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Crossing the Line: The Second, Sixth, Ninth, And Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other Than Sex" Defense

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NOTES

CROSSING THE LINE: THE SECOND, SIXTH, NINTH, AND ELEVENTH CIRCUITS’ MISAPPLICATION OF THE EQUAL PAY ACT’S “ANY OTHER FACTOR OTHER THAN SEX” DEFENSE

I. INTRODUCTION

In 1963, Congress passed the Equal Pay Act\textsuperscript{1} making it illegal for employers to pay one sex a higher salary than that paid to members of the other sex for equal work.\textsuperscript{2} To establish a prima facie case under the Equal Pay Act, a plaintiff must demonstrate that an employer pays one sex a higher salary than the other sex for performing work that is equal in “skill, effort, and responsibility, and which [is] performed under similar working conditions.”\textsuperscript{3} Congress deliberately chose to incorporate

\begin{enumerate}
\item The Equal Pay Act provides:
No employer having employees subject to any provisions of this section shall discrimi- nate, within any establishment in which such employees are employed, between employ- ees 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 estab- lishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .
\item Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). The court held that once an employee satisfies the burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the pay differential is based on one of the Act’s four affirmative defenses. \textit{Id.} at 196-97.
\end{enumerate}

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“equal” instead of “comparable” when it enacted the Equal Pay Act. Thus, the positions to be compared must be “substantially equal” in order for a plaintiff to bring a claim under the Act. It is very difficult to satisfy the “substantially equal” requirement for determining whether the jobs are equal in terms of skill, effort, responsibility and working conditions.

After a plaintiff establishes a prima facie case, the burden shifts to the employer to show that the pay differential is justified according to one of the Act’s four affirmative defenses. Employers satisfy their burden if the pay differential is based on: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” There has been a great deal of inconsistency among the various circuits when applying the Act’s “factor other than sex” defense. Some courts have properly interpreted this defense according to its plain meaning and apply it according to its intended broad scope. 

Fallon v. Illinois illustrates the broad application of the “factor other than sex” defense. In Fallon, the plaintiff brought an Equal Pay Act claim against the State of Illinois because a state law permitted

4. Brennan v. City Stores, Inc., 479 F.2d 235, 238 (5th Cir. 1973). City Stores held that the employer violated the Equal Pay Act because the jobs compared were “substantially equal” even though “substantially equal” is a difficult standard to satisfy. Id. at 237-38.
5. Id.
6. Id.
8. Id. at 196 (quoting 29 U.S.C. § 206(d)(1)).
9. Compare Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (holding that an employer’s gender-neutral “factor other than sex” is sufficient to justify pay differential between male and female employees) and Covington v. Southern Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987), cert. denied, 484 U.S. 848 (1987) (holding that the pay differential at the Illinois University was the result of a factor other than sex”) and Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1980) (finding that the pay differential at the county social services board was based on a “dual classification system”) with Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 527 (2d Cir. 1992), cert. denied, 113 S. Ct. 440 (1992) (holding that an employer must demonstrate a business-related “factor other than sex” in order to justify a pay differential between male and female employees) and EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988) (holding that the legitimate business reason standard is the appropriate benchmark against which to measure the “factor other than sex” defense) and Glenn v. General Motors, 841 F.2d 1567, 1571 (11th Cir. 1988), cert. denied, 488 U.S. 948 (1988) (concluding that the “factor other than sex” exception did not apply because the pay differential did not result from “unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business”) and Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) (arguing that it would be impractical to apply a factor “that rests on some consideration unrelated to business”).
10. See Fallon, 882 F.2d at 1211; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
11. 882 F.2d 1206 (7th Cir. 1989).
only wartime veterans to be eligible for Veteran Service Officer positions. This law confined most women to a lower paying job that required the same work. The Seventh Circuit upheld the law, stating that wartime veteran status could constitute a “factor other than sex” if based on a gender-neutral criterion.

However, other circuits have rejected the broad application of the Act’s fourth affirmative defense and require that the employer’s “factor other than sex” stem from a legitimate business need. For example, in Aldrich v. Randolph Central School District, a school district paid female cleaners lower wages than male custodians. The school district claimed that this wage differential was justified because its civil service classification, which was facially gender-neutral, was a valid “factor other than sex.” To qualify for the custodial position, an applicant had to take a civil service exam. A cleaner, who claimed she was performing the same work as custodians, took the exam, but the district refused to reclassify her because she was not among the top three scorers. The court held that for a civil service exam to qualify as a valid “factor other than sex,” the employer had to prove that the exam was related to the custodian’s job performance.

The inconsistency among the circuits exists because the United States Supreme Court has not directly answered the question of whether the “any other factor other than sex” defense must stem from a legitimate business need. Some of this inconsistency is due to the unclear dicta written by Justice Brennan in County of Washington v. Gunther. Justice Brennan, writing for the majority, found that employers can defend against discrimination claims and justify pay differentials under the

12. Id. at 1207.
13. Id.
14. Id. at 1212.
15. See Aldrich, 963 F.2d at 525; J.C. Penney Co., 843 F.2d at 253; Glenn, 841 F.2d at 1571; Kouba, 691 F.2d at 876.
17. Id. 522-23.
18. Id. at 522, 524.
19. Id. at 522.
20. Id. at 522-23.
21. Id. at 527.
22. 452 U.S. 161 (1981). Claiming that they were paid lower wages than the male guards in the male section of the prison and that this pay differential was due to intentional sex discrimination, four female guards filed suit under Title VII of the 1964 Civil Rights Act seeking back pay and other relief. Id. at 163-64. The plaintiffs brought their action under Title VII of the Civil Rights Act of 1964 because “the Equal Pay Act did not apply to municipal employees” at the time of the suit. Id. at 164 n.3.
Equal Pay Act by showing that the difference in pay is "based on a bona
fide use of 'other factors other than sex.'"23

The Second, Sixth, Ninth, and Eleventh Circuits have improperly
interpreted this "bona fide use" as requiring that the "factor other than
sex" must be related to a business requirement.24 Even though the
language of the Equal Pay Act clearly permits an employer to justify a
wage differential based on "any other factor other than sex," these
circuits have improperly disregarded the Act's plain meaning25 and
instead interpret the statute as requiring a business-related "factor other
than sex."26 To justify their implementation of a business-related
"factor other than sex," these circuits place much emphasis on the Act's
legislative history.27 The problem with overemphasizing the Act's
legislative history is twofold. First, although some legislative history
exists to support their view of a business-related "factor other than sex,"
these circuits fail to acknowledge the equal amount of legislative history
supporting the position that the "any other factor other than sex"
affirmative defense is satisfied once an employer demonstrates that the
pay differential is based on a gender-neutral factor.28 Second, these cir-
cuits fail to take into account the numerous problems associated with
relying on legislative history to determine Congress' intent.29

On the other hand, the Seventh and Eighth Circuits have properly
decided that the employer can justify a pay differential by setting forth
any gender-neutral "factor other than sex."30 Since the language of the
Act's fourth affirmative defense is clear,31 the Seventh and Eighth Circuits have properly construed the "any other factor other than sex"

