NOTES

THOMAS V. ANCHORAGE TELEPHONE UTILITY: ALASKA TACKLES GENDER-BASED WAGE DISCRIMINATION

I. INTRODUCTION

In 1975, after weeks of negotiation, the Anchorage Telephone Utility ("ATU") and the International Brotherhood of Electrical Workers ("IBEW") reached a compromise on new pay increases for employees of the telephone utility.[1] Electricians, draftsmen, and other ATU plant force personnel received a forty-five percent pay raise, while traffic, commercial, and clerical ("TCC") workers received a thirty-five percent wage increase.[2] Some female ATU employees refused to consent to the agreement. The women alleged that the union and the telephone utility had discriminated on the basis of gender.[3]

A class of female employees brought suit against the union and the utility. These employees contended that it was illegal for a predominantly male group (the plant forces) to receive a higher percentage wage increase than the predominantly female group (the TCC forces). The trial court found no violation of the discrimination laws.[4] Presently on appeal before the Alaska Supreme Court, *Thomas v. Anchorage Telephone Utility*[5] tests the plaintiffs' theories of discrimination and thrusts Alaska onto the cutting edge of employment discrimination law.

This note argues that the plaintiffs in *Anchorage Telephone Utility* should rely on Alaska's broad Human Rights Act rather than on federal Title VII to prove their claim of discrimination. This note also contends that the TCC workers can establish a prima facie case of

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1. Brief of Appellants at 4, Thomas v. Anchorage Tel. Util., No. S-51 (Alaska filed July 7, 1983) [hereinafter Brief of Appellants].

2. Brief of Appellee at 5, Thomas v. Anchorage Tel. Util., No. S-51 (Alaska filed July 7, 1983) [hereinafter Brief of Appellee].

3. Brief of Appellants, *supra* note 1, at 15.

4. Thomas v. Anchorage Tel. Util., No. 3AN-76-5496 Civ., slip op. (Alaska Super. Ct. June 21, 1983).

5. No. S-51 (Alaska filed July 7, 1983).

intentional sex discrimination based upon a theory of disparate treatment despite the fact that their work is not comparable to the work of the plant force personnel. This note argues, however, that Anchorage Telephone Utility and the IBEW can successfully defend any charge of intentional discrimination by proving that the marketplace dictated the difference in pay raises. Finally, this note concludes that the plaintiffs fail to meet the requirements for disparate impact which is a theory of discrimination that does not require intent.

First, this note explores the historical development of the anti-discrimination laws of the United States and Alaska. Second, it examines the legal theories developed under federal law available to prove gender-based wage discrimination. Third, the application of those federal theories to the Alaska employment discrimination law are analyzed. Finally, the facts in *Anchorage Telephone Utility* are examined to discover the effect of the Alaska Human Rights Act on gender-based wage discrimination.

II. HISTORY OF EMPLOYMENT DISCRIMINATION LAW

A. Overview of Federal Statutes

Title VII of the Civil Rights Act of 1964[6] is the backbone of federal employment discrimination law. Congress passed Title VII in 1964 following the racial riots and turmoil of the mid-1960's[7] At its passage, there were many conflicting provisions which made the ultimate usefulness of Title VII uncertain. Title VII provided blacks, Hispanics, and women with expanded economic opportunities, but strictly limited government intrusion into business practices that could promote employment equality.[8] When Congress empowered the Equal

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6. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

7. In proposing Title VII to the Congress, President Kennedy stated:

> [T]he result of continued Federal legislative inaction will be continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence . . . .
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> . . . For these reasons, I am proposing that the Congress stay in session this year until it has enacted . . . the most responsible, reasonable, and urgently needed solutions to this problem . . . .
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> This problem of unequal job opportunities must not be allowed to grow, as the result of either recession or discrimination. I enlist every employer, every labor union, and every agency of government—whether affected directly by these measures or not—in the task of seeing to it that no false lines are drawn in assuring equality of the right and opportunity to make a decent living.

109 CONG. REC. 11,174, 11,175, 11,178 (1963).

8. A comparison of the following Title VII sections illustrates some of the conflicting provisions. 42 U.S.C. § 2000e-2(a) (broadly prohibiting employment discrimination); *id.* § 2000e-2(j) (preferential treatment to minorities not required simply

Employment Opportunity Commission ("EEOC") to oversee Title VII, for example, it only authorized the EEOC to mediate disagreements between employers and employees and not to enforce the Act.[9] Thus, initially there was great uncertainty as to Title VII's effectiveness in combating employment discrimination.

Despite this initial uncertainty, Title VII has successfully eliminated many employment barriers for women and minorities. The judiciary has interpreted Title VII's prohibitions against employment discrimination very broadly, thereby making Title VII a powerful anti-discrimination tool.[10] In 1972, Congress strengthened Title VII by expanding its coverage.[11] Title VII also spawned other anti-discrimination laws. These laws include the Age Discrimination in Employment Act,[12] passed in 1967, and the Rehabilitation Act of 1973.[13] These new laws protect from employment discrimination additional classes of people, including the aged and the handicapped.[14]

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because the percentage of minorities in a workplace is not equivalent to the percentage outside the workplace); *id.* § 2000e-2(h) (exempting seniority systems and ability tests from Title VII prohibitions).

9. Title VII of the Civil Rights Act of 1964, § 706(b), 42 U.S.C. § 2000e-5(b) (1964) (amended 1972). Subsequently, the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 105 (1972), empowered the Equal Employment Opportunity Commission to file a civil action in federal district court if mediation failed. 42 U.S.C. § 2000e-5(f) (1982).

10. *See, e.g.*, Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986) (allowing an affirmative action consent decree); Meritor Sav. Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986) (prohibiting sexual harassment); Hishon v. King & Spalding, 467 U.S. 69 (1984) (applying Title VII to partnership decisions); County of Washington v. Gunther, 452 U.S. 161 (1981) (holding that wage discrimination claims available even if work is unequal); United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding a private affirmative action plan); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (requiring that employer contributions to pension fund be sex-neutral); Dothard v. Rawlinson, 433 U.S. 321 (1977) (applying disparate impact to sex discrimination); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (holding that Title VII protects whites); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (rewarding seniority retroactively); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (awarding backpay for violations under disparate impact); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (delineating requirements for prima facie case); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (creating disparate impact theory).

11. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (current version at 42 U.S.C. § 2000e to 2000e-17 (1982)).

12. 29 U.S.C. §§ 621-634 (1982).

13. *Id.* §§ 701-796.

14. Other federal laws that outlaw various types of employment discrimination include the following: the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1982); the Equal Pay Act of 1963, 29 U.S.C. § 206 (1982); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982); and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982).

B. History of Alaska Employment Discrimination Statutes

1. *Human Rights Act.* The history and development of Alaska anti-discrimination law demonstrate a long-standing commitment to the elimination of employment discrimination.[15] Alaska recognized and sought to prevent employment discrimination earlier than did the federal government.[16] Alaska first banned discrimination on the basis of race, religion, color, or national origin in 1953, eleven years before Congress passed Title VII.[17] In 1960, Alaska expanded its law on discrimination with the passage of an act prohibiting employment discrimination on the basis of age.[18] Congress waited seven years before passing similar legislation.[19]

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15. Title VII does not preempt stricter state employment discrimination laws.

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7. The Supreme Court clarified section 2000e-7 in Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714 (1963), saying that there is no federal preemption unless enforcement of the state law would frustrate the aims of the federal law. *Id.* at 722. It is also unlikely that the more expansive Alaska employment discrimination law is invalid as an unreasonable restraint on interstate commerce. *See* Simpson v. Alaska State Comm'n for Human Rights, 423 F. Supp. 552, 555 (D. Alaska 1976), *aff'd,* 608 F.2d 1171 (9th Cir. 1979).

16. Following the Civil War, Congress passed the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1982). It was not until 1975, however, that the Supreme Court approved the use of section 1981 in employment discrimination suits against private employers. *See* Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982). For a history of section 1981, see *Developments in the Law—Section 1981,* 15 HARV. C.R.-C.L. L. REV. 29 (1980).

17. *See* Act of Mar. 9, 1953, ch. 18, 1953 Alaska Sess. Laws 64.

18. Act to Prohibit Unjust Discrimination in Employment Because of Age, ch. 10, 1960 Alaska Sess. Laws 7.

19. *See supra* note 12 and accompanying text.

In 1965, the Alaska Human Rights Act replaced Alaska's early employment discrimination laws and became the sole state law prohibiting race, religion, national origin, and age discrimination in employment.[20] In 1969, the Alaska legislature amended the Human Rights Act to prohibit discrimination in employment based on physical handicap or sex.[21] Finally, the legislature amended the Human Rights Act in 1975 to prohibit discrimination on the basis of marital status, changes in marital status, pregnancy, or parenthood.[22]

2. *Equal Pay for Women Act.* Alaska acted even more quickly to prohibit wage discrimination based on gender than in banning employment discrimination based on race, religion, or national origin. With the passage of the Equal Pay for Women Act in 1949, the Alaska territorial legislature prohibited discrimination between males and females in the payment of wages for work of comparable character.[23] When

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20. Human Rights Act, ch. 117, § 7, 1965 Alaska Sess. Laws 88, 92 (codified at ALASKA STAT. §§ 18.80.200-.300 (1986)). The Human Rights Act currently makes it unlawful for:

> (1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color or national origin, or because of the person's age, physical handicap, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.
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> . . . .
>
> (5) an employer to discriminate in the payment of wages as between the sexes, or to employ a female in an occupation in this state at a salary or wage rate less than that paid to a male employee for work of comparable character or work in the same operation, business or type of work in the same locality. . . .

ALASKA STAT. § 18.80.220(a) (1986). Part of the original motivation for enacting the Human Rights Act was to bring "Alaska's law 'into conformity' with federal civil rights legislation." Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas, 551 P.2d 942, 945 (Alaska 1976).

