11-1-1974

The Equal Pay Act of 1963: A Decade of Enforcement

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I. INTRODUCTION

On June 3, 1974 the United States Supreme Court handed down its decision in Brennan v. Corning Glass Works. That decision constitutes the first analysis of the Equal Pay Act of 1963 (EPA) by the Court. Coming as it did at the tenth anniversary of the statute's effective date, the decision represents an appropriate
occasion for a review of the status of EPA enforcement. Such a review will demonstrate that the EPA has not been, as was feared even by its proponents, "only a promise to the ear, to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." To the contrary, the EPA has proven to be one of the leading and most effective pieces of equal employment opportunity legislation in the history of the United States.

II. BACKGROUND AND LEGISLATIVE HISTORY

At the beginning of the 20th century, women constituted only about eighteen percent of the total labor force in the United States.\(^4\) In the succeeding decades, this percentage increased slowly, reaching just over twenty-four percent by 1940.\(^5\) With the outbreak of World War II, however, a rapid acceleration began in the rate of female employment; and, by 1960 the percentage of women in the American labor force had risen to more than thirty-two percent.\(^6\) By that year almost 23.3 million women were part of the labor force, constituting 37.8 percent of all women in the United States of working age.\(^7\)

Although single women predominated among female workers in 1940, the upward trend in labor force participation since World War II has been due almost entirely to the changed attitudes of married women.\(^8\) Thus, while the overall percentage of single women in the labor force actually fell between 1950 and 1960, the percentage of working married women (living with their husbands) rose from 23.8 to 30.5 percent.\(^9\) The materially higher proportion of working wives among families in the low-income brackets indicates that family need was the prime reason for the increased participation of married women.\(^10\)

Unfortunately, these dramatic changes in the makeup of the

\(^4\) Economic Report of the President 91, Table 21 (1973).
\(^5\) Id.
\(^6\) Id. This participation has continued its increase to 36.7 percent in 1970 and an estimated 37.4 percent in 1972. Id.
\(^7\) Id. The term "working age" refers to individuals between the ages of 16 and 65. The 1970 census figures indicated that, 31.56 million women were in the labor force, or 43.4 percent of all women of working age. Id.
\(^9\) Economic Report of the President, supra note 4, at 92, Table 22.
\(^10\) In 1960, for instance, 32.4 percent of the wives worked where the husband's annual income was less than $3,000; 35.9 percent, where the husband's income was between $3,000 and $5,000; but, only 15.9 percent, where it was $10,000 or over. Schiffman, Marital and Family Characteristics of Workers, March 1960, 84 Monthly Lab. Rev. 355, 363, Table 8 (1961).
labor force were not accompanied by an enlightened change in the occupational pattern of employment. The historic practice of sexual segregation in jobs continued largely unabated. "Though [such] sex-based stratification of economic roles may to some extent reflect the socially conditioned desires of men and women themselves, there can be little doubt that there has been considerable employer resistance to the job applicant seeking employment in a position that tradition, collective bargaining agreement, or law had marked out as the exclusive preserve of the opposite sex." Indeed, even where jobs were finally opened to members of both sexes, or where limited numbers of females entered an occupation dominated by males, more often than not the women received considerably lower wages than men performing the same work. The result of such discriminatory practices has been the creation and perpetuation of an actual "earnings gap." In 1960, the median earnings of full-time, year-round women workers were only 60.8 percent of median male earnings. Admittedly, of course, these figures do not necessarily reflect unequal pay for equal work, as much as they might reflect the fact that "women have restricted freedom of occupational choice."

More significant, therefore, are the wage statistics for men and women of particular occupational groups which show a similar income disparity. For example, in 1960 the median wage for female sales workers was only 40.9 percent of the males' earnings, and female primary and secondary school teachers received but 75.6 percent of their male colleagues' total wages. Similar discrepancies between the pay received by females and that received by males, existed in numerous other occupations. For example, United States Department of Labor surveys of the major labor market areas showed male note tellers in banks received from $5.50 to $31 per week more than their female counterparts. Even industrial statistics indicated male machine tool operators averaging $2.05 per hour as compared with $1.71 for women; and, male machinery assem-

12 Hearings on H.R. 8898 and H.R. 10226 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 2d Sess. 66-67 (1962) [hereinafter cited as 1962 House Hearings]; Hearing on S. 2494 and H.R. 11677 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 87th Cong., 2d Sess. 46-47 (1962) [hereinafter cited as 1962 Senate Hearing]. The opposition to equality for women in employment is evidently so great that the earnings gap has continued to increase. Thus, in 1970 the median earnings for female workers were $5,323, as compared to $8,966 for males, or only 59.4 percent of median male earnings. U.S. Dep't of Labor, Fact Sheet on the Earnings Gap (December 1971).
13 Waldman, supra note 8, at 15.
14 Economic Report of the President, supra note 4, at 104, Table 28.
15 1962 House Hearings, supra note 12, at 70; 1962 Senate Hearing, supra note 12, at 50.
blers averaging $2.07 per hour, while females earned but $1.68 per hour. Nor can the above-mentioned differentials be justified on the grounds that men are better educated or more experienced than women, since "[a] large differential is also evident when the comparison is restricted to men and women of the same age and education." Thus in 1960, among individuals who had received a bachelor's degree two years earlier, it was found that the difference between the median annual salaries of male and female pharmacists was $1,560, and for accountants $1,200. Indeed, the overwhelming weight of such statistics led the President's Task Force on Women's Rights and Responsibilities to reach the startling conclusion that "[s]ex bias takes a greater economic toll than racial bias."

During 1945 the first comprehensive federal equal pay bill was introduced in the Congress. Essentially, that bill was based upon successful experiences under the War Labor Board, which in 1942 had issued a general order calling for "[a]djustments which equalize the wage or salary rates paid to females with the rates paid to males for comparable equality and quantity of work on the same or similar operations . . . ." However, neither this nor any of the similar measures proposed in each Congress over the following seventeen years received favorable action, "despite the efforts of their bipartisan proponents and [substantial] support from both the public and the Government." Indeed, it was not until the end of 1961 that a report of a Presidential Commission generated an Administration proposal with serious possibilities for enactment. At that time "the President's Commission on the Status of Women, established by President John F. Kennedy, endorsed the policy of equal pay for comparable work."

During 1962 the House Committee on Education and Labor held extensive hearings and considered a number of equal pay bills. When the Administration proposal emerged from committee virtually unscathed, an amendment was offered and passed on the House
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floor which required equal pay for equal, rather than comparable, work. That amendment served as the turning point which ultimately made the enactment of an equal pay law possible. Indeed, in the same year, the Senate also passed similar equal pay legislation. Unfortunately, the Senate action occurred late in the session and the two bills failed to be fully reconciled before Congress adjourned.

When the 88th Congress convened in 1963, the Administration once again recommended equal pay legislation. After further hearings, bills emerged from both the Senate and the House of Representatives. The amended Senate version was enacted shortly thereafter and sent to the President. On June 10, 1963, President Kennedy signed the EPA and summarized the conditions which necessitated such a law:

[T]he average woman worker earns only 60 percent of the average wage for men . . . . Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children . . . and for the

27 In transmitting to Congress the Administration proposal, Secretary of Labor Willard Wirtz stressed particularly the importance of an equal pay bill to the national economy:

The present practice of paying discriminatory wage rates on the basis of sex has an undesirable effect on many aspects of the life of our Nation. It tends to affect adversely the general purchasing power and the living standard of workers. It offers an unfair competitive advantage for employers who follow this practice. The resulting low wage levels prevents [sic] the maximum utilization of worker skills to the detriment of morale and, in turn, of production.


Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has 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."

Id. at 2228.
protection of the family unit . . . . The lower the family income, the higher the probability that the mother must work. Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. I believe they bear the heaviest burden of any group in our nation. Where the mother is the sole support of the family, she often must face the hard choice of either accepting public assistance or taking a position at a pay rate which averages less then two-thirds of the pay rate for men.28

III. STATUTORY PROVISIONS

Although legislative hearings had established that women were far more often the victims of wage discrimination, the EPA was drafted in such a manner as to ensure that, where a woman might be paid more than a man, the equal pay requirement would be extended to men as well as women. The prime provision forbids wage discrimination "between employees on the basis of sex" when employees perform "equal work" on jobs in the same establishment requiring "equal skill, effort and responsibility, and which are performed under similar working conditions . . . ."29 "These criteria are the same factors which traditionally have been used in accepted job study analyses made by various manufacturing groups for industrial and labor relation purposes."30 The administrative interpretations of the EPA31 have defined skill as "experience, training, education,

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, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: 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.
31 See 29 C.F.R. Part 800 (1973). 29 C.F.R. § 800.2 states, in part: The interpretations of law contained in this part are official interpretations of
and ability" as they relate to the performance of a particular job.\textsuperscript{32} Effort is defined as "the measurement of the physical or mental exertion needed for the performance of a job,"\textsuperscript{33} and responsibility is measured by "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."\textsuperscript{34} The term "wages" has been interpreted to mean "all payments made to or on behalf of the employee as remuneration for employment," including most fringe benefits.\textsuperscript{35}

The EPA additionally contains several so-called exceptions to the equal pay standard. Under these exceptions, where it can be established that a differential in pay is the result of a wage payment made pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or that the differential is based on any other factor other than sex, the differential is expressly excluded from the statutory proscription.\textsuperscript{36}

The EPA was enacted as an amendment to the Fair Labor Standards Act of 1938, as amended (FLSA),\textsuperscript{37} which act is administered and enforced by the United States Department of Labor. The stated purposes of such incorporation were to eliminate "the need for a new bureaucratic structure to enforce equal pay legislation," and to take advantage of the fact that "compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions."\textsuperscript{38} Additionally, the effective date of the EPA amendments to the FLSA
was postponed until June 11, 1964,\textsuperscript{39} which thereby granted employers a full year to comply voluntarily, and permitted the Labor Department to establish enforcement procedures.\textsuperscript{40}

Except as otherwise provided by specific exemptions, the FLSA brings within the general coverage of its wage and hour provisions every employee who "is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . ."\textsuperscript{41} The EPA neither extended nor curtailed such coverage, but simply placed within the new equal pay requirements those employers and employees already subject to the FLSA's minimum wage provisions.\textsuperscript{42} Consequently, exemptions from the minimum wage provisions were also applied to restrict the coverage of the EPA as well.\textsuperscript{43} Undoubtedly, at least some of those exemptions constitute "a real limitation on enforcement"\textsuperscript{44} of the apparent Congressional purposes in enacting the EPA.\textsuperscript{45} Not until passage of the Education Amendments of 1972,\textsuperscript{46} however, did Congress finally eliminate the

\textsuperscript{39} Pub. L. No. 88-38, § 4, 77 Stat. 56 (1963), 29 U.S.C.A. § 206, Note (1965), provides: The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: \textit{Provided}, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.


\textsuperscript{43} "All of the fair labor standards exemptions apply: Agriculture, hotels, motels, restaurants, and laundries are excluded. Also, all professional, managerial, and administrative personnel, and outside salesmen are excluded." H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963), reprinted in Legislative History, supra note 26, at 49 (supplemental views). See 29 U.S.C. § 213(a) (1970).

\textsuperscript{44} Murphy, supra note 30, at 619 n.25.


exemption for employees engaged in bona fide executive, administrative, professional or outside sales jobs as it applied to the equal pay requirements. 47

Any covered, non-exempt employee who believes that he or she has been the object of equal pay discrimination may file suit against his or her employer under section 16(b) of the FLSA. 48 Suit may be brought despite the fact that the employee is covered by a collective bargaining agreement which contains a binding arbitration clause. This is so even where the employee has previously submitted to such arbitration and received an adverse decision. 49 Section 16(b) specifically authorizes the recovery of back wages found to be due as the result of a statutory violation and permits the court to award "liquidated damages" 50 in a sum which may equal the amount of the unpaid wages. 51 Furthermore, reasonable attorney's fees and costs are awarded if the employee is successful in such an action.


Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

50 "[T]he liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583-84 (1942).


In any action commenced . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound
More often, however, equal pay violations are investigated by a compliance officer from the Employment Standards Administration, United States Department of Labor, either upon receipt of a specific complaint or as part of a general investigation. The compliance officer has broad investigative authority to inspect the employer’s place of business, to examine all employment records and to discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.


55 Section 11(c) of the FLSA sets forth, inter alia, the record keeping requirements and authorizes the administrative regulations contained in 29 C.F.R. Part 516 (1973). See 29 U.S.C. § 211(c) (1970).
interview any employees. If a violation is discovered, the employer will be requested to eliminate the discriminatory practice by raising the lower wage of the aggrieved sex to the higher wage of the opposite sex and by paying any back wages computed to be due. If compliance cannot be achieved, investigative files suitable for potential litigation will be transmitted to the appropriate regional Office of the Solicitor, United States Department of Labor, for further action.

The FLSA specifically permits the Secretary of Labor a two-fold choice of litigative remedies. Once the Secretary initiates an action against any employer, the employee's right to institute or become a party to any private wage suit under section 16(b) is terminated. "It is important to note that this right can be terminated by a government action without the employee's sanction or consent." Under section 16(c) the Secretary "may bring an action" to recover back wages. Until recently, however, a proviso barred the Secretary from using that statutory authority in "any case involving an issue of law which has not been settled finally by the courts." Inasmuch as this novel issue test necessarily excluded all the earlier EPA cases because they raised questions of first impression, "the section 16(c) remedy [became] for all practical purposes a dead letter" as regards EPA enforcement. The Fair Labor Standards Amendments of 1974 not only removed the proviso, but added a clause permitting the recovery of an amount of liquidated damages equal to the back wages wrongfully withheld. It may therefore be expected that EPA suits will soon be filed under this section.

57 Voluntary compliance is obtained in more than 95 percent of the investigations. Memorandum of Morag Simchak, supra note 53.
58 In the event that an investigation reveals the probability of a statutory violation, but the case is determined to be inappropriate for litigation by the Secretary of Labor, affected employees may be notified of their private right to sue for relief under section 16(b) of the FLSA. See 29 U.S.C. § 216(b) (1970). With regard to the duties and responsibilities of the Office of the Solicitor, see U.S. Dep't of Labor, Annual Report 1972, 60, 69-70 (1973).
63 Hodgson v. Wheaton Glass Co., 446 F.2d 527, 532 (3d Cir. 1971).
The second litigative remedy available to the Secretary, which was the only type of EPA action brought by the Secretary of Labor throughout the first decade of enforcement, is that instituted pursuant to section 17 of the FLSA. The essential reason, of course, that suits were brought exclusively under section 17 is the absence of the novel issue limitation in that section. This remedy authorizes the Secretary to sue in a United States district court for an injunction restraining further violations of the FLSA, including "the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees . . . ." Moreover, such injunctive actions may be brought in cases of discriminatory harassment or discharge. Such suits may seek reinstatement of an employee and reimbursement of wages lost as the result of a discharge for reasons related to the provisions of the FLSA. Inasmuch as any section 17 action is equitable in nature, there is no right to a jury trial.

Should an employer fail to comply with any injunction granted in a section 17 action, the Secretary of Labor may also bring a civil

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65 29 U.S.C. § 217 (1970) provides, in pertinent part:

The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter . . . .


67 29 U.S.C. § 217 (1970). 29 U.S.C. § 206(d)(3) (1970) provides: "For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of [the equal pay provisions] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]."

68 29 U.S.C. § 215(a)(3) (1970), provides that it shall be unlawful for any person: to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

69 See, e.g., Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960), where the Court upheld the award of lost wages as part of the trial court's general equity power to insure compliance with the FLSA. Id. at 291-92. See also Note, 58 Mich. L. Rev. 939 (1960).


Prejudgment interest is awarded on the amount of back wages found by the court to have been withheld. Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971); Hodgson v. American Can Co., 440 F.2d 921, 922 (8th Cir. 1971). The interest is paid on such amounts withheld at the rate of 6 percent from the median date of the violation period in question. Hodgson v. Corning Glass Works, 330 F. Supp. 46, 51 (W.D.N.Y. 1971), aff'd as modified, with specific approval of the interest award, 474 F.2d 226, 236 (2d Cir. 1973), aff'd sub nom., Corning Glass Works v. Brennan, 94 S. Ct. 2223 (1974).
contempt proceeding. If found in contempt, the employer may be ordered to pay not only the amount of the wrongfully withheld compensation, but court costs and the Government's expenses in investigating and prosecuting the matter as well.

