Comparable Worth Claims Under Title VII: Does the Evidence Support an Inference of Discriminatory Intent?—American Federation of State, County, and Municipal Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985)

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COMPARABLE WORTH CLAIMS UNDER TITLE VII: DOES THE EVIDENCE SUPPORT AN INFERENCE OF DISCRIMINATORY INTENT?—American Federation of State, County, and Municipal Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985).

In American Federation of State, County, and Municipal Employees v. Washington, the Ninth Circuit Court of Appeals held that proof of unequal pay for jobs of comparable worth is not sufficient to establish a prima facie case of sex discrimination under Title VII of the Civil Rights Act of 1964. Comparable worth theory postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in predominantly male classifications, if the evaluated worth of the jobs is equal. Although courts have rejected this theory with near uniformity, some assert that the viability of comparable worth claims has not been fully explored.

This Note suggests that comparable worth theory, as a means of proving discrimination under Title VII, has been fully explored and charted, and observes that comparable worth claims have gained virtually no ground in legal battles against sex-based wage discrimination. Where courts have upheld such claims, their decisions have turned on the accompanying evidence of discriminatory intent, rather than on the inference of intent drawn from comparable worth studies. Moreover, since many factors provide plausible explanations of wage differentials, courts are correct in rejecting comparable worth claims that are unsupported by additional evidence of intentional discrimination. The Ninth Circuit was correct in rejecting the claim of the American Federation of State, County, and Municipal Employees (AFSCME) because AFSCME failed to provide

1. 770 F.2d 1401 (9th Cir. 1985) (AFSCME II).
3. AFSCME II, 770 F.2d at 1404. See COMPARABLE WORTH: ISSUES AND ALTERNATIVES 3 (E. Livernash 2d ed. 1984). Comparable worth has been operationally defined as "the application of a single bias-free point factor evaluation system within a given establishment, across job families, both to rank-order jobs and to set salaries." Remick, The Comparable Worth Controversy, 10 PUB. PERSONNEL MGMT. J. 371, 377 (1981). For purposes of this Note, comparable worth will be considered a method of identifying wage discrimination, rather than a means of operationally setting equitable pay relationships.
additional evidence which, together with evidence of pay disparities between jobs of comparable worth, would support an inference of discriminatory intent. Since comparable worth claims have not succeeded in federal courts, their future lies in nonjudicial forums, such as legislatures and collective bargaining.

I. THE DEVELOPMENT OF AFSCME'S CLAIM

A. The Concept of Comparable Worth

Proponents of comparable worth perceive a job market where discrimination against women persists, despite federal legislation prohibiting sex-based discrimination in employment. They feel that one form of discrimination is the segregation of women into low-paying occupations, either by a process of socialization or by conscious efforts on the part of employers. Another form of discrimination, they contend, is the projection of past discriminatory wage scales into current pay rates. These assertions are prompted by statistics indicating wage disparities that have persisted for decades in the national labor market. Women's median full-time earnings in 1955 were 64% of men's, and by 1983 had risen only slightly to 66.2% of men's earnings.

Proponents of comparable worth reason that, since studies revealed higher pay for predominantly male jobs than for predominantly female jobs of comparable worth, the disparities are presumptively due to discrimination. Studies that extend the inquiry to the underlying causes of wage


7. Blumrosen, supra note 5, at 443-44.

8. Steinberg, supra note 6, at 3-5.

9. Id. at 5.

10. R. WILLIAMS & L. KESSLER, A CLOSER LOOK AT COMPARABLE WORTH 5-6 (1984). The ratio of women's wages to men's wages varies "from a low of 49.8% in retail, trades, and sales [occupations], to a high of 90.5% in health workers (except physicians, dentists, and related practitioners)" (footnote omitted). Remick, supra note 3, at 372 (quoting U.S. DEP'T OF LABOR, WOMEN'S BUREAU, THE EARNINGS GAP BETWEEN MEN AND WOMEN (1979)).

disparities, however, have been unable to single out that portion of wage differentials attributable to discrimination.\textsuperscript{12} Studies measuring worker productivity attribute up to half of the pay disparity to legitimate, non-discriminatory factors, such as age, experience, and education.\textsuperscript{13} Since numerous factors affect wage rates, courts have turned to traditional discrimination analysis to determine whether plaintiffs are entitled to relief under Title VII.

\textbf{B. Theories of Title VII Litigation}

Comparable worth claims usually arise under Title VII of the Civil Rights Act of 1964,\textsuperscript{14} which prohibits discrimination in the terms or compensation of employment on the basis of sex. Prior to the Civil Rights Act, wage discrimination actions were limited to those available under the Equal Pay Act,\textsuperscript{15} which mandates that workers be given equal pay for equal work.\textsuperscript{16} Whether the Civil Rights Act encompassed any claims beyond entirely separate debate which is beyond the scope of this Note. See generally Freed & Polsby, \textit{Comparable Worth in the Equal Pay Act}, 51 U. Chi. L. Rev. 1078 (1984); Nelson, Opton, & Wilson, \textit{Wage Discrimination and the "Comparable Worth" Theory in Perspective}, 13 U. Mich. J.L. Rev. 233 (1980).

\textsuperscript{12} \textsc{National Research Council, Women, Work, and Wages} 42 (D. Treiman & H. Hartmann ed. 1981).

\textsuperscript{13} As noted in \textit{Women, Work, and Wages}, supra note 12, a study by Corcoran and Dunn (1979), considered to be the most thorough of studies using worker characteristics to account for pay disparities, used a variety of factors categorized under the general headings of work history, indications of labor force attachment, and formal education. \textit{Id.} at 19–22. Absent from the study, however, were factors such as collective bargaining strength and nonpecuniary benefits which may not be reflected in pay. Studies which use job characteristics, rather than worker characteristics, as explanatory variables are also inadequate in identifying the cause of wage differentials. \textit{Id.} at 38–39.

\textsuperscript{14} Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2(a) (1982), states in relevant part:

\begin{quote}
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.
\end{quote}


\textsuperscript{16} 29 U.S.C. § 206(d)(1) (1982), provides:

\begin{quote}
No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex.
\end{quote}
those allowed by the Equal Pay Act remained uncertain, until the United States Supreme Court’s decision in *County of Washington v. Gunther*.

