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Cover Page Footnote

The author would like to extend special thanks for the research assistance of Kenneth H. Zimmerman.

WOMEN IN THE WORKPLACE: COMPARABLE WORTH

JUDITH P. VLADECK

INTRODUCTION

Pay equity has been called the money issue of the 1980's. Critics claim that it will bankrupt employers and turn federal judges into personnel managers. The idea that women should receive equal pay for work that is comparable but not identical to that of men is viewed by some as a new and radical excess of the women's movement. In fact, however, it is a continuation of a century-old effort to eliminate discrimination against women in the workplace and represents only a new approach to correcting a basic unfairness. The concept of comparable worth challenges the historic practice of paying women less for the work they do simply because it is work done by women.¹ It embodies the simple principle that any form of wage discrimination based on sex is illegal.

This Article reviews the efforts to eliminate sex-based wage discrimination that have led to the emergence of the notion of comparable worth. It first examines the initial legislative measures taken to achieve wage equality for women performing the same jobs as men. The Article next focuses on the more recent movement to provide wage parity for women whose traditionally female jobs are of a value to their employers comparable to those of their male counterparts. Only when such broader equality is achieved will women be able to escape their relegation to the lowest level of the wage-earning population.

* Partner, Vladeck, Waldman, Elias & Engelhard. The author would like to extend special thanks for the research assistance of Kenneth H. Zimmerman.

1. The phrases "comparable worth," "pay equity" and "equal pay for work of equivalent value" are used interchangeably. The phrase "pay equity" was coined prior to the formation of the National Committee on Pay Equity in 1978 and was intended to avoid limiting discussion to specific methods of evaluating jobs. Telephone interview with Winn Newman, General Counsel, American Federation of State, County and Municipal Employees (AFSCME) (Feb. 29, 1984). Comparable worth was defined broadly in *County of Washington v. Gunther*, 452 U.S. 161 (1981) as a concept "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." *Id.* at 166.

I. FAILURE OF TRADITIONAL THEORIES TO REMEDY
SEX-BASED PAY INEQUITIES

The Equal Pay Act of 1963 (EPA or Act)² was the first federal statute to address pay differentials based on sex. The Act prohibits employers from engaging in sex-based wage discrimination, but it applies only to women who work in jobs essentially identical to those of men. Thus, the EPA has been of limited utility in combating wage discrimination against women because most women do not work in jobs that are identical to those of their male co-workers. The narrow approach of the Act was useful when separate pay scales for men and women in identical jobs were commonplace. Unfortunately, two decades later, notwithstanding the gains made under the EPA toward eliminating overt sex discrimination in wages, the wage gap between women and men remains virtually unchanged.³ Women who work full-time on a yearly basis are paid only approximately fifty-nine cents for each dollar earned by male workers.⁴ This ratio has remained essentially the same since before World War II.⁵

Title VII of the Civil Rights Act of 1964⁶ provides a broader statutory prohibition against discrimination than does the EPA. Until recently, however, the focus of attention in applying Title VII to cases in which sex discrimination is at issue has not been on wage inequities resulting from the under-valuation and under-compensation of "women's" work. Rather, the central effort has been to gain access for women to predominantly male jobs with higher earnings, and to secure equal pay for women performing jobs identical to those of men. As valuable and effective as these efforts have been in opening some doors for women to jobs previously reserved for men, and in challenging the practice of separate wage scales for men and women, the inequities of wage discrimination persist.

Against this background, the concept of comparable worth constitutes a necessary approach in the effort to obtain parity in compensation. Comparable worth requires taking a fresh look at the techniques

2. 29 U.S.C. § 206(d) (1976).

3. *Women, Work, and Wages: Equal Pay for Jobs of Equal Value* 14 (D. Treiman & H. Hartmann eds. 1981) [hereinafter cited as *Women, Work, and Wages*].

