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STATUTE NOTES

LABOR LAW—The Equal Pay Act of 1963— Problems In Upholding The Standard For Female Employees

29 U.S.C. § 206(d)(1) (1970).

The Equal Pay Act of 1963¹ was the culmination of many years of striving to eliminate wage differences based solely on sex. Despite the contributions of many women in all types of occupations,² the average working woman had been systematically paid a lower wage than her male co-worker, even if they worked side by side on the same job.³ The fourteenth amendment did little to improve women's status;⁴ court interpretations of that otherwise far-reaching amendment held that statutory delineations which were based on sex were not discriminatory.⁵

The federal government initiated a form of equal pay regulations for its female employees in 1870,⁶ and some state legislatures passed equal pay acts, most of which were so weak in application that their effect was negligible.⁷ Efforts of women to achieve job and wage equality were also hampered by decisions of the United States Supreme Court.⁸ The landmark case of *Muller v. Oregon*⁹ held that women were "not upon an equality" with

1. 29 U.S.C. § 206(d)(1) (1970).

2. See R. RIEGEL, *AMERICAN WOMEN* (1970); A. SINCLAIR, *THE BETTER HALF* (1965).

3. *AMERICAN WOMEN: THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN* 46 (M. Meade & F. Kaplan ed. 1965).

4. Susan B. Anthony sought to have the word "male" eliminated from the fourteenth amendment, but was unsuccessful. 59 A.B.A.J. 526 (1973).

5. E.g., *In re Lockwood*, 154 U.S. 116 (1894) (women not entitled to vote under fourteenth amendment); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872) (no right to practice law under fourteenth amendment).

6. The principle was first written into law in 1870, but was not fully implemented until 1923. *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) [hereinafter referred to as *Senate Hearings*].

7. *Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 9 (1963) [hereinafter referred to as *House Hearings*]. 22 states had equal pay laws, which are summarized in *House Hearings* 39-52.

8. Cases cited note 5 *supra*.

9. 208 U.S. 412 (1908). See also *Miller v. Wilson*, 236 U.S. 373 (1915).

men in efforts to "maintain an independent position in life"¹⁰ and that the difference in sex justified a difference in legislation.¹¹ An earlier decision¹² had stated that it was "founded in divine ordinance" that woman's place was beneath that of man,¹³ and that women were unfit for the occupations of "civil life."¹⁴

Despite this judicial attitude, the equal pay concept was hardly an innovation. An equal rights plank had been adopted by both political parties in every national convention since 1944,¹⁵ and some form of equal pay legislation had been introduced yearly in Congress beginning in 1945.¹⁶ It was apparent that concern about inequality crossed economic, social, and sexual lines.

This concern was further reflected in the extensive legislative history which supported the Equal Pay Act of 1963. Elaborate committee hearings disclosed widespread economic discrimination against women workers.¹⁷ Although women composed a third of the work force in the United States,¹⁸ their pay was found to be generally far below that of men.¹⁹ It was also disclosed that married women, the bulk of the female labor contingent, often worked in menial jobs to help feed their children and to keep their families' incomes above the poverty level.²⁰ As a consequence of such statistics, the Secretary of Labor cited three major reasons for urging enactment of equal pay legislation: (1) The general purchasing power and living standards of workers were adversely affected by discriminatory pay rates, (2) those employers who followed the practice of paying women lower wages than men thereby realized an unfair competitive advantage, and (3) the resulting low wage levels prevented maximum utilization of workers' skills to the detriment of morale, which in turn was detrimental to production.²¹

Even in view of these factors, Congress was unwilling to appropriate funds for what many members feared would be a vast "new bureaucracy" to administer and enforce equal pay standards for women.²² Sponsors of the legislation introduced a bill which placed the responsibility for enforcement

10. *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

11. *Id.* at 422.

12. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872).

13. *Id.* at 141.

14. *Id.* at 141.

15. 116 CONG. REC. 7948 (1970) (remarks of Congresswoman Griffiths).

16. *Id.*

17. *House Hearings; Senate Hearings. See also Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 344 (1968).

18. *Senate Hearings* 16.

19. *Id.* at 20.

20. *Id.* at 16.

