In the

Supreme Court of the United States

COUNTY OF WASHINGTON ET AL.,	)	
	)	
PETITIONERS,	)	
	)	No. 80-429
V.	)	
	)	
ALBERTA GUNTHER ET AL.	)	

Washington, D.C.
March 23, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

COUNTY OF WASHINGTON ET AL.,

Petitioners,

v.

ALBERTA GUNTHER ET AL.

No. 80-429

Washington, D. C.

Monday, March 23, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

LAWRENCE R. DERR, ESQ., Weiss, Derr & DesCamp, Norton House, 33 N.W. First Avenue, Portland, Oregon 97209; on behalf of the Petitioners.

MRS. CAROL A. HEWITT, ESQ., Lindsay, Hart, Neil & Weigler, 700 Columbia Square, 111 S.W. Columbia, Portland, Oregon 97201; on behalf of the Respondents.

BARRY SULLIVAN, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the United States et al. as amici curiae.

MILLERS FALLS
ERASE
SECTION CONTENT

C O N T E N T S

MILLERS FALLS
ERASE
COTTON CONTENT

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in County of Washington v. Gunther. Mr. Derr, you may proceed when you are ready.

ORAL ARGUMENT OF LAWRENCE R. DERR, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. DERR: Mr. Chief Justice, and may it please the Court:

This case presents the question of whether sex-based wage discrimination claims are subject to a different standard of proof when such claims are asserted under Title VII of the Civil Rights Act of 1964 than the equal pay for equal work standard of the Equal Pay Act of 1963.

The respondents are former employees of the petitioner, Washington County. The respondents were jail matrons who guarded female prisoners in the county jail and had other clerical duties. The male prisoners were guarded by deputy sheriffs and later by corrections officers. The respondents filed this case in the federal district court alleging that they had received compensation lower than that received by their male counterparts doing substantially the same work. They also raised a claim that their jobs had been terminated in retaliation for making that equal pay claim and that they had been refused the right to be rehired, also in retaliation.

The trial court found that the jobs were substantially dissimilar on the facts, and therefore denied the equal pay claim. It also found that there was no retaliatory reaction, that there were good business reasons for the fact that the jobs were terminated. And those had to do with providing additional space in the jail to respond to an overcrowding problem, an ACLU suit.

In a post-trial brief after the facts were in, the respondents raised for the first time the claim that even if the jobs were not equal, that the great differential in pay between the comparison jobs could only be at least partially explained by sex discrimination. The only evidence pointed to were the very pay scales which caused the source of the comparison.

The trial court held on the basis of the laws that existed prior to this case that since the Equal Pay Act standards applied and since the jobs were substantially dissimilar, that is, not substantially equal, that the judge had no authority to override the wage rates set by the employer and the union in this case.

The respondents appealed to the 9th Circuit Court of Appeals and raised one other point of fact found in the record, and that was a statement by the sheriff of the county that at one point in time he felt that the matrons, the respondents here, should have been paid more than they were

being paid. No other evidence was asserted as supporting this comparison of jobs as opposed -- unequal jobs as opposed to equal jobs.

One other assertion was made for the first time on appeal to the 9th Circuit by the respondents, and that is that they were prevented during the trial from introducing additional information to support their comparable job claim. However, they have never pointed to what that evidence was nor anyplace in the record where they were denied that right. And, in fact, it's hard to understand how that could be the case since the claim was first raised in post-trial briefing, not in the complaint or the pre-trial order.

QUESTION: Mr. Derr, one thing that bothers me about this case is the extent to which we are talking about kind of an abstract distinction which may not boil down to too much when it comes to actual application. What in your view is the difference between equal work and comparable work?

MR. DERR: Comparable work is simply the tip of the iceberg of an open-ended interpretation of Title VII in the area of sex discrimination. The concept of equal work is one that is defined by the statute and through case refinements, that's a concept that's understood. But if that limitation that started in the Equal Pay Act is not applied as well to Title VII, then any theory is available to a plaintiff

or a claimant to attempt to show that there was discrimination based on sex. Comparable work is one of those theories and there are many versions and explanations of it. In essence, it amounts to comparing the value of different jobs to the employer, then comparing the wages, and drawing a deduction from a difference between value and wages that sex discrimination is the motivation, and I think by the explanation --

QUESTION: In that area you could -- I'm sure your sister will disagree with this, or the extent of this, but in the extreme logic of it you could compare the wage rights of truck drivers with that of secretaries, for example.

MR. DERR: Very definitely. There's absolutely no limitation upon the comparisons that can be drawn, only in the ability of the analysis to make any rational connection. And of course, this Court is well aware of the method of proof that it has outlined and recently described in the Texas v. Burdine case. The burden of proof, although it involves intent, is initially on the plaintiff only to show a prima facie case, to show a set of circumstances that create an inference that there may have been discriminatory motive. At that threshold level the courts will already be into the type of a situation which Congress did not intend them to get into, and that's attempting to evaluate different jobs and the relative value of those jobs.

In other words, at the very threshold level of determining whether there is a prima facie case in these comparison-of-unequal-job sort of cases, the courts will have to make an analysis, a subjective analysis that Congress did not intend. But you --

QUESTION: I was just going to ask Mr. Derr, I gather on the Equal Pay Act where we deal, I suppose, with something like identical jobs in the sense, for example, of an airline steward, it doesn't matter whether they are male or female, they do exactly the same thing. Here, I gather, there are differences in the job duties of the female guards and the male guards, are there?

MR. DERR: That's correct. That issue was --

QUESTION: To that extent there's no identity of duty between the male and female jobs here, as there would be in my hypothetical of the airline steward?

MR. DERR: That's correct, Your Honor. This case presents the issue squarely, because --

QUESTION: That was a finding of the district court, was it not?

MR. DERR: And that was upheld by the 9th Circuit Court of Appeals.

QUESTION: And the Court of Appeals did not change it.

MR. DERR: And that's not contested by respondents.

QUESTION: And the claim isn't that women are put in these jobs, and men put in these, discriminatorily? The claim is just on the pay?

