12-1984

The Price of Equality

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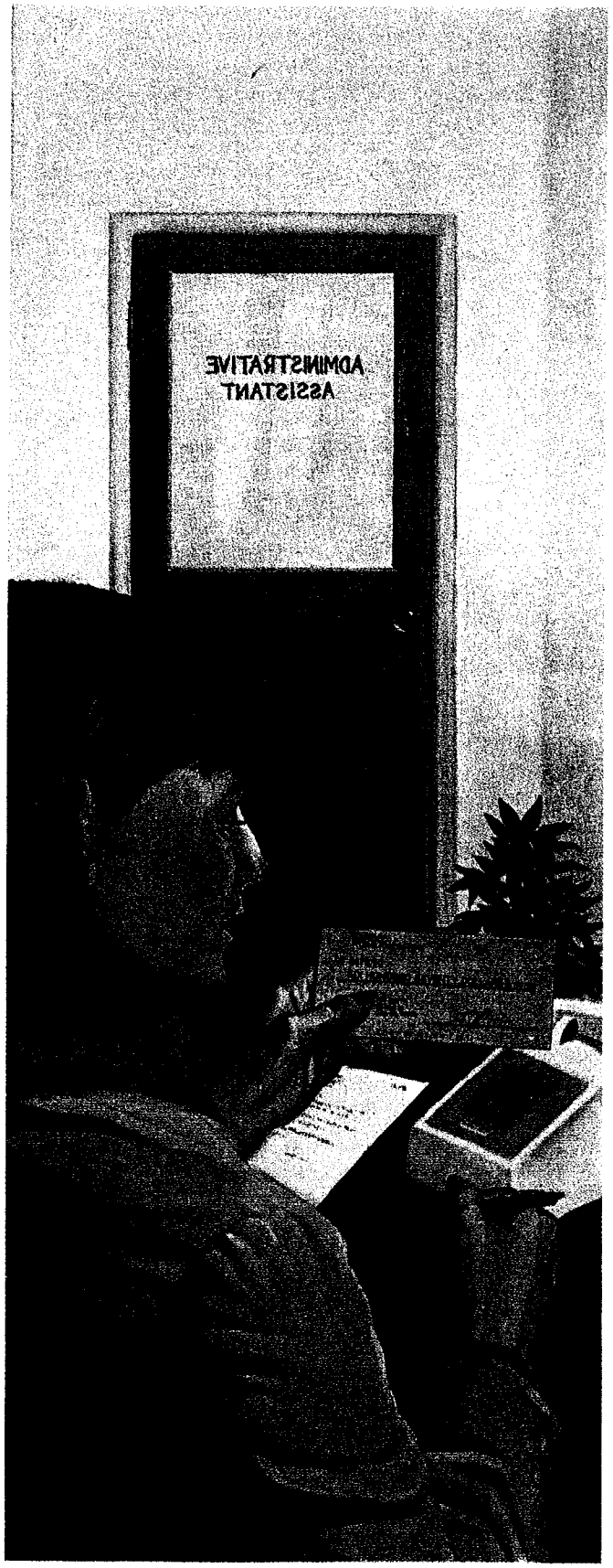

Illustration by J.T. Morrow

The Price

by Drucilla Stender Ramey

The legal and political debate over equal pay for work of comparable worth seems to have put the Civil Rights Act of 1964—and the courts that enforce it—on a collision course with free-market economics. Few challenge the accuracy of surveys showing jobs predominately held by women are not valued as highly as those dominated by men. But employers refuse to be blamed for the inequities of the marketplace. More importantly, they refuse to pay what they say are the exhorbitant costs of correcting those inequities.

"I very strongly believe that people ought to be paid what they're worth," says comparable worth defense attorney Richard Ottesen Prentke, a partner in the Seattle law firm of Perkins, Coie, Stone, Olsen & Williams. "But a judicial green light to comparable worth would be a nightmare." Los Angeles management attorney Charles H. Goldstein of Goldstein, Freedman & Klepetar puts it even more bluntly: "Comparable worth is to pay equity what pre-frontal lobotomy was to brain surgery in 1939."

