In Pursuit of Wages Based on Job Value - Gunther v. County of Washington

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IN PURSUIT OF WAGES BASED ON JOB VALUE—
GUNTHER V. COUNTY OF WASHINGTON

During the early 1960's, Congress twice enacted legislation designed to end sex discrimination in the compensation practices of private industry. With the Equal Pay Act of 1963 (EPA), it prohibited wage differentials between the sexes, but only when men and women perform equal work in the same establishment. Title VII of the Civil Rights Act, enacted one year later, broadly proscribes any sex discrimination against individuals with respect to compensation. Although both statutes ban sex discrimination in wages, the language of Title VII sweeps wide enough to prohibit unequal


2. As used in this Note, a "compensation practice" refers to any practice of an employer to reward employee performance with money or monetary substitutes, including both wages and fringe benefits. "Pay" and "wages" will be used to denote payment for services rendered, or, more simply, the gross amount of an employee's paycheck, whether the employee is paid on an hourly or salaried basis.


5. Section 6(d)(1) of the Equal Pay Act (EPA) provides in full:
No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he [or she] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.


7. Section 703(a)(1) of Title VII provides, in part:
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .
pay for equal work and to extend beyond the EPA's equal pay for equal work principle. Additionally, the EPA covers fewer employers, furnishes less tractable remedies, and is governed by different legal standards than


By contrast, Title VII covers any employer "affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ...." 42 U.S.C. § 2000e(b), as amended by Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (1972). At least one court has held that Title VII's broad coverage is not narrowed in a case of sex discrimination in wages by the EPA's establishment requirement. Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397, 407 (W.D. Pa. 1978). Accord, 29 C.F.R. § 1604.8(a) (1978).

9. Compare 29 U.S.C. §§ 216-217 (1976) (the EPA) with 42 U.S.C. § 2000e-5(g) (1976) (Title VII). Because the EPA amended the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976), remedies for its violation are found at sections 16 and 17 of the Fair Labor Standards Act. Id. §§ 216-217. Section 16(a) provides seldom-used criminal penalties for willful Fair Labor Standards Act violations. Section 16(b) provides that: (1) reasonable attorney's fees are recoverable; (2) class action-like suits may be initiated with the written consent of all similarly situated plaintiffs; and (3) prevailing plaintiffs may recover wages due plus liquidated damages. Id. § 216(a).

Because relatively few EPA suits are brought by employees, few awards of attorney's fees have been made under yet unsettled principles. See Hodgson v. Miller Brewing Co., 457 F.2d 221, 229 (7th Cir. 1972) (noting that the general public was benefited, the court awarded $20,000); McClanahan v. Matthews, 440 F.2d 320, 324 (6th Cir. 1971) (approving an award for less than the claimed amount). By contrast, Title VII standards are well-established: a prevailing plaintiff may recover reasonable attorney's fees unless the award is unjust due to special circumstances. Alhemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (citing Newman v. Piggle Park Enterprises, Inc., 390 U.S. 400 (1968)); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971). See also Sprogs v. United Airlines, Inc., 517 F.2d 387, 392 (7th Cir. 1975).

The class action requirements contained in Federal Rule 23, applicable in Title VII cases, do not require written consent of all those similarly situated. Fed. R. Civ. P. 23. Whether an EPA plaintiff can use the Rule 23 class action device in lieu of § 16(b) has been settled quite differently by courts. Compare Padddison v. Fidelity Bank, 60 F.R.D. 695, 700 (E.D. Pa. 1973) ("[T]he Rule 23 class action device is not available in an Equal Pay Act case," but the court certified a Rule 23 class for a Title VII unequal pay complaint) and Maguire v. Trans World Airlines, Inc., 55 F.R.D. 48, 49 (S.D.N.Y. 1972) (same) and Schmidt v. Fuller Brush Co., 527
Title VII. Therefore, when a claim of discrimination in wages is brought under Title VII, a problem arises as to whether and to what extent the provisions of the EPA are controlling.

Recognizing this problem of overlapping coverage, the Title VII Congress adopted a floor amendment to assure the continued vitality of the EPA. The amendment, offered by Senator Bennett, provides that Title VII does not prohibit wage or compensation differentials between the sexes when those differentials are authorized by the EPA. Thus, the Bennett Amendment

F.2d 532, 536 (8th Cir. 1975) (same) with Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 437 (W.D. Pa. 1973) (class action available but limited to plaintiffs who "opt in" under § 16(b)). See also Laffey v. Northwest Airlines, Inc., 321 F. Supp. 1041, 1042-43 (D.D.C. 1971) (certifying a Rule 23 class but silent on § 16(b)).

The Fair Labor Standards Act's provision for liquidated damages is limited by § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260 (1976), which allows courts to deny liquidated damages if an employer acted in good faith and had reasonable grounds for believing that it was not violating the law. See Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1976); Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972). Unlike other areas in which Title VII's remedies are somewhat more advantageous to a plaintiff, this liquidated damages provision has no counterpart in Title VII.

Finally, the Fair Labor Standards Act, § 17, authorizes district courts to enjoin violations of the Act or "the restraint of any withholding of... wages... found by the court to be due to employees under this [Act]." 29 U.S.C. § 217 (1976). By comparison, Title VII gives courts a blanket authorization to mandate any "equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1976).

The courts have found additional differences in the remedies available under the EPA and Title VII in the two areas of union contribution, Northwest Airlines, Inc. v. Transport Workers, 606 F.2d 1350 (D.C. Cir. 1979) (an employer has the right of union contribution under Title VII but not under the EPA), and back pay, Dessenberg v. American Metal Forming Co., 6 FEP Cas. 159 (N.D. Ohio 1973) (denying back pay for maternity leave as not lying within the EPA's definition of wages).

10. Under Title VII, it is unlawful for an employer to treat its employees differently on the basis of sex, race, religion, color or national origin. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Similarly, the EPA prohibits employers from treating men and women employees disparately by paying a person of one sex differently than one of the other sex when both are doing equal work in the same establishment. But unlike the EPA, Title VII also prohibits the adoption of policies or practices that have the effect of adversely affecting individuals of one sex or race, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), or of perpetuating the present effects of pre-Title VII discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Once the plaintiff proves a prima facie case of discrimination, the burden shifts to the employer to "articulate a legitimate, nondiscriminatory reason." Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1979). The plaintiff can then attempt to show that the articulated reason is pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. at 802. Finally, Title VII allows a very narrowly construed exception for situations in which sex is a "bona fide occupational qualification." See 29 C.F.R. § 1604.2(a) (1979); Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264 (D. Del. 1971) (Title VII's bona fide occupational qualification not applicable to EPA cases).

11. Normally this problem arises in cases of alleged sex discrimination, but not always. See Patterson v. Western Dev. Laboratories, 13 FEP Cas. 772 (N.D. Cal. 1976) (race discrimination).

12. The Bennett Amendment provides:

It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or
links Title VII relief from wage discrimination to the EPA. Yet, the United States Court of Appeals for the Ninth Circuit, in Gunther v. County of Washington,13 effectively severed relief under the two statutes by strictly construing the Bennett Amendment. In a case of first impression among the courts of appeals, the Gunther court held that Title VII prohibits wage disparities based on sex between dissimilar jobs.14 As a result, the Gunther decision will permit Title VII plaintiffs to raise discriminatory wage claims by comparing the value of different jobs.

