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PAY EQUITY - THE COMPARABLE WORTH ISSUE: EQUAL PAY FOR WORK OF EQUAL VALUE; BY WHAT STANDARDS AND BY WHAT MEANS?

Alice L. Ahmuty
Analyst in Labor Economics and Relations
Economics Division
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PAY EQUITY - THE COMPARABLE WORTH ISSUE:
EQUAL PAY FOR WORK OF EQUAL VALUE; BY WHAT STANDARDS AND BY WHAT MEANS?

INTRODUCTION

Although the term comparable worth issue has been given many definitions, it has generally come to entail the theory that jobs dominated by women may be valued less not because of skills required or job content, but because they are "women's jobs," and that this inequity, in the form of lower wages, amounts to sex discimination. Basically, the issue raised is that of pay equity in a labor market that is highly segregated by sex. 1/

In Boston, 9 to 5, an organization of women office workers, charged the Boston Survey Group, a coalition of major insurance, banking, and technical companies, with illegally using an annual wage survey to create a low ceiling on wages paid to clerical workers, who are mostly women, in violation of Federal and State anti-trust laws. 2/

In San Jose, California, workers went on strike when negotiations to implement a comparable worth study became stalled. 3/

1/ For a discussion of the nature and extent of job segregation by sex see: Blau, Francine D. and Wallace E. Hendricks. Occupational Segregation by Sex: Trends and Prospects. The Journal of Human Resources. v. XIV, Spring 1979, pp. 197-210. Blau, Francine D. The Data on Women Workers, Past, Present, and Future, in Stromberg, Ann H. and Shirley Harkess, editors. Women Working: Theories and Facts in Perspective. Palo Alto, Calif. Mayfield Publishing Company, 1978, pp. 29-63. Reagan, Barbara B. De Facto Job Segregation, in Chan, Ann Foote, editor, Women in the U.S. Labor Force. New York, New York, Praeger Publishers, 1979, pp. 90-102.

2/ Boston Group Agrees to Amend Wage Survey, Following 9 to 5 Complaint. Daily Labor Report. No. 157, August 13, 1982. p. A2.

3/ San Jose Workers Strike Over Comparable Worth Issue. Daily Labor Report. No. 128, July 6, 1981, p. A3-4.

In the June 1981 Gunther decision, the U.S. Supreme Court left the "door ajar" enough to encourage women's rights' advocates to see the concept of comparable worth as a strategy in their pursuit of pay equity. 4/

These recent challenges to alleged sex-based wage setting illustrates the current determination of women to change traditional wage-setting practices in the pursuit of pay equity.

Under Title VII of the Civil Rights Act of 1964, lawsuits have been brought by women who claim they were being discriminated against through the operation of the companies' job evaluation and salary administration plans. 5/ Some claim that the classification system used to assign jobs to pay categories was discriminatory. Others have relied on job evaluation systems to support their claims of sex-based wage discrimination. More lawsuits are expected. 6/

Further, studies, relying on job evaluation techniques, have been or are being carried out to analyze civil service classifications systems in a number of states. 7/

4/ Beck, Joan. A Legal Wedge for Comparable Pay. Chicago Tribune. June 13, 1981, p. 6. County of Washington v. Gunther, 49 U.S. 4623, June 9, 1981.

5/ For examples see; Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977); Lemons v. City of Denver, 22 FEP Cases 959 (10th Cir. 1980), cert. denied, U.S. Sup. Ct. (1980) 23 FEP Cases 1668; County of Washington v. Gunther, 452 U.S. 161, (1981) 25 FEP Cases 1521; Taylor v. Charley Brothers, 22 FEP Cases 602 (W.D. Pa 1981).

6/ Comparable Worth Suits in Federal Sector on Horizon, Two Experts Say. Government Employee Relations Report, No. 964, May 24, 1982. p. 10. Women Employees in Public Sector May Gain From Recent Developments. Government Employee Relations Report, No. 932, October 12, 1981. AFSCME Pursues Comparable Worth Campaign With EEOC Charges Against City of Los Angeles. Daily Labor Report, No. 147, July 31, 1981, pp. A14-15. AFSCME Files Sex Discrimination Charges Charges Against State of Wisconsin. Daily Labor Report, No. 79, April 23, 1982, p. A1. Washington State is Target of AFSCME Comparable Worth Suit. Daily Labor Report, No. 142, July 23, 1982, p. A6. State of Connecticut Charged by AFSCME With Sex Discrimination. Daily Labor Report, No. 144, July 28, 1981, p. A9.

