Comments

THE STATUS OF COMPARABLE WORTH: *SPAULDING V. UNIVERSITY OF WASHINGTON*

Comparable worth is an emerging, highly controversial area of the law. The chairman of the U.S. Civil Rights Commission has predicted it would become the major civil rights issue of the 1980s.[1] This comment will discuss the history of comparable worth, the methods of recovery available under title VII, and the impact of the Ninth Circuit's decision in *Spaulding v. University of Washington*.[2]

In *Spaulding*, the nursing faculty had asserted that the university violated the Equal Pay Act[3] and title VII of the 1964 Civil Rights Act[4] because the salaries in the nursing school were below those of other disciplines.[5] The United States Court of Appeals for the Ninth Circuit held that there could be no recovery under the Equal Pay Act because the jobs were not substantially equal,[6] nor could there be recovery under the disparate treatment theory of title VII because no discriminatory animus was proved.[7] In a key section of the opinion, the court held the disparate impact theory of title VII was unavailable "in broad ranging sex-based claims of wage discrimination based on comparable worth."[8]

In a 1981 case,[9] the Supreme Court enlarged the theories of recovery available under title VII by eliminating the equal work requirement of the Equal Pay Act. The Supreme Court did not, however, specify which theories it would accept.[10] The Ninth Circuit in *Spaulding* has limited the theories available by rejecting the theory of comparable worth.

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1. Epstein, *Equal-Pay Idea Derived by Two on Rights Panel*, Philadelphia Inquirer, Nov. 17, 1984, at 4-A, col. 1. Chairman Clarence E. Pendleton, Jr. stated comparable worth is "the looniest idea since 'Looney Tunes' came on the screen." *Id.* at 1-A, col. 1.
2. 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).
3. 29 U.S.C. § 206(d)(1) (1982).
4. 42 U.S.C. § 2000e-2 (1982).
5. *Spaulding*, 740 F.2d at 692.
6. *Id.* at 698.
7. *Id.* at 703.
8. *Id.* at 705.
9. County of Washington v. Gunther, 452 U.S. 161 (1981).
10. *Id.* at 181.

I. BACKGROUND

The fact that women are not paid as much as men is not in dispute. The United States Department of Labor's statistics state that a woman earns fifty-nine cents to a man's dollar.[11] What is in dispute is the method to use to rectify this large wage difference. Much of the disparity is due to job segregation. The jobs that are "typically" a women's generally pay lower wages than male-dominated jobs.[12] Some of the disparity, of course, is due to intentional discrimination by employers.[13]

There are two statutes available to women as they try to eliminate sex-based wage discrimination: The Equal Pay Act[14] and title VII of the 1964 Civil Rights Act.[15]

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11. Vladeck, *Equal Access is Not Enough*, 70 A.B.A. J. 16 col. 1, 20 (Sept. 1984) [hereinafter cited as Vladeck]. This article is in the "At Issue" section of the *Journal*. This section provides a point-counterpoint view of controversial areas of the law. The counterpoint article is Powers, *An Idea with a Long Way to Go*, 70 A.B.A. J. 16 col. 2, 20 (Sept. 1984) [hereinafter cited as Powers].

12. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979) [hereinafter cited as Blumrosen], and Thomas, *Pay Equity and Comparable Worth*, 34 LAB. L.J. 3 (1983) [hereinafter cited as Thomas].

13. *See* Blumrosen, *supra* note 12, at 415-21; Note, *Equal Pay, Comparable Work and Job Evaluation*, 90 YALE L.J. 657 (1981) [hereinafter cited as *Equal Pay*]; and County of Washington v. Gunther, 452 U.S. 161 (1981).

14. 29 U.S.C. § 206(d)(1) (1982) provides:

(d) Prohibition of sex discrimination

(1) 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 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.

15. 42 U.S.C. § 2000e-2(h) (1982) provides:

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national

II. THE EQUAL PAY ACT

One type of wage discrimination occurs when people who do exactly the same job receive different salaries. The Equal Pay Act is especially applicable to this type of discrimination. The statute prohibits employers from paying unequal wages to people working jobs that

> require 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.[16]

Thus, the Equal Pay Act requires that women receive equal pay for equal work, although the jobs need not be identical. The plaintiff may "prove a violation of the Equal Pay Act by showing that the skill, efforts, and responsibility required in performance of the jobs is [sic] 'substantially equal.'"[17] Once a plaintiff makes out a prima facie case, the employer then has an opportunity to show that the pay differential was due to one of the four affirmative defenses listed in the Equal Pay Act.[18]

III. TITLE VII

A second type of wage discrimination

> arises when the job structure within a given place of business is substantially segregated by sex, race, or ethnicity, and workers of one category are paid less than workers of another category for performing work that is not the same but in some sense is of comparable value or worth to their employer.[19]

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origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

16. *See supra* note 14.

17. Usery v. Columbia Univ., 568 F.2d 953, 958 (2d Cir. 1977), *cited in* Gunther v. County of Washington, 623 F.2d 1303, 1309 (9th Cir. 1979).

18. *See* County of Washington v. Gunther, 452 U.S. 161 (1981).

19. Thomas, *supra* note 12, at 3.

It is this type of discrimination, dealing with unequal work, that concerns proponents of comparable worth.

One of the problems with comparable worth is that there is no single definition for the concept. The Supreme Court defines it as a "controversial concept under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in that same organization or community."[20] One commentator has defined it as "the concept of equal pay for work that involves responsibilities of commensurate value to the employer."[21] Although generalization is difficult, it is possible to divide the concept of comparable worth into three broad subcategories: pure comparable worth, comparable value, and comparable work.

