salaried public interest lawyers. The court found none of these factors sufficiently compelling to deny assessing reasonable attorneys' fees against the defendants.[421] Other arguments have been that fees should not be awarded where the plaintiff's action was a test case,[422] where the defendant's case was "not without merit,"[423] and where the defendant relied in good faith on a state protective law.[424] None of these arguments has insulated defendants from liability for attorney's fees.

VI. Conclusion

Both substantive scope and procedural requirements have changed since the enactment of Title VII more than a decade ago. Federal employment discrimination law depends heavily on the private bar for its implementation in administrative and judicial proceedings. It is hoped that this summary and description of current practice and trends will assist practitioners engaged in employment discrimination litigation.

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421. *Id.* at 1255.

422. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

423. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, *cert. denied*, 404 U.S. 1007 (1972). *But see* Jones v. New York City Human Resources Admin., 9 CCH Empl. Prac. Dec. ¶ 9905 (S.D.N.Y. 1975) (because of good faith efforts of defendant in writing tests that were invalidated by the court); Chastang v. Flynn & Emrich Co., 381 F. Supp. 1348 (D. Md. 1974) (plaintiffs sought recovery for contributing to discriminatory pension fund. Court denied attorney's fees because no injunction was sought and the award would penalize the other members of the fund).

424. Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95 (5th Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd per curiam*, 460 F.2d 1228 (5th Cir. 1972).

THE EQUAL PAY ACT OF 1963: A PRACTICAL ANALYSIS

Janet A. Johnson†

I. INTRODUCTION

Statistics depressingly similar to those enumerated below were largely responsible for prompting the Congress to enact the Equal Pay Act of 1963.[1] Such statistics indicate that, although legislation designed to provide remedies for all aspects of sex-discrimination in employment is currently in force,[2] much remains to be done. It is the purpose of this article to explore the operation of the Equal Pay Act of 1963[3] which became effective June 11, 1964.[4]

A. *Background Facts About Women Workers*

There are many myths surrounding female employment. For example, it is frequently alleged that women work to finance family frivolities or that they seek employment out of boredom. Such myths must be dispelled. The cold facts are that nearly two-thirds of all women who work are either single, divorced, separated or have husbands who earn less than $7,000 per year. This level of income, in most instances, does not meet the criteria established by the Bureau of Labor Statistics as a low standard of living for a four-member urban family.[5] In 1972, 43.9 percent of all American women worked; 42.9 percent of women with children under the age of eighteen worked, with a total number of children under eighteen in March, 1971 of 25,723,000, of whom 5,649,000 were under six years of age.[6]

Statistics show that in the past two decades women of all ages have joined the labor force in increasing numbers. For example, women comprised 31 percent (19.4 million) of the total workers in 1953, but in 1973 this percentage had risen to nearly 40 percent (34.6 million).[7] Despite this increased entry

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1. *See* 109 CONG. REC. 9202 (1963).

2. 42 U.S.C. §§ 2000e-1 to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e-1 to e-17 (Supp. III, 1973) (Title VII, Civil Rights Act of 1964); 29 U.S.C. § 206(d) (1970) (The Equal Pay Act of 1963).

3. 29 U.S.C. § 206(d) (1970) (originally enacted as Act of June 10, 1963, Pub. L. No. 88-38, 77 Stat. 56) [hereinafter cited as The Act].

4. Act of June 10, 1963, Pub. L. No. 88-38, § 4, 77 Stat. 56.

5. *The Myth and the Reality*, U.S. Dept. of Labor, Employment Standards Administration, Women's Bureau, Washington, D.C. (April 1973).

6. *Facts about Women Workers*, U.S. Dept. of Labor, Employment Standards Administration, Women's Bureau, Washington, D.C. (April 1973).

7. U.S. Dept. of Labor Statistics, *appearing in* U.S. News & World Report, Oct. 8, 1973, at 41.

into the job market, women continue to fall behind men in pay, tend to hold lower status positions and tend to be paid less for doing the same job.[8] Annual median earnings for full time workers provide data with regard to the widening pay gap between the sexes. In 1957, the median income for women was $3,008, for men, $4,713; in 1965, $3,823 compared with $6,375; and by 1972 $5,903 and $10,202 respectively.[9]

From these figures, it is predictable that women account for 98 percent of private household workers, 76 percent of the clerical workers, 97 percent of the registered nurses, and 63 percent of the social workers, but only 12 percent of lawyers and judges, and 2 percent of engineers.[10]

In the academic world, the level of female participation is in indirect proportion to the level of advancement. Considering persons from each educational level as a group, women are 50.4 percent of all high school graduates, 43.1 percent of those receiving bachelor's degrees, and 36.5 percent of all persons with graduate degrees. Also, women hold 24.0 percent of the faculty positions in higher education but represent a mere 8.6 percent of those achieving the rank of full professor.[11]

A comparison of the median earnings per year for several occupational groups is also informative. In 1972, full time working women in the professional/technical group had a median income of $8,744, while similarly employed men earned $13,542. Female sales workers earned $4,445, male sales workers, $11,610. Factory workers' earnings were $5,004 for women and $8,747 for men. Female laborers earned $4,633 while their male counterparts earned $7,477.[12]

II. Legislative Efforts

A. *Prior to 1963*

As early as 1870 the federal government initiated a form of equal pay regulation for its female employees, a policy which was not fully implemented until 1923.[13] Montana and Michigan enacted state equal pay laws in 1919 and Washington became the third state in 1943.[14] In 1963, when Congress enacted the Equal Pay Act, twenty-two states had passed equal pay legislation.[15]

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8. *Id.*
9. U.S. Dept. of Commerce Statistics, *appearing in* U.S. News & World Report, Oct. 8, 1973, at 42.
10. U.S. Dept. of Commerce, Council of Economic Advisors, *appearing in* U.S. News & World Report, Oct. 8, 1973, at 42.
11. Carnegie Commission on Higher Education, *appearing in* U.S. News & World Report, Oct. 8, 1973, at 42.
12. U.S. Dept. of Commerce Statistics, *appearing in* U.S. News & World Report, Oct. 8, 1973, at 42.
13. *Hearings on S. 882 and S. 910 Before the Subcomm. on Labor and Public Welfare of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 41 (1963). *See also* 5 St. Mary's L.J. 409 (1973).
14. Kanowitz, *Sex-based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 Hast. L.J. 305, 308 (1968) [hereinafter cited as Kanowitz].
15. 109 Cong. Rec. 8916 (1963) (remarks of Senator Randolph).

Beginning in 1945, some form of federal equal pay legislation had been before the Congress each year.[16] The final impetus for passing such legislation came in 1963 after extensive hearings which revealed widespread double pay standards for men and women who were often performing identical work.[17] Thus, unlike the 99th-hour inclusion of "sex" in the language of Title VII of the Civil Rights Act of 1964,[18] Congress enacted the Equal Pay Act of 1963 only after extensive study and deliberation.

B. *The Equal Pay Act of 1963*[19]

The declaration of purpose, set out in section 2 of the statute, is as follows:

> (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—
>
> (1) depresses wages and living standards for employees necessary for their health and efficiency;
>
> (2) prevents the maximum utilization of the available labor resources;
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> (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
>
> (4) burdens commerce and the free flow of goods in commerce; and
>
> (5) constitutes an unfair method of competition.
>
> (b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.[20]

The Act was passed as an amendment to the Fair Labor Standards Act of 1938,[21] which provides basic protections for employees subject to its provisions in minimum hourly wages,[22] overtime compensation,[23] and conditions of employment of children.[24] The Act's prohibition against sex-based wage differentials was included as part of the minimum wage provisions of the FLSA.[25] In pertinent part, the Act 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

16. 109 CONG. REC. 9199 (1963) (remarks of Congresswoman Dwyer).
17. The wages paid to women were always lower. 109 CONG. REC. 9199 (1963) (remarks of Congresswoman Green).
18. *See* Kanowitz, *supra* note 14, at 311 nn.30 & 31 and text accompanying.
19. 29 U.S.C. § 206(d) (1970).
20. Act of June 10, 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56.
21. 29 U.S.C. § 201 et seq. (1970) (originally enacted as Act of June 25, 1938, ch. 676, 52 Stat. 1060) [hereinafter cited as the FLSA].
22. 29 U.S.C. § 206 (1970).
23. *Id.* § 207.
24. *Id.* § 212.
25. *Id.* § 206(d).

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 . . . .[26]

III. Scope of Coverage of the Act

A. *"Employers" and "Enterprises"*

The Act provides that "[f]or purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection [§ 206 (d)(1)] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter [Chapter 8—Fair Labor Standards].[27] Thus, all other sections of the FLSA with regard to scope of coverage, definitions, penalties, and so forth, are applicable to the Act.

The section 206 minimum wage provisions and section 207 overtime provisions apply to every employer otherwise covered by the FLSA[28] with an employee or employees who in any work-week are engaged in commerce, or engaged in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce.[29]

The term "enterprise engaged in commerce or in the production of goods for commerce" includes not only those enterprises with employees directly engaged in commerce or in the production of goods for commerce but also those enterprises with employees who handle, sell or otherwise work on goods or materials that have been moved in or produced for commerce by any person.[30]

Since the enactment of the FLSA in 1938, Congress has regularly passed amendments which have extended its scope of coverage. For example, the 1966 Amendments to the FLSA,[31] in addition to retaining the original scope of coverage of the FLSA, expanded the definition of "employer" to include: a state or political subdivision of a state with respect to employees of a hospital, certain institutions for the care of the sick, aged or mentally ill, certain special schools for handicapped or gifted children, elementary and secondary schools and institutions of higher education.[32] Retail enterprises with a gross annual business volume of not less than $250,000, laundering and cleaning services, and construction and reconstruction activities were included under the "enter-

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26. *Id.* § 206(d)(1).
27. *Id.* § 206(d)(3).
28. *See* 29 U.S.C.A. § 203(d) (Supp. 1975), *amending* 29 U.S.C. § 203(d) (1970) for the definition of the term "employer" under the FLSA.
29. 29 U.S.C.A. § 206(a) (Supp. 1975), *amending* 29 U.S.C. § 206(a) (1970); 29 U.S.C.A. § 207(a) (Supp. 1975), *amending* 29 U.S.C. § 207(a) (1970).
30. 29 U.S.C.A. § 203(s) (Supp. 1975), *amending* 29 U.S.C. § 203(s) (1970).
31. Act of Sept. 23, 1966, Pub. L. No. 89-601, 80 Stat. 830-45, *amending* 29 U.S.C. § 201 et seq. (1964) (codified at 29 U.S.C. § 201 et seq. (1970)).
32. Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831, *amending* 29 U.S.C. § 203(d) (1964) (codified at 29 U.S.C. § 203(d) (1970)).

prise" definition.[33] The 1974 Amendments to FLSA[34] redefined "employer" to include a public agency, meaning the United States government or any state or political subdivision of a State,[35] thereby extending coverage of the Act to employees of such agencies. Also included are employees of preschools, both private and public, whether profit or nonprofit.[36] These amendments further expanded the "enterprise engaged in commerce" definition of section 203(s) to include "materials," as well as goods, that have been moved in or produced for commerce by any person. Preschools and activities of public agencies are also included as "enterprises engaged in commerce."[37]

B. *Exemptions*

The minimum wage and overtime compensation provisions of the FLSA have never applied to certain individuals employed in a variety of specified capacities. Section 213[38] enumerates eleven categories of employees who are exempt if they are employed "in a bona fide executive, administrative or professional capacity"; "in the capacity of outside salesman"; by any retail or service establishment if more than 50 per cent of the annual dollar volume for sales of such goods and services is made within the State;[39] by an amusement or recreational establishment;[40] by certain manufacturing retailers; in certain fishing and sea food operations; in certain types of agricultural activities; by a local newspaper; by a small, independently owned public telephone company; as a seaman on a vessel other than an American vessel; or on a casual basis in domestic service to provide babysitting or companionship services for individuals unable to care for themselves.[41]

Title IX of the Education Amendments Act of 1972[42] represents an important extension of the Act by establishing that exemptions to the equal pay pro-

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33. Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102(c), 80 Stat. 831, *amending* 29 U.S.C. § 203(s) (1964) (codified at 29 U.S.C. § 203(s) (1970)).

