
Christine Y. Martin

*University of Nebraska College of Law*

Follow this and additional works at: [https://digitalcommons.unl.edu/nlr](https://digitalcommons.unl.edu/nlr)

Recommended Citation


Available at: [https://digitalcommons.unl.edu/nlr/vol70/iss3/9](https://digitalcommons.unl.edu/nlr/vol70/iss3/9)

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
The Plaintiff’s Burden in Sex-Based Wage Discrimination Claims—

**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>631</td>
</tr>
<tr>
<td>II.</td>
<td>Background</td>
<td>632</td>
</tr>
<tr>
<td></td>
<td>A. Facts and Issues</td>
<td>636</td>
</tr>
<tr>
<td></td>
<td>B. Opinion</td>
<td>637</td>
</tr>
<tr>
<td>IV.</td>
<td>Analysis</td>
<td>638</td>
</tr>
<tr>
<td></td>
<td>A. <em>UAW’s misplaced reliance on Spaulding v. University of Washington</em></td>
<td>638</td>
</tr>
<tr>
<td></td>
<td>B. Analysis of <em>Spaulding v. University of Washington</em></td>
<td>639</td>
</tr>
<tr>
<td></td>
<td>1. Courts are easily misled by statistical evidence</td>
<td>639</td>
</tr>
<tr>
<td></td>
<td>2. Job evaluations force courts to make standardless decisions</td>
<td>640</td>
</tr>
<tr>
<td></td>
<td>C. Analysis of <em>American Federation of State, County &amp; Municipal Employees v. State of Washington</em></td>
<td>642</td>
</tr>
<tr>
<td></td>
<td>D. <em>UAW moves beyond American Federation of State, County &amp; Municipal Employees v. State of Washington</em></td>
<td>643</td>
</tr>
<tr>
<td></td>
<td>E. Common Law Allocations of the Burden of Proof</td>
<td>644</td>
</tr>
<tr>
<td>V.</td>
<td><em>UAW’s Implications</em></td>
<td>645</td>
</tr>
<tr>
<td></td>
<td>A. Effect of <em>UAW</em></td>
<td>645</td>
</tr>
<tr>
<td></td>
<td>B. Suggestions</td>
<td>646</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. State of Michigan (UAW)\(^1\) is the most recent interpretation of a plaintiff's evidentiary burden under a Title VII claim of sex-based wage discrimination. UAW held that job evaluation studies showing pay differentials between female and male dominated jobs of equal worth are insufficient to prove intentional discrimination.\(^2\) The court's holding was not required by previous case law and serves to make sex-based wage discrimination claims more difficult to prove than other Title VII claims. A plaintiff bringing a sex-based wage discrimination claim can no longer create an inference of intent; the plaintiff must prove intent.

This Note examines those arguments addressing the issue of intent and analyzes the effect of the court's holding.\(^3\) First, the Note introduces the UAW case, its facts, and the arguments related to intent that the court relied on. Second, this Note analyzes the court's justifications for holding job evaluations insufficient to prove discrimination. The Note focuses on the court's erroneous interpretation of previous discrimination cases involving statistical evidence, the court's unprecedented and unwise decision that employers should be able to rely on the market to set wages, and the court's failure to consider traditional considerations in allocating the burden of proof. The Note then addresses the court's illogical concerns about imposing a wage scale on employers. The Note concludes that the UAW decision effectively denies employees their Title VII claims by disproportionately increasing the plaintiff's burden in these cases.

Finally, the Note suggests that shifting the burden of proof to the employer would permit employees to bring claims and still protect the employer's interests. A model for this allocation is presented along with a discussion as to how this shift would address valid concerns raised by the court in UAW, including the employer's disincentive to conduct job evaluation studies if the studies could be used to create an irrebuttable presumption of discrimination.

---

2. Id. at 769.
3. This Note does not address the legislative history of either the Equal Pay Act or Title VII. Congressional intent has already been the subject of exhaustive analyses and further discussion at this point would only obscure this note's focus on the element of intent in sex-based wage discrimination claims. For an analysis of the legislative history of Title VII, see County of Wash. v. Gunther, 452 U.S. 161, 190 (1981) (Rehnquist, J., dissenting).
II. BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation . . . because of such individual's . . . sex."4 Until 1981, the status of wage claims under Title VII was unclear. Some contended these claims could only be made if the plaintiffs were paid less for performing the same job. In 1981 the United States Supreme Court in County of Washington v. Gunther ruled otherwise and held Title VII claims of sex-based wage discrimination were not limited to the confines of the Equal Pay Act.5 The Court held Title VII prohibited sex-based wage discrimination regardless of whether the wage differential existed between employees holding the same or different jobs.6 The Court did not, however, address the merits of the employees' claim in the case. Instead, the Court merely noted that the plaintiffs should be able to recover if they could establish the pay differential was due to "intentional sex discrimination."7 The plaintiffs' evidentiary burden was left unresolved. The nature of this burden has been the focus of current debate.

