Searching for Equality

To my beloved daughter Lovisa and Grandmother Dorothy,
in the hope that this tale of sound and fury will signify something.

Searching for Equality

Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law

Laura Carlson

IUSTUS FÖRLAG

ISBN 978-91-7678-646-8
Sättning: Kristian G. Madsen, Uppsala
Omslag: John Persson
Tryck: Edita, Västerås 2007
Förlagets adress: Iustus Förlag, Box 1994, 751 49 Uppsala, tel: 018-65 03 30
Hemsida: www.iustus.se, E-post: kundtjanst@iustus.se

Foreword

I would first like to thank my advisor, Professor Ronnie Eklund, Labor Law, Stockholm University School of Law, for accepting this project and giving his support and guidance over the years. I will never be able to adequately express the extent of my gratitude and how much this has meant for my life, a "stranger in a strange land." I would also like to thank Professor Peter Melz, Tax Law, Stockholm University School of Law, for introducing me to Ronnie. Stockholm University has funded my time as a doctoral student, the *Stiftelsen av den 28 oktober 1982* has provided monies for books and travels, and the *Emil Hejnes Stiftelse* contributed towards the publication costs. I would also like to thank the labor unions for so generously providing me with the information used in this thesis as well as in individual cases, meeting and discussing the issues they address daily with me.

University Lecturer Vicki Paskalia, Social Rights Law, Department of Social Work, Stockholm University, has been my co-examiner and offered her invaluable insight and comments, for which I am thankful. Gabriella Sebardt, Doctor of Law, Stockholm University has also provided me with her expertise, advice and most importantly, support. Mauro Zamboni, Doctor of Law, Stockholm University has helped me to better understand the "beauty" of legal theory. Professor Laura Cooper, J. Stewart and Mario Thomas McClendon Professor in Law and Alternative Dispute Resolution at the University of Minnesota School of Law, has generously shared with me her expertise in American labor law and her comments, as well as her love of Sweden. Docent Margareta Brattström, University Lecturer at Uppsala University School of Law, has also contributed with comments and support since my first days in Sweden. Advocate Ingrid Eliasson has also encouraged and supported me through this entire process. Sinnika Sandén, Administrator at the Stockholm University School of Law, has assisted me through the years with the concrete needs of this project, as well as the general need for a friendly face. Fellow Doctoral Candidate in Labor Law, Annika Blekemo has been a steady source of encouragement and support. Mohammed Ali, attorney-at-law as well as my former course administrator, has contributed

with his support, proofreading, comments and also the title of this work, for which I will always be grateful.

My family has supported me in this effort as with all my other efforts. I thank my stepmother, Dr. Judy Schindler and sister Lynn Carlson for proofreading the manuscript. Both of my sisters, Lynn Carlson and Lonna Stroinski, have been my lifelines to sanity throughout this entire process. I also thank my father, Dr. Wallace Carlson Jr., for his support and also for renting an apartment in sunny France where I could do my final proofreading. I thank my mother, Joann Carlson, and my mother-in-law, Ragnhild Book Gustafsson, for their support during the years of work for this project.

Finally, I thank my husband, Advocate Fredrik Gustafsson, for tirelessly proofreading the manuscript, particularly in light of the fact that proofreading is not one of his favorite pastimes. If it were not for him, this book would never have been written.

Laura Carlson

Summary of Contents

Table of Contents

List of Abbreviations

AB	Collective Agreement in the Swedish Municipality and County Council Sector
AD	The Swedish Labour Court (*Arbetsdomstolen*)
ALFA	Collective Agreement in the Swedish State Sector
BFOQ	Bona Fide Occupational Qualification
CEEP	European Centre of Public Enterprises
CEHR	UK Commission for Equality and Human Rights
CoR	European Committee of Regions
CF	The Swedish Association of Graduate Engineers
DO	The Swedish Ethnic Discrimination Ombudsman (*Diskrimineringsombudsmannen*)
EC	The European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The Court of Justice of the European Communities
ECSC	The European Coal and Steel Community
EEC	The European Economic Community
EEOC	US Equal Employment Opportunity Commission
EESC	European Economic and Social Committee
EOC	UK Equal Opportunity Commission
EP	European Parliament
EPA	US Equal Pay Act of 1963
ETAN	European Technology Assessment Network
ETUC	European Trade Union Confederation
EU	European Union
Euratom	European Atomic Energy Community
FLSA	US Fair Labor Standards Act of 1938

FMLA	US Family and Medical Leave Act
JämO	The Swedish Equal Opportunity Ombudsman (*Jämställdhetsombudsmannen*)
ILO	International Labour Organization
LAS	The Act on Employment Protection (*Lag SFS 1982:80 om anställningsskydd*)
LO	The Swedish Trade Union Confederation
MBL	The Employment (Co-Determination in the Workplace) Act (*Lag SFS 1976:580 om medbestämmande i arbetsliv*)
RF	The Instrument of Government of the Swedish Constitution (*Regeringsformen*)
SACO	The Swedish Confederation of Professional Associations
SAF	The Swedish Employers' Confederation
SALAR	The Swedish Association of Local Authorities and Regions
SCB	Statistics Sweden
SEA	Single European Act
TCO	The Swedish Confederation of Professional Employees
Title VII	Title VII of the US Civil Rights Act of 1964
UK	United Kingdom
UN	United Nations
UNICE	Union of Industrial and Employers Confederation of Europe
US	United States

May you live in interesting times.[1]

Chapter One: Searching for Equality

The struggle to achieve economic equality between women and men is faced almost by every nation on this planet in some form or another. Sweden is no exception to this rule, despite having received accolades for the advancements made, the most recent a 2005 report placing Sweden first for narrowing the gender gap.[2] However, this must be assessed in light of other statistics demonstrating pervasive sex discrimination, findings such as that the wage gap between women and men in Sweden has not changed since the 1970's.[3] The levels of both horizontal and vertical occupational segregation in Sweden are high, with half of all Swedish women employed in the public sector, as compared to 30 % in the United Kingdom and 19 % in the United States, and there is also a marked absence of women in positions of power in Sweden, with 29 % of the higher management positions held by women, as compared to 33 % in the United Kingdom and 45 % in the United States.[4] The quip, "lies, damned lies and

[1] Part of a speech by Robert F. Kennedy at Cape Town, South Africa on 7 June 1966, believed to be either an ancient Chinese or Scottish curse. For a history of the origins of the phrase, *see* Stephen E. DeLong, *Sidebar – Get a(n Interesting) Life!,* available at*:* http://hawk.fab2.albany.edu/sidebar/sidebar.htm.

[2] World Economic Forum, *Women's Empowerment, Measuring the Global Gender Gap*, 2005 Report, available at the World Economic Forum website: http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/gender_gap.pdf.

[3] *See Inget lönelyft för kvinnor trots löfte,* SVD, 21 September 2005 at 6, *citing* a wage report from LO finding that the monthly wage difference between men and women in 2004 was SEK 4 500, a wage gap of 82 %. *See also* SOU 2005:66 *Makt att forma samhället och sitt eget liv* at 20.

[4] *See, e.g.*, *Myth & Reality, Forget all the talk of equal opportunity. European women can have a job – but not a career,* NEWSWEEK, 27 February 2006 *citing* the OECD, BABIES AND BOSSES, June 2005 REPORT. *See also* Statistics Sweden ("SCB"), MEN AND WOMEN, FACTS AND FIGURES 2004 at 74, available at SCB's website: http://www.scb.se/templates/Listning2____117051.asp and SCB, *Chefen är en man i högre chefsposition,* Press Release, 8 March 2006, available at SCB's website: http://www.scb.se/templates/pressinfo____161842.asp.

statistics"[5] comes easily to mind when attempting to reconcile these different outcomes. A more accurate assessment is that they are all equally true, simply reflecting different aspects of one and the same problem, achieving economic equality between women and men.

This work focuses on the legal structures concerning sex discrimination and parental leave, two ways to approach the issue of economic equality between the sexes. The primary focus is the system created in Sweden within Community law, with comparisons to the approaches taken in the United Kingdom and in the United States. The approach adopted to achieve economic equality between the sexes in Sweden politically and through the legislation is to create a greater economic independence of women from the family through paid work, as well as encourage men to assume a greater share of unpaid work, particularly parental leave, resulting in a lessening of the double burden of work for women. This double burden of paid and unpaid work as carried by women is seen as the major obstacle to economic equality as well as the root of sex discrimination. Mothers in Sweden take over 80 % of the state subsidized parental leave, a parental leave that is one of the most generous in the world, with one parent currently allowed to take up to eleven months of leave with full parental cash benefits. After returning to the workforce, a significant number of Swedish women work part-time in order to better balance the requirements of work and family. Because of this extensive parental leave, as well as the shouldering of the larger share of responsibility in the home, the argument is made that employers discriminate against women not simply on the basis of sex, but on the belief that women cannot participate as fully as men in employment. In addition, women lose ground with respect to seniority, pay, and social benefits in the form of pensions due to their absences from work. The double work load as carried by women is also seen as one of the causes of the large number of sick leaves and early retirements taken by women in Sweden, a way of opting out of the labor market due to stress, leading to further losses of income and pensions for women. Many in Sweden argue today that the solution to sex discrimination in employment lies in men assuming a larger degree of responsibility within the family. If men bear more of the double burden of family and work, employers would then be forced to better accommodate the needs of families, and indirectly, women. To this end, the platform to combat sex discrimination and achieve economic equality in Sweden is based on the 1991 Equal Treatment Act and the 1995 Parental Leave Act.

One cannot examine any aspect of employment law in Sweden without taking into account the "Swedish Model." The historical development of the labor

[5] The entire quote is "[f]igures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force: 'There are three kinds of lies: lies, damned lies and statistics'." Mark Twain, THE AUTOBIOGRAPHY OF MARK TWAIN (1871).

movement in Sweden gave rise to a state "neutrality" regarding employment issues. The social partners, the central employer and employee organizations, have the responsibility of regulating labor issues in accordance to this Swedish Model as it evolved in the early twentieth century. Over 80 % of all employees in Sweden are members of a union. This includes not only traditional "blue collar workers" or wage earners, but also attorneys, judges, and other "white collar" or salaried employees who in other countries have not traditionally been part of the labor movement. The terms of collective agreements govern not only employees who are union members, but all non-union members at a workplace, entailing that more than 90 % of the entire Swedish labor market is governed by such agreements. In those cases in which legislation has been adopted, the social partners have often been given the explicit right in the legislation to opt out of its provisions through collective agreements. To this end, the Swedish collective agreements have been analyzed here generally with respect to discrimination issues, but more specifically with respect to the contractual solutions concerning parental leave. The primary focus of this work, however, is to examine the efficacy of the existing regulatory system in Sweden with respect to asserting the rights granted under the acts in efforts to eradicate sex discrimination, as evidenced in the legislation, case law and collective agreements.

The other parameters in the area of sex equality applicable to the Swedish system are those as defined by Community law, specifically the equal treatment and equal pay directives, now incorporated in the Discrimination Directive, against which the Swedish regulations as well as case law applying such are assessed. The Swedish law is discussed within the framework of European Union law, as Sweden is a member state. Two other systems are explored here, the system as found in the United Kingdom, invoked because within the same parameters as set out by EU law, it has chosen a different course, an emphasis on a family friendly workplace. This is to be achieved at least in part through flexible working, giving employees greater latitude with respect to certain aspects such as working time in efforts to facilitate employees combining work and family. The last system explored is the American, which has focused on discriminatory behavior as a societal phenomena, with concerns as to balancing family and work new to the legislative scheme. Comparisons to these two systems are also interesting from an industrial relations aspect, as Sweden is the most unionized of these three at 80 %, followed by the United Kingdom and then by the United States at only 15 %. Last, access to justice issues with respect to asserting the rights as granted by these four systems are examined, particularly with respect to the remedies available under the statutes, the allocation of attorney's fees and the statutes of limitations with respect to discrimination claims.

1.1 The Systems Examined

The Swedish legislator has taken the political decision that women are to be equal to men in the workplace and the home. The legislative prohibition of sex discrimination and the rights given with respect to parental leave are the primary focus of Chapter Three. Three levels are examined, the legislation through its historical and current developments as well as current legislative proposals, the case law of the Swedish Labour Court as well as the efforts of the Swedish Equal Opportunity Ombudsman, *JämO,* and the initiatives as taken by the social partners basically in the form of collective agreements. This approach, and basically two-fold offensive, the prohibition against sex discrimination as well as the right to take parental leave, is contrasted against the offensives as adopted by the European Union, the United Kingdom and United States. As both Sweden and the United Kingdom are members of the European Union, the presentation in Chapter Two begins with the law of the European Union regarding sex discrimination and parental leave rights. The focus of Chapter Four is UK law concerning these issues, followed by an analysis of American law as to the same in Chapter Five. Chapter Six concludes with a comparison of these four systems with Chapter Seven summarizing the work as well as discussing future directions for the law.

1.1.1 EU Law Regarding Sex Discrimination and Parenting

Given the fact that membership in the European Union entails a harmonization of the laws of the Member States with Community law, any analysis of Swedish or UK law in the area of employment discrimination must begin with the parameters as set out in Community law. This is also particularly appropriate as Article 141 EC Treaty mandating equal pay, first adopted in 1957, predates any of the sex discrimination laws in Sweden, the United Kingdom as well as the two American federal Acts. The European Union historically has both plunged ahead and dragged behind with respect to issues of sex discrimination, as can be seen in the fluctuating case law of the European Court of Justice. This inconsistency is a reflection of the growth of the European Union in general, beginning as a cooperation of market sectors in coal and steel, and finally emerging as a cooperation based on a common market as well as social and political policies, working towards a new constitution. The most recent Discrimination Directive can be seen as embodying this progression from pure market ideology to one of fundamental rights.

The treaties form the jurisdiction of the European Union, so the discussion in Chapter Two begins with the primary law of the treaties in these areas as well as the roles of the institutions. This is followed by an analysis of the secondary law in the form of directives and case law. A recent focus in Community law has been on facilitating combining parenting and work and strengthening the rights

of fathers. Another stronger emphasis can be seen in the discrimination law that the Member States are not only to implement the laws, but to create systems in which the rights as granted by the laws can be asserted by an individual, with a focus on several of the access to justice issues assessed here. This presentation concludes with the discourses that can be traced in the evolution of the Community law with respect to issues of discrimination and parenting.

1.1.2 Sex Discrimination, Parental Leave and the Swedish Model

Swedish labor and employment law are strongly anchored in the Swedish Model. The regulation of labor market issues and labor law generally has been through the cooperation of the social partners, i.e., the employer and employee organizations, achieved mainly through collective agreements. The delineation between employment law, regarding the legal relationship between the individual employee and the employer, and labor law, regarding the legal relationship between the employer and employee organizations, is not as strong in Sweden, in part as a result of the Swedish labor model and this system of collective agreements, as it is in other national systems such as in the United Kingdom and the United States. Employment law issues regarding individual employees, such as individual employment contracts or discrimination prohibitions, historically have been largely undeveloped and unregulated in Sweden, virtually subsumed within labor law and the Swedish model. Legislation has taken an almost secondary place within this Swedish Model, the view being that the social partners are better suited than the legislator to deal with issues arising in employment situations. One good example of this is that Sweden has no minimum wage legislation, leaving it to the social partners to regulate wages within their sectors through collective agreements.

The focus with respect to women since the 1970's has been on increasing their access to work by facilitating combining family and work. The focus on achieving economic equality between men and women has been on women being economically independent from the family through work and men assuming a greater share of the responsibility in the home. The primary legislative acts in the areas of sex discrimination and facilitating family and work currently are the 1991 Equal Treatment between Women and Men Act[6] and the 1995 Parental Leave Act.[7] The 1991 Equal Treatment Act, enacted to replace the original 1979 Act, has been amended several times, the most recent in 2005, with a pending proposal for replacing it with an all-encompassing discrimination act. The objective of the 1991 Equal Treatment Act is to promote equality between the sexes with respect to employment with employers directed to facilitate the combining of employment and parenting for both male and female employees. The current

[6] *Jämställdhetslag* (SFS 1991:433).
[7] *Föräldraledighetslag* (SFS 1995:584).

act prohibits discrimination in the form of direct discrimination, indirect discrimination, wage discrimination and harassment. The Swedish Equal Opportunity Ombudsman, *Jämställdhetsombudsmannen,* has the task of insuring compliance with the law, authorized to prosecute claims on behalf of employees, as also are the labor unions. As to combining family and work specifically, the 1995 Parental Leave Act, first enacted in 1976, protects certain rights of parents taking parental leave. These two acts are the pillars in the Swedish approach to economic equality between women and men.

The historical development of women's rights, the Swedish model, as well as these two acts are presented in Chapter Three. As opposed to the other three systems in this work, the case law of the Swedish Labour Court is presented separately from the legislation. Legal principles with respect to discrimination are not developed in the Swedish case law in the same manner as in the EU, UK and US legal systems, a result in part of the difference between common law and civil law systems, but also of the role the Swedish labor law model has had in the Swedish legal system. The overview of the case law of the Swedish Labour Court is followed by a presentation of *JämO* and its efforts in interpreting, applying and enforcing the legislation. Given the roles the social partners and collective agreements have in the Swedish Model, these are also discussed as to their inclusion of issues arising regarding equality, work and parenting. Several collective agreements are examined in the context of parental leave. The three primary sources of Swedish labor and employment law are consequently reviewed in this work: the legislation, case law and collective agreements. Aspects as to access to justice issues as raised by the legislation and case law are also discussed, as are the discourses discernible in the discrimination legislation, its application and its relationship to the Swedish model.

1.1.3 Sex Discrimination and the Family Friendly Workplace in the UK

The United Kingdom[8] has taken an approach different from the Swedish with respect to women and work, fairly recently invoking a standard of a "family friendly workplace" in the legislation and case law. The Equal Pay Act was passed in 1970 and the Sex Discrimination Act in 1975, but no provisions for family leave of any type existed until the 1990's. Now these provisions are included in the integrated Equality Act 2006, the Employment Rights Act 1996 and the Work and Families Act 2006. In less than twenty years, enormous legal headway

[8] To speak of UK law is a misnomer as the UK comprises three different legal systems, England and Wales, Scotland and Northern Ireland. Certain of the acts and statutes have been adopted in all three jurisidiction in the same or similar forms. For the sake of simplicity, the term UK law is used to denote the acts as adopted in England and Wales, without taking into account modifications or other changes as made in Scotland and Northern Ireland. An example of this complexity can be seen with the new Commission for Equality and Human Rights, which will be operating in England, Wales and Scotland.

has been made regarding issues of discrimination as well as of combining family and work as can be seen from the United Kingdom case, *London Underground Ltd. v. Edwards*[9] decided in 1999 in accordance with the Sex Discrimination Act 1975. The employer in the case had implemented a new flexible shift system beginning at 4:45 a.m. and including Sundays. Under this new system, the plaintiff, a single mother, could not work and care for her child without significantly longer work shifts for no additional pay. When negotiations between management and the unions failed to resolve this problem, she resigned and claimed unlawful sex discrimination. The Industrial Tribunal upheld her complaint, finding that a *prima facie* case of indirect discrimination had been established under the Sex Discrimination Act 1975, as a considerably smaller proportion of female than male single parents could comply with the rostering condition. The tribunal found that the condition was not justifiable, given that the employer had contemplated a scheme catering to the needs of single parents. One commentator has stated that the lower court comes "perilously close to crossing the line between prohibiting unlawful discrimination and imposing positive duties on employers to act in relation to particular groups."[10]

This decision can be seen as indicative of the direction of the flurry of legislation passed in the 1990's and 2000's, resulting ultimately in the Equality Act 2006 and the Work and Families Act 2006, totally revamping or in certain cases creating new systems of rights with respect to discrimination and parenting through the statutes and statutory instruments as explored more fully in Chapter Four. The emphasis of the scheme created has been to maximize flexibility in work to facilitate women and more recently, men, combining work and family. The chapter begins with a short historical overview of the development of women's rights and the passage of the sex discrimination legislation in the United Kingdom. The regulations regarding discrimination and parental leave are also reviewed, as are the roles of the employment tribunals, the Equal Opportunity Commission and now the Commission of Equality and Human Rights, and the labor unions as to sex discrimination, a "family friendly workplace" and parental leave.

1.1.4 Sex Discrimination and Family Leave Legislation in the US

The focus of the legislation in the United States as presented in Chapter Five has been on discrimination as a societal phenomenon, particularly structural/indirect discrimination, with family leave issues addressed at a later stage than in

[9] *London Underground Ltd. v. Edwards* [1999] I.C.R. 494 [1998] Ir.L.R. 364 (Civ).

[10] Joanne Conaghan, *The Family-Friendly Workplace in Labor Law Discourse: Some Reflections on London Underground v. Edwards* (Stockholm 2000)(unpublished) at 6.

Sweden. The idea of substantive equality took a relatively early hold in the case law of the United States Supreme Court as seen in *Brown v. Board*[11] in 1954, in which the Court recognized that formal equality with respect to race in the guise of separate but equal was not sufficient to eradicate racial discrimination thus not constitutional. Employment discrimination and family leave legislation exists in the United States on both the federal and state levels. Due to the federalism in the American legal system, one cannot speak of American law as uniform, but rather must take into account that the American legal system comprises over fifty-one different legal systems. Given this complexity and diversity, the primary focus in this work is on the federal level. The primary pieces of federal legislation regarding sex discrimination and family leave are the Equal Pay Act of 1963,[12] Title VII of the Civil Rights Act of 1964,[13] Executive Order 11246,[14] and the Family and Medical Leave Act of 1993.[15] Almost all states have mirrored these protections against discrimination in either their constitutions (a feat not yet accomplished on the federal level) or by statute.

The issue of combining family and work has definitively taken a backseat in the United States as compared to Sweden and the United Kingdom. The recent federal act provides an individual right for eligible employees of twelve weeks unpaid leave. As to the legislation on the state level with respect to family leave, the entire possible spectrum can be found, from non-existent state protections relying solely on the federal rights, to somewhat more expanded rights as can be seen, for example, in Minnesota Statute § 181.941 regarding parental leave, to finally a system of paid leave as has been recently instituted in California.

Chapter Five begins with an historical overview of women's rights and the labor movement as well as the federal legislation on sex discrimination and family leave, including the principles developed in the federal case law, and the requirements of federal contractors for affirmative action as set out in Executive Order 11246. The state laws of Minnesota and California concerning discrimination and parental leave are briefly discussed, followed by presentation of the different regulatory agencies empowered to enforce the legislation.

Last, the role of the unions in the American context is examined. Regarding issues of discrimination, the United States Supreme Court early in the 20th century imposed a duty of "fair representation" upon the labor unions, entailing that the unions have the duty to represent even minority interests in contract negotiations, initially those of African-Americans. Most labor union contracts have explicit clauses referring to federal or state discrimination legislation.

[11] *Brown v. Board of Education,* 347 U.S. 483 (1954)(separate but equal in issues of education in violation of the equal protection clause of the federal constitution).
[12] 29 U.S.C. § 206(d).
[13] 42 U.S.C. § 2000e *et seq.*
[14] 3 C.F.R. § 339.
[15] 29 U.S.C. § 2600 *et seq.*

Several unions have also been leading concerning issues of pay equity, and these efforts are also examined. Access to justice issues as raised in the American systems are discussed, with the discourses discerned in the systems presented at the end of the chapter.

1.1.5 Comparison, Summary and Future Direction of the Law

A comparison is made in Chapter Six of these four schemes within a system approach to comparative law. The strengths as well as weaknesses of the systems are compared, the major focus the Swedish system, from the protections afforded in the legislation, case law and collective agreements, to the enforcement mechanisms within each of these systems on both the individual and organizational levels. The objective is to identify legal avenues that may be available for strengthening the rights as granted under the legislation to better further the legislator's goal of economic equality between men and women in the Swedish system. To this end, issues of access to justice are also discussed. Finally, these systems are analyzed and compared as against the discourses identified. Chapter Seven contains a summary and discussion of the future direction of the law.

1.2 Materials and Method

The topic of equality for women in employment exists at the intersection of several areas of law, employment and labor law, family law, tax law and social welfare legislation, as well as between the law and private actions of organizations, namely labor unions and businesses, in addition to touching upon the fields of business, economics and sociology. Parental leave is an example of such an intersectionality, a right that can be granted in the legislation as a public benefit or in an employment contract. The decision of which parent is to take the leave is often based on economic and social reasons, with the employer's treatment of the leave based on business reasons, and the legislator's motivation of how the leave should be taken influenced by labor market concerns. Given the multiplicity of sources, fields and countries in this work, a few words about materials and method are warranted.

Despite this broad spectrum of fields, the primary sources examined in this work are the legal sources, the legislation, case law and collective agreements. The legislation and published case law in all three countries are easily accessible public documents. The collective agreements, on the other hand, are not all public documents as easily accessible. For collective agreements in the United Kingdom and the United States, references are made to secondary sources, usually in the form of governmental reports. Given the limited effect collective agreements have in the UK and US systems, less than 30 % and 15 % of workers are unionized respectively, these governmental reports are deemed more than adequate for the purposes here. Swedish collective agreements have been obtained from the

labor unions upon request by the author. Agreements covering both private and public employees have been analyzed, two of which, ALFA in the state sector and AB 05 in the municipal and County Council sector, together cover 1.25 million of the 4 million Swedish workers. However, not all labor unions responded to the requests. To this extent, the survey of Swedish collective agreements cannot be seen as quantitative, but more as a qualitative indication of the different approaches and solutions with respect to combining family and work achieved in the collective agreements.

The structures and approaches as created by the legislation, case law and collective agreements are compared. The main focus of this work is the Swedish system and its internal workings as generated within the framework of EU law. To this end, comparisons are made with the United Kingdom and American legal systems to better assess and evaluate the Swedish Model. To achieve this purpose, theories of comparative law as well as feminist jurisprudence are invoked.

1.2.1 Comparative Law

As a methodology, comparative law can be traced back to the Romans, a natural approach at a time of concurrent legal systems within the Empire. Modern comparative law methods can be seen as products of the nation state, for it is only with the modern nation state that legal systems were unified to the extent they could then be compared to other national unified legal systems. In federal systems, such as the United States, comparative law has always been an aspect of any lawyering, much as with the Romans, as differences must be determined and the applicable law identified. In cases lacking precedent, the different solutions reached can be referred to and adopted by other jurisdictions if found persuasive. Modern comparative law can be seen as having four objectives: resolving conflict of laws issues as well as private law conflicts spanning several systems, harmonizing legislation within a national, supranational or transnational system, and as a tool for shaping or guiding domestic decision-making.[16] The latter is the primary objective of this work within the Swedish context.

Three general methods of comparative law exist, the functional, transplant and system approaches. The traditional functional comparative law approach was first developed in the 1920's, focusing on identifying norms, then the social functions of the norms in order to evaluate the operation of the normative arrangements. This approach has been criticized as looking at only half the baby, simply the norms generated within the system as opposed to the norms as within their systems, the decision-making process and the dynamics surrounding this

[16] David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?,* 46 AM. J. COMP. L. 719 (1998) at 722 and note 5 *citing* Eric Stein, *Uses, Misuses – And Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1 (1974); and Alan Watson, *Legal Transplants and Law Reform*, 92 L. QUART. REV. 79 (1976).

environment. The functional approach has also been criticized for producing too little knowledge about the processes of legal systems, focusing instead on the "artifacts they produce."[17] In response to these criticisms, a system approach to comparative law was developed, the approach chosen in this work.

The system approach, whose object is to capture and represent influences as to decision-making, has four principle sources: texts, institutions, decision-making communities and patterns of thought, discourses. The texts are the legislation, case law and collective agreements in the present work. An objective here is to "reveal patterns in the ways that texts operate in legal systems – how they influence decisions and are influenced by those decisions."[18] A specific category of texts is added in this work, the bridge between the statutory texts and the case law referred to as "access to justice" issues, defined here as the remedies available under the statutes, the allocation of attorney's fees as well as the statute of limitations for discrimination actions. This examination of texts naturally leads to the examination of the institutions in which decision-makers function. The third component places the decision-makers and the institutions within their broader communities. Finally, the patterns of thought, or discourses, are compared as deciphered from the interaction of these three components. This system approach is most suitable when looking at the issue of sex discrimination given its multi-faceted character, but also, as seen from this work, simply focusing on one aspect is not sufficient to address the entire problem of discrimination. Legislation simply prohibiting discrimination without an effective enforcement system is a paper tiger. Each chapter concerning the four individual legal systems, the EU, Sweden, the United Kingdom and the United States, concludes with a discussion of the discourses discernible within each of these systems.

Labor and employment law are newcomers with respect to the traditional fields of the law historically. One can look back to the Romans and find familiar principles of contracts and obligations; negotiable instruments can be found in use by Italian banks during the Renaissance. Labor and employment law, on the other hand, are areas of law carved out at the turn of the nineteenth century when industrialism led to the modern concept of the "worker." The exploitations of such workers resulted in movements for greater employment rights and protections. On the legal time line, labor and employment law are barely two hundred years old, and in Sweden, one hundred.

Given the nature of labor and employment law, the fact that they span such a wide range of fields, endeavors, contracts and legislation, it is prudent from the beginning to take a more systemic approach when comparing the schemes in different countries. Comparisons between the three national systems, Sweden, the United Kingdom and the United States, are also interesting from an industrial

[17] Gerber at 724.
[18] *Id.* at 730.

relations perspective. Sweden is based on the Swedish Model of collectivism and cooperation between the social partners, the United States heavily based on the individual and liberalism, with collective agreements affecting only 15 % of the work force. The United Kingdom historically has fluctuated somewhere in between these two ends of the spectrum, depending very much upon the political power in government. The nature of labor and employment law reinforces the choice made for a systemic comparative law approach.

The idea of legal transplants is also of interest in the Swedish context, particularly in light of certain statements, one regarding that the "Swedish equal opportunity law and the law of protection against discrimination provide fertile ground [for comparative labor law studies]. That body of law is primarily of foreign cloth. United States law is the model for all European law in these respects."[19] Other Swedish authors have argued that the failure of the Swedish equality legislation is the very fact it was a grafting of the American system onto the Swedish Model, two basically incompatible approaches.[20] The early motions in Sweden for the adoption of sex discrimination legislation were based in part on the American 1964 Civil Rights Act, legislation that was evaluated in the legislative preparatory works eventually leading to the 1979 Equal Treatment Act. In addition, the Swedish Labour Court has looked at British decisions concerning the UK Equal Pay Act 1970 in deciding cases.[21] Another aspect of this idea of legal transplants in the arena of discrimination legislation is the fact that much of the Swedish legislation, as well as that of the United Kingdom, is the result of efforts to harmonize Member State legislation in accordance with European Union law. The efforts of the International Labour Organization have also affected all of these systems, particularly with respect to issues of women's work and equal pay.

1.2.2 Feminist Legal Theory

In the transition from a liberal to a welfare state, one also speaks of the transition from formal to substantive justice. This balancing of formal justice as against substantive justice is an aspect in all the critical legal theories, for example, feminist theory, critical race theory and queer theory. The focus of this work is the equality of women at work, something which all three of these theories touch upon, as a woman is not simply a female biological being but has other aspects to her existence including those of race, ethnic origin, culture, sexual preference, parenthood and age. In each of the systems examined in this work, the statistics

[19] Reinhold Fahlbeck, *Comparative Labor Law – Quo Vadis?,* 25 COMP. LAB. L. & POL'Y J. 7 (2003) at 11.

[20] Svante Nycander, MAKTEN ÖVER ARBETSMARKNADEN – ETT PERSPEKTIV PÅ SVERIGES 1900-TAL (SNS Förlag 2002) at 379.

[21] *See, e.g.*, AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm.*

show that women are also discriminated against on these other bases. Prohibitions against discrimination on the basis of race and ethnic origin are recent to the European Union and Sweden. The United Kingdom recently adopted a prohibition of age discrimination in 2006, but as of the date of this writing, there is still no such legislative prohibition against age discrimination in Sweden. Discrimination on a basis other than sex or in a parental capacity is only addressed cursorily in this work as a foil to the case law of the Swedish Labour Court. For many women, however, one should not and probably cannot distinguish these separate bases.[22] Given the recentness of the discrimination legislation on a basis other than sex in Sweden and the EU, any discussion concerning intersectionality would at best be limited. The focus here is on sex discrimination.

Feminist jurisprudence has traditionally been categorized as two debates each embracing a dichotomy, the *reformist/radical* debate and the *sameness/difference* debate. The reformist/radical debate takes aim at the structure of the law, with reformist feminists arguing that the current structure can be used to achieve the ends desired and the radical feminists arguing that the current structure is so permeated by injustice that it must be abandoned. The sameness/difference debate focuses on the difference between women and men and whether these differences should be minimized or incorporated into the law. Pregnancy is a fundamental issue and problem here.[23]

All these facets can be brought to bear in an analysis of women and equality at work. The theory chosen in this work attempts to combine the best of these schools under the guise of a post-liberal feminist legal theory as espoused by Judith Baer. According to Baer, feminist jurisprudence historically has committed two major errors.[24] The first is that though it recognizes that the law secures rights for men but not for women, it has failed to correctly identify the corresponding asymmetry of responsibility. Women are accorded responsibility for themselves and others in ways that men are not, most visibly with respect to responsibilities in the home and family, which affect other areas such as work. The other mistake Baer identifies is that the traditional feminist theories have tended to focus exclusively on women, drawing attention away from men as well as the institutions needing to be studied, criticized, challenged and changed. One solution is to recognize when reform (sameness) and radical (difference) approaches are effective and to use them appropriately. Baer argues that one need not choose between laws that treat women and men the same and laws that treat

[22] *See, e.g.*, the School of Critical Race Feminism as discussed in Angela Onwuachi-Willig, *The Future of Critical Race Feminism,* 39 U.C. DAVIS L. R. 733 (2006).

[23] For a thorough discussion and analysis of feminist legal theory and the Swedish context, *see* Eva Maria Svensson, GENUS OCH RÄTT – EN PROBLEMATISERING AV FÖRESTÄLLNINGEN OM RÄTTEN (Iustus 1997).

[24] *See* Judith A. Baer, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE (Princeton 1999).

them differently; both gender-neutral and gender-specific laws can promote sex inequality or equality.[25]

A third dichotomy can be seen in certain feminist legal literature, as well as in legal theory in general, between "liberal" and "communitarian" perspectives. The communitarian stance stems from socialist legal theory as ultimately derived from the writings of Karl Marx. Marx argued that law was a vehicle of class oppression and that following the proletarian revolution, the bourgeois State would be swept aside and replaced by a dictatorship of the proletariat, and society would have no further need of laws.[26] The Soviet Jurist Evgeny Pashukanis framed this premise somewhat differently in a "commodity exchange" theory of the law, in that the law protects the rights of individuals in a contractual relationship. In a communist society, the law would eventually disappear to be replaced by administration.[27] These theories provide an interesting backdrop to the development of the legislation and women's rights in general in Sweden, with its emphasis on communitarian solutions based on voluntary regulation and consensus.[28]

As to these dichotomies and debates, Baer argues that none of them alone is sufficient in an analysis. However, the sum of them, applied where appropriate, can be. She suggests three tasks for feminist jurisprudence:

1. Posit rights and question responsibility;
2. Develop analyses that separate situations from the persons; and
3. Move beyond women and scrutinize men and institutions.

This model of feminist legal theory is applied in the present work, a model that dovetails the system approach to comparative law chosen. Each chapter identifies the texts in the form of legislation, case law and collective agreements, followed by presentations of the institutions and communities, summarized by the discourses as seen from these texts, institutions and communities in the system approach to comparative law. The feminist analysis is integrated within the chapters addressing issues as they arise. The final chapters address both the comparative law and post-liberal feminist theories in the analysis of the present and possible avenues for the future direction of the law.

[25] Baer at 55.

[26] Raymond Wacks, UNDERSTANDING JURISPRUDENCE – AN INTRODUCTION TO LEGAL THEORY (Oxford 2005) at 222 *citing* Karl Marx, THE CRITIQUE OF THE GOTHA PROGRAMME.

[27] Wacks *citing* R. Warrington, *Pashukanis and the Commodity Form Theory* in David Sugarman (ed.), LEGALITY, IDEOLOGY AND THE STATE (London 1983).

[28] *See, e.g.*, Kevät Nousiainen, *Transformative Nordic Welfare: Liberal and Communitarian Trends in Family and Market Law,* in Kevät Nousiainen, RESPONSIBLE SELVES – WOMEN IN THE NORDIC LEGAL CULTURE (Ashgate 2001).

1.2.3 Language and Terminology

As in any work spanning three countries, four legal systems, two languages, several legal theories and different ideologies, language, terminology and citation systems can become problematic in certain contexts. Translations of Swedish texts as given in this work are primarily those of this author. As to the citation system, the general conventions used are those of "The Bluebook: A Uniform System of Citation"[29], chosen because this is a legal publication written in American English. To the extent possible, the internal conventions of the EU, UK and Sweden with respect to legal citations have been used. The effort has been made to be current with the status of the law in these systems as of 1 September 2006, upon which date all Internet sites were also still valid.

As to more specific terminology, the first issue is the use of the terms "sex discrimination" and "gender discrimination." These terms are used in the present work more in their historic and legal context. The law does not explicitly prescribe gender discrimination yet in any of the statutes examined here. The term "sex discrimination" is still used except by a few American courts discussing "gender discrimination" in their judgments. On the other hand, one speaks of "gender mainstreaming" not "sex mainstreaming." This brings us to the next ideological or terminological question, which is whether these two issues as addressed in this work fall under the category of sex discrimination or the broader category of gender discrimination. Sex discrimination is typically defined as discrimination against a person on the basis of their biological sex as either a man or a woman. A clear example of this is pregnant women, as pregnancy at least presently is an event that only women biologically can experience. Parenting, on the other hand, is seen by some as a biological function, arguing that women are born caretakers. Others view parenting as a cultural phenomena in that women and not men are raised to be caretakers. Using the term "gender discrimination" with the role of parenting has the added benefit of freeing the role from the sex of the parent, as gender discrimination can be against a father taking leave to care for a child as well as against a mother doing the same. Historically, the problem of balancing work and family has been a problem predominantly for women. This fact is raised here only to explain why the majority of the cases discussed in this work concern sex discrimination and women's conditions of employment. For the sake of simplicity, the primary term used here is "sex discrimination," particularly in the historic and legal sections, without the intention of excluding the broader range encompassed by "gender discrimination." The choice of term is not ideological but rather that which fits best within the context whether historical or legal.

[29] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n *et al.* eds., 18th ed. 2005).

Another issue is the use of the terms "labor law" and "employment law," a distinction most felt in the United States and historically less important in Sweden. The terms are used here to the extent they can be used accurately; for example, collective agreements fall within "labor law." However, this distinction is not always possible to maintain rigidly, at least within the Swedish system, and to that extent, must be partially abandoned in certain areas, such as when issues relating to wage discrimination, traditionally "employment law" within the United States, are taken up in the collective agreements.

Chapter Two: EU Law with Respect to Sex Discrimination and Parenting

The law of the European Union ("EU") creates an outer boundary for the legislation of the Member States in those areas the Member States have delegated to the Union, including certain employment law issues. Originally formed as a cooperation to help maintain peaceful relationships after World War II between its European Member States, the European Union has undergone radical and swift changes in recent decades. Initially consisting of six Member States, as of 2006, there are twenty-five Member States covering approximately 455 million people in Europe. However, the most dramatic change has not been in the physical enlargement of the Union, but rather in its focus. Begun as a cooperation of coal and steel markets, the Union, in the form of the European Community, has extended its reach to the creation of a common market based on four freedoms of movement regarding goods, services, persons and capital, in a manner reminiscent of the expansion of legislative power by Congress under the commerce clause of the American federal constitution. From this platform of a common market, the treaties began to incorporate social and political areas. The European Union now has emerged as an extensive economic, political and social cooperation, as concerned now with issues of discrimination and other fundamental human rights as with the free movement of goods, presently in the process of drafting a constitution guaranteeing certain individual fundamental rights within the Member States and against the Union. Issues of employment as well as discrimination, particularly race discrimination, are perceived as urgent priorities within this new focus of the Union. Grappling with the problems arising from discrimination on the basis of sex is not as new an endeavor for the Union. Issues arose with respect to equal pay and wage discrimination as early as the 1950's, with inequality in pay perceived as an impediment to free trade. The development of Community law as to issues of sex discrimination and parenting will be traced in this chapter, creating a backdrop against which both United Kingdom and Swedish law will be analyzed in the following chapters.

The law of the European Union begins with the treaties forming its jurisdiction. Based on this primary law of the treaties, the different governing bodies within the European Union promulgate, interpret and enforce laws through secondary legislation in the form of regulations, directives, decisions and case law. The principal institutions affecting the formation and administration of employment law within the European Union are the European Commission, the Council of the European Union, the European Parliament and the Court of Justice. It should also be mentioned here that although it is not technically an institution with the EU, the decisions of the European Court of Human Rights based on the European Convention for the Protection of Human Rights and Fundamental Freedoms have also affected the interpretation and enforcement of EU legislation as discussed below. The treaties, regulations, directives, decisions and case law constitute the "hard law" of the Union, the binding law. In addition to these legal sources, there are other documents perceived as the "soft law" of the Union, non-binding instruments such as working papers, declarations and recommendations. These latter instruments cannot be cited in court as legally compelling, but are persuasive with respect to issues of interpretation and policy. The focus in this chapter is on the hard law of the European Union concerning sex discrimination and parental leave beginning with the treaties.

2.1 The Primary Legislation: The Treaties of the European Union

The development to the European Union as well as the expansion of its jurisdiction is reflected in the progression of its treaties. The development of the law of the European Union[1] as to discrimination can be seen as a reflection of the line of development of the cooperation between the Member States and the evolution of its constitutional law. The original focus as a treaty on the steel and coal markets has given way to a European Union based on fundamental human rights, with discrimination a specific focus. A historical overview of this evolution is necessary to understand the development of the law concerning discrimination, particularly the case law.

2.1.1 The Origins: The Period from 1951 to 1986

Addressing social issues of any dimension was not uppermost in the minds of the drafters of the first two treaties ultimately establishing the European Union. The

[1] There is a debate whether the law of the European Union should be referred to as EU law, EC law or Community law. Many scholars use "EC law" or "Community law," as under the treaties discussed below, the law technically is based on the EC Treaty, which can be viewed as a component of the EU treaty. The official European Union homepage, http://europa.eu.int, refers to the body of its law as European Union law. The present work uses the more traditional term "Community law."

original "Treaty of the European Coal and Steel Community," also known as the "ECSC Treaty" or the "Treaty of Paris," signed in 1951 and coming into force in 1952,[2] created a common European market in coal and steel, the European Coal and Steel Community (the "ECSC"). Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands agreed that "world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it," and that Europe could "be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development."[3] The ECSC Treaty created a High Authority, a Commission, a Common Assembly, a European Parliament, a Special Council of Ministers, a Council, as well as a Court of Justice and a Consultative Committee.

Six years later, the principle of equal pay was drafted into Article 119 of the "Treaty establishing the European Economic Community," referred to as the "EEC Treaty" or the "Treaty of Rome." The "Treaty Establishing the European Atomic Energy Community" (the "Euratom") was also signed by the original six members in 1957, coming into force in 1958. These two treaties are referred to collectively as the "Treaties of Rome" and with these treaties, the European Communities, the ECSC, the EEC and the Euratom, were created. The EEC Treaty extended the market sectors from simply coal and steel to all economic sectors in the Member States, creating a common economic market. This integration of all economic sectors was to be achieved by 1970, in twelve years through the establishment of the four freedoms of movement of goods, persons, capital and services. A Social Policy Title was included in the EEC Treaty, and common community policies were agreed upon with respect to certain key areas to insure these freedoms of movement: a common agricultural policy,[4] a transportation policy,[5] and a commercial policy.[6] A common market operating at maximum efficiency with the removal of all impediments was seen as benefiting everyone, consumers, workers and employers alike, in turn improving the internal economies of the Member States. In addition, the EEC Treaty designated the Parliamentary Assembly and the Court of Justice as single "common" institutions instead of each community duplicating these institutions.

France worked for the inclusion of Article 119 proscribing equal pay for women and men in the draft of the treaty. France had had equal pay provisions

[2] The Treaty establishing the European Coal and Steel Community, signed 18 April 1951 and entry into force 24 July 1952. It expired 23 July 2003. It is not published in the official journals. For the text of this treaty as well as the others cited below, *see* the official website of the European Union: http://europa.eu.int/eur-lex/lex/en/treaties/treaties_founding.htm.

[3] *See* the second and fourth paragraphs of the preamble to the ECSC Treaty.

[4] *See* EEC Treaty, Articles 38–43.

[5] *Id.* at Articles 74–75.

[6] *Id.* at Articles 110–113.

in place since World War II and at that time, had one of the smallest pay differentials between women and men, 7 % as compared to up to 40 % in Italy.[7] France argued that it could not compete with the price of goods from countries in which women were paid less than men.[8] This "market distortion" or "social dumping" was seen as an impediment to the free movement of goods. Article 119[9] of the EEC Treaty was drafted and adopted, mandating that:

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.
>
> Equal pay without discrimination based on sex means:
>
> a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
>
> b) that pay for work at time rates shall be the same for the same job.

Article 119 was to be implemented by the Member States by 1961, the end of the first transitional stage. In *Defrenne II*, discussed below, the Court gave Article 119 direct effect both vertically and horizontally,[10] however, not retroactively from 1962 but rather from the date of the judgment, 1967. Article 119 has been referred to as the "slender historical thread" upon which the constitutional

[7] Catherine Barnard, EC EMPLOYMENT LAW (Oxford 2000) at 23 *citing* Budiner, LE DROIT DE LA FEMME A L'ÉGALITÉ DE SALAIRE ET LA CONVENTION NO. 100 DE L'ORGANISATION INTERNATIONALE DU TRAVAIL (Librairie Générale de Droit et de Jurisprudence, Paris 1975).

[8] The drafting of Article 119 was also inspired by the United Nation's specialized agency, the International Labour Organization ("ILO") Convention No. 100, Equal Remuneration Convention of 1951, incorporating the principle of equal remuneration for men and women workers for work of equal value. *See* Barnard at 22. Although not an object of this work, the ILO conventions have influenced EC, Swedish and American legislation, and these threads are taken up when appropriate. For more information on the ILO, *see* the ILO website, available at: http://www.ilo.org.

[9] Article 119 of the Treaty of Rome has been re-codified and is now Article 141 of the Amsterdam Treaty (1997)("EC Treaty") and Article III-241 of the proposed Constitution. One of the more difficult parts of historical research as to the European Union is the re-codifications of the treaties, as well as the EU's changing form. For a good overview of the re-codification between the EU and EC treaties and the proposed constitution, *see A Constitution for Europe, Correspondence Table by Article*, available at the EU website: http://europa.eu.int/scadplus/constitution/comparison_en.htm.

[10] *See* Case C-43/75, *Gabriella Defrenne (No. 2) v. Societe Anonyme Belge de Navigation Aerienne Sabena* [1976] 1 ECR-455, Celex No. 61975J0043 at para. 40. "Direct effect" is a term of art in Community law, meaning that a regulation creates rights which a national Member State court must protect, *see* Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR-3, Celex No. 61962J0026. The test for whether a treaty provision has direct effect was first set out in *van Gend & Loos,* that the treaty

dimension of the EU's gender regime hangs.[11] Issues of equality and discrimination were arguably not seriously taken up again in the treaties until the Amsterdam Treaty, a gap of over forty years.

The Merger Treaty, signed in 1965 and entering into force in 1967,[12] merged the executive bodies, the Councils and Commissions, of the three different European Communities, the ECSC, the EEC and the Euratom, into single "common" institutions similar to the European Court of Justice, completing the unification of the institutions of the communities. In addition, a "common" budget was introduced. From this time forward, the EEC became the most prominent of the communities as with respect to the ECSC and Euratom. The Treaty of Luxembourg, signed in 1970, granted the European Parliament certain budgetary powers.[13] The United Kingdom, Denmark and Ireland joined the Communities in 1973.[14] The Treaty of Brussels, signed in 1975,[15] strengthened the European Parliament's powers by granting it the right to reject the budget. The European Parliament was directly elected for the first time by the citizens of the Member States in 1979. Greece became a member in 1981[16] while Portugal and Spain joined in 1986.[17]

The Single European Act ("SEA")[18] was signed by the now twelve Member States in 1986, "moved by the will to continue the work undertaken on the basis

provision is to be either "clear and unconditional" or instead require legislative intervention by the Member States. Vertical direct effect exists when an individual can cite the regulation as against a Member State. Horizontal direct effect creates rights as between private parties and is more restrictively applied to treaty regulations, and even more restrictively to directives, *see* Case C-152/84, *M. H. Marshall v. Southampton Area Housing Authority (No. 1)* [1986] ECR-723, Celex No. 61984J0152 (directive does not have horizontal direct effect). The determination of the non-retroactive application of Article 119 by the Court has been attributed to the consideration the Court took to the arguments of Ireland and the UK that retroactivity from 1962 would expose many employers to claims of unequal pay spanning more than a decade, forcing many employers into bankruptcy. *Defrenne (No. 2)* at 480–81.

[11] Jo Shaw, *Gender Mainstreaming and the EU Constitution,* EUSA REVIEW, Vol. 15, No. 3 (2002) at 3, available at: http://www.eustudies.org/GenderForum.pdf.

[12] The Merger Treaty, OJ 1966 152, Celex No. 165F/PRO/PRI/13, signed 8 April 1964 and entry into force 1 July 1967.

[13] The Treaty of Luxembourg ("Treaty amending certain Budgetary Provisions"), OJ 1971 L 2, signed 22 April 1970 and entry into force 1 January 1971.

[14] The Treaty of Accession of the United Kingdom, Ireland and Denmark, OJ 1972 L 73, signed 22 January 1972 and entry into force 1 January 1973.

[15] The Treaty of Brussels ("Treaty Amending Certain Financial Provisions"), OJ 1977 L 359, signed 22 July 1975 and entry into force 1 June 1977.

[16] The Treaty of the Accession of Greece, OJ 1979 L 291, signed 28 May 1979 and entry into force 1 January 1981.

[17] The Treaty of Accession of Spain and Portugal, OJ 1985 L 302, signed 12 June 1985 and entry into force 1 January 1986.

[18] The Single European Act ("SEA"), OJ 1987 L 169, signed 28 February 1986 and entry into force 1 July 1987.

of the Treaties establishing the European Communities and to transform relations as a whole among their States into a European Union."[19] The European economic cooperation was extended into a political cooperation with SEA introducing several new areas of responsibility: the internal market, social policy, economic and social cohesion, research and technological development as well as environmental issues. SEA introduced a legislative procedure for cooperation between Parliament and the Council giving Parliament real, if limited, legislative powers, addressing the concern that had been expressed with respect to the Parliament's lack of real power and the ensuing democratic deficit. Social elements, however, were not specifically addressed, raising the criticism of a Europe existing without its citizens, instead of for them.[20] All Member States except the United Kingdom signed the Community Charter of Fundamental Social Rights of Workers in 1989 in the form of a political declaration. As such, it lacked any legally binding effect.

2.1.2 The EU at the Turn of the Millennium

The movement towards greater integration as well as the expansion into social and political cooperation became stronger during the 1990's. The single European common market came into effect in 1992. Two major treaties were signed during this decade, the Maastricht Treaty establishing the European Union and the European Community in the singular as well as the Amsterdam Treaty, which further strengthened the political and social objectives set out in the Maastricht Treaty while also giving greater legislative power to the European Parliament.

2.1.2.1 The Maastricht Treaty (1993)

The "Treaty on European Union together with the treaty establishing the European Community" ("Maastricht Treaty" or "EU Treaty") was signed in 1992 and entered into force in 1993.[21] It establishes a European Union ("EU") based on the European Communities (ECSC, EEC and Euratom), marking "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."[22] The European Union now has a single institutional structure, consisting of the European Council, the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. The EEC Treaty was officially renamed the "Treaty establishing the European Community" ("EC Treaty") in accordance with Article G(1) of

[19] First paragraph of the preamble to the SEA.
[20] Barnard at 10.
[21] The Treaty on European Union ("Maastricht Treaty"), OJ 1992 C 191, signed 7 February 1992 and entry into force 1 November 1993.
[22] Title 1, Common Provisions, Article A of the Treaty on European Union.

the EU Treaty. The renaming of the EEC to the EC was to reinforce the change of focus from economic issues to issues concerning the environment, industrial strategy, education, consumer affairs, health and social welfare. The United Kingdom opted out of health and social welfare harmonization until 1997.[23]

The powers of the Union are described in the EU Treaty as resting on three pillars or *locii*. The first pillar consists of the European Community ("EC") as based on the European Communities (the ECSC, EEC and Euratom). It provides the framework within which the Member States, through the Community institutions, jointly exercise their sovereignty in the areas covered by the Treaties. The other two pillars create frameworks for joint actions in security and foreign policy matters and for cooperation in police and justice matters respectively. Employment and discrimination legislation falls within the first pillar, in which the Community's tasks are several. These objectives are to be pursued by the establishment of a common market and an economic and single monetary policy. The European Council had already launched plans for an Economic and Monetary Union ("EMU") in 1989 based on the EURO, and the Maastricht Treaty consolidated them.[24] Two years after the signing of the Maastricht Treaty, Sweden, Austria and Finland became members of the European Community, bringing the total number of Member States to fifteen.[25]

2.1.2.2 The Amsterdam Treaty (1999)

The Treaty of Amsterdam, signed in 1997 and coming into force in 1999,[26] is perceived as "a step forward in the process of European integration … a system which is more effective, more open to dialogue with the people of Europe, more democratic and more geared to the outside world."[27] The Amsterdam Treaty

[23] The stance of the United Kingdom and its reluctance to go forward with social issues through the EU has been referred to as "two-speed Europe" or "variable geometry." *See* Barnard at 15. This "two-speed" Europe can also be seen from the directives concerning discrimination as discussed below, with one directive often issued as to the EU with the exception of the United Kingdom of Great Britain and Northern Ireland, and a separate later directive issued as to enactment in the United Kingdom of Great Britain and Northern Ireland.

[24] In circulation as of 1 January 2001, the Euro currently is the currency in twelve European Union countries: Belgium, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland. Denmark and the United Kingdom have negotiated an "opt out" Protocol to the Maastricht Treaty. Sweden and the ten new Member States are not members of the currency agreement.

[25] The Treaty of Accession of Austria, Finland and Sweden, OJ 1994 C 241, signed 24 June 1994 and entry into force 1 January 1995.

[26] The Treaty on Amsterdam, OJ 1997 C 340, signed 2 October 1997 and entry into force 1 May 1999.

[27] Remarks of Marcelino Oreja, Member of the Commission responsible for institutional affairs and a negotiator of the Amsterdam Treaty with respect to the treaty, *see* The European Commission, *Entry into Force of the Amsterdam Treaty,* Press Release, 28 April 1999, available at: http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/99/269.

codifies, amends and renumbers the EU and EC treaties in efforts for greater transparency. Certain legislative procedures are changed, again strengthening Parliament's role and addressing the issue of the democratic deficit. Included among the former areas of legislation in which a co-decision is now to be taken by the Parliament and the Council are: Article 12(6) prohibitions against discrimination, Article 18 (8a) free movement of EU citizens, Article 141(3) and Article 119(3) implementation of equal pay for equal work.

A movement towards a more constitutional basis for EU and Community policies can be seen in the Amsterdam Treaty in the amendments to the EU and EC Treaties. Article 136 EU Treaty was amended by Article One of the Amsterdam Treaty to include the recognition of the "fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers."[28] The 1989 Community Social Charter was included in the Amsterdam Treaty, with the United Kingdom finally signing the Charter. The Amsterdam Treaty expressly confirms the protection of fundamental rights through the application of Community law, which until then had been a matter primarily for the European Court of Justice case law. In addition, the concept of EU citizenship is further developed in the Amsterdam Treaty. A system of political sanctions was also established in the Amsterdam Treaty as to serious and persistent violations by Member States of the founding principles of the EU, namely freedom, democracy, human rights and rule of law.

[28] The European Social Charter was drafted by the Council of Europe in 1961, and has been revised most recently in 1996. For the text of the charter and its history, *see* The Council of Europe website, available at: http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation.
Article 8, The Right of Employed Women to Protection, of the 1961 Charter states that with a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake:

- To provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks;
- To consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence;
- To provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;
- To regulate the employment of women workers on night work in industrial employment; and
- To prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.

These protections reflect those as demanded at the turn of the 20th century and as can be seen in several ILO Conventions. They also lie at the heart of the debate between the role of women, parenting and family as discussed in this work.

Article 13 was added to the EC Treaty, directly addressing the issue of discrimination, empowering the Council, after consulting with the European Parliament, to take appropriate action to combat discrimination not only based on sex but also on racial or ethnic origin, religion or belief, disability, age or sexual orientation. The definition of discrimination is now expressly extended in the treaty to areas other than sex discrimination, and all types of discrimination are included within the same provision, as opposed to the piecemeal developments that had occurred in separate legal instruments.

The Amsterdam Treaty amended certain provisions of the EC Treaty with regard to discrimination and also introduced a new "Title on Employment." Article Two states:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, *equality between men and women*, sustainable and non-inflationary growth…(italics added)

Article Three defines over twenty activities to be pursued by the Community in line with the goals defined in Article Two, concluding by stating that in all these activities, the Community is to aim at eliminating inequality and promoting equality between women and men. The almost immediate placement in the Treaty of the objective of equality between women and men can be seen as a sign of the priority now given the issue by the EU, the Member States expressly stating their commitment to the developments in the case law discussed below on the issue of sex discrimination.

Articles 136 and 137 EC Treaty are also modified by the Amsterdam Treaty. Under the heading of social provisions, Article 136 now states that:

> The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter … and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labor, the development of human resources with a view to lasting high employment and the combating of exclusion…

Article 137 lists activities the Community is to pursue to achieve these objectives, including the improvement in particular of the working environment to protect workers' health and safety, working conditions, social security and social protection of workers and equality between men and women with regard to labor market opportunities and treatment at work.

Article 141 of the EC Treaty incorporates the original equal pay provision of Article 119 of the EEC Treaty almost verbatim, with the supplement in Article

141(3) that the Council is to adopt measures in accordance to the codecision procedure "to ensure the application of the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value." Article 141(4) makes an exception for affirmative action measures taken "to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

Special prominence has been given to balanced and sustainable development as well as the objective of a high level of employment with a mechanism set up to coordinate Member States' policies on employment. This emphasis on a high level of employment and social protection now within the EC Treaty is seen as a shift in the emphasis of the European Union from measures protecting those in employment to addressing the high levels of unemployment in Europe.[29] The delegation of power to the Community legislator through Articles 13, 137 and 141 EC Treaty to take action in the area of equal opportunities and equal treatment is seen as constituting "an explicit embodiment of the Court's statement that the elimination of discrimination based on sex forms part of fundamental rights."[30]

Work was begun on a Charter of Fundamental Rights of the European Union in 1999.[31] The objective of the Charter is to clarify the rights of EU citizens, not by establishing new rights, but rather by consolidating the rights already existing in other sources, including the EU treaties and the case law of the European Court of Justice and the European Convention on Human Rights. Article 23, "Equality between men and women" states that "[e]quality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex." In other words, affirmative action in the form of positive discrimination is not prohibited by this article.

2.1.3 The EU in the New Millennium

One of the major goals of the European Union in the new millennium can be seen as the ratification of a constitution to entirely replace all the treaties. The

[29] Barnard at 20.

[30] Proposal for a directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) Com(2004) 279 Final at 2.

[31] The charter can be found at 2000/C 36401. For a brief description of its history, *see* the European Parliament, *The Charter of the Fundamental Rights of Europe,* available at: http://www.europarl.eu.int/charter/default_en.htm. The entirety of the text of the Charter of Fundamental Rights has been incorporated into the proposed constitution in Articles II-61 to II-154.

Treaty of Nice, signed in 2001 and coming into force 2003,[32] was drafted to reform the institutions of the European Union prior to the fifth enlargement of membership. The then fifteen Member States, the original six of Belgium, Germany, France, Italy, Luxembourg, the Netherlands, followed by Denmark, Greece, Spain, Ireland, Austria, Portugal, Finland, Sweden and the United Kingdom, were facing a possible enlargement of twelve additional Member States, Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.[33]

The Nice Treaty sets out to simplify certain legislative procedures with respect to the doubling of EU membership, replacing requirements of unanimity in certain areas with a lower requirement of a qualified majority. A new division of tasks as between the Court of Justice and the Court of First Instance was also enacted. With the accession of the ten new members, the Treaty of Athens addressed certain specific considerations without any major changes. The foundation of the Union currently is the EU and EC Treaties as last amended by the Treaties of Nice and Athens and issued in consolidated form in 2002, incorporating all changes to the treaties until 2002.[34]

The focus of treaty efforts has now been on the Treaty Establishing a Constitution for Europe[35] as signed in 2004. This treaty is to replace all other treaties with:

- The inclusion of the Charter of Fundamental Rights as drafted in 1999 in the Text of the Treaty;
- A new definition of the European Union to replace the current "European Community" and "European Union";
- A new presentation of the distribution of powers between the Union and the Member States;
- A revised institutional framework addressing the respective roles of the European Parliament, the Council and the Commission; and
- More effective decision-making procedures.

[32] The Treaty on Nice, OJ 2001 C 80, signed 26 February 2001 and entry into force 1 February 2003.

[33] Ten of these were accepted with the membership of Bulgaria and Romania postponed until 2007. The Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union ("Treaty of Athens"), OJ 2003 L 236, signed 16 April 2003 and entry into force 1 May 2004.

[34] Treaty Establishing the European Community ("EC Treaty")(consolidated text), OJ 2002 C 325 and Treaty on European Union ("EU Treaty")(consolidated text), OJ 2002 C 325.

[35] The Treaty establishing a Constitution for Europe, OJ 2004 C 310, signed 29 October 2005 and with date of entry into force pending.

Along with the replacement of all the other treaties, the changes proposed are with the view of rendering the system more democratic and transparent.[36] The Constitutional Treaty, in addition to incorporating Articles 2, 3, 136, 137 and 141 of the EC Treaty as discussed above and the entirety of the Charter on Fundamental Rights, also incorporates provisions from the EU Treaty. Article I-2 of the proposed Constitutional Treaty, Part I, Title I, Definition and Objectives of the Union states clearly that:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

According to Article I-3(3),[37] the Union is to "combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights."

To date, the treaty has been approved by Austria, Belgium, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg (non-binding referendum), Malta, Slovakia, Slovenia, and Spain and rejected by France and the Netherlands (non-binding referendum). It has to be ratified by all twenty-five Member States of the European Union to be binding. As the treaty was rejected in France and the Netherlands, its current status is a deadlock.

2.1.4 The EU and the European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") was signed in Rome in 1950 by the members of the Council of Europe,[38] which Sweden has been since its inception in 1949.[39] Alleged violations of the convention are brought to the European Court of

[36] *See* the EU website, *Process and Players,* available at: http://europa.eu.int/eur-lex/lex/en/droit_communautaire/droit_communautaire.htm#1.1.3.

[37] A combination of Articles 2 and 6 (4) of EU Treaty and Article 2 EC Treaty.

[38] At that time, the Council of Europe consisted of ten Member States: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. It now consists of 46 Member States. *See* the Council of Europe website, available at: http://www.coe.int/T/e/Com/about_coe/.

[39] *See* Prop. 1949:214 *Kungl. Maj:ts proposition till riksdagen angående godkännande av Sveriges anslutning till Europarådet*, Bet. 1949:UU6, Rskr. 1949:379. Sweden finally adopted the convention as law in 1994, *see Lag* (1994:1219) *om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.* There was some debate about the status of the ECHR in Swedish law prior to its legislative enactment in 1995, and is still some debate concerning its quasi-constitutional status, as it was adopted as an act and not as a part of the Swedish constitution. *See* Iain Cameron, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. Iustus 2002) at 151.

Human Rights in Strasbourg. The Convention has been adopted by all EU Member States. The European Union as an entity has not formally acceded to the ECHR as the European Court of Justice has found that no treaty provision empowers the Community to do so.[40]

Much in line with the path of development of Community equality law, the European Court of Justice initially was reluctant to address issues of more human rights' dimensions. By the 1970's, however, the Court began to evaluate issues and treaty rights against the background of the fundamental rights as included in the ECHR, particularly with respect to actions by Community institutions and Member States. The Court held that fundamental rights ranked as general principles of Community law based on two sources: the constitutional traditions of the Member States as well as international treaties as entered into by the Member States, particularly the ECHR. For example, the Court in 1979 assessed whether a regulation restricting the planting of grape vines could be viewed as interference with the right to own property, stating:

> Fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the court. In safeguarding those rights, the latter is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community. International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of Community law.[41]

The Court went on to find that the Regulation could not be seen as in violation of the right to property as set out in the ECHR.

The European Parliament, the Commission and the Council signed a Joint Declaration in 1977 in which they undertook to continue to respect fundamental rights as arising from these two sources identified by the European Court of Justice, the constitutional traditions of the Member States as well as the ECHR. Article 6 EU Treaty now explicitly states that "[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[42] Before the Treaty of Amsterdam entered into force, the powers of the Court of Justice did not extend to this article. The amendments made in the Treaty of Amsterdam ensure that Article 6(2) is within the jurisdiction of the Court, which now has the explicit, as opposed to the assumed, power to decide

[40] *Opinion 2/94 on Accession of the Community to the ECHR* [1996] ECR 1-1759.

[41] The Court found it to be a permissible restriction in view of the rights granted under the ECHR, *see* Case C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR-3727, Celex No. 61979J0044. The first case raising this issue of the Convention and its relationship to Community law was Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR-1125, Celex No. 61970J0011.

[42] *See* Article 6(2) EU Treaty, formerly Article F.2 EU Treaty.

whether the institutions have failed to respect fundamental rights. An example of this can be seen in a recent decision issued by the Court of First Instance, evaluating the actions of the Commission as against Article 6(2) of the ECHR under which any person charged with a criminal offence is to be presumed innocent until proven guilty according to law.[43]

2.2 The Evolution of the Roles of the EU Lawmaking Institutions

As can be seen from the above progression of treaties, not only have the size and scope of the European Union changed considerably since the original steel and coal union, but also the institutions themselves. Finally integrated into single "common" institutions through the Merger Treaty in 1976, the key institutional actors with respect to discrimination issues, the Council, the European Parliament, the Commission and the Court of Justice, have all undergone radical changes. Many of the institutional changes were taken to address the democratic deficit existing with the originally very weak European Parliament having only consultative power in contrast to a very strong Council.

2.2.1 The Council, Parliament and Commission

The Council of the European Union[44] originally had the final decision on most EU legislation. The Council now shares legislative power jointly with the European Parliament under the co-decision procedure in 43 areas, including combating discrimination. The Council is to coordinate general economic policies between the Member States, enter into international agreements between the EU and other countries, approve the EU budget jointly with the parliament, develop the EU Common Foreign and Security Policy under the second pillar as well as coordinate cooperation between national courts and police in criminal matters under the third pillar. Each Member State appoints a minister to the Council, and the Presidency of the Council rotates every six months between the Member States.

The European Parliament originally was the weakest of the institutions as established by the Treaty of Paris in 1951. First elected by the national legislatures of the Member States, the Parliament was elected directly for the first time in 1979. Elections are now held every five years and all EU citizens are eligible to vote. The Parliament presently has 732 members. It has three main functions: to

[43] *See* Case T-22/02, *Sumitomo Chemical Co. Ltd. v. Commission of the European Communities* [2005] ECR0000, Celex No. 62002A0022.

[44] The Council of the European Union, previously referred to as the Council of the European Communities, is not the same body as the European Council as recognized in Article 2 SEA, or the same body as the Council of Europe, located in Strasbourg and the author of the ECHR and the European Social Charter of 1961.

legislate in accordance with the co-decision procedure, to adopt the budget and to approve the nomination of commissioners.

The European Commission is the executive body of the EU, charged with implementing and enforcing Community law. It also has a legislative monopoly on introducing legislation falling within the framework of the co-decision procedure as established in Article 250(2) EC Treaty. It is to represent the EU internationally, negotiating agreements between the EU and other countries. At present there are twenty-five commissioners, one from each EU Member State. When Bulgaria and Romania join the European Union, there will be 27 commissioners, and at that time, the Commission will set a maximum number of commissioners to be determined by a system of rotation.[45]

Many of the directives with respect to sex discrimination, particularly those adopted in the 1970's, were issued solely by the Council as evident from the title of the directives. Under the current constellation of power, the European Parliament represents EU citizens, elected directly by the populations in the Member States. The Council of the European Union represents the Member States while the European Commission is to uphold the interests of the Union itself. Under the co-decision procedure, the Commission introduces legislation and the Council and Parliament adopt it.[46] Two other bodies are involved in the legislative co-decision process, the European Economic and Social Committee ("EESC") representing sectors impacted by Community law[47] and the Committee of Regions ("CoR").[48]

[45] For more information on the Commission, *see* the European Commission website, available at: http://ec.europa.eu/index_en.htm.

[46] For a flowchart of the co-decision legislative procedure as established in Article 250 EC Treaty, *see* the European Union's website at: http://europa.eu.int/comm/codecision/stepbystep/diagram_en.htm. This new process can be seen in action with the 2006 Discrimination Directive which went through the following stages: Commission proposal presented in 2004; European Economic and Social Committee opinion in 2005; European Parliament opinion (first reading) in 2006; Amended Commission proposal in 2006; Council agreement on a common position in 2006; Common position of the Council in 2006; and Approbation by the European Parliament in 2006. The documents generated at each of these staged with respect to the Discrimination Directive are available at the EU website: http://europa.eu/bulletin/en/200607/p109001.htm.

[47] For more information as to the EESC, a body of 317 members set up in 1994 under the EU Treaty, *see* the EESC website, available at: http://eesc.europa.eu/. The EESC is named in the preamble to the Discrimination Directive, "having regard to the opinion of the European Economic and Social Committee" at Note 1 *citing* The Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (COM(2004) 279 final – 2004/0084 (COD)), OJ 2005 C 157/83.

[48] For more information as to the CoR also with 317 members, *see* the CoR website, available at: http://www.cor.europa.eu/.

2.2.2 The Role of the Social Partners within the European Union

The last of the actors involved in the co-decision legislative process are the social partners. The increasing participation by the social partners in the EU legislative process in many ways parallels that of the European Parliament. Three stages can be distinguished beginning in 1985. During the first period from 1985 to 1991, the activities of the social partners resulted principally in the adoption of joint opinions, resolutions and declarations, all non-binding in nature. An agreement signed between the social partners was subsequently integrated into the Protocol on Social Policy in 1991, and then annexed to the Maastricht Treaty and incorporated into Articles 138 and 139 of the EC Treaty. The third stage can be seen as commencing with the "Joint Contribution" presented by the European cross-industry social partners in December 2001 to the Laeken European Summit, moving towards an increasingly independent and autonomous European social dialogue. The social partners adopted their first joint multi-annual work programme for 2003–2005 in 2002.[49]

Under the process set out in Articles 138 and 139 of the Amsterdam Treaty, the social partners are consulted in the legislation process; to date this has happened twelve times.[50] Three "cross-sector" framework agreements have been concluded, forming the basis for two of the directives discussed below, the Parental Leave Directive and the Part-time Work Directive, as well as the Fixed-terms Directive. One "cross-sector" agreement on telework is to be implemented in Member States by the members of the signatory parties.

The three social partners the Commission has recognized within this European Social Dialogue process in accordance with the Treaty of Amsterdam are the Union of Industrial and Employers Confederation of Europe ("UNICE"), the European Trade Union Confederation ("ETUC") and the European Centre of Public Enterprises ("CEEP"). UNICE[51] represents more than sixteen million small, medium and large companies active in Europe, employing over 106 million employees in all. Members include 33 central industrial and employers' federations from 26 countries. ETUC[52] represents sixty million European workers, 74 national trade union confederations in 34 countries as well as eleven European Industry Federations. CEEP is the international employer's association consisting of public enterprises and organizations in over twenty countries.[53]

[49] *See* European Industrial Relations Observatory On-line, *EU-Level Social Partners issue Work Programme for 2003–2005,* available at: http://www.eiro.eurofound.eu.int/2002/12/feature/eu0212206f.html.

[50] *See* European Commission, *Social Dialogue,* available at: http://europa.eu.int/comm/employment_social/social_dialogue/index_en.htm.

[51] For more information on UNICE, *see* the UNICE website, available at: http://www.unice.org.

[52] For more information on ETUC, *see* the ETUC website, available at: http://www.etuc.org.

[53] For more information on CEEP, *see* the CEEP website, available at: http://www.ceep.org.

2.2.3 The European Court of Justice

The European Court of Justice has been the major actor in the development historically of Community law with respect to discrimination as evidenced by its jurisprudence beginning already in the 1970's. Established by the ECSC Treaty in 1952 with six justices, the Court now has twenty-five justices, one from each Member State. The Court also has eight Advocates-General to assist it in deciding cases, presenting opinions arguing for certain results in cases from an objective and impartial stance. If the case is not seen to raise any new issues of law, the Court can decide that an Advocate-General need not submit an opinion.[54] If an opinion is submitted, the Court is not compelled to follow it. Judgments by the Court are decided by a majority. Dissenting opinions are not given, nor are the votes of the Court. This anonymity is to reduce pressure on the justices to act in accordance with national demands as opposed to EU interests.[55] To alleviate the ECJ's increasing caseload, the Court of First Instance was created in 1989.

The ECJ has jurisdiction in four types of disputes:

1. Reference for a preliminary ruling brought under Article 234 EC Treaty;
2. Actions for failure of a Member State to fulfill an obligation;
3. Actions for annulment of a EU law; and
4. Actions for failure of a EU institution to act.

The majority of cases heard by the Court in the area of discrimination have fallen within one of the two first categories, a request for a preliminary ruling or a failure by a Member State to act. In a request for a preliminary ruling, a Member State's court of final instance must present an issue of law to the Court as to interpreting and applying Community law. The Court has jurisdiction only to rule upon issues of law. The Court is not to rule on issues of fact in a preliminary ruling.[56] The national court then takes the decision of the Court and applies it to the case at hand, as happened in the Swedish equal pay cases as discussed in the next chapter, the legal issue raised being how "pay" was defined.[57] The Court has made significant contributions to both the substantive law, particularly in the area of social policies, as well as the procedural law of the Union, for example by giving direct effect to treaty provisions as it did in *Defrenne (No. 2)*, when such an institutional procedural vehicle did not expressly exist in the treaties.

[54] Article 20 Statute of the Court of Justice, available at the Court of the Justice's website: http://www.curia.europa.eu/en/instit/txtdocfr/index.htm.

[55] Síofra O'Leary, EMPLOYMENT LAW AT THE EUROPEAN COURT OF JUSTICE (Hart Publishing 2002) at 59.

[56] O'Leary at 67–81.

[57] *See* Case C-236/98, *Jämställdhetsombudsmannen v. Örebro läns landsting* [2000] ECR I-2189, Celex No. 61998J0236.

2.3 The Secondary Legislation: The Directives and ECJ Case Law

The secondary legislation as promulgated by the EU institutions described above is the third major source of Community law after the treaties and international agreements. These are the binding legal instruments in the form of regulations, decisions, directives and case law. According to Article 249 EC Treaty, "regulations" are instruments issued by the Council in conjunction with the European Parliament in accordance with the co-decision procedure, or solely by the Commission, directly applicable and having immediate effect in all Member States without any further action required by the Member States. A regulation has general application.[58] A "decision" can be taken either by the Council, the Council in conjunction with the European Parliament, or solely by the Commission, giving a ruling on a particular matter. A decision is binding in its entirety upon those to whom it is addressed. "Directives" are issued by the Council in conjunction with the European Parliament in accordance with the co-decision procedure, or can be issued solely by the Commission. The main purpose of the directives is to harmonize Member State national legislation. A directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but the Member States are to determine the most suitable means of enacting the directive in the national legal system. A directive is given "direct effect," in other words, can be invoked by a private citizen against a member state in the national courts, if the period for enactment by the Member State has expired and the Member State has taken no or an incorrect action. The giving of direct effect to the directives is a product of the case law, and not expressly included in the founding treaties.[59] In contrast to these legal instruments, recommendations and opinions have no binding force. Both binding and non-binding legal instruments have been issued with respect to discrimination in the field of employment, but the major source of law and focus here is on the directives and case law concerning sex discrimination and parental leave.

Almost twenty years after the adoption of the equal pay provision in Article 119, a triad of directives was issued by the Council addressing issues of sex dis-

[58] One of the first regulations issued was Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families. For a thorough analysis of this regulation as well as the Court's decisions, *see* Vicki Paskalia, FREE MOVEMENT OF PERSONS AND SOCIAL SECURITY, GENDER IMPLICATIONS OF EC REGULATION 1408/71 (Stockholm University 2004).

[59] *See* Case C-41/74, *Yvonne van Duyn v. Home Office* [1974] ECR-1337, Celex No. 61974J0041. *See also* Case C-152/84, *M. H. Marshall v. Southampton Area Housing Authority (No. 1)* [1986] ECR-723, Celex No. 61984J0152 and Case C-188/89, *A. Foster and others v. British Gas plc.* [1990] ECR I-3313, Celex No. 61989J0188.

crimination, the Equal Pay Directive mandating equal pay between men and women,[60] the Equal Treatment Directive mandating equal treatment in employment between men and women[61] and the Social Security Directive prohibiting different treatment with respect to social security schemes on the basis of sex.[62] These directives were the result of the Council's 1974 Action Programme,[63] drawn up in response to the then existing period of social unrest and economic recession in Western Europe.[64] The Equal Pay Directive was adopted by the Council prior to the Court's decisions in the first two *Defrenne* cases, when it was generally believed that Article 119 did not have direct effect and that the directive was needed to implement Article 119.[65]

Another lull in activity of almost ten years occurred with respect to discrimination issues as taken up by directives. Two new directives were adopted in 1986, the Equal Treatment Directive in Occupational Social Security Schemes[66] and Equal Treatment in Self-employment.[67] Another flurry of activity occurred in the 1990's, again with several directives being adopted, the Pregnant Workers

[60] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women ("Equal Pay Directive"), OJ 1975 L 45/19, Celex No. 31975L0117. The Equal Pay Directive is now incorporated in the Discrimination Directive.

[61] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions ("Equal Treatment Directive"), OJ 1976 L39/40, Celex No. 31976L0207. The 1976 Equal Treatment Directive was amended in 2002 by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 269/15, Celex No. 32002L0073. It is now incorporated in the Discrimination Directive.

[62] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Social Security Directive"), OJ 1979 L 6/24, Celex No. 31979L0007.

[63] Council Resolution of 21 January 1974 concerning a social action programme, OJ 1974 C 13/1, Celex No. 31974Y0212(01).

[64] *See* Barnard at 6.

[65] George A. Bermann, Roger J. Goebel, William J. Davey, Eleanor M. Fox, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW (West 1993) at 1160.

[66] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986 L225/40, Celex No. 31986L0378. This directive was amended by Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security scheme, OJ 1997 L46/20, Celex No. 31997L0097. This directive is now incorporated in the Discrimination Directive.

[67] Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L359/56, Celex No. 31986L0613.

and Breastfeeding Directive,[68] the Parental Leave Directive,[69] the Burden of Proof Directive[70] and the Part-Time Work Directive.[71]

The directives issued during the new millennium have extended the scope of unlawful discrimination to include discrimination based on race as prohibited by Racial Equality Directive[72] and based on religion or belief, disability, age or sexual orientation as prohibited by Employment Framework Directive.[73] The Equal Treatment Directive was significantly amended in 2002.[74] The Equal Treatment in Access to Goods and Services Directive was issued in 2004.[75]

[68] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ 1992 L 348/1, Celex No. 31992L0085.

[69] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ("Parental Leave Directive"), OJ 1996 L 145/4, Celex No. 31996L0034. Later extended to the United Kingdom and Northern Ireland by Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1998 L 10/24, Celex No. 31997L0075.

[70] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ("Burden of Proof Directive") OJ 1998 L 14/6, Celex No. 31997L0080. Later extended to the United Kingdom and Northern Ireland by Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland, OJ 1998 L 205/66, Celex No. 31998L0052. This directive has been incorporated into the Discrimination Directive.

[71] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ("Part-time Work Directive") OJ 1998 L 014/9, Celex No. 31997L0081. Later extended to the United Kingdom and Northern Ireland by Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, OJ 1998 L 131/10, Celex No. 31998L0023.

[72] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("Racial Equality Directive"), OJ 2000 L 180/22, Celex No. 32000L0043.

[73] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("Employment Framework Directive"), OJ 2000 L 303/16, Celex No. 32000L0078.

[74] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 269/15, Celex No. 32002L0073.

[75] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37, Celex No. 32004L0113.

2.3.1 The Discrimination Directive 2006/54/EC

A new directive addressing sex discrimination was adopted in July 2006,[76] codifying seven[77] of the twelve[78] directives issued with respect to sex discrimination, along with certain of the principles established in the case law of the Court, into one directive. Citing the authority granted under the current Article 141(3) of the EC Treaty, the preamble states that there now is a "specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value."[79] The directive specifically includes a prohibition against discrimination arising from the gender reassignment of a person, as well as against harassment and sexual harassment.[80] The member states are also urged to "continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working

[76] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). For the earlier proposed draft of this directive, *see* Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation ("Proposed Discrimination Directive") COM/2004/0279 final.

[77] The seven directives now included in the Discrimination Directive are:

- The Equal Pay Directive 75/117/EEC;
- The Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC;
- Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes as amended by Directive 96/97/EC; and
- The Burden of Proof Directive 97/80/EC as supplemented by Directive 98/52/EC on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland.

[78] Five of the twelve directives with respect to discrimination were omitted from the proposal because of the belief that their integration would overcomplicate the system:

- The Equal Treatment in Social Security Directive 79/7/EEC;
- The Equal Treatment of Self-employed Directive 86/613/EEC;
- The Protection of Pregnant Workers and New Mothers Directive 92/85/EEC; and
- The Parental Leave Directive 96/34/EC as well as Directive 98/52/EC extending the Parental Leave Directive to the United Kingdom and Northern Ireland.

Also not included in the Discrimination Directive are the Part-Time Work Directive 97/81/EC and the most recent directive 2004/113/EC as to equality of access to and supply of goods and services.

[79] Directive 2006/54/EC at para. 4. Articles 2 and 3(2) are also cited as a basis of promoting equality between men and women, as are Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, *see id.* at paras. 2 and 5 respectively.

[80] *Id.* at paras. 3 and 6 respectively.

time arrangements which enable both men and women to combine family and work commitments more successfully,"[81] including parental leave arrangements and accessible and affordable child-care facilities. The directive explicitly states that the principle of equal treatment "does not prevent Member States from maintaining or adopting measures providing for specific advantage in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."[82] Discrimination on the basis of pregnancy or taking maternity leave is also explicitly prohibited in the directive.[83]

The Discrimination Directive contains four titles. Title I "General Provisions" sets forth the purpose of the directive as "ensur[ing] the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment." Title II "Specific Provisions" includes the principle of equal pay and the principle of equal treatment in occupational social security schemes, providing specific examples of discrimination. Three chapters are given under Title III Horizontal Provisions concerning remedies and enforcement, promotion of equal treatment and general horizontal provisions. Title IV sets forth the final provisions, including that the member states are to implement the directive by 15 August 2008.

Given how recent this latest directive is and that implementation is scheduled for 2008, the cases as decided under the separate directives now incorporated into the one will be analyzed here, looking at the development of the issues of equal pay, equal treatment, maternal and parental leave, part-time work as well as the burden of proof in sex discrimination cases as set out in the treaties and directives and interpreted by the Court.

2.3.1.1 The Principle of Equal Pay

The principle of equal pay was developed in the case law of the Court based on Article 119 of the Rome Treaty, later Article 141 EC Treaty, as well as the Equal Pay Directive. The Equal Pay Directive is now incorporated into the Discrimination Directive, including the case law establishing "key" principles. The case law on Article 119 of the Rome Treaty (Article 141 EC Treaty) and the Equal Pay Directive is voluminous, beginning with the *Defrenne* cases brought in the 1970's, covering a span of thirty years. Only those cases seen as principle against the background of the Discrimination Directive and development of the law are discussed here. One must, however, begin with the *Defrenne* cases and Article 119 of the Treaty of Rome.

[81] *Id.* at para. 11.
[82] *Id.* at para. 22.
[83] *Id.* at paras. 23–25.

2.3.1.1.1 THE *DEFRENNE* CASES

Historically the first and most famous cases in the area of discrimination, as well as arguably the farthest-reaching cases by the Court, both procedurally and substantively, are the *Defrenne* cases. *Defrenne (No. 1)*,[84] *Defrenne (No. 2)*[85] and *Defrenne (No.3)*[86] were brought under Article 119. In *Defrenne (No. 1)*, the question raised was whether a retirement pension in accordance to a statutory scheme was included in "pay" subject to the equal pay provisions of Article 119. In a not so promising start, the Court responded in the negative. However, in *Defrenne (No. 2),* the issue was whether the plaintiff, an airline stewardess, should receive the same pay as men employed as cabin stewards. The Court responded in the affirmative, giving Article 119 direct effect, a legal interpretation for which there was no explicit provision in the treaties. This direct effect was based on the fact that Article 119:

> [F]orms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the Treaty.[87]

This statement was made at a time when the EEC was still very much an economic cooperation with few if any avowed social objectives, and Article 119 was commonly believed to not have any direct effect. The Court went on to state that this "double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community,"[88] laying the groundwork for the fundamental rights approach taken in *Defrenne (No. 3)* and later cases.

In *Defrenne (No. 3),* plaintiff argued that her forced retirement at the age of 40 was in violation of Article 119. The issue before the Court was the scope of Article 119, but also whether any general principle existed prohibiting discrimination in the Community. The Court replied that it has repeatedly stated:

> [T]hat respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure, there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.

[84] Case C-80/70, *Gabriella Defrenne (No. 1) v. Belgian State* [1971] ECR-445, Celex No. 61970J0080. For a discussion of the role of Defrenne's lawyers, *see* O'Leary at 139 note 14 *citing* D. Wincott, *The Court of Justice and the European Policy Process* in J.J. Richardson, ed., EUROPEAN UNION, POWER AND POLICY-MAKING (London 1996) at 170–84.

[85] Case C-43/75, *Gabriella Defrenne (No. 2) v. Societe Anonyme Belge de Navigation Aerienne Sabena* [1976] 1 ECR-455, Celex No. 61975J0043.

[86] Case C-149/77, *Gabriella Defrenne (No. 3) v. Societe Anonyme Belge de Navigation Aerienne Sabena* [1978] ECR-1365, Celex No. 61977J0149.

[87] *Defrenne (No. 2)* at para. 10.

[88] *Id.* at para. 12.

> Moreover, the same concepts are recognized by the European Social Charter of 18 November 1961 and by Convention No. 111 of the International Labour Organization of 25 June 1958 concerning discrimination in respect of employment and occupation.

This reference to the European Social Charter predates its inclusion in the treaties by twenty years. As the Equal Treatment Directive was not in effect at the time of the forced retirement, the Court found that there were no remedies available to the plaintiff under Community law. The summit of the reasoning laid down by the Court in the *Defrenne* cases can be seen as reached in *Seivers* decided in 2000, where the Court states that: "The economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right, namely, a person's right not to suffer discrimination on grounds of sex."[89]

2.3.1.1.2 DEFINING "PAY"

Under the equal pay principle, the two main components are defining "pay" and defining "work of equal value." Article 119 (141(2) EC Treaty) defines pay as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer." As seen in *Defrenne (No. 1)*, the definition of "pay" determines the scope of the principle of equal pay. The Court there found that Article 119 could not be extended to include retirement pay in accordance with a statutory scheme. Since then, the Court has included almost everything but statutory pension schemes in the definition of pay, stating in *Barber* that: "With regard to equal pay for women and men, genuine transparency, permitting an effective review by the national court, is assured only if the principle of equal pay must be observed in respect of each of the elements of remuneration granted to men and women, and not on a comprehensive basis in respect of all the consideration granted to men and women."[90] The Court went on to find that it also was contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and women is based on a national statutory scheme.[91] The Court has found that the following constitute pay: Non-statutory retirement funds,[92] redundancy payments,[93]

[89] Case C-270/97, *Deutsche Post AG v. Elisabeth Sievers* [2000] ECR I-929, Celex No. 61997J0270 at para. 3.

[90] Case C-262/88, *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, Celex No. 61988J0262 at para. 4.

[91] *Id.* at para. 32.

[92] Case C-170/84, *Bilka- Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR-1607, Celex No. 61984J0170.

individual pay supplements to basic pay based on adaptability or training,[94] increments based on seniority,[95] time off with pay for a part-time employee to undertake training,[96] supplements to "heads of households,"[97] sick pay[98] and travel facilities obtainable upon retirement.[99] The Court has held that the principle of equal pay does not preclude a lump sum payment exclusively to female workers taking maternity leave to offset occupational disadvantages which may arise due to their absence from work, as their situation due to maternity cannot be compared to that of male workers.[100]

2.3.1.1.3 Defining "Work of Equal Value"

According to Article 1 of the Equal Pay Directive, the principle of equal pay for women and men as found in Article 119 means "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." One of the greatest difficulties in the application of the equal pay principle, as also seen in the other three systems examined here, is defining work of equal value. The Court in 1980 held that comparisons drawn for purposes of Article 119 should be on the basis of "concrete appraisals of the work actually performed by employees of different sex within the same establishment or service."[101] This has been extended in *Lawrence*, in which the Court, though finding in the present case that the differences in wages could not be attributed to a single source, thus Article 141 EC was not applicable, stated that nothing in the wording of the article confined it "to situations in which men and women are contemporaneously doing equal work for the same employer."[102] The new discrimination directive includes this in its preamble: "The Court of Justice has established that,

[93] *Barber* at para. 4.

[94] Case C-109/88, *Handels- og KontorfuntionWrernes Forbund i Danmark v. Dansk Arbejdsgiverforening acting on behalf of Danfoss* [1989] ECR-3199, Celex No. 61988J0109.

[95] Case C-184/89, *Helga Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-297, Celex No. 61989J0184.

[96] Case C-360/90, *Arbeitwohlfahrt der Stadt Berlin e.V. v. Monika Bötel* [1992] ECR I-3589, Celex No. 61990J0360.

[97] Case C-58/81, *Commission of the European Communities v. Grand Duchy of Luxembourg* [1982] ECR-2175, Celex No. 61981J0058.

[98] Case C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG.* [1989] ECR-2743, Celex No. 61988J0171.

[99] Case C-12/81, *Eileen Garland v. British Railway Engineering Limited* [1982] ECR I-359, Celex No. 61981J0012.

[100] Case C-218/98, *Oumar Dabo Abdoulaye and Others v. Régie Nationale des Usines Renault SA* [1999] ECR I-5723, Celex No. 61998J0218.

[101] Case C-129/79, *Macarthys Ltd. v. Wendy Smith* [1980] ECR-1275 Celex No. 61979J0129 at para. 2.

[102] Case C-320/00, *A.G. Lawrence and Others v. Regent Office Care Ltd., Commercial Catering Group and Mitie Secure Services Ltd.* [2002] ECR I-7325, Celex No. 62000J0320.

in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer."[103]

An integral part of defining equal work is job classification and evaluation. According to Article 1(2) of the Equal Pay Directive, "where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex." The Court established three criteria for job classifications in *Rummler,* stating that:

1. The criteria governing pay-rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman;
2. The use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy, constitutes a form of discrimination on grounds of sex, contrary to the Directive; and
3. In order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.[104]

In *Brunnhofer,* the Court stated that simply being in the same job classification was not *prima facie* evidence of wage discrimination, as this is only one factor of many.[105] The Court has recently ruled that an employer does not generally need to provide a special justification for using length of service as a determinant for pay when it has a disparate impact between male and female employees unless an employee can raise doubts as to its appropriateness.[106]

2.3.1.2 The Principle of Equal Treatment

The principle of equal treatment has been developed by the Court based on the Equal Treatment Directive, amended in 2002 and now incorporated in the Discrimination Directive along with the key principles as established in the cases. However, in contrast to the Equal Pay Directive, the case law was not as heavily referred to in the proposal to the Discrimination Directive, as many of the principles developed in the case law were viewed as already encompassed within the amendments made by the 2002 directive.

[103] Directive 2006/54/EC at para. 10.
[104] Case C-237/85, *Gisela Rummler v. Dato-Druck GmbH* [1986] ECR-2101, Celex No. 61985J0237 at para. 2.
[105] Case C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, Celex No. 61999J0381.
[106] *See* Case C-17/05, *B.F. Cadman against Health & Safety Executive* [2006] ECR I-, Celex No. 62005J0017.

According to Article 1 of the 1976 Equal Treatment Directive, the purpose of the directive was to put into effect the principle of equal treatment for men and women as regards access to employment, including promotion, vocational training and working conditions. Article 2(1) went on to state that the principle of equal treatment entails that there is to be "no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." A supplement was made to Article 2 by Directive 2002/73/EC defining direct discrimination, indirect discrimination, harassment and sexual harassment:

- Direct discrimination is where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation;
- Indirect discrimination is where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- Harassment is where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; and
- Sexual harassment is where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

It should be noted that this was the first time sexual harassment was expressly included in a directive.[107] The application of the principal of equal treatment under the 1976 directive was to cover selection criteria (Article 3), vocational guidance and training (Article 4) as well as grounds for dismissal (Article 5).

These individual categories have been integrated into one article in the new Discrimination Directive, Article 1 of Title I:

> The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[107] Requests for a directive concerning sexual harassment began as early as 1986 when the European Parliament passed a resolution on violence against women, European Parliament Resolution on Violence Against Women, OJ 1986 C 176/73, Celex No. 51986IP0044.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

The definitions of direct and indirect discrimination, and harassment and sexual harassment have been retained in their entirety in Article 2 of the Discrimination Directive. Article 2(2) in addition states that for the purposes of the directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instructions to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

The protections against sex discrimination have thus been expanded under the new Discrimination Directive.

2.3.1.2.1 DEFINING "SEX"

The first element that must be defined in a claim of unequal treatment based on sex discrimination is "sex." Marital status as falling within "sex" was early recognized by the Court[108] and was stated explicitly in Article 2(1) of the Equal Treatment Directive along with family status, but is not included in the Discrimination Directive. In *P v. S*,[109] the Court in 1996 held that the Equal Treatment Directive prohibited discrimination based on sex, including in the definition of "sex" transsexuals. A woman born a man was entitled to protection as a woman under the Equal Treatment Directive. However, two years later in *Grant*,[110] the Court held that the Equal Treatment Directive did not prohibit discrimination on the basis of homosexuality. The Court chose as the comparator a homosexual male and found that in the comparison, both the homosexual male and the lesbian were treated the same. Sexual orientation was not viewed by the Court to be encompassed within "sex." The Discrimination Directive explicitly prohibits discrimination on the basis of gender reassignment but not sexual orientation.

[108] *See, e.g.*, Case C-23/83, *W.G.M. Liefting and others v. Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam and others* [1984] ECR-3225, Celex No. 61983J0023, in the context of Article 141 EC Treaty.

[109] Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143, Celex No. 61994J0013.

[110] Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains* [1998] ECR I-621, Celex No. 61996J0249.

2.3.1.2.2 EXCEPTIONS TO "EQUAL TREATMENT"

Exceptions exist in the Discrimination Directive rendering the different treatment lawful. With respect to indirect discrimination, a provision, criterion or practice can be objectively justified "by a legitimate aim, and the means of achieving that aim are proportionate and necessary.[111] Positive action is also a lawful difference in treatment.[112] Member states may make allowances for difference in treatment where the sex of the employee "constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate."[113] The protection of a woman's biological condition during pregnancy and maternity is also reaffirmed as lawful discrimination in the Discrimination Directive.[114]

2.3.1.2.3 THE PROTECTION OF WOMEN

The case law of the Court in the area of protective legislation and pregnancy has been one of the most troublesome areas in Community equality law. Scholars have criticized the decisions of the Court with respect to the protection of women, pregnancy, maternity and even paternity as at best, inconsistent, and at worst, reinforcing and perpetuating a culture of the single male breadwinner, ignoring the reality of the dual income earner household and the double burdens facing women in the family and at work.[115] One example of this can be seen in one of the more controversial earlier cases, *Hofmann*.[116] The Court held that a father did not have a right to the statutory parental leave allowance given to mothers. The directive, as noted in *Johnston*, was to protect the biological interests of the mother as well as the relationship between the mother and child. The protections afforded under the Equal Treatment Directive at that time thus did not extend to men. The 2002 Equal Treatment Directive, however, specifically refers to protecting both women and men exercising their rights to parental leave. The Discrimination Directive also specifically speaks of "granting working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment,"[117] so hopefully this case is no longer

[111] Directive 2006/54/EC at Article 2(1)(b).
[112] *Id.* at Article 3.
[113] *Id.* at Article 13(2).
[114] *Id.* at para. 24.
[115] *See, e.g.,* O'Leary at 186; and Clare McGlynn, *Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy*, 7 COLUM. J.EUR. L. 241 (2001) arguing for a three-prong approach to the issue of women and work: Access to labor markets, time to care for children, and changing men to shoulder a greater part of parenting. A consistent criticism of the Court has been an underlying assumption in the case law that women are the primary family care-takers. *See also* Paskalia, *passim*.
[116] Case C-184/83, *Ulrich Hofmann v. Barmer Ersatzkasse* [1984] ECR-3047, Celex No. 61983J0184.
[117] Directive 2006/54/EC at para. 26. *See also* at para. 11.

good law under the directives and also under the focus the Court has had in recent cases.

The wholesale exclusion of women from employment positions for reasons of public safety was rejected early by the Court in 1984 in *Johnston*[118] and most recently in *Commission v. Austria.*[119] The argument in *Johnston* was that public opinion in Northern Ireland demanded that women be kept off the police force for public safety reasons. The Court found that the directive intended "to protect a woman's biological condition and the special relationship which exists between a woman and her child."[120] "Reasons of public safety" was too extensive an interpretation of the derogation to be permitted under the article. The risks faced by women and men in the case were the same. In the more recent case, *Commission v. Austria*, Austria argued that its regulations prohibiting women from underground work in mining or in high-pressure atmospheres or diving work were based on the morphological differences found on the average between women and men as placed under strain in these tasks. The Court found that this was an impermissible difference in treatment and in violation of the Equal Treatment Directive.

Dekker[121] is another groundbreaking case in which the Court held that the Equal Treatment Directive prohibited discrimination on the basis of pregnancy. The employer had no male candidates and the woman was denied the job on the basis of her pregnancy. The Court found that a male comparator was not required. As only women could be refused employment due to pregnancy, such an action was direct discrimination in violation of the Equal Treatment Directive. As it is direct discrimination, no grounds of justification could be offered by the employer.[122] The Court in *Webb*[123] found that the dismissal of a worker hired to replace a worker on parental leave, based on her own pregnancy, was also direct discrimination. Taking this line of cases further, the Court in *Tele*

[118] Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR-1651, Celex No. 61984J0222.

[119] Case C-203/03, *Commission of the European Communities v. Republic of Austria* [2005] ECR I-935, Celex No. 603J0203 (wholesale ban of women with respect to employment in underground work in mining or in a high pressure atmosphere or in diving work in violation of Articles 249 and 307 EC Treaty and Articles 2 and 3 of Directive 76/207/EEC).

[120] *Johnston* at para. 44.

[121] Case C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, Celex No. 61988J0177. *See also* Case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567, Celex No. 61993J0032.

[122] The distinction between direct discrimination, for which an objective justification cannot be proffered, and indirect discrimination, for which one can, was first set out in *Bilka.* This distinction was incorporated in the 2002 Equal Treatment Directive and the Discrimination Directive expressly. For further discussion as to the origins in the case law, *see generally* Tamara K. Hervey, JUSTIFICATION FOR SEX DISCRIMINATION IN EMPLOYMENT (Butterworths 1993).

[123] Case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567, Celex No. 61993J0032.

Danmark found that the refusal to rehire a pregnant woman on a fixed contract basis was direct discrimination.[124]

In *Busch,*[125] the Court found that an employer could not refuse to allow an employee to return to work after a parental leave on the basis of a new pregnancy. The employer argued that the plaintiff would not be able to carry out many of her duties due to the safety measures in place to protect pregnant women, and that she simply wanted to return to work in order to be eligible for a higher maternity leave allowance. The Court stated unambiguously that discrimination against women cannot be justified by the existence of measures in place to protect pregnant women, nor can financial loss as suffered by the employer justify refusing employment on the grounds of pregnancy, citing *Dekker* and *Mahlberg,*[126] even when the contract of employment is for a fixed term as in *Tele Danmark.* Perhaps most surprising is the Court's holding that as the employer may not take the employee's pregnancy into consideration for the purpose of applying her work conditions, she is not under any obligation to inform the employer she is pregnant, perhaps the most unequivocal statement as to pregnancy in all four of the systems examined in this work.[127]

2.3.1.2.4 "EQUAL TREATMENT" V. POSITIVE ACTION

The Court in *Kalanke*[128] ruled for the first time with respect to positive action in 1995, finding that a policy favoring women as to recruitment and promotion contravened Article 2(4) of 1976 Equal Treatment Directive. This ruling was seen to embody the tension found in Community law between equal treatment and equal opportunity,[129] as well as between formal and substantive equality. To understand this, one must take a step back to *Johnston,*[130] in which the Court interpreted Article 2(2) as "a derogation from an individual right laid down in the directive" of freedom from discrimination. Under this conception, equal

[124] Case C-109/00, *Tele Danmark A/S v. Handels- og KontorfunktionWrernes Forbund i Danmark (HK)* [2001] ECR I-6993, Celex No. 62000J0109.

[125] Case C-320/01, *Wiebke Busch v. Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-02041, Celex No. 62001J0320.

[126] Case C-207/98, *Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern* [2000] ECR I-549, Celex No. 61998J0207 (employer cannot rely on statute for not hiring a pregnant woman).

[127] *Busch* at para. 40.

[128] Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051, Celex No. 61993J0450.

[129] *See generally* Note, *Hellmut Marschall v. Land Nordrhein-Westfalen: Has Equal Opportunity Between the Sexes finally found a Champion in European Community Law?* 16 B.U.INT'L L.J. 423 (1998). For a discussion of the Community law regarding affirmative action in contrast with Swedish and American law, *see* Ronnie Eklund, *Gender-based Affirmative Action* in Jan Rósen, ed., LEX FERENDA – RÄTTSVETENSKAPLIGA STUDIER AV FORSKARE VID STOCKHOLMS UNIVERSITET NR. 50 (Stockholm 1996).

[130] *Johnston* at para. 36.

treatment is a fundamental individual right that must be respected.[131] The right to equal opportunity was perceived as arising from a group right, a derogation from the fundamental individual right to equal treatment enshrined in Article 2(1) of the Equal Treatment Directive. According to its Article 2(8), the Member States had the right to effect measures to promote equal opportunity for women and men, in particular by removing existing inequalities which affect women's opportunities. The Court in *Kalanke* stated, however, as that the exception is a derogation of an individual right, it must be interpreted strictly.[132] Following this derogation model of equal treatment, the Court rejected the statutory scheme in *Kalanke,* finding that one type of discrimination simply cannot take the place of another.

In *Marschall,* the Court reconfirmed its holding that positive discrimination, a form of sex discrimination, was a derogation from an individual right and that national rules that guarantee women absolute and unconditional priority overstep the limits of the exception.[133] The Court allowed for affirmative action that is not absolute or unconditional, in this case upholding the statute giving preference to women in a tie-break situation, but only if a savings clause exists allowing for a different result in certain cases. The Court's positions in *Kalanke* and *Marschall* were reconfirmed in *Badeck,* which concerned a German equality law designed to ensure equal access for women and men to public sector posts.[134] Where women were under-represented in a particular post or grade, the women's advancement plan was then to provide a target of filling half the posts by women. This did not entail an automatic selection of the female candidates, but where a woman and man were equally qualified for a job vacancy, the woman would be chosen unless there were social factors in favor of the man. The plan also provided for a minimum percentage of female academic posts equal to the percentage of female graduates in the relevant academic discipline, as well as that half of all the training places would be allocated to women where they were under-represented. These rules were challenged under Articles 2(1) and (4) of the Equal Treatment Directive. The Court found that the women's advancement plan was not unlawful. Where women are under-represented in a particular sector, and a male and female candidate have equal qualifications, then there is nothing unlawful about a rule that prefers the woman "*provided that the rule guarantees that candidatures are the subject of an objective assessment which takes*

[131] *See* Luisa Antoniolli Deflorian, *The Dilemma of Affirmative Actions: A Comparison between European Community Law and the American Experience*, in Iain Cameron & Alessandro Simoni eds., DEALING WITH INTEGRATION (Iustus 1996) at 87, 106–110.
[132] *Kalanke* at para. 21.
[133] Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363, Celex No. 61995J0409 at paras. 22–23.
[134] Case C-158/97, *Georg Badeck and Others* [2000] ECR I-1875, Celex No. 61997J0158.

account of the specific personal situations of all candidates" (italics added).[135] It was on this requirement that the Swedish scheme in *Abrahamsson* fell.[136]

In *Abrahamsson,* the Court found that Articles 2(1) and (4) of Equal Treatment Directive and 141(4) EC Treaty precluded national legislation under which a candidate for a public post belonging to the under-represented sex, and possessing sufficient qualifications for that post, *must* be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments as set forth in Swedish constitutional law. The scheme in question was a Swedish regulation promulgated in an attempt to redress the imbalance of women in higher academic positions. The Court also stated, however, that these same provisions did not preclude a national rule under which a candidate belonging to the under-represented sex may be granted preference over a candidate of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, and the candidatures are subjected to an objective assessment taking into account the specific personal situations of all the candidates.[137] In a similar vein, the Court has stated in other cases that the result pursued by the directive is substantive, not formal, equality.[138]

The new directive specifically addresses the issue of positive action, stating that the prohibition as to sex discrimination should be "without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex"[139] and that in accordance with the principle of equal treatment as espoused in Article 141(4) of the Treaty, Member States are not prevented "from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."[140] In addition, Article 3 states that Member States may "maintain or adopt measure within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life."

[135] *Badeck* at para. 38.
[136] Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* [2000] ECR I-5539, Celex No. 61998J0407.
[137] For a discussion of this case against the background of Swedish law, *see* Lotta Lerwall, KÖNSDISKRIMINERING – EN ANALYS AV NATIONELL OCH INTERNATIONELL RÄTT (Iustus 2001) at 382.
[138] C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v. Evelyne Thibault* [1998] ECR I-2011, Celex No. 61995J0136 at para. 26 and *Mahlburg* at para. 26.
[139] Directive 2006/54/EC at para. 21.
[140] *Id.* at para. 22.

2.3.2 The Pregnancy Directive 92/85/EEC

The Pregnancy Directive was not incorporated into the Discrimination Directive, however, the definition of discrimination as in the new directive includes "any less favorable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC."[141] The Pregnancy Directive sets out several different protections for women who are pregnant, have recently given birth or are breastfeeding. Physical protections from work environment risks are required in Articles 3–6, as are changes in work schedules as required by a mother in Article 7. Each Member State under Article 8 is to insure a period of continuous maternity leave of 14 weeks with no requirements for pay provisions, of which two weeks are to be mandatory. The mother is to be given time off without loss of pay for antenatal examinations under Article 9. Article 10 prohibits the dismissal of workers during a pregnancy and subsequent maternal leave, overlapping the protections found in the Equal Treatment Directive and case law. Employment rights are to be retained according to Article 11, again overlapping with the Equal Treatment Directive. Last, according to Article 12, the Member States are to introduce such measures in the legal systems necessary to defend these rights.

As the Pregnancy Directive is a fairly more recent directive, not as many cases have been brought under it as under the Equal Treatment Directive. *Busch* and *Commission v. Austria* as discussed above were both brought under both directives. The major emphasis in the analysis in these cases appears to be the equal treatment principle, the Court appearing to prefer to rule under the established principles. Two cases can be seen as decided somewhat under the Pregnancy Directive, *Boyle*[142] and *Lewen*.[143] In *Boyle*, several issues were raised, the first whether an employment contract could provide for a parental leave allowance supplemental to the statutory allowance on the condition that the parent return to employment with the employer for at least one month. The Court found that this was not in violation of the Equal Pay Directive or the Pregnancy Directive. The Court found that a clause prohibiting a woman from taking sick leave during the minimum 14-week maternity unless she returned to work and terminated her maternity leave, was in violation of the Pregnancy Directive. The Court stated further, however, that should this occur in a supplemental period of maternity leave, it would be compatible with the directive. The issue in *Lewen* was whether a Christmas bonus requiring the employee to be in active employment when awarded was in violation of the Equal Pay Principle or the Pregnancy

[141] *Id.* at Article 2(2)(c).
[142] Case C-411/96, *Margaret Boyle & Others v. Equal Opportunities Commission* [1998] ECR I-6401, Celex No. 61996J0411.
[143] Case C-333/97, *Susanne Lewen v. Lothar Denda* [1999] ECR I-7243, Celex No. 61997J0333.

Directive. The Court held the Christmas bonus to fall within the parameters of pay as in Article 141 EC Treaty, but not within the Pregnancy Directive.

2.3.3 The Parental Leave Directive 96/34/EC

The Parental Leave Directive is a framework directive establishing "minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents."[144] This directive is also not incorporated into the Discrimination Directive, but referenced therein. Parental leave is to be granted for a period of at least three months to be taken up to when a child reaches the age of eight years. The right is to be individual,[145] and to be granted on a non-transferable basis in accordance with Clause 2(2). That this right is an individual right has been reconfirmed recently by the Court[146] and reinforced in the Discrimination Directive.[147] A qualification time of one-year of employment is permissible, but it cannot impede free movement, as held in *Öberg*,[148] brought under both the Parental Leave Directive and Article 39 EC.

The Court in *Öberg* found that the failure to take into account employment as staff within the European Communities in the national sickness and parental leave schemes was an unlawful impediment to free movement. Plaintiff had been on staff with the European Court of Justice for five years and then returned to Sweden and applied to take parental leave. The Swedish governmental authority found that he was not eligible for the parental leave cash benefit as he did not fulfill the qualification requirement of employment in Sweden for a certain period. Sweden argued that these qualification periods were necessary as it had a more generous parental leave plan than other Member States.[149] The Court found that Sweden had simply made assertions as to the undue burden without producing any evidence, thus Sweden did not meet the burden of proof and the

[144] Parental Leave Directive 96/34/EC at Clause 1.

[145] The individualization of the parental leave benefit is seen as a step forward, compare Essi Rentola, *Coordinating the Social Security of Women Moving between Member States* in Nordic Council, PERSPECTIVES OF EQUALITY – WORK, WOMEN AND FAMILY IN THE NORDIC COUNTRIES AND EU (Copenhagen 2000) at 315 in which the author discusses Case C-275/96, *Anne Kuusijärvi v. Riksförsäkringsverket* [1998] ECR I-3419, Celex No. 61996J0275, where the ECJ found that the Swedish parental leave benefit was a family benefit within the meaning of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149/2, Celex No. 31971R1408.

[146] Case C-519/03, *Commission of the European Communities v. Grand Duchy of Luxembourg* [2005] ECR I-3067, Celex No. 62003J0519.

[147] Directive 2006/54/EC at paras. 26 and 27.

[148] Case C-184/04, *Ulf Öberg v. Försäkringskassan, Länskontoret Stockholm, formerly Stockholms läns allmänna försäkringskassa* [2006] ECR 00, Celex No. 62004J0185. *See also* Case C-137/04, *Amy Rockler v. Försäkringskassan, formerly Riskförsäkringsverket* [2006] ECR 00, Celex. No. 62004J0137.

[149] The Swedish qualification periods were removed through the amendments to the law in July 2006 discussed below.

provision was unlawful. The Court consequently did not need to address the issues raised under the Parental Leave Directive. In another recent case, the Court found that the Parental Leave Directive was not applicable as plaintiff was on maternal, not parental, leave.[150]

2.3.4 The Part-Time Work Directive 97/81/EC

The part-time work directive is to address discrimination against part-time workers and improve the quality of part-time employment.[151] It is also to facilitate the development of part-time work on a voluntary basis and contribute to the flexible organization of working time in a manner taking into account the needs of employers and workers. Part-time workers are not to be treated in a manner less favorable than comparable full-time workers with respect to employment conditions solely because they work part-time, unless different treatment is justified on objective grounds, and where appropriate, the principle of *pro rata temporis* is to apply.[152] To the extent possible, requests to go from full-time to part-time and vice versa are to be facilitated.

As this also is one of the more recent directives, the case law again is rather sparse. Three recent cases are *Wippel*,[153] *Steinicke*[154] and *Edeltraud*.[155] The first issue in *Wippel* was whether a fixed term contract worker, for whom hours of work and the organization of working time were dependent upon quantitative requirements in terms of available work, and determined only on a case-by-case basis by agreement between the parties, comes within the Equal Treatment and Part-Time Work Directives. The Court found that such workers come within the scope of the Part-Time Work Directive if they fulfill the following criteria:

- They have a contract or employment relationship as defined by the law, collective agreement or practices in force in the Member State;
- They are employees whose normal working hours, calculated on a weekly basis or on average over an employment period which may be up to a year, are less than those of a comparable full-time worker within the meaning of Clause 3(2) of that Framework Agreement; and

[150] *See* Case C-294/04, *Carmen Sarkatzis Herrero v. Instituto Madrileno de la Salud (Imsalud)* [2006] ECR-00, Celex No. 62004J0294.
[151] For a discussion of the history of the Part-Time Work Directive, *see* Ronnie Eklund, *"The Chewing Gum Directive" – part-time work in the European Community* in Ronnie Eklund, *et al.* ed., FESTSKRIFT TILL HANS STARK (Jure 2001) at 59.
[152] The Part-Time Work Directive 97/81/EC at Clause 4.
[153] Case C-313/02, *Nicole Wippel v. Peek & Cloppenburg GmbH & Co. KG* [2004] ECR I-9483, Celex No. 62002J0313.
[154] Case C-77/02, *Erika Steinicke v. Bundesanstalt fur Arbeit* [2003] ECR I-09027, Celex No. 62002J0077.
[155] Case C-285/02, *Edeltraud Elsner-Lakeberg v. Land Nordrhein-Westfalen* [2004] ECR I-5861, Celex No. 62002J0285.

- In regard to part-time workers working on a casual basis, the Member State has not, pursuant to Clause 2(2) of the Framework Agreement, excluded them, wholly or partly, from the benefit of the terms of that agreement.[156]

The second issue in *Wippel* was whether a law mandating a maximum 40-hour week and 8-hour day is in violation of either of these directives. The Court answered in the negative. The third issue was whether the Part-Time Work Directive precluded contract work on the above basis, to which the Court again answered in the negative.

In *Steinicke*, the Court found that the part-time pension scheme was within the ambit of the Equal Treatment Directive, thus there was no need to consider whether the Part-Time Work Directive was applicable.[157] According to the statutory scheme, part-time workers were not eligible for a part-time pension scheme for older employees. As women in Germany were over 90 % of the part-time workers in the public sector, the provision resulted in *de facto* discrimination against female workers in violation of the Equal Treatment Directive. In *Edeltraud*, the Court found that requiring the same amount of additional hours before being entitled to remuneration was indirect discrimination against female teachers employed part-time in violation of Article 141 EC.[158]

2.3.5 The "Soft Law" of the EU

In addition to the treaties and secondary law as discussed above, there are instruments which are not considered binding, categorized instead as "soft law" such as Council Resolutions and Commission Recommendations. Several such instruments have been issued with respect to sex equality beginning with the Council Resolution of 7 June 1984 on action to combat unemployment amongst women.[159] Later that same year, the Recommendation on the Promotion of Positive Action for Women[160] was issued, in which the Council recommended that the Member States take positive action "designed to eliminate existing inequalities affecting women in working life … including safeguarding women's dignity at work."[161] Three years later, the Commission issued Recommendation of 24 November 1987 on vocational training for women,[162] urging Member States to

[156] *Wippel* at para. 40.
[157] *Steinicke* at para. 52.
[158] *Edeltraud* at para. 19.
[159] Council Resolution of 7 June 1984 on action to combat employment amongst women, OJ 1984 C 161/4, Celex no. 31984Y0621(02).
[160] 84/635/EEC: Council Recommendation of 13 December 1984 on the promotion of positive action for women, OJ 1984 L 331/34, Celex No. 31984H0635.
[161] The issue of dignity at work is important here, as it is the building blocks towards developing a EU policy on sexual harassment in the workplace.
[162] 87/567/EEC: Commission Recommendation of 24 November 1987 on vocational training for women, OJ 1987 L 342/35, Celex No. 31987H0567.

encourage the participation of young and adult women in training schemes, particularly for occupation where women are under-represented.

Several resolutions and recommendations were also issued in the 1990's, the first being Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work.[163] This resolution directly addresses the issue of sexual harassment at the workplace, finding it to be a serious problem and an "obstacle to the proper integration of women into the labour market." This Council Resolution was confirmed and reinforced in Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work.[164] This was followed by a Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment.[165] These documents predate the amendments made in 2002 to include sexual harassment within the protections given in the Equal Treatment Directive by over ten years.

Sexual harassment was not the only issue addressed in the soft law in the 1990's, which can be seen as following (or perhaps more appropriately, spearheading) developments within Community law in general. The next issue tackled was childcare and parental leave, with the Council Recommendation of 31 March 1992 on child care urging Member States to "take and/or progressively encourage initiatives to enable women and men to reconcile their occupational, family and upbringing responsibilities arising from the care of children."[166] The Recommendation anticipated the Parental Leave directive by four years. The promotion and participation of women in the labor market are the themes of the final three soft law documents mentioned here, Council Resolution of 22 June 1994 on the promotion of equal opportunities for women and men through action by the European Structural Funds,[167] Resolution of the Council and of the representatives of the Governments of the Member States meeting with the Council of 6 December 1994 on equal participation by women in an employment-intensive

[163] Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work, OJ 1990 C 157/3, Celex No. 31990Y0627(05).
[164] 92/171/EEC: Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, OJ 1992 L 49/1, Celex No. 31992X0131.
[165] Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment, OJ 1992 C 27/1, Celex No. 31992Y0204(01).
[166] 92/241/EEC: Council Recommendation of 31 March 1992 on child care, OJ 1992 L 123/16, Celex No. 31992X024 at Article 1.
[167] Council Resolution of 22 June 1994 on the promotion of equal opportunities for men and women through action by the European Structural funds, OJ 1994 C 231/1, Celex No. 31994Y0820(01).

economic growth strategy within the European Union,[168] as well as Council Resolution of 27 March 1995 on the balanced participation of women and men in decision-making[169] extending to all spheres of life. The Commission issued "A code of practice on the implementation of equal pay for work of equal value for women and men"[170] in 1996 giving guidance in studying and assessing pay structures.

Few new recommendations or resolutions have been issued by the Council or Commission since 1996 with respect to issues of sex discrimination. This period of inactivity coincides with the adoption of the Maastricht Treaty, raising the question of whether "soft law" in this area is necessary now that explicit treaty provisions create a social policy platform.

2.4 The Enforcement Role of the Commission

The Commission, Member States and individuals can bring actions with respect to the implementation of Community law. The Commission, however, in contrast with Member States and individuals, is charged with enforcing community law. An example of this system at work can be seen in the case of Sweden and its 1995 Parental Leave Act.

Sweden had revised its Parental Leave Act[171] in 1995 to make the changes it deemed necessary to be in conformance with the Pregnancy Directive 92/85/EEC. The right to a transfer and leave due to certain conditions during a pregnancy was extended for reasons of health and safety to women recently giving birth. The unconditional right to six weeks of leave women had immediately prior to or after the birth of a child were both extended to seven weeks. However, Sweden did not make the leave mandatory, but instead, kept it as a right. The specific requirement of an obligatory two-week maternal leave as stated in the directive had been considered unnecessary in Sweden based on the findings of the Swedish committee.[172] Nothing in the Swedish labor market indicated to the committee that women, who had recently given birth or who were nursing, had difficulty in taking maternal leave under the current legislative scheme. The requirement of a

[168] Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council of 6 December 1994 on equal participation by women in an employment-intensive economic growth strategy within the European Union, OJ 1994 C 368/3, Celex No. 41994X1223.

[169] Council Resolution of 27 March 1995 on the balanced participation of men and women in decision-making, OJ 1995 C 168/3, Celex No. 31995Y0704(02).

[170] Communication from the Commission – A Code of Practice on the Implementation of Equal Pay for Work of Equal Value for Women and Men, COM/96/0336 Final, Celex No. 51996DC0336.

[171] *Föräldraledighetslag* (SFS 1995:584), Prop. 1994/95:207 *Ny föräldraledighetslag m.m.*, Bet. 1994/95:AU16, Rskr. 1994/95:364.