34. Act of April 8, 1974, Pub. L. No. 93-259, 88 Stat. 58, *amending* 29 U.S.C. § 201 et seq. (1970).

35. 29 U.S.C.A. § 203(d) (Supp. 1975), *amending* 29 U.S.C. § 203(d) (1970). However, it should be noted that extending coverage to public agencies does not effect a waiver of sovereign immunity by a State and does not enable an employee to bring a suit against a State under the FLSA unless such suits are authorized by a state statute or sovereign immunity is waived in a particular case. Board of Regents v. Dawes, 8 CCH EMPL. PRAC. DEC. 5009 (D. Neb. 1974).

36. 29 U.S.C.A. § 203(r)(1) (Supp. 1975), *amending* 29 U.S.C. § 203(r)(1) (1970); 29 U.S.C.A. § 203(s)(4) (Supp. 1975), *amending* 29 U.S.C. § 203(s)(4) (1970).

37. Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(5), 88 Stat. 58, *amending* 29 U.S.C. § 203(s) (1970) (codified at 29 U.S.C.A. § 203(s) (Supp. 1975)).

38. 29 U.S.C.A. § 213(a) (Supp. 1975), *amending* 29 U.S.C. § 213(a) (1970).

39. The section 203 "enterprise" definition must also be inapplicable.

40. Such an establishment is exempt "if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year . . . ." 29 U.S.C. § 213(a)(3) (1970).

41. 29 U.S.C.A. § 213(a) (Supp. 1975), *amending* 29 U.S.C. § 213(a) (1970).

42. Act of June 23, 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 375, *amending* 29 U.S.C. § 213(a) (1970) (codified at 29 U.S.C.A. § 213(a) (Supp. 1975)).

visions of the FLSA no longer apply to executive, administrative, and professional employees and outside salespersons.[43]

IV. Administration and Enforcement

A. *In General*

Previous legislative efforts to enact equal pay legislation had included attempts to create an entirely new structure for administration and would have established standards of coverage different from those already in operation under the FLSA.[44] Enactment of the Act as an amendment to the FLSA therefore placed the administration and enforcement of its provisions within a well-developed structure and one with which employers throughout the nation were familiar. The federal agency responsible for the administration and enforcement of the Act is the Wage and Hour Division of the Employment Standards Administration,[45] United States Department of Labor. The Wage and Hour Division is under the direction of an Administrator appointed pursuant to section 4 of the FLSA.[46]

Unlike other well-established administrative agencies, such as the Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, and the Securities and Exchange Commission, all enforcement of the FLSA is in the courts. The FLSA does not permit the issuance of administrative cease and desist orders and provides for no administrative hearing to determine whether there has been a violation of its provisions. Thus all enforcement of the FLSA (except for voluntary compliance)[47] must be accomplished through litigation.[48] The FLSA grants the Administrator no general rule-making powers but does prescribe the issuance of regulations for specific purposes, such as those governing records to be kept by the employer,[49] and regulations governing employment of learners, apprentices, students and handicapped workers.[50]

B. *The Administrator's "Interpretative Bulletins"*

Due to the Congressional refusal to grant the Administrator general rule-making authority, the issuance of interpretative bulletins became a creature of

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43. *See also* 38 Fed. Reg. 11390-411 (1973), *amending* 29 C.F.R. § 541.0 et seq. (1973).
44. 109 Cong. Rec. 8914 (1963).
45. Formerly the Workplace Standards Administration.
46. 29 U.S.C. § 204(a) (1970). The position is currently vacant due to the recent resignation of Administrator Betty Southard Murphy.
47. Voluntary compliance is permitted under 29 U.S.C. § 216(c) (1970). That section provides in pertinent part that "[t]he Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207. . . ."
48. *See generally* Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 Law & Contemp. Prob. 368 (1939) [hereinafter cited as Herman].
49. 29 U.S.C. § 211(c) (1970).
50. *Id.* § 214.

necessity.[51] The "Interpretative Bulletin" for the equal pay provisions[52] specifically cautions that the ultimate decisions under the FLSA "are made by the courts"[53] but, with regard to matters which have not yet been determined by the courts, official interpretations reached by the Administrator relating to the manner in which his or her responsibilities under the Act will be carried out are to be issued by the Administrator. These interpretations represent "the construction of the law which the Secretary of Labor and the Administrator believe to be correct . . . unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect."[54] Persons affected by the Act are entitled to rely on the Administrator's interpretations so long as they are not modified, rescinded, withdrawn or determined to be incorrect by a court of competent jurisdiction. Further, as stated by the United States Supreme Court in *Skidmore v. Swift*,[55] such interpretations of the FLSA provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it and "constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance."[56] The administrative interpretations are entitled to be respected by the courts.[57]

C. *Records, Inspections and Investigations*

Pursuant to section 211(c)[58] any employer subject to the provisions of the FLSA, including the equal pay provisions, must keep certain records relating to wages earned and hours worked by employees covered by the FLSA.[59] Payroll records, among others, must be retained by the employer for a minimum period of three years;[60] certain other supplementary basic records, (*e.g.*, basic employment and earnings records, wage rate tables, worktime schedules) are to be preserved for at least two years.[61]

The Administrator or a designated representative may make any investigations necessary to obtain compliance with the FLSA, including the equal pay provisions.[62] The Wage and Hour Division has over 900 compliance officers in approximately 400 locations throughout the country to assist in enforcement of the FLSA.[63] These officers, as designated representatives of the Administra-

51. Herman, *supra* note 48, at 378-79.
52. 29 C.F.R. § 800.0 et seq. (1974).
53. *Id.* § 800.2.
54. *Id.*
55. 323 U.S. 134 (1944).
56. *Id.* at 140.
57. Irwin v. Clark, 400 F.2d 882, 884 (9th Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969).
58. 29 U.S.C. § 211(c) (1970).
59. 29 C.F.R. § 800.165 (1974). This section refers to those records designated in 29 C.F.R. §§ 516.2, .6, .29 (1974).
60. 29 C.F.R. § 516.5 (1974).
61. *Id.* § 516.6.
62. 29 U.S.C. § 211(a) (1970).
63. The Des Moines Area Office of the Employment Standards Administration is under the administrative authority of the Region VII Office of the United States Depart-

tor, regularly check places of employment for compliance with all provisions of the FLSA and investigate complaints of violations. They are authorized to inspect the employer's premises and records, interview employees, and gather all relevant data on wages, hours and working conditions.

Information regarding potential violations of the law comes to official attention from numerous sources including general program inspections conducted by the Wage and Hour Division, complaints of an employer's competitors, compliance officers' leads, Division follow-up inspections as a result of prior violations, and employee complaints. Complaints, records and other information obtained by the Division must be treated confidentially.[64]

The Administrator and Secretary may seek the cooperation and consent of state labor agencies to utilize the services of such agencies for the purpose of carrying out official administrative and enforcement functions under the FLSA. Provisions are also made for reimbursement to the state agencies and their employees for any services rendered as a result of this cooperation.[65]

D. *Subpoena Powers*

Pursuant to section 209[66] the Administrator or the Secretary of Labor is authorized to exercise the subpoena powers granted to the Federal Trade Commission relating to the production of books, papers, documents and attendance of witnesses,[67] to aid in the investigation under the FLSA. So long as the investigation is made for a purpose authorized by the FLSA, it is not necessary that a specific charge or complaint of violation of the law be pending.[68] Upon refusal by any person to obey a subpoena, the Administrator can make application for an enforcement order from the federal district court. To be entitled to such an order the Administrator is only required to show the existence of reasonable grounds for belief that the employer being investigated is subject to the FLSA. Thus the Administrator does not have to make proof of actual coverage, nor is the employer entitled to an adjudication on the question of coverage.[69]

While the Administrator can delegate his or her powers of inspection and investigation,[70] there is no statutory authority to delegate the power to issue subpoenas.[71]

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ment of Labor which is located in Kansas City, Missouri. The Des Moines Area Office handles inspections and investigations for all but four counties in the State of Iowa.

64. 29 C.F.R. § 800.164 (1974). See *Brennan v. Engineered Products, Inc.*, 8 CCH EMPL. PRAC. DEC. 6259 (8th Cir. 1974) and *Brennan v. Glen Falls National Bank & Trust Co.*, 8 CCH EMPL. PRAC. DEC. 6493 (N.D.N.Y. 1974) for a discussion of the qualified "informer" privilege which courts have recognized as being necessary to assure and preserve the anonymity of complainants in order to avoid possible retaliation by an employer.

65. 29 U.S.C. § 211(b) (1970).

66. *Id.* § 209.

67. 15 U.S.C. §§ 49, 50 (1970).

68. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

69. Walling v. Benson, 137 F.2d 501 (8th Cir.), *cert. denied*, 320 U.S. 791 (1943).

70. 29 U.S.C. § 211(a) (1970).

71. *Id.* § 209; Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942).

E. *Suits to Enforce Compliance*

If an investigation by the Wage and Hour Division produces evidence that the employer is in violation of the FLSA, voluntary compliance is sought. Voluntary compliance is effected by area office personnel as an administrative procedure.[72] Once the employer consents to the payment of the back wages calculated to be due under the equal pay provisions, as well as to future compliance with the law, and any employee to whom amounts are due accepts such payments, the matter is closed.[73]

1. *Suit by the Secretary of Labor to Recover Back Wages*

The Secretary of Labor is authorized, under section 216(c),[74] to bring an action in any federal or state court of competent jurisdiction to recover the amount of unpaid wages due and an equal amount as liquidated damages.[75] Once the Secretary has filed a complaint to recover such amounts withheld from any employee, the employee is no longer entitled to maintain suit on his or her own behalf unless the action commenced by the Secretary is dismissed without prejudice on the motion of the Secretary.[76]

The 1974 Amendments to the FLSA[77] made several changes with regard to suits under this subsection[78] which should be noted. The right to recover liquidated damages in such a suit brought by the Secretary has been added. The former requirement that a written request be filed with the Secretary by the employee claiming unpaid wages or compensation prior to suit by the Secretary has been deleted.[79] The Secretary can also bring suit in a case involving an issue of law which has not been finally settled by the courts.[80] Due, in part, to the former requirement that an employee had to request that the Secretary bring suit and the fact that recovery was limited to back wages (no liquidated damages were recoverable), section 216(c) suits have not been popular.[81]

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72. It is estimated that more than 95 per cent of the equal pay cases are settled through voluntary compliance of employers. Burns & Burns, *An Analysis of the Equal Pay Act*, 24 LAB. L.J. 92, 95 (1973) [hereinafter cited as Burns & Burns].

73. However, past violations may place the employer under an increased likelihood of future inspections to assure continued compliance with the law.

74. 29 U.S.C.A. § 216(c) (Supp. 1975), *amending* 29 U.S.C. § 216(c) (1970).

75. Actions in the name of the Secretary are generally brought in the federal courts to assure greater uniformity. The suits are usually handled by staff attorneys of one of the United States Department of Labor Regional Solicitor's offices. Iowa is one of 10 states in Region VII with offices in Kansas City, Missouri.

76. 29 U.S.C.A. § 216(c) (Supp. 1975), *amending* 29 U.S.C. § 216(c) (1970).

77. Act of April 8, 1974, Pub. L. No. 93-259, 88 Stat. 73, *amending* 29 U.S.C. § 201 et seq. (1970).

78. 29 U.S.C.A. § 216(c) (Supp. 1975), *amending* 29 U.S.C. § 216(c) (1970).

79. *Id.*

80. The so-called "novel question" provision has been removed. Under the prior law the courts could not assume jurisdiction in cases involving questions of law not finally settled by the courts. The underlying reason for the provision was to prevent the Administrator from using section 216(c) to bring test cases. For an extensive discussion of the "novel question" provision under former section 216(c), see *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527 (3d Cir. 1971) and *Hodgson v. American Can Co.*, 440 F.2d 916 (8th Cir. 1971).

81. The staff of Region VII, Regional Solicitor's Office, estimates that section 216(c)

2. *Injunction Proceedings under Section 217*

Upon complaint filed by the Labor Department's Solicitor's Office, federal district courts have jurisdiction under section 217[82] to restrain any further violations of the FLSA and the continued withholding of minimum wages or overtime compensation that are owed to an employee.[83] Employers, however, cannot be restrained from withholding amounts which employees are barred from recovering because the statute of limitations has run on the cause of action.[84]

Because of the likelihood of continued violations where the employer has contested amounts alleged to be due under the equal pay provisions, most suits by the Secretary are filed under this section.[85]

3. *Private Suits under Section 216(b)*

An employee who accepts payment of amounts determined to be due through the employer's voluntary compliance waives any right to recover back wages or liquidated damages under section 216(b).[86] If there has been no voluntary compliance, or if the Secretary has not filed a suit under section 216(c) or section 217, an employee or employees may maintain an action against the employer in any federal or state court of competent jurisdiction on his or their own behalf and on behalf of other employees similarly situated. But no employee is made a party plaintiff in such an action unless he has filed a written consent in the court where the action is brought.