4. Bureau of Labor Statistics, U.S. Dep't of Labor, *The Female-Male Earnings Gap: A Review of Employment and Earnings Issues* 2 (1982) (Rep. No. 673).

5. In 1939, the median earnings for women who worked year-round, full-time in the experienced labor force were 58% of those of similarly employed men. *Id.* In 1981, equivalent figures show women's earnings to be 59% of men's earnings. *Id.*

6. 42 U.S.C. §§ 2000e to 2000e-16 (1976 & Supp. V 1981). Title VII provides in part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e(2)(a)(1).

used to evaluate the aspects of a job that are used to set wages. The EPA responded to nearly a century of women's pressure against explicit wage differentials. Comparable worth challenges the less explicit, but no less discriminatory, practices resulting from the assignment of low pay to female-dominated jobs in historically sex-segregated occupations, practices that have created a system that pays nurses less than painters and schoolteachers less than liquor clerks.⁷

II. SEX DISCRIMINATION BASED ON JOB SEGREGATION

The connection between sex-based job segregation and wage discrimination is well documented. In the past ten years, women have entered the work force in record numbers, accounting for six of every ten new workers during the 1970's.⁸ Although they now comprise more than forty percent of the work force, the majority of working women, rather than benefiting from this change, are participants in what has been called the "feminization of poverty."⁹ In spite of the highly visible few now in professional and management positions, most women workers remain concentrated in traditionally female jobs at the lowest end of the pay scale.¹⁰ As the National Academy of Sciences has noted: "[T]he data are clear. Women and minorities are differentially concentrated not only by occupation but also by industry, by firm, and by division within firms. Moreover, the evidence shows that this differential concentration has persisted, at least with

7. For example, in Denver, Colorado, public nurses earn less than city tree trimmers and gardeners. Daily Labor Report, No. 180 at E-11 (Sept. 16, 1982). In Montgomery County, Maryland, a county school teacher with two years experience and a B.A. earns \$12,323 per year; a male liquor clerk with two years experience and a high school diploma earns \$12,479. New York State Assembly Task Force on Women's Issues, *Comparable Worth: Every Woman's Right 1* (May 1983) [hereinafter cited as *Comparable Worth*].

8. Women's Bureau, U.S. Dep't of Labor, *20 Facts on Women Workers 1* (1982) [hereinafter cited as *20 Facts*].

9. See *Comparable Worth*, *supra* note 3, at 4; Pearce, *The Feminization of Ghetto Poverty*, Society, Nov.-Dec. 1983, at 70. In 1977, approximately one of every three female-headed households was below the poverty line, while only six percent of male-headed households were below the poverty line. *Id.*; Women's Bureau, U.S. Dep't of Labor, *Facts About Women Heads of Households and Heads of Families 8* (Dec. 1979). Being part of a female-headed household is the single most critical determinant of poverty. See *Comparable Worth*, *supra* note 7, at 4. If wives and female heads of households were paid the same wages as similarly qualified men, about half of the families living in poverty would no longer fall below the poverty line. *Id.* Thus, under the present wage system, a job does not guarantee that a woman can escape from poverty. *Id.*

10. In spite of the much heralded and highly visible advances women have made into non-traditional fields, over half of working women are concentrated into only 20 of 427 job classifications. Daily Labor Report, No. 180, at E-7 (Sept. 16, 1982). Over 25% of all women work in jobs that are more than 95% female; 50% work in jobs that are at least 70% female. *Id.*

respect to women, over a substantial period of time.”¹¹ Furthermore, while technological advances have made these predominantly female occupations increasingly complex, wage-setting procedures have failed to respond to the increased skill levels of workers, thereby perpetuating the system built on sex-based wage differentials. One study has noted that “[n]ot only do women do different work than men, but also the work women do is paid less, and the more an occupation is dominated by women, the less it pays.”¹² Indeed, the study concluded that “in many instances . . . jobs held mainly by women and minorities pay less at least in part *because* they are held mainly by women and minorities.”¹³

In theory, the market rewards workers according to the value of their work. In fact, the correlation is more illusory than real. The discriminatory practices of the past remain entrenched in today’s job market, and result in working women today being paid less than men simply because they are women. If efforts to end sex discrimination in the workplace are to succeed, it must be recognized that discrimination is rooted both in job segregation and in biased methods of setting wages.