21. Act of May 22, 1969, ch. 119, § 4, 1969 Alaska Sess. Laws (unpaginated). The federal law protecting the handicapped from employment discrimination was passed four years later. *See supra* note 13 and accompanying text.

22. Act of June 3, 1975, ch. 104, §§ 7-9, 1975 Alaska Sess. Laws (unpaginated). Congress amended Title VII in 1978 to protect pregnant women by defining discrimination on the basis of childbirth or pregnancy as discrimination on the basis of sex. Act of Oct. 31, 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1982)). This amendment overruled General Electric Co. v. Gilbert, 429 U.S. 125 (1976), which held that Title VII did not protect pregnant women. Federal law still does not proscribe discrimination on the basis of marital status or parenthood.

23. Equal Pay for Women Act, ch. 29, 1949 Alaska Sess. Laws 80 (repealed 1980). The Act originally provided that:

the Human Rights Act was passed, it included a provision, subsection five, that closely resembled the Equal Pay for Women Act.[24]

For twenty years, however, the only type of sex discrimination prohibited was the payment of unequal wages. Finally, in 1969 the state legislature expanded the protection to women under the Human Rights Act to include discrimination in hiring.[25] In 1980, the legislature expanded the jurisdiction of the Human Rights Act to make the Equal Pay for Women Act largely duplicative[26] and then the legislature repealed the Equal Pay for Women Act.[27] The text of the Equal Pay for Women Act survives in subsection five of the Human Rights Act.

C. Scope of Alaska's Anti-Discrimination Law

Although the Alaska courts have relied heavily upon federal precedent and theory to interpret the Alaska Human Rights Act,[28] the

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> No employer shall discriminate in any way in the payment of wages as between the sexes, or shall employ any female in any occupation in this Territory at salary or wage rates less than the rates paid to male employees for work of comparable character or work in [sic] same operations, business, or type of work in the same locality.

Id. § 1, 1949 Alaska Sess. Laws at 80.

24. Human Rights Act, ch. 117, § 6, 1965 Alaska Sess. Laws 88, 90 (codified as amended at ALASKA STAT. § 18.80.220(a)(5) (1986), quoted *supra* note 20).

25. Act of May 22, 1969, ch. 119, 1969 Alaska Sess. Laws (unpaginated). A later amendment forbad sex discrimination in public accommodation, property, and housing as well as in hiring. Act of May 6, 1972, ch. 42, § 4, 1972 Alaska Sess. Laws (unpaginated).

26. In Brown v. Wood, 575 P.2d 760, 767 n.8 (Alaska 1978), *modified,* 592 P.2d 1250 (Alaska 1979), the Alaska Supreme Court suggested that the Equal Pay for Women Act had a broader jurisdictional reach than the Human Rights Act, thus allowing application of the Equal Pay for Women Act to non-profit educational institutions. One year after *Brown,* the Alaska legislature subjected public educational institutions to the Human Rights Act. Act of June 30, 1980, ch. 125, § 3, 1980 Alaska Sess. Laws (unpaginated). The legislature obviously wanted to increase the jurisdiction of the Human Rights Act to that of the Equal Pay for Women Act.

27. Act of June 30, 1980, ch. 125, § 5, 1980 Alaska Sess. Laws (unpaginated).

28. *See* Alaska USA Fed. Credit Union v. Fridriksson, 642 P.2d 804 (Alaska 1982); Alaska State Comm'n for Human Rights v. Yellow Cab, 611 P.2d 487 (Alaska 1980); Wondzell v. Alaska Wood Prods., Inc., 601 P.2d 584 (Alaska 1979), *cert. dismissed sub nom.* Lumber, Prod. and Indus. Workers Local 2362 v. Wondzell, 444 U.S. 1040 (1980); *Brown,* 575 P.2d 760.

Furthermore, the Alaska State Commission for Human Rights relies on federal precedent.

> The [Alaska State Commission for Human Rights] considers instructive but not binding relevant federal case law, statutes, regulations, and guidelines if they do not limit the commission's obligation to construe [ALASKA STAT. §] 18.80 liberally.

ALASKA ADMIN. CODE tit. 6, § 30.910(b) (January 1983).

Alaska statute differs significantly from federal employment discrimination law in its scope, procedures, and remedies. The coverage of the Human Rights Act is broader than the federal employment discrimination laws in several ways.[29] First, the Alaska law protects more groups than do the federal laws. In addition to the categories of discrimination prohibited under federal laws, the Alaska Human Rights Act explicitly prohibits discrimination on the basis of marital status and parenthood.[30] Second, Alaska law defines the membership of some protected groups more broadly than does federal law. The federal Age Discrimination in Employment Act, for example, only protects people between the ages of forty and seventy;[31] whereas, the Alaska Human Rights Act has no such upper age limit for protection.[32] Third, while Title VII only covers employers with more than fifteen employees,[33] the Alaska law applies to all employers regardless of size.[34] Fourth, the Alaska law has an unusually broad reach because it prohibits discrimination against minorities living outside of Alaska's borders.[35]

In addition to the broad coverage of the Human Rights Act, Alaska law provides additional procedures and remedies not available

29. *See* Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976) ("In view of the strong statement of purpose in enacting [ALASKA STAT. §] 18.80, and its avowed determination to protect the civil rights of all Alaska citizens, we believe that the legislature intended to put as many 'teeth' into this law as possible." (footnote omitted)).

30. Alaska prohibits discrimination on the basis of race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy and parenthood. ALASKA STAT. § 18.80.220(a)(1) (1986), quoted *supra* note 20.

31. 29 U.S.C. § 631(a) (1982).

32. Simpson v. Alaska State Comm'n for Human Rights, 423 F. Supp. 552, 554 (D. Alaska 1976), *aff'd,* 608 F.2d 1171 (9th Cir. 1979). The definition of "physical handicap" in the Alaska Human Rights Act also appears to be broader than the definition under the Rehabilitation Act of 1973. *Compare* ALASKA STAT. § 18.80.300(11) (1986) *with* 29 U.S.C. § 706(7) (1982).

33. 42 U.S.C. § 2000e(b) (1982). The applicability of other federal employment discrimination laws is also contingent upon the employer's size or the receipt of federal funds. The federal Age Discrimination in Employment Act applies only if an employer has 20 or more employees. 29 U.S.C. § 630(b) (1982). The Rehabilitation Act of 1973 applies only if the employer accepts a government contract in excess of $2,500. 29 U.S.C. § 793(a) (1982).

34. ALASKA STAT. § 18.80.300(3) (1986).

35. Adams v. Pipeliners Union 798, 699 P.2d 343, 349-52 (Alaska 1985). In *Adams,* the union recruited most of its laborers from the South for work in Alaska. The union discriminated against blacks in its hiring practices. Consequently, the Alaska State Commission for Human Rights imposed a requirement that 2.2% of the new jobs be offered to blacks. This quota was based on the percentage of blacks in the Alaska population. The court ruled that imposition of such a low quota was an abuse of discretion since it would not significantly help blacks in the South.

under federal law. The Human Rights Act allows either party to request a jury trial.[36] Moreover, as the agency charged with enforcing the Human Rights Act, the Alaska State Commission for Human Rights ("Commission") has the authority to hold administrative hearings[37] and order appropriate relief if it decides that discrimination has occurred.[38] Appropriate relief may include imposition of affirmative action quotas on employers who have discriminated.[39] Furthermore, upon receipt of any evidence of discrimination, the Commission may on its own initiate an administrative hearing by filing a complaint.[40] The Alaska law also can be considered more expansive than federal law because the Alaska courts need not adopt into state law any future retreats in federal anti-discrimination law by the United States Supreme Court or Congress.[41] Thus, the history of Alaska anti-discrimination law shows that the Alaska legislature recognized relatively early the problem of employment discrimination. The scope of Alaska employment discrimination law shows that Alaska has taken a strong stand against the evils of discrimination.

III. THEORIES TO PROVE DISCRIMINATION UNDER TITLE VII

A. Disparate Treatment Under Title VII

Under both federal and Alaska law, the two main analytical tools to prove employment discrimination are disparate treatment and disparate impact.[42] Disparate treatment, the first analytical tool, is defined as intentional discrimination against an individual on the basis of race, sex, or religion.[43] In *McDonnell Douglas Corp. v. Green,*[44] the

36. Hall v. Morozewych, 686 P.2d 708, 710 (Alaska 1984); Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341, 1344 (Alaska 1976).

37. ALASKA STAT. § 18.80.120 (1986).

38. *Id.* § 18.80.130. If the Commission determines that discrimination occurred, then it must issue an injunction against future discrimination. The Commission has discretion to provide other types of relief. *Adams,* 699 P.2d at 351.

39. *Adams,* 699 P.2d at 349-50. The Alaska Supreme Court, however, has not ruled whether hiring quotas violate the equal rights provision of the Alaska Constitution. *Id.* at 352 (Burke, J., concurring).

40. ALASKA STAT. § 18.80.100 (1986). The commission's complaint may even be in the form of a class action. Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas, 551 P.2d 942 (Alaska 1976).

41. *See, e.g.,* Culp, *New Employment Policy for the 1980's: Learning from the Victories and Defeats of Twenty Years of Title VII,* 37 RUTGERS L. REV. 895 (1985) (arguing that the Supreme Court has recently reduced many of the Title VII rights available to blacks, Hispanics, and women).

42. Disparate impact will be discussed *infra* notes 51-60 and accompanying text.

43. Under ALASKA STAT. § 18.80.220(a)(1) (1986), disparate treatment can also result from intentional discrimination on the basis of physical handicap, age, marital status, pregnancy, or parenthood. *See supra* note 20.

44. 411 U.S. 792 (1973).