In *Gunther*, the Court examined the Bennett Amendment to Title VII, which reconciled the Civil Rights Act and the Equal Pay Act by incorporating the affirmative defenses of the Equal Pay Act into Title VII. The employer in *Gunther* argued that the Bennett Amendment was intended to restrict Title VII claims to those available under the Equal Pay Act. The Court rejected this contention, holding that discrimination suits are not limited to the equal-pay-for-equal-work cause of action provided under the Equal Pay Act. At the same time, however, the Court emphasized that the case before it did not involve comparable worth, and declined to define “the precise contours of lawsuits challenging sex discrimination . . . .” Suits based on comparable worth, then, were not foreclosed.

Subsequently, lower courts have addressed comparable worth claims through two methods of analysis generally applied to Title VII cases. The first method, disparate impact, enables plaintiffs to establish a prima facie case of discrimination by showing that a facially neutral employment practice, not justified by business necessity, has an uneven—or disparate—impact on the plaintiff or the plaintiff’s class. The second method, disparate treatment, requires plaintiffs to prove that the employer intentionally discriminated by using impermissible considerations in its employment policies.

17. 452 U.S. 161 (1981). In *Gunther*, the plaintiffs were women employed as guards in the female section of the county jail. *Id.* at 163–64. They alleged that wage differentials were attributable to intentional sex discrimination, since the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs. *Id.* at 164. Prior to *Gunther*, the majority of federal courts rejected discrimination claims based solely on comparable worth. See *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977); *Gerlach v. Mich. Bell Tel. Co.*, 501 F. Supp. 1300 (E.D. Mich. 1980).


19. The *Gunther* Court noted that certain practices are excluded from Title VII’s prohibitions by the Bennett Amendment, including wage differentials attributable to seniority, merit, quantity or quality of production, or “any other factor other than sex.” *Gunther*, 452 U.S. at 167–68 (quoting relevant portions of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982)).


21. *Id.* at 181.

22. *Id.* at 180–81. Apparently the Court did not consider the claim to be one involving comparable worth because it did not require the Court to make its own assessment of the value of the jobs. *Id.* at 181. Rather, the claim asserted intentional discrimination as the motivation for the employer’s practice of setting female employees’ wages below the levels indicated by the employer’s own survey of outside markets and the value of the jobs. *Id.* at 164–65.

23. *Id.* at 181. The Court affirmed the Ninth Circuit’s order remanding the case and instructing the district court to take evidence on the employees’ allegations that wage differentials were attributable to sex discrimination. *Id.* at 165–66.


Under either theory, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of sex discrimination.\(^{26}\) The plaintiff's ultimate burden of proving the employer's discrimination never shifts.\(^{27}\) However, when a prima facie case of discrimination is established by a preponderance of the evidence, the burden of production shifts to the employer.\(^{28}\) In a disparate impact case, the employer may rebut the plaintiff's prima facie case by showing that the challenged employment practice was justified by business necessity.\(^{29}\) In a disparate treatment case, the employer need only present evidence of a legitimate, nondiscriminatory reason for its employment practice.\(^{30}\) The employer is not required to show that it was motivated by the stated reasons, but only that a genuine issue of fact exists as to whether it discriminated against the employee.\(^{31}\) If the employer succeeds in rebutting plaintiff's claims, the burden of production

petitioner's application for employment was rejected by the employer. \textit{Id.} at 796. The Court stated that a prima facie case of discrimination could be established by a showing that the petitioner (i) belonged to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that he was rejected; and (iv) that after his rejection the job remained open and the employer continued to seek applicants having the petitioner's qualifications. \textit{Id.} at 802. From these facts it could be inferred that impermissible factors guided the employer's hiring decisions. The Court added that, since facts vary in Title VII cases, the foregoing formula is not necessarily applicable in all cases. \textit{Id.} at 802 n.13. Proof of discriminatory motive is critical in disparate treatment cases, although it can be inferred from the employer's less favorable treatment of certain persons because of their race, color, religion, sex, or national origin. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

\(^{26}\) Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–53 (1981). The requirements of a prima facie case differ depending upon which theory is being pursued. In a disparate impact claim, the initial burden of establishing a prima facie case is met by showing that the challenged practice has a significantly discriminatory impact. Connecticut v. Teal, 457 U.S. 440, 446 (1982). Under a disparate treatment theory, a prima facie case may be established by showing facts supporting an inference of discriminatory intent. \textit{Burdine}, 450 U.S. at 253; American Federation of State, County, and Municipal Employees v. Washington (AFSCME 1), 578 F. Supp. 846, 858 (W.D. Wash. 1983). This may be accomplished through statistical evidence bolstered by circumstantial evidence of discrimination. Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 553 (9th Cir. 1982).

\(^{27}\) \textit{Burdine}, 450 U.S. at 253 (1981).

\(^{28}\) \textit{Id.} at 253–56. The employer has only a burden of production, not the burden of persuasion. The burden of production is that of producing satisfactory evidence of a particular fact in issue, while the burden of persuasion requires the proponent to persuade the trier of fact that the alleged fact is true. MCCORMICK ON EVIDENCE 947 (E. Cleary 3d ed. 1984).

\(^{29}\) \textit{Griggs}, 401 U.S. at 431. In \textit{Griggs}, the Court stated that the employer could meet the business necessity test by demonstrating that its high school completion requirement and its general intelligence test each bore a relation to job performance. \textit{Id.}

\(^{30}\) \textit{Burdine}, 450 U.S. at 254. In the case of an allegation of wage discrimination, the employer might rebut with legitimate reasons for its employment practices, such as: disruptive or unlawful acts by the plaintiff employees against the employer, \textit{McDonnell Douglas}, 411 U.S. at 806; the necessity of adjusting pay scales in order to attract qualified employees to particular occupations, Christensen v. State of Iowa, 563 F.2d 353, 355 (8th Cir. 1977); Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982); or differences in the occupations upon which the plaintiffs base their wage comparisons, Lanegan-Grimm v. Library Ass'n, 560 F. Supp. 486, 494 (D. Or. 1983).

\(^{31}\) \textit{Burdine}, 450 U.S. at 254–55.
shifts back to the plaintiff to show that the proffered reasons are a pretext for a discriminatory motive. Pretext is established by showing that a discriminatory reason more likely motivated the employer than a non-discriminatory reason or that the stated reasons are not worthy of credence.

