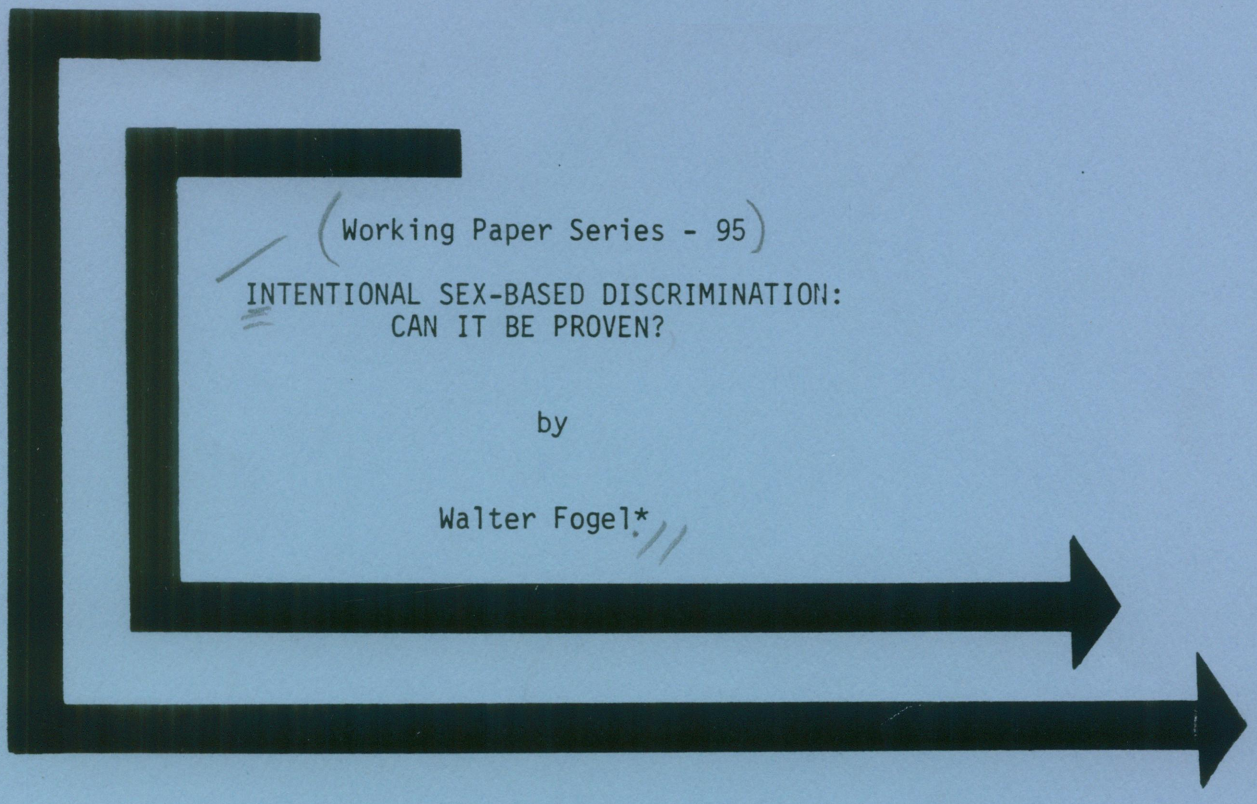

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INTENTIONAL SEX-BASED DISCRIMINATION: CAN IT BE PROVEN?

by

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Recent federal court decisions on sex-based pay discrimination claims under Title VII suggest that the chances of proving such claims are slight when they are brought on behalf of women whose jobs are only comparable, rather than equal, to those of men. Last year, both a federal trial court, in American Nurses Assn. v. State of Illinois,[1] and the ninth circuit, in AFSCME v. State of Washington,[2] ruled against claims by women that they were the victims of intentional wage discrimination when their employer refused to pay them in accord with the results of job evaluation studies. At least in AFSCME, the facts were such that, if they did not prove intentional pay discrimination against women, very few fact situations will be able to prove that claim.

