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NANCY E. DOWD

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The following outline was initially prepared in conjunction with a lecture on "The Problem of Comparable Worth" presented at the Public Sector Labor Law conference sponsored by the Institute of Continuing Legal Education at Suffolk University Law School on February 2, 1986. The outline has been revised and updated to include cases and developments through August 1, 1986.
Comparative worth is an extension of women's demand for equal pay for equal work, an idea that is both reasonable and fair as a way of correcting historic wage discrimination against women."

Business Week, editorial, January 1985

"Comparable worth is the looniest idea since Looney Tunes."

Clarence Pendleton, Chairman, U.S. Civil Rights Commission, November 1984

Introductory Note

The proposition that individuals should be paid according to the comparative or comparable worth of their work to an employer, and that the failure to do so may constitute unlawful discrimination, is one of the most controversial employment issues of the 1980s. Comparable worth or pay equity is an issue that has generated odd alignments of supporters and detractors, as the quotations above indicate: a publication which speaks from the perspective of the business community finds the concept a logical extension of the concept of equal pay for equal work, while the current chairman of U.S. Civil Rights Commission derides the concept as absurd.

These materials provide, in outline form, an overview of the concept of comparable worth, and a summary of litigation, collective bargaining, and legislative developments concerning comparable worth. Part I begins with a brief summary of the factual underpinnings of the comparable worth issue. Part II explains the theoretical concept of comparable worth. Part III explores the viability of comparable worth as a legal theory within the framework of the Equal Pay Act and Title VII of the 1964 Civil Rights Act, and reviews the U.S. Supreme Court's only decision on this issue, the Gunther case. Parts IV, V and VI summarize developments in the areas of litigation, collective bargaining, and legislation, respectively.

Two caveats are in order. First, although these materials are intended to provide an overview of this area of the law, they are by no means exhaustive. This is a rapidly evolving area of the law, particularly with respect to developments at the local level or with respect to private employers. Furthermore, these materials do not attempt to catalogue the legal or economic scholarship on this issue.

Second, because the bulk of the developments in the area of comparable worth have been with respect to sex-based wage discrimination, these materials focus on that issue. The concept is equally applicable, however, to race-based wage discrimination. See Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the 1964 Civil Rights Act, 12 Mich. J. of L. Ref. 397 (1979); Scales-Trent, Comparable Worth: Is This a Theory for Black Workers?, 8 Women's Rts. L.Rep. 51 (1984).

Comparable Worth: A Problem in Search of a Solution

I. Women in the Workforce: The Labor Market Basis for the Legal Theory of Comparable Worth

A. Labor Participation Rate
1. There has been an enormous upsurge in women's labor participation rate over the past 30 years: in 1980, 52% of women aged 16-64 worked, as compared to 34% in 1950; men's participation rates in the same period fell from 87% to 78%.
2. The largest increase in the labor participation rate is among women aged 20-44; in addition, there has been a dramatic increase in the number of women working with pre-school age children (45%) and school-age children (62%).
3. It is projected that 2 out of 3 entrants into the labor market over the next two decades will be women.
4. Women's greater participation in the workforce is motivated by the same considerations that motivate men to work, economic need and/or economic betterment. One of every six households is headed by a woman, and one in every three of those households are at the poverty level, compared to one in every eighteen male-headed households.

B. Occupational Distribution
1. Occupational segregation or concentration on the basis of sex is pervasive: it has been estimated that in order for an equal proportion of men and women to be doing the same work, two-thirds to three-quarters of all employees would have to change jobs.
2. This concentration is both historic and current. Historically, women by custom were confined to certain jobs, and
sometimes by law were prohibited from certain occupations. Although the civil rights laws now prohibit such discrimination, there continues to be a high degree of occupational concentration by sex.

3. Among the 503 occupations listed in the 1980 U.S. Census, 275 occupations were more than 80% male or female-dominated.

4. Women are concentrated in clerical and service occupations: 42.5% of working women work in sales, clerical or administrative occupations; 25% of working women work in service occupations.

5. Within the occupations in which most women work, most are female-dominated: 81% of all clerical occupations and 61% of service occupations are filled by women. Thus, the majority of working women work in occupations that are 70-95% female-dominated. For example, 98.8% of all secretaries, 89.7% of all bookkeepers, 88% of all waiters and waitresses, and 95.9% of all registered nurses are women.

6. Although there has been some breakdown of women's occupational concentration or segregation over the past 30 years, the dominant trend has been the continuing trend of entry into female-dominated occupations. In addition, it has been projected that this trend is likely to persist given the expectation that the occupations in which women are concentrated, particularly service occupations, are expected to expand in the next 20 years.

C. The Wage Gap

1. Women on average earn 61 cents for every dollar earned by men. The median salary in 1981 for full time women workers was $12,001, compared to $20,260 for full time male workers.

2. The wage gap between women and men has been essentially the same for the past 25 years. It is projected that the wage gap will narrow, but by the year 2000 it is expected that women will only earn 75% of male wages.

3. Among younger workers the earnings gap is smaller, but still substantial: women aged 20-34 with a college degree earned 72% of their male counterparts' income in 1982.

4. Within the same occupations women earn less than men, regardless of whether the occupation is male or female dominated.

5. At least part of the wage gap has been attributed to the lower earnings in the occupations where women work.

Female-dominated occupations tend to pay less than male-dominated occupations; also, when particular occupations have shifted from male to female-dominated, wages have tended to decline.

6. Research conducted over the past 10 years has attributed the wage gap, in part, to differences in work experience, skills, education, training, and choice of work. Yet even if these variables are excluded, a residual difference still remains, which some researchers attribute to sex discrimination in wages: that is, that employers pay women less because they are women.

D. Public Sector Trends

1. The phenomenon of occupational segregation is as prevalent in the public sector as it is in the private sector. Indeed, in some areas of the public sector, the pattern is even more pronounced. For example, a 1980 study of the workforce of the City of Philadelphia (which has recently been the target of a pay equity suit, see below Part IV-D) found that 75% of all job classifications were filled exclusively by men or women, and 90% of the classifications were dominated 70% or more by workers of one sex.

2. The wage gap is also substantially the same in the public sector, although marginally less than the gap in the private sector. According to 1984 figures, women in public sector jobs earned 68% of male wages, versus 59% in the private sector. According to the Philadelphia study, 25% of female employees, but only 3% of male employees, were in the lowest 4 pay grades; conversely, 25% of male employees, but only 4% of female employees, were in the 10 highest pay grades.

II. The Concept of Comparable Worth

A. The reasoning underlying the concept of comparable worth is that there is a connection between occupational segregation and the wage gap: the gap is due in part to the depression of wages for "women's work." Even though work which women perform is equal to, or even of greater value or "worth" to employers than work performed predominantly by men, it is not paid its full value because it is being performed by women. See Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the 1964 Civil Rights Act, 12 Mich. J. of L. Ref. 397 (1979).

B. Under the legal theory of comparable worth, discrimination exists when workers in a job classification dominated by one sex (70% or more of one sex) are paid less than workers in a classification dominated by the opposite sex, where both job classifications are of equal value or worth to the employer, or the underpaid classification is of greater value to the employer.

1. "Worth" is generally defined by the skill, effort, responsibility and working conditions of the job. These categories are those utilized in the Equal Pay Act (see Part III, A, 1 infra) to determine the quantitative value of work, which in turn were derived from categories long used in the business of job evaluation for the purpose of establishing compensation systems. The worth or value of a particular job is measured according to these factors and computed on a point system.

2. Once the evaluated worth of a female-dominated job classification is established, it is then compared to the benchmark of a male-dominated job classification of equal or lesser worth (again, which has been determined on the basis of a professional job evaluation) in the particular employer's workforce.

a. The theory therefore permits comparison of dissimilar jobs of equal value to the employer. For example, according to one evaluation of an employer's job classifications, the job of human services specialist (72.1% female) was worth 177 points, and was paid a monthly salary of $343.00; the job of highway technician, intermediate (92.7% male) was worth 178 points, and was paid a monthly salary of $1646.00. If the one point differential in job worth does not affect the value of the jobs to the employer, then it fails to explain the $303 monthly salary differential.

b. The theory also permits comparison of dissimilar jobs of unequal value where one of the jobs is not being paid its evaluated worth. For example, again according to the evaluation cited in part a, the job of general repair worker (99.3% male) was worth 134 points, and was paid a monthly salary of $1564.00; the job of licensed practical nurse II (94.7% female) was worth 183 points, and was paid a monthly salary of $1382.00. Therefore, the employer is paying a
higher salary to a job of less value within its compensation structure, or, the female-dominated job classification is not being paid according to its proportionate worth.

III. Comparable Worth: A Viable Legal Theory

A. The Legal Framework


   a. The EPA requires "equal pay for equal work" by prohibiting wage differentiation on the basis of sex where equal work is performed, unless such differentiation is based on seniority, merit, quality or quantity of production, or any other factor other than sex.

   b. "Equal work" is defined as work of equal skill, effort and responsibility performed under similar working conditions. The courts have construed the "equal work" requirement to include not only identical jobs but also "substantially equal" jobs.

   c. The statutory defenses are fairly straightforward, except for the "factor other than sex" exception. The U.S. Supreme Court has held, however, that the depressed value of women's labor within the labor market is not a valid "factor other than sex" upon which an employer can base differentials in pay. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).


   a. Title VII prohibits sex discrimination in the terms and conditions of employment.

   b. The Bennett Amendment to Title VII, contained in Section 703(h), provides that any defense to an EPA claim will also serve as a defense to a Title VII sex-based wage discrimination claim.

B. The Scope of Wage Discrimination Claims: Gunther

1. In County of Washington v. Gunther, 452 U.S. 161 (1981), the U.S. Supreme Court held that the incorporation of the EPA in Title VII by the Bennett Amendment merely provides that EPA defenses may be raised in Title VII cases; the Bennett Amendment does not, however, operate to limit the scope of wage discrimination claims that may be brought under Title VII to those cognizable under the EPA.

   a. The Court specifically noted that it was not deciding whether a claim of comparable worth could be brought under Title VII.

   b. The Court did recognize a cause of action under Title VII for sex-based wage discrimination involving comparable work. The female plaintiffs in Gunther, prison guards in the female section of the county jail, performed similar work to that of their male counterparts, but not so substantially similar that they could meet the EPA standard of "equal work." The Court held that they nevertheless had stated a cause of action under Title VII disparate treatment theory by alleging the following additional facts:

      1. The defendant had evaluated the value of its job classifications, with the result that the female guard classification was evaluated as worth 95% of the male guard classification.

      2. The defendant used the evaluation as the basis for establishing appropriate compensation. The male guard classification was paid 100% of its evaluated worth; the female classification was paid only 70% of the wage rate for the male classification.

      2. The legal issues left unresolved by Gunther include:

         1) whether sex-based wage discrimination claims under Title VII extend beyond the paradigm of that case; e.g., whether claims are limited to those involving comparable work, or may include claims of comparable worth;

         2) whether claims may only be established under disparate treatment theory (which requires proof of intentional discrimination, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)), or may also be proved under disparate impact theory (which requires only that there be proof that a facially neutral policy is discriminatory in effect and is not justified by business necessity, see Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)); and

         3) what defenses are available in comparable worth cases; in particular, whether Equal Pay Act defenses can be raised in all wage discrimination cases, or solely with respect to claims involving unequal pay for equal work.

IV. Litigation

A. Overview

1. The vast majority of cases alleging comparable worth as a theory of recovery have arisen in the public sector, primarily because wage data and information concerning the compensation system and job classifications are accessible. Furthermore, several public sector unions, most notably the American Federation of State, County and Municipal Employees ("AFSCME"), have made comparable worth a priority issue.

2. There have been three discernable phases of comparable worth litigation since the theory was first addressed in judicial opinions beginning in the 1970s:

   a. 1970-81 pre-Gunther: The focus of the courts in this period was in determining the relationship between the EPA and Title VII; most plaintiffs attempted to fit their claim within the "substantially equal work" framework of the EPA. To the extent comparable worth claims were raised, the courts generally denied them either on the grounds that such a claim was not cognizable under the EPA, and Title VII extended no further than the EPA, or that even if it did, plaintiffs had failed to provide sufficient proof of comparability or employers had justifiably relied on market wage rates.

   b. 1981-85 Gunther-Washington State: After Gunther was decided, the courts began to focus on the question of whether Gunther was the outer limit of wage discrimination claims under Title VII. The courts continued to be largely hostile to comparable worth claims, on the grounds Gunther was the limit of wage discrimination claims, or on the basis of lack of proof of comparable worth or the presentation of an adequate market defense. Some of the cases in this period reflect the fact that they were litigated without the benefit of the Gunther decision, and therefore suffer from severe proof problems. At the end of 1984, however, the District Court of Washington recognized liability under the comparable worth theory in a massive wage discrimination
case brought against the State of Washington. Less than a year later, the Ninth Circuit reversed, rejecting both the theory and the proof of comparable worth. Furthermore, the Equal Employment Opportunity Commission ("EEOC") issued its views on comparable worth, refusing to recognize the theory as viable under Title VII, and the Justice Department argued as an amicus against recognition of the theory.

c. 1985-present post-Gunther Washington State: After the Ninth Circuit's opinion in the Washington State case, the question was whether that sounded the death knell for comparable worth. The preliminary indications are that it has had little effect on the number of cases being filed, but has clearly affected the theory of those cases, by limiting the claim of comparable worth to the theory of disparate treatment. This was reinforced by the decision in February, 1986, by the Seventh Circuit in American Nurses Assoc. v. Illinois, which similarly limited comparable worth claims to disparate treatment theory. On the other hand, the decision of the U.S. Supreme Court in July, 1986, in Bazemore v. Friday contemplate that complex wage discrimination claims are capable of proof under Title VII and arguably rejects the narrow view of disparate impact theory seemingly adopted by the Ninth and Seventh Circuits. This would reinforce the likely emergence in this next phase of comparable worth litigation of more sophisticated statistical analysis, but will also require plaintiffs to confront the question of whether the market defense can be rebutted.

B. 1970-71 Pre-Gunther

Circuit Courts

1. Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977): In this class action, female clericals alleged sex discrimination in compensation by comparing their wages to those of physical plant workers. The court held for the defendant, on the basis that payment of market wages was a complete defense to the discrimination claim.

2. Lemons v. City & County of Denver, 620 F. 2d 228 (10th Cir. 1980): This class action sought to enjoin the city from adopting a market-based compen-

sation scheme, on the grounds that using the market rate for nurses, the plaintiffs in this case, would perpetuate historic depression of wages on the basis of sex. The court held for defendant, on the grounds that the relief requested was beyond the scope of that authorized by Title VII and the Constitution.

3. Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980): The court held that a woman who took over most but not all of the duties of a male advertising director was subjected to wage discrimination due to the employer's failure to award her a wage increase to reflect her additional responsibilities.

4. International Union of Electrical Workers v. Westinghouse, 631 F. 2d 1094 (3rd Cir. 1980), cert. denied, 452 U.S. 967 (1981): The court held that the employer violated Title VII where explicit sex segregation of jobs and underpayment of women on the basis of sex continued after passage of Title VII, albeit in more subtle form.

District Courts

5. Gerlach v. Michigan Bell, 501 F. Supp. 1300 (E.D. Mich. 1980): The court held that although there is no cause of action for comparable worth under Title VII, a plaintiff can maintain a cause of action for intentional wage discrimination. The case contains a good review of legislative history and of cases decided prior to Gunther.

6. Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224 (N.D.Tex. 1980): This class action against a bank challenged a broad range of policies. In the course of a lengthy opinion, the court did not decide the question of comparable worth because it did not need to be decided in this case, but indicated that courts cannot perform evaluations of job worth as that is a matter beyond judicial competence. Thus, according to the court, worth must be established by the plaintiff as part of the prima facie case. This can be done by presenting job evaluations, the court notes, and the burden would then shift to the defendant who could rebut this evidence by showing, for instance, that wages were consistently based on market factors.

7. Taylor v. Charley Brothers, Inc., 25 Fair Empl. Proc. Cas. (BNA) 602 (W.D. PA. 1981): The court found that the employer violated Title VII by classifying jobs according to the sex of the individual holding the position, evidencing an intent to pay women less solely on the basis of sex, not because the work performed was of less value.


