1-1-1990

Exorcising the Bugaboo of "Comparable Worth": Disparate Treatment Analysis of Compensation Differences Under Title VII

Mack Player
Santa Clara University School of Law

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Part of the Law Commons

Automated Citation
Mack Player, Exorcising the Bugaboo of "Comparable Worth": Disparate Treatment Analysis of Compensation Differences Under Title VII, 41 Ala. L. Rev. 321 (1990), Available at: http://digitalcommons.law.scu.edu/facpubs/746

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
EXORCISING THE BUGABOO OF "COMPARABLE WORTH": DISPARATE TREATMENT ANALYSIS OF COMPENSATION DIFFERENCES UNDER TITLE VII

Mack A. Player*

I. DEFINING THE ISSUE

A. Introduction

This Article is not going to advocate adoption of a comparable worth theory; nor is it going to attack comparable worth.1 That

---

1 Professor of Law, Florida State University, College of Law; A.B. 1962, Drury College; J.D. 1965, University of Missouri; LL.M. 1972, George Washington University.

The author thanks Jeanne M. L. Player, a member of the bars of Georgia, Florida, and the District of Columbia for her critical reading of the manuscript, and for her many suggestions concerning style and substance, most of which became part of the final product.


See also Cox, Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther, 22 Duq. L. Rev. 65, 95 (1983):

It cannot be said that there is a single identifiable legal theory of "comparable worth." Rather, there are distinct theories which share common themes. As the comparable worth label implies, one such common theme is that compensation is to be based upon the relative value of distinct and unequal work. A second common theme
issue is joined elsewhere. This Article will assume that the mere subjective judgment of the comparable worth of objectively dissimilar jobs is insufficient, standing alone, to state a Title VII claim, and that such a theory, regardless of merit, is unlikely to receive judicial acceptance. What this Article will suggest is a coherent analysis under Title VII of the 1964 Civil Rights Act of the relative burdens the parties must carry in addressing the issue of the employer’s motive for compensation differences. It will suggest how the fear and loathing of the comparable worth concept is improp-

See also AFSCME v. Washington, 770 F.2d 1401, 1404 (9th Cir. 1985) (Kennedy, J.); EEOC Dec. No. 85-8, 37 Fair Empl. Prac. Cas. (BNA) 1889 (June 17, 1985).


3. International Union, UAW v. Michigan, 886 F.2d 766, 768-69 (6th Cir. 1989), American Nurses’ Ass’n v. Illinois, 783 F.2d 716 (7th Cir. 1986), AFSCME, 770 F.2d 1401, Spaulding v. University of Wash., 740 F.2d 696 (9th Cir. 1984), and Plemer v. Parsons-Gilbane, 717 F.2d 1127 (6th Cir. 1983), all rejected the argument that subjective comparable worth of objectively dissimilar jobs stated a Title VII claim. The EEOC concurred. EEOC Dec. No. 85-8, 37 Fair Empl. Prac. Cas. (BNA) 1889. Accord Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409 (9th Cir. 1988); EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988). Given the current leaning of the Supreme Court, it is doubtful that such holdings will be re-examined. Indeed, Justice Kennedy wrote for the Ninth Circuit in AFSCME, the leading case rejecting comparable worth theories.

Comparable worth appears to have some life in legislative reform, particularly as applied to state and local government employees. Comparable Worth: Still the Subject of Studies, Bargaining, 123 Fair Empl. Prac. (BNA), newsletter, Oct. 6, 1986; E. PAUL, supra note 2, at 92-94.
Compensation Differences

erly inhibiting some courts from applying traditional Title VII disparate treatment analysis to compensation cases.

B. Statutory Overview

The first modern employment discrimination statute was the Equal Pay Act of 1963 (EPA). The EPA prohibits an employer from discriminating:

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 . . . 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 . . . .

The EPA is thus quite limited. It deals solely with pay discrimination; it applies only to differences in pay along gender lines, and in no way addresses race or national origin discrimination.

Title VII of the Civil Rights Act of 1964 (Title VII), enacted a few weeks after the effective date of the EPA, is a broad, comprehensive employment discrimination statute which regulates all aspects of the employment relationship: hiring, promotion, discharge, and terms and conditions of employment such as the working environment. And particularly, for the purposes of this Article, Title VII makes it unlawful 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 . . . .” As Title VII proscribes discrimination with respect to compensation because of sex, there is an expressed statutory overlap between Title VII and the EPA.


5. Id.

6. This is apparent from the face of the Act itself. See Marshall v. Western Grain Co., 838 F.2d 1165, 1172 (11th Cir. 1988).


Title VII addressed that duplication in the last sentence of section 703(h).\textsuperscript{9} That proviso, known as the Bennett Amendment, after its author Senator Bennett, provides:

\begin{quote}
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 [the Equal Pay Act].\textsuperscript{10}
\end{quote}

Wholly apart from compensation differences, Title VII jurisprudence has delineated two broad models for establishing liability: (1) improperly motivated treatment, and (2) use of factors which adversely impact upon a class protected by the statute.\textsuperscript{11} Improperly motivated disparate treatment "was the most obvious evil Congress had in mind when it enacted Title VII."\textsuperscript{12} In the absence of express or admitted sex-based, race-based, or ethnic-based classifications, the courts have developed a number of models by which the factual issue of the defendant's motivation is addressed and proved.\textsuperscript{13} These models differ dramatically in the nature of proofs and the respective burdens of the parties.\textsuperscript{14}

Improperly motivated treatment is not, however, the sole basis of proscribed discrimination. The seminal case of \textit{Griggs v. Duke}

\begin{itemize}
\item \textsuperscript{9} Id. § 2000e-2(h).
\item \textsuperscript{10} Id. The Bennett Amendment was construed in \textit{County of Wash. v. Gunther}, 452 U.S. 161 (1981). That construction will be analyzed \textit{infra} notes 94-102 and accompanying text.
\item \textsuperscript{12} \textit{International Bhd. of Teamsters}, 431 U.S. at 335 n.15.
\item \textsuperscript{14} Briefly, there are four major categories: (1) \textit{direct evidence cases} (sometimes called "mixed motive" cases), see \textit{Price Waterhouse v. Hopkins}, 109 S. Ct. 1775 (1989); (2) \textit{statistical, "pattern or practice" cases}, see \textit{International Bhd. of Teamsters}, 431 U.S. 324, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) and Bazemore v. Friday, 478 U.S. 358 (1986); (3) \textit{neutral practices which perpetuate into the present, improperly motivated segregation}, see Bazemore, 106 S. Ct. 3000 and Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); and (4) \textit{individual disparate treatment cases}, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), \textit{Furnco Constr. Corp.}, 438 U.S. 567, and Texas Dep't of Community Affairs v. Burdine, 456 U.S. 248 (1981).
\end{itemize}
Power Co.\textsuperscript{15} held that selection devices neutral on their face and even neutral in terms of intent would violate Title VII if such devices adversely affect the employment opportunities of a protected class and the employer could not prove that such factors were a "business necessity."\textsuperscript{16} "Proof of discriminatory motive . . . is not required under a disparate impact theory."\textsuperscript{17} Application of impact
\begin{itemize}
\item 15. 401 U.S. 424, 430-32 (1971).
\item 17. \textit{International Bhd. of Teamsters}, 431 U.S. at 336 n.15. Because of the Bennett Amendment, 42 U.S.C. § 2000e-2(h) (1982), as construed by County of Wash. v. Gunther, 452 U.S. 161 (1981), the adverse impact basis of Title VII liability is not fully applicable to factors adversely affecting the compensation of women. This is because the EPA specifically authorizes employers to utilize "factors other than sex." 29 U.S.C. § 206(d)(1)(iv) (1982). And the Bennett Amendment, in turn, allows Title VII defendants to utilize any factor "authorized" by the EPA defenses. Gunther, 452 U.S. at 168-71. Thus, if a factor adversely affected the compensation of a gender, the employer could avoid Title VII liability by proving that the practice was based on a "factor other than sex." EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577, 557, 590 (7th Cir. 1987); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988); Laycock, \textit{Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues}, 49 LAW & CONTEMP. PROBS., Autumn 1986, at 53, 55. However, since Title VII has now been construed to impose on employers a relatively light burden of presenting evidence of a justification for any factor having an adverse impact (\textit{Wards Cove Packing}, 109 S. Ct. at 2126), Title VII liability can be avoided by the employer simply by presenting evidence of a substantial justification for the factor being used to set the salary. The plaintiff must then carry the burden of persuading the fact finder that the asserted justification is lacking or that the employer could have used a less discriminatory alternative. Cf. Liberles v. Cook County, 709 F.2d 1122, 1130-33 (7th Cir. 1983); United States v. South Carolina, 445 F. Supp. 1094, 1111-16 (D.S.C. 1977), \textit{aff'd mem.}, 434 U.S. 1026 (1978); Newman v. Crews, 651 F.2d 222, 224-25 (4th Cir. 1981) (applying impact
\end{itemize}
C. Introduction to the Thesis

In holding that the Bennett Amendment did not limit the application of Title VII simply because the work of the male and female was not "equal," the Court in County of Washington v. Gunther expressly noted that a "comparable worth claim" was not before it, and thus it was expressing no opinion thereon, but nevertheless indicated that the "precise contours of lawsuits" would be determined by utilizing Title VII standards of motivational analysis. Gunther thus raised speculation (fear in some, hope in others) that Title VII liability might be premised upon comparable worth theories. To this point, however, the courts have rejected both the illegal motive and adverse impact theories of Title VII liability which use the comparable worth concept as their muse. Perhaps blinded by the fear and loathing of comparable worth, the courts have failed to recognize the presence of traditional, well-developed Title VII disparate treatment analysis, and in this blindness have limited the ability of individuals to redress intentional compensation discrimination that is well within the scope and intent of Title VII. These courts allow the objective equal

analysis to compensation distinctions, albeit quite important, is beyond the scope of this Article.

18. Gunther, 452 U.S. at 166.
20. See cases cited supra note 3.
21. See Vieira, supra note 19, at 460-68.
work standard of the EPA to overpower the motive-driven analysis central to Title VII liability, and in so doing ignore the fact that "the doctrinal centerpiece of the Gunther opinion is the approval of a remedy for sex-based wage discrimination where jobs do not involve equal work."^{22}

The first major issue addressed by this Article is the proper analytical standard under Title VII where the work of two employees of separate protected classes is "equal" within the meaning of the EPA. The premise is that EPA analysis does and should have a significant, if not controlling, effect on Title VII analysis, even in race, national origin, and religious discrimination cases where the EPA has no structural overlap or application to Title VII.^{23}

The second major theme is that when persons in different classes are similarly situated, but are being treated differently in terms of compensation, this creates an inference of illegal motivation, even though the jobs of the two employees are not "equal" within the meaning of the EPA. This initial inference of improper motive triggers continued application of traditional Title VII disparate treatment analysis. Under this analysis the employer's burden is relatively light—to articulate or produce a creditable and legitimate explanation for the compensation difference. If this burden of production is carried by defendant, then to prevail plaintiff must carry the ultimate burden of convincing the fact finder that the proffered explanation is pretextual.

As a result, there are two different analytical models of disparate compensation, depending on the degree of similarity of job duties. If jobs are "equal" within the meaning of the EPA, the EPA model (although based on totally objective concepts) is transplanted into Title VII motivational terms, but reaching the same result as would be reached under the EPA. If the jobs are alike but not "equal," yet are still "similar" within the meaning of Title VII jurisprudence, traditional Title VII disparate treatment analysis should be applied.

While it is far from settled, the courts appear to have accepted the first model (when work is proved to be "equal," EPA analysis is applied). Recent authority, however, has rejected the second

---

22. *Id.* at 456.
23. Since Title VII is applicable to discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a) (1982), the analysis will be applicable regardless of the class to which the persons belong.
model, that "similar" work and dissimilar pay of different classes creates an initial inference of improper motivation. Thus, the primary plea of this Article is that courts should apply the traditional Title VII motive analysis to those situations where work is "similar," and not demand that, in the absence of direct evidence or statistical proof, a prima facie case of improperly motivated compensation discrimination can be created only by proof that jobs performed by different classes are "equal" within the meaning of the EPA.

Since the EPA plays a central role in the analysis of compensation discrimination in its own right as well as under Title VII it is necessary first to survey how analysis under that Act has evolved. Thereafter, Title VII and the two themes of this Article will be explored.

II. THE EPA MODEL24

A. The Role of Motive

1. Motive and the Prima Facie Case.—The EPA was an amendment to the Fair Labor Standards Act of 1938.25 The wage and hour provisions of the Fair Labor Standards Act impose an absolute obligation on covered employers to pay the wage rates set by the statute. This is an objective obligation which is in no way dependent upon an employer's motivation.26

As the EPA structurally is an amendment to the Fair Labor Standards Act, it has been similarly construed. In absolute terms, it demands an equal rate of pay for males and females who perform work that is "equal," and provides that the failure to do so is

---


25. See supra note 4.

considered unpaid minimum wages. This creates a fixed, objective obligation which is not dependent upon an employer's motivation.

If the job duties of the male and female employee in fact are not "equal" within the meaning of the EPA, there will be no liability under this Act, even if the difference in actual job duties is a product of gender motivation. Consequently, if male employees are all assigned heavy work because the employer believes females are unable or unwilling to perform those jobs, and the females are all assigned duties requiring close attention to detail because the employer assumes that women are better able to perform such jobs, with the result that the job duties of the males and females are not equal in terms of skill, effort, and responsibility, there is no violation of the EPA.

2. Motive and the Defenses: Gender Neutrality.—If the work of unequally paid males and females is "equal" within the meaning of the Act, the employer can justify inequality of pay by establishing one of the four statutory defenses: that the pay differ-

27. 29 U.S.C. § 206(d)(3) (1982). While litigation under the EPA usually involves males making more than females, the Act, in fact, protects men under the same standards applicable to women. Board of Regents v. Daves, 522 F.2d 380 (8th Cir. 1975); 29 C.F.R. § 1620.1(c) (1989). Title VII likewise protects men under the same standards as are applied to women, Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), and whites under the same standards as are applied to racial minorities, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

28. Peters v. City of Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987); Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1260 & n.5 (7th Cir. 1983); Sinclair v. Automobile Club of Okla., Inc., 733 F.2d 726, 729 (10th Cir. 1984); Hein v. Oregon College of Educ., 718 F.2d 910 (9th Cir. 1983).

29. Waters v. Turner, Wood & Smith Ins. Agency, 874 F.2d 797, 800 (11th Cir. 1989); Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 976 (5th Cir. 1983); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280-81 (9th Cir. 1979); Daves, 522 F.2d at 384. See also Usery v. Columbia Univ., 568 F.2d 953 (2d Cir. 1977). Cf. Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987) (involving a female supervisor who was paid less than male subordinates whom she supervised). In holding that this could violate the EPA, the court stated: "[A]n employer cannot avoid the [Equal Pay] Act by the simple expedient of loading extra duties onto its female employees—unless it pays them more." Id. at 699. Accord Hein, 718 F.2d at 916.

It is the fact of job segregation, and the conceptual difficulty of the EPA to reach such segregation, that triggered the arguments in favor of pure comparable worth theory. See Blumrosen, supra note 19; Newman & Vonthof, supra note 2.

Regardless of whether an improperly motivated work load assignment requires equal pay under the EPA, discriminatory assignments of work or job opportunities violate Title VII. Henson v. City of Dundee, 682 F.2d 897, 911-12 (11th Cir. 1982); Paxton v. Union Nat'l Bank, 688 F.2d 552, 571 (8th Cir. 1982).
ential is premised not upon gender differences, but upon (i) seniority, (ii) a merit system, (iii) a system which measures the quality or quantity of work, or (iv) "any other factor other than sex." The burden is on the employer to establish any of these defenses, and it is a burden of persuasion, not simply one of producing evidence going to the issue.\textsuperscript{30}

An earmark of each of those four statutory defenses is that to qualify they must be neutral in terms of gender. If sex plays a role in the employer's use of a factor, it cannot, by definition, be a "factor other than sex."\textsuperscript{31} Thus, plaintiff's proof of defendant's improper motive is not necessary to establish a prima facie case and consequently is not necessary to plaintiff's recovery. However, motive can become material if the employer attempts to establish one of the statutory defenses because defendant must prove the subjective gender neutrality of the factor used to make the salary distinction.\textsuperscript{32}


An ostensibly neutral rule, such as differential based on time of day, or shift, may not be gender neutral if it perpetuates an employer's past segregation. However, a rule does not lose its gender neutrality simply because it has an adverse impact on the compensation of women. See EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988) (head-of-household premium benefits men as a class, but if uniformly applied is gender neutral notwithstanding this impact); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876-77 (9th Cir. 1982) (use of prior salary affects women as a class but is gender neutral).

\textsuperscript{32} The issue of good faith or motive also could become material when the court considers the remedy for violations of the Act. The Fair Labor Standards Act, of which the EPA is a functional part, provides for an automatic award of liquidated damages equal to the amount of back pay liability. That is, an employer will be liable for double the amount of any unpaid and owing wage liability. The Portal-to-Portal Act, however, grants discretion to reduce the liquidated portion of the back pay liability if the trial court finds that the employer acted in good faith with reasonable grounds for believing that its act or omission was not a violation of the Act. 29 U.S.C. § 260 (1982). Thus, an employer's proof of reasonableness and good faith, while not a defense to back wage liability, would allow an employer to avoid statutory liquidated damages. Pearce v. Wichita County, 590 F.2d 128, 134 (5th Cir. 1979).
B. The Objective Standard of "Equal Work"

1. *Equal Skill, Effort, and Responsibility.*—The EPA defines "equal work" in terms of "job performance which requires equal skill, effort and responsibility." The Act is thus concerned not with job descriptions, potential worth, or past loyalty, but with "job performance." For jobs to be "equal," all three statutory elements of content must be "equal." That is, the "skill" of the male and female employees must be "equal"; the "effort" expended in the two jobs must be "equal"; and the "responsibility" required of the two employees must be "equal." There is no set-off or counterbalancing between the independent statutory components of "equal work." For example, work requiring the male to expend significantly greater physical effort than the female will not be considered work "equal" to that performed by a female simply because the female's work entails greater responsibility than that of the male.

34. Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1414 (9th Cir. 1988) (emphasis added). See also EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 344 (7th Cir. 1988); Epstein v. Secretary of Treasury, 739 F.2d 274, 277 (7th Cir. 1984); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1980); 29 C.F.R. § 1620.13(e) (1989).
35. "Skill" refers to an objective standard or level of ability or dexterity. 29 C.F.R. § 1620.14 (1989). It does not refer to the efficiency or natural ability of a particular employee. A male barber and a female beautician may well possess a skill in grooming hair that is "equal." Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 151-53 (3d Cir. 1976). Similarly, a male tailor and a female seamstress probably have abilities and dexterities of "equal" skill. Brennan v. City Stores, Inc., 479 F.2d 235, 239-41 (5th Cir. 1973).
36. "Effort" refers to the physical or mental exertion necessary to perform the two jobs. 29 C.F.R. § 1620.16 (1989). It must be correlated to actual job requirements and not to how hard a particular employee works at the job. Brennan v. South Davis Community Hosp., 538 F.2d 859, 863-64 (10th Cir. 1976); Brennan v. Owensboro-Daviess County Hosp., 523 F.2d 1013, 1018-28 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976).
38. Forsberg, 840 F.2d at 1414; EEOC v. Mercy Hosp. & Medical Center, 709 F.2d 1195, 1197 (7th Cir. 1983); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1175-76 (3d Cir. 1977).
39. Angelo, 555 F.2d at 1175-76. See also Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985) (holding that work of a classroom teacher and a school adminis-
Congress recognized that the term "equal" could not require that jobs be identical or exactly alike. The legislative history also demonstrates that "equal" required that the jobs be more alike than merely comparable. This history has led the courts to adopt a "substantially equal" test. That is, jobs need not be identical to be "equal"—small, minor, or insignificant differences cannot be used to defeat the Act—because "equal" presupposes that jobs be only "substantially equal." Precisely identifying in myriad factual contexts whether ostensibly similar jobs are similar enough to be "substantially similar"—and thus legally "equal"—is a difficult, translator were not deemed to be equal because they involved quantitatively different skills and responsibility, but that teaching in the same general discipline required equal skill and responsibility even though the precise subjects taught were different. Cf. Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), cert. denied, 469 U.S. 1036 (1984) (teaching at the college level in different disciplines was said to involve fundamentally different skill, effort, and responsibility). See also Orr v. Frank R. MacNeill & Sons, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975) (different executive responsibilities); Usery v. Columbia Univ., 568 F.2d 953 (2d Cir. 1977) (different janitorial duties required quantitatively different kinds of effort, light cleaning of large areas versus heavy cleaning of smaller areas); EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987) (coaching different sports).

40. The legislative history of the EPA is set out in full by the dissent in County of Wash. v. Gunther, 452 U.S. 161, 184-96 (1981) (Rehnquist, J., dissenting). Legislation introduced in 1962, the year before the EPA was enacted, would have required equal wages for men and women doing "work of comparable character." H.R. 8898, 87th Cong. 1st Sess. (1962). This language, drawn from the perceived practices of the World War II War Labor Board, was extensively debated vis-a-vis a standard requiring more objective job likeness, which Congress dubbed as "equal." See 108 Cong. Rec. 14767-68. Neither version was enacted in 1962, but the 1963 bill, H.R. 3851, 88th Cong. 1st Sess. (1963), which became the EPA, utilized the concept of "equal." COMPARABLE WORTH: ISSUES AND ALTERNATIVES, supra note 2. See also 29 C.F.R. § 1620.14 (1989).

In Thompson v. Sawyer, 678 F.2d 257, 271 (D.C. Cir. 1982), the court reviewed this history and noted:

Like most legislation, the Equal Pay Act of 1963 was a compromise. Congress for several years had considered competing versions of what ultimately became the Act. Some versions sought to prohibit unequal pay for comparable work . . . . Other versions sought only to prohibit unequal pay for equal work . . . . Although passing the more limited statute, Congress recognized the disputatious nature of the term "equality." Sponsors of the more extensive versions of the bill were careful to emphasize that "equality" did not mean "identity."


For an interesting comparison between the "equal work" concept under the American Equal Pay Act and the "like work" language of the British Equal Pay Act, see Covington, supra note 24.

41. See supra notes 34-40.
imprecise, and unpredictable factual inquiry. Without trying to define those metes and bounds, it is sufficient to recognize that the requirement of job equality, while not requiring that job duties be identical, nonetheless requires a relatively high level of objective identity, and that jobs ostensibly quite similar, but lacking sufficient likeness or match, will not be considered "equal."

2. "Similar Working Conditions"—Unlike job content which, for EPA liability, must be "equal," the EPA requires that working conditions need be only "similar." "Similarity" is a concept that differs both from equality, at one extreme, and mere comparability at the other. Congress obviously articulated an objective comparative concept demanding less match than equality (otherwise it would have used the same term—"equal") but with more of a likeness or match than comparability (which the legislative history rejected as a comparative concept). Consequently, even significant differences in the conditions under which one must work will

42. Madison Community Unit School, 818 F.2d at 582. See, e.g., Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1972); Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973).

The finding of equal work is one of fact, and may be reversed on appeal only if "clearly erroneous" within the meaning of rule 52(a) of the Federal Rules of Civil Procedure. See EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 345 (7th Cir. 1988); Hein v. Oregon College of Educ., 718 F.2d 910, 913 (9th Cir. 1983). The "clearly erroneous" standard of rule 52(a) is discussed in Anderson v. City of Bessemer City, 470 U.S. 564 (1985).

43. In evaluating alleged "equal work" in light of articulated differences in job duties asserted by the employer to be sufficient to make similar jobs merely "comparable"—and thus not "equal" for the purposes of the EPA—the courts and enforcement agencies examine the articulated differences in light of: (1) whether the extra duties in the higher paying job actually exist; (2) whether all employees receiving the premium pay actually perform these additional duties; (3) whether the extra duties consume more than a de minimis amount of the higher-paid employee's working time; (4) whether the extra duties that distinguish the jobs are significant, or merely minor incidents of primary jobs; (5) whether employees not receiving the premium pay perform similar secondary duties of like kind to those receiving premium pay; and (6) whether third persons who perform the extra tasks as their primary duty receive less pay than the employees who receive the premium pay for doing these extra tasks. Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 286 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975); see also Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 460 (D.C. Cir. 1976); Brennan v. South Davis Community Hosp., 538 F.2d 859, 862 (10th Cir. 1976), cert. denied, 434 U.S. 1086 (1978).


46. See discussion supra note 40.
not justify pay differences, if those different conditions are deemed to be "similar" in nature.\(^47\)

\section*{C. Summary of Objective "Likeness": A Spectrum}

As outlined immediately above, the EPA's language and history recognize a spectrum of job content comparisons for the degree of match or likeness. At one extreme are totally incomparable jobs, jobs dissimilar in both objective and subjective terms. However, even with a large degree of objective dissimilarity some jobs may be subjectively compared and evaluated as having a comparable worth (whatever "worth" means), thus making them in the eyes of a beholder "comparable." For example, elementary school teachers may be subjectively compa-

\(47\) EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577, 580 (7th Cir. 1987). See also Usery, 568 F.2d at 961 (different buildings where risk of crime was higher might be a dissimilar working condition); Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397, 403-04 (W.D. Pa. 1978) (working in the field was a working condition similar to working in an office).

Corning Glass Works v. Brennan, 417 U.S. 188 (1974), construed the term "working conditions" in the context of the time of day in which one worked. Employees who worked a night shift were paid more than day shift employees, and the employer argued that the shift an employee worked constituted dissimilar working conditions. Consequently, as working conditions were not similar, the employer argued that it had no obligation to provide equal pay for male and female employees performing equal work. The Court disagreed, concluding that Congress intended to give the phrase "working conditions" the narrow and specific meaning accorded it by industrial relations specialists as a term of art that defines job classifications, and not, as the employer argued, a common sense, lay definition suggesting general, overall desirability of the job. "Working conditions," in the industrial relations context, the Court stated, "encompasses two subfactors: 'surroundings' and 'hazards.' 'Surroundings' measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker . . . . 'Hazards' takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause." \textit{Id.} at 202. Thus, since the jobs were "equal" and the working conditions were "similar," the employer had an obligation to provide equal pay for male and female employees performing these duties unless the employer could carry the burden of proving that the difference in pay was premised on the defense of being a "factor other than sex." \textit{Id.} at 240.

A gender neutral shift differential can be a "factor other than sex." In Corning Glass, however, the employer failed to carry the burden of establishing the gender neutrality of the shift differential because, in that case, the pay difference for shifts had its genesis in gender segregation into the day and night shifts, with the night shift premium being paid because of the gender of the employees.

