IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 81-4536 and 81-4566

LOLA KOUBA, a/k/a LOLA HOGAN, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of California

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

Equal Employment Advisory Council respectfully submits this brief amicus curiae pursuant to Rule 29, Fed. R. App. P., with the written consent of all parties. Statements of consent have been submitted to the Clerk of Court. This brief urges reversal of the decision by the district court to grant summary judgment.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principle of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constitutents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Thus, the members of EEAC have a direct concern in the standards applied to claims of wage discrimination under these statutes. Following the Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. ——, (No. 80-429, decided June 8, 1981), it is of particular concern to the amicus curiae how litigation alleging sex-based wage discrimination under Title VII is structured to incorporate the fourth exception of the Equal Pay Act. The opinion of the district court in the instant case is one of the first post-*Gunther* decisions to address this issue, and thus this appeal

offers an opportunity for this Court to rule on some of the important questions relating to the Supreme Court's *Gunther* decision.

Because of its interest in equal employment opportunity issues, EEAC has participated as amicus curiae in a number of cases in the United States Supreme Court, in this Court and in other courts of appeals involving the interpretation and enforcement of federal nondiscrimination requirements, including cases concerning allegations of sex-based wage discrimination under Title VII.[1]

STATEMENT OF THE CASE

Plaintiff Lola Kouba was hired by defendant Allstate Insurance Company as a sales agent on November 8, 1974. At that time the employer set a monthly minimum guaranteed income for her, as with all other new agents, on the basis of her experience, education, ability, and current salary (meaning the salary she received in the job she held immediately prior to being hired by Allstate). Prior to being employed by Allstate, plaintiff worked for Xerox Publishing Company for six months earning a maximum of approximately $800 per month. Prior to that, she had worked as a school teacher with earnings not exceeding

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[1] EEAC participated as amicus curiae in the Supreme Court in *County of Washington v. Gunther*, 452 U.S. ——, 101 S.Ct. 2242 (No. 80-429, decided June 8, 1981). Previously, the EEAC had filed a brief supporting the petition for rehearing in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979). EEAC also has participated as amicus curiae in *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980), and *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1009 (1981), both of which involved issues of sex-based wage discrimination under Title VII.

$10,000 a year. At Allstate, the plaintiff's monthly minimum was set at $825 and later was raised to $900. Plaintiff quit her job with Allstate on November 5, 1975. Subsequently, she brought this class action under Title VII of the Civil Rights Act of 1964 alleging, *inter alia*, that Allstate's use of the prior salary criterion in setting the monthly minimum for new sales agents constitutes sex discrimination in violation of Title VII. The Equal Employment Opportunity Commission joined the suit as plaintiff-intervenor.

The plaintiff conceded that the prior salary criterion, also called the "current salary situation," is a facially neutral factor which does not, by its terms, discriminate on the basis of sex. Plaintiff asserted, however, that use of that factor had a substantial disparate impact on the monthly minimums for female sales agents and trainees. The record indicates that the monthly minimum serves as the new agent's compensation during the agent's period as a trainee learning Allstate's sales system, and the monthly minimum also serves as a cushion for agents in recognition that, during their early years as agents, they will have peaks and valleys in sales. Once an agent has gone into the field, the monthly minimum does not, in any way, place limits on the agent's ability to earn a salary in excess of the minimum by selling insurance. Plaintiff offered evidence to show that for the years 1973 through 1979 there was a disparity between the average monthly minimum for female sales agents and the average monthly minimum for male sales agents. The record also indicates, however, that as a group, female applicants hired as sales agents have had less overall prior experience than male applicants hired during the same year.

For each year from 1973 through 1979, the majority of newly hired male agents receive monthly minimums greater than their most recent job earnings, but in no year during that period did the majority of newly hired male agents receive monthly minimums exceeding their prior earnings. 26 FEP Cases at 1276. This system also resulted in some women being paid higher monthly minimums than some men. *Id.*

On this record, the plaintiff moved for partial summary judgment seeking a ruling that as a matter of law the "current salary situation" criterion violated Title VII. The plaintiff supplemented the record with general labor force statistics showing that the average female worker in the United States earns less than the average male worker. These statistics were not adjusted to account for differences between the average female worker and the average male worker, such as differences in number of years of work experience and in the number of years and type of education. The district court concluded that there were no issues of material fact in dispute with respect to the current salary criterion and that, as a matter of law, the use of that criterion violated Title VII by perpetuating the effects of past discrimination against females. *See Kouba v. Allstate Insurance Co.*, 26 FEP Cases 1273 (E.D. Calif. 1981).[2] The court stated that an employer may use prior salary as a factor in setting compensation rates for its employees only if the employer can demonstrate that it has assessed the salary paid to the

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[2] In a separate opinion, the district court granted plaintiff's motion for certification of a class action. *See Kouba v. Allstate Insurance Co.*, 26 FEP Cases 1689 (E.D. Calif. 1981).

individual by a previous employer and has determined that prior salary was based on a factor other than sex.

SUMMARY OF ARGUMENT

This Title VII case involves an allegation that female employees were paid less than male employees for performing the same job. In substance, this is a typical "equal work" claim of the type commonly brought under the Equal Pay Act. Under traditional Equal Pay Act standards, once a difference in pay for the same work is established, the employer then may rebut the plaintiff's claim by showing that the pay practices were based upon any "other factor other than sex." Here the employer demonstrated that the minimum monthly salary for female agents was based upon a number of non-sex-related factors such as ability, experience, education and prior salary. The plaintiff conceded these were neutral factors, which by their terms, did not discriminate on the basis of sex.

The plaintiff argued, however, without supporting evidence, that the employer's practice of basing the monthly minimum in part on prior salary was discriminatory because it perpetuated past historical discrimination against women by society. In response to this unproven allegation, the district court placed upon the employer the legally improper and practically impossible burden of proving that the prior employers' salaries were *not* based upon sex. Imposition of this burden on the defendant-employer is contrary to both the Equal Pay Act and Title VII.

As the Supreme Court stated in *County of Washington v. Gunther*, 101 S. Ct. 2242, 2248 (1981), the Equal Pay Act's fourth defense was designed

differently than the Title VII adverse impact case. In the Equal Pay Act-type case, the ultimate question concerning the fourth defense is whether the wage differential was "attributable" to sex discrimination. In other words, once the employer has met the burden of demonstrating that there was a non-sex-based reason for the pay differential, the plaintiff must then rebut this evidence by showing that the employer based the pay differential on sex. No such rebuttal evidence was before the trial court—only unsubstantiated allegations upon which the court assumed that the prior employer's pay practices were sex-based. Not only was there no showing that sex factors played a part in Allstate's practices, but also there was no evidence that Allstate was, or even could have been, aware of any sex discrimination involved in the pay practices of the prior employer. Certainly the presence of sex-based factors cannot be presumed from a mere showing of unequal pay for equal work.

As a practical matter, it would be impossible for an employer to fulfill the burden imposed by the district court and obtain information from the prior employer as both are competitors for the same labor force. The prior employer would be under no compulsion to supply such information to a company that had hired one of its former employees, and would have no incentive to do so. In any event, even if any information were turned over by the prior employer, it would almost certainly be sanitized of any evidence of sex discrimination. Indeed, as the district court itself recognized, discrimination will seldom be admitted by any employer. 26 FEP Cases at 1281.

In addition, as applied by the district court, the adverse impact mode of analysis makes no sense.

The presumption of discrimination underlying the court's findings was based upon an alleged historical disparity, not among the defendant's employees, but in the nation's workforce as a whole. Proof regarding the allegation is not within the control of the defendant employer; in fact, it is more likely to be within the knowledge of the plaintiff, who once worked for the previous employer. The disparate impact rebuttal factor of "business necessity" is singularly inapplicable where the defendant is required to assess the practices of another employer.

Finally, in considering the plaintiff's motion for summary judgment, the court failed to draw inferences, as it is required, from the evidence viewed in a light favorable to the non-moving party. The evidence in the record, when viewed in a light favorable to the defendant, does not support an inference that the current salary situation was a factor that discriminated on the basis of sex. Nor does the evidence, when viewed in the appropriate light, support an inference that the differential between the average monthly minimum payments to males and females was the result of discrimination. Rather, the evidence indicated that the wages were set on the basis of the individual employee's experience, education, ability, and prior salary. Plaintiff concedes that these factors are facially neutral and do not, by their terms, discriminate on the basis of sex. Thus, the district court's decision below should be vacated.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY GRANTED THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INCORRECTLY PLACED THE BURDEN ON THE EMPLOYER TO DISPROVE DISPUTED ALLEGATIONS OF WAGE DISCRIMINATION THAT HAD NEVER BEEN ESTABLISHED IN THE RECORD

A. Introduction

The district court below held that the employer violated Title VII by paying female sales agents/trainees a monthly minimum guaranteed income which was based in part on their respective salaries in their employment immediately prior to hire by Allstate. The plaintiff conceded that prior salary on its face is a neutral factor which "does not, by its terms, discriminate on the basis of sex." 26 FEP Cases at 1283. Nevertheless, the district court, without receiving evidence on an obviously disputed point of fact, granted the plaintiff's motion for summary judgment on the basis of allegations that the prior salary factor incorporates discrimination because, as a matter of "historical fact" (26 FEP Cases at 1283), women are paid less than men. Moreover, the court placed the burden on the hiring employer of inquiring of every one of the prior employers whether or not their female agents' wages were based upon sex-based factors.

As shown below, the district court erred for a number of reasons: it misallocated the burdens of proof in a Title VII sex-based compensation suit; it improperly granted summary judgment based upon a clearly disputed point of fact without requiring the plaintiff to establish that fact, or giving the employer a chance to rebut the presumption of dis-

crimination; it misconstrued grossly inappropriate societal wage data as evidence of legally relevant sex discrimination; it misunderstood prior court precedent dealing with the labor market; and it placed upon the employer the impossible and legally improper burden of making its compensation practices depend upon an inquiry into the wage practices of prior employers.

B. The Relationship of Equal Pay Act Standards to Sex-Based Equal Pay Cases Brought Under Title VII

Although this action was filed under Title VII of the Civil Rights Act of 1964, the district court was called upon to incorporate certain Equal Pay Act principles into the case because the plaintiff alleged that she received unequal pay for equal work performed by herself and male employees. As this Court has held, "both [the Equal Pay Act and Title VII] serve the same fundamental purpose of remedying inequality in the area of compensation and where an equal pay claim has been raised under either or both statutes, the courts have held that the statutes should be construed harmoniously." *Gunther v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979), *affirmed*, *County of Washington v. Gunther*, 101 S. Ct. 2242 (1981). Thus, where a Title VII plaintiff attempts to base a prima facie case of wage discrimination solely on a comparison of the work she performs and the inequality of the pay for that work, "[t]he standards developed under the Equal Pay Act are relevant to this inquiry." *Gunther*, 623 F.2d at 1321.