Generally, any suit under the EPA to enforce the wage liability of an employer must be commenced within two years after the cause of action accrued. A separate cause of action for unpaid wages accrues on each regular payday on which less wages are paid than are required under the EPA. Thus, the statute of limitations bars recovery of only the portion of back wages owed that was not paid prior to the two-year period immediately preceding the commencement of the action. While the courts must consequently restrict recoveries to the period allowed, they may look "as far back as necessary to determine whether the present wage discrimination occurring within the limitation [period] ... is the result of past discriminatory conduct ...".

By the Fair Labor Standards Amendments of 1966, moreover, the statute of limitations was expanded to permit a three-year recovery period for causes of action arising out of a willful violation. In Coleman v. Jiffy June Farms, Inc., the United States Court of Appeals for the Fifth Circuit held:

[a] violation of [the] FLSA is 'wilful' when ... there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?

Of course, this standard applies to EPA actions as well. Where the violations are of a willful nature, the Department of Labor may

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72 Wirtz v. Chase, 400 F.2d 665, 667 (6th Cir. 1968); Fleming v. Credit Serv., Inc., 16 BNA Wage & Hour Cas. 755, 761, 51 CCH Lab. Cas. ¶ 31,658 (S.D. Fla. 1964), aff'd, 372 F.2d 143 (5th Cir. 1967).
74 See 29 C.F.R. § 790.21(b) (1973).
77 458 F.2d 1139 (5th Cir.), cert. denied, 409 U.S. 948 (1972).
78 458 F.2d at 1142.
recommend to the Department of Justice that a criminal action be brought against the employer under section 16(a) of the FLSA. That provision carries a maximum $10,000 fine and imprisonment for second offenders.\textsuperscript{80} This offense is subject to a five-year statute of limitations.\textsuperscript{81}

In addition to the more traditional FLSA actions against an employer, the EPA also authorizes enforcement against labor organizations which "cause or attempt to cause . . . an employer to discriminate against an employee" in violation of the equal pay standard.\textsuperscript{82} Interpreting this provision, the Department of Labor has determined that such a labor organization (or its agents) must therefore "refrain from strike or picketing activities aimed at inducing an employer to institute or maintain a prohibited wage differential, and must not demand any terms or any interpretation of terms in a collective bargaining agreement with such an employer which would require the latter to discriminate in the payment of wages . . . ."\textsuperscript{83}

With regard to workers covered by collective bargaining agreements, it is further the position of the Department of Labor that unions "share with the employer the responsibility for ensuring that the wage rates required by such agreements" are not violative

\textsuperscript{80} 29 U.S.C. § 216(a) (1970), provides:

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.


\textsuperscript{82} 29 U.S.C. § 206(d)(2) (1970) provides:

No labor organization, or its agents, representing employees of an employer having employees subject to any provision of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.


As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

This is the same definition of "labor organization" that is used in the National Labor Relations Act, 29 U.S.C. § 152(5) (1970).

The statute of limitations applicable to actions brought against labor organizations is the same as that for actions brought against employers. 29 U.S.C. § 255(a) (1970). In such situations, however, the cause of action accrues when the union actually causes the employer to discriminate in violation of the EPA. Hodgson v. Sagner, Inc., 20 BNA Wage & Hour Cas. 49, 66 CCH Lab. Cas. ¶ 32,344 (D. Md. 1971).

\textsuperscript{83} 29 C.F.R. § 800.106 (1973).
of the equal pay standard. This interpretation derives substantial support from the legislative history of the EPA. Nonetheless, in a decision directly on point it was held that, "[o]n its face, the statute requires some sort of affirmative action by the union involved" and that the mere signing of a collective bargaining agreement, without more, does not constitute a violation.

The Department of Labor has, in any event, adopted the enforcement position that, whether or not a union is in part responsible for the negotiation of a collective bargaining agreement which sets a discriminatory wage schedule, only the employer is liable for the resulting back wage claims. Thus, the Department has taken the position that an employer may not seek contribution or indemnification by filing a third party complaint against the employees' collective bargaining representative.

84 Id.
85 Note the following colloquy between Congressmen Goodell (N.Y.) and O'Hara (Mich.):

Mr. GOODELL . . . It is my view, and I think it is . . . the view of our subcommittee that this bill as now written obligates the union and gives the union the responsibility to negotiate [where an existing agreement violates the EPA] to eliminate the discrimination . . . .

Mr. O'HARA . . . It is my understanding, as it is the understanding of the gentleman from New York that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.

Mr. GOODELL. I would stress the word "maintaining" in your reply, because we feel that the words "shall cause or attempt to cause" put an obligation on a labor union, as well as the employer, to change that existing agreement, if the agreement is in violation of this act and this requires the employer to violate the act. Does the gentleman agree?

Mr. O'HARA . . . I would agree. Not only does it refer to new agreements but to an existing agreement where a labor organization would attempt to maintain a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act.


87 Wirtz v. Hayes Indus., Inc., 18 BNA Wage & Hour Cas. 590, 58 CCH Lab. Cas. ¶ 32,085 (N.D. Ohio 1958). The importance of the contribution issue to employers can easily be seen from the fact that the Hayes Industries case resulted in the employer paying $206,214 in back wages, including interest. See Memorandum of Morag Simchak, supra note 53.

In some cases, however, an employer has been permitted to join a labor organization for the purpose of establishing their respective rights, in relation to the collective bargaining agreement, as the result of the EPA action. See Hodgson v. School Bd., 56 F.R.D. 393, 395 (W.D. Pa. 1972); Johnson v. Thomson Brush Moore, Inc., 21 BNA Wage & Hour Cas. 715, 719, 74 CCH Lab. Cas. ¶ 33,124 (N.D. Ohio 1974). But see Phillips v. Carborundum Co.,
Were the Court to authorize or sanction the employer's shifting of his financial responsibility to a labor organization it could be thwarting one of the pre-eminent policies of the Act that the employer be primarily liable for the payment of equal wages to employees. By the same token Congress deemed it essential that for effective enforcement of the Act any economic and competitive advantages accruing to the employer due to his non-compliance with the equal pay provisions be extinguished and the pecuniary benefits disgorged.

Consequently during the first ten years of EPA enforcement, out of more than 600 actions filed by the Department of Labor, only one suit was brought against a labor union seeking a monetary recovery; but, in that case the labor organization had taken a discriminatory action apart from entering into a collective bargaining agreement. In Hodgson v. Sagner, Inc., it was mutually agreed after a series of labor-management meetings that the EPA had been violated. Accordingly, the employer proposed to raise the aggrieved women to the male rate and pay full restitution. Instead of accepting this offer, which would have remedied the violations, the union insisted on a plan whereby the women were paid only one quarter of the amount owed as back wages and the remainder was paid to more than one hundred other employees as a temporary "wage increase." Based on those facts, the district court found the employer and the union liable jointly and severally as to the entire amount of back wages remaining unpaid to the aggrieved female workers. On appeal the Fourth Circuit affirmed the decision on the ground that the district court "was within its general equitable powers in imposing such liability upon the Union."

While it is thus evident that a labor organization may be required to pay back wages in an injunction proceeding instituted by the Secretary of Labor, the same does not appear to be true where an aggrieved worker brings a private suit seeking the identical back wages. For as one district court has held, the FLSA

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89 Memorandum of Morag Simchak, supra note 53.


91 326 F. Supp. at 377. It is the position of the Department of Labor that a labor organization is also liable to criminal penalties under 29 U.S.C. § 216(a) (1970), although no EPA criminal prosecutions have yet been undertaken. 29 C.F.R. § 800.168(d) (1973).

92 462 F.2d at 181.
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provision "which allows maintenance of a civil action by employees for monetary damages, provides for such liability only on the part of 'any employer.' It does not provide for private actions by employees against a union."\(^9^3\) It is therefore apparent that, at least under the EPA, neither an employer nor an employee may seek a monetary award from a labor organization.

Further, it is well-settled that a labor organization lacks standing to enforce the equal pay rights of its members in a private EPA action.\(^9^4\) Similarly, a labor organization may not intervene where the Secretary of Labor has already instituted an action against an employer, and the union representing that employer's employees objects to an agreement reached in settlement of the suit. For example, the Department of Labor and two other federal agencies brought suit in *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*,\(^9^5\) to end discriminatory employment practices based on sex. The Consent Decree entered in settlement of that suit called for the payment of $15 million in back wages,\(^9^6\) of which approximately $7.7 million covered EPA violations.\(^9^7\) One of the unions representing affected employees, however, was dissatisfied with the arrangements for monetary awards and future compliance. The union's petition to intervene and to deny enforcement of the Consent Decree was rejected by the court, except for the permission granted to the union to intervene on the limited issue of the rights of pregnant employees.\(^9^8\)

**IV. RELATIONSHIP TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**

Closely related to, but more far reaching than the EPA are the sex discrimination prohibitions contained in Title VII of the Civil  

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\(^9^6\) 365 F. Supp. at 1109.

\(^9^7\) Memorandum of Morag Simchak, supra note 53. In similar suits, recoveries of back wages have been made from the Pacific Telephone and Telegraph Company ($593,457) and the New England Telephone and Telegraph Company ($457,000). Id. See Kilberg, Progress and Problems in Equal Employment Opportunity, 24 Lab. L.J. 651, 653 (1973). It is quite interesting to note that the American Telephone and Telegraph Company subsequently agreed to pay another $7 million in back wages to management employees who had not been covered by the EPA at the time of the original suit.

\(^9^8\) 365 F. Supp. at 1110-23, 1128-29.
The prime provision of Title VII makes it an unlawful employment practice for a covered employer 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." The essential difference, therefore, between the EPA and the sex discrimination provisions of Title VII is that Title VII applies to all conditions of employment, while the EPA prohibits sex discrimination only in the area of compensation.

To aid in the administration of Title VII, Congress created the Equal Employment Opportunity Commission (EEOC). Although the original version of Title VII did not contain any such specific requirement, the courts held that an individual must initiate his charge of discrimination with the EEOC in order to bring a complaint before the courts. Under that original version, however, there was "no enforcement function for the EEOC other than any voluntary compliance that it could induce." Thus, during the past decade, under the EPA the courts have had considerably greater opportunity to reveal their response to sex discrimination than has been

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104 During the Fiscal Year ended June 30, 1972, the EEOC received 1,301 charges concerning sex discrimination with regard to compensation (1,252 from females, 49 from males), out of a total of 9,056 sex-related discrimination charges made against employers. EEOC, 7th Annual Report 39 (1973).

105 Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824, 879 (1972). "What frequently resulted under this scheme was a purely mechanical function of filing the charge and receiving from the Commission a notice of right to sue." Id. at 879 n.355.
the case under Title VII. This is, of course, because from the start of the Equal Pay Act, the Secretary of Labor has had authority to seek court enforcement, including, explicitly, restitution of back pay.105

This situation was altered by the passage of the Equal Employment Opportunity Act of 1972.106 That act amended Title VII, but retained the general scheme of the prior law, requiring the EEOC initially to process a charge of employment discrimination through investigation and conciliation,107 and permitting aggrieved individuals to file suit.108 As amended, Title VII also now authorizes the EEOC, in cases involving discriminatory practices in the private sector, to bring a civil action against a respondent when it is unable to conciliate. Authority to bring civil actions against state and local governments is vested in the Attorney General.109

These amendments will, of course, inevitably increase the volume of sex discrimination litigation under Title VII.

In both Title VII and the EPA, "Congress has itself manifested an increasing sensitivity to sex-based classifications"110 and a "purpose to eliminate subjective assumptions and traditional stereotyped conception"111 regarding the equal employment of members of both sexes in the same job. Thus, "[i]t is apparent that the purposes of [Title VII] and the Equal Pay Act are interrelated, and that the two . . . must in some way be `harmonized.'"112 For, "[a]lthough the Civil Rights Act is much broader than the Equal Pay Act,"113 this is clearly recognized in Title VII. Section 703(h) states that an employer's differentiation upon the basis of sex in determining wages or compensation shall not be an unlawful employment practice under Title VII if the differentiation is authorized by the EPA.114

109 Sape & Hart, supra note 104, at 862.
Thus, in one Title VII action, *Hays v. Potlach Forests, Inc.*, the Court of Appeals for the Eighth Circuit looked to the EPA in holding that "any discrimination against men resulting from the Arkansas [protective] statute [requiring women to be paid time and one-half for all hours worked in excess of eight hours per day] is to be cured by extending the benefits of that statute to male employees . . . ." Likewise, the Tenth Circuit in *Ammons v. Zia Co.* looked to cases decided under the EPA in determining the shifting burdens of proof in a Title VII sex discrimination action.

The courts have been far less unanimous, however, in determining to what extent the prohibitions of Title VII apply in an EPA action. In *Shultz v. Wheaton Glass Co.*, the Third Circuit suggested in dictum that equal pay would be required for a "male" job and a "female" job even though the two may be unequal, if the women are prohibited from performing the "male" job. In contrast, however, the Fifth Circuit in *Hodgson v. Golden Isles Convalescent Home, Inc.* held that questions concerning unequal jobs "are to be resolved in actions under Title VII . . . . Courts must be cautious not to apply improperly one Congressional act to achieve a purpose for which another act was intended." Accordingly, the Fifth Circuit takes the position that if the "male" work as compared to the "female" work is unequal, it is beyond the purview of the EPA but may still be within the domain of Title VII. Nonetheless, there has been no definitive resolution of this issue and it is yet quite alive.

V. Enforcement

The plaintiff in an equal pay case, whether an employee or the Secretary of Labor, has the burden of proving that the aggrieved employee has performed work equal to that performed by employees of the opposite sex involving equal skill, effort, and responsibility, and that the work was performed under similar working conditions in the same establishment. The plaintiff must, therefore, produce evidence that,"[w]here such a defense is raised the Commission will give appropriate consideration to the [EPA] interpretations of the . . . Department of Labor, but will not be bound thereby." 29 C.F.R. § 1604.8 (1973).
evidence sufficient to permit an accurate comparison of job content and duties between the two sexes. Should the plaintiff fail to prove any one of the criteria, "the equal pay standard cannot apply even though the jobs may be equal in all other respects."\footnote{29 C.F.R. §§ 800.125, 800.127 (1973).}

[T]he complaint must be dismissed even if the wage differentials were unreasonably large in comparison with the actual differences in skill, effort, responsibility, or working conditions, and were based on discriminatory motivation; Congress did not intend to put either the Secretary or the courts in the business of evaluating jobs and determining what constituted a proper differential for unequal work.\footnote{Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2d Cir. 1973), aff'd sub nom. Corning Glass Works v. Brennan, 94 S. Ct. 2223 (1974).}

There is, of course, no violation at all unless a wage differential exists between the two sexes for the equal work in question. Proof of that wage differential is also part of the plaintiff's burden in an EPA case.

