Missouri Law Review

Volume 51
Issue 3 *Summer 1986*

Article 6

Summer 1986

Death before Comparable Worth: The Limited Utility of Comparable Worth Evidence in a Title VII Cause of Action

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DEATH BEFORE COMPARABLE WORTH: THE LIMITED UTILITY OF COMPARABLE WORTH EVIDENCE IN A TITLE VII CAUSE OF ACTION

American Federation of State, County, and Municipal Employees v. Washington[1]

Average pay for women in the United States is less than that for men.[2] This is true despite many years of enforcement of federal and state laws mandating pay equity and prohibiting discrimination in compensation on the basis of sex. Although the magnitude[3] and causes[4] of this pay inequality

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1. 770 F.2d 1401 (9th Cir. 1985).

2. Average full-time earnings of women are approximately 60% of men's earnings. Goldin, *The Earnings Gap in Historical Perspective,* 1 COMPARABLE WORTH: ISSUE FOR THE 80's 3, 9-12 (U.S. Comm'n on Civil Rights June 6-7, 1984) (women's pay approximately 60% of men in 1970); WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 14 (Table 1) (D. Treiman & H. Hartmann eds. 1981) (approximately 55% in 1978) [hereinafter WOMEN, WORK, AND WAGES].

3. *See supra* note 2.

4. An in depth discussion of the causes of pay disparity is beyond the scope of this Note. Nevertheless, a brief discussion of the leading explanations of these causes is necessary to understand the conceptual framework from which the theory of comparable worth arises.

The following discussion is adapted from Judge Richard Posner's opinion in American Nurses' Ass'n v. Illinois, 783 F.2d 716, 719-20 (7th Cir. 1986). One explanation for the pay disparity "is that a society politically and culturally dominated by men steered women into certain jobs and kept the wages in those jobs below what the jobs were worth, precisely because most of the holders were women." This is known as occupational or job segregation. Comparable worth is premised upon the idea that analytical techniques exist for determining the relative worth of jobs that involve different levels of skill, effort, risk, and responsibility. An alternative explanation vigorously disputes the theoretical idea of job segregation and the empirical data for comparable worth.

> Economists point out that unless employers forbid women to compete for higher paying jobs (traditionally men's jobs), . . . women will switch into those jobs until the only difference in wages between traditionally women's jobs and traditionally men's jobs will be that necessary to equate the supply of workers in each type of job to the demand. Economists have conducted studies which show that virtually the entire difference in the average hourly wage of men and women, including that due to the fact that men and women tend to be concentrated in different types of jobs, can be explained by the fact that most women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their

are subject to dispute, the simple fact remains that women are not paid as much as men.

One aspect of the movement to diminish the earnings gap between men and women is the use of evidence of comparable worth. Comparable worth is an elusive concept[5] and one that may not be subject to precise

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"human capital" (earning capacity); and since part of any wage is a return on human capital, they tend . . . to be found in jobs that pay less. Consistently with this hypothesis, the studies find that women who have never married earn as much as men who have never married.

To . . . this, advocates of comparable worth reply that although there are no longer explicit barriers to women entering traditionally men's jobs, cultural and psychological barriers remain. As a result of which many though not all women internalize men's expectations regarding jobs appropriate for women and therefore invest less in their human capital.

With regard to the empirical premise of comparable worth, "economists point out that the ratio of wages in different jobs is determined by the market rather than by any *a priori* conception of relative merit . . . ." To this comparable worth proponents argue that

collective bargaining, public regulation of wages and hours, and the lack of information and mobility of some workers make the market model an inaccurate description of how relative wages are determined and how they influence the choice of jobs. This point has particular force when applied to a public employer . . . which does not have the same incentives that a private firm would have to use labor efficiently.

Id.

For an historical overview of gender-based pay disparity, see Goldin, *supra* note 2, at 3-19.

For information on wage disparity as a result of job segregation, see generally Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12* U. MICH. J.L. REF. 397 (1979); WOMEN, WORK, AND WAGES, *supra* note 2, at 13-42; Beller, *Occupational Segregation and the Earnings Gap,* 1 COMPARABLE WORTH: ISSUE FOR THE 80's 23 (U.S. Comm'n on Civil Rights June 6-7, 1984); England, *Explanation of Job Segregation and the Sex Gap in Pay* 1 COMPARABLE WORTH: ISSUE FOR THE 80's 54 (U.S. Comm'n on Civil Rights June 6-7, 1984).

For information on the labor market and the human capital theory, see generally Nelson, Opton, and Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980); Polachek, *Women in the Economy: Perspectives on Gender Inequality*, 1 COMPARABLE WORTH: ISSUE FOR THE 80's 34 (U.S. Comm'n on Civil Rights June 6-7, 1984); Hildebrand, *The Market System*, COMPARABLE WORTH: ISSUES AND ALTERNATIVES 79, 84-88 (1980); WOMEN, WORK, AND WAGES, *supra* note 2, at 44-45, 117-18.

5. Northrup, *Comparable Worth and Realistic Wage Setting*, 1 COMPARABLE WORTH: ISSUE FOR THE 80's 93, 93 (U.S. Comm'n on Civil Rights June 6-7, 1984) (comparable worth is an ill-defined concept that means many things to many people; its definitions are often lacking or vague).

A few examples of how commentators "define" comparable worth are in order. One author treats as equivalents the phrases "pay equity," "comparable worth," and "equal pay for work of comparable value." Rothchild, *Overview of Pay Initiatives, 1974-1984,* 1 COMPARABLE WORTH: ISSUE FOR THE 80's 119, 119 (U.S. Comm'n on Civil Rights June 6-7, 1984). These phrases are less than helpful because they

definition.[6] Generally, comparable worth relates jobs that are dissimilar in content, e.g., skill, effort, and responsibility, and purports to demonstrate that if such jobs are of equal value to the employer or society, the persons employed in them should be equally compensated.[7] In the context of litigation, most suits are brought by women in "traditionally" or "predominantly" female jobs who allege gender-based wage discrimination due to men in "traditionally" or "predominantly" male jobs receiving greater pay for work that is of comparable worth to the employer.[8] For example, "[w]omen who are nurses, librarians, government employees, and clerical workers have assessed their skills and the requirements of their jobs and have argued that their jobs are underpaid relative to jobs of comparable worth . . . that are held mainly by men."[9]

This Note will examine in detail whether evidence of comparable worth, alone or coupled with other evidence of discrimination, can be used to base a claim of discrimination under Title VII.[10] The discussion will be in three parts. First, a brief historical examination of the two major federal statutes concerning sex-based discrimination is necessary in order to understand the current relevance of comparable worth. The second and major part of the

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merely substitute one nebulous term for two "equivalents."

Other authors provide more expansive definitions that differ only as to emphasis: *compare* WOMEN, WORK, AND WAGES, *supra* note 2, at 1-2 (comparable worth requires equal pay for male and females doing jobs requiring *similar* levels of skill, effort, and responsibility, and similar working conditions) *with* Bellak, *Comparable Worth: A Practitioner's View*, 1 COMPARABLE WORTH: ISSUE FOR THE 80'S 75, 75 (U.S. Comm'n on Civil Rights June 6-7, 1984) (comparable worth means equal pay for males and females doing work requiring *comparable* skill, effort, and responsibility under similar working conditions). These definitions are similar to that adopted by the State of Washington, considered later in this Note. *See infra* note 39.

A more general definition of comparable worth is:

> comparable worth is a concept that encourages an organization or community to express the value it attaches to components of jobs by identifying and weighting various factors—such as knowledge and skill, accountability, and working conditions—so that relationships between job content and wages are made explicit and comparisons can be made.

E. JOHANSEN, COMPARABLE WORTH: THE MYTH AND THE MOVEMENT 14 (1984).

6. Livernash, *An Overview*, COMPARABLE WORTH: ISSUES AND ALTERNATIVES 1, 8-9 & 8 n.1 (1980). *But see* Milkovich, *The Emerging Debate*, COMPARABLE WORTH: ISSUES AND ALTERNATIVES 23, 36-38 (1980) (further study and research may lead to an operational definition of comparable worth).

7. Northrup, *supra* note 5, at 93.

8. *See, e.g.*, American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

9. WOMEN, WORK, AND WAGES, *supra* note 2, at 1-2.

10. Title VII will be discussed in depth below. Discussion of an equal pay claim based upon comparable worth will be minimal because it is a dead letter. *See infra* notes 11-15 and accompanying text.

Note will focus on the decision in *American Federation of State, County and Municipal Employees v. Washington*, wherein the Ninth Circuit Court of Appeals held that the plaintiffs using evidence of comparable worth failed to state a cause of action under Title VII. Finally, the Note will discuss how evidence of comparable worth may be used to state a cause of action under Title VII.

Congress' first major attempt to correct the wage imbalance between the sexes was the Equal Pay Act of 1963.[11] It required an employer to provide "equal pay for equal work" unless the employer could assert one of the four affirmative defenses listed in the Act.[12] The courts have expanded the equal pay concept to include not only those jobs which are identical but also those jobs which are "substantially equal."[13] Nonetheless, this expansion has fallen short of allowing an equal pay claim based upon comparable worth.[14] This position is justified, in large part, by Congress' rejecting the word "comparable" and replacing it with the word "equal" in the original draft of the Act.[15]

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11. 29 U.S.C. § 206(d) (1982); *see also* Legler, *City, County and State Government Liability for Sex-Based Wage Discrimination After County of Wash. v. Gunther and AFSCME v. Wash.*, 17 URB. LAW. 229, 231 (1985).

The Equal Pay Act states in relevant part:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex.

29 U.S.C. § 206(d)(1).

12. 29 U.S.C. § 206(d)(1).

13. One legislator, commenting upon the use of "equal" during the House debate on the Equal Pay Act, stated that "the jobs involved should be virtually identical . . . ." 109 CONG. REC. 9,197 (1963).

The leading case of Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), expanded the definition to "substantially equal." *See also* Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 666 n.55 (1981).

14. *See, e.g.*, Brennan v. City Stores, 479 F.2d 235 (5th Cir. 1973); *see also* Legler, *supra* note 11, at 232.

15. As originally proposed, the Equal Pay Act called for equal pay for "work of comparable character on jobs the performance of which requires equal skill." S. 882, 88th Cong., 1st Sess. § 4 (1962). Congress later substituted for this formulation an equal work standard which ultimately became law. 108 CONG. REC. 14771, 87th Cong. 2d sess. (1962); Legler, *supra* note 11; Note, *supra* note 13. The reason for the substitution is that the original bill was criticized as "unworkable because it failed to take into account the factors employers used in determining a job's value." Bellace, *Comparable Worth: Proving Sex-based Wage Discrimination*, 69 IOWA L. REV. 655, 661 (1984).

Claimants alleging wage discrimination then turned their focus to the provisions of Title VII of the Civil Rights Act of 1964 (Title VII), as amended,[16] as a means of stating a claim based upon comparable worth.[17] Title VII prohibits discrimination in compensation, *inter alia*, on the basis of race, religion, sex, color, or national origin.[18] Before June 1981, claimants under Title VII were largely unsuccessful[19] because courts interpreted the Bennett Amendment[20] to Title VII as prohibiting such claims. This amendment was designed to relate Title VII to the Equal Pay Act and eliminate potential

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16. 42 U.S.C. § 2000e to 2000e(2)(h) (1982); *see also* Legler, *supra* note 11, at 232.

Section 703(a) of Title VII states in relevant part:

> It shall be an unlawful employment practice for an employer — (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex . . . or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a).

17. *See, e.g.*, Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); Molthan v. Temple Univ., 442 F. Supp. 448 (E.D. Pa. 1977).

