University of Richmond Law Review

Volume 7 | Issue 2 Article 6

1972

Equal Pay: The Hospital-Nursing Home Dilemma

NOTE

EQUAL PAY: THE HOSPITAL-NURSING HOME DILEMMA

The Equal Pay Act of 1963[1] (EPA) is not an independent piece of legislation, but rather an amendment to existing legislation. The EPA simply adds an additional fair labor standard to the already familiar Fair Labor Standards Act of 1938[2] (FLSA) [hereinafter alternately referred to as "the Act"]. By utilizing the process of amendment, Congress hoped to avoid the creation of a new bureaucratic structure to enforce the new law,[3] and hoped to facilitate compliance because both industry and labor were already aware of the operation and provisions of the FLSA.[4] However, what appeared to be a simple matter has nevertheless become the subject of considerable litigation. Although "equal pay for equal work" is a now familiar concept to attorneys practicing in the field of labor law, litigation has recently taken on a new look as hospitals and nursing homes now begin to feel the effect of the EPA. It is the purpose of this article to explore the provisions of the Equal Pay Act in an attempt to determine when and how it should be applied to these institutions, and through an examination of a body of cases, to reflect a trend that is now unfavorably emerging for the employer.

I. Basic Coverage Provisions

The equal pay provisions neither extend nor curtail coverage under the FLSA. Necessarily then, when the question arises whether an employer need comply with the equal pay legislation, one must inquire whether he is subject to the FLSA. The question of coverage generally is complex, and it is beyond the scope of this article to explore the intricacies and ramifications of the law in complete detail. The following explanation will show, however, that when directed towards hospitals and nursing homes, the question of coverage is answered almost exclusively in the affirmative.

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[1] 29 U.S.C. § 206(d) (1970). For the legislative history of the EPA see 1963 *U.S. Code Cong. & Adm. News* 687-92.

[2] 29 U.S.C. §§ 201-19 (1970).

[3] The task of administration and enforcement fell to the Wage and Hour Division of the Department of Labor. This agency was already well established and skilled in the administration of the FLSA.

[4] 1963 *U.S. Code Cong. & Adm. News* 688.

A. The Enterprise Concept

Prior to 1961, only those individual employees actually engaged in commerce[5] or the production of goods for commerce[6] were entitled to the benefits of the Act. By virtue of the 1961 and 1966 amendments, the scope of coverage was broadened, and is now founded on the concept of the "enterprise." An enterprise as defined in the Act means "related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. . . ." [7] It is difficult to conceive of any business conducted in a single establishment[8] that would not be classified as an enterprise. Standing alone, however, the classification of "enterprise" is of little significance,[9] for the enterprise must also be an "enterprise engaged in commerce or the production of goods for commerce." Such an enterprise is defined as one that has two or more employees engaged in commerce or the production of goods for commerce, and that has an Annual Gross Dollar Volume (AGDV) of sales made or business done of not less than $250,000, or is among those enumerated enterprises that need not satisfy the AGDV test.[10] Once the enterprise has been determined to be engaged in commerce or the production of goods for commerce, all its employees unless otherwise exempt[11] are entitled to the benefits of the Act whether or not they themselves are so engaged.

Hospitals and nursing homes are among those enumerated enterprises that need not satisfy the AGDV test, provided they are "primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises. . . ." [12] Therefore, the only inquiry with respect to coverage

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[5] Prior to the 1961 Amendments, coverage was founded on an individual employee basis, hence the term "individual coverage." Although this type of coverage is rarely asserted today, it is still in force. For an explanation of these terms see note 13 *infra*.

[6] *Id.*

[7] 29 U.S.C. § 203(r) (1970).

[8] The term "establishment" is not defined in the Act, but it generally refers to a distinct physical place of business. Each separate place of business is usually considered to be a single establishment. For a more complete explanation of this concept see 29 C.F.R. § 800.108 (1972).

[9] Where the business is carried on at more than one establishment, these separate establishments may be grouped together under certain circumstances and denominated an enterprise. This is beneficial to the Secretary in that he may then look to the entire organization to find two or more employees who are engaged in commerce, and thus establish coverage. Generally, however, this concept is of little importance when dealing with hospitals and nursing homes because the business will probably be carried on in a single establishment. Furthermore, the duties of employees may only be compared within a single establishment.

