trial or disposed of without a reported decision.

[11] Although the report cited three damage awards in excess of $200,000, one of these awards was reversed on appeal. *Holland v. First Virginia Banks, Inc.*, 937 F.2d 603 (1991) (reversed in light of Supreme Court's decision in *Patterson v. McLean Credit Union*), vacated, 112 S.Ct. 1152 (1992) (remanded for reconsideration in light of Civil Rights Act of 1991).

to enforce their right to be free from discrimination against them. Working men and women will not lightly subject themselves to the public exposure and long-term professional threats that accompany a discrimination lawsuit.[12]

Unrestricted compensatory and punitive damages do not offer a "pot of gold" to those willing to sue for employment discrimination. For a number of reasons, many plaintiffs will choose to put their experience behind them rather than bring suit.

Section 1981A's limitations deny a fair remedy to those who suffer the worst injuries

Although the history of section 1981 litigation indicates that many awards would not be affected by section 1981A's caps, certain section 1981 cases illustrate the unfairness of imposing arbitrary limits on damages.

For example, the plaintiff in *Holland* v. *First Virginia Banks, Inc.*,[13] a 46 year old black male, was subjected to a campaign of racial harassment which ended only when his supervisor fired him in retaliation for his decision to complain to a more senior company official. According to the trial court's findings of facts, the plaintiff, the first black employee in his facility, was warned by a co-worker when he first began work that "he should be careful since he was the first black employee in the office." True to the warning, the plaintiff's supervisor shortly began to racially harass the plaintiff. He referred to the plaintiff using demeaning names such as "Chicken Little," "Chicken George," "Sparerib Kid," "Watermelon Man," "Watermelon Kid," or "his Boy." The supervisor told the plaintiff in the presence of his co-workers "that he had seen a dead coon in the road and suggested that the plaintiff take it home and make stew for his family." On another occasion, he told the plaintiff that he couldn't have any donuts "because they had not been fried in chicken fat or chicken grease."

The plaintiff endured this harassment for nearly a year. His complaints to company officials resulted in no meaningful response. In the end, he was injured on the job and, while he was recuperating, his supervisor fired him.

The trial judge found that the plaintiff had been subjected to an extensive campaign of severe racial harassment. It found that his employer's reaction was initially to deny that the name-calling had occurred and, when it became apparent that such a denial was spurious, to "resort[ ] to a belittlement of the claim by characterizing the conduct as the type of kidding and joking that normally goes on in the work-place." According to the trial court, even by the end of the trial the defendant had not acknowledged or apparently even recognized the injury that the supervisor's unlawful conduct inflicted.

The jury awarded the plaintiff $20,000 in compensatory damages and $501,000 in punitive damages. Even though the defendant in the case was a large employer which would have been subject to

[12] *Cf. Mitchell* v. *OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) (noting that a plaintiff who brings a Title VII lawsuit must "endur[e] the humiliation of making public the indignities which she has suffered in private, as well as the anticipated claims that she has 'consented', and the attempts to trivialize her concerns . . .").

[13] 744 F. Supp. at 722.

the highest of section 1981A's caps, if a woman had been subjected to essentially identical discrimination based on her sex, and suffered the same injuries as Mr. Holland did, she would have received only $300,000, plus any portion of the compensatory damage award not subject to section 1981A's caps. The bank, despite its refusal to remedy obvious, outrageous discrimination that resulted in a worker being fired from his job—or even, as the court found, to acknowledge there was a problem—would have had its liability reduced dramatically.

In *Rowlett* v. *Anheuser-Busch, Inc.*,[14] a black worker suffered several years of discrimination. He was denied training that his white coworkers received and that he repeatedly requested. He was denied pay raises equivalent to those of his white coworkers. Ultimately he was fired, and was unable to find another job for a "significant" period of time.

The jury awarded the plaintiff $176,000 in lost wages, $123,000 for the emotional distress associated with Anheuser-Busch's intentional discrimination, and $3 million in punitive damages. The court of appeals reduced the punitive damages award to $300,000. Anheuser-Busch did not challenge the award for lost wages, and the court explicitly upheld the $123,000 emotional distress award.

Although Anheuser-Busch would be subject to section 1981A's highest limitation, if a person had suffered equivalent discrimination based on her religion, she would have received only $300,000 for damages subject to the cap—at least $123,000 less than the jury and the court found that Mr. Rowlett was entitled to.

Because women, certain religious minorities, and persons with disabilities have historically been prevented from recovering damages, existing court cases do not contain detailed information on the injuries these victims have suffered. However, there are a number of reported cases which demonstrate that women, religious minorities, and persons with disabilities are subjected to similarly serious acts of humiliating, debilitating, and financially destructive discrimination. They deserve fair and equal remedies for the injuries they are forced to suffer.

For example, Nancy Phillips was fired when she told her employer that she was pregnant.[15] She not only lost her job, she also lost her family's health insurance. Unable to pay the medical bills she incurred during her pregnancy and delivery, she was successfully sued by the hospital, which threatened to send a marshal to her home to collect the judgment. Her family was barely able to make ends meet and went deeply into debt, well beyond the medical bills. When her case finally went to trial, the court found that she had been a victim of unlawful sex discrimination. She was awarded back pay and compensation for her medical costs—but she recovered absolutely nothing for the years of stress, humiliation and fi-

[14] 832 F.2d 194 (1st Cir. 1987).

[15] *EEOC* v. *Service News Co.*, 898 F.2d 958 (4th Cir. 1990). This example, and the examples that follow, are taken from C. Newkirk, E. Vargyas, M. Greenberger, and L. Rivera, "Title VII's Failed Promise: The Impact of a Lack of a Damages Remedy—Impact Update," (National Women's Law Center, Mar. 6, 1991), reprinted in "Hearings on H.R. 1, The Civil Rights Act of 1991," Hearings Before the Committee on Education and Labor, House of Representatives, 102nd Cong., 1st Sess., at 581 (1991). The report contains many other illustrations of the forms of discrimination that continue to prevent women and others from achieving equality in the workplace.

nancial hardship caused by her employer, or for the permanent
damage to her credit rating. Although she could now recover more
complete remedies, the compensation to which she would be enti-
tled for many of her injuries would be subject to the artificial caps.
Virginia Delgado worked in a Navy EEO office, where she was
illegally harassed, discriminatorily denied a salary increase, and
eventually discriminatorily discharged by her supervisor, the offi-
cer responsible for enforcing workers' rights to equal employment
opportunity.[16] After she was fired, she was unable to find another
job. She lived in poverty, forced to scrape by on borrowed money.
She did not have enough money to eat properly and she lacked
medical coverage. When she was finally able to afford a dentist,
she lost several teeth because of her lack of medical care. When
her case went to trial, she proved her claim of discrimination. She
received back pay, and was offered reinstatement. However, the su-
pervisor who had engaged in the discrimination was still working
in the EEO office, and she felt she could not return to her previous
job under such circumstances. She took early retirement instead,
which represented an additional financial loss. Yet she received
nothing for that loss, her medical injuries, or the stress and humili-
ation caused by the discrimination. Even with section 1981A's im-
proved remedies, her compensation would be limited, and might
not give her a complete remedy.

Dr. Jean Jew, a medical neuroscience researcher and faculty
member at the University of Iowa College of Medicine, endured
thirteen years of sexual harassment, which resulted in the denial
of a promotion and permanent damage to her career.[17] Male facul-
ty members spread rumors accusing Dr. Jew of moving up in the
department by providing sexual favors. She was called a "whore,"
"bitch," and "slut." Cartoons appeared on doors depicting her in
sexual acts, and she was ridiculed in graffiti on bathroom stalls.
Dr. Jew proved her claim of discrimination in court. Yet she re-
ceived nothing for the damage to her professional reputation
within the national scientific community, for the resulting difficul-
ty she encountered in obtaining research grants, or for the prob-
lems she faced in finding alternative employment. Like other vic-
tims of sex discrimination, even under section 1981A she might
still be denied full compensation for these permanent, severe pro-
fessional injuries.

Nancy Ezold was denied promotion to partnership at a prestigi-
ous Philadelphia, Pennsylvania law firm because of sex discrimina-
tion.[18] The firm had subjected Ms. Ezold, who the court found was
fully qualified for the job, to a far more rigorous standard than her
male colleagues. For example, despite her protests, she was as-
signed less challenging work than her colleagues and was then
criticized for not handling complex matters. She was called "too de-
manding," while male associates who had been criticized for not
being "aggressive enough" were made partners. She was criticized
for being "too concerned with women's issues," while a male associ-

[16] *Delgado v. Lehman*, 665 F. Supp. 460 (E.D. Va. 1987).
[17] *Jew v. Univ. of Iowa and the Bd. of Regents of the Univ. of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990).
[18] *Ezold v. Wolf, Block, Schoor, and Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990).

ate's sexual harassment of a co-worker was viewed as insignificant.
When she was denied partnership, Ms. Ezold left her firm. She was
unable to find comparable employment; she believes that her
career has permanently been sidetracked and her earnings poten-
tial permanently reduced.

Women, certain religious minorities, and people with disabilities
are increasingly moving into prestigious and lucrative professions
such as law, accounting, medicine, engineering, computer program-
ming, and banking. They are beginning, slowly, to break down the
"glass ceiling" that has restricted their access to America's board-
rooms and corporate headquarters. By arbitrarily limiting their
right to be compensated when they suffer unlawful discrimination,
section 1981A's limitations deny their progress into high-level, high
paying positions of authority and responsibility, and condone the
discrimination which continues to block their path.

Existing law protects against excessive or unfair verdicts

Those who argue that women, religious minorities, and people
with disabilities should be denied full and fair remedies essentially
contend that juries cannot be trusted to award damages in discrim-
ination cases. This attempt to constrain juries' decisionmaking au-
thority ignores the central role juries have played throughout this
nation's history. Indeed, the Framers' faith in the jury system was
so deep that the right to a jury trial is one of the few rights explic-
itly enshrined in the Bill of Rights.

These arguments also ignore the checks the legal system imposes
to prevent unfair or excessive jury awards.[19] Although juries are
responsible for determining the amount of compensatory and puni-
tive damages, legal standards guide their deliberations. The Civil
Rights Act of 1991 explicitly provides that compensatory damages
are available only where the plaintiff proves intentional discrimi-
nation.[20] General legal principles require that compensatory
damage awards must be supported by the evidence, must justly and
fairly compensate the plaintiff for the injuries caused by the de-
fendant's conduct, and must not be based on speculation or sympa-
thy.[21] As to punitive damages, the Civil Rights Act of 1991 pro-
vides that these damages are available only where the plaintiff
proves that the defendant engaged in intentional discrimination
"with malice or with reckless indifference to the [victim's] federally
protected rights."[22] In assessing punitive damage awards, courts
have held that the amount awarded "must bear some relation to
the 'character of the defendant's act' along with 'the nature and
extent of the harm to the plaintiff that the defendant caused,'"
and may depend in part on the wealth of the defendant and the

[19] The sources referred to in this section are cited for illustrative purposes only. The commit-
tee does not intend to express approval of a particular decision, approach, or standard for in-
structing juries or reviewing jury awards. Nothing in the Equal Remedies Act is intended to
change in any way existing law regarding the circumstances under which a jury may award
compensatory or punitive damages or a trial or appellate court may modify such an award.
[20] 42 U.S.C. Secs. 1981A (a)(1), (a)(2).
[21] See e.g. L. Sand, J. Siffert, S. Reiss, and N. Batterman, "Modern Federal Jury Instruc-
tions—Civil," Instruction 87-83 (compensatory damages in section 1981 cases), Instruction 77-3
(compensatory damages generally); 22 Am. Jur. 2d, "Damages" Secs. 27, 1018 (1988 and Supp.
1992).
[22] 42 U.S.C. sec. 1981A(b)(1).

verdict's potential for deterrence.[23] Moreover, both trial courts and courts of appeals may reduce or vacate compensatory and punitive damage awards if they are excessive.[24]

The legal system's existing protections shield defendants from excessive or unfair awards better than arbitrary, across-the-board caps do, without sacrificing victims' rights to full and fair compensation. Rather than protecting employers from excessive damage awards, section 1981A's limitations will shield lawbreakers from full responsibility for their actions and for the damage that they cause.

Section 1981A's restrictions are not a form of tort reform

Despite the protections described above, there are imperfections in America's civil justice system. It has been argued that the nation must overhaul its legal system, and that the limitations on damages are a first step toward comprehensive tort reform. The committee finds that this is untrue for two reasons.

First, the conduct at issue in section 1981A suits are *intentional* violations of America's most basic promise of equality, violations which deny the victim's right to equal opportunity. They are fundamentally different from the actions at issue in medical malpractice suits, slip-and-fall cases, product liability claims, and the other kinds of cases—typically negligence cases—which are cited by those urging Congress to adopt tort reform.

Second, it is tremendously misguided to believe that limiting the remedies available to a single set of victims for a single type of injury, merely because such victims have historically been denied equal treatment under the laws, is a meaningful or effective way of addressing the complex problems facing the nation's civil litigation system.

Congress should not carve out a special exemption for exployers with between 15 and 50 employees

It has also been suggested that Congress should attempt to accommodate the interests of small business owners by lifting the

[23] *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d at 207 (citing Restatement 2d (Torts) section 908(2) (1987) and *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267 (7th Cir. 1984)); see generally "Modern Federal Jury Instructions—Civil," Instruction 87-85 (punitive damages in section 1981 cases) (in determining whether to award punitive damages and, if such damages area awarded, the appropriate amount, the jury should "consider whether the award of punitive damages will accomplish th[e] dual purpose of punishment and deterrence" and as part of its determination, may consider the defendant's financial circumstances). Instruction 77-5 (punitive damages generally) (if jury decides to award punitive damages, it must use "sound reason" in setting the amount, which "must not reflect bias, prejudice, or sympathy toward any party"; jury may consider defendant's financial resources).