In a private suit, the court can award plaintiff(s) any amounts due as back wages, an additional equal amount as liquidated damages, a reasonable attorney's fee assessed to the defendant, and costs.[87] Employees who have been the subject of an FLSA violation are not required to obtain approval from the Department of Labor before filing an action under section 216(b) nor must the alleged violation upon which the suit is based arise out of an investigation by the Labor Department.[88] It should be reiterated, however, that an employee's right to bring an action under section 216(b) terminates if, prior to his bringing suit, the Secretary files a complaint under either section 216(c) or section 217.[89] If an employee files an action under 216(b) prior to any action by the Secretary under 216(c) or section 217, that employee is not included as a per-

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suits comprise only a negligible per cent of its actions brought by the Secretary to recover amounts due under the equal pay provisions.

82. 29 U.S.C. § 217 (1970).

83. *See also Id.* § 215(a)(2).

84. *See* discussion under the "Statute of Limitations" section of this Article, *infra.*

85. The staff of Region VII, Regional Solicitor's Office, estimates that virtually all of its actions filed by the Secretary to recover back amounts due under the equal pay provisions are filed as section 217 suits.

86. 29 U.S.C. § 216(b) (1970).

87. *Id.*

88. Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 UNIV. CIN. L. REV. 615, 623 n.42 (1970) [hereinafter cited as Murphy].

89. *See* discussion of these sections, *supra.*

son for whom relief is sought in the Secretary's suit.[90] Also, if it is determined by the Labor Department attorneys to be advisable, the Secretary can intervene in a section 216(b) suit.[91]

4. *Class Actions*

The provision in section 216(b) enabling any one or more employees to bring an action on their own behalf and in behalf of "*other employees similarly situated*"[92] raises the question as to whether a class action can be maintained under Federal Rule of Civil Procedure 23 to recover amounts due for violations of the Act.

The court in *Laffey v. Northwest Airlines, Inc.*,[93] in a memorandum opinion, certified plaintiffs seeking back pay and injunctive relief into two subclasses under Rule 23(b)(2) and 23(b)(3). However, the court in *Paddison v. Fidelity Bank*,[94] while recognizing *Laffey* to the contrary, reasoned that the heart of section 216(b) is that a person can only be bound by the judgment in a suit under the Act if he or she files a written consent with the court to be a party plaintiff. Rule 23(c)(2), on the other hand, binds a party who has not "opted out."[95] Therefore, the court concludes that, while the FLSA provides for a statutory class action, a Rule 23 class action cannot be utilized in an equal pay case.[96] Thus while the few decided cases give no definitive answer, they more strongly support the position that such suits cannot be brought under Rule 23.

5. *Criminal Prosecutions*

If an employer is convicted of a willful violation of the minimum wage and overtime compensation provisions of the FLSA, the court can impose a fine of not more than $10,000 or imprisonment; however, imprisonment cannot be im-

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90. Personal conversation with the staff of Region VII, Regional Solicitor's Office, April 7, 1975.

91. See EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105 (E.D. Pa. 1973) where the court finds that only employees (or former employees) and the Secretary of Labor can commence legal actions under the FLSA and that a labor organization not only lacks standing to enforce the equal pay rights of its members in a private suit prior to the secretary's filing under section 217, but also has no unconditional right, even as the exclusive bargaining agent for the aggrieved employees, to intervene as a party plaintiff in a section 217 suit.

92. 29 U.S.C. § 216(b) (1970) (emphasis added).

93. 321 F. Supp. 1041 (D.D.C. 1971).

94. 60 F.R.D. 695 (E.D. Pa. 1973).

95. *Id.* at 700.

96. *Accord* American Finance System, Inc. v. Harlow, 8 CCH EMPL. PRAC. DEC. 6228 (D. Md. 1974). *See also* Hull v. Continental Oil Co., 58 F.R.D. 636 (S.D. Tex. 1973); Maguire v. Trans World Airlines, Inc., 55 F.R.D. 48 (S.D.N.Y. 1972); Sims v. Parke Davis & Co., 334 F. Supp. 774 (E.D. Mich.), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). But see Tuma v. American Can Co., 367 F. Supp. 1178 (D.N.J. 1973), where the court denied certification of a class on a conditional basis as permitted by Federal Rule of Civil Procedure 23(c)(1) because the plaintiff had not met the burden of showing that there was a class "so numerous that joinder of all members is impracticable." 367 F. Supp. at 1188.

posed on first time offenders.[97] The United States attorneys have the authority to prosecute FLSA violations and may commence an action without first receiving authority from either the Attorney General or the Administrator. The attorneys of the Administrator, appointed under section 204 to assist the Administrator in carrying out his duties,[98] have no authority to initiate or prosecute criminal proceedings in the name of the United States.[99]

6. *Statute of Limitations*

Actions to enforce payment of unpaid minimum wages or overtime compensation under the FLSA, except those based upon willful violations, must be commenced within two years after the cause of action accrues or they are barred; actions involving willful violations may be commenced within three years after the cause of action accrues.[100] For purposes of the equal pay provisions, if the employer's unlawful practice continues, there is a continuing violation of the Act which enables the employee to recover back wages for up to two years prior to the bringing of the action. To place any other interpretation on section 255(a) would allow an employer to maintain a perpetual violation of the Act if that practice had been in existence, but had been judicially unchallenged, for over two years.[101]

V. The Prima Facie Case

A. *Introduction*

The major thrust of the Act is to require employers to pay men and women equally for equal work.[102] Again the pertinent part of the Act provides that "[n]o employer . . . shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."[103] The task of arriving at a working definition for each of the important terms in the Act has not been an easy one for the courts.

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97. 29 U.S.C. § 216(a) (1970).
98. *Id.* § 204.
99. Sunshine Mining Co. v. Carver, 41 F. Supp. 60 (D. Idaho 1941); Connecticut Importing Co. v. Perkins, 35 F. Supp. 414 (D. Conn. 1940).
100. 29 U.S.C. § 255(a) (1970).
101. Hodgson v. Behrens Drug. Co., 475 F.2d 1041, 1050 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).
102. The equal pay provisions apply to situations where either males or females are hired to replace the other in jobs formerly held exclusively by members of the other sex. The provisions are also applicable where jobs were previously performed by members of both sexes but are presently performed by members of only one sex. Thus equal pay is required even though employees of both sexes may not be performing the job at the same time.
103. 29 U.S.C. § 206(d)(1) (1970).

B. *The Burden of Proof*

Although the Act itself does not indicate which party has the burden of proof, the legislative history indicates clearly that the Secretary has the burden of proving a prima facie case under the Act.[104] This includes proof that the employer pays differential wages to employees of the opposite sex for equal work on jobs requiring equal skill, effort and responsibility which are performed under similar working conditions.[105] If the Secretary does not sustain the burden with regard to each of these factors the suit must be dismissed even though the wage differentials between the jobs appear to be unreasonable and based on discriminatory motivations. To conclude otherwise would enable the Secretary and the courts to become job evaluators with authority to determine the proper wage differentials for unequal work.[106]

C. *"Wages"*

Wages "generally include all payments made to or on behalf of the employee as remuneration for employment."[107] In addition to an employee's regular compensation, vacation and holiday pay, as well as premium payments for working on weekends or holidays and extra hours are considered wages.[108] Generally board, lodging or other facilities constitute wages if these items are customarily furnished by the employer for the employees.[109] Insurance benefits under a company insurance plan and employer's contributions to a company or private pension plan are considered remuneration as are paid lunch and rest breaks.[110] Bona fide gifts, discretionary bonuses, payments made by the employer that are related to maternity or for reimbursement of travel expenses while on the employer's business are not wages to be compared for equal pay purposes.[111] But to be in compliance with the Act the employer must provide equal benefits (or contribute equal amounts for such benefits) and compensation to all employees who perform equal work within any establishment.

D. *An "Establishment"*

The term "establishment", while not defined in the Act, "refers to 'a distinct

104. 109 CONG. REC. 9196 (1963) (remarks of Congressman Frelinghuysen).
105. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973); Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1972); Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719 (5th Cir. 1970); Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966). *Wirtz v. Basic, Inc.* was the first court decision under the equal pay provisions.
106. Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2d Cir. 1973), *aff'd sub nom.* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).
107. 29 C.F.R. § 800.110 (1974).
108. *Id.*
109. *Id.* § 800.112.
110. Landau & Dunahoo, *Sex Discrimination in Employment*, 20 DRAKE L. REV. 417, 518-21 (1971) [hereinafter cited as Landau & Dunahoo]. See 29 *C.F.R.* § 800.113 (1974) relating to payment of sums for services into a bona fide profit sharing plan or trust or bona fide thrift or savings plan.
111. 29 C.F.R. § 800.110 (1974).

place of business' " and is not synonymous with the terms "business" or "enterprise" which may include a multiunit operation.[112] Thus each physically separate facility is, in most instances, considered a separate establishment for purposes of the Act.[113] For example, a manufacturer who operates a plant for production of goods, a warehouse for their storage and a store for sales would have only one "business" or "enterprise," but would be operating three establishments. Likewise, each store in a chain store system or branch operation is considered a separate establishment. Large department stores are generally held to be one establishment even though lines of products may be physically segregated into departments having separate methods of operation and records or diversity of ownership. The test is whether the separate departments are functionally related and operate as integral parts of the department store unit.[114] On the other hand, two or more establishments may be located on the same premises if the activities are physically separate, are functionally unrelated, have separate records and bookkeeping, and have no regular interchange of employees between the units.[115]

Compliance with the Act is determined by equality of wages within a single establishment.

E. *Equal Work*

1. *Background*

As one might anticipate, ambiguities created by the term "equal work" have led to varying results in the courts. In 1962, the House changed the language of its equal pay bill from "comparable work" to "equal work."[116] Congressman Goodell's remarks on that point are instructive: "Last year when the House changed the work 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is they would be very much alike or closely related to each other."[117] However, the fact is that males and females rarely do identical work. Senator McNamara, recognizing this fact, stated that "[i]t is not the intent of the Senate that jobs must be identical. Such a conclusion would obviously be ridiculous."[118] The court, in *Wirtz v. Rainbo Baking Co.*,[119] recognizing that jobs are seldom identical, concluded that equal work does not mean identical work. Additional tasks which are merely inciden-

112. *Id.* § 800.108.
113. *Id.*
114. *Id. See also* 29 C.F.R. § 779.304 (1974).
115. 29 C.F.R. § 779.305 (1974).
116. 108 CONG. REC. 14771 (1962). This amendment, known as the "St. George" amendment, passed the House but did not receive action in the Senate before the session ended.
117. 109 CONG. REC. 9197 (1963) (emphasis added).
118. Murphy, *supra* note 88, at 624, quoting *Staff of the House Comm. on Ed. and Labor, Legislative History of the Equal Pay Act of 1963*, 88th Cong., 1st Sess. 10 (Comm. Print 1963).
119. 303 F. Supp. 1049 (E.D. Ky. 1967).

tal to the primary job cannot justify a wage differential.[120] In view of this history, one author concludes that the courts were in fact using the test of "substantial identity" to determine whether the equal pay provisions applied.[121]

In *Schultz v. Wheaton Glass Co.*,[122] the court stated that "Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be *substantially equal.* Any other interpretation would destroy the remedial purposes of the Act."[123] Thus in *Brennan v. Board of Education*,[124] the court could say "[t]hat 'equal work' means work of 'substantial equality' is by now abundantly clear."[125]

2. *The General Standard of "Substantial Equality"*

The court in *Wheaton Glass* was confronted with a situation in which female selector-packers of the company were compensated at a rate of $2.14 per hour; male selector-packers received $2.35 per hour. A third class of employees, known as "snap-up" boys, who generally functioned as handymen, were paid $2.16 per hour. The district court had found that male and female selector-packers performed substantially identical work in inspecting bottles for defects as they emerged from ovens but found that the work of the male selector-packers was substantially different overall because they were expected at times to perform sixteen additional tasks (routinely performed by the snap-up boys) and were, therefore, more flexible. Although the court ultimately determined that the differential rate paid to male and female selector-packers was violative of the Act, it did not set forth any test for determining whether jobs are substantially equal.

