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County of Washington v. Gunther: Sex-Based Wage Discrimination Extends beyond the Equal Pay Act

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COUNTY OF WASHINGTON V. GUNTHER: SEX-BASED WAGE DISCRIMINATION EXTENDS BEYOND THE EQUAL PAY ACT

I. INTRODUCTION

In the recent case of *County of Washington v. Gunther,*[1] the United States Supreme Court settled a controversy which had been brewing for years among the courts, legal scholars, and professionals: whether parties alleging sex-based wage discrimination under Title VII of the Civil Rights Act of 1964[2] are required to show that a member of the opposite sex, holding the same position in the same establishment, is receiving a higher rate of pay. In a five to four decision,[3] the Court answered this question in the affirmative and held that, despite the provisions of the Bennett Amendment to Title VII,[4] such claims may be brought under Title VII absent compliance with the Equal Pay Act's[5] requirement of "equal work."[6]

In so holding, the Court explicitly distinguished a plaintiff's use of direct evidence to establish wage discrimination from claims based on the comparable worth theory.[7] This theory has been the subject of much debate among legal scholars and lower courts alike. It essentially provides that a woman in a traditionally female job should receive pay equal to that of a man in a traditionally male job when both jobs require comparable skill, effort, and responsibility.[8] Although proponents of this theory may view the Court's holding as a step toward

1. 452 U.S. 161 (1981).

2. 42 U.S.C. §§ 2000e - 2000e-17 (1976 & Supp. IV 1980).

3. Justice Brennan delivered the opinion of the Court in which Justices White, Marshall, Blackmun and Stevens joined. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justices Stewart and Powell joined. 452 U.S. at 163.

4. 42 U.S.C. § 2000e-2(h) (1976).

5. 29 U.S.C. § 206(d) (1976).

6. Under the Equal Pay Act, equal work is defined as jobs which entail substantially equal skill, effort and responsibility, and which are performed under similar working conditions within the same business establishment. *Id.*

7. 452 U.S. at 166.

8. The comparable worth theory compares the value of different jobs and their respective wages. Although employer evaluation systems vary, typical evaluation plans used by larger employers rate the value of employee jobs on the basis of skill, effort, responsibility and working conditions. The employer then adopts a pay scale commensurate with the worth of the jobs. If there is either a substantial difference in wages but not in job value, or a substantial difference in job value but not in wages, discrimination is said to exist. COMMITTEE ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, NATIONAL RESEARCH COUNCIL,

allowing Title VII wage discrimination claims based on a showing of the comparable worth of different jobs, the *Gunther* decision does not endorse the comparable worth theory.

The Bennett Amendment to Title VII[9] is the crucial yet confusing link between Title VII and the Equal Pay Act. The Amendment effectively establishes that the four categories of permissible sex-based wage differentiations authorized by the Equal Pay Act may be asserted as affirmative defenses to a Title VII claim.[10] The Equal Pay Act provides that no employer shall pay lower wages to employees of one sex while paying higher wages to employees of the opposite sex where both are performing equal work. Wage differentations may be made, however, pursuant to a seniority, merit, or incentive system, or "any other factor other than sex."[11] In holding that Title VII has a broader remedial scope than the Equal Pay Act, the Court construed the Bennett Amendment as merely incorporating the four affirmative defenses of the Equal Pay Act into Title VII.[12] Accordingly, the Court rejected an alternative interpretation of the Amendment which would have limited Title VII claims by requiring plaintiffs to show unequal pay for equal work pur-

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WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE, 69-74 (1981). [hereinafter cited as WOMEN, WORK, AND WAGES].

The merits of the comparable worth theory as a method of establishing intentional sex-based wage discrimination have been vigorously debated. The most recent study concluded that although comparable worth may one day be a viable method, the varying criteria used in different evaluation systems often lead to undetected bias. As a result, comparable worth analysis is not presently considered a reliable means of proving such discrimination. *Id.* at 70, 90; *see generally* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964,* 12 U. MICH. J. L. REF. 397 (1979) [hereinafter cited as Blumrosen] (Because job segregation has prevented both Title VII and the Equal Pay Act from providing effective remedies for women and minority victims of wage discrimination, Title VII should be construed to require pay in proportion to the worth of jobs.); *cf.* Nelson, Opton & Wilson, *Wage Discrimination And The "Comparable Worth" Theory in Perspective,* 13 U. MICH. J. L. REF. 231 (1980) [hereinafter cited as Nelson] (Title VII should not be construed to allow sex discrimination claims in compensation cases to be based on a comparable worth analysis. If the courts accept Title VII claims based on the comparable worth of different jobs, the economic principle of a free labor market will be destroyed.).

9. 42 U.S.C. § 2000e-2(h) (1976).

10. The Bennett Amendment provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by provisions of section 206(d) of title 29 [the Equal Pay Act].

Id. at § 2000e-2(h).

11. 29 U.S.C. § 206(d)(1) (1976). For the language of the four Equal Pay Act exceptions, *see infra* text accompanying note 39.

12. 452 U.S. at 168-71.

suant to the Equal Pay Act.[13]

This note will explore the confusion which has surrounded lower court decisions interpreting the Bennett Amendment, the analytical basis of the Supreme Court's holding in *Gunther*, and the practical and legal consequences of the Court's opinion. This note concludes that, while *Gunther* ultimately benefits victims of sex-based wage discrimination by enlarging the scope of Title VII claims, the Court's holding is nevertheless incomplete because of its failure to suggest the type of evidence future plaintiffs must introduce in order successfully to prove intentional sex-based wage discrimination. Without further clarification, it is inevitable that a flood of suits alleging intentional sex-based wage discrimination will be filed.[14]

II. FACTS AND HOLDING

In *County of Washington v. Gunther*,[15] four female prison guards employed by the county filed suit under Title VII in federal district court in Oregon, alleging that they were paid lower wages for work substantially equal to that performed by the prison's male guards. They further alleged that the difference in pay was attributable, at least in part, to intentional sex discrimination by the county.[16] The district court held that a Title VII claim required a showing of "equal work."[17] The court further determined that the female guards did not perform work substantially equal to that performed by the male guards and dismissed the case.[18] The Ninth Circuit Court of Appeals, affirming in part, upheld the district court's finding that the work of the male guards was substantially unequal to that of the female guards.[19] The appellate court further held, however, that Title VII was broader in its remedial scope than the Equal Pay Act, and that the absence of a showing of "equal work" as required under the Equal Pay Act, did not preclude an employee from filing suit under Title VII.[20]

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13. *Id.* at 168.