The relationship between the Equal Pay Act and Title VII was further explained by the Supreme

Court in *County of Washington v. Gunther*, 101 S. Ct. 2242 (1981). As the Court described the two statutes, Title VII prohibits compensation discrimination, but the Bennett Amendment to Section 703(h) of Title VII provides that it is not unlawful for an employer to differentiate upon the basis of sex in determining wages or compensation "if such differentiation is authorized by the provisions of [the Equal Pay Act]." 42 U.S.C. § 2000e-2(h).

Even if a plaintiff establishes that the employer pays women less pay for the same work as performed as men, the Equal Pay Act contains four exemptions under which an employer may defend against the equal work claim.[3] It is the broad fourth exemption, which authorizes a differential based on "any other factor other than sex," that is relevant here. As the Supreme Court explained in *Gunther*:

> incorporation of the fourth affirmative defense could have significant consequences for Title VII

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[3] In relevant part, Section 206(d) of 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.*

29 U.S.C. § 206(d)(1) (emphasis added).

litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S. Ct. 849, 853, 28 L.Ed. 2d 158 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials *attributable to sex discrimination.* H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963), U.S. Code Cong. & Admin. News 1963, p. 687. 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."

101 S. Ct. at 2248 (Emphasis added).

Application of the fourth defense is not, as stated by the district court (26 FEP Cases at 1283), limited to cases where the validity of a job evaluation system is in question. The fourth defense is a "general catchall provision" (*Corning Glass Works v. Brennan*, 417 U.S. at 196), and there is no "job evaluation" limitation in the language of the Equal Pay Act. Indeed, as the House Committee Report cited on this point in *Corning Glass* stated:

> Three specific exceptions and one broad general exception are also listed. . . [in the Equal Pay Act]. As it is impossible to list each and every exception, the broad general exclusion has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences *based on experience, training*, or *ability* would also be excluded.

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963) (emphasis added). Differences based on experience, training and ability, of course, are characteristics of individual employees, not differences based upon evaluations of specific jobs.[4]

Under the equal work standards applicable to this case, the issues turn on whether the plaintiff has proved the employer paid employees of the opposite sex more for performing substantially equal work, or on whether the employer has proved that the wage differential was based on a factor other than sex.

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[4] The district court's refusal to apply the fourth exception to jobs within the same classification is inconsistent with the court's own acknowledgment (26 FEP Cases at 1283 n. 14) that the first three exceptions could be applied within a job classification. The first three exceptions were intended by Congress as specific examples of the broad fourth exemption. As Representative Griffin stated, "Roman numeral iv is a broad principle, and those preceding it are really examples. . . ." Daily Cong. Rec., 8692, House, May 23, 1963.

It is also true that Congress prohibited the courts and administrative agencies from "substituting their judgment for the judgment of the employer . . . who [has] established and employed a bona fide job rating system." *Gunther*, 101 S. Ct. at 2249, citing 109 Cong. Rec. 9209 (statement of Rep. Goodell). (See also the discussion below at p. 21). But this limitation on the ability of the courts in certain cases to look behind bona fide job evaluation techniques to find substantive violations of the "equal work" standard in no way limits the defenses given to employers to justify wage differentials for women once it has been established they are performing the same work as men.

In this case, the evidence demonstrated that the employer's pay practices were based upon factors which the plaintiff conceded were neutral on their face and which were applied equally to male and female employees.[5] The record before the court established that the pay differential was based upon factors other than sex. Absent any further, legally sufficient showing by the plaintiff, the complaint should have been dismissed, and there clearly was no justification for granting summary judgment for the plaintiff. As now shown, the district court's analytical method by which it granted summary judgment was incorrect and at odds with well-established standards of proof governing "equal pay" cases under Title VII.[6]

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[5] Moreover, there was evidence that the monthly minimum was applied so that a majority of newly-hired female agents received monthly minimums greater than at their most recent jobs, but during the relevant time period the majority of males received monthly minimums lower than their prior earnings. 26 FEP Cases at 1276. Indeed, the system resulted in some women being paid more than some men. *Id.*

[6] As the plaintiff and court recognized that *Allstate's* pay practices were neutral, it was manifestly incorrect for the district court to rely on the decision in *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 713 (1978), where the court noted that "sex" was "exactly" what the employer's policy was based on. There the employer had an obvious sex-based differential in its retirement program. Here the same practice was applied equally to male and female agents.

C. The Defendant Employer's Burden Under the Equal Pay Act's Fourth Exception Is Merely to Establish That the Challenged Pay Rate Was Based on Non-Sex-Related Factors, Not to Disprove Unsubstantiated Allegations That Such Factors Have an Adverse Impact on Members of the Plaintiff's Sex

Despite the employer's undisputed evidence that its pay practices were based upon neutral standards, the court granted the plaintiff's motion for summary judgment on grounds that the employer had not rebutted the plaintiff's allegations of societal wage discrimination against women. Although these allegations were unsubstantiated, the district court assumed that such societal practices have had a legally significant adverse impact on females generally, and were manifest in the pay practices of prior employers that Allstate thereby incorporated into its monthly minimum compensation. The court thus ruled, as a matter of law, that judgment should be entered for the plaintiff unless the employer "could demonstrate that it has assessed the previous salaries paid to the men and women, and determined that they themselves were set on 'other factors other than sex.' " 26 FEP Cases at 1284. As now shown, the district court thereby applied incorrect legal standards and placed a burden of proof on the employer that was legally improper and impossible in practical application.

At the outset, the district court's preliminary conclusion that the plaintiff's evidence established a prima facie case is open to serious question. Numerous decisions require plaintiffs to prove something more than equal work and a pay differential before shifting the burden to the employer to prove that the differential is justified by one of the Act's exceptions. For example, in *Hodgson v. Corning Glass Works,*

474 F.2d 226 (2d Cir. 1973), *affirmed sub nom. Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), the court noted that the plaintiff has the burden to establish that the jobs in question constitute equal work requiring equal skills, effort and responsibility under similar working conditions *and* that the plaintiff

> *also* has the burden of establishing a prima facie case that the wage differentials represent "discriminat[ion] . . . on the basis of sex. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3rd Cir.) *cert. denied*, 398 U.S. 905 (1970). Once [the plaintiff] has sustained these *burdens*, the employer can escape liability only by bringing itself within one of the four exceptions.

474 F.2d at 231 (emphasis added).[7] In light of the plaintiff's failure to present legally sufficient evidence of sex discrimination by this particular employer (see *infra* pp. 26-28), the case against the employer should have been dismissed once the employer's neutral pay practices had been demonstrated.

But even assuming that the plaintiff established a prima facie case, the district court erred in its interpretation of precisely what rebuttal burden was then required of the employer. Rather than accepting an affirmative showing that the pay differential was based upon legitimate factors, the district court placed upon the employer the additional and negative burden of showing that the differential was *not* based upon societal factors which were outside of the employer's control. In essence, the court required the employer

[7] This specific discussion of burdens of proof under the Equal Pay Act, and the similar discussion in *Wheaton Glass*, were cited with approval by the Supreme Court in *Corning Glass*, 417 U.S. at 196 n. 11.

to rebut assertions that past societal discrimination had an adverse impact on the plaintiff and her class. This mode of analysis was improper in this type case.[8]

Although under the Equal Pay Act the employer may rebut a prima facie case by way of the fourth affirmative defense,[9] it was indefensible for the district court to grant summary judgment on the basis of the employer's asserted lack of evidence rebutting the alleged illegality of other employers' pay practices that had never been litigated. As noted above, the employer may only be held responsible for pay differences that are "attributable" to sex discrimination. *Gunther*, 101 S. Ct. at 2248. Proving such "attribution" is a burden that logically falls upon the plaintiff. If the plaintiff is not to be required to establish the existence of sex discrimination as part of her prima facie case, then, at the very least, the only sensible and orderly method of proof would be to permit the employer to state its non-sex reasons and then place the burden upon the plaintiff to demonstrate that the reasons given were a pretext or subterfuge.

Under an analogous sequence of proof in which the plaintiff's initial prima facie burden was deemed "not onerous," the Supreme Court described the ap-

[8] Moreover, as shown below, pp. 23-31, regardless of the burden of proof sequence, the evidence submitted by the plaintiff was legally insufficient to show that this defendant's compensation practices were based upon any gender-related factor.

[9] See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), *affirming Hodgson v. Corning Glass Works*, 474 F.2d 226, 231 (2d Cir. 1978). See also *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970).

plicable standards that provide a division of intermediate evidentiary burdens which "serves to bring the litigants and the court expeditiously and fairly to [the] ultimate question" of whether the employer's practices were based upon illegal factors. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1093 (1981). Under this mode of analysis, the employer can rebut the prima facie case by introducing evidence that there was a legitimate reason for the employment practice, although the "defendant need not persuade the court that it was actually motivated by the proferred reasons." 101 S. Ct. at 1094. The defendant's explanation can then be rebutted by the plaintiff by demonstrating that the stated reasons were pretextual and that intentional discrimination motivated the employer's employment decision.

This distribution of the burden of proof provides an orderly sequence that fairly places the proof burdens on both the plaintiff and defendant. The court thus is not required or permitted to indulge in unwarranted presumptions. The district court's contrary allocation of the burdens of proof preliminary to its decision to grant summary judgment thus was incorrect and must be reversed.

D. Title VII's Incorporation of the Equal Pay Act's Fourth Exception Precludes the Use of a Disparate Impact Mode of Analysis in Sex-Based Pay Discrimination Cases

The district court based its summary judgment decision on the presumption that Allstate's pay practices carried forward the adverse impact of societal sex discrimination against women that was reflected in the prior salaries. Not only was this assumption

unwarranted both in fact and in the evidence presented to the lower court (see pp. 23-31, *infra*), but it also incorporated an adverse impact analysis that is inappropriate to compensation cases of this type.

As noted above (p. 12), in *Gunther*, the Supreme Court stressed that the Equal Pay Act was structured differently than the adverse impact case as typified by *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In the *Griggs*-type case, once a prima facie showing of adverse impact is demonstrated, the employer is required to justify those practices by a showing of "business necessity." Rebutting business necessity in the first instance is not part of the plaintiff's burden, because "[k]nowledge of a legitimate business practice is *uniquely available to the employer* who is accordingly required to persuade the court of its existence . . .". *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753; 26 FEP Cases 1417, 1418-19 (5th Cir. 1981) (emphasis added).

