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County of Washington v. Gunther: The Supreme Court Provides a Title VII Remedy for Victims of Intentional Sex-Based Wage Discrimination

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COUNTY OF WASHINGTON V. GUNThER: THE SUPREME COURT PROVIDES A TITLE VII REMEDY FOR VICTIMS OF INTENTIONAL SEX-BASED WAGE DISCRIMINATION

During the early 1960's, dramatic steps were taken to ensure equal employment opportunities for women. The 88th Congress served as the catalyst behind these advances through its enactment of two statutes which today form the major federal law prohibiting sex-based employment discrimination. In 1963, the 88th Congress passed the Equal Pay Act, which prohibits wage discrimination on the basis of sex. One year later, Congress enacted Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against individuals in any aspect of the employment process where such discrimination is based on the employee's "race, color, religion, sex, or national origin."


3. 42 U.S.C. § 2000e-2(a) (1976). The relevant proscriptions of Title VII read as follows:

   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment...
A prima facie violation of the EPA occurs when an employee is paid less than an employee of the opposite sex for equal work in the same establishment. Courts have held that in order to satisfy this equal work standard, the plaintiff must show that he or she was performing a job “substantially equal” to that being performed by an employee of the opposite sex. However, the employer may rebut this prima facie case by asserting one of the EPA’s four affirmative defenses. These defenses allow a pay differential if it is either made pursuant to a seniority, merit, or piecework system, or based on any factor other than sex.

Under Title VII, a prima facie sex discrimination case may be established upon one of two general theories: “disparate treatment” or “disparate impact.” A prima facie disparate treatment case is established by showing that an employer has treated some individuals less favorably than others because of their sex. Under the disparate impact theory, a prima facie case is established by showing that a facially neutral employment practice is sexually discriminatory in application.
The EPA is narrower than Title VII because it only proscribes wage discrimination, whereas Title VII applies to all facets of the employment process, including hiring and promotion. The coverage of these statutes overlaps in the area of sex-based wage discrimination, however, since individuals whose wages have been discriminatorily depressed because of their sex may sue under either the EPA or Title VII. Presumably, plaintiffs could sue under Title VII and circumvent both the EPA's equal work requirement and its four affirmative defenses. In an effort to harmonize the two statutes, Senator Bennett proposed, and Congress adopted, a clarifying amendment to Title VII prior to its passage. The Bennett Amendment provides that, under Title VII, an employer may lawfully differentiate upon the basis of sex in setting employee wages if such differentiation is "authorized" by the EPA.

Ironically, this amendment, which was intended to clarify the scope of Title VII's sex-based wage discrimination coverage, has posed grave problems of interpretation for the courts. Specifically, the question has been whether a sex-based wage discrimination suit may be brought under Title VII even though it does not satisfy the EPA's standard of substantially equal work. In County of Washington v. Gunther, the Supreme Court answered this question affirmatively. However, the Court explicitly left open the issue whether such a suit may be maintained under circumstances other than where intentional sex discrimination is proven by direct evidence.

13. The Bennett Amendment provides:
It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [i.e., the EPA].
14. See Part II infra.
16. Id. at 2254. The Court thus left open the complex and volatile issue of "comparable worth," which would entitle female plaintiffs to Title VII relief where they could show that male employees performing comparable, although not necessarily equal, jobs were paid a
Alberta Gunther and three of her female colleagues were jail matrons at the Washington County (Oregon) jail. They brought a Title VII action against the county, alleging that they were denied equal pay for work substantially equal to that performed by male guards, or in the alternative, that, even if the work was not substantially equal, some of the discrepancy in their wages was the result of intentional sex discrimination. The district court found that the male and female jobs were not substantially equal, and then held as a matter of law that a sex-based wage discrimination claim could not be brought under Title VII unless it satisfied the equal work standard of the EPA.

The United States Court of Appeals for the Ninth Circuit affirmed in part, holding that the district court's factual finding that the jobs lacked higher salary. The leading article advocating comparable worth is Wage Discrimination, supra note 8. Professor Blumrosen's article points out that many jobs are now segregated on the basis of sex, and of these jobs, the lower-paying ones tend to be held by women. Blumrosen's thesis is that the lower wages are not entirely the result of legitimate factors; instead, some of the low wages can be explained only by the fact that they have been discriminatorily depressed because the jobs are occupied by women. Professor Blumrosen then argues that a showing of job segregation should justify an inference of discriminatorily depressed wages, and thus prima facie entitle the plaintiff to a remedy. Strictly speaking, Blumrosen's model would not require a court to compare the value of unequal jobs, but she does suggest such a comparison as one possible way to measure the damages. Furthermore, the employer would often want to compare the value of unequal jobs in an attempt to rebut Blumrosen's inference that the female jobs are discriminatorily underpaid. Not all commentators have accepted Blumrosen's model as consistent with Title VII theories of liability. See, e.g., Nelson, Opton and Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. Mich. J.L. Ref. 231 (1980) (arguing against Blumrosen's thesis). But see Blumrosen, Wage Discrimination and Job Segregation: The Survival of a Theory, 14 U. Mich. J.L. Ref. 1 (1980) (responding to the Nelson, Opton and Wilson article).


18. 20 Fair Empl. Prac. Cas. at 791. Plaintiffs also alleged that the county violated § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) (1976), by abolishing their jobs in retaliation for their equal pay suit. The district court rejected this claim, and the Ninth Circuit affirmed. This issue was not before the Supreme Court. See County of Washington v. Gunther, 101 S. Ct. at 2245 n.4.

19. 20 Fair Empl. Prac. Cas. at 791. The basis for the court's finding that the jobs lacked substantial equality was that the male guards were responsible for more than 10 times as many prisoners as were the female matrons. Thus, much of the matrons' time was spent performing less valuable clerical work. Id.