After briefly discussing the wage discrimination provisions of Title VII and the EPA, and pre-Gunther case law concerning the relationship between them, this Note dissects the Gunther court's opinion, and concludes that the court misconstrued legislative intent, statutory language and agency interpretations in achieving its result. Presenting an alternative judicial role for resolving similar future claims, this Note further addresses the insidious effects that the Gunther decision may have both on the stability of the employment market and on the long-run accomplishment of true employment equality for women.

BACKGROUND DISCUSSION

Although the United States Supreme Court has never expressly decided whether Title VII's only wage discrimination yardstick is the equal pay for equal work standard, the Gunther court's decision that Title VII need not duplicate this EPA standard represents a significant departure from antecedent judicial pronouncements. At the outset, however, the provisions of Title VII and of the EPA must be discussed.

Congress' first effort to abolish sex discrimination in wages, the EPA, contains two basic clauses.15 The first sets forth the general rule: men and women who perform "equal work" in the same establishment shall not receive unequal pay.16 Equal work is defined as work requiring equal skill, effort and responsibility under similar working conditions.17 A plaintiff's burden of showing equal work is met by proof that two jobs require substantially equal work, not necessarily identical work but not merely similar

compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA].

13. 602 F.2d 882 (9th Cir. 1979).
14. 602 F.2d at 891. The term "dissimilar job" is used in this Note to denote jobs that are neither equivalent nor substantially equivalent. It can be equated with the often-used, but misleading, term "comparable job."
16. The statutory term is not pay; it is "wage rate." This is defined as overtime premiums and all rates, whether calculated by time, piece, job, incentive, or otherwise. 29 C.F.R. § 800.106 (1979).
work. Moreover, in comparing job content to show equal work, Congress intended the measures of skill, effort, responsibility and working conditions to be applied as terms of art in the job evaluation field. The second clause contains three particular exceptions and one catch-all exception to the general rule. Specifically, it provides that wage gaps between the sexes are not unlawful when based on a seniority, a merit, or a piece-work system, or when based on any other factor other than sex. After the plaintiff proves both equal work and unequal pay, the burden shifts to the defendant to justify the wage disparity with one of the Act's four exceptions as affirmative defenses.

The same general congressional purpose that motivated the EPA also gave rise to Title VII to eradicate the deleterious effects of a long and well-

18. The "substantially equal work" standard was first fashioned in Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970). The Wheaton Glass court recognized that, on the one hand, a strict identical work requirement would effectively emasculate the EPA's protection while, on the other hand, a comparable work standard was rejected by Congress in favor of the equal work standard. Id. at 265. Thus, the court adopted the more moderate substantially equal standard, which was quickly embraced by other courts. See, e.g., Ridgeway v. United Hospital-Miller Div., 563 F.2d 923, 926 (8th Cir. 1977); Hodgson v. Miller Brewing Co., 457 F.2d 221, 226 (7th Cir. 1972); Hodgson v. Fairmont Supply Co., 454 F.2d 490, 493 (4th Cir. 1972); Hodgson v. American Bank of Commerce, 447 F.2d 416, 419 (5th Cir. 1971). Furthermore, the Supreme Court has indicated that it approves of the substantially equal standard. Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974). It is clear, however, that some courts find jobs with more than inconsequential differences to be "substantially equal." See, e.g., Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) (female stewardesses and male pursers perform substantially equal work despite divergent flight assignments, duties and responsibilities).

19. The term "job content" refers to the requirements of a job, the duties performed by the employee and the conditions under which they are performed. See 29 C.F.R. § 800.109 (1979).

20. Corning Glass Works v. Brennan, 417 U.S. at 201-02. Thus, as the Supreme Court noted "wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." Id. at 201 (emphasis added). For a discussion of job evaluation plans, see notes 117-32 and accompanying text infra.

21. Congress intended the first three exceptions—merit, seniority and piecework systems—to be specific examples of situations where a pay differential is based on a "factor other than sex" under the final exception. H.R. REP. No. 176, 88th Cong., 1st Sess. 1 (1963); Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974).


24. Specifically, the EPA "was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), cert. denied, 398 U.S. 905 (1970). See also Corning Glass Works v. Brennan, 417 U.S. at 195 (quoting S. REP. No. 176, 88th Cong., 1st Sess. 1 (1963)). The declared purpose of Congress in adopting the EPA was to end the following consequences of wage differentials between the sexes: depressed living standards, poor utilization of human resources, tendency to cause labor disputes, and unfair competition. The Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a), 77 Stat. 56 (1963). See also H.R. REP. No. 1370, 87th Cong., 2d Sess. (1962) (evincing Congress' concern with improper employment discrimination).
documented history of employment discrimination against individuals belonging to economically disadvantaged groups. In contrast to the EPA's finely delineated provisions, Title VII broadly prohibits discrimination "against any individual with respect to his [or her] compensation." Although it is not entirely clear what affect Title VII was intended to have on the EPA, the United States Supreme Court once concluded that Title VII was meant to "supplement rather than supplant existing laws . . . relating to discrimination." The Court's recent decision in City of Los Angeles Department of Water & Power v. Manhart is also somewhat instructive.

In Manhart, female employees challenged under Title VII their employer's practice of deducting more for pension benefits from their pay than from the pay of male employees. The employer argued that the disparate deductions were necessitated by the longer average lifespan of females, which would ultimately require it to pay females larger pension benefits. The employer further contended that this practice was authorized by the fourth exception in the EPA, namely, that the greater deduction was based on longevity, a factor other than sex. Since the Court rejected this defense, it did not reach the employer's contention that an EPA defense could be asserted in this Title VII action because of the Bennett Amendment link between the two acts. Thus, the Court in Manhart did not decide

Title VII's more comprehensive, but related purpose was "to achieve equality of employment opportunity and remove barriers that have operated in the past to favor an identifiable group of white [male] employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971). See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971) (Title VII puts men and women on equal footing).


30. Id. at 712.

31. See note 5 supra.

32. The Court's discussion of the Bennett Amendment was very carefully limited to the contentions of the parties. 435 U.S. at 711-13.
whether the Bennett Amendment serves to incorporate the EPA's four exceptions into Title VII. Nevertheless, the decision could be interpreted as necessarily concluding that the Bennett Amendment incorporates the EPA's four defenses because the Court allowed the employer to assert one of those defenses. But even under this less persuasive interpretation, the Court clearly did not decide whether the EPA's equal work standard also is incorporated.

Indeed, before the Ninth Circuit's decision in Gunther, no circuit court had expressly decided whether Title VII plaintiffs could bring claims predicated only on the EPA's equal pay for equal work principle. There were, however, some vague indications of how the appeals courts regarded the interplay between Title VII and the EPA. Some courts have treated each statute as helpful in interpreting the other. Many circuits, following dicta

33. 435 U.S. at 712. An interpretation of Manhart suggesting that the Supreme Court did decide whether the EPA's four exceptions are incorporated into Title VII is possible because the Court affirmed the court of appeals decision which stated that "all that the Bennett Amendment did was incorporate the exemptions of the Equal Pay Act into Title VII." Manhart v. City of Los Angeles Dep't of Power & Water, 553 F.2d 581, 590 (9th Cir. 1977). Similar language is not, however, found in the majority's affirmance. Cf. City of Los Angeles Dep't of Power & Water v. Manhart, 435 U.S. at 727 (1978) (Burger, C.J., dissenting) ("the exemption provided by the Equal Pay Act . . . is incorporated into Title VII"). Nevertheless, in Gunther the Ninth Circuit relied upon its previous decision in Manhart as support. 602 F.2d at 890.