In the instant case, application of the disparate impact standard would be particularly inappropriate because the allegations of adverse impact involve a presumed "historical disparity" not among the defendant's employees but in the nation's workforce as a whole. Proof or disproof of such an allegation does not depend on information uniquely within the control of the defendant but rather would appear to involve factual information at least as readily available to the plaintiff as it would be to the defendant—particularly as the plaintiff here once worked for the prior employer. Certainly, it would be odd to make the employer argue that there was a "business necessity" for the practices of another employer where such practices and information relating to such practices are beyond its knowledge and control. Thus,

where a Title VII plaintiff only establishes a prima facie unequal pay claim, and the employer comes forward with legitimate factors to support the pay differential, allegations of adverse impact do not relieve the plaintiff of the obligation of proving that the pay differential is "attributable" to sex.[10]

E. The Burden Imposed on the Employer by the Court Below to Prove That the Pay Practices of Employees' Former Employers Were Nondiscriminatory Is Legally Improper and Impossible To Implement

As noted above, the district court granted the plaintiff's motion for summary judgment because the employer had not demonstrated that it had determined that the female agents' prior salaries were set on factors other than sex. 26 FEP Cases at 1284. It viewed

[10] The *Gunther* decision contains other indications that a plaintiff in a compensation case cannot avoid her burden of showing she is a victim of sex discrimination. While stating that a transparently sex-biased system for wage determination may violate Title VII, the Court noted that women holding jobs not equal to those held by men should not "be denied the right to prove that the system is a *pretext* for discrimination." 101 S. Ct. at 2252 (emphasis added). The burden of showing *pretext* is relevant to the *Burdine* analysis, not to an adverse impact case. In addition, at the point where the majority opinion argues that its decision is consistent with the broad remedial purposes of Title VII, it cites two disparate treatment cases. See 101 S. Ct. at 2253, citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (pattern and practice violation); and *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978) (". . . Congress intended to strike at the entire spectrum of *disparate treatment* of men and women resulting from sex stereotypes" (emphasis in original)). By contrast, adverse impact precedent was not cited anywhere in the *Gunther* opinion to discuss the burden of proof structure of sex-based compensation cases.

this requirement as an insignificant burden for the employer because employers routinely contact previous employers to obtain information about individuals they hire. *Id.* Moreover, it justified this holding by reference to the Supreme Court's statement in *Gunther* that the Equal Pay Act was passed to remedy what Congress perceived as an "endemic" problem of sex-based compensation discrimination in private industry. 26 FEP Cases at 1284. See also *Gunther*, 101 S. Ct. at 2249 (1981). The district court's requirement is legally incorrect and impossible to implement.

Contrary to the lower court's presumption, courts are not permitted to assume the existence of discrimination by specific employers subject to social welfare legislation such as the Equal Pay Act and Title VII. As stated by the Supreme Court when discussing the substantial history of official race discrimination in Alabama, "past discrimination cannot, in the manner of original sin" condemn action that is not itself unlawful. *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490 (1980). The Court concluded:

> The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

100 S. Ct. at 1503-04.

The district court's reading of *Gunther*, moreover, ignores the fact that the Court also pointed out that under the Equal Pay Act

> the courts and administrative agencies are not permitted "to substitute their judgment for the judgment of the employer . . . who [has] estab-

> lished and employed a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (statement of Rep. Goodell, principal exponent of the Act).

101 S. Ct. at 2249. Clearly, both Congress and the courts have recognized the impropriety of presuming the illegitimacy of employer pay practices and have precluded the courts from "second-guessing" the validity of bona fide compensation systems.[11] Thus, although plaintiffs have been given the opportunity to prove that particular employers have engaged in illegal sex-based compensation practices, the broad presumption of the district court was not one permitted by Congress.

Moreover, should the courts engage in deciding whether employers such as Allstate made a correct determination about the validity of other employer's practices, they will indeed be involved in "second guessing." Not only is it doubtful that the court would even have jurisdiction over nonparty employers, but inquiries into their practices would open up myriad side issues concerning the legality of compensation practices of employers which have not been subject to a Title VII charge and the attendant statutory procedures. It thus is evident that the district court placed a burden upon the hiring employer that Congress specifically decided not to impose upon the courts.

Finally, as a practical matter, the inquiry required by the district court would be impossible. The open exchange of internal salary information between competitors is extremely unlikely. Any information

[11] *Corning Glass Works v. Brennan,* 417 U.S. at 200. See also *Gunther,* 101 S. Ct. at 2248-49 & n. 11.

disclosed by the prior employer undoubtedly would be sanitized of any evidence of sex discrimination that might make that employer an additional target of a plaintiff's attorney who might obtain the information from the hiring employer through Title VII discovery proceedings. Ultimately, as "the federal courts have had not small difficulty" [12] in determining cases brought under the Equal Pay Act and Title VII, the additional burden which the lower court would place upon the federal judiciary and private employers to examine the practices of other nonparty employers is particularly ill-conceived.

II. THE DISTRICT COURT'S DECISION TO GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS BASED UPON IMPERMISSIBLE INFERENCES FAVORING THE MOVING PARTY AND WITHOUT WHICH PLAINTIFF FAILED TO MEET THE BURDEN OF SHOWING THAT THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

This Court has recognized the fundamental proposition that the party who moves for summary judgment has the burden of demonstrating by evidence in the record that there is no genuine issue as to any material fact.[13] The moving party has this burden

[12] *Angelo v. Bacharach Instrument Co.,* 555 F.2d 1164, 1170 (3d Cir. 1977).

[13] *See Long v. Bureau of Economic Analysis,* 646 F.2d 1130, 1320-21 (9th Cir. 1981); *Bieghler v. Kleppe,* 633 F.2d 531 (9th Cir. 1980); *Ruffin v. County of Los Angeles,* 607 F.2d 1276, 1280 (9th Cir. 1979); *Neely v. St. Paul Fire & Marine Ins. Co.,* 584 F.2d 341, 345 (9th Cir. 1978); *Radobenko v. Automated Equipment Corp.,* 520 F.2d 540, 543 (9th Cir. 1975); *Caplan v. Roberts,* 506 F.2d 1039, 1042 (9th Cir. 1974); *Stansifer v. Chrysler Motors Corp.,* 487 F.2d 59, 63 (9th Cir. 1973).

even with respect to those issues on which the opposing party would have the burden at trial.[14] In deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party opposing the motion, and "all permissible inferences properly to be drawn from the record must be drawn in favor of the non-moving party." *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1279 (9th Cir. 1979). Thus, in opposing the plaintiffs' motion for summary judgment in this case, the defendant-employer was

> entitled not only to have the facts viewed in the light most favorable to it but also to all reasonable inferences which may be drawn from these facts.

Tyler v. Vickery, 517 F.2d 1089, 1094 (5th Cir. 1975). *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). Contrary to this standard, however, the district court drew several inferences which were not reasonable, particularly when the evidence in the record is viewed in a light favorable to the non-moving party. Specifically, the court impermissibly concluded that the so-called "current salary schedule," a concededly neutral factor, was a factor based entirely on sex. 26 FEP Cases at 1284. The Court also improperly inferred that plaintiffs' statistical showing demonstrated a wage differential which was the result of sex discrimination. 26 FEP Cases at 1281.

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[14] *See Securities and Exchange Commission v. Murphy*, 629 F.2d 633, 641 (9th Cir. 1980); *Doff v. Brunswick Corp.*, 372 F.2d 801, 805 (9th Cir. 1966). *See also* 6 *J. Moore Federal Practice* ¶ 56.23 (2d ed. 1976) at 56-1389-1390.

In both of these instances, the district court appears to have shifted the burden prematurely to the non-moving party without first requiring the plaintiff to demonstrate by evidence that no issue of material fact existed as to these matters.

A. The Evidence in the Record, Viewed in a Light Favorable to the Non-Moving Party, Does Not Support An Inference That The Current Salary Schedule Was A Factor That Discriminated On the Basis of Sex

The district court concluded that the defendant-employer's use of the current salary situation as a factor in setting the monthly minimum of a sales agent is prohibited as a matter of law. Relying on *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), the court reasoned that the current salary schedule, although neutral on its face, operated to perpetuate the effects of past illegal practices. The record, however, contains no evidence of past illegal practices. The court's conclusion is based solely on data offered by the plaintiff to show as a "historical fact that women were paid less than men." 26 FEP Cases 1283. From this "historical fact," the court inferred that there must have been some past discriminatory practices that affected the plaintiff's earnings prior to her employment at Allstate, and that these unspecified past practices are perpetuated by the otherwise neutral current salary schedule.

The drawing of such broad inferences from such limited evidence finds no support in the Supreme Court's decision in *Corning Glass*. The facts in that case showed that prior to 1944, the workforce in Corning plants consisted of night inspectors who were *all* males and day inspectors who were *all* females and that the male inspectors received significantly higher wages. 417 U.S. at 192. It was not until

sometime after the effective date of the Equal Pay Act that efforts were made to eliminate the differential rates for male and female inspectors. In 1966, the night inspector jobs were opened to women. In 1969, a new collective bargaining agreement provided for equal base wages for night and day inspectors hired in the future but continued the unequal base wages for those employees already working for the company.

Thus, in *Corning Glass*, the Supreme Court found that three distinct questions were presented:

> (1) Did Corning ever violate the Equal Pay Act by paying male night shift inspectors more than female day shift inspectors? (2) If so, did Corning cure its violation of the Act in 1966 by permitting women to work as night shift inspectors? (3) Finally, if the violation was not remedied in 1966, did Corning cure its violation in 1969 by equalizing higher "red circle" rates for existing employees working on the night shift?

417 U.S. at 195. The district court in this case has relied upon the Supreme Court's discussion of the third question to support a conclusion that a neutral factor other than sex which operates to perpetuate the effects of prior illegal practices is illegal. What has been overlooked, however, is that the Supreme Court reached that question only *after* deciding on the basis of *specific* evidence that there had, in fact, been identifiable prior illegal practices by the defendant employer.

No such finding was made in this case as a prologue to the district court's conclusion that the current salary schedule has a perpetuating effect. While the Supreme Court found prior illegal practices by the Corning Glass Company, the district court here has not limited itself to Allstate but seems to rely

on discriminatory practices by employers generally. The district court never defined the practices but merely discussed them in the most vague and general terms. It simply inferred that, (1) since the average female earns less than the average male, there must have been discrimination, and (2) that the discrimination must have affected the prior salary of the plaintiff, and (3) that therefore Allstate's consideration of that prior salary must constitute a perpetuation of past discrimination.[15]

These inferences by the court neither are reasonable nor are they based upon a view of the evidence favorable to the non-moving party. The plaintiff's evidence of "historical disparity" is a general statistic which has not been tailored to the particular facts and circumstances of this case. In Title VII cases,

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[15] Nothing in *Corning Glass*, or in *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970) and the other cases cited by the district court, supports the broad assertion that it is illegal generally to rely on a prior salary in paying employees. 26 FEP Cases at 1283. The so-called "market rate" in those cases relates merely the employer's atttempted defense that it was proper to pay unequal wages just because the particular employer could find women to perform the same work as men for less pay. There was no examination in those cases of the pay practices of employers generally throughout society or indeed, any employers other than the defendants. Thus, there is no justification for the district court's observation that those cases established the existence of a "market rate [which] itself is a reflection of the historical discrimination against women . . ." 26 FEP Cases at 1283. For the same reasons, it cannot validly be argued that *Corning Glass* prohibits employer reliance upon relative wage rates which the market has established to differentiate pay for *different* jobs. See *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); and *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977).

the Supreme Court has recognized that such broad-based general statistics "may have little probative value" in showing the existence of discrimination in particular situations. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n. 13 (1977). Statistical comparisons reflecting a disparity are probative of discrimination only if the statistics have been tailored to minimize factors other than discrimination which may have caused or contributed to the disparity. The "historical disparity" data was not so tailored. Moreover, the plaintiffs offered no evidence to show that, absent discrimination, the national average earnings for females should equal the national average for males.[16]

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[16] The general rationale behind the use of such statistical comparisons in employment discrimination cases is that

> absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n. 20 (1977).

