Comparable Worth in the United States and the Canadian Province of Ontario

Kathleen Weaver

Follow this and additional works at: http://lawdigitalcommons.bc.edu/iclr

Part of the Comparative and Foreign Law Commons

Recommended Citation
Kathleen Weaver, Comparable Worth in the United States and the Canadian Province of Ontario, 14 B.C. Int'l & Comp. L. Rev. 137 (1991), http://lawdigitalcommons.bc.edu/iclr/vol14/iss1/7
Comparable Worth in the United States and the Canadian Province of Ontario

INTRODUCTION

In the last decade, the continuing wage disparity between male and female workers has garnered both national and international attention.1 Although a portion of this wage gap can be attributed to nondiscriminatory factors, studies confirm that a significant portion of the wage gap is due to gender-based wage and job discrimination.2 The theory of comparable worth requires employers to institute equal pay for different jobs that are comparable in value or worth, but are filled predominantly by women and men respectively.3 Comparable value is generally determined by comparing each of such female- and male-dominated jobs in terms of the skill, effort, responsibility, and working conditions required.4 This theory attempts to eliminate that segment of discrimination attributable to employers paying lower wages for traditional “female” jobs than they would pay for traditional “male” jobs.5

Comparable worth experts differ significantly in their opinions regarding the plausibility and merits of the comparable worth theory.6 Advocates of comparable worth legislation argue that wages for traditional female jobs have been intentionally depressed through years of discrimination by virtue of their female

1 See generally Nat’l Committee on Pay Equity, Closing the Wage Gap: An International Perspective 3 (1988) [hereinafter Closing the Wage Gap].
4 Closing the Wage Gap, supra note 1, at 3.
5 Weiler, supra note 3, at 1728.
status. Opponents of comparable worth legislation argue that the lower wages paid to females in traditional female jobs reflect objective market factors such as lower levels of skill, decreased demand for labor, and increased supply of labor rather than relative merit.

In addition, opponents of comparable worth legislation estimate the cost of implementing pay equity for jobs of equal value at 5 percent of the employer's total payroll. This added cost arguably would result in substantial added production costs, squeezing an employer's profit margin and seriously threatening the continued vitality of the business. Advocates of comparable worth legislation respond that these costs to the employer are "reasonable expenses necessary to eliminate discrimination as a cost of doing business."10

The United States has yet to adopt legislation incorporating the comparable worth theory. This Comment focuses on the progress of comparable worth theory in the United States in contrast to that in Ontario, which recently adopted the most progressive comparable worth legislation in the world.11 Part I of this Comment examines the legislative and judicial history of equal pay in the United States. Part II then discusses Canada's

---

7 See Blumrosen, supra note 6, at 415–28; see also Survival of a Theory, supra note 6, at 2–4.

8 See Nelson, supra note 6, at 243–63; see also Weiler, supra note 3, at 1756–59. This theory by opponents of comparable worth has been incorporated into the "market defense" theory. See Brodin, Costs, Profits, and Equal Employment Opportunity, 62 NOTRE DAME L. REV. 318, 356 (1987). The market defense is not available to employer-defendants against claims brought under the Equal Pay Act. The market defense, however, has been permitted by courts in Title VII cases. See, e.g., American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722–23 (7th Cir. 1986) (practice of paying market rate is not actionable under Title VII despite an employer’s knowledge that its wage structure disadvantages women and its ability to alter wage structure in favor of comparable worth); American Fed’n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985) (the decision to base compensation on the market instead of on the theory of comparable worth is too complex to be appropriate under this type of claim); Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), cert. denied, 469 U.S. 1036 (1984); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982). At least one court has questioned the validity of the market rate defense under Title VII despite an employer’s knowledge that its wage structure disadvantages women and its ability to alter wage structure in favor of comparable worth; American Fed’n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985) (the decision to base compensation on the market instead of on the theory of comparable worth is too complex to be appropriate under this type of claim); Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), cert. denied, 469 U.S. 1036 (1984); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982). At least one court has questioned the validity of the market rate defense under Title VII. See Koub v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) (allowing the employer to use prior salary as the basis for a new employee's salary only if the employer had an acceptable business reason for doing so).

9 Weiler, supra note 3, at 1771–72.

10 Brodin, supra note 8, at 359.

11 See An Act to Provide For Pay Equity, ONT. REV. STAT. ch. 34 (1987) [hereinafter Ontario Act].
federal equal pay standard and the circumstances preceding Ontario's adoption of the Ontario Pay Equity Act (Ontario Act). Part III of this Comment contrasts the provisions of the Ontario Act with present U.S. law on pay equity. This Comment concludes that current U.S. law has had little impact in narrowing the wage gap, and that the United States, therefore, should adopt comparable worth legislation on a national level. In this regard, the Ontario Act should serve as an appropriate model for effectively eliminating gender-based discrimination in the wage structure.

I. U.S. PROGRESS IN ADOPTING A COMPARABLE WORTH STANDARD

A. The Equal Pay Act of 1963

Despite slow and steady progress by women in the labor market in both the United States and Ontario, the wage gap has remained fairly constant. Since 1955, for example, the U.S. female-male annual earnings ratio of full time, nonseasonal workers has averaged approximately 60 percent. This figure represents the total wage gap including that portion attributable to sex-based wage discrimination. In 1973 and 1974, the ratio representing the total female-male wage gap was as low as 57 percent. In 1987, this ratio reached a new high of 65 percent.