In a case decided by the Fifth Circuit Court of Appeals shortly after the *Wheaton Glass* decision,[126] the court succinctly set forth the standard for determining substantial equality:

> As the doctrine is emerging, jobs do not entail equal effort, [and skill and responsibility] even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort [skill and responsibility], (2) consume a significant amount of the time of *all* those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differential.[127]

It is clear from the result reached by the appellate court in *Wheaton Glass*, wherein the court reversed a district court judgment for the defendant employer,

120. *Id.* at 1052. *Accord* Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966).
121. Murphy, *supra* note 88, at 624. *See, e.g.*, Wirtz v. Wheaton Glass Co., 284 F. Supp. 23 (D.N.J. 1968), *rev'd sub nom.* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).
122. 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).
123. 421 F.2d at 265 (emphasis added).
124. 374 F. Supp. 817 (D.N.J. 1974).
125. *Id.* at 828 (citing cases).
126. Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719 (5th Cir. 1970).
127. *Id.* at 725 (emphasis added).

that it had considered those factors explicitly set forth in *Brookhaven.* The court found that there was no evidence in the record to show any duties that required greater skill, effort or responsibility on the part of male selector-packers. In fact, the extra duties were those unskilled, physical tasks generally performed by the $2.16 per hour snap-up boys.

There was no finding of fact as to what percentage of the time male selector-packers were involved in the extra tasks, although the district court had pointed to some evidence submitted by the company that approximately 18 per cent of the total time of the male selector-packers was spent at snap-up boy tasks. Also, the court found there was no basis for the district court's assumption that all male selector-packers performed any or all the additional tasks. Finally, there was no rational explanation, in terms of economic value to the employer, as to why male selector-packers, "who at times perform[ed] work paying two cents per hour more than their female counterparts should for that reason receive 21½ cents per hour more than females for the work they [did] in common."[128]

Prior to *Wheaton Glass*, the Department of Labor's litigation in equal pay cases had been relatively unsuccessful. An unofficial count indicated that the Department had been successful in litigating four cases and had been unsuccessful in eleven.[129] *Wheaton Glass*, therefore, has been regarded as "immeasurably aid[ing] the Labor Department in enforcing the Equal Pay Act."[130]

While the standard of substantial equality has been clearly stated, the court in *Brennan v. City Stores, Inc.*,[131] cautioned that the boundaries of equality under the Act are still indefinite[132] and must be delineated on a case by case basis.[133]

In all cases involving "substantial equality" the applicability of the equal pay provisions is determined by actual job requirements and performance rather than job classifications or titles.[134] The quality of equal work is also specifically determined by the statutory requisite of "work on jobs the performance of which requires equal skill, effort, and responsibility . . . ."[135] These terms, which represent criteria traditionally used for job study analysis for industry and labor relations,[136] constitute three tests, each of which must be met before the equal pay provisions apply.[137]

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128. Shultz v. Wheaton Glass Co., 421 F.2d 259, 263 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). *See also* 29 C.F.R. § 800.122 (1974).
129. Murphy, *supra* note 88, at 623 n.47 quoting *Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 770 (1970).
130. K. DAVIDSON, R. GINSBERG, & H. KAY, SEX-BASED DISCRIMINATION 541 (1974).
131. 479 F.2d 235 (5th Cir. 1973).
132. *Id.* at 238-39.
133. *Accord* Hodgson v. Golden Isles Convalescent Homes, Inc., *on rehearing en banc*, 468 F.2d 1256 (5th Cir. 1972).
134. 29 C.F.R. § 800.121 (1974).
135. 29 U.S.C. § 206(d)(1) (1970).
136. See Justice Marshall's detailed tracing of the legislative history on this point in *Corning Glass Works v. Brennan*, 417 U.S. 199-202 (1974).
137. 29 C.F.R. § 800.122 (1974).

3. *The Tests for Determining Equal Work*

a. *Equal Skill*—In determining whether jobs require equal skill in their performance such factors as "experience, training, education and ability," as they relate to actual job content, are considered.[138] Skills which are not essential to meet the actual requirements of the job cannot be utilized in determining whether jobs require equal skills.[139] Thus higher pay to members of one sex as compared with that paid to members of the opposite sex, based on the argument that such employees have more education or experience, would be permissible only if the jobs *in fact* require that level of education and experience.[140] Further, the relative efficiency with which an employee performs the job is not, in and of itself, an appropriate factor to consider.[141]

For example, the court in *Brennan v. Board of Education*[142] was called upon to determine, among other things, the equality of skills required of the Board's male custodial workers and female custodial maids. From the facts the court concluded that the two jobs entailed utilization of essentially equal skill where the work was obviously unskilled. "[T]he only skill nominally required of males and not of females, by the defendant's [employer's] own job description, [is] 'knowledge of making minor repairs to heating, electrical and other systems . . . .' However, the men almost never make such repairs. . . ."[143] Those skills were found to be unnecessary to fulfill the job requirements. Therefore, they could not properly be considered as a basis for higher pay to the male employees.

Differences in the degree of skill required of night shift tag-processing machine operators were found to be substantial enough to justify a pay differential in *Wirtz v. Dennison Manufacturing Co.*[144] The male night shift workers in that case were required to possess sufficient mechanical skill to enable them to change over their machines for various jobs. They also had to make repairs on the machines when necessary. Female machine operators on the other shifts did not perform any tasks which required such mechanical ability. The court thus concluded that the differentials were not violative of the Act.

Sales women in the women's clothing department were compensated at a lower rate than salesmen in the men's department in *Brennan v. City Stores, Inc.*[145] The district court, in a judgment for the Secretary that was affirmed on appeal, had found that both male and female sales personnel were required to make and fit clothes for alterations as well as to sell items to customers. After a careful consideration of the relative differences between marking cuffs,

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138. *Id.* § 800.125.
139. *Id.*
140. Such pay differences may be permissible as an exception to the Act under a merit system or as a factor other than sex. *See* discussion on these points, *infra.*
141. 29 C.F.R. § 800.125 (1974).
142. 374 F. Supp. 817 (D.N.J. 1974).
143. *Id.* at 829.
144. 265 F. Supp. 787 (D. Mass. 1967).
145. 479 F.2d 235 (5th Cir. 1973).

crotches and waistbands on men's suits and marking hemlines, shoulder lines and waists on women's dresses, the trial court concluded that the jobs required equal skill in their performance and that the employer had violated the equal pay provisions. Jobs which required the salesperson to sell customer-selected items or merchandise of an entirely different type (*e.g.*, appliances) were found to require less skill, thereby permitting the employer to compensate those employees at a lower rate without violation of the Act.

Another court found salesmen who marked garments for fitting and alterations to be performing jobs that required greater skill than was required of the women who were employed as regular sales personnel.[146] However, the case was remanded to the district court for additional findings of fact as to whether such female sales persons were also required to perform alterations as part of their job.[147]

The court in *Brennan v. Collins & Williams*,[148] found that saleswomen in the boys' department who made minor markings on trousers for leg length and waist size were performing jobs that required less skill than salesmen in the men's department who were required to make markings for more substantial alterations of trousers and coats.

b. *Equal Effort*—Effort, for equal pay purposes, is concerned with "the measurement of the physical or mental exertion needed for the performance of a job."[149] It encompasses the total job requirements including factors which both cause and alleviate mental stress and fatigue.[150] Where substantial differences exist, in either the amount or degree of effort required, jobs are not equal for purposes of the Act even though they might be equal in all other aspects. Likewise, jobs may require equal effort, even though the effort may be exerted in a different manner on each job. Mere differences in the kind of effort required by a job, rather than amount, do not justify wage differentials. If the primary job functions are the same, merely requiring employees of one sex to perform "extra tasks" not required of the other cannot be used as a basis for higher pay. Differentials based on "extra tasks" are not permissible if some employees of the higher paid group receive the higher pay without doing any extra tasks. For example, in *Shultz v. Wheaton Glass Co.*,[151] male selector-packers were paid 21½ cents more per hour than the female selector-packers because the males allegedly performed extra duties. The court, in finding that the defendant had violated the Act, attached significance to the fact that *all* males were paid the higher rate but there was no evidence to show either

146. Brennan v. Cain-Sloan Co., 8 CCH EMPL. PRAC. DEC. 5678 (6th Cir. 1974).
147. *Id., aff'g in part and vacating and remanding in part* Hodgson v. Cain-Sloan Co., 5 CCH EMPL. PRAC. DEC. 7698 (M.D. Tenn. 1973).
148. 8 CCH EMPL. PRAC. DEC. 6425 (W.D. Ark. 1974).
149. 29 C.F.R. § 800.127 (1974).
150. Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970), *aff'd in part and rev'd in part and remanded*, 445 F.2d 823 (8th Cir. 1971); Annot., 7 A.L.R. Fed. 707, 719 (1971).
151. 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

that all males were available for those tasks or that all of them were actually performing the extra tasks.[152]

Employers cannot lawfully pay higher wages to one group for extra tasks if members of the lower paid group also perform the extra duties. The defendant in *Brennan v. Board of Education*[153] asserted that its male custodial workers were required to service water coolers as an extra task. This consisted of carrying five gallon jugs of water from their storage area to the coolers. In addition to finding that the activity took little time and was performed by only some of the male workers who were receiving higher pay, the court noted that at least one woman also carried the water jugs but received no extra pay for her efforts.[154]

Higher pay for extra duties that do not in fact exist cannot be justified. A review of the duties performed by the male boys' hardball coach and the female girls' softball coach led the court in *Brennan v. Woodbridge School District*[155] to conclude that the higher pay to the male coach was unlawful because there were no differences in the efforts required. Both supervised practice sessions within limits established by the State Department of Public Instruction, both commenced practice and ended the season within a few days of the other, although the girls' team actually began practice a week earlier than the boys' team, both teams played the same opponents at home and away and had the same number of games during the season. Each had the general duties of recruiting for his or her team and accounting for equipment and uniforms. Based on these facts, the court concluded that the boys' coaching position did not entail additional duties.[156]

Extra efforts which consume minimal time and are of peripheral importance are insufficient to justify payment of differential wages. The employer in *Brennan v. Board of Education*[157] alleged that its male custodial workers were paid more than the female custodial aides because the men performed extra tasks. After an extensive review of the facts, the court found that both types of employees were primarily involved in keeping the school buildings clean. There was evidence to show that the male workers shoveled snow three or four times during the winter. They were also occasionally called upon to lift boxes of supplies from delivery trucks. Such deliveries were sporadic and could occur as infrequently as once per week, every several weeks or every several months. The total time spent actually lifting per delivery ranged between fifteen and thirty minutes. The extra tasks were found to be inconsequential in light of the general job requirements.[158]

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152. *Accord* Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719 (5th Cir. 1970); Shultz v. American Can Co.—Dixie Prod., 424 F.2d 356 (8th Cir. 1970); Brennan v. Board of Education, 374 F. Supp. 817 (D.N.J. 1974) (citing cases).
153. 374 F. Supp. 817 (D.N.J. 1974).
154. *Accord* Hodgson v. Fairmont Supply, 454 F.2d 490 (4th Cir. 1972).
155. 8 CCH EMPL. PRAC. DEC. 5719 (D. Del. 1974).
156. *Accord* Hodgson v. Fairmont Supply, 454 F.2d 490 (4th Cir. 1972).
157. 374 F. Supp. 817 (D.N.J. 1974).
158. *Accord* Hodgson v. Behrens Drug. Co., 475 F.2d 1041 (5th Cir. 1973), *cert de-*

Employers also violate the Act by paying one group of employees at a higher rate for extra tasks if a third class of persons who do the extra tasks as their primary job are paid less than the higher paid group. In *Shultz v. Wheaton Glass Co.*,[159] pursuant to a collective bargaining agreement, the male selector-packers could be assigned to perform the snap-up boy functions at any time. During this time, they continued to receive their regular rate of pay. The court indicated that this agreement sufficiently explained why the male selector-packers would not have their pay reduced while performing snap-up boy work but that it could not justify paying them 21½ cents more per hour for work performed in common with women when the extra work was regularly performed by persons who received only two cents more per hour.[160]

c. *Equal Responsibility*—Differences in degrees of responsibility must also be taken into account in determining whether two jobs are equal. Responsibility is described as the "degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[161]

(i) *Relief Supervisory Duties*—If an employee who performs a job otherwise equal in all aspects to other employees is required to occasionally assume duties as a relief supervisor, the equal pay provisions would not be violated by paying such an employee at a higher rate so long as the differential rate applies to relief supervisors of both sexes.