20. Id.
substantial equality was "not clearly erroneous," and therefore should not be overturned. However, the Ninth Circuit reversed the district court's holding that a sex-based wage discrimination claim was barred under Title VII unless, as required by the EPA, a showing of substantial equality was made. The court remanded the case, instructing the district court to hear the plaintiffs' evidence that part of the wage discrepancy was attributable to sex discrimination. The Ninth Circuit subsequently denied the county's petition for rehearing.

In its supplemental opinion denying rehearing, the court made it clear that it had not adopted a comparable worth theory. It emphasized that a showing that the jobs performed by the plaintiffs were of comparable value to those performed by male guards would not be sufficient to entitle the plaintiffs to relief under Title VII. The court, however, failed to specify what further showing was required. The county obtained a writ of certiorari, and the Supreme Court affirmed the Ninth Circuit's decision, holding that a showing of substantial equality was not a prerequisite to a Title VII suit in which the plaintiffs sought to prove by direct evidence that their wages had been discriminatorily depressed on account of their sex. According to the Court, the Bennett Amendment did not incorporate the EPA's equal work requirement into Title VII sex-based wage discrimination cases. However, the Court took great care to note that it was not deciding the propriety of a Title VII claim based on comparable worth. The four dissenters criticized the majority's interpretation of the Bennett Amendment, arguing that the legislative history demonstrated that Congress had meant to incorporate the EPA's equal work requirement into Title VII suits alleging sex-based wage discrimination.

This Note will discuss the legislative history surrounding the congressional response to sex-based wage discrimination, and the lower courts' interpretations of the Bennett Amendment. It will focus upon the Supreme Court's recent decision in Gunther, and demonstrate that the case

21. Gunther v. County of Washington, 602 F.2d 882, 887 (9th Cir. 1979), aff'd, 101 S. Ct. 2242 (1981). This standard for appellate court review is consistent with FED. R. CIV. P. 52(a) which states in pertinent part that "[f]indings of fact shall not be set aside unless clearly erroneous. . . ."
22. 602 F.2d at 891.
23. Id.
25. 623 F.2d at 1321.
28. Id. at 2246, 2253-54.
29. Id. at 2254 (Rehnquist, J., dissenting).
was correctly decided, albeit inadequately reasoned. Finally, the Note will examine the impact of *Gunther* on the future of Title VII sex discrimination litigation.

I. CONGRESSIONAL REGULATION OF SEX-BASED WAGE DISCRIMINATION: A LOOK AT THE CONFUSING LEGISLATIVE HISTORY

A. The EPA's Requirement of Equal Work

From 1945 through 1963, bills regarding sex-based wage discrimination had been introduced into every Congress. In 1962, the House Committee on Education and Labor reported a bill which would have required equal pay for *comparable* work. When the bill reached the House floor, Representative St. George introduced an amendment to replace the comparable work language in the bill with a provision requiring equal pay for *equal* work.

With backing from the Kennedy Administration, the sponsors of the original comparable work bill urged the House to reject the St. George Amendment. Their efforts proved unsuccessful, and the House passed a bill requiring equal pay for equal, not comparable, work. Although the Senate also passed an equal pay for *equal* work bill in 1962, there were minor differences between the two versions and the 87th Congress adjourned before those differences could be worked out.

In the following year, equal pay legislation that specifically retained the equal work requirement of the St. George Amendment was reintroduced.

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32. 108 Cong. Rec. 14767 (1962). Rep. St. George explained her purpose as follows:

> What we want to do in this bill is to make it exactly what it says. It is called equal pay for equal work in some of the committee hearings. There is a great difference between the word “comparable” and the word “equal.” . . . The word “comparable” opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes.

*Id.*

33. *Id.* at 14768-69. The support of the Kennedy Administration was made clear by a letter from Labor Secretary Goldberg, stating that “[c]omparable’ is a key word in our proposal.” *Id.* at 14768.

34. The House passed H.R. 11677 on July 25, 1962. *Id.* at 14782.

35. *See, e.g.*, 109 Cong. Rec. 9195 (1963) (statement of Rep. Powell recounting that equal pay bills had been passed by both the House and Senate in 1962, but that equal pay legislation was not enacted due to failure to reconcile the differences between the two versions); *Id.* at 9204 (statement of Rep. Pepper to the same effect).
into the House. Representative Goodell noted that the change from comparability to equality was a deliberate effort to narrow the scope of the bill. Goodell emphasized that his bill was not intended to allow the comparison of unequal jobs.

Other House members, commenting on similar bills, were equally vehement in rejecting a comparable work standard. Representative Frelinghuysen stressed that the equal pay bill was "not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different." Representative Griffin agreed, and gave the example that the jobs of inspector and assembler could not be compared under the proposed legislation.

On May 23, 1963, the House passed an equal pay bill. After concurrence by the Senate, it became the Equal Pay Act, a supplemental amendment to the Fair Labor Standards Act of 1938. As the legislative history demonstrates, Congress intended a narrow construction of the EPA to require employers to pay their employees equally only for work substantially equal in nature. Furthermore, Congress tempered the EPA by establishing four affirmative defenses to any action brought under it.

