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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*.¹ That decision constitutes the first analysis of the Equal Pay Act of 1963 (EPA)² by the Court. Coming as it did at the tenth anniversary of the statute's effective date, the decision represents an appropriate

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¹ — U.S. —, 94 S. Ct. 2223 (1974).

² 29 U.S.C. § 206(d) (1970).

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."³ 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

³ Margolin, *Equal Pay and Equal Employment Opportunities for Women*, 19 N.Y.U. Conf. Lab. 297 (1967), quoting from *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

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.*

⁸ Waldman, *Changes in the Labor Force Activity of Women*, 93 Monthly Lab. Rev. 10, 11 (1970).

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."¹¹ 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.¹² 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."¹³

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.¹⁴ 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.¹⁵ Even industrial statistics indicated male machine tool operators averaging \$2.05 per hour as compared with \$1.71 for women; and, male machinery assem-

¹¹ Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 *Hastings L.J.* 305, 307 (1968).

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.¹⁶ 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."¹⁷ 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 \$1,200.¹⁸ 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."¹⁹

During 1945 the first comprehensive federal equal pay bill was introduced in the Congress.²⁰ 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"²¹ 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."²² 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."²³

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

¹⁶ 1962 House Hearings, *supra* note 12, at 74; 1962 Senate Hearing, *supra* note 12, at 53.

¹⁷ Economic Report of the President, *supra* note 4, at 104.

¹⁸ 1962 House Hearings, *supra* note 12, at 76; 1962 Senate Hearing, *supra* note 12, at 55.

¹⁹ President's Task Force on Women's Rights and Responsibilities, *A Matter of Social Justice* 18 (1970). See Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 Val. U.L. Rev. 237 (1971).

²⁰ S. 1178, 79th Cong., 1st Sess. (1945). See Hearings on S. 1178 Before a Subcomm. of the Senate Comm. on Education and Labor, 79th Cong., 1st Sess. (1945).

²¹ General Order No. 16, as amended, reprinted in *Wartime Wage Control and Dispute Settlement* 135 (1945) (emphasis added). See Vladek, *The Equal Pay Act of 1963*, 18 N.Y.U. Conf. Lab. 381, 388-90 (1966).

²² Moran, *Reducing Discrimination: The Role of the Equal Pay Act*, 93 Monthly Lab. Rev. 30, 31 (1970).

²³ Simchak, *Equal Pay in the United States*, 103 Int'l Lab. Rev. 541 (1971). See President's Commission on the Status of Women, *American Women* (1965).

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floor which required equal pay for *equal*, rather than *comparable*, work.²⁴ 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.²⁵

When the 88th Congress convened in 1963, the Administration once again recommended equal pay legislation. After further hearings,²⁶ bills emerged from both the Senate and the House of Representatives.²⁷ 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

²⁴ 108 Cong. Rec. 14771 (1962). See H.R. 11677, as amended, 87th Cong., 2d Sess. (1962).

²⁵ H.R. 11880, tit. II, 87th Cong., 2d Sess. (1962), enacted as a rider to a House-approved bill on another topic. 108 Cong. Rec. 22082-85 (1962) (debates). See 109 Cong. Rec. 8914 (1963) (remarks of Senator McNamara, Mich.).

²⁶ See Hearings on S. 882 and S. 910 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963); Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. (1963).

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.

109 Cong. Rec. 2889 (1963) (statement of Secretary Wirtz). See also S. Rep. No. 176, 88th Cong., 1st Sess. 1-2 (1963), reprinted in Staff of the House Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Equal Pay Act of 1963*, 36-37. (Comm. Print 1963) [hereinafter cited as *Legislative History*]. The Senate Report was quoted in *Corning Glass Works v. Brennan*, 94 S. Ct. 2223 (1974), where the Supreme Court stated:

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.

²⁷ S. 1409, 88th Cong., 1st Sess. (1963); H.R. 6060, 88th Cong., 1st Sess. (1963).

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 than 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,

²⁸ 21 Cong. Q. 978 (1963).

²⁹ 29 U.S.C. § 206(d)(1) (1970) provides:

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.

³⁰ Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 *Cin. L. Rev.* 615, 620 (1970). "These factors are the core of all job classification systems. They form a legitimate basis for differentials in pay." 109 *Cong. Rec.* 9195 (1963) (remarks of Congressman Frelinghuysen (N.J.)); *Legislative History*, *supra* note 26, at 81. See also *Corning Glass Works v. Brennan*, 94 S. Ct. at 2230.

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.³² Effort is defined as "the measurement of the physical or mental exertion needed for the performance of a job,"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."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.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.³⁶

The EPA was enacted as an amendment to the Fair Labor Standards Act of 1938, as amended (FLSA),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."³⁸ Additionally, the effective date of the EPA amendments to the FLSA

the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss They indicate the construction of law which the Secretary of Labor and the [Department of Labor] believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

As the Supreme Court has pointed out, such Department of Labor interpretations "provide a practical guide to employers and employees as to how the agency representing the public interest in enforcement of the law will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944). While not controlling upon the courts, *id.* at 140, such interpretations are entitled to great weight when before the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Roland Elec. Co. v. Walling*, 326 U.S. 657, 676 (1946); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940).

³² 29 C.F.R. § 800.125 (1973).

³³ 29 C.F.R. § 800.127 (1973).

³⁴ 29 C.F.R. § 800.129 (1973).

³⁵ 29 C.F.R. § 800.110 (1973).

³⁶ 29 U.S.C. §§ 206(d)(1)(i)-(iv) (1970). The exception based on "any other factor other than sex" was the only one contained in the original Senate version, S. 1409, 88th Cong., 1st Sess. (1963). 109 Cong. Rec. 8866 (1963) (text of S. 1409). All the exceptions were contained, however, in the House version, H.R. 6060, 88th Cong., 1st Sess. (1963), in which the Senate ultimately concurred. 109 Cong. Rec. 9761-9762 (1963) (text of H.R. 6060).

³⁷ 29 U.S.C. §§ 201-219 (1970).

³⁸ H.R. Rep. No. 309, 88th Cong., 1st Sess. 2 (1963), reprinted in *Legislative History*, supra note 26, at 43.

was postponed until June 11, 1964,³⁹ which thereby granted employers a full year to comply voluntarily, and permitted the Labor Department to establish enforcement procedures.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"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.⁴² Consequently, exemptions from the minimum wage provisions were also applied to restrict the coverage of the EPA as well.⁴³ Undoubtedly, at least some of those exemptions constitute "a real limitation on enforcement"⁴⁴ of the apparent Congressional purposes in enacting the EPA.⁴⁵ Not until passage of the Education Amendments of 1972,⁴⁶ however, did Congress finally eliminate the

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: *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.

Id., reprinted in 1963 U.S. Code Cong. & Ad. News 60.

⁴⁰ See Comment, *The Equal Pay Act of 1963—Problems in Upholding the Standard for Female Employees*, 5 St. Mary's L.J. 409, 411 (1973).

⁴¹ 29 U.S.C. §§ 206(a), 207(a)(1) (1970). The statutory terms are defined in 29 U.S.C. § 203 (1970). The Department of Labor has issued official interpretations of the terms and general statutory coverage thereunder, including citation of supporting court decisions. See 29 C.F.R. Part 776 (1973). See also Comment, *Scope of Coverage Under the Fair Labor Standards Act of 1938*, 30 Wash. & Lee L. Rev. 149 (1973).

⁴² H.R. Rep. No. 309, 88th Cong., 1st Sess. 2 (1963), reprinted in *Legislative History*, supra note 26, at 43. See 29 C.F.R. § 800.5 (1973). The minimum wage requirements of the FLSA are contained in 29 U.S.C. § 206 (1970).

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).

⁴⁴ Murphy, supra note 30, at 619 n.25.

⁴⁵ Pub. L. No. 88-38, § 2(a), 77 Stat. 56 (1963), 29 U.S.C.A. § 206, Note (1965), reprinted in 1963 U.S. Code Cong. & Ad. News 59.