Pure comparable worth is the most abstract theory, claiming that an inference of discrimination should be made whenever a job is primarily held by women and its wages are low.[22] Proponents here point to stereotypical judgments regarding the value of work of males versus the value of work of females,[23] and state that in most societies, including the United States, work done primarily by females is valued lower than that done by males.[24]

In comparable value, on the other hand, the plaintiff attempts to establish that two dissimilar jobs have comparable value to the employer and thus require comparable wages.[25] Proponents claim that employer directed job evaluation systems can be utilized to determine equal value. One case involving precisely such an issue is currently pending appeal to the Ninth Circuit.[26]

Finally, comparable work involves comparing jobs that are not identical but are similar enough to be classified together. The focus is on the nature of work, not its value to the employer;[27] these jobs are from the same occupational groups and are, therefore, fairly similar.

Since proponents of comparable worth cannot utilize the Equal

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20. *Gunther*, 452 U.S. at 166.

21. Gasaway, *Comparable Worth: A Post Gunther Overview*, 69 GEO. L.J. 1123, 1133 n.6 (1981) [hereinafter cited as Gasaway].

22. *See* Comment, *Comparable Worth Theory of Title VII Sex Discrimination in Compensation*, 47 MO. L. REV. 495, 501 (1982) [hereinafter cited as Comment, *Comparative Worth in Compensation*]; and Blumrosen, *supra* note 12, at 402.

23. Blumrosen, *supra* note 12, at 402.

24. *Id.* at 415-21.

25. Comment, *Comparable Worth in Compensation, supra* note 22, at 501.

26. AFSCME v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983).

27. Comment, *Comparable Worth in Compensation, supra* note 22, at 503.

Pay Act due to its basic requirement of *equal* work, they resort to title VII of the 1964 Civil Rights Act[28] to aid their cause.

Title VII of the 1964 Civil Rights Act prohibits employers from discriminating against a person "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.[29] Title VII was enacted by Congress to achieve equality of employment opportunities and to eliminate those discriminatory practices[30] and devices which have fostered racially and sexually stratified job environments to the disadvantage of minority citizens.[31] Recovery under title VII is based on two theories: disparate impact and disparate treatment.

A. Recovery Under Disparate Impact

Disparate impact concerns business practices "fair in form but discriminatory in operation."[32] In this model, the employer need not have any intent to discriminate.[33] For a prima facie case, the plaintiff must show (1) the occurrence of certain outwardly neutral employment practices and (2) a significantly adverse or disproportionate impact on persons of a particular sex produced by the employer's facially neutral acts or practices.[34] To rebut a charge of employment discrimination under this model, the employer must show a business necessity for the practice in question.[35]

B. Recovery Under Disparate Treatment

Under the disparate treatment model, the plaintiff must establish a prima facie case by meeting the factors of the *McDonnell-Douglas*[36] test. These factors require:

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28. *See supra* note 15.

29. *Id.*

30. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

31. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (discussing racially stratified job environment).

32. *Griggs*, 401 U.S. at 431.

33. *Id.* at 432.

34. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

35. *Griggs*, 401 U.S. at 432 (any given requirement must have a manifest relationship to the employment in question). *See also Equal Pay, supra* note 13, at 679 n.119 (test of business necessity requires proof that practice is job related or essential to safe and efficient operation of business); and Note, *Sex-Based Wage Discrimination Under Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1088 (1982) (question is if the practice is job related) [hereinafter cited as *Sex-Based Wage Discrimination*].

36. McDonnell-Douglas v. Green, 411 U.S. 729 (1973).

1. that she is a member of a class protected by Title VII;

2. that she was qualified for the position or rank sought;

3. that she was denied promotion or reappointment;

4. that in cases of reappointment (or tenure) others (*i.e.*, males) with similar qualifications achieved the rank or position.[37]

The burden then shifts "to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection."[38] The plaintiff has the opportunity to show that the reason given "was a pretext or discriminatory in its application."[39] The Supreme Court has said that this test must be flexible and that it is not the only means by which a prima facie case can be made.[40] The plaintiff's burden is met where "the plaintiff has shown that 'it is more likely than not' that employers' actions are based on unlawful considerations."[41]

IV. OVERLAP OF THE EQUAL PAY ACT AND TITLE VII

The coverage provided in the Equal Pay Act overlaps that provided in title VII.[42] The courts have struggled since 1964 to define the relationship between these two statutes,[43] especially whether the equal work

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37. The *McDonnell-Douglas* factors were thus applied in Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1341 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). The factors in their original form were:

> (i) that he belong to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell-Douglas, 411 U.S. at 802.

38. *McDonnell-Douglas*, 411 U.S. at 802.

39. *Id.* at 807.

40. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977).

41. Furnco Constr. Co. v. Waters, 478 U.S. 567, 576 (1978), *cited in Lynn*, 656 F.2d at 1341.

42. *Gunther*, 623 F.2d at 1309.