MR. DERR: That's correct. There is no claim of denial of access, and in fact there is a finding in the record by the trial courts and I believe noted by the 9th Circuit that there was access to the higher paid jobs. These respondents are claiming larger pay for the jobs that they were in and not disputing the fact that they had access to the higher paying jobs.

QUESTION: And your position would be that even if you didn't have to rely on inference to prove intention, even if they had the employer cold, so to speak, that there would be no Title VII liability?

MR. DERR: No, that hypothetical was raised by the 9th Circuit. They stated it as though the employer would say to a female employee, if you were a man I would pay you more. The 9th Circuit felt that that would not be covered by the Equal Pay Act and we disagreed. Judge Van Dusen in the dissenting opinion in the 3rd Circuit in the IUE v. Westinghouse case disagreed that the fault --

QUESTION: Well, isn't it your position now, Mr. Derr, that unless the guards have a case under the Equal Pay Act, they have none under Title VII?

QUESTION: Yes.

MR. DERR: For wage-based sex discrimination.

QUESTION: For anything, whether intentional or not.

MR. DERR: The Equal Pay Act is an intentional act. It does require an attempt to discriminate on the basis of sex, and that's true because one of the defenses is that if the discrimination is based on --

QUESTION: I know, but the case doesn't get off the ground unless the jobs are identical?

MR. DERR: That's correct.

QUESTION: Unless they're like my hypothetical of the airline steward's job?

MR. DERR: That's correct.

QUESTION: Unless it's like that -- and since the finding here by two courts is, it's not, you say there's no Title VII claim?

MR. DERR: That's correct, Your Honor, but if I may respond to the hypothetical, there are remedies and one of them is an improper interpretation of the Equal Pay Act. The 9th Circuit, I believe, felt that unless there was an incumbent in the male job that was being used for comparison, there could be no Equal Pay Act violation. The Department of Labor has since the early days of the Equal Pay Act had a regulation -- I believe it's 29 CFR 800.114(c) -- which clearly indicates that you may look to successors and predecessors in the job, and --

QUESTION: Even though your current force is 100 percent female?

MR. DERR: That's right. The best example is a situation where there was just one person holding the job. If the person is a female and is terminated or leaves and a male comes into that particular job, it's possible to make that comparison. That's consistent with the interpretation of the Department of Labor and there are cases that have held. The thing that takes the next step and makes the Equal Pay Act the sort of remedy that it should be is to recognize that if the employer hypothesizes a male employee as perhaps the next incumbent, that should be no different than having to wait until the time that that next incumbent comes along.

And so that the employer who makes the statement that I would pay a man more, or, I will pay you less than I would a man, has made a comparison of necessity and by definition to equal work and has shown a violation of the Equal Pay Act.

QUESTION: Is it true, then, Mr. Derr, that the problem presented by this case only affects those job categories that are bona fide gender-based classifications? Because if you have a history of passed male or female in the opposite sex category, you can always find your remedy under the Equal Pay Act, if I understand you? So that --

MR. DERR: I'm sorry, I'm not sure if I understand

the relationship of bona fide qualification, Your Honor.

QUESTION: Well, the problem that you're addressing in this case is one in which there's a separate female category of jobs and a separate male category of jobs, entirely separate, and then -- you assume it won't be changed in the future, and it's always been that way, in both categories?

QUESTION: Oh, I thought you said there was access to the higher jobs?

MR. DERR: Yes, definitely.

QUESTION: Well, at least the category that we're talking about here is an exclusively female category?

QUESTION: No.

MR. DERR: The matron's job was an exclusively female category of job. But the higher-paying jobs were open to the females.

QUESTION: You mean the matrons might have had access to the males' jobs?

MR. DERR: That's correct.

QUESTION: Of superintending male prisoners?

MR. DERR: Yes.

QUESTION: Are there any?

MR. DERR: The jobs do not exist -- well, the matrons' jobs do not exist. The deputy sheriffs, there are female incumbents in those jobs. I'm not certain whether there are any female corrections officers at the moment.

There were not during this period of time.

QUESTION: But they are open?

MR. DERR: But they are definitely open; that was a finding of the case --

QUESTION: Has there ever been one? A female corrections officer?

MR. DERR: A corrections officer?

QUESTION: That's really the comparison here, isn't it?

MR. DERR: And the deputy sheriffs, because this covers a period of time when the deputies in a rotation were doing the jail guarding and later when the corrections officers were doing it exclusively.

QUESTION: Then there have been -- ?

MR. DERR: There are deputy sheriffs who are female. I do not know whether there are any corrections officers. There were not in the period of less than a year that that was pertinent in this case. The reason that --

QUESTION: But this would be a perfectly straightforward Title VII case if there were no access.

MR. DERR: That's true, but under another provision of Title VII which is unaffected by the Equal Pay Act.

QUESTION: Yes.

QUESTION: Let me just ask one here. Assume that, instead of this being a pay case, that they were complaining

they had to work Saturdays instead of -- and the corrections officers did not, or they had to work till 6 o'clock and they only had to work till five, omsething like that. That would clearly violate Title VII, wouldn't it? If it's anything but pay?

MR. DERR: It would present a case that could be brought under Title VII.

QUESTION: "Whiteapple."

MR. DERR: Yes; if it had to deal with conditions of employment.

QUESTION: Well, supposing they said they get paid for overtime if they're male but they don't if they're female, in the two categories?

MR. DERR: That appears to me to be a compensation case and most likely would be a case that could be brought under the Equal Pay Act standard and therefore must be.

QUESTION: Only under Equal Pay, if they said the men get overtime and the females do not? That would not violate Title VII, in your judgment?

MR. DERR: Well, that would present a question whether it involved some other factor other than wages and compensation, and I would prefer not to venture a guess as to how that might be interpreted by a court, but to the extent that it was interpreted to be a legal question, it would not.

QUESTION: Well, what would your position be?

MR. DERR: On an overtime pay?

QUESTION: Yes.

MR. DERR: It appears to me that that would be directly related to wages, and if they were denied the opportunity to work the overtime it would affect wages.

QUESTION: Denied payment for the overtime? If the males are paid time and a half and the females are paid straight time for overtime? That's the only difference.

MR. DERR: That appears to me to be a wage case.

