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Sex Discrimination Under the Equal Pay Act (Hodgson v. Corning Glass Works)

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ADMINISTRATIVE LAW

SEX DISCRIMINATION UNDER THE EQUAL PAY ACT

Hodgson v. Corning Glass Works

For years American women have worked alongside men, performing the same duties and functions as their male counterparts, yet being paid less for their services. In 1963, the Equal Pay Act[1] was passed by Congress to remedy this injustice and to guarantee women equal pay for equal work.

A prima facie case under the Act exists where equal work is performed under similar working conditions and a wage differential based on sex is being paid. The burden of proving such a case rests with the Secretary of Labor.[2] Once a prima facie case has been established, the defendant, in order to avoid liability, must either rebut the allegations or show as an affirmative defense that he fits within one of the four

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1 29 U.S.C. § 206(d) (1970), which provides in part:

> (d)(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 as 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.

At the time of enactment in 1963, twenty-two states already had equal pay laws in effect. BUREAU OF NATIONAL AFFAIRS, EQUAL PAY FOR EQUAL WORK 29 (1963). Despite the existence of state statutes, federal legislation was needed because state statutes were rarely enforced. *Id.* at 32. The first such law, enacted in New York in 1944, provided in part that:

> No employee shall, because of sex, be subjected to any discrimination in rate of her or his pay. A differential in pay between employees based on a factor or factors other than sex shall not constitute discrimination within the meaning of this section.

N.Y. LABOR LAW § 199-a (McKinney 1965). *See* Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. Erie County 1950), wherein the court granted an injunction against a bartenders union's picketing of a non-union bar which had hired women contrary to the union's policies.

In 1966 New York revised its equal pay law to closely resemble the Equal Pay Act. N.Y. LABOR LAW § 194 (McKinney 1972).

2 *See* Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719, 722 (5th Cir. 1970); Schultz v. American Can Co., 424 F.2d 356, 360 (8th Cir. 1970).

The Act most commonly is enforced through an action brought by the Secretary of Labor. In general, the Secretary is authorized to bring civil actions on behalf of employees to recover "minimum wages or unpaid overtime." 29 U.S.C. § 216(c) (1970). The Equal Pay Act provides, for the purposes of administration, that amounts withheld because of sex discrimination in violation of the Act "shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter." 29 U.S.C. § 206(d)(3) (1970). *See* Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 649 n.3 (5th Cir. 1969).

statutory exceptions. The first three are specific, while the fourth is a catch-all exception. The Act does not prohibit wage discrimination "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. . . ."[3]

In *Hodgson v. Corning Glass Works*,[4] the Second Circuit dealt with the establishment of a prima facie case under the Act and the application of the catch-all exception. The court, in its first decision under the Act, held Corning liable because the night shift differential was for equal work, thereby invoking the Act, and because none of the exceptions were applicable. In reaching this determination Judge Friendly, writing for a unanimous court, strictly construed the "similar working conditions" clause of the Equal Pay Act to insure that subtle as well as obvious wage discriminations would be eliminated.

The wage plan under scrutiny in *Corning Glass* had a troubled history. Until approximately 1925, Corning operated its plant only during the day with women filling most of the inspection jobs. The advent of automation compelled Corning to institute a night shift. At that time, New York law[5] prohibited women from working at night and consequently the night inspector positions were filled solely by men. Because these men were able to earn more at their prior positions than as inspectors, they demanded and received a higher wage than that of the women daytime inspectors. In 1944, Corning personnel were unionized and as a result of a collective bargaining agreement a night shift wage differential was established for the first time. This wage differential was additional to the already existing disparity between the wage rates of male and female inspectors. In 1953 the New York law prohibiting the employment of women at night was repealed.[6] Women over 21 were now permitted to work at night provided the Industrial Commissioner found transportation and safety conditions adequate. However, Corning did not apply for the Commissioner's approval of nighttime employment of women until 1966.[7]

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[3] 29 U.S.C. § 206(d)(1) (1970).

[4] 474 F.2d 226 (2d Cir.), *cert. granted*, 42 U.S.L.W. 3362 (U.S. Dec. 17, 1973) (No. 73-29).

[5] [1927] N.Y. Laws, ch. 453; [1930] N.Y. Laws, ch. 868.

[6] N.Y. LABOR LAW § 173(3)(a)(1) (McKinney 1965), provides:

> A woman twenty-one years of age and over may be employed in a factory between twelve midnight and six o'clock in the morning if a permit for such employment has been issued by the commissioner. Such a permit shall be issued if application is made and the commissioner finds that satisfactory conditions exist, including adequate transportation and safeguards for the protection of the health and welfare of the women.