34. While pay level usually depends on job content, pension benefits are commonly determined by multiplying an employee's years of service by a percentage of an employee's average earnings. Staats, Private Pension Plans: How Benefits Are Computed, MANAGEMENT REV. 33-36 (No. 10, 1965). Thus, there is no assurance that two employees performing identical jobs would be assessed the same pension deduction. Because there was no question in Manhart whether the male and female employees were performing equal work, the Court was not presented with this incorporation question. Similarly, in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the issue was whether a disability plan discriminated against women by failing to provide pregnancy coverage; there was no question whether women and men performed equal work.

35. Although it is true, as the Gunther court asserted, that no circuit court ever expressly discussed the incorporation issue, id. at 888, several decisions are incomprehensible unless they impliedly decided that Title VII does incorporate the EPA's equal pay for equal work principle. See Keyes v. Lenoir Rhyne College, 15 FEP Cas. 914 (W.D.N.C. 1976), aff'd, 15 FEP Cas. 925 (4th Cir. 1977) (court applied only the EPA's equal pay for equal work standard to a Title VII claim not so confined); Ammons v. Zia Co., 448 F.2d 117, 119-20 (10th Cir. 1971) (same). Every district court considering the link between Title VII and the EPA has decided that Title VII is coextensive with the EPA. See Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397 (W.D. Pa. 1978); Moltman v. Temple University, 442 F. Supp. 448 (E.D. Pa. 1977); Howard v. Ward County, 12 Empl. Prac. Dec. 5790 (D.N.D. 1976). Other courts have considered the question only when presented with a Title VII claim solely alleging unequal pay for equal work. See cases cited in note 43 infra.

in the first important EPA case, Shultz v. Wheaton Glass Co.,\textsuperscript{37} have declared that Title VII and the EPA must be construed harmoniously to achieve Congress' purpose.\textsuperscript{38} At a minimum, this rule of construction requires that EPA standards be applied to Title VII claims of unequal pay for equal work.\textsuperscript{39} A serious problem remains: whether a plaintiff may allege wage discrimination under Title VII grounded on a theory other than equal pay for equal work.

Decisions preceding Gunther clearly indicate that Title VII's facially broader prohibition of sex discrimination in wages must be restrained in application to achieve amity with the EPA. For example, in Christensen v. Iowa,\textsuperscript{40} the Court of Appeals for the Eighth Circuit held that when Title VII plaintiffs fail to prove that two jobs are substantially equal they may not attempt to prove sex bias by showing that dissimilar jobs are of equal value.\textsuperscript{41} Although this court did not directly address the role played by the EPA in a Title VII case,\textsuperscript{42} its decision implies that the only way Title VII plaintiffs may prove sex discrimination in wages by comparing two jobs is by comparing the content of the two jobs, i.e., by showing equal work. In Lemons v. City & County of Denver,\textsuperscript{43} the Court of Appeals for the Tenth Cir-


\textsuperscript{38} Wheaton Glass has been cited and followed by several circuits: Di Salvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593, 596 (8th Cir. 1978); Orr v. Frank R. MacNeill & Sons, Inc., 511 F.2d 166, 170 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117, 119 (10th Cir. 1971). But because these courts typically cite each other with little independent analysis, it is important to note exactly what the Wheaton Glass court said:

- Although the Civil Rights Act is much broader than the Equal Pay Act, its provision regarding discrimination based on sex are in pari materia with the Equal Pay Act. This is recognized in the provisions of § 703(h) [the Bennett Amendment].
- Since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of § 703(h) would undermine the Civil Rights Act.
- It is not necessary here, however, to delineate the precise manner in which these two statutes must be harmonized to work together in service of the underlying Congressional objective.

421 F.2d at 266.

\textsuperscript{39} See Gunther v. County of Washington, 602 F.2d 882, 891 (9th Cir. 1979); Di Salvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593, 596 (8th Cir. 1978); Orr v. Frank R. MacNeill & Sons, Inc., 511 F.2d 166, 170 (5th Cir.), cert. denied, 423 U.S. 865 (1975).

\textsuperscript{40} 563 F.2d 353 (8th Cir. 1977).

\textsuperscript{41} Id. at 356.

\textsuperscript{42} Although the Eighth Circuit declined to decide the Bennett Amendment issue in Christensen, it did decide that a prima facie case of Title VII discrimination is not established by showing merely that two differently paid, dissimilar jobs are equally valued by an employer. Id. at 355 n.5. The court adamantly refused to "interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications." Id. at 356. Accord, Lemons v. City & County of Denver, No. 78-1499 (10th Cir. 1980); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975); Hodgson v. Miller Brewing Co., 457 F.2d 221, 227 (7th Cir. 1972); Keyes v. Lenoir Rhyne College, 15 FEP Cas. 914, 924 (W.D.N.C. 1976); aff'd, 15 FEP Cas. 925 (4th Cir. 1977).

\textsuperscript{43} No. 78-1499 (10th Cir. 1980). The appeals court observed that the plaintiffs were "not seeking equality of opportunity in skills as contemplated by Title VII . . . but instead would
cuit did not merely imply this result, it expressly held that Title VII is coextensive with the EPA, and hence Title VII plaintiffs who complain that they are paid less than employees of the opposite sex may only prevail by showing equal work. While *Lemons* was decided after *Gunter*, the pre-*Gunter* courts also refused to allow plaintiffs to circumvent the EPA by using Title VII to compare the value of dissimilar jobs.

### FACTS AND PROCEDURE

In 1973, the County of Washington (Oregon) employed female "matrons" to supervise its female prisoners and male guards to supervise its male inmates. Each guard managed about twelve times as many prisoners as each matron. Moreover, the County employed more matrons than needed to guard the few female prisoners, and thus the matrons spent about fifty percent of their working hours doing clerical work not done by the male guards.

Upon their dismissal, four of the matrons brought suit under section 703(a)(1) of Title VII, alleging, *inter alia*, that during their employ the County had denied them equal pay for work substantially equal to the guard's work. The district court held that the County had not violated

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**Deputy Sheriff**

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<th>C.O. Trainee</th>
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<td>$525-$668</td>
<td>$525-$668</td>
<td>$525-$668</td>
<td>$525-$668</td>
</tr>
</tbody>
</table>

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44. 602 F.2d at 886. In mid-1973, male guards, who were temporarily assigned deputy sheriffs, were replaced by corrections officers, a position open to both men and women. *Id.*

45. Three matrons were employed for each prisoner. *Id.* at 887.

46. *Id.* at 888.

47. Their dismissal was apparently the aggravating cause in their initiation of this suit, although it is irrelevant to the wage discrimination issues.

48. The matrons also alleged that the County had violated § 704(a) of Title VII by retaliating against them for asserting their right to equal pay for equal work. *Id.* at 885. The court held that the County did not violate Title VII because (1) the County had eliminated the matrons' jobs for the "legitimate, nondiscriminatory" purpose of reducing overcrowding and saving money, *id.* at 892; (2) the County refused to rehire one plaintiff because of her poor health, *id.* at 893; and (3) no connection was shown between the matrons' assertion of their civil rights and a no-rehire notation made in their personnel files. *Id.* For a discussion of Title VII law relating to retaliation claims, see *Schlei & Grossman, supra* note 1, at 416-41.