The Supreme Court in its 1981 decision, County of Washington v. Gunther,[3] opened Title VII to sex-based pay claims that go beyond the allegations of substantially equal work that are authorized under the Equal Pay Act, to include claims that involve unequal (dissimilar) work of men and women. Rulings since Gunther, especially the two cited, suggest that the Title VII opening provided by the high court may turn out to be only an insignificant crack that provides no remedy for the vast sex differences in earnings that exist in the United States.

This article reviews recent "comparable worth" decisions of the federal courts, especially American Nurses and AFSCME, and assesses the current state of sex-based wage discrimination law. I conclude that women cannot look for significant pay gains from the law, but an alternative theory of proof of pay discrimination, if accepted by the courts, could provide a small amount of help.

Background

The Gunther decision and its departure from the prior law of sex-based wage claims for dissimilar work have been widely discussed.[4] Consequently, I will review those matters only as necessary for the examination of more current rulings.

In 1963, Congress passed the Equal Pay Act, prohibiting the payment to women of unequal pay for the performance of work equal to that done by men in the same establishment. Relevant to this discussion, the Equal Pay Act's threshold requirement of an equal work allegation also came to govern sex-based wage claims under Title VII of the Civil Rights Act, enacted one year later. This occurred because the "Bennett Amendment," an eleventh hour addition to Title VII in order to harmonize it with the Equal Pay Act, declared that sexual wage differences "authorized" by the Equal Pay Act were also lawful under Title VII; and the courts, nearly uniformly until 1979, held that sexual wage differences for unequal work were "authorized" by the Equal Pay Act and, thus, by virtue of the Bennett Amendment, were not violative of Title VII. In short, sex-based pay discrimination claims under Title VII, as well as the Equal Pay Act, had to prove equal work.

That rule was authoritatively overturned by the Supreme Court in County of Washington v. Gunther. The facts about the employer conduct in Gunther are not described in much detail in the decisions of the Supreme Court and lower courts. Apparently the two jobs involved, matron for female prisoners and guard for male prisoners, were not sex segregated, although all matrons were women and all but one of the guards were men. The employer conducted job evaluations of these positions and the evaluation point total for matrons came out to be 95 percent of the total for guards.[5] The employer

then conducted a market survey of prevailing wage rates, but it is not clear whether the survey included the matron position as well as that of guard. In either event, the wage for matrons was ultimately established at only 70 percent of the guard wage. The ninth circuit decided that these facts, without an allegation of equal work (the Equal Pay Act did not then, in 1973, cover government employees), were a cause of action under Title VII and should go to trial.[6]

In affirming the ninth circuit, the U. S. Supreme Court decided that the Bennett Amendment incorporated into Title VII only the four affirmative defenses for unequal pay that are contained in the Equal Pay Act, and that sexual wage differentials for unequal work were not "authorized" by the Equal Pay Act and, therefore, could not have been made unchallengeable under Title VII by the Bennett Amendment. The Court emphasized that it was not ruling on any comparable worth theory of proof, but only that the facts about the County of Washington's behavior could produce an inference of intentional sex-based discrimination under Title VII.[7] Justice Rehnquist's dissent emphasized that the Gunther ruling was a very narrow one and expressed doubt that intentional discrimination could be proven in many instances.[8] That forecast (self-fulfilling?) has been prophetic up to the present time.