The results of recent studies examining the wage disparity between men and women reveal that what most determines the lower level of a woman worker’s wages is her sex.¹⁴ The studies also dispel any lingering assumption that the disparity can be explained by differences in worker characteristics—that men might be better-trained, more able, or more committed workers. Studies show that factors historically assumed to account for the wage gap, such as work experience, educational attainment, on-the-job training, continuous attachment to the work force, and commitment to work, do not in fact account for the disparity in earnings between the sexes. The clear conclusion is that deeply-entrenched sex discrimination far outweighs a woman worker’s skill, training, or experience as the determinative factor for her wages.

A. Westinghouse: A Case Study of the Institutionalization of Wage Discrimination Against Female Workers

The sex-based wage discrimination established by almost a half-century of American industrial wage-setting practice was finally addressed by the Court of Appeals for the Third Circuit in *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.*¹⁵ Prior to the enactment of equal pay legislation, West-

11. Women, Work, and Wages, *supra* note 3, at 93.

12. *Id.* at 28.

13. *Id.* at 93 (emphasis in original).

14. *Id.* at 19, 30-31.

15. 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981). The Westinghouse wage-setting system led to a broader interpretation of Title VII than that

inghouse employed a wage-setting system that explicitly provided that female workers be paid less than male workers. The discrimination, however, did not occur at the job evaluation level. The corporation used the same evaluation system to rate the value of sex-segregated jobs to the company. As the Westinghouse Industrial Relations Manual explained: "The occupations or jobs filled by women are point rated on the same basis of point values . . . as are the jobs commonly filled by men. It is the job that is involved in the analysis, not the operator."¹⁶

After determining the point values of the various jobs, however, Westinghouse assigned lower wage rates to jobs held predominantly by females although they were of equal value as predominantly male jobs. The corporation explained that "[t]he gradient of the women's wage curve . . . is not the same for women as for men because of . . . general sociological factors Basically then, we have another wage curve . . . for women *below* and not parallel with the men's curve."¹⁷

The enactment of the Equal Pay Act and Title VII made such overt sex-based wage differentials for work of the same grade unlawful. In 1965, therefore, Westinghouse established a new system in which different wages were no longer assigned to male and female jobs within each pay grade. Instead of raising the wages for female jobs to the higher male standard, however, Westinghouse merely changed the grade numbers so that the female jobs received lower grade numbers. Thus, the premise of paying women less than men simply because they were women remained embedded in the Westinghouse system—even for jobs that the company itself had determined to be of equal worth as far back as 1939.

Westinghouse originally justified its system of lower pay for female workers on the basis of then current myths about "the more transient character of [women's service], the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, [and] extra help needed

of the Equal Pay Act. In *Westinghouse*, female plaintiffs claimed that the company intentionally set wage rates at a lower level for female-dominated jobs than for jobs in which male workers predominated, *id.* at 1096, even though the work was of comparable difficulty as determined by the company's own job evaluation system. *Id.* at 1097. The Third Circuit held that such facts, if proven, would constitute a violation of Title VII, and that Title VII was not limited to wage claims predicated on the failure to pay equal wages for equal work. *Id.* at 1099.