[172] SOU 1994:41 at 195.

mandatory maternal leave was considered foreign and unmotivated with respect to the view of women taken by Swedish legislation as a whole. Ninety-eight percent of all women having children took leave in connection with the birth of a child, and the remaining two percent were assumed to take sick leave instead. A Swedish practice, that women who have recently given birth take maternal leave, was found to exist by the Committee. A mandatory requirement was viewed as unnecessary to fulfill the requirements of the directive, and the present legislation was deemed sufficient.

The European Commission in accordance with Article 226 EU Treaty[173] gave formal notice to Sweden in December of 1998 for failure to legislate a mandatory two-week maternal leave in compliance with Article 8 (2) of the Pregnancy Directive. As support for its interpretation of the need for mandatory legislation to comply with Article 8.2, the European Commission stated:

> The two weeks of mandatory maternal leave are necessary for the health of the mother and the child, and to secure and protect against the pressuring of women to work until the last minute or to return to work too early. They also guarantee that women wishing to work late into their pregnancy, or to return immediately to work, must be away at least two weeks due to health reasons.[174]

In its response to the Commission dated 25 February 1999, the Swedish Government argued that according to the Swedish legislative scheme, an employer cannot deny an employee the right to maternal leave for a period of up to fourteen weeks. The efficacy of the Swedish legislation, the Government argued, was demonstrated by the fact that the practice exists in Sweden that women who have recently given birth utilize their right to take maternal leave and Sweden fulfilled the requirements of the Directive.

The Commission responded on 6 August 1999 with a reasoned opinion in accordance with Article 226 EU Treaty, repeating verbatim the reasons given above for the mandatory nature of the leave. In addition, the Commission rejected Sweden's argument that the directive was implemented through practice, relying on *Commission v. The Netherlands*[175] and *Commission v. France*[176] for the proposition that a practice mirroring the protections mandated by a directive does not excuse the omission of legislating the protection. The Commission argued that legislation was required to insure that individual persons are conscious

[173] Formerly Article 169 of the Treaty of Rome.
[174] Letter dated 30 December 1998 from Pádraig Flynn, Member of the European Union's Council, directed to Swedish Minister Anna Lindh.
[175] Case C-339/87, *Commission of the European Communities v. The Kingdom of the Netherlands* [1990] ECR I-851, Celex No. 61987J0339.
[176] Case C-167/73, *Commission of the European Communities v. French Republic* [1974] ECR-359, Celex No. 61973J0167.

of their rights and able to assert them. As a result, the Commission found Sweden still to be in violation of the Directive. In the response to the reasoned opinion submitted by the Swedish Government on 30 September 1999, Sweden stated that Swedish legislation created the right for women, not the obligation, of a maternal leave. However, as the Commission found Sweden to be in violation of the directive, a legislative proposal would be drafted in the fall of 1999, submitted to the Parliament in March of 2000 and enacted as law by 1 July 2000.[177] This gives an example of the enforcement power that can be exerted by the Commission with respect to Community law.[178]

2.5 Gender Mainstreaming and the EU

The EU has the specific mission to mainstream equality between women and men in all of its own internal activities.[179] Mainstreaming is defined as the systematic integration of gender equality into all systems and structures, policies, programmes, processes and projects, into ways of seeing and doing, into cultures and their organizations.[180] It is to identify the ways in which existing systems and structures are "male-centered," unintentionally or subconsciously, and to neutralize the gender bias.[181] Gender mainstreaming is an analysis of gender taking a long-term approach, used as a complement and/or measurement of equal treatment efforts. Gender statistics, indicators and benchmarks, as well as statistics disaggregated by sex, play an essential role as tools in promoting gender equality, monitoring the progress in implementing the gender dimension in different policy fields, and towards the goal of equality between women and men.[182]

[177] *Lag* (SFS 2000:580) *om ändring i föräldraledighetslagen (1995:584),* Prop. 1999/2000:87 *Obligatorisk mammaledighet*, Bet. 1999/2000:AU8, Rskr. 1999/2000:231.

[178] For the argument that Sweden would have prevailed against the Commission if it had litigated the issue of whether a practice can be seen as implementing the directive, *see* Ronnie Eklund, *Obligatorisk mammaledighet – Nytt vin i gamla läglar,* in Ann Numhauser-Henning, NORMATIVA PERSPEKTIV – FESTSKRIFT TILL ANNA CHRISTENSEN (Lund 2000) at 59.

[179] Article 3(2) EC Treaty. The Commission started work on gender mainstreaming following the 1995 United Nations Women's Conference in Beijing in which gender mainstreaming first came to prominence. This was the focus behind the European Commission's Framework Strategy on gender equality 2001–2005.

[180] Teresa Rees, MAINSTREAMING EQUALITY IN THE EUROPEAN UNION (London Routledge 1998) at 46.

[181] Teresa Rees, *Gender Mainstreaming: Misappropriated and Misunderstood?* Report presented at the Department of Sociology, University of Sweden, 21 Feb. 2002.

[182] This description and more information as to gender mainstreaming can be found at *Gender Mainstreaming, General Overview*, available at: http://ec.europa.eu/employment_social/gender_equality/gender_mainstreaming/general_overview_en.html.

In addition to the above-mentioned tools, certain organizational prerequisites are considered to facilitate a successful implementation of gender mainstreaming. These are:

- A legally backed, public duty to promote equality;
- Appropriate institutional arrangements;
- Awareness raising;
- Training;
- Expertise;
- Reporting mechanisms;
- Commitment from the top of the organization;
- Incentives to "build ownership";
- Sanctions; and
- Resources.[183]

One report examining science policies using a gender mainstreaming approach identified the existence of a "scissors' effect" in all the Member States.[184] Regardless of EU Member State, profession or level of education, and regardless of the fact that a majority of women existed at the entry level positions, the higher the position, the greater the number of men holding them until finally, the number of men becomes the majority at the highest positions, crossing over the number of women which is on a declining slope, creating a scissors' effect.

Key policy areas in which gender mainstreaming is to be conducted include the employment and labor market, gender pay gap, gender balance in decision-making, reconciliation between work and private life, social inclusion and social protection, structural funds, migrant women, men's role in promoting gender equality, education and training, women and science, gender budgeting, development cooperation, gender equality at the international level and gender based violence and trafficking in women.[185] The European Commission has issued "A

[183] Rees, Report at 11.

[184] Report from the European Technology Assessment Network ("ETAN") Expert Working Group on Women and Science, issued by the European Commission, Research Directorate-General, SCIENCE POLICIES IN THE EUROPEAN UNION, PROMOTING EXCELLENCE THROUGH MAINSTREAMING GENDER EQUALITY (2000) at 13, available at: ftp://ftp.cordis.europa.eu/pub/improving/docs/g_wo_etan_en_200101.pdf.

[185] A group of Commissioners on Equal Opportunities for Women and Men was established in 1995 with the aim of achieving a cross-sectoral approach to gender equality. The group, now called the "Fundamental Rights, Anti-discrimination and Equal Opportunities Group," has the mandate to:

> [D]evelop policy and ensure the coherence of action taken by the Commission in the areas of fundamental rights, combating discrimination, equal opportunities, equality between women and men, and the social integration of minorities; and

Roadmap for Equality between Women and Men for 2006–2010"[186] in which efforts with gender mainstreaming are cited as a basis for the progress that has been made to date with respect to sex discrimination.

The duty to internally gender mainstream activities within the EU has been expanded to the Member States in the Discrimination Directive. The Directive contains an explicit duty now in Article 29, "Gender Mainstreaming," for Member States to "actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive."

2.6 Equal Access to Justice Issues within Community Law

Equal access to justice issues have been identified in this work as the remedies available under the law, the allocation of legal costs and fees, as well as the statute of limitations. Community law, however, has been more focused on the implementation and harmonization of substantive laws in the national Member States' systems, allowing the Member States fairly extensive freedom in the avenues chosen. The vulnerability that arises with respect to EU law is that it is dependent upon the interpretation and implementation by the Member States.

A parallel can be detected to the development of the substantive law in the area of sex equality with respect to the concern that the implementation of Community law provides true avenues of recourse for the individual, with the Court again taking an early lead in the case law. As the social basis in the treaties has grown stronger, the scope of the directives has expanded with stronger and greater protections, as seen ultimately in the Discrimination Directive, codifying both previous directives and principles as established in the case law of the Court. A similar progression has occurred with respect to the implementation in the Member States as to these directives. The Court demonstrated early a desire to insure that the rights granted could be enforced by individuals and that the

---

[E]nsure that the gender equality dimension (or *the dimension of equality between women and men*) is taken into account in the framework of all relevant Community policies and actions, in accordance with Article 3, paragraph 2 of the Treaty.

This decision at the political level is reinforced through the creation of the Inter-Service Group on Gender Equality, whose main task is to develop the future gender mainstreaming activities in all Commission services, through the formulation of work programmes and the monitoring of their implementation. The High Level Group on gender mainstreaming is an informal group of high-level representatives responsible for gender mainstreaming at the national level in the Member States.

[186] *See* Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – A Roadmap for equality between women and men 2006–2010, Celex No. 52006DC0092, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0092:EN:NOT.

procedural laws of the Member States ensured true remedies for failures to follow or implement Community law. In *Von Colson*,[187] the Court found that the Equal Treatment Directive required that the sanction chosen by the Member State be such as to guarantee a real and effective legal protection.

The original version of the 1975 Equal Pay Directive simply stated in Article 6 that the member states were to "in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed." The Burden of Proof Directive was issued by the Council in 1997, after a finding by the Council that "the aim of adequately adapting the rules on the burden of proof has not been achieved satisfactorily in all Member States."[188] It was adopted as a response to issues arising in the case law and also as a further strengthening of the efforts in combating sex discrimination, applicable to all the sex discrimination directives discussed above except the Part-Time Work Directive, namely the Equal Pay Directive, the Equal Treatment Directive, the Pregnancy Directive and the Parental Leave Directive. Under the directive, the burden of proof according to Article 4 shifts to the respondent upon plaintiff "showing facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment." This directive is now incorporated in the Discrimination Directive.

The recognition of the need for adequate procedural guarantees as well as remedies is expressed even more strongly in the Discrimination Directive: "The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment" and that Member States are to provide for effective, proportionate and dissuasive penalties for breaches of the obligation under this Directive.[189] Title III of the Discrimination Directive includes explicit paragraphs concerning not only the burden of proof, which has remained the same as under the Burden of Proof directive, but also defense of rights as well as compensation or reparation. The Member States are to insure according to Article 17 that all persons who consider themselves wronged by failure to apply the principle of equal treatment to them have possible recourse to judicial proceedings for the enforcement of the obligations under the directive. The Member States under Article 18 are also to introduce such national legal measures:

[187] Case C-14/83, *Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* [1984] ECR-1891, Celex No. 61983J0014.
[188] Directive 97/80/EC at para. 20.
[189] Directive 2006/54/EC at paras. 29 and 35 respectively.

> [A]s are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

The first of the aspects as to access of justice, remedies, has now been expressly addressed in the Discrimination Directive. The issue of statutes of limitations is also addressed, but in the negative, in that the defense of rights paragraphs according to Article 17(3) are to be without prejudice with respect to national rules relating to time limits for bringing actions. In general, however, the statute of limitations in a member state cannot unduly impede an individual from asserting her rights as seen in the UK case discussed in Chapter Four. The allocation of attorney's costs and fees is not addressed in the new directive.

2.7 The Discourses within EU Sex Discrimination Law

The Community law as described above is somewhat problematic with respect to comparative law as the nature of the union itself is unique in Western legal history. It is not a nation, as seen from the problems of status as signatory to the European Convention on Human Rights, but it is now much more than simply an economic union, yet still not a federation. The EU's status, or lack thereof, is not an insurmountable hurdle in this comparison, however, particularly if the system approach is taken, as a nation state is not necessarily required, but rather a system of law.

The texts of the EU, the treaties, directives and case law have been discussed. With respect to sex discrimination, it has been clear that there has been a fairly straightforward development towards stronger protections with greater effect. Based on Article 119, the Court began to discuss freedom from discrimination as a fundamental right based on the treaties and the constitutional traditions of the Member States. In turn, the treaties began to evidence a more explicit social platform, culminating now in the proposed Constitution. The directives also followed this pattern, initially with terse, rather free instructions to the Member States as to implementation, to the adoption of the burden of proof directive, regulating territory that had previously been seen as solely within the jurisdiction of the Member States, the procedural rules as to evidence at trial, to the strengthened 2002 Equal Treatment Directive, and ultimately, to the Discrimination Directive, incorporating the directives and case law at the same time as it has broadened the mandate to the Member States to include gender mainstreaming, dissemination of information, defense of rights as well as effective and dissuasive compensation and reparation.

The institutions have also been explored above, the Court in issues of sex discrimination being the primary actor historically followed by the Commission and Council, with the Parliament coming up in parity as it gains in legislative power. The community within which these actors participate is the Union itself, but also as within the Member States, spanning almost the entire range of European countries and legal systems and cultures, from the Nordic countries which are seen as having their own unique legal system, to the Germanic and Roman influenced systems, and finally the common law system as found in the United Kingdom. The need to find broad solutions that can be enacted across this panoply of systems has arguably led to certain of the inconsistencies that can be found in the treatment of sex discrimination in the case law and in the directives. As in most systems of democratic governance, compromises are reached. Finally, the evolution of the discourse as to sex discrimination has been shown, beginning as a need to address trade imbalances and social dumping, to the ECJ recently holding that the economic concerns must take a second place to the fundamental rights at issue. In line with this development, a development in the approach taken towards the role of women and men within the family is occurring, with one of the more recent directives including and encouraging states to provide a period of parental leave specifically for men, showing a movement from a biological to a gendered understanding of parenting. These developments are the impetus for the statutory amendments with respect to issues of discrimination that are seen in the next two chapters concerning the Swedish and United Kingdom legal systems.

The Discrimination Directive clearly demonstrates many of the progressions as discussed above: From simply an economic union to a structure of governance very much concerned with human rights, from a weak to a strong European Parliament and also from a biological understanding of women's roles to greater inclusion of fathers and a shared responsibility in the home. In addition, there is a greater emphasis on the need for procedural guarantees for the exercise of rights, as clearly demonstrated by the inclusion of the paragraphs concerning defense of rights as well as real and effective compensation. The latter is a progression traceable also in the national systems of the United Kingdom and the United States with respect to discrimination issues.

Chapter Three: Sex Discrimination, Parental Leave and the Swedish Model

Two pieces of legislation form the platform for combating unlawful sex discrimination in Sweden, the 1991 Equal Treatment Between Women and Men Act and the 1995 Parental Leave Act. Both of these acts have their direct roots in the 1970's. However, the origins of parental leave are actually found at the end of the nineteenth century in the protective legislation enacted with respect to women and children. The movement for equality between the sexes in Sweden became intertwined early with the movement of labor, with a conscious decision made by the labor unions in the beginning of the 1900's to work for the rights of all workers and not just specific groups, namely women. This somewhat neutral stance took a more negative turn in the mid-1900's at the same time as the "Swedish Model" was put into place as a resolution mechanism for labor issues. The 1970's marks the decade in which encouraging women to work became a central focus, with efforts toward creating *jämställdhet*, equality between the sexes, at both work and home. Since the passage of the original 1979 Equality Treatment Act and the 1976 Parental Leave Act, the following decades have been spent making adjustments to these acts in attempts to eradicate continuing discrimination against women, to be in conformance with Community law, and to a certain degree, arguably in counterpoint to the jurisprudence of the Swedish Labour Court. The objective has been women having access to work, and the belief that discrimination against women will be eradicated if the responsibilities in the home are shared equally between men and women. Employers then will be forced to different patterns of behavior if men make the same demands in the work place concerning balancing work and family as those presently required mainly by women.

Among the reasons for Sweden maintaining a top position with respect to sex equality in the international arena is the social welfare system that has been created, including the availability of day care for children, health care as well as the

number of women participating in politics.[1] High degrees of both vertical and horizontal occupational segregation, however, still remain. This balance between success and persisting problems is reflected in the efforts that have been made both historically and currently with respect to the Swedish legislation addressing the needs of women at work, with the main emphasis on facilitating women's work and not on discrimination *per se*. The historical developments leading to, as well as the current status of, these two acts and the Swedish model are presented next, including pending legislative proposals. An overview of the Swedish Labour Court and its case law taking up discrimination and parental leave issues is given separately, in contrast to the presentations of the EU, UK and US systems. This is motivated by the perception of the Swedish Labour Court as to its role, which is not to further develop the law in the area of discrimination as the courts in these other systems perceive their task, but rather simply to "apply" the law. The presentation of the case law is followed by the origins and role of the Swedish Equal Opportunity Ombudsman, *JämO*. The fifth section of this chapter focuses on the Swedish Model, the social partners comprising the employer and employee organizations, as well as the collective agreements that have been reached, particularly regarding the issue of balancing family and work. Last, a discussion of equal access to justice issues followed by the discourses discernible from the actions and interactions of these institutions within the Swedish Model summarizes this chapter.

3.1 The Historical Background of Women's Legal Rights and the Development of the Swedish Model

An overview of the historical developments of the Swedish Model of labor law as well as the developments in the legal rights of women is necessary to understand the system currently in place in Sweden regarding labor law in general and discrimination specifically. Employment legislation historically has been considered alien to the Swedish Model as set out in the *Saltsjöbads* Agreement in 1938. The State is to be neutral with respect to such issues, and when legislation has been passed, it has been almost a secondary source of law, as the social partners historically have been granted significant leeway to opt out of it through collective

[1] Even this latter statistic can be viewed with a certain degree of skepticism, with women absent from many of the top and most powerful political positions in Sweden. In a survey conducted by one of Sweden's leading newspapers in 2004, six of ten of the 155 of 158 female members of parliament felt that they had been discriminated against based on their sex in the form of information being withheld, being kept out of decision-making processes or being made invisible, or in the form of negative comments by male colleagues including "little woman, you are so cute when you are angry" or "you understand that we need young women to look at." *See Sex av tio i riksdagen förtrycks – Undanhållande av information och osynliggörande vanligt visar SvD:s granskning,* SvD, 8 March 2004 at 1, 6 and 7.

agreements. This also explains why certain areas of labor and particularly employment law, such as minimum wages and redundancy benefits, are not regulated by statute.[2] Such issues have been in the hands of the social partners to regulate in accordance with the Swedish Model, and the State is considered to have no role to fulfill in these issues. This relationship between the State, legislation, the social partners and collective agreements can only be understood against its historical development. This model, strongly entrenched in a system anchored in the 1930's, has had difficulties dealing with the issue of discrimination, at first fighting any legislative regulation of the question at all. Even after concessions by the social partners as to the appropriateness of legislation, remnants of this attitude remain.[3]

Despite this general reluctance to regulate labor and employment issues, protective legislation regarding women and children began to be enacted already in 1900. Swedish women tentatively began their emancipation from the legal custody of fathers and husbands in the 1860's, and in line with the growing legal independence of women and their increased presence in the work force, legislation began to be adopted, primarily aimed at protecting women and children. The Swedish employment legislation with respect to women can be divided into three periods. First came the early protective employment legislation proposed at the end of the nineteenth century. The second period arises with the adoption of the legislative restrictions with respect to women, beginning with the passage of the 1900 Act and ending in 1962, when the first of the restrictions, the prohibition against night work, was repealed. The third period begins in 1962 and covers the dismantling of the regulations and the enactment of the modern legislation in efforts to create the economically independent woman, in part through the Parental Leave and Equal Treatment Acts.

The legislation enacted from period to period naturally reflects society's attitudes towards working women. In the mid-nineteenth century, when women were newly emerging as workers, no specific focus existed on women as a particular group needing employment protection. The early twentieth century, in contrast, shows the beginning of a focus on women as a special interest group, with the early legislation motivated by a true desire to protect all workers from the rampages of industrialism. The mid-twentieth century shows the beginning of a more negative attitude towards women working, motivated in part by the economic situation of the country, culminating in the 1930's with several motions to prohibit married women from holding state employment, as this was

[2] For an example of this, *see* Gabriella Sebardt, REDUNDANCY AND THE SWEDISH MODEL (Iustus 2005) describing the system of redundancy benefits created through collective agreements between the social partners.

[3] *See, e.g.,* Nycander at 380 who argues that the inefficacy of the Swedish discrimination legislation is a result of trying to artificially impose a foreign system of legislation on the already well-functioning system of agreement between the social partners.

perceived as essentially robbing men of needed jobs. The year 1962, with the repeal of the prohibition of night work, is chosen as the beginning of the modern period, but the current approach, of women as equal to men in the workplace and idealistically, in the home, does not come into force until after the adoption of the Work Environment Act in 1977.

The progression of the Swedish legislation from period to period is also interesting from an international perspective. The international developments in these issues are reflected at each stage in the Swedish legislation, as is the pressure felt by Swedish politicians to harmonize Swedish legislation to reflect the efforts in the international arena.[4] This progression also shows that the rights of Swedish women to employment at times were sacrificed in the interest of achieving international harmony, a tendency that has continued to the present day. In the same vein, several of the more prominent United Nation's Women's Conferences in the 1970's, 1980's and 1990's have served as benchmarks within Sweden as to the progress already made or still necessary.[5]

3.1.1 The Roots of Economic Freedom – The Transition from an Agrarian to Industrial Society (1800–1850)

Sweden's economic development differed greatly from that of the United Kingdom and the United States. In the beginning of the 1800's, the combination of a very strong guild system and church control as well as pervasive poverty had created a society that lacked inward mobility and was extremely tightly controlled, to the point that an individual could not make goods for his or her own use. Industrialism came to Sweden almost a century later than in England, but in the words of one author, "Sweden became an industrial society in record speed."[6]

Women and men began to leave the traditional employments in this transition from an agrarian to an industrial society. Statutes had been in effect for centuries regulating "employment" significantly to the advantage of the employer, who had a status akin to a family patriarch with the right to exert corporal punishment over wives, children and servants.[7] Based on a Germanic view of women, the legal and social structure of Sweden at this time did not allow women any legal capacity, whether married or single. Women were objects of

[4] *See, e.g.,* Ulla Wikander, Alice Kessler-Harris, Jane Lewis, PROTECTING WOMEN – LABOR LEGISLATION IN EUROPE, THE UNITED STATES AND AUSTRALIA, 1880–1920 (University of Illinois Press 1995) at 17.

[5] *See, e.g.,* Prop. 1979/80:147 *om godkännande av Förenta nationernas konvention om avskaffande av all slags diskriminering av kvinnor. See also* SOU 1978:38 *Jämställdhet i arbetslivet med förslag till lag om jämställdhet* at 29 which speaks of using general principles as formulated at the UN Women's Conference in Mexico City in 1975.

[6] Nycander at 89.

[7] This type of employment relationship was in the form of either a voluntary or involuntary (if a person was found to be without means) indentured servitude. It was first regulated by statute in 1664, with the last such statute adopted in 1833, which was finally repealed in 1926. *See*

guardianship of either fathers or husbands, and thus could not enter into contracts or even choose husbands.[8] Wives and unmarried women had no legal capacity under the 1734 Code, however, widows were granted such.[9] Motions were made as early as the Swedish Parliament of 1809/1810 to grant women legal capacity at a certain age,[10] the right to an equal inheritance[11] and the right to participate in trade.[12] These motions were made in part based upon economic necessity as there was a shortage of men[13] after recent wars, creating a surplus of "defenseless"[14] women, women having no male guardians or any economic means of support. Allowing women to enter into trade was proposed as a better alternative than consigning them to prostitution or to poor houses already filled

Prop. 1926:183 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om upphävandet av legostadgan för husbönder och tjänstehjon den 23 november 1833 m.m.* According to the *Lego Stadga för husbönder och tjenstehjon* (SFS 1833:33 p. 461) §§ 52 and 10, the master of the household could physically force a servant to return to service and could take half the wages earned as a penalty for the flight. A servant could also lose the entirety of wages earned for reasons such as negligence, laziness, slovenness, disobedience, ignorance or unsuitability, as well as receive a reference from the employer reflecting such characteristics. For a discussion of this period and the statutes regulating the work of indentured servants, *see* A.O. Winroth, OM TJENSTEHJONSFÖRHÅLLANDET ENLIGT SVENSK RÄTT (Uppsala 1879) and for a more modern analysis, Susanne Fransson, LÖNEDISKRIMINERING (Iustus förlag 2000) at 89.

[8] For a presentation of these Parliamentary measures and their treatment, as well as how the issue of women's rights became intertwined with the dismantling of the existing guild-system, *see* Gunnar Qvist, KVINNOFRÅGAN I SVERIGE 1809–1846 (Gothenburg 1960) at 70–113. Women received the right in 1872 to choose their own husbands.

[9] Fransson at 103 *citing Sweriges Rikes lag* 1734, The Swedish Inheritance Code, Chapter 19 § 2 and at 88 *citing* Chapter 19 § 3.

[10] Motion made to the Swedish Parliament Estate of Nobility, Ad 1809–10 II:1 at 87.

[11] Motions made to the Swedish Parliament Estate of Farmers, Bd 1809–10 III at 116 and 212.

[12] Motion made to the Swedish Parliament Estate of Burghers, Bg 1809–10 III:1 at 178.

[13] Sweden suffered a shortage of men during extensive parts of the 1700's and 1800's. At its worst in the 1700's, there were five women to three men within the nobility class due mainly to military engagements. During the 1800's, the imbalance was due to emigration, as more men emigrated than women, as well as the longer life spans of women. Karin Widerberg, KVINNOR KLASSER OCH LAGAR 1750–1980 (LiberFörlag 1980) at 23 and 39.

[14] Defenselessness, *försvarslöshet,* was a status assigned persons not found to have suitable economic means or employment, similar to the vagrancy statutes in the United States during the 1800's, and could result in the person being sent to the workhouse. Only a minority of persons had a status at this time, as reflected in the four estates of the Swedish Parliament, nobility (0.5 %), clergy (0.9 %), merchants (2 %) and farmers. As late as 1901, a legitimate child inherited citizenship, name and status from the father, *see* A.O. Winroth, PROFESSOR WINROTHS FÖRELÄSNINGAR I FAMILJRÄTT (Lund 1901) at 4. The vast majority of persons had no status and no political power whatsoever. *See* Lars-Arne Norborg, SVERIGES HISTORIA UNDER 1800- OCH 1900- TALEN (Almqvist & Wiksell 1995) at 41. Those persons not in one of these classes had to prove their economic self-sufficiency, and there was a presumption in the law that males working with farming had economic means, while servants (positions held mostly by women) were most vulnerable to being found defenseless. Women having no man through which to obtain economic sustenance were the most vulnerable in the system. Qvist (1960) at 44.

to over-capacity.[15] An equal right for women and men to inherit was legislated in 1845.[16]

The first general elements of a legislative protection with respect to workers in Sweden can be found in the Factory and Handwork Proclamation of 1846,[17] in part a response to the motion for greater freedom of trade for women made in the 1809/1810 Parliament.[18] The 1846 Proclamation is exciting from a historical perspective, as it gives a glimpse of a society on the cusp of industrialism, but also in the transition from a male dominated guild system to a marginally freer society. Each person in Sweden was given the right by the 1846 Proclamation to freely create factory or handwork for his or her own needs. Swedish male citizens who had received the sanctity of communion could offer such goods for public sale.[19] Women were given a limited version of the rights granted men. Married women needed the consent of their husbands, their guardians, to enter into trade, a requirement that would be in place until 1920. Unmarried women had to be declared by the King to possess legal capacity.[20] The protective elements consisted of prohibiting the employment of children under the age of twelve and imposing an obligation upon employers of supervising the secular and religious education of children.[21]

3.1.2 The Rise of the Worker and Beginning of Women's Emancipation (1850–1900)

With the onset of industrialism in Sweden in the 1850's, as well as the break-up of guild structures that had dominated Swedish mercantile since the 1600's, the emergence of the worker as an individual, without the former, albeit minimal, protections of household or guild, led to a movement for worker protections mirroring the ones that had begun in England almost a century earlier. The lack of regulation in Sweden concerning employment conditions in industry has been seen as a result of a combination of the domination of political interests by a conservative agrarian and upper class, as well as strong resistance by industrial employers.[22] Women were not perceived as a group in need of specific protective legislation at this time. The 1864 Freedom of Trade Proclamation expressly gave Swedish men and unmarried women the right to freely participate in trade or factory operations. Married women, however, continued to need the consent of

[15] Qvist (1960) at 80.

[16] *Kungl. Maj:ts Nådiga Förordning* (SFS 1845:13) *angående förändring i vissa delar af lagens stadgande om giftorätt och arfsrätt.*

[17] *Fabriks- och Handtwerksordningen af Kungl. Maj:t* (SFS 1846:39)("1846 Regulation").

[18] The motion for equal inheritance was the first to result in legislation in 1845. *See* Bet. 1848:LU17 at 1.

[19] 1846 Regulation at §§ 1 and 3.

[20] The requirement of a royal declaration in the 1846 Regulation was replaced by a requirement of a court declaration in 1863.

[21] 1846 Regulation at § 32 para. 4, §§ 35 and 36.

[22] *See* Wikander at 237.

their husbands.[23] At this point, there still was a "surplus" of women due to the largely male emigration to the United States. The emancipation of Swedish women had begun in earnest. Women were given the right, albeit still limited, to participate in trade through these acts.

Unmarried women were granted legal capacity successively in 1858, 1863 and 1884.[24] With respect to education, women were granted the right to hold certain elementary school teaching positions in 1853. This was expanded in 1859 to a broader range of teaching positions and certain state jobs. Women received the right to secondary education in 1870 if they paid for it privately, and the right to university education in 1873. The first woman docent was appointed in 1883, and the first woman professor at Stockholm in 1884, Sonja Kovalevsky, who had been educated in Russia and Germany.[25]

Both men and unmarried women who paid taxes were given the right to vote in municipal elections in 1862, but there is no evidence that any women voted that year.[26] A year later, unmarried women were given legal capacity automatically when they reached the age of 25. Corporal discipline of wives by husbands was outlawed the year after. Married women were given the right in 1874 to dispose of their own income in limited ways, mainly for the purchase of food for the family.[27] Women were evolving as independent legal persons at the same time as the number of free laborers was increasing.[28]

[23] *Kungl. Maj:ts Nådiga Förordning* (SFS 1864:41) *angående Utvidgad Näringsfrihet* ("The 1864 Freedom of Trade Regulation") §§ 1 and 4.

[24] *See Kungl. Maj:ts Nådiga Förordning* (SFS 1858:60) *angående ogift qwinnas rätt att wid wiss ålder wara myndig* (granting single women who had reached the age of 25 legal capacity under petition to and guardianship of the court), *Kungl. Maj:ts Nådiga Förordning* (SFS 1863:61) *angående ogift qwinnas rätt att wid wiss ålder wara myndig* (granting single women who had reached the age of 25 legal capacity under petition to a court) and *Lag* (SFS 1884:32) *angående ogift qvinnas rätt att vid viss ålder vara myndig* (granting women who had reached age of 21 legal capacity upon petition to the court). Married women received almost complete legal capacity in 1920 with the enactment of the new marriage code.

[25] *See* JämO, VÅRA LÄROMÖDRAR OCH LÄROFÄDER, JÄMSTÄLLDHETSFÖRKÄMPAR I SVENSK HISTORIA FRÅN 1700-TALET TILL 1900-TALET (2000) at 128. However, it would not be until 1937 that the next female professor, and first female professor educated in Sweden, would be appointed, Nanna Svartz.

[26] The Swedish Parliament was reorganized from four chambers to two in 1866, the First Chamber indirectly elected by the municipalities, the Second Chamber elected directly by Swedish citizens. In 1866, 5.5 % of the population had the right to vote for the Second Chamber, Swedish male citizens over the age of 21 with an annual income of SEK 800 who had paid municipal taxes for ten years and also had either assets in the amount of 1000 riksdalers or a tenancy worth 6000 riksdalers. *See* Barbro Björkhem *et al.* ed., RÄTT ATT RÖSTA (Swedish Parliament Sweden 2002) at 5 and 27.

[27] *See* Fransson at 103 *citing* Widerberg (1980) at 46. The recognition of married women as having legal capacity and the right to enter into trade without their husbands' consent and suretyship did not occur until 1920 with the new Marriage Code.

[28] *See* SOU 1938:47 *Betänkande angående Gift Kvinnas Förvärsvarbete m.m.* at 47–55.

The costs of industrialism in terms of human labor also began to be debated in Sweden during this period.[29] The focus of the Swedish Parliament at this time was on the employment conditions of children and all adults, not women as a specific category.[30] Motions were made as early as 1856 to limit the work day of all adults to twelve hours, and that of children under the age of 16 to eight hours.[31] The opposition to such measures argued that such prohibitions would be an infringement as to the contractual freedom of the parties.[32] Parliamentary motions were made in 1875 to draw attention to the fact that child labor counteracted the statutory goal of general education: children were employed before gaining a minimum of education, and long work days of twelve or more hours allowed neither the time nor the endurance for any educational efforts.[33] The current legislation was viewed as inadequate as the enforcement mechanisms were weak or nonexistent.

In response to these motions, the King appointed a committee to investigate the issue of child labor in 1875.[34] Its legislative proposal was adopted in 1881,

[29] The issue of prohibitions against night work can be traced back to individual initiatives such as those by Robert Owen in 1818 or Daniel Le Grand in 1840. *See* ILO, *Anatomy of a prohibition: ILO standards in relation to night work of women in industry*, 18 June 2001 available at the ILO website: http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-iii1b-c2.htm. The first collective effort was that of the Congress held by the International Working Men's Association in 1866, which adopted a prohibition against night work. Karl Marx wrote the platform, with the third plank regarding a limited work day addressing the issue of women:

> A preliminary condition, without which all further attempts at improvement and emancipation must prove abortive, is the limitation of the working day… The tendency must be to suppress all night work. This paragraph refers only to adult persons, male or female, the latter, however, to be rigorously excluded from all night work whatever, and all sort of work hurtful to the delicacy of the sex, or exposing their bodies to poisonous and otherwise deleterious agencies.

The fourth plank was devoted to issues concerning child labor including night work. *See* Karl Marx, *Instructions for the delegates of the provisional general council: The Different Questions*, first published in DER VORBOTE Nos. 10 and 11, October and November 1866 and the INTERNATIONAL COURIER Nos. 6/7, 20 February and Nos. 8/10, 13 March 1867, available at: http://libcom.org/library/instructions-gen-council-iwma. *See also* Ruth Bohman, KVINNOR I FACKLIG OCH POLITISK KAMP 1880–1920: KRING BORGERLIGA OCH PROLETÄRA KVINNORÖRELSER I SVERIGE (Zenit Häften 2 1979) at 24, and Lotta Forssman and Marianne Paas, DE FÅ VARA TACKSAMMA ATT VI GE DEM ARBETE (Stockholm 1976) at 11–14.

[30] England began to pass its first protective legislation with respect to women in the early 1800's, with many other industrial lands following by the 1890's. Bohman at 64. Sweden was rather late with its adoption of the prohibitions in 1900 and 1909. This can be explained in part by the fact that industrialism occurred earlier in England than in Sweden.

[31] Bet. 1856:EU103 at 4.

[32] *See*, *e.g.*, Motion 1893 (Second Chamber No. 215).

[33] Bet. 1875:2TfU21 at 2.

[34] Rskr. 1875:45 at 17 and SOU 1877 *Betänkande angående minderårigas antagande och användande i fabrik, handtverk eller annan handtering, afgifvet af dertill af Kungl. Maj:ts förordnade Kommitterade*. The original motion for this legislation was made already in 1856 as referred to above. *See* Bet. 1894:2TfU18 at 5.

containing a prohibition of the use of children and younger female adults in mines and quarries.[35] Two groups of individuals were to be protected by the legislation: children from the ages of twelve to fourteen, and younger persons from the ages of fourteen to eighteen, regardless of sex.[36] In its investigation of over one hundred pages, the committee devoted only several interspersed sentences on restrictions regarding women, summarizing the issue by stating that though outside the parameters of its mandate, the committee felt that such restrictions, comparable to those in England, could be enacted in Sweden without any significant problems to industry and to the benefit of family life and future generations.[37] No such restrictions for women were adopted in the 1881 Act. Parliament requested an investigation into the issue of worker safety in 1884, resulting in a legislative bill[38] and the adoption of the 1889 Act concerning Protection against Employment Dangers applicable to all workers regardless of sex, and also creating a system of factory inspectors.[39]

The first central labor union organization was established in 1898, the current central blue-collar employee organization, the Swedish Trade Union Confederation ("LO"), founded by the Social Democrats with the agenda of repealing laws impeding the organization of labor.[40] As to a question posed at the first Social Democrat Congress regarding encouraging the organization of women in the labor market, the response was: "As women's interests are shared with men and her participation in the labor movement would benefit the party and facilitate men's employment and battle against capital, the Congress encourages each proletarian woman to not be apathetic, but with all strength and energy participate in the fight and stand in solidarity with men."[41]

The Parliamentary discussions during the 1890's show the beginning of a focus on women as a specific group needing protection. Motions were introduced to limit the work day of all adults, and in the alternative, the work day of women so that Sweden could be seen as offering at least the minimum of protections as

[35] *Kungl. Maj:ts Förordning* (SFS 1881:64) *angående minderåriges användande i arbete vid fabrik, handtverk eller annan hantering* ("1881 Regulation") at § 9. For the history of these acts with respect to minor children, *see* Prop. 1900:57 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till förordning angående minderåriges och qvinnors användande till arbete i industriellt yrke* at 2–6.

[36] SOU 1877 at 99.

[37] SOU 1877 at 87. *See also* Prop. 1900:57 at 8 *citing* this statement.

[38] Prop. 1889:5 *Kungl. Maj:ts nådiga proposition till Riksdagen, med förslag till förordning om åtgärder för skyddande af arbetares lif och helsa i arbetet* at 8.

[39] *Lag* (SFS 1889:19) *angående skydd mot yrkesfara*. The King's proposal was for a regulation, but Parliament voted on it as an act.

[40] *See* Presentation of LO, at the LO website, available at: http://www.lo.se.

[41] Yvonne Hirdman, DEN SOCIALISTISKA HEMMAFRUN OCH ANDRA KVINNOHISTORIER (Stockholm 1992) at 39 *citing* SAP konstituerande kongressprotokoll 1889.

already given in other European countries.[42] Sweden sent a delegation to the Intergovernmental Conference held in Berlin in 1890 concerning worker protection.[43] The program focused on children and women as two specific groups needing protection. Proposals were tendered for legislation forbidding their work in mines, quarries and other dangerous environments, as well as night work; and for women, work during the first four weeks after the birth of a child. Regarding a general limitation as to the work hours of adult females, the Swedish committee assessing the outcome of the conference stated that a limitation with respect to the work day of men was a more necessary measure.[44] The statistical survey conducted by the committee demonstrated that adult women were not employed to any great degree in industrial work, and that no complaints had been raised on the issue of any specific exploitation. The most significant repercussion of the 1890 Berlin Conference in Sweden appears to be the establishment

[42] *See* Motion 1893 (Second Chamber No. 215). Much of the debate in the early 1890's can be attributed to one person, Fridtjuv Berg, who introduced motions in the Second Chamber to limit the work day of all adults, and at the very least, of women, in 1891 (Second Chamber No. 191), 1893 (Second Chamber No. 215), 1894 (Second Chamber No. 139) and 1895 (Second Chamber No. 144). Berg relied heavily on the statement made by the 1875 Committee that a restriction as to women would not be too arduous for industry in his arguments for a limitation of the work day. This referenced comment by the committee, as mentioned above, had no basis in any actual investigation conducted by the committee as to the specific issue, but rather was in the nature of a general observation given by the committee. Berg also cited the laws in England, the United States, Australia, Switzerland, Austria, France, Germany, Holland, Belgium, Spain, Hungary, Russian, Denmark, Norway, Italy, the Baltic states and Portugal as support for his motion, demonstrating both the international awareness and the pressure felt by Swedish politicians to be in conformity with international developments. *See* Motion 1893 (Second Chamber No. 215). Berg cites the fact that a ten hour work day was already the rule in factories in the United States and that President van Buren's Executive Order in 1840 made the same true in trade, with an eight hour work day the law in 35 American large cities, *id.* at 5.

[43] Bet. 1893:2TfU21 at 28. The 1890 Berlin International Labour Conference was the first of several intergovernmental conferences on the issue of worker protection. Even at this time, the issue of worker protection raised concerns on the international level with respect to social dumping. An International Association for Labour Legislation was founded in Paris in 1900. It requested the Bern Convention to address two issues, i.e. the prohibition of the night employment of women in industry and the use of white phosphorus in the manufacture of matches, as these were seen as fairly uncontroversial for the purpose beginning the process of agreement and adopting uniform rules. Prohibitions of night work for women already existed in most European national legislation. One of the motives behind an international prohibition was the desire to equalize costs of production between countries by inducing those countries that had not yet prohibited night work for women to enact such legislation. *See* ILO, *Anatomy of a prohibition: ILO standards in relation to night work of women in industry,* dated the 18 June 2001, available at the ILO website: http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-iii1b-c2.htm. *See also* Motion 1908 (Second Chamber No. 245) at 108.

[44] Bet. 1893:2TfU21 at 32. *See also* Prop. 1900:57 at 8 *citing* this same statement. This 1891 Committee had suggested that the restrictions as to work in mines and night work be with respect to women under the age of 21. *Id.*

of a framework for Swedish legislation focusing on women as a specific group needing protection.

3.1.3 The Turn of the Twentieth Century: The "Masculine Renaissance"

The beginning of the twentieth century, referred to by some as the "Masculine Renaissance,"[45] marks expansions in the rights of workers as a whole in Sweden as well as the beginning of restrictions of women's employment. The early 1900's was a period of worker strife marked by decreasing wages and a general economic recession.[46]

The first two national central organizations of employers were founded in 1902, the Swedish Metal Trades Employers' Association[47] and the Swedish Employers' Confederation.[48] The famous "December Compromise" was reached between them and LO in 1906. In exchange for the right of the employer to lead and delegate work, freely hire and terminate workers, as well as hire workers regardless of union affiliation, rights which still are referred to as "paragraph 23" (of the Swedish Employers' Confederation's charter) rights, the employers agreed to a freedom for workers to organize and take industrial action.[49] The pattern of the central organizations resolving labor conflicts and establishing rights without state involvement was laid and would remain largely unchanged to the present day.[50] Unionized laborers grew from 65 000 at the turn of the century to 230 000 by 1907, the highest percentage of the work force in Europe known at that time.[51] A hostility by the labor unions as to legislative control began soon after with LO leading the resistance.

The issue of women's rights came to the forefront again during this period of economic crisis, consistent with the pattern begun in the transition to an industrial society in the mid-1800's, in this case, however, limiting, not expanding, rights. The prevailing perception at this time was that the number of women in

[45] *See* Lynn Carlson, *The Beginning of the "Masculine Renaissance"* in Ulla Wikander, Alice Kessler-Harris and Jane Lewis, PROTECTING WOMEN – LABOR LEGISLATION IN EUROPE, THE UNITED STATES, AND AUSTRALIA, 1880–1920 (University of Illinois Press 1995) at 235.

[46] Birgitta Furuhagen, ed., ÄVENTYRET SVERIGE – EN EKONOMISK OCH SOCIAL HISTORIA (Stockholm 1993) at 73.

[47] The Swedish Metal Trades Employers' Association, *Sveriges verkstadsförening,* which became part of the Swedish Metal Trades Employers, *Sveriges verkstadsindustrier,* now called the Association of Swedish Engineering Industries, *Teknikföretagen.*

[48] The Swedish Employers' Confederation, *Svenska Arbetsgivareföreningen* ("SAF"). SAF joined with the Federation of Swedish Industries, *Industriförbundet,* in 2001 to become the Confederation of Swedish Enterprise, *Svenska Näringsliv.*

[49] As to the developments with respect to the employer's prerogative in Swedish law, *see* Mia Rönmar, ARBETSLEDNINGSRÄTT OCH ARBETSSKYLDIGHET – EN KOMPARATIV STUDIE AV KVALITATIV FLEXIBILITET I SVENSK, ENGELSK OCH TYSK KONTEXT (Juristförlaget Lund 2004) particularly at 45.

[50] Nycander at 24–26.

[51] Nycander at 30 and 91.

the workforce was increasing. The statistics reveal the opposite, the number of men in reality was increasing. Women constituted 30 % of the industrial labor force in the 1870's, while in 1909, approximately 50 000 women worked in Swedish factories, constituting 19 % of the industrial labor force.[52] Three lines of restrictions were legislated with respect to women's work during this period, a mandatory unpaid leave for mothers in connection with childbirth, restrictions in the type of work women could perform, and also as to night work. The 1900 Act first prohibited women from working in dangerous environments, mines and quarries, and within four weeks after the birth of a child. The prohibition as to night work came in 1909 through legislation and the ratification of the Bern Convention. These restrictions were later united in the Swedish Workers Protection Act of 1949.[53]

3.1.3.1 The Prohibition of Work in Mines and Quarries and the Mandatory Maternity Leave – The 1900 Act

The first protective legislation concerning adult women was enacted in 1900 with the Act on Minor Children and Women Employed in Industrial Work.[54] The legislation was mainly the result of the desire by Swedish politicians to be seen as offering the same amount of worker protection as other industrial, particularly European, countries.[55] Sweden sent delegations to the 1890 Berlin conference, the 1897 Zurich International Congress and the 1900 Paris Congress, congresses consisting predominantly of male representatives, all of which focused on the issue of protective legislation for children and women that could be adopted fairly simply, treating these groups as homogenous, and one and the same.[56]

The pertinent section of the 1900 Act with respect to women states:

> § 7 With employment in industrial work, women who have given birth to a child may not be employed in the first four weeks after the birth of the child, unless they can produce a physician's certificate stating that she can return to work earlier without causing any physical harm.
>
> As to employment underground in mines or stone quarries, women may not be used and neither minor children of the male sex under the age of fourteen years.

[52] Wikander *et al.* at 235.

[53] *Arbetarskyddslag* (SFS 1949:1).

[54] *Lag* (SFS 1900:75) *angående minderårigas och qvinnors användande till arbete i industriellt yrke* ("1900 Act"), Prop. 1900:57 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till förordning angående minderåriges och qvinnors användande till arbete i industriellt yrke*, Bet. 1900:LU44, Rskr. 1900:119.

[55] Of the several motions connected to the proposal for the 1900 Act, not one discusses the inclusion of women in the act. *See* Motions 1899 (Second Chamber No. 238) and 1900 (Second Chamber Nos. 165, 171, 172 and 178).

[56] *See* Ulla Wikander, *Debates at International Congresses* in Wikander *et al.* at 30.

This first paragraph would remain largely unchanged until 1977. The legislative bill to the 1900 Act recommended that a prohibition of the use of women in mines and quarries be adopted, not based on any existing misuse within Sweden, but as a preventive measure against potential misuse based on the experiences cited by other countries during the 1890 conference.[57] The clause concerning mandatory maternity leave was not discussed at any length in the legislative preparatory works.

Two items should be noted here. First, if a woman could produce a physician's certificate, she could return to work at an earlier date. Leeway existed, if somewhat miniscule, for exceptions in the act, mainly due to the fact that the mandatory four-week period was not seen as fulfilling the needs of all women.[58] At that time, no compensation was available for the enforced maternal leave, resulting in a financial hardship for most women. Second, the legislation was restricted to industrial work, affecting only a segment of working women.

3.1.3.2 The Prohibition of Night Work – The 1906 Bern Convention

The next restriction placed upon the employment of women was the prohibition against night work adopted in 1909.[59] A committee appointed in 1905 to investigate the issue of night work hesitantly tendered a legislative proposal, stating that:

> The committee finds that the statements [from several different women's organizations, including Fredrika-Bremer-Förbundet and the Women Typographers Club], coming from such circles most closely affected by the legislation in question, should not be ignored, so much more in our time when more and more voices are being raised for the removal of the limitations which to date have been placed in the path hindering women's efforts to attain complete equality with men in the public life as well as in employment. Portions of the [Bern] Convention's proposals would, however, in segments of the labor market where women have to date been mainly treated as equals to men, create rather significant changes in a direction altogether contrary to the one, as stated above, taken by the continually increasing opinion underlying these efforts.[60]

[57] Prop. 1900:57 at 33. This analysis echoes that given by the 1875 Committee, which stated that as the number of women in this type of work was not large, it was just as well to legislate a prohibition to prevent future abuses such as those found in England and Belgium. SOU 1877 at 113. These findings can be contrasted with the findings in SOU 1938:47 at 73, stating that during the 1600-1700's, women consisted of 10 to 20 % of the workers in mines and in 1805, up to 25 % in certain sectors. These are not the statistics for the years 1875 and 1900, but it is difficult to imagine that the numbers had gone from 25 % to almost zero in this relatively short period of time.

[58] Prop. 1900:57 at 16.

[59] *Lag* (SFS 1909:131) *ang. förbud mot kvinnors användande till arbete nattetid i vissa industriella företag* ("1909 Act").

[60] SOU 1907 *Förslag till Lag angående förbud mot kvinnors användande till arbete nattetid i vissa industriella företag, afgifvet af den af Kungl. Maj:t den 20 januari 1905 tillsatta kommitté för revision af lagen angående skydd mot yrkesfara den 10 maj 1899 m.m.* at 2. The King submitted the documents from the Bern Convention to the committee in 1906 and requested that it draft a legislative proposal with respect to the issue.

The committee also raised the question as to how the care of present and future generations, and a consideration of women's generally weaker body constitutions in comparison to men's – the two main viewpoints posed as the basis for the convention – could require so significant a limitation of the freedom to adapt work hours to existing needs, a limitation which according to the committee's understanding must be the consequence of the convention's altogether too restrictive regulations.[61] The committee further noted that the statistical investigation demonstrated that women were not employed in night work to any significant extent in Sweden. However, women within a certain industrial operation, namely female typographers, would be significantly affected. The committee attempted to minimize the onerous nature of the regulations in the convention as much as possible in its legislative proposal.[62]

As noted by the committee, the proposal for the prohibition against women working night shifts was hotly debated. The Social Democratic Women's Organization submitted a rebuttal drafted during their 1907 conference,[63] based on the argument that night work was harmful to both men and women, with no evidence demonstrating that it was more harmful to women.[64] According to the organization, a better solution to the harmful effects of night work would be to increase wages to compensate for the negative effects of night work, as it occurred most frequently in low wage sectors.[65]

When originally drafted in the late 1800's, the restriction with respect to night work was sought primarily for the purpose of ending the exploitation of vulnerable workers. The debate concerning night work took on another dimension in the 1900's, the competition for employment between male and female workers: "One must always with sympathy favor laws that drive women away from the labor market. If there were no women in the factories, unemployment would not be so great."[66] The wages of women were half those of their male counterparts in certain industries, creating a greater demand for female than male workers.[67] Women, as competitors with men in the labor market, began to be blamed for

[61] SOU 1907 at 2–3.

[62] *Id.* at 8.

[63] Other issues were also discussed at the conference, such as the goals of equal pay, female work inspectors to check employment conditions in factories, monetary compensation for those industrial workers forced to take the four week maternal leave in accordance to the 1900 Act, help for unwed mothers and daycares for children, the deregulation of suspected "prostitutes" and suffrage for all regardless of sex or income. Bohman at 31. For a discussion of the responses by the different women's groups, and the passage of the Act through the Parliament, *see* Christina Carlsson, KVINNOSYN OCH KVINNOPOLITIK (Lund 1986) at 225–248.

[64] *Id.* at 233, note 203, *citing* Soc.dem. kvinnokonferensen 1907, s. 39, Arb. ½ 07.

[65] Bohman at 33.

[66] *Id.* at 32, *citing Morgonbris*, the Women's Labor Union's periodical, 1909, quoting a male friend. *See also* Bet. 1908:LU76 at 35.

[67] Forssman at 11.

unemployment, a theme that would prevail until after the Second World War.[68] Also inflaming the debate concerning night work was the fact that universal suffrage for men was granted as to the Second Chamber of Parliament in 1907. Feminists maintained that if women also had the right to vote, they could decide this issue for themselves.[69]

Despite the committee's clear hesitation and the opposition by different women's groups to the prohibition, the King submitted a proposal in 1908 for a proclamation restricting night work in accordance to the Bern Convention.[70] In the first legislative round, motions were made to include both men and women in the prohibition:

> If we compare our Swedish worker protection legislation with that of other countries, we immediately find that we are seriously behind … At most, we can speak of a comparison with one or another southern European country, and even, with some backwards folk – but the comparison will not be continued. It is too embarrassing.[71]

Motions were also made for further investigation of the issue, as well as for legislating an act instead of a proclamation.[72] The question was raised whether the scope of the law should include categories of employment other than industrial workers, with the committee rejecting such an expansion as it might lead to a reduction in the rate of marriage.[73]

The Chamber of Commerce was in favor of the law, while the standing Legislative Committee recommended a rejection of the legislative bill, which recommendation was adopted by Parliament. Parliament gave several reasons for its rejection of the prohibition. Despite the fact that only a small number of women currently were affected by the proposed legislation, the statistics showed an increasing number of women would be affected.[74] A prohibition against night work would not guarantee that women would be able to fulfill their duties in the home. With such a restriction, women would be placed at a disadvantage to men in the labor market due to the limitations in working times and overtime. Industries would also be inconvenienced.[75]

[68] *See, e.g.*, Renée Frangeur, YRKESKVINNA ELLER MAKENS TJÄNARINNA? STRIDEN OM YRKESRÄTTEN FÖR GIFTA KVINNOR I MELLANKRIGSTIDENS SVERIGE (Lund 1998) at 185.

[69] Wikander *et al.* at 255. Motions were made as early as 1884 as to granting women the right to vote, for these early efforts, *see* Gulli Petrini, KVINNORÖSTRÄTTEN RIKSDAGSHISTORIA I SVERIGE 1884–1912 (Stockholm 1914) at 3.

[70] Prop. 1908:156 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till förordning angående förbud mot kvinnors användande till arbete nattetid i viss industriella företag* at 1.

[71] Motion 1908 (Second Chamber No. 245) at 32.

[72] Motions 1908 (Second Chamber Nos. 333 and 310), respectively. *See also* Bet. 1908:LU76 at 20.

[73] Bet. 1908:LU76 at 11.

[74] Rskr. 1908:198 at 3.

[75] *Id.* at 4.

During the next session of Parliament, motions reintroducing the legislation were made, as well as a motion for an investigation into the effects of night work upon both sexes.[76] Argued in favor of the proposal was that significant consideration should be given to the international character of the prohibition: It was obvious that if the abuses of modern industrialism were to be curbed, it must occur on the international level. As international cooperation had succeeded in drafting a prohibition, it was both in the interest of the prohibition and in future areas of cooperation that it be adopted, that no link in the chain be broken. It was further argued that Sweden was the only country present at the Bern convention that had not yet adopted suitable legislation.[77] The standing Legislative Committee once again recommended rejection of the proposal.[78] However, the attitude in Parliament had changed and the prohibition was adopted. The reasons for the adoption are not stated, but the most apparent reason, based on the existing legislative history, is that the proposal was reintroduced as an act, and not a proclamation, placing the matter squarely within the ambit of Parliament's legislative power as opposed to the King's.

The 1909 Act prohibited the use of women in shifts of more than thirteen hours, and between the hours of 10:00 p.m. and 5:00 a.m. within certain industrial operations consisting of more than ten persons.[79] After the passage of the legislation, the King was free to ratify the 1906 Bern Convention, which he

[76] Motions 1909 (First Chamber No. 34) and (Second Chamber Nos. 64 and 202).

[77] Motions 1909 (First Chamber No. 34) at 5 and (Second Chamber No. 64) at 5.

[78] Bet. 1909:LU43 at 21. In a reservation made to the Committee's reasoning, Lindhagen summarizes the history of the protective legislation with respect to women, characterizing it as a remnant of the guardianship attitude, noting that no actual investigation had been conducted with respect to the effects of night work on women or men, and pointing to the fact that with respect to the issue of protection of future children, men as well as women contribute to the creation of children, with both sexes meriting protection. *Id.* at 23–24. He concludes by stating:

> When we come down to the wire, the main motivation argued for casting ourselves in the arms of this legislation is that it is international. It is an injury and disgrace for us not to be included in the European concert in this area. A contrary opinion is seen as an expression of a myopic feminism. The rebuttal to this, with reference to that stated above, can only be that it cannot be considered advantageous or flattering to be included in the finale of this male chorus of a dying masculine culture. We could have been the first European people to enact a general voting right for both men and women, but we chose to be the last, adhering to the old ways. We can still be the first, in employment protective legislation, to place adult men and women at each other's sides as comrades.

Id. at 25. The proponents of the prohibition termed themselves as belonging to the "masculine renaissance." Motion 1910 (Second Chamber No. 150) at 3.

[79] *Lag* (SFS 1909:131) *ang. förbud mot kvinnors användande till arbete nattetid i vissa industriella företag* ("1909 Act").

did.[80] Motions were introduced and voted down for a similar prohibition with respect to men in 1910 and 1911.[81] Motions to exempt typographers, the industrial group mentioned by the committee, a highly paid, educated and skilled group of female employees, from the prohibition were also introduced and voted down.[82] The negative impact of the law upon these women was almost immediately apparent.[83] Numbering approximately 500 at the time the legislation was passed, they were reduced to only 4 by 1934.[84] Women who had competed with men in terms of comparable wages in certain sectors were now excluded by the prohibition, forcing them to compete with other women in already low wage sectors, driving those wages even lower and contributing to even greater occupational segregation.[85]

[80] Accession Proclamation of 14 January 1910.

[81] Motion 1910 (Second Chamber No. 150) and 1911 (Second Chamber No. 253) respectively.

[82] Motion 1910 (Second Chamber No. 150) and 1911 (Second Chamber No. 254) respectively.

[83] The percentage of female workers in industry at this time was assessed to be 19 %. *See* SOU 1911 *Betänkande angående införande av moderskapsförsäkring* at 27. Most of the statistics referred to by the committees in favor of the prohibition referenced sectors of industry specifically affected by the night prohibition, for example, typographers. The general limitations with respect to overtime work and its impact were not specifically discussed by the proponents of the prohibition. In a motion made in 1911 to create exceptions to the prohibition, the difficulties with respect to the limitations as to overtime were also named. Motion 1911 (Second Chamber No. 253) at 2. Lindhagen summarizes the debate thus:

> In our time, there are two steps left, which women strive to obtain, one is equality in the right to vote, and the other, as strange as it sounds, is equality as to worker protection. The official view has focused with a preference of first resolving the issue as to the voting rights of all men and then possibly giving the right to vote to women, but in contrast with respect to the second matter, giving women employment protection first and thereafter possibly employment protection to men to the degree they so request it.
>
> From this it appears that women are consequently favored with respect to employment protection and disfavored with respect to the right to vote. So it is only on the surface. If one goes behind the scenes, it becomes immediately apparent that both cases concern the same reasons and the same effects. On one side, the prejudice is against women as somewhat subservient, belonging more with children than with men. On the other side, there is an unmistakable tendency by the dominant male sector to retain rights, work opportunities and freedoms free from unnecessary restrictions. With respect to the economic benefits of employment protection, a reversal occurs as to who is actually being protected. Men are not simply the equal of women, but instead receive greater advantages.

[84] Bohman at 34 *citing* ARBETETS KVINNOR 1934.

[85] Catherina Calleman, KVINNORS ANSTÄLLNINGSSKYDD (Norstedts 1991) at 15. *See also* Ulla Wikander, KVINNORS AND MÄNS ARBETEN: GUSTAVSBERG 1880–1980 (Lund 1988) at 222 who describes the devastating effect the prohibition against night work had on certain sectors, and its contribution to increasing occupational segregation. Wikander follows the occupational segregation within one Swedish manufacturer, and notes a parallel between night work and technology. New technology gave women opportunities to enter into new fields due to male resistance to the new technology, but that as soon as those fields became established and viewed as "better jobs," women were then driven out, much as had occurred with night work.

3.1.3.3 The 1912 Swedish Worker Protection Act

The King proposed an overhaul of the laws with respect to worker protection in 1912 to strengthen their enforcement mechanisms and to incorporate the several different pieces of legislation into one law.[86] The proposal was accepted by Parliament, and the 1912 Act was in force, in a more or less amended condition, until 1949.[87] The prohibition against the use of women in mines and quarries was retained. The maternal leave was extended to six weeks instead of four. The right to a leave of absence two weeks prior to the birth of a child was added, as well as a right to work breaks for nursing mothers.[88] The King was given the authority to determine that certain types of work were too dangerous for women and prohibit their employment within those areas. The 1909 Act and the ratification of the 1906 Bern Convention with respect to the prohibition of the use of women in night shifts were retained separately in their entirety.[89]

As to the retention of the prohibition concerning night work, the Chamber of Commerce stated:

> But even with respect to women, on one side their need of protection is of a more special and even for the public a more significant nature than that of men, and on the other side, their ability to acquire the protections which voluntary contracts provide, is much inferior to that of men. Women as employees demand a special protection due to their lesser physical ability to perform and their greater susceptibility to certain harmful affects of work, as well as their functions as mothers and as leaders of or helpers to the family's household work. But women workers have only in a nominal manner been capable of or understood the strength, which with a demarcation of employment relations within industry can find support for in the labor unions.[90]

[86] Prop. 1912:104 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till förordning angående lag om arbetarskydd* at 55. The King appears to have given up the territorial legislative dispute, submitting this as a legislative bill for an act instead of a proclamation.

[87] *Lag* (SFS 1912:206) *om arbetarskydd* ("1912 Act"). Limitations as to the work of children are discussed in §§ 8–17, those with respect to women in §§ 18–22.

[88] Concerns were raised as to extending the maternal leave to six weeks. The Finance Committee stated that the leave should not be extended to six weeks until a social insurance program with respect to compensation for mothers was implemented. Prop. 1912:104 at 55 and 132. The committee anticipated that a maternity leave compensation program would be implemented within the next year, 1913, but it was not implemented until 1931. A sick-leave compensation program was instead introduced in 1913, and new mothers were compensated under that program until the passage of the 1931 law. SOU 1954:4 at 14.

[89] During World War I, the King was granted the power to stay the enforcement of the night work prohibition for reasons of national defense, *see Lag* (SFS 1915:194) *om eftergift vid krig eller krigsfara från vissa bestämmelser om arbetstid för minderåriga och kvinnor*.

[90] Prop. 1912:104 at 177. This should be contrasted against the fact that the first women's labor union was formed in 1866 in Lund for seamstresses, followed by the Fredrika-Bremer-Association representing professional women in 1884 (for more on this association, *see* its website at: http://www.fredrikabremer.se/) and unions were formed in Stockholm and Malmö in 1887 and 1888 for

This reasoning for the retention of the prohibition repeats the arguments given for each of the restrictions legislated regarding women's employment; their weaker constitutions (and here, weaker understanding) and their duty to the home and future generations. The organization of women's groups in the debate concerning the prohibition against night work is simply swept away as if it had never occurred. The other arguments offered in favor of the proposed legislation are once again dominated by a reliance upon the experiences and arguments as given by other European countries as opposed to any actual need or experiences in Sweden. [91]

The first provisional law legislating a forty-eight hour work-week for all workers was passed in 1919.[92] That same year, a revision of the 1906 Bern Convention was drafted at the 1919 ILO Washington Conference.[93] The Swedish delegation's comments in 1922 on the issue of night work as treated at the conference[94] reveal the revisionist history of the debates surrounding the enactment of the Swedish legislation:

> That which has not been remarked upon is the fact that representatives of specific women's issues have eagerly fought the legislation as unjust and for women, harmful and humiliating. It must be admitted that this last-mentioned viewpoint is not completely lacking in reason.[95]

The Social Political Delegation went on to state that the current legislation with respect to women working night shifts, as based on the 1906 Bern Convention,

---

seamstresses, pressers, shoe binders and laborers respectively. Bohman at 26 and 50. The first significant female employees' labor strike was in 1890. *Id.* at 28. The first collective labor agreement was reached with respect to female workers in 1904. *Id.* at 29. In 1902, the Women's Labor Union was formed. *Id.* at 31.

[91] Prop. 1912:104 at 172.

[92] *Lag* (SFS 1919:652) *om arbetstidens begränsning,* valid from 1920–1923.

[93] The 1919 Washington Conference was the first conference of the UN International Labor Organization ("ILO") as founded in 1919. The primary motivation for founding the ILO was humanitarian, as is apparent from the Preamble of its Constitution, "conditions of labor exist involving … injustice, hardship and privation to large numbers of people." The secondary motivation was political, based on a fear of social unrest. A third motivation can be seen as economic from the perspective of social dumping, with the adoptions of social reforms placing countries at an economic disadvantage compared to countries with no regulation. Last, the ILO was created based on the belief that "universal and lasting peace can be established only if it is based upon social justice." *See* the ILO website, available at: http://www.ilo.org/public/english/about/history.htm.

[94] Six ILO conventions were the result of this conference: ILO Convention No. 1, Hours of Work (Industry) Convention of 1919; ILO Convention No. 2, Unemployment Convention of 1919; ILO Convention No. 3, Maternity Protection Convention of 1919; ILO Convention No. 4, Night work of Young Persons (Industry) Convention of 1919; ILO Convention No. 5, Minimum Age (Industry) Convention of 1919; and ILO Convention No. 6, Night work (Women) Convention of 1919.

[95] Prop. 1931:40 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag angående ändring i vissa delar av lagen den 29 juni 1912 (nr 206) om arbetarskydd* at 106.

could be viewed as going beyond its purpose of protecting the health of women workers as well as their capacity to fulfill their roles as mothers.[96] According to the delegation, the legislation, as proven by experience, created unmotivated difficulties for women workers, had the contemptuous character of a "class" motivated legislation, and favored men in the competition for employment between men and women. In addition, the legislation was almost impossible to enforce. As the 1919 convention would extend the jurisdiction of the legislation to all sectors of labor, the delegation recommended not adopting the convention.

The Swedish National Board of Health and Welfare, in its comments issued in 1925 as to the 1919 convention, concurred with the delegation's 1922 conclusions. It cautioned, however, that the actions demanded by the women's organizations would require a repeal of the Bern Convention, an act that would invoke considerable attention within the circles of international cooperation and which should only be taken for compelling reasons. The Board did not dare state whether such reasons presently existed. Further investigation was called for and the 1919 convention was not implemented in Swedish law.[97]

3.1.4 The 1920's: Setting the Stage for Change

The early 1920's were positive for women with respect to several legal developments. Married women received almost complete legal capacity in 1921 with the enactment of the new Marriage Code,[98] which was heralded by certain Swedish organizations as the best in the world for furthering women's interests, with Sweden perceived as a model country for family legislation, a leader in women's issues.[99] Married women under the new Marriage Code could now freely accept employment, or enter into trade without their husband's consent and suretyship as still required by the 1864 Proclamation.[100] Women received the right to vote in 1921[101] and were given the right of equal access to certain state employment in 1923, exempting, however, large categories of positions, such as the priesthood in the state church, certain military and diplomatic positions and positions

[96] *Id.*

[97] *Id.* at 108.

[98] *Giftermålsbalk* (SFS 1920:405). The new marriage code did not change the terms of divorce as set out in the *lag* (SFS 1915:426) *om äktenskaps ingående och upplösning,* which was the first Swedish law to allow divorce after a one year of separation due to irreconcilable differences.

[99] Karin Widerberg, KVINNANS RÄTTSLIGA OCH SOCIALA STÄLLNING I SVERIGE 1750–1976 (Lund 1978) at 115 *citing* Per Nyström, SVERIGES HISTORIA. I ORD OCH BILD, NR. 5/1970 (Sweden 1970) at 334 and 332.

[100] Prop. 1920:15 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till ny giftermålsbalk m.m.* at 133.

[101] Sweden was the last of the Nordic countries to grant suffrage to women. See Prop. 1912:110 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändrad lydelse av §§ 9, 16, 19 och 21 riksdagsordning och till övergångsbestämmelser däri* (married women not given the right to vote under this bill), Prop. 1918:104 *Kungl. Maj:ts proposition till riksdagen med förslag till lag*

responsible for the public order or safety.[102] Access to the right of public employment coincided with a period in which men were leaving the low paying public sector jobs in favor of higher paying private sector jobs.[103] A system was also created in 1925 within state employment differentiating wages between men and women for the first time since women began to gain access to public jobs in the second half of the 1800's.[104] This system of different wages would remain in place until 1948.[105]

A depression hit Sweden in the 1920's. Unemployment reached over 27 % according to labor union statistics.[106] In the same year as the enactment of the act granting women equal rights to public employment, a motion was introduced to restrict the right of married women to state employment. Motions were made in 1925, 1926 and 1927 for the state to take actions to encourage women to voluntarily terminate their state employment upon marriage for the purpose of providing better income possibilities for men and unmarried women in order to help fight the rampant unemployment existing at the time.[107]

A central arbitration institution was created in 1920 to address labor law issues, its jurisdiction based on the existence of a collective agreement between the parties.[108] Two important pieces of legislation were enacted in the late 1920's as to labor law in general, the Collective Agreements Act[109] and the Labour

angående ändrad lydelse av §§ 9, 16, 19 och 21 riksdagsordning och till övergångsbestämmelser däri (married women not given the right to vote under this bill) and Prop. 1919:358 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändrad lydelse av §§ 6, 7 , 9, 16, 19 och 21 riksdagsordning och till övergångsbestämmelser däri* (married women not given the right to vote under this bill).

[102] *Lag* (SFS 1923:249) *innefattande bestämmelser angående kvinnas behörighet att innehava statstjänst och annat allmänt uppdrag*, Prop. 1922:241 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag innefattande bestämmelser angående kvinnas behörighet att innehava statstjänst och annat allmänt uppdrag* at 6.

[103] Frangeur at 59.

[104] Kjell Östberg, EFTER RÖSTRÄTTEN – KVINNORS UTRYMME EFTER DET DEMOKRATISKA GENOMBROTTET (Stockholm 1997) at 107.

[105] *See, e.g.,* Lotta Lerwall, KÖNSDISKRIMINERING – EN ANALYSIS AV NATIONELL OCH INTERNATIONELL RÄTT (Iustus 2001) at 64.

[106] Norborg at 70.

[107] Motions 1925 (Second Chamber No. 229), 1926 (Second Chamber Nos. 26 and 201) and 1927 (Second Chamber Nos. 256 and 252).

[108] *Lag* (SFS 1920:246) *om central skiljenämnd för vissa arbetstvister.* According to § 2 of this act, the object of the dispute was to be a collective agreement. The arbitration panel according to § 7 was to consist of seven members, three non-partisan members appointed by the King of whom one was to be knowledgeable in the law, two members appointed by SAF and two by LO. A law concerning mediation was also passed that year, *lag* (SFS 1920:245) *om medling i arbetstvister.*

[109] *Lag* (SFS 1928:253) *om kollektivavtal*. The first judicial recognition of a collective agreement as a source of law had been in 1915, *see* Axel Adlercreutz, KOLLEKTIVAVTALET – STUDIER ÖVER DESS TILLKOMSTHISTORIA (Lund 1954) at 480 *citing* NJA 1915 at 233.

Court Act.[110] The former explicitly recognized collective agreements and imposed a system of damages for unlawful industrial actions, purposefully choosing private law solutions as opposed to penal sanctions as found in other systems such as England.[111] The Swedish Labour Court ("AD") was established by the latter act to assess the lawfulness, damage liability and interpretations of collective agreements and industrial actions. The Court replaced the central arbitration institution created in 1920, but retained certain aspects of the latter, namely a composition in the judging panel of members chosen by the social partners, a feature retained to the present day. On 22 May 1928, over one-third of a million LO members protested this legislation,[112] evincing a hostility to legislation and state "interference" that would linger to the current day. The employee associations were not initially positive to these two acts, but quickly saw their advantages.[113] Statistics show that the employee side brought over two hundred cases annually in the period from 1929 to 1933, finally tapering down to about 60 per year by 1963.[114] It would not be until the 1970's that these two acts would be replaced and the caseload of AD would again increase significantly under its expanded jurisdiction according to the new legislation.

3.1.5 The 1930's: The Birth of the Swedish Model and a Population in Crisis

The 1930's brought a new period of change within the area of labor, marking the birth of the Swedish welfare state and the finalization of the Swedish Model of labor law. The Swedish welfare state, as incarnated in the concept of the folk home, *folkhemmet,* based on public services such as insurance, education and medical care, began to take shape during this period, arguably reaching its peak in the present day. The term *folkhemmet* was based in part on an often-quoted

[110] *Lag* (SFS 1928:254) *om arbetsdomstol*.

[111] Prop. 1928:39 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om kollektivavtal och till lag om arbetsdomstol*. For a summary of this history, *see* Folke Schmidt, THE LAW OF LABOUR RELATIONS IN SWEDEN (Harvard 1962) at 211. The first legislative bill for this law was submitted already in 1910, Prop. 1910:96 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag om kollektivavtal mellan arbetsgivare och arbetstagare, lag om särskild domstol i vissa arbetstvister, m.m.* followed by Prop. 1911:43 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag om kollektivavtal mellan arbetsgivare och arbetstagare, lag om särskild domstol i vissa arbetstvister, m.m.* and governmental reports as early as 1901, *Förslag till lag om vissa arbetsaftal, afgifvet af dertill i nåder utsedde kommitterade*, and again in 1910, *Kollektivaftal angående arbets- och löneförhållanden i Sverige. I. Redogörelse för kollektivaftalens utbredning och hufvudsakliga innehåll (Arbetsstatistik A:5, Utgifven af K. Kommerskollegii afdelning för arbetsstatistik)*. With respect to the criminalization of labor union membership, the American courts had begun to abandon that referenced common law doctrine already in the 1850's.

[112] Nycander at 32.

[113] Lennart Geijer, ARBETSGIVARE OCH FACKFÖRENINGSLEDARE I DOMARSÄTE (Lund 1958) at 12. *See also* Tore Sigeman, *Från legostadgan till medbestämmandelagen*, 1984 SvJT 875 at 880.

[114] *See* Sten E.Son Edlund, TVISTEFÖRHANDLINGAR PÅ ARBETSMARKNADEN – EN RÄTTSLIG STUDIE AV TVÅ RIKSAVTAL I TILLÄMPNING (Norstedt 1967) at 48.

speech by Per Albin Hansson, later Swedish Prime Minister, to the Swedish Parliament in 1928:

> The basis of the home is community and the spirit of togetherness. The good home does not recognize any privileges or slighting, any favorites or stepchildren. No one looks down upon anyone else there, no one attempts to profit at another's expense, the strong do not oppress and exploit the weak. In the good home, equality, consideration, cooperation and helpfulness rule. Applied to the great house of the people and citizens, this means the breakdown of all social and economic barriers that now distinguish citizens as privileged or slighted, dominant or dependent, rich or poor, propertied or destitute, conqueror or plundered. Swedish society is not yet this good citizens' home…[115]

However, Hansson had referred to this imagery previously, as in an article he wrote for *Morgonbris* in 1927:

> We have come so far that we have begun to furnish the great *folkhemmet*. It is a question of creating harmony and comfort there, making it nice and cozy, light, happy and free. For a woman, there ought not be a more enticing task. Perhaps she only needs to gaze upon it to be revived, for her to come with all her zeal and enthusiasm.[116]

The rise of the welfare state, or *folkhemmet*, as well as the Swedish labor law model, must also be analyzed at this time against the background of women in power. Suffrage as granted to women in 1921 led to the first five women elected to the Swedish Parliament in 1922 of the 380 positions. By the beginning of the 1930's, their numbers had increased to six.[117] Women were entirely absent from the upper echelons of power, both politically and within the hierarchies of the social partners. This absence was felt significantly past the 1970's, one example of which is that LO's first female chairman was elected in 2000. By 1940, women were in the majority of six of LO's 46 affiliated labor unions; by 1970 that number was seven.[118]

The Swedish labor law model began to be finalized during the 1930's. It is estimated that there were over 700 strikes a year in Sweden during the first half of this decade, and that eighty percent of all industrial workers were covered by collective agreements, a level of coverage that has continued to the present.[119] The central organizations entered into the *Saltsjöbads* Agreement in 1938, reinforcing the Swedish model of cooperation between the social partners, the employer and employee central organizations, and the state's expressed policy of

[115] For the text of this speech, *see* http://www.komvux.helsingborg.se/larare/lb/textniv1/histait/1900/folkhem.htm.

[116] *See* Hirdman at 82 *citing* Per Albin Hansson in *MORGONBRIS* Christmas edition 1927.

[117] *See* Östberg at 9. By 1967 the percentage of women in parliament was 13 % and 1979, 23 %. *See* Widerberg (1980) at 85.

[118] *See* Gunnar Qvist, STATISTIK OCH POLITIK. LANDSORGANISATIONEN OCH KVINNORNA PÅ ARBETSMARKNADEN (Prisma 1974) at 61.

[119] Nycander at 65 and 91.

neutrality to labor issues.[120] Five main topics were covered by the agreement. The Labour Market Council was established, which through mutual appointments to the Council, the central organizations would deal with specific labor market issues. Second, a negotiation procedure was established between the parties to handle labor disputes. Third, employers lost the right to freely terminate and/or lay-off employees, agreeing instead to a procedure by which the union would be notified in such cases, and if the parties were unable to resolve the issue, it would be referred to the Council. The counterbalance to this concession by the employers was the fourth point in the agreement. It limits employees taking industrial actions in certain contexts, such as cases of retaliation or potential damages to third parties, proscribing a duty to maintain industrial peace. Finally, the parties agreed that industrial actions presenting potential disruptions to vital public interests would be assessed by the Council for the dangers they posed. If they were too great, they would be enjoined. That same year, a law regulating organizational and negotiating rights was enacted.[121]

As to legislation enacted during the 1930's concerning women, revisions were made to the 1912 Worker Protection Act in 1931, prompted in part by the 1919 Washington Convention.[122] The resulting modifications regarding women were modest: Women now had the right to a six-week period of leave before the birth of a child without needing to demonstrate a health risk. The prohibition of women working night shifts was discussed with a consensus reached that the legislation was not satisfactory to either women or industry.[123] Despite this, the prohibition was integrated into the revised Act. Revisions were also made to the maternal leave compensation program: Industrial female workers were now entitled to 56 days of economic compensation for maternal leave, while other female employees were entitled to 30 days, reflecting the difference between industrial workers having a mandatory maternal leave of six weeks and other female workers

[120] That this neutrality is still maintained in this new millennium can be seen from a 1999 legislative bill, Prop. 1999/2000:32 *Lönebildning för full sysselsättning* (Wage level development for full employment) at 4:

> Sweden has had a system that stretches far back in which the social partners in the labor market themselves have responsibility for the collective agreements entered into, without the interference of the government or parliament. This right to freely negotiate is a cornerstone in the Swedish labor market. The employee's right to strike and the employer's right to lock-out are parts of the Constitution. This fundamental basis for wage level development is also anchored as to the future. The responsibility for wage development is with the labor market parties. The State is to be neutral between the parties.

[121] *Lag* (SFS 1936:506) *om förenings- och förhandlingsrätt*.
[122] Prop. 1931:40 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändring i vissa delar av lagen den 29 juni 1912 (nr 206) om arbetarskydd* at 17.
[123] *Id.* at 111.

having no such requirement.[124] A motherhood insurance system was created in 1931 to be administered by the labor union's health insurance funds, giving sickness benefits for 30–42 days as well as compensation to midwives.[125] For those persons not eligible for monies from one of the labor unions' funds, a specific amount was made available. This was transformed in 1937 to a right to compensation for maternal leave based on general requirements.

The motions introduced in the 1920's calling for restrictions as to state employment of married women were renewed in the 1930's, again during a period of economic depression caused in part by the Kreuger crash.[126] In 1934, nine such motions were introduced in Parliament.[127] Two government investigations, by the Population Committee and the Women's Employment Committee, respectively, were commenced to address the issues raised in these motions, and the employment of married women in general.[128] The Population Committee investigated issues concerning the low rates of marriage[129] and nativity,[130] and family structure in general. Alva Myrdal, chair of the committee, spoke of the significant *jämställdhet* women had with men in the factories.[131] The committee proposed legislation prohibiting employers from terminating employment based upon marriage or pregnancy, as the Committee found that many women were choosing to not marry, as the result of marriage often was employment termination.[132] The proposal was enacted in 1939.[133] Contraception no longer was outlawed after 1938. In the 1945 proposed amendment to strengthen the 1939 Act,

[124] SOU 1954:4 at 17.

[125] *Kungliga förordning* (SFS 1931:281) *om moderskapsunderstöd.*

[126] Motions 1931 (Second Chamber No. 51), 1933 (Second Chamber No. 394) and 1934 (Second Chamber Nos. 29, 146, 366, 368, 488, 489 and 502, and First Chamber No. 23 and 269).

[127] The motions introduced in the 1920's and the 1930's appear to follow the pattern of unemployment, with unemployment reaching a high (27 %) in the early 1920's, then a lull (12 %), then a high again (22 %) in the early 1930's, following a decline that by 1950 was a level of only 3 % which lasted until the 1970's. *See* Norborg at 70.

[128] This debate was extensive, taken up by the different labor unions and other organizations. A men's union was even formed to fight against the injustices caused by married women having state employment positions, resulting in "double" employment within certain families. Frangeur at 196.

[129] Sweden's marriage frequency reached an all-time low in 1930. Frangeur at 64 *citing* Qvist (1974) at 18.

[130] At the turn of the twentieth century, approximately 260 children were born to each 1000 women of childbearing age. By 1930, this had decreased to 116. *See* Widerberg (1980) at 87.

[131] *See* SOU 1938:47 at 64 ("Even within factory work, [women] have from the beginning taken a significant place *jämsides* with men").

[132] SOU 1938:13 *Betänkande angående Förvärvsarbetande Kvinnors Rättsliga Ställning vid Äktenskap och Barnsbörd* at 12

[133] *See Lag* (SFS 1939:171) *om förbud mot arbetstagarens avskedande i anledning av trolovning eller äktenskap m.m.* The prohibition against terminating employment due to a betrothal, marriage or pregnancy was applicable to employers with more than three employees and to employees who had worked for the employer two years or more.

it was estimated that as many as 10 % of the abortions performed were motivated by a fear of losing employment.[134]

The Women's Employment Committee investigated the effects of married women's employment on the labor market, and whether further restrictions of employment rights in accordance to the motions made would be feasible or desirable. The committee concluded that any further restrictions on women's employment, particularly married women's employment, would be unreasonable given women's increasing role in the economic sector. As to the existing prohibition of night work, the committee stated that it was against the prohibition, but understood that international obligations made its repeal difficult. The committee suggested amending the prohibition to make it more flexible, and concluded by "expressing the hope, that equality in this respect can be reached for men and women through the cessation of night work generally as an unsuitable and unhealthy form of work for one and all."[135] The central problem as viewed by the committee was not the employment of women, but facilitating women's rights to marriage and children, goals that ought to be the focus of any legislation enacted with women's employment rights.[136]

The issue was raised in 1935 whether Sweden should ratify the 1934 Geneva Convention, a revision of the 1919 Washington Convention, yet another convention concerning women working night shifts. This convention differed from the current Swedish legislation in three main aspects, the time prohibition would be from 11:00 p.m. to 6:00 a.m. instead of 10:00 p.m. to 5:00 a.m., operations of less than ten employees would be included, and women having management positions would be exempted from the prohibition.[137] One argument offered against the adoption of the Convention was that no reason existed to prohibit older, unmarried women from having the same jobs as men, a fact that had been true since the early 1900's when the restriction was first considered. As the range of labor covered under the new convention was much broader, it was not adopted, as it would "unquestionably cause, in many areas, effects which for women workers would be noticeable and unjust."[138]

An interesting foil to the treatment by the Swedish Parliament of the issue of women's night work is its parliamentary treatment of legislation restricting the

[134] Prop. 1945:368 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap m.m.* at 9. The proposal was passed as *Lag* (SFS 1945:844) *av 21 dec. 1945 om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap* ("1945 Act"). The two year qualification period was reduced to one year of employment with the employee.
[135] SOU 1938:47 at 201.
[136] *Id.* at 333.
[137] Prop. 1935:84 *Kungl. Maj:ts nådiga proposition till Riksdagen med anhållan om riksdagens yttrande angående vissa av den internationella arbetsorganisationens konferens år 1934 fattade beslut* at 4.
[138] *Id.* at 5.

work hours of both sexes to eight hour days and forty-eight hour weeks. This right was one of the first demands by the labor movement, and motions were introduced in the Swedish Parliament as early as 1856 calling for restrictions of the workweek for all workers. International conventions had been drafted, including one during the 1919 ILO Washington conference. Instead of jumping enthusiastically onto this bandwagon, as it had with the prohibition as to women's night work, the Swedish Parliament assumed a more skeptical stance in its assessment of this prohibition affecting men. It passed provisional laws upon three occasions, all of which were in force for limited periods of time, over a decade, in order to be able to "assess" the effects of the law on the Swedish labor force and industry before adopting a permanent solution. When potentially restricting the employment of men, Parliament was willing to enact laws tailored specifically to Swedish needs instead of simply succumbing to international demands.[139] This flexibility, in an area of legislation affecting the male population, is interesting when compared to the Parliamentary treatment of almost identical restrictions in women's working hours. There Parliament gave precedence to international demands and the experiences of other European countries, almost ignoring those in Sweden. This precedence was shown to be clearly detrimental to Swedish women, as was so clearly demonstrated by the subsequent experiences of Swedish female typographers.

3.1.6 The Post-War Period of Relative "Inactivity"

The period following the 1930's into the 1970's has been characterized as inactive with respect to labor law in general, a sign of the harmony reached by the social partners in the labor market. The beginning of this period was fairly inactive regarding women's rights. In contrast to their counterparts in England and the United States, women in Sweden were not forced into the workplace to any large extent during World War II as Sweden maintained neutrality. During the 1940's and 1950's, the labor market participation of adult married women in Norway and Sweden was at 5–10 %, among the lowest in Western Europe at that time. The increased demand for women in the labor force in Sweden

[139] Provisional laws were passed in *lag* (SFS 1919:652) *om arbetstidens begränsning*, valid from 1919–1923, *lag* (SFS 1923:288) *om arbetstidens begränsning*, valid from 1924–1926, *lag* (SFS 1926:162) *om arbetstidens begränsning*, valid from 1927–1930, with a permanent law finally enacted in 1930, *lag* (SFS 1930:138) *om arbetstidens begränsning*. *See generally* Prop. 1926:73 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om arbetstidens begränsning* and Prop. 1930:31 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om fortsatt giltighet av lagen den 4 juni 1926 (nr 162) om arbetstidens begränsning*. The right to a two week vacation was not enacted until 1938, *see lag* (SFS 1938:287) *om semester*.

occurred 10–15 years after this initial demand caused by World War II, during the post-war rebuilding phase in Europe.[140]

The large infusion of women in the workplace in Europe and the United States during World War II ultimately led to an international recognition in 1948 of equal pay for equal work in Article 23(2) of the UN Declaration of Human Rights, followed three years later by the adoption of ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951. Legislation mandating equal pay for equal work in the Swedish state public sector was passed in 1948.[141]

An overhaul of the 1912 Employment Protection Act was also proposed that year, extending the coverage of the mandatory maternal leave to include all female workers, not just industrial workers.[142] Each of the women's organizations consulted with respect to the proposal were against it, arguing that instead of a general prohibition in the law, the problem should be resolved by giving women the *right* to maternal leave with adequate economic compensation.[143] The night work prohibition was retained without change. A proposal was also made to extend this prohibition to all female workers to be consistent with ILO Convention No. 89.[144] Women's groups argued that the prohibition should be repealed in its entirety.[145] The standing Legislative Committee found that as Sweden was currently bound by the 1906 Bern Convention, it could not amend the existing law.[146] The prohibition was retained in its entirety, as was the prohibition of women working in mines and quarries. The responsible Minister stated that even if the prohibitions against mines and quarries ought not to have a significant impact, they should be retained as Sweden had ratified the 1935 ILO Convention concerning the employment of women in mines.[147]

The Government was given the authority in 1948 to grant exemptions to the prohibition of women's night work, much as had been given to the King during

[140] *See* Lynn Roseberry, *Equal Rights and Discrimination Law in Scandinavia* in Scandinavian Studies in Law Vol. 43, STABILITY AND CHANGE IN NORDIC LABOUR LAW (Stockholm 2002) at 221. *See also* Bengt Nilsson, KVINNOR I STATENS TJÄNST (Uppsala 1996) at 290.

[141] *Statens allmänna avlöningsreglemente* (SFS 1948:436).

[142] Prop. 1948:298 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till arbetarskyddslag* and SOU 1946:60 *Betänkande med förslag till Lag om Skydd mot Ohälsa och Olycksfall i Arbete m.m.*

[143] SOU 1946:60 at 479.

[144] ILO Convention No. 89, Night Work (Women) Convention (Revised) of 1948 was drafted in San Francisco.

[145] Bet. 1948:2LU62 at 53.

[146] *Id.*

[147] Bet. 1961:2LU23 at 3. ILO Convention No. 45, Underground Work (Women) Convention of 1935, drafted in Geneva, concerning prohibiting the use of women in underground work, was ratified in Sweden in 1936. A denouncement of the convention could occur at the earliest in 1967. Prop. 1962:167 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i arbetarskyddslagen den 3 januari 1949 (nr 1)* at 7.

World War I. This was based on a desire to maximize the utilization of the work force, especially labor in two work shifts, and to increase production in Swedish industry, particularly in the iron industry during the post-war reconstruction.[148] Sweden was economically benefiting from the fact that it was one of the few European countries not significantly harmed by World War II. Its industrial power structure as well as infrastructure were still intact. The Government's ability to grant dispensations would allow further exploitation of this economic advantage.

The 1906 Bern Convention was partially denounced finally in 1949.[149] Freed from the restraint of the international cooperation, legislative changes were proposed in 1950 to the night work prohibition, to renew the authority to grant exemptions and to render the prohibition consistent with the most recent version of the ILO night work convention.[150] Although the convention was not ratified by Sweden, it was viewed by parliament as desirable that Swedish legislation mirror the resolutions as agreed upon in the convention. The proposed changes were a softening of the prohibition: The mandatory night rest could consist either of a prohibition of work between 10:00 p.m. and 5:00 a.m. or any seven hour stretch falling within the time period of 10:00 p.m. and 7:00 a.m. The proposed changes were enacted into law in 1951.[151]

A general child allowance was established as a public benefit in 1947.[152] Both parents were given legal custody of their children in 1950.[153] Previously, the father had sole legal custody if the parents were married. A national health insurance system with income-related sickness benefits and subsidized health care as well as an occupational injury insurance were established in 1955. Motions were made in 1957 to investigate the repeal of the prohibition of night work for women.[154] The recommendation of the standing Legislative Committee to reject the motions was adopted.[155] The next year, women received the right to become priests in the Swedish state church.[156] The Board of Occupational Safety proposed in 1960 amending the 1949 Worker Protection Act by transferring the authority to grant exemptions from the Government to the Board. A government investigation was initiated.

[148] Prop. 1950:43 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i arbetarskyddslagen den 3 januari 1949 (nr 1), m.m.* at 12.
[149] *Kungl. Maj:ts Beslut* 20 May 1949.
[150] ILO Convention No. 89, Night Work (Women) Convention Revised drafted at San Francisco. *See* Prop. 1950:43 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i arbetarskyddslagen den 3 januari 1949 (nr 1), m.m.* at 4.
[151] *Lag* (SFS 1950:73) *om ändring i arbetarskyddslagen (1949:1).*
[152] *Lag* (SFS 1947:529) *om allmänna barnbidrag.*
[153] *Föräldrabalken* (SFS 1949:381) Chapter 11 § 1.
[154] Motions 1957 (Second Chamber No. 413) and (First Chamber No. 330).
[155] Bet. 1957:LU37.
[156] *Lag* (SFS 1958:514) *om kvinnas behörighet till prästerlig tjänst.*

The issues of whether Sweden should ratify ILO Convention No. 100 on equal remuneration, adopted in 1951, and ILO Convention No. 111 on discrimination (employment and occupation), adopted in 1958, were raised in the 1950's.[157] Both the government and the parliament opposed ratification as they did not wish to depart from the generally accepted principle that the social partners, through free contract negotiations, had the right to enter into agreements as to wage conditions without interference or influence of the state.[158] Different wage tariffs for men and women had existed in the collective agreements since the beginning of the 1900's. The central parties, SAF and LO, entered into an agreement that all such different wage tariffs would be phased out over a period of five years beginning in 1960, arguably to prevent legislation in the area.[159] Based on these efforts, the Government found that the conditions required to adopt the conventions existed in 1962, and parliament ratified the conventions that same year despite opposition by LO and SAF.[160] Sweden and Finland were the last of the Nordic countries to ratify these conventions.[161] This voluntary phasing out of wage differences based on sex, however, did not effect a resolution of the wage differences between women and men. The designations of male and

[157] *See for example,* Prop. 1952:47 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens konferens år 1951 vid dess trettiofjärde sammanträde fattade beslut* at 1.

[158] Prop. 1959:23 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens allmänna konferens år 1958 vid dess fyrtioandra sammanträde fattade beslut* at 11. *See also* Ds Ju 1975:7 *PM till frågan om lagstiftning mot könsdiskriminering* at 26, *citing* Prop. 1952:47 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens konferens år 1951 vid dess trettiofjärde sammanträde fattade beslut*, Bet. 1952:2LU21, Rskr. 1952:93, as well as renewed parliamentary treatment in 1956 (Bet. 1956:2LU37), 1958 (Bet. 1958:B8LU2), 1959 (Bet. 1959:2LU2), 1960 (Bet. 1960:2LU58) and 1961 (Bet. 1961:2LU4) regarding ILO Convention No. 100, Equal Remuneration Convention of 1951, incorporating the principle of equal remuneration for men and women workers for work of equal value, and Bet. 1959:2LU2, Rskr. 1952:83 regarding ILO Convention No. 111, Discrimination (Employment and Occupation) Convention of 1958 (prohibition as to discrimination on the basis of race, creed or sex).

[159] An example of the sex based tariffs as explicitly included in the collective agreements can be seen in the collective agreement, *Verkstadsavtalet,* dated 1960 given as Attachment 1, in Edlund (1967) at 363. Minimum wages are listed on the basis of sex, which are then broken down further as to age, with the age of 19 being peak wages for women, and the age of 24 for men. Male wages are further categorized by length of experience. For employees at least the age of 24 with at least seven years' experience, a man was entitled to a minimum wage of SEK 3.08 per hour, a woman SEK 2.43, 79 % of the male wages. *Id.* at 364.

[160] Prop. 1962:70 *Kungl. Maj:ts proposition till riksdagen rörande ratifikation av Internationella arbetsorganisationens konvention (nr 100) angående lika lön för män och kvinnor för arbete av lika värde, m.m.*, Bet. 1962:2LU26, Rskr. 1962:333. *See* Fransson at 174.

[161] Despite the ratifications of these conventions, they did not become Swedish law. Sweden has a dualistic ratification system with respect to public international law agreements, as stated by both the Swedish Supreme Court in NJA 1973:423 and the Swedish Supreme Administrative Court in RÅ 1974:121, as opposed to a monistic system such as in the United States where international

female employers in the collective agreements were often simply substituted with new designations of "skilled" and "unskilled" workers respectively.[162] These new classifications have repercussions even today as jobs held by men are categorized to a greater degree and number than jobs held predominantly by women. For example, 27 work classifications presently exist for the predominantly male position of machine operator, but only one for the female dominated position of nurse's assistant.[163]

Motions were made again in both chambers in 1960 for an investigation of the repeal of the prohibitions concerning night work for women. The prohibition, it was argued, prevented Swedish industry from maximizing its labor force, placing Sweden at a disadvantage among competing countries. Sweden was losing the industrial advantage it had after the Second World War, and was even lagging in capital investments due to industry's inflexibility as a result of the prohibition.[164] Motions were made again in 1961 in both chambers for the repeal of the prohibition on night work for women. The prohibition, it was maintained, was antiquated and inconsistent, as women were prohibited from working in industrial sectors at night due to health reasons, but could work night shifts, for example at hospitals, without any perceived harm.[165] The standing Legislative Committee recommended that treatment of the motions be postponed until the already commenced state investigation was complete.[166] The legislative bill submitted in 1962 went a step further than the proposed amendments of the Board of Occupational Safety, with the proposal that the prohibition of women and night work be repealed in its entirety, that the required night rest be applicable to both sexes, and that the Board of Occupational Safety be given the authority to grant exceptions to the prohibition of women working in mines. Among the reasons given for this proposal was the fact that "[a]mong our women, there is a labor force reserve, which our industry is eagerly seeking for its continued expansion."[167] The proposal was accepted by the Parliament in its entirety.

---

agreements automatically become law. The first public international law convention to be enacted as a law in Sweden was the ECHR in January 1995, *Lag* (SFS 1994:1219) *om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna. See also* Cameron (2002) at 151.

[162] *See* Roseberry (2002) at 223. *See also* Anita Dahlberg, *Equal Opportunities and collective bargaining in the European Union – Selected Agreements from Sweden Phase II,* European Foundation for the Improvement of Living and Working Conditions (1996) at ii.

[163] *See Självkritisk LO-bas lutar åt lagstiftad jämställdhet – För stark tro på reformer enligt Wanja Lundby-Wedin,* SVD NÄRINGSLIV, 10 April 2005 at 1.

[164] Motion 1960 (Second Chamber No. 26) at 25.

[165] Motion 1961 (Second Chamber No. 234) at 7.

[166] Bet. 1961:2LU23 at 10.

[167] Prop. 1962:167 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i arbetarskyddslagen den 3 januari 1949 (nr 1)* at 10. *See also* Motions 1962 (Second Chamber No. 884) and (First Chamber No. 730).

3.1.7 The Dismantling of the Restrictions in the 1970's: The Birth of the Modern Economically Independent Woman

The dismantling of the statutory restrictions with respect to women's employment, once begun, took a period of fifteen years to complete, beginning with the repeal of the prohibition of night work in 1962, the transformation of maternal leave from an obligation to a right in 1976, and the repeal of the prohibition of women working in mines and quarries with the passage of the Work Environment Act in 1977. The expansion of women's rights began with the adoption of the first Equal Treatment between Women and Men Act. As the legislative bill to the Act noted, this was a new period of change. Employment during the decade had increased by 390 000 jobs, of which 380 000 were held by women.[168] Half of all women working did so part-time, in contrast with 5 % of men, and many women were working in the rapidly expanding public sector.[169] The level of occupational segregation was high as were wage differences between women and men, at least in part a relic of the different tariffs that had explicitly existed in certain collective agreements until the mid-1970's.[170] In addition, women had almost total responsibility in the private sphere for home and the care of children. The word *jämställdhet* began to be used in earnest,[171] coined to denote a demar-

[168] *See* SOU 1978:38 at 39 and Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 13–15.

[169] *See* Ronnie Eklund, *Sweden: part-time work – welfare or unfair?* in Silvana Sciarra, Paul Davies and Mark Freedland, eds., EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION – A COMPARATIVE ANALYSIS (Cambridge 2004) at 259 as to the historical roots of part-time work for women in Sweden and Sweden's tepid response to the EC Part-time Directive as well as the absence of any true change in this area since 1976.

[170] *See* Irma Irlinger, TCO OCH KVINNORNA – TIDSPERIODEN 1944–1974, STUDIE AV TCOS OCH SIFS ARBETSMARKNADSPOLITIK OCH BEHANDLING AV PRINCIPEN LIKA LÖN FÖR LIKA ARBETE (Uppsala 1990). Irlinger found that as late as 1974, the labor union SIF still had terms in the collective agreements that created differentials on the basis of sex. Within the salaried employees sector, Irlinger found during this period that only teachers at the municipality level had come close to achieving equal pay for equal work. She also found that during this period, men and women did not have access to the same employment positions to the same degree. *Id.* at 316. In her study of two labor unions, TCO and SIF, and their stances towards equal pay legislation, she notes that arguments these labor unions made against such legislation included the "Swedish model", limited fiscal resources, that such legislation would be a "patriarchal" treatment of women, as well as it would invoke jealousy among women's groups. *Id.* at 325.

[171] *Jämställdhet,* equality between the sexes, was thus distinguished from all other forms of equality, *jämlikhet,* predominantly concerned with equality between the economic/social classes, as well as within groups other than men and women. This conceptual distinction has carried over to other legislative areas treating discrimination based on race, handicap and sexual preference, all of which are referred to as issues of *jämlikhet.* Ethnic discrimination was first generally prohibited in 1986, *Lag* (SFS 1986:442) *mot etnisk diskriminering,* which law was replaced in 1994 by *Lag* (SFS 1994:134) *mot etnisk diskriminering* containing express provisions concerning employment and hiring. This was replaced in 1999 by *Lag* (SFS 1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet* which expanded the provisions to include religion and other beliefs. That same year, prohibitions against discrimination based on sexual orientation and handicap were also legislated.

cation from equality in society as whole, *jämlikhet. Jämställdhet* focused exclusively on equality between the sexes, marking a shift from women's issues to societal issues between women and men. Theoretically this was to free both sexes from the roles that society historically had placed on them, giving women and men equal rights as well as equal responsibilities.[172] To this end, one of the first acts with respect to *jämställdhet* in the 1970's was the beginning of the transition from family based to individual income taxation in 1972, a process completed in 1991.[173] Wealth tax, however, is still assessed on a family basis.

The 1970's were a significant period of change also for labor and employment law in general, with several of the currently key acts passed in this decade. These changes need to be seen in the context of the national economy. During the 1950's and 1960's, Sweden was one of the wealthiest countries in the world, as it capitalized on an infrastructure left untouched by two world wars. Europe was rebuilding, and Sweden provided many of the materials and tools. Acts limiting working hours in general[174] and as to household work[175] were passed in 1970. Sweden was plunged into an economic crisis in the middle of the 1970's, with high inflation, high state budgetary deficits, an aging population as well as a potential shortage of workers. The Act on Employment Protection ("LAS") was enacted in 1974, requiring objective reasons for employment terminations and putting into place statutory regulations for drawing up redundancy lists.[176] The Employment (Co-determination in the Workplace) Act[177] was passed, replacing the 1928 law on collective agreements and the 1936 act as to union affiliation and negotiations, codifying much of the practices between the social partners on such agreements and adding new joint regulation schemes.[178] Statutory protection was established for union representatives in the Trade Union Representatives (Status at the Workplace) Act.[179] A right to a leave of employment for educational purposes was also created.[180] Many of these acts contained provisions

[172] Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 14.

[173] For a criticism of the theoretical neutrality of this taxation system and its contribution to *jämställdhet*, *see* Åsa Gunnarsson, *Myten om vad den könsneutrala skatterätten kan göra för jämställdheten,* 2000 SKATTENYTT 487.

[174] *Allmän arbetstidslag* (SFS 1970:103), replacing the 1930 Working Hours Act. The 1970 Working Hours Act was replaced by the 1982 Working Hours Act, *Arbetstidslag* (SFS 1982:673).

[175] *Lag* (SFS 1970:943) *om arbetstid m.m. i husligt arbete*.

[176] *Lag* (SFS 1974:12) *om anställningsskydd* ("1974 LAS") was replaced in 1982 by an act with the same name, *Lag* (SFS 1982:80) *om anställningsskydd*. As to the regulations regarding the employer's determination of redundancy, both statutory and contractual, and their application, *see* Catharina Calleman, TURORDNING VID UPPSÄGNING (Norstedts 2000).

[177] *Lag* (SFS 1976:580) *om medbestämmande i arbetsliv* ("MBL").

[178] Sigeman (1984) at 886. Sigeman speaks of a rather seamless transition from the 1928 act to MBL. Compare Nycander at 270.

[179] *Lag* (SFS 1974:358) *om facklig förtroendemans ställning på arbetsplatsen.*

[180] *Lag* (SFS 1974:981) *om arbetstagares rätt till ledighet för utbildning*.

allowing the social partners to opt out of certain of these provisions through collective agreements. The Labour Disputes (Judicial Procedure) Act was also passed in 1974, replacing the 1928 act and expanding the jurisdiction of AD to include employment issues where the parties were bound by collective agreements.[181] Sweden's Prime Minister Olof Palme stated in 1976 that he considered the passage of the new employment legislation the most important thing that had happened in Sweden in the 1970's.[182]

In addition to the new labor legislation, a new constitution became effective in 1974.[183] According to Chapter 1 § 1 of the Instrument of Government, all state power in Sweden resides in the people, and the powers of the state are to be exercised showing respect for the equal value of all persons and for the freedom and integrity of the individual.[184] Freedom of expression, as well as freedoms to obtain information, of association, of protest as well as of religion are protected in the Second Chapter, including the right to not be associated with an organization. Certain guarantees concerning the relations between employers and employees were also included in the Second Chapter, among them the right according to § 17 to take industrial action, providing that "[a]ny trade union or employer or association of employers has a right to take industrial action unless otherwise provided by law or by agreement." A provision was added in 1976 forbidding the state from discriminating against any person by law or regulation due to sex, if the legal instrument did not constitute a step in the endeavor to achieve equality between men and women.[185] The Swedish ratification of the UN Convention for the Elimination of all Forms of Discrimination against Women started at the end of this decade.[186]

Another aspect of Swedish employment regulations that can be mentioned here is the general divide between labor and employment law. Labor law, the regulations concerning the social partners, the right to organize as well as collective agreements, has the primary role as to employment in general, very much a reflection of the Swedish Model as discussed above. Individual employment terms and conditions, as well as individual contracts, have always been, and still are, regulated in accordance with principles of general contract law. Not much

[181] *Lag* (SFS 1974:371) *om rättegången i arbetstvister.*
[182] Nycander at 294.
[183] *See Kungörelse* (SFS 1974:152) *om beslutad ny regeringsform*.
[184] This provision was later amended to include a provision mandating that the state work against discrimination of persons on the basis of sex, color, nationality or ethnic origin, language or religion, physical handicap, sexual orientation, age or other circumstance concerning the individual as a person. *See Lag* (SFS 2002:903) *om ändring av regeringsformen*.
[185] *Lag* (SFS 1976:871) *om ändring i regeringsformen.*
[186] *See* Prop. 1979/80:147 *om godkännande av Förenta nationernas konvention om avskaffande av all slags diskriminering av kvinnor.* Sweden ratified the convention in March 1980, *see* http://www.un.org/womenwatch/daw/cedaw/states.htm.

exists in the way of employment law in Sweden, except arguably the protective legislation discussed above and the discrimination and parental leave legislation. The individual employment contract historically has had a secondary role in the minds of both legislators and legal scholars. However, the function of these individual contracts in employment is becoming more and more prominent, not yet reaching parity with the collective agreements that cover over 90 % of the workforce in Sweden, but still significant.[187] The terms of individual employment agreements, particularly for wages, have been cited as a basis and justification for wage differences between women and men, as seen in the case law discussed below concerning issues of wage discrimination.

3.1.7.1 The Repeal of the Work in Quarries and Mines Prohibition – The Work Environment Act of 1977

The committee appointed to draft a Work Environment Act issued several separate reports in 1976 on a revision of the regulations found in the 1949 Employment Protection Act, and the shape modern legislation for workers' occupational protection should take.[188] The committee noted that § 35 of the 1949 Act forbidding the use of women in employment within four weeks after the birth of a child, as drafted in 1900, was the only regulation in Swedish legislation that guaranteed female employees the right to a maternal leave after the birth of a child.[189] It further noted that the legal status of an employee's right to maternal leave was unclear from the different applicable laws, but that this was an issue more suitable to legislation other than a Work Environment Act. The committee proposed amending the 1945 Act prohibiting employers from terminating employment on the basis of a marital engagement, marriage or childbirth, to include a provision allowing a maternal leave beginning six weeks prior to and ending six weeks after the birth of a child to be in compliance with the European Social Charter.

The Work Environment Act Committee also found that the restriction placed on women working in mines and quarries was unwarranted as no evidence existed demonstrating that women suffered more unduly than men in such environments.[190] The repeal of the paragraph was recommended, the committee finding it more suitable that the Board of Occupational Safety be authorized to determine suitable levels of work exposure for both sexes and issue regulations

[187] For further analysis as to the modern role of the individual employment contract, *see generally* Jonas Malmberg, ANSTÄLLNINGSAVTALET – OM ANSTÄLLNINGSFÖRHÅLLANDETS INDIVIDUELLA REGLERING (Iustus 1997).

[188] See SOU 1976:1 *Arbetsmiljölag A,* SOU 1976:2 *Bakgrund till arbetsmiljölag B*, and SOU 1976:3 *Internationella konventioner inom arbetarskyddet A*.

[189] SOU 1976:1 *Arbetsmiljölag A* at 443 and SOU 1976:2 *Bakgrund till arbetsmiljölag B* at 64.

[190] SOU 1976:1 *Arbetsmiljölag A* at 113.

accordingly.[191] Before the proposal was accepted by the Parliament, the 1976 Parental Leave Act was passed, rendering the committee's proposal on maternal leave moot. The Work Environment Act was legislated in 1977, repealing the prohibition against women working in mines and quarries and the last of the statutory restrictions of women's employment.

3.1.7.2 The Repeal of the Mandatory Maternal Leave – The Parental Leave Acts of 1976 and 1978

Up to the 1970's, the six weeks of obligatory maternal leave for industrial workers had basically remained unchanged since the 1900 Act and was the only legislation existing for this type of leave. An extended right to parental leave encompassing both parents was passed in 1976 in the effort towards complete formal equality between the sexes in the law.[192] The 1945 Act concerning the protections against employment termination on the basis of marriage or pregnancy was repealed, as were the provisions in the 1949 Worker Protection Act. The right of employees to parental leave was established in § 3 of the 1976 Parental Leave Act, with an employee eligible to take leave after either six months of continual employment, or twelve months of employment within the past two years. The right to parental leave was tied to the Swedish National Insurance Act that still defines many issues of eligibility and parental leave cash benefit amounts. The mother allowance had already been transformed into a parental leave cash benefit in 1974 through amendments to the National Insurance Act.[193] The original period of leave under the 1976 Act was seven months and a parent could take either 100 % or 50 % leave from employment.[194] Female employees not eligible

[191] An authorization of power which the board has used, *see, e.g., Arbetarskyddsstyrelsens föreskrifter om rök- och kemdykning*, AFS 1995:1 at § 8, pregnant employees prohibited from working with the containment of chemicals or smoke as in rescue work, *Arbetarskyddsstyrelsens föreskrifter om dykeriarbete*, AFS 1993:57 at § 9, pregnant employees not allowed to dive as employment, and *Arbetarskyddsstyrelsens föreskrifter om bergsarbete*, AFS 2003:2 at § 42, pregnant and nursing employees prohibited from mining. It should be noted that in each of these cases, there is an obligation on the part of the employee to notify the employer as to her condition. The requirement of notice gives the employee the choice of working until the employer is notified, but also demonstrates the difficulty in weighing the freedom of the employee to take risks against the potential harm to a child that cannot yet assert any rights. These agency regulations are available at the Swedish Work Environment Authority's website: http://www.av.se/lagochratt/afs/.

[192] *Lag* (SFS 1976:280) *om rätt till föräldraledighet* ("1976 Parental Leave Act"), Prop. 1975/76:133 *om utbyggnad av föräldraförsäkring m.m.*, Bet. 1975:SfU30, Rskr. 1975/76:283.

[193] *See* Prop. 1973:47 *Kungl. Maj:ts proposition angående förbättrade familjeförmåner inom den allmänna försäkringen, m.m.*

[194] This was extended by two months the next year. *See Lag* (SFS 1977:630) *om ändring i lagen (1962:381) om allmän försäkring*, Prop. 1976/77:117 *om utbyggnad av föräldraförsäkring m.m.*, Bet. 1976/77:SfU27, Rskr. 1976/77:298. This was part of a larger plan set up by the Government's 1976 Guidelines as to increasing the availability of child care, the child allowance and residential subsidies.

for parental leave under § 3 were given the right to a maternal leave beginning six weeks before and ending six weeks after the birth of a child under § 4. The decision to take parental leave was left in the hands of the parents, with employers barred from refusing to respect the decision of a parent. An ideological shift occurred with the passage of the act, with maternity leave as an obligation for certain women within industry transformed into a right for each parent to decide as to whether to exercise. During the first year after the enactment of the Parental Leave Act, 0.5 % of men took parental leave.[195]

The law was replaced by a new act already in 1978.[196] The unequivocal right to complete leave was retained in § 3 and a right to reduced hours was introduced in § 8. However, the employer had the right to schedule the reduction of hours, and in the absence of agreement, to do so unilaterally at the end and beginning of each day. The right to opt out of the legislative provisions through collective agreements was added. The 1978 Act was amended again in 1979, strengthening the protections by making any unlawful decision by the employer invalid under § 11, and granting pregnant women the right to reassignments in the event of strenuous physical work.[197]

The 1978 Act was amended seven times during the 1980's. The first amendment effective in 1980 added a right to compensation for leave taken due to pregnancy.[198] The next changes reflected the new 1982 LAS.[199] The right for a mother to leave for breastfeeding was also added.[200] Two other sets of changes occurred in 1985, both in the effort to simplify the parental cash benefit. The possibility to 75 % part-time was granted, as were rights to adoptive parents.[201]

[195] *See* the Swedish Social Insurance Administration, *Report on Föräldrapenning,* available at the Swedish Social Insurance Administration website: http://www.fk.se/omfk/analys/barnfamilj/foraldrap/#Brinn.

[196] *Lag* (SFS 1978:410) *om rätt till ledighet för vård of barn, m.m.* ("1978 Parental Leave Act"), Prop. 1977/78:104 *med förslag om utvidgad rätt till ledighet för vård of barn, m.m.*, Bet. 1977/78:AU31, Rskr. 1977/78:255.

[197] Lag (SFS 1979:645) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.,* Prop. 1978/79:168 *om föräldrautbildning och förbättringar av föräldraförsäkring m.m.,* Bet. 1978/79:AU24, Rskr. 1978/79:386.

[198] Lag (SFS 1979:645) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.,* Prop. 1978/79:168 *om föräldrautbildning och förbättringar av föräldraförsäkring m.m.,* Bet. 1978/79:SfU24, Rskr. 1978/79:386.

[199] *Lag* (SFS 1982:91) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1981/82:71 *om ny anställningsskyddslag m.m.*, Bet. 1981/82:AU11, Rskr. 1981/82:153.

[200] *Lag* (SFS 1982:676) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1981/82:154 *om ny arbetstidslag m.m.*, Bet. 1981/82:SoU55, Rskr. 1981/82:436.

[201] *Lag* (SFS 1985:85) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, *lag* (SFS 1985:90) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1984/85:78 *Förbättringar inom föräldraförsäkring, havandeskapspenning och vissa regler inom sjukpenningsförsäkringen*, Bet. 1984/85:SfU12, Rskr. 1984/85:125, SOU 1980:8 *Föräldraförsäkring utredning*, SOU 1982:36 *Enklare föräldraförsäkring*, SOU 1983:30 *Utbyggd havandeskapspenning m.m.*

A minor change was made in 1988 to better coordinate the rules within the different social rights systems.[202] The right to leave was strengthened in 1989 allowing leave to be taken during three periods, not simply two, as well as setting out procedures for a decision by the employer regarding when leave is to be scheduled during the day.[203]

The 1978 Act was amended again six times in the 1990's to be finally replaced by the 1995 Parental Leave Act. The first amendment added a right to a transfer due to restrictions concerning work and pregnancy as found in the Work Environment Act.[204] The second strengthened the rights of adoptive parents to take leave.[205] The qualification period for parental leave was expanded consistent with the amendments to the National Insurance Act in 1993.[206] The Act was amended three times in 1994, extending the right to full leave until the child reached the age of three years,[207]the second for consistency in other areas of social law for leave calculations,[208] and the third to set the age of the child back again to eighteen months for full-time leave.[209]

3.1.7.3 The Repeal of Spousal Maintenance and Family Taxation

Another step in the direction of equality between women and men was the virtual repeal in 1978 of the obligation in Chapter 6 § 7 of the Swedish Marital Code as to spousal maintenance after marital dissolution, reflecting in part an ideological shift from the single breadwinner provider to a two income household. An interesting facet of the legislative actions taken with respect to women in this decade is their timing in general. The aspects of the legal system that

[202] Lag (SFS 1988:710) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.,* Prop. 1987/88:171 *om reformering av den allmänna försäkringens efterlevandeförmåner m.m.,* Bet. 1987/88:AU20, Rskr. 1987/88:389.

[203] Lag (SFS 1989:101) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1988/89:69 *om utbyggnad av föräldraförsäkringen och förstärkt föräldraledighet,* Bet. 1988/89:SfU12, Rskr. 1988/89:137.

[204] *Lag* (SFS 1991:680) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1990/91:140 *Arbetsmiljö och rehabilitering*, Bet. 1990/91:AU22, Rskr. 1990/91: 302.

[205] *Lag* (SFS 1992:393) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1991/92:90 *om svenskt medborgarskap för adoptivbarn och förbättrad rätt till föräldraledighet vid adoption*, Bet. 1991/92:SfU12, Rskr. 1991/92:267.

[206] Lag (SFS 1993:396) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1992/93:159 *Stöd och service till vissa funktionshindrade,* Bet. 1992/93:SoU19, Rskr. 1992/93:321.

[207] *Lag* (SFS 1994:555) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1993/94:148 *Vårdnadsbidrag*, Bet. 1993/94:SoU34, Rskr. 1993/94:343.

[208] *Lag* (SFS 1994:858) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1993/94:220 *Vissa socialförsäkringsfrågor, m.m.*, Bet. 1993/94:SfU15, Rskr. 1993/94:368.

[209] *Lag* (SFS 1994:1989) *om ändring i lagen (1978:410) om rätt till ledighet för vård of barn, m.m.*, Prop. 1994/95:61 *Vårdnadsbidraget. Garantidagarna. Enskild barnomsorg*, Bet. 1994/95:SoU08, Rskr. 1994/95:105.

arguably benefited women, albeit modestly, family taxation and spousal maintenance, were removed prior to any protections or strengthening of the rights of women to employment being put into place to compensate for any losses. This perhaps is consistent with efforts towards formal equality, however unluckily planned, but also can be seen as consistent with the "Work Line" approach adopted by the government. This approach entailed that the social welfare system was to be based on facilitating the individual's possibilities to support herself. The welfare system is to function as a safety net for individuals needing financial support at different stages in their lives, and work is to be the basis of the welfare system.[210]

In contrast to developments in England and the United States, the obligation as to spousal maintenance arguably never took root in the Swedish case law even when it did exist. Already at the beginning of the 1970's, a time in which the wage gap between women and men is acknowledged to have been significant and many women did not yet work, spousal maintenance was only awarded on a national average in one out of ten cases, and half of these for a period of four years or less.[211] Even despite awards of maintenance, women had considerably worse economic situations than men after divorce.[212] The 1978 amendment to the Marriage Code was seen as a codification of this case law. The focus in the preparatory works is the objective that spouses are to be economically self-sufficient, and no discussion appears concerning an equal standard of living between spouses after marital dissolution, despite the fact that the circumstance that women often were less economically well-off after divorce was noted.[213]

Under the current Marriage Code, each spouse has legal control of his or her property and is responsible for his or her own debts.[214] Spouses have a legal duty to provide each other with the information necessary for assessment of the family's financial condition.[215] In the event a spouse is not able economically to support his or her own personal needs, the other spouse has a legal duty to provide that which is needed.[216] The property of the spouses becomes marital property to be shared equally upon dissolution based on marital divorce or death, unless it falls within a category of "individual property" which is entirely exempt from the

[210] For a discussion of this "Work-Line" approach, *see, e.g.,* SOU 2005:73 *Reformerad föräldraförsäkring Kärlek Omvårdnad Trygghet* at 67.
[211] *See* Anders Agell, ÄKTENSKAP SAMBOENDE PARTNERSKAP (3rd ed. Iustus 2004) at 54. For an in-depth analysis of the financial impact the division of marital property, and most significantly, pensions, upon the dissolution of marriage, has for women, *see* Margareta Brattström, MAKARS PENSIONSRÄTTIGHETER (Iustus 2004).
[212] *Id. citing* Anders Agell, UNDERHÅLL TILL BARN OCH MAKE (4 ed. 1988) at 102 and Prop. 1978/79:12 *om underhåll till barn och frånskilda, m.m.*
[213] *See, e.g.,* Prop. 1978/79:12 at 70.
[214] The Swedish Marriage Code ("ÄktB") Chapter 1 § 3.
[215] *Id.* at Chapter 1 § 4.
[216] *Id.* at Chapter 6 § 2.

marital property estate.[217] "Individual property" according Chapter 10 § 3 (1) of the Marriage Code includes insurances and pensions contracted as individual property.[218] The other spouse can make no claim on these types of property in a divorce, or on any future income. The worth of the individual property is not included in the marital estate, and the only deviation allowed from a 50/50 division of the marital property is one in favor of the wealthier spouse, as he or she is not forced to give more than what is found just according to Chapter 12 § 1 of the Swedish Marriage Code.