21. S. REP. NO. 176, 88th Cong., 1st Sess. 1-2 (1963).

22. *See* 109 CONG. REC. 9193 (1963).

under the Fair Labor Standards Act of 1938.²³ The new law included all that Act's attendant exceptions and exemptions.²⁴ An individual employed in agriculture,²⁵ a hotel or motel,²⁶ a restaurant,²⁷ or a laundry²⁸ was not protected by the equal pay standard. All professional, managerial, and administrative personnel also fell under the exceptions.²⁹ In giving the duty of enforcement to the Department of Labor, which had many other programs to oversee, Congress was creating a dichotomy. Any change in wage practices would not be rapid; in fact, this was the desired effect. As it was noted in the House Hearings, the Equal Pay Act would close a gap in labor legislation "in a moderate and flexible manner, allowing adequate time for adjustment and adequate play for special circumstances."³⁰

The Equal Pay Act was passed by Congress and became law on June 10, 1963.³¹ With the full support of the Executive branch³² and a large majority in Congress,³³ the Act went into effect on June 10, 1964, granting employers a full year to comply voluntarily, and to permit the Labor Department to set up enforcement procedures. The heart of the statute declared that:

No employer having employees subject to any provisions of this section 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 . . .³⁴

In addition to those exceptions incorporated by reference from the Fair Labor Standards Act,³⁵ the Equal Pay Act itself included four exceptions to the rule of "equal pay for equal work": Where disparate wages were paid on the basis of (1) a merit system, (2) a seniority system, (3) a system which

23. 29 U.S.C. §§ 201-219 (1970).

24. This was specifically noted by Congress. H.R. REP. NO. 309, 88th Cong., 1st Sess. 8 (1963).

25. Act of June 25, 1938, Pub. L. No. 75-718, 52 Stat. 1060-9.

26. Act of May 5, 1961, Pub. L. No. 87-30, § 9(a)(2), 75 Stat. 71.

27. Act of May 5, 1961, Pub. L. No. 87-30, § 9(a)(20), 75 Stat. 73.

28. Act of May 5, 1961, Pub. L. No. 87-30, § 9(a)(3), 75 Stat. 71.

29. Act of May 5, 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 71.

30. *House Hearings* 9.

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

32. President Kennedy remarked in signing the act into law that:

Our economy today depends upon women in the labor force It is extremely important that adequate provisions be made for reasonable levels of income to them, for the care of children . . . and for the protection of the family unit.

21 CONG. Q. 978 (1963).

33. The only roll call vote in the House was 362-9 in favor of a motion to consider the Equal Pay Act. 109 CONG. REC. 9194 (1963). The measure was agreed to in the Senate by voice vote. 109 CONG. REC. 9762 (1963).

34. 29 U.S.C. § 206(d)(1) (1970).

35. 29 U.S.C. §§ 201-219 (1970).

measured earnings by quantity or quality of production, or (4) any factor other than sex, inequality in pay was not illegal.³⁶

The 10-year period since the passage of the Equal Pay Act gives an excellent base upon which to determine the effectiveness of the legislation. Paradoxically, the decade was marked by the expansion of the women's rights movement,³⁷ while the Equal Pay Act lay dormant for some time as a vehicle to force employers to raise the pay of women employees.

Despite the fact that millions of women were employed in jobs now covered by the extended federal umbrella, it was 2 years after the equal pay requirements went into effect before a suit was brought. In *Wirtz v. Basic Inc.*,³⁸ the pay of two female chemical analysts was raised to the higher level of a male analyst, on the theory that all three employees were doing the same work.³⁹ In declaring the wage discrepancy illegal, the court gave great weight to the "comprehensive regulations" of the Labor Department which interpreted the equal pay provisions.⁴⁰ A contrary result was reached in *Wirtz v. Dennison Manufacturing Co.*,⁴¹ where the court found that male employees had to possess significant additional skills and to perform physical work which women could not perform. Such differences were "substantial," the court stated, and thus a difference in pay was justified.⁴²

In *Wirtz v. Wheaton Glass Co.*,⁴³ a case that was to achieve landmark status in its appellate stages, the court permitted the defendant company to pay its male selector-packers more than females employed in the same jobs, on grounds that men regularly performed 16 additional tasks.⁴⁴ In an exhaustive opinion, the court laid down the rule that the plaintiff-Secretary of Labor had the burden of proving that an employer's wage differential was based on sex discrimination, and that the defendant-employer then had the burden of proving that his pay practices fell within one of the Act's exceptions.⁴⁵ This case was reversed on other grounds,⁴⁶ and the rule

36. 29 U.S.C. § 206(d)(1) (1970).

