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INTERPRETING THE EQUAL PAY ACT: *CORNING GLASS WORKS v. BRENNAN*

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The United States Supreme Court in *Corning Glass Works v. Brennan*[1] handed down its first decision under the Equal Pay Act of 1973. In finding that Corning Glass had violated the Equal Pay Act, the Court gave substance to the Act, bolstered the vital goal of equal pay for equal work, and further chiseled the Act's rough outline.

This note will proceed from a section detailing the background and essential elements of the Equal Pay Act, to an analysis of the particular issues of *Corning Glass Works v. Brennan.* Finally, the Court's reasoning will be discussed with a view toward pinpointing the future impact of this significant decision.

In *Corning Glass Works v. Brennan* the Supreme Court consolidated two cases which had resulted in a direct conflict between the Second[2] and Third Circuits.[3] The case which came from the Second Circuit involved Corning plants located in Corning, New York, while the case from the Third Circuit involved a Corning plant in Wellsboro, Pennsylvania. The Secretary of Labor brought both of these cases to enjoin Corning from violating the Equal Pay Act and to collect back wages allegedly due female inspectors because of past violations. The history of Corning's employment practices in regard to the particular job of inspector will help to focus the precise issues present in this case.

In 1930, when Corning originally instituted a night shift, the state laws in Pennsylvania and in New York prohibited women from working at night.[4] Though women had previously worked as inspectors during the day shift, it became necessary for Corning to hire male employ-

1. 417 U.S. 188 (1974).
2. 474 F.2d 226 (2d Cir. 1973).
3. 480 F.2d 1254 (3d Cir. 1973).
4. New York prohibited the employment of women between 10 p.m. and 6 a.m. Pennsylvania prohibited them from working between midnight and 6 a.m.

ees for these positions at night. Men, predominantly recruited from the day shift, received substantially higher base wages for transferring to the night shift, though all other job categories received equal pay for either day or night shift. Even after a 1944 labor agreement set up a plant-wide shift differential creating a set premium for everyone on the night shift, the male inspectors at night continued to receive substantially higher base wages than the women day shift inspectors and at a rate in excess of the established premium.

Corning made no effort to alleviate this discriminatory wage situation until June 1966, though the state laws were amended years before to allow women to work at night,[5] and though the Equal Pay Act demanding such an effort became effective in 1964.

In June 1966 Corning finally offered jobs to women as inspectors on the night shift. Women were allowed to compete for these positions on an equal footing with men and for equal pay.

The next move made to comply with the Equal Pay Act took place in January 1969 when a new collective-bargaining agreement established a uniform job evaluation system which resulted in a wage equalization for both sexes doing equal work. This equalization plan, while eliminating discriminatory wages between men and women inspectors, provided for an important exception. This exception established a higher "red circle" base rate to be paid to inspectors hired for the night shift prior to the date of the labor agreement in 1969.

In *Corning Glass* the Supreme Court dealt with the primary issue: did Corning Glass Works violate the Equal Pay Act by paying higher base wages to male night shift inspectors than it paid to female day shift inspectors doing equal work. Complementary issues involved the adequacy of Corning's corrective measures in 1966 and in 1969.

The Court, in affirming the decision of the Second Circuit, held that Corning had violated the Equal Pay Act through its sexually discriminatory wage policies; furthermore, the corrective measures which Corning had implemented years after the effective date of the Act were found wanting. Since these half-hearted schemes failed to fulfill the equalization requirement of the Act, the Court held that the violations continued unabated. This decision lead to an injunction and to an estimated one million dollar back pay settlement.

5. Law of March 30, 1927, ch. 453, [1927] N.Y. Laws 1133 (repealed 1953); Law of April 28, 1930, ch. 868, [1930] N.Y. Laws 1625 (repealed 1953).

The Federal Equal Pay Act was enacted June 10, 1963.[6] It added subsection (d) to section 6 of the Fair Labor Standards Act. The Act, in relevant part, states:

> (1) 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.[7]

The purpose of the Act is clearly set forth in the legislation's "Declaration of Purpose."[8] There, the existence of wage differentials based

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6. Department of Labor bulletins relevant to the Equal Pay Act. 29 C.F.R. §§ 800.100-800.163 (1974).