43. *See* County of Washington v. Gunther, 452 U.S. 161 (1981); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Power v. Barry County, Mich., 539 F. Supp. 721 (W.D. Mich. 1982); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980); and AFSCME v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983).

requirement and/or the four affirmative defenses of the Equal Pay Act were incorporated into title VII by the Bennett Amendment.[44]

The Bennett Amendment, introduced to prevent conflicts between the Equal Pay Act and title VII,[45] provides that:

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44. 42 U.S.C. § 2000e-2(h) (1982). The full text of the Bennett Amendment reads:

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

45. The prohibition against sex discrimination was added to title VII late in the House debate. The legislative history of title VII's prohibition of sex discrimination is "notable for its brevity". GE v. Gilbert, 429 U.S. 125, 143 (1976). Concern was raised in the Senate over conflicts between title VII and the Equal Pay Act. Senator Clark, a floor manager for the bill, issued an answer to the question raised. The question and the response were as follows:

> Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs. Answer: The Equal Pay Act is part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of a bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.

110 CONG. REC. 7217, *cited in Gerlach*, 501 F. Supp. at 1310. The entire discussion of the Bennett Amendment was:

> Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
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> By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.
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> The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
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> I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.
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> Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
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> Mr. DIRKSEN. Mr. President, I yield myself one minute.
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> We were aware of the conflict that might develop, because the Equal

> it shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is *authorized* by the provisions of [the Equal Pay Act].[46]

The controversy has centered on the word "authorized." Is the equal work requirement of the Equal Pay Act "authorized" and therefore to be considered a necessary requirement under title VII? Also, are the four affirmative defenses available to employers under the Equal Pay Act "authorized," and so also available under title VII?

Until 1981, the courts held that the equal work requirement was authorized and, therefore, all claims based on unequal work failed.[47] In 1981, the Supreme Court resolved the controversy in *County of Washington v. Gunther*,[48] by finding that only the four affirmative defenses of the Equal Pay Act are incorporated into title VII.[49] In that case, female matrons claimed their salaries were lower than the male prison guards' due to intentional discrimination, but it was found that the jobs were not substantially similar. The Court stated that to include the equal work provision of the Equal Pay Act could leave some plaintiffs without a remedy,[50] and held that "claims of discriminatory undercompensation are not barred by § 703(h) [Bennett Amendment] of

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Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification. *Id.* at 13647, *cited in Gunther*, 452 U.S. 173-74.

46. 42 U.S.C. § 2000e-2(b) (1982) (emphasis added). *See supra* note 44 for full text.

47. *Powers*, 539 F. Supp. at 722.

48. 452 U.S. 161 (1981).

49. *Id.* at 171. The Court discussed the meaning of the word "authorized." The Court concluded that the Equal Pay Act was divided into two sections: a definition and the defenses. The first section is "purely prohibitory [and] can hardly be said to 'authorize' anything. . . . The second part 'authorizes' employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act." *Id.* at 169.

50. *Id.* at 178. To include equal pay "means 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 a [sic] equal job in his same establishment, at a higher rate of pay." *Id.*

Title VII merely because respondents do not perform equal work to that of male [employees]."[51]

This decision "open[ed] the door to Title VII claims of discrimination compensation practices even where jobs are not substantially equal, except where the disparity is due to [one of the four affirmative defenses of] the Bennett Amendment."[52] However, just how far open the door is remains unanswered because the Supreme Court did not define "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII."[53]

Even though the Court in *Gunther* expressly denied any reliance on "the controversial theory of 'comparable worth,'"[54] proponents of comparable worth greeted this decision favorably[55] because sex-based wage claims were no longer limited to those alleging equal work.[56] The plaintiffs in *Spaulding* alleged equal work, but the Ninth Circuit upheld the district court's conclusion that the jobs involved in the suit were not substantially equal.

V. ANALYSIS

In March of 1972, the nursing faculty at the University of Washington[57] filed a petition with the university's administration charging sex discrimination.[58] The university answered that salaries varied because "each academic discipline commanded a salary based upon training, expertise, emphasis, subject matter, and the academic marketplace for the discipline."[59] A salary study revealed that all univer-

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51. *Id.* at 181.

52. Thomas, *supra* note 12, at 6.

53. *Gunther*, 452 U.S. at 181.

54. *Id.* at 166.

55. *Sex-Based Wage Discrimination*, *supra* note 35, at 1095. "Prior to *Gunther*, courts summarily rejected disparate impact claims based on a comparison of job values. *Gunther*, which explicitly left undecided the viability of such claims, probably will encourage them."

56. Vladeck, *supra* note 11, at 21.

57. The University of Washington was created by WASH. REV. CODE ANN. §§ 28B.20.010-.20.820 (1982 & Supp. 1983). The university consists of 16 separate schools. Each has its own dean and is responsible to appoint faculty, to assign salaries and job levels for new appointees, and to determine salary increases for individual faculty members. The university's budget office allocates a portion of the money to across-the-board salary increases and the rest for distribution at the school's discretion. *Spaulding*, 740 F.2d at 692.

58. *Spaulding*, 740 F.2d at 692.