The EPA only applies to jobs being performed within the same "establishment" of an employer. When jobs are performed at different physical locations, these locations may well be considered different "establishments." See infra note 51. In such cases, therefore, it is not necessary to evaluate whether the "working conditions" in these separate "establishments" are "similar."
teachers and attorneys may have a "worth" to society or to this employer which is "comparable." The concept of liability based on such subjective comparability of objectively dissimilar jobs is what Congress presumably considered and rejected when it enacted the EPA and Title VII.\textsuperscript{48} As the content of the two jobs increasingly begins to coincide, they will become, for want of a better descriptive word, "similar." Congress recognized, and enacted in the EPA, the concept of similarity in working conditions as a basis for liability. However, when it came to the content of job duties, Congress required more than similarity; job content must be sufficiently similar so that the jobs can be described as being "substantially equal."\textsuperscript{49}

Ultimately, there can be perfect match of all job elements. When this happens the two jobs are identical. Congress clearly indicated that even EPA liability did not demand a perfect likeness or match; substantial equality was sufficient.\textsuperscript{50}

Obviously, the various degrees of objective identity have no clear demarcations. As the likeness of two jobs increases, they gradually merge, as a spectrum, into the next descriptive level. Nonetheless, these levels are a continuum and at some point ultimately become distinctly identifiable. These demarcations could be plotted as follows, from the most complete likeness to total absence of any objective match:

<table>
<thead>
<tr>
<th>Identical</th>
<th>Substantially Similar</th>
<th>Comparable</th>
<th>Incomparable</th>
</tr>
</thead>
</table>

The problem is not in identifying this spectrum; the statute and its history do that for us. The problem is identifying the point on the spectrum where legal obligations attach. The EPA clearly states those points: "equality" for work and "similarity" for working conditions. While factually difficult to identify in the particular case, the precise lines that divide "substantial equality" from "similarity" and "similarity" from "comparability," the conceptual and

\textsuperscript{48} See supra note 40 for a discussion of the history of the EPA. See supra note 3 for authority construing Title VII similarly to preclude the use of "worth" concepts. The arguments as to why Title VII is sufficiently broad to allow liability premised upon comparable worth can be found in the materials cited supra note 2.

\textsuperscript{49} See supra notes 40-44.

\textsuperscript{50} Id.
legal obligation under the EPA is clear. But as will be pointed out below, the conceptual points of proof under Title VII are not so clearly defined. However, the spectrum of likeness found in the EPA should serve as a muse for Title VII analysis.

D. Comparing the Work and Pay Rate of a Male and a Female Employee

The objective standard of the EPA simply requires the identification of a male employee and a female employee within the same "establishment" who perform work that is "equal" and receive for this "equal work" an unequal rate of pay. It does not (or

51. "Establishment" is a term of art that generally denotes the physical location of a discrete portion of an employer's business, in a phrase, the "place of business." 29 C.F.R. § 1620.9 (1989); Shultz v. Corning Glass Co., 319 F. Supp. 1161, 1163-64 (W.D.N.Y. 1970), aff'd on other grounds, 474 F.2d 226 (2d Cir. 1973), aff'd, 417 U.S. 188 (1974) (adjoining plants were a single "establishment," but a plant located one-half mile away was a separate "establishment"). Physically distinct locations can, however, be considered within the same "establishment" if they have centrally controlled management and personnel policies, particularly in regard to the setting of wages. Epstein v. Secretary of Treasury, 739 F.2d 274, 277 (7th Cir. 1984) (different governmental regions assumed to be the same establishment); Brennan v. Goose Creek Consol. Indep. School Dist., 519 F.2d 53, 56-58 (5th Cir. 1975) (different schools in the same district are within the same establishment).

52. The EPA prohibits payment of wages "at a rate less than the rate at which he [the employer] pays wages to employees of the opposite sex in such establishment for equal work . . . performed under similar working conditions." 29 U.S.C. § 206(d)(1) (1982).

It can be safely assumed that in most cases it will be the employer-established "rate" that is used for the comparison. Regardless of whether the employer-established rate is based on employee performance, per hour worked, or by the calendar month or year, if that rate differs between male and female employees, the employer is in prima facie violation of the EPA. Bence v. Detroit Health Corp., 712 F.2d 1024, 1026-28 (6th Cir. 1983), cert. denied, 465 U.S. 1025 (1984).

In setting the rate the employer clearly is free to utilize an hourly rate for lower level jobs that would be subject to the wage-hour provisions of the Fair Labor Standards Act, even if different wages are actually delivered to the employee on a weekly, bi-weekly, or monthly basis. Indeed, if the employer uses something other than an hourly rate (such as a weekly or monthly salary) for lower level employees, it is not only appropriate, it may well be necessary, to translate that income received into an hourly rate. The gross amount received by the male and female employees is divided by the hours each employee actually worked during the week. If the resulting hourly rates—as translated—are not equal, there is a prima facie violation of the EPA, even if actual gross income of the two employees is the same.

For higher level jobs such as executives, administrators, or professionals, where hourly rates are not a traditional basis for compensation, translation of the gross wages into an hourly rate probably is not appropriate. In such cases, the employer not only may, but perhaps must, set a rate based on the traditional calendar measurement such as monthly or yearly. Regardless of the hours actually worked by the high level employee, the annual or
Compensation Differences

at least should not) detract from plaintiff's claim that some members of the opposite sex perform the same job as the plaintiff and receive the same lower rate of pay, or conversely, that members of the same gender as plaintiff receive the same higher rate of pay as the higher paid member of the opposite sex. 53 Even if other persons of the same sex as plaintiff are paid at the higher rate, plaintiff is entitled to be compensated at the rate of any person of the opposite sex who is performing equal work at the higher wage rate unless the employer can justify that rate difference by proof that a "factor other than sex" was used by the employer to set the wage rates. 54

While this comparison between the work and pay rates of employees to determine an equal pay obligation is often conducted between employees who are working simultaneously, the work and pay of successive employees can also be compared. Consequently, should a female worker be paid less than her male predecessor for equal work, a prima facie violation exists. 55

Moreover, comparison of work and pay rates is not limited to comparisons between the plaintiff and plaintiff's immediate prede-

monthly rate will serve as the basis for comparison, because an hourly rate for such higher level employees would not be appropriate to determine an employer's wage obligations to high level employees. See M. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 4.12(c) (1987).

53. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (males and females both worked in the higher paying night shift and the lower paying day shift). Accord Peters v. City of Shreveport, 818 F.2d 1148 (5th Cir. 1987); 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 17.5.1 (2d ed. 1988). Cf. Hein v. Oregon College of Educ., 718 F.2d 910, 916 (9th Cir. 1983) (if employees of the opposite sex performing work equal to the plaintiff on the average make less than the plaintiff, no claim is stated, even if one or more of those employees is paid at a rate higher than that paid to the plaintiff). The result in Hein is rationalized on the grounds that if male employees make on the average less than the female plaintiff, the wage paid the plaintiff is not gender premised.

54. See infra notes 64-90 and accompanying text. Thus, if there is some relevant difference between a higher paid man doing work "equal" to that of the woman, then the employer is not in violation of the Act. However, if there is no relevant basis for making the distinction, the Act imposes an absolute obligation to increase the rate of the lower paid worker to that of the higher paid. In this regard, the law provides: "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 19 U.S.C. § 206(d)(1) (1982). See Board of Regents v. Dawes, 522 F.2d 380, 384 (8th Cir. 1975); Hodgson v. Miller Brewing Co., 457 F.2d 221, 227 (7th Cir. 1972); Cayce v. Adams, 439 F. Supp. 606 (D.D.C. 1977), vacated by consent, 18 EPD Para. 8681 (D.C. Cir. 1977). Cf. EEOC v. Penton Indus. Pub. Co., 851 F.2d 835, 837 (6th Cir. 1988).

cessor. A plaintiff can compare his/her work and rate of pay to remote predecessors who performed the job prior to the time plaintiff occupied it. For example, a female may receive the same, or even more pay than the employee she succeeded (male or female), while a former male employee earned more than plaintiff and the plaintiff's immediate predecessor. If plaintiff's qualities more resemble the remote male predecessor than the plaintiff's immediate predecessor, the Act permits the comparison of job and pay rate to this remote successor, in effect skipping a generation to make the work-wage comparison. Unless the employer can establish a statutory defense, plaintiff will be entitled to a back pay remedy.

E. Defenses to Unequal Pay for Equal Work

1. The Burden: Title VII Contrasted.—If plaintiff proves the equality of the work and the inequality of the pay rates between the male and female workers, plaintiff will be entitled to prevail unless the defendant can establish that the wage rate difference was made pursuant to: (i) a seniority system, (ii) a merit system, (iii) a system that measures quality or quantity of production, or (iv) any other factor other than sex. The burden of establishing a gender neutral "system" or "factor" is placed upon the defendant and is described as being "heavy." This is similar to the burden placed on defendants in Title VII cases where plaintiff has established through direct evidence the presence of a discriminatory motive or has established a statistical pattern or practice of illegal

57. Plaintiff is entitled to receive as unpaid wages the difference between what the plaintiff earned and the wages plaintiff would have received had plaintiff been paid at the rate received by the employee of the opposite sex. 29 U.S.C. § 206(d)(3) (1982). These back wages are recoverable for a period of up to two years prior to the filing of the action, three years if plaintiff can prove that the violation of the Act was "willful." 29 U.S.C. § 255 (1982). See McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677, 1681-82 (1988). In addition, a successful plaintiff can recover as statutory liquidated damages an amount equal to that of the back wage liability unless the employer can establish that the failure to comply with the EPA was in good faith and that "reasonable grounds" existed for the belief that its actions were in compliance with the Act. See supra note 32. The remedial provisions of Title VII contain no similar provisions for liquidated damages. See 42 U.S.C. § 2000e(5)(g) (1982).
treatment. In such cases, Title VII jurisprudence, similar to the EPA, places the burden of persuasion upon the defendant to establish to the satisfaction of the fact finder the nondiscriminatory basis for making the decision.\footnote{See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1777-88 (1989) (direct evidence of animus); International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977) (statistical pattern).}

By contrast, the EPA burden of persuasion placed on the defendant differs significantly from the relatively light burden placed on employers in Title VII litigation where only a prima facie case of improper motive has been created by proof of simple differential treatment between similarly situated persons of different races, sexes, national origins, or religions. In such cases, defendant can refute the initial inference of illegal motivation by merely articulating a legitimate, nondiscriminatory reason for the difference in treatment.\footnote{McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983). “Articulation” requires only that defendant clearly state the reason for the action, and present evidence sufficient to support a finding thereon. See Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 STAN. L. REV. 1129 (1980); Player, The Evidentiary Nature of Defendant’s Burden in Title VII Disparate Treatment Cases, 49 Mo. L. REV. 17 (1984). The “legitimate reason” need not have any relationship to the employer’s business goals and purposes. At most, to be “legitimate” the “reason” must be legal and one that a rational person might make in ordering business or personal relationships. See Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988) (Blackmun, J., dissenting). See generally Belton, Burdens of Pleading & Proof in Discrimination Cases: Theory of Procedural Justice, 34 VAND. L. REV. 1205 (1981); Player, Defining “Legitimacy” in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis, 36 MERCER L. REV. 855 (1985).} If this burden of coming forward with the evidence is met by defendant, plaintiff retains the ultimate burden of persuasion on the issue of motivation.\footnote{See authority cited supra note 62.}

2. Gender Neutrality.—The portion of the EPA setting forth the defenses provides that the higher rate of pay for the equal work must be made “pursuant to” systems of seniority or merit, systems that measure production, or “any other factor other than sex.”\footnote{29 U.S.C. § 206(d)(1) (1982).} This necessarily presupposes that if the decision in any way was made pursuant to gender, then the defense would not be applicable. As defendant carries the burden of establishing the defense, if defendant cannot prove—not simply produce evidence of—the
gender neutrality in the adoption and application of the asserted factor, plaintiff will prevail. 66

A system lacks gender neutrality if it facially utilizes gender characteristics or if it is instituted by the employer based on considerations of gender. 66 A system also lacks neutrality if it tends to perpetuate a prior pattern of gender segregation or premium pay based on gender. 67 However, the fact that a facially neutral factor may adversely affect a particular gender will not, standing alone, cause that factor to lose its neutrality. 68 To illustrate, if an employer based a salary upon the prior salary of an employee, this necessarily perpetuates any prior discrimination or segregation practiced by this employer. 69 The factor would not be gender neutral, and thus could not be considered a "factor other than sex." However, if an employer set the salary based upon the prior salary the applicant earned elsewhere, at most such a factor adversely affects the salary of women who tend to earn lower salaries than men. But since the prior salary factor does not perpetuate any segregation practiced by this employer, it can be considered gender.

66. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 712-13 (1978) (use of sex-based mortality table could not be "factor other than sex"); Bence v. Detroit Health Corp., 712 F.2d 1024, 1031 (6th Cir. 1983), cert. denied, 465 U.S. 1025 (1984) (different commissions to gender segregated managerial employees to provide equal gross pay is not gender neutral); EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987) (salary based on gender of clientele served by employee cannot be gender neutral); Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047 (5th Cir.), cert. de-
nied, 414 U.S. 822 (1973) (training program which excluded females from participation cannot be factor other than sex).
67. E.g., Corning Glass Works, 417 U.S. 188 (night shift premium perpetuated prior segregation of women into day shift and was thus not gender neutral); Gosa v. Bryce Hosp., 780 F.2d 917, 919 (11th Cir. 1986) (red circle rates for previously discriminatory rates perpetuated a discriminatory salary and thus could not be a factor other than sex). See also Bazemore v. Friday, 478 U.S. 385 (1986) (The base salary of black employees was discriminatorily set at a lower rate. Uniform pay increases to black and white employees maintained the pay difference. This was discriminatory under Title VII in that it perpetuated the prior racial differences in compensation).
68. International Union, UAW v. Michigan, 886 F.2d 766, 769-70 (6th Cir. 1989); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988) (head of household benefits tend to benefit male employees, but is a factor other than sex if allowed to both male and female household heads); Kouba, 691 F.2d at 876-77 (prior salary adversely affects women, but is still within the defense).
69. See supra note 67.
Similarly, payment of certain premiums to employees based on whether they are the head of a household may adversely affect female employees; fewer females than males are heads of household. Nonetheless, and regardless of impact, if uniformly applied in good faith to all employees, the head of household premium will be considered gender neutral.