49. The male guards were classified as deputy sheriffs and deputy sheriff recruits until June 1973 when the county replaced them with correction officers and correction officer trainees. 602 F.2d at 886. In 1973, the salary ranges for these positions were as follows:
Title VII by paying the matrons less than guards because a matron's job required less effort and responsibility. In addition, the lower court held that this decision on the equal work issue ended its inquiry, and therefore it refused to hear the plaintiffs' contention that, even if the two jobs were not substantially equal, sex bias alone caused some of the pay gap.

On appeal to the United States Court of Appeals for the Ninth Circuit, the matrons argued that job differences in the number of prisoners guarded were not significant because a supervisor must be present whether the jail contained one or ten prisoners. They further contended that job differences in the amount of clerical work done were not important because they merely did clerical work rather than sit idle. The court of appeals disagreed, affirming as not clearly erroneous the lower court's decision that the two jobs were not substantially equal. Nevertheless, the court remanded the case to allow the plaintiffs a chance to prove that sex discrimination had caused some of the wage differential.

THE ISSUE AND THE DECISION

If the matrons had brought suit under the EPA, a decision that their job and the guards' job were dissimilar would have ended the inquiry because that statute only prohibits wage gaps between equal jobs. Since the suit was brought under Title VII, the Gunther court framed the issue as whether Title VII is broader in scope than the EPA. Unfortunately, this statement of the issue is so general that it serves to obscure rather than to clarify the actual decision in Gunther. The issue is better stated as whether Title VII's broad language is narrowed by the EPA so that Title VII plaintiffs, trying

50. Id. at 888. The fundamentally subjective nature of job comparisons under the equal work principle is underscored by the district court's and Ninth Circuit's assertion that "clerical work entails substantially less effort . . . than guarding prisoners." Id. The court did not, however, fully discuss how it reached this deceptively simple conclusion. Effort could be measured by the expenditure of physical effort or energy, by mental fatigue, or by an amalgam thereof. If effort is measured by mental fatigue, it becomes more difficult to conclude summarily that clerical work requires less effort. Choosing between these proxy variables and defending with solid evidence the conclusion that one job requires less effort than another undoubtedly complicates the task. See generally A. Langsner & H. Zollitsch, Wage and Salary Administration 203 (1961) (hereinafter cited as Langsner & Zollitsch).

51. 602 F.2d at 886.

52. Petitioner's Brief at 28, Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979).

53. 602 F.2d at 887.

54. Id. at 891.

55. The matrons brought suit under Title VII alone because the EPA did not apply to local governments until May 1, 1974 (The Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 1(a), 88 Stat. 55 (1974)), several months after the matrons were discharged. 602 F.2d at 886 n.4.


57. 602 F.2d at 888.

58. See note 7 supra.
to prove sex discrimination in wages by comparing two jobs, may only compare jobs that are substantially equal. In explanation, the matrons did not present evidence that they would have been paid more if they were male despite what other male or female employees were paid. Rather, their proof was that because male guards were paid more, sex must have been a factor in setting their wages. An EPA analysis would gauge the strength of this inference by comparing the content of the two jobs, and a presumption would arise that sex discrimination did indeed cause the wage gap when the jobs' contents are substantially equal. Moreover, the EPA only envisions a situation in which plaintiffs use job comparisons to infer discrimination, as manifested in the Act's comparison-based formula of equal pay for equal work. When a plaintiff's evidence does not include job comparisons, therefore, the Equal Pay Act has no application.

The matrons' suit was initiated, however, under Title VII and not under the EPA. Title VII, without relying on a comparison-based formula, makes sex discrimination in compensation unlawful. For example, Title VII prohibits sex discrimination in wages when the plaintiff's job is unique while the EPA does not because in such a case no jobs can be compared. Clearly, then, Title VII reaches farther than the EPA when an inference of sex discrimination in wages does not depend upon job comparisons. Hence, the question presented in Gunther was not, as the court indicated, simply whether Title VII is broader than the EPA—in some cases it clearly is. The more subtle question was whether Title VII also reaches claims not covered by the EPA when those claims are based on job comparisons, or whether the EPA's comparison-based formula is the only one Congress intended to allow.

Without sufficiently explaining why the EPA's approach to male-female pay disparities was not relevant, the Gunther court declined to curb Title VII's broad scope and remedial purposes without evidence of a clear legislative intent suggesting that Title VII was to incorporate the EPA's relatively

59. 602 F.2d at 886.
60. The courts have never expressed it as a presumption; technically, this proof establishes a prima facie case. Corning Glass Works v. Brennan, 417 U.S. 188, 195-96 (1974). It is, however, convenient for analytic purposes to think of it in these terms. Arguably, the absence of equal content between two jobs raises the reverse presumption, that job content rather than sex differences caused the wage differential. In other words, unequal pay for equal work between the sexes is presumptively caused by sex discrimination while unequal pay for unequal work is presumptively caused by variant job content.
61. See S. Rep. No. 176, 88th Cong., 1st Sess. 3 (1963) ("job comparisons can be put to the practical end of administering a Federal equal pay policy").
63. Title VII expansively proscribes any sex discrimination in compensation without restricting its protection to a particular method of proof. 42 U.S.C. § 2000e-2(h) (1976). For the text of this section, see note 7 supra.
limited equal pay for equal work standard. It divined no such purpose from section 703(h) of Title VII, the Bennett Amendment, which provides that compensation differentials authorized by the EPA are not unlawful under Title VII. Focusing briefly on selected bits of legislative history, the court concluded that Congress only intended the Bennett Amendment to make the EPA's four exceptions available to employers as affirmative defenses in Title VII suits for sex discrimination in wages. It found contrary district court authority unpersuasive and construed agency regulations to be consistent with its conclusion. The court reasoned that Title VII creates rights independent of other statutes, and if Title VII’s protection were restricted to EPA claims of unequal pay for equal work, then other harmful practices would be immunized from attack. Therefore, the Gunther court held that a Title VII plaintiff is not confined to the claim of unequal pay for equal work.

Having decided that Title VII is broader than the EPA, the Gunther court proceeded to establish the precise protection afforded by the two statutes. It held that, by virtue of the Bennett Amendment, the EPA’s exceptions are available as affirmative defenses in Title VII actions, and that a claim based on job comparisons, but not alleging equal work, is permissible under Title VII. Stated differently, the court held that a Title VII plaintiff who fails to prove that two jobs are equivalent may still compare the wages of these dissimilar jobs to prove sex bias. Moreover, the decision permits plaintiffs to rely, as the Gunther plaintiffs relied, on evidence that shows the value of

65. 602 F.2d at 890.
66. Id.
67. Id. at 889. In its summary, the court stated its newly fashioned standard as allowing plaintiffs to attack discriminatory practices other than equal pay for equal work “unless” an exception applies. Id. at 891. But the more likely interpretation of the Gunther court’s allocation of the burden of proof is that the defendant, not the plaintiff, has the burden of showing the applicability of an exception as an affirmative defense.
69. 602 F.2d at 890.
70. Id. at 890-91.
71. Id. In the court’s words, “although decisions interpreting the Equal Pay Act are authoritative where a plaintiff suing under Title VII raises a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices.” Id.
72. Petitioner's Brief at 29-30. Specifically, the matrons asserted:

[C]omparisons among the salary ranges show that the matrons salary levels make no sense in relation to other salaries. . . . If the County considers policemen inherently more valuable, why are corrections officers' salaries 'higher than deputies? If matrons are worth less than corrections officers because they do some clerical work, why are they paid 48% less than corrections officers and only slightly more than police stenographers, whose work was 98% clerical? How can corrections officers trainees, who have no experience at all, be more valuable than matrons with an average experience of 5 years?

