Golden Gate University Law Review

Volume 11
Issue 3 *Women's Law Forum*

Article 3

January 1981

Equal Pay for Comparable Worth

Jolie Lipsig

EQUAL PAY FOR COMPARABLE WORTH

Jolie Lipsig*

Wage discrimination against women is prohibited by both the Equal Pay Act[1] and Title VII of the Civil Rights Act.[2] While Title VII contains a broad prohibition against any form of employment discrimination, the Equal Pay Act specifically addresses the problem of unequal wages between men and women workers. The Equal Pay Act requires that men and women who perform "substantially equal" work receive equal compensation but does not apply when men and women are segregated in the workplace and, therefore, perform different jobs.[3]

* Second Year Student, Golden Gate School of Law.

1. 29 U.S.C. § 206(d)(1) (Supp. II 1978) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

2. 42 U.S.C. § 2000e-2 (Supp. II 1978) states in part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

3. 29 U.S.C. § 206(d)(1) (Supp. II 1978).

Because application of the Equal Pay Act is limited by the "substantially equal" requirement, women seek relief for wage discrimination under Title VII using a theory of comparable worth, also known as comparable work or comparable value theory.[4] Comparable worth is based on the premise that all employees who perform work of equal value to their employers should be paid equal wages.[5]

Several recent wage discrimination cases have been brought under a theory of comparable worth, with the plaintiffs charging violations of both the Equal Pay Act and Title VII.[6] The circuit courts that have heard these cases reached differing conclusions on the proper relationship between the two Acts and on the viability of a comparable worth standard.[7] The Supreme Court has granted certiorari in one such case, *Gunther v. County of Washington,*[8] and will decide whether the standards required by the Equal Pay Act are also required in wage discrimination suits under Title VII. Although conclusions are grounded in statutory interpretation and legislative history, the courts ultimately balance the economic effects on the employer and labor market against the economic rights of women.[9]

---

4. Lemons v. City of Denver, 620 F.2d 228 (10th Cir.), *cert. denied,* 100 S. Ct. 244 (1980) (city-employed nurses sued their employer for violating Title VII by paying them low wages that reflected the community wage scale); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977) (university clerical workers charged they were paid less than physical plant workers for work of equal value to their employer and that this discriminated against them as women); IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980) (female factory workers claimed their employer used discriminatory job evaluations to determine wages and job levels, resulting in low salaries for jobs filled by women); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981). *See* note 212 *infra.*

5. Employers use several methods of job evaluation to determine wages and the relative values of jobs. *See* notes 196-209 *infra* and accompanying text.

6. *See* cases cited note 4 *supra.*

7. The Fifth, Tenth, and Eighth Circuits refuse to recognize a theory of comparable worth, while the Third and Ninth Circuits have upheld the validity of a limited comparable worth theory.

8. 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981).

9. *See* cases cited note 4 *supra. See also* Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975) (female head of department unsuccessfully claimed wage discrimination based on fact that some male department heads earned more than plaintiff); Ammons v. Zia, 448 F.2d 117 (10th Cir. 1971) (plaintiff, an employee at the Apollo test site, failed to establish that her denial of test site clearance, which was granted to male employees, would have entitled her to higher pay, and that she was performing work equal to higher paid males).

This Comment will briefly trace the history of job segregation from colonial America to the present, and explore the relationship between the Equal Pay Act and Title VII in light of the controversial Bennett Amendment.[10] The interpretation of this Amendment, which limits the effect of the Equal Pay Act on Title VII, has lead to arguments both for and against adoption of a comparable worth standard by the courts. A comparison of opinions of the various courts concerning the amendment will follow, focusing on the emerging theory of equal pay for comparable worth. A discussion of different job evaluation techniques and suggestions on how to use these evaluations as proof of discrimination is included.

I. WOMEN'S WORK—PAST AND PRESENT

A. The Evolution of Job Segregation

Traditionally, work done by women in America served a vital function in the growth and maintenance of society. While women perform important jobs, their work is undervalued by employers because it is weighed on a scale in which "male" traits, such as physical strength and aggression, rate high. Because the job market is segregated by gender, the low value assigned "women's work" is reflected in low salaries, whether the work is exactly the same as work done by men or merely worth the same to their employer.[11]

In colonial America women produced all essential manufactured goods. They bore the responsibility of manufacturing because they were considered unfit for heavy manual labor and, therefore, remained at home while men worked in the fields.[12] Because the colonists strove to develop a strong agrarian economy, agricultural work received a higher societal value than the supplying of domestic necessities.[13] After the American Revolu-

10. 42 U.S.C. § 2000e-2(h) (1978). *See* notes 106-141 *infra* and accompanying text.

11. *See* notes 43-47 *infra* and accompanying text.

12. Blau, *The Data on Women Workers, Past, Present, and Future*, in Women Working—Theories and Facts in Perspective 30 (A. Stromberg & S. Harkess eds. 1978). Colonial women manufactured essentials such as soap, cloth, candles, and lace. Pilgrims made these goods because they no longer had ready access to products available in England. *Id.* at 32.

13. S. Morison, The Oxford History of the American People 48-49 (1965). The colonists' emphasis on agriculture was based in part on England's control. England wanted the colonies to provide her with sorely needed produce, and, in turn, wanted a

tion, women continued to perform primarily domestic functions,[14] although some women did work outside the home as school teachers, midwives, and nurses.[15]

Segregation of women into lower paying occupations intensified with the Industrial Revolution in the mid-nineteenth century, as women became a major force in the growing textile industry.[16] The proliferation of textile factories allowed women to supplement farm income with part-time work away from home.[17] Although employed outside of the house, a woman working at the mill did the same job she had done at home;[18] thus, factory work provided her with no new skills.

With industrialization, growing numbers of families abandoned farming altogether and moved into urban areas.[19] Some women were forced to stay at home to care for children who were no longer occupied with farm chores; others continued to

---

captive market for her own manufactured goods. Thus, agriculture became the only major profitable industry. The manufacture of goods, while essential in lowering the volume of English imports, was not essential to the colonial economy directly. *Id.*

14. E. DEXTER, CAREER WOMEN OF AMERICA: 1776-1840, at 224 (1950). Dexter suggests that women generally had more freedom before the Revolution than after:

> It appears . . . women were accorded somewhat less freedom after the Revolution, [which was] dedicated to the ideal that all *men* were created equal, than they had enjoyed before it
>
> . . . .
>
> . . . [I]n pioneer days there were few codes, legal or traditional: matters were dealt with as they came up, according to the English Common Law [which was] adapted to fit new conditions. The Revolution was followed by a mania for codifying, all done of course by men. Apparently they were not ready to accept formally some conditions they had tacitly permitted, and so perhaps unconsciously, they curtailed the existing privileges of women.

Id. at 223-24.

15. *Id.* at 29. Women taught boys and girls through age 10, and young women. The more important task of educating young men was left to the male school master. *Id.* at 2.

16. Women's dominant role in the textile industry began with women working at home, spinning wool into yarn to meet family needs, and selling the surplus to weavers. Blau, *supra* note 12, at 31. In 1850 there were over 12,000 cotton factories and over 1,500 woolen mills in the United States. S. MORISON, *supra* note 13, at 483.

17. Kuhn, *An Economist's View of Woman's Work*, in CORPORATE LIB: WOMEN'S CHALLENGE TO THE MANAGEMENT 64 (E. Ginzberg & A. Yohalem eds. 1973).

18. Blau, *supra* note 12, at 31.

19. In the 1840's, the population of towns and cities with over 8,000 inhabitants increased by 90%. S. MORISON, *supra* note 13, at 483.

work at the mills.[20] Young, single women, eager to escape the drudgery of rural life, comprised another growing section of the work force.[21] The shift from an agrarian to an industrial society affected a marked change on the role of women. On the farm, women's work, while undervalued, had been an integral part of rural life and survival. In the cities, however, there was no equally significant work for women.[22] Although textile mills, and later garment factories, continued to employ women into the twentieth century, few other industries were open to women. The influx of immigrants to the growing labor market during this period intensified the exclusion of women from occupations in new industries.[23]

The participation of the United States in World War I forced women into occupations that would have otherwise been unavailable to them.[24] Despite the success of the suffrage movement in 1919, by 1920 women had returned to traditional employment to make way for the returning troops.[25] Nevertheless, during the first two decades of the twentieth century women dominated certain rapidly growing fields, particularly clerical work and retail sales.[26]

During the Great Depression both women and men were among the unemployed; increasing numbers of women found it necessary to seek employment to supplement their husbands' in-

---

20. Kuhn, *supra* note 17, at 64.

21. S. MORISON, *supra* note 13, at 483.

22. Kuhn, *supra* note 17, at 64.

23. The number of people immigrating to America increased from 300,000 in 1866 to 789,000 in 1802. S. MORISON, *supra* note 13, at 768. Employers preferred hiring male immigrants because men were viewed as the traditional breadwinners, Blau, *supra* note 12, at 33; and also because women generally worked only until marriage. S. MORISON, *supra* note 13, at 483.

24. Women replaced male workers in iron and steel mills, as drivers for public transportation, elevator operators, and bricklayers. They also gained prominent positions in the professions—notably as lawyers and doctors. W. CHAFE, THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970, at 51 (1972).

25. Women were fired or forced out of their newly acquired positions when the war ended. Some male workers even went on strike to force women out of jobs. Twenty women appointed to the bench in New York State during the war were forced to resign immediately after the Armistice because their appointments had been only "emergency provisions." *Id.* at 53.

26. "Almost one million women joined the clerical work force during the decade beginning in 1910 and the proportion of female employees holding clerical and sales jobs jumped from 17 per cent in 1910 to 30 per cent in 1930." *Id.* at 55.

comes or to support their families. Throughout this period women were primarily employed in low-level white-collar and service-oriented occupations.[27] These jobs paid lower wages than blue-collar jobs, which, with the exception of those in the textile industry, remained unavailable to women.[28] Employers justified underpaying women because of the common notion that women worked only to earn "pin money" and, therefore, shouldn't be allowed to take jobs from unemployed men, or men who worked at lower paying jobs.[29]

World War II created even larger changes in the female labor market than the previous war. The government, as well as private industry, realized the potential of solving the "manpower crisis" with womanpower.[30] Women not only found satisfaction doing "non-traditional" work in the munitions factories and the transportation and construction industries, but also found substantially higher salaries than offered before.[31] Women proved

---

27. The 1930 census indicated that 30% of all working women worked in domestic and service fields, 19% as clerical workers, 17% in manufacturing, 14% were classified as professionals, 9% worked as skilled tradespersons, 9% in agriculture, and only 3% worked in transportation and communications. WOMEN WORKERS THROUGH THE DEPRESSION, THE AMERICAN WOMEN'S ASSOCIATION 51-52 (L. Pruette & I. Peters eds. 1934). The American Women's Association, which conducted an early survey of working women, gives a possible reason for the lack of women in trades: "The appeal of certain professions and of many clerical positions is derived from the pleasanter conditions of work as from other aspects. Many women will prefer a lower income and agreeable and dignified surroundings to the higher income under more distasteful conditions." *Id.* at 53. Presumably, "distasteful conditions" included the hostility of male co-workers, as well as inadequate health and safety provisions.