16. Brief of the EEOC and the United States as Amicus Curiae at 4, *International Union of Elec. Radio, & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980) (quoting Westinghouse Industrial Relations Manual (Feb. 1, 1939)). This manual was part of the record in *Westinghouse*. See *id.*

17. *Id.* at 4-5 (quoting Westinghouse Industrial Relations Manual (Feb. 1, 1939)) (emphasis added).

for the occasional heavy work.”¹⁸ Such assumptions about women workers, made forty-five years ago, help explain present employment practices that perpetuate both job segregation and sex bias in wage-setting procedures. The perception of women workers as housewives, interested in making only “pin money,” has long been discredited—it certainly is not valid today.¹⁹ Nor is there any basis for assuming that women workers are less qualified than male workers. Over the past decades, women have increasingly pursued higher education and broader training until, by 1981, the average female and male worker had attained the same educational level of 12.7 years.²⁰ Society’s reliance on stereotypes rather than on fact to determine present wages explains in large part why women as a group continue to suffer from wage discrimination.

B. *Discrimination in Wage-Setting Practices*

One of the central tenets of the American economic system is that jobs should be paid according to their relative worth—a result accomplished by ranking work according to an implicit or explicit scale. Almost every employer has a job evaluation system which fits jobs into a hierarchy.²¹

Studies of job evaluation plans reveal that jobs performed by women are not classified or described with the same care with which the wage structures in male jobs are classified. For example, in the Midwest Industrial Management Association Job Evaluation System, first developed in 1937 and still used today, the most important single factor in evaluating job worth for both shop and office workers is shop experience. Although formal education is clearly more important for workers in the predominantly female office jobs, this importance is

18. *Id.* at 4 (quoting Westinghouse Industrial Relations Manual (Feb. 1, 1939)).

19. There is no basis for the view that women workers provide only secondary wages. Currently, two-thirds of the female labor force work because they need to, either because they are single or, if married, because their husbands are unemployed or earn less than \$15,000 a year. 20 Facts, *supra* note 8, at 1. The multi-earner family has become a permanent feature of American life, if, in fact, it was not before.

20. *Id.* at 2. Increased education does not affect the wage gap. In 1981, women who completed college had an average income of \$12,085, while men who had completed only one to three years of high school earned \$11,936. *Id.* “When employed full time, year round, women high school graduates (with no college) had about the same income on the average as fully-employed men who had not completed elementary school—\$12,332 and \$12,886, respectively.” *Id.* at 2.

21. It is estimated that almost two-thirds of the adult working population in this country are pay-graded according to job evaluation schemes. Statement of Winn Newman, General Counsel, AFSCME, Before the House Subcomms. on Civil Rights, Human Resources, and Compensation and Employees Benefits 9 n.10 (Sept. 16, 1982) [hereinafter cited as Statement of Winn Newman] (available in files of *Fordham Law Review*).

not reflected in the point scale. Female office workers thus receive lower ratings than shop employees. Similarly, sex stereotyping of jobs is often seen in the "job knowledge" category essential to most evaluation plans. In the plan of a photography firm, a truck driver is considered to require twelve months of training while a typist needs only one month.²² "Were typists judged to require the same training time as truck drivers it would mean an increase of two full pay grades."²³

Job evaluation plans fail to disclose the extent of undervaluation of female jobs because the plans themselves segregate jobs according to the sex of the workers. Nurses, for example, are often given a separate scaling system. Yet, if a single scale included them with other workers, the extent of their underpayment would clearly be illustrated.²⁴ Job surveys in the states of Washington and Connecticut revealed that when predominantly female occupational fields such as health care and office support services were compared to predominantly male occupations such as maintenance work, the female groups were paid significantly less for the same number of rating points.²⁵

Those who complain that application of the comparable worth doctrine will impose radical changes in employment practices contend that it is impossible to compare the worth of dissimilar jobs for the purpose of setting wages—the so-called "apples and oranges" argument.²⁶ Such a position is disingenuous because American industry

22. Committee on Occupational Classification and Analysis, National Academy of Sciences, *Job Evaluation: An Analytic Review* 45 (1979) [hereinafter cited as *Job Evaluation*].

