

1991

## Does Liability under the Equal Pay Act Automatically Lead to Title VII Liability?—*Fallon v. State of Illinois*, 882 F.2d 1206 (7th Cir. 1989)

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### Recommended Citation

DaNay A. Kalkowski, *Does Liability under the Equal Pay Act Automatically Lead to Title VII Liability?—Fallon v. State of Illinois*, 882 F.2d 1206 (7th Cir. 1989), 70 Neb. L. Rev. (1991)

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# Does Liability Under the Equal Pay Act Automatically Lead to Title VII Liability?—*Fallon v. State of Illinois*, 882 F.2d 1206 (7th Cir. 1989)

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### I. INTRODUCTION

The question of whether liability established under the Equal Pay Act<sup>1</sup> and its burden of proof scheme will automatically lead to Title VII<sup>2</sup> liability has been the subject of much discussion and analysis. However, differing conclusions have been reached by courts across the country. The United States Court of Appeals for the Seventh Circuit recently addressed this question in *Fallon v. Illinois*.<sup>3</sup> The Seventh Circuit in *Fallon* held that a violation of the Equal Pay Act does not automatically mean Title VII has also been violated, because the proof and the allocation of the burden of proof required to establish a claim under each statute is different (the “no equivalence” rule). The Sev-

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1. 29 U.S.C. § 206(d)(1)(1988).

2. 42 U.S.C. § 2000e-2 (1988).

3. 882 F.2d 1206 (7th Cir. 1989).

enth Circuit's negative answer to the question is consistent with the reasoning and conclusions of the Fifth Circuit. On the other hand, four other circuits<sup>4</sup> have answered the question affirmatively, finding Title VII sex-based claims of unequal pay for equal work should be analyzed under the Equal Pay Act's burden of proof scheme (the "equivalence" rule).

The differing conclusions of the circuits on the question of whether a violation of the Equal Pay Act automatically leads to Title VII liability are important to plaintiffs who have possible sex-based wage discrimination claims under both the Equal Pay Act and Title VII. Most obviously, the courts' answers to the liability question affect the burden of proof that will be placed upon a plaintiff to establish a claim under Title VII. The answer is also important for other less obvious reasons.

First, class actions are treated differently under the Equal Pay Act and Title VII. A potential class member must give written consent to become a class member under the Equal Pay Act.<sup>5</sup> Under Title VII, however, once a class action has been filed the court will exclude a class member only if she notifies the court.<sup>6</sup> As a general rule then it is easier to establish a class action under Title VII. Therefore, under the "equivalence" rule plaintiffs would be able to take advantage of the favorable rules for establishing class actions under Title VII without losing the favorable burden shifting rules of the Equal Pay Act. The "no equivalence" rule would often force plaintiffs to either choose between the two sets of rules or establish two separate classes—an opt-in class for the Equal Pay Act claim and an opt-out class for the Title VII claim.

Second, the remedial schemes available under the two statutes differ. If a plaintiff is successful, backpay under the Equal Pay Act runs back in time to a point two years prior to the day on which the lawsuit was filed,<sup>7</sup> while under Title VII backpay extends back to two years before a *charge* of discrimination is filed with the Equal Employment Opportunity Commission.<sup>8</sup> The "equivalence" rule would permit a plaintiff who has prevailed on an Equal Pay Act claim to obtain more backpay if Title VII applied to a more favorable period of time. The "no equivalence" rule would require that a plaintiff provide additional evidence of a Title VII violation to obtain the additional backpay.<sup>9</sup>

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4. The Tenth, Ninth, Eighth and Sixth Circuits have held that liability under the Equal Pay Act automatically leads to Title VII liability.

5. 29 U.S.C. § 216(b)(1988).

6. FED. R. CIV. P. 23(b)(2).

7. 29 U.S.C. § 255(a)(1988).

8. 42 U.S.C. § 2000e-5(g)(1988).

9. On November 21, 1991, after this Note went to press, President Bush signed the Civil Rights Act of 1991 into law. The new law effectively reverses seven

Finally, the decision maker in a claim brought under each statute is different. The Supreme Court has held that a plaintiff in an Equal Pay Act section 16 action has a right to a jury trial on a claim for unpaid wages.<sup>10</sup> On the other hand, the circuit courts have unanimously concluded that a Title VII plaintiff has no right to a jury trial when backpay is sought.<sup>11</sup> Under the "equivalence" rule the jury would be the decision maker because all the issues are the same for the Equal Pay Act and Title VII claims. Meanwhile, under the "no equivalence" rule, a judge would decide all questions peculiar to Title VII (*i.e.*, whether the plaintiff has met the burden of proving that the pay differential is not justified by seniority, merit system, etc.).

