IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,

Petitioner,

—v.—

CORNING GLASS WORKS, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-29

CORNING GLASS WORKS, a Corporation,

Petitioner,

—v.—

PETER J. BRENNAN, Secretary of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

RUTH BADER GINSBURG
MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

KENNETH M. DAVIDSON
State University of New York at Buffalo, School of Law
John Lord O'Brian Hall
North Campus
Buffalo, N. Y. 14250

Attorneys for Amici Curiae

INDEX

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

Federal Regulations:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,

Petitioner,

—v.—

CORNING GLASS WORKS, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-29

CORNING GLASS WORKS, a Corporation,

Petitioner,

—v.—

PETER J. BRENNAN, Secretary of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief *amici curiae.* Counsel for the petitioner in *Brennan* v. *Corning Glass Works,* #73-695, and for the respondent in *Corning Glass Works* v. *Brennan,* #73-29, have consented to the filing of this brief; counsel for the respondent in *Brennan* v. *Corning Glass Works, supra,* and for the petitioner in *Corning Glass Works* v. *Brennan, supra,* have refused consent.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus,* American Civil Liberties Union, believes that these cases concerning the rights of working women pose a legal issue of great significance to the achievement of full equality under the law between the sexes. At stake in these cases is the effectiveness of the Equal Pay Act in eradicating discrimination in pay based solely on sex.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving gender discrimination in employment. We acted as *amici curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), which involved automatic dependency benefits for the wives of servicemen, while servicewomen were required to prove that their husbands were dependent on them for more than half their support before they could qualify. This sex-based differential in employment benefits was held by this Court to constitute invidious discrimination in violation of the

fifth amendment. We also acted as *amici curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *La Fleur,* 42 U.S.L.W. 4186 (Jan. 22, 1974), in which the ACLU argued that regulations terminating the employment of public school teachers or requiring them to take unpaid leaves of absence before and after childbirth were unconstitutional. This Court held that regulations of the kind imposed by the Chesterfield County School Board and the Cleveland Board of Education violated the due process clause of the fourteenth amendment. Lawyers for the American Civil Liberties Union were counsel in *Struck* v. *Secretary of Defense,* 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted,* 409 U.S. 947 (1972), judgment vacated and remanded for consideration of mootness when the Air Force waived Captain Struck's discharge shortly after her brief was filed. The Brief for Petitioner in *Struck,* filed with this Court on December 8, 1972, discussed in detail the issues raised by the involuntary discharge of pregnant military officers, in particular, and of pregnant gainfully employed women, in general. With regard to the general problem of sex-based discrimination, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971).

The National Organization for Women is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000, with over 500 chapters throughout the United States. Its membership consists of large numbers of working women who are immediately affected by the Equal Pay Act.

NOW, since its inception, has sought enforcement of the Equal Pay Act as part of its efforts to achieve economic and employment gains for women. Basic to these efforts is the securing of equal pay for equal work for all women. The decision of this Court will have significant impact on large numbers of working women, including many members of NOW.

The purpose of this brief is to argue that a claim under the Equal Pay Act, 77 Stat. 56, 29 U.S.C. §206(d)(1), may not be barred at the threshold merely because it involves comparison of a job performed during the day and that same job performed at night. It is the position of *amici* that time of work is not a "working condition" as that term is used in the Equal Pay Act, and that even if time of work does constitute a "working condition," sex-based pay differentials of the kind here involved remain within the ambit of the Act. The brief develops that while time of work may constitute a valid basis for a wage differential under the Act, pay disparities that happen to fall along shift lines, but are occasioned by sex discrimination rather than time of work, fall squarely within the core concern of Congress declared and implemented in the Equal Pay Act.

RUTH BADER GINSBURG
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016
Attorney for Movants

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-695

PETER J. BRENNAN, Secretary of Labor,

Petitioner,

—v.—

CORNING GLASS WORKS, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-29

CORNING GLASS WORKS, a Corporation,

Petitioner,

—v.—

PETER J. BRENNAN, Secretary of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, *AMICI CURIAE*

Interest of *Amici*

The interest of *amici* appears in the foregoing motion.

Statement of the Cases

Amici incorporate the Statement of the Cases by the Petitioner in *Brennan* v. *Corning Glass Works*, #73-695, 480 F.2d 1254 (3d Cir. 1973), and by Respondent in *Corning Glass Works* v. *Brennan*, #73-29, 474 F.2d 226 (2d Cir. 1973).