14. Although Congress or the Supreme Court might define what constitutes sufficient proof of sex-based wage discrimination under Title VII, it is more likely that the issue initially will be resolved by the lower courts.

15. 452 U.S. at 161.

16. *Id.* at 166.

17. Gunther v. County of Washington, 20 Fair. Empl. Prac. Cas. (BNA) 788, 791 (Or. 1976), *aff'd in part, rev'd in part, and remanded*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

18. *Id.* at 791-92.

19. Gunther v. County of Washington, 623 F.2d at 1310.

20. *Id.* at 1313. Thus, the Ninth Circuit instructed the district court to accept evidence

The Supreme Court granted certiorari[21] to remove the confusion surrounding the relationship between the Equal Pay Act and Title VII, as augmented by the Bennett Amendment. The Court affirmed the Ninth Circuit's decision and found that the Bennett Amendment did not bar employees with direct evidence of intentional sex discrimination, but who were unable to make a showing of "equal work," from bringing suit under Title VII.[22] The Court thus recognized the broad remedial scope of Title VII and extended it beyond the narrow confines of the Equal Pay Act.[23]

III. HISTORICAL SETTING AND ANALYSIS

A. The Presence of Discrimination

It is widely recognized that sex-based wage discrimination persists throughout the country.[24] Women continue to be paid lower wages than men.[25] The various causes of wage discrimination, however, are not susceptible to precise measurement.[26] As justification for paying men higher wages than women, employers often cite a greater demand for male workers and the willingness of women to work for lower wages.[27] Additional evidence suggests that employers continue to pay women lower wages because of their belief that men make better workers than women. This view is fostered by an acceptance of the following stereotypes: (1) women must contend with the dual responsibilities of job and family; (2) women are more likely to take sick leave to bear

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on the plaintiffs' claim that a portion of the disparity between their wages and those of the male guards was due to sex discrimination. *Id.* at 1314.

21. 449 U.S. 950 (1980).

22. 452 U.S. at 180-81.

23. *Id.* at 178-80.

24. *Breakthrough in the Wage War,* TIME, June 22, 1981, at 70.

25. Among full time employees, women earn on the average 60% less than men. WOMEN, WORK, AND WAGES, *supra* note 8, at 41.

26. Researchers have identified three factors responsible for the concentration of women in low paying jobs. Some women choose lower paying jobs because they are socialized to believe that only certain jobs are compatible with their dual responsibilities of work and family. Other women receive low compensation because they are performing traditionally female tasks. In addition, some employers routinely exclude women from high paying jobs. WOMEN, WORK, AND WAGES, *supra* note 8, at 52-62.

27. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 192 (1974) (employer took advantage of the availability of female workers to fill its day shift at low pay rates); Shultz v. Wheaton Glass Co., 421 F.2d 259, 262-63 (3d Cir.) (employer preferred to hire male workers even though the wage rates for women were 10% lower), *cert. denied,* 398 U.S. 905 (1970); Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII,* 8 LOY. U. CHI. L.J. 723, 727-730 (1977) [hereinafter cited as Gitt & Gelb] (to eliminate subtle forms of sex-based wage discrimination, Title VII must be interpreted as allowing for discrimination claims not based on "equal pay" allegations).

and care for their children; and (3) women change jobs more frequently than men.[28]

Researchers agree that, regardless of the various rationales given for sex-based wage discrimination, the difference in wages between the sexes is due in large part to job segregation.[29] Women have traditionally been employed as secretaries, clerk-typists, elementary school teachers, nurses and maids; while men have tended to work as accountants, engineers, mechanics and construction workers.[30] Additionally, within traditionally non-segregated occupations, some employers have encouraged job segregation by slightly modifying their male employees' jobs, and then paying them a much higher salary than their female counterparts who are performing nearly the same work.[31] Such modifications might include the occasional moving of heavy loads, infrequent travel obligations or other additional minimal responsibilities. Under the Equal Pay Act's narrow requirement of equal pay for equal work, these employers were able to avoid liability by segregating women into "women's jobs," while paying higher wages to male employees performing only slightly different duties.[32]

B. The State of the Law Before Gunther

Prior to the Supreme Court's decision in *Gunther*, considerable confusion existed as to whether the Bennett Amendment required an allegation of "equal work" in a Title VII sex-based wage discrimination claim. The ambiguous language and the brief legislative history of the Amendment,[33] the vagueness of administrative guidelines,[34] and the disparate judicial interpretations of the Amendment[35] created a significant need for the Supreme Court's decision in *Gunther*.

1. Legislation

In the early 1960's, Congress enacted two major pieces of legislation aimed at alleviating sex-based wage discrimination. The Equal Pay Act was passed in 1963 to create an objective standard under which

28. WOMEN, WORK, AND WAGES, *supra* note 8, at 22-24.

29. Blumrosen, *supra* note 8, at 401; WOMEN, WORK, AND WAGES, *supra* note 8, at 52-62.

30. *See* Blumrosen, *supra* note 8, at 405; Nelson, *supra* note 8, at 233; Gitt & Gelb, *supra* note 27, at 725.

31. *See* Gitt & Gelb, *supra* note 27, at 729.

32. *Id.* at 729.

33. *See infra* notes 44-46 and accompanying text.

34. *See infra* notes 48-52 and accompanying text.