New York currently applies the restriction only to women between the ages of 16 and 21. *See* N.Y. LABOR LAW § 173(1) (McKinney 1972).

[7] 474 F.2d at 229.

The Equal Pay Act became effective as to Corning on June 11, 1964.[8] Corning promptly merged the separate pay scales for men and women which it had maintained on a plant-wide basis. Female inspectors, however, were placed in a lower salary grade than their male counterparts.[9] In June, 1966, the previously separate male and female seniority lists were merged, and employment on the night shift was open to women. Females were allowed to apply for night shift work as vacancies on the shift arose, but could not use their seniority to "bump" a junior male already on the night shift. Notwithstanding this impediment, a great number of women eventually made the change to the night shift.[10]

In January, 1969, pursuant to a new collective bargaining agreement, Corning eliminated the base wage differential between day and night shift inspectors and raised the lower rate of the day inspectors to that of the night workers. However, the agreement also provided

[8] Section 4 provided that the Act would take effect one year from the date of its passage, which was June 10, 1963, but, that in the case of employees covered by a collective bargaining agreement in effect at least 30 days before its enactment, it would take effect two years from the date of its enactment or upon termination of the collective bargaining agreement, whichever occurred first. *See* Annot. to 29 U.S.C.A. § 206 (1970).

[9] This was due to shift differentials and the fact that all female employees worked during the day and afternoon shifts. The classifications and shift differentials in question can be seen from the district court's chart:

Defendant pays the following rates to employees employed on or prior to January 20, 1969 who work as Class B and Class C inspectors:

	Base Rate Resulting from Agreement of					
	11/1/67 through 1/5/69	1/4/69 through 11/2/69	11/3/69 through 1/4/70	1/5/70 through 11/1/70	11/2/70 through 1/3/71	1/4/71 through Present
Class B, night shift	$2.575	$2.80	$2.92	$2.95	$3.07	$3.10
Class B, day and afternoon shifts	2.37	2.68	2.80	2.83	2.945	2.975
Differential	.205	.12	.12	.12	.125	.125
Class C, night shift	2.46	2.68	2.80	2.83	2.945	2.975
Class C, day and afternoon shifts	2.29	2.64	2.76	2.79	2.90	2.93
Differential	.17	.04	.04	.04	.045	.045

The agreement provided that an added retroactive sum payment be made for the period between November 4, 1968 and January 6, 1969. The sum was based on the rate of the employee's job on January 6, 1969. The arrangement was arbitrary and temporary. Plaintiff does not request that a recomputation be made for this period, and none is ordered by the court.

Hodgson v. Corning Glass Works, 330 F. Supp. 46, 48 n.4 (W.D.N.Y. 1971), *aff'd*, 474 F.2d 226 (2d Cir. 1973), *cert. granted*, 42 U.S.L.W. 3362 (U.S. Dec. 17, 1973) (No. 73-29).

[10] 474 F.2d 230 n.6: "In 1966 only 4 of 15 requests by women to transfer to the night shift were granted. The situation later improved so that 39 out of 61 requests were honored in 1967, and 42 out of 52 through November 7 in 1968."

that a higher "red circle" base wage rate would be paid to persons employed before January 20, 1969 as night shift inspectors. The higher wage rate was to be partially implemented by retroactive wage boosts effective November, 1969.

Subsequently, the Secretary of Labor determined that Corning's pay structure violated the Equal Pay Act and instituted an action seeking an injunction and monetary damages for the violations from the effective date of the Act to the 1969 agreement. In *Schultz v. Corning Glass Works*,[11] Corning claimed that the base wage differential was a "supplemental escalating shift differential," which was necessary because New York prohibited night work by women. District Judge Curtin rejected this contention and concluded that the higher base wage rates in effect for night shift employees from November 1, 1964 until November, 1968 violated the Equal Pay Act and restrained Corning from withholding the back wages due.[12]

The district court did not consider the possibility of wage discrimination attending the "red circle" plan of the 1969 collective bargaining agreement. Accordingly, one week after the decision the Secretary of Labor moved to amend the findings of the court on the ground that the equal pay violations had not been terminated by the collective bargaining agreement of January, 1969, but rather had been extended thereby in the form of the "red circle" rates. The motion was granted. In December, 1970, Corning unsuccessfully moved to join the local and international unions as defendants.[13]

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[11] 319 F. Supp. 1161 (W.D.N.Y. 1970).

[12] *Id.* at 1171.

