Applying Disparate Impact To Title VII Comparable Worth Claims: An Incomparable Task

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INTRODUCTION

Although there is no generally accepted definition of "comparable worth,"[1] the following definition will be utilized for purposes of this article. In a comparable worth claim, the plaintiff attempts to establish that "dissimilar jobs have comparable value to the employer and, therefore, deserve comparable wages."[2] This comparison usually involves an analysis of female-dominated occupations, which are generally low paying, and male-dominated occupations, which are generally higher paying. The concept has grown out of the assumption that socio-economic and historical factors have led to job segregation.[3] Comparable worth proponents posit that these same forces have acted on the market resulting in undercompensation in the female-dominated job categories.[4] Thus, for example, the comparable worth theorist might argue that the higher wages paid to tree trimmers (a male-dominated job category) as compared to nurses (a female-dominated job category) is the result of a discriminatory compensation system that simply perpetuates historical discrimination.

Title VII of the Civil Rights Act of 1964,[5] the federal statute designed to eliminate employment discrimination, would appear to be the present legislative solution to the problem of remedying comparable worth wage dis-

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1. *See Pay Disparities and Comparable Worth,* 1980 LAB. REL. Y.B. (BNA) 158, 158-60 (1981).

2. Comment, *Comparable Worth Theory of Title VII Sex Discrimination in Compensation,* 47 Mo. L. REV. 495, 501 (1982).

3. *See, e.g.,* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964,* 12 U. MICH. J.L. REF. 397 (1979).

4. *Id.* at 401-57.

5. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

parities.[6] However, the role of Title VII in resolving the comparable worth problem has not been clarified by the courts. A former chair of the Equal Employment Opportunity Commission has described comparable worth as "the largest and most difficult issue left unresolved under Title VII today."[7]

This paper addresses the applicability of disparate impact analysis to sex-based comparable worth claims,[8] suggests a reformulation of the prima facie case, and determines how such a formulation of the prima facie case might affect the employer defenses. In order to understand whether disparate impact analysis can be applied to a sex-based comparable worth claim, it is first necessary to provide a brief overview of the disparate impact model of proving discrimination. Part I discusses the disparate impact model in its currest manifestations. Before directly addressing the formulation of a prima facie case, an analysis of *County of Washington v. Gunther*[9] is crucial in determining the proper formulation of the prima facie case and the employer defenses. Part II analyzes the *Gunther* decision, wherein it is argued that *Gunther* does not foreclose applying disparate impact analysis to a sex-based comparable worth claim. Recognizing that the application of disparate impact analysis to a sex-based comparable worth claim presents novel problems, part III addresses several of the more significant of these problems and formulates a prima facie case modifying traditional disparate impact analysis. Since the prima facie case is interrelated with the employer defenses, any discussion of the prima facie case must also entail a discussion of the employer defenses. Part IV analyzes the employer defenses and discusses those situations in which a successful employer defense should be permitted.

I. DISPARATE IMPACT

Title VII of the Civil Rights Act of 1964 bars employment discrimination that is based on an individual's race, color, religion, sex, or national origin.[10] The statute specifically prohibits such discrimination in compensation as well

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6. This article does not address the possible applicability of state legislation modeled after Title VII, which may have wider coverage than the parent federal legislation.

7. *Hearings on Job Segregation and Wage Discrimination,* U.S. Equal Employment Opportunity Comm'n 2-3 (1980) (opening statement of then EEOC Chair, Eleanor Holmes Norton).

8. The same analysis could be applied to race-based comparable worth claims. *See, e.g.,* Blumrosen, *supra* note 3, at 405. Indeed, one authority has put forth the argument that "the coverage of Title VII's prohibition of race discrimination in pay may be even broader than for sex, since the Bennett Amendment, incorporating the four affirmative defenses of the Equal Pay Act into Title VII, does not technically apply to race cases." 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 85.10 n.6 (1984).

9. 452 U.S. 161 (1981).

10. 42 U.S.C. § 2000e-2(a) (1982).

as in other employment opportunities.[11] In construing Title VII, the courts have developed analytical models that specify the evidentiary showing necessary to prove discrimination. Generally, employment discrimination claims brought under Title VII take one of two forms: disparate treatment or disparate impact.[12] The focus of a disparate treatment cause of action is on the discriminatory aims or intentions of the employer.[13] By way of contrast, intent is not a necessary showing under disparate impact analysis; rather, the focus is upon measuring the effects of an employment policy or practice upon a protected class.[14] This paper addresses only the disparate impact doctrine.

Over time, the courts came to the realization that the elimination of present, intentional discrimination could not likewise eliminate all the effects of institutional discrimination, where the intent to discriminate is not so readily identifiable. In recognition of this problem, the Supreme Court articulated the disparate impact doctrine in the seminal case, *Griggs v. Duke Power Co.*[15]

In *Griggs,* the employer had established diploma and testing requirements for certain jobs. Although facially neutral vis-à-vis the race of a given employee, these requirements eliminated a significantly higher proportion of blacks than whites, primarily because far fewer blacks were high school graduates. The Court reasoned that Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate."[16] Therefore, the Court held, Title VII bars "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[17] The Court added that an employer can justify a neutral policy that has a discriminatory effect by showing that the policy bears a "demonstrable relationship to successful performance of

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11. 42 U.S.C. § 2000e-2(a) (1982) provides:

> It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

12. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

13. *Id.* (proof of discriminatory motive is critical in disparate treatment cases); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (ultimate issue in disparate treatment case is intentional discrimination).

14. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis original).

15. 401 U.S. 424 (1971).

16. *Id.* at 431.

17. *Id.*

the jobs for which it was used."[18] Since the workers performed adequately prior to the imposition of the diploma requirement, it was concluded that the requirements were not sufficiently job related to justify their discriminatory effect.

Since the *Griggs* decision was handed down, disparate impact analysis has been applied by the Supreme Court in cases challenging height and weight requirements;[19] an employer's refusal to employ methadone users;[20] and various testing requirements.[21] The disparate impact doctrine has also been utilized by various appellate courts in cases challenging "word-of-mouth" recruitment;[22] an employer's refusal to hire persons with arrest records[23] or prior convictions;[24] and discharge policies based on garnishment rules,[25] to name but a few. Although the employer may apply any of the above criteria in a neutral fashion to all of its employees or prospective employees, and, indeed, may have no intent to discriminate, the effect of such policies may be a disproportionate exclusion of women and/or minorities.

Under disparate impact analysis, then, a plaintiff need only prove that a facially neutral employment policy or practice has a disproportionate adverse[26] effect on members of the plaintiff's class. If the plaintiff has been successful in establishing a prima facie case, the burden of persuasion then shifts to the employer[27] to show that the employment policy is justified as a business necessity. While the courts differ in their articulation of the business necessity defense,[28] at least three formulations of the business necessity defense can be discerned from a reading of the cases.

