



## National Committee on Pay Equity

1201 Sixteenth Street, Northwest • Washington, D.C. 20036 • 202/622-7304

September 10, 1991

The Honorable Joseph R. Biden, Jr.  
Senate Judiciary Committee  
Senate Dirksen Office Building Room 224  
Washington, D.C. 20510

Dear Senator Biden:

The National Committee on Pay Equity (NCPE) opposes the confirmation of Judge Thomas to the U.S. Supreme Court.

Enclosed please find the written testimony of the National Committee on Pay Equity concerning Judge Thomas' nomination. NCPE would appreciate your submitting this testimony into the record of the Confirmation Hearings of Judge Thomas.

It was after careful scrutiny that the Board of the National Committee on Pay Equity voted to oppose Judge Thomas' nomination. The opposition is based on Judge Thomas' record on wage discrimination during his tenure as Chair of the EEOC. Attached to the testimony is a list of the Board members of NCPE who support this statement.

Thank you in advance for including this testimony in the record.

Sincerely,

Claudia E. Wayne  
Executive Director

**Statement by The National Committee on Pay Equity**

**Before the Senate Judiciary Committee**

**Concerning the Confirmation Hearings of**

**Judge Clarence Thomas to the United States Supreme Court**

**September 10, 1991**

**Introduction**

The National Committee on Pay Equity (NCPE), formed in 1979, is a coalition of labor, women's and civil rights organizations working to eliminate gender- and race-based wage discrimination and to achieve pay equity. Since its inception NCPE has monitored the activities of federal agencies on the issue of wage discrimination. We have testified at congressional oversight hearings, met with agency policymakers, and commented on agency policies regarding wage discrimination. Based on its experience in monitoring the Equal Employment Opportunity Commission under the leadership of Chairman Clarence Thomas, NCPE has grave concerns regarding the nomination of Judge Clarence Thomas to the U.S. Supreme Court. Accordingly, we believe that Judge Thomas' record on the enforcement of the laws prohibiting wage discrimination while EEOC Chair should be carefully scrutinized.

**Pay Equity**

The term pay equity means that compensation for jobs should not be based on the race or sex of workers, but according to legitimate job factors such as skill, effort, responsibility, and working conditions. Although the term pay equity has been used interchangeably with the term "comparable worth" for the proposition that race or gender should not be a factor in setting wages, opponents have attempted to describe "comparable worth" as an esoteric notion involving the intrinsic value of jobs. Pay equity, quite simply, is a remedy for wage discrimination based on race or sex. Wage discrimination can be challenged under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.

### The EEOC and Wage Discrimination

**The EEOC Prior to Judge Thomas.** Prior to Judge Thomas' tenure as Chair, the Equal Employment Opportunity Commission played an active role in the movement to end wage discrimination and to achieve pay equity. Under the leadership of Eleanor Holmes Norton, the Commission held extensive hearings on wage discrimination.<sup>1</sup> Further, the Commission helped shape litigation strategies to enforce Title VII's ban on wage discrimination and filed amicus curiae briefs in support of workers charging sex-based wage discrimination under Title VII in County of Washington, Oregon v. Gunther, 452 U.S. 161 (1981) and IUE v. Westinghouse, 631 F. 2nd 1094 (3rd Cir. 1980). Finally, the EEOC commissioned a National Academy of Sciences study on gender-based wage discrimination.<sup>2</sup>

In 1981 the Supreme Court held in Gunther that Section 703 (h) (the "Bennett amendment") of Title VII did not limit sex-based wage discrimination claims to those involving substantially equal work (an Equal Pay Act limitation), but rather was meant to prohibit discrimination in pay even where the jobs being compared were totally different. The Court made clear, however, that the fact that two different jobs were of equal value or "comparable worth" (based, for example, on a comparison of the skill, effort, responsibility and working conditions) did not necessarily prove a violation of Title VII. Rather, the plaintiffs would have to produce evidence to show that the disparity in pay resulted from discrimination. The Court also stated that it was not dealing in Gunther with the issue of

<sup>1</sup> Hearings before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination, Washington, D.C. April 28-30, 1980.

<sup>2</sup> H. Hartmann & D. Treiman, eds. Women, Work and Wages: Equal Pay for Jobs of Equal Value.