By referring to "intentional" sex discrimination, the Court seemed to allude to the disparate treatment theory of liability which had been developed to address Title VII discrimination claims.8 To bring a disparate treatment claim, plaintiffs must allege an employer treats some people less favorably because of their race, color, religion, sex, or national origin.9 In sex-based wage discrimination claims the plaintiff must initially show a pattern or practice of intentional salary discrimi-

---

   (a) It shall be an unlawful employment practice for an employer-
   (1) to fail or refuse to hire or to discharge any individual, or otherwise
to discriminate against any individual with respect to his compensation,
terms, conditions, or privileges of employment, because of such individ-
ual's race, color, religion, sex, or national origin. . . .
6. Id. at 166.
7. Id. at 181 (emphasis added).
   Under section 2000e-2(a)(2)(1964), the courts have developed an alternate the-
ory of liability known as disparate impact. Disparate impact analysis relies not on
the employer's intent, but the effect of facially neutral employment practices that
disproportionately impact members of a particular group. Id.
   Courts have limited application of this theory to discrimination in job place-
ment. Spaulding v. University of Wash., 740 F.2d 686 (9th Cir. 1984). The court in
Spaulding argued that sex-based wage discrimination does not fit within the dis-
parate impact model which was developed "to handle specific employment prac-
tices not obviously job related, such as: employer's intelligence tests . . . height
and weight . . . requirements," among others. Id. at 707. Whether this narrow
application was necessary will not be addressed in this note.
nation against a particular sex.10

In general, a claim of intentional Title VII discrimination involves shifting burdens of proof whether the plaintiff asserts racial, religious, or sex discrimination. The plaintiff must establish a prima facie case by proving the employer's intent to discriminate.11 The defendant can rebut the prima facie case by articulating "legitimate, nondiscriminatory" reasons for the difference in treatment.12 The plaintiff then can only prevail by showing the employer's explanation is a pretext for discrimination. The plaintiff must demonstrate that the defendant's explanation does not relate to or justify the defendant's conduct.13

Recognizing the difficulty plaintiffs face in proving intent, the courts have allowed plaintiffs to create an inference of intent by establishing certain facts which eliminated some of the legitimate, nondiscriminatory reasons an employer might have for treating the plaintiffs in a different fashion.14 Under this approach, plaintiffs need to create only an inference of intent, and a very uncertain one at that.

The facts in McDonnell Douglas Corp. v. Green are indicative of the uncertainty surrounding the inference of intent.15 In McDonnell, a racial failure to rehire case, the Court held a plaintiff could create an inference of intent by proving: (1) the plaintiff is a member of a minority group, (2) the plaintiff applied and was qualified for the job for which the employer sought applicants, (3) the plaintiff was rejected, and (4) the position remained open.16 The inference of intentional discrimination created by these four elements is very uncertain; the inference does not discount the possibility that an employee may have been fired for engaging in illegal activities17 or because of personality conflicts with other workers,18 yet the Court willingly inferred an intent to discriminate.19 In addition, the Court in McDonnell allowed the plaintiff to infer discriminatory intent by relying solely on infor-

16. Id. at 802. The Court qualified its holding when it noted these elements did not establish an inflexible standard. Id. at 802 n.13. According to McDonnell and its progeny, the facts will vary in Title VII cases and the prima facie case set out in McDonnell must therefore, vary in these different settings. Id.
17. Id. at 801.
19. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1982). In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) the Court articulated the reasons for using the McDonnell inference: intent can be inferred "'only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" Id. at 254 (quoting Furnco Construction
mation at the plaintiff’s disposal.\textsuperscript{20}

The Supreme Court has indicated statistical evidence alone can establish a prima facie case of intentional discrimination in racial hiring and firing cases.\textsuperscript{21} In \textit{Teamsters}, the Supreme Court noted “[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”\textsuperscript{22} Despite this language, the Supreme Court has not squarely addressed the issue of the sufficiency of statistics because non-statistical evidence also existed in \textit{Teamsters}.

Initially, the lower courts followed the Supreme Court’s guidance. In \textit{Melani v. Board of Higher Education of New York},\textsuperscript{23} a federal district court decision, the plaintiffs proved a prima facie case of sex-based wage discrimination by using statistics that showed a salary differential between male and female employees. The statistics were corrected for productivity-related factors such as years of service and educational level (common variables in job evaluation studies). The Fifth Circuit in \textit{Wilkins v. University of Houston}\textsuperscript{24} held that statistics created a prima facie case when the numbers revealed that females comprised eighteen of twenty-one individuals being paid less than the lowest salary level for a particular job title.