Supreme Court set forth the requirements for establishing a prima facie case of disparate treatment under Title VII. The Court stated that to make a prima facie case the plaintiff must show:

> (1) that he belongs to a [protected class];
> (2) that he applied and was qualified for a job for which the employer was seeking applicants;
> (3) that, despite his qualifications, he was rejected; and
> (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[45]

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to give a legitimate nondiscriminatory reason for refusing to hire the plaintiff.[46] According to *Texas Department of Community Affairs v. Burdine,*[47] the defendant in a Title VII action need not *prove* the existence of a legitimate reason for the decision not to hire the plaintiff, but only need *articulate* a legitimate reason for the decision in order to overcome the plaintiff's prima facie case.[48] Finally, the plaintiff has the opportunity to come forward and rebut the defendant's articulated reasons by showing that they are mere pretexts or rationalizations. The plaintiff may succeed directly by persuading the trier of fact that "a discriminatory reason more likely [than not] motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[49] Whichever approach is taken, the ultimate burden of persuasion rests on the plaintiff.[50]

B. Disparate Impact Under Title VII

In addition to disparate treatment, federal law recognizes disparate impact as a second way to prove employment discrimination. Disparate impact is distinguished from disparate treatment in that disparate impact does not require a showing of an intent to discriminate. Disparate impact had its genesis in *Griggs v. Duke Power Co.*[51] In *Griggs,* the Supreme Court confronted the problem of a facially neutral hiring practice—the requirement that a job applicant possess a high school diploma—that disproportionately disqualified more blacks

45. *Id.* at 802. The Supreme Court in *McDonnell Douglas* also noted that this test must be flexible to fit the particular facts of each case. *Id.* at 802 n.13.

46. A "legitimate reason" has been defined as one that rationally relates to an employer's bona fide business concerns. Player, *Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis,* 36 MERCER L. REV. 855, 880-81 (1985).

47. 450 U.S. 248 (1981).

48. *Id.* at 257-58.

49. *Id.* at 256.

50. *Id.* at 253.

51. 401 U.S. 424 (1971).

than whites. Since there was no evidence that Duke Power imposed the requirement to prevent the employment of blacks, there was no issue of intent.[52] The diploma requirement, however, significantly restricted the access of blacks to jobs offered by Duke Power because only twelve percent of black males in the state had a high school education as opposed to thirty-four percent of white males.[53] The Supreme Court held that such a facially neutral requirement that disproprotionately disadvantaged one protected class as opposed to another was discriminatory unless it had "a manifest relationship to the employment in question."[54]

The *Griggs* Court gave two rationales for the disparate impact doctrine. The first rationale was to prohibit defendants from hiding their discriminatory intent behind employment tests that were not job-related.[55] The second reason was to remove the barriers erected by previous societal discrimination that might cause a disproportionately large number of blacks to fail certain employment tests.[56] Six years later, in *Dothard v. Rawlinson,* [57] the Supreme Court applied the *Griggs* theory of disparate impact to sex discrimination. After *Dothard,* federal law was better able to address the problem of societal discrimination that had disadvantaged women.

A disparate impact claim involves three steps. First, the plaintiff must prove that a particular employment practice has a disproportionate impact upon a protected class.[58] Second, the defendant must show that the practice in question is job-related.[59] Finally, if job-relatedness

52. *Id.* at 428-29. Duke Power, however, had openly discriminated against blacks prior to the enactment of Title VII. *Id.* at 426-27.

53. *Id.* at 430 n.6.

54. *Id.* at 432.

55. *Id.* at 431.

56. *Id.* at 430. The Supreme Court declared that the purposes of Title VII are the achievement of equal employment opportunity and the removal of past barriers to such equality. Thus, the *Griggs* Court held that an employer cannot use policies that "operate to 'freeze' the status quo of prior discriminatory employment practices," even if he has no intent to discriminate. *Id.* In *McDonnell Douglas,* the Supreme Court reaffirmed its statement in *Griggs,* declaring that "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas,* 411 U.S. at 806.

57. 433 U.S. 321 (1977). In *Dothard,* a female applicant for a position as a correctional counselor challenged minimum height and weight requirements for prison guards because the requirement barred more women than men.

58. American Fed'n of State, County and Mun. Employees v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process." (citation omitted)).

59. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979).

is shown, the plaintiff is given the opportunity to establish that other alternative practices would serve the employer's interest without a similar discriminatory effect.[60] Thus, the pivotal questions in disparate impact cases are the closeness of the relationship between the challenged employment practice and the actual requirements of the job, as well as the existence of practical alternatives to the challenged practice. The disparate impact analysis set out in *Griggs* and *Dothard* allows women and other protected groups to challenge discriminatory employment practices without having to prove intent.

C. The Effect of the Equal Pay Act on Title VII Sex Discrimination

The federal Equal Pay Act of 1963[61] only addresses the narrow problem of gender-based wage discrimination. The Equal Pay Act prohibits an employer from paying unequal wages to men and women who do work of substantially "equal skill, effort, and responsibility."[62] To succeed in an action under the Act for unequal wages, a female employee must show that she: (1) worked in the same establishment as males,[63] (2) received unequal pay, and (3) performed work "equal" to that performed by males.[64] The Equal Pay Act is limited by the

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60. Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982).

61. 29 U.S.C. § 206(d) (1982). The Equal Pay Act provides:

> No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. § 206(d)(1).

62. The Equal Pay Act cannot be construed to require equal pay for comparable work. In the debate over the Act, by floor amendment, the word "equal" was substituted for the word "comparable." 108 CONG. REC. 14,771 (1962). Representative Goodell explained that use of the word "equal" rather than "comparable" meant that the "jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other." 109 CONG. REC. 9197 (1963).

63. *See* Brennan v. Goose Creek Consol. Indep. School Dist., 519 F.2d 53 (5th Cir. 1975).

64. *Cf.* Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974) (holding that substantial equality in the nature of the work, not identicalness, is sufficient to establish a claim under the Equal Pay Act); Schultz v. American Can Co.—Dixie Prods., 424 F.2d 356, 360 (8th Cir. 1970) (finding equal work when the one differing task involved relatively little time or effort); Schultz v. Wheaton Glass Co., 421 F.2d

"equal work" requirement and cannot be used to challenge many industry-wide practices.

Title VII offers more hope than the Equal Pay Act for remedying historical wage discrepancies between broad classes of workers. Until 1980, however, courts did not apply Title VII to sex-based wage discrimination unless the work performed by women was equal to that performed by men.[65] Courts interpreted the Bennett Amendment,[66] a last minute addition to Title VII, to require that the plaintiff show a violation of the Equal Pay Act's "equal pay for equal work" standard when alleging wage discrimination based on sex under Title VII. For women claiming wage discrimination, this requirement severely limited Title VII's broad remedial powers.

Finally, in 1981, the Supreme Court ended this limitation on Title VII wage discrimination cases. In *County of Washington v. Gunther,*[67] the Court held that the Bennett Amendment did not incorporate into Title VII the "equal pay for equal work" requirement of the Equal Pay Act.[68] The Court in *Gunther* gave female plaintiffs the opportunity to sue for wage discrimination even if they performed different work than

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259, 266 (3d Cir.) (holding that female job is to be compared to the least different male job, not the typical male job, for purposes of determining whether work is equal), *cert. denied,* 398 U.S. 905 (1970).

65. *See, e.g.,* Christensen v. Iowa, 563 F.2d 353, 355 (8th Cir. 1977); Laffey v. Northwest Airlines, 567 F.2d 429, 448 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978); Orr v. Frank R. MacNeill & Son, 511 F.2d 166, 170 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117, 119-20 (10th Cir. 1971).

66. 42 U.S.C. § 2000e-2(h) (1982). The Bennett Amendment declares: "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 [Equal Pay Act]." *Id.*

67. 452 U.S. 161 (1981).

68. *Id.* at 168. The Supreme Court did maintain that the Bennett Amendment incorporates the four affirmative defenses of the Equal Pay Act into Title VII. *Id.* at 170. These four defenses to an allegation of wage disparity are: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and (4) a differential based on any other factor other than sex. *See supra* note 61.

But note that if the Bennett Amendment was only intended to incorporate the Equal Pay Act's affirmative defenses, then it accomplishes very little, since Title VII already expressly contained the first three of these defenses. *See* 42 U.S.C. § 2000e-2(h) (1982). The fourth affirmative defense to the Equal Pay Act is different since it was meant to "confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.' " *Gunther,* 452 U.S. at 170 (citation omitted). The incorporation of the fourth affirmative defense may have an effect on Title VII wage discrimination litigation. *See, e.g.,* Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982).

men. As a result of *Gunther,* the requirements for a prima facie case under the Equal Pay Act no longer restrict Title VII actions.[69]

After *Gunther,* courts have used a modified *McDonnell Douglas* and *Burdine* analysis in cases of intentional wage discrimination. The main modification that some lower courts have adopted is that even if the plaintiff's work is not equal, it still should be similar to that performed by men.[70] The rationale for this "similar work" requirement is that the four requirements of *McDonnell Douglas*[71] do "not eliminate the most common, nondiscriminatory reason for wage disparity: differences in the jobs' requirements of skill, effort, and responsibility."[72] The courts reason that a difference in the jobs and not an intent to discriminate probably caused the difference in pay.[73] Because the majority in *Gunther* did not decide the "precise contours of lawsuits challenging sex discrimination in compensation under Title VII,"[74] the requirements for proving sex-based wage discrimination under disparate impact are also very unclear.[75] What remains important, however, is that Title VII can finally be used to attack gender-based wage discrimination without a showing of equal work.

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69. Note that the Bennett Amendment also does not incorporate the "single establishment" requirement of the Equal Pay Act, *see supra* note 63, into Title VII. Marcoux v. Maine, 797 F.2d 1100, 1104 (1st Cir. 1986).