The emotional debate over sex, power and money is now before the ninth circuit

While private employers worry about government interference with their wage scales, the real action in comparable worth these days is in the public sector. Vulnerable to the political pressures

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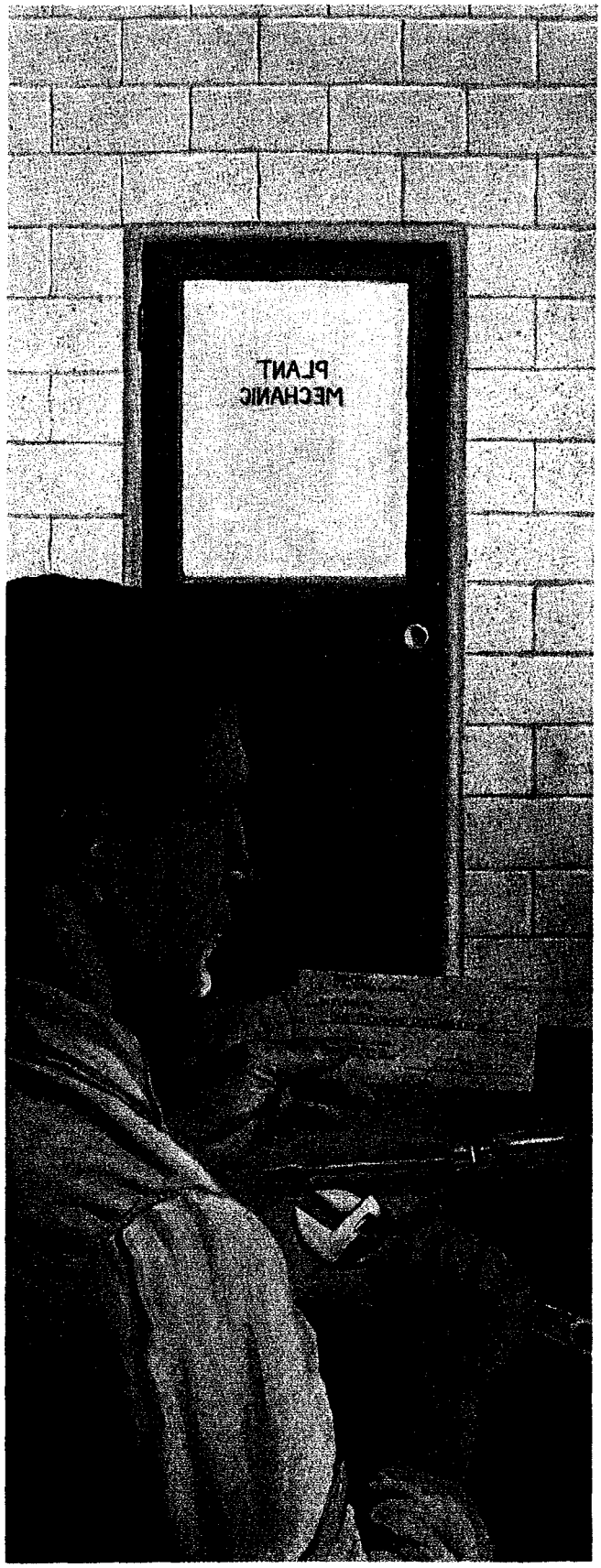

of women's commissions and grass roots groups, exposed by pay scales that are a matter of public record, and facing off against broad-based public employees' unions, public employers have been legislating, bargaining, negotiating and, in some cases, litigating the contours of comparable worth.

The evolution of a right

One of those public employment cases is now before the Ninth Circuit Court of Appeals and is likely to provide the next episode in the continuing drama of comparable worth. *AFSCME v Washington* (WD Wash 1983) 578 F Supp 846. The first episode also originated in our circuit, culminating in the U.S. Supreme Court's decision in *County of Washington v Gunther* ((1981) 452 US 161). At issue was an Oregon county's practice of paying female prison guards not just less than their male counterparts (each of whom was responsible for more prisoners) but also less than the county's own study showed the woman guards should have been paid.

Gunther broke comparable worth ground by holding that suits brought under Title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq) and alleging sex discrimination in employment compensation do not have to involve unequal pay for equal work. At the heart of any comparable worth action since *Gunther* are both evidence that certain jobs in which women predominate are paid less than comparably valued jobs generally held by men, and the claim that this disparity exists *because* the lower-paid jobs are dominated by women.