35. *See infra* notes 53-82 and accompanying text.

sex-based wage discrimination could be determined.[36] The inclusion of the word "equal," rather than "comparable,"[37] resulted in a limited application of the Act to those situations in which an employee of the opposite sex performs virtually identical work for higher wages.[38] The four exceptions to the Act permit wage differentiations based on: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[39]

In comparison, Title VII of the Civil Rights Act of 1964 was broadly drafted with the purpose of eliminating all forms of employment discrimination.[40] It thus prohibits discrimination based on race, color, religion, sex or national origin in all phases of employment practices, including hiring, firing, wages and promotion.[41] Although Title VII was passed only one year after the enactment of the Equal Pay Act, congressional discussion concerning the inclusion of the word "sex" in the language of Title VII and its effect on the Equal Pay Act was brief.[42]

With the passage of the Bennett Amendment, Congress attempted to clarify the relationship between the Equal Pay Act and Title VII.[43] The Amendment provides that those sex-based wage differentiations

36. *See* 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell).

37. In adopting the Act, Congress substituted the word "equal" for "comparable" to avoid the necessity for judicial determinations of the comparable values of different jobs. 108 CONG. REC. 14,768 (1962) (remarks of Rep. St. George). Gitt & Gelb, *supra* note 27, at 738-39.

38. *See, e.g.,* Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (equal work factors of skill, effort, responsibility, and similar working conditions are to be construed as "terms of art" and allow substantially equal, but not identical, jobs to be considered "equal work" under the Equal Pay Act); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.) (Equal Pay Act requires an allegation of "substantially equal" work), *cert. denied,* 398 U.S. 905 (1970).

39. 29 U.S.C. § 206(d)(1) (1976).

40. Franks v. Bowman Transp. Co., 424 U.S. 747, 763-64 (1976) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (in order to be consistent with congressional intent, it is the duty of the courts to construe Title VII to have the greatest possible effect on employment discrimination). *See also infra* text accompanying note 58.

41. *Id.*

42. Sex was not added as a protected classification within Title VII until the bill reached the house floor. *See* 110 CONG. REC. 2577 (1964) (remarks of Rep. Smith). Thus, it was not subject to congressional committee review. Case law establishes that the " 'legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity.' " International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1101 (3d Cir. 1980) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)) (the Court's broad interpretation of the Bennett Amendment allowed for a Title VII claim based on the employer's maintenance of lower wages for job classifications predominantly filled by women).

43. *See infra* note 46.

which are "authorized" by the Equal Pay Act shall not constitute unlawful employment practices under Title VII.[44] The meaning of the Amendment, however, was not clear because of its ambiguous language and its brief legislative record.[45] The Amendment's legislative history discloses only that Congress intended it to harmonize the two statutes, so that in the event of conflict, the Equal Pay Act would not be invalidated.[46]

2. Administrative guidelines

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with assuring that the provisions of Title VII and the Equal Pay Act are enforced.[47] Yet the EEOC has not been consistent in its rulemaking guidelines interpreting the Bennett Amendment.[48] In its 1965 guidelines,[49] the EEOC took the position

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44. For the language of the Bennett Amendment, see *supra* note 10.

45. In observing the uncertainty surrounding the meaning of the Amendment, the Third Circuit Court of Appeals stated that "[t]he dispute here is about what is meant by the phrase in the Amendment 'if such differentiation is authorized by' . . . . Our research has not revealed any single document or statement which unambiguously gives the Amendment meaning." International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1099 (3d Cir. 1980).

46. The pertinent legislative history of the Bennett Amendment is represented by this discussion between Senators Bennett and Dirksen:

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

110 CONG. REC. 13,647 (1964).

Before voting on Title VII, as modified by the Bennett Amendment, Representative Celler offered assurance that compliance with Equal Pay Act standards would also satisfy the requirements of Title VII. 110 CONG. REC. 15,896 (1964).

47. 452 U.S. at 177.

48. The courts, furthermore, have not been consistent in adopting these guidelines. For instance, the Supreme Court recently gave the 1965 guideline greater weight than the 1972 guideline. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (employer's refusal to provide plaintiffs with pregnancy benefits as part of employer's health insurance program did

that the Amendment limited Title VII claims to cases in which unequal pay for equal work was alleged. In 1972, however, the EEOC revised its prior guideline to eliminate express incorporation of the "equal work" standard into Title VII.[50] While this current guideline conspicuously refrains from setting forth any precise explanation of the proper relationship between the Equal Pay Act and Title VII, it may be inferred from the EEOC's position as amicus curiae in *Gunther* that the EEOC presently supports an approach which incorporates only the four affirmative defenses[51] of the Equal Pay Act into Title VII.[52]

3. Judicial interpretations

The same confusion and ambiguity apparent in administrative guidelines also appeared in judicial opinions interpreting the Amendment. Prior to the Ninth Circuit's decision in *Gunther*,[53] the courts had consistently restricted wage discrimination claims to those violations which were either Equal Pay Act claims[54] or Title VII claims alleging

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not in itself constitute evidence of a Title VII violation). Subsequently, in *Gunther,* the Court concluded that it felt "no hesitation in adopting what seems . . . the most persuasive interpretation of the Amendment, in lieu of that once espoused, but not consistently followed, by the Commission." 452 U.S. at 178.

49. The relevant portion of the EEOC's 1965 guideline provided:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations in which both statutes are applicable. Accordingly, the Commission interprets section 703(h) [the Bennett Amendment] to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, . . . the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703 [Title VII], and is not limited by section 703(h) [the Bennett Amendment] to those employees covered by the Fair Labor Standards Act.

29 C.F.R. § 1604.7 (1966).

50. In 1972, the EEOC revised its prior guideline as follows:

> (a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is co-extensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
>
> (b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

29 C.F.R. § 1604.8 (1980).

51. For the language of the four Equal Pay Act exceptions, *see supra* text accompanying note 39.

52. 452 U.S. at 178; *see also infra* note 94.

53. 623 F.2d 1303 (9th Cir. 1979).

