

I. INTRODUCTION

Nineteen years ago, then Equal Employment Opportunity Commission (“EEOC” or “Commission”) Chair Eleanor Holmes Norton opened three days of hearings on the issue of “comparable worth,” saying that “the sessions ‘[were] the most important hearings this Commission has had in a decade.’”^{1/} The law has matured a great deal since those hearings. Moreover, and although much more surely remains to be done, the societal attitudes that lead to and perpetuate compensation disparities have significantly evolved. Yet, a compensation disparity remains and the EEOC -- again -- seeks consult on how it should address the issues of compensation disparity.

This Paper by no means opposes the concept of equity in pay for all employees. Certainly no reasonable person would oppose the concept of “equity.” This Paper, however, suggests that before the issue gets lost in the emotional world of campaign politics and rhetoric, critical examination need be made of the extent to which, if any, there currently is a “legal problem” **requiring enhanced governmental intervention** and, if so, how to define that problem and ultimately remedy it within the confines of the law, limited resources and other employment issues which call upon those resources. The EEOC’s meeting on April 13, 1999 is a step in the right direction of ensuring that the discussion and debate over disparity in pay receive appropriate deliberation. Without such due deliberation, the Commission cannot be assured that it distinguishes between compensation disparities resulting from illegal employment

1/ EEOC Begins Hearings On Comparable Worth, Topic Called “Most Important” In Last Decade, 83 Daily Lab. Rep. (BNA) A-14 (Apr. 28, 1980). Detailed reporting on those hearings also can be found at 84 Daily Lab. Rep. (BNA) A-5 (Apr. 29, 1980), and 85 Daily Lab. Rep. (BNA) A-8 (Apr. 30, 1980).

discrimination and the disparities resulting from societal and other factors and that it effectively directs its limited resources in a manner that attacks illegal compensation disparities most effectively and efficiently.

In order to frame the issue for discussion, this Paper starts with an attempt to give some meaning to the phrase “pay inequity” and distinguishes pay differences. The Paper then proceeds with a discussion of the legal framework that governs compensation discrimination. The Paper next addresses certain initiatives currently being advanced in an effort to address what some perceive to be inequitable disparities in compensation. The Paper concludes with the plea that the EEOC not lose sight of controlling law -- which takes into account the economic realities of the employment marketplace -- and that it attempt to use its resources in a highly educative -- not overly litigative -- manner to address the societal and labor marketplace influences that create and perpetuate compensation disparities.

II. THE ISSUE, THE LAW, AND THE EEOC’S ROLE

A. What Is “Pay Inequity” And To What Extent Does It Exist?

Defining “pay inequity” is not an easy task. Indeed, in large measure, the definition of “pay inequity” depends upon the perspective of the person offering the definition. However one defines the concept, moreover, the question to which this Paper repeatedly returns is whether there is a compensation disparity that is “inequitable” to the extent that increased governmental intervention is required and, if so, how should the government view its role today -- as opposed to 35 years ago when Congress enacted the Equal Pay Act (“EPA”), 29 U.S.C. § 206(d), and Title VII of the Civil Rights of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e-2(a). These questions are difficult to answer because of differing interpretations of the law and its intent. Nonetheless, it is the responsibility

of those of us in the employment law community to ensure that those responsible for enforcing the employment laws do all that they can to combat discrimination, while remaining mindful that those laws do not place the onus of social change solely or mandatorily on the shoulders of the Nation's employers.

Two things are certain with respect to the definition of "pay inequity." First, Title VII prohibits intentional discrimination in terms of pay because of sex, race, color, religion or national origin. Second, the EPA, requires an employer to pay men and women equal pay for equal work. See, e.g., McMillan v. Massachusetts Soc'y for Prevention of Cruelty to Animals, 880 F. Supp. 900, 907 (D. Mass. 1995) ("the difference between the two statutes is that the Equal Pay Act requires a plaintiff to prove that 'I was paid less than a comparable man and I am a woman,' while Title VII requires a plaintiff to prove, even in the absence of a comparable man, that 'I was paid less than I deserved because I am a woman'").^{2/} Under the EPA, it is not enough for a plaintiff to contend that her employer paid her less than a man doing a similar job. Rather, the plaintiff must establish that the job to which she compares her job is "substantially equal." Lambert v. Genesee Hosp., 10 F.3d 46, 56 (2d Cir. 1993) (internal citations omitted), cert. denied, 511 U.S. 1052 (1994).

^{2/} Although highlighting the differences between Title VII and the EPA, this quote is not precisely accurate insofar as the references to "comparable" men and women and the notion of a particular "deserved" level of compensation could be read to incorporate notions that "comparable worth" must play a role in the establishment of pay scales. As explained below, the courts resoundingly have rejected the "comparable worth" theory as inconsistent with legislative intent under the EPA and Title VII.

Notwithstanding that Congress enacted the EPA and Title VII in 1963 and 1964, respectively, the debate over pay equity still rages -- 35 years later and 19 years after then-Chair Norton gavelled the EEOC's "comparable worth" hearings to order. Studies still point to the fact that women, on average, earn less than do men and that, when race and national origin are factored in, compensation disparities are larger.^{3/} In reality, one need not review studies to recognize this fact. For example, it is well known that men professional basketball players make far more money than do women professional basketball players notwithstanding that both jobs require extraordinary skill and effort. To some advocates of change, "pay inequity" refers to this societal fact and their mission is to affirmatively eradicate this compensation disparity. Although this is a cause worthy of support, it must not ignore the fact that differences in pay between the sexes and discrimination by employers are too very different things.

3/ The U.S. Census Bureau reported that, "[o]n average, women are paid 74 cents for every dollar men earn -- forcing women to work for 15 months to earn what men earn in 12 months." The White House: Vice President Gore Announces Support For Legislation On Equal Pay, M2 Presswire, 1998 WL 11305777 (Apr. 7, 1998). Similarly, the Department of Labor's Women's Bureau has compiled statistics comparing women's earnings as a percentage of men's earnings. See also Bureau of Labor Statistics Bulletin 2340 and unpublished tables <http://www.dol.gov/dol/wb/public/wb_pubs/7996.htm>. The Bureau's compilation spans from 1979 to 1997. As of 1979, women earned 59.7% of men's earnings annually. Since then, however, there have been fairly steady increases, with some decreases in 1981, 1986, 1991, and 1995. In 1996, women's earnings reached 73.8% of men's earnings and in 1997, women's salary percentage reached a peak at 74.2%. See also Lisa Greim, Working Women Protest Pay Gap, Rocky Mountain News, at 1B, 1998 WL 7934325 (Apr. 4, 1998) (averages are worse for black women, who earn 65 cents on the dollar, and worse still for Hispanic women, who earn 57 cents on the dollar.).

From a more legal -- less sociological -- perspective, compensation comparisons must be made at a narrower level than generalized compensation averages.^{4/} For example, the EPA compares men and women performing equal work in equal working conditions on jobs requiring equal skill, effort and responsibility. See Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974). Title VII authorizes comparisons between “similarly situated” -- yet not necessarily “substantially equal” -- jobs. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1041 (2d Cir. 1993). Others have attempted to expand the comparison beyond “equal jobs” or “essentially similar” jobs to those jobs that arguably have “comparable worth” to society or a particular employer. As the Court of Appeals for the Ninth Circuit has explained: “The 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 job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar.” AFSCME v. State of Washington, 770 F.2d 1401, 1404 (9th Cir. 1985). The courts generally have rejected the doctrine of comparable worth as a basis for liability under Title VII. See, e.g., County of Washington v. Gunther, 452 U.S. 161, 166 (1981); Gunther, 452 U.S. at 203 (Rehnquist, J., dissenting) (majority opinion’s not endorsing comparable worth is its “saving feature”); Sprague v. Thorn Ams., Inc., 129 F.3d 1355 (10th Cir. 1997); Davidson v. Board of

^{4/} For example comparing overall average earnings which include predominately male professional baseball, football and basketball players who earn millions a year, with predominately female clerical workers is meaningless.

Governors of State Colleges and Univs for Western Ill. Univ., 920 F2d 441, 446 (7th Cir. 1990) (“the theory of comparable worth . . . has no standing in civil rights law”).

Defining the appropriate scope for assessing the existence of a compensation disparity is only the first step in determining whether there is a problem warranting legislative and/or regulatory response. In other words, we need consider whether employer discrimination has caused a particular compensation disparity. If not, we still need to address whether the government should intervene as a facilitator of social evolution through mechanisms such as education and training. These questions warrant careful study of, in particular, the causes of specific disparities.

The root causes of compensation disparities should not be assumed without proper study and debate. On the one hand, the White House has said that “the gap is, in part, attributable to differing levels of experience, education and skill. However, even after accounting for these factors, a significant pay gap still remains between men and women in similar jobs.”^{5/} Some attribute this gap to the largely antiquated assumption that men are the principle breadwinners upon whom families rely. In this regard, a female in management at a pharmaceutical firm has been quoted as stating that a firm vice president had stated that “a man was paid more money because he had a family to support.”^{6/} Insofar as this attitude -- as opposed to legitimate considerations such as education, experience, hours worked,

^{5/} Pam Ginsbach, Politics: Clinton Proposes New Job Protections For Parents Among Labor Initiatives, 12 Daily Lab. Rep. (BNA) AA-2 (Jan. 20, 1999).