Once a plaintiff has established that a wage differential exists between male and female employees performing equal work, the question arises as to whether the plaintiff must also show that the differentiation is based on sex. The Fifth Circuit in \textit{Hodgson v. American Bank of Commerce},\footnote{447 F.2d 416 (5th Cir. 1971).} faced with exactly this question, held that the plaintiff "has no such burden to convince the court."\footnote{Id. at 420.} On the other hand, however, in the \textit{Corning Glass Works} case,\footnote{Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973).} the Second Circuit concluded that a plaintiff must establish a prima facie case that the wage differential represents discrimination on the basis of sex.\footnote{Id. at 231.} This holding was based on a reading of \textit{Shultz v. Wheaton Glass Co.},\footnote{421 F.2d 259 (3d Cir. 1970).} in which the Third Circuit determined that "the Secretary clearly established his prima facie case that the wage differential was based on sex and therefore discriminated against women," but noted that the burden was met solely by showing the existence of a wage differential between male and female employees for equal work.\footnote{Id. at 266.} Consequently, it would not appear that the plaintiff must meet the additional burden of proving specifically that \textit{sex} is the motivation for the wage differential. For as the Supreme Court noted, in affirming the Second Circuit's \textit{Corning Glass} deci-
sion, "the Secretary must show that an employer pays different wages to employees of opposite sexes" for equal work.132

In any event, once a plaintiff has established the required prima facie case, "the burden shifts to the employer to show that the differential is justified under one of the [EPA's] exceptions."133 The employer must prove as an affirmative defense that the wage differential was not in any manner based on sex, but rather that it was based on a non-discriminatory seniority system, a merit system, a system which measures earnings by quantity or quality of production, or some other factor other than sex.134 Application of such exceptions to the equal pay standard are to be narrowly construed against an employer seeking to assert them.135

The equal pay standard is statutorily restricted on an "establishment" basis. While the word "establishment" is not expressly defined in either the EPA or the FLSA, the Supreme Court noted in one FLSA case that the term refers to "a distinct physical place of business" rather than to "an entire business or enterprise."136 The Department of Labor has therefore ordinarily considered each physically separate place of business as a single establishment.137 In this connection, for instance, a unit store in a chain store system will constitute the establishment, but not the individual departments within the store.138 There are, however, a number of exceptions to the rule. Thus, a college campus139 or an entire school district140 may be a single establishment for purposes of equal pay comparison. Geographically proximate industrial plants may also be a single

133 Id. at 2229.
135 See Corning Glass Works v. Brennan, 94 S. Ct. at 2229 n.12, and Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 654 n.8 (5th Cir. 1969). Both cases cite, inter alia, A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) and Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1950), which held that exemptions under the FLSA "are to be narrowly construed against the employers seeking to assert them and their application limited to those ... plainly and unmistakably within their terms and spirit," Arnold, supra, at 392; A. H. Phillips, supra, at 493. While the EPA "provides an exception rather than an exemption [there is] no essential difference between the two insofar as the law relating to burden of proof is concerned." Foremost Dairies, Inc. v. Wirtz 381 F.2d 653, 656 n.4 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968) (emphasis added).
establishment. 141 In each case the relevant questions concern physical location, identity of business purpose, integration of services, centralization of administration and management, interchange of employees, and coverage under a single collective bargaining agreement.

While it is thus no major problem to define the basic limits of the term "establishment," the same is not true for the other essential terms of the EPA: "equal skill," "equal effort," "equal responsibility," "similar working conditions," "any other factor other than sex," etc. Indeed, as the Department of Labor has readily admitted, many of the terms "cannot be precisely defined." 142 The application of the equal pay standard is necessarily a matter of case-by-case analysis, 143 not readily subject to broad generalization. There is significant value to be derived, therefore, from an examination of the actual judicial construction and application of those terms during the first decade of EPA enforcement.

In undertaking such an examination, it must be remembered that the EPA "is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." 144 "The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." 145 The EPA is thus "in the category of statutes which must be construed broadly so as to advance their important purposes." 146 As the Supreme Court noted, in language directly applicable to the EPA:

[T]hese provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a

142 29 C.F.R. § 800.122(a) (1973).
144 Corning Glass Works v. Brennan, 94 S. Ct. at 2234.
VI. THE WHEATON GLASS DECISION

After six years of difficult, arduous and indecisive litigation, the Labor Department's program of enforcement of the EPA came of age in Shultz v. Wheaton Glass Co.148 Prior to the Third Circuit's decision in that case, survey of the fifteen equal pay cases tried on the district court level by the Department of Labor indicates that only four cases were won, while eleven were lost.149 Inasmuch as Wheaton Glass was a true landmark case, establishing principles which have been the very heart of subsequent enforcement activities, it is worthy of close examination, both as an example of equal pay litigation and as a guide to equal pay law.

The Wheaton Glass Company is one of the largest manufacturers of special-order glass containers in the United States, having its principal plants in Millville/Vineland, New Jersey.150 Prior to 1956 the Bottle Inspection Department, like almost all production departments at Wheaton, was staffed solely with male employees who were classified as "selector-packers" and "snap-up boys." At that time, because of a shortage of available men in the local labor market, Wheaton was forced to hire women as selector-packers for the inspection department. Accordingly, a special provision was added to the collective bargaining agreement, whereby no male selector-packer was to be replaced by a female except to fill a vacancy resulting from resignation, retirement, or dismissal for just cause. On the insistence of the union separate "male" and "female" selector-packer job classifications were also created, with certain job

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149 Murphy, supra note 148, at 623 n.47. In that same period, however, approximately $12.6 million in back wages was collected and distributed to some 36,000 women (and a few men) as a result of voluntary compliance agreements and consent judgments. See Hearings on S. Joint Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 770 (1970).
content differences and a wage differential in favor of the males of approximately 10 percent.

The principal function of both the male and female selector-packers, and the bulk of their working time (estimated to be an average of 98 percent for women and 82 percent for men as a class) consisted of the performance of identical selecting and packing operations. As glass emerged from cooling ovens on a conveyor belt, the selector-packers discarded defective items into waste containers and packed the remaining items into cardboard cartons. To the extent that differences did exist between the "male" and "female" jobs, the divergence resulted solely from the assignment of many (but not all) of the men to perform miscellaneous unskilled manual tasks ordinarily performed by the so-called snap-up boys. The extra tasks typically involved crating and moving glassware, sweeping and other general cleaning chores. Such assignments consumed varying amounts of any given male selector-packer's total working time.151

After enactment of the EPA, Wheaton Glass was one of the first large manufacturing companies to be investigated by the Department of Labor. The investigation resulted in a finding that the male and female workers were performing equal work for unequal pay.152 When faced with this finding, which was accompanied by a request to equalize the wage rates in question and pay back wages to the women, Wheaton balked. In January 1966, after almost a year of fruitless compliance negotiations, an injunctive action was instituted in the name of the Secretary of Labor.153

When the case was brought to trial in 1968,154 Wheaton argued

151 Congressman Peter Frelinghuysen of New Jersey had hypothesized a similar situation in the House debates which immediately preceded the passage of the EPA:

For example, a plant may have one rate for a classification such as a male selector and packager and another for the classification female selector and packager. Yet both are doing the same job on the same assembly line. Such discrimination would be a violation . . . . On the other hand, the male packagers may be required to lift the heavy crates off the assembly line and place them on dollies or do various jobs requiring additional physical effort. The women selectors may work on the assembly line, selecting small items, for example, and placing them in crates. This would be a significant difference which would justify a difference in pay.

152 Shultz v. Wheaton Glass Co., 319 F. Supp. at 233. The court noted that there had been, as well, "considerable doubt in Wheaton's mind as to whether its [selector—packer] job classifications and wage rates were in compliance with the Act . . . ." Id.

153 Id. at 230, 233.

that: (1) the male and female selector-packers were not performing "equal work";\textsuperscript{155} and, (2) even if they were performing "equal work" within the meaning of the EPA, the admitted wage differential was justified as being based on a "factor other than sex."\textsuperscript{156} Wheaton contended, and the district court found, that "as a matter of operational and economic necessity,"\textsuperscript{157} selector-packers were required to perform the work of snap-up boys during limited periods of the work day when various cooling ovens were shut down. Under the collective bargaining agreement, however, while male selector-packers could be assigned at any time to perform such work, the female selector-packers could not. Wheaton therefore argued not only that the job content of the two positions was unequal, but also that the work flexibility of the males constituted a valid basis for paying the wage differential.

In reaching its decision, the district court examined the legislative history of the EPA, and concluded that Congress intended the term "equal work" to mean "substantially identical."\textsuperscript{158} On that basis, the court found that the performance of some snap-up boy duties by the males constituted "substantial differences" between the jobs performed by the two sexes, "thereby justifying the disparity in their wages."\textsuperscript{159} The court also found that the availability of male selector-packers to perform the work of snap-up boys during shut-downs was an element of flexibility which was of an economic value to the company, and, as such, a "factor other than sex" which legitimized payment of the wage differential.\textsuperscript{160}

The Department of Labor appealed the district court's decision on three grounds: first, that the district court's construction of the statutory term "equal work" rested upon an erroneous interpretation of the legislative intent; second, that the contention of male "flexibility" in job performance was not a "factor other than sex;" third, that in any event, the violation had been proven as to all the women, since at least some of the higher paid men performed little or none of the extra duties which were claimed as the basis of the wage differential.\textsuperscript{161} After receiving voluminous briefs and hearing oral arguments on two separate occasions,\textsuperscript{162} the Third Circuit

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\textsuperscript{157} Wirtz v. Wheaton Glass Co., 284 F. Supp. at 27.
\textsuperscript{158} Id. at 32.
\textsuperscript{159} Id. at 33.
\textsuperscript{160} Id. at 30-31, 33.
\textsuperscript{161} Brief for Appellant at 25, 57, 52, Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970).
\textsuperscript{162} The Third Circuit itself ordered reargument and requested the submission of supplemental briefs on specific questions presented by the court. The questions presented as a result of the court's rehearing order were:
\end{footnotesize}
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reversed the district court's judgment for Wheaton Glass, holding that the term "equal work" required only that the compared jobs be "substantially equal," not identical. Additionally, the court rejected all arguments as to flexibility, noting that job content "restrictions on females similar to those imposed by Wheaton Glass have been held illegal under the Civil Rights Act of 1964 . . . ." The court also stressed that while individual differences in work capacity may be a proper basis for a wage differential, sex-based group criteria are not acceptable.

Further, the court dissected the work content of the extra duties performed by the males and found the actual time spent by the males on such duties to be minimal. The court indicated that, even if it had been established that the extra duties consumed a substantial amount of time of all the male selector packers, there would still be no basis for the differential since this extra service was ordinarily performed by snap-up boys, who were only paid two cents more per hour than the females. In other words, "there would be no rational explanation why men who at times perform work paying two cents per hour more than their female counterparts should for that reason receive 2½ cents per hour more than females for the work they do in common."

Following the denial of Wheaton's motion for rehearing by the Third Circuit, and of its petition for writ of certiorari by the Supreme Court, the case was remanded to the district court with instructions to enter an appropriate judgment in favor of the Secretary of Labor. Wheaton's attorneys, however, decided that they had only lost a battle, not the war. In opposing the Secretary's proposed form of judgment, Wheaton expressed its willingness to raise the

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Can a 10% differential (or any differential) in favor of male selector-packers over female selector-packers be justified under the Equal Pay Act on the basis of the advantage of flexibility to the employer in male selector-packers availability for assignment to various unskilled tasks, when it appears that female selector-packers perform skilled selector-packer work 98% of their time while male selector-packers do skilled work only 81% of the time, and that "snap-up boys" receive 2 cents per hour more than female selector-packers although nearly all of the work they do is clearly unskilled?

To what extent does the Civil Rights Act of 1964 affect the construction of the Equal Pay Act of 1963?

Is there any evidence in the record which would indicate discrimination in arriving at the two classifications of male and female selector-packers?

See Supplemental Brief for Appellant at 1, 7, 10, Shultz v. Wheaton Glass, 421 F.2d 259 (3d Cir. 1970).

Shultz v. Wheaton Glass Co., 421 F.2d at 265.

Id. at 262 n.4. The cases cited by the court were: Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

pay scale for female selector-packers to that of their male counterparts, but would agree to pay back wages only from the date on which certiorari was denied. Wheaton made a de novo attack on the subject matter jurisdiction of a district court to award back wages in any case involving legal issues not previously settled by the courts. In essence Wheaton argued that the “novel issue” test, which at that time was applicable to actions brought under section 16(c) of the FLSA, should also be applicable to a section 17 injunctive action.

Wheaton’s arguments were rejected in toto by the district court and ultimately that court’s decision was affirmed by the Third Circuit. As a result, some 2,168 past and present female selector-packers were paid a total of $901,602, which included interest in the amount of $112,233. Undoubtedly, as was noted by one legal writer, the Wheaton Glass case “breathed new life into the effort to eliminate female wage discrimination.”

VII. IDENTITY VS. COMPARABILITY

The obligation of an employer under the EPA to accord equal wage treatment to its male and female employees employed in the same establishment is contingent on the men and women, who are the subjects of the comparison, engaging in equal work on jobs performed under similar working conditions, and requiring equal skill, effort, and responsibility. In the absence of equal work, no issue of sex discrimination in wages under the EPA arises. A definitional analysis of the word “equal” is, therefore, of critical importance.

The word “equal” is defined as: “of the same measure, quantity, amount, or number as another or others . . . identical in mathematical value or logical denotation.” In the Congressional debate prior to enactment of the final bill, there was much discussion as to whether an equal pay standard should require identical or comparable duties. The word “identical” denotes: “showing exact likeness: characterized by such entire agreement in qualities and

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172 Memorandum of Moorg Simchak, Chief, Branch of Equal Pay Discrimination, U.S. Dep't of Labor (Jan. 1974).
173 Murphy, supra note 148, at 616.
175 Webster's Third New International Dictionary, Unabridged 766 (1966 ed.).
attributes that identity may be assumed . . . having such close resemblance and such minor differences as to be essentially the same." On the other hand, the word "comparable" is defined as "capable of being compared . . . having enough like characteristics or qualities to make comparison appropriate . . . permitting or inviting comparison often in one or two salient points only . . . ."

Insight into the legislative intent can be gleaned from a review of certain proposals which were advanced during the final efforts to enact anti-sex discrimination legislation.

In 1962, the Kennedy Administration introduced a measure which proposed the standard of equal pay for comparable work. After the House Committee on Education and Labor favorably reported the Administration's bill, an amendment was offered to narrow that standard to one requiring equality of work. Indeed, the sponsor offered the amendment with the avowed intention of reducing the "tremendous latitude" which the word "comparable" would allow. The then Secretary of Labor Arthur Goldberg, however, wrote in support of the "comparable" standard and his remarks were introduced in the House debate:

"Equal" may be interpreted to have a rigid connotation such as "exact uniformity," "of the same measure," and so on— incompatible with an effective equal pay law which necessarily must be applied on the basis of similarity between one job in relation to another job but not the exactness of two jobs.

If a showing of equality was a requisite to establish the requirement of equal pay, the conscious introduction of one slight and trivial factor might be considered sufficient to justify a lower wage rate.

Subsequently, in 1963 a measure was proposed by Congresswoman Florence Dwyer of New Jersey which contained the phrase: "work of comparable character." Simultaneous with the introduction of the Dwyer legislation in the House of Representatives, the Senate was also confronted with a bill, sponsored by Senator Clifford Case of New Jersey, which contained identical language insofar as it sought to proscribe sex based wage differentials "for work of comparable character on jobs the performance of which requires
comparable skills." Nevertheless, despite the Secretary's admonition, a bill was introduced by Congresswoman Edith Green of Oregon which contained the phrase "equal work." These bills are cited as illustrative of the fact that the Congress, in debating the phraseology of the potential statutory standard, was clearly aware of the options presented to it. On the one hand, it might have adopted a standard requiring identity of work; on the other hand, it might have selected the more liberal approach which would merely have necessitated comparability as the requisite for equal wages.

Significantly, as evidenced by the final bill, in its selection of the word "equal," Congress rejected the "comparable" standard and opted for a more stringent test. Equally significant, however, is that in selecting the phrase "equal work," there was no intention to require that jobs be identical before a comparison could be made. In fact, any belief to the contrary was labeled as "obviously ridiculous" by the Chairman of the Senate Labor Subcommittee.

Accordingly, the equal pay standard requires that the jobs be somewhere on a scale between absolute identity and mere comparability. Eleven years after passage of the EPA, however, there remains widespread debate regarding this standard. The degree of "equality" needed to establish a violation is still not susceptible of precise definition. Thus, the Fifth Circuit, in *Brennan v. City Stores, Inc.*, addressed itself to this elusive concept:

"While the standard of equality is clearly higher than mere comparability yet lower than absolute identity, there remains an area of equality under the Act the metes and bounds of which are still indefinite. . . . [N]o talismanic words will resolve the ambiguities presented by the phrase "equal skill, effort, and responsibility." Like many other legal concepts, that of equality under the Equal Pay Act is susceptible of definition only by contextual study."