[24] See e.g. *Mitchell v. Keith*, 752 F.2d 885, 888, 892 (9th Cir.), cert. denied, 472 U.S. 1028 (1985) (in suit brought under 42 U.S.C. sec. 1981, trial judge granted defendant's motion for new trial, unless plaintiff accepted remittitur on punitive damages award); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d at 206–07 (in suit brought under section 1981, court reduced punitive damages from $3 million to $300,000); see generally 22 Am. Jur. 2d, "Damages," section 1017 (although courts are generally unwilling to set aside jury awards, "[i]t is clear that the verdict of a jury is subject to the supervision of the court . . ."); section 1021 (although the amount of damages to be awarded "rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict, a verdict may be set aside as excessive by the trial court, or on appeal"; "[i]n most jurisdictions the trial court, as a condition of entering judgment upon the verdict, or the appellate court, as a condition of affirming the judgment, in a proper case, may require a remittitur of the excess from the judgment entered or the verdict returned and enter of [sic] affirm judgment for the amount as so reduced"); section 1032 (although the amount of a punitive damages award is "vested in the sound discretion of the trier of fact," [t]he discretion of the jury in fixing the amount of punitive damages is not beyond supervision by the court").

caps on damages, but only for employers with 50 or more employees.[25] The Committee finds that this proposal is misguided for a number of reasons.

First, it violates the fundamental principle underlying S. 2062: that all victims of intentional employment discrimination in violation of Title VII should be entitled to the same remedies. Just as there is no justification for denying women, religious minorities, and people with disabilities equal remedies in all Title VII cases, there is no justification for denying them equal remedies merely because they happen to work for an employer with fewer than 50 employees.[26]

Second, Title VII already addresses the unique needs of small businesses by exempting employers with fewer than 15 employees. Congress decided more than 20 years ago that employers with more than 15 employees should be subject to the requirements of Title VII. No reason now exists to relieve these employers of full responsibility if they intentionally violate that law.

Third, such an arbitrary exemption could shield egregious discrimination, including cases in which the owner actually engaged in the discrimination. For example, during hearings on the Civil Rights Act of 1991 the Labor and Human Resources Committee heard Pat Swanson describe her experience as a victim of severe harassment at the hands of her boss, a part owner of the company for which she worked.[27] Ms. Swanson was subjected to a barrage of extremely humiliating and degrading actions and comments. Her boss engaged in repeated, unwanted physical contact. His campaign of harassment left Pat Swanson feeling humiliated, anxious, and unable to concentrate. She could not quit because she was her family's sole support. She suffered migraine headaches and a stress-related medical disorder. Moreover, her husband was in the same business as her employer, and she lived in constant fear that his business colleagues would see how she was treated. Although Ms. Swanson did not tell the committee how many others worked for her employer, her testimony indicated that she worked for a small car dealership. If in fact there were fewer than 50 employees at her workplace, her employer would be protected by the special small business exemption. Clearly, this is not the kind of businessperson Congress should be writing laws to protect.

Fourth, limiting the amount of damages that a plaintiff can recover does not cause the cost of the injuries to disappear. It simply shifts those costs, forcing the victim herself to pay for a portion of the harm caused by the defendant. Although small employers may have limited resources for paying legal judgments, individual victims are generally even less able to shoulder the burden of uncompensated medical bills, decreased earnings potential, and other losses.

[25] See, e.g., S. 2058 (102nd Cong., 1st Sess. (1991)).

[26] Supporters of S. 2062 have not attempted to expand Title VII's coverage by removing the exemption for employers with fewer than 15 employees. However, this failure does not condone different treatment of similarly situated victims of discrimination. S. 2062 will ensure that all victims of discrimination who are protected by Title VII—i.e., all persons who work for employers with 15 or more employees and who suffer employment discrimination on the basis of race, color, religion, sex, or national origin—are entitled to equal remedies.

[27] "Civil Rights Act of 1990," Hearing Before the Committee on Labor and Human Resources, United States Senate, 101st Cong., 1st Sess., at 186 (1989).

Fifth, an exemption for businesses with fewer than 50 employ is not a minor exception. Five million, seven hundred thousand of the nation's 6 million businesses—95%—have fewer than 50 employees.[28] 38 million of the country's 88 million workers—43%—are employed by companies with fewer than 50 employees.[29]

Finally, removing the caps on damages will not expose small businesses to unfair risks while they develop an understanding of the Americans with Disabilities Act's requirements. The ADA itself includes a phase-in provision to protect the needs of small businesses.[30] Moreover, although ADA extends protection from discrimination based on disability to private sector employees, there is a body of case law under the Rehabilitation Act that can guide private sector employers in their effort to understand the new law's requirements.[31] In addition, the Civil Rights Act of 1991 ensures that employers who reasonably and in good faith attempt to accommodate a person's disability will not be liable for damages.[32] Finally, S. 2062 would merely lift arbitrary restrictions on damages for the most egregious violations of the ADA, almost two years after the Act's passage. This would not impose an unfair or unexpected burden on employers; indeed, the changes made by S. 2062 are much more limited than the 1988 amendments to the Fair Housing Act, which simultaneously extended the Act to prohibit discrimination on the basis of disability and provided for unlimited punitive damages.[33]

Americans know that discrimination continues to restrict the opportunities of women, people with disabilities, and certain religious minorities, and that it can impose very serious financial and nonfinancial costs on its victims. It is unfair to suggest that the 38 million Americans who work for companies with fewer than 50 employees should be denied equal treatment and forced to bear the costs of their injuries, merely to protect those who intentionally deny equal employment opportunity to their workers.

[28] United States Bureau of the Census, U.S. Statistical Abstract, "County Business Pattern, U.S. Summary for 1988," Table 1b (United States—Establishments, Employees, and Payroll by Industry by Employment-Size Class: 1988).

[29] Id.

[30] Under 42 U.S.C. sec. 12111(5)(A), employers with between 15 and 25 employees are not subject to the ADA until two years after the Act's effective date of July 26, 1992.

[31] See "The Americans with Disabilities Act of 1989," Report of the Senate Committee on Labor and Human Resources, No. 101-116, 101st Cong., 1st Sess. at 21 (Aug. 20, 1989) (ADA's definition of the term "disability" "is comparable to the definition of the term "individual with handicaps" in section the Rehabilitation Act of 1973 and the Fair Housing Act"; committee intended that the Department of Health, Education, and Welfare's interpretation of the term "individual with handicaps" in the regulations implementing section 504 of the Rehabilitation Act, and the Department of Housing and Urban Development's analysis of the regulations implementing the Fair Housing Amendments Act of 1988, apply to the definition of the term "disability" in the ADA.)

[32] 42 U.S.C. sec. 1981A(a)(3) provides that:

> In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

[33] Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619 (Sept. 13, 1988).

Section 1981A's limitat s c te false and perverse incentives for victims of multiple forms of discrimination

People who suffer discrimination on the basis of race or national origin combined with sex, disability, or religious minority status have recourse under both sections 1981 and 1981A. These plaintiffs, who may have different independent causes of action arising out of the same or different factual situations, may proceed under both sections and recover damages under each for the independent causes of action. For example, a woman who suffers both racial and sexual harassment, and is injured in different ways by each, may challenge the race discrimination under sections 1981 and 1981A, and the sex discrimination under section 1981A. If she is successful, she may recover for both claims.[34]

However, the differences between sections 1981 and 1981A may force the plaintiff artificially to separate a course of discriminatory conduct into distinct portions and, for example, attribute certain acts to race discrimination and other acts to gender discrimination. This defies logic, and denies the experience of the victim. In many instances, discriminatory conduct cannot be separated in such a manner. The victim is discriminated against both because she is a woman *and* because she is a racial minority.

Although in such a case the plaintiff may file a combined claim for race and sex discrimination, if her damages exceed the limits imposed by section 1981A the trial court will be forced to address the difficult question of how to apply the damages caps to an award which cannot be segregated by statute, without denying the victim her right under section 1981 to receive full compensation for her racial discrimination claim.

Removing section 1981A's restrictions on damages is consistent with the compromise reached on the Civil Rights Act of 1991

Congress' efforts to provide equal, fair, and adequate remedies under Title VII were part of a much larger and more complex undertaking. In addition to addressing Title VII's inadequate remedies, the Civil Rights Act of 1991 reversed several Supreme Court decisions which had made it significantly more difficult for victims of discrimination to bring suit and prove their cases. When the struggle to enact a fair, full damages remedy became intertwined with other controversial provisions in the Act, and a compromise containing limited damages was offered, supporters decided to agree to the compromise, and seek uncapped damages separately.

Congress passed the Civil Rights Act to ensure that its vitally needed provisions became law. But before voting for the Act, a number of members of Congress—including one of the compromise's chief architects—stated their opposition to the caps and expressed their intent to introduce legislation to remove them. The Senate Majority Leader promised to bring such legislation to the floor of the Senate early in 1992.

The Equal Remedies Act has been introduced, and Congress must now finish the work it began last year. It must remove the limita-

[34] Although such plaintiffs could recover separately for separate causes of action, they could not recover double damages for the same harm caused by the same facts and circumstances.

tions on damages, and finally give women, religious minorities, and people with disabilities equal treatment under the nation's civil rights laws.

Conclusion

Congress must decide whether it will accept a legal regime which values the injuries suffered by women, religious minorities, and people with disabilities less than identical injuries suffered by others, and which on its face discriminates between different victims of intentional discrimination. Congress should not deny the right of those who are injured by intentional discrimination to full compensation, and fair and equal treatment, in the nation's courts. For this reason, the committee concludes that the Equal Remedies Act must become law.

VI. Tabulation of Votes Cast in Committee

The Equal Remedies Act was brought before an executive session of the Labor and Human Resources Committee on March 11, 1992. No amendments were offered. The bill was reported favorably out of committee by a voice vote.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 21, 1992.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman. The Congressional Budget Office has revised its cost estimate of S. 2062, the Equal Remedies Act of 1991, as ordered reported by the Committee on Labor and Human Resources on March 11, 1992, to clarify the assumptions underlying the estimate. It is possible that S. 2062 could affect direct spending. CBO believes that the increase to federal outlays in any year is likely to be small, however, probably less than $500,000. This bill would not affect the budgets of state and local governments.

S. 2062 would amend Sec. 102—Damages in Cases of Intentional Discrimination—of P.L. 102-166—the Civil Rights Act of 1991. Under P.L. 102-166, federal employees can be awarded compensatory damages up to a maximum of $300,000. This bill would remove the limitations placed on the amount of damages that could be awarded in cases of intentional discrimination involving the federal government.

It is possible that removing the limitations placed on awards would increase the amount awarded or increase the number of cases filed or both and therefore would increase federal spending. However, there is no information available to develop an estimate. P.L. 102-166 was enacted on November 21, 1991. While the issue is still before the courts, CBO has assumed for the purpose of this estimate that P.L. 102-166 applies to cases initiated after the date of enactment. Due to the newness of the law and the fact it takes on average two years to process a case, there is no information on the amount of compensatory damages awarded to federal employees in cases of intentional discrimination.

The law firm of Shea and Gardner reviewed intentional discrimination cases involving non-federal employees between 1980 and 1990 and found compensatory damage awards ranged from $1.00 to $300,000. There is no limitation on awards for cases not involving the federal government. Based on this survey, it appears there would be few if any awards above the current maximum of $300,000.

CBO estimates the cost of this bill would be less than $500,000 in any year. This estimate assumes that S. 2062 is effective upon enactment. The estimate is very uncertain. It is possible the above estimate is too low. First, the cases reviewed by Shea and Gardner may not be representative of the cases that will be filed against the federal government and therefore the information on award amounts may be too low. Second, as mentioned above, there may be more cases initiated against the federal government when there is no limit to the amount of damages that can be awarded. On the other hand, the estimate may be too high because there may be no awards above the $300,000 limit.

If you wish further details on this estimate, we will be pleased to provide them. The CBO analyst is Cory Oltman, who can be reached at 226-2820.

Sincerely,

Robert D. Reischauer,
Director.

VIII. Regulatory Impact Statement

In accordance with Rule XXVI of the Standing Rules, the committee has prepared the following statement regarding the impact of the legislation:

A. Estimated Number of Individuals and Business Regulated and Their Groups or Classifications

This legislation will not result in an increase in the number of individuals or businesses regulated by either Title VII or section 1981A.

S. 2062 does not change Title VII's substantive proscription against discrimination. In practice, it would affect only those businesses who may be successfully sued for discrimination and against whom a judgment in excess of the current limitations may be assessed by a jury.

B. Economic Impact on the Individuals, Consumers, and Businesses Affected

S. 2062 will provide full and equal remedies to women, religious minorities, and people with disabilities who suffer intentional employment discrimination. It will impose no significant economic burdens on consumers or employers. Rather, by removing discrimination from America's workplaces, the legislation will improve the country's economic well-being by encouraging business practices that enable every working person to achieve his or her full potential in the workforce.

SPECIAL REPORT: VERDICT SURVEY

Litigation

PLAINTIFFS' WIN RATE FOR PUNITIVE DAMAGES IS DOWN SINCE 1991, SAYS CALIFORNIA STUDY

Juries awarded punitive damages to plaintiffs in employment cases in 10 percent of the cases tried in California state and federal courts from January through August 1997, continuing a trend that began in 1991, according to an attorney interpreting data compiled by Orrick, Herrington & Sutcliffe, a management law firm based in San Francisco.

Since 1991, the percentage of employment cases in which plaintiffs recover punitive damages in California courts has been "extremely low," said Gary R. Siniscalco, a partner with Orrick, Herrington & Sutcliffe in San Francisco. From January through August 1997, plaintiffs were awarded punitive damages in six of 62 cases, or approximately 10 percent. Plaintiffs were awarded punitive damages in 12 of 106 cases (11 percent) in 1996; 11 of 106 cases (10 percent) in 1995; 12 of 141 cases (9 percent) in 1994; and in 11 of 95 cases (12 percent) in 1993, according to data compiled by the firm.

