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BANKS AND THE EQUAL PAY ACT: ESTABLISHING A BONA FIDE MANAGEMENT TRAINEE PROGRAM

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I. INTRODUCTION

There is probably no subject more sensitive to an employer today than "discrimination." The mood of the country and the "persuasive encouragement" of legislation and governmental enforcement, are making employers acutely aware of their obligation to eradicate any type of discrimination in the hiring, paying, promotion and termination of any of their employees. The Equal Employment Opportunity Commission, in its enforcement of Title VII of the Civil Rights Act and the Equal Employment Opportunity Act,[1] acts as the vanguard on many of the attacks on discrimination due to race, creed, religion, or national origin.[2] However, there is another form of discrimination which is equally as pervasive, devastating, deep-rooted, and antithetic as any of the other forms: sex discrimination.

II. SEX DISCRIMINATION

The basis of the Equal Rights Amendment[3] is to provide equal rights with corresponding equal obligations to men and women.[4]

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1. 42 U.S.C. § 2000e *et seq.* (1964). This encompasses Title VII of the Civil Rights Act of 1964 and its amendments from the Equal Employment Opportunity Act of 1972.

2. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Strain v. Philpott, 331 F. Supp. 836 (M.D. Ala. 1971); Guzman v. Polich & Benedict Constr. Co., 62 CCH LAB. L. REP. ¶ 9385 (C.D. Cal. 1970); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971); *cf.* Clay v. United States, 403 U.S. 698 (1971).

3. *See generally*, Freund, *"The Equal Rights Amendment is Not the Way"*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234 (1971); Murphy, *Sex Discrimination in Employment - Can We Legislate a Solution?*, 17 N.Y.L.F. 437 (1971); Comment, *Discrimination & Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

4. Murphy, *Sex Discrimination in Employment - Can We Legislate a Solution?*, 17 N.Y.L.F. 437 (1971).

While the effects of the amendment have not been completely tabulated, essentially, it should at least do the following: 1) equalize property rights of men and women; 2)

Few people are aware that an "Equal Rights Amendment has been introduced in every Congress since 1923."[5]

The intensity of the campaign for equal rights for both sexes, particularly for those rights relating to employment, is probably in direct proportion to the number of females in the total labor force of the United States.[6] World War II, and its high demand for men in the military, contributed to the number of women in the civilian labor force at that time. Since that period, however, the growth has been primarily due to a fundamental change in the attitude of married women and their expectations toward men, work, and life.[7] Unfortunately, this change in attitude among women did not result in a corresponding change among employers.[8] The traditional practice of sexual segregation remained entrenched.[9] While it was natural to assume that some differential in compensation was due to different job selection, the fact remained that similar discrepancies appeared in those occupations which included both men and women.[10] These considerations prompted a legislative solution to the problem.

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require women to serve on juries and in the military; 3) remove labor protective laws which restrict hours, weight-lifting limits, and other conditions of female employment; 4) alter the presumptions and benefits accorded to women in family and divorce cases; 5) eliminate all-male and all-female institutions such as schools, colleges and military academies; 6) equalize benefits and obligations under the Social Security Law and various state laws; 7) remove sex as a qualification for any employment position; and 8) remove any prohibition regarding marriage between persons of the same sex. *Id.* at 438, n.6.

5. Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 236 (1965). Yet, the proposed Constitutional amendment has not yet been ratified by the requisite number of states.

6. Since the turn of the century, the percentage of women in the total labor force has risen from approximately 18% to approximately 40% by the current year. Economic Report of the President, 91, Table 21 (1973).

7. Waldmen, *Changes in the Labor Force Activity of Women*, 93 MONTHLY LAB. REV. 10, 11 (1970).

8. Ross & McDermott, *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. IND. & COM. L. REV. 1 (1974).

9. Though sex-based stratification of economic roles may to some extent reflect the socially conditioned desires of men and women themselves, there can be little doubt that there has been considerable employer resistance to the job applicant seeking employment in a position that tradition, collective bargaining agreement, or law had marked out as the exclusive preserve of the opposite sex.

Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 307 (1968).