23. Gunther, 452 U.S. at 170.
24. See Aldrich, 963 F.2d at 525; J.C. Penney Co., 843 F.2d at 253; Glenn, 841 F.2d at 1571;
Kouba, 691 F.2d at 876.
25. See Caminetti v. United States, 242 U.S. 470, 485 (1917) (holding that statutory in-
terpretation should begin by analyzing the plain meaning of the words in the statute). The Second,
Sixth, Ninth, and Eleventh Circuits have violated the plain meaning rule because they have not
interpreted the "any other factor other than sex" according to its plain meaning, but chose to interpret
the "any other factor other than sex" as requiring that the factor stem from a legitimate business re-
quirement. See also Aldrich, 963 F.2d at 525; J.C. Penney Co., 843 F.2d at 253; Glenn, 841 F.2d
at 1571; Kouba, 691 F.2d at 876.
26. See Aldrich, 963 F.2d at 525; J.C. Penney Co., 843 F.2d at 253; Glenn, 841 F.2d at 1571;
Kouba, 691 F.2d at 876.
27. See Aldrich, 963 F.2d at 525; Glenn, 841 F.2d at 1571.
28. See infra text accompanying notes 42-47.
29. See infra notes 56-62 and accompanying text.
30. See Fallon, 882 F.2d at 1211; Covington, 816 F.2d at 322; Stacker, 640 F.2d at 100.
31. See Caminetti v. United States, 242 U.S. 470, 485 (1917) (holding that when the language
of a statute is clear, the starting place for all statutory interpretation is the plain meaning of the
statute's language).
defense according to its plain meaning and thus have not placed too much weight on the Act's legislative history. If Congress truly intended for an employer to justify a pay differential by setting forth a business-related "factor other than sex," Congress could have done either of two things. First, Congress could have simply drafted the Act's fourth affirmative defense to read "any business-related factor other than sex." Second, Congress could have amended the Equal Pay Act to incorporate a business-related requirement as Congress has done in the past when a statute contains language that does not best exemplify its legislative intent. Since Congress has not acted in accordance with either scenario, the Seventh and Eight Circuits' interpretation of the "any other factor other than sex" defense (i.e. requiring an employer to justify a pay differential by setting forth any gender-neutral "factor other than sex") must prevail.

This Note will show that the Act's "any other factor other than sex" defense must be applied broadly and that the employer must not be required to prove that the "factor other than sex" stems from a legitimate business need. Part II of this Note will analyze the Act's legislative history to determine Congress' intent in adopting the "factor other than sex" defense and will conclude that the legislative history is not useful in analyzing the Act's fourth affirmative defense. Part III will analyze the Act according to its plain meaning and will determine that a business relation requirement for the "factor other than sex" is clearly not within the plain meaning interpretation of the statute. Part IV will critique judicial interpretations that require that the "any other factor other than sex" defense be business-related. Part V critiques the Fifth Circuit's implementation of disparate-treatment analysis in Equal Pay Act claims. Part VI will analyze judicial interpretations that properly require that the employer justify a wage differential by setting forth a gender-neutral "factor other than sex." In Part VII, the author will conclude that the "factor other than sex" defense must be applied when an employer properly sets forth a gender-neutral criterion as a justification for the pay differential and will discuss the various policy reasons for doing so.

II. LEGISLATIVE HISTORY OF "FACTOR OTHER THAN SEX"

In 1963, the Equal Pay Act amended the Fair Labor Standards

32. See Fallon, 882 F.2d at 121; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
33. See infra text accompanying notes 86-91.
34. See Fallon, 882 F.2d at 121; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
Act of 1938\textsuperscript{35} by incorporating a new subsection (d) to section 6.\textsuperscript{36} The Equal Pay Act forbids an employer from paying an employee of one sex more than an employee of the other sex for doing work that is substantially equal, unless the employer can justify the pay differential based on "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."\textsuperscript{37} Once a plaintiff establishes a prima facie case, the burden of proof shifts to the employer to satisfy one of the Act's four affirmative defenses.\textsuperscript{38} Although the first three affirmative defenses are clear in terms of their application, the fourth generated much debate and discussion during its drafting in Congress.\textsuperscript{39} The only indisputable point regarding the legislative history for the "factor other than sex" defense is that the drafters had two objectives in mind: the preservation of employer discretion and that employers set wages based only on "factors other than sex."\textsuperscript{40} However, it is unclear from the Act's legislative history whether the drafters intended the "factor other than sex" to be business-related or gender-neutral because an argument can be made for either view.\textsuperscript{41}

The view that the "factor other than sex" should be construed to encompass any gender-neutral factor is explained by Representative Goodell, the bill's primary sponsor, who stressed the importance of preserving employer discretion in an exchange with Representative

\textsuperscript{36} Id. § 206(d) (1988).
\textsuperscript{38} Id. Whether the Act's four exceptions serve as affirmative defenses is not clearly stated in the Act's legislative history. The bill's primary sponsor, Representative Goodell, expressed that the four exceptions were not affirmative defenses but part of the plaintiff's burden. 109 CONG. REC. 9208 (1963). However, after examining the Act's legislative history and other judicial decisions, the United States Supreme Court in \textit{Corning Glass Works} found that once a plaintiff sets forth a prima facie case, the burdens of proof and production shift to the employer to satisfy one of these affirmative defenses. \textit{Corning Glass Works}, 417 U.S. at 196-97 (1974).
\textsuperscript{39} The legislative history indicates that members of Congress differ as to whether the "factor other than sex" defense should stem from a legitimate business need. See 109 CONG. REC. 9198 (1963); Nina J. Kimball, Note, \textit{Not Just Any "Factor Other Than Sex": An Analysis of the Fourth Affirmative Defense of the Equal Pay Act}, 52 GEO. WASH. L. REV. 318, 320 n.11 (1984) (citing S. REP. NO. 176, 88th Cong., 1st Sess. 4 (1963)).
\textsuperscript{40} See 109 CONG. REC. 9198 (1963).
\textsuperscript{41} The legislative history is not decisive in determining whether Congress intended for a business-related "factor other than sex" since the legislative record contains ample testimony supporting a gender-neutral application of the "factor other than sex" defense. See 109 CONG. REC. 9198 (1963); Kimball, \textit{supra} note 39, at 318, 320 n.11 (1984) (citing S. REP. NO. 176, 88th Cong., 1st Sess. 4 (1963)).
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Griffin.42

[MRS. GOODELL.] [W]e want the private enterprise system, employer and employees and a union... to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

[MRS. GRIFFIN.] So long as pay differentials are not based on sex.

