

**ONE OF THESE THINGS IS NOT LIKE THE OTHER:  
PROVING LIABILITY UNDER THE EQUAL PAY ACT  
AND TITLE VII**

***Tidwell v. Fort Howard Corp.*, 989 F.2d 406 (10th Cir. 1993).**

In *Tidwell v. Fort Howard Corp.*,<sup>1</sup> the United States Court of Appeals for the Tenth Circuit defined the interrelationship between the evidentiary standards required for liability under the Equal Pay Act (EPA)<sup>2</sup> and under Title VII of the Civil Rights Act of 1964 (Title VII)<sup>3</sup> by determining that a jury verdict<sup>4</sup> in favor of a female employee in an EPA suit does not constitute proof<sup>5</sup> of or require a similar finding of liability for intentional discrimination<sup>6</sup> under Title VII.<sup>7</sup>

The plaintiff, Sharon Tidwell, had been employed since 1985 at the paper products mill owned by the defendant, Fort Howard Corporation.<sup>8</sup> She began as an accounts payable clerk and moved into an expanding department to serve as its coordinator two years later. Tidwell received several promotions within the next three years and, in 1989, became

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1. 989 F.2d 406 (10th Cir. 1993).

2. The Fair Labor Standards Act of 1938 § 6(d) (codified as amended at 29 U.S.C. § 206(d) (1988)). The Act provides, in relevant part, as follows:

(1) 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. . . .

29 U.S.C. § 206(d)(1) (1988).

3. The Civil Rights Act of 1964 provides, in relevant part, as follows: "It shall be an unlawful employment practice for an employer . . . 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." 42 U.S.C. § 2000e-2(a)(1) (1988).

4. This Case Comment, while discussing the liability-creating nature of certain jury verdicts, will only briefly address the Seventh Amendment issue noted after the court's "Conclusion" section of *Tidwell*, 989 F.2d at 412. The requirement that a jury trying common factual issues of legal and equitable claims must be bound by the same evidentiary standards and hence must reach a compatible verdict is the subject of a separate circuit court split of opinion and is therefore beyond the scope of this Case Comment.

5. See *infra* note 16.

6. See *infra* notes 29, 30.

7. 989 F.2d at 409-11.

8. *Id.* at 408.

supervisor of her department.<sup>9</sup> As supervisor, she succeeded a male who had been paid a higher salary for the same position.<sup>10</sup> Because Tidwell believed that the pay disparity was unfair, she brought suit under both the EPA and Title VII.<sup>11</sup> Both actions were combined in one proceeding, but while the jury returned a verdict for Tidwell on the EPA claim,<sup>12</sup> the court entered judgment for Fort Howard on the Title VII claim.<sup>13</sup> Both parties appealed.<sup>14</sup>

The Tenth Circuit affirmed the trial court's decision on both claims.<sup>15</sup>

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9. *Tidwell v. Fort Howard Corp.*, 756 F. Supp. 1487 (E.D. Okla. 1991), *rev'd on other grounds*, 989 F.2d 406 (10th Cir. 1993). When Tidwell began working for the defendant in 1984, her position as a clerk was classified as salaried, nonexempt, with overtime paid. *Id.* at 1489. That classification also applied to her coordinator position after she was promoted in 1986. This salary netted Tidwell \$13,500 per year. *Id.* In 1989, Tidwell was promoted to a supervisor role in her department. *Id.* This position was a salaried, exempt position with no overtime paid, which resulted in a yearly salary of \$23,000. *Id.* Two male employees were temporarily transferred into Tidwell's department. One of the men, Smith, had previously been paid by the hour, with overtime pay. *Id.* The defendant employer continued to pay Smith on this basis after his transfer. Changing Smith's pay rate would have resulted in a pay reduction. *Id.* at 1490. The other man, Willard, had been a supervisor before his temporary transfer, and the defendant continued to pay him at the same salaried, exempt rate. *Id.*

10. 989 F.2d at 408.

11. *Id.*

12. *Id.* Tidwell was awarded two years' back pay, the EPA's remedy in equity. The court briefly addressed the Seventh Amendment issue of equitable remedies in concert with legal remedies in its opinion, saying that "[t]he court is bound by the jury's determination of factual issues common to both the legal and equitable claims." *Id.* at 412 (quoting *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986)). The court explained that due to the common factual issues in both the legal and equitable claims asserted, the jury's determination that the defendant had not willfully violated the EPA was binding upon the court. 989 F.2d at 412. *See supra* note 4.

