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Not Any Factor Other Than Sex: A Proper Limit to Defending the Equal Pay Act

Victoria Lazar†

Despite more than two decades of Congressional efforts to eliminate unequal pay for equal work,¹ some employee compensation plans still retain an anomalous characteristic that ensures unequal pay for identical work. The “head-of-household” employee compensation scheme, in which an employer extends benefits to an employee’s family only if the employee is the head of a household, benefits overwhelmingly more male employees than female employees.² This result flies in the face of the goal of all equal pay legislation in this country.

In 1963, Congress passed the Equal Pay Act to remedy the broad disparity in wages between men and women.³ This Act prohibits employers from paying employees of one sex more than employees of another sex if both do “equal work.”⁴ The Act allows four exceptions to the requirement of equal pay. An employer may justify a seemingly discriminatory pay or benefit scale by proving that his plan is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production,

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² There are currently 61,735,000 (69%) male heads of households and 27,744,000 (31%) female heads of households. Of these, 50,142,000 (81%) of the male and 5,602,000 (19%) of the female heads of households are married and are members of two-income families. US Bureau of the Census, Current Population Reports no 692 (1986). An employer’s benefit rule that uses a head-of-household criterion thus has, on average, a distribution of two-thirds male and one-third female employees who are beneficiaries. The percentage disparity is even more dramatic if one considers members of a two-income family. In this case, four-fifths of the benefit recipients are male while only one-fifth are female. Female employees in this last group are of particular concern because they become dependent on their husbands for insurance although they are members of the work force.
³ In this comment, the term “head-of-household” will be used, as it is in the litigation under discussion, to identify the person who earns more than one half of the family’s wage income.
⁵ “Equal work” under the Equal Pay Act means almost identical work. See n 5. It is thus distinct from the notion of “comparable worth.” See County of Washington v Gunther, 452 US 161 (1981).
or a system based on any factor "other than sex"—the "catchall" exception.\footnote{The Equal Pay Act states in relevant part:

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

29 USC § 206(d)(1).}

Title VII of the Civil Rights Act of 1964 was also directed at employment discrimination and is also applicable in sex-wage discrimination cases.\footnote{Sections 703(a)(1) and (2) of Title VII provide:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


Congress recognized that the Equal Pay Act and Title VII might conflict and, in the Bennett Amendment, directed courts to interpret the two laws to permit differentiation in pay that would otherwise be unlawful under the Civil Rights Act if it was permitted by the Equal Pay Act.\footnote{The Bennett Amendment states:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29 [The Equal Pay Act].

42 USC § 2000e-2(h) (1982).}

The Supreme Court has held that the Bennett Amendment incorporates the four defenses of the Equal Pay Act into Title VII,\footnote{Gunther, 452 US 161. The Court resolved whether the "equal work" requirement and the four affirmative defenses would apply to Title VII actions, concluding that only the latter were properly included in Title VII.}


\footnote{Id at 170. Justice Brennan implied that Title VII would be limited because employers were allowed to assert a defense in keeping with Congress' intent in the Bennett Amendment.}
VII jurisprudence are imported into Equal Pay Act claims.

In structuring the relationship between the Equal Pay Act and Title VII, Congress did not identify any precise limits to the use of the "catchall" defense. Courts have been left the task of constructing these limits in cases where employers circumvent the goals of the Act. Most of the cases involve employers who have tried to compensate their employees on the basis of various factors which, although not explicitly sex based, correlate highly with sex and provide male employees more compensation than female employees. Courts have generally rejected these compensation schemes.

The head-of-household scheme is a curious exception to this pattern of rejecting pay and benefit structures that operate to disadvantage women. Several courts have upheld this scheme despite its clearly disparate effect on women. The head-of-household characteristic does not explicitly distinguish between employees on the basis of sex and so appears to fit within the wording of the fourth exception. However, because the overwhelming number of people so classified are male, employers who provide benefits based on this classification in effect pay their male employees more than their female employees.

There are several reasons why courts should reject the head-of-household rule as discriminatory in violation of the Equal Pay Act and Title VII. First, the rule disregards Congress’ intent, in passing both the Equal Pay Act and Title VII, to eradicate sex-based wage disparities that were unrelated to the employees’ actions or abilities on the job. Second, the agency charged with enforcing Title VII (and implicitly the Equal Pay Act) has repeatedly criticized the rule as impermissibly discriminatory. Third, courts have rejected other compensation schemes based on job classification factors that are not explicitly sex related but operate to give more benefits primarily to men. Fourth, the rule can only be sustained by a very broad reading of the fourth exception to the Equal Pay Act, and this reading ignores the Supreme Court’s warning that defenses to discrimination claims are to be narrowly

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10 See Part IIA.
11 See Part IIA.
12 Most recently, the Sixth Circuit, in EEOC v J.C. Penney Co., Inc., 843 F2d 249 (6th Cir 1988), upheld J.C. Penney’s use of a head-of-household scheme to award insurance benefits to its employees.
13 See n 2.
14 See Part I.
15 See Parts II.B. and II.C.
construed. Finally, acceptance of the head-of-household rule is bad policy because it relies on and reinforces discriminatory stereotypes about family organization, and it contradicts the principle that compensation should reflect job performance rather than economic need. The head-of-household rule has no place in a world of equal pay.

