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Published in *North Atlantic Regional Business Law Review*, vol. , pp. 61-65, Spring 1982

SPRING 1982

North Atlantic Regional

Business Law Review

THE OFFICIAL PUBLICATION
OF THE NORTH ATLANTIC REGIONAL BUSINESS LAW ASSOCIATION

SEX DISCRIMINATION IN EMPLOYEE COMPENSATION: THE IMPLICATIONS OF THE COUNTY OF WASHINGTON V. GUNTHER DECISION

by

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INTRODUCTION

In spite of the passage of the Equal Pay Act of 1963[1] and Title VII of the Civil Rights Act of 1964,[2] which laws were aimed at the elimination of sex discrimination in employment, overall earnings for women in comparison to men have not improved since enactment of these laws. In 1955 the median level of earnings for women was 64 percent of the median income for men. In 1975 the median level of earnings for women decreased to 59 percent of the median level for men.[3] It is generally accepted that the reason why the overall statistics show that women earn substantially less than men is that a large proportion of working women are employed in certain predominately female occupations, such as nursing, secretarial work, social work, clerical work, school teaching, food service and domestic service, which occupations have significantly lower pay scales relative to other occupations where men are dominant.[4] It should be made clear that the Equal Pay Act has been very successful in remedying pay disparity between men and women performing the same work for their employer.[5] Thus, female full time college professors earn about the same as male full time college professors of similar qualifications; and female autoworkers earn the same as male autoworkers doing the same work.

Advocates of the concept of comparable worth believe that female employees whose jobs are separate and distinct from jobs performed by male employees, but are of comparable "worth" or value to the employer, are entitled to comparable wages to male employees, and if not so paid, they should be entitled to relief under Title VII of the Civil Rights Act of 1964. No court has accepted this theory. However, a recent United States Supreme Court decision, County of Washington v. Gunther,[6] permits females to bring a Title VII sex discrimination suit on the basis of low pay where male and female employees did not perform substantially similar work. This paper will discuss the issue and implications of the Gunther decision on Title VII sex-based wage discrimination claims; and will discuss the Equal Pay Act and court

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decisions under this Act in order to provide a setting to better understand the issues and implications of the Gunther decision.

THE EQUAL PAY ACT

The principle of equal pay for equal work regardless of sex is set forth in the Equal Pay Act of 1963, which was enacted as Section 6(d) of the Fair Labor Standards Act (FLSA). The Equal Pay Act prohibits employers from discriminating against employees covered by the minimum wage provisions of the FLSA by paying lower wages to employees of one sex than the rate paid employees of the opposite sex for equal work in the same establishment on jobs which require equal skill, effort and responsibility and are performed under similar working conditions.[7] The Act was intended as a broad charter of women's rights in the business world. The Act seeks to eliminate the depressing effects of living standards caused by reduced wages for female workers. The Act does not prohibit any variation in wage rates paid men and women, but only those variations based solely on sex. The Act sets forth four exceptions allowing for variances in wages, if paid, pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex.[8] The 1974 amendments to the FLSA make the Act applicable to employees of the federal, state and local governments and their agencies.[9]

Congress, in prescribing equal pay for "equal" work, did not require that the jobs in question be identical, but only that the jobs must be "substantially equal."[10] In applying this "substantially equal" test, the courts have had no difficulty finding that it is the job content, not the job description, which is controlling.[11] In Shultz v. Wheaton Glass Co.,[12] the Third Circuit Court of Appeals found that a manufacturing plant's 10 percent pay differential for male selector-packers, where the male selector-packers spent a relatively small portion of their time doing the additional tasks of "snap-up boys," a lower paying classification requiring lifting and other unskilled tasks, was a violation of the Act. The Court did not require the skill, effort and responsibility of the female selector-packers' work to be precisely equal to the male selector-packers' work, but rather that the work be substantially equal.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Written a year after the passage of the Equal Pay Act, Congress enacted Title VII of the Civil Rights Act of 1964. Title VII was designed to eliminate discrimination against any individual with respect to compensation, terms, conditions or privileges of employment because of the individual's race, color, religion, sex or national origin.[13] Title VII then prohibits discrimination with respect to compensation because of an individual's sex, which is similarly prohibited by the Equal Pay Act. Congress dealt with the possible conflict between the Equal Pay Act and Title VII, by passage of the so-called Bennett Amendment to Section 2002e-(h) of Title VII. This amendment provided:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29."

The Bennett Amendment clearly incorporated the four statutory exceptions from the Equal Pay Act allowing for variances in wages between the sexes if paid pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; and (4) a differential based on any factor other than sex.[14] Did this Amendment also incorporate the equal pay for "equal work" requirement of the Equal Pay Act into Title VII? The circuit courts differed on this question[15] and it was resolved by the Supreme Court in the County of Washington v. Gunther decision.