[MRS. GOODELL.] Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction.43

Furthermore, the Supreme Court in Corning Glass Works v. Brennan44 examined the legislative history of the Equal Pay Act and concluded that Congress must have intended that the "factor other than sex" defense serve as a broad general exception because to hold otherwise would disrupt the bona fide job evaluation systems used by American businesses.45 This concern is apparent in the statements of many legislators.46 For instance, Representative Griffin explained that the fourth affirmative defense is a broad principle "which makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation."47

Although certain excerpts from the House debates indicate that Congress intended the fourth affirmative defense to encompass any factor other than sex,48 some courts49 and scholars50 believe that a narrower

42. 109 CONG. REC. 9198 (1963).
43. Id. (emphasis added).
45. Id. at 199-201.
47. 109 CONG. REC. 9203 (1963) (emphasis added); see also id. at 9196 (statement of Representative Frelinghuysen); id. at 9198 (statement of Representative Goodell); id. at 9202 (statement of Representative Kelly); id. at 9209 (statement of Representative Goodell); id. at 9217 (statements of Representative Pucinski and Representative Thompson).
48. See 109 CONG. REC. 9198 (1963). Representative Goodell, the bill's primary sponsor, expressly stated that sex is the "sole factor" that employers are prohibited from using as the basis for the pay differential. Id.
interpretation of the exception best exemplifies the language and committee reports of the Act. Their view is that Congress did not intend the "factor other than sex" to mean just any gender-neutral factor, but rather that Congress drafted this seemingly broad general exclusion because, as a matter of space constraints, the Act could not list every single exception. The proponents of a business-related requirement justify their view of Congress' intent by placing much weight on statements such as Representative Griffin's explanation that classifications such as a seniority system, a merit system, and a piecework system are examples of factors that would justify a wage differential under the fourth affirmative defense. Moreover, they point to a Senate Committee Report which also characterizes a "factor other than sex" in terms of such valid classification systems as seniority, merit, and piece-work. Additionally, the language of this Senate Committee Report suggests not only that such systems are examples of "factor[s] other than sex," but that the breadth of this exception is limited and that the defense does not encompass just any factors. Furthermore, the proponents of a business-related requirement refer to a House Report


50. Ellen M. Bowden, Note, Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense, 27 COLUM. J.L. & SOC. PROBS. 225, 227-28 (1993) (explaining that the "factor other than sex" affirmative defense should be business-related because otherwise an employer could make up any gender-neutral factor and use it as a pretext for discrimination); Kimball, supra note 39, at 322.


52. 109 CONG. REC. 9203 (1963). During the House debate on the bill, Representative Griffin stated "Roman numeral iv [the 'factor other than sex'] is a broad principle, and those preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production." Id. Advocates of a business-related "factor other than sex" place much emphasis on this piece of legislative history because it demonstrates that Congress intended that the "factor other than sex" be business-related since it is merely an example of the preceding business-related affirmative defenses (a seniority system, a merit system, and a system which measures earnings on the basis of quality or quantity of production). Kimball, supra note 39, at 324. However, these same advocates fail to allocate the same amount of emphasis on the parts of the Act's legislative history that clearly indicate Congress' intent for a gender-neutral application of the "factor other than sex" defense.

53. Kimball, supra note 39, at 324 (citing S. REP. NO. 176, 88th Cong., 1st Sess. 4 (1963)).

54. Kimball, supra note 39, at 324 (citing S. REP. NO. 176, 88th Cong., 1st Sess. 4 (1963)). Certain members of the Senate expressed their disapproval of a broad application of the "factor other than sex" defense because it would permit employers to justify wage differentials by setting forth any motive or factor not based on sex. Kimball, supra note 39, at 320.
which provides examples of acceptable factors that would satisfy the Act's fourth affirmative defense.\textsuperscript{55}

After analyzing the Act's legislative history in light of both sides of the argument for a business-related "factor other than sex," it is clear that neither side can rely on the Act's legislative history to justify its position because the legislative history is not conclusive in either direction. Additionally, the criticism of courts using legislative history as a means for statutory interpretation is two-pronged. First, it is argued that the use of legislative history is inconsistent with the democratic theory embodied in the Constitution.\textsuperscript{56} In other words, if the objective of legislative history is to find the intent of the legislature, "[l]egislative materials . . . at best can shed light only on the 'intent' of that small portion of Congress in which such records originate; [the legislative materials] therefore lack the holistic 'intent' found in the statute itself."\textsuperscript{57} Second, the reliability of legislative history to show Congress' intent has been questioned.\textsuperscript{58} The most extreme example of this criticism comes from Justice Scalia.\textsuperscript{59} This criticism addresses corruption, which is described as "making" or "planting legislative history."\textsuperscript{60} "Planting" refers to adding to the legislative record (e.g., committee reports and the Congressional Record) language which is not intended to influence the legislative enactment process, but rather to influence the judicial interpretive


\textsuperscript{56} See Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.").

\textsuperscript{57} Kenneth W. Starr, Observations About The Use Of Legislative History, 1987 DUKE L.J. 371, 375.

\textsuperscript{58} Abner J. Mikva, A Reply to Judge Starr's Observations, 1987 DUKE L.J. 380, 384.


That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained . . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

\textsuperscript{60} Id.
Thus, the more the courts rely on legislative history, the greater the incentive for such corruption of the legislative record.

III. THE PLAIN MEANING OF THE FOURTH AFFIRMATIVE DEFENSE

In those instances in which the language of the statute is clear, the clear language should govern the judicial decision. Known as the plain meaning rule, this rule is the starting place of all statutory interpretation.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.

Essentially, the judiciary must yield to the words of the legislature and assure ours laws of their "democratic pedigree." Furthermore, the United States Supreme Court has held that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules [of using legislative history as a means of statutory interpretation] which are to aid doubtful meanings need no discussion."

The Equal Pay Act clearly states: "No employer . . . shall discriminate . . . between employees on the basis of sex [when equal work is performed] . . . except where such payment is made pursuant to . . . (iv) a

61. Mikva, supra note 58, at 384. Judge Mikva writes about his experience in Congress:

Two members will rise and engage in a colloquy for the purpose of 'making legislative history.' Frequently, however, the colloquy is written by just one of the members, not both. It is handed to the other actor and the two of them read it like a grade B radio script. And that is the material that judges later will solemnly pore over, under the guise of 'studying the legislative history.' This, of course, is ridiculous.

Mikva, supra note 58, at 384.

62. Mikva, supra note 58, at 384. The criticism of legislative history has had an effect. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 846 (1992) (reporting that 10 out of the 65 statutory cases decided by the Supreme Court during its 1989 term made no reference to legislative history and that in 1990, 19 out of 55 decisions were similarly free of reference to legislative history).


64. Id.

65. Id.


differential based on any other factor other than sex . . . ." Since the language of the Equal Pay Act is clear, the Act’s plain meaning is the starting place for statutory interpretation and there is no need to analyze the Act’s legislative history. However, certain scholars and courts refuse to acknowledge the plain meaning of the word “any” and insist that the “any other factor other than sex” must stem from a legitimate business need. These courts and scholars fail to acknowledge that virtually every dictionary defines the word “any” as “regardless of kind.” Thus, when interpreting the “factor other than sex” according to its plain meaning, it is not plausible for an individual or a court to make the argument that “any other factor other than sex” means not any factor, but a factor that is business-related. The doctrine of interpreting statutes based on their plain meaning is alive and well and was recently invoked by the Supreme Court in MCI Telecommunications Corp. v. American Telephone & Telegraph Co.

