SUBJECTIVITY IN ACADEMIC SALARY DECISIONS: BROADENING THE SCOPE OF DISPARATE IMPACT

I. INTRODUCTION

Salary disparities between male and female faculty members in American colleges and universities is a historical problem[1] currently receiving closer attention.[2] While ahead of American business in the march toward equality,[3] academia still suffers from marked disparities in male and female faculty salaries.[4] A major obstacle female faculty

1. *See* Jepsen v. Florida Bd. of Regents, 754 F.2d 924 (11th Cir. 1985), where a female faculty member, underpaid when she began in 1946, failed to receive a promotion or salary increase from 1947 to 1971. *Id.* at 925.

2. Approximately 220 colleges and universities have recently conducted salary equity studies, some at the direction of state legislatures. By spring 1987 approximately 100 schools had made salary adjustments for faculty members, clerical workers, or both. The Chronicle of Higher Education, July 15, 1987, at 1, col. 3. Currently Washington University is seeking to remedy this salary problem. *Id.* at 1, col. 1.

3. According to the National Committee on Pay Equity, academic institutions actually have a smaller pay gap than American business as a whole. *Id.* at 1, col. 3. This does not mean, however, that inequities do not exist.

4. The largest salary gap nationwide in academia is among full professors. Where men earn an average salary of $46,070, women earn $40,630. *Id.* at 14, col. 3. The University of Missouri at Columbia faculty salary disparities are as follows:

Professor	Average Salaries
Men	$41,864
Women	$38,168
Associate Professor	
Men	$31,891
Women	$30,636
Assistant Professor	
Men	$29,406
Women	$27,543

members face in combatting salary disparities is evaluation programs[5] incorporating subjective criteria.[6] Subjective evaluations based on scholarship, quality of teaching, and number and quality of publications may have a discriminatory effect on women.[7] Many aggrieved female faculty members have invoked the Equal Pay Act[8] to remedy salary disparities. Title VII[9] and its two major theories, disparate treatment[10] and disparate impact,[11] have also proved useful in eliminating salary disparities.[12] Nevertheless, the use of Title VII to remedy

---

Instructor	
Men	$23,066
Women	$19,985

St. Louis Post-Dispatch, Nov. 15, 1987, at 14D, col. 2.

5. *See infra* text accompanying notes 93-96 (summary of factors used in academic regression analysis).

6. 'Subjective criteria' include factors such as number and quality of publications, faculty and student evaluations, quality of research, community service, and committee work. *See infra* notes 63, 83, 91, 153 and accompanying text (enumerating subjective factors used by universities in their salary determination process). For further discussion of subjective employment practices, see Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63 (1988); Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI. [-]KENT L. REV. 1 (1987); Denis, *Subjective Decision Making: Does it Have a Place in the Employment Process?*, 11 EMP. REL. L.J. 270 (1985); Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869.

7. Until recently, courts have failed to require subjective criteria as a factor in salary discrimination cases. This apparent neglect, however, is completely unwarranted as such criteria are often crucial to a college or university setting. *See infra* notes 167-73 and accompanying text (arguing for the mandatory inclusion of subjective factors in multiple regression analysis).

8. 29 U.S.C. § 206 (1982). *See* Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987); Brock v. Georgia Southwestern College, 765 F.2d 910 (9th Cir. 1983) (Equal Pay Act cases addressing university salary discrimination).

9. 42 U.S.C. § 2000e (1982). Congress' intent to include educational institutions under Title VII's coverage is evidenced by the following House Report:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. Discrimination against women in the field of education is as pervasive as discrimination in any other area of employment.

H. REP. NO. 92-238, 92nd Cong., 2d Sess. 19, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2155.

10. *See infra* text accompanying notes 17-24 (discussing disparate treatment theory).

11. *See infra* text accompanying notes 25-32 (discussing disparate impact theory).

12. Claims based on the Equal Pay Act are problematic because plaintiffs must

academic salary discrimination is an ill-defined area of the law.[13] While courts accept the disparate treatment theory in academic salary discrimination claims, no court has determined whether disparate impact is an acceptable method for contesting sex-based, subjective salary decisions.[14] Given universities' concern with salary inequities,[15] challenges to an academic salary decision based on subjective criteria may reach a federal court in the near future.

This Note examines the problem of salary disparities between male and female faculty members in American colleges and universities. Part II provides a brief explanation of multiple regression analysis, disparate treatment, and disparate impact. Part III examines the development of the pattern and practice and disparate treatment theories in academic salary discrimination cases. Part IV explores the use of disparate impact in nonacademic, subjective-criteria cases and its limited use in academic cases. Part V recommends that courts include subjective criteria in multiple regression analysis, and that courts allow plaintiffs to use the disparate impact theory to contest academic salary decisions based in part on subjective criteria.

II. THE USE OF DISPARATE TREATMENT AND DISPARATE IMPACT TO ESTABLISH A PRIMA FACIE CASE

A plaintiff may establish a prima facie case of discrimination under Title VII by showing disparate treatment or disparate impact.[16] The Supreme Court established the disparate treatment theory in *McDonnell Douglas v. Green*,[17] which involved an employer's discharge of a

---

prove the male and female jobs compared are in fact substantially equivalent. Comparing jobs in a college or university setting can be particularly troublesome because teaching jobs vary widely among departments and disciplines. *See infra* notes 66-72 and accompanying text; *see* Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (comparing nursing faculty with professors from other schools within the University).

13. *See infra* notes 174-84 and accompanying text (arguing for use of disparate impact to combat partially subjective academic salary decisions).

14. *See infra* notes 117-39 and accompanying text (discussing Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988), which dealt with subjective factors in a racial discrimination context).

15. *See supra* note 2 and accompanying text (current academic concern over salary inequities).

16. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 n.5 (1981); Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (contrasting disparate treatment and disparate impact).

