

## THE SEVENTH CIRCUIT'S EROSION OF THE EQUAL PAY ACT

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### I. INTRODUCTION

The Equal Pay Act of 1963 (“EPA”),<sup>1</sup> an amendment to the Fair Labor Standards Act (“FLSA”) of 1938, added to § 6 of the FLSA “the principle of equal pay for equal work regardless of sex.”<sup>2</sup> The EPA was the first modern employment discrimination statute, and it addresses a very specific form of gender discrimination in employment—unequal pay for equal work.<sup>3</sup> Less than one year later, Congress passed Title VII of the Civil Rights Act of 1964 which also prohibits sex-based wage discrimination.<sup>4</sup> Title VII is broader than the EPA because it also prohibits many other forms of discriminatory employment practices based on other protected traits including an individual’s race, color, religion, sex, or national origin.<sup>5</sup> Although

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<sup>1</sup> 29 U.S.C. § 206(d)(1) (2000).

<sup>2</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974).

<sup>3</sup> MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 366 (3d ed. 2004).

<sup>4</sup> 42 U.S.C. §2000e-2(a)(1) (2000).

<sup>5</sup> Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1) (2000). Section 703(a)(1) states that it is an “unlawful employment practice” for a covered employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions or privileges of

both statutes protect an employee from sex-based wage discrimination in employment, the statutes function differently.<sup>6</sup>

Section 206(d)(1) of the EPA establishes that

[n]o employer having employees subject to any provisions of this section shall discriminate, between employees on the basis of sex by paying wages to employees in such establishment at the 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.<sup>7</sup>

The EPA has four exceptions for discriminatory pay between the sexes where an employer has in place “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>8</sup> Thus, the EPA is divided into two parts—part one is prohibitory, while the second part lays out the affirmative defenses.<sup>9</sup> The affirmative defenses, in effect, “authorize” employers to differentiate in pay if the reason for that differentiation falls within one of the four categories, even though that differentiation might otherwise violate the Act.<sup>10</sup>

The circuit courts are split in their interpretation of the “factor other than sex” defense.<sup>11</sup> Employers frequently assert that a difference in wages between employees of opposite sexes is the result of basing their initial salary on the prior salary an employee was

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employment, because of such individual’s race, color, religion, sex, or national origin.”

<sup>6</sup> See *County of Wash. v. Gunther*, 452 U.S. 161, 170 (1981).

<sup>7</sup> 29 U.S.C. § 206(d)(1) (2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Gunther*, 452 U.S. at 169.

<sup>10</sup> *Id.*

<sup>11</sup> See *infra* notes 13-14.

earning elsewhere. They argue that the use of prior salary in setting wages qualifies as a “factor other than sex,” and therefore is not a violation of the EPA.<sup>12</sup> The Seventh Circuit, along with the Eighth Circuit, finds that any gender-neutral reason asserted by the employer qualifies as a factor other than sex.<sup>13</sup> On the other hand, several circuits, including the Second, Ninth and Eleventh Circuits, use a legitimate business reason test when examining an employer’s “factor other than sex.”<sup>14</sup>

This article will show that the Seventh Circuit incorrectly analyzed an EPA claim in *Wernsing v. Department of Human Services*.<sup>15</sup> In this decision, the court also rejected the legitimate business reason test from the Ninth Circuit based on the Seventh Circuit’s incorrect analysis of an EPA claim.<sup>16</sup>

Part of the problem interpreting the factor other than sex defense stems from the interaction of the EPA with Title VII. The Seventh Circuit treated the EPA claim in *Wernsing* as if it were the same as a Title VII claim.<sup>17</sup> In doing so, the Seventh Circuit has made EPA litigation defendant-friendly, creating an enormous difficulty for a plaintiff seeking to prove a violation of the EPA, and has thus eroded the intent and purpose of the statute.

## II. THE FACTOR OTHER THAN SEX DEFENSE OF THE EQUAL PAY ACT AND THE RELATIONSHIP BETWEEN THE EQUAL PAY ACT AND TITLE VII

The Supreme Court has only decided one case brought under an Equal Pay Act claim.<sup>18</sup> Although the Supreme Court’s decision

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<sup>12</sup> See *infra* notes 13-14.

<sup>13</sup> *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466 (7th Cir. 2005); *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96 (8th Cir. 1980).

<sup>14</sup> *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988).

<sup>15</sup> *Wernsing*, 427 F.3d at 466.

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* note 125.

<sup>18</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

provides some guidance for interpreting the Act's factor other than sex defense, the Supreme Court did not articulate a standard for determining what qualifies as a factor other than sex.<sup>19</sup> In addition, the Court has also examined the Act in claims brought under Title VII.<sup>20</sup> An examination of the differences between EPA and Title VII litigation, combined with the Supreme Court's interpretations of the EPA, and the Act's purposes and legislative history, is an integral inquiry in order to formulate a standard for determining what qualifies as a factor other than sex.