70. *See, e.g.,* Beall v. Curtis, 603 F. Supp. 1563, 1581 (M.D. Ga.), *aff'd without published opinion,* 778 F.2d 791 (11th Cir. 1985); Briggs v. City of Madison, 536 F. Supp. 435, 444 (W.D. Wis. 1982); *cf.* Spaulding v. University of Washington, 740 F.2d 686, 700-01 (9th Cir.) (holding that even more than just similarity between jobs needed to infer a discriminatory animus), *cert. denied,* 469 U.S. 1036 (1984); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133 (5th Cir. 1983) (holding that besides a similarity in jobs, one needs to show a "transparently sex-biased system for wage determination").

71. *See supra* note 45 and accompanying text.

72. *Briggs,* 536 F. Supp. at 444.

73. Another modification is that the employer may rely on the four affirmative defenses of the Equal Pay Act. *See supra* note 68. For these defenses, the burden of proof is on the employer. Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974); *cf.* Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982) (holding that, in Title VII suit alleging gender-based wage discrimination, the employer had the burden of proving that the wage differential resulted from a "factor other than sex").

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

75. *See, e.g.,* American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986) (stating that *Gunther* confines sex-based wage discrimination for unequal work under Title VII to the disparate treatment theory only); *Kouba,* 691 F.2d at 876 ("An employer cannot use a factor which causes a wage differential between male and female employees [unless he proves he had] an acceptable business reason."); Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine,* 34 STAN. L. REV. 1083 (1982) (stating that *Gunther* allows wage claims under disparate impact, but not under comparable worth).

IV. ALASKA'S APPLICATION OF THE DISPARATE TREATMENT AND DISPARATE IMPACT THEORIES

A. Disparate Treatment Under The Alaska Human Rights Act

1. *Application of* McDonnell Douglas *to Alaska Employment Discrimination Law.* The first case in which the Alaska Supreme Court applied the *McDonnell Douglas* prima facie test to the Alaska Human Rights Act was *Alaska State Commission for Human Rights v. Yellow Cab.*[76] In 1975, Wendy Mayer went to the Fairbanks office of Yellow Cab and asked for an application for the position of cab driver.[77] An employee of Yellow Cab told Mayer that he could not give her an application because the company did not hire women cab drivers. The employee also told her that if she still wanted to apply, she could only see the manager at 5:00 a.m. the following day. Mayer made no further attempts to apply formally for a position.[78]

The question before the Alaska Supreme Court was whether Mayer had established a prima facie case.[79] The supreme court began by explicitly adopting the *McDonnell Douglas* four-part test.[80] Yellow Cab conceded that Mayer was a member of a protected class which established the first requirement of the prima facie case. The question arose, however, whether Mayer had applied for the job within the meaning of *McDonnell Douglas.* Since Mayer had been rebuffed in her application attempt and since any further actions would clearly have been futile, the supreme court determined that a formal application was unnecessary.[81] After reaching this conclusion, the supreme court found that the remaining *McDonnell Douglas* requirements were met.[82] The court then noted that Yellow Cab did not attempt to articulate a nondiscriminatory reason for its action in order to rebut plaintiff's prima facie case.[83] Therefore, Yellow Cab failed to meet its simple burden of producing evidence under *Burdine*[84] and was found in violation of the Alaska Human Rights Act. The significance of *Yellow Cab* lies in the adoption and flexible application of the *McDonnell Douglas* test to the Alaska Human Rights Act by the Alaska Supreme Court.

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76. 611 P.2d 487 (Alaska 1980).

77. *Id.* at 488.

78. *Id.*

79. *Id.*

80. *Id.* at 490. The *McDonnell Douglas* test is set forth *supra* note 45 and accompanying text.

81. *Yellow Cab,* 611 P.2d at 491.

82. *Id.* at 491-92.

83. *Id.* at 492.

84. *See supra* notes 46-48 and accompanying text.

2. *Alaska Defines the Intent Requirement for a Disparate Treatment Case.* Although Alaska remains committed to the use of the *McDonnell Douglas* principles adopted in *Yellow Cab,* the recent case of *Alaska USA Federal Credit Union v. Fridriksson*[85] raises questions regarding the requirement of intent under the Alaska Human Rights Act.[86] *Fridriksson* involved the application of a female employee of a credit union for the position of branch manager.[87] Fridriksson had been recommended for the position by the previous manager.[88] When her application was rejected and a male applicant was hired, she brought suit before the Alaska State Commission for Human Rights.[89] The Commission concluded that the credit union had discriminated against Fridriksson, and the credit union appealed the decision to the Alaska Supreme Court.

The Alaska Supreme Court found that Fridriksson had established a *McDonnell Douglas* prima facie case.[90] The supreme court then adopted the *Burdine* approach, which required the credit union to articulate a non-discriminatory reason for its decision.[91] The credit union offered several reasons for not hiring Fridriksson, including the cost of training her. The supreme court, however, concurred with the declaration of the Commission that these "explanations were unworthy of belief."[92]

A problem for the supreme court in *Fridriksson* arose from the prior finding of the Commission that the credit union's actions were not "intentionally and willfully discriminatory,"[93] but that "sex was a

85. 642 P.2d 804 (Alaska 1982).

86. For a fuller discussion of Alaska's struggle with the intent requirement in disparate treatment cases, see Fossey, *Employment Discrimination Law*—Strand v. Petersburg Public School *and* Fridriksson v. Alaska USA Federal Credit Union: *The Supreme Court Charts an Uncertain Course,* 1 ALASKA L. REV. 53 (1984).

87. *Fridriksson,* 642 P.2d at 805.

88. *Id.*

89. *Id.*

90. *Id.* at 806-08. The credit union argued that Fridriksson was not qualified for the job because she lacked management experience. The Alaska Supreme Court held, however, that the qualification element of the *McDonnell Douglas* test applied only to objective criteria. Fridriksson met the only objective qualification for the job—a high school diploma. The court determined that the question of whether the plaintiff was unqualified due to subjective criteria such as personality or management experience should be left for the employer to articulate and should not constitute an element of the prima facie case. *Id.* at 807. For a discussion on whether Title VII requires that the plaintiff show she is subjectively as well as objectively qualified to make a prima facie case, see Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation,* 82 COLUM. L. REV. 553, 557-64 (1982).

91. *Fridriksson,* 642 P.2d at 808.

92. *Id.*

93. *Id.* at 809 n.7.

factor in the decision not to promote [Fridriksson]."[94] Convinced that discrimination had occurred, but faced with the Commission's seemingly inconsistent findings, the majority of the court in *Fridriksson* concluded that "[d]iscrimination need not be purposeful," but may be simply an "accidental byproduct of a traditional way of thinking about females."[95] The majority opinion suggested that actions based on stereotypical assumptions about a protected class would be sufficient to satisfy the intent requirement of disparate treatment.

In a special concurrence, Chief Justice Rabinowitz agreed with the majority that an employer's decision need not be made in bad faith or with a purposeful design to place women at a disadvantage.[96] Rabinowitz emphasized, however, that the existence of a discriminatory motive is critical for liability under disparate treatment and that a court must find that gender was a factor in the decision.[97] Rabinowitz also noted that the court could infer an intent to discriminate when the defendant failed to rebut the plaintiff's prima facie case as had occurred in the case at bar. A reconciliation of the majority opinion with the concurrence of Rabinowitz shows that Alaska law recognizes an intent to discriminate if sex was a factor in the decision.[98]

B. Disparate Impact Under the Alaska Human Rights Act

Surprisingly, the Alaska Supreme Court has never had the opportunity to decide a case using the powerful theory of disparate impact.[99]

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94. *Id.* at 808.

95. *Id.* at 809 n.7 (*citing* Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in judgment)). *Goldfarb* involved a challenge on due process and equal protection grounds to differing requirements for widows and widowers for receipt of social security survivors' benefits.

96. *Id.* at 809 n.2 (Rabinowitz, C.J., concurring).

97. *Id.*

98. This definition of "intent" should be contrasted to the federal definition. The United States Supreme Court in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979), held that, under the equal protection clause, discriminatory "intent" means choosing "a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Note that the definition of "intent" under Title VII is the same as that under equal protection analysis. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir. 1986).

99. Disparate impact under Title VII has been used to challenge a variety of employer policies. *See, e.g.,* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (methadone users); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (education requirements); Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983) (head of household rule), *cert. denied,* 467 U.S. 1255 (1984); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982) (jobs reserved for employee shareholders), *cert. denied,* 467 U.S. 1251 (1984); Hariss v. Pan Am. World Airways, 649 F.2d 670 (9th Cir. 1980) (maternity leave policy); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (English language only rule), *cert. denied,* 449 U.S. 1113 (1981); Blake v. City of Los Angeles, 595

It appears that all Alaska cases to date have proceeded under disparate treatment.[100] There is no indication, however, that disparate impact analysis would be inapplicable to the Alaska Human Rights Act. In fact, the history of Alaska's reliance on federal precedent[101] and Alaska's desire to have a broad prohibition against discrimination[102] suggest that the Alaska Supreme Court would apply disparate impact at least as broadly as do federal courts under Title VII.

C. Equal Pay Under the Alaska Human Rights Act

1. *Alaska Wage Discrimination Law Is Not Limited by an Equal Work Requirement.* Alaska currently has no separate equivalent of the federal Equal Pay Act.[103] Subsection five of the Alaska Human Rights Act contains the prohibition against discrimination in payment of wages on the basis of gender.[104] Unlike the federal Equal Pay Act, subsection five does not require that a female plaintiff show exactly "equal work" before she can challenge her pay as unequal. Instead, subsection five prohibits unequal pay to women for work of the same

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F.2d 1367 (9th Cir. 1979) (physical abilities), *cert. denied,* 446 U.S. 928 (1980); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978) (experience requirements), *cert. denied,* 441 U.S. 968 (1979); Yuhas v. Libby-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (no-hiring-of-spouse rule), *cert. denied,* 435 U.S. 934 (1978); Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.) (immorality), *cert. denied,* 431 U.S. 917 (1977); Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975) (arrest or conviction records); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) (excessive garnishments); Asbestos Workers, Local 83 v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (pro-nepotism policies).

