

The Burger Court Opinion Writing Database

County of Washington v. Gunther

452 U.S. 161 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 4, 1981

Re: No. 80-429, County of Washington v. Gunther

Dear Potter:

Are you willing to take on a dissent
in this case? You recall Byron said his vote
to affirm was "tentative". A swift dissent might
"shake" the case.

Regards,

WRB

Justice Stewart
cc: Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 6, 1981

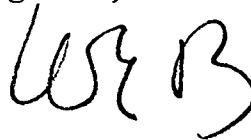


Re: 80-429 - County of Washington v. Gunther

Dear Bill:

Since Potter "opts out of the class," will
you put your hand to it?

Regards,



Justice Rehnquist

Copy to Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

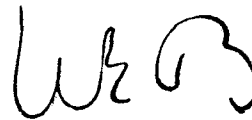
June 4, 1981

RE: 80-429 - County of Washington v. Gunther

Dear Bill:

I join your dissent.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written in a cursive, stylized script.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 30, 1981

RE: No. 80-429 County of Washington v. Gunther

Dear Chief:

I'll undertake to try an opinion for the Court
in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

The Chief Justice

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-429

County of Washington et al., Petitioners, v. Alberta Gunther et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit,
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[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether § 703 (h) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (h), restricts Title VII's prohibition of sex-based wage discrimination to claims of equal pay for equal work.

I

This case arises over the payment by petitioner, the County of Washington, Ore., of substantially lower wages to female guards in the female section of the county jail than it paid to male guards in the male section of the jail.¹ Respondents are four women who were employed to guard female prisoners and to carry out certain other functions in the jail.² In January 1974, the county eliminated the female

¹ Prior to February 1, 1973, the female guards were paid between \$476 and \$606 per month, while the male guards were paid between \$668 and \$853. Effective February 1, 1973, the female guards were paid between \$525 and \$668, while salaries for male guards ranged from \$701 to \$940. *Gunther v. County of Washington*, 20 FEP Cases 788, 789 (Ore. 1976).

² Oregon requires that female inmates be guarded solely by women, Ore. Rev. Stat. §§ 137.350, 137.360, and the District Court opinion indicates that women had not been employed to guard male prisoners. 20 FEP Cases, at 789, 792, nn. 8-9. For purposes of this litigation, respondents concede that gender is a bona fide occupational qualification for

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1981

RE: No. 80-429 County of Washington v. Gunther

Dear Thurgood:

Thanks so much for your suggestions. I wonder if the following changes would do the job:

1. On page 8: move footnote 11 to the end of the next sentence so that the term "other factors other than sex" will be understood in the sense of your Corning Glass Works.
2. On pages 8 and 9: to delete at top of page 9 the second half of the quotation and to substitute after "bona fide job rating system," the following: "so long as it does not discriminate on the basis of sex."
3. On page 7: to substitute for "explicitly authorizes" in lines 6-7 the words "in essence 'authorizes'".
4. On page 15, first paragraph of Part D, lines 10-11, to substitute for the quotation beginning "essential . . ." the paraphrase essential to overcoming and undoing the effect of discrimination.

Sincerely,

Bill

WSB
Justice Marshall

your changes are OK, Thanks
JM

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Brennan
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-429

County of Washington et al.,
Petitioners,
v.
Alberta Gunther et al. } On Writ of Certiorari to the
United States Court of Ap-
peals for the Ninth Circuit,

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether § 703 (h) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (h), restricts Title VII's prohibition of sex-based wage discrimination to claims of equal pay for equal work.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

8, 16, 17

For The Chief Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice

Brennan

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-429

June 5, 1981

County of Washington et al.,
Petitioners,
v.
Alberta Gunther et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Ninth Circuit.

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether § 703 (h) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (h), restricts Title VII's prohibition of sex-based wage discrimination to claims of equal pay for equal work.

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This case arises over the payment by petitioner, the County of Washington, Ore., of substantially lower wages to female guards in the female section of the county jail than it paid to male guards in the male section of the jail.¹ Respondents are four women who were employed to guard female prisoners and to carry out certain other functions in the jail.² In January 1974, the county eliminated the female

¹ Prior to February 1, 1973, the female guards were paid between \$476 and \$606 per month, while the male guards were paid between \$668 and \$853. Effective February 1, 1973, the female guards were paid between \$525 and \$668, while salaries for male guards ranged from \$701 to \$940. *Gunther v. County of Washington*, 20 FEP Cases 788, 789 (Ore. 1976).

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Brennan

To: The Chief Justice
Mr. Justice Stewa
Mr. Justice White
Mr. Justice Marsh
Mr. Justice Black
Mr. Justice Powe
Mr. Justice Rehnq
Mr. Justice Steve

From: Mr. Justice Bre

Circulated: JUN 12 1981

June 12, 1981 Recirculated: _____

Memorandum to the Conference

Cases held for No. 80-429, Gunther v. County of Washington

No. 80-781, International Union of Electrical, Radio, and Machine Workers v. Westinghouse Electric Corp., and No. 80-944, Westinghouse Electric Corp. v. International Union of Electrical, Radio, and Machine Workers:

These petitions are from a single decision of the Third Circuit. The Union filed suit in District Court alleging, inter alia, that Westinghouse set the wages for jobs predominantly held by women at a rate lower than that for jobs predominantly held by men, as a result of intentional sex discrimination. As part of its proof, the Union proffered evidence that, prior to 1965, the company used a job rating system that evaluated all jobs according to knowledge, training, and responsibility. Female job categories, however, were set at a lower wage level than male job categories of the same rating. The Union further alleged that, after 1965, when job categories were integrated, this discriminatory system was perpetuated by placing the female categories at a lower level in the new hierarchy than male categories that had formerly received the same job rating. Thus, under the present wage scale, employees in predominantly female

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 6, 1981

Re: No. 80-429, County of Washington v. Gunther

Dear Chief,

At the Conference discussion of this case, it became evident to me that at least some members of the majority did not see it as involving the broad and important issues that I perceived.