10. For example, female school teachers consistently received only 75% of their male counterparts' earnings. *See* Ross & McDermott, *supra* note 10, at 3. Further, Department of Labor surveys suggested that male tellers in banks were paid from $5.50 to $31 per week more than females occupying similar positions. *Id., citing Hearings on H.R. 8898 and H.R. 10226, Define the Select Subcomm. on Education & Labor*, 87th Cong., 2d Sess. 66-67 (1962).

III. THE EQUAL PAY ACT OF 1963

Although efforts to secure federal equal pay had been brewing in Congress since 1945,[11] it was not until June 10, 1963 that President Kennedy signed into law the Equal Pay Act of 1963[12] as an amendment to the Fair Labor Standards Act of 1938, as amended.[13] The purpose of the Equal Pay Act was to put some force behind the proposition that two persons, regardless of sex, performing equal work should receive equal pay.[14] Thus, to invoke the Equal Pay Act, the two affected workers of the opposite sex must be performing work which requires equal skills, effort, responsibility, and performance under similar working conditions. In carrying out its obligation to administer and enforce the Equal Pay Act, the Department of Labor has promulgated certain administrative regulations[15] which

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11. *See generally*, Ross & McDermott, *supra* note 10, at 4-5.

12. 29 U.S.C. § 206(d) (1964). In signing the bill into law, President Kennedy made the following observations concerning the need for such legislation:

> [T]he average woman worker earns only 60 percent of the average wage for men . . . . Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of children . . . and for the protection of the family unit . . . . The lower the family income, the higher the probability that the mother must work. Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year - many of them much less. I believe they bear the heaviest burden of any group in our nation. Where the mother is the sole support of the family, she often must face the hard choice of either accepting public assistance or taking a position at a pay rate which averages less than two-thirds of the pay rate for men.

21 CONG. Q. 978 (1963), cited in Ross & McDermott, *supra* note 10, at 5-6.

13. 29 U.S.C. § 201-19 (1964). Specifically, it provided at 29 U.S.C. § 206(d)(1) (1964):

> 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 skills, 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 productions; 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.

14. *See generally*, Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 U. CIN. L. REV. 615 (1970).

15. 29 C.F.R. § 800 *et seq.* (1973). 29 C.F.R. § 800.2 states in relevant part:

> The interpretations of law contained in this part are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss . . . . They indicate the construction of law which the Secretary of Labor and the [Department of Labor] believe to be correct

interpret the above criteria.[16] Employers learned early that it was not easy to discriminate in pay based on those factors. Litigation soon made it clear that *equal* did not mean *identical*;[17] it was sufficient if the job only required *substantially* the same degree of skill, experience, and responsibility.[18] Accordingly, incidental and occasional performance of differing job requirements did not exempt the situation from the Equal Pay Act and did not justify a pay differential.[19]

The Equal Pay Act can be enforced by three methods: (1) criminal indictments; (2) government civil litigation; and (3) private civil litigation. Under its enforcement provisions, criminal proceedings can be instituted for wilful violations of the Equal Pay Act.[20]

In the typical case, the Department of Labor attempts a conciliation of the problem which normally includes an award of back pay. If its attempts to conciliate are unsuccessful, the Department of Labor administrator is authorized to bring an action in federal district court seeking a mandatory injunction for the payment of equal wages and back wages for the aggrieved employees.[21]

If the Department of Labor does not institute suit and notifies the aggrieved employees that they have the right to sue the employer, then any aggrieved employee may file a private suit for recovery of (1) unpaid back wages, (2) an amount equal to the unpaid back wages as a civil penalty or as liquidated damages, including (3) reasonable attorneys' fees and court costs.[22]

In the civil litigation, there is an additional provision which plays an important role in determining how the employer reacts to an "Equal Pay" charge. That provision prohibits an employer who is paying a wage differential in violation of the Equal Pay Act from

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and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

16. Under these regulations, *skill* means "experience, training, education, and ability" pertaining to the particular job. 29 C.F.R. § 800.125 (1973). Effort means "the measurement of the physical or mental exertion needed for the performance of a job." 29 C.F.R. § 800.127 (1973). Responsibility means the amount of "accountability required in the performance of the job, with emphasis on the importance of the job obligation." 29 C.F.R. § 800.129 (1973).

17. Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049, 1052 (E.D. Ky. 1967).

18. *Id.*

19. *Id.*

20. 29 U.S.C. § 216(a) (1964). For the first offense, the penalty is a fine not to exceed $10,000; for the second and succeeding convictions, a similar fine and/or up to six months' imprisonment may be imposed.