The Equal Pay Act of 1963 (Equal Pay Act) was an important first step towards addressing gender-based wage discrimination in the United States. The Equal Pay Act requires employers to

---


13 Briefing Paper #1, supra note 12, at 1–2.

pay males and females equal pay for the same jobs. The Equal Pay Act states that equal pay is required for

equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.15

A prima facie claim under the Equal Pay Act is established when a plaintiff demonstrates that she earns a lower wage than a male who performs equal work within the same establishment.16 Although the legislative history of the Equal Pay Act demonstrates a clear congressional intent to reject the comparable worth standard which advocates equal pay for different work of equal value as opposed to equal pay for the same work, the courts have allowed some flexibility for plaintiffs by interpreting the equal work standard to mean "substantially equal."17 Under this standard, male and female jobs challenged under the Act do not have to be identical but merely substantially equal in terms of skill, effort, responsibility, or working conditions.18

For example, in applying the Equal Pay Act standard, the Supreme Court has found the jobs of male and female industrial inspectors to be substantially equal despite the fact that men were required to work the day and night shifts as opposed to women who worked only the day shift.19 The Third Circuit, in applying the substantially equal standard, has equated male and female "selector-packers" even though the male employees performed extra tasks.20 Similarly, the Fourth Circuit has equated male hospital orderlies and female nurses aids despite extra tasks performed by the orderlies.21 The Fifth Circuit also has applied the substantially equal standard, equating the work of female and

18 See Corning Glass, 417 U.S. at 199.
19 Id. at 203 n.24.
20 Shultz, 421 F.2d at 266.
21 Prince Williams Hosp., 503 F.2d at 291.
male retail sales clerks employed within different departments in the same clothing store. Thus, the courts have consistently accorded plaintiffs a degree of flexibility in interpreting the equal work standard.

If a plaintiff can successfully demonstrate that the jobs in question are substantially equal, the burden of proof shifts to the employer-defendant. The defendant must then demonstrate that the difference in pay is validated by one of the Equal Pay Act's four affirmative defenses. An affirmative defense is invalid if it contains any evidence of sex discrimination. In addition, a red-circle rate—that is, "a higher than normal rate given to an employee based on exceptional reasons" such as a temporary reassignment—cannot be used to maintain wage differentials for equal work over an extended period of time. Similarly, an employer cannot argue that a pay differential is based on an employee's status as head of a household or that the average cost of employing a male is lower than for a female. If the plaintiff can prove the existence of a prohibited sex-based wage differential, the employer is required to increase the wage rate of the lower paid sex.

Thus, the scope of the Equal Pay Act seems very narrow, restricted solely to males and females performing the same type of work. The courts have not considered any claims under the Act alleging that two disparate occupations are comparable in value. Instead, plaintiffs have brought these types of claims under Title VII of the Civil Rights Act of 1964 (Title VII).

B. Title VII

Congress enacted Title VII of the Civil Rights Act of 1964, prohibiting employment and wage discrimination, subsequent to

---

22 City Stores, 479 F.2d at 240-41.
23 See supra notes 16-22 and accompanying text.
24 46 Fed. Reg. 43,852 (§ 1620.12(c)).
25 46 Fed. Reg. 43,852 (§ 1620.12(a)).
26 Id. "A seniority system which provides periodic increases is invalid [under the Equal Pay Act] if it prescribes dual wage rates for men and women performing equal work."
27 46 Fed. Reg. 43,852 (§ 1620.15(b)).
30 46 Fed. Reg. 43,852 (§ 1620.15(a)).
31 See, e.g., American Nurses' Ass'n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986); American Fed'n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1401-05 (9th Cir. 1985).
the adoption of the Equal Pay Act. Title VII forbids discrimination in all aspects of employment including compensation on the basis of “race, color, religion, sex, or national origin.” Title VII in its original form did not contain the term “sex.” This term was inserted in an unsuccessful last minute attempt to block the bill’s passage. The Senate considered the effect of Title VII and its potential interaction with the provisions of the Equal Pay Act. The result was the Bennett Amendment which exempted from Title VII those employers that “differentiate on the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of [the Equal Pay Act].” On its face, this provision appears to vitiate the inclusion of the sex-based discrimination prohibition.

Initially, most courts considering wage discrimination claims under Title VII held that the Bennett Amendment required plaintiffs to meet the Equal Pay Act’s equal work standard. Recent courts, however, have concluded that the Bennett Amendment does not require plaintiffs to meet the Equal Pay Act’s narrow equal work standard. These courts have interpreted the amendment to incorporate only the Act’s affirmative defenses. In 1981, the Supreme Court resolved this conflict in County of Washington v. Gunther, concluding that the Bennett Amendment “merely incorporates” the Equal Pay Act’s affirmative defenses and does not restrict plaintiff’s claims to the Equal Pay Act’s narrow equal work standard.