QUESTION: And so there would be no recovery under Title VII? And they're in different categories, as they are here. So you have no right under the Wage Act, under my hypothesis. And I'm asking you, is there a right under Title VII in that hypothetical case?

MR. DERR: I don't believe so, Your Honor, any more than the truck driver and the secretary situation.

QUESTION: Of course, the truck driver-secretary wouldn't qualify under the 9th Circuit opinion either, because those jobs are not substantially equal.

MR. DERR: Well --

QUESTION: They don't have to be; that's the point.

QUESTION: The 9th Circuit says they do.

MR. DERR: The 9th Circuit is reading the substantially equal limitation out of Title VII, which Congress intended to be there as carrying into it from the Equal Pay Act.

We're talking about comparison of jobs that are not substantially equal.

QUESTION: That's the comparable, is it not? They don't use the comparable standard. They definitely disavow it in the supplemental opinion.

MR. DERR: Your Honor, they attempt to.

QUESTION: Well --

MR. DERR: They eliminate the equal pay standard, and having done that they leave no standard other than sex-based wage discrimination. The 9th Circuit attempts to distinguish by saying that it would not be sufficient to compare jobs, as they understand it, without other evidence. The only other evidence would be evidence of intent and we submit that the claimants will say that intent is inferred from the comparisons that we draw, and they'd certainly be entitled to raise that as a claim and will raise it as a claim, and that will then be a decision for the court to make as to whether or not it's sufficient to present a prima facie case.

But the distinction drawn by the 9th Circuit to say that they are not allowing cases based on comparison of comparable but not equal jobs is simply not warranted by the position they've taken. The 9th Circuit certainly has no ability to rewrite the statute and there's nothing to be found in the statute that would say that.

QUESTION: Mr. Derr, do you think the 9th Circuit would

permit a "comparison" between the wages paid secretaries and the wages paid salesmen, by the same corporation, in terms of one puts in 40 hours and another puts in 40 hours, and therefore we have to decide which is harder work, or which is more difficult work, and that sort of thing?

MR. DERR: Yes, I do, Your Honor. That and any even more disparate sort of comparison that you might choose to make because they've said that there is no such limitation.

QUESTION: Another criterion would be the economic contribution made by the job.

MR. DERR: Certainly. One of the problems, of course, with the comparable work question which the 9th Circuit's interpretation opens the door to is that there is no clear understanding of what sort of economic or professional valuation methods would be used to apply it. And I am not here prepared to explain to the Court how it would be done because, frankly, I do not know. But I do know that those claims would be available.

QUESTION: How? I presume the court would have to take testimony, and make its own decision as a question of fact.

MR. DERR: That's correct. The important point to remember in understanding why Congress chose this to be the state of affairs, that is, that sex-based wage discriminations would be limited to the standards of the Equal Pay Act, is

that it considered these questions in 1962 and 1963. The evidence was presented to Congress in great detail that there were allegations of dual standards of pay between males and females, that there was avowed intentional sex discrimination; Congress was well aware of that. Secretary of Labor Arthur Goldberg and his assistant, Esther Peterson, representatives of the unions, presented that information to Congress and urged that a comparable work standard, which was in the original proposal before Congress, be adopted.

QUESTION: What was that standard?

MR. DERR: The standard was first worded as requiring that comparable pay be made for comparable work. That was the bare bones initial statement that evolved to add some modifiers as to skill. Congress had great concern with that, and moved to the equal pay for equal work standard and in so doing also added definitions and eliminated the per se or the strict liability character of the Act by adding, as a defense, that if the pay, even though for equal jobs, was disequal, unequal, but if there was any factor other than sex involved, then it would not violate the Equal Pay Act.

Congress didn't do that because it didn't see the problems because the problems were not pointed out to it; they were. It did it because it saw greater problems in getting the Department of Labor, the Federal Government, and the courts into the sort of evaluations of employers' wage

schedules, that the Court has addressed its questions to here today. That's a policy question. We're not here arguing a policy. We're simply saying that Congress in 1962 and 1963 addressed that policy question and decided it.

QUESTION: Has the EEOC changed its position on the matter?

MR. DERR: Your Honor, it has. The EEOC, of course, is not authorized to issue binding regulations --

QUESTION: No.

MR. DERR: -- but it does issue guidelines --

QUESTION: Guidelines.

MR. DERR: -- and it did issue a contemporaneous guideline in 1965 which we have reprinted in the Appendix to Petitioners' Brief at page 4a.

QUESTION: Then how has it evidenced its change of position if it has?

MR. DERR: The guideline and the subsequent opinion letters which are also reprinted in the Appendix make it very clear that the EEOC at that time felt that the equal pay for equal work standard was incorporated. The position of the EEOC which it's arguing in its amicus brief and will be presenting to the Court in a moment is clearly to the contrary.

QUESTION: But how has it evidenced it other than filing this brief?

MR. DERR: It has evidenced it in later opinion letters.

QUESTION: Has it changed its guideline?

MR. DERR: The guideline was changed in 1972 to omit the language that makes it clear that the Equal Pay Standard was incorporated.

QUESTION: And then it issued some opinion letters contrary to the earlier one?

MR. DERR: And both before and after that '72 guideline there had been opinion letters issued directly contrary, so that there's no question but what there has been a complete reversal of the position, and of course the petitioners rely upon this Court's analysis in General Electric v. Gilbert that to the extent that the opinions and the guidelines of the EEOC are entitled to deference, it's the contemporaneous opinions. And certainly where they accord with the express legislative intent, that should have the controlling effect.

QUESTION: What of the Bennett amendment, Mr. Derr?

MR. DERR: Your Honor, if I may respond to that by one word of introduction?

QUESTION: Take your time.

MR. DERR: When Title VII, of course, was before Congress there was concern expressed, initially by others and finally by Senator Bennett, that the decision reached in the Equal Pay Act of 1963 might be abrogated or nullified in

some way by the broad sweep of Title VII, at the time that sex was introduced as a protected classification.

QUESTION: That was almost a happenstance, as I recall, wasn't it?

MR. DERR: It came after committee hearings had ended in the House, while there was debate on the House floor. It appeared in a proposed amendment by Representative Smith and in the same afternoon was adopted with limited debate. When the bill went to the Senate it never went through committee hearing, it went straight to the Senate for debate, and so there was very little really substantive discussion of the sex amendment.