21. 29 U.S.C. § 217 (1964).

22. 29 U.S.C. § 216(b) (1964).

reducing the wage rate of any employee in order to comply with the law.[23] Obviously, compliance may be very expensive for an employer who is faced with a substantial back pay award and a prospective requirement for an indefinite time of a substantially increased payroll. This factor alone will often compel an employer to seek complete vindication even though in other instances he might have been willing to negotiate a settlement.[24] However, until tempered by judicial fiat or legislative modification, the "all or nothing" prescription seems to necessitate an unyielding defense.

IV. Application of the Equal Pay Act to Banks

The banking industry has been significantly affected by the Equal Pay Act.[25] The particularly troublesome job classification in the bank is that of teller.[26] Any time a bank has paid a male teller more than a female teller, it becomes vulnerable to investigation, if not litigation, for an alleged violation of the Equal Pay Act. Some litigation involving banks has centered on whether the pay differential can be justified on additional responsibility, skills, or efforts.[27]

One exception to the application of the Equal Pay Act's provisions has been for a "factor other than sex" which has been interpreted to include a bona fide training program. The administrative interpretative regulations provide that employees engaged in bona fide training programs may rotate among various jobs even though he/she may be receiving a wage differential from other employees in each of the various jobs.[28] Despite the simple parameters for

23. 29 U.S.C. § 206(d)(1) (1964). Although a similar provision exists in equal pay acts in ten states, there are an additional thirty-five states in which there is no such prohibition. *See generally*, Landan & Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 Drake L. Rev. 417 (1971).

24. This factor appears in practice to be a sensitive area in the Equal Pay Act. The Act provides no flexibility for settlement as to back pay or to future pay. For a more complete discussion, see text accompanying notes 84-94, *infra*.

25. As of mid-1971, banking institutions employed 645,000 women—63% of all bank employees. Moran, *Equal Pay for Women*, 63 Banking 28 (June 1971).

26. "Banks employ approximately 200,000 tellers. About seven out of ten are women." *Id.* at 29.

27. *See, e.g.*, 29 C.F.R. § 800.148 (1970); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969); Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972).

28. Interpretative Regulation § 800.148 provides in relevant part as follows:

> Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. At such times, the employee in a training status may be performing equal work with non-trainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under the circumstances, provided the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential

judging the validity of the training program, specific factual situations have generated many other factors which the courts have used to evaluate whether a particular bank's proffered "training program" does so qualify.

The application and scope of the Equal Pay Act was subjected to much litigation in order to have a judicial determination of the parameters of the Act's coverage.[29] In *Shultz v. Wheaton Glass Co.*,[31] Wheaton, over an extended period, had employed only male "selectors-packers," *i.e.*, individuals who select out defective bottles and pack acceptable bottles into packing cartons. Subsequently, the position of "female selector-packer" was created; this employee received less than her male counterpart, but she was not permitted to lift certain cartons in excess of 35 pounds.[32] In addition, the company claimed that the male employees performed several additional tasks.[33] In reviewing the situation in light of the Equal Pay Act, the Third Circuit examined legislative intent and concluded that the Act in prescribing equal pay for equal work did not require identical work, but only "that they must be substantially equal."[34] This rule obviously blocked avoidance of the Act's application by the creation of artificial job classifications. It also paved the way for an effective enforcement of the administrative interpretations and clearly put the burden on the employer to establish that any disparity was due to substantially different jobs, not merely technically different jobs.

More than ten years after the enactment of the Equal Pay Act, the Supreme Court affirmed in *Corning Glass Works v. Brennan*[35]

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can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result. Training programs which appear to be available only to employees of one sex will, however, be carefully examined to determine whether such programs are, in fact, bona fide. In an establishment where a differential is paid to employees of one sex because, traditionally, only they have been considered eligible for promotion to executive positions, such a practice, in the absence of a bona fide training program, would be a discrimination based on sex and result in a violation of the equal pay provisions, if the equal pay standard otherwise applies.

29. *See, e.g.*, Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973); Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970); Shultz v. American Can Co.-Dixie Prod., 424 F.2d 356 (8th Cir. 1970); Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972); Hodgson v. Square D Co., 459 F.2d 805 (6th Cir. 1972).

30. 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

31. 421 F.2d at 262.