54. Cases arising under the Equal Pay Act which required a violation of the "equal pay for equal work" standard as proof of sex-based wage discrimination include: Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (equal work factors of skill, effort, responsibility and similar working conditions are to be construed as terms of art allowing for substantially equal but not identical jobs to be considered "equal work" under the Equal Pay Act); Shultz

"equal work."[55] In interpreting the Bennett Amendment to incorporate the Equal Pay Act standard of "equal work" into Title VII, these courts had no choice but uniformly to dismiss wage discrimination suits not based on "equal work." Between the time of the Ninth Circuit's decision in *Gunther* and the Supreme Court's review of that decision, the question of whether an allegation of "equal work" was required in a wage discrimination action depended, at least partly, on the circuit in which the plaintiff chose to bring suit.[56]

Despite the traditional view articulated in the majority of the circuits before *Gunther,* dicta in several contemporary Supreme Court cases support the proposition that Title VII was intended to have a broad remedial scope.[57] The Court has stated that one of the primary

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v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.) (despite the assignment of insignificant extra duties to male employees, plaintiffs' allegation of equal work was sufficient to state a cause of action under the Equal Pay Act because plaintiffs' and male employees' jobs were still substantially equal), *cert. denied,* 398 U.S. 905 (1970); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970) (employer's assignment of extra duties solely to male employees who formerly performed the same work as female employees would justify employer's paying male employees higher wages because these extra duties required extra effort).

55. Cases arising under Title VII in which unequal pay for "equal work" was required by the court as proof of sex-based wage discrimination include: Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.) (no cause of action for intentional discrimination under Title VII unless plaintiff shows that she performed equal work for unequal compensation; Title VII must be construed in harmony with the Equal Pay Act), *cert. denied,* 423 U.S. 65 (1975); Di Salvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978) (plaintiff, magazine editor, who alleged that defendant paid her one-third less than he paid male employees performing substantially equal work set forth prima facie Title VII cause of action); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971) (plaintiff, a writer, could not equate her job with that of other writers working for same employer because all had different backgrounds, experiences and responsibilities; thus, no Title VII or Equal Pay Act claim was allowed).

In the cases cited above, the courts limited their consideration to whether plaintiffs had pleaded sufficient facts to meet the traditional requirements of unequal pay for equal work. In *Gunther,* the Court was asked to include an alternative test for establishing a cause of action under Title VII. Plaintiff female prison guards' salaries were set at seventy percent of the rate paid to male prison guards, despite findings in the county's own job evaluation study which indicated that they should have been paid at ninty-five percent of the rate for males. Plaintiffs contended that "even if the work was not substantially equal, the defendants nevertheless violated Title VII if some of the difference in salary between the plaintiffs and the male guards [was attributable] to sex discrimination." 623 F.2d at 1308.

56. While the Fifth and Eight Circuit Courts of Appeals had retained the requirement of a showing of "equal work" for all Title VII wage discrimination claims, *see supra* cases cited note 55, the Third, Ninth and Tenth Circuits had abandoned this traditional requirement. *See infra* notes 62-77 and accompanying text.

57. *See infra* notes 58 & 59 and accompanying text. *Accord* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (Title VII was designed to *supplement* existing laws and institutions relating to employment discrimination); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (purpose of Title VII is to assure equal employment opportunities and to eliminate those discriminatory practices which have worked to the disadvantage of minority citizens); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Congress intended

objectives of Title VII is to make persons whole for injuries suffered due to unlawful employment discrimination.[58] The Court has emphasized that "[i]n 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."[59] The Supreme Court's views as articulated in the above cases are consistent with the concept of allowing sex-based wage discrimination claims filed under Title VII to expand beyond the parameters of the Equal Pay Act.[60]

Several lower courts had held that the broad remedial purpose of Title VII requires that it be given an expansive interpretation.[61] The Ninth Circuit in *Gunther*, however, was the first court of appeals to extend Title VII beyond the Equal Pay Act. The court held that:

> although decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by § 703(h) [the Bennett Amendment].[62]

This holding, which was substantially affirmed by the Supreme

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that Title VII would remove those employment barriers which operate to discriminate on the basis of race or other impermissible classifications).

58. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (in order to be consistent with congressional intent, it is the duty of the courts to construe Title VII to have the greatest possible effect on employment discrimination).

59. City of Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

60. This is necessarily so because sex discrimination in employment extends beyond the unequal pay for equal work concept of the Equal Pay Act. *See supra* text accompanying notes 29-32. By allowing those wage discrimination claims not falling within the parameters of the Equal Pay Act to be brought under Title VII, the broad remedial goals of Title VII as articulated by the Supreme Court necessarily have a better chance of being achieved.

61. *See infra* text accompanying notes 62-82. *But see* Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.) (explained *infra* at notes 129-131 and accompanying text), *cert. denied,* 449 U.S. 888 (1980); Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp 397, 400-01 (W.D. Pa. 1978) (public policy considerations and rules of statutory construction dictate that Title VII plaintiffs be required to allege "equal work" when filing sex-based wage discrimination claims); Molthan v. Temple Univ., 442 F. Supp. 448, 455 (E.D. Pa. 1977) (violation of the Equal Pay Act is a prerequisite for a successful Title VII sex-based wage discrimination suit).

62. 623 F.2d at 1313.

Court,[63] was based largely on the Ninth Circuit's analysis of the legislative history of the Bennett Amendment and the broad remedial policy behind Title VII.[64]

After the Ninth Circuit's decision in *Gunther,* the Tenth Circuit in *Fitzgerald v. Sirloin Stockade, Inc.,*[65] held that a female plaintiff who possessed substantial evidence of her employer's intentionally discriminatory practices had sufficient evidence to establish a claim of sex-based wage discrimination under Title VII, without satisfying the equal work standard of the Equal Pay Act. The court determined that the purpose of the Bennett Amendment was "to bring Title VII into accord with the Equal Pay Act."[66] Because the employer's discriminatory activity was not sanctioned under any of the four Equal Pay Act exceptions,[67] the finding of a Title VII violation was held not to conflict with the provisions of the Equal Pay Act.[68]

Although these two decisions broadened the scope of Title VII beyond the limitations of the Equal Pay Act, they were analytically deficient. The Tenth Circuit in *Fitzgerald* placed considerable emphasis on public policy considerations, but omitted a review of the language and legislative history of the Amendment and the relevant EEOC guidelines. It thus failed adequately to support its conclusions. The Ninth Circuit in *Gunther* failed to recognize the statutory canon of *in pari materia,* which provides that, absent clear intent to the contrary, a spe-

63. The Supreme Court qualified the Ninth Circuit's holding by limiting Title VII claims to cases where plaintiffs are able to marshal direct evidence of their employer's intentionally discriminatory practices. Although the Court refrained from deciding "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII," it expressly distinguished the prison matrons' claims from a comparable worth claim. 452 U.S. at 181; *see infra* notes 116 & 117 and accompanying text.

64. The Ninth Circuit interpreted Senator Bennett's comment that the purpose of his amendment was "to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified," and Senator Dirksen's remark that "[a]ll . . . the . . . amendment does is recognize those exceptions, that are carried in the basic act," 110 CONG. REC. 13,647 (1964), as referring only to the possibility of conflict if the four exceptions of the Equal Pay Act were not included in Title VII. 623 F.2d at 1312. The Ninth Circuit also cited language in *Manhart* to the same effect and noted that the broad remedial policy behind Title VII was persuasive in the absence of clear congressional intent. *Id.* The court then distinguished contrary district court cases, and indicated that its view was consistent with the EEOC's 1965 guideline which interpreted the Bennett Amendment as being designed to avoid conflicting interpretations when both the Equal Pay Act and Title VII are applicable. *Id.*

65. 624 F.2d 945 (10th Cir. 1980).

66. *Id.* at 953.

67. For the language of the four Equal Pay Act exceptions, *see supra* text accompanying note 39.

68. 624 F.2d at 953-54 n.2.

cific statute should not be nullified by a general one.[69]

The Third Circuit, in *International Union of Electrical Workers v. Westinghouse Electric Corp.*,[70] provided a comprehensive analysis of the Bennett Amendment. In *Westinghouse,* plaintiffs did not allege "equal work," but claimed that their employer had intentionally discriminated against them by setting lower pay rates for those job classifications predominantly filled by women. The court considered the language[71] and the legislative history[72] of the Bennett Amendment, the relevant EEOC guidelines[73] and the public policy considerations.[74] It then concluded that, on balance, all of these factors indicated that the Bennett Amendment was intended to include within Title VII only the four affirmative defenses[75] of the Equal Pay Act.[76] Accordingly, plaintiffs had the right under Title VII to have their case heard on the merits.[77]

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69. International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1114 (3d Cir. 1980) (Van Dusen, J., dissenting) (the failure of the Ninth Circuit to discuss the application of the *in pari materia* canon of statutory construction undermines the force of the court's analysis), *cert. denied,* 452 U.S. 967 (1981). *See also* Note, *Wage Discrimination Under Title VII After* IUE v. Westinghouse Elec. Corp., 67 VA. L. REV. 589, 608 (1981) (the Ninth Circuit's failure to consider the *in pari materia* canon of statutory construction makes its analysis incomplete); Comment, *The Bennett Amendment--Title VII and Gender-Based Discrimination,* 68 GEO. L. J. 1169, 1189 (1980) (although the Ninth Circuit in *Gunther* reached the correct result, much of the court's analysis was superficial).

70. 631 F.2d 1094 (3d Cir. 1980), *cert. denied,* 452 U.S. 967 (1981).

71. The court reasoned that because "the term 'authorized' is used to describe something that is endorsed or expressly permitted," the language of the Amendment merely incorporates into Title VII the four affirmative defenses permitted by the Equal Pay Act. *Id.* at 1100-01. The court rejected the application of the *in pari materia* canon as inconsistent with "the Supreme Court's caution that remedies for employment discrimination 'supplement' each other and should not be construed so as to ignore the differences among them." *Id.* at 1101 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 & 48 n.9 (1974)).

72. In reviewing the legislative history of the Amendment, the court considered the context in which "sex" was added to Title VII, the context in which the Bennett Amendment was enacted, and relevant memoranda written after the Amendment's enactment. *Id.* at 1101-05.

73. *Id.* at 1105-06; *see supra* notes 48-50 and accompanying text.

74. In reviewing public policy, the court paraphrased the Supreme Court's opinion as follows:

> It would be ironic indeed if [the Equal Pay Act,] a law triggered by a Nation's concern over centuries of [sexual discrimination] and intended to improve the lot of those who had 'been excluded from the American dream for so long' were to lead to the contraction of their rights under Title VII.

Id. at 1107 (quoting United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979), quoting Senator Humphrey, 110 CONG. REC. 6552 (1964)).

75. For the language of the Equal Pay Act's four affirmative defenses, *see supra* text accompanying note 39.

76. 631 F.2d at 1107.

77. *Id.* at 1108 n.20.

In the recent district court decision of *Gerlach v. Michigan Bell Telephone Co.*,[78] the court cited the preceding courts of appeals cases as support for its holding that the Bennett Amendment was not intended to limit Title VII claims only to those claims which would also be actionable under the Equal Pay Act.[79] Plaintiffs had claimed that their employer intentionally segregated them into the company's lowest paying jobs.[80] After proceeding through a detailed analysis of the Bennett Amendment, similar to that undertaken by the Third Circuit in *Westinghouse*,[81] the district court concluded that Congress had not intended to render such victims of discrimination remediless unless they fell within one of the exceptions provided by the Equal Pay Act.[82]

The Supreme Court's holding in *Gunther* thus confirmed the reasoning of several recent lower court rulings.[83] However, because of the brevity of the Amendment's legislative history,[84] the ambiguity surrounding the congressional intent in enacting the Amendment,[85] the vagueness of the relevant EEOC guidelines[86] and the courts' traditional adherence to "equal work" allegations,[87] the Supreme Court's decision in *Gunther* was desperately needed. The Court's decision ultimately assures that all sight is not lost of the purpose for which Title VII was enacted—the eventual elimination of all employment discrimination.[88]

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78. 501 F. Supp. 1300 (E.D. Mich. 1980).

79. *Id.* at 1316-20.

80. *Id.* at 1302-03.

81. *Id.* at 1310-14.

82. *Id.* at 1320.

83. *See supra* notes 61-82 and accompanying text. *But see* cases cited *supra* notes 54 & 55 and accompanying text.

84. *See supra* note 46 and accompanying text.

85. *See supra* note 45 and accompanying text.

86. *See supra* notes 48-50 and accompanying text.

87. *See supra* notes 53-56 and accompanying text.

88. The purpose of Title VII as contained in § 703(a) provides:

> Employer Practices
>
> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex . . . or
>
> (2) to limit, segregate, or classify his employees . . . 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 . . . sex . . . .

42 U.S.C. § 2000(e)-2(a) (1976).

The Supreme Court recently noted that Congress enacted Title VII with the intent of eliminating discrimination from all forms of employment. United States Steelworkers of America v. Weber, 443 U.S. 193, 202-04 (1979).

C. *Reasoning of the Court*

Although the *Gunther* Court relied most heavily on the remedial purposes of Title VII in formulating its decision, it began its analysis with an examination of the language and legislative history of the Bennett Amendment. It observed that Senator Bennett offered this "technical" amendment to resolve potential conflicts between Title VII and the Equal Pay Act.[89] The language of the Bennett Amendment refers only to those wage differences *"authorized"* by the Equal Pay Act. The Court reasoned that because the prohibitory language of the Equal Pay Act, requiring equal pay for equal work, does not *authorize* anything, the Bennett Amendment cannot logically incorporate this part of the Act into Title VII. Accordingly, under this interpretation, the Amendment incorporates into Title VII only the four affirmative defenses *authorized* by the Equal Pay Act.[90] The Court observed that this interpretation does not render the Amendment superfluous, but has the effect of assuring that both the courts and administrative agencies adopt a consistent interpretation of both statutes.[91]

The Court proceeded next to review the legislative history of the Amendment. The Court found Senator Bennett's "emphasis on the 'technical' nature of the Amendment and his concern for not disrupting the 'effective administration' of the Equal Pay Act" consistent with its interpretation of the Amendment.[92] After evaluating the EEOC's guidelines, the Court concluded that the EEOC's views were not helpful because of their inconsistencies.[93] From the EEOC's appearance as amicus curiae to the female prison guards in *Gunther,*[94] the Court concluded that the EEOC currently supports a narrow interpretation of the

89. 452 U.S. at 170.

90. *Id.* at 170-71. For the language of the Equal Pay Act's four affirmative defenses, *see supra* text accompanying note 39.

91. 452 U.S. at 169-70. Thus, Title VII and the Equal Pay Act are consistent to the extent that both statutes allow for pay differences based on seniority, merit, and incentive systems, and any factor other than sex.

92. *Id.* at 174-75. In discussing congressional references to the Amendment at the time of its passage, the Court observed that congressional remarks did not shed much light on the specific purpose of the Amendment, but were, nevertheless, compatible with its interpretation of the Amendment. *Id.* at 176. As to the few remarks made by Congressmen after the Amendment's passage, the Court noted that it is normally hesitant to attach much weight to such comments. *Id.* at 176 n.16.

93. 452 U.S. at 177-78; *see also supra* note 48-50 and accompanying text.

94. The EEOC also filed an amicus curiae brief in International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied,* 452 U.S. 967 (1981). In *Westinghouse* the Third Circuit referred to the EEOC's position as supporting a broad interpretation of Title VII, *id.* at 1099, and cited current EEOC guidelines in support thereof. *Id.* at 1105.

Bennett Amendment.[95]

The broad remedial purpose of Title VII played an important role in shaping the Court's opinion. In addition to emphasizing the expansive language of Title VII,[96] the Court recognized a congressional statement which declared that "a 'broad approach' to the definition of equal employment opportunity is essential."[97] The Court thus found that in order to provide a remedy for all victims of sex-based wage discrimination, a narrow reading of the Bennett Amendment was necessary.[98] Moreover, the Court considered this approach consistent with an earlier decision in which it had construed Title VII as " 'prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.' "[99] The Court further observed that avoiding those interpretations of Title VII which leave victims of discrimination remediless is crucial to overcoming and undoing the effect of discrimination.[100] Consequently, because there was no clear Congressional mandate limiting Title VII claims to "equal work" allegations, the Court concluded that any such constriction of Title VII was unwarranted.[101] By expanding Title VII beyond a showing of unequal pay for equal work the Court in *Gunther* sought to make it possible for all victims of wage discrimination to obtain relief.[102]

D. Analytic Importance of Gunther

The *Gunther* decision represents an affirmative step toward providing all victims of sex-based wage discrimination with a legal remedy. Henceforth, an employee who is unable to show that a member of the

95. 452 U.S. at 177-78; *see also supra* text accompanying notes 51 & 52.

96. 452 U.S. at 178 (quoting 42 U.S.C. § 2000e-2(a)); *see supra* note 88.

97. 452 U.S. at 178 (citing S. REP. No. 867, 88th Cong., 2d Sess. 12 (1964)).

98. 452 U.S. at 178-80. A narrow reading of the Bennett Amendment incorporates only the four affirmative defenses of the Equal Pay Act into Title VII, thus allowing Title VII claims not based on "equal work" allegations. By so limiting the scope of the Bennett Amendment, the *Gunther* Court allows women in traditionally segregated jobs to file Title VII claims if they can otherwise prove intentional discrimination. Similarly, women holding unique managerial and professional positions will also be able to seek redress. *See infra* note 103 and accompanying text. For an analysis of the advantages of adopting a narrow interpretation of the Bennett Amendment, *see* Gitt & Gelb, *supra* note 27, at 724-25.

99. 452 U.S. at 180 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976)).

100. 452 U.S. at 178. The Court recognized that if "equal work" is required under Title VII, "women holding jobs not equal to those held by men would be denied the right to prove that [their employer's wage determination] system is a pretext for discrimination." *Id.* at 179.

101. *Id.* at 178.

102. *See supra* notes 98 & 100 and accompanying text.

opposite sex holds an equal but higher paying job is not barred from establishing a sex-based wage discrimination claim under Title VII. Employees holding jobs which are segregated by sex, as well as those in unique positions, may now seek relief.[103] Consequently, the Court's decision can be seen as having a deterrent effect: with the new possibility of liability for wage differentiations not based on "equal work" allegations, more employers may now feel compelled to refrain from unfair differentiations in pay.

Despite the significance of the *Gunther* decision, it is likely that some courts and commentators will be dissatisfied with the Court's opinion. Had the Court considered the statutory canon of *in pari materia,*[104] it would have had to reconcile its opinion with the doctrine that where there is no intent to the contrary, a specific statute will not be nullified by a general one.[105] In light of the congressional intent of Title VII, as implied by its broad remedial purpose[106] and the fact that the Court's opinion does not nullify the Equal Pay Act,[107] the Court's failure to discuss the canon is not detrimental. Moreover, the Court undertook a comprehensive analysis of the pertinent legislative history.[108] Because of the ambiguity embedded in that history,[109] however, the Court turned its attention toward the practical considerations of the statute's remedial goals.[110]

Nevertheless, the Court's holding is incomplete. Aside from casting doubt on the viability of the comparable worth theory,[111] the Court

103. The Court recognized that in these situations employees could not obtain relief under a construction of Title VII which encompassed only "equal work" allegations. 452 U.S. at 179-80.

104. *See supra* note 69 and accompanying text.

105. The dissent criticized at length the majority's failure to construe the Equal Pay Act and Title VII *in pari materia.* 452 U.S. at 189-90.

106. *See supra* notes 57-60, 88 and accompanying text.

107. The Court's decision has the effect of insuring that both statutes are construed consistently. *See supra* notes 90 & 91 and accompanying text.

108. Although the dissenting opinion criticized the majority for not devoting more analysis to relevant legislative history, 452 U.S. at 182, the dissent was not able to point to any piece of legislation which the majority did not recognize. The differences in opinion between the majority and the dissent thus appear to be exactly that—differences in opinion as to the meaning of legislative history.

109. *See supra* notes 36-46 and accompanying text.

110. 452 U.S. at 178-79. *See supra* notes 97-102 and accompanying text. The dissent also voiced disapproval over the majority's reliance on Title VII's broad remedial purpose. 452 U.S. at 201-03. Declaring that "it is by no means clear that Title VII was enacted to remedy *all* forms of alleged discrimination," *id.* at 203, the dissent asserted that despite the limitations imposed upon Title VII by the Equal Pay Act's requirement of equal work, victims of sex-based wage discrimination have sufficient legal recourse. *Id.* at 201-03.

111. 452 U.S. at 166, 180-81. The Court repeatedly noted that respondents' suit did not

did not indicate what evidence will suffice as satisfactory proof of intentional sex-based wage discrimination.[112] Consequently, plaintiffs are left without guidance when alleging a cause of action for intentional discrimination under Title VII, and employers are left to speculate on what job and pay structures are permissible. Although plaintiffs are told by the Court that it is possible to prove sex-based wage discrimination without a showing of "equal work,"[113] they are not told how they might otherwise satisfactorily show such discrimination. In recognizing this deficiency, the dissent remarked that "all we may conclude is that even absent a showing of equal work there is a cause of action under Title VII where there is direct evidence that an employer has *intentionally* depressed a woman's salary because she is a woman."[114]

If the Court had chosen to articulate what evidence constitutes sufficient proof of sex-based wage discrimination under Title VII, it could have provided both claimants and employers with a more useful precedent. Instead, the Court has established a vague guideline which goes no further than to allow for the expansion of Title VII beyond the Equal Pay Act in instances where a plaintiff has direct evidence of the employer's intentionally discriminatory practices.[115] It may be expected that the lower courts will be deluged with Title VII claims alleging "direct evidence" of sex-based wage discrimination and courts of appeals will have to formulate workable standards.

E. Viability of the Comparable Worth Theory after Gunther

In strictly limiting its holding to provide that Title VII sex-based wage discrimination claims may be grounded upon allegations other than unequal pay for equal work, the Court expressly refrained from considering the merits of a claim based on a theory of comparable worth.[116] *Gunther* itself did not raise this issue. Plaintiffs were not asking the Court to determine the comparable worth of their jobs vis-a-vis the jobs of the prison's male guards, but were demanding that the

require the Court to make its own subjective assessment of the value of the female guards' jobs vis-a-vis the jobs of their male counterparts. *Id.; see also infra* notes 116, 117 & 125.

112. 452 U.S. at 183. Justice Rehnquist, in his dissent, observed that the Court's decision "provides little guidance to employers or lower courts as to what types of compensation practices might now violate Title VII." *Id.*

113. *Id.* at 178-80.

114. *Id.* at 204.

115. *Id.* at 166.

116. *Id.* at 166, 180-81. For a discussion of the comparable worth theory, *see supra* note 8.

county adhere to a pay scale which reflected its own previously determined evaluation of the worth of their jobs.[117]

In addressing the issue of comparable worth,[118] the Ninth Circuit Court of Appeals in *Gunther* noted that, "because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case."[119] The court of appeals was justified in rejecting the use of comparable worth analysis as proof of wage discrimination. The present state of job evaluation analysis[120] used to determine comparable worth is underdeveloped.[121] Current evaluation systems often contain employer bias or are incapable of uniform application.[122] Discrimination on the part of the job evaluator often distorts both the writing of job descriptions and the assigning of weight to the factors used to evaluate a job's worth.[123] In conclusion, although comparable worth analysis may be helpful in identifying possible discrimination, courts cannot, at the present time, be expected to rely solely on comparable worth analysis to determine whether wage discrimination exists.[124]

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117. The female guards alleged that the county's failure to adhere to its own job evaluation study (wherein wages for both male and female guards were determined) was direct evidence of the county's intentional discrimination. 452 U.S. at 166. In accepting the female guards' theory the Supreme Court cautiously distinguished their use of direct evidence from evidence based on the comparable worth doctrine. *Id.* The Court stated that "respondents' 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." *Id.* at 181.

118. The Ninth Circuit addressed the comparable worth issue in an effort to clarify the effect of its holding. To this end, the court stated that "[w]here . . . plaintiff . . . attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male." Gunther v. County of Washington, 623 F.2d 1303, 1321 (9th Cir. 1979).

119. *Id.*

120. The terminology job evaluation analysis, as used in this Note, refers to the criteria an employer uses to arrive at the value of different jobs within his or her organization.

121. *See* WOMEN, WORK, AND WAGES, *supra* note 8 at 91.

122. *Id.* at 70-74. For example, some job analysis systems are designed so as to reproduce those biases which existed when the job anaysis systems were introduced. *Id.*

123. *Id.* at 77.