[13] 330 F. Supp. at 47 n.3 (W.D.N.Y. 1971).

When Congress enacted the Equal Pay Act it considered the possibility that some discriminatory wage practices might, at least partially, be the result of labor union demands. Included in the Act, therefore, was a paragraph providing that:

> No labor organizations, 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.

29 U.S.C. § 206(d)(2) (1970). In elaborating on this provision, regulations issued by the Secretary of Labor explain that "[a] labor organization and its agents . . . must not demand any terms or any interpretation of terms in a collective bargaining agreement with such an employer which would require the latter to discriminate in the payment of wages contrary to the provisions of section 6(d)(1)." 29 C.F.R. § 800.106 (1972). In spite of these sanctions, labor unions have remained virtually untouched by litigation arising out of the Equal Pay Act. Even though many equal pay violations have resulted from wage schemes established by collective bargaining agreements, unions have repeatedly escaped liability. *See* Murphy, *Female Wage Discrimination*, 39 U. CIN. L. REV. 615, 617 (1970). In the absence of definitive proof that the labor union insisted on the payment of the discriminatory wages, courts refuse to shift liability from the employer. Note, *Union Liability for Sex Discrimination*, 23 HASTINGS L.J. 295, 299 (1971).

In the instant case, all collective bargaining agreements entered into between Corning and the union from 1944 to 1968 provided for the payment of base wage differentials to

In deciding the case for the second time,[14] the district court held that since the "red circle" rate was founded on the previous practice of paying a "supplemental escalating shift differential," it perpetuated the discrimination. The court directed Corning to pay back wages due those inspectors who had not received either the "supplemental escalating shift differential" or the "red circle" rate, until all wages were equalized.[15] It also held that in the future Corning would have to pay the "red circle" rate to day shift as well as night shift inspectors. The injunction, which was to apply to Corning's operations nationwide, with one exception,[16] resulted from the court's feeling that Corning had not acted in good faith in devising the "red circle" pay scheme.

In appealing the decision, Corning claimed that the inspection jobs were not equal since work at night is per se performed under "working conditions" different from those during the day. Corning reasoned that if time of day is properly considered a working condition, then a simple showing that the male employees worked at night, while the females served in the daytime, would bar the Secretary from making out a prima facie case, the amount of the wage differential and its motivation notwithstanding.[17] Thus, the threshold question facing the court was whether the time of day is a working condition. If time of day were not a working condition, but still a basis for a legitimate wage differential, the defendant would then bear the burden of proving that the wage differential was not in any way based on sex.

The court concluded that the shift difference was not a working condition but was, however, covered by the catch-all exception clause. Judge Friendly noted that although there was concern over this issue

night shift employees. The agreement of January 20, 1969 provided for the payment of the "red circle" rates. Yet, when the wages were attacked as discriminatory, Corning was not permitted to join the unions as defendants. This result stifles the goals of the statute. Since the wage disparity resulted from the union agreement joint liability must be imposed if such discriminatory practices are to be eliminated.

14 Hodgson v. Corning Glass Works, 330 F. Supp. 46 (W.D.N.Y. 1971). The decision was on the motion for amended findings, to determine that the "red circle" rate continued the discrimination beyond 1969.

15 *Id.* at 50.

16 The reason for the one exception was a suit pending against that plant which was then on appeal. Hodgson v. Corning Glass Works, 341 F. Supp. 18 (M.D. Pa. 1972). This action by the Secretary involved Corning's plant at Wellsboro, Pennsylvania. The facts and circumstances were almost identical to those in Corning's New York plant. The Pennsylvania District Court held that, because the male employees in that plant worked under dissimilar working conditions, *i.e.*, in different shifts, the Secretary of Labor had failed to establish that the jobs were equal. Additionally, the court compiled a long list of "supplemental findings of fact" in order to provide the higher court with a more complete basis for review. *Id.* at 22. The Third Circuit has subsequently affirmed, *sub nom.* Brennan v. Corning Glass Works, 480 F.2d 1254 (3d Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3271 (U.S. Nov. 6, 1973) (No. 73-695). *See* note 21 and accompanying text *infra*.