59. *Id.*

sity salaries lagged behind those of other universities and that the School of Nursing salaries lagged even more.[60]

In September of 1972, the School of Nursing received a salary allocation above that given to the rest of the university.[61] During the next five years, the School of Nursing received salary allocations equal to or above the rest of the university.[62] The nursing faculty, still dissatisfied, filed complaints with various agencies,[63] and in February of 1974, the United States Department of Justice issued a right to sue letter to plaintiff Spaulding. The case was originally a class action, but the class claims were dropped.[64]

In August of 1977, the district court judge assigned the case to a United States Magistrate, since the judge could not schedule the case within 120 days.[65] The magistrate, who sat as a special master, heard the case on its merits and made recommended findings of fact and conclusions of law that were subject to review by the district court.[66]

The magistrate concluded that the nursing faculty failed to show that they performed substantially equal work compared to male faculty members in other departments and planned to grant the university's motion for involuntary dismissal.[67] During this time, the Ninth Circuit decided *Gunther v. County of Washington*,[68] which removed the equal work requirement from title VII lawsuits.[69] The magistrate reviewed his original findings and concluded that *Gunther* had no effect on his decisions,[70] and, therefore, recommended the case be dismissed. After reviewing the transcript[71] of the proceedings before the magistrate,

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60. The university as a whole lagged 9% behind; the nursing school lagged 10.5% behind. *Id.*

61. The entire university was allocated a 3% merit raise; the School of Nursing received an additional 2%. *Id.*

62. *Id.*

63. They filed complaints with the Washington State Human Rights Commission, the Equal Opportunity Commission, and the University's Human Rights Commission. *Id.* at 693.

64. Those people dissatisfied with the dismissal of the class action were granted permission to intervene. *Id.*

65. The case was referred pursuant to 42 U.S.C. § 2000e-5(f)(5) (1982), rule 53 of the Federal Rules of Civil Procedure and Local Magistrates' Rule 21. *Spaulding*, 740 F.2d at 693.

66. *Spaulding*, 740 F.2d at 693. *See also* FED. R. CIVIL PRO. 53(e).

67. *Spaulding*, 740 F.2d at 693.

68. 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

69. *See supra* notes 47-56 and accompanying text.

70. 740 F.2d at 693.

71. The nursing faculty had requested the transcript be made of the magistrate's proceedings, and the district judge refused. He certified the issue for interlocutory

the district court judge adopted both the findings of fact and law and then ordered the case dismissed.[72]

The nursing faculty's claims centered on four theories of recovery: (1) a section 1983 claim, (2) an Equal Pay Act claim, (3) a disparate treatment claim under title VII, and (4) a disparate impact claim under title VII. The Ninth Circuit dismissed the section 1983 claim for lack of jurisdiction,[73] but allowed the Equal Pay Act claim and both title VII claims due to federal question jurisdiction.

A. Equal Pay Act Claim

The Equal Pay Act[74] prohibits discriminatory payment of wages due to sex. The nursing faculty, in order to establish a prima facie case, had to show that its members did not get equal pay for equal work. It was then the defendant's burden to show the existence of one or more of the Bennett Amendment affirmative defenses.[75]

The nursing facility attempted to establish a prima facie case by presenting evidence that teaching the subject of nursing was substantially equal to teaching other academic disciplines.[76] They introduced statistics comparing the nursing faculty with other faculty, using factors such as degrees held, experience, and merit.[77] Although the Ninth Circuit saw a facial similarity between the jobs of the nursing faculty

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appeal. In Spaulding v. University of Washington, 676 F.2d 1232 (9th Cir. 1982) (*Spaulding I*), the Ninth Circuit ordered the transcript prepared. *Id*

72. *Id.*

73. 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Spaulding, 740 F.2d at 694.

74. 29 U.S.C. § 206(d)(1) (1982).

75. The four defenses are a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential factor other than sex. *See supra* note 44.

76. The nursing faculty contended that the jobs were substantially equal because both required preparation and teaching, research and publication, committee work, advising students, and community services. *Spaulding*, 740 F.2d at 697.

77. The nursing faculty chose comparable faculty groups which had a similar degree mix to the nursing faculty and which also put students in clinical situations. *Id.*

and the jobs of the other faculty, the court concluded that the district judge's finding of no substantial equality was not clearly erroneous.[78]

The Ninth Circuit specifically stated that the statistics the plaintiffs used were deficient because they did not adequately evaluate the actual work performed by various faculty members. The court stated that the statistics did show a pay disparity, but "a difference in pay between jobs which women primarily hold and jobs which men primarily hold does not state a prima facie Equal Pay Act case if the jobs are not substantially equal."[79]

B. Title VII Claims

The nursing faculty asserted violations of title VII[80] under both disparate treatment and disparate impact, even though the jobs were found to be substantially equal. The Ninth Circuit cited *Gunther* to support the court's statement that a title VII cause of action can exist outside the equal work requirement of the Equal Pay Act.[81]

1. Disparate Treatment

Under the disparate treatment model of sex discrimination, the plaintiffs must present a prima facie case by meeting the *McDonnell-Douglas* factors[82] or by presenting evidence from which the court can infer discriminatory animus.[83] Under this model, discriminatory motive must be proved.[84]

Since the district judge did not clearly err by finding that the jobs were not substantially equal,[85] the faculty's case had to rest on an inference of discriminatory animus by showing that the wage disparity was more likely than not the result of intentional discrimination.[86] The court explained that evidence of comparable work alone will not establish a prima facie case in a disparate treatment

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78. *Id.*

79. The court also found the jobs of the intervenors were not substantially equal. *Id.* at 698.

80. 42 U.S.C. § 2000e-2(h) (1982).

81. *Spaulding*, 740 F.2d at 697. *See supra* notes 47-56 and accompanying text.

82. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). *See supra* notes 37-41 and accompanying text.

83. *Spaulding*, 740 F.2d at 700.

84. *Id.*

85. Because the district court held the jobs were not substantially equal, the title VII equal pay for equal work claim failed. *Id.*

86. *Id.*

claim.[87] The court refused to "infer intent merely from the existence of wage differences between jobs that are only similar."[88]

The nursing faculty proposed a "comparability plus" test. This test would not only compare jobs, it would also add in other factors including direct and circumstantial evidence of discriminatory conduct and pay disparities. The faculty suggested a "sliding scale" where the 'plus' factors vary in inverse proportion to the degree of comparability shown."[89] The court completely rejected this theory[90] stating that *Gunther* allowed the comparison of somewhat dissimilar jobs, but only to infer discriminatory intent.[91] The court concluded that the "comparability plus" test, as proposed by the plaintiffs, would create a "confusing potpourri of 'plus factors' plunging courts into standardless supervision of employer/employee relations."[92]

The faculty attempted to show an inference of discriminatory intent from the university's failure to cooperate in response to the discrimination charge and its failure to appoint a women's rights advocate.[93] The court found that the university did cooperate in good faith[94] and, in fact, worked to improve the status of women employees.[95]

The faculty presented evidence of a "demeaning attitude"[96] by an administrator and claimed it was part of a "predisposition to discriminate"[97] on the part of the university's upper echelon. The court decided that the evidence presented only good faith disagreements over internal policy,[98] not "an endemic discriminatory attitude."[99] The court held the evidence proved only sporadic discriminatory acts which were not the university's usual practice.[100]

Finally, the faculty presented statistical evidence to show

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87. *Id.*
88. *Id.*
89. *Id.* at 701.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. The court stated that the university met with faculty, initiated new salary schedules, and provided data for salaries, degrees, and entry dates for nursing faculty, women at the university and representative males. *Id.*
95. The nursing salaries kept competitive with other schools and the salary base expanded at a faster rate than most other schools. *Id.*
96. The administrator was described as "arrogant, authoritarian, and autocratic toward female administrators." *Id.* at 702.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

discriminatory intent. The court admitted that "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment"[101] and that statistics may be part of the circumstantial proof bolstering such an inference.[102] However, the court explained that "if the plaintiff only presents the circumstantial evidence of statistics in lieu of all other proof of discriminatory intent, the case becomes a case of disparate impact."[103]

The court criticized the faculty's statistics[104] due to the technique used to compile them and because the statistics were strictly comparative. The nursing faculty employed a simple matching technique to gather its statistics and the court concluded this method was unacceptable and recommended a multi-variate regression analysis.[105] The court was concerned with the "inherently slippery nature of statistics"[106] and suggested that using a sophisticated method of gathering statistics would make the results more reliable and would be more likely to ferret out any discriminatory factors.[107]

In addition, the court said the statistics ignored a detailed analysis of day-to-day responsibilities and did not compare nursing faculty wages to (1) wages of other female faculty in other departments, (2) wages paid at other universities, or (3) wages in the general labor market.[108]

2. Disparate Impact

The disparate impact model protects employees from facially neutral practices that are discriminatory in operation.[109] The nursing faculty argued that the university's facially neutral policy of setting wages according to the market price for jobs in that discipline caused the adverse impact of a wage disparity between nursing faculty and other faculty. According to the court, however, to qualify as a facially

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101. *Id.* at 703 (citing *Teamsters*, 431 U.S. at 335 n.15).

102. *Spaulding*, 740 F.2d at 703.

103. *Id.*

104. *Id. See also supra* note 82 and accompanying text.

105. *Id.* at 704. *See generally* Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 702, 705 (1980) [hereinafter cited as Fisher]. "Multiple regression analysis is a device for making precise and quantitative estimates of the effects of different factors on some variable of interest." *Id.* at 702.

106. *Spaulding*, 740 F.2d at 703.

107. *Id.*

108. The court also noted that the data provided to the nurses by the president of the university was inaccurate. *Id.*

109. *See Spaulding*, 740 F.2d at 705; Fisher, *supra* note 105, at 705.

neutral policy causing disparate impact, the policy had to be "a non-job-related pretext to shield an invidious judgment."[110] The court found that reliance on competitive market prices was "inherently job-related[111] [even though] the market price may embody social judgments as to the worth of some jobs."[112] The employers had to take the market prices as they found them and, thus, had no influence over the market prices. The court concluded that to permit reliance on market forces to qualify as a facially neutral policy would make employers liable for pay disparates over which they had not made an "independent business judgment."[113] The court found this argument unacceptable.

Therefore, the nursing faculty had only the comparable worth theory upon which to rely.[114] The court defined comparable worth as a theory that "essentially holds that men, women, and minorities should be paid equally for jobs that are of comparable value to the employer."[115] The court explained that the areas where disparate impact analysis had been applied[116] dealt with very "specific employment practices,"[117] not "a wide ranging attack on the cumulative effect of a company's employment practices."[118] The court, therefore, held that the disparate impact analysis was not available to plaintiffs in a claim of broad based wage discrimination between comparable jobs.[119] The

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110. *See Spaulding*, 740 F.2d at 708; Fisher, *supra* note 105, at 708.

111. *Spaulding*, 740 F.2d at 708.

112. The court also dismissed three other policies which plaintiffs asserted were facially neutral: (1) making all salary increases on a percentage basis, (2) faculty having to go through a four rank promotion system, and (3) allocating the budget on subjective considerations. *Id.* at 708-09.

113. *Id.* at 708. The court has in effect adopted the marketplace defense.

114. *Id.* at 705.

115. *Id.* The court cited articles in favor of comparable worth: Blumrosen, *supra* note 12; and *Equal Pay*, *supra* note 13. The court also cited articles opposed to the theory: Beller, *The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964*, 21 J.L. & ECON. 359 (1978); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980) [hereinafter cited as Nelson, Opton & Wilson] (a rebuttal to Blumrosen's article). *Spaulding*, 740 F.2d at 705, 706 n.10.

116. Disparate impact applies to: employers' intelligence tests, *Griggs*, 401 U.S. at 429; height and weight, Dothard v. Rawlinson, 433 U.S. 321 (1977); required leave upon pregnancy, Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980); exclusion of applicants due to arrest records, Gregory v. Litton Syss., Inc., 472 F.2d 631 (9th Cir. 1972). *Spaulding*, 740 F.2d at 707.

117. *Spaulding*, 740 F.2d at 707.

118. *Id.* (quoting Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982)).

119. *Id.* at 706.

court explained that its decision to disallow this broad based claim of wage disparity for comparable jobs was supported by "considerations of precedent, prudence and judicial competence . . . and accord[ed] with the laws and goals of Title VII."[120]

3. Concurrence

Judge Schroeder agreed with the majority on the failure of the Equal Pay Act claim and the failure of both the disparate treatment and disparate impact claims under title VII.[121] He disagreed, however, with the total elimination of comparable worth. He sated that the Supreme Court in *Gunther* "acknowledged the existence, if not the validity, of a comparable worth theory."[122] The majority, according to Judge Schroeder, "meshes adverse impact with varying concepts of comparable worth."[123]

The judge stated that neither party had presented evidence of the comparable worth of the jobs in question,[124] nor had the plaintiff asserted a comparable worth theory per se. He concluded, therefore, that the case could not be read to "render any definitive ruling on the validity of comparable worth as a tool in employment discrimination cases."[125]

VI. EVALUATION

The impact of *Spaulding* will be seen in three areas: the marketplace defense, job evaluation systems, and the future of comparable worth. The marketplace defense offers the employer his best weapon to combat comparable worth. Job evaluation systems, if designed properly, will protect both employers and employees. The status of comparable worth, after *Spaulding*, is difficult to determine.

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120. *Id.* The court cited: *Sex-Based Wage Discrimination, supra* note 35 (surveying cases and presenting arguments why courts should deny disparate impact claims based on comparable worth theories); Nelson, Opton & Wilson, *supra* note 115 (explaining problems of comparable worth theory as a legal vehicle); Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980) (title VII did not require employers to ignore the market in setting wages); and Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977) (employer not required to reassess the worth of services in each position in relation to all others; title VII requires that individuals should be entitled to equal opportunities in the job market, not equal results). *Spaulding*, 740 F.2d at 706.

121. *Spaulding*, 740 F.2d at 709.

122. *Id.* at 710.

123. "The majority fails even to define what it means by 'comparable worth.'" *Id.*

124. "The only evidence presented was of comparable work, not worth." *Id.*

125. The district court did not include the magistrate's observation that nurses "might well be being paid less than they are worth." *Id.*

A. Marketplace Defense

Proponents of comparable worth argue that basing wages on the marketplace perpetuates the wage discrimination already existing in the market.[126] They suggest that the primary objective of title VII is the achievement of equitable employment practices and "interference with the market—intervention in decision making and invalidation of discriminatory choices made by individual employees—is exactly what the Act requires."[127] Merely because there will be an effect on the economy if the discrimination is eliminated, does not change the goal of the Act, which is to end discrimination.[128] Proponents thus assert that cost to the employer should not be a major consideration. Gender-based discrimination should not be excused solely because it is costly to remedy.[129]

Opponents argue that ignoring the marketplace could cause economic dislocation[130] which would "rip through the American economy costing untold millions of dollars."[131] In *Christensen v. Iowa*,[132] the Eighth Circuit agreed, stating title VII was not "intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work."[133] That court also found that "value to an employer is but one factor affecting wages."[134] Other factors considered by employers in setting wage policy are "providing incentives for workers to perform well, reducing turnover in certain key positions and minimizing training costs."[135]

Opponents point to the fact that Congress, by specifically using "equal work" rather than "comparable work" in the Equal Pay Act, sought to make sure that Congress would not "unduly infringe an employer's rights to run a business in the manner which the employer believes is most efficient."[136] Since Congressional intent is clear, the courts should not make changes absent legislative action.[137]

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126. *See* Blumrosen, *supra* note 12, at 441-57; *Equal Pay, supra* note 13; *Christensen*, 563 F.2d at 355 (appellants contend the policy of using market rates "perpetuate[s] wage differences resulting from past discrimination").

127. *Equal Pay, supra* note 3, at 671-72.

128. Comment, *Comparable Worth in Compensation, supra* note 22, at 507.

129. Gasaway, *supra* note 21, at 1163.

130. Comment, *Comparable Worth in Compensation, supra* note 22, at 507.

131. *Id.*

132. 563 F.2d 353 (8th Cir. 1977).

133. *Id.* at 356.

134. *Id.*

135. *Sex-Based Wage Discrimination, supra* note 35, at 1100.

136. *Id.*

137. Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for*

In *Spaulding*, the court specifically stated that it would not address the issue of "whether the University may rely on the competitive marketplace as a defense."[138] Yet later in the opinion, the court stated,

> We agree with [*Lemons v. City & County of Denver* and *Christensen v. Iowa*] and join those courts in refusing to accept a construction of Title VII allowing the nursing faculty to establish a prima facie violation of the Act "whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market."[139]

The court discussed the job-relatedness of market prices and concluded that to ignore the market prices would make employers responsible for pay disparities over which they had no control.[140] Thus, the court, in effect, endorsed the marketplace defense.