B. Title VII: Remedy for Sex Discrimination as an Afterthought

Title VII of the Civil Rights Act of 1964 was initially designed to put an end to discrimination in employment based on "race, color, religion, or national origin." It did not include a prohibition against discrimination

38. Id.
39. Id. at 9196.
40. Id. at 9197.
41. See 109 Cong. Rec. 9217-18 (1963). The bill finally passed by the House was an amended version of H.R. 6060. Id. at 9218. H.R. 6060 had been the equal pay bill reported out by the House Committee on Education and Labor. See (1963) U.S. Code Cong. & Ad. News 687.
42. The Senate adopted the language of the House bill, and it was this bill that became the EPA. See (1963) U.S. Code Cong. & Ad. News 687.
43. See note 1 supra. The Fair Labor Standards Act (FLSA) was enacted to guarantee certain adequate working conditions for covered employees. Its protections include the establishment of a minimum wage (29 U.S.C. § 206(a) (1976)) and maximum working hours (29 U.S.C. § 207 (1976)). Rather than enacting separate legislation, the 88th Congress decided to pass the EPA as a supplemental amendment to the FLSA. This allowed Congress to apply the provisions of the FLSA regarding enforcement and employer coverage to the EPA. See (1963) U.S. Code Cong. & Ad. News 687, 688.
44. See notes 6-7 and accompanying text supra.
based upon sex until late in the House floor debate when Representative Smith proposed amending Title VII to include a proscription of sex discrimination in the employment process.\textsuperscript{46} The House passed the amendment that same day,\textsuperscript{47} and passed the entire bill two days later.\textsuperscript{48} In an effort to expedite the enactment of the civil rights legislation, the Senate dealt with the House version without first referring it to committee.\textsuperscript{49}

The House thus added the proscription against sex discrimination in Title VII at the last minute, and both the House and Senate considered it without the benefit of prior committee hearings and reports. Consequently, Congress had focused little attention upon the interrelationship of the EPA and Title VII with regard to sex-based wage discrimination. Senator Clark quickly recognizing this weakness, attempted to rectify any possible inconsistencies between the two statutes by inserting a memorandum into the \textit{Congressional Record}. In pertinent part, this memorandum stated: "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under [T]itle VII."\textsuperscript{50}

Senator Clark's memorandum does little to clarify the problem of whether Title VII sex-based wage discrimination suits require a showing of equal work. Its meaning depends on how broadly one defines a "comparable situation" under Title VII. These words can be defined to mean that the only sex-based wage discrimination claims which can be brought under Title VII are those involving equal pay for equal work. However, an equally plausible interpretation is that Senator Clark intended only that the EPA standards would control where an equal work claim was made, and did not intend that intentional sex-based wage discrimination claims be limited to situations where the plaintiff could prove that a member of the opposite sex held an equal job. In any event, Senator Clark's memorandum is of uncertain value since it was written over two months before the introduction of the Bennett Amendment, which was the official attempt

\textsuperscript{46} 110 \textit{Cong. Rec.} 2577 (1964). Smith's motives for adding sex discrimination to Title VII have been questioned. Some commentators suggest that Smith, an outspoken critic of Title VII, added the sex amendment in an attempt to block passage of the entire bill. \textit{See}, \textit{e.g.}, Kanowitz, \textit{Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963}, 20 \textit{Hast. L.J.} 305, 310-13 (1968); Miller, \textit{Sex Discrimination and Title VII of the Civil Rights Act of 1964}, 51 \textit{Minn. L. Rev.} 877, 880-83 (1967).

\textsuperscript{47} 110 \textit{Cong. Rec.} 2584 (1964).

\textsuperscript{48} \textit{Id.} at 2804-05.

\textsuperscript{49} 20 \textit{Cong. Q. Almanac} 354 (1964).

\textsuperscript{50} 110 \textit{Cong. Rec.} 7217 (1964).
by Congress to clarify the relationship between Title VII and the EPA.\footnote{110 CONG. REC. 13647 (1964).} 

C. The Bennett Amendment: More Ambiguity

The Bennett Amendment was introduced in 1964 during the Senate debate on Title VII. It provides that pay differentials based on sex, if authorized by the EPA, are not unlawful.\footnote{Id.} Senator Bennett introduced his amendment onto the floor with the stated purpose of ensuring that the provisions of the EPA were not “nullified” by passage of Title VII.\footnote{Senator Bennett’s comments were as follows:}

“Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word “sex” has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word “sex” in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand \[sic\], I shall ask that the amendment be voted on without asking for the yeas and nays.

\textit{Id.} \footnote{Id. It is not clear whether “technical” should be interpreted to mean insignificant. See the contrasting interpretations of the majority and dissent in County of Washington v. Gunther, 101 S. Ct. at 2250 (majority); \textit{id.} at 2259 n.5 (dissent).}
tic thoughts on the amendment noting that the Fair Labor Standards Act contained certain "exceptions" and that all the Bennett Amendment did was recognize those exceptions. The meaning of this statement is far from clear since the word "exceptions" is ambiguous. One possible interpretation is that "exceptions" refers to the exemptions from the coverage of the Fair Labor Standards Act granted to certain businesses. Under this interpretation, the Bennett Amendment would ensure that EPA standards (including the equal work requirement) apply to sex-based wage discrimination cases brought under Title VII, even though the EPA itself might be inapplicable. Another possibility is that "exceptions" refers to the four affirmative defenses contained in the EPA, and that Senator Dirksen was concerned with preserving these defenses in actions brought under Title VII.

The final significant piece of pre-passage legislative history is a statement by Representative Celler, explaining the Bennett Amendment to his colleagues in the House of Representatives prior to their vote on the bill. Celler stated that the amendment "provides that compliance with the Fair Labor Standards Act as amended [the EPA] satisfies the requirement of the title barring discrimination because of sex [Title VII]." A literal interpretation of this comment would render Title VII a nullity with regard to sex discrimination. Such an interpretation could result in the anomalous situation of allowing an employer who blatantly violates Title VII by refusing to hire women to avoid liability by showing "compliance" with the EPA provisions, which do not extend to discrimination in hiring. Thus, Celler's comments supplement the already confusing legislative history surrounding the Bennett Amendment.

