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Recent Developments: American Federation of State, County, and Municipal Employees v. State of Washington: Ninth Circuit Rejects Comparable Worth

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grossly negligent. The court held that once it was established that Liscombe was contributorily negligent as a matter of law it was up to Liscombe to prove gross negligence on the part of the defendants. Evidence at trial showed that the defendants were aware of the dangerous position of the overhead lines, because one month before a similar, less serious, accident occurred. However, the court found that Potomac and Hagerstown acted reasonably in trying to prevent further accidents. The evidence showed red flags had been hung from the wires, oral warnings were given to all trucks entering the plant, and Potomac had staked out a new route for the wires. After an examination of the facts, the court found the defendants acted reasonably under the situation and were not guilty of gross negligence.

The court dismissed Liscombe's last argument, that the issue of last clear chance should have been left for the jury, by holding the doctrine inapplicable in this case. The court, citing *Sanner v. Suard*, 236 Md. 271, 203 A.2d 885 (1964), held that in Maryland the last clear chance doctrine has no application when the negligence of the plaintiff is concurrent with the negligence of the defendant, and the defendant had no opportunity to avoid the accident after the original negligence. In the case at bar no such opportunity was afforded to the defendants.

The court of appeals' decision in *Liscombe v. Potomac Edison Co.* reaffirms the Maryland judiciary's position that a plaintiff guilty of negligence, however slight, is completely barred from recovery. The burden placed upon the defendant in electrical shock cases is slight. In the absence of wanton or reckless conduct on the part of the defendant, a person who knew or should have known that a wire is dangerous, and puts himself close enough to it to receive a shock, is contributorily negligent as a matter of law and is thus barred from recovery.

—Stephen Markey

**American Federation of State,
County, and Municipal Employees v.
State of Washington: NINTH
CIRCUIT REJECTS COMPARABLE
WORTH**

In *American Federation of State, County, and Municipal Employees v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985), the United States Court of Appeals for the Ninth Circuit held that the state's decision to base compensation on the competitive market rather than on a theory of comparable worth did not establish its liability

under a disparate impact analysis. The court held that the state's participation in the market system did not allow the inference of discriminatory motive so as to establish its liability under a disparate treatment theory, since the state did not create the market disparity and was not shown to have been motivated by impermissible sex-based considerations in setting salaries.

The State of Washington was sued in the United States District Court for the Western District of Washington by two unions: the American Federation of State, County, and Municipal Employees, (AFSCME), and the Washington Federation of State Employees, (WFSE), on behalf of a class of 15,500 state employees who work or have



worked in jobs consisting of at least seventy percent female employees. The district court found that the state discriminated on the basis of sex by compensating employees in predominately female jobs at lower rates than employees in predominately male jobs, where the jobs were found to be although dissimilar, of comparable worth to the employer. The district court found Washington State in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e-2(a) (1982).

The State of Washington sets its employee salaries at rates comparable to the prevailing market rates in the public and private sectors. Market rates are determined by a process of surveys, hearings, and state budget analyses. In 1974, the state conducted a wage disparity study entitled "The Willis Study" which found a

wage disparity of about twenty percent to the disadvantage of employees in jobs held predominately by women for jobs of comparable worth held predominately by men. Comparable worth was determined by a four-prong test: knowledge and skills, mental demands, accountability, and working conditions. Similar surveys were conducted in 1976 and 1980. In 1983, the state adopted a ten-year plan to correct the disparity.

The district court ordered immediate implementation of a system of compensation based on comparable worth as well as back pay. The district court based its determination of sex discrimination on two theories: disparate impact and disparate

treatment. Disparate impact discrimination involves a facially neutral employment practice that, without business justification, has a disproportionately adverse impact upon members of a group protected under Title VII. Proof of intent is not required, because, where a practice is specific and focused, the question is whether the employer's explanation for the compensation policy reveals that it is a pretext for discrimination. For disparate treatment analysis, discriminatory intent is an essential element. Under the disparate treatment theory, to establish intent, it is insufficient for the plaintiff to show that the employer was merely aware of the adverse consequences of a compensation policy. The plaintiff must show that the employer chose the policy, at least partly, because of its adverse effects.