Under the narrowest view, the defendant is required to produce evidence that the policy causing the disparate impact is an "irresistible demand" that

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18. *Id.* This is what has come to be known as the business necessity defense. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328-29 (2d ed. 1983). Elsewhere, the Court stated that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Griggs,* 401 U.S. at 432.

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

20. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

21. Connecticut v. Teal, 457 U.S. 440 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

22. United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

23. Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972).

24. Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

25. Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974).

26. Precisely what constitutes a sufficiently disproportionate adverse effect remains an unsettled question. *See, e.g.,* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 47 n.88 (1980); 3 A. LARSON & L. LARSON, *supra* note 8, § 74.50; B. SCHLEI & P. GROSSMAN, *supra* note 18, at 98-99.

27. There is some dispute as to whether the shifting burden is one of persuasion or merely that of production. For an exhaustive citation to the leading cases on this issue, see B. SCHLEI & P. GROSSMAN, *supra* note 18, at 1328-29 nn.141-43.

28. *See* Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII,* 46 U. CHI. L. REV. 911 (1979).

is "essential" to the goals of safety and efficiency.[29] A middle approach mandates a showing that the importance of the business purpose is "sufficiently compelling to override any racial impact" and that no acceptable alternatives exist that could result in a less disparate impact.[30] The broadest reading merely requires that the policy or practice in issue be "job related."[31]

If the defendant successfully carries its burden of proving business necessity, the plaintiff can rebut the defendant's showing by demonstrating that there are less discriminatory alternatives than the practice employed by the defendant.[32] The Supreme Court has stated that "[s]uch a showing would be evidence that the employer was using its [facially neutral job requirement] merely as a 'pretext' for discrimination."[33]

II. *COUNTY OF WASHINGTON V. GUNTHER*

In *County of Washington v. Gunther,*[34] the county paid substantially lower wages to female guards in the female section of the county jail than it paid to male guards in the male section of the county jail. The respondents, four female guards, argued that the pay differential was attributable to intentional discrimination in violation of Title VII since the wage scale for women, but not for men, was set at a level lower than the county's own survey of outside markets and the worth of the jobs dictated.[35]

Arguing against the applicability of Title VII to the respondents' claim, the county contended that the Bennett Amendment[36] restricted Title VII sex-

29. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

30. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). Note that this formulation of the business necessity defense imposes upon the employer the additional burden of proving a negative, the absence of less discriminatory alternatives. In effect, then, such a formulation eliminates the plaintiff's rebuttal stage, discussed *infra* at notes 32-33 and accompanying text, by forcing the employer to disprove the existence of feasible, less discriminatory alternatives.

31. *Beazer,* 440 U.S. at 587. This case involved consideration of public safety, however, which may well serve to explain the lighter burden placed on the employer.

32. *Albemarle Paper Co.,* 422 U.S. at 425.

33. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)). Inasmuch as "pretext" is classic disparate treatment language, this and similar observations by the Supreme Court leave one in doubt as to whether intent is a requisite showing once the employer has established business necessity. *See also Dothard,* 433 U.S. at 329. For a thoughtful analysis of this question, see Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

34. 452 U.S. 161 (1981).

35. *Id.* at 163-65.

36. The Equal Pay Act, which applies only to sex-based wage discrimination, *see* 29 U.S.C. § 206(d)(1) (1982), was signed into law in June of 1963, a year before Title VII was passed. As originally proposed, Title VII prohibited employment discrimination on the bases of "race, color, religion, or national origin," making no reference whatsoever to sex discrimination. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401-08. Towards the end of the House floor debate on Title VII, however, Representative Smith of Virginia proposed an amendment to add "sex" to the listing of

based wage discrimination claims to those that could also be brought under the Equal Pay Act's equal work standard.[37] The respondents maintained that the Bennett Amendment merely incorporated the four affirmative defenses of the Equal Pay Act into Title VII.[38] The Supreme Court agreed with the respondents and held that the Bennett Amendment only incorporated the four affirmative defenses of the Equal Pay Act into Title VII.[39] Thus, the *Gunther* decision removed the major obstacle to sex-based wage discrimination suits that seek to compare jobs which are not substantially equal. The Court recognized that such claims can indeed "be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or 'any other factor other than sex.' "[40] Beyond this, the Court did not attempt to formulate the prima facie case for a sex-based comparable worth claim.

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prohibited bases of employment discrimination. 110 CONG. REC. 2577 (1964). This amendment was adopted by the House and forwarded to the Senate, apparently without any consideration of its relation to the Equal Pay Act. The adoption of this amendment to Title VII created the possibility of a conflict between Title VII and the Equal Pay Act since both statutes prohibited sex-based wage discrimination. Recognizing the possibility of such a conflict, Senator Bennett introduced a further amendment to Title VII, which he described as a "technical correction" to the bill that was necessary "to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 CONG. REC. 7515, 13,647 (1964). The Bennett Amendment, which was passed by the Senate and subsequently accepted by the House, reads as follows:

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

42 U.S.C. § 2000e-2(h) (1982).

37. *Gunther,* 452 U.S. at 168. Equal Pay Act analysis involves a comparison of jobs which require "equal skill, effort, and responsibility, and . . . are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (1982). It was believed by some courts that the Bennett Amendment incorporated this equal work standard of the Equal Pay Act into Title VII. *See, e.g.,* Lemons v. City & County of Denver, 620 F.2d 228, 229-30 (10th Cir.), *cert. denied,* 449 U.S. 888 (1980). Under this view, a plaintiff alleging sex-based wage discrimination would be required to prove that he or she was paid lower wages than employees of the opposite sex for substantially equal work. This construction of the Bennett Amendment would preclude a sex-based comparable worth claim which is premised on a comparison of dissimilar work.

38. *Gunther,* 452 U.S. at 168. The Equal Pay Act permits unequal wages for substantially equal work "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." 29 U.S.C. § 206(d)(1) (1982). This interpretation of the Bennett Amendment would permit a sex-based comparable worth claim by eliminating the equal work requirement and, instead, incorporating only the statutory defenses of the Equal Pay Act.

39. *Gunther,* 452 U.S. at 171.

40. *Id.* at 168 (quoting 29 U.S.C. § 206(d)(1) (1982)).

It does not seem unreasonable to read *Gunther* quite narrowly. The Court exhibited meticulous caution in limiting its holding. Indeed, Justice Brennan, writing for the majority, stated:

> We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of "comparable worth," under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community. Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted.[41]

In conclusion, the Court stated:

> [T]he failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, respondents' suit does not require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.[42]

This language can be interpreted as limiting compensation claims for unequal work to disparate treatment theory since *Gunther* involved direct evidence of intentional discrimination.[43] The dissent clearly reads the majority opinion in this light.[44] The foregoing language not only seems to oppose comparable worth theory, but also the use of disparate impact theory to demonstrate its existence. Nonetheless, *Gunther* may have a broader application.