Contrastingly, some lower courts have recently ignored the Supreme Court’s language in \textit{Teamsters} and held statistics based on job evaluation studies are insufficient to prove a prima facie case of sex-based wage discrimination.\textsuperscript{25}

In 1984, the court in \textit{Spaulding v. University of Washington} addressed a discrimination claim brought by the faculty at the University of Washington School of Nursing against the University.\textsuperscript{26} The nursing faculty sought relief by relying on statistics showing a pay differential between the salaries in the School of Nursing and salaries

\textsuperscript{20} See the elements of a prima facie case of racial discrimination listed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1982).
\textsuperscript{24} 654 F.2d 388 (5th Cir. 1981), vacated & remanded on other grounds 459 U.S. 809 (1982), aff’d on remand, 695 F.2d 134 (5th Cir. 1983).
\textsuperscript{25} E.g., International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. State of Mich., 886 F.2d 766 (6th Cir 1989); American Fed’n of State, County & Mun. Employees v. State of Wash., 770 F.2d 1401 (9th Cir. 1985); American Nurses’ Ass’n v. State of Ill., 606 F. Supp. 1313 (N.D. Ill. 1985), rev’d on other grounds, 783 F.2d 716 (7th Cir. 1986).
\textsuperscript{26} Spaulding v. University of Wash., 740 F.2d 686 (9th Cir. 1984).
paid in other academic disciplines. But, when the plaintiffs compiled these statistics, the plaintiffs failed to take into account job experience, education, or job responsibility.

The *Spaulding* court held the plaintiffs' statistics were too unreliable and flawed to support an inference of intent to discriminate. The court reasoned that relying on these statistics would subject employers to "standardless supervision" by the courts.

In 1985 the Ninth Circuit in *American Federation of State, County & Municipal Employees v. State of Washington* (AFSCME), addressed a sex-based wage discrimination claim against the state of Washington brought by state employees in female dominated jobs. The plaintiffs relied on a state commissioned job evaluation that suggested state employees in female dominated jobs were paid approximately twenty percent less than those in male dominated jobs considered to be of comparable worth. Job values were calculated using four criteria: "knowledge and skills, mental demands, accountability, and working conditions."

The *AFSCME* court denied the plaintiffs' claim asserting that the court in *Spaulding* had established statistics were insufficient to prove intentional discrimination and that the employer should be able to take market rates into consideration when setting wages.

In another 1985 decision, the court in *American Nurses' Association v. State of Illinois* also held job evaluation studies were insufficient to prove intentional discrimination. The plaintiffs, various nursing associations and a few individuals, asserted a sex-based wage discrimination claim against the state of Illinois. The plaintiffs relied on a job evaluation study commissioned by the state, but never implemented. The court rejected the plaintiffs' claim because the study did not take into account market factors. The court also expressed strong reservations about the court's competency to impose a wage structure on the employer, a concern the court adopted from the *Spaulding* decision.

The *Spaulding*, *AFSCME*, and *American Nurses'* cases form much of the support for the latest sex-based wage discrimination case. In 1989, the Sixth Circuit in *UAW* reaffirmed these other court decisions by holding job evaluations insufficient to prove intentional

---

27. *Id.* at 703-04.
28. *Id.* at 701.
30. *Id.* at 1403.
31. *Id.* at 1403.
32. *Id.* at 1407.
34. *Id.* at 1318.
III. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA v. MICHIGAN

A. Facts and Issues

In the early 1970s the state of Michigan realized its job classification and compensation system had grown unwieldy. In 1975, Michigan adopted what the Civil Service Commission thought was a much more manageable classification scheme. To implement this system, the state's Classification and Compensation Bureau first divided jobs into eleven service groups that largely paralleled labor market occupational groups. The Bureau then divided each service group into levels and classes using the "Benchmark" system.36

The Benchmark system evaluated jobs on five factors: "knowledge requirements, nature of work, responsibility, personal relationships, and physical effort/work environment."37 By assigning points for each factor and adding up the points for each job, the Bureau was able to rank jobs within service groups and assign the jobs to classes and levels.

Implementation of the Benchmark system revealed some pay disparities between male and female dominated jobs at the same class and level. The state commissioned a comparable worth study. The study compared jobs across service groups and revealed inconsistencies in the assignment of service groups and in the application of the five factors. The study reported that under the Benchmark system, female dominated classes "were paid less than predominantly male classes with similar objective" job scores.38 The study did not reach any conclusions about intentional discrimination.

Employees working in predominately female job classifications filed suit in a class action against the state alleging sex-based wage discrimination in violation of Title VII of the Civil Rights Act of 1964.39 The employees claimed the state's Civil Service Commission had intentionally discriminated against women by implementing a job classification scheme that assigned lower wage rates to female dominated positions. The plaintiffs argued the service groups were based on gender and that jobs were placed in service groups depending on whether they were dominated by males or females. For example, the

36. Id. at 768.
37. Id.
38. Id.
plaintiffs pointed to the fact that the predominantly male class of liquor control clerks had been assigned to Labor & Trades even though the job required clerical responsibilities. If assigned to Clerical, all the wages of clerical workers might have been raised. The employees based their discrimination claim on the job evaluation study which had revealed differences in pay for equivalent jobs.