*A. Supreme Court decisions addressing the EPA's Factor Other than Sex Defense.*

The landmark case of *Corning Glass Works v. Brennan*, has been the only instance where the Supreme Court has decided a case that was brought under the EPA.<sup>21</sup> *Corning Glass* involved a wage disparity between male night shift inspectors and female day inspectors.<sup>22</sup> The wage disparity had somewhat of a historical basis – Corning initially instituted a night shift between 1925 and 1930 when New York and Pennsylvania law prohibited women from working at night.<sup>23</sup> Therefore, the company needed to fill the night shift inspector position, traditionally a female position, with male day workers.<sup>24</sup> These men demanded and received higher wages than those paid to the female day inspectors.<sup>25</sup> At this time, the only pay disparity between

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<sup>19</sup> *Id.*

<sup>20</sup> *County of Wash. v. Gunther*, 452 U.S. 161 (1981); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). Both of these cases were brought under Title VII's Bennett Amendment, 42 U.S.C. § 2000e-2(h) (2000).

<sup>21</sup> 417 U.S. 188 (1974).

<sup>22</sup> *Id.* at 190.

<sup>23</sup> *Id.* at 191.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

the night shift and day shift positions existed with respect to the position of inspector.<sup>26</sup>

After the laws of New York and Pennsylvania were amended to allow women to work at night, women at Corning were allowed to bid on the higher paid night inspection jobs.<sup>27</sup> In 1969, a new collective bargaining agreement eliminated the wage disparity between day and night inspectors hired after the date of the agreement, but provided a “red circle” rate for current inspectors, thus allowing for a continued disparity between day and night inspectors.<sup>28</sup>

Corning argued that day shift work and night shift work were not performed under “similar working conditions” as required by the EPA.<sup>29</sup> The Secretary of Labor contended that such a shift differential would fall under the “factor other than sex” exception, and that Corning had failed to prove that paying higher wages to its male night inspectors was based on any factor other than sex.<sup>30</sup> The Court looked to the statute’s language, history, and Congressional intent, and determined that the work at issue was “equal work” as defined by the EPA.<sup>31</sup>

The Court found that Corning failed to prove that its compensation system for the inspector position was not based upon sex.<sup>32</sup> Although the EPA allows for wage differentials based on nondiscriminatory shift differentials, in *Corning* the pay disparity arose simply because the men originally thought the inspector work performed by women demeaning. In order to perform this work during a night shift, they demanded higher pay, but all other positions were paid the same whether performed during the night or day shift.<sup>33</sup> Therefore, the Court concluded, the pay disparity “reflected a job

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<sup>26</sup> *Id.* at 191-92.

<sup>27</sup> *Id.* at 192-93.

<sup>28</sup> *Id.* at 194.

<sup>29</sup> *Id.* at 197.

<sup>30</sup> *Id.* at 197-202.

<sup>31</sup> *Id.* at 203.

<sup>32</sup> *Id.* at 204-05.

<sup>33</sup> *Id.* at 205.

market in which Corning could pay women less than men for the same work.”<sup>34</sup>

*B. Supreme Court decision regarding the relationship between the Equal Protection Act and Title VII.*

The Supreme Court has also had occasion to examine the EPA in cases brought under Title VII. *County of Washington v. Gunther* involved the relationship between Title VII and the EPA.<sup>35</sup> The Bennett Amendment, contained in section 703(h) of Title VII, provides that

[i]t shall not be an unlawful employment practice under [Title VII] 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 [the Equal Pay Act].<sup>36</sup>

The Supreme Court examined the affect of the Bennett Amendment on Title VII wage-based discrimination claims in *County of Washington v. Gunther*.<sup>37</sup>

In *County of Washington*, female guards in a county jail filed a wage discrimination claim under Title VII, alleging that the County of Washington intentionally discriminated against them by paying the female guards in the female section of the jail less than the wages paid to the male guards in the male section of the jail.<sup>38</sup> The county defended the suit by claiming that the Bennett Amendment restricted sex-based wage discrimination claims under Title VII to those that

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<sup>34</sup> *Id.*

<sup>35</sup> 452 U.S. 161 (1981).

<sup>36</sup> 42 U.S.C. § 2000e-2(h) (2005).

<sup>37</sup> *County of Wash. v. Gunther*, 452 U.S. 161 (1981).