Of the three main categories of pensions existing in Sweden, state pensions, employment pensions and individual pensions, state pensions by law are not marital property[219] and most employment pensions are considered individual property. However, the possibility now exists to split each individual year's state pension savings between spouses, but not retroactively and only for one year at a time, for a fee amounting to 15 % of the amount transferred.[220] Employment pensions are often drafted to reflect this family law designation of property by including a provision in the pension agreement that it cannot be transferred, thus rendering it individual property. Another aspect of private pensions that has recently been noted is that even for the same premiums, women and men receive different pension payments; for a premium of SEK 1 000, a woman receives SEK 1 381 and a man SEK 1 533.[221]

The right to spousal maintenance still technically exists, but the dividing line between awarding spousal maintenance or not is basically destitution, the driving force being that the state should not then have to support a former spouse. Spouses have no right to claims of maintaining the same standard of living upon dissolution. Certain economic repercussions of this system combined with employment decisions can be seen with the differences in pensions. Many, if not

[217] *Id.* at Chapter 7 § 1 and Chapter 9 § 1. As a rule, property in Sweden is owned individually. Joint ownership of property can be in the form of tenants in common as regulated by the *Lag* (1904:48 p. 1) *om samäganderätt,* the Act on Co-tenancy. Real property and chattels can be owned as co-tenants, and unless otherwise contracted, each co-tenant has an equal share in the property, and their heirs directly inherit the property from the co-tenant. This is however a fairly rare form of property ownership outside of real property, and almost impossible with certain types of property, such as bank accounts. Joint tenancy, whereby the tenants own the property together, and upon the death of one tenant, the other automatically receives complete ownership of the property, and where the property is not included in the estate of the deceased, does not exist as a form of property ownership in Sweden.

[218] The Swedish Marriage Code, Chapter 7 § 2.

[219] *Lag* (SFS 1998:674) *om inkomstgrundad ålderspension,* Chapter 15 § 16.

[220] This high fee is imposed due to the fact that women live longer than men. As it cannot be imposed on one group based on sex, it is imposed upon everyone with such transfers. For a discussion as to the underlying motivations as to this system and their lack of credibility, *see* Brattström at 300.

[221] *See Jämställdheten granskad i skuggrapport – Rapport till FNs CEDAW-kommitté från tio svenska frivilligorganisationer* (Svenska UNIFEM-kommitté 2001) at 46.

most, Swedish women take an extended parental leave, and in addition, work part-time during some point in their career. This can be seen from statistics from 2003, when a 65-year old man had pension funds in the amount of SEK 2.2 million, and a 65-year old woman, SEK 1.6 million, 73 % of the man's.[222]

It must also be kept in mind that these limited rights within marital law as to the marital estate as described above are only granted to married spouses or registered partners. Almost one-third of the couples in Sweden cohabit without marrying,[223] and in such relationships, the rights are limited to certain interests in the mutual residence and household goods, and definitely are not as extensive as the spousal rights described above.[224] The ultimate result of the property arrangements under this system is that if a couple makes the choice that one of the spouses will work part-time and take care of the house and family, and the other full-time, the spouse working less has no further claim and in essence, carries the entire financial burden of the allocation of work as between the parties in the event of a separation. In cases of divorce with children, the woman is often significantly poorer than the man after the divorce.[225]

This focus on the economic independence of women as existing in the family, property, tax and employment law systems has been referred to as a shift going from a triangular maintenance system for women to a dual maintenance system for women as is argued is the present case for men.[226] In this triangular maintenance system for women historically, income was derived from the family, employment and the state in the form of public assistance and men relied solely on a dual maintenance system of income and social assistance. By removing

[222] Brattström at 17 *citing* Pensionssystemets årsredovisning 2003 at 35.

[223] *See Sambolag skapar en falsk trygghet,* SvD, 9 April 2005, available at: http://www.svd.se/dynamiskt/naringsliv/did_9501724.asp. As to property regimes based on marriage or cohabitation, in Sweden and the United States, *inter alia*, *see* Göran Lind, COMMON LAW MARRIAGE – ETT RÄTTSINSTITUT FÖR SAMBOENDE. URSPRUNG – GÄLLANDE RÄTT – FRAMTID (Uppsala 2006).

[224] Almost one-half of all cohabiting persons believe that the same regulations are applicable to them as for married persons, *see* Lind at Chapter 12, note 167 *citing* Statskontoret 1993:24 at 18, noting that with the division of property between cohabiting persons, assets acquired prior to the cohabitation relationship are not included, as are neither assets acquired during the cohabitation relationship that are not the residence and household, *e.g.,* money, shares, automobiles, boats, vacation homes and other real estate. Lind further notes that the number of automobiles, boats and vacation homes per capita is very high in Sweden, as is the number of shares, with 80 % of all Swedes owning shares in some form.

[225] The difference in the economic situations of spouses after divorce is considerable, divorced women often have the greater responsibility for care of children, higher rates of unemployment (1994 – 14 %), part-time work and lower income in general. *See* Michael Gähler, *Ekonomiska konsekvenser av Skilsmässa* in SOU 1997:138 *Familj, Makt och Jämställdhet, Kvinnomaktutredning* at 256.

[226] *See* Ruth Nielson and Marit Halvorsen, *Sex Discrimination between the Nordic Model and European Community Law* in Niklas Bruun *et al.*, THE NORDIC LABOUR RELATIONS MODEL – LABOUR LAW AND TRADE UNIONS IN THE NORDIC COUNTRIES – TODAY AND TOMORROW (Dartmouth 1992) at 180.

spousal maintenance and family taxation, as well as with women entering the workforce, the third prong of this system was hypothetically to be phased out, leaving women with the same dual maintenance system as men and in a better position of equality according to this conception. An objection can be made to this reasoning, however, as it is fallacious in its depiction of the dual maintenance system of income for men, as women also contribute to men, not simply in economic terms but also with work in the home and care of the family thus facilitating men's participation in employment. By removing this from the analysis, the non-monetary contributions of women go unrecognized, exacerbating the position of women in Sweden as to unpaid work. This is true not only of heterosexual married couples but is equally applicable to both heterosexual and homosexual couples living together. By removing the "third prong" from the analysis, the work of women becomes even more "unpaid" under this reasoning.[227] In addition, as the third prong of support for men in the form of women's unpaid work still exists, the rights of spouses become asymmetrical. A woman is no longer economically dependent upon her spouse, but in the event of a divorce, she will be the poorer of the two with respect to both income and pension, a gap that the state only fills to maintain a minimum level of existence.

3.1.7.4 The 1979 Equal Treatment Between Women and Men at Work Act

The issue of whether legislation should be used as a means to promote equality between women and men was the object of general debate during the entirety of the 1970's. Proposals for legislation as well as calls for government investigations of the issue of sex discrimination were raised in motion after motion to the Swedish Parliament by the liberal political party, *Folkpartiet*.[228] The original motions included prohibitions against unlawful discrimination on other grounds such as race, based on the American federal Civil Rights Act of 1964. An equality subsidy was instituted instead of legislation by the Swedish government on a trial basis, with employers hiring the less represented sex eligible for a government subsidy of SEK 8–14 per hour.[229] A regulation was adopted in 1973 prohibiting discrimination on the basis of sex or age in state employment.[230]

[227] For a discussion of this issue as to the Nordic Model of Family Law, *see* Nousiainen, *Transformative Nordic Welfare: Liberal and Communitarian Trends in Family and Market Law,* in RESPONSIBLE SELVES – WOMEN IN THE NORDIC LEGAL CULTURE at 25. Nousianien discusses the tension between the ideology of the Nordic welfare state and the reality of the division of labor between spouses, concluding that the Nordic welfare state "has undeniable merits." *Id.* at 57.

[228] Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 9. *See also* Gudrun Nordborg, *Jämställdhet – synpunkter utifrån jämställdhetslagstiftningen och vissa ärenden hos jämställdhetsombudsmannen,* 1984 SvJT 190.

[229] Bet. 1978/79:AU39 at 25 *citing* Prop. 1974:1 *Kungl. Maj:ts proposition angående statsverkets tillstånd och behov under budgetåret 1974/75* bil. 13.

[230] *Kungörelse* (SFS 1973:279) *om förbud mot köns- och åldersdiskriminering vid tillsättning av tjänst.*

An Equality Delegation was appointed at the end of 1972 to further investigate and develop an overarching perspective that was to guide the work towards achieving equality between women and men. The delegation presented a report in 1975, concluding that legislation could easily freeze the current injustices in the system and impede more active equality measures.[231] The delegation found overwhelming reasons against adopting legislation similar to that in the United States. Another international push towards discrimination legislation arose from Sweden's participation in the first United Nations World Conference of Women in 1975.

After a change in government to a non-socialist coalition, an Equality Committee was appointed in 1976, and given the task to objectively and without preconceived notions investigate and draft legislation against sex discrimination. The new mandate was based on the conviction that a law prohibiting sex discrimination was significant as one of several societal mechanisms for bringing about change.[232] That same year, a regulation was passed mandating equality between women and men in state employment.[233] However, statutory regulation of discrimination in the private sector had long been fought by both employer and employee organizations. They argued that discrimination did not and should not differ in any aspect from other employment issues regulated by the social partners.[234] The Swedish Model could take care of the problem, and the state needed to retain its historical neutrality to labor issues in general also in the area of discrimination. Employers viewed a prohibition against discrimination as limiting their right to freely hire, a right that had been protected since the December Compromise in 1906. Another fear was that the proposed law was too vague, making it impossible for individual employers to predict what was expected, posing a threat to legal certainty. The social partners entered into an Equality Agreement in 1977 covering large segments of the work population. In the private sector, all areas except transportation were covered in an effort to

[231] Ds Ju 1975:7 *PM till frågan om lagstiftning mot könsdiskriminering*.

[232] Its first report was SOU 1978:38 *Jämställdhet i arbetslivet med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet.* The Committee issued a second report, SOU 1979:56 *Steg på väg* concerning a national plan of action resulting from the 1975 UN Women's Conference in Mexico.

[233] *Förordning* (SFS 1976:686) *om jämställdhet mellan kvinnor och män i statlig tjänst*. This was followed by instructions issued in the form of a *Cirkulär* (SFS 1976:687) *om arbetet för jämställdhet mellan kvinnor och men i statlig tjänst.* The 1976 regulations were replaced in 1980 by *Förordning* (SFS 1980:540) *om jämställdhet mellan kvinnor och män i statlig tjänst, m.m. See also* SOU 1975:46 *Kvinnor i statlig tjänst.*

[234] Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 25. All the social partners were negative to the proposal in the responses they submitted with the exception of SACO/SR. *Id.* at 196.

prevent regulation by statute or *JämO*.[235] They then argued that these agreements should be given time to assess their effectiveness.[236] In the alternative, the social partners also argued that legislation would impede work with equality and increase bureaucracy.[237]

The Equality Committee issued its report in 1978.[238] The Government thereafter presented a first legislative bill.[239] As to the goals of the law, the Minister stated that:

> A law gives a material and tangible expression for society's recognition of the principle of equality between men and women. It can be a starting point for actively influencing opinion and attitudes and give good support for those working at promoting equality and also remove any remaining sexual stereotypes. In addition, a prohibition against discrimination as stated in the law gives a protection to individuals from violations or unfair treatment based upon such prejudices, on incorrect and uncritical ideas as to the differences between the abilities of men and women as well as suitability for certain types of work.[240]

Only a "half-law" was passed by the Swedish parliament by a vote of 155 to 150, namely the paragraphs simply containing a general prohibition against discrimination.[241] The sections covering the creation and jurisdiction of the Equal Opportunity Ombudsman, *JämO*, as well as the obligation of the employer to carry out active measures, were not adopted. Certain resistance existed as to placing collective agreements within the jurisdiction of *JämO*,[242] as evidenced by the

[235] For two cases concerning the scope of the equality agreements, *see* AD 1991 no. 65 *The Commercial Employee's Union v. Sunny Beach in Varberg Inc.* and AD 1990 no. 134 *The Swedish Building Workers' Union v. The Swedish Construction Federation and Kullenbergbyggen Göteborg Inc. in Hisings Backa.* As to the efficacy of the Equality Agreements reached by the social partners, *see* Ronnie Eklund, *Är jämställdhetsavtal värda pappret?*, 1990 JT 105. *See also* Anita Dahlberg, *Jämställdhetslagen som paradox och dekonstruktion* in Gudrun Norborg, ed. 13 KVINNOPERSPEKTIV PÅ RÄTTEN (Iustus 1995) at 34.

[236] See Prop. 1978/79:56 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 9.

[237] *Id.* at 196.

[238] SOU 1978:38. The precursor to this governmental report arguably was SOU 1975:58 *Målet är jämställdhet.* There were subsequent investigations on the conditions of part-time work, SOU 1976:6 *Deltidsanställdas villkor* and SOU 1978:28 *Kvinnornas förvärvsarbete och förvärvshinder.*

[239] Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*

[240] *Id.* at 18.

[241] *Lag* (SFS 1979:503) *om jämställdhet mellan kvinnor och män i arbetslivet. See* Bet. 1978/79:AU39 and SOU 1990:41 *Tio år med jämställdhetslagen – utvärdering och förslag* at 59. This first law, comprising seven paragraphs effective 1 January 1980, was replaced by *Lag* (SFS 1979:1118) *om jämställdhet mellan kvinnor och män i arbetslivet* before it came into effect. *See* Prop. 1978/79:175, Bet. 1978/79:AU39, Rskr. 1978/79:411 as well as the Equality Committee's Report, SOU 1978:38. In the first draft, *JämO* was designated as *Jämställdhetsombudet*, which was changed in a later version of the act to remove the perceived more "governmental" impression. Bet. 1978/79:AU39 at 3.

[242] *See* Roseberry (2002) at 236.

1977 Equality Agreement, resistance that prevailed until 1994. A second legislative was submitted in 1979, to a large extent simply the same bill as the first.[243] It was adopted in its entirety by Parliament, passing by only one vote.[244] After decades of discussion and debate, the first Swedish act prohibiting unequal treatment of women and men in work finally came to pass, effective 1 July 1980.[245] It was to the highest degree a political compromise not based solely on the actual issue of equality for women but on the power of the Swedish Model in society as well as upcoming elections. This partially explains the skepticism that has persisted with respect to statutory regulation in this area.

As does the current 1991 Equal Treatment Act, the 1979 Equal Treatment Act had three sections: prohibitions against discrimination, active measures to be taken by the employer, and enforcement mechanisms and procedures, including the establishment of *JämO*. The objective as set out in the first section was to promote equal rights between women and men in questions regarding employment, employment conditions and opportunities for development within work. This was to be achieved through a prohibition against discrimination as stated in §§ 2–5 to be invoked in individual cases, as well as active measures to be taken by employers as set out in § 6. The prohibitions as set out in §§ 2–5 were mandatory, while the social parties were empowered by § 7 to deviate from the active measures prescribed in § 6 in collective agreements.

According to § 2, employers were prohibited from disfavoring an employee or person seeking employment on the basis of sex. Disfavoring existed according to § 3 if an employer in employment, promotion or training, appointed a person of the opposite sex while overlooking *a person with better qualifications*. This difference in treatment was justified where the employer could prove that the decision did not depend on a person's sex, or that the decision was a step in an endeavor to promote equality in employment, or was justified with respect to a charitable or other interest that ought not be subordinated to the interest of equality in employment. A disfavoring occurred on the basis of sex in § 4 when an employer applied worse employment conditions for an employee than those for an employee of the opposite sex in the performance of employment, management or distribution of work, in a manner in which the employee is obviously disadvantageously treated in comparison with persons of the opposite sex, or terminates, relocates, lays off or fires any person or comparable measure thereto if the measure depends upon the employee's sex. Collective agreements prescribing

[243] Prop. 1979/80:56 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*, Bet. 1979/80:AU10, Rskr. 1979/80:117.
[244] Nycander at 375.
[245] *Lag* (SFS 1979:1118) *om jämställdhet mellan kvinnor och män i arbetslivet*, Prop. 1979/80:175, Bet. 1979/80:AU10, Rskr. 1979/1980:117.

differences as to employment terms on the basis of sex were to be declared invalid according to § 5.

A requirement for active measures to promote equality in employment was placed on the employer in accordance with § 6, as well as to encourage an equal balance of employment between women and men to the degree reasonable taking into consideration the employer's resources and circumstances in general.

Damages could be awarded for violations of § 3. A "group rebate" was created in § 8 for violations of § 3 in that, in the event an employer discriminated against more than the one person, the damages were to be assessed for one person to be shared equally by the group. If the disfavoring were in violation of § 4, the employer was to pay damages for the losses arising and for the violation suffered by the plaintiff. In any event, the amount of damages could be lowered or entirely nullified if the court found it just to do so. Violations of the duty to perform active measures could lead to fines and an injunction to perform the measures under § 9.

The office of the *Jämställdhetsombudsmannen* ("*JämO*")[246] was created under § 10 to enforce compliance with the law. A duty for employers to provide information upon request to *JämO* was created in § 11. An Equality Council[247] was also established to assist in effecting compliance, consisting of eleven members, the chairman and four members trained in the law and non-partisan, and the remaining six appointed by the social partners. *JämO* could bring an action to the Council to decide in accordance with §§ 9, 11 and 13 for an order to comply upon penalty of fine. If the employer still persisted in noncompliance with the Council's order, the order could be brought for enforcement to a district court. *JämO* was also given the authority to issues fines for an employer's failure to provide information, a decision that could be appealed to the Council. The Council's decisions as to these fines could not be appealed according to § 13.

JämO was also empowered to bring actions to the Swedish Labour Court on behalf of a wronged individual in accordance to § 12 if the person consented and *JämO* found the case to be significant for the application of the law. If the labor union had such a right to bring the action, *JämO* could only bring the action if the labor union declined. Cases brought under the Equal Treatment Act were to proceed according to the 1974 Labour Disputes (Judicial Procedure) Act and be negotiated by the social partners in accordance with MBL.

That the 1979 Equal Treatment Act was not a happy compromise can be seen not only from the fact that the first proposal adopted did not have a chance to become effective before it was "repealed," but also that only one year later, the

[246] *Jämställdhetsombudsmannen* uses the English title, Equal Opportunity Ombudsman. See *Jämställdhetsombudsmannen* website in English, available at: http://www.jamombud.se/en/. In this work, the shorter version, *JämO,* has been used instead.
[247] *Jämställdhetsnämnden.*

act was amended again rather significantly. Seven new paragraphs were added, due to factors both internal and external to Sweden.[248] Three legislative bills had already been submitted that year concerning sex equality, one with respect to the costs of *JämO* and the Equality Council, estimated at that time to be approximately SEK one million,[249] one for amendments to the 1979 Equal Treatment Act, and the third about ratifying the United Nation's Convention on the Elimination of all Forms of Discrimination against Women.[250] Amendments were made to §§ 8, 9, 11–14 of the 1979 Equal Treatment Act while §§ 15–22 were added. The wording of the group rebate in § 8 was strengthened, so that it was clear that damages would be based on the situation of one person to be split by all. The directions for how and when an employer was to perform active measures were removed from § 9. A court could order proceedings to be held confidential according to the amendment to § 11 to the extent the proceedings might disclose sensitive business or personal information. A statute of limitations of six months to be triggered by the event of discrimination was inserted in new wording of § 14 as to § 8. The new §§ 15–22 set out the procedures and powers of the Equality Council and *JämO* in greater detail. Last, a duty of confidentiality was created in § 22 for those persons who in proceedings before *JämO* or the Council obtained information that could be considered sensitive from a business or personal aspect.

The turbulence of the initial passing of the act seems to have quieted somewhat after this barrage of legislation and amendments. The 1979 Equal Treatment Act was amended already a second time in 1980, but simply to take into consideration the newly enacted Swedish Secrecy Act.[251] Section 14 concerning procedure was amended in 1982 to reflect the new paragraph numbering in the new 1982 LAS.[252]

[248] *Lag* (SFS 1980:412) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*. Prop. 1979/80:129 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*, Bet. 1979/80:AU30 also referring to Prop. 1979/80:92 *om bestridande av kostnader för jämställdhetsombudsmannen och jämställdhetsnämndens verksamhet* and Prop. 1979/80:147 *om godkännande av Förenta nationernas konvention om avskaffande av all slags diskriminering av kvinnor*, Rskr. 1979/80:327.

[249] Bet. 1979/80:AU30 at 1.

[250] For information as to this convention, *see* the UN Division for the Advancement of Women, *Convention on the Elimination of all Forms Discrimination against Women,* available at: http://www.un.org/womenwatch/daw/cedaw/.

[251] *Lag* (SFS 1980:888) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*, Prop. 1980/81:18 *med förslag till lag om ändring i sekretesslagen (1980:100) m.m.*, Bet. 1980/81:KU4, Rskr. 1980/81:14.

[252] *Lag* (SFS 1982:80) *om anställingsskydd*, replacing the 1974 LAS, *Lag* (SFS 1974:12) *om anställningsskydd*. *See also* Prop. 1981/82:71 *om ny anställningsskyddslag m.m.*, Bet. 1981/82:AU11, Rskr. 1981/82:153.

The initiative for the changes made in 1985 was a report submitted by *JämO* to the State Department of Labor Law dated 1982 on the efficacy of the law to date. Six areas of concern were brought up by *JämO*:

- The lack of a right by an applicant to obtain information about other candidates in hiring or promotion;
- The need for an extension of the statute of limitations;
- The right for a wronged plaintiff to receive the employment denied;
- The right for persons called to an investigation to receive compensation for associated costs;
- The need for protection against retaliatory measures by employers against plaintiffs based on the assertion of rights under the act; and
- A change in the composition of the courts as to discrimination claims, the proposal being that persons sitting on the tribunal be of the same sex as the plaintiff.[253]

As envisioned already in the initial discussion in 1978 concerning the adoption of the six month statute of limitations, the right of an applicant to receive information about the qualifications of other applicants was finally expressly included in the Act in 1985.[254] Certain other changes were also made, an extension of the statute of limitations in § 14 by two months after the statute of limitations for labor union action had expired, compensation for the expenses of witnesses as called by *JämO*, and the revocation of the right to appeal *JämO's* assessment of fines in accordance with § 19(1) to the Equality Council.[255] The proposed changes not effected were sent to referral for further action. This eventually led to the governmental report concerning a ten-year assessment of the 1979 Act[256] and ultimately to the new 1991 Equal Treatment Act.

[253] Attachment 1 to Prop. 1984/85:60 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 42.

[254] Lag (SFS 1985:34) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet,* Prop. 1984/85:60 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*, Bet. 1984/85:AU8, Rskr. 1984/85:102.

[255] The early 1980's has been characterized by one author as a backlash to the seventies, that the ideal of the housewife was once again enshrined for her care of the home and family. Women were no longer needed in the workplace, the growth economy was replaced by a savings economy and the Social Democrat government did not even include equality in the Government Declaration in 1982. *See* Nordborg (1984) at 215.

[256] *See* SOU 1990:41 *Tio år med jämställdhetslagen – utvärdering och förslag.*

3.2 The Current Swedish Discrimination and Parental Leave Legislation

Both current pieces of Swedish legislation governing parental leave and sex equality were enacted in the 1990's, replacing the above 1970's acts, and addressing issues as raised in the case law and also in response to the requirements of EU membership. The Swedish Government drafted a five-year action plan in 1988 addressing the politics of equality facing the 1990's.[257] As a step towards the action plan, a committee was formed to evaluate and draft proposals for changes to the 1979 Equal Treatment Act. In its five hundred-page report, the Committee addressed both substantive and procedural aspects of the 1979 Equal Treatment Act, identifying seven key areas:

- A change in the definition of discrimination to include situations in which the candidates have comparable merits, but there is a discriminatory intent by the employer;
- Allowance of the use of information other than an agreed work evaluation to prove wage discrimination;
- Explicit inclusion of sexual harassment and retaliatory actions as part of the definition of discrimination;
- Explicit statement that discrimination includes both direct and indirect discrimination so that the law could reach behavior disproportionately favoring one sex;
- The obligation for an employer to annually draft an equality plan;
- More concrete regulations for active measures even if they can be replaced by collective agreements; and
- Expansion of *JämO's* authority to enforce the law.[258]

As to procedural aspects, *JämO* had raised the issue as to the statute of limitations again and the difficulty in getting unions to act before the last minute, leaving little time for any investigation *JämO* may need to conduct before bringing a case.[259] The Committee argued that the statute of limitations in discrimination cases ought not vary so much from other types of employment cases, particularly the right to organize,[260] and found no reason to change the current system. The preparatory works had expressed a desire from the inception of the equality legislation that such legislation mirror the protections as given to the right for workers to organize. The Committee also looked at the issues of exem-

[257] Prop. 1987/88:105 *om jämställdhetspolitiken inför 90-talet*, Bet. 1987/88:AU17 Rskr. 1987/88:364, Bet. 1987/88:UbU34, Rskr. 1987/88:365.
[258] SOU 1990:41 *Tio år med jämställdhetslagen – utvärdering och förslag* at 17–18.
[259] *Id.* at 361.
[260] *Id. citing* Ds A 1984:9.

plary damages, noting the criticism that employers could buy themselves free with nominal amounts.[261] The Committee stated that during the years from 1981–1986, AD had ordered exemplary damages in amounts from SEK 10000–20000. The Committee rationalized that AD could have been making allowances for the fact that the law was new and had not yet sunk into the consciousness of employers and noted that in one 1987 case, exemplary damages of SEK 25000 were awarded, and in another from 1989, SEK 40000. The Committee found that despite this tendency towards a modest increase, these amounts had no significant effect on preventing discriminatory behavior. The Committee maintained that the amount of damages ought to be felt by the employer, and that in most cases, an amount of six figures ought not be too much. Other procedural aspects as to bringing claims under the 1979 Equal Treatment Act were examined, including the possibility of class actions similar to the American system.[262] The Committee found that this option should perhaps exist, but in a broader context in general in the Swedish legal system and not only in sex discrimination claims.

3.2.1 The 1991 Equal Treatment Between Women and Men at Work Act

The results of the ten-year evaluation formed the bases for the current 1991 Act Concerning Equal Treatment Between Women and Men at Work ("1991 Equal Treatment Act").[263] The Act kept much of the 1979 Equal Treatment Act, particularly its layout and enforcement mechanisms, however, the order was changed, beginning with the sections on the duty to take active measures, followed by the prohibition against discrimination, with the third section still regarding enforcement and *JämO.* A very central aspect of the Swedish Model was retained in the 1991 Equal Treatment Act, namely that collective agreements could replace the Act's provisions on active equality measures to the extent the agreements were approved on the central level by the social partners. The social partners had originally used this opt out right to limit *JämO's* jurisdiction by entering into the 1977 and 1983 Equality Agreements.[264] The requirement that plaintiff demonstrate that she was better objectively qualified was retained. A

[261] SOU 1990:41 at 357.
[262] *Id.* at 351–354.
[263] *Jämställdhetslag* (SFS 1991:433), Prop. 1990/91:113 *Om en ny jämställdhetslag, m.m.*, Bet. 1990/91:AU17, Rskr. 1990/91:288.
[264] The 1983 Equality Agreement is still incorporated into collective agreements to this date, *see, e.g.,* the Collective Agreement for the Timber Mill Sector entered into between the Association of Swedish Timber Industries and the Federation of Swedish Forestal and Agricultural Employers valid between 1 April 2004 and 31 March 2007, which states in § 17 of the Equality Agreement, that the Equality Agreement entered into between SAF, LO and PTK on 3 March 1983 was valid as a collective agreement between the parties to the current agreement in accordance with an accord reached on 2 September 1983.

prohibition against harassment based on refusal of sexual advances or reporting of a sex discrimination claim was included in § 22.

Since the passage of the new 1991 Equal Treatment Act, the Swedish Government through ad hoc committee reports[265] has addressed issues of sex equality legislation,[266] equal pay,[267] the double burden of women[268] including the part-time "trap,"[269] parental leave,[270] and vertical[271] as well as horizontal occupational segregation.[272]

[265] The number of governmental reports issued in a subject can be seen as a reflection to a certain degree of legislative activity in the area. During the years 1904 to 1945, in which marked changes as to women's rights as well as restrictions occurred, over twenty-nine governmental reports were issued with respect to women. In the period from 1950–1970, one report was issued concerning the right of women to serve as priests (SOU 1950:48). From 1971 to 1991, over twenty SOU's were issued concerning women. It should also be kept in mind that the number of governmental reports has been increasing consistently each decade, from approximately thirty per year in the early 1900's to a high of 193 in 1997.

[266] Governmental reports addressing sex discrimination legislation since the passage of the 1991 Equal Treatment Act include: SOU 1996:43 *Jämställdhet i EU. Spelregler och verklighetsbilder*; SOU 1999:91 *En översyn av jämställdhetslagen*; SOU 2004:55 *Ett utvidgat skydd mot könsdiskriminering*; and SOU 2006:22 *En sammanhållen diskrimineringslagstiftning.*

[267] Governmental reports addressing the issue of equal pay since the passage of the 1991 Equal Treatment Act include: SOU 1993:7 and 8 *Löneskillnader och lönediskriminering – Om kvinnor och män på arbetsmarknaden*; SOU 1997:87 *Kvinnor, män och inkomster. Jämställdhet och oberoende*; and SOU 1997:136 *Kvinnors och mäns löner – varför så olika?*

[268] Governmental reports addressing the double burden of women since the passage of the 1991 Equal Treatment Act include: SOU 1994:38 *Kvinnor, barn och arbete i Sverige 1850–1993*; SOU 1996:3 *Fritid i förändring. Om kön och fördelning av fritidsresurser*; SOU 1997:115 *Ljusnande framtid eller ett långt farväl*; SOU 1997:138 *Familj, Makt och Jämställdhet, Kvinnomaktutredning*; SOU 1997:139 *Hemmet, barnen och makten*; and SOU 1998:3 *Välfärdens genusansikte*

[269] Governmental reports addressing part-time work as well as sick leave since the passage of the 1991 Equal Treatment Act include: SOU 2000:121 *Sjukfrånvaro och sjukskrivning – Fakta och förslag*; SOU 2004:70 *Tid och pengar – dela lika?*; SOU 2005:105 *Stärkt rätt till heltidsanställning*; and SOU 2005:106 *Partiell ledighet.*

[270] Governmental reports addressing parental leave since the passage of the 1991 Equal Treatment Act include: SOU 1994:41 *Ledighetslagstiftning – en översyn*; SOU 2003:36 *En jämställd föräldraförsäkring?*; SOU 2005:73 *Reformerad föräldraförsäkring*; SOU 2005:105 *Stärkt rätt till heltidsanställning*; and SOU 2005:106 *Partiell ledighet.*

[271] Governmental reports addressing occupational segregation since the passage of the 1991 Equal Treatment Act include: SOU 1997:137 *Glastak och glasväggar? Den könssegregerade arbetsmarknaden*; SOU 1998:3 *Välfärdens genusansikte*; SOU 2000:31 *Jämställdhet och IT – en kartläggning på uppdrag av JämIT*; SOU 2000:58 *Jämställdhet och IT,* SOU 2001:43 *Underlagsrapporter till Jämits slutbetänkande Jämställdhet – transporter och IT*; SOU 2001:44 *Jämställdhet – transporter och IT*; SOU 2004:43 *Den könsuppdelade arbetsmarknaden*; SOU 2004:59 *Kvinnors organisering*; and SOU 2005:112 *Demokrati på svenska? Om strukturell diskriminering och politiskt deltagande.*

[272] Governmental reports addressing inequalities in power since the passage of the 1991 Equal Treatment Act include: SOU 1994:3 *Mäns föreställningar om kvinnor och chefskap*; SOU 1995:110 *Viljan att veta och viljan att förstå – Kön, makt och den kvinnovetskapliga utmaningen i högre utbildning*; SOU 1995:145 *Fria val? Om kön, makt och fritid*; SOU 1996:56 *Hälften vore nog – om kvinnor*

The results of all these investigations have been rather modest amendments to the legislation and procedural mechanisms originally instituted in the 1970's. The right to opt out of the legislative provisions through collective agreements was finally removed in 1994,[273] mandating that the provisions of the Act for active measures be followed even where collective agreements existed.[274] A duty for the employer to analyze wages was also included in § 9a. The provisions concerning the employer's responsibility for sexual harassment were sharpened in 1998,[275] mandating that the employer take those measures necessary to prevent sexual harassment, and also imposing a duty to investigate in situations coming to the knowledge of the employer.

A second governmental report, this time on the efficacy of the 1991 Equal Treatment Act, was issued in 1999.[276] It proposed that a definition of indirect discrimination be explicitly included in the 1991 Equal Treatment Act. It also found that the requirement under the Swedish act for a comparator of the opposite sex was not consistent with Community law. Changes were suggested as to amending the presumptive rule as applied to sex discrimination to conform to the EC directive. This Committee found, however, that the burden of proof for wage discrimination was in conformance with Community law and did not need to be changed. With respect to damages, the committee proposed that the group rebate be finally taken away but found that in general, the Swedish case law was

---

och män på 90-talets arbetsmarknad; SOU 1997:82 *Lika möjligheter*; SOU 1997:83 *Om makt och kön i spåren av offentliga organisationers omvandling*; SOU 1997:113 *Mot halva makten – Elva historiska essäer om kvinnors strategier och mäns motstånd*; SOU 1997:114 *Styrsystem och jämställdhet – Institutioner i förändring och könsmaktens framtid*; SOU 1997:135 *Ledare, makt och kön*; SOU 1998:4 *Män passar alltid?*; SOU 1998:5 *Vårt liv som kön. Kärlek, ekonomiska resurser och maktdiskurser*; SOU 1998:6 *Ty makten är din*; SOU 2003:16 *Mansdominans i förändring – Om ledningsgrupper och styrelser*; and SOU 2005:66 *Makt att forma samhället och sitt eget liv – jämställdhetspolitiken mot nya mål.*

[273] *Lag* (SFS 1994:292) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1993/94:147 *Jämställdhetspolitiken: Delad makt – delat ansvar*, Bet. 1993/94:AU17, Rskr. 1993/94:290, SOU 1993:7 *Löneskillnader och lönediskriminering, om kvinnor och män på arbetsmarknaden.*

[274] Prop. 1993/94:147 *Jämställdhetspolitiken: Delad makt – delat ansvar* at 40.

[275] *Lag* (SFS 1998:208) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1997/98:55 *Kvinnofrid*, Bet. 1997/98:AU10, Rskr. 1997/98:186, SOU 1995:60 *Kvinnofrid.*

[276] SOU 1999:91 *En översyn av jämställdhetslagen.* It has been noted that the head of this committee, Hans Stark, had also previously served as chairman of the Swedish Labour Court, for criticism of this fact, *see* Fransson at 289. It should also be noted, however, that the directive for the committee with respect to the 1999 investigation was of a different nature than that for the 1990 investigation. The 1999 directive basically contained a laundry list of specific issues, such as the presumption rule's conformance with Community law, the need for a definition of indirect discrimination, the Act's conformance in general with Community law, the damages awarded, wage analysis as performed, and the rights for labor unions to information, and to pursue actions before the equality council. *See* Dir. 1998:60. The first directive had a more general nature, the only specific issue being raised that of dealing with sexual harassment. *See* Dir. 1988:33.

consistent with Community law. According to the committee, the requirement for employers to analyze wage differences should be an express duty. The right to petition the Equality Council regarding compliance upon penalty of fine should also be extended to the labor unions.

These amendments as suggested by the Committee were made two years later in 2000.[277] Section 11 was amended to require that any wage inequalities found by employers through the wage analysis be remedied within three years. The requirement that plaintiff demonstrate that she was better qualified was replaced by a requirement of a comparison with a "person in a similar position" in § 15. A definition of indirect discrimination was included in § 16. The group rebate for damages was taken away, damages would no longer be based on those of one individual to be shared by the group but instead be based on each individual's damages and not shared. The evidentiary presumption rule, as well as the evidentiary rules by which the employer's intent was given significance as to whether discrimination existed, were also removed. A plaintiff now is to show that circumstances give reason to believe that discrimination exists. The burden of proof then is to shift to the employer to prove that the difference in treatment was not based on sex. The intent of the employer is no longer of any significance so no evidence needs be presented regarding the existence of a discriminatory intent.

The burden of proof was changed for equal wage claims in an effort to make it easier for plaintiffs to meet the evidentiary burden and also arguably as the Swedish Parliament's response to certain of AD's judgments. This can be seen from a statement in the preparatory works on the existing Swedish case law and previous legislative preparatory works:

> First, the presumption rules and the requirement of a comparator are now removed. Therewith, the statements in the legislative preparatory works and the case law to date

[277] *Lag* (SFS 2000:773) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.*, Bet. 2000/01:AU3, Rskr. 2000/01:4. *See also* SOU 1998:6: *Ty makten är din … Myten om det rationella arbetslivet och det jämställda Sverige.* Other discrimination legislation had been passed the year before in 1999 prohibiting for the first time by statute discrimination on the basis of physical handicap, *lag* (SFS 1999:132) *om förbud mot diskriminering i arbetslivet av personer med funktionshinder*, and sexual orientation, *lag* (SFS 1999:133) *om förbud mot diskriminering i arbetslivet på grund av sexuell läggning.* A new act prohibiting discrimination on the basis of race or religion was also passed in 1999, *lag* (SFS 1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet.* These 1999 statutes were modeled on the set-up of the 1991 Equal Treatment Act. *See* Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 21. Despite requirements by the EU as to legislation concerning age discrimination, it appears that Sweden will be the only Member State to not enact such discrimination within the time period set out in the directive establishing a general framework for equal treatment in employment and occupation, 2000/78/EC, which according to Article 18 is to be by 2003, or an additional three year period, by 2006. A proposal has been submitted for enactment of age discrimination legislation in 2008, SOU 2006:22 *En sammanhållen diskrimineringslagstiftning – del 1* at 329.

> must be read with caution and in light of the ECJ's decisions. The statement, for example, that the presumption in cases of wage discrimination is not generally seen as "strong" will not have significance in the future. The most important source of law in the interpretation and application of the evidentiary regulations are the decisions by the ECJ.[278]

Employers now have the obligation to map and analyze their regulations and practices according to § 9b for wages and other employment terms and conditions, and if any differences exist, effect measures to remove them within three years. The employer also has a duty to provide wage information to the labor unions so that they can assist in these efforts. *JämO* was given the authority to monitor these efforts and the labor unions were given the right to petition the Equal Opportunity Council for fines for failure to provide information according to § 33.

The most recent amendments in 2005 were again to strengthen the 1991 Equal Treatment Act and take those measures necessary to comply with the EC Equal Treatment Directive, Social Security Directive and Pregnant Workers Directive.[279] The definitions of direct and indirect discrimination were amended to be consistent with the definitions as stated in the other Swedish discrimination legislation. Direct discrimination is now defined in § 15 as where an employer treats an employee or applicant less favorably than the employer treats, has treated or would treat another in a "comparable situation" (as opposed to similar situation) if the less favorable treatment has a connection with the person's sex.[280] Indirect discrimination is now defined in § 16 as an employer applying a provision, criteria or procedure that appears neutral but in practice particularly is to the detriment of one sex, if it is not motivated by a lawful objective and suitable and necessary to reach that objective.[281] The previous justification for sex discrimination on the basis of certain interests was amended to simply a lawful objective that is suitable and necessary.

The prohibition against sexual harassment was further categorized into harassment violating a person's dignity with a tie to sex or sexual harassment in § 16a. Prohibitions were included against retaliatory measures by the employer in § 22 as well as instructions by an employer as to discriminating in § 16b. A list of

[278] Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 55. For cases in which this statement is affirmatively cited, *see, e.g.,* AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm*; AD 1995 no. 158 *JämO v. Kumla Municipality*; and AD 1997 no. 68 *The Swedish Association of Graduate Engineers v. Mjölby Municipality.*

[279] *Lag* (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433)*, Prop. 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering*, Bet. 2004/05:AU7, Rskr. 2004/05:267.

[280] *Lag* (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433)* at § 15.

[281] *Id.* at § 16.

situations defined as unlawful discrimination is now given in § 17. Last, a new burden of proof rule was included based on the EC Burden of Proof Directive. Plaintiff no longer has to prove that she was treated less favorably than someone in a comparable situation, only demonstrate circumstances that give cause to assume that she has been discriminated against or the object of retaliatory measures as stated in § 45a.

3.2.2 The 1995 Parental Leave Act

As stated in Chapter Two, the revised 1995 Parental Leave Act[282] was issued to make the changes necessary for conformance with the EC Pregnancy Directive 92/85/EEC. A thirty-day non-transferable period was reserved for each parent, the first "Pappa month." According to § 16 of the 1995 Parental Leave Act originally, an employee could not be terminated or fired only on the basis of a request to exercise or the exercise of a right to parental leave. If this occurred, the termination or firing would be declared invalid if the employee so requested. This can be seen as a somewhat unhappy wording, for technically, if the employer had another reason for the termination, the action no longer was only based on the taking of leave. The right to a transfer and leave due to certain conditions during a pregnancy was also extended for reasons of health and safety to women recently giving birth. The unconditional right to six weeks of leave women had immediately prior to or after the birth of a child were both extended to seven weeks.[283] To date, the 1995 Act has been amended eight times since its passage. The first amendment, already in 1996, was to specifically include 75 %

[282] *Föräldraledighetslag* (SFS 1995:584), Prop. 1994/95:207 *Ny föräldraledighetslag m.m.*, Bet. 1994/95:AU16, Rskr. 1994/95:364.

[283] In addition to the legislative amendments, the Swedish Work Environment Authority issued specific regulations with respect to pregnant and nursing workers in 1994, *see Gravida och ammande arbetstagare*, AFS 1994:32, issued in accordance with § 18 of the *Arbetsmiljöförordning* (SFS 1977:1166). These regulations are applicable to workers who are pregnant, nursing or have given birth to a child within the past fourteen weeks, and have notified their employer as to their status. Under the regulations, the employer is to assess the risks to the employee and take any measures necessary to avoid them, and where they cannot be avoided, the employee is to be given a different work assignment, or where that is not possible, a leave of absence. Certain types of work are completely prohibited after the giving of notice by the employee of her condition. The topic of night work appears once again, but in a different form. Pregnant or new mothers cannot be assigned night shift work if a physician's certificate is produced stating that such work would be harmful to the employee's safety or health. In such cases, the woman is to be offered day-time employment when possible. The Board notes that night-time employment generally does not pose any risk to a pregnancy or nursing, but in individual cases can be too taxing. The decision as to whether to work night shift is to be made between the employee and her physician. These regulations are available at the website of the Swedish Work Environment Authority: http://www.av.se/lagochratt/afs/afs1994_32.aspx.

part-time as a right, allowing parents to take leave of 25 %, 50 %, 75 % or 100 %.[284]

A more major amendment was the result of the European Commission giving notice in 1998 for failure to legislate a mandatory two-week maternal leave in compliance with Article 8 (2) of the Pregnancy Directive as discussed in Chapter Two. This was enacted as law as of 1 July 2000,[285] entailing that the right for women to make the decision about taking parental leave in essence was thrown back to the 1900 mandatory leave for women having children.

Other amendments were again made in 2001 to further strengthen the right of parents to take leave and also allow leave of one-eighth time.[286] The original thirty days reserved for each parent were expanded to sixty days in 2002. The right to work part-time until a child was eight years of age was also included. Parents requesting leave, as well as their labor unions, were also given the right to receive any negative decision by the employer as to the scheduling of leave two weeks prior to the commencement of the leave to allow time for union negotiations. In addition, the employer was now obligated to grant the leave as requested by the employee unless the employer could show that it would cause disruptions in the workplace.[287]

Significant changes were made to the act in 2006.[288] The qualification requirements were removed from the act, allowing parents to be eligible for parental leave immediately upon employment. Leaving taking protections were also strengthened, removing the unlucky wording in the act of "only on the basis" of exercising the right to leave. The wording of § 16 now states that an employer may not disfavor an applicant or employee for reasons that have a connection with parental leave in accordance with this law when the employer takes

[284] *Lag* (SFS 1996:1545) *om ändring i föräldraledighetslagen (1995:584),* Prop. 1996/97:1 utg. 12 *Budgetpropositionen för 1997*, Bet. 1996/97:SfU1, Rskr. 1996/97:1. Another amendment was made in 1997 to include the law governing maritime employment, *see Lag* (SFS 1997:99) *om ändring i föräldraledighetslagen (1995:584),* Prop. 1996/97:69 *Vissa socialförsäkringsfrågor, m.m.*, Bet. 1996/97:SfU8, Rskr. 1997/98:172.

[285] *Lag* (SFS 2000:580) *om ändring i föräldraledighetslagen (1995:584),* Prop. 1999/2000:87 *Obligatorisk mammaledighet*, Bet. 1999/2000:AU8, Rskr. 1999/2000:231.

[286] *Lag* (SFS 2001:143) *om ändring i föräldraledighetslagen (1995:584)* and *Lag* (SFS 2001:144) *om ändring i föräldraledighetslagen (1995:584),* respectively, Prop. 2000/01:44 *Föräldraförsäkring och föräldraledighet*, Bet. 2000/01:SfU10, Rskr. 2000/01:169.

[287] Cosmetic changes were made in 2003 to remove the reference to maritime law, which now falls under the Swedish Work Environment Act, and in 2004 with reference to the National Insurance Act, *see Lag* (SFS 2003:373) *om ändring i föräldraledighetslagen (1995:584),* Prop. 2002/03:109 *Sjösäkerhet*, Bet. 2002/03:TU5, Rskr. 2002/03:191 and *lag* (SFS 2004:1251) *om ändring i föräldraledighetslagen (1995:584),* Prop. 2004/05:1, utg. omr. 12 *Budgetpropositionen för 2005*, Bet. 2004/05:SfU1, Rskr. 2004/05:112, respectively.

[288] *Lag* (SFS 2006:442) *om ändring i föräldraledighetslagen (1995:584),* Prop. 2005/06:185 *Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen*, Bet. 2005/06:AU8, Rskr. 2005/06:282.

certain employment actions. The prohibition is not applicable, however, if the action is a necessary consequence of the parental leave. In addition, if an employee is terminated only for reasons that have a connection with the parental leave, the termination is to be declared invalid if the employee so requests. A new burden of proof was added in § 24, that if an applicant or employee can demonstrate circumstances that give rise to an assumption that he or she has been disfavored for reasons having a connection to parental leave, the employer is to demonstrate that no such disfavoring has occurred or that the disfavoring was a necessary consequence of the parental leave. *JämO* was explicitly given the authority to prosecute claims under the parental leave act in § 25 on behalf of employees or applicants of either sex if the labor union declines to do so.

3.2.3 The Parental Leave Cash Benefit

Forty-two million days of parental leave were taken in Sweden in 2004.[289] The average parental leave cash benefit paid for each day was SEK 393 for women and SEK 477 for men as based on income.[290] The regulations concerning the parental leave cash benefit are mainly found in the Swedish National Insurance Act and not the 1995 Parental Leave Act. This bifurcation of the system reflects the history of the maternal leave and origins of the motherhood allowance. The original four week mandatory maternal leave in 1900 provided no economic compensation for time taken off from employment. A limited mother allowance was finally provided by regulation in 1931, eight weeks for women working in industry and thirty days for women in other sectors.[291] This dual system reflected the requirements in the legislation to the extent that it was only women in industry who were forced to take a leave of at least six weeks with the birth of child. Women working in other sectors had no such requirement by law. A qualification period was set out in the 1931 regulation in that a mother must have been registered at least 270 days with a union health insurance fund in order to be eligible.[292] A general mother allowance was enacted in 1938 for all female

[289] *See* SOU 2005:73 *Reformerad föräldraförsäkring Kärlek Omvårdnad Trygghet* at 137.
[290] *Id.* at 138.
[291] For a detailed history of the motherhood allowance and parental leave cash benefit, as well as social benefits in general, *see* Lotta Vahlne Westerhäll, DEN STARKA STATENS FALL? EN RÄTTSVETENSKAPLIG STUDIE AV SVENSK SOCIAL TRYGGHET 1950–2000 (Norstedts 2003) particularly at 127–131 and 221–225 covering the motherhood allowance during the 1950's and 1960's, parental leave cash benefits in the 1970's and 1980's at 271–282, and in the 1990's at 350–359. Westerhäll maintains that the shift from an expansion economy up to the 1970's to a savings economy has resulted in a weakening of the social justice basis of social rights in Sweden in general, *see id.* at 626. She notes that the fiscal aspects of the parental leave cash benefit are clearly apparent from the changes that have been made as to payment compensation levels over the past two decades, which have varied between 75 % and 90 % of the sick leave cash benefit, as well as the length of leave granted, *id.* at 356.
[292] *Kungliga förordning* (SFS 1931:281) *om moderskapsunderstöd.*

employees for the same amount. Three months paid leave for working mothers was legislated in 1955 and extended to six months in 1962.

The mother allowance was transformed into a parental leave cash benefit through amendments to the Swedish National Insurance Act in 1974, based on the objective of formal equality between men and women.[293] The regulations concerning the parental leave cash benefit and parental leave currently are found primarily in the Swedish National Insurance Act[294] and the 1995 Parental Leave Act, respectively. However, the entirety of the system of parental leave and cash benefit refers to several other different laws in addition to these two acts, including 1982 LAS, the 1999 Social Insurance Act, the Regulation concerning the Price Base Amount, the 1991 Equal Treatment Act, MBL as well as the Labour Disputes (Judicial Procedure) Act.

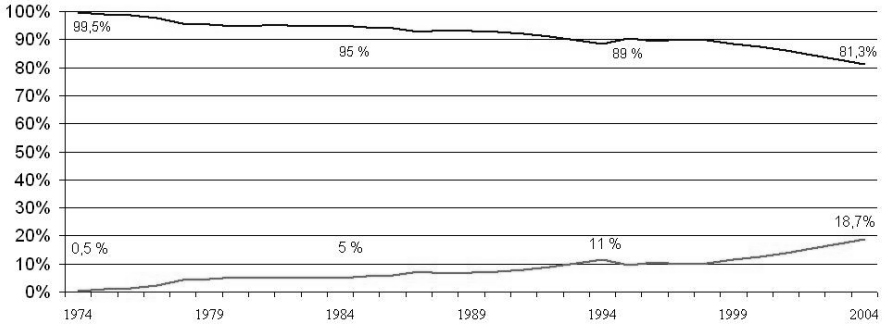
To be eligible for parental leave, an "employee" must invoke the right. "Employee" for this purpose is not defined in either the 1995 Parental Leave Act or the 1962 National Insurance Act, but rather in § 1 of 1982 LAS,[295] where an employee is a person in public or private employment. The amount of the parental leave cash benefit is regulated in Chapter 4 § 1 of the National Insurance Act, which states that an "insured parent" has a right to parental leave cash benefits[296] and temporary parental leave cash benefits.[297] In order to find the requirements as to being an "insured parent," one must turn to Chapter 3 §§ 1 and 4 of the 1999 Social Insurance Act.[298] A person who resides or works in Sweden is insured for certain benefits as stated in the National Insurance Act, including parental leave cash benefits at the lowest and basic levels. According to § 8 of the Social Insurance Act, the right to the parental leave cash benefit arises when the benefits according to the law arise. Prior to July 2006, this was when the qualification period in § 9 of the Parental Leave Act had been fulfilled. This qualification period was removed in July 2006 so that parents are now eligible for parental leave when they begin to work.

The parental leave cash benefit in connection with the birth of a child is paid in accordance with Chapter 4 § 2 of National Insurance Act for 480 days at the longest for both parents combined. The compensation can be paid until the child has reached the age of eight or at a later date when the child has completed the first year of school. A parent may refrain from exercising the right to parental leave to the benefit of the other parent with the exception of 60 days for each child, referred to as the "Pappa months," in an effort to encourage fathers to

[293] *See generally* SOU 1972:34 *Familjstöd* and SOU 1978:39 *Föräldraförsäkring*.
[294] *Lag* (SFS 1962:381) *om allmän försäkring*.
[295] *Lag* (SFS 1982:80) *om anställningsskydd* ("LAS").
[296] *Föräldrapenning*.
[297] *Tillfällig föräldrapenning*.
[298] *Socialförsäkringslag* (SFS 1999:799).

spend more time with their children,[299] originally 30 days in 1995 and extended to 60 days in 2002. Of those 60 days reserved per parent per child in 2005, fathers took 38 days, resulting in 22 days per child being unclaimable.[300] Fathers in addition have the right to ten temporary parental leave days in connection with the birth of a child that must be taken within sixty days of the birth.

Diagram 1: The Percentage of Parental Insured Days Taken by Women (top line) and Men (bottom line) for the Years 1974–2004, statistics and diagram from Swedish Social Insurance Administration.[301]



The amount of the parental leave cash benefit is regulated in Chapter 4 § 6 of the National Insurance Act. Three different compensation categories are used to calculate the monetary amount of the parental leave cash benefit: the sick leave benefit level, the basic level and the lowest level. The sick leave benefit level is based on the parent's income and is paid for a period of 390 days. The remaining 90 days, guaranteed days, are paid at the lowest level of SEK 180 per day. This is also the minimum rate of benefit at which the entire leave can be taken when a parent is not eligible to receive any higher amount.

The sick leave cash benefit is calculated in accordance with Chapter 3 of the National Insurance Act, which defines the income eligible for the sick leave cash benefit. The item most significant here is that with the calculation of eligible income, income exceeding seven and one half times the price base amount[302] for a child born prior to 1 July 2006, and ten times the price base amount for a child born on that date or after, is not eligible. A maximum income ceiling conse-

[299] *See* Prop. 1993/94:147 *Jämställdhetspolitiken: Delad makt – delat ansvar.*

[300] *See* the statistics as generated by the Swedish Social Insurance Administration, *Föräldrapenning,* available at its website: http://www.forsakringskassan.se/omfk/analys/barnfamilj/foraldrap/.

[301] This diagram, *Antal av föräldrapenningdagar,* is available at the Swedish Social Insurance Administration website: http://www.forsakringskassan.se/omfk/analys/barnfamilj/foraldrap/1974.JPG.

[302] The price base amount, *prisbasbeloppet,* is determined yearly and published in a regulation each year, *see, e.g., Förordning* (SFS 2005:650) *om prisbasbelopp och förhöjt prisbasbelopp för år 2006,* the amount for 2006 is SEK 39700.

quently exists as to the amount of the sick leave cash benefit. In accordance with Chapter 3 § 4, the full-time sick leave daily cash benefit constitutes 80 % of the income eligible for the sick leave cash benefit, divided by 365. The maximum ceiling of income eligible for a sick leave cash benefit for 2006 is SEK 24812 (child born prior to 1 July 2006) or SEK 33000 (child born 1 July 2006 or after) per month, which entails that parental leave cash benefits can be paid at the maximum amount of SEK 19800 or 26400 per month, or SEK 626 or 870 per day, respectively, in accordance with the legislation.

A qualification period exists for the parental leave cash benefit during the first 180 days. The benefit is to be paid in an amount comparable to the parent's sick leave cash benefit if the parent during at least 240 consecutive days prior to the birth of the child or the calculated point of time for the birth has been insured for a sick leave cash benefit over the lowest level and would have been if the Swedish Social Insurance Administration was aware of all current circumstances.[303] The parental leave cash benefit for the first 180 days is always paid at least at the basic level, in other words, SEK 180 per day for full-time leave. For the remaining 210 days, there is no requirement of a certain period's sick leave cash benefit insurance above the lowest level. The days can be paid in accordance with the sick leave cash benefit level without any qualification period.

The system for enforcement of the regulations concerning the parental leave and cash benefit is split, as is the substantive legislation. When it comes to issues regarding eligibility, payments or amounts of the parental leave cash benefit, these are administrative law issues brought up through the administrative courts by the individual. When it comes to issues arising with respect to the exercise of the right parental leave, *JämO* historically had limited jurisdiction in that the violation of the right to parental leave had to have a connection with sex. As such, most employees took such issues up instead with their labor unions. The 1991 Equal Treatment Act addresses the issue of parental leave implicitly in the employer's duty in § 5 to facilitate combining work and parenthood for both female and male employees. However, there originally was no remedy for an employer's refusal to follow § 5, but the act was amended in 2000 to include such violations in § 35, so that an employer can be ordered to fulfill its obligations upon penalty of fine. The Equality Council issues such orders at the request of *JämO* or the labor unions. An individual employee, however, cannot bring such an action to the Equality Council. As of 1 July 2006, either parent can report discrimination on the basis of parental leave to *JämO* without any requirement of a connection to sex. As to the actual granting of leave, an employer in violation of the 1995 Parental Leave Act can be ordered to pay dam-

[303] *Lag* (SFS 1962:381) *om allmän försäkring* Chapter 4 § 6.

ages in accordance to § 22 for any losses that have arisen and for the violation that has occurred. Disputes under the Parental Leave Act are to be brought in accordance with the 1974 Labour Disputes (Judicial Procedure) Act. If the dispute concerns a termination or dismissal, §§ 34–43 of LAS are applicable. In other types of disputes, §§ 64–66 and 68 of MBL are applicable. If it is a question of the right to employment leave, according to § 45 of the 1991 Equal Treatment Act, it is to be brought according to 1974 Labour Disputes (Judicial Procedure) Act. For disputes concerning §§ 15–17 and 22–28 of the 1991 Equal Treatment Act, MBL is applicable.

3.2.4 The Act Prohibiting Discrimination Against Part-Time and Fixed Term Contract Workers

One last act needs be mentioned here, the Swedish Act prohibiting discrimination against part-time and fixed term contract workers enacted in 2002 under the EC 1997 Part-Time Directive.[304] The act prohibits an employer from disfavoring a part-time or fixed term contract worker by applying a less favorable wage or other employment term or condition than the employer applies or would have applied to employees in a similar situation that work full-time, unless the employer shows that the disfavoring lacks a connection to the person's part-time or fixed term contract work. The prohibition is not applicable if the condition is justified by objective reasons. Indirect discrimination is defined as where an employer disfavors a person by applying a wage or employment term that appears neutral but in practice particularly disfavors part-time or fixed term contract workers. Such is not unlawful indirect discrimination if the condition is motivated by a legitimate objective and the means are suitable and necessary to reach the objective.

The social partners cannot opt out of the provisions in the act through collective agreements. If a provision in a contract is found discriminatory, it is to be modified or declared invalid. If an employee is discriminated against, the employer is to pay damages for the losses that have arisen and the violation that has occurred, but these can be reduced to zero if the court finds it just to do so.

3.2.5 The Regulation Prohibiting Anti-discriminatory Terms in Public Procurement Contracts

A regulation as to anti-discriminatory terms in public procurement contracts[305] was recently adopted, inspired at least partly by the American Presidential Exec-

[304] *Lag* (SFS 2002:293) *om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning,* Prop. 2001/02:97 *Förslag om lag om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning, m.m.*, Bet. 2001/02:AU6, Rskr. 2001/02:222. No cases have been brought to AD under the act as of the date of this writing.

[305] *Förordning* (SFS 2006:260) *om antidiskrimineringsvillkor i upphandlingskontrakt.*

utive Order 11246 discussed below in Chapter Five.[306] Its objective according to § 2 is to "increase consciousness as to and execution of the laws against discrimination, such as the 1991 Equal Treatment Act…" A contract as awarded by one of the specified agencies with respect to services or construction is to contain terms that have the purpose of combating discrimination within the vendor if the contract has a duration of more than eight months and a value of at least SEK 750000. The terms are to be drafted in such a way that the governmental agency awarding the contract can insure that they are followed. If appropriate, the terms are also to be applicable to subvendors. The governmental authority is to annually check that the terms are being fulfilled by the vendor, or if the contract term is shorter than one year, once during the contract term. No penalties are mentioned in the regulation. Neither is any guidance given as to the more concrete content of the terms, how follow-up is to occur, what is to be checked, and how subvendors are to be reached with respect to their conduct.

3.2.6 Pending Proposals for Legislative Changes

Persisting problems with respect to vertical and horizontal sex segregation are dominant themes in many of the governmental reports and legislative enactments and amendments presented above. With respect to horizontal segregation, the current composition of the Swedish workforce is slightly over four million employees, of which approximately one-half are women.[307] Over one-half of Swedish women work in the public sector, while 80 % of men work in the private sector. Two-thirds of all employees work in the private sector, of which less than one-third is women. One-third of all employees work in the public sector consisting of the state, county councils and municipalities, and of these, over 70 % are women.[308] Not surprisingly, the wages in the public sector are significantly lower than those in the private sector. The average monthly wages in the private sector for a salaried worker as of May 2006 were SEK 29262.[309] Within the public sector, the average monthly wages for the same date in the state sector were SEK 26760,[310] in the county councils SEK 24731[311] and in the municipalities

[306] The issue of whether this strategy could be used in Sweden to fight ethnic discrimination has been addressed several times, *see, e.g., Ingen diskriminering med skattemedel! Avtalsklausuler mot diskriminering vid offentlig upphandling,* Integrationsverkets Rapportserie 2000:7.

[307] *See* SCB, *Statistics of Number of Persons Employed by Sex for the period from 1976–2005,* 26 April 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____23330.asp.

[308] *See* SCB, PÅ TAL OM KVINNOR OCH MÄN – LATHUND OM JÄMSTÄLLDHET 2004 (SCB 2004) at 5.

[309] *See* SCB, *Economic Activity Statistic – Wages for the Private Sector and Salaried Workers*, 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____33542.asp.

[310] *See* SCB, *Economic Activity Statistic – Wages for the State Sector,* 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20464.asp.

[311] *See* SCB, *Economic Activity Statistic – Wages for County Councils,* 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20515.asp.

SEK 21 074.[312] The wage gap between the private sector and the municipal sector seen thus is 28 %. The latter two categories of public sector workers constitute more than 20 % of all those employed full-time in Sweden. In addition, almost 28 % of women working in Sweden work part-time in contrast to approximately 5 % of men.[313] Women are also overrepresented with respect to sick leaves[314] and early retirements.[315]

Wage differences also exist with respect to vertical occupational segregation. Within the state sector, the average monthly wage for a man in the age of 55–64 is SEK 32000 and a woman of same age, SEK 25000, a wage gap of 22 %.[316] On the entire average, the wages in the state sector for May 2006 were SEK 28630 for men and SEK 24790 for women, a wage gap of 14 %.[317] Other recent statistics cite that the wages of women can be seen as 92 % of those of men when consideration is taken as to differences in professions and sectors; without such considerations, the wages of women are 83 % of those of men.[318] However, within the same report, the wages of women within a sector equally distributed as to women and men were 77 % of those of the men, demonstrating the slipperiness of statistics.

There is also a general lack of women in positions of higher power in both the private and public sectors. Reports also indicate that a scissors' effect occurs within the public sector in Sweden; despite the fact that the majority of employees in the public sector are women, the higher positions within that sector are held by men. One example of this is medical physicians. General physicians are 58 % women and 42 % men, but when it comes to the highest positions in

[312] *See* SCB, *Economic Activity Statistic – Wages for the Municipalities,* 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20505.asp.
[313] *See* SCB, *Statistics as to Persons in the ages of 20–64 according to employment category and typical hours worked 1970–2003*, available at SCB's website: http://www.scb.se/templates/tableOrChart____27543.asp.
[314] *See* SCB, *Statistics as to Sick Leave Taken 1987–2005*, 2 June 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____23348.asp, showing that 4.4 % of women took sick leaves in 2005 and 2.8 % men, women thus accounting for almost two-thirds of the sick leaves.
[315] Comparable statistics with respect to early retirement are given, women at 4.6 % taking early retirements, men 2.9 %. *See* SCB, *Förtidspension, Arbetslöshetsstöd och sjukpenning, Mest för Kvinnor och Norrlänningar,* Välfärd No. 1 2004 at 16, available at SCB's website: http://www.scb.se/Grupp/allmant/BE0801_2004K01_TI_04_A05ST0401.pdf.
[316] *See* SCB, *Statistics as Average Monthly Wages for Women and Men in the State Sector by Age May 2006,* 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20450.asp.
[317] *See* SCB, *Economic Activity Statistic – Wages for the State Sector*, 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20464.asp.
[318] Prop. 2003/04:1 *Budgetpropositionen för 2004*, Appendix 4 at 4 and 10.

charge of operational areas, 22 % are women and 78 % are men.[319] Access to jobs is also problematic. A recently issued working paper showed that in male dominated sectors, women with equal qualifications had a 30 % chance of being called to a job interview, compared to men with the same qualifications who had a 52 % chance. When the sex of both candidates was known to the employer generally in all sectors, women had a 40 % chance of being called to an interview compared to men's 45 %, and when the sex of the candidates was not disclosed, both had 45 % chances of being called to an interview.[320] These are the primary issues facing the current Swedish legislation, occupational segregation, unequal wages and sex discrimination.

In efforts to combat these problems, proposals for legislative amendments are currently outstanding as to both the 1995 Parental Leave Act and the 1991 Equal Treatment Act, as well as regarding strengthening the rights of part-time workers in general. They are presented primarily in this section; however, certain specific issues concerning *JämO*, attorney's fees and the statute of limitations are discussed under their respective headings below.

3.2.6.1 Proposed Amendments to the Parental Leave Act

The issue of individualizing parental leave as between parents was addressed as early as 1984, with a proposal that 90 days be granted to each parent that could be transferred in writing.[321] Instead, first thirty days in 1995 then sixty days in 2002 were reserved to each parent through the legislation. A governmental report issued in 2005 found that in general, the laws on parental leave did not discriminate against either parent, but rather gave them equal opportunities to take parental leave.[322] The allocation between the parents themselves instead was perceived to lead to the unequal distribution, finding that women took 81 % of the leave in 2004, in other words, men took 38 days.[323] The prognosis given by the Swedish Social Insurance Administration is that *ceteris paribus,* the rate of

[319] *See Jämställdheten granskad i skuggrapport – Rapport till FNs CEDAW-kommitté från tio svenska frivilligorganisationer* (Svenska UNIFEM-kommitté 2001) at 41.
[320] *See* Per-Anders Edin and Jonas Lagerström, *Blind dates: quasi-experimental evidence on discrimination,* IFAU – Institute for Labour Market Policy Evaluation Working Paper, Uppsala University 2006:4, available at: http://www.ifau.se/upload/pdf/se/2006/wp06-04.pdf. *See also Företag sållar bort kvinnor,* UNT 21 May 2006 at A24.
[321] Prop. 1984/85:78 *Förbättringar inom föräldraförsäkring, havandeskapspenning och vissa regler inom sjukpenningsförsäkringen* at 56.
[322] *See* SOU 2005:73 *Reformerad föräldraförsäkring Kärlek Omvårdnad Trygghet*.
[323] SOU 2005:73 at 141. This period of 38 days can be seen as tying into the benefits as granted in the private sector collective agreements as discussed below, most of which are for maximum periods of 30, 60 or 90 days depending upon length of employment.

parental leave as taken by men will go from 20 % in 2005 to 30 % in 2015.[324] Recent proposals have included an individualization of parental leave 50/50, a proposal supported by *JämO*,[325] or on a third basis, each parent having one-third with the last third free to share between them,[326] similar to a system used in Iceland. The most recent SOU 2005:73 has suggested the one-third model. Another change is proposed for the purpose of reducing the period of time women stay at home,[327] that parents would be eligible for the cash benefit until the child reaches the age of four, as opposed to the current age of eight. Under the terms of the EC Parental Leave Directive, leave has to be available until a child reaches the age of eight. However, one of the weaknesses in the Community scheme is that there is no requirement of parental leave compensation, so Sweden arguably is free to change the terms of its parental cash leave benefit to the age of four instead of eight.

One aspect of the argument for equal parental leave is that men, after assuming a larger share of the responsibility for children and the home by taking a greater amount of leave, will then continue to assume a larger share of the responsibility of the unpaid work in the house. According to available statistics, women's share of unpaid work in Swedish households has gone down since 1990, while the amount of unpaid work performed by men has remained the same. Of those couples living together with children, women perform 6 hours 6 minutes unpaid work per day while men perform 3 hours 50 minutes.[328] There is no indication that men have assumed a larger part of the unpaid work in the home parallel to the modest increase in taking of parental leave, only that women have stopped doing as much in the home instead.

3.2.6.2 Combining the Statutory Discrimination Provisions as well as Ombudsmen

Another recent governmental report proposes the most radical changes to the discrimination legislation as well as enforcement mechanisms in Sweden since the 1970's.[329] The different pieces of discrimination legislation, including the

[324] *See* the Report by the Swedish Social Insurance Administration of the number of parental leave cash benefits taken by women and men respectively from 1990 with future prognoses to 2015, available at the Swedish Social Insurance Administration website: http://www.fk.se/omfk/analys/barnfamilj/foraldrap/prognos.JPG.

[325] *See, e.g., JämO's* editorial, *Fler pappamånader hjälper inte kvinnorna* in DAGENS NYHETER, 5 April 2005 and *JämO, Ny rapport om föräldraskap och arbetsliv,* Press Release, 4 January 2005, available at: *JämO's* website: http://www.jamombud.se/news/nyrapportomforaldras.asp.

[326] *See, e.g.,* Anna Fransson and Irene Wennemo, MELLAN PRINCIP OCH PRAKTIK – EN RAPPORT OM FÖRÄLDRAFÖRSÄKRINGEN (Landsorganisationen i Sverige 2005).

[327] SOU 2005:73 at 322.

[328] *See* Bilaga 13 to Bet. 2003/04:LU22 at 34.

[329] *See* SOU 2006:22 *En sammanhållen diskrimineringslagstiftning.*

1991 Equal Treatment Act, are to be combined in a fashion mirroring the UK Equality Act 2006 and the American 1964 Civil Rights Act.[330]

The Committee begins by discussing the human rights bases for the prohibitions against discrimination, citing:

- The UN Universal Declaration of Human Rights;
- The UN Convention on Civil and Political Rights;
- The UN Convention on Economic, Social and Cultural Rights;
- The UN Convention on the Elimination of All Forms of Discrimination of Women;
- The UN Convention on the Elimination of All Forms of Racial Discrimination;
- The UN Convention on the Rights of the Child;
- ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation;
- Article 14 of the ECHR;
- That the European Union is founded on the principles of respect for human rights and fundamental freedoms as provided by Article 6.1 EU Treaty, and which according to Article 6.2, the Union is to respect fundamental rights as guaranteed by the ECHR;
- The case law of the European Court of Justice which has declared that human rights constitute an integral part of the general principles of law and should be safeguarded by the courts, and that the protection of human rights also embraces the rights contained in the ECHR;
- Article 13 of the EC Treaty which empowers the Council, acting unanimously on a proposal from the Commission and following consultation with the European Parliament, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; and

[330] The following acts are to be repealed and incorporated with the passage of the new act:

- The Equal Treatment between Women and Men at Work Act (SFS 1991:433);
- The Act (SFS 1999:130) Prohibiting Ethnic Discrimination in Employment;
- The Act Prohibiting Discrimination based on Physical Handicap in Employment (SFS 1999:132);
- The Act (SFS 1999:133) Prohibiting Discrimination in Employment because of Sexual Orientation;
- The Equal Treatment of Students at Universities Act (SFS 2001:1286);
- The Prohibition of Discrimination Act (SFS 2003:307); and
- The Prohibition of Discrimination Act and other treatment that is unfair against children and pupils (SFS 2006:67).

- Article 21.1 of the Charter on Fundamental Rights of the European Union (the EU Charter), which prohibits any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.[331]

The committee, based on the above, concluded that discrimination constitutes a violation of fundamental human rights and that legislation is one means of combating discrimination and thereby supporting these rights. Finding that the current regulatory situation can best be described as piecework legislation, the committee proposes the introduction of a new "Prohibition and other Measures against Discrimination Act" with the purpose of combating discrimination and promoting equal rights and opportunities regardless of sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age. The Act is to apply to employment, education, labor market policy activities, the setting-up or running of business operations, practicing professions, memberships in employee, employer and professional organizations, goods, services and housing, public meetings and public events, social welfare services, the social insurance system, unemployment insurance, health and medical care services, public educational grants, compulsory military and compulsory civilian service, and to public appointments and assignments. The new Act is divided into four chapters, with Chapter 1 defining discrimination, Chapter 2 concerning discrimination in employment, Chapter 3 education and the other areas outside of employment and Chapter 4 enforcement of the act. A new ombudsman authority is to be created unifying the current ombudsmen, with the exception of the children's ombudsman, as discussed below under the heading *JämO.*

According to the proposed act, discrimination is prohibited when based on sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation and age. Sexual identity and age are new to the Swedish discrimination regulations. Direct discrimination is defined as where a person is treated less favorably than another is, has been or would have been treated in a comparable situation, provided that the difference in treatment is based on sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age. Indirect discrimination occurs with the application of a provision, criteria or procedure that appears neutral but is likely to disfavor someone of a particular sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age, unless the provision, criteria

[331] *See* SOU 2006:22 *En sammanhållen diskrimineringslagstiftning, del 1* at 45.

or procedure can objectively be supported by a lawful objective and the means to achieve it are appropriate and necessary.

A prohibition against harassment is included in the proposed act, covering conduct related to sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age, and which violates the integrity of a person. Sexual harassment is behavior of a sexual nature that violates a person's integrity. Unlawful instructions to discriminate are orders or instructions to discriminate against a person given to someone in a position subordinate or dependent to the person giving the order or instruction or who, in relation to such a person, has undertaken to perform a task. Prohibitions against retaliatory measures as well as an obligation to investigate and implement measures against harassment are also in the proposed act.

The proposal includes an obligation to conduct active measures, expanding them to cover not only issues relating to sex, ethnic background and religion or other religious beliefs, but also to sexual identity and age. Employers are to take active measures regarding recruitment, education and the development of skills, job seeking and applications. The employer is to prepare an annual equal treatment plan for work with active measures to achieve equal rights and opportunities in working life, regardless of sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age. This plan is to contain an overview of the active measures required at the workplace according to the Act together with a report of those measures the employer intends to commence or implement during the forthcoming year. Certain other changes as to damages, the statute of limitations as well as the Swedish Labour Court are proposed, and discussed below under these respective headings.

3.2.6.3 Proposal as to Part-time Workers

Another governmental report presented in 2005 has addressed the issue of part-time employment and women, finding that the number of part-time employees is at least 200000 persons in Sweden, and of these, 75 % are women.[332] New legislation is proposed concerning the right to full-time employment. Under the new act, each employment contract as a general rule is to be for full-time work with a right to full-time employment for a person employed part-time. A general exemption of one-seventh of the total number of employees is allowed. An employee, however, can choose part-time employment. The current provisions contained in § 25a of LAS granting a preferential right to increased working hours are to be transferred to the new Act. At the same time, a right to full-time employment will be introduced for those already employed part-time, if the employee notifies the employer of the wish for full-time employment, and has

[332] SOU 2005:105 *Stärkt rätt till heltidsanställning.*

been employed for a total of more than three of the past five years. The right also assumes that the employer has need of full-time employment for which the employee is sufficiently qualified. The act is mandatory, but the social partners are given the right to opt out of certain provisions through collective agreements. An employer in violation of the Act is to pay damages, including compensation for losses sustained by the employee.

Now that the legislation, both current and proposed, has been presented, it is time to turn to the case law applying the legislation and the legislator's intent as decided by the Swedish Labour Court.

3.3 The Swedish Labour Court and its Discrimination Jurisprudence

To understand the role and jurisprudence of the Swedish Labour Court ("AD"), one not only has to take into account the Swedish labor law model as discussed above and the Swedish legislation, but also the Swedish judicial and political systems. Sweden has a parliamentary political system as expressed in the first sentence of the first Chapter of the Instrument of Government of the Swedish Constitution, "[t]he power emanates from the people." The Swedish Parliament, as representatives of the people, enacts, interprets and enforces the laws. However, the Swedish legal system cannot be seen as a purely civil law system, as the Swedish courts are empowered according to the Swedish Constitution to declare acts of the Swedish Parliament unconstitutional, a power seldom invoked.[333] In addition, large areas of Swedish private law are regulated primarily by case law, such as third party claims to chattels.[334]

This "hybrid" system reflects those found in the other Nordic countries, not surprising given the degree of legislative cooperation between these countries,[335] earning them their own designation as the "Nordic legal family."[336] Within this legal family, the courts do not perceive their role as making law, but rather interpreting legislative intent, resulting in a much different stance than that of the courts in common law countries such as the England and the United States or

[333] Chapter 11 § 14 of the Instrument of Government.

[334] In Swedish law, this is a specific field of law referred to as *sakrätt.*

[335] Sweden was one of the founders of the Nordic Council in 1952. *See* Prop. 1952:206 *Kungl. Maj:ts proposition till riksdagen angående underrättelse av ett nordiskt råd*, Bet. 1952:UU9, Rskr. 1952:320. The Nordic Council is a forum for Nordic parliamentary cooperation. The Swedish Sale of Goods Act, *Köplag* (SFS 1990:931), is an example of legislation that has been drafted by this Council and adopted in all the Nordic countries. For more information on the Nordic Council, *see* the Nordic Council website, available at: http://www.norden.org.

[336] For a discussion as to the Nordic legal family, *see, e.g.,* Jaakko Husa, *Guarding the Constitutionality of Law in the Nordic Countries: A Comparative Perspective,* 48 AM.J.COMP.L. 345 (2000). With respect to the Nordic labor law model, *see* Niklas Bruun, *The Nordic Model for Trade Union Activity* in Bruun *et al.* at 3.

that of the European Court of Justice. When faced with an issue not covered by the direct text of the statute, the Swedish rule of interpretation in private law requires that the judge turn to the legislative preparatory works generated regarding the legislation, in order for the court theoretically to come as close to the intent of the legislator as possible. In the case of the Swedish Equal Treatment Acts, the legislative preparatory works have been amended so many times that much of the discourse in the earlier works is no longer relevant or even, from a Community law perspective, lawful. This problem has been raised fairly recently in the evaluation of the act conducted in 1999[337] and later preparatory works have stated that the earlier ones no longer are to be considered by the court.[338]

The Swedish judicial system comprises two court systems, an administrative set of courts with administrative trial courts, administrative appellate courts as well as the Swedish Supreme Administrative Court, and the general courts also with trial courts, appellate courts and the Swedish Supreme Court.[339] The Labour Court does not fall directly within either of these two systems, as it is in itself a court of first and final instance. It has jurisdiction to hear certain appeals from the general district courts, but in many cases, it is the first and final instance as to the employment law issue, particularly claims of discrimination as raised by the labor unions or *JämO*. The Swedish Supreme Court does not have final jurisdiction with respect to the decisions of the Labour Court. However, a right exists to petition the Swedish Supreme Court to vacate the Labour Court's final judgment if it is found to manifestly contradict the law and enter a judgment *de novo*.[340]

3.3.1 The Swedish Labour Court

Under the collective agreements entered into at the turn of the twentieth century, arbitration was the resolution mechanism of choice for the social partners, particularly given their skepticism and desire to keep the State out of all labor issues. The state supported this preference by passing the first mediation act in

[337] *See* SOU 1999:91, *see also* Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 57.
[338] *See, e.g.,* Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 55.
[339] *Länsrätt, kammarrätt* and *Regeringsrätten*, and *tingsrätt, hovrätt* and *Högsta Domstolen,* respectively.
[340] Chapter 58 § 1(4) of the Swedish Code of Judicial Procedure. *See, e.g.,* NJA 2003 C 36 in which the Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR, a SACO labor union, requested that the Swedish Supreme Court vacate the final judgment of the Labour Court through *resning* in AD 2001 no. 51 *SACO-S through the Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Agency for Government Employers*, an action claiming wage discrimination, arguing that AD had manifestly disregarded the law in finding that the wage differences were not a result of sex. The Swedish Supreme Court dismissed the petition, finding that AD had not manifestly disregarded the law.

1906[341] and later by setting up a central mediation institute[342] as well as a central arbitration institution in 1920.[343] By then, over 400000 Swedish workers were covered by collective agreements, many of which had arbitration clauses.[344] The Swedish Labour Court came into existence in 1929,[345] established in line with the 1928 Collective Agreements Act,[346] replacing the arbitration institution set up in 1920. The Labour Court's primary task was to resolve labor law issues, disputes regarding the interpretation and application of collective agreements and the non-strike regulations of the Collective Agreements Act.[347] The present expanded jurisdiction of the Labour Court has had several causes: [348] Collective agreements are now applied to the entire labor market, extended to include salaried private employees and the public sector. Through the expansion of employment legislation reaching a peak in the 1970's and the new Labour Disputes (Judicial Procedure) Act in 1974, AD's jurisdiction was expanded to include certain individual as well as collective agreements, extending the Court's jurisdiction to employment law, basically all employment issues.

The Court originally consisted of three "official" non-partisan members, a chairman and vice-chairman trained in law and a third member an expert in the labor market, as well as four partisan members, two chosen by SAF and two by LO. In 1947, private salaried employees were granted representation in the Labour Court, and in such cases, members appointed by the Confederation for Professional Employees ("TCO")[349] replaced the LO members. Public sector

[341] *Lag* (SFS 1906:113) *om medling i arbetstvister*, SOU 1901 *Bet. och förslag afgifna af den för behandling af frågan om förliknings- och skiljenämnder i tvister mellan arbetsgifvare och arbetare i nåder tillsatta komite, Stockholm 1901 (Riksdagstrycket 1903)*. For the history of the development of the Mediation Institute, *see* Birgitta Nyström, MEDLING I ARBETSTVISTER (Norstedts 1990) at 58, beginning with its inception, and the roots of the Swedish Labour Court, already in the late 1800's. This institution was replaced in 2000 by the National Mediation Office, with the same general jurisdiction as to resolving labor conflicts, but two new mandates, promoting efficient wage formation and overseeing the statistics governing such, *see* the National Mediation Office website, available at: http://www.mi.se.

[342] *See Lag* (SFS 1920:245) *om medling i arbetstvister* and *Kungl. Maj:ts förordning* (SFS 1920:898) *med närmare föreskrifter angående medling i arbetstvister.*

[343] *See Lag* (SFS 1920:246) *om central skiljenämnd för vissa arbetstvister.*

[344] Nycander at 31.

[345] *Lag* (SFS 1928:254) *om arbetsdomstol*, Prop. 1928:39 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om kollektivavtal och till lag om arbetsdomstol*, Bet. 1928:LU36. For a history of the labor court, *see* Ronnie Eklund, ed., RÄTTEGÅNGEN I ARBETSTVISTER – LAGKOMMENTAR OCH UPPSATSER UTGIVNA AV ARBETSRÄTTSLIGA FÖRENINGEN (2 ed. Norstedts 2005) at 29.

[346] *Lag* (SFS 1928:253) *om kollektivavtal* and *lag* (SFS 1928:254) *om arbetsdomstol.*

[347] For a summary of the Swedish Labour Court's first fifty years, *see* Hans Stark, *Arbetsdomstolen femtio år – av ordföranden i arbetsdomstolen Hans Stark*, 1979 SvJT 321–335.

[348] For this history, *see* Hans Stark, *Arbetsdomstolen i skottgluggen,* in STUDIER I ARBETSRÄTT TILLÄGNADE TORE SIGEMAN UTGIVNA AV ARBETSRÄTTSLIGA FÖRENINGEN (Iustus 1993).

[349] *Tjänstemännens centralorganisation. See Lag* (SFS 1947:90) *angående ändrad lydelse av lagen den 22 juni 1928 (nr. 254) om arbetsdomstolen.*

salaried employees were given the right to enter into collective agreements in 1966, and in those cases, there would be one SAF member, one employer member from the public sector, one LO member and one from TCO. This composition as appointed by the social partners reflects the origins of labor dispute resolutions in arbitration at the turn of the twentieth century.

3.3.1.1 The Current Composition of the Swedish Labour Court

The composition of the Labour Court as to partisan and non-partisan members has remained unchanged since its inception in 1929, and arguably can be traced back to that of the central arbitration panel as established in 1920. The composition, as well as the procedure before the Court, is regulated in the 1974 Labour Disputes (Judicial Procedure) Act. The judging panel can vary, but generally consists of seven members, three non-partisan "official" members plus two members representing the interests of the employer and two the employees' interests. Two of the three "official members," the chairman and vice chairman, are to have judicial experience and the third member expertise in labor market issues. In less complicated cases, the panel may consist of only three members, a chairman plus one representative each for employer and employee interests. In certain procedural matters, the chairman is authorized to rule alone. The Court currently has twenty-five members including four chairmen, four vice-chairmen and three members with specialist experience of the labor market, seven members representing the interests of employers and seven those of employees.

Of those members representing employer and employee interests, thirteen are appointed by the social partners, four by the Confederation of Swedish Enterprise,[350] two by the Swedish Association of Local Authorities and Regions ("SALAR"),[351] four by LO, two by TCO, and one by the Swedish Confederation of Professional Associations ("SACO").[352] The fourteenth member is appointed as a representative of the state as an employer. Specific conflict of interest rules exist to prevent members from sitting on panels in cases involving members of their same organization.

The nomination of members by the social partners has been debated[353] and challenged several times under Article 6 of the European Convention on Human Rights[354] based on the decision by the European Court of Human Rights in

[350] *Svenskt Näringsliv* formerly *SAF* and *Industriförbundet*.
[351] *Sveriges kommuner och landsting*.
[352] *Sveriges Akademikers Centralorganisation*.
[353] As for several articles in this debate, *see Processordningen i diskrimineringsmål m.m.* Debatt i Lag & Avtal 2001–2002.
[354] As to cases brought challenging AD's composition, *see* the summary in SOU 2006:22 *En sammanhållen diskrimineringslagstiftning* at 310–325. One case has been heard by the court on the merits, *AB Kurt Kellermann v. Sweden*, European Court of Human Rights, judgment dated 26

Langborger.[355] The issue in *Langborger* was whether the composition of the Swedish Housing and Tenancy Court was in violation of Article 6(1) of the ECHR guaranteeing a fair and public hearing by an independent and impartial tribunal. Plaintiff originally had contested the amount of rent set for his apartment as well as the inclusion of a negotiation clause mandating his representation by a specific tenants' union, for which it would receive fees in the amount of 0.3 % of the rent. The Rent Review Board that heard and dismissed his complaint was composed of a chairman and two lay assessors, the two assessors nominated by the Swedish Federation of Property Owners and the National Tenants' Union, the central organizations under which affiliated local organizations had entered into the original, contested agreement. Plaintiff's appeal of this Board's decision was heard and dismissed by the Housing and Tenancy Court, which was composed of four members, two judges and two lay assessors who also had been nominated by the Swedish Federation of Property Owners and the National Tenants' Union. The ECHR Court found that impartiality was the issue in the case, and that:

> As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court notes that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim.[356]

As the balance of interests was upset, and the central organizations in addition had a financial stake in the process from the fees received in the negotiations, the ECHR Court found that the Swedish Housing and Tenancy Court was not impartial as mandated under Article 6 ECHR.

The impartiality of the composition of the Swedish Labour Court was addressed by the ECHR Court in *Kellermann* in 2004.[357] In a five to two deci-

---

October 2004, Application No. 41579/98. Four other applications have been submitted and dismissed by the European Commission of Human Rights, *see Stallarholmens Plåtslageri o Ventilation Handelsbolag and others v. Sweden,* no. 12733/87, Commission decision of 7 September 1990, Decisions and Reports 66 at 111 (Commission found no conflicting interest), *Dyrwold and others v. Sweden,* no. 12259/86, Commission decision dated 7 September 1990, *Yom-tov v. Sweden*, no. 12962/87, Commission decision dated 7 September 1990, all three dismissed on the same date, as well as *Smeeton-Wilkinson v. Sweden*, no. 24601/94, Commission decision dated 28 February 1996.

[355] *Langborger v. Sweden*, European Court of Human Rights, judgment dated 22 June 1989, Application No. 11179/84.

[356] *Langborger* at para. 36.

[357] *AB Kurt Kellermann v. Sweden,* European Court of Human Rights judgment dated 26 October 2004, Application No. 41579/98.

sion, the Court held that the composition of AD was not in violation of the requirements of objectivity or independence as set out in Article 6. The balance of interests in the composition had not been upset by the issue brought, the lawfulness of an industrial action, nor could the parties appointing the members of the Court be seen as having any financial stake in the outcome of the case, as had been the case in *Langborger*.[358]

The 2006 Committee proposing the new Swedish Discrimination Act appears to have reacted to the fact that two justices dissented in the *Kellermann* opinion, as well as that the holding in the case was fairly narrow, limited to that the balance of interests was not disturbed by the issue at hand. Stating that the Committee agreed that employment discrimination cases in the future should also be under the jurisdiction of AD, it found no need to change AD's role or the appointment system of its members.[359] However, despite this conciliatory approach, a fairly strong change is actually proposed. Instead of a seven member panel, three non-partisan and four partisan members as is the current composition of AD, the Committee proposed that the judging panel consist of five members, three non-partisan and two partisan so that the "interest members" cannot constitute a majority but still be included in the process and shaping of the law.[360] *JämO* rejected this proposal, arguing that the presence of any of the partisan members jeopardizes the impartiality of the panel.[361] Another suggestion made in the proposal is that the third official member be a person not only with special insight into the labor market, but also discrimination issues as well.

3.3.1.2 Proceedings before AD

Before a case can be brought to AD by the social partners, they are under an obligation to negotiate certain issues in accordance to MBL or LAS. This procedure is referred to in both the 1991 Equal Treatment Act §§ 45–47 and the 1995 Parental Leave Act § 23. *JämO* is not authorized to represent a plaintiff unless the labor union having the right to do so declines.[362]

The Labour Court has jurisdiction in labor-related disputes, defined fairly broadly as any dispute affecting the relationship between the employee and the social partners where a collective agreement exists. As stated above, the collective

[358] For a discussion how the decision in *Kellermann* was not the resounding approval of the Swedish Model as depicted in the Swedish media, *see* Thomas Bull, *Arbetsdomstolens Opartiskhet och Europadomstolen*, EUROPARÄTTSLIG TIDSKRIFT No. 4 2005 at 808, in which he concludes that the decision was an interpretation of the convention based more on policy, as many European countries had judging panels appointed in a similar fashion.
[359] SOU 2006:22 Del 2 *En sammanhållen diskrimineringslagstiftning* at 334.
[360] *Id.* at 368.
[361] *Id.* at 596.
[362] *See* Lars Gellner and Lars Sydolf, TVISTELÖSNING I ARBETSRÄTTEN (Norstedts 2005) at 46.

agreements in Sweden effectively cover 90 % of the employees through the system of adhesion agreements.[363] Certain cases are brought directly to AD as it has exclusive jurisdiction, such as when a labor union or *JämO* prosecutes a discrimination claim on behalf of the plaintiff. If a private person prosecutes a claim of discrimination, it is first brought to the general trial courts. Appeal of the trial court decision is made to AD. In either case, the judgment of the Labour Court is the final judgment. The 1974 Labour Disputes (Judicial Procedure) Act governs the process, and to the extent a specific issue is not regulated there, the procedural rules as found in the Swedish Code of Judicial Procedure are applicable. Part of the proposed new discrimination law includes that actions by the Ombudsman against Discrimination be brought to the district courts with AD as the appellate court, apparently at least in part as a response to *JämO's* campaign to bring discrimination claims to the general courts, emphasizing more the human rights aspect of discrimination than the employment/labor dimensions.[364] However, *JämO* had argued for a change in venue for all discrimination cases, as discussed below, not just those cases as prosecuted by *JämO*. *JämO's* response to this part of the proposal is that it results in an illogical and unnecessary dual tracking of rights leading to a fundamental inequality, as a right to appeal would still not exist for cases originating in AD, namely those brought by the unions on behalf of their members.[365] Under this proposal, AD would continue to be the first and final instance in such cases.

The number of cases in general brought to the Labour Court has varied over time reflecting the expansion of its subject matter jurisdiction. During 1960–1973, the average total number of cases annually was 62. With the passage of the employment legislation in the 1970's, the workload of AD almost tripled from a total of 135 cases in 1974 to an average total of 316 cases in 1978–1982.[366] Two categories of cases were also created, "A" cases in which AD is the first and final instance, and "B" cases, where AD hears the case on appeal. AD decided in total 369 cases in 2002, 414 in 2003 and 389 in 2004.[367] These statistics do not include the number of cases resolved by the parties through settlement negotiations prior to trial. The number of cases brought between 2002 and 2004 was 1172;

[363] In Swedish, *hängavtal.* These agreements are also referred to in English as "application agreements" and "adoption agreements." *See, e.g.,* the definition given by the European Foundation for the Improvement of Living and Working Conditions for *hängavtal*, available at: http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-H-Auml-NGAVTAL-SE.html.

[364] *See, e.g.,* Claes Borgström, *Diskriminering bör prövas i allmän domstol,* LAG & AVTAL Nr. 7/2001 at 4.

[365] SOU 2006:22 *del II* at 596.

[366] *See* Tore Sigeman, RÄTTEGÅNGEN I ARBETSTVISTER: LAGKOMMENTAR OCH UPPSATSER UTGIVNA AV ARBETSRÄTTSLIGA FÖRENINGEN UNDER REDAKTION AV TORE SIGEMAN (Stockholm 1979) at 19.

[367] Statistics taken from the Swedish Labour Court's website, http://www.arbetsdomstolen.se/ and Eklund, RÄTTEGÅNGEN I ARBETSTVISTER (2005) at 20.

in those three years, six cases were decided under the 1991 Equal Treatment Act, almost exactly one-half of one percent of AD's caseload.

3.3.2 The Discrimination Case Law of AD

The case law of AD demonstrates a consistency of result and approach as to issues of discrimination. Approximately one hundred discrimination cases have been decided by the court on their merits, 70 of which have been brought under the two Equal Treatment Acts.

Of these almost 100 cases, the Court has found for the plaintiff in twenty-seven, basically finding discrimination once a year in the almost thirty years since the enactment of the first Equal Treatment Act. The ombudsmen have brought a total of forty cases, the labor unions fifty-five and private individuals three. These cases do not comprise the entirety of cases in which discrimination claims are brought; as stated above, private individuals must first bring such claims to the general courts. However, the AD cases comprise the entirety of the appellate as well as officially published cases and are to be viewed as precedent. The vast majority of the sex discrimination cases as decided by AD have concerned issues of direct discrimination.

The cases brought in the first decade after the passage of the 1979 Equal Treatment Act are almost one-half of all the sex discrimination cases brought, with the prevalent issue whether plaintiff was obviously better qualified than the candidate chosen. Half that number of cases was brought in the 1990's with wage inequality claims as well as claims relating to sexual harassment the dominant issues. The new millennium is not marked any one topic. The case law is discussed here in the main categories of direct and indirect discrimination, parental leave issues treated separately, followed by a discussion of general trends detectible as raised by the Court's judgments.

3.3.2.1 Direct Discrimination

Direct sex discrimination claims as based on the 1979 and 1991 Equal Treatment Acts can be further categorized as claims regarding discrimination based on the qualifications of the candidates, pregnancy, unequal pay and harassment. Such claims originally were brought under the general wording of "less favorable" treatment in §§ 2 and 3 of the 1979 Equal Treatment Act. Three of these are now included in explicit sections in the 1991 Act, unequal treatment, unequal pay and harassment. Pregnancy is still not explicitly included in the wording of the act.

3.3.2.1.1 Direct Sex Discrimination on the Basis of Qualifications

The cases decided on the merits by AD alleging direct sex discrimination with respect to qualifications in violation of the 1979 and then later, the 1991 Equal

Treatment Acts, number thirty-four to date, with thirty of these brought in the 1980's.[368] All these early cases are not examined here, but rather certain lines of development are presented, beginning with the first cases brought in the 1980's and ending with the most recent four brought in the 1990's and 2000's. The examination of discrimination on the basis of qualifications by the Court has contained three aspects: education/training qualifications, professional experience and personal qualifications. During the 1980's and 1990's, when the standard applied was "obviously better qualified," many cases fell on the first two aspects, educational qualifications and professional experience. After parliament changed the wording of the 1991 Equal Treatment Act in 2001 to "*a position of a similar*

[368] *See* in numerical order, AD 1981 no. 169 *JämO v. Upplands Väsby Municipality*; AD 1981 no. 171 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality*; AD 1982 no. 17 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*; AD 1982 no. 102 *Swedish Association of Graduates in Law, Business Administration and Economics, Computer and Systems Science, Personnel Management and Social Science (JUSEK) v. Kalmar County Council*; AD 1982 no. 139 *JämO v. Örebro County Council*; AD 1983 no. 50 *JämO v. The State of Sweden through the Swedish National Labour Market Board*; AD 1983 no. 78 *The Swedish Musician's Union Entertainment Business Employees' Association v. Hörby Municipality*; AD 1983 no. 83 *The Swedish Food Workers' Union v. Kalmar Municipality*; AD 1983 no. 102 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers*; AD 1983 no. 104 *JämO v. The State of Sweden through the Swedish National Labour Market Board*; AD 1984 no. 1 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers*; AD 1984 no. 6 *JämO v. The State of Sweden through the National Swedish Police Board*; AD 1984 no. 12 *Gertrud Anljung, B.A. in Lund v. The State of Sweden through the Swedish Agency for Government Employers*; AD 1984 no. 22 *JämO v. Lessebo Municipality*; AD 1984 no. 100 *JämO v. The State of Sweden through the National Swedish Board of Agriculture*; AD 1984 no. 120 *JämO v. The Swedish Federation of United Stevedores and Wallhamn Hamn Inc. in Skärhamn*; AD 1986 no. 67 *The Swedish Municipal Workers' Union v. Stockholm Transport Inc. in Stockholm*; AD 1986 no. 84 *The Swedish Medical Association v. Jönköping County Council*; AD 1986 no. 103 *JämO v. Uppsala Parish in Uppsala*; AD 1987 no. 1 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. Gävle Municipality*; AD 1987 no. 8 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association and ASEA Inc. in Västerås*; AD 1987 no. 35 *JämO v. The Swedish Newspaper Publishers' Association and Framtiden Press Inc. in Malmö*; AD 1987 no. 51 *The Swedish Association of Vocational Teachers v. Nacka Municipality*; AD 1987 no. 67 *Helsingborg's Local Federation of the Central Organization of Swedish Workers v. Bjuv Municipality*; AD 1987 no. 83 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish National Agency for Education*; AD 1987 no. 140 *The Swedish National Union of Local Government Officers v. City of Stockholm*; AD 1987 no. 152 *JämO v. The State of Sweden through Gothenburg University*; AD 1988 no. 50 *Helena Tepponen in Kvillsfors v. The Association of Ädelfors Folk High School in Holsbybrunn*; AD 1989 no. 40 *The Swedish State Employees' Union v. Gothenburg Municipality*; AD 1989 no. 122 *The Swedish Municipal Workers' Union v. Östergötland County Council*; AD 1993 no. 49 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Immigration Board*; AD 1997 no. 16 *JämO v. Umeå Parish*; AD 2004 no. 44 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*; and AD 2005 no. 69 *The Church's Association of University Graduates v. The Swedish Church's Association of Parishes and Häverö and Singö Parishes in Hallstavik*.

nature," the Court's analysis in the only two cases brought under that standard has followed the same line of analysis as in the 1980's, in essence negating any gains hoped for by the amendments to the act.

The cases in the 1980's were brought in accordance with §§ 2 and 3 of the 1979 Equal Treatment Act. Sections 2 and 3 of the original 1979 Equal Treatment Act stated that:

> § 2 An employer may not treat an employee or job applicant less favorably due to his or her sex.
>
> § 3 Less favorable treatment based on sex exists when an employer in employment or promotion or training for promotion appoints a person over another of the opposite sex, despite the person overlooked having *better objective qualifications* for the work or the training (italics added).
>
> This is not applicable, however, if the employer can demonstrate that the decision did not depend upon a person's sex or that the decision was a part of efforts to promote equality in working life or justified having regard to such a charitable or other special interest that ought not be subordinated to the interest of equality in working life.[369]

These provisions remained unchanged during the life of the 1979 Equal Treatment Act. The enactment of the 1991 Equal Treatment Act brought certain facial changes to these paragraphs, but the standard of better objective qualifications was retained:

> § 15 By sex discrimination in this law is meant where a person is treated less favorably under such circumstances that the less favorable treatment has a direct or indirect connection with the person's sex.
>
> § 16 Unlawful sex discrimination exists, when an employer in employment or promotion or training for promotion chooses a person before another of the opposite sex, despite the person overlooked having *better objective qualification* for the employment or training (italics added).[370]

Amendments were made in 2001 to these paragraphs, changing the standard from better objective qualifications to persons in a similar situation. Direct and indirect discrimination were also separately defined, with § 15 now addressing only direct discrimination:

[369] *Lag* (SFS 1979:1118) *om jämställdhet mellan kvinnor och män i arbetslivet*, Prop. 1979/80:56 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*, Bet. 1979/80:AU10, Rskr. 1979/80:117. The text in Swedish refers to "*ideell*" interests which has been translated here as charitable interests, but in other translations, "ideological" interests has been used, for example, in the translation by the Government Offices of Sweden of "The Equal Opportunities Act (SFS 1991:433)", available at their website at: http://www.sweden.gov.se/sb/d/5807/a/54396. However, the term *ideell* is both broader and narrower than ideological, referring more to non-profit endeavors that are charitable, educational or humanitarian. As charitable normally can be viewed as also encompassing the latter two, it has been used here.

[370] *Jämställdhetslag* (SFS 1991:433).

> An employer may not disfavor any job applicant or employee by treating her or him less favorably than the employer treats, has treated or would have treated a person of the opposite sex *in a similar situation,* unless the employer can show that the less favorable treatment did not have a connection to sex (italics added).[371]

The standard is now a person in "a similar situation" and it can be noted that there is still a requirement of a comparator of the opposite sex. The 2005 amendment removed the requirement of a comparator and changed the standard of "similar" to "comparable" situation:

> § 15 *Direct Discrimination*. An employer may not disfavor any job applicant or employee by treating her or him less favorably than the employer treats, has treated or would have treated a person in *a comparable situation,* if the less favorable treatment has a connection with sex (italics added).[372]

To date, no cases have been decided under this new 2005 standard of "*comparable situation"* but given the case law as presented below, it does not appear that this change in statutory text will result in any significant strengthening of the rights (or chances) of plaintiffs.

"Clearly Better Objective Qualifications" – The Cases in the 1980's

Plaintiffs were successful in the first three cases brought under §§ 2 and 3 of the new 1979 Equal Treatment Act. The very first case in 1981 concerned a claim of direct sex discrimination based on qualifications.[373] A trade union brought the case on behalf of their member, a 58-year old woman who had not received a position as a temporary secretary in a municipality, as a 22-year old man was appointed instead. The 1979 Equal Treatment Act required that the person alleging discrimination prove that she had better qualifications than the person receiving the job. Plaintiff at the time had the equivalent of over three years' post-secondary education, twenty years' work experience, of which fifteen were in office administrative positions and directly relevant to the position at issue. The male candidate hired had approximately two years of post-secondary education and three months' work experience.

The municipality contested the claim of discrimination, arguing that the person hired was the most qualified. In the alternative, the municipality argued that the position was in a female dominated field, thus the choice of a man was part of its efforts to promote equality. Finally, the municipality argued that even if

[371] *Lag* (SFS 2000:773) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.*, Bet. 2000/01:AU3, Rskr. 2000/01:4.
[372] *Lag* (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433)*, Prop. 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering*, Bet. 2005/05:AU7, Rskr. 2004/05:267.
[373] AD 1981 no. 171 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality.* The very first case decided concerning the 1979 Equal Treatment Act, AD 1981 no. 109 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality*, regarded summary judgment motions brought within this case.

discrimination was found, no damages should be awarded based on statements made in the legislative preparatory works to the 1979 Equal Treatment Act, and for the same reason, defendants should not be ordered to pay plaintiff's costs and fees. Plaintiff was not as qualified as she alleged, and several persons in the municipality felt that she was lacking in diplomacy and tactfulness and was seen as confrontational.

AD first addressed an issue that would present repeated problems even to the present day, the burden of proof in discrimination cases. The original Equality Committee had proposed that the burden of proof be expressly stated in the act as "probable reason" was sufficient to prove that the disfavoring was based on sex, much as the rule at that time was in labor law cases concerning the protections granted union membership, where the employee first shows that it is probable that the measure by the employer was for the purpose of violating the employee's union rights.[374] The employer would then have to show that this was not the case, but rather that the employer had other objectively acceptable reasons for the measure. The Minister, however, deemed that the rule as to discrimination ought to be formed as a presumption instead.[375]

AD found that a burden of proof as suggested by the Committee would perhaps reach that for which the law strived, but could also lead to misunderstandings of the meaning of the rule and of probable cause[376] as arguably shown in the different opinions submitted as to the proposal. Instead, a presumption rule had been adopted by the legislator, that an employee must first prove that she is clearly better qualified than the candidate chosen. Once plaintiff has met this burden of proof, the employer is presumed to have committed unlawful sex discrimination when the employer with employment, promotion or training appoints a person of the opposite sex despite the fact that plaintiff had better objective qualifications, unless the employer can show that the purpose was not to disfavor on the basis of sex.

In addition, the Court addressed the standard to be invoked for the assessment of *objective* qualifications.[377] AD found that the intent of the legislator was not to intercede and change the norms used in the selection and assessment of merits existing on the labor market, but rather that the assessment should be based on whether the employer would have the right to continue to use those same norms common to the sector, assuming that they in themselves were not discriminatory. The norms are to be explicable and rational to third parties, and

[374] AD 1981 no. 171 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality* at 1057 *citing* Prop. 1978/79:175 at 45.
[375] *See id*. at 1057 *citing* Prop. 1978/79:175 at 59. The 1991 Act was amended in 2000 in a manner very similar to the committee's original proposal in 1979.
[376] *Sannolika skäl.*
[377] *Id.* at 1058.

cannot be random or subjective. When several candidates are equally qualified, the employer is free to choose whom it will.

AD found that the municipality had violated §§ 2 and 3 of the 1979 Equal Treatment Act. Against the background of the case and to give the act its intended effect, the Court decided to award what it considered rather high exemplary damages in the amount of SEK 15 000, as well as plaintiff's attorney's costs and fees in the amount of SEK 18 873, both with interest.[378] Two justices dissented as to the award of damages; they found that as the law had never been applied, and in addition, must be seen as difficult to interpret, and that no evidence had been produced demonstrating an intentional violation of the law, they would set the damages at zero.[379]

Plaintiff also prevailed in the second case decided by AD on that same day, this time brought by *JämO* against a municipality.[380] AD found that the female plaintiff was better qualified, and again awarded SEK 15 000 in exemplary damages and *JämO's* costs and fees; again two justices dissented, arguing that the damages should be zero and that the attorney's fees reduced.[381] The 45-year old female plaintiff was an external applicant to the position of municipal secretary while the 36-year old male candidate was an internal candidate. The municipality argued that internal recruiting should be used in cases in which the internal candidate is less qualified than the external, as the rule in general typically benefited underpaid female employees. In addition, the municipality argued that the choice here was between two generally equally qualified persons. AD found that though the educational and personal qualifications of the candidates were comparable, plaintiff's twenty years of professional experience outweighed the male candidate's approximately two years of experience.

JämO brought the third case under the 1979 Equal Treatment Act in 1982 against the State, arguing that the plaintiffs, two women, both of whom had been working in the military sector since 1944, were discriminated against in promotions awarded to men in 1980, resulting in their own constructive demotions from administrative assistants to simply secretaries.[382] Defendants argued

[378] A listing of all damage awards as ordered by AD under the 1979 and 1991 Equal Treatment Acts can be found in Appendix One, broken down by decade. A listing of the award of attorney's fees by AD in discrimination cases can be found in Appendix Two, which is also broken down by decade. Comparable listings are given in the respective appendices for the damages and attorney's fees awarded in other types of discrimination cases.

[379] In actuality, the municipality withdrew the decision as to employing the male candidate for the temporary vacancy and decided to not fill the temporary position at all as so little time remained. The permanent position was opened, the male candidate was the only person to apply and he received it. Plaintiff had won the battle but lost the war.

[380] AD 1981 no. 169 *JämO v. Upplands Väsby Municipality.*

[381] *Id.* at 1036.

[382] AD 1982 no. 17 *JämO v. The State of Sweden through the Swedish Agency for Government Employers.*

that the actions were part of a military reorganization and did not amount to constructive demotions nor had anything to do with the sex of the plaintiffs. AD found that redefining plaintiffs' employment duties fell within the scope of the 1979 Equal Treatment Act and that the defendants' actions had negative consequences to the plaintiffs. Defendants' treatment of the plaintiffs, in comparison, for example, to the treatment of predominantly male platoon officers such as the ones that assumed their duties, was probably based on their sex. AD awarded SEK 10000 to each of the two plaintiffs, as well as *JämO's* costs and fees.[383] The Court refused, however, as pleaded by *JämO,* to declare the promotion invalid as "this is a question that must finally be decided by the head of the regiment."[384]

The fourth case under the 1979 Equal Treatment Act brought the first loss to a plaintiff.[385] The issue raised was how to assess employment qualifications, here for a position as a personnel training leader. Plaintiff's labor union brought the case against a county council, arguing that they had underestimated plaintiff's direct experience as a personnel training leader, and that the person who received the job had no direct experience in the position and only marginally related other experience. AD agreed with plaintiff that the assessment of experience by the county council was incorrect, but found that plaintiff did not prove this "incorrectness"[386] to be on the basis of sex. Plaintiff's complaint was dismissed and given the difficulty of the issue, each party was ordered to bear its own attorney's fees and costs.

The assessment of professional requirements was brought up again in the hiring of an agricultural high school principal in 1981.[387] The female plaintiff had a bachelor's degree in agronomy received in 1965, a master's in 1971 and a doctor's degree in the same in 1974, as well as 40 credits in pedagogy and eleven years' teaching experience. The 32-year old male candidate had received a bachelor's degree in agronomy in 1975 as well as taken various pedagogical courses for 20 credits with two years' teaching experience. Plaintiff was better qualified with respect to two of the three qualification assessments, educational qualifications and professional experience. The county council argued that plaintiff was less qualified in personal qualifications, as she had difficulty working with others, and that she was a theoretician and not equipped to take care of the practical needs of the operations. Cited as evidence for this was hearsay by a teacher who

[383] The awards of exemplary damages as well as trial costs and attorney's fees for the cases in continuation can be found in Appendices One and Two respectively.
[384] AD 1982 no. 17 *JämO v. The State of Sweden through the Swedish Agency for Government Employers* at 166.
[385] AD 1982 no. 102 *Swedish Association of Graduates in Law, Business Administration and Economics, Computer and Systems Science, Personnel Management and Social Science (JUSEK) v. Kalmar County Council.*
[386] *Id.* at 839.
[387] AD 1982 no. 139 *JämO v. Örebro County Council.*

said he did not have problems working with plaintiff, but that there had been a conflict seven or eight years ago between her and another teacher who had since left. This was not sufficient evidence of suitability, and the Court found that the County Council had not proven its case.

In the next case concerning the hiring of a supervisor for a state unemployment office, the Court found the two candidates comparably qualified and thus no discrimination was proven.[388] This was the sixth in this series of cases in the 1980's in which the analysis of qualifications dominated, leading to a rather wooden application of the law focusing solely on whether plaintiff was equally or less qualified[389] or clearly better qualified.[390] In cases in which plaintiff was better qualified, the defendant at times was successful in demonstrating that the

[388] AD 1983 no. 50 *JämO v. The State of Sweden through the Swedish National Labour Market Board.*

[389] *See, e.g.,* AD 1983 no. 102 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers* (male and female candidates equally qualified, two justices dissenting, finding that plaintiff was better qualified); AD 1984 no. 1 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers* (plaintiff not better qualified); AD 1984 no. 12 *Gertrud Anljung, B.A., in Lund v. The State of Sweden* (plaintiff not clearly more qualified); AD 1984 no. 100 *JämO v. The State of Sweden through the National Swedish Board of Agriculture* (plaintiff not more skilled than male candidate chosen); AD 1986 no. 84 *The Swedish Medical Association v. Jönköping County Council* (plaintiff not more skilled according to defendant's lawful assessment of qualifications); AD 1987 no. 1 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. Gävle Municipality* (plaintiff can scarcely be seen as having better qualifications, in any event decision made based on efficiency in the workplace, not sex); AD 1987 no. 8 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association and ASEA Inc. in Västerås* (plaintiff not better qualified, two justices dissenting arguing that certain of the male candidates' qualifications as assessed not central to position); AD 1987 no. 35 *JämO v. The Swedish Newspaper Publishers' Association and Framtiden Press Inc. in Malmö* (that female plaintiff had longer employment experience did not entail she had better objective qualifications according to the norms applied in the workplace); AD 1987 no. 140 *The Swedish National Union of Local Government Officers v. City of Stockholm* (plaintiff not clearly more qualified); AD 1987 no. 152 *JämO v. The State of Sweden through Gothenburg University* (plaintiff not clearly more qualified); AD 1988 no. 50 *Helena Tepponen in Kvillsfors v. The Association of Ädelfors Folk High School in Holsbybrunn* (plaintiff not clearly more qualified); and AD 1989 no. 40 *The Swedish State Employees' Union v. Gothenburg Municipality* (female plaintiff not personally suitable for re-hiring as she had difficulties working with others and extensive sick leaves which could entail disturbances in the workplace).

[390] *See* AD 1984 no. 22 *JämO v. Lessebo Municipality* (university educated 53-year old female plaintiff had longer and more relevant work experience as opposed to 46-year old male candidate); AD 1986 no. 67 *The Swedish Municipal Workers' Union v. Stockholm Transport Inc. in Stockholm* (female plaintiff had eight years direct experience compared to hired male candidates' one); AD 1989 no. 122 *The Swedish Municipal Workers' Union v. Östergötland County Council* (42-year old female plaintiff with 17 years' work experience, 34-year old hired male candidate had four years' work experience, two dissenting justices found the level of experience to be equal); AD 1993 no. 49 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Immigration Board* (plaintiffs better qualified than male candidate receiving the position); and AD 1989 no. 122 *The*

decision was not related to the sex of the plaintiff.[391] AD itself even commented that at times, it seemed that the Court was serving more as an appeal board with respect to appointments in the public sector.[392]

The first male plaintiff brought suit in 1983 represented by his labor union against a municipality, arguing that he had better qualifications than the female candidate chosen as a work leader in the female dominated sector of industrial cleaning.[393] AD found that plaintiff was not better qualified than the female candidate chosen, thus no disadvantage on the basis of sex could be proven. This case was the first of several in which male plaintiffs unsuccessfully argued discrimination.[394]

The actual procedure for the assessment of qualifications has been brought up in several cases. In AD 1984 no. 6, AD found that plaintiff had not been given an objective assessment of her qualifications for a position as police officer, and that the state was unable to prove that the different treatment was not based on plaintiff's sex.[395] The issue of the depth of the assessment process was raised in AD 1986 no. 84, in which plaintiff argued that the county council did not take into consideration certain information.[396] The Court found that plaintiff was not better qualified than the candidate hired, and that the employer could not be expected to conduct more than a reasonable investigation of qualifications. A related issue, the quality of the information relied upon as to a candidate's

Swedish Municipal Workers' Union v. Östergötland County Council (municipality's decision to hire the male candidate could not be justified based on the social/political objectives argued as to creating continuity in the patient group. AD found that the county council offered no proof or need for this).

[391] *See, e.g.,* AD 1986 no. 103 *JämO v. Uppsala Parish in Uppsala* (plaintiff was more qualified, but defendant congregation could hire a male family counselor in order to achieve a better balance with respect to the work unit); AD 1987 no. 83 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish National Agency for Education* (defendant proved that action was not based on sex); and AD 1987 no. 98 *JämO v. City of Stockholm* (transfer not based on sex).

[392] SOU 1990:41 *Tio år med jämställdhetslagen – utvärdering och förslag* at 144.

[393] AD 1983 no. 78 *The Swedish Musician's Union Entertainment Business Employees' Association v. Hörby Municipality.*

[394] *See, e.g.,* AD 1983 no. 83 *The Swedish Food Workers' Union v. Kalmar Municipality* (male plaintiff not better qualified); AD 1983 no. 104 *JämO v. The State of Sweden through the Swedish National Labour Market Board* (male plaintiff argued that the lesser qualified female was hired simply on the basis of her sex. AD found that two labor market policy reasons came into conflict here, one of assisting those who were less employable, and the other of equality between the sexes in the labor market. As the Equal Treatment Act did not displace the former, the council's decision could be seen as based on objective grounds); AD 1987 no. 3 *The Swedish Teachers' Union v. Uddevalla Municipality* (man denied request for leave of absence for personal reasons, while woman granted request for same reasons, not in violation of Equal Treatment Act); and AD 1987 no. 51 *The Swedish Association of Vocational Teachers v. Nacka Municipality* (decision not dependent upon sex).

[395] AD 1984 no. 6 *JämO v. The State of Sweden through the National Swedish Police Board.*

[396] AD 1986 no. 84 *The Swedish Medical Association v. Jönköping County Council.*

personal qualifications, was raised by a male plaintiff in AD 1987 no. 67.[397] In the case, the municipality hired the female candidate based in part on interviews with co-workers in which they stated that they opposed the male candidate's promotion. AD found this reliance simply on the interviews to be unlawful discrimination.

"Clearly Better Objective Qualifications" – The Cases in the 1990's

Two cases were brought to AD claiming direct discrimination on the basis of qualifications between female and male candidates in the 1990's under the standard of clearly better objective qualifications. Plaintiffs were successful in the first of these in 1993, the last such case in which plaintiffs have been successful with respect to this type of direct discrimination claim under Swedish law to date. In the case, two 53-year old female candidates were passed over for employment when defendant hired a 39-year old male candidate.[398] The position required a university degree in political/social sciences or comparable knowledge acquired in another manner. Both plaintiffs had university degrees that fit this requirement. The male candidate hired, however, had acquired his knowledge through the comparable, defendant arguing that he fulfilled the requirement through independent courses that he had taken and his international travels. Defendant, after proclaiming that it was committed to welcoming women to management positions, stated that the candidates were somewhat equal with respect to both education and experience, but that it was the personal qualifications upon which defendant finally based its decision, finding the male candidate after the interview to be a very competent person with great work capacity. The one female plaintiff was found to be tentative, needing strong guidance and clear directives, and the other was nonchalant, therefore defendant was unconvinced as to her ability to work with others. AD held that against the background of plaintiffs' work experience, this assessment was not objectively founded. As plaintiffs were more qualified in education and relevant work experience, and it was not proven they were less personally suitable, and defendant had not presented any counter evidence as to that the decision was based on their sex, defendant had committed unlawful discrimination.

Plaintiff lost in the last case brought under the "clearly better" standard. Plaintiff and a male candidate applied for the position of parish priest in Ålidhem's congregation in 1994.[399] As to educational qualifications, plaintiff had 5 years 6 months, the male candidate 6 years 9 months. Defendant argued that the Catholic

[397] AD 1987 no. 67 *Helsingborg's Local Federation of the Central Organization of Swedish Workers v. Bjuv Municipality.*
[398] AD 1993 no. 49 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Immigration Board.*
[399] AD 1997 no. 16 *JämO v. Umeå Parish.*

education the male candidate had received was more rigorous than the Swedish Lutheran education plaintiff had received, thus giving the male candidate a considerably "heavier" academic background.[400] Plaintiff had served as a priest for 23 years. The male candidate had served as a Catholic priest for 12 years, converted and served as a Lutheran priest at a hospital for two years and four years with seminary students. Defendant argued that as to personal qualifications, plaintiff "was not the type of leader one desired… [she] was not a person focused on cooperating with others as needed for the internal work in the congregation."[401]

After reviewing the record, AD found that the male candidate was more qualified as to education. With respect to length of employment, the Court stated, relying on its judgment in AD 1981 no. 169, that a long length of employment service in certain positions can be seen so that each additional year contributes less and less to the experience as a whole from a qualification perspective. Citing AD 1983 no. 102, the Court further stated that in this context, the higher the position, the less significant each additional year becomes.[402] The Court found that plaintiff had a certain advantage with respect to experience, and that they were equally qualified regarding personal qualifications.

AD found overall that plaintiff was not clearly better qualified than the male candidate:

> Against this background and taking into consideration that [plaintiff] was a generally witnessed competent priest with a considerably longer experience than [the male candidate's] within Ålidhem congregation's operations, it can from a general view appear that she ought to have received the position as parish priest in the congregation. The Labour Court's task, however, is not to assess the hiring from such a general view. The Labour Court's task with the application of the regulations in the Equal Treatment Act, is to determine whether [plaintiff] was not hired as parish priest due to her sex. As already stated above in the Court's reasoning, the Court must first determine whether [plaintiff] is clearly superior to [the male candidate] as to qualifications.[403]

The Court found that the male candidate's longer education of seventeen months outweighed plaintiff's longer work experience of twenty-three years compared to the male candidate's six within the Lutheran church, or combined eighteen if his experience in the Catholic Church were included. Defendant thus

[400] *Id.* at 142.
[401] *Id.*
[402] *Id.* at 150. The viability of this principle as expressed by the Court, however, is tenuous at best when assessed against the market conception of the value of higher positions and greater experience. If the Court's reasoning here actually were applied within the labor market, wages for higher positions over time would eventually stagnate, not increase as is the case at times exponentially, for example, with respect to corporate officers.
[403] *Id.* at 153.

did not have to demonstrate that the decision was not based on plaintiff's sex. Two justices dissented as to this assessment of the male candidate's qualifications.