⁴⁶ Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, reprinted in 1972 U.S. Code Cong. & Ad. News 278, 447. The Education Amendments of 1972 amended § 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1) (1970). The legislative history of the amendment indicates: "Testimony before the [House Education and Labor] Committee revealed that women in these [executive, administrative, professional, or outside sales] positions are too often paid less than their male colleagues because of the existing exemption, a situation which the Committee seeks to

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.

rectify." H.R. Rep. No. 554, 92d Cong., 1st Sess. 84 (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 2462, 2512.

⁴⁷ 29 U.S.C.A. § 213(a) (Supp. 1973).

⁴⁸ 29 U.S.C. § 216(b) (1970), as amended by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 61 (1974), provides, in pertinent part:

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.

29 U.S.C. § 216(b) (Supp. 1974), reprinted in 1974 U.S. Code Cong. & Ad. News 615, 622.

⁴⁹ Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). But cf. *Satterwhite v. United Parcel Serv. Inc.*, — F.2d — (10th Cir. 1974). As was noted in *Phillips v. Carborundum Co.*, 361 F. Supp. 1016 (W.D.N.Y. 1973), the question whether employees "are entitled to equal pay depends not on the contract, but on the equal pay provisions of the F.L.S.A. For this reason, the individual employees are not required to exhaust any grievance procedures before prosecuting an action under the F.L.S.A." *Id.* at 1021.

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).

⁵¹ Section 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260 (1970), as amended by Pub. L. No. 93-259, § 6(d)(2)(B), 88 Stat. 62 (1974), provides, in pertinent part:

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 complaint⁵² or as part of a general investigation.⁵³ The compliance officer has broad investigative authority⁵⁴ to inspect the employer's place of business, to examine all employment records⁵⁵ and to

discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 216(b) (Supp. 1974), reprinted in 1974 U.S. Code Cong. & Ad. News 615, 623. Any employee who is awarded liquidated damages, in addition to the back wages due, may not recover pre-judgment interest on the back wages. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. at 715-16. However, if the district court makes no award of liquidated damages, the employee is generally held to be entitled to such pre-judgment interest on the unpaid back wages. *McClanahan v. Mathews*, 440 F.2d 320, 325-26 (6th Cir. 1971); *Holtville Alfalfa Mills Inc. v. Wyatt*, 230 F.2d 398, 401 (9th Cir. 1955). *Contra*, *Landaas v. Canister Co.*, 188 F.2d 768, 772 (3d Cir. 1951).

⁵² The identity of anyone furnishing information relative to possible EPA or FLSA violations is regarded as privileged. See, e.g., *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972); *Hodgson v. Keeler Brass Co.*, 56 F.R.D. 126 (W.D. Mich. 1972).

Total No. of Equal Pay Investigations Conducted By U.S. Dep't. of Labor		Fiscal Year
385 establishments		1969
736 establishments		1970
1,203 establishments		1971
1,115 establishments		1972
No. of Employees Underpaid Under the EPA	Amounts Found Due	Fiscal Year
960	\$ 156,202	1965
6,633	2,097,600	1966
5,931	3,252,319	1967
6,622	2,488,405	1968
16,100	4,585,344	1969
17,719	6,119,265	1970
29,992	14,842,994	1971
29,022	14,030,889	1972
29,619	18,005,582	1973
16,507	11,043,833	6 mos. 1974

Memorandum of Morag Simchak, Chief, Branch of Equal Pay Discrimination, U.S. Dep't of Labor (Jan. 1974).

⁵⁴ 29 U.S.C. § 211(a) (1970) provides, in pertinent part:

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.

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 sex⁵⁶ and by paying any back wages computed to be due.⁵⁷ 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.⁵⁸

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.⁵⁹ "It is important to note that this right can be terminated by a government action without the employee's sanction or consent."⁶⁰

Under section 16(c) the Secretary "may bring an action" to recover back wages.⁶¹ 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."⁶² 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"⁶³ 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.⁶⁴ It may therefore be expected that EPA suits will soon be filed under this section.

⁵⁶ The proviso to 29 U.S.C. § 206(d)(1) (1970) specifically prohibits the lowering of the higher rate in order to eliminate the wage discrimination. See 29 U.S.C. § 206(d)(1) (1970).

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).

⁵⁹ 29 U.S.C. §§ 216(b), (c) (1970).

⁶⁰ Comment, Monetary Recovery Under the Fair Labor Standards Act, 45 Texas L. Rev. 921, 922 (1967).

⁶¹ 29 U.S.C. § 216(c) (1970), as amended by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 26, 88 Stat. 73 (1974), provides, in pertinent part: "The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. § 216(c) (Supp. 1974), reprinted in 1974 U.S. Code Cong. & Ad. News 615, 637.

⁶² 29 U.S.C. § 216(c) (1970).

⁶³ *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 532 (3d Cir. 1971).

⁶⁴ Pub. L. No. 93-259, § 26, 83 Stat. 73 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 615, 637.

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.⁶⁵ The essential reason, of course, that suits were brought exclusively under section 17 is the absence of the novel issue limitation in that section.⁶⁶ 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"⁶⁷ Moreover, such injunctive actions may be brought in cases of discriminatory harassment or discharge.⁶⁸ 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.⁶⁹ Inasmuch as any section 17 action is equitable in nature, there is no right to a jury trial.⁷⁰

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

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

Section 15(a)(2) of the FLSA makes it unlawful for any person "to violate any of the provisions of section 206 or section 207" 29 U.S.C. § 215(a)(2) (1970).

⁶⁶ *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 534 (3d Cir. 1971); *Hodgson v. American Can Co.*, 440 F.2d 916, 921 (8th Cir. 1971).

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).

⁷⁰ *Sullivan v. Wirtz*, 359 F.2d 426 (5th Cir.) (per curiam), cert. denied, 385 U.S. 852 (1966); *Wirtz v. Jones*, 340 F.2d 901, 904-05 (5th Cir. 1965); Comment, The Fair Labor Standards Act and Trial By Jury, 65 Colum. L. Rev. 514 (1965).

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.⁷¹ 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.⁷²

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.⁷³ 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.⁷⁴ 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" ⁷⁵

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.⁷⁶ In *Coleman v. Jiffy June Farms, Inc.*,⁷⁷ 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?⁷⁸

Of course, this standard applies to EPA actions as well.⁷⁹ Where the violations are of a willful nature, the Department of Labor may

⁷¹ See, e.g., *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *Mitchell v. Fiore*, 470 F.2d 1149 (3d Cir. 1972), cert. denied, 411 U.S. 938 (1973).

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).

⁷³ Portal-to-Portal Act of 1947, § 6(a), as amended, 29 U.S.C. § 255(a) (1970).

⁷⁴ See 29 C.F.R. § 790.21(b) (1973).

⁷⁵ Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 Hastings L.J. 305, 352 (1968). See *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

⁷⁶ Pub. L. No. 89-601, § 601(b), 80 Stat. 844 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 978, 994.

⁷⁷ 458 F.2d 1139 (5th Cir.), cert. denied, 409 U.S. 948 (1972).

⁷⁸ 458 F.2d at 1142.

⁷⁹ *Brennan v. J.M. Fields, Inc.*, 488 F.2d 443, 448 (5th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3511 (U.S. March 5, 1974).

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.⁸⁰ This offense is subject to a five-year statute of limitations.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.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"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

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.

⁸¹ 18 U.S.C. § 3282 (1970). See, e.g., *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2d Cir. 1960).

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.

The original Senate version, S. 1409, 88th Cong., 1st Sess. (1963), did not contain any provisions relative to labor organizations. 109 Cong. Rec. 8866 (1963) (text of S. 1409). 29 U.S.C. § 206(d)(4) (1970) provides:

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. ¶ 32,544 (D. Md. 1971).

⁸³ 29 C.F.R. § 800.106 (1973).

of the equal pay standard.⁸⁴ This interpretation derives substantial support from the legislative history of the EPA.⁸⁵ 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.⁸⁶

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.⁸⁷

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.

109 Cong. Rec. 9209 (1963) (remarks of Congressmen Goodell and O'Hara). See also Staff of the House Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Equal Pay Act of 1963*, 93-94 (Comm. Print 1963).

⁸⁶ *Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 839 (E.D. Wis. 1969), aff'd sub nom. *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972). See also *Shultz v. Kimberly-Clark Corp.*, 315 F. Supp. 1323 (W.D. Tenn. 1970) (petition for injunctive relief against employer and unions denied on the merits).

