Testimony of

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Barriers to Justice: Examining Equal Pay for Equal Work

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Good morning Chairman Leahy, Ranking Member Specter, and Members of the Committee. Thank you for affording me the privilege of testifying today. My name is Lawrence Z. Lorber, and I am a partner at the law firm of Proskauer Rose here in Washington, D.C.

The laudable goal of equal pay for equal work that we are discussing today is one with which I am personally familiar. Prior to entering the private practice of law, I served as the Director of the Office of Federal Contract Compliance Programs ("OFCCP") and Deputy Assistant Secretary of the Department of Labor. The OFCCP enforces Executive Order No. 11246, which prohibits discrimination by federal contractors on the basis of race, gender, national origin, color, and religion, and requires contractors to take affirmative action to promote equal employment opportunity. During my tenure at the OFCCP, policies asserting that agency's authority to retrieve back pay for employees were formulated and successfully litigated. In 1990 and 1991, I was counsel to the Business Roundtable for the discussions and legislation activity which led to the 1991 Civil Rights Act. More recently, as Chair of the U.S. Chamber of Commerce's (the "Chamber's")1 policy advisory committee on equal employment opportunity 1 The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every industry, sector, and geographical region of the country. 2 matters, I have witnessed, first hand, the elimination of barriers that stand in the way of equal pay for equal work.

Today, I will discuss the meaning and impact of H.R. 1338, the Paycheck Fairness Act. If enacted, the Paycheck Fairness Act would amend the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), in significant substantive and procedural ways. Next, I will summarize a series of employment law cases decided by the Supreme Court during its 2007-2008 Term. As these cases demonstrate, the Supreme Court has not demonstrated a pro-employer bias when interpreting the equal employment opportunity laws. I will

conclude my comments by discussing what I believe to be a serious barrier to equal pay for equal work - class action litigation of employment discrimination actions.

I. The Paycheck Fairness Act (H.R. 1338)

The Paycheck Fairness Act ("the Act"), if enacted, would radically amend the Equal Pay Act of 1963 in significant substantive and procedural ways. These amendments are based on an unsubstantiated premise that, throughout the United States, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.

On this assumption, the Act would impose harsh, "lottery-style" penalties upon all employers, lower the applicable standards for claims, and make available a more attorney friendly class action device (among other suggested changes). The Act's proponents contend these changes are necessary to ensure that women receive equal pay for equal work. Nothing could be further from the truth. In reality, the Act would expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women in setting compensation rates.

The proposed changes to the EPA are also contrary to the most fundamental underpinnings of that Act - the requirement that equal pay for equal work be balanced against the mandate that government not interfere with private companies' valuation of the work performed for them and, more generally, the setting of wages. The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other nondiscrimination legislation. Perhaps the most notable difference is the lack of any requirement to actually prove intentional discrimination. This feature separates the EPA from Title VII, the ADEA, the ADA, as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871. These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. Unlike these statutes, the EPA currently imposes liability on employers without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for equal work unless the employer meets its burden of proving that the rate differential was due to: a seniority system, a merit system, a system measuring quality or quantity of work, or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by the Paycheck Fairness Act are debated.

Because the EPA is a "strict liability" statute requiring no showing of discriminatory intent to facilitate the imposition of unlimited punitive and compensatory damages, it is both unnecessary and inappropriate to amend the EPA. Nonetheless, the Paycheck Fairness Act proposes the following amendments to the EPA:

?The elimination of caps on punitive and compensatory damages.

?The availability of punitive and compensatory damages for unintentional pay

disparities.

?The elimination of the employer defenses for pay disparities, such as paying

employees differently because they work in different parts of the country based on the different costs of living.

?The creation of relaxed filing requirements for class claims.

?The creation of comparable worth "guidelines" that effectively second guess market forces regarding the relative worth of different jobs, et cetera.

?The re-imposition of statistical analyses and auditing methods used by the Labor Department.

These amendments would serve no legitimate purpose. They are contrary to the long experience under the Equal Pay Act and to the framework of Title VII as established by the 1991 Civil Rights Act. Instead, these amendments would serve the ill-conceived purpose of turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate age differentials and unjustly enrich plaintiffs' attorneys. For these reasons, the Paycheck Fairness Act is an ill-conceived effort to dramatically change the compensation structure in our country and to substantiate unnecessary and non-productive litigation for carefully thought out compensation decisions.

II. Employment Law Decisions Issued During the 2006-2007 and the 2007-2008 Supreme Court Terms

A. Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008).

In 1996, the New York-based federal research laboratory, Knolls Atomic Power Lab, Instituted an involuntary reduction in force and asked supervisors to follow a set of criteria to determine which employees would be dismissed. The supervisors were asked to rank employees based on performance, flexibility, and the criticality of their skills. Points were added to the employees' scores based on their years of service. On the basis of these rankings, thirty5 one employees were terminated in connection with the reduction in force. All but one of the thirty-one terminated employees was over forty years of

age. Twenty-six of the terminated employees filed a lawsuit, alleging age discrimination in violation of the ADEA.