The percentage of plaintiffs who prevailed in jury trials also dropped, as did the amount of the average jury award. In state and federal courts in California, the average jury award of punitive damages for January through August 1997 was $243,786—down from $982,715 for the period from January through December 1996. The law firm expects to update its data to include figures for September through December 1997.

The declines in both the average amount of punitive damages awarded and the percentage of cases in which plaintiffs prevailed can be attributed to employers' increased use of education and training, Siniscalco suggested. Companies and their lawyers are emphasizing training to prevent the types of egregious cases that are associated with large punitive damages, he explained.

New Category of Average Awards

In its latest compilation, Orrick, Herrington has added a new category of average awards based on total verdicts reported in wrongful termination and non-termination cases. Its previous compilations had included only statistics on awards in cases in which plaintiffs prevailed—which tended to result in a higher average award, Siniscalco said. By also including cases in which the plaintiff was not awarded any damages, the average award is lower.

The average based on total verdicts enables individuals to see "what the likely value is of any case going to trial," said Siniscalco. From January through August 1997, the average award in non-termination cases based on total verdicts for sex harassment and sex discrimination claims was $419,756; for race, it was $207,786; for age, it was $104,344; and for disability discrimination claims, it was $52,007.

In wrongful discharge cases, the average award based on total verdicts was $139,558 in sex harassment and discrimination cases; $486,251 in race cases; $245,949 in age cases; and $239,538 in disability bias cases.

Plaintiffs prevailed in 47 percent of the non-termination discrimination cases, winning 53 of the 112 cases reported for January through August 1997. Plaintiffs in discrimination cases that include wrongful termination claims prevailed in 45 percent, winning 135 cases out of 303, according to the study.

The compilation of verdicts is gleaned from three published sources in California, according to Denise Thomas, a legal assistant with Orrick, Herrington & Sutcliffe. Siniscalco cautioned that the data on plaintiff win rates and average awards do not reflect cases in which a jury award is reduced or overturned by a trial judge or on appeal.

Use Data As Guidepost

Rather, the data are meant to give people a "sense" of what happens to these claims before a jury, Siniscalco said. The data can "give you some guideposts for cases that are going to go to trial as to what the range of a verdict might be in different jurisdictions and for different kinds of cases," he said. The data do not take into account the facts of any particular case, said Siniscalco.

The information can be used to ascertain both overall trends and to get an overall view of how differen jurisdictions look at employment cases, Siniscalco explained. For example, state courts in Alameda and Los Angeles counties had average jury awards of $751,551 and $976,618, respectively, in cases in which the plaintiff prevailed. The numbers "confirm general wisdom t t these two are the most hostile counties to employers and the most favorable to plaintiffs," Siniscalco said.

State Or Federal Court?

The numbers compiled by Orrick, Herrington contradict management lawyers who say they w ld rather be in federal court than state court, Siniscalco remarked. The overall percentage of cases in which plaintiffs prevail and the dollar amount of federal awards do not suggest any significant difference in cases that go to trial.

The data do not address cases in which summary judgment is awarded, Siniscalco acknowledged. He added that attorneys may have other reasons for preferring federal to state court, including the greater efficiency of the federal courts at managing their caseloads or a more favorable forum for getting summary judgment.

By Nadya Aswad

The following tables show the data compiled by Orrick, Herrington & Sutcliffe:

1072-1987/97/$0+$1.00

Jury Verdicts in Employment Cases

California Verdicts Reported From 1981 through August 1997

Total Awards

Year	Median Jury Award	Average Jury Award	Total Verdicts	Plaintiff Prevailed: Number (Percent)
1981	$ 300,000	$ 490,091	18	11 (61%)
1982	136,660	472,946	35	22 (63%)
1983	76,500	238,221	24	13 (54%)
1984	230,000	766,152	29	17 (59%)
1985	252,743	795,343	64	50 (78%)
1986	109,000	268,395	72	42 (58%)
1987	260,500	866,074	80	42 (52%)
1988	120,742	610,613	63	42 (67%)
1989	154,007	341,431	42	28 (67%)
1990	317,135	1,806,034	67	46 (69%)
1991	278,900	449,668	69	37 (54%)
1992	330,000	816,858	81	35 (43%)
1993	250,000	429,315	95	51 (54%)
1994	250,000	457,777	141	79 (56%)
1995	242,479	439,653	106	58 (55%)
1996	184,000	646,013	106	47 (44%)
1997	263,500	606,789	62	28 (45%)

Emotional Distress Awards

Year	Median Jury Award	Average Jury Award	Total Verdicts	Plaintiff Prevailed: Number (Percent)
1981	$ 45,000	$ 45,000	18	1 (6%)
1982	6,500	54,000	35	4 (11%)
1983	150,000	150,000	24	1 (4%)
1984	50,000	50,000	29	2 (7%)
1985	37,000	44,400	64	5 (8%)
1986	30,000	41,318	72	11 (15%)
1987	79,500	145,188	80	8 (10%)
1988	75,000	201,198	63	13 (21%)
1989	80,000	81,428	42	7 (17%)
1990	55,750	270,642	67	23 (34%)
1991	200,000	192,611	69	9 (13%)
1992	200,000	180,134	81	7 (9%)
1993	96,148	199,998	95	19 (20%)
1994	100,000	150,582	141	27 (19%)
1995	85,000	214,965	106	18 (17%)
1996	135,420	309,997	106	23 (22%)
1997	750,000	750,000	62	1 (2%)

Punitive Damages Awards

Year	Median Jury Award	Average Jury Award	Total Verdicts	Plaintiff Prevailed: Number (Percent)
1981	$ 200,000	$ 444,333	18	6 (33%)
1982	100,000	637,713	35	12 (34%)
1983	1,500,000	1,500,000	24	1 (4%)
1984	100,000	498,364	29	11 (38%)
1985	250,000	750,884	64	25 (39%)
1986	75,000	225,000	72	25 (35%)
1987	261,430	1,182,656	80	20 (25%)
1988	305,173	1,161,659	63	12 (19%)
1989	200,000	284,050	42	7 (17%)
1990	115,000	3,394,321	67	14 (21%)
1991	500,000	661,929	69	7 (10%)
1992	1,000,000	1,187,929	81	7 (9%)
1993	235,000	414,895	95	11 (12%)
1994	404,500	913,708	141	12 (9%)
1995	125,000	225,455	106	11 (10%)
1996	325,000	983,715	106	12 (11%)
1997	150,000	243,786	62	6 (10%)

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1072-1967/97/$0+$1.00

Jury Verdicts in Employment Cases

California Verdicts Reported From January 1989 through August 1997

Wrongful Termination

Issues	Median Jury Award	Average Jury Award	Averages Based on Total Verdicts	Total Verdicts	Plaintiff Prevailed: Number (Percent)
Discrimination					
Sex	$ 100,000	$ 319,328	$ 139,558	135	59 (44%)
(Sexual Harassment)	(100,000)	(273,861)	(122,675)	(29)	(13) (45%)
(Non-Harassment)	(137,750)	(332,234)	(17,870)	(106)	(46) (43%)
Race	500,000	943,900	486,251	66	34 (52%)
Age	503,000	700,008	245,949	74	26 (35%)
Disability	364,119	419,191	239,538	28	16 (57%)
Total				**303**	**135 (45%)**
Non-Discrimination					
Breach of Contract/Covenant	$ 250,000	$ 605,956	$ 409,783	278	188 (68%)
Violation of Public Policy	250,000	1,057,103	575,743	112	61 (54%)
Fraud/Misrepresentation	803,158	862,669	383,408	9	4 (44%)
Defamation/Slander	122,750	240,250	60,063	8	2 (25%)
Total				**407**	**255 (63%)**

Non-Termination (Includes such issues as harassment, failure to hire, failure to promote, demotion, etc.)

Issues	Median Jury Award	Average Jury Award	Averages Based on Total Verdicts	Total Verdicts	Plaintiff Prevailed: Number (Percent)
Discrimination					
Sex	$ 195,000	$ 731,187	$ 419,756	54	31 (57%)
(Sexual Harassment)	(283,500)	(969,600)	(501,862)	(29)	(15) (52%)
(Non-Harassment)	(172,500)	(506,777)	(193,412)	(25)	(16) (64%)
Race	325,000	488,909	207,786	40	17 (42%)
Age	157,984	260,860	104,344	10	4 (40%)
Disability	416,059	416,059	52,007	8	1 (12%)
Total				**112**	**53 (47%)**
Non-Discrimination	$ 442,000	$ 603,600	$ 248,541	17	7 (41%)
Violation of Public Policy	120,000	154,613	66,263	7	3 (43%)
Breach of Contract/Covenant					
Total				**24**	**10 (42%)**

Jury Verdicts In Employment Cases–California Superior and U.S. District Courts

California Superior and U.S. District Courts	Median Jury Award	Average Jury Award	Total Verdicts	Plaintiff Prevailed: Number (Percent)
[Selected California Superior Courts not reproduced.]				
All California Superior Courts	**$ 264,000**	**$ 482,629**	**568**	**314 (55%)**
United States District Courts				
Northern	216,500	1,344,827	27	14 (52%)
Eastern	495,351	450,643	7	3 (43%)
Central	276,750	886,010	27	14 (52%)
Southern	----	----	--	—
All California U.S. District Courts	250,000	670,370	**61**	**31 (51%)**
All California Courts	263,000	576,499	**629**	**345 (55%)**

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A BNA Graphic

1104 (6th Cir. 1987), held that the plaintiff presented sufficient evidence to submit the issue of intentional discrimination to the jury, but did not produce sufficient evidence of malice or reckless indifference to submit the issue of punitive damages. Similarly, in Stephens v. South Atlantic Canners, 848 F.2d 484, 46 FEP Cases 1729 (1988), the Fourth Circuit held in a racial discrimination action under 42 U.S.C. § 1981 that it was error for the trial court to submit to the jury the issue of punitive damages where there was no competent evidence of "the requisite malice or reckless or callous indifference of an egregious character."

E. EEOC Factors for Determining Appropriateness of Punitive Damages

The EEOC has listed seven factors that should be considered by EEOC investigators when determining whether "conduct was committed with malice or reckless indifference to the complaining party's federally protected rights." See EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, July 14, 1992. They are:

1. The degree of egregiousness and nature of the respondent's conduct ("[c]onduct which is shocking or offends the conscience is egregious and warrants punitive damages");

2. The nature, extent, and severity of the harm;

3. The duration of the discriminatory conduct;

4. The existence and frequency of similar past discriminatory conduct;

5. Evidence that the respondent planned and/or attempted to conceal or cover-up the discriminatory practices or conduct;

6. The employer's actions after it was informed of the discrimination; and

7. Proof of threats or deliberate retaliatory action against complaining parties for complaints to management of filing a charge.

The EEOC's standards seem to foreclose the argument that the underlying intentional violation is, standing alone, sufficient to support an award of punitive damages.

Wage Gap (Pay Equity) GW

FAX TRANSMISSION

OFFICE OF CONGRESSWOMAN ROSA DELAURO

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PHONE: (202) 225-3661
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To: Tom Freedman **Date:** 1/5

Fax #: 456-7431 **Pages:** 3

From: Becky Salay

Comments:

Per our conversation today

Summary of Congresswoman DeLauro's Paycheck Fairness Act (H.R. 2023)

This bill would amend the Equal Pay Act (EPA) and the Civil Rights Act of 1964 to provide more effective remedies to women who are not being paid equal wages for doing equal work.

Enhancement of Equal Pay Requirements

Nonretaliation provision. This provision would amend the EPA to prohibit employers from penalizing employees for sharing information about their salaries with coworkers. Currently, it is unlawful under the National Labor Relations Act (NLRA) to discipline or terminate employees for such discussions. Because of the difficulty of proceeding under NLRA, it is essential to provide remedies under the EPA as well.

Enhanced penalties and Class action formation. This provision would allow for compensatory and punitive damages not currently available under the EPA. The EPA currently provides only for liquidated damages — essentially back pay awards — which tend to be very insubstantial. This provision would also conform EPA procedures for a lawsuit to proceed as a class action with those provided by the Federal Rules of Civil Procedure. Currently it is very difficult to proceed as a class action because the EPA, adopted prior to the current form of Rule 23 of the Federal Rules, requires plaintiffs to opt in to a suit.

Action. This provision enables the Equal Employment Opportunities Commission (EEOC), in addition to private plaintiffs, to pursue claims under the new damage provisions described above.

Collection of Pay Information by the EEOC

Reporting. This provision would add a new category of wage information that by law must be submitted by employers to the EEOC. It would require employers with one hundred or more employees to report generalized pay information by race, sex and national origin. This information would not be available to the public and would not identify employees.

Enforcement and Waiver. In cases of noncompliance with the reporting provision, the EEOC may apply to a United States District Court for an order requiring compliance. Employers who find that the requirement would result in undue hardship may request an exemption from the reporting provision of this section and may bring civil action if the EEOC denies the request for exemption.

Training. This section requires the EEOC and Office of Federal Contract Compliance (OFCCP) of the Department of Labor to provide training for its employees to improve the intake and processing of EPA claims.

Research, Education, and Outreach. This provision would enhance and promote existing programs at the Department of Labor and direct the secretary to undertake new initiatives that include: research in the area of sex-based pay disparities and the dissemination of that information to interested members of the general public; provide information to employers, such as voluntary pay guidelines, on means of eradicating sex-based pay disparities; assist State and local information and educational programs on pay disparities; recognize and promote the achievements of employers that have made strides to eliminate pay disparities; and convene a national summit to discuss and highlight the issue of sex-based pay disparities.

Establishment of National Award for Pay Equity in the Workplace. This provision would establish an award, to be administered by the Women's Bureau of the Department of Labor, to recognize and promote the achievements of employers that have made strides to eliminate pay disparities.

Increased Resources for Enforcement and Education

General Resources. This provision would bring the EEOC appropriation level up to that requested by the President for FY 1997 by adding $36 million to its budget. This provision would also bring the Office of Federal Contract Compliance Program appropriation level up to that requested by the President for FY 1998 by adding $10 million to its budget.