100. *See, e.g.,* Adams v. Pipeliners Union 798, 699 P.2d 343 (Alaska 1985); Strand v. Petersburg Pub. Schools, 659 P.2d 1218 (Alaska 1983); *Fridriksson,* 642 P.2d 804; Alaska State Comm'n for Human Rights v. Yellow Cab, 611 P.2d 487 (Alaska 1980); Brown v. Wood, 575 P.2d 760 (Alaska 1978), *modified,* 592 P.2d 1250 (Alaska 1979); McLean v. State, 583 P.2d 867 (Alaska 1978); Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341 (Alaska 1976). In *Fridriksson,* however, Chief Justice Rabinowitz accused the majority of confusing the disparate treatment and impact theories and incorrectly deciding *Fridriksson* under disparate treatment while using elements of disparate impact. *Fridriksson,* 642 P.2d at 810 n.3 (Rabinowitz, C.J. concurring).

101. *See supra* note 28 and accompanying text.

102. *See supra* notes 29-41 and accompanying text.

103. *See supra* notes 23-27 and accompanying text.

104. ALASKA STAT. § 18.80.220(a)(5) (1986), quoted *supra* note 20.

"comparable character" as men,[105] a requirement that is probably more broad than "equal work."[106]

Because of the Bennett Amendment, federal courts were initially reluctant to use Title VII to attack sex-based wage discrimination without a showing of equal work.[107] Even though *Gunther* eventually eliminated the equal work requirement, wage discrimination suits under Title VII remain subject to the Equal Pay Act's four affirmative defenses.[108] The Human Rights Act, however, has no connection between the equal pay provision in subsection five and the broad general prohibition against employment discrimination in subsection one. Defenses in an action under subsection one are not necessarily applicable to an action under subsection five and vice versa. A plaintiff, for example, may either sue under subsection five and show that the jobs are comparable in their character, or sue under the general provisions of subsection one and be subject to the "reasonable demands of the position" defense.[109] The analysis of subsection one can also track *McDonnell Douglas* and *Griggs* while the analysis of subsection five can follow that of the Equal Pay Act cases without any interaction between the two subsections.[110]

2. *Alaska Wage Discrimination Law Allows a Defense that the Decision Was Not Based on Sex.* The only Alaska Supreme Court case

105. The "comparable character" language dates back to the Alaska Equal Pay for Women Act, which was first passed in 1949. Equal Pay for Women Act, ch. 29, § 1, 1949 Alaska Sess. Laws 80 (repealed 1980), quoted *supra* note 23. In 1980, the Equal Pay for Women Act was repealed and the "comparable character" language was retained exclusively in subsection five of the Human Rights Act. Act of June 30, 1980, ch. 125, § 5, 1980 Alaska Sess. Laws (unpaginated); *see also supra* notes 26-27 and accompanying text.

106. *See Alaska State Comm'n for Human Rights ex rel. Bradley v. Alaska,* No. D-79-0724-188-E-E, slip op. at 63 (Alaska State Comm'n for Human Rights Jan. 29, 1986) (finding "comparable character" when the "evaluated worth of the two positions is essentially equivalent to the employer").

107. *See supra* notes 65-66 and accompanying text.

108. *See supra* note 68.

109. ALASKA STAT. § 18.80.220(a)(1) (1986), quoted *supra* note 20. The "reasonable demands of the position" defense is not available in a suit alleging discrimination based on race, religion, color, or national origin. The Alaska Supreme Court has interpreted the "reasonable demands of the position" defense to allow distinct treatment on the basis of sex only for "requirements or necessities that are of an urgent nature." McLean v. State, 583 P.2d 867, 869 (Alaska 1978). The supreme court also held that the employer has the burden of proving this particular defense by clear and convincing evidence. *Id.* at 869-70.

110. For an example of a case that combined elements of analysis from Title VII cases and Equal Pay Act cases, see Kouba v. Allstate Insurance Co., 691 F.2d 873, 876 (9th Cir. 1982).

involving discrimination in pay is *Brown v. Wood.*[111] In 1965, the University of Alaska hired Greeta Brown as an Assistant Professor of Music.[112] Brown contended that, before she resigned in 1973,[113] she was paid less, promoted more slowly, and required to work harder than her male counterparts.[114] After examining Brown's case on appeal, the supreme court found insufficient evidence of discrimination in promotions or workload.[115] The only issue remaining before the court, therefore, was whether the university had discriminated against Brown in setting her salary. Brown did not bring suit under the Human Rights Act, but instead relied on the Alaska Equal Pay for Women Act which was still in force at that time.[116]

The Equal Pay for Women Act provided:

> No employer may discriminate in the payment of wages as between the sexes, *nor may he employ a female in an occupation in this state at a salary or wage rate less than the rate paid to a male employee for work of comparable character* or work in the same operations, business, or type of work in the same locality.[117]

Because the italicized clause of the Equal Pay for Women Act is preceded by the word "nor," Brown argued that the italicized clause should be read independently from the first clause. Read independently, the italicized clause would allow a female plaintiff to prove discrimination merely by showing that she was paid less than a man for comparable work.[118]

The supreme court rejected this argument, stressing that the legislature, at a minimum, intended that merit or seniority be a defense to a disparity between the salaries of males and females.[119] The supreme court held that sex-based considerations would be illegal, but that wage rates based on other considerations would not violate the Equal

111. 575 P.2d 760 (Alaska 1978), *modified,* 592 P.2d 1250 (Alaska 1979).

112. *Id.* at 762.

113. *Id.* at 765.

114. *Id.* at 762-63.

115. *Id.* at 768 n.9.

116. *Id.* at 766. The University of Alaska was not subject to the Human Rights Act at this time. *Id.* at 767 n.8; ALASKA STAT. § 18.80.300(3) (1974) (amended 1980). The legislature expanded the jurisdiction of the Human Rights Act to cover the university at the same time it repealed the Equal Pay for Women Act. Act of June 30, 1980, ch. 125, § 3, 1980 Alaska Sess. Laws (unpaginated). Brown also sued the University of Alaska under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982). The supreme court later modified the opinion to hold that the university was within the jurisdiction of section 1983. Brown v. Wood, 592 P.2d 1250, 1251 (Alaska 1979), *modifying* 575 P.2d 1250 (Alaska 1978).

117. ALASKA STAT. § 23.10.155 (1972) (repealed 1980) (emphasis added). Note the similarity of the Equal Pay for Women Act with subsection five of the Alaska Human Rights Act. ALASKA STAT. § 18.80.220(a)(5) (1986), quoted *supra* at note 20.

118. *Brown,* 575 P.2d at 768.

119. *Id.*

Pay for Women Act.[120] Since *Fridriksson* defined discriminatory "intent" as a decision based on sex,[121] the statement by the *Brown* court, that the law prohibits only sex-based considerations, implies that Alaska wage discrimination law allows a defense that no intent existed.

Even after the supreme court allowed a "lack of intent" defense, Brown prevailed. Brown first established a prima facie case of discrimination by showing that "she was paid less than her male colleagues for comparable work at the University of Alaska."[122] The university attempted to rebut the prima facie case by offering a nondiscriminatory reason for paying Brown lower wages. The university contended that "it could not get funding for the original position offered to Brown and that it drained other resources to create the position for her at $9,000 per year."[123]

Since *Brown* did not involve subsection one of the Human Rights Act, the Alaska Supreme Court relied on federal court interpretations of the Equal Pay Act rather than Title VII, and determined that the university bore the burden of *proving* its defense[124] rather than merely articulating a nondiscriminatory reason for the disparate treatment.[125] The court held that the university failed to prove its nondiscriminatory reason why Brown's salary was consistently lower than her male counterparts, and that Brown's prima facie case remained unrebutted.[126] Thus, the *Brown* decision shows the willingness of the Alaska Supreme Court in interpreting Alaska employment discrimination law to rely on the analysis developed in other federal laws as well as in Title VII.

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120. *Id.*

121. *See supra* notes 93-98 and accompanying text.

122. Johnson v. State, 607 P.2d 944, 947 (Alaska 1980) (explaining *Brown*).

123. *Brown,* 575 P.2d at 769.

124. *Id.* at 768-69. In placing the burden on the employer, the Alaska Supreme Court relied on Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). The supreme court added that the employer must meet his burden of proof with *clear and convincing* evidence that the decision was based on factors other than sex. *Id.* at 768 n.11 (citing Brennan v. Owensboro-Daviess County Hosp., 523 F.2d 1013, 1031 (6th Cir. 1975) (burden on the employer is a "heavy one"), *cert. denied,* 425 U.S. 973 (1976)).

125. *See supra* notes 46-48 and accompanying text.

126. *Brown,* 575 P.2d at 769. The court indicated that, even if the university had met its burden, Brown was prepared to respond by presenting evidence that other women in the music department also received lower wages than men. In such an event, the court could then determine whether this evidence of a pattern or practice of discrimination disproved the university's justifications. *Id.* at 769-70.

V. GENDER-BASED WAGE DISCRIMINATION UNDER THE ALASKA HUMAN RIGHTS ACT

A. *Thomas v. Anchorage Telephone Utility*

The Anchorage Telephone Utility is owned by the Municipality of Anchorage.[127] In 1975, the ATU work force was divided into three groups: plant forces,[128] traffic forces,[129] and commercial and clerical personnel.[130] Ninety percent of the plant force personnel were male, while ninety-five percent of the traffic, commercial, and clerical employees were female.[131] The International Brotherhood of Electrical Workers represented all of the ATU employees.