C. 1981-85 Gunther-Washington State

Circuit Courts

1. Wilkins v. University of Houston, 654 F. 2d 388 (5th Cir. 1981), vacated & remanded, 103 S.Ct. 34 (1982), aff'd on remand, 695 F. 2d 134 (5th Cir. 1983): This class action challenged the compensation of female faculty and staff. The court held that the plaintiffs established proof of a Gunther-type claim, but only with respect to professional and administrative staff, on the grounds of defendant's failure to pay the lowest rate established for job classification for female-dominated classifications, whereas male-dominated classifications were paid at least the lowest rate.

2. Plemer v. Parsons-Gilbane, 713 F. 2d 1127 (5th Cir. 1983): The plaintiff alleged sex discrimination in the defendant's payment of higher compensation to a male equal employment opportunity ("EEO") officer as compared to plaintiff's compensation as EEO "representative." The court held for the defendant on the grounds that the plaintiff failed to provide the court with evidence of the proportionate value of her job in comparison to the job held by the male employee; the plaintiff was asking the court to find the difference in their duties did not justify the substantial difference in salary ($8700/year), but the court refused to make its own subjective valuation of the worth of the two jobs.

3. Spaulding v. University of Washington, 35 Fair Empl. Proc. Cas. (BNA) 217 (9th Cir. 1984): This class action suit alleged sex discrimination in the compensation of female faculty members. Although the suit was filed and tried prior to Gunther, the court nevertheless treated the case as if it raised a comparable worth claim, and held that...
disparate impact theory under Title VII was inapplicable to sex-based wage discrimination claims, and, furthermore, that an employer could legitimately base its compensation on market rates. The decision harbingered the result and rationale in the Washington State case. See also Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982) (limitation of disparate impact model to discrete employment practices)
4. Babrocky v. Jewel Food Co., 38 Fair Empl. Prac. Cas. (BNA) 1667 (7th Cir. 1985): The court reversed a district court decision dismissing several claims on the basis they were beyond the scope of the EEOC charge, including a comparable worth claim. The comparable worth claim was not directly addressed in the appellate court's opinion.

District Courts
5. Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wisc. 1982): The court held that the plaintiffs established a prima facie case by demonstrating that women in a female dominated classification were paid less than a male dominated classification of such similar skill, effort, responsibility and working conditions that the positions were of comparable value to the employer, but the employer effectively rebutted this evidence by proof of its reliance on market wage rates.
8. Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982): The court granted the defendant's motion to dismiss the comparable worth claim brought by plaintiff county jail matrons who sought to compare their compensation to male correction officers. The dismissal was based on the court's conclusion that Gunther is the outer limit of wage discrimination claims under Title VII.
9. EEOC v. Hay Associates, 545 F. Supp. 1064 (E.D. Pa. 1982): This is a particularly interesting case because the defendant is one of the leading firms performing job evaluations for comparable worth plaintiffs. The individual plaintiff proved wage discrimination under the Gunther analysis.
12. Waterman v. N.Y. Tel. Co., 36 Fair Empl. Prac. Cas. (BNA) 41 (S.D.N.Y. 1983): The court dismissed a claim on the basis Title VII is limited to Gunther-type claims, and plaintiff failed to prove intentional discrimination in the compensation of clerical instructors, as compared to technical instructors.
13. EEOC v. Affiliated Foods, Inc., 34 Fair Empl. Prac. Cas. (BNA) 943 (W.D. Mo. 1984): While not deciding whether the comparable worth theory is viable, court found, in case comparing two production classifications, that the plaintiffs failed to prove comparable value or intent to discriminate.
14. Cox v. American Cast Iron Pipe, 385 F.Supp. 1143 (N.D. Ala. 1984): In evaluating individual claims of wage discrimination, the court finds that the comparable worth analysis of the district court in the Washington State case is "implausible" because it violates market conditions to require equal pay on the basis of non-market "value."
15. AFSCME v. City of N.Y., 599 F. Supp. 916 (S.D.N.Y. 1984): Although this is a procedural opinion only, it states the facts of a comparable work/comparable worth claim involving comparison of police and fire dispatchers.
16. Chang v. University of Rhode Island, CA Nos. 77-0070, 790087, 83-0044, 83-0099 S (D.R.I. April 4, 1985): In the course of a lengthy opinion concerning four consolidated sex-based wage discrimination claims against URI, the court rejects comparable worth as a viable legal theory where the employer presents a market defense.
17. Penk v. Oregon Board of Higher Education, No. 80-436, D.Ore. Feb. 15, 1985 (DLR 51: A-1, March 15, 1985): This class action was brought against Oregon's eight colleges and universities in 1980. The court held that the plaintiffs failed to prove a pattern of discrimination in setting salaries for female-dominated departments. The court was particularly critical of the statistical evidence presented by the plaintiffs, and also expressed reluctance to second guess employment decisions in an academic setting.
18. Beall v. Curtis, M.D.Ga. April 2, 1985 (DLR 63: D-1): In this class action against the University of Georgia Health Services, the compensation of nurse practitioners was claimed to be discriminatory as compared to physician's assistants. The court held for the defendant, on the grounds the employer provided a legitimate non-discriminatory reason for differences in pay, based on legislative and regulatory classifications, and that the class was too small to present a disparate impact claim.

Federal Agencies
1. U.S. Civil Rights Commission: The Commission issued its 232 page report on comparable worth in March 1985, rejecting the concept as "profoundly and fundamentally flawed." The Commission pointed out that the valuation of jobs is inherently subjective and therefore there is no meaningful way to measure the worth of particular jobs, and also stated that the wage gap in large part is due to factors other than discrimination. A review of the report by the General Accounting Office in June 1985 criticized it as flawed, and as containing numerous inconsistencies and errors.
2. Equal Employment Opportunity Commission: In a decision issued June 1985, the EEOC rejected "pure" comparable worth theory, defined as indicating the existence of discrimination by establishing the predominance of one sex in a job classification and unequal pay in comparison to a job classification dominated by men. If, however, the employer admits that jobs are of equal value as a result of the adoption of the results of a job evaluation study, and refuses to pay evaluated value, then, according to the Commission, there is a cognizable claim under Title VII.
D. **AFSCME v. State of Washington**

1. **Facts:** This class action was filed in 1982 on behalf of 15,000 state employees in job classifications 70% or more female dominated. The State had conducted three studies of its compensation system, one in-house, two by outside consultants, in 1974 and 1976. The studies evaluated jobs on the basis of skill, effort, responsibility and working conditions, and found that female-dominated jobs on average were compensated 20% less than male-dominated jobs of comparable value. In December 1976, Governor Evans included a $7 million appropriation, in the budget for pay adjustments. In 1977 the new governor, Dixie Lee Ray, deleted this appropriation although there was a budget surplus that would have covered this amount. After suit was filed, the legislature, in 1983, appropriated $1.5 million for pay equity adjustments effective in 1984.

2. **District Court decision, 33 Fair Empl. Pract. Cas. (BNA) 819 (W.D. Wash. 1983).**
   a. The court held that the state violated Title VII under both the disparate treatment and disparate impact theory.

1. **Under disparate treatment theory,** the court found discriminatory intent, *inter alia,* in the state's acknowledged failure to correct inequities revealed in its own studies, and characterized the case as a straightforward “failure to pay” case.

2. **Under disparate impact theory,** the court held that the state's compensation system had a disparate impact upon employees in predominantly female job classifications, and the state had failed to show that this was justified by business necessity.

b. Backpay and immediate wage adjustments were ordered, with immediate pay raises estimated at $75 million, and backpay estimated at $300 million. The highest estimate of total damages was $1 billion.

3. **Court of Appeals decision, 38 Fair Empl. Pract. Cas. (BNA) 1353 (9th Cir. 1985).**
   a. The district court's decision was reversed on both the disparate treatment and disparate impact theories.
   b. Under disparate treatment theory, the court found that the plaintiffs failed to establish proof of discriminatory intent. By using market wage rates, the court found, the employer did not discriminate, even if the market was discriminatory, as there was no proof that the employer used market rates for the purpose of discriminating. Title VII was not, the court asserted, designed to interfere with the laws of supply and demand, and employers therefore cannot be required to pay wages on the basis of the value of the job to the employer, irrespective of external factors. The failure of the state to correct pay disparities is also not proof of discriminatory intent: the state has discretion to decide whether to correct a situation that it was not responsible for creating, and should not be penalized for conducting an evaluation study.
   c. Under disparate impact analysis, the court found that comparable worth simply cannot fit within this legal theory of discrimination. According to the court, the theory of disparate impact is limited to challenging specific, clearly delineated employer practices as they affect a single point in employment, usually the employee selection process. The practice of using market factors to set wages is too complex to be analyzed under the disparate impact theory.

3. **Settlement, December 31, 1985:** Although the plaintiffs initially petitioned for rehearing en banc and vowed to appeal the case to the U.S. Supreme Court, the parties settled the case, and the settlement was subsequently approved by the state legislature January 31, 1986. The terms of the settlement are:
   - (1) pay raises will be given over a 7 year period to 35,000 employees in female-dominated job classifications;
   - (2) $41.4 million is to be available for pay adjustments April 1, 1986 (the 1985 legislature appropriated $41.4 million for settlement of the case or implementation of its 1983 pay equity law), followed by $10 million annually through June 30, 1992, which adds up to a total cost of $482.4 million;
   - (3) AFSCME does not concede that the Ninth Circuit decision is correct, and the state does not admit discrimination.

4. **Implications of the case**
   a. At least within the Ninth Circuit, the theory of comparable worth applies to be dead; indeed, the court's opinion has already been cited to that effect. See, e.g., Foster v. Arcata Associates, Inc. 772 F.2d 1453 (9th Cir. 1985), opinion amended October 25, 1985 (Lexis). This means that plaintiffs must come within the *Gunther* framework in order to prevail in a Title VII wage discrimination case.
   b. On the other hand, the Ninth Circuit's opinion raises a multitude of questions, and does not provide a particularly strong articulation of the argument against comparable worth.

4. **Implications of the case**
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1. The court's disparate treatment analysis appears to require a showing of specific intent to discriminate, a standard not usually applied in prior Title VII cases and seemingly inconsistent with *Gunther.* On the other hand, the case is distinguishable from *Gunther* because the state was alleging that its compensation system was based on market rates, not on its evaluation of the jobs; in *Gunther,* the employer admittedly based its wages on its job evaluation, but only paid males their full evaluated worth.

2. **Unresolved by the opinion is the role of market factors.** The district court opinion ignored this issue, while the Court of Appeals appears to embrace the concept that either the market is nondiscriminatory or that even if it is discriminatory, an employer can rely on it, since he or she cannot change the market and must live with economic realities. This raises the issue of whether this is in conflict with EPA decisions disallowing a market defense; it also raises the question of whether plaintiffs could rebut a market defense by a particularized showing of
discrimination as a factor in setting the market rate.
3. The court's opinion appears to permit evaluation studies to be offered as relevant evidence, but on the other hand it views such evidence as suspect on the grounds that evaluation is subjective.
4. The court's disparate impact analysis is the most troubling, as much for its unsatisfactory rationale for rejecting comparable worth as its commentary on the scope of disparate impact theory. The court's opinion limits disparate impact theory to challenges of discrete, specific policies, and then finds that compensation policy is too complex a policy to be analyzed under this theory.
5. The opinion leaves the distinct impression that reversal is based on institutional and economic concerns, that is, that comparable worth is not an issue susceptible to judicial determination and would require unacceptable and costly judicial intrusion in the labor market.

E. Post Washington State: Is Comparable Worth Dead?
1. To paraphrase the famous quotation, reports that the concept of comparable worth was "dead" as a legal theory after the Ninth Circuit's decision in Washington State overstated the impact of that decision. Rather, it appears that Washington State will simply be viewed as a transitional case, going beyond the Gunther-type claim and presenting one of the first full-blown efforts to prove a claim of comparable worth, but lacking the necessary evidentiary support to sustain the district court's judgment or provide a persuasive basis for applying disparate impact theory to this type of wage discrimination claim.
2. The characteristics of this next stage of litigation have nevertheless been strongly affected by the Ninth Circuit's opinion. Although there has been no decline in the number of cases filed, there has been an effort to limit those cases to disparate treatment claims. Recently filed cases, and developments in those cases, include the following:
   a. California State Employees Assoc. v. State of California: This suit was filed on behalf of 37,000 current state employees, with a potential class of 100,000 past and future employees. The suit focuses on 400 classifications, 170 of which are totally female, the balance of which are two-thirds or more female-dominated. In 1981 the state amended its state civil service law to require salaries for female-dominated jobs to be set on the basis of comparability of the value of the work preformed. The state Department of Personnel acknowledges the existence of pay inequities. In 1984 the legislature passed a bill to begin correcting pay inequities, but the governor vetoed the bill, although there was a surplus in the budget. The district court recently refused to grant a motion to dismiss the comparable worth claim in the case on the grounds the plaintiffs alleged they intend to prove intentional discrimination. The court also has considered the issue of class certification, with some interesting analysis of whether the named plaintiffs can represent all of the job classifications, and whether the union is an appropriate class representative, given the potential conflict between its female and male members concerning wage increases versus pay equity adjustments. No. C-84-7275-MHP (N.D. Cal. Sept. 13, 1985)(Lexis).
   b. AFSCME v. State of Missouri: The union filed an EEOC charge in October 1984 on behalf of 15,000 state workers after it was unable to reach a voluntary settlement revising the state's compensation system. The state legislature defeated a bill authorizing a study of the state compensation system in 1984.
   c. Michigan State Employee's Assoc. v. EEOC and Michigan Dept. of Civil Rights (No. 84-CV-4056DT CE.D.Mich. Aug. 31, 1984): This suit, filed September 1984, asks the court to order the appropriate state and federal agencies to investigate charges of sex discrimination in the state's wage system based on charges filed with the agencies in August 1981 on behalf of 15,000 employees.
   d. AFSCME v. Nassau County (No. CV841730 CE.D.N.Y. Apr. 23, 1984): This suit was filed on behalf of 10,000 employees in 200 job classifications. A motion to dismiss was denied May 1985, although the court dismissed disparate impact claims because of failure to identify particular, discrete practices to be challenged.
   e. St. Louis Newspaper Guild v. St. Louis Post-Dispatch: This federal suit was filed May 1985 seeking wage adjustments in inside sales jobs held predominantly by women, comparing those jobs to outside sales jobs held predominantly by men. A motion to dismiss was denied on grounds the plaintiffs had alleged a Gunther-type claim of intentional discrimination. 618 F. Supp. 1468 (E.D.N.Y. 1985). The case was settled February 25, 1986, with the following features included in the settlement agreement: (1) a pay increase for classified telephone sales representatives and telemarketing representatives of $24/week over current salary levels, for employees with more than 5 years' experience, and these employees were also given a one time $200 lump sum payment; (2) dismissal with prejudice of all claims, except for those of voluntary classified advisors; and (3) an agreement that the plaintiffs would not file any further actions as long as the job duties and responsibilities of the inside sales personnel remain the same.
   f. Hawaii Govt. Employees Assoc. v. State of Hawaii No. 84-1314 (D. Hawaii Aug. 12, 1985): In this federal suit filed 1984, the court denied a motion to dismiss comparable worth claims, stating that evidence of comparable worth is relevant, although it alone will not satisfy the requirements of a prima facie case. The court granted dismissal of claims brought by male plaintiffs, as well as claims against the Hawaii state legislature and its members. (DLR 162: A-5).
   g. Pennsylvania Nurses Association v. State of Pennsylvania 115 Daily Lab. Rep. (BNA) A-11-A-12 (June 14, 1985): In June 1985 an EEOC charge was filed on behalf of nurses and other female state employees alleging that 84% of state classifications are 70% or more dominated by one sex and 50% have no women in the classification.
   i. SEIU v. County of Los Angeles, Los Angeles Superior Court, No. 000985, complaint filed June 13, 1986: This complaint was filed under state law by three SEIU locals alleging intentional wage
discrimination on the basis of sex, race, and national origin, in addition to promotion claims. The suit covers approximately 30,000 of the county's 60,000 full time employees and alleges job segregation, denial of equal opportunity to transfer or promotion to higher paid positions, and undercompensation. The suit was filed after the county failed to respond to a 1984 SEIU report which allegedly showed severe occupational concentration by sex and race, and underpayment of women and minorities by $6000-7000 annually in comparison to similarly situated white males.