Targeted Resources. This provision would authorize $500,000 in supplemental appropriations to the EEOC and OFCCP to provide training for its employees for intake and processing of EPA claims.

Research, Education, Outreach and National Award. This subsection authorizes $1,000,000 in additional funding for the Women's Bureau of the Department of Labor for the activities to address pay disparities in the workplace, described in the bill.

Equal Pay

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: EQUAL PAY UPDATE

DATE: FEBRUARY 19, 1998

I. BACKGROUND

Attached are summaries of the two main bills on equal pay and a list of ideas on the topic we solicited from DOL, the EEOC, and various outside groups.

According to the Department of Labor, women earn on average only 75 cents for each dollar a man earns. African American women earn 63 cents and Hispanic women earn only 54 cents to each dollar that white men earn.

The AFL-CIO and Gephardt are pushing this issue. It also fits in with our families agenda because equal pay is not just for women; it is for families. In two-earner families, if the wife starts earning more, the extra money helps the entire family, not just the female wage-earner.

Even though the President is currently scheduled to travel on April 3, **April 3 is Equal Pay Day**, the day on which women's earnings, added to their previous year earnings, equal what men earn in one calendar year. The AFL-CIO is planning a roll-out on April 3 at various sites across the country, and if we had some kind of announcement, we could plug into what they already have planned.

II. LEGISLATIVE OPTIONS

There are two main bills regarding fair pay that have been introduced, one by Senator Daschle (D-SD) and one by Senator Harkin (D-IA). Attached are section-by-section analyses of these bills. In addition, below is a brief summary of the main provisions of each of these bills.

A. Paycheck Fairness Act - Daschle S.71

The main part of Daschle's bill is enhanced enforcement. This bill would amend the Equal Pay Act (EPA) to allow for compensatory and punitive damages. Currently, the EPA only allows for liquidated damages, which are essentially back pay awards. In addition, the bill includes a nonretaliation provision that amends the EPA to prohibit employers from penalizing employees for sharing information about their salaries with coworkers.

Daschle's bill also provides for the collection of pay information by the EEOC. Daschle's bill did not perform a cost analysis for the collection of this data, but merely requests that the EEOC appropriations be brought up to the level requested by the President in FY 1997 by adding $36 million to the budget. (The President's FY 1999 budget requests $279 million for the EEOC -- $37 million or 15 percent more than the enacted 1998 budget. More than one-third of the proposed increase ($13 million) goes to expansion of the agency's ADR program.) A more detailed cost analysis is provided below in the section of nonlegislative options; these numbers were estimated by the EEOC.

In addition, the Daschle bill provides for training, research, education, and outreach.

B. Fair Pay Act - Harkin S.232

The principal provision in Harkin's bill is for equal pay for equivalent jobs. The Fair Pay Act outlaws discrimination in wages paid to employees within a workplace in equivalent jobs solely on the basis of sex, race, or national origin. However, wage differences on the basis of seniority, a merit system, or an quality/quantity system would not be affected.

Harkin's bill also contains a non-retaliation provision, a provision to permit the awarding of expert fees, a section that provides for the collection of wage information by the EEOC. The bill also provides for research, education, and technical assistance.

III. NON-LEGISLATIVE OPTIONS (PROPOSED BY EEOC AND DOL)

A. Collect pay data by the EEOC.

Reason for collecting data: The EEOC currently collects annual data regarding the demographic breakdown of the workforces of private employers with 100 or more employees and of federal contractors with 50 or more employees. The EEOC does not currently collect salary data. The availability of salary data would be extremely useful. It would allow the actual jobs grouped into the broad EEO-1 occupational groups to be further defined. It would show the extent of differential pay by race/ethnic categories and gender for the same type of work. It would improve the assignment of employees into the proper EEO-1 categories. This data would assist enforcement of the Equal Pay Act and would assist the Department of Labor in monitoring affirmative action programs.

Currently the EEOC only collects demographic data. The EEOC has proposed two alternatives in order to collect pay data.

1. The most detailed way to collect the data would add eight salary intervals within each of the nine current EEO-1 occupational categories. This would cost $5,599,800, increasing EEOC's cost from $801,200 to $6,401,000. It would also increase the public reporting compliance burden hours to 3,684,000 from the

current 464,000. This burden hour increase translates conservatively into increased public cost of more than $32 million annually.

2. A second way to do this is to create a supplement to the EEO-1 form. This would not change the EEO-1 form, but it also would not provide data by job category. Nonetheless, the matrix would have 20 salary intervals and would provide fairly detailed salary data by race/ethnic categories and gender. This method would cost $1,598,800, roughly tripling EEOC's current annual processing cost from $801,200 to $2,400,000. It would also triple the public respondent burden to 1.4 million hours, increasing the respondent burden cost about $9.5 million over the current cost.

B. **SWAT Team at DOL to provide technical assistance.** DOL proposes $2 million for a specialized technical assistance team to reach out to approximately 1000 companies. DOL's Women's Bureau technical assistance would include analysis of hiring, promotion, compensation, and evaluation data to ensure fairness and consistency for women at all levels within the company. Recommendations for correcting problem areas could be proposed.

C. **The Department of Labor proposes that the President endorse the following legislative principles for pay equity:**

1. Providing for the recognition and promotion of fair pay practices by employers;
2. Providing for research, education and outreach to encourage fair pay practices and to eliminate pay disparities in the workplace;
3. Providing enhanced enforcement to deter violations of the Equal Pay Act and other laws;
4. Prohibiting retaliation against employees who disclose, discuss, or inquire about their wages or the wages of their co-workers.

D. **Other Initiatives Proposed by the Women's Office at Labor**

- **10-step voluntary self-audit for businesses:** The Department of Labor would develop and make available a package that would give both small and large companies guidelines to determine whether they offer equal pay, hiring, and promotional opportunities. The Department would also develop a similar checklist for employees.

- **Increase funding for enforcement of the Equal Pay Act and the Civil Rights Act at EEOC.** DOL estimates that it would require approximately $5 million to support additional training, travel, and staff to increase corporate management reviews.

- **Equal Pay Day on April 3 with Internet Chat Room.** The Department of Labor suggests that the President could participate in a special interactive dialogue on equal pay issues on April 3, the day on which women's earnings, when added to their previous year's earnings, finally equal what men earn in one calendar year. This online dialogue could pose a snapshot of the magnitude of the issue. For the past two years, the President has recognized this day by issuing a proclamation.

- **White House Conference on Equal Pay.**

- **Fair Pay Tour**. The President could join the Secretary of Labor during the Women's Bureau Fair Pay Tour, currently scheduled to begin in late March, to discuss equal pay concerns with women's leaders, business executives, labor union women, and working women. After the tour, the President could announce one of the above initiatives.

S.71
SPONSOR: Sen Daschle (introduced 01/21/97)

SUMMARY:

(AS INTRODUCED)

Paycheck Fairness Act - Amends the Fair Labor Standards Act of 1938 (FLSA) and the Civil Rights Act of 1964 (CRA) to revise and increase remedies and enforcement on behalf of victims of discrimination in the payment of wages on the basis of sex.

Amends FLSA to provide for enhanced enforcement of equal pay requirements, adding a nonretaliation requirement. Increases penalties for such violations. Provides for the Secretary of Labor to seek additional compensatory or punitive damages in such cases.

Amends CRA to direct the Equal Employment Opportunity Commission (EEOC) to require certain employers to maintain payroll records and report to the EEOC pay information analyzed by race, sex, and national origin of employees. Applies such requirement applicable to employers who have 100 or more employees for each working day in each of 20 or more calendar weeks.

Requires EEOC to train its employees and affected individuals and entities on matters involving discrimination in the payment of wages.

Directs the Secretary to conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including convening a national summit and carrying out other specified activities.

Establishes the Robert Reich National Award for Pay Equity in the Workplace, which shall be evidenced by a medal. Sets forth criteria for specified types of entities to receive such an award.

Authorizes appropriations to the EEOC and to the Secretary to carry out this Act.

PAYCHECK FAIRNESS ACT

This bill amends the Equal Pay Act and the Civil Rights Act of 1964 to provide more effective remedies to women who are not being paid equal wages for doing equal work.

SECTION 1. Short Title: PAYCHECK FAIRNESS ACT

SECTION 2: Findings. This section sets forth the basis for this legislation: women's wages are more and more important in our economy and to working families. Despite the existence of the Equal Pay Act (EPA), women's wages still stagnate at 71 cents to every dollar earned by a man. Such pay disparities need to be eradicated to help families get by, keep people off public assistance, allow for the best utilization of labor and ensure that commerce is not burdened by labor disputes or unfair competition. To accomplish these ends, women need more effective remedies under the Equal Pay Act and more access to information about pay disparities in the work place. As part of this goal of education and outreach, it is important to recognize employers that have made great strides in addressing pay disparities.

SECTION 3. Enhanced Enforcement of Equal Pay Requirements.

(a) Nonretaliation provision. This provision amends the EPA to prohibit employers from penalizing employees for sharing information about their salaries with coworkers. Currently, it is unlawful under the National Labor Relations Act to discipline or terminate employees for such discussions. Because of the difficulty of proceeding under the NLRA, it is essential to provide remedies under the EPA as well.

(b) Enhanced penalties. This section allows for compensatory and punitive damages not currently available under the EPA. The EPA currently provides only liquidated damages -- essentially back pay awards -- which tend to be very insubstantial. Without adequate damages, similar to those provided under the Civil Rights statutes, there is little or no deterrent effect on employers. In addition, this section rectifies a long-standing EPA problem. Currently, it is very difficult for a lawsuit to proceed as a class action because the EPA, adopted prior to the current form of Rule 23 of the Federal Rules of Civil Procedure, requires plaintiffs to opt in to a suit. This section will conform the EPA procedures to those already provided under the Federal Rules.

(c) Action by Secretary. This section enables the Equal Employment Opportunities Commission (EEOC), in addition to private plaintiffs, to pursue claims under the new damage provisions described above.

SECTION 4. Collection of Pay Information by the EEOC.

– information not confidential

(1) Reporting. This section adds a new category of wage information that by law must be submitted by employers to the EEOC. This bill would require only those employers with one hundred or more employees to report generalized pay information by race, sex and national origin. This information would not be public and would not identify employees. This information is necessary to enable the EEOC and the public better to understand the nature of pay disparities in the workplace as well as national and industry trends.

(2) Enforcement and Waiver: In cases of noncompliance with subsection 1 of this section, the EEOC may apply to a United States District Court for an order requiring compliance. Employers who find that the requirement would result in undue hardship may request an exemption from the

requirement set forth in subsection 1 of this section and may bring a civil action if the EEOC denies the request for exemption.

SECTION 5. Training. This section requires the EEOC to provide training for its employees to improve the intake and processing of EPA claims.

SECTION 6. Research, Education, and Outreach. This section enhances programs already in place in the Women's Bureau of the Department of Labor and specifically requires the Bureau to undertake research in the area of sex-based pay disparities, disseminate that information to interested members of the general public, provide information on means of eradicating such disparities, assist State and local information and educational programs, recognize and promote the achievements of employers that have made strides to eliminate pay disparities, and convene a national summit to discuss and highlight the issue of sex-based pay disparities.

SECTION 7. Establishment of the National Award for Pay Equity in the Workplace. This section establishes an award, to be administered by the Women's Bureau of the Department of Labor, to recognize and promote the achievements of employers that have made strides to eliminate pay disparities.

SECTION 8. Increased Resources for Enforcement and Education.

(a) General Resources: This section addresses the fact that the EEOC's level of appropriations has remained stagnant despite an ever-increasing set of new responsibilities, including enforcement of such new civil rights statutes as the Americans with Disabilities Act (ADA). This section simply brings the EEOC appropriations level up to that requested by the President for FY 1997 by adding $36 million to its budget.

(b) Targeted Resources. To enable EEOC to carry out the training of its employees, as required by section 5 of the bill, this provision authorizes $500,000 in supplemental appropriations.

(c) Research, Education, Outreach, and National Award. This subsection authorizes funding for the Women's Bureau's activities to address pay disparities in the workplace, described in sections 6 and 7.

HARKIN

SUMMARY OF FAIR PAY ACT, S. 232

Section 1 & 2: Title and Findings

Section 3. Equal Pay For Equivalent Jobs

The Fair Pay Act outlaws discrimination in wages paid to employees within a workplace in equivalent jobs solely on the basis of a worker's sex, race or national origin. This would not apply to wage differences that are the result of a seniority system, a merit system or a pay system that relates earnings to quantity or quality of products. Employers are prohibited from reducing the wages of an employee in order to comply with the fair pay requirements.

Section 4. Prohibited Acts

Adds no-retaliation provisions for employees inquiring about or assisting in the investigations of provisions under this act.

Section 5. Remedies

Allows for awarding expert fees as part of the costs granted to a prevailing plaintiff/s. Fees are in addition to other remedies given by the court, and together may be maintained as a class action as stipulated by the Federal Rules of Civil Procedure.

Section 6. Records

Requires employers to preserve records documenting wage setting practices and file annual reports with the EEOC which disclose the wage rates paid for each job classification within the company as well as the sex, race, and national origin of employees within these positions. Small businesses of 25 and under are exempted for the first two years, businesses with 15 and under exempted thereafter. Confidentiality of individual names would be mandated.

Section 7. Research, Education, and Technical Assistance

Directs the EEOC to provide educational materials and technical assistance to employers to assist in implementing fair pay policies. The EEOC must also develop ongoing research regarding pay equity. In addition, the EEOC is directed to include a separate evaluation and appraisal regarding implementation of the act's requirements in its biennial report to Congress.

Section 8. Conforming Amendment

Section 9. Effective Date

The law would go into effect one year after enactment.

S.71
SPONSOR: Sen Daschle (introduced 01/21/97)

SUMMARY:

(AS INTRODUCED)

Paycheck Fairness Act - Amends the Fair Labor Standards Act of 1938 (FLSA) and the Civil Rights Act of 1964 (CRA) to revise and increase remedies and enforcement on behalf of victims of discrimination in the payment of wages on the basis of sex.