[10] 29 U.S.C. § 203(s) (1970).

[11] Certain employees are exempt from the operation of the FLSA. For an explanation of these exemptions see 29 C.F.R. § 541 (1972).

[12] 29 U.S.C. § 203(s)(4) (1970).

of these institutions is whether they have two or more employees who are "engaged in commerce or the production of goods for commerce." The terms "engaging in commerce" and "production of goods for commerce" have received extensive treatment in both court decisions and official interpretations.[13] However, it is clear from the Act that among other things, these terms include "the handling, selling, or otherwise working on goods[14] that have been moved in or produced for commerce . . . ."[15] Drugs, food, hospital supplies, and mail correspondence are all classified as "goods" for the purposes of the Act. In almost every case, it will be found that such goods are utilized by these institutions, and that a large portion of them originate out of state, or in the case of insurance forms and other correspondence, are transmitted out of state. Accordingly, these are "goods" that "have been moved in or produced for commerce." It is unequivocally clear therefore, that any hospital or nursing home that employs doctors, nurses, cooks, and administrative personnel will have two or more employees who "handle or otherwise work on" these goods, and therefore, will be considered to be engaged in commerce or the production of goods for commerce. Consequently, the institution becomes an "enterprise engaged in commerce or the production of goods for commerce" and accordingly, all of its employees will be entitled to the benefits of the Act.

II. The Equal Pay Act

The EPA comprises section 6(d) of the FLSA and provides in part that "[n]o employer . . . shall discriminate . . . 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 . . . or equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. . . ."[16] The obvious purpose of the law is to eliminate the payment of a discriminatory wage rate where such discrimination is based on the sex of the employee.[17]

The EPA also provides three specific exceptions and a broad general exception. Where discrimination is based upon (1) a seniority system, (2) a

[13] These terms are defined in 29 C.F.R. §§ 800.6 and 800.7 (1972).

[14] "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 29 U.S.C. § 203(i) (1970).

[15] 29 U.S.C. § 203(s) (1970).

[16] 29 U.S.C. § 206(d)(1) (1970).

[17] *See* 1963 *U.S. Code Cong. & Adm. News* 668.

merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex, the discriminatory wage rate will be exempt from the operation of the statute.[18]

It is well settled that the Secretary has the burden of proving the existence of a discriminatory wage differential based on sex; once he has satisfied this, the burden shifts to the employer to bring himself within one of the four exceptions.[19] The Secretary's case therefore requires a showing that there are in fact two dissimilar wage rates, and that these rates are paid to employees of the opposite sex for equal work on jobs that require equal skill, effort, and responsibility and that require performance under similar working conditions. The employer then has the burden of showing that the wages are the same, or that the work is not equal by virtue of the fact that performance of certain jobs requires more effort, skill, or responsibility, or that they are performed under dissimilar working conditions. If the employer is unable to defend in this manner, he must show that the wage rates are paid pursuant to one of the four enumerated exceptions.

III. Official Interpretations

The Secretary of Labor and the Administrator of the Wage and Hour Division are authorized to issue official interpretations regarding the position of the Department of Labor with respect to the meaning and application of the FLSA.[20] These interpretive bulletins are intended to reflect the construction of the law which the Secretary and Administrator believe to be correct, and which the Department will follow in the administration and enforcement of the Act, unless and until such law is otherwise changed upon re-examination or by judicial decision.[21] The significance and weight to be attributed to such directives was determined by the Supreme Court in *Skidmore v. Swift*,[22] where the Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity

[18] 29 U.S.C. § 206(d)(1) (1970).

[19] Hodgson v. American Bank of Commerce, 447 F.2d 416 (5th Cir. 1971); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969); Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971).

[20] 29 C.F.R. § 800.2 (1972).

[21] *Id.*

[22] 323 U.S. 134 (1944).