<sup>38</sup> *Id.* at 163-64.

could also be brought under the Equal Pay Act.<sup>39</sup> Because the Equal Pay Act only permits claims for “equal work,” the county argued that the Bennett Amendment precluded suit because the jobs of the male and female guards were not “equal.”<sup>40</sup>

The plaintiffs argued that the Bennett Amendment was designed only to incorporate the four affirmative defenses of the EPA into Title VII for sex-based wage discrimination claims, and therefore did not restrict Title VII claims to the “equal or substantially equal work” standard of the EPA.<sup>41</sup> The Supreme Court agreed with the plaintiff’s argument, finding that the Bennett Amendment to Title VII incorporated the affirmative defenses of the EPA into an unequal pay claim under Title VII.<sup>42</sup> Additionally, the Court noted that it was not deciding how discrimination litigation under Title VII should be structured to incorporate the EPA’s affirmative defense of “factor other than sex,” which requires an employer to prove that a wage differential is not based on sex, different from Title VII’s burden of proof shifting.<sup>43</sup>

Although the Court did not articulate a standard for determining what qualifies as a factor other than sex in *Gunther*, the case does provide some guidance for determining how sex-based wage discrimination claims should be decided. First, the Court noted that employers may defend against charges of sex-based wage discrimination under the EPA where pay differentials “are based on a *bona fide* use of ‘other factors other than sex.’”<sup>44</sup> Also, the Court recognized that EPA and Title VII are structured differently, and function under different burdens of proof.<sup>45</sup>

### *C. The Equal Pay Act and Title VII: Different Burdens of Proof.*

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<sup>39</sup> *Id.* at 168.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 169-70.

<sup>44</sup> *Id.* at 170. (emphasis added).

<sup>45</sup> *Id.*

One year after the EPA was enacted, Congress passed Title VII of the Civil Rights Act of 1964 (“Title VII”), prohibiting, inter alia, gender discrimination in all “terms, conditions or privileges” of employment.<sup>46</sup> Title VII also prohibits sex-based wage discrimination, but unlike the EPA’s narrow application to wage differentials attributable to sex discrimination, Title VII’s prohibitions were “intended to be broadly inclusive, proscribing ‘not only overt discrimination but also practices that are fair in form, but discriminatory in operation.’”<sup>47</sup> The structure of Title VII litigation, with its shifting burdens of proof, varying defenses, and presumptions, was designed to reflect its broad nature.<sup>48</sup> On the other hand, EPA litigation, specifically the fourth affirmative defense, has been structured differently than Title VII.<sup>49</sup> EPA litigation is designed to allow employers to defend against charges of wage discrimination where pay differentials are based “on a bona fide use of ‘other factors other than sex.’”<sup>50</sup>

### 1. EPA: Burden of Proof.

In order to make out a prima facie case under the EPA, the plaintiff has a heavy burden of proof<sup>51</sup> to establish that employees of the opposite sex receive different wages “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”<sup>52</sup> A female plaintiff establishes a prima facie case by showing “(1) higher wages were paid to a male employee, (2) for equal work requiring

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<sup>46</sup> Section 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1) (2005).

<sup>47</sup> *County of Wash. v. Gunther*, 452 U.S. 161, 170 (1981) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 439 (1971)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

<sup>52</sup> *Id.*

substantially similar skill, effort and responsibilities, and (3) the work was performed under similar working conditions.”<sup>53</sup> Once a prima facie case is established, the burden of proof shifts to the defendant to establish that the difference in pay is permitted under one of the four exceptions, or affirmative defenses, permitted by the EPA.<sup>54</sup> Therefore, under the EPA, the “risk of nonpersuasion rests with the employer on the ultimate issue of liability.”<sup>55</sup>

The EPA does not require a plaintiff to show intent to discriminate, and has been referred to as a “strict liability” statute for this reason.<sup>56</sup> In contrast, under Title VII claims the burden of persuasion rests with the plaintiff at all times to show discriminatory intent.<sup>57</sup>

## 2. Title VII: Burden of Proof.

The standard for proof of discrimination under Title VII is different from the EPA because EPA litigation follows a two-step burden-shifting paradigm, whereas Title VII follows a three-step burden shifting framework.<sup>58</sup> Under Title VII, individuals proving discrimination can proceed either through a theory of disparate treatment or disparate impact.<sup>59</sup> The burden framework for both theories is divided into three steps. This framework for a disparate treatment case was first announced in *McDonnell-Douglas Corp. v. Green*.<sup>60</sup>

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<sup>53</sup> *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998).

<sup>54</sup> *Fallon v. State of Ill.*, 882 F.2d 1206, 1213 (7th Cir. 1989) (citing *Corning Glass Works*, 417 U.S. at 195).

