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Note, Equal Pay Act - Economic Benefit to Employer is Justification for Wage Differential Between Male and Female Employees

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LABOR LAW — EQUAL PAY ACT — ECONOMIC BENEFIT TO EMPLOYER IS JUSTIFICATION FOR WAGE DIFFERENTIAL BETWEEN MALE AND FEMALE EMPLOYEES

The Secretary of Labor sought an injunction[1] against Robert Hall Clothes, Inc.[2] alleging that the store had violated the Equal Pay Act[3] by paying the salesmen who worked exclusively in the men's department a higher rate of pay than the saleswomen who worked exclusively in the women's department even though the work performed was substantially equal. Since the men's department was more profitable,[4] Robert Hall contended that it was justified in paying the salesmen more; therefore, the wage differential between salesmen and saleswomen was based on a factor other than sex which constituted an exception, section 206 (d) (1) (iv), to the Equal Pay Act. The Secretary of Labor contended that economic benefit to the employer is not an acceptable justification for a wage differential under section 206 (d) (1) (iv) because it is not related to job performance or typically used in setting wage scales. The District Court of Delaware held that the wage differential between the part-time salesmen and saleswomen was not justified, but that the store was justified in paying the full-time saleswomen less than the full-time salesmen because of economic benefits to the employer.[5] On appeal to the Third Circuit Court of Appeals,

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[1]Using the enforcement provisions of the Equal Pay Act, the Secretary was seeking an injunction against future violations and the withholding of back pay. *See* 29 C.F.R. §§ 800.164-.166 (1972).

[2]Robert Hall Clothes, Inc., named as a defendant, is a Delaware corporation with its main office in New York. The corporation has several wholly owned subsidiaries. One of these, Robert Hall Clothes of Jamaica, Inc., owns Robert Hall Clothes Greenbank Corp., the other defendant and the subject of this litigation. Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264, 1267-68 (D. Del. 1971).

[3]The Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act of 1938, provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206 (d) (1) (1970).

[4]The men's department carried more expensive merchandise which resulted in a gross profit of $148,001.30 in 1969 as compared to a gross profit in the women's department of $92,686.87. The records produced were for 1963 through 1969 and showed similar discrepancies between the departments for each year. Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264, 1276 (D. Del. 1971).

[5]The district court based its decision on the premise that the relevant figures were those relating economic benefit to the employer by the individual salesperson.

held, affirmed as to the full-time personnel and reversed as to the part-time personnel. Where there is a valid business reason for an occupation qualification based on sex, a wage differential based on economic benefit to the employer is recognized as a factor other than sex and, therefore, not a violation of the Equal Pay Act. *Hodgson v. Robert Hall Clothes, Inc.,* 473 F.2d 589 (3d Cir. 1973), *cert. denied,* 42 U.S.L.W. 3186 (U.S. Oct. 9, 1973) (No. 72-1615).

At the beginning of the 20th century, women represented 18 percent of the American labor force. By 1966 this figure had doubled. Instead of promoting equality between the sexes, the rising employment rate of women often had the opposite effect. Women were relegated to certain jobs and paid less than men performing similar work.[6] A few states passed laws requiring equal pay for males and females performing the same work, but Federal legislation was not passed until the Equal Pay Act of 1963.[7] The purpose of the Equal Pay Act[8] was to give women equal rights in the economic area and eliminate sex-based wage discrimination, with its corresponding stigma of inferiority. The Act also sought to alleviate the depressing effects which reduced wages for women have on living standards.[9] For the first 6 years the Act encountered resistance in the courts,[10] and informal compliance was scattered and reluctant.[11] When the courts were called upon to interpret the Act's provisions, the

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Ordinarily Robert Hall did not keep such records. The only individual records available represented two 10-week periods out of the 6 years involved in the suit. *Id.* at 1278.

[6]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, 305-08 (1968).

The median income of women fluctuated between 63.9 percent and 58 percent of men's income between 1955 and 1968. Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970,* 39 U. CIN. L. REV. 615, 616-17 (1970).

[7]29 U.S.C. § 206(d) (1) (1970). The Equal Pay Act was passed as an amendment to the Fair Labor Standards Act of 1938, Pub. L. No. 718 (June 25, 1938). For the guidelines on coverage of the Fair Labor Standards Act and the Equal Pay Act *see* 29 C.F.R. §§ 800.0, .5 to .12 (1972).

