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U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union

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I. Introduction

"European employment doctrines [and policies] have always been a concern for United States-based multinational corporations."[1] Europe's employment-related social policy has generally protected workers more than that of the United States.[2] Indeed, the underlying employment law framework in the United States is the common law doctrine of employment at-will, which creates an indefinite employment relationship that either party may

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[1] Donald C. Dowling, *Worker Rights in Post-1992 European Communities: What "Social Europe" Means To United States-Based Multinational Employers*, 11 NW. J. INT'L L. & BUS. 564, 569 (1991).

[2] *See id.*

terminate at any time for any reason or no reason at all. [3] In contrast, the European model depends on "comparatively well-paid, highly skilled and organized workers that receive extensive social benefits."[4] European employment law traditions affirmatively guarantee job security. Thus, for employment of undefined length, an implicit assurance of unlimited job tenure exists.[5] In addition, both union and non-union workers are typically parties to written employment contracts.[6] While the European model exists broadly throughout the European Union, each Member State has distinct employment laws. With the passage of the Maastricht Treaty in 1992, however, the EU gained extended authority over social policy, a concept encompassing social welfare and labor law.[7]

This vision of one Union formed around the existing European Communities framework not only encompasses a single market with a single currency and the free movement of goods and people, but also a cohesive social policy including social welfare and employment laws. Consequently, the governmental institutions of the EU have embarked on a harmonization of employment policies across Member States.

Sex equality law is and has been a central focus in EU employment law.[8] Sex equality law (known as sex discrimination law in the United States) has occupied the time and resources of both administrators and litigators for several years.[9] Indeed, seven years have passed since the Maastricht Treaty expanded EU authority to include employment matters and the goal of harmonizing Member States' social policies. Consequently, American multinational corporations must know and understand current EU sex equality law.

This Comment will examine the current state of EU sex

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[3] *See id.* at 572.

[4] Peter Lange, *The Politics of the Social Dimension*, in EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY, 225, 227 n.8 (Alberta M. Sbragia ed., 1992).

[5] *See* Dowling, *supra* note 1, at 572-73.

[6] *See id.* at 573.

[7] *See infra* notes 21-27 and accompanying text.

[8] *See* CATHERINE BARNARD, EC EMPLOYMENT LAW § 4.1 (1996).

[9] *See Id.*

equality law using American law as a basis of comparison. As a foundation for understanding sex equality law in the EU, Part II of this Comment will describe the basic political and legal framework of the EU.[10] Part III will examine the principle of equal pay as it is applied in the United States and in the EU, focusing on the concept of comparable worth.[11] Part IV will discuss the broader concept of equal treatment law embodied in Title VII of the Civil Rights Act in the United States and in the Equal Treatment Directive in the EU.[12] Part V focuses on a specific area of law, sexual harassment, which has exploded in the U.S. and is currently in a state of expansion in the EU.[13] This Comment will conclude with observations about the unique and evolving nature of the EU and the consequent need for American multinational corporations to monitor the state of EU sex discrimination law.

II. The Political and Legal Framework of the European Union

A. The Founding Treaties

What is now known as the European Union was created in April 1951 when the Federal Republic of Germany, Belgium, France, Italy, Luxembourg, and the Netherlands entered into the Treaty Establishing the European Coal and Steel Community (ECSC), creating an international trade affiliation.[14] Six years later these nations further expanded their relationship by forming two additional communities, the European Economic Community (EEC)[15] and the European Atomic Energy Community (Euratom).[16] By 1986, the United Kingdom, Denmark, Ireland, Spain, Portugal,

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[10] *See infra* notes 14-66 and accompanying text.

[11] *See infra* notes 67-225 and accompanying text.

[12] *See infra* notes 226-425 and accompanying text.

[13] *See infra* notes 426-501 and accompanying text.

[14] TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY].

[15] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY].

[16] TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EURATOM TREATY].

and Greece had acceded, expanding the EEC to twelve members.[17] The same year, the EEC Treaty was amended by the Single European Act[18] that set the year 1992 as the goal for completing the internal market.[19] These three communities, the ECSC, EEC and Euratom, came to be identified as a single "European Community."[20] In 1992, the members ratified the Treaty on the European Union, or the Maastricht Treaty.[21] The Maastricht Treaty integrates the Member States into a political and economic union[22] by mandating the creation of a single European Union, constructed around the existing European Communities framework.[23] "Union," in this context, means a single currency, the free movement of goods and people, greater coordination of common defense and foreign affairs, and more expanded power over "social policy," a concept encompassing social welfare and labor law.[24] Specifically, the social policy provisions of the EC Treaty[25] are central to this examination of EU sex discrimination

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[17] *See* JO SHAW, LAW OF THE EUROPEAN UNION 4 (2d ed. 1996).

[18] Single European Act, 1987 O.J. (L 169) 1 [hereinafter SEA].

[19] *See* SHAW, *supra* note 17, at 5.

[20] *See id.*

[21] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, 1 C.M.L.R. 573 [hereinafter EC TREATY], incorporating changes by the Treaty on European Union, Feb. 7 1992 O.J. (C 224) 1, 1 C.M.L.R. 719 [hereinafter Maastricht Treaty]. Article G of the Treaty on European Union renames the European Economic Community the "European Community," but does not rename the other communities (ECSC and Euratom). *See* SHAW, *supra* note 17, at 5.

[22] *See* Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT. L. REV. 1427, 1427-28 (1993).

[23] *See* SHAW, *supra* note 17, at 5.

[24] Weiss, *supra* note 22, at 1427. Initially, the U.K. opted out of the social policy provisions. *See id.* at 1430. When no agreement could be reached as to the social provisions among the twelve Member States, all except the U.K. entered into the Agreement on Social Policy Concluded Between the Member States of the European Community With the Exception of United Kingdom of Great Britain and North Ireland. *See id.* at 1430-31. This Agreement was annexed to the Protocol on Social Policy, which was then annexed to the EC Treaty. *See id.* at 1431 (citing the Protocol on Social Policy annexed to Treaty on European Union, reprinted in 31 I.L.M. 357-58 (1992)). After Prime Minister Tony Blair's election the U.K. opted into the social policy provisions of the EC Treaty. *See* Charles Bremner, *EU Will Extend Social Laws to Britain*, TIMES (London), Sept. 24, 1997, at 12.

[25] *See* EC TREATY art. 117-20.

law.[26] These four treaties function as "a constitution or articles of confederation, creating the EC institutional superstructure and governing its relations with the Member States and their citizens."[27]

B. EU Institutions

The EU is a unique supranational entity. Its institutional structure differs from the governing structures of traditional international organizations in that Member States transfer substantive sovereign power to EU.[28] At the same time, comparisons between EU-Member State relations and U.S. federal-state relations lay only a foundational understanding of the EU's institutional framework.[29] The EU more closely resembles a confederation of nation-states with "a solid base of well-developed national legal systems" than a "unified federation."[30] Thus, in many areas of competence, the EU institutional framework functions to conform Member State laws. [31]

The EC Treaty establishes the institutional branches of the European Union: the European Parliament (EP), the Council of Ministers, the Commission, and the European Court of Justice (ECJ).[32] A clear separation of powers does not exist among the

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[26] *See* Weiss, *supra* note 22, at 1427 n.3. Specifically, Article 119 stipulates equal remuneration for equal work by men and women. *See* EC TREATY art. 119.

[27] Weiss, *supra* note 22, at 1430. Since the ratification of the Maastricht Treaty the EU has gained three new members. *See* SHAW, *supra* note 17, at 4. In 1995, Austria, Finland, and Sweden became EU Member States. *See id.*

[28] *See* SHAW, *supra* note 17, at 107.

[29] *See* Weiss, *supra* note 22, at 1434-35.

[30] *Id.* at 1435. Within the EU, advocates advance several different methods of integrating Europe. *See* SHAW, *supra* note 17, at 11-12. The "radical" Federalists promote a rapid transition to a United States of Europe model. *See id.* at 11. Neo-functionalists conceptualize a more pragmatic, incremental model of European integration. *See id.*

[31] *See* Weiss, *supra* note 22, at 1435.

[32] *See* ROGER BLANPAIN AND CHRIS ENGELS, EUROPEAN LABOUR LAW 42 (1998). The four-cornered institutional structure embodied by the Commission, the Council, the EP, and ECJ is supplemented by various subsidiary institutions including the Economic and Social Committee, the Court of Auditors, and the Committee of the Regions. *See* SHAW, *supra* note 17, at 107-08.

EU institutions.[33] The EC Treaty divides legislative functions between the Council and the Parliament, with input from the Commission and various subsidiary bodies.[34] The Commission mainly acts as the executive.[35] Yet the Council delegates powers to the Commission and retains control over that body through a committee structure, which in turn must exercise its powers with the cooperation of the Member States.[36] Finally, judiciary power vests in the ECJ. The ECJ supervises the divisions of power among the institutions and between the EU and the Member States.[37] Furthermore, unlike the Supreme Court of the United States, the ECJ has the power to give advisory opinions.[38]

C. Sources of Law

The EU has three main sources of law. The founding treaties, which the ECJ now characterizes as the "constitutional charter," constitute the primary sources of EU law.[39] Much of the "constitutional law," however, is created through the judicial pronouncements and decisions of the ECJ.[40] The ECJ has established four main principles of EU law: (1) EU law penetrates Member States' legal systems, must be applied by State courts,

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[33] *See* SHAW, *supra* note 17, at 107.

[34] *See id.*

[35] *See id.*

[36] *See id.* The EU law-making process begins when the Commission issues a proposal, sometimes with the advice of an EC committee. *See* Dowling, *supra* note 1, at 577. Next, the Parliament comments and suggests any changes. *See id.* The Commission may adopt the suggestions by amending the proposal and resubmitting it back to the Parliament. *See id.* Finally, the Commission must ratify the proposal. *See id.*

[37] *See* SHAW, *supra* note 17, at 107.

[38] *See id.* at 231-32. Because a central objective of the EU legal order is to achieve the intermeshing of EC law and national law, the legal framework must have an "organic mechanism for ensuring the uniform application of EC law." *Id.* Article 177 of the EC Treaty serves this function by providing a reference procedure for national courts to receive preliminary rulings from the ECJ on the interpretation of EC law. *See id.*

[39] SHAW, *supra* note 17, at 16.

[40] *See id.* The ECJ has played a central role in furthering integration of the EU through its "maximalist interpretation of the authority and effect of EC law, of the regulatory and policy-making competence of the institutions and of its power to control both the institutions and the Member States to ensure that 'the law is observed.'" *Id.* at 16.

and is subject to ECJ rulings on its interpretation, effect, and validity; (2) EU law bestows rights on individuals that State courts must enforce; (3) EU law preempts conflicting State law; and (4) Member States must reverse "the effects of violations" of EU law "which affect individuals."[41] The third source of law is legislative in nature. The EC Treaty empowers the Council and Commission to make regulations or decisions referred to as secondary or derived legislation.[42]

EU legislation is divided into hard and soft laws.[43] Soft laws, "including Recommendations, Opinions, and other non-Treaty Acts," serve as guidance to the Member States.[44] In contrast, hard laws, including Regulations, Directives, and Decisions, have a binding effect on all Member States or the addressees.[45] Decisions are measures that bind individual addressees rather than set a general norm, and may be addressed either to natural or legal persons or Member States.[46] Regulations serve to ensure uniformity of law throughout the Union, therefore they "automatically render inapplicable conflicting provisions of national law."[47] Directives enact EU policy objectives and, at the same time, achieve approximation of Member States' national law.[48] A directive requires Member States to enact or change national law to achieve an EU policy objective.[49] Thus, directives give Member States the flexibility to implement EU law while retaining their own legal traditions.[50] For these reasons, directives

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[41] *Id.* at 17.

[42] *See* BARNARD, *supra* note 8, § 1.28.

[43] *See id.*

[44] *Id.* § 1.33. Although soft laws technically have no binding force, the ECJ has ensured that they have some legal effect. For instance, in Case 113/75, Giordano Frecassetti v Amministrazione della Finanze della Stato, 1976 E.C.R. 983, the ECJ concluded that national courts may consider a recommendation when interpreting a national statute that implements the recommendation. *See* Case 113/75, 1976 E.C.R. 983, 996-97.

[45] *See* BARNARD, *supra* note 8, § 1.28.

[46] *See* BLANPAIN AND ENGELS, *supra* note 32, at 57.

[47] BARNARD, *supra* note 8, § 1.28.

[48] *See id.*

[49] *See* SHAW, *supra* note 17, at 200.

[50] *See* Weiss, *supra* note 22, at 1435.

are the most prevalent form of EU law.[51]

D. Directives

A complete understanding of sex discrimination law in the EU requires a closer examination of directives. Directives may be enforced at the Community level or at the national level.[52] At the Community level, the Commission may bring cases against a Member State for non-implementation or inadequate implementation of directives.[53] These cases have allowed the ECJ to rule on the reasons invoked by Member States to justify their failure to implement a particular directive.[54] As with other forms of hard law, the ECJ has held that directives are capable of direct judicial enforcement at the national level provided that they are sufficiently precise and unconditional.[55] Indeed, directives may give rise to rights which individuals can enforce in national courts.[56] More specifically, if a Member State has not yet adopted implementing national legislation or has done so improperly, individuals may bring claims to enforce the directive against their Member States in their national court systems.[57] This principle has been termed "vertical direct effect."[58] As held by the ECJ in *Marshall I*,[59] a directive in and of itself does not provide a cause of action between individuals, known as "horizontal direct effect."[60] Only national law can directly create obligations for individuals.[61]

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[51] *See id.*

[52] *See* SACHA PRECHAL, DIRECTIVES IN EUROPEAN COMMUNITY LAW 8-9 (1995).

[53] *See id.*

[54] *See id.* at 9.

[55] *See* SHAW, *supra* note 17, at 265. The ECJ determines whether a directive is sufficiently precise, unconditional, and nondiscretionary on a case by case basis. *See* Gina L. Ziccolella, Comment, *Marshall II: Enhancing the Remedy Available to Individuals for Gender Discrimination in the EC*, 18 FORDHAM INT'L L.J. 641, 657 (1994).

[56] *See* Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337.