37. *E.g.*, There was wide-spread support for the equal rights amendment. As of May, 1973, 30 states, including Texas, had ratified the amendment. Thirty-eight states must ratify by March 22, 1979 for the amendment to become part of the Constitution. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *WOMEN IN 1972*, at 26 (1973).

38. 256 F. Supp. 786 (D. Nev. 1966).

39. *Id.* at 790. See also *Wirtz v. Meade Mfg. Co.*, 285 F. Supp. 812 (C.D. Kan. 1968); *Wirtz v. Koller Craft Plastic Prod.*, 296 F. Supp. 1195 (E.D. Mo. 1968); *Wirtz v. Rainbo Baking Co.*, 303 F. Supp. 1049 (E.D. Ky. 1967).

40. 256 F. Supp. 786, 790 (D. Nev. 1966). For a compilation of the regulations, see 29 C.F.R. § 800 (1972).

41. 265 F. Supp. 787 (D. Mass. 1967).

42. *Id.* at 789-90.

43. 284 F. Supp. 23 (D.N.J. 1968), *rev'd sub nom.* *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

44. *Id.* at 34.

45. *Id.* at 33.

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

delineating the burden of proof has been followed by other courts.⁴⁷ Women employed in banks,⁴⁸ breweries,⁴⁹ paper plants,⁵⁰ gun manufacturing plants,⁵¹ and various other manufacturing enterprises⁵² recovered back wages in suits brought under the Act.⁵³ The changes in employment practices were hardly sweeping, however, and the number of women involved in the suits was small.⁵⁴

Although there is no Supreme Court decision interpreting the Equal Pay Act, the United States Courts of Appeals have affirmatively endorsed the equal pay standard. Illusory or nonexistent training programs were struck down as a basis for wage disparity by the Court of Appeals for the Fifth Circuit in *Shultz v. First Victoria National Bank*.⁵⁵ This same court held, in another case concerning a bank,⁵⁶ that it was not the degree of discrimination that mattered in equal pay suits, but rather the mere existence of *any* difference in wages paid to the respective sexes.⁵⁷ The "substantially similar" meaning of the word "equal" was affirmed, so that women workers did not have to be performing the exact same jobs as men in order to recover.⁵⁸ Congress, in prescribing "equal" work, did not require that the jobs be identical, but only that they be "substantially equal."⁵⁹ Therefore, if the jobs required substantially the same skill, effort, and responsibility, they were "equal" for purposes of applying the Act.⁶⁰

There has been no lack of incisive judicial statements of the purpose of the Equal Pay Act. In *Shultz v. Wheaton Glass Co.*,⁶¹ for example, the United States Court of Appeals for the Third Circuit reversed the lower court's finding of no discrimination and stated that:

47. *E.g.*, *Shultz v. American Can Co.*, 424 F.2d 356 (8th Cir. 1970); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970).

48. *Hodgson v. American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1971); *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969).

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

50. *Hodgson v. American Can Co.*, 440 F.2d 916 (8th Cir. 1970).

51. *Hodgson v. Daisy Mfg. Co.*, 317 F. Supp. 538 (W.D. Ark.), *aff'd in part, rev'd in part*, 445 F.2d 823 (8th Cir. 1971) (affirmed as to recovery of wages by female employees).

52. *E.g.*, *Hodgson v. Square D Co.*, 459 F.2d 805 (6th Cir. 1972), *cert. denied*, 409 U.S. 967 (1972); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490 (4th Cir. 1972).

53. Recovery of interest on back wages was also allowed. *Hodgson v. American Can Co.*, 440 F.2d 916 (8th Cir. 1971).

54. At least one court sanctioned a class action under the Act. *Laffey v. Northwest Airlines, Inc.*, 321 F. Supp. 1041 (D.D.C. 1971).

55. 420 F.2d 648, 659 (5th Cir. 1969). *See also* *Hodgson v. Security Nat'l Bank*, 460 F.2d 57 (8th Cir. 1972).