28. Female workers in all categories were underpaid. Women doing traditional women's work in garment factories and offices received notoriously low pay, while women doing the same jobs as men were paid less than men. In manufacturing, women received 50-60% of what men earned. In 1937 women workers took home an average of $525 a year, compared to $1,027 a year for men. W. CHAFE, *supra* note 24, at 51.

29. The pin-money hypothesis assumed that women workers were well-supported and sought a paying job only as a means of securing extra cash to indulge frivolous feminine desires. The theory followed women workers wherever they went and, by implication, justified the inequality from which they suffered. If females were subsidized by their families, there was no compelling reason to treat them the same as men. Employers could rationalize paying women low wages on the ground that they did not need their earnings to live on, and public officials could dismiss women workers as casual members of the labor force who had no serious grievances. *Id.* at 53.

30. "By April 1942 the proportion of women receiving government-sponsored vocational training had leaped from 1 per cent to 13 per cent. And within seven months the number of jobs for which employers were willing to consider female applicants had climbed from 29 per cent to 55 per cent." *Id.* at 137.

31. Thelma Carthen, who quit her job at Woolworths to become a welder in 1943

they could do a man's job, and do it well.[32]

Although many women lost their jobs after the war, others remained active members of the work force. Large numbers of women found respectable work, in other words, low-level white-collar jobs,[33] after the war, thus compounding what would come to be known as the secretarial "ghetto." Nevertheless, despite the increasing number of working women, economic inequality prevailed. In 1951, all industries in which women constituted more than fifty percent of the work force paid wages below the national average.[34]

B. Women's Role Today

In the 1960's, women's fight for economic and social equality accelerated. Yet, even today, while more women are working than ever before, and those performing nontraditional jobs receive media attention,[35] economic discrimination against women remains largely unaffected.

Statistics from 1960 to 1980 show that women continue to fill predominantly secretarial positions in the white-collar sector.[36] Women made their largest gains during this period within the professions,[37] while their participation in blue-collar jobs di-

---

spoke of her work: "Actually, I like welding. There is no comparison to shipyard welding and assembly line, because I'll have a *different job* every day . . . I get sort of wound up in my work. I'm interested in how much I can do." Conversations: Working Women Talk About Doing a "Man's Job" 51 (T. Wetherby ed. 1977). Wages for workers making war materiel were 40% higher than wages in consumer factories. Commonly, women were able to double their salaries by leaving jobs as waitresses, secretaries, and laundresses for employment in the war industries. W. Chafe, *supra* note 24, at 144.

32. W. Chafe, *supra* note 24, at 39.

33. Women with training in new fields were able to secure industrial positions. In 1946 women made up 40% of operatives in consumer industry and 13% in heavy industry. The number of clerical workers increased by 100%, and generally, more women were working than ever before. *Id.* at 181-82.

34. *Id.* at 185 (citing Women's Bureau, Equal Pay Indicators, (1952)).

35. While the phrase "nontraditional job" brings to mind truck drivers, carpenters, and the like, statistics reveal executives, doctors, and professors may also belong in this category. *See* notes 41-45 *infra* and accompanying text.

36. 1 EEOC Equal Employment Opportunity Report—1971, Job Patterns for Minorities and Women in Private Industry xxxxii (1972). In 1966, 56.9% of all working women were in white collar jobs; by 1971, that figure rose to 61.6%. A breakdown of the particular positions held by white collar women shows that, in 1966, 38.4% of all working women did office or clerical work, while only 2.4% were officials and managers and 2.9% were professionals. *Id.*

37. In 1971, 6.6% of all working women were professionals—an increase of 3.7%

minished between 1966 and 1971.[38] Within the blue-collar field, women were employed mostly as unskilled factory operatives.[39] Today, in 1981, little has changed. While more women hold managerial positions, fewer work in skilled high-paying blue-collar jobs; their economic status in the work force remains the same.[40]

Although attitudes towards women working in nontraditional jobs have changed somewhat, certain jobs remain linked to gender.[41] Prevailing attitudes are expressed by the treatment of women in educational and vocational institutions. School counselors, teachers, and parents often encourage young women to develop only those skills necessary to perform traditional women's work. Thus, a woman with the educational equivalent of a man lacks the experience or training required for a particular job, and the man will be hired.[42]

Job segregation, or "balkanization,"[43] fosters severe wage discrimination. Nearly all fields dominated by women yield lower salaries than those dominated by men.[44] Somewhat ironi-

---

from 1966. *Id.*

38. The percentage of women blue collar workers decreased from 32% to 28.6% in 1971. *Id.*

39. In 1971, 19% of all women were factory operatives, compared to 2.5% working as skilled craft workers and 7% working as laborers. *Id.*

40. Statistics for May 1980 show that 66% of all working women are white collar workers. Within the white collar field, however, only 7% hold management positions, and 35% are clerical workers. Only 14% of all women are blue collar workers. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 35 (1980).

Generalized statistics are often misleading. An increase in the number of women white collar workers may look promising, but women are invariably concentrated in the lower paying secretarial jobs. As of June 1980, the total clerical work force was 76.19% female, while men made up 83.6% of the blue collar field. Within the white collar field, however, women constituted 71.4% of all nonprofessional health workers, 70% of all school teachers, and 53% of all service workers. In the blue collar field, 95% of all craft and kindred workers were male, as were 98% of all mechanics. *Id.*

41. Our language reflects these attitudes as well. "Secretary, for example, denotes not just job skills but female gender; nursing is so sex-typed that one must make explicit the exception by specifying 'male nurse.'" J. KREPS, SEX IN THE MARKETPLACE, AMERICAN WOMEN AT WORK 35 (1971).

42. WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LAB. BULL., THE EARNINGS GAP BETWEEN MEN AND WOMEN 3-4 (1976).

43. "Balkanization" refers to the division of a potentially strong unit, the workforce, into the segregated, ineffectual categories of men's and women's jobs. Because women are segregated, they can never gain the experience or education necessary to enter the male workplace.

44. In 1974, the median weekly earnings for all managers and administrators (men

cally, the growing female presence in the work force has made the problem more acute. Balkanization has resulted in the overcrowding of the female job market; the number of women seeking work constantly expands while the number of jobs available to them remains limited.[45] With supply far exceeding demand, employers need not pay women wages equal to those in male dominated fields.[46] They are assured of finding women to work for whatever wages they care to offer. Because men need not seek lower paying jobs, the competition for higher paying positions increases, compounding job segregation.[47]

II. FEDERAL LAW AND WAGE DISCRIMINATION

Congress enacted the Equal Pay Act[48] in 1963. In this attempt to end wage discrimination against women, Congress required that men and women be paid the same wages for performing the same jobs.[49] One year later, Congress passed the expansive Civil Rights Act of 1964.[50] The Civil Rights Act generally prohibits discrimination based on race, sex, age, religion, or national origin. Title VII of the Civil Rights Act specifically prohibits discrimination in employment, including wage discrimination.[51] Considerable controversy exists over the relationship of Title VII and the Equal Pay Act; litigants and the judiciary have used both Acts to justify or invalidate a theory of equal pay for comparable worth.

A. THE EQUAL PAY ACT

The Equal Pay Act provides that an employer may not discriminate against employees on the basis of sex by paying differ-

---

and women) was $250. In comparison, service workers earned a median $117. Craft workers received a median salary of $211 a week, while clerical workers received only $140. 1 EEOC, EQUAL EMPLOYMENT OPPORTUNITY REPORT—1974 JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY 28 (1975). In 1976 the median weekly earnings of all full time women workers was $145; the median weekly earnings of all men was $234. U.S. DEP'T OF LAB. BULL., WORKING WOMEN: A DATABOOK 34 (1977).

45. Jobs available to women are dictated by many factors, including the attitudes discussed above.

46. Bergman, *Occupational Segregation; Wages and Profits When Employers Discriminate by Race or Sex*, 1 E. ECON. J. 103-10 (1975).

47. *See* note 44 *supra*.

48. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (Supp. II 1978).

49. *Id.*

50. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Supp. II 1978).

51. *Id.*

ent wages to employees performing jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.[52] Courts interpret the Act to allow wage differentials between male and female workers unless the jobs in question are "substantially equal."[53]

In an Equal Pay Act case, the employee has the burden of proving coverage of the Act and must then show a prima facie sex-based wage differential.[54] Four factors are used to determine whether two jobs are equal for purposes of comparison under the Act: skill, effort, responsibility, and similarity of working conditions.[55]

Skill may be both mental and physical;[56] it includes education, experience, and training,[57] provided the job actually requires the superior training or experience of the employee.[58] Similarly, effort is measured in terms of both physical and mental exertion required by a job. The occasional requirement of greater physical exertion will not constitute superior effort

---

52. 29 U.S.C. § 206(d) (Supp. II 1978). For full text, see note 1 *supra.*

53. Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264 (D. Del. 1971), *aff'd in part, rev'd on other grounds,* 473 F.2d 589 (3d Cir.), *cert. denied,* 414 U.S. 866 (1973) (wage differential between women employees in women's clothing department and male employees in men's clothing department held justified). In Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3d Cir. 1977), in which female bench assemblers were unable to prove they did work equal to that done by male heavy assemblers, the court said: "A showing of comparability of positions is not sufficient to give rise to an inference that the positions are equal." *Id.* at 1176.

54. *See generally* Schultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).

55. 29 U.S.C. § 206(d) (Supp. II 1978). For full text, see note 1 *supra.*

56. An example of comparable physical and mental skills is seen where two employees spend an equal amount of time at basic office work and the balance of their shifts at different tasks, one at bookkeeping and the other at loading and unloading stock. The physical skills required for lifting would be compared with the mental skills required by the bookkeeping.

57. "Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job." 29 C.F.R. § 800.125 (1980).

58. "Possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill." *Id. See* Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976) (duties of female and male police "car markers" identical; fact that the males were trained police officers did not justify 50% wage differential because police skills were not used on the job); Bullock v. Pizza Hut, Inc., 429 F. Supp. 424 (M.D. La. 1977) (a college education did not constitute superior skill of male unit manager of pizza parlor since there was no showing that a college education was required for performance of the job).

under the Act; the extra effort must be both a substantial and regular part of the employee's duties. Physical exertion must be weighed equally with both types of effort required by the job.[59] Job responsibility must also be equal. Responsibility is gauged by the amount of supervision under which an employee works and the amount of independent judgment and discretion an employee must use.[60] The final factor used in determining equality of jobs is whether the jobs are performed under similar working conditions. Working conditions are determined by the job's surroundings and the hazards to which a worker is exposed.[61] For example, a shop employee works in different surroundings than the employee who makes house calls and, therefore, may be subject to different degrees of pressure. Similarly, because of job surroundings one employee may risk bodily harm, while another employee doing the same job in a different location may not.[62] These differences could warrant a wage differential.