Id. (emphasis added).
their job vis-a-vis the value of entirely different jobs held by employees of the opposite gender. Because a pay gap between dissimilar jobs will be partly, if not entirely, attributable to different job content and not to sex discrimination,73 the Gunther court also held that a plaintiff's claim that sex bias caused the entire wage differential will be judged under the EPA's content-comparison principle.74 In short, Gunther begets a new judicial Title VII wage discrimination standard—comparable pay for work of comparable value75—a standard that may, for the first time, significantly undercut economic market evaluations of a job's worth.76

INFIRMITIES OF GUNTHER

The Gunther court's conclusion that the EPA's equal pay for equal work standard is not incorporated into Title VII rests upon weak foundations. The court's construction of the Bennett Amendment contorted that amendment's language, relied imprudently upon selected bits of legislative history and slighted the importance of policies underlying the EPA. In addition, the court questionably interpreted Equal Employment Opportunity Commission regulations to avoid an agency position in conflict with its decision. The Gunther court, in brief, erroneously concluded that the EPA is not the only statutory basis for wage discrimination suits that use job comparisons as proof of sex bias.

Although the court promised a "close analysis,"77 its consideration of the Bennett Amendment was disappointingly superficial. Clearly, courts may seek the legislature's meaning outside the language of a statute; however, they still should be confined by the words Congress carefully chooses in expressing its will.78 The Bennett Amendment provides that it is not unlaw-

73. The matrons alleged only that "some of the discrepancy in wages was due to sex discrimination." 602 F.2d at 888 (emphasis added).
74. The Gunther court apparently distinguished "the Equal Pay Act's equal work formula," id. at 889, from "its equal pay formula." Id. at 890. Therefore, although the decision's use of "equal pay" could be seen as shorthand for the phrase equal pay for equal work, the better interpretation is that the court meant what is said: "Equal Pay Act Standards apply in Title VII suits when the plaintiffs raise a claim of equal pay." Id. at 891 (emphasis added).
75. Although the court did not discuss this standard relying on proof of job value, it made clear that "problems of proof . . . are not sufficient reasons to foreclose" a Title VII claim of wage discrimination. Id. at 891.
76. See notes 137-145 and accompanying text infra.
77. 602 F.2d at 889.
78. See generally Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 543 (1947). Of course, courts should not make "a fortress out of the dictionary." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945); Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 617 (1944) ("we should not stifle a policy by a pendantic or grudging process of construction"); United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J.) ("[T]he general purpose is a more important aid to [a statute's] meaning than any rule which grammar or formal logic may lay down"). Yet, in the case of the Bennett Amendment, the language used becomes critical because any legislative history that might clearly illuminate Congress' intent is lacking. See note 86 infra.
ful under Title VII “to differentiate upon the basis of sex . . . in wages or compensation . . . if such differentiation is authorized by the [EPA].” 79 The problem presented by this language is in deciding what Congress meant by the word “authorized.” This problem arises because, on its face, the EPA does not authorize employers to undertake any conduct. Rather, the EPA prohibits employers from paying men and women doing the same job unequal wages, except that it does not prohibit wage differentials when a factor other than sex is responsible for the differential. 80 Yet, the Gunther court held that the EPA exceptions, which are not prohibited, are incorporated into Title VII. 81 To be incorporated by the Bennett Amendment a practice must, however, be authorized, and hence the court apparently equated “authorized” with “not prohibited.” 82 Strictly speaking, when a course of conduct is “not prohibited,” it is not authorized; it is merely allowed. 83 But the EPA also allows (or does “not prohibit”), because it does not address, wage differences between unequal jobs, which should, thus, also have been considered authorized such that the Bennett Amendment would incorporate the equal pay for equal work standard. 84 If, as it appears, the court construed the term authorized to mean not prohibited, then by refusing to hold also that the EPA’s equal pay for equal work standard is incorporated, the court has garbled the meaning of the word “authorized”—the word Congress used to express its intent.

Ignoring its semantic contortion of the word authorized, the Gunther court relied upon the Bennett Amendment’s legislative history in its partial incorporation decision. 85 Specifically, the court examined the floor com-

81. 602 F.2d at 889.
82. Another court has apparently adopted the construction that “authorize” means “not prohibited.” See Molthan v. Temple University, 442 F. Supp. 448, 454 (E.D. Pa. 1977) (Title VII only prohibits those claims that “run afoul of” the EPA).
83. The specific meanings of the terms “authorize” and “allow” become important because statutory words are normally to be construed in their ordinary meaning. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973). The word authorized is commonly understood to mean to affirmatively and formally empower conduct. See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 100 (unabridged ed. 1973). However, “allow” denotes the lack of any attempt or intent to hinder or encourage. Id. at 40. Thus, when a practice is not prohibited it is allowed but not necessarily authorized.
84. It is true, however, that the EPA expressly allows wage differentials when they are not based on sex and that it can only be said to allow wage differentials between different jobs because it does not address this issue. While there is no significant conceptual difference between Congress allowing an action by not addressing it and allowing an action expressly, it may be dangerous to infer too much from congressional silence. Yet, the EPA Congress expressly rejected a standard that would have allowed equal pay disputes between different jobs. See note 104 infra. Thus, this is not so much a case of congressional silence as a case of conscious congressional inaction.
85. 602 F.2d at 889-90.
ments of Senator Bennett,86 who introduced the amendment as a "technical correction" 87 "to provide that in the event of conflicts [between Title VII and the EPA] the provisions of the Equal Pay Act shall not be nullified." 88 Although it is not completely clear what conflicts the Senator had in mind at this time, 89 he explained that the eleventh-hour insertion of the word "sex"
into Title VII motivated his amendment. Because both Title VII and the EPA would now protect against sex discrimination, Senator Bennett’s comment indicates that he was concerned about any conflict arising between the two statutes, not merely conflicts arising if the EPA’s four affirmative defenses were not available in a Title VII case, the Gunther court’s opinion notwithstanding. Furthermore, since Title VII already included language nearly identical to the EPA’s four exceptions at the time he proposed his amendment, it does not seem particularly likely that Senator Bennett was concerned with ensuring that employers could employ the four EPA exceptions in Title VII cases. Rather, he must have intended that any conflict between the EPA and Title VII be resolved under the EPA’s standards. Contrary to the Gunther court’s conclusion, when a Title VII claim relies on job comparisons other than the job content comparisons specified in the EPA, a conflict does arise between the two acts. Thus, in these cases, the EPA alone should control.

After relying, albeit inappropriately, on Senator Bennett’s remarks, the Utah [Bennett] when he submitted the amendment.” *Id.* Shortly thereafter, Senator Clark protested Senator Bennett’s attempt to create legislative history after the fact. *Id.* at 18,263.

90. An amendment to add “sex” to Title VII was proposed and accepted from the House floor. 110 CONG. REC. 2,577-84 (1964). Thus, the legislative history behind the sex discrimination provision of Title VII is “notable primarily for its brevity.” General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976).

