

108TH CONGRESS
1ST SESSION

S. 841

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.

IN THE SENATE OF THE UNITED STATES

APRIL 9, 2003

Mr. HARKIN (for himself, Ms. MIKULSKI, Mr. KENNEDY, Mrs. BOXER, Mr. AKAKA, Mr. LEAHY, Mrs. MURRAY, Mr. FEINGOLD, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE AND REFERENCE.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Fair Pay Act of 2003”.

6 (b) **REFERENCE.**—Except as provided in section 8,
7 whenever in this Act an amendment or repeal is expressed
8 in terms of an amendment to, or repeal of, a section or

1 other provision, the reference shall be considered to be
2 made to a section or other provision of the Fair Labor
3 Standards Act of 1938 (29 U.S.C. 201 et seq.).

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) Wage rate differentials exist between equiv-
7 alent jobs segregated by sex, race, and national ori-
8 gin in Government employment and in industries en-
9 gaged in commerce or in the production of goods for
10 commerce.

11 (2) The existence of such wage rate differen-
12 tials—

13 (A) depresses wages and living standards
14 for employees necessary for their health and ef-
15 ficiency;

16 (B) prevents the maximum utilization of
17 the available labor resources;

18 (C) tends to cause labor disputes, thereby
19 burdening, affecting, and obstructing com-
20 merce;

21 (D) burdens commerce and the free flow of
22 goods in commerce; and

23 (E) constitutes an unfair method of com-
24 petition.

1 (3) Discrimination in hiring and promotion has
2 played a role in maintaining a segregated work
3 force.

4 (4) Many women and people of color work in
5 occupations dominated by individuals of their same
6 sex, race, and national origin.

7 (5)(A) A General Accounting Office analysis of
8 wage rates in the civil service of the State of Wash-
9 ington found that in 1985 of the 44 jobs studied
10 that paid less than the average of all equivalent jobs,
11 approximately 39 percent were female-dominated
12 and approximately 16 percent were male dominated.

13 (B) A study of wage rates in Minnesota using
14 1990 Decennial Census data found that 75 percent
15 of the wage rate differential between white and non-
16 white workers was unexplained and may be a result
17 of discrimination.

18 (6) Section 6(d) of the Fair Labor Standards
19 Act of 1938 prohibits discrimination in compensa-
20 tion for “equal work” on the basis of sex.

21 (7) Title VII of the Civil Rights Act of 1964
22 prohibits discrimination in compensation because of
23 race, color, religion, national origin, and sex. The
24 Supreme Court, in its decision in County of Wash-
25 ington v. Gunther, 452 U.S. 161 (1981), held that

1 title VII's prohibition against discrimination in com-
2 pensation also applies to jobs that do not constitute
3 "equal work" as defined in section 6(d) of the Fair
4 Labor Standards Act of 1938. Decisions of lower
5 courts, however, have demonstrated that further
6 clarification of existing legislation is necessary in
7 order effectively to carry out the intent of Congress
8 to implement the Supreme Court's holding in its
9 Gunther decision.

10 (8) Artificial barriers to the elimination of dis-
11 crimination in compensation based upon sex, race,
12 and national origin continue to exist more than 3
13 decades after the passage of section 6(d) of the Fair
14 Labor Standards Act of 1938 and the Civil Rights
15 Act of 1964. Elimination of such barriers would
16 have positive effects, including—

17 (A) providing a solution to problems in the
18 economy created by discrimination through
19 wage rate differentials;

20 (B) substantially reducing the number of
21 working women and people of color earning low
22 wages, thereby reducing the dependence on pub-
23 lic assistance; and

1 (C) promoting stable families by enabling
2 working family members to earn a fair rate of
3 pay.

4 **SEC. 3. EQUAL PAY FOR EQUIVALENT JOBS.**

5 (a) AMENDMENT.—Section 6 (29 U.S.C. 206) is
6 amended by adding at the end the following:

7 “(h)(1)(A) Except as provided in subparagraph (B),
8 no employer having employees subject to any provision of
9 this section shall discriminate, within any establishment
10 in which such employees are employed, between employees
11 on the basis of sex, race, or national origin by paying
12 wages to employees in such establishment in a job that
13 is dominated by employees of a particular sex, race, or
14 national origin at a rate less than the rate at which the
15 employer pays wages to employees in such establishment
16 in another job that is dominated by employees of the oppo-
17 site sex or of a different race or national origin, respec-
18 tively, for work on equivalent jobs.