The issue then is whether "head of household" or "prior salary" applied to new employees, being gender neutral, is sufficiently related to employer concerns to meet the objective requirements of the "factor other than sex" defense.

3. "Systems" and "Factors" that Qualify.—

a. Seniority and Merit.—Systems of seniority and systems of merit are specifically listed in the statute as justifying unequal pay rates for equal work. To serve as a defense to unequal pay rates between men and women who perform equal work, a seniority system or merit system must be, as the statutory terms demand, an in-place, objective system, as opposed to an ad hoc, post hoc, or subjective rationalization. While an employer is free to recognize relative length of service to justify a wage difference without a formalized, written program, to qualify as a seniority system, it must be regularly and uniformly applied to all employees. Moreover, as the Act requires that the salary rate difference be pursuant to the system, if the system is totally idiosyncratic, it would be difficult, perhaps impossible, for an employer to prove that a particular wage difference was pursuant to such a system.


71. J.C. Penney Co., 843 F.2d 249. See also Wambhein v. J.C. Penney Co., 705 F.2d 1492, 1495 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984) (appearing to use a "business necessity" standard to sustain a head of household premium). Apparently, this court was unaware of the Bennett Amendment.

72. See infra notes 80-93. As will be pointed out, even if gender neutral, a factor may not be sufficiently related to employer concerns to serve as a defense.

73. EEOC v. Whitin Mach. Works, Inc., 635 F.2d 1095, 1097-98 (4th Cir. 1980); Aetna Ins. Co., 616 F.2d at 725; 29 C.F.R. § 800.144 (1985) (prior EEOC EPA Guidelines). For example, if the pay difference between the senior male employee and the female plaintiff was allegedly pursuant to the seniority of the male employee, proof that another female worker senior to the male comparator was not paid pursuant to that seniority would tend to disprove this allegation. If the seniority system was the justification for the higher rate of pay for the male employee vis-a-vis the plaintiff, it would seem to follow that another female employee senior to the male being compared would be working at a higher rate of pay.
Similarly, a "merit system" is not a "system" if it is simply a subjective evaluation of the two employees with an unsupported conclusion that the lower paid employee did not have as much merit as did the higher paid employee of the opposite sex. 74

b. Quality or Quantity of Production.—Litigation construing the "quality or quantity" defense is sparse. One possible construction of the defense is that it is redundant. If the rate of pay is initially measured by quality or quantity, and that rate differs, there is a prima facie violation. On the contrary, if the production rate is the same for male and female employees, there is no prima facie violation regardless of gross differences in take-home income. 75

Another possibility is that the EPA presupposes that all wages, even if based on quality or quantity of production, will be translated into an hourly rate by dividing the gross amount paid by the number of hours worked. 76 If the gross hourly rate so translated differs, a prima facie violation is established. Defendant can justify this difference in hourly rate only by establishing that the hourly rate is a product of a system measuring quality or quantity of production.

Use of the term "production" presupposes that it is applicable only to actual production attributable to the employees in question. Simple commissions or bonuses based on factors not produced by the employee will not qualify. 77

If she was not, this suggests that the rates of pay were premised on gender, and not pursuant to seniority. See California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (Title VII seniority proviso); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) (Age Discrimination in Employment Act).


76. See supra note 52.

77. See Bence, 712 F.2d 1024. Here, male and female managers were paid a different percentage of club membership fees based on the total number of memberships. Since the "rate," meaning percentage of memberships, differed, there was a prima facie case. The different percentages did not come within the defense because the employees did not necessarily produce the memberships upon which their commissions depended. Cf. Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir.), cert. denied, 414 U.S. 866 (1973). There the court upheld general profitability of a "male" department over the "female" department as a justification for paying male employees more than female. This decision is so clearly contrary to the language of the statute and subsequent litigation, in that employees were assigned to the department on the basis of sex, that it needs no comment.
The significance of this difference in approach is that if the initial rate can be based on a production rate, the burden is upon the plaintiff to establish this different rate. If the production rate is the same for male and female employees, regardless of the gross income, there is no violation of the Act. However, if the Act dictates calculation of an hourly rate, regardless of the identical production rate agreed between employees and employer, a proved difference in gross income must then be justified by the defendant proving that the difference is the result of a bona fide system of actual production measurement.

c. "Factors other than Sex"—The "factors other than sex" defense is an omnibus, catch-all defense. It can apply to innumerable objective, gender neutral factors. Two elements must be established by the defendant. First, as pointed out above, the factor must be gender neutral.78 However—and this is a key point—a factor can remain gender neutral even though its application may have an adverse effect or impact on one gender.79

In addition to gender neutrality, the factor must have an objective relationship to reasonable employer concerns. The precise parameters of the term "factor" are still ill-defined and subject to differing constructions. Some early authority suggested that any non-sex factor that had some conceivable rationality would suffice.80 Subsequent authority has required that the reason, to be a "factor other than sex," must be more than rational; it must have some relationship to employer's concerns as an employer. That is, "factor other than sex" presupposes a legitimate business reason.81

In refining further the concept of "business reason," some courts view the three specific defenses (seniority, merit, and production) which textually precede the more general "factor other than sex" defense to illustrate, and thus limit, the scope of the subsequent, more general defense. "Factor other than sex" is thus limited to those things that an employer traditionally uses to determine wages based on employee worth, such as seniority, merit systems, production systems, etc. Moreover, the phrase preceding "factor other than sex" is "any other," which further suggests a

78. See supra notes 66-71.
79. See supra notes 69-71.
80. Robert Hall Clothes, 473 F.2d 589.
reference back to those factors that precede the phrase. Thus, according to this narrow construction, the "factor" must come from "unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business."

Other courts take a more relaxed, broader view of "factor other than sex" allowing reasons to qualify that go beyond the general scope of the preceding three specific defenses. It is enough if the factor is a rational, gender neutral basis for allocating employee benefits or setting salaries. While it must be more than an idiosyncratic or totally subjective reason, the factor need not be tied to employee performance.

Some factors clearly meet either standard of business rationality in that, if neutral, they are traditional bases for setting salary in terms of employee worth: education or experience, participation in a bona fide training program, shift differential, and red circle payments given employees temporarily assigned to traditionally lower paying jobs. However, when an employer uses factors to set salary not tied to job performance or value to the employer,


83. Glenn v. General Motors Corp., 841 F.2d 1567, 1571 & n.9 (11th Cir. 1988); see also Price v. Lockheed Space Operations, 856 F.2d 1503, 1506 (11th Cir. 1988); 29 C.F.R. § 1620.21 (1989).

84. Covington v. Southern Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988). See also American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986).

85. Wu v. Thomas, 847 F.2d 1480, 1485 (11th Cir. 1988); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1980); EEOC v. First Citizens Bank, 758 F.2d 397, 401 (9th Cir. 1985).


87. See EEOC v. Central Kan. Medical Center, 705 F.2d 1270, 1273 (10th Cir. 1983). Corning Glass Works v. Brennan, 417 U.S. 188 (1974), held that different shifts were not "working conditions" within the meaning of the EPA, and thus, shift differentials would have to be justified by defendant under the "factor other than sex" defense. Defendant failed to establish that defense under the unique facts of that case because the shift assignments had their origin in discriminatory assignments to those shifts. The implication, however, was quite clear; if the initial shift assignments were not discriminatory, payments based on the desirability of the shift would be justified.

such as an employee being a "head of household" or the "prior salary" of the employee, whether the factor will be considered a "factor other than sex" will depend upon which approach to the "factor other than sex" defense the court adopts. If all the court requires is proof of a rational relationship to employer concerns, "head of household" and "prior salary" qualify as a "factor other than sex." On the other hand, if "factor other than sex" presupposes a traditional measurement of employee worth as an employee, then "head of household" and "prior salary" probably do not qualify.

In summary, even though they disagree as to the precise definition of "business reason" as it makes up the objective element of the "factor other than sex" defense, the courts agree that the factor must be more than simply a legitimate reason which would satisfy a defendant's initial burden of coming foward in a Title VII disparate treatment case. They also agree that "business reason" presupposes less objective weight than the "business necessity" requirement used in Title VII adverse impact cases.

89. EEOC v. J.C. Penny Co., 843 F.2d 249, 253 (6th Cir. 1988); Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987).
92. Glenn, 841 F.2d 1567; Price, 856 F.2d 1503.
93. See cases cited supra notes 89-90; see also Spaulding v. University of Wash., 740 F.2d 686 (9th Cir. 1984). Compare Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1495 (9th Cir. 1983) with Colby v. J.C. Penney Co., 811 F.2d 1119.

This result is the product of County of Wash. v. Gunther, 452 U.S. 161 (1981). The Court held that a Title VII claim of pay discrimination could be stated even though the work of the male and female employee was not "equal" within the meaning of the EPA. The Court held that the Bennett Amendment of Title VII, 42 U.S.C. § 2000e-2(h) (1982), did not adopt or incorporate an "equal work" standard of liability into Title VII, but rather did nothing more than make the "factor other than sex" defense of the EPA applicable to gender pay discrimination claims brought under Title VII. In responding to the argument of the dissent that such a narrow construction rendered the Bennett Amendment superfluous, the Court noted that absent the Bennett Amendment an employer in a Title VII suit would have to justify a factor adversely affecting the pay of female employees in terms of the factor being a "business necessity." However, the Bennett Amendment, as construed by the majority, still would allow the employer to make the pay distinctions if the employer could establish that the factor used was merely a "factor other than sex," and would not have to prove "business necessity." Since the "factor other than sex" defense provided an employer with an escape from liability not present in Title VII, the Court's construction did not render the Bennett Amendment redundant. Presumably, therefore, the "factor other than
While Title VII broadly proscribes compensation discrimination because of sex, liability under Title VII is conditioned by a proviso in section 703(h), known as the Bennett Amendment, which 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 wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA].

There are two plausible constructions of this proviso. The first is that, as to male and female employees subject to the EPA, there can be no violation of Title VII unless the pay differences violate the EPA. Stated conversely, legality under the EPA is a complete defense to Title VII liability. If work is not “equal” or the “wage rate” not unequal, as those terms are defined by the EPA, there is no violation of Title VII. Thus, a Title VII wage claim based on gender is only viable if the claim is also actionable under the EPA.

The second view of the Bennett Amendment proviso, and the one adopted by the Court in *County of Washington v. Gunther*, is that Title VII liability is not dependent upon there being an EPA violation. Instead, the proviso serves only to authorize wage

sex” standard was thought to be a burden significantly lighter than the Title VII concept of “business necessity.” *Gunther*, 452 U.S. at 169-171.

With the Court now diluting the concept of “business necessity” to “substantial justification,” and placing on the employer no more than a burden of producing some evidence to show that justification, the rationale of *Gunther* that the “factor other than sex” defense has some Title VII significance loses its vitality. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988). This construction of Title VII liability in impact cases gives new force to the argument that the Bennett Amendment, as construed by *Gunther*, has no independent significance. Does this suggest that *Gunther*, may be restated as was Griggs v. Duke Power Co., 401 U.S. 424 (1971)?


95. *Gunther*, 452 U.S. at 181-204 (Rehnquist, J., dissenting). See also Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980).

differences that are specifically justified by one of the four defenses found in the EPA.

In Gunther, male guards in the male section of the jail were paid significantly more than female guards in the female section of the jail. The lower courts determined, however, that the work of the male guards was not "equal" to that of the female guards in that the male guards supervised ten times more inmates and performed additional duties. Nonetheless, the Court affirmed the court of appeals conclusion that notwithstanding the inequality of the work of male and female guards, plaintiff had stated a claim under Title VII by alleging that the pay received by the female guards was motivated by considerations of sex. The Court explained the meaning of the Bennett Amendment as a proviso which, by its terms, does no more than allow pay differences authorized by the EPA. A difference in pay rates is "authorized" by the EPA only if it falls within one of the four statutory defenses of that Act. Consequently, "claims of discriminatory undercompensation are not barred by [section] 703(h) of Title VII merely because respondents do not perform work equal to that of male jail guards."97

The Court emphasized that it would "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."98 In this regard, the Court noted that Title VII was intended to be broader than the EPA and to strike at "'the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,'"99 and that the limited thrust of the Bennett Amendment history was to insure that the EPA was not nullified by Title VII.

To illustrate that liability under Title VII should not be limited to situations involving equal work, the Court pointed to hypothetical situations involving either express differences between men and women (men and women required to pay different amounts into pension funds) or admitted improper motivation in setting wages and stated that "Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory

97. Gunther, 452 U.S. at 181.
98. Id. at 178.
99. Id. at 180 (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
practices from judicial redress under Title VII.” The majority carefully pointed out that plaintiffs’ “claim is not based on the controversial concept of ‘comparable worth,’ under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community,” but was premised upon an allegation of an improperly motivated pay system. In holding that such allegations stated a claim, the Court left for future development the “contours of lawsuits challenging sex discrimination in compensation under Title VII.” Thus, the task is to develop the contours of Title VII for proving illegal motivation in wage disparity.

IV. Title VII

A. The Central Role of Motive in Title VII Litigation: Disparate Treatment Distinguished

Unlike the EPA, whose language and history establish an obligation to provide equal pay for equal work without regard to the motive or good faith of the employer, the language of Title VII of the 1964 Civil Rights Act directs that motive is a key element in the analysis. The Court has remarked that improperly motivated treatment “was the most obvious evil Congress had in mind when

100. Id. at 179.
101. Id. at 166.
102. Id. at 181. “We are not called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII or to lay down standards for the further conduct of this litigation. The sole issue we decide is whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII.” Id. at 166 n.8 (citations omitted).
103. See supra notes 25-32 and accompanying text.