Thus, statistics deal with a comparison between observed data and the data that would be expected absent discrimination. In the case of general wage figures drawn from the national workforce as a whole, however, it is unreasonable to expect the earnings of the average female to be equal to the earnings for the average male, since the average male worker differs significantly from the average female worker. In fact, the average male worker works more hours a week, has more years experience, more continuous work experience and more education than the average female worker. See Nelson, Opton and Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. of Mich. J. Of Law Reform 231, 251-53, 258-63 (1980), cited by the Supreme Court in *Gunther*. These are all factors which commonly affect individual earnings. Without statistical adjustments to account for these differences between the average male and average female worker, and without any adjustment for different types of work and different working conditions, there is no reason to expect that the earnings of the average female should equal the earnings of the average male. As the Supreme Court has recognized:

> Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs*, does not imply, and this Court has never held, that discrimination must be inferred from such consequences.

Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 711 n. 20 (1978).

B. The Evidence, When Viewed In A Light Favorable to the Non-Moving Party, Does Not Support an Inference That the Difference Between The Average Monthly Minimum for Male Agents and for Female Agents Was a Result of Discrimination

The evidence before the district court showed that the employer-defendant set the monthly minimum for its sales agents on the basis of the individual agent's ability, experience, education, and current salary situation. 26 FEP Cases at 1276. The plaintiff offered evidence to show that there was a difference between the average monthly minimum paid to male agents and the average monthly minimum paid to female agents. But, the plaintiff offered no evidence to show that this difference could be attributed to sex discrimination or to sex-related factors. Rather, the plaintiff's expert, using the standard deviation analysis cited by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 497 n. 17 (1977), and *Hazelwood*, 433 U.S. at 308 n. 14, offered his conclusion merely that this difference was not the result of chance.

From this evidence, the district court concluded that the plaintiff had shown that the difference in average monthly minimums was the result of discrimination. As noted above, however, broad-based statistical comparisons have little probative value in proving discrimination unless the statistics have been tailored to minimize factors other than discrimination which might reasonably account for the disparity. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 586 (1979). Once such adjustments have been made, discrimination and chance are left as possible causes of the disparity. Prior to such adjustments, however, evidence that the disparity is not the result of chance is of little or no importance. And, unless such adjustments are made, it is not reasonable to infer that the disparity is the result of discrimination rather than the result of other factors other than sex which are already a part of the record. For example, differences in experience have been recognized by Congress and the courts as a legitimate basis for differentials in wages. See H.R. Report No. 309, p. 12, *supra.* See also *EEOC v. Aetna Insurance Co.*, 616 F.2d 719 (4th Cir. 1980).

To be even arguably relevant to a sex-based compensation claim, the plaintiffs' statistics would, at a minimum, have had to show that for men and women with the same ability, experience and education, the current salary criteria had a negative impact on the monthly minimums for females but not on the monthly minimums for males. No such evidence was before the court. What was before the court, however, was the fact that the average new male agent has more experience than the average new female agent. Thus, it would have been reasonable, for the court, viewing the evidence in a light favorable to the employer-defendant, to infer that the difference

in the average monthly minimum was the result of the difference in the average experience. At the very least, the court should have concluded that the difference in average experience raised a question of material fact in determining the cause of the disparity in average monthly minimums and thus denied the plaintiffs' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Court should vacate the opinion and order of the district court granting plaintiff's motion for partial summary judgment.

Respectfully submitted,

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December 7, 1981

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 82-3038

MARGARET SPAULDING, *et al.*,
Plaintiffs-Appellants,

and

JAMES BUSH, *et al.*,
Intervenors-Appellants,

vs.

UNIVERSITY OF WASHINGTON,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Washington at Seattle

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion for leave of this Court to file the brief pursuant to Rule 29, Fed. R. App. P. This brief supports the decision of the district court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principle of nondiscrimination and equal employment opportunity.

Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Thus, the members of the Council have a direct concern in the standards applied to claims of wage discrimination under these statutes. It is of particular concern to the amicus curiae how litigation alleging sex-based wage discrimination under Title VII and the Equal Pay Act is to be structured following the Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981). The instant appeal is one of the first post-*Gunther* cases to present this issue, and thus this appeal offers the Court an opportunity to address the important question of the appropriate standards governing such cases.

Because of its interest in equal employment opportunity issues, the Council has participated as amicus curiae in a number of cases in the United States Supreme Court, in this Court and in other courts of appeals involving the interpretation and enforcement of federal nondiscrimination requirements, including cases concerning allegations of sex-based wage discrimination under Title VII.[1]

STATEMENT OF THE CASE

The plaintiffs-appellants are past and present members of the University of Washington School of Nursing who have alleged that the University's compensation practices violate the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. They assert that their jobs on the nursing faculty are substantially equal to the jobs performed by male faculty

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[1] EEAC participated as amicus curiae in the Supreme Court in *County of Washington v. Gunther*, 452 U.S. 161 (1981). Previously, the EEAC had filed a brief supporting the petition for rehearing in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979). EEAC also has participated as amicus curiae in *Kouba and United States Equal Employment Opportunity Commission v. Allstate Insurance Company*, Nos. 81-4536 and 81-4566 (9th Cir., decision pending); *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); and *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1981), all of which involved issues of sex-based wage discrimination under Title VII, as well as in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978).

members in other disciplines located in the University's College of Architecture, the University's School of Social Work, and selected other departments. Plaintiffs-appellants submitted a statistical study to show that each plaintiff earned less than certain male faculty members selected for comparison purposes ("comparators").

With respect to their Equal Pay Act claim, plaintiffs-appellants assert that so long as the degree of skill, effort and responsibility for two jobs is substantially similar, the fact that such skill, effort and responsibility are exercised in a different academic discipline or subject matter does not defeat a claim of equal work for unequal pay.

With respect to their Title VII claim, plaintiffs-appellants contend that a showing of comparability of the jobs involved, coupled with some additional indication of anti-female bias, establishes a prima facie case of discrimination. In this regard, they argue for a sliding-scale "comparability-plus" approach to wage discrimination cases, whereby the amount of additional evidence needed to establish a prima facie case under Title VII would vary in inverse proportion to the degree of comparability between the jobs in question. In the alternative, the plaintiffs-appellants argue that their statistical showing that the female plaintiffs are paid less than the male "comparators" selected from other disciplines constitutes a prima facie showing of discrimination under a disparate impact theory. They argue that the University's reliance on the competitive marketplace in determining salaries of faculty members is no defense to the Title VII claim because the market itself is discriminatory.

After some 14 days of hearing before a United States Magistrate sitting as a Special Master, the plaintiffs completed the presentation of their evidence and the University moved to dismiss their complaint. The Special Master subsequently issued his report, recommending that the motion to dismiss be granted and setting forth his findings and conclusions, including the following:

The University has organized its faculty departmentally by academic discipline. There are approximately 120 academic departments in the University which comprise 16 independently organized schools and colleges, each under a separate dean. The responsibility for initial faculty appointments generally resides in the faculty of a particular school or college. As a practical matter, the faculty of the school or college determines the starting salaries and the amount of the subsequent merit increases each faculty member receives. The hiring and salary recommendations of the faculty are submitted to the dean and then the president of the University for approval. The central University's role in faculty salary administration is primarily in determining the percentage increase to go to each school and college after the state legislature has made a general salary allocation to the entire University.

The University of Washington, as a whole, has traditionally lagged behind comparable universities in terms of its salary scale. This lag is not unique to the School of Nursing. The University attempts to keep its salaries in each discipline competitive with the national academic marketplace for that discipline. There is no evidence that the lag in the salaries of the School of Nursing behind comparable schools of nursing has anything to do with the sex of the faculty

members of the School of Nursing. Rather, this lag appears to be a reflection of a normal pattern that has been experienced throughout the University, regardless of the academic discipline or the sex of the faculty members within a particular discipline.

The district court reviewed the Special Master's findings and recommendations and the whole record in light of the parties' arguments and authorities, including memoranda concerning the applicability of *County of Washington v. Gunther*, 452 U.S. 161 (1981), in which the Supreme Court affirmed the decision of this Court reported at 623 F.2d 1303 (9th Cir. 1980). The district court approved and adopted the Special Master's findings and recommendations with slight modifications[2] and granted the motion to dismiss. The plaintiffs then took this appeal.

SUMMARY OF ARGUMENT

This case suggests the pattern wage discrimination suits are likely to follow if the courts begin to allow claims based wholly or primarily upon cross-occupational or cross-disciplinary job comparisons. The plaintiffs spent some 14 days in trial before the Special Master introducing voluminous statistics, computer compilations and testimony of numerous witnesses, all attempting to evaluate and compare jobs in traditionally separate fields based upon abstract component factors, without regard to the differences in their subject matter or to the distinct values the market places upon them. Congress foresaw the problems inherent in such inter-occupational comparisons during the debates on the Equal Pay Act

[2] The modifications did not affect the findings summarized above.

in 1963 and specifically designed that legislation to keep the courts out of this morass.[3] The *Gunther* decision provides no support for the proposition that the Eighty-eighth Congress meant to inject the courts into this area when it enacted Title VII a year later. Rather, as this Court recognized, "a comparable work standard cannot be substituted for an equal work standard . . ." *Gunther v. County of Washington*, 623 F.2d at 1321. Instead, a Title VII plaintiff attempting to prove wage discrimination solely on the basis of job comparisons must "show that her job requirements are *substantially equal, not comparable*, to that of a similarly situated made." *Id.* (emphasis added).

In this case, the district court properly concluded that the plaintiffs-appellants' cross-disciplinary comparisons between faculty positions in the School of

[3] Recent scholarly analysis shows that there is no more dependable technique for making inter-occupational comparisons today than existed when Congress studied the subject in depth in 1963. *See* Committee on Occupational Classification and Analysis Assembly of Behavioral and Social Sciences, National Research Council, National Academy of Sciences, *Women, Work and Wages; Equal Pay for Jobs of Equal Value*, 94-96 (D. Treiman & H. Hartmann, eds. 1981). The Committee concluded that there is "no universal standard" of job worth, "both because any definition of the 'relative worth' of jobs is in part a matter of values and because, even for a particular definition, problems of measurement are likely." *Id.*, at 94. It also found that "there are no definitive tests of 'fairness' of the choice of compensable factors and the relative weights given to them." *Id.* at 96.