7/ San Francisco Orders Study of Comparable Worth Pay Issue. Government Employee Relations Report, No. 940, November 30, 1981, p. 30. Comparable Worth Issue Debated at Personnel Management Seminar. Government Employee Relations Report. No. 931, September 28, 1981, pp. 27-28.

Women, in some areas and occupations, are also organizing to pursue pay equity through collective bargaining. Thus, in many cases, it has become a major issue in negotiations. 8/

During the Carter Administration, Federal agencies had given support to the principles of comparable worth. The Equal Employment Opportunity Commission's (EEOC) involvement in the several women's lawsuits on job evaluation as amicus curiae and its commission of a study on job evaluation systems have been interpreted by some as the first step to mandating a national job structure or comparable worth standards. The Department of Labor's Office of Federal Contract Compliance Program (OFCCP), furthermore, has indicated that the Executive Order 11246 was broad enough to cover the comparable worth issue.

As a result, some have questioned the extent of the Federal Government's involvement in superimposing comparable worth standards over the existing standard of equal pay for equal work. 9/

Consequently, the policies instituted in the 1960s to eliminate sex discrimination are undergoing serious attack and reassessment by supporters and opponents of comparable worth alike. The difficulty of eliminating the wage gap between men and women through existing equal pay and equal employment opportunity legislation has led to a reassessment of the scope of these laws, especially the definition of equal pay. Some propose the equal pay or equal employment opportunity

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8/ National Organization For Women Addressed Widening Wage Gap Between Men and Women. Daily Labor Report, No. 199, October 19, 1981, p. A9-11; Annual Conference of Working Women Takes Stock of Wage Equity Trends. Government Employee Relations Report, No. 936, pp. 14-15; Issue of Pay Equity for Women Discussed at Conn. Conference. Government Employee Relations Report, No. 972, pp. 23-24; The Women's Labor Project. Bargaining For Equality. San Francisco, Ca., The Project, 1980, 144p.

9/ Executive Order Viewed as Pay Equity Back-up. Daily Labor Report, No. 84. April 29, 1980, pp. A5-12, E3-14; Management Representatives Criticize Comparable Worth. Daily Labor Report, No. 85, April 30, 1980, p. A8-15; E1-13; Spelfogel, Evan J. Equal Pay for Work of Comparable Value: A New Concept. Labor Law Journal. V. 32, January 1981, pp. 30-39.

legislation, or both, be reinterpreted by the courts or amended by legislation to allow for comparison of wages for men and women in dissimilar jobs.

Should the definition of equal pay, as incorporated in the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, be amended to allow for equal pay for men and women in jobs which are dissimilar but are of equal value to an employer (comparable worth)? Do present laws grant EEOC the authority to promulgate guidelines for a comparability standard? Did Congress intend for Title VII to extend to work comparability?

Should this matter be left to the working women and their employers to resolve between themselves, with little or no intervention from the Federal Government?

In order to begin to address these questions, it is necessary to assess what barriers, if any, exist to implementing pay equity, and what obstacles there are in the mechanisms for resolving pay equity issues.

COMPARABLE WORTH - THE CONCEPT

Over the past two decades, women with the same educational level as men have flooded into the labor force in large numbers. The consciousness of their growing attachment to the work force also has been raised. Furthermore, the earnings gap between men and women has been given highly visible publicity. These forces, among others, have provided the catalyst for the movement towards a comparable worth theory.

Women workers began to compare the skills and the requirements of female-dominated jobs with similar male-dominated jobs. Seeing discrepancies, they have argued that their jobs are underpaid relative to jobs of comparable worth, that is, jobs requiring similar levels of skill, effort, responsibility and working conditions as those held by men. Thus, the impetus for the formulation of the comparable worth concept has resulted primarily from sex-segregation of

workers and from the belief that the jobs traditionally held by women receive lower compensation because they are held by women.

According to a University of Michigan Survey Research Center Study, gaps between men's and women's wages are likely to occur when employers treat workers at entry level jobs differently according to sex or race, independent of their skills. 10/ Winn Newman, general counsel, Coalition of Labor Union Women, argues that discrimination at the initial assignment stage, particularly for unskilled or low skilled jobs, is at the heart of female occupational segregation and wage discrimination. 11/ The comparable worth proponents claim that the same forces which determine that certain jobs or job categories will be reserved for women, also determine that the economic value of these jobs is less than if they were men's jobs.

The comparable worth principle goes considerably further than the prohibition of wage discrimination under the Equal Pay Act which is directed to unequal pay only where women and men are performing substantially identical work in the same establishment. The equal pay for equal work standard has not been applied where job segregation exists because the Equal Pay Act applies only to those job classifications in which both women and men are employed. Therefore, women in sex-segregated jobs are rarely able to obtain relief under the Equal Pay Act. 12/ Thus, the pursuit of equal pay for work of equal value is an attempt

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10/ Mary Corcoran, political scientist, Survey Research Center, University of Michigan. Statement before the EEOC on April 29, 1980, in U.S. Equal Employment Opportunity Commission. Hearings. . . on Jobs Segregation and Wage Discrimination, Washington, D.C., 1980. 849 p.