[57] *See* Ziccolella, *supra* note 55, at 647.

[58] *See id.* at 648.

[59] Case 190/87, Marshall v. Southampton and South West Hampshire Area Health Auth., 1986 E.C.R 723 (known as *Marshall I*).

[60] *See id.*; *see also* PRECHAL, *supra* note 52, at 9.

[61] *See* PRECHAL, *supra* note 52, at 62.

Generally, a Member State must implement the directive through national legislation in order for a directive to have horizontal direct effect.[62] Under certain circumstances, however, a directive may create an affirmative obligation even though the Member State has not implemented the directive in national law.[63] The ECJ establishes the individual obligation by interpreting national law in conformity with the directive.[64] Individual obligations may also arise if the ECJ construes a directive together with a directly effective provision of the EC Treaty.[65] Certain treaty provisions may impose obligations on individuals; thus, if a provision of a directive and a relevant EC Treaty provision converge, the ECJ may impose the resulting obligation on individuals.[66]

III. Equal Pay

The EU principle of equal pay as an anti-discrimination concept is further advanced than the U.S. principle.[67] Specifically, EU law embraces the theory of comparable worth rejected by U.S. courts during the Reagan-Bush years.[68] This section will first discuss the differences between the "substantially equal" theory embodied in U.S. law and the EU standard of comparable worth. It will then examine the current state of equal pay law in the United States and in the EU. This section will also highlight the practical differences between the United States' and EU's application of the principle of equal pay.

A. Substantially Equal vs. Comparable Worth

Understanding the difference between the substantially equal theory and comparable worth is essential to comprehending the theoretical and practical differences between U.S. and EU law in this area. The substantially equal theory requires employers to pay

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[62] *See id.*

[63] *See id.*

[64] *See id.* The ECJ reached this result in Case C-177/88, Decker v. Stichting Vormingscentrum voor Jong Volwassenen Plus, 1990 E.C.R. I-3941.

[65] *See* PRECHAL, *supra* note 52, at 63.

[66] *See id.* at 63-64.

[67] *See* Dowling, *supra* note 1, at 605.

[68] *See* Weiss, *supra* note 22, at 1446.

equal compensation to male and female workers who perform jobs that require equal skill, effort, and responsibility under similar working conditions.[69] The controlling factor is not the job's official title, but its required duties.[70] Thus the U.S. standard is equal pay for equal work.[71] In contrast, the comparable worth standard embraced by EU law sets forth an equal pay for equal *value* standard.[72] Comparable worth theory posits that jobs in which women have historically worked should pay the same as jobs in which men have historically worked if these jobs have comparable value.[73]

B. U.S. Law

1. Equal Pay Act

In the United States, claims for equal pay fall under the Equal Pay Act of 1963[74] as well as under the broad prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964.[75] Congress intended the Equal Pay Act to be limited in scope, simply guaranteeing equal pay for equal work.[76] The statute

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[69] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[70] *See* Pearce v. Wichita County, 590 F.2d 128, 133 (5th Cir. 1979).

[71] *See* Cynthia Reddick-Martin, Note, *Women's Right to Equal Pay in the International Workplace: Is the United States a Poor Leader and a Poor Follower?*, 9 FLA. J. INT'L L. 479, 493 (1994).

[72] *See id.*

[73] *See* Stephen A. Mazurak, *Comparative Labor and Employment Law and the American Labor Lawyer*, 70 U. DET. MERCY L. REV. 531, 538-39 (1993).

[74] 29 U.S.C. § 206(d) (1988) (amending the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 210-219 (Supp. 1976)).

[75] 42 U.S.C. § 2000e-2 to -17 (1988).

[76] *See* County of Washington v. Gunther, 452 U.S. 161, 184-88 (1981) (Rehnquist, J., dissenting). Justice Rehnquist chronicled the legislative history of the Equal Pay Act and concluded it was limited only to "equal pay for equal work." *Id.* at 184. He stated, "Congress carefully considered and ultimately rejected the 'equal pay for comparable worth' standard." *Id.*; *see also* Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L. 358, 364-65, n.38 (1995). The relevant part of the Equal Pay Act reads:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to

has three main provisions: (1) the equal pay for equal work standard; (2) four affirmative defenses;[77] and (3) limitations on remedies.[78] The equal pay standard requires the plaintiff and comparator to have "substantially equal," not identical, jobs.[79] Women can bring a claim under the Equal Pay Act only if they are paid a lower rate as compared to men who have substantially equal jobs at the same business establishment.[80] Consequently, the Equal Pay Act has only eliminated the most egregious form of pay inequity, in which men and women perform identical jobs under different job titles and receive unequal pay.[81] In *Laffey v. Northwest Airlines*,[82] for instance, female "stewardesses" brought a claim under the Equal Pay Act asserting that although their jobs were equal to male "pursers," they were compensated at a lower rate.[83] The D.C. Circuit Court of Appeals affirmed the lower court's holding that defendant's compensation scheme violated the Equal Pay Act.[84] The plaintiffs in *Laffey* argued their claim under the equal pay theory.[85] Therefore, the court simply determined

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> employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

[77] *See* 29 U.S.C. § 206(d)(1)(i)-(iv).

[78] 29 U.S.C. § 206(d).

[79] Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 448-49 (D.C. Cir. 1976) ("[I]t is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable; the phrase 'equal work' does not mean that the jobs must be identical, but merely that they must be 'substantially equal.'" (quoting Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24)).

[80] *See* Libeson, *supra* note 76, at 365.

[81] *See id.* at 366.

[82] 567 F.2d 429 (D.C. Cir. 1976).

[83] *See id.* at 429.

[84] *See id.* at 452.

[85] *See* Libeson, *supra* note 76, at 366.

whether the work done by female stewardesses and male pursers was "substantially equal."[86] This determination is fundamentally different from attempting to ascertain the value of the work of the female stewardesses in comparison to that of male pursers.[87]

2. Title VII

In contrast to the narrower focus of the Equal Pay Act, Title VII of the Civil Rights Act of 1964[88] forbids discrimination on the basis of race, sex, religion, ethnicity, and national origin in all aspects of employment including compensation, terms, conditions, or privileges.[89] To prevent conflicts between the Equal Pay Act and Title VII, Senator Bennett introduced an amendment to Title VII.[90] The Bennett Amendment, added at section 703(h) of Title VII, provides that "[i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the (Equal Pay Act)]."[91] Despite the Bennett Amendment, confusion continued to surround the relationship between the Equal Pay Act and Title VII.[92]

The Supreme Court addressed the relationship between Title VII and the Equal Pay Act in *County of Washington v. Gunther*.[93] The Supreme Court held that a sex-based claim could be brought under Title VII even if it did not satisfy the "substantially equal" standard of the Equal Pay Act.[94] Specifically, the Court concluded that claims for sex-based wage discrimination may be brought under Title VII even if no member of the opposite sex holds an

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[86] *See id.*

[87] *See id.*

[88] *See* 42 U.S.C. § 2000e-2 to -17 (1988).

[89] *See* 42 U.S.C. § 2000e-2(a)(1).

[90] *See* 110 Cong. Rec. 13,647 (1964).

[91] Bennett Amendment, Pub. L. No. 88-352, 78 Stat. 241 (Title VII § 703(h)) (1994) (codified at 42 U.S.C. § 2000e-2).

[92] *See* Libeson, *supra* note 76, at 367-68.

[93] 452 U.S. 161 (1981).

[94] *See id.* at 165-66.

equal but higher paying job, provided that the employer's justification did not fall within the four affirmative defenses set out in the Equal Pay Act.[95] In addition, the Court also remarked on the narrowness of its holding and expressly avoided ruling on the issue of comparable worth.[96]

Furthermore, the Court emphasized that its interpretation did not render the Bennett Amendment "superfluous."[97] It noted that the incorporation of the fourth affirmative defense, "a differential based on any other factor than sex," could have "significant consequences" for Title VII claims.[98] Title VII prohibitions of discriminatory employment practices were intended to be broad including both overt discrimination and practices that are facially neutral but discriminatory in effect.[99] The framework of analysis and defenses in Title VII litigation reflect this approach.[100] In contrast, the EPA was designed to allow employers to defend against application of the EPA if their pay differentials are based on factors other than sex.[101] The Court, however, refused to establish the "precise contours of lawsuits challenging sex discrimination in compensation under Title VII."[102]

Thus, the Court in *Gunther* left the lower courts to determine what a plaintiff must prove to plead sex-based wage discrimination under Title VII. For instance, the Fifth and Seventh Circuits have held that plaintiffs must either produce direct evidence of intentional discrimination or meet the equal pay

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[95] *See id.* at 168.

[96] *See id.* at 166. The Court stated, "[w]e emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of 'comparable worth.' " *Id.*

[97] *Id.* at 171.

[98] *Id.* at 170.

[99] *See id.*

[100] *See id.*

[101] *See id.*

[102] *Id.* at 181. One could argue that the Court's enigmatic remarks about the fourth affirmative defense precludes the use of a disparate impact theory in Title VII sex-based wage discrimination claims. *See* MARK ROTHSTEIN ET AL., EMPLOYMENT LAW § 4.18 at 242 (1994). Consequently, an employer's reliance on prevailing market rates for setting wages, standing alone, could not be challenged under a disparate impact theory despite discriminatory effects on women's pay. *See id.*

standard of the EPA in order to state sex-based pay claims under Title VII.[103] Notably, these decisions severely limit disparate treatment claims under Title VII to the rare situations where direct evidence of intentional discrimination actually exists.[104] In comparison, the Eleventh Circuit in *Miranda v. B&B Cash Grocery Store*[105] rejected the approach taken by the Fifth and Seventh Circuits and held that disparate treatment claims of sex-based wage discrimination should be subject to the *Burdine*[106] framework that allows plaintiffs to use indirect evidence such as circumstances of discrimination to establish disparate treatment claims.[107]

3. Preclusion of Comparable Worth

The four affirmative defenses set out in the Equal Pay Act and incorporated into Title VII through the Bennett Amendment have precluded comparable worth as a theory for recovery.[108] Courts have refused to engage in their own comparable worth

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[103] *See* JOEL FRIEDMAN AND GEORGE M. STRICKLER, JR., CASES AND MATERIALS ON THE LAW OF EMPLOYMENT DISCRIMINATION 963 (4th ed. 1997) (citing Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) and EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988)).

[104] *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 534 (1993) (Souter, J., dissenting) ("[I]ndirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discriminatory motive."); *see also infra* notes 236-55 (discussing disparate treatment analysis).

[105] 975 F.2d 1518, 1526 (11th Cir. 1992).

[106] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). *See infra* notes 242-49 and accompanying text for further discussion of the *Burdine* analysis.

[107] *See* FRIEDMAN, *supra* note 103, at 963; *see also Miranda*, 975 F.2d at 1526 (construing *Gunther* to impose a "relaxed standard of similarity between male and female-occupied jobs").

[108] *See* UAW v. Michigan, 886 F.2d 766 (6th Cir. 1989) (concluding that comparable worth statistics alone are not sufficient to establish intentional discrimination under Title VII); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982) (rejecting the contention that plaintiffs could establish a prima facie case under Title VII by showing that women occupied a sex-segregated job in which they were paid less than men in sex-segregated jobs); Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982) (refusing to recognize plaintiffs' comparable worth-based claims under Title VII); Libeson, *supra* note 76, at 371-72.

evaluations[109] and job evaluations conducted by employers are often skewed to match prevailing market wages.[110] Notably, courts have held that under disparate treatment theory, employers' reliance on market rates of pay did not raise an inference of a discriminatory motive[111] nor would market reliance constitute a type of policy or practice required to assert a disparate impact claim.[112] Furthermore, courts have held that even if an employer does fund an independent wage study and fails to adopt its recommendations to ameliorate pay disparities between men and women, this failure does not establish the discriminatory motive for disparate treatment analysis.[113] Hence, if job valuation studies do not exist, plaintiffs often lack sufficient comparative evidence to support their claims, and in cases in which employers actually do their own studies, the labor market defense often justifies lower pay to women in sex-segregated occupations.[114]

C. EU Law

1. Article 119 of the EEC Treaty

Although US and EU law in the area of equal pay developed contemporaneously, each has adopted a different theoretical and practical approach to sex-based wage discrimination. The principle of equal pay is embodied in Article 119 of the EEC

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[109] *See* Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1134 (5th Cir. 1983) (concluding that if plaintiff could not provide "direct or otherwise clear evidence" of how her employer valued the differing responsibilities of her and her male successor, the court would not make its own subjective value judgment).

[110] *See* Libeson, *supra* note 76, at 371-72.

[111] *See* UAW v. Michigan, 886 F.2d at 766; AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

[112] *See* Beard v. Whitley County REMC, 656 F. Supp. 1461 (N.D. Ind. 1987).

[113] *See* AFSCME v. Washington, 770 F.2d at 1408 (concluding that employers should not be penalized for undertaking job evaluations; therefore, the state's failure to adopt the recommendations of the study is not sufficient to prove discriminatory motive for disparate treatment analysis); American Nurses Ass'n v. Illinois, 606 F. Supp. 1313 (N.D. Ill. 1985) (finding that the funding of a wage study did not compel the employer to adopt a wage schedule that the study supported because it would discourage employers from conducting studies).

[114] *See* Libeson, *supra* note 76, at 372.

Treaty.[115] Article 119 requires each Member State to "ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers."[116] Article 119 defines "remuneration" broadly as the "ordinary basic or minimum wage or salary and any additional emoluments . . . whether in cash or in kind, by the employer to the workers and arising out of the workers' employment."[117] Notably, the language of Article 119 is almost identical to the Equal Pay Act of 1963. Indeed, the primary aim of Article 119 is to end wage discrimination where a woman is employed in the same capacity as a man.[118]

As an EEC Treaty provision, Article 119 has vertical direct effect, granting rights directly to individuals against their Member State before their national courts.[119] Article 119 also has horizontal direct effect granting individuals the right to enforce the provision against other private individuals.[120]

2. *Equal Pay Directive*

In response to Member States' slow and inefficient implementation of Article 119,[121] the Council adopted the Equal Pay Directive[122] in 1975. The Equal Pay Directive broadened the meaning of Article 119. The Directive states, "the principle of equal pay for men and women outlined in Article 119 of the Treaty . . . means, for the same work or for work to which equal

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[115] *See* EEC TREATY art. 119.