Like many other factors concerning comparable worth, the exact role of the marketplace defense is unknown. It has not as yet been considered by the Supreme Court.[141] The courts in the United States could decide the defense comes under the fourth affirmative defense of the Bennett Amendment, that is, a factor other than sex. One court has stated, "[I]t appears that the Supreme Court has limited the application of the fourth affirmative defense to a 'bona fide job rating system' . . . and thus where jobs are 'rated the same, unequal pay cannot be justified on the basis of other factors other than sex.'"[142] The Ninth Circuit will have an opportunity to determine the role of

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Narrowly Construing County of Washington v. Gunther, 22 DUQ. L. REV. 65, 150 (1983); *Sex-Based Wage Discrimination, supra* note 35, at 1101.

138. *Spaulding*, 740 F.2d at 699 n.7.

139. *Id.* at 707 (quoting *Christensen*, 563 F.2d at 356). In Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir. 1980), nurses demanded that the city pay them wages comparable to other jobs in the community, rather than other nursing jobs. The Tenth Circuit held that title VII did not require employers to ignore the market in setting wages. In Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977), female clerical workers sought salaries equal to the male plant workers' since the university had determined the jobs were of equal value. The Eighth Circuit, however, held that the value of the job to the employer represents only one factor in determining wages so that no prima facie case was established for discrimination based on sex.

140. *See supra* notes 109-13 and accompanying text.

141. On November 26, 1984, the Supreme Court denied certiorari to the *Spaulding* case. 53 U.S.L.W. 3403 (Nov. 26, 1984).

142. Kouba v. Allstate Ins. Co., 523 F. Supp. 148, 161 (E.D. Cal. 1981) (citing *Gunther*, 452 U.S. at 170-71).

the marketplace defense in *AFSCME v. State of Washington*.[143] In *AFSCME*, the defendant conducted a comparable worth study, discovered wage disparities, and yet still paid females a lower wage. The district court excluded evidence concerning a marketplace defense.[144] The marketplace defense is expected to be an issue on appeal.[145]

B. Job Evaluations

A key to the possible future of the comparable worth theory is job evaluation. The courts will not undertake to compare unequal jobs,[146] so the successful plaintiff must enter the courtroom well-armed with job evaluation studies based on solid statistical evidence. In *Spaulding*, the court criticized the job comparisons used by the nursing faculty because the statistics did not compare actual work performed.[147] Had the statistics been more specific and based on a more sophisticated method, the court would have considered them more seriously.

The *Spaulding* court did not discuss the role of job evaluation systems. However, the Supreme Court in *Gunther* may have given an implied endorsement to the validity of an employer-conducted job evaluation.[148] In that case, the employer had evaluated jobs, determined female guards should be paid ninety-five percent of the wages of male correctional officers, yet paid the females only seventy percent.[149] The Supreme Court stated, as a positive factor for the plaintiffs, that the case did not require "a court to make its own subjective assessment of the value of the male and female guard jobs or to attempt by statistical technique or other method to quantify the effect of sex discrimination in the wage rates."[150]

Job evaluation, with its technical difficulty and inherent subjectivity,[151] appears to be the best available method of identifying jobs that are comparable but not equal.[152] Job evaluation schemes are

143. 578 F. Supp. 846 (W.D. Wash. 1983).
144. Powers, *supra* note 11, at 21.
145. *Id.*
146. *Gerlach*, 501 F. Supp. at 1321 (court stated it could not believe Congress authorized the courts to undertake an evaluation and to determine the relative worth of jobs).
147. *Spaulding*, 740 F.2d at 698.
148. Thomas, *supra* note 12, at 6.
149. *Gunther*, 452 U.S. at 181.
150. *Id.*
151. Gasaway, *supra* note 21, at 1155.
152. *Equal Pay, supra* note 13, at 677.

needed in order to measure and compare the worth or value of dissimilar jobs.[153] Such systems are widely used in the public and private sectors.[154]

Although there is a dispute in the utility of using job evaluation systems,[155] Idaho has successfully implemented a job evaluation system for state employees based on comparable worth principles.[156] As a result of this system, the wages for the predominantly female clerical workers have risen substantially.[157]

In 1971 the state of Washington[158] passed a statute prohibiting employment discrimination based on sex.[159] A comparable worth study revealed that women's job classes tended to be paid less than men's classes for jobs of comparable worth.[160] The state then developed a formula for computing comparable worth rates of compensation based on a comparable worth salary line.[161] In *AFSCME v. State of Washington*,[162] a class action suit was brought on behalf of 15,500 workers in jobs held primarily by females[163] to force the state to implement its own comparable worth legislation.

The *AFSCME* court stated it did not have to make its own subjective assessment as to "comparable worth" of the jobs at issue.[164] The court found there was historical discrimination against women that was ongoing at the time of the suit and that the plaintiffs could

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153. Gasaway, *supra* note 21, at 1155.

154. Comment, *Comparable Worth in Compensation, supra* note 22, at 510. *See also Equal Pay, supra* note 13, at 674 (employers routinely use job evaluation systems to establish pay schedules).

155. Gasaway, *supra* note 21, at 1159. *See, Sex-Based Wage Discrimination, supra* note 35, at 1101 (courts must reject disparate impact claims based on job evaluations).