18. The addition of "sex" to the list of categories of prohibited discrimination in Title VII is marked by some controversy. It was added to the original bill in the apparent hope of defeating the entire bill. Bellace, *supra* note 15, at 665; Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-83 & n.35 (1967). *But see* Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453-54, 467 (1981) (sex added to Title VII for "serious reasons," i.e., sex discrimination was wrong and white women should not be left at a disadvantage vis a vis black women).

There is little in the legislative record from which to discern Congress' intent in promulgating the amendment. Miller, *supra*, at 882; *see also* General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976) (The "legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."), *reh'g denied*, 429 U.S 1079 (1977).

19. *See, e.g., supra* note 17. *But see* International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Gunther v. County of Wash., 602 F.2d 882 (9th Cir.), *republished*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

20. 42 U.S.C. § 2000e-2(h) (1982).

The Bennett Amendment reads:

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

Id.

inconsistencies between them.[21] A controversy arose as to whether the amendment restricted Title VII's prohibition of sex-based wage discrimination to the claims of equal pay for equal work as mandated by the Equal Pay Act.[22]

In June 1981, this issue was resolved by the United States Supreme Court in *County of Washington v. Gunther,*[23] which held that the Bennett Amendment does not limit a Title VII claim to one of equal pay for equal work.[24] It also held that the amendment incorporated into Title VII only the four affirmative defenses of the Equal Pay Act.[25]

After *Gunther*, the concept of comparable worth could be defined in terms of the legal standards relevant to the Equal Pay Act and Title VII. "At its broadest, 'comparable worth' encompasses any claim for sex-based wage discrimination that falls outside the scope of the Equal Pay Act, i.e., any situation in which the plaintiff does not perform work 'substantially equal' to that of a higher paid employee of the opposite sex."[26] Thus the problems encountered with defining comparable worth[27] are now tied to legal concepts with which judges are familiar.

Gunther provided a small crack in the wall for comparable worth proponents. As they saw it, a cause of action based upon comparable worth could now be asserted following traditional Title VII doctrines.

Plaintiffs asserting such claims, however, were unsuccessful until the trial court's decision in *American Federation of State, County, and Municipal Employees v. Washington* (*AFSCME I*).[28] This was a case of "first impression" insofar as it concerned the implementation of a comparable worth compensation system.[29] The federal district court decided the case solely on the basis of Title VII theory and held that Washington State discriminated against plaintiffs on the basis of sex regarding wages[30] and ordered back pay and injunctive relief.[31] This victory for comparable worth, however, was short-lived.

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21. 1 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 33.22(a) (1985) [hereinafter LARSON].
22. *Id.*
23. 452 U.S. 161 (1981).
24. *Id.* at 171.
25. *Id.* The facts of *Gunther* are discussed *infra* notes 173 and accompanying text.
26. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 475 (2d ed. 1983) [hereinafter SCHLEI].
27. *See supra* notes 5-7 and accompanying text.
28. 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).
29. *AFSCME I,* 578 F. Supp. at 865.
30. *Id.* at 854, 866-67.
31. *Id.* at 871.

A unanimous Ninth Circuit Court of Appeals reversed the trial court in *AFSCME v. Washington* (*AFSCME II*).[32] It held that plaintiffs failed to establish that Washington State violated Title VII.[33]

The facts of the case are as follows. By law, salaries for Washington State employees are to reflect prevailing market rates.[34] Because of indications of pay differences within the state's civil service system between jobs held predominantly by men and those held predominantly by women,[35] the state, in 1974, commissioned a study by management consultant Norman Willis (the Willis study) to determine whether such a wage disparity actually existed.[36] The study examined 62 job classifications in which at least 70% of the employees were women, and 59 job classifications in which at least 70% of the employees were men.[37] It found an average wage disparity of about 20%, to the disadvantage of employees in jobs held mostly by females, for jobs of comparable worth.[38] In 1976, 1979, and 1980, the state conducted subsequent studies which confirmed the original Willis study, and in 1983 it enacted legislation[39] providing for a compensation scheme based upon com-

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32. 770 F.2d 1401 (9th Cir. 1985).

33. *Id.* at 1408.

34. WASH. REV. CODE ANN. § 28B.16.100(16) (1982). The court of appeals in *AFSCME II* set forth how this was accomplished.

> [C]omprehensive biennial salary surveys were conducted to assess prevailing market rates. The surveys involved approximately 2,700 employers in the public and private sectors. The results were reported to state personnel boards, which conducted hearings before employee representatives and agencies and made salary recommendations to the State Budget Director. The Director submitted a proposed budget to the Governor, who in turn presented it to the state legislature. Salaries were fixed by enactment of the budget.

AFSCME II, 770 F.2d at 1403.

35. The state's two civil service boards reached this conclusion in 1974 after they conducted a joint study. *AFSCME I*, 578 F. Supp. at 860.

36. *AFSCME II*, 770 F.2d at 1403; *AFSCME I*, 578 F. Supp. at 861.

37. *AFSCME II*, 770 F.2d at 1403; *AFSCME I*, 578 F. Supp. at 861.

38. *AFSCME II*, 770 F.2d at 1403; *AFSCME I*, 578 F. Supp. at 861.

Comparable worth was calculated by evaluating jobs under four general criteria, each of which was alloted a maximum number of points: Knowledge and Skills (280 points), Mental Demands (140 points), Accountability (160 points), and Working Conditions (20). Every job canvassed by the study was assigned a numerical value under each of the four criteria. *AFSCME II*, 770 F.2d at 1403. The study also found that as job value increased, the degree of disparity increased. "For jobs evaluated at 100 points, men's pay was 125% of women's pay. For jobs evaluated at 450 points, men's pay was 135% of women's pay." *AFSCME I*, 578 F. Supp at 861.

39. Salary changes necessary to achieve comparable worth shall be implemented during the 1983-85 biennium under a schedule developed by [each] department in cooperation with the higher education personnel board. Increases in salaries and compensation solely for the purpose of achieving comparable worth shall be made at least annually. Comparable worth for the jobs of all employees under this chapter [State Civil Service] shall be

parable worth.[40] The scheme was to take effect over a ten-year period.[41]

In 1982, two labor unions, American Federation of State, County, and Municipal Employees (AFSCME) and the Washington Federation of State Employees, initiated a class action lawsuit against the State of Washington[42] on behalf of approximately 15,500 workers in state jobs held primarily by females.[43] (Both plaintiffs are referred to as AFSCME in the opinions.) AFSCME sought immediate implementation of a system of comparable worth, arguing that the state system of compensation[44] discriminated against the class upon the basis of sex. As proof of this, it pointed to the Willis study, general statistical data,[45] and testimonial and documentary evidence.[46] When the state failed to rebut AFSCME's evidence,[47] the trial court held that discrimination could be based upon both the disparate impact and disparate treatment theories of discrimination under Title VII.[48] The Ninth Circuit overruled the trial court on both theories of discrimination.

A finding of disparate or adverse impact means that an employment practice has an adverse impact upon a class of employees protected by Title

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fully achieved not later than June 30, 1993.
WASH. REV. CODE ANN. § 41.06.155 (West Supp. 1986).
"Comparable worth" is defined by the statute as follows: "[T]he provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills, and working conditions." *Id.* § 41.06.020(5).

40. *AFSCME I*, 578 F. Supp. at 862.

41. *Id.* at 862-63.

42. *Id.* at 851.

43. The trial court stated that a "job held primarily by females" was any job classification which was occupied by 70% or more females. This conclusion was based upon the findings by the Willis study. *Id.* at 861, 863.

44. *See supra* note 35 and accompanying text.

45. The court's discussion of this is limited to the following sentence: "Plaintiffs submitted general statistical data, prepared over a period of years by the Defendant, tending to show a general pattern of discrimination by the Defendant against women." *AFSCME I*, 578 F. Supp. at 863. If such evidence did exist, it could be highly probative of discrimination. However, naked conclusions such as this are troublesome because it inhibits analysis of the trial court's opinion and prevents understanding the true nature of the alleged discrimination. It unnecessarily forces the reader to rely upon the trial judge's judgment rather than considering the evidence for himself.

46. *AFSCME I*, 578 F. Supp. at 863. As reflected in the trial court's opinion, the evidence did not include any specific instances of discriminatory conduct against members of plaintiff's class. Examples of documentary evidence were public statements by former Washington State governors acknowledging a disparity between women's pay and that of men. *Id.* at 860-62. This evidence is extensively reviewed *supra* notes 161-85, and accompanying text.

47. *Id.* at 863-65.

48. Either disparate treatment or disparate impact theory may be applied to the same set of facts. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977); Wheeler v. City of Columbus, 686 F.2d 1144, 1150 (5th Cir. 1982); Heagney v. University of Wash., 642 F.2d 1157, 1163 (9th Cir. 1981).

VII.[49] To illustrate this, assume that a minimum height and weight requirement operates to exclude 40% of the female applicants to a job, yet less that 1% of the males. The female applicants have suffered an adverse impact.[50]

A finding of disparate treatment means that an employer is intentionally treating a protected class of employees less favorably than other employees.[51] For example, if an employer intentionally channels women, but not men, into traditionally low-paying jobs, the women have suffered from disparate treatment.[52] The applicability of comparable worth to these two theories of employment discrimination will be the focus of the balance of this Note.

To establish a prima facie case of discrimination under disparate impact analysis, plaintiffs must show that a "facially neutral employment practice had a significantly discriminatory impact"[53] upon them. Adverse impact is generally established through statistical proof since "relevant assessments and comparisons must be expressed in numerical terms."[54] Proof of an employer's intent to discriminate is immaterial to a disparate impact cause of action.[55] If a prima facie case is established, the burden of producing evidence shifts to the employer who must either demonstrate the employment practice has a manifest relationship to the job in question[56] or refute the existence of the disproportionate impact.[57] Failure to do so results in a finding that the em-

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49. *See infra* notes 53-102 and accompanying text.

50. This illustration is based upon Dothard v. Rawlinson, 433 U.S. 321 (1977), discussed *infra* notes 72-76 and accompanying text.

51. *See infra* notes 103-210 and accompanying text.

52. This example is suggested by SCHLEI, *supra* note 26, at 583.

53. Connecticut v. Teal, 457 U.S. 440, 446 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

54. SCHLEI, *supra* note 26, at 1331 (statistical proof is the very core of evidence in adverse impact cases).

55. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Spaulding v. University of Wash., 740 F.2d 686, 705 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984). Disparate treatment analysis, however, requires proof of employer's intent to discriminate. *See, e.g.*, *Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical . . . .").

56. Connecticut v. Teal, 457 U.S. 440, 446 (1982). This is known as the "business necessity" defense. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (the touchstone of the test is business necessity).

The term "business neccessity" is best described, not in the abstract, but in relation to the particular practice or criterion being attacked. SCHLEI, *supra* note 26, at 1329-30. Specific examination of this defense is beyond the scope of this Note in view of the conclusion that disparate impact analysis does not apply to the facts of *AFSCME*. *See infra* notes 101-02 and accompanying text. For a general overview of business necessity, see SCHLEI, *supra* note 26, at 1328-30 and cases cited therein.

57. Since plaintiffs will generally establish the adverse impact through statistical proof, see *supra* note 54, "the defendant normally offers evidence in an attempt to demonstrate deficiencies in the plaintiffs' statistical evidence, such as deficiencies in the source of statistics, the geographic area used, the qualified labor market, the

ployer discriminated against a protected class in violation of Title VII.[58] Even if the evidence of the employer successfully rebuts the employee's prima facie case, plaintiffs will still prevail if they show that the employer's use of the employment practice was a mere "pretext" for discrimination.[59]

In *AFSCME I*, the trial court found that AFSCME established a prima facie case under the disparate impact theory.[60] It concluded that plaintiffs suffered a disproportionate impact[61] from the state's objective, facially neutral employment practice, that is, its system of compensation.[62] Since the state failed to rebut the prima facie case,[63] judgment was entered for AFSCME on this issue.[64]

The appellate court ruled that the trial court erred in applying the disparate impact analysis[65] to the state's system of compensation because such analysis is only applicable to an employment practice that is specific and clearly delineated.[66] Since the compensation system in question was composed of a variety of complex factors, AFSCME could not sustain a prima facie case of disparate impact. The court of appeals' conclusion will be analyzed at length below.