3. *American Nurses Assoc. v. Illinois*, 783 F.2d 716 (7th Cir. 1986): The Seventh Circuit essentially agreed with the Ninth Circuit that comparable worth claims can only be brought under disparate treatment theory.

   a. This class action suit was brought on behalf of nurses and other female state employees. A state-sponsored evaluation study issued in 1983 indicated that 56% of state employees are women, but 85% are paid less than $16,000 per year. The study showed that nurses are paid less than highway maintenance workers, electricians, and accountants. The case was dismissed in April 1985 on the ground that Title VII does not require employers to implement changes in a job evaluation study.(DLR 68:D-1). On appeal to the Seventh Circuit, the Justice Department filed an *amicus* brief on behalf of the state.(DLR 161: E-1). The appeal was still pending when the Ninth Circuit issued its opinion in the *Washington State* case.

   b. In February 1986 the Seventh Circuit issued an opinion reversing the district court's dismissal of the case, but recognizing only the narrow legal theory of disparate treatment as the basis for a claim.

   1. The court stressed that this was a reversal of a motion to dismiss, and therefore procedurally this case was in a very different posture from the *Washington State* case, which was decided after a full trial.

   2. The court agreed with the plaintiffs that sex discrimination in wages for different work was cognizable under *Gunther*, but such a claim was limited to the legal theory of disparate treatment, and therefore would require proof of intentional discrimination.

   3. The court did not expressly decide whether comparable worth could be cognizable under a disparate impact theory, because the plaintiffs apparently had made the tactical decision, in view of the *Washington State* case, to cast their case as presenting solely a claim of disparate treatment. The court nevertheless made clear that it disapproved of the application of disparate impact theory in comparable worth cases on the basis that the complexity of compensation systems, as well as the disruption of the labor market if this theory were adopted, militated against the use of this legal theory.

   4. The court suggested that limitation of comparable worth claims to disparate treatment theory may be required by the *Gunther* decision: the court reasoned that if the Supreme Court's decision is read to permit EPA defenses in all wage discrimination cases (not just equal work cases), then EPA defenses would permit an employer to pay wage differentials based on a factor other than sex even if there is disparate impact. This would confine Title VII wage discrimination claims, the court reasoned, to cases of intentional discrimination, or, in other words, disparate treatment theory. Furthermore, the court suggested that the use of disparate treatment theory may be compelled by equal protection doctrine.

   5. Assessing the complaint against the requirements of disparate treatment theory, the court stated that mere failure to follow a comparable worth study would not unlawful discrimination, nor would payment of market rates, even if it was known that this would have a disparate impact on the basis of sex. There were sufficient allegations in the complaint of decisions made because of the sex of the employees, however, so that the complaint could withstand a motion to dismiss.

   c. As with the *Washington State* case, the ANA opinion raises a number of questions.

   1. Not surprisingly, as the opinion was authored by Judge Posner, the opinion contains much economic analysis of the comparable worth issue, but unfortunately includes few citations to sources.

The court therefore rejects the theory on arguable economic grounds while not addressing the scope of disparate impact theory.

2. The court's attempts to show that the use of disparate treatment theory in comparable worth cases is compelled is unconvincing. As the opinion itself concedes, the Supreme Court simply did not decide in *Gunther* whether EPA defenses could be raised in all Title VII wage discrimination claims. The court's suggestion that equal protection cases may mandate that result simply makes no sense—the statutory and constitutional standards are simply not identical, and what is constitutionally permitted is not a limitation on what may be prohibited by Title VII.

3. By the end of the opinion the court's view of the case before it has significantly changed: it characterizes the plaintiffs' claim as "intentional discrimination that consists of overpaying workers in predominately male jobs because most of those workers are male." This characterization of the case as a complaint about overpayment of men is either a classic Freidman slip or indicates a total misunderstanding of the nature of the plaintiff's claims—in any case, it suggests another basis for hostility by the court to the plaintiffs' claim.

4. *Bazemore v. Friday*, __ U.S. __ , 106 S.Ct. 3000 (1986): The Supreme Court's recent decision in a race-based wage discrimination case provides support for comparable worth claims, and particularly points to the kind and level of proof sufficient to establish a wage discrimination claim.

   a. The Supreme Court held that the failure to correct race-based wage disparities which had their origin prior to the effective application of Title VII with respect to public employers is actionable discrimination as a present violation of the statute.

   1. In *Bazemore*, the North Carolina Agricultural Extension Service prior to August 1965 was divided into a "white branch" and a "Negro branch." After passage of
The 1964 Civil Rights Act the branches were merged, but salary disparities were not eliminated even after 1972, when the statute became applicable to public sector employers.

2. The Court held, reversing the Fourth Circuit, that wage discrimination perpetuated after 1972 violates Title VII; each paycheck that contains less than that paid to similarly situated whites is a wrong actionable under the statute, regardless of when the pattern began. Evidence of pre-Act discrimination, while not actionable as a violation in and of itself, is relevant background evidence on the status of current policies.

b. The Court also held that the lower courts had erred in refusing to accept the statistical evidence proffered by the plaintiffs as sufficient proof of discrimination, and in failing to consider whether the plaintiffs had carried their burden of proof in light of all the evidence in the record.

1. The lower courts erred in refusing to admit a multiple regression analysis because the trial court thought it had not included sufficient factors in the analysis. That, the Court pointed out, goes to the probativeness of the evidence, not to its admissibility.

2. Furthermore, the Court emphasized that the plaintiff need not prove discrimination with scientific certainty; rather, the burden of proof is to establish discrimination by a preponderance of the evidence.

3. The evidence was sufficient, in the Court's view, to support the claim of discrimination in this case, in conjunction with other evidence presented, including pre-Act salary discrimination and the failure to eradicate salary differences prior to 1972.

c. The significance of Bazemore for the concept of comparable worth is that it signals the rejection of arguments that the "mere" perpetuation of historic patterns of discrimination is not a current violation of Title VII, or that wage discrimination claims are too complex to be capable of proof of discrimination.

1. Historic patterns of sex-based wage discrimination, therefore, would similarly be actionable if perpetuated in compensation systems.


3. The case, of course, must also be recognized as limited by its facts: Bazemore is not a comparable worth case, but rather was an equal work claim; the legal theory of the case was that the discrimination was a pattern and practice, which imposes a burden of proof different than either a disparate treatment or disparate impact claim.

4. In summary, at the current stage of comparable worth litigation, there remains a host of issues, both theoretical and evidentiary, which have yet to be resolved.

V. Collective Bargaining

A. Comparable Worth as a Labor Relations Issue

1. Even if the legal duty to pay equitably on the basis of the value of job classifications is unclear, ignoring this issue may cause serious labor relations problems, which will only increase with the trend of increasing labor participation by women.

2. Employers should be particularly sensitive to questions of job segregation, especially with respect to hiring and initial assignment policies.

B. Comparable Worth as a Subject of Bargaining

1. Wages are a mandatory subject of bargaining, and information concerning the wage structure may lawfully be demanded by unions. A request to perform a job evaluation, however, would simply be a subject for negotiation.

2. Unions should be sensitive to their duty of fair representation in this area, particularly with respect to potential conflicts of interest between underpaid female bargaining unit members and male bargaining unit members who may desire a larger wage increase over a smaller increase coupled with a pay equity settlement.

3. Public sector employers must be sensitive to financing concerns, and therefore if any pay adjustments are agreed to, they will likely have to be spread over a multi-year period.

4. Recent Agreements
a. Los Angeles: In 1985 the city signed a $12 million pay equity agreement covering 3,900 city employees, to be phased in over a three year period. The agreement provided for a 10-15% special salary increase for designated female-dominated job classifications, and also settled a federal suit filed against the city.

b. Yale University: After a ten week strike, the parties agreed to a 3 year contract in January 1985 covering 2700 clerical and technical employees, providing across the board increases of 20-25%, and establishing a new step progression with 17 steps within each grade. Two thirds of unit employees will move up in the new progression, resulting in a 35% increase for some employees over the term of the contract due to slotting increases, upgrading of positions, and the overall increase.

c. City of Chicago: In December 1985 the city agreed to a 3 year contract covering 7500 employees. Seventy-nine predominantly female classifications are to be upgraded one pay grade, resulting in a 5% salary increase in addition to overall contract increases. Under the agreement the union also agreed to withdraw charges filed with the EEOC against the city in 1982.

d. City of San Jose: After a nine day strike, the city agreed to $1.5 million in pay equity adjustments of 5-15% affecting 60 job classifications, in a 2 year contract.

e. New York State: The state agreed to perform a pay equity study, and the results of that study indicated that 77,000 women and minorities were underpaid. The state's workforce is 48% female, 22% minority. The state has committed $74 million over the next 2 years to implement the recommendations of the study: $64 million to be negotiated in the 1985-88 contracts with the 3 state employees' unions, and $10 million
for adjustments for management and confidential employees. New York City has agreed with AFSCME to fund a comparable worth study of the city's workforce, although the city is under no obligation to adopt any of the study's recommendations. Any proposed changes must, by the terms of the agreement, be negotiated in collective bargaining.

f. San Francisco: The city signed a 2 year memorandum of understanding covering 12,000 workers, agreeing to pay adjustments of $8.8 million in the first year, $18.9 million in the second year, with particular focus on 10 job classifications. The agreement was ratified by the Board of Supervisors, then vetoed by Mayor Feinstein on fiscal grounds, but the veto was overridden by the Supervisors. Mayor Feinstein has stated she intends to put the issue on the ballot to put the agreement before the voters.

VI. Legislation
A. Status: Most state governments are expected to consider comparable worth legislation in the next 2-3 years, according to a survey by the Council of State Governments in January of 1985.

B. Pay equity legislation
1. Five states have enacted legislation to upgrade predominantly female jobs according to their comparable value: Washington, Iowa, New Mexico, Minnesota, and South Dakota.
2. Minnesota was the first state to enact such legislation in 1983, approving a biennial appropriation of $21.8 million after reviewing the results of a legislatively mandated study. The state has also enacted legislation requiring evaluation of wages by local governments to be completed by October 1985.
3. Most recently, in April 1985 South Dakota enacted legislation requiring revision of its compensation system, to be completed within 3 years, affecting 8,000 employees, with 4% of the state payroll appropriated for this purpose.
4. In 1984 pay equity legislation was defeated in Colorado, Florida, Missouri, Nebraska, and Pennsylvania.
5. Canada has enacted comparable worth legislation in 1978 as part of its Human Rights Act, covering all federal employees. Great Britain also has a limited comparable worth provision in its Equal Pay Act; there has been litigation before the European Court of Justice to extend the scope of this provision through the application of the European Economic Community's Treaty, to which Britain is a signatory.

C. Legislatively-mandated comparable worth studies
1. Task forces have been named to study comparable worth in 22 states, including Massachusetts, New Hampshire, Rhode Island, and Vermont.
2. Another six states have completed studies, but have taken no further action.
3. Another six states are monitoring developments in other states, but otherwise have taken no action; another six states have taken no action whatsoever.
4. Legislation authorizing a study of the federal wage system has passed the House (HR 3008), but is still pending in the Senate.

D. Massachusetts
1. Mass. Gen. Laws ch. 105 A: Enacted in 1945, this statute prohibits employers from discriminating in the payment of wages "for work of like or comparable character or work on like or comparable operations" unless based on seniority. A violation will result in back wages and an equal amount as liquidated damages, plus attorneys fees and costs. Private suit may be brought or the Commissioner of DLI may sue on behalf of employees. There is a one year statute of limitations. No cases to date have been litigated under this statute.
2. By joint resolution of the House and Senate, Massachusetts has engaged in a preliminary study of comparable worth, which has recommended that a full scale evaluation be done of the state compensation system. It has been a priority of the current administration to negotiate this issue, and therefore the primary forum of activity has been ongoing renegotiation of state employee contracts as they come up for renewal to incorporate the principles of comparable worth.
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The following article was written in 1985 while Mr. Carey was a student at Suffolk.
I. Background.

An employee was hired by a construction company in 1982 to work as a general laborer on a building project. The employee was not a member of a union. After three months on the job, the employee became upset when the company announced that it had revised its payment policy. The employee met with the company's general manager and stated his belief that the company was taking money that rightfully belonged to the workers. One day later, the employee told the architect responsible for the construction project that he had information concerning substandard work. The employee was terminated shortly thereafter. Subsequently, the company sued the architect for breach of contract. The architect countered, claiming the employee was discharged in violation of public policy in retaliation for objecting to the pay scale.

In 1984, the state trial court dismissed the retaliatory discharge claim holding that it lacked subject matter jurisdiction to hear the action since the claim was preempted by the exclusive jurisdiction of the National Labor Relations Board. On appeal, the state supreme court affirmed and held that the employee's state law claim of retaliatory discharge was arguably protected by the NLRA. The court stated:

It is well established that an employee is entitled to protest wages, as was allegedly done in this case, under the NLRA. Therefore, the NLRA clearly protects and covers the alleged retaliatory discharge as an unfair labor practice in this case since it involved a wage dispute covered by this NLRA.

The question prompted by the state supreme court's decision is simple. Were the nonunion employee's individual actions protected by the NLRA? Unfortunately, the answer to the question is far from easy. The Supreme Court, the federal courts of appeals, and the NLRB have struggled for years over the extent to which the complaints of an individual employee are protected by the NLRA. Recently, the battle has shifted directly to the issue of whether the NLRA affords individual nonunion employees. The objectives of this paper are to first analyze the historical dimensions of this debate and then synthesize the current state of the law as of approximately April 1, 1986. Second, the paper will review and critique the analyses of three major legal commentators that have addressed the issue. Finally, the ramifications of the debate will be analyzed with a view toward the substantial federalism concerns which underlie the scope of the National Labor Relations Act.

II. Introduction.

Section 7 of the National Labor Relations Act grants employees the right to "form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) makes it unlawful for an employer to interfere with employees in the exercise of section 7 rights. A threshold question in many unfair labor practice cases is whether certain employee activities with which an employer has interfered are "concerted activities." An additional and more difficult question concerns the extent to which an individual employee, acting alone, can engage in concerted activity.

Apparently, in many early cases the NLRA and the courts "required at least two employees acting together to find concerted activity." However, as far back as 1953, a commentator argued that the "decisions indicate that an act to be concerted, need only be motivated by a common purpose or community of interest shared by at least two employees." In 1966, the NLRB was presented with the opportunity to enunciate a conceptual dichotomy between "actual concerted activities" — those in which more than one employee engages and "constructive concerted activities" — those activities in which an individual engages that also fall within the protections of section 7. When the Board did so in Interboro Contractors Inc., a twenty year struggle was launched. Although the Supreme Court recently resolved the debate in the context of the unionized workplace, the battle has only just begun over the extent to which a nonunion individual employee's actions may constitute protected concerted activity.


1. Interboro Contractors Inc.

In Interboro, two employees were fired
after lodging various complaints. Specifically, the employees alleged violations of the contract's provisions concerning payment terms and safety procedures. The NLRB ruled that the employees had engaged in protected concerted activities. More importantly, the Board asserted that even if one of the employees had acted alone, her actions would have constituted protected activity because she was attempting to secure rights under the collective bargaining agreement.

The Board's reasoning was twofold. First, the Board read section 7 to mean that an individual employee's assertion of a contractually grounded right is "concerted" because it is an extension of the rights of all employees covered by the collective bargaining agreement. Second, the Board deemed the assertion of a right grounded in a collective bargaining agreement an extension of all the individual employees' concerted action in originally negotiating the contract.

2. Interboro in the Courts of Appeals.

The Interboro doctrine met stiff resistance by the circuit courts. Only the Second Circuit, which enforced the Board's order upheld the doctrine in later cases. The Eighth Circuit held that an individual employee presenting a grievance under a collective agreement engaged in protected activity, but the court did not cite Interboro. The Fourth Circuit initially endorsed the doctrine by enforcing a Board order without opinion. Subsequently, however, the court asserted that it need not "determine ... whether Interboro is to be applied in this circuit."

In contrast, the Third Circuit in NLRB v. Northern Metal Co. specifically rejected the holding and reasoning of Interboro. The Third Circuit argued that individual concerted activity must be for the purpose of preparing or initiating group activity. The court reasoned that Interboro was inconsistent with a literal reading of "concerted activities."

Following reasoning similar to the Third Circuit, between 1971 and 1983, the Sixth, Ninth, Eleventh, Fifth and D.C. Circuits denied enforcement of NLRB Interboro orders. As a result, by 1984 the "prevailing" view was that the NLRB was without authority to interpret "concerted activities" in a broad enough fashion as to encompass individual actions.