Accordingly, rather than preparing a "swift" dissent I would prefer to wait to see what the Court is going to say, and may well end up by joining the Court opinion.

Sincerely yours,

The Chief Justice

Copies to Justice Powell
Justice Rehnquist

P.S.
✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1981

Re: No. 80-429, County of Washington
v. Gunther

Dear Bill,

Please add my name to your dissenting
opinion.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

P.S.
✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1981

Re: 80-429 - County of
Washington v. Gunther

Dear Bill,

Please join me.

Sincerely yours,

A handwritten signature in dark ink, appearing to be 'By' followed by a stylized flourish.

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 22, 1981

Re: No. 80-429 - County of Washington v. Gunther

Dear Bill:

I want to join your proposed opinion. Could you modify the discussion on pp. 8-9? I fear that this discussion of the fourth exception in the Equal Pay Act implies that only facially discriminatory factors would give rise to a violation of the Act, rather than factors leading to a differential impact on employees of one sex. I do not believe that we have previously decided that issue, nor is construction of this portion of the Equal Pay Act the issue presented in this case. Also, I believe that your note 11 more accurately characterizes our opinion in Corning Glass Works v. Brennan than does the sentence following it in text, for we were concerned with use of "bona fide job evaluation systems," rather than "bona fide use of 'other factors other than sex.'" My concerns would be resolved if you replaced the text sentences following note 11 with a sentence reading: "Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide job evaluation system."

As stylistic suggestions I also recommend the following:

on page 7, first full paragraph, 3rd sentence:
place "authorizes" in quotation marks, as you do in the previous sentence;

- 2 -

on page 15, first paragraph under "D", second to last sentence: could you find a different quotation about the purposes of Title VII, as this reference to a "century of discrimination" seems more pertinent to race discrimination than the sex discrimination involved in this case.

Sincerely,

T.M.

Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1981

Re: No. 80-429 - County of Washington v.
Gunther

Dear Bill:

Your changes are OK. Thanks.

Sincerely,

Am.
T.M.

Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1981

Re: No. 80-429 - County of Washington v. Gunther

Dear Bill:

Please join me.

Sincerely,

Jm.

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 29, 1981

Re: No. 80-429 - County of Washington v. Gunther

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line above it.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1981

80-429 County of Washington v. Gunther

Dear Bill:

I will await Bill Rehnquist's dissent.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1981

80-429 County of Washington v. Gunther

Dear Bill:

Please join me in your dissent.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 7, 1981

Re: No. 80-429 County of Washington v. Gunther

Dear Chief:

I will be happy to undertake the preparation of a dissenting opinion in this case.

Sincerely,



The Chief Justice

cc: Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 21, 1981

Re: No. 80-429 County of Washington v. Gunther

Dear Bill:

In due course I will circulate a dissent.

Sincerely,



Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 5/26/81

Recirculated: _____

No. 80-429 County of Washington v. Gunther

JUSTICE REHNQUIST, dissenting.

The Court today holds a plaintiff may state a claim of sex-based wage discrimination under Title VII without even establishing that she has performed "equal or substantially equal work" to that of males as defined in the Equal Pay Act. Because I believe that the legislative history of both the Equal Pay Act and Title VII clearly establish that there can be no Title VII claim of sex-based wage discrimination without proof of "equal work", I dissent.

I

Because the Court never comes to grips with petitioner's argument, it is necessary to restate it here. Petitioner argues that Congress in adopting the Equal Pay Act of 1963 specifically

Stylistic and
2, 3, 9, 14, 15, 17, 18, 21-24

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

1st PRINTED DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-429

County of Washington et al.,	} On Writ of Certiorari to the
Petitioners,	
v.	
Alberta Gunther et al.	United States Court of Ap- peals for the Ninth Circuit.

[June —, 1981]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL join, dissenting.

The Court today holds a plaintiff may state a claim of sex-based wage discrimination under Title VII without even establishing that she has performed "equal or substantially equal work" to that of males as defined in the Equal Pay Act. Because I believe that the legislative history of both the Equal Pay Act and Title VII clearly establish that there can be no Title VII claim of sex-based wage discrimination without proof of "equal work," I dissent.

I

Because the Court never comes to grips with petitioners' argument, it is necessary to restate it here. Petitioners argue that Congress in adopting the Equal Pay Act of 1963 specifically addressed the problem of sex-based wage discrimination and determined that there should be a remedy for claims of unequal pay for equal work, but not for "comparable" work. Petitioners further observe that nothing in the legislative history of Title VII, enacted just one year later in 1964, reveals an intent to overrule that determination. Quite the contrary, petitioner notes that the legislative history of Title VII, including the adoption of the so-called Bennett Amendment, demonstrates Congress' intent to require all sex-based wage discrimination claims, whether brought under the Equal Pay Act or under Title VII, to satisfy the "equal work"

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 21, 1981

Re: 80-429 - County of Washington
v. Gunther

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference