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Comparable Worth and Title VII: The Case against Disparate Impact Analysis

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Comparable Worth and Title VII: The Case Against Disparate Impact Analysis

Comparable worth is said to be the women's issue of the 1980s.[1] Labor unions have gone on strike over comparable worth and legislation has been initiated or enacted to implement comparable worth in twenty-one states.[2] In California, comparable worth legislation has been enacted[3] and a Governor's Task Force on Comparable Worth was formed in April 1984.[4] In addition, the state of California is a defendant in the latest in a series of comparable worth lawsuits.[5] In the most noteworthy case,[6] a federal district court in Washington awarded the plaintiffs a backpay judgment against the state that may amount to $800 million.[7]

This author will examine the theory of comparable worth[8] and demonstrate how this concept depends on the ability of an individual to evaluate and compare jobs.[9] This author then will discuss the various legal theories under which comparable worth litigation can proceed.[10] Since reliance on discriminatory effect alone works an unfair result, this author will conclude that the only permissible theory is one that

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1. BUREAU OF NATIONAL AFFAIRS, THE COMPARABLE WORTH ISSUE 1 (1981).
2. Studies have been completed or are under way in the following states: Connecticut, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. Equal Employment Advisory Council Meeting, June 29, 1984, San Francisco, California.
3. 1981 Cal. Stat. c. 722, §2, at 2826 (enacting CAL. GOV'T CODE §19827.2); 1983 Cal. Stat. c. 906, §1, at 105 (enacting CAL. GOV'T CODE §53248).
4. L. A. DAILY J., April 30, 1984, at 16, col. 3.
5. California State Employees Association v. California, No. C84-7275 MPH (N.D. Cal., filed November 21, 1984); American Nurses Association v. State of Illinois, No. 84-64451 (N.D. Ill., filed May 25, 1984); Penk v. Oregon State Board of Higher Education, No. 80436FR (D.C. Ore., filed 1980).
6. AFSCME v. State of Washington, 578 F. Supp. 846 (E.D. Wash. 1983).
7. L. A. DAILY J., December 5, 1983, at 5, col. 3.
8. *See infra* notes 8-18 and accompanying text.
9. *See infra* notes 114-45 and accompanying text.
10. *See infra* notes 43-145 and accompanying text.

involves proof of discriminatory intent.[11] In the following section, the theory behind comparable worth will be discussed.

THE COMPARABLE WORTH THEORY

The doctrine of comparable worth represents an attempt to remedy the effects of discrimination against women in the United States. Proponents of this idea note the long history of social and legal discrimination against women[12] and claim these "forces" relegate women to a limited number of jobs in the economy.[13] In support of their claim, these proponents cite statistics indicating that seventy percent of the men and fifty-four percent of the women in the labor force are concentrated in occupations dominated by their own sex.[14] Moreover, they contend that the same forces that determine the occupation of a woman operate to keep her wages lower than those of a man.[15] Advocates of comparable worth cite figures showing that the average woman is paid sixty-four percent of the wages of the average man.[16]

The primary tenet of the comparable worth doctrine is that individuals should be paid according to the worth of the duties performed to their employers.[17] In this way, salaries are set objectively, free from subjective sexist influences.[18] Accordingly, comparable worth theorists assert that implementing this doctrine will reduce pay disparities between men and women.[19]

Sex discrimination is found under the comparable worth theory when female workers are paid less than male workers performing jobs of a similar value to their employers.[20] The doctrine, therefore, places a premium on the ability to measure the worth of an occupation.[21] Proponents of comparable worth assume that job evaluation studies constitute an accurate measure of the worth of a job.[22]

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11. *See infra* notes 166-86 and accompanying text.
12. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 401 (1979).
13. *Id.*
14. D. TREIMAN & H. HARTMANN, WOMEN, WORK AND WAGES 28 (1981).
15. Blumrosen, *supra* note 12, at 401.
16. CHRISTIAN SCIENCE MONITOR, November 7, 1984, at 19, col. 1.
17. County of Washington v. Gunther, 452 U.S. 161, 166 (1981).
18. Blumrosen, *supra* note 12, at 428.
19. *Id.*
20. BUREAU OF NATIONAL AFFAIRS, *supra* note 1, at 1.
21. *Id.*
22. D. TREIMAN & H. HARTMANN, *supra* note 14, at 69-70.

A. The Concept Behind Job Evaluation Studies

While differing in details of design, all job evaluation studies first describe a position in terms of the various functions involved.[23] The descriptions then are rated according to the relevant compensable factors.[24] These compensable factors are usually the "universal criteria"[25] of knowledge, skill, conceptual effort, responsibility, and working conditions.[26] The ratings are combined to create a total score and the scores are used to assign wages to job classes.[27] A study utilizing these methods played a key role in imposing liability on the state of Washington in *AFSCME v. State of Washington*, the seminal comparable worth suit.[28]

The Role Played by Job Evaluation Studies In *AFSCME v. State of Washington*

On November 20, 1973, then Governor Daniel Evans of the state of Washington received a letter from Norm Schut, Executive Director of the Washington Federation of State Employees, accusing the state of discrimination against women in setting salaries.[29] The Governor responded on November 28, 1973, with a letter to the directors of the two civil service systems in Washington, the Department of Personnel and the Higher Education Personnel Board. The letter stated that an effort must be made to eliminate any and all bias in wages paid to women.[30] The state then contracted for an independent comprehensive study to evaluate reports of pay inequities.[31]

The state hired the firm of Norman Willis & Associates (hereinafter Willis), a consulting firm, to conduct the comprehensive study. Willis evaluated jobs in both state civil service systems in terms of "knowledge and skills," "mental demands," "accountability," and "working conditions."[32] Released in September, 1974, the Willis Study found, on the average, a twenty percent disparity[33] between the salaries

23. *Id.* at 71.
24. *Id.*
25. Blumrosen, *supra* note 12, at 432.
26. Bureau of National Affairs, *supra* note 1, at 45.
27. D. Treiman & H. Hartmann, *supra* note 14, at 71.
28. *AFSCME*, 578 F. Supp. 846 (E.D. Wash. 1983).
29. *Id.* at 860.
30. *Id.*
31. *Id.* at 861.
32. *Id.* at 865 n.9.
33. *Id.* at 861.

of jobs predominantly occupied by men and those predominantly occupied by women.[34]

Willis was retained in 1976 to update the 1974 study and to develop a program leading to the implementation of comparable worth.[35] The 1976 study concluded that the wages of employees in predominantly female jobs should be raised to the comparable worth salary line established by the study.[36] Governor Evans responded by including a seven million dollar appropriation in the 1976-77 state budget to begin the implementation of comparable worth.[37] His successor in office, however, removed this appropriation.[38]

The American Federation of State, County, and Municipal Employees (hereinafter AFSCME) brought suit against the state in 1982, on behalf of the class of employees situated in jobs predominantly occupied by women.[39] In this suit, plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964[40] (hereinafter Title VII), claiming that the state had discriminated against the plaintiff class with respect to compensation.[41] Plaintiffs relied on a disparate impact as well as a disparate treatment theory.[42]

The court found for the plaintiffs under both theories,[43] holding that the 1974 study established sex based differences sufficient to support a prima facie showing of discrimination under a disparate impact theory.[44] The court also held that the maintenance of established pay practices after the 1974 study disclosed pay disparities constituted a prima facie showing of disparate treatment.[45] When the state failed to rebut either showing,[46] judgment was entered accordingly.

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34. "Predominantly" was defined as 70% one sex or the other. *Id.*

35. *Id.*

36. *Id.* The comparable worth salary line was established by plotting job content against monthly wages for both male and female jobs and then performing a linear regression analysis on the data. N. WILLIS & ASSOCIATES, STATE OF WASHINGTON COMPARABLE WORTH STUDY PHASE II 13 (1976). The irony of this process is that a linear regression analysis is designed to find the average value of salary for each value of job content. A. AGRESTI AND B. AGRESTI, STATISTICAL METHODS FOR THE SOCIAL SCIENCES, 280-81 (1979). Instead of raising women's wages to a value equal to men's wages, the study proposed to raise them only to this average value. Thus, the pay disparity only would have been reduced, not eliminated.

37. *AFSCME*, 578 F. Supp. at 851.

38. *Id.* This appropriation was removed despite the fact that the 1976-77 state budget contained a surplus. *Id.*

39. *Id.* at 851.

40. 42 U.S.C. §2000e.

41. *AFSCME*, 578 F. Supp. at 851.

42. *Id.* at 864. *See infra* notes 74-104 and accompanying text (discussion of disparate impact and disparate treatment).

43. *AFSCME*, 578 F. Supp. at 864-65.

44. *Id.* at 863.

45. *Id.*

46. *Id.* at 864.

AFSCME illustrates the role job evaluation studies can play in comparable worth litigation. *AFSCME* also demonstrates how these studies can constitute one of the elements of proof required in comparable worth litigation. The large backpay judgment against the state indicates the necessity of understanding the legal background of a comparable worth case.

Comparable Worth Litigation

Prior to the 1981 United States Supreme Court decision in *County of Washington v. Gunther,*[47] wage discrimination suits could be brought only under the terms of the Equal Pay Act.[48] This act limits claims to situations in which a female performs a job substantially equal to that performed by a male but is paid less.[49] This limitation was due to a broad interpretation of the Bennett Amendment[50] to Title VII, by several lower federal courts that held the entire Equal Pay Act was incorporated into Title VII.[51]

In *Lemons v. City and County of Denver,*[52] for example, nurses employed by the defendant brought an action under Title VII. The nurses alleged that they were underpaid relative to other city positions of "an equal worth."[53] The court rejected this claim and held that the "Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way it applies in the Equal Pay Act."[54] Since the positions of the plaintiffs were not substantially similar to the positions offered in comparison, the Equal Pay Act did not apply.[55] This narrow approach to wage discrimination suits remained intact until 1981.

A. Expansion Of Wage Discrimination Litigation: County of Washington v. Gunther

The United States Supreme Court viewed the Bennett Amendment differently in *County of Washington v. Gunther.*[56] This case involved the claims of four female prison guards who alleged that they were

47. 452 U.S. 161 (1981).
48. 29 U.S.C. §206(d).
49. Hodgson v. Behren's Drug Co., 475 F.2d 1041, 1049 (5th Cir. 1973), *cert. denied,* 414 U.S. 822 (1973).
50. 42 U.S.C. §2000e-2(h).
51. Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980); Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1978).
52. 620 F.2d 228, 229 (10th Cir. 1980).
53. *Id.*
54. *Id.* at 229-30.
55. *Id.* at 230.
56. 452 U.S. 161 (1981).

paid less than male guards.[57] Since male guards were responsible for more than ten times as many prisoners than were female guards, the Court held that the two positions were not substantially similar so that the Equal Pay Act did not apply.[58] The defendant employer had set the plaintiffs' wages lower than its own job study indicated they should be paid while paying the male guards at the level recommended by the study.[59] Plaintiffs alleged that this failure to utilize the same practices used to pay men constituted intentional discrimination forbidden by Title VII.[60]

By a five to four vote, the Court interpreted the Bennett Amendment as incorporating only the four Equal Pay Act defenses[61] into Title VII[62] and rejected the contention that the entire Equal Pay Act was included in Title VII.[63] The Court thus allowed the plaintiffs to allege sex based wage discrimination since the jobs compared were not substantially similar.[64] The Court held that the language of the Bennett Amendment suggested that the Equal Pay Act defenses were incorporated into Title VII.[65] The majority supported this interpretation with evidence of the Congressional intent in enacting the Bennett Amendment,[66] citing floor discussions during the debate over the merits of Title VII[67] revealing that the intent behind the Bennett Amendment was to relate the Equal Pay Act to Title VII, not to resolve any conflict between the two statutes.[68] From this perception of a lack of conflict between the Equal Pay Act and Title VII, the majority reasoned that Congress could not have intended to incorporate the entire Equal Pay Act into Title VII.[69] By concentrating on the intent behind the 1964 passage of the Bennett Amendment, the majority apparently ignored the Congressional rejection of a comparable worth standard during the passage of the Equal Pay Act.[70] The dissenting

57. *Id.* at 164.
58. *Id.* at 165.
59. *Id.*
60. *Id.* at 164.
61. 29 U.S.C. §206(d). The Equal Pay Act defenses are a seniority system, a merit system, quality or quantity of production, or any factor other than sex.
62. 452 U.S. at 171.
63. *Id.* at 168.
64. *Id.* at 181 (Rehnquist, J., dissenting).
65. *Id.* at 168.
66. *Id.* at 171-76.
67. *Id.* at 173-76. *See* 110 Cong. Rec. 13647 (1964).
68. *Gunther*, 452 U.S. at 174.
69. *Id.* at 174-75.
70. *Id.* at 184-88 (Rehnquist, J., dissenting).

justices, conversely, based their arguments upon that demonstration of congressional intent.[71]

The *Gunther* holding thus authorizes suits comparing jobs to be brought under Title VII.[72] This result is most advantageous to a comparable worth plaintiff, since the jobs being compared need not be substantially similar as required by the Equal Pay Act. Instead, the broad prohibitions of Title VII forbidding an employer "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate against any individual*"[73] with respect to compensation because of an individual's sex now apply. Since a Title VII cause of action now may be alleged, comparable worth plaintiffs also may utilize the Title VII theories of litigation.

B. Theories of Litigation Under Title VII

Currently, cases arising under Title VII may be brought utilizing either a disparate treatment or a disparate impact theory.[74] Under the disparate treatment theory, an employer violates Title VII by intentionally treating some people less favorably than others because of their race, color, religion, sex, or national origin.[75] This theory attempts to alleviate the "crass aspect"[76] of discrimination. Under the disparate impact theory, an employer violates Title VII by utilizing facially neutral practices that are fair in form but discriminatory in operation.[77] This approach is designed to eliminate subtle forms of discrimination.[78] An employer may be found liable under both theories in the same lawsuit.[79]

Two fundamental differences exist between these approaches. One difference is that a plaintiff must prove discriminatory intent in a disparate treatment claim but not in a disparate impact claim.[80] The other difference is that an employer can defend a disparate treatment claim by showing a legitimate nondiscriminatory reason for the apparent inequality.[81] In a disparate impact claim, an employer can

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71. *Id.*
72. *Id.* at 181.
73. 42 U.S.C. §2000e-2(a) (emphasis added).
74. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
75. *Id.*
76. Segar v. Smith, 738 F.2d 1249, 1271 n.18 (D.C. Cir. 1984). The "crass aspect" covers the obvious situations, for example, when an employer pays a white employee more than a black employee who does the same work.
77. *Teamsters*, 431 U.S. at 335 n.15.
78. *Segar*, 738 F.2d at 1271 n.18.
79. *Teamsters*, 431 U.S. at 335 n.15.
80. *Id.*
81. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

defend by showing that a business necessity justifies the challenged practice.[82]

McDonnell Douglas Corp. v. Green[83] provides a classic example of how the disparate treatment theory operates. The plaintiff, a black civil rights activist, applied for a position with the defendant corporation.[84] Although qualified for the position, the application of the plaintiff was denied while the defendant continued to accept other applications for the job.[85] An inference could be drawn that plaintiff was not hired because of race in violation of Title VII. Due to the fact that the plaintiff had instigated a demonstration against the defendant that resulted in pecuniary loss to the corporation,[86] a legitimate reason not based on race existed for not hiring the plaintiff.[87] Therefore, the defendant incurred no liability.

An example of the disparate impact theory is provided by *Griggs v. Duke Power Co.*[88] The defendant company instituted guidelines requiring employees to possess a high school education and pass two aptitude tests.[89] These requirements disqualified more blacks than whites from employment.[90] Clearly, the use of educational standards did not involve discriminatory intent.[91] Just as clearly, however, the use of these criteria impacted more heavily on blacks than whites. The defendant, therefore, was required to show how the challenged practice related to job performance.[92] Since the record revealed that those hired before the guidelines went into effect without an education or high test scores performed as well as those without these credentials,[93] the Court held that the use of the aptitude tests were not needed to achieve the defendant's aim of a high quality workforce.[94]

The disparate impact and disparate treatment theories merge in cases referred to as "pattern or practice" cases.[95] Plaintiffs in these cases allege employer discrimination against a class of persons rather than

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82. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
83. 411 U.S. 792 (1973).
84. *Id.* at 796.
85. *Id.* at 796, 802.
86. *Id.* at 796.
87. *Id.* at 803.
88. 401 U.S. 424 (1971).
89. *Id.* at 427-28.
90. *Id.* at 426.
91. *Id.* at 432.
92. *Id.* at 431.
93. *Id.* at 431-32.
94. *Id.*
95. *Segar*, 738 F.2d at 1267.

against an individual.[96] The class claims that an employer has utilized facially neutral practices that are expected to result in discrimination.[97] Intent is inferred from the conscious maintenance of the discriminatory practice.[98] Since this claim involves the actual practices used, a disparate impact claim also is made.[99] Thus, a single fact pattern may involve both theories.[100] *AFSCME v. State of Washington* provides a good example of this merger.[101]

By nature, comparable worth cases are "pattern or practice" cases. Due to the fact that occupants of predominantly female jobs seek to compare their positions with male jobs, class-wide discrimination is involved. The allegations involve both the practices used and the reason for their use. A comparable worth class action theoretically then can proceed under both disparate treatment and disparate impact theories.

The disparate impact theory developed in hiring discrimination cases brought under 42 United States Code section 2000e-2(a)(2).[102] This statute prohibits practices that classify employees and adversely affect employment opportunities. Comparable worth cases, in contrast, involve allegations of discrimination with respect to wages, which arise under 42 U.S.C. section 2000e-2(a)(1). The United States Supreme Court has not stated explicitly that only a disparate treatment analysis should be applied in wage discrimination cases.[103] The Court recently denied certiorari to a wage discrimination case applying a disparate impact analysis.[104] The effect of shifting the burden of production under a disparate impact analysis reveals the reason why only a disparate treatment analysis should be applied in comparable worth litigation.

C. *Order of Proof in Title VII Cases*

The order of proof is similar for both disparate impact and disparate

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96. *Id.* at 1266.
97. *Id.; see Teamsters*, 431 U.S. at 360 n.46.
98. *Segar*, 738 F.2d at 1266; *see* Columbus Board of Education v. Penick, 443 U.S. 449, 458 (1979).
99. *Segar*, 738 F.2d at 1266.
100. *Teamsters*, 431 U.S. at 335 n.15.
101. In *AFSCME*, the court found that the pay practices of the State had a disparate impact on women inasmuch as women were paid less on the average than men. 578 F. Supp. at 863. The court also found that the State was guilty under a disparate treatment theory because the State maintained its pay practices after learning of the pay disparities. *Id.*
102. Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1494 (9th Cir. 1983).
103. *Id.; see* City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 711 n.20 (1978).
104. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3906 (1984).