11/ Statement of Winn Newman before the Senate Committee on Labor and Human Resources on January 28, 1981.

12/ Newman, Winn. Pay Equity: An Emerging Labor Issue. In Dennis, Barbara D., editor, Proceedings of the Thirty-Fourth Annual Meeting, Industrial Relations Research Association. Madison, Wisc. IRRA, 1982, pp. 166-173.

to find a way around the barrier that a segregated job market has presented to achieving "pay equity" for women. 13/ Many of the jobs of the sexes are not identical,and it has been difficult to demonstrate the discriminatory basis of women's wages. Comparable worth proponents view the segregation of "men's jobs" and "women's jobs" as a barrier to successful litigation and bargaining for women.

Enforcement of Title VII of the Civil Rights Act of 1964 has expanded job opportunities for women, particularly through affirmative action. 14/ And, the Equal Pay Act has helped to ensure that some women receive the same pay as men doing substantially similar work. Continued enforcement may eventually reduce the gap between male and female earnings, yet progress has been slow, some suggest.

Some advocates further point out that while the opportunity to move out of segregated job categories may be welcomed to many women, many others, who have invested considerable time in training for their jobs, demand wage adjustment in "women's jobs" rather than an opportunity to work in other jobs. Comparable worth proponents maintain that the focus on job opportunities and equal pay overlooks a major source of discrimination--segregation by sex--and that the prospects for moving into higher-paying jobs are slim for most women locked into what they term the "female ghetto."

Comparable worth proponents raise the question: Would the low-paying jobs be low-paying regardless of who held them, or are jobs low-paying because of the sex composition of the incumbents? This issue has been addressed only recently because the question of wage discrimination generally has not been viewed as part of the problem of job segregation under Title VII.

13/ Mutari, Ellen, Mary Rubin, Karen Sacks, and Catherine R. Selden. Equal Pay for Work of Comparable Value. Special Library, April, 1982, p. 110.

14/ For an analysis of the progress women have made into the skilled blue-collar occupations see: CRS Report No. 82-16E. Women and Minority Employment in the Blue-Collar Skilled Trades, by Alice L. Ahmuty, Analyst in Labor-Management Relations, February 1, 1982. 32 p.

COMPARABLE WORTH - ITS LEGAL BASE

When Title VII of the Civil Rights Act of 1964 was adopted, the prohibition against sex discrimination was included without committee hearings and with little attention given the interrelationship of the Equal Pay Act and Title VII with regard to sex-based wage discrimination. 15/ During the Senate debate on Title VII, an amendment to Title VII was introduced, known as the Bennett Amendment, with the stated purpose of ensuring that the provisions of the Equal Pay Act were not "nullified" by the passage of Title VII. The amendment was designed to avoid "possible" conflicts with the Equal Pay Act. The Bennett Amendment provided that differences in wages "authorized by" the provisions of the Equal Pay Act would not constitute a violation of Title VII. Thus, with the inclusion of the Bennett Amendment in law, the Equal Pay Act was linked to Title VII.

The Equal Pay Act bars employers from engaging in wage discrimination based on sex for work of equal skill, effort, and responsibility performed under similar working conditions. The law contains several specific defenses for paying wage differentials. These defenses include wages based on "any other factor other than sex," or based on a seniority system, a merit system, or a system which measures earnings by quantity or quality of production.

With a legislative history that is not clear, the precise meaning of the Bennett Amendment has been the subject of great debate, centering on whether it was meant to limit the scope of Title VII to that of the Equal Pay Act, i.e.,

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15/ Connelly, Jean. County of Washington v. Gunther: The Supreme Court Provides a Title VII Remedy for Victims of Intentional Sex-Based Wage Discrimination. Catholic University Law Review, v. 31, Fall 1981. p. 130-131. Gasaway, Laura. Comparable Worth: A Post-Gunther Overview. Georgetown Law Journal, v. 69, June 1981, pp. 1133-1134.

the equal work standard, or simply to incorporate the Equal Pay Act's four affirmative defenses, but not its equal work standard.