<sup>55</sup> *Id.*

<sup>56</sup> *Ryduchowski v. Port Auth. of N.Y. and N.J.*, 203 F.3d 135, 142 (2d Cir. 2000); *Fallon*, 882 F.2d at 1213.

<sup>57</sup> *Fallon*, 882 F.2d at 1213.

<sup>58</sup> *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000).

<sup>59</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>60</sup> 411 U.S. 792 (1973). Alternatively, in 1971, the Court announced the disparate impact theory of liability for cases brought under Title VII in *Griggs v.*

Under a *McDonnell Douglas* framework, a plaintiff proving a sex-based wage discrimination claim must first establish that a member of the opposite sex in a similar job position as plaintiff receives a higher level of pay.<sup>61</sup> The burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for the wage discrepancy.<sup>62</sup> Once this minimal burden of articulation is met, the plaintiff then has the burden of proof to establish that the proffered reason was a pretext for discrimination.<sup>63</sup> Under Title VII, the burden of proof remains with the plaintiff at all times.<sup>64</sup> Once a plaintiff establishes a prima facie case, the burden of *production* shifts to the defendant to *articulate* a nondiscriminatory reason for its action.<sup>65</sup> If this occurs, the plaintiff must then prove that the proffered reason is merely a pretext for discrimination.<sup>66</sup> Therefore, under a Title VII claim, the plaintiff always bears the risk of nonpersuasion.<sup>67</sup>

*D. The Legislative History and Purpose of the Equal Pay Act.*

The statement of purpose of the EPA declares Congress' findings that wage differentials based on sex "depress[] wages and living standards for employees necessary for their health and

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*Duke Power Co.* Unlike disparate treatment, the employer's discriminatory intent is irrelevant under a disparate impact theory. A plaintiff establishes a prima facie case of discrimination under a disparate impact theory by establishing that a neutral employment policy or practice had a significant discriminatory impact on a protected group. Once this is established, the burden then shifts to the employer to show that the policy or practice was job-related or consistent with business necessity. The plaintiff may still prevail at this point by showing that an alternative practice existed. 401 U.S. 424 (1971). Congress officially codified the disparate impact theory in its amendments to Title VII in the Civil Rights Act of 1991.

<sup>61</sup> *Texas Dep't. of Cmty Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 253; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>64</sup> *Fallon v. State of Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

efficiency.”<sup>68</sup> Congress further declared that the policy of the EPA was to correct these conditions.<sup>69</sup>

Congress enacted the EPA in 1963 in order to “remedy what was perceived to be a serious and endemic problem” in private employment industries – that many wages were scaled on “an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”<sup>70</sup> In addition, the Supreme Court has noted that the EPA itself is “broadly remedial” and should be interpreted and applied in order to achieve its underlying purposes.<sup>71</sup>

The Supreme Court examined the legislative history behind the EPA in *Corning Glass Works v. Brennan*.<sup>72</sup> The original version of the Equal Pay bill only allowed for two exceptions for wage differentials, those based on a seniority or merit increase system that did not discriminate on the basis of sex.<sup>73</sup> Due to a concern that this version of the bill did not fully encompass job evaluation systems that established equitable wages in the industry, the amended version of the Act defined equal work in terms of “skill, effort, responsibility, and working conditions.”<sup>74</sup> The Court found that Congress’ clear intent in incorporating this language was to “ensure that wage differentials based upon *bona fide* job evaluation plans would be outside the purview of the Act.”<sup>75</sup> To support this intent, the Court quoted the House Report:

This language [skill, effort, responsibility, and working conditions] recognizes that there are many factors which may be used to measure the relationships between jobs and which

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<sup>68</sup> Pub. L. No. 88-38, §2(a), 77 Stat. 56 (1963).

<sup>69</sup> Pub. L. No. 88-38, §2(b), 77 Stat. 56 (1963).

<sup>70</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

<sup>71</sup> *Id.* at 208.

<sup>72</sup> 417 U.S. at 188.

<sup>73</sup> *Id.* at 198.

<sup>74</sup> *Id.* at 201.

<sup>75</sup> *Id.* at 201 (emphasis added).

establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.<sup>76</sup>

Although the Court in *Corning* used the legislative history to interpret the phrase “working conditions” as used in the EPA,<sup>77</sup> Congress’s characterizations of job evaluation plans and classification systems as bona fide demonstrate its intent to only allow factors tied to legitimate business reasons to defend against charges of discrimination.

