Committee Name:
Joint Committee on Finance – Budget Hearings (JCF_BH)

Appointments

99hr_JCF_BH_Appoint_pt00

Clearinghouse Rules

99hr_JCF_BH_CRule_99–

Committee Hearings

99hr_JCF_BH_CH_pt00

Committee Reports

99hr_JCF_BH_CR_pt00

Executive Sessions

99hr_JCF_BH_ES_pt00

Hearing Records

99hr_ab0000

99hr_sb0000

Misc.

99hr_JCF_BH__Misc_Education_pt04b

Record of Committee Proceedings

99hr_JCF_BH_RCP_pt00

Higher Ed.

JOINT FINANCE COMMITTEE TESTIMONY

Given by Lisa Petrov
Graduate Student – Spanish and Portuguese
University of Wisconsin-Madison

In Support of UW System Library Funding

April 15, 1999

Thank you for providing me with the opportunity to testify today. My name is Lisa Petrov, and I am a graduate student in Spanish and Portuguese at the University of Wisconsin-Madison. This past year I have also served as a member of the University Library Committee, an official advisory committee composed of faculty, staff, and students on the Madison campus.

I am here to talk about the need for increased funding for the collections of the University's libraries. As a dissertator who also teaches undergraduates, I do research in the libraries almost every day. I rely heavily on the book and journal collections, and also interlibrary loan for those things the libraries do not own.

I also use the Internet in my research. The computer resources important for my work are not always free. In fact, very little of what is free on the Internet is of any real research value. Therefore, the licensed databases which the libraries provide are essential. Printed and computer materials complement each other. Computer materials cannot replace print. Because I deal with international studies, I need resources in languages other than English, which the Internet does not support well at all.

I have been on the campus for six years, and I have experienced how the collection resources have become strained. For example, the libraries have had to cancel thousands of journal subscriptions, which creates additional burdens on interlibrary loan.

My experience is virtually the same as that of all graduate students. We depend upon the libraries' staying up to date and complete for our personal research and the retention of quality faculty who render a degree from the University of Wisconsin meaningful.

Please support the request from the Board of Regents for increased library funding. Libraries are the nerve center of a University education.

Joint Finance Committee

April 15, 1999

Testimony by Ken Frazier, Director of the UW-Madison General Library System and Chair of the Council of the University of Wisconsin Libraries (CUWL).

Library Resources for Wisconsin's Information Society

The University of Wisconsin has one of the most heavily used academic library systems in the world. The biggest increase has been in the use of digital information resources that we buy and create for students and faculty.

This year we will record over 7 million uses of the UW-Madison Electronic Library (and that, by the way, is a conservative number). Students and faculty are able to use library resources from their homes, dormitories, and offices without having to come to the library.

Nevertheless, on-site usage of our libraries continues to be huge. Last year, UW-Madison counted over 4.9 million visits to our campus libraries. This is higher by far than the total attendance at all varsity athletic events combined.

Governor Thompson's proposed budget request ensures that Wisconsin continues to have a top-rated state university system to educate the next generation highly-trained professionals as well as informed citizens.

The University of Wisconsin libraries have been and will continue to be one of Wisconsin's most valuable assets in educating our citizens to meet the challenges of the future.

As many of you know, the UW libraries have not received a state-funded increase for library collections for the last ten years—during a time period when all of the Big Ten universities steadily increased funding for library resources. (See attached graph on CIC increases for library resources.) During the 1990s:

- Scientific and technical journals have more than doubled in price.
- UW libraries have cut more than 6000 serial subscriptions.
- The UW-Madison libraries are now buying 25% fewer books than in 1991.

As I have said in testifying to Regents, the financial constraints during the 1990s forced the UW libraries to become more collaborative and resourceful. The UW libraries are recognized nationally for our commitment to library cooperation and resource sharing.

For example, the UW-Madison library ranks second in North America in the number of items it lends off campus—second only to Minnesota which is one of our closest cooperative partners.

We also lend over 50,000 items per year to Wisconsin's businesses, government agencies and hospitals. Very often, the scientific and technical information we provide is available no where else in the state.

In fact, we are doing absolutely everything we can, using every available strategy, so that we can continue to perform an essential information service mission for Wisconsin.

That is why I am extremely appreciative that the Regents' budget proposal was supported by Secretary Bugher in the Department of Administration, and has been included in the Governor's budget proposal.

The Regents' budget request for the UW libraries was substantially reduced in the Governor's budget—cut from $12 million to a total of $7.3 million over the biennium.

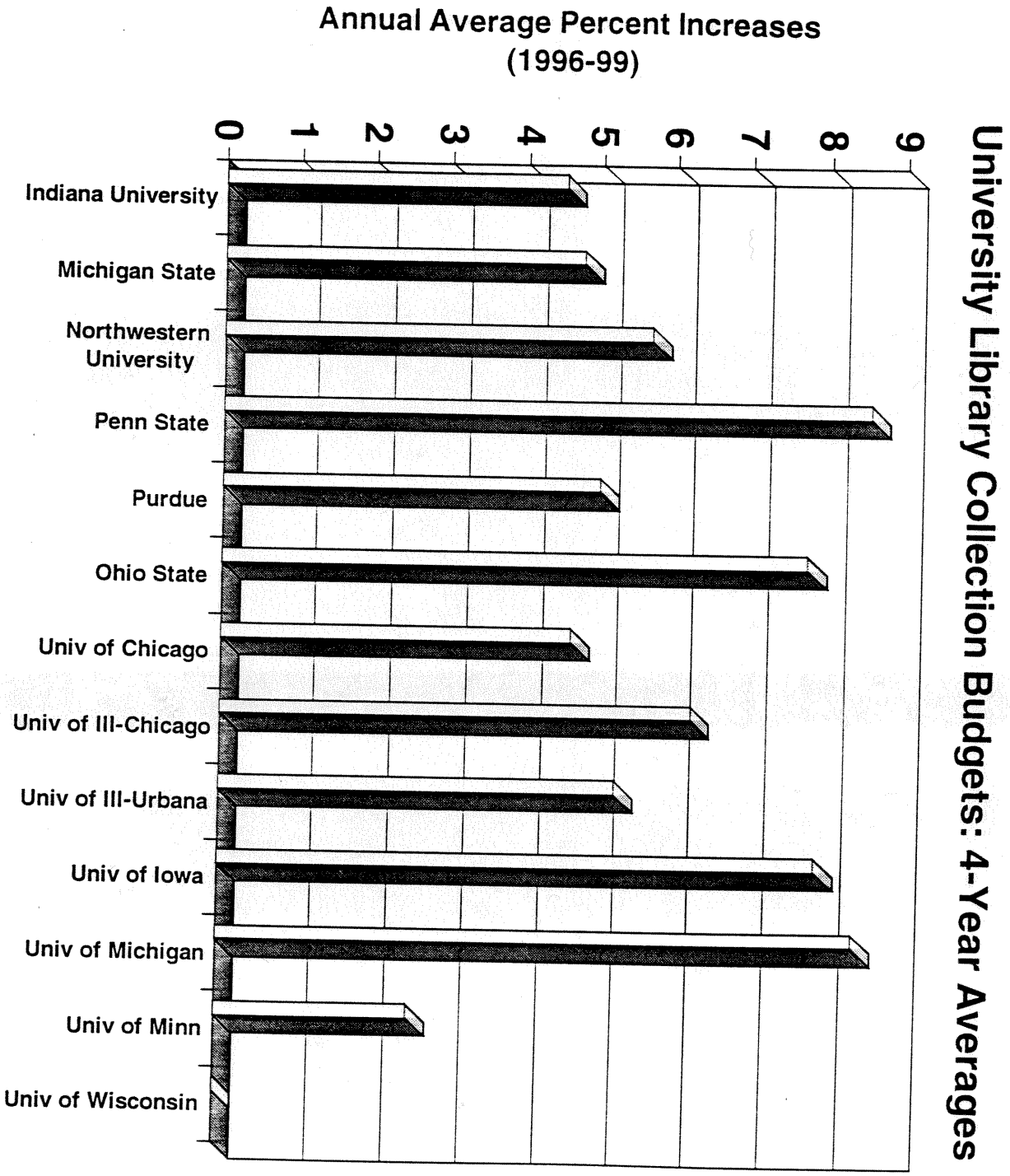
This amount will continue to require us to take a disciplined and highly cooperative approach to managing UW library resources—we will not be able to build research collections as we did twenty years ago. However, with this budget increase, it will be possible to create a library system appropriate for the future needs of UW students and scholars.

I want to close by emphasizing some of the same values and commitments that the Council of UW Libraries has emphasized in its strategic plan:

- We are building the university library system of the future, not of the past. In ways that were never before possible, we intend to make all university library resources available to all UW students wherever they may live in Wisconsin.
- We will control costs by purchasing library databases and other materials cooperatively in order to achieve the highest possible return on the taxpayers' investment in the UW.
- The UW libraries will continue to provide national leadership in developing cost-effective models of information access for students and citizens.
- And lastly, we intend to make the resources of the UW libraries more accessible to Wisconsin's citizens and businesses by making wise use of information technology.

The proposed funding for the Madison Initiative and for the UW System is a historic investment in the continuing quality of higher education in Wisconsin. It also coincides with the celebration of UW-Madison's 150th anniversary of service to the people of Wisconsin. Governor Thompson is continuing this tradition by recommending a prudent investment in one of Wisconsin's best assets for the future.

Thank you again for this opportunity to speak on behalf of the Governor's budget proposal.


University Library Collection Budgets: 4-Year Averages
Annual Average Percent Increases
(1996-99)
0
1
2
3
4
5
6
7
8
9
Indiana University
Michigan State
Northwestern University
Penn State
Purdue
Ohio State
Univ of Chicago
Univ of Ill-Chicago
Univ of Ill-Urbana
Univ of Iowa
Univ of Michigan
Univ of Minn
Univ of Wisconsin

TESTIMONY TO THE JOINT FINANCE COMMITTEE

Given by Jo Ann Carr, Director
Center for Instructional Materials and Computing
School of Education University of Wisconsin-Madison

In Support of Increased UW System Library Funding

April 15, 1999

The libraries of the University of Wisconsin-Madison provide critical information resources and services not only to students and faculty in higher education but also to students, teachers, administrators and school board members in K-12 education. In fact, service to the K-12 community is the fastest growing area of service by the libraries to client groups who are beyond the confines of the campus. These services:

- Provide access to our collections;
- Respond to the professional development needs of K-12 teachers;
- Guide teachers and students to Internet resources;
- Respond to specific information needs of the K-12 community;
- Provide instruction to teachers in the integration of information and technology into the curriculum; and
- Support university-based programs for K-12 students.

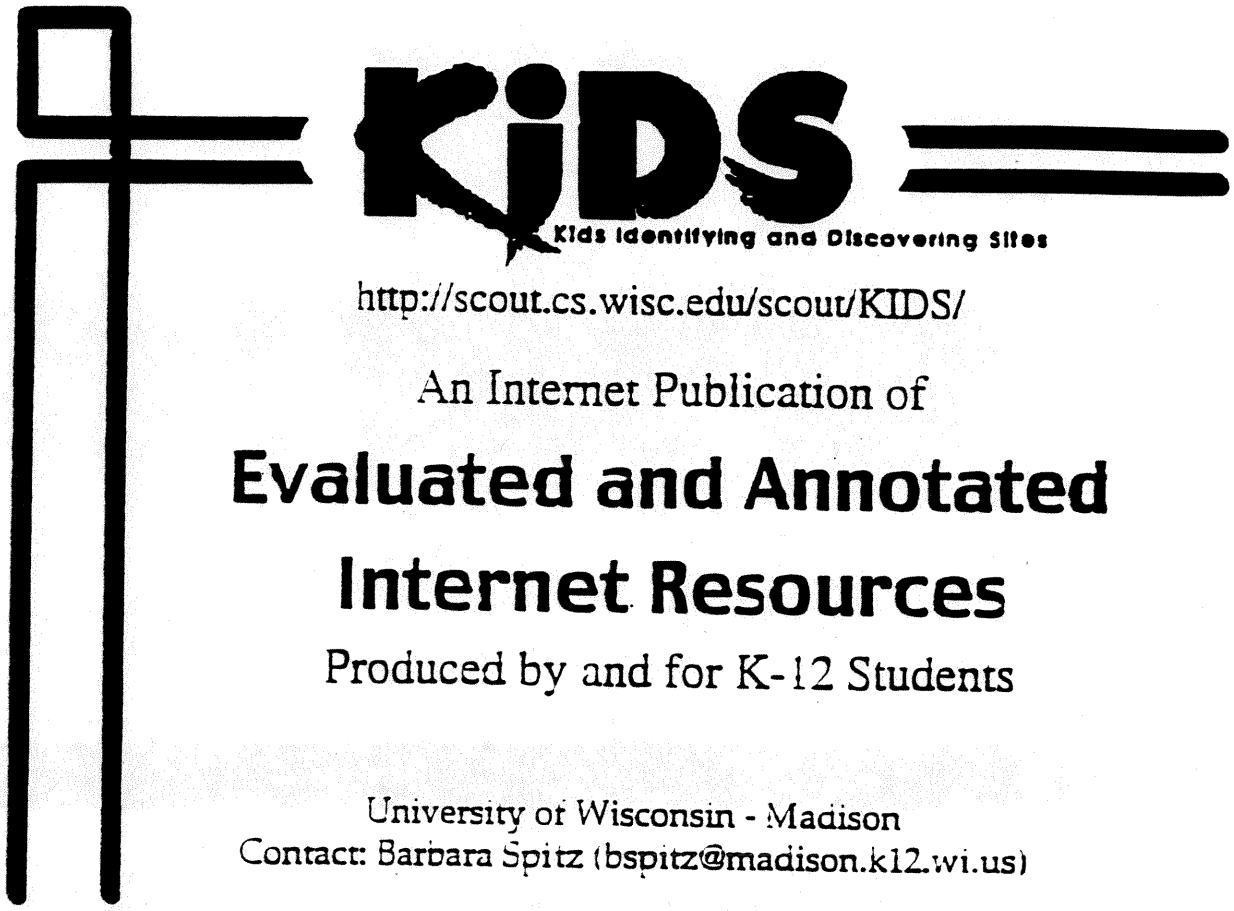
The libraries of the University of Wisconsin-Madison provide borrowing privileges at no cost to teachers and administrators of Wisconsin schools. The implementation of this service in 1997-1998 resulted in a 120% increase in the number of materials borrowed from my library by teachers. In addition, remote access to materials for teachers is available through interlibrary loan services. Specialized resources such as the Kraus Curriculum Development Library and the Educational Resources Information Center Collection, as well as publications of professional associations are important resources for teachers' professional development, which are not available in school or public libraries of the state.

