THE LESSONS OF *AFSCME V. STATE OF WASHINGTON*

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INTRODUCTION

American Federation of State, County, and Municipal Employees v. State of Washington[1] [AFSCME] is the most significant sex-based wage discrimination case since the Supreme Court's 1981 landmark decision, *County of Washington v. Gunther.*[2] *Gunther* represented a victory for opponents of sex discrimination, for the Court's ruling allows plaintiffs to allege employment discrimination under Title VII even where the jobs being compared are not "equal".[3] Relying on *Gunther*, the trial court in *AFSCME* found "overwhelming" evidence of sex discrimination in compensation throughout the Washington State employment system. The Court's decision was based in part on the state's failure to pay women the evaluated worth of their jobs under a study commissioned by the state.[4] The court interpreted Title VII as covering a broad spectrum of discrimination claims, which could be proven by relying on both direct and indirect evidence. In *AFSCME* the Court outlined the broad types of evidence which would be considered relevant to proving wage discrmination claims. Under the court's ruling, such evidence could include a showing that the employer failed to pay plaintiffs the full worth of their jobs under the employer's own assessment of job worth. Since many employers have practiced discriminatory employment policies similar to those condemned by the court in *AFSCME*, the decision signifies an important step towards the goal of eliminating sex- and race-based wage discrimination.[5]

Nevertheless, there remain three major obstacles to that goal. First, employers frequently attempt to sidestep wage discrimination issues by redefining those issues. Second, a number of irrelevant defenses are offered which upon close analysis cannot justify wage discrimination. Finally, although Title VII has been interpreted broadly in the past, so as to encompass cases involving wage differentials, the current administration under President Reagan has sig-

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1. 578 F. Supp. 846 (W.D. Wash. 1983).

2. 452 U.S. 161 (1981).

3. Id. For a discussion of *Gunther*, see text accompanying notes 7-12 infra.

4. 578 F. Supp. 846 (W.D. Wash. 1983).

5. The defendants have appealed the decision in *AFSCME v. State of Washington* to the United States Court of Appeals for the Ninth Circuit. Oral argument is scheduled for April 4, 1985.

nificantly narrowed the scope of Title VII by choosing not to litigate claims based on wage differentials. If the promises of *AFSCME* are to be realized, it will be essential to continue both private and public litigation under Title VII, notwithstanding the current administration's failure to assume an active role in Title VII litigation.

I
THE LAW

A. Gunther & Westinghouse *Open Doors for Wage Discrimination Claims under Title VII & Executive Order 11246*

Title VII of the Civil Rights Act of 1964 expressly prohibits an employer from discriminating in compensation and other terms and conditions of employment on the basis of race, sex, religion or national origin.[6] Opponents of women's equality in employment have attempted to limit the scope of sex-discrimination claims under Title VII by arguing that the jobs being compared must be the same or "similar."

However, in *Gunther*,[7] the Supreme Court rejected the argument that claims of sex-based discrimination in compensation under Title VII are limited to violations of the "equal pay for equal work" standard of the Equal Pay Act.[8]

In *Gunther* the Supreme Court resolved previous doubts about the relation between Title VII and the Equal Pay Act which had arisen because of the "Bennett Amendment" to Title VII, which states that differences in pay are valid under Title VII if authorized by the Equal Pay Act.[9] The Equal Pay Act

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6. 42 U.S.C. § 2000e et seq. (1976). Section 2000e-2(a) provides in relevant 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 compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

7. 452 U.S. 161 (1981).

8. 29 U.S.C. § 206(d) et seq. The Equal Pay Act, which was enacted in 1963 as an amendment to the Fair Labor Standards Act of 1938, provides:
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 . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . 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 . . .

9. The last sentence of 42 U.S.C. § 2000e-2(h), the "Bennett Amendment", provides:
It shall not be an unlawful employment practice under this title for any Employer to differentiate upon the basis of sex in determining the amount of the wages or compen-

requires "equal pay for equal work" and prohibits discrimination based on sex unless the difference in pay is based on one of four affirmative defenses: seniority; a merit system; a system based on quantity or quality of production; or a differential based on any factor other than sex.[10]

The Court rejected the employer's claim in *Gunther* that the language of the Bennett Amendment meant that Title VII incorporated the "equal work" standard of the Equal Pay Act.[11] Rather the Court concluded that the Amendment merely meant to incorporate into Title VII the Equal Pay Act's affirmative defenses, but did not mean to restrict claims brought under Title VII to those that met the "equal work" standard.[12] Such a restriction, the Court held, would mean that:

> a woman who is discriminatorily underpaid could obtain no relief — no matter how egregious the discrimination might be — unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioner's interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be *denied the right to prove that the system is a pretext for discrimination.*[13]

Perhaps the key phrase of the Court's statement is "the right to prove." As the Court suggests, sex discriminatory wages are often manifested in a variety of ways; women should not be prevented from bringing claims under Title VII by being denied the opportunity to present the kind of evidence which would prove the presence of more subtle forms of sex-based wage discrimination. The consequence of the Court's decision in *Gunther* is that under Title VII plaintiffs may attempt to prove that a wage differential is the result of discrimination even if the jobs compared are not "equal," if either the skill, effort and responsibility of the "male" and "female" jobs are equivalent or if the difference in skill, effort and responsibility does not support the amount of the differential.

B. Title VII's Prohibitions Apply Equally to Sex & Race Based Compensation Schemes

The effect of the *Gunther* decision is not limited to cases invloving dis-

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sation paid . . . if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206(d)) [the Equal Pay Act].

10. See supra note 8.

11. 452 U.S. 161 (1981).

12. Id. at 168.

13. 452 U.S. 161, at 178-79 (emphasis added).

crimination in compensation based on sex. Since Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin, the Supreme Court's holding is also applicable to race-based wage discrimination.[14] In fact, the earliest cases of wage discrimination under Title VII involved discrimination on the basis of race.[15] In several early Title VII decisions the Equal Employment Opportunity Commission did not hesitate, even in the absence of case law, to directly enforce Title VII's prohibition against race-based discrimination in compensation.[16]

In one of the earliest court cases involving discrimination in compensation, *Quarles v. Philip Morris Inc.*,[17] the court struck down the payment of lower wages to black workers doing substantially the same work as white workers. In the very recent AFSCME case of *Liberles v. County of Cook*,[18] the court found that the County had discriminated against black Case Aide Trainees and Case Aides by paying them less than white Caseworkers. The court found that ". . . a disproportionate number of black workers were paid less than white workers who performed the same work."[19]

The courts have regularly held that Title VII's prohibition against sex discrimination is co-extensive with its prohibition of other forms of discrimination.[20] Thus, in *Los Angeles Department of Water and Power v. Manhart*,[21] the Supreme Court held that an employer cannot lawfully require female employees to make larger contributions than male employees to its pension fund, even though women on the average live longer than men and therefore are likely to receive larger pension payments. The Court observed that such a practice would be plainly unlawful if based on race:

> Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 436, could not reasonably be construed to permit a take-home-pay differential based on a racial classification.[22]

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14. For the sake of brevity, the term race will be used herein to include color, religion and national origin.