Senator Clark expressed the concern of others that by so doing -- and since the coverage of Title VII is of course, as we have mentioned, broader than the Equal Pay Act. It covers such things as conditions of employment and access to jobs -- that it would have the effect of overreaching the Equal Pay Act and of reading out of it the equal pay for equal work limitation. And so Senator Clark responded to that concern by his understanding of the doctrine of in pari materia construction which was simply to say that the subsequent enactment would not have that effect. There was nothing in Title VII as it was then before Congress that expressly said that. And that's why I say that Senator Clark must necessarily have been relying on in pari materia construction.

However, Senator Bennett apparently was not comfortable with leaving it at that, and so introduced an amendment. Unfortunately for the benefit of legislative history, that amendment came after cloture had been invoked on the Senate floor so that, for one thing, the date was extremely limited, and for another, it was styled as a technical amendment.

That of course was consistent with what Senator Bennett was doing, which was clarifying, not, as has been suggested by other parties, narrowing the scope of Title VII, but clarifying what Congress expected to be the narrow scope.

The Bennett Amendment refers to Section 6(d) which was the Equal Pay Act Amendment to the Fair Labor Standards Act. And it states in essence that it is not a violation of Title VII to differentiate and pay on the basis of sex if it's authorized by the Equal Pay Act. There have been three interpretations put forth for what the Bennett Amendment means. The most narrow and I think one not strongly urged by any party as this time is that all it did was incorporate four defenses that are found as a part of the Equal Pay Act. The reason that that can be discounted fairly simply is that those four defenses already existed in Title VII as it was proposed. The first three existed in a sentence immediately preceding the insertion of the Bennett Amendment in Section 703(h). The other one, any other factor other than sex, is implicit in Title VII itself, which only creates a violation

for discrimination based upon sex.

The second interpretation, and the one that's being urged by the EEOC, is that they recognized that certainly Senator Bennett and Congress intended more than the four defenses. They refer to the entire Equal Pay Act, not just the defenses. And so they say that what he meant to do was simply say that anytime an equal pay claim is raised, that the equal work standard applies. But that is just as illogical, taken in the context of what Congress had just finished doing the year prior -- and I would point out, the same Congress -- in adopting the Equal Pay Act.

QUESTION: And that this upset Dirksen, while you're at it, on that same point?

MR. DERR: Your Honor --

QUESTION: Where he said specifically that it was for the purpose of taking care of the exceptions? Didn't he?

MR. DERR: He uses the word "exception" and in the context in which he uses it, Your Honor, it's not clear what he referred to. The only way that we can interpret it to make any sense is that he intended to incorporate the equal pay for equal work standard, all of Section 6(d), and used the term "exception." It's also possible that what he meant to include was the entire Fair Labor Standards Act, which would include the narrow employee and employer exemptions.

QUESTION: Well, what should we do, Mr. Derr?

What weight should we give Senator Bennett's 1965 clarification?

MR. DERR: The 1965 clarification, although it comes later -- and of course that raises some questions --

QUESTION: That was two, three years later, wasn't it?

MR. DERR: One year later.

QUESTION: One year later.

MR. DERR: The Bennett Amendment was adopted in 1964; the clarification came in 1965. It's entitled to weight. It attempts to show why the Amendment came in the limited form that it did, because of the cloture situation. It comes from the author and sponsor of the amendment, it comes relatively contemporaneously, it was agreed to by Senator Dirksen, who also was instrumental in the adoption of Title VII. And a bit later, several weeks later, Senator Clark, who took exception to a limited portion of it, namely the question of coverage, agreed with the essence of it, which was the incorporation of the Equal Pay Act. So three of the pivotal people --

QUESTION: You haven't mentioned Senator Humphrey, who commented.

MR. DERR: Senator Humphrey was commenting about a different topic. His comments were, as I remember them, directed at the equal pay for equal work standard.

QUESTION: Do you think Senator Humphrey would be

in accord with your interpretation?

MR. DERR: Yes, I do.

QUESTION: What do you think Senator Bennett meant when he referred to a "proper technical correction" of the bill?

MR. DERR: I believe that it's appropriate to view the Bennett Amendment as a technical correction because it was a clarifying amendment. It was not a narrowing of the scope of Title VII in the area of sex-based wage discrimination, it was an explanation of Congress' intent and expectation that Title VII would be that narrow.

QUESTION: It's true, isn't it, that the '65 comment by Senator Bennett was never heard by the 97 other Senators, or 99 other Senators, who had already enacted the bill into law?

MR. DERR: That's correct, Your Honor. The reason that it has relevance and weight is that there is nothing in the legislative history to indicate to the contrary that that was not the sense and intent of Congress when it was adopted.

QUESTION: Yes, but Mr. Derr --

MR. DERR: Everything in the record is consistent.

QUESTION: But haven't we quite frequently suggested that you have to proceed very cautiously in giving any weight to post-enactment statements of what he meant by even sponsors of legislation?

MR. DERR: Your Honor, that's very true, and it certainly goes to an evaluation of the weight of the comments, and we are not relying solely on that comment, although all of the evaluative criteria that the Court has mentioned would require that weight be given to it in this case.

MR. CHIEF JUSTICE BURGER: Mrs. Hewitt.

ORAL ARGUMENT OF MRS. CAROL A. HEWITT, ESQ.,

ON BEHALF OF THE RESPONDENTS

MS. HEWITT: Mr. Chief Justice, and may it please the Court:

The plaintiffs in this case at trial sought to prove that the defendants had established the appropriate pay for the job of jail matron and then paid the women incumbents less. The sheriff, who is one of the defendants and determined by the trial court to be an employer, testified that the appropriate way to pay the jail matrons was to pay them five percent less than corrections officers. He had previously testified in depositions that he thought it appropriate that they be paid at the rate of the deputy sheriffs who, at one time, were the persons performing services in the male section of the jail.

At trial we sought to pursue this matter further. The court terminated the line of questioning about any pay differential with the comment that, if the jobs are not equal, the degree of pay differential or the reason therefor

has no relevance. That is at pages 69 and 70 of the record.

The court also terminated testimony of two other witnesses because he preferred to focus on other issues.

On the appeal, the 9th Circuit --

QUESTION: Did you make a proffer of what you were going to prove?

MS. HEWITT: No, I did not, Your Honor. The judge --

QUESTION: That's usually the best way to preserve a point like that, isn't it?

MS. HEWITT: That is certainly true. This was a calculated risk in this case. The judge was impatient, and we felt confident we were going to win on other grounds. I did not do it. It was obviously an error, in hindsight.

The Court of Appeals remanded the case after reversing, stating that there should be further proceedings on the question of what kind of proof there was of this claim. Therefore, the question that is being reviewed is whether Title VII prohibits wage discrimination for women by an employer paying less than the rate that he has determined to be appropriate for a job.

I think it's important in this case that the only issue of comparability comes because the employer sought to determine the appropriateness of wages within the jail setting by comparing one job to another and also by looking to outside sources. So it's the employer's system that we are

looking to, and we are saying, if the employer follows this system and determines an appropriate rate of pay, then he cannot lower that rate of pay because the incumbents are women.

QUESTION: Mrs. Hewitt, in a case where the employer has established a system of pay and set a certain rate for secretaries and a certain rate for outside salesmen and the outside salesmen's rate is higher or at any rate their gross income is higher, do you think that could be attacked under Title VII?

MS. HEWITT: It could be attacked if there were some reason to indicate that there were sex factors being taken into account in setting the wage rate, not --

QUESTION: Well, let's say all the salesmen were men and all the secretaries were women.

MS. HEWITT: I don't think that that in itself establishes any kind of intent because we have that situation in this case. We have the matron's job which by state statute was required to be filled by women, and we have de facto segregation on the corrections officer side. There were never any female corrections officers. There's evidence in the record that women were discouraged from applying and, in fact, there might well have been a male BFOQ for that job, but that was not litigated.

QUESTION: These are clearly different jobs,

secretary and salesman. And --

MS. HEWITT: That is correct. Now, you can't presume discrimination just because they're different jobs, because, obviously, there are some jobs, where women are the predominant or the sole occupants --

QUESTION: But your point is that there can be discrimination even though the jobs are quite different?

MS. HEWITT: Certainly. And a classic example is if the employer uses a system, the Hay system, the McKenzie system, or any of those nationally known ones, determines what the worth of the job is, and then pays the men that level and pays the women something less simply because they're women.

QUESTION: They equal. But not for the same job?

MS. HEWITT: That's correct. They are not the same job and that's why we're in this court today, because --

QUESTION: It pays the jobs differently, even though -- and it turns out that in one job category 100 percent of the occupants are female and in the other 100 percent are male. Now, that would be a prima facie case, woudln't it?

MS. HEWITT: Yes, but --

QUESTION: But you would be here if half the corrections officers were women and half men if your claim still was that the exclusively female category was paid on a discriminatory basis?

MS. HEWITT: That's correct. There are kinds of discrimination under Title VII in wages where there is no job comparison at all. The example would be a single sex occupant where the employer says, without reference to anyone else, if you were a male I would pay you less; a situation such as the Manhart situation where you have a differential in take-home pay because of the sex of the employee but it's not with comparison to any other job.

QUESTION: Well, what if you take a situation which I think has arisen in connection with the airlines where you have male flight attendants and female stewardesses -- I guess they're all called attendants now. And that group brings a Title VII action on the grounds or an equal pay action, on the grounds that the attendants, although they've put in the same number of hours, are not being paid the same amount as the pilots. Do you think that a court can then evaluate the number of hours and the training and the capacity and ability required of attendants as opposed to pilots?

MS. HEWITT: My view of that is that that fact alone would not state a prima facie case, because what Title VII prohibits is discrimination because of sex, and the mere fact that the plaintiff is a woman and she's comparing herself to a man doesn't create any inference that there's discrimination on the basis of sex. The most obvious reason is discrimination

because the jobs are different.

QUESTION: But your argument says, tells us, that there could be a case of a discrimination even though the jobs are quite different. Isn't that it?

MS. HEWITT: There certainly could be. There certainly could be. And the question that will have to be --

QUESTION: And how much you have to prove is really not here, is it?

MS. HEWITT: Yes; that's correct. That's not here in this case.

QUESTION: But what would be a hypothetical example?

QUESTION: This one.

MS. HEWITT: Of a prima facie case?

QUESTION: Yes.

QUESTION: This case. Isn't that what you say?

MS. HEWITT: All right. In this case -- The county in this case has established a system for determining the value of jobs. That system in this particular case consisted of looking to outside markets and then doing an internal evaluation of what one person did versus another. Based on that they determined that the appropriate rate of pay for corrections officers was one rate and for matrons was one class below that, which was a five percent differential. They then paid the women 35 percent less than they paid the

corrections officers. Now, I think it's quite possible in this case that that raises an inference that there might have been discrimination involved, given the fact that all the matrons are women and all the corrections officers are men, and it's somewhat unusual for an employer to go to the problem of, go to the trouble of evaluating a job, determining the appropriate rate of pay, and then pay one group who are all women less and not men. But that may not be enough. That -- it's possible that you have to come in and say -- and I've got the sworn testimony of the employer that says, yes, I did it, just because that person is a woman.

Now, there's a great variance in what might might be sufficient to raise an inference of discrimination but comparing it to the standards for discrimination in hiring or promotion, the McDonnell-Douglas type of standards, the threshold is relatively low, and the Court has found that an inference of discrimination --

QUESTION: Are you saying that here, for example, they priced the corrections officer, a male job, at $500 a month; they priced the women's, matron's job at $400 a month, but then they paid the corrections officers five but the women 350?

MS. HEWITT: Exactly.

QUESTION: That's what you say this case is?

MS. HEWITT: That's exactly correct. Yes, sir.

Now, the county can come back, certainly, and say, well, the reason we paid the matrons less was something having nothing to do with their sex. They can certainly rebut the presumption, but it would seem to me that that would create a threshold level, raising an inference at this point.

QUESTION: In a prima facie case?

MS. HEWITT: Yes.

QUESTION: You mean to rebut the prima facie case? Not a presumption? There's no presumption there.

