

# *The Negative Employment Effects of the Paycheck Fairness Act*



Panel II:

How Would Employers Comply?

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# Are Employers to Blame?

Common  
assumption:

Pay gap = systemic  
employer discrimination

But *unfounded*:

DOL has recognized: "The raw wage gap continues to be used in misleading ways to advance public policy agendas without fully explaining the reasons behind the gap."

It "should not be used as the basis to justify corrective action. *Indeed, there may be nothing to correct.*"



# Non-Employer Based Explanations for Wage Gap

- **Studies:**

- GAO  
March 2003,  
Sept. 2010
- CONSAD  
Jan 2009
- OECD  
March 2010

Different roles in family and different career choices means:

Fewer years of work experience

Work fewer hours per year

Less likely to work full-time


Leave labor force for longer periods of time

Different choices in industry and occupation



# Remaining gap “unexplained”

- **GAO, March 2003:** cannot determine whether “due to discrimination or other factors that may affect earnings.”
- **GAO, Sept. 2009 (pay of female managers):** analysis “neither confirms nor refutes the presence of discriminatory practices.”



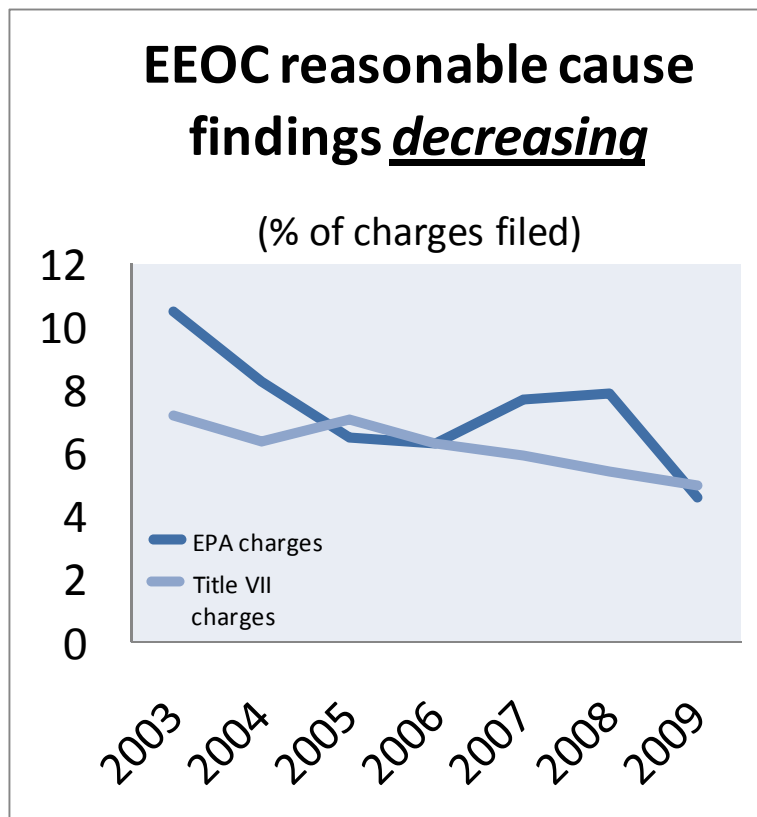
## Other potential reasons:

Women may trade off higher wages for non-wage benefits (e.g., flex schedules, health insurance)

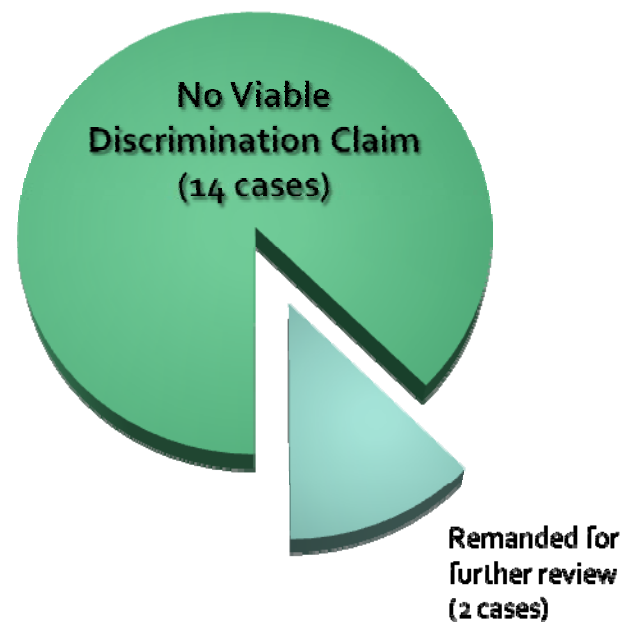
Different coursework or fields of study



# Few pay discrimination cases have merit



### Federal appellate cases July 2009 – June 2010



# Current Laws Have Teeth

## *Dukes v. Wal-Mart*

- 9<sup>th</sup> Circuit affirmed certification of 500,000 woman class
- Left open possibility for 1.5 million women
- Largest sex discrimination class action in U.S. history.

## *Velez v. Novartis Pharmaceuticals Corporation*

- Jury awarded \$250 million in punitive damages
- Largest-ever employment discrimination verdict
- Could have been liable for up to \$1 billion
- Settled for \$175 million plus required to overhaul human resources policies and procedures.



# Shouldn't Innocent Employers Win?

Factor other than sex

```
graph TD; A[Factor other than sex] --> B["Job related"  
"Consistent with business necessity"]; B --> C[Alternative practice?]
```

"Job related"  
"Consistent with business necessity"

Alternative practice?



# Example:



# Analogous to Title VII?

## P's Initial Burden of Proof Higher

Title VII: In disparate impact claims, must show a *particular* employment practice *caused* the disparity.