---

35 Id. Representative Howard Smith of Virginia opposed the passage of Title VII and proposed an amendment which added the term “sex” to the language of Title VII in an effort to get others, who had supported the bill to aid blacks, to reject it. Bellace, Comparable Worth: Proving Wage Based Discrimination, 69 IOWA L. REV. 655, 665 n.54 (1984).
36 See Miller, supra note 34, at 882.
38 See, e.g., Power v. Barry County, 539 F. Supp. 721, 725 (W.D. Mich. 1982); Lemons v. City and County of Denver, 620 F.2d 228, 229–30 (10th Cir. 1980); Ammons v. Zia Co., 448 F.2d 117, 120 (10th Cir. 1971). Recently, however, courts have interpreted the Bennett Amendment to incorporate in Title VII only the Equal Pay Act’s affirmative defenses. See, e.g., County of Washington v. Gunther, 452 U.S. 161, 171 (1981); International U. of Elec. v. Westinghouse Elec., 631 F.2d 1094, 1099 (3rd Cir. 1980).
C. Gunther: Interpretation of the Bennett Amendment and Title VII

In *County of Washington v. Gunther*, respondents, female guards in a female section of a county jail, charged that they were paid less than male guards in a male section of the jail. The district court noted that the male guards supervised ten times as many prisoners per guard than the female guards and that more of the female guards' work was devoted to clerical duties. In dismissing respondents’ claims, the court noted that the jobs were not “substantially equal,” and that as a matter of law, sex-based wage discrimination claims could not be brought under Title VII unless the claim satisfied the standards of the Equal Pay Act. The Ninth Circuit reversed and stated that the claim was not barred merely because the jobs were not substantially equal. The court of appeals remanded the case to the district court with instructions to consider evidence demonstrating that part of the disparity between the female and male pay rates was attributable to sex discrimination. The Supreme Court affirmed, noting that respondents’ failure to meet the Equal Pay Act’s equal work standard did not preclude a cause of action under Title VII.

It is significant that the *Gunther* majority expressly stated that it “did not decide . . . the precise contours of lawsuits challenging sex discrimination in compensation under Title VII.” Rather, the Court merely determined that the Bennett Amendment did not require respondents to meet the equal work standard of the Equal Pay Act, but was instead constructed merely to incorporate the Equal Pay Act’s affirmative defenses. The Court emphasized, however, that respondents’ claims were not based on “the controversial concept of ‘comparable worth.’” The Court noted further that respondents could not succeed under Title VII unless they could demonstrate that their wages were depressed as a result of intentional sex discrimination.

*Gunther* resolved the meaning of the Bennett Amendment but failed to establish whether plaintiffs could present evidence demonstrating alleged wage disparities between the sexes in different jobs of comparable value. Although it did not entirely rule out

---

40 *Id.* at 165 (citing *Gunther v. County of Washington*, 20 FEP Cases 788, 791 (Ore. 1976)).

41 *Id.* at 165 (citing *Gunther v. County of Washington*, 602 F.2d 882, 891 (9th Cir. 1979), supplemental opinion on denial of rehearing, 623 F.2d 1302, 1313, 1317 (1980)).

comparable worth claims brought under Title VII, the Court urged caution against recognizing such causes of action.\textsuperscript{43}

D. \textit{The Disparate Impact and Disparate Treatment Theories Under Title VII}

Claims under Title VII have been brought under two theories of discrimination: the disparate impact theory and the disparate treatment theory.\textsuperscript{44} The disparate impact theory was first recognized in \textit{Griggs v. Duke Power Co.}\textsuperscript{45} In that case, the Supreme Court determined that race discrimination could be established by a showing that a facially neutral employment practice operates to discriminate on the basis of race or upon members of a protected group.\textsuperscript{46}

The courts, however, have shown a strong reluctance to apply the disparate impact theory to claims based on comparable worth under Title VII.\textsuperscript{47} In \textit{American Federation of State, County and Municipal Employees (AFSCME) v. Washington}, for example, the State of Washington had hired an outside consultant to perform a comprehensive evaluation of its wage structure. In the course of this study, the consultant determined that women were paid lower wages than men in comparable state government jobs staffed primarily by women.\textsuperscript{48} The State of Washington ignored the study in its determination of appropriate compensation. The \textit{AFSCME} court concluded that the State of Washington's decision to base its compensation on competitive market wages rather than a comparable worth study did not violate Title VII.\textsuperscript{49} The \textit{AFSCME} court stated that there was no evidence that the State of Washington declined to raise the wages of particular workers because these workers were female.\textsuperscript{50} The Ninth Circuit noted that claims

\begin{itemize}
  \item \textsuperscript{43} See Gunther, 452 U.S. at 166.
  \item \textsuperscript{44} Dowd, \textit{supra} note 42, at 838.
  \item \textsuperscript{45} Griggs v. Duke Power Co., 401 U.S. 424, 432–33 (1971) (employer could not require general job qualifications such as the need for a high school diploma or a minimum score on an aptitude test if these qualifications produced a disparate impact on minority applicants).
  \item \textsuperscript{46} \textit{Id.} at 431.
  \item \textsuperscript{47} See, \textit{e.g.}, American Nurses' Ass'n v. Illinois, 783 F.2d 716, 721 (7th Cir. 1986); American Fed'n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985).
  \item \textsuperscript{48} AFSCME, 770 F.2d at 1405–06.
  \item \textsuperscript{49} \textit{Id.; see also} Spaulding v. University of Washington, 740 F.2d 686, 708 (1984).
  \item \textsuperscript{50} AFSCME, 770 F.2d at 1405–06.
\end{itemize}
based on disparate impact were "confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process." The appeals court further noted that it did not believe that this type of claim was appropriate under a disparate impact theory.

