C.2

LABOR CENTER REPORTER

Number 169
January 1986

UNIVERSITY OF CALIFORNIA, BERKELEY
CENTER FOR LABOR RESEARCH AND EDUCATION
INSTITUTE OF INDUSTRIAL RELATIONS
BERKELEY, CA 94720
(415) 642-0323

THE "COMPARABLE WORTH" DECISION

by Marlene Kim

History -- A 1974 study commissioned by the state of Washington found that Washington state employees in female-dominated jobs earned 20% less than employees in male-dominated jobs of comparable knowledge, skill, mental demands, accountability, and working conditions. The legislature then passed a bill to remedy the pay inequity, but the governor vetoed the bill, so in 1982, the American Federation of State, County, and Municipal Employees (AFSCME) filed suit in the Ninth Circuit U.S. District Court (AFSCME v. State of Washington), charging the state of Washington with violations of Title VII of the Civil Rights Act of 1964, by discriminating on the basis of sex. In 1983, the federal district court ruled in favor with AFSCME, ordering back pay and injunctive relief. Recently, the Ninth Circuit U.S. Court of Appeals reversed this decision, but its decision is not yet final. AFSCME wants the case reheard, and if the appeals court does not grant a rehearing, the case could go to the Supreme Court.

Discrimination Under Title VII -- This case, popularly called a "comparable worth suit," was never termed this by AFSCME's lawyers. Instead, they kept closer to the language of Title VII law, claiming sex discrimination in employment compensation, and the terms, conditions, and privileges of employment, all of which are illegal under Title VII. Thus the case should be identified as one of "sex-based wage discrimination."

Proof of sex-based wage discrimination under Title VII falls into one of two categories: (1) **Disparate treatment** includes policies or actions that intentionally discriminate. This does not necessarily imply that someone set out consciously to discriminate or to harm a group of workers; rather, that the actions were not an accident, that one meant to do what was done, even without malice. Evidence for disparate treatment includes statistical results, supported by workers' reports of specific incidents of sex discrimination they suffered, so that a "reasonable person" in the absence of any other evidence would conclude that "it is more probable than not that there is discrimination."

(2) The second category of sex-based discrimination, **disparate impact**, refers to facially neutral policies which are not justified by any business necessity and have an adverse impact on women. Here, "intent" need not be proven. For example, since women are on average shorter than men, a height requirement for a job could be a facially neutral policy (since it doesn't specify sex and is applied equally to men and women) that has the effect of disqualifying many women for the job. If the policy is not a business necessity, it is discriminatory under Title VII.

AFSCME argued that intentional discrimination can be inferred by help wanted advertisements prior to 1972 which restricted various jobs to members of a particular sex (Title VII made such ads illegal after 1972), and by the state's failure to implement the results of its own study showing a 20% wage disparity by gender even when the demands of the job were taken into account.

The Ruling -- The appeals court claimed that although the study and sex-segregated help wanted ads were valid as possible evidence of discrimination, they were not enough to prove discrimination under disparate treatment. The court wanted witnesses to testify to individual instances of the state's discrimination. This would have substantiated AFSCME's other evidence.

The court went on to discuss the significance of job evaluation studies. It said that employers do not necessarily have to provide equal pay for different jobs, even if their own studies show the jobs have the same value, since doing so would "penalize rather than commend employers for their effort and innovation in undertaking such a study." While the court approved of studies as possible proof of discrimination, therefore, without other evidence which clearly shows that an employer intentionally discriminated, it would not force an employer to readjust wages to fit the study, because, it said, many factors affect compensation besides job evaluations, such as market conditions and collective bargaining.

Finally, the appeals court declared that an employer can follow the prevailing market wages in setting salaries even if those wages underpay women, since "the State did not create the market disparity," and "Title VII does not obligate it to eliminate an economic inequality which it did not create." This debate, however, is probably not over, since arguments about whether or not the state followed market rates were not allowed to come out at trial. Had the state been allowed to put on its market defense at trial, AFSCME would most likely have been allowed to introduce evidence in rebuttal to show that Washington state did not follow the market, despite its claims. Thus the appeals court wrote an opinion without all the relevant information necessary to determine whether the state in fact did set its salaries on the basis of the market. AFSCME requests the opportunity to bring such information into the case in its current petition for rehearing.

Lessons -- This ruling does not disturb traditional Title VII law: to prove sex-based wage discrimination, plaintiffs must show either that an employer has specific wage policies that have the effect of discriminating (disparate impact) or that the employer intends to pay women's jobs less (disparate treatment). If the ruling is upheld, it will be insufficient to present a job evaluation study showing pay inequities to prove that an employer intentionlly discriminated. Plaintiffs will need to prove that specific discriminatory policies and actions keep the compensation for women's jobs lower than for men's jobs of comparable value. Witnesses who can testify to instances of discrimination would be crucial to this kind of case.

The ruling does not affect local ordinances, resolutions, or state laws that require equal pay for work of comparable value; local governments and legislatures can still pass such laws. Nor does it affect bargaining for sex-based -- or race-based -- wage adjustments. Unions can still bargain for such adjustments, bearing in mind that discrimination is not negotiable: if there is a 20% wage gap, the union does not have to settle for less than the full adjustment. Unions can also bargain for a mutually agreed upon job evaluation consultant to work with a union-management team. They can agree that the recommendations of the team will be implemented, and that if the team cannot agree, that the issue be resolved with binding arbitration. Thus, unions can still work for equity through these traditional channels.

The biggest lesson is that sex-based wage discrimination, is still being defined and is subject to revision by further appeals and cases. Patricia Campbell, attorney for the California State Employees' Association's sex-based wage discrimination case against the state of California, believes that the AFSCME ruling will not stop cases that have a strong foundation and good evidence: "Recent history has shown us that this idea has come of age -- through litigation, bargaining, legislation." The positive developments in the California case are significant in assuring people that one adverse ruling is not the end of the road.

Thus, even though the decision appears to be a setback, each employment situation is different, and subsequent appeals and cases can be expected to demonstrate how sex-based wage discrimination can be proven. The amount of legislation, collective bargaining, and litigation around this issue shows that none of us is alone -- in one form or another pay equity is going to happen.

- Marlene Kim