Soon after the enactment of Title VII, a commentator pointed out that the Bennett Amendment had not satisfactorily clarified the relationship between Title VII and the EPA, since the amendment was itself ambigui-

56. As previously noted, the EPA is an amendment to the Fair Labor Standards Act. See note 43 and accompanying text supra.
57. 110 Cong. Rec. 13647 (1964). Senator Dirksen's full statement was:

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

Id.
58. For example, the EPA does not apply to employers engaged in retail sales, fishing, agriculture, and various other occupations. See 29 U.S.C. § 213 (1976).
59. See note 1 supra.
60. 110 Cong. Rec. 15896 (1964).
In a final effort to convey the import of his amendment, Senator Bennett inserted an explanatory statement into the Congressional Record. Bennett argued that his amendment allowed employers who were exempt from the EPA to avoid sex-based wage discrimination suits under Title VII as well. Senator Dirksen agreed with Senator Bennett that this was the interpretation he and Senator Humphrey had in mind when the Senate added the amendment. Senator Clark, however, criticized Senator Bennett for introducing ex post facto legislative history. Nevertheless, he placed into the Congressional Record a letter from the Chairman of the National Committee for Equal Pay which stated that an employee outside the EPA's coverage was not barred from suing under Title VII by virtue of the Bennett Amendment. Senator Clark commended the reasoning in this letter.

In 1977 a Senate committee reporting on amendments to Title VII created additional post-passage legislative history. The committee explained that the Bennett Amendment authorizes only those pay differentials which can be supported by one of the EPA's four affirmative defenses. However, the report suffers from the same defect as the post-passage comments of Senators Bennett, Dirksen, and Clark. Retrospective legislative history is always suspect, and in light of the contradictory nature of these statements, they should be viewed accordingly.

The final materials bearing on the meaning of the Bennett Amendment are the guidelines issued by the Equal Employment Opportunity Commission (EEOC), the federal agency entrusted with the enforcement of Title VII. The EEOC's initial guideline interpreted the Bennett Amendment

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63. Id.
64. Id. at 18263. In pertinent part, Senator Clark commented as follows: Mr. President, as all senators know, legislative history cannot be written after the fact. . . . [T]he intent of Congress in enacting particular legislation must be discovered from the words of the enactment themselves, and through explanatory colloquy prior to the enactment if such is available, but never through explanations made on the Senate floor long after enactment.
65. 111 CONG. REC. at 18263.
as applying the EPA's equal work standard to sex-based wage discrimination cases brought under Title VII.69 Furthermore, the original guideline was followed in several opinion letters written by the EEOC's acting general counsel.70 However, in 1972, the EEOC promulgated a new guideline, still in effect today, which eliminated the language of the original guideline that the equal work standard applied to Title VII cases.71 Although the current guideline does not discuss whether the Bennett Amendment incorporates the equal work standard into Title VII, the EEOC filed an amicus curiae brief in Gunther maintaining that the equal work standard was not so incorporated.72

Once again, it is unclear what significance should be given to these guidelines in light of their conflicting nature. Although the Supreme Court has noted that EEOC interpretations of Title VII are entitled to "great deference,"73 the Court has also stated that EEOC guidelines which contradict an earlier position taken by the agency are entitled to little weight.74

II. THE LOWER COURTS' RESPONSES TO THE BENNETT AMENDMENT

In response to this confusing legislative history, the federal courts have

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69. 29 C.F.R. § 1604.7 (1966).
70. See, e.g., Acting General Counsel's Memorandum of June 6, 1967, App. to Brief for Petitioners at 21a-22a, County of Washington v. Gunther, 101 S. Ct. 2242 (1981), which states:

Differentiations which are authorized under [the Bennett Amendment] are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.

It is the interpretation of these provisions that requires harmonization between Title VII and the Equal Pay [Act], because these are the provisions which, within the meaning of [the Bennett Amendment], "authorize" differentiations.
71. 29 C.F.R. § 1604.8 (1980). The present guideline reads as follows:

Relationship of title VII to the Equal Pay Act.
(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.
(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.
developed two distinct views as to the effect of the Bennett Amendment on the ability of a plaintiff to bring a sex-based wage discrimination claim under Title VII.75 These views will be referred to as the substantive overlap theory76 and the four defenses theory.

Courts adopting the substantive overlap theory have held that the substantive provisions of the EPA (equal pay for equal work and the four affirmative defenses) are incorporated into Title VII sex-based wage discrimination cases but that EPA procedural requirements, such as its employer coverage, are not. It is unclear how many of the circuits actually subscribed to this theory prior to the Supreme Court's decision in Gunther. The Courts of Appeals for the Fifth, Eighth, and Tenth Circuits had all stated that a Title VII sex-based wage discrimination claim could not be maintained absent a showing of equal work.77 However, in none of these cases was the court faced with the question whether a plaintiff who had proven intentional sex discrimination could maintain a wage discrimination suit without showing that she performed work substantially equal to that of male employees who were paid more.78

75. Initially, a third construction was possible. Courts could have given a broad construction to the Bennett Amendment and held that an employer who did not run afoul of the EPA could not be sued under Title VII for sex-based wage discrimination. The result of this would have been that an employer who was covered by Title VII, but exempt from the EPA, would be free to discriminate against women in the setting of wages even though that same employer would be required to hire and promote women in a nondiscriminatory manner. Due perhaps to this anomalous result, no court has ever adopted this theory although Senator Bennett later suggested that this was what he had in mind when he introduced his amendment. See text accompanying note 62 supra.


78. Lemons v. City and County of Denver, 620 F.2d 228, 229 (10th Cir.), cert. denied, 101 S. Ct. 244 (1980) (plaintiffs proceeded solely on a comparable worth theory; they did not allege intentional sex discrimination); Di Salvo v. Chamber of Commerce, 568 F.2d 593, 597 (8th Cir. 1978) (plaintiff showed equal work, so any discussion of the consequences of failing to show equal work is dicta); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 171 (5th Cir.), cert. denied, 423 U.S. 865 (1975) (plaintiff alleged, but failed to prove, intentional discrimination).