The Court stressed its unwillingness to deprive victims of discrimination of a remedy, and it referred to the broad policy goals of Title VII.[45] In light of the broad remedial goals of Title VII, disparate treatment analysis, stand-

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41. *Id.* at 166.

42. *Id.* at 181.

43. *Id.* at 166. Indeed, prior to *Gunther,* at least one appellate court had indicated that sex-based comparable worth claims would be limited to situations involving intentional discrimination. *See* Christensen v. Iowa, 563 F.2d 353, 355 n.5 (8th Cir. 1977).

44. Justice Rehnquist characterized the majority holding as a "restricted railroad ticket, 'good for this day and train only.' " *Gunther,* 452 U.S. at 183 (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)). Indeed, the dissent concludes that:

> Because there are no logical underpinnings to the Court's opinion, all we may conclude is that even absent a showing of equal work, there is a cause of action under Title VII where there is direct evidence that an employer has *intentionally* depressed a woman's salary because she is a woman.

Id. at 204 (emphasis original).

45. "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Id.* at 178 (citation omitted). Significantly, the Court used the term "effect," disparate impact nomenclature.

ing alone, provides scant protection against institutional discrimination in the context of a comparable worth claim. If an employee must prove intentional discrimination in this area, then an employer, relying on "neutral" factors to establish wages, could consciously or unconsciously perpetuate the effects of historical discrimination without redress.

The majority, quoting *Griggs v. Duke Power Co.*,[46] stated that Title VII proscribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[47] This appears particularly noteworthy inasmuch as *Griggs* established disparate impact as a viable theory of recovery under Title VII. Although the Court noted pointedly that *Gunther* was not a comparable worth case, it declined the invitation to limit wage discrimination claims only to those cases where intentional discrimination could be demonstrated.[48] A reasonable conclusion is that the procedural posture of *Gunther* did not require the Court to address the issue of whether intent is required in all Title VII compensation claims.[49] Therefore, one may conclude that the issue is an open one.

Summarizing, *Gunther* opened the door for plaintiffs bringing sex-based comparable worth claims by allowing a comparison of jobs involving dissimilar work.[50] However, the Court explicitly declined the opportunity to specify the prima facie showing necessary in order to sustain such claims under Title VII.[51] Nor did the Court in *Gunther* decide "how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act."[52] These deliberate omissions mean that the lower courts must now fashion the prima facie case for sex-based comparable worth claims while determining how the fourth affirmative defense is to be interpreted under Title VII.

III. Articulating the Prima Facie Case

A. A Threshold Issue: Specificity of the Challenged Policy or Practice

Section I presented a brief summary of established disparate impact theory. However, comparable worth involves novel questions which are not entirely clear under traditional disparate impact analysis. The most significant of such questions is whether disparate impact theory can be utilized to attack broad employment practices such as a compensation system.

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46. 401 U.S. 424 (1971).
47. *Gunther*, 452 U.S. at 170 (quoting *Griggs*, 401 U.S. at 431).
48. *Gunther*, 452 U.S. at 166 n.8.
49. *Id.* at 168.
50. *Id.* at 181.
51. *Id.*
52. *Id.* at 171.

Traditionally, plaintiffs have pinpointed particular employment policies or practices having a disparate impact on a protected class. For example, height and weight requirements and diploma requirements are specific employment policies that have in the past been demonstrated to impact disproportionately on certain protected classes.[53] Plaintiffs did not identify the hiring, promotion, or compensation system itself as the facially neutral factor, although such arguments have on occasion been put forward, usually without success.[54]

In contrast, a plaintiff bringing a comparable worth claim typically alleges that the compensation system in its entirety, or some other broad practice such as reliance on market forces[55] in establishing wage rates, is the neutral factor which has a disparate impact on the plaintiff's class. For example, in *American Federation of State, County, and Municipal Employees v. Washington*[56] (*AFSCME*), the trial court recognized the compensation system as the facially neutral factor, thus allowing the plaintiffs to proceed under the disparate impact theory of liability.[57] However, this analysis was explicitly

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53. Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

54. *See, e.g.*, American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985) (disparate impact analysis confined to cases challenging specific, clearly delineated employment practice); American Fed'n of State, County, and Mun. Employees v. County of Nassau, 609 F. Snpp. 695 (E.D.N.Y. 1985) (disparate impact model inappropriate vehicle to launch broad-based attack on wage system); American Nurses Ass'n v. Illinois, 606 F. Supp. 1313 (N.D. Ill. 1985) (reliance on factor such as competitive market prices does not qualify as facially neutral policy or practice; disparate impact analysis designed to handle specific employment practices); Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984) (specific employment practice required to mount disparate impact attack); Hill v. K-Mart Corp., 699 F.2d 776 (5th Cir. 1983) (disparate impact analysis inappropriate to launch a wide-ranging attack on cumulative effect of a company's employment practices); Pegues v. Mississippi State Employment Serv., 699 F.2d 760 (5th Cir.), *cert. denied*, 104 S. Ct. 482 (1983) (classification and referral practices involving subjective judgments are not properly analyzed under disparate impact analysis); Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982) (disparate impact model applicable only when an employer has instituted a specific procedure); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (disparate impact analysis improper vehicle to attack subjective decision-making system); Heagney v. University of Wash., 642 F.2d 1157 (9th Cir. 1981) (disparate impact analysis inappropriate for challenging the use of ill-defined or subjective job criteria). *But see* Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984) (vague, subjective hiring criteria ordinarily lends itself to disparate treatment analysis, but disparate impact analysis may be applied in certain situations); Page v. United States Indus., 726 F.2d 1038 (5th Cir. 1984) (promotion system based upon subjective selection criteria may be challenged under disparate impact analysis); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (highly subjective promotion system had a disparate impact on blacks).

55. "Market forces" refers generally to factors such as supply and demand, prevailing wage rates for particular job classifications, and similar external influences which an employer typically considers in setting wage rates. As used herein, the terms "market rate" and "market forces" are treated as generally synonomous, unless otherwise indicated.

56. 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

57. 578 F. Supp. at 864 ("Under the disparate impact theory, the objective facially neutral factor is Defendant's system of compensation.").

rejected when the decision was reversed on appeal.[58] Prior to its reversal, *AFSCME* represented the only successful attempt by a plaintiff to apply disparate impact analysis to a sex-based comparable worth claim.