[116] *Id.* Article 119 further states that "equal remuneration without discrimination based on sex means: (a) that remuneration for the same work at piece meal rates shall be calculated on the basis of the same unit of measurement; (b) that remuneration for work at time rates shall be the same for the same job." *Id.*

[117] *Id.*

[118] *See* Taline Aharonian, *Equal Value in the European Union: Fiction or Reality?*, 2 BUFF. J. INT'L L. 91, 93-94 (1995). ECJ has also recognized equal pay claims in which plaintiffs actually are paid less for a job of greater value than the comparator. *See* Case 157/86, Murphy v. Board of Telecomm Eirann, 1988 E.C.R. 673.

[119] *See* Case 26/62, Van Gend en Loos v. Administrate der Balastihpen, 1963 E.C.R. 1. For a detailed discussion of the fundamentals of EU law see *supra* notes 39-66 and accompanying text.

[120] *See* Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 455 (known as *Defrenne II*).

[121] *See* Libeson, *supra* note 76, at 378-79.

[122] Council Directive 75/117, 1975 O.J. (L 45) 19 [hereinafter Equal Pay Directive].

value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration."[123] The Equal Pay Directive enunciates the principle of comparable worth, and thus addresses "the undervaluing of jobs undertaken primarily by women, in particular where the women's jobs are found to be as demanding as different jobs more usually undertaken by men."[124]

3. Direct vs. Indirect Discrimination

The ECJ has held that Article 119 is directly applicable,[125] for both direct[126] and indirect discrimination.[127] Direct discrimination corresponds to what U.S. law labels disparate treatment, while indirect discrimination corresponds to the concept of disparate impact.[128] Direct discrimination, for instance, encompasses a claim that plaintiff is being paid less than her male comparator even though their jobs have equal value. A notable example of indirect discrimination is in the context of part-time work. The ECJ has held that "less favorable treatment of part-time workers is indirectly discriminatory where considerably fewer men than women work part-time."[129] Unless the employer can objectively

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[123] *Id.* art. 1. In Case 96/80, Jenkins v. Kingsgate, 1981 E.C.R. 911, the ECJ held that because Article 1 was enacted to facilitate the application of Article 119 of the EC Treaty , it has the same effect as Article 119 itself. Thus, Article 1 of the Directive has played a fundamental part in the development of equal pay law. *See* BARNARD, *supra* note 8, § 4.17.

[124] BARNARD, *supra* note 8, § 4.17.

[125] *See supra* notes 52-66 and accompanying text (discussing direct application of directives).

[126] *See* Case 43/75, Defrenne v. Sabena 1976 E.C.R. 455 (*Defrenne II*).

[127] *See* Case 96/80, Jenkins v. Kingsgate, 1981 E.C.R. 911.

[128] *See* BARNARD, *supra* note 8, §§ 4.25-4.26. For a discussion of the concepts of disparate treatment and disparate impact see *infra* notes 236-96 and accompanying text.

[129] BARNARD, *supra* note 8, § 4.28; *see* Case C-360/90, Atberterwohlfahrter der Stadt Berlin e. v. Bötel, 1992 E.C.R. I-3589; Case C-184/89, Nimz v. Frei Hansestadt Hamburg, 1991 E.C.R. 322; Case 33/89, Kowalska v. Freie und Hansestadt Hamburg, 1990 E.C.R. I-2591; Case 170/84, Bilka-Kaufhaus v. Weber von Hartz, 1986 E.C.R. 1607; Case 96/80, Jenkins v. Kingsgate, 1981 E.C.R. 911. The ECJ has also held that Article 119 is directly effective in complex areas of indirect discrimination including occupational pensions and survivors benefits. *See* Case C-102/88, Ruzius Wilbrink v. Bestuur van de Bedrfijfsvereniging voor Overheidsdiensten, 1989 E.C.R. 4311. Although beyond the scope of this Comment, equal pay law has developed in the

justify the less favorable treatment, the part-time workers are entitled to have the same compensation scheme, proportional to their working time, as the employer applies to full-time workers.[130]

4. *Job Classification Systems and Other Mechanisms for Assessment*

The equal value principle requires assessing the value of work through evaluating the qualifications of workers and clearly defining their various job functions.[131] Job classification systems and job evaluation schemes are ways to ascertain the value of work.[132] The Equal Pay Directive does not obligate an employer to utilize a job classification system to determine pay,[133] but if an employer does use one, paragraph two of Article 1 requires that it "must be based on the same criteria for both men and women and so drawn to exclude any discrimination on grounds of sex."[134] Thus, the Equal Pay Directive seeks to dismantle the inequities of job classification systems in current use.[135]

A job classification system is not the only vehicle for determining whether the work of a man and woman is of equal value. A national court may have to make the assessment as to whether the work is of equal value.[136] In *Commission v. UK*,[137] the ECJ held that job classifications were not the only method for

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complex areas of occupational pensions and survivors benefits. *See* BLANPAIN AND ENGELS, *supra* note 32, at 272.

[130] *See infra* notes 182-91 and accompanying text for an explanation of objective justification and employer defenses.

[131] *See* Aharonian, *supra* note 118, at 94.

[132] A distinction between job classification and job evaluations exists. A job classification is non-analytical in nature and is used to categorize jobs based on their relative worth, utilizing a whole job comparison. *See* BARNARD, *supra* note 8, § 4.18 n.53. In contrast, job evaluation is a more analytical process that separates a job's component elements for the process of comparison. *See id.* Although the analytical approach is more objective, evaluations are affected by the evaluator's subjective judgments, based on their individual attitudes, experiences, and backgrounds. *See id.*

[133] *See* Equal Pay Directive, *supra* note 122.

[134] *Id.* art 1.

[135] *See* Libeson, *supra* note 76, at 380-81. The Equal Pay Directive covers pay for work of greater value as well. *See* BARNARD, *supra* note 8, § 4.24.

[136] *See* BARNARD, *supra* note 8, § 4.21.

[137] *See* Case 61/81, Commission v. UK, 1982 E.C.R. 2601.

determining job values. The UK law at issue required the existence of a job classification system before a party could bring an equal value claim.[138] The ECJ held that individuals must have the right to initiate a claim that their work is of equal value to a comparator, notwithstanding employer objections in the context of adversary proceedings.[139] Consequently, Member States must endow an authority with requisite jurisdiction to determine whether different jobs are of equal value.[140]

Member States have adopted different types of authorities for equal value assessments.[141] In Belgium, France, Italy, and Luxembourg, labor inspectorates may resolve disputes.[142] Under Irish law, disputes over equal pay may be referred to one of three equality officers who investigate and give recommendations.[143]

5. The Assessment of Value

Job value assessment can be accomplished in several ways, all controversial.[144] Every Member State has now adopted either through legislation or case law the "job content" approach.[145] The most commonly accepted method of evaluating the value of job content in Member State judicial and administrative hearings is known as the "points method."[146] This method breaks down each job into components such as "skill, responsibility, physical and mental requirements, and working conditions."[147] An independent expert assigns points for each factor.[148] The total number of points determines the job's comparative value.[149]

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[138] *See id.* at 2603.

[139] *See id.* at 2614.

[140] *See id.* at 2616.

[141] *See* BARNARD, *supra* note 8, § 4.22.

[142] *See id.*

[143] *See id.*

[144] *See* Christopher McCrudden, *Comparable Worth: A Common Dilemma*, 11 YALE J. INT'L L. 396, 411 (1986).

[145] *See id.*

[146] *See id.* at 412.

[147] *Id.*

[148] *See id.*

[149] *See id.*

A British case, *Hayward v. Cammell Laird Shipbuilders Ltd.*,[150] amply illustrates the "points method" of assessing the value of job content.[151] In *Hayward*, the woman plaintiff was a cook in the workers' cafeteria and her male comparators were shop stewards and craftsman engaged in shipbuilding trades.[152] All workers were employees of the same company.[153] The independent expert designed a "points method" analysis in which the jobs under evaluation were broken down into factors, then each factor was rated according to its demand on the worker.[154] The five factors included the following: (1) physical demands; (2) environmental demands; (3) planning and decision demands; (4) skill and knowledge demands; and (5) responsibility demands.[155] The expert then made judgments about whether the demand under each factor was low, moderate, or high.[156] On the basis of the calculations the expert found that the plaintiff's work was of equal value to her comparators.[157]

6. The Structure of Job Classification Systems

While the ECJ made it clear that an employer job classification system was not the exclusive means of assessing the value of a job in *Commission v. UK*, the ECJ specifically addressed the issue of the structure of an employer's job classification system in *Rummler v. Dato-Druck GmbH*.[158] A German printing firm adopted a scheme that based compensation, in part, on the degree of muscular effort required for particular tasks.[159] The national court expressed its misgivings, finding that in practice the criterion of muscular effort took into account only male standards, which

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150 [1984] INDUS. REL. L. REP. 463.

151 *See* McCrudden, *supra* note 144, at 412-13.

152 *See id.* at 413.

153 *See id.*

154 *See id.* at 412.

155 *See id.* at 412-13.

156 *See id.* at 413 n.101.

157 *See id.* at 413.

158 Case 237/85, 1986 E.C.R. 2101.

159 *See id.* at 2103.

women might find impossible to meet.[160] The ECJ stated that the nature of the work must be assessed objectively and held that the employer could consider muscular effort in its pay determination.[161] At the same time, the ECJ concluded that job classification systems may not have the overall practical effect of discriminating on the basis of sex.[162] Thus when calculating physical effort in determining pay, employers could not base their assessments solely on the characteristics of one sex. Based on the nature of the work, employers might have to consider "other criteria in relation to which women workers may have a particular aptitude."[163]

The ECJ again addressed the issue in *Union of Commercial & Clerical Employees v. Danish Employer's Association, Ex Parte Danfoss*.[164] The Danish Industrial Arbitration Board referred this case to the ECJ to determine whether the use of certain criteria establishing salary supplements was incompatible with the Equal Pay Directive.[165] The Employee's Union presented statistical evidence that salary supplements resulted in unequal pay between men and women.[166] The salary supplement calculated using three criteria: employee mobility, special training, and length of service.[167] Although the documents before the ECJ did not define the "mobility" criterion, the court examined it using two possible meanings—either as a reward for quality of work done or for adaptability and flexibility of working hours and locations.[168] As to the first possible meaning the court explained, "where [the criterion] systematically works to the disadvantage of women [it] can only be because the employer has misapplied it. It is inconceivable that the quality of work done by women should

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160 *See id.*

161 *See id.* at 2115.

162 *See id.* at 2114.

163 *Id.* at 2115.

164 Case 109/88, 1989 E.C.R. 3199.

165 *See id.* at 3202.

166 *See id.* at 3201.

167 *See id.* at 3200.

168 *See id.* at 3227.

generally be less good."[169] Thus, the employer's use of this meaning of mobility would not be justified.[170] If the employer intended the second meaning, then the mobility criterion could also disadvantage women who, due to their greater household and family commitments, cannot organize their time as flexibly as men.[171] The ECJ examined the second criterion, "special training," in the same manner as "mobility."[172] As to the third criterion, "length of service," the ECJ concluded that length of service goes "hand in hand with experience."[173] Consequently an employer need not prove the importance of length of service in the performance of a worker's specific tasks.[174]

The ECJ's view on length of service is particularly controversial because not all jobs have a strong correlation between length of service and experience.[175] Two years after deciding *Danfoss*, the ECJ modified its approach to the length of service criterion. In *Nimz v. Frei Hansestadt Hamburg*,[176] the ECJ stated that the objectivity of the length of service criterion depends on the particular circumstances and the relationship between the nature of the work and the experience gained from working.[177] Thus, the ECJ concluded that national courts may not simply accept length of service criterion as valid but must examine the criterion for a correlation to experience.

7. *Scope of Comparison*

Another major issue concerning the law of equal value is the scope of comparison. Member States have generally adopted a narrow scope requiring that the men and women being compared

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[169] *Id.*

[170] *See id.*

[171] *See id.*

[172] *See id.* at 3228.

[173] *Id.*

[174] *See id.* Notably, the length of service criterion may also work to disadvantage women; due to child bearing and rearing responsibilities, many women must take breaks from their careers.

[175] *See* BARNARD, *supra* note 8, § 4.37.

[176] Case C-184/89, 1991 E.C.R. I-297.

[177] *See id.* at I-311.

must work for the same employer within the same establishment.[178] Dutch law, however, provides a broader comparative scope that allows for comparisons to be made between men and women situated in similar positions in the same section of industry.[179]

8. Employer Defenses

Defenses available to employers for the violation of Article 119 and the Equal Pay Directive are limited.[180] Unless expressly mentioned in the relevant national law, commonly known as derogation, no defense normally exists to a claim of direct discrimination.[181] Yet in the context of indirect discrimination, the ECJ concluded in *Bilka-Kaufhaus v. Weber von Hartz*[182] that discriminatory conduct may be permissible if justified by objective economic reasons not related to sex discrimination.[183] The ECJ further found that national courts must decide whether the compensation practice was objectively justified. The ECJ articulated three requirements that a practice must meet to qualify as objectively justified: (1) a genuine need of the enterprise; (2) necessary for that purpose; and (3) suitable for attaining the objective pursued.[184] Thus, the employer must not only establish that the practice was used for a good reason but also that the

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[178] *See* McCrudden, *supra* note 144, at 417. Note that a comparison may be permissible if the establishments are associated, which requires one company to control the other or both companies to be controlled by a third company. *See id.* at 418.

[179] *See id.* at 420 (citing Act to Lay Down Rules for the Entitlement of Workers to a Wage that is Equal to the Wage Earned by Workers of the Other Sex for Work of Equal Value, 2 ILO LEGIS. SERIES, at Neth. 1 (1975)).

[180] *See* BARNARD, *supra* note 8, § 4.32.

[181] *See id.* The Commission advocates a directive on the burden of proof for Article 4 of the Equal Pay Directive that would allow both direct and indirect discrimination to be objectively justified. *See id.* § 4.40. Article 4 requires that Member States take the necessary measures to void or amend provisions appearing in collective agreements, wage scales, wage agreements or individual contracts which are contrary to the principle of equal pay. *See* Equal Pay Directive, *supra* note 122, art. 4.