Summary of Argument

The principal argument developed by *amici* is that a claim under the Equal Pay Act, 77 Stat. 56, 29 U.S.C. §206 (d)(1), may not be barred at the threshold merely because it involves comparison of a job performed during the day and that same job performed at night. Corning Glass Works ("Corning") has asserted a number of defenses in these actions in addition to the defense based on time of work; *amici* has addressed these other defenses first, to demonstrate that the only substantial issue before this Court is whether the Equal Pay Act permits Corning to perpetuate a "male" wage premium, which happens to fall along shift lines, but is unrelated to time of work. Thus the first two

points in the argument of *amici* ignore, for most purposes, the fact that inspection work is performed at night as well as by day; the argument initially developed is that (1) apart from the time factor, the Equal Pay Act clearly requires Corning to pay a uniform base wage rate to both men and women employed as inspectors, and (2) the uniform rate must be the "male" rate. *Amici* then argues that the legislative purpose and structure of the Equal Pay Act require that an action not be precluded solely on the ground that the action compares persons working during the day with persons working at night.

ARGUMENT

I.

Where two jobs receiving different pay are found equal, the Equal Pay Act requires pay equalization by raising the lower wage to equal the higher.

The work performed by the day and night inspectors at the Corning Glass plants is "equal work."[1] All courts that have considered this issue, both district courts and the United States Court of Appeals for the Second Circuit, have made findings to that effect. The study commissioned by Corning accords with this conclusion. Moreover, the Corning management apparently recognized that the work performed is equal when it established a uniform base rate in January 1969 for day and night inspectors.

---

[1] The effect of the time at which work is performed is considered under Points III and IV. For purposes of Points I and II it is sufficient to note that both *amici* and the Secretary of Labor concede that night work may constitute a valid basis for a wage differential. See 29 C.F.R. §800.145 (1971).

Corning maintains that it complied with the Act when in 1966 it permitted women to earn as much as men by becoming night inspectors. Had this case involved an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and were the day and night jobs considered to be different, opening the night jobs to women would have been an essential step toward an adequate response. But the work performed by the inspectors has been established to be equal, not different, and the Equal Pay Act requires that the wages paid to both day and night workers also be equal (apart from any genuine night shift differential).

Corning's reliance on the proviso to 29 U.S.C. §206(d)(1) which forbids "only" *lowering* wages to equalize pay (and according to Corning's argument does not require *raising* wages) is misplaced. The body of §206(d)(1) requires that wages be equalized. To equalize wages without lowering anyone's pay means that one sex's wages must be raised to the current level of the other's. The rationale for "equalizing up" is explicit in the statement of purpose supplied by Congress and implicit in its decision to place the Equal Pay Act within the Fair Labor Standards Act, 52 Stat. 1060 (1938). The Equal Pay Act Declaration of Purpose, Act of June 10, 1963, Pub. L. No. 88-38 §2, recording congressional findings and policy, indicates a legislative determination that wage differentials between the sexes for equal work exist because of the economic inability of one sex to resist exploitation. The remedy Congress provided was to require the employer to pay the employees the difference between the wages they receive at the exploitation rate and what they would have received had they

been paid a fair market rate, that is, had they been members of the opposite sex. The remedy is not to provide new employment opportunity; it is simply to end sex-based exploitation in wages. Thus Congress deemed it appropriate to equate the position of the lower paid sex with those who lacked bargaining strength to demand even the minimum wage, and to treat the differential in pay between the sexes as unpaid minimum wages. Under the Fair Labor Standards Act, an employer cannot justify having paid or perpetuating a depressed sex-based wage rate any more than he can justify having paid or continuing to pay a wage rate below the statutory minimum.

II.

Corning's 1969 introduction of a base wage rate did not equalize wages since the "male" premium was preserved for persons then working as inspectors on the night shift.

If the 1969 uniform wage rates had been instituted in 1966 it would have been clear that either equalization was not achieved or it was achieved by lowering the pay accorded males. The following hypothetical, using simplified wage rates, illustrates the point.