Libraries through their Web pages provide assistance in locating Internet resources that are most appropriate for K-12 education. In addition to listing Internet sites that contain resources for integrating technology in K-12 classrooms, these sites guide teachers to professional development resources. The integration of the Internet into the K-12 classroom is further assisted by UW-Madison libraries' support of the KIDS Report project, a collaborative effort involving Wisconsin schools in LaCrosse, Madison, Fond du Lac, and Green Bay. (See attached).

In addition to responding to reference questions submitted by students, teachers, administrators and school board members, the campus libraries also provide instruction in information and technology literacy to teachers and students. This instruction may be provided through inservice activities arranged by specific school districts or in

cooperation with outreach programs of academic departments of the university. In addition, campus libraries provide instruction in information access and technology use to K-12 students in outreach programs such as Upward Bound and College for Kids.
The libraries of the University of Wisconsin Madison are committed to working closely with the K-12 community in the integration of information and technology literacy into the curriculum. Additional support for collections is critical for the libraries continue to meet this commitment and the expectations of the K-12 community.

Thank you.



http://scout.cs.wisc.edu/scout/KIDS/

An Internet Publication of

Evaluated and Annotated Internet Resources

Produced by and for K-12 Students

University of Wisconsin - Madison
Contact: Barbara Spitz (bspitz@madison.k12.wi.us)

1. Overview

The KIDS Report Website:

The KIDS website presently contains several sections including the current KIDS Report, past issues of KIDS, a search mechanism for current and past issues, site selection guidelines, and subscription information for the e-mail version of the KIDS Report. In the future we plan to add an online version of the *Handbook for Teacher's and Librarians*. The entire KIDS website is offered in both graphical and non-graphical versions, an option that allows accessibility for all end users. To our knowledge, KIDS is the only regularly published, collaborative Internet resource publication produced by K-12 students for other K-12 students.

Current Issue of KiDS

The most recent issue of the KIDS Report can be found here. Reports evolve around a theme chosen by the students and their teachers. Students select and review each of the 10 to 15 sites included in the report.

Site Selection Criteria

The selection criteria created by the students themselves is the key to understanding the real power behind the KIDS Report. Students produce a product for other students based on criteria listed here. Main categories include: design, ease of use, content, and credibility. The selection guidelines are provided for both readers and other students who may want to use similar criteria when identifying and selecting Internet sites for their own Web pages. Students learn to critically evaluate what they see on the Internet while also learning about the content that they are evaluating.

Past Issues of KiDS

The KIDS Report archive provides links to nearly two years of reports, beginning in May of the 1995-96 school year. As you may have noticed, the KIDS Report was initially called Y'know. This was changed with the start of the 1996-97 school year. All four original participating classrooms nominated and voted on the current title, the KIDS Report: Kids Identifying and Discovering Sites.

Search KiDS

For those who choose to search the current and past issues of the KIDS Report, this simple search page is provided. This addition to the KIDS site was the result of reader requests.

Subscribe to the K.I.D.S. Report

The KIDS Report subscription page provides both manual and automated online instructions detailing how to subscribe and unsubscribe. Currently, the KIDS Report is sent via e-mail to approximately 1,000 readers.

2. Participants

Janet Amann jamann@sdlax.k12.wi.us	LMC Director	North Woods Elementary N2541 Sablewood La Crosse, WI 54601 (608) 789-7008
Chris Burnett Chris_Burnett_T@MtClem6-8.edisonproject.com	Teacher	Mt. Clemens Junior Academy (Middle Level) 155 Cass Ave Mt. Clemens, MI 48043 (810) 469-6100
Karen Grindall kgrindal@akron.ohio.gov	Teacher	Portage Path School of Technology - elementary level 55 South Portage Path Akron, Ohio 44303 (330) 761-2765
Steven Kalmon kalmon@bvsd.k12.co.us	Teacher	New Vista High School 805 Gillaspie Dr Boulder, CO 80303 (303) 447-5401
Nora Kneebone nkneebon@up.net	Technology Instructor	West Iron County Middle School 612 W Adams St Iron River, MI 49935 (906) 265-0016
Tina Krouth kkrouth@madison.k12.wi.us	Technology Resource Teacher	Whitehorse Middle School 218 Schenk Street Madison, WI 53714 (608) 246-4468
Dawn Morden dmorden@aasdcat.com	Gifted Support Program Specialist	Altoona Area School District 1501 7th Ave Altoona, PA 16602 (814) 946-8511 (W)
Renee Nolan Renee_L._Nolan@fonddulac.k12.wi.us	Science Teacher	Sabish Junior High (7-9) 100 N Peters Ave Fond du Lac, WI 54935 (920) 929-2800
Randy Sachter rsachter@bvsd.k12.co.us	Teacher	Nederlands Elementary #1 North Sundown Trail Nederland, CO 80466 (303) 447-5577

2. Participants

Betsy Starling bstarling@madison.k12.wi.us	Librarian	Memorial High School 201 S Gammon Rd Madison, WI 53717 (608) 829-4037
Mark Waggoner andersod@uwgb.edu	Teacher	Elmore Elementary 615 Ethel Ave Green Bay, WI 54303 (920) 492-2615
Joan Whartnaby Joan2@obs.org	Senior Class Instructor	Overbrook School for the Blind 6333 Malvern Ave Philadelphia, PA 19151 (215) 877-0313

TESTIMONY BEFORE THE JOINT FINANCE COMMITTEE
WISCONSIN STATE LEGISLATURE
APRIL 15, 1999

Good Morning/Afternoon, Ladies and Gentlemen,

I would like to thank you for this opportunity to testify today about the proposed state budget.

My name is Diane Lewis. I am an enrolled member of the Ho-Chunk Nation and currently work as the Financial Aid Specialist within the Division of Higher Education of the Ho-Chunk Nation Department of Education. I am testifying today on behalf of the Wisconsin resident post-secondary students, and the Wisconsin Tribal Education Directors Association.

Our concern is with the Governor's proposed funding of the Indian Student Assistance program within the budget of the Higher Education Aids Board. The Governor is proposing to use Gaming Compact funds to pay for this program, which in effect would force the Tribes to make a double contribution towards the unmet financial aid needs of Wisconsin Native American students. In addition to this, we believe that this is a fiscally inefficient way of handling this program.

The purpose of the Indian Student Assistance program is to "assist those Indian students who are residents of this state to receive a higher education." The State of Wisconsin has been providing the funding for this program since 1971. The amount of funding available to assist students was cut in half from $2,200 to $1,100 in 1996 without any consultation with the Tribes. Since 1996, the level of funding has remained constant although the cost of attendance for post-secondary students has risen approximately 10% each of the past three years. The actual amount of grant money each student would receive is based upon their financial need, as determined by Federal Student Financial Aid regulations.

Statute 39.38, the law regarding the Indian Student Assistance program, states "The maximum grant shall not exceed $2,200 per year, of which not more than $1,100 may be from the appropriation under s.20.235 (1) (fb). State aid from this appropriation may be matched by a contribution from a federally recognized American Indian tribe or band that is deposited in the general fund and credited to the appropriation account under s.20.235 (1) (gm)." Statute 20.235 (1) (fb) reads "Biennially, the amounts in the schedule to carry out the purposes of s.39.38" or the Indian Student Assistance program. Statute 20.235 (1) (gm) refers to the tribal contribution being used for the Indian Student Assistance program.

It is our belief that Governor Thompson's use of gaming compact revenues to fund the Indian Student Assistance program is violating s.39.38 and s.20.235 (1) (fb). In fact, at no time has the Governor previously stated that he would supplant, not supplement the State's aid to the Indian Student Assistance program with gaming compact revenue. His press releases regarding the extension of the gaming compacts never mention the use of the revenue gathered for educational purposes. Rather the gaming compact revenue was to be used for economic development, promotion of tourism and support of programs and services of the county in which the tribe is located.

Beyond the fact that the use of gaming compact revenue may be in violation of s.39.38 is that this action, in essence, is forcing the Tribes to make financial aid contributions for their students twice. All the tribes and bands in the State of Wisconsin already contribute more than the $1,100 provided under the Indian Student Assistance program. In the case of the Ho-Chunk Nation, students are eligible for up to $4,000 per academic year, based upon financial need. If students can not show any financial need, according to

Federal Student Financial Aid regulations, the Ho-Chunk Nation will provide up to $4,000 per year towards the cost of tuition and books. Other Tribes have similar grant programs but in most cases the grants do not meet the financial aid needs of the students. Last year the Indian Student Assistance program provided $21,829.00 to 107 eligible Ho-Chunk students. The Ho-Chunk Nation provided $165,263.00 to these same 107 students. But there was still an unmet need of $127,527.

The Wisconsin Tribal Education Directors Association (WTEDA) would like to have the State of Wisconsin abide by s.39.38 by using general revenue funds for the program. If the State of Wisconsin is not willing to do this, then the WTEDA proposes returning the gaming compact revenue slated for the Indian Student Assistance program to the Tribal Education Departments in proportion to the current ratio of eligible Indian students currently receiving an award. The tribes already have the infrastructure to carry out the Indian Student Assistance program. Providing the money directly to the Tribal Education Departments would put more funds in the hands of needy post-secondary students. Giving the money back to the Tribal Education Departments will also accomplish what Governor Thompson stated in his 1999-2000 budget address that the government should be "subservient to the people, help us help ourselves; embrac(e) the belief that the people always know best."

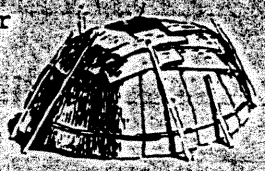
The Wisconsin Tribal Education Directors Association truly believes that the State of Wisconsin has a commitment to providing the best educational services to its residents. Now we ask that the State continue its commitment to American Indian students by modifying the Governor's proposed budget regarding the funding of the Indian Student Assistance program.

Thank you very much.

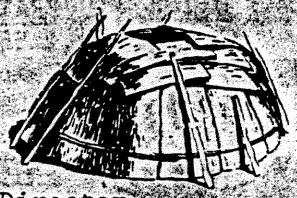
"THE WISCONSIN TRIBAL VILLAGE"

LISTING OF MINNEAPOLIS AREA TRIBAL EDUCATION DIRECTORS (CONTINUED):

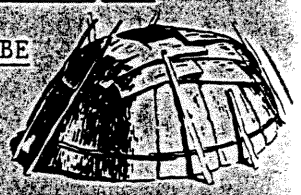
BAD RIVER CHIPPEWA TRIBE
P.O. Box 39 Chief Blackbird Center
Odanah, WI 54816
PHONE: 715-682-7111
FAX: 715-682-7118
DANA JACKSON, Education Director



LAC COURTE OREILLES OJIBWA TRIBE
Route 2 Box 2700
Hayward, WI 54843
PHONE: 715-634-8934 FAX: 715-634-4797
MARGARET COOPER, Scholarship Director
SANDY CARLEY, J.O.M. Coordinator

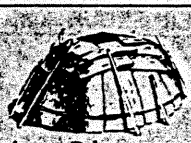


LAC DU FLAMBEAU CHIPPEWA TRIBE
P.O. Box 67
Lac du Flambeau, WI 54538
PHONE: 715-588-3303
FAX: 715-588-2302
CHRISTINA RENCONTRE, Education Director

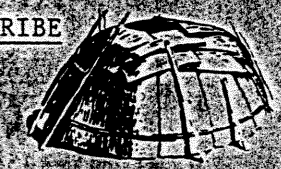


RED CLIFF CHIPPEWA TRIBE
P.O. Box 529
Bayfield, WI 54814
PHONE: 715-779-3700
FAX: 715-779-3704
MARY DUFFY, Education Director

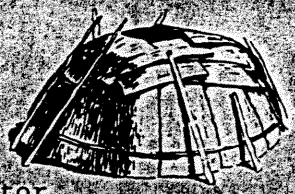
SOKAOGON (Mole Lake) CHIPPEWA TRIBE
P.O. Box 625
Crandon, WI 54520
PHONE: 715-478-3830
FAX: 715-478-5275
KEN VAN ZILE, Education Director



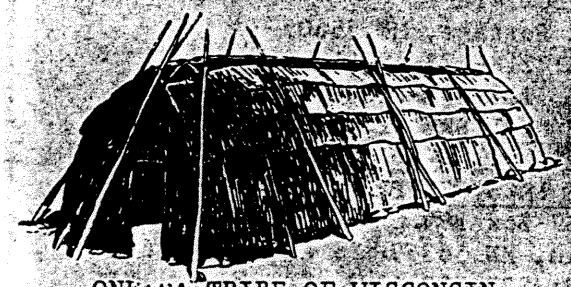
ST. CROIX CHIPPEWA TRIBE
P.O. Box 287
Hertel, WI 54845
PHONE: 715-349-2197
FAX: 715-349-5768
JOANNE DOWNS, Education Director



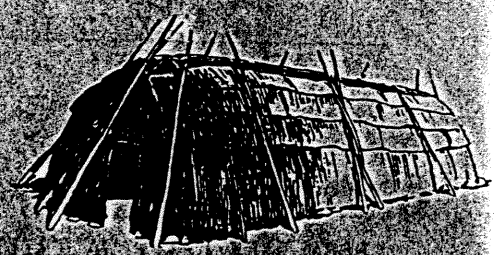
FOREST COUNTY POTAWATOMI TRIBE
P.O. Box 346
Crandon, WI 54520
PHONE: 715-478-7355
FAX: 715-478-5280
BARBARA ANAWASH, Education Director

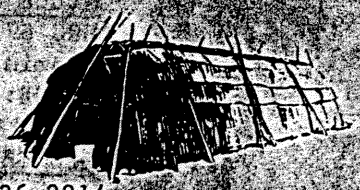


STOCKBRIDGE MUNSEE MOHICAN TRIBE
13429 Cherry Street
Bowler, WI 54416
PHONE: 715-793-4100
FAX: 715-793-1307
THERESA PUSKARENKO, Education Director

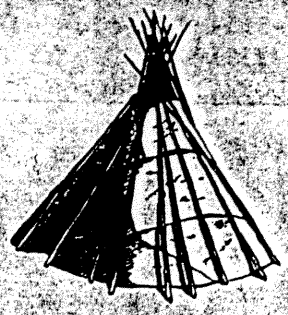


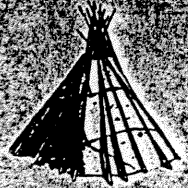
THE MENOMINEE INDIAN NATION
P.O. Box 910
Keshena, WI 54135
PHONE: 715-799-5110
FAX: 715-799-1364
VIRGINIA NUSKE, Ed. Dir.
BEATRICE BRUNETTE, JOM Dir.