156. Gasaway, *supra* note 21, at 1159. The article discusses in detail the four major job evaluation schemes: (1) ranking scheme, (2) classification scheme, (3) point rating scheme, and (4) factor comparison scheme.

157. *Id.*

158. *Id.* at 1160 n.382. Other states that have conducted comparable worth studies include Connecticut, Michigan, Minnesota, and Nebraska. Rykken, *Points Will Tell Each County Job's Worth*, Sunday News J., Wilmington, Del., Oct. 21, 1984, at B2, col. 3. New Castle County, Delaware, has recently decided to use the Point Factor Job Evaluation Plan to evaluate the worth of every job in the county government.

159. *See* AFSCME v. State of Washington, 578 F. Supp. 846, 860 (W.D. Wash. 1983).

160. The wage disparity varied from 20% to 135%; as job value increased, so did the degree of discrimination. *Id.* at 861.

161. The method purports to value each employment classification on the basis of four factors: knowledge and skills, mental demands, accountability, and working conditions. The total value of these four components constituted the final point value of the class. *Id.* at 861-62.

162. 578 F. Supp. 846 (W.D. Wash. 1983).

163. *Id.* at 851, 871.

164. *Id.* at 862.

use either disparate impact or disparate treatment. Under disparate impact, the facially neutral practice was the state's system of compensation, for it had a disparate impact upon employees in the predominantly female job classifications. Under disparate treatment, the discriminatory intent was established by (a) the deliberate perpetuation of the salary disparity, (b) the admissions of state officials that wages paid to employees were discriminatory, and (c) the state's failure to pay the plaintiffs their worth as established by the state.[165] The court stated disruption resulting from action required to correct the sex-based wage discrimination was not a defense.[166]

As shown in *AFSCME* courts seem willing to use job evaluation systems that are employer conducted as a basis to infer an intent to discriminate when the employer fails to pay the rates given in its own evaluation system.

Labor unions are in a strong position to influence employers to institute job evaluation systems. "By participating in wage discrimination studies and helping to document the existence of pay inequities, unions could provide significant support for . . . comparable worth claimants."[167]

C. Status of Comparable Worth After Spaulding

The controversial[168] comparable worth concept is currently in limbo,[169] and the Ninth Circuit's opinion in *Spaulding* has done little to alleviate the confusion. It is clear the Ninth Circuit attempted to limit the theories of recovery available under title VII, but its opinion was too vague to do that effectively. *Spaulding* did not define exactly what it was rejecting. Did the court reject pure comparable worth, comparable value, comparable work, or all three? The opinion does not answer that question.

The court rejects comparable worth saying it "would plunge us

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165. *Id.* at 864.

166. *Id.* at 865. It has been estimated that the cost of the comparable worth decision could be as high as $1 billion. Epstein, *Ruling Against "Comparable Worth" is Left Intact by the Supreme Court,* Philadelphia Inquirer, Nov. 27, 1984, at 5-A, col. 1.

167. Comment, *Comparable Worth in Compensation, supra* note 22, at 516.

168. Hess, *President: Pay Plan is "Nebulous,"* Philadelphia Inquirer, Oct. 20, 1984, at 1A, col. 1. Comparable worth found its way into the 1984 presidential election campaign. A spokesman for President Reagan stated that comparable worth was "nebulous at best"; whereas Walter Mondale, the Democratic candidate, had included comparable worth in his platform.

169. Comment, *Comparable Worth in Compensation, supra* note 22, at 514.

into unchartered and treacherous areas"[170] and concludes that reliance on market prices in setting wages is not a facially neutral policy.[171] However, the court does not discuss in any detail its reasons for rejecting the theory. It discusses the specific weaknesses in the plaintiffs' case and their failure to prove any facially neutral policy, but does not explain why the comparable worth theory is unavailable as a theory of recovery in other cases. The concurrence emphatically states that *Spaulding* is not the correct case for any major decision concerning comparable worth because the parties did not argue comparable worth.

The Ninth Circuit in *Spaulding* treated comparable worth as an astronomer might plot a black hole—its whereabouts are determined by plotting around it to determine where it is not. *Spaulding* discussed many things that comparable worth is not. In *AFSCME*, however, the court will have to fill the void left by *Spaulding*; it will have to tell what comparable worth is.

VII. CONCLUSION

Since *Gunther*, title VII claims of sex-based wage discrimination have a broader base of recovery. How broad no one knows, for the Supreme Court refused to specify the theories it would accept in the future. Comparable worth may or may not be a viable theory of recovery. Courts seem willing to approve comparable worth if the case involves a job evaluation system already in place. The courts are completely unwilling to have to do their own comparison on unequal jobs.

It appears that the Ninth Circuit is beginning to set some limits on title VII theories of recovery. The court rejects comparable worth as a theory, yet it does so without a detailed explanation and without specifying which type of comparable worth it is rejecting. The *AFSCME* case is now on appeal to the Ninth Circuit;[172] the decision the court renders in that case will help explain what types of comparable worth the court rejected in *Spaulding*.

Jean C. Kissane

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170. *Spaulding*, 740 F.2d at 706.

171. *Id.* at 708.

172. 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985). On September 4, 1985, the Ninth Circuit reversed the district court, holding no title VII violation was made out either under disparate impact or disparate treatment. The court held the state was justified in relying on the market to decide its wage policy. *AFSCME*, 770 F.2d at 1405-07. In addition, the court refused to infer discriminatory intent from the fact that the state ordered a comparable worth study and then did not implement the results of the study. *Id.* at 1408.