Despite these somewhat expansive, flexible criteria, the

---

59. [S]uppose that a male checker employed by a supermarket is required to spend part of his time carrying out heavy packages or replacing stock involving the lifting of heavy items whereas a female checker is required to devote an equal degree of effort during a similar portion of her time to performing fill-in work requiring greater dexterity—such as rearranging displays of spices or other small items. The differentiation in kind of effort required does not . . . justify a wage differential . . . . Suppose, however, that men and women are working side by side on a line assembling parts. Suppose further that one of the men who performs the operations at the end of the line must also lift the assembly, as he completes his part of it, and place it on a waiting pallet. In such a situation, a wage differential might be justified for the person . . . who is required to expend the extra effort in the performance of his job, provided that the extra effort expended is substantial and is performed over a considerable portion of the work cycle.

29 C.F.R. § 880.128 (1980).

60. 29 C.F.R. §§ 800.129-.130 (1980). *See* Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (D. Mass. 1967) (wage differential justified because men on night shift in tag room worked under less supervision than women on day shift); Kilpatrick v. Sweet, 262 F. Supp. 561 (N.D. Fla. 1967) (difference in pay between male office manager and female bookkeeper justified because office manager was responsible for handling and depositing cash and needed to use personal judgment regarding expenditures).

61. Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1977) (airline stewardesses found to be doing work under same conditions as male pursers).

62. *See* 29 C.F.R. § 800.132 (1980). *See also* Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (day shift versus night shift does not constitute different working conditions).

Equal Pay Act does not address the problem of job segregation, nor does it provide a remedy for those women who are trapped in low-paying, sex-segregated jobs. In a labor market segregated by gender,[63] men and women perform different jobs, yet wage differentials between workers doing dissimilar work cannot be compared under the Equal Pay Act.[64] A wage differential between male "orderlies" and female "nurses aides" was justified under the Equal Pay Act in *Brennan v. Inglewood*,[65] because the orderlies were trained to use a catheter with male patients (a more difficult operation than with female patients), and their duties included waxing floors and some heavy lifting. While the court found that the jobs in question were not substantially equal, the district court never addressed the fundamental question of *why* females were given different tasks. Nor did the court compare the difference in job requirements with the wage differential. Failure to address job segregation is a basic inadequacy in Equal Pay Act cases. Because the courts never examine or attempt to eradicate the underlying discrimination, the Equal Pay Act provides a superficial remedy applicable in only the most blatant cases of wage discrimination.[66]

---

63. *See* notes 38-39 *supra* and accompanying text.

64. [I]t is clear that Congress did not intend to apply the equal pay standard to jobs substantially differing in their terms and conditions. Thus the question of whether a female bookkeeper should be paid as much as a male file clerk required to perform a substantially different job is outside the purview of the equal pay provisions . . . [T]he equal pay standard is not to be applied where only men are employed in the establishment in one job and only women are employed in dissimilar job . . . the standard would not apply where only women are employed in clerk typist positions and only men are employed in jobs as administrative secretaries if the latter require substantially different duties.

29 C.F.R. § 800.120 (1980).

See also Krumbeck v. John Oster Mfg. Co., 63 Lab. Cas. (CCH) 44,265 (E.D. Wis. 1970) (two women were denied coverage under the Equal Pay Act even though their jobs had been assigned the same point value by the employer as jobs performed by male coworkers, because no males performed the same jobs).

65. 412 F. Supp. 362 (S.D. Mo. 1975).

66. For further explanation of the Equal Pay Act, see Johnson, *Equal Pay Act of 1963: A Practical Analysis*, 24 DRAKE L. REV. 570 (1975). For a detailed history, see Elisburg, *Equal Pay in the United States: The Development and Implementation of the Equal Pay Act of 1963*, 29 LAB. L.J. 195 (1978).

Defenses

The Equal Pay Act provides four affirmative defenses which an employer charged with a violation may raise.[67] Once the plaintiff makes a prima facie showing of a sex-based wage differential between two substantially equal jobs, the burden shifts to the employer to prove one or more of the defenses. The defenses include a seniority system, a bona fide merit or evaluation system, quantity or quality of product, or any factor other than sex.

A seniority system which rewards employees with higher wages according to their length of employment with the company is justified even though it may result in a wage differential between employees performing equal work.[68] A merit or job evaluation system helps the employer rate jobs in order to determine relative wages.[69] If an employer can show a systematic, bona fide, and not purely subjective evaluation method was used to set the wages in question, the differential will survive scrutiny under the Act.[70] Differing quantity or quality of work may also justify a difference in pay. If an employee sells more expensive goods, for example, or produces a more valuable item than other employees, an employer may pay that worker at a higher rate.[71] The fourth defense, "any other factor other than sex," operates as a broad and general exclusion. Because Congress felt it impossible to anticipate every potentially legitimate basis for a wage differential, it provided this inclusive exception.[72] To prove

---

67. 29 U.S.C. § 206(d) (Supp. II 1978) authorizes a wage differential if the employer can show it is based on "(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 . . . ."

68. Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974) (seniority system was legitimate basis for wage differentials between male and female bank tellers).

69. For a further discussion of job evaluation techniques, see notes 187-199 *infra* and accompanying text.

70. *See generally* cases cited note 68 *supra.*

71. Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir.) *cert. denied,* 414 U.S. 866 (1973) (pay differential between male and female sales persons justified because men sold more expensive merchandise).

72. [The fourth defense] recognizes certain circumstances such as 'red circle rates.' The term is borrowed from War Labor Board parlance and describes certain unusual higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate

this exception applies, however, an employer may have to show what specific factor other than sex was determinative, and that the factor was accorded its proper weight in the determination of wages.[73]

Remedies

A court may assess both civil and criminal penalties for an Equal Pay Act violation. The standard remedy is an award of back pay, the difference between the wages paid the employee and what would have been paid absent the discrimination.[74] In addition, the employee is entitled to attorney's fees,[75] as well as liquidated damages,[76] which are a fixed sum equal to the amount of back pay already awarded. Liquidated damages may be reduced or eliminated, however, if the employer can show he or she acted in good faith.[77] Once liability is established, an employer may not lower rates for men, but must instead raise the

---

> in order to have them available when they are again needed for their former jobs.

H.R. REP. No. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 689.

It is interesting to note that the House Report also mentions "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving of heavy objects" as things that they might consider as "factors other than sex." The courts have held that none of the factors listed above justify wage differentials under the Equal Pay Act.

73. > [I]f the difference in salaries paid is too great to be accounted for by the difference [in the asserted factor other than sex], then it would seem necessary to show some other factor other than sex as the basis for the unexplained portion of the wage differential before a conclusion that there is no wage discrimination based on sex would be warranted.

29 C.F.R. § 800.143 (1980).

74. "Any employer who violates the provisions of section 206 or section 207 of this [title] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . ." 29 U.S.C. § 216(b) (Supp. II 1978).

75. *Id.* "The employee is entitled to 'an additional . . .' amount [equal to their back pay] as liquidated damages." *Id.* This amounts to double damages.

76. *Id.*

77. > Liquidated Damages: In any action . . . to recover unpaid minimum wages, unpaid overtime compensation or liquidated damages, under the [FLSA], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof

wages paid to women to an equal amount.[78] In addition to a civil suit, the Equal Employment Opportunity Commission (EEOC) may bring a criminal action against willful violators and may file for a preliminary injunction in district court to prevent continuing violations.[79]

B. TITLE VII

While most wage discrimination cases have been brought under the Equal Pay Act, a few plaintiffs have attempted to prove a violation of Title VII as well.[80] Title VII prohibits sex discrimination by employers in matters concerning hiring and firing, compensation, conditions or privileges of employment, and in segregation or classification of employees or applicants.[81] Title VII's application is broader than that of the Equal Pay Act. While the Equal Pay Act requires equal skill, effort, responsibility, and similar working conditions,[82] Title VII generally prohibits all discrimination in compensation based on sex.[83] As a result, several plaintiffs have attempted to use Title VII to establish a theory of comparable worth by which they seek to attack wage discrimination. This theory would protect female employees not covered by the Equal Pay Act because their jobs are not substantially equal to jobs done by men, yet who nonetheless suffer from sex-based wage discrimination.[84]

> not to exceed the amount specified in section 216(b) of this title.

29 U.S.C. § 260 (Supp. II 1978).

78. "*Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." *Id.* § 206(d)(1).

79. "Willful violations of the Act may be prosecuted criminally." 29 C.F.R. § 800.166(c) (1980). "The [EEOC] may obtain a court injunction to restrain any person from violating the law, including the unlawful withholding by an employer of proper compensation." *Id.* § .166(b).

80. *See* cases cited notes 4 & 9 *supra*. The prison employees in *Gunther* brought suit under Title VII because the Equal Pay Act did not apply to government employees during the period in question. Although the court recognized the validity of job comparisons in limited situations, appellants actually argued that their jobs were substantially equal, as if proceeding under the Equal Pay Act, rather than under a theory of job comparability. Brief for Appellants at 22, Gunther v. County of Washington, 602 F.2d 852 (9th Cir. 1979).

81. 42 U.S.C. § 2000e-2 (Supp. II 1978). See note 2 *supra*, for full text.

82. 29 U.S.C. § 206(d) (Supp. II 1978).

83. 42 U.S.C. § 2000e-2 (Supp. II 1978).

84. *See generally* cases cited note 4 *supra*.

The requisite burden of proof in a Title VII suit depends on the nature of the alleged violation. There are three basic types of Title VII violations. A plaintiff may allege the employer engaged in intentional discrimination, or, although not intentional, the employer's action or inaction resulted in either disparate treatment of an individual, or in disparate impact on a class of individuals.

Intentionally or facially discriminatory practices are prohibited by Title VII. After a showing of discriminatory intent is made, the employer may attempt to raise the bona fide occupational qualification,[85] the only defense to a charge of intentional discrimination. This defense allows employers to give preferential treatment in employment or classification of an individual based on gender "in instances where [gender] is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[86] The bona fide occupational qualification has been narrowly construed by the courts and permitted only where certain sexual characteristics are absolutely necessary.[87] Because only intentionally discriminatory practices give rise to a bona fide occupational qualification, this defense has little relevance in comparable worth cases, where wage inequality is generally the result of a subtle evolution of job segregation.

---

85. (e) Not withstanding any other provision of this subchapter: (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2 (Supp. II 1978).

86. *Id.* For a detailed discussion of the BFOQ, see Comment, *Title VII: Sex Discrimination and a New Bona Fide Occupational Qualification—How Bona Fide?*, 30 U. FLA. L. REV. 466 (1978).

87. Dothard v. Rawlinson, 433 U.S. 321 (1977) (pregnant women may be excluded from stewardess positions); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (strength requirements for "switchman" job did not constitute bona fide occupational qualification); Rosenfield v. Southern Pacific Co. 444 F.2d 1218 (9th Cir. 1971) (heavy manual work required for trainyard worker not bona fide occupational qualification). In *Rosenfield,* the court suggested that only jobs such as actor and actress, model, and wet nurse could satisfy the defense.