[8]*See* 109 CONG. REC. 8702 (daily ed. May 23, 1963). For some of the legislative history of the Equal Pay Act see 109 CONG. REC. 8683-8707 (daily ed. May 23, 1963).

[9]Shultz v. Wheaton Glass Co., 421 F. 2d 259, 265 (3d Cir. 1970), *cert. denied,* 398 U.S. 905 (1970). The Civil Rights Act of 1964 also prohibited discrimination based on sex in employment practices. *See* 42 U.S.C. § 2000 e-2 (1970).

[10]As one commentator has noted:

> A review of the early Equal Pay Act cases in the district courts conveys . . . an unwillingness on the part of federal judges to separate their own manhood and their lifelong impressions of the role of women in society from their duty as judges to interpret the law as written.

Sangerman, *A Look at the Equal Pay Act in Practice,* 22 LAB. L.J. 259 (1971). *See* Wirtz v. Muskogee Jones Store Co., 293 F. Supp. 1034 (E.D. Okla. 1968); Wirtz v. American Can Co.—Dixie Products, 288 F. Supp. 14 (W.D. Ark. 1968), *rev'd sub nom.* Shultz v. American Can Co.—Dixie Products, 424 F.2d 356 (8th Cir. 1970).

[11]Murphy, *supra* note 6, at 616.

term "equal" job[12] presented the most problems.[13] Unequal work was the most frequently cited excuse for wage differentials. In *Wirtz v. Wheaton Glass Co.*,[14] the District Court of New Jersey interpreted equal to mean "substantially identical" with reference to compared jobs.[15] Since jobs are seldom identical, the *Wheaton* interpretation was a major stumbling block for effective enforcement of the Act.[16] The major breakthrough came with a forcefully written opinion reversing *Wheaton* in which the Third Circuit Court of Appeals declared that men and women who do "substantially equal" work should be paid equally, and that "[a]ny other interpretation would destroy the remedial purposes of the Act."[17] The Act is now being vigorously enforced by the Labor Department.[18] If the work done by males and females is found to be equal and the pay unequal, the employer must bring himself within one of the four exceptions to avoid violating the Act.[19] The most litigated exception is section 206 (d) (1) (iv), the broad exception which permits wage differentials "based on any other factor other than sex."[20] Since

[12]Four criteria are used to determine whether compared jobs are equal: (1) Equal skill "includes consideration of such factors as experience, training, education, and ability" measured in terms of job requirements. 29 C.F.R. § 800.125 (1972). *See, e.g.*, Shultz v. Kimberly-Clark Corp., 315 F. Supp. 1323, 1332 (W.D. Tenn. 1970). (2) Equal "[e]ffort is concerned with the measurement of the physical or mental exertion needed for the performance of a job." 29 C.F.R. § 800.127 (1972). *See, e.g.*, Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970). (3) Equal responsibility concerns "the degree of accountability required in the performance of the job, with emphasis on importance of the job obligation." 29 C.F.R. § 800.129 (1972). *See, e.g.*, Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970). (4) Similar working conditions is determined by a "practical judgment . . . in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels." 29 C.F.R. § 800.131 (1972). *See, e.g.*, Wirtz v. Basic Inc., 256 F. Supp. 786, 790-91 (D. Nev. 1966).

[13]Murphy, *supra* note 6, at 623.

[14]284 F. Supp. 23 (D.N.J. 1968), *rev'd sub nom.* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970).

[15]*Id.* at 32.

[16]Wirtz v. Rainbow Baking Co., 303 F. Supp. 1049, 1052 (E.D. Ky. 1967).

[17]Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (The Secretary of Labor proved that male selector-packers were being paid 10 percent more than female selector-packers for performing the same work. Occasional additional work performance by the male selector-packers was also done by snap-up boys paid about the same as female selector-packers and therefore the 10 percent wage differential was not justified).

[18]Sangerman, *supra* note 10, at 265.