The disparate impact theory continues to make little progress in the United States.51 In fact, the Supreme Court's recent decision in Wards Cove Packing Co. v. Atonio actually raised the plaintiff's burden of proof in disparate impact cases. The Court held that in order to establish a prima facie case of Title VII disparate impact, a plaintiff must go "beyond the need to show that there are statistical disparities in the employer's workforce."52 The Court found that the plaintiff must also "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities."53 Even if the plaintiff can meet this stringent burden of proof, the defendant no longer has to show a business necessity, but, instead, need only produce some business justification for its practices. The Court will also consider "the availability of alternative practices to achieve the same business ends" with less discriminatory impact. The burden of proof remains with the plaintiff at all times. Wards Cove Packing further constricts the application of the disparate impact theory introduced in Griggs, and limits the use of litigation as a means of achieving pay equity.54

The alternative cause of action available to plaintiffs follows from the disparate treatment theory. Under this theory, a plaintiff must demonstrate a prima facie case of sex discrimination by a preponderance of the evidence under Title VII.55 Unlike the

55 American Fed'n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1406-07 (9th Cir. 1985).
disparate impact theory, the disparate treatment theory requires the plaintiff to prove a discriminatory intent or motive by the employer. Discriminatory intent may be derived from circumstantial evidence.

Under the disparate treatment theory, a majority of courts have found proof of discriminatory intent based solely on comparable worth studies and job comparisons to be insufficient. As the Ninth Circuit noted in *AFSCME*, "we reject a rule that would penalize rather than commend employers for their effort and innovation in undertaking such a study."\(^{56}\) Despite the general consensus among courts not to allow *AFSCME*-type comparable worth studies to serve as proof of intentional discrimination, a few courts have allowed recovery on the basis of this type of evidence of intentional discrimination.\(^{57}\) In *Taylor v. Charley Brothers*, for example, the district court found that the plaintiff met the burden of proof by demonstrating wage discrimination through job segregation, lower compensation for female jobs, and job comparisons commissioned by both the plaintiff and the defendant.\(^{58}\) *Taylor*, however, is an exception to the growing trend in courts to disallow proof of discriminatory intent based on comparable worth studies.\(^{59}\)

Neither the disparate impact theory nor the disparate treatment theory under Title VII have proven truly successful in U.S. courts.\(^{60}\) As a result, the comparable worth doctrine has made little progress in assuring equal pay for equal value in the United States.\(^{61}\)

II. THE STATUS OF EQUAL PAY LEGISLATION IN CANADA AND THE PROVINCE OF ONTARIO

A. Canadian Equal Pay Legislation

Canada, on a national scale, has seen little progress in the narrowing of the wage gap.\(^{62}\) In 1911, employed women earned

\(^{56}\) Id. at 1408; see also American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir. 1986).
\(^{58}\) Taylor, 25 Fair Empl. Prac. Cas. (BNA) at 614.
\(^{59}\) See supra notes 55–56 and accompanying text.
\(^{61}\) See supra notes 12–13 and accompanying text.
\(^{62}\) Abella, supra note 12, at 185.
53 percent of the average wage for men. Over the next seventy years, this average wage improved by only 2 to 11 percentage points. In Ontario as of 1987, the wage gap was 36 percent, with the average full time salary of women at $20,710 and the average full time salary of men at $32,120.63

The legislatures of Canada and Ontario, however, have taken significant steps towards adopting a comparable worth standard.64 In 1978, Canada enacted the Canadian Human Rights Act (CHRA or Act) which required pay equity for all federal employees and other specified employees protected under CHRA.65 These employees, however, constitute only 10 percent of the female work force. CHRA, therefore, falls short of protecting the vast majority of female workers.66

Section 11 of the Act requires equal pay for work of equal value.67 Section 11 provides: “It is discriminatory practice for an employer to establish and maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.” The language “work of equal value” is the U.S. equivalent of comparable worth.68 The Act also established the Canadian Human Rights Commission (CHRC), which is responsible for administration and enforcement of the Act’s provisions.69 The CHRC investigates complaints from individuals and assists in the negotiation of dispute settlement.70

Although the Act is significantly broader in scope than U.S. equal pay legislation, its narrow application is limited to federal and other specified employees. Each Canadian province must enact its own equal pay legislation to protect the balance of the female work force.71 The most recent and progressive example

---

65 Canadian Human Rights Act, supra note 64.
66 CLOSING THE WAGE GAP, supra note 1, at 3.
67 Canadian Human Rights Act, supra note 64.
68 CLOSING THE WAGE GAP, supra note 1, at 10.
70 Id. at §§ 32(1), 38(1)(2). Since its establishment, twenty-four cases have been brought before the Canadian Human Rights Commission (CHRC) involving nearly 8000 workers with awards totaling approximately $37 million including back pay. CLOSING THE WAGE GAP, supra note 1, at 11.
71 See generally, CLOSING THE WAGE GAP, supra note 1.
of equal pay legislation is the Ontario Pay Equity Act (Ontario Act), effective January 1, 1990.\textsuperscript{72}

B. \textit{Equal Pay Legislation in Ontario}

In 1951, Ontario enacted legislation that required equal pay for equal work, imposing a standard similar to that under the U.S. Equal Pay Act.\textsuperscript{73} Subsequently, the government of Ontario recognized that such legislation, in combination with Canada's federal legislation (Section 11 of the CHRA), would not effectively eliminate the pay differential between men and women in jobs of equal value.\textsuperscript{74} In response, Ontario introduced pay equity laws for public service and for the broader public sector. The legislature combined these two legislative initiatives into Bill 154, now known as the Ontario Pay Equity Act.

Concurrent with the introduction of Bill 154 into the Ontario legislature, the Ontario government published its Green Paper on Pay Equity. The Green Paper specified six principles for Ontario's pay equity legislation.\textsuperscript{75} The Ontario Act subsequently incorporated many of the premises of the Green Paper.\textsuperscript{76}

The Ontario Act is the first legislation in the world to "proactively require implementation of pay equity in both public and private sectors."\textsuperscript{77} The Act requires that the pay in jobs historically held by women match the pay for jobs of comparable skills that

\textsuperscript{72} Ontario Act, \textit{supra} note 11.