Court decisions were inconclusive on the legislative intent of the Bennett Admendment until the U.S. Supreme Court decided the issue in County of Washington v. Gunther. The issue before the Supreme Court in Gunther was whether the Bennett Amendment precluded a Title VII claim of intentional sex-based wage discrimination. The Supreme Court said that the Bennett Amendment did not incorporate the equal work standard of the Equal Pay Act into Title VII sex-based wage discrimination cases. The Court decision thus allows a Title VII claim of intentional sex-based wage discrimination even though the jobs are not substantially equal. Victims of intentional sex-based wage discrimination may now seek judicial remedy regardless of whether they satisfy the Equal Pay Act's equal work standard. In other words, employers are liable for "intentional wage discrimination" even though jobs performed by women are not substantially equal to jobs performed by men.

The Court, however, took great care to note it was not deciding the propriety of a Title VII claim based on comparable worth. The Court emphasized the narrowness of the question before it and stated that the women's claim was not based on the "controversial concept of comparable worth . . . ." 16/ The Court further stated:

> Respondent's suit does not require a court to make its own subjective assessment of the value of male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates. We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII.

The Court thus left open the complex issue of comparable worth for future litigation and court decision. Courts could interpret this language so as to impede future comparable worth litigation. Nevertheless, the courts

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16/ County of Washington v. Gunther, 49 U.S. 4623, June 9, 1981.

will be addressing the issue in more detail now that the intent of the Bennett Amendment has been resolved. But, it is not certain whether court resolution will prove favorable to comparable worth. If unfavorable, Congress may be asked by proponents to amend Title VII to clearly endorse this concept.

The scope of Title VII's protections against sex discrimination in employment remains unclear since the court did not lay down rules to identify "intentional discrimination." In refusing to specify the type of proof required for a sex-based wage discrimination claim to be upheld under Title VII, the Supreme Court, in effect, left it to the lower courts to develop a body of case law in this area one step at a time. 17/ However, according to Professor Blumrosen of Rutgers Law School, the opinion suggested that there was no Title VII liability under the theories of "comparable worth" of jobs based on subjective judgments, or on the "adverse impact" of wage practices. 18/ The fact, he stated, that women are paid less than men for doing different work is not, in itself, sufficient to establish liability even though the pay structure has "adverse impact" on women.

Shortly after the Gunther decision, many persons predicted there would be extensive federal court litigation. This has been the case. In July 1982, in a case decided by the U.S. District Court for Western District of Michigan, the district court concluded that comparable worth is not a viable legal theory under Title VII. 19/

17/ Connelly, Jean. County of Washington v. Gunther: The Supreme Court Provides A Title VII Remedy For Victims of Intentional Sex-based Wage Discrimination. Catholic University of Law Review, v. 31, Fall 1981. p. 145.

18/ Employers Should Review Wage Structure For Possible Bias Following Gunther Ruling. Daily Labor Report. No. 121, June 24, 1981, p. A 10, full text of Blumrosen's analysis of Wage Discrimination Issues After Supreme Court's Decision in County of Washington v. Gunther. p. E 1 - 2.

19/ U.S. Court in Michigan Dismisses Cause of Action Based on Comparable Worth. Government Employee Relations Report, No. 973, August 2, 1982, pp. 21-23.

In its analysis of the Gunther decision, the district court said that the Supreme Court had embraced the trend established by lower courts and sanctioned the practice of permitting plaintiffs to prove that they were victims of intentional genderbased discrimination. Since Gunther, a number of lower courts have subsequently been called on to decide claims involving wage compensation, the court noted, but none of those decisions recognized the theory of comparable worth as stating an independent cause of action. In summary, the court stated that the reported decisions fail to sustain the existence of a comparable worth theory; instead they either adopt the Gunther intentional discrimination theory or adhere to the more traditional Title VII analysis. In reviewing the legislative history of Title VII, the court concludes that "the Supreme Court's recognition of intentional discrimination may well signal the outer limit of the legal theories cognizable under Title VII."

At this point in time, the court says it could not conclude that "Congress has authorized the courts to undertake an evaluation and determination of the relative worth of employees."

IN PURSUIT OF COMPARABLE WORTH

Integration of Sex-Segregated Jobs

Title VII prohibits job segregation. However, some claim that the prohibition of intentional job segregation alone is insufficient to remedy the comparable worth form of pay discrimination, and that occupational integration is a long term goal, providing no relief to present victims of discrimination. 20/

20/ Notes, Equal Pay, Comparable Work, and Job Evaluations. The Yale Law Journal, v. 90, 1981, p. 666.