17 *See* note 2 and accompanying text *supra*.

prior to enactment of the Equal Pay Act,[18] the legislative history proved dispositive. The House Report, in discussing exceptions to the Act's coverage stated:

> [T]hree specific exceptions and one broad general exception are also listed. . . . As it is impossible to list each and every exception, the broad general exception has also been included. Thus among other things, *shift differentials*, restrictions on or differences based on the time of day worked, hours worked, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. . . .[19]

Additional support for this position was found in the case law. Prior to the Second Circuit's decision in *Corning Glass*, both the Seventh and Eighth Circuits[20] had expressed the opinion that the time of day was not a working condition within the meaning of the Act. However, subsequent to the Second Circuit's decision in *Corning Glass*, the Third Circuit held the opposite on virtually the same facts, finding that the differences in Corning's shifts constituted differences in working conditions.[21]

Having rejected Corning's initial contention, the Second Circuit examined the question of whether the jobs were of "equal work . . . the performance of which requires equal skill, effort and responsibility."[22] Corning argued that the Equal Pay Act did not apply to these jobs because the men on the night shift performed "utility work" which was done during the day by personnel hired especially for that pur-

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18 When the bill was on the House floor, Representative Goodell stated that the difference in shift would logically be a working condition. 109 CONG. REC. 9209 (1963).

19 H.R. REP. NO. 309, 88th Cong., 1st Sess. 8 (1963) (emphasis added). The interpretative bulletin issued by the Wage and Hour Administrator concurs with this position, 29 C.F.R. § 800.132 (1972). *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

20 Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972); Shultz v. American Can Co., 424 F.2d 356 (8th Cir. 1970). In both cases, the courts treated the shift differentials as falling within the general catch-all exception to the Act. *See also* Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (D. Mass. 1967). *But see* Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966), where a Nevada district court considered time of day to be a working condition. There, however, the court held that the wage differential being paid the male employees was not based on inconvenient working hours, but rather on a discriminatory scheme, noting that men were already being compensated for the different working conditions by being paid a shift premium. *Id.* at 791. It is submitted that this approach is erroneous because, if the working conditions were not similar, then the jobs would not be equal, and a prima facie case would not have been made.

21 Brennan v. Corning Glass Works, 480 F.2d 1254 (3d Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3271 (U.S. Nov. 6, 1973)(No. 73-695).

22 474 F.2d at 234. On the equal work question, the Wage and Hour Administrator had stated: "Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." 29 C.F.R. § 800.122(a) (1972).

pose. This "extra" work consisted of packing and lifting inspected articles and light cleaning around the work area.

In *Schultz v. Wheaton Glass Co.*,[23] the Third Circuit had declared that the mere performance of certain extra physical duties does not render the jobs unequal[24] but that the jobs need only be "substantially equal."[25] The meaning of "substantially equal" has emerged in a decision by the Fifth Circuit, *Hodgson v. Brookhaven General Hospital*,[26] which stated:

> [J]obs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differentials.[27]

Thus, the mere fact that men perform some additional work does not render the jobs unequal. These added duties must be more than inconsequential.

The Second Circuit applied the "substantially equal" measure and concluded that the inspectors' jobs were properly subject to the Act. Judge Friendly noted that District Judge Curtin had relied heavily on Corning's own job evaluation plans developed before there was any hint of litigation. These plans "considered the utility work of so little consequence that these tasks were not included in the job descriptions of any of the inspectors."[28]

Once the Secretary had established to the satisfaction of the court that the jobs entailed "substantially equal" skill, effort and responsibility and were performed under similar working conditions, it became incumbent on the defendant employer to prove one of the exceptions as an affirmative defense.[29] The appellant relied on the

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23 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) (wherein the jobs were deemed "substantially equal" because little extra effort was required and there was no evidence that all of the men performed the additional tasks).

24 *See, e.g.*, Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972) (where the transfer to another laboratory did not make the job unequal in that the working conditions in both places were similar); Schultz v. American Can Co., 424 F.2d 356 (8th Cir. 1970) (where the loading function was minor and incidental and did not make the jobs unequal).

25 421 F.2d at 263.

26 436 F.2d 719 (5th Cir. 1970).

27 *Id.* at 725. For an interesting factual distinction from *Brookhaven* see Hodgson v. Good Shepherd Hosp., 327 F. Supp. 143 (E.D. Tex. 1971) (where male orderly's position was held not equal to that of female nurse's aide).

28 474 F.2d at 234, *quoting* 319 F. Supp. at 1169. When attempting to determine equality of jobs, the court should look at the actual work required to be performed. Job evaluation plans are only some evidence of job content.

29 29 U.S.C. § 206(d)(1) (1970). *See* note 2 and accompanying text *supra*.

catch-all exception. Corning claimed that the wage differential was not based on sex[30] but rather on the physical and emotional inconveniences inherent in nighttime employment. This contention was rejected because Corning introduced no evidence that night shift employees other than inspectors received a similar wage differential.[31] In fact, the record showed that the higher rate was paid to the male night inspectors in order to compensate them "for performing what they regarded as demeaning tasks."[32] Since the Act's purpose was to provide equal pay for equal work to men and women, Judge Friendly held that Corning had failed to sustain its burden and was in violation of the Act.