17. 411 U.S. 792 (1973).

black employee who had participated in illegal civil rights protests against the employer.[18] The Court held that an employee establishes a prima facie case of race discrimination by proving that: "(i) he belongs to a racial minority; (ii) he applied and was qualified for a job which the employer was seeking applicants; (iii) despite his qualifications, he was rejected; (iv) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[19] Once the plaintiff establishes this four-part test, the employer must produce evidence showing a "legitimate, nondiscriminatory reason for the employee's rejection."[20]

While useful as a theory to individual plaintiffs, the *McDonnell Douglas* test becomes burdensome in class actions involving many claimants. Thus, plaintiffs employ the pattern and practice theory to establish a prima facie case of discrimination in class actions.[21] In a pattern and practice suit, the plaintiffs must prove by a preponderance of the evidence that discrimination is the defendant's regular operating procedure.[22] In proving such facts, plaintiffs need not establish that each member of the class was a victim of the employer's practice.[23] Rather, plaintiffs may use statistics to imply broad-based, widespread discrimination, much like cases using disparate impact.[24]

In *Griggs v. Duke Power Co.*,[25] the Supreme Court established guidelines for the construction of a prima facie case under the disparate impact theory.[26] The Court later refined these guidelines in *Albemarle Paper Co. v. Moody*.[27] Under disparate impact theory, the court must determine, based mainly on the statistics offered by the plaintiff and

18. *Id.* at 794.

19. *Id.* at 802.

20. *Id.*

21. For a discussion of the pattern and practice theory in class actions, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1322-24 (2d ed. 1983).

22. Teamsters v. United States, 431 U.S. 324, 336 (1977).

23. *Id.* at 360. The Court stated that the Government must prove the existence of the employer's discriminatory policy. *Id.*

24. *See infra* notes 33-41 and accompanying text (addressing the use of statistics to prove discrimination).

25. 401 U.S. 424 (1971).

26. Before the enactment of Title VII, lower federal courts used a disparate impact-like analysis to find evidence of discrimination. *See* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1971) (barring transfer of city truck drivers to over-the-road jobs).

27. 422 U.S. 405 (1975).

defendant,[28] whether a facially neutral employment device or practice adversely impacts upon a protected group.[29] In disparate impact cases, a plaintiff need not prove employer intent.[30] Instead, disparate impact analysis examines the consequences of the employment practice, not its motivation.[31] An employment practice that produces an adverse impact is deemed illegal if it is not related to job performance.[32] The disparate impact theory is difficult to apply in a university setting because courts must decide whether subjective criteria are "facially neutral."

III. THE APPLICATION OF DISPARATE TREATMENT ANALYSIS TO ACADEMIC SALARY DISCRIMINATION

A. *The Use of Multiple Regression Analysis to Prove Discrimination*

Multiple regression analysis seeks to organize and explain seemingly random data in order to prove classwide salary discrimination.[33] In multiple regression analysis, variables such as years of experience, degree, discipline, and faculty rank are held constant to determine whether disparities exist in the treatment of male and female faculty members.[34] Statistics concerning the atmosphere of discrimination, while not completely probative, often serve to prove an employer's discrimination against the plaintiff.[35]

Recently, the Supreme Court considered whether a multiple regression analysis must include all determinative variables before admission

---

28. Parties may also use anecdotal evidence to bolster their claims of discrimination. *See Teamsters*, 431 U.S. at 338.

29. *Id.* at 335 n.15.

30. *Id.*

31. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The Court stated that good intent alone will not save a discriminatory employment practice. *Id.*

32. *Id.* at 431.

33. Bazemore v. Friday, 478 U.S. 385, 403 n.14 (1986) (per curiam) (Brennan, J., concurring in part). For an explanation of the mathematical processes used in a multiple regression analysis, see generally Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

34. The Chronicle of Higher Education, *supra* note 2, at 14, col. 3.

35. Lamphere v. Brown Univ., 685 F.2d 743, 749-50 (1st Cir. 1982). In *Lamphere*, the plaintiffs' argument failed because it omitted statistics on the number of qualified women in the labor pool and impermissibly compared interdepartmental salaries. *Id.* at 750.

into evidence. In *Bazemore v. Friday*,[36] the Court held that a regression analysis need not include all measurable variables in order to establish a case of discrimination.[37] In overruling the Fourth Circuit,[38] the Supreme Court maintained that absence of measurable factors may only affect the probativeness of the study, not its admissibility.[39] The Court also stated that defendants in such cases must attempt to show that, when all factors are properly considered, no significant disparity exists between the two groups in question.[40] Though *Bazemore* was a race discrimination case, its broad holding should apply to claims alleging sex discrimination in academic salary determinations that use subjective criteria.[41]

B. *Challenges to Academic Salary Discrimination Using Disparate Treatment*

Mecklenburg v. Montana State University[42] marked the first successful class action brought by female faculty members. In *Mecklenburg*, a class of more than 105 female faculty members[43] complained that MSU had discriminated on the basis of sex in salary,[44] promotion, and

36. 478 U.S. 385 (1986) (per curiam). In *Bazemore*, black employees of the North Carolina Agricultural Extension Service sued the Service, claiming a pattern and practice of race discrimination based on salary disparities between white and black employees. Designed to disseminate information concerning agricultural and home economics, the Service had a long history of racial segregation. *Id.* at 391 (Brennan, J., concurring in part). The United States Court of Appeals for the Fourth Circuit held that plaintiffs' multiple regression analysis, which used factors such as race, education, tenure, and job title, would not support a finding of salary discrimination. *Id.* at 394.

37. *Id.* at 387.

38. 751 F.2d 662 (4th Cir. 1984).

39. 478 U.S. at 400 (Brennan, J., concurring). The Fourth Circuit objected to the exclusion of a variable which would account for differences in salary increases among counties. *Id.*

40. *Id.* at 403 n.14.

41. Plaintiffs in sex-based, academic salary discrimination cases might use *Bazemore* to argue that a court must consider subjective criteria. While a court may find a study excluding subjective factors admissible, it might question the probative value of the study, especially in the academic setting, where subjective factors are weighed heavily. *See infra* notes 167-73 and accompanying text (arguing for mandatory inclusion of subjective criteria in multiple regression analysis).

42. 13 Empl. Prac. Dec. (CCH) ¶ 11,438 (D. Mont. 1976).