treatment cases.[105] A prima facie case must be established by the plaintiff to satisfy the plaintiff's initial burden of production and shift the burden of production to the defendant.[106] A defendant may rebut the prima facie showing by demonstrating a legitimate reason for the alleged disparate treatment[107] or a business necessity for the disparate impact.[108] Once the defendant raises a genuine issue of fact as to whether the defendant has discriminated against the plaintiff, the defendant rebuts the prima facie case.[109] The burden of persuasion then rests with the defendant. In a disparate treatment case, the plaintiff then must show that the rebuttal put forth by the defendant is a mere pretext for intentional discrimination.[110] In a disparate impact case, the plaintiff must show that other policies would serve an employer equally well.[111]

The prima facie showing for both theories of recovery necessitates proof that "raises an inference of discrimination."[112] In a disparate treatment case, a prima facie showing is made with proof that a plaintiff is treated differently because of race, color, religion, sex, or national origin.[113] A showing that a practice creates a disparity adverse to a plaintiff establishes a prima facie case in a disparate impact claim.[114]

Statistics can play a very important role in establishing a prima facie case.[115] Discriminatory intent for a disparate treatment claim may be inferred from statistics constituting a "sufficient showing of disparity."[116] An entire prima facie case of disparate impact can be established with a statistical showing that one class is treated differently than another.[117] Of course, a prima facie case must be established by a preponderance of the evidence[118] and a defendant can always impeach the credibility of the statistical evidence by demonstrating methodological errors.[119]

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105. *Segar*, 738 F.2d at 1267 n.12.
106. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
107. *Burdine*, 450 U.S. at 255.
108. *Griggs*, 401 U.S. at 431.
109. *Burdine*, 450 U.S. at 255.
110. *Id.* at 255-56.
111. *Albemarle Paper Co.*, 422 U.S. at 426.
112. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).
113. *Teamsters*, 431 U.S. at 358; *see* McDonnell Douglas Corp. v. Green, 411 U.S. at 802.
114. *Albemarle Paper Co.*, 422 U.S. at 425.
115. *Segar*, 738 F.2d at 1267.
116. *Id.*
117. New York City Transit Authority v. Beazer, 440 U.S. 568, 584 (1979).
118. *Burdine*, 450 U.S. at 253.
119. *Segar*, 738 F.2d at 1268.

Job Evaluation Studies

After a job evaluation study measures the job content of various positions, those positions predominantly held by men are compared with those positions predominantly held by women.[120] If the female positions are paid less, a prima facie case of discrimination with respect to wages has been presented. The burden of production consequently will shift to the defendant. Since job evaluation studies can shift the burden of production and possibly impose liability on a defendant, these studies need to be examined closely.

A. The Methodology of Job Evaluation Studies

Job evaluation studies have been criticized heavily by experts because the methodology involves extensive subjective judgment.[121] The following section will demonstrate how subjective judgment can enter into a study. The study utilized in *AFSCME* will be used to show where subjectivity can be found.

Not all jobs in a firm are examined in the course of a job evaluation study.[122] Instead, a representative cross-section of jobs are selected. These jobs are known as "benchmark" jobs.[123] The choice of benchmark jobs is crucial.[124] If only the relatively higher paying male jobs and the lower paying female jobs are selected, the study will show sex based pay differences even though these differences actually may not occur.[125] A scientific method of selecting the benchmark positions is critical to the reliability of the study.

The study in *AFSCME* evaluated only 121 of over 3,000 job classifications.[126] Moreover, no mention was made regarding how the 121 classifications were chosen.[127] Additionally, the study did not disclose whether the consultants or the State Advisory Committee selected the jobs. The possibility of manipulation, however subtle, was present.

The next step in the evaluation process was to break down each position into the particular functions necessary to perform the job.[128]

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120. Grune & Reder, *Pay Equity: An Innovative Public Policy Approach to Eliminating Sex-Based Wage Discrimination*, 12 Pub. Personnel Mgmt. 395, 397 (1983).
121. Blumrosen, *supra* note 12, at 428-41.
122. D. Treiman & H. Hartmann, *supra* note 14, at 76.
123. *Id.*
124. *Id.*
125. *Id.*
126. N. Willis & Associates, State of Washington Comparable Worth Study 2 (Sept. 1974) [hereinafter cited as Willis].
127. *Id.*
128. Blumrosen, *supra* note 12, at 431.

Obviously, the judgment of those describing the jobs will greatly influence the results.[129] The consultants in Washington attempted to gather data by sending questionnaires to 1,600 employees chosen at random from the 13,612 employees in the designated job classifications.[130] Of the 1,600, approximately 800 employees were interviewed by the consultants and task force members.[131] Additionally, the consultants added information to the questionnaires based on their observations of the selected employees.[132] Thus, the following two levels of subjective opinion were at work: (1) the views of the employees, and (2) the views of the consultants.

The answers then were screened by the consultants.[133] The consultants selected those answers that they felt "described positions most representative of [the] respective classifications."[134] The consultants screened responses based on their opinion that some were more complete and of a higher quality than others.[135] No criteria were given as to what constituted a representative, complete or quality answer. Clearly, these choices were made solely on the opinion of the consultants involved.