"comparable worth".<sup>3</sup> The Court stated that the affirmative defenses of the Equal Pay Act were incorporated in Title VII, but it did not explain what evidence would be necessary to establish that the disparity in pay resulted from race or sex discrimination.

After the Gunther decision the EEOC under the leadership of Acting Chairman J. Clay Smith, Jr. issued a 90 day notice on September 15, 1981 to the agency's field offices.<sup>4</sup> The notice provided important information on the Gunther decision and on how to investigate charges of wage discrimination. The policy also identified several issues which were to be considered "non-CDP" (non-Commission Decision Precedent). Among these were "claims of sex-based wage discrimination brought under Title VII that may be based on... 'comparable worth'". Although the notice stated that the Gunther decision had left unclear the likelihood of success or failure of "comparable worth" claims, it did make clear that wage discrimination charges were to be investigated thoroughly.<sup>5</sup>

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<sup>3</sup> The Court referred to "comparable worth" as a concept "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the community". 452 U.S. at 166. However, there was no evidence heard by any court in Gunther on "comparable worth".

<sup>4</sup> *Notice Adopted by the EEOC to Provide Interim Guidance to Field Offices on Identifying and Processing Sex-Based Wage Discrimination Charges under Title VII and the Equal Pay Act.*

<sup>5</sup> Investigators were instructed that the following information should be secured for respondent's work force or an appropriate segment of the workforce, in documentary form, where

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available, and analyzed using investigative principles developed in equal pay cases...

1. A breakdown of the employer's work force by sex in terms of job classifications, assignments, and duties;
2. Written detailed job descriptions and, where appropriate, information gathered from an on-site inspection and interviews in which actual job duties are described;
3. Wage schedules broken down in terms of sex showing job classifications, assignments, and duties;
4. Any documents which show the history of the employer's wage schedules such as collective bargaining agreements which were previously in effect;
5. All employer justification of, or defenses to, the sex-based wage disparity;
6. If a job evaluation system is the basis for the sex-based wage disparity, the EOS should obtain copies of the evaluation and, if available, an analysis of its purpose and operation;
7. If market wage rate is the basis for the sex-based wage disparity, determine the underlying factors relied upon by the employer and the methods the employer used to determine the market wage rate;
8. If union collective bargaining agreements are the basis for the sex-based wage disparity, the EOS should obtain

**The EEOC Under Judge Thomas.** Judge Thomas became Chair of the EEOC in May of 1982. The Commission's efforts to eliminate wage discrimination came to a standstill. Under Judge Thomas' leadership, the EEOC did nothing with the wealth of information acquired from their earlier hearings, except publish the transcripts. Nor did the Commission act on the results of the NAS study, which documented the extent of wage discrimination and provided guidance for evaluating sex bias in job evaluation systems. The agency was positioned after the hearings and the study to take a variety of actions. It could have, for example issued findings or implemented new initiatives to alleviate wage discrimination. It did neither.

The Commission did renew regularly the 90 day notice. However, it appeared that even the 90 day notice was not being carried out. In the field, charges were mishandled; they were dismissed for no cause, or were not investigated at all.<sup>6</sup>

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copies of those agreements; and

9. Any evidence which shows that the employer or the employer and union have established and maintained sex-segregated job categories.

<sup>6</sup> See Oversight Hearings on the Federal Enforcement of Equal Employment Laws: Hearings Before the House Subcommittee on Employment Opportunities, 98th Cong. 1st Sess. (1984). Testimony of Nancy Reder and Claudia Withers on behalf of the National Committee on Pay Equity. Nancy Reder, then Chair of NCPE, also testified that on at least one occasion, NCPE had been informed that a complainant who tried to file a wage discrimination charge in the Chicago District office was told that the office had no

In 1983 NCPE issued a set of Recommendations to the EEOC, in which we called upon the Commission to:

1. Vigorously enforce the "90 day notice" in order to provide adequate guidance to field regarding the identification and processing of gender-based wage discrimination charges under Title VII and the Equal Pay Act.
2. Give specialized review and processing to wage discrimination charges.
3. Establish a mechanism to ensure that wage discrimination charges received by field offices are referred to EEOC headquarters so that proper monitoring could take place.
4. Provide, on a quarterly basis, information to NCPE regarding wage discrimination charges and cases.
5. Establish an EEOC Headquarters Task Force that would target wage discrimination cases for possible litigation, ensure that wage discrimination cases are a Commission priority, and designate individuals in headquarters who would be responsible for review of all wage discrimination cases.<sup>7</sup>

The EEOC declined to follow any of our recommendations.