This Note will examine the reasoning behind the circuits' differing answers to the question of whether a violation of the Equal Pay Act will automatically lead to Title VII liability and the effect the different answers have on the allocation of the burden of proof under a Title VII claim. Finally, a critical analysis will be done to determine which rule, the "equivalence" or "no equivalence," is based upon better reasoning.

## II. BACKGROUND

Linda Fallon brought suit in federal district court against the State of Illinois alleging violation of the Equal Pay Act and Title VII of the Civil Rights Act of 1964.<sup>12</sup> Fallon was employed by the state as a Veterans Service Officer Associate (VSOA), a position composed entirely of females.<sup>13</sup> The district court found that the jobs of VSOAs and Veterans Service Officers (VSOs), a position composed entirely of males, "were substantially equal within the meaning of the Equal Pay Act, that female VSOAs were paid less than the male VSOs, and that no factors other than sex justified the pay differential."<sup>14</sup> The district court then concluded that the State of Illinois had violated both the Equal Pay Act and Title VII with respect to the plaintiff Fallon, and had violated Title VII with respect to the class of VSOAs.<sup>15</sup>

The state appealed the district court's decision. First, the state alleged that the court's finding that the two jobs were "substantially equal" under the Equal Pay Act was clearly erroneous. Second, the

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Supreme Court decisions and expands the remedies available to a Title VII claimant.

10. *Lorillard v. Pons*, 434 U.S. 575 (1978).

11. II C.A. SULLIVAN, M.J. ZIMMER, & R.F. RICHARDS, *EMPLOYMENT DISCRIMINATION*, 57 (2d Ed. 1988).

12. *Fallon v. Illinois*, 882 F.2d 1206, 1207 (7th Cir. 1989).

13. *Id.*

14. *Id.* (citation omitted).

15. *Id.*

state argued that a factor other than sex justified the differential.<sup>16</sup> The State further argued that the district court had failed to find intentional discrimination when it considered the Title VII claim. Instead, the State alleged, the court improperly relied upon its finding of liability under the Equal Pay Act to find automatic Title VII liability.<sup>17</sup>

On appeal, the Seventh Circuit Court of Appeals affirmed the district court's decision in part, but reversed and remanded two issues. After viewing the evidence, the court affirmed the district court's finding the VSO and VSOA jobs were substantially equal, stating it was not firmly convinced the district court was mistaken.<sup>18</sup>

The court then found the district court had prematurely rejected the State's assertion that the VSO's requisite wartime veteran status was a "factor other than sex" which justified the pay differential. The court found the district court had improperly rejected the defense as a matter of law, stating that under proper circumstances the wartime veteran status could be a valid factor other than sex.<sup>19</sup> Accordingly, the court remanded the case to district court to make appropriate findings on the issue.

In addressing the question of whether liability under the Equal Pay Act leads automatically to Title VII liability, the court decided the statutes were distinct and required different proof. In formulating its conclusion that the acts are distinct, the *Fallon* court examined the acts individually and looked at what was required to establish a case under each.

The court, following guidelines established by the Supreme Court in its first case interpreting the Equal Pay Act, *Corning Glass Works v. Brennan*,<sup>20</sup> set out the requirements necessary to prove a prima facie case under the Equal Pay Act. The court stated, "a plaintiff must show: (1) that different wages are paid to employees of the opposite sex; (2) that the employees do equal work which requires equal skill, effort, and responsibility; and (3) that the employees have similar working conditions."<sup>21</sup>

Once the plaintiff has established a prima facie case under the Equal Pay Act, the court found the burden then shifts to the defendant to show the pay disparity is due to one of four exemptions established by the Equal Pay Act.<sup>22</sup> The Supreme Court in *Brennan* found

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16. *Id.*

17. *Id.*

18. *Id.* at 1210.

19. *Id.* at 1212.

20. 417 U.S. 188 (1974).

21. *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989)(quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

22. *Id.* at 1211.

that the exemptions under the Fair Labor Standards Act are affirmative defenses on which the employer (defendant) bears the burden of proof.<sup>23</sup> Accordingly, the *Fallon* court stated it is up to the employer to prove that the pay disparity is due to: "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor other than sex."<sup>24</sup>

The court concluded that under the Equal Pay Act, once a plaintiff has proven a prima facie case, the burden of proof then shifts to the defendant to establish that the pay disparity is due to one of the four exemptions established by the Equal Pay Act. The pay disparity must be proven by the defendant as due to a factor other than sex. Thus, under the Equal Pay Act, once a prima facie case has been established, the risk of nonpersuasion rests with the defendant on the ultimate issue of liability.<sup>25</sup>

In examining the allocations of the burden of proof under a Title VII claim, the *Fallon* court looked to the Supreme Court's decision in *Texas Department of Community Affairs v. Burdine*.<sup>26</sup> Relying upon *Burdine*, the *Fallon* court stated that under Title VII, in all but a few cases,<sup>27</sup> the plaintiff bears the burden of proving a prima facie case.<sup>28</sup> To establish a prima facie case under Title VII, the plaintiff must prove the defendant's intent to discriminate or establish facts sufficient to create an inference of discriminatory intent.<sup>29</sup>

Once the plaintiff has done this, the defendant carries only a burden of production to articulate a legitimate, nondiscriminatory reason for the pay disparity. The plaintiff then has a chance to prove that the reason given by the defendant is only a pretext for discrimination. The court stated that under Title VII, the plaintiff bears the burden of persuasion at all times to show discriminatory intent.<sup>30</sup> Accordingly, under Title VII the plaintiff always carries the risk of nonpersuasion on the ultimate issue of liability.

The *Fallon* court concluded that although the Equal Pay Act and Title VII are similar, they remain distinct. The proof required to establish a claim under each is different and each statute's allocation of the burden of proof in a sex-based discrimination claim of unequal pay for equal work is different. Therefore, the court held, "a finding of Equal Pay Act liability, without more, will not lead automatically to

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23. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

24. *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989); 29 U.S.C. § 206(d)(1)(i)-(iv) (1988). See also *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

25. *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

26. 450 U.S. 248, 256-58 (1980).

27. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 280 (1989).

28. *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989)(citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981)).

29. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

30. *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

liability under Title VII.”<sup>31</sup> The court then remanded the case to the district court as to the Title VII claim to make more explicit findings in regard to intentional discrimination.

Regardless of the differences the Seventh Circuit in *Fallon* found between the statutes regarding both proof and the allocation of the burden of proof, the Tenth, Ninth, Eighth and Sixth Circuits have held that the burdens of proof a Title VII sex-based wage discrimination plaintiff must establish in an unequal pay for equal work case are those set out under the Equal Pay Act. Therefore, a finding of liability under the Equal Pay Act automatically establishes liability under Title VII. The Seventh Circuit stated in *Fallon* it was not persuaded by the reasoning used by the Tenth, Ninth and Eighth Circuit courts to equate the statutes, “thus, we will continue to adhere to the traditional analysis of Title VII claims, namely, that a plaintiff bears the burden of proof to show discriminatory intent.”<sup>32</sup> Since the Seventh Circuit decided *Fallon*, the Sixth Circuit has issued an opinion that is consistent with the Tenth, Ninth and Eighth circuits.

In order to determine which circuit’s answer is based upon better reasoning, it is necessary to: (1) examine the history of the two statutes to see where they overlap in the area of sex-based wage discrimination cases; (2) examine the cases where the circuits have found sex-based claims of unequal pay for equal work under both Title VII and the Equal Pay Act are to be analyzed according to the Equal Pay Act and its burden of proof scheme (making the analysis of an equal pay for equal work claim under Title VII equivalent to an analysis of the same claim under the Equal Pay Act) and the Seventh Circuit’s response to their reasoning; and (3) critically analyze the basis the opposing holdings are based upon, setting forth which holding is most strongly supported.

### III. ANALYSIS

#### A. History of Title VII’s Bennett Amendment

Congress passed the Equal Pay Act in 1963 “to remedy what was perceived to be a serious and endemic problem of [sex-based] employment discrimination in private industry.”<sup>33</sup> Therefore, when Congress passed Title VII of the Civil Rights Act in 1964 it became the second bill to relate to employment discrimination. Originally Title VII extended only to discrimination based on race, color, religion and national origin.<sup>34</sup> The Bill was amended late in its debate before the

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31. *Id.* at 1218.

32. *Id.* at 1214.

33. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

34. H.R. REP. NO. 914, 88th Cong., 1st Sess. 10 (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355.

House to also proscribe sex discrimination, but the House did not discuss the implications of the overlapping jurisdiction of the amended Title VII with its proscription against sex discrimination and the Equal Pay Act before it passed the Bill and sent it to the Senate.<sup>35</sup>

The Senate began consideration of the House version of Title VII without the Bill being referred to committee,<sup>36</sup> foregoing any chance to have the overlap between the two Acts analyzed. In response to the concern of several Senators that insufficient attention had been paid to possible inconsistencies between the statutes,<sup>37</sup> Senator Bennett proposed a "technical amendment" to the Civil Rights Bill.<sup>38</sup> The Bennett Amendment to Title VII passed with no controversy, the entire discussion on it comprised just a few short statements.<sup>39</sup> The Amendment provides:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.<sup>40</sup>