COUNTY OF WASHINGTON V. GUNTHER

The plaintiffs in County of Washington v. Gunther were four women employed as matrons at the Washington County, Oregon, jail. The county also employed male corrections officers and deputy sheriffs. The matrons under Oregon law guarded female inmates, while the corrections officers and deputy sheriffs guarded male inmates. Effective February 1, 1973, the matrons were paid between $525 and $668, while the salaries for the male guards ranged from $701 to $940. The plaintiffs filed suit under Title VII ,alleging that they were paid unequal wages for work substantially equal to that performed by their male counterparts; and, in the alternative, that part of the pay differential was attributable to intentional sex discrimination. The District Court found that the male corrections officers supervised up to ten times as many prisoners per guard as did the matrons; and that the females devoted much of their time to less valuable clerical duties such as: processing fingerprint cards and mug shots; filing reports; keeping medical records; recording deputy sheriffs' activities; and censoring mail.[16] The District Court held that the plaintiffs' jobs were not substantially equal to those of the male guards; and the plaintiffs were thus not entitled to equal pay. The District Court also dismissed the claim based on intentional sex discrimination; holding as a matter of law that sex-based wage discrimination cannot be brought under Title VII unless it would satisfy the "equal work" standard of the Equal Pay Act. The Court of Appeals reversed the District Court on this point; and the Supreme Court granted certiorari.

Justice Brennan, writing for the Supreme Court majority, affirmed the Court of Appeals decision. The majority concluded that the Bennett Amendment was technical in nature and did not restrict Title VII to the "equal work" standard of the Equal Pay Act. The majority held that the Equal Employment Opportunity Commission's interpretation of the Bennett Amendment provided little guidance in this case, although it appeared to support the position of the plaintiffs. The majority points out that if the "equal work" standard were to apply such would mean that a woman who is discriminatorily underpaid could obtain no relief--no matter how

egregious the discrimination might be--unless her employer also employed a man in an equal job in the same establishment at a higher rate of pay.[17] The Court concluded that Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

The Court majority emphasized the narrowness of the question before the Court; and the Court stated that the plaintiffs' claim was not based on the controversial concept of "comparable worth."[18]

The dissent, written by Justice Rehnquist, with whom Chief Justice Berger, Justice Powell and Justice Stewart joined, argued that legislative history and canons of statutory construction were largely ignored by the majority, in deference to the majority's perception of public policy considerations, which extends Title VII coverage beyond the scope of the Equal Pay Act. The dissenting justices recognize that a remedy would not be available where a lower paying job held by women is "comparable" but not substantially equal to a higher paying job performed by men. That is, women would be foreclosed from showing that they received unequal pay for work of "comparable worth" or that dissimilar jobs are of "equal worth." The dissent states that the short answer to this contention is that Congress in 1963 explicitly chose not to provide a remedy in such cases.[19]

CONCLUSION

The Supreme Court in County of Washington v. Gunther set forth the narrow holding that the plaintiffs' claim of low pay because of discrimination based on sex was not barred by Section 2000e-2(h), the Bennett Amendment, merely because the plaintiffs do not perform work "equal" to the male corrections officers and deputy sheriffs. The significance of the decision is that women may now bring a sex discrimination suit on the basis of low compensation even if they cannot prove that male coworkers are being paid higher wages for substantially the same job. The Court majority emphasized that its narrow holding did not require it to take a position on the issue of "comparable worth." However, the Gunther decision is widely acclaimed by advocates of the concept of "comparable worth" as a first step in the direction of court acceptance of the doctrine of comparable worth.[20] The narrow Gunther decision will have little impact on the disparity in wage rates between women working in the predominately female occupations and the male dominated occupations. The Equal Pay Act and Title VII were clearly not enacted to correct such disparity; and Congressional action is needed to address this issue.

FOOTNOTES

1. 29 U.S.C. §206(d) (1976).

2. 42 U.S.C. §§2000e (1976), et seq.

3. U.S. Department of Labor, Bureau of Labor Statistics, U.S. WORKING WOMEN; A DATA BOOK (1977).

4. See N. Fligstein and W. Wolf, "How Can We Explain the Apparent Sex Similarities in Occupational Status Attainment?" Women's Changing Roles at Home and on the Job, Special Report to the National Commission of Manpower Policy, Special Report No. 26 (September 1978) at 231-63.

5. Id., pp. 223-34.

6. 452 U.S. 161, 101 Sup. Ct. 2242 (1981).

7. 29 U.S.C. §206(d)(1)(1976).

8. Id.

9. See Section 3(d) of the FLSA.

10. Shultz v. Wheaton Glass Co., 421 F2d 259 (3rd Cir 1970).

11. Brennan v. Victoria Bank & Trust Co., 493 F2d 896 (5th Cir 1974).

12. 421 F2d 259 (3rd Cir 1970).

13. 42 U.S.C. §2000e-2(a) (1976).

14. 29 U.S.C. §206(d)(1) (1976).

15. See Orr v. Frank MacNeil & Sons, Inc., 511 F2d 166 (5th Cir 1975); DiSalvo v. Chamber of Commerce, 568 F2d 593 (8th Cir 1978) where dicta indicated that Title VII plaintiffs alleging sex-based wage discrimination must prove lower pay for equal work; but see: Fitzgerald v. Sirloin Stockade, Inc., 624 F2d 945 (10th Cir 1980); Laffey v. N.W. Airlines, 567 F2d 429, 446 (D.C. Cir 1976) where dicta indicated that the Bennett Amendment did not incorporate into Title VII, the "equal work" standard of the Equal Pay Act.

16. Footnote 7, Gunther v. County of Washington, 602 F2d 882, (9th Cir 1979).

17. 452 U.S. 161, 101 Sup. Ct 2242 (1981).

18. Id. at 166; 2246.

19. Id. at 202, 203; 2265.

20. BNA Daily Labor Report No. 109, p. AA-3 (June 8, 1981).