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Requires EEOC to train its employees and affected individuals and entities on matters involving discrimination in the payment of wages.

Directs the Secretary to conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including convening a national summit and carrying out other specified activities.

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(c) Action by Secretary. This section enables the Equal Employment Opportunities Commission (EEOC), in addition to private plaintiffs, to pursue claims under the new damage provisions described above.

SECTION 4. Collection of Pay Information by the EEOC.

– information not confidential

(1) Reporting. This section adds a new category of wage information that by law must be submitted by employers to the EEOC. This bill would require only those employers with one hundred or more employees to report generalized pay information by race, sex and national origin. This information would not be public and would not identify employees. This information is necessary to enable the EEOC and the public better to understand the nature of pay disparities in the workplace as well as national and industry trends.

(2) Enforcement and Waiver: In cases of noncompliance with subsection 1 of this section, the EEOC may apply to a United States District Court for an order requiring compliance. Employers who find that the requirement would result in undue hardship may request an exemption from the

requirement set forth in subsection 1 of this section and may bring a civil action if the EEOC denies the request for exemption.

SECTION 5. Training. This section requires the EEOC to provide training for its employees to improve the intake and processing of EPA claims.

SECTION 6. Research, Education, and Outreach. This section enhances programs already in place in the Women's Bureau of the Department of Labor and specifically requires the Bureau to undertake research in the area of sex-based pay disparities, disseminate that information to interested members of the general public, provide information on means of eradicating such disparities, assist State and local information and educational programs, recognize and promote the achievements of employers that have made strides to eliminate pay disparities, and convene a national summit to discuss and highlight the issue of sex-based pay disparities.

SECTION 7. Establishment of the National Award for Pay Equity in the Workplace. This section establishes an award, to be administered by the Women's Bureau of the Department of Labor, to recognize and promote the achievements of employers that have made strides to eliminate pay disparities.

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(b) Targeted Resources. To enable EEOC to carry out the training of its employees, as required by section 5 of the bill, this provision authorizes $500,000 in supplemental appropriations.

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Harkin

SUMMARY OF FAIR PAY ACT, S. 232

Section 1 & 2: Title and Findings

Section 3. Equal Pay For Equivalent Jobs

The Fair Pay Act outlaws discrimination in wages paid to employees within a workplace in equivalent jobs solely on the basis of a worker's sex, race or national origin. This would not apply to wage differences that are the result of a seniority system, a merit system or a pay system that relates earnings to quantity or quality of products. Employers are prohibited from reducing the wages of an employee in order to comply with the fair pay requirements.

Section 4. Prohibited Acts

Adds no-retaliation provisions for employees inquiring about or assisting in the investigations of provisions under this act.

Section 5. Remedies

Allows for awarding expert fees as part of the costs granted to a prevailing plaintiff/s. Fees are in addition to other remedies given by the court, and together may be maintained as a class action as stipulated by the Federal Rules of Civil Procedure.

Section 6. Records

Requires employers to preserve records documenting wage setting practices and file annual reports with the EEOC which disclose the wage rates paid for each job classification within the company as well as the sex, race, and national origin of employees within these positions. Small businesses of 25 and under are exempted for the first two years, businesses with 15 and under exempted thereafter. Confidentiality of individual names would be mandated.

Section 7. Research, Education, and Technical Assistance

Directs the EEOC to provide educational materials and technical assistance to employers to assist in implementing fair pay policies. The EEOC must also develop ongoing research regarding pay equity. In addition, the EEOC is directed to include a separate evaluation and appraisal regarding implementation of the act's requirements in its biennual report to Congress.

Section 8. Conforming Amendment

Section 9. Effective Date

The law would go into effect one year after enactment.

Cell phones Community

EW

BACKGROUND

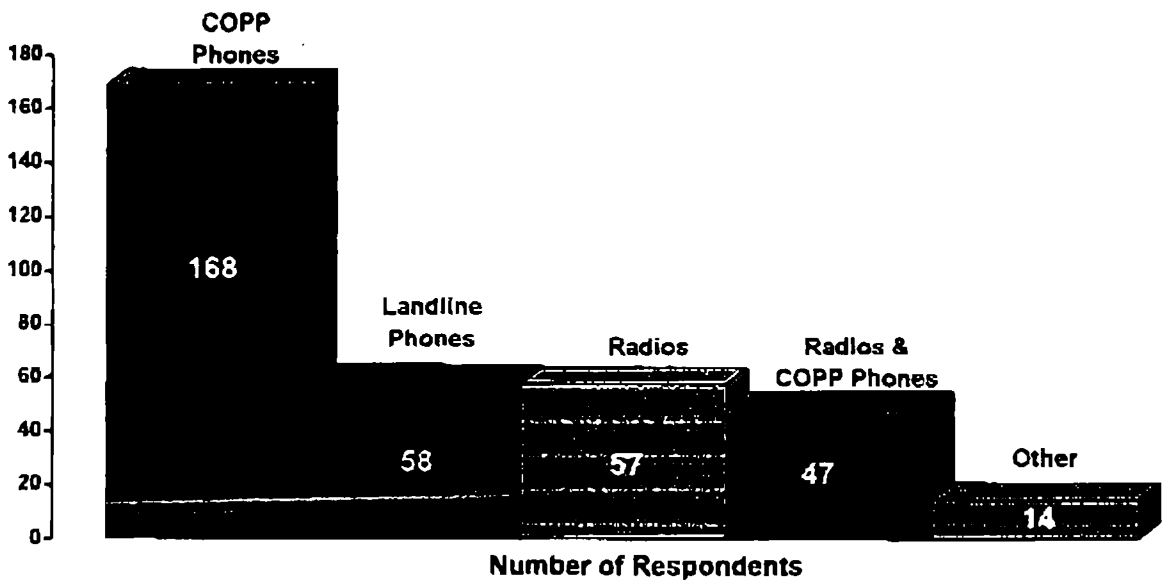
On July 17, 1996, President Clinton joined with the CTIA Foundation For Wireless Telecommunications and the Community Policing Consortium to announce Communities on Phone Patrol (COPP). COPP is an innovative program which puts pre-programmed wireless phones in the hands of trained volunteers working together with police and sheriffs to prevent crime in local communities.

This document presents the highlights of the Year-One Program Review conducted by the Community Policing Consortium during the summer of 1997.

CONCLUSIONS

- 34 police officers surveyed knew of at least one incident where a COPP phone saved a life.
- Each participating neighborhood watch group reports 4.4 crimes a month on their COPP phone.
- 33,624 crimes are reported each month with COPP phones.
- An average of 42 volunteers participate in each COPP Neighborhood Watch.
- 320,964 volunteers are armed with COPP phones across the country.
- Each neighborhood watch group serves a population of 6,121, collectively 7,642 groups protect 46 million Americans nationally.
- 76% of participating groups feel that the phones are beneficial or very beneficial.
- 35% of groups reported an increase in volunteers because of the availability of COPP telephones.

PREFERRED METHOD FOR REPORTING CRIMES AND SUSPICIOUS INCIDENTS



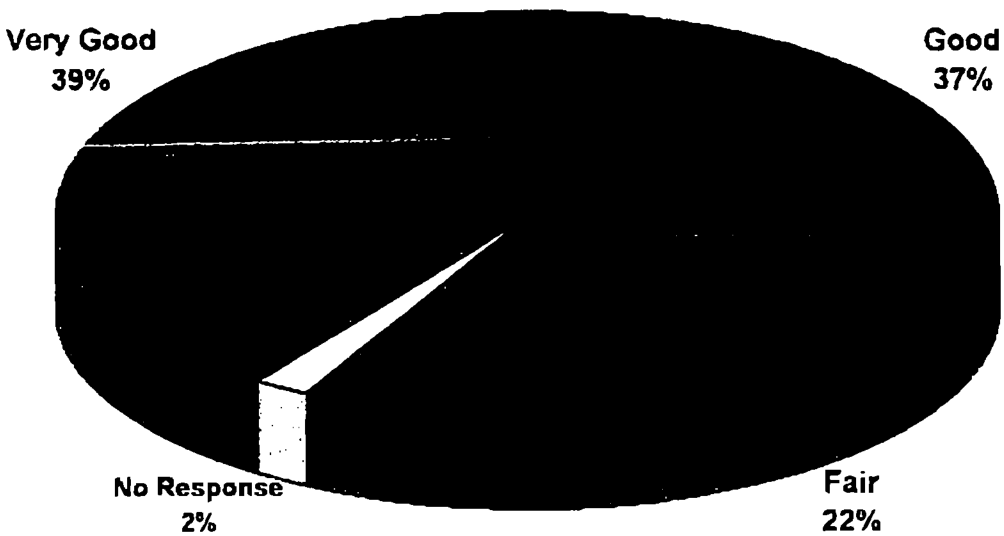
207 representatives of Neighborhood Watch Groups surveyed.

CHARACTERISTICS OF WIRELESS NEIGHBORHOOD WATCH GROUPS

	Per Patrol Group (average)	All Wireless Patrols*
Number of residents served:	6,121	46,776,682
Number of patrollers:	42	320,964
Number of hours patrolled per week:	33.2	253,714
Number of times phones used each month:	4.4	33,624

* These calculations are based on the total number of watch groups that have received phones from wireless carriers and includes telephones donated outside of the COPP application process. According to CTIA Foundation records 7,642 neighborhood watch groups had received wireless telephones from wireless carriers as of July 31, 1997.

COMMUNITY RESPONSE TO COPP



Responses from 172 law enforcement professionals when asked how they felt the community had responded to the COPP program.

EFFECTS OF PHONES ON NEIGHBORHOOD WATCH GROUPS

	Patrol Groups
Phones have a beneficial or very beneficial effect:	75%
Phones improve community cooperation:	54%
Phones increase neighborhood watch membership:	35%

207 representatives of Neighborhood Watch Groups surveyed.

POLICE PERCEPTION OF IMPACT OF COPP ON COMMUNITY POLICING

	Percent of Police Responding
COPP is helpful or very helpful to community:	75%
Crime decreased in COPP patrol areas:	42%
COPP led to the formation of additional patrols:	38%
COPP led to an increase in number of incidents reported:	35%

* Responses from law enforcement professionals to a series of questions concerning the COPP program.

Selected COPP Success Stories

Philadelphia, Pennsylvania

On October 9, 1997 patrol members spotted a gunman running after a fleeing vehicle driving East on 71st street. The gunman fired 8 shots at the vehicle and then fled the scene in his black BMW. Watch patrol members immediately dialed 911 on their COPP phone and reported the incident. Within one minute police were on the scene. Minutes later the police had apprehended the gunman.

Since receiving COPP phones on February 6, 1997, Park Watch #9015 has made 94 "9-1-1" calls including 25 high priority calls indicating a crime in progress or other emergency. The average response time by police from a COPP phone call was 4.5 minutes, providing a full two minute advantage over the radios previously used by the Park Watch. Park Watch #9015 has 30 active members and has been patrolling their neighborhood since 1991.

- Pennsylvania has 111 neighborhood watch groups that are armed with COPP phones.
- In Pennsylvania, 360° Communications, AT&T Wireless, Bell Atlantic Mobile, Comcast, and Vanguard provide donated airtime for COPP.

Miami, Florida

While on his nightly COPP patrol, Sigfredo Delgado used his COPP phone to help apprehend a fleeing attacker who had stabbed a waitress with a knife. Mr. Delgado's quick action led to an arrest on charges of aggravated assault, battery to a police officer, and resisting arrest. This COPP patrol uses 30 phones and has 100 serious volunteers.

- Miami has 50 watch patrols which currently use wireless phones. There are 372 COPP patrols in Florida.
- In Miami, AT&T Wireless and BellSouth Mobility provide airtime for the COPP patrols and Ericsson provides the phones.

Wage Gap

Lw

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: PAY EQUITY IDEAS

DATE: JANUARY 28, 1997

SUMMARY

Women earn on average only 75 cents for each dollar a man earns. African American women earn 63 cents and Hispanic women earn only 54 cents to each dollar that white men earn. Below is a three-part proposal that addresses the problem of unequal pay with an emphasis on data collection, technical assistance, and legislative proposals. In addition, following the three main initiatives, there are listed some additional ideas we could pursue on the pay equity issue.

THREE-PRONGED PAY EQUITY INITIATIVES

I. Collect pay data by the EEOC.

Reason for collecting data: The EEOC currently collects annual data regarding the demographic breakdown of the workforces of private employers with 100 or more employees and of federal contractors with 50 or more employees. The EEOC does not currently collect salary data. The availability of salary data would be extremely useful. It would allow the actual jobs grouped into the broad EEO-1 occupational groups to be further defined. It would show the extent of differential pay by race/ethnic categories and gender for the same type of work. It would improve the assignment of employees into the proper EEO-1 categories. This data would assist enforcement of the Equal Pay Act and would assist the Department of Labor in monitoring affirmative action programs.

Currently the EEOC only collects demographic data. The EEOC has proposed two alternatives in order to collect pay data.

1. The most detailed way to collect the data would add eight salary intervals within each of the nine current EEO-1 occupational categories. This would cost \$5,599,800, increasing EEOC's cost from \$801,200 to \$6,401,000. It would also increase the public reporting compliance burden hours to 3,684,000 from the current 464,000. This burden hour increase translates conservatively into increased public cost of more than \$32 million annually.
2. A second way to do this is to create a supplement to the EEO-1 form. This would not change the EEO-1 form, but it also would not provide data by job category. Nonetheless, the matrix would have 20 salary intervals and would provide fairly

detailed salary data by race/ethnic categories and gender. This method would cost $1,598,800, roughly tripling EEOC's current annual processing cost from $801,200 to $2,400,000. It would also triple the public respondent burden to 1.4 million hours, increasing the respondent burden cost about $9.5 million over the current cost.