Due to the circumstances surrounding the passage of the Bennett Amendment, only a smattering of legislative history was generated. As a result, there has been much controversy over what effect the Amendment has on Title VII sex-based wage discrimination claims, specifically in regard to its effect on the allocation of the burden of proof in Title VII sex-based unequal pay for equal work claims. The Tenth, Ninth, Eighth, and Sixth Circuits have all found that the incorporation of the Bennett Amendment into Title VII effectively incorpo-

35. 110 CONG. REC. 2577-84 (1964). For more information about the amendment of Title VII to include sex discrimination, see Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex To Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453 (1981); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967).

36. 110 CONG. REC. 2577-84 (1964).

37. See *id.* at 7217 (statement of Sen. Clark); *id.* at 13647 (statement of Sen. Bennett).

38. *Id.* at 13310. For a discussion of the legislative history of the Bennett Amendment, see *Washington v. Gunther*, 452 U.S. 161, 171-76 (1981); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1330 n.88 (N.D.Ill. 1986).

39. See 110 CONG. REC. 13647 (1964).

40. 42 U.S.C. § 2000e-2(h)(1988). 29 U.S.C. § 206(d)(1)(1988) provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor other than sex. . . .

rated the Equal Pay Act's allocation of the burdens of proof into Title VII sex-based claims of unequal pay for equal work, while the Seventh and Fifth Circuits<sup>41</sup> have found that the Bennett Amendment incorporated the substance of the Equal Pay Act's affirmative defenses into Title VII, but did not alter Title VII's burden of proof scheme in regard to sex-based wage discrimination claims.

## B. An Overview of the Tenth, Ninth, Eighth and Sixth Circuits

### 1. Tenth Circuit

In 1971 the Tenth Circuit in *Ammons v. Zia Co.*<sup>42</sup> addressed the issue of the proper burden of proof under a Title VII claim where the plaintiff alleged she was denied additional compensation because of her sex.<sup>43</sup> The Tenth Circuit concluded that the proper burdens of proof in the Title VII case were those delineated under the Equal Pay Act.<sup>44</sup> The court based its conclusion on the fact that the provisions of the Civil Rights Act that regard sex-based wage discrimination have been interpreted to be *in pari materia* with the Equal Pay Act, that both acts serve the same fundamental purpose, and that the acts should not be construed in a manner which "by virtue of section 703(h) would undermine the Civil Rights Act."<sup>45</sup>

The Seventh Circuit in *Fallon* responded to the Tenth Circuit's conclusion by stating that even if the propositions supporting the conclusion were true, they alone do not justify altering Title VII's burden of proof scheme.<sup>46</sup> The court stated that application of the traditional Title VII burden shifting analysis would not allow section 703(h),<sup>47</sup> to undermine Title VII. The two causes of action, the court held, can be treated as distinct and still serve their respective purposes.<sup>48</sup>

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41. The Fifth Circuit in *Peters v. Shreveport*, 818 F.2d 1148 (5th Cir. 1987), examined the issue of whether a Title VII equal pay case was to be analyzed under the Equal Pay Act and its burden of proof scheme. The court did not discuss its holding in relation to the other circuits. The court found although the Bennett Amendment was an attempt to reconcile the two statutes by incorporating the four Equal Pay Act affirmative defenses into the structure of Title VII, the principle that the Act should in general be interpreted consistently with Title VII does not by itself support an interpretation that the causal element of a Title VII plaintiff's case and the showing an employer must make under the Equal Pay Act's fourth affirmative defense are identical.

42. 448 F.2d 117 (10th Cir. 1971).

43. *Id.* at 118.

44. *Id.* at 119.

45. *Id.*

46. *Fallon v. Illinois*, 882 F.2d 1206, 1215 (7th Cir. 1989).

47. 42 U.S.C. § 2000e-2(h)(1988).

48. *Fallon v. Illinois*, 882 F.2d 1206, 1215 (7th Cir. 1989).