⁸⁷ *Wirtz v. Hayes Indus., Inc.*, 18 BNA Wage & Hour Cas. 590, 58 CCH Lab. Cas. ¶ 32,085 (N.D. Ohio 1968). 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.⁸⁸

Consequently during the first ten years of EPA enforcement, out of more than 600 actions filed by the Department of Labor,⁸⁹ 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.*,⁹⁰ 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.⁹¹ 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."⁹²

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

361 F. Supp. 1016, 1019-20 (W.D.N.Y. 1973); *Hodgson v. Board of Educ.*, 344 F. Supp. 79, 86 (D.N.J.), appeal dismissed, 468 F.2d 1325 (3d Cir. 1972).

⁸⁸ *Love v. Temple Univ.*, 366 F. Supp. 835 (E.D. Pa. 1973) (summarizing and concurring in the Department's position as stated in its brief amicus curiae).

⁸⁹ Memorandum of Morag Simchak, *supra* note 53.

⁹⁰ 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom.*, *Hodgson v. Baltimore Regional Joint Bd., Amal. Clothing Workers*, 462 F.2d 180 (4th Cir. 1972) (*per curiam*). See Note, 31 Md. L. Rev. 365 (1971); Note, 6 Suffolk L. Rev. 733 (1972).

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. § 800.166(d) (1973).

⁹² 462 F.2d at 181.

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."⁹³ 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.⁹⁴ 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.*,⁹⁵ 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,⁹⁶ of which approximately \$7.7 million covered EPA violations.⁹⁷ 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.⁹⁸

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

⁹³ *Tuma v. American Can Co.*, 367 F. Supp. 1178, 1181 (D.N.J. 1973).

⁹⁴ Section 5 of the Portal-to-Portal Act of 1947, § 5, 61 Stat. 84, amended section 16(b) of the FLSA, 29 U.S.C. § 216(b) (1970), to prohibit representative actions. That the amendment was in good part directed at unions can be seen from H.R. Rep. No. 71, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S. Code Cong. Serv. 1029.

⁹⁵ 365 F. Supp. 1105 (E.D. Pa. 1973). The Equal Employment Opportunity Commission brought suit to enforce Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (Supp. II 1972), while the Department of Justice brought suit on behalf of the Office of the Federal Contract Compliance to enforce Executive Order 11246, as amended, 3 C.F.R. § 173 (1973).

⁹⁶ 365 F. Supp. at 1109.

⁹⁷ 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.

⁹⁸ 365 F. Supp. at 1119-23, 1128-29.

Rights Act of 1964.⁹⁹ 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."¹⁰⁰ 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.¹⁰¹

To aid in the administration of Title VII, Congress created the Equal Employment Opportunity Commission (EEOC).¹⁰² 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.¹⁰³ Under that original version, however, there was "no enforcement function for the EEOC other than any voluntary compliance that it could induce."¹⁰⁴ 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

⁹⁹ As amended, 42 U.S.C. § 2000e et seq. (Supp. II 1972). See Edwards, *Sex Discrimination Under Title VII: Some Unresolved Issues*, 24 Lab. L.J. 411 (1973); Wilcox, *Sex Discrimination Provisions of Title VII: A Maturing Controversy*, 3 Pac. L.J. 37 (1972).

¹⁰⁰ 42 U.S.C. § 2000e-2(a)(1) (Supp. II 1972) (emphasis added). The same section further makes it an unlawful employment practice to classify employees, or applicants for employment, in any manner which would deprive or tend to deprive any individual of "employment opportunities or otherwise adversely affect his status as an employee" for any of the above causes, including sex. 42 U.S.C. § 2000e-2(a)(2) (1970). Similar provisions make sex discrimination unlawful practices whether committed by employment agencies or labor organizations. 42 U.S.C. §§ 2000e-2(b), (c) (1970).

¹⁰¹ Sangerman, *A Look at the Equal Pay Act in Practice*, 22 Lab. L.J. 259, 260 (1971). On the similarity of employer defenses under Title VII, see Ragsdale, *Defenses to Sex Discrimination Suits*, 5 Urban Lawyer 359 (1973). Because of the overlap between EPA and Title VII remedies, a private plaintiff will often couple the two statutes in a single action, with the hope of gaining the best advantages of both. See, e.g., *Cupples v. Transport. Ins. Co.*, 371 F. Supp. 146, 148 (N.D. Tex. 1974); *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 789 (D.D.C. 1973).

¹⁰² 42 U.S.C. § 2000e-4 (1970).

¹⁰³ See, e.g., *Stebbins v. Continental Ins. Co.*, 442 F.2d 843 (D.C. Cir. 1971); *Beverly v. Lone Star Lead Constr. Co.*, 437 F.2d 1136 (5th Cir. 1971); *Johnson v. Seaboard Air Line R.R.*, 405 F.2d 645 (4th Cir. 1968).

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).

¹⁰⁴ 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, its provisions regarding discrimination based on sex are in *pari materia* with 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

¹⁰⁵ Margolin, *Management-Union Confrontation 1972 New Frontiers: Who Discriminates Against Women*, 25 N.Y.U. Conf. Lab. 205, 220 (1972). See Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 Rutgers L. Rev. 741 (1973).

¹⁰⁶ Pub. L. No. 92-261, 86 Stat. 103 (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 122.

¹⁰⁷ 42 U.S.C. § 2000e-5(b) (Supp. II 1972).

¹⁰⁸ 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972).

¹⁰⁹ Sape & Hart, *supra* note 104, at 862.

¹¹⁰ *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973).

¹¹¹ *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971) (Title VII), citing *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648, 656 (5th Cir. 1969) (EPA).

¹¹² *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 727 (5th Cir. 1970).

¹¹³ *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

¹¹⁴ 42 U.S.C. § 2000e-2(h) (Supp. II 1972). The EEOC guidelines on sex discrimination

Thus, in one Title VII action, *Hays v. Potlatch Forests, Inc.*,¹¹⁵ 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"¹¹⁶ Likewise, the Tenth Circuit in *Ammons v. Zia Co.*¹¹⁷ looked to cases decided under the EPA in determining the shifting burdens of proof in a Title VII sex discrimination action.¹¹⁸

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.*,¹¹⁹ 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.¹²⁰ In contrast, however, the Fifth Circuit in *Hodgson v. Golden Isles Convalescent Home, Inc.*¹²¹ 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."¹²² 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.¹²³ The plaintiff must, therefore, produce

provide 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).

¹¹⁵ 465 F.2d 1081 (8th Cir. 1972).

¹¹⁶ *Id.* at 1083. The court cited the proviso to 29 U.S.C. § 206(d)(1) (1970). But see *Homemakers, Inc. v. Division of Indus. Welfare*, 356 F. Supp. 1111 (N.D. Cal. 1973).

¹¹⁷ 448 F.2d 117 (10th Cir. 1971).

¹¹⁸ *Id.* at 119.

¹¹⁹ 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

¹²⁰ 421 F.2d at 266.

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

¹²² *Id.* at 1258-59. See also *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 727 (5th Cir. 1970).

¹²³ *Corning Glass Works v. Brennan*, 94 S. Ct. at 2228.

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."¹²⁴

[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.¹²⁵

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 *Hodgson v. American Bank of Commerce*,¹²⁶ faced with exactly this question, held that the plaintiff "has no such burden to convince the court."¹²⁷ On the other hand, however, in the *Corning Glass Works* case,¹²⁸ the Second Circuit concluded that a plaintiff must establish a prima facie case that the wage differential represents discrimination on the basis of sex.¹²⁹ This holding was based on a reading of *Shultz v. Wheaton Glass Co.*,¹³⁰ 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.¹³¹ Consequently, it would not appear that the plaintiff must meet the additional burden of proving specifically that *sex* is the motivation for the wage differential. For as the Supreme Court noted, in affirming the Second Circuit's *Corning Glass* deci-

¹²⁴ 29 C.F.R. §§ 800.125, 800.127 (1973).

¹²⁵ *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).

¹²⁶ 447 F.2d 416 (5th Cir. 1971).

¹²⁷ Id. at 420.

¹²⁸ *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973).

¹²⁹ Id. at 231.

¹³⁰ 421 F.2d 259 (3d Cir. 1970).