The district court dismissed the claim after finding insufficient evidence to establish intentional discrimination in the state's classification system. The employees appealed the dismissal to the Sixth Circuit where the lower court's ruling was upheld.

B. Opinion

The Court of Appeals for the Sixth Circuit dismissed the plaintiffs' claim by holding that job evaluation studies were insufficient to prove intentional discrimination. In support of its holding, the court cited the Spaulding decision and expressly advanced many of the arguments articulated by other courts. Relying on American Nurses', the court in UAW asserted that judges lack competency to assign comparative worth to jobs. The court implied that imposing a wage system on the employer would constitute "standardless supervision." This argument can be traced to Spaulding.

Relying on AFSCME, the court in UAW held that employers should be able to look to the market to set wages. The court reasoned that employers, as business people, must be given latitude to compete in the marketplace. The court concluded that since job evaluation studies do not take market factors into account, the studies are insufficient to prove discrimination.

The UAW court also faulted job evaluation studies for failing to take into account "labor trends, economic predictions" and the "employer's economic health." The court set precedent when it appended this list by allowing employers to consider other factors "an employer must weigh before implementing change."

The court also sought to protect the employer's use of job evalua-
tion studies. The court noted, "to wield these studies as swords against well-intentioned employers would quickly spell their demise."50

The following discussion analyzes these arguments and their origins and demonstrates the weaknesses of the courts' reasoning which rejected the sufficiency of statistics based on job evaluation studies.

IV. ANALYSIS

A. UAW's misplaced reliance on Spaulding v. University of Washington

The UAW court argued job evaluation statistics "are insufficient to establish intentional discrimination."51 The court did not offer any rationale for its position, thus in evaluating the soundness of the court's statement, it is appropriate to analyze the source of this holding. UAW cites AFSCME for this proposition. Since the court in AFSCME relied on an argument advanced in Spaulding, an analysis of the argument of Spaulding is illuminating.

The facts in Spaulding are distinguishable from those in UAW. In Spaulding, faculty at the University of Washington School of Nursing sued the university claiming sex-based wage discrimination. The nurses sought relief by relying on statistics showing a pay differential between salaries in the nursing school and those salaries paid faculty members in other academic disciplines. The court criticized these statistics because the plaintiffs had concluded jobs were comparable without taking into consideration job experience, responsibilities, or education.52 After noting the unreliability of the plaintiffs' evidence, the Spaulding court held that the statistics could not be used to infer intentional discrimination.53 In light of the type of statistics being evaluated, it is not clear from the court's holding that it intended to discount the sufficiency of job evaluations per se or whether the court merely wanted to discount unreliable statistics.

Succeeding courts have cited Spaulding for the proposition that job evaluation studies are insufficient to infer intent without determining the accuracy of the statistics in each particular case.54 In UAW, the "statistics" involved were job evaluation studies that involved the same variables the court in Spaulding felt were necessary to have "reliable" statistics. In UAW the study had weighed "five factors: knowledge requirements, nature of work, responsibility, personal relationships, and physical effort/work environment."55 The UAW

50. Id. at 770.
51. Id. at 769.
52. Spaulding v. University of Wash., 740 F.2d 686, 704 (9th Cir. 1984).
53. Id. at 703.
court took no notice of the different types of statistics involved in the Spaulding decision and extended Spaulding by holding that job evaluations are insufficient to prove intentional discrimination.\textsuperscript{56}

In addition to the factual differences between the two cases, the court in UAW further erred by relying on an opinion which suffers from internal inconsistencies. The Spaulding holding suffers from faulty reasoning because the court failed to offer a logical argument supporting its conclusion that statistics cannot be used to infer intent.\textsuperscript{57}

B. Analysis of Spaulding v. University of Washington

1. Courts are easily misled by statistical evidence

The Spaulding court refused the nurses' claim because statistics could be "exaggerated, oversimplified, or distorted to create support for a position not otherwise supported by the evidence."\textsuperscript{58} The court noted statistical evidence has an "inherently slippery nature."\textsuperscript{59} The court seemed to reject the statistics because the court could not recognize whether the numbers were being manipulated; the court was concerned about being misled. After voicing its suspicions about the statistics, however, the court immediately commenced a lengthy discourse addressing the problems with the nurses' statistics. In one breath the court claimed it was incompetent to evaluate statistics, and in the next, the court critically examined the very same statistics.