Pure Comparable Worth

Since Gunther was decided, nearly all pure comparable worth claims have been rejected by the courts.[9] By this term I refer to claims where the court is asked to make comparisons of the value or worth of different jobs, by means of judgments about the worker demands and skill requirements of jobs (for practical purposes, "comparable worth" or "value" is synonomous with

"comparable work"); or is asked to assess the merits of conflicting job evaluations. Rejections of these claims have been on the grounds that they are not permitted either by Gunther or the language of Title VII. Powers v. Barry County is illustrative. The trial court in that case was asked to find female matron (guard) positions comparable in worth to those of male corrections officers, and, consequently, to infer that the pay difference between the jobs was sex-based pay discrimination. The court refused to allow the claim, stating that it went beyond that authorized by Gunther and that Gunther had probably signaled the "outer limit of the legal theories cognizable under Title VII."[10]

One judgment, Briggs v. City of Madison, did countenance a comparable worth claim when it found the work of city nurses and sanitarians to be of "comparable value."[11] The trial court thought this judgment was authorized because plaintiffs showed "Substantial similarity of work requirements and work conditions"[12] (defendants ultimately prevailed with a "market" defense for the pay differential), but the court was wrong. Title VII does not authorize pay claims for similar (but unequal) work any more than it authorizes them for dissimilar work.[13]

The court rejection of pure comparable worth claims has been correct in my judgment. Title VII nowhere authorizes comparable worth or work determinations by the courts, and the history of the Equal Pay Act, where an equal pay requirement for "comparable work" was replaced with one for "equal work," together with the Bennett Amendment, show a Congressional opposition to such determinations.[14]

While the courts have properly refused to hear pure comparable worth claims, they are obliged to consider claims of intentional discrimination

where the proofs offered are direct, that is, of the variety approved by Gunther. Several such cases have been recently decided.

Wilkins, American Nurses and AFSCME

The first judgment on facts generally like those of Gunther was Wilkins v. University of Houston.[15] In 1975, the University conducted job evaluations and developed a pay plan designed, in part, "to cure inequities in pay existing between men and women professional and administrative employees."[16] The plan placed each job in one of nine levels, based on its evaluation, and established a minimum and maximum salary for each level. The system did not operate as planned within the academic division of the University, however. Twenty one employees of this division were paid less than the minimum of the pay level for their job, and eighteen of these employees were women, even though women were slightly less than half of all employees in the division. Furthermore, the jobs of seven women, five of whom were paid less than the prescribed minimum for their level, were reclassified to a lower level, while no jobs held by men were reclassified. On these facts, the fifth circuit reversed the trial court and found a violation of Title VII.

In American Nurses v. State of Illinois,[17] the plaintiffs brought a Title VII sex-based wage claim after the State of Illinois had commissioned and paid for job evaluations that were "conducted under the auspices" of the Illinois Commission on the Status of Women. Since the State employer refused to implement the evaluation results, which called for increases in the relative pay of female dominated jobs, the plaintiffs thought they had a cause of action like that endorsed by the Supreme Court in Gunther. However, the trial court distinguished the facts from those of Gunther and dismissed the case for its failure to state a cause of action.

Similar and additional facts were present in AFSCME v. State of Washington.[18] The Executive Director of the Washington Federation of State Employees, in 1973, wrote to then Governor Daniel J. Evans complaining about discriminatory salary setting for female employees in the State government. Governor Evans responded with letters to the heads of the Higher Education and State Personnel Boards, stating that "... If the State's salary schedules reflect a bias in wages paid to women compared to those of men, then we must move to reverse this inequity."[19] A preliminary study by the two Boards concluded that there were "clear indications of pay differences" between predominately male and predominately female job classes that were not "due solely to job 'worth'," and that further study was necessary to determine "'correction'" amounts and their applicability.[30] The State then employed Willis & Associates, a local consulting firm, to conduct the additional study. That firm evaluated 59 predominately male jobs and 62 predominately female jobs, selected by State officials, and concluded that on average the pay disparity between the two sets of jobs was 20 percent for equal numbers of evaluation points. Shortly thereafter (1974) Governor Evans publicly described the "imbalance" ("There are two basic lines. One follows the practice for those positions filled primarily by males. The other, by women.") and stated that "steps ought to be taken to rectify" it.[31]