The possibility that these courts may have used broader language than they would have had they been faced with proven intentional sex discrimination is demonstrated by two Tenth Circuit cases. In Lemons, the Tenth Circuit held that the EPA's equal work requirement was incorporated into Title VII, and thus dismissed a comparable worth claim. 620 F.2d at 229-30. However, in the previous case of Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980), the court had allowed a claim of intentional sex-based wage discrimination even though the plaintiff did not satisfy the equal work requirement. 624 F.2d
The case which came closest to barring victims of intentional sex discrimination from a remedy because they had failed to show equal work was *Stastny v. Southern Bell Telephone and Telegraph Co.*\(^7^9\) In *Stastny*, the plaintiffs alleged that they had been discriminatorily underpaid because of their sex, and the district court granted relief under Title VII.\(^8^0\) However, on appeal, the Fourth Circuit dismissed the claim, stating that the failure of the female employees to show that they performed work substantially equal to that performed by male employees "constitute[d] a total failure of proof."\(^8^1\) While this broad language would seem to indicate that it followed the substantive overlap theory, the court was extremely vague about whether it interpreted the complaint as alleging intentional sex discrimination or merely a denial of equal pay for comparable work. The Fourth Circuit's position was further clouded by the fact that in a previous case, it had implied in dictum that an intentional sex-based wage discrimination claim could be brought under Title VII without a showing of equal work.\(^8^2\)

The other construction of the Bennett Amendment which federal courts have adopted is the four defenses theory. Under this theory, the Bennett Amendment merely incorporates the EPA's four affirmative defenses (and not the equal work requirement) into Title VII suits involving sex discrimination in the setting of wages. Until the Ninth Circuit's opinion in *Gunther*, no circuit had accepted this theory in anything other than dictum.\(^8^3\) After the Ninth Circuit announced *Gunther*, two other courts of appeals based decisions on this theory. In both *Fitzgerald v. Sirloin Stockade*,

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at 953. *Fitzgerald* is discussed further in the text accompanying notes 86-89 infra. Interestingly, not even once was *Fitzgerald* referred to in *Lemons*.

79. 628 F.2d 267 (4th Cir. 1980).

80. *Id.* at 271.

81. *Id.* at 281.

82. See EEOC v. Aetna Ins. Co., 616 F.2d 719, 724 n.5 (4th Cir. 1980). *Aetna* was brought under the EPA and, therefore, did not involve Title VII or the Bennett Amendment. Nevertheless, the Fourth Circuit gratuitously added the following footnote:

Both the Equal Pay Act and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, protect workers against sexual discrimination in employment. The EPA, however, is more limited in scope, applying only to claims of unequal pay for equal work based upon sex. Title VII is broader and affords a worker the opportunity to challenge other discriminatory compensation practices. Section 2000e-2(h) specifically provides that the four exemptions in the EPA apply to actions brought pursuant to Title VII which claim sexual discrimination in wages or compensation paid or to be paid.

*Id.* (citing the Ninth Circuit's original opinion in *Gunther*).

83. See, e.g., Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) (a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act).
Sex-Based Wage Discrimination

Inc. and IUE v. Westinghouse Electric Corp., the courts allowed claims of intentional sex-based wage discrimination even though the female plaintiffs did not perform jobs equal to those performed by men.

In Fitzgerald, the plaintiff brought suit under Title VII, alleging that her employer had consistently refused to pay her the same salary it would have paid to a male for equal work. However, since she occupied a unique job, she could not allege that men were being paid more for substantially equal work. The district court nevertheless granted the plaintiff relief and the employer appealed, asserting that the Bennett Amendment incorporated the equal work requirement into Title VII. In rejecting this argument and affirming the district court, the Tenth Circuit held that only the EPA's four affirmative defenses were incorporated into Title VII.

The facts of Westinghouse were more complicated, but the rationale underlying the court's decision was the same. During the 1930's, Westinghouse had segregated the jobs in one of its plants by sex and intentionally depressed the wages for job categories occupied by women. At the time of the suit, jobs were no longer explicitly segregated by sex, but de facto segregation existed and the salaries for those jobs occupied primarily by females remained depressed. The plaintiffs, workers in jobs predominantly occupied by women, sought Title VII relief from Westinghouse's present salary structure, which they alleged embodied the prior intentional discrimination. The district court granted the defendant's motion for summary judgment since the plaintiffs did not make a showing of equal work. The Third Circuit reversed, holding that the Bennett Amendment incorporated only the EPA's four affirmative defenses, and not the equal work requirement, into Title VII. Thus, the court aligned itself with those circuits following the four defenses theory.

84. 624 F.2d 945 (10th Cir. 1980).
86. 624 F.2d at 950.
87. Id. at 953. The plaintiff worked in the advertising department, id. at 949-50, performing a job that was unique because it was dissimilar from those of her predecessor or any of her current co-workers.
88. Id.
89. Id.
90. 631 F.2d at 1097.
91. Id.
92. Id.
93. Id. at 1096.
94. Id. at 1099.
III. County of Washington v. Gunther: The Supreme Court Provides a Partial Answer

A. The Four Defenses Theory Prevails

The issue before the Supreme Court in Gunther was whether the Bennett Amendment precluded a Title VII claim of intentional sex-based wage discrimination. The plaintiff-respondents argued that they should be allowed to present direct evidence showing that the county had intentionally depressed their wages because of their sex.\(^9\) Conversely, the county petitioned the Supreme Court to dismiss respondents' claims, contending that the Bennett Amendment was designed to prevent plaintiffs from avoiding the EPA's equal work requirement by filing suit under Title VII.\(^6\)

The majority of the Supreme Court agreed with the respondents and adopted the four defenses theory. The Court thus allowed a Title VII claim of intentional sex-based wage discrimination to go forward even though the female plaintiffs did not perform work equal to that performed by men. In contrast, the four dissenters adopted what has been referred to in this Note as the substantive overlap theory, arguing that a Title VII claim of sex-based wage discrimination should be barred unless the plaintiff satisfies the equal work requirement of the EPA.