Of the four affirmative defenses, Congress intended the fourth one, “factor other than sex,” to be a “broad general exception.”<sup>78</sup> It was designed in order to narrow the scope of the EPA to wage differentials based on sex discrimination.<sup>79</sup> Therefore, employers may defend against discrimination litigation brought under the EPA where differentials in pay are based “on a bona fide use of ‘other factors other than sex.’”<sup>80</sup>

### III. VARYING INTERPRETATIONS BETWEEN THE CIRCUIT COURTS REGARDING PRIOR SALARY AS A FACTOR OTHER THAN SEX

#### A. *Other Circuit Interpretations Regarding the Equal Pay Act’s Factor Other than Sex Defense.*

In *County of Washington v. Gunther*, the Court stated in dicta that the fourth affirmative defense of the EPA differs from Title VII litigation. Title VII was intended to encompass both intentional discrimination as well as “practices that are fair in form, but

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<sup>76</sup> 417 U.S. at 201 (quoting H.R. REP. NO. 88-309 at 8 (1963)).

<sup>77</sup> *Id.*

<sup>78</sup> *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261 (7th Cir. 1985).

<sup>79</sup> *County of Wash. v. Gunther*, 452 U.S. 161, 170 (1981).

<sup>80</sup> *Id.*

discriminatory in operation,”<sup>81</sup> whereas the EPA’s “factor other than sex” defense was designed in order to narrow the scope of the EPA to wage differentials based on sex discrimination.<sup>82</sup> However, the Court noted that it was not deciding how discrimination litigation under Title VII should be structured to incorporate the EPA’s affirmative defense of “factor other than sex” which requires an employer to show that a wage differential is not based on sex, different from Title VII’s burden of proof shifting.

The Seventh Circuit inferred that this passage stated that the EPA was limited to disparate treatment claims, and did not have a disparate impact component.<sup>83</sup> However, because the Supreme Court also noted in the same passage that EPA litigation is structured in order to permit employers to defend charges of discrimination by showing that a wage differential is based on *bona fide* uses of “other factors other than sex,”<sup>84</sup> other circuits have interpreted this passage differently than the Seventh, requiring an “acceptable business reason”<sup>85</sup> in conjunction with a “factor other than sex” defense.

Circuits requiring an acceptable business to justify the EPA’s factor other than sex defense correctly analyze EPA claims. As noted above, EPA and Title VII litigation functions differently, with different burdens of proof. Disparate treatment and disparate impact analysis reflects Title VII analysis. Requiring an acceptable business reason to justify a factor other than sex defense under an EPA claim properly requires an employer to *prove* an affirmative defense.

In *Kouba v. Allstate Insurance Co.*,<sup>86</sup> a Title VII case dealing with the EPA’s “factor other than sex” defense incorporated into Title VII by the Bennett Amendment, the Ninth Circuit examined whether Allstate’s policy of setting wages based on an employee’s former salary constituted a “factor other than sex.” The Ninth Circuit held

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<sup>81</sup> *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>82</sup> *Gunther*, 452 U.S. at 170.

<sup>83</sup> *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 469 (7th Cir. 2005).

<sup>84</sup> *Gunther*, 452 U.S. at 169.

<sup>85</sup> *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982).

<sup>86</sup> 691 F.2d 873 (9th Cir. 1982).

that the EPA does not prohibit the use of prior salary as a “factor other than sex,” but any such use should be justified by an acceptable business reason.<sup>87</sup> The court reasoned that because the EPA is concerned with business practices, any “factor other than sex” defense must still be tied to an acceptable business reason.<sup>88</sup> Allowing wage differentials where an employer asserts a “factor other than sex” that is unrelated to business practices is thus “nonsensical” under the EPA.<sup>89</sup>

The Second Circuit also requires the legitimate business reason test when examining a factor other than sex and has correctly distinguished EPA from Title VII litigation. In *Aldrich v. Randolph Central School District*,<sup>90</sup> the school district defended a claim of sex-based wage discrimination under both the EPA and Title VII, claiming that its job classification system was a “factor other than sex” under the EPA. The school district employed both “cleaners” and “custodians,” with custodians receiving higher pay.<sup>91</sup> Under local civil service rules, custodian applicants were required to take a civil service exam.<sup>92</sup> Aldrich, employed as a cleaner, claimed that she performed the same work as male custodians but was classified and paid as a cleaner in violation of the EPA.

The court held that a gender neutral job classification system is a “factor other than sex” where the employer can also establish a business related justification for the use of the system.<sup>93</sup> Looking to the statutory history of the EPA, the court found an employer could not assert a job classification system as a “factor other than sex”

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<sup>87</sup> *Id.* at 878.

<sup>88</sup> *Id.* at 876.

<sup>89</sup> *Id.* Similarly, the Eleventh Circuit held in *Irby v. Bittick* that prior salary alone is not a legitimate factor other than sex, but reliance on prior salary and experience in setting wages for a new employee is a successful affirmative defense as a “factor other than sex” because other business reasons then explain the use of prior salary. 44 F.3d 949, 955-56 (11th Cir. 1995).