In 1976, pursuant to a decision by Governor Evans to pursue remedial measures, Willis expanded its earlier study to additional jobs and developed a method for adjusting the pay of "underpaid" jobs. In December 1976, prior to leaving office, Governor Evans included $7 million in his proposed budget for implementation of these adjustments; however, the new Governor, Dixie Ray Lee, removed this request. Also in 1976, the State Personnel Board

adopted a policy resolution declaring support for removal of the "disparities" identified by the Willis study and stating "...that salaries will be based on prevailing rates except where such criteria do not adequately compensate the employee based on the concept of comparable worth."[22] Governor Ray did support wage adjustments for female dominated jobs in her 1980 Message to the Legislature, stating that "...the cost of perpetuating unfairness, within State government itself, is too great to put off any longer...."[23] No legislative action occurred until 1983, when two bills were passed. One provided pay increases of only $100 a year to job classes that were paid more than 20 percent below their evaluated worth, and the other called for full implementation of the comparable worth adjustments by 1993.

These facts persuaded the federal trial court that the State of Washington had intentionally discriminated, on the basis of sex, in establishing salaries for female dominated job classes. The ninth circuit, however, reversed this judgment in August 1985, ruling, most fundamentally, that the evidence presented by AFSCME--the foregoing, and other, facts--failed to establish the requisite discriminatory motive by the State.[24]

Distinguishing Facts?

The trial court in American Nurses factually distinguished its case from Gunther, and the ninth circuit in AFSCME cited approvingly the distinction made by that court. The "crucial" distinction according to American Nurses was that:

> The employer in Gunther had deviated from the results of a job evaluation it had adopted in setting the wage rates of women's jobs. In other words, a consistent pattern

> emerged of underpayment of women's jobs relative to their accepted evaluated worth, while men's jobs were paid in accordance with their accepted evaluated worth as determined by the employer's own job evaluation plan (emphasis in original).[25]

In contrast, the States of Illinois and Washington had only commissioned job evaluation studies and had not adopted their results. Is this a distinction without any real difference, or does it truly distinguish between the presence of an intent to discriminate against women (Gunther) and the absence of such intent (American Nurses and AFSCME)?

The court in American Nurses does not make clear what is meant by "adoption" of a job evaluation plan. If "adoption" means a statement to employees that the employer will set pay rates in accord with job evaluation results, then none of the employers, including the County of Washington, appear to have adopted a job evaluation plan. The Supreme Court in Gunther only cited the failure of the County of Washington to pay its matrons a salary, relative to that paid its male guards, that was consistent with the relative job evaluations of the two positions. No indication is given that County of Washington officials ever announced an "adoption" of the job evaluation plan the County deviated from. The available facts indicate that the County did not adopt the plan--the plaintiffs sued because their pay as matrons was inconsistent with it.

While State of Illinois officials may have given no indication of State "adoption" of the job evaluation plan they commissioned, the same cannot be said for State of Washington officials. The facts set forth earlier show that two governors, as well as officials of the State Personnel Board, endorsed both the results and remedial purpose of the Willis study. The Willis evaluations were not implemented only because the State legislature did not provide the necessary funds. Thus, the distinction drawn in

American Nurses and supported in AFSCME is not at all convincing. It is not apparent that the County of Washington "adopted" a job evaluation plan to any greater extent than did the State of Illinois, and, of the three employers, the State of Washington gave the greatest endorsement of its job evaluation study.

