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Introduction

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INTRODUCTION

Winn Newman*

This issue of the *University of Michigan Journal of Law Reform* addresses the much maligned and oft-misunderstood doctrine of “comparable worth.” “Comparable worth” (or pay equity) is merely a popular name for the well-established concept that sex- or race-based wage discrimination is illegal. As the following articles demonstrate, proponents of the so-called “comparable worth” doctrine do not argue that employers are required to pay women’s and minorities’ jobs according to their intrinsic “worth.” Rather, proponents assert—and the courts agree—that wage disparities between male and female jobs, or between minority and nonminority jobs, having their genesis in discrimination are unlawful and must be eliminated. Moreover, at least in some cases, one such indicator of unlawful wage discrimination is a pattern of disparate pay between male and female classifications, which the employer itself has determined possess equivalent or identical components of skill, effort, and responsibility. Where these patterns occur in a work force segregated along race or sex lines, the inference that discrimination was a factor in setting these disparate wage rates seems inescapable.

Thus described, the basic position of the proponents of measures for ending wage discrimination would seem to be both uncontroversial and unassailable. Nonetheless, objections to these efforts abound. Opponents chiefly raise five arguments, which I will discuss briefly.

First, some opponents of pay equity initiatives take a “blame the victim” approach. They maintain that women (or minorities) working in job classifications with unlawfully depressed wage rates should seek relief from wage discrimination by securing other jobs. Clearly this argument is woefully lacking in both law and logic. Title VII of the Civil Rights Act of 1964¹ specifically bans discrimination in compensation, as well as a variety of other discriminatory employment practices. Remedies under Ti-

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

tle VII have been carefully tailored by the courts to redress specific discriminatory practices and to “make whole” the victims of such unlawful discrimination. Nothing in the language of Title VII itself, its legislative history, or the numerous court decisions interpreting it suggests that a different rule applies with respect to remedies applied for wage discrimination.

Second, opponents argue that elimination of wage discrimination is too costly. This argument, however, was resolved by Congress when it enacted Title VII’s prohibitions against wage and other forms of discrimination. Congress recognized that some costs would be the inevitable by-product of ending discrimination, but Congress made the basic policy decision that the societal and individual costs of maintaining discrimination in the work force far outweighed the costs to employers of eliminating it. In short, cost is simply no defense to discrimination.

Third, some opponents raise the “apples and oranges” argument. They assert that it is impossible to compare dissimilar jobs to determine their respective components of skill, effort, and responsibility. However, this argument completely ignores the long history of employer reliance on job evaluation as the principal mechanism for comparing and determining the relative values of jobs within a given workplace. Indeed, it has only been since plaintiffs began to use job evaluation offensively, in the wage discrimination arena, that employers have attempted to retreat from their own reliance on job evaluation as a sound mechanism for measuring jobs.

Fourth, opponents raise the spectre of “disrupting the market” as an argument against ending wage discrimination. They contend that wages within individual workplaces are set on the basis of “market rates” and that implementation of pay equity or comparable worth initiatives to end wage discrimination within that workplace necessarily constitutes impermissible interference with the “market.” The opponents’ market argument partakes of an entirely simplistic, and often unsupportable, interpretation of “market rates” as a mechanism for setting wages. Moreover, it ignores the fact that historically the government has interfered with “the market” in numerous ways—e.g., minimum wage and overtime laws and the Equal Pay Act—and that Congress has regularly mandated such interference where essential to securing other broad public policy objectives. No less is appropriate in the context of eliminating wage discrimination.

Finally, opponents argue that workers’ campaigns to end wage discrimination will result in the establishment of governmental wage-setting bureaucracies. This argument mischaracterizes the

very particularized nature of wage discrimination lawsuits, as well as the mechanisms for implementing necessary wage adjustments. Ending wage discrimination manifestly does not mandate the establishment of national wage scales; to the contrary, all it requires is that individual employers address their own compensation practices to determine whether, and the extent to which, they discriminate on prohibited bases. Where such discrimination exists, it should be remedied, consistent with the individual employer's overall compensation and classification scheme.