Other job evaluation experts agree that there is no statistical or economic technique by which to establish the value or other comparability of dissimilar jobs. See E.R. Livernash, *Comparable Worth: Issues and Alternatives* (1980), at 41, 59, 94.

Nursing and faculty positions in other schools and colleges at the University failed to satisfy the substantially equal standard. The premise that all university teaching jobs are essentially the same regardless of field or subject matter is antithetical to the established concept of nursing, architecture and other disciplines as distinct professions. Moreover, it fails to recognize that each discipline legitimately commands its own salary levels depending upon the academic marketplace for that discipline. See *Wilkins v. University of Houston*, 654 F.2d 388, 402 (5th Cir. 1981). Indeed, plaintiffs-appellants' argument disregards the very words of the statute that defines the equal work standard. The Equal Pay Act prohibits an employer from paying employees on the basis of sex for "equal work." Both the legislative history and university faculty cases indicate that "equal work" cannot be established if different disciplines are involved, even if some of the job functions might be similar.

Having failed to establish pay differentials between substantially equal jobs, the plaintiffs were precluded from establishing a prima facie case of wage discrimination based solely upon job comparisons. *Gunther v. County of Washington*, 623 F.2d at 1321. Furthermore, although they were not precluded from attempting to prove discrimination under some other theory, in order to do so they had to satisfy the Title VII standard recognized by the Supreme Court in *McDonnell Douglas*, *Teamsters*, *Furnco*, and *Burdine*. Under the disparate treatment standard of those cases, the plaintiffs were required to demonstrate that the defendant employer *intentionally* discriminated against the nursing school faculty. Lacking direct evidence of intent, plaintiffs would

then be required affirmatively to produce evidence which would eliminate the most common nondiscriminatory reasons for salary differentials as possible bases for the particular differentials upon which they based their claims. The most common nondiscriminatory reason for pay differentials is differences in the jobs being compared. To the extent that a plaintiff fails to offer evidence establishing that this most common nondiscriminatory reason for wage differentials was lacking here because of intentional discrimination, the plaintiff has failed to satisfy its initial burden.

When measured against this standard, the "comparability plus" sliding scale theory urged upon the Court by plaintiffs-appellants is shown to be defective. Where, as here, the jobs involve different occupations or disciplines, no amount of comparability in their abstract component functions will justify an inference that they would command similar pay rates absent discrimination. Paying different disciplines differently is a common nondiscriminatory pay practice which itself is not probative of intentional discrimination. By utilizing comparators, the plaintiffs merely indulge in the very type of job comparison that was rejected by Congress and has been treated skeptically by both this Court and the Supreme Court in the *Gunther* decisions.

Moreover, even if plaintiffs' evidence could be found to constitute a prima facie case, the *Burdine* decision makes it clear that the employer could rebut the prima facie case by introducing evidence that there was a legitimate reason for the employment practice. 450 U.S. at 254. The University's reliance upon the labor market to establish wages for different disciplines satisfied its burden of articulating a

legitimate defense. The plaintiffs' final burden under this test was to establish that the reasons were pretextual. Both the Magistrate and district court found that the employer's motive in setting the wages for the nursing faculty was nondiscriminatory. As there has been no showing that the findings are incorrect, much less "clearly erroneous" under Rule 52, Fed. Rules of Civ. Pro., the lower court's findings in this regard cannot be reversed on appeal by this Court. See *Pullman-Standard, Inc. v. Swint*, 102 S. Ct. 1781 (U.S. No. 80-1190, decided April 27, 1982).

The plaintiffs-appellants also have argued that their statistical showing constituted a prima facie showing of adverse impact resulting from the University's compensation system. Such an adverse impact approach, however, is of little or no probative value in attempting to prove wage discrimination. As the Supreme Court stressed in *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981), the typical adverse impact case under Title VII is structured differently from wage discrimination cases, because the fourth affirmative defense of the Equal Pay Act (made applicable to Title VII by the Bennett Amendment) confines the prohibition of the statute to "wage differentials attributable to sex discrimination." Furthermore, where the plaintiff is challenging the employer's practice of relying on the market rate in setting the wage rate for particular jobs, the employer's practice is generally to apply the wage rate to a *job*, rather than to an *individual*. Thus, unless there has been a showing that the employer has engaged in intentional job segregation, the fact that employees in one job are paid less than employees in another job will not create an inference of sex-based wage discrimination. Indeed, the fact that an em-

ployer relies on the competitive market rate for particular jobs is an entirely legitimate nondiscriminatory factor in a wage system and qualifies as a factor other than sex within the meaning of the fourth affirmative defense of the Equal Pay Act. *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977); *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

ARGUMENT

I. CONGRESS DID NOT INTEND EITHER THE EQUAL PAY ACT OR TITLE VII TO SERVE AS A VEHICLE FOR PAY DISCRIMINATION SUITS DEPENDENT UPON JUDICIAL EVALUATIONS OF THE RELATIVE WORTH OF DIFFERENT JOBS OR JUDICIAL COMPARISONS BETWEEN JOBS IN TRADITIONALLY DISTINCT PROFESSIONS OR DISCIPLINES.

Unlike most previous claims of sex-based wage discrimination that have been litigated under concurrent Equal Pay Act and Title VII theories, the plaintiffs' claims in this case specifically call for judicial evaluation and comparison of the relative worth of jobs that are different in content and subject matter. This is not, therefore, a case like *Gunther*, in which it was alleged that the employer evaluated jobs in its own workforce pursuant to its own criteria and then proceeded to compensate predominantly male jobs at a disproportionately higher rate than predominantly female jobs relative to its own evaluations.[4] Rather, in this case the plaintiffs pre-

[4] In *Gunther*, the Supreme Court stressed that it was deciding the narrow question of whether Title VII precluded plaintiffs from establishing a claim of "intentional" discrimination based upon assertions that the County had set the

sented raw evidence concerning selected components of various jobs directly to the trial court and called upon the court to make findings concerning the jobs' value and comparability. Their theory of the case specifically required a judicial determination that faculty jobs in nursing are *comparable* to faculty jobs in architecture, social work and other traditionally distinct professions or disciplines, notwithstanding the differences in the specific content of the jobs.

Congress, however, did not intend, in enacting either the Equal Pay Act or Title VII, to inject the federal courts into the complex field of job evaluation. Those statutes were not designed to substitute judicial determinations of relative job worth for the business judgments and market processes by which compensation levels traditionally have been established in this country. Indeed, it was specifically because Congress did not want the courts and federal agencies to become mired in these intricate processes that it rejected a "comparable work" standard in the Equal Pay Act in favor of the "equal work" standard.[5]

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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." 452 U.S. at 166. *Heagney v. University of Washington,* 642 F.2d 1157 (9th Cir. 1981), is similarly distinguishable from the case at bar. In *Heagney,* the court concluded that an expert job evaluation study commissioned by the University itself was admissible and could be probative on the issue of discrimination. The court was not required to make any independent findings of its own concerning the relative value or comparability of different jobs.

[5] The extensive history of the Equal Pay Act is set forth in the dissent of Justice Rehnquist in the *Gunther* opinion. He pointed out that in enacting the Equal Pay Act's "equal work" standard, Congress carefully considered and rejected the 'equal pay for comparable worth' standard . . ." by substituting the word "equal" for the initially proposed "comparable work" standard. 452 U.S. at 184. Several legislators expressed Congress' view that the courts and administrative agencies were not permitted to make determinations of the relative compensation to be paid to different jobs. See also the discussion below, pp. 15-17. For a full discussion of the Equal Pay Act's legislative history, see E. Livernash, *Comparable Worth: Issues and Alternatives* (1980) at 212-221. The Livernash book was cited by the Supreme Court *Gunther* majority as an example of the "scholarly debate" on the comparable worth issue. 452 U.S. at 166 n.6.

This Court made it clear in its order denying rehearing in *Gunther* that, although Title VII broadened the protection against wage discrimination beyond the Equal Pay Act's limits, it did not thereby "nullify" the equal work standard. "The effect of our decision," this Court declared, "will not be to substitute a 'comparable' work standard for an 'equal' work standard." 623 F.2d at 1321. The Supreme Court similarly emphasized in its *Gunther* opinion that its decision should not be read as an endorsement of "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." 452 U.S. at 166. For as Justice Brennan was careful to point out in his majority opinion, the suit before the Court in that case "d[id] 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." 452 U.S. at 181.[6]

Gunther thus provides scant support for the approach advocated by the plaintiffs-appellants in this case. The Supreme Court clearly withheld its blessing from any theory of wage discrimination requiring a judge to make cross-occupational comparisons of job value, and this Court came no closer than to state that "evidence of comparable work" is "*not necessarily irrelevant* in proving discrimination under some alternative theory." 623 F.2d at 1321 (emphasis added). It is a distant leap indeed from this bare acknowledgement that job comparability *might* have *some* relevance under *some* alternative theory of discrimination to the plaintiffs-appellants' proposition that a judicial finding of job comparability may be *almost enough* to make out a prima facie case of discrimination. In fact, nowhere in the *Gunther* opinions is there any suggestion that job comparability can or should be determined independently by a court in the absence of a showing that the jobs in question are substantially equal. Accordingly, where, as in this case, plaintiffs seek wage discrimination findings based *primarily* upon judicial findings of job comparability, the concerns expressed by Congress in the Equal Pay Act debates and the reservations subsequently reflected in the above-quoted passages from the *Gunther* opinions require close consideration. The amicus curiae submits that those concerns warrant dismissal of the plaintiffs' case unless

[6] Indeed, the *Gunther* dissent noted that the majority "disassociates itself from the entire notion of 'comparable worth.' " 452 U.S. at 204. Clearly, both the majority and dissenters in *Gunther* were wary of the type of suit now brought by the plaintiff in the instant case.

the substantially equal standard is satisfied. And, as we show below, the district court properly concluded that the plaintiffs' evidence did not meet that standard here.

II. THE "SUBSTANTIALLY EQUAL" STANDARD CANNOT PROPERLY BE RELAXED SO AS TO OBLITERATE TRADITIONAL DISTINCTIONS BETWEEN DIFFERENT DISCIPLINES, PROFESSIONS OR OCCUPATIONS.

The plaintiffs-appellants have argued for a liberalized interpretation of the "substantially equal work" requirement that would permit jobs to be considered equal even though there are significant differences in the skills, disciplines and bodies of knowledge required for their performance. In urging the Court to find that the faculty positions in the School of Nursing involve the same skill, effort and responsibility as the faculty positions in the College of Architecture, the plaintiffs-appellants seek to have the indicia of equal work viewed in an abstract fashion so as to permit cross-occupational comparisons. The amicus suggests that such a view of the equal work criteria goes well beyond the job requirement comparisons intended by Congress when it passed the Equal Pay Act.[7] The legislative history of that statute indicates that the skill factor was meant to recognize substantive differences in the knowledge, edu-

[7] In *Gunther*, the Supreme Court held that the fourth affirmative defense of the Act was incorporated into Title VII and "could have significant consequences for Title VII litigation." 452 U.S. at 170. The Court then stressed the legislative history of the Equal Pay Act which indicated that courts should not substitute their judgment for that of employers in establishing pay systems. *Id.* at 170-171 and n.11.

cation and training required for jobs, rather than simply differences in the abstract amount of skill as suggested by plaintiffs-appellants (Appellants' Opening Brief, p. 51).