In order better to understand the meaning of equal pay for equal work, it is necessary to follow the sound advice of the Fifth Circuit by analyzing several of the cases which have construed that phrase. However, initially it must be stressed that, although there

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184 There is a rather lengthy discussion in the Senate Report No. 176 on the methods and procedures which the Department [of Labor] should utilize to determine which jobs do involve equal skills, efforts, and responsibilities. That report discussion makes it clear that it is not the intent of the Senate that jobs must be identical. Such a conclusion would obviously be ridiculous.
185 479 F.2d 235 (5th Cir. 1973).
186 Id. at 238-39.
may be conflicting views as to the connotation of "equal work," there is absolutely no reasonable dispute as to the meaning of the phrase "equal pay." Any disparity in pay between men and women who come within the EPA standard is proscribed unless justified under one of the statutory exceptions.\(^{187}\)

In 1966, in the first case tried under the EPA, the court in \textit{Wirtz v. Basic, Inc.}\(^{188}\) confirmed that it was not the legislative intent to construe the phrase "equal work" to mean identical work and that insubstantial differences should be ignored.\(^{189}\) Six months later, this rationale received added support in \textit{Wirtz v. Rainbo Baking Co.}\(^{190}\) wherein the Court made explicit what was and is obvious: jobs are seldom identical and small differences are of no consequence where the work is substantially the same.\(^{191}\) Significantly, therefore, in the landmark \textit{Wheaton Glass} case,\(^{192}\) the Third Circuit concluded that "equal" could not have been intended to mean identical, since "[a]ny other interpretation would destroy the remedial purposes of the Act."\(^{193}\) With the advent of \textit{Wheaton Glass} an unbroken line of cases began which, regardless of whether or not a violation was found, have recognized the principle that equality means something less than identical, to wit "substantially equal."\(^{194}\) On that basis, the more recent cases have further recognized that job content differences do not in themselves necessarily preclude application of the EPA standard.\(^{195}\) For the issue in determining equality is not whether the employees are performing


\(^{189}\) Id. at 790. As a somewhat humorous aside, the court's prefatory language is worthy of note:

The case for the plaintiff was presented by a feminine attorney of the Department of Labor, resisted by a masculine attorney of the Nevada Bar and considered by a Judge who, for the purposes of this case at least, must be sexless, a possibility not apparent when the oath of office was taken and one which may bespeak the appointment of older judges.


\(^{191}\) Id. at 1052.


\(^{193}\) 421 F.2d at 265.


different duties, but whether the duties that they are performing are substantially equal in terms of skill, effort, and responsibility.

In a comparison of jobs which are substantially equal, job titles, job classifications, and job evaluations are not controlling. Rather the application of the Act is dependent on the job requirements and the duties actually performed by the employees involved in the comparison. The fact that jobs may have different titles is no bar to a comparison under the EPA. By the same token, the fact that two jobs may bear identical titles does not mean that the work performed by the employees is equal. Job evaluations are some evidence of equality or inequality of work; however, they are not conclusive. For example, if the male and female duties add up to the same number of points under an evaluation system, this does not necessarily mean that the jobs are equal. The holding of the Seventh Circuit in *Hodgson v. Miller Brewing Co.* must be stressed—that the EPA “does not authorize courts to equalize wages merely because they find that two substantially different jobs are worth the same monetarily to the employer and therefore should be paid the same wages. However, [t]here is evidence that Congress intended that jobs of the same or closely related character should be compared in applying the equal pay for equal work standard . . . .” Conversely, the fact that two jobs under evaluation are deemed to have different point values does not prevent the application of the equal pay standard.

Likewise, enforcement experience establishes that often the employees are doing either more or less work than is provided in the job description. Thus, in *Hodgson v. Brookhaven General Hospital*, the Fifth Circuit recognized that certain employees' duties exceeded those mentioned in the job description, and agreed that the trial court was correct in placing its reliance on the test.

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197 “Application of the equal pay standards . . . is not dependent on job classifications, such as ‘heavy work’ or ‘light work’ . . . but depends, rather on actual job requirements and performance.” Wirtz v. Versail Mfg., Inc., 18 BNA Wage & Hour Cas. 527, 529, 58 CCH Lab. Cas. ¶ 32,047 (N.D. Ind. 1968); See also Hodgson v. Food Fair Stores, Inc., 329 F. Supp. 102, 104 (M.D. Pa. 1971).

198 See Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 899 (5th Cir. 1974).

199 Under a job evaluation system, the point value for a male clerk might be equal to the point value for a female bookkeeper, yet there could be no comparison for purposes of the EPA. 29 C.F.R. § 800.120 (1973). “The points for the two positions may be equal, but the jobs themselves might be substantially different.” Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257, 260 (E.D. Wis. 1970).

200 457 F.2d 221 (7th Cir. 1972).

201 Id. at 227.


203 436 F.2d 719 (5th Cir. 1970).
timony of employees rather than on artificial job descriptions. For, it is manifest that blind reliance on job descriptions which may have substantial discrepancies when compared with the actual duties of an employee would be "too wide a door through which the content of the Act would disappear."  

The EPA prescribes that the performance of "equal work" must require equal skill, effort, and responsibility. These three requirements have been construed in virtually all judicial decisions and interpretations as constituting three separate tests. In the interpretations promulgated by the Secretary of Labor, it is patent that where the amount or degree of skill required to perform one job is substantially different than that required to perform another job, the jobs may not be compared even though they may be equal in all other respects. The same position is expressed in the analysis of "equal effort." In discussing equal responsibility the interpretations are not quite as explicit, but they do unmistakably suggest that differences in responsibility can render two jobs unequal for purposes of the EPA. Thus, in the seminal case under the EPA, the court held that the plaintiff bore the burden of proving "equal skill," "equal effort," and "equal responsibility."  

In Hodgson v. Daisy Manufacturing Co., the district court held that these three criteria should be weighed collectively. The court found that while certain stock chasing duties performed by the males required substantial physical effort, such work demanded little skill or responsibility. Furthermore, the court found that while the men were so exerting themselves, the females were engaged in duties which required substantially greater skill and job responsibility. Based on these findings, the court concluded that the substantial effort exerted by the males was offset by the substantially greater skill and responsibility required in the performance of the female job. This collective approach obviously eases the burden of establishing an equal pay violation.  

One critical concept, accepted by every court before which the question has been raised, is that concurrent employment of the two  

208 29 C.F.R. § 800.127 (1973) (emphasis added).  
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The sexes need not be established in order to conduct an EPA comparison. Thus, if women replace higher paid males and perform work which is substantially equal to that which was formerly performed by the males, the equal pay standard is violated. The employer's obligation to pay members of both sexes the higher wage paid for the job cannot lawfully be avoided by replacing male employees with lower paid female employees or vice versa. 213

In Hodgson v. Behrens Drug Co., 214 for instance, the Fifth Circuit found violations of the EPA in comparing a female supervisor with the male whom she replaced. The male supervisor resigned and was immediately replaced by the lower paid woman. In fact, when the Secretary instituted suit, four and one-half years after the male's resignation, the woman was still earning less than what the male had been paid. The court held that the wage discrimination was a continuing violation and ordered the recovery of back wages for the two years preceding the suit. 215 This holding is important not only for the reason that it affirms the concept that concurrent employment is not the sine qua non in these cases, but also for the reason that it sanctions the right of the plaintiff to establish violations based on a course of conduct occurring outside the period of the statute of limitations. In other words, the court allowed the Secretary of Labor to go back over four and one-half years to establish the fact of discrimination, but limited the back wage recovery to the two-year statutory period.

VIII. EQUAL SKILL

The administrative interpretations of the EPA define the term "skill" as including consideration of such factors as experience, training, education and ability, each measured by the performance requirements of the particular jobs involved in the comparison. 216 The fact that an employee possesses skills which are not required for the performance of his job duties cannot be considered in measuring equality of skill. 217 As one court has held:

[T]he concern is not with the capabilities, skill, knowledge and expertise of the employees in general, but with the expertise required for a particular job classification. For example, a candy salesman or a ribbon clerk may have

215 475 F.2d at 1048-51.
217 Id.
expertise in business administration, tailoring, automobile mechanics, or space science. However, job pay requirements may be determined by the expertise required to accomplish a particular job such as candy or ribbon sales without reference to skills in unrelated areas.\textsuperscript{218}

Insight into the meaning of the word "skill" as used in the EPA may be obtained from a review of the decided cases. In \textit{Wirtz v. Dennison Manufacturing Co.}\textsuperscript{219} the men who worked the third shift, as opposed to the women who worked the first and second shifts, were required to set up machinery before starting work on a new order and were required to make repairs and adjustments on the machines when a malfunction occurred. The set-up work occurred regularly and certain repairs could exceed 20 minutes of the males' time. All of the male employees on the third shift had either passed a mechanical aptitude test or had some mechanical ability. Based on these facts, the court found that the men possessed and exercised, to a substantial degree, special skill which was not required of the women who acted solely as machine operators.\textsuperscript{220}

In hospital and nursing home cases under the EPA, duties which are asserted to require "skills" have been analyzed. One such duty is that of catheterization which has been labeled "a skilled nursing function" by a number of district courts.\textsuperscript{221} In the \textit{Bookhaven General Hospital}\textsuperscript{222} case, however, the Fifth Circuit found that catheterizations performed by male orderlies, but not by female aides, did not warrant the payment of higher wages to the men. In arriving at this conclusion, the court considered factors apart from the duty per se, taking cognizance of the trial judge's findings that: (1) the males devoted an insignificant amount of time to this duty; (2) the duty had been performed in the past by female aides; and (3) the women performed other duties which required as much skill as


\textsuperscript{220} Id. at 790. But see Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049, 1051 (E.D. Ky. 1967) (minor machine adjustment, which "does not involve any peculiar skill," cannot justify a wage differential).


was involved in catheterization. Therefore, it is apparent that the mere possession of a skill will not justify a differential, if the duty which necessitates the skill is only performed for an insignificant amount of time. Moreover, a skill needed in the performance of certain duties performed by employees of the higher-paid sex will not validate the higher wage if employees of the lower-paid sex perform the same or other duties which require equal skill.

Differences merely in the kinds of duties performed do not negate the presence of equal skill if the basic duties are of a closely related character. Rather, the critical consideration is the amount or degree of skill required to perform the respective jobs. The Department of Labor adopts the position that, regardless of the frequency of its exercise, if the same degree of skill is needed for the performance of the two jobs, there is equality of skill. The frequency of exercise of the skill would only be a determinative consideration where the skilled duty is performed for an insignificant amount of time. In such a situation, due to the infrequency of exercise, the skill is virtually not needed in the performance of the job, and thus it cannot serve as a basis for a wage differential.

It should also be noted that where an additional skill is shown, an employer may not justify a wage differential for all hours, if the differential is predicated on a skill used for only a limited and identifiable period of time. This is so even though the duty in

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224 Other hospital and nursing home cases have treated as "skilled duties . . . (requiring) additional training and know-how" such tasks as setting up tractions and oxygen tents and performing inhalation therapy. Hodgson v. Maison Miramon, Inc., 344 F. Supp. 843, 848 (E.D. La. 1972) and cases cited therein.
225 Brennan v. Houston Endowment, Inc., 21 BNA Wage & Hour Cas. 561, 562, 73 CCH Lab. Cas. ¶ 33,022 (S.D. Tex. 1974), involved custodial personnel. The court treated as skilled duties the operation by men of floor buffers, wet vacuums and carpet pile lifters and compared those operations with the skill of cleaning venetian blinds with tools as performed by women.
226 The court in Houston Endowment concluded that the "skills" exercised by both sexes were equal. This conclusion was reached despite a finding that "the men regularly spent a substantial portion of their time performing a type of janitorial work which was not identical to the type of janitorial work which occupied a substantial portion of the women's time." Id. at 563.
229 See, e.g., Wirtz v. Rainbow Baking Co., 303 F. Supp. 1049, 1052 (E. D. Ky. 1967); Shultz v. Wheaton Glass Co., 421 F.2d 421, 263 (3d Cir. 1970). This concept applies as well to other elements of the equal pay standard:

There could be no effective enforcement of the equal pay provisions if differentials between sexes were permitted for all hours worked because of the substantially different working conditions and responsibilities entailed in a specific part of the work performed at identifiable times and places.

question might entail substantially greater skill (effort and/or responsibility). Conversely, of course, if an employer can establish through business records that any given employee performs a duty which is substantially different during a certain identifiable period of time, the employer is entitled to pay a higher rate to the employee during the particular time in which the duty is performed. 230

IX. EQUAL EFFORT

The next criterion under the EPA is that of effort. The term "effort" is defined as "the physical or mental exertion needed for the performance of the job." 231 It is not the differences in kinds of effort which are to be considered in evaluating the equality of two jobs, but rather the differences in amount or degree of effort which is actually expended in the performance of the jobs. 232 Of the four tests which comprise the equal pay standard, the effort factor has proven the most quantifiable. Consequently, the overwhelming majority of cases under the EPA have involved discussions of equality of effort; and, as a result, this element of the equal pay standard is more clearly defined than those of skill, responsibility, and working conditions.

If an employer relies on effort as the basis for a disparity in pay between male and female employees, essentially three tests must be met: (1) the effort must in fact be greater; (2) the duty or duties which require the extra effort must consume a significant amount of time of all those employees whose added wages are sought to be justified in terms of the extra effort; and, (3) the extra effort must have a value commensurate with the differential. 233

In order to counter successfully a charge of EPA discrimination, it is not sufficient merely to establish that one or two of the


In retail store cases which have arisen under the EPA, the tailoring and fitting of clothing has been presented by the employer as a duty requiring skill. In Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971), the defendant argued that the male tailor's job was more skilled than that performed by the female seamstress. The tailor made sleeve and trouser alterations, hemmed and occasionally altered suit collars. The seamstress altered sleeves, hemmed skirts, made other skirt and dress alterations and occasionally narrowed shoulders. The two used essentially the same equipment in the performance of their jobs. The district court found that the work entailed equal skill, id. at 449, and the Fifth Circuit affirmed on appeal. Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973). In contrast, however, another district court held that salesmen who pinned suits for alteration required more skill than women engaged in pure sales. Hodgson v. Cain-Sloan Co., 21 BNA Wage & Hour Cas. 1, 4, 71 CCH Lab. Cas. ¶ 32,880 (M.D. Tenn. 1973).


232 Id.

above tests are satisfied. Instead, it is imperative that all three requisites be established. The tests have been formulated to avoid situations where the differences in effort are merely illusory. These tests also serve to negate differentials which are sought to be justified on the basis of duties which are either infrequently performed, or are performed by only some of the employees who receive the higher wage. Further, the tests serve to disallow wage differentials based on duties which, when performed by other employees in the establishment, command a lower rate of pay than is received by the employees whose rate is sought to be justified in terms of these duties.\textsuperscript{234}

In \textit{Brookhaven General Hospital}, the trial court found as a fact that the primary duty of the female aides and male orderlies was general patient care and assistance.\textsuperscript{235} Notwithstanding this identity of duties, the hospital argued on appeal that the jobs were substantially distinguishable in terms of the "secondary and tertiary" duties exercised by the two classifications.\textsuperscript{236} On remand to the district court for further evidence, it was found that the added duties were performed off the regularly assigned station for other than the regularly assigned patients. It was estimated that the female aides devoted 2\% of their time to the off-station duties and the male orderlies devoted 20-25\% of their time to these differing duties. Among the extra duties of the orderlies were tasks which allegedly required substantially greater effort, such as the lifting of patients, setting up of traction, assisting in the application of casts, subdued violent patients, moving equipment, assisting in the emergency room and transporting supplies. Nonetheless, the district court concluded that "[t]he orderlies do not exert significantly more effort than aides because of these 'secondary and tertiary' duties, which consume only a minor and insignificant amount of the time of the orderlies who have been considered as the counterparts of the aides."\textsuperscript{237} On appeal once again, the decision was affirmed.\textsuperscript{238}

\textsuperscript{234} The court in Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970) stated:

\begin{quote}
We are persuaded that this approach to the application of the statutory "equal effort" criterion is in keeping with the fundamental purposes of the Equal Pay Act, and adopt it here. Employers may not be permitted to frustrate the purposes of the Act by calling for extra effort only occasionally, or only from one or two male employees, or by paying males substantially more than females for the performance of tasks which command a low rate of pay when performed full time by other personnel in the same establishment.
\end{quote}

Id. at 725.


\textsuperscript{236} Hodgson v. Brookhaven Gen. Hosp., 436 F.2d at 723.