There are a number of reasons which support a specificity limitation to disparate impact challenges. As a practical matter, if an employee is allowed to attack any employment practice, no matter how broad that practice might be, there is no logical stopping point. For instance, employment itself may have a disparate impact on the wages of women, or, for that matter, on the wages of any historically oppressed group of employees. Mere identification of a broad policy or practice having a disparate impact would shift the burden of proof to the employer, perhaps requiring validation of other elements of that policy or practice having no disparate impact.[59]

Not only is this an impermissible burden to place upon the employer under established disparate impact doctrine, it also serves to obfuscate the issue of causation.[60] Finally, identification by the plaintiff of a specific policy or practice having a disparate impact represents a fair allocation of the respective burdens of proof, for it simply does not seem fair to shift the burden of persuasion to the employer without at least specifying the causative elements of the disparate impact.[61]

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58. *AFSCME,* 770 F.2d at 1405.

59. *See, e.g.,* Rivera v. City of Wichita Falls, 665 F.2d 531, 539 (5th Cir. 1982).

60. Inasmuch as the Supreme Court has to date failed to specify precisely what constitutes a sufficiently disproportionate adverse effect, *see supra* note 26, the issue of causation is largely an uncharted area. Simply put, we lack the present ability to say beyond mere conjecture to what degree compensation systems, such as reliance on the market rate in setting wages, are infected with bias, or, put another way, that the market rate *causes* the impact at issue. One method of demonstrating disparate impact is, obviously, through the presentation of statistical evidence. "When the proof of adverse impact is statistical, many courts place on the plaintiff the burden of discounting chance as a possible cause of the observed disproportionate impact. When so burdened a plaintiff must show not only the difference . . . is 'substantial' but also that it is *statistically significant.*" D. BALDUS & J. COLE, *supra* note 26, at 48 (footnote omitted) (emphasis original). "[T]he test of statistical significance determines the likelihood that the observed disparate impact . . . was caused by chance factors rather than by rule or selection criteria under challenge." *Id.* at 31-32 (Supp. 1984). Broad-based challenges to hiring, promotion, or compensation systems simply are incapable of eliminating chance and other nondiscriminatory factors from the calculus.

61. *See Spaulding,* 740 F.2d at 705 ("Plaintiffs must prove not merely circumstances raising an inference of discriminatory impact; they must prove the discriminatory impact at issue.") (citation omitted); Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983) (same); Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981), *cert. denied,* 459 U.S. 967 (1982) (same); EEOC v. Greyhound Lines, 635 F.2d 188, 193 (3d Cir. 1980) ("In other words, a policy does not have a disparate impact unless it is the cause of that impact."); Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine,* 34 STAN. L. REV. 1083, 1097 (1982) ("[A] plaintiff must . . . prove that this practice *causes* a disparity between male and female employees' opportunities.") (footnote omitted) (emphasis original). If the employer is not permitted to defend itself by asserting that, as a "bottom line," its hiring or selection system as a whole does not have a disparate impact, *see* Connecticut v. Teal, 457 U.S. 440 (1982), why then should the plaintiff be allowed to assert in her prima facie showing that an employer's *system* (such as compensation) has a disparate impact? Specificity of the

Moreover, where a broad employment practice is identified as the facially neutral factor, the traditional articulation of the business necessity defense is not particularly applicable.[62] The courts could approach the problem of challenges to broad employment policies or practices generally in one of two ways.

First, the plaintiff could be required to identify a specific employment practice as the neutral factor causing the disparate impact. As an alternative to the approach used by the lower court in *AFSCME,*[63] a job evaluation scheme is particularly conducive to the identification of a specific employment practice adversely affecting the plaintiff's class. For instance, "effort" tends to be defined in terms of the strength required in heavy work, without regard for the repetitive lifting of light objects which tends to occur in female-dominated jobs. Another example of this sort of internal bias occurs when an employer assigns greater weight to physical strength than for manual dexterity. Plaintiffs should be permitted to apply disparate impact analysis to these types of specific employment practices.[64]

A second approach would simply require the adoption of a broadened business necessity defense, thereby providing a correspondingly lighter burden on the employer. Such a reallocation of the order and burdens of proof appears appropriate in light of the plaintiff's weaker prima facie showing. If broad practices, such as a system of compensation, are open to attack under disparate impact theory, fairness requires a restructuring of the defendant's traditional burden under the business necessity defense. At some point in the analysis, however, the plaintiff will likely have to establish the causative element(s) of the impact.

B. The Prima Facie Case

One of the earliest articulations of the prima facie case in comparable worth claims was presented by Professor Ruth Blumrosen, who suggested

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policy or practice purportedly having a disparate impact should be required at both ends of the spectrum, for it serves to isolate the allegedly causative elements of the disparate impact. This concept of causation is of particular concern where, for example, the challenged practice is reliance on supply and demand or other market forces. The recurring question continues to be: to what extent is the market place infected with bias?

62. For example, it would be difficult for an employer to assert that a compensation system is an "irresistible demand" that is essential to the goals of safety and efficiency.

63. The lower court in *AFSCME* allowed the plaintiffs to proceed under the disparate impact theory of liability by identifying the employer's compensation system as the facially neutral factor causing the impact at issue. 578 F. Supp. at 866-67.

64. For other examples of challenges to specific, facilly neutral criteria, see Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 3544 (1984) ("head-of-household" status used to limit spouse's coverage under employee's medical policy); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982) (prior salary used as a factor in determining current salary).

that a mere showing of job segregation sufficed to meet the plaintiff's initial burden of production in a disparate impact claim. According to Professor Blumrosen, where job segregation occurs, wage discrimination is a necessary correlate because the same factors that cause job segregation also result in wage discrimination.[65] Professor Blumrosen first points out that women work mainly in certain sectors of the economy.[66] Jobs filled by women tend to be low-paying jobs and the low wages cannot entirely be explained by legitimate reasons.[67] It is said that women's work has always and everywhere been devalued, and this devaluation is reflected in lower wages for women.[68]

The crucial underpinning of Professor Blumrosen's theory is that job segregation has been so intimately linked to discriminatory devaluation of women's work that the two are really one and the same. Professor Blumrosen sets forth a theory by which employers translate this devaluation into lower wages for women.[69] Wages are set by two principal standards: internal job evaluations by which the relative worth of each job is assessed within the enterprise; and, external reliance on market forces, such as supply and demand, in establishing wages. According to Professor Blumrosen, both systems are inherently discriminatory. Internal job evaluations are necessarily subjective, and are reflective of the unconscious or conscious biases of those who set the wages. Use of external market forces imports whatever aggregate stereotypes and prejudices infect the economy as a whole.

In summary, under the Blumrosen analysis, a plaintiff must merely show that her job is segregated, in other words, that more than seventy or eighty percent of the employees performing the job are women.[70] As Professor Blumrosen asserts, "[e]vidence of segregated jobs justifies an inference of discrimination in compensation."[71]

Perhaps the biggest criticism of Professor Blumrosen's thesis is her attribution of wage differentials to sex discrimination. In her article, Professor Blumrosen cites a number of econometric studies of sex differentials in wages.[72] The authors of these studies were only able to account for zero to fifty-five percent of the gross wage differentials between sexes. The remaining wage differentials, Blumrosen asserts, must be the result of illegal sex discrimination. In essence, Professor Blumrosen is making an assumption not based on any quantifiable data.