The articles in this Symposium discuss in depth many of these and other arguments that have been presented in the wage discrimination debate. In so doing, they clarify the issue of wage discrimination and resolve some of the confusion engendered by this debate. Three of the articles, those by Carin Clauss, Ruth Blumrosen, and Nancy Gertner, discuss the role litigation plays in ending wage discrimination. Analysis of wage discrimination litigation is important because vigorous enforcement of Title VII is one mechanism for securing various objectives of the broader-based pay equity movement.

Carin Clauss discusses one theory of proving Title VII wage discrimination suits.² Relying on experiences in Wisconsin and elsewhere, Clauss describes the manner in which an employer's paradigmatic model for assessing male (or nonminority) jobs may be applied to female (or minority) jobs to determine whether standards have been applied disparately. Where application of the "male model" to female jobs reveals apparent sex-linked disparities in pay, Clauss argues that a standard Title VII disparate treatment case has been shown. Clauss cautions, however, that litigation alone will not be enough to achieve pay equity goals. She predicts that legislative initiatives in the pay equity area will become necessary, due to politics and lower courts' reluctance to embrace fully Title VII's prohibitions against wage discrimination.

Ruth Blumrosen's article³ postulates that a principal barrier to successful wage discrimination litigation has been the belief of some courts that they lack the expertise to formulate appropriate remedies for wage discrimination. The reluctance of courts in this regard is often articulated as a fear that remedial orders on their part necessarily will result in wage-setting bureaucracies or bankrupt employers. Blumrosen attempts to lay these concerns

2. Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7 (1986).

3. Blumrosen, *Remedies for Wage Discrimination*, 20 U. MICH. J.L. REF. 99 (1986).

to rest. By analyzing litigation and studies, she identifies three typical patterns of wage discrimination and proposes practical remedies, premised on the employers' own assessment of jobs within their work force, which may be implemented without becoming enmeshed in economic theory. Professor Blumrosen estimates that these remedies will typically cost between one and four percent of an employer's payroll.⁴

As an experienced Title VII litigator, Nancy Gertner is aware of the difficulties of using Title VII to achieve the goals of the pay equity movement. Some of the problems Gertner addresses are those of proof of "either discriminatory animus or a discriminatory mechanism"⁵ as the cause of wage differentials, and of remedy when an employer does not have an identifiable mechanism to set wages. Due to the difficulties inherent in wage discrimination litigation, as well as the time and expense of any litigation, Gertner argues for the development of organizational strategies to use in conjunction with litigation. She particularly stresses that any such organizational strategy should focus on unions because of their recognized status as participants in the marketplace and their power to affect wages.

One theoretical and one practical discussion of comparable worth round out this Symposium. George Johnson and Gary Solon use economic theory to analyze the possible long-run impact of a comparable worth law on the economy.⁶ They predict that comparable worth legislation would transfer income between women, from those who do not have jobs affected by comparable worth to those who do, rather than from male to female workers. Nina Rothchild, unlike Johnson and Solon, does not address the abstract, macroeconomic effects of comparable worth, but rather explains how one employer, the State of Minnesota, implemented it and discusses its results to date.⁷ Contrary to the predictions of its opponents, comparable worth for Minnesota employees has not been prohibitively expensive, nor has it resulted in employee layoffs, a transfer of income among employees, or a new enforcement bureaucracy. To the contrary, Rothchild attributes to this successful statewide implementation the recent enactment of additional legislation requiring municipalities in

4. *Id.* at 152 & n.154.

5. Gertner, *Thoughts on Comparable Worth Litigation and Organizational Strategies*, 20 U. MICH. J.L. REF. 163, 169 (1986).

6. Johnson & Solon, *The Attainment of Pay Equity Between the Sexes by Legal Means: An Economic Analysis*, 20 U. MICH. J.L. REF. 183 (1986).

7. Rothchild, *Pay Equity—The Minnesota Experience*, 20 U. MICH. J.L. REF. 209 (1986).

Minnesota to apply comparable worth principles in their own wage-setting practices.

This Symposium helps to explain that "comparable worth" is merely a euphemism for garden variety discrimination that violates express prohibitions of federal antidiscrimination law and severely limits job-related opportunities and benefits for women and minorities. Hopefully, the message of this Symposium will not be lost on reasonable people: that wage discrimination is unlawful and that our energies must now be turned to developing effective means for eliminating it.