This comment has three parts. Part I examines the legislative history of the Equal Pay Act and its relationship to Title VII. Part II analyzes judicial interpretations of the fourth affirmative defense under the Equal Pay Act, which permits employers to have sex-wage differentials that are based on any factor other than sex and allows the head-of-household rule. Part III criticizes these interpretations on both legal and policy grounds and provides alternative means of achieving whatever legitimate aims an employer may have in implementing a head-of-household based benefit scheme.

I. LEGISLATIVE HISTORY

A. The Passage of the Equal Pay Act

The Equal Pay Act was Congress' first attempt to combat the stereotype that men, as traditional breadwinners, were entitled to higher salaries. By the early 1960s, women were becoming increasingly important participants in the work force and there was an emerging notion that they were entitled to receive equal pay for equal work. Congress, however, did not want to force employers

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16 Justice Brennan reasoned in Gunther:
As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S Rep No 876, 88th Cong, 2d Sess 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

Gunther, 452 US at 178.

17 See Part III.

18 Representative Donohue stated:
We all realize that the origin of the wage rate differential for men and women performing comparable jobs is the false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work.

19 Cong Rec 9212 (1963).

19 Rep. Powell stated:
The objective sought is wage justice for working men and women. Discriminatory wage practices based upon sex, like other forms of discrimination in employment, are contrary to our basic employment, are contrary to our basic traditions of freedom and fair play. . . . Women are essential to some of our key industries. . . . They perform work—and competently—in almost every occupation in our indus-
to completely restructure their compensation schemes. The new legislation, therefore, addressed only a narrow category of wage classifications. The Act was passed as an amendment to the Fair Labor Standards Act to ensure that existing definitions and interpretations of words such as “employer,” “employee,” or “establishment” would not change. After its basic prohibitions, the Act lists four defenses which an employer may use to justify a disparity in wages: a seniority system, a merit system, a system which measures earnings on the basis of quantity or quality of production and any factor other than sex. Congress intended the first three to be examples of the fourth, construing the fourth as a defense that could excuse other legitimate wage differences not explicitly captured in the first three. These guidelines were meant to ensure that employers were left some flexibility in designing compensation schemes. This vague definition of the scope of the fourth exception could arguably legitimate any factor other than sex and potentially swallow the Equal Pay Act. Congress clearly did not intend such a result. The House Special Subcommittee on Labor, for instance, when listing other examples of permissible classifications, included only job-related factors. Congress rejected an amendment complex. All of these facts serve to point out the importance economically and morally of more equally sharing the benefits of our national prosperity with the hardworking ladies of our land.


26 This is suggested from the following colloquy on the floor during debate over the Act. Rep. Goodell:

In this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees, if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee’s work and how much he should be paid for it.

Rep. Griffin:

So long as pay differentials are not based on sex.


31 Id at 9196 (Reps. Frelinghuysen and Thompson). See also 29 USC § 206(d)(1). Wage disparities among women, among men, or between men and women that existed where each sex performed different jobs were not covered by the Act.

27 Id.

29 USC § 206(d)(1).

32 The report of the Special Subcommittee on Labor which considered the bill explained:

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included.


28 109 Cong Rec 9198 (Reps. Goodell and Griffin).

29 The examples included:

Thus . . . among other things, shift differentials, restrictions on or differences
ment to the Equal Pay Act that would have allowed pay differentials between men and women if the employer could prove it cost more to employ women than to employ men.\textsuperscript{27} The author of the Equal Pay Act, Representative Edith Green, argued that the only legitimate classifications were those “based on merit, on work that is performed,” rather than on economic or cost factors.\textsuperscript{28} There was some discussion in the House as to whether the head-of-household rule should be considered a legitimate factor other than sex but no consensus was reached.\textsuperscript{29}

The EEOC has further clarified the Equal Pay Act in its Interpretations.\textsuperscript{30} It has determined that a prima facie violation of the Equal Pay Act is established “upon a showing that an employer pays different wages to employees of opposite sexes” for equal work.\textsuperscript{31} Once the case is established, an employer may defend its actions by asserting one of the four defenses. The EEOC suggests that certain factors are unacceptable under the fourth defense. For

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\textsuperscript{27} Id at 9206. Rep. Goodell replied that if there was a legitimate business reason for the difference apart from sex, the Act would excuse the scheme. Rep. Thompson, however, warned that many excuses, differing costs in particular, did not survive close scrutiny. Id at 9207.

\textsuperscript{28} Id at 9206.

\textsuperscript{29} In brief floor debate, Rep. Green indicated that the head-of-household rule was illegitimate while Rep. Goodell felt it was acceptable. Id at 9206. This debate was neither conclusive nor lengthy. Indeed, none of the courts considering the head-of-household rule have referred to this debate in their opinions.

\textsuperscript{30} The Equal Pay Act: Interpretations, 29 CFR § 1620 (1988). The EEOC replaced the Wage and Hour Division of the Department of Labor as the agency in charge of administering sex-wage discrimination cases in 1979 as part of a consolidation of the enforcement mechanisms of antidiscrimination statutes.