MS. HEWITT: No. Excuse me. That's very correct. Rebutting the prima facie case.

QUESTION: What if both the matrons' guard force were made up of both men and women and paid equally, and the deputy sheriff force were made up of men and women, and paid at a higher rate, but paid equally? Do you think a matron or a guard, a male, could bring a challenge to that sort of system?

MS. HEWITT: I think the system is challengeable but they're going to have to show something that would lead you to believe, even on a prima facie case, that discrimination was involved. The problem you have with --

QUESTION: Well, you answered me a while ago that the matron could certainly make out a case on that basis, if you -- and that you could make your proffer of proof and make a prima facie case.

MS. HEWITT: Well, as I understand the difference in the situation, in the matron situation we have two factors: one, it's totally sex-segregated, and two, you have a level of pay which is then determined and then the women are paid less, so that's determined. Now, as I understand, in your hypothetical, you've got a mixture of men and women in both jobs. Now --

QUESTION: Right.

QUESTION: Are you saying that both are prima facie?

MS. HEWITT: I think it's more questionable whether you have a prima facie case when you have a mix of males and females and you're paying that particular job category less. I'm not saying you can't do it, but I'm not sure that it's as clear that sex may have played a factor in the different way in which the two groups are treated.

QUESTION: But the matrons in my brother Rehnquist's example would have as strong a case there as they do here, if they exclusively --?

MS. HEWITT: That's correct.

QUESTION: Yes.

MS. HEWITT: There is nothing magical about a pay case under Title VII as compared to any other kind of a discrimination case under it. Obviously there are difficult problems of comparisons and this does not limit itself to pay cases in either the Equal Pay Act or Title VII. There are

difficult factual questions to be determined and anytime when you're dealing with motivation I think it's important that --

QUESTION: But you do reject the argument of your brother that there can't be a Title VII case unless you can prove an equal pay violation?

MS. HEWITT: Absolutely. I do not think that there's anything in the Bennett Amendment which can possibly be construed to have such a broad result. The only legislative history on the Bennett Amendment that is relevant is that which was at the same time it was enacted, and that was Bennett's proposal, that it was being introduced as a technical correction in order to avoid conflicts between the Equal Pay Act and Title VII, and Dirksen's comment that this was a good idea because it incorporated the exceptions, and all it did was incorporate the exceptions of the Equal Pay Act into Title VII. There was no debate. It was voted on and enacted on that basis.

And furthermore, even the language of the Bennett Amendment only says that it is not an unlawful employment practice for an employer to differentiate in compensation on sex if such differentiation is authorized by the Equal Pay Act. I think it's very important to look at what the Equal Pay Act authorizes.

When Congress was considering the Equal Pay Act it

thought about two things. It thought about creating a standard requiring that there be equal pay for equal work, or in the alternative that there be equal pay for comparable work. And that was all it considered. And in both of those alternatives it had in mind a plaintiff coming in and being able to say, I make less than this person over here, and he's a man and he does either exactly the same thing or is comparable. Therefore, I am entitled to recover unless the employer comes in and proves that his conduct is because of one of the four affirmative defenses.

Now that is a different kind of situation than is required under Title VII.

QUESTION: Well, then, is your position that the Bennett Act -- rather, that the Equal Pay Act, in effect, authorized nothing?

MS. HEWITT: I think the Equal Pay Act authorized the payment of different wages for the same job in four instances which are the four affirmative defenses, seniority system, merit system, productivity and quantity or any factor other than sex. And that's what it authorized.

QUESTION: What's your response, then, to your opponent's argument that that was already in the Act?

MS. HEWITT: The first three, the seniority system and the merit system, and the quantity or quality of production, are already in Section 703(h) of Title VII. The fourth

one, any factor other than sex, is not. And the petitioner has said that that doesn't really mean anything because it's just surplus verbiage, but that was certainly not the intent of the law.

QUESTION: Well, it wouldn't be a violation of Title VII if the alleged discrimination was based on a factor other than sex -- race or --

MS. HEWITT: That's correct.

QUESTION: Any other statutory criterion.

MS. HEWITT: It's interesting that the defense of any factor other than sex came out of the Equal Pay Act and the Equal Pay Act says the same thing. You don't have a violation of the Equal Pay Act unless it's sex, and then they go on to say, but it's a defense if it's in effect the other --

QUESTION: It's surplusage in those cases, is the argument.

MS. HEWITT: So they obviously thought it meant something, and it must mean the same thing --

QUESTION: What do you think it means?

MS. HEWITT: And it has been -- well, it has been used --

QUESTION: What do you think it means if it says "there shall be no violation of this Act if there is no violation of this Act"?

MS. HEWITT: Well, I think it's been interpreted to

bear on the burden of going forward for the parties, and the inference of sex being a factor created in a prima facie case can be rebutted by showing that it's some factor other than sex, under either Title VII or under the Equal Pay Act.

QUESTION: And that would be true whether or not that statutory provision were there or not.

MS. HEWITT: But, I agree -- I think that in the drafting of both statutes that there are some words that may not have needed to be there, but I don't think that there's anything that indicates that Congress intended the wholesale change of Title VII which the petitioners' construction would have. Now, there are lots and lots of kinds of instances of discrimination which should by the clear language of 703(a) be recoverable under Title VII, but I'm sure Congress never thought of that in the Equal Pay Act, and if they thought about them they were not trying to deal with them, and certainly not at the time they incorporated the Bennett Amendment. And bear in mind that these types of discrimination would only affect women, and I don't think Congress intended to completely change Title VII to so limit the rights for women and to provide protections for other protected groups.

QUESTION: Do you attach any significance to the fact that the provision banning discrimination on the basis of sex in Title VII was introduced by Congressman Howard Smith

from Virginia?

MS. HEWITT: I subscribe fully to the theory that he had in mind that he wanted the bill not to be enacted because sex was included, but that isn't what happened, and I don't think that too much can be put for that now at this time. I am sure that Congress had in mind that women would receive the same benefits under Title VII as any other protected class.

QUESTION: Well, except that women, you concede, are the only group protected by Title VII, where, for whom there's a BFOQ?

MS. HEWITT: That's correct.