AD had relied on its own dictum in the first of the two cases cited as support for negating plaintiff's longer work experience. In AD 1981 no. 169, the successful 54-year old plaintiff had over twenty years' work experience, whereas the 25-year male candidate hired had one year's work experience, a situation far from the one in the case at hand. In the other case cited, AD 1983 no. 102, AD found that plaintiff had twelve years' experience, as opposed to the male candidate's ten, stating that:

> In this last aspect, the difference is less tangible [two years]…The Swedish National Archives has in its assessment made the judgment that ten years service with the archives fulfills the requirements it has with respect to routine and experience, *and after so long a time in service, other criteria must be decisive. It is also clear that the requirement of experience becomes more diluted the higher the position in question* (italics added).[404]

The difference in this case, as found by the Court under the 1979 Act's standard of "better qualified," was still only two years, as opposed to at least a five years' difference in the case at hand if the male candidate's service as a Catholic priest were included, and if not, a difference of seventeen years. Another point that can be raised here is that the Court has never negated a successful male candidate's longer experience. In fact, the Court has found that requiring a certain length of service in a male dominated sector in which women were just beginning to make inroads was not discrimination.[405]

"Position of a Similar Nature" – The Cases in the 2000's

Two cases have been brought unsuccessfully under the standard of a "position of a similar nature" as amended in 2001. In AD 2004 no. 44, *JämO* brought a claim of direct discrimination on behalf of a plaintiff who had unsuccessfully applied for a job as police commissioner. The Court once again addressed the three criteria of education, professional experience and personal qualifications, conducting its analysis in the same manner as under the previous standard.[406] The female plaintiff had applied for a permanent job as police commissioner in Haparanda, a city in northern Sweden on the Finnish border. She had held the temporary position, but now the permanent position was open. No women held any positions at this level at this time in the police force in Haparanda on a permanent basis. *JämO* raised the issue of direct sex discrimination as well as proce-

[404] AD 1983 no. 102 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers* at 644.
[405] AD 1984 no. 100 *JämO v. The State of Sweden through the National Swedish Board of Agriculture.*
[406] AD 2004 no. 44 *JämO v. The State of Sweden through the Swedish Agency for Government Employers.*

dural irregularities indicating that the entire hiring process reflected an almost discriminatory intent. The male candidate's application was considered though submitted after the application deadline, plaintiff was not called to an interview, the labor union had not been consulted as required by MBL until after the position was filled, and the male candidate was hired after the time for any appeal had expired.

The first issue addressed by AD was the education/training of the candidates. Plaintiff had completed the police education, as had the male candidate. In addition, she had taken classes concerning sexual crimes against children as well as several on sexual crimes in general, and had trained to become a certified instructor in the computer program used by the police. She had received police training in criminal police operations, advanced witness examination and family violence. In addition, plaintiff spoke Finnish, and Haparanda has a significant Finnish-speaking segment in the population, some of whom do not even speak Swedish. The male candidate chosen had completed police training and computer training. AD found that plaintiff was better qualified with respect to training and education.

The professional experiences of the candidates were examined next by the Court. Plaintiff had worked as a police officer since 1973 and as a criminal investigator since 1988, and had filled the position in question on a temporary basis for several months. She thus had 29 years' experience as a police officer, and fourteen as a criminal investigator, and had actually worked several months in the position at issue. The male candidate hired in 2002 had become a police officer in 1995 and had worked with investigations since 1998. During these years, he had also acted as a technical supervisor for the United States' Ski Team between 1999–2002. The male candidate thus had seven years' experience, of which arguably at least two or three were spent with the American ski team. The Court found that in number of years, plaintiff was better qualified, but then began to assess the qualitative aspects of her experience as measured against the references given, finding that though the male candidate's length of experience was shorter, it was of a better quality. The Court even acknowledges that this went more to the issue of personal qualifications than professional experience, but proceeded anyway to negate the plaintiff's professional experience, finding that the male candidate hired had reached the same level of experience as the plaintiff when these qualitative aspects were taken into consideration.

These same references were then used again as the basis for the assessment of the third prong, personal qualifications. One reference had been obtained from the district police chief with whom plaintiff had worked, given in accordance with police guidelines, stating that she worked with good results and that she would be good for the job. Two prosecutors also gave references as to the plaintiff. One stated that plaintiff was not successful in completing investigations and that they were often lacking in quality. He had not worked with either of the

candidates in the most recent eighteen months. The second prosecutor stated that there previously had been a certain tentative quality to plaintiff's knowledge, interest and compatibility with investigative work, but that her work had recently gone through a positive development and was better/good.

These same two prosecutors gave the male candidate positive marks and found him the best suited of the candidates. Two additional references, equally as positive, were received from the male candidate's district police chief and a police commissioner who had not been the male candidate's supervisor. *JämO* argued that these references were an overvaluation of the candidate's abilities. However, AD stated that they had also heard the witnesses and that these assessments were neither exaggerated nor subjective. Finding that these personal qualifications were the most important aspect, AD found that the male candidate was clearly better qualified, and that no discrimination had occurred.

Two justices dissented, finding first that the candidates did not have equal professional experience and that AD had overvalued the male candidate's experience, finding it difficult to concur that experience from the American ski team was relevant for the position of police commissioner. The justices also dissented regarding the assessment of personal qualifications, finding again that the male candidate's merits were overvalued and that the police agency had not taken into consideration aspects of equality in the hiring process. They also agreed with *JämO* that the actual hiring process was suspect in the procedural deviations that had occurred.

The plaintiff was also unsuccessful in the most recent case addressing direct discrimination on the basis of sex and qualifications.[407] A labor union brought the action on behalf of a plaintiff against the central organization representing parishes in the Church of Sweden, as well as against the parishes of Häverö and Singö. The parishes had placed a job advertisement for a priest. Eight persons applied for the job with three applicants remaining after the final round of interviews, two women and a man. The male candidate received the job in 2003. Plaintiff argued that she was best merited for the job, having grown up in Singö municipality, working and having an established local network in the area. She had five years of experience in direct pastoral work, three years less than the person hired, but in addition, she had 35 years of experience in congregational work as a youth leader, cantor and organist. Plaintiff also argued that defendants' conclusions during the interview process, that plaintiff behaved tentatively at the same time as she was "cocky" and "nit-picky", demonstrated how subjective the hiring process was. Defendants contested any unlawful sex discrimination, arguing that the candidate chosen had the best objective qualifications, and in the alternative, that the candidate hired had the best views as to leadership, instruc-

[407] AD 2005 no. 69 *The Church's Association of University Graduates v. The Swedish Church's Association of Parishes and Häverö and Singö Parishes in Hallstavik.*

tions from the parish, operations, place in the community and work environment, as well as in the general assessment of his person, none of which related to the sex of the candidates.

AD began its assessment with the requirements as stated in the 1991 Equal Treatment Act: unequal treatment, similar situations and causality. AD stated that in line with the EC directive on the burden of proof, the party claiming discrimination must first prove that they have been treated less advantageously than a person of the other sex in a similar situation. AD found that the candidates were equally merited for the position. Plaintiff had produced evidence relating to sex in the form of notes taken during a personnel meeting by one attendee not a witness in the case, stating that the majority of those present preferred a male priest, and that the candidate who filled this criteria did not completely fill the other requirements. The Court noted, however, that these minutes were neither attested nor signed. The burden of proof shifted to defendant to show that no unlawful discrimination on the basis of sex occurred. The crux of the issue was narrowed to the results of the interviews, interviews that plaintiff argued initially placed her in a bad light as, for example, she was never even asked questions about leadership. The Court found that the result of the interviews was that the candidate chosen was found more suitable in the interviews, and that plaintiff was found less suitable. That the candidate chosen was found to have the best views on leadership, instructions from the parish, operations, place in the community and work environment, as well as in general, the assessment of his person that he seemed to have initiative and commitment and appeared to be able to work well with others, did not appear to the Court to be an after hand construction created to hide discriminatory motives. Just the opposite, the Court found this to be an objective and motivated basis for the hiring decision. Plaintiff's complaint was dismissed.

The court, despite the new wording of the statute with respect to similarly situated, did not change the approach it took in its analysis compared to the case law decided under the requirement of "clearly better." No cases have been brought yet under the latest standard as amended in 2005 of a comparable situation.

3.3.2.1.2 Direct Discrimination on the Basis of Pregnancy

Three cases have been heard by AD concerning discrimination on the basis of pregnancy under the 1991 Equal Treatment Act. Neither the 1979 Equal Treatment Act nor the 1991 Equal Treatment Act has had any specific prohibition of discrimination on the basis of pregnancy. The requirement of a male comparator was specifically included in § 15 of the 1991 Equal Treatment Act until it was amended in 2002.

THE NOBEL BIOCARE CASE

In *Nobel Biocare*,[408] defendant, a private sector employer of approximately one thousand employees, sought to hire a programmer in the spring of 1999. Plaintiff applied for the position and was called to an interview. After the second interview, plaintiff discovered she was pregnant. She was then called to a third interview. The factual circumstances as to the events after this were disputed. Plaintiff alleged that she was given an offer of employment at the third interview, informed defendant Nobel Biocare that she was pregnant, and the offer was then rescinded. Defendants argued that no offer of employment was made, but that after plaintiff informed them of her pregnancy, they made the decision that she no longer was suitable for the position, in part because she could not work according to the needs of the company, and in part because she lacked sufficient qualifications.

The Court first addressed the issue of whether an employment contract had been created, answering the question in the negative, finding no mutual declaration of intent. The Court relied on § 20 of the 1991 Equal Treatment Act, which stated that unlawful discrimination existed when an employer terminated an employment agreement, transferred, placed on leave or fired any person or undertook other similar measures harmful to an employee, if the measure directly or indirectly had a connection with the employee's sex. The Court noted that the paragraph had been amended to be in conformance with the EC Burden of Proof Directive but that the Swedish statutory amendments were not effective until 1 January 2001. Emphasizing that the wording of the former Act spoke of discrimination within the framework of employment, the Court found that plaintiff had not proven that any employment existed. *JämO* argued that Community law should be given direct effect. The Court found that as the EC Burden of Proof Directive was not to be implemented within the Member States until 1 January 2001, it did not yet have direct effect. As such, though the testimony of both parties was credible, and plaintiff most likely believed she had been offered employment, the employment routines and notes of Defendant Nobel Biocare supported Defendant's stance that no offer had been made. The Complaint was dismissed unanimously by AD.[409]

[408] AD 2001 no. 61 *JämO v. The Swedish Metalworking Industries' Association and Nobel Biocare.*

[409] The decision as reached by AD in this case can be assessed in light of its own prior case law imposing on employers the duty to clarify certain unclear employment issues, such as whether an offer of employment has been made. *See* Ronnie Eklund, *Att ingå avtal om anställning – Ett blad ur arbetsdomstolens praxis* in FESTSKRIFT TILL JAN RAMBERG (Juristförlaget Stockholm 1996). In accordance with Eklund's discussion of AD's case law to that point of time, Nobel Biocare arguably had the duty to clarify that an offer of employment had not been made, and in the failure to do so, would be bound by the offer plaintiff believed she had been given.

The Västmanland Case

The *Västmanland* case[410] was decided ten months after *Nobel Biocare.* In contrast to the decision in *Nobel Biocare,* AD in *Västmanland* held that Community law had direct effect, finding for the plaintiff despite the fact that relief was not available under the then current Swedish legislation, a precedent the first of its kind by AD in the area of discrimination.

In *Västmanland*, the defendant County Council, a public sector organization, had advertised the vacancy of a position as mid-wife at a public health care service provider in Arboga in June 1999. Plaintiff was one of the five applicants for the position and was pregnant. On 10 September 1999, another candidate was given the position; thus the event triggering plaintiff's claim occurred one month prior to the event in *Nobel Biocare. JämO* filed a complaint for unlawful discrimination on behalf of plaintiff, arguing that the EC Equal Treatment Directive and the European Court of Justice's case law, particularly *Dekker,* have direct effect, and in the alternative, that the 1991 Equal Treatment Act must be interpreted to be in conformance with Community law.

Defendant responded, arguing first that the best qualified person was chosen for the job. In the alternative, defendant argued that the then current Swedish law should be applicable instead of Community law, as this was an area of competence for the Member States. As the 1991 Equal Treatment Act required a comparator of the opposite sex, unlawful discrimination could not have occurred, as both candidates were women. Finally, defendant argued that if Community law were seen as controlling and having direct effect, it would not apply to the extended parental leave as granted in Swedish legislation, only to the shorter mandatory period required under Community law directly connected to the birth of child. According to the defendants, the Equal Treatment Directive could not be given the content of protection during a longer period of parental leave.

The first legal issue addressed by AD was whether sex discrimination could be found to exist at all if no person of the opposite sex was favored in the situation.[411]

[410] AD 2002 no. 45 *JämO v. Västmanland County Council.*

[411] Another interesting Swedish case with respect to the issue of the requirement of a comparator within the legislation is *Stora skattefjällsmålet*, NJA 1981 at 1, in which the court stated as to a claim of discrimination in accordance to the Swedish Constitution, Chapter 2 § 15:

> This does not in itself rule out that the statutory regulation of the right of use could be seen to entail such a disfavoring of the Saami people as intended by the prohibition against discrimination in Chapter 2 § 15 in the Swedish constitution, if they can be said to have worse conditions as to this matter than others in a comparable situation. However, there is no other legislation giving other groups of citizens rights comparable to those the Saamis have with respect to reindeer herding. Therefore, there is no basis for a direct comparison between that which the Saamis have with respect to this question and other groups of citizens.

Id. at 234. As there was no group to which a comparison could be made, the claim of discrimination was denied.

The person chosen instead of the plaintiff was of the same sex, and the requirements for unlawful discrimination within the Swedish law technically were not fulfilled. *JämO* argued that plaintiff was discriminated against based on her pregnancy, a direct result of her sex, thus it was sex discrimination. Swedish law cannot be seen as controlling, and AD must instead turn to Community law, Articles 2.1 and 3.1 of the Equal Treatment Directive[412] and the European Court of Justice's interpretations of the directive as given particularly in *Dekker*.[413] According to *Dekker*, the fact that no person of the opposite sex was present is not significant to a claim of discrimination under the Equal Treatment Directive. As such, the Swedish law enacting the directive was flawed in its construction as it requires such a person and the regulations of the directive should be given direct effect within Swedish law. In rebuttal, the County Council maintained that Sweden has the greater jurisdiction in the area of social politics within the European Union and that Swedish law should prevail, and in the alternative, the directive did not protect extended periods of parental leave as granted under the Swedish legislation.

In addressing this legal issue, AD found that in accordance with the then applicable Swedish Equal Treatment Act, a person of the opposite sex was

[412] Equal Treatment Directive 76/207/EEC. Article 2.1 stated:

> For purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Article 3.1 stated:

> Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

[413] Case C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, Celex No. 61988J0177 (refusal to appoint a pregnant woman where no male candidates discrimination in violation of Equal Treatment Directive). *JämO* also cited Case C-188/89, *A. Foster and others v. British Gas plc.* [1990] ECR I-3313, Celex No. 61989J0188 (state agency policy concerning retirement ages of 65 for men and 60 for women falls within the Court's jurisdiction under the Equal Treatment Directive); Case C-271/91, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, Celex No. 61991J0271 (person injured as a result of discriminatory dismissal may rely on the Equal Treatment Directive as against any authority of the State in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation); Case C-438/99, *Maria Luisa Jimenez Melgar v. Ayuntamiento de Los Barrios(I)* [2001] ECR I-6915, Celex No. 61999J0438 (the non-renewal of a fixed term contract that is motivated by the worker's pregnancy constitutes direct discrimination on grounds of sex in violation of the Equal Treatment Directive); and Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, Celex No. 61984J0222 (prohibition against women police officers carrying guns in violation of directive).

unequivocally required in order for unlawful sex discrimination to be found.[414] The Court noted that the Act had since been amended as of 1 January 2001, removing the requirement of a comparator of the opposite sex as that requirement was viewed as not being in conformance with Community law.[415] The Court was faced with the choice of applying the Swedish law that the Swedish Parliament had already found to be incompatible with Community law or applying Community law. The Court found that the Swedish law was not applicable to the case at hand. Relying on *Dekker* and several other cases, AD found that an employer refusing to employ a woman suitable for a position based on her pregnancy violates the Equal Treatment Directive. As the County Council is the type of organization that according to EC case law has the status of a state actor, the directive has direct effect. Plaintiff was the better qualified of the two parties. As plaintiff was best qualified, the County Council had unlawfully discriminated against her by not employing her based on her pregnancy.

JämO sought exemplary damages in the amount of SEK 150000. The Court referred to the legislative preparatory works, stating that the level of damages under the Act ought to be viewed against the background of that more generally awarded as to damage awards in the area of labor law.[416] According to the Court, there was reason not only to take into account the degree of discrimination to which the plaintiff was exposed, but also the interest of clearly demarcating that such actions are not permitted. The Court found there was no reason for "adjusting" the damages in favor of the defendant, applied the damages rule in the 1991 Equal Treatment Act analogously and awarded plaintiff SEK 50000 plus interest.

ERLANDSONS BRYGGA INC.

In the most recent case brought alleging sex discrimination on the basis of a pregnancy, plaintiff had worked for the defendant in a temporary position from 30 August 2004 to 28 February 2005, which led to a permanent position beginning on 1 March 2005.[417] Three weeks after being permanently employed, plaintiff stated that she informed her boss, one of the two brothers who were partners and owners of the business, that she was to go on sick leave 25 % due to her pregnancy and had the physician's certification in her hand. That same day, 22 March 2005, plaintiff was called to an employment review. Plaintiff alleged that she was fired at the meeting. Defendants alleged that plaintiff became upset due to the comments she received as to her work performance and quit, directly

[414] The Court referred to the legislative preparatory works, Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 40.
[415] The Court here referred to the legislative preparatory works for the amendment, SOU 1999:91 at 53 and Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 33.
[416] Prop. 1990/91:113 *Om en ny jämställdhetslag, m.m.* at 91.
[417] AD 2006 no. 79 *JämO v. Erlandsons Brygga Inc.*

leaving the meeting. AD began its analysis by noting that it was to apply the new burden of proof which was to make it easier for the plaintiff, namely that she need only present facts showing discrimination, and defendant must demonstrate that the disfavoring did not have any connection with plaintiff's sex. However, AD went on and stated that *JämO* must first show that the employer had taken an employment action, namely that the employer had fired the employee. Finding the testimony of the defendant and plaintiff to be of equal weight, AD found that *JämO* had not met the burden of proof with respect to that the company had terminated or provoked plaintiff's employment termination.[418] As such, there was no need to address the issue of discrimination.

3.3.2.1.3 EQUAL PAY CLAIMS

The cases with respect to equal pay[419] brought under §§ 2 and 4 of the 1979 and § 18 then §17 of the 1991 Equal Treatment Act number eleven to date.[420] Claims can be brought for equal pay for equal work, or equal pay for work of equal value, reflecting the delineation in the language of the statute. Plaintiffs have prevailed in only three of these cases.[421]

Under the 1979 Equal Treatment Act, equal pay claims had to fall under the general wording of less favorable treatment due to sex in §§ 2 and 4 as stated above, with § 4(1) defining less favorable treatment when an employer:

[418] Another interesting aspect of this case is that plaintiff had first contacted her labor union. However, the labor union had a three-month qualification period with respect to providing legal assistance, and plaintiff had only been a member of the union for two months. Exceptions can be made to this rule, however, the union office decided that it already had too many matters to handle and referred plaintiff to *JämO*.

[419] For an in-depth analysis of the law concerning equal pay in Sweden, *see* Eva Schömer, KONSTRUKTION AV GENUS I RÄTTTEN OCH SAMHÄLLET (Iustus 1999) particularly at 213 and Fransson at 306.

[420] *See* AD 1984 no. 140 *The Swedish National Union of Local Government Officers v. Stockholm County Council*; AD 1985 no. 134 *The Salaried Employees Union v. The Swedish Newspaper Publishers' Association and Dagens Nyheter Inc. in Stockholm*; AD 1987 no. 132 *The Swedish Metal Trades Employers' Association v. The Swedish Union of Clerical and Technical Employees in Industry*; AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm*; AD 1995 no. 158 *JämO v. Kumla Municipality*; AD 1996 no. 41 *JämO v. Örebro County Council (I)*; AD 1996 no. 79 *The Swedish Union of Local Government Officers v. Karlskoga Municipality*; AD 1997 no. 68 *The Swedish Association of Graduate Engineers v. Mjölby Municipality*; AD 2001 no. 13 *JämO v. Örebro County Council (II)*; AD 2001 no. 51 *SACO-S genom the Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Agency for Government Employers*; and AD 2001 no. 76 *JämO v. Stockholm County Council.*

[421] *See* AD 1985 no. 134 *The Salaried Employees Union v. The Swedish Newspaper Publishers' Association and Dagens Nyheter Inc. in Stockholm*; AD 1995 no. 158 *JämO v. Kumla Municipality*; and AD 1996 no. 79 *The Swedish National Union of Local Government Officers v. Karlskoga Municipality.*

> [A]pplies a worse employment condition for an employee than the one applied by the employer to an employee of the opposite sex when they perform work, which according to a collective agreement or practice within the area of operations is to be viewed as the same or which is found to be of equal value in accordance to an agreed upon work valuation, if the employer cannot demonstrate that the different employment condition depends upon differences in the employees' objective qualifications, or that it in any event does not depend upon the employees' sex.

Thus the work had to be defined by the collective agreement or a practice as of the same value for a claim to be made. The work could also be defined as of equal value by a work evaluation, but this had to be agreed upon by the parties. This latter requirement was removed in the 1991 Equal Treatment Act.

The 1991 Equal Treatment Act expressly included wages, stating in § 18 that unlawful sex discrimination occurred when an employer applies wage or other employment conditions for work that is equal or viewed as of equal value in the labor market. This definition of work proved problematic, and the text of the last sentence was changed "for work that is viewed as equal or of equal value" already in 1994, deleting "in the labor market."[422] Section 18 was repealed in 2000, and the new § 17 stated that the prohibitions against both direct and indirect sex discrimination were applicable when an employer applied wage or other employment conditions for work that was to be considered equal or of equal value.[423] The objective justifications in § 15 were also amended, stating that the prohibition was not applicable to actions that were part of efforts to promote equality in working life and *not a question of the application of wage* or other employment conditions for work that is viewed as equal or of equal value. Facial changes were made to these provisions in 2005, but the larger change was the inclusion of a new burden of proof to make it easier to prevail in a discrimination claim.[424]

Claims of Equal Wages for Equal Work

The first case to address unequal wages for equal work brought by a union on behalf of a female member was in 1991. The employee had received SEK 700 per month less than her male counterpart in a wage increase.[425] The Court addressed the issue of what was required to prove that this was not based on sex under § 4(1) of the 1979 Equal Treatment Act. The employer argued that the male had requested a higher wage and refused to settle for less. The Court stated

[422] *See Lag* (SFS 1994:292) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1993/94:147 *Jämställdhetspolitiken: Delad makt – delat ansvar* at 9, Bet. 1993/94:AU17, Rskr. 1993/94:290.
[423] *See Lag* (SFS 2000:773) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.*, Bet. 2000/01:AU3, Rskr. 2000/01:4.
[424] *See Lag* (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433)*, Prop. 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering*, Bet. 2004/05:AU7, Rskr. 2004/05:267.
[425] AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm*.

that this was a reason that would not have been acceptable to the Court if the parties had been hired at the same time. However, as the male candidate was hired at a later date, the employer succeeded in proving that the difference was not based on sex but rather individual wage requirements, finding that:

> One must not lose sight that the application of § 4 (1) is a question of an evidentiary assessment, and that the legislator has not had reason in the wage context to create a strong presumption that the employer has discriminated on the basis of sex. The assessment must therefore be a question of the circumstances that appear as objective and can convince an outside third party that the basis for the actions by the employer in the wage issue truly did not concern the affected employee's sex. It can be added that the British decision[426] cited by [defendant concerning the UK Equal Pay Act 1970] in principle does not seem to be based on any other ground than that given. [427]

One justice dissented, arguing that this gave too broad a leeway for the employer. This assessment of § 4(1) as a rather weak presumption would affect the cases decided by the Court in this issue until the Swedish Parliament expressly changed the language of the statute in 2005 to a strong presumption.[428]

A recent case of equal work decided in 2001 was brought by a labor union on behalf of ten of its female members.[429] The union argued that the ten already employed female social consultants received lower wages than two recently employed male social consultants. The similarity of the work of the employees was not contested. The 1991 Equal Treatment Act had been changed in the midst of the period of alleged discrimination. The Court found that for the period prior to 2001 when the amendment came into effect, the county council's need for fresh experience warranted hiring the male employees who had previously worked for higher wages with municipalities, and that it was a necessary and defensible action to hire the males at wages higher than the already hired predominantly female employees in the same positions. After an overall assessment of the circumstances, and taking into consideration in particular the significance of the market situation, the Court found that no connection was proven as to sex. For the period after 2001 when the amendment took effect, the same circumstances also spoke for AD finding no discrimination later on the basis of sex.

Two cases claiming unequal pay for equal work were brought early by men regarding employment benefits given in connection with the birth of a child.

[426] The more than ten years' old decision cited by Defendant was *Clay Cross (Quarry Services) Ltd. v. Fletcher* [1978] 1 W.L.R. 1429 [1979] 1 ALL E.R. 474.
[427] AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm* at 366.
[428] For a discussion as to this issue, *see* Fransson at 306 and Schömer at 237.
[429] AD 2001 no. 51 *SACO-S through the Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Agency for Government Employers*.

Somewhat ironically, the male plaintiff in the first case was the first plaintiff to succeed with a claim of wage discrimination under the 1979 Equal Treatment Act.[430] The claim concerned discrimination of men resulting from a specific provision in the collective agreement granting an employment benefit in the form of a maternal leave cash supplement. According to the provision in the agreement, women were expressly entitled to a maternal leave cash supplement for four months while on parental leave. The male plaintiff argued that this was discriminatory as men were not given this contractual right and wage benefit. With one justice dissenting, the Court found that the provision was in violation of the 1979 Equal Treatment Act. Finding that the provision was a contract benefit, AD awarded plaintiff entitlement to the benefit.

A second case concerning men and a maternal leave wage supplement was brought again raising the question of direct discrimination, however, here the benefit was in connection with the birth of a child or immediately thereto.[431] AD found that this clause was not unlawful discrimination as "this contract benefit accrues to a woman in her capacity as carrying a child and has the purpose of providing for a certain need of leave that a woman has in connection with pregnancy and birth."[432] The Court made a distinction from the previous case, finding that there it was an employment benefit, whereas in the present case, the benefit was more an extension of the public parental leave benefit. A third case on this same issue was also recently brought unsuccessfully, as discussed below under the category of indirect discrimination.[433]

Claims of Equal Wages for Work of Equal Value

The first case alleging unequal pay for work of equal value was brought in 1984 under § 4(1) of the 1979 Equal Treatment Act: Two female plaintiffs at the county council grade of K22 received lower wages than a male allegedly performing the same tasks at the grade of K27.[434] A key issue was whether the county council had unlawfully discriminated when the grades and wages were set by collective agreements. The Court found that the coordination responsibilities as well as degree of initiative required for the K27 position merited the different treatment and wages. Three justices dissented, finding that these differences in reality were marginal and that such an interpretation by the Court defeated the

[430] AD 1985 no. 134 *The Salaried Employees Union v. The Swedish Newspaper Publishers' Association and Dagens Nyheter. Inc. in Stockholm.* The provision was entitled *Havandeskapslön.*
[431] AD 1987 no. 132 *The Swedish Metal Trades Employers' Association v. The Swedish Union of Clerical and Technical Employees in Industry.* This provision was also entitled *Havandeskapslön.*
[432] *Id.* at 866.
[433] *See* AD 2003 no. 74 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association.*
[434] AD 1984 no. 140 *The Swedish National Union of Local Government Officers v. Stockholm County Council.*

purpose of the act. The dissent proceeded to conduct a more in-depth comparison of the positions and found that the two distinctions as adopted by the majority were more of a theoretical than of a practical significance.[435]

A series of cases was brought by *JämO* as to equal pay for work of equal value. The first case, *Örebro County Council (I)*[436] was brought by *JämO* under § 18 of the 1991 Equal Treatment Act and the EC Equal Pay Directive.[437] *JämO* claimed that the plaintiff midwife was discriminated against on the basis of her sex as two male clinic technicians received higher wages despite the fact that the work performed in the two jobs was of equal value. The Court found that *JämO* did not meet the burden of proof in demonstrating that the work was of equal value.

JämO brought a second suit under § 18 of the 1991 Equal Treatment Act against Örebro County Council, *Örebro (II),* tailoring the claims and evidence to reflect the requirements as set out by AD in *Örebro (I)*, representing the original plaintiff and a second midwife, claiming sex discrimination for unequal pay in accordance to the Swedish law as against a male clinic technician.[438] The case was sent by AD to the European Court of Justice for a preliminary ruling regarding what was to be included in pay.[439] AD found in *Örebro (II)* that plaintiffs had succeeded in proving that the work was of equal value. However, AD found that defendant had successfully proven that the difference in wages was not due to the sex of the employees, but mainly to market conditions. The Court ordered *JämO* to pay the legal costs and fees of the defendant in the amount of SEK 829251 plus interest, the highest ever award of trial costs and attorney's fees in a discrimination case. The case has been viewed as a partial success in that AD rejected the employer's argument that such different jobs could not be compared.[440]

JämO brought a third case, this time on behalf of a female intensive care unit nurse, claiming wage discrimination in comparison to male medical technicians

[435] For a more extensive discussion of this case, *see* Schömer at 214 and 290, *citing* a study conducted by the Swedish National Institute for Working Life by Suzanne Schlyter with respect to the use of language in the case, Suzanne Schlyter, EN MAN OCH EN KVINNA BESKRIVER SITT ARBETE, UNDERSÖKNING AV SPRÅKET I EN JÄMSTÄLLDHETSRÄTTEGÅNG, INFORMATIONSSKRIFT NR. 9 (Arbetslivsinstitutet 1986).

[436] AD 1996 no. 41 *JämO v. Örebro County Council (I)*.

[437] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[438] AD 2001 no. 13 *JämO v. Örebro County Council (II)*.

[439] *See* Case C-236/98 *Jämställdhetsombudsmannen v. Örebro läns landsting* [2000] ECR I-2189, Celex No. 61998J0236.

[440] For this conclusion and a discussion of the case, *see* Ronnie Eklund, *Barnmorskemålet II*, 108 JT 2001–02 at 112, particularly the discussion concerning collective agreements as an objective factor in proving that wages are not discriminatory.

under § 18 of the 1991 Equal Treatment Act.[441] The Court found that *JämO* succeeded in proving that the work was of equal value but that the market situation concerning the respective positions was responsible for the wage difference. After this judgment, *JämO* stated for a Swedish newspaper that it would have to seriously consider bringing another such case to the Swedish Labour Court.[442]

3.3.2.1.4 HARASSMENT CLAIMS

Harassment has been a "stepchild" in questions of sex equality in general with express prohibitions in each of the systems examined in this work included at later dates. The original 1979 Equal Treatment Act contained no provision specifically dealing with harassment of any type, with such claims falling instead within the general provisions in §§ 2 and 4(1) if a comparator could be identified, but as this most often was not the case, then under § 4(3). One of the reasons for the enactment of the 1991 Equal Treatment Act was to redress this deficiency.[443] Section 6 of the 1991 Equal Treatment Act originally stated that an employer was to act so that no employee was subject to sexual harassment or harassment due to reporting sex discrimination. An amendment was made to § 6 and new paragraphs added in 1998[444] as part of a government investigation concerning violence against women. The new § 6 mandates that an employer:

> [T]ake measures to prevent and preclude an employee from being subjected to sexual harassment or harassment resulting from a complaint about sex discrimination. Sexual harassment means such unwanted conduct based on sex or unwanted conduct of a sexual nature, that violates the integrity of the employee at work.

A duty for the employer to investigate was prescribed in a new § 22a when the employer received knowledge that an employee had been subjected to sexual harassment by another employee, as well as to take measures that reasonably could be required to prevent continued sexual harassment. The failure to perform these obligations can lead to damages to the employee according to § 27a.

The categories of harassment were further refined in 2005[445] with § 6 amended to state that the employer is to take the measures necessary to prevent and impede any employee from being subjected to harassment based on sex, sexual harassment or retaliatory harassment in accordance with this law. Section 16a contains a prohibition against harassment that violates the dignity of a job applicant or employee and that either has a connection with sex or is of a sexual

[441] AD 2001 no. 76 *JämO v. Stockholm County Council.*
[442] *Långt kvar till lika lön, Tredje gången JämO förlorar i arbetsdomstolen,* AFTONBLADET, 14 September 2001, available at Aftonbladet's website: http://www.aftonbladet.se/vss/kvinna/story/0,2789,89281,00.html.
[443] *See* SOU 1990:41 at 270.
[444] *Lag* (SFS 1998:208) *om ändring i jämställdhetslagen (1991:433)*, Prop. 1997/98:55 *Kvinnofrid.*
[445] *Lag* (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433).*

nature. In addition, an employer may not give instructions to harass according to § 16b. A prohibition against retaliatory harassment by the employer for rejecting sexual advances, reporting discrimination, alleging discrimination or cooperating in an investigation in accordance with the 1991 Equal Treatment Act now exists in § 22. The employer also has a duty according to § 22a to investigate and take measures to the extent reasonable to prevent harassment when the employer receives knowledge that an employee feels they have been exposed to harassment based on sex or sexual harassment by another employee.

Only one case claiming retaliatory harassment by an employer has been brought, predating its explicit inclusion in the 1991 Equal Treatment Act.[446] Only one case has been brought alleging sexual harassment by an employer under the 1991 Equal Treatment Act.[447] In contrast, the majority of cases in which the issue of sexual harassment has been raised have concerned the lawfulness of terminations of employment, either whether a harassing employee has been lawfully terminated,[448] or a victim of harassment constructively terminated due to the employer's failure to act.[449] This line of cases gives evidence of the tendency by AD to decide discrimination cases under statutes other than the discrimination legislation. It also demonstrates a certain development in AD's understanding of issues concerning equality for women.

Retaliatory Harassment

In the one case addressing retaliatory harassment, defendant had employed the plaintiff every summer for four years.[450] She brought a claim of sex discrimination to *JämO* in 1989 based on defendant's refusal to hire her on a permanent

[446] AD 1991 no. 111 *The Swedish Miners' Union v. SFO-branch committee and Luassavaara-Kiirunavaara Inc. in Luleå.*

[447] AD 1995 no. 74 *The Salaried Employees' Union HTF v. Wenceslao R. med firma WR Förlag in Upplands Väsby.*

[448] *See* AD 1995 no. 68 *The Association of the Church of Sweden Employees v. Cathedral Chapter in Skara diocese*; AD 1996 no. 10 *The Union of Swedish Civil Servants v. The University College of Film, Radio, Television and Theatre in Stockholm*; AD 1996 no. 55 *The Swedish Teachers' Union v. Bollnäs Municipality*; AD 1996 no. 82 *The National Union of Teachers in Sweden v. Danderyd Municipality*; AD 1996 no. 85 *The National Union of Teachers in Sweden v. Bollnäs Municipality*; AD 1999 no. 29 *LEDARNA v. ALMEGA Service Associations and Partena Clean Inc. in Stockholm*; AD 2003 no. 32 *The Swedish National Union of Local Government Officers v. Södertälje Municipality*; and AD 2003 no. 54 *Gothenburg Municipality, District administration Majorna v. M.H. in Gothenburg*.

[449] *See* AD 1987 no. 98 *JämO v. City of Stockholm*; AD 1991 no. 65 *The Commercial Employee's Union v. Sunny Beach in Varberg Inc.*; AD 1993 no. 30 *The Swedish Metalworkers' Union v. TVAB in Sundbyberg*; AD 2002 no. 102 *Sif v. ALMEGA Service Associations and Casino Cosmopol Inc. in Stockholm*; AD 2005 no. 22 *JämO v. ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm;* and AD 2005 no. 63 *JämO v. The State of Sweden through the Swedish Armed Forces*.

[450] AD 1991 no. 111 *The Swedish Miners' Union v. SFO-branch committee and Luassavaara-Kiirunavaara Inc. in Luleå.*

basis. *JämO* reached a settlement in which plaintiff received SEK 50000 in exemplary damages. She again applied for summer employment after the settlement. AD found that she was offered and accepted a position in the summer of 1990 and that defendant immediately terminated her employment. AD found it not proven that defendant had acted in violation of § 4 of the 1979 Equal Treatment Act but that defendant had acted in violation of LAS through an unlawful termination and awarded exemplary damages, economic compensatory damages and trial costs and fees.

Sexual Harassment by the Employer

In the only claim of sexual harassment brought against an employer under § 22 of the 1991 Equal Treatment Act, an 18-year old plaintiff alleged that her older male employer, her mother's former boyfriend, had sexually harassed her, including forcing her to share a hotel room with him in January 1992 claiming that he could not afford two rooms on a business trip.[451] This was her first job, part of a project managed by the employer, covering a period from 1 September 1991 to 18 June 1992. AD found that plaintiff's status as employee covered only certain dates within that period due in part to its project status. In the period in which plaintiff alleged sexual harassment, January and February of 1992, AD found that plaintiff technically was not an employee of the defendant thus not protected by the 1991 Equal Treatment Act. For the months in the beginning and end of the period, from September to December 1991, and March to June 1992, the Court found that she was an employee but had not alleged any sexual harassment during this period.

Lawful Employment Termination of the Harasser

The majority of cases concerning sexual harassment have been regarding the issue of the lawfulness of an employment termination based on sexual harassment. Two very strong and different interests collide in cases of employment termination due to sexual harassment, the rights of an employee to not be harassed and the rights of the harassing employee to employment protection according to LAS. This issue was first raised in 1996 under the new provision in the 1991 Equal Treatment Act.[452] A 59-year old male teacher argued that he was unlawfully terminated for sexually harassing students. AD found that no one had informed the plaintiff of the inappropriateness of his behavior and that the employer had failed in its duty to correct the problem and thus, lawful grounds for the termination did not exist. The Court noted that the 1991 Equal Treatment Act did not explicitly define sexual harassment, but found that labeling the

[451] AD 1995 no. 74 *The Salaried Employees' Union HTF v. Wenceslao R. with the firm WR Publisher in Upplands Väsby.*
[452] AD 1996 no. 10 *The Union of Swedish Civil Servants v. The University College of Film, Radio, Television and Theatre in Stockholm.*

conduct at issue was not necessary to evaluate whether the termination was lawful. The investigation showed that plaintiff had used colorful and diverse sexual language and often spoke of items of a sexual nature when teaching. However, the employer at no time had tried to correct his behavior as required according to LAS § 7. As the employer did not attempt to correct the situation, it had not done all that was required of an employer in a situation of this type. Plaintiff was awarded exemplary damages and legal costs and fees under LAS.

AD also found in the next case that the 45-year old plaintiff's termination was unlawful, as his touching of a female student, even if she found it unpleasant, could not be seen as sexual harassment, and the alleged sexually explicit comments made to three other students on three separate occasions were most likely simply misunderstood by the female students. Plaintiff's termination was declared invalid, and he was awarded exemplary damages and legal costs and fees under LAS.[453]

The next cases raised easier issues as to lawfulness, where the sexual misconduct was either criminal or simply one step removed from criminal behavior, falling neatly within the discussion in the legislative preparatory works of the 1991 Equal Treatment Act.[454] AD found that a male consultant who had been prosecuted for two criminal offenses of sexual molestation had been lawfully terminated based on those same offenses.[455] In another case, a male supervisor's forcing female employees to have sex with him in return for work on a *quid pro quo* basis was a lawful ground for termination.[456] A 46-year old male treatment assistant, who had a sexual relationship and child with a 21-year old female patient and was criminally prosecuted for physically abusing her, was lawfully terminated.[457]

In a more recent case, AD appears to have reached a balance between the interests of the woman and the employment protection of the harasser.[458] A 36-year old male plaintiff alleged that his termination was not lawful based on his sexual harassment of a 19-year old female. He argued that he was not given notice in accordance with 1982 LAS and was thus entitled to damages. AD held that according to the preparatory works to 1974 LAS,[459] the standard for lawful termination was where an employee had grossly neglected his duties or commit-

[453] AD 1996 no. 55 *The Swedish Teachers' Union v. Bollnäs Municipality.*
[454] AD has relied on the statements made in Prop. 1990/91:113 *Om en ny jämställdhetslag, m.m.*, *see for example* AD 1991 no. 65 at 386; AD 1993 no. 30 at 206; AD 1996 no. 10 at 63; and AD 2002 no. 102 at 606..
[455] AD 1996 no. 85 *The National Union of Teachers in Sweden v. Bollnäs Municipality.*
[456] AD 1999 no. 29 *Ledarna v. ALMEGA Service Associations and Partena Clean Inc. in Stockholm.*
[457] AD 2003 no. 32 *The Swedish National Union of Local Government Officers v. Södertalje Municipality.*
[458] AD 2006 no. 54 *Andrzej Sedrowski v. Skånemejerier Economic Association.*
[459] Prop. 1973:129 *Kungl. Maj:ts proposition med förslag till lag om anställningsskydd, m.m.* at 254.

ted an act so intentional or grossly negligent that it could not reasonably be tolerated in a legal relationship. Stating that violence or the threat of violence does not belong in the workplace,[460] AD found that the male employee's action were of such a serious nature in violation of the 1991 Equal Treatment Act that he could be seen as having grossly neglected his duties. However, AD did find that the employer failed to give notice of termination, awarding plaintiff SEK 5000 in exemplary damages. Determining that the plaintiff had not prevailed as to the majority of the issues in the case, AD ordered plaintiff to pay defendant's trial fees and costs in the amounts of SEK 50184 for the proceedings before AD and SEK 185968 for the proceedings before the district court, a total of SEK 236152 plus interest.[461]

Constructive Termination and the Employer's Duty to Investigate

On the other end of the spectrum of sexual harassment cases is the issue of whether the employer, through a failure to act, has caused the constructive termination of an employee subjected to sexual harassment. The first case raising this issue as well as sexual harassment in general was brought in 1987 under the 1979 Equal Treatment Act.[462] A female employee had reported sexual harassment by a fellow employee in November 1984. In a general personnel meeting held the next day, the employee accused of harassment stated that he would not want to have sex with her even if he could. After meetings to discuss the issue, the supervisor requested the plaintiff to seek employment elsewhere as she was disrupting the workplace and the male employees had all threatened to quit. In April 1985 both the plaintiff and the male employee were transferred to other positions. Plaintiff filed a lawsuit alleging that the defendant employer had disfavored her based on her sex in violation of § 4 of the 1979 Equal Treatment Act. AD found that the actions of the supervisor were not based on plaintiff's sex but rather the disruptions in the workplace.

The decisions after this first case demonstrate a positive and consistent line of development by AD heightening the employer's duty with respect to complaints of sexual harassment. A second case was brought under the 1979 Equal Treatment Act; in this case a company representative had subjected a female employee

[460] Citing Prop. 1981/82:71 *om ny anställningsskyddslag m.m.* at 72.

[461] In a decision issued just several weeks later, AD found that a man who had been sentenced for assault, battery and sexually molesting his own children had been unlawfully terminated from his employment. The employer argued that the crimes for which the man had been convicted were in conflict with the moral values and social responsibility the company profiled, giving it cause for the termination. AD found that the plaintiff had not committed any crimes at work, that he worked well for 17 years, worked alone and had no position of authority, thus the termination was not lawful and declared it invalid and awarded plaintiff exemplary damages. *See* AD 2006 no. 52 *The Swedish Pulp and Paper Workers' Union v. The Association of Swedish Forest Industries and Mondi-Packaging Dynäs Inc. in Väja*.

[462] AD 1987 no. 98 *JämO v. City of Stockholm.*

first to oral statements, then physical actions of a sexual nature for months.[463] The Court first addressed whether this situation violated the 1979 Equal Treatment Act, finding that it did not as it was not a disfavoring based on sex, just as in the first case above, noting that a legislative bill had been submitted to change the law. Neither could the Court find that it was in violation of any implied or expressed terms in the Equality Agreement as entered into by the social partners or the collective agreement. However, the Court did find the employer to be in violation of LAS, resulting in a constructive termination of the woman's employment, awarding her compensatory and exemplary damages. The parties were each ordered to pay their own costs and fees despite plaintiff prevailing in the case.

In the third case brought under the 1979 Equal Treatment Act, a 20 year-old female plaintiff was sexually harassed by an older male employee. He eventually was criminally prosecuted for sexual molestation.[464] The Court found that plaintiff's perception of her situation led to her voluntary termination, which in effect was a constructive termination by the employer in violation of LAS. Defendant had failed to more closely investigate the circumstances surrounding the alleged harassment in a satisfactory manner in conflict with good practices on the labor market. AD found that it must have been clear to defendant that its passivity would create a difficult situation for the plaintiff. Finding that the employer did not fulfill this duty, AD awarded the plaintiff exemplary and compensatory damages and trial costs and fees.

Three cases have been brought in the new millennium concerning the employer's duty to investigate. In the first, plaintiff alleged that she was accosted by her supervisor, who was chief of security, during a business trip and had to forcefully remove him from her hotel room.[465] She eventually informed the Vice President of the company, who gave the male supervisor a warning. During a later business trip, plaintiff alleged that her supervisor again tried to convince her to have sexual relations and when she refused, he fired her, an act that he almost immediately retracted. Plaintiff had been hired on a temporary basis; when the period expired, she was informed by the company that they did not wish to hire her on a permanent basis. AD found that as such, plaintiff was not entitled to the protections afforded under LAS, however, defendant had failed in its duty to investigate, awarding plaintiff SEK 80000 in exemplary damages, the highest amount of exemplary damages to date in a case with a sex discrimination claim. In the next case, AD found that the Post Office had failed in its duty to investigate.[466]

[463] AD 1991 no. 65 *The Swedish Commercial Employees' Union v. Sunny Beach in Varberg Inc.*
[464] AD 1993 no. 30 *The Swedish Metalworkers' Union v. TVAB in Sundbyberg.*
[465] AD 2002 no. 102 *Sif v. ALMEGA Service Associations and Casino Cosmopol Inc. in Stockholm.*
[466] AD 2005 no. 22 *JämO v. ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm.*

In the most recent case concerning this issue, AD found in contrast that the employer did not fail in its duty to investigate nor did the employer have a duty to encourage plaintiff to resume her employment.[467] The 22-year old female plaintiff was serving in the Swedish military and sent to Kosovo, the sole woman in a group of six. Of the 600 troops in Kosovo, 50 were women. Plaintiff alleged that she was subjected to both oral and physical sexual harassment there and also excluded from decision-making processes. She informed her platoon officer of the harassment and eventually requested a transfer. Plaintiff alleged that she eventually was told either to accept the situation or leave. She chose the latter. On her return home, she informed the personnel department of the situation as she experienced it, but no investigation was initiated.

AD found, taking the circumstances as a whole into consideration, that the employer had a basis for finding that plaintiff's termination was not based on the reasons she gave, but rather that she simply did not like Kosovo and wanted to go home. The Court also found that her supervisor's statement, that she needed to decide whether she wanted to stay or leave, could not be seen as an ultimatum. Because of this, the employer according to the Court could not be seen as having acted in a way conflicting with good practices on the labor market, thus causing plaintiff's termination. Finding that plaintiff most likely was subjected to sexual harassment, but that she never explicitly informed her employer of this, defendant had no knowledge and thus no duty.

3.3.2.2 Indirect Discrimination

Only a few cases have been brought alleging indirect discrimination, which in the original 1979 Equal Treatment Act was simply encompassed within the general meaning of discrimination. The question of defining it separately in the new 1991 Equal Treatment Act was raised and initially rejected.[468] A separate definition was finally introduced with a new § 16 in 2000, defining indirect discrimination as an employer treating an employee or job applicant "less favorably by applying a regulation, criteria or procedure that appears neutral but which in practice particularly disfavors persons of one sex, unless it is suitable and necessary and can be motivated by factors not having any connection to the person's sex." The 2005 amendment changed this last sentence to "unless the provision, criterion or procedure can be motivated by a legitimate goal and the means are suitable and necessary for reaching the goal."[469]

[467] AD 2005 no. 63 *JämO v. The State of Sweden through the Swedish Armed Forces.*
[468] *See* Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 41.
[469] *See Lag* (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433)*, Prop. 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering*, Bet. 2004/05:AU7, Rskr. 2004/05:267.

The first case raising an issue related to indirect discrimination was brought in 1984 under §§ 2 and 3 of the 1979 Equal Treatment Act.[470] *JämO* argued that the defendant, a public sector employer, discriminated against women by giving greater weight to a male candidate due to his longer professional experience in reindeer breeding, a field historically dominated by men. *JämO* argued that the male candidate should be credited only for that period of experience during which women could also work in the field. AD stated that:

> An employer in a hiring situation can have qualification requirements that job applicants of actually only one, or almost one, sex can fulfill. If such a qualification requirement is given decisive significance for the hiring, in reality the situation is the same as if the employer had expressly required that applicants belong to the one sex that can fulfill the requirement. The difference is only that the requirement is made indirectly instead of for directly. Decisive for the assessment of whether such a qualification requirement is to be viewed as impermissible sex discrimination is whether the qualification is objective in the sense that it is really necessary or at least of value in the employment. (Compare Prop. 1978/79:175 pp. 43 f and 121 f). In the present case, experience with reindeer breeding is a clearly valuable and almost necessary qualification.[471]

Plaintiff had such experience, but not for a period of time as long as the male candidate's as women in general had not been active in the field that long. AD found that the assessment in the present case was not unlawful sex discrimination.

A male plaintiff brought a claim of indirect discrimination in 2003 under the explicit definition of indirect discrimination as stated in § 16 of the 1991 Equal Treatment Act.[472] The claim was similar to the cases discussed above concerning maternal leave supplemental wages, with the union arguing that a benefit in the form of a supplemental parental leave wage limited to a period of three months in connection with the birth or adoption of a child, had an indirect discriminatory effect on men. The union had 290 000 members, of which 70 000, or 24 %, were women. The union argued that the content of the provision was not compatible with the 1991 Equal Treatment Act, as the three month limitation meant in practice that male employees could not take advantage of the provision during such a period in connection with birth, as mothers often were home with the child during that period, recovering and also breastfeeding and only one parent at a time was eligible for the parental leave cash benefit. The three-month period appears neutral, but has the effect of excluding men from its benefit. AD found that men were disfavored in the meaning of the 1991 Equal Treatment Act by the provision to a considerably larger extent than women in practice. However,

[470] AD 1984 no. 100 *JämO v. The State of Sweden through the National Swedish Board of Agriculture.*
[471] *Id.* at 647.
[472] AD 2003 no. 74 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association.*

defendant's objective with the benefit was to limit the right to the wage supplement so close in time to the birth or adoption of a child due to the child's need of care at that time. This purpose was an objective circumstance with no discrimination on the basis of sex, a conclusion not affected by the fact that fewer men than women in practice could exercise the right to the benefit. As the objective was the best interest of the child, AD found no unlawful indirect discrimination.

The first and only claim of indirect discrimination in which a plaintiff has prevailed in Sweden is a recent case against Volvo in 2005.[473] Plaintiff had applied for a job at a Volvo factory and was not hired, as defendant had a height requirement of 163 to 195 cm and plaintiff was 159.7 cm. *JämO* argued that the requirement was unlawful indirect discrimination as the height requirement was a typical provision that discriminated indirectly against women; The number of women falling outside the necessary height, 28.2 %, is greater than the number of men, fewer than 1 % and that a universal height requirement was unnecessary for all jobs in the three Volvo factories. Defendant argued the percentages, and also that the height requirement was in place to prevent ergonomic work injuries, an objective distinct from the sex of the person. Volvo had invested over SEK 500 million in their efforts to eradicate such injuries. Research in the area had demonstrated that the probability for injury increases at the lower heights, fulfilling the requirements in the law as to appropriate, necessary and justified with objective factors not connected with sex.

AD began by referring to the legislative preparatory works regarding indirect discrimination in which it is stated that a height requirement with respect to employment as a police officer is indirect discrimination.[474] The assessment of whether indirect discrimination is unlawful is to be based on an analysis of three factors: a disadvantage, comparison and balancing of interests.[475] The Court found that the parties agreed that 25 % of women and 2 % of men fell outside the height requirement, thus a disadvantage to women existed in comparison to men. The burden of proof then shifted to the employer to prove that objective reasons existed independent of sex and that they are appropriate and necessary to achieve the purpose. The employer's desire to reduce ergonomic injuries was found to be an acceptable objective reason. When addressing the issue of appropriate and necessary, however, the Court found that defendant could not cite any evidence for why the height of 163 cm was chosen. The Court found that given the nature of the work performed, all workers were at risk for ergonomic injuries. The Chief Safety Inspector testified that the labor union had not agreed that the height restriction of 163 cm was appropriate, and that he knew of as many ergo-

[473] AD 2005 no. 87 *JämO v. The Association of Swedish Engineering Industrial Employers and Volvo Cars Inc. in Gothenburg.*
[474] *Id.* at 689 *citing* Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 41.
[475] *Id.* at 690 *citing* Prop. 1999/2000:143 at 42.

nomic injuries for those persons between 170 and 180 cm as for those who were shorter, with no employee claiming height as a factor. In addition, evidence was presented that there were workers at the factories currently shorter than 163 cm who evidenced no greater exposure to injury than the work population at large. The Court found that defendant had indirectly discriminated against plaintiff in violation of § 16. *JämO* had petitioned for damages in the amount of SEK 200000. The Court, taking into account the fact that defendant in no way intended to discriminate, awarded plaintiff SEK 40000 as well as trial costs and fees.

3.3.2.3 Cases Brought under the Parental Leave Act

The other group of cases of interest here are those dealing with the second, and main prong of the legal platform for economic equality between men and women in Sweden, the right to parental leave. The unions have brought thirteen cases concerning violations of the right to exercise or benefits resulting from parental leave. The unions have brought these cases as *JämO* was not explicitly empowered to do so until 2006 unless the complaint was also based on the sex of the person.[476] Two cases have been brought by individual plaintiffs.[477]

In the most recent case brought under the 1995 Parental Leave Act in 2005, the employer rejected the employee's request as to changing his work schedule due to parental leave.[478] The employee worked at a large factory on a shift basis, and wished to schedule his work so that he could be free from Monday to Friday

[476] AD 1982 no. 56 *The Employers Association of the Swedish Wood Products Industry v. The Swedish Wood Workers' Union*; AD 1982 no. 96 *The Swedish Newspaper Publishers' Association v. The Graphic Workers' Union*; AD 1983 no. 87 *The Swedish Federation of Salaried Employees in the Hospital and Publish Health Services v. Örebro County Council*; AD 1985 no. 65 *The Swedish Electricians' Union v. The Swedish Commerce Employers' Association Central Group and Schönborgs Ljud and Bild Inc. in Jönköping*; AD 1985 no. 104 *The Salaried Employees Union v. The Swedish Commerce Employers' Association Central Group and SCANAIR in Bromma*; AD 1985 no. 134 *The Salaried Employees Union v. The Swedish Newspaper Publishers' Association and Dagens Nyheter Inc. in Stockholm*; AD 1986 no. 87 *The Swedish Teachers' Union v. Gullspång Municipality*; AD 1987 no. 23 *The National Union of Teachers in Sweden v. Sundsvall Municipality*; AD 1987 no. 101 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association and Thorn EMI Belysning Inc. in Solna*; AD 1987 no. 132 *The Swedish Metal Trades Employers' Association v. The Swedish Union of Clerical and Technical Employees in Industry*; AD 1999 no. 51 *ALMEGA Industrial and Chemical Employers' Association v. The Swedish Industrial Workers' Union as well as The Swedish Industrial Workers' Union v. ALMEGA Industrial and Chemical Employers' Association and Shell Refinery Inc. in Gothenburg*; AD 2003 no. 13 *The Salaried Employees' Union HTF v. My Travel Airways in Köpenhamn, Danmark*; and AD 2005 no. 92 *The Swedish Pulp and Paper Workers' Union v. The Association of Swedish Forest Industries and AssiDomän Cartonboard Inc. in Frövi*.

[477] AD 1991 no. 6 *Björn-Olof Belwin in Linköping v. Uppsala County Council* and AD 1991 no. 139 *Age-Svets Inc. in Solna v. Michael Ahlberg in Solna*.

[478] AD 2005 no. 92 *The Swedish Pulp and Paper Workers' Union v. The Association of Swedish Forest Industries and AssiDomän Cartonboard Inc. in Frövi.*

and work shifts on the weekend, based on his desire to accommodate his wife's work schedule and care for their child during the week. Two issues were raised by the employer: First, that the employee's request for rescheduling exceeded the protections of the Parental Leave Act. According to § 10, leave need not be granted by the employer for more than three periods each calendar year. The employer unsuccessfully argued that the employee's request in fact amounted to fifty-two different periods of leave as the employee had requested full parental leave as opposed to shortened work hours, exceeding the three periods allowed by the 1995 Act.

In the alternative, the employer argued that it had the right to deny the requested scheduling in accordance with § 14 of the Parental Leave Act, as the requested hours would result in a "tangible disturbance in the employer's operations." As shift work on the weekends was the most lucrative for employees, it would be impossible for the employer to find any person willing to work 75 % only from Monday to Friday. The company would be forced to hire a full-time replacement worker and in addition, had no need for the 25 % of the hours plaintiff wished to work in its operations of 680 employees.

The issue before AD was whether this inconvenience could be considered to reach the threshold of "tangible disturbance" as set out in § 14 of the 1995 Parental Leave Act. The Court found that defendant had not presented any concrete evidence of the difficulties in finding a replacement, and had not even made any attempts to do so, simply stating it would be impossible. After finding, with one justice dissenting, that the employer had not proven that this was a tangible disturbance, AD awarded plaintiff both economic and exemplary damages and trial costs and fees. The dissenting justice argued that she would find the request to cause a tangible disturbance in the workplace. As shift work requires full-time workers, plaintiff would not be able to stay as informed part-time as other workers, and that other workers may also now request partial leave.

The decision of AD in *AssiDomän* reflects in general the tendencies in the decisions in the other cases involving parental leave as decided by the Court. When the issue has concerned a technical application of a collective agreement or the right to assert parental leave, the Court, in contrast with the discrimination cases, has found for the plaintiff more often than not, as can be seen in AD 2003 no. 13 (damages based on a violation of redundancy listing to be assessed on full wages, not partial wages for any employees currently on parental leave),[479] AD 1999 no. 51 (plaintiff transferred due to pregnancy had right to all

[479] AD 2003 no. 13 *The Salaried Employees' Union HTF v. My Travel Airways in Copenhagen, Danmark.*

the benefits of her original position),[480] AD 1991 no. 139 (employer had no basis for believing that the employee was leaving his job after taking parental leave, unlawful termination of employment),[481] AD 1987 no. 101 (work performed outside hours shortened due to parental leave by plaintiff overtime),[482] AD 1986 no. 87 (union prevailed as to claim of violation of redundancy listing with respect to parent on parental leave, but did not prove a violation of the Parental Leave Act),[483] AD 1985 no. 104 (a 90-day rule, not explicitly included in collective agreement, limiting leave included in service to 90 days when calculating time of service concerning wages not valid when taking parental leave),[484] AD 1985 no. 65 (employer's actions resulting from employee taking parental leave resulted in constructive termination of employment in violation of LAS, plaintiff awarded economic and exemplary damages, as well as trial costs and fees),[485] AD 1982 no. 96 (reduced work hours due to parental leave still deemed full-time employment and eligible for shift work compensation)[486] and AD 1982 no. 56 (employee on parental leave entitled to holiday pay).[487]

Once the Court departs from these technical, mostly contractual issues, the rate of success for plaintiffs decreases. Even with regards to the three cases already discussed above concerning the supplemental maternal/parental leave as provided under the collective agreements, the Court found for the plaintiff only when it interpreted the supplemental pay as a wage benefit.[488] When basically the same provision was placed in a larger context, either as against the parental leave system in general, or as indirect discrimination of men, the Court found no

[480] AD 1999 no. 51 *ALMEGA Industrial and Chemical Employers' Association v. The Swedish Industrial Workers' Union as well as The Swedish Industrial Workers' Union v. ALMEGA Industrial and Chemical Employers' Association and Shell Refinery Inc. in Gothenburg.*

[481] AD 1991 no. 139 *Age-Svets Inc. in Solna v. Michael Ahlberg in Solna.*

[482] AD 1987 no. 101 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association and Thorn EMI Belysning Inc. in Solna.*

[483] AD 1986 no. 87 *The Swedish Teachers' Union v. Gullspång Municipality.*

[484] AD 1985 no. 104 *The Salaried Employees Union v. The Swedish Commerce Employers' Association Central Group and SCANAIR in Bromma.*

[485] AD 1985 no. 65 *The Swedish Electricians' Union v. The Swedish Commerce Employers' Association Central Group and Schönborgs Ljud and Bild Inc. in Jönköping.*

[486] AD 1982 no. 96 *The Swedish Newspaper Publishers' Association v. The Swedish Graphic Workers' Union.*

[487] AD 1982 no. 56 *The Employers Association of the Swedish Wood Products Industry v. The Swedish Wood Workers' Union. See also*, AD 1983 no. 87 *The Swedish Federation of Salaried Employees in the Hospital and Publish Health Services v. Örebro County Council* (defendant found to have the right according to the 1978 Parental Leave Act to unilaterally schedule plaintiff's leave at the beginning and end of the work day).

[488] *See* AD 1985 no. 134 *The Salaried Employees Union v. The Swedish Newspaper Publishers' Association and Dagens Nyheter Inc. in Stockholm.*

discrimination.[489] The same analysis can be seen in the pregnancy cases above, in which the Court found no employment in the first case, no employment termination in the third case, and found for plaintiff in the second case on the basis of Community, and not Swedish, law. Another example of this can be seen in AD 1987 no. 23, in which plaintiff alleged that a transfer was discrimination on the basis of taking parental leave. AD found that the transfer of the plaintiff was not based on her taking employment leave, but that the employer had proven other grounds for the transfer.

3.3.3 General Comments Regarding AD's Discrimination Jurisprudence

Several themes become evident with this review of AD's jurisprudence concerning discrimination. The first is that the employee is held to a very high threshold when it comes to proving that she was clearly "better qualified" under the burden of proof applicable prior to 1999, or even under the more "plaintiff friendly" burden of proof passed in the 1999 amendment to the 1991 Equal Treatment Act, or in the combination of the lower burden of proof and requirement of a person in a "similar situation" as after 2001.[490] As to the first two decades of jurisprudence, AD clearly stated early on that it can "be seen from the legislative preparatory works and the statements made in several of the judgments by AD that the presumption for disfavoring based on sex … is first invoked when it can be ascertained that a clearly distinguishable difference to the advantage of the person not hired exists when it comes to qualifications for the employment."[491] Neither have plaintiffs been successful in either of the two cases brought under the new "plaintiff friendly" version. In the first of these cases, a reference by a prosecutor, not a direct supervisor of the plaintiff nor in contact with the plaintiff or the male candidate during the most recent eighteen months, was sufficient in essence to nullify twenty-two years' additional experience (if the male candidate's

[489] *See* AD 1987 no. 132 *The Swedish Metal Trades Employers' Association v. The Swedish Union of Clerical and Technical Employees in Industry* and AD 2003 no. 74 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association*.

[490] According to the legislative preparatory works, the inclusion of an express provision in 2005 as to the burden of proof in a new § 45a was no change in the substantive content of the law after the lessening of the plaintiff's burden of proof in 1999. *See* Prop. 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering* at 121:

> There is from a substantive perspective scarcely any noteworthy difference between the different ways in which the Community law evidentiary rules have been incorporated in the Swedish discrimination legislation, but the texts and placement of the rules are different. These differences can lead to a misunderstanding that a substantive difference is intended. This is reason enough to adapt the 1991 Equal Treatment Act to the other laws.

The opinions of the Court and the legislative preparatory committees are that Sweden fulfills the requirements as set out in the EC Burden of Proof Directive.

[491] *See* AD 1987 no. 152 *JämO v. The State of Sweden through Gothenburg University* at 961.

position as technical advisor for the American ski team is included as relevant to police work), specialized training in sexual crimes and witness examination techniques as well as proficiency in Finnish.[492] In the other recent case, evidence in the form of notes taken during a meeting of defendants' personnel regarding the hiring clearing stating that they desired a man to fill the post were not sufficient to prove discrimination.[493] According to the legislative preparatory works regarding the new standard, all that is now required is that plaintiff demonstrate that it appears discrimination has occurred, after which the defendant has to prove discrimination has not occurred.[494] Instead, the Court has negated the proof offered by the plaintiffs prior to shifting the burden of proof to the defendants, as seen most clearly in most recent pregnancy case in which AD found that *JämO* had not succeeded in proving that the employer had taken any action.

A related theme apparent in the more recent cases is the choice of language by the parties and the Court as most evident in the *Haparanda* police case. When describing plaintiffs, the Court has allowed defendants to focus on words such as adequate, competent, good, tentative, investigations "lacking in quality," lacking in leadership, initiative, or cooperation, or that she was easily ignored in certain situations. When describing male candidates, the defendants and the Court in certain cases have focused on words such as the male candidate's investigations were "very successful," he was "uniquely gifted," very knowledgeable and that the quality of his investigations was always high, he could inspire colleagues, was very driven and goal oriented and had a high work capacity, along with a particularly good ability to work with others and make contact. He was very ambitious, competent, driven, rich with initiative, quick and open to new aspects. If the woman in a case is branded a "troublemaker," unable to work with others, or lacking in leadership, these function as the kiss of death for her career.[495] The

[492] *See* AD 2004 no. 44 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*.

[493] *See* AD 2005 no. 69 *The Church's Association of University Graduates v. The Swedish Church's Association of Parishes and Häverö and Singö Parishes in Hallstavik.*

[494] *See* Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.* at 50.

[495] According to a former *Jämställdhetsombudsman,* Lena Svenaeus, AD early rejected the sweeping generalization that a woman was not personally qualified because she had difficulty working with others. *See* Lena Svenaeus, *Jämställdhetslagens illusionsregler* in Ann Numhauser-Henning, ed., NORMATIVE PERSPEKTIV – FESTSKRIFT TILL ANNA CHRISTENSEN (Lund 2000) at 525, 535 *citing* AD 1981 no. 169 *JämO v. Upplands Väsby Municipality.* Svenaeus states that this judgment served as a useful tool to reach settlements with employers out of court. However, this characteristic continued to be offered as reason for insufficient personal qualifications by defendants in at least eleven cases later heard by AD. *See* AD 2005 no. 69 *The Church's Association of University Graduates v. The Swedish Church's Association of Parishes and Häverö and Singö Parishes in Hallstavik* (male candidate better fit defendant's required profile that the congregation wished a leader who could work with employees, politicians and volunteers and could engage and participate in working with the employees, and the male candidate's view of leadership meant that he wanted to work with his co-workers); AD 2005 no. 63 *JämO v. The State of Sweden through the Swedish Armed Forces* (plaintiff's

issue of the language of the Court has been raised by other scholars.[496] In its assessments of personal qualifications, the Court's acceptance of the use of such characteristics reinforces the gender stereotypes it is charged with breaking. Instead of requiring defendants to produce objective analyses of both candidates' concrete qualifications, including personal qualifications, using the same standards and assessing the same qualities with the same procedures, the Court relies on the defendants' recapitulations of assessments that are perceivably biased. Neither "likely to be ignored" nor "ambitious, competent, driven, rich with initiative, quick and open to new aspects" are characteristics that can be proven or rebutted on any objective grounds, allowing for a perpetuation of the stereotypes the Acts were passed to eradicate.

A third theme that dominates the judgments of the Court is its deference to employers in general, a criticism that has been raised against the Court in other contexts.[497] If an employer offers what can be seen as a minimum of evidence that the decision is not related to sex, the Court finds no discrimination. The three most recent direct discrimination cases show that despite an almost total absence of women in these positions, and with respect to the police force in

relationship with her supervisor could be said to have been characterized by difficulties in working together and that plaintiff was uncertain and lacked the capacity to make decisions); AD 2004 no. 44 *JämO v. The State of Sweden through the Swedish Agency for Government Employers* (one reviewer assessed the male candidate as having a particularly good ability to work with others); AD 1997 no. 16 *JämO v. Umeå Parish* (male candidate had a great capacity to work with others as well as flexibility and plaintiff was not the type of leader desired as she was not focused on working with others); AD 1993 no. 49 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Immigration Board* (plaintiff during interview demonstrated a certain distance to others that made the male interviewer doubt her ability to work with others in a meaningful way); AD 1991 no. 111 *The Swedish Miners' Union v. SFO-branch committee and Luassavaara-Kiirunavaara Inc. in Luleå* (plaintiff not hired due to her inability to work with others); AD 1989 no. 40 *The Swedish State Employees' Union v. Gothenburg Municipality* (plaintiff not hired due to her inability to work with others); AD 1988 no. 50 *Helena Tepponen in Kvillsfors v. The Association of Ädelfors Folk High School in Holsbybrunn* (defendant argued that plaintiff was less merited with respect to personal appearance, ability to work with others as well as work capacity); AD 1987 no. 98 *JämO v. City of Stockholm* (plaintiff claiming sexual harassment told by employer to find different employment due to the conflicts in the workplace); AD 1987 no. 67 *Helsingborg's Local Federation of the Central Organization of Swedish Workers v. Bjuv Municipality* (plaintiff not hired due to employer's expectation of resulting work conflicts); AD 1984 no. 12 *Gertrud Anljung, B.A., in Lund v. The State of Sweden through the Swedish Agency for Government Employers* (if plaintiff hired defendant believed work conflicts would arise); and AD 1983 no. 102 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers* (defendant relied upon unproven belief that work conflicts would arise if plaintiff hired).

[496] *See* Fransson at 363 discussing the differences arising between job evaluations as performed by men and women; Schömer at 289; and the founder of this perspective, Carol Gilligan, IN A DIFFERENT VOICE (Harvard 1983).

[497] *See, e.g.,* Reinhold Fahlbeck, *Tankar om arbetsdomstolen – hädiska och andra* in Birgitta Nyström, ed., DEN SVENSKA ARBETSRÄTTEN I ETT NYTT EUROPA (Carlsson bokförlag 1993) at 95.

question, any positions of power, AD gave this circumstance no weight. AD has not required that the employer objectively prove that the evaluations were based on comparable grounds, that the same qualifications were assessed in the same manner, that the same questions were asked at interviews, that the same procedure in general was applied to all the candidates. Again the police case serves as example, in which plaintiff, despite being imminently qualified, was not even called to an interview. One can also trace a progression of this deference as developed in the case law. Where the plaintiff was more qualified in 1981, twenty years' experience compared with the male candidate's one, discrimination was found. A two-year difference in experience in favor of plaintiff in 1984 led to a finding of no discrimination. An eight years' difference in experience in favor of plaintiff in 1997 led to no discrimination being found. A seventeen years' difference in favor of the plaintiff in 2004 under the new "plaintiff friendly" standard of evidence led to no discrimination being found.[498]

This deference to the employer is also reflected in the cases in which AD has found for the plaintiff. Either plaintiff was obviously more qualified as in AD 1981 no. 169 (plaintiff had twenty years' experience compared to male candidate's several months), AD 1981 no. 171 (plaintiff had twenty years' experience compared to the male candidate's two), AD 1984 no. 22 (in assessment of the position as head of personnel, plaintiff's university degree in social sciences as well as eleven years' experience as a personnel administrator outweighed male candidate's marginally related independent course work and 11 ½ years' experience in other positions), AD 1986 no. 67 (plaintiff had six years' experience compared to the male candidate's one) and AD 1989 no. 122 (plaintiff had seventeen years' experience compared to the male candidate's four, two justices dissenting finding it comparable) and a different decision in these cases technically almost would have been legally impossible. Alternatively, in the other line of cases in which AD has found for the plaintiff, defendant produced little or no reliable evidence: AD 1982 no. 17 (defendant in defense sector produced no evidence that the reassignment of the two women was necessary or related to reorganization or efficiency); AD 1982 no. 139 (defendant produced hearsay as to plaintiff's difficulties in working with others); AD 1987 no. 67 (defendant's reliance on interviews with co-workers not sufficient proof of personal qualifications); AD 1993 no. 49 (defendant relied simply on one interview for the assessment of personal qualifications); AD 2005 no. 87 (defendant produced no evidence for the height requirement imposed); and AD 2005 no. 92 (defendant produced no evidence that it tried to hire a replacement for the employee

[498] *See* AD 1981 no. 169 *JämO v. Upplands Väsby Municipality*; AD 1984 no. 100 *JämO v. The State of Sweden through the National Swedish Board of Agriculture*; AD 1997 no. 16 *JämO v. Umeå Parish;* and AD 2004 no. 44 *JämO v. The State of Sweden through the Swedish Agency for Government Employers* respectively.

requesting parental leave). The employers' actions in these cases gave little leeway for AD to find for the defendants.

When one looks at the lines of development in the different categories above regarding qualifications, pregnancy, unequal pay, harassment, indirect discrimination and parental leave, the movement in a positive direction to an expansion of rights in the one pregnancy case was explicitly under Community law, with the employer's behavior lawful under the then current Swedish law. The most positive line of development in AD's case law has been concerning the lawfulness of the termination of employees who sexually harass. However, this line of development does not limit the rights of the employers as do findings of discrimination, but rather expands employers' rights by freeing them from liability under LAS for unlawful termination. The discrimination jurisprudence of AD as a whole cannot be seen as "infringing" to any great extent upon the employer's freedom to act.

This attitude of deference to the employer is reinforced in AD's case law concerning ethnic discrimination. Fourteen cases in total have been brought to AD alleging ethnic discrimination: Of these, AD has found ethnic discrimination in one.[499] One aspect, however, that does differentiate these cases from those regarding sex discrimination is that the plaintiffs in the majority of the cases alleging ethnic discrimination were not even called to the interview, whereas in many of the sex discrimination cases, the plaintiff at least made it to the interview. In the ethnic discrimination cases, AD has found that the employers have had a number of "non-discriminatory" reasons. A review of the case law in the most recent three years shows that AD has found that an employer failing to call a plaintiff of Kosovo-Albanian descent to an interview for a position as a truck driver at the hospital was not ethnic discrimination, as those called to the interview already knew other employees at the hospital.[500] Not calling a plaintiff of Yugoslavian descent to an interview was not discrimination even though plaintiff was theoretically as qualified as those called, as he had less practical experience according to the defendant's assessment.[501] That a plaintiff from Kosovo was not hired by the defendant municipality for the position of building permit architect because of deficient Swedish was not discrimination despite the fact that plaintiff

[499] *See* AD 2002 no. 128 *DO v. Service Companies Employers' Association and GfK Sverige Inc. in Lund* in which AD found that defendant had indirectly discriminated against plaintiff by applying a requirement of "clear" Swedish that was higher than necessary for the position. In AD 2005 no. *21 The Swedish Municipal Workers' Union and A.Ö. on Ingarö v. The Association of Healthcare Companies and Attendo Care Inc. in Stockholm*, the plaintiff, a Jehovah's witness, could not participate in certain employment activities due to her religious beliefs, such as decorating a Christmas tree. AD did not find discrimination on the basis of religion in the case, but found that plaintiff was constructively terminated from her employment and that the employer had violated LAS.

[500] AD 2006 no. 60 *The Swedish Municipal Workers' Union v. Skåne Region in Kristianstad.*

[501] AD 2005 no. 126 *The Swedish Association of Graduate Engineers v. Klippan Municipality.*

had received a university degree from a Swedish university and later received the same position with a different municipality.[502] The fact that plaintiff submitted an employment application within the deadline set by the job advertisement, but defendant hired another Swedish candidate prior to the deadline, was not discrimination.[503] Where plaintiff of Iranian background had applied for a job as pre-school teacher via fax, AD found it doubtful that the school had received the application as claimed, as the school would have been eligible for more funding if they had hired any person for the position, thus there was no motive for the school to discriminate.[504] Plaintiff of Russian background sent in an application and was asked to call for an interview, but when plaintiff called, she was not scheduled for an interview. AD found that the employer did not discriminate against her on the basis of her Russian accent, but rather because during the telephone call, defendant discovered that plaintiff had not gone to a three-year high school program in Sweden and had not submitted additional information concerning her education in Russia.[505] Plaintiff of Algerian descent was not hired for overtime work despite his being first on the list for such work in the company, but this was not discrimination as the signalmen refused to work with him for safety reasons.[506] Plaintiff of Iranian descent was not called to an interview during a telephone conversation, but it was not discrimination as defendant's employee felt that plaintiff was aggressive and not suitable for the position.[507]

[502] AD 2005 no. 98 *DO v. Norrköping Municipality.*
[503] AD 2005 no. 7 *N.K. in Norrköping v. Nor Di Cuhr Inc. in Norrköping.*
[504] AD 2005 no. 14 *The Swedish Teachers' Union v. ALMEGA Service Employers' Associations and K.E.M. in Skarpnäck.*
[505] AD 2005 no. 3 *DO v. Comsol Inc. in Stockholm.*
[506] AD 2004 no. 22 *A.K.T. in Malmö v. Copenhagen Malmö Port Inc. in Malmö.*
[507] AD 2003 no. 73 *DO v. The Swedish Metal Trades Employers' Association and Westinghouse Atom Inc. in Västerås.* Other cases decided against plaintiffs in 2003 are AD 2003 no. 58 *DO v. Swede-Eye Inc. in Täby* (no discrimination when the 27-year old plaintiff, with education as hotel receptionist, experience as a hotel receptionist as well as five years' experience as a personal assistant but no sales experience, was not called to job interview and instead a 19-year old candidate with experience from MacDonald's and a video store after high school was hired); AD 2003 no. 55 *DO v. The Swedish Social Insurance Administration and Jämtland County's General Social Insurance Administration in Östersund* (no discrimination when plaintiff, the only one with a foreign background of twelve hired temporarily, was not also permanently hired as were the other eleven. The employer found that she was not sufficiently cooperative and did not adjust to the demands of the employer as evidenced by her failure to participate in internal educations, from which for one she had received a dispensation for a trip abroad and had attended seven, and that she also had requested a wage increase) and in 2002, AD 2002 no. 54 *L.G-C. in Haverdal v. Boods Färg, S.K. Inc. in Halmstad* (Plaintiff, of Israeli descent, not discriminated against though she was qualified for the job and employer defendant knew she was of a minority during the job interview, question was whether a representative of the employer informed plaintiff during the interview that she would not receive the job because of her skin color after singing "Hallelujah" during the interview. AD found that the person committing these acts at the interview was not a representative of the company).

In a more interesting case, plaintiff, who was of the Muslim faith and wore a purdah, had been called to an interview after a telephone conversation.[508] At the interview, plaintiff was told by the person hiring that "I don't care what people have for religion, but unfortunately you cannot wear those clothes when you demo, because you are our face to the customer."[509] In addition, the woman stated that "I live in Malmö where the most common name nowadays is Mohammed" and that she was used to seeing people from all corners of the world. The defendant employer admitted that the employee had said these things to the plaintiff, but that the woman had already hired someone else just seconds before the interview and did not feel she could inform the plaintiff of this. Accepting this as the course of events, AD found that there was no discrimination as the position had already been filled.[510]

The above leads to the issue of formal versus substantive equality. The argument has been made that women in Sweden have been formally equal to men since the passage of the new Marriage Code in 1920, a statement that can be seen as tenuous at best when one takes into consideration that married women had to assume the name of their husband under the new 1920 code, and were not automatically granted custody of their own children until 1950 and that restrictions in employment as well as differentiated wages existed well into the 1970's.[511] Neither does the jurisprudence of AD demonstrate a formal equality. Since the passage of the 1979 Equal Treatment Act and until the 2000 amend-

[508] AD 2003 no. 63 *DO v. DemÅplock in Gothenburg Inc. in Lindome*.
[509] *Id.* at 496 and 500.
[510] The first two cases under the Ethnic Discrimination Act were AD 1997 no. 61 *The Swedish Association of Graduate Engineers v. Österåker Municipality* (plaintiff, of Greek descent, applied for job as system engineer, was not discriminated against by the municipality for not being called to an interview as plaintiff requested too high wages, SEK 27000 per month as opposed to the hired candidate's SEK 20000) and AD 1998 no. 134 *DO v. Otto Farkas Bilskadeverkstad Inc. in Växjö* (plaintiff was as qualified as the candidate hired, but offered no proof of discriminatory action by defendant despite DO's allegations that the defendant did not evaluate the qualifications in the same manner nor in compliance with industry practice, nor asked the same questions nor gave the same opportunity to answer).
[511] *See, e.g.,* Widerberg (1978) at 4 where she notes that much of the research concerning the legal status of women in Sweden had been conducted by the 1950's due to the widely-accepted notion that formal equality between men and women had been achieved and that such issues were no longer a problem. She then notes the resurgence of such research in the rest of Europe and the United States in the beginning of the 1970's, stating that "[t]he primary reason for this certainly was that in these countries and parts of the world there was (and still is) greater formal inequality between the sexes than has been the case in Sweden" and that this research was structured in basically the same manner as the research conducted in Sweden at the turn of the century. *See also id.* at 151, where Widerberg states "[a]s women in the 1920's had acquired formal equality with men, the public debate as to women's issues stopped." At the time she wrote this, the UK Equal Pay Act 1970, the UK Sex Discrimination Act 1975, as well as the American federal Equal Pay Act of 1963 and Civil Rights Act of 1964 had all been enacted. Widerberg's conclusions based on her readings of the American literature illustrate one of the problems with respect to cultural differences in

ment to the 1991 Equal Treatment Act, a woman has had to prove that she was clearly better qualified to successfully prosecute a discrimination claim. Substantive equality as well as structural discrimination have not been addressed by AD in any of the cases heard regarding discrimination in general. This conclusion is reinforced by the decisions issued by AD in the cases alleging ethnic discrimination.

3.4 The Swedish Equal Opportunity Ombudsman

JämO was established in July 1980 after the "whole" 1979 Equal Treatment Act became effective. Both the 1979 and 1991 Equal Treatment Acts comprise prohibitions against discriminations as well as the duty as to active measures, both of which are within *JämO's* power of enforcement. The equality agreements as entered into by the social partners in 1977 and 1983 initially bound *JämO's* hands by removing large segments of the labor market outside *JämO's* jurisdiction regarding the duty for active measures. Many of the amendments to the acts can be seen as incrementally increasing *JämO's* powers. *JämO* originally had four and a half positions, expanded to eight in 1988,[512] and currently has thirty positions. *JämO* was under the Department of Labor originally, but later became an independent governmental agency.[513] *JämO's* operations initially cost SEK 1 million in 1980, and in 2006, *JämO* had a budget of SEK 27.9 million. *JämO* has four main areas of activity: enforcement, information, education and projects.

JämO is currently charged with ensuring compliance with the provisions of the 1991 Equal Treatment Act, sections of the Act concerning the Equal Treatment of Students in Higher Education[514] prohibiting discrimination on grounds of sex, ethnic background, disability or sexual orientation in universities, the Act on the prohibition of discrimination and other degrading treatment of children and pupils[515] and of the Prohibition of Discrimination Act which prohibits discrimination on grounds of sex, ethnic background, disability or sexual orientation in areas such as employment policy, including employment agencies, social insurance, unemployment insurance, memberships in trade unions and

doing research in general. Swedish academic legal literature can be seen as having more of an apologist approach to the subject of the research, while American academic legal literature can be seen as having more of a confrontational approach to the same, meaning that both have to be read with this difference in mind.

[512] SOU 1990:41 at 125.

[513] The original regulations as to *JämO* were issued in 1980, *Förordning* (SFS 1980:415) *med instruktion för jämställdhetsombudsmannen*, replaced by *Förordning* (SFS 1988:128) *med instruktion för jämställdhetsombudsmannen,* thereafter replaced by *Förordning* (SFS 1991:1438) *med instruktion för jämställdhetsombudsmannen* amended most recently in 2006.

[514] *Lag* (SFS 2001:1286) *om likabehandling av studenter i högskolan.*

[515] *Lag* (SFS 2006:67) *om förbud mot diskriminering och annan kränkande behandling av barn och elever.*

employer organizations, starting and running a business as well as professional trade with goods, services and housing.[516] In the effort to strengthen the rights of parents taking parental leave, *JämO* was given the explicit right in 2006 to represent parents regardless of sex, an area that had been in a gray zone previously, particularly if it were a man claiming discrimination.[517]

3.4.1 Enforcement: Discrimination Cases brought to the Swedish Labour Court

Sections 30–46 regulate *JämO's* role in enforcing the 1991 Equal Treatment Act. *JämO* is to encourage employers to follow the law voluntarily, but in the absence of compliance, is empowered to bring cases to AD concerning discrimination. *JämO* can represent the individual plaintiff before AD as set out in § 46, but only if the plaintiff has consented to the representation, the labor union has declined, and *JämO* finds that a judgment in the case would be significant as to the development of the law, or if other specific reasons exist. In total under the 1979 and 1991 Equal Treatment Acts, *JämO* has brought thirteen cases to AD in the 1980's, three in the 1990's, and nine in this millennium. Of these combined twenty-five cases, *JämO* has been successful in nine.[518]

In its first full year of operations, *JämO* received 102 complaints regarding discrimination.[519] In 2005, *JämO* received 171 reports of sex discrimination at the workplace, eight regarding sex discrimination in post-secondary education, and 56 under the Prohibition of Discrimination Act.[520] Of the 171 reports of sex discrimination in the workplace, 55 concerned recruiting, 65 employment terms, 5 instructions from employers, 19 sexual harassment and 27 terminations.[521] Approximately 20 % of the complaints came from men.[522] Thirty-six reports concerned discrimination on the basis of pregnancy or taking of parental leave.

[516] *Lag* (SFS 2003:307) *om förbud mot diskriminering* as amended on 1 July 2005.

[517] *Lag* (SFS 2006:442) *om ändring i föräldraledighetslagen (1995:584). See also JämO, Förslag om förstärkt skydd för föräldralediga,* Press Release, 8 May 2006, available at *JämO's* website: http://www.jamombud.se/news/Forslagomforstarktsk.asp.

[518] *See* AD 2005 no. 87 *JämO v. The Association of Swedish Engineering Industrial Employers and Volvo Cars Inc. in Gothenburg*; AD 2005 no. 22 *JämO v. ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm*; AD 2002 no. 45 *JämO v. Västmanland County Council*; AD 1995 no. 158 *JämO v. Kumla Municipality*; AD 1984 no. 22 *JämO v. Lessebo Municipality*; AD 1984 no. 6 *JämO v. The State of Sweden through the National Swedish Police Board*; AD 1982 no. 139 *JämO v. Örebro County Council*; AD 1982 no. 17 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*; and AD 1981 no. 169 *JämO v. Upplands Väsby Municipality.*

[519] Nordborg (1984) at 200.

[520] *JämO, Ökad effektivitet hos JämO,* Press Release, 23 February 2006, available at *JämO's* website: http://www.jamombud.se/news/OkadeffektivitethosJ.asp and 2005 Annual Report to the Swedish Government.

[521] *See Fler män klagar på diskriminering,* SvD, 4 February 2006 at 28.

[522] After a recent amendment to the Discrimination Act in 2005, seven of ten persons reporting sex discrimination to *JämO* in the next following year were men, many concerning the different price of haircuts for men and women, as well as admittance to nightclubs. The statistics of the

Half the reported employers were public, half private. Nine settlements were reached in the cases investigated by *JämO*. The average length of time for handling a typical case is approximately six months.

3.4.2 Enforcement: Active Measures and the Equality Council

In addition to its power to bring enforcement suits to AD, *JämO* also has powers under the 1991 Equal Treatment Act to enforce the employer's obligation as to active measures, namely in the form of the requirements of equality and wage plans. According to § 2, the employer and employees are to work together on active measures to achieve equality in working life, in particularly concerning wage and employment term differentials for work that is equal or of equal value. Employers are to create a work environment suitable for both men and women, balancing work and family and preventing sexual harassment.[523] In addition, employers are to analyze wage differences, draft action plans to eradicate such differences within at the latest three years, and annually draft equality plans including those active measures necessary to achieve equality.[524] *JämO* has the right to request information as well as access to the workplace, and in cases of failure to comply with such requests, *JämO* is empowered to levy a fine in accordance to § 34. This fine can be appealed to the Equality Council, but the decisions of the Equality Council may not be appealed according to § 43.[525] The Council consists of nine members, three non-partisan trained lawyers and three appointed by each of the social partners. The Council is within the Ministry of Industry, Employment and Communications.

In cases of failure to analyze wages or draft an equality plan, *JämO* can petition the Equality Council for an order of compliance upon penalty of fine in accordance with § 35. In the event the employer persists in not complying, the order can be brought to a district court for execution. In 2003, the Council ordered the first compliance upon penalty of a fine of SEK 100000 for the failure of an employer to perform a wage analysis despite *JämO's* repeated requests

complaints under all the laws, however, is that women bring 58 %. *See JämO, Fortfarande mest kvinnor som anmäler könsdiskriminering,* Press Release, 9 May 2006, available at *JämO's* website: http://www.jamombud.se/news/Fortfarandemestkvinn.asp.

[523] §§ 4–6 of the 1991 Equal Treatment Act.

[524] §§ 10–13 of the 1991 Equal Treatment Act, employers of less than ten employees are excluded from the requirements of plans.

[525] *Jämställdhetsnämnden*. The Council's composition was first explicitly stated in the 1980 Act, but this has since been moved to the regulations, the first of which was *Förordning* (SFS 1980:416) *med instruktion för jämställdhetsnämnden*, replaced by *Förordning* (SFS 1991:1437) *med instruktion för jämställdhetsnämnden*.

to do so as required in §§ 10 and 11.[526] In a different case, a fine was set as petitioned by *JämO* in the amount of SEK 200000 in 2004.[527]

JämO commissioned a study in 1999, performed by the governmental agency, Swedish Statistics ("SCB"), to confirm the existence of employer Equality Plans as mandated in § 13 of the 1991 Equal Treatment Act. Of the 7000 employers surveyed, half responded. In the public sector, 73 % had plans, in the private, 22 %.[528] *JämO* then conducted the "500 Audit." A group comprising 10000 private sector employers were sent letters informing them of their obligations according to the law as to wage analyses. Five hundred of these were asked to submit documentation within one month. Ninety-five of these failed to comply within the deadline, and of these, twenty-nine failed to respond.[529] Of the 420 employers that submitted documentation, 82 were satisfactory according to the audit. After supplementation of documentation, over half were approved.[530] In 2002, *JämO* assessed fines upon twenty private sector employers in amounts varying between SEK 10000 and 20000 based on the "500 Audit" after having sent the employers two reminders to submit their wage analyses and action plans for equal wages.

JämO conducted the "50 audit" in 2004, requesting documentation from 40 industrial and 10 public sector employers[531] including several from the original 500 Audit. Sixteen of the fifty had satisfactory documentation in the first audit. One audit led to an action for fines. The audits also demonstrated subjective differences in the wages of women and men for several employees. Further, several chosen from the original 500 audit continued to display a lack of cooperation with labor unions as to working towards eradicating the differences.

Another study of equality plans was conducted in 2005 by SCB and showed that only one of three employers follow the 1991 Equal Treatment Act as to the requirement of an equality plan, 80 % in the public sector, 30 % in the private sector.[532] In November 2005, *JämO* wrote to 35000 employers obligated to annually draft an equality plan informing them of the recent SCB statistics.

[526] *See JämO, Majgården AB vitesförelagt av Jämställdhetsnämnden*, Press Release, 21 October 2003, available at *JämO's* website: http://www.jamombud.se/news/majgardenabvitesfore.asp.
[527] *See* Jämställdhetsnämnden Beslut, *JämO v. Närkes Elektriska Inc.*, 2 February 2004, available at *JämO's* website: http://www.jamombud.se/jamojuridik/docs/narkes_elektriska.pdf.
[528] *See* Jämställdhetsombudsmannens Årsredovisning 1999 at 22, available at *JämO's* website: http://www.jamombud.se/docs/JamOsarsredovisningforar1999.pdf.
[529] *See JämO, JämO vitesförelägger tjugo privata arbetsgivare*, Press Release, 22 October 2002, available at *JämO's* website: http://www.jamombud.se/news/jamovitesforelaggert.asp.
[530] *See JämO, Hälften av privata arbetsgivarna godkända av JämO*, Press Release, 7 October 2002, available at *JämO's* website: http://www.jamombud.se/news/halftenavprivataarbe.asp.
[531] *See JämO, Samverkan leder ofta till bättre jämställdhetsarbete*, Press Release, 4 May 2005, available at *JämO's* website: http://www.jamombud.se/jamsides2/samverkanledero.asp.
[532] The statistics as to compliance have been consistent the past three years, the latest statistics by SCB for 2005. *See Mer pengar till JämO ska sätta fart på bolagen*, SvD, 5 January 2005 at 7.

Copies of the letters were also forwarded to the major labor union at the employer's site. The letter also informed employers of *JämO's* plans to increase its focus on wage analyses in the coming years as a result of an increased budget for 2006–2008 in order to better work to reduce the wage differences between women and men. During 2005, *JämO* reviewed 172 equality and equal treatment plans. After review, five cases were referred to the Equality Council, mostly for wage review issues.

JämO has been using the possibility of fines as a carrot and a stick, bringing actions to spur compliance. In one municipality in November 2003, fines in the amount of SEK 500000 were petitioned, which action was withdrawn in November 2004 when the municipality complied with the wage analysis requirements. *JämO* did this again, filing an action for fines in the amount of SEK 500000 against a county council, which again was withdrawn in January 2005 after the County Council in question dedicated funds in the amount of SEK 36 million to raise the wages of women within female dominated sectors.[533] *JämO* filed an action in February 2005 for fines of SEK 750000 against the state defense sector for failure to remedy wage differences.[534] In February 2006, *JämO* brought an action for fines in the amount of SEK 100000 against an employer who argued that there was no reason for the plan as few of its employees spoke Swedish.[535] To date, no fines have been levied by a district court for failure to comply with the Council's order. In addition to *JämO*, labor unions are now also permitted under the 2005 amendments to the 1991 Equal Treatment Act to bring actions for fines to the council.[536]

3.4.3 The Responsibilities of Public Information and Education as well as Individual Projects

The three other areas of *JämO's* operations are information, education and projects. Information on the laws *JämO* enforces is directly available from *JämO's* website and includes reports that can be downloaded. *JämO* also holds informational seminars. The topics in 2006 have included preventing sexual harassment in schools and at work, drafting equality plans, performing wage analysis and breaking out of traditional patterns of sexual stereotypes. Reports have been

[533] *See JämO, Uppsala County Council åtgärdar löneskillnader – slipper vitesföreläggande*, Press Release, 31 January 2005, available at *JämO's* website: http://www.jamombud.se/news/uppsala-lanslandsting.asp.

[534] *See JämO, JämO ansöker om vitesföreläggande för Försvarsmakten*, Press Release, 15 February 2005, available at *JämO's* website: http://www.jamombud.se/news/jamoansokeromvitesfo07a.asp.

[535] *See JämO, JämO begär vitesföreläggande av Jobpoint AB in Norrköping*, Press Release, 7 February 2006, available at *JämO's* website: http://www.jamombud.se/news/jamobegarvitesforelaaf5.asp.

[536] *See, e.g.,* Decision of the Equality Council, *Jämställdhetsnämnden Beslut*, *Sveriges psykologförbund v. Stockholms län landsting*, 9 August 2005, available at *JämO's* website: http://www.jamombud.se/jamojuridik/docs/psykologforbundet.pdf in which the labor union was not successful.

issued concerning parental leave wage supplements (2000), a study on affirmative action (2002), the Glass House (2004) and parenthood (2005) to name a few.

One EU project was begun in 2003, "Women to the Top." Fourteen of the larger organizations in Sweden, including ABB, Cloetta Fazer, Folksam, the Police Authority in Västra Götaland and Öhrlings PriceWaterhouse Coopers agreed to cooperate with *JämO* in efforts to get a larger percent of women in management. Each has chosen two candidates who are assigned mentors and a project leader to help them climb up in management with *JämO's* support. The project was completed in 2005, and an evaluation of the success will be conducted in 2007.[537]

JämO also releases reports as to the status of women in employment. One recent report concerned the salaries of chief executive officers in 2004, showing that the salaries of male CEO's increased by 5 % to SEK 521 000 annually, while for female CEO's, the increase was 3 % to SEK 373 000, widening the wage gap between women and men in these positions to 39.4 %.[538] Another recent survey by *JämO* in 2006 showed that 38 % of female supervisors feel that they have been sexually harassed.[539]

3.4.4 Proposed Changes as to *JämO*

In line with the legislative proposal incorporating the different statutory texts concerning discrimination into one text, a new ombudsman authority is also proposed, with the current four ombudsmen against discrimination – the Equality Ombudsman ("*JämO*"), the Ombudsman against Ethnic Discrimination ("DO"), the Disability Ombudsman ("HO") and the Ombudsman against Discrimination because of Sexual Orientation ("HomO") – to be merged into one authority, the Office of the Ombudsman against Discrimination (the "Ombudsman").[540] To strengthen the autonomy and independence of the new authority, its areas of responsibility and functions are to be defined by statute and not governmental regulations as is the case presently for all the ombudsmen.[541] The Ombudsman is to ensure compliance with the new Prohibition and other Measures against Discrimination Act, first through voluntary compliance and active measures. The Ombudsman is to:

[537] *See JämO, JämO's projekt, Kvinnor mot toppen*, Press Release, 5 April 2005, available at *JämO's* website: http://www.jamombud.se/vadgorjamo/womentothetop.asp. as well as the EU page concerning the project, Women to the Top, available at: http://www.women2top.net/.
[538] *See JämO, Kvinnliga VD:ar tappar i löneligan,* Press Release, 24 January 2006, available at *JämO's* website: http://www.jamombud.se/news/kvinnligavdartappari.asp.
[539] *See JämO, Olika villkor för kvinnliga och manliga chefer,* Press Release, 2 May 2006, available at *JämO's* website: http://www.jamombud.se/news/Olikavillkorforkvinn.asp.
[540] SOU 2006:22 Part II at 205.
[541] SOU 2006:22 Part II at 223.

1. Work to eliminate discrimination based on sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age in all areas of society;
2. Work generally to promote equal rights and opportunities, regardless of sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age;
3. Work to promote equality between men and women and prevent and counteract racism, xenophobia and homophobia;
4. Provide advice and assist in ensuring that those exposed to discrimination can exercise their rights; and
5. Provide information to the public and governmental authorities in general.

The committee also recommends that the new Ombudsman have a budget higher than the combined budgets of the existing ombudsmen, as the new authority will have responsibility for a broader scope of supervision as to a number of new provisions contained in the new Act, including matters relating to new grounds of discrimination, prohibitions in new areas of society, protection of legal persons, extended provisions on active measures and measures for enhanced accessibility. The committee estimated that the present combined budget for all the ombudsmen in 2005/06 was approximately SEK 83.7 million.[542] A new merged council is also proposed.[543]

3.5 The Swedish Labor Law Model

The history of the Swedish Model has demonstrated how powerful the social partners are in labor and employment issues in Sweden. A recent example is the demand by the Swedish government for a three-part dialogue with the social partners to eradicate the persistent 20 % wage difference between sexes in the private sector.[544] The focus of this section is on current efforts by the social partners specifically addressing equality and parental leave as evidenced in the collective agreements. Four main categories of issues have been addressed in at least some of the collective agreements examined here:

1. Wage supplements with respect to parental leave;
2. The qualification periods for wage supplements;
3. The length of parental leave and of the wage supplements; and
4. Wage reviews.

[542] SEK 28346000 for *JämO*, SEK 31239000 for DO, SEK 14892000 for HO and SEK 9218000 for HomO. *See* SOU 2006:22 Part I at 50.
[543] *Id.* at 271.
[544] *See Trepartssamtal ska få löner att bli jämställda*, SvD NÄRINGSLIV, 20 May 2006 at 8.

For the examination of the collective agreements, requests were made to all 16 LO-unions, 19 TCO-unions and 26 SACO-unions for copies of collective agreements, as well as any other information/programs the unions had regarding parental leave and issues of sex discrimination. The unions were also asked about the existence of any specific problems and to what degree parental leave or any other parenting related issues were treated in the collective agreements entered into or in general. The response rate and actual clauses in the collective agreements received, as well as calculations as to benefits granted, can be found in Appendix Three. As the response from the social partners was not 100 % (unions covering approximately two million employees, half the Swedish workforce, responded), this study must be seen as qualitative and not quantitative. However, the variations between the different contractual solutions and sectors demonstrate a spectrum of solutions that is telling in issues of equality and parenting.

The Swedish Model is based on a system of collective agreements that exist on several levels, primarily on the local and central levels. In addition to the collective agreements, individual employment contracts can be entered into between the employer and the individual employee. The terms of these differ considerably depending upon the labor market sector. The main requirement of an individual employment contract is that it may not be in conflict with the prevalent collective agreement. The individual employment agreements are generally governed by private law contract regulations.

The social partners have fairly extensive freedom with respect to the content in the collective agreements. In accordance with MBL § 23, a collective agreement is to be a written agreement that concerns employment terms and conditions or the relationship in general between employees and the employer.[545] The primary areas taken up in collective agreements are wages and employment terms and conditions. Issues concerning, for example, the work environment, employment leave and travel compensation can also be taken up in the agreements, but nothing is stated as to that which more closely is required as to the content of the collective agreements. Certain national agreements as adopted by LO, TCO or SACO, recommended agreements, must be adopted by the individual labor unions to become applicable. Local agreements can also be entered into between labor unions and the employer, but these are only effective locally, in other words, at the local workplace. No statutory requirement exists that each workplace has to have a collective agreement. However, MBL grants labor unions means for inducing employers to sign collective agreements, namely boycotts. The duty to maintain the industrial peace does not exist in the absence of a collective agreement. Employers are also given the option instead of simply signing an already existing collective agreement, referred to in such situations as an

[545] *See* Folke Schmidt, FACKLIG ARBETSRÄTT (Juristförlaget 1997) at 180.

adhesion agreement, usually containing a minimal amount of terms and conditions.

Each collective agreement must be seen as a product of a compromise with certain sacrifices on both sides. They are to be re-negotiated prior to their expiration. In 2006, 20 collective agreements were renegotiated covering approximately 70000 Swedish employees. In 2007, over 500 collective agreements, 85 % of all agreements covering 2.8 million Swedish workers, are to be renegotiated.[546] One of the major issues in these negotiations is wage setting. No minimum wage legislation exists in Sweden, instead the social partners regulate wage setting through collective agreements. The public insurance system makes provisions for loss of income with respect to unemployment, sickness, occupational injuries, pensions and parental leave. No legal obligation exists for the social partners to provide benefits in excess of these public insurance schemes, however, many collective agreements have supplemental support systems that can address income losses occurring when an employee, because of unemployment, sickness, occupational injuries, retirement or parental leave, goes from full-wages to the public insurance benefits. In the case of parental leave, this is a loss of 20 % of the employee's wages up to the income ceiling and 100 % of the wages over the income ceiling.[547]

The Swedish labor market is divided between the private and public sectors. These sectors can be further divided, the private sector between white and blue-collar workers and the public sector between state and municipal/county council employees. The collective agreements fall into three main categories, public sector, private sector salaried employees and private sector wage earners. On the whole, the collective agreements tend to grant greater benefits with respect to income loss the higher the position and salary, and lesser protections for blue-collar workers. To further complicate issues, one trade union federation can represent all these different categories of employees, public employees as well as private white and blue-collar employees. This is particularly true in the health care sector, and the terms of the employment for the same job can differ depending upon whether the employee works in the public or private sector. Likewise, one company can be bound by several collective agreements regarding its workforce, for example, with respect to salaried employees and wage earners.

[546] *See Nästa år väntar en het avtalsrörelse – Men 2006 blir lugnt enligt Medlingsinstitutet,* SVD NÄRINGSLIV, 17 February 2006 at 11.

[547] For a complete review of the collective agreement provisions as to all these public insurance benefits, *see* Gabriella Sjögren Lindquist and Eskil Wadensjö, INTE BARA SOCIALFÖRSÄKRING – KOMPLETTERANDE ERSÄTTNINGAR VID INKOMSTBORTFALL, RAPPORT TILL ESS EXPERTGRUPPEN FÖR STUDIER I SAMHÄLLSEKONOMI 2005:2 (Fritzes 2005). *JämO* has also issued a report on parental leave clauses found in collective agreements, *Löneutfyllnad vid föräldraledighet,* 11 April 2000, available at *JämO's* website: http://www.jamombud.se/dokument/rapporter.asp.

When it comes specifically to parental leave, several different problematic areas can be addressed in the collective agreements. Purely technical requirements in the collective agreements can concern qualification periods, payment and income levels. The scheduling of leave is a practical problem as seen in the *AssiDomän* case discussed above. Other issues are requirements as to notice, of continued employment after the leave and how wage reviews and wage increases are to be treated. Even if a company decides to not include periods of leave in the length of employment service when it comes to a wage increase, the wage review can also serve a further function by notifying employees about their performances and the company's assessment. Missing a wage review means not only missing a wage increase but also important information and feelings of participation.

3.5.1 The Social Partners – The Employer Organizations

National central collective agreements are entered into between the social partners, however, the agreements are adopted on the member level within these organizations. Within the public sector, the employer organizations are the Swedish Agency for Government Employers[548] for the state, covering 250 employer members having 240 000 employees, and SALAR[549] for the municipalities and county councils covering members with approximately 900 000 employees. On the private employer side, the main organization is the Confederation of Swedish Enterprise with 55 000 member companies covering 1.5 million employees. These three organizations together cover almost 2.7 million employees. Several smaller private employer organizations also exist, such as the Banking Sector Employers Organization ("BAO") with 150 member banks having 45 000 employees, and KFO with economic cooperations as members, including 2 300 such organizations with 85 000 employees and 400 collective agreements. Individual employers can take initiatives with respect to equality and parental issues, but of the employer organizations that responded to the requests, none had any such programs on a central level.

3.5.2 The Social Partners – The Labor Unions

LO, TCO and SACO are the major central organizations on the employee side. Historically, the labor unions were opposed to any legislative regulation or incursion into their freedoms as to issues in the labor market in general as shown above. Efforts were made on behalf of all workers, not just a single category of workers such as women. In addition, the absence of women in general in posi-

[548] For more information on *Arbetsgivarverket,* see their website at: http://www.arbetsgivarverket.se/index.htm.
[549] For more information on *Svenska Kommunförbundet och Landstingsförbundet i Samverkan,* see their website at: http://www.skl.se.

tions of power within the hierarchies of the social partners still lingers today.[550] When discussions were raised about legislating the issue of sex discrimination, the proposals were rejected by the labor unions as unnecessary. As a preventive measure, the first Equality Collective Agreement, *Jämställdhetsavtal,* was entered into in 1977 between LO and SAF. In 1983 another agreement was entered into between SAF, LO and the Council for Negotiation and Co-operation[551] in which the active measures as set out in the 1979 Equal Treatment Act were contracted away.[552] These agreements effectively limited *JämO's* jurisdiction with respect to active measures. As they were contracted between the social partners, the social partners thus retained the police powers concerning their enforcement.

The power structure today has progressively gone towards greater representation and inclusion of women. Of the three chairmen for the central employee organizations, LO, TCO and SACO, two currently are women. On the central union level, 12 % women and 88 % men serve as chairmen within the member organizations of LO, 44 % and 56 % respectively within TCO, and 35 % and 65 % respectively within SACO.[553] The focus by the unions on class, instead of sex, has led to some soul searching by at least LO, the central organization including many of the female dominated low paying sectors, as expressed by LO's current and first female chairman, Wanja Lundby-Wedin. She has stated that legislation is required, at least regarding parental leave and the right to full-time work, citing that LO women have the lowest wages, least influence, most difficulty in obtaining permanent or full-time positions and least equality in the home. She notes that there are 27 work classifications for the predominantly male position of machine operator, but only one for the female dominated position of nurse assistant as a sign of the invisibility of this sector in the labor market.[554] This fact alone does not seem significant, but when viewed in light of the tariffs existing in the collective agreements based on sex, then skilled and unskilled, a lack of classifications within a position leads inevitably to a more stagnant wage development. In the same vein, the Mediation Institute noted in its 2004 annual report that the efficacy of the 1991 Equal Treatment Act depended to a large extent on the efforts of the union at the local level as to wage discrimination, and that such efforts were often absent.[555]

[550] One example that can be seen is with Handels in 2003, a labor union with 115 000 women and 52 000 men. With respect to their union negotiators, eight were men and two women. *See Män gör karriär i kvinnoförbund*, LO-TIDNINGEN No. 38, 5 December 2003 at 7.

[551] *Privattjänstemannakartellen* ("PTK") was formerly known as the Federation of Salaried Employees in Industry and Services.

[552] *See* Fransson at 290.

[553] *See* SOU 2005:66 at 92.

[554] *See Självkritisk LO-bas lutar åt lagstiftad jämställdhet – För stark tro på reformer enligt Wanja Lundby-Wedin,* SVD NÄRINGSLIV, 10 April 2005 at 1.

[555] *See* SOU 2005:66 at 169 *citing* Medlingsinstitutets årsrapport (2004).

In contrast to the UK and US acts as discussed in their respective chapters below, the Swedish labor unions are not encompassed by the Swedish 1991 Equal Treatment Act. Prohibitions against discrimination within labor unions can be found in the law prohibiting discrimination, which states that discrimination on the basis of sex, ethnic origin, religion or other belief, sexual orientation or physical handicap is prohibited with respect to membership or participation in an employee or employer organization or other professional organization, as well as with respect to the benefits such organizations provide their members.[556] The liability of the Swedish labor unions, however, goes no farther than their internal actions, in contrast to the UK and US systems. The closest one finds in the Swedish Model of this type of accountability are the "good practices in the labor market" as determined by AD. In one of the few cases somewhat raising this issue, the employer in consultation with the labor union had placed the Finnish speaking part of the crew on the redundancy lists, resulting in their employment being terminated. The Court rejected the employer's argument that the crew needed to speak Swedish for safety reasons, and found the actions to be in conflict with "good practices in the labor market." AD did not, however, invalidate the terminations but awarded each of the thirteen plaintiffs exemplary damages of SEK 20000 and certain plaintiffs economic damages of lesser amounts.[557] The labor union was not named as a defendant in this case and thus its liability was not at issue before AD. Hypothetically, liability could be imposed.

However, there is not an absence of efforts on the labor union level regarding equality issues. One good example of a program addressing both equality in the form of wages and parental leave is that of the Swedish Association of Graduate Engineers ("CF").[558] Eighty percent of CF's members are employed in the private sector, 15 % in the state and 5 % in the municipal sectors. CF as of January 2006 has approximately 80 collective agreements, 79000 employed members of which approximately 21 % are women and approximately 34 % are in the ages of 25–34 years. The average monthly wage for CF members in the private sector in 2005 was SEK 41566. CF's wage statistics in 2004 show that women already were discriminated against with the first wages, receiving approximately SEK 1125 per month less than their male counterparts, with the difference simply increasing over time. After fours years, it reaches the level of SEK 1587. CF issued a report in 2005 concerning parental leave for engineers[559] in which 75 %

[556] *See Lag* (SFS 2003:307) *om förbud mot diskriminering.*
[557] *See* AD 1983 no. 107, *Brita Lempiäinen in Åbo, Finland, et al. v. Johnson Line Inc. in Stockholm.*
[558] *See* the website of Civilingenjörsförbundet ("CF"), http://www.cf.se as to the information given here.
[559] *See* Helen Sjöman, Kids och karriär 2005 – En rapport och enkät om föräldraledigheten för ingenjörer. This report is available at the CF website at: http://www.cf.se/CFWeb/valkommen/pressrum/rapporter_o_undersokningar.htm.

of those surveyed stated that they would not have stayed home longer than they did if changes were legislated as economic repercussions steered their choices. Both men and women perceived that taking parental leave negatively affected their wage developments. Male members in CF in 2005 took twice the amount of parental leave than the national average, 76 days as opposed to 38, up from the 53 days taken on an average by CF male members in 1999.[560] This increase can be seen as a result of CF's efforts to inform the members of their rights, for example, by holding informational seminars as to parental leave. Since the 2005 report, CF has noted that problems of discrimination based on parental leave have increased, not decreased, with the increased number of men taking parental leave.[561] The efforts of CF are not indicative of a general level of activity for all labor unions and are unique in that CF is a male dominated labor union and still very active with respect to issues of discrimination and parenting. Neither is CF the sole active union in its efforts. However, it is an illustrative example here for two purposes, in that the efforts of the union can at least in part be seen to have increased the amount of parental leave taken by men, and that the experiences of these men has not been the politically argued greater understanding of needs by employers for parents. A recent survey by CF has shown that one-half of all women and one-fourth of all men have suffered in both career and wage developments due to parental leave.[562]

The labor unions have also been active with respect to research in the area of equality as seen again with CF. Other union reports in 2005 have found, for example, that women are on sick leave for longer periods than men, a difference that did not exist ten years ago, arguing that discrimination is the reason.[563] Other recent statistics show that the rate of stroke among women under 65 has increased by 33 % compared to men's 19 % in the period from 1989–2002.[564] Another report issued in 2004 maintains that the recent decreased health, increased sick leaves and consequent decreased wages for women is due to the fact that society has placed the onus on women to adjust to both paid and

[560] *See Ingenjörer tar pappaledigt – Yrkesgruppen tillhör toppskiktet när det gäller att utnyttja föräldraförsäkringen,* SVD NÄRINGSLIV, 15 February 2005 at 15.

[561] *See Barnledig tappar karriärfart*, DAGENS NYHETER, 26 April 2006.

[562] *Id.* CF engineers are not the only fathers facing problems when taking parental leave. Men taking extended parental leave experience worse repercussions with respect to wage development when compared to women taking extended leaves. *See, e.g.,* the expert report generated by LO and described in *Män förlorar mest på föräldraledighet*, LO-TIDNINGEN Nr. 24, 26 August 2005 at 6, stating that men are "punished" for taking leave.

[563] *Kvinnor är sjuka längre tid än män, Skillnaden mellan könen fanns inte för tio år sedan – "orsaken är diskriminering,"* LO-TIDNINGEN Nr. 19, 3 June 2005 at 9, both studies, one by the labor union for municipal workers, *Kommunal,* and the other a project, *Sick Sweden*, led by a professor of sociology at Lund University, showing that women were twice as often as men on sick leave longer than 100 days.

[564] *Vanligare att kvinnor blir sjuka av stress*, ARBETSLIV 2/04 at 16.

unpaid work, basically in all areas, while men have not needed to adjust their situations in the same manner.[565]

Another area in which the unions have been active is in the cases brought to AD raising discrimination issues. Of the approximately eighty cases brought alleging sex discrimination and/or harassment, the unions represented the plaintiff in approximately fifty. Of the fifteen cases concerning claims under the parental leave act, the unions brought thirteen. These numbers, however, do not take into account the number of conflicts resolved by the unions not brought to AD. Current statistics are not available on this; the letters sent to the unions requested this information and only one case was mentioned in general. In the 1991 ten year assessment of the 1979 Equal Treatment Act, a survey was conducted of the unions as to how many disputes to date had been handled under the 1979 Equal Treatment Act (to 1989). From the responses it was ascertained that a total of 151 disputes had been taken up by the labor unions in that ten-year period, and settlements reached in 91.[566] In a recent newspaper article discussing *JämO's* successful out of court resolution of a wage discrimination claim, *JämO's* representative spoke of the difficulties for both the unions and *JämO* to successfully prosecute claims: "It is difficult to get the unions to go the whole way, they either refuse immediately or after hearing the employer's explanation. But it is as hard for the unions as *JämO* to prosecute wage discrimination cases."[567]

3.5.3 The Collective Agreements

Two separate issues relevant here can be addressed in the collective agreements, discrimination in general and the treatment of parental leave within the employment context. As to discrimination in general, a few collective agreements include direct prohibitions, the Banking Agreement[568] being the best example of an integrative approach to sex discrimination as well as parental leave. A few that address discrimination do so in a wage context, with the inclusion of provisions in the collective agreements as to applying the equal pay principle, references to the requirement of wage analysis in the 1991 Equal Treatment Act, as well as investigating unmotivated differences in wages between men and women and non-discriminatory wage setting.[569]

[565] *Bristande jämställdhet gör kvinnor mer sjuka*, LO TIDNINGEN Nos. 39–40, 17 December 2004 at 20.
[566] *See* SOU 1990:44 at 176.
[567] *See Framgång för JämO i diskrimineringsmål,* SvD Näringsliv 12, 27 April 2004.
[568] The Federation of Bank Employees and the Financial Sector Union of Sweden Collective Agreement for Employees in the Banking Sector valid from 1 January 2006 to 21 December 2008.
[569] For a listing of some of the collective agreements that directly or indirectly address discrimination, *see* SOU 2004:55 at 81.

The collective agreements of the social partners have been analyzed in this segment with respect to issues arising with taking parental leave, mainly wage supplements and qualification periods, but also whether the issue of employment reviews during parental leave and calculation of employment service are specifically addressed. When it comes to wage supplements, there are several different approaches as seen in Appendix Three. Certain solutions are based upon a wage supplement approach while others are based upon a wage deduction model and others on a combination of these two. These different methods for determining pay supplements in the agreements are applied to two different levels of income, one under the price base amount, SEK 20000 per month, and one of SEK 40000 per month for a period of eleven months. The latter calculations are made on the basis of whether the child was born prior to 1 July 2006 with compensation for seven and one-half times the price base amount, and a child born on or after 1 July 2006, the income then eligible ten times the price base amount, using the price base amount for 2006 of SEK 39 700. As stated above, the system changed as of 1 July 2006, and the collective agreements examined here were entered into on the assumption of a calculation based on seven and one-half times the price base amount, giving rise to certain irregularities in the calculations in Appendix Three. The objective of this analysis is not to determine the wage losses under the contractual and statutory system as a whole, but rather demonstrate that certain sectors have been more active in neutralizing wage losses arising from parental leave than others, predominantly those sectors with higher degrees of female employees. The comparison is based on the calculations as found in Appendix Three as to the percent of the employee's income received during parental leave during an eleven-month period in accordance with the different solutions in the agreements. An eleven-month period is chosen as the basis of comparison, as eleven months (330 days) currently is the longest period during which one parent can receive the parental leave cash benefit above the basic amount (390 minus the other parent's non-transferable 60 days).

3.5.3.1 The Public Sector Collective Agreements

The collective agreements examined with respect to parental leave are categorized by sector: Within the public sector, two main collective agreements exist, the ALFA agreement, currently its 2005 version, which governs the entire state sector, and the AB 05 agreement which governs the municipalities and county councils. The ALFA agreement covers approximately 240000 (48.5 % women) employees in the state sector, including the Swedish Parliament. In the municipality/county council sector, AB 05 covers approximately 723000 (80 % women) municipal employees and 250000 (81 % women) county council

employees.[570] These two agreements consequently cover almost one-third of the almost four million employees and half of all women in the Swedish workforce.

Both the ALFA and AB 05 agreements have provisions granting wage supplements when taking parental leave that are generous. On the state level with respect to ALFA, there is no need to address whether the parental leave is to be viewed as time in employment with respect to the hiring of certain state positions, as a specific regulation exists equating any period of parental leave as taken as employment when assessing qualifications.[571] Any parental leave taken after the child has reached the age of eighteen months, however, is only counted as half employment time under the regulation. The compensation afforded under ALFA provides the highest benefits in the public sector, 90 % of all income for state employees for the entire period.