ONEIDA TRIBE OF WISCONSIN
P.O. Box 365
Oneida, WI 54155
PHONE: 414-869-4370 or 800-236-2214
FAX: 414-869-~~2129~~ or ~~869-2194~~ 4039
THELMA MCLESTER, Division Director of Oneida Education & Training
CHERYL VAN DEN BERG, Scholarships Dir.
ROSALIND WEBSTER, Youth Education al Services Director





HOCHUNK (Winnebago) NATION
Education Department
P.O. Box 667
Black River Falls, WI 54615
PHONE: 715-284-9343 or 800-362-4476
FAX: 715-284-1760
~~CHERYL TWO BEARS~~, Interim Exec. Dir. of Ed.
Scott Bear ~~SCOTT BEARD~~, Higher & Adult Education Coordinator
TARA SNOWBALL, JOM Program Administrator
~~[illegible]~~, Support Education Specialist
Dan

To: **Hearing of the Joint Committee on Finance**
April 15, 1999

From: **Theresa Duello**
305 Racine Road
Madison, WI 53705

I speak as a taxpayer
I represent only myself
My concern is pay equity at the University of Wisconsin-Madison.

In March, 1997 a gender pay study was submitted to the Attorney General's office. It was a 15-year salary retrospective of 187 PhDs in the UW-Madison Medical School. Statistical analyses of the data had been carried out by Professor Mary Gray, who had previously served as a consultant to a gender study at UW-Madison. The data were analyzed using 16 different statistical models, each of which concluded the women PhDs in the Medical School are as a group underpaid, despite the fact that paying women is the law. It is not that it is 'not nice'. It is illegal. It is 'not nice' to chew with your mouth open. It is 'illegal' to discriminate.

So who cares whether educated white women get paid? Hopefully you do. Because if a white woman with a PhD can not expect pay equity, what is anyone else to do? Anyone other than an educated white male. How can anyone go home at night and explain to a little girl that she is going to make 74¢ on the dollar simply because she is a little girl. How can you explain to her that all babies are equally precious in utero, but, once born, the rules change if you are a girl.

It is often argued that 'new laws' are not needed because 'laws are in place'. But what good does it do to have 'laws in place' if a public institution is not required to abide by them. It is also argued that pay equity 'will take time'. How long? How long until we are legal? How long are we to wait? How long do we sit at the back of the bus? The Equal Pay Act was passed in 1963. Thirty-six years of waiting.

Perhaps the most dismaying aspect of the pay equity battle for me has been finding out Mrs. Martin was wrong. Mrs. Martin was my eighth grade teacher who taught me all about the U.S. Government. I learned about the Constitution, the balance of power among the different legislative branches, about the sanctity of our laws, and especially about how it was all 'fair'. I felt like I 'grew up' when I asked my attorney if there was some way to file an injunction to stop a budget that permits the law to remain broken. The wording of a biologist, but the spirit of a little eighth grade girl. He told me there was no such provision. One could only file a lawsuit afterwards challenging the legality of a decision. After the proverbial 'cows are out'. There has to be a better way.

Please note: Increasing salaries at a flat percentage will not achieve pay equity. It will only exacerbate it as the disparity will widen.

based on sex when sex is a bona fide occupational qualification for employment.[5]

A special provision of the Act prohibits sex discrimination in employment by the Federal Government, and makes the Civil Service Commission the agency responsible for insuring that federal employment is free from discrimination based on sex.[6] Except with regard to federal employment, the Equal Employment Opportunity Commission is the agency responsible for enforcing the Act's prohibition against sex discrimination in employment, and it has issued guidelines on sex discrimination[7] which, while they do not have the force of law, are entitled to great deference.[8]

§ 155. Equal Pay Act of 1963.

The Equal Pay Act of 1963,[9] which is a part of the Fair Labor Standards Act,

5. 42 USCS § 2000e-3(b).

See § 159, infra.

6. 42 USCS § 2000e-16.

7. 29 CFR §§ 1604 et seq.

8. Bartmess v Drewrys U. S. A., Inc. (CA7 Ind) 444 F2d 1186, cert den 404 US 939, 30 L Ed 2d 252, 92 S Ct 274; Weeks v Southern Bell Tel. & Tel. Co. (CA5 Ga) 408 F2d 228, 12 ALR Fed 1.

9. The Equal Pay Act of 1963 in 77 Stat 56, Pub L 88-38 provided in § 2:

"(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

"(1) depresses wages and living standards for employees necessary for their health and efficiency;

"(2) prevents the maximum utilization of the available labor resources;

"(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

"(4) burdens commerce and the free flow of goods in commerce; and

"(5) constitutes an unfair method of competition. "(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States, and with foreign nations, to correct the conditions above referred to in such industries."

The Act was intended as a broad charter of women's rights in the economic field; it sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effect on living standards of reduced wages for female workers and the economic and social consequences which flow from them. Shultz v Wheaton Glass Co. (CA3 NJ) 421 F2d 259, cert den 398 US 905, 26 L Ed 2d 64, 90 S Ct 1696 and on remand (DC NJ) 319 F Supp 229 and later app (CA3 NJ) 446 F2d 527.

The purpose of the Equal Pay Act was the elimination of those subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work; the rule of equal pay for equal work was not laid down simply out of concern about the injustice of discrimination, but was also laid down out of concern about the economic and social consequences of disparate wages paid to a major portion of the nation's labor force. Such wages not only depress the standard of living of those who receive them, but also depress wages for all workers and particularly for workers in certain industries. Shultz v First Victoria Nat. Bank (CA5 Tex) 420 F2d 648, 7 ALR Fed 691, later app (CA5 Tex) 446 F2d 47 and later app (CA5 Tex) 447 F2d 416.

The Equal Pay Act was intended as a broad charter of women's rights in the economic field, and sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effect on living standards of reduced wages for female workers, and the economic and social consequences flowing from such depression. Hodgson v Behrens Drug Co. (CA5 Tex) 475 F2d 1041, cert den 414 US 822, 38 L Ed 2d 55, 94 S Ct 121.

The broad remedial purposes of the Equal Pay Act were the elimination of discrimination and the raising of the level of women's wages. Shultz v American Can Company-Dixie Products (CA8 Ark) 424 F2d 356, conformed to (DC Ark) 314 F Supp 1192, affd in part and revd in part on other grounds (CA8 Ark) 440 F2d 916, 17 ALR Fed 334.

Annotation: 7 ALR Fed 707, 715, § 4 (construction and application of provisions of Equal Pay Act of 1963 (29 USCS § 206(d)) prohibiting wage discrimination on basis of sex).

Ross & McDermott, The Equal Pay Act of 1963: A Decade of Enforcement. 16 Boston College Industrial & Commercial L Rev 1.

Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970. 39 U Cin L Rev 615.

provides that no employer having employees subject to the minimum wage provisions of the Act shall, with certain exceptions prescribed in the Act, discriminate[10] between employees, in any establishment in which they are employed, on the basis of sex, by paying wages to employees in such establishment at a lesser rate than that paid to employees of the opposite sex in such establishment for equal[11] work on jobs requiring equal skill,[12] effort,[13]

10. Although the Fair Labor Standards Act contains a definition section, 29 USCS § 203, no definition of the word "discrimination" was added thereto when the equal pay provisions were added; the commonly accepted meaning of the word "discrimination" is a failure to treat all equally or alike under substantially similar conditions; it is a favoritism of certain persons within the same class. Wirtz v D'Armigene, Inc. (DC NY) 54 CCH **Lab Cas** ¶ 31817.

11. The courts appear to be in agreement that the term "equal" as used in the general prohibitory language of 29 USCS § 206(d)(1) does not mean "identical." Brennan v Prince William Hospital Corp. (CA4 Va) 503 F2d 282, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392; Hodgson v Behrens Drug Co. (CA5 Tex) 475 F2d 1041, cert den 414 US 822, 38 L Ed 2d 55, 94 S Ct 121; Hodgson v Corning Glass Works (CA2 NY) 474 F2d 226, affd 417 US 188, 41 L Ed 2d 1, 94 S Ct 2223; Shultz v American Can Company-Dixie Products (CA8 Ark) 424 F2d 356, conformed to (DC Ark) 314 F Supp 1192, affd in part and revd in part on other grounds (CA8 Ark) 440 F2d 916, 17 ALR Fed 334; Shultz v Wheaton Glass Co. (CA3 NJ) 421 F2d 259, cert den 398 US 905, 26 L Ed 2d 64, 90 S Ct 1696 and on remand (DC NJ) 319 F Supp 229 and later app (CA3 NJ) 446 F2d 527; Brennan v Board of Education (DC NJ) 374 F Supp 817; Tuma v American Can Co. (DC NJ) 373 F Supp 218; Hodgson v Food Fair Stores, Inc. (DC Pa) 329 F Supp 102; Hodgson v Daisy Mfg. Co. (DC Ark) 317 F Supp 538, affd per curiam as to Equal Pay Act issues (CA8) 445 F2d 823; Hodgson v American Can Co., Dixie Products (DC Ark) 317 F Supp 152, affd in part and revd in part on other grounds (CA8 Ark) 440 F2d 916, 17 ALR Fed 334; Shultz v Kimberly-Clark Corp. (DC Tenn) 315 F Supp 1323; Krumbeck v John Oster Mfg. Co. (DC Wis) 313 F Supp 257; Murphy v Miller Brewing Co. (DC Wis) 307 F Supp 829, affd (CA7 Wis) 457 F2d 221; Shultz v Brookhaven General Hospital (DC Tex) 305 F Supp 424, revd on other grounds (CA5 Tex) 436 F2d 719, later app (CA5 Tex) 470 F2d 729; Wirtz v Rainbo Baking Co. (DC Ky) 303 F Supp 1049; Wirtz v Muskogee Jones Store Co. (DC Okla) 293 F Supp 1034; Wirtz v Basic, Inc. (DC Nev) 256 F Supp 786.

Although, in adopting 29 USCS § 206(d)(1), Congress chose to specify equal pay for "equal" work rather than "comparable" work, Congress did not require that the jobs be identical, but only that they be substantially equal. Shultz v Wheaton Glass Co. (CA3 NJ) 421 F2d 259, cert den 398 US 905, 26 L Ed 2d 64, 90 S Ct 1696 and on remand (DC NJ) 319 F Supp 229 and later app (CA3 NJ) 446 F2d 527.

By substituting "equal" for "comparable" in enacting the Equal Pay Act, Congress showed that the jobs involved should be virtually identical, that is, very much alike or closely related to each other, substantially although not absolutely identical. Brennan v City Stores, Inc. (CA5 Ala) 479 F2d 235, reh den (CA5 Ala) 481 F2d 1403.

12. Under § 206(d)(1), the jobs to which the equal pay standard is applicable are jobs requiring equal skill in their performance, and where the amount or degree of skill required to perform one job is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Equal skill includes consideration of such factors as experience, training, education, and ability, and must be measured in terms of the performance requirements of the job; if an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the Act as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his working time as the employee in the other job. Moreover, possession of a skill not needed to meet requirements of the job cannot be considered in making a determination regarding equality of skill, and the efficiency of the employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill. 29 CFR § 800.125.

Equal Pay Act regulations are entitled to great deference and are presumptively valid unless shown to be erroneously in conflict with the Act itself. Brennan v City Stores, Inc. (CA5 Ala) 479 F2d 235, reh den (CA5 Ala) 481 F2d 1403.

13. "Effort" is the measurement of physical or mental exertion needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, all bear on the question of "effort" required by the job. Where jobs are otherwise equal under the Act and there is no substantial difference in the amount or degree of effort which must be expended in performing the

and responsibility[14] for their performance,[15] and performed under similar working conditions.[16]

jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs; differences only in the kinds of effort required to be expended in such a situation will not justify wage differentials. 29 CFR § 800.127.

In considering the substantial equality of the effort expended by males and females, both physical and mental effort required to be performed on a job must be weighed. Brennan v Sterling Seal Co. (DC Pa) 363 F Supp 1230; Hodgson v Oil City Hospital, Inc. (DC Pa) 363 F Supp 419.

Where the basic routine tasks of nurse's aides and male orderlies in a hospital were equal, and the extra work done by the orderlies, such as heavy lifting, performing surgical preps on male patients, work in the emergency room, duties involving the provision of security in cases of combative or hysterical persons, and catheterization of male patients, did not add significantly to the effort involved in the orderlies' jobs, or was on occasion performed by nurse's aides, and where the aides did some work which the orderlies did not, such as working in the obstetrics department and caring for infants in the nursery, there was no difference in skill, effort, or responsibility between the two jobs, and the differential in pay between the orderlies and the aides was violative of the Equal Pay Act. Brennan v Prince William Hospital Corp. (CA4 Va) 503 F2d 282, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392.

Jobs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) are of economic value commensurate with the pay differential. Hodgson v Behrens Drug Co. (CA5 Tex) 475 F2d 1041, cert den 414 US 822, 38 L Ed 2d 55, 94 S Ct 121.

14. The concept of job responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. 29 CFR § 800.129.

15. What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined, and in interpreting these key terms, which are considered to constitute three separate tests each of which must be met in order for the equal pay standard to apply, the broad remedial purpose of the law must be taken into consideration. In the application of the test, it should be kept in mind that "equal" does not mean "identical"; that insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs, will not render the equal pay standard inapplicable, but that on the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs, justifying differences in pay. 29 CFR § 800.122(a).

16. 29 USCS § 206(d)(1).

Employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions. For example, if some sales persons are engaged in selling a product exclusively inside a store and others employed by the same establishment spend a large part of their time selling the same product away from the establishment, the working conditions would be dissimilar, and where some employees do repair work exclusively inside a shop while others employed by the shop spend most of their time doing similar repair work in customers' homes, there would not be a similarity in working conditions. On the other hand, slight or inconsequential differences in working conditions that are essentially similar would not justify a differential in pay, and such differences are not usually taken into consideration by employers or in collective bargaining in setting wage rates. 29 CFR § 800.132.

While a layman might well assume that the time of day worked reflects one aspect of a job's "working conditions," the latter term has a different and much more specific meaning in the language of industrial relations. The element of working conditions encompasses two subfactors, namely, (1) "surroundings," which measure the elements, such as toxic chemicals or fumes, regularly encountered by the worker, their intensity, and their frequency, and (2) "hazards," which take into account the physical hazards regularly encountered, their frequency, and the severity of the injury they can cause; nowhere in any of these definitions is time of day worked mentioned as a relevant criterion; the concept of "working conditions," as used in specialized job evaluation systems, does not encompass shift differential. Corning Glass Works v Brennan, 417 US 188, 41 L Ed 2d 1, 94 S Ct 2223.

In the absence of a difference in working conditions, performance of the same duties in a different location is not a significant difference in jobs for purposes of the Equal Pay Act. Brennan v Prince William Hospital Corp. (CA4 Va) 503 F2d 282, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392.

Annotation: 7 ALR Fed 707, 713, § 3 (con-

An employer who is paying a wage differential in violation of the Equal Pay Act shall not, in order to comply with its provisions, reduce the wage rate of any employee.[17] In some cases, certain methods of payment by employers have been held to come within the prohibition of this proviso.[18] Further, no labor organization or its agents, representing employees of an employer having employees subject to the minimum wage provisions of the Act, shall cause or attempt to cause such employer to discriminate against an employee on the basis of sex.[19] Where a violation of the equal pay provisions of the Fair Labor Standards Act is alleged, the plaintiff must prove that the alleged discrimination was based on sex.[20]

The Equal Pay Act provides for certain exceptions from its requirement of equal pay for equal work, regardless of the sex of the employee.[21] Permissible

struction and application of provisions of Equal Pay Act of 1963 (29 USCS § 206(d)) prohibiting wage discrimination on basis of sex).

Practice Aids.—Complaint or petition alleging wage discrimination because of sex. 16 AM JUR PL & PR FORMS (Rev Ed), LABOR, AND LABOR RELATIONS, Form 301.

17. 29 USCS § 206(d)(1).

Where an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex, comparison of the newly assigned employee's wage rate with that of the replaced former employee is required for purposes of 29 USCS § 206(d)(1), whether or not the job is performed concurrently by employees of both sexes, and if the rates paid for the same jobs are lower when occupants of the jobs are of one sex than they are when the jobs are filled by employees of the opposite sex, such discrimination within the establishment is in violation of the statutory prohibition. 29 CFR § 800.114(c).

It is well settled that the official administrative interpretations of the Fair Labor Standards Act, while not binding on the courts, are entitled to "great weight." See Skidmore v Swift & Co., 323 US 134, 89 L Ed 124, 65 S Ct 161.

The Equal Pay Act of 1963 is broadly remedial and should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve; the purpose of the proviso in the Equal Pay Act of 1963 that an employer who is paying a wage differential in violation of that subsection shall not, in order to comply with the provisions thereof, reduce the wage rate of any employee, is to insure that to remedy the violations of the Act, the lower wage rate must be increased to the level of the higher. Corning Glass Works v Brennan, 417 US 188, 41 L Ed 2d 1, 94 S Ct 2223.

18. Jobs performed by the higher-paid male, and the lower-paid female, extrusion press operators, were equal within the terms of 29 USCS § 206(d)(1). Therefore, inasmuch as the males no longer operated these machines, the continued payment of the "old" lower rate to the females who were exclusively operating them was an impermissible wage differential, since it amounted to a wage reduction. Shultz v Saxonburg Ceramics, Inc. (DC Pa) 314 F Supp 1139.

Transferring male technicians from an analytical laboratory while paying them at a higher wage rate than that received by female laboratory technicians remaining in the analytical laboratory, and then hiring other men in the analytical laboratory at a later date and at the lower rate paid to the female technicians, thereby in effect reducing the rate of pay of the men in the analytical laboratory, constitutes a violation of 29 USCS § 206(d)(1). Murphy v Miller Brewing Co. (DC Wis) 307 F Supp 829, affd (CA7 Wis) 457 F2d 221.

19. 29 USCS § 206(d)(2).

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 USCS § 206(d)(4).

Annotation: 7 ALR Fed 707, 753, § 11 (construction and application of provisions of Equal Pay Act of 1963 (29 USCS § 206(d)) prohibiting wage discrimination on basis of sex).

20. Kilpatrick v Sweet (DC Fla) 262 F Supp 561.

21. 29 USCS § 206(d)(1).

These exceptions are recognized as permissible under the Civil Rights Act of 1964, which prohibits discrimination in employment, in general, because of sex. For a discussion of the provisions of the Civil Rights Act of 1964, see § 154, supra.

Annotation: 7 ALR Fed 707, 740, § 9 (construction and application of provisions of Equal Pay Act of 1963 (29 USCS § 206(d)) prohibiting wage discrimination on basis of sex).

wage differentials may exist where payment is made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity or quality of production, or where a differential is based on any factor other than sex.[22] If there are factors other than sex upon which differences in wages are based, the law is not violated.[23]

For purposes of administration and enforcement of the equal pay provisions, any amounts owing to any employee which have been withheld in violation of such provisions are deemed to be unpaid minimum wages or unpaid overtime compensation.[24, 25] Accordingly, action to receive such wages may be brought by the Wage and Hour Administrator or by any employee affected. And provisions of the Fair Labor Standards Act relating to the recovery of liquidated damages, attorneys' fees, and court costs, as well as the criminal penalties prescribed, are applicable to the equal pay provisions.

§ 156. Federal Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution[26] have occasionally been interpreted to preclude sex discrimination in various matters,[27] including employment. Thus the Supreme Court has held that state mandatory maternity leave rules bear no rational relationship to the valid state interests of preserving continuity of instruction in the schools.[28] But the Supreme Court has held that the Fourteenth Amendment is not violated here a state excludes from the risks covered by its unemployment compensation disability fund a disability caused by normal pregnancy.[29] It is also a violation of the equal protection clause to have an employment policy which precludes hiring people with illegitimate children.[30]

22. 29 USCS § 206(d)(1).

These exceptions are discussed in §§ 190–191, infra.

23. Kilpatrick v Sweet (DC Fla) 262 F Supp 561.

24, 25. 29 USCS § 206(d)(3).

26. The Fourteenth Amendment prohibits the states from denying to any person within their jurisdiction the equal protection of the laws. The Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, but the Supreme Court has held that its due process clause forbids discrimination that is so unjustifiable as to be violative of due process. See, for example, Weinberger v Wiesenfeld, 420 US 636, 43 L Ed 2d 514, 95 S Ct 1225.

27. A state statute governing the appointment of administrators of estates which prefers males to females is unconstitutional. Reed v Reed, 404 US 71, 30 L Ed 2d 225, 92 S Ct 251, conformed to 94 Idaho 542, 493 P2d 701.

In the context of child support, a state statute which specifies a greater age of majority for males than for females denies equal protection. Stanton v Stanton, 421 US 7, 43 L Ed 2d 688, 95 S Ct 1373.

A statute which defines "defendant" differently in respect to men and to women members of the Armed Forces violates the Fifth Amendment. Frontiero v Richardson, 411 US 677, 36 L Ed 2d 583, 93 S Ct 1764.

However, the Navy's mandatory discharge procedures that accorded better treatment to female line officers than to male line officers were upheld as not violative of the due process clause of the Fifth Amendment. Schlesinger v Ballard, 419 US 498, 42 L Ed 2d 610, 95 S Ct 572, reh den 420 US 966, 43 L Ed 2d 446, 95 S Ct 1363.

Annotation: 27 L Ed 2d 935 (sex discrimination).

28. Cleveland Board of Education v La Fleur, 414 US 632, 39 L Ed 2d 52, 94 S Ct 791, 67 Ohio Ops 2d 126.

29. Geduldig v Aiello, 417 US 484, 41 L Ed 2d 256, 94 S Ct 2485. However, this case has been distinguished by various Courts of Appeal which have held that private disability plans excluding pregnancy do violate Title VII of the Civil Rights Act of 1964, even if they do not work an invidious discrimination in violation of the Fourteenth Amendment. Communications Workers v American Tel. & Tel. Co. (CA2 NY) 10 FEP 435; Gilbert v General Electric Co. (1974, DC Va) 375 F Supp 367, affd (CA4 Va) 519 F2d 661, cert gr 423 US 822, 46 L Ed 2d 39, 96 S Ct 36.

30. Andrews v Drew Municipal Separate

B. Compensation Packages [§§ 725–868]

Research References

5 USCS § 2301; 29 USCS §§ 206, 623, 630, 791 et seq., 1012; 38 USCS §§ 4211 et seq.; 42 USCS §§ 1981, 2000d et seq., 2000e, 2000e-2, 12112, 12201

P.L. 102-166

Executive Order 11246

28 CFR Parts 41, 42; 29 CFR Parts 860, 1604, 1613, 1620, 1625, 1630; 34 CFR Part 106; 41 CFR Parts 60-20, 60-250

ALR Digest, Civil Rights § 39

ALR Index, Civil Rights and Discrimination; Civil Service; Equal Pay Act; Labor and Employment

12 Federal Procedural Forms, L Ed, Job Discrimination § 45:242

Employment Coordinator ¶¶ EP-10,601 et seq., ¶¶ PM-14,001 et seq., ¶ EP-20,281, ¶¶ EP-20,415 et seq., ¶¶ EP-20,640 et seq., ¶¶ EP-21,657 et seq., ¶ EP-21,760, ¶¶ 80,000 et seq.

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1. Wages and Salaries [§§ 725–800]

a. In General [§§ 725–727]

§ 725. Generally

Employers are prohibited from paying discriminatory wages or salaries by a variety of federal and state[43] job discrimination laws. Many federal laws either expressly prohibit or have been interpreted by courts or agencies to prohibit wage and salary discrimination. Private and public employers are prohibited from committing "compensation" discrimination based on race, color, religion, sex, and national origin, under Title VII,[44] based on age under the Age Discrimination in Employment Act,[45] and based on disability under the Americans with Disabilities Act (ADA),[46] as of its effective date, which varies with the size of the employer.[47] Under the ADA, an employer cannot reduce pay or compensation to an employee with a disability because it has to eliminate marginal job functions or provide a reasonable accommodation, such as specialized or modified equipment.[48] The Equal Pay Act forbids sex discrimination in pay by public and private employers, under the equal work standard.[49]

43. **State Aspects:** As to state statutes prohibitings discrimination in the payment of wages or salaries, see Employment Coordinator ¶§ 20,281 et seq. A full discussion of all wage and salary discrimination prohibitions in all state job discrimination laws, including laws of limited applicability to particular private employers, and laws which only regulate public employers, as well as state constitutions, attorney general opinions and executive orders appears in Employment Discrimination Coordinator ¶¶80,000 et seq.

44. 42 USCS § 2000e-2(a)(1).

Annotations: Wage differentials as violative of those provisions of Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.), which prohibit sex discrimination in employment, 62 ALR Fed 33.

45. 29 USCS § 623(a)(1).

46. 42 USCS § 12112(a).

47. §§ 39 et seq.

48. Technical Assistance on the Employment Provisions (Title I) of the Americans with Disabilities Act-Explanation of Key Legal Requirements, Equal Employment Opportunity Commission, 1/28/92.

49. 29 USCS § 206(d).

As to the equal work standard, see § 728.

Forms: Allegations in complaint—Equal Pay Act—Collective action by employees for discrimination by employer in payment of wages on basis of sex [29 USCS §§ 206(d), 216(b); FRCP 8(a)]. 12 Federal Procedural Forms, L Ed, Job Discrimination § 45:242.

Government contractors cannot establish "rates of pay" based on race, color, religion, sex, and national origin, under Executive Order 11246.[50] or discriminate against qualified disabled veterans or veterans of the Vietnam era in "rates of pay or other forms of compensation" under the Vietnam Era Veterans Readjustment and Assistance Act.[51]

Employers operating federally assisted programs are also forbidden from committing wage and salary discrimination. Title VI forbids race, color, and national origin discrimination in "rates of pay and other forms of compensation,"[52] Title IX forbids sex distinctions in "rates of pay or other compensation,"[53] and the Rehabilitation Act forbids handicap discrimination in "rates of pay . . . and changes in compensation."[54]

Under civil service law, federal employees must be given equal pay for work of equal value[55] without regard to their political affiliation, race, color, religion, sex, national origin, marital status, age, or handicap.[56] Also, while the Rehabilitation Act of 1973 does not expressly address wage and salary discrimination in federal employment, a court has found that a handicapped federal worker cannot be paid less than a non-handicapped employee who is performing the same work and being evaluated under the same standards.[57] Furthermore, the EEOC takes the position that handicapped federal workers are protected from compensation discrimination under the Rehabilitation Act to the same extent as other discrimination is forbidden by Title VII.[58]

The right to be free from racial discrimination in the making and enforcement of contracts, guaranteed under 42 USCS § 1981.[59] as amended by the Civil Rights Act of 1991.[60] includes the making, performance, modification, and termination of contract, as well as the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.[61] This list is intended to be illustrative rather than exhaustive.[62] and is intended to apply in the context of employment.[63]

Observation: Terms and conditions of employment may reasonably be construed to include wages and salaries.

Caution: Before § 1981 was amended, the Supreme Court held that its application was limited in the employment context to hiring[64] and promotion[65] decisions that involved the formation of new contracts, and did not reach post-formation conduct.[66] *Patterson* was interpreted to bar recovery under § 1981 for discriminatory wage practices.[67] The Civil Rights Act of 1991's amendment of § 1981 supersedes *Paterson.*[68]

50. 42 USCS § 2000e Note § 202(1).

51. 41 CFR § 60-250.6(a).

52. 28 CFR § 42.104(c)(1).

53. 34 CFR § 106.54(a).