¹³¹ Id. at 266.

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

¹³² *Corning Glass Works v. Brennan*, 94 S. Ct. 2228.

¹³³ *Id.* at 2229.

¹³⁴ 29 U.S.C. §§ 206(d)(1)(i)-(iv) (1970).

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 (1960), 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).

¹³⁶ *A. H. Phillips*, 324 U.S. at 496. See also *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027 (1957) (per curiam).

¹³⁷ 29 C.F.R. § 800.108 (1973).

¹³⁸ See 29 C.F.R. § 779.304 (1973). This standard was found to "correctly interpret the Act." *Hodgson v. City Stores, Inc.*, 332 F. Supp. 942, 946 (M.D. Ala. 1971), *aff'd sub nom. Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973).

¹³⁹ *Hodgson v. Waynesburg College*, 20 BNA Wage & Hour Cas. 142, 145, 66 CCH Lab. Cas. ¶ 32,542 (W.D. Pa. 1971).

¹⁴⁰ *Cf. Brennan v. Board of Educ.*, — BNA Wage & Hour Cas. —, — CCH Lab. Cas. ¶ — (D.N.J. 1974).

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*

¹⁴¹ Shultz v. Corning Glass Works, 319 F. Supp. 1161, 1163-64 (W.D.N.Y. 1970), aff'd sub nom. Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973), aff'd sub nom. Corning Glass Works v. Brennan, 94 S. Ct. 2223 (1974).

¹⁴² 29 C.F.R. § 800.122(a) (1973).

¹⁴³ Hodgson v. Brookhaven Gen. Hosp., 470 F.2d 729, 730 (5th Cir. 1972) (per curiam).

¹⁴⁴ Corning Glass Works v. Brennan, 94 S. Ct. at 2234.

¹⁴⁵ Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), cert. denied, 398 U.S. 905 (1970), quoted in Hodgson v. Security Nat'l Bank, 460 F.2d 57, 63 (8th Cir. 1972).

¹⁴⁶ Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. U.L. Rev. 326, 328 (1971).

*statute must not be interpreted or applied in a narrow, grudging manner.*¹⁴⁷

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

¹⁴⁷ *Tennessee Coal, Iron & R.R. v. Muscoda Local 123*, 321 U.S. 590, 597 (1944) (emphasis added).

¹⁴⁸ 421 F.2d 259 (3d Cir. 1970), cert. denied, 398 U.S. 905 (1970). See Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 Cin. L. Rev. 615, 616 (1970). Although *Wheaton Glass* was the first equal pay case to reach the appellate level, the Third Circuit's presentation of specific questions for additional briefing and its order for reargument resulted in the final decision being handed down somewhat more than a month after *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969).

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).

As an aside it is interesting to note that, while some men have recovered back wages as the result of the equal pay requirement, only one private EPA action brought on behalf of men has been located. Interestingly, in *De Figueiredo v. Trans World Airlines, Inc.*, 55 F.R.D. 44 (S.D.N.Y. 1971), the court humorously commented that "[t]he forces of women's liberation confront their male counterparts in this litigation." *Id.* at 45.

¹⁵⁰ Facts abstracted from *Wirtz v. Wheaton Glass Co.*, 284 F. Supp. 23 (D.N.J. 1968).

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.

109 Cong. Rec. 9196 (1963) (remarks of Representative Frelinghuysen); Staff of the House Comm. on Education and Labor, 88th Cong., 1st Sess., Legislative History of the Equal Pay Act of 1963, 10-11 (Comm. Print 1963).

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.

¹⁵⁴ The trial was preceded by considerable procedural skirmishing. See *Wirtz v. Wheaton Glass Co.*, 253 F. Supp. 93 (D.N.J. 1966) (demand for jury trial denied); *Wirtz v. Wheaton Glass Co.*, 17 BNA Wage & Hour Cas. 412, 54 CCH Lab. Cas. ¶ 31,829 (D.N.J. 1966) (informers' privilege upheld).

that: (1) the male and female selector-packers were not performing "equal work";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."¹⁵⁶ Wheaton contended, and the district court found, that "as a matter of operational and economic necessity,"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."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."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.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.¹⁶¹ After receiving voluminous briefs and hearing oral arguments on two separate occasions,¹⁶² the Third Circuit

¹⁵⁵ 29 U.S.C. § 206(d)(1) (1970).

¹⁵⁶ 29 U.S.C. § 206(d)(1)(iv) (1970).

¹⁵⁷ *Wirtz v. Wheaton Glass Co.*, 284 F. Supp. at 27.

¹⁵⁸ *Id.* at 32.

¹⁵⁹ *Id.* at 33.

¹⁶⁰ *Id.* at 30-31, 33.

¹⁶¹ Brief for Appellant at 25, 57, 52, *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970).

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:

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.¹⁶³ 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"¹⁶⁴ 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 2 1/2 cents per hour more than females for the work they do in common."¹⁶⁵

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,¹⁶⁶ 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

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).

¹⁶³ Shultz v. Wheaton Glass Co., 421 F.2d at 265.

¹⁶⁴ 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).

¹⁶⁵ Shultz v. Wheaton Glass Co., 421 F.2d at 263.

¹⁶⁶ 398 U.S. 905 (1970). See Memorandum of Respondent in Opposition, *Wheaton Glass Co. v. Shultz*, 398 U.S. 905 (1970).

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.¹⁶⁷ 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,¹⁶⁸ should also be applicable to a section 17¹⁶⁹ injunctive action.

Wheaton's arguments were rejected in toto by the district court¹⁷⁰ and ultimately that court's decision was affirmed by the Third Circuit.¹⁷¹ 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 \$112,233.¹⁷² Undoubtedly, as was noted by one legal writer, the *Wheaton Glass* case "breathed new life into the effort to eliminate female wage discrimination."¹⁷³

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.¹⁷⁴ 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."¹⁷⁵ 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

¹⁶⁷ *Shultz v. Wheaton Glass Co.*, 319 F. Supp. at 230-31.

¹⁶⁸ 29 U.S.C. § 216(c) (1970). The "novel issue" limitation was removed by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, 88 Stat. 73 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 615, 637.

¹⁶⁹ 29 U.S.C. § 217 (1970).

¹⁷⁰ *Shultz v. Wheaton Glass Co.*, 319 F. Supp. at 229.

¹⁷¹ *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527 (3d Cir. 1971).

¹⁷² Memorandum of Morag Simchak, Chief, Branch of Equal Pay Discrimination, U.S. Dep't of Labor (Jan. 1974).

¹⁷³ Murphy, *supra* note 148, at 616.

¹⁷⁴ 29 U.S.C. § 206(d)(1) (1970).

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."¹⁷⁶ 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 . . ."¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰

Subsequently, in 1963 a measure was proposed by Congresswoman Florence Dwyer of New Jersey which contained the phrase: "work of comparable character."¹⁸¹ 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

¹⁷⁶ Id. at 1122-23.

¹⁷⁷ Id. at 461.

¹⁷⁸ H.R. 11677, 87th Cong., 2d Sess. (1962).

¹⁷⁹ 108 Cong. Rec. 14767 (1962) (remarks of Congresswoman St. George, N.Y.).

¹⁸⁰ Id. at 14768.

¹⁸¹ H.R. 4022, 88th Cong., 1st Sess. (1963).

comparable skills."¹⁸² Nevertheless, despite the Secretary's admonition, a bill was introduced by Congresswoman Edith Green of Oregon which contained the phrase "equal work."¹⁸³ 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.¹⁸⁴

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.*,¹⁸⁵ 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.¹⁸⁶

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

¹⁸² S. 882, 88th Cong., 1st Sess. (1963).

¹⁸³ H.R. 3861, 88th Cong., 1st Sess. (1963).

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).

¹⁸⁶ 479 F.2d 235 (5th Cir. 1973).

¹⁸⁷ 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 *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 *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 *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 *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

¹⁸⁷ *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 420 (5th Cir. 1971).

¹⁸⁸ 256 F. Supp. 786 (D. Nev. 1966).

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.

Id. at 787.

¹⁹⁰ 303 F. Supp. 1049 (E.D. Ky. 1967).

¹⁹¹ *Id.* at 1052.

¹⁹² *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

¹⁹³ 421 F.2d at 265.