The court was not misled, but by pointing out the flaws in the statistical study, the court sought to reaffirm its position that statistics have questionable evidentiary value. The flaw in this reasoning is that simply because one study is faulty does not prove that all studies are similarly faulty. The court's holding was correspondingly overbroad. Instead of finding only faulty statistics insufficient to establish a prima facie case, a holding which could be supported by the court's analysis, the court held all statistics insufficient to prove intentional discrimination.\textsuperscript{60}

Even ignoring the inconsistent arguments advanced in Spaulding, it is questionable whether judges should be able to reject statistics simply because they have difficulty understanding the numbers. Statistics find general acceptance in many areas of the law. For example, in antitrust cases, statistics alone are the relevant determinant in estab-

\textsuperscript{56} Id. at 769.
\textsuperscript{57} Id.
\textsuperscript{58} Spaulding v. University of Wash. 740 F.2d 686, 703 (9th Cir. 1984)(quoting Note, Judicial Refinement of Statistical Evidence in Title VII Cases, 13 Conn. L. Rev. 515, 525 (1981)).
\textsuperscript{59} Spaulding v. University of Wash., 740 F.2d 686, 703 (9th Cir. 1984)(quoting Wilkins v. University of Houston, 695 F.2d 134 (5th Cir. 1983)).
\textsuperscript{60} Spaulding v. University of Wash., 740 F.2d 686, 703 (9th Cir. 1984).
lishing the element of market power in a claim of monopolization in violation of section 2 of the Sherman Act.\textsuperscript{61} Although determining a firm's market share is fraught with uncertainties,\textsuperscript{62} courts are willing to undertake the task even though multi-million dollar damage awards depend on the outcome. It is illogical to welcome statistics in the context of antitrust litigation, but reject them in sex-based wage discrimination claims\textsuperscript{63}

2. \textit{Job evaluations force courts to make standardless decisions}

In addition to the \textit{Spaulding} court's concern about being misled, the court was also motivated by a concern that evaluating an employer's wage system would usurp the employer's prerogative in setting wages. The court argued that judicial analysis would subject the employer to "standardless supervision."\textsuperscript{64} This argument is compelling given the unreliable statistics offered in \textit{Spaulding}. A court which attempted to set wages without having any confidence in the alleged value of the respective jobs would impose "standardless supervision" on employers. Given the facts, the court's refusal to impose a wage on the employer was justified.

The court in \textit{UAW} ignored the reasoning behind the \textit{Spaulding} decision, and as in \textit{American Nurses'}, assumed the use of any statistics to set wages would constitute arbitrary interference by the courts.\textsuperscript{65} The court in \textit{American Nurses'} read the \textit{Spaulding} decision to mean implementation of an evaluation system previously conducted by the employer would always constitute standardless supervision by the courts.\textsuperscript{66} This is a broad construction, for the court in \textit{Spaulding} only questioned statistics generated by employees, not evaluations of worth generated by the employer.

The \textit{UAW} court supported its position by asserting that the validity

\textsuperscript{62} The market share depends on how the relevant product and geographic markets are defined. These definitions are the source of much litigation because the more broadly the market is described, the smaller a firm's market share and the less likely monopolization can be established. Courts use "slippery" variables like consumer perception, pricing relationships, and the rate of return to arrive at an exact (albeit somewhat uncertain) percentage. \textit{Id}.
\textsuperscript{63} The Supreme Court has implied that courts are competent to evaluate statistics in Title VII discrimination claims. In Hazelwood School Dist. v. United States, 433 U.S. 299, 304-05 (1977), the Court evaluated and accepted statistics which showed the percentage of Negroes hired for teaching positions was much lower than the percentage of qualified Negroes searching for jobs in the relevant market. The Court then specified exactly what statistics the employer could introduce to rebut this prima facie case of discrimination. \textit{Id} at 312.
\textsuperscript{64} Spaulding v. University of Wash., 740 F.2d 686, 701 (9th Cir. 1984).
\textsuperscript{66} American Nurses' Ass'n v. State of Ill., 606 F. Supp 1313, 1318 (N.D. Ill. 1985).
of a job evaluation system rests on value judgments.\textsuperscript{67} The court felt compelled to deny claims of discrimination based on such studies "[b]ecause jobs do not have an intrinsic value that can be \textit{scientifically measured}."\textsuperscript{68} This argument fails in the context of sex-based wage discrimination claims because the plaintiffs are not asking the court to arbitrarily set a wage. The court is merely asked to mandate that an employer apply the \textit{same} compensation structure in female dominated jobs as the employer applies in male dominated jobs.\textsuperscript{69}

Courts readily choose between two compensation systems when they address equal work claims and direct the employer to pay the plaintiff the same wages as others in the same job. Courts are not asked to place dollar amounts on what experience, education, or responsibility are worth to an employer. The employer has already decided what these variables were worth when it set wages. By introducing evidence of wage discrepancies, the plaintiff asks the court to abrogate the separate compensation structure maintained for female dominated jobs. Whether the value of jobs can be scientifically measured is irrelevant. Setting the value of labor remains the employer's prerogative.