> of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[23]

In accordance with his authority, the Administrator has caused to be issued certain guidelines to be followed in determining "equal work" under the EPA.[24] Cursory perusal of these directives reveals the fundamental principle that in order for work to be equal, the jobs in question must require equal skill, effort, and responsibility, and must be performed under similar working conditions. If one or more of these requirements is determined to be unequal, the employees are not entitled to the benefits of the legislation.[25] However, *equal* does not mean identical, and "[i]nsubstantial 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." [26]

Although the Administrator concedes that those factors that constitute equal skill, effort and responsibility cannot be precisely defined,[27] he does offer certain criteria for consideration in making such an evaluation.

A. *Equal Skill*

Among those factors to be considered when evaluating the requirement of equal skill are experience, training, education and ability.[28] The Administrator cautions, however, that these must be "measured in terms of the performance requirements of the job," *i.e.*, the possession of a skill not needed to meet the job requirements should not be considered in determining equality of skill.[29]

To further point up the principles to be utilized in comparing skill requirements, the Administrator provides an illustration.[30] Suppose that the jobs of nurses' aide (female) and orderly (male) require that these employees spend two-thirds of their working time in the same activities (primary work), and the remaining one-third in diversified tasks that are not necessarily the same for the respective positions (secondary work). Since there is no difference in the skills required for the primary activities, the determination of equal skill in overall performance must necessarily depend upon

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[23] *Id.* at 140.

[24] See 29 C.F.R. §§ 800.0 through 800.166 (1972).

[25] 29 C.F.R. § 800.122 (1972).

[26] *Id.*

[27] *Id.*

[28] 29 C.F.R. § 800.125 (1972).

[29] *Id.*

[30] The exact illustration appears at 29 C.F.R. § 800.126 (1972). It has, however, been modified by the author so that it may be compared more readily to actual court decisions involving aides and orderlies.

the nature of the secondary tasks. If the job requirements of the secondary work performed by the orderly require more training and command a higher wage than the primary work, and if the secondary tasks of the nurses' aide require less training and command a lower wage whether performed by aide or orderly, then the orderly's job will be considered to require a substantially different degree of skill, and accordingly the equal pay standard will not be applicable.

This illustration seemingly suggests a dual inquiry: (1) Does the secondary work of the orderly require more training and command a higher wage than the primary work; and, (2) if so, does the secondary work performed by the nurses' aide—if in fact she performed secondary tasks—require less training and command a lower wage than the secondary work performed by the orderly? Where both questions are answered affirmatively and the differences are not inconsequential, the job of the orderly requires more skill.

B. *Equal Effort*

In explanation of this requirement, the Administrator offers: "Where substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job." [31] Differences in the kind of effort, however, do not justify wage differentials,[32] and "the occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort." [33]

As an illustration, suppose that the aide and the orderly perform primary work that requires equal effort. The orderly, however, is also called to perform secondary activities that require extra effort, *e.g.*, heavy lifting, an activity not performed by the aide. A wage differential, therefore, might be justified "provided that the extra effort so expended is substantial and is performed over a considerable portion of the work cycle." [34]

The illustration appears to base the test for equal effort on a single inquiry. Where the primary work is otherwise equal, does the secondary work of the orderly require a greater amount or degree of effort than the secondary work of the aide—if in fact the aide performs secondary tasks? Where the question is answered affirmatively and the difference is not inconsequential, the orderly's job requires more effort.

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[31] 29 C.F.R. § 800.127 (1972).

[32] *Id.*

[33] 29 C.F.R. § 800.128 (1972).

[34] *Id.* Again the illustration has been adapted to the hospital-nursing home situation.

It should be noted that the differential based on a difference in degree or amount of effort must be applied uniformly to men and women. The fact that one half of the orderlies perform heavy lifting and the others do not would not justify a higher wage differential for all orderlies.[35]

C. *Equal Responsibility*

The Administrator offers very little in this area to guide the employer in making his determination, and the illustrations given are not readily adaptable to the aide-orderly relationship and functions. Clearly, however, where one employee has the additional responsibility of extinguishing the lights at the end of the day, such a task would not be of sufficient consequence to justify a finding of unequal responsibility. On the other hand, where an employee has the additional responsibility of determining whether to accept personal checks from customers, this task might well warrant the payment of a higher wage.[36]

The interpretive bulletin states that "[r]esponsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." [37] It would seem fundamental therefore that although the primary work performed by the aide and the orderly is otherwise equal in responsibility, the secondary and tertiary activities that are dissimilar will be attended by differences in responsibility. Such differences in responsibility, however, would not warrant a finding of unequal responsibility unless the importance of the job obligation of the orderly with respect to the secondary and tertiary activities resulted in a significant increase in the degree of accountability as compared to that of the nurses' aide, and such increase in degree of accountability was a significant factor in determining wage rates.