The majority commenced its search for congressional intent by looking to the language of the Bennett Amendment, which provides that wage differentials do not violate Title VII if they are "authorized" by the EPA.\(^9\) The majority stated that the word "authorize" denotes some "affirmative enabling action," and reasoned that the only differentials authorized by the EPA are those allowed by its four affirmative defenses.\(^9\) However, it recognized that "authorize" could also mean simply "to permit."\(^9\) This latter definition would support the dissent's view that more than just the four affirmative defenses were incorporated into Title VII.

Having deciphered the language of the Bennett Amendment and having concluded that only the EPA's defenses are incorporated into Title VII, the majority then noted that "[t]he legislative background . . . is fully consistent with this interpretation."\(^10\) It first considered Senator Bennett's introductory statement that the amendment was designed to protect the EPA

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96. Id. at 2254 (Rehnquist, J., dissenting).
97. See note 13 supra.
98. 101 S. Ct. at 2247-49.
99. Id. at 2247.
100. Id. at 2249.
from being nullified by the passage of Title VII. The majority felt that the EPA would not be nullified if its defenses were incorporated into Title VII. Although implicitly acknowledging that Senator Bennett's statement could also be read to incorporate the equal work requirement into Title VII, the majority believed that the statement was "more compatible" with its interpretation that only the four affirmative defenses were so incorporated. This belief was buttressed by Senator Bennett's reference to his amendment as "technical," which the majority inferred to mean insignificant.

The majority next examined Senator Dirksen's comment that the Bennett Amendment merely recognizes certain exceptions carried out by the Fair Labor Standards Act (to which the EPA is an amendment). It decided that Senator Dirksen used the word "exceptions" in reference to the exemption of certain businesses from the Fair Labor Standards Act's coverage. The majority felt that Senator Dirksen's comment showed that he intended the EPA standards to govern even those sex-based wage discrimination claims that could only be brought under Title VII. The majority did not contend that this reading of Senator Dirksen's comment compelled the interpretation that it had already reached. Rather, the majority stated that such a reading was "not inconsistent" with its interpretation.

All other legislative history was dismissed by the majority as either "ha[ving] no bearing on the meaning of the . . . Bennett Amendment," "not provid[ing] a solution to the present problem," or being of "no weight." The Court mentioned the EEOC's varying interpretations, but

101. Id. at 2250.
102. Id.
103. Id.
104. See note 54 supra for the full text of Senator Bennett's comment.
105. 101 S. Ct. at 2250.
106. See note 57 supra for the full text of Senator Dirksen's comment.
107. 101 S. Ct. at 2251.
108. Id.
109. Id. Under the majority's reading, Senator Dirksen's comment does little to solve the problem of whether the EPA's equal work requirement is incorporated into Title VII. It shows that some of the EPA's standards are incorporated into Title VII, but does not specify which of these standards are so incorporated. Since Senator Dirksen placed no limitation upon which standards are incorporated, his statement more strongly supports the dissent's view that all of the substantive standards are incorporated.
110. Id. at 2249 n.12 (dismissing Senator Clark's memorandum because it predated the introduction of the Bennett Amendment).
111. Id. at 2251 (dismissing Rep. Celler's statements as imprecise).
112. Id. at 2251 n.16 (dismissing all post-Title VII passage legislative history).
relied on none of them.\textsuperscript{113} Finally, the majority noted that the remedial nature of both Title VII and the EPA supported its interpretation of the Bennett Amendment.\textsuperscript{114} The majority stated that courts should not interpret Title VII in a manner that deprives discrimination victims of a remedy, unless clearly directed by Congress to do so.\textsuperscript{115}

The dissent, on the other hand, prefaced its opinion with specific reliance on two canons of statutory construction. First, it said that “[i]t has long been the rule that when a legislature enacts a statute to protect a class of persons, the burden is on the plaintiff to show statutory coverage . . . .”\textsuperscript{116} Secondly, the dissent relied on a canon of statutory construction known as \textit{in pari materia},\textsuperscript{117} which holds that “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”\textsuperscript{118} Simply stated, implied repeals of legislation are disfavored. The dissent interpreted the \textit{in pari materia} doctrine to mean that the respondents could maintain their claim only by showing that Congress intended to repeal the equal work standard of the EPA when it enacted Title VII.\textsuperscript{119}

The dissent then examined the language and legislative history of the Bennett Amendment, and concluded that it was meant “to insure that the equal work standard would be the standard by which all wage compensation claims would be judged.”\textsuperscript{120} Because the respondents did not satisfy this standard, the dissent would have dismissed the claims of intentional sex discrimination.

\textbf{B. The Inadequacy of the Court’s Reasoning}

The majority based its holding on the rationale that “authorize” means an affirmative enabling action rather than mere permission.\textsuperscript{121} However, when one delves beneath the surface of the opinion, it becomes apparent that the majority did not reach its decision simply by referring to a dictionary. Instead, the thesis advanced here is that the majority’s holding was grounded in its policy determination that the remedial nature of Title VII

\textsuperscript{113} \textit{Id.} at 2251-52.
\textsuperscript{114} \textit{Id.} at 2252.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 2254 (Rehnquist, J., dissenting).
\textsuperscript{117} \textit{Id.} at 2255, 2257-58 (Rehnquist, J., dissenting).
\textsuperscript{119} 101 S. Ct. at 2258 (Rehnquist, J., dissenting).
\textsuperscript{120} \textit{Id.} at 2264 (Rehnquist, J., dissenting).
\textsuperscript{121} See notes 97-99 and accompanying text \textit{supra}. 
dictated the result.122

The majority's outward reliance on the dictionary as determinative of the issue in Gunther is evidenced by the structure of its opinion. Even prior to examining the legislative history, the majority had "conclude[d] that only differentials attributable to the four affirmative defenses of the Equal Pay Act are 'authorized' by that Act within the meaning of [the Bennett Amendment]."123 Thus, even though a great deal of the majority opinion focuses on the legislative history, it apparently was not relied upon as a basis for the decision.