A Title VII violation may also be found where an employer's practices, while facially neutral, result in the discriminatory treatment of an individual. The formula for proof in such a case, as stated by the Supreme Court in *McDonnell-Douglas Corp. v. Green,*[88] puts the primary burden on the plaintiff to show prima facie discriminatory treatment. Plaintiff's burden includes a showing that plaintiff is a member of a group protected by Title VII and that she was denied an opportunity granted to others with equal qualifications.[89] Once a prima facie showing is made, the burden shifts to the employer to show "some legitimate, nondiscriminatory reason for the employee's [treatment].[90] The plaintiff is then entitled to prove that the employer's ostensible reason for the disparate treatment was merely a pretext for sex discrimination. Because disparate treatment analysis applies only to individuals, wage discrimination suits are rarely brought under this theory.[91]

Most compensation discrimination suits involve more than one plaintiff and may be appropriate for class actions,[92] the third type of Title VII suit. Generally the plaintiffs will need to prove that their employer's neutral practices have a disparate impact on the class as a whole. In *Griggs v. Duke Power,*[93] the Supreme Court held that proof of specific discriminatory intent was not required under Title VII, but would be inferred from a showing of disparate impact.[94] The Court found that "Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation."[95]

A prima facie case under this theory begins with a showing of disparate impact on plaintiffs as a class. This is usually done

88. 411 U.S. 792 (1973).

89. *Id.* at 802.

90. *Id.*

91. Nevertheless, the *McDonnell-Douglas* formula was intended to be flexible and could be applied to a compensation suit. In that case the plaintiff might have to show 1) that she was a member of a group protected by Title VII, 2) that her qualifications and job requirements were comparable to workers in other areas, 3) that despite her worth, she was paid less than other workers, and 4) the other workers were not members of the class.

92. Class actions brought under Title VII must comply with Federal Rules of Civil Procedure. *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

93. 401 U.S. 424 (1971).

94. *Id.*

95. *Id.* at 432.

with statistical evidence that illustrates a numerical disparity between members of the plaintiffs' class and other groups in the desired position.[96] A showing of a disproportionate impact on a class creates a rebuttable presumption of a Title VII violation. Thus, if no women are selected on a job for which there were numerous female applicants, the court will find an inference of illegality. The burden then shifts to the employer to raise the business necessity defense.

The business necessity defense places "on the employer the burden of showing that any given [job] requirement must have a manifest relationship to the employment in question."[97] Proof of a manifest relationship will depend on the nature of the challenged practice. Generally, an employer must show there was an overriding, legitimate business purpose behind the practice and that the practice is necessary to the safe and efficient operation of the business.[98] Once the employer shows sufficient "job relatedness" of the practice, the employees are given an opportunity to prove the existence of a less discriminatory alternative.[99] If such an alternative exists, the employer's business necessity defense will fail.

Damages

In a Title VII suit, a successful plaintiff is entitled to back pay and attorney's fees;[100] generally no punitive or exemplary damages will be awarded.[101] The court may grant a preliminary injunction if the plaintiff shows a probability of success on the merits and proof of irreparable harm.[102]

---

96. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), in which plaintiffs asserted that an employment test discriminated against blacks. A prima facie case consisted of proof that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 409.

97. Griggs v. Duke Power Co., 401 U.S. at 436.

98. Dothard v. Rawlinson, 433 U.S. 321. (1977).

99. *Id.*

100. "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin respondent . . . and order such affirmative action as may be appropriate . . . ." 42 U.S.C. § 2000e-5(g) (Supp. II 1978).

101. *Id.* Although the statute generally does not provide for an award of punitive damages, they have occasionally been granted. *See* Dessenberg v. American Metal Forming Co., 6 Empl. Prac. Dec. (CCH) 5460 (N.D. Ohio 1973).

102. "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin respondent from engaging in such unlawful employment practice

C. Equal Pay Act vs. Title VII

Often a plaintiff will need to elect between suing under the Equal Pay Act and suing under Title VII. Each puts a heavy burden on the plaintiff. Even where a plaintiff can meet the substantially equal requirement of the Equal Pay Act,[103] the employer has a variety of available defenses.[104] In a Title VII suit, the plaintiff has more options for proving a case, ranging from proof of discriminatory intent to mere proof of disparate impact. The court has not yet enunciated the requisite burden of proof for a Title VII wage discrimination suit, but the disparate impact formula may apply. One final benefit of an Equal Pay Act suit, however, is the availability of a larger award, including back pay and double damages.[105]

III. THE BENNETT AMENDMENT CONTROVERSY—THE RELATIONSHIP OF THE EQUAL PAY ACT AND TITLE VII

Because Title VII prohibits discriminatory compensation based on sex, courts have experienced difficulty determining its proper construction in relationship to the Equal Pay Act. Confusion has been heightened by the Bennett Amendment to Title VII,[106] which states: "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]."

Two interpretations of the Amendment have emerged during recent litigation.[107] Both address the same question: how

---

. . . ." 42 U.S.C. § 2000e-5(g) (Supp. II 1978).

103. For a discussion of the Equal Pay Act, see notes 53-66 *supra* and accompanying text.

104. Defenses are discussed at notes 67-73 *supra* and accompanying text.

105. For an explanation of remedies, see notes 74-79 *supra* and accompanying text.

106. The amendment, found at 42 U.S.C. § 2000e-2(h) (Supp. II 1978), was named for its author, Republican Senator Bennett of Utah.

107. The Fifth and Tenth Circuits held, in Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied,* 101 S. Ct. 244 (1980); Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975); and Ammons v. Zia, 448 F.2d 117 (10th Cir. 1971), that a compensation discrimination claim under Title VII must meet the requirements of the Equal Pay Act. The Third and Ninth Circuits have held that the Bennett Amendment only incorporates the Equal Pay Act's defenses into Title VII and therefore allows a claim of wage discrimination without an allegation of equal work. IUE

much of the Equal Pay Act is incorporated into Title VII through the Bennett Amendment? One view maintains that wage discrimination suits brought under Title VII must comply with all the requirements of the Equal Pay Act;[108] the other holds that only the defenses enumerated in the Equal Pay Act are available to an employer charged with wage discrimination under Title VII.[109] The first interpretation requires a showing of job equality in all compensation discrimination suits; the latter is more flexible and may allow a plaintiff to prove discrimination where the jobs are merely comparable.

A. Statutory Construction

The interpretation favored by the Tenth and Fifth Circuits limits Title VII wage discrimination suits to situations in which the jobs are substantially equal according to the Equal Pay Act standards.[110] In *Ammons v. Zia,*[111] the Tenth Circuit held that the Equal Pay Act and the Title VII compensation provisions are *in pari materia* and must therefore be construed in harmony with each other.[112] The court made no Bennett Amendment analysis and concluded that the plaintiff must prove the jobs in question were "substantially equal" to make a prima facie showing of discrimination under Title VII.[113]

The *Ammons* court assumed applicability of the *in pari*

---

v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981).

108. Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied,* 101 S. Ct. 244 (1980); Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975); Ammons v. Zia, 448 F.2d 117 (10th Cir. 1971).

109. IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981).

110. A successful Equal Pay Act claim requires that the jobs in question involve equal skill, effort, and responsibility, and that they be performed under similar working conditions. 29 U.S.C. § 206(d) (1978).

111. 448 F.2d 117 (10th Cir. 1971). Plaintiff failed both to show that the denial of Apollo test site clearance granted to male employees would have entitled her to higher pay, and that she was performing work equal to that done by higher paid males.

112. *Id.* at 119 (quoting Shultz v. Wheaton Glass, 421 F.2d 259, 266 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970)). Many other courts have agreed that the two statutes are *in pari materia; see* Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.) *cert. denied,* 423 U.S. 865 (1975); Cullari v. East-West Gateway, 457 F. Supp. 335 (E.D. Mo. 1978); Disalvo v. Chamber of Commerce, 416 F. Supp. 844 (W.D. Mo. 1976).

113. 448 F.2d 117, 120 (10th Cir. 1971).

materia doctrine to Title VII and the Equal Pay Act; other courts have given it similar summary treatment.[114] Generally, statutes are held to be *in pari materia* when they pertain to the same subject matter or were enacted with the same purpose in mind, and as such, are construed as one body of law, giving effect to every provision in each statute.[115] The *Ammons* court presumably relied on the doctrine as it applies to general and special statutes, which provides that when one statute specifies procedures or subjects touched upon in a broader statute, the specialized statute controls.[116]

The Third Circuit declined to apply the *in pari materia* doctrine in *IUE v. Westinghouse Electric Corp.*[117] and stated that "it is inconsistent with the Supreme Court's caution that remedies for employment discrimination 'supplement' each other and should not be construed so as to ignore the differences among them."[118] This interpretation implies that the Equal Pay Act and Title VII have important differences and that each act should increase, and not denigrate, the protections offered by the other.

The Bennett Amendment gives force to the *in pari materia* argument and indicates that Congress, aware that confusion over statutory construction might arise, enacted Title VII with the Equal Pay Act in mind. Unfortunately, the language of the

---

114. *See* cases cited note 112 *supra*.

115. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (4th ed. 1973).

> In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they should all be construed together.
>
> . . . Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision of all of them.

Id. (footnotes omitted).

116. This is suggested by the Third Circuit's discussion of Westinghouse's allegations in IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980): " 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment.' " *Id.* at 1101 (quoting Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976)). *See* C. SANDS, note 115 *supra*, § 15.05.

117. 631 F.2d 1094, 1101 (3d Cir. 1980).

118. *Id.* (citing Alexander v. Gardener-Denver Co., 415 U.S. 36, 48 n.9 (1974)).

Amendment is ambiguous and vague as to what is specifically allowed under Title VII. Courts holding that the Equal Pay Act completely controls wage discrimination suits under Title VII have consistently avoided a discussion of statutory language and construction, giving no legal basis for their conclusions beyond the bare citation of the statute and amendment.[119]

The Ninth and Third Circuits, on the other hand, have closely examined the language of the statutes to reach a different interpretation of the Amendment.[120] Although the Bennett Amendment allows a wage differential if it is *authorized* by the provisions of the Equal Pay Act, the only differentials expressly authorized are those based on the four enumerated defenses.[121] In *Gunther v. County of Washington,*[122] the Ninth Circuit stated:

> The Equal Pay Act applies only when a plaintiff has been denied equal pay for equal work, and authorizes a differentiation only where one of the four defenses is invoked. The Equal Pay Act does not "authorize" differentiations in the absence of equal work; in those cases it simply does not apply. Read literally, the amendment only incorporates the Equal Pay Act's defenses. If Congress had intended to say that wage differentials do not

119. In *Ammons,* the Tenth Circuit concluded that "to prove a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing equal work." 448 F.2d at 120. The court cited no authority for this proposition beyond the provisions of the Equal Pay Act. Citing *Ammons,* the Fifth Circuit, in Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975), found that any wage differential authorized under the Equal Pay Act is not unlawful under Title VII. A more recent Tenth Circuit case also approved *Ammons.* In Lemons v. City of Denver, 620 F.2d 225 (10th Cir. 1979), *cert. denied,* 101 S. Ct. 244 (1980), city-employed nurses contended that the city's wage scheme, based on the community wage scale, discriminated against women in violation of Title VII. The court stated: "The Bennett Amendment is *generally considered* to have the equal pay/work concept apply to Title VII in the same way as it applies in the Equal Pay Act." *Id.* at 229-30 (emphasis added).

120. Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981). IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980). This interpretation is also supported by dictum in Manhart v. City of Los Angeles Dep't of Power & Water, 553 F.2d 581, 590 (9th Cir.), *aff'd in part and rev'd in part,* 435 U.S. 702 (1978).

121. 29 U.S.C. § 206(d) (Supp. II 1978).

122. 602 F.2d 852 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981). For a discussion of the opinion issued on rehearing, see text accompanying note 170 *infra.*

> violate Title VII unless they violate the Equal Pay Act, it could have easily said so.[123]

The Third Circuit approved the *Gunther* interpretation in *IUE v. Westinghouse Corp.* defining the term "authorized" as describing something endorsed or expressly permitted, rather than merely something not prohibited.[123.1] The *IUE* court also recognized a well-established rule of construction, somewhat the converse of *in pari materia,* which states that when two statutes concern the same subject matter but one contains additional provisions not included in the other, the omission of the provisions indicates different intentions behind the two statutes.[124] Title VII does not expressly require equal work in compensation suits, whereas the Equal Pay Act includes the "substantially equal" requirement. According to the Third Circuit's reasoning, the omission of the "substantially equal" provision from Title VII indicates a congressional intent to allow a broader application than is possible under the Equal Pay Act. This interpretation is reinforced by the chronological aspect of the statutory history. The Equal Pay Act was an initial, narrow and highly focused piece of legislation, while Title VII was a strong, broad statement of policy to be implemented as necessary for maximum enforcement.

B. Legislative History of the Bennett Amendment

The scanty legislative history accompanying the Bennett Amendment reveals little about the purpose for including the Amendment in Title VII.[125] While introducing the Amendment, Senator Bennett stated his personal intent that "[in] the event

---

123. 623 F.2d at 1319. This view is also supported by dictum in Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978).

123.1 631 F.2d at 1101.

124. 631 F.2d at 1101. This argument is also made in *Gunther;* see discussion at note 120 *supra.*

125. The legislative materials on the Bennett Amendment are remarkable only for their equivocacy and turbidity. As has oft been noted, sex was added as a protected classification late in the debate on the Civil Rights Act . . . . The Amendment was not part of the [Act] when it had first passed the House and was sent to the Senate, although the Act at that time included the prohibition against sex discrimination. The amendment was included later on on the floor of the House after cloture and was adopted following a very brief colloquoy.

Id. at 1101-02.

of conflicts, the provisions of the Equal Pay Act shall not be nullified."[126] The Fifth and Tenth Circuits chose not to discuss the legislative history of the Bennett Amendment,[127] while both the Ninth and Third Circuits relied on the congressional record in their decisions.[128] The Ninth and Third Circuits concluded that the remarks of Senator Dirksen, that "the Fair Labor Standards Act carries out certain exceptions, and . . . [a]ll that the pending amendment does is recognize those exceptions that are carried in the basic act,"[129] combined with those of Senator Bennett, indicate an intent to incorporate only the four Equal Pay Act defenses into Title VII.[130]

---

126. The legislative record reads:

> MR. BENNETT: Mr. President, after many years of yearning by members of the fair sex in this country, after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> By this time programs have been established for the effective administration of this Act. Now, when the Civil Rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and the Equal Pay Act.
>
> The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
>
> . . . .
>
> MR. HUMPHREY: The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> MR. DIRKSEN: Mr. President, I yield myself 1 minute.
>
> We were aware of the conflict that might develop, because the Equal Pay Act is an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary in the interest of clarification.

110 CONG. REC. 13647 (1964).

127. *See* cases cited note 119 *supra.*

128. *See* cases cited note 120 *supra.*

129. *See* note 126 *supra.*

130. *See* cases cited note 120 *supra.* Senator Dirksen's statement refers to exceptions; the Equal Pay Act's exceptions are its four defenses. Because no circuit reaching an opposite conclusion has discussed legislative history, it is impossible to determine what their interpretation would have been. Arguments posed by Judge Van Dusen in his *IUE* dissent present a contradictory view of legislative history, but the interpretation is

Attempting to controvert this conclusion, defendants in *IUE* and *Gunther*[131] introduced two documents. The first was a portion of the legislative record showing a pre-enactment question and answer session which occurred two months before the proposal of the Bennett Amendment, just after the word "sex" was added to Title VII.[132] The exchange focused on the fact that Title VII does not include the equal work requirements present in the Equal Pay Act, and on how the two acts were to be reconciled. In response, Senator Clark concluded that the standards set out in the Equal Pay Act apply to the "comparable situation" under Title VII.[133] While Senator Clark's response cannot clarify the Bennett Amendment, as it had not yet been written, it does show a congressional concern over the relationship between the two acts.

The Ninth Circuit used Senator Clark's answer to reinforce its holding. When plaintiffs allege equal work, yet base their claim on a violation of Title VII, it is a "comparable situation"

---

unsupported. Summarizing Senator Bennett's statement, *supra* note 126, Judge Van Dusen remarked:

> [The] statement is open to different interpretations because Senator Bennett did not specify the provisions of the Equal Pay Act to which he was referring. I believe, however, the most logical interpretation of the statement is that Senator Bennett was referring to the equal work provisions of the Equal Pay Act.

631 F.2d at 112-13 (Van Dusen, J., dissenting).

131. The Ninth Circuit panel issued a second opinion in *Gunther,* after a petition for rehearing was filed by the County of Washington. The court discussed additional documents that were submitted at that time. 623 F.2d 1303, 1317 (9th Cir. 1979).

132. The objection was raised by Senator Dirksen and answered by Senator Clark:

> Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and numerous exemptions than those under Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of a bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.

110 CONG. REC. 7217 (1964).

133. *Id.*

to an Equal Pay Act claim and, therefore, Equal Pay Act standards must be applied. Absent a claim of equal work, however, the alleged discriminatory conduct must be analyzed under Title VII, which requires no showing of job equality. Although the Third Circuit acknowledged a different interpretation was plausible,[134] it ultimately agreed with the *Gunther* court.[135]

The second document submitted by defendants in *IUE* and *Gunther* constitutes ex post facto legislative history. One year after Title VII, in an attempt to clarify the growing confusion surrounding the interpretation of the Amendment,[136] Senator Bennett inserted the following statement into the record: "If the Bennett Amendment is to be given any effect, it must be interpreted to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act."[137] In considering the statement, the *Gunther* court stated:

> Either from a legal standpoint or as a practical matter, Senator Bennett's statement cannot express what was on Congress' collective mind when it acted a year earlier. If Senator Bennett's "clarifying" statement has any significance, it must be as evidence that the amendment was ambiguous on its face and its contemporaneous legislative

---

134. This interpretation is also acknowledged by the Fifth and Tenth Circuits. *See* cases cited note 119 *supra*.

135. *IUE*, 631 F.2d at 1107.

136. Senator Bennett cited the time pressure on Congress during the original debates as the reason for this later addition to the record. He explained: "As an example of what has occurred because of the confusion and near chaos that prevailed on those days, I find myself today under the necessity of trying to create legislative history that should have been created then." 111 CONG. REC. 13359 (1965).

137. Section 6(d) authorizes . . .

> 1. Wage differentials on equal jobs 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 amendment therefore means that it is not an unlawful employment practice; . . . (b) to have different standards of compensation for nonexempt employees where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.
>
> Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.

Id.

history was not enlightening.[138]

In *IUE,* the Third Circuit looked also to EEOC regulations to define the relationship of the Equal Pay Act to Title VII. It found the EEOC favors an expansive interpretation of Title VII.[139] Regulations specify that, while the Equal Pay Act is controlling in situations where both statutes apply, Title VII is not necessarily limited by the provisions of the Equal Pay Act.[140] The *IUE* court reasoned that the Equal Pay Act applies only when a claim of equal work is made; barring such a claim, Title VII controls in wage discrimination cases.[141]

One issue which has been largely ignored by the courts is the overall effect of the two possible interpretations of the Bennett Amendment on Title VII. The courts have not yet discussed the practical application of the Equal Pay Act defenses to Title VII. Nor have the courts considered whether the Bennett Amendment restricts an employer's defenses in a Title VII com-

---

138. 623 F.2d at 1318.

In *IUE,* the Third Circuit followed *Gunther,* but Judge Van Dusen's dissent gave great weight to postenactment comments by legislators. In Sioux Tribe v. United States, 316 U.S. 317 (1942), the court held that a statement by a member of the drafting committee of an act made five years after the statute was passed was "conclusive" as to the meaning of the statute. In Galvan v. Press, 347 U.S. 522 (1953), cited by both the majority and the dissent in *IUE,* the court upheld the deportation of a Mexican alien for membership in the Communist Party, even though he proved that he was unaware they advocated violence against the government. A 1951 amendment to the Internal Security Act of 1950 excluded those who were duped into joining the Party from the definition of "member." During the debate over the amendment, however, several members of Congress claimed that, even with the amendment, the word member would be given the same meaning as in the original statute.

Galvan may be distinguished from the cases involving the Bennett Amendment because the statements made in *Galvan* are part of the contemporaneous legislative history of the amendment in question, having been made during the congressional debates. The memorandum by Senator Bennett was not part of the debate and is therefore not contemporaneous.

139. *See* Decision No. 70-112, [1973] EEOC Dec. (CCH) ¶ 6108 (1969); Decision No. 70-0695, [1973] EEOC Dec. (CCH) ¶ 6148 (1970).

140. 29 C.F.R. § 1604.8 (1980) provides:

> Relationship of Title VII to the Equal Pay Act.
>
> (a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of other prohibitions contained in Title VII and is not limited by [the Bennett Amendment] to those employees covered by the Fair Labor Standards Act.
>
> (b) By virtue of [the Bennett Amendment], a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

141. 631 F.2d at 1106.

pensation suit to only those defenses enumerated in the Equal Pay Act, or whether it also allows the employer to raise Title VII defenses as well.

If the Bennett Amendment is determined to incorporate entirely Title VII's compensation provisions into the Equal Pay Act, then it would seem that regular Title VII defenses should not be allowed. On the other hand, if all the Bennett Amendment does is permit an employer to raise Equal Pay Act defenses in response to a wage discrimination charge under Title VII, then perhaps they may be raised in addition to the usual Title VII defenses. It is important to note that the bona fide occupational qualification only applies to charges of facial or intentional discrimination and thus would not often arise in a comparable worth situation. Business necessity, however, may be raised to counter a charge of disparate impact. Such a defense would be difficult to establish in a compensation case, however, unless the court were willing to accept mere economic necessity, which they have not yet done.