While these interpretations are not binding upon courts, they are “entitled to great weight,” \textit{Marshall v Dallas Ind. School Dist.}, 605 F2d 191, 195 (5th Cir 1979), and should be presumed valid and given deference even though the statute did not confer authority on the agency to promulgate them. \textit{Usery v Allegheny County Institution Dist.}, 544 F2d 148, 153 n 3 (3d Cir 1976); \textit{Brennan v City Stores, Inc.}, 479 F2d 235, 240 (5th Cir 1973). One case has held that the deference due regulations interpreting § 206(d) fails over time because the regulations were issued in 1965 and have not been amended to reflect judicial constructions. \textit{Hein v Oregon College of Educ.}, 718 F2d 910, 914 n 3 (9th Cir 1983). This is no longer correct, however, as the interpretations were amended in 1986. See 51 Fed Reg 29,819 (Aug 20, 1986).

\textsuperscript{31} The Equal Pay Act: Interpretations, 29 CFR § 1620.27 (1988).
example, "[a] wage differential based on claimed differences between the average cost of employing workers of one sex as a group and the average cost of employing workers of the opposite sex as a group" is discriminatory. An employer who alleges that male workers performed extra duties will also have his plan scrutinized closely. The EEOC recognizes that the head-of-household rule bears no relationship to the requirements of the job or to the individual’s performance on the job. As a result, such a plan will be "closely scrutinized." These guidelines emphasize that employers should not manipulate the head-of-household rule to disproportionately deprive female employees of fringe benefits.

B. The Impact of the Passage of Title VII

On the last day of the House Rules Committee’s consideration of the bill that would become Title VII of the Civil Rights Act of 1964, Chairman Howard Smith added a prohibition against sex discrimination to the text. He hoped to prevent passage of the Act itself. Instead of succeeding in this effort, he established the potential for conflict between the Equal Pay Act and Title VII.

There are several differences between the two statutes. Title VII’s remedial goals explicitly reach farther than those of the Fair Labor Standards Act (and thus the Equal Pay Act). As the Supreme Court has stated, “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

Title VII and the Equal Pay Act differ structurally as well. Title VII applies to a wider range of businesses than does the Equal Pay Act; unlike the Equal Pay Act it covers businesses engaged in retail sales, fishing, agriculture and newspaper publishing. The statute of limitations for back pay relief, however, is

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35 29 CFR § 1620.11(c) (1988). The term “closely scrutinized” does not refer to any particular judicial test. Rather, it indicates how strong a plaintiff’s case should be when she proves that a plan is based on the head-of-household classification. Compare this to interpretations of Title VII which indicate that a plaintiff can make out a prima facie case merely by proving that the plan is head-of-household-based.
38 See 29 USC §§ 203(a), 213(a) (1976 ed and Supp III).
more generous under the Equal Pay Act than under Title VII. Also, Title VII actions must first be investigated by the EEOC; only if their conciliation efforts fail will a case go to court. Under the Equal Pay Act, a plaintiff need not exhaust prior administrative remedies and may go directly to federal court.

Despite these differences, Title VII was not intended to replace the Equal Pay Act. Congress passed the Bennett Amendment "to resolve any potential conflicts between Title VII and the Equal Pay Act." It states that an employer may differentiate compensation on the basis of sex in a Title VII claim if that differentiation is authorized by the Equal Pay Act. Congress was not concerned with any particular substantive conflict between the two laws but simply meant to emphasize generally that no interpretive discrepancies were intended. The Supreme Court has ruled that the Bennett Amendment incorporates the Equal Pay Act's four affirmative defenses into Title VII.

C. Administrative Interpretation of the Equal Pay Act and Title VII

In keeping with Congress's intent to interpret the two statutes congruently, the EEOC has explained that the Bennett Amendment allows any defense based on the Equal Pay Act to "be raised in a proceeding under Title VII." The EEOC recognizes that a head-of-household scheme tends to make benefits "available only to male employees and their families," and that the "head-of-household" or 'principal wage earner' status bears no relationship to job performance.

As a result, a plaintiff need not prove discriminatory intent in order to bring a wage discrimination claim. According to the authority with expertise and practical administrative experience in implementing antidiscrimination law, the head-of-household rule

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39 Gunther, 452 US at 175.
40 Id at 170.
41 See 42 USC § 2000(e)-2(h). The Amendment was passed in conjunction with Title VII in 1964. During the discussion, Congress was concerned with potential administrative and enforcement problems that might arise if Title VII and the Equal Pay Act were not interpreted congruently. Senator Bennett expressed a concern for preserving the "programs" that had "been established for the effective administration" of the Equal Pay Act.
110 Cong Rec 13647 (1964).
42 Id.
43 Gunther, 452 US at 171.
44 Guidelines on Discrimination Because of Sex, 29 CFR § 1604.8(b) (1988).
45 See 29 CFR § 1604.9(c) (1988).
has a sufficiently disparate impact that its use "will be found a prima facie violation of the prohibitions against sex discrimination" in Title VII.\(^4\)

II. JUDICIAL INTERPRETATION OF THE FOURTH DEFENSE

A. Litigation of the Catchall Exception Under the Equal Pay Act

A plaintiff can make a prima facie case under the Equal Pay Act by proving

that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions'.\(^4\)