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 opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), the Court stated:
1990] Compensation Differences 349

it enacted Title VII.” 105 Absent adverse impact of the selection device, 106 simple disparate treatment, including a difference in pay rates, without any racial, ethnic, or gender motivation, does not violate Title VII. Differences in pay rates must be improperly mo-

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. . . . [statute quoted] We take these words to mean that gender must be irrelevant to employment decisions. To construe the words “because of” as colloquial shorthand for “but-for causation,” as does [the employer], is to misunderstand them.

. . . . It is difficult for us to imagine that, in the simple word “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Id. at 1784-86.


106. Impact analysis and its application to pay systems is beyond the scope of this Article. See generally supra notes 15-17. Briefly stated, however, salary differences, even when based on subjective evaluations, would be subject to an evaluation of their legality based on their impact. Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983); Newman v. Crews, 651 F.2d 222 (4th Cir. 1981); United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), aff’d mem., 434 U.S. 1026 (1978). See Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988). Cf. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985). Consequently, if plaintiff proves that a device or devices used to set salary adversely affects the salary of plaintiff’s class, defendant will have a burden to produce evidence that the “challenged practice serves in a significant way, the legitimate employment goals of the employer.” Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125 (1989). Failure to produce such evidence will result in a judgment for plaintiff, though there is no requirement that the challenged practice be essential or indispensable for it to pass muster. Id. If defendant carries this burden, to prevail plaintiff must carry the ultimate burden of persuading the fact finder either that the challenged practice does not serve in a significant way the employer’s goals, or alternatively, that there is an equally effective way to set salaries that does not have the same impact on plaintiff’s class. Id. The irony of this is that if an employer uses a neutral selection device that results in a pay difference between genders, the employer must carry a burden of persuasion, proving that the device has business legitimacy. Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir.), cert. denied, 109 S. Ct. 378 (1988). If that device adversely affects salaries of minorities, the ultimate burden of proving the business illegitimacy of the practice will be upon the plaintiff. Consequently, women receive more protection against neutral devices under the EPA than racial minorities receive by the use of the same pay systems under Title VII.
tivated in order to be a violation. On the other hand, treatment of an individual need not be disparate to violate the Act. Any and all treatment motivated by considerations of race, color, sex, religion, or national origin violates Title VII. In short, improperly motivated treatment of an entire class of employees, even if all the persons in that class are treated precisely the same, is a Title VII violation. Consequentially, so-called disparate treatment does not alone create liability, nor is it a necessary element of liability. Disparate treatment of individuals from different classes is simply one of many methods by which improper motivation is established.

107. See Vaughn v. Pool Offshore Co., 683 F.2d 922, 925 n.3 (5th Cir. 1982); Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1418 (9th Cir. 1988).

108. County of Wash. v. Gunther, 452 U.S. 161, 178-79 (1981); Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 606-08 (9th Cir. 1982)(en banc), cert. denied, 460 U.S. 1074 (1983). Most cases involve treating one individual differently from another. Price Waterhouse, 109 S. Ct. 1775, makes clear, however, that any employment action motivated by proscribed criteria, unless justified by a defense, is an actionable wrong. Perhaps the simplest example illustrates this principle: If all applicants for a vacancy are rejected because all are black, it is illegal race discrimination even though no white received the job. All applicants were treated precisely the same way, yet the adverse employment action motivated by the race of the applicants is sufficient to establish a violation. And as Gunther held, even if all employees in a class receive the same pay, but that level of pay is based on proscribed factors such as the gender of the class, a claim exists under the Act. See Gunther, 452 U.S. at 163-81.

The problem is that section 703(a)(1) of the Act makes it unlawful "to discriminate... with respect to his compensation..." 42 U.S.C. § 2000e-2(a) (1982)(emphasis added). If all persons are treated precisely the same it could be argued that the employer, regardless of motive, has not violated the statutory term of "discriminate." See Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)(dicta suggesting that if a man is not treated differently from the woman plaintiff there is no violation of the Act). Nonetheless, even treating an entire class in a particular way may well be considered "discrimination" if that class would not have been treated in that manner save an invidious motive. See Textile Workers v. Darlington Mfg., 380 U.S. 263 (1965) (closing a plant, and thus discharging all workers, is "discrimination" if improperly motivated). Moreover, subsection (a)(2) of section 703 (supra note 104), unlike subsection (a)(1), does not use the word "discriminate," but makes it unlawful "to limit, segregate, or classify... employees... in any way which would deprive or... otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(2) (1982). Thus, even if all workers are classified in exactly the same way "because of" their race, color, religion, sex or national origin, if that classification results in lower wages for all workers, a claim would seem to exist under subsection (2) even though none was victimized by differential treatment.

109. Existence or non-existence of motive is a fact to be resolved by the fact finder which, under Title VII, is the trial court. On appeal the trial court's findings on motive are subject to the limited review accorded facts under rule 52(a) of the Federal Rules of Civil Procedure. Anderson v. City of Bessemer City, 470 U.S. 564 (1985).
Occasionally, an employer may express an animus against a particular class (e.g., race, color, gender, national origin, or religion). If this animus is expressed simultaneously with the employment decision or is proved to exist in the mind of the employer at a time closely juxtaposed with the employment decision, a fact finder can infer that the animus influenced the employment decision to some degree.  

The Supreme Court has determined the employer's burden in such a case: "[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."  

This burden on the defendant to prove that it would have made the same decision even in the absence of animus is a burden of persuasion. 

In the absence of direct evidence of animus, some authority indicates a plaintiff may be able to marshal a statistical demonstration of a "pattern and practice" of illegally motivated decision-making. However, because salaries are often a product of numerous variables, relatively simple binomial analysis that does nothing more than exclude chance as a hypothesis cannot be used in compensation cases. The Court, however, has accepted use of a

110. See generally Walsdorf v. Board of Comm'rs, 857 F.2d 1047, 1052 (5th Cir. 1988); Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541, 546 (8th Cir. 1984). Of course, plaintiff must carry the burden of proving the animus and the nexus between the animus and the employment decision. Kendall v. Block, 821 F.2d 1142, 1145-46 (5th Cir. 1987). Accord Price Waterhouse, 109 S. Ct. 1778.  


complex statistical technique that accounts for, or holds constant, the major variables used to set salary. This technique, known as multiple regression analysis, can produce a conclusion that a pattern of differences in salaries between persons of different races or genders cannot be accounted for by reference to the neutral variables, such as differences in education, experience, seniority, output, etc., thus allowing an inference that the observed compensation differences between classes was a product of a pattern of improperly motivated decision-making.115

Once that inference of improper motive is drawn from the data by the fact finder, similar to direct evidence cases, the burden shifts to the employer to prove that the same individual decision would have been made even absent the illegal animus.116 And, as in direct evidence cases, the burden is one of persuading the fact finder that legitimate reasons, in fact, account for the disparate treatment of each individual.

Many cases do not involve direct evidence of animus. Most plaintiffs cannot generate statistically significant patterns of exclusion. Many cases involve a simple difference in treatment given to individuals from different classes. These cases raise the issue of whether an inference of improper motive may be drawn from simple differential treatment, and if so, when.


Of course, if plaintiff's data is flawed in that the data fails to account for major variables that are used to set salary, no inference of improper motive is created, and the employer has no burden to justify the observed salary differences. Federal Reserve Bank of Richmond, 698 F.2d 633; EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 342-43 (7th Cir. 1988).

A discussion of statistical techniques is far beyond the scope of this Article. For a general discussion, see P. Cox, supra note 24, ¶ 16.03[4]; M. Player, supra note 24, at § 5.53(c). For a more thorough discussion, see D. BalduS & J. Cole, Statistical Proof of Discrimination, 173-80, 240-86 (1980); Campbell, Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 Stan. L. Rev. 1299 (1984); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980).

B. Disparate Treatment and The Basic McDonnell Douglas “Similar Situation/Dissimilar Treatment” Model

As outlined above, treating a man differently than a woman, or a black differently than a white is not, in and of itself, a violation of Title VII. Treatment, whether differential or not, must be improperly motivated. An understanding of this point leads to the next issue, which is fundamental: If a woman or minority person is treated differently from a similarly situated male or white, is this difference in treatment, unexplained and standing alone, sufficient to create an inference that the treatment was a product of proscribed motive? The case of McDonnell Douglas Corp. v. Green answered that fundamental query in the affirmative; even in the absence of direct evidence, differential treatment can carry an inference of proscribed motive.

Slightly different models of proof have evolved to define broadly when the circumstances of two employees or applicants are sufficiently similar to create an inference of illegal motive. These models vary, depending upon whether the different treatment arose in the context of hiring, promotion, discipline, or a broad, general reduction in force; but all are variations on the broad outlines of McDonnell Douglas. Ultimately, regardless of the factual context, proof that the minority and non-minority or the male and female were similarly situated and were not similarly treated is the

119. For example, in hiring or promotion cases McDonnell Douglas indicated that a plaintiff can establish an initial inference, or prima facie case, of improper motive by proving: (1) that he or she is in a protected class, (2) applied for a position with defendant, (3) that the position was vacant and defendant was seeking persons to fill it, (4) that plaintiff was qualified to hold the position, (5) that plaintiff was not appointed to the position, and finally, (6) either the position remained open after plaintiff’s rejection or was filled by a person from a class different from the plaintiff. See McDonnell Douglas, 411 U.S. at 802. If these elements are established, “the burden [of proof] then must shift to the employer to articulate some legitimate, non-discriminatory reason” for the rejection of the plaintiff. Id.

A similar standard for creating an inference of illegal motive is used when the employee is discharged. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982) (“he or she is a member of a protected class ... and was discharged ... while a person outside the class with equal or less qualifications was retained”). See also Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985), and EEOC v. Brown & Root, Inc., 688 F.2d 338, 340-41 (5th Cir. 1982) which articulate the standard in more precise terms of disciplinary standards.
necessary first step in proving that any differences in treatment were improperly motivated. If the plaintiff's proof fails to establish the similarity of the situations between the dissimilarly treated persons, plaintiff will not, in the absence of direct or statistical evidence, be able to create an inference of illegally motivated disparate treatment.

Once the plaintiff proves the dissimilar treatment of similarly situated persons from different classes, the burden shifts to defendant. Unlike the burden in "direct evidence" or "pattern or practice" cases where defendant carries a burden of persuading the fact finder of the legality of its decision, defendant's burden in individual disparate treatment situations is simply to articulate a legitimate, nondiscriminatory reason. This is a relatively light burden, a burden of simply coming forward with evidence of a legitimate reason for the treatment of plaintiff. It requires no more than simply producing evidence of a reason that would permit a fact finder to conclude that the articulated reason, rather


122. See supra notes 110-112.

123. See supra notes 113-116.

124. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). This difference in placing the burdens in disparate treatment cases is because, unlike "direct evidence" cases and "pattern or practice" cases, defendant's motive is still at issue, still being addressed by the proof. The initial inference created by the prima facie case is only the first step toward resolving that issue. Defendant articulating a legitimate reason for its treatment of plaintiff merely sharpens the factual issue for the fact finder. Id. In "direct evidence" and "pattern or practice" cases, plaintiff has already carried the burden of proving the presence of defendant's illegal motive; defendant has already been proved to have acted in a way that will be illegal unless justified by a defense. Consequently, in such cases it is appropriate to shift the burden of establishing legality—e.g., a defense—onto the defendant. Whereas, until the defendant has been proved to have acted with an improper motive, it is appropriate to shift an intermediate burden of producing evidence to the defendant, as McDonnell Douglas does, it is not appropriate to shift to defendant a risk of non-persuasion on the issue of motivation. See Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (O'Connor, J., concurring).
than improper animus, motivated the employment decision.\textsuperscript{125} It is one of production and is not a burden of persuading the fact finder of the absence of improper motive.\textsuperscript{126} Moreover, unlike the burden on employers in EPA cases where the employer must prove not only the existence of a factor, but also that the factor has some significant business rationality,\textsuperscript{127} the employer's responsive burden in a Title VII disparate treatment case is merely to articulate a reason that is lawful and has some minimal level of rationality.\textsuperscript{128}

Once defendant carries this light evidentiary burden of articulating a legitimate, nondiscriminatory reason for the differential treatment, the burden of persuasion is shifted to plaintiff to establish that the articulated reason was merely a pretext to disguise illegal motive. In short, plaintiff carries the burden of persuading the fact finder of defendant's improper motive.\textsuperscript{129} Plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer, or

\begin{equation}
\begin{aligned}
\text{125. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981); Pierce v. Marsh, 859 F.2d 601, 604 (6th Cir. 1988); MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988); Roebuck v. Drexel Univ., 852 F.2d 715, 726-27 (3d Cir. 1988).}
\text{127. See supra notes 80-93 and accompanying text.}
\text{128. See cases cited supra notes 117-126. In Burdine, 450 U.S. 248, "personality conflict" was deemed to be a legitimate reason which would carry defendant's burden of articulation. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978), held that a reason is legitimate when it is "reasonably related to the achievement of some legitimate purpose" and that a "no walk-on" rule was legitimate. See also Miller v. WFLI Radio, Inc., 687 F.2d 136, 138 (6th Cir. 1982). For illustrative cases and analysis see Player, supra note 126. See also Smith, Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine, 55 Temple L.Q. 372, 379 (1982); Furnish, A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine, 23 B.C.L. Rev. 419, 437 (1982).}
\text{129. See sources cited supra note 128. The trial does not necessarily proceed in this three-step judicial minuet of plaintiff presenting a prima facie case, followed by defendant articulating a legitimate, nondiscriminatory reason, followed by plaintiff presenting rebuttal evidence. Plaintiff may, in fact, be required to present all evidence indicating improper motive, reserving a response to new or unanticipated evidence for the rebuttal. Aikens, 460 U.S. 711; Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977). For a brief summary of the individual disparate treatment model see, Player, Applicants, Applicants in the Hall, Who's The Fairest of them All? Comparing Qualifications Under Employment Discrimination Law, 46 Ohio St. L.J. 277, 284-287 (1985).}
\end{aligned}
\end{equation}
indirectly by showing that the employer’s proffered explanation is unworthy of credence.” 130

Application of this general three-step approach to compensation cases would seem both logical and appropriate. But the very existence of the EPA and the fear of comparable worth have given rise to considerable confusion as to the content of plaintiff’s prima facie case and the nature of defendant’s burden in responding to plaintiff’s showing. 131 Virtually all courts are willing to accept the EPA as a model in Title VII litigation when plaintiff actually succeeds in proving that persons of different classes were performing “equal work” within the meaning of the EPA. 132 However, when plaintiff’s proof fails to establish job “equality,” rather than applying the traditional Title VII model and following McDonnell Douglas, recent authority rejects plaintiff’s claim for failure to establish a prima facie case. 133 That is, under this authority, the failure of a plaintiff making a pay discrimination claim under Title VII to establish “equal work” will result in judgment for the defendant.