3.5.3.2 The Private Sector Collective Agreements

The private sector in Sweden covers about two-thirds of all employees, in other words, approximately 2.6 million employees, of which one-third is women. Literally hundreds of collective agreements exist within the private sector, and not all have been accessible for this work. In addition, many agreements lack provisions concerning parental leave. A selection has been made of certain provisions to illustrate different aspects of the problems arising for an employee when taking parental leave. This is not a quantitative analysis but rather qualitative, even if many of these provisions (or absence thereof) exist in the majority of collective agreements. The absence of any provisions with respect to parental leave cannot in itself be analyzed further; employees with such collective agreements receive nothing over that provided by the law. Within the private sector, the agreements tend to fall roughly within categories of white and blue collar workers, with five types of clauses identified here: The absence of any provisions concerning parental leave wage losses, provisions providing a pay supplement within three months of the birth of a child, a straight percentage pay supplement, the 90/10 and 80/10 models, and finally, that which is referred to here as a neutralizing model, in which both the economic and professional losses resulting from taking parental leave are neutralized by the provisions in the contract. These provisions are presented in this order in Appendix Three as are the actual calculations under the terms of the agreements.

[570] These collective agreements are available at the website of the central employers' organizations, ALFA at the Swedish Agency for Government Employers, *Arbetsgivarverket*, http://www.arbetsgivarverket.se and AB 05 at the Swedish Association of Local Authorities and Regions ("SALAR") *Sveriges kommuner och landsting,* http://www.skl.se.

[571] *See Förordning* (SFS 1985:335) *om tillgodoräknande av tid för föräldraledighet vid tillsättningen av statliga reglerade tjänster.*

3.5.3.3 Comparison of the Benefits Given in the Different Collective Agreements

Parental leave is not taken up in all the private collective agreements. Among those that take up the issue, a wide spectrum of variation exists among the different aspects addressed and solutions reached. Certain only address the deduction that is to be made from wages during the parental leave. Other agreements, as seen, take up forms of wage supplements, with the state's ALFA agreement the most generous, with 90 % of income retained during the eleven months. The private bank collective agreement comes in second place with 80 % of the income during the entire eleven months. The municipalities/county councils are next with 80 % of the income for nine months. Certain other private agreements have wage supplements for up to four months, but the majority provides compensation for 30 days after employment of one to two years, 60 days for two years or more. During these months, private salaried employees often receive 90 % of their income, while wage earners receive compensation, which becomes 90 % under the ceiling and 10 % over. Half of this time limited compensation is given often at the commencement of the leave, the other half after a certain period of employment after returning to work. The differences in the wage supplements as calculated in Appendix Three are given in the table below:

Table 1: Percentage of wages received in the combination of parental leave cash benefit and wage supplements given in collective agreements during an eleven-month period of parental leave.

Collective Agreement	SEK 20000 per month	SEK 40000 per month Child born 30 June 2006 or before	SEK 40000 per month Child born after 30 June 2006[a]
Public Sector			
ALFA	90 %	90 %	103 %
AB 05	81.8 %	84 %	90 %
Private Sector			
Banking Sector[572]	90 %	86.18 %	102.5 %
Teachers Agreement[573]	83.6 %	65.24 %	82 %
90/10 model[574]	81 %	59.8 %	76.2 %
80/10 model[575]	81 %	56.84 %	73.24 %
Graphic Workers[576]	81.8 %	51.07 %	67.8 %
Ambulance Drivers[577]	81.7 %	51.1 %	67.8 %
Simply parental leave cash benefit	80 %	49.25 %	66 %

[a] Almost all the contractual clauses that cause windfalls in this column result from their being based on a parental leave cash benefit calculated at 7.5 times the price base amount (2006 = 39700) that was changed to 10 times the price base amount for children born on or after 1 July 2006.

When one compares how the issue of the wage supplement with parental leave is treated in the various collective agreements, the differences are striking. The debate concerning parental leave most often has emphasized that men earn more money than women and that the financial losses steer the parents' decisions regarding parental leave. If one simply looks at the legislation, this reasoning is perhaps tenable. However, within the context of the Swedish Model, it is too superficial. Against the background of the structures created through the collective agreements, another, perhaps stronger aspect exists than the public benefit wage loss. For a couple in which the woman works in the public sector (as do 50 % of all women in Sweden) and the man works in the private sector (as do 80 % of all men in Sweden) and they have the same monthly salary, SEK 40 000 per month, the parental leave compensation under the collective agreements in the majority of cases differs significantly between the spouses. If one takes the best case, the state ALFA agreement, and the least beneficial case, no regulation at all as in many private sector collective agreement, the couple during eleven months loses SEK 177 760[578] prior to taxes if the man takes out all the parental leave he is entitled to take, the entire eleven months, for a child born prior to 30 June 2006. This is a loss in a situation in which the spouses earn the same amounts. If the man takes out one-half of the leave, in other words, six and one half months, the couple loses SEK 105 040 in total, once again assuming that both spouses have the same income. If the man's income is higher than the woman's, these losses become even more exacerbated.[579]

[572] The Federation of Bank Employees and the Financial Sector Union of Sweden Collective Agreement for Employees in the Banking Sector valid from 1 January 2006 to 21 December 2008.
[573] The Collective Agreement between the Employers' Alliance – Branch Committee Education and Adult Education, The Swedish Adult Education Teachers' Association, the Swedish Union of Local Government Officers, the Swedish Municipal Workers' Union, the Swedish Teachers' Union and the Swedish National Teachers' Organization of Unions from 2004–2007.
[574] Employment Terms and Conditions in IT Companies, valid from 1 April 2004 to 31 March 2007, ALMEGA, The Swedish Union of Clerical and Technical Employees in Industry, CF, JUSEK and the Association of Business Administration Graduates.
[575] The General Employment and Wage Terms and Conditions for employees within health and other care between the Association of Cooperative and Non-profit Enterprises, the Association of Swedish Occupational Therapists, Swedish Association of Registered Physiotherapists, the Swedish Municipal Workers' Union, the Swedish Union of Local Government Officers and the Swedish Association of Health Professions valid from 1 June 2004–31 May 2007.
[576] Collective Agreement between the Swedish Newspaper Publishers' Association and the Graphic and Media Workers' Union valid from 1 June 2004 to the 31 May 2007.
[577] Collective Agreement between the Association of Swedish Health Care Companies and the Swedish Association of Health Professionals valid from 1 July 2005 to 30 June 2005.
[578] The calculation if the woman had taken the eleven-months instead under the state agreement: SEK 40 000 in monthly wages (90 %) – SEK 19 840 (the parental cash benefit for a child born prior to or on 30 June 2006) x 11 months equals SEK 177 760 in lost benefits. For six and one-half months, the total becomes SEK 105 040.
[579] For a similar analysis, *see* Lindquist and Wadensjö at 185–222. *See also* Laura Carlson, *Föräldraskap och regelverket på arbetsmarknaden* in Daniel Rauhut and Björn Falkenhall, eds., A2005:15 ARBETSRÄTT, RÖRLIGHET OCH TILLVÄXT (ITPS 2005) at 155.

In addition to the extent of any wage supplement, the collective agreements run the spectrum from no regulation of the issues of discrimination and other treatment with respect to parental leave, to the provisions found in the collective agreement in the Banking and Financial Sector. The Financial Sector Union of Sweden has approximately 33000 active members of which 64 % are women. Not only does the banking agreement provide a high level of compensation, it also specifically regulates wage setting and wage reviews within the same document, providing the most systematic and comprehensive regulation of these issues in both the private and public sectors. In accordance with the wage development guarantee in the second paragraph of § 17 of the agreement, a salaried employee who at the beginning of a wage review year has been on parental leave full-time for care of a child at least eight months during the closest three previous years, is guaranteed individual wage supplements that can be up to 4 % of the previous wage review final wages with certain deductions. In addition, under § 7.1 Individual Wage Setting, the salaried employee's wages are to be determined individually taking into consideration the principle regarding equal wages for equal work and observing § 2 of the 1991 Equal Treatment Act. Section 7.5.2 On Parental Leave states that:

> The Bank and the Financial Sector Union of Sweden's local organizations shall, for employees who have been on parental leave full-time at least eight months, review the salaried employee's wages within two months from returning to service. This is to occur in order to insure a correct wage setting including observing § 2 of the 1991 Equal Treatment Act. Time spent on parental leave is to be equated with time of employment service.

This is the strongest recognition of parental leave, for in comparison to the state regulation, time on parental leave is taken with respect to wage-setting, not only hiring, and there is no "halving" of the time. This collective agreement covers not only the wage supplement but also expressly regulates issues such as wage reviews and wage increases within the same agreement. Several labor unions regulate wage issues in a separate agreement and several local collective agreements include such provisions. Other labor unions responded that they had a policy that wage reviews would be held but nothing in writing. Few labor unions had a provision that expressly equated parental leave time with employment service.

However, the compromise/balance reached in the banking agreement between the social partners is also apparent. The employees have received generous terms, 80 % of wages, but only with a full-time leave that must be taken within a timeframe of eighteen months from the birth of a child. The employer's contribution is equally as generous as that existing in the public sector, but on the other side, the same flexibility concerning how parental leave can be taken does not exist.

This decreases the employer's costs for parental leave, for example with respect to temporary employees and disruptions in the functioning of the workplace.

These collective agreements and the differences existing between the private and public sectors explain to a certain extent not only why parents choose as they do regarding the division of the parental leave, in other words, that women take out 83 % of the parental leave. These differences also explain at least partly why many women choose to work in the public sector or in areas of the private sector with more favorable benefits, particularly younger women considering starting a family. This in its turn can be seen as contributing to reinforcing the occupational segregation already existing in the Swedish labor market. The structure that is created through the collective agreements can also partially explain why women are not as attracted to the private sector to the same extent as men.

Another aspect to the parental leave wage supplement is that these are monies paid by the employer. There can be an incentive for employers to minimize costs, which can include a requirement that leave be taken within three months of the birth/adoption of a child or only by mothers. There can also be an incentive for insuring that a workforce in general does not have persons likely to take such leave, in other words, by avoiding hiring women of a fertile age.[580]

3.6 Equal Access to Justice Issues within the Swedish Model

Three aspects of equal access to justice are discussed here, the remedies available under the statutes, the award of trial costs and fees as well as the statute of limitations. An additional aspect, however, can first be briefly mentioned, and that is obtaining legal representation in discrimination cases. A plaintiff in Sweden can turn to her labor union, and if it declines, to *JämO*. No duties are set out by law as to the union's representation of an individual member, for example, as in the United States with the labor unions' duty of fair representation. This can be seen in the most recent pregnancy case, where the Swedish union felt it already had too much work to take on a new case.[581] In Sweden, this appears very much to be a matter of discretion on the part of the labor unions. *JämO,* the other alternative for an individual plaintiff, has two very real limitations with respect to representation. The first is limited financial resources, a restriction felt by every national governmental authority, but exacerbated in Sweden due to the remedies and awards of fees as discussed below. The second very real limitation for *JämO* is set out in the actual statutory text in § 46 of the 1991 Equal Treatment Act, in that *JämO* is to litigate cases that are of interest to the development of the law or

[580] *See Avtalade förmåner cementerar könsroller*, LO-TIDNINGEN Nr. 33, 28 October 2005 at 4, *citing* the above-mentioned report by Lindquist and Wadensjö.
[581] *See* AD 2006 no. 79 *JämO v. Erlandsons Brygga Inc.*

for another specific reason. Another limiting factor for both the unions and the ombudsmen in general is the lack of success for plaintiffs when prosecuting discrimination claims before AD. Svenaeus points out that of 105 individual reports of discrimination in 1991, settlements were reached in eleven, twenty-two were withdrawn by the individuals, fourteen most likely were barred by the statute of limitations, and 58 were written off, many of these probably because of the assessment that the standard of proof required by AD could not be met.[582] Svenaeus also notes the importance of successful cases, stating that they are used as precedent by *JämO* to reach settlements in other, similar types of cases.

3.6.1 The Remedies Available under the Acts

If successful in a case raising issues of sex discrimination, a plaintiff can be awarded economic, and in certain situations, exemplary damages and trial costs and fees as well as interest as stated in §§ 25 and 27 of the 1991 Equal Treatment Act. As to claims arising with respect to parental leave, an employer in violation of the 1995 Parental Leave Act can be ordered to pay damages in accordance to § 22 for any losses that have arisen and for the violation that has occurred. Both statutes contain provisions in §§ 28 and 22 respectively that explicitly state that if it is fair, the amount of damages awarded can be reduced to zero.

3.6.1.1 The Award of Exemplary Damages

In all the cases under the Equal Treatment Acts, the amount of exemplary damages as awarded by the Court for unlawful sex discrimination can be seen as modest at best. In the 1980's, plaintiffs prevailed in ten of forty-six discrimination cases heard on their merits, with AD awarding on the average exemplary damages of SEK 19000 per plaintiff.[583] In the first ten-year assessment of the 1979 Equal Treatment Act, the Committee stated in 1991 that these amounts were low, but made allowance for the Court applying a new law. A somewhat increasing trend was detected by the 1991 Committee towards the end of the decade. Finding this to be modest, however, the Committee noted that defendants were seen as buying themselves free of claims, and that in the majority of

[582] Sveneaus at 527 and 529.

[583] *See* the listing that can be found in Appendix One concerning the award of damages by AD under the 1979 and 1991 Equal Treatment Acts, covering AD 1981 no. 171 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality*; AD 1981 no. 169 *JämO v. Upplands Väsby Municipality*; AD 1982 no. 17 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*; AD 1982 no. 139 *JämO v. Örebro County Council*; AD 1984 no. 6 *JämO v. The State of Sweden through the National Swedish Police Board*; AD 1984 no. 22 *JämO v. Lessebo Municipality*; AD 1987 no. 67 *Helsingborg's Local Federation of the Central Organization of Swedish Workers v. Bjuv Municipality*; and AD 1989 no. 122 *The Swedish Municipal Workers' Union v. Östergötland County Council*, respectively.

cases, exemplary damages in the hundreds of thousands would be reasonable.[584] The average of exemplary damages awarded in the 1990's was SEK 27500 per plaintiff,[585] and to date in the 2000's, the average has been SEK 55000.[586] The increase in exemplary damages awarded during this twenty-five year period is 289 % without making any allowances for inflation. The averages of the amounts petitioned by plaintiffs during these decades are SEK 23500 for the 1980's, SEK 86666 for the 1990's and SEK 175000 for the 2000's, resulting in the exemplary damages awarded by the Court totaling 81 % of the amount petitioned in the 1980's, then 31 % for the 1990's and 2000's respectively. The Court provides little or no discussion explaining its deviations from the amounts as petitioned by the plaintiffs or for its motivations as to the variances in the awards.

In the 1999 report concerning the 1991 Equal Treatment Act, the Committee found the award of exemplary damages by AD to be consistent with Community law. The committee assessed that the exemplary damages as awarded by AD have been at such a level that they cannot:

> [B]e seen to be only symbolic but rather just the opposite, have been adjusted so that a preventive effect can be reached. It is important to emphasize that an assessment has occurred in each individual case based on the circumstances existing in the case.[587]

At the time of this statement, the exemplary damages as awarded by AD during the 1990's averaged SEK 27500 per plaintiff.

3.6.1.2 The Award of Economic Compensatory Damages

Economic compensatory damages can only be awarded in Sweden for unlawful conduct in the course of employment, in other words, a decision to not hire falls outside of this parameter as no "course of employment" has commenced.[588] As

[584] SOU 1990:41 at 357.

[585] AD 1991 no. 111 *The Swedish Miners' Union v. SFO-branch committee and Luassavaara-Kiirunavaara Inc. in Luleå*; AD 1993 no. 30 *The Swedish Metalworkers' Union v. TVAB in Sundbyberg*; AD 1993 no. 49 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Immigration Board*; and AD 1995 no. 158 *JämO v. Kumla Municipality.*

[586] AD 2002 no. 45 *JämO v. Västmanland County Council*; AD 2002 no. 102 *Sif v. ALMEGA Service Associations and Casino Cosmopol Inc. in Stockholm*; AD 2005 no. 22 *JämO v. ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm*; and AD 2005 no. 87 *JämO v. The Association of Swedish Engineering Industrial Employers and Volvo Cars Inc. in Gothenburg.*

[587] SOU 1999:91 *En översyn av Jämställdhetslagen* at 84.

[588] For the history of this issue, *see* SOU 2006:22 at 148, noting that the committee originally drafting the 1979 Equal Treatment Act had proposed economic compensatory damages also with respect to the failure to hire, *citing* SOU 1978:38. The proposal was raised again in SOU 1999:91, stating that the absence of economic compensatory damages in such situations was not compatible with Community law, a proposal to which all three ombudsmen agreed.

such, economic compensatory damages have been awarded in even fewer cases than exemplary damages. During the 1980's, economic compensatory damages were awarded in one case, but not under the 1979 Equal Treatment Act but rather LAS.[589] In the 1990's, economic compensatory damages were pleaded in eleven cases and awarded in five, and of these, two were awarded under the Equal Treatment Act.[590] To date in the 2000's, economic compensatory damages have not been awarded under the 1991 Equal Treatment Act in any case. Economic compensatory damages were awarded for violations of the 1995 Parental Leave Act in 2005 in the amount of SEK 87000.[591]

The most recent governmental report addressing the issue of economic compensatory damages found that the scope of these damages needs to be expanded to be in conformity with Community law. It also noted that such a possibility for this type of damages exists in the United Kingdom.[592] In addition, the report noted that a ceiling as to these damages as existing under LAS was applied, a limitation of economic compensatory damages to a number of months depending on the length of employment service as set out in LAS § 39.

One of the leading principles that inundates the procedural and remedial aspects of the Swedish discrimination cases is their confinement by the Court and the legislator to the boundaries as set out in labor law in general, and the right to union affiliation specifically. In a more recent case alleging handicap discrimination, AD found that the employee had been unlawfully terminated three months after the employer found out that plaintiff had been diagnosed with multiple sclerosis.[593] AD awarded plaintiff economic compensatory damages in the amount of SEK 260763, exemplary damages in the amount of SEK 100000 as pled by plaintiff and SEK 25000 to the union, and trial costs and fees in the amount of SEK 88616, the highest ever awards both for economic and exemplary damages in a discrimination case. As to the award regarding exemplary damages, AD stated that "with the determination of the amount it ought to be

[589] *See* AD 1985 no. 65 *The Swedish Electricians' Union v. The Swedish Commerce Employers' Association Central Group and Schönborgs Ljud and Bild Inc. in Jönköping.*

[590] The three cases, AD 1991 no. 65 *The Commercial Employee's Union v. Sunny Beach in Varberg Inc.*; AD 1991 no. 111 *The Swedish Miners' Union v. SFO-branch committee and Luassavaara-Kiirunavaara Inc. in Luleå*; and AD 1993 no. 30 *The Swedish Metalworkers' Union v. TVAB in Sundbyberg* were awarded under LAS. In the two cases, AD 1995 no. 158 *JämO v. Kumla Municipality* and AD 1996 no. 79 *The Swedish Union of Local Government Officers v. Karlskoga Municipality,* the economic damages were awarded under the Equal Treatment Act.

[591] *See* AD 2005 no. 92 *The Swedish Pulp and Paper Workers' Union v. The Association of Swedish Forest Industries and AssiDomän Cartonboard Inc. in Frövi.*

[592] *See* SOU 2006:22 at 159 and 161. This can be seen in contrast to the ten-year assessment made in 1999, in which the Committee found the award of economic damages to be consistent with EU law, *see* SOU 1999:91 at 84.

[593] *See* AD 2005 no. 32 *The Swedish Association of Graduate Engineers and M.K. in Stockholm v. T. & N. Management Inc. in Stockholm.*

taken into consideration that it has been stated in the legislative preparatory works that exemplary damages in cases of discrimination ought to be determined at a higher amount than those applied within employment law in general."[594] This statement by AD can be seen as an indication of a willingness to award higher damages in the future.

3.6.3 The Award of Trial Costs and Fees

Trial costs and fees in Sweden in general are awarded according to the English rule as expressed in Chapter 18 § 1 of the Swedish Code of Judicial Procedure, which means that the non-prevailing party pays the trial costs and fees for both parties. According to § 5(2) of the 1974 Labour Disputes (Judicial Procedure) Act, the Court may in cases governed by the act order that each party bear its own costs if the losing party had reasonable cause to have the dispute tried. This is a power seldom invoked in discrimination cases by AD. To date, AD has ordered the parties to bear their own costs in six of the over one hundred cases discussed in this work above, and in three of them, plaintiff was successful.[595] In the three in which plaintiffs were not successful, the Court stated that these were difficult cases, and the trial costs and fees should be born by the parties, not simply the non-prevailing plaintiffs.[596]

The amount of trial costs and fees awarded by AD demonstrates a trend that deviates from the relatively modest increases in the amount of damages awarded.[597] The average amount of trial costs and fees awarded during the 1980's was approximately SEK 26000 per case, almost at parity with the damages awarded on the average in the amount of SEK 19000. In the 1990's, the average amount of trial costs and fees increased almost four-fold to SEK 96500, with the average amount of damages awarded SEK 27500, the trial costs and

[594] AD 2005 no. 32 at 272.

[595] AD 1999 no. 51 *ALMEGA Industrial and Chemical Employers' Association v. The Swedish Industrial Workers' Union as well as The Swedish Industrial Workers' Union v. ALMEGA Industrial and Chemical Employers' Association and Shell Refinery Inc. in Gothenburg* (plaintiff prevailed as to claims under the parental leave act); AD 1996 no. 79 *The Swedish Union of Local Government Officers v. Karlskoga Municipality* (plaintiff prevailed on wage discrimination claim); and AD 1991 no. 65 *The Commercial Employee's Union v. Sunny Beach in Varberg Inc.* (plaintiff prevailed on sexual harassment claim of constructive termination under LAS).

[596] AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm* (plaintiff lost equal wage claim, only case in which AD specifically cites § 5(2) of 1974 act); AD 1984 no. 12 *Fil. kand. Gertrud Anljung in Lund v. The State of Sweden through the Swedish Agency for Government employees*; and AD 1982 no. 102 *Swedish Association of Graduates in Law, Business Administration and Economics, Computer and Systems Science, Personnel Management and Social Science (JUSEK) v. Kalmar County Council* (plaintiff lost sex discrimination claim, unable to prove discriminatory intent, AD stated that the issues were "difficult to assess").

[597] *See* the listing of the awards of trial costs and attorney's fees that can be found in Appendix Two, broken down by decade.

fees outpacing the damages awarded over three to one. During the 2000's, the average trial costs and fees to date is SEK 202500 with a corresponding average award of damages for this period SEK 55000, almost a four to one ratio. The increase in the trial costs and fees over the twenty-five year period is 818 % compared to the increase in exemplary damages during the same period of 289 %.

The highest single award of trial costs and fees in a discrimination case was SEK 829251.[598] In a recent case concerning unlawful termination based on the plaintiff's sexual harassment of a fellow employee, the plaintiff as a private individual was ordered to pay the costs and fees for his employer of the proceedings before AD and also the costs of the proceedings in the trial court, a total of SEK 278727.[599] This was despite the fact that he had been successful in the trial court proceedings and even awarded SEK 100000 as damages for unlawful termination. The increase in the amount of trial costs and fees is a development in favor of defendants, as the risks a plaintiff takes if unsuccessful have successively increased, not only with respect to the increase in costs and fees, but also to the parallel relative stagnation of damage awards. These two aspects, combined with the rate of success in general of discrimination claims before AD, create a significant deterrent for plaintiffs bringing discrimination claims.

3.6.4 The Statute of Limitations as to Sex Discrimination Claims

The original statute of limitations under the 1979 Equal Treatment Act was four months, and is still four months under the 1995 Parental Leave Act. The issue of this short period of statute of limitations has been raised several times by different ombudsmen throughout the lives of both equal treatment acts. As mentioned in the discussion concerning the passage of the 1979 Equal Treatment Act, the provision regarding the statute of limitations was almost immediately amended.[600] Historically, the statute of limitations for labor disputes has always been short. One reason posited is that the shorter periods for statute of limitations in labor law in general, though they appear to favor the employer as seen in the case law, promote a good relationship between the social partners.[601] The statute of limitations of six months was triggered by the event of discrimination as stated in § 14, prompting plaintiffs to act:

[598] *See* AD 2001 no. 13 *JämO v. Örebro County Council (II)*.
[599] *See* AD 2006 no. 54 *Andrzej Sedrowski v. Skånemejerier Economic Association.*
[600] *Lag* (SFS 1980:412) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*. Prop. 1979/80:129 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*, Bet. 1979/1980:AU 30 also referring to Prop. 1979/80:92 *om bestridande av kostnader för jämställdhetsombudsmannen och jämställdhetsnämndens verksamhet* and Prop. 1979/80:147 *om godkännande av Förenta Nationernas konvention om avskaffande av all slags diskriminering av kvinnor*, Rskr. 1979/80:327.
[601] Falhbeck at 233.

> The six month period begins from the disfavoring or in other words, from the point of time when the discriminating act has been performed (compare Prop. 1978/79:175 at 60 *ff*.) The discriminating action can have consisted of that the employer has entered into an employment contract with another applicant or chosen another for training. That the person disfavored does not possess knowledge of this until later has in principle no significance for the calculation as to the period. It is then consequently in the interest of the person seeking employment to stay informed of the result of the application.[602]

However, when the original 1979 Equal Treatment Act was passed, there was no legal basis for a job applicant to compel an employer to produce information about persons hired. The right to gain access to such information was added later in 1985. The statute of limitations has been amended several times, mostly in response to requests by *JämO*. Currently, the length of the statute of limitations is dependent first on whether LAS or MBL is applicable to the dispute, then whether negotiations occur, and when they occur, whether they occur on the local and/or central levels, and whether the person is represented by a union. This is a tortuous path of legislation for a lawyer, not to mention a layperson. If the action brought is a result of notice of termination or dismissal, according to § 54 of the 1991 Equal Treatment Act, LAS § 40 on the statute of limitations for actions concerning declaration of invalidity is applicable, LAS § 41 for actions for damages or other claims of debt and § 42 regarding the lapse of right of action due to the statute of limitation. In other actions, MBL § 64 applies to the statute of limitations for requesting negotiations, MBL § 65 to instituting proceedings, MBL § 66 to an extension for a person not represented by an employee organization and MBL § 68 to the lapse of a right of action due to prescription. Currently there is no way to toll the statute of limitations in the law, and no right for the Court to grant exceptions to the rule on any basis.

That this is a difficult area of the law can be seen from a recent case brought by the Ombudsman against Race Discrimination ("DO") under both the 1991 Equal Treatment Act as well as the 1999 act against ethnic discrimination.[603] DO filed a complaint on behalf of the plaintiff on 17 March 2003. The chain of events was as follows: A job advertisement was posted with the last day of application 28 March 2002. The plaintiff applied for the job in March and a person was hired on 21 May 2002. Plaintiff called in June to ask if anyone had been hired, and received a negative answer. On 12 July 2002, plaintiff received a letter

[602] Prop. 1979/80:129 at 28. For a general discussion as to how the statute of limitations can begin to toll, for example, in a tort action, in the Swedish legal system before a plaintiff has knowledge as to the cause of the action, *see* Herbert Jacobson, PRESKRIPTIONS FUNKTIONER – FORDRINGSRÄTTSLIGA OCH ERSÄTTNINGSRÄTTSLIGA PROBLEM I KOMPARATIV BELYSNING (Visby 2005) at 533. *See also* AD 1981 no. 50 *Peter D in Onsala v. Färgmaterial, Inc. in Stockholm* (statute of limitations as to employee's claim as to unlawful termination commenced with the termination and not the knowledge that came later as to its unlawfulness).

[603] *See* AD 2004 no. 8 *DO v. Malmö Municipality.*

stating that the position had been filled. She wrote on 15 July 2002 to ask why she did not receive the position and received an answer the same day. She wrote again on 25 July 2002 for information about the candidate hired. On 12 August 2002 she received the response that the information was no longer in that person's possession but that another division had it. Plaintiff contacted that division and was told copies could not be sent out and that she would have to come in person to view the information. When she requested the address, she was informed that the information no longer existed. On 19 August 2002 she contacted her labor union, the Swedish Union of Local Government Officers, and informed them that she had not received the documents she requested. On 22 August 2002 she contacted DO. DO wrote to the employer and was informed that plaintiff had never requested the information. DO then wrote to plaintiff's labor union on 17 September 2002 to ask whether they intended to represent plaintiff. On 1 October 2002 the labor union informed DO they did not intend to represent plaintiff, the point of time at which DO argued to AD that the statute of limitations should begin to run. AD found that the labor union knew that the plaintiff did not receive the job on 19 August 2002, and it is from that point of time that the statute of limitations runs.[604] As such, DO's complaint was one month too late and could not be heard. As seen from this case, deciding the point of time according to MBL or LAS is difficult for legal professionals as well as governmental authorities, and even more difficult for a layperson contemplating making a complaint.

The statute of limitations with respect to claims under the Parental Leave Act regarding the right to take parental leave in accordance with MBL § 64 is four months commencing when a party has knowledge of the circumstance upon which the claim is based, and at the latest within two years after that the circumstance has occurred. If collective negotiations are to occur both locally and centrally, the central negotiations are to be invoked within two months after the local negotiations have been concluded. In accordance with MBL § 65, a lawsuit in those cases referred to in MBL § 64 must be filed within three months after the conclusion of negotiations. When both local and central negotiations have occurred, the period is to be calculated from the date that the central negotiations have been concluded. If the impediment to the negotiations did not depend upon the plaintiff, the period is to be calculated from the date that the negotiations at the latest would have been held. In the event the labor union has failed to observe these regulations, or chooses to not file a complaint, an individual who is or has been a union member and is affected by the dispute can file a complaint in accordance with MBL § 66 within one month after the above statute of limitations has expired. In a dispute in which the employee is not represented by the union, he or she has four months in which to file the complaint

[604] For a similar case, *see* AD 1977 no. 13 *Astrid Angantyr in Malmö v. Malmö Municipality.*

after receiving knowledge of the circumstances or at the latest two years after the circumstances occurred.

These three issues, the remedies available under the statutes, the award of trial costs and fees as well as the statute of limitations, have a significant impact on the bringing of claims and in themselves serve functions that can further or deter discrimination claims, aspects that have not been emphasized in the Swedish legislation.

3.7 The Discourses within Swedish Sex Discrimination Law

The system approach to comparative law as used in this work focuses on the texts, institutions, decision-making processes as well as the discourses existing in a system. The texts in the Swedish system, specifically the 1991 Equal Treatment Act and the 1995 Parental Leave Act, the case law of AD, as well as the collective agreements with respect to parental leave, have been presented above, as well as the institutions and decision-making communities in the form of the social partners, parliament, courts, the council and *JämO*. Weaving the discourses into whole cloth is more of a challenge in the Swedish system than in the other systems presented in this work. The discourses that have most permeated the entirety of this area of sex discrimination and parental leave is the Swedish Model, that the social partners are to regulate labor market issues and that the state is to maintain a neutrality, as well as the desire to achieve economic equality among social classes. This has led to legislation being introduced at a stage later than in the other systems in an environment characterized by a strong feeling of antipathy, not directed solely at the subject of the legislation itself, but also at the political interference within a model considered by the main actors (at that time predominantly men) as well functioning, remnants of which remain to date. It has also led to an attitude in Sweden towards legislation that is unique to the four systems examined in this work, that employment legislation is not really legislation as in the other systems, not mandatory in general and not effective or necessary at all.[605] This can be seen most recently in the response by the social partners to amendments made in 2006 to LAS for the purpose of protecting youths and women from the misuse of consecutive temporary employment terms by employers: "The problems that exist are better solved through collective agreements without specific legislation."[606]

The discourses of the legislator have been several. One aspect on the legislative level is in the international arena, with most of the legislation concerning women

[605] *See, e.g.,* Svante Nycander, *Håll politiken på avstånd*, editorial, LO-TIDNINGEN Nr. 18, 4 June 2004, who argues that the only effective discrimination provision in the legislation is that banning discrimination on the basis of union affiliation, as this was already anchored in the collective agreements thirty years prior to its inclusion in the LAS legislation in the 1970's.

[606] *See Nya las-reglerna förhandlas bort,* SVD NÄRINGSLIV, 19 May 2006 at 7.

adopted in an international context with the objective of fulfilling international requirements, regardless of the domestic situation or the specific needs of Swedish women. This begins with the prohibition of women working in mines and continues to the present day, with the amendments to the 1991 Equal Treatment Act as well as with the now mandatory maternal leave in the 1995 Parental Leave Act for better conformity with Community law. Another discourse has been the legislator's response to economic events as well as nativity rates, at times restricting and at other times expanding women's access to employment in accordance with the frequency of marriages as well as births.[607] There has also been a dialogue between the legislator and the Swedish Labour Court, with the legislator modifying both acts in response to the jurisprudence of AD or the requirements of Community law. In addition, the state, as in all these systems, has the dual role of legislator and employer, with over 50 % of Swedish women working in the public sector.

Several discourses also exist on the political level. Sweden is in the somewhat unenviable position of being perceived of as "first" in the area of equality, a position that arguably has invoked a sort of cognitive dissonance with respect to certain of the aspects in the legal system as discussed above. The political emphasis has been on complete equality between men and women, women assuming a larger share of paid work, men assuming a larger share of unpaid work. When this occurs, the hypothesis is that women will achieve true equality and *jämställdhet*. Discrimination does not exist as a separate phenomenon in itself within this analysis. The reality, as shown by the experiences of the labor union CF, has been different, with men now facing a greater amount of discrimination than before when taking a larger amount of parental leave. There is no incentive for men to assume a greater share of unpaid work, as this results in a sacrifice of wages and pensions.

As to the labor unions, the early decision to work for the rights of all workers, not specific groups, in essence subsumed issues specific to women within this larger context. Class was the central issue.[608] Issues concerning women, equal pay and equality in general, were not taken up by the labor unions until the threat of legislation existed, legislation that in any form is perceived as an encroachment of power. A labor union is primarily to safeguard the interests of its members. In certain situations, for example with wage differences or sexual harassment, the union has members on both sides of the issue. As to other issues,

[607] *See also* Calleman (1991) at 128.

[608] This can also be seen in the early academic literature, where a system of legislation as in capitalistic societies was rejected as "unthinkable" in Sweden in that equality between the sexes in Sweden must go hand in hand with equality between classes and freedom from capitalism, "[o]ne must fight for a societal system in which politics, and not economics, determines measures to achieve equality between the sexes and the classes, in other words, a fight for socialism." *See* Widerberg (1978) at 300.

such as parental leave, a predominantly male union perhaps does not perceive the same need to address the issue as a predominantly female union, as seen in the different solutions or lack thereof regarding parental leave. Of course, there are exceptions to every rule, such as the efforts by CF. The unions have been active in litigating issues with regard to sex equality and parental leave, but as noted by the mediation institution, the 1991 Equal Treatment Act cannot receive full effect until more is done on the local level.

JämO has been designated the agency to enforce the act, but originally had tied hands at least with respect to active measures in the private sphere. The amendments to the legislation and increased funding have strengthened the powers of *JämO*, however, there still are very real limits with respect to *JämO's* mandate. A case is to be brought if it will develop the case law in the area. There is as well the case law as decided by AD rarely finding for the plaintiff. In the case law itself, one sees several different discourses, the most prominent being the deference AD gives employers, much in line with the paragraph 23 rights stemming from the *Saltsjöbad* agreement. The case law on the whole comprises decisions based on an analysis of formal equality, with arguably only one case as decided early in the 1980's coming close to an approach of substantive equality, the case in which the Court compared the plaintiff's situation with that of male platoon officers'. Another discourse readily discernible in the case law is AD's endeavor to treat discrimination issues the same as other labor law issues, perhaps explaining why plaintiffs succeed more often on technical issues not calling for more expansive interpretations by the Court as do broader issues of discrimination.

Finally, there is the individual plaintiff who has experienced discrimination, facing the very real threat in the legal system of paying costs and fees not only for herself, but if unsuccessful, also for her employer. This is to be weighed against the amount of damages as awarded by AD, which have been modest in the area of sex discrimination. The individual plaintiff also finds herself with a statutory text that is almost impossible to decipher, the best example of which is the statute of limitations for claims that requires a legal expert to interpret. In addition, this same difficult statute of limitations requires immediate action, which as seen in the case brought by DO, is not always within the power of an individual to bring about, and no exceptions exist as to tolling this statute of limitations. In the event the plaintiff is unable to engage the union or *JämO* in the conflict, both organizations with limited resources, she in essence is left with little or no alternative under the existing legal system. These same components, texts, institutions, decision-making and discourses will now be examined in the next chapter with respect to the United Kingdom and its focus on a family friendly workplace.

Chapter Four: UK Sex Discrimination Legislation and the "Family Friendly Workplace"

The struggle of equality for women in the United Kingdom took a path different from both Community law, which focused already in the 1950's on sex discrimination as an impediment to free trade in the guise of social dumping, and from Sweden, which focused on maximization of female participation in the workforce during the 1970's. The main impetus for the passage of the Equal Pay Act 1970 and Discrimination Act 1975 was the United Kingdom's contemplated EC membership, and the Equal Pay and Equal Treatment Directives. Certain parallels can be seen in the developments in England and Sweden with respect to women's rights, with the UK Acts predating the Swedish 1979 Equal Treatment Act only by a few years, particularly when the five-year grace period of the former two is taken into consideration.

Other women's rights were also created rather parallel between the United Kingdom and Sweden. The right for women to vote in both countries was tied to expanding the same limited rights for men, with women householders (widows and unmarried women of property) in England receiving the right to vote in municipal elections in 1869, and all men and women receiving the right to vote nationally in 1918. Certain aspects as to education were also rather close in time, women granted the right to teach primary education in 1870 and the right to a university education in 1889 (but not at Oxbridge until 1923). However, certain significant deviations in comparison to the Swedish legal developments as to women's rights existed. England became industrialized almost a century prior to Sweden, and the abuses and tensions in the labor market also manifested themselves at an earlier date. Employment protections began to be legislated at earlier stages in England, beginning already in the 1840's with a prohibition against women working underground in 1842, women's night work in 1844, a ten hour

work day for predominantly female textile workers in 1847 and a ten hour day in general in 1867.[1]

As to more positive developments regarding women's rights in the United Kingdom, primary education was legislated earlier for both girls and boys in 1869. Women householders were granted the right to vote at school board elections and sit as members in 1870. The legal capacity of widows and unmarried women, *femme sole,* has never been circumscribed by English law. The English legal doctrine of coverture, however, limiting the legal rights of married women, *femme couverte,* gave husbands control of their wives' property. A series of Married Women's Property Acts, beginning in 1870 and culminating with the 1882 Act, abolished this doctrine, finally giving married women control of their own property.[2]

Great Britain was one of the major targets of Hitler's aggression during World War II, and women were forced to enter into the labor market to keep the economy going. Despite this significant entrance of women into the labor market in the 1940's, it was not until the 1970's that legislation as to sex discrimination was enacted in the form of the Equal Pay Act 1970 and the Sex Discrimination Act 1975.[3] These acts were followed by a period of relative legislative inactivity, again for almost twenty years, perhaps best explained by the attitude of the Government as exemplified by the Employment Minister's statement in 1992 regarding a prohibition concerning age discrimination: "More legislation is not the answer. … Sometimes we are accused of being reluctant Europeans because we do not believe that piling on regulation is the way forward. There are limits to the good that Governments can do though I sometimes think there are no limits to the harm."[4]

This reluctance to legislate gave way to a flurry of legislation beginning in the 1990's that has continued to date. The focus of the new legislation has been on facilitating the balancing of family and work. The UK legislative regulation shares the same bifurcation as in Sweden with respect to efforts to eradicate sex discrimination, legislation specifically prohibiting sex discrimination and mandating equal pay, as well as legislation guaranteeing certain rights as to parental

[1] *See* Jane Lewis and Sonya O. Rose, *"Let England Blush" – Protective Labor Legislation, 1820–1914* in PROTECTING WOMEN at 91.

[2] This historical account is taken in part from Pamela Clayton, SOCIAL CITIZENSHIP AND POLITICAL RIGHTS OF WOMEN IN THE UNITED KINGDOM (Helsinki 1997), available at: http://www.helsinki.fi/science/xantippa/wle/wle22.html.

[3] *See, e.g., Shields v. E. Coomes (Holdings) Ltd.* [1978] I.C.R. 1159, 1169 (Civ). The case also looks at the influence of the American Equal Pay Act of 1963 and federal case law on English law.

[4] Statement made by Employment Minister Michael Forsyth as cited by Bryan D. Glass, *The British Resistance to Age Discrimination: Is it time to follow the U.S. Example?,* 16 COMP. LAB. L. J. 491, 509 note 95 (1995) *citing* UK: Employment Department – *Ageism 'Shortsighted and Wasteful' Says Michael Forsyth*, Hermes-UK Government Press Release, 14 May 1992. The statutory prohibitions against age discrimination became effective as of 2006.

leave. With the passage of the 2006 Equality Act, all the discrimination legislation has been merged under this one umbrella, as currently is proposed in Sweden. As is the case in Sweden, UK legislation regarding discrimination and parental leave has been very much influenced by Community law. A marked difference, however, has been that in Sweden, efforts have been directed at the formal economic equality of women as independent from the family, women participating full-time in the labor market with individual based taxation, limited rights to pension sharing between spouses,[5] and virtually no right to spousal maintenance after divorce except in cases of destitution. The efforts in the United Kingdom are focused on women having the option of more flexible work, such as part-time work, to facilitate combining family and work, along with provisions for family taxation, pension sharing and spousal maintenance. This difference in focus, a reflection both of ideology and political aspirations regarding the role of women in society as a whole, can be seen as a partial explanation for the different focuses of the legislation, in Sweden towards full-time work, and in the United Kingdom towards facilitating part-time and more flexible work.

Another contrast between the United Kingdom and Sweden is that the movement towards fathers having the right to take parental leave as given by the legislation is very recent in the United Kingdom, again in part a result of Community law. The legislation regarding issues of sex discrimination and parental leave is discussed here first, followed by a discussion of the roles of the Employment Tribunals, the Equal Opportunity Office, now the Commission for Equality and Human Rights, and the labor unions. Access to justice issues are presented as addressed in the UK systems, with an identification of the discourses within in the system the conclusion of the chapter.

4.1 The Law Concerning Sex Discrimination and the "Family Friendly Workplace"

Two categories of laws are generally invoked regarding employment legislation in the United Kingdom, statutes and statutory instruments. Statutes are passed by the Parliament while statutory instruments are delegated legislation, the equivalent of regulations issued by governmental agencies as in the Swedish and American systems, in this area of law by the UK Secretary of State of Trade and Industry. The primary statutes of interest with respect to sex discrimination and

[5] For a comparison between Swedish and UK pension law with respect to spouses, *see* Brattström, in which she argues for changes in the Swedish system towards a sharing of pension rights between spouses in cases of divorce more in line with the UK system, as the current system in Sweden penalizes spouses working part-time, "forcing them to bear alone the consequence of the spouses' division of employment during their marriage." *Id.* at 330.

parental leave are the Equality Act 2006, the Employment Rights Act 1996 and the Work and Families Act 2006.

4.1.1 The Statutes

The statutes concerning sex discrimination originally stem from the 1970's, the Equal Pay Act 1970 mandating equal pay between women and men, and the Sex Discrimination Act 1975, prohibiting direct and indirect discrimination on the basis of sex. The Employment Rights Act 1996 also addresses issues of discrimination and family leave, further solidifying certain protections in employment. In addition, certain claims concerning sex discrimination have also been based on the Human Rights Act 1998, the UK enactment of the European Convention on Human Rights. The most recent acts, the Equality Act 2006 and the Work and Families Act 2006, can be seen as extensions towards greater protections against discrimination and rights to family leave. After presenting these statutes, their interrelationship as well as differences regarding enforcement, intertwined with a presentation of the case law, statutory instruments with respect to family leave and flexible working are discussed. Given the recent enactments of the Equality Act 2006 and the Work and Families Act 2006, the discussion focuses on the case law as developed under the older acts that are now designated equality enactments, to gain an understanding of the application of the law by the tribunals and Courts.[6]

4.1.1.1 The Equality Act 2006

The Equality Act 2006 designates a list of "equality and human rights enactments" which the Secretary of State is empowered to add, remove or change.[7] The primary equality and human rights enactments of interest regarding sex discrimination are the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Human Rights Act 1998, against which unlawful sex discrimination is to be assessed.[8] The Race Relations Act 1976, the Race Relations (Amendment) Act 2000 and the Disability Discrimination Act 1995 are also included.[9] Excluded from protection under these acts were sexual orientation, age and, outside Northern Ireland, religious and political opinions. These are now explicitly included in the protections granted under the act. "Unlawful" is defined in the Equality Act as an action that is contrary to a provision of the equality enactments.

[6] The Employment Rights Act 1996 and Statutory Instruments can be loaded down from http://www.opsi.gov.uk/.

[7] *Id.* at Sections 33(1) and 33(3).

[8] Equality Act 2006 Chapter 3 Part 1 Section 33.

[9] The Equality Act 2006 is available at the UK Office of Public Sector Information: http://www.opsi.gov.uk/acts/acts2006/20060003.htm.

The act also creates a "gender duty" for public authorities to promote gender equality and prevent sex discrimination in the exercise of public functions.[10] This gender duty is viewed as one of the most significant changes in discrimination law in the past thirty years. In force as of April 2007, it requires public authorities to pay due regard to promoting gender equality and eliminating sex discrimination.[11] Service providers and public sector employers are to design employment and services with the different needs of women and men in mind. Public bodies will have to set their own gender equality goals in consultation with their service users and employers, and to take the actions necessary to achieve them. As to the provisions of services, the public service providers will need to assess:

- The priority issues for women and men in the services provided;
- Whether women and men have different needs within some services;
- Whether women or men are deterred from using a service because of lack of childcare or an unsafe or unwelcoming environment; and
- Whether there are services that are more effectively delivered as women or men-only.

Public sector employers will also be required to look at their employment practices and consider the needs of all their staff, including those who identify as transgender or transsexual. A shift in enforcement emphasis has thus occurred. Instead of individuals prosecuting complaints about sex discrimination, the duty places the responsibility on public bodies to demonstrate that they treat men and women fairly and are taking active steps to promote gender equality, a form of gender mainstreaming.

Each of the discrimination statutes has been enforced by an independently working commission, the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission. The Equality Act 2006 dissolves these agencies and creates the Commission for Equality and Human Rights in 2007.[12] The new commission is to encourage and support the development of a society in which several objectives are set out, including where "people's ability to achieve their potential is not limited by prejudice or discrimination" and "each individual has an equal opportunity to participate in society."[13] The primary functions of the new commission are to monitor the effectiveness of the law and provide information, advice as well as educational oppor-

[10] *Id.* at Section 82.

[11] For more information on the gender duty, *see* the EOC's web page available at: http://www.eoc.org.uk/Default.aspx?page=17686.

[12] For more information on the new Commission for Equality and Human Rights, see its website available at: http://www.cehr.org.uk/.

[13] Equality Act 2006 Part I Sections 3(a) and (d).

tunities. The issuance of Codes of Practice has been retained, with the new commission empowered to issue codes of practice concerning equal pay, sex, race, disability, sexual orientation, religion and belief discrimination. The failure by a party to comply with a provision of a code does not render the party liable in criminal or civil proceedings, but the code is admissible as evidence in such proceedings and is to be taken into account by the court or tribunal if relevant. In addition, the new commission has the power to request information, conduct inquiries and investigations as to parties it suspects of unlawful conduct. The commission can serve an unlawful act notice upon parties it finds have committed an unlawful act, requiring them to draft an action plan to remedy the unlawful act or recommending an action to be taken by the party.

These changes show two lines of development: A stronger unified approach to discrimination, allowing for shared resources and knowledge in the authority designated to enforce the legislation. This can be seen as strengthening the concept of unlawful discrimination, as the emphasis now is being placed on the discriminatory behavior as opposed to the manifestations of the behavior, for example, whether the discrimination is on the basis of race or sex. Second, the groundwork laid in the case law on the human rights' approach to issues of discrimination can be seen to have had effect in the legislation, resulting in the placement of these issues on a higher, more constitutional level. It is no longer simply an issue of equal pay, but a violation of human rights, which raises the stakes for both employers and employees with respect to discriminatory behavior. As the case law and the Equal Pay Act 1970, Sex Discrimination Act 1975 and Human Rights Act 1998 are still relevant under the Equality Act 2006 as human rights enactments, their history, application and extensions in the case law will be briefly presented next.

4.1.1.1.1 The Equal Pay Act 1970

The Equal Pay Act 1970[14] was legislated as a result of the EC Equal Pay Directive.[15] It did not originally contain an explicit provision guaranteeing equal pay for equal work, this was added after an adverse ruling from the European Court of Justice in 1983.[16] The Equal Pay Act basically includes a prohibition against

[14] The Equal Pay Act 1970 came into force in 1975. The five year period was to give employers the chance to adjust their practices. Several of the amendments to the act have been based on Community law. For example, the Act did not originally cover businesses employing less than five persons. In Case C-165/82, *Commission v. United Kingdom* [1983] ECR 3431, Celex No. 61983J0165, the ECJ found this exception in conflict with Article 141 EC Treaty and the 1975 Act was amended by the Sex Discrimination Act 1986 accordingly, removing this exception. The Employment Act 1989 removed many of the protective restrictions that still existed with respect to women and also to younger persons.

[15] Rees, Mainstreaming Equality at 33.

[16] *See Ms S Villalba v. Merrill Lynch & Co Inc & Others,* Appeal No. UKEAT/0223/05/LA, Employment Appeal Tribunal dated 31 March 2006.

unequal pay in the form of an equality clause, enforcement mechanisms before the employment tribunal, exceptions, and the employer's duty to provide information as well as a "questioning of the employer," the comparable of a discovery device in the United States.

In the absence of an explicit equality clause in an employment contract, an "equality clause" is deemed to exist in each contract under which a woman is employed in Great Britain. The equality clause is defined as a provision relating to terms (whether or not concerned with pay) of a contract under which a woman is employed, and applied to redress imbalances existing in an employment contract between a man and a woman falling within four categories:

i. Like work;

ii. Work rated as equivalent by an analytical job evaluation study;

iii. Work that is proven to be equivalent outside such a job study; and

iv. Situations concerning wages while on maternity leave.

If a woman and a man have "like work" in the same employment, the equality clause functions so that any term that is or becomes less favorable to the woman is to be modified to equal that of the man's, or in the case of the omission of a term more favorable to the man, the term is to be included in the woman's contract. "Like work" is defined as where "her work and theirs is of the same or a broadly similar nature" and any differences are not of any practical importance.[17] The frequency of such differences, as well as their nature and extent, are to be taken into account in the comparison.

The same is true in the second category where a woman is employed in work "rated as equivalent" with that of a man in the same employment. A woman's work is "rated as the equivalent" of a man's if "her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees…"[18] Such study is referred to as a job evaluation study ("JES"). A focus by the courts and tribunals is whether the JES is analytical or non-analytical.[19] Examples of non-analytical JES methods include job ranking,[20] paired compari-

[17] Equal Pay Act 1970 at Sections 1(4)–(6).

[18] Equal Pay Act 1970 at Section 1(5).

[19] This information was obtained from the EOC website, available at: http://www.eoc-law.org.uk/Default.aspx?page=2668#Job_evaluation, *citing* the Employment Appeal Tribunal (EAT) in an appendix to their judgment in *Eaton Ltd. v. Nuttall* [1977] Ir.L.R. 71 (EAT).

[20] Job ranking is where each job is considered as a whole and then given a ranking in relation to other jobs. A ranking table is then drawn up and the ranked jobs grouped into grades. Pay levels then are fixed for each grade.

son[21] and job classification.[22] The common denominator for non-analytical methods is that entire jobs are compared. The non-analytical methods are seen as perpetuating the structural wage discrimination existing as they do not more closely look at the aspects of the job but simply the job as a unit. The analytical methods are seen as a better way to reach wage equity as they break out the components of the jobs, redistributing their importance in the structural scheme. Two examples of analytical methods are points assessment[23] and factor comparison.[24] The kinds of factors typically assessed include: knowledge; mental, interpersonal and communication skills; physical skills; initiative and independence; responsibility for supervision, direction and coordination of employees; responsibility for financial and physical resources; physical, emotional, and mental demands; and the quality of working conditions. The former three methods are becoming increasingly in disuse as they are regarded as not fulfilling the requirements of the Equal Pay Act.

The third category under the Equal Pay Act is where a woman is employed for work not falling within the first two categories, but "in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value" to that of a man in the same employment. The third category is the same as the second except that the woman's job has not been given an equal value in a study.

The fourth category was added in 2005 to be in conformance with Community law. It governs situations concerning pay raises and bonuses while on maternity leave and upon return from maternity leave. According to Section 1(2)(d) of the Act, if a woman is on maternity leave, and during that period would have been entitled to an increase in salary, pay and/or bonus if she had not taken the leave, the increase is to be taken into account when determining maternity related pay. In addition, any calculations of pay with respect to the woman

[21] With paired comparisons, each job is compared as a whole with each other job in turn and points (0, 1 or 2) awarded according to whether its overall importance is judged to be less than, equal to or more than the other. Points awarded for each job are then totaled and a ranking order produced.

[22] With job classification, the grading structure is established first and individual jobs fitted into it. A broad description of each grade is drawn up and individual jobs considered typical of each grade are selected as benchmarks. The other jobs are then compared with these benchmarks and the general descriptions are placed in their appropriate grade.

[23] Points assessment reduces each job into a number of factors and points are awarded for each factor according to a predetermined scale. The total points decide a job's ranking. The factors can be weighted.

[24] Factor comparison uses the same principles as points assessment but only with a limited number of factors, such as skill, responsibility and working conditions. A number of key jobs are selected because their wage rates are generally perceived as fair. The proportion of the total wage attributable to each factor is then calculated and a scale produced showing the rate for each factor of each key job. The other jobs are then compared with this scale, factor by factor, so that a rate is finally obtained for each factor of each job. The total pay for each job is reached by adding together the rates for its individual factors.

returning to work have to take into consideration any pay increases she would have received if she had not taken maternity leave. This provision neutralizes the taking of maternity leave regarding pay, basically allowing the leave to be treated as time worked, a legislative solution similar to the contractual one found in the Swedish banking sector's collective agreement.

Depending upon which of the four categories the unequal pay claims falls within, any offered justification for the different treatment has a differentiated burden of proof. If the inequality of pay falls within the first two categories, "like work" or "work rated as equivalent," the employer must prove that the variation is genuinely due to a material factor which is not the difference of sex and that factor *must* be a material difference between the woman's and the man's situation. If the inequality falls within the third category, "in terms of demands," the employer has to prove that the variation is genuinely due to a material factor not the difference of sex, and that factor *may* be such a material difference. The genuine material factor must be justified by objective criteria.[25]

The Equal Pay Act 1970 has been criticized for difficulties in application arising due to the inclusion of a male comparator. The act has been amended several times to try to address these problems, but as can be seen from recent case law, hurdles still exist comparable to those found in Sweden, making the implementation of the principle of equal pay difficult. Other issues include defining what constitutes pay, a development comparable to that in the Community law regarding Article 141 EC Treaty, as well as how pay is to be calculated as between a plaintiff and a male comparator.[26] Another problematic issue concerning the male comparator has been discrimination on the basis of pregnancy. A recent Court of Appeal's decision, *Alabaster v. Barclays Bank Plc,* issued after receiving a preliminary ruling from the ECJ,[27] found that in accordance with Community law, less favorable treatment in comparison with a male comparator need not be proven in cases of pregnancy.[28] The Court in *Alabaster* found that the only

[25] *Ms A Sharp v. Caledonia Services Ltd*, No. UKEAT/0041/05/ZT, Employment Appeal Tribunal, 2005 WL 29999767 at 21(6).

[26] *See, e.g., Degnan and other v. Redcar and Cleveland Borough Council*, Case No. A2/2004/1746/EA TRF (Civ), 2005 WL 1410008 with respect to the treatment of an attendance allowance of male comparators and *Fletcher and Others v. NHS Pensions Agency and Another* [2005] I.C.R. 1458 (Civ), whether bursary payments to midwife trainees terminated during maternity absence constituted pay.

[27] *Alabaster v. Woolwich Plc* (Case – 147/02) [2005] I.C.R. 695 (Civ).

[28] *Alabaster v. Barclays Bank Plc (Formerly Woolwich Plc) and Another* [2005] I.C.R. 1246 (Civ). The plaintiff argued inequality in pay under the Employment Rights Act 1996, instead of the Equal Pay Act 1970 and the Sex Discrimination Act 1975, the first such argument of its kind. On appeal, plaintiff further honed her argument, maintaining that the Community principle of equality in addition to the principles of equivalence and effectiveness entailed that the right to full maternity pay fell within the ambit of Article 6 of the ECHR as adopted in the UK in the Human Rights Act.

appropriate way to proceed when faced with the paradox pregnancy presented was to "*disapply* those parts of section 1 of the Equal Pay Act 1970 which impose the requirements for a male comparator (emphasis added)."[29] In contrast to this decision is another from 2005, in which the Employment Appeal Tribunal found that a woman was not entitled to receive full pay as though she had actually worked while on maternity leave. A proportionate reduction to reflect absence on ordinary maternity leave is permitted as the Tribunal interpreted "Luxembourg jurisprudence."[30] The question can be raised whether this case is still good law after the 2005 amendments to the Equal Pay Act 1970.

4.1.1.1.2 The Sex Discrimination Act 1975

The Sex Discrimination Act 1975 prohibits direct and indirect discrimination against women and men. It consists of eight parts, with direct and indirect discrimination defined in Part I and with Part II addressing employment discrimination.[31] A person directly discriminates against a woman if he treats her less favorably than he treats or would treat a man. Two alternative definitions of indirect discrimination are given in the first section of Part I, the second applicable to employment. Accordingly, indirect discrimination exists in employment where a person discriminates against a woman if a person:

> [A]pplies to her a provision, criterion or practice which he applies or would apply equally to a man, but:
>
> (i) Which puts or would put women at a particular disadvantage when compared with men;[32]
> (ii Which puts her at that disadvantage; and
> (iii) Which he cannot show to be a proportionate means of achieving a legitimate aim.

This provision is to be read as applying equally to the treatment of men as of women except in cases of pregnancy or childbirth. Protections against discrimination on the basis of gender reassignment and marital status are also incorporated within Part I of the Act.

[29] *Id.* at para. 37.

[30] *See Hoyland v. Asda Stores Ltd* [2005] I.C.R. 1235 (EAT) at para. 17.

[31] The eight parts are: Discrimination to which Act Applies (Part I), Discrimination by Employers (Part II), Discrimination in other fields: Education as well as Goods, facilities or services (Part III), Other unlawful acts including discriminatory practices, discriminatory advertisements and instructions and pressure to discriminate (Part IV), General Exceptions from Parts II to IV (Part V), Equal Opportunities Commission (Part VI), Enforcement (Part VII) and Supplemental Provisions (Part VIII).

[32] This standard was lowered by the amendment made in October 2005. The previous requirement under the Act was "would be to the detriment of a considerably larger proportion of women than of men…" *London Underground* as discussed below was decided under this higher, previous standard.

Several new provisions were added to the Sex Discrimination Act by 2005 amendments, including Part 1 Section 3a concerning "Discrimination on the ground of pregnancy or maternity leave." According to this section, discrimination exists if a person at a time in a protected period and on the ground of the woman's pregnancy treats her less favorably than he would have had she not been pregnant. A male comparator consequently is not necessary. The protected period begins each time a woman becomes pregnant and ends at the end of her period of ordinary or additional maternity leave, or in the absence of any right to maternity leave, two weeks after the birth of a child, or when she returns to work. Discrimination also occurs if an employer treats a woman less favorably for exercising or seeking to exercise her statutory right to maternity leave or her rights in accordance to Section 72(1) of the Employment Rights Act 1996. In a recent case, an employee informed her employer she was pregnant who then dismissed her.[33] At the hearing, the employer claimed that she was dismissed because she was not acquiring the relevant experience and that her performance was not satisfactory. The Employment Appeal Tribunal stated that "[o]ne could well understand anyone, let alone an employment tribunal well used to specious reasons as cover for discrimination, to conclude that the real reason was something different," finding for the plaintiff.

Discrimination by way of victimization, or retaliation, is also prohibited in Part I Section 4 of the Act. The 2005 amendment adds for the first time a prohibition against sexual harassment as well as other forms of harassment in Part 1 Section 4a. Protections against discrimination are even extended to fixed term contract workers, not simply employees, as well as public office holders and persons seeking vocational training. Discrimination with respect to accepting a person as partner in a partnership is also prohibited. Labor unions, qualifying/certifying bodies, employment agencies, the police, prison officers and the Secretary of State are also prohibited from engaging in discriminatory conduct.

According to Part II, it is unlawful for an employer at an establishment in Great Britain to discriminate against a woman when offering employment, in terms of employment offered, or by refusing to employ her. It is also unlawful to discriminate in a promotion, transfer, training, benefits, dismissals or rights and/or memberships as to occupational pension schemes. Certain exceptions are made for maternity leave and remuneration. Exceptions are also made where sex is a genuine occupational qualification for the job, or any promotions, transfers or training related to such employment. Being a man is a genuine occupational qualification for a job only where the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or reasons of authenticity such as with actors, or the need to preserve decency or privacy, for example, in jobs involving physical contact or states of undress.

[33] *See Lana v. Positive Action Training in House (London) Ltd.* [2001] Ir.L.R. 502.

In a claim of direct discrimination, plaintiff must prove a less favorable treatment and the claim is framed as a *but for* question, "would the woman have been treated in the same way *but for* the fact that she was a woman."[34] The intention or motive of the respondent is not a necessary condition of liability. The *but for* test is to avoid complicated questions relating to concepts such as intention, motives, reason or purpose.[35] The tribunal is to determine whether sex was an effective but not sole cause, whether direct evidence existed as to the grounds, whether there was a non-discriminatory reason and the circumstances of the situation. Statistical information may be used to infer discrimination. Where there is a total absence of a minority in a workplace, discrimination can be inferred.[36] The absence of records with the employer concerning the presence of minorities in the work place can also be used to infer discrimination.[37] Direct unlawful discrimination cannot be justified.

The three basic elements to a claim of indirect discrimination under the act are disparate impact, disadvantage and not proportionate. Defining the pool for determining disparate impact under the previous standard of "considerably larger proportion of women" could make or break the complainant's case. A movement towards the present statutory wording, as well as a standard of access to a family friendly workplace, can be detected in the 1999 decision in *London Underground v. Edwards*.[38] In *London Underground,* the employer implemented a new flexible shift system beginning at 4:45 a.m. and including Sundays. Under the new system, Susan Edwards, a single mother, could not work and care for her child without working significantly longer shifts for no additional pay. When negotiations between management and the unions failed to resolve the problem, she resigned and claimed unlawful sex discrimination.

The Industrial Tribunal[39] upheld the complaint, finding that a *prima facie* case of indirect discrimination had been established under the first section of Part I of the Sex Discrimination Act 1975 as a considerably smaller proportion of female single parents than male single parents could comply with the rostering condition. The tribunal found that the condition was not justifiable, given that the employer had contemplated a scheme catering to the needs of single parents. The employer appealed on the grounds that a pool consisting of only those train operators who were single parents was the wrong pool for comparison. The Second Industrial Tribunal[40] found that the correct pool for comparison was male and female train operators. Edwards was only one of the twenty-one female train

[34] *See* Camilla Palmer, et al., DISCRIMINATION LAW HANDBOOK (LAG 2002) at § 3.7.
[35] *See James v. Eastleigh BC* [1990] 2 AC 751; [1990] Ir.L.R. 307.
[36] *See Marshall v. F. Woolworth & Co. Ltd.,* COIT 1404/80, ET.
[37] *See* Palmer at § 3.77.
[38] *London Underground Ltd v. Edwards* [1999] I.C.R. 494 [1998] Ir.L.R. 364 (Civ).
[39] Now the "Employment Tribunals."
[40] Now the "Employment Appeal Tribunal."

operators who positively complained that she could not comply with the new arrangements, meaning that the percentage of women who could comply was 95.2 %. However, the tribunal concluded that "taking into account the number of male train operators as compared to the very few female train operators…and also added to the fact that it is common knowledge that females are more likely to be single parents and caring for a child than males, it is clear that this was a condition or requirement that a 'considerably smaller' number of females could comply with." The tribunal went on to find that the employer had failed to justify the indirect discrimination, stating that the employer "could have easily, without losing the objectives of their plan and reorganization, have accommodated the applicant who was a long-serving employee."

On appeal, the Court of Appeal affirmed the Tribunal's finding of indirect discrimination, stating that it was not appropriate to lay down a rule of thumb defining what amounts to a proportion which is "considerably smaller" for purposes of determining the potentially discriminatory nature of a requirement or condition. The Court of Appeal also stated that the Tribunal was correct in using its general knowledge and expertise to look outside the pool for comparison, and to take into account the national figure that ten times as many women as men who are single parents have care of a child. It has been argued that the reasoning applied by the tribunal can be viewed as changing the analysis under the Sex Discrimination Act from indirect discrimination to almost a form of direct discrimination, as the lower court comes "perilously close to crossing the line between prohibiting unlawful discrimination and imposing positive duties on employers to act in relation to particular groups."[41] As seen below with the regulations issued contemporaneously and later, the tribunal seems to have anticipated the future direction of UK law. Under the wording of the present requirement in Section 1(2)(b)(ii) "which puts or would put women at a particular disadvantage when compared with men," the judgment in the case seems natural, however, it should be seen as a departure from the then current case law with respect to disparate impact.

In addition to easing the burden of proof for the plaintiff as to disparate impact, the new wording of the statute also increases the employer's burden of proof regarding justifications. Previously, the employer could present objective justifications if the employer proved that the proposal was justifiable irrespective of the sex of the person to whom it is applied. In assessing the justification, the case law already mandated that the tribunal assess the justification in accordance with the principle of proportionality, requiring it to take into account the reasonable needs of the business. In a recent case, a pregnant worker requested to be allowed to work part-time or job share, which request was denied by the employer. She took maternal leave during which defendant employer underwent

[41] Conaghan at 6.

a restructuring. Her position was declared redundant and she was terminated based on the redundancy. She sued for discrimination under the Sex Discrimination Act 1975 and prevailed, the tribunal awarding her £ 60000 in damages, including £ 14000 plus interest for injury to feelings. The Court of Appeal found that though the Tribunal had misunderstood some of the evidence, it had rested its judgment as to whether the practice was reasonably necessary after a fair and detailed analysis of the working practices and business considerations involved.[42] The Act now specifically states that the employer must show it to be "a proportionate means of achieving a legitimate aim."

4.1.1.1.3 Human Rights Act 1998

The third equality and human rights enactment under the Equality Act 2006 of interest here is the Human Rights Act 1998, the United Kingdom's enactment of the European Convention on Human Rights.[43] Though it does not specifically address the issue of sex discrimination in the workplace, several of the articles have been interpreted extensively to grant protection of certain fundamental rights, particularly Article 8 regarding the right to respect for private and family life as well as home. According to Article 14, the enjoyment of the rights granted in the Convention are to be secured without discrimination on the basis of "any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." In the adoption of the Convention, the provision was added in Section 3 that primary and secondary legislation "must be read and given effect in a way that is compatible with the Convention rights." Claims of sex discrimination and/or equal pay are often combined with claims under Community law as well as based on fundamental rights in accordance with the Convention as seen in *Alabaster*. This combination of claims with respect to discrimination can be seen as culminating in the Equality Act 2006, in which discrimination is specifically designated a human rights violation.

4.1.1.2 The Employment Rights Act 1996

The second avenue of rights for women concerning combining work and family is found in the Employment Rights Act of 1996, a mammoth piece of legislation spanning over two hundred pages, regulating employment law issues. It covers a wide spectrum of aspects of employment, from the commencement of employment and the right to an employment particular, or employment agreement, in Part I, the duration of employment as covered by Parts II–VIII, limitations in the employers' right to make wage deductions in Part II, guarantee payments in

[42] *Hardy v. Hansons Plc v. Lax* [2005] I.C.R. 1565 (Civ).

[43] Sweden has also adopted the ECHR as legislation, but to date, it has not been cited by the Swedish Labour Court as a recognized basis for a sex discrimination claim.

Part III, Sunday working in Part IV, protected disclosures in Part IVA, protection from suffering detriment in employment as covered by Part V, time off from work in Part VI, suspension from work as in Part VII, parental leave and flexible working in Part VIII, and finally the termination of employment in Parts IX–XII, termination of employment in Part IX, unfair dismissal in Part X, redundancy payments in Part XI and insolvency of employers in Part XII. Part XIII contains miscellaneous provisions and Part XIV governs interpretation.

The focus here is on the provisions regarding parental leave as well as flexible working, found mainly in Part VIII. The groundwork for Part VIII can already be seen in Part V, *Protection from Suffering Detriment in Employment.* According to Section 47C, an employee has the right to not be subjected to a detriment from his/her employer for a reason relating to exercising rights associated with flexible working, pregnancy, childbirth or maternity, ordinary, compulsory or additional maternity leave, parental leave or paternity leave, as well as taking time off to care for dependents including a spouse, child, parent or person living in the same household who is not an employee, tenant, lodger or boarder. Complaints as to suffering a detriment are to be taken to an employment tribunal. The statute of limitations for such complaints is three months, unless the tribunal finds that it was not reasonably practicable for the complaint to be presented before the end of the three-month period.

A right to paid time off for ante-natal care is prescribed in Part VI concerning time off from work, Sections 55–56, for a pregnant woman who has made an appointment to receive ante-natal care based on medical advice. If the employer so requests, the woman is to provide a certificate of pregnancy and proof of the appointment. Time off for dependants is also protected in Section 57 when needed in order to make arrangements for the provision of care because of unexpected disruptions or termination of arrangements for care of a dependant, or to deal with an unexpected incident involving a child, during hours in which an educational establishment is responsible for the child. The employee has the obligation to inform the employer of the reason for the absence as soon as reasonably practicable as well as the expected length of absence. Violations of both of these rights can be taken to the Employment Tribunal.

A provision for suspension of work on maternity grounds is set out in Sections 66–68 of Part VII. Suspension exists only if the employee continues to be employed by her employer, and is not provided work or does not perform the work she normally performs. If the employer has suitable alternative work available, the employee has the right to be offered this work before being suspended from work on maternity grounds. She has a right to remuneration by her employer while she is so suspended.

Parts VIII and VIIIA are the heart of the provisions with respect to family leave and flexible working. Part VIII sets out maternity leave, parental leave, and paternity leave. Maternity leave is divided into three categories: ordinary maternity

leave (Section 71), compulsory maternity leave (Section 72) and additional maternity leave (Section 73). Ordinary maternity leave is taken in accordance with the regulations as set out by the Secretary of State, but not for a period of less than 18 weeks, to be taken at the discretion of the employee. An employee exercising her right to ordinary maternity leave is entitled to the benefit of the terms and conditions of employment which would have applied if she had not been absent, is bound by any obligations arising under those terms and conditions, and is entitled to return from leave to a job of a prescribed kind, however, remuneration is exempted from the terms and conditions. Compulsory maternity leave is the category of leave adopted to conform with the EU requirements of obligatory maternal leave in accordance with the EC Pregnancy Directive. The compulsory leave is not to be less than two weeks and is to fall within an ordinary maternity leave period. An employee who satisfies the prescribed conditions is not permitted to work during a compulsory maternity leave on the penalty of a fine to the employer. Additional maternity leave is also governed by the regulations as adopted by the Secretary of State with no minimum requirements as to length.

The Secretary of State is also authorized under Section 76 to issue regulations concerning parental leave for a period of at least three months. Parental leave is to be taken with the same protections as set out for maternity leave. A complaint regarding parental leave is to be taken to an Employment Tribunal within three months of the date of the action or another such period that the tribunal finds reasonable. The tribunal can award compensation that is to be just and equitable in all circumstances taking into account the employer's behavior and the employee's loss. Section 80A authorizes the Secretary of State to make regulations entitling an employee to be absent from work on paternity leave for the purpose of caring for a child, or supporting the mother, for a period of at least two weeks to be taken within 56 days after the child's birth.

The right to request contract variation, flexible working, is set out in Part VIIIA. An employee may apply to his/her employer for a change in the terms and conditions of employment relating to the hours required, the time required, the location of work as between the employee's residence and the employer's place of business, or other aspects as specified by the Secretary of State in the appropriate regulations. The purpose for the change must be to enable the employee to care for a child and the application must be made before the child reaches the age of six or if the child is disabled, eighteen. The employer can refuse the application on the following grounds: the burden of additional costs, detrimental effect on the ability to meet customer demand, inability to re-organize work among existing staff, inability to recruit additional staff, detrimental impact on quality or performance, insufficient work, planned structural changes or other grounds as specified by Secretary of State. Time periods are set out in which the employer must address and answer the request. Complaints are to be

brought to an Employment Tribunal within three months or otherwise as the tribunal finds reasonable. The tribunal may order reconsideration of the application or award damages with a ceiling as determined by the number of weeks' pay set out by the Secretary of State's regulations.

The remaining parts of the Employment Rights Act 1996 concerning the cessation of employment tangentially touch upon issues of family leave. In Part IX, termination of employment, the requirement of "ready and willing to work" is not applicable to those absent due to pregnancy or childbirth, or on adoption leave, parental leave or paternity leave. An employee has the right to a written statement of dismissal giving the particulars of the reasons for a dismissal if she is dismissed while pregnant or after childbirth if her ordinary or additional maternity leave period ends by reason of the dismissal. Part X sets out the right for an employee not to be unfairly dismissed by his/her employer. Being dismissed for taking leave for family reasons, including pregnancy, childbirth or maternity, ordinary, compulsory or additional maternity leave, ordinary or additional adoption leave, parental leave, paternity leave or time-off to care for dependents, is regarded as unfair dismissal in accordance with Section 99. Also included in the category of unfair dismissal is dismissal due to refusal to work in contravention of the Working Time Regulations 1998 (Section 101A), the assertion of a statutory right (Section 104), making an application for or exercising rights with respect to flexible working (Section 104C), as well as redundancy of part-time workers in violation of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Complaints of unfair dismissal are to be taken to an Employment Tribunal within three months or such a period as the tribunal finds reasonable. The tribunal may issue an order for reinstatement, for re-engagement or for damages after consultation with the complainant.

Protections for women pregnant or taking maternity leave have been recognized consistently by the courts in the United Kingdom. The House of Lords, in a situation in which a pregnant woman was found redundant, found the action to be an unfair dismissal, as an employer cannot make an absence due to pregnancy and maternity leave a factor that determines the pregnant woman's dismissal. Noting that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her while she is absent from work in order to have a baby, the House of Lords stated that "this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the work place."[44]

[44] *Clayten v. Vigirs* [1989] I.C.R. 713, 717 (EAT).

4.1.1.3 The Relationships Between the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Employment Rights Act 1996

An issue that can arise with respect to an unequal pay claim is under which statute the plaintiff should bring her claim, under the Equality Act 2006 and then either the Equal Pay Act or the Sex Discrimination Act, or under the Employment Rights Act. The relationships between these statutes, and the avenues available for claims, are complex. Lord Denning stated that the approach:

> [I]s like fitting together a jig-saw puzzle. The pieces are jumbled up together in two boxes. One is labeled Sex Discrimination Act 1975. The other, the Equal Pay Act 1970. You pick up a piece from one box and try to fit it in. It does not. So you try a piece from the other box. That does not fit either. In despair you take a look at the picture provided by the makers. It is the Guide issued by the Home Office. Mr. Lester recommended especially paragraph 3.18, which he says will show the distinction between the two acts. Even that will not make you jump with joy. You will not find the missing pieces unless you are very discriminating.[45]

In the words of Lord Denning, a third box was thrown into this mix almost 20 years after this statement, the Employment Rights Act 1996. The relationships of the jurisdictions of these three acts have been set out by statute, but also analyzed in the case law.

4.1.1.3.1 The Relationship Between the Equal Pay Act 1970 and the Sex Discrimination Act 1975

The relationship between the Equal Pay Act 1970 and the Sex Discrimination Act 1975 is set out in Part II, Sections 6 and 8 of the latter act. Case law has found these statutes to be mutually exclusive. If the less favorable treatment relates to the payment of money regulated by a contract of employment, only the Equal Pay Act can apply. Only the Equal Pay Act is applicable if the employee is treated less favorably than an employee of the other sex who is doing the same or broadly similar work, or whose work has been given an equal value under job evaluation, and the less favorable treatment relates to some matter which is regulated by the contract of employment of either of them.

If the less favorable treatment relates to a matter not included in a contract, either expressly or by virtue of the Equal Pay Act, only the Sex Discrimination Act is applicable. If the less favorable treatment relates to a matter other than the payment of money in a contract, and the comparison is with workers who are not doing the same or broadly similar work, or work that has been given an equal value under job evaluation, only the Sex Discrimination Act is applicable. If the complaint relates to a matter other than the payment of money regulated by an employee's contract of employment, but is based on an allegation that an employee of the other sex would be treated more favorably in similar circum-

[45] *Shields v. E. Coomes (Holdings) Ltd.* [1978] I.C.R. 1159 (Civ) at 1169.

stances, i.e. it does not relate to an actual comparator, only the Sex Discrimination Act is applicable.[46]

4.1.1.3.2 The Relationship Between the Employment Rights Act 1996 and the Equal Pay Act 1970

A comparison of the rights that arise under the Employment Rights Act 1996 ("ERA") and the Equal Pay Act 1970 was recently made by the Court of Appeal in *Alabaster*.[47] The Court of Appeal looked at the following as significant (most of which are defined in this work as access to justice issues) for a plaintiff asserting rights between the two acts:

(i) Time limits

(a) ERA: three months, subject to a power to extend time where it is not reasonably practicable to present a claim within time;
(b) Equal Pay Act: six months from the date of termination of employment, except in cases of "concealment" and "disability."

(ii) Composition of the tribunal

(a) ERA: chairman sitting alone, subject to a discretion contained in section 4(5) of the Employment Tribunals Act 1996;
(b) Equal Pay Act: full tribunal.

(iii) Interest to date of judgment

(a) ERA: no interest payable from the date of the unauthorized deduction until judgment;
(b) Equal Pay Act: interest payable from half way between the date of contravention and the date of judgment at a current rate of 6 %.

(iv) Interest from date of judgment

(a) ERA: interest payable at judgment rate from 42 days after the relevant decision;
(b) Equal Pay Act: interest payable at judgment rate from the relevant decision (unless full award is paid within 14 days after that date).

(v) Free legal advice and legal services

(a) ERA: Legal Services Commission funding not available. No assistance from the Equal Opportunities Commission ("EOC");
(b) Equal Pay Act: advice and assistance available from the EOC.

(vi) Provision for service of a statutory questionnaire

(a) ERA: no provision;
(b) Equal Pay Act: provision under section 78 of the Act and the Equal Pay (Questions and Replies) Order 2003 (SI 2003/722), which prescribes that an adverse inference may be drawn from any failure to respond, or an evasive response.

[46] See *Phillips P and members in Peake v. Automotive Products Limited* [1977] I.C.R. 480 (EAT).
[47] *Alabaster v. Barclays Bank Plc (formerly Woolwich Plc) and Another* [2005] I.C.R. 1246 at 1256–1257 (Civ).

(vii) Victimization during continuing employment

(a) ERA: no protection;
(b) Equal Pay Act: protection against discrimination (including victimization) under Section 4 of the Sex Discrimination Act 1975.

(viii) Victimization as a reason for dismissal

(a) ERA: dismissal of an "employee" for alleging that his/her statutory rights have been infringed, including a breach of Section 13 of the ERA, constitutes unfair dismissal;
(b) Equal Pay Act: dismissal of both an "employee" and a "worker" by reason of victimization constitutes unlawful discrimination.

(ix) Victimization post-dismissal

(a) ERA: no protection;
(b) Equal Pay Act: post-employment victimization of both "employees" and "workers" constitutes unlawful discrimination.

(x) Burden of proof

(a) ERA: the burden is on the claimant to establish an unlawful deduction;
(b) Equal Pay Act: the burden of showing there has been no sex discrimination passes to the respondent once a *prima facie* case is established. Back pay is limited to six years under both an ERA claim and an Equal Pay Act claim, so that there are no differences between the two regimes in that respect.

The court found that the difference in remedies available between the two acts was not sustainable, particularly in light of ECJ case law: "We are here undoubtedly in Article 141 territory, and if section 13 of the ERA represented the only way in which Mrs Alabaster could enforce her European Community rights, she would be left with a remedy under national law which did not comply with all the Community principles of equality, equivalence and effectiveness."[48] The court decided to "disapply" the requirement of a male comparator as found in the Equal Pay Act 1970, giving plaintiff the benefit of the statute most beneficial with respect to her case as concerned statutes of limitations, burden of proof, and discovery devices.

Alabaster raises questions as to future interpretation of the applicability of these acts with each other. The six month period for the statute of limitations for Section 2(4) of the Equal Pay Act 1970 has been found by the ECJ to be compatible with Community law as it did not make the exercise of rights under Article 141 EC Treaty impossible or excessively difficult, and did not breach the Community principle of equivalence.[49] The reasoning of the court in *Alabaster,* that the best of procedural alternatives ought to be available to the plaintiff,

[48] *Id.* at 1257.
[49] Case C-78/98 *Shirley Preston and Others v. Wolverhampton Healthcare NHS Trust and Others, and Dorothy Fletcher and Others v. Midland Bank plc.* [2000] ECR I-3201, Celex No. 61998J0078.

would entail that the Employment Rights Act 1996, with a three month statute of limitations, the absence of the right to question the employer as well as the shift in burden of proof to the employer in a *prima facie* case, would be the last alternative chosen between the three acts.

4.1.1.3 The Work and Families Act 2006

In addition to extending the prohibitions against discrimination in the Equality Act 2006, the first prong of the legislative campaign concerning economic equality for women, one also sees a further strengthening of the second prong as discussed above, the right to combine family and work, in the Work and Families Act 2006.[50] It extends the period of Statutory Maternity Pay and Adoption Pay from 26 to 39 weeks and also allows the Ordinary Maternity Leave and Additional Maternity Leave to be taken for a combined 52 weeks without any length of service requirement. Entitlements to additional paternity leave now allow fathers to take 26 weeks leave as well as strengthening the rights of fathers to more closely mirror those of mothers. These provisions introduce new rights for mothers to transfer part of their Statutory Maternity Pay or Maternity allowance to fathers. Employees will be able to go into work for up to ten 'Keeping in Touch' days without losing entitlement to benefits.

4.1.2 The Statutory Instruments Regarding the Family Friendly Workplace

The Secretary of State of Trade and Industry is empowered to issue statutory instruments, regulations, as to the enactment and enforcement of the above acts. Those statutory instruments of interest here can be placed into three categories, the regulations on family leave (maternity, parental and paternity), flexible working and enforcement mechanisms. The first two are discussed in this section, while the regulations on enforcement mechanisms are discussed below with respect to the Employment Tribunals, the Commission of Equality and Human Rights and the Secretary of State.

4.1.2.1 The Regulations Concerning Maternity, Parental and Paternity Leave

Two main statutory instruments address family leave, the Maternity and Parental Leave etc Regulations 1999 and the Paternity and Adoption Leave Regulations 2002 as well as the statutory instruments governing the rate of pay for each respectively.

The Maternity and Parental Leave etc. Regulation 1999 as amended governs entitlement to statutory ordinary maternal leave for a period of 26 weeks, additional maternity leave of up to 26 weeks, compulsory maternity leave for a two-

[50] The Work and Families Act 2006 can be obtained from the UK Office of Public Sector Information available at: http://www.opsi.gov.uk/acts/acts2006/20060018.htm.

week period and parental leave of up to thirteen weeks. An employee is entitled to ordinary maternity leave upon the condition that no later than 28 days before her due date she notifies her employer in writing of her pregnancy, the due date and when she intends her ordinary maternity leave period to start, as well as if requested, produces a certificate as to the due date. A qualification requirement for additional maternity leave had been that the employee be entitled to ordinary maternity leave and had been continuously employed for a period of not less than 26 weeks, but this has been removed by the Families and Work Act 2006.

The Paternity and Adoption Leave Regulations 2002 were amended by the Statutory Paternity Pay and Statutory Adoption Pay (General) and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates)(Amendment) Regulations 2006, which can also be seen as a result of the Work and Families Act 2006. They establish paternity leave as well as accompanying requirements and rights. A male employee is entitled to one or two weeks paternity leave with Statutory Paternity Pay, and also 26 weeks Additional Paternity Leave, if the biological father of the child, spouse or partner to the child's mother, or if he expects to have responsibility for the upbringing of the child. The Additional Paternity Leave is eligible for a cash benefit only if the mother has cash benefits regarding her leave outstanding.

Both mothers and fathers returning to work after a period of leave, or a period of parental leave of less than four weeks, are entitled to return to the same job. An employee returning to work after a period of additional maternity leave, or a parental leave of more than four weeks, is entitled to return to the same job, or if it is not reasonably practicable for the employer to permit that, to another job which is both suitable and appropriate. Included in the right to return is the right to return with seniority, pension rights and similar rights either if the parent has taken additional leave, as if the period before the leave and after were continuous, or where if the parent has simply taken ordinary maternal leave or parental leave, as if she or he had not been absent. In either case, a parent has a right to return on terms and conditions not less favorable than those, which would have applied, had she or he not been absent. Again there is a neutralizing of the leave taken as provided by the regulation. An employee is also given the right to be protected from detriment by any act or deliberate failure to act by the employer due to the employee's pregnancy, birth of a child, exercising rights connected with ordinary maternity leave, additional maternity leave, parental leave or time off to care for defendants as set out in the Employment Rights Act 1996. Protections are also given against unfair dismissals based on the same.

The amounts of maternity pay are set out in the Statutory Maternity Pay (General) Regulations 1986, and for paternity pay, the respective Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002. The rate for statutory maternity pay as of 2006 is 90 % of the woman's salary for the first six weeks, then either £ 108.85 per week or 90 % of average weekly

earnings if less for the remaining twenty weeks. A woman is entitled to a maternity allowance if she has worked 26 of 66 weeks before the baby is due, and has earned an average of £ 30 in any 13 of those 66 weeks. The maternity allowance is at the rate of £ 108.85 per week or 90 % of average weekly earnings if less for a period of 26 weeks.[51] For a child expected to be born after 1 April 2007, maternity allowance can be received for 39 weeks. The rate for statutory paternity pay for the one or two weeks as of April 2005 is either £108.85 or 90 % of average weekly earnings.

4.1.2.2 Flexible Working

The right to flexible working is established in the Employment Rights Act 1996. The regulations falling within this category are those concerning fixed-term employees, part-time employees as well as the flexible working regulations. In an effort to accommodate different choices with respect to work, particularly for women combining work and family, regulations were issued to protect two categories of workers, fixed-term and part-time, also in line with the requirements of Community law. According to the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, a fixed-term employee is an employee hired for the duration of a specific term, particular task or occurrence of another specific event. An employee who has been on successive fixed-term contracts for a period of more than four years becomes a permanent employee. The regulations give a fixed-term employee the right to not be treated less favorably than a permanent employee as to the terms of her contract or being subjected to any detriment. The employer can offer an objective justification for the less favorable treatment "if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment."[52]

A full-time worker according to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2002 is a worker who in regard to the custom and practice of the employer in relation to other workers of the employer under the same contract is identifiable as a full-time worker. A part-time worker is a worker not identifiable as a full-time worker. A part-time worker has the right to not be treated less favorably than a full-time worker if the treatment is based on the fact that she is a part-time worker and is not justified on objective grounds.

Both fixed-term employees and part-time workers have the right to receive a written statement of the reasons for the less favorable treatment, as well as

[51] See the UK Department of Work and Pensions, *Statutory Maternity Pay (SMP)* available at the website: http://www.dwp.gov.uk/lifeevent/benefits/statutory_maternity_pay.asp#howmuch.
[52] Fixed-term Employees Regulations 2002 at Section 4.

protection against unfair dismissals and being subjected to detriment. Complaints under the regulations can be brought to an Employment Tribunal within three months or otherwise if the tribunal finds it just and equitable to permit the complaint.

The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 and the Flexible Working (Procedural Requirements) Regulations 2002 set out the framework for the right to flexible working as protected in the Employment Rights Act 1996. An employee is entitled to request a contract variation for flexible working if he/she has been employed 26 weeks and either is a parent, foster parent or guardian of a child or spouse or partner to such a person.[53] The application is to be dated in writing and include information as to any other such applications made. An application for flexible working as made by the employee is to be discussed by the employer and employee within 28 days of the date of the application.[54] The employee has the right to be accompanied at the meeting. A written notice of decision is to be given by the employer fourteen days after the date of the meeting. An appeal can be made to the employer of the decision within 14 days. Barring resolution of the matter, a complaint can be filed with an Employment Tribunal within three months from the date of threat or failure unless the tribunal finds a longer period is reasonable. The tribunal can award compensation in an amount not to exceed two weeks pay for the failure to allow the employee to be accompanied at the meeting,[55] or eight weeks pay for the failure to hold a meeting or notify a decision.[56]

4.2 The Employment Tribunals, Courts and CEHR

The main route for enforcement by a private individual of the above legislation is through the Employment Tribunals and appeals to the Employment Appeal Tribunal as regulated by the Employment Tribunals Act 1996. The Equal Opportunity Commission, created by the Sex Discrimination Act 1975, also had enforcement powers as well as was authorized to represent private individuals. As of 2007, it is replaced by the Commission for Equality and Human Rights. The Secretary of State of Industry and Trade[57] is the designated Minister for purposes of section 2(2) of the European Communities Act 1972 in relation to discrimination and has been conferred powers with respect to both executing as well as enforcing the discrimination laws, issuing regulations and has oversight of the employment tribunals.[58]

[53] The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 at Sections 3–7.
[54] The Flexible Working (Procedural Requirements) Regulations 2002 at Sections 3–15.
[55] *Id.* at Section 15.
[56] The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 at Section 6.
[57] *See* the UK Department of Trade and Industry website, available at: http://www.dti.gov.uk/.
[58] *See* European Communities (Designation)(No. 3) Order 2002 (S.I. 2002/1819).

4.2.1 The Employment Tribunals and Courts

The Employment Tribunals function as the trial courts in employment and labor law disputes.[59] A tribunal consists of a chairman who is either a barrister or solicitor with a seven-year general qualification, and two lay members, "wingmen" selected from a panel drawn up after consultation with employers' and employees' organizations.[60] A self-nominating procedure exists for the lay members.[61] Approximately twenty-five employment tribunal offices and 2000 chairmen and members are available in England and Wales for employment tribunals.[62] A full tribunal consists of a chairperson and two lay members, one from each of the social partners. The parties to the complaint are free to waive their rights and have one lay member. When a complaint has been presented under the Equal Pay Act 1970, the Sex Discrimination Act 1975 or the Employment Rights Act 1996, a copy is sent to the Advisory, Conciliation and Arbitration Service, which has a duty to promote a settlement if requested to do so by both parties.

The procedure during the Employment Tribunal hearing is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. Proceedings before the tribunals are to be less formal than court proceedings to create a more user-friendly system.[63] Approximately 100000 cases are received each year covering eighty areas of the law.[64] Of those pending in the beginning of the academic year 2003/2004, approximately 70 % were withdrawn and 30 % decided. Twenty-one percent of the cases decided were decided in favor of the complainant.[65] A rule of thumb in the case law is that in a normal, relatively difficult and lengthy case, the time in which judgment should be rendered is three and one-half months.[66]

The tribunals generally have the power to issue a declaratory judgment defining the rights of the parties, or a recommendation concerning specific performance, namely reinstatement or reengagement of employment, or monetary damages which can consist of a basic award calculated according to a schedule, and a compensatory award which the Employment Tribunal finds just and equitable

[59] For more information on the employment tribunals, *see* Employment Service Tribunals website, available at: http://www.employmenttribunals.gov.uk/default.asp.

[60] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Section 8.

[61] N.M. Selwyn, SELWYN'S LAW OF EMPLOYMENT (13th ed. LexisNexis UK 2003) at 9.

[62] *See* the UK Council of Tribunal's Annual Report 2004/2005, available at: http://www.council-on-tribunals.gov.uk/files/ar2005.pdf at 44.

[63] *See* Report of the Review of Tribunals by Sir Andrew Leggatt, Tribunals for Users, One System, One Service, Commissioned by the Lord Chancellor in 2000, available at: http://www.tribunals-review.org.uk/index.htm in general and Employment Tribunals at Section 3.21 in particular.

[64] *See* the 2001 Report of the Employment Tribunals Review Taskforce at 11, available at: http://www.dti.gov.uk/er/individual/etst-report.pdf. The Government has implemented a reform of the support services for the tribunals effective in 2006.

[65] *See* the Council of Tribunal's Annual Report 2004/2005 at 44.

[66] *See Mr S Radley v. Department for Work* 2005 WL 2608282.

considering the losses including injury to feelings. If the employer fails to comply with the recommendation, the tribunal may increase the amount of compensation, or in the case compensation has not been awarded, award compensation. The same discovery device is available under the Sex Discrimination Act 1975 as under the Equal Pay Act 1970, namely questioning of the employer. An appeal of a decision by an employment tribunal is made to the Employment Appeal Tribunal.[67] An appeal of the determination of the Employment Appeal Tribunal can be taken to the Court of Appeal, and ultimately to the House of Lords.

4.2.2 The Commission for Equality and Human Rights

The Equal Opportunities Commission ("EOC") was established under the Sex Discrimination Act 1975. The EOC is to be replaced in 2007 by the Commission for Equality and Human Rights ("CEHR"),[68] an independent government agency established by Part I of the Equality Act 2006. Its several tasks include annually drafting a strategy plan, providing information to the public, drafting codes of practice,[69] monitoring compliance by private parties and government agencies of the equality enactments as well as enforcing them.[70] The Commission is empowered to conduct inquiries or investigations of organizations or areas in which discrimination is persistent or frequent. The Commission can issue an "unlawful act notice" to a party found to be in violation of the Equality Act 2006, requiring the party to draft an action plan through which the unlawful act is to be remedied. The Commission is also empowered to enter into an "agreement" with a party the Commission believes to be conducting unlawful acts. The Commission may provide legal assistance to persons wronged in violation of the equality enactments in the form of legal advice, legal representation, facilities for the settlement of a dispute or any other form of assistance. The Commission is also given the power to institute or to intervene in litigation that the Commission finds to be relevant to its functions.

[67] *See* Employment Appeal Tribunal website, available at: http://www.employmentappeals.gov.uk/about_us/about_us.htm.

[68] *See* the Commission for Equality and Human Rights website, available at: http://www.cehr.org.uk/.

[69] The Equal Opportunity Commission has issued two codes of practice in the area of sex discrimination and employment, the Code of Practice Sex Discrimination and a Code of Practice on Equal Pay. By way of example, the latter code informs employers and employees of rights under the Equal Pay Act 1970, explains comparators and grievance procedures, and goes on to describe how to conduct a voluntary equal pay review and how to develop an equal pay plan as well as policy. Available at the Equal Opportunity Commission website: http://www.eoc.org.uk/PDF/law_code_of_practice.pdf.

[70] Equality Act 2006 Part 1 Sec. 8.

4.3 The Role of the Labor Unions

The role of the labor or trade unions in the United Kingdom is not as strong as in Sweden, yet stronger than in the United States. In 2004, 26 % of all employees were members of trade unions.[71] The role of collective agreements within the United Kingdom can be seen as expressed in *Commission v. United Kingdom*[72] where the United Kingdom argued that it had properly implemented the Equal Treatment Directive even though it did not legally prohibit discriminatory provisions in collective agreements as collective agreements were not legally binding.

In a report published by the Department of Trade and Industry in 2004, the content of collective agreements for the years 1998–2002 was analyzed.[73] Family-friendly policies were categorized in the report as non-core issues for collective agreements. The conclusion drawn was that most employers were open to discussions with employees concerning equal opportunities, but that the discussions tended to be led by employers and local unions often had no clear bargaining agenda regarding family-friendly issues. Seven percent of the agreements specifically provided for collective bargaining on family-friendly policies. The report concluded that the issue in general was not whether there was a right to bargain as to these issues, but whether the unions had sought to bargain at all in such issues in general.[74]

However, a significant difference between the unions in Sweden and in the United Kingdom is that unions in the United Kingdom are explicitly prohibited from discriminating by the language of the Sex Discrimination Act 1975. Section 12 of the Act states that it is unlawful for an organization of either workers or employers to discriminate against a woman not a member with an application for or terms of membership. In addition, it is unlawful for such organizations to discriminate against a woman who is a member:

> (a) in the way it affords her access to any benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
>
> (b) by depriving her of membership, or varying the terms on which she is a member, or
>
> (c) by subjecting her to any other detriment.

Such organizations are also expressly prohibited from sexually harassing members or persons applying for membership. In addition to their liability for their own acts of discrimination, trade unions can also be held liable for discrimination

[71] *See* UK Trade Union Membership Report 2004 by the Department of Trade and Industry, available at: http://www.dti.gov.uk/files/file11427.pdf?pubpdfdload=05 %2F857.

[72] Case C-165/82, *Commission v. United Kingdom* [1983] ECR-3431, Celex No. 61982J0165. The ECJ disagreed, finding that collective agreements have a *de facto* influence on conduct.

[73] The report is available at the DTI website: http://www.dti.gov.uk/er/emar/errs26.1.pdf.

[74] *Id.* at 5.

and/or aiding unlawful acts if they include discriminatory terms in collective agreements.

4.4 Equal Access to Justice Issues in UK Law

The UK legal system is not as plaintiff friendly as the American systems, but has certain components compelling the cooperation of employers in discrimination litigation. Under the Equal Pay Act 1970 and the Sex Discrimination Act, the complainant and/or the Secretary of State have the right to question the respondent employer during proceedings before a court or tribunal. If the complainant has questioned the respondent, and the court or tribunal finds that the respondent either deliberately and without reasonable excuse omitted to reply within the prescribed period, or was evasive or unequivocal, the court or tribunal may draw any inference it considers just and equitable to draw, including "an inference that the respondent has contravened a term modified or included by virtue of the complainant's equality clause or corresponding term of service" under the Equal Pay Act, or "that he committed an unlawful act" under the Sex Discrimination Act. Though this is not as drastic as the penalty of contempt of court is in the United States, its effective result is that a defendant can potentially lose the case for failure to cooperate. This is a strong incentive for employer cooperation during proceedings, redressing the imbalance of access to information between the parties. Damages, the award of trial costs and fees as well as the statute of limitations are other aspects to the issue of equal access to justice discussed next.

4.4.1 Remedies Available Under the Statutes

Under the Equal Pay Act 1970, a prevailing plaintiff can be awarded arrears for remuneration, or back pay, including pre-judgment interest commencing at a date halfway between the date of the violation and the date of the judgment, or damages as to the violation. The tribunal is to award a sum equal to the pay of the comparator, including back pay for the period the unequal pay was paid, limited to six years before the day the claim is made with the employment tribunal.[75] Back pay is paid net of tax, national insurance and any employee pension contribution. Compensation can also be awarded for other financial losses apart from not being paid at the same rate as the comparator, for example, loss of occupational pension benefit or lower performance related pay, and if appropriate, a new employment grade. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 authorize the tribunals to award interest on back pay in Equal Pay Act cases and compensation awards made under the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

[75] *See Levez v. TH Jennings (Harlow Pools) Limited* [1999] Ir.L.R. 764.

Under the Sex Discrimination Act 1975, plaintiff can be awarded monetary damages and also equitable relief through an order declaring the rights of the parties or a recommendation that the defendant take certain actions to obviate or reduce the adverse effects of the discrimination.[76] The tribunals generally have the power to issue a declaratory judgment defining the rights of the parties, or a recommendation concerning specific performance, namely reinstatement or reengagement of employment, or monetary damages which can consist of a basic award calculated according to a schedule, and a compensatory award which the Employment Tribunal finds just and equitable considering the losses including injury to feelings. Historically, exemplary or punitive damages have not been available as a remedy. The objective is for complainant to be put in the position she would have been in had it not been for the discrimination.

According to a survey of awards issued in 2000 conducted by the Equal Opportunity Commission, the average award for "injury to feelings", only one of the components in an award in sex discrimination cases, was £ 3737 and the median £ 2000. For sexual harassment cases, the awards were higher: the average award was £ 13331 and the median, £ 10405.[77] The tribunal can also award compensation for personal injury, both physical and psychiatric.[78] The same survey showed that the range of awards in 2000 for general psychiatric damages was between £ 750 and £ 57500. Three of the highest award cases highlighted on the EOC website with respect to damages are:[79] *Ms Mayo Thalia Welch v. MSB International PLC* (policy of respondent to only hire male candidates as sales consultants, plaintiff offered job instead as assistant, constructively terminated when she applied again for a job as a sales consultant, damages awarded were £ 46344 for past loss of earnings, £ 4447 for future loss of income, £ 4500 for injury to feelings, plus pre-judgment interest for the total amount of the award excluding future loss in the amount of £ 6 460, for a total award of £ 61741),[80] *Ms L McKibbin v. Telewest Communications (Midlands and North West) Ltd. (2) Mr. Phil Beck* (plaintiff discredited by former manager who allowed rumor of their sexual affair to circulate, the tribunal finding that this "was evidence of his desire to discredit a woman whom he felt to be a threat" and later dismissed due to "financial irregularities," damages awarded were £ 29182 for past loss of earnings plus £ 1532 in prejudgment interest, £ 18902 for future loss of income, £ 12000 for injury to feelings plus prejudgment interest of £ 1190, for a total award of

[76] Sex Discrimination Act 1975, Part VII Enforcement, Section 65.

[77] *See* Equal Opportunity Commission, General Guidance for Claims, at the EOC website: http://www.eoc.org.uk/Default.aspx?page=15491&lang=en.

[78] *See Sherriff v. Klyne Tugs (Lowestoft) Ltd.* [1999] Ir.L.R. 481 (Civ).

[79] *See* the Equal Opportunity Commission website, Dismissal and redundancy damages, available at the OEC website: http://www.eoc.org.uk/Default.aspx?page=15253.

[80] *Ms Mayo Thalia Welch v. MSB International PLC,* 22 October 1998, ET No. 1100300/98/MP D6391.

£ 62807),[81] and *Mrs E McLaughlin v. London Borough of Southwark* (circumstances that plaintiff's work was reallocated to men, plaintiff was reassigned to lesser positions, as well as finally dismissed while male heads of service retained their jobs, was sex discrimination, damages awarded were £ 64239 for past loss of earnings, £ 5963 for fees for career counseling, injury to feelings plus pre-judgment interest of £ 8401, £ 93738 for future loss of income, £ 43812 for loss of pension, £ 2500 for investment advice, £ 12500 for injury to feelings plus pre-judgment interest of £ 3106, for a total award of £ 234262).[82] The cases cannot be seen as quantitative of the awards given by the tribunals, but can be seen as qualitative as to the spectrum of damages and amounts available.

4.4.2 The Award of Trial Costs and Fees

Despite the fact that the Swedish system follows with few exceptions the "English Rule" as to the award of trial costs and fees in discrimination cases, the "English" do not follow the "English Rule" of the award of costs and fees in bringing a discrimination case, but rather the "American Rule," which means that the starting point is that costs are not normally awarded by the employment tribunal. Changes to the tribunal rules in 2001 mean that costs can be awarded by the tribunal if it considers a party to be at fault in some way for bringing or defending the claim, or a part of the claim, or for the way a party behaved in conducting the case. Costs may be awarded where "a party has in bringing the proceedings, or a party or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived."[83] "Misconceived" is defined as having no reasonable prospect of success. The tribunal can also order a party to pay costs incurred because of a request for a late postponement or adjournment of the hearing, or a failure to comply with an order of the tribunal.

4.4.3 The Statute of Limitations for Sex Discrimination Claims

The statute of limitations with respect to the Equal Pay Act 1970 is set out in Section 2ZA "Qualifying Date." Four categories of situations are defined in the section, a concealment case, a disability case, a stable employment case as well as a standard case. If the claim falls within a concealment case, the qualifying date is the date falling six months after the day on which the woman discovered, or with reasonable diligence, could have discovered, the qualifying fact in question. In the other situations, the statute of limitations is six months from the last date of

[81] *Ms L McKibbin v. Telewest Communications (Midlands and North West) Ltd. (2) Mr. Phil Beck,* 18 February 2000, ET No. 2102542/98 & 2100989/99 D7264 and D7448.
[82] *Mrs E McLaughlin v. London Borough of Southwark,* 8 January 1998, IT No. 7575/97 D5933.
[83] Employment Tribunals Act 1996 Section 57.

employment (standard case), from the day on which the stable employment relationship ended (stable employment case), from the day the disability ceased (disability case), or if a combination of concealment and disability, the latter date. For discrimination claims other than under the Equal Pay Act, the statute of limitations is three months. However, the tribunal may extend the limit where it is "just and equitable to do so." In *Mills and another v. Marshall*,[84] an extension of three years was permitted for a claim of sex discrimination.

4.5 The Discourses within the UK Sex Discrimination Law

The texts and institutions with respect to sex discrimination legislation and family-friendly working in the United Kingdom have been presented in this Chapter. The main text now is the 2006 Equality Act under which the Equal Pay Act 1970, the Sex Discrimination Act 1975 as well as the Human Rights Act 1998 are designated as equality and human rights enactment. The Employment Rights Act 1996 and the Families and Work Act 2006 are the other main statutes. The statutes and case law interpreting and applying the acts, as well as regarding family leave and flexible working, the statutory instruments, have all been drafted to be in conformance with the requirements of Community law. The main institutions in the development of the law have been the Employment Tribunals and the courts. The Commission for Equality and Human Rights, formerly the Equal Opportunity Commission, Secretary of State of Trade and Industry, and the Government have all been driving factors in the enactment of the sex discrimination legislation. The communities within which these institutions act are several. First, there is the community of the European Union to which the United Kingdom belongs. Second the United Kingdom itself comprises England, Wales, Scotland and Northern Ireland with variations and exceptions to the above-discussed legislation. Added to this are variances in cultures and backgrounds that result from a history that at one point, the sun never set on the English empire, which perhaps explains the efforts made now in combating discrimination.

The discourses also can be found at several levels. One more recent discourse is the movement towards treating discrimination as a violation of human rights, receiving constitutional protection. Another discourse is the movement towards the inclusion of fathers in the concept of a family-friendly workplace, with an expansion in rights and the extension of the length of paternity leave. Underlying both of these discourses, however, is the understanding that combining family and work is primarily a problem for women, and that the resolution of that conflict is necessary for women to participate in the workplace. The last of the discourses of interest here is the one between the courts and the legislator, with

[84] *Mills and another v. Marshall* [1998] Ir.L.R. 494.

the courts pushing the law with respect to discrimination further, even to the extent of "disapplying" legislative requirements, and the legislator amending the law to keep up with these developments.

We now turn to these same moments as can be identified in the American systems.

Chapter Five: American Discrimination and Family Leave Legislation

The focus in the American systems has been on discrimination as a societal phenomena, with the movement for women's equality joining efforts already in the 1830's with the anti-slavery movement, taking a path different from that of the United Kingdom, Sweden and the EU.[1] The institution of slavery also affected labor, which developed a focus that due to the American conditions also differed from that of labor in Sweden and the United Kingdom, the issue of race also early an object instead of simply class. Congress passed the Equal Pay Act of 1963, mandating equal pay for men and women for equal work, and then Title VII of the Civil Rights Act of 1964, prohibiting both public and private employers, labor organizations and employment agencies from discriminating in employment on the basis of race, color, sex, religion and national origin.[2] Pregnancy was added to Title VII in 1978 as a subcategory of "sex." Prohibitions against age discrimination were legislated in 1967[3] and on the basis of disability in 1991.[4] Federal legislation addressing issues of combining work and family came at a relatively later stage in 1993, and then only to an extremely limited extent by European standards.[5]

Within the American system of federalism, labor and employment law issues have been governed on both the federal and state levels since the 1800's. The federal legislation creates a floor of rights under which the state legislation cannot fall. An overview of the sex discrimination and family leave legislation in all the American states is beyond the scope of this work. Instead, two states have been chosen, California, a path breaker with respect to family and work, and

[1] *See, e.g.,* Kathryn Kish Sklar, WOMEN'S RIGHTS EMERGES WITHIN THE ANTISLAVERY MOVEMENT 1830–1870 (Bedford 2000) tracing the history of women's rights, slavery as well as religious beliefs, particularly those of the Quakers, at this time.

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

[3] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634.

[4] Americans with Disabilities Act of 1967, 42 U.S.C. §§ 12101–12117.

[5] Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2619, 2651–2654.

Minnesota, addressing these issues as well as that of pay equity in state employment. This chapter begins with a cursory history of women's rights and the labor movement in the United States, then moves to sex discrimination on the federal and then the state level, followed by family leave legislation on both levels. The case law is interwoven in the presentation of the legislation. This is followed by a presentation of the enforcement agencies on both the federal and state levels and a discussion of the role of labor unions in the United States regarding issues of discrimination and family leave. Access to justice issues are examined as raised under the statutes, with the discourses as identified concluding the chapter.

Prior to the passage of the federal acts in the 1960's, the legislative variations permissible historically with respect to women's rights under the American federal system initially led to extremely different rights for women depending upon their state of residence, best exemplified by the right to vote. New Jersey was the first state granting propertied women voting rights already in 1776, which were repealed in 1807. It would not be until 1889 in the Territory of Wyoming that women were again granted full voting rights as well as the right to hold public office. Michigan, Oklahoma, South Dakota and Texas were the last states to grant women the right to vote in 1918, at the end of this approximately thirty-year period. Federal suffrage was granted to women in 1920, a year fairly consistent with both the United Kingdom (1918) and Sweden (1921).

Unmarried women and widows always had legal capacity throughout the history of the United States, much as in England. The Germanic/Roman view of women as not possessing legal capacity, adopted in Sweden as evidenced by the 1734 Code, did not take root in the United States. However, married women had restricted rights in those American states originally following the English doctrine of coverture.[6] This doctrine began to be repealed with Mississippi leading in 1839, followed by New York in 1848. By 1850, seventeen of the then thirty-one states had granted married women certain legal capacity as to their property.[7] Marriage and divorce were and are purely secular matters in the United States as no state church was ever established. Divorce was allowed in the Northern states as early as 1785. In Southern states, more faithful in general to the English legal system, divorce was permitted in the mid-1800's.[8] This was in contrast to both Sweden, which began to somewhat more freely allow divorce in

[6] The common law of England was not adopted in all the American colonies or in all the American states. The Northern states tended to view the common law as an extension of English oppression, while the Southern states tended to adhere to its tenets more loyally. *See* Paul Samuel Reinsch, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (Wisconsin 1899), reprinted by Gordon Press 1977.

[7] *See* Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (2nd ed. New York 1985) at 210. At this time, the population in the United States was 23 million.

[8] *See* Friedman (1985) at 205. By 1900, the number of divorces that had been granted was 55000 a year. *Id.* at 500.

1915[9] and England, which started to permit certain secular divorces in 1857.

The colonies experienced their share of labor disputes. The first recorded prosecution of strikers was in New York in 1677.[10] The issue of labor was intimately intertwined with the issue of independence from England, as high taxes pushed the wages of workers down. The Sons of Liberty, a group of artisans and workers, began protesting English taxes in 1765. The Daughters of Liberty, a group auxiliary to the Sons of Liberty, was the first organization of working women, founded the same year. It worked to produce substitutes for the goods from England that were being boycotted in America in its bid for freedom, this "work" seen as a patriotic duty. The Boston Tea Party in 1773 was begun by laborers protesting English taxes.

After American independence, the state initially assumed a bystander status with respect to legislating issues within the commercial sphere, particularly as between capital and labor, similar to the tenets of the Swedish Model.[11] The first strike in the building trade was in 1791 by carpenters demanding a ten-hour work day. Under the common law prevailing until 1842, it was a criminal offense for unions to use economic or social pressure to compel workers to join. In 1805, Philadelphia shoemakers were found guilty of criminal conspiracy for striking for higher wages, but by 1842, the judicial tide began to turn, with the Massachusetts Supreme Court in *Commonwealth v. Hunt* ruling that labor unions as such were not illegal conspiracies; the union's objective or means had to be illegal for the union to be found guilty of conspiracy.[12]

President Van Buren adopted an executive order in 1840 limiting the work day of all employees under federal contracts to ten hours.[13] New Hampshire passed a ten-hour limit for all employees in 1847, and in 1868, the first federal law mandating an eight-hour work day was passed for federal employees. The first all female strike was conducted by the United Tailoresses of New York in 1825, demanding a wage increase. The Lowell Female Labor Reform Association was founded in 1844 as one of the first American labor groups organized by and for women.[14] The oldest labor union still active in the United States, the Typo-

[9] Divorce was permitted earlier in Sweden on limited grounds: criminal adultery, desertion, criminal conspiracy to murder a spouse, lifetime imprisonment and insanity, or a dispensation from the King. *See* A.O. Winroth, HANDBOK I SVENSK CIVILRÄTT (Uppsala 1904) at 46. The law was amended in 1915 to allow for divorce based on irreconcilable differences after a one year separation. *See* Agell (2004) at 37.

[10] Friedman (1985) at 553.

[11] *See* Stephen B. Presser and Jamil S. Zainaldin, LAW AND AMERICAN HISTORY, CASES AND MATERIALS (West 1980) at 576.

[12] *Commonwealth v. Hunt,* 42 Mass. (1 Met.) 111 (1842).

[13] Presidential Executive Order, President Martin Van Buren, Washington City, 31 March 1840.

[14] By the 1860's, the Lowell mills employed over 60000 female workers. Robert Belton, Dianne Avery, EMPLOYMENT LAW DISCRIMINATION, CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (6th ed. West 1999) at 343.

graphers Union, was founded in 1856 and women were admitted as members beginning in 1869.[15] The first significant central labor organization was the Knights of Labor, founded among garment cutters in 1869 in Philadelphia. It was dedicated to organizing all workers for their general welfare and one of the first to work for organizing women nationally, appointing Leonora Barry in 1887 to this task. By 1886, the Knights had about 700 000 members, including African Americans, women, wage earners, merchants and farmers.[16] The Federation of Organized Trades and Labor Unions of the United States and Canada was founded in 1881, the predecessor to the present day American Federation of Labor ("AFL").[17] Three hundred and fifty thousand workers demonstrated for an eight-hour work day in the Haymarket Riots in Chicago on 1 May 1886, for which May 1st was designated the international workers' holiday. The path of women in the labor unions, however, was not always straight nor always positive, with backlashes of male resistance to women's rights and employment occurring much as was the case in Sweden.

The federal government adopted a prohibition against unequal wages between men and women in federal service in 1870. A federal Bureau of Labor was established within the Department of Interior in 1884, eventually becoming part of the present day federal Department of Labor in 1913.[18] The first federal labor relations act was passed governing railroad employment in 1888. Demands, particularly by farmers, for the state to prohibit trusts and cartels such as John Rockefeller's Standard Oil, "bust the trusts," led to the passage of the 1890 Sherman Act, prohibiting contracts that prevented full and free competition. A union sympathy strike was found to be a restraint of trade under the act by a Louisiana court in 1893.

Protective legislation was passed in the United States as seen above with respect to limiting the work day of all workers, both at the state and federal level.

[15] *See* The Printing, Publishing and Media Workers Sector of the Communication Workers of America website available at: http://www.cwa-ppmws.org/.

[16] *See* the U.S. Department of State's history website, http://usinfo.state.gov/products/pubs/oecon/chap9.htm. *See also* http://www.spartacus.schoolnet.co.uk/USAknights.htm. For Barry's report in 1887 as to women workers, *see* http://www.scc.rutgers.edu/njwomenshistory/Period_4/barry.htm.

[17] For a history of the present day AFL-CIO, *see* the AFL-CIO website, available at: http://www.aflcio.org/aboutus/history/history/timeline.cfm.

[18] The Bureau of Labor became a Department of Labor, which later was merged into the Department of Commerce and Labor as established in 1903. In 1913, this Department was split again into the Department of Commerce and the Department of Labor ("DOL"). The DOL also combined four bureaus: the Bureau of Labor Statistics, the Bureau of Immigration, the Bureau of Naturalization and the Children's Bureau, established in 1912, which investigated and reported on matters related to the health and welfare of children. The DOL was also authorized to establish a conciliation function to mediate labor disputes. Total staff initially was 2000 with a budget of $ 2.33 million. A Woman in Industry Service division was created during World War I, and after the war, the Congress established a permanent Women's Bureau in the Department. For this history of the DOL, *see* http://www.dol.gov/oasam/programs/history/dolchp01.htm.

Legislation also was passed on the federal and state levels as to the employment of children and women in the form of state laws limiting hours and setting wages in certain industries. This stemmed partly from a true desire to protect, but was also due to the perceived threat against male workers.[19] Few statutes existed prior to the Civil War, but by the 1900's, considerable legislation existed concerning the work of children, women, wage and hours laws, as well as factory inspectors. The more industrialized Northern states had more extensive legislation, while the Southern states followed after and less vigorously. Massachusetts adopted the first minimum wage for women and minors in 1912. The Court initially held that the protective laws for children and women were not in violation of the American federal equal protection and due process clause of the 14th amendment if they had a rational basis.[20] The Court viewed other general protective employment legislation, however, as infringing freedom of contract.[21] Congress passed the Clayton Antitrust Act in 1914 limiting the use of injunctions against industrial actions. The first national conference of women trade unionists was held in 1918. Congress passed the Railway Labor Act of 1926 requiring employers to bargain with unions and prohibiting discrimination on the basis of union membership. The act was indicative of a shift towards supporting unions and collective bargaining, limited only to railroads and their employees as they fell squarely within the jurisdiction of Congress under the Commerce Clause.

Any vestiges of neutrality through non-interference by the state in the form of legislation in the labor/capital arena gave way completely during the Great Depression in the 1930's when the federal government was called upon to solve the significant problem of unemployment, which at its worst was one-third of the American workforce. Laws passed on the federal level included the Norris-LaGuardia Act (1932) prohibiting federal injunctions in labor disputes and outlawing "yellow dog contracts",[22] the National Industrial Recovery Act, Section 7(a) which guaranteed rights of employees to organize and bargain collectively

[19] Friedman (1985) at 561. *See also* Alice Kessler-Harris, OUT TO WORK – A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (Oxford 2003) at 180 who notes both these motivations and still a third, echoing from the early intergovernmental conferences, that it would be easier to first pass such laws then move on to the more general ones.

[20] *See Muller v. Oregon,* 208 U.S. 412 (1908) in which the famous *Brandeis* brief was submitted, based predominantly on sociological evidence produced at that time as to the detrimental effect of certain labor on the health of women.

[21] *See, e.g., Lochner v. New York,* 198 U.S. 45 (1905)(Lochner was convicted under a New York statute prohibiting bakers from working more than 10 hours per day or 60 hours per week. Lochner argued the law was unconstitutional, and the Court held the New York law was not a constitutional regulation of health and safety of a workplace under state police power and violated freedom of contract as guaranteed by the 14th Amendment).

[22] A "yellow dog" contract is an employment contract in which a worker disavows membership in and agrees to not join a labor union in order to receive a job, first prohibited by the federal Erdman Act of 1898 which outlawed the railroad's use of such as a direct result of the Pullman Strike of 1894.

(1933),[23] the National Labor Relations Act (1935) establishing the National Labor Relations Board, the Social Security Act (1935) and the Fair Labor Standards Act (1938) establishing a 40-hour work week nationally, a minimum wage as well as banning child labor for goods sold in interstate commerce. Congress also implemented unemployment programs and insurance, loan programs for purchasing residential houses, and funded public housing. After initial resistance in line with the reasoning presented in *Lochner,* the Court finally acknowledged the constitutionality of these acts under Congress' powers as granted by the commerce clause in the infamous "switch in time that saved nine."[24] The period from the 1940's to the 1960's is characterized in the United States by the same stability with respect to labor and capital as experienced in Sweden, with war and post-war production strengthening the economy.

The issue of racial discrimination, the legacy of slavery, was brought to a head in the 1950's and 1960's. Efforts against slavery and racial discrimination had already begun prior to the signing of the American constitution. Arguments that racial discrimination was a "badge of slavery" and prohibited by the Equal Protection Clause were brought unsuccessfully after the American Civil War. The Court, in a series of cases spanning almost a century, repeatedly found that separate but equal, simply formal equality, was constitutional and that it was the task of Congress to change this situation through legislation.[25] After decades of inaction by Congress, the Court finally in the famous case of *Brown v. Board of Education* held that separate but equal, formal equality, was not constitutional in the area of education, making the first move towards the principle of substantive equality in 1954.[26]

Congress passed the Equal Pay Act of 1963, mandating equal pay between men and women for equal work, a culmination of efforts for equal pay that had begun at the turn of the century, strengthened by the influx of six million women in the workplace during World War II.[27] Feminist proponents had argued that "as we make progress in working against the Jim Crow laws of the nation, it is high time that we also work against the Jane Crow laws."[28] As demanded by the Court in *Brown,* Congress finally acted, passing the Civil Rights Act of 1964 prohibiting both public and private employers, labor organi-

[23] The United Supreme Court declared this act unconstitutional before its famous switch in nine, *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[24] *See* David M. O'Brien, STORM CENTER – THE SUPREME COURT IN AMERICAN POLITICS (6th ed. Norton 2003) at 56.