In MCI, the Federal Communications Commission (“Commission”) pursuant to 47 U.S.C. § 203(b)(2), issued an order stating that its earlier decision to make tariff filing optional for all non-dominant long distance carriers was within its authority to “modify.” The only dominant long distance carrier, the American Telephone and Telegraph Company, appealed to the D.C. Circuit to reverse the Commission’s order. The Supreme Court held that the Commission’s permissive detariffing policy was not a valid exercise of its power under 47 U.S.C. § 203(b)(2) to “modify any requirement.” The Court reasoned that since the word “modify” means to change moderately or in minor fashion, § 203(b)(2)
does not allow the Commission to make basic or fundamental changes such as the order it issued in this case.\textsuperscript{77} In other words, the Commission's permissive detariffing policy could not be justified as a moderate or minor "modification."\textsuperscript{78} Therefore, based upon the Court's interpretation of the statute's plain meaning, the Commission only had the proper authority to authorize minor changes.\textsuperscript{79}

Furthermore, even if applying the plain meaning of a statute would result in an unfair or ridiculous judicial decision, judges must still fulfill their constitutional obligation to interpret the statute according to its plain meaning if the language is clear.\textsuperscript{80} In \textit{Tennessee Valley Authority v. Hill},\textsuperscript{81} Congress appropriated millions of dollars in initial funds to develop the Tellico Dam and Reservoir Project on the Tennessee River.\textsuperscript{82} The purpose of the Tellico Project was to spur shoreline development, generate enough electricity to heat 20,000 residences, and afford flatwater recreation and flood control, in addition to stimulating economic improvements in "an area characterized by underutilization of human resources and outmigration of young people."\textsuperscript{83} However, after years of construction and with the dam near completion, the Secretary of the Interior tried to halt the project because snail darters, an endangered species, were found in the dam area.\textsuperscript{84} Although the Tennessee Valley Authority claimed that the Endangered Species Act did not apply to this project because it was "authorized, funded, and substantially constructed before the Act was passed,"\textsuperscript{85} respondents filed suit to enjoin completion of the dam. The Supreme Court, applying the plain meaning of the Endangered Species Act, held that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."\textsuperscript{86} Thus, even

\textsuperscript{77.} \textit{Id.} at 2229, 2230.
\textsuperscript{78.} \textit{Id.} at 2232.
\textsuperscript{79.} \textit{Id.} at 2229.
\textsuperscript{80.} \textit{Caminetti v. United States}, 242 U.S. 470, 485 (1917).
\textsuperscript{81.} \textit{437 U.S.} at 153 (1978).
\textsuperscript{82.} \textit{Id.} at 157, 165.
\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} \textit{Id.} at 162.
\textsuperscript{85.} \textit{Id.} at 163.
\textsuperscript{86.} \textit{Tennessee Valley Auth.}, 437 U.S. at 184. \textit{See also} Endangered Species Act of 1973, 16 U.S.C. \textsection 1536 (1988). The statute provides:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purpose of this chapter . . . . [T]he purposes of this chapter [consist of] carrying out programs for the conservation of endangered species and threatened species . . . [and of insuring] that any action authorized, funded, or carried out by [a federal] . . . agency is not likely to jeopardize the continued existence of any endangered

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though millions of dollars would be wasted and 20,000 homes would be without electricity, the Supreme Court felt compelled to apply the plain meaning of the Endangered Species Act and preserve the snail darter.\textsuperscript{87} However, Congress in 1979, expressly mandated the completion of the project in an appropriations bill that exempted the Tellico Dam from compliance with the Endangered Species Act.\textsuperscript{88} Since Congress has amended the Endangered Species Act to allow the Tennessee Valley Authority to complete construction, the Supreme Court will no longer be bound by the plain meaning of the original Endangered Species Act and thus will not be constitutionally obligated to render an unfair judicial decision.\textsuperscript{89}

Although it is argued that a plain meaning application of the “any other factor other than sex” would result in unfair judicial decisions by providing employers with loopholes to escape discrimination charges under the Act,\textsuperscript{90} the plain meaning of this affirmative defense must still prevail. If Congress had intended the Act’s fourth affirmative defense to be business-related, Congress would have either drafted or amended it to read “any other factor other than sex that is business-related.” However, Congress did not do so.\textsuperscript{91} Therefore, based on the plain meaning of the Act’s “any other factor other than sex” defense, an employer is not required to set forth a legitimate business reason to justify a pay differential, but must produce sufficient evidence that a gender-neutral criterion is the reason for the pay differential.\textsuperscript{92}

\begin{itemize}
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\end{itemize}

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  \item species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . .
  \item 87. \textit{Tennessee Valley Auth.}, 437 U.S. at 173-74.
  \item 88. Act of Sept. 25, 1979, Pub. L. No. 96-69, 93 Stat. 449-50 provides:
  \item For the purpose of carrying out the provisions of the Tennessee Valley Authority Act of 1933, as amended . . . Provided, That notwithstanding the provisions of 16 U.S.C., chapter 35 or another law, the [Tennessee Valley Authority] is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir project for navigation, flood control, electric power generation and other purposes, including the maintenance of a normal summer reservoir pool of 813 feet above sea level.\textit{Id.} (emphasis added).
  \item 89. See \textit{Tennessee Valley Auth.}, 437 U.S. at 194.
  \item 90. See \textit{infra} note 94.
  \item 92. See Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989); Covington v. Southern Ill. Univ., 816 F.2d 317, 321-22 (7th Cir. 1987), cert. denied, 484 U.S. 848 (1987).
\end{itemize}
IV. THE BUSINESS RELATION REQUIREMENT

The Second, Sixth, Ninth, and Eleventh Circuits interpret the fourth affirmative defense as requiring that a "factor other than sex" stem from a legitimate business need. The reason these circuits incorporate a business relation requirement into the defense is because they believe if such a requirement were not there, employers could easily find loopholes to justify discriminatory pay differentials. Furthermore, they argue that Congress never intended to provide an employer with a loophole that would undercut the purpose of the Act, which was to eliminate sex discrimination at the workplace.

Aldrich v. Randolph Central School District is the most recent case to hold that employers must justify a pay differential by basing it on a "factor other than sex" that is business-related, not gender-neutral. The Second Circuit held that an employer cannot justify a pay differential, between cleaners (all females) and custodians, based on a civil service test and on a classification system if both are not business-related "factor[s] other than sex." After analyzing the Act's legislative history, the court concluded that Congress must have intended for a business relation requirement to be incorporated in the fourth affirmative defense because otherwise, the "factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned. Surely Congress did not intend that an employee would lose an [Equal Pay Act] claim after making out a prima facie case of wage discrimination simply because [an employer based the pay differential on a gender-neutral factor]. . . ."