IV. THE DEVELOPMENT OF COMPARABLE WORTH IN THE COURTS

Courts are gradually acknowledging and reviewing the theory that women should be paid according to the value of their work rather than by extrinsic, stereotypic standards. No court has yet fully accepted a legal application of the theory of comparable worth, and the Supreme Court's decision in *Gunther* sidestepped the issue. The basis for judicial acceptance or rejection of a comparable worth standard, however, lies outside the realm of the courts. Some courts have gone beyond mere statutory construction to consider economic questions which underlie the legal issues.[142] Decisions based on economic principles, however, are not always just, and may be heavily influenced by the power of business interests. As is indicated by the cases discussed below, these interests, and how much weight the courts choose to grant them, provide the ultimate basis for most decisions in this area.

---

142. *See* cases cited note 4 *supra*.

A. Legislative History of the Equal Pay Act

The controversy surrounding the Bennett Amendment and the interpretation of Title VII has led several courts to go beyond rules of construction into the hazy area of legislative intent. Because there is no relevant record concerning the compensation provisions of Title VII, courts have based their decisions on interpretations of the congressional intent of the Equal Pay Act and have formulated a strong argument against the equal pay for comparable worth concept because of the economic burden involved.[143]

The congressional record reveals that an early version of the Equal Pay Act mandated equal pay for work of a "comparable character," rather than equal pay for equal work.[144] This language was modified to its current form after some debate in the House of Representatives. The major proponent of the modification, Representative St. George, argued that women wanted nothing less than absolute equality. She believed that a comparable standard would lessen, rather than increase, the chances of equality for women in the same way that protective legislation may further discrimination against women by fostering stereotypic responses and attitudes.[145]

Proponents of the comparable worth standard argued that an equality standard would often be impossible to prove and would impose an undue hardship on women. One House member argued that the equal work standard failed to address the problem of job segregation and would, in fact, leave many women unprotected.[146] The House nevertheless adopted the more re-

---

143. Lemons v. City of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 101 S. Ct. 244 (1980); Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied*, 429 U.S. 865 (1975).

144. The original provision under consideration was: "Employers must pay equal wages to employees doing comparable work, the performance of which requires comparable skill." 108 Cong. Rec. 14754 (1962).

145. Representative St. George (R. New York) remarked: "As a woman, I do not particularly want to be compared to a man . . . ." 108 Cong. Rec. 14768 (1962).

She also believed that, under a comparable standard, quality of work could be compared, which might lead to further discrimination against women doing equal work. *Id.* at 14767.

146. Representative Stratton (D. New York) offered the following prediction which indeed has come to pass:

> [What if] we were confronted with a situation in Gloversville, for example, where we have people sewing knitted gloves in

strictive version. The Fifth and Tenth Circuits have used this record to show that Congress intended to deny application of a comparable worth standard in all wage discrimination suits.[147] In *Lemons v. City of Denver,*[148] the Tenth Circuit, citing the *Congressional Record,* focused on the economic implications of comparing entirely different jobs.[149] The economic and business aspects of the comparable standard were raised only once during the House discussion concerning modification of the Equal Pay Act, when it was argued that "comparable" was too vague for businesses to apply consistently.[150]

It appears from the record that the congressional motive for the modification from comparable to equal was chiefly one of concern for women. While the difficulty of enforcing a comparable standard was noted, the House did not expressly dismiss the standard. Representative St. George's arguments were basically philosophical, but it seems that a majority of House members credited her opinion, because she was a woman, as representing the best economic interests of all women. If, as the record indicates, the House based its decision on a desire to offer the widest protection possible, one must conclude they did not intend to conclusively exclude a theory of comparable worth, or any other

---

> one building and sewing leather gloves in another, [I wonder] whether under [Mrs. St. George's] amendment, it may not turn out this is not equal work. . . . [W]ould it not be easy for an employer to argue in such cases that these operations were not equal, so if all of those sewing knitted gloves happened to be women and all of those sewing leather gloves happened to be men, might it not be possible . . . for an employer to evade the clear intent of Congress in passing this legislation?

108 CONG. REC. 14771 (1962).

147. *See* cases cited note 143 *supra.* In *Orr,* the court cited an Equal Pay Act case, Brennan v. City Stores, 479 F.2d 235 (5th Cir. 1973), which held that Congress substituted the word equal for the word comparable to require that the jobs involved be virtually identical.

148. 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S. Ct. 244 (1980).

149. *See* notes 159-172 *infra* and accompanying text.

150. Representative Landrum (D. Georgia) raised this argument:

> If, in fact, we want to establish equal pay for equal work, then we ought to say so and not permit the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term "comparable" when "equal" is capable of the same definition throughout the United States.

108 CONG. REC. 14767-68 (1962).

theory which would help end employment discrimination against women.

B. Economic Implications of Comparable Worth

Perhaps the best argument against a theory of equal pay for comparable work is the potential economic impact it would have on businesses.[151] Several courts have held that Title VII is not intended to remedy discrimination if to do so would require altering the economic structure of the marketplace.[152]

In *Christensen v. Iowa,*[153] female clerical workers sued their employer, the university, alleging wage discrimination under Title VII. They sought to compare the work of the exclusively female clerical staff[154] with the work of the predominantly male physical plant workers.[155] The university set wages by giving each job a point value and matching salaries to points accrued.[156] But because physical plant workers in the local job market received wages higher than those assigned by the univer-

---

151. Smith, *The EEOC's Bold Foray into Job Evaluation,* Fortune, Sept. 11, 1978, at 59, portrays the economic effect of requiring a comparable worth standard for wage determination:

> [A comparable worth requirement] would certainly correct imbalances rapidly, but the economy would surely be much disrupted in the process. At the extreme, to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls. Such a radical step, of course seems too preposterious to be taken seriously. But even partial measures —a more likely bet—would have enormous impact, undoubtedly aggravated by demands from unionized workers in traditionally male jobs that their pay be increased correspondingly."

152. Lemons v. City of Denver, 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S. Ct. 244 (1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

153. 563 F.2d 353 (8th Cir. 1977).

154. The clerical staff included the following positions: account clerk, key entry operator, data technician, typist, secretary, and mail clerk. *Id.* at 354 n.3.

155. The physical plant workers included carpet layers, mail carriers, tree trimmers, parking enforcement officers, bus drivers, electricians, locksmiths, upholsterers, mechanics, plasterers, carpenters, and plumbers. *Id.*

156. This is a frequently used method of job evaluation. A typist position, for example, will be broken into certain factors such as skill required, amount of supervision necessary, etc. For each factor, the job will receive points, depending on the degree to which the factor figures in the job. Points are tallied and jobs with equal points are assigned the same range of wages. For a further discussion of job evaluation techniques, see notes 189-212 *infra* and accompanying text.

sity, the university raised the physical plant workers' pay to equal the community pay scale.[157] The university's compensation scheme, although ostensibly an attempt to equalize wage differentials, broke down because of the alleged need to compete with the local market, whose practices discriminated against women. The Eighth Circuit found appellants had not established a prima facie case for sex discrimination under Title VII because they did not adequately demonstrate that the wage differential between clerical workers and physical plant workers was based on the employer's discriminatory practices. In addition, the court held the university's dependence on the local labor market was sufficient reason for the wage differential.[158]

The *Christensen* court refused to extend Title VII to an area it believed to be outside of the scope of equal opportunity as defined by the Supreme Court.[159] Appellants argued the university was liable because it was perpetuating the discrimination found in the community. The Eighth Circuit responded:

> Equality of opportunity is not at issue here. . . . Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as

157. 563 F.2d at 354.

158. *Id.* Because appellants did not establish a prima facie case, the court found it unnecessary to confront the Bennett Amendment.

> By way of distinction to the facts presented in this case, we might note that if the record had established that the University relied upon prevailing community wage rates in setting pay scales for male-dominated jobs but paid less than community wages for jobs primarily staffed by women, we would necessarily reach the Bennett Amendment issue.

Id. at 355 n.6.

159. "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." 563 F.2d at 356 (quoting Griggs v. Duke Power, 401 U.S. 424 (1971)).

> requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.[160]

Crucial to the court's decision was the notion that an employer should not be liable for perpetuating prevailing discriminatory community practices. The court did not believe that Title VII allows judicial regulation of the marketplace to the extent of forcing an employer, not guilty of any direct, overt discrimination, to pay for the wrongs of society as a whole. But application of Title VII to wage discrimination, discharge, or hiring practices, indeed requires an employer to guarantee that the particular wrongs of society are corrected. Even more so, quotas, special opportunity programs, and affirmative action, all potentially affect the innocent business operator, entrepreneur, or person who has never engaged in any intentional discrimination.

In *Lemons,* the Tenth Circuit held that the court does not have the power to interrupt the normal operation of the marketplace. In *Lemons,* city nurses sued the city because they felt their wage scale, which reflected that of the local job market, under-valued nurses and nursing as a traditional woman's job.[161] Citing *Christensen,* the court held that under existing law courts could not require an employer who had acted in good faith to re-evaluate the worth of each job in relation to other jobs, especially when this would disregard the community job market.[162] The court stated that comparisons between jobs requiring entirely different skills would "be a whole new world for the courts and until some better signal from Congress is received we cannot venture into it."[163]

C. GUNTHER V. COUNTY OF WASHINGTON

In two recent cases, the Ninth and Third Circuits have ven-

---

160. *Id.* (footnote omitted).

161. The court did recognize the issue:

> The relationship of pay for nurses to pay for other positions is obviously the product of past attitudes, practices, and perhaps of supply and demand. The record shows that it became a part of the economic balance and relationships prevailing in the community among the myriad of positions in the job market.

620 F.2d at 229.

162. *Id.* at 230.

163. *Id.* at 229.

tured into the "new world" of comparable worth. *Gunther v. County of Washington*[164] was the first case in which any circuit has held a claim of wage discrimination need not mirror an Equal Pay Act claim. The plaintiffs in *Gunther* were four women matrons at the county jail, assigned to guard female prisoners. Male guards were paid a higher wage than the matrons for guarding male prisoners. The plaintiffs sued under Title VII, alleging unequal pay for equal work, and retaliatory discharge.[165] Finding plaintiffs' work not substantially equal to that of the male guards, the district court ruled for the county. On appeal, in addition to their equal pay claim under Title VII, plaintiffs asserted that even if they did not perform substantially equal work, at least some of the discrepancy in pay could only be explained by sex discrimination.[166]

The Ninth Circuit upheld the district court's finding that the matron's work differed from that of the male guards, but further held that job equality is not necessarily determinative in compensation discrimination cases.[167] After reviewing the legislative history of the Bennett Amendment, and the language of the Equal Pay Act and Title VII, the panel concluded that Title VII is broader than the Equal Pay Act. "If we were to limit Title VII's protection against sexually discriminatory compensation practices to those covered by the Equal Pay Act, we would in effect insulate other equally harmful discriminatory practices from review."[168]

The appellants' allegation of "other discriminatory practices" proved essential to the court's ruling:

> [A]lthough decisions interpreting the Equal Pay

---

164. 602 F.2d 882 (9th Cir. 1979), *rehearing denied*, 623 F.2d 1303 (1980), *aff'd*, 49 U.S.L.W. 4623 (U.S. June 8, 1981).