43. *Mecklenburg*, 13 Empl. Prac. Dec. at 6493. The class included both current and former MSU employees as well as some applicants. *Id.*

44. Plaintiffs charged the University with "unequal pay for equal education and equal work. . . ." *Id.* at 6494.

tenure.[45] MSU determined salary in a predominantly secretive manner that gave faculty members little opportunity to appeal successfully a decision.[46] Attempting to prove a pattern and practice of salary discrimination, plaintiffs hired a statistical expert to conduct a multiple regression analysis.[47] Using factors such as department, years of experience, and type of degree held, the expert concluded that it would take $222,776 to equalize faculty salaries for 1974-75.[48] Importantly, the expert omitted factors such as professorial rank, tenure, and number of promotions,[49] which he considered sex-dependent, or incapable of indicating the existence of sexually discriminatory policies in the University's program.[50]

Finally, both plaintiffs' and defendant's statistical experts excluded subjective variables such as teaching ability, research contributions, and community contributions.[51] The defendants argued that the court should not question such factors, given their uniqueness to the academic setting.[52] Accepting the validity of this assertion,[53] the court did not require the inclusion of rank or subjective factors in the multiple regression analysis.[54]

One year later, the United States District Court for the Eastern Dis-

45. *Id.* at 6495.

46. At this time the department head had almost complete control over salary decisions. Each faculty member received a letter with a predetermined salary amount but no stated justification for the given sum. The only opportunity for a pre-or post-salary hearing was if the faculty member made an appointment with the department head or approving dean. Few faculty members took advantage of the opportunity to appeal. G. LANOUE & B. LEE, ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION 148 (1987).

47. *See supra* notes 33-41 and accompanying text (explaining multiple regression analysis).

48. *Mecklenburg*, 13 Empl. Prac. Dec. at 6496.

49. *Id.*

50. *Id.* Plaintiffs' statistical expert, Dr. Steven Gilchrest, characterized rank as an unsatisfactory indicator of discrimination because intra-rank salary comparisons would not reveal any sexually discriminatory program policies. *Id.* The court found that the University's statistical study did not refute Gilchrest's findings. *Id.*

51. *Id.* Although the court gave no reason for this omission, both experts probably avoided these variables due to their lack of measurability.

52. G. LANOUE & B. LEE, *supra* note 46, at 164.

53. *See In re* Dinnan, 661 F.2d 426 (5th Cir.), *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982) (expressly rejecting the academic peer review privilege in tenure decisions).

54. *Mecklenburg*, 13 Empl. Prac. Dec. at 6496. One must imply this from the court's refusal to dismiss either regression analysis for lack of proper factors.

trict of Pennsylvania indirectly questioned parts of the *Mecklenburg* opinion in *Presseisen v. Swarthmore College*.[55] Like *Mecklenburg*, *Presseisen* involved a faculty class action charging sex discrimination in hiring, promotion, tenure decisions, and compensation.[56] The *Presseisen* court, however, diverged from the *Mecklenburg* court in its determination of the proper factors to employ in a regression analysis.[57] Although the defendant's analysis included variables such as sex, age, number of years since highest degree attained, years at Swarthmore, degree, and division,[58] the College failed to incorporate rank[59] or subjective factors.[60] Unlike *Mecklenburg*, the *Presseisen* court found the exclusion of rank unjustifiable and, after holding rank constant, ruled that the plaintiffs' prima facie case had failed.[61] Also in contrast to *Mecklenburg*,[62] the court found subjective variables[63] significant enough to warrant their inclusion[64] in the regression analysis and en-

55. 422 F. Supp. 593 (E.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978).

56. The court defined the class as:

all present female employees at Swarthmore College, all future female faculty employees at Swarthmore College, all former female faculty employees who left the employ of Swarthmore College on or subsequent to March 24, 1972, and those applicants for faculty positions who applied to Swarthmore College and were rejected on or subsequent to March 24, 1972, who have been, are at present being or in the future may be:

(1) denied hire, promotion and/or tenure at Swarthmore College or were not recruited by Swarthmore College on account of their sex; and/or

(2) denied equal compensation for performance of substantially similar work as is performed by male faculty members at Swarthmore College, on account of their sex.

442 F. Supp. at 597.

57. *See supra* text accompanying note 48 for a list of *Mecklenburg* factors.

58. 442 F. Supp. at 615.

59. *Id.* at 614-15. Dr. deCani, the defendant's statistician, suggested excluding rank because it failed to demonstrate that women generally took longer to reach a given professorial status. *Id.* at 614.

60. *Id.* at 616.

61. *Id.* at 614. The court further stated that the plaintiffs' prima facie case would have failed even if the defendants had properly excluded rank. *Id.*

62. *See supra* note 54 and accompanying text (*Mecklenburg* court did not require subjective factors in regression analysis).

63. These factors included "scholarship, teaching ability, publications, quality of degree, career interruptions, career opportunity, quality of publications, administrative responsibility and committee work." *Presseisen*, 442 F. Supp. at 616.

64. *Id.* All parties conceded that many of these subjective factors defied accurate measurability. *Id.*

couraged their utilization.[65]

In *Wilkins v. University of Houston*,[66] the plaintiffs used a four-factor multiple regression analysis[67] to show disparities in male and female faculty salaries.[68] The Fifth Circuit, however, found the plaintiffs' regression analysis fatally flawed because it excluded the professor's academic department.[69] The court reasoned that, all other factors being equal, market demand may dictate that universities pay professors in some colleges more than those in others.[70] Additionally, the court held that plaintiffs' failure to consider the professor's college simultaneously with other factors negated any possible inference that sex was the main reason for faculty salary disparities.[71] Thus, the *Wilkins* court added market demand as another acceptable factor in multiple regression analysis.[72]

In *Melani v. Board of Higher Education of New York*,[73] female instructors[74] brought a Title VII suit alleging a pattern and practice of discrimination in hiring, promotion, salary, and fringe benefits.[75] Us-

65. *Id.*

66. 654 F.2d 388 (5th Cir. Unit A), *vacated and remanded on other grounds*, 459 U.S. 809 (1982), *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983).