\textsuperscript{238} Hodgson v. Brookhaven Gen. Hosp., 470 F.2d 729 (5th Cir. 1972) (per curiam).
Thus, it is manifest that the particular duty is not the sole focal point in determining equality of effort. Rather, the time factor can be conclusive. Moreover, the district court regarded as significant the fact that the time devoted to such duties varied considerably from orderly to orderly, yet their respective pay rates did not vary accordingly. This ruling negates the possibility that an employer can justify a differential predicated on effort which is performed by only some of the members of the higher paid sex. For if one or more members of the higher paid sex either does not perform the duty requiring the extra effort or only performs it for an insignificant amount of time, then the employer's reasoning that he pays more for the performance of such duty is without logic.

In Hodgson v. Golden Isles Convalescent Homes, Inc., however, a different panel of the Fifth Circuit affirmed a lower court decision which found that aides and orderlies were not engaged in the performance of equal work. The appellate court distinguished that case from its previous ruling in Brookhaven General Hospital and from another lower court decision in a similar action. The Fifth Circuit opined that in those earlier cases, unlike the case before it, many of the duties which the men performed were also performed by the women. The rationale in such cases is that if some of the members of the lower-paid sex perform the duty, and yet continue to receive the lower wage, the employer's argument that the performance of the duty has an added economic value is without merit. The Golden Isles decision stresses that there can be no universal determination that all aides and orderlies perform equal work in all hospitals.

Another theory, which has surfaced in several of the cases concerning medical care facilities, is that the presence of a male

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Without unnecessarily belaboring the facts and findings below, Brookhaven's orderlies did not expend significantly greater effort in performing primary, secondary or tertiary duties. Indeed, the record supports the affirmative statement that orderlies and aides expended substantially equal effort in performing all of their duties, however divided and ranked.

Id. at 730.

239 The court found, for example, that while one orderly devoted up to 15% of his total working time to off-station duties, another spent only an occasional and minimal amount of time away from the routine duties. Despite the time disparity, both men received equal wages. Hodgson v. Brookhaven Gen. Hosp., 20 BNA Wage & Hour Cas. at 55.

240 468 F.2d 1256 (5th Cir. 1972) (per curiam).

241 436 F.2d 719 (5th Cir. 1970).


243 468 F.2d at 1258.

244 351 F. Supp. at 1297-98. The court in Hubbard found that the males and females "performed and assisted each other in performing" the so-called extra duties which were alleged to have been assigned only to males. Id.

245 468 F.2d at 1258.
orderly provides security to patients and other employees at the institution. To the extent that such a factor merely represents some type of "nice to have a man around the house" argument, it is without merit. For "[t]he presence of male orderlies is not a duty that is performed" within the meaning of the EPA. Indeed, this approach credits all males and no females with the ability to provide a measure of psychological security, which conjures up the very stereotypes which the EPA so evidently sought to avoid.

Nevertheless, there are situations in which this otherwise invalid psychological argument does have legitimacy, most prominently in the case of facilities in which there is an actual and recurring need to restrain violent patients. One such case, Shultz v. Kentucky Baptist Hospital involved alleged violations in the psychiatric unit of the defendant-hospital. The evidence established that, in addition to other regular duties, male orderlies were required to restrain patients during and after shock treatment and to oversee suicidally-inclined patients. Significantly, nearly all the female nurse's aides testified that they would not work in the psychiatric unit in the absence of a male orderly. Based on those findings, the court determined that the male orderlies assured security and provided protection, and therefore declined to find an EPA violation.

It is essential to note that Kentucky Baptist and other similar cases dealt with mental care institutions in which there was not only a possible threat to security, but actual outbreaks of violence. In each case, male orderlies were regularly called upon to restrain

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249 See Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969), noting as "the Congressional purpose: The elimination of those subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work." Id. at 656.

250 19 BNA Wage & Hour Cas. 403, 62 CCH Lab. Cas. § 32,296 (W.D. Ky. 1969).

unruly patients and provide security in the actual performance of other work. Therefore, even where some orderlies did not have occasion to restrain more than a few patients, their presence provided security and peace of mind to other employees. Equally patent, however, is that a general care hospital or nursing home will have but a minimal actual need to restrain violent patients. Accordingly, in such institutions, the mere presence of orderlies will provide no substantial additional peace of mind to other employees and patients.

One of the most fertile sources of litigation under the EPA has been the manufacturing industries. In Shultz v. American Can Co.-Dixie Products,\(^2\) the issue of effort was critical to the ultimate determination. The district court had found that male and female machine operators were engaged in a process which was "identical at all times," with the exception that the men loaded the materials for their machines, whereas the women did not. The materials consisted of rolls of paper weighing from 50-1000 pounds and containers of paper blanks weighing up to 1500 pounds. The rolls had to be moved a few feet and then loaded onto the machines either manually or mechanically.

In reversing the district court's decision, the Eighth Circuit held that the handling and loading functions did not involve substantial additional effort.\(^3\) The appellate court stressed that the male operators' duties were virtually identical to the female operators' duties for 93-98% of the male's work time. The court also considered the fact that although the male operators exerted varying degrees of effort, no wage differential existed among them. All of the men received the same pay regardless of the time each devoted to material handling, regardless of the weight of the materials which each handled, and regardless of whether the loading of the materials was effectuated by manual or hydraulic means. Consequently, the court held that, since the males received the same compensation regardless of the frequency or amount of effort involved, then such effort could not have the economic value which the employer sought to attribute to it.\(^4\) In view of the weight of the materials, moreover, it is important to note that the fact that a woman might be physically unable to perform a certain duty which is assigned to men does not mean that her job cannot be equated with that of the

\(^3\) 424 F.2d at 360-61.
\(^4\) Id. A further indication that the material handling duties did not have the value ascribed by the employer was the fact that the duties were performed "by unskilled workers receiving . . . less than the female machine operators." Id. at 361. See Shultz v. Wheaton Glass Co., 421 F.2d 259, 262 (3d Cir.), cert. denied, 398 U.S. 905 (1970).
males. For it is necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle.\footnote{255}{29 C.F.R. § 800.119 (1973).}

Any "weight-lifting restrictions imposed on women are closely scrutinized by the courts and blanket restrictions which do not take into consideration qualifications of individual employees, such as physiological makeup and physical capabilities, will not pass muster" under the EPA.\footnote{256}{Shultz v. Saxonburg Ceramics, Inc., 314 F. Supp. 1139, 1146 (N.D. Pa. 1970).} An employer may only rely on such a restriction where there is "reasonable cause to believe, which is a factual basis for belief, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."\footnote{257}{Id.} Therefore, where one district court found that the male-only duties were not "the principal activities" of the job and that "all of the women were able to perform all of these additional tasks," the employer's defense of job inequality based on such restriction was rejected.\footnote{258}{Id.}

In another recent district court case,\footnote{259}{Brennan v. Houston Endowment, Inc., 21 BNA Wage & Hour Cas., 561, 73 CCH Lab. Cas. § 33,022 (S.D. Tex. 1974).} it was found that the male custodians "frequently" and "regularly" operated floor buffers, wet vacuums, or carpet pile lifters; whereas, the women generally only used vacuum cleaners. The court found that the only difference in the jobs was that the men, through exposure and experience, were familiar with the power-driven equipment and most women did not have such exposure. There was evidence, however, that one woman had operated the pile lifter and another woman had operated a floor buffer for another employer.\footnote{260}{21 BNA Wage & Hour Cas. at 562.} The court held that, "This lack of exposure, controlled by defendant, does not warrant any wage differential."\footnote{261}{Id. at 563.} Rather, the court ruled that "[e]ach employee must be afforded a reasonable opportunity to demonstrate his or her ability to perform the allegedly more strenuous job on a regular basis;"\footnote{262}{Id.} and, noted that "any wage differential which might be justified may be applied only to those persons, male or female, who are individually unable or unwilling to do that work to which the higher wage is attributable."\footnote{263}{Id.}

In Hodgson v. San Diego Unified School District,\footnote{264}{21 BNA Wage & Hour Cas. 123, 71 CCH Lab. Cas. § 32,920 (S.D. Cal. 1973), aff'd mem. No. 72-2805, 9th Cir., Sept. 5, 1974.} a com-
parision of duties was made between male custodians and female matron custodians. The court found, inter alia, that the men, but not the women, were operating and maintaining electric scrubbing and polishing machines. The evidence established, however, that matrons were capable of and had, in fact, used the floor scrubbing and waxing machines. The court therefore held: "The fact that they are by school regulation not permitted at present to operate them cannot be used as a basis to distinguish between the duties of matron custodians and custodians." 265

In these last three cases, the differences in issue were occasioned not by the physical inadequacies of female employees, but by an employer's decision to bar them from the performance of the tasks. These courts appear to be adopting the position that the restrictions, when controlled by an employer, cannot serve as a basis for justifying the differential notwithstanding the fact that only the men perform such tasks.

This approach is more liberal than that taken by the Department of Labor in the administrative interpretations, which provide:

"[T]he fact that there is an upper limit set by State law on the weights that may be lifted by women would not justify a wage differential to male employees who are not regularly required to lift substantially greater weights or expend the extra effort necessary to make the jobs unequal. The requirement of equal pay in such situations depends on whether the employees involved are actually performing "equal work" as defined in the Act, rather than on legal restrictions which may vary from State to State." 266

The interpretations suggest that if all the higher paid males in an establishment lift weights in excess of 50 pounds, for example, for a significant period of time and the women are barred from such work due to state weight lifting restrictions, then the employees are not performing equal work and the EPA is not violated. The Department's position, however, is addressed to state protective laws 267 which, regardless of their present legal status, were origi-
nally enacted for the purpose of benefitting women and were not intended to be discriminatory. On the other hand, when an employer removes duties from a woman's job, the motivation behind this removal may be discriminatory and intended to circumvent the requirements of the EPA. Debatably, regardless of the motivation, if the removal or restriction of duties renders the female job unequal to that of the male, the EPA has no applicability. The EPA requires equal work as a prerequisite to violation. It can be argued with considerable persuasion, therefore, that if the work is unequal, there can be no comparison regardless of the cause of the inequality.

The term “effort” is not, of course, solely restricted to physical effort, but includes mental effort as well. The balancing of the possibly greater physical effort of one sex against the possibly greater mental effort of the opposite sex was considered in Hodgson v. Daisy Manufacturing Co. The district court found as fact that the women exclusively operated certain high speed presses which posed a constant danger to the hands of the operator. Evidence established that seven women had lost fingers in the operation of such machines, and one woman testified that every time she performed the operation she experienced fear. It was the testimony of an industrial psychologist that the risk of injury is a factor causing mental stress and fatigue. Similarly, an industrial engineer stated that such a risk necessitated sustained mental and visual attention. Based on these representations, the court concluded that the risk of injury, where employees had actually been injured, was evidence that women expended significant mental exertion not expended by the men. The court therefore held that the greater physical effort exerted by the men in certain of their duties was counterbalanced by the mental effort exerted by the women in operating the high-speed presses.

X. EQUAL RESPONSIBILITY

Relatively few equal pay cases have generated judicial discussions of the concept of equal responsibility in the performance of jobs. In good part this is a consequence of the fact that level of
responsibility is a prime consideration in setting compensation primarily for executive, administrative and professional jobs; and, until July 1, 1972, employees in such jobs were exempted from the protection of the EPA. It is to be expected, however, that in the near future many of these cases will be decided by the courts, and that development in the judicial analysis of the phrase “equal responsibility” will result.

The administrative interpretations do set forth a general guideline to the effect that, “responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.” The interpretations provide hypothetical situations where different degrees of responsibility permit different rates of pay. One such example concerns two employees who perform work which is equal in all respects, except that one employee is required from time to time to perform supervisory functions in the absence of the regular supervisor in order to train for a permanent supervisory position. This added duty is a responsibility which could serve as a basis for a higher wage. Another example indicates that if two sales clerks’ jobs consist mainly of selling similar merchandise, but one sales clerk is additionally required to make determinations concerning acceptance or rejection of customers’ checks, the clerk with the added duty may have a considerable additional degree of responsibility for which that person may be paid at a higher rate. The interpretations point out that such discretionary functions may have a material effect on the business operations of the employer. Accordingly, in determining whether certain duties entail greater responsibility, the importance of the duty and the degree of accountability of the employee are to be considered in relation to the extent which the performance of the duty has on the employer’s operations. Despite occasional differences in duties, no pay differential is justified where “the difference in responsibility involved would not appear to be of a kind that is recognized in wage administration as a significant factor in determining wage rates.”

The attempt to define “equal responsibility” requires sifting through masses of facts in an attempt to isolate the duties which courts point to as indices of responsibility. The task is complicated by the courts’ frequent failure to characterize precisely the duty in

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271 See note 46 supra. See Brennan v. American Brands, Inc., 21 BNA Wage & Hour Cas. 61, 64, 71 CCH Lab. Cas. ¶ 32,903 (W. D. Ky. 1973) (section supervisors found to be executive employees were exempt from EPA under prior law).
273 29 C.F.R. § 800.130(a) (1973).
274 29 C.F.R. § 800.130(b) (1973).
275 29 C.F.R. § 800.130(c) (1973).
question as one involving a "skill," an "effort," or a "responsibility." Often, courts will enumerate several duties and then broadly conclude that these duties render the jobs either equal or unequal in terms of all three criteria: skill, effort and responsibility. In such cases it is exceedingly difficult, if not impossible, to ascertain the specific criterion applied.\textsuperscript{276} The study is further complicated by the two usages in the cases of the term "responsibility." The word is often used in a loose sense meaning "duties,"\textsuperscript{277} and also in its more precise sense meaning "accountability."\textsuperscript{278} Because it is sometimes difficult to determine in which sense the term is used, it is difficult to determine what factors are being considered. Notwithstanding these impediments, some patterns can be discerned upon close scrutiny of the cases.

In one of the earliest cases under the EPA,\textsuperscript{279} male and female department heads in a retail store were compared. The evidence established that one man, in addition to the supervisory duties which he had in common with the women, was in charge of the store's warehouse and home delivery service. The court found no violation could be based on the duties of this male, since he exercised more significant and substantial responsibilities than any other department head.\textsuperscript{280} On the other hand, the Fourth Circuit in \textit{Hodgson v. Fairmont Supply Co.}\textsuperscript{281} reversed a district court finding that justified a wage differential on the basis of additional job responsibilities in a warehousing operation. The court held that a finding of greater responsibility was not warranted: the "decisions with respect to all of these jobs were subject to being changed by his superiors, and, therefore, required no more responsibility than his duties" performed in common with the compared female employees.\textsuperscript{282}

In \textit{Hodgson v. American Bank of Commerce}\textsuperscript{283} the defendant bank sought to justify a wage disparity between a male drive-in teller "supervisor" and female drive-in tellers. The bank showed that the man supervised the cashing of checks, helped the other tellers in balancing out, handled unusual problems, and set the break periods for the others. In finding that the jobs were equal, the Fifth Circuit alluded to the fact that the male had no authority

\textsuperscript{276} See, e.g., Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972).
\textsuperscript{277} See, e.g., Brennan v. City Stores, Inc., 479 F.2d 235, 237 (5th Cir. 1973).
\textsuperscript{278} See, e.g., Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 899 (5th Cir. 1974).
\textsuperscript{280} Id. at 1037.
\textsuperscript{281} 454 F.2d 490 (4th Cir. 1972), rev'g 19 BNA Wage & Hour Cas. 849, 850-51, 64 CCH Lab. Cas. ¶ 32,436 (N.D.W.Va. 1970).
\textsuperscript{282} 454 F.2d at 496.
\textsuperscript{283} 447 F.2d 416 (5th Cir. 1971).
either to hire or fire, to control work schedules, or to discipline the other tellers. As for handling unusual problems, there was evidence that he did so only once a day or once a week. Thus, as was observed in the discussion of equal effort, the time devoted to the performance of any given duty is an important consideration.284

In one recent significant bank case, Brennan v. Victoria Bank and Trust Co.,285 the court distinguished between the duties of note tellers and exchange tellers in terms of responsibility. The court found that a note teller’s error in handling a payment on a note owing to the bank could easily be corrected, whereas this was not true for the exchange teller, whose duties “were more complicated and were such that errors could not easily be corrected in the internal operation of the Bank.”286 The court further found that the potential loss to the bank was much greater in the exchange teller position.287

It is significant that, even when note tellers assisted the exchange teller in certain of the latter’s duties, the designated exchange teller was nonetheless solely accountable and responsible for all the work.288 This distinguishes Victoria Bank & Trust from other cases where members of the lower-paid sex were found to have performed duties regularly assigned to the higher-paid sex. In those cases, the overlapping performance of the duties normally assigned to the higher paid sex rendered those duties invalid as a basis for the wage differential.289 Victoria Bank & Trust stresses the point that even though the note tellers occasionally perform the duties of the exchange teller, there is no shift in responsibility. Indeed, the exchange teller’s retention of accountability for the actual labor of others indicates an inequality of responsibility.