The Subcommittee on Manpower and Housing of the Committee on Government Operations, concerned that all activity on wage discrimination ceased after the appointment of Clarence Thomas to EEOC, held oversight hearings on February 29 and March 14, 1984 and

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policy for handling such cases. NCPE provided a copy of the 90-day notice to the individual so she could show it to the investigator in Chicago.

<sup>7</sup> National Committee on Pay Equity, "Summary of Recommendations to the Equal Employment Opportunity Commission" (1983).



issued the following finding on May 22, 1984:

The Equal Employment Opportunity Commission has taken no action on charges and cases of sex-based wage discrimination other than straight Equal Pay Act cases, since the June, 1981 Supreme Court decision in *Gunther* determined that charges involving dissimilar jobs could be brought under Title VII. At the time of the Subcommittee hearing, EEOC had no policy on handling these types of cases, yet the Commission believes it needs to adopt such a policy before any charges can be processed and cases can be filed. By its insistence on a policy in this area prior to taking action and then refusing to adopt a policy, the Commission has denied relief to victims of discrimination and has failed to provide guidance for the courts and for employers in this area.<sup>8</sup>

On May 1, 1984, in a likely response to the Subcommittee's investigation and impending report, the Commission adopted Section 633 of the Compliance Manual, which clarified for field staff how to investigate and handle some wage discrimination charges. Section 633 divided all wage discrimination charges into three categories: equal pay for substantially equal work, intentional wage discrimination and "comparable worth" charges. Section 633 instructed field staff to continue sending all "comparable worth" charges to EEOC Headquarters. The Commission also submitted a written response to the Committee Report.<sup>9</sup>

<sup>8</sup> Committee on Government Operation's Thirty-Ninth Report, "Pay Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints", at p.3, H.R. Rep. No. 98-796, 98th Cong., 2d Sess. (1984).

<sup>9</sup> The Commission indicated that charges were not languishing in Washington, D.C.; rather, the Commission was engaged either in active consideration of a number of charges, or was requesting additional information before determining what to do. Response of the Chairman of the Equal Employment Opportunity Commission To the Committee on Government Operation's Thirty-Ninth Report, "Pay

However, three years after the Gunther case was decided, the EEOC had still not taken a definitive position on how to handle wage discrimination charges involving jobs that were different under Title VII.

In 1985, the Commission finally issued a "Commission Decision Precedent," which it characterized as its "first decision on comparable worth." The charge at issue alleged that a municipal housing employer paid the administrative staff (85% female) less than maintenance staff (88% male) even though the duties performed by the women required equal or more skill, effort, and responsibility than those performed by men. The female employees also charged that the employer intentionally set wage increases for female-dominated jobs at lower levels than the prevailing rate of increase for such jobs in local municipal agencies, while giving men wage increases that equaled the prevailing rate for their jobs. The EEOC found that the case was a "comparable worth" case and thus not within the agency's jurisdiction.<sup>10</sup>

NCPE disagreed with this decision. We challenged the adequacy of the investigation, which led to the decisions, as well as the overly restrictive reading of Gunther.<sup>11</sup> The 1985

Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints", at 6. (August 1984).

<sup>10</sup> The EEOC adopted the Gunther terminology regarding "comparable worth" as claims involving "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." Gunther, 452 U.S. at 166.