[182] Case 170/84, 1986 E.C.R. 1607.

[183] *See id.* at 1617.

[184] *See* Richard Townshend-Smith, Economic Defenses to Equal Pay Claims, in SEX EQUALITY LAW IN THE EUROPEAN UNION 35, 38 (Tamara K. Hervey & David O'Keeffe eds., 1996).

means to do so were appropriate and proportional.[185] One problem with using three requirements is that each allows great latitude for subjective decision-making by the court; therefore the court's overall sympathy for the employer may ultimately shape its decision.[186]

The ECJ has recognized objective justifications that take into account the needs and objectives of the business. For instance, in *Jenkins v. Kingsgate*,[187] the ECJ permitted an employer to pay full-time workers more than part-time workers to encourage full-time work.[188] In *Enderby v. Frenchay Health Authority*,[189] the ECJ found that paying certain jobs more to attract workers when the market indicates such workers are in short supply was a valid compensation practice, but the national court must determine whether the market forces were sufficiently significant to provide the objective justification.[190] At the same time, the ECJ has rejected purportedly objective generalizations about categories of workers, such as the belief that part-time workers are not as integrated in the workplace or dependent on their employers.[191]

9. Burdens of Proof

The ECJ has ruled that in principle the plaintiff bears the burden of proof in claims of sex-based pay discrimination.[192] In *Danfoss*, the ECJ distinguished between the requisite elements of proof in claims of direct and indirect discrimination.[193] In cases of direct discrimination, to establish a prima facie case the plaintiff must specifically compare the pay of a male and female worker

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[185] *See id.* Note that in the context of indirectly discriminatory legislation, the ECJ has allowed broader considerations to apply. *See* BARNARD, *supra* note 8, § 4.33.

[186] *See* Townshend-Smith, *supra* note 184, at 38.

[187] Case 96/80, 1981 E.C.R. 911.

[188] *See id.* at 926.

[189] Case C-127/92, 1993 E.C.R. I-5535.

[190] *See id.* at I-5564.

[191] *See* Case 171/88, Rinner Kuhn v. FWW Spezial-Gebaudereingung, 1989 E.C.R. 2743.

[192] *See* Enderby, 1993 E.C.R. at I-5558.

[193] *See* Case 109/88, Union of Commercial & Clerical Employees v. Danish Employer's Ass'n, Ex Parte Danfoss, 1989 E.C.R. 3199, 3213.

and demonstrate that the jobs are of equal value.[194] By contrast, in cases of indirect discrimination, the plaintiff may establish a prima facie case by showing that differences in pay based on neutral criteria mainly or exclusively disadvantage employees of one sex.[195] In *Danfoss*, because the employer's pay structure was not transparent, the court concluded that specific comparisons in indirect discrimination cases would deny women the protection of the Equal Pay Directive. The ECJ concluded that "concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of the proof."[196] Thus, once the plaintiff establishes a prima facie case of indirect discrimination, the burden of proof shifts to the employer to rebut the presumption.

In *Enderby*, a subsequent case, the ECJ held that the plaintiffs had a prima facie case of discrimination if the pay of predominately female speech therapists was significantly lower than that of predominately male pharmacists and the two jobs were of equal value.[197] The ECJ concluded that the employer may rebut this presumption by proving objective reasons for the pay difference that the national court could assess for validity.[198] The employer in *Enderby* asserted that the pay differential resulted from a separately negotiated collective bargaining agreement that was internally non-discriminatory, and from the need to attract pharmacists.[199] The ECJ concluded that the employer's reliance on the bargaining agreement was not a sufficient justification because such reliance would allow employers to "circumvent the principle of equal pay by using separate bargaining processes."[200] As discussed above, the need to attract candidates may be an objective justification if the national courts determine that the role of market forces was sufficiently significant.[201]

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[194] *See id.*

[195] *See id.*

[196] *Id.* at 3226.

[197] *See* Enderby, 1993 E.C.R. at I-5535.

[198] *See id.* at I-5559.

[199] *See id.* at I-5554.

[200] *Id.* at I-5547.

[201] *See id.* at I-5564.

In a more recent case, *Hill & Stapleton v. The Revenue Commissioners and The Department of Finance*,[202] the ECJ held in a preliminary ruling that an Irish civil service compensation system that regressed on the salary scale those workers who convert from job-sharing/part-time work to full-time work violated the Equal Pay Directive unless the employer could show it was objectively justified.[203] Almost 98% of all civil servants employed under job-sharing contracts were women.[204] Under the system, job-sharers progress along the pay scale parallel to full-time workers; thus, the hourly pay for the two categories of worker is identical on each point of the scale.[205] Yet when job-sharing workers convert to full-time work their situation is evaluated in such a manner that they are placed on the full-time pay scale at a level lower than that which they held on the pay scale while job sharing.[206] A provision of this kind that adversely affects the mostly female job-sharers without an objective justification would have discriminatory effect based on sex.[207]

The employer asserted two justifications: (1) the Civil Service has an established practice of "crediting" only actual service; and (2) the practice functions as a reward system that maintains staff motivation, commitment, and morale.[208] The ECJ rejected both of these justifications.[209] The ECJ found that the first justification was unsupported by objective criteria and with regard to the second, the pay system for full-time workers cannot be influenced by the job-sharing scheme.[210] In addition the ECJ noted that an employer cannot justify discrimination arising from a job-sharing program solely on economic grounds.[211] The ECJ further recognized that 83% of the job-sharers chose the option to

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202 Case C-243/95, 1998 E.C.R. I-3739.

203 *See id.* at I-3772.

204 *See id.* at I-3767.

205 *See id.* at I-3768.

206 *See id.* at I-3769.

207 *See id.*

208 *See id.* at I-3771.

209 *See id.*

210 *See id.*

211 *See id.*

accommodate childcare responsibilities.[212] Also, the ECJ emphasized that Community policy is to encourage and, if possible, adapt working conditions to family life.[213] Indeed, the ECJ recognized that the protection of women in their professional and family lives is a significant aspect of equality between women and men.[214] Finally, the ECJ found that the Irish Civil Service compensation practice was a breach of Article 119 and the Equal Pay Directive unless the Service could provide some other objective justification.[215]

D. Practical Effects of the Differences Between U.S. and EU Equal Pay Law

EU law goes far beyond U.S. law in the area of equal pay, exposing more employers to liability. The most obvious and fundamental difference is that while U.S. law requires jobs to be "substantially equal" in order to be compared, EU imposes liability on an employer for pay differential across job or professional boundaries.

Moreover, EU law facilitates equal pay claims against employers. In the United States the main obstacle is the plaintiff's lack of evidence on how the employer establishes its compensation scheme, which in turn prevents the plaintiff from presenting comparative evidence that the jobs in question were in fact substantially equal but received different compensation. In *Plemer v. Parsons-Gilbane*,[216] the Fifth Circuit Court of Appeals suggested that if the plaintiff had evidence of a job evaluation system that placed equal value on both her and her male comparator's duties and responsibilities but paid plaintiff less, then she may have prevailed.[217] The court, though, refused to make that assessment of duties and responsibilities. In contrast under EU law, the employer's failure to have a job classification system is not fatal to the plaintiff's claim because EU law requires

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[212] *See id.* at I-3772.

[213] *See id.*

[214] *See id.*

[215] *See id.*

[216] 713 F.2d 1127 (5th Cir. 1983).

[217] *See id.* at 1134.

that some authority, either administrative or judicial, be vested with the jurisdiction to make those assessments.[218] Consequently, a U.S. employer could not avoid liability in Europe on an equal pay claim by failing to establish a transparent job classification system. On the other hand, U.S. courts will not recognize a prima facie case of intentional discrimination even if an employer institutes an evaluation system, finds inequalities, and then fails to implement changes.[219] U.S. courts do not want to dissuade employers from designing evaluation plans because they are the only means by which assessments of worth can be undertaken.[220] Under EU law, however, failure to implement changes after a finding of inequality would establish a prima facie case of direct discrimination against the employer.

Finally, the ECJ has recognized that part of EU social policy is to accommodate work and family responsibilities.[221] Indeed, the ECJ expressly stated in *Hill & Stapleton* that the protection of women in their professional and family lives was an essential aspect of equality.[222] This social policy has ramifications, particularly in the areas of part-time and job-sharing work schemes.[223] The ECJ has held that less favorable treatment for part-time workers who are predominately female establishes a prima facie case of sex-based wage discrimination.[224] In contrast, the plaintiff's prima facie case under the U.S. Equal Pay Act is much more exacting, and therefore, more difficult to prove. Under the EPA, a plaintiff must prove that her job and that of the male comparator are of "equal skill, effort, and responsibility."[225] U.S. employers will have to scrutinize their own part-time and full-time compensation schemes in order to comply with EU law. In order to protect themselves from liability under Article 119 and the

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[218] *See* Case 61/81, Commission v. UK, 1982 E.C.R. 2601.

[219] *See* AFSCME v. Washington, 770 F.2d 1404, 1408 (9th Cir. 1985).

[220] *See* Nurses Ass'n v. Illinois, 606 F. Supp. 1313, 1317-18 (N.D. Ill. 1985).

[221] *See* Case C-243/95, Hill & Stapleton v. The Revenue Commissioners and The Department of Finance, 1998 E.C.R. I-3739.

[222] *See id.*

[223] *See id.*

[224] *See, e.g.*, Case C-360/90, Arbeiterwohlfahrt der Stadt Berlin e. V. v. Bötel, 1992 E.C.R. I-3589.

[225] *See* ROTHSTEIN, *supra* note 102, § 4.14 at 229.

Equal Pay Directive, U.S. employers should institute their own job evaluations to assess their compensation systems and remedy any sex-based pay inequities.

IV. Equal Treatment

In both the United States and the EU, the right to equal pay was the first guiding principle in prohibiting sex-based discrimination in the workplace. Subsequently, the range of protection has expanded through Title VII of the Civil Rights Act of 1964 in the United States and through the Equal Treatment Directive in the EU. This section will first discuss the concept of equal treatment in the workplace in the United States based on Title VII. It will next examine the meaning of sex-based discrimination as prohibited by the EU's Equal Treatment Directive. Finally, this section will focus on points at which U.S. and EU sex discrimination laws diverge in the context of employer liability.

A. U.S. Law

1. Title VII: Generally

Title VII of the Civil Rights Act of 1964[226] is the cornerstone of federal anti-discrimination legislation. Title VII provides broad anti-discrimination protection based on various protected classes. The statute prohibits discrimination in employment based on an individual's "race, color, religion, sex, or national origin."[227] Under Title VII, it is an unlawful practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment " or "to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee."[228]

Title VII covers all private employers with fifteen or more

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[226] 42 U.S.C. § 2000e-2 to -17 (1988 & Supp. 1993).

[227] *Id.* § 2000e-2(a)(1).

[228] *Id.* § 2000e-2(a)(1) to -2(a)(2).

employees who are engaged in business affecting commerce.[229] State and local governments as employers are also covered.[230] The federal government as an employer is excluded under the main body of the statute but is included by a separate amendment.[231] In addition, Title VII covers individual employees in their capacity as agents of the employer.[232] Covered employees include all paid workers who are not independent contractors, except military personnel.[233] Finally, Title VII addresses employers who do business outside of the United States with respect to employees who are U.S. citizens.[234]

Title VII prohibits two types of discrimination: intentional discrimination, known as disparate treatment, and unintentional discrimination, known as disparate impact. Because the courts use a separate framework of analysis including burdens of proof and employer defenses for the two types of discrimination, this Comment will discuss them separately.[235]

2. *Disparate Treatment*

A disparate treatment claim under Title VII focuses on the employer's intent.[236] The plaintiff's claim under a disparate treatment theory is that the employer intentionally treated her differently because of her sex. Title VII also encompasses sex "plus" discrimination that occurs when an employer restricts employment opportunities for specific classes of women, such as those with very young children.[237] The plaintiff may prove disparate treatment by direct evidence, such as statements of

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[229] *See id.* § 2000e(b).

[230] *See id.*

[231] *See id.*

[232] *See id.*

[233] *See id.* § 2000e(f), -16(a).

[234] *See id.* Title VII does not require an employer who employs American citizens in a business outside of the United States to engage in any practices that would violate the laws of the host country. *See id.* §2000e-1(b).

[235] *See* ROTHSTEIN, *supra* note 102, § 3.8.

[236] *See id.* §3.6.

[237] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

bigotry accompanying a negative employment decision,[238] or by circumstantial evidence in which an inference of discriminatory intent arises from an employer's actions.[239] Furthermore, in *Price Waterhouse v. Hopkins*[240] the Supreme Court held that Section 703's language prohibiting employment practices "because of" sex means that employers will be liable under Title VII if they make decisions based on a mixture of legitimate and illegitimate considerations.[241] These cases are known as mixed motive cases.

Because direct evidence of discriminatory animus is not always available, the Supreme Court has established an elaborate system for the burdens of proof and production[242] in disparate treatment cases with circumstantial evidence of discrimination.[243] In order to establish a prima facie case of intentional discrimination, a complainant must generally satisfy four requirements: (1) she is in a protected class; (2) she was qualified and applied for the job; (3) she was rejected despite her qualifications; and (4) the position remained open and the employer continued the search.[244] Because the facts will vary in Title VII cases, the prima facie proof may also vary to accommodate specific situations.[245] Once the plaintiff establishes a

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[238] An example of direct evidence of discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) were comments made by partners in plaintiff's evaluation for partnership, suggesting that she needed a course in charm school. *See id.* at 256.

[239] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) provides an example of indirect evidence. In Hicks, plaintiff presented evidence that prior to personnel changes he had a satisfactory employment record but soon after the change his new supervisor singled him out and disciplined him for infractions of the same or lesser degree that co-workers had also committed and manufactured a verbal confrontation that resulted in his dismissal. *See id.* at 504-08.

[240] 490 U.S. 228 (1989).

[241] *See id.* at 241.

[242] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). In *Burdine*, the Court distinguished between the burden of proof or persuasion and the burden of production. *See id.* "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253. The burden of production refers to the employer's burden of producing admissible evidence to rebut a prima facie case of discrimination. *See id.* at 255.