## 2. Ninth Circuit

In 1979 the Ninth Circuit decided the case of *Gunther v. Washington*<sup>49</sup> and addressed the interrelationship of Title VII and the Equal Pay Act in regard to the Bennett Amendment. The plaintiffs in *Gunther* brought an action under Title VII alleging they had been denied equal pay for equal work and that the defendant's termination and later refusal to rehire them was done in retaliation for their demands for equal pay.<sup>50</sup> They further contended that even if the work was not substantially equal, the defendant nevertheless violated Title VII if some of the wage differential could be attributed to sex discrimination.<sup>51</sup>

The Ninth Circuit found there were two plausible interpretations of the Bennett Amendment: (1) the Amendment could be interpreted to incorporate the Equal Pay Act's equal work formula into Title VII, thereby limiting the scope of Title VII in the area of sexually discriminatory compensation to claims that would also violate the Equal Pay Act, or (2) the Amendment could be interpreted to only incorporate the Equal Pay Act's affirmative defenses into Title VII and not its equal work standard.<sup>52</sup> The court found the second interpretation was more persuasive and was supported by a literal reading of the Amendment.

Incorporation of the Equal Pay Act's first three affirmative defenses did not make any substantive alteration in Title VII because the three defenses are already included elsewhere in Title VII. But, the court went on to state the incorporation of the Equal Pay Act's fourth affirmative defense, allowing differentiation based on "any factor other than sex," is significant.<sup>53</sup> The court found the incorporation of the fourth affirmative defense equates the burden of proof under Title VII sex-based wage discrimination claims of unequal pay for equal work with that of the Equal Pay Act claims. "The incorporation of the fourth affirmative defense into Title VII makes clear that once a Title VII plaintiff has shown that she was denied equal pay for equal work, the burden shifts upon the employer to prove that the differentiation was based on some factor other than sex."<sup>54</sup>

The Ninth Circuit's decision in *Gunther* was reviewed by the Supreme Court.<sup>55</sup> The Supreme Court affirmed the Ninth Circuit's holding, but stated it did not decide in the case "the precise contours of

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49. 623 F.2d 1303 (9th Cir. 1979)(supplemental opinion denying rehearing), *aff'd*, 452 U.S. 161 (1981).

50. *Id.* at 1307.

51. *Id.*

52. *Id.* at 1311.

53. *Id.* at 1319.

54. *Id.*

55. *Washington v. Gunther*, 452 U.S. 161 (1981).

lawsuits challenging sex discrimination in compensation under Title VII.”<sup>56</sup> In its opinion the Court stated the incorporation of the fourth affirmative defense into Title VII could have significant consequences, but the court specifically stated it was not deciding in *Gunther* how sex-based wage litigation should be structured under Title VII to accommodate the fourth affirmative defense of the Equal Pay Act.<sup>57</sup>

The Ninth Circuit specifically addressed the question of what rules govern the allocation of the evidentiary burdens in a Title VII sex-based unequal pay for equal work claim in *Kouba v. Allstate Insurance Co.*<sup>58</sup> The defendant in *Kouba* argued that standard Title VII rules governed the allocation of the burden of proof, but the court found the defendant had misallocated the burden.<sup>59</sup> Relying on its earlier decision in *Gunther*, the Ninth Circuit stated that even under Title VII the defendant bears the burden of proving the wage differential resulted from a factor other than sex.<sup>60</sup>

The Seventh Circuit’s response in *Fallon* to the Ninth Circuit’s holding was that it did not think the Ninth Circuit’s conclusion, that the incorporation of the Equal Pay Act’s fourth affirmative defense into Title VII clarifies the burden of proof required in a Title VII equal pay case, is clear from the Bennett Amendment.<sup>61</sup> The Seventh Circuit stated it has interpreted the Bennett Amendment differently. The court stated there wasn’t anything said by the Supreme Court in *Gunther* in regard to reallocating the burden of proof under Title VII cases.<sup>62</sup> Therefore, the Seventh Circuit concluded the effect of the Bennett Amendment was only to incorporate the substance of the Equal Pay Act’s affirmative defenses into Title VII and not its burden of proof scheme.<sup>63</sup>

### 3. Eighth Circuit

In 1986 the Eight Circuit addressed the burdens of proof required under a Title VII claim in *McKee v. Bi-State Development Agency*.<sup>64</sup> The plaintiff in *McKee* argued that a jury verdict in her favor on her Equal Pay Act claim required the district court to find liability on her Title VII claim also.

The Eighth Circuit looked to the Ninth Circuit’s decision in *Gunther v. Washington* and to other circuit court decisions in making its

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56. *Id.* at 181.

57. *Id.* at 171.

58. 691 F.2d 873 (9th Cir. 1982).

59. *Id.* at 875.

60. *Id.*

61. *Fallon v. Illinois*, 882 F.2d 1206, 1215 (7th Cir. 1989).

62. *Id.*

63. *Id.* at 1216.