It is not necessary to establish discriminatory intent to recover under the Equal Pay Act.\(^4\) After the plaintiff proves her case, the burden shifts to the employer to justify his actions under one of the four defenses in the Act.\(^9\) If an employer establishes a legitimate defense under the Act, a plaintiff may still prevail if she proves that the rationale is merely a pretext for discrimination. She can do this by showing that the factor which causes the disparity does not reasonably relate to any business purpose.\(^6\)

Although the language in the fourth exception could, if read broadly, swallow the Equal Pay Act’s prohibitions on discrimination, courts have not construed it so broadly as to allow discrimination based literally on any factor other than sex.\(^6\) Under the test articulated in Kouba v Allstate Ins. Co.,\(^5\) an employer cannot set up a compensation scheme that pays men and women different

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\(^4\) Guidelines on Discrimination Because of Sex, 29 CFR § 1604.9(c) (1988). With respect to a claim challenging the head-of-household rule, EEOC interpretations employ a lower standard of proof under Title VII than under the Equal Pay Act. In a Title VII claim, the existence of the head-of-household rule alone establishes a prima facie case. In a claim under the Equal Pay Act, the existence of a head-of-household rule only means that the plan will be scrutinized closely. This difference has never been tested in the courts because no head-of-household claims have been brought under the Equal Pay Act. This difference may, however, offer some insight into why plaintiffs have relied exclusively on Title VII thus far.


\(^6\) See Peters v Shreveport, 818 F2d 1148, 1153 (5th Cir 1987), and Patkus v Sangamon-Cass Consortium, 769 F2d 1251, 1260 n 6 (7th Cir 1985).

\(^7\) Corning Glass Works, 417 US at 196.

\(^8\) See Kouba v Allstate Ins. Co., 691 F2d 873, 878 (9th Cir 1982); EEOC v J.C. Penney Co., Inc., 843 F2d 249, 253 (6th Cir 1988).

\(^9\) See EEOC v J.C. Penney Co., Inc., 843 F2d 249 and Section II(c).

\(^4\) 691 F2d 873 (9th Cir 1982).
wages absent an "acceptable business reason." Other courts have adopted this test as the middle ground "between the extremes of permitting any other factor and allowing only those factors traditionally included in substantive job evaluations." The Supreme Court has implied that the fourth defense should be limited to factors that measure how valuable an employee’s performance is to his or her employer (for example, factors traditionally included in any substantive job evaluation). Lower courts have not followed the Supreme Court’s suggestion.

B. Title VII Litigation

Many plaintiffs choose to file wage discrimination claims under Title VII rather than the Equal Pay Act, often for procedural reasons. In a Title VII claim, the plaintiff makes out a prima facie case by proving that a sex-based wage differential exists. She may use either a disparate impact or disparate treatment theory of liability. Once the claim is established, the burden

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53 The court noted:
The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.

54 Id at 876.


The Ninth Circuit has declared that Congress did not limit the exception to job-evaluation schemes. See Kouba, 691 F2d 873. The Sixth Circuit followed the Kouba court’s reasoning in EEOC v J.C. Penney Co., Inc., 843 F2d 249. This way of thinking makes it more difficult to find the head-of-household rule clearly illegal under the fourth defense.

56 EEOC v J.C. Penney Co., Inc., 843 F2d 249; Colby v J.C. Penney Co., Inc., 811 F2d 1119, 1128 (7th Cir 1987); Gunther, 452 US 161; Wambheim v J.C. Penney Co., Inc., 705 F2d 1492 (9th Cir 1983); Kouba, 691 F2d 873. See Part I.B. concerning structural differences between the Acts.

57 Id.

58 The Supreme Court articulated the two theories in International Brotherhood of Teamsters v United States, 431 US 324 (1977). In a Title VII action, an employee proves disparate treatment by showing that the employer has treated some employees less favorably than others because of their sex, religion, color, race or national origin. Under this theory, proof of a discriminatory motive is required. Proof of disparate impact, on the other hand, requires only a showing that an employer’s practices “are facially neutral in their
of proof shifts to the employer to defend his actions. An employer has two choices. He may invoke the Equal Pay Act’s four defenses explicitly by citing the Bennett Amendment and claiming the “catchall” defense, or he simply may offer a “legitimate business reason” to justify his actions. In practice, apart from procedural defenses such as statutes of limitations, defendants will make the same arguments whether they are sued under the Equal Pay Act or Title VII. Kouba held that acceptable business reasons other than sex are a legitimate factor. Further, Colby and Wambheim held that legitimate business reasons are an adequate defense to Title VII discrimination claims. In Title VII cases, as in Equal Pay Act cases, even if the defendant establishes a proper defense, the plaintiff still can win if she shows the employer’s scheme is merely a pretext for discrimination. This litigation structure is different from that in other discrimination claims brought under Title VII litigation. In those cases, plaintiffs usually must prove the absence of a legitimate business reason as part of the prima facie case. Providing a chance for the plaintiff in a sex discrimination case to win even where the employer has presented legitimate business reasons, however, is consistent with the Supreme Court’s holding that the Bennett Amendment incorporates the Equal Pay Act defenses into Title VII.