The court also cited *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988), in which two claims for race discrimination under 42 U.S.C. § 1981 and Title VII were tried together. *Id.* at 1441. After the jury awarded the plaintiff a small amount in his § 1981 claim, the court, in a bench trial, awarded plaintiff a larger amount under Title VII. *Id.* at 1442. The plaintiff sought to set aside the § 1981 award, but the court upheld the jury's decision, as the two claims were tried on the same facts. *Id.* The *Skinner* court said:

[W]here, due to the presence of both equitable and legal issues, trial is both to the jury and to the court . . . any essential factual issues which are central to both [claims] must be first tried to the jury, so that the litigants' Seventh Amendment jury trial rights are not foreclosed on common factual issues.

*Id.* at 1443.

13. *Tidwell*, 989 F.2d at 408.

14. Tidwell's position on appeal was that the jury verdict finding sex-based wage discrimination under the EPA also required the Title VII claim to be decided in her favor. *Id.* Tidwell also appealed the court's denial of her request for liquidated damages under the EPA. *Id.* at 411. Defendant Fort Howard appealed from the denial of its motion for judgment n.o.v. and the denial of its alternative motion for a new trial on the EPA cause. *Id.* at 408.

15. *Id.* The appeals court reversed the trial court's decision only on the issue of Tidwell's request for attorney's fees. *Id.* at 413.

It held that a jury verdict in favor of a female employee in an EPA suit does not entitle that employee to favorable judgment on a Title VII claim when the employee has not produced evidence, either directly or indirectly,<sup>16</sup> that her employer intentionally discriminated against her.<sup>17</sup>

Congress passed the EPA in 1963 to address the problem of pay disparities based on an employee's sex.<sup>18</sup> Under the EPA, a plaintiff alleging discrimination due to her sex has the burden of proving a prima facie case.<sup>19</sup> Once this requirement is met the burden shifts to the defendant who must prove that the difference in pay is attributable to some factor other than sex.<sup>20</sup> The EPA sets out four exceptions that a defendant

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16. *Id.* at 412. The court's cursory mention of "direct or indirect" evidence of intentional discrimination is the subject of yet another circuit court split of opinion, the question whether, without direct evidence of intentional sex-based wage discrimination, a plaintiff "must meet the equal pay standard of the EPA to prove . . . a Title VII sex discrimination in wages claim." E.E.O.C. v. Sears, Roebuck & Co., 839 F.2d 302, 342 (7th Cir. 1988) (holding that only evidence of discrimination that is "clear and straightforward" would be sufficient to make out a Title VII wage discrimination claim not based on equal work).

*Compare* E.E.O.C. v. Sears, Roebuck & Co. and *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133 (5th Cir. 1983) (holding that when a plaintiff alleges a pay disparity based on sex under Title VII, evidence of a transparently sex-biased system or direct evidence of sex-based wage discrimination is required, other than that offered for the EPA claim) with *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992) (stating that "the 'direct evidence' standard, such as the one adopted by the Fifth Circuit, eviscerates the standards and burdens for a Title VII case as set out" by the Supreme Court) and *Forsberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (holding that requisite discriminatory intent may be inferred from circumstantial evidence).

17. 989 F.2d at 410. In a Title VII claim, the plaintiff must first make out a prima facie case. *See infra* note 28. The prima facie case will create a presumption that the employer discriminated against the employee. "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

18. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Congress sought to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry ha[ve] been based 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." *Id.* at 194 (quoting S. REP. NO. 176, 88th Cong., 1st Sess. 1 (1963)).

19. To establish such a case, the plaintiff must show: (1) that his or her employer is subject to the EPA; (2) that he or she performed work in a position requiring equal skill, effort, and responsibility under similar working conditions; and (3) that he or she was paid less than the employees of the opposite sex providing the basis of comparison. *Jones v. Flagship Int'l*, 793 F.2d 714, 722-23 (5th Cir. 1986).