64. 801 F.2d 1014 (8th Cir. 1986).

decision. The court stated that although the Supreme Court in *Gunther* noted that it did not decide on the effect the incorporation of the Equal Pay Act's defenses would have on the structure of sex-based wage discrimination claims under Title VII, the court did indicate, "that the incorporation of the 'factor other than sex' affirmative defense could have 'significant consequences for Title VII litigation.'"<sup>65</sup> The Eighth Circuit then held that the standards of the Equal Pay Act are to apply to claims for unequal pay for equal work whether the suit alleges a violation of the Equal Pay Act or Title VII.<sup>66</sup>

The Seventh Circuit in *Fallon* stated it disagreed with the Eighth Circuit's holding.<sup>67</sup> The Seventh Circuit interpreted the Bennett Amendment and its potential "significant consequences" on Title VII litigation to be confined to situations where a defendant asserts a legitimate nondiscriminatory reason for the wage differential which may cause a disparate impact.<sup>68</sup> In this type of case, the Seventh Circuit would interpret the Bennett Amendment under Title VII to preclude liability. The court asserts it is this type of consequence the Supreme Court was alluding to in *Gunther*, not a change in the traditional Title VII burden of proof scheme.

#### 4. Sixth Circuit

The Sixth Circuit had an opportunity to address the question of the proper burden of proof under a Title VII sex-based wage discrimination claim of unequal pay for equal work in 1990 in *Korte v. Diemer*,<sup>69</sup> after the Seventh Circuit's decision in *Fallon*. The plaintiff in *Korte*, as in *McKee*, argued that a jury verdict in her favor on her Equal Pay Act claim bound the trial judge to also find in her favor on her Title VII claim of discriminatory compensation.<sup>70</sup>

The court in *Korte* stated that the determinative question was, "whether the standards of liability under the two statutes are sufficiently similar such that the jury's verdict in favor of Korte on her Equal Pay Act claim necessitates that the trial judge find for Korte on her Title VII unequal pay claim."<sup>71</sup> The court looked at the Eighth Circuit's decision in *McKee* where the Eighth Circuit ordered the district court to enter judgment on the plaintiff's Title VII unequal pay claim in accordance with a jury verdict in her favor on her Equal Pay Act claim.<sup>72</sup>

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65. *Id.* at 1018 (quoting *Washington v. Gunther*, 452 U.S. 160, 170 (1981)).

66. *Id.* at 1019.

67. *Fallon v. Illinois*, 882 F.2d 1206, 1217 (7th Cir. 1989).

68. *Id.* at 1215.

69. 909 F.2d 954 (6th Cir. 1990).

70. *Id.* at 957.

71. *Id.*

72. *Id.* at 958.

The court also noted that both the Fifth and Seventh Circuits had decided that although the two statutes were similar, they remain distinct as to proof and the allocation of the burden of proof.<sup>73</sup> The Sixth Circuit concluded by stating it found the distinction the district court had drawn between Equal Pay Act liability and Title VII liability was "overly technical".<sup>74</sup> The court stated,

A finding of "sex discrimination in compensation" under one Act is tantamount to a finding of "pay discrimination on the basis of sex" under the other. Conduct that a jury finds to be "based on" sex, and not motivated by nondiscriminatory reasons, cannot later be found by a district court to lack an intent to discriminate on the basis of sex.<sup>75</sup>

The court then held the jury's verdict on the plaintiff's Equal Pay Act claim was binding on the district court as to the Title VII claim.

### C. Who's Right?

The differing views of the circuits in answering the question of whether a claim found to violate the Equal Pay Act under its burden of proof scheme also automatically violates Title VII are based upon the circuits' differing interpretations of the effect the incorporation of the Bennett Amendment has on the burden of proof required under a Title VII sex-based claim of unequal pay for equal work.

The Tenth, Ninth, Eighth, and Sixth Circuits base their answer to the question on the conclusion that the effect of the Bennett Amendment was to incorporate into Title VII the Equal Pay Act's burden of proof scheme along with the four Equal Pay Act affirmative defenses. The courts have essentially adopted the view of the Ninth Circuit in *Gunther*, "The incorporation of the fourth affirmative defense into Title VII makes clear that once a Title VII plaintiff has shown that she was denied equal pay for equal work, the burden shifts upon the employer to prove the differentiation was based on some factor other than sex."<sup>76</sup>

Meanwhile, the Fifth and Seventh Circuits based their holdings upon a different interpretation. These courts found the Bennett Amendment only incorporated the substance of the Equal Pay Act's affirmative defenses into Title VII as "defenses" not "affirmative defenses". The Seventh Circuit stated the exemptions under the Equal Pay Act were set out as affirmative defenses because the Fair Labor Standards Act traditionally treated exemptions as such, leaving defendants to bear the ultimate burden of proof.<sup>77</sup> Title VII, on the

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73. *Id.*

74. *Id.* at 959.