C. Disparate Compensation When the Work is “Equal”: Transplanting the EPA Model into Title VII

1. Plaintiff’s Showing: The Prima Facie Case—“Equal Work” Revisited.—If the jobs of the male and female employees are so closely identical so as to be “equal” within the rather strict


131. While the language of the courts is often confusing as to the elements of a prima facie case and the nature of defendant’s burden, comparable worth cases do at least follow the three-step approach of McDonnell Douglas. See Beard v. Whitley County REMC, 840 F.2d 405, 411 (7th Cir. 1988).


133. EEOC v. Sears, Roebuck & Co., 839 F.2d at 341-43; Forsberg, 840 F.2d at 1418. Cf. Orahood v. Board of Trustees, 645 F.2d 651, 655 (8th Cir. 1981); Merrill, 806 F.2d at 606-07.
Compensation Differences

confines of the EPA, creating under that Act a prima facie case of liability, legislative comity would suggest that a prima facie case of similar strength is also created under Title VII. However, since Title VII is a motive-driven statute, that prima facie case must be restated in motivational terms. That is, proof of "equal work" and unequal pay establishes a prima facie case by creating an inference of improperly motivated gender discrimination.\textsuperscript{134}

Since the EPA covers only gender-based pay discrimination, differences in compensation along racial, ethnic, or religious lines are not subject to EPA protection. Thus, the need for legislative parity between the EPA and Title VII is not immediately apparent. Nonetheless, it would be ironic, and no doubt contrary to the purposes of Title VII, to provide less or a significantly different form of protection to racial and ethnic minorities than is provided to women. Consequently, if jobs of the black and the white employee, or the Hispanic and the Anglo employee are so closely identical as to be "equal" within the strict confines of the EPA, the failure to pay these employees at an equal rate creates the same inference created in gender discrimination cases.\textsuperscript{135} Thus, even though rooted in EPA analysis, proof of "equal work," under standards developed under the EPA,\textsuperscript{136} creates the inference under Title VII that differences in compensation between persons of different classes is a product of improper motivation, shifting to the defendant the burden of providing an explanation for those differences.

2. Defendant's Burden: McDonnell Douglas or The EPA Model—A Burden of Production or Persuasion?—The problem, therefore, is not recognizing that "equal work" for unequal compensation creates an inference of improper motivation—all courts accept this proposition.\textsuperscript{137} The problem is identifying the em-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{134} See cases cited supra note 132.
  \item \textsuperscript{135} Id. See also Bazemore v. Friday, 478 U.S. 358 (1986).
  \item \textsuperscript{136} For jobs to be "equal," the content need not be "identical" but must be "substantially equal." See supra notes 34-40. This "substantial equality" must exist in "skill, effort, and responsibility," see supra notes 35-37, and must be performed under working conditions which are "similar." See supra notes 45-47. The jobs of the two employees must be performed within the same "establishment" of the employer. See supra note 51. The rate of pay of the two employees must be proved to be unequal. See supra note 52.
  \item \textsuperscript{137} See, e.g., Forsberg, 840 F.2d at 1418 and EEOC v. Sears, Roebuck & Co., 839 F.2d at 341-43 (rejecting a standard less than that of "equal work," and agreeing that "equal work" would create such an inference). Even the dissent in County of Wash. v. Gunther, 452 U.S. 161, 181-204 (1981) (Rehnquist, J., dissenting), accepted the proposition that under
\end{itemize}
\end{footnotesize}
ployer's burden in responding to the inference created by such proof. Since the claim is made under Title VII, where motive is the issue, this might suggest superficially that the employer's burden should be that set forth in the disparate treatment model of *McDonnell Douglas Corp. v. Green*, a rather relaxed obligation to articulate a reason for the pay difference that is legitimate and nondiscriminatory, a burden of simply going forward with the evidence. The ultimate burden of persuasion on the issue of motive remains at all times on the plaintiff.

On the other hand, those who have advocated that the EPA model should control Title VII analysis, would argue that the employer's burden of responding to unequal pay for equal work should be the same as it is under the EPA model. That model shifts to defendant a significantly heavier burden of persuading the fact finder that the different "payment is made pursuant to...[a] factor other than sex," race, national origin or religion.

The issue is not a small one because the party with the burden of persuasion runs a significantly greater risk of not prevailing. If the relaxed, relatively light burden of production used in disparate treatment Title VII cases is used in situations where the work of the male and female employees is "equal," the obvious result will be that females invoking Title VII will be provided significantly less protection than if they had brought suit under the EPA. Granting less protection under Title VII than is granted by the

---

Title VII proof of unequal pay for equal work created an inference of improper motivation and that a violation of the EPA would also violate Title VII.


140. See *supra* notes 125-130 and accompanying text.

141. See 110 Cong. Rec. 7217 (1964) ("The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.").


EPA is hardly consistent with the purpose, expressed in *Gunther*, that the protections of Title VII go beyond those granted by the EPA.

Moreover, the reason behind the Bennett Amendment proviso in Title VII\(^{144}\) was to insure that the EPA was not nullified.\(^{145}\) Most certainly, construing the two statutes in the same way when presented with identical factual patterns does nothing to nullify EPA rights. Indeed, placing a significantly lighter burden on employers in Title VII claims would tend to dilute the rights created by the EPA.\(^{146}\)

Finally, in the rather sparse legislative history of Title VII's relationship to the EPA is the statement that "[t]he standards in the EPA for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII."\(^{147}\) This statement certainly suggests that Title VII standards of proof should not be less demanding than if the same situation were to arise under the EPA.

Significant too is the plight of racial and ethnic minorities, whose only remedy for less pay for "equal work" is Title VII. If Title VII places on employers the significantly lighter burden of merely articulating a legitimate reason for unequal treatment of minorities, these minorities would be denied recovery under circumstances where women at least theoretically could recover under the EPA. There is nothing in the interrelated statutory schemes suggesting that women should secure more protection than similarly situated racial and ethnic minorities, or that in wage discrimination cases, Title VII would impose a lesser or more relaxed standard than the EPA.\(^{148}\)


\(^{147}\) 110 Cong. Rec. 7217 (1964) (Clark memorandum explaining the sections of Title VII to the full Senate). The use of the phrase "comparable situation" indicates that if a different situation is presented, as there would be when the work is not "equal," then EPA standards are not controlling. When the work is "equal," however, the employer's burden under Title VII should be no less than it would be if the action were brought under the EPA. Otherwise, the EPA standard is not being applied.

\(^{148}\) See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787 n.9 (1989). The Court rejected suggestions that sex discrimination perhaps should receive less protection than race and national origin discrimination by stating: "the statute on its face treats each of the enumerated categories exactly the same. By the same token, our specific references to gen-
All of this strongly suggests that when plaintiff proves that the work she performs is "equal" to that performed by a man, within the meaning of the EPA, and proves that the rate of pay is less, defendant's burden under Title VII should be the same as it is under the EPA. 149

These considerations have prompted the few courts addressing this issue to reject the analysis of a Title VII disparate treatment model and transplant the EPA model into Title VII litigation. These courts hold that once the plaintiff establishes equality of the work by employees of different classes, the burden of proof set forth in the EPA is shifted to the Title VII defendant. 150 Regardless of which statute is invoked, defendant's burden is to convince the fact finder that the factor used to set salary differences has a legitimate connection to bona fide employer concerns, and that the factor is totally neutral in terms of race, sex, religion, or national origin. Failure to carry this burden of persuasion will result in a judgment for the plaintiff.

Placing this higher standard on defendants can be justified in Title VII motivational terms since proof of "equal work" is much more onerous for plaintiff than establishing the relatively easy elements of dissimilar treatment found in a typical McDonnell Douglas-type case. The plaintiff's proof of "equal" circumstances creates a significantly stronger inference of improper motivation. This stronger inference of illegal motive justifies a correspondingly heavier burden on the employer to overcome the inference by proof that the difference in fact was based on a factor other than sex, race, religion, or national origin.

D. "Similar Situation": A Pure McDonnell Douglas Title VII Model

1. The Prima Facie Case: Is "Equal Work" Necessary?—As pointed out above, the analytical premises of Title VII and the

---


EPA are different. The EPA has an objective standard while Title VII is largely motive driven. However, when the work of employees in different classes is "equal," the broad approach and ultimate result reached under the two statutes is the same.

Some courts assume that if the work is not "equal," it is inappropriate to infer improper motive under Title VII. Again, as mentioned above, traditional, well-established Title VII models allow the creation of an inference of illegal motivation if "members of a racial minority . . . were treated differently from similarly situated non-minority members." For example, the discharge of a black employee and the retention of a white employee arising under similar circumstances creates an inference of racially motivated discipline. That inference is created even though the situations of the two employees may not be so much alike as to be labeled as "equal." Indeed, the Court has indicated that different discipline arising under comparable circumstances is sufficient to support an inference of improper motive.

There is no reason why such a model should not apply also to determine the issue of motivation for pay differences, and some courts appear to hold so. Certainly, the language of Title VII

151. EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 344 (7th Cir. 1988); Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1418 (9th Cir. 1988).
153. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976). The employer had argued that to create an inference of illegal motive, or "pretext," plaintiff had to plead with "particularity" the degree of culpability of a black employee, who was retained, and that of two white employees, both discharged for theft. The Court stated, "Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other 'employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained . . . ' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext." Id. (emphasis in original) (citations omitted). Note that the Court used the term "comparable," a term requiring even less preciseness than "similar." Friedel v. City of Madison, 832 F.2d 965, 974-75 (7th Cir. 1987) (also applying a "comparable seriousness" standard). See also Artim Transp. Sys., 826 F.2d at 542; Kendall, 821 F.2d 1142; Western Grain Co., 838 F.2d 1165.
154. Orahoo v. Board of Trustees, 645 F.2d 651, 655 (8th Cir. 1981) ("Title VII may properly be invoked in situations of discrimination involving inadequate compensation where the plaintiff's work is comparable (but not substantially equal) work."); Merrill v. Southern Methodist Univ., 806 F.2d 600, 606-07 (5th Cir. 1986) ("The Title VII plaintiff
does not suggest that compensation is to be treated any differently than refusal to hire, discharge, or differential dispensation of any other term or condition of employment, and save for protecting the EPA from Title VII nullification, the legislative history of Title VII does not suggest different standards for analysis of pay discrimination.

Moreover, *County of Washington v. Gunther*, in unequivocally rejecting an "equal work" limit on Title VII analysis, clearly directed, in rather sweeping terms, that Title VII provides remedies for a wide range of sex-based wage discrimination going beyond the narrow confines of "equal work." Construing *Gunther*, a decision which allowed an expanded application of Title VII, to narrow traditional Title VII analysis is to ignore the context in which that decision was rendered.

Finally, *Bazemore v. Friday*, seems to have recognized traditional similar situation/dissimilar treatment analysis in the context of compensation differences. Black employees and white employees doing similar jobs were paid different rates. The employer justified this difference by arguing that black employees had received less pay prior to the effective date of Title VII, but since that date, they had received the same wage increases as similarly situated white employees. Nonetheless, because of pre-Act discrimination, a pay difference remained between black and white employees. The Court found this to be a clear and obvious violation of the Act, stating: "Each week's paycheck that delivers less to


156. *See supra* note 141.


159. 478 U.S. 385 (1986).
a black than to a similarly situated white is a wrong actionable under Title VII."\textsuperscript{160}

Nevertheless, two circuits (the seventh and ninth) hold that, in the absence of direct or statistical proof, a prima facie case of improperly motivated compensation differences is created only if plaintiff is able to establish the EPA standard of "substantial equality" of work; similarity of work is insufficient.\textsuperscript{161} These two circuits appear to be so obsessed with the "equal work" model of the EPA or fearful of the dreaded comparable worth standard that they cannot recognize the broader, more flexible scope of Title VII analysis outlined by the Court in Gunther and apparently confirmed in Bazemore. Indeed, they read Gunther as dictating an

\textsuperscript{160} Bazemore, 478 U.S. at 395 (emphasis added). Compare this with the holding in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Moreover, Bazemore, holding that multiple regression analysis may establish a violation of Title VII, recognizes that equal work is not necessary to create an inference of improper motive, and re-emphasizes the Gunther holding that equal work is not required to create such an inference.

\textsuperscript{161} EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 343-44 (7th Cir. 1988):

We believe that the district court correctly determined that the EEOC did not show the type of direct evidence of intentional sex discrimination in pay contemplated by the Gunther Court, and thus the EEOC had to meet the equal pay standard of the EPA to prove its Title VII sex discrimination in wages claim.