In general, after job descriptions are complete, each classification is assigned a value based on how the components of the job correspond to the given compensable factors.[136] Most experts believe that the following three universal compensable factors exist: (1) knowledge; (2) mental and physical demands; and (3) responsibility.[137] These factors, however, must be subdivided into specific characteristics that make up "knowledge," "mental demands," and "responsibility."[138] The subdivision process particularly is susceptible to influences that can take the form of sexual bias. Critics of job studies claim that this choice may ignore the skills involved in typically women's work,[139] but a study designed to find sex discrimination easily could overemphasize these same skills. If physical demands are calculated, for instance, the manual dexterity involved in secretarial work may be overmephasized or underemphasized relative to the heavy lifting in construction.[140] After the compensable factors are broken down, each

129. D. TREIMAN & H. HARTMANN, *supra* note 14, at 72.
130. WILLIS, *supra* note 126, at 3-4.
131. *Id.* at 4.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 5.
136. D. TREIMAN & H. HARTMANN, *supra* note 14, at 72.
137. Blumrosen, *supra* note 12, at 432.
138. *Id.*
139. *Id.* at 436.
140. *Id.* at 437.

component then must be weighted.[141] Again, critics claim that sexism may cause physical demands and working conditions to be weighted heavier than skill and responsibility,[142] but bias also can work in favor of women. In any event, the outcome of a study will depend heavily on how the examiner values one compensable factor relative to another.[143]

The *AFSCME* study employed the following four compensable factors: (1) knowledge and skill; (2) mental demands; (3) accountability; and (4) working conditions.[144] The four factors were subdivided into very broad characteristics. For example, the category "knowledge and skill" was divided into "job knowledge" and "interpersonal skills."[145] "Job knowledge" was defined as the "occupational, specialized or functional knowledge or skill required by an incumbent."[146] Interpersonal skills were defined as "the extent to which the position is required to serve, influence and/or motivate others."[147] These general categories obviously were used in order to minimize charges of sexual bias. Both manual dexterity and heavy lifting are covered by this expansive definition. Working conditions are deemed to include discomfort, both physical and psychological.[148] Thus, both the auto mechanic and the executive secretary are covered by these definitions. The use of general categories, however, places additional emphasis on the subjective judgment of those evaluating the positions.

The *AFSCME* study did not mention how the different categories were weighted. All that was revealed were the number of points assigned to each category and a total number of points awarded to each job.[149] This report does nothing to dispel inferences of subjective bias.

Due to the fact that the methodology of job evaluation studies lacks a detailed technique of evaluating the benchmark jobs, the reliability of the study depends on the expertise of those who conduct the study. In the *AFSCME* study, a committee trained by the consultants actually evaluated the worth of the benchmark jobs.[150] The backgrounds of the committee members revealed no special qualifications in the job

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141. *Id.*
142. *Id.*
143. D. TREIMAN & H. HARTMANN, *supra* note 14, at 75.
144. WILLIS, *supra* note 126, at 5-6.
145. *Id.* at 5.
146. *Id.*
147. *Id.*
148. *Id.* at 6.
149. *Id.* at 8 and Table of Evaluations, following 8.
150. *Id.* at 7.

evaluation area. A registered nurse supervisor, a social worker, the registrar from a state college, an economist from the Department of Highways, a labor representative, and the director of the State Women's Council constituted half the committee membership.[151] Not only was the committee inexperienced, but all evaluations were arrived at by group consensus.[152] Compromise among members necessary to reach a consensus merely operates to increase the effects of subjectivity.

After each job was assigned a value in the *AFSCME* study, the salaries of predominantly male and female jobs of equal value were compared. The study revealed that those in predominantly female jobs were paid only eighty percent of the wages of those in predominantly male jobs.[153] This finding is suspect because of the subjective influence present in the study and the lack of qualifications of those who actually performed this analysis. Allowing subjective studies to shift the Title VII evidentiary burden clearly is unfair.

B. Job Evaluation Studies in a Disparate Impact Analysis

While the foregoing discussion points out the particular methodological shortcomings of the *AFSCME* study, job evaluation studies in general are inherently subjective in nature and dependent on the opinions of those who participate in the effort.[154] As statistical evidence, job evaluation studies can constitute by themselves a prima facie case of sex based wage discrimination.[155] If methodological errors are obvious, a defendant may impeach the credibility of a study in order to prevent a prima facie case from arising by a preponderance of the evidence.[156] If subjective opinion is only subtly present, the plaintiff may succeed in this phase of the case.[157] The defendant then must prove that an overriding business consideration justifies the pay practice.[158] The court will balance these considerations against the countervailing national interest in eliminating employment discrimination.[159] This is an extremely high threshold to clear.