Pre-Gunther Cases

For comparative purposes, it is useful to examine two cases decided prior to Gunther that also concerned pay deviations from employer conducted job evaluations. In International Union of Electrical Workers (IUE) v. Westinghouse,[26] the employer, in its Trenton plant in the late 1930's, conducted job evaluations that resulted in the assignment of numerical values to all jobs. At that time the firm's jobs were sex segregated and classified by sex as "male" or "female." Following the job evaluations all jobs were assigned a labor grade (and a corresponding wage rate) on the basis of the evaluation point totals. However, according to a Westinghouse manual, two wage scales were used, with the scale "for women below and not parallel to the men's curve," and this resulted in lower pay for women than for men even when the jobs held by each sex had an equal number of evaluation points and were in the same labor grade. In 1965, Westinghouse removed the sexual designations from its jobs, opened all jobs to both sexes, and eliminated the dual wage scales; however, the existing sex disparity in pay was maintained by expanding the number of labor grades and placing the predominately female jobs into the lowest grades. The third circuit decided that these facts, if proven at trial, constituted "explicit discrimination" in violation of Title VII.

It can be argued that IUE differs from American Nurses and AFSCME (and Gunther, as well) because in the former the employer's wage structure evolved from wage setting that was clearly discriminatory--the sex segregated jobs and separate wage scales for female and male jobs. But when Westinghouse eliminated the sex segregation and separate wage scales in 1965 (the year Title VII became effective), its pay system became like that in AFSCME: the pay for female dominated jobs was less than that for male dominated jobs with equal job evaluation points. Governor Evans even acknowledged the "two basic lines" (in the quotation given above). The third circuit may have read a discriminatory motive into Westinghouse's pay setting procedures in the 1930's and decided that that motive contaminated its pay system in the 1970's, but it is not clear that, in the 1970's, Westinghouse's motive was any different from that credited by the ninth circuit to the State of Washington--the control of payroll costs through the payment of market wages.

Somewhat different facts were present in the pre-Gunther case, Christiansen v. University of Northern Iowa.[37] The University had instituted a job evaluation plan that covered both clerical (largely female) and physical plant (largely male) employees. Under this plan "compensation was to be based on an objective evaluation of each job's relative worth to the employer regardless of the market price."[38] The system did not work as intended, however, because the local labor market wages for physical plant jobs were higher than the beginning pay for these jobs under the University's system, making it difficult to attract workers to the physical plant jobs in the University. Consequently, advanced step starting pay was provided for many physical plant employees, but not for beginning clerical employees,

resulting in pay differences between female and male employees whose jobs carried the same number of job evaluation points.

The eigth circuit ruled that the plaintiffs had failed to make a prima facie case under Title VII (the court decided the case on this ground rather than rejecting it for its failure to alledge equal work) because they failed to show that the described pay differences were based on sex rather than on the requirements of the local labor market. The court wrote that the University merely acted to meet market requirements where it was forced to do so, and did not display any motive to discriminate against women. But, relative to the distinction made in American Nurses and AFSCME, there can be no doubt that the University had "adopted" its job evaluation plan and even stated that it was to replace purely market determination of pay. Then its failure to stay with the plan parallelled the employer's behavior in Gunther, with the difference that the relative pay of male jobs was increased in Christiansen, while the relative pay of women was lowered in Gunther. In both instances departure from the job evaluation system resulted in relative disadvantage to women. Nor is it clear that Christiansen and IUE differ significantly. In both instances men were paid their market wage while women with equally rated jobs were paid less. In one sense the women in Christiansen were worse off than those in IUE, because the former had been led to believe that they would be paid as much as men who held similarly evaluated jobs.

Motive

It is evident that only small factual differences exist among the six cases I have described while, on the other hand, the basic similarities

among the six cases are substantial. In all instances the fact complained of was that female dominated jobs were paid less relative to male occupations than was prescribed by job evaluations that were either conducted or commissioned by the employer. In all six instances the condition that permitted the deviation from the job evaluation results was that the market wage for the female job was below that of the male job, for a given number of job evaluation points. Then it is plausible, and the American Nurses and AFSCME courts so found, that the employer's motive for deviating from the job evaluations was a desire to achieve lower labor costs than if the evaluation results had been followed. Women could be hired for less, so the job evaluations were ignored. The motive was cost, the method was prevailing market wage rates, and the victim was job evaluation. The court in Christiansen ascribed a somewhat different motive to the employer--the attraction of enough applicants to the male dominated physical plant jobs (through higher pay)--but this motive, also, was clearly economic.