15. Prior to the Court's decision in *Gunther*, federal courts were divided as to whether sex-based wage claims under Title VII were limited to claims cognizable under the Equal Pay Act's standard of "equal pay for equal work." However, since the Equal Pay Act only prohibited unequal pay based on sex, the "equal work" standard was never thought to apply to Title VII cases involving race-based wage discrimination.

16. EEOC Case Nos. 5-12-3175, 5-12-3179 (1966), as supplemented.

17. 279 F. Supp. 505 (E.D. Va. 1968).

18. 31 FEP Cases 1537 (7th Cir. 1983).

19. Id. at 1544.

20. The only specific exception pertains to the bona fide occupational qualification ("BFOQ") defense in § 703(h) of Title VII.

21. 435 U.S. 702 (1978).

22. Id. at 709. See also Meadows v. Ford Motor Co., 510 F.2d 939, 944 (6th Cir. 1975), cert. den. 425 U.S. 998 (1976).

Because "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful," the Court held that the sex-based "take-home-pay differential" which was at issue in *Manhart* was likewise unlawful.[23]

Race discrimination precedents are regularly applied in sex discrimination cases. The Supreme Court noted in *Dothard v. Rawlinson*:[24] "We dealt in *Griggs v. Duke Power Co.*, . . . and *Albemarle Paper Co. v. Moody*, . . . with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment, and those cases guide our approach here."[25]

The Court further explained in *General Electric Co. v. Gilbert*:[26] "When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant . . . ."[27] Congress reaffirmed its intent in enacting the 1972 amendments to Title VII. The House Report stated: "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."[28]

In the *AFSCME* case the court found " . . . no realistic distinction between discrimintion on the basis of race or sex. The results are just as invidious and devastating. There is nothing in Title VII that distinguishes between race and sex in the employment discrimination context."[29]

Furthermore, Title VII does not protect one group at the expense of another. While *all* workers benefit from the elimination of race and sex discrimination in compensation, black women in particular will directly benefit from the elimination of sex-based wage discrimination. Half of the black work force is female, and most black women work in predominantly female jobs. In addition, males working in predominantly female jobs and white employees in jobs predominantly held by minority workers also gain when the wages of their jobs are no longer artifically reduced due to unlawful discrimination.

C. AFSCME v. State of Washington *Fleshed Out the Kinds of Evidence Relevant to a Claim of Wage Discrimination*

Although the Supreme Court made clear in *Gunther* that wage bias is illegal, it did not spell out the kind of evidence that may be presented in wage

23. 435 U.S. at 709.

24. 433 U.S. 321 (1977).

25. Id. at 329, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

26. 429 U.S. 125 (1976).

27. Id. at 145.

28. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 5 (1971). See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971).

29. 578 F. Supp. 846, 870 n.22 (W.D. Wash. 1983).

bias cases.[30] The recent holding in *AFSCME*[31] showed in detail the kind of evidence that could result in a court finding of discrimination.

The court reached its decision in *AFSCME* by following burden of proof standards generally applicable to Title VII discrimination claims. Title VII prohibits two types of discrimination: 1) disparate treatment, which refers to the intentional, unfavorable treatment of employees based on race, color, religion, sex, or national origin[32], and 2) disparate impact, which involves facially neutral practices having a discriminatory impact.[33] In a disparate treatment case, the plantiffs must first establish a prima facie case of disparate treatment. The burden then shifts to the defendant to show a legitimate, nondiscriminatory reason for the practices. Finally, the plaintiffs have an opportunity to prove that defendants' alleged reasons for disparate treatment are merely a pretext for discrimination.[34] In a disparate impact case, plaintiffs must establish a prima facie case of disparate impact. The burden then shifts to the defendant to show its practices were justified by business necessity.[35]

In *AFSCME* the court held that defendant, the State of Washington, had violated Title VII under *both* a disparate treatment and a disparate impact theory. The court found "overwhelming evidence" of "historical discrimination against women in employment in the State of Washington, and that discrimination has been, and is manifested by direct, overt and institutionalized discrimination."[36] The court found that the state's compensation system had a disparate impact on jobs held predominatly by women and found that the state failed to show any business justification for its practices. The court further held that discriminatory intent, required under a disparate treatment theory, was demonstrated by the state's deliberate perpetuation of compensation practices which had an adverse impact on female employees.

The evidence relied upon by the court in *AFSCME* underscores the importance to plaintiffs of utilizing discovery in the broadest possible manner to uncover all relevant evidence of discrimination by an employer. Employees are not limited solely to direct evidence of wage discrimination, but may use indirect or circumstantial evidence of wage and other types of discrimination by an employer to prove their claim. In *AFSCME*, the evidence presented by the plaintiffs included:

> 'Statistical evidence that there is a statistically significant inverse correlation between sex and salary. For every 1% increase in the female population of a classification the monthly salary decreased by $4.51 for jobs that the employer evaluated to be worth the same. A 100%

30. This is standard practice for the Court, which usually restricts its rulings to the facts of a particular case.

31. 578 F. Supp. 846 (W.D. Wa. 1983).

32. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

33. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

34. Texas Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

35. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1973).

36. 578 F. Supp. 846, 864.

female job is paid, on average, $5,400 a year less than a 100% male job of equivalent value. The chances of such a relationship occurring by chance is less than 1 in 10,000.

'Deliberate occupational segregation on the basis of sex. The employer placed classified ads in the "male only" and "female only" columns until 1973, when the newspapers stopped accepting such ads because they violated Title VII. The employer also used classification specifications which indicated a preference for male or female employees.

'Exclusion of women from entry or promotion into managerial positions, and denial to women of the chance to take examinations for certain positions. Many statements of state officials had revealed a bias against hiring women into supervisory positions (e.g., "Most women resent being supervised by another woman, too much bickering between themselves . . .").

'Disparities in wages between closely related but segregated jobs such as Barber and Beautician, Institutional Counselor and Classification Counselor, House Parent and Group Life Counselor. Predominantly male jobs in each set were consistently paid more than the predominantly female jobs requiring similar duties.