54. 28 CFR § 41.52(c)(3).

55. 5 USCS § 2301(b)(3).

56. 5 USCS § 2301(b)(2).

57. Davis v U.S. Postal Service (1987, MD Pa) 675 F Supp 225, 44 BNA FEP Cas 1299, 46 CCH EPD ¶ 38020.

58. 29 CFR § 1613.802(a).

59. 42 USCS § 1981(a).

60. P.L. 102-166 § 101(2).

61. 42 USCS § 1981(b).

62. S Rept No. 101-315, 6/8/90, p. 58.

63. H Rept No. 102-40, Part 2, 5/17/91, p. 37.

64. §§ 557 et seq.

65. §§ 904 et seq.

66. Patterson v McLean Credit Union (1989) 491 US 164, 105 L Ed 2d 132, 109 S Ct 2363, 49 BNA FEP Cas 1814, 50 CCH EPD ¶ 39066.

Public employers have also been prohibited from committing sex discrimination in wages or salaries under 42 USCS § 1983.[69]

The Government Employee Rights Act of 1991 reaffirms the Senate's commitment to Rule XLII of the Standing Rules of the Senate, prohibiting discriminatory compensation practices based on race, color, religion, sex, national origin, age, or physical handicap.[70] Furthermore, the Civil Rights Act of 1991 applies the rights and protections provided under Title VII (footnote 1) to employment by the House of Representatives[71] and the instrumentalities of Congress.[72]

▮▮▮▮ *Caution:* Besides those federal laws discussed above, other federal statutes may prohibit discrimination in wages and salaries as part of a broader prohibition against discrimination in all terms, conditions, or privileges of employment.[73]

§ 726. How Title VII differs from the Equal Pay Act

▮▮▮▮ *Practice guide:* While most claims involving sex discrimination in pay may be brought under both the Equal Pay Act (EPA) and Title VII, there are some substantive, procedural, and remedial differences in the statutes that should be considered in determining whether to sue for sex discrimination in pay under one or both of these acts, and in formulating a successful defense under each statute.

The most crucial differences between Title VII and the EPA are the fact that Title VII forbids additional types of discrimination,[74] and forbids types of intentional and other sexual discrimination in pay that are not banned by the EPA.[75] Therefore, if a sex discrimination in pay claim is brought against an employer covered by both statutes, a violation of the EPA will automatically result in a violation of Title VII, but a violation of Title VII does not automatically constitute a violation of the EPA.[76]

Other major differences which must be considered include the following:

—the different coverage of private employers under Title VII and the EPA,[77] so that an employer may be subject to only one of the laws;

—because the EPA is limited to sex discrimination claims while Title VII is not, companion claims based on other types of discrimination may only be raised under Title VII;

—a successful claim under the EPA must satisfy the criteria of the equal

67. Summerville v GTE South, Inc. (1989, MD NC) 55 BNA FEP Cas 303.

68. S Rept No. 101-315, 6/8/90, pp.6, 58.

69. Stathos v Bowden (1981, DC Mass) 514 F Supp 1288, 30 BNA FEP Cas 1852, 26 CCH EPD ¶ 31957, affd, amd on other grounds (CA1) 728 F2d 15, 34 BNA FEP Cas 142, 33 CCH EPD ¶ 34165; Burkey v Marshall County Bd. of Education (1981, ND W Va) 513 F Supp 1084, 25 BNA FEP Cas 1229, 30 BNA FEP Cas 1855, 26 CCH EPD ¶ 31950.

70. P.L. 102-166 § 319(a).

71. P.L. 102-166 § 117(a).

72. P.L. 102-166 § 117(b).

73. §§ 701 et seq.

74. § 725.

75. §§ 758 et seq.

76. 29 CFR § 1620.27(a).

77. As to coverage of private employers generally, see §§ 39 et seq.

work standard,[78] while Title VII claims may but do not have to satisfy those criteria, and, therefore, may be based on intentional discrimination even when the work at issue is different and there is no single comparison employee on which to base the required rate of pay;[79]

—the EPA has a longer time limitations period for bringing suit than does Title VII,[80] so that a delay in filing may only effect rights under the latter statute in some circumstances;

—private class actions under the EPA are not subject to the certification requirements of the Federal Rules of Civil Procedure as are class actions under Title VII,[81] so that it may be more difficult to raise class claims under the EPA and to bind individuals to the judgment if they are not parties to the suit;

—a private right to court action is terminated when the EEOC files suit over the same matter under the EPA, but not under Title VII;[82]

—a required initial resort to administrative processing of a claim with the EEOC and state agencies is a prerequisite to suit only under Title VII;[83]

—liquidated damages are only available under the EPA for willful violations,[84] which double the amount of an employer's liability for purposeful discrimination;

—decreasing an employee's pay is expressly forbidden as a remedy under the EPA,[85] and is not expressly prohibited under Title VII;

—criminal sanctions are available only under the EPA;[86]

—the right to a jury trial is firmly established only under the EPA,[87] so that bringing a claim under both laws may increase the complexity and expense of a bifurcated proceeding before both a judge and jury.[88]

§ 727. Effect of state law requirements

The Fair Labor Standards Act (FLSA), of which the EPA is a part[89] requires an employer not only to satisfy its minimum wage requirements, but also to conform with any state minimum wage laws which establish higher minimum wages than are mandated by federal law.[90] An employer complying with a state minimum wage law that requires higher minimum wages than are provided under the FLSA to be paid to workers of only one sex is obligated to pay the same wage to workers of the other sex who meet the equal work standard[91] under the EPA.[92]

Likewise, since all forms of state women's protective legislation are invalid if

78. As to the equal work standard, see § 728.

79. As to equality of work standards, see § 731.

80. As to time limitations, generally, see §§ 2177 et seq.

81. As to class action requirements, see §§ 2371 et seq.

82. As to federal suits, generally, see §§ 2096 et seq.

83. As to administrative processing requirements, generally, see §§ 2252 et seq.

84. As to liquidated damages, generally, see §§ 3007 et seq.

85. § 765.

86. As to criminal sanctions, generally, see §§ 3155 et seq.

87. As to the right to a jury trial, generally, see §§ 2371 et seq.

88. See, for example, §§ 2714 et seq., which discusses the different burden of proof requirements imposed respectively under the EPA and Title VII.

89. § 20.

90. 29 USCS § 218.

91. As to the equal work standard, see § 728.

92. 29 CFR § 1620.29.

inconsistent with Title VII's ban on sex discrimination,[93] an employer's compliance with state laws providing minimum wages or premium overtime for only female employees constitutes a violation of Title VII unless the employer provides the same pay to male employees.[94]

Also, compliance with the EPA does not excuse a violation of a state job discrimination statute or other law establishing stricter requirements than does the EPA.[95]

B. Wage and Salary Discrimination Claims Under the Equal Work Standard [§§ 728–757]

(1) In General [§§ 728–735]

§ 728. Equal work standard requirements

All claims of sex discrimination in pay under the Equal Pay Act (EPA) must meet a set of established criteria known collectively as "the equal work standard." Specifically, the EPA forbids an employer to pay a different wage[96] on the basis of sex to employees in an establishment[97] for equal work[98] on jobs requiring equal skill,[99] effort,[1] and responsibility,[2] which are performed under similar working conditions.[3] This same standard applies to claims of sex discrimination in pay raised under Title IX of the Education Amendments of 1972 for employers operating educational programs or activities that receive federal financial assistance.[4]

The equal work standard must be satisfied by male as well as female employees bringing sex discrimination in pay claims under the EPA,[5] and an employer attempting to justify a pay deviation from this standard must justify the higher, rather than the lower paid job, as including more skill, effort and responsibility, or as being performed under less desirable working conditions.[6]

While the equal pay standard is also primarily used in evaluating sex discrimination in pay claims under Title VII, a claimant need not adhere to that standard if proof if intentional discrimination[7] is established.[8] However, if the equal pay standard is the basis of a sex wage claim under both Title VII and the EPA, there is no reason for a court to arrive at different findings on the merits under the respective statutes, based on the same facts.[9]

IIII *Caution:* Title VII cases analyzed under the equal work standard are

93. §§ 152 et seq.

94. 29 CFR § 1604.2(b)(3)(ii).

95. 29 CFR § 1620.28.

96. § 729.

97. § 730.

98. § 731.

99. § 732.

1. § 733.

2. § 734.

3. 29 USCS § 206(b)(1).

As to the similar working conditions requirement, see § 735.

Forms: Defense in answer—Plaintiff not performing equal work [29 USCS 206(d)]. 12 Federal Procedural Forms, L Ed, Job Discrimination § 45:246.

4. 34 CFR § 106.54(b).

5. 29 CFR § 1620.1(c).

6. 29 CFR § 1620.14(a); 29 CRF § 1620.13(d).

7. As to intentional discrimination, see §§ 758 et seq.

8. County of Washington v Gunther (1981) 452 US 161, 68 L Ed 2d 751, 101 S Ct 2242, 25 BNA FEP Cas 1521, 26 CCH EPD ¶ 31877.

9. McKee v Bi-State Dev. Agency (1986, CA8) 801 F2d 1014, 42 BNA FEP Cas 431, 41 CCH EPD ¶ 36541.

included in the following discussion of that standard, even when based on a different ground of discrimination such as race, since there is no legal basis to conclude that such claims should be treated differently from sex discrimination claims when that standard is utilized.

When a pay discrimination claim was brought under not only Title VII and the EPA, but also the Age Discrimination in Employment Act (ADEA), the Ninth Circuit applied the equal work standard under all three statutes, and found that the claimant had not demonstrated that the comparison position required substantially equal work to hers.[10]

§ 729. What are "wages"

Under the equal work standard[11] "wages" include all payments made to or on behalf of an employee as remuneration for employment. All forms of compensation are included regardless of the time of payment, whether payment is periodical or deferred until a later date, and whether the payment is called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or by some other name. Thus, all fringe benefits such as vacation and holiday pay,[12] as well as overtime pay required under other provision of the Fair Labor Standards Act[13] fall under the definition of "wages."

However, since the equal work standard's concern with the equality of work[14] only extends to an evaluation of the equality of "wages," the EPA is not violated if an employer imposes a heavier work load on a female employee than it does on a male employee, as long as the "wages" are equal.[15]

Furthermore, not every payment of money to an employee by an employer falls within the definition of "wages." For example, an employer's investment in the businesses of several male employees did not constitute "wages" to which a female employee was equally entitled. The equal work standard does not apply to lost business opportunities, and the employer's investment was neither compensation for services rendered, nor for the primary benefit of the employees.[16]

While "wages" include any form of compensation for employment, comparisons under the equal work standard must be made in the same medium of exchange. For example, an employer cannot pay higher hourly rates to employees of one sex and attempt to equalize the differential by occasionally paying employees of the other sex a bonus.[17]

§ 730. Same establishment requirement

Pay differentials among employees may not be unlawful under the equal

10. Foster v Arcata Associates, Inc. (1985, CA9) 772 F2d 1453, 38 BNA FEP Cas 1850, 27 BNA WH Cas 624, 38 CCH EPD ¶ 35559, 103 CCH LC ¶ 34710, cert den 475 US 1048, 89 L Ed 2d 576, 106 S Ct 1267, 40 BNA FEP Cas 272, 27 BNA WH Cas 984, 39 CCH EPD ¶ 35925.

11. § 728.

12. 29 CFR § 1620.10.

13. 29 CFR § 1620.29.

14. § 731.

15. Berry v Board of Supervisors of L.S.U. (1983, CA5) 715 F2d 971, 32 BNA FEP Cas 1567, 26 BNA WH Cas 706, 32 CCH EPD ¶ 33828, 98 CCH LC ¶ 34446, affd (CA5) 783 F2d 1270, 42 BNA FEP Cas 917, 27 BNA WH Cas 1143, 39 CCH EPD ¶ 35964, cert den 479 US 868, 93 L Ed 2d 158, 107 S Ct 232, 44 BNA FEP Cas 848, 44 CCH EPD ¶ 37446.

16. Williams v D. Richey Management Corp. (1988, ND Ill) 1988 US Dist LEXIS 12009.

17. 29 CFR § 1620.19.

they were centrally supervised and adhered to the same pay standards,[26] and separate offices of the corporation were not a single "establishment" when they were hundreds of miles apart, independently managed, had different customers and operational needs, and separate budgets.[27]

§ 731. What is "equality of work"

The equality of work being compared under the equal work standard[28] pertains to a comparison of the jobs held by employees of different sexes, not to the skills and qualifications of individual employees holding those jobs.[29] Furthermore, the jobs being compared do not have to be identical, but only "substantially equal,"[30] and the actual performance required by the jobs, not the job titles or classifications, controls the evaluation of whether the jobs are substantially equal.[31] The mere fact that there are overlapping tasks among the comparison jobs is insufficient to establish substantial equality.[32] However, insubstantial or minor differences in the degree or amount of skill,[33] effort,[34] or responsibility[35] required for the performance of the respective jobs will not render the work unequal under the equal work standard.[36]

The jobs being compared under the equal work standard need not be simultaneously held by workers of different sexes. Comparisons may be validly made when the same job is held in immediate succession,[37] as when a woman is employed to do substantially equal work to that formerly performed by a man.[38] In other words, the jobs being compared for equality are compared on the basis of their respective duties, not on the time when they were performed.[39]

26. Brownlee v Gay & Taylor, Inc. (1985, DC Kan) 642 F Supp 347, 45 BNA FEP Cas 334, 28 BNA WH Cas 514, 40 CCH EPD ¶ 36278, affd (CA10) 861 F2d 1222, 48 BNA FEP Cas 594, 29 BNA WH Cas 17, 48 CCH EPD ¶ 38519, 110 CCH LC ¶ 35138.

27. Foster v Arcata Associates, Inc. (1985, CA9) 772 F2d 1453, 38 BNA FEP Cas 1850, 27 BNA WH Cas 624, 38 CCH EPD ¶ 35559, 103 CCH LC ¶ 34710, cert den 475 US 1048, 89 L Ed 2d 576, 106 S Ct 1267, 40 BNA FEP Cas 272, 27 BNA WH Cas 984, 39 CCH EPD ¶ 35925.