¹⁹⁴ See, e.g., *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972); *Shultz v. American Can Co.-Dixie Prod.*, 424 F.2d 356, 360 (8th Cir. 1970); *Hodgson v. Braswell Motor Freight Lines, Inc.*, 20 BNA Wage & Hour Cas. 1025, 1026, 69 CCH Lab. Cas. ¶ 32,808 (N.D. Tex. 1972), aff'd sub nom., *Brennan v. Braswell Motor Freight Lines, Inc.*, 480 F.2d 922 (5th Cir. 1973). See *Corning Glass Works v. Brennan*, 94 S. Ct. 2223 (1974), which cites *Wheaton Glass* and notes that "it is, now well settled that jobs need not be identical in every respect . . ." *Id.* at 2232 n.24.

¹⁹⁵ See, e.g., *Brennan v. Houston Endowment, Inc.*, 21 BNA Wage & Hour Cas. 561, 563-64, 73 CCH Lab. Cas. ¶ 33,022 (S.D. Tex. 1974). *Brennan v. Farmers & Merchants Nat'l Bank*, 21 BNA Wage & Hour Cas. 113, 114, 71 CCH Lab. Cas. ¶ 32,905 (D. Neb. 1973).

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.¹⁹⁶ The fact that jobs may have different titles is no bar to a comparison under the EPA.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ The holding of the Seventh Circuit in *Hodgson v. Miller Brewing Co.*²⁰⁰ 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’ ”²⁰¹ 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.²⁰²

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*,²⁰³ 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 tes-

¹⁹⁶ 29 C.F.R. § 800.121 (1973). See *Wirtz v. Muskogee Jones Store Co.*, 293 F. Supp. 1034, 1037 (E.D. Okla. 1968); *Wirtz v. Rainbo Baking Co.*, 303 F. Supp. 1049, 1052 (E.D. Ky. 1967).

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.

²⁰² 29 C.F.R. § 800.121 (1973).

²⁰³ 436 F.2d 719 (5th Cir. 1970).

timony of employees rather than on artificial job descriptions.²⁰⁴ 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."²⁰⁵

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.²⁰⁶ 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.²⁰⁷ The same position is expressed in the analysis of "equal effort."²⁰⁸ 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.²⁰⁹ 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."²¹⁰

In *Hodgson v. Daisy Manufacturing Co.*²¹¹ 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.²¹² 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

²⁰⁴ Id. at 724. See also *Shultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424 (N.D. Tex. 1969).

²⁰⁵ *Shultz v. Wheaton Glass Co.*, 421 F.2d at 265-66.

²⁰⁶ See *Brennan v. J.M. Fields, Inc.*, 488 F.2d 443, 447 (5th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3511 (U.S. March 5, 1974), quoting from 29 C.F.R. § 800.122 (1973).

²⁰⁷ 29 C.F.R. § 800.125 (1973).

²⁰⁸ 29 C.F.R. § 800.127 (1973) (emphasis added).

²⁰⁹ 29 C.F.R. §§ 800.129, 800.130 (1973).

²¹⁰ *Wirtz v. Basic, Inc.*, 256 F. Supp. 786, 790 (D. Nev. 1966) (emphasis added).

²¹¹ 317 F. Supp. 538 (W.D. Ark. 1970), aff'd on this point, but rev'd on other grounds, 445 F.2d 823 (8th Cir. 1971) (per curiam).

²¹² 317 F. Supp. at 551-52.

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

²¹³ *Shultz v. Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139, 1146 (W.D. Pa. 1970); *Wirtz v. Koller Craft Plastic Prod., Inc.*, 296 F. Supp. 1195, 1198 (E.D. Mo. 1968); 29 C.F.R. § 800.114 (1973).

²¹⁴ 475 F.2d 1041 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

²¹⁵ 475 F.2d at 1048-51.

²¹⁶ 29 C.F.R. § 800.125 (1973).

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.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 *Wirtz v. Dennison Manufacturing Co.*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.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.²²¹ In the *Brookhaven General Hospital*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

²¹⁸ *Hodgson v. Cain-Sloan Co.*, 21 BNA Wage & Hour Cas. 1, 3, 71 CCH Lab. Cas. ¶ 32,880 (M.D. Tenn. 1973), aff'd and vacated in part sub nom. *Brennan v. Cain-Sloan Co.*, 21 BNA Wage & Hour Cas. 145, 74 CCH Lab. Cas. ¶ 33,126 (6th Cir. 1974).

²¹⁹ 265 F. Supp. 787 (D. Mass. 1967).

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).

²²¹ *Hodgson v. Golden Isles Nursing Home, Inc.*, 19 BNA Wage & Hour Cas. 903, 905, 64 CCH Lab. Cas. ¶ 32,445 (S.D. Fla. 1971), aff'd sub nom. *Hodgson v. Golden Isles Convalescent Homes, Inc.* 468 F.2d 1256 (5th Cir. 1972) (per curiam). See also *Hodgson v. Good Shepherd Hosp.*, 327 F. Supp. 143, 145 (E.D. Tex. 1971) ("special skill developed by training"). The catheterization procedure is described in *Hodgson v. William & Mary Nursing Hotel*, BNA 20 Wage & Hour Cas. 10, 19-20, 65 CCH Lab. Cas. ¶ 32,497 (M.D. Fla. 1971). See Comment, *Equal Pay: The Hospital-Nursing Home Dilemma*, 7 U. Richmond L. Rev. 303 (1972).

²²² *Hodgson v. Bookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970).

was involved in catheterization.²²³ Therefore, it is apparent that the mere possession of a skill²²⁴ 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 performed²²⁵ do not negate the presence of equal skill if the basic duties are of a closely related character.²²⁶ 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.²²⁷ 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.²²⁸

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.²²⁹ This is so even though the duty in

²²³ *Shultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424, 425 (N.D. Tex. 1969).

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.

²²⁷ 29 C.F.R. § 800.125 (1973).

²²⁸ See *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970).

²²⁹ See, e.g., *Wirtz v. Rainbo 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.

Wirtz v. Basic, Inc., 256 F. Supp. 786, 791 (D. Nev. 1966).

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

²³⁰ *Hodgson v. Daisy Mfg. Co.*, 317 F. Supp. 538, 551-52 (W.D. Ark. 1970), *aff'd*, 445 F.2d 823 (8th Cir. 1971) (*per curiam*).

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).

²³¹ 29 C.F.R. § 800.127 (1973).

²³² *Id.*

²³³ *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970). The same criteria may be applied as well to the "skill" and "responsibility" tests. See *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972).

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.²³⁴

In *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.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.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, subduing 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."²³⁷ On appeal once again, the decision was affirmed.²³⁸

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

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.

Id. at 725.

²³⁵ *Shultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424, 425 (N.D. Tex. 1969).

²³⁶ *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d at 723.

²³⁷ *Hodgson v. Brookhaven Gen. Hosp.*, 20 BNA Wage & Hour Cas. 54, 55, 65 CCH Lab. Cas. ¶ 32,520 (N.D. Tex. 1971).

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.²³⁹ 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.*,²⁴⁰ 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*²⁴¹ and from another lower court decision in a similar action.²⁴² 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.²⁴³ 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.²⁴⁴ The *Golden Isles* decision stresses that there can be no universal determination that all aides and orderlies perform equal work in all hospitals.²⁴⁵

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

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).

²⁴² *Hodgson v. George W. Hubbard Hosp.*, 351 F. Supp. 1295 (M.D. Tenn. 1971).

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.²⁴⁶ 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"²⁴⁷ 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.²⁴⁸

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*²⁴⁹ 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.²⁵⁰

It is essential to note that *Kentucky Baptist* and other similar cases²⁵¹ 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

²⁴⁶ See, e.g., *Shultz v. Kentucky Baptist Hosp.*, 19 BNA Wage & Hour Cas. 403, 62 CCH Lab. Cas. ¶ 32,296 (W.D. Ky. 1969).