'Disparities in salaries between predominantly male and predominantly female entry level jobs which require the same qualifications. Predominantly male entry level jobs requiring no high school paid an average of over 20% more than predominantly female entry level jobs requiring no high school. Predominantly male entry level jobs requiring a high school degree were paid an average of 22% more than predominantly female entry level jobs requiring high school. Predominantly male entry level jobs requiring one year of business school were paid an average of 19% more than predominantly female entry level jobs requiring one year of college. Predominantly male entry level jobs requiring two years of college were paid an average of 13% more than predominantly female entry level jobs.

'A series of job evaluation studies performed by the state which show a 20% disparity between predominantly male and predominantly female jobs which require an equivalent composite of skill, effort, responsibility and working conditions. The disparity increased by 1983. The state updated the studies but took no action to correct the discrimination. On the eve of trial, the state passed a bill calling for a 10 year phase-in of "comparable worth." The judge did not make an independent determination of job worth.

'Admissions by top officials of discriminatory practices. Successive Governors admitted that the job evaluation studies performed by the state showed discrimination in compensation. Reports by the personnel boards, the Governor's Affirmative Action Committee and

> others documented discrimination in a variety of personnel practices.
> 'Discrimination in the administration of the state's compensation system. The Campus Police Assistant position, which had to be filled by a woman, was not classified as a security job, but was instead classified as a lower-paying (predominantly female) clerical position.
> 'Reclassification actions favored male employees over female employees. Requests by male employees for reclassification to a higher-paying position were granted by the Personnel Board more frequently than requests by female employees.
> 'Discrimination in promotion within job families, even within job families which are predominantly female. As the grade and salary increase, the percentage of women decreases. Licensed Practical Nurse (LPN) 1 is 87.5% female but LPN 4 is 61.5% female.[37]

Between the time of the Supreme Court's *Gunther* decision in 1981 and the 1983 lower court ruling in *AFSCME*, other courts also issued decisions consistent with the *AFSCME* ruling. AFSCME members recently won $15 million in back pay settlement of the race-based Title VII wage discrimination suit previously discussed, *Liberles v. County of Cook*.[38] The court had similarly reviewed direct and circumstantial evidence showing that a disproportionate number of black workers were paid less than white workers for the same work, and ordered back pay and prospective relief.

A similar approach to the examination of evidence of sex discrimination was employed by a trial court in *Taylor v. Charley Bros.*[39] The court found that the employer had segregated its employees on the basis of sex, and had paid women less for jobs requiring similar work. Furthermore, the court made detailed findings of fact regarding the issue of discriminatory intent, which included findings of deliberate segregation on the basis of sex, discriminatory probation procedures, discrimination in the creation and assignment of new classifications, sexist comments, the similarity in duties between the male and female jobs, the history and consistency of the wage differentials between male and female jobs, and the failure of the employer in these circumstances to undertake any evaluation of the jobs.[40] In *Melani v. Board of Higher Education*,[41] the court found intentional discrimination in compensation based solely

37. The broad-scale evidentiary approach used in *AFSCME* was spelled out in several articles, see Newman and Vonhoff, " 'Separate but Equal' — Job Segregation and Pay Equity in the Wake of *Gunther*," 1981 U. Ill. L. Rev. 269; Newman, Signs: J. of Women in Culture and Soc'y 262 (Spring 1976).

38. Supra fn.18, 31 FEP Cases 1537, 1549 (7th Cir. 1983). The standards applying to this case of race-based wage discrimination under Title VII should also apply to all Title VII cases of sex-based wage discrimination.

39. 25 FEP Cases 602, motion den. 26 FEP 395, motion gr. 26 FEP 397 (W.D. Pa. 1981).

40. The *Charley Bros.* decision was issued before the Supreme Court's *Gunther* decision; a motion for reconsideration filed after *Gunther* was denied. The employer paid approximately $1 million in back pay.

41. 561 F. Supp. 769 (S.D.N.Y. 1983). See also Heagney v. University of Washington, 642

on a statistical analysis of the salaries of male and female instructional staff.

These cases suggest that a *pattern* of disparate wages, and a showing that wage differentials are correlated to whether the job is held predominantly by males or females, is highly persuasive evidence of discriminatory intent. A disparity between the salaries of a single male and a single female may on occasion be explained away as mere idiosyncracy. But *a consistent pattern of wage disparities is difficult to explain on any ground other than discrimination.*[42]

II
SIDESTEPPING THE WAGE DISCRIMINATION ISSUE

A. "Comparable Worth" is not the Issue

While Title VII prohibits discrimination in compensation, it does not refer specifically to "comparable worth." "Comparable worth" and "pay equity" are popular, rather than legal terms. The popular proposition on comparable worth states that male and female jobs of equal social value, or "worth," should be paid the same. The Supreme Court in *Gunther* found that it did not have to consider the concept of "comparable worth" in order to resolve the issue of sex-based wage discrimination presented in the case.[43] Wage discrimination, within the meaning of Title VII, is the depression of the wage rate for predominantly female or minority jobs by a given employer. *All Title VII cases involving wage discrimination should be resolved on the basis of traditional Title VII principles,* rather than on generalized notions of "comparable worth."

F.2d 1157 (9th Cir. 1981); Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983); Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982); Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir. 1983); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vac. & remand. 459 U.S. 809, aff'd on remand, 695 F.2d 134 (5th Cir. 1983); and Lanegan-Grimm v. Library Ass'n of Portland, 560 F. Supp. 486 (D. C. Ore. 1983).

42. The recent decision in Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984) does not substantially change the law governing litigation of wage discrimination cases. In *Spaulding,* which was originally filed and tried as an Equal Pay Act case prior to the Supreme Court's decision in *Gunther,* the court found, on the basis of the evidence presented, that the faculty of the nursing school had not established that their salaries were lower than those in other departments because of sex discrimination. The *Spaulding* court also held that reliance on the market did not constitute a facially neutral practice for purposes of disparate impact analysis, but left the door open for challenging other wage practices under a disparate impact theory.

43. 452 U.S. 161 (1981). *Gunther* involved a suit by female prison guards in the female section of a prison, who alleged discrimination because they were paid less than the appropriate level under the state's own evaluation of the worth of the jobs. The plaintiffs alleged that the failure to pay them the full evaluated worth of their jobs constituted discrimination. The Court noted that the plaintiffs' claims were not based on the concept of comparable worth, which the Court defined as a method of compensation based on the "intrinsic worth" of jobs. Id. Thus although the Court rejected a concept of comparable worth that would require courts to independently assess job worth, the Court held that plaintiffs could attempt to show that an employer's deviation from its *own* evaluation of job worth was the result of intentional discrimination.