QUESTION: And also, I think, since I've already interrupted you, as I understand your colleague's argument, it is that the Equal Pay Act is the sole criterion only when the claim is a differential in compensation, not where the claim is something else, a promotion, or hiring, or whatever?

MS. HEWITT: That's correct. The Equal Pay Act clearly speaks only to pay differentials.

QUESTION: And your colleague's argument, even at its broadest extent, would tell us that the Title VII is satisfied if the Equal Pay Act is satisfied in a claim devoted exclusively to differentials in compensation?

MS. HEWITT: That's correct. But there are a wide variety of places in which that does not do women any good and

this is a prime example, because they are sex-segregated jobs and they can't just go out and find either a male comparator in their own job or, in this case, even go to the corrections officers' position.

QUESTION: Incidentaly, Mrs. Hewitt, I thought you -- did you not say earlier, there's not ever been a female in the corrections officer's job? But what about your brother's suggestion to us, however, that access to corrections officers' jobs is available to females?

MS. HEWITT: Our contention is that access is illusory. We did not pursue that in the trial because it was not really an issue, but the fact is that there never had been one that really discouraged --

QUESTION: Well, is there any finding by either of the lower courts that there is access to the corrections officer's -- ?

MS. HEWITT: It was noted, yes, in the court, that the corrections officer's position was open to women.

QUESTION: As a finding?

MS. HEWITT: As a finding.

QUESTION: By whom, the district court?

MS. HEWITT: By the district court. That's correct.

QUESTION: And there have been, or are, women deputy sheriffs?

MS. HEWITT: There are women deputy sheriffs, but

now that the deputy sheriffs for a time were in the jail doing the corrections officers' job. There were no women at that time, so there have never been any women on the male side of the jail, but there are now women who are deputies who do the general police patrol work.

I think it's important to keep in mind in this case the kinds of discrimination in pay which Title VII would prohibit if the petitioners' contention were correct. And that includes the situation that even he mentioned, which is someone saying to an employee, I'm not going to pay you as much as if you're a man. It includes a lot of situations where you would have a discriminatory impact. For instance, if an employer determined that he was going to pay extra pay for combat experience, which obviously would prejudice women, under the analysis of the petitioner, that would be perfectly all right. In the Phillips v. Martin Marietta situation, you couldn't hire somebody on a sex-plus theory if they had preschool age children, but you could pay them less because they did. You could pay a head of household more, which would impact against women. All of these kinds of cases have no bearing whatever on comparing one job to another. It's clear that in Congress's contemplation of the Equal Pay Act, what they were worried about was, as they expressed it, legions of government bureaucrats coming into businesses and telling them how much one job was worth versus another. We don't

have that situation in this case because we're relying on the county's own system of valuing jobs for a starting point, and then what they did to discount that.

Also, that is not the situation in most of what I have described as the pay discrimination.

MR. CHIEF JUSTICE BURGER: Mr. Sullivan.

ORAL ARGUMENT OF BARRY SULLIVAN, ESQ.,

ON BEHALF OF THE UNITED STATES, ET AL., AS AMICI CURIAE

MR. SULLIVAN: Mr. Chief Justice and may it please the Court:

I'd like to state the Government's interest in this issue, but before I do I'd like to pick up on Mr. Justice Stewart's question about the BFOQ. And it seems to me that the BFOQ analogy doesn't carry you very far in this area because --

QUESTION: Well, really, I agree with you, and the only reason I raised that was to qualify the claim that women are treated exactly like every other protected group under Title VII. And there's certainly a very explicit exception to that generalized statement in the BFOQ, which is applicable only to women. And that was the only purpose --

MR. SULLIVAN: Well, I believe it's also applicable to members of religious groups, and I think that the rationale is that there are some legitimate purposes that Congress --

QUESTION: Right. And there are not --

MR. SULLIVAN: -- wanted to protect, as there --

QUESTION: Statutorily, for the other groups protected.

MR. SULLIVAN: -- such as pay discrimination.

The Government's interest here rests on the district court's holding that sex-based compensation discrimination is actionable under Title VII only if the particular acts of discrimination would also be actionable under the Equal Pay Act. In other words, an employer could admit to a woman employee that he would pay her at a higher rate if she were not a woman, or he could give a bonus that had absolutely nothing to do with work to only male employees, or he could give a cost of living increase that bore no relationship to the duties performed only to male employees. And this would not violate Title VII in petitioners' view. The effect of this theory --

QUESTION: Because it would not violate the Equal Pay Act?

MR. SULLIVAN: That's correct.

QUESTION: And why wouldn't it violate the Equal Pay Act, that latter example?

MR. SULLIVAN: Well, it would violate the Equal Pay Act only in those circumstances in which a male and a female were doing exactly the same job --

QUESTION: Exactly.

MR. SULLIVAN: -- within the definition. However, as to --

QUESTION: Exactly. And you can't give the same base pay to women and men, but give the bonuses only to men under the Equal Pay Act, can you?

MR. SULLIVAN: That's right. But if you assume that work forces are not made up of people who all have the same jobs, as the Court assumed in Manhart --

QUESTION: Right.

MR. SULLIVAN: -- then the point is that a good deal of discrimination could be allowed to occur simply because the jobs were not equal under the Equal Pay Act. And if you assumed that the factor that is causing this discrimination is a factor that has absolutely nothing to do with the duties that are being performed by the various people who are working here, then it clearly would violate Title VII in our view, but it would not violate the Equal Pay Act.

QUESTION: Mr. Sullivan, as I understand Mrs. Hewitt's argument, she says that for her purposes she is taking the scale, wage scale, already set by the county and simply seeking to show that there has been discrimination on the basis of sex under Title VII in it; and that that would not require the courts to evaluate the relative worth of the flight attendant's job versus the pilot's job, and that sort of thing. Now, is that your submission also, or do you

think that courts under the comparability theory can evaluate quite widely varying jobs?

MR. SULLIVAN: Well, the Government has not taken a position as to that question in our brief. And the reason that we haven't is that we believe that, quite frankly, we don't understand what this comparability theory is.

QUESTION: Well, what if we don't either? How are we supposed to write the opinion?