The court in \textit{American Nurses'}, however, may have been referring to a problem addressed earlier in the reasoning process, i.e., how does the court recognize separate compensation systems? This comparison does pose some problems for the court, but note, under traditional Title VII analysis, plaintiffs were not required to conclusively establish discrimination with statistics; they only had to prove a prima facie case. As already discussed, prima facie cases of racial hiring and firing were fraught with uncertainty but were nevertheless accepted. The court in \textit{UAW} did not explain why a high degree of uncertainty is acceptable in all Title VII claims except for those involving sex-based wage discrimination.\textsuperscript{70}

Notwithstanding the rather unique treatment reserved for sex-based wage discrimination claims, the refusal to accept job evaluation studies because job values cannot be scientifically measured is groundless. The courtroom is not a laboratory in which only object facts are deemed relevant. Judges may prefer objective facts, but they repeatedly have been willing to accept less than objective standards. For example, questions of reasonableness are not absolutely objective, yet judges have set the salaries of corporate directors by asking "what is

\textsuperscript{67} Id.
\textsuperscript{68} Id. (emphasis added).
\textsuperscript{70} International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. State of Mich., 886 F.2d 766 (7th Cir. 1989).
reasonable compensation?" Courts have even used "ability," a common factor in job evaluation studies, to arrive at a director’s salary.

Similarly, in personal injury suits, judges have been willing to set damage awards for pain and suffering. When juries award pain and suffering damages, the judge retains the ultimate authority and can remand for a new trial if the judge believes the damages are excessive. Denying judicial competency to compare jobs with factors laid out in a job evaluation study conducted by the employer is inconsistent in light of the courts’ reliance on judicial discretion in other areas of the law.

C. Analysis of American Federation of State, County & Municipal Employees v. State of Washington

The court in UAW also denied the plaintiffs an inference of intent through the use of statistics because job evaluation studies do not take market factors into account. The court in UAW relied on AFSCME for this proposition.

By recognizing a market defense, the court in UAW again addressed sex-based wage discrimination claims differently than other discriminatory compensation claims. A market defense was never recognized in Equal Pay claims. An employer could not pay female workers less than male workers doing the same job simply because women were willing to work for less than men. Likewise, an employer could not justify paying lower wages to non-white employees than wages paid to white employees simply because the non-white employees were willing to work for lower wages. However, according to the court in UAW, if the jobs are different, the employer can use a market defense. The court never explained this distinction.

After the UAW decision, a plaintiff can no longer create an inference of discriminatory intent when the employer pays wages approximating the market rates. The market has become an absolute defense because its presence means it is no longer "more likely than not" the pay difference is due to "impermissible factors." The UAW court indi-

76. See id. at 769. This Note will not analyze the arguments advanced in AFSCME for recognizing a market defense. The Note focuses, instead, on the debilitating effect the market defense has on the plaintiffs’ ability to meet the burden of proof.
cated it would defer to the employer's economic decisions, and it was willing to presume these decisions would be nondiscriminatory.  

D. *UAW* moves beyond *American Federation of State, County & Municipal Employees v. State of Washington*

In *AFSCME*, the court criticized evaluation studies because the studies do not take into account certain market factors such as the supply of workers willing to do the job and the effectiveness of collective bargaining in a particular industry.  

The court in *UAW* supplemented the market defense with other possibilities including "labor trends, economic predictions, the employer's economic health and other factors an employer must weigh." Therefore, the *UAW* court viewed sex-based wage discrimination claims differently than other Title VII discrimination cases. The *UAW* court expanded the number of "legitimate" defenses in an unprecedented fashion. In equal pay and racial discrimination claims, courts allowed plaintiffs an inference of intent despite the possible existence of other "legitimate nondiscriminatory reasons" for the differences in treatment.  

The *UAW* court also refused to delineate when a court should and should not infer intent. By recognizing an open-ended number of legitimate defenses, the court was implicitly holding that there can be no inference of intent in sex-based wage discrimination claims. An employee is only given the opportunity to directly prove rather than infer intent. Since an employer is very unlikely to make an overtly discriminatory statement, the employee often faces an impossible burden.

Given the recognized need for flexibility in establishing the burden of proof and the legal history of inferring intent, the *UAW* court's decision was unjustified. A variety of cases can be brought under Title VII, and it is within each court's discretion to set up the burden of proof. Neither the *UAW* holding nor the precedents *UAW* relied on took into account the traditional considerations other courts have used to allocate the burden of proof. These considerations should have been addressed because the evidentiary burdens had never been ex-

---

80. *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., 886 F.2d 766, 769-70 (6th Cir. 1989).*

81. *American Fed’n of State, County & Mun. Employees v. State of Wash., 770 F.2d 1401, 1407 (9th Cir. 1985).*


83. *See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).*


amined in a sex-based wage discrimination claim. The sex-based wage discrimination claim was first recognized in 1981, however, neither UAW nor the prior holdings UAW relied on ever addressed the appropriate burdens of proof.