Considering the consequences of a shift of the burden of production under a disparate impact theory in a comparable worth case,

151. *Id.* The other half of the committee worked in the personnel field and were presumably more experienced. *Id.*
152. *Id.* at 8.
153. *Id.* at 13.
154. D. TREIMAN & H. HARTMANN, *supra* note 14, at 94; Hildebrand, *The Market System*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 83 (E. Livernash, ed. 1980).
155. *Beazer*, 440 U.S. at 584.
156. *Segar*, 738 F.2d at 1268.
157. *Beazer*, 440 U.S. at 587.
158. *Bonilla*, 697 F.2d at 1303.
159. *Id.*

this result becomes all the more unfair. An employer then must show that the wage structure is justified by business necessity.[160] Evidence of the profit margin of the employer, though, may show that higher wages could have been paid to those in predominantly female jobs without interrupting the "efficient operation of the business."[161] Other factors also may enter into the wage calculations of a defendant, such as labor-management relations[162] or the individual choice of an employee.[163] If the truck drivers union is stronger than the clerical union, the employer will be forced to pay truck drivers more than the clerical workers. This will result, however, in the creation of a sex based wage disparity between the two groups. The employer then faces either a strike by the truck drivers or a Title VII action brought by the clerical workers. If a collective bargaining situation is not in effect, an employer will negotiate individually with employees. A woman may agree to work for less money than a man. This creates another sex based wage disparity and a disparate impact will punish an employer for the actions of an employee. These factors that often determine wage levels demonstrate the difficulty of showing a business necessity to rebut the prima facie case of the plaintiff.[164]

C. *Admissibility of Job Evaluation Studies*

Courts could take two approaches in addressing the issue of the admissibility of job evaluation studies. A court could refuse to admit job evaluation studies because the studies fail the test for admissibility of scientific evidence[165] articulated in *Frye v. United States*:[166]

> while [the] courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which this deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[167]

Admissibility thus depends on how well the experts in a field have received a new technique. The subjectivity and unreliability of job

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160. *Teamsters*, 431 U.S. at 335 n.15.
161. Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982).
162. *See* Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1098 (1982).
163. *Id.*
164. *Id.*
165. Scientific evidence can either make data available by scientific means or evaluate data by scientific means. Giannelli, *Admissibility of Novel Scientific Evidence:* Fry v. United States *A Half-Century Later*, 80 COL. L. REV. 1197, 1200-01 n.19 (1980). By weighting data pertaining to job function, job evaluation studies fit into the latter category.
166. 293 F. 1013 (D.C. Cir. 1923).
167. *Id.* at 1014.

studies noted above have been criticized soundly by experts in the comparable worth field.[168] Thus, job evaluation studies would not be admitted under the *Frye* test.

Not all courts follow the *Frye* test,[169] however, and many courts follow the "relevancy approach"[170] of Professor McCormick.[171] Professor McCormick proposes to admit scientific evidence if supported by a qualified expert,[172] letting disagreements in the scientific community over reliability bear on the weight of the evidence.[173] The availability of expert testimony poses no problem for the comparable worth plaintiff, for the author of the study certainly would testify as to the reliability of the study at issue. Hence, the relevancy approach probably would admit job studies into evidence. This fact points out the necessity of another solution to the dilemma posed by subjective job evaluation studies.

Eliminating Disparate Impact from Comparable Worth Cases

This author proposes to reject the use of the disparate impact analysis in comparable worth litigation. The impact of subjective studies then would be reduced because a plaintiff would have to prove discriminatory intent to succeed.[174] Studies still could be utilized by a plaintiff to demonstrate disparities in pay between the sexes, but these studies would constitute a prima facie case only if accompanied by facts that indicate the intentional utilization of illegal practices by the defendant.[175]

In response to cases suggesting that comparable worth litigation should be limited to disparate treatment theories,[176] commentators have argued that disparate treatment analyses are inadequate to eliminate all discrimination with respect to compensation.[177] Critics of the disparate treatment analysis claim that an employer easily can cite a legitimate reason to justify pay practices with a discriminatory

168. Blumrosen, *supra* note 12, at 428-41.
169. Giannelli, *supra* note 165, at 1228.
170. *Id.* at 1232-33.
171. *See E. Cleary, ed.,* McCormick on Evidence 608 (3rd ed. 1984).
172. *Id.* at 606-07.
173. Reed v. State, 391 A.2d 364, 371 (Md. Ct. App. 1978).
174. *Teamsters*, 431 U.S. at 335-36 n.15.
175. *Furnco*, 438 U.S. at 577.
176. *Gunther*, 452 U.S. 161; Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984).
177. *See* Comment, *Comparable Worth, Disparate Impact and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 Cal. L. Rev. 730, 741 (1983).

effect.[178] Countering this contention is the fact that a plaintiff then may show that the explanation of the defendant is a mere pretext for discrimination.[179]

Proponents of the disparate impact theory also note that discriminatory intent is difficult to prove.[180] Courts, however, have been relatively eager to infer proof of discriminatory intent.[181] Intent may be inferred from a sufficient showing of a disparity,[182] the conscious maintenance of a discriminatory practice,[183] or departures from usual patterns of decision making.[184] Therefore, comparable worth cases still could proceed if proof of discriminatory intent is required. If proof of intent is required, a verdict for a plaintiff is more indicative of illegal action.