28. As to the equal work standard, generally, see § 728.

29. Glenn v General Motors Corp. (1988, CA11) 841 F2d 1567, 46 BNA FEP Cas 1331, 28 BNA WH Cas 1033, 46 CCH EPD ¶ 37921, 108 CCH LC ¶ 35054, cert den (US) 102 L Ed 2d 367, 109 S Ct 378, 48 BNA FEP Cas 232, 29 BNA WH Cas 752, 50 CCH EPD ¶ 39164, 110 CCH LC ¶ 35125.

30. Corning Glass Works v Brennan (1974) 417 US 188, 41 L Ed 2d 1, 94 S Ct 2223, 9 BNA FEP Cas 919, 7 CCH EPD ¶ 9374b, 74 CCH LC ¶ 33078.

31. EEOC v Maricopa County Community College Dist. (1984, CA9) 736 F2d 510, 35 BNA FEP Cas 234, 26 BNA WH Cas 1398, 34 CCH EPD ¶ 34526, 101 CCH LC ¶ 34582.

32. Koster v Chase Manhattan Bank, N.A. (1985, SD NY) 609 F Supp 1191, 41 BNA FEP Cas 1379.

33. As to skill requirements, see § 732.

34. As to effort requirements, see § 733.

35. As to responsibility requirements, see § 734.

36. 29 CFR § 1620.14(a).

37. Hodgson v Behrens Drug Co. (1973, CA5) 475 F2d 1041, 9 BNA FEP Cas 816, 5 CCH EPD ¶ 8452, 70 CCH LC ¶ 32844, cert den 414 US 822, 38 L Ed 2d 55, 94 S Ct 121, 9 BNA FEP Cas 1408, 6 CCH EPD ¶ 8861, 72 CCH LC ¶ 32962.

38. Pittman v Hattiesburg Municipal Separate School Dist. (1981, CA5) 644 F2d 1071, 25 BNA FEP Cas 1349, 26 CCH EPD ¶ 31836; Clymore v Far-Mar-Co., Inc. (1983, CA8) 709 F2d 499, 42 BNA FEP Cas 439, 32 CCH EPD ¶ 33671, 97 CCH LC ¶ 34391.

39. Lowery v WMC-TV (1987, WD Tenn) 658 F Supp 1240, 43 BNA FEP Cas 972, 43 CCH EPD ¶ 37278.

§ 732. What is "equal skill"

For purposes of applying the equal work standard[40] "skill" includes consideration of such factors as experience, training, education, and ability, and must be measured in terms of the performance requirements of the job. Neither the efficiency of an employee's performance, nor his possession of a skill not required for the job, will be considered in determining whether the jobs require equal skill.[41]

▌▌▌▌ *Observation:* Efficiency of performance, while having no bearing on evaluating "equal skill," may still support an employer's defense that a pay differential is based on a merit[42] or incentive[43] system.

▌▌▌▌ *Caution:* An employer's imposition of education or training job requirements not needed for the performance of a particular position may not only raise equal pay, but also other discrimination problems in terms of selection practices.[44]

Thus, two jobs may be similar insofar as requiring the same task to be performed, but may necessitate different levels of skill. For example, where each job entailed the identification of the cause of malfunctions on telephone lines, but one job required the operation of a complicated test board, the diagnosis of a malfunction, and the determination of a solution, and the other job relied on a computer to automatically perform those tasks, the jobs did not require "equal skill."[45]

§ 733. What is "equal effort"

For purposes of determining whether jobs require "equal effort" when applying the equal work standard,[46] a difference in the kinds of efforts required to perform the job will not make the jobs unequal. Thus, both physical and mental exertion of more than an occasional or sporadic nature must be evaluated for this purpose.[47] While the balancing of physical and mental exertions necessary to evaluate "equal effort" has not often occurred, where a court was faced with job classifications exclusively segregated by sex, it balanced an occasional extra physical effort with a corresponding extra mental effort necessary to achieve high production quotas, in determining that certain factory positions were substantially equal.[48]

Comparison jobs will not be found unequal based on "effort" if a wage differential due to the effort required by the jobs is not applied uniformly to men and women. For example, if only some men performed jobs requiring heavy lifting, the payment of a higher wage rate to all men, based on the extra

40. As to the equal work standard, generally, see § 728.

41. 29 CFR § 1620.15(a).

42. As to the merit defense, see § 740.

43. As to the incentive system defense, see § 741.

44. As to selection processes generally, see §§ 316 et seq.

45. Forsberg v Pacific Northwest Bell Tel. Co. (1988, CA9) 840 F2d 1409, 45 CCH EPD ¶ 37758, amd (CA9) 46 CCH EPD ¶ 37996.

46. As to the equal work standard, generally, see § 728.

47. 29 CFR § 1620.16(b).

48. Hodgson v Daisy Mfg. Co. (1970, WD Ark) 317 F Supp 538, 9 BNA FEP Cas 565, 2 CCH EPD ¶ 10320, 63 CCH LC ¶ 32392, affd in part and revd in part on other grounds (CA8) 445 F2d 823, 9 BNA FEP Cas 646, 3 CCH EPD ¶ 8289, 65 CCH LC ¶ 32528.

efforts of only some men, would constitute a violation of the equal work standard.[49]

It has also been found that spending 35% of work time in out-of-town travel constituted a greater "effort" justifying higher pay than a job which did not require such travel.[50]

§ 734. What is "equal responsibility"

Evaluations of job content for purposes of the determining "equal responsibility" under the equal work standard[51] are primarily concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.[52] For example, the temporary assumption of supervisory responsibilities,[53] or the additional authorization for a particular group of sales clerks to approve a customer's personal check[54] would render comparison jobs unequal and justify a pay differential under the equal work standard. However, duties which are only occasionally dissimilar and would not normally be recognized in wage administration as a significant factor in establishing wage rates will not justify increased pay on the basis of "equal responsibility."[55]

The responsibility being evaluated does not have to be officially assigned by the employer in order for it to be subject to an equal work standard analysis. For instance, the fact that a female employee's responsibilities were only equal to those of the comparison male employee because she performed work above and beyond her job description did not lessen the employer's obligation to pay both jobs equally, as long as the added responsibilities were performed with the knowledge and acquiescence of supervisory officials.[56]

The sole fact that one job has more assistants helping to perform it than does another will not, by itself, require a determination that it involves more responsibility.[57] Furthermore, where a common core of tasks are performed, the mere fact that one job is responsible for the work of a larger total number of individuals will not, alone, make the jobs unequal under the equal work standard.[58] However, the responsibility for a heavier workload on one shift as opposed to another justifies higher pay for the more burdened supervisor.[59]

An employer's defense to unequal pay claims raised under the equal work standard, which are based on unequal responsibility justifications, most fre-

49. 29 CFR § 1620.16(b).

50. Gorrell v Abbott Laboratories (1987, ND Ill) 1987 US Dist LEXIS 11732.

Situations in which travel was evaluated for purposes of dissimilar "working conditions" rather than an "equal effort" factor under the equal work standard, are discussed at § 735.

51. As to the equal work standard, generally, see § 728.

52. 29 CFR § 1620.17(a).

53. 29 CFR § 1620.17(b)(1).

54. 29 CFR § 1620.17(b)(2).

55. 29 CFR § 1620.17(b)(3).

56. Katz v School Dist. (1977, CA8) 557 F2d 153, 18 BNA FEP Cas 726, 14 CCH EPD ¶ 7650.

57. EEOC v Madison Community Unit School Dist. (1987, CA7) 818 F2d 577, 43 BNA FEP Cas 1419, 28 BNA WH Cas 105, 43 CCH EPD ¶ 37142, 106 CCH LC ¶ 34908.

58. Brewster v Barnes (1986, CA4) 788 F2d 985, 46 BNA FEP Cas 1758, 28 BNA WH Cas 1110, 40 CCH EPD ¶ 36098, 104 CCH LC ¶ 34759.

59. Williams v Scientific Plastics, Inc. (1979, SD Miss) 20 BNA FEP Cas 1585, 20 CCH EPD ¶ 30232.

quently arise in the context of the employer's assertion that "additional duties"[60] justify the pay differences.

§ 735. "Similar working conditions" requirement

In applying the equal work standard,[61] the jobs to be compared should involve "similar working conditions." This evaluation depends on two factors; (1) the physical surroundings of the work; (2) the frequency and severity of exposure to physical hazards. Differences only in the time work is performed will not justify unequal pay based on "working conditions."[62]

The EEOC defines the "surroundings" element of this evaluation to include exposure to toxic chemicals or fumes on an intense and frequent basis. The Commission concludes that "hazards" involve physical dangers measured by both the frequency and severity of the potential injury they may inflict.[63] The agency finds slight or inconsequential differences in working conditions that are not usually considered by employers or in collective bargaining for the purposes of establishing wage rates, will not justify pay differences between otherwise substantially equal jobs.[64]

Proof of a "hazard" necessary to justify a pay differential will depend on the nature of the hazard asserted by the employer. For example, male custodians could be paid more for working outside of a security perimeter in a dangerous urban environment, despite the fact that none had been victim of a crime,[65] while another employer could not justify pay differences based on an increased risk of industrial accident peculiar to particular jobs, when it failed to submit evidence that that type of accident had ever occurred in the history of its operations.[66]

▮▮▮▮ *Observation:* As the above cases demonstrate, an employer claiming a "hazard" making working conditions dissimilar enough to justify unequal pay under the equal work standard may be required to present scientific or occupational expert testimony substantiating the hazard if it has not yet occurred, and if it is not a commonly shared and easily recognizable hazard.

One court has expanded the "working conditions" evaluation to include aconsideration of the amount of travel required by the comparison jobs, so that an employer was justified in paying more for a job requiring 50% of the time to be expended in traveling, than for a job in which no travel was required.[67]

60. § 738.

61. As to the equal work standard, generally, see § 728.

62. Corning Glass Works v Brennan (1974) 417 US 188, 41 L Ed 2d 1, 94 S Ct 2223, 9 BNA FEP Cas 919, 7 CCH EPD ¶ 9374b, 74 CCH LC ¶ 33078.

63. 29 CFR § 1620.18(a).

64. 29 CFR § 1620.18(b).

65. Usery v Columbia University (1977, CA2) 568 F2d 953, 15 BNA FEP Cas 1333, 15 CCH EPD ¶ 7877, 82 CCH LC ¶ 33593.

66. Hodgson v Daisy Mfg. Co. (1970, WD Ark) 317 F Supp 538, 9 BNA FEP Cas 565, 2 CCH EPD ¶ 10320, 63 CCH LC ¶ 32392, affd in part and revd in part on other grounds (CA8) 445 F2d 823, 9 BNA FEP Cas 646, 3 CCH EPD ¶ 8289, 65 CCH LC ¶ 32528.

67. Chapman v Pacific Tel.&Tel. Co. (1978, DC Cal) 456 F Supp 65.

▮▮▮▮ *Observation:* Other courts have evaluated travel time under the equal work standard in the context of "effort" needed to perform a job. See § 734 for further discussion.

the misclassification of a position, is not an exculpatory defense.[80] Likewise, an employer's "good faith" is not a complete defense to an alleged EPA violation.[81]

IIII *Caution:* An employer's "good faith" may be a necessary part of demonstrating a "factor other than sex" defense under the EPA.

IIII *Observation:* An employer's "good faith" may affect the liquidated damages remedy available under the EPA.[82]

§ 738. Additional duties for the higher paying job

When an employer defends a pay discrimination claim raised under the equal work standard[83] based on the assertion that the plaintiff has not established the substantial equality[84] of the comparison jobs, it often asserts that the higher paying job is unequal in content due to the fact that additional duties are required. The courts and the EEOC have established several criteria that normally preclude the success of such a defense. For instance, jobs will generally be considered equal, despite additional duties involved in the higher paying positions, and will correspondingly be entitled to equal pay when:

—the higher paid employees received the increased wages without actually performing the additional duties;[85]

—the lower paid employees are also performing the alleged additional duties;[86]

—the alleged additional duties do not in fact exist;[87]

—the additional duties consume only a minimal or insignificant amount of time;[88]

80. Grimes v District of Columbia (1986, DC Dist Col) 630 F Supp 1065, 42 BNA FEP Cas 1480, 27 BNA WH Cas 1084, 42 CCH EPD ¶ 36889, 104 CCH LC ¶ 34803, vacated on other grounds 266 App DC 483, 836 F2d 647, 45 BNA FEP Cas 1137, 45 CCH EPD ¶ 37784, 108 CCH LC ¶ 35013.

81. Laffey v Northwest Airlines, Inc. (1984, App DC) 238 App DC 400, 740 F2d 1071, 35 BNA FEP Cas 508, 27 BNA WH Cas 94 CCH EPD ¶ 34540, 101 CCH LC ¶ 34585, cert den 472 US 1021, 87 L Ed 2d 622, 105 S Ct 3488, 37 BNA FEP Cas 1816, 37 CCH EPD ¶ 35293; Peters v Shreveport (1987, CA5) 818 F2d 1148, 43 BNA FEP Cas 1822, 28 BNA WH Cas 169, 43 CCH EPD ¶ 37160, 107 CCH LC ¶ 34936 and cert dismd 485 US 930, 99 L Ed 2d 264, 108 S Ct 1101, cert den (US) 102 L Ed 2d 367, 109 S Ct 378, 48 BNA FEP Cas 232, 29 BNA WH Cas 752, 50 CCH EPD ¶ 39164, 110 CCH LC ¶ 35125.

82. §§ 3007 et seq.

83. As to the equal work standard, generally, see § 728.

84. As to the substantial equality requirement, generally, see § 731.

85. 29 CFR § 1620.20(a); Brennan v Prince William Hospital Corp. (1974, CA4) 503 F2d 282, 9 BNA FEP Cas 979, 8 CCH EPD ¶ 9687, 75 CCH LC ¶ 33149, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392, 11 BNA FEP Cas 576, 9 CCH EPD ¶ 10032.

86. 29 CFR § 1620.20(b).

87. 29 CFR § 1620.20(c); Brennan v Prince William Hospital Corp. (1974, CA4) 503 F2d 282, 9 BNA FEP Cas 979, 8 CCH EPD ¶ 9687, 75 CCH LC ¶ 33149, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392, 11 BNA FEP Cas 576, 9 CCH EPD ¶ 10032.

88. 29 CFR § 1620.20(d).