^{6/} Karen Robinson-Jacobs, When It Comes To Pay, It's Still A Man's World, L.A. Times at D1, 1998 WL 2420604 (Apr. 23, 1998).

skill, and level of responsibility -- arbitrarily affects a woman's compensation, it is undoubtedly indefensible employer discrimination under the law.

Others argue that a labor market that continues to undervalue work traditionally considered to be "women's work" causes compensation disparities. By way of example, advocates for change cite studies revealing that the average child-care worker (typically a female job) earned less than the average parking-lot attendant (typically a male job) -- \$6.12 per hour versus \$6.38.^{7/} Although surely a disturbing statistic to many, this disparity is not illegal (unless the product of a conscious intent by an employer to pay female child-care workers less because they are females) because the law does not embody notions of societal "comparable worth."

Others argue that compensation disparities cannot be attributed solely "to traditional 'women's work' being lower-paying, to women's larger presence in part-time or temporary work, or to women interrupting their careers to tend to family."^{8/} Rather, advocates for change cite statistics that women nurses, for example, still make \$30 less per week than their scarcer male counterparts.^{9/} Assuming that these nurses are performing "equal jobs" within the meaning of the EPA (i.e., in terms of responsibilities, functions, working conditions and the like), and that there are not factors other than sex causing it, the disparity would be illegal.

^{7/} Id.

^{8/} Greim, supra note 3, at 1B.

^{9/} Ginsbach, supra note 4 (quoting the White House as stating: "This gap is, in part, attributable to differing levels.").

The question remains, however, as to whether employer discrimination causes widespread compensation disparities or those pay gaps are attributable to other factors which, although not illegal, lead to the same result. Recent studies confirm that, in fact, compensation disparities are largely -- if not entirely -- attributable to factors other than employer discrimination.^{10/} Specifically, these studies confirm that compensation disparities are based largely on the differences in average levels of experience and tenure, years and type of education, hours of work, and industry and occupation:

- 1) **EXPERIENCE:** Women often take more time off than men to care for children, and “less experience does tend to translate into less pay.”^{11/} Moreover, there is a lower percentage of women with advanced degrees (particularly in higher paying fields) in their fifties, the age of peak earning power.^{12/} For example, “CEOs received their education and training in the 1960s and 1970s, a time when women accounted for only 4% of graduate degrees in law and business.”^{13/}
- 2) **INDUSTRY AND OCCUPATION CHOICE:** The 80% of women who have children are likely to “choose jobs that enable them to better combine work and

^{10/} See Diana Furchtgott-Roth & Christine Stolba, Women’s Figures: An Illustrated Guide To The Economic Progress Of Women In America, The AEI Press and Independent Women’s Forum (1999) (explaining that the comparison between the average earnings of men and women produces a meaningless statistic); Anita U. Hattiangadi, The Facts About Pay Equity, 5 Fact and Fallacy 3 (visited Mar. 30, 1999) <<http://epfnet.org/ff/ff990315.htm>> (explaining that the “gap... is attributed to workplace discrimination without accounting for the many relevant economic factors that influence earnings”).

^{11/} Robinson-Jacobs, supra note 5, at D1.

^{12/} Furchtgott-Roth & Stolba, supra note 9, at 22-23.

^{13/} Diana Furchtgott-Roth & Christine Stolba, American Women Aren’t Really So Cheap, Wall Street Journal (Nov. 20, 1998).

family,” and such jobs may be lower paying.^{14/} “Economists estimate that 31 to 38 percent of the wage gap may be explained by differences in the industrial distribution of men and women, and up to 35 percent may be explained by differences in occupations. For example, women age 35-44 with engineering degrees working as engineers earn 95 percent as much as their male counterparts.”^{15/} Other evidence also suggests that when qualifications are equal, the compensation gap diminishes greatly. For example, women aged 16 to 29 earned 92% of their male counterparts.^{16/} A June 1998 report by the Council of Economic Advisors noted that one study, using 1980s’ data, estimated that just accounting for male/female differences in experience, industry, occupation, and union status narrowed the unexplained portion of the gap to 12%.^{17/}

- 3) **HOURS:** Even when comparing the earnings of full-time men and women, the gap does not recognize that in 1997 full-time women, on average, worked 41.3 hours a week, compared with 45 hours for full-time men.^{18/} One commentator explains that “[s]imply correcting for hours differences increases the female/male pay ratio to 81 percent.”^{19/}
- 4) **FIELD OF STUDY:** Although studies have shown that college educated women earn only 75% of college educated men, men and women are still choosing different fields of study. For example, 13% of men and just 2% of women earn bachelor’s degrees in engineering.^{20/} At least one economist argues that if women had the same field of study

14/ Nancy Montwieler, Compensation: Male-Female Wage Gap Is A Myth, Researchers Analyzing Statistics Assert, 60 Daily Lab. Rep. (BNA) A-6 (Mar. 30, 1999).

15/ Setting The Record Straight On The Gender Pay Gap, Employment Policy Foundation (visited Mar. 30, 1999) <<http://www.epf.org>>.

16/ Montwieler, supra note 13, at A-6.

17/ Setting The Record Straight On The Gender Pay Gap, supra note 14.

18/ Id.

19/ Hattiangadi, supra note 9, at 3.

20/ See Peter Ligh, Gender Gap Still Thrives in Selecting Major, Yale Daily News (visited Apr. 7, 1999) <<http://www.yale.edu/ydn/9.30/9.30.95storyno.BA.html> > (examining gender based (continued...))

distribution as men, the wage gap would be cut by 8%. In fact, “the median annual earnings of men and women age 25 to 34 with bachelor’s degrees in the same field of study are roughly equal in most fields.”^{21/}

Another factor that may influence a compensation disparity between sexes, particularly in sales-related employment, is customer preference. There can be little doubt that in certain types of positions, men tend to do better in terms of compensation.^{22/} For example, on average, men likely do better selling hardware than do women -- especially where performance is a significant factor in determining overall compensation -- because customers, who tend to be males, likely have a stereotypical tendency to seek out salesmen when purchasing hardware. Undoubtedly, this phenomenon permeates its way into more white collar, traditionally male occupations such as stockbrokers, which historically has catered to a primarily male customer base. Absent evidence of

20/(...continued)

differences in selecting majors at Yale University and noting: “Students said the discrepancy could be a natural result of students pursuing their interests or could be the product of institutional structures that still channel women and men into different arenas.”). See also Kristen Olson, Despite Increases, Women and Minorities Still Underrepresented in Undergraduate and Graduate S&E [science and engineering] Education, National Science Foundation Division of Science Resource Studies Data Brief, at 1 (Jan. 15, 1999).

21/ Setting The Record Straight On The Gender Pay Gap, supra note 14.

22/ By the same token, in other lines of business, women undoubtedly will do better. For example, one study demonstrated that waitresses who draw “smiley faces” on their customers’ checks get better tips on average than do waitresses who do not do so. By contrast, waiters who draw “smiley faces” on their customers’ checks do not get greater tips and, to some extent, may lose tips as a result of their conduct. See Richard Morin, Unconventional Wisdom, The Washington Post, at C5 (Mar. 24, 1996). Obviously, these results belie the fact that societal influences beyond an employer’s control can and do affect compensation received by employees.

some specific employer discriminatory practice, however, it would not be appropriate to fault an employer in these situations for an earnings disparity.

Study of the impact of these types of non-discriminatory or non-employer factors that influence and, in fact, create compensation disparity has led one commentator to conclude:

Remaining differences [beyond those cited above] between the pay of men and women could be attributable to statistical mismeasurement, unaccounted characteristics, discrimination, or some combination of these. In fact, studies show that when other relevant economic factors are accounted for, the measured gender pay gap shrinks considerably -- by some estimates to zero. Thus, it is clearly wrong to attribute the measured gender pay gap solely, or even primarily, to workplace discrimination.^{23/}

Similarly, in their recently published and extensively researched book, Diana Furchtgott-Roth and Christine Stolby explain:

Both the wage gap and the glass ceiling are rhetorically useful but factually corrupt catch phrases. As we have demonstrated, those myths are harmful to women and do little to describe accurately the complex factors that determine a woman's place in the labor market. Important elements such as experience, intensity of work effort, and field of employment are not taken into consideration by those who generate pessimistic statistics about women's lack of progress. In addition, those who constantly point to the existence of a wage gap and a glass ceiling ignore one of the most important (but least statistically measurable) factors: personal choice.^{24/}

^{23/} Hattiangadi, supra note 9.

^{24/} Furchtgott-Roth & Stolba, supra note 9, at 80.