[243] *See* ROTHSTEIN, *supra* note 102, § 3.8.

[244] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[245] *See id.* Note that Title VII encompasses a broad range of employer practices that

prima facie case of intentional discrimination, she has established a rebuttable presumption of discrimination.[246] The burden of production shifts to the employer to present evidence that the employer took the action for a legitimate, nondiscriminatory reason.[247] The employer's presentation of a legitimate non-discriminatory reason for its action destroys the presumption of discrimination.[248] Conversely, if an employer does not articulate a legitimate, non-discriminatory reason for the action it took then the employee wins. If the employer does meet its burden of production, the employee may still prevail if she can show that the employer's proffered reason was actually a pretext for discrimination.[249] In *St. Mary's Honor Center v. Hicks*,[250] the Court concluded that even if the plaintiff proves pretext, she will not automatically win the case.[251] The Court held that a finding of pretext merely permits rather than compels the trier of fact to find in plaintiff's favor.[252]

In mixed motive cases, the analysis differs from that set out by the Supreme Court in simple disparate treatment cases. The Civil Rights Act of 1991 amended Title VII, which now provides that if

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affect employment. *See* 42 U.S.C. § 2000e-2(a). The courts have modified the original formula established under *McDonnell Douglas* for claims under Title VII other than race discrimination. *See* ROTHSTEIN, *supra* note 102, §3.8.

246 *See Burdine*, 450 U.S. at 253-54.

247 *See id.* at 254.

248 *See id.* at 255.

249 *See id.* at 253-54.

250 509 U.S. 502 (1993).

251 *See id.* at 511.

252 *See id.* In two recent cases, the D.C. Circuit and the Fourth Circuit have diverged in their interpretations of the Supreme Court's holding in *Hicks*. In Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998), the D.C. Circuit rejected any reading of *Hicks* that would routinely require the plaintiff to prove evidence over and above rebutting the defendant's proffered reason. *See id.* The D.C. Circuit also concluded that the fact finder's rejection of a defendant's proffered reason was entitled to considerable weight. *See id.* Compare this reading of *Hicks*, to the Fourth Circuit in Vaughan v. MetraHealth Cos., Inc., 145 F.3d 197 (4th Cir. 1998). The *Vaughan* court concluded that for a fact finder to find intentional discrimination, the plaintiff's evidence of pretext had to provide a "factual basis for the ultimate finding of discrimination." *Id.* at 201. The Fourth Circuit emphasized that finding an employer's purported reason unbelievable carries a different and lesser burden than finding the employer's reason to be based on unlawful discrimination. *See id.* (citing *Hicks*, 509 U.S. at 514-15).

a plaintiff persuades the trier of fact that sex, race, color, or religion was a motivating factor in the employer's challenged decision, then Title VII liability attaches.[253] If the employer proves by a preponderance of evidence that it would have made the same decision regardless of the impermissible factor, the plaintiff is limited to declaratory relief, certain injunctive relief, and attorney's fees and costs.[254] The court may not award damages or require the employer to hire, reinstate, or promote the plaintiff.[255]

Employers may defeat Title VII liability for disparate treatment cases by proving that their actions fall within one of several affirmative defenses provided in the statute. The key defense is the bona fide occupational qualification defense (BFOQ).[256] Under this defense, an employer may intentionally discriminate on the basis of sex[257] if sex is "a bona fide qualification reasonably necessary to the normal operation of that particular business."[258] The Supreme Court has interpreted the BFOQ defense narrowly; in *UAW v. Johnson Controls*,[259] the Court held that to qualify as a legitimate BFOQ, sex must be "an objective, verifiable requirement and must concern job-related skills and aptitudes."[260] In addition, the Court emphasized that the BFOQ must relate to the "essence"[261] or "central mission"[262] of the enterprise or business.

The BFOQ exemption has been used in three major contexts. The first context is for the purpose of authenticity. The Equal Employment Opportunity Commission (EEOC) guidelines state that "[w]here it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide

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253 *See* 42 U.S.C. § 2000e-5(g)(2)(B).

254 *See id.*

255 *See id.*

256 *See* 42 U.S.C. § 2000e-2(e).

257 Title VII permits a BFOQ on the basis of sex, religion, or national origin. *See id.* Race or color may never be the basis for a BFOQ. *See id.*

258 *Id.*

259 499 U.S. 187 (1991).

260 *Id.* at 201.

261 *Id.* at 203 (citing Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).

262 *Id.* (citing Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

occupational qualification, e.g., an actor or actress."[263] The second context is one in which a customer preference for a specific sex is related to personal privacy and modesty. For instance, in *Healy v. Southwood Psychiatric Hospital*,[264] the Third Circuit Court of Appeals found that a policy of requiring at minimum one staff member of each sex to be available for patients is reasonably necessary to the normal operation of the particular business. The third context is a BFOQ based on safety to third parties. The Court has stressed that a safety BFOQ is permissible only under narrow circumstances.[265] In *Dothard v. Rawlinson*,[266] the Court permitted an employer to hire only male prison guards in the contact areas of a maximum-security male prison.[267] The Supreme Court reasoned that female guards would more likely be targets of assault, which could create real risks of safety to others if violence broke out.[268] Thus, the Court required a high correlation between sex and the ability to maintain prison safety. Since *Dothard*, however, efforts to exclude women from institutional positions in prisons have not been very successful.[269] Furthermore, the Supreme Court has rejected employers' attempts to use sex as a BFOQ based on their desire to protect women or their fetuses from jobs that are dangerous. In *Johnson Controls*, the Court held that an employer could not exclude fertile women from manufacturing batteries because the environment was highly toxic to fetuses.[270] The Court stressed that unconceived fetuses are neither customers nor parties whose safety is of the "essence" to the business of battery making.[271]

In addition to the statutorily created affirmative defenses in Title VII, the Supreme Court has recognized that a valid affirmative action program may defeat a claim of disparate

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263 *See* 29 C.F.R. § 1604.2(a)(2) (1998).

264 78 F.3d 128, 133 (3d Cir. 1996).

265 *See Johnson Controls*, 499 U.S. at 203-04.

266 433 U.S. 321 (1977).

267 *See id.*

268 *See id.* at 336.

269 *See* FRIEDMAN AND STRICKLER, *supra* note 103, at 201.

270 *See Johnson Controls*, 499 U.S. at 206.

271 *Id.* at 203-04.

treatment.[272] In *United Steelworkers v. Weber*,[273] the Court held that Title VII permits voluntary affirmative efforts to remedy past patterns of discrimination.[274] Subsequently in *Johnson v. Transportation Agency*,[275] the Court further outlined the permissible boundaries of a voluntary affirmative action plan. In this case, the employer promoted a woman to a position as a road dispatcher pursuant to an affirmative action plan.[276] Although the woman's overall job ratings were adequate for her promotion, they were slightly lower than those of the male plaintiff.[277] In holding the employer's decision was consistent with Title VII, the Court concluded that the employer's affirmative action plan was valid under the criteria outlined in *Weber*.[278] Specifically, the affirmative action plan was designed to eliminate workforce imbalances in traditionally segregated job categories, did not unduly infringe upon the rights of male workers, and was intended to attain, not maintain, a balanced workforce.[279]

3. Disparate Impact

In the Civil Rights Act of 1991, Congress codified in section 703(k) the disparate impact model of discrimination. Disparate impact theory imposes employer liability for a facially neutral policy that disproportionately disadvantages a protected category of employees.[280] The seminal disparate impact case is *Griggs v. Duke Power Company*.[281] In *Griggs* the Court held that an employer's requirement of a high school diploma or a specific score on an aptitude test in order to be hired or transferred to a higher level job had a disproportionate impact on African-

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[272] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[273] 443 U.S. 193 (1979).

[274] *See id.* at 209.

[275] 480 U.S. 616 (1987).

[276] *See id.* at 634.

[277] *See id.* at 623-24.

[278] *See id.* at 631-42.

[279] *See id.* at 637-39.

[280] *See* 42 U.S.C. § 2000e-2(k)(1)(A).

[281] 401 U.S. 424 (1971). Note that in the Civil Rights Act of 1991 that amended Title VII, Congress codified the disparate impact analysis set forth in *Griggs*. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991).

Americans.[282]

In the 1991 amendments to Title VII, Congress codified the burden of proof required for claims asserted under disparate impact theory.[283] The prima facie case for disparate impact theory requires the plaintiff to demonstrate that a particular employment practice causes a disparate impact.[284] If the complainant can show the court that the challenged practice cannot be analyzed standing alone, the decision-making process as a whole may be analyzed.[285] In addition, the Court has held that subjective employment criteria could be subject to a disproportionate impact claim.[286] Typically, the plaintiff proves her case using statistical evidence of the impact on the protected group disadvantaged by the practice.[287] The employer may rebut the prima facie case by proving that the challenged practice is job-related and consistent with business necessity.[288] The scope of business necessity remains unclear because the circuits vary widely on what kind of showing the employer must make in order to satisfy the business necessity defense.[289] For instance, in *Robinson v. Lorillard Corp.*[290] the Fourth Circuit stated that the test was whether there was an

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[282] *See Griggs*, 410 U.S. at 431.

[283] *See* 42 U.S.C. § 2000e-2(k)(1)(A).

[284] *See id.*

[285] *See id.* Congress enacted this provision of the Civil Rights Act of 1991 partly in response to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991). In *Wards Cove*, the Supreme Court held that a plaintiff must isolate and identify the specific employment practice that resulted in the disproportionate impact on the protected group. *See* 490 U.S. at 656.

[286] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

[287] The rule of thumb as to the threshold of disproportionate effect is the four-fifths rule. In general, a selection rate for members of a protected class of less than eighty percent of the rate for the highest scoring group establishes a prima facie case of discrimination under the disparate impact theory. *See* FRIEDMAN AND STRICKLER, *supra* note 103, at 235.

[288] *See* 42 U.S.C. § 2000e-2(k)(2).

[289] The Civil Rights Act of 1991 did not provide courts with assistance in determining what standard to apply for the business necessity defense. *See* FRIEDMAN AND STRICKLER, *supra* note 103, at 266-67.

[290] 444 F.2d 791 (4th Cir. 1971).

"overriding legitimate business purpose."[291] In contrast, the Eighth Circuit in *Nolting v. Yellow Freight System, Inc.*[292] concluded that an employee evaluation system satisfied the business necessity defense because it "significantly served" the interest in production quantity.[293] If the employer proves that the challenged practice is job-related and a business necessity, the plaintiff may still prevail if she proves that the employer "refuses to adopt . . . [an] alternative employment practice" that serves the same purpose without the discriminatory impact.[294]

Section 703(h) of Title VII also provides a defense to liability if the employer's practice or action is taken "pursuant to a bona fide seniority or merit system."[295] Thus, without discriminatory intent a seniority system that has discriminatory consequences for a protected group does not violate Title VII.[296]

4. Pregnancy Discrimination

Section 701(k) of Title VII specifically covers discrimination based on "pregnancy, childbirth, or related medical conditions."[297] Congress passed the Pregnancy Discrimination Act of 1978 (PDA) as an amendment to Title VII.[298] Employers must treat pregnant employees like all other employees unless it can prove a BFOQ, for disparate treatment, or business necessity defense, for disparate impact. For instance in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,[299] the Court held that an employer's health care insurance policy covering hospitalization for all conditions except those associated with pregnancy violated the PDA.[300]

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[291] *Id.* at 798.

[292] 799 F.2d 1192 (8th Cir. 1986).

[293] *Id.* at 1198.

[294] 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[295] *Id.* § 2000e-2(h).

[296] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[297] 42 U.S.C. § 2000e(k).

[298] The PDA was a response to the Supreme Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) holding that Title VII did not prohibit an employer disability plan that covered all disabilities except those associated with or arising from pregnancy.

[299] 462 U.S. 669 (1983).

[300] *See id.*

Under the PDA, employers must treat physical limitations occasioned by pregnancy equally with disabilities of non-pregnant workers. In *Troupe v. May Department Stores Co.*,[301] the Seventh Circuit held that the PDA does not require an employer to treat a pregnant employee whose morning sickness causes chronic tardiness more favorably than a non-pregnant employee who is chronically late for work for a different health reason.[302] Although employers may not treat pregnant workers less favorably than non-pregnant workers, the Supreme Court held in *California Federal Savings and Loan Association v. Guerra*[303] that employers may afford preferential treatment to pregnant workers without running afoul of Title VII.[304]

Disparate impact claims have also been recognized under the PDA. The EEOC has ruled that an employer who refused to allow pregnant women a reasonable leave of absence beyond the two-week sick policy violated the PDA unless the employer could demonstrate business necessity.[305] Likewise in *EEOC v. Warshawsky & Co.*,[306] the district court found that an employer's policy that prohibited all employees from taking any paid sick leave during the first year of employment violated Title VII because it resulted in a disparate impact on pregnant first-year employees and the employer did not prove a business necessity.[307]

5. Remedies

Title VII remedies can include equitable relief such as reinstatement of back pay, seniority credit, affirmative action, other types of affirmative orders, and attorneys' costs and fees.[308]

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[301] 20 F.3d 734 (7th Cir. 1994).

[302] *See id.* at 737.

[303] 479 U.S. 272 (1987).

[304] *See id.* at 289 (finding that the legislative history of the PDA was intended to guarantee women the right to participate fully in the workforce without having to sacrifice their family life).

[305] *See* FRIEDMAN AND STRICKLER, *supra* note 103, at 423 (citing EEOC Dec. No. 74-112, 19 FEP Cases 1817 (April 15, 1974)).

[306] 768 F. Supp. 647 (N.D. Ill. 1991).

[307] *See id.* at 655.

[308] *See* ROTHSTEIN, *supra* note 102, § 3.27. *See also* 42 U.S.C. § 2000e-5 (outlining the enforcement provisions of Title VII).