[25] The most infamous of these being *Plessy v. Ferguson,* 163 U.S. 537 (1896).

[26] *Brown v. Board of Education,* 387 U.S. 483 (1954).

[27] Equal Pay Act of 1963, 29 U.S.C. § 206(d).

[28] Alice Kessler-Harris, IN PURSUIT OF EQUITY – WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20th CENTURY AMERICA (Oxford 2001) at 242 quoting Oregon's Representative Edith Green.

zations and employment agencies from discriminating in employment on the basis of race, color, sex, religion and national origin.[29]

5.1 The American Discrimination and Family Leave Legislation

The examination in this chapter now turns to the sex discrimination legislation and case law, focusing on the federal level and then two states chosen as examples, California and Minnesota. The issue of family leave is thereafter addressed on the federal level, then with respect to these two states. The presentation here is not meant to be exhaustive, but rather to serve as a backdrop for the comparison with the EU, Swedish and UK systems.

5.1.1 The Sex Discrimination Law

As stated, the federal legislation in this area constitutes a bottom floor of protection that the states cannot regulate below. Several states have gone considerably farther, including protections against discrimination on a state constitutional level. The proposed federal Equal Rights Amendment ("ERA"), first introduced to Congress in 1923, has consistently failed to gather the ratifications necessary for a federal constitutional amendment. However, about one-third of the states have state constitutional provisions concerning sex discrimination.[30] Almost all states have anti-discrimination and equal pay legislation that mirrors, and in some cases, invokes the same standards as the federal legislation while others have expanded protections. In addition to state legislation, common law actions are available in certain states, for example, wrongful termination claims based on discrimination. The general tenet in the state law, which to the greater extent regulates the employment relationship and specifically, termination of employment, is that an employer may discharge an employee at will, in other words, at any time, for any reason. There are exceptions to the employment at-will doctrine, where the termination violates a contractual, statutory, or constitutional requirement, or where an employee is terminated for pursuing private statutory

[29] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2. For a history of both the Equal Pay Act of 1963 and how sex was included in the 1964 Civil Rights Act, *see* Kessler-Harris (2001) particularly at 234 and 239 respectively.

[30] The ERA states are identified as: Alaska (1972), California (1879), Colorado (1973), Connecticut (1974), Hawaii (1972), Illinois (1971), Louisiana (1974), Maryland (1972), Massachusetts (1976), Montana (1973), New Hampshire (1974), New Mexico (1973), Pennsylvania (1971), Texas (1972), Utah (1896), Virginia (1971), Washington (1972), and Wyoming (1890). There is some controversy over whether New Jersey has an ERA. *See* the website for the federal equal rights amendment, http://www.equalrightsamendment.org/. *See also* Lisa Baldez, Lee Epstein, Andrew Martin, *Does the U.S. Constitution Need an Equal Rights Amendment?,* 35 J. LEGAL STUD. 243 (2006) at note 14.

rights that are directly related to employment. The main federal legislation concerning sex discrimination is the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act, presented here first with the case law interpreting these acts, followed by a presentation of the federal presidential Executive Order 11246 requiring federal contractors to use affirmative action.

5.1.1.1 The Federal Equal Pay Act of 1963

A movement for equal pay legislation in the United States began already in the 1860's when women assumed traditionally male employment positions during the American Civil War. Legislation enacting equal pay between men and women in federal employment was first passed in 1870. The need for female labor during World War I raised the issue again, with efforts by the Women's Bureau within the Department of Labor pressing for national legislation. Women were guaranteed equal pay through regulations enforced by the War Labor Board of 1918 mandating that manufacturers employing women pay them wages at the same rate as those paid to men.[31] Two states passed legislation banning unequal pay also for private employers in 1919, Michigan and Montana.[32] In 1923, Congress enacted legislation classifying governmental positions and pay scales in the federal civil service, incorporating principles of merit and equal pay.

However, it was the increase in female labor of six million workers during World War II in the United States that finally provided the definitive momentum towards equal rights and equal pay.[33] The same phenomena occurred on the other side of the Atlantic in continental Europe, eventually leading to the adoption in 1948 of Article 23(2) mandating equal pay for equal work in the UN Declaration of Human Rights, followed in 1951 by ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value, and ultimately, the inclusion of the Equal Pay principle in Article 119 of the Treaty of Rome in 1957. After almost two decades of introductions of equal pay bills annually to the American Congress, President Kennedy finally signed the Equal Pay Act into law in 1963. At that time, full-time American working women were paid on average 59 cents to the dollar earned by their male counterparts.[34]

[31] *See* Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine,* 55 Me L. Rev. 23 (2003).

[32] *See* Kessler-Harris (2001) at 234 and Belton (1999) at 345.

[33] The fifty percent increase in female workforce participation in the United States during the 1940's was paralleled by a similar increase in the participation of women in the Swedish labor force in the 1960's. This increase was later in Sweden mostly due to Swedish neutrality during World War II entailing a boost mainly in post-war production.

[34] *See* Warren Farrell, *Are Women Earning More Than Men?,* FORBES 12 May 2006.

5.1.1.1.1 A Prima Facie Case under the Equal Pay Act of 1963

The statutory text of the Equal Pay Act of 1963 ("EPA") is Scandinavian in its simplicity:

> Prohibition of sex discrimination
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions…[35]

The simplicity of this text, however, is somewhat illusory, as extensive regulations have been issued in conjunction with the act as to both substantive[36] and procedural[37] issues. In addition, the EPA is a part of the larger and more extensive Fair Labor Standards Act ("FLSA"). Issues not specifically addressed within the wording of the EPA can be addressed in the text of the broader Fair Labor Standards Act.

The EPA prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of substantially equal skill, effort, and responsibility, for the same employer under similar working conditions. The EPA is directed at employers, and to that end, it is unlawful for employers to reduce the wages of either sex to equalize pay between men and women.[38] In addition, no labor organization, or its agents, representing employees of an employer subject to any provisions, is to cause or attempt to cause an employer to discriminate against an employee in violation of the equal wage provision.[39] When Congress enacted the EPA, its purpose was to remedy what was perceived as "a serious and endemic problem of employment discrimination in private industry," the fact that the wage structure in many segments of American industry had "been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[40] The rules concerning equal pay are to "be liberally construed to effectuate the purpose and provisions of this Act and any other Act administered by the Commission issued by the Secretary of Labor."[41]

[35] The Equal Pay Act, 29 U.S.C. § 206(d)(1).
[36] 29 C.F.R. § 1620 *et seq.*
[37] 29 C.F.R. § 1621 *et seq.* issued by the EEOC.
[38] *See* 29 C.F.R. § 1620.25.
[39] The Equal Pay Act, 29 U.S.C. § 206(d)(2) and (3).
[40] *See Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974) *citing* S.Rep. No. 176, 88th Cong., 1st Sess., 1 (1963).
[41] *See* 29 C.F.R. § 1620.34(a).

To prove a *prima facie* case under the EPA, the plaintiff must establish with sufficient evidence that: (i) in the same establishment, (ii) the employer pays different wages to employees of the opposite sex, (iii) who perform equal work on jobs requiring equal skill, effort and responsibility, and (iv) the jobs are performed under similar working conditions.[42] Discriminatory intent is not an element in an Equal Pay Act case.

The Requirement of Same Establishment

The prohibition against wage discrimination under the EPA applies only to jobs within "an establishment." The term "establishment" is not defined in the EPA or in the Fair Labor Standards Act. The Court held early that under the Fair Labor Standards Act, "establishment" meant that which is normally meant in business and government, a "distinct physical place of business." The term "establishment" has been defined in the companion regulations as: "[A] distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment."[43]

The regulation goes on to state that in "unusual circumstances … two or more distinct physical portions of a business enterprise" may be treated as a single establishment. For example, "a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions." Cases construing the regulation tend to focus on evidence of centralized control of job descriptions and salary administration, standardization of wage rates across locations, similarity of operations at the separate locations, and interchangeability of job assignments and functions.[44]

The Requirement of Different Wages

The second requirement concerns wages. Under the EPA, the term "wages" generally includes all payments made to an employee as remuneration for employment, including all forms of compensation irrespective of time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline

[42] *See, e.g., Rhonda Tenkku v. Normandy Bank,* 348 F.3d 737, 741 (8th Cir. 2003)(plaintiff failed to prove with sufficient evidence a *prima facie* case under the EPA).

[43] 29 C.F.R. § 1620.9(b).

[44] *See Mulhall v. Advance Security, Inc.,* 19 F.3d 586, 590 (11th Cir.) *cert. denied,* 513 U.S. 919 (1994); *Marshall v. Dallas Ind. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1979)(all schools in a school district are a single establishment for purposes of EPA) and also in general, Francis M. Dougherty, *What Constitutes "Establishment" for Purposes of § 6(d)(I) of Equal Pay Act,* 124 A.L.R. Fed. 159 (1995).

allowance, or some other name. Fringe benefits are deemed remuneration for employment, as are vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work, even though not a part of the employee's "regular rate."[45]

Defining wages has raised few issues. One employer unsuccessfully argued that though the rates paid men and women differed, the resulting pay was equal as the women sold more than the men.[46] In another case, unequal wages included the better lodging and cleaning allowances provided to airline pursers and not given to airline stewardesses. The court found that the jobs of pursers and stewardesses were similar.[47] The court acknowledged that outlays for uniforms and their maintenance, when given primarily for the employer's benefit, do not count as wages under the Fair Labor Standards Act. However, allowances that primarily serve the interest of the employee do qualify as wages. The male-only cleaning allowance was a wage supplement, a benefit to the employee rather than a "boon to the employer." Had the allowance primarily benefited the employer rather than the employee, the court observed, the airline defendant "obviously would have extended it to female cabin attendants as well."[48] In a different case, the plaintiff failed to establish a *prima facie* violation of Equal Pay Act absent a showing that her wages were less than either of two "comparators," as plaintiff's wages and health benefits exceeded the wages of comparators, who did not receive insurance benefits.[49]

Employees of the Opposite Sex

In addition to unequal wages, the plaintiff must have a comparator of the opposite sex. One male comparator[50] is sufficient to prove wage differentials, although risky because with such a small number of comparators, it is easier to identify another male paid less.[51] The larger the pool of comparators, the easier it

[45] *See* 29 C.F.R. § 1620.10 (definition of wages), 29 C.F.R. § 1620.11 (assessment of fringe benefits), 29 C.F.R. § 1620.12 (assessment of rates) and 29 C.F.R. § 1620.19 (requirement of pay in the same medium of exchange).

[46] *Bence v. Detroit Health Corp.,* 712 F.2d 1024 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984).

[47] *Laffey v. Northwest Airlines, Inc.,* 740 F.2d 1071 (D.C. Cir. 1984).

[48] *Id.* at 1081.

[49] *See Bertotti v. Philbeck, Inc.,* 827 F.Supp. 1005 (S.D.Ga. 1993).

[50] *See Mullenix v. Forsyth Dental Infirmary for Children,* 965 F.Supp. 120 (D.Mass. 1996) *citing Dubowsky v. Stern, Lavinthal, Norgaard & Daly,* 922 F.Supp. 985 (D.N.J. 1996)(the plaintiff "need only establish that she was paid less than a single male employee" to prevail on EPA claim).

[51] *See, e.g., Brousard-Norcross v. Augustana College Assoc.,* 935 F.2d 974, 979 (8th Cir. 1991)(affirming summary judgment under EPA for employer where the plaintiff's salary was only marginally smaller than one comparator and marginally larger than another comparator in academic setting); and *Strag v. Board of Trustees,* 55 F.3d 943, 950 (4th Cir. 1995)(affirming summary judgment on failure to establish *prima facie* case given absence of more systemic, widespread discrimination and use of improper comparator in university setting).

is to prove a more systemic, widespread wage discrimination. A blatant example occurred in a case in which the plaintiff left on maternity leave, the supervisor stripped her of her responsibilities and transferred them to a newly hired male who was given an annual raise of $ 18000 to do essentially the same job.[52] In a different case, the plaintiff did not succeed in proving an Equal Pay Act violation based on a marginal difference of five cents per hour in pay compared to an extremely small comparator class of male and female supply clerks for a two-year period.[53] The court found that the employer's pay structure clearly contemplated some pay variation and flexibility within job classifications and among employees ostensibly doing equal work. An employee claiming pay discrimination may compare herself to a male successor or predecessor in order to prove an Equal Pay Act or Title VII violation and is not limited to comparing herself to a contemporaneous employee.[54]

The Equal Work Standard

In setting forth a *prima facie* EPA case, the plaintiff need not establish that her position is identical to the higher paid position but only that the two positions are "substantially equal."[55] The determination of "substantially equal" ordinarily focuses on the "actual job content, not job titles or descriptions."[56] For the work of two employees to be "equal work," there need only be "substantial equality of skill, effort, responsibility, and working conditions,"[57] collectively referred to as the "equal work standard." The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply.[58] The determination as to substantially equal is to be made from an overall comparison of the work, not the individual segments.

The Requirement of Equal Skill

The first criterion relevant to a determination of the equal work standard is the skill requirement. Skill is "measured in terms of the performance requirements of the job" and "includes consideration of such factors as experience, training, education, and ability."[59] If two positions require the same degree of skill in their

[52] *See* 29 C.F.R. § 1620.13(a). *See also Brinkley-Obu v. Hughes Training, Inc.,* 36 F.3d 336 (4th Cir. 1994).
[53] *See Flockhart v. Iowa Beef Processors, Inc.,* 192 F.Supp.2d 947 (N.D. Iowa 2001).
[54] *See Lovell v. BBNT Solutions, LLC,* 299 F.Supp.2d 612 (E.D. Va. 2004).
[55] *See Tomka v. Seiler Corp.,* 66 F.3d 1295, 1310 (2nd Cir. 1995).
[56] *See Mullenix v. Forsyth Dental Infirmary for Children,* 965 F.Supp. 120 (D.Mass. 1996) *citing Mazzella v. RCA Global Comm. Inc.,* 642 F.Supp. 1531, 1551 (S.D.N.Y. 1986) *aff'd*, 814 F.2d 653 (2nd Cir. 1987).
[57] *Kahn v. Dean & Fulkerson, P.C.,* 238 F.3d. 421 (6th Cir. 2000) *citing Odomes v. Nucare, Inc.,* 653 F.2d 246, 250 (6th Cir. 1981). *See also Simpson v. Merchants & Planters Bank,* 441 F.3d 572 (8th Cir. 2006).
[58] *See* 29 C.F.R. § 1620.14(a).

performance, regardless of whether such skill is exercised with greater frequency than it is in the second position, they will qualify "as jobs the performance of which requires equal skill." The fact that a skill is possessed that is unnecessary to the performance of the requirements of a position is irrelevant in determining equality of skill. The key issue is those skills required for the job, not the skills of the individual employees.

The Requirement of Equal Effort

The second criterion is effort. Substantial differences existing in the amount or degree of effort required to be expended in the performance of the jobs preclude the application of the equal pay standard even if the jobs are equal in all other respects: "Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job [through assessment of] [j]ob factors which cause mental fatigue and stress, as well as those which alleviate fatigue."[60] "Effort" encompasses the total requirements of a job. Where jobs are otherwise equal, and no substantial difference exists in the amount or degree of effort that must be expended in performing the jobs under comparison, the jobs may deemed to require equal effort in their performance even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort required to be expended in such a situation do not justify wage differentials.

The Requirement of Equal Responsibility

The third criterion, responsibility, is conferred by the respective positions: "Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[61] Differences in responsibilities considered must be of "sufficient consequence or importance to justify a finding of unequal responsibility."[62] A county employee failed to establish that the positions of maintenance engineer and assistant were "equal" under the Equal Pay Act, although both positions involved the same type of maintenance work, where the engineer position carried the additional responsibility of supervising the assistant and serving as department head.[63] In another case, a female sheriff's department dispatcher/corrections officer was not found to perform work of equal skill, effort and responsibility as to higher-paid male corrections officers, and therefore, did not establish a claim

[59] *See* 29 C.F.R. § 1620.15(a).
[60] *See* 29 C.F.R. § 1620.16(a).
[61] *See* 29 C.F.R. § 1620.17(a).
[62] *See* 29 C.F.R. § 1620.17(b)(3).
[63] *See Krenik v. County of Le Sueur,* 47 F.3d 953 (8th Cir. 1995).

under the Equal Pay Act or the New York Equal Pay Act. The male officers had primary responsibility for interacting with inmates and supervising the jail, while the female officers were primarily responsible for the dispatching duties.[64]

The Requirement of Similar Working Conditions

In order for the equal pay standard to apply, the jobs are required to be performed under similar working conditions.[65] In determining whether this requirement is met, a practical judgment is required in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels. The term "similar working conditions" encompasses two subfactors: "surroundings" and "hazards." "Surroundings" measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, and their intensity and their frequency. "Hazards" take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause.[66]

The question was raised early whether time of day for work was a working condition. In *Corning Glass Works*,[67] the issue was whether wages paid to predominantly male night supervisors that were higher than those paid to predominantly female day supervisors were lawful under the Equal Pay Act. The Court found that defendant did not succeed in proving other than that this wage differential was an added payment on the basis of sex, as men historically had a monopoly on such jobs. In addition, the Court found that defendant had not "cured" the violation by permitting women to take such positions after 1966, the effective date of the Equal Pay Act:

> The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes that Congress sought to achieve. If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends.[68]

According to the Court, curing the violation would require paying day supervisors the same rate as night supervisors.

[64] *See Pfeiffer v. Lewis County,* 308 F.Supp. 2d 88 (N.D.N.Y. 2004).
[65] *See* 29 C.F.R. § 1620.18.
[66] *Id.* at § 1620.18(a).
[67] *Corning Glass,* 417 U.S. 188 (1974).
[68] *Id.* at 207 *citing Shultz v. American Can Co. – Dixie Products,* 424 F.2d 356, 359 (8th Cir. 1970); *Hodgson v. Miller Brewing Co.,* 457 F.2d 221, 227 (7th Cir. 1972), and *Hodgson v. Square D Co.,* 459 F.2d 805, 808–809 (6th Cir. 1972).

5.1.1.1.2 Affirmative Defenses to Pay Differentials

Once a plaintiff establishes a *prima facie* EPA violation, defendant bears both the burden of persuasion and production on its affirmative defenses.[69] Record-keeping requirements of two years are imposed on employers in the companion regulations.[70] The Equal Pay Act states that a difference in wages between men and women is lawful:

> [W]here 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:
>
> Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[71]

Once a *prima facie* case is demonstrated, the employer must prove by a preponderance of the evidence that the differential is justified by one of four exceptions set forth in the EPA to avoid liability: (i) a seniority system, (ii) a merit system, (iii) a system measuring earnings by quantity or quality of production, or (iv) a differential based on a factor other than sex. Although the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a "factor other than sex," it is the employer, not the employee, who must prove that the actual disparity is not sex linked.[72] A defendant invoking an affirmative defense under the EPA must show that the factor of sex provided no basis for the wage differential. When the defendant overcomes the burden, the plaintiff must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential.[73] A plaintiff bears the burden of *producing* evidence of pretext

[69] *Beck-Wilson v. Principi,* 441 F.3d 353 (6th Cir. 2006) *citing Buntin v. Breathitt County Board of Education,* 134 F.3d 796, 800 (6th Cir. 1998).

[70] *See* 29 C.F.R. § 1620.32, Recordkeeping Requirements:

(b) Every employer subject to the equal pay provisions of the Act shall maintain and preserve all records required by the applicable sections of 29 CFR Part 516 and in addition, shall preserve any records which he makes in the regular course of his business operation which relate to the payment of wages, wage rates, job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, description of practices or other matters which describe or explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment, and which may be pertinent to a determination whether such differential is based on a factor other than sex.

[71] The Equal Pay Act, 29 U.S.C. § 206(d)(1).

[72] *See Corning Glass,* 417 U.S. at 188 *citing* 28 U.S.C. § 206(d)(1).

[73] *See, e.g., Miranda v. B & B Cash Grocery Store,* 975 F.2d 1518, 1533 (11th Cir. 1992).

solely when a reasonable jury viewing the defendant's evidence could find only for the defendant on the issue of the affirmative defense.

A Seniority System

The Equal Pay Act generally prohibits employers from compensating their employees unequally on the basis of sex but creates a specific exception where the apparent discrimination is due to a seniority system.[74] A differential based on the date of hire is justified so long as it is uniformly applied.[75] When an employer defends against a charge of sex discrimination by invoking its seniority plan, the burden of proving that the plan is *bona fide* rests upon the employer.[76] To meet this burden, the employer must demonstrate that it has an established policy, written or unwritten, formal or informal, the essential terms and conditions of which have been made known to the affected employees.[77] When the employer proves that the alleged discrimination was the result of a *bona fide* seniority system, the employer is entitled to summary judgment.[78]

The Court has stated that length of employment is the key element in a seniority system.[79] A seniority system, either "alone or in tandem with non-seniority criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase."[80] A pay schedule that does nothing more than increase each employee's pay annually without any reference to the employee's actual length of service, or the employee's date of hire in relation to that of other employees, is not a seniority system within the meaning of the EPA.

A Merit System

In order for a "merit system" to permit an employer to pay unequal compensation to employees of different sexes for equal work without violating the Equal Pay Act, it must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria.[81] To establish a merit system defense under the Equal Pay Act, the defendant must prove that it has a system that presents means or order of advancement or reward for merit. Systems that are informal or based on ad hoc, subjective or personal judgments

[74] *See* The Equal Pay Act, 29 U.S.C. § 206(d)(1)(i).
[75] *Hodgson v. Washington Hospital,* 9 F.E.P. 612 (W.D.Pa. 1971).
[76] *Corning Glass,* 417 U.S. 188 (1974).
[77] *EEOC v. Aetna Ins. Co.,* 616 F.2d 719 (4th Cir. 1980).
[78] *See Pierce v. Duke Power Co.,* 811 F.2d 1505 (4th Cir. 1987). *See also Brennan v. Sears, Roebuck & Co.,* 410 F.Supp. 84 (N.D. Iowa 1976).
[79] *California Brewers Ass'n v. Bryant,* 444 U.S. 598 (1980).
[80] *Ameritech Ben. Plan Committee v. Communication Workers of America,* 220 F.3d 814 (7th Cir. 2000).
[81] *See Ryduchowski v. Port Authority of New York & New Jersey,* 203 F.3d 135, 142–145 (2nd Cir. 2000).

cannot qualify as such.[82] The employees must be aware of the merit system, and it cannot be sex based in order for an employer to be able to pay unequal compensation to those of different sexes for equal work. This defense is strictly construed against the employer so that the exception does not "swallow the rule."[83] A difference in pay between female County Veterans Affairs Assistants and male Veteran Service Officers could not be justified under the merit system exception since the former were governed by a merit system, while the latter were not, and thus there was no evidence that former employees' pay had been determined fairly in relation to the latter's pay.[84]

A System Measuring Earnings by Quantity or Quality of Production

The third affirmative defense available is an employment system measuring earnings by quantity or quality of production. Employment agreements constituting performance-based compensation systems that tie the employee's pay to objective performance, for example of how an investment fund develops, qualify as compensation systems based on quality/quantity of production.[85] The absence of a system measuring quality or quantity of work cannot be cited as a defense.[86]

A Differential Based on a Factor other than Sex

These three first affirmative defenses are interpreted strictly by the courts. The fourth affirmative defense, "based on a factor other than sex" is a broader category, assessed by the courts against the intent of the Act, as the "Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."[87] The courts have therefore held that this affirmative defense "does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."[88] The requirements for the defense are not met if the wage differentials are based in any part on the factor of sex, which in this context also includes pregnancy. Acceptable factors "other than sex" include experience,[89] prior salary, education,[90] skills that the employer deems useful to the position, and a proven

[82] *See Glover v. Kindercare Learning Centers, Inc.,* 980 F.Supp. 437 (M.D. Ala. 1997).
[83] *See Hodgson v. Brookhaven Gen. Hosp.,* 436 F.2d 719, 726 (5th Cir. 1970).
[84] *Prewett v. State of Alabama Dept. of Veteran Affairs,* 419 F.Supp.2d 1338 (M.D. Ala. 2006) *citing* Fair Labor Standards Act of 1938 § 6(d)(1), Equal Pay Act 29 U.S.C.A. § 206(d)(1). *See also EEOC v. Aetna Ins. Co.,* 616 F.2d 719, 725 (4th Cir. 1980).
[85] *See Diamond v. T. Rowe Price Associates, Inc.,* 852 F.Supp. 372 (D. Md. 1994).
[86] *See EEOC v. Shelby Cty. Govt.,* 707 F.Supp. 969 (W.D.Tenn. 1988).
[87] *Corning Glass,* 417 U.S. at 208.
[88] *Beck-Wilson v. Principi,* 441 F3d at 365 *citing EEOC v. J.C. Penney Co.,* 843 F.2d 249 (6th Cir.1992).
[89] *See, e.g., Balmer v. HCA, Inc.,* 423 F.3d 606 (6th Cir. 2005).
[90] *See, e.g., Hutchins v. Int'l Bhd. of Teamsters,* 177 F.3d 1076 (8th Cir. 1999).

ability to generate higher revenue for the employer's business.[91] Education not related to the job is not a "factor other than sex."[92] A nexus must exist between the legitimate non-discriminatory reason and the job. Five federal appellate courts have held wages in a former job to be a "factor other than sex" if the employer has an acceptable business reason for setting the employee's starting pay in this fashion.[93] However, if prior salary alone were a justification, the "exception would swallow up the rule and inequality in pay among genders would be perpetuated."[94]

5.1.1.2 Equal Pay Acts on the State Level

Certain states began legislating equal pay statutes after World War I and again after World War II. Maine is an example, enacting an "equal pay for equal work" statute originally in 1949, and amending it in 1965 to an equal pay for comparable worth statute, finally strengthening its administrative procedures in 2001 with an administrative claims process and employers' self-auditing to encourage voluntary compliance.[95] Seventeen states currently have statutes modelled on the EPA[96] and equal wages for "equal work" including California[97] and Minnesota.[98] Six states have equal wages for "same" or "similar work" legislation. Eleven states

[91] *See, e.g., Mullenix v. Forsyth Dental Infirmary for Children,* 965 F.Supp. 120 (D.Mass. 1996) and *Dubowsky v. Stern, Lavinthal, Norgaard & Daly,* 922 F.Supp. 985 (D.N.J. 1996).

[92] *Simpson,* 441 F.3d at 579.

[93] *See Wernsing v. Dept. of Human Services, State of Illinois,* 427 F.3d 466 (7th Cir. 2005) *citing also Aldrich v. Randolph Central School District,* 963 F.2d 520 (2nd Cir.) *cert. denied* 506 U.S. 965 (1992); *EEOC v. J. C. Penney Co.,* 843 F.2d 249 (6th Cir. 1992); *Kouba v. Allstate Ins. Co.,* 691 F.2d 873 (9th Cir. 1982); and *Glenn v. General Motors Corp.,* 841 F.2d 1567 (11th Cir. 1988).

[94] *Irby v. Bittick,* 44 F.3d 949, 955 (11th Cir. 1995).

[95] *See* Wyman at 25 *citing* Me. Dep't of Labor Reg. 12-170, Ch. 12 (Nov. 19, 2001).

[96] State or local equal pay provisions are specifically allowed to differ according to 29 C.F.R. § 1620.28 from the equal pay provisions set forth in the FLSA. However, "[n]o provisions of the EPA will excuse noncompliance with any State or other law establishing fewer defenses or more liberal work criteria than those of the EPA. On the other hand, compliance with other applicable legislation will not excuse violations of the EPA."

[97] *See* Cal. Lab. Code § 1197.5: No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

[98] *See* Minn.Stat. § 181.67(1): No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate the employer pays to employees of the opposite sex 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 a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.

are seen as having "comparable work" [99] statutes. Four states simply prohibit wage discrimination on the basis of sex.[100]

In addition, over twenty states and municipalities have adopted comparable work legislation for public employers. Minnesota is one of the most far-reaching examples here, with the State Employees Pay Equity Law and the concept of comparable worth, not just comparable work.[101] Minn.Stat. § 43A.01 states that:

> It is the policy of this state to attempt to establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in the executive branch. Compensation relationships are equitable within the meaning of this subdivision when the primary consideration in negotiating, establishing, recommending, and approving total compensation is comparability of the value of the work in relationship to other positions in the executive branch.

It is estimated that Minnesota's comparable worth program has resulted in an increase in women's pay of 12 % for state employees.[102]

5.1.1.3 Title VII of the 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act[103] constitutes the backbone of discrimination jurisprudence in the United States on both the federal and state levels. The 1964 Civil Rights Act was passed in the aftermath of *Brown* and demonstrations demanding an end to the apartheid system that had reigned in the South for one hundred years since the American Civil War. President Kennedy addressed the nation in 1963, stating:

> The events in Birmingham [court ordered admission of African Americans to schools] and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them. … We face, therefore a moral crisis as a country and as a people. It cannot be met by repressive police action. It cannot be left to increased demonstrations in the streets. It cannot be quieted by token moves or talk. It is

[99] A plaintiff can theoretically bring an unequal pay claim for comparable worth under Title VII, as mentioned briefly below, but the courts have not been receptive to such claims, *see American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) v. State of Washington,* 770 F.2d. 1401 (9th Cir. 1985).

[100] *See* Wyman at 45.

[101] Minn.Stat. § 43A.01-3, -14a, and -22a. *See* Robert Belton, Dianne Avery, Maria Ontiveros and Roberto Corrado, EMPLOYMENT LAW DISCRIMINATION, CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (7th ed. West 2004) at 432. *See also* Wyman, who distinguishes "comparable work" from "comparable worth," stating that comparable worth "is not concerned with whether men's jobs and women's jobs are substantively similar. Rather, the theory proposes that society place a value on every job, and jobs that are considered equally valuable should be paid the same." Wyman at 50.

[102] Wyman at 49.

[103] 42 U.S.C. § 2000e *et seq.* Title VII also has companion regulations found at 29 C.F.R. § 1604 *et seq.*

> time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives … Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.[104]

The proposed legislation, the first major civil rights legislation since the post-Civil War Reconstruction era, was to deal with the remaining vestiges of Jim Crow and segregation, and to that end it addressed discrimination on the basis of race, color and creed in voting, public accommodations, education and employment. The roots of Title VII's prohibitions against discrimination in employment can be found in the Unemployment Relief Act of 1933, which provided "[t]hat in employing citizens for the purpose of this Act, no discrimination shall be made on account of race, color, or creed." The administration of President Roosevelt in 1941, followed by those of Presidents Truman, Eisenhower, and Kennedy, had all issued Executive Orders prohibiting racial discriminatory practices by federal contractors and each had created Fair Employment Practices Committees to investigate complaints of discrimination against such businesses. President Kennedy's proposed legislation can be viewed as taking this a step further.

One quarter of a million demonstrators marched on Washington D.C. for jobs and freedom on 28 August 1963, hearing Dr. Martin Luther King Jr.'s "I Have a Dream" speech. President Kennedy met with leaders of the march afterwards to try to discourage them from attempting to strengthen Title VII and other portions of the bill, as he feared doing so would kill the needed Republican support. Two weeks later, several children were killed when an African American church was bombed in Birmingham, Alabama. Supporters of the Civil Rights Bill responded by strengthening key provisions, particularly the employment measures. The bill was sent to the Rules Committee the day before President Kennedy was assassinated. Five days after the assassination, President Johnson addressed a joint session of Congress on 27 November 1963, stating:

> We have talked long enough in this country about civil rights. It is time to write the next chapter and to write it in the books of law…No eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.

The proposed 1964 Civil Rights Act did not initially include a prohibition of discrimination on the basis of sex. Debate exists as to the motives for its inclusion, with some arguing that it was added in an effort to defeat the bill.[105]

[104] President John F. Kennedy's Civil Rights Address, delivered 11 June 1963 as restated in the 40th anniversary of the 1964 Civil Rights Act as found at the EEOC website, http://www.eeoc.gov/abouteeoc/40th/panel/firstprinciples.html. The address can also be found at the American Rhetoric website: http://www.americanrhetoric.com/speeches/johnfkennedycivilrights.htm.
[105] Baer (1991) at 76.

Women's rights groups had organized around the omission of "sex," arguing that the rights of African American women were protected under the category of race while Caucasian women would continue to be disadvantaged because of their sex.[106] The proposal to include sex originated with the National Women's Party, which had been lobbying for an Equal Rights Amendment since 1923, and had sought to include sex in every civil rights bill considered by Congress over forty years.

Despite the addition of sex as a protected category, Title VII was passed in June 1964 by strong bipartisan majorities in both houses, and signed into law by President Johnson on 2 July 1964. The act included a prohibition against discrimination on the basis of sex, with the exception of where sex is "a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business enterprise," an exception similar to those found in both the Swedish and UK legislation. Constitutional challenges were raised quickly as to Congress' authority to legislate the act under the commerce clause.[107]

The courts under Title VII in the early cases in the 1960's began to invalidate the restrictive state protective legislation based on sex, such as that limiting women to jobs not requiring lifting over 25–30 pounds, as well as those imposing height and weight requirements for jobs traditionally held by men.[108] Con-

[106] Kessler-Harris (2001) at 242.

[107] *See, e.g., Heart of Atlanta, Inc. v. United States,* 379 U.S. 241 (1964)(1964 Civil Rights Act constitutional exercise of power by Congress under the commerce clause).

[108] *See, e.g., Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969)(lifting requirement for position of switchman not a *bona fide* occupational qualification) and *Rosenfeld v. Southern Pacific Co.* 444 F.2d 1219 (9th Cir. 1971)(employer's policy to exclude women, generically, from certain positions on basis of strenuous physical demands of the positions both as to hours of work and physical activity required with no showing that sexual characteristics of employee were crucial to successful performance of job, not a *bona fide* occupational qualification). These types of state statutes are now specifically addressed in 29 C.F.R. § 1604.2(b)(1), Effect of sex-oriented State employment legislation:

> Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, *e.g.*, the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

The types of legislation addressed in this provision reflect those adopted by many countries at the turn of the twentieth century, prohibitions as to work in certain occupations such as mines, night work and the mandatory maternity leave.

gress added pregnancy[109] as an explicit subcategory of sex in 1978 in direct response to the Court's decision in *General Electric*.[110] However, by the late 1980's and early 1990's, civil rights activists and litigants were frustrated over the perceived inefficacy of Title VII. They focused on the inadequacy of the then existing remedies for compensating victims and deterring discrimination, as well as recent Court decisions narrowing the protections of the Act, arguing that the Court had seriously "misperceived the political will."[111]

The Civil Rights Act of 1991 amending Title VII was in part Congress' response to the Court's decisions, particularly in *Wards Cove Packing* and *Price Waterhouse*.[112] In *Wards Cove Packing*, the Court had reformulated the standards and burdens of proof for a disparate impact claim, making it more difficult for plaintiffs to prevail. In *Price Waterhouse*, the Court had held that even when a plaintiff proves that an adverse decision was made for discriminatory reasons, the employer can escape liability by proving it would have made the same decision even if it had not been motivated by discriminatory animus. The amendments negated these cases by codifying the disparate impact theory of discrimination as originally articulated in the *Griggs v. Duke Power* decision,[113] and clarifying that whenever a plaintiff in a "mixed-motive" case proves that discrimination motivated an employment decision, she has established a violation of Title VII. In such cases, employers can avoid only certain forms of relief, but not liability, if they can prove they would have made the same decision even without the discriminatory animus. Congress also overruled the case in which the Court held

[109] Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), which states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. *See also* 29 C.F.R. § 1620.10.

[110] *See General Electric Co. v. Gilbert,* 429 U.S. 125 (1976). This case was one of the few times that the Court rejected an EEOC guideline and the "heavy weight of authority in the federal courts of appeals in order to hold that Title VII did not prohibit discrimination on the basis of pregnancy-related conditions… Congress swiftly 'overruled' that decision in the Pregnancy Discrimination Act of 1978, 92 Stat. 2076." *See Sutton v. United States Airline, Inc.,* 527 U.S. 471 (1999) at note 3. Pregnancy is specifically addressed in 29 C.F.R. § 1604.8 and sexual harassment in 29 C.F.R. § 1604.11.

[111] Restated in the 40th anniversary of the 1964 Civil Rights Act as found at the EEOC website, http://www.eeoc.gov/abouteeoc/40th/panel/firstprinciples.html.

[112] 42 U.S.C. § 1981 *et seq.* The passage of the 1991 Civil Rights Amendment has also been seen as a response to the appointment hearings of Supreme Court Justice Thomas Clarence and the testimony of Anita Hill. *See, e.g., The Thomas Connections,* The New York Times, 22 October 1991 at Section A 22. *See Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642 (1989) and *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).

[113] *Griggs v. Duke Power,* 401 U.S. 424 (1971).

that Title VII does not apply extraterritorially,[114] making Title VII, the Age Discrimination in Employment Act and the Americans with Disabilities Act applicable extraterritorially through the Civil Rights Act of 1991.[115] The congressional response to *Price Waterhouse* led the lower courts to assume that the new rule – that liability attaches when discrimination is shown to have motivated a decision and the burden shifts to the defendant to avoid damages by proving it would have made the same decision anyway – only applies when the plaintiff has "direct" evidence of discrimination. The Court in 2003 in *Desert Palace v. Costa* unanimously rejected what it found to be a misreading of the statute, and held that no heightened evidentiary requirement existed according to the plain text of the statutory amendment to establish a "mixed-motive" violation of Title VII.[116]

The most significant change effected by the Civil Rights Act of 1991 arguably was the addition of compensatory and punitive damages to the panoply of remedies available to victims of intentional discrimination, with damages having limits calibrated to the size of the employer. Title VII cases were also made eligible for trial by jury as under the Seventh Amendment that mandates the availability of jury trials whenever damages may be awarded, through the amended wording as effected by the Civil Rights Act of 1991.

5.1.1.3.1 A Prima Facie Case of Discrimination under Title VII

Title VII makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[117]

Employers of more than fifteen employees, employment agencies, as well as labor unions, are explicitly liable for discrimination under Title VII. Regarding employment agencies, it is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of race, color, reli-

[114] *See EEOC v. Arabian American Oil Co.,* 499 U.S. 244 (1991).
[115] *See Landgraf v. U.S.I. Film Prod.,* 511 U.S. 244 (1994).
[116] *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003).
[117] Title VII, 42 U.S.C. § 2000e-2(a).

gion, sex, or national origin. Labor unions are prohibited from excluding or expelling from membership, or otherwise discriminating against, any individual because of race, color, religion, sex, or national origin. They are also prohibited from segregating, or classifying membership or applicants for membership, or classifying or failing or refusing to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or limit such employment opportunities or otherwise adversely affect one's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin. Finally, labor unions are prohibited from causing or attempting to cause an employer to discriminate against an individual in violation of Title VII.[118]

A plaintiff must first file a charge with the EEOC or other authorized state agency before she can litigate a Title VII claim. To establish a *prima facie* case of discrimination under Title VII, a plaintiff must demonstrate that: (1) she was a member of a protected class; (2) she was subject to an adverse employment action; (3) she was qualified for the job; and (4) for the same or similar conduct, she was treated differently from similarly situated male employees. Once the plaintiff has established a *prima facie* case, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the adverse employment action. A discrimination claim under Title VII may be established using direct or indirect evidence.

"Sex" is defined as including pregnancy and marital status.[119] With respect to the "protected class," the Court has extended the protections under Title VII from solely the category of "sex" to a "sex-plus" hybrid theory of discrimination.[120] Certain other federal courts have also recognized "sex-plus" hybrid claims of discrimination including sex-plus race,[121] sex-plus age[122] as well as African-American women as a protected subclass under Title VII.[123]

Discrimination is not specifically defined in Title VII. The Court has defined two different methods of proving discrimination, disparate treatment or direct or intentional discrimination[124] and disparate impact or indirect discrimin-

[118] Title VII, 42 U.S.C. § 2000e-2(b) and (c).

[119] Sex includes pregnancy as enacted in 1978 and also marital status as seen from 29 C.F.R. § 1604.4 as well as sexual harassment 29 C.F.R. § 1604.11.

[120] *See Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971)(upholding a discrimination claim challenging a policy not to accept women with pre-school aged children).

[121] *See Jefferies v. Harris Cty. Community Ass'n,* 615 F.2d 1025 (5th Cir. 1980).

[122] *See Hall v. Missouri Highway and Transportation Comm'n,* 995 F.Supp. 1001 (E.D.Mo. 1998).

[123] *See Hicks v. Gates Rubber Co.,* 833 F.2d 1406 (10th Cir. 1987) and *Graham v. Bendix Corp.,* 585 F.Supp. 1036 (N.D.Ind. 1984).

[124] Disparate treatment is based on the first clause of the act which states that it is unlawful for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–806 (1973).

ation.[125] In the landmark case of the *Teamsters*,[126] the Court referred to these two methods, defining "disparate treatment" as where the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." This is distinguished from claims of "disparate impact," defined by the Court as:

> [E]mployment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity… Proof of discriminatory motive, we have held, is not required under a disparate-impact theory… Either theory may, of course, be applied to a particular set of facts.[127]

The Court in *Teamsters* was addressing whether a broad systemic pattern of discrimination existed in the operation of the seniority system used by the labor union.

5.1.1.3.2 Disparate Treatment

Disparate treatment cases can be brought by individual or multiple plaintiffs or as a class action. A claim of disparate treatment typically falls within one of four basic categories of proof: (1) direct evidence, (2) pretext cases, (3) evidence of mixed or dual motives, or (4) evidence of a pattern or practice of discrimination. These four categories represent the different analytical approaches to establishing a *prima facie* case of discrimination, applicable presumptions as well as burden-shifting rules.[128]

Direct Evidence

Direct evidence cases are based on an admission by a defendant, or a facially discriminatory employment policy, establishing the fact of intentional discrimination.[129] The burden of proof then shifts to the defendant employer to justify its reliance on the prohibited criterion.

Pretext Cases

In the absence of direct evidence of discrimination, discrimination claims can be analyzed under a burden-shifting framework set forth in *McDonnell Douglas*

[125] Disparate impact is based on the second clause of the act which states that it is unlawful for an employer (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. *See Griggs,* 401 U.S. at 430–432.

[126] *See International Brotherhood of the Teamsters v. United States,* 431 U.S. 324, 335 n. 15 (1977).

[127] *Teamsters* at 335 note 14.

[128] *See* Belton (1999) at 68.

[129] *See, e.g., United Automobile Workers v. Johnson Controls,* 499 U.S. 187 (1991)(defendant's policy prohibiting women, but not men, of child-bearing age from certain positions explicit facial discrimination).

Corp.[130] Under this framework, a plaintiff must first establish a *prima facie* case of discrimination based on indirect evidence.[131] After establishing a *prima facie* case, a presumption arises that the employer has unlawfully discriminated. The burden then shifts to the employer to produce a legitimate, non-discriminatory reason for the adverse employment action. The employer satisfies its burden as long as it articulates a valid rationale for its decision. If the employer presents a legitimate, non-discriminatory reason for the adverse action, plaintiff will only prevail by proving that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[132]

In order to establish pretext, the plaintiff must show by a preponderance of the evidence either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the adverse action, or (3) that they were insufficient to motivate the adverse action.[133] The Court in *Hicks* has stated that "[t]he fact finder's disbelief of the reasons put forward by the defendant … may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination…"[134] The Court flatly rejected a "pretext-plus" approach to discrimination analysis, which had required the plaintiff not only to demonstrate that the employer's asserted reasons were pretextual, but also to introduce additional evidence of discrimination.

Evidence of Mixed or Dual Motives

Cases in which evidence of mixed or dual motives were presented proved to be problematic. In *Price Waterhouse v. Hopkins*,[135] the Court had considered an employment decision made "because of sex" in a "mixed-motive" case, *i.e.,* when both legitimate and illegitimate reasons motivated the decision. Although the Court concluded that an employer had an affirmative defense if it could prove that it would have made the same decision had sex not played a role, it was divided on the question of when the burden of proof shifts to an employer to prove the defense. Concurring in the judgment, Justice O'Connor concluded that the burden would shift only when a disparate treatment plaintiff could show by "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision."[136] In response to this decision, Congress passed the Civil Rights Act of 1991, providing that an unlawful employment practice is

[130] *McDonnell Douglas,* 411 U.S. 792.
[131] *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252 (1981).
[132] *Burdine,* 450 U.S. at 253 *citing McDonnell Douglas,* 411 U.S. at 804.
[133] *Manzer v. Diamond Shamrock Chemicals Co.,* 29 F.3d 1078, 1084 (6th Cir. 1994).
[134] *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993).
[135] *Price Waterhouse,* 490 U.S. 228.
[136] *Id.* at 276.

established "when the complaining party demonstrates that … sex … was a motivating factor for any employment practice, even though other factors also motivated the practice."[137] If the plaintiff succeeds in proving such a violation, the employer can avail itself of a limited affirmative defense that simply restricts the available remedies if it demonstrates that it would have taken the same action absent the impermissible motivating factor,[138] lowering the threshold argued by Justice O'Connor in *Price Waterhouse*.

The Court addressed this new standard with respect to mixed motives in *Desert Palace Inc. v. Costa,*[139] where the issue was raised as to whether plaintiff must present direct evidence of discrimination as stated by Justice O'Connor to obtain a mixed-motive instruction. The Court began with the clear text of the statute, finding that where, "as here, the words of the statute are unambiguous, the 'judicial inquiry is complete'."[140] Section 2000e-2(m) unambiguously states that a plaintiff need only demonstrate that an employer used a forbidden consideration as to "any employment practice." The Court found that the statute on its face does not mention, much less require, that plaintiff make a heightened showing through direct evidence. In addition, Title VII's silence concerning the type of evidence required in mixed-motive cases suggested that the Court should not depart from the conventional rule of civil litigation applicable in Title VII cases requiring plaintiff to prove her case by the preponderance of the evidence using direct or circumstantial evidence: "In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin' was a motivating factor for any employment practice." The Court deferred to the will of Congress and accepted the lower standard.

Evidence of Practice or Pattern

In the pattern-or-practice method of proving discrimination, plaintiffs show that the company had a policy of discriminating against a protected class. As a pattern-or-practice claim focuses on establishing a policy of discrimination and does not address individual hiring decisions, it has been found by the courts to be inappropriate as a vehicle for proving discrimination in an individual case.[141] However, pattern-or-practice evidence may be relevant to proving an otherwise

[137] Title VII, 42 U.S.C. § 2000e-2(m).
[138] Title VII, 42 U.S.C. § 2000e-5(g)(2)(B).
[139] *Desert Palace,* 539 U.S. 90.
[140] *Id.* at 98 *citing Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992).
[141] *See Bacon v. Honda Mfg. of America, Inc.,* 370 F.3d 565 (6th Cir. 2004) *citing Lowery v. Circuit City Stores, Inc.,* 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds,* 527 U.S. 1031 (1999); and *Brown v. Coach Stores, Inc.,* 163 F.3d 706, 711 (2nd Cir. 1998), which also stated that "[a]ll interpret the Supreme Court's discussion of the pattern-or-practice method of proof as being limited to class actions or suits by the government" at 575 *citing Teamsters,* 431 U.S. at 359–360.

viable individual claim for disparate treatment under the *McDonnell Douglas* framework. In a pattern or practice case, plaintiffs have the initial burden of showing that the unlawful discrimination was the employer's regular policy, proving by the "preponderance of the evidence that the discrimination was the company's standard operating procedure – the regular rather than the unusual practice."[142]

In a case in which the plaintiff has alleged that her employer has engaged in a "pattern or practice" of discrimination, "[s]tatistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue."[143] For purposes of Title VII, where "gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination."[144] Even when not sufficient to establish a *prima facie* case, statistical evidence is helpful in showing that an employer's articulated reason for the employment decision is pretextual.

In *Teamsters*, plaintiffs presented statistical evidence of wide disparities between the percentages of African Americans in the work population at large in the community, and those employed by defendant in particular positions, with a total absence of African Americans at certain levels. This was also supported by evidence of individual instances of discrimination. The combination of the statistical and individual evidence was sufficient to prove discrimination. The Court emphasized the inability of an employer to rebut an inference of discrimination based on the "inexorable zero," the total absence of a protected group from the jobs at issue.[145]

Title VII Wage Claims

In certain cases, Title VII and the Equal Pay Act can address the same behavior, unequal wages as between men and women.[146] An Equal Pay Act claim almost always falls within the ambit of Title VII actions. However, the scope of behavior falling within Title VII is broader than simply the EPA. The EPA is directed only at wage discrimination based on sex and forbids the specific practice of paying unequal wages for substantially similar work. Title VII can address claims raised

[142] *Teamsters,* 431 U.S. at 336.
[143] *Obrey v. Johnson,* 400 F.3d 691 (9th Cir. 2005) at 694 *citing Diaz v. Am.Tel. & Tel.,* 752 F.2d 1356 (9th Cir. 1985) and *McDonnell Douglas,* 411 U.S. at 805.
[144] *Id. citing Hazelwood Sch. Dist. v. United States,* 433 U.S. 299 (1977).
[145] *Teamsters,* 431 U.S. at 342, note 23.
[146] For the relationship between the EPA and Title VII as to wage claims, *see* 29 C.F.R. § 1620.27 and 29 C.F.R. § 1604.8.

with respect to the broader category of comparable work. Both Title VII and the Equal Pay Act are often pleaded in the same case.

5.1.1.3.3 Defenses to Disparate Treatment

When a plaintiff has established a *prima facie* case of disparate treatment under Title VII, the defendant must then offer a legitimate, non-discriminatory reason for the adverse employment action at issue. A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination.[147] It is lawful for an employer to discriminate on the basis of national origin, sex or religion if it is a *bona fide* occupational qualification ("BFOQ") falling within one of three categories: safety issues with respect to third parties, authenticity, and privacy.[148] The employer must show that the challenged qualification relates to the essence or to the central mission of the employer's business. The BFOQ defense is limited to qualifications that affect an employee's ability to do the job.

To establish a sex BFOQ based on safety, the employer must show that it has a "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" at a risk to third parties.[149] The Court has refined these requirements for a safety-based BFOQ defense, stating that the employer must show that the challenged safety-related requirement was "indispensable to the particular business at issue."[150] According to the regulations, "[w]here it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a *bona fide* occupational qualification, e.g., an actor or actress."[151] Privacy-based BFOQ defenses were discussed in Title VII's legislative history, with the House debate specifically mentioning situations involving a masseur and a female nurse caring for an elderly woman.[152] Courts have recognized privacy-based BFOQ defenses in cases involving a nursing home assistant, a labor and delivery nurse, and bathroom attendants.[153] Other defenses available are where an employer acts on the basis of

[147] Title VII, 42 U.S.C. § 2000e-2(k)(2). *See also In re Pan American World Airways, Inc.*, 905 F.2d 1457 (11th Cir. 1990).

[148] Title VII provides that it is not unlawful "for an employer to hire and employ employees … on the basis of … religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *See* Title VII, 42 U.S.C. § 2000e-2(e)(1).

[149] *See Dothard v. Rawlinson,* 433 U.S. 321 (1977).

[150] *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

[151] *See* 29 C.F.R. § 1604.2(a)(2).

[152] *See* 110 Cong. Rec. 2705, 2718, 2720 (1964)(statements of Reps. Goodell, Multer, & Green).

[153] *See Fesel v. Masonic Home of Del., Inc.,* 447 F.Supp. 1346, 1354 (D.Del. 1978), *aff'd without op.*, 591 F.2d 1334 (3rd Cir. 1979); *EEOC v. Mercy Health Ctr.,* 29 Fair Empl. Prac. Case (BNA) 159, 163 (W.D. Okla. 1982); and *Norwood v. Dale Maint. Sys., Inc.,* 590 F.Supp. 1410, 1417 (S.D.W.Va. 1982), respectively.

a *bona fide* seniority, merit or bonus system, on the results of a professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

A Title VII claim of wage discrimination parallels that of an EPA violation insofar as it incorporates the EPA's affirmative defenses.[154] An employer may therefore avoid liability under a Title VII wage discrimination claim if it can establish one or more of the four affirmative defenses allowed by the EPA: (i) a seniority system, (ii) a merit system, (iii) a system measuring earnings by quantity or quality of production, or (iv) a differential based on a factor other than sex. In addition, an employer is also allowed to give and to act upon the results of any professionally developed ability test as stated above.

5.1.1.3.4 Disparate Impact

Since the 1970's, the Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and based on disparate impact, stating that disparate treatment is the "most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]."[155] Liability in a disparate treatment case "depends on whether the protected trait … actually motivated the employer's decision."[156] In contrast, disparate impact claims involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Under a disparate impact theory of discrimination, "a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case."[157]

The first finding of disparate impact by the Court in an employment context was in *Griggs v. Duke Power Co.*,[158] seen by many as the most important discrimination case since *Brown*, empowering plaintiffs by allowing them to reach the roots of discriminatory behavior.[159] The defendant employer in *Griggs* required either a high school education or a certain score on an intelligence test for certain jobs. The Court found that there was no significant relationship between the requirements and the employment positions, that the requirements tended to exclude African Americans at a higher rate than Anglo-Americans, and that the jobs in question historically only had been filled by Anglo-Americans; in other

[154] Title VII, 42 U.S.C. § 2000e-2(h). *See Washington Cty. v. Gunther,* 452 U.S. 161 (1981).
[155] *Raytheon Co. v. Hernandez,* 540 U.S. 44 (2003) at 52 *citing Teamsters,* 431 U.S. at 335.
[156] *Id.*
[157] *Id.* at 53 *citing Wards Cove Packing v. Atonio,* 490 U.S. 642 (1989).
[158] *Griggs v. Duke Power,* 401 U.S. 424 (1971).
[159] *See, e.g.,* Belton (1999) at 174.

words, the requirements perpetuated the historical exclusion of African Americans from such positions. The Court stated that Congress had "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,"[160] noting that the EEOC, which had enforcement responsibility, "had issued guidelines that accorded with our view." The Court thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent. Under this analysis, the Court in 1977 later held that a corrections facility could not have height or weight requirements for employment as a prison guard.[161] The holding in *Griggs,* that objective criteria as to employment could result in disparate impact, was extended by the Court in *Watson v. Fort Worth Bank & Trust*[162] to subjective criteria such as interviews, for "[w]e are persuaded that our decision in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices."

To establish a *prima facie* disparate impact claim, plaintiffs must show a specific, facially-neutral employment practice, a statistically significant disparity among members of different groups affected by the practice, and a causal nexus between the facially-neutral employment practice and the statistically significant disparity.[163] An unlawful employment practice based on disparate impact is established if –

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration … with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[164]

Disparate impact claims do not require proof of intent to discriminate. Plaintiffs must identify specific practices as responsible for the asserted disparities[165] and present a systemic analysis of those employment practices to establish their case.[166] Once it is shown that the employment standards are discriminatory in

[160] *See also Smith v. City of Jackson, Miss.,* 544 U.S. 228, 234 (2005) *citing Griggs,* 401 U.S. at 425.
[161] *Dothard v. Rawlinson,* 433 U.S. 321 (1977).
[162] *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977 (1988).
[163] The disparate impact basis for Title VII liability is based on 42 U.S.C. § 2000e-2(a)(2), which forbids an employer to "limit, segregate, or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of race or sex.
[164] *See* Title VII, 42 U.S.C. §§ 2000e-2(a)–(k).
[165] *See Johnson v. Uncle Ben's, Inc.,* 965 F.2d 1363, 1367 (5th Cir. 1992).
[166] *See Black Fire Fighters Ass'n v. City of Dallas,* 905 F.2d 63 (5th Cir. 1990).

effect, the employer must meet "the burden of showing that any given requirement (has) … a manifest relationship to the employment in question."[167] If the employer proves that the challenged requirements are job-related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest and that the employer was using the practice as a mere pretext for discrimination.[168] Punitive damages are not available for a disparate impact claim nor are compensatory damages other than in the form of backpay and interest on backpay.[169]

Under the Uniform Guidelines issued by the EEOC, a selection rate for any race, sex or ethnic group which is less than four-fifths of the rate for the group with the highest rate will generally be regarded by federal enforcement agencies as evidence of adverse impact.[170] In other words, if the dominant group of Anglo-American males is selected at a rate of 70 %, any minority group with a selection rate for employment of less than 56 % will be seen as discriminated against by the EEOC. Several of the federal Circuit Courts of Appeals have also adopted this as a guideline for finding disparate impact.[171]

5.1.1.3.5 Defenses to Disparate Impact

Once plaintiff demonstrates that the employment standards are discriminatory in effect, the employer must meet the burden of showing that any given requirement has a manifest relationship to the employment in question. This showing can be either a business necessity or a *bona fide* occupational qualification. In order to prove a business necessity so as to refute a Title VII charge of discrimination by disparate impact, the employer must demonstrate that the employment practice is directly related to the prospective employee's ability to perform the job effectively, i.e., it must be necessary to fulfill legitimate business requirements.

5.1.1.3.6 Title VII's Retaliation Provision

Title VII contains an anti-retaliation provision forbidding employers from taking retaliatory actions:

[167] *See Dothard v. Rawlinson,* 433 U.S. 321 (1977).
[168] *See Int'l Bhd. of Elec. Workers, AFL-CIO, Local Unions Nos. 605 & 985 v. Miss. Power & Light Co.,* 442 F.3d 313, 317–18 (5th Cir. 2006).
[169] *See* The Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1).
[170] 29 C.F.R. § 1607.4D.
[171] *See, e.g., Isabel v. City of Memphis,* 404 F.3d 404 (6th Cir. 2005)(African-American police sergeants with City of Memphis established *prima facie* case of discrimination through statistical evidence, including T- and Z-tests, that examination for promotion to lieutenant had adverse impact on them, even though passing rate under new cutoff score satisfied the EEOC's "four-fifths rule"); *Reid v. State of N.Y.,* 570 F.Supp. 1003 (S.D.N.Y. 1983)(Violation of "four-fifths rule" is evidence of adverse impact which would establish a *prima facie* case of Title VII discrimination under the Civil Rights Act of 1964, § 701 *et seq.*); and *United States v. City of Chicago,* 663 F.2d 1354 (7th Cir. 1981).

> It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment … because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (italics added).[172]

A split arose in the circuit courts as to the standard to be applied to such actions. The Court settled this split recently in *Burlington Northern*.[173] This decision is interesting not only in the protections the Court gives to plaintiffs, but also the interplay that can be seen between the roles of the Court, Congress and the EEOC.

The Court begins its analysis with the plain language of the statute as stated above, noting that the language of the substantive discrimination prohibition provision below differs from that of the anti-retaliation provision in important ways:

> It shall be an unlawful employment practice for an employer--
>
> (1) *to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment,* because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,* because of such individual's race, color, religion, sex, or national origin (italics added).[174]

The Court notes that the underscored words in the substantive provision, "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" explicitly limited the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision.[175] Given these linguistic differences, the Court finds that the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing.[176] Rather, the question is whether Congress intended its different words to make a legal difference. The Court went on, stating that "[w]e normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion',"[177] finding strong reason to believe that Congress intended the differences that its language sug-

[172] *See* Title VII, 42 U.S.C. § 2000e-3(a).
[173] *Burlington Northern and Santa Fe Railway Co. v. White,* – U.S. – , 126 S. Ct. 2405 (2006).
[174] Title VII, 42 U.S.C. § 2000e-2(a).
[175] *Burlington Northern* at 2412.
[176] *Id.* at 2412 *citing Pasquantino v. United States,* 544 U.S. 349, 355, n. 2 (2005); *McFarland v. Scott,* 512 U.S. 849, 858 (1994); and *Sullivan v. Everhart,* 494 U.S. 83, 92 (1990).
[177] *Id. citing Russello v. United States,* 464 U.S. 16, 23 (1983).

gests, for the two provisions differ not only in language but in purpose as well. The Court found that the anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.[178] The anti-retaliation provision, according to the Court, in contrast seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.,* their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.,* their conduct.

To this end, the Court found that to secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments" would be achieved were all employment-related discrimination "miraculously" eliminated.[179]

The Court found, however, that the second objective cannot be achieved by only focusing upon an employer's actions and harms that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to her or his employment or by causing harm *outside* the workplace.[180] A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, the Court reasoned that such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms."[181]

The Court found that "purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[182] The Court's case law did not compel a contrary conclusion and neither did the EEOC's interpretations of the provision.[183] Finding that Title

[178] *Id. citing McDonnell Douglas,* 411 U.S. at 800-801.
[179] *Id. citing McDonnell Douglas* at 800.
[180] *Id. citing Rochon v. Gonzales,* 438 F.3d 1211, 1213 (C.A.D.C. 2006)(FBI retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife"); and *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 984, 986 (10th Cir. 1996)(finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination).
[181] *Burlington Northern* at 2412 *citing Robinson v. Shell Oil Co.,* 519 U.S. 337, 346 (1997).
[182] *Id.*
[183] The Court reviewed the guidelines issued by the EEOC here, EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel § 491.2 (1972) and 2 EEOC Compliance Manual § 8, pp. 8–13. *Burlington Northern* at 2414.

VII's substantive provision and its anti-retaliation provision were not coterminous, the Court held that the application of the Title VII retaliation provision is not limited to an employer's actions that affect terms, conditions or status of employment, or those that occur at workplace, i.e. that the scope of the retaliation provision is broader than that of Title VII's substantive discrimination provision.[184] The Court further held that the anti-retaliation provision does not protect an individual from all retaliation, but from retaliation that produces an injury or harm. A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'."[185]

5.1.1.3 State Prohibitions against Sex Discrimination

State constitutional provisions against state discrimination on the basis of sex exist in one-third of the American states. Anti-discrimination and equal pay legislation can be found in almost all the states, some invoking the same standards as the federal legislation, while others provide expanded protections. One example is the Minnesota Human Rights Act ("MHRA"),[186] its predecessor the Minnesota Fair Employment Practices Act passed in 1955. The MHRA, Subdivision 1. Freedom from discrimination, states that "[i]t is the public policy of this state to secure for persons in this state, freedom from discrimination":

> (1) in employment because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and age;
>
> (2) in housing and real property because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and familial status;
>
> (3) in public accommodations because of race, color, creed, religion, national origin, sex, sexual orientation, and disability;
>
> (4) in public services because of race, color, creed, religion, national origin, sex, marital status, disability, sexual orientation, and status with regard to public assistance; and

[184] This holding by the Court abrogated the holdings of the Circuit Courts in *Von Gunten v. Maryland,* 243 F.3d 858 (4th Cir. 2001); *Robinson v. Pittsburgh,* 120 F.3d 1286 (3rd Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); and *Manning v. Metropolitan Life Ins. Co.,* 127 F.3d 686 (8th Cir. 1997).

[185] *Burlington Northern* at 2414.

[186] Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363A.01 *et seq.* The Minnesota Human Rights Act is enforced by the Minnesota Department of Human Rights, *see* their website at: http://www.state.mn.us/ebranch/dhr/.

> (5) in education because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and age.
>
> (b) Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy. It is also the public policy of this state to protect all persons from wholly unfounded charges of discrimination. Nothing in this chapter shall be interpreted as restricting the implementation of positive action programs to combat discrimination.

The MHRA goes on to state in subd. 2 that "[t]he opportunity to obtain employment … without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right." The protections afforded under the MHRA are broader than those afforded under Title VII as the MHRA explicitly includes sexual orientation.

The California Fair Employment Practice Act was enacted originally in 1959, close in time to the first Minnesota Act, and was recodified in 1980 as part of the Fair Employment & Housing Act.[187] Section 12920 "declare[s] as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." This is a broader range of protected groups than those afforded under Title VII and the MHRA.

Section 12940 goes on to define unlawful employment practices as by employers, labor organizations and employment agencies:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

Both the Minnesota and California statutes contain additional prohibitions with respect to retaliation and sexual harassment.

[187] *See Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379 (1987). The Fair Employment and Housing Act is enforced by the California Department of Fair Employment and Housing, *see* its website at: http://www.dfeh.ca.gov/.

5.1.1.4 Presidential Executive Order 11246

In addition to the federal legislation and the regulations as issued by the different agencies, the President of the United States also has certain lawmaking powers in the form of executive orders. Beginning in 1941 with President Roosevelt's Executive Order 8802, each president since has issued or affirmed executive orders prohibiting discrimination in employment on the basis of race, color, national origin or religion by private employers who contract with the federal government to perform work above a certain amount. President Johnson issued Executive Order 11246 in 1965,[188] which for the first time included a prohibition against discrimination on the basis of sex. Every federal contractor during the performance of the contract agrees that:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.[189]

The contractor also agrees that all solicitations or advancements for employees placed by or on behalf of the contractor will state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin. Prohibitions against discrimination on the basis of age and handicap were added by President Carter in 1978, and sexual orientation was added as a protected category by President Clinton in 1998.[190]

Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that the contractor take affirmative action to ensure that applicants are employed, and that during employment, employees are treated without regard to their race, color, religion, sex or national origin, making equal employment opportunity and affirmative action integral elements of a contractor's agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract. A contractor in violation of Executive Order 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be

[188] 3 C.F.R. § 339 (1965) and accompanying regulations, 41 C.F.R. § 60.
[189] Executive Order 11246 Subpart B § 202.
[190] For more information, *see* the Office of Federal Contract Compliance Programs ("OFCCP") website, available at: http://www.dol.gov/esa/ofccp/.

debarred, i.e., declared ineligible for future government contracts. However, a contractor is not debarred without being afforded the opportunity for a full evidentiary hearing. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed-term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the Executive Order. Information as to which parties have been debarred is public[191] as is information regarding parties found to be in compliance.[192]

Certain government contractors are required under Executive Order 11246 to develop and implement a written affirmative action program ("AAP") for each establishment.[193] The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The affirmative action plan is to identify those areas, if any, in the contractor's workforce that reflect underutilization of women and minorities. "Under-utilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability.[194] When determining availability of women and minorities, contractors can consider the presence of minorities and women having requisite skills in an area in which the contractor can reasonably recruit. Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, contractors are to establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

[191] *See* the Excluded Parties Listing as published by the United States General Services Administration, available at: http://epls.gov/.

[192] *See* the National Pre-award Registry as published by the United States General Services Administration, available at: http://epls.gov/.

[193] Those government contractors who are non-construction (service and supply) contractors with 50 or more employees and government contracts of $ 50000 or more. The origin of the term "affirmative action" is argued to be the Philadelphia Plan as drafted by the Department of Labor under Executive Order 11246, *see* James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities,* 70 Iowa L.Rev. 901 (1985). *See also* by the same author, *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process under Executive Order 11,246 as Amended,* 59 Chi.-Kent. L.Rev. 67 (1982). *See also* Belton (1999) at 34–35.

[194] *See* 41 C.F.R. § 60-2.11 (b).

The Office of Federal Contract Compliance Programs ("OFCCP") within the Department of Labor is charged with enforcing Executive Order 11246. If a matter raised under the order is not resolved through conciliation, the OFCCP may refer it to the Office of the Solicitor of Labor, authorized to institute administrative enforcement proceedings. After a full evidentiary hearing, a Department of Labor Administrative Law Judge issues recommended findings of fact, conclusions of law, and a recommended order. On the basis of the entire record, the Secretary of Labor issues a final Administrative Order. Cases may also be referred to the Department of Justice for judicial enforcement of Order 11246, primarily when use of the sanctions authorized by the Order is impracticable, such as in a case involving a sole source supplier. According to the OFCCP, its programs have helped several Fortune 1000 companies and other major corporations break the glass ceiling for women and minorities. In 1970, women accounted for 10.2 percent of the officials and managers reported on the Employer Information Report (EEO-1) form submitted by federal contractors. In 1993, women were 29.9 percent of all officials and managers, according to the EEO-1 data.[195]

5.1.2 Combining Work and Family – Parental Leave Legislation

With respect to discrimination legislation, certain states were progressive prior to the enactment of the 1964 Civil Rights Act, with Utah and Wyoming having constitutional protections against discrimination already in the late 1800's. However, the lead was taken on the federal level, and after the passage of Title VII and the Equal Pay Act, the states as a whole followed suit. The issue of parental leave has followed the same path although at a later date and more modestly. It has in contrast been addressed quite extensively by at least one state, California. This section will begin with the federal Family and Medical Leave Act of 1993, and then look at the systems in California and Minnesota. According to the United States Census Bureau, in the period between 1996–1999, nearly 65 % of first-time mothers in the United States returned to work one year after giving birth and 45 % returned after the first three months.[196] According to the U.S. Department of Labor, an estimated 23.8 million employees took FMLA leave during an 18-month period between 1999 and 2000.[197]

[195] The guidelines as restated here as well as statistics were taken from the OFCCP website, available at: http://www.dol.gov/esa/regs/compliance/ofccp/aa.htm.

[196] Linda A. White, *Institutions, Constitutions, Actor Strategies, and Ideas: Explaining Variation in Paid Parental Leave Policies in Canada and the United States,* 319 INT.J.CON.L. 2006 *citing* U.S. Census Bureau, Maternity Leave and Employment Patterns for First-Time Mothers: 1961–2000, tbl. 8 (U.S. Dep't Commerce 2005), available at: http://www.census.gov/prod/2005pubs/p70-103.pdf.

[197] *See* Patrick Hicks and Debra Westbrook, *FMLA – It's Not Just for Employment Lawyers Anymore,* 13 NEVADA LAWYER 2005.

5.1.2.1 Federal Legislation Addressing Family Leave

The Family and Medical Leave Act of 1993 ("FMLA")[198] provides eligible employees an individual right to a twelve week unpaid leave of absence from employment during a twelve month period commencing with the birth or adoption of a child. Eligible employees are those that have worked twelve months with the same employer, and within those twelve months, 1250 hours, or approximately 25 % part-time.[199] In addition, public agencies and employers that do not employ more than fifty employees within seventy-five miles of the requesting employee's worksite are not required to provide unpaid leave.

In the event that the employer provides paid leave for fewer than twelve weeks as part of an employee benefit plan, the FMLA requires additional unpaid leave only to the extent necessary to attain twelve weeks total. Employers are entitled to notice of an employee's intention to take leave thirty days before the leave period is to begin, or, in the event that leave must begin sooner, notice is to be given as soon as practicable. The right to the leave is an individual right to which both parents are entitled and if eligible, a combined total of 24 weeks of leave can be taken. If the spouses work for the same employer, however, they are to share one twelve-week period.

If an employer "has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook," information about entitlement to FMLA benefits and the obligations of employees seeking such benefits "must be included in the handbook or other document."[200] An employer is to provide employees with a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice is to include any requirements for the employee to furnish medical certification and the consequences of failing to do so. An employer that does not provide required notice may not take action

[198] 29 U.S.C.A. § 2611 *et seq*. and accompanying regulations issued by the Wage and Hour Division of the Department of Labor, 29 C.F.R. § 825 *et seq.* FMLA became effective on 5 August 1993 for most employers. If a collective agreement was in effect on that date, FMLA became effective on the expiration date of the agreement or 5 February 1994, whichever was earlier. According to the FMLA, leave can be taken:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;

(B) Because of the placement of a son or daughter with the employee for adoption or foster care;

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition; and

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. *See* FMLA, 29 U.S.C.A. § 2612(a)(1)(A)-(D).

[199] *See* FMLA, 29 U.S.C.A. § 2612(a)(2).

[200] 29 C.F.R. § 825.301(a)(1) and (b)(1).

against an employee for failure to comply with any provision required to be set forth in the notice.

An employee's job position and benefits are protected during the period of unpaid leave. In general, an employee is entitled upon returning from leave to be restored to his or her previous position or a comparable position, with equivalent benefits and pay. The employer is required to continue to provide any employment benefits accrued prior to the beginning of a leave period, as well as continuing coverage under the employer's health care plan. It is unlawful for an employer to interfere with the assertion of rights under the FMLA or to discriminate in the form of retaliation for taking leave, defined respectively as:

> (a) Interference with rights
>
> (1) Exercise of rights: It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
>
> (2) Discrimination: It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.[201]

The courts have recognized these two categories as prescriptive and proscriptive protections for employees.

5.1.2.1.1 Interference with the Exercise of FMLA Rights

The first category consists of "prescriptive" protections that are expressed as substantive statutory rights: "When an employee alleges a deprivation of these substantive guarantees, the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. In such cases, the intent of the employer is immaterial."[202] To state a claim for interference with her substantive rights under the FMLA, an employee must establish by a preponderance of the evidence that she was entitled to the benefit denied.[203] The employer may then present evidence to show that the employee would not have been entitled to that benefit even if she had not taken leave. In other words, if an employer can show that it denied the employee a benefit (such as reinstatement) for a reason wholly unrelated to the FMLA leave, the employer is not liable for interference with a substantive FMLA right.[204] The issue of the employer's intent is immaterial

[201] FMLA, 29 U.S.C. § 2615(a)(1) and (2), *see also* 29 C.F.R. § 825.220(a)(1).

[202] *See, e.g., King v. Preferred Tech. Group,* 166 F.3d 887, 891 (7th Cir. 1999) *citing* 29 U.S.C. §§ 2612(a)(1) and 2615(a)(1) making it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."

[203] *See, e.g., Rice v. Sunrise Express, Inc.,* 209 F.3d 1008, 1018 (7th Cir. 2000).

[204] *See, e.g., Throneberry v. McGehee Desha County Hospital,* 403 F.3d 972, 977 (10th Cir. 2005); and *O'Connor v. PCA Family Health Plan, Inc.,* 200 F.3d 1349, 1352 (11th Cir. 2000).

when an employee alleges a deprivation of the substantive rights guaranteed by the FMLA.

5.1.2.1.2 Retaliation or Discrimination Based on the Exercise of FMLA Rights

The second category consists of "proscriptive" protections and encompasses the above prohibition against discrimination based on an employee's exercise of rights under the FMLA. In the case of proscriptive protections, intent is relevant and "[t]he issue becomes whether the employer's actions were motivated by an impermissible retaliatory or discriminatory animus."[205] An employee can prove retaliation or discrimination either directly with a disparate treatment analysis or indirectly. When direct evidence is lacking, an employee can prove FMLA retaliation circumstantially by using a variant of the burden-shifting test established in *McDonnell Douglas*.[206] Under the *McDonnell Douglas* framework, the plaintiff employee must initially establish a *prima facie* case of discrimination. This showing creates a presumption that the employer acted unlawfully. The burden of production then shifts to the employer who must provide legitimate, non-discriminatory reasons for the adverse employment action. Once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but a pretext for discrimination.[207]

Different standards are applied by the courts as to establishing a *prima facie* case of retaliation or discrimination under the FMLA. One is that plaintiff must prove that she engaged in a "protected activity" when she took FMLA leave, that she suffered an adverse employment action and that there was temporal proximity between plaintiff's protected leave and the adverse employment action that infers a causal connection. Adverse employment actions are defined as "tangible changes in duties or working conditions that constituted a material employment disadvantage."[208] The FMLA's protection against retaliation is not limited to periods in which an employee is on FMLA leave, but encompasses the employer's conduct both during and after the employee's leave. The causal link required by the third prong of the *prima facie* case does not rise to the level of a "but for" standard.[209] The plaintiff need not prove that her protected activity

[205] *King,* 166 F.3d at 891.
[206] *See McBurney v. Stew Hansen's Dodge City, Inc.,* 398 F.3d 998 (8th Cir. 2005) *citing McDonnell Douglas*.
[207] *See Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).
[208] *Manning,* 127 F.3d at 692.
[209] *See Gee v. Principi,* 289 F.3d 342, 345 (5th Cir. 2002).

was the sole factor motivating the employer's challenged decision in order to establish the "causal link" element of a *prima facie* case.

A second standard for a *prima facie* case has been set out by the Seventh Circuit Court of Appeals, in that the plaintiff to establish an FMLA retaliation or discrimination case under the indirect method must show that after taking FMLA leave (the protected activity), she was treated less favorably than other similarly situated employees who did not take FMLA leave, even though she was performing her job in a satisfactory manner.[210] The causality requirement has been removed. To determine whether two employees are directly comparable, a court looks at all the relevant factors, which most often include whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications – provided the employer considered these latter factors in making the personnel decision.[211]

5.1.2.2 State Legislation Addressing Family Leave

As with every legal issue in the United States that is not exclusively a federal question, a wide range of state legislative rights can be found with respect to family leave, with the starting point those rights granted in the federal act. The federal Family and Medical Leave Act does not supersede any provision of a state or local law that provides for greater family or medical leave rights. Four significant areas in which the state laws tend to differ are: (1) state coverage may extend to smaller employers; (2) the amount of leave required may be longer; (3) eligibility, such as less time in service, may be different; and (4) leave may be allowed for other purposes.[212] Only two state systems are examined here, the progressive paid leave as granted by California law, and the more middle-of-the-road rights as granted under Minnesota law.

5.1.2.2.1 The California Parental Leave Legislation

California was one of the first states to grant a right to leave already in the 1980's. The legislature in 2002 established a paid family leave program, allowing six weeks per year for the care of a new child or sick relative (including domestic partners) at a wage replacement level of 55 percent, with a cap of $ 840 per week

[210] *See Hull v. Stoughton Trailers, LLC.,* 445 F.3d 949, 951 (7th Cir. 2006) *citing Buie v. Quad/Graphics, Inc.,* 366 F.3d 496, 503 (7th Cir. 2004).
[211] *Hull,* 445 F.3d at 951 *citing Ajayi v. Arammark Bus. Servs., Inc.,* 336 F.3d 520, 532 (7th Cir. 2003); *Radue v. Kimberley-Clark Corp.,* 219 F.3d 612, 617–619 (7th Cir. 2000); and *Buie,* 366 F.3d at 508.
[212] See Jennifer K. Wilson, *Validity, construction, and application of state family-, parental-, or medical leave acts,* 57 A.L.R. 5th 477 (2006) at § 2(a).

as per 2005.[213] The eligibility requirements for the paid leave are the same as for the disability program, namely that a person is employed or actively looking for work, and that they have earned at least $ 300 in the previous year.

Employees are to use two weeks of their vacation time before applying for paid leave. No job protection guarantees exist in the legislation.[214] The six weeks may be used to care for a seriously ill child, spouse, parent, or domestic partner, or to care for and bond with a newly born or newly placed child.[215] The California leave must be taken concurrent with FMLA leave if the employee is eligible for both programs and, similar to the FMLA, an employer may require an employee to count two weeks of unused accrued paid vacation time toward California leave. However, unlike the FMLA, the California leave provides benefits to all private sector employees, regardless of the number of employees employed at a particular job site.

5.1.2.2.2 The Minnesota Legislation

First passed in 1987 prior to the adoption of the federal FMLA, the Minnesota Parenting Leave Act allows employees working one-year, half time or more, an unpaid leave of six weeks with the birth or adoption of a child. Employers covered under the Minnesota statute are those with 21 or more employees on at least one site.[216] The length of the leave is to be determined by the employee, but may not exceed six weeks unless agreed to by the employer. Nothing in the statute prohibits an employer from providing leave benefits in addition to those provided in the statute. Finally, the Minnesota act contains a provision prohibiting employers from retaliating against employees who exercise the rights provided under the act. Thus the provisions of the Minnesota act are both narrower and broader than the FMLA in that only six weeks are granted, but with respect to a larger number of employers, those with more than 21 employees. If an employee in Minnesota works for an employer of more than 50 employees, she is eligible for the twelve weeks under FMLA. If her employer has 21–50 employees, she is

[213] California Family Temporary Disability Insurance Program, Cal. Unemp. Ins. Code § 3301 (2002). The program is funded under the state's Disability Insurance Program and paid for entirely by employee contributions rather than employer taxes. Employees contribute through a mandatory payroll deduction paid into the state's Disability Fund determined annually based upon a statutory formula. The contribution rate is not to exceed 1.5 % of an employee's wages, nor be lower than 0.1 %. For the calendar years 2004 and 2005, the Paid Family Leave insurance contribution rate was .08 % of the taxable wage limit of $ 79418 for 2005, making the maximum annual contribution per individual for the Paid Family Leave insurance $ 63.53. *See* the calculations by the California Employment Development Department, available at: http://www.edd.ca.gov/direp/pflfaq1.asp#RELATION %20OF %20PAID %20FAMILY %20LEAVE.

[214] White (2006) at 337.

[215] Information about the program is available from the California Employment Development Department website at: http://www.edd.ca.gov/direp/pflfaq1.asp.

[216] Minn.Stat. § 181.940 *et seq.*

eligible for six weeks under the Minnesota statute. If her employer has twenty employees or less, she is not eligible for any leave. Even if there is no general paid leave, Minnesota does have a public program, At-Home Infant Care, adopted in 1998.[217] Under At-Home Infant Care in Minnesota, low-income working parents receive subsidies in lieu of child care vouchers for caring for infants under the age of one at home.

5.2 The Enforcement Agencies

As with the dual state and federal legislation, dual enforcement agencies exist on federal and state levels. In Minnesota, for example, the Department of Human Rights enforces the Minnesota Human Rights Act prohibiting discrimination in employment, and as to parental leave, the Minnesota Department of Labor and Industry enforces the rights.[218] In California, the Department and Commission of Fair Employment and Housing enforce discrimination claims under the California Fair Employment and Housing Act, while the Employment Development Department enforces rights concerning paid parental leave.[219]

On the federal level, the primary actor with respect to discrimination is the Equal Employment Opportunity Commission, which is charged with enforcing Title VII and the Equal Pay Act. The Wage and Hour Division within the Department of Labor is charged with enforcement of the federal Family and Medical Leave Act, while the Office of Federal Contract Compliance Programs enforces Executive Order 11246.

5.2.1 The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission ("EEOC") was created in 1965, but was not originally given the authority to litigate claims where the agency was unable to secure voluntary compliance. By 1971, it was apparent that the voluntary approach to Title VII was inadequate to the task of eliminating employment discrimination.[220] The Equal Employment Opportunity Act of 1972 was passed, expanding the coverage of Title VII and strengthening its enforcement mechanisms, including granting prosecuting authority to the EEOC. The EEOC also has the authority to prosecute claims under the Equal Pay Act as of 1979 and the Pregnancy Discrimination Act as part of the Title

[217] For information about the program, *see* Focus on at-home infant care organization, available at their website: http://www.familyandhome.org/policy/infant_care.htm.
[218] Minn.Stat. § 181.9435. The Minnesota Department of Labor and Industry's website is: http://www.doli.state.mn.us/.
[219] The California Division of Labor Standards Enforcement website is: http://www.dir.ca.gov/dlse/dlse.html.
[220] *See* EEOC Annual Report 2005, available at: http://www.eeoc.gov/litigation/05annrpt/index.html.

VII. The EEOC is empowered under Title VII to sue non-governmental employers with 15 or more employees. Under the EPA, the EEOC may sue both private and public employers with no minimum required number of employees. The EEOC has five commissioners and a General Counsel, each appointed by the President and confirmed by the senate for five-year, staggered terms.

The EEOC budget for the fiscal year 2005 was $ 332 million.[221] The Commission's rate of success at trial is 60.24 % and on appeal, 80 %. The highest recovery in a single discrimination case in the Commission's history is $ 81.5 million in *Shores & EEOC v. Publix Super Markets, Inc.* During the five-year period from 1997 to 2001, the EEOC obtained in total $ 409.7 million in monetary benefits through litigation as well as $ 585.9 million through administrative enforcement processes, close to one billion dollars total in pursuing discrimination claims.[222] During this same period, the Office of the General Counsel of the EEOC filed 1963 lawsuits, of which sex discrimination accounted for 30.1 % and equal pay 1.6 %. The EEOC received 4449 charges of pregnancy-based discrimination in 2005, resolved 4321 pregnancy discrimination charges and recovered $ 11.6 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

The EEOC is also charged with the task of providing information to the public as to legal rights. The EEOC has a National Contact Center with a toll-free number at which service representatives are available from 8:00 a.m. to 8:00 p.m. offering assistance in over 100 languages. The geographic territory covered physically is the entire United States, with the head office in Washington D.C., fifteen District Offices, nine Field Offices, fifteen Area Offices and twelve Local Offices, for a total of fifty-two locations. In addition, the EEOC has work sharing agreements and a contract services program with more than ninety state and local fair employment practices agencies for the purpose of coordinating investigations of charges dual-filed under state, local and federal law.

It is mandatory that a Title VII plaintiff first file a charge with the EEOC or comparable fair employment practices agency before commencing litigation. The information required to file a charge consists of:

- The complaining party's name, address, and telephone number;
- The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and number of employees (or union members), if known;

[221] *See* the EEOC website, available at: http://www.eeoc.gov/abouteeoc/plan/par/2005/consolidated_statements.html.

[222] *See* the Office of the General Counsel, A Study of the Litigation Program Study Fiscal Years 1997–2001, available at: http://www.eeoc.gov/litigation/study/.

- A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated); and
- The date(s) of the alleged violation(s).[223]

The EEOC investigates the charge, attempts a voluntary reconciliation, and if cause is found and no consent order reached, litigates the claim. In the event the defendant is a state or local government employer, the EEOC refers the case to the Department of Justice for litigation.

The EEOC also has the authority to issue administrative procedural regulations as found in the Code of Federal Regulations, but not substantive regulations. However, from the beginning it has issued guidelines as to substantive interpretations of Title VII. The Court has held that the EEOC's guidelines are to be accorded great deference, stating that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference… Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[224] The EEOC also issues guidelines, such as Management Directive 715, with respect to compliance with Title VII by federal employers.[225]

5.2.2 The Department of Labor

Within the Department of Labor, the Hour and Wage Division enforces the FMLA, and the Office of Federal Contract Compliance Programs enforces Executive Order 11246. The number of FMLA complaint investigations in 2005 was 2784 and $ 1.8 million was collected in back wages for violations of the FMLA by the Hour and Wage Division.[226]

The Office of Federal Contract Compliance Programs ("OFCCP") within the Department of Labor is charged with enforcing Executive Order 11246, Section 503 of the Rehabilitation Act of 1973[227] and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act.[228] Together, these laws ban discrimination and require federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran. The OFCCP's jurisdiction

[223] For information concerning the filing of EEOC charges, *see* the EEOC's guidelines to filing charges, available at: http://www.eeoc.gov/charge/overview_charge_filing.html.
[224] *Griggs,* 401 U.S. at 434 *citing United States v. City of Chicago,* 400 U.S. 8 (1970).
[225] Management Directive 715 is, available at the EEOC website: http://www.eeoc.gov/federal/md715/index.html.
[226] *See* the official website of the Hour and Wage Division, available at: http://www.dol.gov/esa/whd/. *See* the Wage and Hour Division Fact Sheet 2005, available at: http://www.dol.gov/esa/whd/statistics/200531.htm.
[227] 29 U.S.C. § 791 *et seq.*
[228] 38 U.S.C. § 4212 *et seq.*

in 2002 covered approximately 26 million employees or nearly 22 % of the total civilian workforce (92500 non-construction establishments and 100000 construction establishments). The federal government awarded more than $ 179 billion taxpayer dollars in prime contracts in 1995.

5.3 The Role of the Labor Unions

Women originally were a minority of those unionized in the United States. The gap in unionization rates between women and men has narrowed; in 1999 it was 11.4 % for women and 16.1 % for men respectively.[229] The labor unions can be seen from two perspectives within the statutory regulations that have been created concerning discrimination and family leave, either as proponents of the interests of their members, or as collaborators with respect to issues of structural discrimination.

With respect to the more positive role, the unions in the United States have fought for greater legislative protections with respect to issues of discrimination, equal pay and family leave.[230] In addition, American labor unions have brought about changes in the area of discrimination and family leave through the collective agreements reached. Section 8(d) of the National Labor Relations Act defines mandatory subjects of collective bargaining as wages, hours, and other terms and conditions of employment. Discrimination and family leave policies fall outside the explicit terms of wages and hours. However, a 1995 survey of 4000 private sector collective agreements showed that 95 % of them had a guarantee against discrimination, by either the union, the employer or both.[231] Discrimination on the basis of race, color, creed, sex, national origin or age was prohibited in 87 % of the collective agreements, and 65 % also prohibited discrimination on the basis of political activity or affiliation, marital status, or mental or physical disability. Provisions requiring compliance with federal, state or local laws concerning discrimination were contained in 39 % of the collective agreements. As in Sweden and the United Kingdom, family leave provisions have not been viewed as mandatory subjects for collective bargaining. The provisions often entail the same protections as available under the FMLA. The unions have also been seen to have played a significant role in advocating the comparable worth theory of equal pay discussed above at the state legislative level, lobbying

[229] *See* Melissa Childs, *The Changing Face of Unions: What Women Want From Employers,* 12 DePaul Bus.L.J. 390 (Fall/Spring 1999/2000).
[230] *See, e.g.,* the AFL-CIO Legislative Alert, available at the AFL-CIO website: http://www.aflcio.org/issues/legislativealert/.
[231] *See* Belton (1999) at 36 note 3.

for legislation, litigating claims as well as negotiating pay equity schemes.[232] A number of the state and local governments that have undertaken pay equity studies have adopted comparable worth schemes as a result of bargaining with public sector unions, one of the more notable adopted by San Jose in 1981 to settle a strike called by AFSCME Local 101.[233]

In contrast, the labor unions have also been seen as contributing to existing structural discrimination. The Court already in the 1940's imposed a liability upon unions as to protecting minority interests.[234] It found that unions had a duty of fair representation under the Railway Labor Act passed in 1926[235] as well under the National Labor Relations Act of 1935 due to the union's status as the exclusive bargaining agent for all employees in the bargaining unit.[236] This duty of fair representation entails representing the interests of all of its members, minorities as well as the majority. A breach of the duty of fair representation can arise either in contract negotiations or in a failure by the union to pursue an individual's grievance. In negotiations by a union comprising a majority of men, the union negotiator had stated, "I've got these guys to protect, they would kill me, there's more men than women."[237] The Eighth Circuit found this to be the type of "invidious discrimination" that Title VII was designed to prevent.

A labor union is liable under Title VII and the Equal Pay Act in two capacities, as an employer or as a labor organization. Liability as an employer refers to the union's internal action to its own employees. Liability as a labor organization addresses concerns such as the imbalance of power between minority and majority interests. To establish a *prima facie* Title VII case against a union based on a breach of the duty of fair representation, a plaintiff must show that the union breached the duty, and that the breach was motivated by the complainant's race, color, religion, sex, or national origin. A *prima facie* case concerning sex discrimination is where: (1) the employer violated the collective bargaining agreement with respect to the employee; (2) the union breached its duty of fair representation by allowing the breach to go unrepaired; and (3) there is some evidence of gender animus by the union.[238] A union can also breach its duty of fair represen-

[232] *See* Belton (2004) at 432. *See also* Dan Clawson, THE NEXT UPSURGE – LABOR AND NEW SOCIAL MOVEMENTS (Cornell 2003) at 59 describing the union successes with respect to pay equity at San Jose, Yale and Harvard.

[233] Belton (2004) *id. citing* Shulamit Kahn, *Economic Implications of Public-Sector Comparable Worth: The Case of San Jose, California,* 31 Ind. Rel. 270 (1992).

[234] For a history of African Americans within the union movement, "breaching the color line", *see* Nelson Lichtenstein, STATE OF THE UNION (Princeton 2002) at 71. Lichtenstein also traces the history of the union movement with the equal pay movement, *id.* at 92.

[235] *See Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944).

[236] *See Wallace Corp. v. NLRB,* 323 U.S. 248 (1944).

[237] *See Carter v. United Food and Commercial Workers, Local No. 789,* 963 F.2d 1078, 1082 (8th Cir. 1992).

[238] *See, e.g., EEOC v. Reynolds Metals Co.,* 212 F.Supp.2d 530, 539–40 (E.D.Va. 2002).

tation by deciding not to pursue a grievance when the decision is arbitrary or based on discriminatory or bad faith motives.[239] In *Teamsters*, the employer and labor union were found to have engaged in a pattern and practice of employment discrimination against African and Hispanic Americans when choosing drivers for transportation.[240] In a different case, the labor union was found liable for a violation of Title VII for failing to assert a woman's claim of a hostile work environment.[241]

5.4 Equal Access to Justice Aspects with Respect to the American Systems

Of the four systems examined in this work, the American systems are the most plaintiff friendly forums in general. Plaintiffs are permitted to file complaints upon belief and the parties are free to amend the pleadings up to a fairly late stage in the case management, however, after a pre-determined deadline as set out by the case schedule, not without showing cause. In addition, the power of the courts to compel the parties with respect to discovery production is very strong, the ultimate penalty for failure to comply with an order of a court being a party held in "contempt of court" subject to fines and/or imprisonment.

Enforcement agencies are empowered to investigate claims on both the state and the federal levels with respect to Title VII and the Equal Pay Act. In addition, Congress emphasized the importance of retaining a private right of action in the Title VII enforcement scheme: "The retention of the private right of action … is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint." It was perceived by Congress as paramount for the individual's rights to redress under the provisions of Title VII that all avenues be left open for quick and effective relief.[242] The allocation of attorney's fees under Title VII is the same as for the EPA. The remedies available and the statute of limitations, however, differ from those applicable to the EPA.

5.4.1 Remedies Available under the Acts

The spectrum of remedies available under these laws, the Equal Pay Act, Title VII, the Family Medical Leave Act and Executive Order 11246 varies somewhat.

[239] *See Griffin v. Air Line Pilots Ass'n Int'l.,* 32 F.3d 1079, 1083 (7th Cir. 1994).
[240] *Teamsters,* 431 U.S. 324.
[241] *See EEOC v. Regency Architectural Metals Corp.,* 896 F.Supp. 260 (D.Conn. 1995).
[242] *EEOC v. Associated Dry Goods Corp.,* 449 U.S. 590 (1981) note 21 *citing* 118 Cong.Rec. 7565 (1972).

The EPA and FMLA do not require the filing of charges with an agency prior to bringing litigation as does Title VII.

5.4.1.1 Remedies Available under the EPA

The primary remedy available under the EPA is wages withheld in violation of the act, "back pay."[243] The court must make a determination whether the employer has acted in good faith or willfully. An employer can show that it acted in good faith if it had reasonable grounds for believing that the act or omission was not a violation of the federal Fair Labor Standards Act. The employer then is liable only for back pay. If the employer's actions were "willful," back pay and an amount of liquidated damages equal to the back pay award can be awarded.[244] Willful has been defined as more than negligence, where the employer "knew or showed reckless disregard as to whether its conduct was prohibited by statute."[245]A court may also order an injunction to restrain the employer from such actions violating the law in the future. The award of liquidated damages is mandatory in cases of willfulness.[246] In addition, willful violations of the EPA may be prosecuted criminally and the violator fined up to $ 10000. A second such conviction can lead to imprisonment.

During the first ten years of enforcing the EPA, a total of over $ 65 million in back pay was awarded.[247] For the period from 1996 to 2005, the EEOC recovered approximately $ 42 million in back pay.[248] Given the number of cases litigated in the United States, it is impossible to go through each or most individually, as is possible in the more confined quantity of Swedish case law. Several cases are mentioned here for qualitative purposes as examples of the statute in action, "high profile" cases for the EEOC. The Commission brought two Title VII/Equal Pay Act suits concerning relief for women denied service credit for pregnancy and maternity leave taken prior to the Pregnancy Discrimination Act of 1979 and "care of newborn child" leave taken prior to 1984. The first concerned an early retirement program initiated in 1994 that failed to take these leaves into account as service, the second a failure to include credits for pregnancy and maternity leave in a cash balance plan for management employees

[243] *See* 29 U.S.C. § 216(b) as well as 29 C.F.R. § 1620.33 (b) "Recovery of wages due; injunctions; penalties for willful violations," which provides for these methods of recovery of unpaid wages.
[244] 29 U.S.C. § 216(b).
[245] *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985). *See also MacLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988); and *Jarrett v. ERC Properties, Inc.,* 211 F.3d 1078 (8th Cir. 2000).
[246] *See Braswell v. City of El Dorado,* 187 F.3d 954, 957 (8th Cir. 1999).
[247] Baer (1991) at 68 *citing* Barbara Babcock *et al.*, eds., SEX DISCRIMINATION AND THE LAW: CASES AND REMEDIES (New York 1975) at 440.
[248] *See* the statistics concerning "Equal Pay Charges" issued by the EEOC and available at the EEOC website: http://www.eeoc.gov/stats/epa.html.

implemented in 1998. Under a consent decree[249] covering women employed by the defendant in 13 states between January 1994 and April 2002, each woman was to receive 2 to 7 additional weeks service credit per pregnancy. Retired claimants were to recover a total of $ 50 million to compensate for lost pension benefits.[250] The efficacy of legislation in any context is difficult to measure, but one study has estimated that between the years 1967 and 1974, while the EPA was enforced by the Department of Labor, the wage gap in the United States between men and women would have increased by 7 % instead of remaining as constant as it did due to the passage of the EPA.[251]

5.4.1.2 Remedies Available under Title VII

Prior to the Civil Rights Act of 1991, plaintiffs in Title VII cases were limited to equitable remedies.[252] Title VII now grants a right to compensatory and punitive damages awards in cases of "intentional discrimination," that is, cases that do not rely on the "disparate impact" theory of discrimination.[253] Caps for compensatory and punitive damages are established on a sliding scale from $ 50000 to $ 300000 based on the size of the employer. Back pay, the amount awarded as compensation lost during the period between the triggering event and the judgment, and front pay commencing with the running of damages, and the reinstatement of employment, are not subject to the damage caps.[254] A plaintiff must make an additional showing for punitive damages that the "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[255] The following cases designated as high profile by the EEOC give examples of both the monetary and equitable remedies available in sex discrimination cases.

In the first case, *EEOC v. Abercrombie & Fitch Stores, Inc.,*[256] the defendant, a national clothing retailer with over 700 stores and 22000 employees, was alleged to have engaged in a pattern or practice of race, color, national origin, and sex

[249] A consent decree or consent order is an agreement by a defendant to cease activities asserted as illegal by the government, here the EEOC, subject to court approval. The litigation against the defendant is either dismissed without prejudice or stayed depending upon the context.

[250] *See* EEOC Annual Report 2004, *citing EEOC v. Bell Atlantic & NYNEX* (S.D.N.Y. Sept. 30, 2004)(unpublished), available at: http://www.eeoc.gov/litigation/04annrpt/index.html.

[251] Baer (1991) at 66 *citing* Cynthia B. Lloyd *et al.* eds., WOMEN IN THE LABOR MARKET (New York 1979) at 304.

[252] *See Landgraf,* 511 U.S. at 252.

[253] *See* 42 U.S.C. § 1981a(a)(1) and (b)(1).

[254] *See Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843 (2001).

[255] *See Kolstad v. American Dental Ass'n,* 527 U.S. 526 (1999).

[256] *EEOC v. Abercrombie & Fitch Stores, Inc.,* Case File No. 04-4731 (N.D.Cal. Apr. 14, 2005)(unpublished). For information about this case and the next four, *see* the EEOC's Performance and Accountability Report for the Fiscal Year 2005, available at the EEOC website: http://www.eeoc.gov/abouteeoc/plan/par/2005/mda_objective1.html. For more information on

discrimination in the recruitment, hiring, assignment, promotion, and discharge of African Americans, Asian Americans, Latinos, and women. Defendant centered its marketing efforts around an "image" or "look" that it called "Classic All-American," targeting its recruitment efforts primarily at white high schools and colleges (and primarily at white fraternities and sororities at the colleges). Defendant channeled minority hires to stock and night crew positions rather than sales associate positions, maintaining a 60 % to 40 % ratio of male to female employees and failed to hire and promote minorities and women into management positions. Defendant also discharged minorities and women when corporate representatives believed they were "overrepresented" at particular stores.

Defendant entered into a consent decree with the EEOC for a period of six years upon the following conditions:

- Defendant's marketing materials taken as a whole are to reflect diversity as reflected by the major racial/ethnic minority populations of the United States;
- Defendant is to create an Office of Diversity headed by a Vice President who is to report directly to defendant's Chief Executive Officer or Chief Operating Officer;
- Defendant is to hire 25 full-time diversity recruiters;
- In consultation with an industrial organizational psychologist, defendant is to develop a recruitment and hiring protocol requiring that it affirmatively seek applications from qualified African Americans, Asian Americans, and Latinos of both genders;
- Defendant is to advertise for in-store employment opportunities in periodicals or other media that target African Americans, Asian Americans, and/or Latinos of both genders; attend minority job fairs and recruiting events; and use a diversity consultant to aid in identifying sources of qualified minority candidates;
- Percentage benchmarks are to be established for the selection of African Americans, Asian Americans, Latinos, and women into sales associate (brand representative), manager-in-training, assistant manager, and store manager/general manager positions; and
- The court is to appoint a monitor who is to prepare annual reports on defendant's compliance with the terms and objectives of the decree.

Defendant in addition is to establish a settlement fund of $ 40 million to provide monetary awards (15 % back pay and 85 % compensatory damages) to a

---

the Abercrombie case, *see* the website of one of the law firms representing the plaintiffs, Lieff Cabraser Heimann & Bernstein, LLP, available at: http://www.afjustice.com/press_release_02.htm.

settlement class consisting of African Americans, Asian Americans, Latinos, and women who applied or were discouraged from applying for positions with defendant since 24 February 1999, and were not hired, or who were employed in one of defendant's stores for any length of time since that date.

The second case, *EEOC v. Dial Corp,*[257] was a Title VII class sex discrimination/failure to hire case brought against a nationwide manufacturer of household products. The suit alleged that defendant's use of a physical "work tolerance" test for production operator positions at a plant producing and packaging sausages and other foods had a disparate impact on female applicants and constituted a pattern or practice of intentional sex discrimination. At trial, the EEOC presented the testimony of an expert witness finding that 97 % of all men passed the test while only 40 % of women were successful, that the test was more difficult than the job, that the scoring was subjective, and that the test did not accomplish its stated objective of reducing injuries. The EEOC also presented testimony from 10 of approximately 40 unsuccessful female applicants, focusing on their experience in performing jobs that require heavy lifting. The jury found that the defendant's continued use of the work tolerance test after April 2001 when the extent of the disparate impact should have become apparent to the defendant constituted a pattern or practice of sex discrimination. The jury denied punitive damages but awarded compensatory damages of $ 30000 to the individual plaintiffs. The court later ruled that the test had a disparate impact against women. The judgment provided approximately $ 3.38 million in back pay, benefits and prejudgment interest to be shared among 52 class members. The judgment prohibits Dial from implementing any pre-employment screening device for 5 years without first consulting the EEOC. Dial is also to provide job offers with lawful wages to all class members.

In *EEOC v. EGW Temps, Inc.*,[258] the Commission found evidence that an employment agency coded and referred applicants based on race and sex, and that some of the agency's client-employers made requests for individuals of a particular race or gender. Under the consent decree, the employment agency is to pay $ 285000 into a Claim Fund to be distributed among qualified claimants identified by the Commission. Three of the agency's clients are to pay $ 50000 in administrative costs. In view of the employment agency's role as a gatekeeper for many jobs at various companies, the decree includes specific requirements to prevent the recurrence of race- and sex-based exclusion of applicants and to open up employment opportunities for black and female applicants. The agency is prohibited from using race or sex in making employment referrals, and is to

[257] *EEOC v. Dial Corp.,* Case File No. 3:02-CV-10109 (S.D. Iowa Sept. 29, 2005)(unpublished).
[258] *EEOC v. EGW Temps, Inc.* (W.D.N.Y. Sept. 1 2005)(unpublished).

retain an outside contractor to provide annual training regarding lawful interviewing, screening, and hiring procedures. The agency is also to publish and implement an antidiscrimination policy and procedure explaining prohibited conduct, describing the internal complaint process, protecting confidentiality of individuals who file complaints, and providing for the prompt, thorough, and effective investigation of complaints.

In a recent case concerning discrimination on the basis of pregnancy, the EEOC entered into a consent decree with a global financial services company that failed to hire a woman for an executive vice president position after learning of her pregnancy.[259] The woman had signed a written employment contract, subject to a drug test and credit and criminal record background checks. After she disclosed her pregnancy to her new boss, the company conducted a number of additional reference checks and ultimately revoked the job offer. Under the consent decree, the company is to pay $ 450000 and is prohibited from making employment decisions based on pregnancy.

One large recovery of $ 54 million was awarded in a suit against the financial services firm of Morgan Stanley[260] for engaging in a pattern or practice of sex discrimination in its Institutional Equity Division by preventing women from being promoted, compensated, or enjoying other terms, privileges and conditions of employment on the same basis as men. The case was resolved through a 3-year consent decree, with $ 40 million going to a claim fund to pay identified victims; $ 12 million to the individual who filed the discrimination charge and $ 2 million for training designed to combat discrimination and enhance promotional opportunities for women. As part of the injunctive relief provided in the decree, Morgan Stanley is to appoint an EEOC-approved ombudsperson to oversee implementation of the decree, and retain an outside monitor to review Morgan Stanley's antidiscrimination policies and be a point of contact for sex discrimination complaints. Again, these cases cannot be seen as quantitative, but are rather qualitative with respect to the spectrum of remedies available in the American systems through the judgments and consent orders.

5.4.1.3 Remedies Available under Executive Order 11246

The OFCCP investigates complaints of discrimination and conducts compliance reviews (3833 in 1999). The OFCCP recovered a record amount of $ 45 million for 14761 American workers in fiscal year 2005 who had been subjected to unlawful employment discrimination. Of that record recovery, 97 % was

[259] *EEOC v. Johnson Int'l, Inc.* (E.D. Wis. Dec. 27, 2004)(unpublished).
[260] *EEOC v. Morgan Stanley & Co., Inc.* (S.D.N.Y., 12 July 2004)(unpublished).

collected in cases of systemic discrimination, which involved a significant number of workers or applicants subjected to discrimination because of an unlawful employment practice or policy.[261] The OFCCP also performed 50 Corporate Management Compliance Evaluations, also known as "Glass Ceiling" audits to ensure that women and minorities do not face discriminatory barriers to advancement into management and executive positions.

A high profile case has recently been filed by the United States Department of Labor against The Goodyear Tire & Rubber Company for alleged hiring discrimination against female applicants at one of the company's manufacturing facilities in violation of Executive Order 11246.[262] A compliance review conducted by the OFCCP found that from January 1998 through June 1999, Goodyear utilized a hiring process and selection procedures that discriminated against hundreds of female applicants for entry-level positions on the basis of gender. The lawsuit seeks to have Goodyear hire and provide monetary relief, retroactive seniority and all other employment benefits to the unsuccessful female applicants.

5.4.1.4 Remedies Available under the FMLA

Both damages and equitable relief are available under FMLA.[263] Any employer who violates the act is liable for damages in the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation up to a sum equal to 12 weeks of wages or salary for the employee plus interest. In addition, liquidated damages equal to the sum of the first amount including interest can be awarded in the case of a willful violation. Equitable relief may also be awarded including employment, reinstatement, and promotion.[264] The statute also mandates an award of attorney's fees to prevailing plaintiffs.[265] In one case brought by an individual, plaintiff was awarded $ 107571 on claims of retaliation under the FMLA, which was then doubled by the addition of liquidated damages, and in total was over $ 300000 after front pay and attorney's fees and costs were added to the award.[266] In 2005, 2785

[261] *See* OFCCP, *Improvements at OFCCP Produce Record Financial Recoveries in FY 05 – $ 45,156,462 collected for 14,761 American Workers,* Press Release, 16 August 2006, Department of Labor, OFCCP website, available at: http://www.dol.gov/esa/ofccp/enforc05.htm.

[262] *See* Department of Labor, *Labor Department Lawsuit Targets Discriminatory Practices against Women at Goodyear Manufacturing Plant*, Press Release, 16 June 2006, available at the U.S. Department of Labor website: http://www.dol.gov/esa/media/press/ofccp/of2006971.htm.

[263] FMLA, 29 U.S.C. § 2615.

[264] *Id.* at § 2617.

[265] *See McDonnell v. Miller Oil Co.,* 134 F.3d 638 (4th Cir. 1998).

[266] *See* Patrick Hicks and Debra Westbrook, *FMLA – It's Not Just for Employment Lawyers Anymore,* 13 NEVADA LAWYER 2005.

charges were filed for FMLA violations with the Wage and Hour Division, and the division collected $ 1.8 million in back wages for FMLA violations.

5.4.2 The Allocation of Trial Fees and Costs

The American rule with respect to the allocation of trial fees and costs is that each party is to bear its own legal expenses.[267] Several of the exceptions to this rule that exist under the common law are pertinent here with respect to sex discrimination claims. To protect the integrity of the courts, a court may punish a willful violation of its order by imposing an award of attorney's fees as a sanction.[268] Second, a court may award attorney's fees against a losing party that has promoted litigation or manipulated the judicial process in bad faith.

The most important exception under the common law to the American rule that ultimately led to the adoption of the Civil Rights Attorney's Fees Awards Act is the private attorney general doctrine. Under this doctrine, the court could award attorney's fees and costs in a case in which an individual plaintiff acted as a "private attorney general" in enforcing rights deemed to be important to the public. The Court in *Alyeska* held that federal courts could not use the private attorney general doctrine to award attorneys' fees to prevailing parties, stating that only the federal legislature had the authority to create exceptions to the American Rule by statute.[269] Congress immediately responded. Within a year after *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, a statutory exception granting courts discretion in awarding attorneys' fees to prevailing parties in an action or proceeding to enforce a provision of a civil rights act including the EPA, evincing the belief that the availability of attorneys' fees to prevailing parties in justifiable situations was an essential element of the American justice system.[270] There currently are over 200 federally created statutory exceptions to the American Rule.

Congress has granted courts the power, in their discretion, to award reasonable attorney's fees to the plaintiff in civil rights litigation, to ensure "effective access to the judicial process" for persons with civil rights grievances.[271] Accordingly, a prevailing plaintiff ordinarily is to recover attorney's fees unless special circumstances would render such an award unjust. The amount of fees awarded

[267] For a discussion of this rule and its exceptions, *see* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees against the Federal Government,* 25 ARIZ.ST.L.J. 733, 735 (Winter 1993).
[268] *See Alyeska Pipeline Serv. Co. v. Wilderness Soc.y,* 421 U.S. 240, 257–59 (1975).
[269] *Id.* at 262.
[270] For this history, *see* Jamie H. Kim, *Better Access to Justice, Better Access to Attorney's Fees, The Procedural Implications of Scarborough v. Principi,* 25 J. NAT'L A. ADMIN. L. JUDGES 583, 588 (2005).
[271] 42 U.S.C.A. § 1988. *See also Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983) *citing* legislative history to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, H.R.Rep. No. 94-1558 at 1 (1976).

is to be assessed against certain factors.[272] A prevailing defendant may recover attorney's fees only where the suit was vexatious, frivolous or brought to harass or embarrass the defendant.[273]

5.4.3 The Statute of Limitations for Sex Discrimination Claims

The statutes of limitations vary between the acts, with Title VII having the shortest time span. A plaintiff is to file an employment discrimination charge under Title VII with the EEOC either 180 or 300 days after an "alleged unlawful employment practice occurred."[274] In a state having a government agency authorized to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in other states, the charge must be filed initially with the EEOC within 180 days. If a claim brought to the EEOC is dismissed, or within 180 days of filing the charge, no civil action has been filed, the EEOC must notify the party, who then has an additional period of ninety days after receiving such notice in the form of a "right to sue letter."[275] This 90-day period can be tolled in the event of an inadequate notice; in other words, the Court has found that the claimant must be able to understand the notice as given by the EEOC as to her rights.[276]

The EPA and FMLA both require that claims be brought within two years after the cause of action arises, unless the violation is "willful," in which case a three-year limitation period applies.[277] In addition, no requirement exists under these acts that a "charge" be filed with an agency prior to plaintiff litigating the claim.

5.5 The Discourses within American Discrimination Law

The texts in the form of legislation as well as case law have been presented in this chapter, focusing on the issues of equal pay, sex discrimination and family leave.

[272] The factors to be considered include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley* at 429 note 3.

[273] *Hensley* at 429 note 2, *citing* H.R.Rep. No. 94-1558 at 7 (1976) and *Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978).

[274] Title VII, 42 U.S.C. § 2000e-5(e)(1). *See National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002).

[275] Section 706(f)(1) of 42 U.S.C. § 2000e-5(e)(1).

[276] *See Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147 (1984).

[277] 29 U.S.C. § 255(a) and 29 C.F.R. § 1620.33(b).

The institutions in the form of the courts, enforcement agencies on the federal level and labor unions have also been explored. Decision-making in the form of the case law, the interaction between the Court, Congress and the EEOC, as well as between the federal and the state powers, has also been examined.

Regarding sex discrimination and combining work and family, the discourses historically have taken an approach that has diverged considerably from those in the EU, Sweden and the United Kingdom. Women in the United States were forced into employment as a result of war, beginning already with the Daughters of Liberty during the Revolutionary War. Women's participation in the 1860's during the American Civil War led to federal laws mandating equal pay between women and men in federal service as early as the 1870's. The issues of women and of slavery became aligned early, as did those of slavery, segregation and labor. This brought a different dimension to the issue of discrimination and labor, a focus in the American discourse parallel to that of "class" in Sweden. The issue of equal rights for women was not subsumed by the labor movement's class struggle, and more importantly, there was no perceived threat at least initially to the power of the labor unions in society in general with respect to the enactment of discrimination legislation.

The role of the courts in the United States is active, with the Court playing a decisive and varying role. The Court in the early 1900's was initially negative to general state protective legislation, a reluctance that gave way during the Great Depression. After decades of inaction by Congress, the Court paved the way for a substantive justice analysis with respect to racial discrimination in *Brown* in 1954. The Court has since also functioned in a more conservative fashion, finding in the 1970's that discrimination on the basis of pregnancy was not sex discrimination, and also limiting rights of Title VII plaintiffs in subsequent case law. However, where Congress has amended the legislation to address issues as raised by the Court's decisions, the Court has followed suit faithfully, as can be seen by its recent decisions on mixed motive cases decided under the 1991 Civil Rights Act Amendment. The Court's deference to the interpretation given the legislation by both Congress and the EEOC is also clear, as can be seen from its most recent case, *Burlington Northern.*

Federalism has also affected the discourses in the American systems. In the discourse between the federal and state legislative powers, many states have been willing to stay within the federal parameters, while others have expanded either the discrimination or family leave protections in some fashion, more modestly as in the case of Minnesota with the Minnesota family leave provisions applicable to employers of 20 or more instead of the federal requirement of 50 employees, or more radically, as in the case of California providing paid leave. Certain states have led the way, while others have followed. The separation of powers can also be seen to have contributed to the progression with respect to discrimination. The federal government has often led the way with groundbreaking legislation

affecting its own role as an employer, mandating eight hour work days for federal employees in 1868, equal pay between men and women in federal service in 1870, union protection in the Railway Labor Act of 1926, and the Presidential Executive Orders banning discrimination on the basis of race beginning in 1941.

One can also discern a faith in legislation that is absent in some of the other systems, beginning as early as the 1880's with demands for legislation by farmers to "bust the trusts." The Great Depression deepened this faith with the passage of the New Deal in efforts to remedy the rampaging economic harm. This faith can also be seen in the 1963 March on Washington for Jobs and Freedom with African-Americans demanding legislation mandating equal access to employment, facilities and housing.

Despite this faith in the law as a vehicle for change, certain areas of the law have been viewed as "private", mainly the family as a unit. This discourse has made itself most palpable in the issue of family leave, explaining in part the late and modest steps taken in the federal legislation. Here virtually every ideology is split, with certain scholars arguing the private/public sphere, and that the state has no jurisdiction in such issues. Others argue that long paid leaves will result in less participation by women in the workplace, while still others argue that class and/or race is decisive here, as white middle-class women have the choice of whether to opt out and stay home without the need for paid leave.

A last discourse that can be detected, also stemming more from the experience of African-Americans after the American Civil War than the experiences of women, is the role of actors other than employers in discrimination. It became apparent early at the turn of the twentieth century that the labor unions did not always work for the interests of all members, and could even contribute to the structural discrimination existing at certain workplaces, particularly with respect to African American workers. The Court imposed early a duty of fair representation to insure that the labor unions also acted for the interests of its minorities. Both the EPA and Title VII specifically include the labor unions as actors liable for discriminatory actions. Employment agencies for these reasons are also included within the scope of these two acts in efforts to reach structural discrimination, the main focus of the American discrimination legislation.

Now that the four systems have been examined, we can proceed with the comparison.

Chapter Six: Comparison of the Systems within the Theoretical Framework of a System Approach

A leading Swedish feminist legal scholar recently wrote:

> Five years ago, in 1995, the United Nations extolled Sweden as the most equal country in the world. Such resounding kudos is a testament to the efficacy of Sweden's vigorously promoted campaign via sex equality politics in Sweden as well as in the international community. Sweden's self-image corresponds to the image that the international community now has of the country. Both the self-image and image are inaccurate. Sweden has deluded itself and the world.[1]

Eva-Maria Svensson bases this conclusion on the several levels of tensions she finds inherent in the Swedish legal system, including those between formal and substantive equality, justice for the majority and for a minority, the individual assertion of rights versus the group assertion of rights, as well as between legal and political norms of equality. Certain of these tensions are endemic to the issue of sex equality, and equality in general, in all four of these systems, particularly issues of structural discrimination and positive discrimination, displacing the rights of individuals for those of minority groups. As a way to move forward within the issue of sex equality, Svensson proposes studying foreign legal systems, placing the Swedish system in another context, as "[a] distancing through other cultures helps us gain some perspective about the limits we consider 'natural' in our own society."[2] That is the very ambition of this work. Under the system approach to comparative law invoked here, the texts, institutions, decision-making, access to justice issues and discourses of each of these four systems have

[1] Eva-Maria Svensson, *Sex Equality: Changes in Politics, Jurisprudence and Feminist Legal Studies* in RESPONSIBLE SELVES – WOMEN IN THE NORDIC LEGAL CULTURE (Ashgate 2001). Svensson also authored the first doctoral thesis in law on the topic of feminist legal theory in Sweden, receiving her degree in 1997, *see* Eva-Maria Svensson, GENUS OCH RÄTT – EN PROBLEMATISERING AV FÖRESTÄLLNINGEN OM RÄTTEN (Iustus 1997).

[2] Svensson (2001) at 93.

been presented. The task now is to take up these threads for the purpose of comparison. The focus of this work is the platform to create economic equality as in the Swedish system, based on the equal treatment acts and rights to parental leave, with the objective of the economically independent woman and the larger assumption of responsibility in the home by men. The other three systems presented here are not analyzed in themselves, but taken up for comparative purposes. None of the systems presented has achieved completely effective solutions as to the issue of the economic equality of women, but the endeavor here is to explore the different avenues that could potentially be contemplated in the Swedish context.

6.1 The Texts: The Laws, Case Law and Collective Agreements

The texts examined have consisted of the legislation, case law and collective agreements. Each of these three different sources is given different weight in the systems examined depending upon the legal system and legal culture at issue, the model of industrial relations, as well as the political system. However, in each of the four systems, the primary legal texts are the constitutions, treaties, statutes and then regulations. The Swedish system is unique here in granting the right for the social partners to opt out of certain statutory provisions through collective agreements, with the starting point still the statutory texts.

6.1.1 The Statutory Texts – Equal Pay, Equal Treatment and Parental Leave

Three lines of texts have been discussed in this work, acts concerning equal pay, separate statutes in each of the four systems except in Sweden, where it is included in the Equal Treatment Act of 1991, statutes prohibiting discrimination, as well as those giving rights to parental leave. From a historical perspective, the European Union was the first to explicitly adopt provisions mandating equal pay in Article 119 of the Treaty of Rome. The United States can be seen as last with the Family and Medical Leave Act of 1993 giving individual rights to parents and other caretakers for a twelve-week unpaid leave. The historical developments of the passages of these different acts very much reflected the emphasis of the societies at the time of the enactments. The focus in the United States has been on discriminatory conduct, whether by employers, labor unions or employment agencies, and regardless of basis, with discrimination addressed early due to the history of slavery and racism. In Sweden, the objective has not been to eradicate "badges of slavery," but rather originally to optimize the employment participation of women, resulting in a focus on facilitating work and family, the right to parental leave as well as welfare benefits in the form of daycare and healthcare. The United Kingdom has recently focused on facilitating employment participation for women by strengthening the rights to a "family friendly work place" and

more flexible work schedules, but has now also moved forward with a human rights' perspective to questions of discrimination, parallel to developments in EU law. These lines of development are first compared as expressed in the statutory texts.