According to Robert Livernash, it is not evaluation job rates which need correction but the distribution of women within the employment and compensation hierarchy. As a result, he says, the viable method for correcting the relative shortfall in female average earnings when compared to male earnings is through the increase upward mobility of women. 21/ Clearly, the increased upward mobility of women within the employment and compensation hierarchies, Livernash says, is a logical method of raising the relative average earnings of women, and is not attended by the problems and difficulties associated with comparable worth. The principle objection, he acknowledges, to the mobility approach is that it is "far too slow to be effective." 22/ He further points out that the emerging favorable employment trends among women demonstate that mobility is working. Given the success of and the continued potential for upward mobility for female workers, and the problems associated with the implementation of comparable worth, it was most doubtful, in his opinion, that new legal or regulatory controls were appropriate. 23/

The long-term solution to the wage discrimination issue, according to Professor Blumrosen, is the elimination of women's concentration in traditionally female jobs. This situtation, Blumrosen says, is the predicate for virtually all wage discrimination claims of a class nature. 24/ He points out that employers

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21/ Livernash, Robert E., editor, Comparable Worth: Issues and Alternatives. Washington, D.C., Equal Employment Advisory Council. 1980, p. 3.

22/ Ibid., p. 20

23/ Ibid., p. 21.

24/ Employers Should Review Wage Structure For Possible Bias Following Gunther Ruling. Daily Labor Report. No. 121, June 24, 1981, p. A10, full text of Blumrossen's analysis of Wage Discrimination Issues After Supreme Court's Decision in County of Washington, v. Gunter. p. E1-2.

will need to make "conscious decisions" and increase their efforts in hiring and assignment of men into traditionally female jobs, and women into male dominated jobs. Such promotion and transfer policies, according to Blumrosen, would help "dexex" (sic) the job into which such persons are promoted, thereby reducing the prospect that it will be considered a "man's job" for purposes of wage comparison and would open the possibility of hiring males into the previously female jobs. However, he notes that this approach may take considerable time, particularly where the available pool of "atypical" persons (male secretaries, female engineers) is small.

However, Carin Clauss, former Solicitor of Labor, dismisses the claim of employers that "upward mobility" and "mobility enhancements" will be the answer to equalizing women's pay levels in the future. 25/ Clauss points out that for the forseeable future the majority of women will continue to stay in eight principle "female jobs" such as those in the clerical, nursing, and service fields, mostly because men are not going into them. If women's jobs have been undervalued for sex and no other reason, she contends, they should not have to change career plans for pay equity.

Discussion of equal employment opportunities for women focusing on affirmative action and goals and timetables is currently taking place in Congress and in the Reagan Administration. 26/

25/ Comparable Worth Concerns are Addressed by Equal Employment Advisory Council Conference. Daily Labor Report. No. 228, Novermber 24, 1980. p. A5.

26/ For example: U.S. Congress. House. Committee on Education and Labor Subcommittee on Employment Opportunities. Report on Affirmative Action and the Federal Enforcement of Equal Employment Opportunity Laws. Committee Print. 97th Cong. 2d sess., Washington, D.C. U.S. Govt. Print. Off. 1982, 62p.

William Bradford Reynolds, Assistant U.S. Attorney General for Civil Rights, in testimony before the House Subcommittee on Employment Opportunities stated that the U.S. Department of Justice will no longer support the use of mandatory quotas or other statistical formulae to redress past discrimination against women. 27/ Reynolds stated that affirmative action has come to mean that certain groups are afforded preferential treatment whether or not, as individuals, they have been victims of discrimination. According to Reynolds, the Administration is taking a three-pronged remedial approach in cases of discrimination. First, the Department of Justice will seek specific relief for "identifiable victims" of past discrimination. Second, injunctive relief will be sought, directing employers to make employment decisions in a "nondiscriminatory race-neutral and sex-neutral" manner. And finally, the employer will be required to apply color-blind and sex-neutral practices for future hiring and promotion of employees.

Women's rights activists assert that this new approach amounts to an "abandonment of affirmative action" and will signal women that the Federal Government will not be on the side of those discriminated against unless the individual has the time and means to bring a suit. 28/ To them, affirmative action is the only way to break a vicious circle of past discrimination that has denied women the education, access to training and seniority they would need to qualify for desirable jobs. Spokespersons for working women argue that employers will do less to provide equal opportunity for women if government programs designed to enforce equal opportutnity laws are reduced. 29/

27/ Administration Will Not Seek Job Quotas, Justice Official Tells House Subcommittee. Daily Labor Report, No. 184, September 23, 1981, pp. A8-9, F1-3.

28/ Every Man for Himself. Time Magazine. September 7, 1981, pp. 8-9; Fields, Cheryl M. Administration Moves to Ease Federal Anti-Bias Regulations. The Chronical of Higher Eduction. v. 23, September 2, 1981, pp. 1 & 21.

29/ Working Women Believe Employers Will Do Less on Equal Opportunity Without Compulsion. Daily Labor Report. No. 184, September 23, 1981. pp. A4-5.