C. Factors Other Than Sex That Have Been Held Acceptable Bases For Discrimination

Courts have rejected many compensation schemes based on factors that are not explicitly sex based. They have disallowed,
for example, differences in pay based on participation in training programs when the programs were not readily available to employees of both sexes. Employers were also unsuccessful in attempting to justify disparate benefits on the basis of physical characteristics of employees. The Supreme Court has extended this ban on differentials based on physical characteristics to life expectancy by rejecting a scheme where women were paid less annuity money per month than men because of their average longer life expectancy.

Courts have also rejected pay differentials based on external economic factors. The Supreme Court held in *Corning Glass Works v Brennan* that male workers who were in higher demand than their female counterparts could not be paid more. The fact that night workers, who were male, were in greater demand than day workers, who were female, did not justify differences in pay between the two groups. "The differential arose simply because men would not work at the low rates paid women inspectors, and it

but see *Briggs v City of Madison*, 536 F Supp 435 (W D Wis 1982) (prima facie case of intentional discrimination made by plaintiffs who proved that their less remunerative jobs had requirements equal to higher paying jobs held by men). However, the head-of-household cases all involve cases of equal work. The "equal work" requirement is met even if males and females do not perform exactly equivalent jobs, see n 75. Indeed, the Supreme Court has held that the Equal Pay Act will not sustain a claim based on a theory of comparable worth. *County of Washington v Gunther*, 452 US 161 (1981).

69 See *Hodgson v Behrens Drug Company*, 475 F2d 1041 (5th Cir 1973) (where no females were allowed in the training program because, according to the company's vice-president, they could not travel); *Hodgson v Security National Bank of Sioux City*, 460 F2d 57 (8th Cir 1972) (where no females had ever qualified for the management training program, participation in which resulted in differentiated wages); *Shultz v First Victoria National Bank*, 420 F2d 648 (5th Cir 1969) (court found that the training program was a post-event justification for disparate pay to men and women where there was no real difference between the training rotation and the normal rotation of female employees).

70 See *Odomes v Nucare, Inc.*, 653 F2d 246 (6th Cir 1981) (where male orderlies who lifted patients could not be paid more than aides who, although they could not lift patients alone, helped the orderlies when possible); *Brennan v Owensboro-Daviess Cty. Hosp., Etc.*, 523 F2d 1013 (6th Cir 1975) (where male orderlies who set up traction could not be paid more than female orderlies); *Shultz v Wheaton Glass Co.*, 421 F2d 259 (3d Cir 1970) (where male meat inspector/packers who did more strenuous physical work could not be paid more than female meat inspector/packers because the work was not much more strenuous and was performed by only a few male workers on a sporadic basis).


72 *Corning Glass Works v Brennan*, 417 US 188 (1974) (male night shift workers could not receive higher salary than female day shift workers).
reflected a job market in which Corning could pay women less than men for the same work." Although the House Subcommittee that drafted the Equal Pay Act mentioned shift differentials as an example of a potentially valid justification, the Corning court rejected it. Like shift differentials, pay differentials based on the exercise of the same responsibilities under different circumstances could not be justified by any factor other than sex. The Supreme Court decided in Gunther that female guards who could work only in the female section of the prison had to receive the same pay as male guards working in the male section of the prison. It was irrelevant that the women's jobs in the female section of the prison were slightly less strenuous. Men and women did not have to perform exactly the same duties to merit the same pay.

Similarly, the use of prior wages to set salaries has attracted close judicial scrutiny. Although the Ninth Circuit did not expressly reject the use of prior wages to set salaries in Kouba, it remanded the case to the District Court to ensure that the employer did not "manipulate its use of prior salaries to underpay female employees."

D. Head-of-Household Litigation

Thus far, courts have upheld employers' use of the head-of-household factor in distributing benefits, holding that compensation schemes based on such a factor are not discriminatory because they serve legitimate business reasons. The cases discussed in this section were brought under Title VII and have centered on

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73 Id at 205.
75 Gunther, 452 US at 178-80. Gunther was brought under Title VII because the plaintiffs could not meet the "equal work" standard of the Equal Pay Act. Id at 178. The Court said, however, that the difference in jobs could not justify wage disparities because the low paying positions had been created specifically for women. Id at 179. In those situations, the employer could not legitimize a plan, illegitimate because sex was a factor, by using "market forces" as a factor. This is distinguished from comparable worth cases in which employers do not explicitly set lower wages for women by creating unique jobs.
76 Kouba v Allstate Ins. Co., 691 F2d 873, 878 (9th Cir 1982).
77 The Sixth Circuit has done so in EEOC v J.C. Penney, 843 F2d 249, the Ninth Circuit has done so in Kouba, 691 F2d 873, and the Seventh Circuit has done so in Colby v J.C. Penney, 811 F2d 1119.
78 There are several reasons plaintiffs have relied on Title VII. J.C. Penney is a retailer and arguably not under the coverage of the Equal Pay Act. Courts have already held that plaintiffs may establish a prima facie case under § 703(a)(1) of Title VII with a disparate impact theory, the theory that makes the most sense in head-of-household cases. The EEOC, which helps investigate and litigate Title VII cases, considers the head-of-household rule a prima facie violation only under Title VII.
the same benefit plan offered by J.C. Penney. The legitimacy of the head-of-household rule has been tested several times in the context of employer-sponsored medical plans. Courts have accepted that its use may save an employer money, contribute to employee satisfaction, and promote administrative efficiency by reaching employees who need insurance most. Currently, courts do not require that an employer demonstrate how such a scheme has actually achieved these goals. Instead, they require only that its use be reasonably related to the achievement of the stated business purposes.