\textsuperscript{73} Todres, \textit{With Deliberate Care: The Framing of Bill 154}, 16 \textit{MANITOBA L.J.} 221 (1987).

\textsuperscript{74} \textit{See} Todres, \textit{supra} note 73, at 221–22. In 1985, the Canadian province of Manitoba passed the Manitoba Pay Equity Act (MPEA) which required pay equity for public employees and certain other specified employees. The MPEA is proactive as compared to "complaint driven," similar to the Canadian Human Rights Act. \textit{Closing the Wage Gap, supra} note 1, at 11.

\textsuperscript{75} Todres, \textit{supra} note 73, at 221–22. The six principles of the Green Paper consist of the following:

1) The purpose of pay equity would be to correct gender-based pay discrimination only, not to address the issue of general wage levels;
2) Only female employees and employees in female predominated job groups would be eligible for pay adjustments;
3) Pay equity would not require jobs to have identical value—a range of values would be permitted;
4) Equal value comparisons would be limited to a given employer’s establishment—in other words, comparisons would not be made between wages paid by one employer and those paid by another;
5) The legislation would not be retroactive—no retroactive adjustments would be required; and
6) Wage reductions would not be permitted.

\textsuperscript{76} \textit{See} Ontario Act, \textit{supra} note 11.

\textsuperscript{77} \textit{Closing the Wage Gap, supra} note 1, at 11.
are usually held by men. The Ontario Act covers approximately 1.7 million working women.

III. PAY EQUITY UNDER THE ONTARIO ACT

A. Mechanics of the Ontario Act

The Ontario Act seeks to eliminate "that portion of the wage gap that has resulted from the historical undervaluation of women's work." The Ontario Act requires pay equity in all public sector establishments and in private sector establishments with ten or more employees. Furthermore, the Ontario Act requires all employers in public and private sector firms with 100 or more employees to develop and post pay equity plans. Private sector firms with ten to ninety-nine employees must achieve pay equity; they may post plans, but are not required to do so. Compliance is required by January 1, 1990.

The Ontario Act designates a mandatory posting and wage adjustment date for each employer depending upon the number of employees in each establishment. Public employers are the first group required to make adjustments, followed by large private firms, and then smaller private companies. All employers

78 See Questions and Answers, supra note 63, at 2.
80 Questions and Answers, supra note 63, at 2. It is important to note that the Ontario Act does not apply to women who work in an all female environment. Todres, supra note 73, at 225. The Ontario legislature, however, committed itself to study this situation further and to make recommendations.
81 "Pay equity is achieved when the job rate for the female-job class that is the subject of the job comparison is at least equal to the job rate for a male-job class in the same establishment where the work performed in the two job classes is of equal or comparable value." Ontario Act, supra note 11, at § 6.
82 For a list of all employers in the public sector, see id.
83 Employers in the private sector are defined as "all employers not in the public sector." Id. at § 1(1).
84 Id. at § 3(1).
85 Id. at § 11. An employee does not include a student employed for his/her vacation period. Id. at § 1(1).
86 Id. at §§ 11, 12.
87 Id. at §§ 18, 19.
88 Id. at § 10; Questions and Answers, supra note 63, at 3.
89 Where the Ontario Act requires that a document describing that employer's pay equity program be posted in the workplace, the employer should post the document in a prominent area. Ontario Act, supra note 11, at § 1(2).
90 Questions and Answers, supra note 63, at 3.
must begin the introduction of pay equity within a six year period. This phase-in allowance will benefit smaller employers who are less able financially to implement the pay equity program.

In order to implement pay equity, employers must first identify the number of pay equity plans required for its organization. This is accomplished by determining the identity of the employer, the number of employees, and the number of establishments within the organization. An establishment consists of all the employees of an employer within a geographic division. An employer must prepare a pay equity plan for each establishment, and if an establishment contains bargaining and nonbargaining units, the employer must complete a plan for each unit.

Second, an employer must determine the number of female-job classes and male-job classes contained within the establishment. Generally, a female-job class is one in which 60 percent or more of the members are female, and a male-job class is one in which 70 percent or more of the members are male. Criteria for determining a job class include: similar duties and responsibilities; similar requisite qualifications; same compensation schedules, salaries, grades or ranges of salary rates; and employment by similar recruitment methods. This determination is important because pay raises are based on an employee's membership in a determined female- or male-job class.

Third, once an employer determines its female- and male-job classes, the employer must apply an appropriate gender-neutral method of comparison to determine whether pay equity exists. Employers are free to develop individualized pay equity plans for

---

92 Ontario Act, supra note 11, at § 1(1).
93 Series #15, supra note 91, at 5.
94 Under the Act, a female-job class means, "except where there has been a decision that a job class is a male-job class as described in clause (b) of the definition of male-job class; [where] (a) a job class in which sixty percent or more of the members are female . . . ." Ontario Act, supra note 11, at § 1(1).
95 Under the Act, a male-job class means, "except where there has been a decision that a job class is a female-job class as described in clause (b) of the definition of 'female-job class’ . . . a job class in which seventy percent or more of the members are male . . . ." Ontario Act, supra note 11, at § 1(1).
96 Series #15, supra note 91, at 5.
97 See Ontario Act, supra note 11, at § 1(1).
98 Ontario Act, supra note 11, at § 1(1); see also Series #15, supra note 91, at 5.
99 Ontario Act, supra note 11, at § 12; see also Series #15, supra note 91, at 5.
Furthermore, the Ontario Act does not include a model job evaluation system to be used by employers. The Ontario Act only requires that an employer's system base its comparison on skill, effort, responsibility, and working conditions. The system must be free of any gender discrimination in the determination of salaries and wages. The Ontario Act recognizes that wages for jobs are determined by a number of factors including job content and the market factors of supply and demand. Pay equity under the Ontario Act does not disregard the general market rate for male-dominated and gender-neutral jobs; it merely addresses the inequities within a company. Employers collect information from their employees regarding the content of their job and use this information to compute the relative value of each job to an employer. Job comparison is strictly a means to identify the relative worth of jobs within an employer's organization. In unionized workplaces, the jobs are rated by a committee composed of management and union representatives. Because employers do not have to utilize a specific evaluation system, each employer can choose the type of gender-neutral evaluation system which they feel will best suit their establishment and work structure.