67. These factors included rank, college, length of service, and age. *Wilkins*, 654 F.2d at 402. The University performed two multiple regression analyses, the first of which included the following eight factors: (1) the mean salary of the department; (2) experience as an instructor at any university, including the University of Houston; (3) experience as a faculty member other than at the University of Houston; (4) experience as a full professor at the University of Houston; (5) experience as an associate professor at the University of Houston; (6) experience as an assistant professor at the University of Houston; (7) possession of a doctoral degree other than a Ph.D.; (8) possession of a Ph.D. degree. *Id.* at 403. The second analysis added 'sex' as a ninth variable. *Id.*

68. The plaintiffs' regression analysis showed a $1,388 per year disparity between male and female faculty salaries. *Id.* at 403. The defendants claimed that no pay disparity existed, even after the second regression analysis revealed a $694 gap. *Id.*

69. *Id.* at 402.

70. *Id.*

71. *Id.*

72. More recent decisions have cited *Wilkins* for the proposition that litigants must include all significant factors influencing the dependent variable in order to make a regression analysis viable. *See* E.E.O.C. v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1287 (N.D. Ill. 1986).

73. 561 F. Supp. 769 (S.D.N.Y. 1983).

74. "Instructional staff" included positions such as professor, associate professor, lecturer, and instructor, as well as administrative and service positions such as registrar, college laboratory technician, and higher education officer. *Id.* at 772.

75. *Id.* at 773. Plaintiffs alleged that generally the Board paid higher wages to males than to similarly qualified females. *Id.*

ing two different regression studies,[76] plaintiffs claimed their evidence proved male/female salary differentials of nearly $3,530 for all faculty members[77] and $1,600 for those hired after 1972.[78] In evaluating the regression analyses, the United States District Court for the Southern District of New York first excluded job title as a necessary factor if employees held similar jobs.[79] Second, the court stated that the Board had failed to rebut plaintiffs' statistics because it had shown only intra- rather than inter-rank salary disparities.[80] By failing to compare between rank, the court believed the defendants had hidden their assignment of women to undeservedly lower ranks, which would provide another example of salary discrimination.[81] Third, the court allowed the plaintiffs' regression analyses to stand even though plaintiffs had failed to include the market demand variable, which may have helped explain the salary differential.[82] Most importantly, the *Melani* court did not require the incorporation of subjective factors in the plaintiffs' multiple regression analysis.[83] Recognizing that a woman might have more demanding teaching responsibilities which could adversely affect the quality of her teaching and publications, the court declined to require the inclusion of subjective factors.[84]

Finally, in *Craik v. Minnesota State University Board*,[85] the Eighth Circuit found St. Cloud State University guilty of unlawful discrimina-

76. Study I, covering all fulltime, active instructional staff members, used the following 'productivity factors': highest degree, age, years of CUNY service, and years since highest degree. *Id.* at 773. Study II, including all employees hired after September 1972, used age, years of CUNY service, academic degrees, quality of degree, certificates and credentials, time since last degree, and time between completion of successive degrees. *Id.* at 774.

77. *Id.* at 773.

78. *Melani*, 561 F. Supp. at 774.

79. *Id.* at 777. The court cited Valentino v. United States Postal Serv., 674 F.2d 56, 70-71 (D.C. Cir. 1982), for this proposition. *Id.*

80. *Melani*, 561 F. Supp. at 783.

81. *Id.*

82. *Id.* at 779. *But see* Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1109-10 (1984) (challenging the wisdom of this decision due to the nonfungibility of faculty in different disciplines).

83. *Melani*, 561 F. Supp. at 778. These factors, according to the Board, included "publications, total years of teaching experience, quality of teaching, committee work and community service." *Id.*

84. *Id.* *See* Freed & Polsby, *supra* note 82, at 1107 (arguing that the court did not presume these productivity variables tainted).

85. 731 F.2d 465 (8th Cir. 1984).

tion in both rank and salary.[86] After holding constant such factors as experience, degree, division, and rank, the court concluded that proof of intentional salary discrimination existed.[87] Additionally, the *Craik* court excluded 'division' as a variable because it had no bearing in the University's salary determinations.[88] The court did allow market demand factor[89] and performance factor[90] increases, which it concluded did not adversely affect women.[91] Thus, the *Craik* court included subjective factors through its allowance of market and performance factors.

Courts generally agree that rank,[92] degree, years spent in the university, and time since last degree are acceptable regression analysis variables.[93] 'Division' and 'college' are also included if they are regularly used in university salary determinations.[94] Courts have yet to determine, however, whether subjective factors are mandatory in an academic multiple regression analysis.[95] While *Presseisen*, *Wilkins*, and *Craik* urge the inclusion of subjective criteria,[96] *Mecklenberg* and *Melani* allowed plaintiffs to proceed without using subjective variables.[97]

86. *Id.* at 478-79.

87. *Id.* at 479.

88. *Id.* The court concluded that the Board simply invented this variable in an attempt to explain away interdepartmental salary disparities. *Id.*

89. *Id.* at 480. The Board granted these awards in areas in which a numerical deficiency of professors existed, namely in business administration, computer science, economics, engineering technology, and mathematics. *Id.*

90. *Id.* "Performance increases" were merit based, but the opinion fails to mention the method of determining these awards. *Id.*

91. *Id.* Of the eighteen market factor recipients, only one, or six percent of that group, was a woman. *Id.* Only a three percent disparity existed between female and male employees receiving performance factor increases. *Id.*

92. *See infra* note 155 and accompanying text (court in Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983), required the inclusion of rank as a factor in statistical studies attempting to prove academic, sex-based salary discrimination).

93. *See supra* notes 48, 58, 67, 76, 87 and accompanying text (regression analysis factors considered in five previously discussed cases).

94. *See supra* text accompanying notes 71, 88 (*Wilkins* and *Craik* courts' opinion regarding the inclusion of 'division' as a factor in regression analysis).

95. *See supra* note 6 (defining "subjective criteria").

96. *See supra* notes 62-65, 69-72, 89-91 and accompanying text.

97. *See supra* notes 54, 84 and accompanying text.