²⁴⁷ *Hodgson v. Cook*, 20 BNA Wage & Hour Cas. 941, 948, 69 CCH Lab. Cas. ¶ 32,782 (C.D. Cal. 1972). See also *Hodgson v. St. Elizabeth Hosp.*, 20 BNA Wage & Hour Cas. 1242, 1245, 70 CCH Lab. Cas. ¶ 32,863 (E.D. Ky. 1973) (noncontested); *Hodgson v. South Shore Convacare, Inc.*, 20 BNA Wage & Hour Cas. 490, 492, 67 CCH Lab. Cas. ¶ 32,628 (N.D. Ill. 1972). Contra, *Hodgson v. Golden Isles Nursing Home, Inc.*, 19 BNA Wage & Hour Cas. 903, 64 CCH Lab. Cas. ¶ 32,445 (S.D. Fla. 1971) aff'd sub nom. *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256 (5th Cir. 1972) (per curiam).

²⁴⁸ 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.

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

²⁵⁰ 19 BNA Wage & Hour Cas. at 410. This matter is considered under equality of effort, despite the court's apparent treatment of the duty as involving all three criteria—skill, effort and responsibility: "It is in this duty performed by the orderly who possesses the skill and the physical ability and strength to do this job that particularly distinguishes his responsibilities from that of the nurses' aide." Id. at 406-07.

²⁵¹ *Hodgson v. Anclote Manor Foundation*, 21 BNA Wage & Hour Cas. 290, 72 CCH Lab. Cas. ¶ 32,957 (M.D. Fla. 1973); *Brennan v. Cenco Hosp. & Convalescent Homes Corp.*, 21 BNA Wage & Hour Cas. 29, 71 CCH Lab. Cas. ¶ 32,908 (S.D. Tex. 1973). See also *Hodgson v. Good Shepherd Hosp.*, 327 F. Supp. 143 (E.D. Tex. 1971) (alcoholic and psychiatric units).

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*²⁵² 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.²⁵³ 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.²⁵⁴ 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

²⁵² 424 F.2d 356 (8th Cir. 1970). The following facts are abstracted from *Wirtz v. American Can Co.-Dixie Prod.*, 288 F. Supp. 14, 22 (W.D. Ark. 1968).

²⁵³ 424 F.2d at 360-61.

²⁵⁴ *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.²⁵⁵

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.²⁵⁶ 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."²⁵⁷ 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.²⁵⁸

In another recent district court case,²⁵⁹ 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.²⁶⁰ The court held that, "This lack of exposure, controlled by defendant, does not warrant any wage differential."²⁶¹ 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,"²⁶² 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."²⁶³

In *Hodgson v. San Diego Unified School District*,²⁶⁴ a com-

²⁵⁵ 29 C.F.R. § 800.119 (1973).

²⁵⁶ *Shultz v. Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139, 1146 (N.D. Pa. 1970).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Brennan v. Houston Endowment, Inc.*, 21 BNA Wage & Hour Cas., 561, 73 CCH Lab. Cas. ¶ 33,022 (S.D. Tex. 1974).

²⁶⁰ 21 BNA Wage & Hour Cas. at 562.

²⁶¹ *Id.* at 563.

²⁶² *Id.*

²⁶³ *Id.*

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.

parison 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 laws²⁶⁷ which, regardless of their present legal status, were origi-

²⁶⁵ 21 Wage & Hour Cas. at 126.

²⁶⁶ 29 C.F.R. § 800.163 (1973).

²⁶⁷ Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and,

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.²⁶⁸ 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.*²⁶⁹ 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.²⁷⁰

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

therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

²⁶⁸ 29 C.F.R. § 1604.2(b)(1) (1973).

²⁶⁹ 29 C.F.R. § 800.127 (1973).

²⁷⁰ 317 F. Supp. 538 (W.D. Ark. 1970), aff'd, 445 F.2d 823 (8th Cir. 1971) (per curiam).

²⁷¹ 317 F. Supp. at 543-44. See also *Hodgson v. Allied Supermarkets, Inc.*, 20 BNA Wage & Hour Cas. 616, 619, 68 CCH Lab. Cas. ¶ 32,683 (E.D. Okla. 1972), aff'd, No. 72-1485 (10th Cir., March 26, 1973) (per curiam).

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.²⁷¹ 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."²⁷² 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.²⁷³ 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.²⁷⁴ 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 effect 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."²⁷⁵

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

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).

²⁷² 29 C.F.R. § 800.129 (1973).

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.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,"²⁷⁷ and also in its more precise sense meaning "accountability."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,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.²⁸⁰ On the other hand, the Fourth Circuit in *Hodgson v. Fairmont Supply Co.*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.²⁸²

In *Hodgson v. American Bank of Commerce*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

²⁷⁶ See, e.g., *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972).

²⁷⁷ See, e.g., *Brennan v. City Stores, Inc.*, 479 F.2d 235, 237 (5th Cir. 1973).

²⁷⁸ See, e.g., *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 899 (5th Cir. 1974).

²⁷⁹ *Wirtz v. Muskogee Jones Store Co.*, 293 F. Supp. 1034 (E.D. Okla. 1968).

²⁸⁰ *Id.* at 1037.

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).

²⁸² 454 F.2d at 496.

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.*

²⁸⁹ See, e.g., *Hodgson v. Montana State Bd. of Educ.*, 336 F. Supp. 524, 525 (D. Mont. 1972); *Shultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424, 425 (N.D. Tex. 1969).

²⁹⁰ *Wirtz v. Dennison Mfg. Co.*, 265 F. Supp. 787, 788-89 (D. Mass. 1967).

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.²⁹¹ 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.²⁹²

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.²⁹³ 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.²⁹⁴

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.²⁹⁵

In *Hodson v. Behrens Drug Co.*,²⁹⁶ 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

²⁹¹ *Kilpatrick v. Sweet*, 262 F. Supp. 561, 563-64 (M.D. Fla. 1969). See also, *Hodgson v. Good Shepherd Hosp.*, 327 F. Supp. 143, 145-46, 148 (E.D. Tex. 1971).

²⁹² 262 F. Supp. at 564.

²⁹³ *Hodgson v. Montana State Bd. of Educ.*, 336 F. Supp. 524, 525 (D. Mont. 1972); *Brennan v. Goose Creek Consol. Indep. School Dist.*, 21 BNA Wage & Hour Cas. 25, 27, 71 CCH Lab. Cas. ¶ 32,904 (S.D. Tex. 1973), appeal docketed, No. 74-1485, 5th Cir., Feb. 22, 1974.

²⁹⁴ See cases cited in note 293 supra.

²⁹⁵ *Hodgson v. Newport Indus. Prod. Co.*, 20 BNA Wage & Hour Cas. 688, 692, 68 CCH Lab. Cas. ¶ 32,712 (E.D. Tenn. 1972).

²⁹⁶ 475 F.2d 1041 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

receive a wage increase immediately.²⁹⁷ The Fifth Circuit, therefore, appears to have based its conclusion on two of the three tests it enumerated in the *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.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 *Hodgson v. Square D. Co.*,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 *not* of a type associated with differences in wage levels.³⁰⁰ A similar position was adopted in the *Daisy Manufacturing* case,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.³⁰²

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.³⁰³

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

²⁹⁷ 475 F.2d at 1051.

²⁹⁸ *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970).

²⁹⁹ 19 BNA Wage & Hour Cas. 752, 64 CCH Lab. Cas. ¶ 32,397 (E.D. Ky. 1970), aff'd in part and rev'd in part, 459 F.2d 805 (6th Cir.), cert. denied, 409 U.S. 967 (1972).

³⁰⁰ 19 BNA Wage & Hour Cas. at 754, specifically approved, 459 F.2d at 807-08.

³⁰¹ *Hodgson v. Daisy Mfg. Co.*, 317 F. Supp. 538 (W.D. Ark. 1970), aff'd, 445 F.2d 823 (8th Cir. 1971) (per curiam).

³⁰² 317 F. Supp. at 544.

³⁰³ 29 C.F.R. § 800.132 (1973).

³⁰⁴ H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in Staff of the House Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Equal Pay Act of 1963*, 44 (Comm. Print 1963). [hereinafter cited as *Legislative History*].

³⁰⁵ 94 S. Ct. 2223 (1974).

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."³⁰⁶

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"³⁰⁷ 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."³⁰⁸ 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."³⁰⁹ 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."³¹⁰ 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.³¹¹

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

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.

³⁰⁷ 29 U.S.C. § 206(d)(1) (1970).

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).