Wage Rates Prior to Equalization		Wage Rates After Equalization	
Women's Rate	$1.50	Women's Rate	$1.75
Men's Rate	$2.50	Men's Rate ..... (already hired)	$2.75
		Men's Rate ..... (newly hired)	$1.75

While no person's wages have been reduced (indeed the hypothetical wage rate for women has been increased), all women continue performing equal work at a rate less than that paid all men until the first new man is hired. Nor is retention of the higher wage rate for already hired men justifiable under Labor Department regulations as a "red circle" rate, for the regulations specifically preclude red circle status "where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work . . . . To allow this would only continue the inequities which the Act was intended to cure." 29 C.F.R. §800.146 (1971). Moreover, the rate paid newly hired males does not terminate sex-based wage depression. See *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 226-27 (7th Cir. 1972). Rather, it perpetuates a depressed rate for females and may exacerbate the situation by spreading disadvantageous treatment to men whose personal situation diminishes their job market opportunities.

The actions of Corning differ from the hypothetical case set out above in two respects: (1) when the rates were "equalized" some women were receiving the "male" rate because "equalization" was introduced after women became eligible to apply for night work; (2) when the wages were "equalized" in 1969 the new uniform rate was in excess of the 1966 "male" rate although less than the 1969 "male" rate. Neither of these differences establishes compliance with the Equal Pay Act.

The fact that some women are being paid at the "male" rate does not alter the sex-based character of the rate. See *Miller Brewing, supra,* 457 F.2d at 227. As noted in Point I, the Equal Pay Act was initially violated at Corning

plants because women were paid a lower rate for performing equal work. At that point it became the obligation of the employer to equalize the rates, which opening up the "male" rate classification to some women does not do. See *Shultz* v. *American Can Co.*, 424 F.2d 356, 359 (8th Cir. 1970). The higher rate does not cease to be a "male" rate until equalization is achieved, that is, until no woman inspector is paid the lower rate. If this were not so, employers could avoid all back pay liability under the Equal Pay Act by: reclassifying one woman to the male rate; establishing a new uniform rate equal to the former female rate; and red circling the wage rate of all male employees and the one lucky woman.

While Corning does not urge that the Act can be circumvented in the manner just described, it has suggested that because the 1969 "equalization" rate was higher than the 1966 "male" rate, its obligations under the Act are satisfied. So long as the sex-based differential is perpetuated, however, raising the female rate to the level of the former male rate does not achieve equalization. The 1969 elevation of the female rate may reflect no more than inflation. In any event, to allow that raise as a defense would transform an unlawful delay in taking steps towards achieving equalization into a method of complying with the Act. Moreover, an elevated female rate that remains below the current "male" rate fails to reflect the fair market rate that Congress presumed was represented in the "male" rate.

Further indicating that Corning's course of action perpetuated and even spread sex-based wage depression is the improbability that the 1969 uniform rate could have been imposed had it encompassed male inspectors then work-

ing on the night shift. Inclusion of these male inspectors almost certainly would have engendered formidable resistence. The male employees not subject to a generally discriminatory labor market are in a better position to assert their demands and, through concerted action, could make it difficult for Corning to do without them. By segregating employees who have the bargaining power to demand a fair wage, a company may gradually assemble a work force of persons whose personal situation or characteristics impel them to accept depressed wages. When the employees receiving the "male" rate are completely phased out, the employer will have transformed a competitive wage into a depressed rate in an orderly, rather than disruptive, manner due to the time afforded by gradual phaseout of the "male" wage rate. The end result may be that the jobs are held only by those who encounter discrimination in the labor market. By contrast, if Corning is required to raise all wages to the new "male" rate the jobs would continue to be attractive to those with more marketable personal characteristics, persons equipped to resist lowering wages to an exploitation level.

Corning has asserted that equalizing up to the "male" rate entails a heavy cost. That is both true and irrelevant. When exploitation ceases and fair value is paid the cost is always greater, but cost factors do not excuse an employer from paying the minimum wage, nor do they excuse wage exploitation of women.

Finally, Corning asserts that judicial alteration of the collective bargaining agreement will disrupt industrial relations. Where, as here, that agreement perpetuates unlawful discrimination the agreement is no defense. Con-

gress has specifically forbidden labor organizations to foster such discrimination, 29 U.S.C. §206(d)(2), and the courts have held them liable under the Equal Pay Act. See, e.g., *Hodgson* v. *Baltimore Regional Joint Board,* 462 F.2d 180 (4th Cir. 1972).

III.

Consistent with the dominant intent of Congress to eliminate sex-based wage differentials, time of work under the Equal Pay Act should be considered a wage "factor other than sex" rather than a non-"similar working condition".