Finally, after employers collect job information, they must compare the compensation of job classes determined to have similar value. Data is categorized according to male- and female-job class, value, and job rating. When comparing values, compensation levels include the cost of benefits received by both job classes. Where it is found that job classes are of equal value and the female jobs are underpaid, compensation in the female-dominated-job classes must be increased. Both sexes in these job classes will receive adjustments. Under the Ontario Act, the

---

100 Ontario Act, supra note 11, at § 13; Questions and Answers, supra note 63, at 7.
101 Questions and Answers, supra note 63, at 7.
102 Ontario Act, supra note 11, at § 5(1).
103 SERIES #15, supra note 91, at 5.
104 THE PAY EQUITY COMM., PAY EQUITY IMPLEMENTATION SERIES #1 7 (1988) [hereinafter SERIES #1].
105 THE PAY EQUITY COMM., HOW TO DO PAY EQUITY JOB COMPARISONS 20 (1989) [hereinafter JOB COMPARISONS].
106 Freudenheim, supra note 79, at A18, col. 1.
107 SERIES #15, supra note 91, at 6.
108 Ontario Act, supra note 11, at § 1(1).
109 Id. at § 6.
110 Questions and Answers, supra note 63, at 2.
salary of male-dominated classes will never be decreased to achieve pay equity. This provision ensures equal treatment to both female and male employees and further protects members in a male-job class from unfair wage reduction.

The Ontario Act provides for periodic adjustments in wages to achieve pay equity. Each employer's pay equity plan must provide that the female-job class with the lowest job rate will receive salary increases higher than those for other female-job classes until the former's rate is equal to the lesser of either the wage required to achieve pay equity or the wage of the female class with the next lowest job rate. An employer's first adjustments in compensation should not be less than either "[1 percent] of the employer's payroll during the twelve month period preceding the first adjustments; [or] the amount required to achieve pay equity." The drafters of the Ontario Act also provided for phasing in implementation and costs to ease public concern regarding the cost of pay equity.

The Ontario Act incorporates five specific exceptions to the pay equity requirement: a formal seniority system; a temporary employer training assignment equally available to male and female employees; a merit compensation system based on formal performance ratings; red-circling, which involves the withholding of some or all of the increases normally given to an employee whose job was found to be overvalued; and a skill shortage resulting in a temporary increase in compensation. An employer has the burden of proof to demonstrate that either all or part of the disparity in wages is due to one of these permissible differences. These exceptions recognize that pay equity is not necessarily fair and deserved in all specific employment instances and that employers need limited discretion to assure fairness in these specific cases.

---

111 Ontario Act, supra note 11, at § 9.
112 Id. at § 13(6).
113 Id. at § 13(3).
114 Id. at § 13(4).
115 Todres, supra note 73, at 223–24. Many opponents of the Ontario Act argued that small private companies would be unable to afford the closing of the wage gap which would result in companies forcing the additional costs on to consumers. Opponents also argued that the cost of pay equity would discourage foreign investment.
116 Ontario Act, supra note 11, at § 8(1).
The Ontario Act also established the Pay Equity Commission (Commission) to aid in the administration and enforcement of the Act.\textsuperscript{117} The Commission consists of a Pay Equity Office and a Pay Equity Hearings Tribunal (Hearings Tribunal).\textsuperscript{118} The Pay Equity Office’s duties include the enforcement of the Ontario Act and mandates of the Hearings Tribunal.\textsuperscript{119} The Pay Equity Office also develops educational materials, seminars, and workshops designed to aid employer’s compliance with the Act.\textsuperscript{120} In establishing the Pay Equity Office, the Ontario legislature recognized that its pay equity program could not succeed unless employers have full access to informational materials on pay equity, and assistance in implementing pay equity plans.

Enforcement of the Ontario Act is also essential to the success of pay equity in Ontario. The Ontario Act establishes the Hearings Tribunal, a quasi-judicial body with exclusive jurisdiction to determine all questions connected with the Act.\textsuperscript{121} All of its decisions are conclusive. The Ontario Act provides that any employer, employee, group of employees, or bargaining agent may file a complaint with the Hearings Tribunal simply by asserting a violation of the Ontario Act.\textsuperscript{122} The Ontario Act should increase the Hearings Tribunal’s enforcement efforts by simplifying the procedures through which individual employees may bring actions against their employers. The Hearings Tribunal appoints a review officer who investigates the complaint and may attempt to effectuate a settlement.\textsuperscript{123} A hearing will then be held if the parties fail to settle the claim or request a hearing, or if the review officer refers the matter to the Hearings Tribunal.\textsuperscript{124} The system should be efficient and effective in settling pay equity disputes because fewer claims will be adjudicated by the Hearings Tribunal. The Hearings Tribunal may fine an employee not more that $2,000 in the case of an individual, and not more than $25,000 in any other case.\textsuperscript{125}