7. 29 U.S.C. § 206(d) (1970). The remainder of the statute follows:

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

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

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

8. The Equal Pay Act of 1963 provided that:

(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;

(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.

Pub. L. No. 88-38, 2, 77 Stat. 56.

on sex was found to depress employee wages and living standards necessary for health and efficiency; to prevent maximum utilization of available labor resources; to cause labor disputes thereby burdening and obstructing commerce; to impede the free flow of goods in commerce; and to constitute an unfair method of competition. Clearly the sponsors of the Act viewed the concept of equal pay for equal work as an essential tenet of commercial stability and found the effects of wage discrimination to be profound, causing a dramatic detrimental impact on a major share of the nation's labor force and substantially burdening our system of commerce.[9]

Courts which have interpreted and fleshed out the Equal Pay Act have given fuller breadth and meaning to the Act's purpose. In *Shultz v. Wheaton Glass Co.*[10] the Court of Appeals for the Third Circuit envisaged the Equal Pay Act as a broad charter of women's rights in the economic field. The court in *Shultz v. First Victoria National Bank*[11] found that an important purpose of the Act was to eliminate traditional stereotyped misconceptions regarding the value of women's work.

Focusing on the Act as a remedy for discrimination, Justice Marshall in *Corning Glass* found that the purpose of the Act was to remedy our nation's entire wage structure; a structure based on the outmoded view that a man, because of his role in society, should be paid more than a woman though their duties are the same.

A number of courts have mentioned the stereotyped misconceptions which have contributed to the perpetuation of wage discrimination in the United States. Recent statistics show that an unequal wage structure continues to exist and flourish today, despite evidence that women now are a permanent part of the work force.

Nearly 35 million women are in the labor force today, representing over 36 percent of the total labor force. More than 50 percent of all women between 18 and 64 years of age are in the labor force and they work for exactly the same reasons men do.[12] The clear majority of women work for compelling economic reasons, and are as reliable[13] and as stable as men workers.[14]

9. S. REP. No. 176, 88th Cong., 1st Sess. 1 (1963).
10. 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).
11. 420 F.2d 648 (5th Cir. 1969).
12. Figures are from the U.S. Department of Commerce, Bureau of the Census and U.S. Department of Labor, Bureau of Labor Statistics.
13. Exploding the myth that women are paid less because they are more unreliable and unstable, "[a] recent Public Health Service study shows little difference in the ab-

Though women workers contribute equal value they are paid less.[15] Among all workers, women's median earnings were only three-fifths those of men in 1971. While this statistic fails accurately to reflect the comparative difference in compensation received by men and women who invest the same amount of skill, time and effort in their vocations, the Council of Economic Advisors to the President has estimated that a differential of approximately 20 percent between the earnings of men and women remains after adjusting for factors such as education, work experience during the year, and lifelong work experience.

In continuing now to examine the operation of the Equal Pay Act, it should be noted that the coverage provided by the Act is limited to those employees otherwise covered by the Fair Labor Standards Act.[16] Generally, to be covered an employee or enterprise must be engaged in commerce or produce goods for commerce.[17] Most business coverage attaches only where annual business volume is at a 500,000 dollar level.[18]

Remedies available under the Act include aggrieved employee suits and injunctive actions brought by the Secretary of Labor, with

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sentee rate due to illness or injury between men and women: 5.6 days a year for women compared with 5.2 days for men." WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMIN., U.S. DEP'T OF LABOR, 0-550-114 (1974).

14. Studies on labor turnover indicate that net differences for men and women are generally small. In manufacturing industries the 1968 rates of accessions per 100 employees were 4.4 for men and 5.3 for women; the respective separation rates were 4.4 and 5.2. U.S. GOV'T PRINTING OFFICE, *The Myth and the Reality*, (1974).

15. Figures from the U.S. Department of Commerce, Bureau of the Census and U.S. Department of Labor, Bureau of Labor Statistics indicate that median wage or salary incomes of year-round full-time women workers in selected major occupation groups in 1971 were as follows:

Major Occupation group	Income	As percent of men's income
Professional and technical workers	$8,346	69
Nonfarm managers and administrators	7,312	56
Clerical workers	5,718	62
Sales workers	4,549	43
Operatives, including transport	4,798	61
Service Workers (except private household)	4,280	60

16. As of July 1, 1972, the protection of the Equal Pay Act was extended to executive, administrative, and professional employees and to outside sales personnel, who had previously been exempt from coverage. For example, all employees of educational institutions, public and private, are now protected by the Act, as are nonsupervisory and managerial employees in most other organizations and industries. Among the few categories still unprotected are certain public employees and employees in small retail or service establishments.

17. 29 U.S.C. § 201 et seq. (1970).

18. 1 CCH LAB. L. REP. Wages and Hours ¶ 24,901 (1974).

criminal penalties provided for willful violators.[19] An aggrieved employee may sue for back wages, plus an additional sum up to the amount of the back wages, plus attorneys' fees and costs.

It is important to observe that relief from wage discrimination can also be sought under the provisions of Title VII of the Civil Rights Act of 1964 and its enforcement machinery. While the scope of the Civil Rights Act is broader than that of the Equal Pay Act, these statutes work together. Section 2000e-2(h) of Title VII provides that it is a lawful employment practice for an employer to discriminate on the basis of sex in fixing wages if such differentiation is not prohibited by the provisions of the Equal Pay Act.

The test for the application of the Equal Pay Act was succinctly set out by the Court in *Corning Glass*. In an action enforcing the provisions of the Equal Pay Act, the Secretary of Labor has the burden of proving that an employer paid an unequal wage to employees of opposite sexes for equal work at jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.[20]

Once the Secretary has carried his burden of proof it shifts to the employer to establish that the differential in wages was justified under any one of the Act's four exceptions.[21] A differential is permissible if it is shown to be based on a valid seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any factor other than sex.

In both of the circuit court cases combined in *Corning Glass*, the Secretary of Labor asserted that he had fulfilled his burden of proof—that employees of opposite sexes were being paid different wages for equal work. The Secretary further maintained that Corning had not shown that its actions fit under any of the exceptions to the Act.

Corning's principal argument provided that the inspectors' jobs during the night, in contrast to the same jobs during the day, were not performed under similar working conditions. If this assertion could be established there would be no violation of the Equal Pay Act.

19. 29 U.S.C. § 216(c) (1970); 29 C.F.R. 800.166(b) (1974).

20. Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2d Cir. 1973); Brennan v. Corning Glass Works, 480 F.2d 1254 (3d Cir. 1973). *See also* Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1049 (5th Cir. 1973); Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256, 1257 (5th Cir. 1972).

21. *See* 474 F.2d at 231, n. 10; 480 F.2d at 1258, n. 10; Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 597 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973); Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972).

The central point of disagreement between the circuits was the proper interpretation of the phrase "similar working conditions." For, if a difference in work shift prevents two otherwise equal jobs from being considered "equal work"[22] within the definition of the Equal Pay Act, then the Secretary would be unable to establish a violation of the Act under the facts of the *Corning Glass* case.

The Third Circuit believed, as did Corning, that shift differences made the jobs unequal because they were not performed under "similar working conditions;" therefore it was the Secretary's burden to prove that night and day shift jobs were performed under similar conditions. In support of its contention, the Third Circuit stressed the importance of a quote made by Congressman Goodell, an Act sponsor, who maintained that a difference of shift would fall within the Act's "working condition" factor.[23] The appeals court found that the Secretary had failed to carry his burden of proof in this regard and decided the case in favor of Corning without further discussion.

The Second Circuit, in contrast, found that the presence of different work shifts did not create a problem of proof for the Secretary under the "working condition" element of the Act. Rather, the court indicated, as had a House Committee report on the subject,[24] that a shift differential question should be included in the fourth broad exception category, "differentials based on any other factor other than sex," and was thus a matter to be proven by Corning. Specifically, Corning would have had to prove that the higher base wage of male night inspectors was in fact based on any factor other than sex.