Both parties and the Courts of Appeals for the Second and Third Circuits agree that time of work may constitute a valid basis for a wage differential. See 29 C.F.R. §800.145 (1971). These cases do not involve that issue. The actions brought by the Secretary of Labor against Corning Glass are based solely on a premium paid over and above the shift differential. As Chief Judge Friendly said below:

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. 474 F.2d at 233.

The issue in these cases is whether pay differentials which happen to fall along shift lines, but are attributable to sex discrimination rather than time of work, may be attacked as violations of the Equal Pay Act.

The Third Circuit concluded that time of work constitutes a "working condition"; it further concluded that this characterization placed Corning's wage pattern beyond the pale of the Equal Pay Act. 480 F.2d at 1261. The Second Circuit ranked time of work as a factor that did not exclude application of the Equal Pay Act, but recognized that shift differentials could be defended under the Act if "based on any other factor other than sex." Chief Judge Friendly, writing for the Second Circuit, observed that the term "working condition" has an accepted technical meaning in industrial relations which apparently does not include time of work. 474 F.2d at 231-32. He also noted that Corning's internal job evaluation reports do not treat time of work as a "working condition" and that in congressional hearings on the Equal Pay Act concerning "working conditions," neither the representative of Corning Glass nor representatives of other industries mentioned time of work as a "working condition." *Ibid.* He therefore concluded that Congress did not intend time of work to be defined as a working condition. Judge Adams, writing for the Third Circuit, reached the opposite conclusion relying primarily upon a syntactic analysis of a statement on the floor of the House of Representatives. 480 F.2d at 1260.

These different characterizations of time of work assumed pivotal importance because Judge Adams and Chief Judge Friendly agreed that if time of work constituted a "working condition," then the jobs at Corning would not be comparable under the Equal Pay Act unless the Secretary of Labor could prove that night is day. The position of the Third Circuit, that even blatant sex-based wage discrimination is immune from challenge under the Act if

the sexes work on different shifts, would create a coverage gap of potentially enormous proportion. For example, an employer would have no Equal Pay Act problems if he put women to work from midnight to 8 a.m., and from 8 a.m. to 4 p.m. at a rate of two dollars an hour, and hired men for the 4 p.m. to midnight shift at a rate of four dollars an hour. Or the employer might transfer women from the day shift to the evening shift, retaining their pay rate at two dollars an hour, and men from the evening shift to the day shift, retaining their pay rate at four dollars an hour. These are extreme examples, but they are no more improbable than the contention of Corning that Congress did not mean to outlaw such discrimination. If the Second and Third Circuits are correct in their view of the effect of classifying time of work as a "working condition," then the Second Circuit must be correct that shift differentials rank as an exception to the Act only to the extent that the employer establishes they are "based on any other factor other than sex."

IV.

Even if time of work is considered a "working condition" the Equal Pay Act remains applicable to the wage differential challenged in the instant cases.

A. *The Third Circuit failed to consider the consistency of its holding with the purpose of the Equal Pay Act.*

In the concluding portion of his opinion for the Third Circuit, Judge Adams stated:

> Recognizing that the pursuit of intent and meaning in the words of congressional committees and individual legislators may seem to some like exploring a quagmire or, perhaps, fathoming a mirage, we have been cautious against injecting whatever notions of public policy we might have into the interstices of the Equal Pay Act. 480 F.2d at 1261.

If Judge Adams meant only that he and the members of his panel resisted the temptation to decide the case on the basis of their personal preferences, the statement would be unexceptionable. But examination of the opinion suggests that he may have meant something more—that the purpose of the Act should not be considered in determining the meaning of particular statutory words because public policy is too difficult to discern from legislative history. Yet Judge Adams plunged into the quagmire to locate a definition for "working condition." His search disclosed a definition of these words in isolation from the general context of the statute. Judge Adams then embraced that definition without pausing to consider its consistency with the dominant purpose of the legislation.

Even if Judge Adams correctly labelled the time factor a "working condition," however, it was incumbent upon him, before disposing of the case, to consider the values Congress balanced when it enacted the Equal Pay Act. The opinion does not do that. Much space is devoted to the court's location of a definition for "working condition," but the effect of the definition selected on the outcome of the case is decided in a single sentence quoted from the district court opinion:

> Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not "very much alike" or "alike in substance or essentials." 480 F.2d at 1261.