(ii) *Duties Materially Affecting Employer's Business*—Employees who have positions requiring them to make decisions which may materially affect the employer's business operations may permissibly be paid at a higher rate without equal pay consequences, even though the jobs otherwise entail equal responsibility. For example, requiring a salesperson to assume responsibility for determining whether a customer's personal check will be accepted as payment for a purchase could justify a differential rate of pay.[162] The court in *Brennan v. Victoria Bank & Trust Co.*[163] found that higher wages were lawfully paid where the duties of one class of tellers "were more complicated and were such that errors *could not* easily be corrected in the internal operation of the Bank," and "there was a specific duty upon the exchange teller to keep informed as to the current rates of exchange."[164]

The court concluded that the defendant employer was entitled to a judg-

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nied, 414 U.S. 822 (1974); Hodgson v. Maison Miramon, Inc., 344 F. Supp. 843 (E.D. La. 1972).

159. 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

160. *Accord* Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973), *cert. denied*, 414 U.S. 822 (1974); Hodgson v. Maison Miramon, Inc., 344 F. Supp. 843 (E.D. La. 1972).

161. 29 C.F.R. § 800.129 (1974).

162. *Id.* § 800.131.

163. 493 F.2d 896 (5th Cir. 1974).

164. *Id.* at 899 (emphasis in original).

ment as a matter of law in *Kilpatrick v. Sweet*[165] where it was found that the male employee was required to exercise substantially greater responsibility. He was required to know the employer's entire business, handle the cash on hand and exercise independent judgment and discretion in many matters. The female employee, on the other hand, was closely supervised and was not expected to exercise any independent judgment or discretion.

The additional responsibility of requiring male bartenders to check customer I.D.'s has been held to be insufficient reason to support the payment of higher wages to male bartenders who were otherwise found to be performing work equal to that of the female bartender.[166]

(iii) *Accident Prevention Duties*—Differentials based on the alleged facts that male workers were responsible for accident prevention while females were not was held to be violative of the equal pay provisions because the employer introduced no proof that any accidents had ever occurred during the plant's ten-plus years of operation.[167] This case suggests that a differential based on substantial proof that such duties are in fact performed might be permissible.

(iv) *Security Duties*—The employer in *Brennan v. Board of Education*[168] alleged that male custodial workers regularly performed "watchmen" functions which constituted sufficient reason to pay these employees higher wages than the similarly employed female custodial aides who did not perform these functions. The court found that both types of custodial employees were incidentally involved in determining and reporting incidents of rowdiness or vandalism which occurred in hallways, locker rooms, and restrooms. The court further noted that, in some schools, the Board employed a separate category of "watchmen" and "security guards," some of whom were women.[169]

Proof that male employees (especially orderlies in psychiatric or geriatric wards) perform the essential function of providing protection from disturbed or violent patients as a significant part of their job has been held to justify the payment of higher wages than those paid to aides otherwise performing substantially equal work.[170]

4. *Similar Working Conditions*

Even if jobs involve equal skill, effort and responsibility, the Act requires the performance of the jobs to be under similar (rather than equal) working conditions. The "Interpretative Bulletin" says that "[g]enerally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be

165. 262 F. Supp. 561 (M.D. Fla. 1967).
166. Brennan v. Sheridan Lanes, Inc., 8 CCH EMPL. PRAC. DEC. 6488 (W.D.N.Y. 1974).
167. Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538, 544 (W.D. Ark. 1970), *aff'd in part and rev'd in part and remanded per curiam*, 445 F.2d 823 (8th Cir. 1971).
168. 374 F. Supp. 817 (D.N.J. 1974).
169. *Id.* at 823.
170. Shultz v. Kentucky Baptist Hosp., 62 CCH LAB. CAS. 44, 117 (W.D. Ky. 1969). *See also* Landau & Dunahoo, *supra* note 110, at 517.

performing them under similar working conditions."[171] This determination requires exercising a practical judgment based upon whether the differences are of the kind customarily taken into consideration in setting wage levels.[172] Slight or inconsequential differences in working conditions would not justify a wage differential; such differences should be substantial.[173]

Shift differentials present a significant problem in this regard. While the time of day that work is performed might support the payment of higher wages to some employees,[174] the court, in *Corning Glass Works v. Brennan*,[175] states that "[t]he 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."[176] In fact, testimony by company officials in the *Corning Glass* case indicated that time of day had never been considered to be a part of the working conditions and that night and day shift work had been treated equally in all respects in the company's job evaluation plans.[177]

During hearings on the proposed Equal Pay Act, industry officials had testified that working conditions encompass two components: "surroundings," that is, the elements (*e.g.*, toxic chemicals or fumes) which the worker regularly encounters, as well as the frequency and intensity of the encounters; and relative frequency and intensity of "physical hazards" regularly encountered by the worker, as well as the severity of injury which could result therefrom.[178] While the factors of "surroundings" and "hazards" were developed for industrial purposes, the underlying concepts can be extended by analogy to other situations. Thus, for example, traveling salespersons could properly be found to be working under substantially different conditions than in-store sales personnel.[179]

VI. Exceptions

A. *Burden of Proof*

Once the Secretary or aggrieved employee has established a prima facie case, the burden is then upon the employer to show as an affirmative defense, by a preponderance of the evidence, that the pay differentials are based upon one of the Act's four exceptions.[180] In pertinent part, the Act provides that the equal pay provisions do not apply if the differential payment "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earning by quantity or quality of production; or (iv) a differential based on

171. 29 C.F.R. § 800.132 (1974).
172. *Id.* § 800.131.
173. *Id.* § 800.132.
174. *See* discussion under "Any Other Factor Other Than Sex," *infra.*
175. 417 U.S. 188 (1974).
176. *Id.* at 202.
177. *Id.*
178. Corning Glass Works v. Brennan, 417 U.S. 188, 202 (1974).
179. 29 C.F.R. § 800.132 (1974).
180. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974) (citing cases); 29 C.F.R. § 800.141 (1974). *But see* 109 Cong. Rec. 9208 (1963) (remarks of Congressman Goodell); Comment, 1967 Univ. Ill. L.F. 202, 206.

any other factor other than sex . . . ."[181] The any "factor other than sex" exception is the one which the courts have most frequently been called upon to apply, but it has also been the most problematical because of its general language. The first three exceptions, on the other hand, are quite specific and much more easily defined.

B. *Seniority, Merit, and Incentive Systems*

To serve as a legitimate basis for differential pay, the employer must show that its system "is administered, if not formally, at least systematically and objectively."[182] In *Brennan v. Victoria Bank & Trust Co.*,[183] the Secretary brought suit on behalf of the bank's female exchange and note tellers, alleging a violation of the Act. Each employee of the bank was given an annual review during which time the department head prepared a data sheet recommending a salary raise and grading the person on his or her knowledge of the job, ability in that job, ability to deal with the public and other general characteristics. Subsequent review and recommendations were made by the bank's Personnel Manager and an Operations Committee. Final approval was given by a Management Committee. Longevity raises were generally standardized but merit considerations based on evaluations of the data sheet information were combined in the annual review. Merit increases were then given to outstanding employees. Based on this system, an employee who had worked at jobs in other departments prior to being assigned to the teller position, even though his total length of employment with the bank was the same, might have a salary at variance with other tellers due to considerations of the person's specific talents as shown in past performance. Likewise, the standard annual longevity raises produced disparate wages between employees with differing lengths of employment with the bank. The factor considered by the court to be important in this case was the fact that the system was applied equally to all employees and the record was found to reflect several instances where females were advanced over males as a result of the bank's merit and seniority system. The court found the employer bank's merit and seniority system to be "a systematic, formal system" based upon "objective, written standards"[184] and, therefore, one which qualified as an exception under the Act.

The defendant employer in *Brennan v. Collins & Williams*[185] operated a men's and boys' retail clothing store. Salespersons in the more profitable men's department were all male, while those employed in the less profitable boys' department were all female. Salespersons in each department received a salary draw based upon the employer's evaluation of the potential sales capacity of the salesperson. Each employee thereafter received a commission of seven percent

181. 29 U.S.C. § 206(d)(1) (1970).
182. Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719, 726 (5th Cir. 1970).
183. 493 F.2d 896 (5th Cir. 1974).
184. *Id.* at 901.
185. 8 CCH EMPL. PRAC. DEC. 6425 (W.D. Ark. 1974).

of his or her net sales for the quarter if this figure was in excess of the employee's total salary draw for the quarter. This compensation plan had been formalized more than two years prior to trial. The court found the plan to be a publicized compensation plan whereby all salespersons received salary draws and commissions in excess of draws on the same basis. The higher earnings in the men's department were attributable to the higher prices and greater profitability of men's clothing.

A plan such as the one in *Collins & Williams* is in harmony with the "Interpretative Bulletin" which states: "A compensation plan which provides for a 'draw' based on a percentage of each employee's earnings during a specified prior period would not be in violation of the equal pay provisions of the Act if the plan is applied equally to men and women."[186] On the other hand, economic reward and pay based merely on such illusory concepts as "enthusiasm" or "ambition" would appear to circumvent the law.[187]

While formal or written plans may provide better evidence that a bona fide plan exists, the real test for qualification as an exception under the Act is whether there are ascertainable criteria known, available and equally applied to all employees.[188]

C. *"Any Other Factor Other Than Sex"*

The presence of even one member of one sex who is being paid at a higher (or lower) rate than members of the opposite sex who are performing equal work, is sufficient to indicate that a violation of the Act exists.[189] In order to justify an exception of "any other factor other than sex" the employer must show that "the factor of sex provides '*no part*' of the basis for the wage differential."[190]

1. *Shift Differentials*

As discussed earlier, shift-work does not constitute work performed under dissimilar conditions for equal pay purposes.[191] Evening and night shift workers may lawfully be paid higher wages, however, as a differential based on a factor other than sex. There is general acceptance of the fact that such shifts are less desirable and hence require payment of higher wages to be attractive to employees. There are no equal pay problems involved even if the day shift is comprised totally of females and the other shifts are comprised exclusively of males. A violation arises, however, if in addition to the shift differential, the all male shifts receive a higher base rate than that paid to females who perform the same

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186. 29 C.F.R. § 800.143 (1974).
187. Murphy, *supra* note 88, at 643. *But see* Wirtz v. Oregon State Motor Ass'n, 1 CCH EMPL. PRAC. DEC. 937 (D. Ore. 1968).
188. 29 C.F.R. § 800.144 (1974).
189. Murphy, *supra* note 88, at 622.
190. 29 C.F.R. § 800.142 (1974) (emphasis added).
191. *See* discussion under "Similar Working Conditions," *supra*.

work on the day shift[192] or the sex-differentiated evening and night shift employees are the only employees on those shifts who receive a higher rate of pay than the corresponding day workers.[193]

In *Corning Glass Works v. Brennan*[194] men were first employed as night shift inspectors between 1925 and 1930 when the company instituted its night shift operations. At that time state laws did not permit women to work at night. Thus Corning developed an all male night shift of inspectors and an all female day shift. Evidence showed that males were originally paid at the higher rate because the work was regarded as demeaning and that was the only method by which the company could attract men to perform inspection tasks. At that time no other differential in base wages was paid to night shift employees. A 1944 collective bargaining agreement established a plant-wide shift differential but this was added on to the existing base wages of the male inspectors. Although the company made later attempts to rectify the situation, the court found that a violation came into existence as soon as the Act became effective.[195]

During the period between 1961 and 1965, the employer in *Hodgson v. Miller Brewing Co.*[196] paid its day shift female lab technicians 70 cents less per hour than their male counterparts who ran the other two shifts. Women at that time were restricted to working only on the day shift. In addition to the 70 cent differential paid only to the male technicians, there was a plant shift differential of 10-16 cents per hour. Although the company later took steps to change these policies, the court held that the 70 cent differential represented a violation of the equal pay provisions from the date when the Act became effective until the policy revisions were made in 1965.[197]

2. *"Red Circle" Rates*

This term is used to describe higher wage rates which are lawfully paid to employees, otherwise performing equal work, due to a variety of reasons which do not involve seniority, merit or incentive systsems.[198]

a. *Training Programs*—One of the most frequently encountered "red circle" situations involves employee training programs. Employers attempt to justify differential wages to men on the grounds that, although the work performed is equal, the male employees are in fact management trainees who are merely working in a particular job for a brief period of time to enable them to acquire a more thorough understanding of the employer's total business operation.

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192. Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972).
193. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).
194. *Id.*
195. *Id.* at 205.
196. 457 F.2d 221 (7th Cir. 1972).
197. *Id.* at 226.
198. 29 C.F.R. § 800.146 (1974).