II. **SWAT Team at DOL to provide technical assistance.** DOL proposes $2 million for a specialized technical assistance team to reach out to approximately 1000 companies. DOL's Women's Bureau technical assistance would include analysis of hiring, promotion, compensation, and evaluation data to ensure fairness and consistency for women at all levels within the company. Recommendations for correcting problem areas could be proposed.

III. **The Department of Labor proposes that the President endorse the following legislative principles for pay equity:**

1. Providing for the recognition and promotion of fair pay practices by employers;
2. Providing for research, education and outreach to encourage fair pay practices and to eliminate pay disparities in the workplace;
3. Providing enhanced enforcement to deter violations of the Equal Pay Act and other laws;
4. Prohibiting retaliation against employees who disclose, discuss, or inquire about their wages or the wages of their co-workers.

OTHER INITIATIVES

- **10-step voluntary self-audit for businesses:** The Department of Labor would develop and make available a package that would give both small and large companies guidelines to determine whether they offer equal pay, hiring, and promotional opportunities. The Department would also develop a similar checklist for employees.

- **Increase funding for enforcement of the Equal Pay Act and the Civil Rights Act at EEOC.** DOL estimates that it would require approximately $5 million to support additional training, travel, and staff to increase corporate management reviews.

- **Equal Pay Day on April 3 with Internet Chat Room**. The Department of Labor suggests that the President could participate in a special interactive dialogue on equal pay issues on April 3, the day on which women's earnings, when added to their previous year's earnings, finally equal what men earn in one calendar year. This online dialogue could pose a snapshot of the magnitude of the issue. For the past two years, the President has recognized this day by issuing a proclamation.

- **White House Conference on Equal Pay.**

- **Fair Pay Tour**. The President could join the Secretary of Labor during the Women's Bureau Fair Pay Tour, currently scheduled to begin in late March, to discuss equal pay concerns with women's leaders, business executives, labor union women, and working women. After the tour, the President could announce one of the above initiatives.

Pay equity - wage gap

MEMORANDUM

TO: Tom Freedman, Mary Smith
FROM: Amy Block
RE: Pay Equity Enforcement II
DATE: February 4, 1998

- The nonretaliation provision amends the EPA to prohibit employers for penalizing employees for sharing salary information with their coworkers. If employers violate the nonretaliation provision, employees may bring suit and possibly receive greater damages.

- 'Increased penalties' simply means that employees may sue employers for larger amounts. Currently, the EPA provides for only liquidated damages (back pay awards). Back pay awards tend to be insubstantial and therefore an ineffective deterrent for employers violate the EPA. DeLauro's bill allows employees to sue for punitive and compensatory damages in addition to liquidated damages.

- 'Enhanced enforcement' entails increased funding for training, research, education, and outreach. Research, education, and outreach includes providing information to employers (such as voluntary pay guidelines), assisting State and local information and educational programs on pay disparities, and convening a national summit. To enhance enforcement, the bill authorizes $500,000 in supplemental appropriations to the EEOC and the Office of Federal Contract Compliance (OFCCP) of the Department of Labor to train its employees to improve the intake and processing of EPA claims. The EEOC would receive an additional $36 million (bringing its budget up to that requested by the President for FY 1997) and the OFCCP would receive $10 million. The Women's Bureau of the DOL would receive $1,000,000 in additional funding. Finally, the establishment of the National Pay Award for Pay Equity in the Workplace (administered by the Women's Bureau of the DOL) also qualifies as enhanced enforcement.

EW

MEMORANDUM

Summary

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: PAY EQUITY IDEAS

DATE: JANUARY 21, 1997

PAY EQUITY INITIATIVES

- **Collect pay data by the EEOC.** Currently the EEOC only collects demographic data. The EEOC has proposed two alternatives in order to collect pay data.
  1. The most detailed way to collect the data would add eight salary intervals within each of the nine current EEO-1 occupational categories. This would cost $5,599,800, increasing EEOC's cost from $801,200 to $6,401,000. It would also increase the public reporting compliance burden hours to 3,684,000 from the current 464,000. This burden hour increase translates conservatively into increased public cost of more than $32 million annually.
  2. A second way to do this is to create a supplement to the EEO-1 form. This would not change the EEO-1 form, but it also would not provide data by job category. Nonetheless, the matrix would have 20 salary intervals and would provide fairly detailed salary data by race/ethnic categories and gender. This method would cost $1,598,800, roughly tripling EEOC's current annual processing cost from $801,200 to $2,400,000. It would also triple the public respondent burden to 1.4 million hours, increasing the respondent burden cost about $9.5 million over the current cost.

- **10-step voluntary self-audit for businesses:** The Department of Labor would develop and make available a package that would give both small and large companies guidelines to determine whether they offer equal pay, hiring, and promotional opportunities. The Department would also develop a similar checklist for employees.

- **The President could endorse legislative principles for pay equity such as**
  1. Providing for the recognition and promotion of fair pay practices by employers;
  2. Providing for research, education and outreach to encourage fair pay practices and to eliminate pay disparities in the workplace;
  3. Providing enhanced enforcement to deter violations of the Equal Pay Act and other laws;
  4. Prohibiting retaliation against employees who disclose, discuss, or inquire about their wages or the wages of their co-workers.

Where is this from

- **SWAT Team at DOL to provide technical assistance.** DOL proposes $2 million for a specialized technical assistance team to reach out to approximately 1000 companies. DOL's Women's Bureau technical assistance would include analysis of hiring, promotion, compensation, and evaluation data to ensure fairness and consistency for women at all levels within the company. Recommendations for correcting problem areas could be proposed.

- **Increase funding for enforcement of the Equal Pay Act and the Civil Rights Act at EEOC.** DOL estimates that it would require approximately $5 million to support additional training, travel, and staff to increase corporate management reviews.

- **Equal Pay Day on April 3 with Internet Chat Room**. The President could participate in a special interactive dialogue on equal pay issues on April 3, the day on which women's earnings, when added to their previous year's earnings, finally equal what men earn in one calendar year. This online dialogue could pose a snapshot of the magnitude of the issue.

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- **Fair Pay Tour**. The President could join the Secretary of Labor during the Women's Bureau Fair Pay Tour, currently scheduled to begin in late March, to discuss equal pay concerns with women's leaders, business executives, labor union women, and working women. After the tour, the President could announce one of the above initiatives.

TOM DASCHLE
U.S. Senator for South Dakota

810 S. Minnesota	20 6th Avenue SW, Suite B	816 6th Street	Washington, DC 20510
Sioux Falls, SD 57101	Aberdeen, SD 57401	Rapid City, SD 57701	202-224-2321
605-334-9596	605-225-8823	605-348-7551	1-800-424-9094

TELECOPY COVER SHEET

DATE: February 12, 1998

TO: Mary

FAX: (202) 456-7431

FROM: Caroline Fredrickson
Counsel for Labor and Judiciary
Senator Thomas A. Daschle
509 Hart Senate Office Building
Washington, DC 20510
Telephone: (202) 224-2321; Fax: (202) 224-2047

MESSAGE: **I have included a summary of the original bill and a memo regarding a provision that we would like to add.**

PAGES: 5 (including cover sheet)

Memorandum

To: Larry, Joel
From: Caroline
Date: ~~February 4, 1998~~
Re: Paycheck Fairness Addition

The Paycheck Fairness Act (PFA) now addresses cases of overt pay discrimination in which employers pay men and women differently even though they do the same or similar work. While this type of discrimination is still a problem, job segregation is the predominant cause of women's lower earnings. Women tend to fill jobs that pay less than traditional men's jobs. In other words, secretaries usually make less than janitors. This new provision of PFA would attempt to focus a spotlight on this problem, without mandating a major overhaul of pay scales by employers.

The new provision of PFA would do the following:

- instruct DOL to develop and publicize voluntary fair pay guidelines

- the pay guidelines would give employers an objective means to evaluate how much a particular job category is worth, i.e., years of education, skill level required, numbers of hours worked, responsibility, etc. [OFCCP does something similar now with federal contractors to ensure that they are abiding by the Executive Order on affirmative action].

- employers could choose to use the guidelines to revise their pay scales [with the proviso that they should avoid lowering men's wages as a result]

- employers that voluntarily participate in the program would get some benefit. This could be public recognition through an award, publication of the names of award recipients by DOL, and the recipients' ability to use their award as part of their marketing. [we are looking for some bigger carrot, similar to OSHA's promise to eliminate random inspections for participants in the agency's voluntary compliance program, but have not yet come up with one.]

PAYCHECK FAIRNESS ACT

This bill amends the Equal Pay Act and the Civil Rights Act of 1964 to provide more effective remedies to women who are not being paid equal wages for doing equal work.

SECTION 1. Short Title: PAYCHECK FAIRNESS ACT

SECTION 2: Findings. This section sets forth the basis for this legislation: women's wages are more and more important in our economy and to working families. Despite the existence of the Equal Pay Act (EPA), women's wages still stagnate at 71 cents to every dollar earned by a man. Such pay disparities need to be eradicated to help families get by, keep people off public assistance, allow for the best utilization of labor and ensure that commerce is not burdened by labor disputes or unfair competition. To accomplish these ends, women need more effective remedies under the Equal Pay Act and more access to information about pay disparities in the work place. As part of this goal of education and outreach, it is important to recognize employers that have made great strides in addressing pay disparities.

SECTION 3. Enhanced Enforcement of Equal Pay Requirements.

(a) Nonretaliation provision. This provision amends the EPA to prohibit employers from penalizing employees for sharing information about their salaries with coworkers. Currently, it is unlawful under the National Labor Relations Act to discipline or terminate employees for such discussions. Because of the difficulty of proceeding under the NLRA, it is essential to provide remedies under the EPA as well.

(b) Enhanced penalties. This section allows for compensatory and punitive damages not currently available under the EPA. The EPA currently provides only liquidated damages -- essentially back pay awards -- which tend to be very insubstantial. Without adequate damages, similar to those provided under the Civil Rights statutes, there is little or no deterrent effect on employers. In addition, this section rectifies a long-standing EPA problem. Currently, it is very difficult for a lawsuit to proceed as a class action because the EPA, adopted prior to the current form of Rule 23 of the Federal Rules of Civil Procedure, requires plaintiffs to opt in to a suit. This section will conform the EPA procedures to those already provided under the Federal Rules.

(c) Action by Secretary. This section enables the Equal Employment Opportunities Commission (EEOC), in addition to private plaintiffs, to pursue claims under the new damage provisions described above.

SECTION 4. Collection of Pay Information by the EEOC.

(1) Reporting. This section adds a new category of wage information that by law must be submitted by employers to the EEOC. This bill would require only those employers with one hundred or more employees to report generalized pay information by race, sex and national origin. This information would not be public and would not identify employees. This information is necessary to enable the EEOC and the public better to understand the nature of pay disparities in the workplace as well as national and industry trends.

(2) Enforcement and Waiver: In cases of noncompliance with subsection 1 of this section, the EEOC may apply to a United States District Court for an order requiring compliance. Employers who find that the requirement would result in undue hardship may request an exemption from the

requirement set forth in subsection 1 of this section and may bring a civil action if the EEOC denies the request for exemption.

SECTION 5. Training. This section requires the EEOC to provide training for its employees to improve the intake and processing of EPA claims.

SECTION 6. Research, Education, and Outreach. This section enhances programs already in place in the Women's Bureau of the Department of Labor and specifically requires the Bureau to undertake research in the area of sex-based pay disparities, disseminate that information to interested members of the general public, provide information on means of eradicating such disparities, assist State and local information and educational programs, recognize and promote the achievements of employers that have made strides to eliminate pay disparities, and convene a national summit to discuss and highlight the issue of sex-based pay disparities.

SECTION 7. Establishment of the National Award for Pay Equity in the Workplace. This section establishes an award, to be administered by the Women's Bureau of the Department of Labor, to recognize and promote the achievements of employers that have made strides to eliminate pay disparities.

SECTION 8. Increased Resources for Enforcement and Education.

(a) General Resources: This section addresses the fact that the EEOC's level of appropriations has remained stagnant despite an ever-increasing set of new responsibilities, including enforcement of such new civil rights statutes as the Americans with Disabilities Act (ADA). This section simply brings the EEOC appropriations level up to that requested by the President for FY 1997 by adding $36 million to its budget.

(b) Targeted Resources. To enable EEOC to carry out the training of its employees, as required by section 5 of the bill, this provision authorizes $500,000 in supplemental appropriations.

(c) Research, Education, Outreach, and National Award. This subsection authorizes funding for the Women's Bureau's activities to address pay disparities in the workplace, described in sections 6 and 7.

S.71
SPONSOR: Sen Daschle (introduced 01/21/97)

SUMMARY:

(AS INTRODUCED)

Paycheck Fairness Act - Amends the Fair Labor Standards Act of 1938 (FLSA) and the Civil Rights Act of 1964 (CRA) to revise and increase remedies and enforcement on behalf of victims of discrimination in the payment of wages on the basis of sex.

Amends FLSA to provide for enhanced enforcement of equal pay requirements, adding a nonretaliation requirement. Increases penalties for such violations. Provides for the Secretary of Labor to seek additional compensatory or punitive damages in such cases.

Amends CRA to direct the Equal Employment Opportunity Commission (EEOC) to require certain employers to maintain payroll records and report to the EEOC pay information analyzed by race, sex, and national origin of employees. Applies such requirement applicable to employers who have 100 or more employees for each working day in each of 20 or more calendar weeks.

Requires EEOC to train its employees and affected individuals and entities on matters involving discrimination in the payment of wages.

Directs the Secretary to conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including convening a national summit and carrying out other specified activities.

Establishes the Robert Reich National Award for Pay Equity in the Workplace, which shall be evidenced by a medal. Sets forth criteria for specified types of entities to receive such an award.

Authorizes appropriations to the EEOC and to the Secretary to carry out this Act.