As societal attitudes evolve, the compensation disparity is bound to shrink. For example, as more women with advanced degrees grow into executive positions, their salaries obviously will increase. Moreover, as these women become more visible role models and mentors, the means and methods for advancement will become far more familiar to other women into higher paying jobs. Similarly, insofar as familial attitudes evolve such that men and women increase their sharing of childrearing responsibilities, the hours worked by men and women will draw closer.

Along the same lines, as more women work full-time, they will become more familiar with the means available to them to achieve greater financial remuneration. Women will aggressively pursue and negotiate for raises and higher starting salaries. Indeed, as more women gain advanced degrees and higher levels of experience, they will be able to -- and should -- demand higher salaries.

In addition, the union movement is focusing on increasing its efforts to organize women.^{25/} For example, there has been a great deal of publicity about efforts to unionize day care workers,^{26/} which likely would reduce the wage gap referred to above between day care workers and

^{25/} See, e.g., Michelle Amber, AFL-CIO: Number Of Women Organizing Into Unions Has Doubled Since 1960, New Report Says, 54 Daily Lab. Rep. (BNA) AA-2 (Mar. 20, 1998); Michelle Amber & Nancy Montwieler, Women: Working Women Said To Be Future Of Labor Movement By AFL-CIO Leaders, 174 Daily Lab. Rep. (BNA) A-1 (Sept. 9, 1997); Michelle Amber, Women: AFL-CIO Launches Initiatives Aimed At Helping Working Women, 172 Daily Lab. Rep. (BNA) A-3 (Sept. 5, 1997); Erik Gunn, Women: AFL-CIO Surveys Women Workers, Seeks To Capitalize On Gender Gap, 112 Daily Lab. Rep. (BNA) A-7 (June 11, 1997).

^{26/} See, e.g., Vincent J. Schodolski, Child-Care Workers Seek Union/Parking Lot Clerks Often Earn Twice As Much, But Parents Can't Afford To Pay More. Organizers See A Path To
(continued...)

parking lot attendants. Although employers almost always will resist union organizational efforts, they are not always successful where a true need for representation exists. As such, the effort to organize women likely will result in increased compensation for women and the deterioration to a certain extent of traditional notions of male versus female work.

As the foregoing reveals, the issue of compensation disparity is a complex one worthy of extensive study and debate. Although the issue obviously is subject to politicalization, the employment law community must work together to ensure proper restraint and deliberation that take into account the causes of compensation disparities and the impact of change on all interested parties -- employees and employers alike. Moreover, before hastily changing the laws and devoting greater resources to enforcement, careful thought must be given to creative ways to attack the disparity within the confines of the current legal framework.

B. The Current Legal Framework

Since 1964, the primary means to challenge discrimination in terms of compensation has been pursuant to the EPA and/or Title VII. In order to properly analyze current pay equity initiatives, it is important to place them in the context of current law.

1. Equal Pay Act^{27/}

^{26/}(...continued)

Subsidies, 1998 WL 2893404 (Chicago Tribune, Sept. 7, 1998); Kevin Galvin, Unions Court Child-Care Workers, 1998 WL 6718304 (AP, Sept. 4, 1998).

^{27/} The Equal Pay Act of 1963 amended the FLSA to provide:

(continued...)

a. Standards Of Proof

In order to prevail on an EPA claim, a plaintiff must prove that: (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions. See, e.g., Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); Bragg v. Navistar Int'l Transp. Corp., 164 F.3d 373, 378 (7th Cir. 1998); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 524 (2d Cir.), cert. denied, 506 U.S. 965 (1992).

i. Equality Of Work

To establish a claim under the EPA, “a plaintiff need not prove that her job is identical to a higher-paid position, but only must demonstrate that the two positions are ‘substantially equal.’ . . . However, where jobs are merely comparable, an action under the [EPA] will not lie.” Lambert, 10 F.3d at 56. See also Stopka v. Alliance of Am. Insurers, 141 F.3d 681, 685-686 (7th Cir. 1998)

27/(...continued)

No employer having employees subject to any provisions of [the minimum wage and overtime laws] shall discriminate, within any establishment in which such employees are employed, 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 other factor other than sex.

29 U.S.C. § 206(d)(1).

(female vice president failed to establish prima facie case under the EPA where male vice presidents had substantially different responsibilities); Arrington v. Cobb County, 139 F.3d 865, 874 (11th Cir. 1998) (evidence that male employee appointed to new position was performing same tasks formerly performed by female plaintiff precluded summary judgment for employer); Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1363-64 (10th Cir. 1997) (female employee failed to establish prima facie equal pay claim since wage disparity was consistent with disparity in jobs' level of "importance, value, and depth of responsibility"); Tomka v. Seiler Corp., 66 F.3d 1295, 1310 (2d Cir. 1995) (plaintiff not properly compared to three district managers who had greater responsibility and supervisory authority); Brobst v. Columbus Servs. Int'l, 761 F.2d 148, 156 (3d Cir. 1985) (jobs are "substantially equal" if they have a "common core" of tasks); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1173-76 (3d Cir. 1977) (expert's testimony that aggregated different skill and effort requirements did not fulfill plaintiff's obligation to prove equal job content); Burdick v. Associated Grocers, Inc., No. C97-1670C, -- F. Supp. -- (W.D. Wash. Mar. 12, 1999) (denying summary judgment and finding a prima facie case equating warehouse and clerical positions notwithstanding division of positions into two separate collective bargaining units).

ii. Similar Working Conditions

An EPA plaintiff must identify a specific comparator performing a substantially similar job under similar working conditions. See Bragg, 164 F.3d at 378 (plaintiff failed to establish prima facie case where the only evidence presented described a white male who received a promotion after passing a performance exam that plaintiff failed); Stanley v. University of S. Cal., 13 F.3d 1313, 1321-22 (9th Cir. 1994) (women’s basketball coach not entitled to same salary as men’s basketball coach where latter had greater revenue-raising responsibilities and experience); Houck v. Virginia Polytechnic Inst., 10 F.3d 204, 206 (4th Cir. 1993) (plaintiff failed to establish prima facie case because she “did not single out an actual comparator instead of a hypothetical one”). An EPA claim, however, does not require proof of an intent to discriminate. Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 118 (2d Cir. 1997).

b. Defenses

Once the plaintiff makes out a prima facie case, the burden shifts to the employer to justify the wage differential by proving that the disparity results from: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1); Corning Glass Works, 417 U.S. at 196; Aldrich, 963 F.2d at 524. The employer will prevail if it proves that one of these listed factors has caused the disparity in compensation. See, e.g., Irby v. Bittick, 44 F.3d 949, 957 (11th Cir. 1995).

To constitute a valid defense, some courts hold that there “must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined

criteria.” EEOC v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980). Further, “when factors such as seniority, education, or experience are used to determine the rate of pay, then those standards must be applied on a sex neutral basis.” 29 C.F.R. 1620.13 (c) (cited in Flory v. Salt Lake City County Sheriff’s Office, 680 F. Supp. 1504, 1506 (D. Utah 1988)). In determining whether a facially neutral compensation system is applied on a sex-neutral basis, the courts focus on the consistency of application of a system’s criteria across gender lines. See Cox v. Home Ins. Co., 637 F. Supp. 300 (N.D. Tex. 1985) (defendant’s motion for summary judgment granted where defendant presented evidence that wage disparities resulted from consistent application of gender-neutral salary guide). In Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 353 (4th Cir. 1994), the employer tried to show that experience and education explained the disparities between the salaries of the plaintiff and her male comparators. The evidence presented at trial, however, showed that some “less experienced people (including men) are often paid more highly than more experienced people (including men).” Id. The court thus held that it was not necessarily more probable than not that experience accounted for the disparities in pay, and that the jury reasonably rejected the employer’s affirmative defense. See also Churchill v. IBM, 759 F. Supp. 1089, 1100 (D.N.J. 1991) (summary judgment denied because defendant failed to establish that plaintiff’s evidence of pay disparity could be explained by merit-seniority system).

i. Seniority Systems

Some courts have held that whether a seniority system exists is a matter of law, and a question for the court to decide rather than a jury. Irby v. Bittick, 44 F.3d 949, 954-55 (11th Cir.