E. Common Law Allocations of the Burden of Proof

When a statute such as Title VII does not indicate the burdens of proof, the courts must step in and make the allocation. Through the years courts of general jurisdiction have developed criteria for determining who should bear the burden of proof and what the prima facie elements of a claim should be. Among the factors considered are: best evidence, public policy, fairness, and reducing the number of negatives that must be proven. UAW and the precedents it relied on ignored these common considerations.

One principle that has guided courts for years is that no party should be forced to prove a negative. But, under the existing proof structure, employees in sex-based wage discrimination claims must prove negatives. Lacking an outright statement of discriminatory intent by the employer, the employee can only advance a discrimination claim by showing the wage differential is not due to any other nondiscriminatory factor. For example, the employee must prove the difference in pay was not due to a difference in experience, education, seniority, etc.

On its face this argument may appear to be an exercise in semantics, for any element can be stated in both positive and negative form. Courts have realized this proposition and have sometimes required a party to prove a negative. Nevertheless, the employee should not be required to disprove all the possible legitimate justifications for a pay differential.

One commentator, Professor Kevin W. Saunders has suggested that what motivates a court's dislike of negative proof is not the negative quality, but the fact the plaintiff is asked to prove a "universal proposition."

For example, here are two statements analogous to those Saunders proposed: (1) the wage difference is not due to experience and (2) the

86. Consideration of the common law allocations of the burdens of proof was necessary as the Supreme Court in Gunther recognized in 1981. In Gunther, the Court noted plaintiffs should be permitted to prove discrimination even though the claim was not based on equal work. County of Wash. v. Gunther, 452 U.S. 161 (1981).

87. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971).


90. Saunders, supra note 88, at 281.
wage difference is not due to any nondiscriminatory factor. Both of these statements can be characterized as being negatives, but the first is much easier to prove than the second because in the second, the plaintiff must address a large universe of factors. With the first statement, the plaintiff need only contend with "experience." Saunders calls the first statement an existential proposition and the second statement a universal proposition. Plaintiffs alleging sex-based wage discrimination must prove universal propositions—a nearly impossible task.

UAW made the plaintiff's burden even more difficult to bear when the court left the number of legitimate factors open-ended by including market forces "and other factors an employer must weigh." This open-endedness is UAW's contribution to the comparable worth debate, and the decision demonstrates that courts are reluctant to entertain these claims. Saunders noted that as the "universe of discourse" grows, the difference in the difficulty of proof between universal and existential propositions increases. Because statistics are often an employee's only avenue of proof, the employee has no recourse but to attempt to use these statistics to discount all the possible legitimate justifications for a pay differential. This is an effort deemed to failure at the outset. In contrast, the employer, by having access to its own internal management decisions, could much more easily prove the absence of discrimination.

Policy considerations also militate against the existing burden of proof. Given the broad remedial policy behind Title VII, and the fact that women earn only fifty-nine cents for every dollar men earn, the UAW court's decision to skew the burden of proof in favor of the employer is difficult to justify.

V. UAW'S IMPLICATIONS

A. Effect of UAW

The court in UAW held job evaluations are insufficient to prove

91. See id. at 279.
92. Id. at 281.
94. Saunders, supra note 88, at 281.
95. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971).
96. While the courts never voiced a "best evidence" concern in Title VII claims, this theory adequately justifies the courts' concern with flexibility. E.g., International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Courts have required employees to bring the evidence the plaintiffs had at their disposal.
sex-based wage discrimination. The court followed precedent despite the absence of any compelling reason for rejecting job evaluations as proof of sex-based wage discrimination. The court increased the plaintiff’s burden by recognizing that the employer should be able to make decisions based purely on economics. The court also increased the number of legitimate, nondiscriminatory reasons for wage differentials. The net effect of the 

UAW decision is a reduction in the evidence available to the plaintiff and an increase in the number of defenses available to the employer.

Undercompensated employees in female dominated jobs must patiently wait until the employer either corrects the wage discrepancy voluntarily or until upper-level managers make an overtly discriminatory comment regarding gender and compensation. Without such a statement, plaintiffs have virtually no chance for success in the courts. Meanwhile, employees in female dominated jobs continue to earn approximately fifty-nine cents for every dollar earned by employees in male dominated jobs. Obviously, the existing allocation of the burden of proof is defective and in need of revision, at least if courts want to give plaintiffs redress for undercompensation when plaintiffs hold jobs dominated by females.

B. Suggestions

One solution might be to abrogate the “intent” element altogether. Courts could shift their focus from the causes of discrimination to its effects. The employer could then seek to justify the employment practice by addressing the causes of the disparity in wages. This suggestion would shift the burden of proof to the defendant with the following questions remaining: (1) What is the employee’s initial burden and (2) What is the employer’s burden once the employee has proved a prima facie case of discrimination? A brief look at a decision handed down by the European Court of Justice will suggest answers to both questions.