19 “(B) Nothing in subparagraph (A) shall prohibit the
20 payment of different wage rates to employees where such
21 payment is made pursuant to—

22 “(i) a seniority system;

23 “(ii) a merit system;

24 “(iii) a system that measures earnings by quan-
25 tity or quality of production; or

1 “(iv) a differential based on a bona fide factor
 2 other than sex, race, or national origin, such as edu-
 3 cation, training, or experience, except that this
 4 clause shall apply only if—

5 “(I) the employer demonstrates that—

6 “(aa) such factor—

7 “(AA) is job-related with respect
 8 to the position in question; or

9 “(BB) furthers a legitimate busi-
 10 ness purpose, except that this item
 11 shall not apply if the employee dem-
 12 onstrates that an alternative employ-
 13 ment practice exists that would serve
 14 the same business purpose without
 15 producing such differential and that
 16 the employer has refused to adopt
 17 such alternative practice; and

18 “(bb) such factor was actually applied
 19 and used reasonably in light of the as-
 20 serted justification; and

21 “(II) upon the employer succeeding under
 22 subclause (I), the employee fails to demonstrate
 23 that the differential produced by the reliance of
 24 the employer on such factor is itself the result

1 of discrimination on the basis of sex, race, or
2 national origin by the employer.

3 “(C) The Equal Employment Opportunity Commis-
4 sion shall issue guidelines specifying criteria for deter-
5 mining whether a job is dominated by employees of a par-
6 ticular sex, race, or national origin. Such guidelines shall
7 not include a list of such jobs.

8 “(D) An employer who is paying a wage rate differen-
9 tial in violation of subparagraph (A) shall not, in order
10 to comply with the provisions of such subparagraph, re-
11 duce the wage rate of any employee.

12 “(2) No labor organization or its agents representing
13 employees of an employer having employees subject to any
14 provision of this section shall cause or attempt to cause
15 such an employer to discriminate against an employee in
16 violation of paragraph (1)(A).

17 “(3) For purposes of administration and enforcement
18 of this subsection, any amounts owing to any employee
19 that have been withheld in violation of paragraph (1)(A)
20 shall be deemed to be unpaid minimum wages or unpaid
21 overtime compensation under this section or section 7.

22 “(4) In this subsection:

23 “(A) The term ‘labor organization’ means any
24 organization of any kind, or any agency or employee
25 representation committee or plan, in which employ-

ees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

“(B) The term ‘equivalent jobs’ means jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.”.

(b) CONFORMING AMENDMENT.—Section 13(a) (29 U.S.C. 213(a)) is amended in the matter before paragraph (1) by striking “section 6(d)” and inserting “sections 6(d) and 6(h)”.

SEC. 4. PROHIBITED ACTS.

Section 15(a) (29 U.S.C. 215(a)) is amended—

(1) by striking the period at the end of paragraph (5) and inserting a semicolon; and

(2) by adding after paragraph (5) the following new paragraphs:

“(6) to discriminate against any individual because such individual has opposed any act or practice made unlawful by section 6(h) or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce section 6(h); or

1 “(7) to discharge or in any other manner dis-
 2 criminate against, coerce, intimidate, threaten, or
 3 interfere with any employee or any other person be-
 4 cause the employee inquired about, disclosed, com-
 5 pared, or otherwise discussed the employee’s wages
 6 or the wages of any other employee, or because the
 7 employee exercised, enjoyed, aided, or encouraged
 8 any other person to exercise or enjoy any right
 9 granted or protected by section 6(h).”.

10 **SEC. 5. REMEDIES.**

11 (a) ENHANCED PENALTIES.—Section 16(b) of the
 12 Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is
 13 amended—

14 (1) by inserting after the first sentence the fol-
 15 lowing: “Any employer who violates subsection (d) or
 16 (h) of section 6 shall additionally be liable for such
 17 compensatory or punitive damages as may be appro-
 18 priate, except that the United States shall not be lia-
 19 ble for punitive damages.”;

20 (2) in the sentence beginning “An action to”,
 21 by striking “either of the preceding sentences” and
 22 inserting “any of the preceding sentences of this
 23 subsection”;

24 (3) in the sentence beginning “No employees”,
 25 by striking “No employees” and inserting “Except

1 with respect to class actions brought under sub-
 2 section (f), no employee”;

3 (4) in the sentence beginning “The court in”,
 4 by striking “in such action” and inserting “in any
 5 action brought to recover the liability prescribed in
 6 any of the preceding sentences of this subsection”;
 7 and

8 (5) by striking “section 15(a)(3)” each place it
 9 occurs and inserting “paragraphs (3), (6), and (7)
 10 of section 15(a)”.