20. *See Corning Glass Works*, 417 U.S. at 196. Once a plaintiff shows that she was paid less than a male employee for substantially the same work, the burden of proof shifts to the employer "to show that the differential is justified under one of the [Equal Pay] Act's four exceptions." *Id.* For a discussion of the EPA's four exceptions, see *infra* note 21.

may use as affirmative defenses to a plaintiff's suit.<sup>21</sup> If the defendant cannot prove that the pay disparity in question meets one of the exceptions, the defendant will be held liable.<sup>22</sup> Whether or not the employer intended to discriminate is not a factor in determining liability under the EPA.<sup>23</sup>

The EPA's basic structure and operation are straightforward, aimed to rectify discrimination in pay based on sex.<sup>24</sup> Understandably, then, the passage of Title VII of the Civil Rights Act of 1964<sup>25</sup> threw courts dealing with sex discrimination suits into confusion, as it gave them yet another, slightly different, standard to use to judge such discrimination.<sup>26</sup>

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." <sup>27</sup> Under Title VII, once a plaintiff proves a prima facie case of sex discrimination,<sup>28</sup> the burden of proof shifts to the defendant who must produce some evidence that a nondiscriminatory reason exists for the disparate treatment.<sup>29</sup> If the defendant satisfies this requirement, the burden shifts back

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21. The factors listed as statutory exceptions in the EPA are: "[1] a seniority system; [2] a merit system; [3] a system which measures earnings by quantity or quality of production; or [4] a differential based on any other factor other than sex. . . ." 29 U.S.C. § 206(d)(1) (1982). These exceptions are affirmative defenses as to which the employer has the burden of production and persuasion. *Corning Glass Works*, 417 U.S. at 197.

22. 417 U.S. at 196-97.

23. "[T]he Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown." *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985).

24. *Corning Glass Works*, 417 U.S. at 195.

25. See *supra* note 3; see also *infra* note 33.

26. See generally DaNay A. Kalkowski, Note, *Does Liability Under the Equal Pay Act Automatically Lead to Title VII Liability?* —Fallon v. State of Illinois, 70 NEB. L. REV. 614 (1991) (detailing the history of the Bennett Amendment's effect on courts nationwide).

27. 42 U.S.C. § 2000e-2(a) (1988). Title VII was the second bill relating to employment discrimination enacted by the 88th Congress. See *County of Washington v. Gunther*, 452 U.S. 161, 171 (1981). Two days before voting on Title VII, the House of Representatives changed the bill to prohibit sex discrimination. *Id.* at 172. The Senate voted on the House version of Title VII without reference to any committee. *Id.*

28. "The plaintiff establishes a prima facie case of sex discrimination under Title VII by demonstrating that she is female and that the [low-paying] job she occupied was similar to higher paying jobs occupied by males." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992).

29. Once a plaintiff has proved the prima facie case under Title VII, the burden of production shifts to the defendant "to articulate a legitimate, nondiscriminatory reason" for its allegedly discriminatory action. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). At this point, the Title VII defendant does not also have the burden of persuasion. The defendant "need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."

to the plaintiff. The plaintiff must then persuade the court that the defendant intentionally discriminated against him or her, regardless of the reasons the defendant advanced.<sup>30</sup>

The Bennett Amendment created an exception to Title VII's equal pay requirement by expressly incorporating the EPA. It provides that an employer may lawfully differentiate upon the basis of sex if such differentiation is authorized by the four affirmative defenses set forth in the EPA.<sup>31</sup> Over the years since the enactment of Title VII and the Bennett Amendment,<sup>32</sup> courts deciding sex discrimination cases have actively debated the Amendment's proper interpretation. The inquiry centers on whether the Bennett Amendment incorporates into Title VII the EPA's shifting burdens of proof or whether only the four affirmative defenses are adopted, leaving Title VII's evidentiary burdens unchanged.<sup>33</sup> The *Tidwell* court asked this question in an attempt to determine whether sex-based wage discrimination suits brought under both statutes can stand separately, or if liability under the EPA results in automatic liability under Title VII.<sup>34</sup>

The Supreme Court first addressed this issue in *County of Washington v. Gunther*.<sup>35</sup> In *Gunther*, the Court looked to the "remedial purposes"<sup>36</sup>

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*Id.* at 254 (citations omitted).

30. The court noted that the plaintiff bears the "ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256.

31. The provisions to which the Bennett Amendment refers are the four affirmative defenses set out in the EPA. *See supra* note 21.

32. 42 U.S.C. § 2000e-2(h) (1988).

