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## Comparable Worth Theory of Title VII Sex Discrimination in Compensation

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## COMMENTS

# COMPARABLE WORTH THEORY OF TITLE VII SEX DISCRIMINATION IN COMPENSATION

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## I. INTRODUCTION

The concept of "comparable worth"<sup>1</sup> has ignited a fiery debate among employment discrimination experts,<sup>2</sup> feminists,<sup>3</sup> the business community,<sup>4</sup>

1. "The controversial theory of 'comparable value' or 'worth' holds that whole classes of jobs are traditionally undervalued and underpaid because they are held by women and that this inequality amounts to sex discrimination in violation of Title VII of the 1964 Civil Rights Act." Spelfogel, *Equal Pay for Work of Comparable Value: A New Concept*, 32 LAB. L.J. 30, 31 (1981).

2. See E. LIVERNASH, *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* (1980); C. OWENS, *PAY EQUITY FOR WOMEN: A SPECIAL REPORT* (1981); *Comparable Worth Issues Addressed by Specialists at NYC Symposium*, BNA DAILY LAB. REP. No. 58, at A-3 (March 26, 1981); *Comparable Worth Theories Debated by Speakers at Chicago Conference*, BNA DAILY LAB. REP. No. 103, at A-1 (May 27, 1980).

3. See Celarier, *Paycheck Challenge of the Eighties—Comparing Job Worth*, MS., Mar. 1981, at 38; Elisburg, *Pay Equity: Its Time Has Come*, SPOKESWOMAN, Apr. 1980, at 6; Williamson, *Equal Pay for Work of Comparable Value*, WORKING WOMAN, Jan. 1981, at 10. See also MANUAL ON PAY EQUITY: RAISING WAGES FOR WOMEN'S WORK (J. Grune ed. 1980).

4. See Carter, *Comparable Worth: An Idea Whose Time Has Come?*, 60 PERSONNEL J. 792 (1981); Cody, *Comparable Worth Rules: Another Weight to Balance*, 68 MGMT. REV. 31 (1979); Moskal, *Should Wages Reflect What a Job is Worth?*, INDUSTRY WEEK, May 12, 1980, at 98; *A New Basis for Job Discrimination*, BUS. WK., Aug. 24, 1981, at 90; Brennan, *The Comparable Worth of Jobs*, Wall St. J., Nov. 12, 1979, at 23.

government agencies,<sup>5</sup> and everyone else with a passing interest in money. Not surprisingly, this conundrum has been thrust into the lap of the judiciary for resolution. The courts have responded in a tentative, haphazard manner that has served only to muddy the waters and increase the editorial vehemence of interested commentators.<sup>6</sup> This Comment examines the expanding controversy and speculates about the future of comparable worth claims.

## II. THE ECONOMIC FOUNDATION OF A COMPARABLE WORTH CLAIM

Statistics indicate that women are and will continue to be an integral part of the United States labor force.<sup>7</sup> Nonetheless, the position staked out for the working woman has never been particularly wholesome or financially rewarding.<sup>8</sup> Although overt sex discrimination may be a remnant of the not-so-distant past,<sup>9</sup> the plight of the woman worker remains essentially

5. Both the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) have become involved in the comparable worth controversy. See notes 120-25 and accompanying text *infra*.

6. See Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J. L. REF. 231, 242-43, 289-94 (1980) (comparable worth "would be grossly unfair and impracticable, and would cause a drastic and undesirable upheaval in the American economy."). See also Comment, *The Comparable Worth Theory: A Critical Analysis*, 32 BAYLOR L. REV. 629 (1980); *Pandora's Worth*, L.A. DAILY J., July 20, 1981, at 4.

7. Approximately 49 million women were in the labor force in 1979. This amounted to more than two-fifths of all workers and sixty percent of working age women. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, 20 FACTS ON WOMEN WORKERS (1980). One expert has conducted statistical analyses of the participation rate of working women and concluded that by 1990, "about 52 million women will be in the labor force." R. SMITH, WOMEN IN THE LABOR FORCE IN 1990, at V (1979). For a detailed discussion of the past and current position of the woman worker in the United States, see generally WOMEN IN THE U.S. LABOR FORCE (A. Cahn ed. 1979); THE SUBTLE REVOLUTION: WOMEN AT WORK 3-19 (R. Smith ed. 1979).

8. Prior to the 1960s, the integration of women workers was hindered by protective labor laws. These laws restricted the type of work women could do, the hours women could work, and the working conditions under which a woman could be employed. For a further discussion of these laws, see generally Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U.L. REV. 203, 213-30 (1971). These laws were used to deny women equal opportunity in employment as well as equal pay. See U.S. DEP'T OF LABOR, WOMEN'S BUREAU, SUMMARY OF STATE LABOR LAWS FOR WOMEN (1969).

9. The federal civil rights legislation of the 1960s and 1970s has provided women with a measure of protection. "Under the doctrine of federal supremacy, state protective laws are invalidated to the extent that they defeat the purpose of Title VII of the Civil Rights Act of 1964. They cannot therefore be used to support a bona fide occupational qualification that would not stand independently of such laws." 1 A. LARSON, EMPLOYMENT DISCRIMINATION 5-11 (1980).

unchanged. The average woman working full-time earns only sixty percent of the average male worker's pay.<sup>10</sup> The major reason for this wage gap is the occupational segregation that pervades the American labor force.<sup>11</sup> Though conspicuous strides have been made in certain areas,<sup>12</sup> eighty percent of working women remain trapped in six traditional fortresses of female employment.<sup>13</sup>

10. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, 20 FACTS ON WOMEN WORKERS (1980). Indeed, women with college degrees earn less, on the average, than men with eighth grade educations. Similarly, women who have high school diplomas earn less, on the average, than men who failed to finish elementary school. *Id.* See generally A. AMSDEN, *THE ECONOMICS OF WOMEN AND WORK* (1980). Recent government statistics indicate that this situation has not changed and that women receive lower wages than men when both are doing the same work. St. Louis Post-Dispatch, Mar. 7, 1982, at 1, col.1.

11. Working women generally are employed to do different things than working men. The problem lies in the fact that there are so few jobs working women fill. In 1980, Labor Solicitor Carin Clauss noted that over 90% of working women could be grouped into 8 of the Labor Department's 400 job titles. Wage discrimination in these areas is considered traditional. *Federal EEO Policy and Comparable Worth*, 1980 LAB. REL. Y.B. 90.

12. Between 1950 and 1976, the proportion of female lawyers and judges rose from 4.1% to 9.2%, an increase of 124%. The corresponding increases for some other occupations were: accountants, 81%; engineers, 50%; physicians and osteopaths, 97%; college and university teachers and presidents, 37%; bank officials and financial managers, 111%; buyers and purchasing agents, 152%. Nelson, Opton & Wilson, *supra* note 6, at 233 n.2. The percentage increase in these professions may be somewhat misleading. In real terms, for example, there were only 5.1% more female lawyers in 1976 than there were in 1950.

13. The occupational profile of the female labor force in 1977 was as follows:

- 36%—clerical workers
- 21%—service workers
- 8%—educators, librarians, social workers
- 6%—retail sales workers, peddlers
- 5%—nurses, health technicians
- 4%—clothing and textile workers

The female percentage of each of these groups was as follows:

- clerical workers—79%
- service workers—62%
- educators, librarians, social workers—64%
- sales clerks, peddlers—67%
- nurses, health technicians—83%
- textile workers—76%

U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *EMPLOYMENT AND EARNINGS* (1977). A number of explanations have been offered for this phenomenon. See generally Nelson, Opton & Wilson, *supra* note 6, at 244-64. It has been argued, for example, that women have not obtained the skill, training, and work experience necessary to perform certain tasks. While men and women generally see their role in society as being different and train themselves accordingly, it is unlikely that this

In 1977, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with administering Title VII of the 1964 Civil Rights Act,<sup>14</sup> hired the National Academy of Sciences (NAS) to investigate

explains the entire wage gap. One study analyzed the salary structure of a large university. After taking into account age, education, the nature of the job in question, the number of years on the job, and marital status, the study found that a significant gap remained between the earnings of males and females. Gordon & Morton, *The Staff Salary Structure of a Large University*, 11 J. HUMAN RESOURCES 374, 377 (1976). An economist has reported that the average on-the-job training period for a white male is twice as long as that given to women and black males. The study concludes that one long-term consequence of this difference in training may be an even more egregious wage gap between men with one leg up the ladder of success and women whose training can best be termed incomplete. Hoffman, *Race and Sex Linked Training Differences*, MONTHLY LAB. REV., July 1981, at 34, 36.

To the extent women drop in and out of the labor force, they cannot expect to maintain pay parity with those whose job tenure has been uninterrupted. A study of the employment situation of married and unmarried women, however, belies the notion that job interruptions are responsible for the male-female wage gap. The study found that unmarried female workers, whose average job tenure equaled that of male workers of the same age, earned about the same amount of money as married women. The continuous work experience of the unmarried female reduced the earnings gap by only a single percentage point. Sawhill, *The Economics of Discrimination Against Women: Some New Findings*, 8 J. HUMAN RESOURCES 383, 391 (1973).

14. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). Title VII provides, in part:

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.

*Id.* § 2000e-2(a) (1976). The enforcement mechanisms for Title VII are set out in the subsequent sections of the statute. Title VII can be enforced by private parties or by a government agency. The EEOC is empowered to prevent any person from engaging in unlawful employment practices under Title VII. *Id.* § 2000e-5(a). The EEOC is authorized to investigate employment practices and, if necessary, to file suit in federal district court. *Id.* § 2000e-5(b), (f). Any individual seeking to challenge discriminatory employment practices under Title VII is required to file a charge with the EEOC. *Id.* § 2000e-5(b). If state or local law prohibits the act alleged, and a state or local entity has enforcement powers, the charge must be referred to the state or local unit. If no action is taken within 60 days, the EEOC is free to assert jurisdiction. *Id.* § 2000e-5(c), (d). The EEOC may file enforcement proceedings if it deems legal action necessary. *Id.* § 2000e-5(f)(2), (i). If the EEOC dismisses the complaint or fails to act within 180 days of its filing, the complainant may sue the employer on his or her own behalf. *Id.* § 2000e-5(f)(1).

the economic position of the working woman.<sup>15</sup> The NAS report, recently published after four years of research, confirms that the female worker's quest for equality is far from complete.<sup>16</sup> The NAS found that less than half of the wage disparity<sup>17</sup> between full-time men and full-time women workers can be linked to nondiscriminatory factors such as the greater skill or experience of male employees.<sup>18</sup> The study stressed that the rigid job segregation that defines the American labor force is an important source of the wage differentiation.<sup>19</sup> "Women . . . are differentially concentrated in low paying jobs not only by occupation, but also by industry, by firm, and by division within firms."<sup>20</sup> Moreover, the NAS study concluded that in many instances, jobs held predominantly by women are less lucrative "at least in part *because* they are held mainly by women."<sup>21</sup>

### III. THE STATUTORY FOUNDATION OF A COMPARABLE WORTH CLAIM

The concept of comparable worth is a reaction to the stringent requirements of the 1963 Equal Pay Act (EPA).<sup>22</sup> The EPA was enacted to

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15. The EEOC also requested that the NAS explore whether "appropriate job measurement procedures exist or could be developed to assess the worth of jobs." D. TREIMAN, *JOB EVALUATION: AN ANALYTIC REVIEW—INTERIM REPORT TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION* i (1979).

16. "On the basis of a review of the evidence, our judgment is that there is substantial discrimination in pay" between male and female employees. Treiman & Hartmann, *Women, Work and Wages: Equal Pay for Jobs of Equal Value* (1981), reprinted in *THE COMPARABLE WORTH ISSUE: A BNA SPECIAL REPORT* 120 (1981).

17. "It is well established that in the United States today women earn less than men . . . . Among year-round full-time workers, the annual earnings of white women in the 1970s averaged less than 60% of those of white men . . . . Such differential earnings patterns have existed for many decades." *Id.*

18. *Id.*

19. *See id.* at 121.

20. *Id.*

21. *Id.* The Academy had three explanations for this conclusion. First, when male and female jobs are compared and factors influencing job value and productivity are held constant, there remains an unexplained differential in pay between male and female employees. Second, the discriminatory wage practices of the past have been built into current wage structures and continue to affect these pay plans. Finally, at the level of the individual firm, evidence indicates that a sex-based wage disparity exists even among employees whose jobs have identical values in job evaluation plans. *Id.*

22. 29 U.S.C. § 206(d)(1) (1976). The Equal Pay Act of 1963, a part of the Fair Labor Standards Act, 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 at which 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

equalize the wages of men and women doing equal work.<sup>23</sup> The EPA mandate of equal pay is not triggered, however, unless the work done requires equal skill, effort, and responsibility and is performed under similar circumstances.<sup>24</sup> The judiciary has made it clear that the equal work requirement is satisfied if the female employee is doing work "substantially equal" to that of a higher-paid male employee.<sup>25</sup> Even when the equal work barrier is surmounted, the EPA recognizes four affirmative defenses that employers may assert to escape liability.<sup>26</sup> Despite its stringent equal work standard and four affirmative defenses, the EPA has enabled many women to challenge sex-based wage discrimination. In the 1980 fiscal year, the EEOC distributed over \$3.2 million to female victims of wage discrimination under the EPA.<sup>27</sup> To the extent that working women are occupationally

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responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quality or quantity of production; or (iv) a differential based on any other factor other than sex: *Provided*, that an employer who is paying a wage 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.

The EPA originally was administered by the Wage and Hour Division of the Labor Department. In July 1979, these responsibilities were transferred to the EEOC. *See* 43 Fed. Reg. 19,807 (1978). "The . . . [EEOC] adopted the Labor Department's investigative and enforcement procedures and later issued procedural regulations with no substantive changes." 1 A. LARSON, EMPLOYMENT DISCRIMINATION 7-1 (1981).

23. "[W]e can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the same job under the same working conditions that they will receive the same pay." 109 Cong. Rec. 9196 (1963) (statement of Rep. Frelinghuysen). *See also id.* at 9197 (statement of Rep. Goodell).

24. *See* note 22 *supra*.

25. "Congress in prescribing 'equal work' did not require that the jobs be identical, but only that they must be substantially equal. Any other interpretation would destroy the remedial purpose of the Act." *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970). "While the standard of equality is clearly higher than mere comparability yet lower than absolute identity, there remains an area of equality under the Act the metes and bounds of which are still indefinite." *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-39 (5th Cir. 1973). Since at least 80% of working women are doing traditional women's work, the equal work requirement of the EPA is a significant burden. *See* notes 11 & 13 *supra*.