The ultimate issue in a wage discrimination case is whether sex or race was a factor in the setting of wages. A comparison of the duties required for different jobs *with the same employer* is, of course, relevant evidence of discrimination. In the absence of discrimination, jobs which require a greater composite of skill, effort, responsibility and working conditions are generally paid more. In *AFSCME*, job evaluation studies undertaken by the State of Washington demonstrated that the state used two separate salary practice lines — one for jobs held predominantly by males and one for jobs held predominantly by females. "Male" jobs which required greater skill, effort and responsibility were paid more than other "male" jobs, while "female" jobs which required greater skill, effort and responsibility were paid more than other "female" jobs. Under the two-track system, however, predominantly male jobs were paid more than predominantly female jobs which required an equal level of skill, effort, and responsibility. The establishment of a one-track wage system for all employees would eliminate wage discrimination.

Under Title VII, the theoretical "worth" of a job, or what an employer chooses to pay, or what other employers pay, is not important. Rather, the importance of Title VII is that an employer may not discriminate against its female or non-white employees by paying them less than it pays those holding traditional white, male jobs which require equal skill, effort and responsibility.

In the context of Title VII litigation, "comparable worth" has become a red herring, obfuscating the real issue of discrimination and the clear holding of *Gunther* that discrimination in compensation on the basis of sex or race is illegal, even if the jobs being compared are not substantially equal. However, because the Court in *Gunther* rejected use of a theory of comparable worth which would require courts to independently assess job worth, defenders of wage discrimination attempt to avoid the force of *Gunther* by labelling wage discrimination cases "comparable worth" claims which do not constitute a violation of Title VII. By confusing the issue in this way employers are able to avoid an investigation of the facts which would support a Title VII claim. In reality, any wage discrimination case which is based in part on a comparison of job duties may be tried on the basis of a disparate treatment or disparate impact theory, or both, depending upon the facts. Sexist bigots refuse to talk about discrimination, and prefer to use the label "comparable worth" to create the erroneous impression that if plaintiffs in wage discrimination cases prevail all employers would be required to pay the same wage rates, and that this would bring about national wage controls. But the Title VII yardstick measures discrimination on the basis of how a particular employer treats its female and male employees. Any comparison of job duties or wage rates in support of a claim of wage discrimination must be based on a comparison of the wages an employer pays the occupants of *its* male and female jobs, without regard to what other employers do.

B. *Occupational Segregation and Wage Discrimination Go Hand in Glove*

In the *AFSCME* case, the court relied heavily on evidence showing that the State had deliberately segregated its work force. Such evidence included classified ads placed under the heading of "male" or "female"; job descriptions that limited a job to one sex; state "protective" laws which prohibited women from doing certain work; employer records which referred to "pigeonholing" female employees and to average earnings for "men's" and "women's" jobs; and polls of supervisory and other employees conducted to ascertain their reaction to opening "male" jobs to female employees.

The type of job segregation evidence found in the *AFSCME* case is common. There is a symbiotic relationship between occupational segregation and wage discrimination. More importantly, occupational segregation practiced by employers *leads to* and is *evidence of* wage discrimination.

Prior to the passage of Title VII of the Civil Rights Act, virtually every employer that hired women segregated its work force based on sex, and paid its female employees a lower wage.[44] Certain jobs or departments were occupied by only one sex, and women were assigned to low paying jobs or to jobs with little opportunity for advancement. Discriminatory wage rates invariably resulted from job segregation. Thus, in one case before the War Labor Board in 1945, the General Electric Company was found to have reduced by one-third the wage rates of segregated "women's" jobs which were equivalent to higher paying "men's" jobs.[45]

Even after Title VII and the Equal Pay Act were passed, blatant segregation and discrimination continued. In the previously mentioned electrical industry, for example, women continued to be assigned to relatively few job classifications, and got paid less for work they performed.[46]

Initial job assignments and subsequent discriminatory wage practices derive from a common set of biases about women and minority workers. For example, the employer who assigns women only to assembly line jobs because it believes women are not suited for heavier jobs, also inevitably believes that the jobs performed by women are of less value than the "physical" jobs performed by men. In other words, the employer who believes that women should not be placed in jobs of importance and responsibility (because of the employer's conception of the role of women in our society, or of the "innate" abilities of women) is likely to also believe that the jobs women are "permitted" to perform have less value than the jobs performed by men. (For example, male zoo keepers who take care of animals typically are paid more than

44. See discussion of Newman in *Signs*, supra n. 37 at 266-72. Before the enactment of Title VII, various state "protective laws" required some degree of segregation; those laws did not, however, require paying women a discriminatory wage. Although most of these laws have been superseded by Title VII and are no longer in effect, the continuing effects of such discrimination constitute evidence of discrimination today.

45. *General Electric Co. and Westinghouse Electric Corp.*, 28 War Labor Reports 666 (1945).

46. *Signs*, supra n.37, at 267-68.

female employees who engage in child care.) A study by the National Academy of Sciences, commissioned by the Equal Employment Opportunity Commission, concluded, ". . . the more an occupation is dominated by women the less it pays."[47]

The Supreme Court decided three decades ago that segregation is inherently inconsistent with equality. In its landmark school segregation case, *Brown v. Board of Education*,[48] a unanimous Court held that "separate educational facilities are inherently unequal,"[49] and that racially separate education facilities result in inferior education because "separating the races is usually interpreted as denoting the inferiority of the Negro group."[50]

The Supreme Court's holding in *Brown* that segregation is "inherently unequal" applies with equal force to race and sex segregation in the work place. A racially or sexually separate job structure inherently results in inferior wages because such structure "denotes the inferiority" of the (non-white or female) group.[51] When an employer segregates the work force, wage discrimination invariably follows.

C. *Failure to Pay Equal Pay for Equal Work is Just One Form of Wage Discrimination within the Meaning of Title VII*

Although the *Gunther* case clearly held that Title VII claims are not limited to the "equal work" standard of the Equal Pay Act, some apologists for wage discrimination profess commitment to the goal of equal pay for equal work, but oppose efforts to eliminate other forms of wage discrimination. It is sheer hypocrisy to oppose one form of discrimination and support another. As the Supreme Court held in *Gunther*, the restriction of a Title VII claim to those cases which meet the "equal work" standard would limit a plaintiff's opportunity to prove discrimination under Title VII to situations where her employer also employed a male in an equal job at a higher level of pay,[52] a result inconsistent with the broad remedial purpose of the Civil Rights Act.