91. 602 F.2d at 889-90.

92. The Bennett Amendment was offered on June 12, 1964. As early as June 4, the Senate had amended the bill containing Title VII to allow for the exceptions contained in § 703(h) other than the Bennett Amendment. 110 CONG. REC. 12,723 (1964).

Section 703(h) of Title VII provides that it is not unlawful for employers “to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . .” 42 U.S.C. § 2000e-2(h) (1976). This language duplicates the EPA’s first three exceptions, with the sole difference being the “bona fide” qualifier. But it is inconceivable that Congress intended less than bona fide systems to justify a wage differential under the EPA. See S. REP. NO. 176, 88th Cong., 1st Sess. 2 (1963) (seniority systems are exceptions “provided they are based on tenure and not upon sex”). The EPA’s fourth exception merely clarifies something implicit in the Act’s major provision: that there is no discrimination because of sex in wages if a wage differential is not based on sex. *Id.* Thus, if Senator Bennett thought his amendment made Title VII’s protection coextensive with the EPA’s protection, he would not be concerned with the availability of the EPA’s exceptions in Title VII cases. But even if he was, there is certainly no indication that this was his sole concern.

93. The Gunther court reasoned that “[w]hen plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable.” 602 F.2d at 891.

94. See notes 100-107 and accompanying text infra.

95. Not only did the Gunther court erroneously interpret Senator Bennett’s remarks, it also baldly asserted that Senator Dirksen’s comments were “to the same effect.” 602 F.2d at 890. But Senator Dirksen’s statement does not deal with the availability of the EPA’s defenses under Title VII. Although he was concerned with the particular conflict between the two acts that might arise “because” the EPA amended the Fair Labor Standards Act, he referred to “exceptions” carried out by the Fair Labor Standards Act, most likely referring to § 13 of that Act, which exempts certain employers and employees from coverage.
Gunther court put the Congressional record aside. It either missed or ignored the statement of Congressman Celler, who had described the various amendments the Senate had made to the original House bill.\textsuperscript{96} The Congressman explained that the Bennett Amendment made employer compliance with the EPA the sole requirement of Title VII in the area of sex discrimination in wages.\textsuperscript{97} After the Congressman made this statement, and with no intervening explanations of the Bennett Amendment, the House passed Title VII.\textsuperscript{98} Thus, the only comments from the House indicate that the House understood Title VII to incorporate all the provisions of the EPA—including the equal work requirement. Surely, this slice of legislative history should have played a part in the Gunther court's search for Congress' intent.

A further significant flaw in the Gunther court's construction of Title VII is its failure to discuss why the specific expression of Congress' purpose embodied in the EPA is subordinate to the vague intent expressed by Title VII. Although statutes with remedial purposes are to be construed liberally,\textsuperscript{99} the Gunther court apparently adopted and applied a principle of construing an extensively remedial statute, Title VII, in a broader fashion than a related but more precise remedial statute, the EPA.\textsuperscript{100} Even if the court were candid in announcing it, this approach is contrary to established views of statutory construction. When two statutes overlap, as do Title VII and the EPA, the most reliable expression of the legislature's intent is found in the statute that evidences the most precision,\textsuperscript{101} regardless of the order of their enactment.\textsuperscript{102} The remedial purpose of Title VII is to end all discrimination in private industry's employment policies or practices. The EPA's remedial

\textsuperscript{96} 110 Cong. Rec. 15,896 (1964). Title VII originated as House Bill 7152, was amended in the Senate by Senate substitute amendment No. 656, and was returned to the House, at which point Congressman Celler explained the Senate's amendments. Explaining the Bennett Amendment he stated: "The Senate amendment also ... provides that compliance with the [EPA] satisfies the requirement of [Title VII] barring discrimination because of sex—section 703(b)." \textit{Id.} (because § 703(b) only contains employment agency prohibitions, this is obviously an incorrect reference).

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} See, e.g., Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve").

\textsuperscript{100} The Gunther court did not explain its approach; however, its analysis may prove the assertion that in "matters of statutory construction ... it makes a great deal of difference whether you start with an answer or with a problem." Frankfurter, \textit{Some Reflections on the Reading of Statutes}, 47 COLUM. L. REV. 527, 529 (1947).


\textsuperscript{102} Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); Abell v. United States, 518 F.2d 1369, 1378 (Ct. Cl. 1975); Panama Canal Co. v. Anderson, 312 F.2d 98, 100-01 (5th
purpose, on the other hand, is to strike a balance between ending sex discrimination in wages while preserving maximum discretion in employers and employees to decide the economic worth, the wage, of the employees' jobs. The EPA simply mandates that once the relative value of dissimilar jobs is established, all employees in the same jobs shall receive the wage reflecting that job value, regardless of sex. Furthermore, the same Congress that enacted the EPA rejected a standard of equal pay for "comparable work" to ensure that courts did not meddle with the private sector's job-value decisions. This policy of limiting incursions into the wage market is even more critical when two jobs are dissimilar. The Gunther decision, by holding that equal work need not be shown in a claim under Title VII, ignores this delicate balance established by the EPA in favor of Title VII's amorphous approach, even though there is no evidence that the Title VII Congress intended to alter the previous legislative policy and allow courts to interfere with job value decisions by comparing the relative value of dissimilar jobs.

While the court cursorily examined, and incorrectly construed, the Bennett Amendment's language and legislative history, it exactingly construed the Equal Employment Opportunity Commission's (EEOC) determination of congressional intent. In a 1965 regulation, the EEOC, the delegated authority to administer Title VII, concluded that the Bennett Amendment made the EPA's equal pay for equal work standard "applicable to Title

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103. See note 104 infra.
105. See notes 133-149 and accompanying text infra.
106. 602 F.2d at 891.
108. 602 F.2d at 891.
The *Gunther* court could fail to find this regulation inconsistent with its decision to extend Title VII further than the EPA only by strictly construing it to mean that the equal work standard is applicable in Title VII cases, but not exclusively. If the regulation is read in context, it clearly seems that the EEOC determined that the only aspect of the EPA not incorporated into Title VII was the scope of the EPA’s employer coverage.

Finally, the court contended that if it were to limit Title VII’s scope to the discriminatory wage practices prohibited by the EPA, it would shield “other” discriminatory practices from judicial review. As examples of these practices, the court cited cases in which the plaintiff’s job was unique, but where sex discrimination in wages could be shown without demonstrating substantially equal work or without using job comparisons at all. A different holding, one more aligned with the policy Congress established in the EPA of limiting the government’s intrusion into the wage market, would

110. 30 Fed. Reg. 14,927 (1965) (formerly codified at 29 C.F.R. § 1604.7). The regulation provided, in part:

§ 1604.7. Relationship of Title VII to the Equal Pay Act. (a) Title VII requires that its provisions be harmonized with the Equal Pay Act [§ 206(d)] in order to avoid conflicting interpretations or requirements with respect to situations to 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, it is the judgement of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

Id. (emphasis added).

111. But again, the *Gunther* court failed to explain its reasoning, preferring summary conclusions instead. See 602 F.2d at 891.

112. See note 110 supra. The EEOC has since modified its position “to the extent that . . . prior [EEOC] pronouncements are inconsistent.” 29 C.F.R. § 1604.1(b) (1977). The new regulation states: “By virtue of section 703(h) [the Bennett Amendment], a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.” Id. § 1604.8(b). Although this statement is not necessarily inconsistent with its prior regulation, the EEOC’s recent activity in the area of job evaluation indicates that it has discarded its previous regulation entirely. See note 130 infra.