D. *Similar Working Conditions*

Again, although very little direction is offered by the Administrator, he has made it clear that "a practical judgment is required in the light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels." [38] Accordingly, "slight or inconsequential differences in working conditions that are essentially similar would not justify a differential in pay," because "such differences are not usually taken into consideration by employers . . . in setting wage rates." [39]

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[35] 29 C.F.R. § 800.128 (1972).
[36] 29 C.F.R. § 800.130 (1972).
[37] 29 C.F.R. § 800.129 (1972).
[38] 29 C.F.R. § 800.131 (1972).
[39] 29 C.F.R. § 800.132 (1972).

From an examination of the official interpretations it can be readily seen that in order for any one of the requirements to bar the application of the equal pay standard, it must be of some consequence. Time spent will be of primary importance when evaluating the requirements of equal skill and equal effort. The law is unquestionably clear on the point that "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 standards inapplicable." [40]

IV. Judicial Interpretation

Although the Equal Pay Act was passed in 1963, cases involving hospitals and nursing homes did not appear in the courts until 1969. The reason for this delay can be attributed to a number of factors. Because Congress provided for a one year moratorium on enforcement, the EPA did not become effective until 1964.[41] More important however, Congress broadened the scope of coverage under the Act in 1966, to be effective February 1, 1967,[42] and specifically evidenced its intent that hospitals and nursing homes should be subject to its provisions. Prior to this amendment, a hospital or nursing home would not be covered unless it could meet an AGDV requirement of $1,000,000.[43] In addition, the normal period investigated by the Wage and Hour Division is two years. Therefore, in order to assert the coverage that became effective in 1967 over one of these institutions, the period investigated necessarily must have run from 1967 to 1969. The slow process of disposition through the Solicitor's Office in a case of this nature usually requires six months to a year, and as a result, the first case did not appear until 1969.

A. *Decisions*

By far the most significant case involving hospitals and nursing homes has been *Hodgson v. Brookhaven General Hospital*.[44] Because of the impact of this decision, it is instructive to analyze it in some detail. After stipulating in the court below that the primary duties of the aide and the orderly were equal, the defendant hospital argued that the secondary and tertiary duties performed by the orderlies of lifting patients (effort), catheterization (skill), and serving as fire brigade chief (responsibility), were sufficient to

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[40] 29 C.F.R. § 800.122 (1972).

[41] 29 C.F.R. § 800.101 (1972).

[42] See "Effective Date of 1966 Amendment" set out in notes under 29 U.S.C. § 203 (1970).

[43] 29 U.S.C.A. § 203(s)(1) (1965).

[44] 436 F.2d 719 (5th Cir. 1970).

warrant the wage differential. Addressing itself to the hospital's contention, the trial court stated that "only an insignificant portion of an orderly's time is spent in performing catheterizations, [and that] those tasks performed only by aides require as much skill as the performance of a catheterization which orderlies perform on male patients";[45] serving as a fire brigade chief was only a "minor duty," and "the occasional performance of duties requiring greater physicial exertion does not render jobs unequal which are otherwise equal." [46] Echoing the familiar proposition that "equal does not mean identical," and that "insubstantial differences in the skill, effort, and responsibility requirements of particular jobs should be ignored," [47] the lower court held that "[t]he work of orderlies and aides required substantially equal skill, effort, and responsibility and was performed under similar working conditions." [48]

On appeal to the Fifth Circuit, the appellate court agreed with the trial judge's ruling in part, stating that she[49] was justified in finding that the secondary and tertiary tasks performed only by aides required as much *skill* and involved as much *responsibility* as those performed by orderlies. In sanctioning the lower court's holding on this point, the review court in effect reduced the determination of "equal work" to a consideration of equal effort alone.[50] Under the *Brookhaven* decision, it is difficult to conceive of a hospital that could not offset the more highly technical skill involved in catheterization with the seemingly routine jobs of caring for infants and convalescing mothers.[51] The appellate court would have done well to have placed emphasis on the lower courts finding that the performance of catheterizations required an insubstantial amount of time.