1995) (holding as a matter of law that a seniority system did not exist where deputies who work longer in policy department earned less than two comparators); Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539, 547 (11th Cir. 1991). The employer must uniformly enforce the system, and the standards for measuring seniority must be systematically applied and observed. Irby, 44 F.3d at 954 (concluding as a matter of law that employer did not have seniority system where two investigators were paid more than others hired earlier). See also Pierce v. Duke Power Co., 811 F.2d 1505 (4th Cir. 1987) (table)(unpublished; text in Westlaw) (accepting as affirmative defense a seniority system pursuant to collective bargaining agreement which promoted employees after time if a vacancy existed regardless of sex). One court has held that a bona fide seniority system cannot simply fix employees' pay increases, but must also take into account longevity in determining employees' original pay rate. Mitchell, 936 F.2d at 545-46 (holding that school board's salary structure did not constitute seniority system where it "completely fail[ed] to reflect total length of employment").

ii. Merit Systems

It is perfectly acceptable to pay some employees more than others who they outperform. Consequently, the EPA provides that an employer may rely on a merit-based salary schedule as an affirmative defense. See, e.g., Brownlee v. Gay & Taylor, Inc., 642 F. Supp. 347, 361-62 (D. Kan. 1985) (consistent application of facially valid merit-based compensation criteria establishes affirmative defense), aff'd, 861 F.2d 1222 (10th Cir. 1988); Brennan v. Federal Nat'l Mortgage Ass'n, No. CV-74-1470-EC, 1976 WL 557, at *5 (C.D. Cal. Mar. 5, 1976) (employer

established affirmative defense by proving at trial that merit review plan would produce similar wages for similarly qualified employees regardless of gender).

iii. Systems That Measure Earnings By Quantity Or Quality Of Production

Similarly, an employer can pay its employees according to their abilities to meet sex-neutral production goals. For example, in Diamond v. T. Rowe Price Associates, Inc., 852 F. Supp. 372, 392-94 (D. Md. 1994), the court rejected the plaintiff's EPA claim for standard annual bonuses that other male account managers received, because she had bargained for bonuses that depended entirely upon the performance of funds that she managed.

iv. The "Factor Other Than Sex" Defense

Even if a plaintiff proves equal work under similar conditions, there can be no EPA violation if the pay differentiation is based on a factor other than sex. 29 U.S.C. § 206(d)(1). The "factor other than sex" defense is a broad defense that encompasses a wide range of conditions, and employers are entitled to formulate a composite defense from more than one of many possible factors. Engelmann v. National Broadcasting Co., No. 94 Civ. 5616, 1996 WL 76107, at **7-11 (S.D.N.Y. Feb. 22, 1996) (accepting an affirmative defense composed of tenure with company, tenure in position, and prior salary: "[T]he EPA does not suggest that some legitimate reasons are more legitimate than others, and it does not require an employer to pick on the enumerated criteria . . . while ignoring all others"). The most common of these factors are described below.

(a) Education

In Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1462 (7th Cir.

1994), the plaintiff alleged an EPA violation because her employer paid a higher salary to her male successor. The defendant asserted, among other things, that it paid more to the replacement because he had a four-year college degree and an MBA, as opposed to the plaintiff's two-year associate's degree. The court held that this was a valid reason for a pay differential and that the plaintiff had failed to refute it. The court said:

Although [plaintiff] had no doubt garnered invaluable experience during her tenure with [defendant], we may not second-guess the company's decision to pay more for an advanced business degree where there is no evidence that it paid women with similar degrees a lesser amount or that [the replacement's] degree was unrelated to the tasks assigned him.

Id. at 1462.

(b) Prior Salary History

In Dey, 28 F.3d at 1462, the Seventh Circuit also addressed a defense based on the successor employee's prior salary history. Specifically, the court held that the employer had presented evidence sufficient to support a finding that a pay disparity was based on a factor other than sex where it could show that the male employee had negotiated an annual salary closer to what he had been earning at his prior employer's place of business. The court cautioned, however, that "undue reliance on salary history to explain an existing wage disparity may serve to perpetuate differentials that ultimately may be linked to sex." Id. See also Engelmann v. National Broadcasting, 1996 WL 76107, at *10 ("Salary matching -- payment of a higher salary to match an incoming employee's previous

earnings -- also is a valid reason for wage differences, and one that falls into the catch-all factor-other-than-sex.”).

In Covington v. Southern Illinois University, 816 F.2d 317, 322-23 (7th Cir.), cert. denied, 484 U.S. 848 (1987), the Seventh Circuit held that the University’s “salary retention policy,” which insured that employees maintained their same level of pay regardless of their positions at the University, constituted a “factor other than sex” and was therefore an affirmative defense to the plaintiff’s equal pay act claim.^{28/} In Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir. 1988), however, the Eleventh Circuit created a more limited definition of “factors other than sex.” Recognizing that its holding could contradict the Seventh Circuit’s holding in Covington, the court nevertheless reviewed the relevant legislative history and concluded that the “factor other than sex” exception applies when “the disparity results from unique characteristics of the same job; from an individual’s experience training, or ability; or from special urgent circumstances connected with the business” such as “red-circle rates.” Id. at 1571 (citing H.R. Rep. No. 88-309, at 3, reprinted in 1963 U.S.C.C.A.N. 687, 689). The Glenn court consequently “reject[ed] Covington because it ignores that prior salary alone cannot justify a pay disparity.” Id.

Other courts have held that prior salary alone cannot justify a disparity in pay under the EPA. For example, in Irby, 44 F.3d at 955, the court found that an employer could not justify its

^{28/} Cf. Davidson, 920 F.2d at 444-45 (upholding under ADEA university policy of awarding raises only if faculty member produces written offer of employment from another employer at a higher wage).

decision to pay two male deputies in a sheriff’s department more than the female plaintiff simply because of the male employees’ salaries at their previous employers. Id. at 955. The court reasoned that “if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated.” Id. The court said, however, that an employer may raise prior salary as an affirmative defense if the employer proves that it relied on prior salary in conjunction with another factor such as experience. Id. In an analogous decision, the Ninth Circuit held that employers that must show a legitimate “business reason” for relying on an employee’s prior salary when determining present wages. Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982). In Kouba, the court held that the EPA did not prohibit an employer from computing sales agents’ salaries on the bases of their prior salaries, provided that the business reasons given by the company reasonably explained its use of that factor. Id. at 876.^{29/}

(c) Experience And Background

Compensating an employee for experience gained in similar work can be a factor other than sex that qualifies as an affirmative defense. See Irby, 44 F.3d at 956-57 (holding that “unique, long-term experience as an investigator in a single division constitutes a justification for pay difference . . . [as a] factor other than sex”); Lindale v. Tokheim Corp., 145 F.3d 953, 957-58 (7th Cir. 1998). In Trent v. Adria Laboratories, Inc., 25 Wage & Hour Cas. (BNA) 373 (N.D. Ga. 1982), the court

^{29/} The Seventh Circuit in Covington specifically rejected the plaintiff’s invitation to adopt the Kouba requirement that employers provide a business or performance-related reason for their reliance on prior salary. Covington, 816 F.2d at 323.

denied relief to an EPA plaintiff who showed that male sales representatives, hired after the plaintiff, were given a higher salary. “As to each such representative,” the court wrote, the employer “gave uncontroverted testimony that the higher salary was based upon the applicant’s job-related experience. It is not a violation of the Equal Pay Act to base a higher salary on an employee’s prior experience.” Id. at 379-80. See also Irby, 44 F.3d at 954 (approving higher rate of pay for two investigators with less seniority in department but more experience); Brownlee v. Gay & Taylor, Inc., 642 F. Supp. 347, 362 (D. Kan. 1985) (“The Equal Pay Act contemplates that male employees with more experience may receive higher salaries than less experienced women”), aff’d, 861 F.2d 1222 (10th Cir. 1988).^{30/}

Although education and experience may be legitimate factors to consider in the hiring process when setting initial salaries, some courts have questioned how long these criteria can continue to justify a pay differential where the employee is performing work equal to that of higher paid employees. In Glenn, the court rejected an argument that the plaintiffs who previously earned lower salaries as secretaries could be paid less after their promotions than men performing similar work. 841 F.2d at 1570. Additionally, as discussed above, some courts will not approve an affirmative defense based on prior salary alone.

(d) Hiring Or Retaining Employees

^{30/} These cases, which effectively question the legitimacy of certain factors, are inconsistent with the controlling statutes. Neither the EPA nor Title VII impose a requirement that a particular factor must make the best business sense. Those statutes provide only that if a compensation disparity is based on a factor other than sex, liability will not lie.

Employers also may pay more to employees who demand more upon hire or to keep employees from leaving. See Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 679 (S.D.N.Y. 1995) (paying one male associate more than female was lawful for purpose of keeping that male from joining another firm).

(e) Profitability Or Production Of Revenue

Even where male and female employees perform equal work, wage differences can be justified under the EPA based on profitability or revenue generation. Stanley, 13 F.3d at 1321-22 (women's basketball coach not entitled to same salary as men's basketball coach in part because men's team produced 90 times as much revenue); Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 597-98 (3d Cir.) (higher salaries to men's clothes salesmen justified by higher profitability of men's clothing department), cert. denied, 414 U.S. 866 (1973).