Under Title VII, claims of disparate benefits are brought under Section 703(a)(1), which prohibits discrimination by an employer with respect to an employee's "compensation, terms, conditions or privileges of employment," on the basis of sex. In such cases, courts will accept either a disparate impact or disparate treatment theory of liability. Although plaintiffs have thus far asserted their claims under Title VII, they could also bring a suit under the Equal Pay Act. In order to establish a prima facie case of wage discrimination under the Equal Pay Act, the plaintiff would have to prove only that disparate benefits are paid to men and women. She would not be required to prove that no women receive the benefits, only that a disproportionate number of them do not. In the head-of-household context, a plaintiff would probably be able to assert the necessary disparity by showing that many more men than women are heads of a household.

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79 The relevant cases are EEOC v J.C. Penney Co., Inc., 843 F2d 249; Colby 811 F2d 1119; and Wambheim, 705 F2d 1492.
81 See Wambheim, 705 F2d 1492.
82 See EEOC v J.C. Penney Co., Inc., 843 F2d 249.
83 Id.
84 Id at 253; Kouba, 691 F2d at 876.
86 EEOC v J.C. Penney Co., Inc., 843 F2d at 252.
87 Corning Glass Works, 417 US at 195.
88 Id.
89 A disparity of this degree has been accepted as disparate impact under Title VII. EEOC v J.C. Penney Co., Inc., 843 F2d 249. It is also significant that the EEOC urges close scrutiny. However, the success of a head-of-household claim under the Equal Pay Act has not been tested.
III. CRITICISM OF JUDICIAL TREATMENT
OF THE "CATCHALL" DEFENSE

A. The Judicial Interpretation of "Acceptable Business Reasons"

Courts have presented several arguments that the head-of-household rule satisfies the "legitimate business reasons" standard. Their decisions have relied on insubstantial justifications that substitute employer stereotypes for analysis and meaningful attempts to end wage discrimination. Moreover, acceptance of these arguments disregards Congressional intent to recognize only certain types of demonstrated employer needs as justifications for sex-wage disparities.

In *EEOC v J.C. Penney Co., Inc.*, the court accepted J.C. Penney's unsupported claim that the new head-of-household based program contributed to greater employee satisfaction than had the old, sex-based plan. In fact, under the new plan only 13.2% of Penney's female employees were eligible to receive insurance benefits. Penney's argument rested on the dubious assumption that female employees were more satisfied with the plan because they were theoretically but not actually eligible for coverage.

The judicial treatment of the "reasonable relationship" between an employer's legitimate business reason and the plan adopted is another particularly troublesome aspect of decisions in this area. J.C. Penney, for instance, could not prove it had achieved any of its stated goals, yet the courts upheld its plan. Even if J.C. Penney or any employer could prove that a majority of its employees had agreed to a head-of-household plan, a court should not excuse wage disparities on that basis. If employee satisfaction is an acceptable business reason, an employer could successfully adopt a plan simply because a majority of its employees prefer it, even though the uncompensated minority might be a historically disadvantaged group. This is inconsistent with Congress' intent to encourage suits to remedy sex-wage discrimination.

Courts that allow employees to waive their rights to equal pay by accepting employee satisfaction as a legitimate business reason cre-
ate an easy defense for employers who discriminate. As one judge has noted, "[t]he court offers no guidance as to when employee satisfaction ceases to be a legitimate business reason and becomes a pretext for discrimination in compensation."\(^9\)

While the Equal Pay Act was structured to provide employers latitude in designing compensation and benefit schemes, it was also intended to end certain sex-based wage disparities. Congress recognized the need for employer flexibility and did not intend to dissuade employers from consulting their employees in formulating benefit plans. It is not likely, however, that Congress intended employees to be able to waive their opposition and sanction a discriminatory plan.

The second reason J.C. Penney offered in support of its head-of-household rule is that the scheme gave the greatest amount of coverage to those employees who needed it most. This rationale is based on the questionable assumption that a head-of-household is in greater need of subsidized insurance than a non-head-of-household.

It is quite understandable, although J.C. Penney never convincingly argued the point, that an employer would want to give benefits to those employees who most need them.\(^7\) Employers want benefits to reach those employees who most want them because this maximizes the employee satisfaction an employer can derive from a given level of benefits. Targeting heads of households might be a good way to start identifying those employees who want insurance. The "head-of-household," by definition, contributes the most to family finances and might be attracted by the medical or other insurance options for his family.

Use of the head-of-household criterion as a proxy for those who most desire benefits, however, relies on a basic logical inconsistency. Certainly the head of a household is concerned with getting his family insured. But heads-of-households are clearly not the only family members interested in insurance. The employees who need (and presumably want) family insurance are those whose families are not covered by another plan. A household head whose family is already covered will find the benefits of family coverage less attractive than a non-household head whose family is not covered by any insurance. The head-of-household classification is relevant to determining need only if many other employers have the

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\(^9\) EEOC v J.C. Penney Co., Inc., 843 F2d at 255 (Hillman dissenting).