The Second Circuit held, contrary to the EEOC's argument, that the dismissed workers, not the employer, had the burden to show that the evaluation system used to determine which employees would be terminated in connection with the reduction in force was unreasonable. The Second Circuit held that the employees failed to satisfy this burden.

The class petitioned the Supreme Court for certiorari on two questions: (1) who bears the burden of persuasion to show a "reasonable factor other than age"; and, (2) whether the evaluation practice at issue, whereby employers "confer broad discretionary authority on individual managers to determine which employees to lay off" should be deemed reasonable as a matter of law. By a vote of 7-1, the Supreme Court held that when an employer engages in a business practice that places a disproportionate burden on older workers, it is the employer that bears the burden of persuasion of showing that its action was based on a reasonable factor other than age. Thus, the Supreme Court's decision in Meacham eased the burden on plaintiffs bringing disparate impact claims under the ADEA.

B. Fed Exp. Corp. v. Holowecki, 128 S. Ct. 1147 (2008).

In December 2001, Patricia Kennedy filed an intake questionnaire and a six-page affidavit with the EEOC alleging that FedEx had instituted several workplace policies and practices that discriminated against employees on the basis of age. She did not file a Charge of Discrimination at that time and, thus, the EEOC did not assign a charge number, did not inform FedEx of the allegations set forth in the intake questionnaire and affidavit, and made no attempt at informal conciliation. In April 2002, Ms. Kennedy filed a class-action ADEA law suit on 6 behalf of herself and similarly situated employees. Exactly on month later, Ms. Kennedy filed a Charge of Discrimination with the EEOC.

The district court granted FedEx's motion to dismiss on the ground that Ms. Kennedy's 2001 questionnaire and affidavit did not constitute a "Charge" under the ADEA. The Second Circuit reversed, holding that the standard to determine whether a "Charge" had been filed is two-pronged. According to the Second Circuit, a "Charge" must comport with the EEOC regulations and, second, a "Charge" must manifest the employee's intent to filed a charge, as viewed though the eyes of a reasonable person. The Second Circuit held that Ms. Kennedy's December 2001 submissions satisfied these requirements and permitted her suit to go forward.

In its petition for cert., FedEx argued that an intake questionnaire, even if accompanied by an affidavit, cannot constitute a "Charge." The Supreme Court disagreed. In a 7-2 decision, the Court held that a "Charge" must contain basic information listed in the regulations, including the name of the Charging

Party, the allegation, and the name of the respondent/employer. Provided such requisite information is included, a filing can be deemed a "Charge" under the ADEA if it objectively can be construed as a "request for the agency to take remedial action to protect the employee's rights." The Court referred to this as the "request to act" requirement.

C. Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008).

Gomez-Perez, an employee within the U.S. Postal Service, applied for and was denied a request to transfer from her part-time job as a postal clerk to a similar full-time position. She filed a grievance with the USPS, and a Charge of Discrimination with the Equal Employment Opportunity Commission, alleging in each that she had been denied her request for a transfer because of her age (45). Ms. Gomez-Perez claimed that, as a result of filing her grievance and Charge, she was subjected to various forms of retaliation, including harassment and a reduction 7 in compensable working hours. Ms. Gomez-Perez alleged that the United States Postal Service, and the Postmaster General retaliated against for filing a Charge of Discrimination with the EEOC in violation of 29 U.S.C. § 633a. The First Circuit held that Ms. Gomez-Perez's claim was not barred by sovereign immunity, but found that the ADEA does not provide a cause of action for retaliation.

The First Circuit found that § 633(a) prohibits only "discrimination based on age" and contains no express cause of action for retaliation. The First Circuit further noted that the structure of the ADEA demonstrates Congress's intent not to include retaliation as a cause of action under § 633(a). According to the First Circuit, Congress allowed such a claim against private employers under section 623(d), but did not provide such a cause of action for federal employees against federal employers. The First Circuit conceded that other circuits, such as the D.C. Circuit, have held that § 633(a) does provide federal employees a cause of action for retaliation.

The Supreme Court, following Sullivan v. Little Hunting Park, Inc. and Jackson v. Birmingham Bd. of Ed., reversed the First Circuit. The Court held that § 633(a) prohibits employers from retaliating against federal employees who complain of age discrimination.

D. CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951(2008).

Herndrick Humphries, an African-American, worked as an associate manager in a Cracker Barrel restaurant owned by CBOCS West, Inc. ("Cracker Barrel"). In August and October 2001, Humphries complained to his district manager about his general manager's disciplinary reports, racially offensive remarks, and the termination of a fellow employee, all of which he believed were racially motivated and groundless. The district manager did not take any action and fired Humphries in December 2001 due to a report from another associate manager that Humphries left the store safe open overnight. Humphries

filed a lawsuit under Title VII and Section 1981 alleging both race discrimination and retaliation. The Title VII claim was dismissed for procedural defects.

The United States Court of Appeals for the Seventh Circuit determined that Humphries did have a potential cause of action under Section 1981 stating that Section 1981 provides broad protection against retaliation. Additionally, the court determined that Humphries had sufficient evidence to support his retaliation claim and remanded the case for trial.

It its petition for certiorari, Cracker Barrel raised a single question: "Is a race retaliation claim cognizable under 42 U.S.C § 1981?" Cracker Barrel noted that Section 1981 does not include the word "retaliation," and argued that terminating an employee in retaliation for having made a complaint is conceptually different from terminating an employee because of that employee's race. Cracker Barrel also argued that, because Title VII expressly provides a cause of action for retaliation in the employment context, Section 1981, which has no such provision, should not be read to allow retaliation actions. Humphries countered by arguing that Congress intended Title VII to supplement existing employment discrimination laws, and that the Civil Rights Act of 1991 allowed for such retaliation claims. The Court, in a 7-2 decision written by Justice Breyer, held that Section 1981 does, in fact, encompass retaliation claims and affirmed the judgment of the Seventh Circuit.

E. Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008).

Wanda Glen worked for Sears & Roebuck from 1986 to 2000, when she went on medical leave for a heart condition and never returned to work. Glenn submitted a claim under Sears's long-term disability plan in June 2000. The Sears plan provided for two distinct stages of "total disability" to obtain benefits under the plan. The first required the participant to be unable to perform her current job; the second--which became relevant after the first 24 months of 9 benefits--in essence, required that the participant be unable to perform any job. After her initial 24 months of benefits, MetLife instructed Glenn that if she wished to continue receiving longterm disability benefits under the plan she was required to demonstrate that she met the second stage of total disability. Based on the medical information submitted by Glenn and her doctor, MetLife found that she was able to work in some capacity and denied her continued benefits. Glenn appealed, and MetLife had an independent physician review her medical file. Despite the fact that the physician's conclusion was unclear as to whether Glenn was in fact, totally disabled, MetLife affirmed its decision to deny benefits. Glenn filed suit against MetLife under ERISA § 502(a) for denial of benefits.

The Sixth Circuit held that although the plan documents gave MetLife discretionary authority to interpret the terms of the plan and to determine benefits, the Court is allowed to take into account the existence of a conflict of interest on the part of MetLife in reviewing MetLife's decision. A conflict of interest existed here because MetLife not only decided whether a participant was eligible for benefits,

but also had to pay those benefits. While other facts were involved, such as MetLife's disregard for a Social Security Administration finding that Glenn was totally disabled, the Court admittedly "considered" MetLife's conflict of interest in determining that MetLife's denial of benefits was arbitrary and capricious.

Before the Supreme Court, MetLife argued that, by both administering and funding the Sears benefit plan, it "does not act under a conflict of interest that must be considered on judicial review." In support of that contention, MetLife pointed to the language of ERISA, 29 U.S.C. § 1108(c)(3), which permits a single entity to serve both as a plan's administrator and its payer. "It cannot be the case that an arrangement that was expressly contemplated--and authorized--by Congress, without more, changes the standard of review for discretionary benefit determinations." That assertion, according to MetLife, is further confirmed by principles of trust law, under which a trustee is presumed to have "'acted in good faith' despite . . . a potential conflict, unless there is some affirmative evidence to the contrary."

The Supreme Court rejected MetLife's argument and affirmed the Sixth Circuit's approach, holding that a company which both administers and funds a benefit plan operates under a conflict of interest that must be considered as a factor in a court's review of claim denials.

F. Burlington N. & Santa Fe Railway v. White, 548 U.S. 53 (2006).

Sheila White was the only woman that worked in the Maintenance of Way department of

Burlington Northern & Santa Fe Railway Company's Tennessee Yard. Burlington Northern hired White as a "track laborer," a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-ofway. Soon after White arrived on the job, a co-worker that had previously operated the forklift chose to assume other responsibilities, and White was assigned to the "less arduous and cleaner job" of forklift operator.

In September 1997, White complained to a Burlington Northern official about insulting sex-based comments by her supervisor. The company suspended the supervisor and ordered him to attend a sexual-harassment training session. The company also removed White from forklift duty and assigned her to perform only the track laborer tasks. White filed a complaint with the EEOC and claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her complaint. White filed two additional EEOC charges in which she claimed that the company placed her under surveillance, monitored her daily activities, and suspended her without pay. White invoked internal grievance procedures, and those 11 procedures led the company to reinstate White to her position and award her back pay for the 37 days she was suspended.