Many employers claim affirmative action constitutes "reverse discrimination" that forces them to hire or promote people into jobs they cannot adequately fill.

Additional questions related to the comparable worth issue have been raised. For example: What should be the Federal policy toward affirmative action, goals, and timetables? Have the impact of government intervention and the cultural changes of the 1970s been sufficient to break the chain of historic segregation of jobs and to change attitudes to permit placing less emphasis on antidiscrimination enforcement activities? Will unions and employers return to old practices without a strong Federal enforcement effort to stimulate them to achieve voluntary compliance?

Job Evaluation Studies and Implementation

When the EEOC commissioned the National Research Council, Committee on Occupational Classification and Analysis (National Academy of Science committee) to do their study of the issues involved in measuring the comparability of jobs, the EEOC was concerned with the validity of the principles used to establish compensation, and in particular with whether methods of job analysis and classification currently used are biased by traditional stereotypes or other factors. 30/ In its conclusions, the NAS committee stated that although no universal standard of job worth exists, job evaluation plans do provide standards and measures of job worth that are used to estimate the relative worth of jobs within many firms. 31/ In job evaluation plans, pay ranges for a job are based on estimates of the relative worth of jobs according to such criteria as the skill, effort, and responsibility required by the job and the working conditions under which it is performed.

30/ Treiman, Donald J. and Heidi I. Hartman, editors, Women , Work and Wages: Equal Pay for Jobs of Equal Value. Washington, D.C., National Academy Press. 1981. 136 p.

31/ Ibid., p. 95.

Pay received by an individual within the given pay range, or a range to which an employee is assigned, is determined by the worker's characteristics such as training or educational credentials, related experience, seniority, productivity and quality of job performance. Both the criteria established and the compensable factors and relative weights used as measures of the criteria differ somewhat among the many different plans.

In the NAS committee's judgment, job evaluation plans provide measures of job worth that, under certain circumstances, may be used to discover and reduce wage discrimination for persons covered by a given plan. By making the criteria of compensation explicit and by applying the criteria consistently, the NAS committee states, it is probable that pay differentials resulting from traditional stereotypes regarding the value of "women's work" will be reduced.

However, the NAS committee points out that there are no definitive tests of the "fairness" of the choice of compensable factors and the relative weights given them. 32/ The process is inherently judgmental, the NAS committee notes, and its success in generating a wage structure that is deemed equitable depends on achieving a consensus among employers and employees about factors and their weights.

Courts appear to distinguish between cases in which plaintiffs, on the one hand, ask the court to judge the relative worth of jobs, and on the other, cases in which plaintiffs demand that where employers have made judgments regarding relative job worth through the use of job evaluation procedures, they adhere to them in setting pay rates. In comparable worth cases, courts have used job evaluation systems to scrutinize challenged rates of pay as an aid in taking into account the factors legitimately influencing compensation. For example, in Taylor v. Charley Brothers, Inc., the Court relied upon a job evaluation in reaching its decision. 33/

32/ Ibid., p. 96.

33/ Taylor v. Charley Brothers, Inc., USDC W Pa, 1981, 25 FEP Cases 602, 26 FEP Cases 395.

In the Charley Brothers case, a U.S. District Court applied the comparable worth theory in ruling that a grocery wholesaler had discriminated against women employees by assigning them to a separate department from men and paying them substantially less than those in an all-male department doing jobs that were different in their content but similar in their requirements. The Court held that intentional discrimination on the basis of sex played a role in the employer's wage structure. While the jobs in the two departments were not substantially equal in terms of skill, effort, or responsibility, the Court said they were nonetheless all characteristic of laborer's work and required little skill, education, or experience. When all the jobs in the two departments were compared, the Court said that it was apparent that the total male-female differential could not be justified on the basis of the varying contents of the job. The Court held that a subtantial portion of the male-female differential could only be attributed to intentional sex discrimination as evidenced by the Company's long-standing policy of segregating women from men in the work force and assigning women performing substantially equal jobs as men substantially lower wages. Women were assigned lower wages, the Court said, because they were women and not because of an evaluation of the worth of their job content.

In reaching its decison, the Court relied upon a job evaluation performed by an expert witness according to criteria of the American Association of Industrial Management. The Court concluded that except for certain job categories which covered substantially equal work, women in the female-dominated department should earn about 90 percent (rather than 65 percent) of what the male-dominated department workers earn. The Court, in rejecting a rebutting job evaluation performed by the employer's expert witness, stated that the women's expert employed a more widely used and tested method of job evaluation.