165. Although they initially stated a claim under the Equal Pay Act, plaintiffs were forced to sue under Title VII because, at the time of employment, the Equal Pay Act did not apply to government employees. 602 F.2d at 886 n.4.

166. Essentially, this would require a claim that the matrons were discriminated against in terms of compensation, because their wages were determined by gender. Such a claim seems to counter the Equal Pay Act defense that wages were set by any other factor other than sex.

167. It is important to note this is the first case where a finding that equal work was not performed did not prevent the court from determining that some other discrimination might be involved.

168. 602 F.2d at 890 (footnote omitted).

> Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized [by the Equal Pay Act's defenses].[169]

The Ninth Circuit subsequently issued a second opinion in *Gunther*,[170] in response to a petition for rehearing, to clarify its position. The court did not fully embrace a theory of comparable worth. Rather, they seemed to respond to the Fifth, Tenth, and Eighth Circuits' refusal to review wage discrimination cases that did not meet the Equal Pay Act requirements, even when there had been no allegation of "substantially equal" work. In the second opinion, the Ninth Circuit stated:

> The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff . . . attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male . . . . All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible. We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case.[171]

Thus, the *Gunther* court hesitantly set out the foundations of a theory of comparable worth. According to the court, an allegation that different wages are paid to workers performing jobs of comparable worth, without some further charge of discrimination, is insufficient to establish a prima facie case under Title

169. *Id.* at 891.
170. 623 F.2d 1303 (9th Cir. 1979).
171. *Id.* at 1321.

VII.[172] Although the court did not specify under what situations or alternative theories job comparisons might be relevant, one of the most recent compensation discrimination cases presents an excellent example.[173]

D. IUE v. Westinghouse Electric Corp.

In *IUE v. Westinghouse Electric Corp.*,[174] the Third Circuit Court of Appeals applied the standard suggested in *Gunther*.[175] Plaintiffs, members of the Electrical Union, charged their employer, Westinghouse, with wage discrimination under Title VII. Westinghouse used a wage classification system in which each job was assigned a labor grade number based on the number of points tallied, with lower grades receiving lower salaries.[176] The job evaluations were originally done in 1939 and a keysheet was developed at that time which enumerated wages of jobs at each level. Separate keysheets were maintained for jobs filled by women and jobs filled by men; the grade levels on the women's keysheet received lower wages than identical levels on the men's list.[177] In 1965, Westinghouse devised a new single keysheet, which plaintiffs contended merely disguised the old discriminatory system. Female jobs were placed far below male jobs given equivalent grades on the old keysheets. Company records showed that all employees but one, working in labor grades one through four, were women, and that eighty-five percent of the women working at the plant were assigned to these low level jobs.[178]

Plaintiffs contented the grades were assigned according to whether the position had been traditionally filled by a woman or a man, and that predominantly female jobs were assigned lower wages, resulting in a highly unequal pay distribution. The district court found that, because the plaintiffs did not allege that male and female employees performed "substantially equal"

---

172. *Id.*

173. *See* note 176 *infra* and accompanying text.

174. 631 F.2d 1094 (3d Cir. 1980).

175. *See* text accompanying note 171 *supra.*

176. *See* notes 187-210 *infra* and accompanying text.

177. As the 1939 Westinghouse Industrial Relations Manual explained: "Basically then, we have another wage curve or key sheet for women *below* and not parallel with, the men's curve." 631 F.2d at 1097 (emphasis in original).

178. *Id.*

work, the employer had not violated Title VII.[179] On appeal, the Third Circuit was unable to ignore Westinghouse's discriminatory employment practices and reversed the district court.[180]

After deciding the Bennett Amendment incorporated only the four enumerated Equal Pay Act defenses into Title VII,[181] the court reviewed the allegation of wage discrimination. The court found Westinghouse's system blatantly discriminated against women workers. Although the plaintiffs' claim was based on discriminatory compensation, that compensation had been determined by a discriminatory evaluation system. Because Title VII clearly prohibits an employer from paying workers performing different jobs different wages if wages are determined by race or religion, the court determined that

> [i]n the absence of explicit statutory language or Supreme Court holdings to the contrary, we are hesitant to conclude that Title VII would allow discriminatory behavior on the basis of sex, when the same behavior would be prohibited if made on the basis of race, religion, or national origin.[182]

In *Gunther,* the Ninth Circuit held that a prima facie case would not be established solely on a showing of job comparability but that wage discrimination could be proven under "some other theory compatible with Title VII."[183] In *IUE,* the plaintiffs proved wage discrimination by showing a discriminatory job evaluation system, thus providing an alternative theory of discrimination. Evidence supporting the theory showed the jobs in question had at one time been given identical labor grades and, therefore, were of comparable worth to the employer, but that wages had been determined by the sex of the employee and not according to worth. Although never explicitly articulated, *IUE* allowed a comparison of dissimilar jobs to prove discrimination.[184]

---

179. 19 Empl. Prac. Dec. (CCH) ¶ 9144 (D.N.J. 1979).

180. 631 F.2d. at 1094.

181. *Id.* at 1101.

182. *Id.* at 1100 (footnote omitted).

183. 623 F.2d at 1321.

184. 631 F.2d at 1094.

V. PROVING A COMPARABLE WORTH CASE

It is difficult to prove that an employer has committed wage discrimination against women. With *IUE* as a guide, it appears some courts may be willing to compare different jobs in situations where there are intentional wage differentials between male and female jobs not covered by the narrow language of the Equal Pay Act.[185] The Ninth Circuit and Third Circuits require a showing of a discriminatory practice *before* a claim of comparable worth will be discussed.[186] Often, as in *IUE,* wage discrimination is confirmed either by the employer's method of setting wages, or its job evaluation system.

A. Methods Used to Set Wages

Employers use a wide range of methods to set wages. Understanding these methods may be crucial in proving wage discrimination under Title VII. Although many employers use complex methods of wage determination, some continue to use the basic ranking method. With this method, the employer fixes wages by observing a job and ranking it in relation to other jobs.[187] The hazard of the ranking method is that the employer may allow biased personal preference, about current employees and the job itself, to weight the determination.[188]

The market method is a second method used to set wages.[189] The employer matches the wages of employees to those of similarly situated employees in the community or any other competitive unit in the labor market.[190] Thus, if women have been traditionally segregated into low-paying jobs in the local labor market, an employer will only perpetuate existing wage discrimi-

185. 29 U.S.C. § 206(d) (Supp. II 1978).

186. Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *rehearing denied,* 623 F.2d 1303 (1980), *aff'd,* 49 U.S.L.W. 4623 (U.S. June 8, 1981); IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980).

187. R. Sibson, Compensation: A Complete Revision of "Wages and Salaries" 38-39 (1974). *See* Cody, *The Comparable Worth Slot Machine: Does Job Evaluation Give Every Player an Even Break?,* 1 Equal Employment Practice Guide IV-15 (J. Erickson, K. McGovern eds. 1979).

188. R. Sibson, *supra* note 187, at 38. Cody, *supra* note 187, at IV-28, points out, however, that from an employer's perspective this method is easy to use, easy to understand, consumes little time, and minimizes paperwork.

189. R. Sibson, *supra* note 187, at 44.

190. *Id.*

nation by adopting a market standard.[191] The market method is generally used with a classification system as a means of rating job levels, such as Typist I or Assistant Researcher III. While the classification system may be facially gender-neutral, discrimination can occur when wage classifications are made in accordance with what a similar job has traditionally paid in the labor market. The market method was approved by the court in *Lemons,* even though it resulted in discriminatory wage levels for city nurses.[192]

A classification system may also be applied independent of market comparisons, using a rating scale based on internal company grade levels.[193] This technique can be subjective, for even though all jobs are set against the same standard and treated alike, the system tends to depend on arbitrarily assigned job levels within the organizational hierarchy rather than levels of work performance.[194]

---

191. From an employer's point of view this may be an advantage.

> The major advantage of the market evaluation system is that the market is built into the program from the start, thereby insuring that evaluation results conform to the realities of the marketplace . . . .
>
> . . . In the traditional evaluation approach . . . no one can ever really satisfactorily explain why a salesman is in a higher grade than, say, an accountant. But if the answer is that salesmen at a given level are *paid* more than accountants at a given level that is simply describing what exists. The company did not make these judgments; the labor market did. The market has valued work done and the experience that goes with doing the work. These are clearly more objective than subjective job evaluation decisions and therefore tend to be more acceptable to employees.

Id. at 44-45 (emphasis in original).

Unfortunately, this method has also been acceptable to the courts. *See, e.g.,* Lemons v. City of Denver, 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S. Ct. 244 (1980). The employer may rely on the market system as justification for paying women less than men.

192. City jobs were first classified, then compared to the equivalent private sector jobs, and assigned wages accordingly. Plaintiffs argued that the city's scheme upheld the traditional under-valuation of nursing as a woman's job, and that their jobs should be compared with non-nursing positions of equal value. 620 F.2d at 229.

193. Under this method, an employer assigns each job a grade level, and starts the pay scale with Grade One, for example, which would receive the lowest salary. Salaries increase with higher grades, but all jobs on the same level receive equal pay. R. SIBSON, *supra* note 187, at 40.

194. Cody, *supra* note 187, at IV-27.

More complex methods are the point/factor method and a variation, the factor comparison method.[195] Under the more common point method,[196] jobs are analyzed and broken down into compensable factors and subfactors,[197] which in turn receive

---

195. R. SIBSON, *supra* note 187, at 40-42.
196. *Id.* at 40.
197. Cody lists the following possible factors and subfactors:
    1. EXPERIENCE
        A. Number of areas in which experience is required to perform job effectively.
        B. Amount of experience in each area required to perform job satisfactorily.
    2. EDUCATION AND TRAINING
        A. Number of areas in which education/training is required.
        B. Type of education/training: General-Technical
        C. Frequency of use of education/training on job.
    3. MENTAL DEMAND
        A. Degree of mental application required.
        B. Continuity of mental alertness.
        C. Degree of diversity of mental demand.
    4. VISUAL DEMAND
        A. Degree of visual alertness required.
        B. Continuity of visual alertness.
    5. PHYSICAL DEMANDS
        A. Pace of physical input.
        B. Strength/endurance required.
        C. Degree of continuity.
    6. COMPLEXITY OF DUTIES
        A. Types and diversity of problems handled: Routine - Nonroutine.
        B. Frequency of problems arising.
        C. Amount of work required to respond to problems.
    7. PSYCHOLOGICAL AND EMOTIONAL DEMANDS
        A. Number, types, and frequency of deadlines to be met.
        B. Routine pace of job (rate of work turn-around).
        C. How is work reviewed and by whom?
    8. CONFINEMENT DEMANDS
        A. Physical confinement.
        B. Mental confinement; monotony.
        C. Job potential confinement (dead-end job?).
    9. HAZARDS/WORKING CONDITIONS
        A. Probability of accidents/health hazards.
        B. Severity of accidents/health hazards.
    10. ABILITY TO EFFECT RESULTS
        A. Independence of action.
        B. Exercise of judgment/creativity.
    11. ERRORS
        A. How easily discerned.
        B. Impact of error on orderly work flow.

point values based on the factor's importance or worth to the employer. Wages are set according to the point value.[198] A variation of this method is the factor comparison method, which assigns points to each job for the same standard factors, each of which carry equal weight.[199] Jobs with equal points yield equal wages.