113. 602 F.2d at 890.

114. The court hypothesized an employer who only employs women in one job and men in a comparable but not substantially equal job, and suggested that the EPA would not prohibit the employer from reducing the women’s wages because of sex. Id. at 890 n.9. This hypothetical is strikingly similar to City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702 (1978), where an employer’s greater deduction for pension benefits from its female employees was held to be based on sex. Although, in both cases, female plaintiffs would compare their treatment to the treatment of men to prove sex discrimination, the particular jobs held by each are irrelevant. See notes 30-34 and accompanying text supra.

115. 602 F.2d at 890 n.9. The court noted that when a complainant’s job is unique her boss could, without violating the EPA, tell her that he would pay her more if she were male. Id. Her proof of discrimination would not require job comparisons, and in fact is independent of job comparisons.
still have enabled Title VII to reach the court's examples. If the *Gunther* court had concluded instead that when a claim does not depend upon a showing of equal work between the plaintiff's job and other employees' jobs, a Title VII action could be brought independent of the EPA, then the situations it mentioned still would be prohibited by Title VII. Under such a holding, Title VII plaintiffs could demonstrate sex discrimination in wages either by comparing the content of jobs using the EPA's standards or by presenting evidence other than job comparisons. The rationale for this holding is simply that, with the EPA, Congress established the only permissible use of job comparisons to show sex discrimination in wages and that the Bennett Amendment to Title VII manifests Congress' intent to transfer this limited evidentiary use of job comparisons to Title VII. Further, because the EPA does not address the case in which sex discrimination is not proven by job comparisons, Title VII is available as an independent device in these cases. Of course, such a holding would not allow Title VII plaintiffs, like those in *Gunther*, to engage in comparisons of the value of dissimilar jobs. But by ignoring the delicate balance formulated in the EPA between discriminatory practices and market wage setting, by distorting the Bennett Amendment's language, and by dissembling that amendment's legislative history as well as agency regulations, the *Gunther* court has become *sub silentio* the first circuit court in the country to allow a theory of recovery based on comparing the value of dissimilar jobs.\textsuperscript{116}

**Economic Problems:**

*Gunther's Impact on Market Wage Setting Mechanisms*

To better understand the potential impact of the *Gunther* decision, one must realize that, in general, employers attempt to calibrate wages with job value,\textsuperscript{117} and that the field of wage and salary administration\textsuperscript{118} provides the methods to assess the value of jobs.\textsuperscript{119} In fact, although a court's EPA task is to determine simply whether two jobs are equal, and not to decide the relative value of entirely different jobs, the EPA's criteria of skill, effort,
responsibility and working conditions are the most basic factors used in job evaluation systems.120

Wage and salary administration attempts to objectify fundamentally subjective employer wage decisions121 by systematizing the achievement of employers' two primary goals in setting wages. First, employers wish to establish wages that are internally equitable, that is, they seek to ensure that employees' jobs are properly ranked on the company's scale of possible wage rates in order to minimize employee discontent and departure.122 Second, employers wish to set wages that are externally equitable, that is, they seek to ensure that their wages will enable them to retain capable employees and competitively recruit new personnel.123 Accordingly, an employer will install a wage-setting system that best effectuates its current emphasis on internal or external equity.124

While there are numerous, often subtle variations among available wage-setting systems,125 most utilize a three-step process. To ensure internal equity, jobs are evaluated and then ranked on the basis of predetermined "compensable factors."126 Next, to ensure external equity, job market surveys are conducted to determine what wage rates will enable employers to retain and attract qualified employees.127 Finally, to ensure currency, the wage rates established for all jobs128 and for individual employees are

120. Congress adopted the criteria of skill, effort, responsibility, and working conditions in the EPA in response to testimony of business representatives about job evaluation techniques. See Hearing on H.R. 3861, Before the Special Subcomm. on Labor of the House Comm. on Educ. & Labor, 88th Cong., 1st Sess. 139, 194, 243, 252, 258-59 (1963); Equal Pay Act of 1963: Hearings on S. 882 and S. 910 Before the Senate Subcomm. on Labor of the Comm. on Labor & Public Welfare, 88th Cong., 1st Sess. 142, 145 (1963); H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963) ("This language recognizes that there are many factors which may be used to measure the relationship between jobs.... These factors will be found in a majority of job classification systems").

These four factors are called "universal factors" by experts in the wage and salary administration field, see, e.g., Henderson, supra note 117, at 113, because they help identify elements common to all jobs. But even the experts do not agree as to the definition of these factors or the subcomponents of each. Id. at 116-20; Lytle, supra note 117, at 51-65. One expert states that literally "hundreds of compensable factors have been identified and defined." Henderson, supra note 117, at 112.


123. Id.; Langsner & Zollitsch, supra note 50, at 51; Henderson, supra note 117, at 36.

124. These two goals are not always compatible. For example, an increase in the starting wage intended to attract new clerks may create a situation where formerly hired clerks are paid less than newly hired, inexperienced clerks. See also J. Berg, Managing Compensation 77-86 (1976) (arguing that contribution to the organization is an underrated consideration).

125. See generally NAS Interim Report, supra note 122.


127. See Langsner & Zollitsch, supra note 50, at 281-308; Henderson, supra note 117, at 191-222.

128. See authorities cited in note 127 supra.
periodically re-evaluated \(^{129}\) and adjusted accordingly. Absent a centralized means of defining the worth of each and every job in the country, \(^{130}\) job valuations will vary among employers and resulting wage rates will vary among labor markets. \(^{131}\) Ultimately, the job market has the most significant impact on wages. \(^{132}\)

The market wage-setting process comes under attack by a claim requiring comparisons of the value of dissimilar jobs when plaintiffs charge that an employer’s job evaluation and wage system is discriminatory per se. For instance, in Christensen v. Iowa, \(^{133}\) clerical workers alleged that they were paid less by an employer whose job evaluation system awarded them as many points as maintenance workers. The employer responded that the tighter market for maintenance jobs caused the wage disparity even though it believed that the clerical workers deserved about the same wages. The plaintiffs countered that the job market discriminates against women by devaluing traditionally “female jobs,” and that the market merely reflects the sex discrimination of individual employers. While the Christensen court rebuffed this challenge to the market wage-setting system, \(^{134}\) the Gunther court’s expansive interpretation of Title VII’s protection suggests that it might not reach the same result when the plaintiff does not seek equal pay. \(^{135}\) Indeed, the Gunther court specifically noted the matron’s evidence that their employer valued their jobs more than it paid them. \(^{136}\) Thus, the potential for a Christensen-like problem is present under the Gunther decision.

\(^{129}\) This process of performance reviews and salary increases should, however, be kept conceptually separate from the process of setting entrance wages. After an employee is hired, his or her wage will be determined by merit and not, theoretically, by the job market’s going rate, although in fact the two will be closely related because employers also wish to retain their employees. See generally W. Ronan & E. Prien, Perspectives on the Measurement of Human Performance (1971).


\(^{131}\) Lytte, supra note 117, at 178-79.


\(^{133}\) 563 F.2d 353 (8th Cir. 1977).

\(^{134}\) See note 42 supra.