Therefore, a superficial reading would lead one to believe that the decisive factor was the majority's definition of "authorize." However, since that word has two plausible definitions, and each points to a different conclusion, the majority's heavy reliance on lexical distinctions provides an insecure foundation for its decision. To complicate matters, the legislative history is of little help in ascertaining the congressional intent behind the Bennett Amendment. Both the majority and dissent admitted that the Bennett Amendment is ambiguous,124 and indeed it is likely that the 88th Congress did not even contemplate the type of situation presented in Gunther.

When the problem is viewed in this light, it seems possible that the determinative factor was actually the Court's policy decision as to which party should receive a presumption that its interpretation of the congressional intent behind the Bennett Amendment was correct. In a case where the congressional intent is ambiguous, the party with such a presumption in its favor will most often prevail. Unfortunately, such analysis must be somewhat speculative since there is little explicit mention of presumptions in either of the opinions. Instead, the majority did not fully confront the issue, and the dissent spoke in terms of canons of statutory construction. However, because such canons generally establish certain presumptions about legislative intent,125 one may argue that the adoption of a particular canon is tantamount to placing the burden of overcoming this presumption on one party or the other.

While the majority did not explicitly rely on a particular canon, it did

122. A noted authority on statutory interpretation states that "attitudes of judges toward legislation being construed, whether they be liberally or strictly disposed toward it, can have an important influence on how it is construed." 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 58.01, at 461 (4th ed. C. Sands 1973). As will be demonstrated, the Supreme Court's decision in Gunther testifies to the wisdom of this observation.
123. 101 S. Ct. at 2249.
124. Id. at 2247 (majority), 2259 (dissent).
125. See generally R. DICKERSON, supra note 67, at 228.
note in passing that it would “avoid interpretations of Title VII that de-
prive victims of discrimination of a remedy, without clear congressional
mandate.”

In other words, any ambiguity in the statute would be re-
solved in favor of the plaintiffs. Although the dissent criticized the major-
ity for “turn[ing] traditional canons of statutory construction on their
head,” the majority’s statement is actually quite consistent with tradi-
tional rules of construction. It is well accepted that the courts should liber-
ally construe civil rights statutes in order to effectuate their remedial
aims. This rule is further buttressed in this case by Congress’ specific
conclusion that a “broad approach” in defining equal employment oppor-
tunity is necessary to combat discrimination.

The majority cannot be faulted, therefore, for liberally construing Title
VII and, in effect, placing the burden on the defendant to show that Con-
gress meant to preclude certain victims of sex discrimination from ob-
taining a remedy. However, the majority may be criticized for failing to
properly acknowledge this as its rationale. As previously noted, the major-
ity ostensibly based its opinion on a literal definition of the word “author-
ize,” which even it admitted was susceptible of two meanings. Rather than
making a “fortress out of the dictionary,” the more sound approach
would have been for the majority to base the opinion upon its intention to
resolve any ambiguity against the defendant.

Although the purported basis for the majority’s opinion is somewhat
flawed, the dissent’s counterargument that plaintiffs should have the bur-
den of showing statutory coverage may be criticized as violative of the
congressional intent behind Title VII. If applied, this rule would conflict
with the canon that, due to the remedial nature of Title VII, female em-
ployees should be covered unless the defendant can show that Congress
intended otherwise. Conflicts between rules of statutory construction are
“the subjects of honest debate and the stuff of which decisions are
made.” In this case, Congress included sex discrimination among Title
VII’s proscriptions and intended for that statute to be construed liberally.

126. 101 S. Ct. at 2252.
127. Id. at 2254 (Rehnquist, J., dissenting).
128. See Gomez v. Toledo, 446 U.S. 635, 639 (1980) (“remedial legislation . . . is to be
construed generously to further its primary purpose.”). See also 3A J. SUTHERLAND, STAT-
130. 101 S. Ct. at 2262 n.10 (Rehnquist, J., dissenting) (quoting Cabell v. Markem, 148
F.2d 737, 739 (2d Cir.), aff’d, 326 U.S. 404 (1945)).
131. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.13, at 45 (4th
Thus, the usual practice of placing the burden on the plaintiff to show statutory coverage should give way to a rebuttable presumption that female employees are covered.

Furthermore, the dissent's application of the doctrine of in pari materia to the situation in Gunther was erroneous. The dissent interpreted this doctrine in a manner which placed the burden on the Gunther respondents to show that, in enacting Title VII, Congress intended to repeal the equal work standard of the EPA. However, allowing a Title VII claim of intentional sex-based wage discrimination without a showing of equal work does not imply repeal or nullify the EPA, any more than allowing a Title VII claim of sex discrimination in hiring does. Both are examples of situations not contemplated by the EPA. Thus, they may extend beyond the EPA, but they do not repeal or nullify it. Hence, the Gunther decision does not violate the doctrine of in pari materia.

IV. The Impact of Gunther and the Lingerling Issue of Comparable Worth

The ramifications of the Gunther decision are difficult to gauge. Although the dissent labelled it "virtually meaningless," the decision does have more significance than the dissent acknowledged. No longer is there any question whether the Bennett Amendment allows an employer to "willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or..." 