The EEOC had the burden of meeting the equal work standard of the Equal Pay Act.

The Seventh Circuit appeared to be suspicious of statistical data, notwithstanding the Court's direction in Bazemore, absent this direct evidence. Id. at 342-43.

Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1418 (9th Cir. 1988), similarly held that when work was not "equal" within the meaning of the EPA, even if coupled with additional nondirect evidence of illegal motive, this was insufficient to create an inference of illegal motive under Title VII. See also American Nurses' Ass'n v. Illinois, 783 F.2d 716, 721 (7th Cir. 1982); Spaulding v. University of Wash., 740 F.2d 686, 700 (9th Cir.), cert. denied, 469 U.S. 1036 (1984).

The Fifth Circuit at one time used a standard similar to that now adopted by the Seventh and Ninth Circuits. In Uviedo v. Steve's Sash & Door Co., 738 F.2d 1425, 1431 (5th Cir. 1984), cert. denied, 474 U.S. 1054 (1986), the court stated: "To establish a prima facie case of discrimination respecting compensation a plaintiff must prove (1) that she is a member of a protected class, and (2) that she is paid less than a nonmember for work requiring substantially the same responsibility." Accord Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1075-76 (6th Cir. Unit A 1981). However, in Merrill v. Southern Methodist Univ., 806 F.2d 600, 606-07 (5th Cir. 1986), the court specifically stated that to establish a prima facie case "plaintiff need not necessarily prove that she performed work equal to that of her better paid male colleague," indicating that a prima facie case would be created by proof that jobs were "substantially the same." Accord Orahood v. Board of Trustees, 645 F.2d 651, 655 (8th Cir. 1981); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982); Taylor v. Charley Bros., 25 Fair Empl. Pract. Cas. (BNA) 602 (W.D. Pa. 1981).
"equal work" standard of liability in the absence of direct evidence or statistical proof of improper motive, a reading that is, to say the least, ironic given the fact that the centerpiece of the Gunther decision is unambiguous imposition of liability even where jobs do not involve equal work.\textsuperscript{162}

The demand by these courts of "equal work" seems to be based upon a dichotomy that does not and need not exist. Apparently, they assume that if an inference of illegal motive is permitted by comparing job duties that are less than "equal," this necessarily assumes that the court is entertaining liability based on comparable worth.\textsuperscript{163} This is a non sequitur, as the majority in Gunther recognized.\textsuperscript{164} The concept of equality found in the EPA, requires a high level of objective content equality.\textsuperscript{165} Comparable worth is a distant extreme which presupposes jobs totally dissimilar in objective content, with a liability premised on a subjective concept that these dissimilar jobs have similar economic value to

\begin{itemize}
  \item \textsuperscript{162} In addressing the dissent's argument that absent equal work there could be no Title VII violation, the Gunther Court hypothesized certain "egregious" and "blatantly discriminatory" practices clearly within the scope of Title VII which would be excluded if "equal work" was required: (1) the employer "admitted that her salary would have been higher had she been male," and (2) an express or "transparently sex-biased system for wage determination . . . [as where] the employer required its female workers to pay more into its pension program than male workers." County of Wash. v. Gunther, 452 U.S. 161, 178-79 (1981). Such illustrations of "egregious" violations hardly establish the proposition that only such direct or express violations are exceptions to the "equal work" standard. The Court nowhere suggested that these examples, which simply illustrate the absurdity of using the equal work model to control the broader sweep of Title VII, establish the outer limits of motivational analysis. Ironically, the lower courts are following not the majority in Gunther, but rather the dissent. The Gunther dissent seems to concede, grudgingly, that the express classifications and direct evidence situations hypothesized by the majority would be illegal, id. at 201-02, but argues that the language of the majority goes beyond those situations. Id. at 204. The dissent is correct; the clear language of the majority does not limit its application to those examples of facial, "blatantly discriminatory" practices. Yet the courts of appeals, by adopting the examples virtually conceded by the dissent as the only limits on the "equal work" standard have, in effect, adopted the position of the dissent that "equal work" does place real limits on Title VII analysis.
  \item \textsuperscript{163} See American Nurses' Ass'n, 783 F.2d at 721; AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); Pacific Northwest Bell Tel. Co., 840 F.2d at 1418-19.
  \item \textsuperscript{164} A major premise of the dissent in Gunther was that allowing liability when the jobs were not "equal," was adoption of a "comparable worth" theory. Gunther, 452 U.S. at 193 (Rehnquist, J., dissenting). Furthermore, Congress expressly rejected the whole theory of "comparable worth." Id. at 185-87. Although the courts of appeals apparently miss the message, the majority of the Court recognized the argument for what it was, a non sequitur. Id. at 166.
  \item \textsuperscript{165} See supra notes 41-54 and accompanying text.
\end{itemize}
Between the extremes of objective content equality and subjective comparable worth there lies a vast distance, and in this expanse there is ample room for a middle ground of objective job similarity.

Recall the spectrum of job likeness that Congress specifically identified when it enacted the EPA. At one extreme is absolutely identical job content. At the other extreme are jobs totally dissimilar which have no economic equivalency. Jobs of somewhat less likeness than identical were described by Congress as being substantially equal, and thus "equal" for the purposes of the EPA. Totally dissimilar jobs which might be deemed to have some subjective economic equivalency were deemed to be merely comparable, and thus outside the protections of the EPA. However, Congress recognized that between subjective comparability, on one hand, and equality, on the other, was a condition of objective likeness described as similarity. Congress used the term "similar" when it established the statutory standard to be met for differing working conditions. The structure of the EPA itself thus recognizes a distinction between the concept of equal and similar, and it does so without entering the forbidden territory of "comparable worth."

Consequently, we can assume for the purposes of argument that Congress rejected a comparable worth concept of liability when it enacted the EPA. We can assume further that when it enacted Title VII, Congress maintained that position and did not intend to permit Title VII liability based on a subjective view of the relative abstract worth of two totally different jobs. But this does not mean that Congress also accepted the notion that an ini-

166. See supra notes 1-2.
167. See supra notes 40-44 and accompanying text.
168. See Gunther, 452 U.S. at 184-88 (Rehnquist, J., dissenting).
169. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986). Moreover, we may assume that once the intent of Congress is discovered, courts may be unwilling to use judicially created doctrines of proof to bootstrap protection for certain classes of persons or conduct specifically outside the group that Congress sought to protect. See, e.g., International Union, UAW v. Michigan, 886 F.2d 769-70 (6th Cir. 1989); United Steelworkers v. Weber, 443 U.S. 193 (1979) (initially recognized that whites were protected under Title VII against racial discrimination, but nonetheless concluded that Congress did not intend to prohibit employers from adopting racially premised affirmative action plans); DeSantis v. Pacific Tel. & Tel. Co., 603 F.2d 327, 330-31 (9th Cir. 1979) (holding that disproportionate impact analysis, normally available in gender cases, could not be extended to protect homosexual men against discrimination
tial inference of illegal motive is impermissible when two objectively similar jobs held by persons of different classes are paid substantially dissimilar salaries.

When the sole issue is the level of objective sameness necessary to create an inference that different treatment was improperly motivated, attacks that can be made on the comparable worth standard have little or no validity. First, legislative history rejecting liability premised upon comparable jobs does not preclude creating an inference of improper motive when jobs reach an objective likeness of similarity.

Based on sexual orientation based upon the perceived intent of Congress to exclude such discrimination from the protection of the Act).

Comparable worth has been attacked on many grounds. See generally supra notes 1-2. The basic premise has been attacked on grounds that worth cannot be evaluated in a universe that is divorced from the very economic forces which determine wages. Abstract worth determinations are said to be meaningless, not unlike an attempt to set an absolute just price for apples, oranges, soybeans, and chocolates apart from the supply and demand for each distinct product. Brown, Baumann & Melnick, supra note 1, at 138-40; Nelson, Opton & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. Mich. J.L. Ref. 231, 254 (1980); E. Paul, supra note 2, at 52-56, 111-19. Furthermore, to the extent that comparable worth is premised upon "men's jobs" earning more then "women's jobs," it is argued that the premise is based on faulty data. Job segregation can be attributed to many factors (education, conflicting family roles, societal expectations, etc.) other than overt gender exclusion. Id. at 39-51; Brown, Baumann & Melnick, supra note 1, at 134-38; United States Comm. on Civil Rights, Findings & Recommendations 70 (April 11, 1985). It is asserted, too, that comparable worth is an unwarranted intrusion into the market, unjustifiably denying the employer necessary economic decision-making authority. Id. at 71; Brown, Baumann & Melnick, supra note 1, at 140; Lemons v. City & County of Denver, 620 F.2d 228, 229 (10th Cir.), cert. denied, 449 U.S. 888 (1980).

A legal attack which has some validity is that Congress intended to exclude comparative worth comparisons from the scope of the EPA and presumably Title VII. See supra note 4. There may also be some validity to a structural attack; comparable worth simply does not fit into the motive and impact elements required to establish Title VII liability. Even if the employer was well aware of the consequences of the pay system, mere proof that structurally different jobs might have a similar intrinsic worth does not establish that an employer was improperly motivated when market forces applicable to different job content were allowed to influence the pay differences. See P. Cox, supra note 24, at ¶ 16.02(c); Nelson, Opton & Wilson, supra at 278. See also General Bldg. Contactors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); International Union, 866 F.2d at 769. Even if proof that use of market forces has an adverse impact on women, such market forces can serve as a defense. Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982); EEOC v. J.C. Penney Co., 843 F.2d 249 (6th Cir. 1988).

Finally, it can be argued that comparable worth is so subjective, so divorced from objective norms, that the concept provides no justiciable standards by which liability can be articulated. Consequently, if allowed to be a basis for liability, employers would be left at risk and at the mercy of a future third-party evaluation of worth that could not be foretold at the time wage rates were established.
Unlike comparable worth, which, without some additions or alterations, does not fit well into existing analytical models, similar situation/dissimilar treatment is the direct application of one well-established model of inferring motivation from circumstantial evidence. Indeed, the refusal to apply the well-established dissimilar treatment model to compensation amounts to a refusal to apply established Title VII jurisprudence to compensation issues. Understandably, courts may be reluctant to create new systems of proof and liability without legislative sanction (or indeed, contrary to legislative suggestions), but it is hard to justify a refusal to apply well-established principles of motivational analysis to another form of discrimination.

Similar situation/dissimilar treatment, unlike some aspects of comparable worth, is a judicially manageable standard. Since Congress and the courts have recognized that jobs less than identical can trigger liability, it is clear that some judgment necessarily, and inherently, goes into the making of the comparison. Any time liability attaches to circumstances that are not objectively identical, a finder of fact must make a judgment. The issue is whether that judgment can be evaluated in terms of objective norms known to and articulated by the court. "Worth," because of its subjectivity, may, like beauty, be solely in the eyes of the beholder, and thus lack justiciable norms. "Similarity," on the other hand, can be defined in objective terms and used by the fact finder in making principled evaluations. Again, "similarity" is a standard long utilized under Title VII in comparing working conditions and discipline. It is neither less objective, nor any more difficult to

---

171. Even the earliest cases under the EPA held that if third persons who do the extra tasks normally performed by the higher paid male employees as their primary job are paid less than the higher paid male employees, these tasks could not justify a premium payment. The pay premium could not be justified in terms of the greater flexibility accorded by the male employees performing extra tasks. Shultz v. Wheaton Glass Co., 421 F.2d 259, 263 (3d Cir. 1969), cert. denied, 398 U.S. 905 (1970); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 286 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975). This necessarily involves the judiciary in making economic choices—evaluating the worth of two jobs that are not objectively identical. See Freed & Polsby, supra note 1, at 1086-90. Some authority even held that pay differentials could not be justified on the basis of additional duties unless those duties were "of an economic value commensurate with the pay differential." Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 725 (5th Cir. 1970). Clearly, the judgment as to whether duties are of commensurate economic value is laden with comparable worth overtones.

172. See supra notes 120-121.
determine whether two jobs are similar than it is to determine that two employees of different classes involved in similar misconduct were not similarly disciplined.

"Similar" is an objective standard also long used by the EPA itself to define the necessary sameness of working conditions. If "similar" provides a justiciable standard by which working conditions are compared for EPA liability, it would seem that "similar" would provide a justiciable norm when comparing the total circumstances of the job.

The judgment call required to determine whether two jobs are more than comparable, and thus similar, may not be easy. It requires the drawing of another line between the extremes of "comparable" and "substantially equal," and the drawing of an additional line presents an additional set of close cases. But this does not mean that a norm is lacking. Mere difficulty in application should not be a basis to deny the proper scope of remedial legislation. The line between "similar" and "comparable" on one hand, and "similar" and "substantially equal" on the other, is no more difficult to draw than the lines between slight, ordinary, and gross negligence, distinctions the common law has been drawing for generations.

Finally, a similar situation/dissimilar treatment standard for inferring improper motive does not place employers at risk of unjustified, unavoidable, and unforeseen liability for any wage difference. Given the absolute liability concept of the EPA, and the correspondingly heavy burden on the employer to justify pay differences by proving that a "factor other than sex" actually produced the wage difference, it is understandable why a high standard of objective likeness should be imposed as a condition of that prima facie liability. However, Title VII structure is different. As will be pointed out below, proof that jobs are similar and paid

174. For example, determining whether a particular classification is a "bona fide occupational qualification" within the meaning of Title VII, 42 U.S.C. § 2000e-2 (1982), or the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1) (1982), requires the fact finder to evaluate whether use of the otherwise forbidden classification is "reasonably necessary to the normal operation of the particular business." Id. § 623(f)(1). See also Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).
Compensation Differences 369

differently merely creates an inference of improper motive (not of
liability or even presumptive liability), and the employer may re-
fute this fairly weak inference of motive with relative ease, by
simply articulating a legitimate reason for the wage difference.
Employers with legitimate reasons for salary differences thus will
not be at risk. Only those with no rational basis for pay differences
for similar jobs held by persons of different classes will be liable.
Asking employers to articulate their reasons for treating minorities
and women less favorably than similarly situated whites and men
falls far short of the economic engineering critics of comparable
worth fear.