C. Comparable Worth in Washington State

Amidst growing awareness of market wage disparities, the State of Washington commissioned a comparable worth study in 1974. At the time of the study, the two state civil service systems were directed by statute to set salaries for approximately 3000 job classifications according to prevailing market rates. At the request of former Governor Daniel J. Evans, an outside consultant identified 121 classifications as either predominantly male or female, and evaluated the worth of those jobs on the basis of knowledge and skills, mental demands, accountability, and working conditions. The study revealed that, on the average, predominantly male jobs were paid twenty percent more than predominantly female jobs.

32. Id. at 256.
33. Id. Pretext may be proven by showing that an employment practice, although outwardly legitimate, was applied unevenly. For example, an employer may refuse to hire one who has engaged in unlawful acts against it, but only if this criterion is applied to members of all races. McDonnell Douglas, 411 U.S. at 804. Pretext may also be established by showing that the employer was more likely motivated by discrimination. For example, derogatory and sexist remarks by the employer may render pretextual the employer's explanation that differences between jobs account for pay inequities. See Lanegan-Grimm v. Library Ass'n, 560 F. Supp. 486, 494 (D. Or. 1983).
34. NORMAN D. WILLIS & ASSOCIATES, STATE OF WASHINGTON, COMPARABLE WORTH STUDY (September 1974) [hereinafter cited as STUDY]. Governor Evans requested the study upon recommendations of the State Personnel Board and the Higher Education Personnel Board. AFSCMEI, 578 F. Supp. 846, 861 (W.D. Wash. 1983). The purpose of the study was to "identify salary differences that may pertain to job classes predominantly filled by men compared to job classes predominantly filled by women, based on job worth." STUDY, at 1.
35. Wash. State Civil Service Law, 1973 WASH. LAWS 1ST EX. SESS., ch. 75 at 668, amended by 1983 WASH. LAWS 1ST EX. SESS., ch. 75 at 2077; State Higher Education Personnel Law, 1973 WASH. LAWS 1ST EX. SESS., ch. 75 at 669, amended by 1983 WASH. LAWS 1ST EX. SESS., ch. 75 at 2073 (both amendments adding comparable worth as a requirement of salary schedules in the two civil service systems). See also WASH. REV. CODE §§ 41.06.155, 28B.16.110 (1985).
36. STUDY, supra note 34, at 2. A job category is considered predominantly male or female if it is occupied by over 70% males or females. Id.
37. Id. at 5-6. The point-factor techniques employed in the Study have commonly been used by large scale employers for many decades to assess the value of jobs. See E. JOHANSEN, COMPARABLE WORTH: THE MYTH AND THE MOVEMENT 12-13 (1984). An evaluation team, trained and supervised by management consultants, evaluated each classification on the basis of descriptions obtained through position questionnaires. STUDY, supra note 34, at 4-8. The questionnaires were initially screened to obtain those that were most complete, and that described positions most representative of their classifications. Id. at 4-5.
of comparable worth.\textsuperscript{38} A second phase of the study developed a comparable worth salary structure setting equitable pay relationships.\textsuperscript{39} Governor Evans responded by budgeting seven million dollars to implement salary structures based on comparable worth,\textsuperscript{40} but his successor, Dixie Lee Ray, retracted the allocation.\textsuperscript{41} Subsequent inaction by the state legislature prompted AFSCME and the Washington Federation of State Employees to file a class action suit on July 20, 1982. In \textit{American Federation of State, County, and Municipal Employees v. Washington (AFSCME I)},\textsuperscript{42} the union alleged sex-based wage discrimination and sought declaratory and injunctive relief.

\textbf{D. The District Court Opinion}

The district court held that AFSCME established a prima facie case of sex-based wage discrimination under both the disparate impact and disparate treatment analyses.\textsuperscript{43} Disparate impact, the court held, resulted from the defendant's facially neutral compensation system, which adversely affected predominantly female job classifications and was not justified by a legitimate and overriding business consideration.\textsuperscript{44} Disparate treatment was established by the defendant's deliberate perpetuation of a twenty percent disparity in salaries between occupations predominated by males and comparably valued occupations filled primarily by females.\textsuperscript{45} Evidence of discriminatory intent relied on by the court included the historical context of wage discrimination claims\textsuperscript{46} and admissions by state officials that pay scales were discriminatory.\textsuperscript{47} The district court awarded

\begin{itemize}
\item \textsuperscript{38} \textit{Study, supra} note 34, at 20.
\item \textsuperscript{40} \textit{AFSCME I, 578 F. Supp.} 846, 862 (W.D. Wash. 1983).
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{578 F. Supp.} 846, 851 (W.D. Wash. 1983). The court noted the legislature's failure to address supplemental salary schedules which had been submitted pursuant to Washington Revised Code §§ 41.06.160(5) and 28B.16.110. \textit{Id.} at 862. The court also found a 1983 comparable worth appropriation to be an inadequate remedy. \textit{Id.} at 865.
\item \textsuperscript{43} \textit{AFSCME I, 578 F. Supp.} at 864.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.} The court also noted that, as the value of the jobs increased, the wage gap widened. \textit{Id.} at 861, (citing \textit{Study, supra} note 34, at 13).
\item \textsuperscript{46} The district court noted that, as early as the 1950's and as late as 1973, Washington State ran help-wanted ads in the "male" and "female" columns of newspapers, and offered no evidence that sex was a bona fide occupational qualification for the jobs advertised. \textit{AFSCME I, 578 F. Supp.} at 860. The court also noted that sex discrimination was permissible until the passage of the State's Civil Rights Law in 1971. \textit{Id.} at 866 n.11.
\item \textsuperscript{47} The district court cited statements, letters, and memoranda by the State Governor and the
\end{itemize}
declaratory and injunctive relief, which required the state to compensate employees according to the evaluated worth of their jobs.\(^4\) The court also awarded back pay to 1979 for employees in predominantly female job classifications who were not paid the evaluated worth of their jobs.\(^4\)

## II. THE APPELLATE OPINION

The district court erred in concluding that the use of market wage rates, which demonstrably results in lower pay for women than for men, is sufficient evidence to support a prima facie case under Title VII. As the Ninth Circuit pointed out in *American Federation of State, County, and Municipal Employees v. Washington (AFSCME II)*,\(^5\) discrimination is one of many possible causes of wage disparities.\(^5\) The additional evidence offered by AFSCME did not allow an inference that discrimination was a more likely cause than any others.