23. *Id.*

24. Nursing illustrates why supply and demand does not control wages in some traditionally female jobs. Instead of solving the perpetual nursing shortage by raising salaries, many health care employers have recruited lower paid foreign nurses. For example, at St. Luke's Hospital in Milwaukee, Wisconsin, instead of increasing salaries for nurses while experiencing a shortage of nurses, the hospital appropriated money to recruit nurses from England, Scotland and Ireland. The Immigration and Naturalization Service was persuaded to permit the nurses to enter the country, but they were not offered more money so as not to disturb "the domestic labor market." Statement of Winn Newman, *supra* note 21, at 6.

25. In a Washington state study, "[t]he pay rates for female-dominated jobs averaged about eighty percent of pay rates for male-dominated jobs with the same number of job evaluation points." *Job Evaluation*, *supra* note 22, at 27. Similar disparities were found to exist in Connecticut. See State of Connecticut Objective Job Evaluation Pilot Study 18a-b, chart G, at 29, chart K, at 33-34 (Feb. 1980) [hereinafter cited as *Pilot Study*]. In both cases, the pay discrepancy increases as the number of points assigned rises, so that in lower-paid jobs women earn a greater percentage of what men do than in higher-paid jobs. *Job Evaluation*, *supra* note 22, figure 2, at 28; *Pilot Study*, *supra*, chart K, at 33.

26. Statement of Winn Newman, *supra* note 21, at 9; see Letter to the Editor, *Women's Work*, N.Y. Times, Jan. 29, 1984, § 3, at 29, col. 1; *A New Push to Raise Women's Pay*, N.Y. Times, Jan. 1, 1984, § 3, at 1, col. 3.

traditionally has introduced and relied on evaluation systems that rank dissimilar jobs.

While there have been some recent innovations in job evaluations,²⁷ it is significant that scant research has been done on the underlying sex-based assumptions of job ranking systems since large-scale wage inequities were discovered by the National War Labor Board during World War II.²⁸ As challenges to job evaluation systems increase, however, pressure will grow for employers to restructure their ranking procedures to reflect more accurately workplace reality rather than nineteenth century stereotypes.

III. THE EMERGENCE OF THE COMPARABLE WORTH DOCTRINE AS A VEHICLE TO CHALLENGE SEX-BASED PAY INEQUITIES

In the past decade, there have been pioneering efforts by a determined few to correct all aspects of discriminatory wage practices.²⁹

27. Women, Work, and Wages, *supra* note 3, at 83-87.

28. Job Evaluation, *supra* note 22, at xii. The growing debate over comparable worth has, in some circles, made it appear newly discovered. In fact, the legal, economic and practical aspects of comparable worth date back many years. For example, when women entered the workforce in large numbers in the periods of national emergency that occurred during the two World Wars, the government made efforts to equalize their wages. During World War I, the War Department issued General Order 13 which stated generally that wages for women should not be lowered when women rendered equal service. Vladeck, *The Equal Pay Act of 1963*, in Proceedings of New York University Eighteenth Annual Conference on Labor 381, 388 (T. Christenson ed. 1966). It is estimated that women added between 2 and 4 million workers to the First World War work force. *Id.* Women's active involvement in the work force was recognized in the post-war passage of the Civil Service Classification Act of 1923, ch. 265, 42 Stat. 1488 (repealed 1949)—a beginning of the effort to bring equity and order to federal recruiting, pay and personnel practices. The Act attempted to reclassify jobs so that they were paid on the basis of content. Vladeck, *supra*, at 389.

The massive need for women workers during World War II once again forced the government, through the War Labor Board, to confront the sex-based wage inequities unearthed when women replaced men at traditionally male jobs. In 1942, the War Labor Board issued General Order 16 enunciating its policy that wage differentials were improper in cases in which the work performed by women is comparable to that performed by men. *Id.* The Board wrote: "As part of [our effort we have] attempted to sweep from job classifications all meaningless references to race and sex. Rationally there is no 'female' job, as surely as there is no 'colored' job, occasional industrial practice to the contrary, notwithstanding. It is this orientation of the Board that makes it imperative that definitions of job classifications be objective, adequate, and above all, clear." *Id.* at 390 (quoting *Sex Differentials*, in War Labor Board Manual (Aug. 15, 1943)).