1. Alleluia Cushion.

In 1962, the Supreme Court made clear that the NLRA protects employees in both unionized and nonunionized sectors. However, the NLRB and the federal courts have struggled with the definition of the extent to which individual actions in the nonunion setting constitute "concerted activities." The specific analytical problem stems from the Interboro requirement that the individual's "complaint be reasonably related to some right granted in the collective bargaining agreement." Axiomatically, individual activity in the nonunion environment cannot fall within an extension of the rights of a collective bargaining agreement.

Nevertheless, in 1975, the NLRB promulgated the Alleluia Cushion doctrine of "implied" or "constructive" concerted activity in nonunion workplaces. In Alleluia Cushion Co., a nonunion employee was discharged for filing a complaint with a state occupational safety and health agency. The Board noted that the nature and extent of the complaints the employee filed indicated the employee's concern was not only for himself but for his fellow employees. The Board thus held the assertion of statutory rights in the nonunion context constructively concerted.

The Board reasoned:

... since minimum safe and healthful employment conditions for the protection and well-being of employees has been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assumption of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence to disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

Essentially, Alleluia Cushion provided that if an individual employee's activity benefitted all workplace employees, such activity would be deemed concerted. As such, under the Alleluia Cushion doctrine the Board characterized as concerted those activities which it felt were mutually beneficial to the workplace.

2. The Board's Applications of Alleluia Cushion

The Alleluia Cushion decision was never appealed. In subsequent cases, the NLRB expanded the reasoning of Alleluia Cushion to protect the invocation of other state and federal statutes and encompass complaints over matters of mutual concern and reasonable group interests. As summarized by one commentator:

The Board applied the Alleluia Cushion doctrine in cases concerning employee complaints about job safety and unhealthy working conditions. The Board also applied the doctrine in cases in which an employee acted out of concern over payroll funds and payments.

3. Alleluia Cushion in Court of Appeals

Both the Alleluia Cushion doctrine and the NLRB's subsequent extensions of the concept of constructive concerted activity were generally rejected by the courts of appeals. In NLRB v. Dawson Cabinet Co., the Eighth Circuit held that an unrepresented employee's individual protest over the employer's failure to comply with the Equal Pay Act did not constitute concerted activity. Similarly, the Fourth, Seventh and Ninth Circuits held that an individual employee's complaints concerning various terms and conditions of employment were not concerted activities. Indeed, in Ontario Knife Co. v. NLRB, the Second Circuit, the only circuit which had approved of the Interboro doctrine, rejected Alleluia Cushion. In Ontario Knife, the court asserted that "except in the context of agreements between an employer and his employees which are themselves the product of concerted activities, as in Interboro §7 ... should be read according to its terms."

Only the Sixth Circuit was willing to rely on the principles of Alleluia Cushion. In NLRB v. Lloyd A. Fry Rooting, the court upheld the Board's determination that a truck driver who was fired due to his safety complaints was engaged in concerted activity. The court specifically noted that the employee was protected by the NLRA because his complaints were intended to provide his fellow workers with a safe workplace.

Despite the courts of appeals general rejections of Alleluia Cushion, the NLRB continued to apply the doctrine until 1984.8 Indeed, in Hotel and Restaurant Employees,9 the Board relied upon Alleluia Cushion even though the Ninth Circuit had expressly rejected it. The Board stated that it would "respectfully decline to adopt the Ninth Circuit's rejection of ... Alleluia Cushion" until such time as the Supreme Court may determine the issue.53

Moreover, in at least two cases, the Board relied on the Alleluia Cushion doctrine in union contexts.41 Thus, it became clear that the Board deemed the Alleluia Cushion doctrine an extension of Interboro.58 As stated by one commentator:

What began as a doctrine protecting individual employee assertions of statutorily protected occupational safety and health rights in a nonunion, no collective bargaining context became a doctrine protecting individual assertions of any claimed right of common interest to fellow employees even in a union... context.55


A. Introduction.

In 1984, the NLRB overruled Alleluia Cushion in Meyers Industries Inc.97 Several months later, the Supreme Court decided NLRB v. City Disposal Systems.20 Together, these two decisions establish the present parameters defining individual concerted activity.


In City Disposal, a truck driver was discharged when he refused to drive a truck that he reasonably believed was unsafe due to faulty brakes. Under the relevant collective bargaining agreement, employees were permitted to refuse to drive unsafe vehicles if the refusal was justified. The NLRB found the discharge unlawful under the Interboro doctrine. The Sixth Circuit, however, reversed the Board based on its belief that "concerted activity" required activity on the behalf of or with the object of preparing for group action.59

The Supreme Court reversed and granted specific approval to the Board's Interboro doctrine which for so long had been disparaged by the courts of appeals.80 Specifically, the Court characterized the issue before it as the definition of "the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees" to constitute concerted activities.41

The Court held that both of the justifications for Interboro — that the assertion of a contractual right is an extension of the concerted activity which brought about the collective bargaining agreement and that the assertion of such rights affects all the employees covered by the agreement — were reasonable interpretations of the NLRA.62 Therefore, the truck driver's individual refusal to drive an unsafe truck constituted concerted activity.63

Along the way to this conclusion, the Court faced and rejected three arguments. First, the Court rejected the argument that a formal grievance procedure should preclude section 7 protection of other collective rights. The Court noted that for various reasons the infringement of an employee's collective bargaining rights might not result in a formal grievance.46 Second, the Court rejected the argument that Interboro undermines the grievance arbitration process. The Court noted that the NLRB possessed broad deferral powers in situations where issues are raised in unfair labor practice cases which were or could have been submitted to arbitration.65

Most importantly, the Court specifically rejected the argument that the NLRB was without authority to interpret section 7 broadly. Although the Court observed: ... [o]ne could interpret the phrase, "to engage in other concerted activities," to refer to a situation in which two or more employees are working together... the language of §7 does not confine itself to such a narrow reading.66

Instead, the Court reasoned that the legislative history of section 7 revealed no inconsistency between the Interboro doctrine and congressional intent.67 Moreover, recognizing that in the 1930's a single employee was helpless in dealing with an employer, the Court stated:

There is no indication that Congress intended to limit [§7] protection to situations in which an employee's activity and that of a fellow employee combine... in any particular way.... Instead, what emerges from the general background of §7 —... is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining and enforcement of collective rights.88

The dissent in City Disposal asserted that the majority was allowing the NLRB to exercise "undelegated legislative power" by deferring to the Board's construction of section 7.90 Specifically, the dissent reasoned that by basing the "determination whether activity is 'concerted' on the assertion's ultimate grounding in the collective bargaining agreement, the Interboro doctrine's extension of the concerted activity proviso transfers final authority for interpreting all contracts... to the Board."70

Unfortunately, neither the majority nor the dissent in City Disposal found it necessary to expand on the NLRB's authority to interpret section 7. Indeed, the majority footnoted that the NLRB had recently decided Meyers Industries71 which held that a nonunion employee's assertion of a right presumed to be of interest to other employees was not concerted. Nevertheless, the Court concluded that the existence of a collective bargaining agreement meant that Meyers had "no relevance here."72

Moreover, in another footnote the Court indicated that the employer in City Disposal had argued "because the scope of the concerted 'activities clause' in section 7 is essentially a jurisdictional question... the Court need not defer to the Board's interpretation. The Court merely concluded, however, that it had "not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here."79

Similarly, the dissent, citing Meyers, merely footnoted "the Court and Board agree... that the mere fact that an asserted right can be presumed to be of interest to other employees is not a sufficient basis for labeling it concerted."77

C. Individual Concerted Activity in the Nonunion Workplace: Meyers Industries, Inc.

1. Meyers Industries, Inc.89

Meyers Industries manufactured aluminum boats. The unrepresented employee was a truck driver who hauled boats from Michigan to various dealers throughout the nation. During a trip, the driver began to experience problems with his rig. He complained repeatedly to his manager. In addi-
tion, a co-worker complained to the employer when he drove the same rig. Neverthe-
less, despite repeated complaints by the employee and a citation by a safety patrol, the
defects were not repaired. 76

Subsequently, the employee had an accident in Tennessee. When the employer in-
sisted that the employee chain the rig together and drive it home, the driver com-
plained to the Tennessee Safety Commission. A safety citation resulted in the
damaged rig being taken out of service. The employer then fired the driver and
told him "we can't have you calling the cops like this all the time. 77

The driver filed a complaint under section 8(a)(1) of the NLRA. Based on Alle-
luia Cushion, an administrative law judge ruled that the discharge violated the Act.
The Board disagreed, overruled Alleluia Cushion and dismissed the complaint. The
Board first stated that activity could be "concerted" only if it in fact involved
"some sort of group action." Thus, the Board concluded that Alleluia Cushion was
inconsistent with the NLRA because it allowed group support to be presumed
rather than proven. 78

The Board then formulated what it termed an objective standard on which it
believed the courts had relied upon before Alleluia. The Board stated:

In general, to find an employee's activity to be "concerted," we shall require that it
be engaged in with or on the authority of other employees, and not solely by or
on behalf of the employee himself. Once
the activity is found to be concerted, an
8(a)(1) violation will be found if, in ad-
dition, the employer knew of the pro-
tected nature of the employee's activity,
the concerted activity was protected by
the Act, and the adverse employment
decision at issue (e.g. discharge) was
motivated by the employee's protected
conscerted activity. 79

On the Meyers facts, the Board con-
ccluded that the employee had acted alone
when he refused to return with the dam-
aged rig. Therefore, the Board held that
the employees' discharge did not violate his
rights under section 7 of the NLRA. 80

Despite the Supreme Court's observation
on Meyers in City Disposal, in Prill v.
NLRB 81 the D.C. Court of Appeals refused
to enforce the Board's order in Meyers and
remanded the case for reconsideration.

The Prill court argued first that "the
Board's opinion is wrong insofar as it holds
that the agency is without discretion to
construe 'concerted activities' except as in-
dicated in the Meyers test."82 Specifically,
the court held that in light of City
Disposal, the NLRB committed legal error
when it based Meyers on the conclusion
that the NLRA mandated the Meyers for-
mulation of "concerted activities."83 The
court reasoned:

City Disposal makes unmistakably clear
that, contrary to the Board's view in Meyers,
neither the language nor the history of section 7 requires that the
term "concerted activities" be interpreted to protect only the most normally de-
dined forms of common action by employees, and that the Board has
substantial responsibility to determine the scope of protection in order to pro-
mote the purposes of the NLRA. 84

In addition, the Prill court rejected the
Board's contention that Meyers was a
return to pre-Alleluia Cushion standards.
Indeed, the Prill court deemed the
Meyers test narrower than pre-Alleluia
Board law because of the Meyers re-
quirement of group authorization before
individual assertion of a group right
would constitute concerted activity. Fur-
ther, the Prill court noted that "it is not
clear whether the Meyers test would
allow the protection of individual efforts
to enlist other employees in support of
common goals. 85

The dissent in Prill would have upheld
Meyers. Noting that "if the activity in
question here may be called 'concerted,'
than almost any actions might be so
characterized,"86 the dissent argued that
the question at issue before the court
was whether the Board's interpretation of
section 7 was reasonable. The dissent
asserted that the majority never even
answered this question and concluded
that the Board's interpretation "should be
upheld without hesitation."87 Moreover,
the dissent argued that City Disposal did
not control because it applied only in
the context of collective bargaining
agreements. 88

2. Meyers in the Courts of Appeals.

In opposition to the Board, the Second Circuit in Ewing v. NLRB 89 agreed with
the D.C. Circuit's decision in Prill. In Ewing, the employer refused to recall a
laid-off employee because the employee was believed to have filed an OSHA
complaint. The Second Circuit noted that it was not reviewing Meyers "but
only the Meyers rule as applied to Ew-
ing."90 Consequently, the court declined to find that the NLRB was required to
give "concerted activity" a narrow
reading. The court ordered the Board to
reconsider its decision in light of Prill
and determine whether the employer's
refusal to recall the worker would have a
"chilling effect" on the collective rights
of other employees. 91

Finally, in JMC Transport v. NLRB, 92
the Sixth Circuit held that an employer unlawfully fired an employee who
repeatedly complained about pay. The
court found that the employee's actions
with a co-worker in confronting the
employer constituted protected concerted
activity under Meyers despite the co-
workers' silence. 93 The court noted,
however, it was not deciding the validity

Massachusetts State House
of Meyers. Rather, the court reasoned that the individual employees’ actions constituted concerted activity even under the restrictive test of Meyers.95

3. Recent NLRB Applications of Meyers.

The NLRB has continued to utilize Meyers even though the D.C. Circuit remanded the case in Prill v. NLRB.96 In addition, the Board has taken the position that Meyers applies in both the unionized and nonunionized contexts. Thus, unless an individual employee’s activity is joined or approved by other workplace employees, the activity is not considered to be concerted. For example, in Schreiber Materials,97 a union employee’s filing of a workers compensation claim was held not “concerted” under Meyers. The Board reasoned that invocation of a workers compensation statute entailed strictly individual activity.

In short, the NLRB has developed a City Disposal-Meyers test. Essentially, in a unionized workplace an individual employee engages in concerted activity when she files a complaint invoking the collective bargaining agreement. In the nonunion workplace, an individual employee’s complaint is concerted only if actually engaged in with other workers, regardless of whether the employee is invoking an employment-related statute.98

VI. Critical Views of Meyers.

1. Introduction.

The Meyers battleground provoked substantial critical debate. The following three analyses address some of the issues.


A well-researched, but thinly reasoned “Recent Development” in the Vanderbilt Law Review concluded that City Disposal and Meyers “read separately” create “serious problems.”99 Specifically, the writers argued that City Disposal threatens to undermine grievance arbitration because alleged contractual violations will support unfair labor practice charges without adequate deferral to arbitration procedures or awards.99 The writers viewed Meyers as exposing employees not governed by a collective bargaining agreement to the “threat of employer retaliation against legitimate assertions of employment-related statutory rights.”100

The Vanderbilt writers asserted that if the decisions are read together:

All things being equal, an employee’s assertion of a right that a collective bargaining agreement secures will constitute concerted activity, while the employee’s assertion of the same or similar right that only a statute secures will not be concerted . . . . Thus, section 7 now effectively favors union employees over nonunion employees. Furthermore, section 7 favors collective bargaining rights over statutorily granted rights . . . .

As a solution, the writers suggested a “unified City Disposal-Alleluia Cushion standard:”

... the Board and the courts should deem an individual employee’s activity to be concerted when the employee reasonably and in good faith asserts a right secured either by an existing collective bargaining agreement or by an employment-related statute.101

Unfortunately, the analysis failed to set forth a reasoned argument in favor of granting employment-related statutory rights the same degree of protection under section 7 as collective bargaining rights. The analysis’ assertion in a footnote that the “invocation of a statutory right affecting all employees is at least as much for the purpose of mutual aid or protection as the invocation of a collective bargaining right” has emotional appeal.102 Nevertheless, it is far from persuasive on the question of whether the NLRA should protect those rights.

2. Weirich.103

C. Weirich has addressed the Meyers debate from a blatantly employer perspective. Weirich anchored his analysis on footnote six of the Supreme Court’s decision in City Disposal.104 In his view, the Court’s express distinction between Meyers and Interboro as to the existence of a collective bargaining agreement undercuts the analysis in Prill. As a result, Weirich argued that the “individual invocation of a right gained through collective bargaining is rationally related to the system of industrial governance set up under the NLRA.”105 Therefore, in Weirich’s view, the Alleluia Cushion doctrine in fact provided the nonunion employee with greater statutory protection than union employees.