### A. Disparate Impact

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The Ninth Circuit reversed the district court on both theories of recovery.\(^5\) The court first held that disparate impact analysis was unsuited to a
determination of whether the state's use of prevailing market rates was discriminatory.\textsuperscript{53} Such a practice, the court held, is not the sort of "specific, clearly delineated employment practice applied at a single point in the job selection process" to which disparate impact analysis is confined.\textsuperscript{54}

The Ninth Circuit's analysis closely follows the reasoning of other decisions that have denied disparate impact claims based on comparable worth. For example, in \textit{Spaulding v. University of Washington},\textsuperscript{55} female faculty members alleged discrimination by comparing their salaries to those of male faculty at other universities and in other divisions within the University.\textsuperscript{56} The Ninth Circuit characterized the claim as a wide-ranging allegation challenging general wage policies.\textsuperscript{57} Such a claim, the court held, is distinct from cases where disparate impact analysis was appropriately used to examine the use of specific criteria in employment decisions.\textsuperscript{58} The court concluded that when disparate impact analysis is applied to broad-based claims, rather than to claims involving specific, clearly delineated employment policies, it becomes "so vague as to be inapplicable."\textsuperscript{59} Numerous other decisions have found similarly broad-based challenges to employment policies inappropriate for disparate impact analysis.\textsuperscript{60}

The courts' concern about the broad-based nature of comparable worth claims overlooks a more important distinction. An employer's use of

\begin{itemize}
  \item \textsuperscript{53} Id. at 1405.
  \item Id.
  \item \textsuperscript{55} 740 F.2d 686, 697 (9th Cir.), \textit{cert. denied}, 105 S. Ct. 511 (1984).
  \item Id. at 707.
  \item \textsuperscript{56} \textit{Spaulding}, 740 F.2d at 707-08.
  \item \textsuperscript{57} Id. at 707-08. The court cited \textit{Dothard v. Rawlinson}, 433 U.S. 321 (1977) (height and weight requirements excluding women); \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971) (intelligence test which excluded minorities); and \textit{Gregory v. Litton Sys., Inc.}, 472 F.2d 631 (9th Cir. 1972) (exclusion of applicants based on arrest records). \textit{See also} American Federation of State, County, and Municipal Employees v. County of Nassau, 609 F. Supp. 695, 712 (E.D.N.Y. 1985), where the court rejected disparate impact analysis for the same reason (citing \textit{Wambheim v. J.C. Penney Co.}, 705 F.2d 1492 (9th Cir. 1983)) (head of household status used to limit spouse's coverage under employee's medical policy), \textit{cert. denied}, 464 U.S. 1036 (1984); \textit{Kouba v. Allstate Ins. Co.}, 691 F.2d 873 (9th Cir. 1982) (prior salary used as a factor in determining current salary).
  \item \textsuperscript{58} \textit{Spaulding}, 740 F.2d at 707-08.
  \item Id. at 708.
  \item \textsuperscript{59} \textit{Spaulding}, 740 F.2d at 707-08.
  \item \textsuperscript{60} \textit{See}, e.g., \textit{Atonio v. Wards Cove Packing Co.}, 768 F. 2d 1120, 1131–32 (9th Cir. 1985) (a broad-scale attack against the gamut of the defendant's subjective employment practices—including claims that job classifications lacked objective qualifications, that subjective criteria were used in hiring and promoting, and that nepotism was rampant—does not constitute a challenge to a specific facially neutral practice); \textit{Pouncy v. Prudential Ins. Co.}, 668 F. 2d 795, 801 (5th Cir. 1982) (the challenged employment practices—failure to post job openings, promotion policies that retained black employees at low-paying positions, and use of subjective criteria in evaluating employees—were not akin to educational requirements, aptitude tests, and other specific practices to which the disparate impact model traditionally has been applied); \textit{Heagney v. University of Wash.}, 642 F.2d 1157, 1163 (9th Cir. 1981) (disparate impact analysis is inappropriate for addressing the claim that lack of a well-defined employment practice allowed a pattern of discrimination to exist).}

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market data to determine the "going rate" for a particular occupation seems to be just as specific and clearly delineated a practice as setting pay according to an applicant's prior salary or education. Nevertheless, the latter is more likely to be considered a specific employment practice worthy of disparate impact analysis by the courts. The underlying distinction is that the employer's use of market rates, alone, can never be impermissible, since market rates bear a rational relationship to the value of the work. 61 Market rates always bear this rational relationship, because they reflect factors which define the value of different jobs. 62 These factors include the availability of workers in a particular occupation and their ability to bargain collectively for higher wages. 63

In contrast, the use of another specific employment criterion may or may not be related to the value of the work. For example, a requirement that job applicants must have a high school diploma may be related to many types of work, but is probably unrelated to manual labor. If a high school diploma was required of an applicant for a job involving manual labor, a finder of

61. The rational relationship test has been applied by courts in their determination of whether an employer has demonstrated that the challenged employment practice is a business necessity. For example, in Griggs, the Court implied that, had the employer's intelligence tests been shown to be related to the employees' successful performance, they would have been deemed to fulfill a genuine business need. 401 U.S. at 431–32; see also Shannon v. Pay 'N Save Corp., 104 Wn. 2d 722, 731, 709 P.2d 799, 806 (1985)(to establish a business necessity defense an employer must prove that a hiring or promotion test accurately predicts or significantly correlates with the fundamental requirements of job performance). Since market wage rates reflect not only the nature of the work performed, but also the supply of workers and other factors which affect the value of work, the use of such rates is rationally related to the employer's business needs. See infra notes 62–63 and accompanying text.

62. See generally Baird, Comparable Worth: The Labor Theory of Value and Worse, 6 GOV'T UNION REV. 13 (1985)(market prices reflect millions of bids that are made, accepted, and rejected by consumers and resource owners, based on their own knowledge and goals).