33. Due to the hasty manner in which Title VII was amended to include sex discrimination, possible inconsistencies between the EPA and Title VII did not arise until late in the debate over Title VII in the House of Representatives. *See County of Washington v. Gunther*, 452 U.S. 161, 171-72 (1981). After several Senators expressed concern that insufficient attention had been paid to such inconsistencies, Senator Bennett proposed his amendment. *Id.* at 173 (citing 110 CONG. REC. 13,647 (1964) (statement of Sen. Bennett)). The Senate leadership approved his proposal as a "technical amendment" to the Civil Rights bill. *Id.*

The entire discussion of the Amendment consisted of a few short statements, including Senator Bennett's explanation that the purpose of his amendment was "to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." *Id.*

34. 989 F.2d at 408.

35. 452 U.S. 161 (1981).

36. *Id.* at 178. The Court looked to Congress' indication that a "broad approach to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." *Id.* (quoting S. REP. NO. 867, 88th Cong., 2d Sess. 12 (1964)). The Court wanted to avoid interpretations of the Amendment and Title VII that would "deprive victims of discrimination of a remedy, without clear congressional mandate." *Id.*

and language<sup>37</sup> of the Bennett Amendment to conclude that Congress only intended to incorporate the affirmative defenses from the EPA into Title VII.<sup>38</sup> The Court sought to avoid what it saw as the practical consequence of interpreting the Bennett Amendment to incorporate not only the affirmative defenses but also the evidentiary burdens of the EPA—that an entire class of women would be deprived of a remedy if their employers discriminated against them because of their sex, but did not employ men at similar jobs with higher pay.<sup>39</sup> The Court noted a lack of a “clear congressional mandate” to incorporate all of the EPA’s standards into Title VII,<sup>40</sup> a contention that has been the source of disagreement among the circuit courts.<sup>41</sup>

*Gunther* gave rise to the much litigated question whether a judgment for sex-based wage discrimination under the EPA should necessarily require that a court impose liability for such discrimination in an accompanying

37. The Court sought to answer the question which it believed that the Bennett Amendment set out: “[W]hat wage practices have been affirmatively authorized by the Equal Pay Act[?]” *Id.* at 168-69. Looking to the statutory language, the Court analyzed the two parts of the Amendment. The first part, the definition of the violation, the Court called “purely prohibitory.” *Id.* at 169. The second part preceded the four exceptions from the EPA. Considering their location, the Court decided that it must be to those exceptions that the Bennett Amendment refers as “authoriz[ing],” and to nothing else. *Id.*

38. 452 U.S. at 168.

39. *Id.* at 177. The Court considered the possible gaps left in plaintiffs’ remedies if the two statutes were interpreted as co-extensive.

In practical terms, this [would mean] that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay . . . . Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII. . . .

*Id.* at 178-79. If the EPA provides the only set of standards by which to judge sex-based discrimination, then many women like the one described above would be left without a remedy under either the EPA or Title VII.

40. *Id.* at 179-80. The Court examined the record of the Equal Employment Opportunity Commission (EEOC) in interpreting the Bennett Amendment because great deference is generally accorded to the construction of a statute by those charged with its execution. *Id.* at 177. *See also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *Gunther*, however, the Court found that the EEOC Guidelines on the issue did not provide much guidance. *Gunther*, 452 U.S. at 177. The original EEOC Guidelines stated that “the standards of ‘equal pay for equal work’ set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.” *Id.* (citing 29 C.F.R. § 1604.7(a) (1966)). The EEOC deleted that portion of the Guideline in 1972. *Id.* (citing 37 Fed. Reg. 6837 (1972)). Since then, the EEOC has wavered, never making a definitive statement on the issue here in question. *Id.* Currently, the regulations provide that in “situations where the jurisdictional prerequisites of both the EPA and title VII . . . are satisfied, any violation of the Equal Pay Act is also a violation of title VII.” 29 C.F.R. § 1620.27(a) (1992).

41. *See* Kalkowski, *supra* note 26, at 614.

Title VII suit.<sup>42</sup> The circuits disagree in their resolutions of this issue.<sup>43</sup>

The Sixth Circuit, in *Odomes v. Nucare, Inc.*,<sup>44</sup> was the first circuit to examine this problem. It determined that the EPA's four affirmative defenses apply to Title VII claims of unequal pay for equal work.<sup>45</sup> Giving little rationale,<sup>46</sup> the court asserted that the analysis of claims of unequal pay for equal work is essentially the same under both the EPA and Title VII.<sup>47</sup>

One year later in *Kouba v. Allstate Insurance Co.*,<sup>48</sup> the Ninth Circuit analyzed the interplay between the EPA and Title VII by focusing on the Bennett Amendment. Like the *Odomes* court, the *Kouba* court held that even under Title VII, the defendant's only burden was to prove that the disparity in pay resulted from a factor other than sex<sup>49</sup>—the standard set out by the EPA.<sup>50</sup> With this conclusion, the *Kouba* court implied that a Title VII analysis of evidentiary burdens should also be conducted by EPA standards.<sup>51</sup>

Later, the Fourth Circuit in *Brewster v. Barnes*<sup>52</sup> held several defendants

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42. *Id.* at 622.