During the 1979 negotiations between AFSCME 34/ and the City of San Jose, it was agreed that a survey of both management and nonmanagement positions be done. 35/ The analysis of the city's job structure was done by Hay Associates, a nationally known management consulting firm. A special committee of 10 city employees worked with the Hay Associates to quantify the worth of approximately 288 city job classifications. The study broke down each job into three components: know-how, problem-solving, and accountability. The salaries for the various jobs were then measured against an overall average pay trend for city employees. The jobs next were identified according to male or female domination. The results confirmed that "women's jobs" paid less than predominately male job classification. However, disagreeement arose over the implementation of the study's recommendations.

Although city officials did not dispute the validity of the study, Frank LeSueur, the city's employee relations officer, said that there was a difference of opinion over how the results should be interpreted and how much the city could afford to pay. He said the union had stretched the Hay study results too far by strictly interpreting the job ratings, instead of regarding them as loose approximations. He claimed that the union's views also ignored market factors which should have a bearing on how much is paid for certain types of jobs.

Prudence Slaathaug, business agent, AFSCME local 101, said she agreed with LeSueur that market factors have an influence on wages, but the point of the Hay study was that the "market place results in discrimination against women." She said the union hoped to correct this "dysfunction" so that men and women are paid equally for jobs of comparable value to the City and

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34/ American Federation of State, County and Municipal Employees.

35/ San Jose Workers Vote to Strike in Dispute Over Comparable Worth Study. Daily Labor Report. No. 100, May 26, 1981, pp. A3-6.

alleged that the City of San Jose had not been bargaining in good faith. 36/

Alan Riordan, a partner in Hay Associates, said the San Jose study was intended to measure "internal job relationships," and was not specifically designed to assess the comparable worth of male- and female-dominated jobs. He said the firm's job evaluations are not ordinarily used for this purpose, but added that it has conducted studies in connection with discrimination in the past.

In another case, Washington State, in 1974, conducted an independent comparable worth study between male-dominated and female-dominated state civil service jobs. 37/ The study found that salaries for "women's jobs" to be only 80 percent of those for "men's jobs" of similar worth. Although the study recommended implementation of comparable worth to remedy the salary inequities, it has not been accomplished because of costs involved. In September 1981, AFSCME filed EEOC charges, claiming that by failing to take any measures to correct the wage inequities cited in its own study, the State had continued to endorse the discriminatory practices of its system and of the private sector and other public employment. In July 1982, AFSCME filed a suit in Federal Court against the State of Washingtion charging State officials with ignoring the results of its studies.

36/ San Jose Workers Strike Over Comparable Worth Issue. Daily Labor Report. No. 128, July 6, 1981, pp. A3-4.

37/ AFSCME Charges State of Washington With Comparable Worth Violations Against Women. Daily Labor Report. No. 179, September 16, 1981, pp. A4, E1-2; Washington State is Target of AFSCME Comparable Worth Suit. Daily Labor Report. No. 142, July 23, 1982, p. A6.

The Los Angeles, California, Board of Education rejected doing a study of the comparable worth of the 2,000 separate job classification in the Los Angeles Unified School District. 38/ Instead, the Board adopted a statement stating that current research in the field is inadequate and the Board should monitor progress made by other agencies, including the California State government, in conducting comparable worth studies before becoming involved. The concerns expressed by board members included the cost of such a study and the cost of raising salaries that might be recommended by such a study. Board members also indicated that they did not wish to raise expectations of a large salary increase the Board might not afford.

The San Francisco, California, Board of Supervisors, in November 1981, took the first step toward assuring equal pay in the city's employment by ordering a study of pay scales to determine officially if women and minority employees were discriminated against. 39/ Any proposed changes in pay scales to address the comparable worth issue must be approved, however, by the voters through a change in the city charter. The Board members who were opposed to the idea warned it could have legal and fiscal repercussions for the city. They feared the action amounted to tacit endorsement of the comparable worth concept and that the study might form the basis of a discrimination suit. Furthermore, they contended, a restructuring of the city's pay scales, if approved by the voters, could worsen the city's precarious financial position.

Comparable worth studies have been conducted in the States of Connecticut (1980), Michigan (1980), Minnesota (1974), and Nebraska (1978). In several

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38/ Los Angeles Board of Education Rejects Plan to Conduct Comparable Worth Study. Government Employee Relations Report. No. 934, October 19,1981. p. 28.

39/ San Francisco Orders Study of Comparable Worth Pay Issue. Government Employee Relations Report. No. 940. November 30, 1981. p. 30.