The Equal Pay Act applies generally to cases where men and women are performing the same job and thus does not apply to segregated jobs. Those who argue that Title VII is limited to "equal pay for equal work" standard indirectly encourage employers to sex-segregate the work force, thereby permitting discrimination, on the erroneous theory that neither the Equal Pay Act nor Title VII prohibits wage discrimination which results from segregation. *The most substantial component of the wage gap is attributable to discrimination in compensation for the work women have traditionally performed.*

Even opponents of the elimination of wage discrimination admit that one

47. Treiman and Hartman, Women, Work and Wages: Equal Pay for Jobs of Equal Value, 28 (1981).

48. 347 U.S. 483 (1954).

49. Id. at 495.

50. Id. at 494.

51. For a more complete discussion of this issue, see Newman and Vonhoff, supra, n.23.

52. 452 U.S. 161 at 178-79. See text accompanying notes 7,8,9,10,11 and 13 supra.

half of the total wage gap is attributable to discrimination. Dr. June O'Neill, a vigorous opponent of broader Title VII remedies to eliminate wage discrimination,[53] testified on behalf of Wshington State in the *AFSCME* case that there is an approximate 40% wage gap between predominantly female jobs and predominantly male jobs. Only one-half of that disparity, according to Dr. O'Neill, can be attributed to non-discriminatory factors such as education, training, and experience. Dr. O'Neill admitted that *the other half of the wage gap cannot be explained by any factor other than sex.* Ironically, Dr. O'Neill's testimony is remarkably consistent with the wage gap identified in the State's job evaluation studies. Dr. O'Neill's testimony is also consistent with that of Dr. George Hildebrand, witness for defendants, and Dr. F. Ray Marshall, former Secretary of Labor, witness for AFSCME.

Basically, Dr. O'Neill contends that discrimination is good for women. If women in traditionally female jobs were paid above the market rate, according to O'Neill, the increased cost to the employer would force the employer to lay off some women, even though other women would benefit.[54] O'Neill further contends that raising the pay of traditionally female jobs above the market rate would reduce the incentive for women to enter traditionally male jobs, and would thus lead to an oversupply of women in traditional female jobs.[55] Ignoring the stereotypes of women workers inherent in such an analysis, it should at least be noted that discriminatory wage differentials have not, in reality, brought about the nirvana of occupational integration and equitable wage rates predicted by O'Neill's "free market" model. When questioned by the judge as to the assumptions underlying her analysis, Dr. O'Neill stated that, "I'm not a Marxist. . . ." The court dryly inquired whether one needed to be a Marxist to oppose unlawful discrimination.

III
ARGUMENTS BASED ON RACE & SEX BIGOTRY ARE NOT DEFENSIBLE

The extent of discriminatory wage rates has been recognized by employers and personnel specialists. Ronald M. Kurtz, President of the International Personnel Management Association, testified at congressional hearings that:

> As an Association of personnel professionals, IPMA recognizes that discriminatory compensation systems continue to exist in the public sector. Numerous studies have documented the pay inequity problem. Our Association urges all employers to eliminate discrimination from their compensation systems . . . .
> Our Association believes that job evaluation systems exist which enable an employer to compare jobs within an organization. IPMA

53. See O'Neill, "The 'Comparable Worth' Trap," Wall Street Journal, January 20, 1984, at 28, col. 4.
54. Id.
55. Id.

> supports the use of well designed job evaluation systems as an effective management tool which will assist in the elimination of wage discrimination.
>
> Failure to undertake a study of the value of jobs held by either men or women also has been held to constitute proof of an employer's intent to discriminate against women by setting their wages at rates lower than the salaries paid to men.[56]

Despite widespread acknowledgement of discriminatory wage conditions, many employers and public officials persist in raising irrelevant defenses as a smokescreen for their failure to comply with the law. They assert four basic defenses: a) "apples and oranges"; b) "market"; c) "cost"; and d) "blame the victim."

A. "Apples and Oranges" is Not a Defense

One argument raised by employers in response to challenges to wage discrimination is that it is not possible to determine the value of dissimilar jobs because it is like comparing apples and oranges. But this is exactly the purpose for which job evaluation was developed. As stated by Arbitrator Bertram Gottlieb:

> From the very beginning job evaluation plans were developed for the purpose of devising a yardstick for measuring dissimilar jobs: for determining "How much one job is worth compared with other jobs". If all jobs were similar there would have been no need for job evaluation plans.[57]

Virtually every large employer, including federal and state governments, uses some method to evaluate the internal relationship of different jobs. These methods are based on an objective evaluation of the composite of skill, effort, responsibility and working conditions required by the jobs.[58] Higher paid jobs are expected to require a greater degree of skill, effort and responsibility.

Comparison of different jobs for the purpose of adjusting intraplant wage rates has long been a common occurrence in the industrial world. Unions have regularly challenged and attempted to negotiate the proper rate for a job, and arbitrators have been called upon to resolve the dispute by establishing

56. Pay Equity: Equal Pay for Work of Comparable Value, 1982: Hearings to Examine Female Worker Salary Inequities Before the Subcomm. on Human Resources, the Subcomm. on Civil Service, and the Subcomm. on Compensation and Employee Benefits, 97th Congress, 2d Sess. 255, 228-29, 230 (Sept. 21, 1982).

57. Testimony of Mr. Gottlieb, who specializes in job evaluation cases, before Carol Bellamy and Andrew Stein, President of the New York City Council and Borough of Manhattan, respectively, on February 7, 1984.

58. "Almost two-thirds of the adult population in the USA are pay-graded by job evaluation schemes." T. Patterson, Job Evaluation (London Business Books) (1972) at p. xi; P. Katz, "Comparable Worth," Federal Service Labor Relations Review, Spring, 1982, 38, 39.

proper wage rates for a particular classification, based upon testimony and/or personal observations of the job. Gender should play no role in this evaluation.

For more than 50 years, employers have supported the concept of job evaluation. Although employers themselves recognized that job evaluation was not a science, they supported the job evaluation concept when it was in their own best interest, as for example, during passage of the Equal Pay Act.[59] Employers did not reject job evaluation until workers began to borrow employer job evaluation techniques to prove discrimination in compensation on the basis of sex or race. Suddenly, employers argued that job evaluation was not scientific or objective and was not, therefore suitable evidence.

The weakness of the "apples and oranges" defense is demonstrated by the fact that, consistent with legislative history, judges have compared "apples and oranges" under the Equal Pay Act for 20 years. Frequently a judge must determine on the basis of job content or job evaluation whether predominantly male and female jobs are "equal or substantially equal" within the meaning of the Equal Pay Act. Thus, in *Thompson v. Sawyer*,[60] a case involving the Government Printing Office, the court compared the female job of bindery worker with that of the male job of bookbinder, and found that the government had violated the Equal Pay Act with respect to a particular category of female bindery workers.[61] Although these particular female bindery workers *worked on entirely different machines and had different job classifications* from male bookbinders, the court concluded on the basis of expert job evaluation testimony and the court's analysis of job content, that the jobs were substantially equal in content, skill, effort, responsibility and working conditions.[62]

Similarly, in a case involving male pursers and female stewardesses, a court found on the basis of expert job evaluation testimony that the work performed was substantially equal *even though the jobs had different titles, descriptions and responsibilities.*[63] The process for comparing jobs in a sex-based wage discrimination case under Title VII is the same as that required under the Equal Pay Act.

Even in the absence of a formal job evaluation plan wage discrimination is often evident. For example, male barbers are paid more than female beauti-

59. In Corning Glass Works v. Brennan, 417 U.S. 188, 199-200 (1974), the Court noted that the employer supported the concept of job evaluation. The Court further held that the fourth affirmative defense in the Equal Pay Act ("any other factor other than sex") had been added to protect bona fide non-discriminatory job evaluations. 417 U.S. at 199-201. See discussion in Newman and Vonhof, supra note 37, at 314 n.204. For a discussion of business community testimony on the job evaluation concept and the subsequent narrowing of Equal Pay provisions, see Gitt and Gelb, "Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII," 8 Loy. U. Chi. L. J. 723, 740, n.94 (1977).

60. 678 F.2d 257 (D.C. Cir. 1982).

61. Id. at 274-76.

62. Id.

63. Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976), cert. den. 434 U.S. 1086 (1978). See also Hodgson v. Brookhaven Gen. Hosp.,436 F.2d 719 (5th Cir. 1970) (requiring factual inquiry on whether orderlies duties and nurse's aid duties differed and whether they required equal effort).

cians, male liquor store clerks are paid more than female school teachers, male toll collectors are paid more than female medical stenographers, and male tree trimmers are paid more than female nurses. An expert evaluator is not necessary to recognize that discrimination exists where the qualifications for entry level jobs are the same, but pay scales are not. An example would be where a high school diploma is the sole requriement for both "female" and "male" entry level jobs, and the rates for the "female" jobs are consistently below the rates of the "male" jobs, as was the case in *AFSCME*.[64]

Sometimes sex-based wage discrimination is blatant because wage differences between male and female employees appear to be unexplained on any other basis. In San Jose, a joint study by AFSCME and the City of San Jose showed that female employees with master's and doctoral degrees, supervising as many as 25 people, earned less than street sweepers, a predominantly male job classification. An "apples and oranges" defense is unpersuasive in the face of blatant wage discrimination.

B. The Market is Not a Defense

The "market" argument, often asserted by employers as a defense to wage discrimination claims, is that wages are established by market mechanisms of supply and demand, rather than the result of discrimination. "We do not discriminate," employers protest. "We just pay the going rate." There are several fallacies in this argument.

First, the market itself is distorted by discrimination. The concept of supply and demand does not explain compensation rates for traditionally female jobs. The well known and long-time shortage of nurses in the grossly underpaid profession of nursing vividly demonstrates that supply and demand have had little effect on the wages of female-dominated professions.

Second, most wage discrimination in industrial employment is a product of "initial assignment discrimination," as it was in *IUE v. Westinghouse*[65] and the *AFSCME* case.[66] Initial assignment discrimination occurs when entry level unskilled applicants or applicants with equal skills are assigned to different jobs on the basis of sex, and female employees are paid less.

Third, the courts have consistently refused to sanction law-breaking simply because it is a customary practice. The Supreme Court and lower federal courts have specifically rejected the market as a defense to wage discrimination claims. Although *Corning Glass v. Brennan* involved the Equal Pay Act, the Supreme Court's comment should be equally applicable to broader claims of wage bias:

> The differential . . . *reflected a job market* in which Corning could

64. In such cases, a formal job evaluation may be required in order to structure an appropriate remedy, but not to determine liability. Many kinds of cases—antitrust, school desegregation, for example —require technical support at the remedy stage.

65. 631 F.2d 1094 (3d cir. 1980), cert. denied, 452 U.S. 967 (1981).

66. 578 F. Supp. 846 (W.D. Wash. 1983).

> pay women less than men for the same work. *That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.* . . . The whole purpose of the Act was to require that these depressed wages be raised, in part *as a matter of simple justice to the employees themselves*, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex 'constitutes an unfair method of competition.'[67]

In *Norris v. Arizona Governing Committee*,[68] a Title VII case, the Ninth Circuit stated: "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the market place. . ."[69] Similarly in *Thompson v. Sawyer*,[70] which was decided under both Title VII and the Equal Pay Act, the court condemned "traditional industry practice," or the market defense, noting that ". . . the 'traditions' of paying women less than men, or of assigning different labelling to female and male jobs, no matter how hoary, are not defenses to the Equal Pay Act."[71] Our society has advanced to the point where only a bigot would publicly state that because of the market, blacks and Hispanics should be paid less money, or that because of the tragic unemployment rate of black workers they should be paid less. The market defense can not be held legitimate for women but not for other minorities. The Civil Rights Act was designed to eliminate discrimination. "Following the market" simply perpetuates discrimination.

C. Cost is Not a Defense

The cost defense to wage discrimination claims is based on the view that the "cost" of correcting discrimination would destroy the economy. Such dire predictions are obviously exaggerated. Moreover, Congress did not place a price tag on the cost of correcting discrimination. Although Title VII limits back pay to two years preceding the filing of a charge with EEOC, it does not include any form of cost-benefit analysis, such as is found under the Occupational Safety and Health Act. Congress did not condition the elimination of discrimination on its cost. In *Los Angeles Department of Water & Power v. Manhart*,[72] which involved employee contributions to a pension fund, the Supreme Court stated:

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67. 417 U.S. at 205, 207 (1974) (emphasis added). In accord: Brennan v. City Stores, 479 F.2d 235, 241 n.12 (5th Cir. 1973); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d at 726; Laffey v. Northwest Airlines, see note 63 supra.

68. 671 F.2d 330 (9th Cir. 1982), aff'd in relevant part, 51 U.S.L.W. 5243 (1983).

69. Id. at 335. *Norris* involved a challenge to an employer's pension plan which required female employees to make larger contributions to the plan than male employees. The court's rejection of a market defense should be applied to Title VII wage discrimination cases as well.

70. 678 F.2d 257 (D.C. Cir. 1982).

71. Id. at 276.

72. 435 U.S. 702 (1978).