Other courts have looked to the amount of supervision employees received as an indication of the responsibility required by the job. In one case, the court allowed a higher wage to be paid to male employees who worked one-half of their shift without supervision, while the female employees were fully supervised during their entire shift.290 Thus, the males’ accountability in completing orders assigned to them was greater than that of the supervised female

284 It is noteworthy that, although the issue in American Bank of Commerce appeared to be one of responsibility, the court seemed to treat it as an issue of effort: i.e., mental exertion. Id. at 422. This is but one example of the difficulty encountered in analyzing court decisions which discuss equal responsibility.

285 493 F.2d 896 (5th Cir. 1974).

286 Id. at 899 (emphasis in original).

287 Id.

288 Id.


employees. In similar fashion, another court upheld a pay differential between a male assistant office manager and a female bookkeeper and predicated its finding on the responsibility levels of the two jobs. The male was required to use his own independent judgment in many matters, including expenditures of the employer's funds. In comparison, the woman was very closely supervised and not required to exercise her personal discretion in the performance of her job.

Another group of cases, however, has examined not the amount of supervision exercised over the compared employees, but rather the supervisory duties of the compared employees themselves. For example, courts have looked to the supervisory duties of male and female custodians in situations where the overwhelming majority of time of both was spent in routine custodial duties. Despite the performance of certain supervisory tasks by the men, the courts have held that there was equal work. These decisions were based on the facts that the men's supervisory tasks took only a small portion of their time, such tasks were not performed by all men, and several women also performed similar supervisory tasks.

Other cases have looked to the cost of goods and equipment handled as an index of job responsibility. In one case, a court found that males had "much greater responsibility" than females, since the former used materials that were three to five times more expensive, and equipment that was nearly five times more expensive than that used by the latter. Any mistakes, therefore, entailed considerably greater financial loss to the employer and, necessarily, the handling of such materials carried commensurately greater responsibility.

In Hodson v. Behrens Drug Co., the Fifth Circuit conceded that a male "checker" of narcotics had a greater degree of responsibility than did employees who handled non-narcotic drugs. Nonetheless, the court rejected the employer's assertion of inequality. Equal responsibility was found instead on the bases that: the checking of narcotics entailed only the preparation of a few extra forms; and, when a woman was assigned to the position she failed to

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292 262 F. Supp. at 564.


294 See cases cited in note 293 supra.


receive a wage increase immediately.\textsuperscript{297} The Fifth Circuit, therefore, appears to have based its conclusion on two of the three tests it enumerated in the \textit{Brookhaven General Hospital} decision: (1) the increased responsibility was not substantially greater; and (2) the added responsibility did not have a value commensurate with the differential.\textsuperscript{298}

One theory which has been advanced in certain cases is that the obligation to care for the safety of others in the performance of duties is a "responsibility" within the meaning of the EPA. In \textit{Hodgson v. Square D. Co.},\textsuperscript{299} the employer argued that the use of an electrical cart by the males in transporting stock and equipment was an added responsibility in that care had to be exercised for the safety of others. The district court decision, which was upheld by the Sixth Circuit, indicated that this defense was "largely contrived" and \textit{not} of a type associated with differences in wage levels.\textsuperscript{300} A similar position was adopted in the \textit{Daisy Manufacturing} case,\textsuperscript{301} where the court held that the males' obligation to exercise care for others in rolling containers of parts did not confer on the men an added "responsibility." The court noted that the record was devoid of any accidents resulting from such material handling and that, in any event, this duty was and is not within the equal pay concept of job responsibility.\textsuperscript{302}

\section*{XI. Similar Working Conditions}

Employees engaged in jobs requiring equal skill, effort and responsibility are likely to be performing them under similar working conditions. However, the equal pay principle does not apply in a comparison of employees who perform otherwise equal jobs under dissimilar working conditions.\textsuperscript{303}

The statutory phrase "working conditions" was intended by Congress as a term of industrial art,\textsuperscript{304} best defined by reference to the job classification systems from which the phrase was borrowed. In \textit{Corning Glass Works v. Brennan},\textsuperscript{305} therefore, the Supreme

\begin{footnotesize}
\begin{itemize}
\item[297] 475 F.2d at 1051.
\item[300] 19 BNA Wage & Hour Cas. at 754, specifically approved, 459 F.2d at 807-08.
\item[302] 317 F. Supp. at 544.
\item[303] 29 C.F.R. § 800.132 (1973).
\item[305] 94 S. Ct. 2223 (1974).
\end{itemize}
\end{footnotesize}
Court construed the term as encompassing the physical surroundings and hazards of a job. The following factors constitute the physical surroundings and hazards of a job: "inside work v. outside work, exposure to heat, cold, wetness, humidity, noise, vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust and poor ventilation."

The EPA defines equal work as "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." Significantly, the EPA does not require that "working conditions" be "equal," but only that they be "similar." Undoubtedly, therefore, the word "similar" denotes a more flexible test than is available in measuring the other criteria of the equal pay standard. This is especially evident from the fact that at least one of the many proposed equal pay bills before Congress in 1963 would have required "working conditions" to be "equal." Thus, the EPA's utilization of the term "similar working conditions" indicates an apparent intent of Congress to allow greater latitude in the comparison of "working conditions" than is permissible with regard to the other elements of the equal pay standard.

In line with these conclusions, the administrative interpretations note that "slight or inconsequential differences in working conditions that are essentially similar would not justify a differential in pay." Thus, one court held that a pay differential could not be based on dissimilarity of working conditions where the compared jobs were "performed in essentially the same surroundings." On the other hand, if certain sales persons are engaged in selling a product exclusively inside a store and others employed by the same employer spend a significant amount of time selling the same product away from the store, the working conditions would be dissimilar.

Another aspect of the "similar working conditions" requirement has been discussed in a number of cases comparing the jobs of male custodians and female matrons in schools. Each of these cases has adopted the view that otherwise equal work performed merely in

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306 2 U.S. Dep't of Labor, Dictionary of Occupational Titles 656 (3d ed. 1965), which is referred to by the Supreme Court in Corning, 94 S. Ct. at 2232 n.21.
308 H.R. 5605, 88th Cong., 1st Sess. (1963) (introduced by Congressman Goodell, N.Y.) provided equal pay "for equal work or jobs the performance of which requires equal skill, effort, responsibility and working conditions."
309 29 C.F.R. § 800.132 (1973) (emphasis added).
different areas of a school building will not constitute dissimilar working conditions. In a similar vein, the court in a factually analogous case held:

The mere fact that jobs are in different departments of an establishment will not necessarily mean that the jobs are performed under dissimilar working conditions. 29 C.F.R. § 800.131. Where salespersons and division managers all work within the confines of a modern retail store, they are working under "similar working conditions" for purposes of the Act even though they work in different departments of the store.

A number of hospital cases have also dealt with allegations of dissimilar working conditions. In Hodgson v. Brookhaven General Hospital, for instance, the Fifth Circuit stated: "where pay is unequal, no dissimilarity in working conditions is relevant unless it somehow explains the pay differential." In that case, there was evidence that work on North Station was more unpleasant than work on South. However, there was no evidence that orderlies or aides assigned to North Station were regularly paid more than their counterparts of the same sex on South. The court therefore found that there was no rational economic justification for treating the working conditions as being dissimilar, since employees of both sexes received the same respective rates regardless of whether they worked on North Station or South Station.

This conclusion appears quite logical. A practical judgment is required for each separate case, and the evaluation must be made in the light of whether alleged differences in working conditions are of the kind customarily taken into consideration in setting wage levels. If the employer made no distinction with respect to payment of wages for the alleged dissimilarity, then it would appear that the working conditions are "similar" for purposes of the EPA. The test is one of economic reality. Those working in the allegedly unpleasant, onerous or difficult conditions may receive a wage rate commensurately higher than their counterparts of the same sex who

314 436 F.2d 719 (6th Cir. 1970).
315 Id. at 723 n.3.
316 Id.
do not work under such conditions. Failure to make such increased
payments is evidence that the working conditions were not consid-
ered by the employer as the basis for the wage disparity.\footnote{318}

XII. THE CORNING DECISION

As was noted in the Introduction to this article, on June 3, 1974
the Supreme Court handed down a 5-3 decision in Corning Glass
Works \textit{v.} Brennan,\footnote{319} the first EPA case to be heard by the high
court. The principal question posed in the case was "whether Cor-
ning Glass Works violated the [EPA] by paying a higher base wage to
male night shift inspectors than it paid to female inspectors perform-
ing the same tasks on the day shift, where the higher wage was paid
in addition to a separate night shift differential paid to all employees
for night work."\footnote{320} In resolving an "unusually direct conflict be-
tween two circuits" on the question,\footnote{321} the Court centered on the
meaning of the term "similar working conditions." Due to subsidiary
issues and the very nature of any ground-breaking decision, the
force of \textit{Corning} will necessarily affect all aspects of EPA enforce-
ment.

\textbf{The Facts}

Leading up to the \textit{Corning} decision were two separate suits for
injunctions filed by, the Secretary of Labor against the Corning,
New York, and Wellsboro, Pennsylvania plants of this major glass
products manufacturer.\footnote{322} The facts in both cases are strikingly
similar.\footnote{323}  

Another example of dissimilar working conditions justifying an actual differential is
to be found in another hospital case, Hodgson \textit{v.} Good Shepherd Hosp., 327 F. Supp. 143
(E.D. Tex. 1971):

\begin{quote}
The \[male\] orderly by virtue of working all over the hospital, and the demand-
ning working conditions in the emergency room, performed his duties in a different
environment—more taxing and demanding work encompassing the unpleasant con-
tact with the very ill, severely injured and dying, the unruly and violent, the drunk
and drug addict—all this points up the hard, heavy, unpleasant, tedious and
dangerous work of the orderly—which rarely at any time confronted the \[female\]
aide. The constant strain and tension of hospital wide responsibility to emergency
calls was a factor in the more onerous and hazardous working conditions to which
orderlies were subjected.
\end{quote}

\footnote{Id. at 148.}

\footnote{318 Another example of dissimilar working conditions justifying an actual differential is
to be found in another hospital case, Hodgson \textit{v.} Good Shepherd Hosp., 327 F. Supp. 143
(E.D. Tex. 1971):}

\footnote{319 (94 S. Ct. 2223 1974). The majority opinion was written by Justice Marshall, in
which Justices Douglas, Brennan, White and Powell joined. Chief Justice Burger and Justices
Blackmun and Rehnquist dissented. Justice Stewart took no part in the consideration or
decision of the case. Id.}

\footnote{320 Id. at 2226.}

\footnote{Id. at 2226, aff'g Hodgson \textit{v.} Corning Glass Works, 474 F.2d 226 (2d Cir. 1973), and
rev'g Brennan \textit{v.} Corning Glass Works, 480 F.2d 1254 (3d Cir. 1973).}

\footnote{321 A third suit, alleging similar violations, was filed against a Corning plant in Central
Falls, Rhode Island. Disposition of that case was postponed pending the outcome of the other

\footnote{322 Unless otherwise indicated, all facts are summarized from the Supreme Court opinion
94 S. Ct. 2223.}}
THE EQUAL PAY ACT OF 1963

The practice of compensating male inspectors at higher base rates began during the period 1925 to 1930, when Corning started automating its plants. Prior to 1925, almost without exception it was women who were assigned to inspection classifications at the plants in dispute. The advent of automation made it desirable to institute a night shift and staff it with inspectors, but New York and Pennsylvania state laws prohibited the employment of women during night-time hours. Consequently, only men could be employed as inspectors on the third shift. The men who transferred into the inspection jobs demanded and received wages which were comparable to the rates which they had previously received on other, often more demanding, jobs in the plant. These rates were approximately twice the wages paid to female inspectors who worked on the day shifts.

During the period of the transfer and for many years thereafter, Corning paid no shift differentials. It was not until 1944, when the Corning plants were unionized, that a collective bargaining agreement was negotiated which contained a shift differential provision. This contract did not eliminate the higher base wage rate paid to male night shift inspectors; rather, the new shift differential accorded to the night shift inspectors was superimposed on the existing difference in base rates.

Following the effective date of the EPA, Corning eliminated its practice of maintaining separate wage schedules for male and female employees and merged the two schedules. This merger, however, preserved the wage disparity between day and night shift inspectors by placing the women in lower labor grades calling for lower rates of pay. During 1966, but long after the relaxation of restrictions in both New York and Pennsylvania, women were permitted for the first time to bid into night shift inspector positions. The facts establish that a significant number of women availed themselves of this opportunity. Those women who transferred to the night shift received the shift differential, plus the higher base wage. Nevertheless, those women who continued to work on the day shift together with men who transferred to the day shift, received the lower base rate.

The final change instituted by Corning took place through a collective bargaining agreement which became effective on January 20, 1969. As of that date, the separate base wage rates for day and

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324 The Pennsylvania law was amended in 1947 and the New York law was amended in 1953. Id. at 2227 n.7.

325 A temporary exception was made during World War II when manpower shortages caused Corning to be permitted to employ women on the night shift inspection jobs, for which they were paid the same higher night shift wages earned by the men. Id. at 2227 n.4.
night shifts were abolished and a uniform base rate for all shifts was adopted. This new rate was higher than the base rate which had been paid to night shift inspectors. At the same time, however, the employer, through retroactive wage increases, agreed to pay a higher rate to night shift inspectors who were employed on or before January 20, 1969.\(^{326}\)

As of January 20, 1969, the day shift inspectors would receive an added raise to the new uniform rate. In contrast, however, the night shift inspectors who were employed on or before the effective date of the new uniform rate would be permitted to retain the higher rate under an alleged "red circle" theory.\(^{327}\) This "red circle" rate, therefore, continued a wage disparity between day and night shift inspectors even beyond January 20, 1969.

**The issues**

Corning's basic defense to the suits was the argument that the equal pay standard did not apply to the situation, inasmuch as the different shifts worked by the men and women constituted a dissimilar "working condition" within the meaning of the EPA. Alternatively, it was Corning's contention that even if a violation were proven, it was corrected in 1966 when the night shift jobs were opened to the women. Finally, it was alleged that any remaining violation was cured in 1969, when the base wage rates for the various shifts were equalized.

The position of the Secretary of Labor was that time-of-day-worked did not constitute a dissimilar "working condition," and, thus, the Secretary contended that the equal pay standard did apply. The Department of Labor did not question Corning's right to pay higher wages, in the form of a shift differential, to employees working undesirable hours. In fact, the administrative interpretations explicitly recognize the legitimacy of such a practice.\(^{328}\) What the Department did challenge was Corning's right to maintain a wage differential, in favor of the male night shift employees, which was paid over and above the shift differential. The Department


\(^{327}\) The term "red circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. Under the "red circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees, for the work both will be doing. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red circled" in order to comply with the [EPA].

\(^{328}\) As noted by the Supreme Court, 29 C.F.R. § 800.145 (1973) "recognizes the legitimacy of night shift differentials shown to be a factor other than sex." 94 S. Ct. at 2233 n.25.

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takes the position that shift differentials may be justified as based on "factors other than sex." Nevertheless, in this case it was argued that the difference in the base wage rates did not rest on "factors other than sex," but on sex itself. The Department also contended that the violation was not cured in 1966 by allowing some women to earn the higher rate, while permitting others to continue performing equal work on the day shifts without receiving the higher base wage rate. Lastly, it was argued that the violation was not corrected in 1969 by the equalization of wage rates, since the higher so-called "red-circle" rate only served to perpetuate the sex-based differential.