\textsuperscript{117} Id. at § 27.
\textsuperscript{118} Id. at § 27(2).
\textsuperscript{119} Id. at § 33(1).
\textsuperscript{120} Id. at § 33(2).
\textsuperscript{121} Id. at § 30(1).
\textsuperscript{122} Id. at § 22.
\textsuperscript{123} Id. at § 23(1).
\textsuperscript{124} Id. at § 25(1).
\textsuperscript{125} Id. at § 26(1).
B. A Comparison of the Ontario Act with the Equal Pay Act and Title VII

The wage gap in the United States has remained fairly constant throughout the past forty years despite the adoption of the Equal Pay Act and Title VII, in contrast to the gradually declining wage gap in Canada and Ontario. Opponents of comparable worth legislation argue that the wage gap is the result of objective market factors and that the gap will naturally decline over an extended period of time as women continue to enter male-dominated positions in the workforce. Nevertheless, statistics demonstrate that the past fifty years of increasing female participation in the workforce have witnessed little progress in the elimination of the wage gap in the United States. Apparently then, the wage gap is not the result of objective market factors but rather, years of intentional discrimination against females in the workforce. Unlike the United States, the Ontario legislature has recognized that legislation incorporating a comparable worth standard is the only means of eliminating gender-based wage discrimination.

The Ontario Act's comparable worth standard is substantially broader in scope than the Equal Pay Act's narrow equal work standard, and embraces a standard which U.S. courts have consistently refused to apply under Title VII. For example, in Gunther, although the Supreme Court did not entirely rule out the possibility of comparable worth claims under Title VII, the Court emphasized that respondents' claims were not premised on the comparable worth concept. Since Gunther, U.S. courts have continued to reject claims based on the theory of comparable worth. Plaintiffs have thus been unsuccessful in obtaining any remedy for claims premised on wage discrimination in jobs of

126 See Briefing Paper #1, supra note 12, at 2.
127 Nelson, supra note 6, at 243–63.
128 Briefing Paper #1, supra note 12, at 2; see also supra notes 12–13 and accompanying text.
129 Blumrosen, supra note 6, at 415–28.
130 See Ontario Act, supra note 11.
131 See, e.g., County of Washington v. Gunther, 452 U.S. 161, 166 (1981); American Nurses' Ass'n v. Illinois, 783 F.2d 716, 720–21 (7th Cir. 1986); American Fed'n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1401 (9th Cir. 1985).
132 Gunther, 452 U.S. at 166.
133 See, e.g., American Nurses' Ass'n, 783 F.2d at 720–21; AFSCME, 770 F.2d at 1407.
equal value. U.S. courts will only validate a remedy pursuant to the Equal Pay Act's equal-pay-for-equal-work standard.

Under the Ontario Act, the relative value of jobs is determined by employer-implemented job evaluation systems. 134 U.S. courts, however, continually disallow a plaintiff's use of job evaluations to prove wage discrimination. 135 This current trend to further restrict plaintiff's use of comparable worth studies as evidence of wage discrimination is partially due to the refusal of U.S. courts to find fault based on the disparate impact theory. 136 Instead, U.S. courts have entertained claims under the disparate treatment theory, which requires plaintiffs to demonstrate an employer's intent or motive to discriminate.

In contrast, the Ontario Act does not distinguish between intentional and unintentional discrimination by an employer. 137 The Ontario Act recognizes that wage discrimination which results from the historical undervaluation of women's work should be eliminated regardless of an employer's motive unless, of course, an employer can justify his or her actions under one of the Act's affirmative defenses. 138 Because the Ontario Act does not generally consider an employer's motive, courts can employ objective criteria to readily enforce the Act.

Examination of the Ontario Act, the Equal Pay Act, and Title VII reveals a number of similar provisions concerning the elimination of gender-based discrimination in wages. 139 Under the Ontario Act, employers perform job evaluations on the basis of skill, effort, responsibility, and working conditions to determine whether pay equity exists. 140 These four factors are almost identical to those used to define the basis for determining "equal work" under the Equal Pay Act. 141 It is evident, therefore, that the Ontario and U.S. legislatures both accept the use of these four factors in the comparison of jobs. 142

The U.S. legislature and courts, however, only appear to validate the use of these factors in the comparison of equal work, as

---

134 Ontario Act, supra note 11, at § 12.
135 See, e.g., American Nurses' Ass'n, 783 F.2d at 720–21.
136 Id.
137 See Ontario Act, supra note 11.
138 QUESTIONS AND ANSWERS, supra note 63, at 2. See also Ontario Act, supra note 11.
140 Ontario Act, supra note 11, at § 5(1).
142 See supra notes 140–41 and accompanying text.
opposed to an equal value standard.\textsuperscript{143} In disallowing the use of comparable worth studies based on job evaluations, the Ninth Circuit noted that studies based on the four factors contained too many complex variables to demonstrate wage discrimination by the State of Washington.\textsuperscript{144} U.S. courts allow some flexibility in establishing a prima facie case of wage discrimination under the Equal Pay Act by defining the Act's equal work standard as "substantially equal," as opposed to "identical." The courts have refused, however, to expand the standard to include a comparison of different jobs of comparable value.\textsuperscript{145} The next logical step for U.S. courts is to extend their recognition of the validity of these four factors to their use in comparable worth studies. Such recognition would be a significant and necessary progression towards implementing a comparable worth standard in the United States.