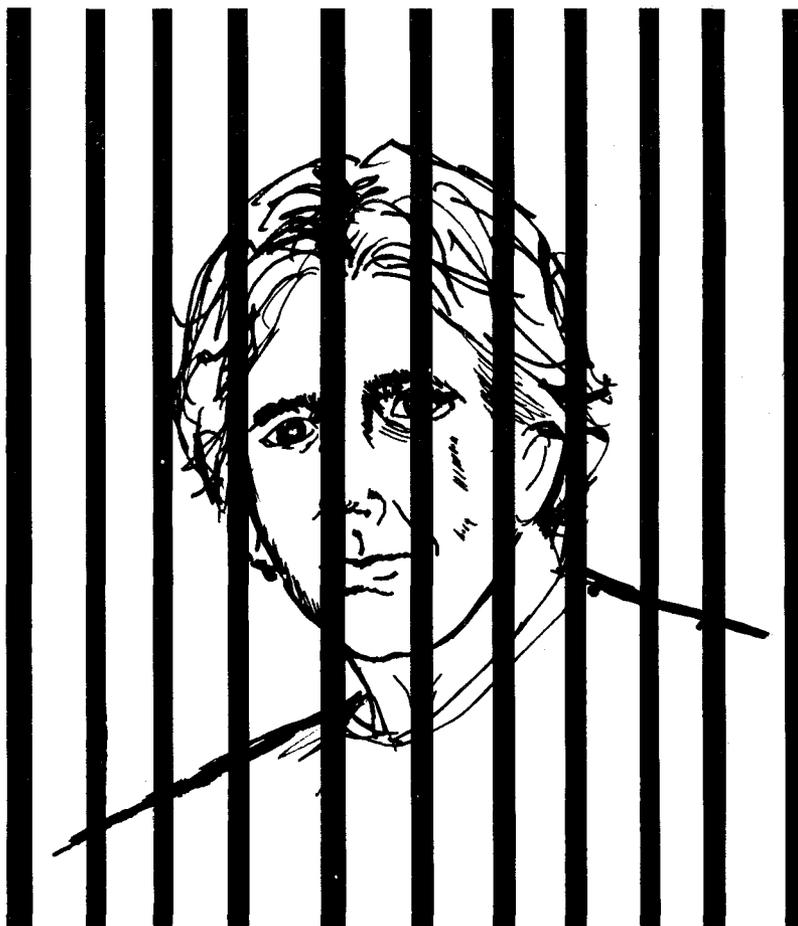
The U.S. Court of Appeals reversed the district court's finding of liability under both the disparate impact and disparate treatment theories. The court stated that Washington's decision to base compensation on the competitive market, rather than on a theory of comparable worth, was not a clearly delineated practice applied at a single point in the job selection process. The court noted that the decision to base compensation on the competitive market involves the assessment of factors too complex and multifaceted for disparate impact analysis. Some of those factors included: surveys, hearings, administrative recommendations, budget proposals, executive actions and legislative enactments. As a result there was no disparate impact found.

The U.S. Court of Appeals overturned the district court's determination of disparate treatment because it found that discriminatory intent had not been proven. Although in appropriate cases discriminatory intent may be inferred from circumstantial or direct evidence, the court held that the findings of "The Willis Study" alone, (that the state sets compensation at the market rate), would not establish the requisite intent without corroborating evidence. The court stated that although the state participates in the market system, it did not create the market disparity and that setting pay rates according to the prevailing market rate does not support the inference of intent to discriminate. The court noted that in some cases an inference of intent may be drawn from statistical evidence, but the weight given to statistical evidence is determined by the existence of independent corroborative evidence of discrimination such as testimony of specific incidents of discrimination.

The court also rejected AFSCME's contention that because the state commissioned "The Willis Study", it was committed to implementing a new system of compensation based on comparable worth as defined in the study. The court was hesitant to adopt a rule that had the effect of penalizing rather than commending employers for their innovation in undertaking such a study. The court was also reluctant to bind the state to base its decision on the results of one study because different studies produce different results which the employer should be permitted to take into account when determining rate of pay. The U.S. Court of Appeals found neither disparate impact nor disparate treatment. They held, therefore, that no Title VII violation had occurred.

(AFSCME is currently petitioning the United States Supreme Court to hear this case.)

—Audrey A. Creighton



***Hamilton v. State*: JUDICIAL APPROVAL OF "JAIL HOUSE PLANTS"**

In *Hamilton v. State*, 62 Md. App. 603, 490 A.2d 763 (1985), the Court of Special Appeals of Maryland held that a defendant's statements to an acquaintance while both were incarcerated, did not amount to custodial interrogation requiring *Miranda* warnings even though the acquaintance carried on the conversation at the direction of the police.

In the course of a murder investigation, the Maryland State Police became suspicious of the defendant, Raymond Hamilton, who was incarcerated in the Maryland House of Correction in connection with an unrelated matter. At the behest of the State Police, an acquaintance of Hamilton's, named Fowler, agreed to tape his conversation with the defendant in exchange for the authorities' consideration on pending charges. On two occasions, the acquaintance visited Hamilton and elicited from him incriminating statements regarding the murder. These statements were made without the benefit of *Miranda* warnings. The trial court denied the defendant's motion to suppress his statements, and as a result he was subsequently convicted of murder and various related offenses.

On appeal, the defendant argued that the admission of the statements made to the acquaintance were in violation of his fifth amendment privilege against self-incrimination. The court noted, as a preliminary matter, that the admission of the taped conversations violated neither the Maryland nor federal wiretap statute. MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(2) (1984); 18 U.S.C. § 2511(a)(c) (1982). Additionally, the court held that the admission of the tapes did not violate Hamilton's fourth amendment protection against unreasonable searches and seizures because "[t]he law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent. . . ." *Hamilton*, 62 Md. App. at 608, 490 A.2d at 766 (quoting *United States v. White*, 401 U.S. 745, 752 (1971)).

Turning to the defendant's fifth amendment claim, Judge Alpert, writing for a unanimous court, stated that "*Miranda* warnings must be given when 'an individ-

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