On the surface the rulings in Wilkins, Gunther and IUE appear to conflict with the judgments in American Nurses, AFSCME and Christiansen that an economic, rather than discriminatory, motive brought about the employers' departures from job evaluation results, but that conflict may be smaller than it appears. Wilkins was the only case of the six (other than the trial court judgment in AFSCME, now reversed) that resulted after trial in a judgment for plaintiffs, and its significance is limited because the ruling for the plaintiffs involved just a small part of a much larger, complex litigation. IUE found that plaintiffs had a cognizable claim under Title VII, and Gunther, more narrowly, ruled that a Title VII action can be

brought without alledging equal work, but both cases were settled without trials, where proof of employer intent (motive) would have had to be shown.

Although Title VII has been opened to sex-based pay claims that do not involve equal work, it appears that the courts will ascribe economic motives to Gunther-like facts, rather than find that they prove an intent to discriminate against women. The facts of the cases reviewed, especially, AFSCME, certainly raise the possibility that women were not paid according to their job evaluation results because they were women; that if male dominated jobs were discovered to be paid less than their evaluated worth, their pay would be raised. But that is a hypothesis only, and the courts are unwilling to accept it as proof of an employer motive to discriminate against women, even if, as in AFSCME, there is considerable inferential support for the hypothesis.

Then, it may be a nearly insurmountable task to prove intentional discrimination with facts about what an employer did and did not do with job evaluation results, although employer behavior sufficiently egregious to prove it is not unimaginable. In retrospect, this conclusion almost five years after the Supreme Court's Gunther decision is only mildly surprising. The Court wrote in that ruling that it was not deciding if the plaintiffs had a prima facie case, only if their failure to allege equal work "precludes their proceeding under Title VII."[29] In the same vein, the ninth circuit, in ruling that the Gunther facts stated a cause of action under Title VII, wrote: "We note that problems of proof may present substantial barriers to establishing this kind of discriminatory compensation claim."[30]

A Disparate Impact Remedy

I have taken the position in other articles that women cannot look to Title VII pay claims as a remedy for their low earnings (but must move into better jobs).[31] The language of that statute does not require employers to base their wages and salaries on comparable work comparisons (job evaluations), nor does it authorize the courts to make judgments about work in connection with charges of pay discrimination; and the history of the Equal Pay Act and the Bennett Amendment indicate that Congress was opposed to any such requirement or adjudication.[32] Nonetheless, employers should not be free to treat the pay concerns of women, that arise from their low earnings relative to men, with callous disregard. And this ~~has been~~ was done in all of the cases I have described.

When an employer conducts or commissions a job evaluation study this amounts to an implicit, sometimes made explicit, promise of equity--the setting of relative wage rates based on comparative job tasks and requirement. Then, when the employer refuses to implement the results of the job evaluations, calling for increases in the relative pay of women, their equity expectations are cruelly dashed. As women have said to me, "Why did they do the evaluations if they weren't going to follow them?" This kind of behavior, in the context of the female struggle for economic equity, offends my sense of fairness and, I think, that of many others.

But apparently, there is no Title VII remedy for this conduct--which is discriminatory in effect, if not in intent--even though remedying it does not call for comparable worth judgments by courts, but only the implementation of the employer's own job evaluations. An occasional court, such as the trial court in AFSCME, may find an intent to discriminate from

Gunther-like facts, but evidence is accumulating that most courts will find a legitimate economic motive for employers' rejections of their own job evaluations.