Comparable worth plaintiffs allege discrimination based on one or both of Title VII's two well-established theories of violation—"disparate treatment" (discriminatory intent) and "disparate impact" (discriminatory effect unjustified by business necessity). Both theories require judges to decide what the jobs in question are worth. That

evaluation may not be something judges are trained for, but courts have long made similar findings in adjudicating claims brought under the Equal Pay Act of 1963 (29 USC §206(d) et seq). In *Lanegan-Grim v Library Ass'n of Portland* ((D Ore 1983) 560 F Supp 486), for example, the court was able to equate the extra duties of a female mobile-library driver with the extra cash-carrying duties of a library deliveryman.

The job evaluation studies used to assign point values to dissimilar jobs also are not new. The U.S. Supreme Court recognized the validity of such evaluations when it quoted one major industrial employer's 1963 testimony before Congress: "Job evaluation is an accepted and tested method of attaining equity in wage relationship....A great part of industry is committed to job evaluation by past practice and by contractual agreement as the basis for wage administration." *Corning Glass Works v Brennan* (1974) 417 US 188, 200.

Beyond the EPA

Still, equal work analysis is a far cry from cases in which completely dissimilar jobs are compared. The study introduced in evidence in *AFSCME* assigned "worth points" to all jobs dominated by one sex, defined as jobs in which more than 70 percent of the workers were of one sex. These points were based on factors such as skill, mental demands, accountability and working conditions. A typical comparison was between the female-dominated classification "clerk typist" and the male-dominated "warehouse worker." Though their "worth" was equal, the warehousemen's wages were 45 percent greater.

Management attorneys say job evaluation is a highly subjective, inevitably biased, infant "science," whose results are too malleable to be competent evidence. They say that the primary index of the worth of dissimilar jobs is their market price, which represents a complex amalgam of neutral, free-market forces such as supply and demand and trade unionism. If women want better wages, lawyers for defendant employers say, they should change their job choices.

The market merely reflects endemic sex discrimination.

Plaintiffs respond that the market wage is not a reliable index of the worth of women's jobs because the market merely reflects endemic sex discrimination in the workplace. As Seattle attorney Richard S. White of Helsell, Fetterman, Martin, Todd & Hokanson puts it, "Market surveys amount to comparing the wages of slaves on adjacent plantations." White's argument on behalf of plaintiffs failed before the ninth circuit this year, when the court held that an employer could not be liable for the disproportionate impact on women of a market wage system. *Spaulding v Univ. of Wash.* (1984) 740 F2d 686.

The trial and appellate courts in *Spaulding* rejected the plaintiffs' claim of disparate treatment as well, saying that the evidence of discriminatory intent was not persuasive. That evidence had consisted of rough comparisons of the job *requirements* for nursing faculty and other instructors at the university, not a comparison of the jobs themselves. But the Spaulding decision also may be an indication of the courts' reluctance to fulfill Phyllis Schlafly's prediction that comparable worth would lead to "nothing less than a complete court takeover of the private sector." In both *Gunther* and *AFSCME*, there had been a job-worth study conducted by the defendant. The courts in those cases were therefore able to say they were not consider the comparable worth of the occupations involved but were instead applying the defendants' own evaluation.

Although these decisions relied on employer-provided studies, most courts have read *Gunther* to allow application of traditional disparate treatment analysis to a variety of pay equity claims, many of them involving plaintiff-adduced proof of unequal pay for unequal but comparable jobs. (See "Pay Equity and Comparable Worth, A BNA Special Report," 1984.)

Comparability studies, which invariably have shown an average 20 percent male/female pay gap, have met with mixed results in the courts. A study's reception depends on which party sponsored it, the similarity of the jobs at issue, the sophistication and scope of the study, and the strength of other evidence of discriminatory intent. In *Spaulding*, for example, the ninth circuit affirmed as not clearly erroneous (the standard for review established by *Pullman-Standard v Swint* ((1982) 456 US 273)) the trial court's finding that the plaintiffs' evidence of intent was fatally lacking in sophistication or credibility. The court observed, however, that evidence of job comparability, while not intuitively compelling, "can be relevant to determining whether we infer discriminatory animus."

Discounting the market

In the AFSCME case, the ninth circuit will be applying the clearly erroneous standard to a lower court's finding that there *was* intentional discrimination. District Court Judge Jack E. Tanner based his finding on the state's own job evaluation study and its refusal—even in a surplus year—to remedy an acknowledged system-wide pattern of sex-based wage differentials.