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss1/5
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discrimination would be sanctioned.\footnote{98}

The Sixth Circuit, in \textit{EEOC v. J.C. Penney Co.},\footnote{99} justified the employer's wage differential by upholding a "head of household" clause, which provided spousal health insurance only to spouses who earned less than the employee, as a business-related "factor other than sex."\footnote{100} "We now hold that the legitimate business reason standard is the appropriate benchmark against which to measure the 'factor other than sex' defense."\footnote{101} The Sixth Circuit reached its decision by relying on the \textit{Kouba} decision\footnote{102} and by not applying an "extreme interpretation" of the "factor other than sex" defense.\footnote{103} The "extreme interpretation" consists of "placing] an impossibly high standard on the employer by requiring it to show that the factor used does not 'perpetuate historic sex discrimination.'\footnote{104} However, the Sixth Circuit, along with the court in \textit{Kouba}, refused to interpret the "factor other than sex" as just a gender-neutral factor because that would "facilitate an employer's disguising all but the most blatant discrimination."\footnote{105} Instead, the court required that an employer demonstrate that the "factor [other than sex] was adopted for a legitimate business reason and used reasonably in light of the employer's stated purpose."\footnote{106}

The Ninth Circuit, in \textit{Kouba v. Allstate Insurance Co.},\footnote{107} was the first court to implement a business-related requirement in the "factor other than sex" defense.\footnote{108} In \textit{Kouba}, female agents claimed that an insurance company's use of prior salaries to set the wages of all new

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\footnote{98. \textit{Id.} at 525. The \textit{Aldrich} court found: Based on [the Act's] statutory history, we conclude that employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral classification system without more. Rather, Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue. \textit{Aldrich}, 963 F.2d at 525.}

\footnote{99. 843 F.2d 249 (6th Cir. 1988).}

\footnote{100. \textit{Id.} at 250-51.}

\footnote{101. \textit{Id.} at 253.}

\footnote{102. \textit{Id.} The \textit{Kouba} court justified a business-related "factor other than sex" by deferring to the parts of the Act's legislative history that supported this proposition. \textit{Kouba}, 691 F.2d at 876. \textit{See infra} notes 108-113 and accompanying text.}

\footnote{103. \textit{J.C. Penney, Co.}, 843 F.2d at 253.}

\footnote{104. \textit{Id.}}

\footnote{105. \textit{Id.}}

\footnote{106. \textit{Id.}}

\footnote{107. 691 F.2d 873 (9th Cir. 1982).}

\footnote{108. \textit{Id.} at 876.}
sales agents resulted in females being paid less than males. The court, in reversing summary judgment for the agents, held that while the Act did not prohibit an employer's use of prior salary as a "factor other than sex," the district court had to examine whether this use of prior salary, which resulted in lower wages for females, was consistent with a legitimate business reason. However, the court does admit that interpreting the "factor other than sex" defense based on its plain meaning creates a "broad general [gender neutral] exception" which does not require the "factor" to be business-related. In spite of acknowledging the clarity of the Act's plain meaning, the Kouba court decided to defer to the Act's legislative history in order to justify implementing a business-related requirement into the "factor other than sex." Further, the court held that "[i]t would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason."

Similarly, the Eleventh Circuit, in Glenn v. General Motors, requires an employer to justify a pay differential by setting forth a business-related "factor other than sex." General Motors attempted to justify its pay differential on the basis of a market force theory. The theory contends that the forces of supply and demand in the market compel employers to pay women lower wages in comparison to men and that these forces constitute a valid "factor other than sex." It is no surprise that the Eleventh Circuit, as did the Second, Sixth, and Ninth

109. Id. at 875.
110. Id. at 878.
111. Id. at 877. The Kouba court admitted: "In drafting the Act, however, Congress did not limit the exception to job-evaluation systems. Instead, it excepted 'any other factor other than sex' and thus created a 'broad general exception.'" Id. (citing H.R. REP. No. 309, 88th Cong., 1st Sess. pt. 7, at 3 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 689).
112. Kouba, 691 F.2d at 876. The Kouba court justified its incorporation of a business-related requirement by explaining that "[s]ince an employer could easily manipulate factors having a close correlation to gender as a guise to pay female employees discriminatorily low salaries, it would contravene the Act to allow their use simply because they also are facially neutral or do not produce complete segregation." Id.
113. Kouba, 691 F.2d at 876. See also Maxwell v. City of Tucson, 803 F.2d 444 (9th Cir. 1986) (applying the Kouba analysis in holding that an employer could justify a pay differential only by setting forth a business-related "factor other than sex").
115. Id. at 1571.
116. Id. at 1570.
117. Id.
Circuits, justified a business relation requirement for the "factor other than sex" defense by deferring to the Act's legislative history. The court found that "[t]he legislative history thus indicates that the 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." Based on the Act's legislative history, this court held that General Motors did not satisfy its burden of justifying its market force theory as a business-related "factor other than sex."

The problem with the Second, Sixth, Ninth, and Eleventh Circuits' judicial decisions is that they rely too heavily on the Act's legislative history in order to justify the business-related "factor other than sex" defense. Additionally, these circuits have failed to acknowledge the problems associated with relying on legislative history and have only referred to certain congressional debates to justify their view. For example, each circuit failed to mention that Representative Goodell, the bill's primary sponsor, clearly explained that the "sole factor that we are inserting here as a restriction [is sex]." Furthermore, even though the Ninth Circuit in Kouba admits that the fourth affirmative defense's plain meaning creates a "broad general exception," it deliberately decides to ignore the plain meaning rule of statutory interpretation by explaining that Congress must have intended a business relation requirement. Otherwise, an employer could set forth any gender-neutral factor as a mere pretext for discrimination. This is not a credible argument because if that was Congress' intent, Congress could have drafted or amended the fourth affirmative defense to read: "any other factor other than sex that is business related." However, Congress did not do so and, as a result, the Second, Sixth, Ninth, and Eleventh Circuits' interpretation of the fourth affirmative defense's language violates the spirit of the plain meaning rule. Since 1917, the plain meaning rule has been consistently upheld by the Supreme Court as the starting place for

118. Id. at 1571.
120. Glenn, 841 F.2d at 1570.
121. See Aldrich, 963 F.2d at 525; Glenn, 841 F.2d at 1571; Kouba, 691 F.2d at 876.
122. See Aldrich, 963 F.2d at 525; Glenn, 841 F.2d at 1571; Kouba, 691 F.2d at 876. See supra text accompanying notes 56-62.
124. Kouba, 691 F.2d at 876, 877.
125. Aldrich, 963 F.2d at 524; J.C. Penney Co., 843 F.2d at 253; Glenn, 841 F.2d at 1570, 1571; Kouba, 691 F.2d at 876.
statutory interpretation when the statute’s language is clear.\textsuperscript{126}

V. CRITICISM OF THE FIFTH CIRCUIT’S INTERPRETATION

Although the Fifth Circuit in \textit{Plemer v. Parsons-Gilbane}\textsuperscript{127} does not interpret the “factor other than sex” to be business-related, the court erroneously applies the “factor other than sex” exemption to both the Equal Pay Act and Title VII by requiring an additional burden shift after the production of evidence on the affirmative defense.\textsuperscript{128} The Fifth Circuit applies a disparate-treatment analysis to plaintiff’s claim of wage discrimination and requires the plaintiff to rebut the employer’s justification for the wage differential by showing that the “factor other than sex” was a pretext for the employer’s discriminatory motive.\textsuperscript{129} By providing the plaintiff with an opportunity to rebut, a privilege not meant to be read into the Equal Pay Act,\textsuperscript{130} the court erroneously fails to treat the “factor other than sex” as a complete affirmative defense.