63. AFSCME H, 770 F.2d at 1407; see also Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977); Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982), where the court noted additional factors such as "crowding" (a heavy concentration of women available for the same job category), and the historical reality that many jobs characterized by some as "women's work" are jobs that have never been well-compensated, whether they have been filled by women or by men. Other factors affecting pay scales include nonpecuniary differences in the attractiveness of jobs and the stability or instability of earnings expected from different jobs. Hildebrand, The Market System, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 79, 101 (E. Livernash 2d ed. 1984) (citing M. FRIEDMAN, PRICE THEORY: A PROVISIONAL TEXT (1962)). Another factor, the segregation of women into a narrow range of occupations, is influenced by socialization which reinforces people into sex-typical roles. England, Socioeconomic Explanations of Job Segregation, in COMPARABLE WORTH AND WAGE DISCRIMINATION 28, 29 (H. Remick ed. 1984). The increase in the number of working women since 1950 has aggravated job segregation by increasing the supply of workers in certain fields and thereby keeping their relative wage rates low. Hutner, The Female-Male Earnings Gap, in MANUAL ON PAY EQUITY 15, supra note 5, at 16. Most commentators agree that discrimination can be added to the foregoing list of factors which influence some wage differentials. The problem is to detect discrimination and to measure its influence separately from other factors. Hildebrand, supra, at 101.
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fact would likely infer an impermissible intent to exclude from employment opportunities those statistically less educated.  

B. Disparate Treatment

When jobs of comparable worth draw disparate wages, up to half of the disparity may be attributable to legitimate, identifiable factors. The residual may or may not be attributable to discrimination. Although this uncertainty may be addressed by either disparate impact or disparate treatment analysis, the latter compels courts to consider evidence of discriminatory intent, in addition to the employer’s use of market wage rates. Since this additional evidence may pinpoint intentional discrimination as the source of the wage gap, courts prefer disparate treatment analysis when addressing Title VII comparable worth claims.

1. Order and Allocation of Proof

Whether the Ninth Circuit’s rejection of AFSCME’s prima facie case was proper depends in part on the order and allocation of proof between the parties. The court rejected AFSCME’s prima facie case by concluding that the state’s use of market wage rates was a permissible employment practice. One could argue that the market defense should be considered as part of the employer’s burden of production in rebutting the prima facie case. Therefore, it would follow that the Ninth Circuit deviated from the established order of proof by considering the market defense when assessing AFSCME’s prima facie case.

However, an examination of the rationale behind the allocation of proof in Title VII cases reveals that the Ninth Circuit’s approach was correct. The allocation of proof is a method of analyzing claims in light of common experience and the probabilities of the situation. A prima facie case is established by proof of actions taken by an employer from which discriminatory intent may be inferred. This inference is permitted because experience suggests that people do not act arbitrarily and that, in the absence of other explanations, it is more likely than not that the challenged actions are based on impermissible factors. Since the employer has superior access to

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64. See, e.g., Griggs, 401 U.S. at 429–31 (high school diploma requirement or intelligence test found to render ineligible a disproportionate number of minority applicants; such requirements are forbidden unless they are a reasonable measure of job performance).
65. See supra note 13 and accompanying text.
66. See supra notes 25–33 and accompanying text.
67. AFSCME II, 770 F. 2d at 1406.
69. Id.
information that may rebut a prima facie case, the burden should shift to the employer to produce information rebutting the likelihood of discriminatory intent.70

Where a comparable worth claim challenges the employer's use of market rates, however, the foregoing rationale does not apply. First, as previously noted, a disparate treatment claim under Title VII requires proof by a preponderance of the evidence that the employer was motivated by discriminatory intent.71 Since courts recognize many explanations for market wage disparities,72 discrimination by the employer is not a more likely explanation than others. Therefore, a discrimination claim based on the employer's use of market wage rates does not meet the preponderance of the evidence test required of a prima facie case under Title VII.

Second, because the employer has no more knowledge than the plaintiffs of why the market value of labor varies between occupations, there is no justification for shifting to the employer the burden of explaining such variations. However, if additional evidence showing intent to discriminate is produced, the rationale underlying the allocation of proof in Title VII cases mandates that the burden shift to the employer to justify the disparity.

In addition, the Ninth Circuit's approach was correct, in light of its observation that much of the state's rebuttal evidence was excluded by the district court,73 including testimony as to legitimate reasons for the state's reliance on market wage rates.74 In the absence of such rebuttal evidence, the Ninth Circuit was forced to address the state's reliance on market rates as part of its analysis of the prima facie case. Finally, even though the court used the market defense to reject AFSCME's prima facie case, the tenor of the opinion suggests that the same outcome would have resulted if the market defense had been addressed at the rebuttal stage.

2. The Quantum of Proof Necessary to Establish a Prima Facie Case of Disparate Treatment Under Title VII

The most readily accepted proofs of disparate treatment are overt acts by the employer that demonstrate an intent to treat employees differently solely because of their gender. For example, in International Union of

71. See supra note 25 and accompanying text.
72. See supra note 63 and accompanying text.
73. AFSCME II, 770 F.2d at 1408.
74. Brief for Appellants at 38, AFSCME II, 770 F.2d 1401 (9th Cir. 1985). The Brief for Appellants noted the state's attempts to present evidence of legitimate reasons for its reliance on market rates. These included recruitment and retention of qualified employees, provision of the best services for the tax dollar, and maintaining a fair and uniform system of compensation. Most of this testimony was excluded, and almost all of the exhibits were excluded. Id.
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Electrical, Radio, and Machine Workers v. Westinghouse Electric Corp., the court held that the employer's policy of deliberately segregating its workforce on the basis of sex and maintaining a lower wage curve for classifications primarily filled by women would, if proven, constitute a violation of the Civil Rights Act. Other courts have found overt discrimination in practices such as paying employees' retirement benefits on the basis of sex-based mortality tables, or refusing to hire women with preschool children, while hiring men with preschool children, without justifying such a policy as a bona fide business necessity. In such cases, the discriminatory motive was clear from the employer's action itself, and courts did not hesitate to allow the remedies available under Title VII.