Washington Deputy Attorney General Christine Gregoire is nevertheless confident of reversal, because Tanner did not just reject the state's defense that wages were legitimately based on the market;

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Does Sacramento know the way to San Jose?

California was the first state to declare a policy of setting salaries on a comparable worth basis for female-dominated classifications. Government Code §19827.2 became law in 1981 and has since been extended to state universities.

Two years and two reports later, the Legislature passed SB 1701 (David A. Roberti, D-Hollywood), which would have established an advisory commission charged with studying and recommending a method for closing any sex-based inequities in state salaries. Governor George Deukmejian vetoed that bill this fall, just as he earlier vetoed $77 million in pay adjustments for female-dominated classes.

The governor also vetoed SB 711 (Diane E. Watson, D-Los Angeles), which would have required the Department of Fair Employment and Housing to make a report on, among other things, the status of pay equity claims under California law. The Commission on Fair Employment and Housing already has ruled against both the city of Napa and Madera County in sex-based claims involving unequal jobs.

A legislatively mandated task force (ACR 37, Sally Tanner, D-El Monte) is beginning to investigate sex-based pay inequities in the public and private sector in preparation for a report and recommendations to the Legislature. Though plagued with partisan divisions, this group of representatives from the Senate, Assembly, governor's office, labor organizations and the Commission on the Status of Women is making progress toward a consensus. According to Chair Christine Curtis, who is a former president of California Women Lawyers, that consensus "will clearly be a political solution, with some give and take on both sides."

Two new laws that Deukmejian has signed in recent years may have a significant effect on comparable worth compensation. The more recent is AB 3183 (Tom Hayden, D-Santa Monica), which bars employers from prohibiting employees' disclosure of their own salaries. The bill is most significant in the private sector, where wage scales are not a matter of public record. Government Code §53248, enacted in 1983, may have an impact on local government. The statute says no "local agency" can prohibit, in law or in practice, the consideration of comparable worth in collective bargaining over wages.

Even without state-level prodding, many local governments in California have negotiated pay equity among comparable jobs:

San Jose settled a nine-day AFSCME strike by designating $1.4 million to provide pay adjustments for female-dominated job classifications. The settlement called for adjustments of 5 percent to 15 percent over a two-year period. For the three contracts covering from 1981 to 1986, the cost of pay equity is about $6 million.

Berkeley negotiated a similar agreement this spring, providing for pay adjustments of between 7.4 percent and 14.4 percent over 1½ years. The cost of improving compensation for 13 female-dominated classes is estimated at $300,000 per year. "The Berkeley experience shows you can negotiate comparable worth at a fraction of the price of litigation," says Maura Kealey, an official with the Service Employees International Union. "People will compromise if they get their money now."

Contra Costa County recently negotiated a 3 percent incremental raise for selected female-dominated classes. "What made this happen," says county Supervisor Sunne Wright McPeak, "was women pushing at every level—the supervisors, personnel, the unions and powerful chapters of groups like NOW and the National Women's Political Caucus."

Meanwhile, in the state's two biggest local governments, progress comes more slowly:

San Francisco has finally begun to move on comparable worth, three years after its Board of Supervisors passed a resolution urging the mayor to request a job evaluation study by the Civil Service Commission. A joint committee of supervisors and union representatives and a separate mayor's task force both are studying the costs and legal implications of implementing a comparable worth program. They are applying studies from San Jose and the state of Washington to San Francisco statistics. Mayor Dianne Feinstein has issued a statement strongly supporting comparable worth implementation.

Los Angeles County still has not given in to union demands for a job study. The city of Los Angeles has followed a similar course (at least until last month's elections), leading the union to file charges with the Equal Employment Opportunity Commission. The staff of the city's Board of Education, however, has conducted a study and begun comparable worth implementation in some classifications.

And then there is the self-described "Most Liberated City in the World." **Pismo Beach** has achieved full comparable worth for its 14 female employees by granting monthly pay raises of between $28 and $248.

—*DSR*

dence relating to market wage to be introduced. "The trial court committed procedural error in excluding our market defense in the intentional claim," says Gregoire, "and *Spaulding* would appear to require reversal of the trial court's second theory of liability based on disparate impact."