(f) Market Forces

The "market forces" theory -- paying women less simply because they are willing to work for less -- is generally not a valid defense. Corning Glass Works, 417 U.S. at 205. See also Glenn, 841 F.2d at 1570 (rejecting argument that plaintiffs previously earned lower salaries before promotion as an invalid market forces defense). A few later cases have recognized, however, that the market can lawfully play some role in determining wages. As noted above, an employer may consider a potential employee's salary history when making an offer of employment. See Engelmann, 1996 WL 76107, at *10; Dey, 28 F.3d at 1462 (accepting salary history of comparator as defense while cautioning that undue reliance on salary history may perpetuate differentials ultimately linked to

sex). See also Kouba, 691 F.2d at 877-78 (adopting the prior salary defense with the caveat that employers must show a legitimate business reason for relying on an employee's prior salary when determining present wages). The Southern District of New York also has held that a law firm could pay a male associate more than a female comparator in order to retain the male associate. Sigmon, 901 F. Supp. at 679. The Eleventh Circuit's decision in Mulhall, however, rejected an employer's defense that, in the court's opinion, came "precariously close to the market force justification for disparate wages long rejected as an affirmative defense." 19 F.3d at 596 n.22. The plaintiff had identified, inter alia, three comparators who were owners or principals in businesses purchased by the employer. Id. at 596. Those individuals were paid more than the plaintiff, the employer argued, to facilitate the purchase of their businesses. Id. The plaintiff, however, outperformed two of the three comparators in virtually all of the years of comparison. Id. When coupled with her five years of experience in her position before the comparators' arrival, the court felt compelled to reverse the district court's grant of summary judgment for the employer:

We do not hold that an employer may never pay higher wages to a new employee whose position results from the purchase of his business. We simply hold that the record before us does not establish as a matter of law that comparators' superior experience, training or ability, or exigent business circumstances justified greater compensation than received by plaintiff. . . .

Id. at 597.

2. Title VII

The Bennett Amendment to Title VII bars sex-based wage discrimination claims under Title VII where the pay differential is authorized by the provisions of the EPA. 42 U.S.C. § 2000e-2(h). The Amendment was introduced to resolve any potential conflicts between Title VII and the EPA, and specifically, in the words of Senator Bennett, “to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.” 110 Cong. Rec. 13647 (1964). Though the courts have preserved the defenses of the EPA discussed above, they have not settled on a uniform interpretation of the relationship between Title VII and the EPA, in part because the Supreme Court “did not decide the full impact of the Bennett Amendment on the combination of the two Acts” Tidwell v. Fort Howard Corp., 989 F.2d 406, 411 (10th Cir. 1993). In Gunther, the Supreme Court decided only that the Bennett Amendment incorporated into Title VII the four affirmative defenses of the EPA, but not its equal work requirement. 452 U.S. at 171.

a. Elements Of A Sex-Based Wage Discrimination Claim Under Title VII Claim As Distinguished From An EPA Claim

In order to prevail on a Title VII claim for gender-based wage discrimination, a plaintiff must prove that the defendant intentionally treated her less favorably than other employees because of her gender. Loyd v. Phillips Bros., Inc., 25 F.3d 518, 525 (7th Cir. 1994) (even when jobs are not sufficiently similar to constitute “equal work” under the EPA, a Title VII claim for wage discrimination is not precluded; however, in an action under Title VII, a plaintiff must show an intent and actual desire to pay women less than men because of gender). Proof that an employer pays one gender less for work that has “comparable worth,” while possibly relevant, is not sufficient to prove a Title VII claim. Gunther, 452 U.S. at 166. The plaintiff must prove intentional disparate treatment. See 989 F.2d at 410-12.

Notwithstanding that Title VII requires proof of intent, in Korte v. Diemer, 909 F.2d 954, 957 (6th Cir. 1990), the Sixth Circuit, in reversing a district court holding dismissing a Title VII claim, held that a Title VII claim automatically is proven upon proof of an EPA claim. The district court had reasoned that the element of intent under Title VII sufficiently distinguished the plaintiff’s Title VII claim from her EPA claim, and that the plaintiff had not carried her burden of proof on that element. Id. In reversing, the Sixth Circuit first found dicta from one of its prior decisions stating that “[t]he analysis of a claim of unequal pay for equal work is essentially the same under both the Equal Pay Act and Title VII,” and an Eighth Circuit decision that held that “the standards of the Equal Pay Act apply whether the suit alleges a violation of the Equal Pay Act or Title VII.” Id. at 957-58 (citing Odomes v. Nucare,

Inc., 653 F.2d 246, 250 (6th Cir. 1981); McKee v. Bi-State Dev. Agency, 801 F.2d 1014, 1019 (8th Cir. 1986)). See also Herndon v. Wm. A. Straub, Inc., 17 F. Supp.2d 1056, 1060 (E.D. Mo. 1998) (holding that a jury verdict in favor of a plaintiff on her EPA claim entitled that plaintiff to judgment as a matter of law on her Title VII claim); 29 C.F.R. § 1620.27(a) (EEOC regulations stating that EPA violation is necessarily Title VII violation).

The departure by these courts and the EEOC from the requirement of proof of intent is inconsistent with controlling law. In this regard, many courts have decided that the EPA and Title VII are very different in that Title VII requires proof of intent. See Fallon v. State of Illinois, 882 F.2d 1206, 1218 (7th Cir. 1989) (finding of EPA liability, without more, does not automatically lead to liability under Title VII); Peters v. City of Shreveport, 818 F.2d 1148 (5th Cir. 1987) (holding that burden of proof shifted to city to articulate nondiscriminatory reason for wage differential, but burden of persuasion that the differential was due to city's intentional discrimination remained with plaintiff), cert. dismissed, 485 U.S. 930 (1988).^{31/} For example, in Tidwell, the Tenth Circuit faced exactly the same decision as the Korte court did, but held instead that a jury verdict in favor of the employee on her EPA claim did not control her Title VII claim. 989 F.2d at 412. To hold otherwise, the Tidwell court said, would privilege a particular class of plaintiffs -- those alleging sex-based wage discrimination -- over all other Title VII plaintiffs, by not requiring the former to prove intentional discrimination. Id. at 410-11. Likewise, in Meeks v. Computer Associates International, 15 F.3d 1013, 1019-20 (11th Cir. 1994),

^{31/} The Sixth Circuit in Korte concluded that these distinctions were “overly technical.” 909 F.2d at 959.

the court remanded the plaintiff's Title VII claim because it depended entirely on a jury's special verdict that contained no evaluation of the employer's intent. In the court's words,

the EPA establishe[d] a form of "strict liability". . . . If the evidence is in equipoise on the issue of whether a salary differential is based on a "factor other than sex," the plaintiff is entitled to judgment on her EPA claim. However, the employer prevails on the Title VII claim. Under Title VII, the risk of nonpersuasion always remains with the plaintiff.

Id. at 1019. See also Churchill v. International Bus. Machs., Inc., 759 F. Supp. 1089, 1097 (D.N.J. 1991) (citing Fallon for the proposition that plaintiff's Title VII claim "should be decided in accordance with the traditional Title VII scheme of burdens").

b. Defenses

Although the plaintiff's burden in Title VII and EPA cases may be different, the affirmative defenses enumerated in the EPA also are available as defenses to employers in Title VII cases. The Bennett Amendment to Title VII "offered . . . to resolve any potential conflicts between Title VII and the Equal Pay Act," Gunther, 452 U.S. at 170, states:

It shall not be an unlawful employment practice . . . 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.

42 U.S.C. § 2000e-2(h).

The Supreme Court's decision in Gunther held that the Bennett Amendment incorporates the four affirmative defenses of the Equal Pay Act into Title VII, but not the EPA's equal work requirement. 452 U.S. at 168-71. If the defendant carries his burden of proof on one of the

affirmative defenses, the burden shifts back to the plaintiff to prove that the defendant's proffered explanation of wage rate discrepancies is merely a pretext for sex-based pay discrimination. Some courts have held that proof of pretext does not require the introduction of evidence beyond that already offered to establish his prima facie case. Mulhall v. Advance Sec., Inc., 19 F.3d 586, 598 (11th Cir.), cert. denied, 513 U.S. 919 (1994). Other courts disagree, however, requiring some additional evidence of discrimination. Lidge-Mystil v. Deere & Co., 49 F.3d 1308, 1311 (8th Cir. 1995).

C. Current Governmental Initiatives To Revise The Legal Framework

1. **The President's Equal Pay Initiative**

The Clinton Administration has made the achievement of equality in pay an agenda item. In its pursuit of the issue, the White House has announced new initiatives to achieve the goal of improved enforcement of the EPA, including increased analysis of wage data and assistance to federal agencies that enforce wage discrimination laws.^{32/} Along these lines, the Department of Labor's Women's Bureau has suggested a ten-step voluntary self-audit for both private business and federal agencies so that they can analyze their wage-setting policies.^{33/} Vice President Gore also has said that the federal government will provide technical assistance concerning employers' "best practices."^{34/} Furthermore, the Vice President introduced the Memoranda of Understanding between the

^{32/} The White House (visited Mar. 19, 1999) <<http://www.whitehouse.gov>>. The text of the memoranda are available on the EEOC's website <<http://www.EEOC.gov>>.