In May 1975, the Anchorage Telephone Utility and IBEW renegotiated the ATU employee contract.[132] IBEW had recently concluded successful negotiations for plant force workers on the Trans-Alaska Pipeline Project.[133] Construction and maintenance of the communication systems on the pipeline greatly increased the demand for skilled electrical workers.[134] IBEW used the high demand for, and high salaries available to, these skilled craft employees on the pipeline as leverage in negotiating the contract with ATU.[135] As a result, the plant forces received a forty-five percent pay raise, while the traffic, commercial, and clerical personnel received a lesser pay hike.[136]

A class of women in the TCC forces sued the Anchorage Telephone Utility as well as the International Brotherhood of Electrical Workers for discrimination on the basis of gender. Their complaint argued both the disparate treatment and disparate impact theories of liability. Because the work performed by the TCC personnel and the

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127. Brief of Appellee, *supra* note 2, at 4. In 1975, the Municipality of Anchorage was still divided into the Greater Anchorage Area Borough and the City of Anchorage, which at that time owned ATU.

128. *Id.* The plant forces contained about 300 people, most of whom were journeymen electricians with four years of training.

129. *Id.* The traffic forces contained 70 people, most of whom were telephone operators.

130. *Id.* The commercial and clerical group contained approximately 25 people, most of whom were service representatives.

131. Brief of Appellants, *supra* note 1, at 5. Nationwide, 80% of clerical workers are women while only 6% of craft workers are female. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WOMEN WORKERS 2 (1982).

132. Brief of Appellants, *supra* note 1, at 4.

133. Brief of Appellee International Brotherhood of Electrical Workers, Local Union 1547 at 16, Thomas v. Anchorage Tel. Util., No. S-51 (Alaska filed July 7, 1983) [hereinafter Brief of IBEW].

134. Brief of Appellee, *supra* note 2, at 5-6.

135. Brief of IBEW, *supra* note 133, at 9.

136. Brief of Appellee, *supra* note 2, at 5.

plant forces was not comparable,[137] the equal pay provision of subsection five of the Human Rights Act did not apply to their action.[138] Therefore, the plaintiffs relied on the general prohibitions against discrimination contained in subsection one of the Act.[139]

Since subsection five was unavailable, the plaintiffs could not rely on *Brown* and establish a prima facie case simply by showing that a female wage rate was less than a male wage rate for work of comparable character.[140] The plaintiffs also could not use *Brown* to place on ATU the burden of proving that the disparity in pay raises resulted from a non-sex-based consideration.[141] The absence of job comparability restricted the plaintiffs to a disparate treatment theory as set forth in *McDonnell Douglas* or a discriminatory impact theory as set forth in *Griggs.*

Anchorage Telephone Utility raises several novel issues for Alaska employment discrimination law. The first issue is whether treating a male-dominated sector of the work force differently from a female-dominated sector is the same as treating individual men and women differently under the Act. The second issue is whether a showing of similarity or comparability between the jobs is required to establish a prima facie case. The third issue is whether the employer can justify different pay raises to male- and female-dominated groups by asserting that the marketplace valued certain jobs more highly than others. The fourth issue is whether a market defense requires that the market actually value the jobs differently or that the employer only believe the market valued the jobs differently. And the fifth issue of *Anchorage Telephone Utility* is what type of facially neutral test the Alaska Supreme Court should require in order to establish liability under a disparate impact theory.

B. Establishing A Case Of Disparate Treatment

1. Pennsylvania Human Relations Commission v. Hempfield Township: *A Differing Pay Raise May Indicate Intent to Discriminate.* The plaintiffs in *Anchorage Telephone Utility* have precedent for a finding of disparate treatment in *Pennsylvania Human Relations Commission v. Hempfield Township.*[142] In *Hempfield Township,* a Pennsylvania court found that the award of a higher wage increase to male road maintenance employees than to female clerical employees

137. *Id.* at 4.

138. *See* ALASKA STAT. § 18.80.220(a)(5) (1986), quoted *supra* note 20.

139. *Id.* § 18.80.220(a)(1), quoted *supra* note 20.

140. *See supra* note 122 and accompanying text.

141. *See supra* note 124 and accompanying text.

142. 23 Pa. Commw. 351, 352 A.2d 218 (1976). Unlike *Anchorage Telephone Utility, Hempfield Township* concerned unequal dollar-amount pay raises rather than unequal percentage pay increases. Since the average woman earns less than 60% of the

violated the Pensylvania Human Relations Act.[143] After examining several of management's derogatory statements about women, the court held that the difference in pay increases resulted from an intent to treat women differently.[144]

It is important to note that, in *Hempfield Township,* only males worked in road maintenance and only females held clerical positions.[145] Thus, every female received a smaller raise than every male. The discriminatory nature of the different raises was emphasized by the fact that previous pay increases of road maintenance and clerical personnel were fairly equal when a male had held a clerical position. As soon as the male clerical position was eliminated, however, the difference in annual pay raises between the work groups greatly increased.[146] The Pennsylvania Supreme Court's decison in *Hempfield Township* illustrates that with evidence of intent a case of disparate treatment among different classes of employees can succeed.

2. *Discrimination Against Groups Dominated by Members of a Protected Class.* Although the *Hempfield Township* decision suggests that courts can find sex discrimination when exclusively female groups receive lower pay raises than exclusively male groups, it left unanswered questions as to the rights of work groups that are not exclusively female. When one employment sector is composed entirely of men and another is composed entirely of women, it is relatively easy to infer that any difference in the treatment of the sectors results from an intent to treat men and women differently. As more women join the male-dominated sector of the work force and as more men join the

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average man's earnings, WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WOMEN WORKERS 1 (1982), most women would benefit more from equal dollar-amount pay increases than equal percentage pay increases.

143. *Hempfield Township,* 23 Pa. Commw. at 353, 352 A.2d at 219. The Pennsylvania Human Relations Act is codified at PA. STAT. ANN. tit. 43, § 955 (Purdon 1964). The Alaska Supreme Court has previously looked to Pennsylvania law for support in interpreting the Alaska Human Rights Act. *See* Hotel, Motel, Restaurant, Constr. Camp Employees, and Bartenders Union Local 879 v. Thomas, 551 P.2d 942, 946-47 (Alaska 1976).

144. *Hempfield Township,* 23 Pa. Commw. at 354-55, 352 A.2d at 220. Some of the statements were:

> "A woman cannot negotiate like a man who has a family to support."
> "If you are able to put on overalls and take a shovel and dig a ditch, then you would get the same as the men."
> "[O]ffice girls should not receive as much in pay raises as men since they do not have families to raise."

Id. There was some conflicting evidence of similar statements having been made by the defendants in *Anchorage Telephone Utility.* Brief of Appellants, *supra* note 1, at 12-14.

145. *Hempfield Township,* 23 Pa. Commw. at 353, 352 A.2d at 219.

146. *Id.* at 356, 352 A.2d at 220-21.

female-dominated sector, however, the inference of an intent to discriminate lessens.[147] Thus, as the work groups become more integrated, it becomes increasingly difficult to establish a prima facie case of disparate treatment.[148] At least one federal court has held that a prima facie case of intentional sex-discrimination cannot be made if the favored work group is at least thirty-three percent female.[149] Furthermore, once a plaintiff does establish a prima facie case, she faces an even greater burden of proving that sex was a factor in the decision.[150]

Wage rate negotiations that are based on sex so that women receive less than men clearly violate the law.[151] When negotiations are based on work groups and the groups, because of integration, are not perceived as either "male" or "female," it is less likely that the negotiators based their decision on sex and more likely that some other factor such as market forces determined the differing outcomes. In *Anchorage Telephone Utility,* the plant forces were ninety percent male and the TCC personnel were ninety-five percent female.[152] This high degree of sex-segregation[153] allows an inference of discriminatory intent when the groups are treated differently, and therefore, permits the plaintiffs to establish a prima facie case.

3. *Job Comparisons Are Not Required for a Prima Facie Case.* The Supreme Court announced the *McDonnell Douglas* prima facie test because the natural inference that results from the rejection

147. Use of the disparate impact theory avoids the need to prove an intent to discriminate. *See supra* notes 51-60 and accompanying text. For a discussion of why the plaintiffs could not use the disparate impact theory in *Anchorage Telephone Utility,* see *infra* notes 194-203 and accompanying text.

148. The rationale of the *McDonnell Douglas* prima facie test is that the plaintiff's establishment of the four parts of the test suggests that discrimination more likely than not motivated the action. *See infra* note 154 and accompanying text.

149. Beall v. Curtis, 603 F. Supp. 1563, 1581 (M.D. Ga.), *aff'd without published opinion,* 778 F.2d 791 (11th Cir. 1985). Economic studies often define "men's jobs" and "women's jobs" as those where at least 70% of the work force is represented by one sex. *See, e.g.,* American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401, 1403 (9th Cir. 1985).

150. It is intuitively less likely that the employer perceives of TCC workers as "females" when a larger percentage of men fill that sector of the work force.

151. IBEW stipulated to this conclusion of law. *See* Brief of IBEW, *supra* note 133, at 1.

152. *See supra* note 131 and accompanying text.

153. Title VII forbids the wrongful segregation of employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2) (1982). Title VII also forbids intentionally segregating the work force on the basis of sex and then paying the female portion of the work force less than the male portion. *See* Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981). The plaintiffs, however, did not raise the issue of wrongful segregation in *Anchorage Telephone Utility.*

of a qualified minority candidate and the later hiring of a non-minority candidate is that discrimination motivated the decision.[154] Some lower courts believed that the natural inference from unequal pay for unequal jobs was that the different requirements of skill, effort, and responsibility, not a discriminatory motivation, caused the pay difference.[155] These lower courts required that the work performed by males and females be similar in order for the plaintiff to establish a prima facie case.[156] The *Hempfield Township* decision, however, demonstrates that even when male and female employees hold completely dissimilar jobs, a court may find an intent to discriminate if the employer treats those men and women differently.[157] Alaska must decide whether to follow the lower federal courts by adding a requirement of similarity, or comparability, of jobs to the requirements for establishing a prima facie case of disparate treatment under subsection one of the Human Rights Act.