26. Unequal pay for equal work does not violate the EPA if it results from a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex. *See* note 22 *supra*.

27. *EEO Notes*, 428 FEP SUMMARY OF LATEST DEVELOPMENTS 5 (1981). The EEOC first assumed responsibility for enforcement of the Equal Pay Act in 1980. During fiscal 1980, it "closed 1,614 individual EPA complaints that resulted

segregated, however, they are unable to meet the equal work standard and, consequently, remain outside the scope of the EPA's protection.<sup>28</sup>

Increasingly, these women are seeking relief under the provisions of the Civil Rights Act of 1964.<sup>29</sup> Title VII of the Civil Rights Act outlaws sex discrimination in hiring, firing, compensation, and in the terms, conditions, and privileges of employment.<sup>30</sup> The comparable worth controversy is an outgrowth of attempts by female plaintiffs to establish illegal sex discrimination in compensation under Title VII.<sup>31</sup>

### A. Defining "Comparable Worth"

There is no generally accepted definition of "comparable worth."<sup>32</sup> The difficulties arise because comparable worth litigants have failed to follow a common path and judicial opinions are tailored to the facts of each case. Scholarly commentators also have contributed to the definitional morass.<sup>33</sup> Although generalization is difficult, it is possible to divide the concept of comparable worth into three broad categories: comparable value, pure comparable worth, and comparable work.

In a comparable value claim, the plaintiff attempts to establish that two dissimilar jobs have comparable value to the employer and, therefore, deserve comparable wages. For example, in *Christensen v. Iowa*,<sup>34</sup> clerical workers at the University of Northern Iowa alleged that the University policy of paying physical plant workers, who were predominantly men, more than clerical workers, who were all women, was unlawful sex-based wage discrimination

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in benefits of \$1.9 million, and resolved 27 enforcement cases that involved \$1.3 million in benefits." *Id.* The number of complaints brought under the EPA belies the increasingly popular notion that sex discrimination in employment is a myth. For a discussion of this position, see Gilder, *The Myths of Racial and Sexual Discrimination*, 32 NAT'L REV. 1381, 1387 (1980) ("It is the greater aggressiveness of men, biologically determined but statistically incalculable, that accounts for much of their earnings superiority.").

28. See notes 22-25 and accompanying text *supra*.

29. See, e.g., *Molthan v. Temple Univ.*, 442 F. Supp. 448 (E.D. Pa. 1977).

30. For the text of Title VII's prohibition of sex discrimination, see note 14 *supra*.

31. See generally note 14 *supra*.

32. See *Pay Disparities and Comparable Worth*, 1980 LAB. REL. Y.B. 158, 158-60.

33. See Comment, *The Comparable Worth Theory: A New Approach*, 32 BAYLOR L. REV. 629, 629-31 (1980); Comment, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 658 (1981) (comparable work is "work that is of equal value or importance to the employer."). Former EEOC Vice Chair Daniel E. Leach went so far as to characterize comparable worth as "a misnomer . . . a euphemism. I think basically it's been used by people to exploit this issue." Interview with Daniel E. Leach, reprinted in THE COMPARABLE WORTH ISSUE: A BNA SPECIAL REPORT 53 (1981).

34. 563 F.2d 353 (8th Cir. 1977).



under Title VII.<sup>35</sup> The University had instituted a job evaluation system in which each job was to be compensated on the basis of its objective worth to the University. Clerical workers and physical plant workers were deemed to be of equal value and placed in the same labor grade. When the University increased the starting pay for physical plant employees in order to raise their wages to the level of the local job market, the clerical workers alleged discrimination and filed suit under Title VII.<sup>36</sup>

A more abstract theory that comes under the generic heading of comparable worth is pure comparable worth.<sup>37</sup> Under this theory,<sup>38</sup> when a female plaintiff establishes that her job is performed primarily by women and that the job's wages are low, "an inference of wage discrimination sufficient to constitute a prima facie case"<sup>39</sup> is drawn. Proponents of a pure comparable worth approach argue that the community wage rate reflects stereotypical judgments of the value of work done by men and the value of work done by women. Existing job evaluation plans, they say, are equally infected with this prejudice. One commentator has noted:

[W]hen the job evaluation-community wage system is used to set wages in jobs which are sex-segregated, discrimination has more probably than not been a negative influence on the value of those jobs. The lower wage rate determination follows directly from the fact that the jobs in question are substantially segregated by . . . sex.<sup>40</sup>

This theory has incited intense criticism.<sup>41</sup> If the pure comparable worth

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35. *Id.* at 354. ("Appellants . . . commenced this action under Title VII . . . contending that UNI's practice of paying clerical workers . . . less than the amount it pays physical plant workers . . . for jobs of equal value to the University constitutes illegal sex discrimination in compensation.'").

36. Although the plaintiffs in *Christensen* were denied relief when the court of appeals found that their claim was beyond the scope of Title VII, *id.* at 356, there are signs that comparable value claims may be recognized in the future. *See* notes 65-87 & 116-20 and accompanying text *infra*.

37. The adjective "pure" is used because although the plaintiff alleges under-compensation relative to his job's value, there is no attempt to establish this under-valuation through a comparison with other, higher paying positions.

38. This theory received a degree of notoriety after the publication of a controversial article by Ruth G. Blumrosen, a former consultant to the EEOC. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 399, 401 (1979) ("It is the thesis of this article that job segregation and wage discrimination are not separate problems, but rather are intimately related. Wherever there is job segregation, the same forces which determine that certain jobs or job categories will be reserved for women or minorities also and simultaneously determine that the economic value of those jobs is less than if they were 'white' or 'male' jobs.'").

39. *Id.* at 459.

40. *Id.*

41. *E.g.*, Spelfogel, *supra* note 1, at 31 ("[I]f this new doctrine finds accep-

theory is accepted, an employer could be held liable for sex discrimination in compensation without any showing that he discriminated between his employees. Pure comparable worth, moreover, might result in the disruption of large industries that employ predominantly women. No court has yet recognized pure comparable worth, and there is no sign that judicial approval will soon be forthcoming.<sup>42</sup>

The third type of comparable worth claim is based on comparable work. A comparable work claim involves comparing jobs that are not identical but are similar enough to be classified together.<sup>43</sup> It focuses on the nature of the work, not its value to the employer. All wage discrimination suits not based on equal work involve analyzing the wages of different jobs for evidence of sex discrimination. The less comparable the jobs, the more reluctant courts have been to accept a difference in wages as evidence of discrimination.<sup>44</sup> A comparable work claim is less susceptible to this problem than a comparable value claim because the jobs compared are from the same occupational group. Because the theory of pure comparable worth has garnered so little support, the remainder of this Comment will explore comparable value and comparable work claims.

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tance, it would cause the end or major modification of nearly every wage and compensation plan and every job classification system in the country, supersede every union contract, and destroy collective bargaining as we know it.”).