Although the point/factor system is facially objective, it can be discriminatory. Because the employer may give more weight to factors such as physical effort or technical training, jobs predominantly filled by women may be undervalued.[200]

C. Frequency of probability for error.
12. CONTACT WITH OTHERS
A. Frequency of contact.
B. Nature of contact/type of impact to be had by individual.
C. How contacts made; individual vs. group.
D. Type of people contacted/range.
E. Skill required in contact: routine courtesy—creating rapport— nonroutine decisions.
F. Loyalty to company/product.
13. RESPONSIBILITY FOR CONFIDENTIAL DATA
A. Character of data.
B. Degree to which full import of data is apparent on the job.
14. RESPONSIBILITY FOR RECORDS AND REPORTS
A. Degree of care required to prevent inaccuracies.
B. Degree of loss/disruptive effect would result from inaccuracies.
15. RESPONSIBILITY FOR MATERIAL, EQUIPMENT, AND PRODUCT
A. Dollar value of equipment, etc.
B. Degree of care required to prevent mishap.

Cody, *supra* note 187, at IV-29 to IV-31.

198. Wages are usually determined by isolating certain jobs as benchmark or key jobs, and wages paid these jobs are matched to the point value assigned to them. A graph is drawn with benchmark jobs marked on a wage line and all other jobs are aligned into the correct place on the point scale. Grades and ranges are established on the graphs in varying widths. *Id.* at IV-18.

199. These factors might include skill, physical demands, mental demands, responsibility, and working conditions. A benchmark system may be used to fix wages. The main difference between factor comparison and point/factor is that in factor comparison all jobs are rated by a standard set of factors with equal values, while in point/factor analysis any number of variable factors may appear. The employer will weigh each factor for value, rather than giving each factor equal value. Both these methods are complex and involve a great deal of paperwork. *Id.*

200. *Id.* at IV-28.

B. Proof of Discrimination

Because the job evaluation process can be discriminatory,[201] discovery of an employer's wage determination method may reveal inherent discrimination in compensation. In *IUE*[202] the plaintiffs used records of evaluation practices to prove intentional compensation discrimination. Westinghouse ostensibly used a modified factor comparison method to set wages, but the plaintiffs proved the method was not used fairly when rating women's jobs.[203] Only after the plaintiffs demonstrated that Westinghouse used discriminatory evaluation practices did the Third Circuit examine the jobs in question, and compare them with other company jobs to determine if they had been undervalued.[204] The employer's evaluation practice, by itself, was a violation of Title VII; it constituted intentional discrimination against women in terms of compensation.

The fact situation in *IUE* is a model of the Ninth Circuit's suggestion in *Gunther*[205] that, while mere proof of comparable work is insufficient to establish a prima facie case under Title VII, proof of comparable worth can be used under some theory other than equal work and be compatible with Title VII. An alternative theory suggested by plaintiffs in *IUE* was that the employer had engaged in discriminatory job evaluations, which resulted in wage inequality.[206] Examining this assertion, the court found a violation of Title VII based on gender-classified job evaluations. *IUE* involved blatant discrimination by the employer, while most forms of discrimination are subtle and more difficult to prove. It is important to note the Third Circuit's decision did not directly concern the use of a bona fide evaluation system which may have a discriminatory effect, but only speaks to an evaluation system discriminatorily implemented.

One can only speculate whether the Third and Ninth Cir-

---

201. Despite the discriminatory effect of some job evaluations, detailed evaluation methods may lead to fairer wage determination. Several professional consulting firms have experimented with nondiscriminatory wage programs for willing employers. *See, e.g.*, Compensation Institute, Comparable Worth Analysis Questionaire (1980).

202. 631 F.2d at 1097.

203. *Id.* *See* notes 178-180 *supra* and accompanying text.

204. *Id.*

205. 623 F.2d at 1320.

206. 631 F.2d at 1096.

cuits will be willing to extend their decisions to include situations in which the employer's job evaluation method, though objectively sound, discriminates against women in application.[207] Where wages are set through the use of factor comparisons, for example, the factors themselves may be rated in a discriminatory fashion. Clerical skills may be given lower point values than physical skills, resulting in wage differentials. Facially, the evaluation method is objective because factors are applied uniformly to all jobs, but the factors themselves are discriminatory. While this hypothetical situation would constitute a "disparate impact" type of violation of Title VII if proved, it could not be proved without an initial comparable worth analysis of the jobs in question.

A more difficult problem of proof, following the *Gunther-IUE* model, occurs when the employer can show it acted in good faith, but its evaluation methods have a disparate impact nonetheless. For example, in *Christensen*[208] and *Lemons*,[209] the employers used bona fide evaluation systems for classifying jobs, but actual wages were determined according to the local job market. The employers' wages merely reflected the discriminatory practices in the community. This type of fact situation presented several difficulties for the courts. Not only were they asked to find a violation of Title VII when the employer had not directly instituted discriminatory practices, they were also asked to force the employer to engage in detailed job comparisons and suffer possible economic loss by setting wages in disregard of local supply and demand. Neither court felt it could implement these demands. Were a court willing, however, proof would have

207. In a situation in which the employer used a point/factor method of job evaluation, for example, and factors associated with women's work were assigned less weight than other factors, the court would have to make a determination that certain factors *should* carry the same weight, i.e., that they are of comparable worth. Support for this contention might be found in production records, profit charts, or independent studies. One commentator suggests that the plaintiff should only have to show the existence of job segregation and differing pay to establish a prima facie claim of wage discrimination. The burden would then fall on the employer to prove the wages were not lower because the job in question was a woman's job. Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1974*, 12 U. MICH. J.L. REF. 397, 462 (1979). For an argument against this approach, see Nelson, Opton & Wilson, *Wage Discrimination and the 'Comparable Worth' Theory in Perspective*, 13 U. MICH. J.L. REF. 233, 279 (1980).

208. 563 F.2d 353.

209. 620 F.2d 228.

to be twofold. The plaintiff would have to first prove wages in the local job market were discriminatory (necessitating proof of comparability), and then prove the employer discriminated by applying the community standard to its own establishment.

VI. CONCLUSION

Title VII prohibits discrimination in compensation on the basis of sex. While Title VII may reiterate certain protections offered by the Equal Pay Act, it provides an independent basis for a claim of wage discrimination. Title VII offers protection to women underpaid, either because of job segregation or an employer's undervaluation of women's work; there is nothing in the statute that prevents a claim of discrimination based on unequal pay for comparable worth. Barriers to judicial acceptance of such a claim, however, lie beyond the realm of statutory construction.

While the Ninth and Third Circuits have cautiously widened the scope of a wage discrimination claim, no court has allowed a mere showing of comparable worth of jobs as sufficient proof of a Title VII violation. Because unequal pay for comparable worth is not a per se violation of Title VII, it must be predicated on some specific, articulable discriminatory practice or effect. It seems unlikely courts will extend *Gunther* to recognize a Title VII claim based merely on a showing that the plaintiff was denied equal pay for work of comparable worth to the employer.

Judicial reluctance to accept or develop this theory partially results from pressure from the business sector.[210] When courts scrutinize the laws of supply and demand for "fairness," they are accused of interfering with the economic structure; when they consider requiring employers to reassess the job worth and to set wages accordingly, they are accused of usurping the right

210. The market method can provide a cover for businesses which seek to avoid complex evaluation systems. Vice-President of Employee Compensation at Bank of America, John Turney, favors use of the market method, in conjunction with a classification system, to more detailed systems. He stated that evaluation systems such as point factor merely "clutter up" the basic practice of setting wages at a level competitive with those in the community market. Because systematic evaluation methods are often the only documentation of discriminatory practices, an employer is better off using the illusive, changing scale of the market place. Conversation with John Turney, Vice President, Employee Compensation, Bank of America, San Francisco (Nov. 17, 1980).

of the employer to engage in free enterprise.[211] Nevertheless, despite strong resistance from business interests, the courts frequently engage in such interference to insure equal protection and fairness in other business-related areas. An undue solicitude prevents it here.

While the courts need a firm directive from Congress before they are likely to hold against the alleged business interests, plaintiffs may be able to strengthen the theory of comparable worth through litigation. Although individual litigation appears to benefit only the plaintiff with compensation for lost wages, litigation has a strong impact on the employer. Employers who anticipate adverse judgments may be compelled to re-evaluate their own practices and exchange them for methods that compensate women employees for the actual value of their work.[212]

---

211. *See A Business Group Fights "Comparable Worth,"* BUS. WEEK, Nov. 10, 1980, at 100, which discusses the rise of business groups such as the Equal Employment Advisory Council (EEAC), that concentrates on filing *amicus curiae* briefs in Title VII cases, and whose board of directors includes officials of General Electric, Exxon, Sears, General Motors, and Prudential Insurance. The latest EEAC cause is the fight against comparable worth. Malcolm Lovell, a board member of the EEAC, states the organization's goal: "We have to tackle comparable worth before a law is passed. It could come down to whether a group of bureaucrats or the market is going to determine wages." *Id.* at 105, col. 2.

212. As this Comment went to press, the Supreme Court affirmed *Gunther*, 5-4. 49 U.S.L.W. 4623 (U.S. June 8, 1981) (per Brennan, J.; Blackmun, Marshall, Stevens and White, J.J. joining in the opinion. Rehnquist, J., filed a dissent, joined by Burger, C.J., Powell and Stewart, J.J.). The Court determined that the legislative history of the Equal Pay Act and Title VII, as well as the policy and language of the employment discrimination provisions of the Civil Rights Act, supported the Ninth Circuit's conclusions. The Court sidestepped the issue of comparable worth, however, by narrowly framing the issue as "whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII." *Id.* at 4625.

The Court concluded that the Bennett Amendment merely incorporates the Equal Pay Act defenses into Title VII and that any other interpretation would "insulate . . . blatantly discriminatory practices from judicial redress under Title VII." *Id.* at 4628. It did not, however, decide the "precise contours of lawsuits challenging sex discrimination in compensation under Title VII." *Id.* at 4629.

The dissent followed the reasoning of the Eighth and Tenth Circuits, found fault with the majority's reliance on policy instead of strict rules of construction, and concluded that the Equal Pay Act governs all compensation discrimination suits.

While the majority opinion provides little guidance for the Title VII plaintiff, and despite the Court's refusal to directly address the issue of comparable worth, the decision is important to women. The Court has opened the way for the use—however limited—of job comparisons in wage discrimination suits.