Consequently, Weirich dismissed the Prill court’s view that Meyers produces “the anomaly that a unionized worker who complains about safety or other matters covered by a collective agreement will be held protected . . . while an unorganized employee will be denied protection for engaging in the same conduct.”106 Rather, Weirich asserted:

But there is really no anomaly at all. The Court’s concern misconceives the source of the organized employee’s protection . . . . The organized worker gains additional protection strictly by virtue of [collective bargaining] . . . . But such a clause does not come without sacrifice.107 Thus, as a bottom line policy justification for his support of Meyers Weirich stated:

Unorganized workers have not made the sacrifices involved in choosing a collective bargaining agent, nor have they given up the quid pro quo necessary to gain such contractual terms. The unrepresented worker’s complaints do not continue prior concerted activity nor do they necessarily impact identically on all other workers.108

“Protection for whistleblowers under state and federal statutes may be appropriate, but such protection should not be afforded to employees under an unrelated statute.”109

3. Finklin.110

M. Finklin, in contrast, pulled no punches in accusing the “Reagan Board” of “slipshod scholarship” and “pettifogging distinctions.”111 In his view, there is no “principled basis upon which to distinguish the individual invocation of law in refusing to drive an unsafe truck from the individual invocation of a collective bargaining agreement.”112 Finklin supported his argument by first noting that although the definition of “concerted activities” is a fundamental question of statutory interpretation, the Board failed in Meyers to make any references to legislative history.113 That history, Finklin asserted, indicates that individual protests should be considered concerted activity protected by the NLRA.114

Second, Finklin asserted:

The Act, however, rests upon concern for the relative helplessness of the individual, upon the enormous power inequality between the individual employee and the employer. This inequality is redressed by bringing the force of government to bear to allow individuals to band together and pool their power in bargaining collectively. The individual engages in activity in calling upon
government — the Board — to remedy an employer's invasion of his or her rights. . . . There is no basis in the history of the Act for imputing to the legislature the desire to help the helpless by insulating from employer sanction the relatively ineffective call to just one other employee, but deny the helpless individual the more effective call to government. 27

Thus, Finklin submitted that the Board's interpretation of the Act before Meyers was sound. In essence, the requirement of "concerted" is "met, with only a speaker and listener involved, even if the listener is not an employee of the speaker's employer." 28

V. Conclusions: Meyers, Employment-At-Will, and Federalism.

One recent observer of Meyers and the question of NLRA protection for individuals acting alone in a nonunion setting noted that "advocates of each point of view have elements of convincing arguments on their side." 29 On the one hand, the advocates of Meyers can stress that the term "concerted" implies mutual actions. On the other hand, the advocates favoring protection of the individual may rely on the strong sense of equity and public policy which that interpretation entails. 30

In his Prill v. NLRB dissent, Justice Bork asserted that the policy considerations propounded in favor of a broad interpretation of "concerted activity" should be addressed instead to the "legislature or state courts as expositors of the common law." 31 Bork suggested, but did not articulate, the crucial question surrounding the Meyers debate; namely, whether the extension of NLRA protections to individual employees acting alone in a nonunion setting would contravene established notions of federalism. 32

That a broad interpretation of "concerted activities" to protect individual nonunion employees runs straight into the dynamic state law developments eroding the doctrine of employment-at-will is clearly demonstrated by the Part I — Background facts. There, the state supreme court held that the individual nonunion employee's pay complaint was preempted by the NLRA. 33 Certainly, in light of Meyers, it is probable that the case was wrongly decided. Under classic preemption analysis, the employer's conduct was not arguably protected nor prohibited by the NLRA. 34 Indeed, the state supreme court's failure to cite Meyers highlights the conceptual difficulties and potential for federal-state conflict.

A resolution of this conflict necessarily proceeds from one's view of the NLRA in the scheme of American justice. Proponents of a broad interpretation of concerted activity believe that the Act aims "to protect and deepen existing constitutional rights to expression, association and voluntary labor. Thus, the statute is more like a civil rights act or voting rights act than a regulation of securities exchange." 35 The contrasting view posits that both "contemporary events and the NLRA itself created a strong association between section 7 terminology and organizational activity." In effect, the NLRA had the "intended function of providing the collective bargaining process to American workers." 36

Possibly, the truth lies between these two extremes. Clearly, the NLRA's enactment in 1935 served as a substantial grant of expressive and associational rights to the working class. Yet, the means by which those rights were to be secured was through the process of collective bargaining. In City Disposal, even the liberal wing of the Supreme Court seemed to recognize this when it stated:

[What emerges from the general background of §7 — and what is consistent with the Act's statement of purpose — is a congressional intent to create an equality of bargaining power throughout the entire process of labor organizing, collective bargaining, and enforcement of collective bargaining agreement.]

Still, even if §7 was intended to protect collective bargaining-related activities, the question is should the Act's substantive protections be excluded from the individual nonunion employment relationship. Arguably, a consideration of the policy judgments entailed in the Supreme Court's labor law preemption doctrine militates against an extension of NLRA section 7 protection to nonunion employees acting individually.

First, much of the subject matter covered by the NLRA "has been and continues to be the subject of state regulation." 37 For example, under section 14(c) of the Act the states are free to act with respect to disputes over which the NLRA does not take jurisdiction. 38 More important, however, is the Supreme Court's acknowledged basis for the preemption doctrine. As stated by the Court, the doctrine focuses "upon the crucial inquiry whether Congress intended that conduct involved be unregulated . . . ." 39 As a result, the Court has permitted states to regulate matters of intense local concern even if there is potential for conflict with the Act. 40

In its touchstone formulation of the preemption doctrine in San Diego Building Trades v. Garmon, 41 the Court stated that "state jurisdiction has prevailed in these situations because of a compelling state interest, in the scheme of federalism." 42 Under the Garmon doctrine courts should deem an individual's wrongful discharge in a nonunion context outside the scope of the NLRA due to clearly compelling state interests. 43

At least one state court has so held. In Martin v. Capital Cities Media, Inc., 44 the Pennsylvania Superior Court held that a nonunion employee's state claims for wrongful discharge in violation of public policy and interference with contractual relations were not preempted by the NLRA. 45

In Martin, a newspaper employee was terminated in retaliation for placing an advertisement in a rival newspaper. 46 Relying on Garmon and a state supreme court decision which limited federal preemption to issues involving unfair labor practices because they were unknown at common law, the Martin court reasoned: Without hesitation, we may say that the appellant's claims of breach of contract, wrongful discharge and interference with contractual obligations are all recognized actions of Pennsylvania common law. These actions were not created by statute, and the state has a strong interest in deciding whether the alleged injury should be redressed. 47

In effect, Martin stands as an initial indication that state courts can, with proper reference to the preemption framework, pursue the development of common law protections for individual employees in a nonunion context. At bottom line, then, it must be questioned whether the assertion of the NLRA into this area would best serve justice and fairness in an American workplace where unionism and collective bargaining continue to decline. As the battle over Meyers continues in the federal courts and at the NLRB, the essential dynamism of state law approaches will best serve American labor policy.
Footnotes

1. The background facts are drawn from Amco Constr. Co. v. Freemna, 693 P.2d 1183 (Kan. 1985). For the purpose of analysis, however, these facts have been modified.

2. Amco Constr., 693 P.2d at 1185.

3. Id.


5. See Analysis, Nonunion Employee's Safety Complaint as Concerted Activity Under LMRA, 118 Analysis 37 (BNA LRR, March 11, 1985).


8. See Gorman and Finklin, supra, note 4 at 288, 234.

9. Id. at 286, 287.


13. See Gorman and Finklin, supra note 4; See also Note, Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act, 58 Tex. L. Rev. 989 (1980).


16. 61 L.R.R.M. at 1537.

17. Id.

18. Id. at 1538.

19. Id.


22. Roadway Express, Inc. v. NLRB, 532 F.2d 751 (4th Cir. 1976); see Recent Development, supra note 10, at 1301, n. 33.

23. Id. at 1301, n. 32.

24. 440 F.2d 881 (3rd Cir. 1971).

25. Id. at 833; see generally Comment, Constructive Concerted Activity and Individual Rights: The Northern-Metal-Interboro Split, 121 U. Pa. L. Rev. 152 (1972).

26. Id. at 155-158.

27. City Disposal Sys., Inc. v. NLRB, 683 F.2d 1005 (6th Cir. 1982).

28. Royal Dev. Co. v. NLRB, 703 F.2d 363 (9th Cir. 1983).

29. Roadway Express, Inc. v. NLRB, 700 F.2d 687 (8th Cir. 1983).

30. NLRB v. Buddies Supermarkets, 481 F.2d 714 (5th Cir. 1973).


32. See Recent Development, supra note 10, at 1295-1306.

33. 221 N.L.R.B. 999 (1975).

34. See NLRB v. Washington Alum. Co., 370 U.S. 9 (1962) (holding that seven nonunion employees who left work because their shop was cold were engaged in protected concerted activity).


38. 91 L.R.R.M. at 131.

39. Id. at 131, 132.

40. See Recent Development, supra note 10, at 1229.


42. See Recent Development, supra note 10, at 1307-1309.

43. 566 F.2d 1079 (8th Cir. 1977).

44. Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980).

45. Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980).

46. NLRB: Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980).

47. 637 F.2d 240 (2nd Cir. 1980).

48. Id. at 845.

49. 651 F.2d 442 (6th Cir. 1981).

50. Id. at 445.

51. See Recent Development, supra note 10, at 1308.

52. 252 N.L.R.B. 1124 (1982).

53. Id. at 1124.


55. See Gorman and Finklin, supra note 4, at 292.

56. See Recent Development, supra note 10, at 1309.


59. 115 L.R.R.M. at 3195.

60. Id.

61. Id. at 3197, 3199-3201.

62. Id. at 3197.

63. Id. at 3197.

64. Id. at 3199.

65. Id. at 3201.

66. Id. at 3197.

67. Id. at 3198.

68. Id. at 3199.

69. Id. at 3202 (O'Connor dissenting).

70. Id. at 3202-3203.

71. Meyers, supra note 57.

72. 115 L.R.R.M. at 3196, n. 6.
73. Id. at 3197, fn. 7.
74. Id. at 3202, fn. 3 (O'Connor J. dissenting).
76. Id. at 1029.
77. Id. at 1030.
78. Id. at 1025.
79. Id. at 1028-1029.
80. Id. at 1030-1031.
82. Id. at 948.
83. Id.
84. Id. at 952.
85. Id.
86. Id. at 953-956.
87. Id. at 957 (Bork J. dissenting).
88. Id.
89. Id.
90. 768 F.2d 51 (2d Cir. 1985).
91. Id. at 55.
92. Id. at 58.
93. 766 F.2d 612 (2d Cir. 1985).
94. Id. at 620.
95. Id. at 618, fn. 3.
96. See Recent Development, supra note 10, at 1326-1337.
100. Id. at 1343.
101. Id. at 1344.
102. Id. at 1337-1338.
103. Id. at 1344.
104. Id. at 1340.
105. Id. at 1341, fn. 227.
106. See Weirich, supra note 36.
107. Id. at 369, fn. 10.
108. Id. at 363.
109. Id. at 366-367.
110. Id. at 367.
111. Id.
111A. Id. at 368-369.
112. See Franklin, supra note 15.
113. Id. at 156.
114. Id. at 170.
115. Id. at 165.
116. Id. at 164-169.
117. Id. at 170.
118. Id. at 163.
120. Id. at 35.
121. See Prill, 755 F.2d at 966, N. II (Bork J. dissenting).
122. Research for this paper indicated that this issue has yet to be critically addressed.
125. Foy and Murmann, supra note 19, at 35.
126. City Disposal, 115 L.R.R.M. at 3199.
127. Morris, supra note 123, at 1504.
128. Id. at 1551.
132. Id. at 247. The Garmon Court also stated that activity of "merely a peripheral concern" of the NLRA would not be preempted. Id. at 248; citing Int. Nat. Assn. of Machinists v. Gunalzes, 352 U.S. 281 (1958).
135. Id. at 477.
136. Id.

Professor Robert V. Ward, Jr. of New England Law School, a 1978 graduate of Suffolk, chaired the recent conference on D.W.I. litigation at the Law School. He is shown discussing the conference with Prof. Kindregan and Attorney Joanne Maas (Suffolk J.D. '79), former editor of The Advocate.
A Edward Doudera (J.D. '78), an executive director of the American Society of Law and Medicine, is the co-author of two recent books — *Defining Human Life: Medical, Legal & Ethical Implications* and *Legal and Ethical Aspects of Health Care for the Elderly*. Both works were published by Alpha Press of the University of Michigan.

Robert R. Berluti (J.D. '80) practices law at One Boston Place in Boston.

James P. Moriarty (J.D. '82) practices law in Presque Isle, Maine.

Jeremy I. Silverfine (J.D. '83), former associate editor of *The Advocate*, now practices law in the Boston firm of Shriberg and Sorbello.

Susan Donnelly McKelliget (J.D. '84) is currently employed as research director for the state Commerce & Labor Committee.

Gary Boland (L.L.M. '72) has become a partner in the Louisiana law firm of Hunter & Boland. He is also continuing to serve as Director of Continuing Legal Education for Louisiana State University's Law Center.

State Rep. Richard Voke (J.D. '75) was recently honored as the "Legislator of the Year" by the Massachusetts Bar Association. Representative Voke serves as chairman of the Ways and Means Committee. He previously served as chairman of the House Committee on Health Care, which has responsibility for rate setting, licensing and medical insurance.

William G. Davidson, III (J.D. '74) is practicing law in Fairfax, Virginia.

**Alumni Notes**

Christopher Sullivan (J.D. '82) has entered private practice in Hingham with the firm of Malley & Sullivan. He was formerly an assistant attorney in the Civil Bureau/Torts Division of the Department of the Attorney General.

Norman E. Brunell (J.D. '73) has recently opened new offices at 4249 San Rafael Ave. in Los Angeles. He established his law practice in Los Angeles in 1981. He specializes in patent law.

R. Demarest Duckworth, III (J.D. '76) has recently become a partner with the firm of McKenzie, Meaders & Ives, 535 Fifth Ave., New York, N.Y. His practice concentrates in real estate, trust & estates and corporations.

Tim Richards (J.D. '78) practices international commercial law in Miami, Florida with the firm of Corrigan, Zelman & Bander. He recently published a book: *Foreign Investment in U.S. Real Estate*. Recently, he and his wife, who are North Indian concert musicians, completed a one-month tour of India, which was sponsored by the Institute of Indian Studies.

James E. Carroll (J.D. '83) has recently been appointed trial attorney for the United States Department of Justice, Washington, D.C. Prior to his appointment, Carroll was an associate with the firm of Gaston Snow & Elly Bartlett in Boston.

Leonard I. Singer (J.D. '65), formerly of Singer & Singer, has been practicing in Lake Worth, Florida since 1981.

Roland J. Regan, Jr. (J.D. '83) is a contracts and international licensing consultant with Simmonds Precision in Winooski, Vermont. Previously, he served on the District Attorney's staff in Essex County. He was also a contracts officer in the Air Force.

Richard J. Kowen (J.D. '75) is now associated with Grecel, Walker & Kowen, 1001 Bishop Street, Honolulu, Hawaii.

Stephen V. Manning (J.D. '82) has become an associate with the firm of Day, Berry & Howard in Boston.

Robert J. Ebersole (J.D. '82) has been recently re-elected town clerk, tax collector and treasurer to the town of Lunenbug, Mass. He was recently elected to the executive board of Concerned Americans for Individual Rights — a group for conservative to moderate gay men & lesbians.

Irwin A. Berkowitz (J.D. '77) has been elevated to the Circuit Court of the Seventeenth Judicial Circuit of Florida, the highest trial court in the state of Florida. Since 1982 he has served as County Court Judge, and Juvenile Court Judge.

Earle E. Jacobs, III (J.D. '73) has been re-elected to a second 3-year term on the East Windsor (N.J.) Board of Education. He is currently serving as board president. Mr. Jacobs has been an Estate & Gift Tax Attorney with the Internal Revenue Service since 1974.

**ALUMNI NOTES INFORMATION**

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NOTE: ____________________
Thomas M. Dailey graduated from Colby College with a Bachelor of Science in Economics. He received his Juris Doctorate, cum laude, from Suffolk University School of Law in 1985. While at Suffolk Mr. Dailey was Editor of the law review. Currently he is an Associate at Goodwin, Proctor & Hoar, specializing in employment litigation.

Mr. Dailey wrote the following article in the Spring of 1985.
JOB EVALUATION – A CATALYST FOR WAGE DISCRIMINATION UNDER COMPARABLE WORTH THEORY

Thomas M. Dailey

Introduction:

Despite recent setbacks in the development of the doctrine of comparable worth, courts and commentators continue to reevaluate the job evaluation process, which many plaintiffs contend has resulted in a fundamental difference in the way women and men are paid. Although the concept of job evaluation originated in the 1920's, the process has remained relatively unchanged since the 1950's. And while social science has carefully examined from a behavioral standpoint other aspects of the workforce, job evaluation, which is critical to the ultimate establishment of wages and salaries, has gone virtually untested. It is, then, little wonder that with the growth of the equal rights movement and the increasing number of women in the workforce, a doctrine defining equal pay based on comparable worth has evolved to test the validity of job evaluation systems.

Comparable worth serves as a legal basis for attacking the wage disparity created by the combined effects of job segregation and wage discrimination. While in the view of one commentator, job segregation and wage discrimination have been viewed as separate problems, comparable worth views these issues as symptoms of a deeper form of gender discrimination. The essence of comparable worth, and the factor that separates it from claims under the Equal Pay Act ("EPA") or Title VII of the Civil Rights Act of 1964 ("Title VII"), is that the doctrine focuses on the comparative value of jobs to an organization, not just job content. Consequently, comparable worth examines an employer's job evaluation or market valuation system to determine whether jobs of equal or comparable worth to the company are paid at similar levels.