42. In *Oaks v. City of Fairhope*, 515 F. Supp. 1004 (S.D. Ala. 1981), the city was sued by its female librarian who alleged that she should receive higher wages than the heads of other city departments. No evidence was introduced showing that the work involved was comparable or had comparable value to the city. The district court disposed of the claim in the following manner: “Even if this court were to adopt a ‘comparable worth’ approach, however, the undisputed facts in this case would not permit *Oaks* to prevail. This court cannot conclude that the librarian’s position is comparable to that of city department heads who oversee the provision of essential services to the populace of Fairhope. The services provided by the librarian, no matter how desirable, are not essential to the daily life of the City as are the operations of the police and the departments that provide electricity, water, street maintenance and sewage treatment.” *Id.* at 1040-41.

43. See *Current Issues in Labor Relations—Comparable Worth*, 1980 LAB. REL. Y.B. 150, 153-54.

44. A number of courts have been very disturbed by the prospect of having to compare two completely different jobs in an attempt to discover sex-based wage discrimination. “I asked, and I was very sincere in my request, that some expert explain to me what one does or the Court is supposed to do when confronted with the impossible problem of trying to determine . . . relative worth . . .” *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. (BNA) 906, 909 (D.C. Colo. 1978). “The plaintiffs here say they want their pay to be compared with other occupations. Of course they do. If that were done, it would give them more pay. But I can find nothing in the law that requires that. It would be nice for the plaintiffs. It would be completely disruptive of our way of life . . .” *Id.* This objection does not apply as forcefully if the claim is based on comparable work.

B. *The Bennett Amendment*

The Bennett Amendment to Title VII of the 1964 Civil Rights Act provides that it is not unlawful "for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation . . . to be paid to employees of such employer if such differentiation is authorized by the provisions of . . . [the Equal Pay Act]."<sup>45</sup> This language is susceptible to different interpretations. A number of courts have found that it forecloses sex-based wage discrimination claims under Title VII unless the EPA's equal work standard is satisfied.<sup>46</sup> The contrary interpretation is that the Bennett Amendment merely authorizes the use of the EPA's four affirmative defenses<sup>47</sup> in any wage discrimination suit based on Title VII.<sup>48</sup> In June 1981, the United States Supreme Court entered the fray and, by a narrow margin, accepted the latter view in *County of Washington v. Gunther*.<sup>49</sup>

*Gunther* involved guards at a sex-segregated county jail. Oregon law required that female inmates be guarded only by women. The male section of the jail employed only male guards. The women contended that they received lower wages than their male counterparts as a result of the county's policy of intentional sex discrimination.<sup>50</sup> To buttress this allegation, the female guards charged that the county set the pay scale for female guards, but not for male guards, at a level lower than warranted by its own survey of outside markets and the worth of the jobs.<sup>51</sup> The district court dismissed the claim, holding as a matter of law that the Bennett Amendment required satisfaction of the EPA equal work standard in every Title VII sex-based wage discrimination claim.<sup>52</sup> After sifting through the legislative history of the Bennett Amendment, the court of appeals reversed.<sup>53</sup> The Supreme Court granted certiorari and affirmed the court of appeals decision.<sup>54</sup>

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45. 42 U.S.C. § 2000e-2(h) (1976).

46. See *Lemons v. City & County of Denver*, 620 F.2d 228, 229-30 (10th Cir.), cert. denied, 449 U.S. 888 (1980) ("The Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way as it applies in the Equal Pay Act."). See also *Molthan v. Temple Univ.*, 442 F. Supp. 448 (E.D. Pa. 1977).

47. For a list of the EPA's four affirmative defenses, see note 26 *supra*.

48. See *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1099 (3rd Cir.), cert. denied, 449 U.S. 1009 (1980) (the "Bennett Amendment merely incorporates into Title VII the four exceptions outlined in the Equal Pay Act."). See also *Gerlach v. Michigan Bell Telephone Co.*, 501 F. Supp. 1300 (E.D. Mich. 1980).

49. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

50. *Id.* at 164.

51. *Id.* at 165.

52. *Gunther v. County of Washington*, 20 Fair Empl. Prac. Cas. (BNA) 788, 791 n.7 (D.C. Ore. 1976).

53. *Gunther v. County of Washington*, 623 F.2d 1303, 1313-14 (9th Cir. 1979).

54. 452 U.S. at 166.

At the outset, the Court stressed the limits of its decision. "We emphasize . . . the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of 'comparable worth' . . ."<sup>55</sup> The Court distinguished *Gunther* from a comparable worth claim by noting that the "respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination."<sup>56</sup> Nonetheless, *Gunther* is certain to affect comparable worth litigation. With its holding that "claims of discriminatory undercompensation are not barred by . . . [the Bennett Amendment] merely because respondents do not perform work equal to that of male . . . [employees],"<sup>57</sup> the Court effectively separated the EPA from the Bennett Amendment to Title VII.<sup>58</sup>

### C. Title VII

Title VII expressly forbids sex discrimination in compensation.<sup>59</sup> Nonetheless, it has been argued that even apart from the Bennett Amendment, a lawsuit based on comparable worth is not within the scope of Title VII.<sup>60</sup> Various theories have been advanced to support this view. It has been pointed out, for example, that the Civil Rights Act was enacted to guarantee the rights of disenfranchised blacks.<sup>61</sup> There is no evidence that Congress intended to countenance anything remotely like comparable worth.<sup>62</sup> There is evidence to the contrary that Congress intended to define the scope of wage discrimination claims narrowly. In enacting the EPA, Congress expressly rejected comparable worth in favor of an equal work standard.<sup>63</sup> Finally, Title VII was directed at equal employment opportunity,<sup>64</sup> which comparable worth plaintiffs do not allege has been denied.

Each of these arguments has been disputed. Although the Supreme

55. *Id.*

56. *Id.* Intentional sex discrimination is prohibited by the 1964 Civil Rights Act. See note 14 *supra*. It appears that the judiciary is more comfortable providing relief if the claim is considered in this context. See *Wilkins v. University of Houston*, 654 F.2d 388, 405 n.26 (5th Cir. 1981). It is, as yet, unclear at what point a comparable worth claim may be successfully characterized as intentional sex discrimination. If female plaintiffs are able to prove that their job value to the employer is equal to that of higher paid male employees, the spectre of intentional sex discrimination rears its head. In this sense, overt judicial recognition of claims based on comparable worth may become less important.

57. 452 U.S. at 181.

58. *Id.*

59. See note 14 *supra*.

60. See generally Nelson, Opton & Wilson, *Wage Discrimination and Title VII in the 1980s: The Case Against Comparable Worth*, 6 EMPL. REL. L.J. 380 (1981); Spelfogel, *supra* note 1, at 31.

61. Nelson, Opton & Wilson, *supra* note 6, at 295.

62. *Id.* at 296.

63. *Id.* at 265-67.

64. *Id.* at 295.

Court in *Gunther* reserved opinion on comparable worth, it noted that the federal courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."<sup>65</sup> The Court also referred to its earlier decision in *City of Los Angeles Department of Water and Power v. Manhart*,<sup>66</sup> in which it explained the breadth of Title VII's protection: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>67</sup> While this statement is dicta, it seems broad enough to encompass a lawsuit based on comparable worth. The latitude with which the courts previously have interpreted Title VII's broad mandate also seems to favor extending coverage to comparable worth claims.<sup>68</sup> The United States Court of Appeals for the Sixth Circuit, for example, recently acknowledged that the ultimate goal of Title VII is to eliminate not only racial discrimination in employment but also sex discrimination.<sup>69</sup> The Equal Employment Opportunity Act, a 1972 amendment to Title VII, emphasizes that the Civil Rights Act requires the eradication of all discrimination based on sex.<sup>70</sup> Much can be said for construing the statute in a manner that is consistent with this purpose.