\(^{135}\) See notes 65-76 and accompanying text supra.

\(^{136}\) 602 F.2d at 891 n.11. The evidence offered was that the matron’s supervisor thought the matrons were worth more than they were paid. Id. In fact, at one time he recommended a wage increase to the wage level of deputy sheriffs. Petitioner’s Brief at 10.
Similarly, an allegation that a job evaluation system is discriminatorily applied also brings the market wage system into question. For example, in *Krumbeck v. John Oster Manufacturing Co.*, the plaintiff alleged that the employer’s job evaluation system arbitrarily assigned lesser wage ranges to jobs performed by females than it would if those jobs were performed by males. In effect, the plaintiffs contended that the employer’s system weighted “female characteristics” less heavily. Because an employer who uses a formal job evaluation system becomes a microcosm of the job market through its market surveys, such a claim indirectly challenges the market. Although the employer in *Gunther* did not utilize a formal job evaluation system, the plaintiff’s evidence was that the employer’s job evaluations, reflected in wages, disadvantaged female employees. The *Gunther* court’s remand of the case to the lower court to consider this evidence leaves room in the *Gunther* decision for claims like those raised in *Krumbeck*.

It should be noted that the nature of the court’s intervention in the market significantly differs in adjudicating claims like those raised in *Christensen* and those raised in *Krumbeck*. In the case of claims that an employer’s system is per se discriminatory, as in *Christensen*, courts will be forced to answer the yet unanswered question: How are wages to be established if not by reference to the labor market? Judicial fiat is a poor substitute for the market mechanism and may spawn labor shortages, rippling pay inflation and other deleterious economic consequences. On the other

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138. *Id.* at 259. The court rejected this contention because the suit was brought solely under the EPA and because the EPA does not allow the comparison of dissimilar jobs. *Id.* at 260.
139. See note 72 *supra*.
140. 602 F.2d at 891.
142. The market-pricing system will react to labor shortages by increasing pay levels. See, e.g., *Secretaries Get Better Pay, Broader Work as Demand Outpaces Supply*, Wall St. J., Jan. 29, 1980 at 1, col. 5. Job evaluation techniques, when severed from the market, will determine wage rates by gauging the intrinsic value of jobs. *NAS INTERIM REPORT, supra* note 122, at 35-36.
143. For instance, if the *Christensen* court had ordered the employer to pay clerical workers as much as maintenance workers, the attraction of employees to this employer and away from other employers would place pressure on the market to increase wages generally. The problem becomes more complex when wages are also set through collective bargaining with an employee union. *See Equality of Opportunity: The Emerging Challenge in Employment*, CONF. BD. OF CAN. (No. 4 1978).
144. One thoughtful study concluded:

Implementing the comparable work doctrine will increase the wages of some women. However, the corresponding misallocation of resources will force down aggregate personal income for everyone. Incentives to perform well will be reduced in controlled occupations, as statistical indicators of qualifications again take prece-
hand, a claim that an employer’s wage-setting system discriminates as applied would necessitate a circumscribed judicial incursion into the wage market. Courts could, and should, assent to the employer’s job evaluation criteria and wage-setting system but review inconsistent applications between male and female employees from which to infer sex discrimination.\textsuperscript{145} If, however, the \textit{Gunther} decision signals a growing tendency of courts to intercede in market forces, employers should be on notice that courts may increasingly disrupt the market premise of traditional compensation systems.

\textbf{POLICY DILEMMA:
SABOTAGING TITLE VII}

The \textit{Gunther} plaintiffs’ successful argument will doubtless become the model for future attempts by plaintiffs to contort the EPA’s principles by extending Title VII to claims based on job value. The matrons did not attempt to persuade the court that job value comparisons are permissible under Title VII. In fact, no court faced squarely with the job value question has decided it in favor of allowing such comparisons.\textsuperscript{146} Instead, the \textit{Gunther} plaintiffs argued that sex discrimination influenced their wages vis-à-vis the wages of male employees and requested a chance to prove it. Faced with convincing evidence that something was amiss in the employer’s practice of compensating employees in different jobs, the \textit{Gunther} court revealed a willingness to clear away technical barriers to relief when Congress had not positively precluded a method of recovery. In short, the lesson of \textit{Gunther} for future Title VII plaintiffs is that it is not so much what they say as how they say it that may determine whether a court will allow recovery based on job value comparisons.

The \textit{Gunther} court’s approach to reconciling the relationship between Title VII and the EPA indicates that Title VII predominance in wage discrimination cases is assured. The decision also offers the first judicial support, however indirect, for the EEOC’s recent activity in the job evaluation area.\textsuperscript{147} The EEOC undoubtedly will embrace the \textit{Gunther} decision to sustain its current concern that a relationship may exist between female job segregation and depressed female wages overall.\textsuperscript{148}

\begin{thebibliography}{9}
\bibitem{145} There is precedent for this more limited intrusion in the decisions of the War Labor Board. \textit{See, e.g., In re General Electric Co. and Westinghouse Electric Corp., 28 War Lab. Rep. 667, 677 (1945).}
\bibitem{146} \textit{See cases cited in notes 42 & 43 supra.}
\bibitem{147} \textit{See note 130 supra.}
\end{thebibliography}
Yet, the comparable job doctrine, while founded upon Title VII, could potentially defeat Title VII’s purposes. If females are ultimately to progress into more responsible management jobs, then increasing wage levels in traditionally female jobs—because these jobs are “worth” as much as higher paid traditionally male jobs—will be counterproductive to Title VII’s ultimate objective of ensuring equal employment opportunity. The Gunther formulation will tend to ensure the result of overall wage equality but only at the cost of perpetuating female occupational ghettos.\textsuperscript{149} Such a nondiscrimination doctrine is, therefore, self-defeating.

CONCLUSION

In Gunther, the United States Court of Appeals for the Ninth Circuit became the first circuit to decide that the EPA’s equal pay for equal work principle is not the exclusive standard for determining the existence of sex discrimination in wages under Title VII. The court’s preoccupation with Title VII in reconciling the overlap between Title VII and the EPA in the narrow but significant area of wage discrimination means that its decision will permit Title VII plaintiffs to pursue claims based on job value. As a matter of public policy, any employment discrimination is pernicious; however, as a matter of market economics, the potential expansion of the government’s role in determining wage levels is of great concern. Courts should be more attentive to the balance between market forces and equality of the sexes established by Congress in the EPA. Courts that decide, like Gunther, that Title VII overrides this fine balance should, however, limit their incursions into market wage-setting mechanisms by reviewing only an employer’s inconsistent application of its wage-setting system, and by refusing to consider employer reliance on market demand and supply. Any other approach would not only tax judicial expertise but also could seriously endanger the progression of women into upper professional and management ranks. Whether the courts are, in fact, empowered to sit as a review board for market wage determinations at all is a question that only the United States Supreme Court or Congress can, and should, answer.\textsuperscript{150}

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\textsuperscript{149} See generally Lindsay, supra note 144.

\textsuperscript{150} As this Note went to press, the Third Circuit held in IUE v. Westinghouse Electric Corp., No. 79-1893 & 79-1894 (3d Cir. Aug. 1, 1980), that the Bennett Amendment does not preclude Title VII comparable job suits, reversing the lower court decision cited in notes 43, 68 and 87 supra. The increasing conflict among the circuit courts is further testimony of the need for a Supreme Court decision.