For all its logical and intrinsic appeal, however, development of comparable worth through Title VII has been slow. Resistance to the concept is understandably high, given the tremendous economic costs involved in correcting company-wide wage disparities. But plaintiffs have also encountered a reluctance on the part of the courts to accept the doctrine as a full adjunct to Title VII. Although at least one major plaintiff group has succeeded temporarily in maintaining a comparable worth claim under disparate treatment theory, disparate impact theory, which potentially provides redressability to an even broader class of comparable worth claims, has gained limited acceptance.

Part I of this article explores the current practices of job evaluation, including the processes of internal job analysis and external market wage rate analysis. Part II examines the primary methods by which plaintiffs have attacked employer compensation plans through the doctrine of comparable worth. Part III then discusses the viability of disparate impact as an alternative theory under which a comparable worth case may be brought. Finally, this article considers the possible defenses to a comparable worth claim that employers may raise in the post-Gunther era of comparable worth.

I. Discriminatory Job Evaluation:

The validity of job evaluation techniques have been called into question as a major cause of sex discrimination in the work-place. Each segment of the job evaluation process, which can be divided into two stages — internal job analysis and external market comparisons — has been challenged as discriminatory. First, the internal process of job evaluation is attacked as potentially biased because the factor analysis and factor weighting systems used to establish job worth often to do so in a manner that ultimately values female dominated jobs below jobs traditionally dominated by men. Second, market wage rate comparisons, which involve a comparison of company wages with average wage data in the relevant labor market, are challenged on the basis that the market rate is itself an "average bias" rate representing the results of discrimination in internal job evaluation systems. According to this position, bias at the firm level is passed on to the market rate, which in turn is utilized by companies participating in market surveys to establish or justify their internal rates of pay.

A. Internal Job Evaluation:

The objective of internal job evaluation is to establish a job structure that accurately portrays the relative value of each position within an organization. When constructed properly, a job structure provides fair compensation and serves as a tool to motivate employees consistent with overall organizational objectives. Good internal evaluation also reflects the requirements of the labor market, thereby insuring top candidates will be attracted and qualified employees will be retained. Job evaluation, therefore, establishes the point in which a given position will fall within a company's job hierarchy, as well as the wage incumbents in that position will receive.
It is job evaluation’s role in establishing the internal job hierarchy, and the relationship between a job’s value and the market wage, which subjects job evaluation to scrutiny as a possible cause of wage discrimination between male and female dominated jobs. A central criticism of job analysis is that the process is overly subjective, which allows historical, sociological and psychological biases held by job evaluators to enter the evaluation system. But to understand why job evaluation is challenging as subjective, it is necessary to understand the process compensation professionals use to evaluate positions.

For the vast majority of jobs, evaluation is through factor analysis, which calls upon the compensation manager or committee to make a valuation of company jobs according to certain evaluative factors which the compensation manager or committee select. Knowledge, experience, working conditions, skill and attendant responsibility are five general factors typically considered. Each general factor is then divided into sub-factors, which are further divided into “degrees” representing the relative importance of each sub-factor to the job evaluated. Sub-factors are then assigned a weight representing that factor’s value to the organization.

For example, under one widely used job evaluation system, the range of degree points for the “experience” sub-factor runs from 22 to 88 points; each “responsibility” factor runs from 5 to 25 points. “Experience” receives a higher weighted value than “responsibility,” which indicates that between these two factors, the former is valued more than the latter. Correspondingly, a position that requires greater experience may be evaluated higher, and its incumbents compensated at a higher rate, than a position that demands less experience but greater responsibility.

Comparable worth challenges to job evaluation are based on the concern that discrimination enters the evaluative process at several stages because of subjectivity inherent in job analysis. First, because evaluations are generally performed based on job descriptions which the compensation analyst who gathers the data prepares, the information gatherer’s subjective feelings or impressions concerning what should and should not be included in the description can strongly influence the evaluation process. The analyst will typically interview the proposed job’s supervisor to flesh out the intended job function, duties and accountabilities, then prepare the job description based on those findings and any personal perceptions the analyst may have as to the job’s functions. “Inaccuracies [in the description] can be caused intentionally by emphasizing duties seldom, if ever, performed to ensure a high rate of pay for an incumbent, or by making a job look more important that it is, or to assist a manager maintain an ‘empire.’” Perceptions held by the information gatherer, or the job’s supervisor that positions involving clerical or secretarial tasks are of lesser value may lead to development of a position description that emphasizes duties which receive fewer points under the evaluation system. The result is potentially discriminatory in that a position’s evaluated worth may not adequately portray its true value to the organization.

Second, subjectivity through personal perceptions or sociological, psychological or historical factors may enter into the process to affect the selection of compensable job factors. The evaluator generally decides which elements of a job will be used in the evaluation process and what factor degree will be assigned to that element. Thus, the evaluator’s perception that lifting should be a heavily weighted “physical effort” factor, but manual dexterity should not, leads to a higher evaluation for jobs requiring lifting than those requiring typing or assembly skills.

Accordingly, emphasizing physical strength rather than mental fatigue will tend to undervalue female dominated positions, such as typists and word processor operators. Conversely, male dominated positions, such as loading dock workers and packers, which require a substantial amount of heavy lifting, will tend to be overvalued. The sex of the evaluator and information gatherer may also impact the ultimate evaluation. A male evaluator may be less likely to understand the demands of female dominated jobs than would a female evaluator.

Subjectivity in assigning the weight afforded to each job factor may also affect the ultimate evaluated worth of a position. Under the commonly used point-factor method of job evaluation, a compensation manager or committee may weigh each sub-factor and assign a range of values which effectively represent that sub-factor’s importance to the organization. Each sub-factor is then divided into several degrees, and a numerical value assigned to each degree. For example, the value assigned to the first degree of a sub-factor may vary from 5 to 22 points. This variance reflects the company’s perception that factors assigned a first degree value of 5 are of lesser value than those assigned a value of 22.

If properly performed, the weighing process will reflect the value of each factor to the organization. Discrimination enters into the process, however, because the weights assigned are rarely based on objective criteria, such weights being dependent instead on the subjective values which the compensation manager or committee assigns.

To illustrate, female dominated positions often require a high degree of manual dexterity, involve great amounts of stress and fatigue, and are generally performed in office conditions. Male dominated positions generally require lifting and are often performed in nonoffice conditions, subject to heat or cold and noise. Under one frequently used point-factor rating plan, the positions incorporating the characteristics of the male dominated job receive a higher evaluation than positions incorporating the characteristics of the female dominated job. A comparison of three job factors illustrates this point.

“Physical demand” is a frequently used evaluation factor focusing on the strength requirements of a job. Under the point-factor rating plan, the factor has a degree point spread from 10-50 points. In contrast, “mental or visual demand,” a factor which includes fatigue and is more prevalent in female dominated jobs, has a point spread from 5-25 points. A position with heavy physical demands will therefore receive an evaluation from 5 to 25 points higher than a position with heavy mental or visual demands. Because males dominate the former group of jobs, male employees are more likely to be in higher evaluated, higher paid positions.

Similarly, “working conditions” as a job factor considers the general environment in which a job is performed. The greater the exposure to heat, cold, dust, noise or odors, the higher the degree assigned to the job factor. Since office jobs are generally performed under “good” working conditions, female dominated clerical positions receive lower evaluations than male dominated jobs.

The potential for bias in the point-factor job evaluation system is made even more pronounced because positions in a given job hierarchy will frequently receive total scores of between 200 and 400 points. The 5 to 25 point differential based on built-in biases in the physical and mental demand factors alone can impact the overall job evaluation point total. Couple this with the
higher ratings which factory workers receive based on working conditions and a 10 to 20 percent evaluation differential between male and female dominated jobs becomes likely. Because the evaluated worth of a position translates into wages, the link between job evaluation and wage discrimination is direct.

In summary, the subjectivity of internal job evaluation leaves the door open for personal perceptions of job worth unrelated to actual value, as well as more direct feelings of bias against female dominated jobs. The result is a colored evaluation process. Because women are segregated into specific kinds of jobs, subjective calculations of job worth can and do lead to lower valuations of the jobs women are most likely to occupy.

B. External Job Evaluation – Market Rate Analysis:

Once internal job evaluation is complete many organizations engage in a comparison of internal variations with the market's valuation of similar jobs. The survey process generally takes three forms: First, because compensation professionals maintain informal networks with others in the industry, salary and wage data exchange often occurs over the telephone regarding a limited number of positions. Second, many companies conduct their own area wage and salary surveys which focus on a wider variety of positions and request a greater amount of data from survey participants. Third, companies often participate in commercial salary and wage surveys, submitting data on relevant job matches and receiving, in various statistical forms, data on the market's perception of a specific position's "worth."

Although market surveys take different forms, the potential for wage discrimination is the same: The market represents what individual companies pay their people based primarily on internal evaluation, and to a lesser extent supply and demand. The market therefore represents no more than a compilation of wage data that reflects individual company biases caused by job evaluation systems, as well as the effects of supply and demand for given positions. The objective of plaintiffs suing under comparable worth theory must, then, be to separate nondiscriminatory economic factors from potentially discriminatory job analysis systems.

To understand how the market wage may be viewed as a source of individual company discrimination, it is essential to understand the process by which compensation professionals "survey" the market. The least formal method of gathering market data is the telephone survey. The process is simple. Several key positions are earmarked and companies in the relevant labor market are contacted and asked to exchange average salary and salary range data for the highlighted jobs. In exchange, participants may receive a compilation of survey results, coded to preserve confidentiality. Job matches are often performed without the aid of job descriptions, since the jobs surveyed are usually well known to the survey participants and the surveyor.

Larger companies test the market by conducting more extensive area salary and wage surveys. Such surveys cover more jobs and often request more sophisticated and varied data than do phone surveys. A typical study will request input on 10-20 jobs in each of the production, clerical and technical job classifications. As with the phone survey, data requested will focus on average salaries paid and high/low salaries for each position, in addition to salary range (minimum, midpoint, maximum) and "number of incumbents" inquiries. Job matches are performed by comparing brief job descriptions prepared by the surveying company to those in the surveyed company's structure.

The most formal and complex method of gathering market data is participation in a commercial salary survey. Most companies participate in at least one, and often as many as eight or ten surveys in a given year. Survey participation involves several steps to insure the accuracy and quality of the data input, and the corresponding usefulness of the survey output. First, descriptions of all survey jobs are compared with the surveyed company position descriptions. Many surveys allow for "fine-tuning" of descriptions where the match is close, but not exact, providing several levels of frequently utilized positions. This increases the likelihood of a job match and provides an opportunity to measure salary progression from level to level in multi-level positions.

The survey report generated may also take a variety of forms. Certain surveys are highly computerized and allow for virtually infinite data-base manipulation. Others simply present individualized data, coded to preserve confidentiality. Still others produce data in regression line form.

As with internal job evaluation, the market wage comparison involves a degree of subjectivity that may support a claim of wage discrimination. Although surveys attempt to objectify the data submission process as much as possible, a certain amount of subjectivity in matching company jobs with survey position descriptions is inevitable. Ambiguous survey position descriptions only add to the problem.

There is, however, a far less obvious form of discrimination present in the use of market data: Because salary surveys simply gather individual company wage information, any biases inherent in individual data are transferred directly to the survey data. When market results are then reincorporated into the survey participant's wage structure, the participant's own biases, as well as those of the market, are embedded into its internal system. In this manner, prejudices concerning female dominated jobs, and the biases built into job evaluation plans, are reinforced through the use of survey data representing the individual biases of hundreds of companies. Although this form of wage discrimination may not be intentional, it serves to further the wage segregation between men and women that has lead to the oft quoted 60% wage gap.

Companies utilize a variety of salary and wage data gathering techniques, limited by organization resources and expertise in compensation program administration. The results of these surveys are generally used to gauge competitiveness with the market and for salary planning purposes to adjust salary ranges to changing market conditions. But market data is also used to substantiate existing job evaluations by insuring wages paid each position "match" wages paid similar jobs in the market. If a company wage approximates the market wage rate, few organizations will reevaluate the position surveyed. In this manner, the market rate may act to legitimize biases built into individual company job analysis systems.

II. PROVING WAGE DISCRIMINATION:

A. Introduction:

Although the process of job evaluation appears fraught with subjectivity which may lead to gender and wage discrimination, the question remains whether current law provides an adequate means of redress. The Equal Pay Act has, since 1963, provided the primary means of addressing sex-based wage discrimination claims. A
cause of action under the Act is severely limited, however, by the "equal pay for equal work" requirement, which is interpreted as only allowing comparisons between jobs of virtually equal content. Title VII, though modified to allow comparisons between jobs of "substantially equal" work, has not yet been interpreted by the Supreme Court to support a claim under comparable worth. It is clear therefore, that because comparable worth analysis often involves comparisons between jobs with totally different functions and duties, Title VII provides the only statutory basis for recovery. The issue, however, is which theory of recovery, disparate treatment, disparate impact, or both, provides a vehicle for proving wage discrimination where the jobs in question differ substantially in content.

B. Disparate Treatment Theory:

In McDonnell Douglas v. Green, the Supreme Court set out the basic allocation of burdens and the order of presentation of proof in a Title VII case. Initially, it is the plaintiff who bears the burden of proving, by a preponderance of the evidence, that the defendant engaged in discriminatory conduct. The function of the prima facie case in this instance is to eliminate the most common nondiscriminatory reasons for the plaintiff's injury. The prima facie case also serves to create an inference of discrimination that if the acts alleged are otherwise unexplained, they are more likely than not based on impermissible conduct by the employer. After the prima facie case has been established, the burden of proof shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the plaintiff's alleged discrimination. The employer's burden, however, is not to persuade, it is merely to raise sufficient questions of fact to send the inquiry to "a new level of burden, however, is not to persuade, it is merely to raise sufficient questions of fact to send the inquiry to "a new level of

III. Disparate Impact As An Alternative Theory For Plaintiffs In Comparable Worth Cases:

Unlike disparate treatment theory, disparate impact analysis requires no showing by the plaintiff of intentional discrimination by the defendant. Rather, the plaintiff's burden is to show that the employer's challenged employment practice, though facially neutral in form, is discriminatory in operation. Once shown, the burden of production shifts to the employer to show that the challenged policy has "a manifest relationship to the employment in question." If the employer proves the policy is job-related, the plaintiff may then show that a nondiscriminatory alternative exists which would still satisfy the employer's legitimate interests.

Although disparate impact theory has been successfully applied to claims of discriminatory overtime and benefits policies under Title VII, the theory has not gained acceptance in the comparable worth area. There is no compelling reason, however, why disparate impact should not apply to comparable worth cases, particularly those involving discriminatory job evaluation.
considered. If direct evidence of discrimination is lacking, as where an employer follows an established, albeit discriminatory, pay practice, or where no analysis indicating a bias in the system exists, proof of intentional discrimination is difficult.

Finally, the evidentiary advantages available to plaintiffs under disparate impact theory, namely that the burden of persuasion and production both shift to the defendant after the plaintiff establishes a prima facie case, do not unreasonably tax the employer. In fact, an employer in the compensation context is in a far better position to obtain information concerning the needs of its business and the industry as a whole, comparative job requirements, and applicant pool data. It is appropriate, therefore, for the courts to shift the burden to the employer once the plaintiff has demonstrated injury through disparate impact.

1. The Plaintiff’s Case Under Disparate Impact Theory:

Under traditional theory, a plaintiff need only demonstrate that a neutral employer policy has a disproportionately harsh impact on women or other members of a protected class. Some commentators postulate that a similar burden awaits plaintiffs under comparable worth theory. To establish a prima facie case of disparate impact, a plaintiff must show that her job is 70% or more female dominated, and that the employer’s job evaluation system, though neutral on its face, has led to discriminatory wage practices. The latter may be shown by contrasting average salary data for female and male dominated job incumbents.

A significant concern surrounding the use of disparate impact analysis is whether an inference of discrimination can be established merely from the fact that women earn less than do men. To address this issue, plaintiffs should attack the subjectivity of the job evaluation process directly. Every element of bias should be explored and presented to the court for proof of a business relationship by the defendant once the burden shifts. Clearly, evidence that a defendant knew discrimination existed or that it was deviating from compensation policy of practice will facilitate establishment of the inference. The bias argument is particularly strong because of the growing consensus among compensation experts that job evaluation systems serve to perpetuate wage relationships which reflect historic discriminatory market differentials and pay practices.