Third Circuit—Hodgson v Oil City Hospital, Inc. (1972, WD Pa) 363 F Supp 419, 9 BNA FEP Cas 802, 5 CCH EPD ¶ 8412, 70 CCH LC ¶ 32826.

Fourth Circuit—Grove v Frostburg Nat. Bank (1982, DC Md) 549 F Supp 922, 31 BNA FEP Cas 1675, 26 BNA WH Cas 316, 31 CCH EPD ¶ 33606, 96 CCH LC ¶ 34327.

Fifth Circuit—Hodgson v Behrens Drug Co. (1973, CA5) 475 F2d 1041, 9 BNA FEP Cas 816, 5 CCH EPD ¶ 8452, 70 CCH LC ¶ 32844, cert den 414 US 822, 38 L Ed 2d 55, 94 S Ct 121, 9 BNA FEP Cas 1408, 6 CCH EPD ¶ 8861, 72 CCH LC ¶ 32962.

Sixth Circuit—Wirtz v Rainbo Baking Co. (1967, ED Ky) 303 F Supp 1049, 9 BNA FEP

—the extra duties are of only peripheral importance,[89] such as unskilled[90] or manual labor;[91]
—the additional duties are of a type normally performed only by workers earning a lower rate of pay;[92]
—employees outside of the comparison jobs perform the additional duties as their primary responsibilities, but are paid less than employees in the higher paid comparison group;[93]
—the additional duties are exclusively linked to different equipment being used, such as the use of different machines[94] or driving different vehicles.[95]

Conversely, application of these factors will support an employer's defense based on additional duties when the duties are complicated and of more economic importance to the employer,[96] even when a small percentage of the higher paid workers do not actually perform the additional duties.[97]

§ 739. Wages set by a seniority system

One of the statutory defenses available under the Equal Pay Act and Title VII, to pay discrimination claims brought under the equal work standard, involves wage rates established under a bona fide seniority system. Therefore, unless an employee can demonstrate that the seniority system was either adopted or applied with a discriminatory intent,[98] that is, that the system is not "bona fide," wages set by a seniority system constitute a valid defense to claims brought under the equal work standard. If the seniority system is not "bona fide," provisions of a collective bargaining agreement that require unequal rates of pay in conflict with EPA's requirements are void and of no effect.[99]

In order to establish the seniority system defense to pay discrimination

Cas 477, 1 CCH EPD ¶ 9749, 54 CCH LC ¶ 31884.

Eighth Circuit—Wirtz v Meade Mfg., Inc. (1968, DC Kan) 285 F Supp 812, 1 CCH EPD ¶ 9769.

DC Circuit—Goodrich v International Brotherhood of Electrical Workers (1987) 259 App DC 318, 815 F2d 1519, 43 BNA FEP Cas 727, 28 BNA WH Cas 19, 42 CCH EPD ¶ 36926, 106 CCH LC ¶ 34896.

89. 29 CFR § 1620.20(d).

90. Brennan v Prince William Hospital Corp. (1974, CA4) 503 F2d 282, 9 BNA FEP Cas 979, 8 CCH EPD ¶ 9687, 75 CCH LC ¶ 33149, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392, 11 BNA FEP Cas 576, 9 CCH EPD ¶ 10032.

91. Brennan v South Davis Community Hospital (1976, CA10) 538 F2d 859, 13 BNA FEP Cas 258, 12 CCH EPD ¶ 11094, 79 CCH LC ¶ 33402.

92. Brennan v Prince William Hospital Corp. (1974, CA4) 503 F2d 282, 9 BNA FEP Cas 979, 8 CCH EPD ¶ 9687, 75 CCH LC ¶ 33149, cert den 420 US 972, 43 L Ed 2d 652, 95 S Ct 1392, 11 BNA FEP Cas 576, 9 CCH EPD ¶ 10032.

93. 29 CFR § 1620.20(e).

94. 29 CFR § 1620.14(c).

95. Lanegan-Grimm v Library Asso. of Portland (1983, DC Or) 560 F Supp 486, 31 BNA FEP Cas 865, 31 CCH EPD ¶ 33512, 98 CCH LC ¶ 34434.

96. Brennan v Victoria Bank & Trust Co. (1974, CA5) 493 F2d 896, 9 BNA FEPCas 932, 7 CCH EPD ¶ 9358, 74 CCH LC ¶ 33077.

97. Marshall v Building Maintenance Corp. (1978, CA2) 587 F2d 567, 18 BNA FEP Cas 892, 18 CCH EPD ¶ 8680, 84 CCH LC ¶ 33727.

98. Hebert v Monsanto Co. (1982, CA5) 682 F2d 1111, 29 BNA FEP Cas 802, 29 CCH EPD ¶ 32976.

For a discussion of when a seniority system is "bona fide" and a discussion of how the seniority system exception in job discrimination laws affects all terms and conditions of employment, see §§ 706 et seq.

99. 29 CFR § 1620.23.

claims, all seniority standards must be applied on a sex neutral basis,[1] and the defense is only valid to the extent that it accounts for all of the disparity in pay. For example, when seniority only accounted for 20% of the greater pay given to male employees than to their female counterparts, an EPA violation was established entitling the female employees to an award equal to 80% of the male employees' salary.[2] A pay schedule that did nothing more than annually increase an employee's pay, based not on length of service or date of hire, but on the position assigned to the worker in 1975, did not constitute a seniority system defense to a sexual pay disparity claim under Title VII and the EPA.[3]

§ 740. Wages paid under a merit system

One of the statutory defenses available to an employer faced with a pay discrimination claim brought under the EPA or Title VII, in conformity with the equal work standard, permits wages to be based on a merit system. To use this defense under either Title VII[4] or the EPA,[5] the system must be "bona fide." The system will not be bona fide if it is based on an evaluator's "gut feeling,"[6] or other subjective, ill-informed, informal, and unsystematic judgments of an individual's worth or value.[7] Nor do an employee's self-evaluations of merit qualify as "bona fide" merit systems on which pay may be unequally based.[8]

A "bona fide" system is one in which an organized and structured procedure systematically evaluates employees at regular intervals[9] according to predetermined criteria, written or unwritten. However, if the criteria is unwritten it must be made known to employees.[10] Once employees are made aware of the criteria, their failure to comply with the established evaluation process is fatal to their unequal pay claims.[11]

Also, the system must be based on actual performance which can be evaluated. Therefore, the defense cannot be used to justify sexual pay dispari-

1. 29 CFR § 1620.13(c).

2. EEOC v Whitin Machine Works, Inc. (1983, CA4) 699 F2d 688, 35 BNA FEP Cas 583, 31 CCH EPD ¶ 33326, 96 CCH LC ¶ 34325.

3. Mitchell v Jefferson County Bd. of Educ. (1991, CA11) 936 F2d 539, 56 BNA FEP Cas 644, 30 BNA WH Cas 730, 56 CCH EPD ¶ 40897, 119 CCH LC ¶ 35512.

4. 42 USCS § 2000e-2(h).

5. Herman v Roosevelt Federal Sav. & Loan Asso. (1977, ED Mo) 432 F Supp 843, 21 BNA FEP Cas 1199, affd (CA8) 569 F2d 1033, 21 BNA FEP Cas 1206, 15 CCH EPD ¶ 8049, 83 CCH LC ¶ 33621.

6. Grove v Frostburg Nat. Bank (1982, DC Md) 549 F Supp 922, 31 BNA FEP Cas 1675, 26 BNA WH Cas 316, 31 CCH EPD ¶ 33606, 96 CCH LC ¶ 34527.

7. Brock v Georgia Southwestern College (1985, CA11) 765 F2d 1026, 43 BNA FEP Cas 1525, 27 BNA WH Cas 946, 37 CCH EPD ¶ 35470, 103 CCH LC ¶ 34687.

8. Ottaviani v State University of New York (1988, SD NY) 679 F Supp 288, 50 BNA FEP Cas 251, 28 BNA WH Cas 739, 45 CCH EPD ¶ 37720, 108 CCH LC ¶ 35032, affd (CA2) 875 F2d 365, 51 BNA FEP Cas 330, 50 CCH EPD ¶ 39019, cert den (US) 107 L Ed 2d 740, 110 S Ct 721, 51 BNA FEP Cas 1224, 52 CCH EPD ¶ 39540.

9. Wirtz v First Victoria Nat. Bank (1970, SD Tex) 9 BNA FEP Cas 561, 2 CCH EPD ¶ 10297, 63 CCH LC ¶ 32378, affd (CA5) 446 F2d 47, 9 BNA FEP Cas 669, 3 CCH EPD ¶ 8302, 66 CCH LC ¶ 32545.

10. EEOC v Aetna Ins. Co. (1980, CA4) 616 F2d 719, 22 BNA FEP Cas 607, 24 BNA WH Cas 641, 22 CCH EPD ¶ 30881, 88 CCH LC ¶ 33888.

11. Willner v University of Kansas (1988, CA10) 848 F2d 1023, 46 CCH EPD ¶ 38016, cert den (US) 102 L Ed 2d 972, 109 S Ct 840, 48 CCH EPD ¶ 38575.

ties existing at the time employees are hired.[12] Performance under a bona fide merit pay system has been measured by such criteria as ability and skill, speed, accuracy, experience, versatility, dependability, and attitude.[13]

§ 741. Wages paid on an incentive basis

An employer faced with a pay discrimination claim raised under the equal work standard may use the statutory defense under both Title VII and the EPA that the disparity results from the implementation of a system that measures earnings by quantity or quality of production, in other words, an incentive basis. To use this defense in a claim brought under Title VII, there is an additional requirement that the differences in pay be demonstrated not to be the result of intentional discrimination.[14] An incentive system will not justify sexual disparities in hourly wage rates if it is only applied as a percentage of those existing rates.[15]

§ 742. Freedom of religion

Organizations with religious affiliations may claim that the First Amendment permits them to establish pay rates in conformity with religious principles, despite the dictates of federal law. In an instance in which the Equal Pay Act (EPA) was challenged on this basis, the court found that since it was not part of the employer's faith to discriminate in pay for a substantially equal work on the basis of sex, the free exercise clause of that amendment was not violated. Furthermore, the EPA had a secular purpose that did not foster excessive government entanglement nor advance or inhibit a particular religion. Therefore, the establishment clause of that amendment was also not violated.[16]

The EEOC takes the position that religious institutions covered by the EPA or Title VII cannot pay women less than men for equal work, even if that policy is part of its religious beliefs. However, the Commission recognizes that a "ministerial exception" may exist for clergy or individuals functioning as clergy, in order to protect First Amendment religious freedoms.[17] The "ministerial exception" for individuals functioning as clergy, under the First Amendment's prohibition against excessive entanglement of government and religion, did not apply to EPA violations against teachers and administrators of a church-sponsored school.[18]

Observation: Title VII's compensation discrimination prohibitions have also been challenged on the basis of constitutional claims involving religious freedom. Such challenges have arisen in the context of fringe

12. EEOC v Missouri, Dept. of Social Services, Div. of Corrections (1985, ED Mo) 617 F Supp 1152, 46 BNA FEP Cas 849, 37 CCH EPD ¶ 35391, 105 CCH LC ¶ 34823.

13. Coe v Cascade Wood Components, Inc. (1988, DC Or) 48 BNA FEP Cas 664, 29 BNA WH Cas 19.

Practice Aids.— Guidance on formulating performance appraisal systems that not only comply with job discrimination laws, but which also assist in implementing other employer concerns. Employment Coordinator ¶ PM-14,-001 et seq.

14. 42 USCS § 2000e-2(h).

15. Shultz v Saxonburg Ceramics, Inc. (1970, WD Pa) 314 F Supp 1139, 9 BNA FEP Cas 546, 2 CCH EPD ¶ 10222, 63 CCH LC ¶ 32564.

16. Russell v Belmont College (1982, MD Tenn) 554 F Supp 667, 30 BNA FEP Cas 1111, 25 BNA WH Cas 1128, 31 CCH EPD ¶ 33520, 96 CCH LC ¶ 34356.

17. EEOC Policy Statement No. N-915.049, 2/1/90.

18. EEOC v Tree of Life Christian Schools (1990, SD Ohio) 751 F Supp 700, 54 BNA FEP Cas 548, 30 BNA WH Cas 49, 55 CCH EPD ¶ 40450, 117 CCH LC ¶ 35417.

benefit claims,[19] and such claims also occasionally involve attempts to justify increased pay for "heads of households".[20]

Caution: Constitutional religious freedom defenses are not limited to claims raised under the equal work standard,[21] but may also be raised in defense of an intentional or impact discrimination pay claim under Title VII and the ADEA,[22] and the same constitutional principles will apply in each instance.

(B) Factor Other Than Sex Justifying Different Pay [§§ 743–757]

§ 743. Jobs paid under a neutral evaluation and classification system

The primary purpose behind providing the statutory defense under the EPA and Title VII of "a factor other than sex" for pay discrimination claims based on the equal work standard, is to allow an employer to use gender-neutral job evaluation and classification systems.[23]

Observation: The difference between a defense based on a neutral evaluation and classification system and a defense under a merit system is that the former system evaluates jobs, while the latter system evaluates employees' job performance.

Thus, an employer's classification system establishing minimum and maximum pay ranges as well as minimum experience and education requirements for each job, provided a legitimate defense for paying a female employee who "under filled" her job classification a lower rate of pay than males who had already obtained the credentials necessary to acquire higher classified jobs.[24]

However, there are limitations imposed on this defense.The use of a gender-neutral classification system, without more, will not enable an employer to meet its burden of proving that a factor other than sex is responsible for a wage differential. A job classification system may serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue. Without a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the EPA, through which many pretexts for discrimination would be sanctioned. An employee may not lose an EPA claim after making out a prima facie case of wage discrimination simply because an employer chooses to call one employee a cleaner and another employee a custodian, when it could reasonably be found that the cleaner performs equal work to that of custodians.[25] Other employers were unable to successfully demonstrate the defense when the job evaluation and classification systems were:

19. §§ 801 et seq.

20. § 751.

21. § 728.

22. §§ 758 et seq.

23. County of Washington v Gunther (1981) 452 US 161, 68 L Ed 2d 751, 101 S Ct 2242, 25 BNA FEP Cas 1521, 26 CCH EPD ¶ 31877.