In Handels-og Kontorfunktionaerernes Forbund I Danmark v. Dansk Arbejdsgiverfocening, (Danfoss), the European Court of Justice shifted the burden of proof to the employer. In Danfoss, the plaintiffs were alleging sex discrimination based on a 6.85% wage differential between workers within the same pay grades. The court held:

100. WOMEN’S BUREAU, supra note 98, at 2.
Where an undertaking applies a pay system which is characterised by a total lack of transparency, the burden of proof is on the employer to show that his pay practice is not discriminatory. Where a female worker establishes, by comparison with a relatively large number of employees, that the average pay of female workers is lower than that of male workers.102

By "transparent" the court was referring to the ease with which employees could identify the wage criteria. The court justified its holding by recognizing workers had no way of knowing which criteria were applied to them or how the criteria were applied.103 Employers had access to this information.

The Danfoss case suggests employees can meet their burden by showing: (1) differences in pay between predominantly male and female based jobs and (2) either a pay scale without indentifiable wage criteria or a job evaluation study indicating equal worth.104 Proof of these two elements would create a rebuttable presumption of sex discrimination.105

The employer could rebut this presumption by proving the differential is due to an objectively justified factor. Justification would require (A) proof that the criterion is important in the performance of the employee's specific duties and (B) proof that the criterion has been applied in a nondiscriminatory fashion.106

A brief explanation of these elements should clarify the issue. The Danfoss court held that the "quality of work" could not justify a pay differential between employees holding jobs of otherwise equal value. While quality of work is generally accepted as important in job performance, the employer's application of this criterion would not be accepted. As the court in Danfoss noted, "[i]t is inconceivable that the work carried out by female workers would be generally of a lower quality"107 than that of male workers. The criterion must have been

102. Id. at 13.
103. Id. at 11-13.
104. Id. at 13. Possibly the European Court of Justice did not intend its holding to be broadly interpreted. The court was addressing pay differences between workers in the same pay grade. A narrow holding might require employers to apply whatever wage system the employer selects in a nondiscriminatory manner. At this time, the court has not defined the limits of its holding. As the purpose of this note is not to conduct a comparative analysis of the American and European approaches to sex discrimination, the broad holding suggested in the text will suffice for purposes of discussion.
105. Id. at 11-13. While some theorists have expressed concern that an employer would never be able to meet its burden, see Nelson, Opton, Jr. & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. Mich. J.L. Ref. 233, 280 (1980), employers would not be limited to job evaluations but could focus instead on one nondiscriminatory factor that explains the wage differential. The courts could recognize many legitimate factors as they seem wont to do without holding the employee to an impossible standard.
106. Id. at 11-12.
107. Id. at 11.
applied in a discriminatory manner.

If, however, an employer could prove "adaptability of workers to variable work schedules" was highly advantageous in a particular job, the employer might prevail.108 This criterion might legitimately discriminate against women because women arguably have more responsibility for time-consuming family duties that are not conducive to flexible work schedules.109

VI. CONCLUSION

The court in UAW denied a sex-based wage discrimination claim arguing that a contrary holding would give employers a disincentive to conduct job evaluations.110 The UAW court recognized job evaluation studies play an important role in setting wages, and an employer would be less likely to use this tool if studies could be used against the employer. This argument finds support in Great Britain's experiences with its Equal Pay Act of 1970 which required equal pay for individuals who were doing work rated as equivalent by job evaluation studies.111 After the Act had been adopted, studies revealed that the greater the proportion of women employed, the less likely an employer was to have a job evaluation scheme.112 The result of using job evaluation studies, however, is not as preordained as the British system suggests. Employers may indeed curtail the use of such studies if they create an irrebuttable presumption of discrimination, but employers may find the studies helpful if they can also be used to rebut prima facie cases of discrimination. Under the model patterned after the Danfoss case, an employer might be able to justify the wage discrepancy with a job evaluation study.

The approach suggested in Danfoss is meritorious because it conforms to the common law standards for allocating the burdens of proof. The employer need only prove an existential proposition to dispense with the claim. For example, the defendant need only prove the difference in pay was due to varying degrees of experience. The shift provides the employer a defense while still allowing plaintiffs in undercompensated female dominated positions a realistic chance for success. The UAW decision demonstrates that evaluating Title VII claims of sex-based wage discrimination under a method requiring proof of

108. Id. at 12.
109. Id.
111. THE EQUAL PAY ACT OF 1970, c.41, § 1 as amended.
112. W. DANIEL & N. MULLWARD, WORKPLACE INDUSTRIAL RELATIONS IN BRITAIN, 205 (1983); see also S. WILLBORN, A SECRETARY AND A COOK; CHALLENGING WOMEN'S WAGES IN THE COURTS OF THE UNITED STATES AND GREAT BRITAIN, 162-63, n.3 (1989).
"intent" is outmoded and ineffective in attacking the wage gap. Without being able to infer intent, employees trained for jobs that have been and continue to be dominated by females cannot look to the court for relief.

Christine Y. Martin '92