IV. DISPARATE IMPACT THEORY

A. *Subjective Employment Practices*

Plaintiffs initially used the disparate impact theory to attack employment practices based on objective criteria such as general intelligence tests[98] or height and weight requirements.[99] More recently, however, plaintiffs have adopted this theory to challenge employer decisions based on subjective practices[100] such as an interviewer's assessment of the candidate's size or strength,[101] or an interviewer's own ranking of a list of desired employment qualities.[102] Regardless of whether the employer uses the subjective method, courts since *Griggs*[103] have scrutinized practices which might operate as "built-in-headwinds" against a protected group.[104] In the last decade federal circuit courts have split on whether plaintiffs may use the disparate impact theory to challenge employment practices based on subjective criteria. While the Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have allowed such actions,[105] the Fourth Circuit has denied any such efforts.[106] The Fifth, Eighth and Tenth Circuits currently show internal dissension.[107]

---

98. Griggs v. Duke Power Co., 433 U.S. 424 (1971); Teamsters v. United States, 431 U.S. 324 (1977).

99. Dothard v. Rawlinson, 433 U.S. 324 (1977).

100. *See* Comment, *Disparate Impact and Subjective Employment Criteria Under Title VII*, 54 U. CHI. L. REV. 957, 962 (1987) (most subjectivity arises from supervisor or interviewer preferences).

101. *See* E.E.O.C. v. Spokane Concrete Prods., 534 F. Supp. 518, 523 (E.D. Wash. 1982) (company agent hired male applicant because he 'appeared to be' strong).

102. *See* Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1147 (9th Cir. 1982) (promotion system allowed project supervisors to determine hiring criteria on an ad hoc basis).

103. 433 U.S. 424 (1971). *See supra* notes 25-32 and accompanying text (discussing *Griggs* and the development of disparate impact theory).

104. *Id.* at 432.

105. The following cases allowed the use of disparate impact to challenge subjective-based employment practices: Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88, 92 (6th Cir. 1982); Regner v. City of Chicago, 789 F.2d 534, 537 (7th Cir. 1986); Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976); Antonio v. Ward's Cove Packing Co., 810 F.2d 1477, 1478, 1480, 1489 n.2 (9th Cir. 1987) (listing cases); Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985); Maddox v. Claytor, 764 F.2d 1539, 1548 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1266 (D.C. Cir. 1984).

106. E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 639 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984).

107. *Compare* Page v. United States Indus., Inc., 726 F.2d 1038, 1045-46 (5th Cir. 1984); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 221 (5th Cir. 1974);

The Eighth Circuit's decisions in *E.E.O.C. v. Rath Packing Co.*[108] and *Talley v. United States Postal Service*[109] exemplify that court's internal dissension. In *Rath*, female plaintiffs challenged a plant manager's employment selection system that lacked specified guidelines and stressed little, if any, objective selection criteria.[110] Faced with an enormous statistical disparity between the number of male and female plant employees,[111] the court held that the defendant's subjective system had an illegal disparate impact on women and was not justified by business necessity.[112] Four years earlier, however, the *Talley*[113] court barred an employee's use of disparate impact where the employer discharged her based on subjective reasons.[114] Because the plaintiff had cited a subjective decision rather than a facially neutral employment practice, the court held that her disparate impact claim must fail.[115] Thus, neither the Eighth Circuit nor the federal circuit courts as a whole[116] have conclusively determined whether a plaintiff may use the disparate impact theory to contest subjective employment practices.

The United States Supreme Court recently clarified this area in *Wat-*

Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972) (permitting suit) *with* Vuyanich v. Republican Nat'l Bank of Dallas, 723 F.2d 1195, 1202 (5th Cir. 1984); Cunningham v. Housing Auth. of City of Opelousas, 764 F.2d 1097 (5th Cir. 1985) (barring suit).

Compare E.E.O.C. v. Rath Packing Co., 787 F.2d 318, 328 (8th Cir. 1986) (permitting suit) *with* Talley v. United States Postal Serv., 720 F.2d 505, 507 (8th Cir. 1983) (barring suit).

Compare Lasso v. Woodmen of World Life Ins. Co., 741 F.2d 1241, 1244 (10th Cir. 1984); Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975) (permitting suit) *with* Mortenson v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982) (barring suit).

The Second Circuit has not addressed the question directly on point.

108. 787 F.2d 318, 328 (8th Cir. 1986) (permitting suit).

109. 720 F.2d 505, 507 (8th Cir. 1983) (disallowing suit).

110. *Rath*, 787 F.2d at 322.

111. *Id.* at 328. Males comprised 95% of all plant employees. *Id.*

112. *Id.* Under disparate impact analysis, an employer may justify his employment practice by claiming that it is essential to his business. *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 21, at 358-60 (discussing the bona fide occupational qualification and business necessity defenses).

113. 720 F.2d 505 (8th Cir. 1983).

114. *Talley*, 720 F.2d at 506. Normal Talley's postal supervisor discharged her after she had twice lost the keys to her mail carrier vehicle. The supervisor believed that such actions constituted "a serious threat to the security of the mail that necessitated her discharge." *Id.*

115. *Id.* at 507.

116. *See supra* notes 105-07 and accompanying text (circuit court decisions addressing use of disparate impact to contest subjective decisions).

son v. Fort Worth Bank & Trust.[117] In *Watson*, a black female bank employee, denied promotions on four separate occasions, brought a class action on behalf of past, present, and future black bank employees.[118] The class action charged the Bank with race discrimination in hiring, promotion, salary, initial placement, and termination in violation of Title VII and section 1981.[119] Both Watson and the class claimed the bank's largely subjective decision-making system,[120] dominated by one person's decisions and opinions, created an adverse impact on blacks.[121]

Finding Watson an inadequate representative of the class,[122] the United States District Court for the Northern District of Texas decertified the class[123] and, utilizing disparate treatment analysis, held that Watson herself had not suffered from racial discrimination.[124] The

117. 108 S. Ct. 2777 (1988). For a brief discussion of *Watson* see *Title VII - Disparate Impact Challenges to Subjective Employment Decisions*, 102 HARV. L. REV. 308 (1988).

118. The district court certified a class consisting of "blacks who applied to or were employed by [respondent] on or after October 21, 1979 or later submit employment applications to [respondent] in the future." 108 S. Ct. at 2782.