In addition, if the court finds unlawful intentional discrimination, the court may award a prevailing plaintiff compensatory and punitive damages.[309] The sum of the compensatory and punitive damages is limited based on the employer's size.[310]

B. EU Law

1. Equal Treatment Directive: Generally

Unlike the principle of equal pay embodied in Article 119, equal treatment between the sexes in general working conditions is not expressly stated in the EEC Treaty. Because the ECJ did not construe Article 119 broadly enough to require equal treatment,[311] the EU legislative bodies enacted the Equal Treatment Directive[312] to provide sex-discrimination protection in the workplace. Article 2(1) of the Equal Treatment Directive defines equal treatment broadly to require that "there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference to marital or family status."[313] The Directive prohibits both direct and indirect discrimination. These concepts should be interpreted in the same manner as in the area of equal pay.[314] The principle of equal treatment applies to conditions of access to employment including selection criteria, all levels of occupational hierarchy, all types of vocational guidance and training, conditions covering dismissal, and some aspects of social security.[315]

For instance, in *Kording v. Senator fur Finanzen*,[316] the ECJ held that Article 3(1) precluded a measure that lengthened the time requirement in the case of part-time workers for an exemption

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[309] *See* 42 U.S.C. § 1981a(b)(1)-(3). If a complaining party seeks compensatory or punitive damages the party may demand a jury trial. *See* 42 U.S.C. § 1981a(c)(1).

[310] *See* 42 U.S.C. § 1981a(b)(3).

[311] *See* Case 149/77, Defrenne v. Societe Anonyome Belge de Navigation Aerienne Sabenna, 1978 E.C.R. 1365 (holding that Article 119 did not prohibit discriminatory working conditions) (known as Defrenne III).

[312] Council Directive 76/207, 1976 O.J. (L 39) 40 [hereinafter Equal Treatment Directive].

[313] *Id.* art. 2(1).

[314] *See* BARNARD, *supra* note 8, § 4.56.

[315] *See* Equal Treatment Directive, *supra* note 312, arts. 3-5.

[316] Case C-100/95, 1997 E.C.R. I-5289.

from passing a qualifying exam to practice as a tax adviser.[317] Individuals were exempt from passing a qualifying exam if they had worked as an executive class employee of the revenue administration for at least fifteen years.[318] For applicants who had worked part-time, the hours worked would be taken into account only on a pro rata basis.[319] Thus, the part-time executive grade employees, 92.4% of whom were women, had to work several years longer than full-time employees.[320] The plaintiff maintained that the variety of tasks and quality of work of part-time employees was comparable to full-time employees and that the only difference was in volume.[321] The ECJ held that in situations where part-time employees who are predominately women are treated less favorably than full-time workers, the measure is contrary to Article 3(1) unless objectively justified on factors unrelated to sex.[322]

2. *Direct Effect*

If Member States have correctly implemented the Directive, the plaintiff need only rely on national law.[323] Even if the Directive has not been correctly implemented, the ECJ has held that the principle of equal treatment laid down in Article 2(1) and as applied as to the various conditions of employment set out in Articles 3,4, and 5 is directly effective.[324] The Directive is directly effective against the Member State, and specifically to bodies that are subject to the authority of the state or that have powers beyond

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317 *See id.* at I-5297.

318 *See id.* at I-5294.

319 *See id.* at I-5296.

320 *See id.* at I-5298.

321 *See id.* at I-5298.

322 For a discussion of objective justification as an employer's defense to an indirect discrimination claim see *supra* notes 182-91 and accompanying text.

323 *See* BARNARD, *supra* note 8, § 4.59.

324 *See* Case 152/84, Marshall (No. 1) v. Southampton-South West Hampshire Area Health Authority, 1986 E.C.R. 723 (holding the Equal Treatment Directive is directly effective as applied to conditions governing dismissal referred to in Article 5(1)); Case 222/84, Johnston v. R.V.C., 1986 E.C.R. 1651 (ruling the Equal Treatment Directive is directly effective as applied to conditions governing access to jobs and vocational training referred to in Articles 3(1) and 4(1)).

those normally applicable between private individuals.[325] The ECJ, however, in *Dekker E.J.P. v. Stichting Vorningscentrum voor Jong Volwassenen (VJV-centrum) Plus*[326] held that a private employer was bound to comply with the provisions of the Directive that had not yet been fully implemented by the Dutch government.[327]

Articles 3, 4, and 5 also require Member States to invalidate any laws, regulations or administrative provisions that are contrary to the principle of equal treatment.[328] Furthermore, these Articles obligate Member States to ensure that any discriminatory provisions in collective agreements, individual employment contracts, internal rules of businesses, or rules governing occupations and professions are either voided or amended.[329] Consequently, individuals who have been discriminated against but are not employed by the State have grounds to bring an action against the Member State for its failure to fulfill these obligations.[330]

3. Remedies

Article 6 of the Equal Treatment Directive requires Member States to enact laws enabling individuals to pursue their claims by

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[325] *See* BARNARD, *supra* note 8, § 4.59 (citing Case C-188/89, Foster v. British Gas, 1990 E.C.R. I-3313).

[326] Case C-177/88, 1990 E.C.R. I-3941.

[327] *See id.* The doctrine of indirect effects, or the interpretation mechanism, is derived from the duty of loyalty from Member States required by Article 5 of the EC Treaty. *See* BARNARD, *supra* note 8, § 1.66. The ECJ has found that the obligation contained in Article 5 also binds national courts, obliging them to interpret national law with Community law as a guide. *See id.* Moreover, this obligation is not limited to the situation in which national law has been passed to implement an EU provision. *See id.* Rather, when applying national law, regardless of whether the law had been enacted before or after the Directive, the national court must interpret its law in light of the wording and purpose in order to achieve the goal of the Directive. *See* Case C-106/89, Marleasing SA v. La Commercial International de Alimentacion SA, 1990 E.C.R. I-4135.

[328] *See* Equal Treatment Directive, *supra* note 312, arts. 3-5.

[329] *See id.*

[330] *See* BARNARD, *supra* note 8, § 4.60 (citing Case C-6 and C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357).

judicial process.[331] In addition, Article 6 does not mandate specific sanctions but allows Member States the discretion to design solutions.[332] The ECJ, though, has curbed Member States' discretion in the area of sanctions. The ECJ stated that the obligation in Article 6 requiring Member States to provide a judicial process for individuals who have an equal treatment claim implies that the Member States' sanctions must be sufficiently effective to achieve the Directive's purpose.[333] Thus, Member States must take measures to restore equality by requiring that victims be reinstated or awarded monetary compensation for the loss and damages they incurred.[334] Sanctions established by the Member States must be adequate in relation to the damage and serve a deterrent to the employer.[335] In *Marshall II*, the ECJ held that although an upper limit on compensation is not per se unlawful, an upper limit on the amount of compensation and the exclusion of interest did not meet the purpose of the Directive in that case.[336] Similarly, the ECJ has held that the restriction of compensation to traveling expenses incurred did not meet the requirements of Article 6.[337] Notably, in light of the Court's decision in *Marshall II* that Article 5 and Article 6 in combination are directly effective, Article 6 read in conjunction with Article 3 and Article 4 should also be directly effective.[338]

4. Exceptions

The Equal Treatment Directive specifies exceptions (1) where sex is a determining factor; (2) where women need protection, particularly with regards to pregnancy and maternity; or (3) where the Member State has instituted positive action programs.[339] These

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[331] *See* Equal Treatment Directive, *supra* note 312, art. 6.

[332] *See id.*

[333] *See* Case 271/91, Marshall v. Southampton-South West Hampshire Area Health Authority, 1993 E.C.R. I-4367 [hereinafter Marshall II].

[334] *See id.*

[335] *See id.*

[336] *See id.*

[337] *See* Case 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891; Case 79/83 Harz v. Deutsche Tradax, 1984 E.C.R. 1921.

[338] *See* BARNARD, *supra* note 8, § 4.79.

[339] *See* Equal Treatment Directive, *supra* note 312, art. 2.

exceptions are derogations from an individual right set out in the Directive.[340] Consequently, they are subject to the principle of proportionality and must be interpreted strictly and reviewed regularly.[341] In addition to the three exceptions enumerated in the Directive, other exceptions have been implied.[342] For instance indirect discrimination, although expressly forbidden by the Directive, may be justified if it is demonstrated that the discrimination is the result of some policy that reflects a "real need" of an employer or a very important consideration of the social policy of the Member State.[343]

5. Determining Factor

Article 2(2) states that the Member State may "exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of the nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."[344] The Directive requires the Member States to compile a list of occupations and activities excluded under this exception and submit it to the Commission for verification.[345] In *Commission v. UK of Great Britain and Northern Ireland*,[346] the UK argued that the determining factor exception applied in three situations: (1) employment in a private household; (2) employment of five or fewer persons; or (3) the profession of midwife.[347] The ECJ held that although sex may be a determining factor in certain types of

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[340] *See* BARNARD, *supra* note 8, § 4.61.

[341] *See id.* (citing Case 222/84, Johnson v. RUC, 1986 E.C.R. 1651 (rejecting the United Kingdom's reservation to the principle of equal treatment in regard to measures taken based on public safety)).

[342] *See* Jill Andrews, Comment, *National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 J. INT'L L. BUS. 413, 423 (1994).

[343] *See id.* (citing Note, *Presentation of the Third Comparative Labor Law Roundtable: Unlawful Discrimination in Employment*, 20 GA. J. INT'L & COMP. L. 1, 20 (1990)).

[344] Equal Treatment Directive, *supra* note 312, art. 2.

[345] *See id.* art. 9(2).

[346] Case 165/82, 1983 E.C.R. 3431.

[347] *See id.* at 3438-39.

private household employment, it is not so in all situations, and therefore the exception was overly broad.[348] The ECJ also found that the UK had not demonstrated that in a business of five or fewer employees that sex would be a determining factor as to activities or their context.[349] Finally, the ECJ found that sex may be a necessary factor in the relationship between midwife and patient due to personal sensitivities.[350]

In *Johnston v. Chief Constable of Royal Ulster, Constabulary*,[351] however, the ECJ held that in certain law enforcement activities in Northern Ireland involving the use of fire-arms, the sex of the police officer was a determining factor.[352] The ECJ accepted that because of the dangerous conditions in Northern Ireland, armed female police officers might face additional risks of being targets of assassination.[353] In addition their firearms may more easily fall into the hands of terrorists.[354] The possibility of these additional risks would be contrary to public safety.[355]

Another significant case addressing sex as a determining factor is *Commission v. French Republic*.[356] Although the Commission did not dispute that prison guards below the rank of governor could be hired on the basis of sex, it argued that the supervisory position of governor was administrative in nature and thus was not exempt from the principle of equal treatment.[357] The ECJ, however, disagreed with the Commission. The ECJ held that because the French government wanted to hire from the prison guard pool and that this experience was necessary for proper prison administration, sex could be a determining factor for the

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348 *See id.* at 3348.

349 *See id.*

350 *See id.*

351 Case 222/84, 1986 E.C.R. 1651.

352 *See id.* at 1687.

353 *See id.*

354 *See id.* at 1686.

355 *See id.* at 1687.

356 Case 318/86, 1988 E.C.R. 3559.

357 *See id.* at 3573.

governor position.[358] The French government also argued that five categories of national police supervisor could be selected using sex as a criterion and attempted to justify separate recruitment.[359] The court rejected this claim and concluded that exceptions could only relate to specific activities and had to be sufficiently transparent.[360] Transparency would enable the Commission to supervise the situation so that the exceptions could be adapted to future social developments. Because objective criteria did not govern the fixed percentages of posts to be filled by each sex, the Commission could not properly supervise the situation.[361] Consequently, the ECJ ruled that the system of separate recruitment was not exempt from the principle of equal treatment.[362]

6. *Protection of Women*

Article 2(3) permits an exception from the principle of equal treatment to protect women "particularly as regards pregnancy and maternity."[363] In *Johnston*,[364] the ECJ stated that this exception was intended to protect the biological condition of pregnancy and the relationship between mother and child.[365] The ECJ fleshed out this issue in *Ulrich Hofmann v. Barmer Ersatszkasse*.[366] In this case, a father took unpaid paternity leave to look after his newborn child when the mother returned to work after the obligatory period of maternity leave.[367] The ECJ refused the father's claim to the Member State's maternity allowance and concluded that the Equal Treatment Directive did not require Member States to grant leave

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[358] *See id.*

[359] *See id.* at 3580.

[360] *See id.* at 3581.

[361] *See id.* at 3582.

[362] *See id.*

[363] Equal Treatment Directive, *supra* note 312, art. 2(3).

[364] Case 222/84, Johnston v. Chief Constable of Royal Ulster, Constabulary, 1986 E.C.R. 1651.

[365] *See id.* at 1688.

[366] Case 184/83, 1984 E.C.R. 3047.

[367] *See id.* at 3050.

to fathers, even if the parents decide he will remain home.[368] Because the exception aims to protect women in connection with the effects of pregnancy and motherhood, leave may be reserved for women to offset the disadvantages they face as to retention of employment or pressures to return to work prematurely.[369]

Although the protection-of-women exception to the equal treatment provision may justify special protection of women in connection with pregnancy and motherhood, a total exclusion of women from an occupation such as police work cannot be justified.[370] For instance, in *Stoeckel v. French Republic*[371] the ECJ declared unlawful a provision of the French Labor Code excluding women from night work, because the risks were common to men and women.[372] The ECJ did point out, however, that measures designed solely to protect the mother and child during and immediately following pregnancy could fall within the derogation of Article 2(3).[373]

7. *Positive Action*

Article 2(4) permits Member States to take measures to promote equal opportunity for men and women by removing barriers facing women.[374] These measures, referred to as "positive action," are analogous to what the United States labels "affirmative action" programs. Positive action programs seek to remedy situations that result in or promote inequalities in the workplace and are constructed to encourage underrepresented groups to achieve a position in which they are competitive for jobs.[375]

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[368] *See id.* at 3077.

[369] *See id.* at 3075.

[370] *See* BARNARD, *supra* note 8, § 4.68.

[371] Case C-345/89, 1991 E.C.R. I-4047.

[372] *See id.* at I-4058, I-4061.

[373] *See id.* at I-4057-58.

[374] *See* Equal Treatment Directive, *supra* note 312, art. 2(4). Article 2(4) states "this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities." *Id.*

[375] *See* BARNARD, *supra* note 8, § 4.71.