6.1.1.1 Equal Pay

The roots of the movement for equal pay in the United States began already in the 1860's with the American Civil War. The Second World War, however, was the impetus for the final drive on both sides of the Atlantic, leading eventually to Article 119 of the Treaty of Rome in 1957 and the American federal Equal Pay Act of 1963. The UK Equal Pay Act 1970 was passed in anticipation of EC membership. The UK Equal Pay Act is unique as to these systems in the approach it has taken as to redressing pay inequalities, implying an "equality clause" in any employment agreement lacking such explicitly. The issue of equal wages was finally explicitly included in Sweden in the 1991 Equal Treatment Act. Another difference with respect to these systems is that under the United Kingdom and American equal pay acts, the employers and the labor organizations, as well as employment agencies, are held liable under the acts. The liability of labor unions in these two systems stems from the recognition of the role labor unions have in the structures existing in the labor market. Community law and the Swedish Equal Treatment Act hold only employers liable for violations of the equal pay provisions.

Two elements have been central with respect to the equal pay principle in all four systems, defining "pay" and "work." The definition of pay initially was interpreted fairly narrowly in Community law, but now, all four systems have fairly extensive statutory interpretations of pay with no significant deviations. The second progression in all four systems is the movement from equal pay for equal work to equal pay for work of equal value, comparable work or comparable worth in efforts to eradicate not only individual cases of discrimination, but structural discrimination as well. As to defining work, the ECJ has stated within Community law that job classifications must be non-discriminatory and that any analysis is to go beyond the actual title to determine equality of pay. The UK system has developed four statutory categories in the Equal Pay Act 1970: like work, work rated by a job study as equivalent, work proven equivalent outside a job study, and situations arising regarding maternal leaves. The emphasis by the UK courts has been on whether a job evaluation is analytical, going beyond the actual job as historically perceived and examining and assessing the individual components therein contained. The Swedish 1991 Equal Treatment Act refers to like work and work of equal value. The American federal Equal Pay Act of 1963 mandates equal pay for "equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar

working conditions." These elements comprise the equal work standard, invoked according to the EEOC to prove that the work is substantially similar. Each of these four systems has reached a point of consensus in that equal pay must be addressed more broadly than simply equal pay for equal work in order to reach structural discrimination. The Swedish act requires that employers conduct wage analyses and in the event they find any differences which can be attributed to sex, they are to draft a plan to eradicate such differences within a three-year time span. This is an ambitious timeframe, but no cases have been brought to AD for the failure to eradicate such differences within three years.

6.1.1.2 Prohibitions against Discrimination on the Basis of Sex

The United States was the first of these systems to explicitly prohibit discrimination on the basis of sex in Title VII of the 1964 Civil Rights Act. The other three systems all passed their legislation in the 1970's: The United Kingdom came after with the Sex Discrimination Act 1975, anticipating the 1976 EC Equal Treatment Directive. Sweden's first Equal Treatment Act was legislated in 1978, but the final act was not effective until 1980. The American Title VII was the only legislation in the four systems that originally encompassed more than one ground of discrimination, covering race, religion, national origin and sex, with prohibitions as to discrimination on the basis of pregnancy, marital status, age and disability enacted later. The United Kingdom has moved in this direction with the Equality Act 2006 incorporating the separation pieces of legislation as equality enactments, however, it appears that they will still function individually. A legislative proposal has been made in Sweden to incorporate all the separate discrimination acts into one act in 2008.

Under each of these systems, the distinction is made between direct and indirect discrimination, or as in the American systems, disparate treatment and disparate impact. This distinction was arguably first recognized by the United States Supreme Court in 1954 when it held that separate but equal with respect to race was not constitutional in the area of education. The United States Supreme Court was also the first court to recognize indirect discrimination, disparate impact, in an employment context in *Griggs* in 1971. All four of the systems now have specific statutory definitions of indirect discrimination. The elements required for direct and indirect discrimination according to the legislative texts are analyzed next.

6.1.1.2.1 Direct Discrimination/Disparate Treatment

Within the four systems, one sees a convergence as to the statutory language. In the American systems, Title VII contains no specific definition of direct discrimination, leaving it to the courts to define, stating simply that it is unlawful for an employer to discriminate against any individual of a protected class with respect

to compensation, terms, conditions or privileges of employment. This difference in treatment is lawful if it is the result of a bona fide occupational qualification relating to safety, authenticity or privacy. In the UK Sex Discrimination Act 1975, direct discrimination is where on the ground of her sex an employer treats her less favorably than he treats or would treat a man. The different treatment is lawful if based on a genuine occupational qualification for a job or where the essential nature of the job calls for a man due to reasons of physiology, authenticity or privacy. Both the UK and US acts are broad in the language used.

The EC Discrimination Directive defines direct discrimination as where a person is treated less favorably on the grounds of sex than another is, has been or would be treated in a comparable situation unless it is a genuine and determining occupational requirement, where the provision concerns the protection of women particularly with pregnancy and maternity as well as measures to ensure full equality in practice between men and women. The directive then proceeds to give examples of situations constituting unlawful discrimination. The list is probably a response to the difficulties in achieving harmonization within the different Member States' understandings of discrimination. Under the Swedish Equal Treatment Act 1991, an employer may not disfavor any job applicant or employee by treating her or him less favorably than the employer treats, has treated or would have treated any person in a comparable situation, if the less favorable treatment has a connection with sex. The discrimination is not unlawful if the requirement of a certain sex is due to the nature of the work or its context or if taken in efforts to achieve equality in employment. However, the language in the Swedish statute until the amendment in 2000 was that plaintiff had to be better qualified that the male comparator to prove direct discrimination. As seen from the Swedish case law presented in Chapter Three, this was an onerous standard for plaintiffs.

6.1.1.2.2 Indirect Discrimination/Disparate Impact

Disparate impact, or indirect discrimination, due to its insidious nature, was identified and defined at a later stage in all four systems. The distinction between disparate treatment and disparate impact was drawn by the United States Supreme Court in *Griggs* in 1971, and still is not specifically defined in Title VII, though Congress has set out the burden of proof in disparate impact cases: Where an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

Indirect discrimination was first addressed by the ECJ in *Bilka* in 1986 and first defined in the 1997 EC Burden of Proof Directive. Indirect discrimination is now defined in the Discrimination Directive as where an apparently neutral provision, criterion or practice "would put persons of one sex at a particular

disadvantage compared with persons of the other sex," lessening the standard of "a substantially higher proportion of the members of one sex" as first set out in the Burden of Proof Directive. The Swedish 1991 Equal Treatment Act did not include any separate definition of indirect discrimination until the 2000 amendment introducing an explicit definition of indirect discrimination in § 16, stating that an employer "may not disfavor an applicant or employee by applying a provision, criterion or procedure that appears neutral but in practice that particularly disadvantages persons of one sex." An amendment of the UK Sex Discrimination Act 1975 followed on its heels in 2001 and then again in 2005, with indirect discrimination now defined as where an employer applies a provision, criterion or practice which is applied or would apply equally to a man, but:

(i) Which puts or would put women at a particular disadvantage when compared with men;

(ii) Which puts her at that disadvantage; and

(iii) Which he cannot show to be a proportionate means of achieving a legitimate aim.

Fairly high thresholds existed originally in the European systems with respect to the number of persons put at a disadvantage, a threshold that has been successively lowered in the last two decades.

Justifications for indirect discrimination exist in all four systems. In the United States, the two main defenses are the business necessity defense or that it is a bona fide occupational qualification falling into one of the three categories of safety, authenticity or privacy. Under the EC Discrimination Directive, the employer is to show that the "provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary." The defense permitted under the UK Sex Discrimination Act 1975 is where the employer shows it "to be justifiable irrespective of the sex of the person to whom it is applied." The Swedish justification as amended in 2005 is where the employer can show that "the provision, criterion or procedure can be motivated by a legitimate goal and the means are suitable and necessary for reaching the goal," much in line with the wording of the 2002 EC Equal Treatment Directive. The wordings of the statutes in all four systems in defining indirect discrimination or disparate impact as well as justifications also demonstrate a convergence.

6.1.1.3 Part-Time Work

Issues relating to part-time work in Europe have been viewed as compelling with respect to sex discrimination and balancing family and work. This issue has received little attention in the United States, which may simply be because the percentage of women working part-time in the United States is lower than in

Europe.[3] Specific provisions exist in the EU, the United Kingdom and Sweden addressing problems arising with part-time work. The 1997 EC Part-Time Work Directive mandates equal treatment between part-time and full-time workers to prevent the exploitation of part-time workers through employment on lesser terms. In the United Kingdom, the Employment Rights Act gives employees protections against suffering a detriment in employment for exercising rights associated with flexible working including working part-time, rights which are expanded in the regulations concerning part-time workers and flexible working. These along with the family leave provisions constitute the heart of the United Kingdom's "family friendly workplace." In Swedish law, discrimination against part-time and fixed term contract workers is prohibited expressly since the passage of the act in 2002 in accordance to Community law. Certain other protections are granted part-time workers, for example, in LAS giving the right for a part-time worker to receive preference to full-time work in certain situations. There is currently a legislative proposal in Sweden as to strengthening the rights of part-time employees including a right to full-time work. Here the European systems demonstrate a fair degree of consistency, with the United States not addressing the issue at all on the federal level.

6.1.1.4 Parental Leave

The issue of a legislated mandatory maternal leave was raised early in all three national systems at the end of the 1800's, in part due to the intragovernmental conferences held on worker protection issues. The modern concept of parental leave as a right of parents, and not a mandatory restriction of employment, began in Sweden, which legislated its first Parental Leave Act in 1976. The United Kingdom came next with employment protections for taking maternity leave in the 1980's. The EC 1993 Pregnancy Directive mandates a two-week obligatory maternal leave. Both Sweden and the United Kingdom are in conformance with this requirement. Under the EC 1996 Parental Leave Directive, a

[3] *See* Joan C. Williams, Elizabeth Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of Carers in the Workplace,* 13 Duke J.Gender.L.Pol'y 31, 36 (March 2006). The authors cite one case in which the court permitted a part-time comparator under the Equal Pay Act, *citing Lovell v. BBNT Solutions LLC,* 295 F.Supp.2d 611, 621 (E.D.Va. 2003). The authors also cite cases rejecting this proposition, *see Ilhardt v. Sara Lee Corp.,* 118 F.3d 1151, 1155 (7th Cir. 1997); *Stockhoff v. D.E. Baugh Co.,* 2003 U.S. Dist. Lexis 3619 (S.D. Ind. Mar. 10, 2003); *Payne v. Huntington Union Free Sch. Dist.,* 219 F.Supp. 2d 273, 281 (E.D.N.Y. 2002); and *Brown v. Super K-Mart,* No. 98 C 3498, 1999 U.S. Dist. Lexis 9525 (N.D.Ill., 14 June 1999). The percentage of women working part-time in the United States is seen as significantly less than in Europe, *see* Hans-Peter Blossfeld and Catherine Hakim, BETWEEN EQUALIZATION AND MARGINALIZATION – WOMEN WORKING PART-TIME IN EUROPE AND THE UNITED STATES OF AMERICA (Oxford 1997) at 289 note 1 citing 1990/91 statistics in which the percentage of women in Sweden working part-time was 40.5 % and in the United States, 25.6 %.

minimum of three months individual parental leave is set out. This is the system that has been adopted in the United States in the federal Family and Medical Leave Act of 1993.[4]

The extent of the benefits granted under these different systems differ significantly. In the United States, if both parents are eligible and not working for the same employer, the leave combined can be up to 24 weeks without pay. The leave has to be taken individually with twelve weeks for the mother and twelve for the father. There is no possibility of transferring leave between parents and there is no right to payment. California recently in 2002 has established a six-weeks right to paid leave. In Sweden, one parent currently can take up to eleven months paid leave with full benefits with 60 days reserved for the other spouse, a total of thirteen months. The United Kingdom recently with the passage of the Work and Families Act 2006 provides 52 weeks of leave for mothers, the 2 week compulsory leave, paternity leave of one or two weeks, as well as parental leave of 13 weeks, giving a total of over fifteen months leave. Mothers may transfer a part of their leave to fathers, the only system in the three focused on mothers having the right to leave, and the right to leave of fathers for more than two weeks derivative of the mother's.

Specific protections exist in the legislation of the three national systems with respect to the exercise of the right to parental leave. The UK Employment Rights Act 1996 protects an employee from any detriment resulting from the exercise of such rights. In Sweden, the 1995 Parental Leave Act was recently strengthened in 2006, stating that an employer may not disfavor an applicant or employee when taking certain actions in employment for reasons having a connection with parental leave in accordance with the parental leave act. The prohibition, however, is not applicable if the action is a necessary consequence of the parental leave. In addition, if an employee is terminated for reasons having a connection with parental leave in accordance to the act, the termination is to be declared invalid if the employee so requests. A new burden of proof was added to the Swedish act, that if an applicant or employee can demonstrate circumstances that give rise to assume that he or she has been disfavored for reasons having a connection with parental leave, the burden of proof shifts to the employer. The employer must then demonstrate that no such disfavoring has occurred or that the disfavoring was a necessary consequence of the parental leave.

Under the American federal Family and Medical Leave Act, the employee's job position and benefits are protected during the period of unpaid leave and the employee is entitled to be restored to his or her previous position or a comparable position, with equivalent benefits and pay. The employer is required to continue to provide any employment benefits accrued prior to the beginning of a leave period, as well as continuing coverage under the employer's health care

[4] This is disregarding any state legislation as to the issue.

plan. It is unlawful for an employer to interfere with the assertion of rights under the FMLA or to discriminate in the form of retaliation for taking leave.

Each of the three national systems has statutory protections that facially are very similar to protect the rights of individuals taking parental leave. One marked difference, however, can be found in the UK legislation, which specifically makes certain allowances that the leave taken is to be calculated as time in employment with respect to certain benefits, nullifying any career "set-back" due to leave for the care of a child.

6.1.1.5 Regulations v. Legislative Preparatory Works

An interesting difference that appears within the three national systems is the function within the legal systems of legislative preparatory works and agency regulations. The courts in the United States and Sweden refer to the legislative preparatory works of Congress and the Swedish Parliament in their interpretation of the statutory texts. In the United Kingdom, the courts have recently begun to interpret the employment statutes more in light of the Community law under which they were adopted and as human rights, against rights given in the European Convention on Human Rights. The latter is not surprising, as legislative history in general can only be cited in a relatively limited context in the UK legal system. The point is that when the US and UK courts look to the legislative preparatory works, they are seeking a broader interpretation of the will of Congress or the Community in which to interpret the effectuation of the statute. The Swedish Labor Court, in contrast, has sought the intent of the legislator in what can be seen as very narrow and detailed issues, and has often have used this analysis to narrow the scope of the statute. This can be seen in the most recent race discrimination case where AD, when applying the new standard of proof for discrimination, stated that as the preparatory works maintained that the new standard meant no change to the existing law, there would be no change. Swedish statutes in general are written in broader language than the statutes in the United States, often "incomplete" without the legislative preparatory works. This is easily seen with a comparison of simply the UK Employment Rights Act 1996 comprising over 200 pages and all the employment legislation in Sweden that perhaps fills half those pages. The function of supplementing the statutory text is fulfilled in the United Kingdom and in the United States not by the legislative preparatory works, but rather by regulations issued by government agencies with respect to the acts as well as the principles developed in the case law.

Another limitation that exists as to the reliance on the legislative history in the Swedish system is its static nature. Regulations in the United States and the United Kingdom are adopted through administrative processes in which the public has the opportunity to comment on drafts before any final version. If after its adoption a regulation proves to be ineffective or too onerous, or in

another way inadequate, it can be changed through this same administrative law procedure. The Swedish legislative preparatory works go through an administrative procedure where certain bodies are asked for their assessments as to proposed legislation, which opinions are then incorporated into the legislative preparatory works. The presiding minister's statements as to the legislation are seen as having the greatest weight. If the legislative preparatory works prove themselves to be inadequate, there is no way to amend them in the Swedish system without actually amending the legislation. The use by the Swedish Labour Court of the legislative preparatory works has been to a point at which the Swedish legislator has specifically instructed the court to look no further in the previous "out-dated" legislative preparatory works, but instead for issues of interpretation, look to Community law. This problem with the legislative preparatory works as becoming outdated was also mentioned in the second ten-year assessment of the equality legislation. Given the paucity of case law in the Swedish system, one of the main supplementary legal sources to legislation in the European Union, United Kingdom and the United States, and the nature of legislative preparatory works, as well as the broad language used in the Swedish statutes, regulations may be an appropriate vehicle within the Swedish legal system for creating stronger protections in the area of discrimination.

6.1.1.6 Conclusions as to the Statutory Texts

The terms of the legislative acts as adopted in these four systems with respect to equal pay, sex discrimination and parental leave do not facially vary to any great extent any longer. Each of the systems has come to the point where equal pay is to be applied to a category broader than equal work. A similar extension has occurred with sex discrimination, now explicitly categorized as either direct or indirect discrimination. The right to parental leave varies in accordance with the statutory schemes created in the systems. In Sweden, parents have a right to leave that can be shared with the exception of sixty days. In the United Kingdom, the right has been that predominantly for mothers with a movement towards fathers receiving greater rights and a greater share of the leave. The right to parental leave in the United States is individual and for the shortest term of the three national systems, twelve weeks per parent. As to protections for part-time workers, the European systems offer comparable protections, with the EU, the United Kingdom and Sweden all recognizing the vulnerability of part-time workers in the context of combining work and family. The United States has no legislation on the federal level addressing this issue.

However, there is a marked difference with respect to the use of regulations and legislative preparatory works in order to flesh out the bones defined in the acts. The American and UK systems use agency regulations to define more technical issues, creating legal certainty in the interpretations of the acts for the parties

and the courts. In contrast, the Swedish Labour Court has turned to the legislative preparatory works to decide such issues, as there are no agency regulations giving guidance. Regulations in this area are a legal vehicle that should be contemplated within the Swedish context.

6.1.2 The Case Law

A comparison of the case law brings to light the differences not only in result, but approach and the parameters in which the decisions are decided, such as the political and legal systems in which the judges are working. These latter differences are revisited in the sections concerning institutions and decision-making, but a certain overlap is impossible to avoid, as the perceptions of the courts of their roles very much affect the judgments they issue. As seen from the presentations of the case law in Chapters 2 through 5, the ECJ and the UK and US courts have fleshed out the principles established in the laws, at times anticipating new directions, while at other times acting more conservatively. The case law of the Swedish Labour Court has not filled this function due in part to its perception of its role, a topic discussed more thoroughly under the heading of institutions, but which also must be mentioned here cursorily due to the absence in general of Swedish case law establishing principles in the area of discrimination, making a comparison difficult. AD simply does not perceive its role as setting forth principles driving the law forward. There simply are very few cases, which due to access to justice issues as discussed below as well as the lack of success of plaintiffs in general, arguably has become a self-perpetuating cycle within Swedish employment discrimination law. As plaintiffs are not generally successful and the risks are great, they do not risk bringing cases. The last time a plaintiff was successful with a claim under Swedish law of direct sex discrimination based on qualifications was 1993 and for wage discrimination was 1996.

The case law is examined here against the categories discussed throughout this work, direct discrimination with respect to qualifications, equal wage claims, indirect discrimination and discrimination or interference with the right to parental leave claims. The judgments as given by the courts can be seen as defining the divide between the law in books and the law in action, a distinction coined by the American jurist Roscoe Pound over one hundred years ago.[5] Having laws is not enough, the individual must also be able to successfully assert her rights under those laws within the legal system, as stated in the latest Community directive, that the "provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment."

[5] *See* Roscoe Pound, *The Law in Books and Law in Action,* 44 Am.L.Rev. 12 (1910). *See also* Jay Tidmarsh, *Pound's Century, and Ours,* Notre Dame Law Review 513 (Jan. 2006).

6.1.2.1 Direct Discrimination Based on Qualifications

In a comparison of cases deciding claims of direct discrimination on the basis of qualifications, it must be noted that the Swedish Labour Court, according to the applicable law, had to apply a standard of the plaintiff proving that she was clearly "better qualified" than the male candidate chosen for the period from 1980 to 2000. The act contained the standard "better qualified," so arguably the Labour Court raised the threshold somewhat by adding the adjective "clearly" in its analysis under this law. The majority of cases concerning discrimination on the basis of qualifications were brought in the 1980's under this standard, in effect until 2001, after which the standard was amended to persons "in a similar situation," a standard closer to the ones applied in the European Union, the United Kingdom and the United States. It seems rather fruitless to compare the Swedish cases from that period as the Swedish law permitted so wide a discretion to employers under this standard as applied by the Swedish Labour Court.

Only two cases have been decided by the Swedish Labour Court under the standard of persons "in a similar position," the Haparanda police case and the Singö priest case. Plaintiffs were not successful in either of these cases. In both, the Court in the end relied heavily on the assessments by the employers as to issues such as leadership, guidance, initiative, ability to work with others, most of which are subjective qualifications that can neither be proven nor disproven. A comparison in this area is difficult because there are no such discussions raised in the EU, UK or US case law concerning such subjective qualifications or assessments. This can be that the reported decisions from the European Union, United Kingdom and United States are all appellate level decisions, in which only questions of law are raised in the respective systems at this level. The Swedish Labor Court is the first and final instance in the discrimination claims as filed by the labor unions or *JämO,* addressing both questions of law and questions of fact, explaining the presence of such discussions to a greater extent.

The present standard in the 1991 Equal Treatment Act as amended in 2005 is persons in a "comparable situation." No case of sex discrimination has been decided yet under this standard. For purposes of comparison, however, one can look at the most recent case decided by AD in 2006 with respect to ethnic discrimination under this same standard.[6] The ethnic discrimination act now has the same burden of proof as in the 1991 Equal Treatment Act. The plaintiff of Kosovo heritage, had applied at a local hospital for a job within their internal delivery/transport system as a driver. He had experience with professional driving. Eight persons were called to the interview, of which, one did not have a driver's license. Plaintiff was not called. Defendant admitted that plaintiff had suffered a detriment as required under the race discrimination act, but defendant

[6] AD 2006 no. 60 *The Swedish Municipal Workers' Union v. Skåne Region in Kristianstad.*

argued that the difference in treatment was not motivated by race, but other grounds. AD noted that the legislative preparatory works of that act stated that no change was meant by the amendment, and AD found that its previous case law was still applicable. Of the eight persons that had been called to an interview at the hospital, six had previously worked there. The other two persons called to an interview were familiar with the hospital tunnel transportation system either through their father or a friend. Defendant argued that the underground tunnel system of the hospital was so complicated that prior knowledge of it was seen as a merit for the position despite the fact that such qualification was not required in the job notice. AD found that no discrimination was proven and defendant's assessment of knowledge of the hospital was a ground other than on the basis of race.

This standard as established under the Swedish case law can be contrasted with the development in the case law of disparate treatment in the United States, in which discrimination can be proven by direct or indirect evidence. Plaintiffs are seldom so lucky to find direct evidence of disparate treatment, and when they are, the case most likely is settled and rarely goes to trial. Regarding indirect evidence, plaintiffs can bring a pretext case under the standard set out in *McDonnell Douglas.* After establishing a *prima facie* case of discrimination, a presumption that the employer has unlawfully discriminated arises. To establish a *prima facie* case of discrimination under Title VII, plaintiff must demonstrate that: (1) she was a member of a protected class; (2) she was subject to an adverse employment action; (3) she was qualified for the job; and (4) for the same or similar conduct, she was treated differently from similarly situated non-minority employees. After this, the employer must produce a legitimate, non-discriminatory reason for the adverse action. Plaintiff is then allowed to show that this "legitimate reason" was simply a pretext for discrimination. Plaintiff can also bring a third type of case, a mixed motive case, where the defendant can have a legitimate and discriminatory motive for the negative action. If the plaintiff can prove the existence of the "inexorable zero", that no persons of the protected category exist in that level of position, it is almost impossible for the employer to present evidence rebutting the presumption of discrimination. This same "zero" presence of a minority group in a workplace in the United Kingdom can also give rise to an inference of direct discrimination under the case law.

In the Haparanda police case, *JämO* had presented evidence that there were no women permanently working at positions at the same level within the police force, the presence of the "inexorable zero." In the ethnic discrimination case, even if the employer could prove that there were others of non-Swedish ethnic background at the workplace, the "four-fifths rule" would have been applicable, meaning that the employer would have had to proven that minorities were called at a rate of four-fifths the rate ethnic Swedes were called to the interview. The case law as decided by AD has not changed nor has had the ambitions to change

the norms in the labor market. Another interesting contrast here is the most recent pregnancy case as decided by AD, in which AD found the testimony of the defendants equally convincing as plaintiff so they prevailed. The brothers and co-owners argued that she had quit the job without any encouragement from them, despite the fact that she was pregnant and had a physician's certificate in hand stating she was entitled to sick leave from employment. In a case addressing the employer's claim that a pregnant worker was terminated because she was not acquiring the relevant experience and that her performance was unsatisfactory, the Employment Appeal Tribunal stated that "[o]ne could well understand anyone, let alone an employment tribunal well used to specious reasons as cover for discrimination, to conclude that the real reason was something different," finding for the plaintiff, demonstrating a distancing from employers not present in the case law of the Swedish Labour Court.

6.1.2.2 Equal Pay Claims

Each of the systems has case law finding for the plaintiffs with respect to equal pay for equal work claims. AD has found for the plaintiffs in three of the seven cases brought concerning equal pay for equal work, the most recent in 1996. Defining "work" has been problematic in all four systems. The UK system has developed four statutory categories in the Equal Pay Act 1970: like work, work rated by a job study as equivalent, work proven equivalent outside a job study, and situations arising regarding maternal leaves. The emphasis by the courts has been on whether any job evaluation comparing jobs is analytical, going beyond the actual job as historically perceived and examining and assessing the individual components therein contained. The Swedish 1991 Equal Treatment Act refers to like work and work of equal value and the Labour Court has found that two fairly disparate jobs, that of a midwife and that of a laboratory technician, could be compared, requiring *JämO* to present an analytical comparison of the two jobs. However, the Court went on to conduct its own "non-analytical" comparison of jobs in the private sector to the man's public sector job. Based on this "non-analytical" comparison, the Court found that market conditions determined the wages. Under the American equal work standard, nurse practitioners established a prima facie case of violation of Equal Pay Act and Title VII based on evidence that they were paid at a lower rate than predominantly male physician assistants.[7] The American courts have not required equal work, applying a broader category of substantially equal, but have not yet in general crossed the threshold on the federal level over to comparable work or comparable worth. Those efforts have occurred more on the state and local level. Each of these four systems has reached a fairly consistent point of consensus that equal pay must be

[7] *Beck-Wilson* at 365.

addressed more broadly than simply equal pay for equal work in order to reach structural discrimination. Progress in these latter areas has been slower, but certain successes can be identified, for example in Minnesota with efforts based on comparable worth and an estimated increase in wages in the female dominated public sector by 12 %, and in Sweden with *JämO's* efforts with the obligatory wage analysis, in one case resulting in a municipality allocating an additional SEK 36 million in order to reduce wage differences between women and men.

6.1.2.3 Indirect Discrimination

AD has found indirect discrimination in only one case as decided in 2004 concerning a height requirement by Volvo, a case which fell squarely within the four corners of the legislative preparatory works, citing a height requirement for police as an example of unlawful indirect discrimination. Such requirements had begun to be struck down by the American courts in the 1970's after the passage of the Title VII.[8]

As the United States Supreme Court expressed in *Griggs* and even earlier in *Brown,* formal equality is not sufficient under the law to reach the conduct that perpetuates discrimination:

> The objective of Congress…was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.[9]

When first faced with an issue of indirect discrimination in 1984 with respect to a requirement of length of service in a male dominated field, AD simply found that it was a legitimate requirement of the job without analyzing its effects on the labor market at all, whether it operated to "freeze" the status quo. This same type of analysis was used by AD with later claims of indirect discrimination made by men regarding the maternal wage supplements and the requirements as to exercising the rights under the collective agreement. AD acknowledged that the collective agreement provisions disproportionately affected men, but that the employer was acting in the best interests of the child, a curious interest in an employment context.

This recognition of effect can be seen in the UK *London Underground* case, which extended protection not only to women, but women who were single

[8] *See, e.g., U.S. v. City of Chicago,* 411 F.Supp. 218 (D.C.Ill. 1976)(police force's height requirement indirect discrimination) and *Mieth v. Dothard,* 418 F.Supp. 1169 (M.D.Al. 1976)(state trooper's height requirement indirect sex discrimination).

[9] *Griggs* at 430. The use of the word "freeze" is interesting in this context, as the original Swedish equal treatment legislation was opposed because any legislation prohibiting discrimination was perceived as potentially "freezing" the progress that had been made with respect to sex equality.

parents, a very small group of the employees affected by the new scheduling system adopted by the employer. The court found that the employer could not motivate the change due to its effects on single parents. Freedom from discrimination is a civil right in the United States, and the move in the European Union and the United Kingdom is to view it as a human right, as seen from *Alabaster.* The case law of the European Union, the United Kingdom and the United States have gone farther than the concrete, evident barriers, attempting to reach the structural behaviors underlying the discriminatory behavior.

6.1.2.4 Claims as to the Exercise of Parental Leave Rights

Claims as to the exercise of parental leave rights are newest to the European Union and the United States. Sweden has had a system of parental leave in place the longest of these four systems with arguably the longest period of case law concerning the issue. However, a divide can be seen in the case law of AD concerning the exercise of parental leave. In those cases raised under the parental leave act regarding interpretations of technical legal or contractual issues, the court has found for the plaintiff at a greater rate than when the argument made has been discrimination. In contrast, the House of Lords as early as 1988 stated that the inconveniences as caused by absences due to pregnancy or maternity leave are "the price that has to be paid as part of the social and legal recognition of the equal status of women in the work place."

6.1.2.5 Conclusions as to the Case Law Regarding Discrimination

The major differences that can be seen in the case law as decided within these four systems are more products of the courts' perceptions of their role within their respective legal systems and the systems themselves rather than of the principles they are to apply, a topic more appropriate for the discussion below as to institutions. In addition, the case law of AD has been characterized by a reticence that has made the comparison here difficult in the absence of principles as established or adopted in the cases. With respect to the largest portion of the case law in Sweden, direct discrimination, the Swedish standard of "better qualified," or as applied by the court, "clearly better qualified," hampers any fruitful comparison, as does the general sparsity of cases. The most marked contrast can be seen with respect to findings of indirect discrimination by the courts. One explanation for this can be the underlying premises for the different pieces of legislation in the different systems. The premise in the Swedish political and legal systems has been that economic equality will be achieved between women and men if women are economically independent from the family and men assume a larger share of unpaid work. As the problem of economic inequality has been viewed as such, discrimination as a separate and distinct phenomenon has not really been addressed, which perhaps explains to a degree AD's preference to

address technical narrow issues in the discrimination cases brought rather than the broader principles addressing issues of discrimination, and particularly structural discrimination, require. However, this same reasoning should then apply at least partially to the courts in the United Kingdom, as the origins of the discrimination acts were based on prospective Community membership, but this has not been the development there, but rather the opposite with the courts applying Community law and human rights interpretations to issues of discrimination.

6.1.3 The Collective Agreements

The collective agreements of the United Kingdom and the United States have not set out rights as to parental leave as extensively as certain of those in the Swedish system, particularly ALFA in the state section, AB 05 in the municipality/county council sector and the collective agreement in the private sector covering bank employees. The range of benefits with respect parental leave in the Swedish collective agreement varies considerably, from no supplement at all for the wage losses resulting from the income not eligible for the parental leave cash benefit, up to supplements entailing retaining 90 % of the employee's income regardless of income level during the entire parental leave. The unions in the United States have focused more on discrimination and equal wage/comparable worth claims, using a combination of bargaining, lobbying for legislation and litigating. The unions in the United Kingdom have not had a clear agenda with respect to "family friendly issues," perhaps partly a result of the rapid pace at which the legislation has been dealing with this issue there. One truth that can be seen in each of these systems is that when a labor union makes the commitment to address an issue, they have a high probability of success. One danger has been identified, however, in that collective agreements with terms favorable for combining work and family have tended to be reached in female dominated sectors, further reinforcing the occupational segregation that occurs in the Swedish labor market.

The analysis of the texts of these four systems, the laws, case law and collective agreements, contains no surprises. The United States has been focused on discrimination as a societal, structural phenomenon, a legacy of the problems of slavery. Addressing balancing work and family has had a secondary role, a fact most obvious with the total lack of federal legislation with respect to part-time work and the late entry as to family leave, and that only modestly and unpaid. Sweden focused solely initially on women's economic independence from the family through participation in the workforce, creating social benefits in the form of paid parental leave, daycare, schools and health care to facilitate this. This stance is clear from the legislation, case law and even arguably collective agreements, which have tended to have better "family" terms in female dominated sectors. The United Kingdom has been somewhat in the middle of these

two perspectives, facilitating women's participation in the work through legislation to achieve flexibility in combining work and family, creating the "family friendly workplace." Another emphasis in discrimination law in the United Kingdom has been on the developments in Community law, as well as treating such issues as human rights, not simply an employment right, an attitude evidenced early by the ECJ in the 1970's. Another recent trend that can be seen in the texts in both the United Kingdom and the EU is of greater access of fathers to parental leave. Now that the texts have been compared, the institutions generated them will be discussed.

6.2 The Institutions

The institutions that have been examined in this work are the legislatures, courts, enforcement agencies and social partners. The legislatures in all four systems, the EU Council and Parliament, Swedish Parliament, UK Parliament as well as the American Congress have all recognized the need to address and redress issues of discrimination on several levels, reaching a point of convergence now with surprisingly similar legislation, at least facially, in the area of discrimination. When it comes to social benefits for combining work and family, Sweden and the United Kingdom have been by far the most beneficent of these four systems. The three sets of actors discussed below seen as most influential after the legislatures are the courts, enforcement agencies and social partners.

6.2.1 The Courts

One of the most significant differences in these four systems is the role that the courts perceive themselves to have with respect to the law and to society, in part related to whether the political system is based on a separation of powers or of function. The EU institutions as well as the American institutions, on both the federal and state levels, are based on a separation of powers. The judiciary, executive branch and legislature have different lawmaking powers. The Swedish and UK systems are based on a separation of function in that parliament is the ultimate lawmaker. Even here though, a difference exists. The courts in the United Kingdom are much more active in driving the law forward in the area of discrimination than AD, going to the extent of "disapplying" the law to achieve justice in an individual case, much in line with the historical view that the "common law" is the defender of rights. A comparison to this UK case could be made to AD's decision in the second pregnancy case, in which it found the Swedish law also to not be applicable. However, the Swedish law had already been amended by the legislature to reflect the requirements in Community law, the amendment was simply not yet effective. It was a question of applying a law already repealed or applying Community law as it is bound to do. The UK court in *Alabaster* compared two valid statutes, and from an access to justice perspective, found

that plaintiff should be entitled to the better set of rights, "disapplying" a part of the act.

AD is also unique to these four systems with respect to both the composition of its members and the procedures before the court, composed of two types of members in a typical judging panel, three non-partisan members, two of which are trained in law, and four partisan members, two from the employer and employee sides each. The partisan members constitute the majority of the panel. The Employment Tribunals in the United Kingdom have a similar composition. A safeguard exists in the United Kingdom that is not present in Sweden, however, in that the Employment Tribunals are only the courts of first instance. A party can then appeal the decision to the Employment Appeal Tribunal, the Court of Appeal and ultimately the House of Lords, four instances at which to have the issue heard and decided. The Swedish Labour Court, when a plaintiff is represented by a labor union or *JämO,* is both the first and final instance. The composition of AD has raised debate in Sweden whether it fulfills the requirements of Article 6 of the ECHR as to an objective court. The European Court of Human Rights has held that in the case before it, the court fulfilled the requirements of objectivity as set out in the Convention, with two dissenting justices. A proposal has been made to change the composition so that the non-partisan members of the panel are the majority, and the partisan the minority.

The Swedish legal system is not based on an active judiciary creating law as there is a separation of function. The courts in civil cases are to interpret the legislator's intent when applying a statute, and this by referring to the legislative preparatory works, as discussed above. There is also a historical fact to keep in mind here in the employment context, that the Swedish Labour Court originally replaced a central arbitration panel created in the 1920. The composition of that panel was transferred to the court, as was also arguably the approach to resolving issues. An arbitration panel can decide the issues before it without needing to create precedent, as arbitration awards often are confidential. It is a different problem solving technique. On top of these two aspects, a legal system with separation of function, as well as a court that has the character of an arbitration panel, there is the palpable interest of the social partners in the development of the law in the labor market. That this interest is tangible can be seen in the early discrimination cases in which AD, citing the legislative preparatory works, stated that the intent of the legislator in passing the 1979 Equal Treatment Act was not to intercede and change the norms used in the selection and the assessment of merits existing on the labor market unless they discrimated.

There arguably has been room in the cases heard by AD to interpret the legislator's intent on a broader level, much in line as the United States Supreme Court when looking to Congress' will, or the House of Lords with respect to Community law, to "eradicate discrimination," interpreting the law consistent with this objective. AD has consistently chosen instead to interpret the legislative

preparatory works and the statutes on more narrowly defined issues. This interpretation of the law by AD has resulted in a downward spiral, few plaintiffs are successful in face of high economic risks and low chances of prevailing with low damage awards, so fewer bring suit, so fewer become successful, resulting in the trickle seen in the past almost twenty years of only four cases brought alleging direct sex discrimination on the basis of qualifications, as opposed to over thirty such cases brought in the 1980's.

6.2.2 The Enforcement Agencies

The enforcement agencies in all four systems are active both with voluntary compliance, litigation and information fronts. The Commission has driven certain lines of interpretation with respect to issues of sex equality, as can be seen from its finding that Sweden was not in compliance with the pregnancy directive due to it not having legislated a mandatory two week leave for mothers directly connected to the birth. The CEHR, EEOC and *JämO* are all involved in helping claimants understand their rights and settling claims outside of litigation. *JämO* must be seen as having the most significant constraints in its work. The first is in the language of the 1991 Equal Treatment Act, in that *JämO* is empowered to bring suits to further the development of the law, or if other special reason exists. The CEHR and the EEOC have no such restrictions in their mandates, with the new CEHR empowered to provide assistance in basically any form, including legal advice, legal representation and physical facilities for dispute resolution. The second restraint is the case law as decided by AD and the entailing economic risks for costs. *JämO* has forged a different path, using the threat of compliance upon penalty of fine to achieve changes with respect to the statutory requirements of wage analyses that the Swedish Parliament has supported with significant additional funding. In one case, *JämO* has succeeded in motivating a county council to dedicate an additional amount of SEK 36 million towards raising the wages of women within its low paid, female dominated sectors.

Another important aspect in comparison to *JämO,* is that the CEHR and the EEOC have more extensive rulemaking powers in the forms of issuing Codes of Practice and procedural regulations that help them shape the law. This can be seen in the relationship between the EEOC and the American Supreme Court, which has stated that the guidelines as issued by the EEOC in certain contexts are to be seen as an extension of the will of Congress and followed. The codes of practice as issued by the CEHR are also admissible in cases. Neither of these systems mandate that the codes be binding, but they are viewed as persuasive as to interpretations of the Equality Act 2006 and Title VII and the Equal Pay Act. If a court chooses to deviate from these, the court typically explains why in the judgment. The weight given these codes in the UK and US systems provides the courts and the parties the benefit of the experiences these agencies gain in working with issues of discrimination on a daily basis.

6.2.3 The Social Partners

The social partners in Sweden have the most extensive power in these four systems with respect to legislation, often with the explicit right to opt out of certain statutory provisions through collective agreements, all in accordance with the Swedish Model of labor law. Certain areas are entirely left to the social partners to regulate, such as wages. The first 1979 Equal Treatment Act was objected to vociferously by both employer and employee organizations. The employer organizations correctly perceived the legislation to be an infringement upon their prerogatives in the workplace, the labor unions viewed the legislation as a dilution of their power, leading to a consensus on both sides as to opting-out of the authority of *JämO* with respect to active measures in original 1979 Equal Treatment Act through Equality Agreements covering most of the private sector. Arguments were made that legislation in this area would "freeze" current injustices and inhibit any progress being made, but the reality at that point of time was that women did not have equal access to employment and the social partners had not to any extensive degree worked towards this. The fact that the social partners could agree to opt out of the 1979 Equal Treatment Act also demonstrates the weakness of the Swedish Model with respect to those outside the system, in general women and minorities.

Despite this heavy delegation of responsibility in the Swedish system to the social partners to regulate issues in the labor market, the counterbalances existing in the United Kingdom and American systems are absent in Sweden, those outer parameters that force the labor unions to take into consideration the interests of minorities within their membership ranks, such as the duty to "fair representation" that exists in the American system or the duty of labor unions in the United Kingdom to not commit or aid in unlawful discriminatory acts or failures to act. Under both the UK and US systems, labor organizations are included as parties under the primary discrimination law that can be liable for committing acts of discrimination in employment. This is also true in Sweden, but it is a separate law and no cases have been brought against unions under it. Nor is there any specific statutory mechanism by which a union member can have redress against a union for the failure to prosecute a claim, which given the rate of success of discrimination claims, the unions understandably are not always keen on doing.

The social partners in Sweden according to the Swedish labor model have retained the greatest freedom from restrictions by the state with the least amount of liability, both employers and employee organizations, with respect to discrimination issues of the four systems examined here. The lack of constriction as to employers becomes evident in the case law of the Swedish Labour Court, where even if discrimination is found, the larger penalty is not the award of damages but the attorney's fees. The labor unions also enjoy a larger degree of freedom in

that there is no recourse for an individual union member to act against their labor unions, either for a failure to negotiate the interests of the minorities in the union, or a failure to prosecute a grievance on behalf of an individual. The closest one finds in the Swedish Model to this type of accountability are the "good practices in the labor market" as determined by AD. In the one case that can be seen to address such an issue, the employer in consultation with the labor union had placed the Finnish speaking part of the crew high on the redundancy lists, resulting in their employment being terminated. The Court rejected the employer's argument that the crew needed to speak Swedish for safety reasons, and found the actions to be in conflict with "good practices in the labor market." AD did not, however, invalidate the terminations but awarded each of the thirteen plaintiffs exemplary damages of SEK 20000 and certain plaintiffs economic damages of lesser amounts.[10] The liability of the union with respect to agreeing to the redundancy list was not addressed as it was not raised. This is not to say that unions are not working for equality, several of the unions have put forth tremendous effort in this area, as seen above with the Swedish Association of Graduate Engineers. The point is though that there should be a minimum level of accountability guaranteed to every union member regardless of the union to which they belong.

An aspect with respect to the Swedish proposed act merging the discrimination statutes can be mentioned here. The first paragraph states that the objective of the law is "to prevent discrimination and in other ways promote equal rights and opportunities regardless of sex, sexual identity, ethnic background, religion or other faith, physical handicap, sexual orientation or age." The second paragraph under the heading, "The Law is Mandatory," states that "a contract that infringes upon any person's rights in accordance with this law is invalid in that aspect." Such paragraphs exist in certain of the current statutes such as MBL § 4 with exceptions, LAS § 2 with exceptions and Equal Treatment Act 1991 § 23 if it contains prohibited sex discrimination, but they are not the unequivocal statement clearly in the beginning of the statute as in the proposed act. This may be seen as a subtle indication that a change is occurring with respect to the Swedish Model.

6.3 The Decision-Making

Several different levels of decision-making occur in each of the systems described here, as decided by the actors discussed above, the legislatures, courts, enforcement agencies, social partners and individual plaintiffs. Some of the internal decision-making has already been discussed above regarding the individual institutions. In addition, the state functions not only on lawmaking and political levels, but is

[10] *See* AD 1983 no. 107, *Brita Lempiäinen in Åbo, Finland, et al. v. Johnson Line Inc. in Stockholm.*

itself an employer as well as a purchaser of goods and services in all four of these systems. The public sector is the largest employer of women in Sweden, in contrast to the United Kingdom and the United States. The EU has a duty to internally gender mainstream all decision-making processes, which duty has now been extended to the Member States through the Discrimination Directive. A similar progression can be seen in the United Kingdom with the new gender duty as proscribed under the Equality Act 2006. In a related vein, American federal law requires federal contractors to incorporate an anti-discrimination clause in all federal contracts as monitored by a central enforcement agency. Sweden has recently enacted a similar regulation with respect to government contracts, but with little guidance and no central enforcement agency, leaving it to the individual governmental agencies to monitor a contractor's compliance.

Other aspects can be seen to influence the decision-making with respect to the development of the discrimination law in Sweden and specifically the Swedish Model. The first can be seen as the dichotomy between liberal and communitarian models. The second is the desire by the Swedish legislator and the Swedish Labour Court for systemic coherence, both internationally and internally. Last, there is the decision-making of the individual plaintiff when faced with the choice of prosecuting a claim.

6.3.1 A Liberal v. Communitarian Approach

The laws that are passed in Sweden tend to be broad, more indicative of objectives than duties. A good example of this is the provision in the 1991 Equal Treatment Act stating that all employers are to eradicate any differences in the wages between women and men within three years. One explanation as to this different approach to legislation and the strength of the Swedish Model can perhaps be found in certain theories of law and society. One theory in particular is brought to mind when viewing the legal solutions that have been implemented in Sweden, the difference between liberal rights and communitarianism. The latter can be seen as having its origins in the writings of Marx, who argued that law was a vehicle of class oppression and that eventually, in a classless equal society, laws would no longer be needed.[11] This was redefined by Pashukanis, who noting that as the law protects the rights of individuals in a contractual relationship, the law in a communist society would eventually disappear to be replaced by administration.[12] These theories can be seen as the roots of the distinction between liberal individual rights and socialistic communitarianism.

[11] Wacks at 222 *citing* Karl Marx, THE CRITIQUE OF THE GOTHA PROGRAMME.

[12] *Id. citing* R. Warrington, *Pashukanis and the Commodity Form Theory* in D. Sugarman (ed.), LEGALITY, IDEOLOGY AND THE STATE

A summary of the major differences between liberal or "bourgeois rights" and communitarian or "socialist rights" has been given as follows:

Table 2: Bourgeois and Socialist Rights Compared[13]

Bourgeois Rights	**Socialist Rights**
– Rights are entitlements	– Rights are policy pronouncements
– Rights are ends	– Rights are the means to an end
– Rights are political	– Rights are organizational
– Rights are negative	– Rights are positive
– Rights depend on the activation of the rightholder	– Rights do not depend on the activation of the rightholder
– Rights protect individuals against the attacks of others	– Rights advance harmonious communal life
– Rights are conditional on the right-holders fulfilling their own obligations	– Rights are dependent on others fulfilling their correlative obligations
– Rights are related to a supporting set of sanctions	– Rights relate to mandatory rules but not supporting sanctions
– Rights are (or seek to be clearly) defined	– Rights are intentionally vague
– The exercise of rights and violation are private affairs	– Rights are public affairs
– Rights are not economic	– Rights are largely economic
– Rights are "legalistic" and individualistic	– Rights are not individualistic or legalistic

If the discrimination systems as created within the European Union, United Kingdom, United States and Sweden are assessed as against these characteristics, though not completely falling within all categories, the EU, UK and US systems tend towards the description of bourgeois rights, while the Swedish system fits rather squarely within this depiction of socialist rights, consistent with the perception many Swedes have of being a middle, third, way between the West and the East.[14]

This theory, however, can be seen as self-perpetuating with respect to liberal and communitarian rights. Prior to the writings of Marx, laws in the United Kingdom and the United States were seen as providing a defense against the subjective exercise of power by the King or government. The role and function of the law as defender, and also as to resolving societal conflict, is at times the only plausible solution given the different cultures, histories, traditions and physical

[13] *See* Wacks at 227 *citing* Tom Campbell, *The Left and the Rights: A Conceptual Analysis of the Idea of Socialist Rights and Markovits*, 45 U. CHIC. L. R. 612 (1978). *See also* N.E. Simmonds, *Rights Socialism and Liberalism*, 5 LEGAL STUDIES 1 (1985).

[14] *See, e.g.,* Kevät Nousiainen, *Transformative Nordic Welfarism: Liberal and Communitarian Trends in Family and Market Law* in Kevät Nousiainen, *et al.*, ed., RESPONSIBLE SELVES – WOMEN IN THE NORDIC LEGAL CULTURE (Ashgate 2001) at 25.

size of the United Kingdom at its heyday and the United States. The law has been seen as a guardian of the rights of the individual from the time of the Magna Carta in both these legal systems. Given this belief in the law, the law has worked and thus future efforts have been based on the law. Historically in the Swedish context, the law has not been a guardian of the rights of the individual, particularly workers, it has been the efforts of the labor unions and the Swedish labor law model. The law has not been seen as providing solutions in Sweden, so alternatives were necessary, as seen at the turn of the twentieth century with the protests against the passage of legislation concerning collective agreements and the creation of the labor court. The law in Sweden has not been perceived as a vehicle for change in the hands of the individual, such as with the private attorney general in the United States. Thus in Sweden, it has not been used as a vehicle for change. This can be seen even with respect to a current proposal in Sweden mandating a certain percentage of women on corporate boards of directors. According to the proposal, if a corporate board does not include at least 40 % women as mandated by law, the corporation is to be fined at the most a proposed SEK 150000.[15] For most corporations to which the law is to be applied, this amount is negligible. The law as proposed creates no true legal incentive for compliance, compliance is more a voluntary issue. This can also be seen from the objections to the original 1978 Equal Treatment Act. This perception can perhaps also explain why there has been no attention to access to justice issues within the Swedish legal system as the intention was never that the laws would be asserted by individuals, but rather remain in the hands of the social partners and governmental agencies to enforce. This distinction between liberal and communitarian rights, however, can be seen as moot under the new EU Discrimination Directive, which requires a system in which an individual can exercise her rights.

6.3.2 The Objective of Systemic Coherence

Another aspect of decision-making on the legislative level and within the legal system that can be taken up is the desire by the Swedish legislator for internal and external coherence and systemization. As seen historically, much of the restrictive legislation regarding women that was enacted in Sweden, the night work prohibition, working in mines and quarries prohibition, as well as the four week mandatory maternal leave, was not legislated because of any actual perceived need in Sweden. A driving objective in the decision-making as to women's issues has been the desire for international conformity. The same is true with all the discrimination law recently enacted in Sweden, including the recent amendments to the 1991 Equal Treatment Act. These amendments have been made mostly with the view of compatibility with EU law, with little attention paid to the internal effects the statutes have been given. One example of this need for

[15] *See* Ds 2006:11 *Könsfördelning i bolagsstyrelser.*

international consistency is the requirement for the two weeks mandatory maternal leave, the enactment of which took the right from women as to deciding. Sweden protested the Commission's notice, but still legislated the mandatory two weeks. Another example of this is the changes that have recently been made to the burden of proof in discrimination cases, in which the preparatory work has referred to the changes as simply facial, signifying no substantive changes, so that AD has not changed its practice in reliance on that statement.

The other tension pulling at the decision-making of the Swedish legislature is the preservation of the Swedish Model and its internal coherence, particularly in the area of discrimination, despite the fact that discrimination cases in the past few years constituted only 0.5 % of the Swedish Labour Court's workload. The Swedish Model was created to deal with the conflicts that arose at the turn of the century between capital and labor. Issues of parental leave and discrimination are problems not brought to the fore until the 1970's and basically wrestled into the existing framework as created by the social partners. As stated above, a short statute of limitations was created to facilitate the resolution of problems between the social partners. Discrimination issues concern almost by definition outsiders, the short time period placing a greater burden on those who are not already within the system. In this aspect, Swedish women have been more privileged than minorities, on the whole having better access to the language and the power structure of the social partners. For a plaintiff that is not Swedish speaking and not a member of a labor union, the retention of coherence in the system becomes more difficult to understand, for it in essence protects employers. It is difficult to see how the original need of quick resolutions by the social partners is met in such a scenario, while the bringing of a claim can be barred. One also sees this desire as to retaining internal cohesion in the proposed merged discrimination act and the provisions as to the statutes of limitations. With respect to employment discrimination claims, the proposed act has retained the convoluted text of the statute of limitations in the 1991 Equal Treatment Act. For actions other than employment, the proposed statutory text simply states that a suit is to be brought within two years from the date the act or obligation arose. One also sees a parallel as to retaining this internal cohesion in the award of damages in discrimination cases, which are to reflect those as awarded in employment cases in general, and rights concerning union affiliation in particular. Between concerns of retaining external and internal cohesiveness, the actual mechanisms required to successfully prosecute discrimination claims within the Swedish context have been neglected.

6.3.3 The Decisions Faced by the Individual Plaintiff

Last, the above systems, texts, actors and institutions create the environment in which the individual plaintiff has to make the decision of whether to prosecute a discrimination claim. If a member of a labor union, the plaintiff can request their assistance in reaching a resolution of the claim if she qualifies for assistance.

Labor unions prosecute claims on behalf of members in all three of the national systems discussed here. Also in all three of the national systems, enforcement agencies have been created to which a plaintiff can turn for assistance in prosecuting a claim. In the United Kingdom and United States, the agencies are free to make the decision as to bringing litigation. *JämO* is to make the decision in light of the need to develop the law or other specific reasons. The enforcement agencies are all constrained by the fact that they need to bring cases that can be successfully litigated. If either the union or *JämO* decide to prosecute the claim, the individual plaintiff takes no economic risks. If the labor union and the enforcement agency decide to not pursue the individual plaintiff's claim, then she must decide whether to pursue it herself. The access to justice issues then become very real, particularly with respect to the award for damages and attorney's fees and costs. The United Kingdom has facilitated plaintiff's bringing discrimination suits by adopting the American rule, and the United States has further facilitated plaintiff's bringing discrimination suits by allowing the award of attorney's fees to a prevailing plaintiff. The assessment for an individual plaintiff in Sweden is a small chance of success, small awards of exemplary damages, and a great risk for significant attorney's fees.

6.4 Access to Justice Issues

Access to justice issues act as a bridge between the statutes, case law and assertion of rights by individuals. The focus here has been on three aspects, the remedies available under the statutes, the award of attorney's fees and the statute of limitations. The importance of the procedural and substantive law integrating to form a tenable legal system in which parties not only have rights, but also can exercise them, was noted over a century ago by the American jurist Roscoe Pound and most recently in the EC Discrimination Directive. This need has been recognized consistently in both the United Kingdom and American systems, the latter most recently with the enactment of the 1991 Civil Right Acts. This aspect of the sex discrimination law is the one that demonstrates the widest divergence in the four systems examined in this work.

6.4.1 The Remedies Available in Discrimination Cases

Societal and attitudinal variations aside, marked differences remain in the resolutions achieved by the courts in sex discrimination cases in the three national systems compared here. When a plaintiff prevails in Sweden, exemplary damages have been awarded by AD on a range from SEK 10000 up to SEK 80000 under the Equal Treatment Acts, with the averages for the 1980's in the amount of SEK 19000, in the 1990's, SEK 27500 and to date in the 2000's, SEK 55000. In awarding these amounts, AD has neither addressed the harm to the plaintiff, nor the reason for the sums, other than they should be in line with those already

awarded. The idea has been that the norm established in the discrimination case law generally reflects that damages for discrimination on the basis of union membership. This is the amount to be awarded. The injury is not viewed as "individual" but rather as falling within a definable "norm" of injury. This is a questionable stance under the requirement as to damages in the EC Discrimination Directive, now explicitly prohibiting ceilings with respect to damages.

This view of damages and their function in the Swedish system is also evidenced by the "group rebate" that existed under both acts until 2000. The damages in cases involving several plaintiffs were to be assessed on the basis of those injuries of one individual to be shared by the group, defining the injuries as fungible. Economic compensatory damages have only been awarded in two cases under the Equal Treatment Acts in Sweden. Equitable relief as a rule is not awarded, but is available with respect to certain claims if the plaintiff petitions for it, for example, in the form of declaring an employment termination or contractual clause invalid. This reflects an understanding of the function of damages that differs radically from that incorporated in the UK and US systems.

Determining comparable annual statistics for the United Kingdom and the United States with the award of monetary damages is beyond the scope of this work and not necessary for the purposes of illustration here. Looking at three of the high profile cases on the UK EOC website, damages were awarded for past loss of income, future loss of income, injury to feelings, for career counseling, for loss of pension and for investment advice, as well as pre-judgment interest commencing on a date mid-point between the date of the violation and the date of the judgment. The total highest award listed for damages was £ 234 262 for sex discrimination, almost twenty-five times the highest amount awarded in the Swedish system under the Equal Treatment Act.

The contrast becomes even greater when the Swedish system is compared to the American systems. The first major difference is that persistent willful violations of the Equal Pay Act or Title VII can result in criminal prosecution, first in fines and with a second criminal offense, imprisonment. On the civil side, the highest award granted the EEOC in a single case was $ 81.5 million. More significant, however, is the spectrum of remedies available in the United States, both monetary and equitable. As to monetary damages, compensatory damages can be awarded, and if certain conduct of the defendant is found willful, liquidated damage can also be awarded. If one takes the consent order the EEOC entered into recently with a major American retail marketer, $ 40 million was paid in back pay and compensatory damages. With respect to equitable remedies, the defendant was ordered to change its marketing materials to reflect the diversity of the major racial/ethnic minority populations of the United States, to create an Office of Diversity headed by a Vice President who is to report directly to its Chief Executive Officer, to hire twenty-five full-time diversity recruiters, to develop in consultation with an industrial organizational psychologist a recruit-

ment and hiring protocol requiring that it affirmatively seek applications from qualified African Americans, Asian Americans, and Latinos of both genders, to advertise for in-store employment opportunities in periodicals or other media that target African Americans, Asian Americans, and/or Latinos of both genders, to attend minority job fairs and recruiting events and to use a diversity consultant to aid in identifying sources of qualified minority candidates. Percentage benchmarks were established for the selection of African Americans, Asian Americans, Latinos, and women into sales associate (brand representatives), manager-in-training, assistant manager, and store manager/general manager positions. The court appointed a monitor to prepare annual reports on defendant's compliance with the terms and objectives of the consent decree. The objective of each of these requirements under the consent order is to address the structural discrimination as reinforced by the defendant's discriminatory practices.

Both the cases cited here for the United Kingdom and the United States are on the high end of awards granted in discrimination cases, but they are compared to the high end in the Swedish case law. These cases also show that the concepts of the harm as suffered by a plaintiff are more developed as well as based on the individual parties in both the United Kingdom and the United States, taking into consideration as well the effects of awards as to deterring future conduct of defendants.

The function of the role of damages, as well as the spectrum of remedies available to plaintiffs, needs to be addressed on a new level within the Swedish system within the area of discrimination law. The existing amounts as well as available remedies, in combination with the allocation of attorney's fees and statute of limitations, discourage plaintiffs from bringing discrimination claims in general. Under the mandate of the EC Discrimination Directive, it is questionable whether the Swedish system with respect to the issue of damages can be seen to conform to the requirements of "real and effective compensation or reparation" which is to be "dissuasive and proportionate to the damage suffered."

6.4.2 The Allocation of Attorney's Fees

The award of attorney's fees is seen as prohibitive to plaintiffs prosecuting claims of discrimination in both the United Kingdom and the United States. The United Kingdom in this area deviates from the English rule, adopting the American rule with each party bearing their own costs. If a party acts in bad faith or brings a frivolous or "misconceived" claim, the other party may petition for an award of attorney's fees. The American systems, however, have deviated from the American rule with respect to claims brought concerning civil rights under the Civil Rights Attorney's Fees Awards Act of 1976, with plaintiffs in general never liable for the opposing party's attorney's fees for discrimination claims brought in good faith. If a plaintiff is successful, she can recover fees from defendant. If the

claim is brought under the FMLA and plaintiff is successful, the court must award plaintiff's attorney's fees according to the text of the statute.

The award of attorney's fees in a typical situation would be a hardship for any plaintiff to bear when bringing a discrimination claim. Given the low amounts of damages awarded by the Swedish Labour Court for successful sex discrimination claims, in the Swedish context the award of attorney's fees can be seen as fatal. The awards of attorney's fees in Swedish sex discrimination cases currently outpace the award of damages by over three to one. That the award of attorney's fees has a semi-punitive function of which AD is aware can also be seen by a recent case in which an individual plaintiff bringing an unlawful termination claim was ordered by the Swedish Labour Court to pay both the defendants' trial costs and fees as well as the costs and fees of the appeal brought to AD, a combined total of SEK 260763. He was ordered to pay this amount despite the fact plaintiff was successful on one of the issues raised to AD, and was successful on all the issues raised to the trial court and awarded SEK 100000 in damages for the unlawful employment termination based on his sexually harassing a fellow employee. The highest amount of attorney's fees awarded in a sex discrimination case in Sweden was against *JämO* in the amount of SEK 829251. This can be seen as deterring even for an organization such as *JämO,* whose budget for 2006 was SEK 27.9 million. This judgment then was almost 3 % of *JämO's* annual budget for 2006, not taking into account the resources *JämO* used to litigate this one case. This same assessment also has to be made by the labor unions when deciding whether to prosecute a claim on behalf of a union member.

Another aspect to the award of attorney's fees in the Swedish context is how discrimination claims are to be prosecuted by individuals. Most of the sex discrimination claims are heard by AD as the court of first and final instance when brought by *JämO* or the labor unions. However, if an individual brings a claim, she brings it to the trial court. She can prevail at the trial court level and defendant can then appeal to the Swedish Labour Court, exactly as the case mentioned above. If defendant prevails before the Swedish Labour Court, defendant is awarded not only the trial costs and fees for the case as heard on the appellate level before AD, but also for the case heard on the trial court level that plaintiff won. This risk of being ordered to pay attorneys' fees then becomes double so large for an individual plaintiff than for *JämO* or the labor unions. Fewer individuals, particularly in discrimination cases in which they are bringing claims of failure to hire, have the same financial resources to prosecute claims of employment discrimination as defendants have to defend the same.

6.4.3 The Statute of Limitations

The statute of limitations bars the bringing of claims after the expiration of the period of time prescribed. The shortest statute of limitations of any of the systems examined here is under the UK Sex Discrimination Act 1975, in which the

qualifying date is three months after the woman discovered or with reasonable diligence could have discovered the fact in question. The courts in contrast are empowered to extend the limit, as seen in *Mill's* in which the court granted an extension of three years. The qualifying date under the Equal Pay Act 1970 is six months with the courts again empowered to grant an extension where it is "just and equitable to do so."

Under both the American federal FMLA and Equal Pay Act, the statute of limitations is two years, unless the defendant's conduct has been willful, in which case it is extended to three years. The courts are also empowered to toll the statute of limitations in certain cases. Under Title VII, if the claim is governed solely by Title VII, the statute of limitations for filing a charge with the EEOC is 180 days. If a concurrent state statute exists, the period is 300 days, the period applicable to the majority of cases as most states have such legislation. If the EEOC decides to not prosecute the claim, it is required to send the claimant a right to sue letter, after which plaintiff receives an additional ninety days to bring a suit.

Under the current Swedish system, the bottom line is a six months statute of limitations under the 1991 Equal Treatment Act and the 1995 Parental Leave Act, with certain references and triggering events in other legislation such as MBL and LAS. There is no statutory tolling of the period, neither is the court empowered to extend the period. As seen in the case discussed in Chapter Three above, the plaintiff is somewhat at the mercy of third parties, either the ombudsman or the labor union, as to taking certain actions and filing in time. The proposed merged discrimination act re-adopts this tortuous path with respect to employment discrimination claims. For all other claims, the proposed language of the statute is straightforward and simple. A new feature can be found in the proposed merged discrimination act in that the ombudsman can toll the statute of limitations by giving notice to an employer of an intent to bring a claim. This starts a new statute of limitations period but can only occur once. This is a step in a positive direction within the development of the Swedish law in this area. However, the statute of limitations should be triggered by events within the plaintiff's power to control, not based on the actions of outside third parties such as labor unions or even the ombudsmen.

6.4.4 Conclusions as to Access to Justice Issues

Of the four systems analyzed in this work, the Swedish system is the only one that has not devoted any significant attention to issues of access to justice. Just the opposite, the Swedish legislator and the Swedish Labour Court have emphasized time and again that issues regarding discrimination are to be treated as any employment or labor law issue in general, with short periods of statute of limitations, the invocation of the English rule concerning the award of attorney's fees as well as damages in the area of sex and race discrimination that reflect those awarded in claims of union affiliation discrimination. The Court has recently

awarded higher exemplary damages in a case concerning handicap discrimination and in another concerning religious discrimination, but these are still nowhere in the proximity of what can be seen as "real and effective compensation or reparation" which is "dissuasive and proportionate to the damage suffered." Neither does the most recent proposal as to the merged discrimination legislation address these issues to any great extent, the exception that the proposed Discrimination Ombudsman can toll the statute of limitations concerning a discrimination claim if notice is served upon an employer. With respect to the issues of the allocation of attorney's fees, it is simply mentioned that the Court already has the power to reallocate the fees if it finds it appropriate to do so. The Court has done this three times in favor of the plaintiff in the over one hundred cases discussed in this work.

The comparison with the other three systems demonstrates the importance ascribed these issues in claims of discrimination, claims in which the plaintiff already from the beginning is at a disadvantage with respect to the employer defendant in terms of financial resources and accessible information. If the proposed Swedish merged discrimination legislation is to receive any effect as to discrimination claims in employment, these issues need to be addressed more extensively by the legislator as to their effects in the legal systems.

6.5 The Discourses

One of the major discourses in all four systems is the transition of the prohibition against discrimination from being seen as an employment protection to freedom from discrimination being viewed as a human right, or as otherwise coined in Community law, a fundamental right, or civil right as within the United States. The discourse originally dominant in Community law was economic based, equal pay for equal work to prevent wage dumping and unfair competition. In line with the development of Community law towards a fundamental rights approach with discrimination, a parallel development has occurred towards an increased role of men within the family, with the Discrimination Directive calling for Member States to provide a non-transferable period of parental leave specifically for men. A transition in the discourse in the United Kingdom is also discernible, with the court in *Alabaster* disapplying the portions of the Equal Pay Act it found inconsistent with the requirements of the European Convention on Human Rights. The Equality Act 2006 refers to the Equal Pay Act and the Sex Discrimination Act as Human Rights Enactments. The latest proposed merged discrimination act in Sweden also begins with the positing of the rights contained as human rights. The idea of freedom from discrimination being a fundamental civil right has existed throughout the development of the discrimination law in the United States, one of the legacies of slavery.

Another discourse discernable is the view of women as to balancing work and family. Community law originally had a very biological view of women as the main care provider in a one-income male breadwinner family. This has started to give way as seen from the recent decision by the Court that parental leave is an individual right. In the United Kingdom, the focus has been on creating a flexibility of work for women in order to allow them to combine work and family. This is also starting to give way to a greater participation of men with respect to parental leave. The focus of the discourse in the United States historically has been solely aimed at eliminating discrimination, with an individual right to unpaid parental leave of 12 weeks finally offered in 1993. On the European scale, little has been done in the United States on the federal level to facilitate balancing of work and family.

The discourse originally in Sweden was a greater economic participation of women in the workforce, at first facilitated by state-paid day care and health care. This led to Sweden being the first of these systems to legislate rights as to parental leave. Spousal maintenance and family taxation were abolished in the effort to remove the third prong of the perceived maintenance system. Women in Sweden are to negotiate an equal division of paid and unpaid work with their spouses. The political emphasis has been on complete equality between men and women, women assuming a larger share of paid work, men assuming a larger share of unpaid work. The drive has been on encouraging men to assume more of the latter. When this occurs, women will have overcome the last remaining vestiges of inequality and achieve true economic equality and sex discrimination will no longer exist. The reality, as shown by the experiences of the labor union CF, has been different, with men now facing a greater amount of discrimination than before when taking a larger amount of leave. There is in general no incentive in Sweden for men to assume a greater share of the unpaid work, as it simply results in the sacrifice of wages and pensions.

From the perspective of the law, the discourse on discrimination has been dominated in Sweden as stated above by the Swedish Model, that the social partners are to regulate labor market issues and that the state is to maintain a neutrality, leading to Sweden being the last of these four systems to adopt anti-discrimination legislation. Legislation in this area historically was regarded as unnecessary, if the labor unions fought for the equality of all classes, women would reap the benefits vicariously. The discrimination legislation led to an environment characterized by a strong feeling of antipathy, not directed solely at the legislation itself, but at the political interference within a model considered by the main actors to function best. This has also led to an attitude in Sweden towards legislation that is unique to the four systems examined in this work, that employment legislation is not really legislation as in the other systems, not mandatory in general and or effective or necessary.

As to the labor unions, the early decision in Sweden to work for the rights of all workers, not specific groups, in essence subsumed issues specific to women within this larger context. Class was the central issue. Issues concerning women, equal pay and equality in general, were not taken up by the labor unions until the threat of legislation existed, legislation that in any form was perceived as an encroachment of the power of the unions. Labor unions are not liable for discrimination in Sweden under the 1991 Equal Treatment Act as they are in the United Kingdom and the United States under both the Equal Pay Acts and the Sex Discrimination Act and Title VII respectively. In addition, there is no duty for fair representation by the labor unions in Sweden, leaving rather significant space for maneuverability in the Swedish system as to unions deciding whether to address certain issues. The unions have been active in litigating issues with regard to sex equality and parental leave, but as noted by the mediation institution, the 1991 Equal Treatment Act cannot receive full effect until more is done on the local level.

This system approach to comparative law has shown that simply the texts in the form of legislation, here discrimination legislation, are not sufficient in themselves to make a comparison between legal systems. The texts, actors, decision-making and discourses as presented here given a more complete picture of the attempt by these systems to achieve economic equality between men and women. The Swedish system has been primarily focused on the economic independence of women from the family through facilitating women participating in the workplace and men assuming a larger share of unpaid work in the home. The United States has been more focused on addressing discrimination, in all forms, as a societal problem, with the United Kingdom taking a third path, of creating a flexible workplace for women to be able to combine work and family and treating issues of discrimination as violations of human rights. The analysis of the Swedish system as against the requirements in Community law and the systems in the United Kingdom and the United States has demonstrated that there is a need to address discrimination in ways other than simply achieving the economic independence of women, that discrimination in itself is a societal phenomenon that needs to be addressed.

6.6 The Swedish Legal System from a Feminist Perspective

Of the four systems compared in this work, the Swedish system is the one that has most focused on the economic independence of women from family, believing this to be the path to economic equality between the sexes. If Baeur's feminist approach is invoked, the first task here is to look at the law, the rights it secures for men but not for women and identify the corresponding asymmetry of responsibility. The first issues that come to mind are that by removing spousal alimony, family taxation and making pensions individual property in Sweden,

men have been allowed to retain a greater part of their incomes, while still being provided the non-monetary services women perform in the home primarily with the care of children. It can also be noted that these benefits to women were repealed before any of the legislation was passed as to greater protection and access to the employment. Despite this economic asymmetry, women in Sweden continue to assume a greater share of the parental leave, work part-time and in jobs that allow them to combine family and work usually at the cost of lower wages and lower pensions.

This approach to the economic independence of women appears in actuality to have increased the economic independence of men. Women in Sweden have the major share of the responsibility in the home as well as are expected to work. The premise is that the spouses are to negotiate equally between them, and if a woman fails to do this, it is her responsibility. Men are encouraged to assume a greater share of the unpaid work. The shortcoming with this approach is that of the three national systems examined, men in Sweden have the least incentive to assume a greater share of responsibility in the home. There is no "cost" to them in the form of any future reallocation of their income through divorce settlements or alimony due to a spouse working part-time, taking care of the children and the home. In fact, just the opposite is true, men in Sweden gain more economically from working than from staying home, receiving higher pensions and better wage development. This is true in a situation in which either of the spouses assumes a larger share of the unpaid work, regardless of the sex of the spouse, but as women assume the greater share of responsibility in the home in all these systems, this hits them in general harder. This is even more detrimental for women in Sweden who are cohabiting with their partner, because the property redistribution upon separation is even less extensive than with marriage and many are not aware of this, believing that they have the same rights as married spouses. The third prong of the maintenance triangle has been removed for women, but in reality, it is still in place for men. By extension, this is as true for heterosexual couples as for homosexual couples in which a completely equal distribution of paid and unpaid work has not been achieved.

The Swedish legislator exhibited little concern when legislating economic equality between spouses, even noting that many women were poorer after divorce as a rule with the limited system of alimony that then existed. However, with respect to legislating the employment (or lack thereof) relationship, the Swedish legislator has been reluctant to intrude upon this "holy" relationship. As seen historically, the Swedish model based on agreement between the social partners did not address women's issues. Arguably the first time the social partners dealt with an issue that was not a restriction of women's work was with threatened legislation based on ILO Convention No. 100 concerning equal remuneration during the late 1950's. The legislation was not adopted, and the social partners in the 1960's agreed to dismantle the structural wage discrimination that

had begun almost in the beginning of the twentieth century and was codified in the collective agreements. This agreement between the social partners was not legally enforceable as a law would have been, and in many collective agreements, the different tariffs for men and women were simply replaced with the categories of skilled and unskilled work respectively. The same issue arose in the 1970's with the threatened discrimination legislation and the Equality Agreements covering most of the private sector that also created no rights for women as to equality. Wage-setting and wages, one of the major areas of inequality between the sexes, is still regulated exclusively by the social partners through the Swedish model.

The protections against discrimination as given in the law have proven themselves almost impossible to assert by an individual within the mechanisms of the Swedish legal system. Either a labor union or *JämO* must be willing to take the economic risks of bringing a case, as the associated financial risks are not within the reach of the average unemployed woman. Under the awards ordered in successful cases, there really is no economic motivation for an employer to do other than as they desire with respect to the work force.

An asymmetry of rights has been created within this Swedish system, with the removal of rights as to alimony and the allocation of pensions to the benefit of men who now retain a greater share of their income, as well as the granting of rights of protection against sex discrimination also to the benefit of men given the success rates of plaintiffs before AD. Women have become economically more independent from the family, but not on the same conditions as exist for men in terms of economic means and power.

Chapter Seven: Conclusions and the Future Course of the Law

Looking back on the accolades given Sweden as best in the world with respect to narrowing the gender gap, simultaneously with a marked absence of women in positions of power, large numbers of women working in the public sector and/or part-time, the high numbers of women on sick leave or early retirement, these contrasts are no longer inexplicable, but rather, after the examination of the systems in this work, appear inevitable. The focus in the Swedish political and legal systems has been on the economic independence of women through work and an increased sharing of unpaid work between spouses. The early decision was made in Sweden to not "split" the worker movement, to focus on the situation of workers as a whole rather than on subgroups, such as women. The welfare state created in Sweden provides a high degree of social justice, with a high minimum living standard, free education, free child care, free health care and available housing. This is an achievement that cannot be denied or negated, and has led to much of the praise with respect to the achievements regarding women. However, instead of bridging the gulf with respect to vertical and horizontal occupational, in certain ways this approach has instead widened it.

The focus of this presentation has been on the issue of how the legal systems within the European Union, Sweden, the United Kingdom and the United States have worked towards economic equality between the sexes. The starting point and focus of this work is the Swedish system. As the EU is now the basis for much of the employment legislation regarding discrimination in its Member States, and Sweden and the United Kingdom are Member States that have to work within the framework provided by Community law, the Community law on these issues is included in this work. The United Kingdom was chosen as it presents alternatives as to working within this framework that can be contrasted to the Swedish system. The United States was chosen to give a contrast outside the Community law context, and also because of its historical influence in the issue of discrimination.

The model chosen for the comparison has been the system approach to comparative law, in which the texts, institutions, decision-making as well as discourses have been examined for each system to give a more comprehensive basis for a comparison. An additional category has been added, access to justice issues. The texts examined have focused on sex discrimination and equal wages, as well as parental leave rights. In Community law, prohibitions against sex discrimination have stemmed from Article 119 mandating equal pay for equal work, and now include several directives, most of the former directives as well as principles created in the case law now espoused in the Discrimination Directive. In Sweden, the main statutory texts have been the Equal Treatment Acts as well as the Parental Leave Acts. In the United Kingdom, the primary texts have been the Equality Act 2006, Work and Families Act 2006 and the Employment Rights Act 1996. In the United States, the main statutory texts examined here have been the federal Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, Executive Order 11246 as well as the Family and Medical Leave Act of 1993.

After the examination of the statutory texts, the case law of the four systems was presented as relating to the above acts. Given the Swedish Model with respect to labor law, collective agreements in Sweden were also examined, mainly regarding issues of sex equality and parental leave. The institutions or actors in these systems comprise the legislatures, the courts, the enforcement agencies and the social partners. The actors and the texts were then placed in their decision-making context. Access to justices issues were discussed next, specifically the remedies available under the statutes, the allocation of attorney's fees and the statute of limitations, issues seen as the bridge from the statutory text, law in books, to the law in action, the exercise of the rights as created under the law. The discourses discernible from these three moments were then identified and compared at the end of each of the chapters two through five.

None of the four systems examined here has achieved perfect solutions as to the issue of economic equality between men and women. The Swedish system has focused on a broader level of social justice and facilitating the entry of women in employment. The American systems have focused on discrimination and only recently have addressed the issue of balancing family and work. The United Kingdom has focused on a "family friendly workplace" creating a flexibility in work to accommodate families. One interesting contrast is the efforts in the United Kingdom towards protecting and facilitating part-time work, while the current efforts in Sweden have been on eradicating part-time work. A recent movement within the United Kingdom and the European Union has been towards granting greater rights to fathers with respect to parental leave. Another movement is towards treating issues of discrimination as violations of fundamental or human rights, similar to the status of civil rights in the United States.

Sweden, however, is the subject of this analysis, with the United Kingdom and the United States to serve as foils with respect to the solutions achieved there. Several contrasts have been identified through the system approach. The first is regarding access to justice issues. The importance of the procedural and substantive law integrating to form a tenable legal system in which parties not only have rights, but also can exercise them, is vital, as noted within the EU, UK and US systems. This has not been seen as a compelling issue to the same degree in the Swedish system, which has led to a stagnant development in the exemplary damages awarded and an almost exponential development in the attorney's fees the losing party pays in the majority of cases. The desire for internal coherence has led to a norm of damages in sex discrimination cases, basically irrespective of the harm to the individual, consistent with those damages awarded for discrimination on the basis of union membership.

This stance has also led to a rather superficial attitude towards damages in general in Sweden. Damages are really not seen as compensating the plaintiff, particularly in line with the rule that compensatory damages are not available where it is an issue of a failure to hire. The damages awarded can also not be seen as having any effect on defendants. In the one case of indirect discrimination found, damages of SEK 40 000 can only be seen as negligible to a defendant worth several billion dollars. The statutory text addressing damages in all the discrimination statutes allows for the court to reduce them to zero if the court finds this just. Equitable relief as a rule is not awarded by AD, but is available for certain claims if the plaintiff petitions for it, in the form for example of declaring an employment termination or contractual clause invalid. Taken against the chances for a plaintiff to prevail in a claim of discrimination before AD, it is a sound business risk to continue in the unlawful behavior. This is in direct contrast with award of remedies by the courts in both the United Kingdom and the United States. From the UK cases presented, damages were awarded for past loss of income, future loss of income, injury to feelings, for career counseling, for loss of pension and for investment advice, as well as pre-judgment interest commencing on a date mid-point between the date of the violation and the date of the judgment. From the US cases presented, damages could be awarded for back pay, front pay, pre-judgment interest, losses, liquidated damages as well as equitable relief. The spectrum of equitable relief available in the United States is the broadest of the four systems, including ordering defendants to change its internal corporate structure and recruiting policies to target minorities for employment, a view very different from the Swedish one of the function of remedies in the context of discrimination.

Another aspect of access to justice issues is the award of attorney's fees, recognized as prohibitive to plaintiffs prosecuting claims of discrimination in both the United Kingdom and the United States, both of which have amended the main general rule to accommodate and facilitate the bringing of discrimination claims.

The Swedish legal system has made virtually no such accommodation, again in the endeavor to create a coherent labor law system in which all issues are treated equally. However, that the award of attorney's fees has a semi-punitive function in the Swedish system can be seen by the recent case in which an individual plaintiff was ordered to pay costs of both the trial and appellate levels of a combined total of SEK 260763. The other aspect is the statute of limitations, which has been rigidly applied in the Swedish system with AD not empowered to grant any extensions for any reason. This again is in contrast to both the UK and US systems, where certain actions by statute toll the statute of limitations, and the courts are empowered to extend the period "where justice so requires."

Another main difference that arises with respect to the systems is the role of the social partners and the Swedish Model. In the Swedish context, the social partners have the broadest power, given the right to opt out of certain legislation in the form of collective agreements. They also are given the right to help shape the law by the fact that they choose members of AD, in a typically judging panel currently composing the majority. The social partners in Sweden can also be seen as having the least amount of liability under the statutes and case law. The labor unions are not subject to the 1991 Equal Treatment Act in contrast to the Equal Pay Act 1970, Sex Discrimination Act 1975, Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. There is no duty by law for the labor unions in Sweden to represent the interests of their minorities, with only one case discussing good practice on the labor market and holding the employer liable for the rostering of redundancies to the detriment of the Finnish-speaking minority. Even the collective agreements as examined in this work reflect the interests of the labor union's majority. In those sectors in which women are a majority of the workforce, particularly the public sector, the parental leave benefits were most favorable, making it easiest to combine work and family. In the private sector, the collective agreements varied considerably, from the Banking Agreement containing a structured overall perspective with respect to issues of combining work and family, as negotiated in a sector in which women are a large part of the work force, to agreements stating nothing at all, mostly in male-dominated areas. This allocation of benefits across the sectors can be seen as contributing towards horizontal occupational segregation, with women choosing to go into and staying within sectors that best facilitate their combining family and work. The labor unions, whether consciously or unconsciously, are an enormously powerful influence as to the structure of labor in Sweden.

In line with this, the Swedish enforcement agency is the least powerful of the enforcement agencies in the three national systems, with *JämO's* jurisdiction originally limited by the social partners through collective agreements. *JämO* does not have the same rule-making authority as do the EOC and particularly the EEOC, and even has a vulnerability in that its mandate has been decided by

governmental regulation and not statute, rendering *JämO* vulnerable to changes in government, a vulnerability which the proposed merged act is to remedy.

The last aspect of the Swedish Model is the role of the Swedish Labour Court in discrimination issues. AD cannot be seen as having interpreted the statutory texts in line with the objectives the Swedish parliament has set out, focusing instead on ways to narrow the scope of the legislation. This tendency can be seen in the sex discrimination cases, but is even more apparent in the race discrimination cases. Even when the Swedish Parliament has amended the text of the statute to facilitate claims, AD has either simply raised the standard it applies or continued as before, as the legislative preparatory works have stated that no change is meant by the amendments. A question that has been debated is whether AD is the appropriate forum for discrimination cases. Given the effective dampening of litigation in the area of discrimination in general, it is difficult to see how one can go forward. Individuals have always been allowed to bring discrimination claims to the district court, but the risk of attorney's fees on both the district court and appellate court levels hangs over their heads much as the sword of Damocles. That risk will not change, and actually simply increase, if all discrimination claims are brought to the district courts and then are appealable to AD. The labor unions then would have a greater disincentive for bringing claims with a risk of doubling attorney's fees. The proposed merged discrimination act has attempted to take certain of these issues into consideration, for example, requiring that the third non-partisan member of the judging panel be a person not only an expert in the labor market, but also an expert with respect to discrimination issues. This still is only one voice of five according to the proposal.

Based on the above work, several issues can be raised in an analysis of the future direction of the law, some changes more radical than others. When it comes to the actual statutory text, the Swedish Equal Treatment Act does not differ greatly in its definitions of direct and indirect discrimination. However, certain language in the text that has no effect, such as that employers are to eradicate all wage differences within three years, should be removed, as it simply weakens the statute as a whole. The language limiting *JämO* to prosecuting certain types of cases should also be removed, *JämO* should be free to accept cases as are the other enforcement agencies in the other systems. The access to justice issues need to be addressed, the award of damages, the allocation of attorney's fees as well as the statute of limitation. Reliance on the legislative preparatory works should again be discouraged, and regulations issued, if not by *JämO,* by the appropriate ministry as in the United Kingdom and the United States. The issue of damages can be addressed in such regulations, with ranges of amounts suggested (but not fixed) depending upon the size of the employer or other parameters as deemed important. Such regulations could also hammer out the small technical issues with respect to bringing discrimination claims, creating greater legal certainty for

both plaintiffs and defendants, as well as facilitating prosecuting claims. Examples of discriminatory behavior can be listed as well as how the burden of proof is to be applied. Certain terms can be defined, such as a "tangible disturbance" in the work place, allowing the parties and courts to better understand the rights granted.

Such regulations could also fill another purpose, and that would be to allow for the creation of several instances in which discrimination claims can be heard. The Swedish system is the only national system in which there is only one instance in the majority of discrimination claims. The argument is given that the law would be applied inconsistently if otherwise, but the reality is that this is a part of any legal system with respect to any legal issue. If this reasoning prevailed, there would be only one court in every legal system, for that is the only certain way to insure consistency of result (as long as the individual judges remain unchanged). Several instances as well as venues would hopefully allow for a development of case law that would better ascertain the rights of both individuals and employers, creating greater legal certainty.

A more radical proposal would be to create a mechanism by which an individual can hold a labor union accountable for not pursuing a valid claim. The unions have prosecuted many of the cases as discussed above, and many work for greater economic equality between women and men. However, there presently is no right for an individual member for redress as to the failure to prosecute a claim, and given the rate of success at the Swedish Labour Court, this can only be seen as a sound financial decision by the labor unions. Unfortunately, under the current system, it leaves the individual too vulnerable to not being able to assert a claim at all.

The composition of the court is debated in the legal scholarship. It is difficult to discern how much of the judgments as issued by the court are the result of representatives of the social partners being members, or of the parameters existing within the Swedish legal system as a whole, with judges assuming a role very different from those found in the European Union, United Kingdom and United States. Having more than one instance and several venues would balance this out to a greater extent than in the present system, and create a dialogue as to legal issues. Discrimination is not a fixed object, as can be seen from the American experiences, that can at one time be defined for all time. This is due to its insidious nature and there should be a better, more immediate dialogue between the law and the problems faced by individuals, a dialogue which the courts should provide as they do in the other systems examined here. Regulations can assist in reducing fears as to inconsistency and legal certainty if drafted appropriately. Another aspect that can be considered is that only issues of law could be appealed, or issues of fact where the trial court manifestly disregarded the evidence. This would also reduce the need for an entire new trial on appeal, as is the rule in Swedish procedure in general, reducing costs for the parties. Even though

this is not the general procedure in Swedish trials, allowing for at least this limited appeal is more than what exists in the present labor law system that already deviates from the general rules for trials in that there is no right to appeal at all in the majority of discrimination cases. *JämO* has argued that the cases should be brought to the general courts as a rule, and it is difficult to see how the Swedish Labour Court's expertise with respect to issues such as those arising from collective agreements has been beneficially transferred to issues concerning discrimination.

The fundamental difference that can be seen with the Community, UK and US law on one side, and Swedish law on the other side, is the concept of substantive justice. The Swedish system has focused on certain of the manifestations of discrimination through its efforts in making women more economically independent and men assume a greater share of unpaid work. However, there is a deeper structural discrimination that the present Swedish legal system does not reach or arguably does not even address as demonstrated by the case law. Something more has to be done to address structural discrimination. A deeper analysis needs to be performed of the reasons for discrimination, past simply the intent of the defendant, to the historical and cultural events that have led up to the present day system, not only by the members of parliament, but also by the social partners and the courts in reaching their decisions. In evaluating the recently proposed merged discrimination law in Sweden, one is taken back to the beginning in the 1970's. The proposed law will only be a "half law" until issues of access to justice as well as substantive justice are addressed by the Swedish legal system.

Appendix One: The Award of Exemplary Damages by the Swedish Labour Court in Discrimination Cases

Table 1: The Award of Exemplary Damages under the 1979 Equal Treatment Act in Sex Discrimination Cases in the 1980's.

Case no.	Plaintiff	Defendant	Issue	Amount
AD 1981 no. 169	**JämO**	Upplands Väsby Municipality	Direct Discrimination – Qualifications	15000
AD 1981 no. 171	**The Swedish Union of Clerical and Technical Employees in Industry**	Kalmar Municipality	Direct Discrimination – Qualifications	15000
AD 1982 no. 17	**JämO**	The State of Sweden through the Swedish Agency for Government Employers	Direct Discrimination – Qualifications	10000 per plaintiff
AD 1982 no. 139	**JämO**	Örebro County Council	Direct Discrimination – Qualifications	20000
AD 1984 no. 6	**JämO**	The State of Sweden through the National Swedish Police Board	Direct Discrimination – Qualifications	15000
AD 1984 no. 22	**JämO**	Lessebo Municipality	Direct Discrimination – Qualifications	20000
AD 1986 no. 67	**The Swedish Municipal Workers' Union**	Stockholm Transport Inc. in Stockholm	Direct Discrimination – Qualifications	20000
AD 1987 no. 67	**Helsingborg's Local Federation of the Central Organization of Swedish Workers**	Bjuv Municipality	Direct Discrimination – Qualifications	25000
AD 1989 no. 122	**The Swedish Municipal Workers' Union**	Östergötland County Council	Direct Discrimination – Qualifications	40000

Table 2: The Award of Exemplary Damages under the 1979 and 1991 Equal Treatment Acts in Sex Discrimination Cases in the 1990's.

Case no.	Plaintiff	Defendant	Issue	Amount
AD 1993 no. 49	**The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR**	The State of Sweden through the Swedish Immigration Board	Direct Discrimination – Qualifications	25000 per plaintiff
AD 1995 no. 158	**JämO**	Kumla Municipality	Wage Discrimination	40000*
AD 1996 no. 79	**The Swedish Union of Local Government Officers**	Karlskoga Municipality	Wage Discrimination	20000*

* Economic compensatory damages also awarded in the case.

Table 3: The Award of Exemplary Damages under the 1991 Equal Treatment Act in Sex Discrimination Cases in the 2000's.

Case no.	Plaintiff	Defendant	Issue	Amount
AD 2002 no. 45	**JämO**	Västmanland County Council	Direct Discrimination – Pregnancy	50000
AD 2002 no. 102	**The Swedish Union of Clerical and Technical Employees in Industry**	ALMEGA Service Associations and Casino Cosmopol Inc. in Stockholm	Sexual harassment	80000
AD 2005 no. 22	**JämO**	ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm	Sexual harassment – Employer's duty to investigate	50000
AD 2005 no. 87	**JämO**	The Association of Swedish Engineering Industrial Employers and Volvo Cars Inc. in Gothenburg	Indirect Discrimination	40000

Table 4: The Award of Exemplary Damages under Other Types Discrimination Cases.

Case no.	Plaintiff	Defendant	Issue	Amount
AD 2002 no. 128	**DO**	Service Employers' Association and GfK Sverige Inc. in Lund	Race Discrimination	40000
AD 2003 no. 47	**The Swedish Metal-workers' Union**	Skandinaviska Raffina-deri Inc., Scanraff in Lysekil and Cooperative Employers' Association	Handicap Discrimination	30000
AD 2005 no. 32	**The Swedish Associa-tion of Graduate Engi-neers and M.K in Stockholm**	T. & N. Management Inc., Stockholm	Handicap Discrimination	100000*

* Economic compensatory damages also awarded in the case.

Appendix Two: The Award of Trial Costs and Attorney's Fees by the Swedish Labour Court in Discrimination Cases

Table 1:
The Award of Trial Costs and Attorney's Fees in Sex Discrimination Cases in the 1980's.
Prevailing Party in bold-faced italics.

Case no.	Plaintiff	Defendant	Issue	Amount
AD 1981 no. 169	***JämO***	Upplands Väsby Municipality	Direct Discrimination – Qualifications	18 675
AD 1981 no. 171	***The Swedish Union of Clerical and Technical Employees in Industry***	Kalmar Municipality	Direct Discrimination – Qualifications	18 873
AD 1982 no. 17	***JämO***	The State of Sweden through the Swedish Agency for Government Employers	Direct Discrimination – Qualifications	33 458
AD 1982 no. 102	Swedish Assoc. of Graduates in Law, Business Administration and Economics, Computer and Systems Science, Personnel Management and Social Science (JUSEK)	***Kalmar County Council***	Direct Discrimination – Qualifications	Parties to bear their own costs
AD 1982 no. 139	***JämO***	Örebro County Council	Direct Discrimination – Qualifications	15 706
AD 1983 no. 50	JämO	***The State of Sweden through the Swedish Nat'l Labour Market Board***	Direct Discrimination – Qualifications	38 726
AD 1983 no. 78	The Swedish Musician's Union Entertainment Business Employees' Association	***Hörby Municipality***	Direct Discrimination – Qualifications	36 681

AD 1983 no. 83	The Swedish Food Workers' Union	***Kalmar Municipality***	Direct Discrimination – Qualifications	23 982
AD 1983 no. 102	TCO's Section of Civil Servants	***The State of Sweden through the Swedish Agency for Government Employers***	Direct Discrimination – Qualifications	15 000
AD 1983 no. 104	JämO	***The State of Sweden through the Swedish Nat'l Labour Market Board***	Direct Discrimination – Qualifications	16 900
AD 1984 no. 1	TCO's Section of Civil Servants	***The State of Sweden through the Swedish Agency for Government Employers***	Direct Discrimination – Qualifications	18 890
AD 1984 no. 6	***JämO***	The State of Sweden through the Nat'l Swedish Police Board	Direct Discrimination – Qualifications	19 485
AD 1984 no. 12	Fil kand Gertrud Anljung in Lund	***The State of Sweden through the Swedish Agency for Government Employers***	Direct Discrimination – Qualifications	Parties to bear their own costs
AD 1984 no. 22	***JämO***	Lessebo Municipality	Direct Discrimination – Qualifications	15 786
AD 1984 no. 100	JämO	***The State of Sweden through the Nat'l Swedish Board of Agriculture***	Direct Discrimination – Qualifications	13 362
AD 1984 no. 140	The Swedish National Union of Local Government Officers	***Stockholm County Council***	Wage Discrimination	15 000
AD 1985 no. 134	***The Salaried Employees Union***	The Swedish Newspaper Publishers' Association and Dagens Nyheter Inc. in Stockholm	Wage Discrimination	8 000
AD 1986 no. 67	***The Swedish Municipal Workers' Union***	Stockholm Transport Inc. in Stockholm	Direct Discrimination – Qualifications	20 000
AD 1986 no. 84	The Swedish Medical Association	Jönköping County Council	Direct Discrimination – Qualifications	12 731
AD 1986 no. 103	JämO	***Uppsala Parish in Uppsala***	Direct Discrimination – Qualifications	23 477
AD 1987 no. 1	The Swedish Assoc. of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR	***Gävle Municipality***	Direct Discrimination – Qualifications	14 583

AD 1987 no. 3	The Swedish Teachers' Association	***Uddevalla Municipality***	Direct Discrimination – Qualifications	16 510
AD 1987 no. 8	The Swedish Metal-workers' Union	***The Swedish Metal Trades Employers' Association and ASEA Inc. in Västerås***	Direct Discrimination – Qualifications	19 140
AD 1987 no. 35	JämO	***The Swedish Newspaper Publishers' Assoc. and Framtiden Press Inc. in Malmö***	Direct Discrimination – Qualifications	31 865
AD 1987 no. 51	The Swedish Association of Vocational Teachers	***Nacka Municipality***	Direct Discrimination – Qualifications	19 368
AD 1987 no. 67	***Helsingborg's Local Federation of the Central Org. of Swedish Workers***	Bjuv Municipality	Direct Discrimination – Qualifications	12000
AD 1987 no. 83	TCO's Section of Civil Servants	***The State of Sweden through the Swedish Nat'l Agency for Education***	Direct Discrimination – Qualifications	10000
AD 1987 no. 98	JämO	***City of Stockholm***	Direct Discrimination – Retaliation	75950
AD 1987 no. 132	***The Swedish Metal Trades Employers' Association***	The Swedish Union of Clerical and Technical Employees in Industry	Direct Discrimination – Wages	15000
AD 1987 no. 140	The Swedish National Union of Local Government Officers	***City of Stockholm***	Direct Discrimination – Qualifications	25 600
AD 1987 no. 152	JämO	***The State of Sweden through Gothenburg University***	Direct Discrimination – Qualifications	43000
AD 1988 no. 50	Helena Tepponen in Kvillsfors	***The Association of Ädelfors Folk High School in Holsbybrunn***	Direct Discrimination – Qualifications	27004
AD 1989 no. 40	The Swedish State Employees' Union	***Gothenburg Municipality***	Direct Discrimination – Qualifications	43 830
AD 1989 no. 122	***The Swedish Municipal Workers' Union***	Östergötland County Council	Direct Discrimination – Qualifications	37061

Table 2:
The Award of Trial Costs and Attorney's Fees in Sex Discrimination Cases in the 1990's.
Prevailing party in bold-faced italics

Case no.	Plaintiff	Defendant	Issue	Amount
AD 1991 no. 62	The Swedish Union of Journalists	***The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm***	Direct Discrimination – Wages	Parties to bear their own costs
AD 1991 no. 65	***The Commercial Employee's Union***	Sunny Beach in Varberg Inc.	Sexual harassment, ***LAS***	Parties to bear their own costs
AD 1993 no. 30	***The Swedish Metalworkers' Union***	TVAB in Sundberg	Sexual harassment, ***LAS***	38 434
AD 1993 no. 49	***The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR***	The State of Sweden through the Swedish Immigration Board	Direct Discrimination – Qualifications	35 000
AD 1995 no. 74	The Salaried Employees' Union HTF	***Wenceslao R. with the Firm WR Förlag in Upplands Väsby***	Sexual Harassment by Employer	39 500
AD 1995 no. 158	***JämO***	Kumla Municipality	Wage Discrimination	94 420
AD 1996 no. 41	JämO	***Örebro County Council***	Wage Discrimination	251 820
AD 1996 no. 79	***The Swedish Union of Local Government Officers***	Karlskoga Municipality	Wage Discrimination	Parties to bear their own costs
AD 1997 no. 16	JämO	***Umeå Parish***	Direct Discrimination – Qualifications	146 000
AD 1997 no. 68	The Swedish Association of Graduate Engineers	***Mjölby Municipality***	Wage Discrimination	70 184

Table 3:
The Award of Trial Costs and Attorney's Fees in Sex Discrimination Cases in the 2000's.
Prevailing party in bold-faced italics

Case no.	Plaintiff	Defendant	Issue	Amount
AD 2001 no. 13	JämO	***Örebro County Council***	Wage Discrimination	829 251
AD 2001 no. 51	SACO-S through the Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR	***The State of Sweden through the Swedish Agency for Government Employers***	Wage Discrimination	124000
AD 2001 no. 61	JämO	***The Swedish Metal-working Industries' Association and Nobel Biocare***	Direct Discrimination – Basis of Pregnancy	105 930
AD 2001 no. 76	JämO	***Stockholm County Council***	Wage Discrimination	474000
AD 2002 no. 45	***JämO***	Västmanland County Council	Direct Discrimination – Basis of Pregnancy	65 321
AD 2002 no. 102	***The Swedish Union of Clerical and Technical Employees in Industry***	ALMEGA Service Associations and Casino Cosmopol Inc. in Stockholm	Sexual harassment	94 480
AD 2004 no. 44	JämO	***The State of Sweden through the Swedish Agency for Government Employers***	Direct Discrimination – Qualifications	88 771
AD 2005 no. 22	***JämO***	ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm	Sexual harassment – Employer's duty to investigate	67 957
AD 2005 no. 63	JämO	***The State of Sweden through the Swedish Armed Forces***	Sexual harassment – Employer's duty to investigate	164 336
AD 2005 no. 69	The Church of Sweden's Association of University Graduates	***The Swedish Church's Association of Parishes and Häverö and Singö Parishes in Hallstavik***	Direct Discrimination – Qualifications	117 250
AD 2005 no. 87	***JämO***	The Association of Swedish Engineering Industrial Employers and Volvo Cars Inc. in Gothenburg	Indirect Discrimination	189 781
AD 2006 no. 79	JämO	***Erlandsons Brygga Inc. in Solna***	Direct Discrimination – Pregnancy	113 340

Table 4:
The Award of Trial Costs and Attorney's Fees in Other Types of Discrimination Cases.
Prevailing party in bold-faced italics.

Case no.	Plaintiff	Defendant	Issue	Amount
AD 1997 no. 61	The Swedish Association of Graduate Engineers	***Österåker Municipality***	Race Discrimination	57 541
AD 1998 no. 134	DO	***Otto Farkas Bilskadeverkstad Inc. in Växjö***	Race Discrimination	77 786
AD 2002 no. 54	L.G-C. in Haverdal	***Boods Färg, S.K. Inc. in Halmstad***	Race Discrimination	49 666
AD 2002 no. 128	***DO***	Service Employers' Association and GfK Sverige Inc. in Lund	Race Discrimination	98 957
AD 2003 no. 47	***The Swedish Metalworkers' Union***	Skandinaviska Raffinaderi Inc., Scanraff in Lysekil and Cooperative Employers' Association	Handicap Discrimination	71 704
AD 2003 no. 55	DO	***The Swedish Social Insurance Administration and Jämtland County's General Social Insurance Administration in Östersund***	Race Discrimination	136 950
AD 2003 no. 58	DO	***Swede-Eye Inc. in Täby***	Race Discrimination	152 800
AD 2003 no. 63	DO	***DemÅplock in Gothenburg Inc. in Lindome***	Race Discrimination	95 461
AD 2003 no. 73	DO	***Westinghouse Atom Inc. in Västerås***	Race Discrimination	82 100
AD 2003 no. 76	SEKO – Union for Service and Communication	***The State of Sweden through the Swedish Board of Correctional Institutions***	Handicap Discrimination	158 515
AD 2004 no. 22	A.K.T. in Malmö	***Copenhagen Malmö Port Inc. in Malmö***	Race Discrimination	117133
AD 2005 no. 3	DO	***Comsol Inc. in Stockholm***	Race Discrimination	154048
AD 2005 no. 14	The Swedish Teachers' Union	***ALMEGA Service Employers' Associations and K.E.M. in Skarpnäck***	Race Discrimination	69000

AD 2005 no. 21	The Swedish Municipal Workers' Union and A.Ö. from Ingarö	***The Association of Healthcare Companies and Attendo Care Inc. in Stockholm***	Religious Discrimination LAS	99 073
AD 2005 no. 32	***The Swedish Association of Graduate Engineers and M.K. in Stockholm***	T. & N. Management Inc., Stockholm	Handicap Discrimination	88 616
AD 2005 no. 47	N.K. in Norrköping	***Nor Di Cuhr Inc. in Norrköping***	Race Discrimination	25000
AD 2005 no. 98	DO	***Norrköping Municipality***	Race Discrimination	128 823
AD 2005 no. 126	The Swedish Association of Graduate Engineers	***Klippan Municipality***	Race Discrimination	84 170
AD 2006 no. 60	The Swedish Municipal Workers' Union	***Region Skåne in Kristianstad***	Race Discrimination	111 515

Appendix Three: Clauses in Swedish Collective Agreements Regulating Parental Leave Wage Supplements

For the examination of the Swedish collective agreements, requests were made to all 16 LO-unions, 19 TCO-unions and 26 SACO-unions for copies of collective agreements, as well as any other information/programs the unions had regarding parental leave. The unions were also asked about the existence of any specific problems and to what degree parental leave or any other parenting related issues were treated in the collective agreements entered into or in general. Thirty of the 61 unions responded to the first request, after which an additional ten answered after a second request, giving a response rate of approximately 60 %. Letters were also sent to the central employer organizations requesting the same information with two responses received. Certain of the labor unions had specific persons responsible for issues concerning either equality or parental leave, and meetings were held with several of these. As the response from the social partners was not 100 % (unions covering approximately two million employees answered), this study must be seen as qualitative and not quantitative. It is difficult to assess how many of those that did not respond did so because they do not have any provisions, or if there was another reason. However, the variation between the different agreements and sectors demonstrates a spectrum of contractual solutions telling in issues of equality and parenting.

In accordance with the 1995 Parental Leave Act and the National Insurance Act, the parental leave cash benefit in 2006 for parental leave taken with respect to a child born on 30 June 2006 or earlier is 80 % of 7.5 times the price base amount, in other words, up to the ceiling of SEK 24812 per month, SEK 19840 per month or SEK 626 per day. For a child born after 30 June 2006, the parental leave cash benefit is 80 % of 10 times the price base amount, in other words, up to the ceiling of approximately SEK 33000 per month, SEK 26400 per month or SEK 870 per day. The calculations under the different contractual clauses are made for a salary of SEK 20000 per month, a salary of SEK 40000 per month

and parental leave taken for a child born on 30 June 2006 or earlier, and third on a salary of SEK 40000 per month and parental leave taken for a child born after 30 June 2006. In the third category of calculations, certain clauses based on the previous parental leave cash benefit have resulted in windfalls for the parents taking leave for a child born after 30 June 2006 as they were based on the 7.5 formula. An eleven-month period is chosen as the basis of comparison, as eleven months (330 days) currently is the longest period during which one parent can receive the parental leave cash benefit (390 minus the other parent's non-transferable 60 days). The objective of the comparison is to calculate the percent of the employee's income received during parental leave during the eleven-month period in accordance with the different solutions in the agreements.

The public sector solutions are first examined, the ALFA agreement that governs the entire state sector and the AB 05 agreement covering the municipalities and county councils. Within the private sector, the agreements tend to fall roughly within the categories of "salaried employees" and "wage earners," and the clauses therein tend to fall within five categories: The absence of any provisions concerning parental leave wage losses, provisions providing a pay supplement within three months of the birth of a child, a straight percentage pay supplement, the 90/10 and 80/10 models, and finally, that which is referred to here as a neutralizing model, in which both the economic and professional losses resulting from taking parental leave are neutralized by the provisions in the contract. These provisions are presented here in this order.

A. The Public Sector Collective Agreements

Two collective agreements govern the public sector, ALFA applicable for state employees, and AB 05 applicable to municipal and county council employees.

1. The State Sector – ALFA

Parental leave and parental leave wage supplements are addressed in Chapter 8 of the current ALFA agreement[1] concerning wages during parental leave. The wage supplement is based on a deduction model. For each calendar day of parental leave, an amount is deducted from the wages that corresponds to 3.3 % of the fixed salary per month. If the leave is taken for a period of a month or more, the entire monthly salary is deducted. An employee on leave for the birth of a child or care of an adopted child in accordance with Chapter 8 § 2 ALFA has the right to a parental leave cash benefit supplement. This supplement is to be paid for

[1] Swedish Agency for Government Employers ALFA General Wage and Benefits Agreement, Central Collective Agreement 2005:4, dated 5 May 2005.

those days during the parental leave that the employee takes out the parental leave cash benefit on or over the guaranteed level, at the highest 360 days per birth/adoption. If partial leave is taken, the parental leave cash benefit supplement is adjusted proportionally. As a prerequisite for the right to the supplement, the employee must be an employee with the governmental authority, or one in that sector, during at least 90 days consecutively prior to the commencement of parental leave, unless the employer makes an exception otherwise for a specific reason. Consequently, an employer can shorten the qualification period of ninety days for specific reasons, an exception that does not exist in any of the other clauses in the other agreements examined here.

The amount of the parental leave cash benefit supplement is regulated in ALFA Chapter 8 § 3. The supplement is 10 % of the daily wages of the portion of wages up to the ceiling of the eligible income. As to the portion of wages that exceed the eligible income, the supplement is 90 % of the daily wages.

Salary of SEK 20000 per month

Applying this formula, if the monthly salary is SEK 20000, the calculation of the supplement is as follows. The wage deduction is SEK 20000. The parental leave cash benefit from the Swedish National Insurance Act is SEK 16000 (80 % of SEK 20000) and the supplement is SEK 2000 (10 % of the monthly wages). The total sum is SEK 18000 or 90 % of the salaried wages. This is in contrast to an employee with an income of SEK 20000 per month with simply the parental leave cash benefit, in other words, without any supplement, receiving 80 % of the salaried wages in the parental leave cash benefit.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

If the monthly salary of the employee is SEK 40000 and the parental leave taken for a child born on 30 June 2006 or earlier, the calculation is as follows. The wage deduction is SEK 40000. The parental leave cash benefit from the Swedish National Insurance Act is SEK 19840. The first part of the supplement is 10 % up to SEK 24812, in other words, SEK 2481. For the part of the wages that exceed SEK 24812, the second part of the parental leave cash benefit supplement is 90 % of SEK 15188 (SEK 40000 – 24812), in other words, SEK 13669. The total becomes SEK 19840 + 2481 + 13669 = 35990, which is 90 % of SEK 40000. An employee who earns SEK 40000 per month in salary with only the parental leave cash benefit, in other words, without any supplement, receives 49.25 % of the salaried wages as parental leave cash benefit for leave taken with respect to a child born on 30 June 2006 or earlier. Regardless of whether the employee has income under the price base amount ceiling as determined by the Swedish National Insurance Act or over, the employee receives 90 % of the salaried wages with parental leave under the ALFA agreement.

Salary of SEK 40000 per month and a child born after 30 June 2006

If the monthly salary of the employee is SEK 40000 and the parental leave taken for a child born after 30 June 2006, the calculation is as follows. The wage deduction is SEK 40000. The parental leave cash benefit from the Swedish National Insurance Act is approximately SEK 26400. The first part of the supplement is 10 % up to SEK 26400, in other words, SEK 2640. For the part of the wages that exceed SEK 26400, the second part of the parental leave cash benefit supplement is 90 % of SEK 13 600 (SEK 40000 – 26400), in other words, SEK 12240. The total becomes SEK 26400 + 2640 + 12240 = 41280, which is 103 % of SEK 40000. An employee who earns SEK 40000 per month in salary with only the parental leave cash benefit, in other words, without any supplement, receives 49.25 % of the salaried wages as parental leave cash benefit for leave taken with respect to a child born after 30 June 2006. A windfall occurs here as the formula is based on the former parental leave cash benefit calculation.[2]

2. The Municipalities and County Councils – AB 05

The collective agreement governing the municipalities and county councils in the public sector, with SALAR representing the employers' organizations, is AB. The current version, AB 05, is valid from April 2005 to June 2007. The first paragraph in Chapter One of AB 05 states that the employment conditions contained within the agreement are to stimulate improvements in operational efficiency, productivity and quality through flexible solutions, and that the conditions are to be adjusted to local conditions with room for individual solutions. The social partners have retained an explicit right in AB 05 § 29(6) to enter into local collective agreements opting out of sections in the 1995 Parental Leave Act, §§ 11 and 12 (scheduling of leave), § 13 (notice of leave), § 15 (notice of resumption of work and the employer's right to delay return to work) and § 17 (protection of employee benefits).

Employees that have worked at least 365 days prior to the leave receive a parental leave wage supplement in accordance to AB 05 Chapter Six § 29, *Parental Leave.* Any reductions or denial of parental leave cash benefits are to be reflected in the benefits given according to § 29 (4). The employee also has the right to take leave twice for consultation during the pregnancy with doctors/midwives at 100 % of their wages.

[2] In a press release concerning the new system for children born after 30 June 2006, the Swedish Agency for Government Employers noted that if the proposed changes were adopted, the central collective agreements would need to be modified and that the parties in the State collective agreement sector had agreed to resume negotiations as to modifications of the agreements. *See Arbetsgivarverket Informerar No. 76,* dated 29 March 2006.

Two wage categories exist in AB 05 § 29, those with wages under 62.5 % of the price base amount, and those over. A parental leave wage supplement of one month is given to all employees according to AB 05 § 29 (1) to be paid at one time at the commencement of the parental leave for leaves of fourteen calendar days or longer. For employees who have been employed 365 but not 730 consecutive calendar days with wages less than 62.5% of the price base amount, the parental leave wage supplement is 10 % of the employee's monthly fixed wage, and for those employed for 730 days or more, 20 %.

For employees earning more than 62.5 % of the price base amount, currently SEK 24812 in fixed wages per month, with a qualification period of at least 180 days in the public sector but not necessarily the same employer, a parental leave wage supplement is paid for at the most 270 calendar days per birth according to AB 05 § 29(2). This parental leave wage supplement is the difference between 80 % of the wage loss – calculated per calendar day – and the highest amount for the parental leave cash benefit.

Salary of SEK 20000 per month

The monthly salary of SEK 20000 does not exceed 62.5 % of the price base amount, SEK 24812, so only AB 05 § 29(1) is applicable. At the maximum rate, 20 % with a monthly salary of SEK 20000, the calculation is as follows. The parental leave cash benefit is SEK 16000. The parental leave cash benefit supplement is 20 % of one month's wages, SEK 4000 per month. In comparison with the state system that runs during the entire period, one must recalculate the sum of the amounts during an eleven-month period here in order to arrive at the percentage during the period. The parental leave cash benefit amount during the eleven months is SEK 176000 plus the parental leave cash benefit supplement of SEK 4000, giving a combined total of SEK 180000. This amount divided by eleven becomes SEK 16364, 81.8 % of the original income of SEK 20000 distributed over a period of eleven months.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

If the monthly salary is SEK 40000, and the parental leave taken with respect to a child born 30 June 2006 or earlier, the calculation is as follows under AB 05 § 29(1). The parental leave cash benefit is SEK 19840. The first part of the parental leave cash benefit supplement is 20 % of the monthly wages at SEK 40000, in other words, SEK 8000. Under AB 05 § 29(2), the employee is also entitled to additional compensation during 270 calendar days. The amount that is paid corresponds to the difference between 80 % of the wage loss – calculated per calendar day – and the highest amount for the parental leave cash benefit during nine months. The highest amount paid for the parental leave cash benefit is SEK 19840. Then 80 % of the wage loss becomes SEK 16128 as the difference

is SEK 20160 per month, with a total monthly of benefits SEK 35968 or 80 % per month of the original salary. Once again, this must be recalculated to eleven months' compensation. The sum becomes SEK 218240 in the parental leave cash benefit (eleven months), SEK 8000 in the parental leave cash benefit supplement (20 %) and SEK 145152 in the compensation (nine months) for a total amount of SEK 371392. Divided by eleven, this becomes SEK 33763 per month during a period of eleven months, or 84 % of the original income per month. An employee who receives SEK 40000 per month in salary in accordance with the Parental Leave Act for a child born 30 June 2006 or earlier without any supplement receives 49.25 % of the wages as the parental leave cash benefit.[3]

Salary of SEK 40000 per month and a child born after 30 June 2006

If the monthly salary is SEK 40000, and the parental leave taken with respect to a child born after 30 June 2006, the calculation is as follows under AB 05 § 29(1). The parental leave cash benefit is SEK 26400. The first part of the parental leave cash benefit supplement is 20 % of the monthly wages at SEK 40000, in other words, SEK 8000. Under AB 05 § 29(2), the employee is also entitled to additional compensation during 270 calendar days. The amount that is paid corresponds to the difference between 80 % of the wage loss – calculated per calendar day – and the highest amount for the parental leave cash benefit during nine months. The highest amount paid for the parental leave cash benefit for a child born after 30 June 2006 is SEK 26400. Then 80 % of the wage loss becomes SEK 10 880 as the difference is SEK 13600 per month, with a total monthly of benefits SEK 37280 or 93 % per month of the original salary. Once again, this must be recalculated to eleven months' compensation. The sum becomes SEK 290400 in the parental leave cash benefit (eleven months), SEK 8000 in the parental leave cash benefit supplement (20 %) and SEK 97920 in the compensation (nine months) for a total amount of SEK 396320. Divided by eleven, this becomes SEK 36029 per month during a period of eleven months, or 90 % of the original income per month. An employee who receives SEK 40000 per month in salary in accordance with the Parental Leave Act for a child born after 30 June 2006 without any supplement receives 49.25 % of the wages as the parental leave cash benefit.

[3] Certain collective agreements have changed the percentage from 62.5 % to 83.3 % as of 1 July 2007, which is not a good solution as the benefits do not depend upon an effective date but rather the birthdate of the child. Those persons taking leave after that date for a child born prior to 1 July 2007 will receive a lesser benefit. *See, e.g.,* the information page for teachers explaining the benefits, available at: http://mail2.lararforbundet.se/web/mt.nsf/print/007102CB?OpenDocument&level=2.

B. The Private Sector Collective Agreements

There are literally hundreds of collective agreements within the Swedish private sector, and not all have been accessible for this work. A selection has been made here of certain provisions to illustrate different aspects of the problems arising for an employee when taking parental leave. The absence of any provisions with respect to parental leave cannot in itself be analyzed further; employees with such collective agreements receive nothing over that provided by the law. The categories of provisions presented concern a pay supplement within three months of the birth of a child, a straight percentage pay supplement, the 90/10 model, the 80/10 model, and finally, the neutralizing model, in which taking parental leave is neutralized by the provisions in the contract as discussed in the next sections.

1. A Typical Blue Collar Clause – Benefit in Connection to the Birth of a Child

Several collective agreements contain clauses concerning supplemental wages connected to the birth of a child, such as those at issue in the cases discussed above, AD 1985 no. 134, AD 1987 no. 132 and AD 2003 no. 74. One example of such can be seen in the collective agreement regarding nurses employed by private ambulance companies.[4] In this situation, it becomes apparent how much a male nurse can lose by working in the private sector instead of the public with respect to these benefits (but not with respect to salary in general). Section 11(2) regarding parental leave states:

> Employees who in accordance with the regulations in the 1995 Parental Leave Act (1995:584) have the right to abstain from work in connection with the birth of a child, shall, if they desire such a leave of employment notify the employer thereof in due time and at the latest two months in advance as well as state which period of time the leave concerns.

A two-month notice period is required according to the collective agreement when taking parental leave. The parental leave wage supplement is based on the deduction model. The provision in § 11(4) governing days of leave states:

> With leave of employment in accordance with §§ 2 and 3, a deduction is made per hour for full-time employees of
>
> $$\frac{\text{the actual monthly wages}}{165}$$
>
> With an absence the entire month, a deduction is made for the entire monthly salary. For part-time employees, the deduction is to be proportioned in relation to the part-time.

[4] Collective Agreement between the Association of Swedish Health Care Companies and the Swedish Association of Health Professionals valid from 1 July 2004 to 30 June 2005.

Section 12 regulates the wage supplement in connection with the birth of a child:[5]

> An employee who is on leave from employment due to pregnancy or the birth of a child has the right to a wage supplement from the employer if:
>
> – the party in question has been employed with the employer at least one year consecutively as well as
>
> – the concerned party's employment continues at least three months after the leave of employment
>
> The wage supplement in connection with the birth of a child is to be paid:
>
> – for one month if the employee has been employed for one but not two years consecutively and
>
> – for two months if the employee has been employed for two years consecutively or more.
>
> If the leave taken in connection is to be shorter than one and two months respectively, the wage supplement paid is for a period of time no longer than the leave encompasses.
>
> The wage supplement constitutes per absent hour
>
> $$\frac{10\ \% \text{ x the monthly wages x } 12.2}{52 \text{ x weekly employment hours}}$$
>
> The wage supplement is paid with one-half the amount when the leave commences and the remaining half after the employee has continued employment for three months after the leave of employment. The wage supplement is not paid if the employee is not eligible for the parental leave cash benefit in accordance with the National Insurance Act. If this benefit is reduced, the wage supplement is also to be reduced to a comparable degree.

As a rule, men are not eligible for this type of wage supplement.[6] According to the Swedish Association of Health Professionals statistics for 2003, there were 1075 ambulance nurses of which 72 % (774) were men, so this collective agreement governs a male-dominated workforce.

Salary of SEK 20000 per month

As the leave is calculated at two months, first two months worth of wages are deducted from the salary. The wage supplement in connection with the birth of

[5] In the Swedish text, *havandeskapslön.*

[6] Certain collective agreements state specifically that the benefit is for female employees, *see, e.g.,* the collective agreement between the Branch and Employer Organization for the Ventilation, Water, Sewage and Cooling Sector and Byggnads, the Swedish Building Workers' Union valid from 1 April 2004 to 31 March 2007, § 11(4). This again is a male dominated work sector granting the benefit to only female employees.

a child for a female employee with an income of SEK 20000 per month becomes SEK 1877 per month (SEK 2000 x 12.2 = 24400 divided by 2080 = 11.73 per hour x 160 hours). Over an eleven-month period with a parental cash benefit of 19840 per month and the two-month supplement, this becomes 81.7 % of the employee's wages.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

With a wage of SEK 40000 per month, the wage supplement becomes SEK 4035 per month (SEK 4000 x 12.2 = 25.22 per hour x 160). Over an eleven-month period with a two-month wage supplement and a parental cash benefit of SEK 19840 per month, this becomes 51.1 % of the wages.

Salary of SEK 40000 per month and a child born after 30 June 2006

With a wage of SEK 40000 per month, the wage supplement becomes SEK 4035 per month. Over an eleven-month period with a two-month wage supplement and a parental cash benefit of SEK 26400 per month, this becomes 67.8 % of the wages.

2. Direct Calculation Clauses

The agreement that must be awarded the prize for simplicity as to formula concerning the parental leave wage supplement is that of the graphic workers.[7] An employee receives a parental leave wage supplement for one or two months depending upon length of employment. The parental leave wage supplement is 10 % of the monthly wages according to § 11(7)(3) including any compensation for work at inconvenient times.