a. Comparable Worth as Evidence of Discriminatory Intent

The extent to which comparable worth analysis contributes to the establishment of a prima facie case may be determined by beginning with "pure" comparable worth claims, and then by considering additional factors that may indicate discriminatory intent. The term "pure" comparable worth usually refers to the claim that evidence of wage disparities between jobs of comparable worth is conclusive proof of discrimination. Courts have uniformly held that this per se theory of comparable worth does not adequately support an inference of discriminatory intent, and therefore cannot be embraced without independent evidence of willful and intentional discriminatory acts.

b. Failure to Adjust Wages in Response to Comparable Worth Studies

An employer's failure to implement corrective pay adjustments, when added to evidence of wage disparities between jobs of comparable worth,
generally does not persuade courts that a prima facie case has been established. In *American Nurses Association v. Illinois*, the court held that neither the funding of an evaluative study nor the failure to take corrective actions upon the findings of the study was probative of discriminatory intent. The court reasoned that the law does not obligate an employer to adopt a new pay structure simply because the study indicates that different wage rates would be more equitable. In addition, the law does not require an employer to disregard the labor market, bargaining demands, or the possibility that some other study might present different results. Similarly, in *Briggs v. City of Madison*, the court concluded that regardless of the findings of the employer’s own job evaluations, an employer could pay the wage rates necessary to compete for qualified applicants.

c. **Comparable Worth Plus Evidence of Intentional Discrimination**

By adding other evidence of discriminatory intent to comparable worth data, plaintiffs are more likely to convince the court that a prima facie case of discrimination has been established. Such circumstantial evidence not only brings the “cold numbers convincingly to life,” but supplants the

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82. Id. at 1317–18.
83. Id. at 1317.
84. Id. at 1318.
85. 536 F. Supp. 435 (W.D. Wis. 1982).
86. Id. at 447. A contrary outcome was suggested in Bohm v. L.B. Hartz Wholesale Corp., 370 N.W.2d 901 (Minn. App. 1985), where the court stated in dicta that an employer’s knowledge of wage disparities based on its own comparable worth study, and failure to remedy such disparities, is prima facie evidence of intent to discriminate. Id. at 907.

Other courts have indicated that a prima facie case requires a showing that an employer has adopted corrective pay scales and then has deviated from those pay scales. See *American Nurses Ass’n.*, 606 F. Supp. at 1317; *Briggs*, 536 F. Supp. at 447 n.12. This distinction leads to the unfair result that states that make the effort to implement comparable worth pay scales but deviate from them are prima facie guilty of acting discriminatorily, while those states which fail to adopt an equitable pay scale, yet have equal knowledge of disparate pay scales, escape a finding of discriminatory intent. An employer who chooses not to implement comparable worth pay scales may be more strongly motivated by discrimination than the employer who implements an equitable pay scale and then deviates from it. An equally unfair solution would be to force employers to accept a particular interpretation of their own study, when many other plausible interpretations exist. A more satisfactory distinction, in cases where the employer’s wage-setting ignores comparable worth data, is between cases that involve additional evidence of intentional discrimination and those that rely solely on the comparable worth data.

87. See, e.g., Spaulding v. University of Wash., 740 F.2d 686, 703 (9th Cir.), cert. denied, 105 S. Ct. 511 (1984), where the court, although rejecting the plaintiff’s disparate treatment claim, stated in dicta that statistical evidence of discrimination based on wage disparities could be reinforced by other supportive facts and testimony recalling experiences of discriminatory treatment.
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need for any inference to be drawn from numbers generated by comparable worth studies.

For example, in *Taylor v. Charley Brothers*, the court concluded that predominantly female jobs should have been compensated at ninety percent of the salary paid for male-dominated positions, based on point-factor evaluations conducted by the plaintiff's expert. The court's finding of sex discrimination was supported by evidence that the employer deliberately segregated the workforce, and prevented women from accruing seniority by keeping them on temporary and part-time status for prolonged periods of time. In *Lanegan-Grimm v. Library Association of Portland*, a prima facie case was established by evidence of wage disparities between similar jobs and the employer's intentional segregation of the workforce. The employer rebutted the plaintiffs' allegations with evidence that the jobs were different. However, the plaintiff ultimately prevailed by showing that discriminatory remarks by officials of the employer demonstrated that the rebuttal evidence was simply a pretext for a discriminatory motive.

In each of these cases, the plaintiff's prima facie case depended on supplemental evidence which, together with statistical comparisons of wages, allowed an inference that sex discrimination was more likely than not the cause of the wage gap. Evidence of pay disparities between jobs of comparable worth, alone, would not permit such an inference. To establish a prima facie case of discrimination under Title VII, proponents must offer corroborating evidence of discrimination, in addition to evidence of wage disparities between jobs of comparable worth.

3. **AFSCME's Failure to Provide Sufficient Evidence of Discriminatory Intent**

The Ninth Circuit held that AFSCME did not establish a prima facie case of disparate treatment because it failed to supply evidence from which to draw an inference of intentional discrimination. First, the court held, intent is linked to culpability, and since the state was not responsible for prevailing wage rates, it could not be held to have been motivated by sex-based considerations in setting salaries. Proponents of comparable worth

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90. *Id.* at 612.
91. *Id.* at 613.
93. *Id.* at 494.
94. *Id.*
95. AFSCME II, 770 F.2d at 1407–08.
96. *Id.* at 1406. In addition, the court noted, to hold the state liable for failing to implement pay
assert that wage differentials are presumptively due to institutional barriers and intentional discrimination.97 This presumption, they argue, is supported by the existence of a segregated workforce98 and by the continued use of wage rates influenced by pre-Civil Rights Act wage discrimination.99 However, as the Ninth Circuit observed, there are many factors which could be responsible for the unexplained residual portion of wage differentials.100 Therefore, the court was justified in rejecting a presumption of impermissible intent based on the employer’s use of market wage rates, absent more specific evidence of discriminatory intent.