32. *Id.*

33. *Id.* at 262-63.

34. *Id.* at 265.

35. 417 U.S. 188 (1974).

the goal of the Act by providing that "equal work will be rewarded by equal wages."[36] It also recognized that putting substance into the phrase "performed under similar working conditions" required an acknowledgement that the government should not be second-guessing the employer's job evaluation system; but neither should the government permit a thinly-veneered "job evaluation" to be used to avoid the effect of the Equal Pay Act.[37] A fortiori, bona fide classifications and programs were permissible exceptions to the act, but if the government attacked their validity, the burden was on the employer to justify them.[38] It was that concept, applied to the recognized exception of bona fide training programs which created the litigation for many banks, investigations for still more banks, and raised questions that all banks should consider.

The first litigation involving bank management trainee programs and the Equal Pay Act was *Shultz v. First Victoria National Bank*.[39] This action involved that bank and the American Commerce Bank. The issue was: Were women bookkeepers and tellers receiving substantially less in wages than male employees for performing the same work?[40]

The trial court dismissed the complaint, concluding that a bona fide training program existed. On appeal, the bank's primary defense was its "management training" program. The circuit court rejected this defense in its entirety:

> The training programs . . . were informal, unwritten, and, if not imaginary, consisted of little more than the recognition of the ability of employees to work their way up the ranks . . . . The rotation of the 'trainee' has apparently been unpredictable, sporadic and unplanned. The time spent in each department varied widely and was in fact based not upon any concept of training but upon the bank's personnel needs.[41]

Indeed, when male employees were hired, the vice-president in charge of personnel did not know if that employee would be "trained" as an officer; yet, male employees were hired at substantially higher pay rates than were their female counterparts.[42] It was clear that there were no objective definitions of the so-called train-

36. *Id.* at 195.
37. *Id.* at 200-04.
38. *Id.*
39. 420 F.2d 648 (5th Cir. 1969).
40. *Id.* at 650-51.
41. *Id.* at 654-55.
42. *Id.* at 655.

ing programs.[43]

The court was wary that any statutory exception, unless narrowly construed, would dissipate the intent, if not the clear statutory language of the Act by permitting "the exception to swallow the rule."[44] Accordingly, the court reversed and remanded, holding that no bona fide management training program existed, and that the differential in pay was not due to a factor other than sex.[45]

On remand, the district court in *First Victoria Bank* found that some male employees were paid more for performing as commercial tellers than were certain female employees;[46] however, the Government's arguments that this disparity constituted a violation of the Act were again rejected. The court found that certain disparities were due to unequal work assignments.[47] The court also found that the bank had a bona fide merit promotion system which was nondiscriminatory.[48] It is significant that in approving the merit promotion system, the court took into account the fact that female employees had additional personal demands which affected their promotion within the bank.[49] On remand a substantial number of the Government's arguments and victories in the prior court of appeals case were unquestionably weakened. The Government appealed, but the Fifth Circuit affirmed.[50]

The issues involving the American Bank of Commerce were resolved in a separate remand.[51] The trial court again reviewed all

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43. [T]he training program . . . were not specified and their metes and bounds were at best poorly surveyed. As structured and operated it was little more than a post-event justification for disparate pay to men and women from the commencement of employment throughout advancement. The training was essentially the acquiring of skills and experience and knowledge of the business through continued performance of regular tasks. In this sense every job in every type of business would be training, and nothing would be left for the operation of the Interpretative Bulletin Training Program. *Id.* at 655-56.

44. *Id.* at 657; *see also* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

45. *Id.* at 659.

46. Wirtz v. First Victoria Nat'l Bank, 63 CCH LAB. L. REP. ¶ 32,378 (S.D. Tex. 1970).

48. The evidence is undisputed that the officers and directors of the bank held quarterly meetings for the purpose of evaluating the service of the various employees; the officers in charge of the various departments expressed their views as to the competence, the interest and the value to the bank of the employees in question. *Id.*

49. It is undisputed that many of the female tellers were married women, with small children. Their personal and domestic demands were such that they did little more than put in the allotted number of hours at the bank. The two male employees in question, as well as certain of the female employees, showed more aptitude, more interest, and more diligence. They were promoted from time to time and ultimately were made officers. *Id.*