States charges under Title VII have been filed by AFSCME because of the State's refusal to implement recommendations made by the studies. One State, Minnesota, passed legislation in 1982 committing the State to an appropriation of funds to adjust salaries in those female-dominated jobs which are found to be lower paying than predominately male jobs of comparable value. 40/

In the private sector, a joint job evaluation committee has been operating in the telecommunications industry. 41/ While a job evaluation system had been a union demand for many years, it was not until 1980 that management agreed to such a step. In fact, there had been little interest in job evaluation since the 1950s, but comparable worth created a new interest in the subject.

The joint committee was established by the 1980 collective bargaining agreement between the American Telephone and Telegraph Company (AT&T) and the Communication Workers of America (CWA). Composed of three union and three management members, the joint committee has met monthly since October 1980. Similar joint committees exist under agreements with the International Brotherhood of Electrical Workers and the Telecommunication International Union. According to Kenneth W. Ross, labor relations manager for AT&T, and Florence C. Koole, assistant to the CWA executive vice president, the joint committee was nearing final agreement on a job evaluation system that could become a part of the Company's 1983 bargaining agreements. They anticipated that the study would be completed by January 1983. If approved by the CWA executive board and the top management of AT&T, a systemwide plan covering some 1,000 jobs then would be available for incorporation in the 1983 contracts.

40/ Minnesota Legislature Passes Comparable Worth Bill. Public Employee, v. 47, September 1982, p. 5.

41/ Joint Committee in Telephone Industry Near Agreement on Job Evaluation System. Daily Labor Report. No. 33, February 1982, pp. A8-9.

According to Ross, both parties are in need of a system to assure that new jobs pay fairly. Among the basic principles guiding the joint committee, Koole said, are: (1) that the evaluation system apply to all bargaining unit jobs; (2) that the system be easy to use and understood; (3) that information be available to all parties; (4) that all parties be encouraged to particpate; (5) that evaluations be based on the job and not the incumbent; (6) that there be an appeals process; and (7) that there be no wage reductions as a result of the system. An additional major principle guiding the joint committee was that the system meet equal employment requirements.

The joint representatives point out that the success of the joint committee, to a great extent, depends on the parties' willingness to discard types of behavior used in bargaining. Both sides had to abandon the adversarial relationship that places rewards on victory over the other rather than on cooperative behavior. Both parties also, they said, had to be straightforward in sharing information, otherwise there would be a tendency to revert back to the adversarial mode. The best method of building trust between the two sides, they observed, was through jointly working hard on a project. Ross holds that unionized businesses have a better chance for a successful job evaluation project than nonunionized ones, because in unionized firms the relationship within Joint Study Committees is not one of a boss to a subordinate. In addition, Ross adds, workers at a unionized company feel more secure about the results of such a project.

The above experiences with job evaluation studies suggest that job evaluation systems can be used effectively in some circumstances to implement comparable worth and to remedy discrimination. However, a number of problems areas remain. One difficulty appears to be funding and the ability to pay on the

part of employers. Also, employers are reluctant to accept comparable worth, basically because they believe there are many nondiscriminatory factors which account for pay differences. That is, many differences in earnings between men and women are accounted for by "factors other than sex" and by market forces.

While the legal route with some legislative mandates could be an essential back-stop, the collective bargaining approach can serve as an effective method of handling the massive amount of pay equity issues which could arise. The concept of joint employer-union committees which study job evaluation and comparable pay rates could play a major role in resolving the comparable worth issue. However, there are limitations to the use of collective bargaining for this purpose. First, only a small percentage of working women are organized. And, where they are organized, there has been insufficient support in many unions for the broad implementation of comparable worth, although this is slowly changing as women gain leadership postions in the unions. Also, as in San Jose, the collective bargaining route could lead to strikes. However, one observer noted that a major obstacle to promoting comparable worth through the collective bargaining process is the continuing general resistance of employers to union organizing activities. 42/

Is collective bargaining the most effective mechanism for resolving pay equity issues? If so, what about the majority of working women who are not organized? Do unions represent women fairly? If the matter is to be left to collective bargaining, what, if anything, should be done to prevent

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42/ For example see: U.S. Congress. House. Committee on Education and Labor, Subcommittee on Labor-Management Relations. Pressures in Todays's Workplace. Report. Committee Print. 96th Cong. 2d sess. Washington, D.C., U.S. Govt. Print. Off., 1981, 62 p.

or deal with strikes that may result from this issue? To what extent is the employer's resistance to employee organizing activities a detrimental influence in the pursuit of pay equity for women? To what extent should recognition be given to employer's claims of "inability to pay?"

Since these substantive questions remain regarding a potentially viable approach to the comparable worth issue, is there a need for legislated national guidelines on job evaluations plans to ensure they are nondiscriminatory and properly applied? But, underlying the whole issue, the first question to be resolved is: To what extent are existing job evaluation systems discriminatory?

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