43. See *infra* notes 44, 48, 52, 56, 60, 65, 70, 75 and accompanying text.

44. 653 F.2d 246 (6th Cir. 1981). Plaintiff, a nurse's aide, brought suit for both race and sex discrimination under the EPA and Title VII. *Id.* at 248. Plaintiff's race discrimination claim was unsuccessful, but the court found that "during her employment, [the] defendant discriminated against her by paying her less for performing substantially [the] same work as more highly paid male orderlies." *Id.* at 247.

45. *Id.* at 251.

46. *Id.* at 249-51. The court's rationale consisted only of a bare recitation of the requirements of the two statutes in question, along with a brief look at *Corning Glass Works*. See *supra* note 18 for a discussion of *Corning Glass Works*.

47. *Odomes*, 653 F.2d at 250.

48. 691 F.2d 873 (9th Cir. 1982). The plaintiff, representing a class of all female sales agents, sued her employer for wage discrimination, alleging that the defendant's use of prior salary in determining new salaries caused a wage differential because the average female agent earned less than her male counterparts. *Id.* at 875. The plaintiff sued only under Title VII, avoiding an EPA suit because at that time it was unclear how these statutes affected one another. *Id.* at 875 n.3.

The district court held that the defendant failed to plead an acceptable affirmative defense because it failed to present evidence that a female agent's prior salary was based on a factor other than sex. *Id.*

49. *Id.* (citing *Gunther v. County of Washington*, 623 F.2d 1303, 1319 (1979), *aff'd*, 452 U.S. 161 (1981)). See also *supra* note 29.

50. See *supra* notes 20, 21.

51. 691 F.2d at 876-77. The court rejected the defendant's proposition that the plaintiff retained the burden of proof and persuasion at all times, a proposition explained at length in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

52. 788 F.2d 985 (4th Cir. 1986). The plaintiff, a female correctional officer, brought suit under 42 U.S.C. § 1983, Title VII, and the EPA against the Compensation Board and Board of Supervisors of her employer, the county prison. *Id.* at 987. Although this Case Comment will not address section

liable under the EPA for sex-based discrimination in pay. The court also held that the plaintiff had failed to meet her ultimate Title VII burden of proving that the defendants intentionally discriminated against her because of her sex.<sup>53</sup> In reconciling the two findings, the court emphasized that the decision meant only that the defendants did not intend to discriminate against the plaintiff because of her sex<sup>54</sup> and that discriminatory intent is not an element of a cause of action under the EPA.<sup>55</sup>

Soon, however, the Eighth Circuit disputed the Fourth Circuit's analysis in *Brewster*. In *McKee v. Bi-State Development Agency*,<sup>56</sup> the Eighth Circuit agreed with the plaintiff that the basic analysis of both Title VII and EPA claims is essentially the same.<sup>57</sup> Boldly stating a new interpretation of the two statutes' evidentiary relationship, the court wrote that in a claim of unequal pay given for equal work in which the disparity is based upon sex, EPA standards apply whether the suit alleges a violation of the EPA or Title VII.<sup>58</sup> The court quickly disposed of the defendant's argument that Title VII requires that the plaintiff prove intentional discrimination.<sup>59</sup>

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1983 claims, the interplay between section 1983 and Title VII is similar to the relationship between the EPA and Title VII. See generally *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

The district court had originally denied the plaintiff's EPA claim on grounds that she was not an "employee" under the EPA, for she was considered to fall within the EPA's "personal staff" exemption. *Brewster*, 788 F.2d at 989. Section 203(e)(2)(C) provides that an individual who holds a public elective office of a state, political subdivision of the state, or interstate governmental agency or who is selected by such an officeholder to be a member of his or her personal staff, is not considered an "employee" under the EPA. 29 U.S.C. § 203(e)(2)(C) (1982). The appeals court found, however, that the plaintiff did not fall within that exemption and that she had established her prima facie case. *Brewster*, 788 F.2d at 991.

53. *Brewster*, 788 F.2d at 992.