Corning claimed that even if it had violated the Equal Pay Act the violation was cured in 1966 when the night shift was opened to female applicants. This argument had been answered by two other circuits which held that merely opening the night shift to female employees as vacancies arose, while the work on both shifts remained equal, did not cure the violation.[33] Additionally, Congress had expressly provided the method of curing a violation of the Act — raising the lower wages to the higher.[34] The court noted that Corning's policy still left the daytime women inspectors at an earning disadvantage which was "not justified by any factor other than sex."[35]

The final contention proffered by Corning was that the "red circle" rate was a legitimate wage differential based on a seniority system. Judge Friendly found that this claim was "belied by the fact that it was paid only for work on the night shift," and served to perpetuate past discrimination.[36] The only modification of the lower

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30 The fourth exception will not apply "unless the factor of sex provides no part of the basis for the wage differential." 29 C.F.R. § 800.142 (1972). *See also* Hodgson v. Square D Co., 459 F.2d 805 (6th Cir.), *cert. denied*, 409 U.S. 967 (1972) (Douglas, J., dissenting).

31 474 F.2d at 233.

32 *Id.* Note that "the Act forbids all discriminations between male and female employees not based on factors other than sex, not just those intended to be based on sex." Hodgson v. American Bank of Commerce, 447 F.2d 416, 423 (5th Cir. 1971).

33 Hodgson v. Miller Brewing Co., 457 F.2d 221, 227 (7th Cir. 1972); Schultz v. American Can Co., 424 F.2d 356, 359 (8th Cir. 1970).

34 29 U.S.C. § 206(d)(1) (1970). *See Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 88th Cong., 1st Sess., 65 (1963).

35 474 F.2d at 235.

36 *Id.* CCH FED. WAGE AND HOUR ¶ 25,983.85 (1969), gives a good explanation of when the payment of "red circle" rates is permitted under the Equal Pay Act:

> For various business reasons, employers sometimes temporarily reassign employees to jobs other than their regular classifications. If the employees' regular job pays a higher rate than the temporary job, payment of the higher rate may be continued during the reassignment without violating the FLSA equal-pay standard. The rate then becomes a "red circle" rate.
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> . . . .
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> However, where such reassignment can no longer be considered of a temporary nature, a wage-rate differential paid to an employee of the opposite sex would

court judgment was the lifting of the nationwide injunction against Corning.[37] The court found that such a large scale injunction was unjustified since Corning had made some sincere efforts to comply with the Equal Pay Act, and because there was no evidence that Corning maintained a company-wide policy of sex discrimination.

The court's holding that time of day is not a working condition which might make jobs unequal gives added impetus to the Act's effectiveness. It appears that the beneficial purpose of the Act will not be frustrated by applying the words of the statute in an overly technical manner. The Second Circuit squarely faced the time of day question and answered it in a way that will help other courts apply the Act's provisions to more subtle types of wage discrimination based on sex. Therefore, it is hoped that the Supreme Court will affirm the Second Circuit.

However, at least one problem remains unsolved. Corning's pay scheme was the result of agreements with a union, and not a unilateral act. The district court denied Corning's motion to join the union as a party defendant and the Second Circuit did not address this point. In order to fully implement the spirit of the Equal Pay Act, the courts should extend liability to unions as the Act would allow[38] since pay scales found in violation of the Act may often be the product of collective bargaining.

TRUTH-IN-LENDING — DISCLOSURE OF SECURITY INTERESTS

N. C. Freed Co. v. Board of Governors

Section 125(a) of the Truth-in-Lending Act[1] gives the consumer the unqualified right to rescind a credit transaction within three business days if "a security interest *is* retained or acquired in any real property which is used or is expected to be used as the [consumer's] residence . . . ."[2] Having been authorized to prescribe rules for implementing the act,[3] the Federal Reserve Board expanded the statutory

violate the equal-pay requirements; the temporary nature of the reassignment becomes questionable under government enforcement policy after one month.

37 474 F.2d at 236.

38 *See* note 13 *supra*.

1 15 U.S.C. § 1601 *et seq.* (Supp. 1972). The Truth-in-Lending Act constitutes Title I of the Consumer Credit Protection Act of 1968.

2 *Id.* § 1635(a) (emphasis added):

[T]he obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section [including disclosure of the right to rescind without liability], whichever is later . . . .

3 *Id.* § 1604.