119. *Id.*

120. *Id.* Under the bank's system, which had few definite guidelines, supervisors made virtually all decisions in their respective department. *Id.*

121. Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 804 (5th Cir. 1986) (Goldberg, J., dissenting). The adverse impact is illustrated by the following statistics:

Offers of Employment by Race

	Whites	Blacks
Offer	16.7% (89)	4.2% (6)
No Offer	83.3% (444)	95.8% (60)

Offers to Teller Applicants by Race

Offer	20.1% (32)	5.3% (6)
No Offer	79.9% (127)	94.7% (54)

Offers to Clerical Applicants by Race

Offer	15.2% (30)	4.8% (3)
No Offer	84.8% (168)	95.2% (60)

Id.

122. *Watson*, 108 S. Ct. at 2783. The district court deemed Watson's claims atypical of the general class claims. *Id.*

123. The district court later decertified the class for lack of common factual or legal questions between applicants and employees. The court then decertified the employee subclass for insufficient number, but addressed the merits the applicants' claims. *Id.* at 2782-83.

124. *Id.* at 2783. The court, utilizing disparate treatment analysis, held that while Watson had established a prima facie case of employment discrimination, the defendant

Fifth Circuit affirmed in part,[125] holding that courts should employ disparate treatment, not disparate impact, to evaluate subjective promotion systems.[126]The United States Supreme Court reversed. Justice O'Connor, writing for the majority,[127] noted that subjective employment practices and objective or standard examinations may have the same discriminatory effects.[128] Thus, because both subjective and objective systems result in impermissible discrimination, the Court reasoned that an examination of employer intent was inappropriate.[129] Consequently, the Court held that disparate impact is also an appropriate method to challenge subjective employment practices.[130]

Next, the Court focused on the necessary evidentiary standards in disparate impact cases.[131] Acknowledging the bank's concern that many subjective criteria are nonmeasurable,[132] the Court expressly stated that it did not intend its holding to compel employers to adopt preferential treatment or quotas to avoid litigation.[133] The Court enumerated several constraints inherent in subjective employment practice cases that would prevent this result. First, the plaintiff must "isolate and identify" the specific employment practice causing the alleged disparity.[134] Next, the plaintiff must prove, through statistical evidence,

---

had successfully rebutted her challenges. Finding no pretext for racial discrimination, the court dismissed the action. *Id.*

125. *Id.* The Fifth Circuit found no district court abuse of discretion in its class decertification. Seeking to avoid unfair prejudice to the class of black job applicants, the court vacated that segment of the district court ruling and remanded for dismissal without prejudice. The Fifth Circuit affirmed the district court's decision regarding Watson's failure to prove discrimination. *Id.*

126. *Id.* The majority utilized the disparate treatment theory primarily because after class decertification no large group existed upon which such subjective decisions could impact. *Watson*, 798 F.2d at 797.

127. 108 S. Ct. at 2782. Chief Justice Rehnquist and Justices Brennan, White, Marshall, and Blackmun all joined in endorsing application of disparate impact analysis to subjective employment systems. *Id.* Justice Kennedy took no part in the decision.

128. *Id.* at 2786.

129. *Id.* at 2787.

130. *Id.* at 2791.

131. *Id.* at 2787-91. The Court expressed the greatest concern over this segment of the case. *Id.* at 2787.

132. The Court stated, "Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and taste—cannot be measured accurately through standardized testing techniques." *Id.* at 2787.

133. *Id.* at 2788. Such a result, the Court concluded, would violate Congress' intent in enacting Title VII. *Id.* at 2787-88.

134. *Id.* at 2788. The Court conceded that it is more difficult to identify specific

that the subjective practice caused the exclusion of applicants because of their membership in a protected group.[135] Third, the Court noted that under disparate impact analysis, the ultimate burden of proof remains with the plaintiff.[136] Thus, when the employer proves a legitimate business reason for the challenged practice, the plaintiff must show that other selection methods would equally serve the employer's legitimate interests.[137] Finally, the Court noted the deferential judicial attitude toward employer selection procedures.[138] Thus, the Court believed that these high standards of proof would prevent employers' drastic modification of their normal, legitimate practices.[139]

B. *Sex-Based Academic Salary Discrimination*

Faculty members initially used disparate impact analysis to challenge denials of tenure.[140] In 1981, however, the Ninth Circuit became the first federal court to hear a case invoking disparate impact to contest an academic salary system. In *Heagney v. Washington*,[141] the plaintiff claimed the University's exemption of a class of faculty members from normal school personnel laws adversely affected the salaries of nonexempt female personnel.[142] Such a classification, the plaintiff claimed, granted the administration too much discretion and enabled it

---

discriminatory practices when employers use subjective criteria rather than standardized tests. *Id.*

135. *Id.* at 2788-89. Plaintiffs must at least raise an inference of causation. *Id.* at 2789. The Court also warned future defendants and courts not to assume the reliability of plaintiff's statistical evidence. *Id.*

136. *Id.* at 2790. *See supra* notes 25-32 and accompanying text (disparate impact analysis).

137. *Id.* at 2790 (quoting *Albemarle Paper Co.*, 422 U.S. 405, 425 (1975)).

138. 108 S. Ct. at 2790-91. The Court used prior cases such as Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978), and Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984), to show courts' traditionally deferential attitudes toward the legitimacy and relatedness of employer selection procedures. 108 S. Ct. at 2791.

139. *Id.*

140. *See* Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984) (both courts rejected the application of disparate impact to the denial of tenure).

141. 642 F.2d 1157 (9th Cir. 1981).