54. *Id.* at 993.

55. *Id.* at 993 n.13 (citations omitted).

56. 801 F.2d 1014 (8th Cir. 1986). A female research assistant employed by the defendant brought suit under the EPA, Title VII, and section 1983. *Id.* at 1016. Her section 1983 claim was dismissed before trial began. *Id.* The district court found in favor of the plaintiff on her EPA claim, but rejected her Title VII claim. *Id.* The plaintiff appealed the Title VII claim, arguing that the jury verdict on the EPA suit required the district court to follow that determination in the accompanying Title VII suit. *Id.* at 1018.

57. 801 F.2d at 1018 (citing *Strecker v. Grand Forks County Social Serv. Bd.*, 640 F.2d 96, 99 (8th Cir. 1980)).

58. *Id.* at 1019.

59. *Id.* The defendant outlined the shifting standards of proof that distinguish the two statutes at hand. The court noted that Title VII places the ultimate burden of persuasion on the plaintiff while the EPA places the ultimate burden of proof on the defendant, provided that the plaintiff establishes its prima facie case. *Id.* at 1019. The defendant pointed out that "unlike the showing required under Title VII's disparate treatment theory, proof of discriminatory intent is not required to establish a prima facie case under the Equal Pay Act." See *Peters v. City of Shreveport*, 818 F.2d 1148, 1153 (5th Cir. 1987).

According to the court, because the EPA did not require proof of intentional discrimination, such proof was therefore unnecessary under Title VII.

The Fifth Circuit's opinion in *Peters v. City of Shreveport*<sup>60</sup> marked yet another change in interpreting the interplay between the two statutes. In *Peters*, the district court had agreed with the plaintiffs that sex had been a factor in the City's disparate pay scheme, but it determined that sex was not a *significant* factor. Therefore, the district court declared that the City had successfully rebutted the plaintiffs' Title VII claim.<sup>61</sup> The district court found the City could not escape liability under the EPA, though, for it could not show that sex "provide[d] no part of the basis for the wage differential."<sup>62</sup> The Fifth Circuit subsequently agreed with the City that the two statutes should be interpreted consistently, in order to avoid a windfall to plaintiffs.<sup>63</sup> The court reasoned that it would be unfair for a plaintiff to recover Title VII damages without having to prove discriminatory intent. Moreover, an extensive review of legislative history led the court to regard the separate analysis of Title VII claims in connection with EPA claims as soundly based and not to be lightly abandoned, absent clear legislative intent—an intent the court failed to find.<sup>64</sup>

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The court rejected this argument, however.

60. 818 F.2d 1148 (5th Cir. 1987). A group of twenty-four women and three physically handicapped men alleged that the city was discriminating against them on the basis of sex by paying higher wages to a group of predominately male communications officers for substantially equal work. *Id.* at 1151.

61. *Id.* Noting that the district court had found the City's violation of the EPA "not willful," the Fifth Circuit emphasized that, under Title VII, once the burden of proof has shifted to the defendant, that defendant does not also inherit the burden of persuasion. *Id.*

62. *Id.*

63. Although the court disagreed with the defendant's rationale, it agreed that there may be negative effects from harmonizing the EPA and Title VII, especially when a plaintiff recovers Title VII damages without having proved discriminatory intent. "To allow recovery when there is no causal relationship between the impermissible factor and the complained of result create[s] a 'windfall' for the plaintiff. . . . We are constrained to give the [EPA] its most reasonable construction: a differential is 'based on' the factor of sex only if the factor of sex was a cause-in-fact of the differential." *Id.* at 1161.

64. *Id.* at 1159-61. The City argued that "Title VII law is *in pari materia* with sex-discrimination claims under the [EPA], and the [EPA] should therefore be interpreted consistently with Title VII." *Id.* The court stated, "Given the peculiar circumstances of the enactment of Title VII as an instrument to combat sex discrimination, however, we hesitate to presume that Congress had the Equal Pay Act in mind in enacting Title VII." *Id.* at 1160 (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (Norman J. Singer ed., 4th ed. 1984)).