[19]29 U.S.C. §§ 206 (d) (1) (i) - (iv) (1970). There are three specific exceptions to the Equal Pay Act: (1) a seniority system. *See, e.g.*, Kilpatrick v. Sweet, 262 F. Supp. 561, 564 (M.D. Fla. 1967). (2) a merit system. *See* 29 C.F.R. §§ 800.140, .144 (1972); Hodgson v. The Washington Hospital, 65 CCH LAB. L. REV. ¶ 32,499 (W.D. Pa. 1971). (3) a system for measuring earnings by quantity or quality of work. *See* 29 C.F.R. §§ 800.140, .144 (1972).

[20]This broad exception was included because it was impossible to list every exception. 109 CONG. REC. 8699 (daily ed. May 23, 1963).

section 206 (d) (1) (iv) could be abused by the employers, the courts have been closely examining the circumstances surrounding wage differentials when this clause is raised as a defense.[21] In order to prevent such abuses the courts look at the actual performance and requirements of the job.[22] In *Shultz v. Wheaton Glass Co.*,[23] a showing that the flexibility of male employees was of some unmeasured advantage to the employer was not a factor other than sex and did not justify a 10 percent wage differential over female employees performing substantially equal work. In another recent decision the Fifth Circuit Court of Appeals found that a vague training program for males was largely illusory and only an excuse to pay males more than females doing equal work.[24] Similarly, an Arkansas district court found a job classification system of "heavy" work for males and "light" work for females to be arbitrary and to serve no purpose but to hide a prohibited wage differential.[25] Another court discovered that higher wages paid to workers on a night shift had never been regarded as compensation for night work but had been established because men refused to work the day shift for the low pay rate of women.[26]

In the instant case the court reasoned that since the statute provided that exceptions to the Equal Pay Act applied to males and females performing equal work, Congress intended to allow justifiable wage differentials between such employees. Further, the court found that the basis of the wage differential may be a factor not related to job performance as evidenced by the exceptions regarding wage differentials based on seniority, section 206 (d) (1) (i), and "any other factor other than sex," section 206 (a) (1) (iv). Neither of these are necessarily related to job performance.[27] The court cited section 206 (d) (1) (iv) and stated that the economic benefit to the employer was a legitimate business reason and a factor other than sex, thus allowing the employer to pay salesmen more than saleswomen performing equal work. The court also noted that segregation of the salespeople was justified by a valid business

[21]The Labor Department lost most of its early Equal Pay Act cases. A major contributing factor to these losses was misapplication of section 206 (d) (1) (iv). Murphy, *supra* note 10, at 623. *See, e.g.*, Wirtz v. American Can Co.—Dixie Products, 288 F. Supp. 14 (W.D. Ark. 1968), *rev'd sub nom.* Shultz v. American Can Co.—Dixie Products, 424 F.2d 356 (8th Cir. 1970).

[22]*See* 29 C.F.R. § 800.121 (1972).

[23]421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

[24]Shultz v. First Victoria Bank, 420 F.2d 648 (5th Cir. 1969).

[25]Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970).

[26]Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973).

The following are not allowed as bases for wage differentials for otherwise equal jobs because they are based on sex: that the employee is head of a household, 29 C.F.R. § 800.149 (1972); that women cost more to employ, 29 C.F.R. § 800.151 (1972); that legal restrictions in state or other laws limit the number of hours, weight-lifting, and rest periods for women, 29 C.F.R. § 800.163 (1972).

[27]The court quickly dismissed the Secretary's other contention that the factor other than sex must be "one typically used in setting wage scales" by saying that economic benefit was probably used by employers in setting wage scales. The Secretary had not included this test until his reply brief in this appeal.

reason, therefore not contravening Title VII of the Civil Rights Act.[28] The court concluded that it was unnecessary for the employer to justify his base salary by correlating it to individual performance.[29] Since the men's department was more profitable than the women's department, the court reasoned that the wage differential was justified and therefore a "clear pattern of discrimination"[30] did not exist.