56. *Hodgson v. American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1970).

57. *Id.* at 420.

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

59. *Id.* at 265.

60. *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 419 (5th Cir. 1971).

61. 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

[T]he Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.⁶²

Even in view of such eloquent statements of purpose, some jurisdictions continued to permit the payment of disparate wages. A notable example is *Hodgson v. Brookhaven General Hospital*,⁶³ where the Court of Appeals for the Fifth Circuit found that male hospital orderlies regularly performed numerous additional and heavy lifting chores which entitled them to higher wages than their female counterparts.⁶⁴ In arriving at its decision, the court announced an equitable and usable test to determine the equality of jobs: (1) do the jobs involve additional tasks, (2) do the tasks require extra effort, (3) do such tasks consume a significant amount of time, and (4) are the tasks of an economic value commensurate with the pay differentials.⁶⁵ This test is the only judicial compilation of standards for the "equal jobs" requirement in the Act.⁶⁶

The trend of recent cases has brought the impotency of the Equal Pay Act into sharp focus. In its first interpretation of the Act, the United States Court of Appeals for the Second Circuit in *Hodgson v. Corning Glass Works*⁶⁷ held discriminatory the defendant's practice of paying male inspectors who worked at night higher wages than women inspectors who worked during the day.⁶⁸ Despite the fact that shift differentials might indeed be different working conditions under the Act, such differentials would not justify inequality in pay if separating men and women into shifts is part of a long standing practice.⁶⁹ Although decided in favor of women employees, this case did not result in a nationwide injunction against Corning, as was requested by the Secretary of Labor.⁷⁰ Since this identical practice was up-

62. *Id.* at 265. The Court of Appeals for the Fifth Circuit noted that:

This "rule"—equal pay for equal work—was not laid down simply out of concern about the injustice of discrimination, important as that was. It was also laid down out of concern about the economic and social consequences of disparate wages paid to a major portion of the nation's labor force. Such wages not only depressed the living standard of those who received them, they also depressed wages for all workers and particularly workers in certain industries.

Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 657-58 (5th Cir. 1969) (citations omitted).

63. 436 F.2d 719 (5th Cir. 1970).

64. *Id.* at 726.

65. *Id.* at 725.

66. It had earlier been held that the incidental or occasional performance of a task which women might be physically inadequate to perform is not sufficient to justify a difference in pay. *Wirtz v. Rainbo Baking Co.*, 303 F. Supp. 1049 (E.D. Ky. 1967).

67. 474 F.2d 226 (2d Cir. 1973).

68. *Id.* at 233.

69. *Id.* at 233.

70. *Id.* at 236. Such an injunction was issued by another court in *Hodgson v. J.M. Fields, Inc.*, 335 F. Supp. 731 (M.D. Fla. 1971), where the court stated that

held for the same employer in another case,⁷¹ women employees in one plant will benefit under the Equal Pay Act, while those in another have been denied recovery.

Paying women lower wages than men for "substantially equal" work has also been upheld on the ground that the employer realizes a greater economic benefit from the work of his male employees. In *Hodgson v. Robert Hall Clothes, Inc.*,⁷² the employer introduced evidence to show that the men's department produced a higher profit than the women's. Even though men and women in the respective departments worked the same hours and in the same store, it was held that the difference in profit justified a difference in base salary.⁷³ Retail stores may thus be permitted to pay women low wages because the economic burden of raising women's pay to the level of men's would weaken the employer's competitive position.⁷⁴

Women workers, as a class, have yet to be accorded the "enduring mantle of constitutional protection by the United States Supreme Court."⁷⁵ The Court's traditional view that sex is a valid basis for difference in legislation⁷⁶ remains unchallenged and that view has been followed by lower courts as recently as 1968.⁷⁷

The scope of the Fair Labor Standards Act, which includes the Equal Pay Act, was broadened in 1966 to include more employees in more enterprises, such as laundries, larger hotels and motels, restaurants, and agricultural processing.⁷⁸ Still, the benefits supposedly due women employees and society in general have failed to materialize. Women presently comprise almost two-fifths of the work force,⁷⁹ yet only a minute percentage have been directly affected by suits brought under the Equal Pay Act.⁸⁰ Employers have had

"[t]he plaintiff is entitled to an injunction, enjoining defendant from future wage discrimination in any of its stores." *Id.* at 733 (emphasis added).