Divergent dispositions in the Second and Third Circuits

The district court in New York agreed with the Secretary and found violations. The court looked to two job evaluation plans utilized by Corning in setting wage rates, both of which plans measured working conditions. Neither plan, however, in measuring working conditions, took into account the time of day a particular job was performed. Consequently, the district court rejected Corning's contentions based on dissimilarity of working conditions and found the compared jobs to be equal. The Second Circuit affirmed the lower court holding that differences in shift do not constitute dissimilar working conditions. In support of its decision, the appellate court cited the legislative history of the equal pay standard. The court noted that certain of the proposed bills contained language which would have only required "equal work on jobs the performance of which requires equal skills." Nevertheless, through the urging of industry representatives, and notably Corning's own Director of Industrial Relations Research, the Congress was persuaded to adopt a standard patterned after job evaluation systems used in industry. These industrial plans evaluated jobs in terms of skill, effort, responsibility and working conditions.

As an example of such plans, Corning's own plan was entered into the record at the legislative hearings. In the Corning plan which was introduced, the "working condition" criterion was measured in terms of "surroundings" and "hazards." "Surroundings" required considerations of such factors as exposure to elements, and

330 Id. at 1166-70.
332 Id. at 231.
334 See 94 S. Ct. at 2238; 474 F.2d at 231.
the intensity and frequency of such exposure. "Hazards" required consideration of such facts as frequency of exposure to hazard, frequency of injury and seriousness of injury. No mention was made, under "working conditions," of time-of-day-worked or differences in shift. Thus, the Second Circuit concluded that Congress, in adopting the working condition criterion, was adopting industry's own criterion which did not consider shift differences to be dissimilar "working conditions." \(^{335}\)

The Second Circuit also referred to the House Committee report in support of its position that differences in shift did not fall within the "working conditions" criterion. \(^{336}\) That report appears to indicate that different wage rates based on time-of-day-worked may fall within the "factor other than sex" exception to the equal pay standard. The court, therefore, considered whether the different base rates were properly predicated on "factors other than sex," and held that the rates were not within the statutory exception. \(^{337}\)

As the history set out above indicates, the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks. The wage differential has never been regarded as compensation for night work. There was no evidence that any other night employees received higher pay than corresponding day workers until the plantwide night differential was superimposed on the basic rates in 1944; since that time, it is apparent that the shift differential has been thought to compensate, fairly and adequately, employees other than inspectors for night work. Indeed, Corning had separate male and female salary schedules until June 11, 1964.

The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. A higher rate paid to men for performing low-paid "female work" is not transformed into a permissible "differential based on any other factor other than sex" simply because the men work at night. . . \(^{338}\)

The Third Circuit, however, faced with identical arguments

\(^{335}\) 474 F.2d at 231-32.


\(^{337}\) 474 F.2d at 233.

\(^{338}\) Id.
and having the opinion of the Second Circuit before it, nonetheless concluded that differences in time-of-day-worked constitute dissimilar working conditions within the meaning of the EPA.339 In essence, this holding was based on the unequivocal statement of a leading proponent of the EPA bills that "hours of work, differences in shift all would logically fall within the working condition factor."340 The Third Circuit therefore affirmed the district court judgment for Corning,341 which had held: "Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.' Hence, plaintiff [Secretary of Labor] has failed to prove a violation of [the EPA]."342

Supreme Court resolution of the conflict

The Supreme Court, however, resolved the conflict between the circuits by holding that time-of-day-worked was not a "working condition" within the meaning of the EPA.343 In doing so, the majority noted "substantial agreement with the analysis of the Second Circuit,"344 while the minority dissented "for the reasons stated" in the Third Circuit opinion.345

The approach taken to the burden of proof problem by the Court came as no surprise. Citing more than a dozen circuit and district court cases, the Court held that "once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions based on factors other than sex."346 Nothing more need be shown by an EPA plaintiff. Neither the Secretary nor an individual employee is required to show that the differential was the result of "sex discrimination" per se. Instead, once the differential is shown to exist between the sexes treated as classes, the burden shifts to the employer to demonstrate that the differential is not the result of even unintended discrimination.

In disposing of the "working conditions" issue the Court was faced with conflicting prior statutory constructions. The Third Cir-

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341 474 F.2d at 1261.
343 94 S. Ct. at 2232.
344 Id.
345 Id. at 2236 (dissenting opinion).
346 Id. at 2229.
cuit had relied heavily on statements in the congressional debates by certain proponents of the equal pay standard whose views on the proper construction of the EPA sharply contrasted with the committee reports accompanying the legislation, which reports were treated as controlling by the Second Circuit in its decision.\textsuperscript{347} In resolving the conflict, the Court made no attempt "to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports."\textsuperscript{348} Instead, the court held that a better understanding of the term "working conditions" could be obtained by considering the manner in which Congress arrived at the actual statutory language. Thus, it was concluded in Corning that Congress intended "to incorporate into the [EPA] the well-defined and well-accepted principles of job evaluation . . . ."\textsuperscript{349} Therefore, the statutory term was held to encompass only physical surroundings and hazards, not time-of-day-worked. This interpretation agreed with the job classifications systems and job evaluations which Corning's own representatives had urged Congress to accept. The Court found it significant that those plans submitted by Corning in 1963 had omitted time-of-day-worked as a factor to be considered under working conditions in setting wage rates.\textsuperscript{350}

While a layman might well assume that time of day worked reflects one aspect of a job's "working conditions," the term has a different and much more specific meaning in the language of industrial relations . . . . The fact of the matter is that the concept of "working conditions," as used in the specialized language of job evaluation systems, simply does not encompass shift differentials.\textsuperscript{351}

Nonetheless, the Court did agree with Corning and the Third Circuit to the extent that it found night work to entail certain psychological and physiological impacts, which would make the work less attractive than that performed during the rest of the day. The Court held, however, that such matters were not part of an EPA plaintiff's burden of proof. Rather, the mental and physical impact of night shift work was held to be an affirmative defense available to the employer, on a clear showing that the resulting wage differential was based on a non-discriminatory factor other

\textsuperscript{347} See id. at 2229-30.
\textsuperscript{348} Id. at 2230.
\textsuperscript{349} Id. at 2231.
\textsuperscript{350} Id. at 2232.
\textsuperscript{351} Id. at 2231-32.
than sex. Corning, of course, was unable to make the showing, since the original wage differential had been based on sex.

The Court next examined Corning's contention that if there were a violation as of the 1964 effective date of the EPA, it had been cured either in 1966 by the opening up of the night shift to women inspectors, or on January 20, 1969 by setting a uniform base rate for all inspectors except those incumbent employees who work on the night shift who were "red circled" at a higher rate. As to the effect of opening up the night shift jobs to women, the Court held:

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.

This comment is especially interesting in view of its recognition of the plight of the women. For while Corning had in 1966 permitted women to bid for the night shift, with its higher-base wage, women were not allowed to exercise their seniority to "bump" a less senior male night inspector. Thus the inescapable fact was that, of the people on the night shift when that higher wage was "red circled" in 1969 and a new uniform rate was set for all other inspectors, the vast majority of those "red circled" were men while the vast majority of lower paid inspectors were women. Therefore, the thrust of the Court's ruling is that employers, when confronted with a situation wherein jobs are found to be equal, cannot cure prior violations of the EPA merely by permitting women to transfer into the higher-paid jobs. The EPA explicitly provides that an employer may not, in order to achieve compliance, "reduce the wage rate of any employee." The clear purpose of this proviso is to require the offending employer to equalize the wage rates by raising the wage paid members of the lower-paid sex to the level of the higher-paid sex, thereby eliminating any need for "transfer."

As for the 1969 equalization and "red circle" plan, the Court found that it too failed to satisfy the EPA requirements:

[I]t is clear from the record that had the company

352 Id. at 2232-33.
353 Id. at 2234-35.
equalized the base wage rates of male and female inspectors on the effective date of the Act, as the law required, the day inspectors in 1969 would have been entitled to the same higher "red circle" rate the company provided for night inspectors.\(^{355}\)

The Court thus made clear that no employer, in correcting an EPA violation, may "red circle" a discriminatory higher wage rate previously paid to members of one sex and then set a separate, lower schedule for the previous discriminatees. For, as the Supreme Court noted with regard to Corning's alleged "red circle" policy:

> [T]he company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work.\(^{356}\)

### XIII. AFFIRMATIVE DEFENSES

The EPA provides that an employer will not be in violation of the equal pay standard if an existing wage differential between male and female employees was instituted "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any other factor other than sex . . . ."\(^{357}\) Thus, there are three specific and one broad general exception to the standard requiring that male and female employees doing equal work be paid equal wages. These exceptions recognize, as do the reports of the legislative committees, that certain systems and factors other than sex can be used to justify a wage differential, even where the compared employees are performing equal work.\(^{358}\)

The sundry interpretive difficulties which arise from the language of these exceptions have been the subject of much litigation. Not only have the courts been faced with the task of determining the parameters of the so-called general exception, "any other factor other than sex,"\(^{359}\) but they have also had to determine what would or would not fall within the specific exceptions.\(^{360}\) Moreover, the

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\(^{355}\) 94 S. Ct. at 2235.

\(^{356}\) Id.


\(^{360}\) See, e.g., Hodgson v. Golden Isles Nursing Home, Inc., 19 BNA Wage & Hour Cas.
phraseology of these exceptions gives rise to an added problem of construction, namely the relationship between these exceptions. The problem is whether the four exceptions are wholly independent of each other, or whether the first three are merely illustrative of the fourth. Understandably, it would have been extremely difficult—if not impossible—to conceive of all the possible circumstances warranting an exception from the equal pay standard. It appears, therefore, that the intention was to describe three specific examples for the purpose of clarity and then to cover all other contingencies by the inclusion of the broad general exception. In fact, the wording of the provision supports such a construction, the choice of the phrase “any other factor” being an indication that the systems which precede it are merely examples of factors other than sex.

Unlike the Civil Rights Act of 1964, the EPA does not explicitly require that these systems be “bona fide” or that they not be instituted with an intention to discriminate. As one commentator has said:

However, it is implicit in the Act especially with its express intention to eliminate sex discrimination, that the seniority system, merit system, or system rewarding quantity and quality of production must be bona fide and not a device for evading the Act. Any other conclusion would violate the cardinal rules of statutory construction—that a remedial statute must be liberally construed and given a meaning which effectuates its purpose.

Thus, the House Report which accompanied the EPA specifically states that a valid defense would consist of a “bona fide” program which “does not discriminate on the basis of sex.” Similarly, the Chairman of the Senate Labor Subcommittee which considered the EPA stressed that any employer plan or system “must be a bona fide one” in order to qualify for an exception.

To come within the purview of the exempting provisions, therefore, any system or factor of the type described must be uniformly and consistently applied irrespective of sex.


361 “Three specific exceptions and one broad general exception are also listed. . . . As it is impossible to list each and every exception, the broad general exclusion has also been included.” H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in Legislative History, supra note 358, at 44.


A sex based system or a system in which sex plays any part cannot be considered as a proper defense under the Equal Pay Act. Otherwise, employers could escape the impact of the Act by establishing a "seniority system" providing different seniority lines for men and women, a "merit system" that applied differently to men and women, or "a system measuring earnings by quantity or quality of production" which set different standards for men and women.366

In order to justify a wage differential based on a system or factor other than sex, there must, moreover, be a reasonable relationship between the amount of the differential and the weight properly attributable to the system or factor.367 For instance, if male employees work a greater number of hours per week than their female counterparts and are paid weekly salaries for such work, a differential in the amount of pay could be justified as based on the number of hours worked. However, if the difference in salaries is too great to be accounted for by the difference in hours of work, then such a factor could not serve as the sole basis for the wage differential. In other words, if some portion of the differential cannot be reasonably justified on the basis of the additional hours worked, it would be incumbent on the employer "to show some other factor other than sex as the basis for the unexplained portion of the wage differential before a conclusion that there is no wage discrimination based on sex would be warranted."368

The first exceptions to be considered are those systems which are specifically designated in the EPA. Wage-rate differentials predicated on bona fide seniority systems, merit systems, or systems which measure earnings by the quantity or quality of production —when applied equally to employees of both sexes—do not violate the equal pay standard. The Department of Labor has taken the position that exceptions for such "systems" are not restricted solely to formal or written systems and plans. Rather, any system or plan 366

366 Berger, supra note 363, at 347 (emphasis added). "The requirements for such an exception are not met unless the factor of sex provides no part of the basis for the wage differential." 29 C.F.R. § 800.142 (1973). See, e.g., Hodgson v. Washington Hosp., 19 BNA Wage & Hour Cas. 1101, 65 CCH Lab. Cas. ¶ 32,499 (W.D. Pa. 1971). "Inadvertent as it may have been, defendant did not apply the provisions of its merit-seniority system [with] uniformity to male and female Technicians . . . . [S]uch nonuniform application of a merit-seniority system leads to a conclusion that such systems will not bring an employer within the exceptions contained in [the EPA]." 19 BNA Wage & Hour Cas. at 1105.


368 Id. In Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.) cert. denied, 414 U.S. 822 (1973), the employer attempted to justify a wage disparity in favor of a male data processing department supervisor on the basis, inter alia, that, in addition to his management duties, he worked several hours on Saturday mornings taking orders and delivering merchandise. The court held, however, that the extra weekend duties were insufficient to justify the wage differential in question. 475 F.2d at 1050.
may qualify, as long as "it can be demonstrated that the standards or criteria applied under it are applied pursuant to an established plan the essential terms and conditions of which have been communicated to the affected employees."369

Accordingly, one court rejected a claimed "merit system" exception on the ground, inter alia, that the system had never been communicated to the employees.370 It is also noteworthy that, although the system was found to have "general guidelines," the court ruled that "specific criteria" were required for determining on what step of a salary range an employee should be placed.371 Thus, "the subjective evaluations of the employer cannot stand alone as a basis for salary discrimination based on sex."372 Much more is required; however, exactly how much more is an open question.

An indication of the requirements may be gleaned from the Golden Isles case.373 In a decision affirmed by the Fifth Circuit, the district court permitted a "merit system" exception with the following characteristics:

Pay raises were not automatic, only the evaluation was automatic. Under the merit system, performance entitled an individual to a raise. Such evaluations were uniform and regular, i.e., every three months. . . . Pay raises under this merit system use the following criteria: performance, reliability, initiative, responsibilities and fulfillment of responsibilities both to the patient and to the nursing home.374

Another district court decision affirmed by the Fifth Circuit held a merit system to be valid where it was shown that "the officers and directors of the bank held quarterly meetings for the purpose of evaluating the service of the various employees," in terms of their individual competence, interest and value to the institution.375

369 29 C.F.R. § 800.144 (1973).
371 21 BNA Wage & Hour Cas. at 27. The court also noted that the “merit” raises “consistently failed to be applied in connection with the female employees so as to raise the majority of the female employees above what the evidence reflected to be the general beginning rate." Id.
374 19 BNA Wage & Hour Cas. at 905.
Whatever the requirements, once it is shown that the criteria for merit increases implement an established plan and are applied irrespective of sex, such a merit system is a valid defense to the wage disparities which it creates. A similar, if less complex, situation is encountered where an employer pays employees in accordance with a wage scale which consists of a series of “step” increases, each step representing one unit of time-in-service, i.e., seniority. Such a seniority system, if applied equally and consistently to males and females performing equal work, constitutes a non-discriminatory exception to the equal pay standard. In either case, of course, it is evident that the mere labeling of certain wage increases as being attributable to one of the excepted “systems” does not thereby constitute a valid defense.

In any event, the bona fide character of this type of merit or seniority system is not affected by the existence of a discriminatory starting or hiring wage. On the other hand, a valid merit or seniority system does not act to relieve the initial discrimination; rather, it merely perpetuates the discrimination. As the Fifth Circuit commented in *Brennan v. Victoria Bank & Trust Co.*: “The significance of the initial salary of an employee is of the utmost importance because in the case of a person starting at a lower salary it would be extremely difficult for the lower paid person ever to catch up . . . .”