The legislative history of the Equal Pay Act reflects the view that while equality of work does not mean absolute identity of jobs, equality does mean that "the jobs involved should be virtually identical, . . . very much alike or closely related to each other." [8] It was "not intended to compare . . . jobs that have been historically and normally considered by the industry to be different." [9] This standard is now reflected in the "substantially equal" test applied by the courts in this and other circuits. A review of the cases in which the various circuits have adopted the "substantially equal" test reveals no support for the proposition that appreciably different jobs can be found to be substantially equal merely because the jobs in the abstract could be said to involve the same amount of skill.[10] In fact, in the legislative history,

[8] 109 Cong. Rec. 9197 (1963) (remarks of Rep. Goodell, a primary sponsor of the legislation).

[9] *Id.* at 9196 (remarks of Rep. Frelinghuysen).

[10] Plaintiffs-appellants have relied heavily on the facts in *DiSalvo v. Chamber of Commerce*, 416 F. Supp. 844 (W.D. Mo. 1977), *affirmed*, 568 F.2d 953 (8th Cir. 1978), and have urged that it be read as an instance where jobs involving different areas of expertise were found to be equal. The court in *DiSalvo* did find substantial equality among the duties of the plaintiff, her successor, and a publications specialist thereby indicating that the *same*, not different, work was involved. It should be noted, moreover, that the court also found that plaintiff's successor had been hired initially with the idea that he could take over the duties of the publications specialist. 416 F. Supp. at 849. This fact indicates the almost interchangeable nature of the duties assigned by the

Congressman Goodell rejected such abstract comparisons of jobs with the example that the job of a truck-driver and the job of a tugboat operator are dissimilar. 109 Cong. Rec. 9209 (1963). He explained that "[o]nly those jobs that are the same and normally related shall be compared." *Id.* Likewise, Congressman Frelinghuysen indicated that for purposes of comparisons, basic job characteristics must not be ignored merely because of superficial similarities.

> It is not intended that salesmen or store clerks, for example, holding widely varied jobs, although in the same general category, should be compared or equated. If they are to be entitled to equal pay, they must be engaged in the same type of selling or clerk job, with the same type of experience and responsibility requirements. Mechanical and surface similarities are not to be confused with, or viewed as, basic job evaluation characteristics.

Daily Congressional Record, 8683-8684, House, May 23, 1963.[11] These proponents of the Equal Pay Act

employer to the jobs being compared in *DiSalvo* and makes that case inapposite to a cross-occupational comparison of traditionally distinct jobs or professions.

[11] Likewise, Representative Griffin stated that the "equal work" standard meant inspector and assembler jobs could not be compared, nor could inspectors who inspect complicated parts be compared to inspectors making simple cursory inspections. 109 Cong. Rec. 9208 (1963). Representative Griffin previously had indicated that if inspectors were doing the same job but "one of them at the end of the line lifts the parts and carries them away. . .", "[i]t is an additional matter which clearly obliterates any question that they would be the same." 109 Cong. Rec. 9198. To the same effect, see the remarks of Rep. Frelinghuysen that additional lifting tasks of male packagers would permit them greater wages than female packagers. 109 Cong. Rec. 9196.

surely did not intend either the cross-occupational comparisons or the relaxed interpretation of the substantially equal requirement sought by the plaintiffs-appellants in this appeal.

Faculty positions in different professional schools or disciplines within a university are unquestionably "jobs that have been historically and normally considered by the industry to be different." In fact, the record before the Special Master specifically showed that each discipline commanded its own salary levels depending upon the academic marketplace for that discipline. The Fifth Circuit recently recognized both the existence and the legitimacy of such traditional marketplace distinctions in *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981), a faculty wage discrimination case brought under Title VII. There, as here, female faculty members sought to establish salary discrimination on the basis of various comparisons with higher paid male faculty members. The court of appeals rejected their comparisons, however, because it found that "the most important factor" affecting faculty salaries was "the college in which a professor teaches—all other factors being equal, professors in colleges such as law and engineering are, because of market forces outside of the university, paid significantly more than professors in colleges such as humanities and social sciences." 654 F.2d at 402. Adoption of the plaintiffs-appellants' liberalized interpretation of the "substantially equal" standard in this case would be plainly inconsistent with the Fifth Circuit's recognition that faculty jobs in different disciplines are, in fact, different jobs.

The plaintiffs-appellants' brief does not address the Fifth Circuit's decision in *Wilkins*, but instead

relies on an earlier district court decision, *Marshall v. Georgia Southwestern College*, 489 F. Supp. 1322 (M.D. Ga. 1980), as support for the proposition that all faculty members perform substantially equal work. In that case, the court compared the jobs and pay of males and females within a particular department, i.e., the Business Department, and did not engage in cross-disciplinary comparisons. But, more importantly, the employer in that case did not contend that differences in subject matter constituted a basis for the pay differentials, and the employer had not informed itself of the market rates for particular experience, expertise, or skills. 489 F. Supp. at 1331. To the extent that *Georgia Southwestern* retains any vitality after *Wilkins*, it cannot be read to support plaintiffs-appellants' desire for abstract comparisons across technical disciplines which the market and the employer have recognized as separate and distinct.

Similarly, the other cases cited on pages 49-51 of plaintiffs-appellants' brief do not support such comparisons. In *Katz v. School District of Clayton*, 557 F.2d 153 (8th Cir. 1977), differences in subject matter were not an issue; rather, the question was whether a female "teaching assistant" who was assigned full-time teaching duties was to be paid the same as male "teachers" who performed equal work. In *Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979), the primary issue was a constitutional question about the application of equal pay provisions to a public school district, and there was no cross-disciplinary comparison by the court. The particular practice challenged in that case was a $300 "head of household" payment made to all male teachers for "extra duties," regardless of whether the male teacher performed any extra duties. It may be noted that in a

school district decision issued the same day as the *A & M* decision, the Fifth Circuit reiterated its conclusion that Congress intended to permit employers wide discretion in evaluating work for pay purposes. See *Marshall v. Dallas Independent School District*, 605 F.2d 191, 195-196 (5th Cir. 1979).[12]

Finally, *Cullari v. East-West Gateway Coordinating Council*, 457 F. Supp. 335 (E.D. Mo. 1978), is cited by plaintiffs-appellants as a case in which a female researcher trained in sociology and urban affairs was found to be doing work equal to a male researcher with training in geography. It should be noted, however, that with respect to another male trained in geography with whom the female researcher sought to have herself compared, the court concluded that "due to the differences in educational background, technical knowledge required for the specific responsibilities assigned, and the nature of the jobs performed," the work was not substantially equal. 457 F. Supp. at 341. Thus, *Cullari* cannot be read as supporting abstract comparisons of different jobs where the jobs actually do require knowledge in different technical subjects. Rather, it supports the district court's finding that a cross-disciplinary comparison which ignores differences in the technical

[12] In *Marshall v. Dallas Independent School District*, 605 F.2d at 196, the Fifth Circuit also reiterated its formulation of the equality standard as set forth in *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973):

> When Congress enacted the Equal Pay Act, it substituted the word "equal" for "comparable" to show that "the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other." The restrictions in the Act were meant "to apply on to jobs that are substantially identical or equal."

knowledge required for the jobs will not support a Title VII sex-based compensation suit.

III. TO ESTABLISH A PRIMA FACIE CASE OF WAGE DISCRIMINATION UNDER TITLE VII, THE PLAINTIFF MUST PRODUCE EVIDENCE WHICH ESTABLISHES, EITHER DIRECTLY OR BY INFERENCE, THE EXISTENCE OF INTENTIONAL SEX DISCRIMINATION.

Although the failure of the plaintiffs-appellants to satisfy the substantially equal work standard precluded them from making a prima facie case under either the Equal Pay Act or Title VII based solely on job comparisons, *Gunther* holds that they were not precluded from attempting to prove a Title VII case of wage discrimination under some other theory. Such an alternative theory, of course, must be compatible with Title VII standards. *Gunther*, 623 F.2d at 1321. Thus, in determining what evidence must be produced by a plaintiff to prove a prima facie case under such an alternative theory, this Court should examine the well-established standards for a prima facie case under Title VII.

The Supreme Court has recognized the general principle that any Title VII plaintiff has the initial burden of proving *intentional* discrimination either by direct evidence of unlawful purpose or by offering indirect evidence that is adequate to create an inference that an employment decision was based on an illegal discriminatory purpose. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *McDonnell Douglas v. Green*, 411 U.S. 792, 800-802 (1973). This prima facie case, the Supreme Court has pointed out, serves a very important function in employment discrimination lit-

igation because "it eliminates the most common nondiscriminatory reasons" for the employment practice at issue. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 (1981). In *Teamsters*, which involved alleged discriminatory hiring practices, the Supreme Court noted that:

> Although the *McDonnell Douglas* formula does nor require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

431 U.S. at 358 n.44. Similarly, in *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), the Court explained that the rationale behind the inference of discrimination produced by a prima facie case is that:

> when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration. . . .

438 U.S. at 577.

The amicus curiae respectfully suggests that it is this rationale, recognized in *Teamsters*, *Furnco*, *McDonnell Douglas*, and *Burdine*, that must guide this Court in determining the appropriate standard for a

prima facie case of wage discrimination under Title VII. To the extent that a plaintiff fails to offer evidence showing that reliance on the most common nondiscriminatory reasons for wage differentials—i.e., differences in the jobs—was intentionally discriminatory, the plaintiff has failed to create an inference of discrimination, and thus, has failed to satisfy the plaintiff's initial burden.[13]

When measured against this standard, the "comparability plus" theory advocated by the plaintiffs-appellants in this appeal is shown to suffer serious inadequacies (Appellants' Opening Brief, pp. 56-57). The plaintiffs-appellants acknowledge that a showing of comparability of jobs will not alone suffice to make a prima facie case.[14] They suggest, however, that a

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[13] The Fifth Circuit recently pointed out that there are numerous nondiscriminatory factors that can cause salary differences between separate employee groups. Where such factors are not considered, a prima facie case of disparate treatment in compensation discrimination cannot be established. See *Pouncy v. The Prudential Insurance Company of America*, 668 F.2d 795, 802-03 (5th Cir. 1982). There, the court indicated that such nondiscriminatory factors as different job levels, different skill levels, previous training and experience could account for salary differences in job groups. As urged more fully in the University's brief, the plaintiff's statistical evidence presented in this case to compare faculty nursing and nonnursing positions failed to control for factors such as prior teaching or business experience, rank, merit, the number of terminal degrees, work content, skills and responsibilities.