What can be done to stop this harsh treatment of female employees without embracing a legal requirement of comparable worth pay setting? Perhaps it can be stopped by means of a disparate impact theory of proof under Title VII. The ninth circuit ruled in AFSCME that disparate impact proofs of discrimination cannot be used when the facially neutral practice that produces the disparate pay results (on women) is the use of the market to set job pay rates. The court felt that this practice was more of a broad, multi-faceted policy than the kind of "...clearly delineated employment policy contemplated by Dothard and Griggs."[33]

The court's conclusion that a market pay policy cannot be attacked under a disparate impact proof was correct, but for the wrong reason. Setting job pay rates based on prevailing market wages is a clear, reasonably precise practice, not unlike the high school graduation requirement for job applicants that was struck down in Griggs because of its disparate impact on blacks. The "compensation system" of the State of Washington may have been complex (because of political and technical influences on it), as the ninth circuit asserted in a fuzzy analysis, and, thus, not subject to a disparate impact claim. AFSCME's disparate impact claim, however, was directed to the practice of paying market rates. The court's conclusion that that practice is too broad for a disparate impact claim is unconvincing.

The practice of paying market rates is an impermissible focus for a disparate impact claim, not because it is too broad, but because it is a manifestation of, and fully consistent with, the nation's basic economic

policy--that goods and services are to be produced through the functioning of product and labor markets. This market oriented policy has existed and continues to exist despite its obviously different impacts on societal groups. Therefore, paying market rates is beyond challenge under a disparate impact claim unless Congress decides otherwise. By assumption in a competitive, market oriented economic system, paying market rates meets the "business necessity" test.

But our adherence to a market system should not mean that all kinds of egregious behavior can be justified under the rubric of market necessity; and perhaps employer use of this rubric in refusing to follow their own job evaluation results can be prohibited under a Title VII disparate impact claim that focuses precisely on that narrow practice; conducting or commissioning job evaluations and then refusing to implement the results. The employer's refusal may be an incident rather than a practice, but the effects of the incident are continuous and would seem to constitute a practice as set forth in Griggs. Alternatively, the challenged practice can be stated positively: continuing to pay lower rates for job classes than are called for by the job evaluations. Generally, the refusal to implement job evaluation results will have much greater adverse impacts on women than on men. Thus, a prima facie case would be made. Note that this claim would not require employers to ignore market wage rates in establishing a pay system; it would simply require them to pay above market rates for jobs where their own evaluations call for above market rates.[34]

Employers would undoubtedly defend their refusal to implement their job evaluations with the business necessity defence of cost containment.[35] Various factual matters would then be important, in particular, the size of the cost increases and the ability of the employer to absorb them.

However, it is not clear that weight should be given to a cost defense since it can be presumed that the employer was, or should have been, aware of possible cost implications before the job evaluations were performed; then, only changes in the employer's ability to absorb the increased costs would be relevant.

Acceptance of this proposed line of proof would require creative interpretation of disparate impact analysis by the courts. Even if this were to occur, the effect on female earnings would probably be unnoticeable. Many employers already have job evaluations in place and use them to establish relative wage rates for various jobs. Others would be unwilling to conduct evaluations if they are to be bound by their results. One salutory effect of court acceptance of this disparate impact proof would be to force legislative bodies, that are now prone to legislate job evaluation studies by government employers, to more carefully consider the implications of this action. They would be forced to decide whether they want the government employer to set all job pay rates on the conventional basis of market wage rates, or whether they want to help those who fare poorly in the marketplace, by requiring their relative pay to be based on comparisons of job demands and requirements. The outcomes of dealing with that issue would be influential on the future of the idea of comparable worth.

The disparate impact proof of sex-based pay discrimination that I have outlined should be pursued even if its acceptance would not noticeably increase female earnings. It should be pursued simply because it is unjust to treat female pay concerns the way they were treated in the cases I have examined. Stopping such treatment would signal at least our minimal sensitivity to those concerns.

Footnotes

1. 606 F. Supp. 1313 (N.D. Ill. 1985).

2. 37 EPD 35,459 (9th Cir. 1985).

3. 452 U.S. 161 (1981).