11 (b) ACTION BY SECRETARY.—Section 16(c) of the
 12 Fair Labor Standards Act of 1938 (29 U.S.C. 216(c)) is
 13 amended—

14 (1) in the first sentence—

15 (A) by inserting “or, in the case of a viola-
 16 tion of subsection (d) or (h) of section 6, addi-
 17 tional compensatory or punitive damages,” be-
 18 fore “and the agreement”; and

19 (B) by inserting before the period the fol-
 20 lowing: “, or such compensatory or punitive
 21 damages, as appropriate”;

22 (2) in the second sentence, by inserting before
 23 the period the following: “and, in the case of a viola-
 24 tion of subsection (d) or (h) of section 6, additional
 25 compensatory or punitive damages”; and

1 (3) in the third sentence, by striking “the first
2 sentence” and inserting “the first or second sen-
3 tence”.

4 (c) FEES.—Section 16 (29 U.S.C. 216) is amended
5 by adding at the end the following:

6 “(f) In any action brought under this section for vio-
7 lation of section 6(h), the court shall, in addition to any
8 other remedies awarded to the prevailing plaintiff or plain-
9 tiffs, allow expert fees as part of the costs. Any such action
10 may be maintained as a class action as provided by the
11 Federal Rules of Civil Procedure.”.

12 **SEC. 6. RECORDS.**

13 (a) TECHNICAL AMENDMENT.—Section 11(c) (29
14 U.S.C. 211(c)) is amended by inserting “(1)” after “(c)”.

15 (b) RECORDS.—Section 11(c) (as amended by sub-
16 section (a)) is further amended by adding at the end the
17 following:

18 “(2)(A) Every employer subject to section 6(h) shall
19 preserve records that document and support the method,
20 system, calculations, and other bases used by the employer
21 in establishing, adjusting, and determining the wage rates
22 paid to the employees of the employer. Every employer
23 subject to section 6(h) shall preserve such records for such
24 periods of time, and shall make such reports from the
25 records to the Equal Employment Opportunity Commis-

1 sion, as shall be prescribed by the Equal Employment Op-
 2 portunity Commission by regulation or order as necessary
 3 or appropriate for the enforcement of the provisions of sec-
 4 tion 6(h) or any regulation promulgated pursuant to sec-
 5 tion 6(h).”.

6 (c) SMALL BUSINESS EXEMPTIONS.—Section 11(c)
 7 (as amended by subsections (a) and (b)) is further amend-
 8 ed by adding at the end the following:

9 “(B)(i) Every employer subject to section 6(h) that
 10 has 25 or more employees on any date during the first
 11 or second year after the effective date of this paragraph,
 12 or 15 or more employees on any date during any subse-
 13 quent year after such second year, shall, in accordance
 14 with regulations promulgated by the Equal Employment
 15 Opportunity Commission under subparagraph (F), pre-
 16 pare and submit to the Equal Employment Opportunity
 17 Commission for the year involved a report signed by the
 18 president, treasurer, or corresponding principal officer, of
 19 the employer that includes information that discloses the
 20 wage rates paid to employees of the employer in each clas-
 21 sification, position, or job title, or to employees in other
 22 wage groups employed by the employer, including informa-
 23 tion with respect to the sex, race, and national origin of
 24 employees at each wage rate in each classification, posi-
 25 tion, job title, or other wage group.”.

1 (d) PROTECTION OF CONFIDENTIALITY.—Section
 2 11(c) (as amended by subsections (a) through (c)) is fur-
 3 ther amended by adding at the end the following:

4 “(ii) The rules and regulations promulgated by the
 5 Equal Employment Opportunity Commission under sub-
 6 paragraph (F), relating to the form of such a report, shall
 7 include requirements to protect the confidentiality of em-
 8 ployees, including a requirement that the report shall not
 9 contain the name of any individual employee.”.

10 (e) USE; INSPECTIONS; EXAMINATIONS; REGULA-
 11 TIONS.—Section 11(c) (as amended by subsections (a)
 12 through (d)) is further amended by adding at the end the
 13 following:

14 “(C) The Equal Employment Opportunity Commis-
 15 sion may publish any information and data that the Equal
 16 Employment Opportunity Commission obtains pursuant to
 17 the provisions of subparagraph (B). The Equal Employ-
 18 ment Opportunity Commission may use the information
 19 and data for statistical and research purposes, and com-
 20 pile and publish such studies, analyses, reports, and sur-
 21 veys based on the information and data as the Equal Em-
 22 ployment Opportunity Commission may consider appro-
 23 priate.

24 “(D) In order to carry out the purposes of this Act,
 25 the Equal Employment Opportunity Commission shall by

1 regulation make reasonable provision for the inspection
2 and examination by any person of the information and
3 data contained in any report submitted to the Equal Em-
4 ployment Opportunity Commission pursuant to subpara-
5 graph (B).