Originally, disparate impact theory was developed to analyze factors in employee selection procedures, such as high school diplomas or their equivalent,[67] height and weight requirements,[68] and written examinations,[69] when such factors disproportionately excluded members of a class protected by

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relevant time period, or simply accuracy." SCHLEI, *supra* note 26, at 1327 (footnote omitted).

58. Connecticut v. Teal, 457 U.S. 440, 446-48 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

59. *Teal*, 457 U.S. at 447; Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

60. *AFSCME I*, 578 F. Supp. at 864. ("Plaintiffs can establish a prima facie case of sexual discrimination in employment under either the theory of disparate impact or disparate treatment.").

61. *Id.* ("The Defendant's system of compensation has a disparate impact upon employees in predominantly female job classifications in violation of Title VII . . . .").

62. *Id.* ("Under the disparate impact theory, the objective facially neutral practice is Defendant's system of compensation.").

63. *Id.* ("The Defendant has failed to demonstrate a legitimate and overriding business consideration justifying discrimination.").

64. *Id.* at 871.

65. *AFSCME II*, 770 F.2d at 1405.

66. *Id.*

67. Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs* is discussed *infra* notes 70-71 and accompanying text.

68. Dothard v. Rawlinson, 433 U.S. 321 (1977). *Dothard* is discussed *infra* notes 72-76 and accompanying text.

69. Connecticut v. Teal, 457 U.S. 440 (1982). One commentator refers to these three as "[t]he classic forms of the adverse impact case." SCHLEI, *supra* note 26, at 1287.

Title VII. For example, in *Griggs v. Duke Power Co.*[70] (the original disparate impact case), the plaintiffs alleged that Duke Power violated Title VII by requiring a high school education or its equivalent as a condition of employment or transfer within departments. This requirement disproportionately impacted blacks. The Supreme Court held that the requirement was invalid under Title VII since it was not shown to be related to job performance.[71]

Dothard v. Rawlinson[72] was the first Supreme Court case to hold that an employment practice which had a disproportionate impact on women violated Title VII. *Dothard* was a class action lawsuit brought by a female applicant who was denied employment as a prison guard by the Alabama Board of Corrections. The applicant, who was otherwise qualified,[73] was refused employment because she failed to meet the height and weight requirements[74] necessary to be a prison guard. The Court held that such requirements had a disparate impact upon women[75] and were not sufficiently related to the job of prison guard to justify their usage.[76]

Disparate impact theory was later used to attack employee training, promotion, termination, and compensation. Most courts refused to allow plaintiffs to state a claim under the disparate impact theory when such attacks were based upon broad-ranging[77] or subjective[78] employer practices. Like

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70. 401 U.S. 424.

71. *Id.* at 431.

72. 433 U.S. 321.

73. Plaintiff met the other requirements of possessing a valid Alabama drivers license, having a high school degree, being free from physical defects, and being between the ages of 20 1/2 years and 45 years at the time of appointment. *Id.*

74. The height requirement was 5'2 and the requirement for weight was a minimum of 120 pounds. *Id.*

75. *Dothard*, 433 U.S. at 331. Plaintiff's statistics showed that the combined minimum height and weight requirement excluded approximately 41% of the female population yet less than 1% of the male population.

76. *Id.*

77. Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982) ("The discriminatory impact model of proof in an employment discrimination case is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."); *see also* Spaulding v. University of Wash., 740 F.2d 686, 706 (9th Cir.) ("[W]here plaintiff's sex discrimination claim is a wide-ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact."), *cert. denied*, 105 S. Ct. 511 (1984); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 620 (5th Cir.) (disparate impact is inappropriate for challenging systematic assignment of lower compensated employment to blacks and women), *reh'g denied*, 712 F.2d 1416 (5th Cir. 1983); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982) ("The disparate impact model applies only when an employer has instituted a specific procedure . . . ."). *But see* Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (remanding to district court to consider plaintiff's disparate

AFSCME II, courts have held that disparate impact analysis cannot be ap-

impact challenges to defendant's "multi-component promotion process."); Page v. U.S. Indus., 726 F.2d 1038 (5th Cir. 1984) (refusing to follow *Pouncy*, 668 F.2d 795).

78. The *AFSCME II* court did not reject applying disparate impact analysis to the compensation system on the basis that it contained subjective factors, although clearly it does. *See supra* notes 65-66, *infra* note 79, and accompanying text. Therefore, it is important to note how other courts treat this issue in order to guide future comparable worth claimants.

One Supreme Court decision which, fortunately, is not marred by the subjective/objective distinction, nonetheless is clearly on point. In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court affirmed the lower court's rejection of the plaintiff's cause of action which was based upon disparate impact theory. Plaintiffs were three black bricklayers who sought employment with defendant Furnco. They challenged Furnco's practice of leaving hiring decisions to the discretion of a sole white supervisor. Basing its decision upon Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court stated that disparate treatment, and not disparate impact, was the proper analysis. *Furnco*, 438 U.S. at 575 & 575 n.7.

The majority of courts follow the Supreme Court in rejecting the application of disparate impact analysis to subjective employment practices and instead apply disparate treatment theory. *E.g.*, Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 620 (5th Cir.) (disparate impact analysis is inappropriate for challenging the use of subjectivity in implementation of job qualifications for initial job assignments and promotions and placement of employees on a compensation scale), *reh'g denied*, 712 F.2d 1416 (5th Cir. 1983); EEOC v. Federal Reserve Bank, 698 F.2d 633, 639 (4th Cir. 1983) (disparate impact inapplicable to challenged method of promotions because plaintiff did not attack "objective standard"), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188-89 (5th Cir. 1983) (Court rejected finding that claimants established a prima facie case of racial discrimination under disparate impact theory in hiring, promotion, job classification, training, and termination because these practices were too subjective. Court further held that the only challenged employment practice that plaintiffs could attack under disparate impact theory was the employer testing because it was a specific, facially neutral selection criterion.); Talley v. United States Postal Serv., 720 F.2d 505, 507 (8th Cir. 1983) (plaintiff's attack on defendant's subjective decision-making in termination would not sustain a disparate impact claim), *cert. denied*, 466 U.S. 952 (1984); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982) (supervisor's decision to promote a male over a female was not susceptible to disparate impact analysis); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) (*per curiam*) (a subjective decision-making system is not the type of employment practice outlawed under *Griggs*, and cannot alone form the foundation for a disparate impact claim). *But see* Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (Court applied disparate impact analysis to challenge subjective elements within "multi-component selection processes." This opinion presents a good discussion of why impact theory should apply to subjective and broad-ranging employment practices.); Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1245 (10th Cir. 1984) (impact analysis applied where Hispanic plaintiff alleged that defendant discriminated against him on the basis of national origin by promoting a white male instead of plaintiff), *cert. denied*, 105 S. Ct. 2320 (1985); Rowe v. Cleveland Pneumatic Co., Numerical Control Inc., 690 F.2d 88, 93 (6th Cir. 1982) (*per curiam*) (application of impact theory to subjective employee selection factors was appropriate); Williams v.

plied to employee compensation systems that are based upon market rates.[79]

As the *AFSCME II* court stated, "the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis."[80] The complexity of the compensation system in *AFSCME II* has been discussed at length above.[81] In addition to the appellate court's legal analysis, strong policy arguments justify the court's conclusion.

In detailing the shifting burden of production of evidence for disparate impact analysis,[82] the Supreme Court has balanced the right of the employee

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Colorado Springs School Dist., 641 F.2d 835, 841 (10th Cir. 1981) (proper to apply impact theory to subjective employee selection factors; decision includes an excellent discussion of why subjective factors are anathema); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (first case to apply disparate impact analysis to subjective factors).

Undoubtedly, the cases which apply disparate impact analysis to subjective employment factors are bad law in light of *Furnco*, 438 U.S. 567. They are also bad policy. They allow plaintiffs to challenge an employer's thought processes. Yet this type of challenge is for disparate treatment theory where the employer's discriminatory intent is the critical focus. *See generally infra* notes 104, 120-22, and accompanying text. Employment practices "that rely heavily on subjective [factors] provide an opportunity for the intentional discrimination that is at the heart of a disparate treatment case." Payne v. Travenol Labs., 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982). The Supreme Court has not indicated any desire to obliterate the differences between disparate impact and disparate treatment theory. Likewise the courts should refrain from doing so.

An example of the misapplication of these separate theories is Rowe v. Cleveland Pneumatic Co., Numerical Control Inc., 690 F.2d 88. After finding that disparate impact analysis should apply to subjective employee selection factors, the court went on to hold that the plaintiff failed to state a prima facie case under that theory. Moreover, the court ultimately held that the plaintiff was discriminated against under the disparate treatment theory. By misapplying impact theory in the first place, the court further complicated an already difficult area of the law.

79. Spaulding v. University of Wash., 740 F.2d 686, 705 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984); Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982).

80. *AFSCME II*, 770 F.2d at 1406. Evan J. Spelfogel, in remarks made to the ABA's Section on Labor and Employment Discrimination Law in August 1980, listed the following factors as relevant in determining wage rates: heavy v. light industry; indoor v. outdoor positions; office v. shop; dirty v. clean conditions; physical jobs; job comfort and environment; fringe benefits; extra overtime pay; job location; abundance of qualified pool of applicants; supply and demand of labor; automation; foreign competition; hours of work; kind or length of time and cost for education and training; length of service; experience; the effect of state and federal labor protection laws; union organizing; geographic variations in the cost of living; and illegal aliens. *Reprinted in* Spelfogel, *Equal Pay for Work of Comparable Value: A New Concept*, 32 LAB. L.J. 30, 38 (1981).

81. *See supra* notes 34, 80, and accompanying text.

82. *See supra* notes 53-59 and accompanying text.

to be free from invidious discrimination against the right of the employer to conduct his business unfettered by government intervention.[83] Altering these burdens eradicates the careful balance struck by the high court. To allocate fairly the parties' respective burdens requires proof that a specific employer practice results in a discriminatory impact.[84] "Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy."[85] An employer is able to do this because he possesses unique knowledge of the legitimate business reasons for his employment practice.[86] A complex employment practice arguably will contain some aspects which are discriminatory and others which are not. Requiring an employer to respond with job-related justifications to this practice means he must also justify those parts which are non-discriminatory.[87] It is not possible to separate the discriminatory aspects of the adverse impact from the nondiscriminatory aspects. Thus, the judicial inquiry moves from knowledge unique to the employer toward ancillary matters. As applied to a compensation system based upon the competitive market, it would require him to justify that the wage rates he pays closely reflect the value of the job in question. However, wage rates reflect more than an employee's worth to the employer and more than attributes measured by typical comparable worth studies such as knowledge, skill, and working conditions. Wage rates also reflect factors such as the supply and demand for workers for a particular job, the effect of collective bargaining, and individual employee preferences.[88] Justifying the numerous complex variables that determine wages would be an insuperable burden on the employer resulting in per se liability of the employer for any imbalance in women's wages as compared to men's.[89] The only way for the employer to avoid this would be to treat women preferentially,[90] a result clearly not dictated by precedent or policy.

Although not discussed by the *AFSCME II* court, another rationale is offered by courts and commentators to explain why comparable worth claims

83. Note, *Sex-Based Wage Discrimination under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1097 (1982); Comment, *Comparable Worth and Title VII: The Case Against Disparate Impact Analysis*, 16 PAC. L.J. 833, 846 (1985).

84. Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982); Note, *supra* note 83, at 1098.

85. *Pouncy*, 668 F.2d at 801.

86. *Id.* at 800; Note, *supra* note 83, at 1098.

87. 1 LARSON, *supra* note 21, § 33.22(c), at 7-140.

88. Note, *supra* note 83, at 1098; Comment, *supra* note 83, at 847; *see* factors listed *supra* note 80.

Nor would it be logical to require the employer to justify only those factors which were allegedly discriminatory since they cannot be separated from those which do not produce discriminatory results.

89. Note, *supra* note 83, at 1098-99; Comment, *supra* note 83, at 846-47.

90. Note, *supra* note 83, at 1097.

do not fall within the purview of disparate impact analysis. This rationale is based upon the Supreme Court's decision in *County of Washington v. Gunther*.[91] *Gunther* held that disproportionate pay claims based upon a standard other than equal pay for equal work, including comparable worth claims, were limited to ones where intentional discrimination can be shown.[92] Since disparate impact theory requires no showing of intent[93] and disparate treatment does,[94] plaintiffs pursuing comparable worth must rely upon the latter theory.

To an extent, *Gunther* supports this conclusion. The *Gunther* Court stated at the outset of its opinion that plaintiffs sought to prove "that their wages were depressed because of *intentional sex discrimination*."[95] Moreover, the Court indicated that its holding was a narrow one.[96] *Gunther*, however, did not say that alleging intentional discrimination was the only way to state a claim on a standard other than equal pay. Nor did it indicate any reason why this should be so.

Courts both prior[97] and subsequent to[98] *Gunther* have required intentional discrimination in comparable worth claims. After an excellent survey of existing case law, the District Court for the Western District of Michigan in *Power v. Barry County* concluded that pre- and post-*Gunther* cases required evidence of intentional discrimination.[99] The court further stated that "the Supreme Court's recognition of intentional discrimination [in *Gunther*]

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91. 452 U.S. 161 (1981).
92. *See infra* note 95 and accompanying text.
93. *See supra* note 55 and accompanying text.
94. *See supra* note 51, and *infra* notes 104, 120-22, and accompanying text.
95. 452 U.S. at 166 (emphasis added).
96. *Id.*
97. Gunther v. County of Wash., 602 F.2d 882 (9th Cir.), *republished*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981); International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Taylor v. Charley Bros., 25 Fair Empl. Prac. Cases (BNA) 602 (W.D. Pa. 1981); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980). *But see* Heagney v. University of Wash., 642 F.2d 1157 (9th Cir. 1981) (court applied both disparate impact and disparate treatment theories to a sex-based wage discrimination case involving comparable worth.)
98. Plemer v. Parsons-Gilmore, 713 F.2d 1127 (5th Cir. 1983); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir.), *reh'g denied*, 662 F.2d 1156 (1981), *vacated on other grounds*, 459 U.S. 809 (1982); Connecticut State Empl. Ass'n v. Connecticut, 31 Fair Empl. Prac. Cases (BNA) 191 (D. Conn. 1983); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982); Blowers v. Lawyers Coop. Publishing Co., 25 Fair Empl. Prac. Cases (BNA) 1425 (W.D.N.Y. 1981).
99. Power v. Barry County, 539 F. Supp 721, 722-24 (W.D. Mich 1982); *see also* Legler, *supra* note 11, at 242-72 (surveying comparable worth cases and concluding almost all courts require intent).

may well signal the outer limit of theories cognizable under Title VII."[100] The court held that plaintiffs did not state a cause of action because they failed to provide evidence of discriminatory intent by the County.[101]

The conclusion to be drawn from the overwhelming majority of cases is that proof of intentional discrimination is required for a plaintiff to state a cause of action under Title VII based upon evidence of comparable worth. It is disappointing that most courts do not provide a principled reason why discriminatory intent is required. As indicated in *Power*, it could be that judges are hesitant to throw wide the judicial gate for such new theories as comparable worth. In any event, it is clear that disparate impact analysis does not apply to compensation systems based upon market rates. Such claims "are controlled by disparate treatment analysis."[102]

Despite its "complete and exhaustive examination of the controlling law," the *AFSCME I* court, on the facts of this case, incorrectly stated the standard appropriate for disparate treatment theory.[103] Although it correctly recognized that disparate treatment analysis required proof of intent,[104] the court described and applied the "order and allocation of proof in a private, non-class action challenging employment discrimination."[105] Yet this case did

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100. *Power*, 539 F. Supp. at 726.

101. *Id.*

102. *AFSCME II*, 770 F.2d at 1406.

103. *See infra* notes 105-15 and accompanying text.

104. *AFSCME I*, 578 F. Supp. at 856 (disparate treatment is intentional, unfavorable treatment of employees based upon impermissible criteria).

105. International Bhd. of Teamsters v. United States, 431 U.S. 324, 357 (1977) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)). The trial court relied upon Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and *McDonnell Douglas*, 411 U.S. 792, in setting forth the "allocations of burdens and order of presentation of proof in a Title VII case alleging disparate treatment." *AFSCME I*, 578 F. Supp. at 857. Yet *Burdine* and *McDonnell Douglas* only apply for a single plaintiff in a non-class action suit.

In *McDonnell Douglas,* the plaintiff, a black civil rights activist formerly employed by McDonnell Douglas, alleged that his discharge and the employer's subsequent refusal to hire him were racially motivated. The plaintiff was laid off in the course of a general reduction in the employer's workforce. This discharge came after he engaged in disruptive and illegal conduct directed at McDonnell Douglas. After the discharge, McDonnell Douglas advertised for workers in a position for which the plaintiff was qualified. The plaintiff applied and was rejected. He alleged this rejection was racially motivated. Because there were "significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964," the Supreme Court granted certiorari. 411 U.S. at 793-94.

The *McDonnell Douglas* Court allocated the burdens of proof as follows. The plaintiff retains the burden of persuasion throughout the litigation. He carries the initial burden of production of evidence under Title VII to establish a prima facie case of discrimination. A prima facie case

> may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking

not involve a single worker alleging discrimination based upon one incident. The plaintiffs here were a class constituting approximately 15,500 employees.[106]

The correct standard for a class of employees alleging intentional discrimination requires proof that the employer engaged in a systemwide "pattern or practice" of disparate treatment against them.[107] Plaintiffs must prove

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applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications.

411 U.S. at 802.

The prima facie case for an individual alleging disparate treatment has been expanded by subsequent courts. *See, e.g., Teamsters*, 431 U.S. 324, 358 (1977); Diaz v. American Tel. and Tel., 752 F.2d 1356, 1361 (9th Cir. 1985); Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 550 (9th Cir. 1982). This expansion is supported by the *McDonnell Douglas* test in two places. First, in the paragraph quoted above, the word *may* not *shall* is used by the Court. This indicates, as a matter of general construction, that it is discretionary on the part of the plaintiff and not mandatory. Second, the Court states that, "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.

A more generalized description of the prima facie proof of disparate treatment is the "plaintiff need only provide evidence that *suggests* that the 'employment decision was based on a discriminatory criterion illegal under the [Civil Rights] Act.'" *Diaz*, 752 F.2d at 1361 (quoting *Teamsters*, 431 U.S. at 358) (emphasis in original). Regardless of how the plaintiff chooses to present his prima facie case under disparate treatment theory, he must prove it by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Spaulding v. University of Wash., 740 F.2d 686, 700 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

After a prima facie case is established, the burden of production of evidence shifts to the employer "to articulate some legitimate, non discriminatory reason" for his actions. *McDonnell-Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 253. If the employer fails to rebut the employee's case, judgment will be entered against him. Even if the employer successfully rebuts the prima facie proof, the employee may undertake to prove that the reason given by the employer is not legitimate and non-discriminatory but actually is "pretextual," i.e., a sham to cover employer's discriminatory intent. *McDonnell Douglas*, 411 U.S. at 804.

106. *See supra* notes 42-43 and accompanying text.

107. *Teamsters*, 431 U.S. at 336. The United States brought suit against the Teamsters, a large labor union, and T.I.M.E. Freight, Inc., a nationwide common carrier of motor freight, pursuant to Sec. 707(a) of Title VII. This section of the act authorizes the U. S. Attorney General to sue any person or group of persons engaged in a "pattern or practice" of discrimination with respect to equal employment opportunities guaranteed by the Act. The Government alleged that defendants engaged in a pattern or practice of discrimination against black and Spanish-surnamed individuals in job assignments and seniority systems.

The Court's discussion indicates that the standards and principles of "pattern or practice" cases are equally applicable to private class actions brought under disparate treatment theory. *Teamsters*, 431 U.S. at 358-62 (discussing and applying Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), a private disparate treatment

this pattern or practice by a preponderance of the evidence.[108] Proof of a systemwide pattern or practice of discrimination requires more than the mere occurence of isolated, accidental, or sporadic discriminatory acts.[109] Plaintiffs must establish that discrimination was the company's regular rather than unusual practice, i.e., the company's standard operating procedure.[110] It is not a requirement to show that each member of the class is a victim of employment discrimination; evidence must be provided to create the inference of classwide discrimination.[111]

The crucial difference between an individual claim and a pattern or practice claim is that the inquiry regarding the single claim concerns the employer's reasons for a particular employment practice, while the focus for a pattern or practice claim often will not be on individual decisions, but on

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theory class action). Subsequently, the Court explicitly stated this in dicta. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); *see also* Melani v. Board of Higher Educ., 31 Fair Empl. Prac. Cas. (BNA) 648, 650 n.5 (S.D.N.Y. 1983); Presseisen v. Swarthmore College, 442 F. Supp. 593, 598-99 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1275 (3d Cir. 1978); 2 LARSON, *supra* note 21, § 50.50, at 10-62 ("Pattern or practice suits usually involve claims of disparate treatment and, as such, are analogous to class action disparate treatment suits."); *id.* § 50.22, at 10-12 ("The Supreme Court [in *Teamsters*] has implicitly endorsed the application of 'pattern or practice' principles and rules of proof to class actions brought by private parties.").

108. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977); EEOC v. Ford Motor Co., 645 F.2d 183, 197 (4th Cir. 1981), *rev'd on other grounds*, 458 U.S. 219 (1982).

109. *See supra* note 108.

110. *Teamsters*, 431 U.S. at 336.

As the Supreme Court notes, this view of pattern or practice is fully suggested by congressional intent:

> The "pattern or practice" language . . . was not intended as a term of art, and the words reflect only their usual meaning. Senator Humphrey explained: [A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature . . . . The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . .

Teamsters, 431 U.S. at 336 n.16 (citation omitted).

In *Teamsters*, the Government sustained its prima facie case through statistics showing a great disparity between job categories held by whites and those held by minorities. This was further "bolstered" through numerous accounts of specific instances of discrimination. *Id.* at 337-38.

111. *Id.* at 360 n.46, 362 (The "proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."); SCHLEI, *supra* note 26, at 1322-23 (The pattern or practice generally relies upon statistics to create the inference of classwide discrimination.).