In *Hodgson v. Fairmont Supply Co.*,[199] the male employee who was alleged to be a "management trainee" had actually been performing the work of a stock clerk for approximately three and one-half years. The court found this period to be too long to support a claim that the work assignment was only temporary to enable the employee to familiarize himself with the company's operations. Any change of job position after that period of time would appear to be nothing more than working one's way up in the company.[200] Consequently, the employer was held to be in violation of the Act.

The Secretary brought an action on behalf of several female warehouse employees in *Hodgson v. Behrens Drug Co.*[201] alleging that certain wage differentials were violative of the Act. The employer asserted that the wage differentials were justifiable because the male workers were actually sales trainees. The court found the sales training program to be loosely constructed and ill-defined but neither illusory nor a mere post event justification for the payment of disparate wages. Rather it appeared to be an honest effort on the part of the company to develop a sales training procedure. The facts revealed that trainees entered the program with knowledge of its existence and received formal sales training. Actual promotion to any sales job was dependent both on successful completion of the training program and an available sales opening. The program had never included a female, allegedly because women were considered unsuitable for traveling. In view of all the facts, the court of appeals concluded that any training program which excludes females must carry "a stigma of suspect validity"[202] and that a program "coterminus with a stereotyped province called 'man's work' cannot qualify as a factor other than sex."[203]

In *Brennan v. Cherokee State Bank*[204] the bank informed the male employee at the time he was hired that he would be the bank's first management trainee for the position of loan officer. During the next several years he worked in a number of positions in the bank, including approximately seventeen months as a teller. During that period of time he was compensated at a rate higher than the regular female tellers who were performing the same work. In an action brought by the Secretary to enjoin the defendant's practices and to restrain further withholding of the unpaid wages due to the female employees, defendant asserted that the pay differential was lawful for the reason that it was paid pursuant to a bona fide officer training program. Several facts in the case are material to the court's findings that the program did not qualify as an exception to the Act. The male employee was aware of the program but it was not reduced to writing until after the Labor Department commenced its investigation

199. 454 F.2d 490 (4th Cir. 1972).
200. *Id.* at 498.
201. 475 F.2d 1041 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).
202. 475 F.2d at 1048.
203. *Id.* at 1047. *Accord* Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972); Brennan v. First Nat'l Bank, 8 CCH EMPL. PRAC. DEC. 6103 (M.D. Ga. 1974).
204. 74 CCH LAB. CAS. 46,587 (N.D. Iowa 1974).

in the case. The trainee received no formal instruction but rather learned through observation and instruction from the individuals regularly performing the various jobs. The program provided for no regular, systematic rotation from job to job and had no definite termination time. In fact, the trainee did not leave the teller position until vacation plans resulted in his being transferred to the bank's savings and loan department. Also, two female employees had expressed an interest in advancement in the bank but they had not been considered for or given access to the program. Thus from these facts, the court concluded that the bank's training process was too unstructured to be called a training program.[205]

In summary, the cases suggest that the courts look to the following factors as tests for the legitimacy of such programs: whether the "trainee" is aware of the program's existence; whether the employee is actually hired as a trainee; whether the work performed by the trainee and the regular employees is substantially the same; whether the program entails any instruction, courses or supervision; whether there is a written, formalized program; whether "trainees" are actually rotated through various jobs to get a better comprehension of the employer's business operations; whether rotation occurs due to completion of the training program rather than the employer's personnel needs; and whether the program is available to members of both sexes.[206]

b. *Temporary Reassignments*—Under the "red circle" principle an employer can continue to pay an employee who is temporarily assigned to a higher or lower paying job the rate established for his regular job despite the fact that this may result in differential compensation to members of the opposite sex for equal work. Although there are no decided cases specifically turning on this issue, the "Interpretative Bulletin" suggests several situations which would involve a permissible temporary reassignment. Cases involving temporary assumption of a job while a regular employee is ill or on vacation or during a period when the position is unfilled pending procurement of a replacement employee are illustrative. Other examples include temporary transfers during a business slow-down or partial shut-down whereby the more skilled employees are retained at less demanding jobs to assure their availability when the business is again operating at full capacity.[207] While "temporary" is not specifically defined, reassignments for a period longer than one month will generally raise questions as to whether the assignment is in fact temporary or rather a subterfuge to avoid the provisions of the Act.[208]

c. *Temporary and Part Time Employees*—Payment of differential wages to persons employed full time for short periods or to those who work only a few hours per day is generally permissible under the Act, even though these employees perform equal work, if the pay practice is applied equally to both

205. *Id.* at 46,590 n.2.
206. *See* Murphy, *supra* note 88, at 646.
207. 29 C.F.R. § 800.147 (1974).
208. *Id.*

sexes.[209] Serious questions arise when an employer attempts to justify a differential on this basis if any employee works for a period longer than one month, if temporary, or for more than 20 hours per week, if part time.[210]

In other instances "red circle" rates can operate in a manner similar to a "grandfather" clause. In *Corning Glass Works v. Brennan*,[211] a 1969 collective bargaining agreement established a new job evaluation system which abolished all future differentials for shift work. The new rate which was to be paid to all the company's inspectors irrespective of sex or shift exceeded the rate previously paid to the night shift inspectors. The agreement also provided for a higher "red circle" rate for inspectors who worked on the night shift if they were hired prior to the effective date of the agreement. Had the provision in the collective bargaining agreement not served to perpetuate a preexisting violation of the equal pay provisions,[212] the court concluded that the "red circle" rates provided for in the agreement would have been permissible under the Act.[213]

3. *Economic Factors*

Employers often attempt to justify payment of lower wages to women on the grounds that it costs more to employ them, they will work for less or that men generate greater profits for the company. Each of these asserted reasons represents an attempt to bring the employer's compensation practices within the "any factor other than sex" exception to the Act.

a. *Employment Costs*—Due both to the myths surrounding female workers and facts which can be established, employers have argued that women should receive lower rates to compensate for the greater cost of employing them. For example, it is alleged that absenteeism among female workers is substantially higher thereby resulting in an employer's paying for work he does not in fact receive. A recent Public Health Service study shows, however, that the absentee rate for women due to injury or illness is 5.9 days per year and for men, 5.0 days.[214] It is also frequently argued that it is costly to train women but that they work only for brief periods or sporadically. Taking into account the fact that many women leave the labor force due to marriage or birth of children, the statistics still reveal that the average female worker has a work-life expectancy of 25 years as compared with 43 years for the male. Single women have a 45 year work-life expectancy.[215] Studies on job turnover rates also suggest that employment habits of men and women are substantially similar. For example, the 1968 separation rates per 100 employees in manufacturing indus-

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209. *Id.* § 800.150.
210. *Id.*
211. 417 U.S. 188 (1974).
212. *See* note 195, *supra* and text accompanying, for a full discussion of *Corning Glass'* violative practices.
213. 417 U.S. 188, 209 (1974).
214. *The Myth and the Reality*, U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADM., WOMEN'S BUREAU, Washington, D.C. (April, 1973).
215. *Id.*

tries were 4.4 for men and 5.2 for women.[216]

Grouping of employees solely on the basis of sex in order to determine the comparative costs of employing members of each group implies that a differential payment for otherwise equal work could be justified on the basis of cost factors relating purely to sex.[217] Such a result is absolutely contrary to the terms and purposes of the Act!

b. *Market Force Theory*—As demonstrated by numerous statistics,[218] women, whether for personal or societal reasons, have historically commanded less pay than men. Consequently, employers have attempted to utilize this argument to avoid liability under the equal pay provisions.

Defendant in *Brennan v. City Stores, Inc.*[219] paid its saleswomen and seamstresses at lower rates than its similarly employed salesmen and tailors. The employer attempted to justify the practice on the ground that there were fewer males available for such employment than there were females. The court rejected the argument stating that while factors such as customer embarrassment resulting from bodily contact with salespersons might support a practice of employing males to perform the job of selling and fitting men's clothing, the greater availability of women did not justify hiring saleswomen at lesser rates just because the market would bear it. The Act was intended to correct just such disparities.[220]

Quoting from *Brookhaven*, the court said:

> 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 Congress had in mind [in including the any factor other than sex exception to the Act]. Thus, it will not do for the hospital to press the point that it paid [male] orderlies more [than female aides] because it could not get them for less.[221]

In a more recent case,[222] the Secretary, citing both *Brookhaven* and *City Stores, Inc.*, argued the invalidity of this theory as a basis for an employer bank's payment of lower wages to its female tellers. The appellate court, while accepting the Secretary's statement of the principle, found that it could not be said that the trial judge had applied this "erroneous 'market' standard."[223] The salary was found to be that which the *best* applicant would accept with "merit and benefit to the Bank [being] the sole salary considerations."[224]

The court's position in *Victoria Bank* would seem to raise questions about differential salaries being paid to the best applicant if all employees in fact

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216. *Id.*
217. 29 C.F.R. § 800.151 (1974); Wirtz v. Midwest Mfg. Corp., 58 CCH LAB. CAS. 43,512 (S.D. Ill. 1968).
218. *See* discussion under "Background Facts," *supra.*
219. 479 F.2d 235 (5th Cir. 1973).
220. *Id.* at 241 n.12.
221. *Id. quoting* 436 F.2d 719, 726 (5th Cir. 1970).
222. Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974).
223. *Id.* at 902.
224. *Id.*

possess the requisite skills to perform the job.[225]

c. *Economic Benefit to the Employer*—The economic value of male employees' "flexibility" has been asserted as a justification for the payment of higher wages to them. While the issue of whether "economic benefit" can be considered as a valid "factor other than sex" under the Act was not specifically dealt with in the *Wheaton Glass* case, the concept was no doubt implicitly recognized by the court. In that case, the lower court had concluded that the availability of Wheaton's male selector-packers to perform the work of snap-up boys at any time was of economic value to the employer. The court of appeals said, however, that the 10 per cent wage differential paid to the men was not automatically justified on the basis of the alleged flexibility. The court found no facts or evidence in the record upon which to determine the economic value of the snap-up boy labor performed by the male selector-packers. The record was devoid of any facts which could support the claim that the alleged flexibility justified, or even bore any relationship to, the pay differential.[226] Thus the court left the door open for the possibility that economic benefit might be an appropriate factor to consider if facts are presented which will assist in determining its value.

The Third Circuit Court of Appeals was presented with an employer's argument that economic benefits justify wage differentials in *Hodgson v. Robert Hall Clothes, Inc.*[227] The defendant's all male sales force in the men's department was paid higher wages than its all female counterpart in the women's department. The company argued that the greater profitability of its men's department resulting from the better quality and higher prices of men's clothing allowed it to pay the salesmen higher wages than those paid to saleswomen employed in the less profitable women's department. Evidence was introduced at trial which demonstrated this greater profitability. The Secretary contended that economic benefit could not qualify as "a factor other than sex" exception because that exception really means "any other factor other than sex which is related to job performance."[228] Thus since the salesmen had nothing to do with the greater profitability, and women could not sell the higher priced men's clothing, this benefit could not be a valid factor upon which to base a wage differential.

The court found that customer embarrassment from possible bodily contact justified the sex-segregated sales forces. It also reasoned that the "seniority system" and "any other factor" exceptions to the Act indicate that an employer may legitimately pay wage differentials which are not related to actual job performance. The court cited section 800.116 of the "Interpretative Bulletin" wherein the amount of compensation under a permissible commission system

225. *See* discussion under "Education," *infra.*
226. Shultz v. Wheaton Glass Co., 421 F.2d 259, 267 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).
227. 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973).
228. *Id.* at 593.

could be based upon the type of article sold. It also quoted from section 34d07 of the Secretary's Field Office Handbook which states that "[s]uch a difference in commission rates might be based on many factors such as sales volume, mark up, cost of the items sold, type of merchandise sold, turnover in merchandise, and the ease of selling merchandise in each particular department."[229] Thus the court concluded that "the only basis for approving such a system has to be that the economic benefit to the employer is greater."[230] Without a clearer indication from Congress the court maintained that it would be unwise to potentially weaken an employer's competitive position by placing the greater economic burden on him of paying women as much as men for selling less profitable merchandise. The court further found that a showing of the greater profitability of the men's department was sufficient to justify the differential and that the employer was not required to justify its base wage through a correlation to an individual employee's job performance.[231]

The court in *Hodgson v. City Stores, Inc.*[232] reached a different result without necessarily rejecting the *Robert Hall* principle. In that case the defendant also paid its saleswomen less than its salesmen for work found to be equal. The court rejected the employer's argument that the differential was based on a factor other than sex. Although the defendant made general claims that the wages paid depended on "the individual employee, the department to which the employee is assigned, and the product sold,"[233] it did not *allege* or *prove* any greater profitability in men's clothes as the employer had done in *Robert Hall.*

The *Robert Hall* decision, by enabling retail employers to combine the factors of greater profitability and sex-segregated sales forces, provides a potentially formidable method for qualifying under the "any other factor" exception to the Act.

d. *Education*—While a few courts have considered the relative educational levels of employees otherwise performing equal work as a factor other than sex, employers have generally failed to meet the required burden of proof.

The court in *Wirtz v. Citizens First National Bank*[234] said that the bank was entitled to consider the greater formal education of its male employees as a factor so long as it was applied equally to both sexes.

Defendant employer in *Brennan v. Cherokee State Bank*[235] also asserted that a college education was a basis for the higher salary of its male teller. The court considered the prior work related experience of several female tellers to be the equivalent of a college degree and said that the record "does not support a finding that sex played no part in the wage differential and that the difference

229. *Id.* at 595.
230. *Id.*
231. *Id.* at 597-98.
232. 332 F. Supp. 942 (M.D. Ala. 1971), *aff'd sub nom.* Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973).
233. 332 F. Supp. at 945.
234. 58 CCH LAB. CAS. 43,439 (E.D. Tex. 1968).
235. 74 CCH LAB. CAS. 46,587 (N.D. Iowa 1974).

in pay was justified by Wiersema's qualifications and education."[236]

An appendix detailing the relative education and experience of the higher paid male and several female tellers convinced the court in *Brennan v. Victoria Bank & Trust Co.*[237] that the factors of college education and prior work experience would not support the defendant's assertion that sex played no part in the disparate pay. The court found in view of the facts that, if education and work experience had actually been taken into account, some of the females should have been paid more than the male.

Although economic reward for prior achievement and experience may be philosophically sound, courts should, and apparently do, look very carefully at disparate pay allegedly based on superior education and experience, particularly in view of the fact that actual job requirements, not skill of the individual applicant, control the applicability of the equal pay provisions.

VII. Remedies

The Secretary can seek an injunction to restrain future violations of the Act and the continued withholding of back wages under section 217.[238] Section 216(c) permits the Secretary to recover back wages and an equal, additional amount in liquidated damages.[239] Employees can recover the back wages, liquidated damages, attorney's fees and costs pursuant to section 216(b).[240] Case law has also established the right to recover interest on the unpaid amount.

A. *Injunctions*

The FLSA does not carry any immediate sanction for misconduct absent willful acts on the part of the employer. The employer, in effect, is given one "free offense" in that he is liable only for the repayment of wages that should have been paid to his employees. Injunctive relief is not a penalty but a means of protecting the public's interest in effecting an employer's compliance with the law. Such relief is appropriate as a matter of administrative economy and fairness because once an employer has been found in violation of the law, he should assume the responsibility for future compliance. The Wage and Hour Division should not have the burden of having to constantly monitor past violators to make sure they are obeying the law.[241]

The court in *Brennan v. Board of Education*[242] stated that an injunction insures compliance and is proper, even in cases where the defendant is no longer

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236. *Id.* at 46,590 n.2.
237. 493 F.2d 896, 903 (5th Cir. 1974).
238. 29 U.S.C. § 217 (1970).
239. 29 U.S.C.A. § 216(c) (Supp. 1975), *amending* 29 U.S.C. § 216(c) (1970).
240. *Id.* § 216(b) (Supp. 1975), *amending* 29 U.S.C. § 216(b) (1970).
241. Brennan v. J.M. Fields, Inc., 488 F.2d 443, 449 (5th Cir. 1973) *quoting* Goldberg v. Cockrell, 303 F.2d 811, 814 (5th Cir. 1962).
242. 374 F. Supp. 817 (D.N.J. 1974).

in violation of the law, if the defendant has consistently adhered to the validity of the past employment practice and would presumably be free to return to its use as soon as the judgment in the suit is final.[243] In that case, the Board had continuously insisted that it was bound by the job classifications and compensation scheme of the State Civil Service Commission and, thus, could not comply with the Act.

A further issue of importance is the scope of the injunction. The case of *Hodgson v. Corning Glass Works*[244] is illustrative. The district court had issued a nationwide injunction against Corning Glass. The facts showed that the defendant had only been in violation of the law in two or three of its many plants; the violation was only with regard to one class of employees, the inspectors; the initial violations were largely a result of a state law which prohibited the employment of women at night; and the company had made repeated efforts to comply with the law following its enactment. The court found that the trial court had abused its discretion in issuing a nationwide injunction. It said that absent a showing of a "policy of discrimination"[245] which extended beyond the plants in question, there was no basis for such a broad, sweeping injunction. Affirming the issuance of such an injunction would place the defendant in a position of being subject to future contempt proceedings at any time were it to commit a new violation, even if that new violation were unrelated to the original charge.[246]

The court in *Brennan v. J.M. Fields, Inc.*[247] upheld a nationwide injunction. Fields was a corporate defendant with more than sixty chain stores. The evidence at trial indicated that the company's hiring and pay policies were largely centralized. The court concluded that the broad purposes of the FLSA would be frustrated in suits involving large corporate defendants with numerous branch operations if the Secretary were required to investigate and prove violations in most or all of those branch operations before a nationwide injunction could issue.

The language of the injunction, however, was found to be too broad in that it applied to all classes of the defendant's employees. The court modified the injunction to apply to only that class of employees against whom discrimination had been proven in the case.[248]

B. *Interest and Liquidated Damages*

There is no specific language in the FLSA which authorizes the recovery of prejudgment interest on back wages which have been wrongfully withheld.

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243. *Id.* at 832.
244. 474 F.2d 226 (2d Cir. 1973), *aff'd sub nom.* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).
245. 474 F.2d at 236.
246. *Id. Accord* Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971).
247. 488 F.2d 443 (5th Cir. 1973).
248. *Id.* at 450.

Some courts have relied on the provision for liquidated damages as a basis for denying such interest.

Section 260 provides that:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the [FLSA] . . . , if the employer shows to the satisfaction of the court that the act or omission giving rise to such an action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 . . . .[249]

Prior to a 1947 amendment to section 260 which provided for the discretionary award of liquidated damages for good faith violations, courts were required to award liquidated damages equal to the amount of actual damage.[250] Cases interpreting the section prior to amendment had held that allowing recovery of back wages due and liquidated damages, *with interest*, would in effect give the employee double compensation for damages resulting from the delay in payment of the wages due because liquidated damages and interest serve essentially the same purpose.[251] The court in *Hodgson v. Miller Brewing Co.*[252] held that regardless of the statutory change allowing discretionary awards where the defendant's acts were in good faith, the principle enunciated in *Brooklyn Savings Bank v. O'Neil*[253] is still controlling if the court awards the maximum amount of liquidated damages allowable under section 216. The court concluded that a different result could obtain if liquidated damages had not been awarded. Interest in a case of that type is essential to fully compensate the employee for wages due but wrongfully withheld[254] and should be calculated from the date of the initial violation.[255]

Section 217 makes no provision for the recovery of either liquidated damages or prejudgment interest. The court in *Hodgson v. American Can Co.*[256] reasoned that a section 217 suit is an equitable proceeding thereby requiring the court to have the power to order full compensation. The employer has had the use of the money during the period the wages were wrongfully withheld; equity and justice then require the recovery of prejudgment interest, especially in view of the fact that the Secretary's suit under section 217 cuts off an employee's private right to sue under section 216(b) in which the employee could have received liquidated damages.[257]

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249. 29 U.S.C.A. § 260 (Supp. 1975), *amending* 29 U.S.C. § 260 (1970).
250. Act of May 14, 1947, ch. 52, § 11, 61 Stat. 89, *amending* 29 U.S.C. § 260 (1946) (codified at 29 U.S.C.A. § 260 (Supp. 1975)).
251. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 715 (1945).
252. 457 F.2d 221 (7th Cir. 1972).
253. 324 U.S. 697 (1945).
254. 457 F.2d 221, 229 (7th Cir. 1972) *citing* Hodgson v. Daisy Mfg. Co., 445 F.2d 823 (8th Cir. 1921) *and* Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971). *Accord* Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973).
255. Brennan v. Board of Education, 374 F. Supp. 817, 834 (D.N.J. 1974).
256. 440 F.2d 916 (8th Cir. 1971).
257. *Id.* at 922.

C. *Attorneys Fees*

Section 216(b) enables the employee to recover "a reasonable attorney's fee" from the defendant. Due to the fact that most suits under the Act are brought by the Secretary few cases involve this issue. The defendant in *Hodgson v. Miller Brewing Co.*[258] challenged the award of $20,000 attorney's fees as being excessive in view of the fact that the total award for back wages and liquidated damages was less than $25,000. The court held that the award of such fees is within the trial court's discretion and that the amount of damages recovered by the employee is only one factor to be considered.[259]

D. *Good Faith Reliance*

Section 259(a) relieves an employer of *any* liability under the FLSA if he pleads and proves that the wages were withheld "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of the Wage and Hour Division] . . . ."[260] In *Hodgson v. Square D Co.*,[261] the court held that language means only the "Administrator" and that the employer could not claim good faith reliance on a letter from the Regional Director of the Wage and Hour and Public Contracts Division of the Department which the employer had interpreted as approving its 1966 plan to bring the company into compliance with the Act.[262]

E. *Willful Violations*

Actions for willful violations of the FLSA may be brought within three years after the cause of action accrues. Other actions come within the two year statute of limitations.[263] The defendant in *Coleman v. Jiffy June Farms, Inc.*[264] alleged that it was not in violation of the Act because, under a collective bargaining agreement, its employees had agreed to exempt themselves from the provisions of the FLSA in exchange for a raise in pay. Defendant had sought advice of its legal counsel who had said that the arrangement would be effective. Defendant further asserted that even if it was found to be in violation of the Act, the violation was not willful. The court held that bad faith and definite knowledge are not required and stated that the test of willfulness in FLSA cases should be "[d]id the employer know the FLSA was in the picture?"[265] seeking advice of legal counsel was sufficient to indicate that the employer, Jiffy

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258. 457 F.2d 221 (7th Cir. 1972).
259. *Id.* at 228.
260. 29 U.S.C. § 259(a) (1970); 29 C.F.R. §§ 790.13, .19 (1974).
261. 459 F.2d 805 (6th Cir. 1972).
262. *See also* Hodgson v. Miller Brewing Co., 457 F.2d 221, 228 (7th Cir. 1972).
263. *See* discussion under "Statute of Limitations," *supra* note 100, and text accompanying.
264. 458 F.2d 1139 (5th Cir. 1971).
265. *Id.* at 1142.

June Farms, Inc., knew the FLSA was in the picture thus making its actions willful for purposes of section 255.

The court in *Brennan v. J.M. Fields, Inc.*[266] relied on the *Jiffy June Farms* test to find the defendant liable for a willful violation where it was shown that the defendant had received central office memoranda advising it of the requirements under the equal pay provisions. Defendant's regional personnel managers had been instructed to make periodic checks of employees' personnel files and report any possible violations to the central office.[267] This was held to be sufficient to establish that the employer "knew the FLSA was in the picture." Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with the intent of Congress to liberalize the effect of the FLSA.[268]

F. *Curing Violations*

Section 206(d) is violated if an employer attempts to comply with the Act by reducing the wages of the higher paid employees.[269] The defendant in *Hodgson v. Miller Brewing Co.*[270] paid its female lab technicians who worked in the Analytical Lab 70 cents less per hour than its male lab technicians who performed the same work. During the period from July, 1964 to January, 1965 all male lab technicians were transferred from the Analytical Lab to the Packaging Lab. Women were restricted to the Analytical Lab where they continued to receive 70 cents per hour less. After October, 1966 newly hired men were assigned to work in the Analytical Lab at the same wages that the female technicians were paid. Women were allowed to work in the Packaging Lab for the first time and could transfer to that lab as vacancies arose. Women who worked in the Packaging Lab received the same pay as their male counterparts. The court found defendant's scheme to be violative of the Act in two regards. First, work in the two labs was found to be equal thereby requiring equal pay to employees in both labs. Second, the defendant's transfer scheme initiated in July, 1964 had the same result as if the defendant had equalized the pay in the Analytical Lab by lowering the male employees wages by 70 cents per hour. Thus, the violations which existed on the effective date of the Act were not cured.