AFSCME trial counsel Winn Newman of Washington, D.C., disagrees. "We'll win on the strength of the record of intentional discrimination," he predicts. "The worst that can happen is that we win again on remand." Newman thinks that the state of Washington is a typical employer. "They take a look at the market," Newman says, "but they readjust the results to preserve historical wage relationships, which were established 30 or 40 years ago, when discrimination was legal and universal."

The AFSCME appeal is likely to produce at least some guidance on the availability and nature of a market defense in comparable worth cases, an issue that was not directly raised in *Spaulding* or *Gunther*. Most observers predict the court will reverse and remand on the disparate treatment issue and hold that the state is entitled to produce evidence of market reliance as the "legitimate non-discriminatory" basis for its actions. What is more difficult to predict is the evidentiary weight to be given that evidence.

The burden of proof

One reason lower courts differ in their interpretations of *Gunther* is that the Supreme Court limited its decision to the meaning of the "Bennett Amendment" to Title VII (42 USC §2000e-2(h)). That section allows a wage differentiation in situations "authorized by" the Equal Pay Act. Although the Supreme Court rejected the argument that the amendment means Title VII applies only in "equal work" cases, the court said the EPA's affirmative defenses are incorporated into Title VII litigation. Those defenses are that "payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

The Supreme Court unfortunately did not say whether those defenses are incorporated in all sex-based wage claims; nor did they say whether they operate as *affirmative* defenses, thus shifting the burden of persuasion in a Title VII case.

In disparate treatment cases, a presumption of intentional discrimination is ordinarily established by the relatively minimal showing that a qualified woman or minority applied for, but was rejected from an available position. *Texas Dep't of Community Affairs v Burdine* (1981) 450 US 248. Comparable worth plaintiffs introduce job comparability studies in which all factors ordinarily assumed to affect the value of the male- and female-dominated jobs in question are held constant, but a significant and unexplained wage differential nevertheless remains. This evidence is used to create or bolster an inference of discriminatory intent. See Helen Remick, *Comparable Worth and Wage Discrimination: Technical Possibilities & Political Realities*, Temple University Press, 1984; "Comparable Worth—Special Issue," 12 *Public Personnel Management* 323 (winter 1983); Donald Treiman and Heidi Hartmann, *Women, Work and Wages*, National Academy Press, 1981.

AFSCME's evidence that the state of Washington had not followed its own job study clinched the plaintiffs' prima facie case. If the state is allowed to, it will respond on remand that it legitimately relied on prevailing market wages. Under ordinary Title VII theory, that would probably be enough to meet the defendant's relatively minimal burden, and the plaintiffs would then have to prove the purported justification to be a pretext for intentional sex discrimination. See *Burdine*, at 252. However, if *Gunther* is interpreted to hold that the EPA defenses are incorporated into *all* Title

If sex-based wage cases (see *Piva v. Xerox Corp.* ((9th Cir 1981) 654 F2d 591, 598-99, n5), then the state probably would be required to bear the EPA's burden of proof, not production, that market reliance is a "factor other than sex" justifying the alleged wage gaps. Under the Ninth circuit's recent holding in the equal work case of *Kouba v Allstate Ins. Co.* ((9th Cir 1982) 691 F2d 873), the state presumably would have to prove that it reasonably used its market-rate system to further a worthy business goal.

The ninth circuit could also choose to confront the disparate impact controversy anew, this time in the context of a post-Gunther case that, unlike *Spaulding*, was actually tried as a modern comparable worth case with a reliable job-worth study. The court could reject *Spaulding* and hold that the disparate impact of a facially neutral market system does establish a presumptive violation of Title VII. Attorney Virginia Dean of the Comparable Worth Project in Oakland says a rejection of *Spaulding* is exactly what *Gunther* requires. "If you cut comparable worth out of disparate impact theory," says Dean, "you cut women out of Title VII."

The District of Columbia circuit recently lent substantial support to this view, finding no basis in policy for excluding from disparate impact analysis practices that "have been brought into the open" by either party. "Indeed, application of disparate impact," the court said, "speeds the day when we will have rid ourselves of discrimination in its subtle as well as its crass aspect." *Segar v Smith* (DC Cir 1984) 35 FEP Cases 31, 45.