^{33/} Those steps, include the following: (1) recruitment self-audits; (2) evaluation of compensation systems for internal equity; (3) evaluation of compensation systems for industry competitiveness; (4) creation of new job evaluation systems if needed; (5) examination of compensation systems and comparisons of grades/scores; (6) review of data for personnel entering the company; (7) assessment of opportunities for employees to achieve commissions and bonuses; (8) assessment of how raises are awarded; (9) evaluation of employee training, development and promotion opportunities; and (10) implementation of changes where needed, maintenance of equity, and the sharing of success.

^{34/} Pamela M. Prah, Equal Pay Act: Gore Announces Equal Pay Initiatives To Give OFCCP Power To Seek Damages, 64 Daily Lab. Rep. (BNA) AA-1 (Apr. 3, 1999).

Commission and the Department of Labor to cross-train their staffs to be able to identify equal pay issues.^{35/}

The Administration also recently announced plans for a \$14 million “equal pay initiative” as part of its fiscal 2000 budget to increase training, technical assistance, and outreach for the Department of Labor and the EEOC.^{36/} As part of the Administration’s plan for greater coordination, Vice President Gore introduced an initiative to enhance the coordination of cases and the sharing of information between the EEOC and the OFCCP, and to enable the OFCCP to seek both compensatory and punitive damages under Title VII. In this regard, on April 7, 1999, the EEOC and the OFCCP signed two memoranda of understanding confirming this enhanced partnership. These memoranda of understanding essentially do the following:

Allow the OFCCP to act as the EEOC’s “agent” in processing charges under Executive Order 11246 so long as those charges also include Title VII allegations. The OFCCP will investigate the charges, issue findings, and attempt conciliation of damages;

Training of personnel of the Department of Labor’s Wage & Hour Division to identify discriminatory wage disparities;

^{35/} The White House (visited Mar. 19, 1999) <<http://www.whitehouse.gov>>. The text of the Memoranda are available on the EEOC’s website <<http://www.eeoc.gov>>.

^{36/} Civil Rights: “Pay Initiative” Highlights Big Boost In Budget Request For Rights Agencies, 21 Daily Lab. Rep. (BNA) AA-2 (Feb. 2, 1999).

Provide for greater information sharing between the OFCCP, the EEOC and the Department of Labor's Wage & Hour Division concerning possible wage disparity situations.^{37/}

2. The OFCCP's DuBray Approach

a. What Is It?

Given the formal enhancement of the ties between the OFCCP and EEOC, it is important that the EEOC scrutinize carefully the methods of the OFCCP to ensure that the OFCCP -- especially when acting as the EEOC's agent for Title VII charges -- acts within the confines of controlling law. With this in mind, this Paper focuses upon the OFCCP's use of the controversial "DuBray Approach," which the OFCCP now regularly uses to conduct compensation analyses.

As part of its enforcement responsibilities, the OFCCP increasingly has focused on issues of compensation disparity between the compensation of whites and minorities, and males and females when conducting its audits. The controversial "DuBray Approach," named after its originator, OFCCP Region III Director Joseph DuBray, has been used to obtain (some say by "blackmail")^{38/}

^{37/} Nancy Montweiler, EEOC: Joint EEOC-Labor Department Agreements Boost OFCCP Authority, Pay Act Enforcement, 67 Daily Lab. Rep. (BNA) AA-1, EE-1 (Apr. 8, 1999) (texts of memoranda of understanding reprinted therein).

^{38/} Pamela M. Prah, Philadelphia Region Uses Controversial Approach In Glass Ceiling Investigations, 192 Daily Lab. Rep. (BNA) D-27 (Oct. 4, 1995) ("Some contractors contend that the region's approach hones in on anomalies in a contractor's pay practices and uses those anomalies as evidence of broad-based pattern of discrimination that may not exist. The approach is viewed by some as a sort of 'blackmail' as it force (sic) contractors to choose between entering a conciliation agreement providing monetary relief or enduring an expanded OFCCP probe.").

numerous highly-publicized settlements linked to findings of alleged compensation discrimination. Some of the more recent of those settlements include the following:

Allison Engine Co. (March 1998): \$309,859 in back pay and \$190,140 in salary adjustments.^{39/}

CoreStates Financial Corp (April 1998): \$1.5 million in back pay and wage adjustments of \$334,115 to 76 women and 66 minorities.^{40/}

Texaco, Inc. (January 1999): \$2.2 million in back pay and interest to 186 women, \$816,000 in raises already distributed, and \$84,000 in salary increases.^{41/}

Xerox Corp. (January 1999): \$56,787 in back pay and wage increases of between 3% and 12%.^{42/}

These settlements notwithstanding, Regional Director DuBray himself has admitted that his approach takes the OFCCP into ““uncharted territory.””^{43/} Although the OFCCP is on record as acknowledging the controversial nature of the DuBray Approach, it has indicated that ““those critiques

^{39/} U.S. Department of Labor Office of Public Affairs (visited Apr. 9, 1999), Indiana Company To Pay Half A Million Dollars In Discrimination Case, <<http://dol.gov/dol/opa/public/media/press/opa/opa98113.htm>>.

^{40/} See Pamela Prah, OFCCP: CoreStates Bank Agrees To Pay \$1.5 Million To Settle OFCCP Pay Discrimination Charges, 75 Daily Lab. Rep. (BNA) AA-1 (Apr. 20, 1998).

^{41/} See Nancy Montwieler, Sex Discrimination: \$3.1 Million Texaco Accord With OFCCP Settles Charges Of Underpayment To Women, 4 Daily Lab. Rep. (BNA) A-1 (Jan. 7, 1999).

^{42/} See Tim Gilroy, OFCCP: Xerox Unit Agrees To Wage Hike, Back Pay To Settle Discrimination Claim, 9 Daily Lab. Rep. (BNA) A-10 (Jan. 14, 1999).

^{43/} Prah, 192 Daily Lab. Rep. (BNA), at D-27.

will not deter OFCCP from using it.”^{44/} Before the OFCCP takes the EEOC into these “unchartered waters,” however, the EEOC should recognize that the DuBray Approach is inconsistent with the laws by which the EEOC is bound.

b. How Does The DuBray Approach Work?

The OFCCP uses the DuBray Approach in an effort to determine whether discriminatory compensation disparities exist in workplaces governed by the OFCCP. The initial step is to compare the **median salary** for men to the median salary for women, and the median salary for non-minorities to the median salary for minorities in each **pay grade** to determine whether a “pattern” of disparity emerges. Thus, the only two controls used at this initial stage in the analysis are pay grade and time in grade, implying that time in grade is the most important factor in determining differences in pay within a particular grade.

Next, a compliance officer (“CO”) interviews those persons responsible for maintaining the compensation system to ascertain which factors were used in the pay decisions. The CO then analyzes a sample of employees in a particular pay group to determine whether the “same criteria were uniformly applied and resulted in compensation decisions which could be objectively determined to be fair.”^{45/} The OFCCP will seek back pay relief and prospective compensation adjustments as part of

^{44/} Emphasis On Equal Pay, Technology Upgrades, And Outreach On OFCCP’s Agenda, 6 Daily Lab. Rep. (BNA) S-5 (Jan. 11, 1999).

^{45/} Joseph DuBray, Systemic Compensation Analysis: An Investigatory Approach, A.B.A. Sec. Lab. & Empl. L. EEO Comm. (Mar. 25-28, 1998 Midwinter Meeting) (Tab 19) [hereinafter (continued...)]

its conciliation efforts if an inconsistency cannot be explained by legitimate factors such as education or prior experience.

According to Regional Director DuBray, it is the OFCCP's experience that three key factors tend to cause compensation disparities. First, Regional Director DuBray cites the fact that an employee who is hired away from another company often leverages himself into a pay raise that places him in a higher pay grade than incumbents. Regional Director DuBray suggests, however, that when performance of that employee does not meet expectations, the newer employee often still retains the benefit of his higher starting salary. He refers to this situation as the "Prince/Frog" phenomenon and argues that "fairness" dictates that "[p]erformance, not credentials, should be the barometer of actual salaries."^{46/} Insofar as a failure to bring the higher salaried, poor performer's compensation into line with his better performing peers appears inconsistent with an articulated performance-based compensation scheme, the OFCCP may view this departure as evidence of discrimination, even if the initial pay decision was not illegally discriminatory.

Second, Regional Director DuBray contends that men have greater bargaining power than do women, resulting in a compensation gap.^{47/} The Regional Director describes his observation by

^{45/}(...continued)
"DuBray Paper"].

^{46/} Id. at 10.

^{47/} Id.

reference to “used car salesmen” and contends that it is evidence that “the market does not treat all people fairly and treats certain groups less fairly than others.”^{48/}

Third, Regional Director DuBray cites the use of “discretion” in promotions and merit increases as a causal factor in creating compensation gaps. He suggests that employers should standardize their percentage increases or ensure greater oversight of the exercise of discretion.

c. The DuBray Approach Departs From Legally Settled Methods Of Conducting Compensation Analyses.