Further, the Ontario Act, the Equal Pay Act, and Title VII each require employers to raise the compensation of female employees in order to eliminate discrimination. A male's salary may never be decreased to achieve pay equity.\textsuperscript{146} This ensures equal treatment for both sexes and provides security to male workers.

Another significant congruity between the Ontario Act, the Equal Pay Act, and Title VII is that each piece of legislation incorporates affirmative defenses available to the employers.\textsuperscript{147} Under all three Acts, employers do not have to pay equal wages if they can demonstrate that a wage discrepancy is the result of either a merit or seniority system.\textsuperscript{148} Red-circling is also an exception available to employers.\textsuperscript{149}

The Ontario Act places the burden of proof on the employer to demonstrate that one of the affirmative defenses under the Act apply.\textsuperscript{150} Similarly, the Equal Pay Act and Title VII traditionally placed the burden of proof on employers.\textsuperscript{151}

\begin{flushright}
\textit{In Wards Cove}
\end{flushright}

\begin{itemize}
\item \textsuperscript{143} See, e.g., American Nurses' Ass'n v. Illinois, 783 F.2d 716, 720–21 (7th Cir. 1986); American Fed'n of State, County and Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1406–07 (9th Cir. 1985).
\item \textsuperscript{144} See, e.g., AFSCME, 770 F.2d at 1406.
\item \textsuperscript{145} See supra notes 17–23 and accompanying text.
\item \textsuperscript{146} See Ontario Act, supra note 11, at § 9; 46 Fed. Reg. 43,852 (§ 1620.15).
\item \textsuperscript{147} See Ontario Act, supra note 11, at § 8(1); see also 29 U.S.C. § 206(d). The Gunther court also interpreted the Bennett Amendment to Title VII to incorporate these exceptions. See County of Washington v. Gunther, 452 U.S. 161, 171 (1981).
\item \textsuperscript{148} See Ontario Act, supra note 11, at § 8(1); 29 U.S.C. § 206(d) (1982).
\item \textsuperscript{149} See Ontario Act, supra note 11, at § 8(1); see also 46 Fed. Reg. 43,852 (§ 1620.15).
\item \textsuperscript{150} See Ontario Act, supra note 11, at § 8(1).
\item \textsuperscript{151} 46 Fed. Reg. 43,852 (§ 1620.12(c)).
\end{itemize}
Packing, however, the Court implied that the burden of proof in wage discrimination claims remains with the plaintiff-employee at all times.\textsuperscript{152} The employer need only demonstrate some business justification for its practices. As a result, the Ontario Act provides greater protection to employees against liberal application of employer exceptions than its U.S. counterparts.\textsuperscript{153}

In addition, both the Ontario Act and Title VII contain a limited market defense available to employers.\textsuperscript{154} The Ontario Act contains a very narrow market exception when employers are forced to pay higher wages due to a skill shortage causing temporary inflation in compensation.\textsuperscript{155} The market defense available to employers under Title VII has been interpreted by U.S. courts as much broader, falling under the exception of "a factor other than sex."\textsuperscript{156} U.S. employer-defendants have been allowed to demonstrate that a wage was the result of objective market factors such as supply and demand. U.S. courts, however, have refused to allow this market defense for claims brought under the Equal Pay Act because of the Equal Pay Act's narrow equal work standard.\textsuperscript{157} Nevertheless, the availability of this market defense to U.S. employer-defendants in Title VII suits makes it too easy to defend against plaintiff's claims of unfair gender-based wage discrimination. In addition, because the wage gap is the apparent result of the historical undervaluation of female work and not objective market factors, U.S. courts should not recognize the market defense as a valid defense of wage discrimination.\textsuperscript{158}

Finally, although the cost to U.S. employers of implementing pay equity for jobs of equal value could be high, these costs can be seen as reasonable expenses necessary to eliminate discrimination and can be justified as a cost of doing business.\textsuperscript{159} With careful drafting, U.S. legislators can allow for the gradual phasing in of implementation and costs—as provided for by the Ontario Act—thereby easing employers' concerns while establishing pay equity in jobs of equal value in the United States.

\begin{footnotes}
\textsuperscript{153} See Ontario Act, \textit{supra} note 11.
\textsuperscript{154} See id. \textit{See also} 42 U.S.C. § 2000e–1 to -17 (1982).
\textsuperscript{155} See Ontario Act, \textit{supra} note 11, at § 8(1).
\textsuperscript{156} See \textit{supra} note 8 and accompanying text.
\textsuperscript{157} Brodin, \textit{supra} note 8, at 356.
\textsuperscript{158} See Blumrosen, \textit{supra} note 6, at 415–28; \textit{see also} Brodin, \textit{supra} note 8, at 356.
\textsuperscript{159} Brodin, \textit{supra} note 8, at 359.
\end{footnotes}
CONCLUSION

While the comparable worth theory has seen little progress in the U.S. legislative and judicial branches, other nations have achieved significant advances. The most progressive comparable worth legislation worldwide appears to be the Ontario Act, proactively requiring implementation of pay equity plans for both public and private employers.160 Whether the Ontario Act will prove successful remains to be seen. Nevertheless, future efforts of nations to implement comparable worth legislation may depend on its success in reducing the wage gap. Current U.S. legislation has done little to narrow this wage disparity. Congress should examine the language of the Ontario Act and adopt similar comparable worth legislation in an effort to eliminate the gender-based wage gap in the United States.

Kathleen Weaver

160 See Ontario Act, supra note 11.