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

72. 473 F.2d 589 (3d Cir. 1973).

73. *Id.* at 597.

74. *Id.* at 595.

75. Rawalt, *Litigating Sex Discrimination Cases*, 4 FAM. L.Q. 44, 48 (1970).

76. *Muller v. Oregon*, 208 U.S. 412 (1908). See also *Miller v. Wilson*, 236 U.S. 373 (1915).

77. *Menglekoach v. Industrial Welfare Comm'n*, 284 F. Supp. 956, 959 (C.D. Cal. 1968), *appeal dismissed*, 393 U.S. 83 (on procedural grounds). The Supreme Court refused by silence to overrule *Muller*; this, the rule announced in *Muller* 65 years ago remains in effect. But see *Fronterio v. Richardson*, — U.S. —, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

78. Act of Sept. 23, 1966, Pub. L. No. 89-601, §§ 201-204, 80 Stat. 833-35, amending 29 U.S.C. § 213 (1964) (codified at 29 U.S.C. § 213) (1970). Coverage of the Equal Pay Act was also extended to executive, administrative, and professional employees under Title IX of the Education Amendments of 1972. Act of June 23, 1972, Pub. L. No. 92-318, § 906, United States Cong. & Ad. News (1831-2662) (1972).

79. U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EMPLOYMENT AND EDUCATION (March 1973).

80. Since the Act became effective, 112,979 employees have recovered wages in

to pay what can only be called a pittance in wages found due as a result of the litigation.⁸¹ In one of the greatest paradoxes ever to arise out of any "progressive" legislation, women's wages, as compared with those of men, were higher *before* the Act went into effect.⁸²

The Act has been unable to accomplish its stated goals,⁸³ and there appear to be at least two reasons. First, placing the equal pay requirement under the Fair Labor Standards Act, with that Act's attendant exceptions, exemptions, qualifications, and enforcement procedures, has created the possibility of evasion by employers.⁸⁴ Furthermore, the Equal Pay Act itself contains internal exceptions as to employees covered, which multiplies the opportunity for circumvention. The Equal Pay Act's blanket exception, which permits disparate wages based on any factor other than sex,⁸⁵ is particularly onerous.

Secondly, cases decided under the Act have had limited impact on the female labor force. The courts have strictly interpreted the Act,⁸⁶ and have given employers wide latitude to show that their wage practices fall within one of the Act's exceptions.⁸⁷ The underlying purpose of the Act⁸⁸ has thus been

equal pay suits. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1972, at 11 (1973).

81. A total of \$47,573,018 has been recovered in back wages. *Id.* at 11.

82. "From 64 percent in 1955, women's median wage or salary income as a proportion of men's fell to 61 percent by 1959 and 1960 and since then has fluctuated between 58 and 60 percent." U.S. DEP'T OF LABOR, FACT SHEET ON THE EARNINGS GAP 1 (1971). In 1971, the last year for which complete data is available, women's median income was 59.5 percent of men's. U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EMPLOYMENT AND EDUCATION (March 1973).

83. "The Congress hereby finds that the existence . . . 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;
- (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.

It is hereby declared to be the policy of this Act . . . to correct the conditions above referred to . . ."

Act of June 10, 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56, amending 29 U.S.C. § 206 (1961) (codified at 29 U.S.C. § 206(d)(1) (1970)).

84. This weakness of the Act was pointed out in Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 359 (1968).

85. 29 U.S.C. § 206(d)(1) (1970).

86. *E.g.*, Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970); Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (D. Mass. 1967); Kilpatrick v. Sweet, 262 F. Supp. 561 (M.D. Fla. 1967). This has been sometimes true even when courts have allowed female employees to recover. *See, e.g.*, Hodgson v. Corning Glass Works, 474 F.2d 226, 236 (2d Cir. 1973); Hodgson v. American Can Co., 440 F.2d 916, 921 (8th Cir. 1971).

87. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir. 1973); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970); Hodgson v. Corning Glass Works, 341 F. Supp. 18 (M.D. Pa. 1972).

88. "The Act was intended as a broad charter of women's rights in the economic