The DuBray Approach departs from legally accepted methods of conducting compensation analyses in three principle ways by: (1) comparing employees in different jobs merely because they are in the same “pay grades”; (2) failing to recognize the variety of legitimate factors which interact to influence compensation; and (3) foregoing the use of statistical analysis to assess the statistical significance of the differences.

The DuBray Approach looks at wage disparities within pay grades, without regard to differences in the jobs and the duties, skills and responsibilities among jobs within the grade. The OFCCP argues that this approach is appropriate because an employer’s grouping of jobs into the same pay grade reflects the employer’s own assessment that those jobs are comparable.^{49/} The use of pay

^{48/} Id.

^{49/} Regional Director DuBray presents this assumption as follows:

“By the very act of creating a grade level system, where each employee has approximately the same potential to move from the minimum to the maximum of
(continued...) ”

grades for this purpose misconstrues the rationale for pay grades and ignores the legal requirements of the EPA and Title VII. (See Discussion at II, C. 2. d. at pp. 36-39 *infra*). In the past, most pattern and practice cases addressed disparities in entry-level jobs because it often was too difficult to compare qualifications for higher level jobs. However, by focusing on an employer's own pay grade system, the DuBray Approach attempts to avoid the OFCCP's burden to establish that jobs actually are the same or essentially similar as required by EPA and Title VII jurisprudence. The DuBray Approach has not yet been relied upon or tested in any court action. The Department of Labor's Office of the Solicitor has said, however, that it has received for possible litigation its first few cases challenging the OFCCP's method of looking for discriminatory compensation practices.^{50/}

In addition to ignoring the requirement of conducting a comparison to determine job similarity, the DuBray Approach also departs from the use of accepted statistical analyses such as statistical significance and multiple regression to analyze the multiple factors on which compensation is based and to determine whether perceived disparities may be a result of chance. According to Regional Director DuBray, statistical significance standards are appropriate in hiring cases where

49/(...continued)

his/her grade range dependent upon performance, the employer has recognized that certain jobs are essentially similar in terms of skill, effort and responsibility. All relevant variables affecting pay being equal, we would expect to see no particular pattern of pay disparity.”

DuBray Paper, at 5.

50/ Pamela M. Prah, Labor Department: DOL Solicitor's Office Prepares To Defend Controversial OFCCP Compensation Cases, 164 Daily Lab. Rep. (BNA) (Aug. 25, 1998).

“actual applicants are always a sample of the total population of potential applicants . . . [and thus] [s]tatistical significance is critical in the context of sampling and inferential statistics”^{51/} Regional Director DuBray argues, however, that in compensation cases, the OFCCP is not looking at a sample, but at the entire population and, therefore, statistical significance analysis is not required. This statement shows a lack of understanding of statistical significance.

d. The EEOC Should Reject The DuBray Approach As Inconsistent With The Law The EEOC Is Charged With Enforcing.

The DuBray Approach is based on a faulty premise. Specifically, the DuBray Approach assumes that because the employer grouped jobs together within a grade, they must be “essentially similar.” This premise finds no basis in business reality. Pay grades are not intended to reflect similarity in positions. To the contrary, pay grades reflect nothing other than a range in salary that an employer determines to be appropriate for a particular position as a result of a multitude of factors. For example, an employer may group all engineers, accountants and/or staff attorneys in one pay grade with managers in non-professional fields because those positions have similar pay ranges -- not because the jobs are equal or even similar. Indeed, pay grades in the private sector are no more reflective of comparable jobs than are governmental civil service pay classifications. Title VII and the EPA require job equality or at least substantial similarity -- and the burden of establishing such equality or similarity is on the plaintiff, whether it be the OFCCP, the EEOC, or a private individual. The reality,

^{51/} DuBray Paper at 6.

therefore, appears that the DuBray Approach is at odds with settled law rejecting the “comparable worth” theory and placing the burden of proof at all times on the plaintiff.

As also explained above, pay disparities attributable to “factors other than sex,” including, among other things, the market forces of supply and demand, prior salaries and prior experience, are not illegal under either the EPA or Title VII. As such, numerous cases have rejected claims wherein the plaintiff employee had received lower pay as a vestige of lower starting salaries or other non-discriminatory reasons. Yet, the DuBray Approach largely ignores these factors. Indeed, Regional Director DuBray goes so far as to argue that “questions of fairness” militate in favor of raising the salaries of employees who for no illegal reason have lower salaries than those who -- for whatever legitimate reason -- started with higher salaries or who might have negotiated higher raises during the course of their employment due to reasons such as a job offer from a competitor. Regional Director DuBray’s value-laden observations concerning the “frog/prince,” “the used car salesman” and the exercise of discretion ignore the fact that the plaintiff at all times bears the burden of proof under Title VII. In reality, the DuBray Approach inserts the government into the role of a super-personnel department based on a governmental notion of “fairness.” It is well settled, however, that such a role is not the prerogative of the courts and, by extension, it cannot be the prerogative of either the OFCCP or the EEOC.

Finally, the DuBray Approach reflects an inappropriate departure from the Supreme Court's ruling in Hazelwood School District v. United States, 433 U.S. 299 (1977), and its progeny,^{52/} which generally require statistically significant proof of a wage disparity of two to three standard deviations to establish a prima facie case of wage discrimination -- absent other evidence of intentional discrimination.

Furthermore, the DuBray Approach's failure to invoke accepted statistical methodology deprives the investigator -- and, as a result, the investigated employer -- of the benefits of multiple regression analyses that assess the influence and interaction of the variety of factors that can influence compensation disparities. The courts have long-recognized the value of this approach^{53/} -- as

^{52/} See, e.g., Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 520 (8th Cir. 1984) (observed outcome 1.42 standard deviations from expected outcome generally evidenced nondiscrimination); EEOC v. American Nat'l Bank, 652 F.2d 1176, 1192 (4th Cir. 1981) ("courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three"), cert. denied, 459 U.S. 923 (1982). See also Ottaviani v. State Univ. of New York, 875 F.2d 365, 370-72 (2d Cir. 1989) (agreeing that two standard deviations is a threshold level of statistical significance, but rejecting argument that would equate two standard deviations with a prima facie case of discrimination as a matter of law), cert. denied, 493 U.S. 1021 (1990).

^{53/} See, e.g., Coward v. ADT Security Systems, Inc., 140 F.3d 271, 274 (D.C. Cir. 1998) (statistical analysis that did not account for "job title or any other variable representing type of work performed" was "so incomplete as to be inadmissible as irrelevant") (citing Bazemore v. Friday, 478 U.S. 385, 400 n. 10 385, 400-01 (1986) (Brennan, J., concurring in part, joined by all Justices)); EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 301 (7th Cir. 1991) (district court committed clear error in crediting statistical evidence missing neutral variables of relative commuting distance and language fluency); Sheehan v. Purolater, Inc., 839 F.2d 99, 103 (2d Cir.) (district court was not clearly erroneous in finding plaintiff's statistical evidence to be flawed when regression analysis did not take into account "various relevant non-

(continued...)

has Regional Director DuBray who has stated: “The advantage of multiple regression analysis is that it can isolate the effect of any one variable on salary while controlling for all the other variables that are objectively relevant to compensation.”^{54/}

In addition to attempting to unpersuasively distinguish Hazelwood as a hiring case as opposed to a challenge to a pattern of compensation disparity,^{55/} Regional Director DuBray justifies his discarding of motions of statistical significance and the “advantages” of multiple regression analysis as a product of limited resources. It is grossly unfair, however, to accuse employers of illegal compensation discrimination and to threaten litigation when the method used to draw a conclusion of compensation discrimination departs from accepted and judicially-required analyses.

^{53/}(...continued)

discriminatory factors such as education and prior work experience”), cert. denied, 488 U.S. 891 (1988).

^{54/} DuBray Paper at 4.

^{55/} Hazelwood nowhere suggests that its rationale is limited to hiring cases only.