BB

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FEB 14 1997

Equal pay
EW

MEMORANDUM

TO: Claire Gonzales, Director
Office of Communications and Legislative Affairs

FROM: Ellen Vargyas
Legal Counsel Ellen Vargyas

SUBJECT: S. 71, Paycheck Fairness Act and S. 232, Fair Pay Act of 1997

The above-referenced bills would expand the rights and remedies available with respect to wage discrimination. We commend the goals of these bills.

The following is an outline of the provisions of S. 71 and S. 232:

I. S. 71

This bill was introduced by Senator Tom Daschle (D-SD) on January 21, 1997. The legislation would expand the remedies available to victims of Equal Pay Act (EPA) discrimination; require certain employers to submit reports to the EEOC containing wage information; provide for training and research on wage discrimination issues; and establish a national award to recognize businesses that have made substantial efforts to eliminate sex-based pay disparities.

Enhanced Enforcement of EPA Requirements

- Under current law, an individual who establishes a violation of the EPA can obtain back wages, and an additional equal amount as liquidated damages. S. 71 would additionally make available compensatory and punitive damages, as appropriate.

- The Fair Labor Standards Act currently bars an employee from being a party plaintiff to a civil action brought unless written consent by the individual is filed in court. S. 71 would eliminate this requirement in class action suits brought to enforce the Equal Pay Act. S. 71 would make clear that class action suits may be brought to enforce the EPA, as provided by the Federal Rules of Civil

Procedure.

- Courts could include expert fees in any judgments awarded to prevailing plaintiffs.

Collection of Pay Information by the EEOC

- S. 71 would amend Title VII by mandating that the EEOC issue regulations requiring every employer with 100 or more employees to maintain payroll records and to submit reports to the Commission containing information from those records. The reports would contain pay information, analyzed by the race, sex, and national origin of the employees. The reports would not disclose this information in a manner that would permit identification of any employees.

Training, Research, Education and Outreach

- The EEOC would provide training to Commission employees and affected individuals and entities on matters involving wage discrimination.

- The Secretary of Labor would conduct research and provide information to affected individuals and entities concerning the means available to eliminate pay disparities between men and women.

Establishment of National Award for Pay Equity

- S. 71 would establish an annual award to businesses that have made substantial efforts to eliminate pay disparities between men and women.

Increased Resources for Enforcement and Education

- S. 71 would authorize the appropriation to the EEOC of $36,000,000 for enforcement of Title VII, Title I of the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act, in addition to amounts otherwise appropriated. S. 71 would also authorize the appropriation of $500,000 for the EEOC to provide the training on wage discrimination described in the legislation.

- S. 71 would authorize the appropriation of $1,000,000 to the Secretary of Labor to carry out the research, education, outreach, and national award program described in the legislation.

II. S. 232

This bill was introduced by Senator Tom Harkin (D-IA) on January 29, 1997. The legislation would prohibit wage differentials between equivalent jobs segregated by sex, race, or national origin; require employers to preserve records regarding the bases for determining wage rates and to submit to the EEOC reports from these records; and require the EEOC to conduct studies and provide technical assistance to affected individuals and entities on effective means to implement the prohibition against unequal pay for equivalent jobs..

Equal Pay for Equivalent Jobs

- No employer could pay wages to employees in a job dominated by employees of a particular sex, race, or national origin at a rate less than the rate paid to employees in another job in the same establishment that is dominated by employees of a different sex, race, or national origin, for work on equivalent jobs. "Equivalent job" are defined as jobs whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.

- The prohibition against unequal pay for equivalent jobs would not apply where the wage disparity is based on a seniority system; merit system; or system that measures earnings by quantity or quality of production.

- No covered entity could retaliate against an individual because (s)he opposed unequal pay for equivalent jobs; participated in a proceeding to enforce the legislation; inquired about or discussed an employee's wages; or exercised or assisted any other person in exercising the rights provided by the legislation.

- Individuals could bring class action suits to enforce the legislation. Prevailing plaintiffs could obtain expert fees, in addition to other remedies.

Records

- The EEOC would issue regulations requiring employers to preserve records regarding the bases used to determine wage rates, and to submit to the Commission reports from those records. Every employer with 25 or more employees would submit to the EEOC an annual report disclosing the wage rates of employees, including the sex, race, and national origin of employees at each wage rate in each job classification. The EEOC regulations would include requirements to protect the confidentiality of employees.

- The EEOC could publish any data obtained pursuant to the legislation; to use the information for statistical and research purposes; and to publish reports based on the data.

Research, Education and Technical Assistance

- The EEOC would conduct studies and provide technical assistance to affected individuals and entities concerning effective means to implement the provisions of the legislation prohibiting unequal pay for equivalent jobs.

Wage Discrimination

MEASURE: **S. 71**

BRIEF TITLE: Paycheck Fairness Act

OFFICIAL TITLE: A bill to amend the Fair Labor Standards Act of 1938 and the Civil Rights Act of 1964 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes.

QUICK REFERENCE: Reduce pay disparities between men and women

INTRODUCED: 01/21/97

CQ BILLWATCH BRIEF:
S71 seeks to reduce and eliminate the pay disparities between men and women. The bill would increase penalties for not complying with the Equal Pay Act.

Employers with more than 100 employees would have to submit payroll information, categorized by sex, to the Labor secretary to create reports on the status of pay equity.

The bill calls for enhanced enforcement on the part of the Equal Employment Opportunity Commission and an increase in its funding and resources.

A National Award for Pay Equity in the Workplace also would be established. It would go to businesses that demonstrate their commitment to pay equity.

CQ BILLWATCH INSIGHT:
No action has been scheduled on S71, which was referred to the Senate Labor and Human Resources Committee.

The Senate Judiciary Committee held a hearing on affirmative action programs and discrimination June 16, 1997.

MEASURE: **H.R. 2023**

BRIEF TITLE: Paycheck Fairness Act.

OFFICIAL TITLE: A bill to amend the Equal Pay Act, the Fair Labor Standards Act of 1938, and the Civil Rights Act of 1964 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes.

QUICK REFERENCE: None

INTRODUCED: 06/24/97

CQ BILLWATCH BRIEF:
None

CQ BILLWATCH INSIGHT:
None

MEASURE: S. 232

BRIEF TITLE: Fair Pay Act of 1997.

OFFICIAL TITLE: A bill to amend to Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.

QUICK REFERENCE: Require equal pay for jobs of comparable value

INTRODUCED: 01/29/97

CQ BILLWATCH BRIEF:

By Michele Hatty, CQ Staff Writer

S232 would require employers to provide equal pay for jobs of comparable value, even if the work is different.

The bill would amend the Fair Labor Standards Act to make it illegal for employers to discriminate against employees on the basis of sex, race and national origin by requiring equal pay for work in jobs that are comparable in skill, effort, responsibility and working conditions.

The legislation would broaden the scope of the 1963 Equal Pay Act, which prohibits sex-based discrimination against workers who do the same tasks. It seeks to guarantee equal pay among employees who do the exact same work, while S232 would seek to guarantee equal pay for workers who serve in different roles but do work that is of comparable value.

Private businesses, government agencies and Congress all would be subject to the legislation. Employers would have to determine the equivalent jobs within their own workplaces but could not reduce other employee salaries to achieve pay equity.

CQ BILLWATCH INSIGHT:

No action has been scheduled on S232, which was referred to the Senate Labor and Human Resources Committee.

However, an aide to bill sponsor Tom Harkin, D-Iowa, said there will be a briefing on April 11, 1997, in conjunction with President Clinton's proclamation declaring that day "Pay Inequity Awareness Day."

No action occurred in the 104th Congress on an identical bill.

MEASURE: **H.R. 1302**

BRIEF TITLE: Fair Pay Act of 1997.

OFFICIAL TITLE: A bill to amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.

QUICK REFERENCE: Provide new protections against wage discrimination

INTRODUCED: 04/10/97

CQ BILLWATCH BRIEF:
By Lara C. Hearnburg, CQ Staff Writer

HR1302 would provide new protections against wage discrimination.

The bill would amend the Fair Labor Standards Act (FLSA) to extend its applicability and impose new reporting requirements.

The measure would extend current law to cover discrimination based on sex, race or national origin among workers in "equivalent jobs." Equivalent jobs would include those requiring similar skills, effort, responsibility and working conditions, even if the jobs themselves are not the same.

The bill would, for example, require equal pay for social workers and parole officers if the two jobs could be considered "equivalent." Bill proponents said in some situations parole officers are paid substantially more simply because they are predominately male.

HR1302 also would direct employers to record and have available the wage rates paid within each of the company's job classifications and the sex, race and national origin of workers. The bill would mandate confidentiality of individual names in the reports.

The Equal Employment Opportunity Commission (EEOC) would have to provide educational materials and technical assistance to companies implementing fair-pay policies. The measure also would mandate a separate pay-equity evaluation to be included in the EEOC's annual report to Congress.

The bill would allow both individual and class-action complaints as a part of its enforcement language. Other enforcement would be provided by EEOC regulation.

Businesses with 25 or fewer employees would be exempt from the requirements for the first two years after implementation, and after that, businesses with 15 or fewer employees would be exempt.

CQ BILLWATCH INSIGHT:
No action has been scheduled on HR1302, which was referred to the House Education and the Workforce Committee.

EQUAL PAY ACT

There are currently two bills in the Senate and two bills in the house which would amend and strengthen the Equal Pay Act (EPA).

- **S. 71** the Paycheck Fairness Act, introduced by Senator Tom Daschle (D-SD), and its companion, **H.R. 2023**, introduced by Rep. Rosa DeLauro (D-CT), would provide for more effective remedies for the victims of discrimination and establish certain reporting requirements.

- **S. 232** the Fair Pay Act of 1997, introduced by Senator Tom Harkin would expand the EPA to include race and national origin and would also establish reporting requirements. For a valid finding of discrimination, it requires that the victim be in a job field dominated by others (e.g. a woman in a field dominated by men).

- **H.R. 1302**, the Fair Pay Act of 1997, introduced by Rep. Eleanor Holmes Norton is similar to S. 232. However, the language is broader because it does not require that the victim be a minority in a job field dominated by others.

Sex Equal Pay

U.S. Department of Labor

Employment Standards Administration
Office of Federal Contract
Compliance Programs
Washington, D.C. 20210

Pay Equity & Economic Opportunity

Pay equity is a cross-cutting, bi-partisan issue of importance to every family in America. Family earnings often determine where and how a family lives; the education of their children; their health care; and their standard of living, including whether the workers have a pension on which to retire comfortably.

A number of factors determine a worker's salary, including his or her educational achievement; employer recruitment efforts; opportunities for training and mentoring; hiring decisions; job assignments; promotions; and the benefits offered, including pensions. Occupational segregation and employment discrimination are still a major contributor to the wage gap and a major barrier to economic self-sufficiency. **"Equitable pay" covers many cross-cutting aspects of employment, including equal pay for equal work.**

The Department of Labor promotes Equal Access, Economic Opportunity and Fair Treatment of All Working Americans and their Families.

The DOL Employment Standards Administration (ESA) Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246 and other laws and regulations, that promote EEO. The laws ensure that taxpayer dollars are not used to discriminate.

Most nonexempt government contracts include an equal opportunity clause. This clause makes equal employment opportunity and affirmative action integral elements of a contractor's agreement with the Federal government. Accordingly, contractors must maintain a non-discriminatory workplace. Contractors engage in affirmative action, including outreach and recruitment to attract qualified individuals and to pay, promote, train and offer other benefits in a non-discriminatory manner. The contract obligations include a self-audit obligation. Self-auditing often ferrets out discrimination and eliminates unnecessary barriers before the discrimination becomes the subject of a complaint or litigation.

Because of the Department of Labor (OFCCP) efforts:

- The patterns of discrimination against women and minorities in numerous contractors' compensation systems were uncovered and corrected.
- The women in Philadelphia who had been on welfare gained necessary skills and found employment with a federal contractor as part of a linkage (partnership) effort.

- The racial and sexual harassment uncovered by OFCCP in a 1996 compliance review of a North Carolina contractor was resolved.
- Individuals with severe disabilities are now employed and self sustaining across the Nation.
- Hispanic men are employed on Federal construction projects.
- Companies have found that having a diverse workforce makes good business sense because of the impetus of the Federal regulations requiring federal affirmative action and pro-active outreach.

To promote EEO workplaces, OFCCP:

- conducts approximately 3,500 compliance reviews (systemic investigations) of federal contractors each year;
- conducted 27 glass ceiling reviews which often focus on compensation issues from entry level to corporate suite;
- provided 11,458 employers with technical assistance during FY 97 alone;
- engaged in extensive outreach and technical assistance on the issue of compensation;
- placed its compliance manual, including the chapter that addresses compensation, and other materials on the Internet at http://www.dol.gov-esa;
- activated an Internet E-laws project to provide interactive guidance;
- works in partnership with contractors; and highlights and recognizes annually the best practices of enlightened employers through its annual EVE awards;
- routinely conducts Town Halls, seminars and other events to educate employers;
- created the Office of the Ombudsperson to serve as a link to the public and an additional customer service resource; and
- recovered more than $160 million dollars for victims of discrimination since 1994, including significant compensation adjustments for women and people of color.

A few occupations experiencing large increases in the percentage of women

Occupation	1986	1996	% change
	(by thousands)		
Physicians	86	176	104.7
Lawyers	111	260	134.2
Computer Scientists	133	307	130.8
Engineers	105	167	59.0

There has been remarkable progress for women and people of color in the past 30 years because of the effectuation of Executive Order 11246. Nevertheless, continuing media revelations regarding discriminatory employment practices in major U.S. companies have also underscored the importance of continued self-auditing, a tool uniquely required by the OFCCP regulations. Equal pay is an important aspect of economic opportunity. Equal employment opportunity is a part of the DOL mission.

January 28, 1999

LIVE WEEKLY RADIO ADDRESS

DATE: January 29, 1999
LOCATION: Roosevelt Room
TIME: 1:00 PM
FROM: Megan Moloney

I. PURPOSE

You will announce a new $14 million Equal Pay Initiative to crack down on wage discrimination in the workplace and build stronger families. You will also renew your call on Congress to pass the Paycheck Fairness Act, which improves enforcement of wage discrimination laws and provides for research, education, and outreach at the EEOC.