MR. SULLIVAN: Well, Mr. Justice Rehnquist, the theory of our brief does not depend on the comparability issue. The theory of our brief is that as a matter of statutory construction what petitioners say the Bennett Amendment means is simply not persuasive. And once that has been decided, then the lower federal courts will have an opportunity to determine such questions as whether particular kinds of proof are relevant in these cases, which I think is the thrust of your question.

QUESTION: To prove intentional sex discrimination, is that it?

MR. SULLIVAN: To prove sex discrimination within the meaning of Section 703(a) of Title VII.

QUESTION: And really, your argument is simply that there can be a violation of Title VII with respect to compensation even though there's no violation of the Equal Pay Act?

MR. SULLIVAN: That's correct.

QUESTION: And that's really the broad issue, isn't it?

MR. SULLIVAN: That's correct.

QUESTION: Are you defending the Court of Appeals' opinion? Certainly you are his judgment.

MR. SULLIVAN: That's correct. And I don't think that there is anything inconsistent in the 9th Circuit's opinion with what I've said. Essentially, the 9th Circuit has said that the case should be remanded for further development of the factual record. And I might add that the other decisions of the courts of appeals that have been rendered on this question are not particularly helpful in that they either reject the notion that 703(a) is left intact after the Bennett Amendment or they accept that. And there isn't really very much discussion, despite the number of cases that are cited in the briefs, on this --

QUESTION: Well there's one that we don't understand at this moment what purpose much further discussion would serve since nobody seems to understand what would be involved.

MR. SULLIVAN: I'm not sure I understand the comment --

QUESTION: Well, that's -- the real issue is the one you stated, isn't it? Whether -- what effect the Bennett Amendment had, and did it serve to say that there can be a violation of Title VII in this context only if there is a

violation of the Equal Pay Act, or did it not? And that, you say, is what the courts have decided. And that's what you're asking us to decide.

MR. SULLIVAN: I think that's the issue that's -- that's correct. But what I'm saying is that with respect to what constitutes a prima facie case, if you accept our construction of the Bennett Amendment, in a situation where there is no violation of the Equal Pay Act alleged, but we would submit there would be a violation of Title VII. But that is a problem.

QUESTION: But you want us to leave it to further development in the district courts and the courts of appeals?

MR. SULLIVAN: That's correct.

QUESTION: But is that what this Court ordinarily does? Aren't we supposed to lay down rules of law rather than simply say, go back and develop some more facts and then we'll tell you whether you've made a case or not?

MR. SULLIVAN: Well, I think that in the Teamsters decision the Court said that despite all of the work that gone into McDonnell-Douglas, that McDonnell-Douglas was simply one paradigm for proving a prima facie case of discrimination, and that there were other ways of proving a prima facie case of discrimination. And that's simply all we're saying here, is that that's essentially a fact-bound question in every case. Some facts may be persuasive in one

case; they may create a strong inference of discrimination in the circumstances of one case, and without any factual record to speak of in this case --

QUESTION: Well, didn't we limit the grant in this case to just the one question? Or, isn't there just one question involved, whether or not you must allege and prove an Equal Pay Act violation in order to prove it Title VII?

MR. SULLIVAN: I think that is correct. That is not the --

QUESTION: That is the issue, and if we decide against you the case is over, if we disagree with your version of the Bennett Amendment.

MR. SULLIVAN: I believe that would be correct.

QUESTION: But if we agree with you we don't reach any other question, do we?

MR. SULLIVAN: No. We submit that the question that the Government has raised here is the threshold question that must be addressed in any event.

QUESTION: Is it your view that the term "comparable work" is the same as "equal work"?

MR. SULLIVAN: No. That's not my view.

QUESTION: I got the impression that that was your view being advanced at some time here. You think that they do not mean the same thing?

MR. SULLIVAN: I think, ordinarily, they don't.

I'm not sure what the context the Chief Justice is suggesting might be.

QUESTION: Well, in a law firm, the young lawyers do work that's comparable to what the senior partners do, but they don't do equal work and they surely don't get equal pay. Is that right?

MR. SULLIVAN: I have been personally aware of that.

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock.

(Recess)

MR. CHIEF JUSTICE BURGER: Has the Solicitor General completed his time, Mr. Taggart?

MR. TAGGART: Yes, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counsel? You have about two minutes remaining.

ORAL ARGUMENT OF LAWRENCE R. DERR, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. DERR: Yes, Mr. Chief Justice, and may it please the Court:

I will not attempt in the time that I have to address all of the comments of the respondents and the Government with which I don't agree. I believe that with one exception those have all been covered in the brief and I would ask that my silence not be taken as consent to them.

The one point, however, that was raised goes to the

question of how this case would be proven if it was returned to the county. I would like to point out that the employer's wage scales prior to the time of collective bargaining were set by the studies and the wages that were produced by those studies were the ones paid. Subsequent to the time of collective bargaining, of course, they were set by bargaining between the union and the employer rather than the impression created by the respondent that they were manipulated by the employer.

The real question, however, is that the respondents and the Government have not provided the answer to this Court of what will be the standard to determine sex-based wage discrimination. The answer is --

QUESTION: Mr. Derr, could I ask you, just to be sure I have your legal position, what about their hypothetical about a cost-of-living increase for the male category but no such increase for the females?

MR. DERR: A cost-of-living increase for the males only?

QUESTION: Yes, or a bonus for them of, say, ten percent at the end of the year?

MR. DERR: If it comes within one of the other protected areas of Title VII, it obviously is a violation. If it is a matter of wage discrimination and is not a matter in which there can be found a comparison job, even a hypothetical

job, which will be the case in almost every instance, then it would not violate Title VII because it does not violate the Equal Pay Act.

QUESTION: Specifically, in this case, it would not violate either statute?

MR. DERR: That's correct. And the reason that we take that position and the reason that that is the correct position is not necessarily because that that's the policy that we espouse or anyone else espouses, but Congress, Congress fully considered that possibility and others, it looked at the comparative worth, the comparative value, and it decided in the Equal Pay Act that the equal pay standard was the one to apply.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 1:02 o'clock p.m. the case in the above-entitled matter was submitted.)

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No. 80-429

COUNTY OF WASHINGTON ET AL.

V.

ALBERTA GUNTHER ET AL.

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