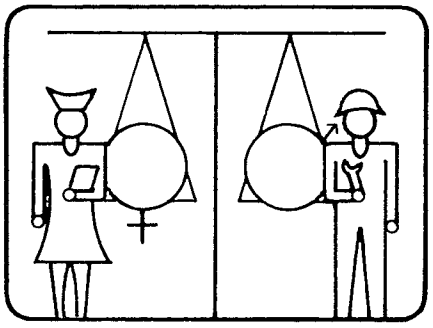

The Courts

Rulings on Comparable Worth Lie Ahead

by Jody George

The jury is out on comparable worth. Lawyers and legal analysts from Washington, D.C., to Hawaii are scurrying around trying to figure out the implications of a recent court case in the state of Washington. Given the evolution of wage discrimination laws, their job is not easy.

The Equal Pay Act of 1963

Until the mid-1900s, employers routinely paid men and women different wages for performing the same job. As the women's movement gained momentum in the late 1950s, women began to speak out against this practice and exert political pressure. In response, Congress passed the Equal Pay Act of 1963.

The Equal Pay Act prohibits employers from paying different wages to men and women who perform *substantially the same work.* For example, under the Equal Pay Act, an employer may not pay different wages to a male and a female computer programmer if the two have the same level of education, do the same job, and have worked for the same employer for the same number of years.

Under the Equal Pay Act, an employer may, however, pay different wages to men and women if the pay differences are based on:

- a seniority system;
- a merit system;
- measurements by quantity or quality of production; and
- any factor *other than sex.*

These exceptions have been important in litigation that affects the issue of comparable worth.

Title VII of the Civil Rights Act of 1964

Congress also prohibited employers from discriminating on the basis of sex under Title VII of the Civil Rights Act of 1964. Title VII and the Equal Pay Act differ in two ways.

First, the Equal Pay Act is more narrow in scope. It applies *only* when an employer pays women different wages for performing substantially the same jobs as men. *Title VII, on the other hand, is a general prohibition against sex discrimination and applies in situations where the Equal Pay Act does not.* For example, some employers traditionally refused to hire women for certain jobs. Title VII makes this refusal illegal, but the Equal Pay Act does not. The Equal Pay Act only applies *after a woman has been hired.* In other words, the Equal Pay Act only requires that *if* women are hired, they must be paid the same wages for performing the same jobs as men.

Second, Congress had different intentions when enacting the Equal Pay Act and Title VII. With the Equal Pay Act, Congress specifically intended to address discrimination in pay for women workers. The inclusion of the word "sex" in Title VII was secondary to the main issue at hand—race discrimination.

As introduced, Title VII was intended to prohibit discrimination on the basis of race, color, religion or national origin in any phase of

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employment—hiring, promotion, pay, terms, conditions, or privileges. Meanwhile, the civil rights battles were raging. In an apparent attempt to defeat Title VII, then Rep. Howard W. Smith (D-Va.) added the word "sex" to "race, color, religion and national origin." Much to the surprise of Title VII opponents, the law passed anyway, with sex discrimination prohibitions included.

During the debates over Title VII, several senators expressed concern that insufficient attention had been paid to possible inconsistencies between it and the Equal Pay Act. In an attempt to rectify the problem, then Sen. Wallace F. Bennett (R-Utah) proposed an amendment. His amendment allowed employers to pay different wages to men and women who perform the same work if the difference is authorized by the Equal Pay Act (remember the four exceptions to this Act, mentioned above). The "Bennett Amendment" passed.

The inclusion of the Bennett Amendment created an ambiguity in the law. The Bennett Amendment seemed to restrict the scope of Title VII, but by how much?

County of Washington, Oregon v. Gunther

In 1981, the U.S. Supreme Court took a step toward determining how much the Bennett Amendment restricts Title VII. In the landmark case of *County of Washington, Oregon v. Gunther,* the Court ruled that the Bennett Amendment does not restrict Title VII's prohibition against sex discrimination to claims of equal pay for equal work.[1] The Court said that women's jobs do not have to be equal to, or compared with, men's jobs in order to bring charges of discrimination under Title VII.

The *Gunther* decision opened the door for sex discrimination lawsuits based on questions other than equal pay for equal work. But the Supreme Court in *Gunther* did not rule on the issue of comparable worth. That issue has yet to be decided.

The Future of Comparable Worth And the Courts

Lawsuits involving comparable worth issues are pending in Hawaii and Wisconsin. But, at the moment, the case to watch is *American Federation of State, County and Municipal Employees (AFSCME) v. Washington.*[2]

In *AFSCME,* decided in late 1983, U.S. District Court Judge Jack Tanner ruled that the state of Washington was guilty of sex-based discrimination. His decision hinged on the fact that the state of Washington had officially adopted a system of evaluating the worth of state jobs but had not, after 10 years, funded a pay system to implement it. Tanner ordered immediate relief *plus* back pay to women, who were making about 20 percent less than they should, according to the state's own study. Washington officials say that the decision, which was based on a wage discrimination statute, could cost up to $377 million to implement.[3]

The state of Washington is appealing the *AFSCME* decision to the Ninth Circuit of the U.S. Court of Appeals. Recently, in *Spaulding v. University of Washington,* this same Ninth Circuit rejected a comparable worth claim by the female nursing faculty of the University of Washington.[4] It is not clear, however, to what extent *Spaulding* will be considered precedent when *AFSCME* is decided. The facts of *AFSCME* and of *Spaulding* are different, and the state employees will probably test lines of reasoning not addressed in the nursing faculty case.

What is clear is that the pressure to raise women's wages will persist and that *AFSCME* is being watched closely by other states. As legal analyst Keon S. Chi said recently, "Comparable worth has become one of the most prominent and important issues of the 1980s, and whatever comes out of the *AFSCME* case may have a lasting impact on compensatory practices everywhere."[5] □

FOOTNOTES

1. *County of Washington, Oregon, et al. v. Gunther, et al.,* 452 U.S. 161 (1981).

2. *AFSCME, et al. v. The State of Washington, et al.,* 578 F. Supp. 846 (Western District, Wash.), 1983.

3. The $377 million figure is from a telephone interview with Dan Keller, Office of Financial Management, state of Washington. Wash. Gen. Stat. 49.12.175: *"Wage discrimination due to sex prohibited—Penalty—Civil Recovery.* Any employer in the state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes or who shall pay any female a less wage, be it time or piece work, or salary, than is being paid to males similarly employed, or in any employment formerly performed by males, shall be guilty of a misdemeanor. If any female employee shall receive less compensation because of being discriminated against on account of her sex, and in violation of this section, she shall be entitled to recover in a civil action the full amount of compensation that she would have received had she not been discriminated against. In such action, however, the employer shall be credited with any compensation which has been paid to her account. A differential in wage between employees based in good faith on a factor or factors other than sex shall not constitute discrimination within the meaning of RCW 49.12.010 through 49.12.180."

4. *Spaulding v. University of Washington,* 35 FEP Cases 217 (1984).

5. Keon S. Chi, "Comparable Worth: Implications of the Washington Case," *State Government,* Vol. 57, No. 2, 1984, p. 34.