> In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. *That argument might prevail if Title VII contained a cost-justification defense available comparable to the affirmative defense in a price discrimination suit.* But neither Congress nor the courts have recognized such a defense under Title VII.[73]

Just as cost cannot justify sex-based discrimination where, as in *Manhart*, biological differences between the sexes dictates the cost to the employer, the cost of eliminating wage discrimination should not be a defense where the employer is responsible for the existing discrimination and thus is to blame for the costs of eradicating it. As the court commented in *AFSCME*, "Defendant's preoccupation with its budget constraints pales when compared with the invidiousness of the impact ongoing discrimination has on the Plaintiffs herein."[74]

D. Blaming the Victims is Not a Defense

Many opponents of the elimination of wage discrimination, including the Reagan administration, attempt to blame the victims of discrimination by suggesting that the "cure" for sex-based wage discrimination is for women to change jobs. Only a bigot would tell black workers who are receiving a discriminatory wage rate that if they do not like it, they should get a higher-paid job. As the judge in the *AFSCME* case eloquently commented: ". . . this Court can see no realistic distinction between discrimination on the basis of race or sex. The results are just as invidious and devastating. There is nothing in Title VII that distinguishes between race and sex in the employment discrimination context."[75]

Nevertheless, the suggestion to change jobs remains one of the current administration's "blame the victim" tactics. Government officials have already blamed the hungry for "voluntarily" going to soup kitchens and blamed the unemployed for being without jobs even though they could "read the classifieds." Telling women whose jobs are illegally underpaid that they can work elsewhere is like telling a mugging victim to move to another neighborhood.

Defenders of discrimination also argue that elimination of sex-based discrimination will only be obtained at the expense of the victims of race-based discrimination. As previously noted, black women will be major beneficiaries of the eradication of sex-based wage discrimination. Significantly, however, it is the lawbreakers, not the individual victims of sex discrimination, who should make restitution to all victims of wage bias.

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73. Id. at 716-17 (emphasis added).
74. 578 F. Supp. 846, 868.
75. Id. at 870 n.22.

IV
THE REAGAN ADMINISTRATION REFUSES TO ENFORCE TITLE VII OF THE CIVIL RIGHTS ACT

The Equal Employment Opportunity Commission, the Departments of Justice and Labor, and other executive agencies are obligated to enforce the law, not to substitute their political judgment or ideological philosophy for the decisions of Congress and the Supreme Court. Unfortunately, under the Reagan administration these agencies are not fulfilling their responsibility to enforce civil rights laws, a duty carried out by prior administrations.

President Reagan did not nominate any Commissioners to the Equal Employment Opportunity Commission (EEOC) until after August, 1981. Until that time, EEOC and the Department of Labor had followed a consistent pattern of interpreting Title VII's prohibition against discrimination in compensation to incorporate more than the Equal Pay Act. A brief chronology demonstrates the EEOC's active involvement in the enforcement of Title VII up to August, 1981:

1. Starting in 1966, EEOC issued Decisions (findings of "cause") applicable to both race and sex-based wage discrimination where jobs were compensated at different rates. EEOC made at least 10 "reasonable cause" findings in wage discrimination cases between 1966 and 1970.[76] The joint brief of EEOC and the Justice Department in the *Gunther* case points to this record with pride:

> . . . the Commission . . . issued a series of decisions that clearly demonstrate that it did not deem a finding of "equal work" necessary to establish a sex-based wage discrimination claim. Decision No. 66-5762, 1973 EEOC Decisions (CCH) P6001, n.22 (June 20, 1968); Decision No. 70-112, 1973 EEOC Decisions (CCH) p.6108 (Sept. 5, 1969); Decision No. 71-2629, 1973 EEOC Decisions (CCH) P6300, (June 25, 1971). In these cases, the Commission found that lower pay scales for jobs held predominantly by women in sex-segregated work forces were discriminatory in certain circumstances.[77]

2. Regulations issued by EEOC in 1972 were consistent with congressional intent under the 1972 Amendments to Title VII to apply the same standards to sex-based wage discrimination claims as to race-based wage discrimination, which were not limited by the equal work standard.[78] The regulations provide that: "The employee coverage of the prohibitions against discrimination based on sex contained in title VII is *coextensive with that of the other prohibitions contained in title VII* . . . ."[79]

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76. Brief for the United States and the Equal Employment Opportunity Commission as *amici curiae* in County of Washington v. Gunther, 452 U.S. 161 (1981), at 25-26.

77. *Id.*

78. See discussion note 15 supra.

79. 29 CFR § 1604.8(a) (1984).

3. In 1979 and 1980 EEOC played a leading role in *Gunther* and *IUE v. Westinghouse*. After the district court initially dismissed the *Westinghouse* case, EEOC's then Acting General Counsel, Issie Jenkins, personally argued that the district court should authorize an expedited appeal to the Court of Appeals under F.R.C.P. 54(b), and the subsequent EEOC General Counsel, Leroy Clark, argued the case in the Court of Appeals. The Justice Department and EEOC played major roles in both cases in rebutting defenses made by employers which were designed to permit the perpetuation of sex-based wage discrimination.[80]

4. Within two months after the Supreme Court decided *Gunther* in July, 1981, EEOC in August, 1981 had adopted a procedure to provide "Interim Guidance to Field Offices on Identifying and Processing Sex-Based Wage Discrimination Charges under Title VII and the EPA."[81] The stated purpose was to provide "interim guidance in processing . . . claims of sex-based wage discrimination in light of the recent Supreme Court decision in *County of Washington v. Gunther*."[82] The EEOC memorandum set forth comprehensive procedures for "investigating" and "evaluating sex-based wage claims" and also provided that "counseling of potential charging parties should be expanded to reflect the scope of *Gunther*."[83] The memorandum also stated that ". . . Title VII is not limited by the equal work standard found in the Equal Pay Act."[84]

It should be noted that this earlier Commission memorandum was addressed to the "Processing of Sex-Based Wage Discrimination Charges" and does not refer to the processing of "comparable worth" charges. Labelling sex-based wage discrimination cases as "comparable worth" cases, to avoid the application of the memoranda, assumes, without investigation, that the facts will not support a finding of a violation of Title VII.

Current EEOC Chair Clarence Thomas correctly analyzes *AFSCME* as a "straight *Gunther*" case of wage discrimination. "Who am I to challenge the Supreme Court?" Thomas has asked rhetorically.[85] Yet EEOC has not brought a single wage discrimination case to trial since the *Gunther* decision was issued in 1981 nor has it investigated and referred any public employment cases to the Justice Department.

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80. Shortly after the *Gunther* decision was rendered, the National Academy of Sciences published a study earlier commissioned by EEOC on wage discrimination and job evaluation. The study concluded that ". . . jobs held mainly by women and minorities are paid less *because* they are held mainly by women and minorities." The study concluded that, "In our judgment job evaluation plans provide measures of job worth that . . . may be used to discover and reduce wage discrimination . . . ." Supra note 47 at 93, 95.