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132. That allowing Title VII sex-based wage discrimination suits in the absence of a showing of equal work does not imply repeal or nullify the EPA is made clear by examining a case in which the doctrine of in pari materia was correctly applied. In Morton v. Mancari, 417 U.S. 535 (1974), two federal statutes were at issue. The first statute was the Indian Reorganization Act of 1934, § 12, 25 U.S.C. § 472 (1976), which grants Indians an employment preference for jobs at the Bureau of Indian Affairs (BIA). The other statute was the Equal Employment Opportunity Act of 1972, § 11, 42 U.S.C. § 2000e-16(a) (1976), which prohibits race discrimination in most federal employment.

Non-Indian employees of the BIA brought suit, claiming that the 1934 act giving job preference to Indians at the BIA had been repealed by the 1972 act prohibiting employment discrimination by the federal government. Morton v. Mancari, 417 U.S. at 539. The Supreme Court rejected this argument, saying that implied repeals of legislation are disfavored. Id. at 549-51.

A comparison of Morton with Gunther demonstrates that the dissent's application of in pari materia in Gunther was inaccurate. In Morton, Indians had been granted a positive right to preferred treatment in the employment process. Had the Supreme Court interpreted the later act to prohibit such a preference, the earlier act would have been nullified. In contrast, the EPA does not grant employers a positive right to discriminate against employees who do not satisfy the equal work requirement. Thus, the EPA is not repealed or nullified by allowing a Title VII suit for intentional sex-based wage discrimination.

133. 101 S. Ct. at 2255 (Rehnquist, J., dissenting).
Catholics, Italians or Irish, or any other group protected by [Title VII]." 134

The Supreme Court has answered this question in the negative and, in so doing, elevated women to the position which they deserve under Title VII. Victims of intentional sex-based wage discrimination are now guaranteed a remedy regardless of whether they satisfy the EPA's stringent equal work requirement.

However, the dissent is correct in inferring that the most significant aspect of Gunther is the issue that the Court did not decide. The majority reserved ruling on exactly what proof was sufficient to establish a prima facie case of sex-based wage discrimination under Title VII absent a showing of equal work. 135 It specifically noted that it did not decide the propriety of a Title VII claim based on comparable worth. 136 The only guidance given by the majority in the area of sex-based wage discrimination under Title VII was that plaintiffs could "seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination . . . ." 137

Since the Court has never ruled on a comparable worth claim, the legal basis for such a claim shall briefly be examined. Most likely, a Title VII comparable worth claim would be brought under the disparate impact theory. 138 The allegation would be that, due to traditional patterns of discrimination, an employer's facially neutral practice of setting wages (e.g., paying the market rate) adversely affected a class protected by Title VII. Plaintiffs would have to establish this disparate impact by showing that they were paid less than others for work of a comparable value to the employer.

The four dissenters in Gunther explicitly rejected sex-based comparable worth. Moreover, the majority kept its opinion narrow enough to allow the possibility that some of its members may one day disapprove of the concept of sex-based comparable worth. The question which then arises is whether the Court could reject sex-based comparable worth while still remaining faithful to the majority's reasoning in Gunther.

Theoretically, the Supreme Court could reject sex-based comparable worth in one of two ways and still adhere to the Gunther reasoning. The first possibility would be the rejection of comparable worth in toto. In

135. 101 S. Ct. at 2246 n.8.
136. Id. at 2246.
137. Id.
138. See discussion of the disparate impact theory in note 10 and accompanying text supra.
other words, the Court could refuse to allow any of Title VII’s protected classes to assert a comparable worth claim. This seems unlikely since comparable worth is consistent with established Title VII principles.\footnote{Comparable worth, where based on the theory that an employer’s facially neutral practice has adversely affected a class protected under Title VII, seems fully consistent with the disparate impact theory.}

The second and more likely possibility would be for the Supreme Court to reject sex-based comparable worth by relying on the fourth affirmative defense of the EPA, which allows wage differentials if they are based on any “factor other than sex.”\footnote{See note 1 supra.} Under \textit{Gunther}, this defense is incorporated into Title VII sex-based wage discrimination cases.\footnote{101 S. Ct. at 2248-49.} It gives an employer great leeway in justifying facially neutral wage practices that have an adverse impact on women. For example, if an employer based his salary structure on the market rate, plaintiffs working in predominately female occupied jobs, who could show that this caused them to be paid less than their actual value to the employer, would establish a prima facie violation of Title VII. However, if the court finds the market rate to be a “factor other than sex,” then the difference between the plaintiffs’ value to the employer and their salaries would be permissible under \textit{Gunther}.\footnote{Note that it could be argued that sexual discrimination is built into the market to such an extent that the market rate cannot be considered a “factor other than sex.” \textit{Cf.} Washington Post, Sept. 2, 1981, at 1, col. 1 (government study finds that discrimination against women is “deeply embedded in the institutions and traditions of the labor market” and is the major reason why women are paid approximately 40% less than men).}

V. Conclusion

By allowing a Title VII action for intentional sex-based wage discrimination without a showing of equal work, the Supreme Court in \textit{Gunther} put an end to some of the confusion which had been steadily mounting among the federal circuits. Nevertheless, the scope of Title VII’s protection against sex discrimination in employment remains unclear. In refusing to specify the type of proof required for a sex-based wage discrimination claim to be upheld under Title VII, the Supreme Court has left it to the lower courts to develop a body of case law in this area one step at a time. Furthermore, although the Court interpreted the Bennett Amendment as incorporating the EPA’s four affirmative defenses into Title VII, a decision on the thorny issue of comparable worth was deferred to another day.

Despite all of these unanswered questions, the \textit{Gunther} decision remains significant. It ensures that victims of intentional sex discrimination will not be remediless. More importantly, it sends a strong signal to the busi-
ness community that intentional discrimination on the basis of sex will no longer be tolerated.

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