<sup>11</sup> See Unpublished statement of Claudia Wayne, Executive Director of the National Committee on Pay Equity (June 1985); "Justice Denied: The Equal Employment Opportunity Commission

decision went too far in categorizing all charges where there is no evidence of intentional discrimination as "comparable worth" charges. It appears that after the Commission issued the 1985 decision, field investigators did not investigate wage discrimination charges that were filed. Instead, they turned away charging parties who alleged wage discrimination because they were paid less than comparable male-dominated or predominantly white jobs on the theory that the agency lacked jurisdiction to handle such cases. Because these cases were turned away for lack of jurisdiction, they could not be appealed under the EEOC's "Determinations Review Program," which allowed charging parties to appeal "no cause" decisions to EEOC headquarters. Charging parties, including those individuals alleging intentional wage discrimination, were thus denied access to EEOC's administrative process because intake officers were encouraged to treat these charges as "comparable worth" charges.

For example, in wage discrimination charges brought by the Fairfax Library Association against Fairfax County, the EEOC dismissed the charge because "...comparable worth is not an issue over which the agency has jurisdiction." This decision was made notwithstanding the fact that charging parties specifically alleged that "Fairfax County intentionally discriminated against me on the basis of sex in compensation and other terms and conditions of employment." In declining even to investigate this and other potential wage discrimination charges the Commission failed to follow federal court precedent. In every wage discrimination lawsuit where defendants have attempted to characterize claims as "comparable worth" claims, the courts have denied motions to dismiss complaints.<sup>12</sup>

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Under the Reagan Administration" at 21-22, Women Employed Institute (February 1986).

<sup>12</sup> See ANA v. State of Illinois, 783 F. 2d 716,727 (7th Cir. 1986) ("[a] complaint that alleges intentional sex

Even Equal Pay Act litigation languished while the EEOC was under the leadership of Judge Thomas. The Equal Pay Act standard is clear and uncontroverted. Yet the number of Equal Pay Act cases that EEOC filed in court fell from 79 cases brought in fiscal year 1980 to just 7 cases in fiscal year 1989.<sup>13</sup>

### Conclusion

As Chair of the EEOC, Judge Clarence Thomas was charged with enforcing the laws against employment discrimination. The record clearly demonstrates that in the area of wage discrimination, he failed to adequately enforce the laws for which he had primary responsibility. He was regularly called before congressional oversight committees who had to

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discrimination...even though the discrimination is between different job classifications...cannot be dismissed..."); IUE v. Westinghouse, 631 F.2d 1094 (3rd Cir. 1980) cert. denied 452 U.S. 967 (1981); District Council 33 v. City of Philadelphia, C.A. #85-7418 (E.D. Pa. 1986); CSEA v. State of California, No. C84-7 245MHF (N.D. Calif. Sept 13, 1985) p. 27, fn.1; AFSCME v. County of Nassau, 37 FEP 1424, 1436 (E.D. N.Y. 1985); St. Louis Newspaper Guild, Local 47 v. Pulitzer Publishing Company, 618 F. Supp. 1468,1470 (E.D. Mo. 1985); Hawaii Government Employees Association v. State of Hawaii, 38 FEP Cases 1126 (D. Hawaii 1985) and Connecticut Employees Association v. State of Connecticut, 31 FEP Cases 191 (D. Conn. 1983).

<sup>13</sup> Women Employed Institute, EEOC Enforcement Statistics (1991).

constantly prod him to take action.

Judge Thomas, and the EEOC during his tenure, treated wage discrimination cases as a political issue in which he adopted opponents' overly restrictive distinctions between wage discrimination and comparable worth. By focussing on issues such as the "intrinsic value" of different jobs rather than on the need to eliminate wage discrimination, the EEOC under the leadership of Judge Thomas failed to address the needs of working women and their families. Instead of exhibiting leadership in the elimination of discrimination from wage setting systems in this country, Judge Thomas gave voice to those who would deny women and people of color fair pay for their work.

The following members of the Board of Directors of the National Committee on Pay Equity endorse this statement:

9 to 5: National Association of Working Women  
 American Association of University Women  
 American Federation of Government Employees  
 American Federation of State, County and Municipal Employees  
 Coalition of Black Trade Unionists  
 Coalition of Labor Union Women  
 Displaced Homemakers Network  
 Equal Rights Advocates  
 Industrial Union Department, AFL-CIO  
 International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers  
 Mexican American Women's National Association  
 National Association for the Advancement of Colored People  
 National Education Association  
 National Women's Law Center  
 Service Employees International Union  
 United Auto Workers  
 Women's Alliance for Job Equity  
 Women's Legal Defense Fund