<sup>90</sup> 963 F.2d 520 (2d Cir. 1992).

<sup>91</sup> *Id.* at 522.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 526.

without more.<sup>94</sup> Requiring an employer to prove that a legitimate business reason for the classification system carries out Congress's goal to eradicate wage discrimination. Without a business reason, employers will be able to use a classification system as a pretext for discrimination, thus thwarting the purpose and intent behind the EPA.<sup>95</sup>

The requirement for an acceptable business reason is consistent with the legislative history of the EPA relied on by the Court in *Corning*, the purpose and policy of the EPA, and the Supreme Court decisions in *Corning* and *Gunther*. The “factor other than sex” defense was intended to be a catch-all exception to cover bona fide business factors other than sex. However, requiring an employer to justify its use of a factor other than sex with a legitimate business reason test satisfies the two-step burden shifting required by the EPA. Requiring this test ensures that a defendant employer prove that its wage discrepancy is not based on sex. Without the business reason test, employers would be able to merely articulate any factor other than sex, which does not satisfy the burden placed on defendants under EPA litigation, and also “provides a gaping loophole in the [EPA] statute through which many pretexts for discrimination would be sanctioned.”<sup>96</sup>

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<sup>94</sup> *Id.* at 525.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* The court stated:

Based on [the Act's] statutory history, we conclude that employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral classification system without more. Rather, Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue.”

*Aldrich*, 963 F.2d at 525.

*B. The Seventh Circuit's Previous Interpretations regarding the Equal Pay Act's Factor Other than Sex Defense.*

The Seventh Circuit's recent holding in *Wernsing v. Department of Human Services* stems from its prior cases under the EPA dealing the Act's factor other than sex defense. The Seventh Circuit has never held that the defense requires justification by a business-related reason. However, an examination of the circuit's previous decisions shows a relaxation over the years of the defendant's burden under the EPA, that culminates with a failure to force defendants to actually prove their defense.

In *Covington v. Southern Illinois University*,<sup>97</sup> the plaintiff alleged that the University discriminated against her by paying her less than a male professor under the EPA and Title VII.<sup>98</sup> The district court had found that the wage disparity was based on a "factor other than sex": the male professor had a higher education and experience, and the university also employed a sex-neutral policy of maintaining an employee's salary when transferred from one assignment to another within the university.<sup>99</sup> The university argued that this policy was adopted to promote employee morale.<sup>100</sup> The plaintiff argued that the factor other than sex defense under the EPA and Title VII where the university maintained an employee's salary who changed assignments required a business-related reason or needed to relate to the requirements of the position.<sup>101</sup>

The court held that the university's salary retention policy qualified as a factor other than sex.<sup>102</sup> While rejecting requiring a justification of the factor other than sex defense where prior salary is at issue, the court distinguished this case from the decision of the Ninth Circuit in *Kouba*, because a salary retention plan relies on the

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<sup>97</sup> 816 F.2d 317 (7th Cir. 1987).

<sup>98</sup> *Id.* at 321.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 322 n.7.

<sup>101</sup> *Id.* at 321.

<sup>102</sup> *Id.* at 322.

prior salary from the same employer, and not a previous employer.<sup>103</sup> The Seventh Circuit stated that the *Kouba* court held that because wages based on prior salary from a previous employer *might* be due to prior discrimination, prior salary qualifies as a factor other than sex only if its use is business-related. If SIU had considered Covington's prior salary in setting her starting salary, "the same concerns that underlie *Kouba* would still be relevant."<sup>104</sup>

However, the Court continued to note that the male professor's salary was influenced by his seven years experience with the university that the plaintiff did not possess.<sup>105</sup> In this regard, the Court supports its holding that a salary retention plan qualifies as a factor other than sex defense where it is justified by a business related reason – previous experience.

In addition, the salary retention policy itself had another business related component relied on by the Court: "We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that that policy is either discriminatorily applied or has a discriminatory effect."<sup>106</sup> The Court further stated that although a plaintiff does not need to establish discriminatory intent under the EPA,<sup>107</sup> an employer is not barred from implementing a policy that has not been shown to undermine the EPA, even where the policy is not related to the requirements of the job.<sup>108</sup>

After *Covington*, the Seventh Circuit examined a case involving prior salary again in *Dey v. Colt Construction & Development*.<sup>109</sup> The plaintiff, Dey, brought a claim alleging that Colt violated the EPA where she was paid substantially less than her male

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<sup>103</sup> *Id.* at 322-23.

<sup>104</sup> *Id.* at 323 n.8.

<sup>105</sup> *Id.* at 324.