50. Hodgson v. First Victoria Nat'l Bank, 446 F.2d 47 (5th Cir. 1971).

51. Wirtz v. American Bank of Commerce, 64 CCH LAB. L. REP. ¶ 32,400 (S.D. Tex. 1970).

the employees, their duties and their pay scales. The court found that the male employee was typically paid more than some female employees, but less than others.[52] The court concluded that any disparity in pay was not due to sex discrimination.[53] The Government appealed and the Fifth Circuit affirmed in part and reversed in part.[54] The findings which were reversed were those in which the district court had found (1) some pay disparity, but allegedly not a sufficient disparity to constitute a violation and (2) that the Government's statistical evidence was insufficient to establish sex-based discrimination.[55] The court concluded that any disparity, no matter how small, constitutes a violation and the Government is entitled to its remedy.[56] Additionally, it is not the Government's burden to justify its statistics; it need only establish a disparity; the employer must then justify the difference in pay structure.[57]

As to male employee "Smith," the bank had attempted to justify the wage differentials because the employee performed "additional duties," specifically supervisory duties.[58] The district court found the evidence to be minimal since these duties were infrequent and insignificant in time[59] and, therefore, found a violation of the Act.[60]

Following *American Bank of Commerce* and *First Victoria National Bank*, the next bank management trainee case appeared in *Hodgson v. Security National Bank*,[61] in which female employees in the paying-and-receiving teller cages received less than male so-called "management trainees."[62] The bank went so far as to stipu-

52. *Id.* at ¶ 44,459.

53. *Id.* at ¶ 44,460.

54. Hodgson v. American Bank of Commerce, 447 F.2d 416 (5th Cir. 1971).

55. 447 F.2d at 419-20.

56. *Id.* at 420. "Any differential in the wages paid to the respective sexes is prohibited by the Act unless adequately justified under one of its statutory exceptions." *Id. See also, e.g.*, Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) ($0.215/hr. differential); Wirtz v. Basic Indus., 256 F. Supp. 786 (D. Nev. 1966)($0.15/hr. differential).

57. 447 F.2d at 420; *see also, e.g.*, Shultz v. American Can Co.-Dixie Prod., 424 F.2d 356 (8th Cir. 1970); Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257 (E.D. Wis. 1970); Wirtz v. Muskogee Jones Stone Co., 293 F. Supp. 1034 (E.D. Okla. 1968).

58. 447 F.2d at 422.

59. Smith supervised the cashing of checks, helping other tellers balance out, and was a general "trouble shooter." *Id.*

60. *Id.* at 423. The only portion of the opinion which was affirmed was that portion relating to one male teller who was performing both bookkeeping duties and teller duties to such an extent that the court concluded he was performing sufficient additional work to justify a wage differential.

61. 460 F.2d 57 (8th Cir. 1972).

62. *Id.* at 58.

late that the work performed was equal with respect to skill, effort, responsibility, and working conditions.[63] The facts reveal that a male with one year of college and no banking experience was hired at a higher rate than one female college graduate with some banking experience.[64] The bank based its argument on the theory that the male employees were management trainees and thus the differential was due to a factor other than sex.[65]

The difficulty with the bank's position was its lack of objective support and questionable evidence for its gossamer management trainee program. For example, it contended that only men entered the management training program because women characteristically had been uninterested in the management positions.[66] Further, the program had little formal structure. There was testimony that qualified applicants for the management trainee position would train as paying-and-receiving tellers by rotation for a period of eighteen to twenty-four months after which time they "might" be transferred into a management position.[67] The bank's case was perhaps further weakened by its tacit admission of a violation when it was revealed that eight months after the Department of Labor started its investigation the bank prepared a formal written description of its management trainee program. The Eighth Circuit ruled against the bank on almost all issues. Specifically, the court noted the following as significant:

1. The training program was not open to both sexes.[68]
2. Rotation among tellers was geared[69] to the needs of the bank, not to the training requirements.
3. In most instances, *male* employees were unaware that any training program existed. Indeed, a male applicant was only assured that, as a hope for the future, advancement would occur "if everything worked out."[70]
4. Female applicants were better qualified than male, but were not admitted to the program. For example, the male "trainees" included a former "fry cook" and a high school graduate who farmed.[71]
5. There was no evidence that the program had ever been offered to any females.[72]

63. *Id.*
64. *Id.* at 58 n. 1.
65. *Id.* at 58-59.
66. *Id.* at 60.
67. *Id.*
68. *Id.* at 60-61.
69. *Id.* at 61.
70. *Id.*
71. *Id.* at 61, n. 7.
72. *Id.* at 61-62.