When the City argued that the two statutes should be interpreted as consistently as possible to avoid unnecessary confusion, the court agreed, but hesitated "to rely exclusively upon this principle to interpret as substantially identical the causal element of a Title VII plaintiff's case and the showing an employer must make under the Act's fourth defense." *Id.* at 1160. The court rejected the defendant's

In *Fallon v. Illinois*,<sup>65</sup> the Seventh Circuit followed the Fifth Circuit in adhering to the separate analysis of EPA and Title VII claims. In *Fallon*, the court held that a finding of EPA liability indicates only that the employer failed to satisfy its burden of proof.<sup>66</sup> After surveying the circuit split and examining the legislative intent behind the Bennett Amendment, the court determined that an employee can sustain an EPA claim despite a finding that the employer did not intentionally discriminate because discriminatory intent is not required under the EPA.<sup>67</sup> In the Seventh Circuit's view, the two statutes remained separate as to the proof required and as to the allocation of the parties' burden of proof.<sup>68</sup> It found that liability under one does not automatically lead to liability under the other.<sup>69</sup>

The Sixth Circuit then revisited the EPA-Title VII question in *Korte v. Diemer*,<sup>70</sup> holding that the distinction drawn between EPA liability and Title VII liability in sex-based wage discrimination cases was overly technical.<sup>71</sup> Consistent with its earlier statement in *Odomes*,<sup>72</sup> the court

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attempt to "harmonize a defense under the [Equal Pay] Act with a requirement of the Title VII plaintiff's case." *Id.* at 1160-61. The court asserted that to do so would result in an inappropriate extension of the Bennett Amendment. *Id.*

65. 882 F.2d 1206 (7th Cir. 1989). *Fallon*, the plaintiff, represented a class of approximately 55 female Veteran Service Officer Associates who were suing their employer under the EPA and Title VII. *Id.* at 1207 & n.1. The class asserted that its members did substantially the same work as the all-male Veteran Service Officers, yet were paid less solely because they were women. *Id.* at 1207. The district court found in favor of the plaintiffs on both claims. *Id.*

The appeals court remanded the EPA decision on the basis that the trial court prematurely rejected the affirmative defense asserted by defendants under the EPA. *Id.* at 1212.

66. 882 F.2d at 1217. The court noted that failing to meet a burden of proof only establishes that the trier of fact cannot conclusively decide the matter. *Id.*

67. *Id.* Another basis for the court's conclusion was its consideration of the long and varied EEOC Guidelines on the issue. *Id.* at 1217-18. *See also supra* note 40.

68. 882 F.2d at 1218.

69. *Id.* While it was clear to the Seventh Circuit that liability under the EPA does not automatically lead to Title VII liability, it was equally clear to that court that "[t]he converse unquestionably is true: a successful affirmative defense to an Equal Pay Act claim likewise serves as a valid defense to a claim based on Title VII." *Id.* at 1213 (quoting *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985)).

70. 909 F.2d 954 (6th Cir. 1990). *Korte* was a Deputy Sheriff. *Id.* at 955. When her superior was replaced by the defendant through an election, the plaintiff's responsibilities and privileges changed drastically for the worse. She attributed this change to her gender and sued the defendant under the EPA, Title VII, and the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1988). 909 F.2d at 956. The plaintiff voluntarily dismissed her Age Discrimination in Employment Act claim prior to trial. *Id.*

71. 909 F.2d at 959.

72. 653 F.2d 246 (6th Cir. 1981). *See supra* note 44.

deduced that a finding of "sex discrimination in compensation" under one statute is tantamount to a finding of "pay discrimination on the basis of sex" under the other.<sup>73</sup> Thus, the Sixth Circuit considered a jury verdict for a plaintiff under the EPA binding on a court deciding a connected Title VII claim.<sup>74</sup>

In *Tidwell v. Fort Howard Corp.*,<sup>75</sup> the Tenth Circuit added a new twist to the analysis of the connection between EPA and Title VII evidentiary standards. While holding the defendant liable for discrimination under the EPA and stating that jury determination may apply to all aspects of the accompanying Title VII claim as well, the court repeatedly emphasized the unusual and significant fact that the violation of the EPA was "nonwillful."<sup>76</sup> When the plaintiff sought to use the EPA judgment in her favor as binding on the Title VII claim, the court rejected her argument, noting that intentional discrimination is still an element of Title VII liability.<sup>77</sup>

Carefully examining the "sparse" legislative history of the Bennett Amendment, the court found no compelling reason to handle the adjudication of sex-based discrimination claims differently from other Title VII actions.<sup>78</sup> The plaintiff urged the court to interpret Title VII and the EPA as mutually incurring liability. The court, seeking to avoid this substantial change, cited the Supreme Court in *County of Washington v. Gunther*<sup>79</sup> for the proposition that the purpose of the Bennett Amendment was to incorporate the EPA's four affirmative defenses into Title VII for sex-based wage discrimination cases, but not the EPA's equal work requirement or

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73. 909 F.2d at 959. The court found that conduct which a jury finds to be "based on sex, and not motivated by nondiscriminatory reasons, cannot later be found by a district court to lack an intent to discriminate on the basis of sex." *Id.*

74. *Id.*

75. 989 F.2d 406 (10th Cir. 1993).