Where the initial salary does result in an EPA violation (e.g., the employer consistently hires women at a lower starting rate), the employer will not be protected by the fact that “some women, after long periods of service, ultimately reached higher salary levels than men subsequently hired.” Likewise, a violation may not be avoided “through the selection of a few women for favorable treatment or a few men for unfavorable treatment—the result of which

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377 Hodgson v. Maison Miramon, Inc., 344 F. Supp. 843, 849 (E.D. La. 1972). The employer asserted that pay differentials were based upon seniority systems, merit promotions, and a system measuring earnings by quantity and quality of work production. Instead, the court found that “[a]l promotions given to [male] orderlies were merely attempts to keep the services of the orderlies by maintaining their wages above those wages paid the aides.” Id.

378 493 F.2d 896 (5th Cir. 1974).

379 Id. at 902 (emphasis in original). It is to be noted that, for purposes of calculating the amount of the initial wage differential, the court used the salary of a male employee who “remained with the Bank but one month.” Id. The court found that “he is the proper male standard for comparison in relation to the beginning employees in his group,” inasmuch as he “was hired by the defendant with the full expectation that he would become a full-time employee.” Id.

would be to give protective coloration to a generally discriminatory pattern."\textsuperscript{381}

Generally, "\textquote{In a case of wage discrimination between the sexes the last rate which an employer pays to each male employee is thereby established as the minimum rate which the defendant is legally obligated to pay women performing substantially the same job under similar working conditions.}\textsuperscript{382} The requirement is necessarily somewhat different where bona fide merit and/or seniority systems are applicable and the violation is restricted solely to the initial rate or salary. In such cases, of course, the starting/hiring rates of the affected employees would have to be retroactively adjusted to the rates they would have received had they not been the objects of sexual discrimination.\textsuperscript{383} Once that adjustment is made, a divergence occurs between the situations where a merit system and a seniority system are involved. With regard to a merit system, the members of the lower-paid sex would each add on to their own adjusted hiring rate all personal merit increases actually received, without reference to the merit in raises received by other employees. With regard to a seniority system, the members of the lower-paid sex would be raised to the pay schedule of the higher-paid sex and placed on the "step" of that higher schedule to which their own seniority entitles them.

In determining the validity of a starting or hiring rate differential, it is accepted that a court may evaluate an employee's education and prior work experience, at least to the extent these and similar factors are \textit{wholly unrelated to sex}\textsuperscript{384} and are \textit{relevant to the jobs in question}.\textsuperscript{385} Thus, in \textit{Golden Isles}, the district court determined not only that the wage increases were within the merit system exception, but also that the base rates were non-discriminatory since they were predicated on educational qualifications, prior experience and training and personal interviews.\textsuperscript{386} However, even where such factors other than sex are relevant to the jobs in question, the factors must also be applied uniformly and consistently to employees of both sexes. In \textit{Brookhaven General Hospital},\textsuperscript{387} for instance, the district court found that newly-hired male orderlies received the

\textsuperscript{381} 447 F.2d at 421.
\textsuperscript{384} Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974).
same wages whether or not they had any college education, while
female aides with some college education were hired at lower wages
than orderlies with similar education. Therefore, due to such
inconsistencies, the factor of college education could not serve to
justify disparities in hiring rates in that case.

One "factor other than sex" which has been clearly recognized
is the so-called "shift differential." The administrative interpreta-
tions state:

[when applied without distinction to employees of both
sexes, shift differentials . . . will not result in equal pay
violations. For example, in an establishment where men
and women are employed on a job, but only men work on
the night shift for which a night shift differential is paid,
such a differential would not be prohibited.

In the *Miller Brewing* case, however, the Seventh Circuit found
that the employer's claim that the entire wage disparity was based
on differences in shifts worked "was not well taken because even
when the men worked the day shift they were still paid the differential and the 70 cents more at night was in addition to the shift
differential of 10 to 16 cents an hour."

The "factor other than sex" exception was also extensively
discussed in *Hodgson v. Robert Hall Clothes, Inc.* In that case,
both the higher-paid salesmen and the lower-paid saleswomen
performed work which was "equal" within the meaning of the EPA.
However, only men worked in the men's department and only
women worked in the women's department. The district court noted
that such separation was a justifiable business necessity since the
jobs were not susceptible of interchangeable performance by both
sexes, due to frequent physical contact between customers and sales
personnel. Customers might be embarrassed by contact with sales-
persons of the opposite sex, resulting in possible detriment to busi-
ness. However, the district court acknowledged that an EPA viola-
tion might be found even where the assignment of salesmen only to
the men's department and saleswomen to the women's department
was a business necessity.

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388 Id. at 426.
390 Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972).
393 326 F. Supp. at 1264, 1269 (D. Del. 1971). See Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973), noting that "factors other than sex (customer embarrassment primarily) justify the employer in seeking male personnel to work in conjunction with selling
The Equal Pay Act of 1963

Nonetheless, the Department of Labor argued that, since the salesmen and saleswomen performed equal work, they must receive equal pay. In response, the employer sought to justify the wage differential on the grounds of economic benefit, to wit the men’s department had a larger dollar volume in gross sales and a greater gross profit. The district court in Robert Hall found that the difference in sales and profits was not attributable to the performance of the sales personnel, but rather to the fact that merchandise sold by the salesmen was priced higher than merchandise sold by the saleswomen. Nevertheless, the district court accepted the employer’s contention that economic benefit to the employer was a “factor other than sex” on which a wage differential could be based.394

On appeal, the Department of Labor asserted that the broad exception is limited to factors which are “typically used in setting wage scales,”395 or, “directly related to the job performance of the individual employee—including, e.g., shift differentials, temporary reassignments, participation in bona fide training programs, differences based on experience, training or ability, red circle rates, etc.”396 Moreover, it was argued that the “factor other than sex” defense must be limited to factors which are not only related to job performance, but also not sex based.397 As the Department of Labor emphasized, a bona fide factor cannot be available only to persons of one sex.398 In Robert Hall, however, women were not permitted to work in the men’s department; and, therefore, the economic benefit factor was literally available only to males. Consequently, it was the position of the Department of Labor that the economic benefit factor was not a “factor other than sex” within the meaning of the EPA.

Despite these arguments, the Third Circuit held that the economic benefit was a valid “factor other than sex” and thus rejected the claim of discrimination.399 In summation, the court and fitting male clothing, this is no excuse for hiring saleswomen and seamstresses at lower rates simply because the market will bear it.” Id. at 241 n.12.

394 326 F. Supp. at 1272.
397 Id. at 20.
398 Reply Brief for Appellant, supra note 395, Cross-Appellee at 5.
399 473 F.2d at 594. It is most interesting to note that the employer did not even strictly adhere to the economic benefit factor in paying wages to the individual employees. Thus, certain salesmen had a higher average hourly volume of sales than other salesmen, yet received lower wages. Likewise, certain saleswomen had better sales records than certain salesmen, yet the salesmen received higher wages. Accordingly, the employer did not consistently apply the factor upon which he claimed to rely in setting wage rates. The Third Circuit considered this inconsistency in Robert Hall, but held that there was no necessity to correlate precisely the salary of each employee to the economic benefit produced by that employee. Id.
noted: "The saleswomen are paid less because the commodities which they sell cannot bear the same selling costs that the commodities sold in the men's department can bear." 400

Perhaps the most frequently used "factor other than sex" defense is participation by the higher-paid employees of one sex in a training program. The administrative interpretations clearly recognize that a bona fide training program, if applied regardless of sex, may serve to validate a differential which would otherwise violate the equal pay standard. 401 The interpretations, however, caution against training programs which are available only to employees of one sex and stress that such programs will "be carefully examined to determine whether such programs are, in fact, bona fide." 402 The Fourth Circuit appears to have taken an even stronger stand in Hodgson v. Fairmont Supply Co., 403 wherein it is stated: "We cannot accept a training program coterminous with a stereotyped province called 'man's work' as a factor other than sex." 404 Thus, the court appears to rule out the possibility that any training program at 597. Such a concept would appear to be contrary to the legislative intent and judicial construction of the EPA. The position that all salesmen should be paid more and all saleswomen should be paid less, due to the performance of the men and women as separate classes, resurrects the very attitudes which the EPA was enacted to proscribe. See Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970). Rather, as one commentator stated: "If the employer is allowed to use economic benefit as a justification for pay differentials, the correlation should be strictly on an individual basis and substantiated by individual records." Note, 44 Miss. L.J. 1028, 1033 (1973).

gram which excludes women can qualify as a "factor other than sex."

In Hodgson v. Security National Bank a training program in which only males were participating was considered by the Eighth Circuit. There was testimony that the program was open to both sexes, but there was no evidence that the management training program had ever been offered to women. In fact, officers of the bank indicated that even women who had college education and prior experience were not considered for training, because of the possibilities of pregnancy or the transfer of their husbands from the Sioux City area. The court, therefore, rejected the training program as a justification for the higher rate and commented on the bank's reasons for excluding women:

[T]he Bank's explanation for the absence of women in the ranks of its management trainees recites a preconceived and traditional notion that women, because of their principal roles as wives and mothers, must occupy an employment status second to men outside the home. This notion is outmoded as well as unfair.

Another of the leading cases in this area is Shultz v. First Victoria National Bank wherein male and female tellers were compared. The bank attempted to justify higher wage rates paid to the men on the basis, inter alia, of a training program in which the males were placed. The Fifth Circuit found the alleged training program not to be a valid "factor other than sex" for a number of reasons. First, the essence of the program was the rotation of the trainees from one department to another, which procedure was dictated by personnel needs and not training requirements. Second, there was no understanding between the bank and the male employees regarding the existence of such a program. Third, women were excluded from the program, but nonetheless appeared to follow the same course of employment as the men.

In Behrens Drug, on the other hand, the employees were informed of the sales training program's existence, although there was no formal plan of training. Testimony established that the trainees followed a regular system of rotation based on individual progress, rather than personnel needs. However, once they reached

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405 460 F.2d 57 (8th Cir. 1972).
406 Id. at 63.
407 420 F.2d 648 (5th Cir. 1969).
408 Id. at 655.
the final point in the rotation, they would not automatically become salesmen. Instead, they had to wait until an opening occurred in that position.\textsuperscript{410} Based on those facts, the Fifth Circuit conceded that the training program was more concrete than that found in \textit{First Victoria National Bank}, but nonetheless found that it did not constitute a valid "factor other than sex."

Behrens' sales training procedure is not illusory, nor does it constitute a mere post-event justification for disparate wage payments. Nevertheless, the program has never included a female, and its completion—advancement to a sales job—is entirely dependent on personnel needs. These two program characteristics compel the conclusion that Behrens' training procedure is not a factor other than sex which should excuse denial of equal pay to female workers and remove them from the aegis of the Equal Pay Act.\textsuperscript{411}

Yet another element which may be characterized as a factor other than sex for purposes of an EPA exception is a "red circle rate."\textsuperscript{412} In \textit{Hodgson v. Goodyear Tire & Rubber Co.}\textsuperscript{413} the term was defined as follows:

\begin{quote}
[A] "red circle" rate is a higher rate paid to a particular employee when he is transferred to a job at a lower skill and rate of pay than his former job, either on a temporary basis, to keep him available when he is needed again in his regular, higher paid job, or to avoid hardship when an employee who has served long and faithfully has, by reason of age or illness, become unable any longer to perform his regular work.\textsuperscript{414}
\end{quote}

In that case, however, the court found that the "changes were not at all temporary; the higher paid men employees were not transferred from a different job; none of them were old or ill, and none of them exceeded in length of service with the defendant the service of most of the lower paid women employees."\textsuperscript{415} Consequently, the court did not allow an exception to the EPA standard. On the other hand, an exception was allowed in a case where there was an established "red circle" policy which "was not motivated or intended by [the employer] to evade the Equal Pay Act, nor was it done, to correct

\textsuperscript{411} 475 F.2d at 1047.
\textsuperscript{412} See 29 C.F.R. § 800.146 (1973).
\textsuperscript{413} 358 F. Supp. 198 (N.D. Ohio 1973).
\textsuperscript{414} Id. at 199-200.
\textsuperscript{415} Id. at 200.
any violation of the equal pay for equal work standard.” Thus, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher-paid sex may not be “red circled” in order to comply with the EPA. To allow such a practice would be merely to perpetuate the discrimination by freezing the status quo of prior discriminatory practices.

In addition to factors which are clearly recognized as within the statutory exceptions when applied in a bona fide manner, employers will typically attempt to frame other potential “factors other than sex” in the hope of thereby avoiding liability. Thus an employer will often interpose a labor-management agreement as indicative of the fact that, at the very least, there was no intent to discriminate. Yet, as the administrative interpretations state and as the courts have consistently held, “no agreement between a company and a union, even if arrived at as a result of collective bargaining negotiations can be used as a defense by [an employer] to the statutory requirements. Indeed, as the Supreme Court noted in Corning:

The differential arose simply because men would not work

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at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.\footnote{422}{Id. at 4832.}

\section*{XIV. Conclusion}

A milestone in the progress of women toward full economic opportunity was reached on June 11, 1964 when the EPA became generally effective. The beneficial results of guaranteeing equal pay through legislation are far reaching. Individuals will increasingly receive wages directly proportionate to job-content requirements, rather than in accordance with their sex and with sex-based stereotypes. Women, whether married or single, will benefit from their increased purchasing power and from the consequent rise in standards of living. These benefits will also accrue to the families of married, working women. Male workers will benefit through increased job security, since employers will no longer seek to replace them with lower-paid women. Today, millions of women in the labor force perform capably in every field of endeavor; and, as their numbers have increased, so has the importance of their work to the national welfare.

The legislative history of the EPA demonstrates that members of Congress had great hesitancy in enacting legislation which would develop the economic rights of women. Many equal pay bills were introduced prior to 1963. On each occasion members of Congress would display their concern over the rights of women, and then, promptly reject the many equal pay proposals.

Despite the passage of the EPA after years of effort, the courts too were reluctant initially to construe its provisions in a broad, liberal and humanitarian manner. In case after case, the courts carefully scrutinized each phase, each minute portion of the mens' work and then juxtaposed it with the work done by the women. They would ultimately conclude that some secondary or tertiary duty performed by one sex and not by the other constituted a significant difference in the content of the work, and therefore the unequal pay could be justified. It was not until 1970, with the \textit{Wheaton Glass}\footnote{423}{Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970).} decision, that the EPA began to assume vitality. It can be said even today, however, that the EPA has not served as
a panacea to the American woman. Its reach is finite; its limitations patent. Astute, resourceful, and ingenious counsel can and do make a word of art out of each statutory term: "skill," "effort," "responsibility," "working conditions," etc. Further, the issue of statutory coverage and the existence of exceptions to the equal pay standard are readily available and are fully utilized.

It is to be expected that the Corning\textsuperscript{424} decision will bring the EPA to its full fruition and give new impetus to enforcement activities. Already, the magnitude of the settlement in the American Telephone\textsuperscript{425} and related subsidiary cases\textsuperscript{426} should make all aware of the impact which the EPA has on the wages of women. These cases emphasize the fact that large amounts of money are involved when inequality of pay is found to be sex based.

In the immediate future, Congress should fully reexamine existing weaknesses in the EPA. Coverage should be expanded to include all American workers, not merely a portion thereof. The meaning of the general exception, "any other factor other than sex," should be clarified and given some definite limits. It would, for instance, be most welcome if Congress would specifically recognize that this exception does not include any factor, but only those factors which are related to individual job performance.

The battle to eliminate sex discrimination and to obtain equality of pay for women is in many ways analogous to the effort to remove racial discrimination from the American scene. Such efforts take years—too many years for those who suffer as a result. There is great reluctance to accept the changes that the EPA seeks to accomplish. Employers have found that the changes are costly; and their immediate reaction is to resist any change which would increase operating costs. Each employer is imbued with a sense of rectitude and certitude. Each feels that no act of discrimination has been committed. Each is able to rationalize the particular method of payment without any undue difficulty.

Slowly but surely, however, as was true of the minimum wage and overtime compensation provisions of the FLSA as first enacted in 1938, employers will develop a clear respect of the EPA's provisions and requirements. No longer will they wait for employee complaints to be made and for federal compliance officers to submit summaries of unpaid wages. For whatever their individual reasons, they will add up their balance sheets and realize that self-analysis and self-policing will in the long run prove to be the best policy.

\textsuperscript{426} See, e.g., Hodgson v. Pacific Tel. & Tel. Co., 20 BNA Wage & Hour Cas. 411, 68 CCH Lab. Cas. ¶ 32,659 (N. D. Cal. 1971).