75. *Id.*

76. *Gunther v. Washington*, 623 F.2d 1303, 1319 (9th Cir. 1979)(supplemental opinion denying rehearing), *aff'd*, 452 U.S. 161 (1981).

77. *Fallon v. Illinois*, 882 F.2d 1206, 1216 (7th Cir. 1989).

other hand, has traditionally left the burden of proof on the plaintiff, shifting it only when sex has been shown to be a "substantial" factor in the claim.<sup>78</sup>

The court found a *prima facie* case under the Equal Pay Act did not implicate sex to this degree and, therefore, there is not justification for shifting the burden to the defendant in Title VII sex-based claims of unequal pay for equal work. The Seventh Circuit asserted the Bennett Amendment effectively incorporated only the Equal Pay Act's defenses and not its burden of proof scheme into Title VII.

To determine which interpretation is correct, the most logical place to start is with the statute itself. Unfortunately in this case, neither the wording of the statute nor the legislative history behind the adoption of the Amendment is particularly helpful in setting out clear guidelines that can be followed. This then leads to the question of how the overlap between the two Acts should be reconciled absent specific direction from Congress?

The Supreme Court in *Gunther* held the effect of the Bennett Amendment was to incorporate the Equal Pay Act's affirmative defenses into Title VII, but the Court stopped short of determining what effect the incorporation of the fourth affirmative defense would have on the burden of proof required in sex-based wage discrimination claims brought under Title VII.<sup>79</sup> In the absence of specific guidelines from the Supreme Court or the statute itself, the circuit courts have advanced differing interpretations of the Bennett Amendment and how this overlap between the statutes should be reconciled.

The distinguishing factor between the opposing views seems to come down to an answer to the question, does the adoption of the Bennett Amendment and its incorporation of the Equal Pay Act's four affirmative defenses into Title VII provide a basis for deviating from the traditional Title VII analysis which would leave the ultimate burden of proving discriminatory intent upon the plaintiff, and instead require an Equal Pay Act analysis in sex-based claims of unequal pay for equal work under Title VII? If it does not, then the position taken by the Seventh and Fifth Circuits would seem to be correct. But, it does.

Congress' adoption of the Bennett Amendment is sufficient reason to shift the burden of proof in a Title VII case to the defendant, where the plaintiff has proven members of the opposite sex are being paid unequally for doing equal work. The Bennett Amendment states that it shall not be unlawful for an employer to discriminate on the basis of sex in determining wages "if such differentiation is authorized under

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78. *Id. See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)(O'Connor, J., concurring).

79. *Washington v. Gunther*, 452 U.S. 160, 171 (1981).

206(d) of Title 29.”<sup>80</sup> The exemptions listed under 206(d) are affirmative defenses under the Equal Pay Act and must be proven by the defendant.

It was a concern of Senators at the time of the passage of Title VII that there were inconsistencies between the Equal Pay Act and Title VII in the area of sex-based wage discrimination where the two statutes overlapped. An example of this overlap is a case where a plaintiff can prove she has been paid different wages than an employee of the opposite sex for doing equal work. The plaintiff may assert this claim under either statute. The Bennett Amendment was proposed to take care of the possible inconsistencies that might arise from this overlap by incorporating the Equal Pay Act's affirmative defenses into Title VII.

Once a plaintiff has proven unequal pay for equal work to employees of the opposite sex under the Equal Pay Act, the burden of proof shifts to the defendant to prove the differential was due to one of the exemptions listed under the Act. If the two statutes are to be construed harmoniously and *in pari materia*, it is logical to conclude that in a Title VII sex-based wage discrimination claim where the plaintiff has established unequal pay for equal work to members of the opposite sex, the burden will also be placed on the defendant to prove the wage differential is based on one of the exemptions listed under the Equal Pay Act which was incorporated into Title VII through the Bennett Amendment.

It is reasonable to conclude that the Bennett Amendment's incorporation of the Equal Pay Act's affirmative defenses into Title VII also incorporated the Equal Pay Act's burden of proving these defenses, if the two statutes are to be construed harmoniously in the areas they overlap. Therefore, in Title VII claims of unequal pay for equal work based on sex, the appropriate analysis for the claim is under the Equal Pay Act's burden of proof scheme. Equating the methods of analysis for unequal pay for equal work cases in effect reconciles Title VII with the Equal Pay Act in this area where the statutes overlap which was Congress' intent in enacting the Bennett Amendment.

Congress' adoption of the Bennett Amendment provides ample reason for courts to treat sex-based unequal pay for equal work claims under Title VII differently than race, color, religion, or national origin cases and to apply an Equal Pay Act analysis when examining these claims.