In *Commission v. French Republic*,[376] the ECJ concluded that Article 2(4) was constructed to allow measures that are discriminatory in appearance and are intended to ameliorate or remove situations of inequality that exist because of social reality.[377] At the same time, the ECJ ruled that generalized special rights for women in collective agreement were outside the scope of the Article 2(4) exception.[378]

Two recent cases have been pivotal in establishing the boundaries of positive action. The first of these cases is *Kalanke v. Freie Hansestadt Bremen*.[379] The ECJ's controversial decision in *Kalanke* prohibited the automatic nature of quotas.[380] The case involved an employment policy that required if two candidates for the same promotion were equally qualified, the woman would automatically be given priority in areas where women were underrepresented.[381] Underrepresentation was deemed to exist when women composed less than half of the staff.[382] The ECJ refined its position on positive action *in Hellmut Marschal v. Land Nordrhein Westfalen*.[383] In *Hellmut*, the ECJ concluded that the positive action policy similar to that in *Kalanke* was impermissible.[384] A savings clause distinguished *Kalanke*, providing that equally qualified female candidates were given priority unless reasons specific to the opposing male candidate tilted the balance in his favor. The ECJ emphasized that even when male and female candidates are equally qualified, the male candidates tend to be promoted because of "prejudices and stereotypes concerning the role and capacities of women in working life."[385] For these reasons the ECJ concluded that equal qualifications of male and female candidates do not translate into

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376 Case 312/86, 1988 E.C.R. 6332.

377 *See id.* at 6336-37.

378 *See id.*

379 Case C-450/93, 1995 E.C.R. I-3051.

380 *See* BLANPAIN AND ENGELS, *supra* note 32, at 264.

381 *See* Case C-450/93, 1995 E.C.R. I-3051, 3054.

382 *See id.* at 3055.

383 Case C-409/95, 1997 E.C.R. I-6363.

384 *See id.* at 6392.

385 *Id.* at 6391.

equal opportunity for promotion.[386]

8. Employer Defenses

Employer defenses under the Equal Treatment Directive are analogous to those articulated by the ECJ for the Equal Pay Directive.[387] In the context of direct discrimination the orthodox position is that no defense exists for employers.[388] Yet for claims of indirect discrimination, the discriminatory consequences may be permissible where the employer justifies its action based on objective economic factors not related to discrimination based on sex.[389]

9. Pregnancy Discrimination

The ECJ has held that an employer's refusal to hire or dismissal of a woman on the basis of pregnancy constitutes direct sex discrimination contrary to the Equal Treatment Directive.[390] The ECJ does not require a male comparator suffering from a similar problem; rather the ECJ has held that since only women can become pregnant, discrimination on the basis of pregnancy is prima facie direct discrimination.[391] In more complex dismissal cases such as *Webb v. EMO Air Cargo Limited*,[392] the ECJ has also invalidated an employer's less favorable treatment of pregnant women.[393] In *Webb*, the plaintiff was appointed to replace another employee who was about to take maternity leave and also to

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386 *See id.*

387 For an examination of employer defenses for direct and indirect discrimination *see supra* notes 182-91 and accompanying text.

388 *See* BARNARD, *supra* note 8, § 4.32.

389 *See* Case 170/84, Bilka-Kaufhaus v. Weber von Hartz, 1986 E.C.R. 1607.

390 *See* Case C-177/88, Deckker v. VJV Centrum, 1990 E.C.R. I-3941 (holding that refusal to hire a women based on her pregnancy constituted direct discrimination on the basis of sex); Case C-179/88, Hertz v. Dansk Abejdsgiverforening, 1990 E.C.R. I-3979 (ruling that the dismissal of a female worker on account of pregnancy was direct discrimination based on sex).

391 *See, e.g.*, Case C-32/93, Webb v. EMO Air Cargo Limited, 1994 E.C.R. I-3567 (finding that pregnancy is not comparable to a pathological condition).

392 Case C-32/93, 1994 E.C.R. I-3567.

393 *See id.* at I-3589.

continue once the other employee returned.[394] Shortly after beginning the job, the plaintiff told the employer she was pregnant.[395] The employer dismissed the plaintiff ostensibly because she would be unavailable to work during the period she for which she was needed.[396] The ECJ rejected the employers' justification and held that if an employer hires a woman for an indefinite period, her pregnancy cannot be used to justify her dismissal because she would be unable to fulfill an essential aspect of her employment, including replacing another employee who is on maternity leave.[397]

The ECJ has not granted women who suffer from pregnancy complications complete protection. In *Forbund i Danmark v. Dansk Abejdsgiverforening*,[398] the ECJ ruled that an employer may not dismiss a woman on the basis of absences during the pregnancy and maternity leave time period.[399] But an employer may dismiss a woman based on absences after the maternity leave time period even if the absences are the result of pregnancy related illness.[400]

Because pregnancy based discrimination is direct discrimination, the orthodox view is that no defense exists for employers. Direct discrimination is permissible, however, if the employer's actions fall within the scope of Article 2(3) derogation regarding the protection of women vis-à-vis pregnancy and maternity. For instance, national law may prohibit pregnant women from working a nighttime shift.[401] The employer cannot, however, terminate a woman hired for an indefinite period because national law temporarily precludes her from working the nighttime shift during her pregnancy.[402] Finally, an employer's actions are

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394 *See id.* at I-3571.

395 *See id.*

396 *See id.*

397 *See id.* at I-3589.

398 *See* Case C-179/88, 1990 E.C.R. I-3979.

399 *See id.* at I-3999.

400 *See id.* at I-4000.

401 *See* Case C-421/92, Habermann-Beltermann v. Abeiterwohlfarht, Bezirksverband Ndb./Ofp. e. V., 1994 E.C.R. I-1657, 1675.

402 *See id.* at I-1677.

permitted under the Equal Treatment Directive if they are not discriminatory on the basis of sex but rather if an employee's inability to work is the result of a pathological condition or non-medical reasons.[403]

In 1992, the EU enacted the Pregnant Workers Directive[404] to provide protection for pregnant workers, those who have just given birth, and those who are breastfeeding.[405] The Pregnant Workers Directive establishes three main areas of protection. First, pregnant employees may take time off without pay penalties for prenatal medical exams.[406] Second, women are entitled to at least fourteen continuous weeks of maternity leave.[407] Also the woman's pay or an adequate allowance that is equivalent to sick pay must be ensured.[408] Third, employers may not dismiss women from the beginning of their pregnancy through the end of their maternity leave, barring exceptional circumstances unrelated to their pregnancy.[409] Member States must provide a remedy for pregnant workers who have been unlawfully terminated.[410]

The Directive also creates requirements to protect the health and safety of pregnant employees. For instance, if certain risks are present at the workplace an employer must notify the pregnant employee and/or a worker's representatives and may have to temporarily adjust working conditions or hours, or move the woman to another job.[411] If these options are not feasible, then the pregnant employee must be allowed leave.[412] Further, pregnant and nursing women may not be required to perform duties that risk

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403 *See* Case C-32/93, Webb v. EMO Air Cargo, 1994 E.C.R. I-3567.

404 Council Directive 92/85/EEC 1992 O.J. (L348) 1 [hereinafter Pregnant Workers Directive].

405 *See id.*

406 *See id.* art. 9.

407 *See id.* art. 8(1).

408 *See id.* art. 11(2)(b), 11(4). Member States may make entitlement to maternity pay conditional on the employee's fulfilling established statutory eligibility requirements. *See id.*

409 *See id.* art. 10(1).

410 *See id.* art. 10(3).

411 *See id.* art. 4.

412 *See id.*

exposure to certain agents and working conditions.[413] Finally, the Directive requires that the Members States provide a means for women to pursue claims under the Directive by judicial process.[414]

C. *Practical Differences Between U.S. and EU Equal Treatment Law*

One of the most significant differences between U.S. and EU law is the exemption in the Equal Treatment Directive for the protection of women with regards to pregnancy. The Supreme Court in *Johnson Controls* rejected an employer's attempt to use a woman's condition as a fertile woman as a BFOQ to protect her potential fetus from risks posed by manufacturing batteries.[415] The Court emphasized that "concern for women's existing or potential offspring historically has been the excuse denying women equal employment opportunities."[416] Furthermore, the Supreme Court emphasized a woman's individual autonomy in making employment and reproductive choices and concluded that it was not the place of the courts or individual employers to interfere with those decisions.[417]

In stark contrast, the Equal Treatment Directive itself provides that an employer may directly discriminate on the basis of sex to protect the woman's fetus.[418] The ECJ has limited the exemption. Employers may not generally exclude women from positions that have risks to both men and women such as night work.[419] This kind of general exclusion would be analogous to the exclusion of all women of childbearing age that the employer in *Johnson Controls* utilized. The Equal Treatment Directive would thus allow employers to exclude women from risky work during pregnancy and its aftermath.[420] Under U.S. law, a fetal protection

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[413] *See id.* art. 6.

[414] *See id.* art. 12. The similarity between Article 12 of the Pregnant Workers Directive and the Article 6 of the Equal Treatment Directive implies that the caselaw surrounding the latter will apply to the former. *See* BARNARD, *supra* note 8, § 4.106.

[415] *See* UAW v. Johnson Controls, 499 U.S. 187, 206 (1991).

[416] *Id.* at 211.

[417] *See id.*

[418] *See* Equal Treatment Directive, *supra* note 312, art. 2(3).

[419] *See* Case C-345/89, Stoeckel v. French Republic, 1991 E.C.R. I-4047, I-4048.

[420] *See id.* at I-4057-58.

policy could expose an employer to Title VII liability.

U.S. and EU law differ in another fundamental area of pregnancy discrimination. Under U.S. law, pregnancy is theoretically analogous to the disability of a non-pregnant employee. Employers must treat pregnant and non-pregnant employees equally. Thus, the Seventh Circuit has held that the PDA does not mandate that an employer treat a pregnant employee with morning sickness more favorably in its tardy policy than any other employee who is disabled by an illness.[421] Under EU law, in contrast, pregnancy is not considered equivalent to a pathological condition.[422] EU law recognizes pregnancy and motherhood as unique to women's biological and cultural experiences. The EU's Pregnant Worker's Directive specifically establishes special treatment for pregnant and breastfeeding employees.[423] Employers must comply with various requirements including granting pregnant employees time off without a pay penalty for prenatal medical visits and mandatory fourteen weeks maternity leave.[424] In addition the employer is responsible for notifying pregnant women of hazardous working conditions and may be responsible for adjusting working conditions or allowing her to take a leave of absence.[425]

V. Sexual Harassment

In the United States, sexual harassment has been recognized as a form of sex discrimination and as such falls within the ambit of Title VII. In the EU, however, sexual harassment claims have not been incorporated into the Equal Treatment Directive in an analogous manner. Sexual harassment is a recently recognized form of sex discrimination that has profoundly affected behavior in the workplace on the part of employees and employers. As a significant new force, sexual harassment law warrants its own section for examination. This section will first examine the current state of sexual harassment law in the U.S. It will next

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421 *See* Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).

422 *See* Case C-32/93, Webb v. EMO Cargo Ltd., 1994 E.C.R. I-3567.

423 *See* Pregnant Workers Directive, *supra* note 404.

424 *See id.* art. 9.

425 *See id.* art. 5-6.

present an overview of EU law and examine several of the varying legal approaches to addressing sexual harassment in the workplace that have been taken by the Member States. Finally, this section will emphasize practical differences between U.S. and EU sexual harassment law and the consequent effects on employer liability.

A. U.S. Sexual Harassment Law

Sexual harassment is a form of sex discrimination actionable under Title VII. Under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[426] Two forms of sexual harassment constitute discrimination "because of" one's sex: quid pro quo and hostile working environment.[427]

Quid pro quo harassment describes a type of harassment in which a supervisor implicitly or explicitly conditions a tangible economic benefit on the receipt of sexual favors.[428] For a plaintiff to establish a successful claim of quid pro quo harassment the plaintiff must demonstrate that her refusal to submit to the demands for sexual favors resulted in a tangible job detriment.[429] Otherwise the harassment falls within the theory of hostile work environment.[430] There exists, however, a distinction between "refusal" cases in which the plaintiff must demonstrate a tangible job detriment and "submission" cases in which the plaintiff does not have this burden.[431] In submission cases, "economic harm will not be available to support the claim of an employee who submits

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[426] *See* 42 U.S.C. § 2000e-2(a)(1).

[427] *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996).

[428] *See id.*

[429] *See* Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998); *see* also Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) ("[A] supervisor's mere threat or promise of job related harm or benefits in exchange for sexual favors does not constitute quid pro quo harassment").

[430] *See* Ellerth, 524 U.S. at 754 ("Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim.").

[431] *See* Jones v. Clinton, 990 F. Supp. 657, 670 (E.D. Ark. 1998) (emphasizing the distinction between "submission" and "refusal" cases).

to the supervisor's demands."[432]

Hostile work environment harassment exists when a supervisor or coworker creates a work climate sufficiently severe or pervasive to alter the conditions of employment so that a reasonable person would perceive the workplace environment as hostile or abusive.[433] The standard is subjective as well as objective. The plaintiff must establish that she or he subjectively perceived the behavior as abusive.[434] In addition the harassment must be "unwelcome"[435] and make the plaintiff's job more difficult to perform.[436] The Supreme Court has held, however, that the plaintiff does not have to prove that job performance actually diminished or that plaintiff suffered psychological damage.[437] Finally, the Supreme Court recently upheld a cause of action under Title VII for same-sex harassment.[438]

Applying the reasonable person standard remains one of the major issues in hostile work environment cases. In *Harris v. Forklift Lift Systems, Inc.*, the Court left this issue open. The Court held that whether the environment was hostile or abusive should be determined by looking at the totality of the circumstances.[439] The circuit courts disagree as to what the reasonable person standard should be. Prior to the Court's ruling in *Harris*, some lower courts had adopted a reasonable woman or victim standard.[440] In a post-*Harris* case, the Ninth Circuit sustained a trial court's instructions that ordered jurors to determine "whether the workplace [was] objectively hostile from the perspective of a reasonable person with the same fundamental

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[432] Karibian v. Columbia Univ., 14 F.3d 773, 778 (2d Cir. 1994).

[433] *See* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

[434] *See id.*

[435] Meritor, 477 U.S. at 68 ("[T]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'") (citing 29 C.F.R. § 1604.11(a) (1985)).