2. Employer Defenses Under Disparate Impact Theory:

As noted, under traditional Title VII disparate impact analysis, once the plaintiff establishes a prima facie case, the burden of proof shifts to the employer to justify use of the challenged policy as a business necessity. The employer must show that the challenged policy bears a demonstrable relationship to the employment issue in question. Unlike traditional Title VII cases, however, employers in wage discrimination cases have the added defenses available under the EPA.

Although all four EPA affirmative defenses are potentially applicable, only the last defense, a “factor other than sex,” would appear to apply directly, as none of the other defenses deal with practices that involve determinations of wage rates that do not distinguish among employees themselves.

To date, several “factors other than sex” have proven to be effective defenses in comparable worth claims, including stated policies to provide pay differentials to cure absenteeism or to insure retention of certain employees. But by far the most controversial defense, and potentially the one most devastating to the plaintiff’s case, is the market-based defense recognized in Christensen v. Iowa.

In Christensen, the plaintiffs contended that their employer’s practice of paying male plant workers more than female clerical workers of similar seniority, where the jobs were of equal worth to the organization, constituted sex discrimination. The Eighth Circuit rejected the plaintiff’s claims, stating that they “ignor[ed] economic realities.” In doing so, the court provided express approval of the employer’s defense based on local market wage rates. The fact that the market rate was higher for male dominated jobs than for female dominated positions, according to the court, was a factor of supply and demand and the presence of collective bargaining forces in the market, not wage discrimination. Title VII, the court opined, does not mandate that employers disregard the market in setting wage rates for genuinely different classifications of work.

The Christensen court’s reasoning, though possessing a degree of intuitive sense, may not be supportable after Gunther. In adopting the four EPA defenses to Title VII, Gunther arguably incorporated the Court’s holding in Corning Glass Works that market factors allowing employment of women at lower rates than men do not constitute a “factor other than sex.” Pay differentials, if they are to exist at all, the Court reasoned, must be based on valid differences in job content, not simply because women are the only employees willing to work for a lower wage. An employer cannot take advantage of such a
market forces and the resulting salary differential that exists between engineer and personnel generalist positions is based on purely economic reasons. In this way, supply and demand can be a "factor other than sex" sufficient to justify the differential.

Notwithstanding Gunther's implicit rejection of the "market-based" defense, the defense is faulty at another level: Because so many factors affect the market rate, reliance on the "market," without isolating the nondiscriminatory factors that affect it, may be inadequate as a defense. The courts have already indicated under Title VII that it is the defendant's burden to articulate a business justification for a challenged policy's disparate results. 125 Absent articulation of a viable defense, it is presumed that discrimination is the cause for statistical data suggesting discrimination, and a nebulous defense based on the "market rate" may not suffice to rebut this presumption. 126 To effectively use the market as a defense, therefore, an employer should be required to break the rate down to its constituent parts. The portion of the rate differential due to supply and demand, geographic wage differentials, seniority and industry variations should be identified to give substance to the otherwise ambiguous term, "market rate." The burden would then shift to the plaintiff under disparate impact analysis to prove existence of a nondiscriminatory alternative which would still satisfy the employer's burden. 127

Under comparable worth theory, plaintiffs may attack the employer's use of the market rate as discriminatory, or they may attack the employer's entire job evaluation system as biased. In the latter case, the plaintiff is essentially attacking the factors used in the job evaluation process, or the subjectivity of the process itself. Therefore, one viable defense may be to challenge the plaintiff's case from an evidentiary perspective by stressing steps the employer has taken to "objectify" its job evaluation plan. Insuring that female and male evaluators participate equally in the job analysis, and that factor weightings which favor male jobs over female positions are eliminated, are two preventative steps that should be taken before litigation and then emphasized at trial. 128 It is unlikely, however, that reliance on the company's job evaluation process itself as a means of promoting a fair and equitable salary administration program will suffice as a valid business justification for a biased system. Even an employer who relies on the process as its defense would have to demonstrate that the evaluation process relates to the job evaluated, and that no less discriminatory alternative job evaluation plan exists for setting wages. 129

**IV. CONCLUSION:**

The doctrine of comparable worth has evolved to challenge sex-based wage discrimination between male and female dominated jobs, where job content is dissimilar but job worth to the organization is comparable. At the heart of the comparable worth issue is the process of job evaluation, which is central to establishment of wages in the workforce. Because job evaluation is inherently subjective, the process has been challenged as a primary cause of wage discrimination. Positions with job characteristics typical of female dominated jobs are often evaluated at lower levels and job incumbents receive lower wages than positions with typically male job characteristics.

For all its intuitive appeal, comparable worth has not gained widespread judicial acceptance as an adjunct to Title VII. Although some plaintiffs have successfully maintained a cause of action using disparate treatment theory, disparate impact has not yet proved a successful basis for challenging a job evaluation system, absent direct evidence of intentional discrimination. What is needed is a definitive statement from the Supreme Court on the viability of comparable worth under Title VII. Until that occurs, proponents of comparable worth must remain content to formulate more refined attacks on the subjectivity of the job evaluation process itself.
Footnotes

1. AFSCME v. Washington, 38 FEP Cases 1353 (9th Cir. 1985), rev'g 33 FEP Cases 816 (D. Wash. 1983).
2. Interview with Dr. Charles A. Dailey, March 15, 1985. Dr. Dailey is a Ph.D in industrial psychology, specializing in the behavioral aspects of employees and employee-supervisor relationships.
4. Id.
7. See Blumrosen, supra note 3, at 438-29 (comparable worth analysis incorporates internal and external valuation systems used by companies).
8. Market valuation is the process by which a company measures salary paid a given job against the average salary paid by other companies in the relevant labor market. See infra notes 48-65 and accompanying text (discussing market rate analysis).
9. See infra notes 48-65 and accompanying text (discussing market rate analysis).
10. The doctrine of comparable worth dates back at least to Christensen v. Iowa, 563 F.2d 353 (7th Cir. 1977), but it has yet to gain acceptance at the Supreme Court. See County of Washington v. Gunther, 452 U.S. 161, 168 n.6 (1981) (noting the controversial nature of the doctrine).
11. The cost estimate for the back pay award in AFSCME v. Washington was in excess of $1 billion. Fifteen thousand employees were involved in AFSCME; in a case pending in California, 100,000 employees are potentially involved.
12. See Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) (court refusing to apply Title VII to comparable worth case based on wage discrimination between jobs of different content unless plaintiff proves comparability).
15. AFSCME v. Washington, 33 FEP Cases 816, 821-23 (D. Wash. 1983). Although the district court in AFSCME stated that disparate impact theory was applied, the court also expressly based its decision on disparate treatment analysis. See id. at 821 (establishing intent through deliberate perpetuation of 20% wage differential).
16. See infra notes 20-65 and accompanying text.
17. See infra notes 66-87 and accompanying text.
18. See infra notes 88-109 and accompanying text.
19. See infra notes 110-133 and accompanying text.
20. See generally Blumrosen, supra note 3, at 428-44.
21. Factor analysis is the process by which jobs are evaluated according to the complexity and magnitude of certain factors present in the job, such as knowledge, experience, working conditions and skills. See infra note 35 and accompanying text (discussing factor weighting).
22. Factor weights represent the value of each factor to the organization. Factors of greater importance receive a higher weighting. See infra note 35 and accompanying text (discussing factor weighting).
23. A position is "female or male dominated" when 70% or more of the incumbents in the job are of one sex. See Blumrosen, supra note 3, at 400 n.3 (discussing sex domination in jobs).
24. See Blumrosen, supra note 3, at 422 (market rate transmits general market bias to individual company data).
25. Id.
27. Id.
28. Id. at 60.
29. See Henderson, supra note 26, at 111 (discussing extent of subjectivity in job evaluation process).
30. See generally Blumrosen, supra note 3, at 402-15 (discussing historical, sociological and psychological antecedents of job and wage segregation).
31. See Henderson, supra note 26, at 49 (compensation manager considers qualities that determine wage basis for position).
32. See Blumrosen, supra note 3 at 432 & n.140 (discussing "universal factors" in job evaluation). Although the discussion which follows focuses on job evaluation of non exempt (based upon Fair Labor Standard Act standards) positions, the same arguments regarding subjectivity apply with even greater force to the evaluation of exempt positions. Exempt positions are tailored to meet the needs of the organization and often those of the incumbent. To the extent that these requirements are based on quantifiable factors, objectivity can be assured. But where positions involve research or other highly analytical tasks, quantifiable criterion are difficult to define. In these individual contributor positions, there is also a tendency to confuse job worth with the incumbent's ability and performance which further detracts from the objectivity of the evaluation.
33. For example, "skill" may combine years of training and length of time required to become competent at the job. "Knowledge" may incorporate years of formal education and prior experience. "Attendant responsibility" may consider the likelihood and impact of error inherent in the job.
34. A comparison of the "years of training" factor can thus be made between two totally different positions. If a secretary requires 12-16 months training adequately to perform her job, and a loading dock worker needs 4-8 months, the secretary position will be evaluated at a higher degree and receive a greater number of points for that factor.
35. For example, one commonly used job evaluation model assigns 5 points to the first degree for the visual demand sub-factor, but 34 points for the first degree of education sub-factor. Education therefore receives a higher weighted value than does visual demand.
37. See Blumrosen, supra note 3, at 435 (value perceptions of job analyst may influence what information is collected).
38. See Blumrosen, supra note 3, at 435. Cf. Henderson, supra note 26, at 95. Professor Blumrosen also notes that the manner in which information is requested can bias a job analysis. Blumrosen, supra note 3, at 435. If the questionnaire used to obtain data fails to list manual dexterity as a skill requirement, or excludes mental fatigue from a list of undesirable working conditions, a secretarial position is unlikely to receive an accurate evaluation. Blumrosen, supra note 3, at 435.
39. See Blumrosen, supra note 3, at 436 (discussing job description).
40. See Blumrosen, supra note 3, at 438-39 (discussing historical, sociological and psychological factors impacting the job factor selection process).
41. See Blumrosen, supra note 3, at 437-38. Negotiation is another factor typically viewed as a male role and therefore highly rated. However, counselling, which is more typical to female dominated jobs, normally receives a lower evaluation even though the skills required may be similar. Blumrosen, supra note 3, at 437. See NAS Report, supra note 6, at 37-38.
42. Blumrosen, supra note 3, at 437.
43. See Blumrosen, supra note 3, at 437 (white or male evaluators more likely to understand difficulties of white or male dominated jobs than minority or female evaluators).
44. See Blumrosen, supra note 3, at 437-40 (discussing subjectivity in weighing compensable factors).
45. See Blumrosen, supra note 3, at 437 (subjectivity often involved in determining relative importance of each factor).
46. See Blumrosen, supra note 3, at 437 (working conditions typically distinguish male and female dominated jobs).
47. See Blumrosen, supra note 3, at 399-400.
The statistics are compelling. One-half of all working women work in positions that are 70% female. Weiskoff, "Women's Place in the Labor Market," 62 Amer. Econ. Rev. 161, 163 (1972). More than one-quarter work in jobs that are 95% female. Women's Bureau, U.S. Dept. of Labor, Handbook on Women Workers 89-91 (1975). The statistics on racial segregation in the workplace are also significant. See generally Blumrosen, supra note 7, at 400 n.3.

48. See Blumrosen, supra note 3, at 441 (wage setting necessarily involves comparison to the market).

49. Interview with Robert Rodina, Corporate Director of Compensation and Benefits, April 26, 1985.

50. Blumrosen, supra note 3, at 441-42.

51. See Blumrosen, supra note 3, at 442 (market rate represents cumulative bias of individual companies).

52. The potential exists for manipulation of salary data to keep wage rates artificially low. J. Robinson, Economics of Imperfect Competition 218 (2d ed. 1968) (wage differentials occur when supply of labor exceeds demand allowing employers to manipulate the market through hiring rates). Even if wage collusion did exist, there is some question as to whether it in fact violates anti-trust laws. See Blumrosen, supra note 3, at 449 n.196 (collusion in wage setting may be excluded from anti-trust laws).

53. Electrical engineer positions are typically the subject of telephone surveys. Interview with Robert Rodina, April 26, 1985. These positions are generally uniform across the electronics industry and their duties and accountabilities are well-established. Id.

54. Cost and time factors as well as the relative sophistication of the surveying company usually dictate whether such a survey is attempted. Id.

55. Company-run surveys will generally focus on nonexempt jobs, plant supervisory and management positions, and other more generic individual contributor positions, such as engineers, accountants. Surveys of salesperson salaries and incentive plans are also not unusual. Interview with Robert Rodina, April 26, 1985.

56. General company information, such as sales volume, number of employees or type of product manufactured, are also requested to allow industry and geographic wage differentials to be considered in compiling the data. Interview with Robert Rodina, April 26, 1985.

57. The number of surveys in which companies participate is a function of cost, company size, compensation program sophistication and the type of jobs for which survey data is needed. Positions of national scope need data from a broader variety of companies in order that a valid market comparison can be made. Interview with Robert Rodina, April 26, 1985.

58. The fine-tuning process may also involve coding of the survey job match as an "A" — company job stronger than survey job; "B" — company and survey jobs equivalent; or "C" — company job weaker than survey job. Interview with Robert Rodina, April 26, 1985.

59. Engineers, accountants and secretaries positions, to name but a few, are often multi-leveled according to experience, education and responsibility or accountability. For example, a typical engineer progression may run as follows: associate engineer, engineer, senior engineer, principal engineer, consulting engineer.

60. Survey participants in these computerized surveys will often request that certain other companies' data be matched against their own, or that data from companies in a specific geographic region or industry be included in their report.

61. Regression line form refers to a graphic portrayal of salary data, built around the mathematical formula, y = mx + b. Depending on the variables used, this equation produces a line that slants more, or less steeply upward and to the right when presented graphically. Market data is represented along one line, the participating company's data presented along another. Thus, comparisons with the market are visual, and adjustments in salary ranges are often accomplished through adjustments to the y = mx + b formula.

62. Blumrosen, supra note 3, at 442.

63. Blumrosen, supra note 3, at 442.

64. See Women's Bureau, Employment Standards Administration, U.S. Dept. of Labor, the Earnings Gap Between Women and Men 1-5 (1975).

65. Salary planning is a process in which most compensation professionals annually engage to establish wage and salary objectives for the coming year. Market movement is monitored from year-to-year and internal salary structures are moved accordingly. Merit budgets, the amount a company allocates to compensate employees based on satisfaction of performance objectives, are also grounded upon establishment of market movement for the upcoming year.


67. See County of Washington v. Gunther, 452 U.S. 161, 166 (1981) (Court emphasizing decision not based on "controversial concept of comparable worth").

68. E.g., Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981).


70. Texas Dept of Comm. Affairs v. Burdine, 450 U.S. 248 (1981). The burden is not onerous. The plaintiff need only allege that "she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Id. at 253.


72. See id. Under the McDonnell Douglas standard, the plaintiff retains the burden of persuasion at all times. Id. A question remains, however, whether the burden of persuasion and production shift to the employer, as is the case in EPA cases, see Brennan v. Corning Glass Works, 417 U.S. 188 (1974), or whether only the burden of production shifts, as is true in Title VII cases. See Texas Dept of Comm. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

73. Although the issue is unresolved, proponents of the EPA burden contend that because Gunther failed to modify in any way the burden of proof in wage discrimination cases brought under Title VII, an argument exists that the higher burden of proof of the EPA should control. The Supreme Court in Gunther added weight to the EPA position, observing that the Bennett Amendment was intended as a "technical" device to insure consistent application of Title VII and the EPA. County of Washington v. Gunther, 452 U.S. at 174-75. In the interests of consistency, it would appear reasonable to presume that comparable worth cases should not be treated any differently under Title VII than they would be treated under the EPA.

Moreover, the concepts underlying the decisions which gave rise to the Court's decision in Corning Glass Works are equally prevalent in cases where unequal pay or comparable worth is at issue. See Brennan v. Corning Glass Works, 417 U.S. 188, 196 (1974). According to the Court, the shifting of the burden of proof on the four EPA affirmative defenses "is consistent with the general rule that the application of an exception under the FLSA is a matter of affirmative defense on which the employer has the burden of proof." Id. at 196-97 & n.12. The practical basis for the Court's reasoning is that establishment of a defense for a wage differential is within the peculiar knowledge of the employer. 29 C.F.R. § 800.14(h) (1981).
female, that their work was substantially similar to that performed by male workers, and they received less pay).