PFA: Pay disparity itself gives rise to inference of discrimination; *could be whole body of amorphous decisions*.

## Financial Exposure for Employers Lower

Title VII: Only equitable relief allowed in disparate impact claims.

PFA: *Uncapped* compensatory and punitive damages.



# Evaluating Pay Decisions



# Increased Uncertainty



# Current Employment Litigation Burdens

**\$5.13 billion spent on outside counsel in 2010  
(up 16.9% from 2009) <sup>1</sup>**

**\$5.28 billion expected in 2011 <sup>1</sup>**

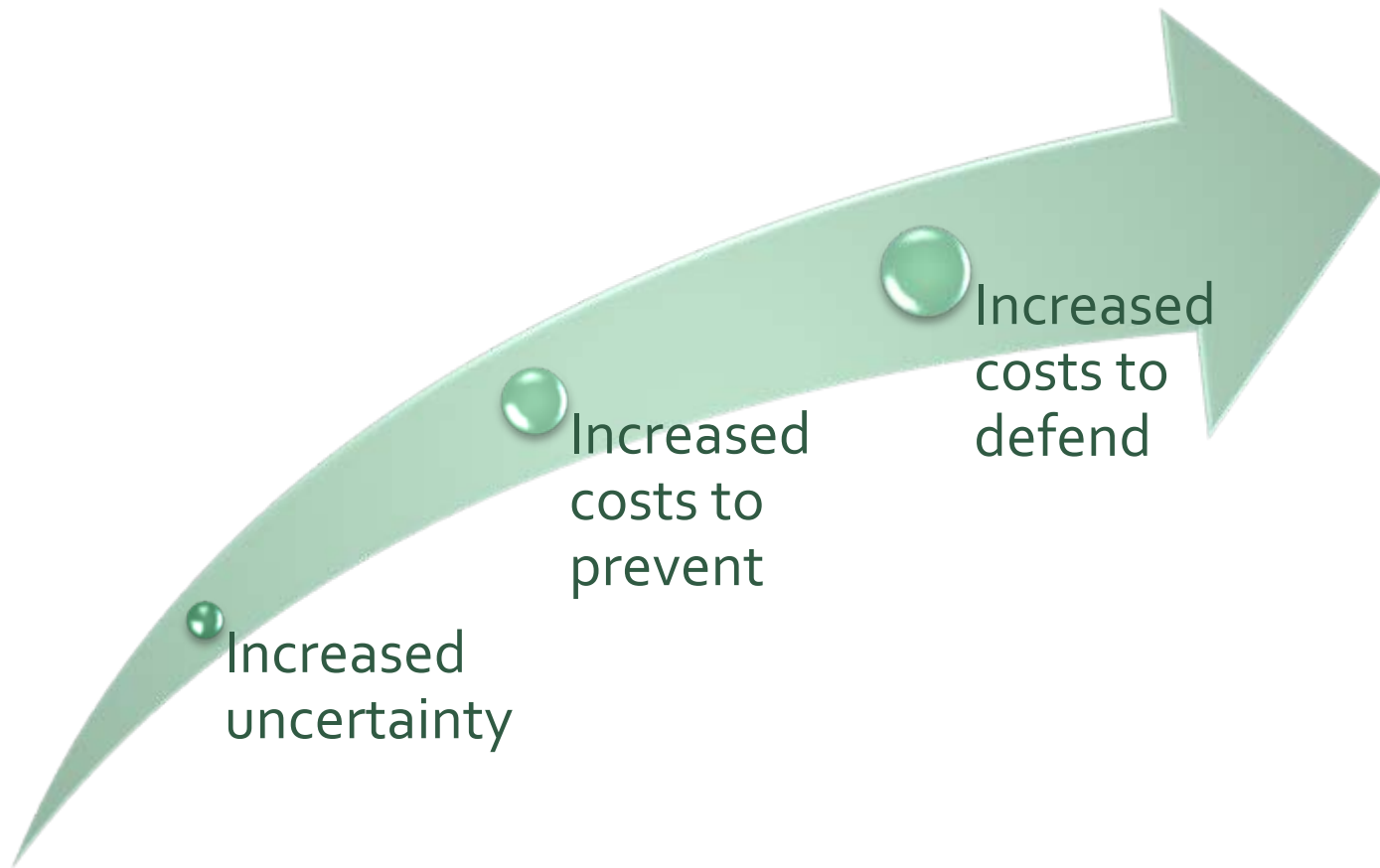
**Largest category of class actions in most industry sectors <sup>2</sup>**

**Ranks second on list of matters that most concerned in-house  
counsel this year <sup>2</sup>**

<sup>1</sup> Premium Practices Forecast 2011, BTI Consulting Group, Inc.

<sup>2</sup> Fulbright & Jaworski LLP's 2010 Litigation Trends Survey

# What Does This Mean for Employers?



# *EEOC v. CRST Van Expedited, Inc.*

EEOC pursues  
frivolous claim

Started as single charge of  
sexual harassment filed  
with EEOC

Two years later, EEOC  
sued on behalf of 270  
women

Court held EEOC failed to  
investigate class claims.

Exorbitant costs  
despite efforts to  
dispose of case

**\$7.6 million**

to defend.

Court agreed CRST moved  
as quickly as possible to  
dispose of case.

Court awarded \$4.5 million  
to CRST under Title VII  
attorneys' fees provision.

PROBLEM:

***No  
equivalent  
relief under  
Paycheck  
Fairness Act***



# Paycheck Fairness Act Misses The Mark

## Windfall for Trial Bar

- Potential bonanza in fees and runaway jury awards

## *Bad for Employers and Women*

- Forces employers to settle.
- Threatens to put employers out of business.
- May eliminate countless jobs.
- Could discourage creativity in offering flexible alternatives for women.