76. *Id.* at 409, 411-12. After deciding that cases brought under the two statutes are distinct, due to the Title VII requirement that a plaintiff prove discriminatory intent, the court seemed to make a 180-degree turn, stating that the "nonwillful" nature of the EPA violation was in fact binding on the Title VII claim. The court called this conclusion "a characterization of the reality of the acts and relationship of the parties out of which the cases arose . . . [which] should not be ignored. . . ." *Id.* at 411.

77. *Id.* at 409-10. See also *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), for a discussion of the plaintiff's "ultimate burden of persuasion" on the issue of her employer's intent to discriminate. *Id.* at 2479. The *Hicks* Court said that once an employer produces a credible reason for a pay disparity, "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him] . . .'" *Id.* (citing *Burdine*, 450 U.S. at 253).

78. *Tidwell*, 989 F.2d at 411.

79. 452 U.S. 161 (1981). See *supra* notes 35-41 and accompanying text.

evidentiary standards.<sup>80</sup>

The *Tidwell* court thus followed the Fourth, Fifth, Seventh, and Ninth Circuits in choosing to retain the traditional Title VII analysis of sex-based wage discrimination cases and in holding that liability for such cases under the EPA does not necessarily lead to liability under Title VII.<sup>81</sup> For the Tenth Circuit, a judgment of liability under the EPA means only that a defendant has failed to prove affirmatively a non-sex-based reason for discriminating in pay, while a judgment of liability under Title VII requires a positive finding of discriminatory intent.<sup>82</sup> Like earlier courts reaching the same conclusion, the *Tidwell* court reasoned that the language of the Bennett Amendment was too vague to infer that Congress intended to replace Title VII's standards with more lenient ones from the EPA.<sup>83</sup> Because little in the legislative history of the Bennett Amendment indicates such a desire on Congress' part,<sup>84</sup> these courts are hesitant to make major changes in Title VII and thus retain the distinction between the EPA and Title VII.

The *Tidwell* court's analysis of the relationship between the EPA and Title VII is correct. Properly noting situations in which a jury verdict under the EPA may be binding on a Title VII claim,<sup>85</sup> the court was careful to preserve the congressionally mandated distinctions between the two statutes. A contrary holding surely would have streamlined the process of determining liability in mixed EPA-Title VII claims for sex-based wage discrimination, but such a decision would have ignored the clearly delineated, different evidentiary standards Congress created for each statute.<sup>86</sup>

The court appropriately applied a traditional Title VII analysis to *Tidwell's* Title VII claim. To have done otherwise would have negated the very purpose of Title VII, for as Justice O'Connor wrote concurring in

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80. *Tidwell*, 989 F.2d at 411. The *Gunther* Court expressly "did not decide in [that] case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII." *Id.* (citing *Gunther*, 452 U.S. at 181).

81. *See supra* notes 48, 52, 60, 65 and accompanying text.

82. *Tidwell*, 989 F.2d at 409.

83. *Id.* at 410-11.

84. *See supra* note 33.

85. *See supra* note 76.

86. Treating the causes of action as related but distinct still allows them to serve their respective purposes; it just means that a plaintiff suing under Title VII may have a little tougher road than under the Equal Pay Act, but that is no reason to transform the separate causes of action into one claim.

*Fallon*, 882 F.2d at 1215.

*Price Waterhouse v. Hopkins*,<sup>87</sup> “It would be odd to say the least if the evidentiary rules applicable to Title VII actions were themselves dependent on the gender or the skin color of the litigants.”<sup>88</sup> The two statutes in question were created to work together and complement one another. In maintaining the traditional Title VII framework for analyzing the interrelationship between the statutes in sex-based wage discrimination cases, the Tenth Circuit preserved congressional intent. The court properly construed Title VII and the EPA as supplementing, rather than supplanting, one another.

*Amy M. Sneirson*

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87. 490 U.S. 228 (1989).

88. *Id.* at 279 (O'Connor, J., concurring).