This conclusion is supported not only in principle because it reconciles the two statutes in this area, but is a practical conclusion as well. Providing a unitary approach to examining claims that can be brought under both the Equal Pay Act and Title VII makes it less costly for the

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80. 42 U.S.C. § 2000e-2(h)(1988).

plaintiff and the defendant. The expense of both time and litigation can be reduced by tying the claims under both statutes together. But, the savings of time and expense by using the same analysis for unequal pay for equal work claims under the two statutes is beneficial only if it outweighs the costs associated with bringing the two statutes together, which it does in this case.

The primary purpose of Title VII is to eliminate intentional discrimination. Does an Equal Pay Act analysis of a sex-based wage discrimination claim effectuate Title VII's purpose of eliminating intentional discrimination? In *Fallon* the Seventh Circuit was concerned with the fact that in a traditional Title VII case, the plaintiff bears the burden of proving discriminatory intent at all times, while under an Equal Pay Act analysis a strict liability is established in that a plaintiff is not required to show an intent to discriminate.<sup>81</sup> The Seventh Circuit's analysis overlooks the fact that a prima facie Equal Pay Act case may be sufficient to establish an inference of intent to discriminate according to Title VII guidelines.

A plaintiff can establish the defendant's intent to discriminate in a Title VII case by direct evidence or intent can be inferred from a plaintiff's prima facie case. In *Texas Department of Community Affairs v. Burdine*, the Supreme Court said a Title VII prima facie case raises an inference of discrimination if the established acts, not otherwise explained, "are more likely than not based on the consideration of impermissible factors."<sup>82</sup>

To establish a prima facie case under the Equal Pay Act, the plaintiff has to establish employees of the opposite sex who do equal work under similar working conditions are being paid different wages.<sup>83</sup> Therefore, by establishing a prima facie case under the Equal Pay Act analysis, the plaintiff has proven the difference in the amount of wages being paid was not based on a differential in the work being performed or a difference in the conditions the same work was being performed under, two of the most common reasons an employer might assert to justify the payment of different wages.

Arguably then, proof of these acts is sufficient to establish the wage differential is more likely than not based on an impermissible factor if they are not otherwise explained, clearly raising an inference of discriminatory intent by the defendant. It is then up to the defendant under Equal Pay Act analysis to prove the wage differential was based on a factor other than sex.

Placing the burden of proof on a Title VII defendant once a prima facie case of equal pay has been established does not interfere with the

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81. *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

82. 450 U.S. 248, 254 (1981).

83. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

effectuation of Title VII's ultimate purpose of stopping intentional discrimination. If a defendant is unable to prove the wage differential was based on a factor other than sex, a strong inference of intent to discriminate has already been established. The same elements must always be proven to establish a *prima facie* Equal Pay Act case. Therefore, use of the Equal Pay Act analysis assures that an inference of intent to discriminate will be raised in every Title VII unequal pay case.

Adoption of the "equivalence" rule by the circuits that states an Equal Pay Act analysis is to be used for unequal pay for equal work cases under both the Equal Pay Act and Title VII, theoretically will not affect cases where the plaintiff could prove the pay differential was not justified by seniority, merit, quantity or quality of production, or any other factor other than sex, nor any case where the defendant could prove the wage differential was justified.

The rule should only affect cases where the factfinder cannot decide whether the differential is justified. In these cases it then becomes important to determine who is left with the ultimate risk of nonpersuasion. If this set of cases is small, the significance of the "equivalence" rule, which places the risk of nonpersuasion in Title VII equal pay cases on the defendant in comparison to leaving it on the plaintiff under the traditional Title VII analysis, is also small.

#### IV. CONCLUSION

The circuit courts are in disagreement over the answer to the question of whether a violation of the Equal Pay Act automatically establishes a Title VII violation. The Fifth and Seventh Circuits argue the two Acts require different proof and allocation of the burden of proof and are, therefore, not equivalent. The Tenth, Ninth, Eighth and Sixth Circuits have concluded that once a plaintiff establishes an Equal Pay Act violation Title VII is also automatically violated, finding the two acts are equivalent as to proof and allocation of the burden of proof under sex-based claims of unequal pay for equal work.

Congress' adoption of the Bennett Amendment to Title VII in its attempt to reconcile the two Acts, plus the fact that the purpose of both Acts can be effectuated by allocating the burden of proof in sex-based claims of unequal pay for equal work (the area where the two Acts overlap) according to the Equal Pay Act provides a strong basis for following the decisions of the Tenth, Ninth, Eighth and Sixth Circuits.

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