HODGSON v. ROBERT HALL CLOTHES

326 F. Supp. 1264 (1971) | Cited 0 times | D. Delaware | April 16, 1971

STEEL, J.:

This case involves the application of the Equal Pay Act of 1963, 29 U.S.C. § 206(d), which was added as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. The Court has jurisdiction under 29 U.S.C. § 217 (1964).

The Equal Pay Act prohibits an employer from discriminating "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, except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . ." [1"]

Invoking the enforcement provisions of the Act, [2"] the Secretary of Labor brought this action against defendants, Robert Hall Clothes, Inc. and Robert Hall Clothes Greenbank Corp., claiming that since June 13, 1964 they have discriminated against saleswomen on the basis of sex by paying them at rates less than those paid to salesmen for equal work. The Secretary sought an injunction against future violations and the withholding of back pay. [3"]

At all relevant times, defendant Robert Hall Clothes, Inc. (Robert Hall) has been a Delaware corporation with its main office in New York and defendant Robert Hall Clothes Greenbank Corp. (Greenbank) has been a Delaware corporation having its place of business on Greenbank Road, Wilmington, Delaware. Greenbank is a wholly owned subsidiary of Robert Hall Clothes of Jamaica, Inc., which in turn is a wholly owned subsidiary of Robert Hall.

Greenbank first opened for business in September, 1962. It was and still is engaged in the operation of a retail clothing store which sells men's and boys' and ladies' and girls' clothing and apparel.

Robert Hall, as agent for Greenbank and other similar subsidiaries operating elsewhere, has exercised overall management, authority and control over Greenbank and has established for Greenbank overall policies relating to working conditions, working hours, rates of pay and other employment practices.

The business activities of the defendant corporations are related and are performed through unified operation and common control and for a common business purpose. They constitute an enterprise

within the meaning of section 3(r) of the Fair Labor Standards Act. (29 U.S.C. § 203(r)).

The annual gross volume of sales of the enterprise is not less than $1 million. It purchases or receives goods for resale that move across state lines, amounting annually to $250,000 or more. The enterprise is engaged in commerce or in the production of goods for commerce within the meaning of section 3(s)(1) of the Fair Labor Standards Act. (29 U.S.C. § 203(s)(1)).

The men's and boys' department, and the ladies' and girls' department at Greenbank are contained in one building. All men's and boys' merchandise sold in the one-floor store is located in the men's and boys' department which is on one side of the store, and all ladies' and girls' merchandise sold in the store is located in the ladies' and girls' department which is on the other side of the store. The two departments are separated by a center aisle nine feet eight inches, running the length of the store from the front entrance to the cashier's desk. There are six ladies' dressing rooms located in the ladies' department and five men's dressing rooms located in the men's department.

There is a wrapping counter and a cashier booth at the rear of the store, and both cashiers and wrappers handle merchandise and service sales made by both salesmen and salesladies at this common counter. Similarly, there is a common stock room and receiving room where all merchandise for both ladies' and men's departments is received. There is the same approximate footage utilized for ladies' and girls' merchandise as for men's and boys' merchandise. The only customer entrance is the main entrance at the front of the store.

Sales personnel in the men's and boys' department (men's department) and sales personnel in the ladies' and girls' department (ladies' department) at the Greenbank store perform their activities under similar working conditions.

Neither the Equal Pay Act nor the decisions thereunder define "establishment" as used in the Act. The Administrator has interpreted the word to have the same meaning it has in § 213(a)(2) and elsewhere in the Fair Labor Standards Act. 29 C.F.R. § 800.103. Section 213(a)(2) has been interpreted by the Secretary in 29 C.F.R. § 779.304, which states:

The unit store ordinarily will constitute the establishment . . . The mere fact that a store is departmentalized will not alter the rule.

The interpretation of the Administrator of an Act is entitled to great weight. United States v. American Trucking Ass'ns., 310 U.S. 534, 549, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940); Roland Electric Co. v. Walling, 326 U.S. 657, 676, 66 S. Ct. 413, 90 L. Ed. 383 (1946); and see Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190, 205, 15 L. Ed. 2d 694, 86 S. Ct. 737 (1966). This is particularly true when the Administrator's interpretation, as here, represents the earliest contemporaneous construction of the statute by the authority charged with enforcing it. American Trucking Ass'ns., supra, p. 539.

Furthermore, in Phillips v. Walling, 324 U.S. 490, 496, 89 L. Ed. 1095, 65 S. Ct. 807 (1945) the court stated:

Congress used the word "establishment" in section 213(a)(2) as it is normally used in business and government -- as meaning a distinct physical place of business . . . .

When the above definitions are applied to the layout and operations of Greenbank, it is clear that both departments constitute a part of a single establishment within the meaning of 29 U.S.C. § 206(d)(1).

At the outset three substantive questions must be decided: (1) does the Act apply where the nature of the jobs makes it impractical for both sexes to work interchangeably; (2) are the rates of wages which Greenbank pays to saleswomen less than those paid to salesmen; and (3) do saleswomen and salesmen perform equal work. If these three questions are answered in the affirmative, a fourth question must be decided, namely, whether the wage differential is based upon any factors other than sex.

(1) Application of the Act to jobs which reasonably require performance exclusively by one sex.

The jobs performed by salesmen and salesladies, respectively, are not reasonably susceptible of performance by both sexes because of the nature of the jobs. One is a "male" job and the other a "female" job. Defendants have always had a policy of having only salesmen in the men's and boys' department because of the frequent necessity for physical contact between the salespersons and the customers which would embarrass both and would inhibit sales unless they were of the same sex. Often the salesperson is required to assist with opening zippers; to touch the body of a customer near private parts in connection with the measurements of the crotch, seat, waist, chest or inseam; to touch other areas of the body while assisting in the try-on of a garment, and to observe the customer in various stages of undress in connection with try-ons. The question arises whether the Equal Pay Act was intended to apply to jobs which require employment by one or the other of the sexes exclusively.