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65. Blumrosen, *supra* note 3.
66. *Id.* at 402-10.
67. *Id.* at 410-15.
68. *Id.* at 415-28.
69. *Id.* at 428-57.
70. *Id.* at 461.
71. *Id.* at 465.
72. *Id.* at 455-56.

This assumption that job segregation is the result of sex discrimination has been attacked because it cuts too broadly.[73] This is so because many women, for personal and cultural reasons, entered the female-dominated job categories voluntarily. Therefore, job segregation alone may not be indicative of sex discrimination. Although an argument could be made that women have been socialized to enter certain job categories, it may not be fair to hold the employer liable for the resulting job segregation. Moreover, it would be extremely difficult to quantify to what extent the employee contributed to job segregation,[74] and, therefore, to what extent the employer is responsible.[75]

Another criticism leveled at Professor Blumrosen is that the proposed method of proof contravenes traditional "established methods of proof under Title VII as to the construction of a prima facie case and as to the available defenses."[76] Nelson, Opton and Wilson contend that Blumrosen's analysis makes the creation of the prima facie case too easy, and, in effect, "mistakenly places the burden of proof upon employers to *disprove* discrimination."[77] Specifically, the authors attack Professor Blumrosen's attempt to apply disparate impact as "a wholesale assault on the employer's wage structure," as opposed to the more traditional application to specific employment practices.[78]

In addition to the scholarly criticism of Professor Blumrosen's thesis, judicial acceptance has not been forthcoming. For example, in *Briggs v. City of Madison,*[79] women employed as public health nurses brought an action under Title VII alleging that the defendant employer discriminated

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73. Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective,* 13 U. MICH. J.L. REF. 233, 280-81 (1980).

74. Comparable worth plaintiffs may be required to demonstrate personal harm, not merely class harm, in order to obtain relief under Title VII. Since, admittedly, not all women are actual victims of job segregation which allegedly accounts for the wage disparity female employees suffer as a class, monetary relief may be unavailable to these nonvictims. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2588-90 (1984); International Bhd. of Teamsters v. United States, 431 U.S. 324, 367-71 (1977).

75. *See, e.g., Spaulding,* 740 F.2d at 708 ("[A]llowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgment."); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981) ("Title VII does not ultimately focus on ideal social distributions of persons of various races and both sexes. Instead it is concerned with combatting culpable discrimination.").

76. Nelson, Opton & Wilson, *supra* note 73, at 278.

77. *Id.* at 281 (emphasis original).

78. *Id.* at 283-84. *See supra* notes 53-59 and accompanying text.

79. 536 F. Supp. 435 (W.D. Wis. 1982). It should be noted, however, that *Briggs* was litigated under a theory of disparate treatment. *See also* EEOC Dec. No. 85-8, 37 Fair Empl. Prac. Cas. (BNA) 1889, 1891 (1985) ("The mere predominance of individuals of one sex in a job classification is not sufficient to create an inference of sex discrimination in wage setting."); Bohm v. L.B. Hartz Wholesale Corp., 38 Fair Empl. Prac. Cas. (BNA) 495, 499 (Minn. Ct. App. 1985).

against them on the basis of sex by employing them in a lower paying classification than that of public health sanitarians, who performed jobs of substantially equal skill, effort, and responsibility. The plaintiffs attempted to establish a prima facie case by demonstrating job segregation and pay disparity between the sexes. However, in rejecting such a formulation of the prima facie case, the court noted that no one "possesses the intellectual tools and data base that would enable them to identify the extent to which the factor of discrimination has contributed to, or created, sex-segregated jobs, and to separate the factor from the myriad of nondiscriminatory factors that may have contributed to the same result."[80]

The court's reasoning in *Briggs* points out the primary problem with the Blumrosen thesis—a number of other nondiscriminatory factors may have contributed to the lower wages paid to women. These contributing factors include familial and peer expectations, a desire for part-time work or work with flexible hours, "crowding" (a heavy concentration of women available for the same job), the effects of unionization, and a reluctance to pioneer in nontraditional jobs.[81] In short, by making the plaintiff's prima facie showing relatively easy to establish, the traditional allocation and order of proof is thereby upset, resulting in a concomitantly heavier burden for the defendant. A mere showing of job segregation together with a pay disparity does not seem sufficiently probative to support a shifting of the burden of persuasion to the employer. For example, if one were to compare clerical workers and engineering professors, a likely finding would be job segregation and a pay disparity. Yet, the causal link necessary to support the shifting burden is not readily apparent.[82]

Another possible formulation of the prima facie case involves employer reliance on market forces in determining wages. In such a setting, the employer uses the same neutral policy—reliance on market rates—to establish wages for all jobs. However, market rate systems are retrospective and allegedly operate to freeze the status quo of prior discriminatory employment practices.[83] Thus, a showing that an employer relied on the facially neutral market rate to establish wages, together with a showing of wage disparity, would arguably constitute a prima facie case of disparate impact.

However, attempts to utilize the facially neutral market rate in this manner suffer from many of the defects discussed above in terms of the Blumrosen thesis. More importantly, it is at present impossible to demonstrate to what extent the market is infected with bias in the establishment of wages. Thus,

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80. *Briggs*, 536 F. Supp. at 444. These same considerations of causation infect disparate impact analysis, and, arguably, play a more significant role since the focus is then upon measuring the effects of a particular policy or practice.

81. *Id.* at 444-45 n.6.

82. *See supra* notes 60-61 and accompanying text.

83. *See* Blumrosen, *supra* note 3, at 421-28.

once again one is confronted with the difficulty of establishing the causal nexus between the facially neutral factor and its apparent adverse effect.[84] To date, no court has recognized a plaintiff's attempt to utilize the market rate as the facially neutral factor in establishing a prima facie case of disparate impact.[85]

In an apparent effort to avoid these conceptual barriers to the utilization of the market rate in establishing the plaintiff's prima facie case, one author has suggested that an additional element be added to the plaintiff's initial showing.[86] The author suggests "that the employer's stated minimum requirements of education and experience for each of its jobs be used as a correlate of the job's worth for the purpose of satisfying the plaintiff's initial burden of proving disparate impact."[87] This approach appears to be something of a hybrid between disparate treatment and disparate impact, inasmuch as it seems to inject an element of intent into the analysis by seeking to demonstrate the relative worth of the jobs to the employer. For example, if two employees, one male and the other female, perform work of comparable value to the employer—as demonstrated by the employer's stated minimum requirements of education and experience—and the male is paid more than the female, then the employer is not actually compensating its employees on the basis of its stated minimum requirements of education and experience. This deviation from the employer's own stated job requirements is indicative of intentional sex-based wage discrimination. Perhaps the infusion of an element of intent into disparate impact analysis is an inevitable development in the area of comparable worth,[88] as it appears that most, if not all, identifiable neutral factors are premised upon underlying historical, intentional sex discrimination.[89]

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84. *See supra* notes 60-61 and accompanying text.