At no point does the opinion consider whether the Congress that passed the Equal Pay Act rationally could have intended to insulate blatant sex-based wage differentials from attack so long as the differential falls along shift lines. The court avoided this inquiry, apparently fearing that it might lead to judicial hypothecation of policy from delphic legislative history. But the policy at issue here is not at all obscure; beyond question, Congress desired to outlaw sex-based wage differentials for equal work. Equal Pay Act of 1963, 77 Stat. 56, §2(b). And if the abuse charged falls squarely within the core concern of Congress, the statute must be construed to secure termination of the abuse.

B. *The structure and purpose of the Equal Pay Act indicate that the Secretary established a prima facie violation in these actions.*

Corning's argument ultimately rests on the proposition that a single difference in working conditions precludes wage comparison of otherwise identical jobs under the Equal Pay Act. But the notion that any difference bars the Secretary from establishing a prima facie case has been almost uniformly rejected with respect to the functionally similar issue of what constitutes "equal work." See Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. U. L. Rev. 326, 339-41 (1971).

From the inception of the Equal Pay Act, courts have agreed that plaintiffs must demonstrate a sex-based pay differential in jobs that require "equal skill, effort and responsibility" performed under "similar working conditions"; until the plaintiff discharges this burden, the defendant need not justify his conduct. Nevertheless, commencing with the earliest appellate decisions, courts have held plaintiff's burden satisfied despite obvious differences in the jobs performed by each sex. For example, in *Shultz* v. *Wheaton Glass Co.,* 421 F.2d 259 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970), the court held that even assuming the sexes performed different work for as much as 18% of their work day, a claim under the Equal Pay Act was well founded. Similar determinations were made in *Brennan* v. *City Stores,* 479 F.2d 235 (5th Cir. 1973) (wage comparison between males who sold, marked and fitted men's clothes, and females who sold, marked and fitted women's and children's clothes), and in *Hodgson* v. *Daisy Mfg. Co.,* 317 F. Supp. 538 (W.D. Ark. 1970), *reversed in part for failure*

to award prejudgment interest, 445 F.2d 823 (8th Cir. 1971) (women processed many small items; men, heavier items, fewer in number). In these cases, the courts relied both on congressional choice of the word equal (rather than the word identical) as a modifier of the word work, see, e.g., *Shultz* v. *Wheaton Glass Co., supra,* 421 F.2d at 265, and on the broad aims proclaimed in the statute and by its sponsors. *Id.* at 265-66.

As is apparent from these decisions, the judiciary has resisted employer arguments focused on work variations that, if accepted, would have undermined the effectiveness of the Equal Pay Act. At the same time, courts have eschewed exploration into employer motivations for establishing work differences. For a motivation-centered approach would have embroiled them in determining as a matter of fact in each case an issue that does not lend itself to resolution through direct, objective evidence. Moreover, a finding of nondiscriminatory motivation for establishing a work difference could not serve as a complete defense if the Act is to be applied in a manner consistent with the congressional decision to modify the word "work" by "equal" instead of "identical." Thus, courts have relied on objective proof of work similarities but have not held plaintiffs to a standard of work identity. Of course, the corridor was not opened wide for wage comparison of dissimilar jobs. In *City Stores, supra,* where different fashions were handled by male and female employees, the court required the Secretary to show a "congruence" of skills as an essential element of his case. 479 F.2d at 239. In *Daisy Mfg., supra,* where the women worked on lighter items, it was the Secretary's burden to show that the higher volume and greater mental exertion demanded of the women required at least as much effort. 317 F. Supp.

at 544. And in *Wheaton Glass, supra,* the Secretary established that at least 82% of the work was identical. 421 F.2d at 263.

The reasons for the approach taken with respect to "equal work" apply with the same force to "similar working conditions." For the very same risks of undermining the Act are entailed in a rigidly restrictive proof requirement concerning working conditions. As already illustrated, time of work, even entire shifts, can be manipulated to achieve sex-based wage discrimination. Indeed, if, as Corning has argued, the work time must be identical, less elaborate schemes would suffice to insulate an employer's wage discrimination from Equal Pay Act scrutiny. For example, a wage differential could be preserved for the favored sex simply by extending the work day for that sex by a quarter of an hour.