In this case, the plaintiff, Ms. Plemer, began working for Parsons-Gilbane as a Personnel Assistant.\textsuperscript{131} Months later, Parsons-Gilbane promoted Plemer to the position of Equal Employment Opportunity (“EEO”) Representative and increased her salary.\textsuperscript{132} The EEO Representative reported to the EEO Officer.\textsuperscript{133} Approximately one year later, Parsons-Gilbane decided to create a position for a full-time EEO Officer, and Ms. Plemer applied for the position with several recommendations.\textsuperscript{134} However, Parsons-Gilbane hired a male, who had more experience at this position than Plemer, and set his salary substantially higher than Plemer’s.\textsuperscript{135} Consequently, Plemer filed a charge with the EEOC alleging that Parsons-Gilbane had discriminated by not promoting her to EEO Officer because of her sex and had discriminated in paying her


\textsuperscript{127} 713 F.2d 1127 (5th Cir. 1983).

\textsuperscript{128} Id. at 1135.

\textsuperscript{129} Id. at 1137.

\textsuperscript{130} See Coming Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974). The Supreme Court held that once a plaintiff establishes a prima facie case, the burden shifts to the employer to justify the pay differential based on one of the Act’s four affirmative defenses. \textit{Id.} If the employer meets his burden, the plaintiff does not have an opportunity to rebut. \textit{Id.}

\textsuperscript{131} Plemer, 713 F.2d at 1130.

\textsuperscript{132} Id.

\textsuperscript{133} Id.

\textsuperscript{134} Id. Both a caucus of employees and an officer within the Office of Federal Contract Compliance Programs endorsed Plemer for the position. \textit{Id.}

\textsuperscript{135} Id. at 1130, 1137.
less money than the promoted male Officer. The district court found that Plemer's discriminatory claims were without merit and that her statistical evidence regarding disparities between men's and women's salaries in defendant's white collar departments were not indicative of discrimination because the data did not include variables (such as experience, education, and seniority) which might justify the wage differential. Plemer then filed an appeal to the Fifth Circuit.

The Fifth Circuit held that "Plemer's evidence, apart from the statistics, did make a prima facie case under both the Equal Pay Act and Title VII, by demonstrating that she was paid less that her male successor... for the identical position." Furthermore, the Fifth Circuit found the statistics to be relevant, and thus should have been used by the district court in deciding whether Parsons-Gilbane’s justification for this wage differential was valid or pretextual.

In reviewing Plemer's Equal Pay Act claim, the Fifth Circuit referred to two Supreme Court decisions, Texas Department of Community Affairs v. Burdine and McDonnell Douglas Corp. v. Green, for the notion that a plaintiff must be offered a “full and fair opportunity” to show that an employer’s justification for a wage differential is merely a pretext for discrimination. The Fifth Circuit found that if an employee demonstrates by statistics that an employer has implemented a discriminatory policy of hiring toward employees of a particular sex, a court may assume that an employer’s justification for a wage differential is pretextual and that the differential is the result of the employer’s discriminatory practice. Thus, by failing to consider Plemer's statistics, the circuit court found that the district court denied Plemer her “full and fair opportunity” to show that Parsons-Gilbane’s reasons for the wage differential were pretextual. The Fifth Circuit

136. Id.
137. Id.
138. Id. at 1134.
139. Id. at 1131.
140. Id. at 1136.
141. Id. at 1137.
142. 450 U.S. 248, 253 (1981) (holding that when a court performs Title VII disparate treatment analysis, a plaintiff must be given an opportunity to show that the employer’s justification for the pay differential is a pretext for discrimination).
143. 411 U.S. 792, 804-05 (1973) (similar to Burdine, holding that when a court performs Title VII disparate treatment analysis, a plaintiff must be given an opportunity to show that the employer’s justification for the pay differential is a pretext for discrimination).
144. Plemer, 713 F.2d at 1137.
145. Id.
146. Id.
found that the district court's denial of this "full and fair opportunity" was reversible error.\textsuperscript{147}

The Fifth Circuit erred by relying on \textit{Burdine}\textsuperscript{148} and \textit{McDonnell Douglas}\textsuperscript{149} because both decisions dealt with Title VII, which unlike the Equal Pay Act, requires disparate-treatment analysis in certain situations.\textsuperscript{150} Even though the Fifth Circuit acknowledges that the Supreme Court in these decisions articulated "standards regarding pretext and the use of statistics to prove pretext in Title VII cases," the Fifth Circuit erroneously held that these standards also apply to claims brought under the Equal Pay Act.\textsuperscript{151} The court reasoned that if this were not the case, a plaintiff in an Equal Pay Act claim would not have a "full and fair opportunity" to rebut evidence that an employer's wage differential was based on a valid "factor other than sex."\textsuperscript{152} Essentially, the Fifth Circuit, by applying the two Supreme Court decisions in an improper manner, created its own standards for analyzing an Equal Pay Act claim in order to provide the plaintiff with an opportunity to show that the employer's justification is a mere pretext for discrimination.\textsuperscript{153} Furthermore, the Fifth Circuit remanded the case to the district court with instructions to determine whether the plaintiff's statistical evidence proved that the employer's justification was a pretext.\textsuperscript{154}

Instead, the Fifth Circuit should have instructed the district court to determine whether the employer's asserted justification constituted a valid "factor other than sex." Here, Parsons-Gilbane asserted that the male EEO Officer had more experience than Plemer and that his experience constituted a valid "factor other than sex" that justified his higher salary.\textsuperscript{155} Although the Equal Pay Act does not provide the plaintiff with an opportunity to rebut an employer's "factor other than sex," the court will necessarily determine whether the employer's
justification is a mere pretext for discrimination when it examines the validity of the "factor other than sex." Once the plaintiff presents a prima facie case, the burden will shift to the employer to show the validity of this "factor other than sex" as an affirmative defense. In this case, Parsons-Gilbane met its burden by justifying the wage differential based on the male's greater experience. However, it would not be a valid "factor other than sex" if the evidence showed that in previous years Parsons-Gilbane had hired males over more experienced female employees. Such a practice would then indicate that Parsons-Gilbane is using the male's greater experience as a pretext for discrimination, but this was not the case. Furthermore, because the data failed to take into account "factors other than sex" such as experience, seniority, and merit, the district court did not err when it disregarded statistics that showed men received higher salaries than women. If these statistics did take such factors into account, then the district court's failure to consider these statistics would be erroneous. Although the Fifth Circuit does not impose a business-related "factor other than sex" requirement, it fails to interpret the Equal Pay Act properly because it misreads two Supreme Court decisions as supporting the use of a Title VII disparate-treatment analysis when deciding claims brought under the Equal Pay Act.