Perhaps the determinative factor in the Eighth Circuit's reversal of the trial court's finding of no violation was the conclusion that the bank's operations were based on preconceived stereotyped concepts of the role of men and women in business.[73]

Based on the above factors, the Eighth Circuit rejected the proffered management trainee program as a post-mortem attempt to justify an otherwise improper wage differential.

The so-called "management trainee" defense was next tendered in *Hodgson v. Industrial Bank of Savannah*[74] in which the bank involved was a small financial institution employing fourteen employees, including three executives.[75]

The court noted the following facts:

1. No woman employee ever participated in the "management training program."[76]
2. There was no formal written description of the program.[77]
3. There was testimony that the bank's past practice was justified because males are more likely to become permanent employees as they do not have to leave to go to school or become pregnant.[78]

The court concluded that there was a wage differential between employees of the opposite sex, there was no bona fide training program, and there was a violation because the discrimination was due to sex.[79]

The significance of the *Industrial Bank of Savannah* case is the court's view of the proper remedy for a violation of the Equal Pay Act. It is recalled that the male employee had only worked at the bank for three and one-half months. Yet the statute appears to be clear that the discriminated employees' wages must be raised to at

73. The bank's explanation for the absence of women in the ranks of its management trainees recites a preconceived and traditional notion that women, because of their principal roles as wives and mothers, must occupy an employment status second to men outside the home. This notion is outmoded as well as unfair. *Id.* at 63.

74. 347 F. Supp. 63 (S.D. Ga. 1972).

75. *Id.* at 65. The management trainee was a 25-year-old male with a high school diploma. He had taken a few college courses while he was in the military. His experience consisted of being a newspaper apprentice, a sales trainee for a business concern, and a clerk at the George Ports Authority. The bank's records indicated he was hired as a "management trainee" at a beginning salary of $400.00 per month. He worked initially with a female bookkeeper whose salary rate was $280.00 per month. Thereafter, he trained as a teller among a pool of female employees whose salaries ranged from $280.00 to $295.00 per month. Three and one-half months after he was hired, his employment was terminated because he was "unable to learn work." It was noted that he had taken none of the courses in bank operations sponsored by the American Institute of Banking.

76. 347 F. Supp. at 67.

77. *Id.*

78. *Id.*

79. *Id.*

least equal the male's and that the employer cannot lower anyone's wages to become in compliance with the law. Thus, the small bank was left with no management trainee, and it would have to raise all of the bookkeepers and tellers to a salary rate of at least $400.00 per month not only for the period in which the trainee had worked at the bank but *ad infinitum* in the future. Despite the apparent unambiguous language of the statute, the specific circumstances involved in that case apparently caused the judge to question whether that rule ought apply to that fact situation:

> It is nonetheless difficult to conceive that Congress could have intended so harsh and inequitable result from an isolated, non-wilful and non-intentional violation. It strikes me as a rather drastic and mechanical consequence of a violation such as this to warrant the imposition of a wage basis of $400.00 per month for all female tellers and bookkeepers from the time [the "trainee"] was employed and thenceforth.[80]

The judge was particularly concerned because the employer's termination of the "trainee" had absolutely nothing to do with the equal pay investigation. "[H]ere the termination of employment did not represent any effort on the Bank's part to bring itself into compliance or avoid the consequences of the violation of the Act."[81] The judge called for further briefs on that issue and the subsequent addendum to the opinion makes it clear that the Government and the bank entered into a settlement for something less than that which would have been computed under a mechanical computation of damages.

The full significance of this case has not yet been judicially determined. No appeal was filed and no similar cases have been decided. This case is a further illustration of the cliche: bad facts make bad law. Clearly, the facts did not justify the mechanical statutory remedy. Nor did the statute's application permit any exceptions. A judge sympathetic to the plight of the employer simply "suggested" that a negotiated settlement be agreed upon. This is no doubt a case which will have little independent precedent and can be objectively relied upon. Courts wishing to be sympathetic to a particular set of facts will cite *Industrial Bank of Savannah* as authority for modifying the requested relief. Courts which are prepared to impose the full statutory remedy will easily distinguish the case on the basis of "clear statutory" language. Neither banks nor

80. *Id.* at 68-69.
81. *Id.* at 69.

lawyers should rely on the case as a means of predicting future conduct or the future course of particular litigation.