3. The Paycheck Fairness Act

On April 2, 1998, Vice President Gore announced his support for the Paycheck Fairness Act (“PFA”), recently reintroduced by Tom Daschle in the Senate and Congresswoman Rosa DeLauro in the House. In what appears to be an effort to convert what fundamentally is a statute designed to promote equal employment opportunity into more of a tort-like statute that will incent employees and plaintiffs’ attorneys to more proactively pursue litigation opportunities, the Act would make compensatory and punitive damages available under the EPA.^{56/} As R. Bruce Josten, Executive Vice President Government Affairs for the U.S. Chamber of Commerce, recently has written in a letter to all members of U.S. House of Representatives and United States Senate:

This is an initiative in search of a problem. Title VII of the Civil Rights Act of 1964 already provides adequate remedies for sex discrimination in employment, including any claim that equal pay is being denied based on gender. These remedies include punitive and compensatory damages (plus lost back pay and jury trials) capped at between \$50,000 and \$300,000 depending on the size of the employer. These provisions were adopted by the Congress as part of the Civil Rights Act of 1991 after two years of hearings and much contentious debate. Notably, the Congress then rejected provisions for unlimited damages

^{56/} See S. 74, 106th Cong. § 3(b)(1) (1999); H.R. 541, 106th Cong. § 3(b)(1) (1999); The White House (visited Mar. 19, 1999) <<http://www.whitehouse.gov>>; The White House: Vice President Gore Announces Support For Legislation On Equal Pay, *supra* note 3. The original Equal Pay Act provided for the award of attorney fees. See 29 U.S.C. 216(b). The Paycheck Fairness Act explicitly provides for the award of expert witness fees as well. See S. 74 § 3(b)(5)(B); H.R. 541, § 3(b)(5)(B).

for employment discrimination which had been contained in earlier versions of the legislation.^{57/}

In addition, the PFA will make it easier to proceed with class action lawsuits under the EPA by eliminating the requirement that absent class members must consent to (i.e., “opt in”) the lawsuit.^{58/} Rather, the PFA would create an “opt out” procedure. The Act also expands the EPA’s retaliation provision by making it illegal to discharge or discriminate against an employee who “has inquired about, discussed, or otherwise disclosed the wages of the employee to another employee.”^{59/} This provision also would make illegal employer policies prohibiting employees from discussing their compensation.

The Act also requires the Secretary of Labor to conduct studies and provide information on the means to eliminate pay disparities by conducting and publishing research, by sponsoring and assisting state and community informational and educational programs, by recognizing and promoting the achievements of employers and unions, and by convening a national summit to discuss pay disparities.^{60/} Moreover, the Act mandates that the Secretary “develop guidelines to enable employers to evaluate job categories based on objective criteria such as educational requirements, skill

^{57/} Letter from R. Bruce Josten to The Honorable Trent Lott (Apr. 6, 1999).

^{58/} See S. 74, 106th Cong. § 3(b)(3) (1999) (“Except with respect to class actions brought to enforce 6(d)...); H.R. 541, 106th Cong. § 3(b)(3) (same).

^{59/} S. 74, 106th Cong. § 3(a)(2); H.R. 541, 106th Cong. § 3(a)(2) (emphasis added).

^{60/} S. 74, 106th Cong. § 5; H.R. 541, 106th Cong. § 5.

requirements, independence, working conditions, and responsibility. . . .”^{61/} These guidelines purportedly are designed to enable employers to compare wages paid for different jobs.^{62/} The Act calls upon the President to increase the amount of information available with respect to wage disparities and authorizes funding necessary to carry out the Act.^{63/}

4. The Fair Pay Act

In addition to the Paycheck Fairness Act, Senator Tom Harkin and House Delegate Eleanor Holmes Norton (former EEOC Chair) have introduced their bill known as the “Fair Pay Act,” which would, among other things, prohibit wage disparities in comparable jobs.^{64/} Specifically, the bill’s primary provision would make it illegal to pay women less than men for jobs that “require comparable skills, effort, responsibility and working conditions.”^{65/} In short, the Fair Pay Act, as proposed, seeks to legislatively overturn the vast judicial authority rejecting the comparable worth theory.

^{61/} S. 74, 106th Cong. § 6(a)(1); H.R. 541, 106th Cong. § 6(a)(1).

^{62/} S. 74, 106th Cong. § 6(a)(2); H.R. 541, 106th Cong. § 6(a)(2).

^{63/} S. 74, 106th Cong. §§ 8, 9; H.R. 541, 106th Cong. §§ 8, 9.

^{64/} S. 702, 106th Cong. (1999); H.R. 1271, 106th Cong. (1999).

^{65/} S. 702 , 106th Cong. § 3(a); H.R. 1271, 106th Cong. § 3(a) (1999).

D. The EEOC Should Not Lose Sight Of 35 Years Of Judicial Precedent, And Should Exercise Due Deliberation And Restraint In Charting Its Course To Explore A More Educative Function.

The EEOC has gotten off on the right foot in convening the panel hearing on April 13, 1999 to address compensation disparities. The panel reflects varied interests and perspectives. The Commission should consider all of these viewpoints when considering its role in responding to the issue of pay equity.

Just as importantly, however, the EEOC must remain true to its primary obligation -- enforcement of the law as it is written and as it has been interpreted by the courts. Indeed, the law as it applies to compensation discrimination -- the EPA and Title VII alike -- has been the subject of careful scrutiny by the judicial system, including a number of decisions by the Supreme Court over the years. Only Congress may change the law. To date, however, Congress has not seen fit to legislatively overrule jurisprudence in this area.

Moreover, as a careful review of the current legal framework reveals, the courts have parsed carefully the legislative intent behind the EPA and Title VII in order to ascertain and advance the purposes of those laws. In so doing, the courts have recognized that the law pertaining to compensation discrimination consciously reflects a balance between the need to protect against intentional discrimination and the fact that determinates of compensation largely are factors over which employers have little or no control (e.g., the economics of supply and demand and individual choice). The Commission should not lose sight of that balancing effort in the face of mounting political pressure.

Thus, the question becomes what should be the Commission's role in confronting the compensation gap between men and women? The first answer is obvious. The Commission should continue to work to weed out intentional discrimination in the workplace. Clearly, the Commission must ensure that antiquated -- and illegal -- attitudes about the needs of men as principle breadwinners are recognized and penalized insofar as they influence compensation decisions. To this extent, the Commission might consider a limited litigative approach as to carefully selected cases that might offer a high-profile forum to publicize the illegal nature of outdated stereotyping and attitudes. Given that the primary causes of compensation disparities have nothing to do with employer discrimination, increased litigation likely will not be the most effective use of the Commission's resources.

As discussed at length above, the reality is that the largest portion of compensation disparities is the product of societal and labor market forces. Thus, before precipitously devoting its limited resources to an aggressive enforcement initiative, the EEOC should study carefully the causes of compensation disparities. Upon doing so, the EEOC likely will conclude that its limited resources will have a far greater impact upon society if devoted more significantly to educational change than to expensive litigation that will be very difficult to win. Indeed, Congress expressly viewed education to be a power and, indeed, a responsibility of the Commission. 42 U.S.C. § 2000e-4(g)-(k).

The EEOC's campaign should not just educate employers. Rather, the Commission should seek to educate current and, perhaps even more importantly, future employees. Current and future employees, especially women, should be made aware of the many factors that influence compensation and how to use that knowledge to their advantage. For example, the EEOC should

educate the future of the Nation's workforce of the fact that the fields of study they choose, the experiences they can obtain and the careers they plan very likely will impact their livelihoods for years to come. Along the same lines, the EEOC should make efforts to educate against the traditional notion that certain types of work is "women's work." Even more importantly, the EEOC should continue and expand its efforts to inform employers -- and employees -- as to "best practices" for mentoring, formal and informal networking, promoting business development skills, and ensuring equal access to choice assignments and promotional opportunities.^{66/}

Recognizing that far more frequently than not factors other than sex cause compensation disparities, the EEOC should create a comfort zone for employees to conduct self-critical analyses of their workforces for any such gaps. An employer should not have to fear that by conducting such an analysis, the Commission and its investigators, or the OFCCP as its agent, will pounce on any disparities to conclude that the employer has discriminated. Rather, where an employer conducts such a study and finds disparities which appear attributable to factors other than sex, the Commission should permit the employer to keep the results confidential. Moreover, if the employer intends to institute compensation adjustments designed to remedy any gaps in compensation which are not the result of illegal discrimination, the EEOC and the OFCCP should allow the self-critical employer the flexibility to address the issue over a reasonable period of time.

^{66/} See U.S. Equal Employment Opportunity Commission, Best Practices Of Private Sector Employers <<http://www.eeoc.gov/task/practice.html>>.

There always will be some compensation gap so long as in our society women continue to have the primary familial responsibility for childrearing. There also can be little doubt, however, that with increased attention devoted to educational initiatives designed to shape societal attitudes, combined with selective litigation efforts, society can and will adapt and the compensation gap, which has diminished significantly over the years, will continue to do so.

III. CONCLUSION

No one would disagree that intentional discrimination in terms of compensation on the basis of any protected characteristic is wrong and that the EEOC should continue to pursue and penalize those who perpetrate such illegal activity. In formulating its response to compensation disparity, however, the EEOC must not lose sight of the fact that the compensation disparity is the product of many forces, the large majority of which are societally motivated and economically oriented and not the result of illegal employer discrimination. As a result, the EEOC would best serve its mission to create equality in employment by studying those root causes carefully and formulating an educational program that serves two principle purposes: (1) changing societal attitudes concerning the roles of women and minorities in the workplace; and (2) ensuring that women and minorities are well aware of their options for pursuing economically lucrative opportunities. With those efforts, the compensation disparity will continue to diminish.

Mark S. Dichter
Richard G. Rosenblatt^{67/}

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UNDERSTANDING WAGE DISPARITY ISSUES

The Legal Framework

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C O U N S E L O R S A T L A W

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**Mark S. Dichter
Richard G. Rosenblatt**

**Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19107
(215) 963-5000**

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