VI. PROPER JUDICIAL INTERPRETATIONS OF THE "FACTOR OTHER THAN SEX" DEFENSE

The Seventh and Eighth Circuits are the only two circuits that interpret the Act's fourth affirmative defense properly. Neither circuit requires an employer to justify a wage differential by setting forth a business-related "factor other than sex." Both circuits apply the Act's "factor other than sex" according to its plain meaning and correctly

157. Id.
158. Id.
159. Plemer, 713 F.2d at 1137.
160. Id.
161. Id. at 1134.
162. Id. at 1137.
164. Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100-03 (8th Cir. 1980).
165. Fallon, 882 F.2d at 1211; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
conclude that the defense's restrictions are limited only to a showing of gender-neutrality. Furthermore, although both circuits have examined the Act's legislative history and have properly found that Congress intended a broad interpretation of the "factor other than sex" defense in order to preserve employer discretion, neither circuit relies on the Act's legislative history to justify a gender-neutral "factor other than sex." In Covington v. Southern Illinois University, the plaintiff, a female assistant professor, sued Southern Illinois University ("SIU") under the Equal Pay Act, alleging that by paying her less than her male predecessor for performing the same work SIU had discriminated against her on the basis of sex. The plaintiff argued that the defendant had set forth no reason other than the male employee's prior salary to justify the wage differential and that this did not constitute a valid "factor other than sex" since his prior salary was not business-related. The Seventh Circuit found that even though the male employee's prior salary was not a business-related "factor other than sex," the defendant set forth a valid justification. In reaching its decision, the Seventh Circuit cited to two other Seventh Circuit cases. In Patkus v. Sangamon-Cass Consortium, the Seventh Circuit upheld, as a valid "factor other than sex," the non business-related reorganization plan of the employer which had led to a male employee being paid more than his female predecessor who had been fired prior to the employer's reorganization. In Ende v. Board of Regents of Regency Universities, male professors brought an Equal Pay Act challenge to a university plan which adjusted female faculty members' salaries in order to remedy past discrimination. Although the university plan was not business-related and created isolated instances of salary disparities between female and male faculty

166. Fallon, 882 F.2d at 1211; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
167. Fallon, 882 F.2d at 1211; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
168. 816 F.2d 322 (7th Cir. 1987), cert. denied, 484 U.S. 848 (1987).
169. Id. at 318.
170. Id. at 321.
171. Id. at 322.
172. Id. at 322 (citing Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1261-62 (7th Cir. 1985) (holding gender-neutral "factor other than sex" set forth by employer is sufficient to justify a pay differential); Ende v. Board of Regents of Regency Univs., 757 F.2d 176, 182-83 (7th Cir. 1985) (holding "that an increase which restores a victim of past discrimination to the salary level he/she would have enjoyed in the absence of the discrimination qualifies as a defense (iv) even where the discrimination itself was based on sex.").
173. 769 F.2d 1251 (7th Cir. 1985).
174. Id. 1261, 1262.
175. 757 F.2d 176 (7th Cir. 1985).
176. Id. at 177.
male faculty members, the court held the plan to be a valid "factor other than sex."\textsuperscript{177}

Thus, the Seventh Circuit has firmly held that an employer can justify a pay differential by showing that the "factor other than sex" is gender-neutral and that this neutrality can be evidenced by demonstrating a lack of discriminatory application and effect.\textsuperscript{178} After Covington, the Seventh Circuit in Fallon v. Illinois\textsuperscript{179} affirmed its broad reading of the Act's "factor other than sex" defense.\textsuperscript{180} In Fallon, the plaintiff brought an Equal Pay Act claim against the State of Illinois because a state law only permitted wartime veterans to be eligible for Veterans Service Officer positions.\textsuperscript{181} Consequently, this law confined most women to a lower paying job requiring the same work.\textsuperscript{182} The Seventh Circuit upheld the law by finding that a wartime veteran's status could constitute a "factor other than sex" even though it is not business-related.\textsuperscript{183} Moreover, the court found that an employer can justify a pay differential at the workplace by merely showing that the "factor other than sex" set forth is gender-neutral. Gender-neutrality is determined by examining whether the factor is discriminatory applied or if it causes a discriminatory effect.\textsuperscript{184}

The Seventh Circuit in Fallon, referring to the Supreme Court decision in Corning Glass Works v. Brennan,\textsuperscript{185} found that the "factor other than sex" defense is a broad "catch-all" exception that contains a limitless number of factors, so long as they do not involve sex.\textsuperscript{186} Additionally, the Fallon court cited to the Supreme Court decision in County of Washington v. Gunther\textsuperscript{187} to support its view that a business-related "factor other than sex" would be counterproductive to employer discretion.\textsuperscript{188} After analyzing the Act's legislative history, the Court in Gunther found that Congress intended a broad reading of the "factor other than sex" in order to prevent courts and administrative agencies

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\textsuperscript{177} Id. at 182-83.
\textsuperscript{178} Covington, 816 F.2d at 322.
\textsuperscript{179} 882 F.2d 1206 (7th Cir. 1989).
\textsuperscript{180} Id. at 1211.
\textsuperscript{181} Id. at 1207.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 1212. "The statute required only that [Veteran Service Officers] be wartime veterans. . . . This could include women as well as men." Id.
\textsuperscript{184} Id. at 1211.
\textsuperscript{185} 47 U.S. 188, 197 (1974).
\textsuperscript{186} Fallon, 882 F.2d at 1211.
\textsuperscript{188} Fallon, 882 F.2d at 1211.
\end{flushleft}
from substituting their judgment for the employer's judgment. This broad reading avoids unnecessary disruption of bona fide job evaluation systems. Thus, the Seventh Circuit in *Fallon* clearly found that the Act's "factor other than sex" affirmative defense does not impose upon the employer the undue burden of proving that the factor is business-related.

Similarly, in *Boriss v. Addison Farmers Insurance Co.*, a district court in the Seventh Circuit followed the standards set in *Covington* and *Fallon*. In *Boriss*, the defendant insurance company justified a pay disparity between the female plaintiff and three male underwriters based upon the males' greater experience and higher educational achievements, claiming that these factors represented valid "factor[s] other than sex." The district court granted the defendant summary judgment, explaining that it need not determine whether a college degree was a prerequisite for the position because a college degree clearly satisfies the gender-neutral criterion for the "any other factor other than sex" affirmative defense. Likewise, the Eighth Circuit, in *Strecker v. Grand Forks County Social Service Board*, refused to interpret the "factor other than sex" defense as one that must be business-related. In *Strecker*, a former female employee of the county social services board brought an Equal Pay Act claim alleging that she performed equal work in comparison to her male predecessor but received less pay because of her sex. The Eighth Circuit held that the board's classification system, which took into account the plaintiff's lower educational and experience levels in setting her salary, was a valid "factor other than sex." Additionally, the court found that it did not need to consider whether the classification system was business-related since the board had properly set forth a gender-neutral criterion as a jus-