The Ninth Circuit’s second reason for rejecting AFSCME’s disparate treatment claim was that the supplemental evidence of intentional discrimination, added to the statistical evidence of wage disparities, was not sufficient to provide an inference of discriminatory intent.101 The district court in AFSCME I had found two such items of evidence to be persuasive: historical examples of discriminatory pay practices, and certain admissions by state officials.102

a. Historical Evidence of Discriminatory Employment Practices

The district court’s opinion in AFSCME I identified two factors demonstrating the state’s historical involvement in employment discrimination. First, the state had deliberately run help-wanted ads in the “male” and “female” columns of newspapers as late as 1973.103 Second, prior to the

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97. See supra note 11 and accompanying text. However, as one commentator noted, to interpret residual wage disparities as discrimination requires two very strong assumptions: that all relevant factors are measured and that all factors are measured without error. WOMEN, WORK, AND WAGES, supra note 12, at 19. Since these assumptions are virtually never satisfied, a degree of doubt emerges as to empirical explanations of the residual. Id. See also Milkovich, The Emerging Debate, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 42-47 (E. Livernash 2d ed. 1984).

98. Occupational segregation studies illustrate the fact that men and women tend to hold different types of jobs. Women are substantially more likely to work in clerical and service occupations, and less likely than men to work in the higher-paying craft and laboring occupations. Milkovich, supra note 97, at 25. Researchers offer three explanations for the concentration of women in low-paying occupations: personal choice for reasons other than pay; intentional exclusion of women from high-paying jobs; and underpayment of jobs solely because women hold them. WOMEN, WORK, AND WAGES, supra note 12, at 52. None of these explanations have proven conclusively valid, and the question of why women are concentrated in a few low-paying occupations remains unresolved. Id. at 52–62.

99. WOMEN, WORK, AND WAGES, supra note 12, at 57. See also Blumrosen, supra note 5, at 443–44.

100. AFSCME II, 770 F.2d at 1407; see also supra note 63 and accompanying text.

101. AFSCME II, 770 F.2d at 1407.


103. Id. at 860.
amendment of Washington's Civil Rights Law in 1971, sex discrimination in employment was not prohibited. The district court surmised that the state's current employment practices were a manifestation of "centuries old discriminatory attitudes and practices of a male dominated society." The difficulty with adding historical factors into the sum of evidence examined in discrimination cases is that it is difficult to ascertain their present impact. It is possible that discriminatory employment practices in general, and segregated help-wanted ads in particular, have some impact on present wage rates, although such practices occurred many years ago. The probative value of such evidence, however, is weak when considered in light of other factors that may also explain the disparity. Courts do not require employers to adjust wage scales that may contain the remnants of past discrimination, when other nondiscriminatory factors provide equally plausible explanations for the present disparity. Even if the court had found a causal nexus between past discrimination and present wage rates, AFSCME still might not have prevailed. Courts have held that an inference of discriminatory intent may not be drawn if the employer's policies subsequent to the Civil Rights Act have been nondiscriminatory. Since courts hold that adhering to market rates is not discriminatory, an employer will not be held liable for the effects of past wage discrimination if its employment policies are otherwise nondiscriminatory.

b. Admissions by State Officials

The second element of substantiating evidence found significant by the lower court was the admission by state officials of discriminatory pay practices. The probative value of those admissions depends on the

104. 1971 Wash. Laws 1st Ex. Sess., ch. 81 at 551 (codified at Wash. Rev. Code § 49.60.010 (1985)).
105. AFSCME I, 578 F. Supp. at 1407. The amendment to the State's Law Against Discrimination preceded the 1972 federal amendment to Title VII, which authorized federal courts to award money damages in favor of private individuals against a state government. 42 U.S.C. § 2000e-5(g) (1982).
106. AFSCME I, 578 F. Supp. at 866 n.11.
107. See supra note 63 and accompanying text.
108. Lemons v. City & County of Denver, 620 F.2d 228, 229 (10th Cir.), cert. denied, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353, 355-56 (8th Cir. 1977).
110. AFSCME I, 578 F. Supp. at 866. The district court found the record replete with statements by state officials indicating knowledge of sex discrimination in state employment. Id. at 860.
overall goals and practices of the state's compensation system. Where a system strictly adheres to market wage scales, the statements by officials might amount only to observations that the market tends to compensate predominantly female occupations less than others. Such statements would have little probative value because they reflect information that is already available through comparable worth studies. Therefore, they do not belie any particular intent on the part of the employer. However, the admission of discriminatory pay practices may have probative significance when coupled with other evidence that the employer intentionally discriminated against women. Since the historical evidence of intentional discrimination in the present case was inconclusive, and since AFSCME failed to produce other circumstantial evidence of discrimination, statements by state officials amounted only to observations of widely acknowledged market disparities. Similarly, legislative efforts to increase pay scales for certain job categories amount to an admission that market wage rates vary between occupations, but not to an admission that the state varies its pay rates because of the sex of its employees.

III. THE FUTURE OF COMPARABLE WORTH

In a recently filed case, the judge warned the plaintiffs that although their comparable worth claims were not precluded by the AFSCME II decision, they faced a “tough row to hoe” in proving discriminatory

also took the form of legislation allocating initial funds towards comparable worth pay scales. Id. at 867.


112. Another aspect of corroborative evidence referred to, but not elaborated upon, by the district court was the State's use of subjective standards in determining pay. AFSCME I, 578 F. Supp. at 863. This evidence does not add to the quantum of proof because the character of the subjective practices, and their probative weight, was not established as a finding of fact. The plaintiff identified the subjective practice as the indexing of over 2000 job classifications to benchmarks based on market surveys of only 3% of those classifications. Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc at 7, AFSCME II, 770 F.2d 1401 (9th Cir. 1985). The plaintiffs also asserted that the indexing results were often modified for historical or other reasons. Id. If such evidence had been accepted by the trial court, it would likely suffice to establish a prima facie case because it supplies an inference of discriminatory intent. In such a case, plaintiffs could persuasively argue that the preservation of historical pay relationships is an impermissible goal of an employer's wage policies, because it “operates to freeze the status quo of prior discriminatory employment practices.” Griggs, 401 U.S. at 430.

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The AFSCME II decision, and the large majority of cases addressing comparable worth, make it clear that the plaintiff's task is virtually impossible without corroborating proof of intentional discrimination. This assessment is supported by the courts' uniform rejection of disparate impact analysis in such claims, and their acceptance of the market defense to disparate treatment claims. Since it is difficult to establish a comparable worth claim in the courts, it makes sense for proponents to pursue the issue in other forums.