In light of the above, it is apparent that the trial judge misstated the applicable standard and misapplied the stated standard. He purported to apply the standard for individual cases. Yet to arrive at the result he did, i.e., that there was classwide discrimination, he must have used the class action disparate treatment analysis.

a pattern of discriminatory decision-making.[112] Upon the establishment of the classwide claim, "the court will infer that all class members were victims of the alleged discriminatory pattern or practice in question."[113] It is entirely possible that a plaintiff will be unable to prove that a pattern or practice exists "even though discrimination against one or two individuals has been proved."[114] One beneficial aspect of the pattern or practice mode of proof is conservation of judicial resources: the court "need not adjudicate the myriad possible claims of each and every witness and/or class member."[115]

Upon a prima facie showing of a discriminatory pattern or practice, the burden shifts to the employer to demonstrate that plaintiffs' proof is either "inaccurate or insignificant"[116] or to come forward with a non-discriminatory, lawful reason for its policy.[117] Failure to rebut the plaintiff's prima facie proof will result in judgment being entered against the employer.[118] Even if the employer succeeds in rebutting the prima facie case, the employee class may then show that the employer's non-discriminatory justification "was in fact a pretext for unlawful discrimination."[119]

Proof of discriminatory intent, critical to a disparate treatment cause of action,[120] is inferred from the prima facie proof:

> [A] prima facie showing is not the equivalent of a factual finding of discrimination . . . . Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed upon impermissible considerations.[121]

The inference of discriminatory motive is necessary because of the difficulty of procuring direct evidence. "Employers are, on the whole, too sophisticated to profess their prejudices on paper or before witnesses."[122]

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112. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

113. SCHLEI, *supra* note 26, at 1323.

114. *Cooper*, 467 U.S. at 878; Chang v. University of Rhode Island, 606 F. Supp. 1161, 1185 (D.R.I. 1985).

115. *Chang*, 606 F. Supp. at 1185-86.

116. *Teamsters*, 431 U.S. at 360; *see also* SCHLEI, *supra* note 26, at 1323 (defendant can rebut the inference of discrimination created by the plaintiff's statistics by showing statistics are flawed, that the disparities shown are not statistically significant, or that equally appropriate statistical comparisons do not demonstrate a statistically significant disparity).

117. *Teamsters*, 431 U.S. at 361 n.46 ("employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result").

118. *Id.* at 361; *see also* SCHLEI, *supra* note 26, at 1323-24.

119. *Teamsters*, 431 U.S. at 362 n.50.

120. *See supra* note 104 and accompanying text.

121. Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978); *see also* Spaulding v. University of Wash., 740 F.2d 686, 700 (9th Cir.) (quoting *Furnco* with approval), *cert. denied*, 105 S. Ct. 511 (1984).

122. 2 LARSON, *supra* note 21, § 50.10, at 10-6.

The type of evidence from which the courts infer intentional discrimination in a disparate treatment claim may be broadly characterized as either statistics or "statistics plus." Where employees seek to show that wages are the result of intentional discrimination, statistics alone will rarely be sufficient to support a prima facie case. This result obtains for three reasons.

First, although statistics are virtually indispensable in class action employment discrimination cases,[123] courts encourage caution with their use. "[S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances."[124] "[I]n no case should there be a blind adherence to the proposition that mere statistical imbalance equals discrimination."[125] Second, courts prefer evidence in addition to statistics, such as specific instances of discrimination against members of the class, because it helps to "bring the cold numbers convincingly to life."[126]

Finally, in the vast majority of Title VII cases, plaintiffs adduce both statistical evidence and such other evidence of discrimination that is available:

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123. *See, e.g.*, Chang v. University of Rhode Island, 606 F. Supp. 1161, 1185 (D.R.I. 1985).

124. International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977); *see also* Pegues v. Mississippi State Empl. Serv., 699 F.2d 760, 766 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983) (quoting *Teamsters* with approval, and further stating "statistical evidence must be regarded with a substantial degree of caution"); EEOC v. Federal Reserve Bank, 698 F.2d 633, 645-46 (4th Cir. 1983) (statistics must not be accepted uncritically), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

Another recent court has written perhaps the definitive caveat regarding the use of statistics as evidence:

> While the progression of civilization from the quipu to the analog computer has added measurably to the store of available computational knowledge, even integrated microcircuitry and silicone chips know some bounds. Although statistical analyses serve an important role in employment discrimination cases, they are neither irrefutable nor necessarily definitive. Death and taxes, arguably, may be certain; but the colligation reached by application of the electronic dactylonomy of the statistical surveyor, and the conclusions suggested thereby, are not. Such analyses are, at best, sophisticated numerative generalizations, and they may, like other forms of generally-reliable evidence, be rebutted.

Chang, 606 F. Supp. at 1188 (quoting an earlier opinion by the court in Chang v. University of Rhode Island, 554 F. Supp. 1203, 1206 (D.R.I. 1983)).

125. EEOC v. Federal Reserve Bank, 698 F.2d at 646 (quoting with approval F. MORRIS, CURRENT TRENDS IN THE USE (AND MISUSE) OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION 51 (2d ed. 1979)).

126. *Teamsters*, 431 U.S. at 339; *see, e.g.*, Spaulding v. University of Wash., 740 F.2d 686, 701-04 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); Spight v. Tidwell Indus., 551 F. Supp. 123 (N.D. Miss. 1982); *see also* 2 LARSON, *supra* note 21, § 50.83(a).

historical, testimonial, and circumstantial. This is because prudent attorneys, knowing the judiciary's caution regarding statistics and its preference for other evidence, will rarely risk coming forth with only statistics. Thus, although instances can be found when statistics alone will support a prima facie showing,[127] these instances are rare.

If plaintiffs are unable to prove a prima facie case based upon statistical evidence, the plaintiffs must present additional evidence of intentional discrimination.[128] This method of proof is referred to as "statistics plus." Examples of the "plus," the evidence in addition to statistics from which it is necessary to establish intent, include a history of discrimination practiced by the employer, opportunities to discriminate that exist in the employer's decision-making processes, and most significantly specific instances of discrimination against members of plaintiff's class.[129]

In holding that the State of Washington intentionally discriminated against AFSCME, the trial court inferred intent from statistics, including the Willis study, and other evidence of discrimination, such as the State's use of subjective standards and admissions by state officials of sex-based discrimination in wages.[130] Thus, without explicitly saying so, the trial court applied the "statistics plus" method of proof.

Since Washington failed to rebut plaintiffs showing of disparate treatment,[131] judgment was entered against it. The court of appeals reversed the trial court on this issue, holding that AFSCME failed "to establish the requisite element of intent by either circumstantial or direct evidence."[132]

One factor from which the trial court inferred intent was the state's "deliberate perpetuation of an approximate 20% disparity in salaries"[133] as

127. *See, e.g.*, United States v. International Union of Elevator Constructors, Local No. 5, 538 F. Supp. 1012, 1015 & n.6 (3d Cir. 1976).

128. *See, e.g.*, Spight v. Tidwell Indus., 551 F. Supp. 123, 133 (N.D. Miss. 1982) (If statistical proof alone is insufficient to establish a prima facie case, plaintiff may supplement it with other evidence of discrimination); *see also* Capaci v. Katz & Bestoff, 711 F.2d 647 (5th Cir.) (gender-based pattern or practice of discrimination proved through use of very strong statistical evidence and sex-differentiated newspaper advertisements for employment), *reh'g denied*, 720 F.2d 1291 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); Spaulding v. University of Wash., 740 F.2d 686, 701-04 (9th Cir.) (statistical evidence, witness' testimony of specific instances of discriminatory conduct, and evidence of various officials' "predisposition" toward discriminating conduct was insufficient to show intent on the facts of this case), *cert. denied*, 105 S. Ct. 511 (1984).

129. Pegues v. Mississippi State Empl. Serv., 699 F.2d 760, 765 (5th Cir.), *reh'g denied*, 705 F.2d 450, *cert. denied*, 464 U.S. 991 (1983); *see also supra* notes 126-28.

130. *AFSCME I*, 578 F. Supp. at 864.

131. *Id.*

132. *AFSCME II*, 770 F.2d at 1406.

133. *AFSCME I*, 578 F. Supp. at 864.

shown by the Willis study.[134] The Willis study alone is insufficient evidence from which to draw discriminatory intent. The Willis study purports only to compare workers regarding four general criteria: knowledge and skill, mental demands, accountability, and working conditions.[135] It does not attempt to account for "other factors," such as work preferences, experience, education, and the state of the job market,[136] that may cause the wage disparity it finds. The *AFSCME II* court correctly recognized that "comparable worth statistics *alone* are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory."[137]

The Willis study, however, can be probative of intentional discrimination. As the *AFSCME II* court stated, "comparability of wage rates in dissimilar jobs *may* be relevant to a determination of discriminatory animus."[138] *Briggs v. City of Madison*[139] is an example of job comparability providing evidence of intentional discrimination. The plaintiffs in *Briggs,* several female nurses employed by the city of Madison, alleged wage discrimination in a non-class action disparate treament suit. They produced evidence that their salary was less than the salary of male public health sanitarians,[140] even though their job qualifications and responsibilities were the same as or greater than the job qualifications and responsibilities of the sanitarians.[141] After a detailed review of their evidence, the court concluded that plaintiffs had established an inference of intentional sex discrimination.[142] In doing so, the court indicated a clear understanding of the nature of the shifting burdens in disparate treatment analysis. If there are nondiscriminatory reasons "for

134. *See supra* notes 36-39 and accompanying text. The trial court did not expressly state whether the Willis study and the other statistical evidence were sufficient to prove intent. However, one can infer that it was not because the court stated it inferred discriminatory motive from other non-statistical evidence. *AFSCME I*, 578 F. Supp. at 864.

135. *See supra* notes 36-39 and accompanying text.

136. *See, e.g.*, Pegues v. Mississippi State Empl. Serv., 699 F.2d 760, 766-67 (5th Cir.), *reh'g denied*, 705 F.2d 450, *cert. denied*, 464 U.S. 991 (1983).

137. *AFSCME II*, 770 F.2d at 1407 (emphasis added); *see also* American Nurses' Ass'n v. Illinois, 783 F.2d 716, 721 (7th Cir. 1986); Spaulding v. University of Wash., 740 F.2d 686, 700-01 (9th Cir.) (the evidence of comparable worth alone is insufficient to support a disparate treatment cause of action), *cert. denied*, 105 S. Ct. 511 (1984); Gunther v. County of Wash., 602 F.2d 882, (9th Cir.), *republished*, 623 F.2d 1303, 1321 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981); SCHLEI, *supra* note 26, at 476 (statistical evidence of job comparability alone may be insufficient for a prima facie case).

138. *AFSCME II*, 770 F.2d at 1407 (emphasis added and citation omitted).

139. 536 F. Supp. 435 (W.D. Wis. 1982).

140. In general, public health sanitarians enforce state and local health rules and regulations as they relate to food and drink, sewage systems, hazardous wastes, and environmental concerns. *Id.*

141. *Id.* at 440.

142. *Id.* at 445.

the wage disparity, such as the employer's need to compete in the marketplace for employees with particular qualifications, the employer is in the best position to produce this information."[143] Thus, an employer must produce evidence that is uniquely known to him, a policy which perfectly comports with the rationale behind the allocation of the burden of producing evidence.