The court also focused on the hospital's most convincing argument, which contended that although an aide and an orderly have approximately the same number of patients, the orderly is called away to perform secondary and tertiary duties far more frequently than the aide, while the same primary duties await him on return. This practice of the hospital thereby forces the typical orderly "to compress into 75 percent of his working time the routine patient duties which occupy something like 98 percent of the working time of the typical aide." [52] In short, the hospital maintained

[45] Shultz v. Brookhaven Gen. Hosp., 305 F. Supp. 424, 425 (N.D. Tex. 1969).

[46] *Id.* at 426.

[47] *Id.*

[48] *Id.*

[49] It is interesting to note that the judge in this discrimination case was a female.

[50] The circuit court also found that the working conditions were similar.

[51] The trial court found the secondary duties of the nurses' aides to be: working in the delivery room, the maternity ward or the nursery, and giving sitz baths, douches and clinical tests.

[52] Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 725 (5th Cir. 1970).

that its orderlies are called on to do a significantly greater volume of work, thereby rendering unequal the *amount* of effort expended. In examining the requirement of equal effort, the review court stated:

> The equal effort criterion has received substantial play in the reported cases to date. As the doctrine is emerging, jobs 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 all those whose pay differentials are to be justified in terms of them, and,* (3) *are of an economic value commensurate with the pay differential.* We are persuaded that this approach to the application of the statutory "equal effort" criterion is in keeping with the fundamental purposes of the Equal Pay Act, and adopt it here[53] (emphasis added).

The court then noted that the trial judge had not made sufficient findings of fact in order that it might apply the newly formulated test. Accordingly, the case was reversed and remanded for supplemental findings.[54]

The significance of the *Brookhaven* decision therefore lies in its shift of emphasis to the "equal effort" criterion, and its accompanying standards for making such an evaluation. Further, the decision requires specific findings of fact in cases of this nature, thereby eliminating any perfunctory disposition by the lower courts. Trial judges are now properly required to investigate the number of orderlies, if any, who participate in the secondary activities, and the exact extent of their participation. "Time spent" therefore is an important factor in determining equal effort. In addition, the court impliedly held that where an orderly is called to perform twenty-three percent more work in secondary and tertiary duties, over and above the total work performed by the aide, such a job requirement might well be considered to require extra effort, consume the requisite amount of time, and be of an economic value commensurate with the pay differential. Accordingly, such a requirement may preclude the application of the equal pay standard.

In accordance with the *Brookhaven* decision, the district court in *Hodg-*

[53] *Id.*

[54] On remand the court found the hospital's contention that the orderlies were called to do a significantly greater volume of work was not supported by any credible and convincing testimony. The court concluded that the secondary and tertiary duties were "substantially the same kind of general hospital duties as the primary duties and are not any more exacting in terms of skill, effort, and responsibility. The orderlies do not exert significantly more effort than aides because of these 'secondary and tertiary' duties, which consume only a minor and insignificant amount of the time of the orderlies who have been considered as the counterparts of the aides." Hodgson v. Brookhaven Gen. Hosp., 65 CCH Lab. Cas. 44,843, 44,844 (N.D. Tex. 1971).

son v. Maison Miramon, Inc.,[55] in a well written opinion, applied the equal effort test. Although the defendant conceded that the duties of aides and orderlies required equal skill and responsibility, it argued that the amount of effort expended was unequal, and warranted the pay differential. After a thorough consideration of conflicting testimony, the court found that *some* of the orderlies did perform functions requiring more physical exertion than the aides could provide; however, these added labors did not consume a significant amount of time. The additional duties on which the defendant relied were basically custodial in nature. The court noted that while the janitors at the institution were exclusively engaged in the performance of such heavy custodial duties, the orderlies were only required to perform them during a portion of their working time. Nevertheless, the salaries of the janitors were the same as those of the orderlies. This situation led the court to conclude that because the defendant did not place any particular emphasis on the degree of effort expended when establishing pay rates, the extra duties of the orderlies were not of "an economic value commensurate with the pay differential." [56]