The lack of express Congressional approval of comparable worth claims in the legislative history of the Civil Rights Act is not dispositive. Judicial interpretation of Title VII's broad language often has reflected the possibility of change.<sup>71</sup> The explicit legislative history of the

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65. 452 U.S. at 178.

66. 435 U.S. 702 (1978).

67. *Id.* at 707 n.13 (dictum).

68. Title VII "prohibits all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

69. *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1256 (6th Cir. 1981).

70. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified in scattered sections of 42 U.S.C.). The legislative history of the Act notes that:

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible, and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2140.

71. There is no indication in the legislative history of Title VII that sexual harassment, for example, was intended to be actionable under the Civil Rights Act. Indeed, for the first 12 years the law was in force, sexual harassment was not considered among the varieties of discrimination prohibited under Title VII. *See, e.g., Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974). In 1976,

EPA,<sup>72</sup> moreover, is irrelevant to claims brought under the 1964 Civil Rights Act. As *Gunther* made clear, the EPA does not limit recovery under Title VII. The Court addressed the harsh consequences of such a restrictive reading of Title VII:

In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress . . . . Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination.<sup>73</sup>

The argument that Title VII is primarily aimed at ensuring equal employment opportunity is little more than a truism. The language of the Act expressly forbids sex discrimination in compensation.<sup>74</sup> Its guarantee of equal employment opportunity does not weaken, undermine, or remove the wage discrimination provision of the Act. "With the Civil Rights Act of 1963, Congress released a strong and forceful weapon against employment discrimination."<sup>75</sup> It is spurious to argue that the acknowledged goal of Title VII equal employment opportunity dilutes the wage discrimination language of the Act.

One of the strongest arguments against allowing Title VII claims based on comparable worth is the alleged economic dislocation that would ensue.<sup>76</sup> Comparable worth, it has been said, is a "storm of cyclonic proportions which, if left unchecked, may soon rip through the American economy costing untold millions of dollars to business and labor."<sup>77</sup> The economic consequences have been argued frequently and forcefully by opponents of comparable worth. A number of federal courts have accepted this logic<sup>78</sup>

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the judicial tide began to turn and today there is universal support for such a claim based upon Title VII. See 1 A. LARSON, EMPLOYMENT DISCRIMINATION 8-97 to 8-117 (1981).

72. The legislative history of the EPA is discussed in Justice Rehnquist's dissenting opinion in *Gunther*. See 452 U.S. at 184-88 (Rehnquist, J., dissenting).

73. *Id.* at 178-79.

74. See note 14 *supra*.

75. *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1107 (3rd Cir.), *cert. denied*, 449 U.S. 1009 (1980). The court then paraphrased the Supreme Court's language in *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979), to the effect that it would be ironic if the passage of the EPA, which was designed to remedy years of sex discrimination, led to a contraction of the rights guaranteed by Title VII. 631 F.2d at 1107.

76. See Nelson, Opton & Wilson, *supra* note 6, at 290-97; note 41 *supra*.

77. Spelfogel, *supra* note 1, at 30.

78. See *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) ("Appellant's

and ruled that Title VII was not designed to restructure the entire economy of the United States.<sup>79</sup> On the other hand, it can be argued that this logic misconstrues the goals of the Civil Rights Act and the practical scope of comparable worth. The Civil Rights Act of 1964 was enacted to eliminate discrimination.<sup>80</sup> There is no language in the Act immunizing discriminatory behavior which is so deeply ingrained that there will be an economic effect if it is discovered and eradicated. While the successful integration of women into the traditional confines of male employment may provide its own increase in efficiency, economic stability was not then and is not now the primary goal of Title VII.<sup>81</sup> It is also unlikely that comparable worth claims, if entertained, will have the calamitous economic effect that opponents predict. The possibility of pure comparable worth suits is not seriously entertained.<sup>82</sup> Comparable value and comparable work are localized complaints. Both focus on comparisons within a single employer. The difficulty of proof, the array of recognized defenses,<sup>83</sup> and the irrelevance of broad societal comparisons belie any prospect of vast economic upheaval.

In *Gunther*, the Supreme Court expressly held that equal work is not required by the Bennett Amendment but declined to delineate the precise contours of comparable worth challenges permissible under Title VII.<sup>84</sup> In a real sense, *Gunther* skirted the issue. Not only did it involve two groups of employees doing comparable work,<sup>85</sup> the county's own wage study provided

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theory ignores economic realities . . . . We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand . . . .").

79. *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. (BNA) 906, 909 (D.C. Colo. 1978).

80. The legislative history of the Civil Rights Act of 1964 indicates that Congress was primarily concerned with protecting the rights of black Americans. See S. Rep. No. 872, 88th Cong., 2d Sess. 10, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2355, 2365. That the Act applies with equal force to the rights of women, however, was made clear when it was amended in 1972. "This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. No. 238, 92d Cong., 1st Sess. 5, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2141.

81. For a discussion of this issue, see Comment, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 671-72 (1981).

82. See notes 37-42 and accompanying text *supra*.

83. See notes 26 & 47-49 and accompanying text *supra*.

84. 452 U.S. at 181. "The Court's interpretation of the Bennett Amendment . . . leaves the door open to 'comparable worth' claims since the 'equal work' standard of the Equal Pay Act will not be required in a Title VII action." 1 A. LARSON, EMPLOYMENT DISCRIMINATION 7-127 (1981).

85. The EPA's equal work standard was not satisfied in *Gunther* because the district court determined that "male guards supervised more than 10 times as many

such damning evidence that the court could characterize the case as one involving intentional sex discrimination. To the extent that suits based on comparable worth lack these elements, it is unclear whether Title VII will grant relief. Litigants will undoubtedly use *Gunther*'s broad dicta concerning Title VII<sup>86</sup> to urge recognition of comparable value as well as comparable work claims.<sup>87</sup>

#### IV. PROVING A COMPARABLE WORTH CLAIM

While *Gunther* is technically a comparable work case, it contains hints for both comparable work and comparable value claimants. In *Gunther*, the defendants presented the standard argument for denying relief to female plaintiffs in comparable worth litigation: if successful, "Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men."<sup>88</sup> Such a comparison would place "the pay structure of virtually every employer and the entire economy . . . at risk and subject to scrutiny by the federal courts."<sup>89</sup> The plaintiffs were able to deflect this argument with the proof offered to support their claim: "[R]espondents' suit does not require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates."<sup>90</sup> A plaintiff seeking to come under the *Gunther* umbrella must show two things: that her job is comparable to those of higher paid male employees and that the wage disparity results from sex discrimination. Comparable value plaintiffs who are unable to prove comparable work must place more emphasis on the second half of this equation.

The most valuable tool for proving sex discrimination in compensation is, perhaps, the employer's own job evaluation plan. In *Gunther*, the Court readily acknowledged the importance of the county's plan to the plaintiff's case.<sup>91</sup> In a comparable value case, the offer of such a plan might well be

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prisoners per guard as did the female guards, and that the females devoted much of their time to less-valuable clerical duties." 452 U.S. at 165.