White subsequently filed a Title VII action against Burlington Northern claiming that changing her job responsibilities and suspending her for 37 days without pay was unlawful retaliation. A jury agreed with White and awarded her $43,500 in compensatory damages. The district court entered judgment on the verdict. A divided panel of the Sixth Circuit reversed. An en banc panel of the Sixth Circuit vacated the panel's decision and reinstated the district court's judgment in White's favor. The en banc court held that in such a case a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment.

The Supreme Court affirmed the Sixth Circuit's decision, but rejected the standard they articulated. Specifically, the Court concluded that Title VII's retaliation provision is broader in scope than Title VII's substantive discrimination provision. The Court observed that Title VII's substantive discrimination provision, section 703(a), is limited in scope to actions that affect employment or alter the conditions of the workplace in the certain enumerated categories: hire; discharge; compensation; terms; conditions; or privileges of employment. Section 704(a), relied on by White, contained no such limiting words.

The Court explained its rejection of the Solicitor General's position by looking to and relying on the EEOC's sub-regulatory guidance, which "expressed a broad interpretation of the anti-retaliation provision." The Court cited with approval the EEOC's 1998 Compliance Manual statement that Title VII's anti-retaliation provision "prohibit[s] any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or other from engaging in protected activity."

The Court concluded that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." The harm must be materially adverse, which, the Court explained, means that a reasonable person might have been dissuaded from making or supporting a charge of discrimination. The Court added that "context matters," and that "the significance of any given act of retaliation will often depend of the particular circumstances."

III. The Class Action Is Neither An Appropriate Nor An Effective Mechanism For The Resolution of Statutory Employment Discrimination Claims.

In 1977, the Supreme Court stated that "suits alleging racial or ethnic discrimination are often by their nature class suits, involving class-wide wrongs."2 Indeed, in 1966, when Rule 23 of the Federal Rules of Civil Procedure was amended, the Federal Rules Advisory Committee opined that Rule 23 is a particularly appropriate vehicle for the resolution of civil rights actions.3 Despite these endorsements, many remained skeptical that the class action could be used to effectively and justly resolve employment discrimination lawsuits. This skepticism gained momentum when, in 1991, Congress enacted the Civil Rights Act of 1991. The Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, provides litigants with certain substantive rights that have significant, albeit unintended, procedural consequences. For example, under the Civil Rights Act of 1991, litigants are

guaranteed the right to a jury trial, and victims of unlawful discrimination are permitted to recover compensatory and punitive damages. As has been demonstrated repeatedly in the years since the passage of the Civil Rights Act of 1991, the significant changes to the law of employment discrimination have created a substantial barrier to the resolution of employment discrimination claims through class litigation and have arguably rendered the federal employment discrimination class action non-viable.

Plaintiffs' attorneys shoehorn class claims by arguing that monetary relief, in the form of back-pay and punitive damages, is "incidental" and "secondary" to injunctive and declaratory relief. What is not clear, however, is how injunctive and declaratory relief can be found to predominate, even for those claimants who are still employed and might benefit from an injunction, when the plaintiff class seeks billions of dollars in punitive damages. Rather than accepting simply accepting such an obviously disingenuous argument, federal courts must seriously inquire whether the injunctive/declaratory relief sought is, in actuality, a sham.

As used in this way, the class action mechanism threatens to deny class plaintiffs - particularly absent class plaintiffs - the protection of the equal employment opportunity laws. In large nation-wide class actions, an employment discrimination case will be filed by an attorney representing a hand full of named plaintiffs on behalf of many more unnamed plaintiffs who are alleged to be similarly situated to the named plaintiffs. If, for example, an employment discrimination case is filed in federal district court in California by ten named plaintiffs on behalf of 10,000 similarly situated individuals, and the ten named plaintiffs are represented by a California-based attorney, it is not likely that the 10,000 unnamed plaintiffs will be adequately represented by the named plaintiffs' attorney. The question of venue raises additional concerns. In our hypothetical, the named plaintiffs filed an employment discrimination law suit in California. The California court will determine the rights of the named plaintiffs, but its decision will also impact 10,000 other individuals who live in cities and towns scattered throughout the United States.

In sum, while the class action is intended to provide an effective and efficient mechanism to resolve legal claims held by numerous litigants, the mechanism has devolved into a moneymaking tool (albeit a very effective money-making tool) for plaintiff's attorneys. The settlement of large nation-wide class actions often results in attorney fee awards in the tens or hundreds of millions of dollars, while providing little relief to the class members. Used in this manner, the class action fails to provide justice for victims of discrimination. Instead, it makes a mockery of the equal employment opportunity laws. Congress should put a stop to this by enacting legislation to clarify the standards that govern employment discrimination class actions.

Thank you again for affording me the privilege to testify today. I look forward to your questions.