This note argues that a prima facie case should not include a showing of comparability, or similarity, of work. First, a requirement that the plaintiff show comparability would make subsection one's general prohibitions of discrimination ineffective against the unfair, category-wide treatment exemplified in *Hempfield Township.* Second, adopting such a requirement would ignore the separate histories of subsections one and five[158] by imposing subsection five's "comparability" requirement onto the elements necessary for a suit under subsection one. Third, the argument for such a requirement rests on the presumption that the marketplace values the different jobs differently.[159] If the marketplace is responsible for the wage disparity, then that assertion should be subject to proof. Because the plaintiff is not likely to be as sophisticated in understanding the market as the employer, the employer is in a better position to present evidence that the market truly did influence its decision.[160] The employer should be required to assert the market defense as a rebuttal to the plaintiff's prima facie case. Finally, the prima facie case was not intended to be a difficult burden for the plaintiff, but rather a simple showing that forces the defendant to explain its decision-making process.[161] After the plaintiffs have established a prima facie case, the defendants have an opportunity to articulate a nondiscriminatory reason for the decision. In *Anchorage Telephone Utility,* the defendants have claimed

154. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
155. *See supra* note 72 and accompanying text.
156. *See supra* note 70 and accompanying text.
157. *See supra* notes 142-46 and accompanying text.
158. *See supra* notes 15-27 and accompanying text.
159. *See* Briggs v. City of Madison, 536 F. Supp. 435, 445 & n.8 (W.D. Wis. 1982).
160. *See id.* at 446.
161. *See supra* notes 44-50 and accompanying text.

that the marketplace mandated the different pay raises for the male- and female-dominated jobs.[162]

4. *Alaska Should Allow a Market Defense in* Anchorage Telephone Utility. In wage discrimination cases under the federal Equal Pay Act, employers are not permitted to assert their reliance on the market as a defense.[163] The United States Supreme Court held that under the Equal Pay Act the fact that "men would not work at the low rates paid women" did not justify paying women less than men for equal work.[164] It is uncertain whether in a suit under subsection five of the Alaska Human Rights Act an employer is precluded from using the differing values of job skills in the marketplace to justify a wage disparity. Because the Alaska courts rely heavily on federal precedent to interpret the Human Rights Act,[165] a market defense is probably unavailable under the transplanted Equal Pay for Women Act.

Nevertheless, any defenses that are unavailable in a suit under subsection five are not necessarily precluded in a suit under subsection one.[166] The general prohibitions against employment discrimination in subsection one are similar to the prohibitions in Title VII, and the Alaska courts should look to the federal cases interpreting Title VII for guidance in interpreting subsection one. The federal courts have allowed defendants to assert a market defense in cases of sex-based wage discrimination under Title VII.[167] Because use of a theory of disparate treatment, as opposed to disparate impact, requires a showing of discriminatory intent,[168] a defendant is allowed to show that the market motivated its decision. In *Briggs v. City of Madison,*[169] a federal district court explained the rationale for the market defense:

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162. *See infra* notes 174-75 and accompanying text.

163. Corning Glass Works v. Brennan, 417 U.S. 188 (1975).

164. *Id.* at 205.

165. *See supra* note 28 and accompanying text; *see also supra* note 124 (explaining the Alaska Supreme Court's reliance on *Corning Glass* in deciding *Brown v. Wood* under the old Equal Pay for Women Act).

166. *See supra* notes 108-10 and accompanying text.

167. *E.g.,* Seville v. Martin Marietta Corp., 638 F. Supp. 590, 595 (D. Md. 1986); Briggs v. City of Madison, 536 F. Supp. 435, 446-47 (W.D. Wis. 1982); *accord* Bohm v. L. B. Hartz Wholesale Corp., 370 N.W.2d 901, 905-08 (Minn. Ct. App. 1985) (holding that under the Minnesota Human Rights Act reliance on market factors dispels an inference of intentional discrimination when male-dominated group receives a greater wage increase than female-dominated group); *cf.* Note, *Use of the Market Wage Rate in Employment Discrimination Suits: Equal Work as the Key to Application,* 61 NOTRE DAME L. REV. 513 (1986) (stating that market defense should be allowed if the work is unequal, but not allowed where the work is equal).

168. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

169. 536 F. Supp. 435 (W.D. Wis. 1982).

> Under Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants. That there may be an abundance of applicants qualified for some jobs and a dearth of skilled applicants for other jobs is not a condition for which a particular employer bears responsibility.[170]

Thus, federal courts recognize that an employer is not liable under a disparate treatment analysis for wage disparities caused by the laws of supply and demand.[171] Setting wages according to market rates does not constitute discrimination under a disparate treatment analysis.[172]

Because use of a disparate treatment theory under Alaska discrimination law also requires evidence of intent,[173] the plaintiff's showing of her employer's profit-making ambition should not be a substitute for that intent requirement. This is especially obvious in the case of a disparate pay raise. As supply and demand fluctuate in the

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170. *Id.* at 447.

171. Judge Posner in American Nurses' Association v. Illinois, 783 F.2d 716 (7th Cir. 1986), stated the economists' view that raising the wages of female-dominated jobs above the market level would actually be harmful to women:

> On the cognitive question 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, in just the same way that the ratio of the price of caviar to the price of cabbage is determined by relative scarcity rather than relative importance to human welfare. Upsetting the market equilibrium by imposing such a conception would have costly consequences, some of which might undercut the ultimate goals of the comparable worth movement. If the movement should cause wages in traditionally men's jobs to be depressed below their market level and wages in traditionally women's jobs to be jacked above their market level, women will have less incentive to enter traditionally men's fields and more to enter traditionally women's fields. Analysis cannot stop there, because the change in relative wages will send men in the same direction: fewer men will enter the traditionally men's jobs, more the traditionally women's jobs. As a result there will be more room for women in traditionally men's jobs and at the same time fewer opportunities for women in traditionally women's jobs—especially since the number of those jobs will shrink as employers are induced by the higher wage to substitute capital for labor inputs (e.g., more word processors, fewer secretaries). Labor will be allocated less efficiently; men and women alike may be made worse off.

Id. at 719-20.

172. *See* American Fed'n of State, County and Mun. Employees v. Washington, 770 F.2d 1401, 1406-07 (9th Cir. 1985); *see also Amercian Nurses' Ass'n,* 783 F.2d at 725 (holding that no claim of discrimination is stated if allegation is that employer set salary according to market rather than worth to employer).

173. *See supra* notes 85-98 and accompanying text. *But see* Fossey, *supra* note 86, at 59-63.

labor market, different jobs will not maintain a constant relative market value with respect to each other. If demand, for example, shifts so that the market value of craft jobs rises momentarily faster than the value of clerical jobs, then a greater pay raise for the craft workers than for the clerical personnel will not necessarily suggest an intent to discriminate on the part of the employer. The Alaska Supreme Court should not find a violation of the Human Rights Act if an employer sets wage levels according to the marketplace and not on the basis of sex.

5. *ATU Satisfied the Market Defense.* The telephone utility and IBEW argued that high oil pipeline wages forced them to offer a "premium" wage to plant force workers. The telephone utility believed that the "premium" was necessary to prevent plant force workers from being lured away to work on the pipeline.[174] The defendants also contended that clerical personnel were less likely to be lured away from their jobs and that even if the clerical personnel did leave, their jobs would be easier to fill than the jobs of the journeymen electricians.[175]

Whether the market defense is successful depends largely on who bears the burden of proof. Under the holding of *Texas Department of Community Affairs v. Burdine,*[176] Anchorage Telephone Utility would only need to articulate the laws of supply and demand as the reason for the differing pay raises.[177] The burden then would fall on the plaintiffs to prove that the market's differing wage rates were not the true reason for ATU's decision.[178] The Alaska Supreme Court adopted the *Burdine* Court's approach in *Alaska USA Federal Credit Union v. Fridriksson.*[179] This means that to succeed under the Alaska Human Rights Act, the traffic, commercial, and clerical workers in

174. Federal courts have held that if an employer needs to pay extra benefits or salary to one group of workers in order to retain them, then that fact will rebut an inference of discriminatory intent. *See* Seville v. Martin Marietta Corp., 638 F. Supp. 590, 595 (D. Md. 1986); *Briggs,* 536 F. Supp. at 447.

175. Brief of IBEW, *supra* note 133, at 18 ("In addition, clerical and sales personnel were more readily available to employers because of the large existing pool of persons seeking such employment and the relatively short periods of training required to qualify the employee for such work.").

176. 450 U.S. 248 (1981), discussed *supra* notes 47-50 and accompanying text.

177. *Burdine,* 450 U.S. at 254-56.

178. *Id.* at 256.

179. 642 P.2d 804, 808 (Alaska 1982); *see also supra* note 91 and accompanying text.