24. Strecker v Grand Forks County Social Service Bd. (1980, CA8) 640 F2d 96, 24 BNA FEP Cas 1019, 25 BNA FEP Cas 1761, 24 BNA WH Cas 1149, 24 CCH EPD ¶ 31426, 27 CCH EPD ¶ 32190, 90 CCH LC ¶ 33964, adopted, en banc (CA8) 34 BNA FEP Cas 1008, 24 BNA WH Cas 1431.

25. Aldrich v Randolph Cent. School Dist. (1992, CA2) 58 BNA FEP Cas 1373.

—arbitrary in relation to the actual work being performed.[26]
—unequally applied in similar situations based on the sex of the employee.[27]
—relying on traditional job classification systems in an industry with long standing, historical sex discrimination and segregation, and, therefore, perpetuated that discrimination.[28]
—based on different levels of supervision that did not actually exist.[29]
—sexually segregated and the employer actively discouraged females from seeking positions in the higher paid classification.[30] Furthermore, the mere fact that a job classification is sexually integrated will not, by itself, establish a "factor other than sex" defense when employees of different sexes are paid unequally for jobs that require equal pay under the equal work standard.[31]

§ 744. Wages established by market rate

A common "factor other than sex" statutory defense used by employers in responding to pay discrimination claims raised under the equal work standard, is that pay differences are attributable to the market rate at which particular jobs and services are valued throughout the industry, or in a specific geographical location. Evidence of the current market rate justifying pay disparities is often essential to a successful presentation of this defense. For example, where an employer continued to pay a differential based on a market rate evaluation occurring long before it took action to adjust its pay structure for competitive purposes, its reliance on the out-of-date evaluation was inadequate to defend an alleged violation of the EPA.[32]

Similarly, market rate defenses have failed to establish "a factor otherthan sex" defense under the EPA or Title VII when:

—the employer did not articulate any systematic or rational application of market factors;[33]
—the market rate was based on a mere presumption or assumption that women would work for a lesser wage than men doing substantially similar work;[34]
—the defense was no more than a "last ditch" effort to avoid liability under the EPA, and was based on nothing more than the employer's

26. Shultz v Hayes Industries, Inc. (1970, ND Ohio) 19 BNA WH Cas 447.

27. Marshall v J. C. Penney Co. (1979, ND Ohio) 464 F Supp 1166, 22 BNA FEP Cas 613, 19 CCH EPD ¶ 9092, 86 CCH LC ¶ 33772.

28. Thompson v Sawyer (1982) 219 App DC 393, 678 F2d 257, 28 BNA FEP Cas 1614, 25 BNA WH Cas 614, 28 CCH EPD ¶ 32668, 94 CCH LC ¶ 34186.

29. Grayboff v Pendelton (1984, ND Ga) 36 BNA FEP Cas 350, 26 BNA WH Cas 1609, 35 CCH EPD ¶ 34775, 102 CCH LC ¶ 34624.

30. EEOC v Madison Community Unit School Dist. (1987, CA7) 818 F2d 577, 43 BNA FEP Cas 1419, 28 BNA WH Cas 105, 43 CCH EPD ¶ 37142, 106 CCH LC ¶ 34908.

31. Peters v Shreveport (1987, CA5) 818 F2d 1148, 43 BNA FEP Cas 1822, 28 BNA WH Cas 169, 43 CCH EPD ¶ 37160, 107 CCH LC ¶ 34936, cert dismd 485 US 930, 99 L Ed 2d 264, 108 S Ct 1101.

32. Corning Glass Works v Brennan (1974) 417 US 188, 41 L Ed 2d 1, 94 S Ct 2223, 9 BNA FEP Cas 919, 7 CCH EPD ¶ 9374b, 74 CCH LC ¶ 33078.

33. Chang v University of Rhode Island (1985, DC RI) 606 F Supp 1161, 40 BNA FEP Cas 3, 39 CCH EPD ¶ 35891.

34. Horner v Mary Institute (1980, CA8) 613 F2d 706, 21 BNA FEP Cas 1069, 24BNA WH Cas 436, 22 CCH EPD ¶ 30565, 88 CCH LC ¶ 33880.

superior bargaining position vis-a-vis a particular woman or women as a group compared to male counterparts;[36]

—market rate evaluations were unequally applied based on sex insofar as the employer met or exceeded market rates in establishing male salaries, but ignored them in paying lower salaries to women performing equal work.[38]

However, employers have successfully used a market rate defense when market factors fully explained disparities between males and females doing substantially equal work, such as when a male employee rejected a salary offer equivalent to the pay of a comparable situated female worker, and the employer risked losing him to another employer if additional compensation was not provided.[37] Likewise, when an employer negotiated a male employee's salary based on the amount it would take to secure his particular skills, which were needed for the business, the male employee's higher salary than that of a female counterpart was justified under Title VII.[38] However, an employer cannot use a market rate defense to justify racial disparities in pay under Title VII if the defense is only based on the greater bargaining power of one race.[39]

One of the most frequent market rate defenses used by employers in defending pay discrimination claims under the equal work standard involves a policy of basing salary, in whole or part, on an employee's previous pay. This specific application of the defense is discussed at ¶ EP-20,221.

Other economic defenses used by employers in addressing pay discrimination claims under the equal work standard are discussed elsewhere.[40]

§ 745. Salary based on employee's previous pay

A common use of the market rate defense as part of a "factor other than sex" statutory justification for dissimilar pay in jobs otherwise requiring equal pay under the equal work standard, is the policy of basing wages or salary, in whole or part, on an employee's previous wage or salary. The Eleventh Circuit has held that such a policy cannot, by itself, justify a pay disparity prohibited by the EPA.[41] However, more limited usage of this policy has provided a successful defense, especially when implemented to protect an employee's pay. For instance, where an employer partially based the pay rate of beginning supervisory employees on the rate of pay they previously earned in their nonsupervisory positions in order to encourage highly paid nonsupervisory staff to compete for the higher level positions without risking a cut in pay, the policy provided a valid defense to an EPA claim.[42]

35. Hodgson v Brookhaven General Hospital (1970, CA5) 436 F2d 719, 9 BNA FEP Cas 579, 3 CCH EPD ¶ 8065, 64 CCH LC ¶ 32431; Futran v Ring Radio Co. (1980, ND Ga) 501 F Supp 734, 24 BNA FEP Cas 776, 24 BNA WH Cas 1107, 24 CCH EPD ¶ 31410.

36. Chang v University of Rhode Island (1985, DC RI) 606 F Supp 1161, 40 BNA FEP Cas 3, 39 CCH EPD ¶ 35891.

37. Horner v Mary Institute (1980, CA8) 613 F2d 706, 21 BNA FEP Cas 1069, 24 BNA WH Cas 436, 22 CCH EPD ¶ 30565, 88 CCH LC ¶ 33880.

38. Walter v KFGO Radio (1981, DC ND) 518 F Supp 1309, 26 BNA FEP Cas 982, 28 CCH EPD ¶ 32497.

39. Fisher v Dillard University (1980, ED La) 499 F Supp 525, 26 BNA FEP Cas 184, 26 CCH EPD ¶ 32089.

40. § 746.

41. Glenn v General Motors Corp. (1988, CA11) 841 F2d 1567, 46 BNA FEP Cas 1331, 28 BNA WH Cas 1033, 46 CCH EPD ¶ 37921, 108 CCH LC ¶ 35054, cert den (US) 102 L Ed 2d 367, 109 S Ct 378, 48 BNA FEP Cas 232, 29 BNA WH Cas 752, 50 CCH EPD ¶ 39164, 110 CCH LC ¶ 35125.

42. Groussman v Respiratory Home Care, Inc.

Caution: Since pay discrimination may be prohibited by Title VII even if the claim does not arise under the equal work standard, a potential violation of the statute may be alleged under the adverse impact method of proof[43] when an employer bases a salary on an employee's previous pay.

§ 746. Employer's economic situation affects pay

Employers have sometimes been able to successfully defend pay discrimination claims brought under the equal work standard when an existing economic situation provides the statutory "factor other than sex" rational for the resulting unequal pay for equal work. For example, an employer's policy of automatically increasing the salaries of employees who received offers from competitors presented a valid economic rational for the fact that a female employee was receiving higher pay than her male counterpart.[44]

Another court has held that an employer's imposition of a salary ceiling on new employees in order to cut costs so that the lowest bid could be made on a government contract, was a potential "factor other than sex" defense for a wage disparity raised under the EPA.[45]

§ 747. Increased pay for employee potential

Employers have sometimes attempted to justify different pay for jobs falling within the equal work standard by asserting that the pay of the higher paid employee is based on that employee's potential enhanced economic value, and, as such, constitutes the statutory defense of a "factor other than sex" validating the disparity in pay. In order to successfully present this defense, the employer must specifically identify the superior qualities justifying the pay disparity.[46] Mere speculation that the employee may contribute to a greater degree at some unspecified future date is insufficient to justify a current pay disparity.[47]

Paying for the increased potential value of an employee has been found a legitimate defense to pay discrimination claims when linked to a bona fide training program,[48] or to a foreseeable business expansion which will result in the employee performing more valuable work in the near future,[49] or when the increased value is clearly based on the employee's past experience doing the same job.[50]

Conversely, increased experience in the same job or credentials for work of

(1986, CD Cal) 40 BNA FEP Cas 122, 27 BNA WH Cas 853.

43. As to the disparate impact theory of proof, generally, see §§ 2703 et seq.

44. Winkes v Brown University (1984, CA1) 747 F2d 792, 36 BNA FEP Cas 120, 26 BNA WH Cas 1533, 35 CCH EPD ¶ 34726, 102 CCH LC ¶ 34608.

45. Price v Lockheed Space Operations Co. (1988, CA11) 856 F2d 1503, 47 BNA FEP Cas 1851, 28 BNA WH Cas 1462, 47 CCH EPD ¶ 38339, 110 CCH LC ¶ 35130.

46. Thompson v John L. Williams Co. (1988, MD Ga) 686 F Supp 315, 46 BNA FEP Cas 1378, 5 BNA IER Cas 623, 28 BNA WH Cas 1636, 51 CCH EPD ¶ 39259, 109 CCH LC ¶ 35103.

47. Marshall v Security Bank & Trust Co. (1978, CA10) 572 F2d 276, 17 BNA FEP Cas 631, 16 CCH EPD ¶ 8188, 83 CCH LC ¶ 33642.

48. As to increased pay for trainees, see § 749.

49. EEOC v Aetna Ins. Co. (1980, CA4) 616 F2d 719, 22 BNA FEP Cas 607, 24 BNA WH Cas 641, 22 CCH EPD ¶ 30881, 88 CCH LC ¶ 33888.

50. Bullock v Pizza Hut, Inc. (1977, MD La) 429 F Supp 424, 26 BNA FEP Cas 313, 14 CCH EPD ¶ 7608, 81 CCH LC ¶ 33550.

more value will not justify an increased amount of pay based on an employee's potential, if the employer cannot identify how the experience will enable the employee to perform more competently or efficiently in the future,[51] or if the credentials possessed by the employee are unnecessary to the performance of the anticipated future position.[52] Furthermore, the increased pay must be commensurate with the anticipated economic benefits to the employer in order for the defense to be successful. For example, the capability of higher paid employees to perform work worth two cents per hour more to the employer did not justify paying them 21 cents per hour more than employees of a different sex who lacked such capabilities.[53]

§ 748. Increased cost of employing one sex

If jobs performed by men and women satisfy the equal work standard,[54] an employer cannot use the "factor other than sex" defense available under Title VII or the EPA[55] for paying one sex less because its average cost of employing workers of one sex, as a group, is greater than employing workers of the opposite sex, as a group.[56]

§ 749. Increased pay for trainees

A specific aspect of an employer's "factor other than sex" defense[57] to a pay discrimination claim brought under the equal work standard, based on increased pay for employee potential,[58] often involves paying more to a trainee who may be temporarily engaged in lesser paid activities, but who will assume the responsibilities and duties of a higher paid position in the future. This defense will be successful if the trainee's lesser valued tasks are only part of a "bona fide" training program which familiarizes him with various aspects of the employer's operation,[59] by rotating him through the various departments under specified guidelines.[60] The defense will not succeed if the "training program" is so poorly constructed and defined[61] or so informal, unpredictable and indistinguishable from the normal course of business,[62] that it fails to establish a credible basis for the unlawful pay differential. Furthermore, when no women participated in training programs despite their ostensible qualifica-

51. Thompson v John L. Williams Co. (1988, MD Ga) 686 F Supp 315, 46 BNA FEPCas 1378, 3 BNA IER Cas 623, 28 BNA WH Cas 1636, 51 CCH EPD ¶ 39259, 109 CCH LC ¶ 35103.

52. 29 CFR § 1620.15(a).

53. Shultz v Wheaton Glass Co. (1970, CA3) 421 F2d 259, 9 BNA FEP Cas 502, 9 BNA FEP Cas 508, 2 CCH EPD ¶ 10077, 61 CCH LC ¶ 32284, cert den 398 US 905, 26 L Ed 2d 64, 90 S Ct 1696, 9 BNA FEP Cas 1408, 2 CCH EPD ¶ 10151, 62 CCH LC ¶ 32333.

54. § 728.

55. § 736.

56. 29 CFR § 1620.22.

57. § 736.

58. § 747.

59. Wirtz v Citizens First National Bank (1968, ED Tex) 18 BNA WH Cas 472, 58 CCH LC ¶ 32050.

60. Usery v Johnson (1977, DC ND) 436 F Supp 35, 20 BNA FEP Cas 1036, 14 CCH EPD ¶ 7644, 81 CCH LC ¶ 33524.

61. EEOC v First Citizens Bank (1985, CA9) 758 F2d 397, 45 BNA FEP Cas 1337, 36 CCH EPD ¶ 35156, 102 CCH LC ¶ 34670, cert den 474 US 902, 88 L Ed 2d 228, 106 S Ct 228, 48 BNA FEP Cas 786, 38 CCH EPD ¶ 35547, 103 CCH LC ¶ 34703; Brennan v First Nat'l Bank (1974, MD Ga) 16 BNA FEP Cas 1097, 75 CCH LC ¶ 33152.

62. Shultz v First Victoria Nat. Bank (1969, CA5) 420 F2d 648, 9 BNA FEP Cas 496, 2 CCH EPD ¶ 10075, 61 CCH LC ¶ 32260.