VI. The Future of Management Trainee Programs for Banks

The covey of cases of banks and their management training programs has left a number of hints for banks and lawyers in charting the future direction for their plans. However, these cases are not able to provide insulation in certain situations. Not even the Department of Labor's administrative interpretations provide a "safe harbor" except in a general sense in that they specify a bona fide program must be open to both sexes. Particular banks appreciate that as a goal but need specific concrete guidelines which minimize the risk of being found in violation of the Act. Each bank situation requires an analysis of its structure, size, facilities, and goals in order to suggest a program which has been tailored for that bank and which still will meet the judicial tests recently promulgated.

If a bank decides to establish a management training program, it must be certain that it does so in such a manner that it stays within the penumbra of the factors mentioned in the adjudicated cases and the administrative interpretations. This will permit it to construct a bona fide program which is an exception to the application of the Equal Pay Act. In building such a program, the following factors should be considered and incorporated into the bank's program:

1. The management training program should be formalized by reducing it to writing.[82] In some instances it might be appropriate to use the services of a management consulting firm in order to explicate the job descriptions. Specifically, the program should include the following:
   a. It should require specific additional training and supervision. For many banks this will include the certificate programs sponsored by the American Institute of Banking.[83] For the larger banks, in-house instruction programs are sometimes established.
   b. It should prescribe a definite rotational schedule which should be adhered to for the benefit of the training program, not for the benefit of the bank's needs.[84]

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82. *Id.*

83. *See* note 88, *supra*. *See also* Moran, *Equal Pay for Women*, 63 Banking 28, 30 (June 1971). It is also clear that the smallness of the employer, *i.e.*, one who cannot afford formal training, does not excuse it from its duty to establish a bona fide training program. *See* Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1048 (5th Cir. 1973).

84. *See, e.g.*, Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972).

c. It should be as specific as possible.[85]

d. It should have built-in record-keeping requirements and procedures.

e. It should have a specific identifiable point of termination.[86]

2. All employees should be advised of its existence and its terms and conditions.[87]
3. The program, its announcements and its actual application should make it clear that it is in fact available to men and women.[88]
4. Applicants interviewed for the management training program should be so advised, so hired, and so employed.[89]
5. Additional work should be built into the program so that even if a management trainee is, *e.g.*, performing the skills of a teller, he/she is also required to have significant additional responsibilities.[90]
6. Upon completion of the training program, the trainee should be placed immediately into a management position and not be required to "wait for an opening."[91]
7. If otherwise qualified, women should be admitted to the program in order to establish a record of past performance.[92]

The cases make clear that the courts are going to be very cautious when considering "management training programs." Further, it is apparent that bona fide means more than innocent and unconscious mistakes. "A bona fide training program, to constitute a valid exception to the Equal Pay Act, must represent more than an honest effort; such a program must have substance and significance independent of the trainee's regular job."[93] The importance of creating a valid program is easily appreciated when the economics of the remedy is computed for a violation. Raising the wages of all tellers or bookkeepers "in the pool" up to the level of the wage rate of the sham trainee is extremely onerous, regardless of bank size. Further, the remedy is one which will always apply since a violation not only justifies back wages but also the payment of all future wages computed according to the same standard. For these reasons, banks and their counsel are well advised to carefully review their policies for

85. 2 CCH LAB. L. REP. ¶ 30,112.

86. Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1045 (5th Cir. 1973).

87. *See* Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972).

88. 29 U.S.C. § 206(d)(1964); 2 CCH LAB. L. REP. ¶ 30,112.

89. *See, e.g.*, Hodgson v. Security Nat'l Bank, 460 F.2d 57 (8th Cir. 1972).

90. *See, e.g.*, Hodgson v. Industrial Bank, 347 F. Supp. 63 (S.D. Ga. 1972); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974).

91. Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1046 (5th Cir. 1973).

92. *Id.*

93. *Id.* at 1047-48.

bringing new management into the bank in order to assure themselves that they are not exposing themselves to the hazards of an "equal pay" investigation and litigation.