\(^7\) Margaret M. Gagliardi and Edwin E. Freedman, Redesigning a Health Plan: What Factors to Consider, 3 J of Compensation & Benefits 234 (1988).
same plan. This is clearly not the case.98

Further, relying on the head-of-household classification may actually hurt some families.99 For example, the head of the house could lose or quit his job; if insurance coverage depends on him, the family goes unprotected.100 Or, employers could simply never extend coverage to some non-heads-of-households who are not covered by any other plan.101 The head-of-household rule is an inadequate way to decide which employees need medical benefits. The use of this rule inaccurately targets those employees who might be attracted by insurance plans and disproportionately deprives female employees of insurance they deserve as legitimate members of the work force.

The increased cost of providing benefits under a plan that does not use the head-of-household criterion is often cited as a justification for employing it, but increased cost is neither an economic certainty nor a good defense at law. J.C. Penney, for example, argued that it was getting the biggest “bang for the buck” with the benefit package it offered.102 Of course, if Penney’s claims that only heads-of-households want the insurance were true, then an employer would not incur any additional cost by making it available to all employees. Contrary to Penney’s assumptions, there may be some employees who are not heads-of-households who might seek coverage and thus increase the employer’s cost. Still, an employer could find better, less discriminatory ways to save money. Many heads-of-households do not want insurance. Persons, whether married or not, who earn a substantial amount of money, may not be particularly enticed by subsidized insurance.103 The assumption that a head-of-household is more likely to be uncovered than a non-head-of-household is not borne out by analysis.

Alternatives other than the head-of-household rule exist. An employer could survey his employees to determine their precise needs and give the benefits only to those who requested them. He could extend insurance only to those employees who can prove they have no other coverage. He could structure plans to allow

98 EEOC v J.C. Penney Co., Inc., 632 F Supp 871, 872. J.C. Penney had between twenty and thirty plans from which to choose.
100 See Colby, 811 F2d at 1122.
102 EEOC v J.C. Penney Co., Inc., 843 F2d at 254.
103 Indeed, one of Penney’s alleged aims was to prevent duplicative insurance. Mamorsky, 4 J of Compensation & Benefits at 45.
lower-paid employees with dependents to pay lower premiums. He could survey different insurance carriers to arrange for large group discounts. Plan administrators could set a salary cap on insurance benefits. An employer could set a certain salary level above which employees could elect compensation in the form of either medical benefits or cash. An employer would do well to cut his costs by rejecting employees who do not need or do not care about insurance from their benefit plan. A more careful evaluation of employee needs would reduce costs and more equally distribute benefits to both sexes.

As the dissent in *EEOC v J.C. Penney* pointed out, cost is not a legitimate defense to Title VII discrimination suits. An employer's showing of increased cost cannot excuse discriminatory wage practices because "[w]ithholding benefits from a group of employees is very often cheaper than extending the benefits equally to all." By endorsing cost as a legitimate defense to disparate wage plans, the court allows employers to disguise "all but the most blatant discrimination." In Title VII actions, increased cost should be secondary to remedying past discriminatory patterns. As the EEOC acknowledges, this balance also makes sense in Equal Pay Act litigation as the intended remedy in such cases is

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104 The court in *EEOC v J.C. Penney* suggested that insurance benefits are akin to parking or health club memberships that are used solely to entice qualified employees. This may be true if employees have enough money to see an employer-sponsored insurance plan as an option rather than a necessity. For employees at the low end of the pay scale, however, insurance is not easily analogized to these perks. If cost is a true consideration, then employers might do better focusing on the employees who cannot afford coverage on their own. These may or may not be heads-of-households.

105 See *EEOC v J.C. Penney Co., Inc.*, 843 F2d at 256, citing *Arizona Governing Committee v Norris*, 463 US 1073, 1084 n 14; *Newport News*, 462 US at 685 n 26; and *Manhart*, 435 US at 716-17 n 32 (Hillman dissenting).

106 *EEOC v J.C. Penney Co., Inc.*, 843 F2d at 256.

107 Id at 256.

108 An employer may seek a particular remedial structure based on cost, but cannot avoid its responsibility to remedy discrimination based on cost. The Supreme Court's holding that remedies under Title VII are to be broadly construed supports this conclusion. One might argue that the disagreement in the House as to whether the head-of-household rule would be legitimate under the fourth defense meant that Congress did not intend to prohibit employers' use of the head-of-household rule. Such a position is not convincing for several reasons. First, the bill's author, Rep. Green, did not accept such an interpretation. 109 Cong Rec 9206 (1963). Second, the Findley Amendment, which proposed a defense for the extra cost of employing women (a factor not related to performance), was rejected. In any case, the Supreme Court has not made House discussion determinative when specific factors were involved. See n 74. In *Corning Glass Works*, the Court refused to allow an employer to pay female workers less because they worked different shifts, although Congress had specifically referred to shift differentials as a potentially legitimate defense. See n 74. The intended broad remedy of equal pay legislation, however, has survived.
designed to facilitate plaintiffs’ suits, at least in its intent to eradicate wage discrimination.\textsuperscript{109}

Judicial deference to employers’ claims seriously undercuts the validity of statutory sex-wage discrimination remedies. The courts seem unduly concerned with securing employer flexibility. They neglect the protection of a group of employees who have little choice in their method of compensation. Allowing employers to defend discrimination claims with business reasons that are merely desired goals rather than forcing them to face reality greatly dilutes the statutory protection against sex-based wage discrimination. The courts have rejected these sorts of employer justifications in the context of other sex-wage differentials that were not related to performance and were based on external economic factors such as market conditions. They should do so here.

B. Policy Reasons to Reject the Head-of-Household Rule

There are at least two policy reasons to reject the head-of-household schemes. First, allowing the use of the head-of-household criterion unnecessarily narrows the scope of the Equal Pay Act and Title VII and simply permits one stereotype to substitute for another. Legislative history indicates that equal pay legislation was designed to combat particular sex stereotypes that resulted in wage differentials which benefitted men.\textsuperscript{110} Men were thought to deserve a higher salary because they were responsible for an entire family while women did not merit as much money because their income was purely extra cash.\textsuperscript{111} Today, however, many families rely on two incomes.\textsuperscript{112} There is no longer an easy and accurate way to generally describe the financial burden of the head of a household.

The stereotype that one member of the family earns the overwhelming majority of the family’s income is simply not accurate. For example, one head of household employee may only support himself and an employed spouse while another non-head-of-house-

\textsuperscript{109} Justice Marshall stated in Corning Glass Works: “The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.” Corning Glass Works, 417 US at 208.

\textsuperscript{110} See Part I.A.

\textsuperscript{111} A telephone poll by the New York Times in November 1983 indicated that 58% of working women and 31% of nonworking women would rather work than stay home, even if they could afford to stay home. Maureen Dowd, Many Women in Poll Value Jobs as Much as Family Life, NY Times A1 (Dec 4, 1983).

\textsuperscript{112} Of the 63,558,000 families in the United States, 27,489,000 are two-income families. US Bureau of the Census, Current Population Reports no 704 (1986).
hold employee may contribute her income to a family of seven. One head of household who makes a high salary may have a spouse who earns only slightly less while another poorly paid non-head-of-household may have a husband who earns only a few dollars more. The head-of-household characterization measures only which member of the family earns the most, not which family is better off financially.

Part of this rationalization for head-of-household plans is that the head of the house is the member of the family who most needs medical insurance for his family because he is the chief provider. This is only another aspect of the long-held stereotype that men work to support families while women work for non-economic reasons. Currently, males have been replaced by the “head-of-household” language in plan structures but the effect has been similar—few women receive any benefits. If equal pay legislation is to have meaning, employers cannot be allowed to substitute socioeconomic criteria for sex where the resulting distribution of benefits is basically the same.

The head-of-household rule also perverts the purpose of compensation. In the American economy, employees expect to be rewarded for the job they perform; merit bonuses, commissions and the like are a way of life. Employers, however, must also consider the cost of various plans. They want their compensation schemes to attract the maximum number of desirable employees at minimum cost. The goal of courts should be to protect employees from employers who cut too many corners. Otherwise, an employer may skew earnings to reflect cost considerations outside the employee’s control, and thus deprive her of the benefit of her labor. The employee then has little incentive to perform up to her capabilities. Such a scheme may help employers in the short run but hurts them in the long run as employees either leave or do not perform adequately. In the end, society suffers from the underproduction.

The effects of such a scheme are mixed: Some heads-of-households are accurately compensated while some non-heads-of-households, who place a higher value on benefits than their employers

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113 Mamorsky, 4 J of Compensation & Benefits at 45 (cited in n 99).
115 Gagliardi and Freedman, 3 J of Compensation & Benefits at 235 (cited in n 97).
116 See Representative Powell’s remarks in n 19.
expect, are undercompensated. Were the employees able to elect benefits, this problem would not exist. Under the head-of-household rule, the employer makes an inefficient and inaccurate determination of a particular employee’s desire for insurance. In this case, the determination is particularly troublesome because women who do the same work as men and expect the same benefit options are systematically denied that choice. Courts need not require employers to adopt the most efficient compensatory system. They should mandate only that employers not award benefits in a way unrelated to job performance, where the vast majority of disparately affected employees are women.

CONCLUSION

Both the Equal Pay Act and Title VII demonstrate the movement beyond the time when men and women were thought to deserve different salaries. Courts have rejected many plans that indirectly benefit men more than women. They have not been diligent enough, however in extending the prohibitions of employment discrimination statutes to subtle discriminatory plans such as those based on the head-of-household rule. Although the criterion in this case is economic, it applies almost perfectly to deprive one sex of employees of additional compensation. Courts show a valid concern for preserving employee flexibility. They neglect the fact that use of such a rule ensures that a large number of women are paid less for performing the same job as men. This is not the result Congress or the EEOC intended.

Even if employers cannot use the discriminatory head-of-household rule, they will still retain flexibility. They have many other alternatives from which to choose. Other approaches not only apply benefits more equally but also save more money, more efficiently target resources, dispel old stereotypes and correctly compensate employees. The current judicial trend reads the fourth defense too broadly and thus lets in a plan that is economically and ethically unjustified. One glance at the degree to which head-of-household rules disparately affect women shows why such a reading does not help correct unfair wage differences.