29. These include the impressive litigation efforts of Winn Newman, as counsel to the International Union of Electrical Workers (IUE) and AFSCME, and the organizing, collective bargaining and legal efforts on behalf of women workers undertaken by unions such as AFSCME, IUE, Service Employees International Union, and Communication Workers of America. See Newman & Vonhof, "Separate

The first gains made were in applying Title VII to sex-based wage discrimination and interpreting it to give women workers broader rights to challenge pay inequities than those granted by the EPA. These legal efforts culminated in the 1981 decision of the Supreme Court in *County of Washington v. Gunther*,³⁰ which cleared the way to claims challenging sex-based wage discrimination by an employer among workers performing dissimilar jobs of equal worth. While explicitly declining to address the issue of comparable worth,³¹ the Supreme Court in *Gunther* held that the sex-based wage discrimination claims under Title VII were not limited to those alleging identical work.³²

The major development following *Gunther* was the December 1983 decision of the District Court for the Western District of Washington in *AFSCME v. State of Washington*.³³ The court found that the state's wage-setting system discriminated against its female employees and awarded nearly one billion dollars in wage increases and back pay. Although perhaps most correctly characterized as an intentional discrimination case, the decision is of enormous significance in the development of the comparable worth doctrine. Using the employer's own comparison of jobs as the basis for its decision, the court found discriminatory a compensation system that had the effect of paying women less than men in jobs that were dissimilar, but that were determined by the employer to be of equal worth. By utilizing the state's own job evaluation study, the court determined that the state was obligated to take steps to correct clearly substantiated inequities. The court found that the state could not allow the effects of past discrimination to continue as a determining factor for wages.³⁴

As demonstrated by the controversy following the ruling, the legal doctrine of comparable worth is just beginning to emerge. The *AFSCME* case stands as the first to confront squarely the effects of historic discrimination upon women's present wages. Increased adher-

but Equal"—*Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. Ill. L. Rev. 269, 317-22.

30. 452 U.S. 161 (1981).

31. *Id.* at 166.

32. *Id.* at 181.

33. 33 Fair Empl. Prac. Cas. (BNA) 808 (W.D. Wash. 1983).

34. In reaching his decision, Judge Tanner followed the Supreme Court's decision in *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), in ruling that the cost of complying with Title VII did not constitute a defense available to the employer. 33 Fair Empl. Prac. Cas. (BNA) at 814. It should be noted that the Supreme Court has also held that the marketplace cannot justify wage discrimination. *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974); see Note, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 Calif. L. Rev. 730, 752-53 (1983).

ence to the principle of comparable worth could finally erase these effects and bring women workers the wage equality that previous efforts have been unable to deliver.

CONCLUSION

In placing the debate over comparable worth in some historical perspective, we should refer to America's experience in World War II, when the desperate shortage of men caused employers to accept women in jobs that had been exclusively male. For at least a short period of time, there were no male jobs or female jobs; there were only jobs. Women worked in the shipyards, in aircraft factories and in many other areas that had been male enclaves. Sex segregation of jobs gave way to compelling need, ultimately proving that jobs by definition are neither male nor female. While the need for equalization of male and female wages may not seem as pressing in the absence of the drama of a war, the social need to abolish irrational and illegal treatment of women workers in a time when almost half our work force is female is as urgent as the need to keep our factories running in wartime.

The notion that time will take care of the problem, and that women should be patient, consigns working women to frustration and poverty, and blights the lives of their children. The clamorous resistance to the concept of comparable worth is only a new version of the century-old argument of managers who prefer a cheap supply of labor. We must not wait for another national emergency before we confront the continuing injustice of treating women workers as women, rather than as workers.