After the burden shifted in *Briggs*, the employer was allowed to adduce evidence that the payment of higher wages to sanitarians was necessary in order to attract and retain qualified employees.[144] The court ruled that the employer rebutted the inference of intent, and since the plaintiffs failed to show that the rebuttal evidence was a pretext, judgment was entered against them.[145]

Many courts deny that evidence of job comparability can be probative of intentional discrimination.[146] One of the primary reasons proffered for this position is that the value of a job to an employer "represents but one factor affecting wages."[147] Other factors include the supply of workers willing to do the job, the collective bargaining power of the workers, and individual employee job preferences.[148] Courts require the employee to account for these if he is to state a cause of action.[149] Another reason given is that courts do not read Congress' intent in promulgating Title VII "to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work."[150]

The two reasons given for denying the probative value of job comparability are insufficient to prevent such application. Evidence of "other factors" besides value to the employer are as much within the knowledge of the employer as the employee. Moreover, the employer is in a better position to marshall this evidence for presentation at trial. Thus, the employer should bear the burden of its production. As for the argument that Congress intended to preserve the law of supply and demand, this is still given effect so

143. *Id.* at 446.
144. *Id.* .
145. *Id.* at 446-50.
146. *See, e.g.*, Wilkins v. University of Houston, 654 F.2d 388, 402 (5th Cir.), *reh'g denied*, 662 F.2d 1156 (1981), *vacated on other grounds*, 459 U.S. 809 (1982); Lemons v. City and County of Denver, 620 F.2d 228, 229 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977); American Nurses' Ass'n v. Illinois, 606 F. Supp. 1313, 1318 (N.D. Ill. 1985), *rev'd on other grounds*, 783 F.2d 716 (7th Cir. 1986).
147. Wilkins v. University of Houston, 654 F.2d 388, 402 (5th Cir.), *reh'g denied*, 662 F.2d 1156 (1981), *vacated on other grounds*, 459 U.S. 809 (1982); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977).
148. *Christensen*, 563 F.2d at 356; *American Nurses' Ass'n*, 606 F. Supp. at 1318; *see also supra* note 80.
149. *Wilkins*, 654 F.2d at 402; *American Nurses' Ass'n*, 606 F. Supp. at 1318.
150. *Christensen*, 563 F.2d at 356; *see also* Lemons v. City and County of Denver, 620 F.2d 228, 229 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

long as the employer, in an effort to rebut a prima facie case, is allowed to rely upon the marketplace to set wages. Currently, the employer can rely upon one of the four affirmative defenses within the Equal Pay Act, including asserting "any factor other than sex" as a defense.[151] For Title VII this is interpreted to include the marketplace.[152] If the *Briggs* analysis is followed, the plaintiff may come forward with a study like the Willis study. Logically, since the employer will always raise the marketplace defense, the plaintiff will probably lose, as was the case in *Briggs*.

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151. *See supra* notes 11-12, 25, and accompanying text.

152. Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982); 1 LARSON, *supra* note 21, § 33.22(c), at 7-137 to -138 (for purposes of Title VII, it is not illegal for an employer to pay market rates to employees in truly different jobs); *see* American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir. 1986); Bellace, *supra* note 15, at 685 (as an example of a legitimate, non-discriminatory reason, the employer may argue that it was necessary to pay a certain rate in order to obtain qualified employees). *But see* Comment, *Equal Pay for Comparable Worth*, 15 HARV. C.R.-C.L. L. REV. 475, 500-01 (1980) (It should be no defense to a charge of discriminatory compensation to assert that market wages for male jobs are higher than those for female jobs.).

It is important to note the difference between a market defense as it applies to an Equal Pay Act cause of action and a Title VII claim. At first blush, it would seem that the payment of market wages as a "factor other than sex" would apply with the same force to both federal acts. Yet, for an equal pay claim, an employer may not rely upon market forces to justify pay disparities between men and women. Brennan v. City Stores, 479 F.2d 235, 241 n.12 (5th Cir.), *reh'g denied*, 481 F.2d 1403 (5th Cir. 1973); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970); Futran v. RING Radio Co., 501 F. Supp. 734, 739 (N.D. Ga. 1980). The rationale for these holdings is very sensible. Equal Pay plaintiffs perform work which is essentially identical to the sex favored by the wage disparity. *See supra* notes 11-15. Thus, the jobs are so similar as to be "interchangeable." *Briggs*, 536 F. Supp. at 447. Wage disparities between such identically situated workers cannot be justified by reference to the marketplace because "[j]ust such disparities were what Congress intended to correct by [the Equal Pay Act]." *Brennan*, 479 F.2d at 241 n.12.

This result does not obtain for Title VII claims. Employers may rely upon market wages because the Act's "remedial purpose is not so broad as to make employers liable . . . for existing market conditions." *Briggs*, 536 F. Supp. at 445 (footnote omitted). Congress' intent in passing Title VII was to disturb existing market forces as little as possible. *See supra* note 13 and accompanying text.

Although not raised by the parties or the courts in the *AFSCME* decisions, another argument regarding the "any factor other than sex" defense should be addressed. The argument is that such a defense is limited to factors relating to job performance such as knowledge and skill, accountability, and responsibility. This argument is "obviously untenable" considering that the other defenses, see *supra* note 11, "are not always concerned with job performance. One need look no further than the first [defense], that for seniority, to demonstrate this, since seniority has nothing to do with performance." 1 LARSON, *supra* note 21, § 31.25, at 7-77 to -78; *see* Hodgson v. Robert Hall Clothes, 473 F.2d 589 (3d Cir), *cert. denied*, 414 U.S. 866 (1973). *But see* Comment, *supra*, at 500-01 (the fact that women will work for lower pay than men is inadmissible as a defense in equal pay claims and should not be permitted to justify sex-based disparities in pay).

What is to be gained from such an arrangement? Several things. First, if there is evidence of a substantial bias in the relevant market, the employer's marketplace defenses may be limited.[153] Second, if the employer is in a position to significantly affect wages in the relevant market, his reliance upon the "market" will be misplaced.[154] Congressional respect for the marketplace defense implicitly assumes a free and competitive market. It would be ironic to allow an employer to rely upon the marketplace defense when the employer is using its substantial monopsony power in an inequitable manner.[155]

Finally, plaintiffs would be allowed to show that an employer's reliance upon market factors is merely a pretext for intentional discrimination.[156] This is the most significant change that the *Briggs* analysis would make in the majority decisions. As it now stands, under no circumstances would an allegedly aggrieved plaintiff be able to seek relief for disparate treatment based upon evidence of comparable worth. This result is harsh when an employer is intentionally discriminating against its employees. Therefore, by holding that the Willis study could be probative of disparate treatment, but not dispositive, the *AFSCME II* court followed the better reasoned position.

Although the appellate court did not address the plaintiff's other statistical evidence, this is not fatal to its disposition of the case. In addition to the Willis study, the trial judge discerned discriminatory motivation from statistical and testimonial evidence of an inverse correlation between the percentage of women in a job classification and the salary for that classification.[157] The judge, however, must be faulted for providing insufficient information as to the probative value of this evidence. Aside from two sweeping generalizations,[158] there was only one piece of evidence discussed by the

153. Legler, *supra* note 11, at 266.

154. *Id.* at 266-67.

155. A monopsonist is the sole buyer in the relevant market; it is the logical converse of the monopolist, i.e., the sole seller in the market. J. HIRSCHLEIFER, PRICE THEORY AND APPLICATIONS 413 n.1 (2d ed. 1980). A classic example of a labor monopsonist is a textile manufacturer in a small town. *Id.* at 412-13. A modern (and perhaps the only important) example of labor market monopsony exists in professional sports. *Id.* at 434.

The argument that monopsony power explains low wages will not be given further consideration here because the empirical evidence supporting the argument is virtually non-existent. R. BUNTING, EMPLOYER CONCENTRATION IN LABOR MARKETS 101, 112-13 (1962); Bunting, *A Note on Larger Firms and Labor Concentration*, 74 J. POL. ECON. 403, 404-05 (1966).

156. Legler, *supra* note 11, at 267.

157. *AFSCME I*, 578 F. Supp. at 864.

158. In two instances, the trial judge referred to plaintiffs' statistical proof other than the Willis study: (1) "Plaintiffs submitted general statistical data, prepared over a period of years by Defendant, tending to show a general pattern of discrimination by the Defendant against women." *Id.* at 863 (Fact No. 34); and (2) "Credible, admissible, statistical evidence, bolstered by relevant circumstantial evidence, supports this finding of disparate treatment." *Id.* at 863 (Fact No. 38). The court did not elaborate on

trial court which supported its inference. This was expert testimony that "[t]here is a significant inverse correlation between the percentage of women in a classification and the salary for that position."[159] The court did not discuss the statistics themselves nor give any indication as to how they were generated. No attempt is made to define what a "significant inverse correlation" means. Therefore, even though the State failed to rebut this evidence,[160] it is only of marginal probative value.

AFSCME has not made a prima facie case based upon statistics alone. It must use the "statistics plus" model of proof to state a prima facie case. In addition to statistics, AFSCME presented three categories of evidence from which the trial court inferred discriminatory intent. These were the state's use of subjective standards, admissions by present and past state officials to payment of discriminatory wages to women, and the state's failure to pay AFSCME its worth as evaluated by the Willis study.[161] For reasons it failed to disclose, the appellate court only considered the latter evidence. Nevertheless the trial court's findings for all three categories were clearly erroneous.

The trial court's reference to finding discriminatory intent based upon subjective standards is ambiguous. It states that the "application of subjective standards . . . have a *disparate impact* on predominantly female jobs . . . ."[162] If the court is using the phrase "disparate impact" in the technical Title VII sense, the application of disparate impact analysis to subjective standards is inapposite.[163] This issue was exhaustively treated above.[164] Moreover, discriminatory intent plays no part in disparate impact theory.[165] If, however, the use of that phrase is only "loose language," then perhaps the court meant to say predominantly female jobs were adversely affected by the application of subjective standards. But even this meaning will not result in a finding of discriminatory motive. The mere existence of subjective criteria is insufficient to find a discriminatory motive.[166] Without more, the court was

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this statistical evidence in the text. The type of evidence, the significance of it, and the quantity of it are all left to the reader's speculation.

159. *Id.* (Fact No. 36) (Testimony of Dr. Stephen Michelson).

160. *Id.* (Fact No. 40). ("Defendant failed to produce credible, admissible evidence raising a genuine issue of fact as to whether it discriminated against the Plaintiffs herein. What evidence Defendant did introduce did not rebut the Plaintiff's prima facie showing of disparate treatment . . . .").

161. *AFSCME I*, 578 F. Supp. at 864.

162. *Id.* (emphasis added).

163. *See supra* note 78.

164. *Id.*

165. *See supra* note 55 and accompanying text.

166. Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 338 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2154 (1984); *see also* SCHLEI, *supra* note 26, at 191.

Lilly is an excellent example of this proposition. In a class action suit based upon disparate treatment theory, discriminatory intent will not be inferred for the employer's use of "unbridled discretion" in promotions absent direct evidence of

incorrect to find unlawful intent based upon the state's use of subjective standards.

The trial judge also inferred intentional discrimination from "admissions by present and former state officials that wages paid to employees in predominantly female jobs are discriminatory."[167] A close review of the trial judge's opinion reveals no such admissions.[168] The judge is confusing ac-

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discrimination coupled with a statistically significant disparity between black and white promotion rates. *Id.*; *see also* Heagney v. University of Wash., 642 F.2d 1157, 1163 (9th Cir. 1981) ("Subjective employment decisions may result in discrimination, but the use of subjective criteria is not per se illegal.")

The *AFSCME* plaintiffs failed to produce direct evidence of discrimination or a statistically significant disparity between men's and women's pay. *See supra* notes 157-60, and *infra* notes 167-70, 207, and accompanying text. Thus, AFSCME's evidence of subjective standards is rendered useless.

What the District Court referred to when it spoke of subjective standards is a mystery. In addition to the instance cited in the text, the court mentioned subjective standards in two other places. First, in its Findings of Fact the court lists "subjective employment practices" as included in the evidence from which intentional discrimination is shown. *AFSCME I*, 578 F. Supp. at 863 (Fact No. 39). In further support, it refers to Finding of Fact No. 11. Yet this fact does not contain any information pertinent to subjective standards: "11. Employer actions, such as use of segregated classified ads, have the expected effect of creating and perpetuating a segregrated workforce." *Id.* at 860 (Fact No. 11).

There is one other place the court refers to subjective employment practices. The court discussed evidence which other courts have found probative of intentional discrimination. It listed without any citation of authority, "subjective employment practices utilized by the Defendants resulting in a pattern disfavoring females." *Id.* at 858.

In effect what the judge has done is to say that, "Intentional discrimination can be found from the improper use of subjective standards and I have found it here." However, the court did not identify these subjective standards. Thus, we have only the court's word that they exist. As one commentator put it, the trial court's summary conclusions preclude any meaningful appellate review. Siniscalco & Remmers, *Comparable Worth in the Aftermath of AFSCME v. State of Washington*, 10 EMPL. REL. L.J. 6 (1984).