A. The Appropriateness of Addressing Comparable Worth in Nonjudicial Forums

Settlements negotiated by unions and legislatures are preferable to court decrees for two reasons. First, courts have been restrained by the legislative history of Title VII which was virtually silent on the question of Title VII's coverage of sex discrimination and comparable worth claims. Courts have therefore looked to the history of the Equal Pay Act, which was passed just one year before the Civil Rights Act, to ascertain Congressional intent. In drafting the Equal Pay Act, Congress rejected proposals that would have added a requirement of equal pay for comparable work to the Act's prohibition against unequal pay for equal work. Proponents of comparable worth argue that the Civil Rights Act should be construed more broadly than the Equal Pay Act, given Congress' broad definition of equal employment opportunity as a means of undoing discrimination. In deciding whether to extend the Civil Rights Act to a controversial theory of recovery, however, courts will likely continue to use caution due to the paucity of the Act's legislative history, and to the contrary intent expressed in the legislative history of the Equal Pay Act.

115. AFSCME II, 770 F.2d at 1404; see also General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976).
118. See, e.g., Gunther, 452 U.S. at 170–71.
119. 109 Cong. Rec. 9194–208 (1963). Representative Goodell, reflecting on the use of the word "equal" instead of the word "comparable," stated that in order for the statute to apply the jobs involved "should be virtually identical." Id. at 9197.
120. In Gunther, the Court noted legislative history broadly defining equal employment opportunity. 452 U.S. at 178 (citing S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964)).
A second reason for exploring comparable worth in nonjudicial forums is that unions, city councils, and state legislatures are more appropriate forums for action where the source and dimensions of the perceived problem are uncertain. In the case of a comparable worth claim that is unaccompanied by corroborative evidence of discrimination, plaintiffs would replace proof of the employer’s discriminatory intent with a presumption of discriminatory intent derived from comparable worth data. Such a presumption may be proper in nonjudicial forums, where decision-makers can weigh societal values and competing interests to determine the extent to which society is willing to act in the face of the uncertainties surrounding comparable worth claims. However, courts cannot tolerate such uncertainties when the legislative intent is unclear and when the impact of factors besides discriminatory intent can account for wage disparities with only limited accuracy.

Legislative enactments and appropriations indicate that the public mandate in Washington State perhaps favored wage scales based on comparable worth. However, it is not clear whether Title VII embodies a legislative or public mandate to legally force employers to adjust their wage scales in response to their own comparable worth studies. The courts traditionally provide a remedy only where discrimination is adequately proven, and the party responsible for the alleged harm is reasonably identifiable.

B. The Likelihood of Success in Nonjudicial Forums

Evidence that comparable worth may succeed in public forums is found in the events surrounding the *AFSCME I* and *AFSCME II* cases. With the support of Governor Booth Gardner, the Washington State Legislature appropriated forty-five million dollars to settle the claims of the *AFSCME* plaintiffs, to develop a new indexing structure that reflects the evaluated worth of job classes, and to compensate selected job categories that are paid far below their evaluated worth. This appropriation was arguably influenced by pressure from AFSCME’s lawsuit. However, even after the Ninth Circuit rejected AFSCME’s claim, the parties negotiated a $482 million settlement which will be applied over the next six years to upgrade the salaries of workers found to be underpaid according to the comparable worth guidelines.

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121. See 1977 WASH. LAWS 1ST EX. SESS., ch. 152 at 563–64 (calling for additional compensation to eliminate dissimilarities in wages between jobs of comparable worth); see also supra note 35 and accompanying text.
122. 1985 WASH. LAWS, 1ST SESS. 2378.
Similar gains have occurred in other states. Minnesota passed legislation requiring its municipalities to provide employees with equal pay for jobs of comparable worth.\textsuperscript{124} New Mexico, acting without the aid of comparable worth studies, appropriated funds to raise the salaries of its lowest paid workers, eighty-six percent of whom are females.\textsuperscript{125} Fourteen states currently have statutes prohibiting employers from discriminating in the payment of wages between sexes, or from compensating females less than males for work of comparable character.\textsuperscript{126}

Proponents of comparable worth have also met with some success at the bargaining table. In 1981 members of AFSCME went on strike against the City of San Jose over the issue of comparable worth. A pay hike of $4.8 million was negotiated, of which $1.45 million was reserved for increasing the salaries of underpaid women.\textsuperscript{127} In Connecticut, 7000 health care workers represented by the New England Health Care Employees' Union negotiated a contract calling for a pay equity fund aimed at making health care salaries higher in relation to wages in male-dominated fields.\textsuperscript{128} These developments, in contrast to the general lack of success in legal forums, indicate that the future of comparable worth lies in legislative and collective bargaining processes.

\section*{IV. Conclusion}

The Ninth Circuit was correct in holding that AFSCME failed to establish a prima facie case of sex-based wage discrimination, because the use of market wage rates, alone, is not sufficient evidence of discriminatory intent. The tenor of the \textit{AFSCME II} decision and other federal decisions suggests that any optimism for comparable worth as proof of sex discrimination under Title VII is largely unfounded. Courts require a very substantial showing of discriminatory intent in addition to the inferences drawn from comparable worth studies. Finally, in the absence of evidence of intentional discrimination, comparable worth claims should be addressed in public forums which are better suited to handle the uncertainties inherent in identifying and solving pay inequities.

The most urgent question remains unanswered: why are predominantly male positions paid twenty percent more than predominantly female occupations? Sex discrimination is invariably among the factors supplied by

\textsuperscript{124} PAY EQUITY AND COMPARABLE WORTH, supra note 4, at 58.
\textsuperscript{126} PAY EQUITY AND COMPARABLE WORTH, supra note 4, at 58.
\textsuperscript{128} Id. at 33-34.
scholars to explain the disparity. Proponents of comparable worth assert that sex discrimination originates with or is perpetuated by employers, and its dimensions are defined by the salary differences between predominantly male jobs and predominantly female jobs of comparable worth. The response of the courts, unsatisfactory as it may be to claimants, is that the origin and dimensions of sex-based wage discrimination cannot be identified, absent other evidence of discriminatory intent, because both are interwoven with legitimate factors which at least partially explain the disparity. The sweeping reforms ordered by the district court in *AFSCME I* should, where evidence further defining the scope of the discrimination is unavailable, await a clear legislative mandate.

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