[14] The plaintiffs-appellants state that although a showing of comparability of jobs alone is not sufficient, it is *significant* evidence, and cite this Court's opinion in *Gunther* as support (Appellants' Opening Brief, p. 56). Again, it should be noted that the Court's actual words were that such a showing of comparability is *"not necessarily irrelevant* in proving discrimination." 623 F.2d at 1321 (emphasis added).

plaintiff needs only to supplement the comparability showing with various "plus factors" in an inverse proportion to the degree of comparability shown (Appellants' Opening Brief, p. 57 n.34).[15] Thus, plaintiffs-appellants urge the Court to adopt a sliding scale test that would permit gaps in the equal work showing to be filled by minor other evidence tending to show discrimination.

What the plaintiffs-appellants' sliding scale test fails to consider, however, is that a prima facie case of employment discrimination is not simply a particular quantity of evidence. Rather, it is evidence which fits together in such a way that it eliminates nondiscriminatory reasons for the employer's conduct and thus creates an inference that it is more likely than not that the employer acted for an impermissible reason. The plaintiffs-appellants' formulation ignores this necessary interrelationship of the bits and pieces of evidence.

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[15] The plaintiffs-appellants rely on the decision in *DiSalvo v. Chamber of Commerce*, 416 F. Supp. 844 (W.D. Mo. 1976), *affirmed*, 568 F.2d 593 (8th Cir. 1978), to support their proposition that even where there has been no showing of substantially equal work, the likelihood of sex as the reason for the wage differential increases according to the degree of comparability which the plaintiff has shown. The *DiSalvo* decisions, however, simply do not support such a proposition. In that case, the district court made a clear finding that a male who performed the *same duties* as the plaintiff was paid a higher salary. The court considered other comparisons only for their possible value as corroborating evidence. 416 F. Supp. at 853. At no point did the district court or the court of appeals suggest that these additional comparisons would command any significant weight in the absence of the primary evidence showing unequal pay for jobs that were substantially equal.

Where the jobs being compared involve different disciplines or professions (i.e., "unequal work") which have traditionally been recognized in the marketplace as distinct, no amount of evidence that the jobs require equal quantities of skill, effort or responsibility will suffice to create an inference that the differences in the pay rates they command are most likely the result of discrimination by the defendant employer. As shown above, note 3, there is no independent method for the courts to determine whether dissimilar jobs are "comparable" for purposes of assessing liability. Additionally, unless the jobs themselves are filled from the same labor market subject to the same forces of supply and demand, such evidence does not even begin to warrant an inference that they would be paid the same absent discrimination by the employer. A sprinkling of essentially unrelated evidence, such as the fact that the compensation system is administered by someone of the opposite sex, simply does not address the deficiency in the plaintiff's evidentiary showing. It remains as likely as not that market forces, rather than discrimination, were the basis for the wage differential. Rather than creating an inference of discrimination by their use of comparators, plaintiffs are merely indulging in the very type of job comparisons that was rejected by Congress and the decisions discussed below and which was treated skeptically both by this Court and the Supreme Court in the *Gunther* decisions.

Furthermore, under the *Burdine* decision of the Supreme Court, even if a prima facie case of compensation discrimination has been made, the employer could rebut it by producing evidence to articulate a legitimate reason (e.g., a factor other than sex) for its compensation decision. The University's

reliance upon the labor market to establish wages for different disciplines satisfied this burden. As we show below, the labor market defense was properly accepted by the district court. The plaintiffs' ultimate burden under the *Burdine* standard was to demonstrate that the employer's stated reason for the wage differential was intentionally discriminatory. Both the magistrate and the district court found that the University's reasons for setting wages for the nursing faculty were nondiscriminatory. Moreover, as there has been no showing that the Magistrate's and district court's findings as to nondiscriminatory purpose are "clearly erroneous" under Rule 52, Fed. Rules of Civ. Pro., these findings cannot be reversed on appeal by this Court. See *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (U.S. No. 80-1190, decided April 27, 1982).

IV. CONGRESS GAVE WIDE LEEWAY TO EMPLOYERS IN SETTING WAGES FOR DISSIMILAR JOBS, AND A SHOWING THAT AN EMPLOYER RELIES ON THE MARKET IN SETTING WAGE RATES DOES NOT SUPPORT AN INFERENCE THAT THE EMPLOYER'S WAGE STRUCTURE IS DISCRIMINATORY.

In structuring a wage system, employers typically are faced with the task of balancing a variety of considerations. One basic consideration is the need for some form of internal equity which attempts to assure that jobs which are substantially equal will be paid at substantially the same rate. Typically, the factors considered include skill, effort, responsibility, and working conditions. This type of job content evaluation was practiced before the Equal Pay Act of 1963, and that statute did not attempt to interfere with the employer's discretion to give these various factors whatever weight the employer chose.

A second basic consideration beyond job evaluation for an employer in structuring a wage system is the need for external competitiveness. For a wage system to be effective, generally it must compensate the jobs within the employer's organization at rates that are competitive with the rates existing in the outside labor market for those same jobs. External competitiveness was a primary factor in bona fide job evaluation techniques prior to the Equal Pay Act of 1963, and the legislative history of that statute reflects an intention not to interfere with external competitiveness as a consideraion in setting wages. In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Supreme Court pointed out that under the Equal Pay Act

> the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and employed a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act).

452 U.S. at 171. The fourth affirmative defense of the Equal Pay Act was designed, the Court noted, to confine the application of the Act to wage differentials "attributable" to sex discrimination, and "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.'" 452 U.S. at 170. Through the Bennett Amendment, this defense has been incorporated into Title VII, and similarly confines that statute's prohibition to wage differentials attributable to sex discrimination. The "other factors other than sex" defense is a "gen-

eral catchall provision," *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), which permits employers to defend against charges of discrimination by showing bona fide reliance on the wage rates for particular jobs in the competitive marketplace.

In *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977), the court held that, quite apart from the dispute over the meaning of the Bennett Amendment, the plaintiffs' argument that reliance on the market was prohibited because it perpetuated discrimination was without merit. The court pointed out that because there was no allegation that females had been denied access to any job that males perform, the theory being proposed was that a prima facie violation of Title VII is established whenever employees of different sexes receive disparate compensation for work of differing skills even though those skills did not command an equal price in the labor market. The Eighth Circuit held that the female plaintiffs had not established a prima facie case by attempting to compare their clerical jobs with physical plant jobs held by men. Because the University relied upon the labor market to establish its compensation for these jobs, the court held that the plaintiffs had failed to show that the wage differences rested upon sex discrimination. The court stated:

> Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

563 F.2d at 356.

Similarly, the Tenth Circuit also has affirmed the market defense and rejected the attempts of nurse plaintiffs to compare their jobs with nonnursing positions in a sex-based Title VII compensation suit. See *Lemons v. City & County of Denver*, 620 F.2d 228 (1980).[16] The plaintiffs alleged that historically nurses had been underpaid by society because of the predominantly female composition of their profession. Rather than being paid on the basis of the community scale for nurses, they sought to compare their jobs with general administrative, nonnursing jobs that were mainly performed by men. As the court characterized the case, "the suit [was] based on the proposition that nurses are underpaid in City positions, in the community, in comparison with other and different jobs which they assert are of equal worth to the employer." 620 F.2d at 229. The court stated that the pay for nurses was the product of "past attitudes, practices, and perhaps of supply and

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[16] The Supreme Court majority in *Gunther* did not disagree with the *Lemons* decision, and noted that the respondents distinguished it on the basis that the nurses in *Lemons* had brought a comparable worth suit that required the court to make its own determination of the relative value of different jobs. 452 U.S. at 166 n.7. The Court also noted that unlike *Christensen*, it was not required to decide whether the plaintiffs had established a prima facie case. *Id.*, n.8. See also, the discussion in the *Gunther* dissent, 452 U.S. at 203-204, which concurs with the *Lemons* and *Christensen* decision.

demand." The court viewed the record as showing that the nurses pay scale "became a part of the economic balance and relationships prevailing in the community among the myriad of positions in the job market." *Id.*

The court, however, held that "[t]his type of disparity was not sought to be adjusted by the Civil Rights Act . . . ." It stated that "[t]he courts under existing authority cannot require the city within its employment to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship." *Id.* Relying upon the *Christensen* decision of the Eighth Circuit, the Tenth Circuit agreed that Title VII does not require an employer to ignore the market in setting wage rates for different jobs. It further agreed with *Christensen* that the plaintiffs had not established a Title VII prima facie case of sex discrimination. As here, the court in *Lemons* noted that the plaintiffs were not seeking equality of opportunities in their skills, but "instead would cross job description lines into areas of entirely different skills." 620 F.2d at 229. Recoiling at that prospect, the Tenth Circuit stated that this type of suit "would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it." *Id.*[17]

[17] See also *Keyes v. Lenoir Rhyne College,* 15 FEP Cases 914, 918 (W.D.N.C. 1976), *affirmed,* 552 F.2d 579 (4th Cir. 1977), where the court concluded that the employer had relied on "legitimate factors" in setting faculty wages, including the area of specialization in question, the availability of qualified persons in the market place at the time the plaintiffs were employed, and the need for such skills by the particular college program in question. See further, *Horner v. Mary Institute,* 613 F.2d 706, 714 (8th Cir. 1980) (where

The argument by the plaintiffs-appellants concerning reliance on the market fails to note the distinction between wage differentials based on the market rates for *different jobs* and wage differentials based on the market rates for *workers of different sexes.* The latter type of market difference can be found where workers of one sex are willing to perform the same work for less money than members of the opposite sex. This latter form of differential was rejected by the Supreme Court in *Corning Glass* (417 U.S. at 205) as a defense to an Equal Pay Act claim. That attempted defense was not what we would view as a proper reliance on the labor market. But, when an employer looks to the market rate for a particular job, without regard to the sex of workers who hold that job, the employer is relying on a legitimate criterion for setting compensation.[18]

the court concluded that an "employer may consider the market place value of a particular individual then determining his or her salary."); and *County Employees Assn. v. Health Dept.,* 18 FEP Cases 1538 (Wash. Ct. App. 1978) (Nurses comparable worth claim, which sought the same pay as other jobs of the same value, was rejected because the plaintiffs' allegation ignored other legitimate reasons for the wage differential).

[18] The plaintiffs-appellants have cited this Court's decision in *Norris v. Arizona Governing Committee,* 671 F.2d 330 (9th Cir. 1982), as an indication that an employer may not maintain a discriminatory practice merely because the practice reflects a discriminatory option available in the market. The option at issue in *Norris* was a life annuity contract which provided larger monthly payments to males than to *similarly situated* females. The Court found that the mere fact that this facially discriminatory plan was among the options available in the marketplace did not excuse the employer who adopted the plan. In this regard, the situation in *Norris* is similar to the discriminatory option rejected in

As previously shown, Congress designed the Equal Pay Act to allow employers to continue to use such criteria in setting wages. Similarly, in Title VII, Congress did not intend to diminish the traditional management prerogatives of employers, *Burdine*, 450 U.S. at 259; *Furnco*, 438 U.S. at 578. As this Court has recognized,

> [t]he legislative history of Title VII "clearly reveals that Congress was concerned about preserving employer freedom, and that it acted to mandate employer color-[and sex-] blindness with as little instrusion into the free enterprise system as possible.