167. *AFSCME I*, 578 F. Supp. at 864.

168. There are seven Findings of Fact which would, arguably, support the trial court's assertion that present or former state officials admitted discriminating wages were paid to employees in predominantely female jobs. *Id.* at 860-62 (Fact No.s 9, 12, 13, 14, 18, 25, and 26). Of these seven, four are mere acknowledgements that differences in pay either do or may exist. *Id.* (Fact No.s 13, 18, 25, 26). For example, in Fact No. 18, the former Governor of Washington, Daniel J. Evans, upon reviewing the results of the first Willis study (1974) stated: "We found that there is . . . a general relationship which results in an average of about 20% less [wages] for women than for males doing equivalent jobs . . . ." This statement is a far cry from saying "Women are paid at 20% less than men due to our discrimination."

Of the remaining three Facts, one is a statement of caution by former Governor Evans: "*If* the state's salary schedules reflect a bias in wages paid to women compared to those of men, then we must move to reverse this inequity." *Id.* at 860 (Fact No. 12) (emphasis added). This statement was in response to a letter received by the

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knowledgement of a pay disparity with admission that the difference in pay is a result of discrimination. If mere acknowledgement that a pay disparity exists were sufficient to support a finding of intent, then a Title VII cause of action based upon wage discrimination would be easy to prove. However, mere awareness of the adverse consequences of a policy is insufficient to support a finding of discriminatory purpose.[169]

The final grounds upon which the state was found to have intentionally discriminated was refusing to pay AFSCME its evaluated worth as established by the Willis study.[170] The court stated that the case was a "failure to pay" case, analogizing it to *County of Washington v. Gunther*.[171] Based upon *Gunther*, it concluded that the state intentionally discriminated against plaintiffs by its "failure to rectify an acknowledged disparity in pay between predominantly female and predominately male job classifications by compensating the predominantly female job employees in accordance with their evaluated worth, as determined by the State."[172] *Gunther* does not support this position.

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former Governor from the former Executive Director of the Washington Federation of State Employees. That letter said the State Civil Service Boards "perpetuated the discrimination against women in salary setting that permeates through the private sector and other governmental units." *Id.* The Governor's statement cannot be read as admitting discrimination.

Finally, there are two findings that, if construed broadly, might support the trial court's reading. First, in reference to a 1974 amendment to the state law against discrimination prohibiting employment discrimination based upon sex, the court reviewed several letters, memoranda, and reports. The court said, "[t]o this Court they indicate an administrative history that reflects knowledge by Defendant of sex discrimination in state employment since no later than March 24, 1972." *Id.* at 860 (Fact No. 9).

The other finding reflects the Evans Administration's concern that, during the time period that Willis conducted his study, "elimination of all forms of discrimination" would be accomplished. *Id.* at 861 (Fact No. 14).

These two Facts are not direct admissions of discrimination. Moreover, given the very broad construction necessary to make them support that proposition, their impact as evidence of intent is minimal.

169. *AFSCME II*, 770 F.2d at 1405 (citing Personnel Admin'r v. Feeney, 442 U.S. 256, 279 (1979)). The *Feeney* Court held that an official practice adopted for a lawful purpose which has a harsher impact upon females than males does not imply discriminatory purpose. Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker selected a particular course of action at least in part "because of," not merely "in spite of" its adverse affects upon a protected group. *Id.* at 279. Although *Feeney* was an equal protection case, when intentional discrimination is charged under Title VII, the inquiry is the same as in an equal protection case. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir. 1986).

170. *AFSCME I*, 578 F. Supp. at 864.

171. *Id.* at 865.

172. *Id.*

The plaintiffs in *Gunther* were female guards employed in the women's section of a county jail. They brought a Title VII disparate treatment claim alleging that the defendant intentionally discriminated against them. As evidence of intent, they pointed to the fact that even though the county evaluated their appropriate pay to be ninety-five percent as much as their male counterparts, according to the implemented pay scheme, they were only paid about seventy percent as much. The Supreme Court held that the plaintiffs stated a cause of action for purposes of Title VII. *Gunther* stands for the proposition that an employer cannot adopt a particular compensation system and then apply it in a discriminatory manner.[173] In *AFSCME*, the state had not adopted the Willis study and therefore could not have unequally applied it. Yet the trial court sought to infer intent from its non-implementation. In rejecting the trial court's position, the appellate court relied upon *American Nurses' Association v. Illinois*.[174]

The District Court in *American Nurses' Association*, when presented with the identical issue, said:

> In the current case, no such implementation of the commissioned evaluative study has taken place. The Court in *Gunther* did not hold that discrimination can be inferred from the mere fact that a particular job evaluation study has concluded a disparity exists between predominantly male and predominantly female jobs. Nor did the Court say that an employer who commissions a job evaluation study necessarily has to conform its pay rates to the results of its study. Rather, job evaluation was an element of proof in *Gunther* because there was a clear showing the employer deviated from the results of its own job evaluation in setting the rates for women's jobs but not for men's jobs.[175]

Clearly *Gunther* may not be relied upon for the proposition that failure to implement a comparable worth study is evidence of intentional discrimination. Precedent and policy dictate against judicial implementation of job evaluation studies. The *American Nurses' Association* court discussed an argument favoring the inference of discriminatory motive from a job evaluation study. Plaintiffs to that suit argued that because the study was funded and conducted by the state, the state's failure to implement its results was actionable. The court summarily rejected this argument. "Nothing in the law obligates an employer to adopt a new pay structure simply because a particular evaluative study indicates that a different set of pay relationships would be more equitable. Such a rule would create a disincentive to employers

173. County of Wash. v. Gunther, 452 U.S. 161, 181 (1982).

174. *AFSCME II*, 770 F.2d at 1408.

175. American Nurses' Ass'n v. Illinios, 606 F. Supp. 1313, 1317 (N.D. Ill. 1985), *rev'd on other grounds*, 783 F.2d 716 (7th Cir. 1986). Although the appellate court reversed the lower court, it specifically upheld the trial court on this issue. *Id.* at 722.

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to conduct job evaluation studies at all."[176] The *AFSCME II* court adopted this position, saying that a rule requiring implementation of any study which showed a disparity in wages "would penalize rather that commend employers for their effort and innovation in undertaking such a study."[177]

If an employer's failure to implement the results of its wage study is actionable, then the natural tendency for the employer will be to avoid conducting studies of their compensation systems or to do so only in utmost secrecy.[178] This chilling effect is in direct contradiction to Title VII's express purpose to cause employers to examine and evaluate their employment practices.[179]

Another reason militating against compulsive implementation of the Willis study is that it requires a court's subjective evaluation of the validity of the study. In order to require implementation, the court would have to assume that the results of the study were valid measurements of the relative "worth" of the job in question.[180] But because of "the limitations inherent in job evaluation techniques,"[181] the court has no standard by which to judge the study.[182] Due to the subjectivity and lack of standards involved, courts already refuse, in the absence of job evaluation studies, to independently determine the relative worth of a job by a comparison of it to other jobs.[183] For these reasons, courts should refuse to implement job evaluation studies like the Willis study.

The analysis of the factors from which the trial court inferred intentional discrimination is summarized as follows:

Of the five factors the court relied upon, three have been totally discredited—the use of subjective standards by the state, "admissions" by state

176. *Id.* at 1317-18; *see also* Siniscalco & Remmers, *supra* note 166, at 22 (The trial judge's decision "in effect holds employers strictly liable for not correcting a compensation system based on the results of *any* comparative study revealing wage disparity between jobs held predominantly by males and females. This holding . . . goes one step beyond precedent and probably sound logic." (emphasis in original)).

177. *AFSCME II*, 770 F.2d at 1408.

178. One commentator reports that attorneys at an increasing rate are advising their employer-clients to avoid studying their compensation system or to do so only in secrecy. Siniscalco & Remmers, *supra* note 166, at 22.

179. *Id.* at 23 (quoting United Steelworkers v. Weber, 443 U.S. 193, 204 (1979), citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

180. American Nurses' Ass'n v. Illinois, 606 F. Supp. 1313, 1318-19 (N.D. Ill. 1985), *rev'd on other grounds*, 783 F.2d 716 (7th Cir. 1986).

181. *Id.* at 1318. Unfortunately, the court does not expound upon these inherent limitations. For a general discussion of some limitations as they relate to comparable worth, see D. Schwab, *Job Evaluations and Pay Setting: Concepts and Practices*, COMPARABLE WORTH: ISSUES AND ALTERNATIVES 49 (1980).

182. *Id.*

183. Brennan v. Prince William Hosp. Corp., 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); Strecker v. Grand Forks City Social Serv. Bd., 21 Fair Empl. Prac. Cas. (BNA) 983 (D.N.D. 1979), *aff'd*, 640 F.2d 96 (8th Cir. 1981).

officials, and the state's refusing to implement the Willis study. One factor, the inverse correlation statistics, is only of marginal probative value. Only the Willis study's finding of an approximate twenty percent wage disparity between predominantly male and female jobs can be argued to have probative value. AFSCME failed to state a prima facie case because the Willis study alone was insufficient to support an inference of intentional discrimination[184] and because no other credible evidence of discrimination was presented.[185] It is therefore obvious that AFSCME lost at the appellate level because it did not present credible evidence from which intentional discrimination could be inferred.

The final section of this Note will explain how evidence of comparable worth may be used to show the employer's compensation system is violative

184. *See supra* note 137 and accompanying text. Because AFSCME's statistical evidence was insufficient to support an inference of intentional discrimination, AFSCME must use the "statistics plus" method of proof, *supra* notes 128-29, and accompanying text; thus when it failed to produce other credible evidence, it failed to state a prima facie case under disparate threatment analysis.

185. The trial court discussed but did not expressly infer discriminatory intent from two other sources of evidence: historical discrimination in employment against women and the state's use of sex-segregated advertising. As evidence of the state's historical discrimination against women, the court discussed Bloomer v. Todd, 3 Wash. Terr. 599, 19 P. 135 (1888) which held that women were not qualified electors under the laws of Washington Territory. *AFSCME I*, 578 F. Supp. at 866 n.11. The court does not explain how an 1888 voting rights case is relevant to historical employment discrimination. Nevertheless, without further discussion, it concludes that employment discrimination against women continued until the present. *Id.* at 866. To bolster its conclusion, the court cited the phrase from the Declaration of Independence that "all men are created equal," noting that "[t]he female gender is conspicuously absent in the Declaration of Independence." *Id.* at 866 n.11. The shortcomings of Mr. Jefferson's prose notwithstanding, such statements by the court are irrelevant to the present inquiry.

Sex-segregated advertising is the second source of evidence referred to by the trial court. The term "sex-segregated advertising" refers to help wanted advertisements placed in newspapers restricting various jobs to members of a particular sex, e.g., "help wanted—male" and "help wanted—female." Such advertising is evidence of discrimination in employment but is not determinative by itself, that is, it is useful and probative insofar as it goes to establish motive. Capaci v. Katz & Bestoff, 711 F.2d 647, 659 (5th Cir.), *reh'g denied*, 720 F.2d 1291 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984). As the appellate court noted, however, these advertisements stopped in 1973, and most were discontinued when Title VII became applicable to the states on March 24, 1972. *AFSCME II*, 770 F.2d at 1407-08. (Title VII was made applicable to state and local governments by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (1972). The effect of pre-Act discrimination is governed by standards set forth by the Supreme Court: a public employer who engaged in intentionally discriminatory conduct, e.g., sex-segregated advertising, before Title VII became applicable to him, will not be in violation of Title VII if he ceases all such conduct after it applied to him. Hazelwood School Dist. v. United States, 433 U.S. 299, 309 & 309-10 n.15 (1977). Since the state of Washington discontinued sex-segregated advertising after Title VII became applicable to it, it will not be held to violate the Act for the pre-Act conduct.