Defendants contend that in such circumstances the Act does not apply. They rely upon 29 C.F.R. § 800.114 which states in paragraph (b):

The legislative history of the Equal Pay Act expressly refers to the War Labor Board experience as furnishing a guide for testing "the relationship between jobs " and determining "equal work " and "equal skills " for purposes of a "practical" administration and application of the Act's "equal pay policy " (see, e.g., S. Rept. 176, 88th Cong. 1st sess., to accompany S. 1409; H. Rept. 309, 88th Cong. 1st sess., to accompany H.R. 6060).

Accordingly, defendants cite War Labor Board cases which they say by analogy support their

position. In Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1969), cert. den. 398 U.S. 905, 26 L. Ed. 2d 64, 90 S. Ct. 1696, however, the court held that the use of the War Labor Board cases as guiding principles for interpreting the Equal Pay Act is not warranted.

Section 800.114 notes that wage classification systems which designate jobs as male jobs and other jobs as female jobs may contravene Title VII of the Civil Rights Act of 1964,

except in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise. (29 C.F.R. § 800.114(a))

Defendants argue that the Administrator of the Equal Pay Act has thus recognized that a bona fide occupation qualification such as exists at bar was outside the contemplation of Congress when it enacted the Equal Pay Act. To interpret § 800.114 to mean that under no circumstances can a wage discrimination based on sex violate the Equal Pay Act unless it also violates the Civil Rights Act is not justified. The reference in § 800.114 to the Civil Rights Act is simply a caveat to employers that in certain circumstances violations of the Equal Pay Act may also impinge upon the Civil Rights Act. It is nothing more. Furthermore, the statement in § 800.114 that the Civil Rights Act does not reach situations where sex is a bona fide occupation qualification is at least questionable. 42 U.S.C. § 2000e-2(e) provides that it is not an unlawful employment practice for an employer to hire and employ employees on the basis of sex provided that sex is a bona fide occupational qualification. No such exception appears in § 2000e-2(h) which relates to compensation discriminations based on sex. Whether under the Civil Rights Act compensation discrimination can be justified upon the basis of sex for the reason that sex is a bona fide occupational qualification depends upon the interpretation of the Equal Pay Act. [4"] That is the question which must be determined without reference to the hiring and compensation practices permissible under 42 U.S.C. § 2000e-2(e) and (h), respectively.

Section 800.114 [5"] states that the Equal Pay Act was intended to cover both situations where male employees are replaced by females and where both sexes perform the same work concurrently and interchangeably. This interpretation of the Act by the Administrator is an affirmative declaration of practices violative of the Act. It cannot be read as limiting the coverage of the Act without disregarding the plain implications of the Equal Pay Act itself, as construed by the courts.

The wage rate discrimination at which the Equal Pay Act is aimed arises when substantially equal jobs are performed by male and female employees; the jobs need not be identical but only substantially equal. Shultz v. Wheaton Glass Co., supra, p. 265; Shultz v. American Can Co.-Dixie Products, 424 F.2d 356, 360-361 (8th Cir. 1970) and Hodgson v. Brookhaven General Hospital, 436 F.2d 719, 64 CCH Lab. Cas. 32,431 (5th Cir. 1970). The test for ascertaining whether the jobs are substantially equal is that prescribed by the statute as judicially interpreted, viz., whether they involve substantially equal skill, effort and responsibility. If they do, wage discrimination based upon sex is prohibited unless the discrimination is based upon one of the exceptions stated in § 6(d)(1) of the Act.

When properly read, the cases of Wirtz v. Muskogee Jones Store Co., 293 F. Supp. 1034 (E.D. Okla. 1968) or Shultz v. Kentucky Baptist Hospital, 62 CCH Lab. Cas. 44,117 (W.D. Ky. 1969) do not hold, as defendants argue, that no violation of the Equal Pay Act can exist if the jobs performed by male employees cannot be reasonably performed by female employees, or vice versa. The act has no such meaning.

(2) Pay Differential

Greenbank employs salesmen and salesladies who work regularly forty hours a week or more and salesmen and salesladies who perform their duties on a sporadic basis and work less than forty hours per week. The former are referred to as full-time and the latter as part-time employees. The full-and part-time sales employees in the men's department have always been exclusively male, and the full-and part-time sales employees in the ladies' department have always been exclusively female. When Greenbank opened in September 1962, it employed the following sales personnel: two full-time females, fifteen part-time females, four full-time males, and twelve part-time males. By January 1963, the number of full-time sales personnel was reduced to two: one man and one woman. It has since remained at that figure.

The number of part-time sales personnel was pared down gradually during 1962 and 1963. It has since varied between two and five part-time salesmen and two and five part-time saleswomen, depending on the season. At all times from the passage of the Act, the starting salaries for full-time salesmen at Greenbank have ranged between 21% and 55% higher than starting salaries for full-time saleswomen. The starting wage rate for part-time salesmen has likewise varied between 3% and 35% higher than that paid part-time saleswomen. See following Table 1: Table 1-Starting n6 Full-Time (per week) Part-Time (per hour) % by which % by which M F M exceeds F M F M exceeds F9/5/62-8/30/64 $65 $42 55% $1.42 $1.05 35%8/31/64-9/2/65 67 46 46% 1.47 1.15 28%9/3/65-1/31/67 67 50 34% 1.47 1.25 18%2/1/67-4/13/70 67 50 34% 1.47 1.25 18%4/13/70 75 62 21% 1.55 1.50 3%