II. BACKGROUND

The Equal Pay Initiative includes $10 million to improve training for EEOC employees to better identify wage discrimination issues, increase technical assistance to businesses, and launch an equal pay public service announcement campaign. The Department of Labor will receive the remaining $4 million, including funds for a program to assist contractors in recruiting and retaining qualified women in non-traditional occupations.

"The Paycheck Fairness Act," introduced by Senator Daschle, is designed to strengthen laws prohibiting wage discrimination. The highlights of this legislation include: increased penalties for violations of the Equal Pay Act (EPA); a non-retaliation provision that would prohibit employers from punishing employees for sharing salary information with their co-workers; and funding for increased training, research, and the establishment of a Pay Equity Award.

III. PARTICIPANTS

Briefing	Oval Office	12:45 - 1:00 PM

The President
Doug Sosnik
Ann Lewis
Bruce Reed
Tom Freedman
Jordan Tamagni

Taping	Roosevelt Room	1:00 - 1:30 PM

The President
Megan Moloney
Mary Morrison
White House Communications Agency (WHCA) Staff
White House Television (WHTV)
White House photographer
Approx. 35 guests (see attached for list)

NOTE: Following the radio address you will greet approximately 50 additional guests, comprised of recently appointed federal district court judges and their families.

IV. PRESS PLAN

The ABC, AP, C-SPAN, CBS, Westwood One, NPR, UPI, USA, American Urban Radio, Standard News and Armed Forces Radio networks will carry the address in its entirety to their thousands of stations worldwide this Saturday at 10:06 AM.

V. SEQUENCE OF EVENTS

Briefing
Tape Radio Address
Greet Guests

VI. REMARKS

To be forwarded by the Office of Speechwriting.

Eq. Pay

EW

Laura Emmett 04/02/98 09:43:17 AM

Record Type: Record

To: Mary L. Smith/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Equal Pay Documents EK signs off on

PAYAN040.NEW PAYQ0330.98

Message Copied To:

Jess A. Gupta/OPD/EOP
Laura Emmett/WHO/EOP
Jonathan Orszag/OPD/EOP
Thomas L. Freedman/OPD/EOP
Cecilia E. Rouse/OPD/EOP

Today the Vice President will announce the Administration's support for legislation, introduced by Senator Daschle and Congresswoman DeLauro, to strengthen the laws that prohibit wage discrimination against women. The Vice President also will announce several Administration initiatives aimed at reducing wage discrimination in the private sector and the federal government.

Legislation to Improve Enforcement of Wage Discrimination Laws. The Vice President will call on Congress to pass legislation to strengthen laws prohibiting wage discrimination. The highlights of this legislation include:

- Increased Penalties for the Equal Pay Act (EPA). The bill amends the EPA to allow for full compensatory and punitive damages. Currently, the EPA provides only for liquidated damages and back-pay awards. This proposal would put gender-based wage discrimination on equal footing with wage discrimination based on race or ethnicity, for which uncapped compensatory and punitive damages are available.

- Non-retaliation Provision. Currently, employers can take action against employees who share information on pay. The Daschle bill amends the EPA to prohibit employers from penalizing employees for sharing information about their salaries with co-workers. The ability to share such information makes it easier for women to evaluate whether there is wage discrimination.

- Training, Research, Education, and Outreach. The bill requires the EEOC to provide training for its employees, subject to the availability of funding, on matters involving discrimination in the payment of wages. The bill also requires the Department of Labor (DOL) to undertake research in the area of sex-based pay disparities; provide information on means of eradicating such disparities; assist State and local information and educational programs; and convene a national summit to discuss and highlight the issue of sex-based pay disparities.

- Pay Equity Award. The bill establishes "The National Award for Pay Equity in the Workplace," to be administered by DOL, to recognize and promote the achievements of employers that have made strides to eliminate pay disparities.

Administration Actions to Enhance Compliance with Equal Pay Laws. The Vice President also will announce a number of Administration initiatives including:

- Memorandum Of Understanding (MOU) Between EEOC and DOL. EEOC and DOL are developing an MOU to train each other's staff on pay issues, to refer potential violations to the applicable EEOC or DOL office for appropriate action, and to permit the DOL's

Office of Federal Contractor Compliance Programs (OFCCP) to serve as the EEOC's agent for purposes of seeking damages for wage discrimination.

- 10-Step Voluntary Self-Audit for Businesses and Employees. To help employers who would like to improve their pay and hiring practices, DOL will place on the Internet a 10-step package that gives companies guidelines in determining whether they offer equal pay, hiring, and promotional opportunities. A similar checklist for employees, to help them determine if they are being paid equitably, will also be placed on the Internet.

- Self-Audit for Agencies. To make the federal government a "model" employer, federal agencies will conduct a self-audit, similar to the one described above, and use these results to monitor their efforts on equal pay.

- Increased Data Analysis on Pay Equity. DOL will publish an annual report on pay differences by gender. The purpose of this report will be to highlight the important issue of wage disparities.

- Guide to Recruitment and Retention of Women in the Federal Government. OPM is publishing a new Guide on Recruitment and Retention of Women in the Federal Government, which contains information to make agency managers aware of career opportunities for women and to provide guidance on recruitment and career development for women.

- Federal Contractor Best Practices. DOL will publicize successful programs of federal contractors by placing them on DOL's web site.

Questions And Answers on Pay Equity
April 2, 1998

Q: What is Equal Pay Day?

A: April 3 is the day on which American women's wages, added to their previous year's earnings, equal what men make in just one calendar year. The President is issuing a proclamation declaring April 3, 1998 as National Equal Pay Day.

Q: What did the Vice President announce today?

A: The Vice President announced the Administration's support for legislation introduced by Senator Daschle to improve the enforcement of wage discrimination laws and to strengthen the remedy provisions in the Equal Pay Act by permitting victims of wage discrimination to seek compensatory and punitive damages. Currently, women who are the victims of wage discrimination receive only backpay and liquidated damages, which may not fully compensate them for their loss. This change will mean that the penalties for sex-based wage discrimination will be the same as those for race-based wage discrimination.

The Vice President also announced several administration initiatives aimed at enhancing enforcement of wage discrimination laws both in the private sector and within the federal government, including the development of a Memorandum of Understanding between the Equal Employment Opportunity Commission (EEOC) and the Department of Labor and a ten-step voluntary self-audit for both private businesses and the federal agencies to help them monitor their efforts on equal pay.

Q: Why is this legislation necessary?

A: More than three decades after the passage of the Equal Pay Act and Title VII of the Civil Rights Act, women and people of color continue to suffer the consequences of unfair pay differentials. The average women works a full year, plus three more months, just to earn the same pay that men earn in one calendar year. According to the Department of Labor, the average woman who works full-time earns just 74 cents for each dollar that men earn. For women of color, the gap is even wider. On average, black women earn only 63 cents, and Hispanic women earn only 53 cents for each dollar earned by white men. Some wage differences exist due to differing levels of experience, education, and skill. However, studies show that even accounting for differences in education, experience, and occupation, there is still a significant wage differential.

Q: What's wrong with the current scheme for collecting damages under the Equal Pay Act?

A: Currently, the EPA allows only for liquidated damages and backpay awards. Liquidated damages usually are awarded in an amount equal to backpay. Such awards may not fully compensate a woman for real losses, such as damages for pain and suffering. In addition, women cannot receive punitive damages for wage discrimination, no matter how intentional and egregious the employer's conduct. The legislation the Administration is endorsing today will ensure that women are fully compensated when an employer discriminates against them in setting wages.

Q: What is the Administration doing with respect to data collection?

A: The endorsed legislation contains a Sense of the Senate that the President should take appropriate steps to increase the amount of information available with respect to wage disparities, while maximizing the utility of the data and protecting individuals' privacy and minimizing burdens on reporting entities. In addition, the Vice President announced an annual report on the pay gap, by sex, to be produced by the Department of Labor. This easy-to-access report will raise the national prominence of wage disparities and will highlight the issue every year in order to spur Americans to achieve increased gender pay equity.

Q: Why is the federal government exempt from punitive and compensatory damages?

A: The federal government is not liable for punitive damages in any of the anti-discrimination statutes. To maintain consistency in the application of these statutes, it was appropriate to exempt the federal government from punitive damages under the Equal Pay Act as well.

Q: Is the Administration's policy on uncapped punitive and compensatory damages consistent with its position in other areas of the law such as tort reform?

A: Yes, this is consistent with Administration's position on tort reform. Our proposals on tort reform have never sought to cap compensatory damages, which are necessary to remedy actual harm. And except in very exceptional circumstances, we have approved the use of punitive damage awards to deter intentional misconduct.. -

Questions of the Federal Work Force

Q: What are some of the specific accomplishments of the Clinton Administration with respect to women appointees?

A: Here are some specific accomplishments:

- **Appointed the first women ever** to serve as Attorney General (Janet Reno) and Secretary of State (Madeleine Albright). Including the Attorney General and Secretary of State, women make up 27 percent of the Clinton Cabinet:. The Cabinet also include: Alexis Herman, Secretary of Labor; Donna Shalala, Secretary of Health and Human Services; Carol Browner, Administrator of the Environmental Protection Agency; Janet Yellen, Chair of the Council of Economic Advisors; and Charlene Barchevsky, United States Trade Representative.
- **A third of all judicial nominees are women**, the highest proportion ever.
- **Nominated the second woman to serve on the Supreme Court.** During his first year in office, President Clinton nominated Ruth Bader Ginsberg to the United States Supreme Court. Justice Ginsburg is only the second woman to serve on the nation's highest court.

Q: What is the representation of women in the federal work force?

A: Women represented 42.8 percent of the Federal permanent workforce in 1997 compared to 46.4 percent of the Civilian Labor Force, a difference of a -3.6 percentage points.

Q: How is the Federal government doing in terms of women's pay as compared to that of male Federal employees?

A: Because we classify jobs and then hire on merit, the incumbent is paid the same, male or female.

Q: A 1995 GAO Report contended that Federal occupations with high female representation were more likely to be under graded than other jobs. How did OPM address this issue?

A: At several points in the course of the study, OPM expressed its strong disagreement with the scope and methodology used by the GAO contractor. An OPM letter, that is included as an appendix to the GAO Report, explains why OPM believes the GAO conclusions cannot be supported (factors such as misapplication of the Primary Standard in the Factor Evaluation System in the study, use of less rigorous methodology to evaluate a more job evaluation methodology, and disagreements between the study findings and other evidence). On the other hand, OPM continues to improve the Government's classification system and remains firmly committed to protecting the Merit System Principles and eliminating instances of economic discrimination against the dedicated women and minorities who serve our country.

Q: How are women represented in the lower grade levels?

A: Nearly 80 percent of women are employed in the GS-5 through 12.

Q: How are women represented in the upper grade levels?

A: The representation of women at the Senior Pay level of the Federal workforce is 21 percent, compared to less than 10 percent a decade ago.

Q: What is the "Senior Pay" level?

A: The Senior Pay level includes employees in the Senior Executive Service (SES), Executive Schedule, Senior Foreign Service, and other employees earning salaries above grade 15 of the General Schedule (such as Administrative Law Judges).

Q: What percentage of promotions went to women?

A: Women received 51.8 percent of permanent workforce promotions in Fiscal Year 1997.

Q: What is the representation of women compared to the CLF for high growth federal jobs?

A: The following table compares the representation of women in the Federal permanent workforce (FW) to the civilian labor force (CLF) for the top 10 Federal occupational series that had the highest percentage increase in employment from 1993 to 1997:

OCCUPATION	Series	Total Emp. (9/97)	Pct Women (FW)	Pct Women (CLF)	Difference in Percentag Pts
Transportation Specialist	2101	7,356	13.9	77.6	-63.7
Border Patrol	1896	6,818	4.4	12	-7.6
Gen. Inspection, Invest. & Compl.	1801	9,266	36.2	30.5	5.7
Compliance Inspection & Support	1802	6,837	57.3	53.3	4
Correctional Officer	0007	12,601	11.8	18.9	-7.1
Environmental Protection Specialist	0028	5,523	40.5	38.8	1.7
Paralegal Specialist	0950	5,347	79.3	75.9	3.4
Social Insurance Administration	0105	26,291	66.9	45.6	21.3
General Business & Industry	1101	19,267	55.8	69.8	-14
Environmental Engineering	0819	5,387	22.9	9.8	13.1

NOTE: Top growing Federal occupations based on percentage net increase in employment for occupational series (with 5,000+ employees in 1997) due to new hiring or reclassification of existing employees from 1993 to 1997.

Q: In which occupation are women the worst represented?

A: Women are worst represented in occupational series 0301, Miscellaneous Administration and Program Series. Compared to like occupations in the CLF, there is a shortfall of over 11,300 women in this occupation in the Federal Government.

Q: What is the average salary of female political employees versus that of male appointees? How does that average compare to comparable figures in the previous Administration?

A: In 1992, under President Bush, women made up 40 percent of the political ranks, and the average female political appointee's salary was 75 percent of the average male appointee's salary. In 1997, in the Clinton Administration, the percentage of women appointees increased to 45 percent, and the average woman's salary shot up to 85 percent of the average man's.

Number and Average Salary of Political Appointments (by Gender): 1992 (Pres. Bush) Compared to 1997 (Pres. Clinton)				
Gender	1992 (Bush) Appts	1997 (Clinton) Appts	1992 (Bush) Avg. Pay ($)	1997 (Clinton) Avg. Pay ($)
Women	1,361	1,331	$61,554	$69,979*
Men	2,055	1,628	$82,490	$82,860*
TOTAL	3,416	2,959	NOTE: Total Political Appointments exclude Ambassadors but include Noncareer SES, Schedule C and Other.	
Pct. Women	39.8%	45.0%		

* Rendered in constant (FY 1992) dollars