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of Title VII.[186] For purposes of this discussion, it will be assumed that the employer relies upon the market to base wages.[187] Furthermore, it will be assumed that this is a class action lawsuit.

As explained above, plaintiffs will be foreclosed from using the disparate impact theory of discrimination to attack the compensation system.[188] Therefore, plaintiffs must use evidence that the employer engaged in a pattern or practice of discriminatory conduct.[189]

As a general rule, plaintiffs must use the "statistics plus" method of proof because evidence of comparable worth alone is insufficient to state a prima facie case.[190] One possible exception to this general rule that statistics alone will be insufficient is the use of a multiple regression analysis.

Multiple regression analysis is a sophisticated statistical technique designed to estimate the effect of several independent variables (like sex, age, job performance, education, experience) on a single dependent variable like salary.[191]

Although ultimate resolution is beyond the scope of this note, the issue of whether multiple regression analysis alone is sufficient will be briefly explored since it has been increasingly used to aid in establishing a prima facie case of wage discrimination.[192]

The case against such a finding is made by Harry V. Roberts, Professor of Statistics at the University of Chicago Graduate School of Business. He points to three biases present in almost all regression analyses of sex discrimination and salary disparity.[193] Once these biases are corrected for, Pro-

186. This discussion is limited to Title VII because, as shown above, an Equal Pay Act claim may not be based upon evidence of comparable worth. *See supra* note 14.

187. This is a valid assumption because most employers rely either directly or indirectly (through the use of job evaluations) upon the market. *See generally* Schwab, *Using Job Evaluations to Obtain Pay Equity*, COMPARABLE WORTH: ISSUE FOR THE 80's 83 (U.S. Comm'n on Civil Rights June 6-7, 1984).

188. *See supra* notes 65-102 and accompanying text.

189. *See supra* notes 107-11 and accompanying text.

190. *See supra* notes 128-29 and accompanying text.

191. SCHLEI, *supra* note 26, at 1342-43; *see, e.g.*, Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508 (5th Cir. 1976); Greenspan v. Automobile Club, 495 F. Supp. 1021 (E.D. Mich. 1980).

192. SCHLEI, *supra* note 26, at 1343; *see* G. SNEDECOR & W. COCHRAN, STATISTICAL METHODS 334 (7th ed. 1980); W. CURTIS, STATISTICAL CONCEPTS FOR ATTORNEYS 153 (1983); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 721-25 (1980); Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980).

193. Roberts, *Statistical Biases in the Measurement of Employment Discrimination*, COMPARABLE WORTH: ISSUES AND ALTERNATIVES 173 (1980). Professor Roberts' article is directed at a general indictment of multiple regression analyses at any stage of sex/wage discrimination suits, rather than a specific caveat against finding a prima facie case. This, however, does not lessen the impropriety of the regression at the prima facie stage.

fessor Roberts concludes that the statistical data is more consistent with an assumption of nondiscrimination than with an assumption of discrimination.[194]

On the other hand, Franklin M. Fisher, Professor of Economics at Massachusetts Institute of Technology, argues that multiple regression analysis is "an entirely appropriate tool for the examination of possible discrimination in wages."[195] The existing case law is only a little more helpful in resolving this issue. As previously indicated, statistical analyses are treated with caution by the courts, and they prefer additional non-statistical evidence of discrimination.[196] Moreover, a prudent attorney will present both statistical and non-statistical evidence.[197] As a result, most courts hold that multiple regression analyses coupled with specific instances of discriminatory conduct are sufficient to establish a prima facie case of wage discrimination.[198] At least one court, however, when presented with evidence solely consisting of multiple regression analyses, held that the plaintiff met its prima facie case.[199]

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194. *Id.* The first and most important bias is underadjustment, i.e., the failure of statistical methodologies to take account of the average woman having less education, experience, and other job qualifications than her male counterpart. *Id.* 183-92; *see* Finkelstein, *supra* note 192, at 747-49. The second bias stems from the failure to make adequate allowances for elements of noncompetition between entering job groups in organizations, e.g., between airline pilots and flight attendants. Roberts, *supra* note 193, at 177, 192-93. The last bias listed by Professor Roberts is the failure to make proper allowances for differences in seniority. *Id.* at 193-94.

195. Fisher, *supra* note 192, at 721. Professor Fisher's article provides a very useful background for comprehending multiple regression analyses and includes an applicaton of regression to wage discrimination. *Id.* at 721-25.

196. *See supra* notes 124-26 and accompanying text.

197. *See supra* note 127 and accompanying text.

198. *See, e.g.*, Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508, 517 (5th Cir. 1976) (plaintiffs established a prima facie case of racial discrimination regarding salaries through evidence of multiple regression analysis (MRA) and specific instances of conduct); Greenspan v. Automobile Club, 495 F. Supp. 1021, 1061-65 (E.D. Mich. 1980) (MRA plus lay testimony establishes prima facie pattern or practice of wage discrimination on the basis of sex); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs., 469 F. Supp. 329, 353-55, 380, 398-99 (E.D. Pa. 1978) (although plaintiff's MRA plus other statistical evidence may support inference of discrimination, this evidence combined with other non-statistical evidence, including specific instances of discrimination, does establish plaintiff's prima facie case of pattern or practice).

Of course, evidence of MRA and specific instances of discrimination does not guarantee plaintiffs will meet their prima facie proof. *See, e.g.*, Allen v. Prince George's County, 737 F.2d 1299, 1304-05 (4th Cir. 1984) (plaintiff's MRA showing salary disparity properly excluded by trial court because it contained improper variables, i.e., pre-Act conduct by employer); Presseisen v. Swarthmore College, 442 F. Supp. 593, 614-20, 628 (E.D. Pa. 1977) (plaintiff's evidence of MRA and specific instances of discrimination failed to establish prima facie pattern or practice).

199. Melani v. Board of Higher Educ., 561 F. Supp. 769 (S.D.N.Y. 1983).

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Therefore, in order to establish a prima facie case of disparate treatment, plaintiffs should use the "statistics plus" method of proof which requires additional non-statistical evidence of discrimination.[200]

The most widely favored source of "additional evidence" is an employee's testimony about an employer's intentional discrimination against him.[201] How many members of the class must testify is unclear. The courts have held that for a large class, two or three isolated acts of discrimination are insufficient to show a pattern or practice of discriminatory conduct.[202] One federal appellate court has stated that to establish a pattern or practice of discrimination based upon specific instances of discrimination, the number of individual instances "must be significant when compared to the number of persons in the class."[203] That court looked at the ratio of discriminatory instances proved to the size of the class, 6/400, and concluded there was insufficient instances to prove class-wide discrimination.[204] The requirement of a "significant" number of discriminatory instances is not a strict mathematical formula. Rather, it represents a balance struck by two seemingly conflicting purposes underlying a pattern or practice claim.

First, pattern or practice is designed as an expedient method of adjudicating several acts of discrimination at once. To that extent, it conserves judicial resources.[205] Little is gained by having every member of the entire class testify. At the same time, there must be sufficient testimony so that the court can infer that the employer's standard operating procedure is to act in a discriminatory manner.[206] The conflict is resolved by having a significant number, but not all, of the plaintiffs testify.

The importance of specific instances of discrimination should not be underestimated. A close review of the trial court's opinion in *AFSCME I* reveals that none of the plaintiffs testified with respect to individual instances of discriminatory conduct. This fact was crucial to the appellate court's rejection of the plaintiffs' prima facie case.[207] "The critical thing lacking in [*AFSCME II*] was evidence that the state decided not to raise the wages of

200. *See supra* notes 128-29 and accompanying text.
201. *See supra* notes 126-29 and accompanying text.
202. *See, e.g.*, EEOC v. Federal Reserve Bank, 698 F.2d 633, 643-44 (4th Cir. 1983) (only two or three employees out of "countless" members of the class testifying is insufficient to support the statistical inference of discrimination), *rev'd on other grounds sub. nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867, 879 (1984) (although reversing the appellate court, the Court acknowledged that two or three instances would be insufficient).
203. Metrocare v. Washington Metro. Area Transit Auth., 679 F.2d 922, 929-30 (D.C. Cir. 1982).
204. *Id.*
205. *See supra* note 115 and accompanying text.
206. *See supra* notes 109-11 and accompanying text.
207. *AFSCME II*, 770 F.2d at 1408.

particular workers because most of those workers were females."[208]

Beyond individual testimony regarding discrimination, the other evidence from which courts infer a discriminatory motive is legion; it is limited only by the imagination of attorneys and the rules of evidence. In view of the conclusion reached below, this evidence will not be explored further.

Assuming plaintiffs are able to muster enough evidence to support a prima facie case, the burden of production of evidence shifts to the employer. From this stage, the lawsuit will proceed as a typical pattern or practice trial, with the employer attempting to rebut the statistical and anecdotal evidence. There is one important variance to this scenario: the employer may rebut the plaintiff's comparable worth evidence, by proving that he relied upon the market in setting wages.[209]

Thus, a crucial part of the plaintiff's case has been eliminated. The only exceptions to this conclusion are where the employer does not rely upon market rates or when his "reliance" is merely a pretext for intentionally depressing the wages of a protected group. The number of employers who do not rely upon the market in setting wages is unknown, but one suspects they are rare.[210] This also indicates that "pretexts" will be rare too. Nevertheless, no market-place defense should be tolerated when it is merely a post-hoc decision of the employer, propounded only for the purposes of trial. The employer's reliance upon the market-place should be closely scrutinized. When such reliance is found to be bona fide, it rebuts evidence of comparable worth.

The result is that plaintiffs are left to rely upon the strength of their other statistical and non-statistical evidence, just as in a generic Title VII action.

This scenario presents a bleak outlook for comparable worth proponents. The conclusions reached, however, are dictated by the structural foundations of Title VII and subsequent judicial interpretations of the Act. A comparable worth cause of action is limited to where there is intentional discrimination by an employer who either does not rely upon market rates or whose "reliance" is merely a pretext for intentionally depressing the wages of a protected class under Title VII. Claims based upon comparable worth which fall outside this limited scope of review must try other federal or state statutes or comparable worth proponents must seek new legislation to provide them with a remedy.[211]

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208. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir. 1986).
209. *See supra* notes 143-44, 151-52, and accompanying text.
210. *See supra* note 187.
211. Proponents have met with some success in the nation's legislatures. Al-

though no federal laws were found which provide for equal pay for work of comparable value, a brief survey revealed at least 17 states which have legislation pertaining to comparable worth. ALASKA STAT. § 18.80.220(a)(5) (1986); ARK. STAT. ANN. § 81-624 (1976); CAL. GOV'T CODE § 19827.2(a) (West Supp. 1987); GA. CODE ANN. § 34-5-1 (Harrison 1983); IDAHO CODE § 44-1702(1) (1977); IOWA CODE § 79.18 (Supp. 1983); KY. REV. STAT. ANN. § 337.423 (Michie/Bobbs-Merrill 1983 & Supp. 1986); ME. REV. STAT. ANN. tit. 26, § 628 (1974 & Supp. 1986); MD. ANN. CODE art. 100, § 55A (1985); MASS. GEN. LAWS ANN. ch. 149, § 105A (West 1982); N.D. CENT. CODE § 34-06.1-03 (1980); OKLA. STAT. ANN. tit. 40, § 198.1 (West 1986); OR. REV. STAT. § 652.220 (1985); S.D. CODIFIED LAWS ANN. § 60-12-15 (1978); TENN. CODE ANN. § 50-2-202 (1983); WASH. REV. CODE ANN. §§ 28B.16.100(16), .16.116 (Supp. 1987); W. VA. CODE § 21-5B-3(1) (1985).