In *Shultz v. American Can Co.—Dixie Products*,[271] the defendant discriminated against its day time female machine operators by paying them 20 cents per hour less than the male night shift operators who performed equal

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266. 488 F.2d 443 (5th Cir. 1973).
267. *Id.* at 448.
268. *Id.* *See also* Eakin v. Ascension Parish Police Jury, 74 CCH LAB. CAS. 46,474 (La. 1974).
269. 29 U.S.C. § 206(d)(1) (1970) states that "an employer who is paying a wage rate differential in violation of this subsection [§ 206(d)(1)] shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."
270. 457 F.2d 221 (7th Cir. 1972).
271. 424 F.2d 356 (8th Cir. 1970), *rev'd in part sub nom.* Hodgson v. American Can. Co., 440 F.2d 916 (8th Cir. 1971).

work. The court emphasized the fact that the employer could not bring itself into compliance with the equal pay provisions by opening the day shift to men nor could it cure a past violation by simply allowing employees from the lower paid group to transfer to the higher paying jobs.[272]

G. *Union Liability*

Labor organizations or their agents are prohibited from causing or attempting to cause any employer to discriminate against an employee with regard to equal pay.[273] In *Hodgson v. Sagner, Inc.*,[274] the union officials suggested that the company, a men's clothing manufacturer, was in violation of the Act. Early in the contract negotiation meetings between the employer and the union both agreed that there was liability under the Act for back wages due to 22 female cutters and markers. The union proposed that, instead of making full payment of amounts due to the 22 employees, the company pay part of the amounts due to other employees of the company as a wage increase to keep harmony within the company's cutting room until the end of the contract period. The company eventually agreed to the union's suggestion and paid one-fourth of the amount due to the proper recipients; it paid the remaining three-fourths to other cuttery-room employees as a pay increase. From evidence presented, it was proven that the company would have been required to pay the 22 female employees the full amount of two years wages which were due had the union not insisted that three-fourths of the amount be used as a pay raise for the other employees.

The union argued that section 217 empowers restraint from further withholding of back wages but since a union does not withhold wages the only relief that could be sought against it was a restraint against future compulsion on the company to pay discriminatory wages for equal work. The court reasoned that such a position would enable the union's unlawful acts to go unpunished. This would be contrary to justice and equity which require a union's violation to be handled in the same manner as an employer's violation. Thus, even if there is no express statutory basis for ordering the union to pay back wages, the courts can do so through exercise of their inherent powers of equity. The employer and the union were found to be jointly and severally liable for the entire amount due plus interest and costs.[275]

VIII. Interrelationship Between The Equal Pay Act and State Legislation

State protective legislation such as that governing lifting requirements, rest periods, hours of work and overtime compensation requires special attention due

272. 424 F.2d at 359.
273. 29 U.S.C. § 206(d)(2) (1970).
274. 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom.* Hodgson v. Baltimore Regional Joint Bd., 462 F.2d 189 (4th Cir. 1972).
275. 326 F. Supp. at 377. *Contra* Wirtz v. Hayes Indus., Inc., 58 CCH Lab. Cas. 43,556 (N.D. Ohio 1968).

to the potential conflict with the requirements of the equal pay provisions. The "Interpertative Bulletin" provides that:

> The provisions of various State or other equal pay laws may differ from the equal pay provisions [but] [n]o provisions of the [FLSA] will excuse noncompliance with any State . . . law establishing equal pay standards higher than the . . . standards provided by [section 206 (d). . . . [C]ompliance with other applicable legislation will not excuse noncompliance with the equal pay provisions of the [FLSA].[276]

If a state law requires payment of a higher minimum wage to one sex than is required by the FLSA, the employer must pay employees of the other sex at the higher rate if such employees perform equal work.[277]

The presence of state laws restricting the amount of weight women can lift or the time of day when women can work, for example, has been used to justify paying women lower wages. Section 800.160 clearly states that wage differentials are not justified merely on the grounds that such legislation exists. The specific requirements of the job control. Thus the limits set forth in such laws cannot be used to justify payment of higher wages to all men regardless of the content of their jobs if some men in fact perform the same work as the lower paid females. On the other hand, wage differentials based on unequal work would not be prohibited by the equal pay provisions even if the reason for the unequal quality of the jobs is the existence of such state laws which limit the work that women can perform.[278]

In *Brennan v. Board of Education*,[279] the Board alleged that it was bound by the job specifications which had been established by the State Civil Service Classification System and thus could not comply with the Act. The court stated that this does not make an invalid classification valid nor are jobs necessarily unequal just because a state accepts or recognizes them to be unequal. Such state classifications are not evidence of lawful classifications under the Act.[280]

IX. Interrelationship Between Title VII and The Equal Pay Act

The thrust of Title VII[281] is the prohibition against sex discrimination in employment opportunities, including discrimination in compensation. The Equal Pay Act, on the other hand, has as its purpose the much narrower goal of prohibition against sex discrimination in pay for the performance of equal work. Within that area of congruence, one Act should reinforce the other.

Section 703(h) of Title VII states that it is not an unlawful employment practice under Title VII "for any employer to differentiate upon the basis of

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276. 29 C.F.R. § 800.160 (1974).
277. *Id.* § 800.161.
278. *Id.* § 800.163. *See* discussion under "Interrelationship Between Title VII and The Equal Pay Act," *infra.*
279. 374 F. Supp. 817 (D.N.J. 1974).
280. *Id.* at 830.
281. 42 U.S.C. §§ 2000e-1 to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e-1 to e-17 (Supp. III, 1973).

sex in determining the amount of the wages or compensation paid or to be paid to employees . . . if such differentiation is authorized by [The Equal Pay Act]."[282]

The Equal Pay Act permits differential pay for jobs which require substantial differences in skill, effort or responsibility. However, this does not address the problem as to how the jobs were allocated between male and female employees in the first instance. The question arises then as to whether section 703(h) renders the remaining provisions of Title VII inapplicable where, even though jobs were originally assigned to employees on a sexually discriminatory basis, men and women are now performing unequal work for which differential compensation can lawfully be paid under the Equal Pay Act. The *Wheaton Glass* case is of some assistance.[283] After noting that Congress did not intend for an artificial classification to provide an escape for an employer from the operation of the equal pay provision, the court further stated that:

> Title VII . . . prohibits discrimination because of sex in the classification of employees as well as in their employment and compensation. Although 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. This is recognized in . . . § 2000e-2(h) . . . . Since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of § 703(h) [§ 2000e-2(h)] would undermine the Civil Rights Act.
>
> It is not necessary here, however, to delineate the precise manner in which these two statutes must be harmonized to work together in service of the underlying Congressional objective.[284]

Male orderlies and female aides were found to be performing equal work in *Hodgson v. Brookhaven General Hospital*.[285] In discussing the defendant's classification system, quoting from Title VII, the court said that "[s]ection 2000 e-2(a)(2) declares it to be an unlawful employment practice for an employer 'to limit, segregate, or classify his employees' in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's sex . . .' "[286] and since the purpose of section 2000 e-2(a)(2) and the Equal Pay Act are interrelated, the two provisions must be harmonized in some way.[287] The court concluded that *Wheaton Glass* suggests that equal pay is required for sexually classified jobs which are in fact considered unequal for equal pay purposes if the reservation of the higher paid job for men would be prohibited by Title VII.[288] The *Wheaton Glass* approach, according to the court, raises substantial problems. If that approach were taken, the *Weeks*[289] analysis

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282. *Id.* § 2000e-2(h) (1970).

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

284. 421 F.2d at 266.

285. 436 F.2d 719 (5th Cir. 1970).

286. 42 U.S.C. § 2000e-2(a)(2) (1970), *as amended*, 42 U.S.C. § 2000e-2(a)(2) (Supp. III, 1973).

287. 436 F.2d 719, 727 (5th Cir. 1970).

288. *Id.*

289. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), held that an employer violates Title VII by foreclosing jobs to women on the assumption that few women possess the necessary physical qualifications to perform the job. The employer

might be used to sustain a claim under the Equal Pay Act although "on many jobs in which men are being paid higher wages than women because greater physical effort is apparently required, most women have not wanted or sought an opportunity to be so employed."[290] Finally, the court concludes, the purposes of the two Acts are not well served by confounding the proofs required of plaintiff under the respective Acts.[291]

The *Wheaton Glass* analysis does not necessarily extend as far as the *Brookhaven* court contends that it might. First, *Wheaton Glass* involved jobs that were in fact found to be equal and thus covered by the equal pay provisions; second, the court in that case said that, while differences in job classifications were in general thought to be beyond the coverage of the Equal Pay Act, this was due to the fact that job classifications based on genuine differences would result in differences substantial enough to justify a wage differential but that an artificially created job classification system could not be used to circumvent the Equal Pay Act;[292] third, section 2000e-2(a)(2) speaks in terms of sex-based job classifications which deprive an individual of an employment *opportunity*; and, finally, *Weeks* prohibits denial of job opportunity based on the assumption that all or substantially all members of one sex cannot perform a particular type of job.

The Equal Pay Act does not permit discrimination in pay to be based on artificial classifications, whether that be sex or some other factor. Real differences in the work performed govern the Act's applicability. Thus differential pay for sex-classified jobs, which in fact involve equal work, would be violative of both Acts. But section 703(h), which permits an employer to differentiate upon the basis of sex if that differentiation is authorized by the Equal Pay Act, would appear to sanction the discriminatory result. Sex-based classifications would be violative of Title VII, as a denial of employment opportunity, even if the work required of the respective jobs were unequal.

The two Acts can be reconciled at this point without distorting the purposes or doing violence to the provisions of either. Thus an individual who claims back pay for the denial of a job opportunity due to a prohibited sex-based classification would be allowed to recover under Title VII if she could prove that she possessed the necessary qualifications to perform the formerly restricted job and the employer could not establish a valid defense. The employer would then be required to make the formerly restricted job available to employees on the basis of merit in the future. The job classification would have to be redefined to conform to actual job requirements to meet the Title VII provisions but such a redefinition would remain consistent with the equal pay provisions, which permit differential pay only if jobs are in fact unequal based upon genuine classifications.

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must have a factual basis for believing all or substantially all women would be unable to safely and efficiently perform the duties of the job.

290. 436 F.2d 719, 727 (5th Cir. 1970) *citing* Kanowitz, *supra* note 14, at 354.

291. 436 F.2d at 727.

292. Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

Finally, the case of *Hodgson v. Robert Hall Clothes, Inc.*[293] lurks as a menace to recovery for many employees under both Acts. In that case, the defendant's sex-segregated sales force policy was upheld because it furthered the legitimate purpose of preventing customer embarrassment due to potential bodily contact with sales personnel. This position is arguably in line with the Title VII requirements espoused in *Diaz v. Pan American World Airways, Inc.*[294] which held that "customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."[295] Thus sex-segregated work forces, particularly in hospitals and retail clothing establishments where the time spent on fitting clothes and marking them for alterations is significant, would be permissible under both Acts. Combining this with the court's position in *Robert Hall* that the greater profitability of the men's department permitted the employer to lawfully pay salesmen at a higher rate than the saleswomen who were performing equal work based on the "any factor other than sex" exception to the Equal Pay Act, leaves substantial doubt as to whether the Congressional purpose of eliminating sex discrimination in employment is being carried out with regard to a significant number of employees.

X. Recoveries

As of December, 1970 one hundred fifty-five cases brought under the Equal Pay Act had yielded $1.6 million back wages to 9,116 employees, most of whom were female.[296] During fiscal year 1969, 72,000 of the covered establishments were investigated from which $4.6 million was found to be due to 16,381 employees. Investigations of 68,000 establishments resulted in recovery of $6.1 million for 18,000 underpaid employees during fiscal year 1970.[297] By 1972, an estimated $47.5 million had been awarded to approximately 113,000 employees since the Act went into effect.[298] Statistics compiled by Region VII, Regional Solicitor's Office, reveal that the Region recovered $139,831 for 341 employees in fiscal year 1973, $434,193 for 364 employees in fiscal year 1974, and $630,103 for 569 employees for the first nine months of fiscal year 1975.[299] Such statistics indicate that enforcement of the Act is being pursued with increasing vigor.

XI. Conclusion

Although much progress has been made towards the goal of elimination of all sex-based discrimination in employment, much remains to be done. It is the hope of the author that this Article will assist the legal community in more effectively playing its vital role towards that end.

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293. 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973).
294. 442 F.2d 385 (5th Cir. 1971).
295. *Id.* at 389.
296. Burns & Burns, *supra* note 72, at 95.
297. *Id.* at 96.
298. Citizen's Advisory Council on the Status of Women, Women in 1972 11 (1973). More than $906,000, including interest, was awarded to approximately 2,000 female employees in the *Wheaton Glass* case alone.
299. Personal conversation with the staff, Region VII, Regional Solicitor's Office, April 7, 1975.