<sup>106</sup> *Id.* at 322.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 28 F.3d 1446 (7th Cir. 1994).

successor.<sup>110</sup> Finding that the male successor negotiated a salary closer to his previous rate after an initial offer by Colt, combined with an educational background superior to Dey's, the Court held that the male successor's higher salary was based on factors other than sex and not therefore in violation of the EPA.<sup>111</sup> In its analysis, the Court noted that the "factor other than sex" defense did not need to relate to the job position or even be business related.<sup>112</sup> Interesting to note, the Court stated that in considering a factor other than sex, "we ask only whether the factor is bona fide, whether it has been discriminatorily applied, and in some circumstances, whether it may have a discriminatory effect."<sup>113</sup>

Dey's successor negotiated his salary to an amount closer to his prior salary after an initial offer and the court noted that this type of evidence "should be considered with some caution...as undue reliance on salary history to explain an existing wage disparity may serve to perpetuate differentials that ultimately may be linked to sex."<sup>114</sup> Although the court made a specific point of noting that the "factor other than sex" defense need not be justified by a business reason, it in fact was. Colt did not rely solely on prior salary to determine the successor's initial salary, and the successor instigated negotiations over his salary. Further, at this point the court still cautions that in considering a factor other than sex, the factor should be bona fide and the court should question whether it may have a discriminatory effect.<sup>115</sup>

Thus, although the Seventh Circuit has never articulated a requirement of a legitimate business reason to justify a factor other than sex under the EPA, this requirement is nonetheless evidenced by these two cases involving the use of prior salary to set wages.

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<sup>110</sup> *Id.* at 1461.

<sup>111</sup> *Id.* at 1461-62.

<sup>112</sup> *Id.* at 1462.

<sup>113</sup> *Id.* (citing *Fallon v. State of Ill.*, 882 F.2d 1206, 1211 (7th Cir. 1989).)

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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#### IV. THE SEVENTH CIRCUIT'S RECENT DECISION INTERPRETING PRIOR SALARY AS A FACTOR OTHER THAN SEX IN AN EQUAL PAY ACT CLAIM

*Wernsing v. Department of Human Services* was the first case before the Seventh Circuit where an employee's salary was set solely on the basis of her prior salary from a previous employer. The court not only incorrectly analyzed the EPA claim in *Wernsing*, but also ignored its own warning in *Covington* that where an employer sets starting salary based on prior salary from a previous employer "the same concerns that underlie *Kouba* would ... be relevant."<sup>116</sup>

##### A. *Wernsing v. Department of Human Services*.

In this case, the plaintiff, Wernsing, brought a claim against her employer, the Department of Human Services of Illinois, under the EPA, alleging that she performed the same tasks as a male coworker, under the same working conditions, but was paid substantially less.<sup>117</sup> Wernsing was hired as an Internal Security Investigator II, a position that had a monthly pay scale between \$2,478 to \$4,466 based on prior experience and years of service.<sup>118</sup> Wernsing had been earning \$1,925 a month at her previous employment, and began with the Department at \$2,478 a month, almost 30% more than her previous salary.<sup>119</sup> Bingaman, a male coworker hired at the same time as Wernsing for the same position, had a starting monthly salary with the Department of \$3,739, 10% higher than his prior salary.<sup>120</sup> Bingaman, therefore, was earning substantially more than Wernsing for the same work because the Department based its initial starting salaries on the previous salary of lateral entrants, plus a raise if possible under the pay scale for the position.<sup>121</sup> Further, annual 10% raises would preserve

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<sup>116</sup> *Covington v. S. Ill. Univ.*, 816 F.2d 317, 323 n.8 (7th Cir. 1987).

<sup>117</sup> *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 467 (7th Cir. 2005).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

the gap until employees reached the maximum amount under the pay scale.<sup>122</sup>

The district court held that prior salary is a “factor other than sex,” and that the Department was not therefore in violation of the EPA. The district court granted summary judgment for Department and Wernsing appealed. On appeal, Wernsing argued that the Department lacked an “acceptable business reason” for using prior salaries to set current ones.<sup>123</sup> Recognizing that other circuits require an acceptable business reason for this approach, the Seventh Circuit stated that the EPA only requires that an employer have a reason other than sex for its business practices, and does not require that the reason be “acceptable.”<sup>124</sup>

The court analogized the EPA to Title VII and other anti-discrimination statutes, stating

once the plaintiff makes a *prima facie* case of discrimination, all the employer need do is articulate a ground of decision that avoids reliance on the forbidden grounds. The plaintiff then bears the burden to show that the stated reason is a pretext for a decision really made on prohibited criteria.<sup>125</sup>

The court then criticized the circuits that hold prior salary qualifies as a factor other than sex when it is justified by an acceptable business reason.<sup>126</sup> The Seventh Circuit found that the Ninth Circuit in *Kouba* treated an EPA claim to a disparate impact theory under Title VII: where a plaintiff establishes that an employment practice has

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 468. Wernsing also advanced a second argument: “that because all pay systems discriminate on account of sex, any use of prior pay to set salary must be discriminatory.” *Id.* This article focuses on Wernsing’s first argument, that wages are a factor other than sex only when justified by an “acceptable business reason.”