85. *See AFSCME,* 770 F.2d at 1406 ("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 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."); *American Nurses Ass'n,* 606 F. Supp. at 1319 ("relying on a factor such as competitive market prices does not qualify as a facially neutral policy or practice having discriminatory impact for the purposes of a disparate impact analysis"); *Spaulding,* 740 F.2d at 708 ("Relying on competitive market prices does not qualify as a facially neutral policy or practice for the purposes of the disparate impact analysis that was first articulated in *Griggs.*").

86. Comment, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application,* 71 CALIF. L. REV. 730 (1983).

87. *Id.* at 749.

88. *See* Gregory, *Comparable Worth: The Demise of the Disparate Impact Theory of Liability,* 1982 DET. C.L. REV. 853, 856 ("Disparate impact proof standards are in the process of a judicial transmogrification into an intent requirement—an unusual hybrid and functional equivalent of the disparate treatment case.").

89. Use of the market rate is the most obvious example of this theory. Use of an employee's prior salary in setting hiring rates is another such example. The actual theory upon which such

A court may require a plaintiff to show not only the job segregation and pay differentials, but also a job evaluation analysis demonstrating that the content of the job does not justify the pay disparity, in order to constitute a prima facie case.[90] However, the prohibitory cost of job evaluation studies could foreclose a plaintiff's utilization of such evidence. In this regard, the foregoing analysis requiring the plaintiff to show that education and experience requirements do not justify the pay differential would appear to be a common sense alternative to the great expense of job evaluation studies. Such a requirement would also present evidence of a given employer's implicit

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claims are premised, "present effects of past discrimination," *see* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 3 (1980), saw its heyday in pre-*Teamsters* seniority cases. *See, e.g.,* Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). The "present effects" theory postulated that a seniority system constituted present discrimination and violated Title VII if it locked members of a protected class into inferior positions in which they had originally been placed as a result of discrimination, even though the original act of discrimination was beyond the reach of the court. Thus, the comparison of comparable worth claims premised upon historical discrimination to seniority systems is inescapable, for the theoretical underpinnings of both rest upon a foundation of past discrimination that is somehow perpetuated into the future. However, whereas seniority systems involved the application of specific rules and perpetuated clearly identifiable prior discriminatory lines of progression, use of the market rate in establishing wages of employees has a more attenuated causal nexus to prior acts of alleged discrimination. Seniority systems normally operate on an internal basis, whereas the market rate is a reflection of community-wide biases and evaluation of job worth. However, the Supreme Court held in *Teamsters,* 431 U.S. at 353-54, that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." On the same day as the *Teamsters* decision, the Supreme Court held in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), that a seniority system is not violative of Title VII simply because it perpetuates the effects of prior discriminatory acts, even if those acts occurred after Title VII went into effect. Acts of discrimination which are not the subject of "a timely charge [are] the legal equivalent of a discrimatory act which occurred before the statute was passed," *id.* at 558, and are not actionable despite the perpetuation of their effects into the present. Read in tandem, *Teamsters* and *Evans* have dealt a crippling blow to the "present effects" theory, at least in the context of seniority systems. Even though seniority systems receive special consideration vis-à-vis § 703(h) of Title VII, comparable worth plaintiffs may face similar judicial reluctance to assign present culpability to acts of historical discrimination, especially where the individual employer in no way contributed to past discrimination. Indeed, at least one commentator, Gregory, *supra* note 88, at 884-86, has suggested the possibility of a judicially created equivalent to § 703(h), a "bona fide compensation system" defense. As Professor Gregory observes in his article, the *Gunther* Court made specific reference to the fact that the fourth affirmative defense of the Equal Pay Act was added "because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted." 452 U.S. at 171 n.11. At least two courts have noted the possible applicability of such a limiting factor on the fourth affirmative defense. *See* Schulte v. Wilson Indus., 547 F. Supp. 324, 339 n.16 (S.D. Tex. 1982); Kouba v. Allstate Ins. Co., 523 F. Supp. 148, 160-61 (E.D. Cal. 1981), *rev'd,* 691 F.2d 873 (9th Cir. 1982). Since no plaintiff has to date survived the initial burden of establishing a prima facie showing that an employer's compensation system has a disparate impact on the wages of females, it remains to be seen whether this defense will ultimately receive judicial acceptance.

90. *See, e.g., AFSCME,* 578 F. Supp. 846.

valuation of the relative worth of various jobs.[91] However, it does not address the argument that reliance on the external market rate in setting wages is nondiscretionary to the employer.[92] Moreover, it does not address those arguments concerned with the identification of a specific neutral policy or practice;[93] nor does it further the quest for a demonstration of causation. Rather, to a large extent it injects elements of intent into the analysis.

In conclusion, where jobs of comparable value are not compensated equally, the burden of proof may appropriately be shifted to the employer. However, the function of the plaintiff's prima facie showing is to eliminate from consideration the more common nondiscriminatory factors which would justify the pay differential. Therefore, in formulating the prima facie burden, a plaintiff should either identify a specific employment practice and demonstrate a causal nexus between that practice and a resulting pay disparity, or the plaintiff should be required to show job segregation, pay disparity, and some showing of the relative worth of the jobs. Analysis of the internal valuation of an individual employer's job classifications would present stronger evidence of relative job worth than would mere reliance on external market forces. Although the latter formulation to a large extent factors intent into the analysis, this would appear to be a reasonable compromise absent identification of a specific employment policy or practice.[94]

IV. DEFENSES

Three types of defenses are potentially available to the employer in a Title VII disparate impact sex-based compensastion case: evidentiary defenses; the business necessity defense; and Equal Pay Act affirmative defenses. This section explores the applicability of these defenses to comparable worth disparate impact claims.

A. Evidentiary Defenses

One way an employer could defend against a prima facie showing of wage discrimination is by presenting evidence "refuting the inference of discrimination raised by the plaintiff's . . . showing of disparate impact."[95] For

91. This is true assuming that education and experience requirements are reflective of job worth. Inasmuch as increased education and experience do not form a perfect correlation to higher wages, even controlling for the gender of the employees, this approach may be too simplistic.

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

93. The argument can be made that utilization of the market rate in establishing wages *is* a specific policy or practice. Even assuming the accuracy of this contention, and the inaccuracy of the Ninth Circuit in *Spaulding*, 740 F.2d 686, this does not meet the objection that reliance on the market rate in setting wages is non-discretionary to the employer.