Some practical considerations demonstrate why Title VII simi-
lar situation/dissimilar treatment analysis should be applied in
compensation cases, and thus why the analysis should not be lim-
ited to situations involving equal work. As pointed out in the
discussion of the EPA, a job performed by a female may be quite
similar to a job performed by a male, with the primary differences
being that the woman has significantly more job duties or respon-
sibilities than the man. But because the two jobs are not “equal,” it
is conceptually difficult, if not impossible, to hold that paying less
to the female is a violation of the EPA.\footnote{176} The objective standard
of the EPA requires proof of “equal work,” which is absent if such
work in fact lacks substantially equal skill, effort, or responsibility.
Intuitively, however, regardless of inequality of work, paying less
to a female who has a similar but more responsible job should cre-
ate an inference of gender bias. Recognition of the similar
situation/dissimilar treatment standard would probe such a motive
by requiring the employer to articulate reasons for paying the fe-
male less for a similar but more responsible job.\footnote{177} Insisting on
proof of “equal work” would inhibit, if not preclude, principled
analysis because the employer would not be obligated to explain a
very suspicious pay difference if the work was not “equal.”\footnote{178}

Another illustration, somewhat the converse of the one de-
scribed above, is the situation in which jobs held by a male and a
female are similar, but the job held by the male contains sufficient
additional duties and responsibilities to make the two jobs not

\footnotesize
\begin{itemize}
\item \footnote{176}{See supra note 29.}
\item \footnote{177}{See I.U.E. v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), cert. de-
nied, 452 U.S. 967 (1981).}
\item \footnote{178}{See Newman & Vonhof, supra note 2, at 269, 286-88, 292-302.}
\end{itemize}
“equal.” Nonetheless, the extra duties and responsibilities, while significant enough to make the jobs not “equal,” do not render the jobs greatly different. Normally, such extra duties, because they involve no great level of skill or effort, receive little if any compensation bonus. However, in this case the male performing the job with these normally low-paying extra duties is paid dramatically higher wages than the female doing the similar work. It therefore seems proper to infer, at least initially, that wages totally disproportionate to such job differences are as much a product of the gender differences as they are of the differences in job duties. Demanding proof of job equality denies the validity of such an inference.

Assuming as a basic proposition it is appropriate to create an inference of improper motivation by proof of job similarity and compensation dissimilarity, the concept of “similarity” needs some definition. At the broadest level the following steps should be necessary for plaintiff to create an initial inference of illegally motivated pay discrimination: (i) plaintiff is in a class protected by Title VII, (ii) a person of another class receives more compensation than the plaintiff, and (iii) the jobs being performed by the plaintiff and the other person entail overall similar skill, effort, responsibility, and working conditions.

Unlike the EPA, where plaintiff must establish “equality” separately in the areas of skill, effort, and responsibility, Title VII contains no statutory requirement that similarity of skill, effort, responsibility, and working conditions exist in each of these job

179. For an illustration see Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970), which arose under the EPA. Wheaton Glass held that extra duties which normally are compensated at a level below that of the primary job are not the kind of duties that ordinarily will cause the otherwise “equal” jobs to lose their equality. Id. at 264. See also Shultz v. American Can Co.—Dixie Prods., 424 F.2d 356 (8th Cir. 1970).

180. Even under the EPA, some courts have attempted to reach wage differences that have no apparent economic justification by holding that different job duties do not in fact make similar jobs unequal if the different duties are not “of an economic value commensurate with the pay differential.” Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970). While such a holding can be criticized doctrinally as going beyond the objective standard set by Congress in the EPA by injecting judicial judgments of economic value, it does illustrate a perceived need to have the statutory scheme regulate such inherently suspicious wage differences. Thus, while it stretches the EPA beyond its objective premises to apply it to jobs which are not objectively equal, it does no damage to Title VII or to the intent of Congress in allowing an inference of improper motivation to flow from such suspicious treatment.

181. See supra notes 33-39 and accompanying text.
Compensation Differences

components; the job is examined in its totality for overall similarity and thus allows for certain off-setting of job components. The fact finder must conclude that the jobs are similar enough in terms of skill, effort, responsibility, and working conditions that the differences in compensation are more likely attributable to the difference in race or gender of the employees than they are to job differences. Two jobs need not be equal or substantially equal, but they must contain sufficiently similar characteristics to make them more alike than merely comparable. "Similarity" is thus equidistant between "equality" and "comparability." 182

2. Defendant's Burden When Jobs are "Similar": A Burden of Production.—When the work of employees from different classes is similar and the compensation for these jobs is dissimilar, an initial inference of illegal motive is to be drawn, but the inference is relatively weak, far weaker than the inference of illegal motive drawn from proof of job equality. This weaker inference of motive is refuted by a correspondingly weaker showing by defendant. 183 This, of course, suggests application of the traditional Title VII disparate treatment model of *McDonnell Douglas Corp. v. Green*, 184 where defendant carries the burden of refuting the inference of motive which flows from dissimilar treatment under similar circumstances by articulating a legitimate, nondiscriminatory reason for the dissimilar salary. Defendant must present objective evidence of a lawful reason which could support an inference that the reason, rather than proscribed criteria, motivated the decision. This is a simple burden of producing evidence on the subject and is not a burden of persuasion. 185 At this point the burden is returned to the plaintiff who must now convince the fact finder by a

---

182. The similar situation/dissimilar treatment model has no rigid requirement, as does the EPA, that the work must be performed in the same "establishment." Title VII does, however, specifically set forth a defense that justifies differences in compensation for employees who work in "different locations." 42 U.S.C. § 2000e-2(h) (1982). That proviso will be considered *infra* notes 190-195 and accompanying text.


preponderance of the evidence that the defendant was improperly motivated. 186

Two analytical models are thus created. The first, the "equal work" model, is driven by the need to insure that the EPA is not nullified and is fully reconciled with Title VII. Consequently, when plaintiff carries the relatively heavy burden of proving the equality of the two jobs, as the term "equal" is defined in the EPA, it is appropriate, for the purposes of legislative comity, to continue with the EPA model in the Title VII motive-seeking context. In such a case the burden is shifted to the employer to prove that the pay difference between the different races or genders performing the jobs is attributable to "any factor other than sex" 187 race, or national origin.

The next model is controlled by traditional Title VII disparate treatment analysis. As Title VII is a motive-driven statute, it allows for analysis keyed to motive and divorced from objective liability imposed by the EPA. Using pure Title VII analysis, where job duties of different paying jobs are "similar," but are held by persons of different races, genders, or ethnic origins, an initial inference of improper motivation is created. This inference is considerably weaker than the inference created by proof of "equal work." Accordingly, defendant's burden is weaker than it would be had plaintiff proved the equality of the jobs. Defendant's burden, as defined by McDonnell Douglas, is simply to present credible evidence of a legitimate, nondiscriminatory reason for the difference in compensation. 188 If defendant establishes the existence of a legitimate reason upon which the compensation differences could have been based, plaintiff's burden is to carry the risk of non-persuasion on the ultimate issue of defendant's motivation. 189 This analysis recognizes a logical continuum of job likeness from complete and total identity, through equal, similar, and comparable, all the way to the other extreme of complete and total dissimilarity: (i) EPA standards of liability are applied to work determined by

186. Burdine, 450 U.S. at 256.
188. McDonnell Douglas, 411 U.S. at 802.
the fact finder to be either identical or "equal"; (ii) work found to be "similar" triggers traditional Title VII inquiries into an employer's motive for pay differences between protected classes; (iii) work that is found to be only "comparable" or totally dissimilar, consistent with the legislative histories, is beyond the scope of either statute.

Recognition of this continuum would give full force to the EPA, while allowing an analysis fully compatible with motive-driven Title VII jurisprudence. Such an analysis is preferable to the unnecessary assumption made by some courts that only proof of "equal work" creates an inference of illegal motive, thereby creating a standard of proof in Title VII compensation discrimination cases that is higher than the standards for proving motive in other contexts.

3. Statutory "Defenses": Production or Persuasion?—As pointed out above, if plaintiff has proved "equal work," defendant is required to carry the burden of proving that the factor articulated met the EPA defense of being a factor other than sex, race, or national origin. If plaintiff proves only that the work of the two employees is "similar," defendant is not required to prove that a factor other than race, sex, or national origin motivated the decision. Defendant's burden is to articulate a legitimate, nondiscriminatory reason for the treatment. This analysis is complicated, however, by the Title VII provision that an employer may:

apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

This proviso has been held to preserve systems which adversely affect a protected class but not to preserve their use if they are improperly motivated. The question is whether it is the plaintiff, who normally carries the burden of persuasion on the key

190. See supra notes 30-32 and accompanying text.
191. Id.
issue of motivation, who must also prove the improper motivation behind the statutorily preserved system of seniority, merit, or physical location, or whether, since the statute structurally postures these systems as defenses, it is the defendant who must carry the burden of proving the existence of, and the good faith use of, such a system. The suggestion of the Court is that regardless of the defensive structure of the statute, plaintiff must prove the motive behind the use of elements such as seniority, merit systems, or physical location.\textsuperscript{195} If plaintiff proves "equal work," there is no analytical problem; the EPA model clearly places the burden on the defendant to establish these elements. The problem is presented only when plaintiff proves job "similarity" but cannot establish the higher level of job "equality." In such a case it would seem that the burden is on the defendant to articulate the statutory factor (seniority, merit, physical location). This is a burden upon the defendant to come forward with evidence of the existence of a system. Once that is accomplished by defendant, the only issue is the defendant's good faith in the implementation or use of the factor. The burden of proving that the factor was improperly motivated and was thus a pretext for underlying proscribed motive would be on the plaintiff. This approach maintains the basic structure of the \textit{McDonnell Douglas} model.\textsuperscript{196}


\textsuperscript{196} \textit{Swint}, 456 U.S. at 276-77. \textit{Johnson v. Transportation Agency, Santa Clara County}, 480 U.S. 616 (1987), took this approach when the issue was the allocation of burdens in establishing the affirmative action "defense." The plaintiff argued that use of affirmative action is a "defense" and thus the burden is upon the defendant to prove all of the elements of this defense, including good faith. The Court disagreed and applied a modified version of \textit{McDonnell Douglas v. Green}, 411 U.S. 792 (1973), stating:

\begin{quote}
Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. . . . That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.
\end{quote}

\textit{Johnson}, 480 U.S. at 626-27.

\textit{Wards Cove Packing Co. v. Atonio}, 109 S. Ct. 2115 (1989), took a similar approach in adverse impact cases. While stating that "business necessity" was a "defense" to the extent...
VII. SUMMARY AND CONCLUSION

Motivational analysis as applied to situations involving direct evidence of proscribed animus and statistical analysis of pay patterns which create inferences of motive, at least in their broad application, is established and not particularly controversial. A key issue, and the one upon which this Article focuses, is the proper model for proof of improper motive flowing from differential treatment.

When plaintiff proves that persons of a protected class perform work that is "equal" within the meaning of the EPA to work of persons of another class and receive for this work unequal compensation, the statutory and judicial standards for proof of EPA violations is properly transplanted into Title VII motivational analysis. When this model is applied, defendant carries the burden of proving that an articulated "factor other than sex," race, or national origin existed and motivated the pay difference. In this way, EPA and Title VII analysis, while differing in theory, are completely reconciled in outcome.

A plaintiff who is unable to prove that the work of persons in different classes is "equal" but is able to establish that the jobs of the two persons are "similar" creates an initial inference that the difference in compensation is a product of improper motivation. The concept of dissimilar treatment for similarly situated persons is well-recognized in Title VII jurisprudence as creating an inference of improper motivation to which defendant must respond. This model should be applied to compensation cases. Consequently, a plaintiff who establishes that overall he or she is performing work that is "similar" to the work of a person in another class and is receiving for that work dissimilar compensation creates an inference that the difference in compensation is attributable to the difference in class membership of the workers. Defendant must refute that inference by producing legitimate, nondiscriminatory reasons that rationally explain the compensation difference. Defendant's failure to articulate such a reason will result in a judgment for plaintiff. However, if defendant is able to carry this relatively relaxed burden of providing a legitimate expla-
nation for the treatment of plaintiff, plaintiff must carry a burden of persuading the fact finder of the pretextual nature of defendant's explanation.

This results in two models of proof depending upon the degree of the similarity of the circumstances of the two employees from different classes. If the two employees perform work that is "equal," the employer's responsive burden is drawn from the EPA, and imposes on the employer a burden of persuasion to prove that a "factor other than sex," race, religion, or national origin motivated the compensation difference. If the two employees perform work that is "similar," the traditional McDonnel Douglas model of Title VII motivational analysis is applied. A weak inference of improper motivation is appropriate, but defendant's burden in responding to this inference is merely one of articulating a legitimate reason for the compensation difference. Thereafter, the burden of persuasion rests on the plaintiff to convince the fact finder with additional evidence of the pretextual nature of defendant's articulated reason.

This dual standard of analysis recognizes the various degrees of job likeness, or match, that can exist, while avoiding the extremes of "equality" on one hand and mere job "comparability" on the other. It establishes a logical intermediate ground between these extremes that in turn gives proper protective scope to Title VII, without endorsing comparable worth. On the other hand, the failure to recognize and apply a "similar situation" standard in compensation cases where jobs are "similar" unduly restricts the practical protection of Title VII.