6 “(E) The Equal Employment Opportunity Commis-
7 sion shall by regulation provide for the furnishing of copies
8 of reports submitted to the Equal Employment Oppor-
9 tunity Commission pursuant to subparagraph (B) to any
10 person upon payment of a charge based upon the cost of
11 the service.

12 “(F) The Equal Employment Opportunity Commis-
13 sion shall issue rules and regulations prescribing the form
14 and content of reports required to be submitted under sub-
15 paragraph (B) and such other reasonable rules and regu-
16 lations as the Equal Employment Opportunity Commis-
17 sion may find necessary to prevent the circumvention or
18 evasion of such reporting requirements. In exercising the
19 authority of the Equal Employment Opportunity Commis-
20 sion under subparagraph (B), the Equal Employment Op-
21 portunity Commission may prescribe by general rule sim-
22 plified reports for employers for whom the Equal Employ-
23 ment Opportunity Commission finds that because of the
24 size of the employers a detailed report would be unduly
25 burdensome.”.

1 **SEC. 7. RESEARCH, EDUCATION, AND TECHNICAL ASSIST-**
2 **ANCE PROGRAM; REPORT TO CONGRESS.**

3 Section 4(d) (29 U.S.C. 204(d)) is amended by add-
4 ing at the end the following:

5 “(4) The Equal Employment Opportunity Commis-
6 sion shall conduct studies and provide information and
7 technical assistance to employers, labor organizations, and
8 the general public concerning effective means available to
9 implement the provisions of section 6(h) prohibiting wage
10 rate discrimination between employees performing work in
11 equivalent jobs on the basis of sex, race, or national origin.
12 Such studies, information, and technical assistance shall
13 be based on and include reference to the objectives of such
14 section to eliminate such discrimination. In order to
15 achieve the objectives of such section, the Equal Employ-
16 ment Opportunity Commission shall carry on a continuing
17 program of research, education, and technical assistance
18 including—

19 “(A) conducting and promoting research with
20 the intent of developing means to expeditiously cor-
21 rect the wage rate differentials described in section
22 6(h);

23 “(B) publishing and otherwise making available
24 to employers, labor organizations, professional asso-
25 ciations, educational institutions, the various media
26 of communication, and the general public the find-

1 ings of studies and other materials for promoting
 2 compliance with section 6(h);

3 “(C) sponsoring and assisting State and com-
 4 munity informational and educational programs; and

5 “(D) providing technical assistance to employ-
 6 ers, labor organizations, professional associations
 7 and other interested persons on means of achieving
 8 and maintaining compliance with the provisions of
 9 section 6(h).

10 “(5) The report submitted biennially by the Secretary
 11 to Congress under paragraph (1) shall include a separate
 12 evaluation and appraisal regarding the implementation of
 13 section 6(h).”.

14 **SEC. 8. CONFORMING AMENDMENTS.**

15 (a) CONGRESSIONAL EMPLOYEES.—

16 (1) APPLICATION.—Section 203(a)(1) of the
 17 Congressional Accountability Act of 1995 (2 U.S.C.
 18 1313(a)(1)) is amended—

19 (A) by striking “subsections (a)(1) and (d)
 20 of section 6” and inserting “subsections (a)(1),
 21 (d), and (h) of section 6”; and

22 (B) by striking “206 (a)(1) and (d)” and
 23 inserting “206 (a)(1), (d), and (h)”.

24 (2) REMEDIES.—Section 203(b) of such Act (2
 25 U.S.C. 1313(b)) is amended by inserting before the

1 period the following: “or, in an appropriate case,
 2 under section 16(f) of such Act (29 U.S.C. 216(f))”.

3 (b) EXECUTIVE BRANCH EMPLOYEES.—

4 (1) APPLICATION.—Section 413(a)(1) of title 3,
 5 United States Code, as added by section 2(a) of the
 6 Presidential and Executive Office Accountability Act
 7 (Public Law 104–331; 110 Stat. 4053), is amended
 8 by striking “subsections (a)(1) and (d) of section 6”
 9 and inserting “subsections (a)(1), (d), and (h) of
 10 section 6”.

11 (2) REMEDIES.—Section 413(b) of such title is
 12 amended by inserting before the period the fol-
 13 lowing: “or, in an appropriate case, under section
 14 16(f) of such Act”.

15 **SEC. 9. EFFECTIVE DATE.**

16 The amendments made by this Act shall take effect
 17 1 year after the date of enactment of this Act.

○