³¹⁰ *Hodgson v. City Stores, Inc.*, 332 F. Supp. 942, 949 (M.D. Ala. 1971), aff'd sub nom., *Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973).

³¹¹ 29 C.F.R. § 800.132 (1973).

different areas of a school building will not constitute dissimilar working conditions.³¹² 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.³¹³

A number of hospital cases have also dealt with allegations of dissimilar working conditions. In *Hodgson v. Brookhaven General Hospital*,³¹⁴ for instance, the Fifth Circuit stated: "where pay is unequal, no dissimilarity in working conditions is relevant unless it somehow explains the pay differential."³¹⁵ 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.³¹⁶

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.³¹⁷ 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

³¹² See, e.g., *Hodgson v. San Diego Unified School Dist.*, 21 BNA Wage & Hour Cas. 123, 127, 71 CCH Lab. Cas. ¶ 32,920 (S.D. Cal. 1973), *aff'd mem.* No. 72-2805, 9th Cir., Sept. 5, 1974. *Brennan v. Board of Educ.*—BNA Wage & Hour Cas.—, 74 CCH Lab. Cas. ¶ — (D.N.J. 1974).

³¹³ *Hodgson v. Sears, Roebuck & Co.* 20 BNA Wage & Hour Cas. 611, 615, 68 CCH Lab. Cas. ¶ 32,684 (W.D. Ky. 1972).

³¹⁴ 436 F.2d 719 (5th Cir. 1970).

³¹⁵ *Id.* at 723 n.3.

³¹⁶ *Id.*

³¹⁷ 29 C.F.R. § 800.131 (1973).

do not work under such conditions. Failure to make such increased payments is evidence that the working conditions were not considered by the employer as the basis for the wage disparity.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 v. Brennan*,³¹⁹ the first EPA case to be heard by the high court. The principal question posed in the case was "whether Corning Glass Works violated the [EPA] by paying a higher base wage to male night shift inspectors than it paid to female inspectors performing 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."³²⁰ In resolving an "unusually direct conflict between two circuits" on the question,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 *Corning* will necessarily affect all aspects of EPA enforcement.

The Facts

Leading up to the *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.³²² The facts in both cases are strikingly similar.³²³

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

The [male] orderly by virtue of working all over the hospital, and the demanding working conditions in the emergency room, performed his duties in a different environment—more taxing and demanding work encompassing the unpleasant contact 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.

Id. at 148.

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.*

³²⁰ *Id.* at 2226.

³²¹ *Id.* at 2226, *aff'g* *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973), and *rev'g* *Brennan v. Corning Glass Works*, 480 F.2d 1254 (3d Cir. 1973).

³²² 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 two suits. See *Brennan v. Corning Glass Works*, Civil No. 4036 (D.R.I. filed Nov. 22, 1968).

³²³ Unless otherwise indicated, all facts are summarized from the Supreme Court opinion 94 S. Ct. 2223.

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,³²⁴ women were permitted for the first time to bid into night shift inspector positions.³²⁵ 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

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

³²⁶ Abstracted from the Brief for the Secretary of Labor at 14-15 n.10, *Corning Glass Works v. Brennan*, 94 S. Ct. 2223 (1974).

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].

29 C.F.R. § 800.146 (1973).

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.

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.³²⁹ 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.³³⁰ The Second Circuit affirmed the lower court holding that differences in shift do not constitute dissimilar working conditions.³³¹ 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."³³² 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.³³³ In the Corning plan which was introduced, the "working condition" criterion was measured in terms of "surroundings" and "hazards."³³⁴ "Surroundings" required considerations of such factors as exposure to elements, and

³²⁹ *Shultz v. Corning Glass Works*, 319 F. Supp. 1161 (W.D. N.Y. 1970).

³³⁰ *Id.* at 1166-70.

³³¹ *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973).

³³² *Id.* at 231.

³³³ See Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 232-240 (1963); Hearings on S. 882 and S. 910 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 96-104 (1963).

³³⁴ See 94 S. Ct. at 2232; 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.

³³⁶ Id. at 232, quoting from H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, 8 (1963), reprinted in Legislative History, supra note 304, at 44, 49.

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-

³³⁹ *Brennan v. Corning Glass Works*, 480 F.2d 1254, 1261 (3d Cir. 1973).

³⁴⁰ *Id.* at 1260, quoting from 109 Cong. Rec. 9207 (1963) (remarks of Congressman Goodell, N.Y.).

³⁴¹ 474 F.2d at 1261.

³⁴² *Hodgson v. Corning Glass Works*, 341 F. Supp. 18, 21 (M.D. Pa. 1972).

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.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."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"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.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.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

³⁴⁷ See *id.* at 2229-30.

³⁴⁸ *Id.* at 2230.

³⁴⁹ *Id.* at 2231.

³⁵⁰ *Id.* at 2232.

³⁵¹ *Id.* at 2231-32.

than sex.³⁵² 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.³⁵³

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."³⁵⁴ 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.

³⁵⁴ 29 U.S.C. § 206(d)(1) (1970).

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

³⁵⁵ 94 S. Ct. at 2235.

³⁵⁶ *Id.*

³⁵⁷ 29 U.S.C. § 206(d)(1) (1970).

³⁵⁸ H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in Staff of the House Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Equal Pay Act of 1963*, 44 (Comm. Print 1963) [hereinafter cited as *Legislative History*]; S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963), reprinted in *Legislative History*, *supra*, at 39.

³⁵⁹ 29 U.S.C. § 206(d)(1)(iv) (1970).

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.³⁶¹ 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 1964,³⁶² 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.³⁶³

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.”³⁶⁴ 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.³⁶⁵

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.

903, 64 CCH Lab. Cas. ¶ 32,445 (S.D. Fla. 1971), *aff'd sub nom. Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256 (5th Cir. 1972) (*per curiam*).

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.

³⁶² 42 U.S.C. § 2000e-2(h) (Supp. II 1972).

³⁶³ Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 Val. U. L. Rev. 326, 347 (1971).

³⁶⁴ H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in *Legislative History*, *supra* note 363, at 44.

³⁶⁵ 109 Cong. Rec. 9761 (1963) (remarks of Senator McNamara, Mich.).

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 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.

³⁶⁷ 29 C.F.R. § 800.143 (1973).

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).

³⁷⁰ *Brennan v. Goose Creek Consol. Indep. School Dist.*, 21 BNA Wage & Hour Cas. 25, 27, 71 CCH Lab. Cas. ¶ 32,904 (S.D. Tex. 1973), appeal docketed, No. 74-1485, 5th Cir., Feb. 22, 1974.

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.*

³⁷² *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974).

³⁷³ *Hodgson v. Golden Isles Nursing Home, Inc.*, 19 BNA Wage & Hour Cas. 903, 64 CCH Lab. Cas. ¶ 32,445 (S.D. Fla. 1971), *aff'd sub nom. Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256 (5th Cir. 1972) (*per curiam*).

³⁷⁴ 19 BNA Wage & Hour Cas. at 905.

³⁷⁵ *Wirtz v. First Victoria Nat'l Bank*, 19 BNA Wage & Hour Cas. 684, 687, 63 CCH Lab. Cas. ¶ 32,378 (S.D. Tex. 1970), *aff'd sub nom. Hodgson v. First Victoria Nat'l Bank*, 446 F.2d 47 (5th Cir. 1971).

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.³⁷⁶ 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.³⁷⁷

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.*³⁷⁸ "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"³⁷⁹

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."³⁸⁰ 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

³⁷⁶ See, e.g., *Kilpatrick v. Sweet*, 262 F. Supp. 561, 564 (M.D. Fla. 1967) (de facto seniority system).

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]ll promotions given the [female] aides were to comply with minimum wage requirements; and all 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.

³⁸⁰ *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 421 (5th Cir. 1971), aff'g in part and rev'g in part, *Wirtz v. American Bank of Commerce*, 19 BNA Wage & Hour Cas. 774, 777, 64 CCH Lab. Cas. ¶ 32,400 (S.D. Tex. 1970).

would be to give protective coloration to a generally discriminatory pattern."³⁸¹

Generally, "[i]n 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."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.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 *wholly unrelated to sex*³⁸⁴ and are *relevant to the jobs in question*.³⁸⁵ Thus, in *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.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 *Brookhaven General Hospital*,³⁸⁷ for instance, the district court found that newly-hired male orderlies received the

³⁸¹ 447 F.2d at 421.