142. *Id.* at 1159. The University categorized nonacademic personnel as either 'classified' or 'exempt.' State salary schedules set the salaries of classified employees. The University had much more discretion to exempt salary awards. Heagney's claim alleged that as a group, female exempt employees received lower salaries than men in the same category. *Id.*

to compensate employees with few or no guidelines.[143] The court held that the invention of such an employee class did not constitute a "well-defined objective employment practice."[144] Because of this lack of objectivity, the court found the use of disparate impact inappropriate.[145]

In *Sobel v. Yeshiva University*[146] a class of female physicians, invoking disparate treatment and disparate impact, claimed their university employer had discriminated against them in salary and pension. Yeshiva varied faculty salaries according to the faculty member's placement in a clinical, research, or teaching capacity.[147] Two problems existed in the plaintiffs' case from its inception: the lack of interchangeability in faculty positions[148] and the tendency of women professors to specialize in lower paying nonclinical fields.[149] Yeshiva's system of 'guideline increases,' which gave faculty members either a percentage salary increase, a fixed increase, or a combination of the two, also complicated the plaintiffs' attempts to prove salary inequities.[150] Finally, the system allowed the department head to recommend nonguideline increases above or below the established rate.[151] The Dean treated the latter increases with considerably more scrutiny.[152]

Disputes arose concerning the inclusion of two variables in the re-

143. *Id.*

144. *Id.* at 1163. The court also stated that the use of objective criteria in salary decisions was not per se unlawful. *Id.*

145. *Id.* The court believed that Heagney had alleged a pattern and practice of discrimination, thus making disparate treatment a more appropriate theory. *Id.*

146. 566 F. Supp. 1166, 1168 (S.D.N.Y. 1983).

147. *Id.* at 1170. Faculty salaries varied with the amount of money the position brought to the University. Generally, doctors engaged in clinical activities received the highest compensation, followed by those in research. Doctors engaged in classroom work received the lowest income. *Id.*

148. *Id.* at 1171.

149. *Id.* The court found no evidence indicating that any of the female faculty had faced any coercion in making their respective choices. *Id.* at 1171 n.16.

150. *Id.* at 1172. These guideline increases, computed annually, were based on cost-of-living increases and the current financial stability of the University. *Id.* The University did allow mid-year increases under special circumstances, such as where a faculty member became burdened with a great increase in duties and responsibilities. *Id.* at 1172 n.20.

151. *Id.* at 1172. The University allowed above-guideline increases where a faculty member showed marked achievement or an increase in production. Below-guideline increases often resulted from either financial difficulties in a given department or a faculty member's relinquishment of previously held duties. *Id.*

152. *Id.*

gression analysis — rank and post-hire productivity.[153] Relying on *Presseisen v. Swarthmore College*,[154] the court held that the exclusion of rank as a variable made the statistical study incomplete.[155] The court further held that a regression analysis must include post-hire productivity factors since most universities consider productivity in salary determinations.[156]

In addition to ruling in favor of the University on the pattern and practice claim,[157] the court rejected the plaintiffs' disparate impact claim on two separate grounds.[158] First, the court found the plaintiffs' mid-trial change from disparate treatment to disparate impact procedurally unfair.[159] More importantly, plaintiff's disparate impact claim failed on the merits because the evidence indicated that Yeshiva's guideline increase system, neutral in principal and operation, had adequately remedied any past salary disparities.[160]

In *Spaulding v. University of Washington*,[161] former and current female faculty members of the School of Nursing brought an action claiming that the disparity between their salaries and those in other schools within the University constituted sex discrimination in viola-

---

153. In the instant case, post-hire productivity factors included:
quality of research, quality of teaching, quality and quantity of clinical work, number and significance of publication, reputation, generation of private practice, development of an important clinical process, procurement or administration of a major grant, any offer of employment from a competing college, mobility, significance of any contributions to science, and, more generally, the manner in which a faculty member spent his or her time.
Id. at 1179.

154. 422 F. Supp. 593, 614 (E.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1987). *See supra* notes 55-65 and accompanying text for a full discussion of *Presseisen*.

155. *Sobel*, 566 F. Supp. at 1180.

156. *Id.* The court believed that the importance of these factors in determining a faculty member's level of compensation warranted their inclusion in the multiple regression analysis, regardless of the problems in measuring such factors. *Id.*

157. *Id.* at 1186. The court denied the pattern and practice claim because the plaintiffs failed to provide a complete statistical model, neglected to consider the effect of pre-Title VII discrimination, and failed to show individual instances of discrimination. *Id.* at 1182-86.

158. *Id.* at 1186.

159. *Id.* at 1186-87. The court found the sudden switch to disparate impact impermissible after seven years of preparation solely directed toward the disparate treatment theory. *Id.*

160. *Id.* at 1188. *See supra* notes 150, 151 and accompanying text (explaining the mechanics of the guideline system).

161. 740 F.2d at 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

tion of Title VII, the Equal Pay Act, and section 1983.[162] To justify the disparity, the defendant University claimed that it based salaries on the training, expertise, emphasis, subject matter, and market demand for each discipline.[163] Thus, interschool comparisons were inappropriate.[164] This argument persuaded the Ninth Circuit, which ruled that plaintiffs' Equal Pay Act claim failed for lack of job equivalence.[165] Similarly, the court held that the plaintiffs' disparate impact claim failed because the University's consideration of market demand did not constitute a facially neutral policy under the meaning of disparate impact.[166]

C. *Proposals*

1. Subjective Factors

Courts are split as to whether regression analysis should include subjective factors. Courts recognize the importance of these factors in academic decisions, but are hesitant to include variables that lack objectivity or measurability.[167] While the lack of measurability is problematic,[168] it does not warrant the exclusion of variables so crucial to academic salary decisions.[169] For example, in *Watson v. Fort Worth Bank & Trust* the Supreme Court recognized that subjective evaluations are essential to many employment decisions[170] and should receive

162. 740 F.2d at 691.

163. *Id.* at 692.

164. *Id.* at 697. The University contended that courts should never compare jobs from varying disciplines due to their substantial inequality. The court disagreed with this broad contention. *Id.*

165. *Id.* at 699. The court also dismissed the plaintiffs' § 1983 claim for lack of jurisdiction, since the state decided not to waive sovereign immunity. *Id.* at 694.

166. *Id.* at 708.

167. *See supra* note 64 (parties in *Presseisen* conceded such factors' lack of measurability). *But see supra* notes 131-39 and accompanying text (while noting lack of measurability, Supreme Court in *Watson* still deemed such inclusion workable).

168. The author refrains from proposing any exact statistical method by which a plaintiff or defendant might measure such factors. It seems clear, however, that once such a system is devised, statistical experts may easily identify the effect of subjective factors by holding constant all other variables. *See generally* Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

169. *See supra* note 156 and accompanying text (*Sobel* court discussion of the importance of subjective factors).