Contreras v. City of Los Angeles, 656 F.2d 1267, 1278 (1981). Through these two statutes, Congress assured that each woman has the same access to every job as a similarly qualified man, and that once in a job, a woman will be paid no less than a man for doing the job. But, as shown above, Congress specifically refrained from involving itself or the courts in the difficulties of weighing the comparable value of different jobs in the competitive marketplace.

Plaintiffs-appellants suggest that to allow employers to rely on the market allows employers to engage in a conspiracy of conscious parallelism in

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Corning Glass, i.e., the fact that a job market existed which allowed the employer to pay women less than men for the *same work* did not justify facially discriminatory wages. 417 U.S. at 205. Thus, *Norris*, too, is inapplicable in a situation where the employer has not adopted a market's facially discriminatory treatment of similarly situated men and women, but rather is relying on the market as a guide in setting the wage for a particular job or occupation without regard to whether that position is held by a man or a woman.

which all employers pay lower wages to women. Such an argument reflects a poor understanding of the stiff competition that goes on among employers to attract and retain high quality employees, regardless of their sex or race. And, in any event, the assertions of such a conscious conspiracy are wholly unsupported by any evidence in plaintiff's brief. Moreover, this argument also fails to appreciate that in *Gunther*, the Supreme Court made it clear that to discriminate intentionally against women by restricting their wages because of their sex would be a violation of Title VII. Merely because the magistrate and district court did not find a discriminatory purpose on the part of the University is no reason for the court to accept the plaintiffs' invitation to expand the permissible scope of a Title VII sex-based compensation action.[19]

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[19] Plaintiffs' argument in this appeal rests heavily on the thesis that they must be allowed to base their claims on inter-occupational job comparisons, because otherwise they, and all workers in predominantly single-sex occupations, would effectively be denied the protection of Title VII. But that thesis is not valid. They *are* protected by Title VII in their right of equal access based on qualifications to whatever job they choose to pursue, whether high- or low-paying. They are protected against employer-caused job segregation. They cannot be made to accept or remain in a low-paying occupation. And, even if they do choose a predominantly female job, *Gunther* makes clear that Title VII protects them against deliberate wage discrimination based on their sex; in other words, their employer cannot set their wages lower *because* their job is predominantly female. But this does not mean that Title VII *exempts* any occupation from the effects of labor market competition simply because it happens to be an occupation predominantly chosen by women. *Briggs v. City of Madison*, 28 FEP Cases 739, 747-748 (W.D. Wis. 1982).

Moreover, while the plaintiffs make much of the unsupported allegation of societal discrimination against female-dominated jobs, general statistical evidence concerning the differences in society between the average earnings of male and female workers is not probative of discrimination in the market place. In Title VII cases, the Supreme Court has recognized that such broad-based general statistics "may have little probative value" in showing the existence of discrimination in particular situations. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). Statistical comparisons reflecting a disparity are probative of discrimination only if the statistics have been tailored to minimize factors other than discrimination which may have caused or contributed to the disparity. The historical disparity data relied on by the plaintiffs here are not so tailored. Moreover, the plaintiffs offered no evidence to show that, absent discrimination, the national average earnings for females should equal the national average for males.[20]

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[20] The general rationale behind the use of such statistical comparisons in employment discrimination cases is that

> absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

Thus, statistics deal with a comparison between observed data and the data that would be expected absent discrimination. In the case of general wage figures drawn from the national workforce as a whole, however, it is unreasonable to expect the earnings of the *average* female to be equal to the earnings for the *average* male, since the *average* male worker differs significantly from the *average* female worker. In fact, the average male worker works more hours a week, has more years experience, more continuous work experience and more education than the average female worker. See Nelson, Opton and Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. of Mich. J. Of Law Reform 231, 251-53, 258-63 (1980), cited by the Supreme Court in *Gunther*. 425 U.S. at 166 n.6. These are all factors which commonly affect individual earnings. Without statistical adjustments to account for these and other differences between the average male and average female worker, and without any adjustment for different types of work and different working conditions, there is no reason to expect that the earnings of the average female should equal the earnings of the average male. As the Supreme Court has recognized:

> Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must be inferred from such consequences.

Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 711 n.20 (1978).

V. AN ADVERSE IMPACT ANALYSIS IS INAPPROPRIATE AS A MEANS OF ESTABLISHING A PRIMA FACIE CASE OF WAGE DISCRIMINATION.

Adverse impact analysis is useful as a means of determining whether a particular employment practice, such as a specific selection criterion, has had a class-based impact on the employer's work force. But, whether such an analysis is probative in a case of alleged wage discrimination is doubtful. In *Gunther*, the Supreme Court stressed the distinction between the adverse impact approach of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and the strictly confined approach to wage discrimination issues necessitated by the fourth affirmative defense of the

Equal Pay Act, made applicable to wage discrimination claims under Title VII by the Bennett Amendment. The Supreme Court held that

> incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials *attributable to sex discrimination.* H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963). 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."

452 U.S. at 170.

The Court's emphasis on the distinction between *Griggs*-type litigation and sex-based compensation litigation is an indication that the Supreme Court contemplated that adverse impact analysis would be of little or no probative value in wage discrimination litigation in which the issue is not whether practices fair in form might be discriminatory in operation, but rather simply whether a pay differential is based on sex. *Griggs*, moreover, is singularly inapplicable to this case as the plaintiffs—far from conceding the neutrality of the employer's compensation system—

have argued that it was operated to treat nurses differently than other faculty disciplines.[21]

The difficulty of applying adverse impact analysis to cases alleging wage discrimination becomes apparent when it is recognized that, for the most part, a wage rate is applied to a job, rather than to an individual. As discussed above, where an employer relies upon a market rate in setting a wage rate, the employer is looking to the market for a wage rate for a particular job, rather than to find a market force for a particular class of individuals. Thus, unless the employer has engaged in intentional job segregation on the basis of race or sex, the employer's reliance on the market rate simply affects jobs rather than individuals.[22] In order to be probative, therefore, any

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[21] The plaintiffs-appellants suggest that disparate impact analysis has been applied to wage discrimination issues in *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978), and in *Norris v. Arizona Governing Committee,* 671 F.2d 330 (9th Cir. 1982). In each of those cases, however, the courts found that the pension plan at issue did "not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " 435 U.S. at 711. This Court has held that such facially discriminatory practices are *intentional* discrimination for purposes of Title VII. 671 F.2d at 334.

[22] In *Griggs,* the Supreme Court described the objective of Title VII as being "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431. If unaccompanied by a showing of intentional job segregation by the employer, a showing that incumbents in a particular job are paid less than incumbents in a different job cannot create an inference of discrimination on the basis of race or sex. See *Briggs,* 28 FEP Cases at 747-48.

statistical study designed to show adverse impact due to a particular wage policy would have to be modeled to account for the fact that differences in jobs account for entirely legitimate differences in the wage rates for those jobs.

In *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981), the court was confronted with a statistical study as flawed as the study introduced by the plaintiffs-appellants in this case. As previously discussed, the court concluded that, because the salary of a faculty member is dependent on a number of factors that operate simultaneously, plaintiffs' statistical effort failed because it did not filter out the combined effect of the entirely legitimate factors.

> The fundamental flaw in plaintiffs' statistical evidence is that it fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary a faculty member receives. It appears uncontroverted that the most important factor is the college in which a professor teaches—all other factors being equal, professors in colleges such as law and engineering are, because of market forces outside of the university, paid significantly more than professors in colleges such as humanities and social sciences. Accordingly, plaintiffs' statistical evidence showing that men and women of the same age, rank, or length of service are paid differently does not demonstrate discrimination because the college factor has not been considered.

654 F.2d at 402.

Similarly, in *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), the court considered a statistical exhibit showing that the av-

erage wage of a female employee was less than that of the average male and concluded that it could not make the leap from this showing to a finding of sex discrimination because the statistical analysis was not controlled for differences in occupational classifications. The court noted that because of the failure to control for these differences, it was impossible to determine from the statistics whether similarly situated men and women have been treated differently from each other. 674 F.2d at 69. In the instant case, the plaintiffs-appellants' statistical showing did not reflect the fact that different disciplines legitimately command different wages, and therefore, the district court properly rejected the disparate impact analysis.

There are two other important reasons why the disparate impact theory is inapplicable to compensation cases. As the Fifth Circuit has held, the disparate impact approach "applies only when an employer has instituted a *specific* procedure, usually a selection criterion for employment, that can be shown to have a *causal connection* to a class based imbalance in the work force." *Pouncy v. the Prudential Insurance Company of America*, 668 F.2d at 800 (emphasis added). Here, rather than attacking a specific employment practice, the plaintiffs have inappropriately launched a broad-based attack against the employer's compensation system and the wage rate set by the market. There are so many possible nondiscriminatory reasons for the wage differential that the adverse impact approach simply does not apply, and a showing of an intentional violation is required.

Next and finally, an employer who relies in good-faith on the labor market to establish his compensa-

tion rates for particular jobs is relying on economic data that is necessary to sustain the employer's competitive economic position. Such data, however, is beyond the control of the employer and it is impossible to determine to what extent, if any, the market compensation differential for different jobs is the result of discrimination. See Nelson, Opton & Wilson, 18 Mich J.L. Ref. at 249-50 n.80.

As noted above, in *Gunther*, the Supreme Court stressed that the Equal Pay Act was structured differently than the adverse impact case as typified by *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In the *Griggs*-type case, once a prima facie showing of adverse impact is demonstrated, the employer is required to justify those practices by a showing of "business necessity." Rebutting business necessity in the first instance is not part of the plaintiff's burden, because "[k]nowledge of a legitimate business practice is *uniquely available to the employer* who is accordingly required to persuade the court of its existence . . .". *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981) (emphasis added).

In the instant case, application of the disparate impact standard would be particularly inappropriate because the allegations of adverse impact caused by reliance upon market forces involve a presumed historical disparity not among the defendant's employees but in the nation's workforce as a whole. Proof or disproof of such an allegation does not depend on information uniquely within the control of the defendant. Certainly, it would be odd to make the employer argue that there was a "business necessity" for the market rate where knowledge and information of the business practices of society as a whole are beyond its knowledge and control. Thus, even where a Title

VII plaintiff only establishes a prima facie unequal pay claim, and the employer comes forward with legitimate factors to support the pay differential, allegations of adverse impact do not relieve the plaintiff of the obligation of proving that the pay differential is "attributable" to intentional sex discrimination.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council respectfully urges this Court to affirm the decision of the District Court.

Respectfully submitted,

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