Salary of SEK 20000 per month

With a wage of SEK 20000 per month, the parental leave wage supplement becomes SEK 2000 per month during an eleven-month period with two months' parental leave wage supplement, 81.8 % of the wages.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

With wages at SEK 40000 per month, the parental leave wage supplement is SEK 4000, the percentage with a two month wage supplement over eleven months and a parental leave cash benefit in the amount of SEK 19840 is 51.07 %.

[7] Collective agreement between the Swedish Newspaper Publishers' Association and the Graphic and Media Workers' Union valid from 1 June 2004 to 31 May 2007.

Salary of SEK 40000 per month and a child born after 30 June 2006

With wages at SEK 40000 per month, the parental leave wage supplement is SEK 4000, the percentage with a two month wage supplement over eleven months and a parental leave cash benefit in the amount of SEK 26400 is 67.8 %.

3. Typical White Collar Clauses – The 90/10 and 80/10 Models

The 90/10 and 80/10 models are called such because up to the statutory ceiling of the parental leave cash benefit, either 80 or 90 % of the wages are deducted for the leave, giving the employee in essence a 20 or 10 % wage benefit respectively. After the ceiling has been reached for wages, only 10 % of the employee's wages are deducted, giving the employee a benefit of 90 % of the excess over the ceiling. The collective agreement regarding civil engineers typifies the 90/10 model, regulating employment conditions for IT companies and specifically in § 7, parental leave compensation.[8] During the time that an employee takes parental leave, a compensation is paid if the employee has had uninterrupted employment with the employer for at least one year prior to the first day of leave. Depending on length of service, compensation is available for two or three months. For a thirty-day period of full-time leave, compensation is paid for a month's salary minus 30 days sick leave days. Sick leave days are calculated in § 6.4, which states for income at the highest 7.5 times the price base amount, sick leave day deductions are 90 % of the monthly salary times twelve divided by 365. For employees falling within this wage category, after a deduction of sick leave days based at 90 %, the parental leave compensation then becomes the 10 % of the income not deducted. For persons over this income amount, the parental leave compensation becomes 10 % up to the wage limit, then 90 % for the amount exceeding the wage limit, again 90 % of the monthly wages. A ceiling exists in the contract, however, in that compensation is not paid for wages exceeding 15 times the price base amount. In addition, the leave must be taken within 24 months of the birth/adoption of the child.

Salary of SEK 20000 per month

With a wage of SEK 20000 per month, the applicable formula for the deduction is:

$$\frac{90\ \% \times \text{the monthly wages} \times 12}{365}$$

[8] Employment Terms and Conditions in IT Companies, valid from 1 April 2004 to 31 March 2007, ALMEGA, the Swedish Union of Clerical and Technical Employees in Industry, the Swedish Association of Graduate Engineers, JUSEK and the Swedish Association of Business Administration Graduates.

As the deduction then is SEK 18000, the parental leave compensation becomes SEK 2000 per month for a maximum of three months, over a period of eleven months the benefits are 81 % of the income.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

As wages of SEK 40000 per month exceed 7.5 times the price base amount divided by twelve, SEK 24812, a different deduction formula is applied:

$$\frac{90\ \%\ \text{x the monthly wages x } 12}{365} + \frac{10\ \%\ (\text{monthly wages x } 12 - 7.5\ \text{x price base amt.})}{365}$$

After the deduction, the parental leave wage supplement becomes SEK 4000 according to the first part of the formula. The sum of the second part of the formula becomes SEK 15000 per month, for a maximum of three months, the percentage over eleven months with a parental cash benefit of SEK 19840 is 59.8 %.

Salary of SEK 40000 per month and a child born after 30 June 2006

Under the same formula as in the preceding section, the parental leave wage supplement after the deduction is made becomes SEK 4000 for the first part of the formula. The sum of the second part of the formula becomes SEK 15000 per month, for a maximum of three months. The percentage over eleven months with a parental cash benefit of SEK 26400 becomes 76.2 %.

The 80/10 Model

Another variation in the white collar types of agreements is an 80/10 split with a somewhat different result.[9] Wage deductions are made and a wage supplement given, for example, 30 or 60 days as can be seen in the health care workers' agreement § 11(3), one-half of the amount is paid when the leave of employment commences and the remaining after the employee has worked for three months after returning from the leave. The parental wage supplement amount is calculated in accordance with the sick pay provisions, which for employees with monthly salary of at the highest SEK 24812, deductions per sick day are made by:

[9] The General Employment and Wage Terms and Conditions for employees within health and other care between the Association of Cooperative and Non-profit Enterprises, the Association of Swedish Occupational Therapists, Swedish Association of Registered Physiotherapists, the Swedish Municipal Workers' Union, the Swedish Union of Local Government Officers and the Swedish Association of Health Professions valid from 1 June 2004 to31 May 2007.

$$\frac{90\ \%\ \text{x the monthly salary x } 12}{365}$$

For employees with monthly salary over SEK 24812, deductions per sick day are made by:

$$\frac{80\ \%\ \text{x } 7.50\ \text{x Price Base Amount}}{365} + \frac{10\ \%\ (\text{monthly salary x } 12)}{365}$$

Salary of SEK 20000 per month

The sum remains the same under this model for those who earn SEK 20000 per month as in the 90/10 model, SEK 2000 for a two-month period after the deduction is made, comparable to 81 % of the wages. However, the result differs for those who earn SEK 40000 per month.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

As the amount of monthly salary exceeds SEK 24812, the second formula is used. The amount of the deduction according to the first formula varies only with the price base amount, which for 2006 was SEK 39 700, so that the deduction for the first part is SEK 652.6. The sum of the second half becomes SEK 131.5 so that the total sum is SEK 784 per day. If one had made deductions for the entire wage sum, SEK 40000 x 12/365, it would have been SEK 1315 per day. The parental leave wage supplement then becomes SEK 1315 minus SEK 784, which is SEK 531 per day, and for 60 days is SEK 31 860. For the two months this parental leave wage supplement is paid, the employee takes home SEK 15930 in parental leave wage supplement and SEK 19840 in the parental leave cash benefit, which is SEK 35770 per month, comparable to 89.42 % of the wages with the parental leave wage supplement. If this is calculated during an eleven-month period, the sum becomes SEK 218240 in parental leave cash benefits and SEK 31860 in the parental leave wage supplement for a total of SEK 250100 or SEK 22736 per month comparable to 56.84 % of the wages per month.

Salary of SEK 40000 per month and a child born after 30 June 2006

The sums according to the formula remain the same as to the amount of the deduction. However the parental leave cash benefit is higher with respect to leave taken for children born after 30 June 2006. For the two months this parental leave wage supplement is paid, the employee takes home SEK 15930 in parental leave wage supplement and SEK 26400 in the parental leave cash benefit, which is SEK 423300 per month, comparable to 105.8 % of the wages with the paren-

tal leave wage supplement for those two months. If this is calculated during an eleven-month period, the sum becomes SEK 290 400 in parental leave cash benefits and SEK 31 860 in the parental leave wage supplement for a total of SEK 250 100 or SEK 29 296 per month comparable to 73.24 % of the wages per month.

4. An Adult/Continuing Education Teachers' Provision

Yet another different solution can be found in one of the collective agreements for teachers.[10] This contains up to a four months' parental leave wage supplement:

> § 5(8)(2) Time When Parental Leave Wage Supplement is Paid
> The parental leave wage supplement is paid
>
> - at the highest one month if the employee has been employed with the employer in one but not two years consequently
> - at the highest two months if the employee has been employed with the employer during two but not three years consequently
> - at the highest three months if the employee has been employed with the employer during three but not four years consequently
> - at the highest four months if the employee has been employed with the employer during four years consequently or a more.
>
> § 5(8)(3) The Amount of the Parental Wage Supplement
>
> The parental leave wage supplement consists of a monthly salary minus 30 deductions according to that stated below, or for two, three or four months' wages respectively, minus 60, 90 or 120 deductions in accordance to the following.
>
> For each day of absence with the right to parental leave (also work free weekdays as well as Sunday- and holidays), deductions per day are made by
>
> $$\frac{90\ \% \text{ x the monthly salary x } 12}{365}$$
>
> The deduction, however, at the highest may be in an amount up to [SEK 734]
>
> $$\frac{90\ \% \text{ x } 7.50 \text{ x the price base amount}}{365}$$

[10] The collective agreement between the Employers' Alliance – Branch Committee Education and Adult/Continuing Education, The Swedish Adult Education Teachers' Association, the Swedish Union of Local Government Officers, the Swedish Municipal Workers' Union, the Swedish Teachers' Union and the Swedish National Teachers' Organization of Unions from 2004–2007.

Here the variation in relation to the previous agreement as to the parental leave wage supplement is that it can be paid up to four months but also that a maximum ceiling for the deduction exists. After a monthly salary of SEK 24812 has been reached, one begins to keep more and more of one's income.

Salary of SEK 20000 per month

The deduction with a salary of SEK 20000 per month is thus SEK 591.78 per day, giving a parental leave wage supplement of SEK 65.75 per day and SEK 1972.5 per month, which becomes 90 % of the wages with the parental leave cash benefit per month. Over an eleven-month period, the parental leave compensation including the four months' parental leave wage supplement is SEK 16717 per month, comparable to 83.6 % of the wages.

Salary of SEK 40000 per month and a child born on 30 June 2006 or earlier

The deduction for SEK 40000 per month is SEK 1315 per day, exceeding the highest amount of SEK 728.63 per day. The parental leave wage supplement then becomes SEK 586.44 per day or SEK 17593.15 per month, comparable to 93.23 % of the wages per month with the parental leave cash benefit. Over an eleven-month period, the wages with four months' parental leave wage supplement become SEK 26237.5 per month comparable to 65.6 % of the wages.

Salary of SEK 40000 per month and a child born after 30 June 2006

The deductions remain unchanged for SEK 40000 per month, SEK 1315 per day, exceeding the highest amount of SEK 728.63 per day. The parental leave wage supplement then becomes SEK 586.44 per day or SEK 17593.15 per month, SEK 43993 comparable to 110 % of the wages for the four months per month with the parental leave cash benefit. Over an eleven-month period, the wages with four months' parental leave wage supplement become SEK 32797.5 per month comparable to 82 % of the wages.

5. A Holistic Approach Neutralizing Parental Leave

The collective agreement for employees in the banking sector provides an example of a more comprehensive view of parental leave.[11] Parental leave is regulated in § 11 with employees having the right to a contribution from the bank in addition to the parental leave cash benefit for at the most 360 calendar days where the employee takes 100 % parental leave cash benefit as stated in § 11.2. The

[11] The Federation of Bank Employers and the Financial Sector Union of Sweden, Collective Agreement for Employees in the Banking Sector valid from 1 January 2006 to 31 December 2008 ("BA").

contribution is paid when the leave is taken out within 18 months from the birth or adoption. The employee agrees with the receipt of the contribution to return to employment for a period comparable to the minimum of the employee's notice of termination period. The contribution constitutes 10 % of the daily wages at an annual salary within 7.5 times the price base amount as determined by the Swedish National Insurance Act. As to fixed monthly salary exceeding 7.5 times the price base amount, in other words, SEK 297750 or SEK 24812 per month, the compensation is 80 %. The parental leave deduction is made in accordance with § 11.3.

Salary of SEK 20000 per month

The calculation with SEK 20000 per month in salary becomes SEK 16000 in parental leave cash benefit and 10 % per month in contributions, in other words, SEK 2000, a combined total of SEK 18000, comparable to 90 % of the wages.

Salary of SEK 40000 per month and a child born prior to 30 June 2006

With a salary of SEK 40000 per month, the contribution is 10 % of the wages up to SEK 24812 per month, in other words, SEK 2481 per month plus 80 % of SEK 15188 (the difference between SEK 40000 and SEK 24812), which is SEK 12150. The combined total becomes SEK 19840 in parental leave cash benefit plus SEK 14 631 (SEK 2481 and SEK 12150) in contributions, in other words, SEK 34 471, comparable to 86.18 % of the wages during the entire eleven-month period. The only collective agreement that has better terms known to this author is the state ALFA giving 90 %.

Salary of SEK 40000 per month and a child born after 30 June 2006

With a salary of SEK 40000 per month, the contribution is 10 % of the wages up to SEK 24812 per month, in other words, SEK 2481 per month plus 80 % of SEK 15188 (the difference between SEK 40000 and SEK 24812), which is SEK 12150. The combined total becomes SEK 26400 in parental leave cash benefit plus SEK 14631 (SEK 2481 and SEK 12150) in contributions, in other words, SEK 41031, comparable to 102.5 % of the wages during the entire eleven-month period. There is a windfall here as the clause granting the contribution is based on the system of parental leave cash benefits calculated at 7.5 instead of 10 times the price base amount.

The results of all these calculations are compiled in Table 1 in Chapter 3.

Bibliography

Primary Sources of Law – By System

European Union

Treaties (reverse chronology)

Treaty establishing a Constitution for Europe, OJ 2004 C 310

Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union ("Treaty of Athens"), OJ 2003 L 236

Treaty Establishing the European Community ("EC Treaty")(consolidated text), OJ 2002 C 325

Treaty on European Union ("EU Treaty")(consolidated text), OJ 2002 C 325

Treaty on Nice, OJ 2001 C 80

Treaty establishing the European Community ("Amsterdam Treaty"), OJ 1997 C 340

Treaty of Accession of Austria, Finland and Sweden, OJ 1994 C 241

Treaty on European Union ("Maastricht Treaty"), OJ 1992 C 191

Single European Act ("SEA"), OJ 1987 L 169

Treaty of Accession of Spain and Portugal, OJ 1985 L 302

Treaty of the Accession of Greece, OJ 1979 L 291

Treaty of Brussels, or the Treaty Amending Certain Financial Provisions, OJ 1977 L 359

Treaty of Accession of the United Kingdom, Ireland and Denmark, OJ 1972 L 73

Treaty amending certain Budgetary Provisions ("Treaty of Luxembourg"), OJ 1971 L 2

Merger Treaty, OJ 1966 152, Celex No. 165F/PRO/PRI/13

Treaty establishing the European Economic Community ("EEC Treaty")(1957)

Treaty establishing the European Atomic Energy Community ("Euratom Treaty")(1957)

Treaty establishing the European Coal and Steel Community ("ECSC Treaty")(1951)

Directives of the European Parliament and the Council (reverse chronology)

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23, Celex No. 32006L0054

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 269/15, Celex No. 32002L0073

Council Directives (reverse chronology)

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37, Celex No. 32004L0113

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("Employment Framework Directive"), OJ 2000 L 303/16, Celex No. 32000L0078

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("Racial Equality Directive"), OJ 2000 L 180/22, Celex No. 32000L0043

Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland, OJ 1998 L 205/66, Celex No. 31998L0052

Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, OJ 1998 L 131/10, Celex No. 31998L0023

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ("Part-time Work Directive"), OJ 1998 L 014/9, Celex No. 31997L0081

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ("Burden of Proof Directive"), OJ 1998 L 14/6, Celex No. 31997L0080

Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1998 L 10/24, Celex No. 31997L0075

Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security scheme, OJ 1997 L46/20, Celex No. 31997L0097

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ("Parental Leave Directive"), OJ 1996 L 145/4, Celex No. 31996L0034

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ 1992 L 348/1, Celex No. 31992L0085

Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L359/56, Celex No. 31986L0613

Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986 L 225/40, Celex No. 31986L0378

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Social Security Directive"), OJ 1979 L 6/24, Celex No. 31979L0007

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ("Equal Treatment Directive"), OJ 1976 L 39/40, Celex No. 31976L0207

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women ("Equal Pay Directive"), OJ 1975 L 45/19, Celex No. 31975L0117

Regulations (reverse chronology)

Council Regulation (EEC) No. 2001/83 of 2 June 1983 amending and updating Regulation (EEC) NO. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and also amending and updating Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71, OJ 1990 L4018 (Corrigendum), Celex No. 31983R2001R(02)

Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149/2, Celex No. 31971R1408

Resolutions (reverse chronology)

Council Resolution of 27 March 1995 on the balanced participation of men and women in decision-making, OJ 1995 C 168/3, Celex No. 31995Y0704(02)

Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council of 6 December 1994 on equal participation by women in an employment-intensive economic growth strategy within the European Union, OJ 1994 C 368/3, Celex No. 41994X1223

Council Resolution of 22 June 1994 on the promotion of equal opportunities for men and women through action by the European Structural funds, OJ 1994 C 231/1, Celex No. 31994Y0820(01)
Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work, OJ 1990 C 157/3, Celex No. 31990Y0627(05)
European Parliament Resolution on Violence Against Women, OJ 1986 C 176/73, Celex No. 51986IP0044
Council Resolution of 7 June 1984 on action to combat employment amongst women, OJ 1984 C 161/4, Celex no. 31984Y0621(02)
Council Resolution of 21 January 1974 concerning a social action programme, OJ 1974 C 13/1, Celex No. 31974Y0212(01)

Recommendations (reverse chronology)

92/241/EEC: Council Recommendation of 31 March 1992 on child care, OJ 1992 L 123/16, Celex No. 31992X0241
92/171/EEC: Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, OJ 1992 L 49/1, Celex No. 31992X0131
87/567/EEC: Commission Recommendation of 24 November 1987 on vocational training for women, OJ 1987 L 342/35, Celex No. 31987H0567
84/635/EEC: Council Recommendation of 13 December 1984 on the promotion of positive action for women, OJ 1984 L 331/34, Celex No. 31984H0635

Other EU Documents (reverse chronology)

Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – A Roadmap for equality between women and men 2006-2010, Celex No. 52006DC0092
Communication from the Commission – A Code of Practice on the Implementation of Equal Pay for Work of Equal Value for Women and Men, COM/96/0336 Final, Celex No. 51996DC0336
Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment, OJ 1992 C 27/1, Celex No. 31992Y0204(01)
The European Commission, Research Directorate-General, SCIENCE POLICIES IN THE EUROPEAN UNION, PROMOTING EXCELLENCE THROUGH MAINSTREAMING GENDER EQUALITY (2000)
Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (COM(2004) 279 final – 2004/0084 (COD)), OJ 2005 C 157/83

Proposal for a directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) Com (2004) 279 Final

Case Law of the European Court of Justice (reverse chronology by case number)

Case C-17/05, *B.F. Cadman against Health & Safety Executive* [2006] ECR I-, Celex No. 62005J0017

Case C-294/04, *Carmen Sarkatzis Herrero v. Instituto Madrileno de la Salud (Imsalud)* [2006] ECR-00, Celex No. 62004J0294

Case C-184/04, *Ulf Öberg v. Försäkringskassan, Länskontoret, formerly Stockholms läns allmänna försäkringskassa* [2006] ECR 00, Celex No. 62004J0185

Case C-137/04, *Amy Rockler v. Försäkringskassan, formerly Riskförsäkringsverket* [2006] ECR 00, Celex. No. 62004J0137

Case C-519/03, *Commission of the European Communities v. Grand Duchy of Luxembourg* [2005] ECR I-3067, Celex No. 62003J0519

Case C-203/03, *Commission of the European Communities v. Republic of Austria* [2005] ECR I-935, Celex No. 62003J0203

Case C-313/02, *Nicole Wippel v. Peek & Cloppenburg GmbH & Co. KG* [2004] ECR I-9483, Celex No. 62002J0313

Case C-285/02, *Edeltraud Elsner-Lakeberg v. Land Nordrhein-Westfalen* [2004] ECR I-5861, Celex No. 62002J0285

Case C-77/02, *Erika Steinicke v. Bundesanstalt fur Arbeit* [2003] ECR I-9027, Celex No. 62002J0077

Case C-320/01, *Wiebke Busch v. Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-02041, Celex No. 62001J0320

Case C-320/00, *A.G. Lawrence and Others v. Regent Office Care Ltd., Commercial Catering Group and Mitie Secure Services Ltd.* [2002] ECR I-7325, Celex No. 62000J0320

Case C-109/00, *Tele Danmark A/S v. Handels- og KontorfunktionWrernes Forbund i Danmark (HK)* [2001] ECR I-6993, Celex No. 62000J0109

Case C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, Celex No. 61999J0381

Case C-438/99, *Maria Luisa Jimenez Melgar v. Ayuntamiento de Los Barrios(I)* [2001] ECR I-6915, Celex No. 61999J0438

Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* [2000] ECR I-5539, Celex No. 61998J0407

Case C-236/98, *Jämställdhetsombudsmannen v. Örebro läns landsting* [2000] ECR I-2189, Celex No. 61998J0236

Case C-218/98, *Oumar Dabo Abdoulaye and Others v. Régie Nationale des Usines Renault SA* [1999] ECR I-5723, Celex No. 61998J0218

Case C-207/98, *Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern* [2000] ECR I-549, Celex No. 61998J0207

Case C-78/98 *Shirley Preston and Others v. Wolverhampton Healthcare NHS Trust and Others, and Dorothy Fletcher and Others v. Midland Bank plc.* [2000] ECR I-3201, Celex No. 61998J0078

Case C-333/97, *Susanne Lewen v. Lothar Denda* [1999] ECR I-7243, Celex No. 61997J0333.

Case C-270/97, *Deutsche Post AG v. Elisabeth Sievers* [2000] ECR I-929, Celex No. 61997J0270

Case C-158/97, *Georg Badeck and Others* [2000] ECR I-1875, Celex No. 61997J0158

Case C-411/96, *Margaret Boyle & Others v. Equal Opportunities Commission* [1998] ECR I-6401, Celex No. 61996J0411

Case C-275/96, *Anne Kuusijärvi v. Riksförsäkringsverket* [1998] ECR I-3419, Celex No. 61996J0275

Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains* [1998] ECR I-621, Celex No. 61996J0249

Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363, Celex No. 61995J0409

Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v. Evelyne Thibault* [1998] ECR I-2011, Celex No. 61995J0136

Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143, Celex No. 61994J0013

Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051, Celex No. 61993J0450.

Case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567, Celex No. 61993J0032

Case C-271/91, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, Celex No. 61991J0271

Case C-360/90, *Arbeitwohlfahrt der Stadt Berlin e.V. v. Monika Bötel* [1992] ECR I-3589, Celex No. 61990J0360

Case C-188/89, *A. Foster and others v. British Gas plc.* [1990] ECR I-3313, Celex No. 61989J0188

Case C-184/89, *Helga Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-297, Celex No. 61989J0184

Case C-262/88, *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, Celex No. 61988J0262

Case C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, Celex No. 61988J0177

Case C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG.* [1989] ECR-2743, Celex No. 61988J0171

Case C-109/88, *Handels- og KontorfuntionWrernes Forbund i Danmark v. Dansk Arbejdsgiverforening acting on behalf of Danfoss* [1989] ECR-3199, Celex No. 61988J0109

Case C-339/87, *Commission of the European Communities v. The Kingdom of the Netherlands* [1990] ECR I-851, Celex No. 61987J0339

Case C-237/85, *Gisela Rummler v. Dato-Druck GmbH* [1986] ECR-2101, Celex No. 61985J0237

Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR-1651, Celex No. 61984J0222

Case C-170/84, *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR-1607, Celex No. 61984J0170

Case C-152/84, *M. H. Marshall v. Southampton Area Housing Authority (No. 1)* [1986] ECR-723, Celex No. 61984J0152

Case C-184/83, *Ulrich Hofmann v. Barmer Ersatzkasse* [1984] ECR-3047, Celex No. 61983J0184

Case C-23/83, *W.G.M. Liefting and others v. Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam and others* [1984] ECR-3225, Celex No. 61983J0023

Case C-14/83, *Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* [1984] ECR-1891, Celex No. 61983J0014

Case C-165/82, *Commission v. United Kingdom* [1983] ECR-3431, Celex No. 61982J0165

Case C-58/81, *Commission of the European Communities v. Grand Duchy of Luxembourg* [1982] ECR-2175, Celex No. 61981J0058

Case C-12/81, *Eileen Garland v. British Railway Engineering Limited* [1982] ECR I-359, Celex No. 61981J0012

Case C-129/79, *Macarthys Ltd. v. Wendy Smith* [1980] ECR-1275 Celex No. 61979J0129

Case C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR-3727, Celex No. 61979J0044

Case C-149/77, *Gabriella Defrenne (No. 3) v. Societe Anonyme Belge de Navigation Aerienne Sabena* [1978] ECR-1365, Celex No. 61977J0149

Case C-43/75, *Gabriella Defrenne (No. 2) v. Societe Anonyme Belge de Navigation Aerienne Sabena* [1976] 1 ECR-455, Celex No. 61975J0043

Case C-41/74, *Yvonne van Duyn v. Home Office* [1974] ECR-1337, Celex No. 61974J0041

Case C-167/73, *Commission of the European Communities v. French Republic* [1974] ECR-359, Celex No. 61973J0167

Case C-80/70, *Gabriella Defrenne (No. 1) v. Belgian State* [1971] ECR-445, Celex No. 61970J0080

Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR-1125, Celex No. 61970J0011

Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR-3, Celex No. 61962J0026.

Opinion 2/94 on Accession of the Community to the ECHR [1996] ECR 1-1759

Court of First Instance

Case T-22/02, *Sumitomo Chemical Co. Ltd. v. Commission of the European Communities* [2005] ECR 0000, Celex No. 62002A0022

Other ECJ Documents

EC Statute of the Court of Justice

Sweden

Swedish Constitution, Instrument of Government

Swedish Codes

The Swedish Code of Judicial Procedure
The Swedish Code of Parents
The Swedish Inheritance Code
The Swedish Marriage Code

Statutes (Reverse Chronology)

Lag (SFS 2006:442) *om ändring i föräldraledighetslagen (1995:584)*
Lag (SFS 2006:67) *om förbud mot diskriminering och annan kränkande behandling av barn och elever*
Lag (SFS 2005:476) *om ändring i jämställdhetslagen (1991:433)*
Lag (SFS 2004:1251) *om ändring i föräldraledighetslagen (1995:584)*
Lag (SFS 2003:373) *om ändring i föräldraledighetslagen (1995:584)*
Lag (SFS 2003:307) *om förbud mot diskriminering*
Lag (SFS 2002:903) *om ändring av regeringsformen*
Lag (SFS 2002:293) *om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning*
Lag (SFS 2001:1286) *om likabehandling av studenter i högskolan*
Lag (SFS 2001:144) *om ändring i föräldraledighetslagen (1995:584)*
Lag (SFS 2001:143) *om ändring i föräldraledighetslagen (1995:584)*
Lag (SFS 2000:773) *om ändring i jämställdhetslagen (1991:433)*
Lag (SFS 2000:580) *om ändring i jämställdhetslagen (1991:433)*
Socialförsäkringslag (SFS 1999:799)
Lag (SFS 1999:133) *om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*
Lag (SFS 1999:132) *om förbud mot diskriminering i arbetslivet av personer med funktionshinder*
Lag (SFS 1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*
Lag (SFS 1998:674) *om inkomstgrundad ålderspension*
Lag (SFS 1998:208) *om ändring i jämställdhetslagen (1991:433)*
Lag (SFS 1997:99) *om ändring i föräldraledighetslagen (1995:584),*
Lag (SFS 1996:1545) *om ändring i föräldraledighetslagen (1995:584)*
Föräldraledighetslag (SFS 1995:584)("1995 Parental Leave Act")

Lag (SFS 1994:1989) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1994:1219) *om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*
Lag (SFS 1994:858) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1994:555) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1994:292) *om ändringar i jämställdhetslagen (1991:433)*
Lag (SFS 1994:134) *mot etnisk diskriminering*
Lag (SFS 1993:396) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1992:393) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1991:680) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Jämställdhetslag (SFS 1991:433)("1991 Equal Treatment Act")
Köplag (SFS 1990:931)
Lag (SFS 1989:101) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1988:710) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1986:442) *mot etnisk diskriminering*
Lag (SFS 1985:90) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1985:85) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1985:34) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*
Lag (SFS 1982:676) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Arbetstidslag (SFS 1982:673)
Lag (SFS 1982:92) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*
Lag (SFS 1982:91) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*
Lag (SFS 1982:80) *om anställningsskydd* ("LAS")
Lag (SFS 1980:888) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*
Lag (SFS 1980:412) *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*
Lag (SFS 1979:1118) *om jämställdhet mellan kvinnor och män i arbetslivet* ("1979 Equal Treatment Act")
Lag (SFS 1979:645) *om ändring i lagen (1978:410) om rätt till ledighet för vård av barn m.m.*

Lag (SFS 1979:503) *om jämställdhet mellan kvinnor och män i arbetslivet*
Lag (SFS 1978:410) *om rätt till ledighet för vård of barn, m.m.* ("1978 Parental Leave Act")
Lag (SFS 1977:630) *om ändring i lagen (1962:381) om allmän försäkring*
Lag (SFS 1976:871) *om ändring i regeringsformen*
Lag (SFS 1976:580) *om medbestämmande i arbetslivet* ("MBL")
Lag (SFS 1976:280) *om rätt till föräldraledighet* ("1976 Parental Leave Act")
Lag (SFS 1974:981) *om arbetstagares rätt till ledighet för utbildning*
Lag (SFS 1974:371) *om rättegången i arbetstvister* ("Labor Disputes (Judicial Procedure) Act")
Lag (SFS 1974:358) *om facklig förtroendemans ställning på arbetsplatsen*
Lag (SFS 1974:12) *om anställningsskydd* ("1974 LAS") *Lag* (SFS 1970:943) *om arbetstid m.m. i husligt arbete*
Allmän arbetstidslag (SFS 1970:103)
Lag (SFS 1962:381) *om allmän försäkring*
Lag (SFS 1959:258) *angående ändrad lydelse av 8 § lagen den 22 juni 1928 (nr. 254) om arbetsdomstolen*
Lag (SFS 1958:514) *om kvinnas behörighet till prästerlig tjänst*
Lag (SFS 1950:73) *om ändring i arbetarskyddslagen (1949:1)*
Arbetarskyddslag (SFS 1949:1)("1949 Worker Protection Act")
Lag (SFS 1947:529) *om allmänna barnbidrag*
Lag (SFS 1947:90) *angående ändrad lydelse av lagen den 22 juni 1928 (nr. 254) om arbetsdomstolen*
Lag (SFS 1945:844) *av 21 dec. 1945 om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap* ("1945 Act")
Lag (SFS 1945:159) *angående ändrad lydelse av 1 § lagen den 22 juni 1928 (nr. 254) om arbetsdomstolen*
Lag (SFS 1939:171) *om förbud mot arbetstagarens avskedande i anledning av trolovning eller äktenskap m.m.*
Lag (SFS 1938:287) *om semester*
Lag (SFS 1937:131) *angående ändrad lydelse av 3 § lagen den 22 juni 1928 (nr. 254) om arbetsdomstolen*
Lag (SFS 1936:506) *om förenings- och förhandlingsrätt*
Lag (SFS 1930:138) *om arbetstidens begränsning*
Lag (SFS 1928:254) *om arbetsdomstol*
Lag (SFS 1928:253) *om kollektivavtal*
Lag (SFS 1926:162) *om arbetstidens begränsning*
Lag (SFS 1923:288) *om arbetstidens begränsning*
Lag (SFS 1923:249) *innefattande bestämmelser angående kvinnas behörighet att innehava statstjänst och annat allmänt uppdrag*
Giftermålsbalk (SFS 1920:405)
Lag (SFS 1920:246) *om central skiljenämnd för vissa arbetstvister*
Lag (SFS 1920:245) *om medling i arbetstvister*
Lag (SFS 1919:652) *om arbetstidens begränsning*
Lag (SFS 1915:426) *om äktenskaps ingående och upplösning*

Lag (SFS 1915:194) *om eftergift vid krig eller krigsfara från vissa bestämmelser om arbetstid för minderåriga och kvinnor*
Lag (SFS 1912:206) *om arbetarskydd* ("1912 Employment Protection Act")
Lag (SFS 1909:131) *ang. förbud mot kvinnors användande till arbete nattetid i vissa industriella företag*
Lag (SFS 1906:113) *om medling i arbetstvister*
Lag (SFS 1904:48 p. 1) *om samäganderätt*
Lag (SFS 1900:75) *angående minderårigas och qvinnors användande till arbete i industriellt yrke* ("1900 Act")
Lag (SFS 1889:19) *angående skydd mot yrkesfara; gifven Stockholms Slott* 10 maj 1889
Lag (SFS 1884:32) *angående ogift qvinnas rätt att vid viss ålder vara myndig*

Proclamations (reverse chronology)

Kungl. Maj:ts Kungörelse (SFS 1974:152) *om beslutad ny regeringsform*
Kong. Maj:ts Kungörelse (SFS 1973:279) *om förbud mot köns- och åldersdiskriminering vid tillsättning av tjänst*
Accession Proclamation Bern Convention of 14 January 1910

Governmental Regulations (reverse chronology)

Förordning (SFS 2006:260) *om antidiskrimineringsvillkor i upphandlingskontrakt*
Förordning (SFS 2005:650) *om prisbasbelopp och förhöjt prisbasbelopp för år 2006*
Förordning (SFS 1991:1438) *med instruktion för jämställdhetsombudsmannen*
Förordning (SFS 1991:1437) *med instruktion för jämställdhetsnämnden*
Förordning (SFS 1988:128) *med instruktion för jämställdhetsombudsmannen*
Förordning (SFS 1980:416) *med instruktion för jämställdhetsnämnden*
Förordning (SFS 1980:415) *med instruktion för jämställdhetsombudsmannen*
Arbetsmiljöförordning (SFS 1977:1166)
Förordning (SFS 1976:686) *om jämställdhet mellan kvinnor och män i statlig tjänst*
Statens allmänna avlöningsreglemente (SFS 1948:436)
Kungl. Maj:ts förordning (SFS 1931:281) *om moderskapsunderstöd*
Kungl. Maj:ts förordning (SFS 1920:898) *med närmare föreskrifter angående medling i arbetstvister*
Kungl. Maj:ts Förordning (SFS 1881:64) *angående minderåriges användande i arbete vid fabrik, handtverk eller annan hantering* ("1881 Regulation")
Kungl. Maj:ts Nådiga Förordning (SFS 1864:41) *angående Utvidgad Näringsfrihet* ("The 1864 Freedom of Trade Regulation")
Kungl. Maj:ts Nådiga Förordning (SFS 1863:61) *angående ogift qwinnas rätt att wid wiss ålder wara myndig*
Kungl. Maj:ts Nådiga Förordning (SFS 1858:60) *angående ogift qwinnas rätt att wid wiss ålder wara myndig*
Fabriks- och Handtwerksordningen af Kungl. Maj:t (SFS 1846:39)("1846 Regulation")

Kungl. Maj:ts Nådiga Förordning (SFS 1845:13) *angående förändring i vissa delar af lagens stadgande om giftorätt och arfsrätt.*
Lego Stadga för husbönder och tjenstehjon (SFS 1833:33 p. 461)

Agency Regulations

Arbetarskyddsstyrelsens föreskrifter om bergsarbete, AFS 2003:2
Arbetarskyddsstyrelsens föreskrifter om rök- och kemdykning, AFS 1995:1
Arbetarskyddsstyrelsens föreskrifter om gravida och ammande arbetstagare, AFS 1994:32
Arbetarskyddsstyrelsens föreskrifter om dykeriarbete, AFS 1993:57

Legislative Preparatory Works

Legislative Bills (reverse chronology)

Prop. 2005/06:185 *Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen*
Prop. 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering*
Prop. 2004/05:1 *Budgetpropositionen för 2005*
Prop. 2003/04:1 *Budgetpropositionen för 2004*
Prop. 2002/03:109 *Sjösäkerhet*
Prop. 2001/02:97 *Förslag om lag om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning, m.m.*
Prop. 2000/01:44 *Föräldraförsäkring och föräldraledighet*
Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.*
Prop. 1999/2000:87 *Obligatorisk mammaledighet*
Prop. 1999/2000:32 *Lönebildning för full sysselsättning*
Prop. 1997/98:55 *Kvinnofrid*
Prop. 1996/97:69 *Vissa socialförsäkringsfrågor, m.m.*
Prop. 1996/97:1 utg. 12, *Budgetpropositionen för 1997*
Prop. 1994/95:207 *Ny föräldraledighetslag m.m.*
Prop. 1994/95:61 *Vårdnadsbidraget. Garantidagarna. Enskild barnomsorg*
Prop. 1993/94:220 *Vissa socialförsäkringsfrågor, m.m.*
Prop. 1993/94:148 *Vårdnadsbidrag*
Prop. 1993/94:147 *Jämställdhetspolitiken: Delad makt – delat ansvar*
Prop. 1992/93:159 *Stöd och service till vissa funktionshindrade*
Prop. 1991/92:90 *om svenskt medborgarskap för adoptivbarn och förbättrad rätt till föräldraledighet vid adoption*
Prop. 1990/91:140 *Arbetsmiljö och rehabilitering*
Prop. 1990/91:113 *Om en ny jämställdhetslag, m.m.*
Prop. 1988/89:69 *om utbyggnad av föräldraförsäkringen och förstärkt föräldraledighet*
Prop. 1987/88:171 *om reformering av den allmänna försäkringens efterlevandeförmåner m.m.*
Prop. 1987/88:105 *om jämställdhetspolitiken inför 90-talet*

Prop. 1984/85:78 *Förbättringar inom föräldraförsäkring, havandeskapspenning och vissa regler inom sjukpenningsförsäkringen*
Prop. 1984/85:60 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*
Prop. 1981/82:154 *om ny arbetstidslag m.m.*
Prop. 1981/82:71 *om ny anställningsskyddslag m.m.*
Prop. 1980/81:18 *med förslag till lag om ändring i sekretesslagen (1980:100) m.m.*
Prop. 1979/80:147 *om godkännande av Förenta nationernas konvention om avskaffande av all slags diskriminering av kvinnor*
Prop. 1979/80:129 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*
Prop. 1979/80:92 *om bestridande av kostnader för jämställdhetsombudsmannen och jämställdhetsnämndens verksamhet under budgetåret 1980/81*
Prop. 1979/80:56 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*
Prop. 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*
Prop. 1978/79:168 *om föräldrautbildning och förbättringar av föräldraförsäkring m.m.*
Prop. 1978/79:12 *om underhåll till barn och frånskilda, m.m.*
Prop. 1977/78:104 *med förslag om utvidgad rätt till ledighet för vård of barn, m.m.*
Prop. 1976/77:117 *om utbyggnad av föräldraförsäkring m.m.*
Prop. 1975/76:133 *om utbyggnad av föräldraförsäkring m.m.*
Prop. 1974:1 *Kungl. Maj:ts proposition angående statsverkets tillstånd och behov under budgetåret 1974/75*
Prop. 1973:129 *Kungl. Maj:ts proposition med förslag till lag om anställningsskydd, m.m.*
Prop. 1973:47 *Kungl. Maj:ts proposition angående förbättrade familjeförmåner inom den allmänna försäkringen, m.m.*
Prop. 1962:167 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i arbetarskyddslagen den 3 januari 1949 (nr 1)*
Prop. 1962:70 *Kungl. Maj:ts proposition till riksdagen rörande ratifikation av Internationella arbetsorganisationens konvention (nr 100) angående lika lön för män och kvinnor för arbete av lika värde, m.m.*
Prop. 1959:23 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens allmänna konferens år 1958 vid dess fyrtioandra sammanträde fattade beslut*
Prop. 1952:206 *Kungl. Maj:ts proposition till riksdagen angående underrättelse av ett nordiskt råd*
Prop. 1952:47 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens konferens år 1951 vid dess trettiofjärde sammanträde fattade beslut*
Prop. 1950:43 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i arbetarskyddslagen den 3 januari 1949 (nr 1), m.m.*
Prop. 1949:214 *Kungl. Maj:ts proposition till riksdagen angående godkännande av Sveriges anslutning till Europarådet*

Prop. 1948:298 *Kungl. Maj:ts proposition till riksdagen med förslag till arbetarskyddslag, m.m.*

Prop. 1945:368 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap m.m.*

Prop. 1935:84 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av den internationella arbetsorganisationens konferens år 1934 fattade beslut*

Prop. 1931:40 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändring i vissa delar av lagen den 29 juni 1912 (nr 206) om arbetarskydd*

Prop. 1930:31 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om fortsatt giltighet av lagen den 4 juni 1926 (nr 162) om arbetstidens begränsning*

Prop. 1928:39 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om kollektivavtal och till lag om arbetsdomstol*

Prop. 1926:73 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om arbetstidens begränsning*

Prop. 1926:183 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om upphävandet av legostadgan för husbönder och tjänstehjon den 23 november 1833 m.m.*

Prop. 1922:241 *Kungl. Maj:ts proposition till riksdagen med förslag till lag innefattande bestämmelser angående kvinnas behörighet att innehava statstjänst och annat allmänt uppdrag, m.m.*

Prop. 1920:15 *Kungl. Maj:ts proposition till Riksdagen med förslag till ny giftermålsbalk m.m.*

Prop. 1919:358 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändrad lydelse av §§ 6, 7 , 9, 16, 19 och 21 riksdagsordning och till övergångs-bestämmelser däri*

Prop. 1918:104 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändrad lydelse av §§ 9, 16, 19 och 21 riksdagsordning och till övergångsbestämmelser däri*

Prop. 1912:110 *Kungl. Maj:ts proposition till riksdagen med förslag till lag angående ändrad lydelse av §§ 9, 16, 19 och 21 riksdagsordning och till övergångsbestämmelser däri*

Prop. 1912:104 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag om arbetarskydd*

Prop. 1911:43 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag om kollektivavtal mellan arbetsgivare och arbetstagare, lag om särskild domstol i vissa arbetstvister, m.m.*

Prop. 1910:96 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till lag om kollektivavtal mellan arbetsgivare och arbetstagare, lag om särskild domstol i vissa arbetstvister, lag om vissa arbetstvister, m.m.*

Prop. 1908:156 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till förordning angående förbud mot kvinnors användande till arbete nattetid i viss industriella företag*

Prop. 1901 *Kungl. Maj:ts nådiga proposition till Riksdagen med Förslag till lag om vissa arbetsaftal, afgifvet af dertill i nåder utsedde kommitterade*

Prop. 1903:1 *Kungl. Maj:ts nådiga proposition till Riksdagen om medling*

Prop. 1900:57 *Kungl. Maj:ts nådiga proposition till Riksdagen med förslag till förordning angående minderåriges och qvinnors användande till arbete i industriellt yrke*
Prop. 1889:5, *Kungl. Maj:ts nådiga proposition till Riksdagen, med förslag till förordning om åtgärder för skyddande af arbetares lif och helsa i arbetet*

Governmental Reports ("SOU")(reverse chronology)

SOU 2006:22 *En sammanhållen diskrimineringslagstiftning – del 1 och 2*
SOU 2005:112 *Demokrati på svenska? Om strukturell diskriminering och politiskt deltagande*
SOU 2005:106 *Partiell ledighet*
SOU 2005:105 *Stärkt rätt till heltidsanställning*
SOU 2005:73 *Reformerad föräldraförsäkring Kärlek Omvårdnad Trygghet*
SOU 2005:66 *Makt att forma samhället och sitt eget liv*
SOU 2004:70 *Tid och pengar – dela lika?*
SOU 2004:59 *Kvinnors organisering*
SOU 2004:55 *Ett utvidgat skydd mot könsdiskriminering*
SOU 2004:43 *Den könsuppdelade arbetsmarknaden*
SOU 2003:36 *En jämställd föräldraförsäkring?*
SOU 2003:16 *Mansdominans i förändring – Om ledningsgrupper och styrelser*
SOU 2001:44 *Jämställdhet – transporter och IT*
SOU 2001:43 *Underlagsrapporter till Jämits slutbetänkande Jämställdhet – transporter och IT*
SOU 2000:121 *Sjukfrånvaro och sjukskrivning – Fakta och förslag*
SOU 2000:58 *Jämställdhet och IT*
SOU 2000:31 *Jämställdhet och IT – en kartläggning på uppdrag av JämIT*
SOU 1999:91 *En översyn av jämställdhetslagen*
SOU 1998:6 *Ty makten är din*
SOU 1998:5 *Vårt liv som kön. Kärlek, ekonomiska resurser och maktdiskurser*
SOU 1998:4 *Män passar alltid?*
SOU 1998:3 *Välfärdens genusansikte*
SOU 1997:139 *Hemmet, barnen och makten*
SOU 1997:138 *Familj, Makt och Jämställdhet, Kvinnomaktutredning*
SOU 1997:137 *Glastak och glasväggar? Den könssegregerade arbetsmarknaden*
SOU 1997:136 *Kvinnors och mäns löner – varför så olika?*
SOU 1997:135 *Ledare, makt och kön*
SOU 1997:115 *Ljusnande framtid eller ett långt farväl*
SOU 1997:114 *Styrsystem och jämställdhet – Institutioner i förändring och könsmaktens framtid*
SOU 1997:113 *Mot halva makten – Elva historiska essäer om kvinnors strategier och mäns motstånd*
SOU 1997:87 *Kvinnor, män och inkomster. Jämställdhet och oberoende*
SOU 1997:83 *Om makt och kön i spåren av offentliga organisationers omvandling*
SOU 1997:82 *Lika möjligheter*
SOU 1996:56 *Hälften vore nog – om kvinnor och män på 90-talets arbetsmarknaden*

SOU 1996:43 *Jämställdhet i EU. Spelregler och verklighetsbilder*
SOU 1996:3 *Fritid i förändring. Om kön och fördelning av fritidsresurser*
SOU 1995:145 *Fria val? Om kön, makt och fritid*
SOU 1995:110 *Viljan att veta och viljan att förstå – Kön, makt och den kvinnovetskapliga utmaningen i högre utbildning*
SOU 1995:60 *Kvinnofrid*
SOU 1994:41 *Ledighetslagstiftning – en översyn*
SOU 1994:38 *Kvinnor, barn och arbete i Sverige 1850 –1993*
SOU 1994:3 *Mäns föreställningar om kvinnor och chefskap*
SOU 1993:7 and 8 *Löneskillnader och lönediskriminering – Om kvinnor och män på arbetsmarknaden*
SOU 1990:44 *Demokrati och makt i Sverige*
SOU 1990:41 *Tio år med jämställdhetslagen – utvärdering och förslag*
SOU 1983:30 *Utbyggd havandeskapspenning m.m.*
SOU 1982:36 *Enklare föräldraförsäkring*
SOU 1980:8 *Föräldraförsäkring utredning*
SOU 1979:56 *Steg på väg*
SOU 1978:39 *Föräldraförsäkring*
SOU 1978:38 *Jämställdhet i arbetslivet med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet*
SOU 1978:28 *Kvinnornas förvärvsarbete och förvärvshinder*
SOU 1976:6 *Deltidsanställdas villkor*
SOU 1976:3 *Internationella konventioner inom arbetarskyddet A*
SOU 1976:2 *Bakgrund till arbetsmiljölag B*
SOU 1976:1 *Arbetsmiljölag A*
SOU 1975:58 *Målet är jämställdhet*
SOU 1975:46 *Kvinnor i statlig tjänst*
SOU 1972:34 *Familjstöd*
SOU 1954:4 *Moderskaps försäkring m.m.*
SOU 1950:48 *Kvinnas behörighet till kyrkliga ämbeten och tjänster*
SOU 1946:60 *Betänkande med förslag till Lag om Skydd mot Ohälsa och Olycksfall i Arbete m.m.*
SOU 1938:47 *Betänkande angående Gift Kvinnas Förvärvsarbete m.m.*
SOU 1938:13 *Betänkande angående Förvärvsarbetande Kvinnors Rättsliga Ställning vid Äktenskap och Barnsbörd*
SOU 1911 *Betänkande angående införande av moderskapsförsäkring*
SOU 1910 *Kollektivaftal angående arbets- och löneförhållanden i Sverige. I. Redogörelse för kollektivaftalens utbredning och hufvudsakliga innehåll (Arbetsstatistik A:5, Utgifven af K. Kommerskollegii afdelning för arbetsstatistik*)
SOU 1907 *Förslag till Lag angående förbud mot kvinnors användande till arbete nattetid i vissa industriella företag, afgifvet af den af Kungl. Maj:t den 20 januari 1905 tillsatta kommitté för revision af lagen angående skydd mot yrkesfara den 10 maj 1899 m.m.*
SOU 1901 *Förslag till lag om vissa arbetsaftal, afgifvet af dertill i nåder utsedde kommitterade*

SOU 1901 *Betänkande och förslag afgifna af den för behandling af frågan om förlikningsoch skiljenämnder i tvister mellan arbetsgifvare och arbetare i nåder tillsatta komite, Stockholm 1901 (Riksdagstrycket 1903)*
SOU 1877 *Betänkande angående minderårigas antagande och användande i fabrik, handtverk eller annan handtering, afgifvet af dertill af Kungl. Maj:t förordnade Kommitterade, Stockholm 1877*

Reports from Parliamentary Standing Committees

Bet. 2005/06:AU8
Bet. 2004/05:SfU1
Bet. 2004/05:AU7
Bet. 2003/04:LU22
Bet. 2002/03:TU5
Bet. 2001/02:AU6
Bet. 2000/01:SfU10
Bet. 2000/01:AU3
Bet. 1999/00:AU8
Bet. 1997/98:AU10
Bet. 1996/97:SfU8
Bet. 1996/97:SfU1
Bet. 1994/95:AU16
Bet. 1994/95:SoU08
Bet. 1993/94:SfU15
Bet. 1993/94:SoU34
Bet. 1993/94:AU17
Bet. 1992/93:SoU19
Bet. 1990/91:AU22
Bet. 1990/91:AU17
Bet. 1988/89:SfU12
Bet. 1987/88:AU20
Bet. 1987/88:AU17
Bet. 1987/88:UbU34
Bet. 1984/85:SfU12
Bet. 1984/85:AU8
Bet. 1981/82:SoU55
Bet. 1981/82:AU11
Bet. 1980/81:KU4
Bet. 1979/80:AU30
Bet. 1979/80:AU10
Bet. 1978/79:AU39
Bet. 1978/79:AU24
Bet. 1978/79:SfU24
Bet. 1977/78:AU31
Bet. 1976/77:SfU27
Bet. 1975:SfU30
Bet. 1974:InU2
Bet. 1962:2LU26
Bet. 1961:2LU23
Bet. 1961:2LU4
Bet. 1960:2LU58
Bet. 1959:2LU2
Bet. 1958:B8LU2
Bet. 1957:LU37
Bet. 1956:2LU37
Bet. 1952:2LU21
Bet. 1952:UU9
Bet. 1949:UU6
Bet. 1948:2LU62
Bet. 1928:2LU36
Bet. 1909:LU43
Bet. 1908:LU76
Bet. 1900:LU44
Bet. 1894:2TfU18
Bet. 1893:2TfU21
Bet. 1875:2TfU21
Bet. 1856:EU103
Bet. 1848:LU17

Reports from Ministries

Ds Ju 1975:7 *PM till frågan om lagstiftning mot könsdiskriminering*
Ds A 1984:9
Ds 2006:11 *Könsfördelning i bolagsstyrelser*

Directives as to Governmental Reports

Dir. 1998:60
Dir. 1988:33

Parliamentary Decisions

Rskr. 2005/06:282
Rskr. 2004/05:112
Rskr. 2004/05:267
Rskr. 2002/03:191
Rskr. 2001/02:222
Rskr. 2000/01:169
Rskr. 2000/01:4
Rskr. 1999/2000:231
Rskr. 1997/98:186
Rskr. 1997/98:172
Rskr. 1996/97:1
Rskr. 1994/95:364
Rskr. 1994/95:105
Rskr. 1993/94:368
Rskr. 1993/94:343
Rskr. 1993/94:290
Rskr. 1992/93:321
Risk. 1991/92: 321
Rskr. 1990/91: 302
Rskr. 1990/91:288
Rskr. 1988/89:137
Rskr. 1987/88:38
Rskr. 1987/88:389
Rskr. 1987/88:365
Rskr. 1987/88:364
Rskr. 1984/85:125
Rskr. 1984/85:102
Rskr. 1981/82:436
Rskr. 1981/82:153
Rskr. 1980/81:14
Rskr. 1979/80:327
Rskr. 1979/80:117
Rskr. 1978/79:411
Rskr. 1978/79:386
Rskr. 1977/78:255
Rskr. 1976/77:298
Rskr. 1975/76:283
Rskr. 1974:67
Rskr. 1962:333
Rskr. 1952:93
Rskr. 1952:83
Rskr. 1952:93
Rskr. 1949:379
Rskr. 1908:198
Rskr. 1900:119
Rskr. 1875:45

Motions

Motions 1962 (First Chamber No. 730 and Second Chamber No. 884)
Motion 1961 (Second Chamber No. 234)
Motion 1960 (Second Chamber No. 26)
Motions 1957 (First Chamber No. 330 and Second Chamber No. 413)
Motions 1934 (First Chamber No. 23 and 269 and Second Chamber Nos. 29, 146, 366, 368, 488, 489 and 502)

Motion 1933 (Second Chamber No. 394)
Motion 1931 (Second Chamber No. 51)
Motions 1927 (Second Chamber Nos. 252 and 256)
Motions 1926 (Second Chamber Nos. 26 and 201)
Motion 1925 (Second Chamber No. 229)
Motions 1911 (Second Chamber Nos. 253 and 254)
Motion 1910 (Second Chamber Nos. 29 and 150)
Motions 1909 (First Chamber No. 34 and Second Chamber Nos. 64 and 202)
Motions 1908 (Second Chamber Nos. 245, 310 and 333)
Motions 1900 (Second Chamber Nos. 165, 171, 172 and 178)
Motion 1899 (Second Chamber No. 238)
Motion 1895 (Second Chamber No. 144)
Motion 1894 (Second Chamber No. 139)
Motion 1893 (Second Chamber No. 215)
Motion 1891 (Second Chamber No. 191)
Motion 1809 (Estate of Nobility, Ad 1809-10 II:1 at 87)
Motions 1809 (Estate of Farmers, Bd 1809-10 III at 116 and 212)
Motion 1809 (Estate of Burghers, Bg 1809-10 III:1 at 178)

Case Law

Swedish Supreme Court
NJA 2003:C 36
NJA 1981:1
NJA 1973:423
NJA 1915:233

The Swedish Supreme Administrative Court
RÅ 1974:121

The Swedish Labour Court
AD 2006 no. 79 *JämO v. Erlandsons Brygga Inc.*
AD 2006 no. 60 *The Swedish Municipal Workers' Union v. Skåne Region in Kristianstad*
AD 2006 no. 54 *Andrzej Sedrowski v. Skånemejerier Economic Association*
AD 2006 no. 52 *The Swedish Pulp and Paper Workers' Union v. The Association of Swedish Forest Industries and MondiPackaging Dynäs Inc. in Väja*
AD 2005 no. 126 *The Swedish Association of Graduate Engineers v. Klippan Municipality*
AD 2005 no. 98 *DO v. Norrköping Municipality*
AD 2005 no. 92 *The Swedish Pulp and Paper Workers' Union v. The Association of Swedish Forest Industries and AssiDomän Cartonboard Inc. in Frövi*

AD 2005 no. 87 *JämO v. The Association of Swedish Engineering Industrial Employers and Volvo Cars Inc. in Gothenburg*
AD 2005 no. 69 *The Church's Association of University Graduates v. The Swedish Church's Association of Parishes and Häverö and Singö Parishes in Hallstavik*
AD 2005 no. 63 *JämO v. The State of Sweden through the Swedish Armed Forces*
AD 2005 no. 32 *The Swedish Association of Graduate Engineers and M.K. in Stockholm v. T. & N. Management Inc. in Stockholm*
AD 2005 no. 22 *JämO v. ALMEGA Service Associations and the Swedish Postal Service Inc. in Stockholm*
AD 2005 no. *21 The Swedish Municipal Workers' Union and A.Ö. on Ingarö v. The Association of Healthcare Companies and Attendo Care Inc. in Stockholm*
AD 2005 no. 14 *The Swedish Teachers' Union v. ALMEGA Service Employers' Associations and K.E.M. in Skarpnäck*
AD 2005 no. 7 *N.K. in Norrköping v. Nor Di Cuhr Inc. in Norrköping*
AD 2005 no. 3 *DO v. Comsol Inc. in Stockholm*
AD 2004 no. 44 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*
AD 2004 no. 22 *A.K.T. in Malmö v. Copenhagen Malmö Port Inc. in Malmö*
AD 2004 no. 8 *DO v. Malmö Municipality*
AD 2003 no. 74 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association*
AD 2003 no. 73 *DO v. The Swedish Metal Trades Employers' Association and Westinghouse Atom Inc. in Västerås*
AD 2003 no. 70 *The Swedish Federation of Salaried Employees in the Hospital and Public Health Services v. Västmanland County Council in Västerås*
AD 2003 no. 63 *DO v. DemÅplock in Gothenburg Inc. in Lindome*
AD 2003 no. 58 *DO v. Swede-Eye Inc. in Täby*
AD 2003 no. 55 *DO v. The Swedish Social Insurance Administration and Jämtland County's General Social Insurance Administration in Östersund*
AD 2003 no. 54 *Gothenburg Municipality, District administration Majorna v. M.H. in Gothenburg*
AD 2003 no. 32 *The Swedish National Union of Local Government Officers v. Södertälje Municipality*
AD 2003 no. 13 *The Salaried Employees' Union HTF v. My Travel Airways in Köpenhamn, Danmark*
AD 2002 no. 128 *DO v. Service Companies Employers' Association and GfK Sverige Inc. in Lund*
AD 2002 no. 102 *Sif v. ALMEGA Service Associations and Casino Cosmopol Inc. in Stockholm*
AD 2002 no. 54 *L.G-C. in Haverdal v. Boods Färg, S.K. Inc. in Halmstad*
AD 2002 no. 45 *JämO v. Västmanland County Council*
AD 2001 no. 76 *JämO v. Stockholm County Council*
AD 2001 no. 61 *JämO v. The Swedish Metalworking Industries' Association and Nobel Biocare*

AD 2001 no. 51 *SACO-S through the Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Agency for Government Employers*
AD 2001 no. 13 *JämO v. Örebro County Council (II)*
AD 1999 no. 51 *ALMEGA Industrial and Chemical Employers' Association v. The Swedish Industrial Workers' Union as well as The Swedish Industrial Workers' Union v. ALMEGA Industrial and Chemical Employers' Association and Shell Refinery Inc. in Gothenburg*
AD 1999 no. 29 *LEDARNA v. ALMEGA Service Associations and Partena Clean Inc. in Stockholm*
AD 1998 no. 134 *DO v. Otto Farkas Bilskadeverkstad Inc. in Växjö*
AD 1997 no. 68 *The Swedish Association of Graduate Engineers v. Mjölby Municipality*
AD 1997 no. 61 *The Swedish Association of Graduate Engineers v. Österåker Municipality*
AD 1997 no. 16 *JämO v. Umeå Parish*
AD 1996 no. 85 *The National Union of Teachers in Sweden v. Bollnäs Municipality*
AD 1996 no. 82 *The National Union of Teachers in Sweden v. Danderyd Municipality*
AD 1996 no. 79 *The Swedish Union of Local Government Officers v. Karlskoga Municipality*
AD 1996 no. 55 *The Swedish Teachers' Union v. Bollnäs Municipality*
AD 1996 no. 41 *JämO v. Örebro County Council (I)*
AD 1996 no. 10 *The Union of Swedish Civil Servants v. The University College of Film, Radio, Television and Theatre in Stockholm*
AD 1995 no. 158 *JämO v. Kumla Municipality*
AD 1995 no. 68 *The Association of the Church of Sweden Employees v. Cathedral Chapter in Skara diocese*
AD 1995 no. 74 *The Salaried Employees' Union HTF v. Wenceslao R. med firma WR Förlag in Upplands Väsby*
AD 1993 no. 49 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. The State of Sweden through the Swedish Immigration Board*
AD 1993 no. 30 *The Swedish Metalworkers' Union v. TVAB in Sundbyberg*
AD 1991 no. 139 *Age-Svets Inc. in Solna v. Michael Ahlberg in Solna*
AD 1991 no. 111 *The Swedish Miners' Union v. SFO-branch committee and Luassavaara-Kiirunavaara Inc. in Luleå*
AD 1991 no. 65 *The Commercial Employee's Union v. Sunny Beach in Varberg Inc.*
AD 1991 no. 62 *The Swedish Union of Journalists v. The Swedish Newspaper Publishers' Association and Swedish Radio Local Inc. in Stockholm*
AD 1991 no. 6 *Björn-Olof Belwin in Linköping v. Uppsala County Council*
AD 1990 no. 134 *The Swedish Building Workers' Union v. The Swedish Construction Federation and Kullenbergbyggen Göteborg Inc. in Hisings Backa*
AD 1989 no. 122 *The Swedish Municipal Workers' Union v. Östergötland County Council*
AD 1989 no. 40 *The Swedish State Employees' Union v. Gothenburg Municipality*
AD 1988 no. 50 *Helena Tepponen in Kvillsfors v. The Association of Ädelfors Folk High School in Holsbybrunn*
AD 1987 no. 152 *JämO v. The State of Sweden through Gothenburg University*

AD 1987 no. 140 *The Swedish National Union of Local Government Officers v. City of Stockholm*
AD 1987 no. 132 *The Swedish Metal Trades Employers' Association v. The Swedish Union of Clerical and Technical Employees in Industry*
AD 1987 no. 101 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association and Thorn EMI Belysning Inc. in Solna*
AD 1987 no. 98 *JämO v. City of Stockholm*
AD 1987 no. 83 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish National Agency for Education*
AD 1987 no. 67 *Helsingborg's Local Federation of the Central Organization of Swedish Workers v. Bjuv Municipality*
AD 1987 no. 51 *The Swedish Association of Vocational Teachers v. Nacka Municipality*
AD 1987 no. 35 *JämO v. The Swedish Newspaper Publishers' Association and Framtiden Press Inc. in Malmö*
AD 1987 no. 23 *The National Union of Teachers in Sweden v. Sundsvall Municipality*
AD 1987 no. 8 *The Swedish Metalworkers' Union v. The Swedish Metal Trades Employers' Association and ASEA Inc. in Västerås*
AD 1987 no. 3 *The Swedish Teachers' Union v. Uddevalla Municipality*
AD 1987 no. 1 *The Swedish Association of Graduates in Social Science, Personal and Public Administration, Economics and Social Work, SSR v. Gävle Municipality*
AD 1986 no. 103 *JämO v. Uppsala Parish in Uppsala*
AD 1986 no. 87 *The Swedish Teachers' Union v. Gullspång Municipality*
AD 1986 no. 84 *The Swedish Medical Association v. Jönköping County Council*
AD 1986 no. 67 *The Swedish Municipal Workers' Union v. Stockholm Transport Inc. in Stockholm*
AD 1985 no. 134 *The Salaried Employees Union v. The Swedish Newspaper Publishers' Association and Dagens Nyheter Inc. in Stockholm*
AD 1985 no. 104 *The Salaried Employees Union v. The Swedish Commerce Employers' Association Central Group and SCANAIR in Bromma*
AD 1985 no. 65 *The Swedish Electricians' Union v. The Swedish Commerce Employers' Association Central Group and Schönborgs Ljud and Bild Inc. in Jönköping*
AD 1984 no. 140 *The Swedish National Union of Local Government Officers v. Stockholm County Council*
AD 1984 no. 120 *JämO v. The Swedish Federation of United Stevedores and Wallhamn Hamn Inc. in Skärhamn*
AD 1984 no. 100 *JämO v. The State of Sweden through the National Swedish Board of Agriculture*
AD 1984 no. 22 *JämO v. Lessebo Municipality*
AD 1984 no. 12 *Gertrud Anljung, B.A. in Lund v. The State of Sweden through the Swedish Agency for Government Employers*
AD 1984 no. 6 *JämO v. The State of Sweden through the National Swedish Police Board*
AD 1984 no. 1 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers*
AD 1983 no. 107, *Brita Lempiäinen in Åbo, Finland, et al. v. Johnson Line Inc. in Stockholm*

AD 1983 no. 104 *JämO v. The State of Sweden through the Swedish National Labour Market Board*

AD 1983 no. 102 *TCO's Section of Civil Servants v. The State of Sweden through the Swedish Agency for Government Employers*

AD 1983 no. 87 *The Swedish Federation of Salaried Employees in the Hospital and Publish Health Services v. Örebro County Council*

AD 1983 no. 83 *The Swedish Food Workers' Union v. Kalmar Municipality*

AD 1983 no. 78 *The Swedish Musician's Union Entertainment Business Employees' Association v. Hörby Municipality*

AD 1983 no. 50 *JämO v. The State of Sweden through the Swedish National Labour Market Board*

AD 1982 no. 139 *JämO v. Örebro County Council*

AD 1982 no. 102 *Swedish Association of Graduates in Law, Business Administration and Economics, Computer and Systems Science, Personnel Management and Social Science (JUSEK) v. Kalmar County Council*

AD 1982 no. 96 *The Swedish Newspaper Publishers' Association v. The Graphic Workers' Union*

AD 1982 no. 56 *The Employers Association of the Swedish Wood Products Industry v. The Swedish Wood Workers' Union*

AD 1982 no. 17 *JämO v. The State of Sweden through the Swedish Agency for Government Employers*

AD 1981 no. 171 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality*

AD 1981 no. 169 *JämO v. Upplands Väsby Municipality*

AD 1981 no. 109 *The Swedish Union of Clerical and Technical Employees in Industry v. Kalmar Municipality*

AD 1981 no. 50 *Peter D in Onsala v. Färgmaterial, Inc. in Stockholm*

AD 1977 no. 13 *Astrid Angantyr in Malmö v. Malmö Municipality*

Equal Opportunity Council Decisions:

Jämställdhetsnämnden Beslut, *JämO v. Närkes Elektriska Inc.*, 2 February 2004, available at *JämO's website*: http://www.jamombud.se/jamojuridik/docs/narkes_elektriska.pdf.

Jämställdhetsnämnden Beslut, *Sveriges psykologförbund v. Stockholms län landsting*, 9 August 2005, available at *JämO's website*: http://www.jamombud.se/jamojuridik/docs/psykologforbundet.pdf

Collective Agreements

The Federation of Bank Employees and the Financial Sector Union of Sweden Collective Agreement for Employees in the Banking Sector valid from 1 January 2006 to 21 December 2008

Collective Agreement for the Timber Mill Sector entered into between the Association of Swedish Timber Industries and the Federation of Swedish Forestal and Agricultural Employers valid between 1 April 2004 and 31 March 2007

Collective agreement between the Branch and Employer Organization for the Ventilation, Water, Sewage and Cooling Sector and Byggnads, the Swedish Building Workers' Union valid from 1 April 2004 to 31 March 2007

Collective Agreement between the Employers' Alliance – Branch Committee Education and Adult Education, The Swedish Adult Education Teachers' Association, the Swedish Union of Local Government Officers, the Swedish Municipal Workers' Union, the Swedish Teachers' Union and the Swedish National Teachers' Organization of Unions from 2004–2007

Collective Agreement between the Swedish Newspaper Publishers' Association and the Graphic and Media Workers' Union valid from 1 June 2004 to 31 May 2007

Employment Terms and Conditions in IT Companies, valid from 1 April 2004 to 31 March 2007, ALMEGA, The Swedish Union of Clerical and Technical Employees in Industry, CF, JUSEK and the Association of Business Administration Graduates

Equality Agreements entered into between SAF-PTK och SAF-LO 1977

Equality Agreement entered into between SAF, LO and PTK on 3 March 1983

General Employment and Wage Terms and Conditions for employees within health and other care between the Association of Cooperative and Non-profit Enterprises, the Association of Swedish Occupational Therapists, Swedish Association of Registered Physiotherapists, the Swedish Municipal Workers' Union, the Swedish Union of Local Government Officers and the Swedish Association of Health Professions valid from 1 June 2004 to 31 May 2007

Swedish Agency for Government Employers ALFA General Wage and Benefits Agreement, Central Collective Agreement 2005:4, dated 5 May 2005

United Kingdom

Statutes

Work and Families Act 2006

Equality Act 2006

Employment Tribunals Act 1996

The Employment Rights Act 1996

The Employment Act 1989

Sex Discrimination Act 1975

European Communities Act 1972

The Equal Pay Act 1970 (as amended 2005)

Regulations

Statutory Paternity Pay and Statutory Adoption Pay (General) and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates)(Amendment) Regulations 2006

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

Fixed-term Employees Regulations 2002

The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002

The Flexible Working (Procedural Requirements) Regulations 2002

European Communities (Designation)(No. 3) Order 2002 (S.I. 2002/1819)

Cases

Alabaster v. Barclays Bank Plc (formerly Woolwich Plc) and Another [2005] I.C.R. 1246 (Civ)

Alabaster v. Woolwich Plc (Case -147/02) [2005] I.C.R. 695 (Civ)

Clay Cross (Quarry Services) Ltd. v. Fletcher [1978] 1 W.L.R. 1429 [1979] 1 ALL E.R. 474

Clayton v. Vigers [1989] I.C.R. 713 (EAT)

Degnan and other v. Redcar and Cleveland Borough Council, Case No. A2/2004/1746/EA TRF (Civ), 2005 WL 1410008

Eaton Ltd v. Nuttall [1977] Ir.L.R. 71 (EAT)

Fletcher and Others v. NHS Pensions Agency and Another [2005] I.C.R. 1458

Hardy v. Hansons Plc v. Lax [2005] I.C.R. 1565 (Civ)

Hoyland v. Asda Stores Ltd [2005] I.C.R. 1235 (EAT)

James v. Eastleigh BC [1990] 2 AC 751; [1990] Ir.L.R. 307

Levez v. TH Jennings (Harlow Pools) Limited [1999] Ir.L.R. 764

London Underground Ltd. v. Edwards [1999] I.C.R. 494 [1998] Ir.L.R. 364 (Civ)

Ms L McKibbin v. Telewest Communications (Midlands and North West) Ltd. (2) Mr. Phil Beck, 18 February 2000, ET No. 2102542/98 & 2100989/99 D7264 and D7448

Mrs E McLaughlin v. London Borough of Southwark, 8 January 1998, IT No. 7575/97 D5933

Marshall v. F. Woolworth & Co. Ltd., COIT 1404/80, ET.

Ms Mayo Thalia Welch v. MSB International PLC, 22 October 1998, ET No. 1100300/98/MP D6391

Mills and another v. Marshall [1998] Ir.L.R. 494

Phillips P and members in Peake v. Automotive Products Limited [1977] I.C.R. 480 (EAT)

Mr S Radley v. Department for Work 2005 WL 2608282

Ms. A Sharp v. Caledonia Services Ltd, No. UK EAT/0041/05/ZT, Employment Appeal Tribunal, 2005 WL 29999767

Sherriff v. Klyne Tugs (Lowestoft) Ltd. [1999] Ir.L.R. 481 (Civ)

Shields v. E. Coomes (Holdings) Ltd. [1978] I.C.R. 1159 (Civ)

Ms S Villalba v. Merrill Lynch & Co Inc & Others, Appeal No. UK EAT/0223/05/LA, Employment Appeal Tribunal dated 31 March 2006

United States

Federal

Statutes

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634
Americans with Disabilities Act of 1967, 42 U.S.C. §§ 12101-12117
Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988
The Equal Pay Act, 29 U.S.C. § 206(d)
Fair Labor Standards Act of 1938 29 U.S.C. § 20
The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*
Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k)
Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Regulations

Exec. Order No. 11246, 3 C.F.R. § 339 (1965)
Exec. Order No. 11246 Companion Regulations, 41 C.F.R. § 60
Exec. Order No. 8802
Exec. Order No. (1840), President Martin Van Buren, Washington City, 31 March 1840
Title VII Companion Regulations, 29 C.F.R. § 1604 *et seq*
Equal Pay Act Companion Regulations, 29 C.F.R. § 1620 *et seq.*
Equal Pay Act Companion Regulations, 29 C.F.R. § 1621 *et seq.*
FMLA Companion Regulations, 29 C.F.R. § 825 *et seq.*

Case Law

United States Supreme Court

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)
Alyeska Pipeline Serv. Co. v. Wilderness Soc.y, 421 U.S. 240 (1975)
Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984)
Brown v. Board of Education, 347 U.S. 483 (1954)
Burlington Northern and Santa Fe Railway Co. v. White, – U.S. – , 126 S. Ct. 2405 (2006)
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980)
Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978)
Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992)
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)
Desert Palace Inc. v. Costa, 539 U.S. 90 (2003)
Dothard v. Rawlinson, 433 U.S. 321 (1977)

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)
EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981)
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)
Griggs v. Duke Power, 401 U.S. 424 (1971)
Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977)
Heart of Atlanta, Inc. v. United States, 379 U.S. 241 (1964)
Hensley v. Eckerhart, 461 U.S. 424 (1983)
International Brotherhood of the Teamsters v. United States, 431 U.S. 324 (1977)
Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999)
Landgraf v. U.S.I. Film Prod., 511 U.S. 244 (1994)
Lochner v. New York, 198 U.S. 45 (1905)
MacLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988)
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)
McFarland v. Scott, 512 U.S. 849 (1994)
Muller v. Oregon, 208 U.S. 412 (1908)
National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)
Pasquantino v. United States, 544 U.S. 349 (2005)
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001)
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)
Raytheon Co. v. Hernandez, 540 U.S. 44 (2003)
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)
Russello v. United States, 464 U.S. 16 (1983)
St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)
Smith v. City of Jackson, Miss., 544 U.S. 228 (2005)
Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944)
Sullivan v. Everhart, 494 U.S. 83 (1990)
Sutton v. United States Airline, Inc., 527 U.S. 471 (1999)
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)
UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991)
United Automobile Workers v. Johnson Controls, 499 U.S. 187 (1991)
United States v. City of Chicago, 400 U.S. 8 (1970)
Wallace Corp. v. NLRB, 323 U.S. 248 (1944)
Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989)
Washington Cty. v. Gunther, 452 U.S. 161 (1981)
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)

Federal Circuit Courts of Appeal

Ajayi v. Arammark Bus. Servs., Inc., 336 F.3d 520 (7th Cir. 2003)
Aldrich v. Randolph Central School District, 963 F.2d 520 (2nd Cir.) *cert. denied,* 506 U.S. 965 (1992)

American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) v. State of Washington, 770 F.2d. 1401 (9th Cir. 1985)
Ameritech Ben. Plan Committee v. Communication Workers of America, 220 F.3d 814 (7th Cir. 2000)
Bacon v. Honda Mfg. of America, Inc., 370 F.3d 565 (6th Cir. 2004)
Balmer v. HCA, Inc., 423 F.3d 606 (6th Cir. 2005)
Beck-Wilson v. Principi, 441 F.3d 353 (6th Cir. 2006)
Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984)
Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996)
Black Fire Fighters Ass'n v. City of Dallas, 905 F.2d 63 (5th Cir. 1990)
Braswell v. City of El Dorado, 187 F.3d 954 (8th Cir. 1999)
Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994)
Brousard-Norcross v. Augustana College Assoc., 935 F.2d 974 (8th Cir. 1991)
Brown v. Coach Stores, Inc., 163 F.3d 706 (2nd Cir. 1998)
Buie v. Quad/Graphics, Inc., 366 F.3d 496 (7th Cir. 2004)
Buntin v. Breathitt County Board of Education, 134 F.3d 796 (6th Cir. 1998)
Carter v. United Food and Commercial Workers, Local No. 789, 963 F.2d 1078 (8th Cir. 1992)
Diaz v. Am. Tel. & Tel., 752 F.2d 1356 (9th Cir. 1985)
EEOC v. Aetna Ins. Co., 616 F.2d 719 (4th Cir. 1980)
EEOC v. J.C. Penney Co., 843 F.2d 249 (6th Cir.1992)
Gee v. Principi, 289 F.3d 342 (5th Cir. 2002)
Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir. 1988)
Griffin v. Air Line Pilots Ass'n Int'l., 32 F.3d 1079, 1083 (7th Cir. 1994)
Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)
Hull v. Stoughton Trailers, LLC., 445 F.3d 949 (7th Cir. 2006)
Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970)
Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972)
Hodgson v. Square D Co., 459 F.2d 805 (6th Cir. 1972)
Hutchins v. Int'l Bhd. of Teamsters, 177 F.3d 1076 (8th Cir. 1999)
Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997)
Int'l Bhd. of Elec. Workers, AFL-CIO, Local Unions Nos. 605 & 985 v. Miss. Power & Light Co., 442 F.3d 313 (5th Cir. 2006)
Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995)
Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005)
Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000)
Jefferies v. Harris Cty. Community Ass'n, 615 F.2d 1025 (5th Cir. 1980)
Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992)
Kahn v. Dean & Fulkerson, P.C., 238 F.3d. 421 (6th Cir. 2000)
King v. Preferred Tech. Group, 166 F.3d 887 (7th Cir. 1999)
Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982)
Krenik v. County of Le Sueur, 47 F.3d 953 (8th Cir. 1995)
Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984)

Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998), *vacated on other grounds,* 527 U.S. 1031 (1999)
McBurney v. Stew Hansen's Dodge City, Inc., 398 F.3d 998 (8th Cir. 2005)
McDonnell v. Miller Oil Co., 134 F.3d 638 (4th Cir. 1998)
Manning v. Metropolitan Life Ins. Co., 127 F.3d 686 (8th Cir. 1997)
Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078 (6th Cir. 1994)
Marshall v. Dallas Ind. Sch. Dist., 605 F.2d 191 (5th Cir. 1979)
Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997)
Miranda v. B&B Cash Grocery Store, 975 F.2d 1518 (11th Cir. 1992)
Mulhall v. Advance Security, Inc., 19 F.3d 586 (11th Cir.) *cert. denied,* 513 U.S. 919 (1994)
O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349 (11th Cir. 2000)
Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005)
Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981)
In re Pan American World Airways, Inc., 905 F.2d 1457 (11th Cir. 1990)
Pierce v. Duke Power Co., 811 F.2d 1505 (4th Cir. 1987)
Radue v. Kimberley-Clark Corp., 219 F.3d 612 (7th Cir. 2000)
Rice v. Sunrise Express, Inc., 209 F.3d 1008 (7th Cir. 2000)
Robinson v. Pittsburgh, 120 F.3d 1286 (3rd Cir. 1997)
Rochon v. Gonzales, 438 F.3d 1211 (C.A.D.C. 2006)
Rosenfeld v. Southern Pacific Co. 444 F.2d 1219 (9th Cir. 1971)
Ryduchowski v. Port Authority of New York & New Jersey, 203 F.3d 135 (2nd Cir. 2000)
Shultz v. American Can Co. – Dixie Products, 424 F.2d 356 (8th Cir. 1970)
Simpson v. Merchants & Planters Bank, 441 F.3d 572 (8th Cir. 2006)
Strag v. Board of Trustees, 55 F.3d 943 (4th Cir. 1995)
Tenkku v. Normandy Bank, 348 F.3d 737 (8th Cir. 2003)
Throneberry v. McGehee Desha County Hospital, 403 F.3d 972 (10th Cir. 2005)
Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001)
Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969)
Wernsing v. Dept. of Human Services, State of Illinois, 427 F.3d 466 (7h Cir. 2005)

Federal District Courts

Bertotti v. Philbeck, Inc., 827 F.Supp. 1005 (S.D.Ga. 1993)
Brennan v. Sears, Roebuck & Co., 410 F.Supp. 84 (N.D. Iowa 1976)
Brown v. Super K-Mart, No. 98 C 3498, 1999 U.S. Dist. Lexis 9525 (N.D.Ill., 14 June 1999)
Diamond v. T. Rowe Price Associates, Inc., 852 F.Supp. 372 (D. Md. 1994)
Dubowsky v. Stern, Lavinthal, Norgaard & Daly, 922 F.Supp. 985 (D.N.J. 1996)
EEOC v. Mercy Health Ctr., 29 Fair Empl. Prac. Case (BNA) 159 (W.D. Okla. 1982)
EEOC v. Regency Architectural Metals Corp., 896 F.Supp. 260 (D.Conn. 1995)
EEOC v. Reynolds Metals Co., 212 F.Supp.2d 530 (E.D.Va. 2002)
EEOC v. Shelby Cty. Govt., 707 F.Supp. 969 (W.D.Tenn. 1988)
Fesel v. Masonic Home of Del., Inc., 447 F.Supp. 1346 (D.Del. 1978), *aff'd without op.*, 591 F.2d 1334 (3rd Cir. 1979)

Flockhart v. Iowa Beef Processors, Inc., 192 F.Supp.2d 947 (N.D. Iowa 2001)
Glover v. Kindercare Learning Centers, Inc., 980 F.Supp. 437 (M.D. Ala. 1997)
Graham v. Bendix Corp., 585 F.Supp. 1036 (N.D.Ind. 1984)
Hall v. Missouri Highway and Transportation Comm'n, 995 F.Supp. 1001 (E.D.Mo. 1998)
Hodgson v. Washington Hospital, 9 F.E.P. 612 (W.D.Pa. 1971)
Lovell v. BBNT Solutions, LLC, 299 F.Supp.2d 612 (E.D. Va. 2004)
Lovell v. BBNT Solutions, LLC, 295 F.Supp.2d 611 (E.D. Va. 2003)
Mazzella v. RCA Global Comm. Inc., 642 F.Supp. 1531 (S.D.N.Y. 1986) aff'd, 814 F.2d 653 (2nd Cir. 1987)
Mieth v. Dothard, 418 F.Supp. 1169 (M.D.Al. 1976)
Mullenix v. Forsyth Dental Infirmary for Children, 965 F.Supp. 120 (D.Mass. 1996)
Norwood v. Dale Maint. Sys., Inc., 590 F.Supp. 1410 (S.D.W.Va. 1982)
Payne v. Huntington Union Free Sch. Dist., 219 F.Supp. 2d 273 (E.D.N.Y. 2002)
Pfeiffer v. Lewis County, 308 F.Supp. 2d 88 (N.D.N.Y. 2004)
Prewett v. State of Alabama Dept. of Veteran Affairs, 419 F.Supp.2d 1338 (M.D. Ala. 2006)
Reid v. State of N.Y., 570 F.Supp. 1003 (S.D.N.Y. 1983)
Stockhoff v. D.E. Baugh Co., 2003 U.S. Dist. Lexis 3619 (S.D. Ind. Mar. 10, 2003)
U.S. v. City of Chicago, 411 F.Supp. 218 (D.C.Ill. 1976)

Unpublished Cases

EEOC v. Abercrombie & Fitch Stores, Inc., Case File No. 04-4731 (N.D.Cal. Apr. 14, 2005)(unpublished)
EEOC v. Dial Corp., Case File No. 3:02-CV-10109 (S.D. Iowa Sept. 29, 2005)(unpublished)
EEOC v. EGW Temps, Inc. (W.D.N.Y. Sept. 1 2005)(unpublished)
EEOC v. Johnson Int'l, Inc. (E.D. Wis. Dec. 27, 2004)(unpublished)
EEOC v. Morgan Stanley & Co., Inc. (S.D.N.Y., 12 July 2004)(unpublished)

Other Federal Documents

EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel § 491.2 (1972)
2 EEOC Compliance Manual

State Law

Legislation

Cal. Lab. Code § 1197.5
Minn.Stat. § 43A.01-3, -14a, and -22a
Minn.Stat. § 181.67(1)

Minn.Stat. § 181.940 *et seq.*
Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363A.01 *et seq.*

Case law

Commonwealth v. Hunt, 42 Mass. (1 Met.) 111 (1842)
Dyna-Med, Inc. v. Fair Employment & Housing Com., 43 Cal.3d 1379 (1987)

International Bodies:

Council of Europe

Conventions

The European Social Charter of 1961, revised 1996
The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

Case Law

European Court of Human Rights

AB Kurt Kellermann v. Sweden, European Court of Human Rights, judgment dated 26 October 2004, Application No. 41579/98
Langborger v. Sweden, European Court of Human Rights, judgment dated 22 June 1989, Application No. 11179/84

European Commission of Human Rights

Smeeton-Wilkinson v. Sweden, no. 24601/94, Commission decision dated 28 February 1996
Yom-tov v. Sweden, no. 12962/87, Commission decision dated 7 September 1990, Decisions and Reports 66 at 111
Stallarholmens Plåtslageri o Ventilation Handelsbolag and others v. Sweden, no. 12733/87, Commission decision of 7 September 1990, Decisions and Reports 66 at 111
Dyrwold and others v. Sweden, no. 12259/86, Commission decision dated 7 September 1990, Decisions and Reports 66 at 111

International Labour Organization of the United Nations ("ILO")

Conventions (reverse chronology)

ILO Convention No. 111, Discrimination (Employment and Occupation) Convention of 1958
ILO Convention No. 100, Equal Remuneration Convention of 1951
ILO Convention No. 89, Night Work (Women) Convention (Revised) of 1948
ILO Convention No. 45, Underground Work (Women) Convention of 1935
ILO Convention No. 6, Night work of Young Persons (Industry) Convention of 1919
ILO Convention No. 5, Minimum Age (Industry) Convention of 1919
ILO Convention No. 4, Night work (Women) Convention of 1919
ILO Convention No. 3, Maternity Protection Convention of 1919
ILO Convention No. 2, Unemployment Convention of 1919
ILO Convention No. 1, Hours of Work (Industry) Convention of 1919

Secondary Sources

Books

Axel Adlercreutz, KOLLEKTIVAVTALET – STUDIER ÖVER DESS TILLKOMSTHISTORIA (Lund 1954)
Anders Agell, ÄKTENSKAP SAMBOENDE PARTNERSKAP (3rd ed. Iustus 2004)
Anders Agell, UNDERHÅLL TILL BARN OCH MAKE (4 ed. Iustus 1988)
Judith A. Baer, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE (Princeton 1999)
Catherine Barnard, EC EMPLOYMENT LAW (Oxford 2000)
Robert Belton, Dianne Avery, EMPLOYMENT LAW DISCRIMINATION, CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (6th ed. West 1999)
Robert Belton, Dianne Avery, Maria Ontiveros and Roberto Corrado, EMPLOYMENT LAW DISCRIMINATION, CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (7th ed. West 2004)
George A. Bermann, Roger J. Goebel, William J. Davey, Eleanor M. Fox, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW (West 1993)
Barbro Björkhem *et al.* ed., RÄTT ATT RÖSTA (Swedish Parliament Sweden 2002)
Hans-Peter Blossfeld and Catherine Hakim, BETWEEN EQUALIZATION AND MARGINALIZATION – WOMEN WORKING PART-TIME IN EUROPE AND THE UNITED STATES OF AMERICA (Oxford 1997)
Ruth Bohman, KVINNOR I FACKLIG OCH POLITISK KAMP 1880-1920: KRING BORGERLIGA OCH PROLETÄRA KVINNORÖRELSER I SVERIGE (Zenit Häften 2 1979)
Margareta Brattström, MAKARS PENSIONSRÄTTIGHETER (Iustus 2004)

Niklas Bruun *et al.*, THE NORDIC LABOUR RELATIONS MODEL: LABOUR LAW AND TRADE UNIONS IN THE NORDIC COUNTRIES – TODAY AND TOMORROW (Dartmouth 1992)

Catherina Calleman, KVINNORS ANSTÄLLNINGSSKYDD (Norstedts 1991)

Catharina Calleman, TURORDNING VID UPPSÄGNING (Norstedts 2000)

Iain Cameron, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. Iustus 2002)

Iain Cameron & Alessandro Simoni eds., DEALING WITH INTEGRATION (Iustus 1996)

Lynn Carlson, *The Beginning of the "Masculine Renaissance"* in Ulla Wikander, Alice Kessler-Harris and Jane Lewis, PROTECTING WOMEN – LABOR LEGISLATION IN EUROPE, THE UNITED STATES, AND AUSTRALIA, 1880–1920 (University of Illinois Press 1995)

Christina Carlsson, KVINNOSYN OCH KVINNOPOLITIK (Lund 1986)

Dan Clawson, THE NEXT UPSURGE – LABOR AND NEW SOCIAL MOVEMENTS (Cornell 2003)

Columbia Law Review Ass'n *et al.* eds., THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (18th ed. 2005)

Sten E.Son Edlund, TVISTEFÖRHANDLINGAR PÅ ARBETSMARKNADEN – EN RÄTTSLIG STUDIE AV TVÅ RIKSAVTAL I TILLÄMPNING (Norstedts 1967)

Ronnie Eklund, *et al.* ed., FESTSKRIFT TILL HANS STARK (Jure 2001)

Ronnie Eklund, ed., RÄTTEGÅNGEN I ARBETSTVISTER – LAGKOMMENTAR OCH UPPSATSER UTGIVNA AV ARBETSRÄTTSLIGA FÖRENINGEN (2 ed. Norstedts 2005)

Reinhold Fahlbeck, OM PROCESSRÄTT (Norstedts 1974)

Lotta Forssman and Marianne Paas, DE FÅ VARA TACKSAMMA ATT VI GE DEM ARBETE (Stockholm 1976)

Renée Frangeur, YRKESKVINNA ELLER MAKENS TJÄNARINNA? STRIDEN OM YRKESRÄTTEN FÖR GIFTA KVINNOR I MELLANKRIGSTIDENS SVERIGE (Lund 1998)

Anna Fransson and Irene Wennemo, MELLAN PRINCIP OCH PRAKTIK – EN RAPPORT OM FÖRÄLDRAFÖRSÄKRINGEN (Landsorganisationen i Sverige 2005)

Susanne Fransson, LÖNEDISKRIMINERING (Iustus 2000)

Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (2nd ed. New York 1985)

Birgitta Furuhagen, ed., ÄVENTYRET SVERIGE – EN EKONOMISK OCH SOCIAL HISTORIA (Stockholm 1993)

Lennart Geijer, ARBETSGIVARE OCH FACKFÖRENINGSLEDARE I DOMARSÄTE (Lund 1958)

Lars Gellner and Lars Sydolf, TVISTELÖSNING I ARBETSRÄTTEN (Norstedts 2005)

Carol Gilligan, IN A DIFFERENT VOICE (Harvard 1983)

Tamara K. Hervey, JUSTIFICATION FOR SEX DISCRIMINATION IN EMPLOYMENT (Butterworths 1993)

Yvonne Hirdman, DEN SOCIALISTISKA HEMMAFRUN OCH ANDRA KVINNOHISTORIER (Stockholm 1992)

Irma Irlinger, TCO OCH KVINNORNA – TIDSPERIODEN 1944–1974, STUDIE AV TCOS OCH SIFS ARBETSMARKNADSPOLITIK OCH BEHANDLING AV PRINCIPEN LIKA LÖN FÖR LIKA ARBETE (Uppsala 1990)

Herbert Jacobson, Preskriptions funktioner – Fordringsrättsliga och ersättningsrättsliga problem i komparativ belysning (Visby 2005)
Jämställdhetsombudsmannen, Våra Läromödrar och Lärofäder, Jämställdhetsförkämpar i svensk historia från 1700-talet till 1900-talet (Stockholm 2000)
Alice Kessler-Harris, In Pursuit of Equity – Women, Men and the Quest for Economic Citizenship in 20th Century America (Oxford 2001)
Alice Kessler-Harris, Out to Work – A History of Wage-earning Women in the United States (Oxford 2003)
Kathryn Kish Sklar, Women's Rights Emerge within the Antislavery Movement 1830–1870 (Bedford 2000)
Lotta Lerwall, Könsdiskriminering – En analys av nationell och internationell rätt (Iustus 2001)
Nelson Lichtenstein, State of the Union (Princeton 2002)
Göran Lind, Common Law Marriage – ett rättsinstitut för samboende. Ursprung – Gällande rätt – Framtid (Uppsala 2006)
Jonas Malmberg, Anställningsavtalet – Om Anställningsförhållandets individuella reglering (Iustus 1997)
Bengt Nilsson, Kvinnor i statens tjänst (Uppsala 1996)
Gudrun Norborg, ed. 13 Kvinnoperspektiv på rätten (Iustus 1995)
Lars-Arne Norborg, Sveriges historia under 1800- och 1900- talen (Almqvist & Wiksell 1995)
Nordic Council, Perspectives of Equality – Work, women and family in the Nordic Countries and EU (Copenhagen 2000)
Kevät Nousiainen, Responsible Selves – Women in the Nordic Legal Culture (Ashgate 2001)
Ann Numhauser-Henning, ed., Normative Perspektiv – Festskrift till Anna Christensen (Lund 2000)
Svante Nycander, Makten över arbetsmarknaden – Ett perspektiv på Sveriges 1900-tal (SNS Förlag 2002)
Birgitta Nyström, ed., Den Svenska Arbetsrätten i ett Nytt Europa (Carlsson bokförlag 1993)
Birgitta Nyström, Medling i arbetstvister (Norstedts 1990)
David M. O'Brien, Storm Center – The Supreme Court in American Politics (6th ed. Norton 2003)
Síofra O'Leary, Employment Law at the European Court of Justice (Hart Publishing 2002)
Camilla Palmer, et al., Discrimination Law Handbook (LAG 2002)
Vicki Paskalia, Free Movement of Persons and Social Security, Gender Implications of EC Regulation 1408/71 (Stockholm University 2004)
Stephen B. Presser and Jamil S. Zainaldin, Law and American History, Cases and Materials (West 1980)
Gunnar Qvist, Kvinnofrågan i Sverige 1809–1846 (Gothenburg 1960)
Gunnar Qvist, Statistik och Politik. Landsorganisationen och kvinnorna på arbetsmarknaden (Prisma 1974)

Gulli Petrini, KVINNORÖSTRÄTTEN RIKSDAGSHISTORIA I SVERIGE 1884–1912 (Stockholm 1914)

Teresa Rees, MAINSTREAMING EQUALITY IN THE EUROPEAN UNION (London Routledge 1998)

Paul Samuel Reinsch, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (Wisconsin 1899), reprinted by Gordon Press 1977

Mia Rönmar, ARBETSLEDNINGSRÄTT OCH ARBETSSKYLDIGHET – EN KOMPARATIV STUDIE AV KVALITATIV FLEXIBILITET I SVENSK, ENGELSK OCH TYSK KONTEXT (Juristförlaget i Lund 2004)

Scandinavian Studies in Law Vol. 43, STABILITY AND CHANGE IN NORDIC LABOUR LAW (Stockholm 2002)

Folke Schmidt, FACKLIG ARBETSRÄTT (Juristförlaget 1997)

Folke Schmidt, THE LAW OF LABOUR RELATIONS IN SWEDEN (Harvard 1962)

Suzanne Schlyter, EN MAN OCH EN KVINNA BESKRIVER SITT ARBETE, UNDERSÖKNING AV SPRÅKET I EN JÄMSTÄLLDHETSRÄTTEGÅNG, INFORMATIONSSKRIFT NR. 9 (1986)

Eva Schömer, KONSTRUKTION AV GENUS I RÄTTEN OCH SAMHÄLLET (Iustus 1999)

Silvana Sciarra, Paul Davies and Mark Freedland, eds., EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION – A COMPARATIVE ANALYSIS (Cambridge 2004)

Gabriella Sebardt, REDUNDANCY AND THE SWEDISH MODEL (Iustus 2005)

N.M. Selwyn, SELWYN'S LAW OF EMPLOYMENT (13th ed. LexisNexis UK 2003)

Tore Sigeman, RÄTTEGÅNGEN I ARBETSTVISTER: LAGKOMMENTAR OCH UPPSATSER UTGIVNA AV ARBETSRÄTTSLIGA FÖRENINGEN UNDER REDAKTION AV TORE SIGEMAN (Stockholm 1979)

Gabriella Sjögren Lindquist and Eskil Wadensjö, INTE BARA SOCIALFÖRSÄKRING – KOMPLETTERANDE ERSÄTTNINGAR VID INKOMSTBORTFALL, RAPPORT TILL ESS EXPERTGRUPPEN FÖR STUDIER I SAMHÄLLSEKONOMI 2005:2 (Fritzes 2005)

Eva Maria Svensson GENUS OCH RÄTT – EN PROBLEMATISERING AV FÖRESTÄLLNINGEN OM RÄTTEN (Iustus 1997)

Mark Twain, THE AUTOBIOGRAPHY OF MARK TWAIN (1871)

Lotta Vahlne Westerhäll, DEN STARKA STATENS FALL? EN RÄTTSVETENSKAPLIG STUDIE AV SVENSK SOCIAL TRYGGHET 1950–2000 (Norstedts 2003)

Raymond Wacks, UNDERSTANDING JURISPRUDENCE – AN INTRODUCTION TO LEGAL THEORY (Oxford 2005)

Karin Widerberg, KVINNOR KLASSER OCH LAGAR 1750–1980 (LiberFörlag 1980)

Karin Widerberg, KVINNANS RÄTTSLIGA OCH SOCIALA STÄLLNING I SVERIGE 1750–1976 (Lund 1978)

Ulla Wikander, KVINNORS AND MÄNS ARBETEN: GUSTAVSBERG 1880–1980 (Lund 1988)

Ulla Wikander, Alice Kessler-Harris, Jane Lewis, PROTECTING WOMEN – LABOR LEGISLATION IN EUROPE, THE UNITED STATES AND AUSTRALIA, 1880–1920 (University of Illinois Press 1995)

A.O. Winroth, HANDBOK I SVENSK CIVILRÄTT (Uppsala 1904)
A.O. Winroth, OM TJENSTEHJONSFÖRHÅLLANDET ENLIGT SVENSK RÄTT (Uppsala 1879)
A.O. Winroth, PROFESSOR WINROTHS FÖRELÄSNINGAR I FAMILJRÄTT (Lund 1901)
Kjell Östberg, EFTER RÖSTRÄTTEN – KVINNORS UTRYMME EFTER DET DEMOKRATISKA GENOMBROTTET (Stockholm 1997)

Articles and Reports

Lisa Baldez, Lee Epstein, Andrew Martin, *Does the U.S. Constitution Need an Equal Rights Amendment?,* 35 J. LEGAL STUD. 243 (2006)
Claes Borgström, *Diskriminering bör prövas i allmän domstol,* Lag & Avtal Nr. 7/2001 at 4
Niklas Bruun, *The Nordic Model for Trade Union Activity* in Niklas Bruun *et al.*, THE NORDIC LABOUR RELATIONS MODEL – LABOUR LAW AND TRADE UNIONS IN THE NORDIC COUNTRIES – TODAY AND TOMORROW (Dartmouth 1992)
Thomas Bull, *Arbetsdomstolens Opartiskhet och Europadomstolen*, EUROPARÄTTSLIG TIDSKRIFT No. 4 2005 at 808
Laura Carlson, *Föräldraskap och regelverket på arbetsmarknaden* in Daniel Rauhut and Björn Falkenhall, eds., A2005:15 ARBETSRÄTT, RÖRLIGHET OCH TILLVÄXT (ITPS 2005) at 155
Melissa Childs, *The Changing Face of Unions: What Women Want From Employers,* 12 DePaul Bus.L.J. 390 (Fall/Spring 1999/2000).
Pamela Clayton, SOCIAL CITIZENSHIP AND POLITICAL RIGHTS OF WOMEN IN THE UNITED KINGDOM (Helsinki 1997)
Joanne Conaghan, *The Family-Friendly Workplace in Labor Law Discourse: Some Reflections on London Underground v. Edwards* (Stockholm 2000)(unpublished)
Anita Dahlberg, *Equal Opportunities and collective bargaining in the European Union – Selected Agreements from Sweden Phase II,* European Foundation for the Improvement of Lving and Working Conditions (1996)
Anita Dahlberg, *Jämställdhetslagen som paradox och dekonstruktion* in Gudrun Norborg, ed. 13 KVINNOPERSPEKTIV PÅ RÄTTEN (Iustus 1995)
Luisa Antoniolli Deflorian, *The Dilemma of Affirmative Actions: A Comparison between European Community Law and the American Experience* in Iain Cameron & Alessandro Simoni eds., DEALING WITH INTEGRATION (Iustus 1996)
Stephen E. DeLong, *Sidebar – Get a(n Interesting) Life!,* available at: http://hawk.fab2.albany.edu/sidebar/sidebar.htm
Francis M. Dougherty, *What Constitutes "Establishment" for Purposes of § 6(d)(I) of Equal Pay Act,* 124 A.L.R. FED. 159 (1995)
Per-Anders Edin and Jonas Lagerström, *Blind dates: quasi-experimental evidence on discrimination,* IFAU – Institute for Labour Market Policy Evaluation Working Paper, Uppsala University 2006:4
Ronnie Eklund, *Att ingå avtal om anställning – Ett blad ur arbetsdomstolens praxis* in FESTSKRIFT TILL JAN RAMBERG (Juristförlaget Stockholm 1996)
Ronnie Eklund, *Barnmorskemålet II*, 108 JT 2001–02 at 112

Ronnie Eklund, *"The Chewing Gum Directive" – part-time work in the European Community* in Ronnie Eklund, *et al.* ed., FESTSKRIFT TILL HANS STARK (Jure 2001)
Ronnie Eklund, *Gender-based Affirmative Action* in Jan Rósen, ed., LEX FERENDA – RÄTTSVETENSKAPLIGA STUDIER AV FORSKARE VID STOCKHOLMS UNIVERSITET NR. 50 (Stockholm 1996)
Ronnie Eklund, *Obligatorisk mammaledighet – Nytt vin i gamla läglar* in Ann Numhauser-Henning, NORMATIVA PERSPEKTIV – FESTSKRIFT TILL ANNA CHRISTENSEN (Lund 2000)
Ronnie Eklund, *Sweden: part-time work – welfare or unfair?* in Silvana Sciarra, Paul Davies and Mark Freedland, eds., EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION – A COMPARATIVE ANALYSIS (Cambridge 2004)
Ronnie Eklund, *Är jämställdhetsavtal värda pappret?* , 1990 JT 105
European Industrial Relations Observatory On-line, *EU-Level Social Partners issue Work Programme for 2003–2005*
Reinhold Fahlbeck, *Comparative Labor Law – Quo Vadis?,* 25 COMP. LAB. L. & POL'Y J. 7 (2003)
Reinhold Fahlbeck, *Tankar om arbetsdomstolen – hädiska och andra* in Birgitta Nyström, ed., DEN SVENSKA ARBETSRÄTTEN I ETT NYTT EUROPA (Carlsson bokförlag 1993)
Warren Farrell, *Are Women Earning More Than Men?,* FORBES 12 May 2006
David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?,* 46 AM. J. COMP. L. 719 (1998)
Bryan D. Glass, *The British Resistance to Age Discrimination: Is it time to follow the U.S. Example?,* 16 COMP. LAB. L. J. 491 (1995)
Åsa Gunnarsson, *Myten om vad den könsneutrala skatterätten kan göra för jämställdheten,* 2000 SKATTENYTT 487
Patrick Hicks and Debra Westbrook, *FMLA – It's Not Just for Employment Lawyers Anymore,* 13 NEVADA LAWYER 2005
Jaakko Husa, *Guarding the Constitutionality of law in the Nordic Countries: A Comparative Perspective,* 48 AM.J.COMP.L. 345 (2000)
ILO, *Anatomy of a prohibition: ILO standards in relation to night work of women in industry,* dated the 18 June 2001
Integrationsverket, *Ingen diskriminering med skattemedel! Avtalsklausuler mot diskriminering vid offentlig upphandling,* Integrationsverkets Rapportserie 2000:7
James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities,* 70 Iowa L.Rev. 901 (1985)
James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process under Executive Order 11,246 as Amended,* 59 Chi.-Kent. L.Rev. 67 (1982)
Otto Kahn-Freund, *On Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1 (1974)
Jamie H. Kim, *Better Access to Justice, Better Access to Attorney's Fees, The Procedural Implications of Scarborough v. Principi,* 25 J. NAT'L A. ADMIN. L. JUDGES 583 (2005)
Clare McGlynn, *Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy,* 7 COLUM. J.EUR. L. 241 (2001)

Karl Marx, *Instructions for the delegates of the provisional general council: The Different Questions*, first published in Der Vorbote Nos. 10 and 11, October and November 1866 and the International Courier Nos. 6/7, 20 February and Nos. 8/10, 13 March 1867

Note, *Hellmut Marschall v. Land Nordrhein-Westfalen: Has Equal Opportunity Between the Sexes finally found a Champion in European Community Law?*, 16 B.U.INT'L L.J. 423 (1998)

Gudrun Nordborg, *Jämställdhet – synpunkter utifrån jämställdhetslagstiftningen och vissa ärenden hos jämställdhetsombudsmannen*, 1984 SvJT 190

Kevät Nousiainen, *Transformative Nordic Welfarism: Liberal and Communitarian Trends in Family and Market Law* in Kevät Nousiainen, *et al.*, ed., RESPONSIBLE SELVES – WOMEN IN THE NORDIC LEGAL CULTURE (Ashgate 2001)

OECD, BABIES AND BOSSES, June 2005 REPORT

Angela Onwuachi-Willig, *The Future of Critical Race Feminism,* 39 U.C. DAVIS L. R. 733 (2006)

Roscoe Pound, *The Law in Books and Law in Action,* 44 Am.L.Rev. 12 (1910)

Processordningen i diskrimineringsmål m.m., Debatt i Lag & Avtal 2001–2002.

Teresa Rees, *Gender Mainstreaming: Misappropriated and Misunderstood?*, Report presented at the Department of Sociology, University of Sweden, 21 Feb., 2002

Essi Rentola, *Coordinating the Social Security of Women Moving between Member States* in Nordic Council, PERSPECTIVES OF EQUALITY – WORK, WOMEN AND FAMILY IN THE NORDIC COUNTRIES AND EU (Copenhagen 2000)

Lynn Roseberry, *Equal Rights and Discrimination Law in Scandinavia* in Scandinavian Studies in Law Vol. 43, STABILITY AND CHANGE IN NORDIC LABOUR LAW (Stockholm 2002)

Jo Shaw, *Gender Mainstreaming and the EU Constitution*, EUSA REVIEW, Vol. 15, No. 3 (2002)

Tore Sigeman, *Från legostadgan till medbestämmandelagen*, 1984 SvJT 875

N.E. Simmonds, *Rights Socialism and Liberalism*, 5 LEGAL STUDIES 1 (1985)

Gregory C. Sisk, *A Primer on Awards of Attorney's Fees against the Federal Government,* 25 ARIZ.ST.L.J. 733 (Winter 1993)

Helen Sjöman, Kids och karriär 2005 – En rapport och enkät om föräldraledigheten för ingenjörer (Civilingingenjörsförbund 2005)

Svenska UNIFEM-kommitté, *Jämställdheten granskad i skuggrapport – Rapport till FNs CEDAW-kommitté från tio svenska frivilligorganisationer* (Svenska UNIFEM-kommitté 2001)

Hans Stark, *Arbetsdomstolen femtio år – av ordföranden arbetsdomstolen Hans Stark*, 1979 SvJT 321

Hans Stark, *Arbetsdomstolen i skottgluggen* in STUDIER I ARBETSRÄTT TILLÄGNADE TORE SIGEMAN UTGIVNA AV ARBETSRÄTTSLIGA FÖRENINGEN (Iustus 1993)

Eric Stein, *Uses, Misuses – And Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977)

Lena Svenaeus, *Jämställdhetslagens illusionsregler* in Ann Numhauser-Henning, ed., NORMATIVE PERSPEKTIV – FESTSKRIFT TILL ANNA CHRISTENSEN (Lund 2000)

Eva-Maria Svensson, *Sex Equality: Changes in Politics, Jurisprudence and Feminist Legal Studies* in RESPONSIBLE SELVES – WOMEN IN THE NORDIC LEGAL CULTURE (Ashgate 2001)

Jay Tidmarsh, *Pound's Century, and Ours,* Notre Dame Law Review 513 (Jan. 2006)

Alan Watson, *Legal Transplants and Law Reform*, 92 L. QUART. REV. 79 (1976)

Linda A. White, *Institutions, Constitutions, Actor Strategies, and Ideas: Explaining Variation in Paid Parental Leave Policies in Canada and the United States,* 319 INT.J.CON.L. 2006

Ulla Wikander, *Debates at International Congresses* in Ulla Wikander, Alice Kessler-Harris and Jane Lewis, eds., PROTECTING WOMEN – LABOR LEGISLATION IN EUROPE, THE UNITED STATES AND AUSTRALIA, 1880–1920 (University of Illinois Press 1995)

Joan C. Williams, Elizabeth Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of Carers in the Workplace,* 13 Duke J.Gender.L.Pol'y 31 (March 2006)

Jennifer K. Wilson, *Validity, construction, and application of state family-, parental-, or medical leave acts,* 57 A.L.R. 5TH 477 (2006)

World Economic Forum, *Women's Empowerment, Measuring the Global Gender Gap*, 2005 Report

Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine,* 55 Me L. Rev. 23 (2003)

Newspaper articles:

Avtalade förmåner cementerar könsroller, LO-TIDNINGEN Nr. 33, 28 October 2005

Barnledig tappar karriärfart, DAGENS NYHETER, 26 April 2006

Bristande jämställdhet gör kvinnor mer sjuka, LO TIDNINGEN Nos. 39–40, 17 December 2004

Fler män klagar på diskriminering, SVD, 4 February 2006

Framgång för JämO i diskrimineringsmål, SvD Näringsliv 12, 27 April 2004

Företag sållar bort kvinnor, UNT, 21 May 2006

Inget lönelyft för kvinnor trots löfte, SVD, 21 September 2005

Ingenjörer tar pappaledigt – Yrkesgruppen tillhör toppskiktet när det gäller att utnyttja föräldraförsäkringen, SVD NÄRINGSLIV, 15 February 2005

JämO's editorial, *Fler pappamånader hjälper inte kvinnorna,* DAGENS NYHETER, 5 April 2005

Kvinnor är sjuka längre tid än män, Skillnaden mellan könen fanns inte för tio år sedan – "orsaken är diskriminering," LO-Tidningen Nr. 19, 3 June 2005

Långt kvar till lika lön, Tredje gången JämO förlorar i arbetsdomstolen, AFTONBLADET, 14 September 2001

Myth & Reality, Forget all the talk of equal opportunity. European women can have a job – but not a career, NEWSWEEK, 27 February 2006

Män förlorar mest på föräldraledighet, LO-TIDNINGEN Nr. 24, 26 August 2005

Nya las-reglerna förhandlas bort, SVD NÄRINGSLIV, 19 May 2006

Svante Nycander editorial, *Håll politiken på avstånd*, editorial, LO-TIDNINGEN Nr. 18, 4 June 2004

Nästa år väntar en het avtalsrörelse – Men 2006 blir lugnt enligt Medlingsinstitutet, SVD NÄRINGSLIV, 17 February 2006

Sambolag skapar en falsk trygghet, SVD, 9 April 2005

Sex av tio i riksdagen förtrycks – Undanhållande av information och osynliggörande vanligt visar SvD:s granskning, SvD, 8 March 2004

Självkritisk LO-bas lutar åt lagstiftad jämställdhet – För stark tro på reformer enligt Wanja Lundby-Wedin, SVD NÄRINGSLIV, 10 April 2005

The Thomas Connections, The New York Times, 22 October 1991

Trepartssamtal ska få löner att bli jämställda, SVD NÄRINGSLIV, 20 May 2006

Vanligare att kvinnor blir sjuka av stress, ARBETSLIV 2/04

Governmental Reports and Press Releases:

Jämställdhetsombudsmannen Press Releases and Reports:

JämO, Förslag om förstärkt skydd för föräldralediga, Press Release, 8 May 2006, available at *JämO's* website: http://www.jamombud.se/news/Forslagomforstarktsk.asp

JämO, Fortfarande mest kvinnor som anmäler könsdiskriminering, Press Release, 9 May 2006, available *JämO's* website at: http://www.jamombud.se/news/Fortfarandemestkvinn.asp

JämO, Jämställdhetsombudsmannens Årsredovisning 1999, available at: *JämO's* website: http://www.jamombud.se/docs/JamOsarsredovisningforar1999.pdf

JämO, JämO ansöker om vitesföreläggande för Försvarsmakten, Press Release, 15 February 2005, available at: *JämO's* website: http://www.jamombud.se/news/jamoansokeromvitesfo07a.asp

JämO, JämO begär vitesföreläggande av Jobpoint AB in Norrköping, Press Release, 7 February 2006, available at *JämO's* website: http://www.jamombud.se/news/jamobegarvitesforelaaf5.asp

JämO, JämO vitesförelägger tjugo privata arbetsgivare, Press Release, 22 October 2002, available at: *JämO's* website: http://www.jamombud.se/news/jamovitesforelaggert.asp

JämO, JämO's projekt, Kvinnor mot toppen, Press Release, 5 April 2005, available at *JämO's website*: http://www.jamombud.se/vadgorjamo/womentothetop.asp

JämO, Hälften av privata arbetsgivarna godkända av JämO, Press Release, 7 October 2002, available at: *JämO's* website: http://www.jamombud.se/news/halftenavprivataarbe.asp

JämO, Löneutfyllnad vid föräldraledighet, Report dated 11 April 2000 available at *JämO's* website: http://www.jamombud.se/dokument/rapporter.asp

JämO, Majgården AB vitesförelagt av Jämställdhetsnämnden, Press Release, 21 October 2003 available at *JämO's* website: http://www.jamombud.se/news/majgardenabvitesfore.asp

JämO, Ny rapport om föräldraskap och arbetsliv, Press Release, 4 January 2005 available at *JämO's* website: http://www.jamombud.se/news/nyrapportomforaldras.asp

JämO, *Olika villkor för kvinnliga och manliga chefer,* Press Release 2 May 2006 available at *JämO's website*: http://www.jamombud.se/news/Olikavillkorforkvinn.asp

JämO, Samverkan leder ofta till bättre jämställdhetsarbete, Press Release, 4 May 2005 available at *JämO's* website: http://www.jamombud.se/jamsides2/samverkanledero.asp

JämO, Uppsala County Council åtgärdar löneskillnader – slipper vitesföreläggande, Press Release, 31 January 2005 available at *JämO's* website: http://www.jamombud.se/news/uppsalalanslandsting.asp

JämO, *Kvinnliga VD:ar tappar i löneligan,* Press Release 24 January 2006 available at *JämO's* website: http://www.jamombud.se/news/kvinnligavdartappari.asp

JämO, Ökad effektivitet hos JämO, Press Release, 23 February 2006 available at *JämO's* website: http://www.jamombud.se/news/OkadeffektivitethosJ.asp and 2005 Annual Report to the Swedish Government

Statistics Sweden ("SCB") Press Releases and Reports

SCB, *Chefen är en man i högre chefsposition,* Press Release, 8 March 2006 available at SCB's website: http://www.scb.se/templates/pressinfo____161842.asp

SCB, *Economic Activity Statistic – Wages for County Councils,* 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20515.asp

SCB, *Economic Activity Statistic – Wages for the Municipalities,* 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20505.asp

SCB, *Economic Activity Statistic – Wages for the Private Sector and Salaried Workers*, 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____33542.asp

SCB, *Economic Activity Statistic – Wages for the State Sector*, 29 August 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____20464.asp

SCB, MEN AND WOMEN, FACTS AND FIGURES 2004, available at SCB's website: http://www.scb.se/templates/Listning2____117051.asp

SCB, PÅ TAL OM KVINNOR OCH MÄN – LATHUND OM JÄMSTÄLLDHET 2004 (SCB 2004)

SCB, *Statistics of Number of Persons Employed by Sex for the period from 1976–2005,* 26 April 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____23330.asp

SCB, *Statistics as to Persons in the ages of 20–64 according to employment category and typical hours worked 1970–2003*, available at SCB's website: http://www.scb.se/templates/tableOrChart____27543.asp

SCB, *Statistics as to Sick Leave Taken 1987–2005*, 2 June 2006, available at SCB's website: http://www.scb.se/templates/tableOrChart____23348.asp

SCB, *Förtidspension, Arbetslöshetsstöd och sjukpenning, Mest för Kvinnor och Norrlänningar,* Välfard No. 1 2004 available at SCB's website: www.scb.se/Grupp/allmant/BE0801_2004K01_TI_04_A05ST0401.pdf

Other Governmental Reports and Press Releases:

Government Reports

The European Commission, *Entry into Force of the Amsterdam Treaty,* Press Release, 28 April 1999 available the EU website: http://europa.eu.int/rapid/pressReleases-Action.do?reference=IP/99/269

OFCCP, *Improvements at OFCCP Produce Record Financial Recoveries in FY 05 – $ 45,156,462 collected for 14,761 American Workers,* Press Release, 16 August 2006, Department of Labor, Office of Federal Contract Compliance Programs website available at: http://www.dol.gov/esa/ofccp/enforc05.htm

Swedish Agency for Government Employers, *Arbetsgivarverket Informerar No. 76,* Press Release, 29 March 2006

Swedish Social Insurance Administration, *Report on Föräldrapenning,* available at the Swedish Social Insurance Agency website: http://www.fk.se/omfk/analys/barnfamilj/foraldrap/#Brinn

Swedish Social Insurance Administration, Number of parental leave cash benefits taken by women and men respectively from 1990 with future prognoses to 2015, available at: http://www.fk.se/omfk/analys/barnfamilj/foraldrap/prognos.JPG.

Swedish Social Insurance Administration, *Föräldrapenning,* available at: http://www.forsakringskassan.se/omfk/analys/barnfamilj/foraldrap/

Swedish Social Insurance Administration, *Antal av föräldrapenning dagar,* available at: http://www.forsakringskassan.se/omfk/analys/barnfamilj/foraldrap/1974.JPG

UK Council of Tribunal's Annual Report 2004/2005, available at http://www.council-on-tribunals.gov.uk/files/ar2005.pdf

UK 2001 Report of the Employment Tribunals Review Taskforce at 11, available at http://www.dti.gov.uk/er/individual/etst-report.pdf.

UK Report of the Review of Tribunals by Sir Andrew Leggatt, Tribunals for Users, One System, One Service, Commissioned by the Lord Chancellor in 2000, available at http://www.tribunals-review.org.uk/index.htm

UK Trade Union Membership Report 2004 by the Department of Trade and Industry, available at: http://www.dti.gov.uk/files/file11427.pdf?pubpdfdload=05%2F857

UK Office of the General Counsel, A Study of the Litigation Program Study Fiscal Years 1997-2001, available at: http://www.eeoc.gov/litigation/study/

US Department of Labor, *Labor Department Lawsuit Targets Discriminatory Practices against Women at Goodyear Manufacturing Plant,* Press Release dated 16 June 2006, available at the U.S. Department of Labor website: http://www.dol.gov/esa/media/press/ofccp/of2006971.htm

US EEOC Annual Report 2004

US EEOC Annual Report 2005

Unpublished Sources:

Letter dated 30 December 1998 from Pádraig Flynn, Member of the European Union's Council, directed to Statsrådet Anna Lindh

Websites:

The AFL-CIO website: http://www.aflcio.org
The CEEP website: http://www.ceep.org
The California Department of Fair Employment and Housing website: http://www.dfeh.ca.gov/
The California Division of Labor Standards Enforcement website: http://www.dir.ca.gov/dlse/dlse.html
The California Employment Development Department website: http://www.edd.ca.gov/direp/pflfaq1.asp
The Civilingenjörsförbundet ("CF") website: http://www.cf.se
The Council of Europe website: http://www.coe.int
The ETUC website: http://www.etuc.org
The European Commission website: http://ec.europa.eu/index_en.htm
The European Committee of Regions ("CoR") website: http://www.cor.europa.eu
The European Court of the Justice website: http://www.curia.europa.eu
The European EESC website: http://eesc.europa.eu
The European Union website: http://europa.eu.int
The Government Offices of Sweden website: http://www.sweden.gov.se
The ILO website: http://www.ilo.org
JämO website: http://www.jamombud.se
The LO website: http://www.lo.se
The Minnesota Minnesota Department of Human Rights website: http://www.state.mn.us/ebranch/dhr/
The Minnesota Department of Labor and Industry website: http://www.doli.state.mn.us/
The Nordic Council website: http://www.norden.org
Statistics Sweden website: http://www.scb.se
The Swedish Agency for Government Employers, *Arbetsgivarverket*, website: http://www.arbetsgivarverket.se
The Swedish Association of Local Authorities and Regions ("SALAR") *Sveriges kommuner och landsting,* http://www.skl.se
The Swedish Labour Court website: http://www.arbetsdomstolen.se/
The Swedish National Mediation Office website: http://www.mi.se
The Swedish Social Insurance Administration website: http://www.forsakringskassan.se
The Swedish Work Environment Authority website: http://www.av.se
The UK Commission of Equality and Human Rights website: http://www.cehr.org.uk/
The UK Council of Tribunals website: http://www.council-on-tribunals.gov.uk/
The UK Department of Trade and Industry website: http://www.dti.gov.uk/
The UK Employment Service Tribunals website: http://www.employment-tribunals.gov.uk/default.asp
The UK EOC website: http://www.eoc-law.org.uk
The UNICE website: http://www.unice.org
The US Department of Labor website: http://www.dol.gov
The US EEOC website: http://www.eeoc.gov
The US General Services Administration website: http://epls.gov/

The US Hour and Wage Division website: http://www.dol.gov/esa/whd/
The US Office of Federal Contract Compliance Programs website: http://www.dol.gov/esa/ofccp/
The World Economic Forum website: http://www.weforum.org

Index

E

F

G

H

I

J

L

M

O

P

R

S

T

W