Restricting comparable worth litigation to those cases in which discriminatory intent can be proven will not impede efforts to cure pay disparities. Both *Gunther* and *AFSCME* stand for the proposition that the failure to implement job evaluation studies constitutes intentional discrimination.[185] Any disparities disclosed must be cured in the many studies that have been commissioned in the wake of the *AFSCME* decision. Further, a federal court in Pennsylvania has held that the failure to conduct a study is actionable.[186] Restricting wage discrimination suits to disparate treatment theories will not eliminate comparable worth; rather, a plaintiff's efforts will shift towards securing the commissioning of a study.

Elimination of disparate impact analysis from comparable worth litigation also eliminates inequities peculiar to "pattern or practice" cases. After a plaintiff establishes a prima facie case of disparate treatment, an employer will often seek to rebut by demonstrating a specific nondiscriminatory employment practice as the cause of the disparity.[187] In so doing, however, a defendant actually articulates a business practice with an adverse effect on the plaintiff class, establishing a prima facie case of disparate impact for the plaintiffs.[188] Rebutting a prima facie case of disparate treatment in a "pattern or practice" case forces

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178. *Id.*
179. *McDonnell Douglas Corp.*, 411 U.S. at 804.
180. *See* Comment, *supra* note 177, at 741.
181. *See infra* notes 182-84 and accompanying text.
182. *Segar*, 738 F.2d at 1267.
183. *Columbus Board of Education*, 443 U.S. at 458.
184. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267-68 (1977).
185. *Gunther*, 452 U.S. at 180-81; *AFSCME*, 578 F. Supp. at 867.
186. *See, e.g.* Taylor v. Charley Brothers Co., 25 Fair Employment Practices Cases (BNA) 602 (W.D. Pa. 1981).
187. *Segar*, 738 F.2d at 1270.
188. *Id.*

a defendant then to rebut a disparate impact claim that the plaintiffs never established.[189] The burdens of proof clearly weigh too heavily upon an employer if disparate impact analyses are allowed.

The reasons for the creation of the disparate impact analysis also support the limitation of comparable worth litigation to a disparate treatment approach. The Ninth Circuit Court of Appeals recently noted that the disparate impact model was designed to handle specific employment requirements which are not job related.[190] Examples of this are the aptitude tests of *Griggs*,[191] height and weight requirements,[192] and pregnancy leaves.[193] The disparate impact model was not designed for a wide ranging attack on the employment practices of a company.[194] This court held that setting wages involves general policies, not specific practices.[195] Since a comparable worth suit challenges the wage practices of an employer, a disparate impact analysis should not be allowed.

Conclusion

The doctrine of comparable worth represents an attempt to produce equality in pay between the sexes. The key instrumentality of this doctrine is the job evaluation study that analyzes the positions of an employer and compares predominantly female positions with predominantly male positions. Since comparable worth cases may be litigated under Title VII, job studies can play a crucial role in relegating the burdens of proof among the parties. Due to the inherent methodological weaknesses of job studies, these studies alone should not be able to shift the burden of production to the defendant. Discriminatory intent also should be proven before requiring a defendant to justify the pay practices at issue.

Much has been written about the broad remedial purposes of Title VII[196] and about the importance of providing a remedy to plaintiffs affected by discrimination.[197] The courts should be careful to avoid favoring a plaintiff over a defendant.[198] Allowing a plaintiff to present suspect statistical evidence in order to establish a prima facie

189. *Id.*
190. *Spaulding*, 740 F.2d 686 (9th Cir. 1984).
191. 401 U.S. 424 (1971).
192. Dothard v. Rawlinson, 433 U.S. 321 (1977).
193. Harris v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980).
194. *Spaulding*, 740 F.2d at 706.
195. *Id.* at 707.
196. *See, e.g., Gunther*, 452 U.S. at 178-80.
197. *Id.; see also* Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 763 (1976); *Manhart*, 435 U.S. at 702.
198. Note, *supra* note 162, at 1097.

case is tantamount to placing the burden of proof on a defendant from the start. The difficulties of establishing a business necessity defense in a comparable worth case and the merger of disparate impact and treatment analyses in "pattern or practice" cases show how disparate impact theories unfairly operate against a comparable worth defendant.

Even if plaintiffs are restricted to a disparate treatment theory, defendant employers still may be liable under the doctrine of comparable worth. Ultimately, the fate of an employer still rests on the results of a job evaluation study. The employer can only hope that the results are not too badly skewed by subjective input.

Robert Lawrence Bragg