170. *See supra* notes 117-39 and accompanying text (discussing *Watson*); *see also*

greater judicial tolerance as the job's complexity increases.[171] The complexity of academic positions warrants a higher tolerance of subjective criteria.[172] But this judicial tolerance should not result in sanctioning the discriminatory use of subjective factors. Past courts have required inclusion of all consequential factors in academic regression analysis. Given the importance of subjective criteria in academic salary decisions, there is no reason why subjective variables should not follow the history of 'rank' in becoming a mandatory part of any academic regression analysis.[173]

2. Disparate Impact Theory

To date, no plaintiff has successfully used disparate impact to challenge an academic salary decision or system. In fact, female plaintiffs generally have fared poorly in suits against their college or university employers.[174] Much of this failure is due to the lack of direct evidence of discrimination, which is often difficult to prove in academic settings.[175] In light of such burdens on the plaintiff, courts must decide whether to expand disparate impact into territory solely inhabited by disparate treatment.[176]

Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975) (subjective criteria are not per se unlawful).

171. Peters v. Middlebury College, 409 F. Supp. 857, 867-69 (D. Vt. 1976).

172. *See* Lewis v. Chicago State College, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969). The *Lewis* court stated: "A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." *Id.*

173. Judicial receptivity to the inclusion of subjective factors is illustrated in Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458, 465 (9th Cir. 1987), where the Ninth Circuit noted that the district court expressly discounted plaintiffs' statistical analysis for failure to include crucial decision-making variables such as teaching quality, community and institutional service, quality of research, and scholarship. *Id.*

174. Female faculty plaintiffs have lost in the following cases: Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); Green v. Board of Regents of Texas Tech Univ., 474 F.2d 594 (5th Cir. 1973) (suit under § 1983); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976); Van deVate v. Boling, 379 F. Supp. 925 (E.D. Tenn. 1974).

175. In Sweeney v. Board of Trustees of Keene State College, 596 F.2d 169, 175 (1st Cir. 1978), the court stated, "Particularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available." *Id.*

176. Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 808 n.17 (5th Cir. 1986) (debate as to applicability of disparate impact is not insignificant since disparate impact has lesser burdens than disparate treatment).

Courts should allow plaintiffs to use the disparate impact theory in cases of academic salary discrimination for four reasons. First, because academic decision making is often clandestine, courts should eliminate the plaintiffs' onerous proof-of-intent requirement.[177] This would eliminate the plaintiff's difficult task of searching for direct evidence of discrimination. Second, the intent requirement is a needless formality where there is a marked salary disparity between male and female faculty.[178] In such cases the discriminatory results of the university's actions are manifest, making proof of intent unnecessary.[179] Third, although plaintiffs may contest subjective decisions under the disparate treatment theory, one might also consider a subjective system facially neutral, as all professors are subject to the same evaluations, publication guidelines, and service requirements.[180] Thus, if the school applied the same criteria equally to all faculty members and an adverse impact on women resulted, then disparate impact analysis should apply.[181]

Finally, courts should apply the Supreme Court's ruling in *Watson v. Fort Worth Bank & Trust*[182] to institutions of higher education for two reasons. First, much like in *Watson*, the use of subjective factors in academic salary determinations may mirror the discriminatory effects produced by the use of objective factors.[183] Second, the same four legal safeguards discussed in *Watson*—practice identification, proof of cau-

177. The *Penk* court demonstrated the possible size of a plaintiff class' burden in academic salary discrimination cases: "The heavy burden accepted by the plaintiffs in this action was ultimately to prove intentional discrimination across the whole state system of higher education." *Penk*, 816 F.2d at 465. *See also* Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN L. REV. 1083, 1089-92 (1982) (arguing for the application of disparate impact to sex-based wage discrimination).

178. *See supra* note 4 (table showing disparities in male and female faculty salaries at the University of Missouri).

179. *See supra* note 31 and accompanying text (focus of disparate impact should be on consequences of the action rather than the motivation). Some university defendants have argued that such a theory amounts to an imposition of strict liability on academic institutions. *See* Note, *Disparate Impact and Subjective Employment Criteria Under Title VII*, 54 U. CHI. L. REV. 957, 977-78 (1987) (arguing that an academic employer may still successfully defend against such charges).

180. *See supra* notes 63, 89-90, 153 and accompanying text (subjective factors used in previously discussed cases).

181. *See supra* notes 25-32 and accompanying text on general disparate impact theory.

182. *See supra* notes 117-39 and accompanying text.

183. *See supra* note 128 and accompanying text.

sation, ultimate plaintiff burden, and judicial deference to employment practices[184]—would prevent a faculty evaluation system from becoming tainted by quotas and preferential treatment. Thus, given the similarity of results in objective and subjective factor cases and the existing legal safeguards, courts deciding sex-based, academic salary discrimination cases should follow the Supreme Court's lead in *Watson* and allow plaintiffs to use disparate impact analysis. Such a result is only a logical extension of this landmark decision.

V. CONCLUSION

The heightened concern over the inequitable disparity between male and female faculty salaries is readily apparent today. In light of female faculty members' understandable frustration with the judicial system in remedying this problem, courts should ease the burden of proving salary discrimination in higher education. Because subjective factors are crucial to the academic setting and are a source of salary disparities, courts should require inclusion of subjective factors in multiple regression analysis. This inclusion would decrease a university's ability to make arbitrary or unjustified salary decisions.[185] Additionally, future courts, following the lead of *Watson*, should allow the use of disparate impact in the academic setting. This would provide female faculty members with an enhanced opportunity to close the salary gap should a college or university fail voluntarily to remedy the problem.[186]

*Keith W. Bartz**

184. *See supra* notes 134-38 and accompanying text.

185. The kind of result which courts must try to avoid is best expressed by named plaintiff Professor Helen Mecklenburg. When asked whether she would do anything differently after her case, she replied, "I would not be an academic. Although I love this way of life, you have to cope with arbitrary, capricious decisions. . . ." G. LANOUE & B. LEE, ACADEMICS IN THE COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION 172 (1987).

186. While beyond the scope of this Note, Washington University Professor Karen Tokarz is currently studying the issue of remedies after a finding of salary discrimination in a university setting. The author wishes to thank Professor Tokarz for her help in developing the initial focus of this Note.

* J.D. 1989, Washington University.