[436] *See* Harris, 510 U.S. at 25 (Ginsburg, J., concurring).

[437] *See id.* at 22.

[438] *See* Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75 (1998). The Court further held, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 80.

[439] *See* Harris, 523 U.S. at 23.

[440] *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

characteristics. Hostility must be measured based on the totality of circumstances."[441] The Ninth Circuit held the trial court's instruction to be consistent with both *Ellison v. Brady*[442] and *Harris*.[443] The Fifth Circuit has interpreted *Harris* as applying a reasonable person standard significantly different from the Ninth Circuit's. The Fifth Circuit has held that "[t]he test is an objective one, not a standard of offense to a 'reasonable woman.'" [444]

In two recent cases *Burlington Industries, Inc. v. Ellerth*[445] and *Faragher v. City of Boca Raton*,[446] the Supreme Court clarified the issue of employer liability in harassment cases. It emphasized that the primary objective of Title VII was to avoid harm.[447] The Court concluded that recognizing employers' affirmative obligation to prevent sexual harassment and rewarding employers who make reasonable efforts to fulfill their obligation would function to implement the policy underlying Title VII.[448] Consequently, the Supreme Court held that an employer is vicariously liable to the victimized employee for a hostile environment created by the acts of a supervisor with immediate or higher authority over an employee.[449] If a supervisor's harassment results in a tangible employment detriment such as discharge, demotion, or undesirable reassignment, employers are strictly liable with no affirmative defense available to them.[450] If the plaintiff does not suffer a tangible employment detriment the employer may assert an affirmative defense. The affirmative defense has two necessary elements: (1) the employer exercised reasonable care to prevent and promptly correct sexual harassment, for instance, through an

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441 Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).

442 924 F.2d at 879 (adopting a reasonable woman standard).

443 *See* Fuller, 47 F.3d at 1527.

444 DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995).

445 524 U.S. 742 (1998).

446 524 U.S. 775 (1998).

447 *See id.* at 805-06 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

448 *See id.*

449 *See id.* at 807; *Ellerth*, 524 U.S. at 765. *Ellerth* and *Faragher* contain the identical holdings and cite each other as sharing authority.

450 *See* Faragher, 524 U.S. at 808; Ellerth, 524 U.S. at 765.

anti-harassment policy and procedure; and (2) the plaintiff unreasonably failed to take advantage of policy and procedures provided by the employer.[451] In *Faragher*, the Court found that the employer could not successfully establish an affirmative defense by merely having an anti-harassment policy.[452] In this case, the employer failed to effectively disseminate and implement the policy and did not provide a procedure in which the employees could bypass the harassing supervisors.[453] Thus, the employer had not exercised reasonable care to prevent the harassing conduct. Because the affirmative defense articulated by the Court in *Faragher* and *Ellerth* is grounded in the employer's duty of "reasonable care," it denies an affirmative defense in a situation in which the employer knew or should have know of the harassing conduct and did not correct it.

Faragher and *Ellerth* specifically address cases that involve harassment by supervisors of subordinate employees. Although the Supreme Court has not heard a case involving the issue of co-worker harassment under Title VII, the dicta in *Ellerth* indicates an approval of lower courts' decisions that apply a "knew or should have known" standard to determine vicarious liability of the employer.[454] The structuring of employer liability under *Ellerth* and *Faragher,* however, is bound to have a spillover effect in peer harassment cases.[455]

B. EU Sexual Harassment Law

1. Applicable Legislation

The Equal Treatment Directive does not expressly designate sexual harassment as a form of sexual discrimination.[456] Because the Directive is not sufficiently specific, it does not require Member States to implement national legislation that protects

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[451] *See* Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

[452] *See* Faragher, 524 U.S. at 808-09.

[453] *See id.* at 808.

[454] *See* Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions, in* 14 LAB. LAW. 261, 307 (1998).

[455] *See id.*

[456] *See* Equal Treatment Directive, *supra* note 312.

employees from sexual harassment.[457] In 1987, an EU Commission report found that although a considerable degree of evidence demonstrated the serious consequences of sexual harassment, most Member States did not have effective legal remedies for a claim of sexual harassment.[458] Consequently the Commission proposed that a Directive should be enacted dealing specifically with protecting workers from sexual harassment.[459] Member States ignored the Commission's suggestion and in its place the Council passed a non-binding Resolution on the Dignity of Women and Men at Work.[460]

The Council Resolution defines sexual harassment as "conduct of a sexual nature, or other sex based conduct affecting the dignity of women and men at work, including conduct of superiors and colleagues."[461] The Council Resolution deems behavior unacceptable if:

> (a) such conduct is unwanted, unreasonable and offensive to the recipient;
>
> (b) a person's rejection of or submission to such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, promotion, salary, or any other employment decisions; and/or
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> (c) such conduct creates an intimidating, hostile, or humiliating work environment for the recipient.[462]

The Commission then passed the Recommendation on the Protection of Dignity in the Workplace[463] that was approved by a

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[457] *See* Victoria Carter, *Working on Dignity: EC Initiatives on Sexual Harassment in the Workplace*, 12 NW. J. INT'L L. & BUS. 431, 441 (1992).

[458] *See* BARNARD, *supra* note 8, § 4.81 (citing Rubenstein, THE DIGNITY OF WOMAN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES (1987)).

[459] *See id.*

[460] Council Resolution of 29 May 1990 on the Protection of the Dignity of Women and Men at Work, 1990 O.J. (C 157) 3 [hereinafter Council Resolution].

[461] *Id.* art. 1.

[462] *Id.*

[463] Commission Recommendation of 27 November 1991 on the Protection and

Council Declaration[464] in December 1991. The Commission Recommendation defines the unacceptable conduct as set out in the Council Resolution and directs the Member States to enact measures to prevent sexual harassment.[465]

The definition of sexual harassment embodied in the Council Resolution and the Commission Recommendation defines sexual harassment subjectively rather than objectively.[466] Thus the effect of the harasser's conduct would not be evaluated by the reasonable person standard but rather by examining how the conduct affected that particular person.[467] The intent or motivation of the harasser is irrelevant in evaluating the conduct.[468]

At the Council's request a Code of Practice accompanies the Commission Recommendation.[469] The Code describes the various forms that sexual harassment may take including physical conduct, suggestive remarks, and displays of pornographic material.[470] It also emphasizes that employers should take measures to prevent sexual harassment.[471] The Code encourages employers to issue a clear sexual harassment policy, develop complaint and investigation procedures, and train sexual harassment counselors.[472]

The Council Resolution, the Commission Recommendation, and the Code of Practice are not legally binding on the Member States.[473] The ECJ, though, has held that Member State national courts must take recommendations into consideration when

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Dignity of Women and Men at Work, 1992 O.J. (L 49) 1 [hereinafter Commission Recommendation].

[464] Council Declaration of 19 December 1991 on the Implementation of the Commission Recommendation on the Protection of the Dignity of Women and Men at Work, Including the Code of Practice to Combat Sexual Harassment, 1992 O.J. (C 27) 1 [hereinafter Council Declaration].

[465] *See* Commission Recommendation, *supra* note 463.

[466] *See* BARNARD, *supra* note 8, § 4.83.

[467] *See id.*

[468] *See id.*

[469] *See* Carter, *supra* note 457, at 442.

[470] *See* Commission Recommendation, *supra* note 463.

[471] *See id.*

[472] *See id.*

[473] *See supra* notes 42-50 for an explanation of the various types of EU legislation.

deciding cases before them.[474] This kind of consideration is particularly pertinent when the Member States' courts are interpreting national law passed to implement the policy set forth in the recommendation.[475] The EU is currently considering enacting a directive proscribing sexual harassment which would have the same binding effects of the Equal Treatment Directive and the Equal Pay Directive.[476]

2. *Sexual Harassment and the Equal Treatment Directive*

The Commission Recommendation states that sexual harassment "may be in certain circumstances, contrary to the principle of equal treatment within the meaning of Articles 3, 4, and 5 of Council Directive 76/207/EEC." [477] Incorporating sexual harassment claims within the scope of the Equal Treatment Directive would grant legally enforceable rights and remedies to those who claim they are victims of sexual harassment.[478] If employers were faced with a claim of direct discrimination, they would be vicariously and strictly liable for the conduct of the harassed.[479] Furthermore, unless the ECJ would allow an employer to raise an objective justification defense to direct discrimination claims, the employer could only resort to the narrowly construed derogations contained in the Equal Treatment Directive.[480] Consequently, employers that have instituted the Code of Practice suggestion have lost the Code defense that all reasonable precautions were taken when faced with a direct discrimination claim.[481]

3. *Member States Laws Against Sexual Harassment*

Currently most Member States do not consider sexual

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[474] *See* Case C-322/88, Grimaldi v. Fonds des Maladies Professionelles, 1989 E.C.R. 4407.

[475] *See id.*

[476] *See* John C. Penn, *Sexual Harassment: Proscriptive Policies of the European Community, Ireland, and New Zealand*, 6 AM. U. J. GENDER & L. 139, 163 (1997).

[477] Commission Recommendation, *supra* note 463.

[478] *See* BARNARD, *supra* note 8, § 4.87.

[479] *See id.*

[480] *See id.*

[481] *See id.*

harassment to be within the scope of sex based discrimination under the Equal Treatment Directive.[482] Furthermore, no directive exists to mandate Member States to adopt legislation proscribing sexual harassment.[483] In fact, levels of consciousness about sexual harassment vary greatly among Member States as does the law.[484] Spain and France have legislation that expressly prohibits sexual harassment.[485] The scope of this legislation is limited in two ways: (1) the laws cover only supervisor-subordinate harassment, not coworker harassment; and (2) the laws provide only fines and/or imprisonment of the harasser but no compensation for the victims.[486] In the United Kingdom and Ireland, the courts have interpreted sexual harassment as within the ambit of sex discrimination. Under the Sex Discrimination Act of 1975, the UK courts have interpreted sexual harassment broadly to include physical and verbal harassment, quid pro quo, and hostile working environment harassment.[487] The Act creates strict employer liability for harassment perpetrated by its employees and provides victims of sexual harassment the right to recover for personal injury damages.[488] Similarly, in Ireland sexual harassment is prohibited as a form of sex discrimination but the law does not establish employer liability for compensation of victims.[489] Unlike the UK, Ireland has a narrow definition of employer liability.[490] Because sexual harassment is a form of employee misconduct that threatens health and safety, the employer is merely responsible for taking steps to minimize the risk that harassment will occur.[491] Ireland further limits sexual harassment law by allowing the Irish Labor Court to investigate the charge of harassment using the

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[482] *See* Penn, *supra* note 476, at 162.

[483] *See id.*

[484] *See id.*

[485] *See* Carter, *supra* note 457, at 436.

[486] *See id.* at 436-37.

[487] *See id.* at 437.

[488] *See id.*

[489] *See id.* at 438.

[490] *See* Penn, *supra* note 476, at 152-53.

[491] *See id.* at 153 (quoting MICHAEL RUBENSTEIN, THE DIGNITY OF WOMEN AT WORK 65 (1988)).

accused harasser's perspective.[492] In addition, because a minimum hourly threshold must be satisfied in order to come under sex discrimination law coverage, many part-time workers, the majority of whom are women, are not covered by the laws.[493]

In some Member States unfair dismissal laws provide a means of prevention and redress for victims of sexual harassment.[494] The unfair dismissal laws, though, are limited to employees who leave their jobs.[495] In Belgium, for instance, an employee may quit her job because of sexual harassment and then assert a claim for compensation under unfair dismissal laws.[496] In Ireland the employer must prove that a dismissal is fair which functions as a deterrent to a retaliatory discharge if a woman files charges of sexual harassment.[497]

Finally, most Member States have laws that require employers to provide a safe and healthy working environment.[498] Theoretically the health and safety of a workplace is tainted by sexually harassing behavior.[499] These health and safety laws, however, do not offer practical solutions to sexual harassment and often do not provide adequate legal redress.[500]

C. Practical Differences Between US and EU Sexual Harassment Law

Sexual harassment law in the United States is far more advanced in its development and its protection of employees than the laws in the individual Member States. Consequently, U.S. employers in the EU will likely be protected from liability for sexual harassment if they maintain a sexual harassment policy that

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[492] *See id.* at 153.

[493] *See id.* at 154. Ireland maintains this hourly threshold requirement for economic reasons. *See id.* The Irish government asserts that it does not want to discourage employers from employing part-time employees. *See id.*

[494] *See* Carter, *supra* note 457, at 438.

[495] *See id.*

[496] *See id.*

[497] *See* Penn, *supra* note 476, at 154.

[498] *See* Carter, *supra* note 457, at 438.

[499] *See* Penn, *supra* note 476, at 156.

[500] *See id.*

protects them from liability under Title VII. At the same time, sexual harassment law is in a state of growth in the EU. With the annexation to the EU of Finland and Sweden, who both have impressive equality records, the EU is beginning to make equality a greater priority.[501] Consequently the EU is currently considering implementing a directive binding the Member States to its policy on sexual harassment that currently exists only in the form of a non-binding recommendation. The EU recommendation, however, does not appear to expose employers to greater liability to sexual harassment claims than U.S. law. The major practical difference may be in the standard used. In EU law it is a subjective perspective; the effect of the harasser's conduct would not be evaluated using the reasonable person standard but rather by examining how the conduct affected that particular person. U.S. sexual harassment law, in contrast, utilizes a combination of both an objective and subjective standard. Consequently, if a directive is implemented employers may be exposed to greater liability for sexual harassment claims in the EU than in the US.

VI. Conclusion

The EU is a unique supra-national structure that has no equal in the present or at any time in the past. The EU is neither a traditional international organization such as the United Nations nor a "United States of Europe." The vision of what European Union means has fundamentally changed the balance of powers between the Member States and the European Union institutions. With increasing frequency, American-based multinational corporations will have to look to the laws of the EU to find answers in the area of employment and labor law. Consequently, they must achieve a working knowledge and understanding of the EU political and legal framework in order to anticipate this changing and expanding area of the law. With sex equality law occupying center stage for administrators and litigators, competence in this field is essential to the successful operation of American-based multinational corporations in the EU.

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[501] *See id.*