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 469 (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)) (emphasis in original).

<sup>126</sup> *Id.*

a discriminatory effect on a protected group, the employer must then show a business necessity for the use of that practice.<sup>127</sup> Because the EPA deals only with disparate treatment,<sup>128</sup> the Seventh Circuit found no justification for a business reason under its interpretation of the *Kouba* court's analysis.<sup>129</sup> The applicable rule, the Seventh Circuit stated, is the one found in disparate treatment litigation and other employment discrimination statutes: "the employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age, or religion."<sup>130</sup>

*B. A Critique of the Seventh Circuit's Decision in Wernsing v. Dep't of Human Services.*

The problem with the analysis of the Equal Pay Act claim by the Seventh Circuit in *Wernsing* is that the court analogized the EPA to Title VII and other discrimination statutes.<sup>131</sup> Because the EPA has a different burden of proof than other discrimination statutes – a two-step burden as opposed to the three step burden of proof under Title VII – an employer must prove an affirmative defense under the EPA and not merely articulate one.<sup>132</sup>

The court stated that the EPA statute "asks whether the employer has a reason other than sex – not whether it has a "good" reason."<sup>133</sup> This statement is not entirely correct because the statute requires an employer to prove its affirmative defense, or "reason other than sex," and not merely to articulate one.<sup>134</sup>

In addition, the Seventh Circuit also incorrectly rejected the legitimate business reason test articulated by the Ninth Circuit in

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (citing *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000).

<sup>133</sup> *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005).

<sup>134</sup> *Stanziale*, 200 F.3d at 107.

*Kouba*. The court found that the Ninth Circuit analogized the EPA to a disparate impact theory and rejected this test because the EPA only deals with disparate treatment and not disparate impact. The problem here is that while Title VII deals with disparate treatment and disparate impact, theories applying the three-step burden shifting process, the EPA has its own two-step burden shifting framework. The Seventh Circuit incorrectly identified the Ninth Circuit as using a disparate impact theory because the language “legitimate business reason” is also used in the three-step burden shifting framework of disparate impact analysis. However, the Ninth Circuit in *Kouba v. Allstate Ins.* applied the correct two-step EPA burden shift. Its use of requiring an employer to justify the use of prior salary as a factor other than sex with a legitimate business reason correctly requires an employer to prove its affirmative defense, consistent with the framework of an EPA analysis. Further, as the Second Circuit noted in *Aldrick v. Randolph Central School District*, failing to require the use of a legitimate business reason “would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned.”<sup>135</sup>

The Seventh Circuit’s holding creates a situation where EPA plaintiffs can win only where they can show that an employer’s assertion of prior salary as a reason for a wage discrepancy is really a pretext for discriminatory intent.<sup>136</sup>

## V. CONCLUSION

The EPA can still be an effective tool in ending wage disparities between the sexes, but only if it is utilized correctly. By using the three-step burden shifting framework of Title VII to analyze EPA claims, the court is effectively eroding the EPA. EPA claims should be treated the way Congress intended – under the two-step burden shifting framework provided by the statute. Under this framework, employers must offer concrete proof that the salaries of their

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<sup>135</sup> 963 F.2d 520, 524 (2d Cir. 1992).

<sup>136</sup> MARK A. ROTHSTEIN ET. AL., EMPLOYMENT LAW 373 (3d ed. 2004).

employees are not based on sex. Analogizing EPA litigation to that of Title VII permits courts to too easily accept a mere articulation of a reason other than sex, rather than requiring employers to carry their burden of proof.

One method to ensure employers do carry their burden of proof is to use the legitimate business test to justify a factor other than sex, particularly where the use of prior salary from a previous employer is at issue. Not only does this test ensure that employers will actually have to prove that wages are not sex-related, but it is also consistent with the purpose and legislative intent behind the statute.

Congress passed the EPA in order to remedy the broad wage disparity between men and women.<sup>137</sup> Because the EPA does not require proof of discriminatory intent on behalf of employers, it can be even more useful than Title VII in ending the wage disparity, but only if it is correctly implemented by the courts. Treating EPA claims in the same manner as Title VII claims erodes the EPA, creates defendant-friendly litigation, and undermines the purpose of the EPA – the requirement of equal pay for equal work.

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<sup>137</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).