78. 33 FEP Cases 816, 817-20 (D. Wash. 1983).

79. Id. at 817-18.

80. Id. at 822-23.


82. Id. at 180. The women were to be paid 95% of the male salary because their positions were evaluated at 95% of the value of the male guard jobs. Id. at 180-181.

83. Id. at 180-81.

84. Id. at 180.

85. See supra notes 37-53 and accompanying text (discussing subjectivity in job evaluation generally).


87. See infra pp. 21-24 (discussing market rate defense).


89. Id. See also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

90. Id.; Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).


92. See Blumrosen, supra note 3, at 458 n.224. Two cases have addressed comparable worth through disparate impact theory. See Bryant v. International Schools Service, Inc., 675 F.2d 562 (3d Cir. 1982) (applying disparate impact theory to case involving compensation issue); AFSCME v. Washington, 33 FEP Cases 816, 821-23 (D. Wash 1983). Although the AFSCME court states that disparate impact theory was applied, the court also expressly based its decision on disparate treatment analysis. See id. at 821 (establishing intent through deliberate perpetuation of 20% wage differential).


94. Id. at 744.

95. The Supreme Court's treatment of bona fide seniority systems under Title VII is a case in point. See Teamsters v. United States, 431 U.S. 324 (1977) and its progeny.

96. See Market Rate, supra note 94, at 745.


104. See Blumrosen, supra note 3 at 460. "To make a prima facie case of wage discrimination ... a plaintiff should have to show only that the job has been and/or is presently identified as a minority or female job." Id.


106. Newmann, supra note 98, at 291.

107. See supra note 46-47 and accompanying text (discussing subjectivity in evaluation process).

108. See supra notes 46 and accompanying text (discussing bias in job evaluation plan where physical effort is more highly valued than manual dexterity, the former a trait of male dominated jobs, the latter a trait of female dominated jobs). But see The Comparable Worth Issue: A BNA Special Report (1981). Marsh Bates, a partner of Hay Associates, a compensation consulting firm, takes a contrary view of the tendency of job evaluation to hide past discrimination. "Job evaluations point out, rather than make, the fact that traditional women's jobs pay less that traditional male jobs. By using such evaluations systematically to reveal market-based pay differentials, an employer may transfer its burden of assigning equal pay for work of equal value to the marketplace ... ." Id. at 44.

109. Although Mr. Bates' correctly indicates that job evaluation plans effectively "flush out" pay discrimination in the market, his statement ignores the fact that a primary cause of pay differentials is discriminatory job evaluation plans themselves. Increasing public awareness of the problem may lead to litigation but does little to force a reevaluation of evaluation plans to eliminate bias-causing factors.


112. See County of Washington v. Gunther, 452 U.S. 161 (1981). The EPA defenses permit wage differentials based on seniority systems, merit systems, systems that measure earnings by quantity or quality of
production, or a differential based on any factor other than sex. 29 U.S. C. § 2-6 (d) (1) (1976).

113. See Newmann, supra note 98, at 290-91 (courts may require adjustments to Griggs standard to fit disparate impact theory to employment policy that does not select or distinguish between employees).


115. 563 F.2d 353 (8th Cir. 1977).

116. Id. at 354.

117. Id. at 356.

118. Id.

119. Id.

120. Id.


122. Id.

123. Id.

124. The fact that union membership on the whole has decreased over the past decade serves to further minimize the impact of union wages on the general market.

125. See supra notes 48-61 and accompanying text (discussing market survey techniques).

126. In 1982, less than 3000 hardware engineers were available to fill more than 10,000 positions open in New England. Interview with Gary Davis, Corporate Director of Employment, April 26, 1985.

127. Wage compression occurs when starting salaries paid recent college graduates increase faster than the salaries paid existing personnel increase through merit and cost of living pay raises. The problem has been particularly acute in engineering, where the starting salaries of new graduates have consistently exceeded the previous years' graduates.

128. By way of example, one Massachusetts computer manufacturer employed approximately 150 engineers in its first two engineering levels in 1981. With approximately 2000 employees, the engineer to employee ratio was 1:13. In personnel, however, the personnel generalist to total population ratio was approximately 1:100. In fact, electronic industry norms indicate that a 1:100 ratio of personnel staff to total employees is optimal from an efficiency perspective. Interview with Robert Rodina, April 26, 1985. Additionally, the number of applicants for personnel positions is consistently high and many positions are filled internally.


132. See Newmann, supra note 104, at 291 n.100. It has been suggested that a company may also defend on the basis that the minimum job requirement established through its evaluation plan do not accurately reflect the weight the company attaches to the job. See Market Rate, supra note 94, at 751. The danger in this approach is that the defense may be taken as an admission that the job evaluation system is somehow unreliable or too subjective. In either case, the defendant may be called upon to justify its reasons for its compensation policy, which may reveal a more subjective evaluation process based on the market or company personnel's own valuation of a job's intrinsic worth.

133. See Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974) (employer must show no less discriminatory process exists); Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir. 1971) (same); see also 29 C.F.R. § 1607.3 (b) (1981) (employer must validate test and show unavailability of suitable alternative). But see (Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer need not show less discriminatory alternative exists).
BOOK REVIEW

LABOR AND EMPLOYMENT LAW:
COMPLIANCE AND LITIGATION, by
Fredrick T. Golder, et. al. Published by
Callaghan and Co., 3201 Old Glenview
Rd. Wilmette, IL 60091

Reviewed by Professor Charles P. Kindregan

This book fills a need experienced by many lawyers in recent years. While there are many books on the market dealing with some aspect of labor and employment law, there is little in the literature as comprehensive and practical as this volume. It is a book which will be of assistance to the specialist who can use it both as a sophisticated checklist and a reference, but it will be of even greater use to the general practitioner who handles the occasional employment problem. This nicely balanced treatise-guidebook will be of use to both counsel for the employee and the employer. Personnel directors and others concerned with employment practices will also find it to be a handy reference.

The non-specialist who handles an employment law case from time to time can be exposed to many potential pitfalls. Even the specialist has to balance many different considerations. Changing employment practices, the decline of labor unions, increasing legislation on matters relating to pensions and workplace safety issues, rules and practices regarding arbitration and grievances, plant relocations, developing common law rules on employment issues, the evolution of a new employment at will law, new cases and statutes on discrimination and harrassment, the emergence of complex new health issues such as AIDS, the application of preemption doctrines, changing rules on workmen’s compensation and numerous other developments have made the practice of labor and employment law a complex and challenging affair for the lawyer. This book deals forthrightly with such developments, and it constitutes a major resource for the lawyer confronted with a case arising from the employment context.

The book begins with an analysis of common law rights, including the judicial expansion of employee rights outside of the traditional N.L.R.B. setting. Major tort and contract remedies are reviewed. Practical ideas for counsel representing both the employer and employee are presented. Litigation practice is discussed. The book also includes materials which will assist employers in minimizing problems.

The book also presents a helpful analysis of the collective bargaining process. Every major aspect of the bargaining process is examined. A review of grievance and arbitration practice includes many issues, including safety disputes, work assignments, job classification, promotion issues, discipline and frivolous grievances.

Issues relating to discrimination in employment are growing in importance, as reflected in both statutory law and a significant number of reported cases. These issues are examined from various angles, including the civil rights perspective, equal pay, age discrimination, sex discrimination and issues affecting the handicapped. Wage hour laws, health and safety issues and problems relating to employee benefits are accorded extensive treatment.

An excellent feature of this volume is that each chapter contains helpful material on litigation which will assist the lawyer in structuring a claim or defense. Each chapter also contains forms which will serve as useful guidelines in pleading a case.

This book should be included in the holdings of major law libraries, as well as in the practice libraries of firms which do any labor and employment law work. Even the general practitioner who handles only the occasional employment case will find it a worthwhile investment to have quick access to the book in his or her library.

Several of the authors of this treatise have a close connection to Suffolk University Law School. The principal author, Fredrick T. Golder, is a graduate of the Law School, as is one of the contributing authors, Alan J. Kaplan. Another contributing author is Professor Marc D. Greenbaum, who teaches a course in labor law at Suffolk.

Suffolk’s Committee on Continuing Legal Education thought so much of this volume that it has been chosen to serve as the course book for the special two-day program on “Problems and Solutions in Labor Law,” which will be held at the Law School on May 1 and 2 (Friday and Saturday) 1987. Each enrollee in this program will receive a copy of the book. Several of the authors have also been selected to serve on the program faculty. Details of this program can be obtained from Carol Dunn, Center for Continuing Professional Development, Suffolk Univ. Law School, 41 Temple St., Boston, MA 02114 (617) 723-4700, Ext. 627.
FACULTY PUBLICATIONS:

Articles:


Contractual Aspects Inherent in the Student-University Relationship, by Prof. Victoria Dodd, Newsletter of New England Assn. of Collegiate Registrars and Admissions Officers (Sept. 1986).


Citations:


Prof. Charles Kindregan, cited in Walfram, Modern Legal Ethics, pp. 208 and 436.

Book Reviews:


Prof. Alexander Cella's three volume treatise on Administrative Law and Practice was reviewed in the Spring, 1986 issue of The Advocate.

Supplements:


Prof. Charles Kindregan is co-author of the 1986 supplements to *Mass. Pleading and Practice* (7 volumes), published by Matthew Bender Co. in October 1986.

Prof. Austin Stickells, 1986 supplement to *Federal Control of Business — Antitrust*.

Prof. John Sherman has contracted with Little, Brown and Co. to prepare the 1987 supplements for *Massachusetts Taxation*.

Summaries and Reprints:

Prof. Victoria Dodd's article on education law, Kansas L.Rev., is summarized in the Nov. 15, 1986 Newsletter of the A.A.L.S. Section on Law and Education.

Prof. Russell Murphy's article on State Constitutional Law in D.W.I. Litigation was reprinted in materials prepared by the A.B.A. Criminal Law Section on D.W.I. cases (May 16, 1986).

Recent Completions and Acceptances:

Prof. Robert P. Wasson recently completed a draft of an article titled: "A Conservative Activist in Strict Constructionist's Clothing; Judge Bork and 'Neutral Principles.'"

Prof. Charles Kindregan is the co-author of an article on tort reform recently accepted for publication in the St. Mary's Law Journal.

Prof. Jeffrey Wittenberg has been invited to prepare an article on products liability law for the Boston College Annual Survey.

Prof. Stephen Hicks is the author of an article on 19th century English Bankruptcy Law accepted for publication by The Legal History Review.

Prof. Linda C. Fentiman's article on insanity and the right to stand trial has been accepted by the Univ. of Miami Law Review.
Suffolk's National Moot Court Team Places Second in the Regional Competition

Suffolk University Law School's National Moot Court Team, Cheryl Jacques, Andrea Griffin, and Bruce Nicholls won its first four arguments before being narrowly defeated by Boston College in the finals of the Northeast Regional Competition at the Federal District Court in Boston on November 21, 1986. Suffolk's second place finish qualifies them for the finals of the National Moot Court Competition held annually in New York City at the end of January.

This year's problem involved whether a federal grand jury subpoena for the fee records of the attorney of a target of the investigation was properly quashed. The problem is based upon a Massachusetts case, U.S. v. Klubock, now pending before the First Circuit Court of Appeals.

The team defeated Boston University, University of Bridgeport, and Western New England Law School to qualify for the semifinals. They defeated Boston University a second time to get into the final round.

Hon. Herbert J. Stern, one of the nation's foremost advocacy lecturers, spent 4 days at Suffolk in the Fall, 1986 presenting a course on “Trying Cases to Win.” Judge Stern is here welcomed to Suffolk by Professor Charles Kindregan, director of continuing legal education. Stern is a United States District Court judge in New Jersey, and has been hailed as “one of the finest teachers of litigation in the nation” by James D. St. Clair. His career as a trial lawyer was profiled in the book “Tiger in the Courtroom,” and his work as a judge was presented in the book “Judgment in Berlin.” After almost a decade and a half on the federal bench Stern will retire into private practice in 1987, and has promised to return to Suffolk to again share his insights into trial advocacy.
SUFFOLK UNIVERSITY LAW SCHOOL
CENTER FOR CONTINUING PROFESSIONAL DEVELOPMENT

V.H.S. VIDEO TAPES FOR PRACTICING LAWYERS

As part of its continuing legal education program Suffolk University Law School has developed a series of color video-tapes which are useful to lawyers, legal educators and law libraries. These tapes are designed for use on an ordinary V.C.R. machine attached to a television set. Most of the tapes average 5 to 6 hours running time. Each tape is available at a cost of $125.00 and may be ordered directly from Suffolk's Center for Continuing Professional Development. These are unedited tapes of live programs. The year in which the tape was made is provided so the attorney can judge for himself or herself how current the material is.

Following is a list of the tapes currently available from the Center. A catalogue containing detailed descriptions of the context of each tape is available from the Center for Continuing Professional Development, Suffolk University Law School, 41 Temple Street, Boston, Massachusetts 02114 [phone (617) 723-4700, Ext. 627].

List Of Titles

Tape #1 Workshop On Division Of Property In A Divorce Case (1983)
Tape #2 Federal And State Civil Rights And Tort Claims
Tape #4 Child Custody In The Divorce Case (1985)
Tape #5 Tax Problems And Solutions In The General Practice Of Law (1984)
Tape #6 Workshop On Condominium And Co-operative Law (1984)
Tape #7 AIDS: Defining The Legal Issues (1985)
Tape #8 Problems And Solutions In Public Sector Labor Law (1986)
Tape #9 Proof Of Injury: Settlement And Trial Of Damage Issues In A Tort Case (1986)
Tape #11(A)(B) Practical Techniques Of Civil Practice In the District Courts (1985)
Tape #13 The Effective Use Of Demonstrative Evidence In Obtaining Settlements And Judgments (1985)
Tape #14 Workshop On Care And Protection Of Abused And Neglected Children (1984)
Tape #15 Handling The Child Support Case
Tape #16 Recent Developments In The Law (1984)
Tape #17 Recent Developments In The Law (1985)
Tape #18 Negotiating, Drafting and Litigating Pre-Nuptial Agreements (1986)
Tape #19 Handling the Drunk Driving Case In The District Court (1986)
Tape #20 Recent Developments In The Law (1986)
Timothy Donovan (J.D.), a Quincy resident for 40 years, died Thanksgiving Day in the Aberjona Nursing Center in Winchester. He was 83. Mr. Donovan was state banking commissioner from 1943 until 1952. After stepping down as banking commissioner, he ran a private law practice on Tremont Street, Boston, until his retirement in 1981. He was a lobbyist on Beacon Hill for the banking industry and he lectured throughout New England on banking, legal and legislative problems. An aspirant to the Democratic nomination for governor in 1953, he was defeated at the Democratic state convention. Mr. Donovan was born in Roxbury and was a graduate of the old High School of Commerce. He earned his law degree at Suffolk University.

Frank D. Elkavich (J.D. '73) died in November of 1985. Mr. Elkavich, 40, lived in Manchester, New Hampshire with his wife and two children. He lived in Quincy most of his life. He was a corporate lawyer, vice president and clerk for Hallmark Mortgage Co., Nashua, New Hampshire.

William Gannon (J.D.) died recently after a long illness. Mr. Gannon, 79, was a retired police chief in Revere and served 34 years on the force. As a World War II veteran, he was assigned to the Counter Intelligence Corps, and he was among the first wave of paratroopers to land on Normandy Beach. Mr. Gannon was a graduate of the FBI Academy in Washington D.C., Bentley College and Suffolk University Law School. He was a prosecuting officer at Chelsea District Court in the late 50s' and early 60s'.

Gerald Gerstein (J.D. '28) died at his home in Plantation, Florida on November 20, 1986. Mr. Gerstein was born in Russia in 1905. He specialized in bankruptcy practice.

Paul Richard Jones. The University was deeply saddened by the death of Paul Richard Jones, a friend to several generations of Law School faculty, students and alumni. A 1956 graduate of Suffolk he served the University in a number of capacities including bookstore manager, supervisor of the mailroom, alumni magazine editor and advisor to the Suffolk Journal. In recent years he was a key volunteer for the University's annual fund phonathons. At the time of his death he was serving as University Archivist. Paul Jones, a beloved and stalwart member of the University community, will be sorely missed.
Bostonians gather to celebrate the Red Sox after the World Series.