The Supreme Court supported the Second Circuit's interpretation of the Act's language. The Court also found that Corning had failed to meet its burden of proving that its higher pay for men inspectors was based on any variable other than sex.[25] In fact, the Court maintained that the pay scales instituted by Corning Glass reflected a labor market in which Corning could pay women less for the same work. Corning's motivation was fairly simple the Court postulated: since they *could* pay less to women they *did*.

To help further define the pivotal term "working conditions" the Court explored the reasons behind the use of this particular language. The Court found that Congress' definition of the general term "equal

22. *See* Annot., 7 A.L.R. Fed. 707, 717 (1971).
23. 109 CONG. REC. 9209 (1973).
24. H.R. REP. No. 309, 88th Cong., 1st Sess. 3 (1963).
25. 417 U.S. at 205.

work" came from its response to the desires of business and from job evaluation plans utilized by industry.[26] In Congress' attempt to put bona fide job differences outside the scope of the Act, certain technical words were used which, the Supreme Court asserted, must be interpreted in the language of industrial relations. The phrase "working conditions" viewed in this manner, and as defined by the Wage and Hour Administration, does not refer to the time of day a job is performed.[27]

After determining that the Secretary had met his burden by showing that Corning had violated the Equal Pay Act through its wage policy for day and night shift inspectors, the Court went on to find that this violation was not cured by Corning's subsequent actions in 1966 and later in 1969.

The Supreme Court forcefully argued that a violation of the Equal Pay Act could only be cured by complete equalization. The Court asserted that complete equalization was not achieved by Corning's effort in 1966 to open up higher paid night positions to women, nor was it achieved by the labor agreement in 1969 which retained higher base wages for former night inspectors. The "red circle" base wage differential was found to perpetuate former wage discrimination and failed to cure Corning's violation of the Equal Pay Act.

The Court also defined the proviso of the Act which states that compliance with the Act can not be accomplished by reducing the wage rate of any employee.[28] Supporting the interpretations of other courts, the Supreme Court declared that a violation of the Act can only be remedied by raising the lower wages to the level of the higher wages. The Court asserted:

> The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition."[29]

26. *Hearings on Equal Pay Act of 1963 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare,* 88th Cong., 1st Sess., at 96-104 (1963); *Hearings on Equal Pay Act Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 88th Cong., 1st Sess., at 304-308 (1963).

27. See BELCHER, WAGE AND SALARY ADMINISTRATION 271-74, 287-89 (1955); U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES 656 (3d ed. 1965).

28. H.R. REP. No. 309, 88th Cong., 1st Sess. 3 (1963).

29. 417 U.S. at 207.

It was thus made clear that no half-way measure will do; only complete equalization of wages at the higher level will operate to cure a violation of the Equal Pay Act.

The Supreme Court's decision in *Corning Glass Works v. Brennan* will have significant impact on the future interpretation and application of the Equal Pay Act of 1973. The final million dollar settlement for back wages stands as a symbol of the Act's vitality and scope.

The Court's definition of the phrase "working conditions" will close one avenue of potential dispute and will aid in subsequent interpretation of the Act. More importantly, the Supreme Court has set an example with regard to the determination of what is "equal work." Where an employer utilizes a bona fide industrial job evaluation plan, the Court noted, this plan should be used as a guide to determine if certain jobs are "equal" for the purposes of the Equal Pay Act. With such a plan as a backdrop, the Court continued, an employer could not assert that jobs equal under the plan were unequal for purposes of the Act merely by claiming some extraneous difference in conditions or because of some small extra effort or responsibility.

By stressing complete equalization as the only acceptable remedy for wage disparity under the Equal Pay Act, the Court has set an example which, if followed, will lead to the demise of the half-way measures so often used in the past to thwart the true thrust of the Act. No longer will a company be allowed to disguise sexual discrimination by the use of "neutral factors" other than sex (*e.g.*, the "red circle" device) to perpetuate past violations. In addition, the Court's decision should restrain the increasing litigation in this area of the law by clarifying the requirements of the Equal Pay Act and by stressing that the purpose of the Act is not to be narrowly drawn but rather is broadly remedial in character.

The Equal Pay Act and the Supreme Court's interpretation thereof stand as monuments to the principle of equal pay for equal work—a principle cast in the steel logic; an idea powerfully furthering the illusive pursuit of sexual equality.