In sum, in view of the potential for crippling the Equal Pay Act inherent in allowing differences in time of work to block any application of the Act, the Secretary must be held to have established a prima facie case where, as here, he has shown the sex-based character of the wage differential and an overall congruence of the requirements of the job. In this manner, differentials in fact attributable to time of work could be preserved, but sex-based differentials would be eliminated.[2]

[2] The obligation of the judiciary to construe the Equal Pay Act in light of congressional purpose cannot be brushed aside by pointing to the potential of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, as a weapon against sex discrimination in employment. Congress hardly intended to dilute legislation that has as its special and exclusive focus gender-based wage depression when it added sex to the Title VII catalogue. In addition to the different central thrust of the two Acts (Title VII is designed primarily to open job opportunities to groups that once faced closed doors), the Equal Pay Act has unique features, for example, anonymous complaints, that make it attractive to persons who might be reluctant to pursue a claim under Title VII.

C. *The Secretary's proof was sufficient to support a determination that Corning's "male" premium for night inspectors was unjustified under the Equal Pay Act.*

Case law noted in the preceding section has established that apparent work differences between wage classifications do not preclude equal pay review. To avoid liability under the Act, employers must show that the wage classification is related to the work difference. Thus, while the bald argument that time of work makes the wage classifications noncomparable should not succeed, an employer may justify a shift differential by showing that it is in fact attributable to time of work rather than to the sex of employees who perform the work.

In each of the cases noted earlier it was open to the employer to show that the work difference justified the pay differential. For example, in *Wheaton Glass, supra,* the employer's liability would have been avoided or diminished by proof that the time men worked at tasks different from those performed by women yielded greater economic gain to the company than the time spent at tasks performed by both sexes. See 421 F.2d at 266-67. And in *Brennan* v. *Robert Hall,* 473 F.2d 589 (3d Cir.), *cert. denied,* 94 S. Ct. 50 (1973), a case similar to *City Stores, supra,* a successful defense was predicated on the greater profit to the employer produced by sale of men's clothing.

Defenses of the same kind are available to an employer whose pay differentials turn on time of work. It is generally recognized that night work entails inconveniences for an employee in a world in which most people work by day. Thus, the Secretary's regulations recognize the

legitimacy of a differential for night work. See 29 C.F.R. §800.145 (1971). In exceptional cases an employer might even be justified in paying persons on the day shift a wage higher than the one paid to persons of the opposite sex who work the evening shift. For example, a bar owner might pay day employees higher wages, recognizing that bar personnel prefer to work evenings when tips are higher.

When an employer establishes that some differential is justified under the Act, it may be that the Secretary must then carry the burden of showing that the differential involved in the particular case is excessive. But where no attempt is made by the employer to justify any differential, the court must conclude that the Act has been violated.

That is the situation in the cases before this Court. The "male" premium (the amount above the base rate and the night shift differential) paid to "red circled" night inspectors cannot seriously be argued to be a night shift differential. If it were it would be paid to all night inspectors and would probably bear some relation to night shift differentials for other jobs at the plant. If the premium represented compensation for inconvenience to the employees or benefit to the company, Corning could justify at least part of the pay differential between those who receive the "male" premium and those who do not. See Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. Cin. L. Rev. 615, 629-31 (1970). But no justification at all has been urged, nor could one be formulated, because the premium is simply the current incarnation of the male rate of pay for night inspectors; thus Corning should be held liable for paying unequal wages for equal work performed under similar circumstances.

CONCLUSION

In construing Title VII of the Civil Rights Act of 1964 this Court has rejected arguments that would have sapped the Act of vitality. For example, in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971), the Court held that even though the company's policy affected only women with pre-school children, the policy entailed sex-based discrimination and could be justified only on grounds specified in the Act. And in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court rejected a reading of the Act that would have required plaintiff to prove defendant's motivation; instead the Court held sufficient plaintiff's proof that defendant's practice caused disproportionate numbers of black employees to be eliminated from consideration for promotion. In those cases, as in this one, the legislation provided a fair basis for the protection of legitimate employer interests. In those cases, as in this one, the arguments pressed by employers exposed the congressional design to the risk of destruction.

For the reasons stated above *amici* urge the Court to safeguard the effectiveness of the Equal Pay Act by affirming the judgment of the Court of Appeals for the Second Circuit and reversing the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

KENNETH M. DAVIDSON
State University of New York at Buffalo, School of Law
John Lord O'Brian Hall
North Campus
Buffalo, N. Y. 14250

Attorneys for Amici Curiae

March, 1974