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

95. *See* Comment, *supra* note 86, at 751.

example, the employer could produce countervailing statistics to demonstrate that its employment practices have not had an adverse effect upon the plaintiff's class. The defendant could also attack the plaintiff's job evaluation study if one was presented, or conduct its own job evaluation analysis to refute the plaintiff's showing.[96]

B. *Business Necessity Defense*

Griggs v. Duke Power Co. established that an employer may legally use a policy which has a disparate impact if it is justified by a business necessity.[97] As discussed above,[98] there is no single formulation of the business necessity defense. Moreover, if an employee cannot pinpoint a specific employment practice which results in a wage disparity, a court may be justified in utilizing a broader definition of the business necessity defense. Thus, the standard for the business necessity defense will depend on two factors: (1) the prevailing articulation of the defense in a given jurisdiction; and (2) the identification in the plaintiff's complaint of a particular employment policy which allegedly has a disparate impact on the plaintiff's class. At the risk of stating the obvious, articulation of this defense may well be dispositive. Under any formulation of business necessity, the plaintiff can rebut the defendant's showing of a business necessity by demonstrating that another policy with a less discriminatory effect would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[99]

Employers have attempted to defend their discriminatory practices on the ground that such practices are justified by cost considerations. Courts, however, have rejected the contention that a discriminatory result may be justified by the administrative cost or convenience of alternative measures.[100] Therefore, a court entertaining a comparable worth claim should reject a cost defense as failing to constitute a business necessity. Moreover, nothing in the language or legislative history of Title VII indicates that Congress placed a price tag on the cost of eliminating employment discrimination.

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96. *Id.* at 751-52.

97. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

98. *See supra* notes 28-31 and accompanying text.

99. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

100. *See, e.g.*, American Fed'n of State, County, and Mun. Employees v. Washington, 578 F. Supp. 846, 867-68 (W.D. Wash. 1983) (comparable worth challenge), *rev'd*, 770 F.2d 1401 (9th Cir. 1985); Wirtz v. Midwest Mfg. Corp., 1 Empl. Prac. Dec. (CCH) ¶ 9869 (S.D. Ill. 1968) (equal pay case holding that wage differential based on alleged higher cost of employing women is not a "factor other than sex"). *See also* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (disparate treatment challenge). *But see* Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1495 (9th Cir. 1983) (need to keep insurance costs to a minimum constituted "legitimate and overriding business justifications").

In addition to cost justifications, employers may assert that reliance on the market rate[101] justifies the wage differential as a business necessity. If an employer could demonstrate, by a preponderance of the evidence, a shortage of qualified workers or an actual difficulty in recruiting workers for certain jobs, then Title VII should permit an employer to maintain the pay differential necessary to attract, retain, and motivate competent employees.[102] The following hypothetical demonstrates the factual application of this principle.

At *X* University, a job evaluation study had disclosed that English professors and engineering professors perform work of comparable value to the employer. The English Department is female-dominated, while in the Engineering Department, the opposite is true. Pursuant to the job evaluation analysis, both departments pay their professors $30,000 per year. However, because of the high demand for engineers in the outside market, an engineering professor could make $60,000 per year working for a private firm. Due to the high demand for engineers, the University finds itself with a shortage of engineering professors. Therefore, the University increases the salary for engineering professors. The University should be successful in its business necessity defense if sued by the English professors. The rationale is that the University must pay the market rate in order to attract qualified engineering professors. To the foregoing, two qualifications should be added.

First, the employer must treat female-dominated jobs similarly. For instance, scarce employees in the female-dominated job category of English professors would have to be given the same type of pay adjustments that engineering professors received if the situation were reversed. Second, the employee must be provided the opportunity to demonstrate a less discriminatory alternative.[103] For example, an employee may be able to show that an employer would not have to pay as much if it recruited from a larger labor pool or trained its own employees to perform the job.

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101. The courts are not always clear as to what they have in mind when they address the adequacy of market rate defenses. Even though courts may not explicitly characterize the defense as being based on market rates in formulating their decisions, the concept of market forces or influences appears implicit in the context of the decisions. On one hand, market rate can mean compensating women for less because they are willing to work for less. In this context, the defense of market rate has clearly been rejected by the courts. *See, e.g.,* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974). On the other hand, market rate can mean the pay rate necessary to attract qualified workers. The defense has enjoyed more success in this context than in any other use of the market rate. *See, e.g.,* Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). In between these two extremes, market rate can also mean the wage rate paid in the outside community. This meaning of the market rate defense has been accepted by the sole court to address the issue. *See* Lemons v. City & County of Denver, 620 F.2d 228 (1980). Courts must be careful in recognizing these distinctions since the concept of market rate encompasses a host of factors and varying circumstances, some of which should constitute a valid employer defense.

102. Indeed, such was implicit in the holding of *Christensen,* 563 F.2d at 356. *See also* Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 480 (8th Cir. 1984); Briggs v. City of Madison, 536 F. Supp. 435, 446-47 (W.D. Wis. 1982).

103. *See supra* notes 32-33 and accompanying text.

C. *Equal Pay Act Defenses*

The four affirmative defenses of the Equal Pay Act[104] apply to Title VII sex-based compensation discrimination.[105] Although an employer may defend its wage differential on the basis of seniority, merit, quantity or quality of production, the majority of employers will likely defend the wage disparity on the basis that it is determined by the market rate, or in equal pay rubric, a "factor other than sex." In addition, *County of Washington v. Gunther*[106] explicitly held that the first three affirmative defenses are to be interpreted consistently with Equal Pay Act case law.[107] Therefore, the balance of this article addresses market rate as a factor other than sex. As an aside, although *Gunther* did not specify how Title VII would accommodate the fourth affirmative defense,[108] case law indicates that a market rate defense may carry great weight with those courts presently unenthusiastic about comparable worth claims.[109]

An argument can be made that the "factor other than sex" defense is available to the employer only in disparate treatment claims. Merely because *Gunther,* clearly a disparate treatment case, held that the four affirmative defenses apply to Title VII sex-based wage compensation cases, it does not necessarily follow that these defenses apply with equal force to disparate impact claims. Addressing the availability of this defense from another perspective, some commentators have argued that the market rate can never be any "factor other than sex" because the market rate is in fact attributable to sex discrimination.[110] In addition to socio-economic arguments put forward by Professor Blumrosen in support of this proposition,[111] a legal argument has been made that reliance on the market rate can never be a "factor other than sex" under Title VII.[112] The argument is based on *Corning Glass Works v. Brennan.*[113]

In *Corning Glass,* men were paid higher wages than women although the two sexes were performing equal work. In defense of its practice, Corning Glass argued that women were simply willing to work for less, and, in terms of the Equal Pay Act, this practice constituted a "factor other than sex." The Supreme Court in rejecting the defense held:

> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which

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104. *See supra* note 38.
105. *See* County of Washington v. Gunther, 452 U.S. 161, 171 (1981).
106. 452 U.S. 161 (1981).
107. *Id.* at 170.
108. *Id.* at 171.
109. *See, e.g.,* cases cited *supra* note 85.
110. *E.g.,* Blumrosen, *supra* note 3.
111. *See supra* notes 65-71 and accompanying text.
112. *E.g.,* Comment, *supra* note 86, at 752-53.
113. 417 U.S. 188 (1974).

> Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[114]

Corning Glass might be cited, on the basis of the above language, as broadly holding that the market rate is not a "factor other than sex" under the Equal Pay Act. Since *Gunther* incorporated the four Equal Pay Act defenses into Title VII, and since reliance on the market rate has arguably been rejected as a defense under the Equal Pay Act, one could conclude that the market rate should likewise be rejected as a defense under Title VII.[115] However, this conclusion should be rejected because there is a fundamental distinction which justifies a different analysis of the market rate defense under the two laws.

Under the Equal Pay Act, equal jobs are being compared, whereas Title VII allows plaintiffs to compare dissimilar jobs.[116] Logically, the defense should not be allowed under the Equal Pay Act because men and women are competing for substantially identical jobs. When two different jobs are being compared, however, market influences become more relevant because differing market rates are operating on each job category. Since women have been crowded into a few fields because of allegedly discriminatory practices which cause an oversupply of women with a concomitant decrease in wages, arguably employers should not be permitted to rely on the differing market rates. However, it would be inequitable to hold the employer wholly accountable for such factors, many of which are nondiscriminatory. It is therefore concluded that *Corning Glass* does not foreclose utilization of the market rate defense under Title VII.

Assuming that the market rate defense should be permitted under Title VII,[117] it must be noted that there may be situations wherein the employer does not in fact rely on the market rate in determining wages. Of course, in these situations, the defense would be unsuccessful. Four such situations come readily to mind.

First, the company may not even be using the market rate in setting wages. The determination of wage rates is more complicated than a simple referral to the market rate. A worker's compensation is comprised of two elements.[118] One element is the average wage "level" of the company in comparison with the market rate. The second element is the compensation structure

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114. *Id.* at 205.
115. *See* Comment, *supra* note 86, at 752-53.
116. *Briggs,* 536 F. Supp. at 447.
117. *See, e.g.,* Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), *cert. denied,* 105 S. Ct. 511 (1984); *Briggs,* 536 F. Supp. 435; *Lemons,* 620 F.2d 228; *Christensen,* 563 F.2d 353.
118. N. CHAMBERLAIN & D. CULLEN, THE LABOR SECTOR 295 (2d ed. 1971).

within the employer's business. The second element is primarily based on the functional worth of the jobs relative to one another.[119] No wage is determined with complete disregard of the market rate, but the company's wage structure usually demands higher priority for the maintenance of an internal hierarchy of wages per job worth and status.[120] A company could mask its discriminatory wage structure by pointing to the market, when, in reality, its wages are set internally. If any employer does, in fact, set wages by placing primary importance on intrafirm relative worth, then the employer cannot utilize the market rate as a defense. Second, if an employer dominates a particular labor market, a defense that the salary paid conforms to the prevailing market wages may well be suspect. The employer is synonymous with the market, and, therefore, cannot justify a discriminatory pay differential on the basis of an external market rate. Third, where a job is unique to a company or industry, there may be no external market rate readily available to employers to determine a rational wage schedule. Fourth, where the employer pays the market rate for male-dominated jobs, but not for female-dominated jobs, the defense is unavailable.[121]

Assuming that the market rate legitimately constitutes a "factor other than sex," and that there is a bona fide reliance by the employer on the market rate, this defense should be equated with the business necessity defense.[122] Equating the business necessity defense with the fourth affirmative defense appears to be a sensible approach. Since the "factor other than sex" standard is arguably a less stringent test than the business necessity defense,[123] the business necessity burden would be undercut if the two defenses were not equated. Faced with the choice between the two defenses, a rational defendant would assert the fourth affirmative defense since it seemingly imposes a lighter burden, although, admittedly, both are affirmative defenses. Moreover, if the employer were allowed to plead "any other factor other than sex" instead of the more stringent business necessity defense, the traditional burdens of proof under disparate impact analysis would be upset. Finally, since *Gunther* did not indicate how the fourth affirmative defense would be analyzed under Title VII,[124] nothing in *Gunther* precludes equating the fourth affirmative defense with the business necessity defense.

As noted above in the discussion of the business necessity defense, a bona fide market rate defense based on the need to recruit, retain, and motivate workers rebuts the inference of discrimination raised in the plaintiff's prima

119. *Id.* at 296.
120. *Id.* at 322.
121. *E.g., Gunther,* 452 U.S. 161 (male guards received compensation substantially equal to the market rate, but the female guards received considerably less than what the market rate dictated).
122. For a similar result, see Note, *supra* note 61, at 1095.
123. *See, e.g.,* B. SCHLEI & P. GROSSMAN, *supra* note 18, at 479 n.149.
124. *Gunther,* 452 U.S. at 171.

facie case. This will prevent an automatic reliance on the market rate which may be discriminatory, while simultaneously recognizing that an employer cannot ignore the market rate in determining compensation.

This is not to say that the employer meets its burden by a mere recitation of the need to recruit, retain, and motivate workers. In order to maintain a successful market rate defense, the defendant must show that the salaries at issue are tied to the demands of the market place. At a minimum, the defendant must have studied the going market rates of particular jobs and be prepared to pay the same dollar amount to qualified men and women. In assessing the defense, a court could look to the following factors which are intended to be merely illustrative: the size of the labor pool from which workers are recruited; the number of applicants for the jobs in issue; the length of time a particular job remained vacant; the turnover rate of employees in a particular job; and the quantity and quality of wage negotiations.

CONCLUSION

Disparate impact doctrine should be available in sex-based compensation claims involving jobs of unequal work. Although *Gunther* may be restricted to cases involving intentional discrimination, particularly by courts and commentators hostile to the comparable worth theory, *Gunther* can also be read as permitting disparate impact theory in comparable worth challenges. However, in contrast to established disparate impact analysis, the application of disparate impact analysis to comparable worth claims presents unique problems. In response to this, a court should either require the plaintiff to pinpoint particular practices causing the disparate impact, or permit the employer to assert a broader articulation of the business necessity defense. A third alternative would allow the plaintiff to meet his or her prima facie burden with a hybrid showing of disparate impact coupled with elements of disparate treatment.

The business necessity defense should be permitted when the wage rate paid is necessary to recruit, retain, and motivate qualified workers. How strictly the employer is held to this standard of business necessity will, of course, be dependent upon the formulation of the business necessity defense in a particular jurisdiction and whether the plaintiff has identified a specific employment practice having a disparate impact. Finally, assuming the fourth affirmative defense to the Equal Pay Act applies to disparate impact challenges, it should be equated with the business necessity defense.