³⁸² *Hodgson v. Industrial Bank*, 347 F. Supp. 63, 68 (S.D. Ga. 1972). See also *Wirtz v. Meade Mfg., Inc.*, 285 F. Supp. 812, 814 (D. Kan. 1968).

³⁸³ *Shultz v. Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139, 1146 (W.D. Pa. 1970). See also *Hodgson v. Industrial Bank*, 347 F. Supp. at 68.

³⁸⁴ *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974).

³⁸⁵ *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970).

³⁸⁶ *Hodgson v. Golden Isles Nursing Home, Inc.*, 19 BNA Wage & Hour Cas. 903, 905-06, 64 CCH Lab. Cas. ¶ 32,445 (S.D. Fla. 1971), *aff'd sub nom.*, *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256 (5th Cir. 1972) (*per curiam*).

³⁸⁷ *Shultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424 (N.D. Tex. 1969).

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.³⁸⁸ 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 interpretations state:

[w]hen 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.³⁸⁹

In the *Miller Brewing*³⁹⁰ 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."³⁹¹

The "factor other than sex" exception was also extensively discussed in *Hodgson v. Robert Hall Clothes, Inc.*³⁹² 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 salespersons of the opposite sex, resulting in possible detriment to business. However, the district court acknowledged that an EPA violation 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.³⁹³

³⁸⁸ Id. at 426.

³⁸⁹ 29 C.F.R. § 800.145 (1973).

³⁹⁰ *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972).

³⁹¹ Id. at 225 n.8. See also *Wirtz v. Dennison Mfg. Co.*, 265 F. Supp. 787, 790 n.1 (D. Mass. 1967).

³⁹² 473 F.2d 589 (3d Cir.), cert. denied sub nom. *Brennan v. Robert Hall Clothes, Inc.*, 414 U.S. 866 (1973). See note, 44 Miss. L.J. 1028 (1973).

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

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.

³⁹⁵ Reply Brief for Appellant, Cross-Appellee at 9, *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973).

³⁹⁶ Brief for Appellant, Cross-Appellee at 21, *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973).

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 pro-

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).

⁴⁰⁰ 473 F.2d at 595. The Third Circuit alluded to what it believed to be an inconsistency in the Secretary's position. The court referred to the administrative interpretations in which commission rates are discussed. See 29 C.F.R. § 800.116(e) (1973). The example given is that of two shoe departments within a retail store, with male and female sales personnel in each, and higher quality, more expensive shoes sold in one department than those sold in the other department. All sales personnel in both departments perform equal work; however, the employer pays one commission rate to male and female sales personnel in the higher price department and a lower commission rate to all sales personnel in the lower price department. The administrative interpretations approve of such a situation, wherein sex plays no part in the rates, as being within the "factor other than sex" exception. 29 C.F.R. § 800.116(e) (1973).

The Third Circuit suggested that if the Department of Labor adopts such a position regarding commission rates, it follows that the *Robert Hall* disparity should be approved. 473 F.2d at 594. (It must be noted that in *Robert Hall*, the primary dispute was not over different commission rates but over different base salaries.) On the contrary, however, the example given in the administrative interpretations contemplates a situation where both men and women work in the higher and lower paid department, and, thus, have an *equal opportunity* to earn the higher commission rate. In the *Robert Hall* case, however, the women were not permitted to sell the higher priced articles and, thus, did *not* have an equal opportunity to earn the higher base salary. Accordingly, the Department of Labor takes the position that even if commissions had been the basic method of payment at *Robert Hall*, there would still have been a violation since women would have been denied the opportunity to earn the higher commissions.

⁴⁰¹ See 29 C.F.R. § 800.148 (1973).

⁴⁰² *Id.*

⁴⁰³ 454 F.2d 490 (4th Cir. 1972).

⁴⁰⁴ *Id.* at 498.

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

In *Hodgson v. Security National Bank*⁴⁰⁵ 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.⁴⁰⁶

Another of the leading cases in this area is *Shultz v. First Victoria National Bank*,⁴⁰⁷ 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.⁴⁰⁸

In *Behrens Drug*,⁴⁰⁹ 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

⁴⁰⁵ 460 F.2d 57 (8th Cir. 1972).

⁴⁰⁶ *Id.* at 63.

⁴⁰⁷ 420 F.2d 648 (5th Cir. 1969).

⁴⁰⁸ *Id.* at 655.

⁴⁰⁹ *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

the final point in the rotation, they would not automatically become salesmen. Instead, they had to wait until an opening occurred in that position.⁴¹⁰ Based on those facts, the Fifth Circuit conceded that the training program was more concrete than that found in *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.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."⁴¹² In *Hodgson v. Goodyear Tire & Rubber Co.*⁴¹³ the term was defined as follows:

[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.⁴¹⁴

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."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

⁴¹⁰ See *Hodgson v. Behrens Drug Co.*, 20 BNA Wage & Hour Cas. 375, 379, 67 CCH Lab. Cas. ¶ 32,598 (E.D. Tex. 1971).

⁴¹¹ 475 F.2d at 1047.

⁴¹² See 29 C.F.R. § 800.146 (1973).

⁴¹³ 358 F. Supp. 198 (N.D. Ohio 1973).

⁴¹⁴ Id. at 199-200.

⁴¹⁵ Id. at 200.

any violation of the equal pay for equal work standard."⁴¹⁶ 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.⁴¹⁷

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 state⁴¹⁸ 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."⁴¹⁹

Another such alleged "factor other than sex" arises from the common hiring practice of paying an individual on the basis of the lowest wage he or she will accept. Oftentimes, the result of this approach is lower female wages, which the employer then asserts to be based purely on marketplace considerations and not the product of *intended* sex discrimination. Again, however, when faced with this contention the Fifth Circuit has consistently held: "Clearly the fact that the employer's bargaining power is greater with respect to women than with respect to men is not the kind of factor which Congress had in mind."⁴²⁰ Indeed, as the Supreme Court noted in *Corning*:⁴²¹

The differential arose simply because men would not work

⁴¹⁶ *Hodgson v. Lenkurt Elec. Co.*, 20 BNA Wage & Hour Cas. 1044, 1046, 70 CCH Lab. Cas. ¶ 32,816 (N.D. Cal. 1972).

⁴¹⁷ *Hodgson v. Corning Glass Works*, 330 F. Supp. 46, 50 (W.D. N.Y. 1971), *aff'd* as modified, with specific approval of the point, 474 F.2d 226, 235 (2d Cir.1973), *aff'd* sub nom., *Corning Glass Works v. Brennan*, 94 S. Ct. 2223 (1974).

⁴¹⁸ 29 C.F.R. § 800.106 (1973).

⁴¹⁹ *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 375 (D. Md. 1971), *aff'd* sub nom., *Hodgson v. Baltimore Regional Joint Bd., Amal. Clothing Workers*, 462 F.2d 180 (4th Cir. 1972) (*per curiam*); quoted in *Brennan v. Board of Educ.*, 374 F. Supp. 817, 832, 33, 131 n.31 (D. N.J. 1974). See also *Wirtz v. Midwest Mfg. Corp.*, 18 BNA Wage & Hour Cas. 556, 561, 58 CCH Lab. Cas. ¶ 32,070 (S.D. Ill. 1968), where the invalidity of such a defense resulted in the employer paying \$238,695 in back wages, including interest. See Memorandum of Morag Simchak, Chief, Branch of Equal Pay Discrimination, Employment Standards Administration, U.S. Dep't of Labor (Jan. 1974).

⁴²⁰ *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970). See also *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973).

⁴²¹ *Corning Glass Works v. Brennan*, 94 S. Ct. 2223 (1974).

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.⁴²²

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 *Wheaton Glass*⁴²³ decision, that the EPA began to assume vitality. It can be said even today, however, that the EPA has not served as

⁴²² Id. at 4832.

⁴²³ *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

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*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*⁴²⁵ and related subsidiary cases⁴²⁶ 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.

⁴²⁴ *Corning Glass Works v. Brennan*, 94 S. Ct. 2223 (1974).

⁴²⁵ See *EEOC v. American Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973).

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).