86. See notes 65-67 & 73 and accompanying text *supra*.

87. *Christensen v. Iowa* may be such a case. See notes 34-36 and accompanying text *supra*. The concurring opinion in *Christensen* indicated that the University policy of providing higher starting wages for beginning physical plant workers but not for beginning clerical workers "established a prima facie case of sex discrimination unless . . . the 'Bennett Amendment' appli[ed]." 563 F.2d at 357 (Miller, J., concurring). The concurring judge found that the Bennett Amendment did apply and precluded the suit. In *Gunther*, the Supreme Court disagreed. 452 U.S. at 181.

88. 452 U.S. at 180 (quoting Brief for Petitioners at 101).

89. *Id.* (quoting Brief for Petitioners at 99-100).

90. *Id.* at 181.

91. *Id.* at 180-81.



vital. Fortunately for potential Title VII litigants, job evaluation plans are widely used in the public and private sectors.<sup>92</sup>

There are different types of job evaluations, but each shares the same basic methodology. Initially, the jobs in question are meticulously described. This step may involve a number of different procedures: job questionnaires, interviews with the workers, or simple observation. Each job is then broken down with respect to its duties, responsibilities, working conditions, degree of difficulty, and any other relevant factors. The jobs then are ranked in terms of value to the organization. Finally, the completed job plan is used to help set the wages of the organization's employees.

Job evaluation plans can be used in two different ways by comparable worth litigants. If female employees, unlike their male counterparts, are not compensated in accordance with the job evaluation plan, the plan can be offered as evidence of intentional sex discrimination.<sup>93</sup> If female employees

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92. D. TREIMAN, JOB EVALUATION: AN ANALYTIC REVIEW—INTERIM REPORT TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1 (1979). Two points about job evaluation are worth repeating. First, it is work that is evaluated, not workers. Second, it is current work rather than work done in the past that is studied. Hand, Classification Memo to the Seattle Personnel Department, at 1 (Sept. 2, 1981). There are four basic types of job evaluation systems. *Ranking* is the simplest. All jobs are ranked in order of value to the employer. *Classification* entails a predetermined hierarchical structure of categories determined by various factors believed to be required by the job. The U.S. Civil Service system is an example of classification. *Factor Comparison* systems work as follows: A small number of factors are chosen on which to base each job evaluation. A set of benchmark jobs are then selected. These are jobs the value of which is not disputed. The benchmark jobs are then ranked according to their total worth and the remaining jobs are structured around them. *Point Methods* also involve a set of compensable factors. For each factor, a scale is devised representing different levels of worth. Each level is assigned a number of points. The individual jobs are then rated as to every factor separately, the point totals are added up, and the hierarchy created is used to schedule wages. *Id.* at 2-4.

93. Such job evaluation plan evidence might have been extremely useful, for example, in *Christensen*. See notes 34-36 and accompanying text *supra*. See also *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981). *Wilkins* was a class action suit brought by female employees of the University of Houston who alleged that the University engaged in sex-based wage discrimination within the academic division of the professional and administrative staff. The plaintiffs introduced no evidence that within the academic division women were being paid less than men for equal work. Rather, the plaintiffs established a prima facie case of sex discrimination within the University's pay plan. In the plan, all professional administrative and staff positions were objectively analyzed and placed in one of nine salary levels. Within each level, there were minimum and maximum wage figures that employees at that level could receive. The academic division of the professional and administrative staff employed 68 people—35 of whom were women. Twenty-one academic division employees were paid less than the minimum wage prescribed for the level in which their job fell. Of these 21, 18 were women. Statistical analysis:

are paid according to the plan, the plan itself can be attacked as discriminatory.<sup>94</sup>

Despite the prevalence of job evaluation plans, questions remain about their use in Title VII litigation. It is unclear, for example, whether job evaluations conducted on behalf of a comparable worth plaintiff are evidence of a discriminatory compensation policy on the part of the employer. One federal district court has indicated that such plans are admissible evidence.<sup>95</sup> This court also concluded that intentional wage discrimination can be inferred from the employer's failure to undertake "any evaluation which would have indicated the value of the jobs held by either men or women."<sup>96</sup>

One circuit court of appeals has ruled that in the course of an investigation, the EEOC can obtain, via subpoena if necessary, information concerning the sex, salary levels, experience, and job responsibilities of the employees of the business being investigated.<sup>97</sup> The Supreme Court has held that an individual who files a job discrimination claim with EEOC is entitled to disclosure of the information obtained by the EEOC during its investigation.<sup>98</sup> As part of the duty to bargain in good faith, an employer must disclose relevant employment information to its employees' bargain-

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indicated that this pay differential was unlikely to be fortuitous. Further, several of the women paid below the minimum rate set for their job classification were subsequently reclassified to a lower job level. *Wilkins* is important for several reasons. It recognizes that the EPA's equal work standard is not applicable in a Title VII wage discrimination suit. It also allows a plaintiff to use comparison between wages paid to male and female employees within the same salary level as evidence of discrimination. Finally, *Wilkins* implies that statistical evidence culled from a comparison of wages in different job levels can be used in a Title VII sex-based wage discrimination suit. In this sense, it goes beyond both *Gunther* and the theory of comparable worth.

94. The less comparable the jobs, however, the greater the plaintiff's burden will be. See note 44 and accompanying text *supra*. But see *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094 (3rd Cir.), *cert. denied*, 449 U.S. 1009 (1980). The Westinghouse wage scale was based on a uniform key sheet with various pay grades and levels. These grades were ostensibly sex-neutral. The female plaintiffs brought the Title VII claim because they felt the compensation plan was based on Westinghouse's 1930 wage manual, which stated that men were compensated according to a separate, higher wage scale. The court held that the plaintiffs' charges, if proven, would be grounds for relief under Title VII of the Civil Rights Act of 1964. *Id.* at 1097.

95. *Taylor v. Charley Bros.*, 25 Fair Empl. Prac. Cas. (BNA) 602, 612 (W.D. Pa. 1981) ("However, plaintiffs' expert employed a job evaluation plan which has been more widely used and tested . . . than defendants' expert's job evaluation plan.").

96. *Id.* at 614.

97. *EEOC v. University of Pittsburg*, 643 F.2d 983, 985 (3d Cir.), *cert. denied*, 102 S. Ct. 362 (1981).

98. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981).

ing representative.<sup>99</sup> Much of this information may be useful in discovering sex-based wage discrimination.<sup>100</sup> There is as yet no indication that employees can force their employer to disclose personnel information or conduct a job evaluation. In spite of the uncertainty that surrounds the use of these plans, future Title VII litigation will rely increasingly on them as evidence of sex-based wage discrimination.<sup>101</sup>

## V. DEFENDING A COMPARABLE WORTH CLAIM

Since *Gunther* incorporated the EPA's four affirmative defenses into Title VII sex-based wage discrimination claims,<sup>102</sup> it is clear that employers may lawfully differentiate between the sexes with regard to compensation if such differentiation is based on seniority, merit, or quality and quantity of production. The fourth affirmative defense, however, presents some interesting possibilities. It permits a wage disparity if the differential is "based on any factors other than sex."<sup>103</sup> The breadth of this language raises significant questions. If a female plaintiff establishes that her job and a higher paid male job have equal value to the employer, for example, can the employer assert that the higher wage merely reflects the higher market rate for certain employees? If the male employee's higher wage is deemed necessary to retain his services, there is arguably no sex discrimination unless the female employee is not being compensated in accordance with her market value. A market defense may carry great weight with courts already unenthusiastic about the concept of comparable worth.<sup>104</sup> In *Gunther*, the Court reserved opinion on this question.<sup>105</sup> One lower federal court, however, has interpreted *Gunther* as repudiating the market rate as a justification for a sex-based

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99. The duty to bargain in good faith is contained in the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), (d) (1976).

100. See generally R. GORMAN, BASIC TEXT ON LABOR LAW 409-15 (1976).

101. There are several other factors that may influence the course of a comparable worth claim. The employer's current methods of hiring, assigning jobs, and issuing transfers or promotions influence a court's conception of the case. Any history of past discrimination by the employer also may play a significant role.

102. 452 U.S. at 167-68.

103. See note 22 *supra*.

104. The *Christensen* court, for example, noted:

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

563 F.2d at 356.

105. "[W]e do not decide in this case how sex-based wage discrimination litiga-

wage disparity.<sup>106</sup> This issue is important because the procedural structure of Title VII litigation has significant impact on the success of such claims.<sup>107</sup>

In the long run, the most effective way for employers to insulate themselves from Title VII liability is to eliminate job segregation by sex.<sup>108</sup> The success of such efforts will depend in part on the willingness of male and female workers to move into areas traditionally considered the domain of the other sex. Nonetheless, through targeted hiring policies, careful use of promotions and transfers, and aggressive training programs, ghettoization of the American working woman can be reduced significantly.<sup>109</sup> Complete job integration is, however, a long-term solution. In the meantime, employers can take a number of steps to provide more immediate protection.

First, the business community can analyze existing job evaluation and compensation plans to determine whether they are infected with intentional sex discrimination.<sup>110</sup> If the factors used in gauging job value<sup>111</sup> are discriminatory or deviations from an internal schedule based on comparable value cannot be satisfactorily explained, voluntary adjustments can be made.<sup>112</sup> Formal statements of an employer's willingness to compensate on the basis of job value can become part of an employer's personnel portfolio.<sup>113</sup> Finally, businesses can begin to employ males in areas traditionally reserv-

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tion under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act . . . ." 452 U.S. at 171.

106. *Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148, 161 (E.D. Cal. 1981) ("It appears that the Supreme Court has limited the application of the fourth affirmative defense to a 'bona fide job rating system', . . . and thus where the jobs are 'rated' the same, unequal pay cannot be justified on the basis of 'other factors other than sex'.").

107. See generally *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

108. See *Conference Focus on Comparable Worth*, 397 FEP SUMMARY OF LATEST DEVELOPMENTS 3 (1980); *Sex-based Wage Discrimination: Combatting the Claim*, 425 FEP SUMMARY OF LATEST DEVELOPMENTS 3 (1981); *Supervisors' Guide to EEO Issues*, 415 FEP SUMMARY OF LATEST DEVELOPMENTS 6 (1981).

109. See 425 FEP SUMMARY OF LATEST DEVELOPMENTS, *supra* note 108, at 3. This commentator argues that action taken to bring "women into nontraditional positions will cut off . . . back pay liability for an employer whether or not the job offer is accepted." *Id.*

110. *Id.*

111. Some of the traditional factors associated with job value are scope of responsibility, difficulty of work, degree of knowledge required, level of social skills required, and relevant work environment. See, e.g., *Primary Standard*, City of Seattle Personnel Department (1980).

112. See *ABA Convention Reviews the Supreme Court's Gunther Decision*, 428 FEP SUMMARY OF LATEST DEVELOPMENTS 6 (1981); 415 FEP SUMMARY OF LATEST DEVELOPMENTS, *supra* note 108, at 3.

113. See 425 FEP SUMMARY OF LATEST DEVELOPMENTS, *supra* note 108, at 3.

ed for women, undercutting any perception that the employer channels new employees into particular areas on the basis of gender.<sup>114</sup>

## VI. THE FUTURE OF COMPARABLE WORTH

The comparable worth concept is currently in limbo. *Gunther* involved female plaintiffs doing work comparable to that done by male counterparts. The county's wage plan provided evidence that the county compensated the male guards, but not the female guards, at a level warranted by market conditions and job value.<sup>115</sup> *Gunther* provides no impetus for arguing that occupational segregation and low wages alone are sufficient indicia of discrimination to allow recovery under Title VII. Pure comparable worth is still impractical and unlikely to receive judicial recognition.

The future of comparable worth suits that attempt to prove organizational job value via job evaluation plans, on the other hand, remains promising. Several lawsuits challenging sex discrimination in compensation currently are pending before federal courts. In 1979, the Connecticut State Employees Association (CSEA), which represents a portion of the state's clerical workers, sued in federal court on behalf of all female employees of the state government. The CSEA suit charged, among other things, that the state's job evaluation system illegally accorded women's jobs lower values.<sup>116</sup> The American Federation of State, County, and Municipal Employees (AFSCME) sought to intervene in the suit in 1981, alleging in part that the state compensated women at lower rates than men doing work of comparable value.<sup>117</sup> AFSCME also claimed that Connecticut's system of job classification was patently discriminatory. To support this allegation, the organization cited a study commissioned by the state legislature which showed that male employees earned from eight to eighteen percent more

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114. Employers may take a different approach altogether. To make job comparisons difficult, employers have been advised to use different job evaluation systems for different jobs. See 428 FEP SUMMARY OF LATEST DEVELOPMENTS, *supra* note 112, at 6. Use of plans that evaluate jobs in terms of point totals also have been discouraged. *Id.* It is possible that use of job evaluation plans will decline in light of *Gunther's* emphasis that such plans may be used as evidence of wage discrimination. In light of the organizational benefits obtained from these plans, however, it is unlikely they will be scrapped. Job evaluation plans serve a number of objectives: wage and salary equity, consistency and uniformity in operation, better promotion and placement policies, standardization of wages and salaries, better morale, better control over wage and salary costs, improved organization, curtailed employee grievances, better personnel administration, and better return on salary investment. E. LANHAM, JOB EVALUATION 381 (1955). Job evaluation plans also provide a framework for a review of wages and salaries as well as a basis for negotiation with labor unions. *Id.* at 5.

115. See note 51 and accompanying text *supra*.

116. THE COMPARABLE WORTH ISSUE: A BNA SPECIAL REPORT 34 (1981).

117. *Id.*

than women employed in jobs of comparable value.<sup>118</sup> In 1981, AFSCME filed a series of complaints with the EEOC charging that the State of Washington was "deliberately maintaining sex-segregated job classifications in which female employees are compensated less than male employees for work of equal value to the employer."<sup>119</sup> These suits will play a large part in further defining the contours of sex-based wage discrimination claims recognized under Title VII.

The EEOC, which has taken an active part in comparable worth litigation, will continue its efforts to find proper cases for the courts.<sup>120</sup> In the wake of *Gunther*, the EEOC sent a memorandum to its field offices advising that women involved in wage discrimination litigation should seek relief under both the EPA and Title VII.<sup>121</sup> EEOC staffers were instructed to inform the complainant of the relative coverage of the two statutes and the advantages of filing under both.<sup>122</sup> Investigators were also asked to assemble information on employer compensation structures.<sup>123</sup> Much of this information could be used to establish the relative worth of the jobs involved, and therefore may have an appreciable effect on the volume of future comparable worth litigation.

During the Carter administration, the Office of Federal Contract Compliance Programs (OFCCP) clearly supported the notion of comparable worth.<sup>124</sup> In 1979, the OFCCP sought to amend its sex discrimination guidelines so that the compensation practices of employers doing business with the federal government could be examined for sex-based wage discrimination.<sup>125</sup> This revision was halted by President Reagan soon after

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118. *Id.*

119. *Id.* at 32.

120. *Id.* at 15-16.

121. *Advice from EEOC*, 430 FEP SUMMARY OF LATEST DEVELOPMENTS 1 (1981).

122. *Id.*

123. Some of the pertinent information included the following: a breakdown of job classifications by sex, written detailed job descriptions, wage schedules by sex, history of wage schedules, information on job evaluation systems, and copies of any collective bargaining agreement that was a basis of a sex-based wage differential. *Id.*

124. *See Contract Compliance Enforcement Review*, 409 FEP SUMMARY OF LATEST DEVELOPMENTS 4 (1980). *See also Investigation Guidelines for Discrimination Complaints*, 410 FEP SUMMARY OF LATEST DEVELOPMENTS 4 (1980); *Strategy to Meet OFCCP Enforcement Efforts*, 396 FEP SUMMARY OF LATEST DEVELOPMENTS 4 (1980).

125. The following language was to be added to the OFCCP's Sex Discrimination Guidelines:

Sec. 60-20.5 Discriminatory wages and placements.

(a) Wages . . .

While the more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar

he took office and has now been discarded. Although the status of the EEOC and the OFCCP as active participants in the comparable worth controversy is now in doubt, the machinery for such participation remains intact.

While the OFCCP and the EEOC can exert a measure of influence on the compensation practices of particular employers, labor unions are in the strongest position to address the issue of sex-based wage discrimination.<sup>126</sup> Women comprise twenty-seven percent of current union membership, and increasing this figure is one of organized labor's top priorities.<sup>127</sup> As this percentage rises, more attention will be paid to the rights of the working woman. Unions have a wealth of information pertaining to wage structure and job content. By participating in wage discrimination studies and helping document the existence of pay inequities, unions could provide significant support for individual comparable worth claimants. Unions can exert even greater influence by flexing their muscles on behalf of women during the collective bargaining process.<sup>128</sup> Although union support may not be unanimous, at least one major organization has publicly challenged "intentional discrimination in formulating classification of jobs and in setting the wages paid for these classifications."<sup>129</sup> More than one expert has

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working conditions, compensation practices with respect to any jobs where males or females are concentrated will be scrutinized closely to assure that sex has played no role in the setting of levels of pay.

126. See *Organizing Women*, 389 FEP SUMMARY OF LATEST DEVELOPMENTS 6 (1980).

127. See *Conference on Women and Labor Organization*, 1980 LAB. REL. Y.B. 242; *Union Organizing Campaigns and Women*, *id.* at 244.

128. See generally COALITION OF LABOR UNION WOMEN, EFFECTIVE CONTRACT LANGUAGE FOR UNION WOMEN 15-18 (1980).

129. Letter from Lane Kirkland, President of the AFL-CIO, to the Equal Employment Opportunity Commission (August 2, 1981), *reprinted in* THE COMPARABLE WORTH ISSUE: A BNA SPECIAL REPORT 128 (1981). At its 1979 constitutional convention, the AFL-CIO passed a resolution urging "its affiliates to adopt the concept of equal pay for work of comparable value in organizing and in negotiating collective agreements." See Policy Resolution Regarding Comparable Worth, adopted December 1979 by the Thirteenth Constitutional Convention AFL-CIO, *reprinted in* THE COMPARABLE WORTH ISSUE: A BNA SPECIAL REPORT 132 (1981). The convention approved this resolution, however, only after heated arguments among AFL-CIO staff members in preconvention meetings and among union presidents in the convention's resolution committee. *The New Pay Push For Women*, BUS. WEEK, Dec. 17, 1979, at 69. Indeed, no woman has ever been appointed to the AFL-CIO's 35 member Executive Council. Further, while 27% of the federation members are women, they hold only 5% of the union's policy making positions. See Hubbell, *The State of the Unions—For Women*, WORKING WOMAN, June 1980, at 62. It is unclear, therefore, how strongly the AFL-CIO will support comparable worth.

It is difficult to speculate on the rest of organized labor. Traditionally, the economic position of the woman worker has never been classified as a pressing concern. "Organized labor often has relegated the woman union members to second-

predicted that organized labor will play a more prominent role in the resolution of these issues,<sup>130</sup> especially in view of the probable effect of the Reagan administration on the EEOC and the OFCCP.<sup>131</sup>

The activities of women's rights groups have been stimulated by the Court's decision in *Gunther*. The National Association of Office Workers has served notice that it intends to investigate comparable worth in industries where significant numbers of men and women are employed in comparable jobs.<sup>132</sup> The banking and insurance industries have already been targeted.

State legislatures also have become involved in the issue of sex-based wage discrimination.<sup>133</sup> A significant number of states have enacted statutes mandating equal pay for comparable work or work of comparable character.<sup>134</sup> The procedural mechanics of these statutes vary, as do the sanctions imposed for violations. Litigation under these laws has been sparse, but state court challenges to wage discrimination may become a viable alternative if aggrieved plaintiffs are unable to obtain relief in federal court.

## VII. CONCLUSION

Comparable worth may be largely an illusory issue. Read narrowly, *Gunther* only authorized relief if the female plaintiff could prove she was the victim of intentional sex discrimination. To the extent that comparable worth plaintiffs can establish, through evidence such as job evaluation plans, that they are being undercompensated relative to male employees, they may obtain relief. In this sense, the controversy is really just a matter of how one is permitted to prove such a claim. Should the courts ever authorize recovery solely on the basis of job segregation and low wages, the focus will shift drastically. There is no indication, however, that any such departure is imminent.

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class membership, refused her admission to apprenticeship and job-upgrading programs and has kept her, through classification schemes, in low-paying, low-skill jobs." Hubbell, *supra*, at 67. Significant changes in these policies may await the time when women rise to power within the union hierarchy. For an exhaustive discussion of the role of women in United States labor unions, see P. FONER, *WOMEN AND THE AMERICAN LABOR FORCE* (1981).

130. See *Conference Focus on Comparable Worth*, 397 FEP SUMMARY OF LATEST DEVELOPMENTS 3,4 (1980).

131. See *Problems along the Potomac: EEOC Slowdown . . . OFCCP Cutbacks*, 436 FEP SUMMARY OF LATEST DEVELOPMENTS 5, 5-6 (1981).

132. Interview with Ellen Cassedy, Program Director for the National Association of Office Workers, reprinted in *THE COMPARABLE WORTH ISSUE: A BNA SPECIAL REPORT* 57 (1981).

133. A few state legislatures have ordered state personnel to conduct investigations into the comparable worth of state jobs. Washington and Nebraska are two such states.

134. See, e.g., ALASKA STAT. § 18.80.220 (1980); IDAHO CODE § 44-1702 (1977).



The furor surrounding comparable worth may prompt employers to re-evaluate and amend existing employment practices to ensure that all employees are receiving equal opportunities and fair wages. Any such behavior will benefit the working woman.

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