124. There are several reasons which currently make reliance solely upon evidence of comparable worth as proof of discrimination inappropriate. First, the value a job is assigned depends on the particular factors used in the job evaluation analysis and the weight assigned to each factor. Moreover, in many job evaluation systems, the current pay rate is determinative of the weight assigned to many job factors. Finally, since the making of value judgments is essential to any valid job evaluation analysis, it is possible that stereotyped

Although the Supreme Court in *Gunther* did not directly address the comparable worth issue, the Court implied that it agreed with the Ninth Circuit's rejection of a Title VII action based solely on the comparable worth theory. In contrasting plaintiffs' direct proof of intentional discrimination with a theory based on comparable worth, the *Gunther* Court noted approvingly that plaintiffs' direct evidence of sex-based wage discrimination eliminated the need for the "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."[125]

Two prior courts of appeals decisions have also expressed a cautious attitude toward the comparable worth doctrine. In *Christensen v. Iowa,*[126] female clerical employees at a university sought to compare their wages to those of male employees in the university's physical plant. Plaintiffs' only evidence of sex discrimination arose from their employer's failure to adhere to its own job evaluation system, which had determined plaintiffs' work to be of equal value to that of the male plant workers. The court dismissed the action in view of the university's own evidence that it modified its evaluation system in order to keep up with local market pay scales.[127] In holding that plaintiffs had failed to demonstrate that sex discrimination, and not some other factor, had caused the wage differentiation,[128] the *Christensen* court implicitly recognized the shortcomings of requiring an employer to adhere to a wage evaluation system which is inconsistent with local market forces.

Similarly, in *Lemons v. City and County of Denver,*[129] the Tenth Circuit also rejected plaintiffs' comparable worth theory. In that case, plaintiffs had offered merely to compare the value of their work as nurses to the value of work performed by other city employees in non-nursing positions. The court indicated that it would not consider comparable worth claims until directed to do so by Congress.[130] In addi-

thinking may have the effect of undervaluing jobs held primarily by women. *See* WOMEN, WORK, AND WAGES, *supra* note 8, at 73-74.

125. 452 U.S. at 181.

126. 563 F.2d 353 (8th Cir. 1977).

127. *Id.* at 354.

128. *Id.* at 355. The court suggested that wage differentials could also depend on "the supply of workers willing to do the job and the ability of workers to band together to bargain collectively for higher wages." *Id.* at 356. Because these factors affect the value of work, their absence from many wage evaluation systems makes comparable worth analysis less reliable.

129. 620 F.2d 228 (10th Cir.), *cert. denied,* 449 U.S. 888 (1980).

130. *Id.* at 229. The court inferred that it could neither intelligently assess and compare

tion, because the *Lemons* court believed that it lacked the authority under Title VII to assess wage differentials not within the equal pay for equal work standard of the Equal Pay Act, it held that it had no choice but to refuse plaintiffs' comparable worth claim.[131]

It is clear that many courts neither feel qualified to take on the substantial burden of assessing and comparing the value of different jobs, nor wish to do so.[132] Because Congress has not required that the courts assume this responsibility, it is not surprising that most courts prefer to inhibit the flood of litigation that would likely result if they were to permit Title VII claims to be litigated solely on a comparable worth theory.[133]

Despite judicial reluctance to adopt a comparable worth analysis, proponents of the theory are nevertheless likely to view *Gunther* as a step in their direction. By eliminating the need to allege equal work in Title VII actions, and by refraining from directly addressing the merits of the comparable worth theory, the Court effectively removed certain legal barriers formerly blocking comparable worth claims. Furthermore, by failing to articulate what type of evidence will suffice as proof of intentional discrimination, the Court left open the possibility of successful Title VII actions based on a comparable worth theory. However, in view of the theory's rejection in prior courts of appeals cases and the bias currently incorporated into many job evaluation systems, proponents of the comparable worth theory would be well advised to marshal additional evidence of discrimination when filing sex-based wage discrimination claims under Title VII.

IV. CONCLUSION

Sex-based wage discrimination is a significant problem in the United States. Consequently, women in all fields of employment continue to receive lower wages than they merit.[134] In an effort to alleviate and ultimately eliminate all such employment discrimination, Congress

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the value of different jobs nor take on the substantial burden that such analysis would entail. *Id.* at 229-30.

131. *Id.* at 230.

132. *Id.* at 229; *see supra* note 130 and accompanying text. *See also* Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1321 (E.D. Mich. 1980).

133. *See* Nelson, *supra* note 8, for a discussion of the practical effects of allowing victims of sex-based wage discrimination to base their allegations of discrimination on the comparable worth theory.

134. Women in the work force get only $.60 for every dollar received by men. TIME, June 22, 1981, at 70; *see also supra* note 8.

enacted the Equal Pay Act and Title VII.[135] Unfortunately, because of problems associated with statutory construction of the Bennett Amendment concerning the proper relationship between the Equal Pay Act and Title VII, congressional intent was temporarily stifled.[136]

The *Gunther* Court's expansion of Title VII to allow for sex-based wage discrimination claims beyond the scope of the Equal Pay Act's limited "equal work" requirement has substantially enhanced the potential availability of relief for victims of employment discrimination. Employees who present direct evidence of their employer's intentional discrimination, but who are unable to show that a member of the opposite sex is receiving higher wages for performing substantially identical work, may now seek relief. Thus, women in traditionally female jobs and unique positions, as well as those deliberately segregated into lower paying jobs, will be afforded the opportunity to prove sex-based wage discrimination under Title VII.

It is expected that future courts, in following *Gunther,* will allow sex-based wage discrimination claims to be brought under Title VII, if plaintiffs' evidence of discrimination does not require the courts to make their own independent determination as to the worth of various jobs.[137] Further guidelines, however, are still needed. Claimants and employers must be able to predict in advance what constitutes evidence of intentional discrimination under Title VII.[138] Without such clarification, a flood of litigation alleging "intentional discrimination" is inevitable.

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135. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979); Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978).

136. *See supra* notes 54 & 55 and accompanying text.

137. *See supra* note 125 and accompanying text.

138. *See supra* note 14.