190. *Fallon*, 882 F.2d at 1211.
195. *Id.* at *9, *10. See also *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (granting summary judgment to defendant because pay disparity was based on the male employee's prior salary and the male employee's more advanced education, both gender-neutral factors).
196. 640 F.2d 96 (8th Cir. 1980).
197. *Id.* at 100.
198. *Id.* at 99.
199. *Id.* at 103.
VII. CONCLUSION

By applying the plain meaning of the affirmative defense when analyzing whether a pay differential is based on a "factor other than sex," the court properly ends its inquiry when the employer produces sufficient evidence that a gender-neutral criterion is the reason for the pay differential. When the language is clear, as it is in this case, the starting point for statutory interpretation is the plain meaning of the statute. Since 1917, the Supreme Court has affirmed and reaffirmed the plain meaning rule. This rule has been closely followed for over seventy-five years because judges are not in the position to legislate law. The role of judges is to interpret statutes and to rule on whether laws are constitutional, not to implement their own views in spite of what Congress has clearly delineated in the statute. Federal judges are not accountable to the public because they are appointed to life terms. Thus, a judge does not answer to the people in the same fashion as a Congressman or Senator. In the democratic system, since the people vote for the legislator who will best represent their interests, it would be a grave injustice to have judges implement their ideas of law when the people have already elected their representatives to enact the laws that best suit them. Even though the Constitution's separation of powers doctrine protects against such overreaching by the judiciary, the Second, Sixth, Ninth, and Eleventh Circuits have engaged in judicial legislation by rewriting the Act's "any other factor other than sex" defense to require a business relationship. This judicial legislation undercuts the very purpose of our democratic system.

These circuits have implemented a business-related "factor other than sex" requirement when it is obvious that the language of the statute does not call for one. Their rationale is twofold. First, they believe

200. Id. at 100.
201. See Fallon, 882 F.2d at 1211; Covington, 816 F.2d at 322; Strecker, 640 F.2d at 100.
203. Id. See also MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S. Ct. 2223, 2229-30 (1994).
205. See Aldrich, 963 F.2d at 525; J.C. Penney Co., 843 F.2d at 253; Glenn, 841 F.2d at 1571; Kouba, 691 F.2d at 876.
that the legislative history strongly indicates Congress' intent for a business-related "factor other than sex" requirement.\textsuperscript{206} However, these circuits fail to mention that they only defer to certain parts of the Act's legislative history and that they deliberately chose to ignore the other parts which strongly suggest that the "factor other than sex" defense was intended to be applied on a gender-neutral basis.\textsuperscript{207} In addition, there is absolutely no proof that a statute's legislative history is a reliable indicator of Congress' true intent.\textsuperscript{208} Furthermore, if Congress truly intended the "factor other than sex" to be business-related, why did it not draft or amend the Act to read "any other factor other than sex that is business-related?" It is hard to believe that Congress intended for a business-related "factor other than sex" but just forgot to insert the words "business-related," or that Congress wanted to place the undue burden on the courts to decipher the Act's legislative history and find a business-related requirement. The only plausible explanation as to why Congress did not draft a business-related "factor other than sex" is that it simply did not intend to do so.

The second rationale set forth by these circuits is that if a business-related requirement is not incorporated into the Act, then employers could easily make up any gender-neutral factor that is really a pretext for discrimination.\textsuperscript{209} This argument lacks credibility because when the burden shifts to the employer to show a gender-neutral "factor other than sex" in response to plaintiff's prima facie case, the court in determining the validity of the "factor other than sex" will be in a position to determine whether the employer's justification is a mere pretext for discrimination.\textsuperscript{210}

A hypothetical will clearly illustrate my point. Suppose an employer has made it a policy not to hire individuals with red hair for management level positions. The employer then refuses to promote a red-haired female for the position and instead hires a dark-haired male. The woman then brings a claim under the Equal Pay Act alleging that she is performing the same work as a manager but is not receiving equal pay due to her female status. Furthermore, she alleges that the employer's justification that her hair is red is not a valid "factor other than sex," but rather a pretext for discrimination. In determining whether

\textsuperscript{206} See Aldrich, 963 F.2d at 525; Glenn, 841 F.2d at 1571.
\textsuperscript{208} See supra text accompanying notes 56-62.
\textsuperscript{209} See Aldrich, 963 F.2d at 525; Kouba, 691 F.2d at 876.
the plaintiff's red hair is a valid gender-neutral criterion or a mere pretext for discrimination, a court will have to examine whether red hair is more prevalent in females in comparison to males. If this is the case, the employer would be in violation of the Act because a valid gender-neutral criterion has not been set forth. However, if evidence shows red hair is just as common for women as it is for men, then the employer can use this as a justification for a wage differential since it is clearly based on a gender-neutral criterion.

It is paramount that employers have the maximum amount of discretion when setting forth employment conditions. Nonetheless, if the evidence supports that red hair is equally prevalent in men and women, the employer would be in violation of the Act if he were to later hire a red-haired male for the management position because the employer would then be using the red-hair as a pretext for sex discrimination. This type of evidence would come to light when the court is determining the validity of the employer's "factor other than sex" defense.

Additionally, society benefits by not imposing a business-related "factor other than sex." First, courts will not have to waste time and money exploring whether the gender-neutral criterion is related to the requirements of the particular job in question. The court system is already overwhelmed with cases and there is no need to overburden it even more.

Second, employers will be more prone to lawsuits by disgruntled employees since it will be much easier for employees to bring claims and harder for employers to defend them. A business-related "factor other than sex" requirement would translate into a more expensive society because an employer will factor in the cost of defending how the "factor other than sex" is related to a legitimate business requirement. This will affect consumers because it will inevitably lead employers to raise prices on goods and services in order to protect themselves against future lawsuits.

Third, a business-related requirement would seriously undercut the value society places on employer discretion. Individuals will now be more hesitant to start a new business because they will not have the freedom of running it in the fashion they envisioned. Thus, a court-imposed business-related requirement would undermine an individual's

212. See Corning Glass, 417 U.S. at 196-97.
fundamental right of freedom of enterprise which is the very root of our capitalistic society. This will hurt society because less goods and services and fewer jobs will be available to the public. If anything can be determined from the Act's legislative history, it is that Congress never intended for the Equal Pay Act to undercut employer discretion. This has been indicated in numerous Supreme Court decisions. Thus, for the numerous reasons and policy goals stated above, the Supreme Court must adopt the Seventh and Eight Circuits' reasoning and hold that a business-related requirement must not be incorporated when applying the Act's "factor other than sex" defense.

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214. See Gunther, 452 U.S. at 170-71. The Supreme Court found: "Under the Equal Pay Act, the courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer ... who [has] established and applied a bona fide job rating system,' so long as it does not discriminate on the basis of sex." Id. (citing 109 CONG. REC. 9209 (1963) (statement of Representative Goodell).

215. See, e.g., Gunther, 452 U.S. at 170-71; Corning Glass, 417 U.S. at 199-201.