The decision in the instant case could have a detrimental effect on the efficacy of the Equal Pay Act. The court was faced with striking a balance between freedom for the employer to set his own pay standards and the need to end discrimination based on sex. The former policy apparently prevailed. Economic benefit to the employer may be proper justification for wage differentials. However, since it is well-known that women, in general, will do the same work for less pay than men, it is possible that economic benefit to the employer was not Robert Hall's true motive for paying saleswomen less than salesmen.[31] Although the store is departmentalized, it is still a unit,[32] and it can be argued that the success

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[28]Since physical contact was necessary, the jobs were segregated on the basis of sex to avoid embarrassment to the customers which would inhibit sales. *See* 42 U.S.C. § 2000e-2(h) (1970). Wage classification systems which designate certain jobs as "female" jobs and others as "male" jobs may contravene Title VII of the Civil Rights Act of 1964 except in certain instances where sex is a bona fide occupational qualification necessary to normal operation of a business. 29 C.F.R. § 800.114 (1972). For guidelines for harmonizing the Civil Rights Act with the Equal Pay Act see 29 C.F.R. § 1604.7 (1972).

[29]The district court had used individual performances as the basis of its decision; *see* note 5 *supra*.

[30]109 CONG. REC. 8697 (daily ed. May 23, 1963) (remarks of Representative Goodell).

The dissent in the instant case insisted that the court was bound by the findings of fact of the lower court. The Secretary had made out a prima facie case against Robert Hall by showing discrimination on an individual basis with regard to the part-time saleswomen. The dissent reasoned that the burden was on Robert Hall to prove that the wage differential was based on a factor other than sex, and that this burden was not satisfied by general assertions of economic benefits.

[31]Saleswomen make 40.5 percent of the income of salesmen. *See* Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971), *aff'd sub nom.* Brennen v. City Stores, Inc., 21 Wage & Hour Cas. 69 (5th Cir. 1973). This department store had violated the Equal Pay Act by hiring saleswomen for less pay than salesmen performing equal work. Some of the justifications given by the defendant were that the wage differentials "resulted from traditional and historical differences in job content," and "the scale prevalent in the labor market." The court replied:

> The fact that women tend to receive less from the labor market as a whole . . . carries no weight since defendant may not justify its discrimination by pointing to the conduct of others. The fact that the defendant has succeeded in paying a low, labor market rate does not authorize that which the Act seeks to end: wage differentials within its store between equivalent jobs.

Id. at 949-50. *See* Hodgson v. Corning Glass Works, 474 F.2d 226, 233-35 (2d Cir. 1973); Shultz v. Brookhaven General Hospital, 436 F.2d 719, 726 (5th Cir. 1970).

[32]*See* 29 C.F.R. § 779.304 (1972).

of one department depends to some extent on the other.[33] Therefore, the true value of one department may be incapable of valid measurement, and salespersons performing equal work in each department should be paid according to the income of the store as a unit. If the employer is allowed to use economic benefit as a justification for pay differentials, the correlation should be strictly on an individual basis and substantiated by individual records. A flat salary based on each department's profit assumes that each salesman is making more profit for the store than each saleswoman. A useful analogy can be found in the claim that wage differentials are justified because women cost more to employ than men. This has been held to be a violation of the Equal Pay Act because it groups employees on the basis of sex, and thus assumes that the factor of sex alone justifies the pay differential. By grouping employees on the basis of sex the group cost is assessed against the individual of one sex without considering whether that person actually costs more to employ than a specific person of the opposite sex.[34] Further, in order to meet the requirements for the exception of any factor other than sex, sex can provide no part of the basis for the wage differential.[35] In the instant case, it cannot be said that these requirements were met since the employees were grouped on the basis of their sex. In *Robert Hall* the court refused to follow the lead of the cases immediately preceding it which delved into the justifications for wage differentials to discover evidence of discrimination. If the Equal Pay Act is to be effective, the courts must discover the motive for paying women less, not just accept the employer's excuse at face value. *Robert Hall* may represent a step backward for the Equal Pay Act and the ramifications of the decision should be carefully studied before it is allowed to stand. This decision could be broadly construed to enable an employer to undermine the Act by justifying his wage differentials with a general assertion that male employees are of more economic benefit. If economic benefit is allowed as an exception to the Act, it should be strictly correlated to individual employees, and the courts must be alert for patterns of discrimination against one sex. Otherwise, economic benefit to the employer, as an exception to the Equal Pay Act, could be the loophole through which the whole purpose of the Act could disappear.

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[33]For example, women often buy their husband's clothes while shopping for their own, and families often shop together; therefore, many people would find a department store more convenient.

[34]29 C.F.R. § 800.151 (1972).

[35]29 C.F.R. § 800.142 (1972).