Anchorage Telephone Utility must persuade the court by a preponderance of the evidence that the market did not motivate ATU to offer differing pay raises.[180]

The plaintiffs must prove that the defendant's articulation of the market is only a pretextual justification for ATU's decision. It is unclear, however, whether in showing pretext the plaintiff must prove that the market actually did not mandate different wage increases or that ATU did not believe different wage increases were necessary to compete in the marketplace. In *Anchorage Telephone Utility,* the plaintiffs argued that different wage increases were not needed under the prevailing market conditions.[181] The shortcoming of this argument is that even if the plaintiffs prove through hindsight that the market did not mandate differing wage increases, ATU at the relevant time of negotiation still may have believed that the market results were different. A grossly inaccurate reading of the market, however, does create an inference that basing the decision on the market was a pretext for discrimination.[182] That inference can be used to rebut ATU's articulated reason.[183]

The plaintiffs in *Anchorage Telephone Utility* did not try to prove that the supply of and demand for clerical and plant force personnel remained unchanged or had changed at the same relevant rates. The plaintiffs mainly attacked the market evidence presented by ATU[184] as insufficient to prove a higher demand for plant force personnel than

180. *But see* Strand v. Petersburg Pub. Schools, 659 P.2d 1218 (Alaska 1983). *Strand* is a post-*Fridriksson* case that casts doubt on Alaska's continuing adherence to the *Burdine* standard. In *Strand,* the majority held that the Alaska State Human Rights Commission's finding of sex discrimination in the school district's refusal to hire Strand as a principal was based on "substantial evidence." The majority held that statistical evidence indicating that no women had been hired as a principal or superintendent in a 25-year period showed a pattern of discrimination. This pattern of discrimination tended to rebut the defendant's articulated reason that Strand was not the best qualified person for the position. *Id.* at 1222. In a dissenting opinion, Justice Rabinowitz discounted the statistical evidence as unreliable and argued that the majority had in reality shifted the burden of proof to the defendant. *Id.* at 1224-26 (Rabinowitz, J., dissenting). Whether the *Strand* opinion signals a clear break from *Burdine* by placing the burden of proof on the employer remains to be seen.

181. Brief of Appellants, *supra* note 1, at 33-34.

182. General economic principles state that an inaccurate prediction of the market may be fatal in the business world. Companies that do not read the marketplace accurately will either not be able to retain employees of sufficient quality and quantity or inefficiently waste their resources on labor.

183. The opinion in Seville v. Martin Marietta Corp., 638 F. Supp. 590, 595 (D. Md. 1986), supports this analysis. The *Seville* court stated that the employer must have a "legitimate perception" that the market mandated the decision. The plaintiff can then conduct a market study to show that, in fact, the market differed from the defendant's perception.

184. *See* Brief of Appellee, *supra* note 2, at 24-32.

for TCC personnel.[185] Because the plaintiffs did not *prove* that ATU's market defense was a pretext, the plaintiffs' case of disparate treatment must fail.

C. Establishing a Case of Disparate Impact.

1. *The Market Is an Unsuccessful Defense to a Disparate Impact Case.* While a market defense can be successful in a disparate treatment case because it shows a motivation for wage disparity that is not based on sex, a market defense is clearly unsuccessful in a disparate impact case. The disparate impact theory does not require that the plaintiff show intent or motivation, but only an employer-given, facially neutral test that disproportionally impacts upon a protected class.[186] The use of such a discriminatory test is valid only if it is proven to be a business necessity.[187] Thus, any evidence offered in a disparate impact case that refutes an intent to discriminate will not negate liability.

2. *Reliance on the Marketplace Is Not a Facially Neutral Test That Creates Disparate Impact Liability.* While reliance on the market's differing valuations of job skills may not be a defense to disparate impact, neither should such reliance establish liability under disparate impact. Several recent Title VII cases have addressed allegations that public employers are liable for paying lower salaries for female-dominated jobs than male-dominated jobs.[188] The plaintiffs in these cases argued that the public employer's reliance on the market resulted in a disparate impact on female salaries.[189] The federal courts, however, have consistently held that reliance on the marketplace is not the type of facially neutral test needed to establish a case of disparate impact:[190]

> A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by *Dothard* and *Griggs;* such a

185. Brief of Appellants, *supra* note 1, at 33-35.

186. *See supra* notes 51-60 and accompanying text.

187. *See supra* note 59 and accompanying text.

188. *See* American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); American Fed'n of State, County and Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985); Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied,* 469 U.S. 1036 (1984); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); *see also* Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.) (suit brought under the Civil Rights Act, 42 U.S.C. § 1983, and the equal protection clause of the fourteenth amendment), *cert. denied,* 449 U.S. 888 (1980).

189. *See American Nurses' Ass'n,* 783 F.2d at 725; *American Fed'n,* 770 F.2d at 1405; *Spaulding,* 740 F.2d at 705; *Christensen,* 563 F.2d at 355.

190. *See American Nurses' Ass'n,* 783 F.2d at 722-23; *American Fed'n,* 770 F.2d at 1405-06; *Spaulding,* 740 F.2d at 707-08; *Christensen,* 563 F.2d at 356.

> compensation system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory.[191]

Some courts have added that an employer's reliance on the marketplace is inherently job-related,[192] because to require an employer to pay anything other than market wages would impair his ability to compete. Therefore, even if reliance on the marketplace constitutes a facially neutral test with a disparate impact, that reliance on the marketplace could be defended as a business necessity.[193]

3. *Disparate Impact Is Unavailable.* ATU cannot be found liable under the disparate impact theory of discrimination because it did not use a facially neutral tool or test to determine wages. The plaintiffs did not argue that ATU's reliance on the market was a facially neutral test;[194] instead, they asserted that the collective bargaining process was the "test" that disproportionately awarded men a higher wage increase than women.[195] The collective bargaining process would be severely undermined if unions and employers could both be subject to liability every time one group of employees received a less favorable employment contract than that obtained by another group. This result could be counterproductive to the women's movement since unionization is strongly advocated as a way to reduce the gap between male and female salaries.[196] Statistical studies suggest that non-unionization explains the male and female earnings gap as effectively as an occupation's concentration of women workers.[197] Thus, increased union activity would probably benefit women's salaries and, therefore, should not be limited by the threat of liability for discrimination under the disparate impact theory.

Another problem with the plaintiffs' argument that the collective bargaining process creates liability under disparate impact is the strong congressional support for collective bargaining. Employers are

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191. *American Fed'n,* 770 F.2d at 1406 (citations omitted).

192. *See Spaulding,* 740 F.2d at 708.

193. *Cf.* Newman v. Crews, 651 F.2d 222, 225 (4th Cir. 1981) (holding that a policy that gave a pay raise to grade A but not to grade B and C teachers and had a disparate impact on black teachers was justified by business necessity because it helped the school district attract the best qualified teachers).

194. The plaintiffs did argue that IBEW partly established the market through previous negotiations on the Trans-Alaska Pipeline Project, which significantly increased salaries for skilled craft employees. Brief of Appellants, *supra* note 1, at 35. If IBEW created, as well as relied on the market, IBEW cannot avail itself of the analysis of the *Spaulding* court, which emphasized that employers are only "price takers" and "deal with the market as a given." *Spaulding,* 740 F.2d at 708.

195. Brief of Appellants, *supra* note 1, at 55.

196. *See, e.g.,* Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth,* 99 HARV. L. REV. 1728, 1797-801 (1986).

197. *Id.* at 1798 (citing statistical studies).

obligated to bargain with unions over the elimination of race and sex discrimination in employment.[198] This duty supercedes the requirements imposed under Title VII.[199] Thus, Congress has deemed the policy behind collective bargaining to be important enough to override the policies underlying Title VII. Because of this strongly expressed support for collective bargaining, the supremacy clause arguably would prevent any state law from also burdening the collective bargaining process.[200] The plaintiffs' only redress is to claim that the union violated its duty of fair representation[201] and not to claim that an unfair result creates liability under the disparate impact theory.

Collective bargaining is also not a facially neutral test that necessarily brings discriminatory results. Collective bargaining allows employees to band together and extract higher salaries from their employer than they could negotiate individually.[202] It is a dynamic process that may or may not award higher pay raises to female-dominated jobs. Collective bargaining contemplates participation through the representation of all employees and requires the approval of the majority of those employees.[203] Moreover, the collective bargaining process easily could be justified as a business necessity. Employers cannot negotiate wage contracts with each employee individually but are compelled to negotiate with one representative or group of representatives. In sum, collective bargaining is not a facially neutral test as contemplated by the Court in *Griggs.* An employer should not be subject to liability if he bargains for wages with representatives of the group simply because one portion of that group is not as successful.

198. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982).

199. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 70-73 (1975).

200. *But see* Bald v. RCA Alascom, 569 P.2d 1328 (Alaska 1977) (holding that the National Labor Relations Act did not preempt the Alaska state courts from deciding whether the union's requirement that a Seventh-Day Adventist pay union dues was discrimination on the basis of religion).

201. *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944) (holding that the Railway Labor Act requires the bargaining agent to represent the minority union members "without hostile discrimination, fairly, impartially, and in good faith"); *see also* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) (holding that the same duty exists under the National Labor Relations Act). Note that the plaintiffs did make a claim that the union did not fairly represent them. *See* Brief of Appellants, *supra* note 1, at 44-48.

202. *Emporium Capwell,* 420 U.S. at 67-68.

203. *Id.* at 62.

VI. CONCLUSION

The Alaska Supreme Court can reject the plaintiffs' petition in *Anchorage Telephone Utility,* and still stand for a broad anti-discrimination law. The breadth of Alaska's law is shown in many ways.[204] First, Alaska succinctly names and protects almost every minority group. Second, the Alaska law applies to all employers not just those that receive federal funds or have a certain number of employees. Third, the Human Rights Act gives the Alaska State Commission for Human Rights more tools to combat employment discrimination than Title VII gives the EEOC. Fourth, the Alaska employment discrimination law applies extra-territorially. And finally Alaska allows for broad remedies like affirmative action quotas.

For all of the above reasons the Alaska law can be interpreted as having more "teeth" than federal law.[205] The Alaska Supreme Court can broaden the Human Rights Act further by allowing a sector of a work force that is composed predominantly by a protected class to establish a prima facie case of discrimination when treated differently from another sector of the same work force even if the work is not comparable or similar. The supreme court, however, should still require in a disparate treatment case for sex discrimination that the plaintiff prove sex was a factor in the decision. The supreme court should also allow the employer to prove that his actions were a result of the marketplace and not of an intent to discriminate. Finally, the Alaska Supreme Court should not broaden Alaska's law by changing the legal requirements for a disparate impact case and allowing collective bargaining to be a *Griggs*-type facially neutral test.

John R. Read

204. *See supra* notes 29-41 and accompanying text.

205. *See* Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976).