If the ninth circuit (presumably a panel other than that which heard *Spaulding*) affirms the trial court's finding of liability on the disparate impact claim, defendants in similar cases will bear what they consider to be the impossible burden of proving a market-based wage system that disproportionately disadvantages women is necessary to the safe and efficient operation of the businesses. As Allstate lawyer Paul R. Garry, of the Chicago law firm of

Fox and Grove, sees it, "It would be a loser, because there are just too many legitimate ways to structure a compensation system for any one method to be proven necessary to the survival of the business."

At what cost?

"Then what are we all fighting about?" asks San Francisco attorney Judith Kurtz of Equal Rights Advocates Inc., who was plaintiffs' counsel in *Kouba*. Employers and their attorneys predict implementation of comparable worth will lead to market chaos, impossible costs—the U.S. Chamber of Commerce quotes estimates of $320 billion—runaway inflation, loss of competitive advantage, and widescale unemployment. So far, these fears have not been borne out by experience. The costs of comparable worth implementation to date have proven it to be neither an economic panacea for working women nor a financial disaster for employers.

All reported costs to public employers—including the AFSCME judgment shorn of its backpay component—have been between 1 percent and 5 percent of the employer's personnel costs or between 1 percent and 2 percent of the entire budget. "People kept telling us the sky would fall, but it just never happened," reports Minnesota's Employee Relations Commissioner Nina Rothchild. Minnesota is currently implementing comparable worth throughout the state's public sector. From a legal standpoint, the *AFSCME* trial court noted that Title VII does not include a cost-justification defense.

The future of comparable worth

Courts are beginning to submit market defenses to close scrutiny, even in disparate treatment cases, and especially in class actions. Melanie M. Poturica of the Los Angeles law firm of Liebert, Cassidy and Frierson is one of a number of defense counsel who already prefer to steer clear of the evidentiary problems, murky economics and sexual politics of a market defense. Given the choice, she opts for attacking the plaintiff's evidence of intent rather than proving that the market forced the employer to pay more to fill a man's job. Allstate attorney Garry agrees. "Lots of judges believe the market discriminates," he says, pointing to the lower court's opinion in *Kouba*. "Plaintiffs can pull out census data that show women make less than men in just about every job there is."

Standards for admissible evidence of intentional discrimination, meanwhile, will almost certainly continue to expand. AFSCME, for example, just filed an action against Nassau County, New York, citing as evidence of

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discrimination the county's refusal to study or remedy allegedly systemic wage gaps of which it repeatedly had been put on notice—by AFSCME. The ninth circuit recently issued a forceful opinion holding a private employer liable on similar grounds in a race-based equal work case. *EEOC v Inland Marine Indus.* (9th Cir 1984) 729 F2d 1229.

Some defense lawyers believe that plaintiffs may well be able to prove their cases with the defendants' own studies, especially if those studies can be bootstrapped through discovery. "Some defense litigators are telling their clients, 'don't do a study,'" says Poturica. "Others say, 'If you do a study, you had better be prepared to act on the results.'" The city of Santa Maria followed the advice of both groups: The city did not do a study, but did adjust salaries.

Similarly, some unionized industrial employers have begun to adjust wages in anticipation of settlement of union-filed charges and lawsuits. This is particularly evident among companies with a documented legal history of trouble under Title VII or the EPA. For example, Justice William F. Brennan Jr. once wrote that General Electric historically conformed to the "general pre-EPA business practice of...scaling women's wages at two-thirds the level of men's." *General Electric Co. v Gilbert* (1976) 429 US 125, 150, dissenting opinion of J. Brennan. General Electric recently paid out over $32 million in back pay and wage adjustments.

'If you do a study, you had better be prepared to act on the results.'

The most significant pressures for movement in the private sector, however, are likely to be state legislation and, arguably, wage competition from public employers who have moved to a comparable worth standard. Over 100 public employers, for example, including 20 states, have already passed comparable worth initiatives, and the federal government may soon get into the act with an equity study of the entire federal civil service.

There is no doubt that comparable worth is having an impact on employers, as managers begin to realize that they may have to fight or switch. Charles Krauthammer, associate managing editor of the *New Republic*, once wrote, "Comparable worth asks the question: How many nurses would it take to screw in a lightbulb?" For employers in 1985 the answer might be, "I don't know. Talk to my lawyer." □