81. EEOC Memorandum, reprinted in *The Comparable Worth Issue: A BNA Special Report*, at Appendix B (pp. 79-83) (October 30, 1981.)

82. Id. at 79

83. Id. at 82

84. The memorandum of August 25, 1981, was unanimously adopted by the Commission, and was later incorporated into EEOC's Compliance Manual.

85. 1984 Daily Labor Report (BNA), 25, AA:7.

Surely there must have been one case of wage discrimination in the three years since *Gunther* that even the Reagan administration would consider a violation of Title VII. AFSCME alone has filed wage discrimination charges with EEOC against the States of Wisconsin, Connecticut and Hawaii; the cities of Philadelphia, Chicago, New York and Los Angeles; Nassau County, N.Y.; and the Reading, Pennsylvania School District. All of these charges are similar to the original AFSCME charge against the State of Washington, which as noted above, the current Chairman of EEOC has described as a "straight *Gunther*" case.

Another obvious candidate for EEOC litigation is the national charge filed against Westinghouse 10 years ago. Charges against six individual Westinghouse plants have been settled, including the case of *IUE v. Westinghouse* discussed above. Discriminatory wage rates are in effect in other Westinghouse plants across the country. Settlements of wage discrimination cases in the electrical industry have reaped tens of millions of dollars for the victims of discrimination. Yet EEOC has taken no action on the pending national charge against Westinghouse despite the fact that the charge has been brought to the attention of the current EEOC staff on at least two occasions. The Commission has shown a similar lack of interest in the case of *Gerlach v. Michigan Bell*,[86] which settled on the eve of trial after plaintiffs amended their complaint, without the benefit of EEOC participation, even though EEOC made a finding of "reasonable cause" that discrimination had occurred.

Any industry in which employees have traditionally been segregated on the basis of sex is an obvious target for a wage discrimination case. Actual litigation demonstrates that there is a pattern of discrimination in the electrical, glass and telephone industries, yet the Reagan administration has not taken any action to challenge such discrimination.

What the Reagan administration *is* doing, in the interest of employers, through the Justice Department and the EEOC, is to continue raising legal arguments which the Supreme Court put to rest in the *Gunther* case.[87] For example, the Assistant Attorney General for Civil Rights, William Bradford Reynolds, without even having read the record in the *AFSCME* case, suggested that the Administration intervene on behalf of the discriminating employer. "If the women with low paying jobs had an equal opportunity to work at the jobs with higher salaries but never took advantage of that opportunity. . . *where's the discrimination*?"[88] The answer was previously provided

86. 501 F. Supp. 1300 (E.D. Mich, 1980).

87. A favorite technique in EEOC memoranda and Justice Department statements on this issue is to cite cases decided before the Supreme Court's decision in *Gunther*. Citing pre-*Gunther* cases is like citing *Plessy v. Ferguson*, 163 U.S. 537 (1895) after *Brown v. Board of Education*, 347 U.S. 483 (1954). Pre-*Gunther* cases are only instructive insofar as they are consistent with *Gunther*. Even before *Gunther*, there were successful wage discrimination claims, see, e.g., Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978); Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976), and 642 F.2d 578 (D.C. Cir. 1980).

88. N.Y. Times, January 22, 1984, at 2 (emphasis added). Although the AFSCME tran-

by Mr. Reynolds' predecessors in the Justice Department, in their eloquent brief filed in support of the prevailing plaintiffs in *Gunther*:

> Petitioners suggest . . . that the purposes of Title VII will be satisfied if women are protected only against discrimination in transfers and promotions. But such opportunitites may not always exist and some women, although qualified for the underpaid jobs that they presently hold, may not have the skills necessary to secure other employment. *That women may theoretically be able to move to jobs in which sex-based compensation practices are not present is irrelevant inasmuch as [the Act] prohibits discrimination not only in promotions and transfers, but also in compensation.*[89]

The Justice Department had also noted: ". . . when Congress amended Title VII in 1972, it confirmed its intent to *broadly proscribe* all forms of compensation discrimination against women, not merely that which was the most obvious."[90]

CONCLUSION: THE IMPORTANCE OF LITIGATION

The AFSCME trial in Washington State inspired a flurry of activity in the area of wage discrimination that has only accelerated since the victory of plaintiffs was announced. To date, numerous state and local governments have conducted or are conducting wage discrimination studies. Several more have passed legislation requiring the elimination of sex-based wage bias. Wage discrimination has become a major issue at the collective bargaining table and in the corporate board room.

One of the most important lessons from this experience is that vigorous litigation is necessary in order for any "voluntary" compliance program to be effective. The most well known "voluntary" victories were achieved in the shadow of litigation or test of strength. In Colorado Springs, the city negotiated equity increases for their clerical workers in the absence of litigation. The personnel director for the city explained later, however, that, "If the city had failed to come up with a comparable worth scheme, AFSCME no doubt would have been waiting in the wings."[91] In 1983, the City of Spokane agreed, as a result of collective bargaining, to equity adjustments for its clerical workers. It is reasonable to assume that Spokane was looking over its shoulder to the state capitol where the *AFSCME* case was pending and learned a lesson. The nine day strike in San Jose in July 1981, which challenged wage discrimination, and the subsequent settlement, are well known. What is less well known is that charges were pending with EEOC when the strike occurred and

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script was not then available, Mr. Reynolds also stated that, "I have absolutely no doubt his decision is wrong."

89. See note 77 at 10, n.5 supra.

90. Id. at 12 n.7 (emphasis added).

91. P. Katz, Comparable Worth, Federal Service Labor Relations Review 39 (Spring 1982).

that, as a pre-condition of settlement, the City insisted that AFSCME agree to withdraw the charges.

The pace of litigation will no doubt increase in the future. Employers are unlikely to incur the costs of complying with the law unless they believe they will be forced to do so. Since the present administration has shown an unwillingness to enforce the law's prohibition against discrimination in compensation, labor unions, women's rights and other civil rights organizations and individuals will probably continue to press the issue on their own initiative.

Voluntary compliance with Title VII by employers who are afraid of being sued will speed up the process of eliminating discrimination. A lawsuit often expedites public education on an issue. The coverage of the *AFSCME* case may have educated more people than all the conferences ever held on the subject of sex-based wage discrimination. *AFSCME v. Washington State* moved the issue of wage discrimination from rhetoric to action, and from the conference room to the courtroom. The proper litigative approach can and will break the back of sex-based wage discrimination and bring an end to pervasive wage discrimination.

Title VII is a good tool. Let's use it!