4. E.g., Golper "The Current Legal Status of 'Comparable Worth' in the Federal Courts," LABOR LAW JOURNAL, Vol. 34, No. 9 (Sept. 1983) 563; Gasaway, "Comparable Worth: A Post-Gunther Overview," 69 Geo. L.J. 1123 (1981); Vieira, "Comparable Worth and the Gunther Case: The New Drive for Equal Pay," 18 U.C. Davis L.R. 449 (1985); Fogel, THE EQUAL PAY ACT: IMPLICATIONS FOR COMPARABLE WORTH, Ch. 8 (1984).

5. 452 U.S. at 180.

6. Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979).

7. 452 U.S. at 166.

8. Id. at 183.

9. Plemer v. Parsons-Gilbane, 713 F.2d 466 (5th Cir. 1983); Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982); Connecticut Employees Assn. v. State of Connecticut, 31 EPD 33,528 (D. Conn. 1983); Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir. 1984); Cox v. American Cast Iron Pipe Co., 36 EPD 35, 185 (N.D. Ala. 1984); EEOC v. Affiliated Foods Inc., 34 EPD 33,571 (W.D. Missouri 1984).

10. 539 F. Supp. at 726.

11. 536 F. Supp. (W.D. Wis. 1982).

12. Id. at 446.

13. Also wrongly decided was Lanegan-Grimm v. Library Assn. of Portland, 560 F. Supp. 436 (D. Or. 1983), where the court ruled that the plaintiff had shown that her job and one held by a man were "...sufficiently similar to give rise to an inference of intentional discrimination..." (at 439).

14. See Fogel, [illegible], Ch. [illegible].

15. 695 F.2d 734 (5th Cir. 1983), vacated and remanded 103 S. Ct. 34 (1982), aff'd on remand, 695 F.2d 134 (5th Cir. 1983).

16. Id. at 406.

17. 606 F. Supp. 1313 (N.D. Ill. 1985).

18. The facts were obtained from 578 F. Supp. 846 (W.D. Wash. 1983).

19. Id. at 860.

20. Id. at 861.

21. Id.

22. Id. at 862.

23. Id.

24. AFSCME v. State of Washington, 37 EPD 35,459 (9th Cir. 1985).

25. 606 F. Supp. at 1317.

26. 631 F. 2d 1094 (3rd Cir. 1980), cert. denied 452 U.S. 967 (1981).

27. 563 F.2d 353 (8th Cir. 1977).

28. Id. at 354.

29. 452 U.S. at 166, n. 8.

30. 602 F.2d at 891.

31. Fogel, "Class Pay Discrimination and Multiple Regression Proofs," 65 Neb. L.R. (forthcoming 1986); Fogel, "Comparable Worth: It's Not the Answer," Management, Vol. 4, No. 3, 1985.

32. Note 14, supra.

33. 37 EPD 35,459; 38, 934. See Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The 9th Circuit also cited its equally unpersuasive disparate impact analysis in Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir. 1984), cert. denied 105 S. Ct. 511 (1984).

34. Alternatively, such employers could pay market rates for female dominated jobs and attempt to pay less than market rates for certain male dominated jobs. Since labor markets provide a range of rates for a given job rather than a single rate, this might be successful, although the quality of applicants for the male dominated positions might fall. The point is that job evaluation systems can establish relative pay rates for all jobs, but not the level at which the total system is to be connected to external labor markets.

35. The four affirmative Equal Pay Act defenses for sexual pay differences would be inappropriate since the challenged practice would not be wage differentials per se, but the refusal of the employer to implement his own job evaluations. Furthermore, the "market" as a factor-other-than-sex defense may be unavailable because of Equal Pay Act rulings to this effect. See Fogel, THE EQUAL PAY ACT...., Ch. 8 (1974). See contra, Vieira, "Comparable Worth and the Gunther Case...," 12 U.C. Davis L.R. 440, 473 (1975).