In *Maison Miramon*, obviously reluctant to find in favor of the Secretary and although constrained to do so, the trial judge seriously questioned the propriety of the EPA.[57] The opinion suggests that the result might have been different had the defendant been able to advance arguments on the requirement of "equal skill." As previously noted, the defendant conceded this point, relying alone on equal effort. Bound by the mandate in *Brookhaven*, the trial judge had no choice but to find for the plaintiff.

The decision in *Maison Miramon* is not unique. Other courts have determined that the amount of time spent by orderlies in the performance of secondary duties is insubstantial and inconsequential, and therefore not sufficient to warrant a finding of unequal effort.[58] To the contrary, however, is *Hodgson v. Good Shepherd Hospital*.[59] Here the court found that orderlies were called to perform arduous work requiring more physical effort and strength than the work of aides, and that these duties consumed as much as twenty-five percent of the orderlies' time. The court noted that "[t]he lifting and strength demanding work of the orderly is not merely occasional but is shown to be one of the main functions that is demanded

[55] 344 F. Supp. 843 (E.D. La. 1972).

[56] *Accord*, Hodgson v. Skyvue Terrace, Inc., 68 CCH Lab. Cas. 45,395 (W.D. Pa. 1972).

[57] Hodgson v. Maison Miramon, Inc., 344 F. Supp. 843 n.9 (E.D. La. 1972).

[58] Hodgson v. Stastny, 67 CCH Lab. Cas. 45,265 (N.D. Ill. 1972); Hodgson v. McMurray Hills Manor, Inc., 66 CCH Lab. Cas. 45,066 (W.D. Pa. 1971); Hodgson v. Hubbard Hosp., 66 CCH Lab. Cas. 45,009 (M.D. Tenn. 1971).

[59] 327 F. Supp. 143 (E.D. Tex. 1971).

of the orderly with great frequency and regularity." [60] The trial judge went on to note that were the hospital not necessarily dependent on the male orderly to perform these jobs, it could have hired all females and saved any pay differential. Accordingly, the court concluded that "[t]hese additional duties are of economic value commensurate with the pay differential." [61]

To a similar effect was *Shultz v. Royal Glades, Inc.*,[62] wherein the district court found that fifty to sixty percent of the orderlies' time was spent in lifting patients. In addition, the orderlies were required to lift and carry 250 pound oxygen tanks and patient's luggage. In order to perform these duties, it was necessary to report for work one hour earlier than the nurses' aides. Testimony of the aides having proved that these duties were beyond the aides' physical capabilities, the court concluded that "the work performed by the orderlies regularly requires significantly more effort. . . ." [63]

Notwithstanding that the *Brookhaven* decision seemingly limits the inquiry to that of "equal effort," there are other cases that have turned on the requirements of equal skill or equal responsibility. *Shultz v. Kentucky Baptist Hospital*[64] was the pilot decision involving a hospital under the EPA. Although the hospital employed approximately 202 nurses' aides and 31 orderlies,[65] the Secretary did not charge discrimination throughout the entire hospital, but limited his complaint to the psychiatric ward in which the hospital employed six orderlies and 16 aides.[66] The court, noting the various tasks performed solely by orderlies that required extra physical strength and skill, did not evaluate these duties in terms of time spent so that they might be shown to be "substantial" and warrant a higher wage differential. Rather, the court focused on the fact that there was "at least one important basic *duty* and *responsibility* of the orderly that is not and cannot be assumed or performed by the nurses' aide. That duty and responsibility is to assure security and provide protection to the aides in the psychiatric ward, and not only to the patients but to the nurses' aides as well as to the registered nurses (emphasis added)." [67] The court therefore determined that providing security was in fact a *duty*, that "the orderly is performing this duty at all times while he is on the shift working," and that "the responsibility of furnishing security to patients and to personnel

[60] *Id.* at 147.
[61] *Id.* at 148.
[62] 66 CCH Lab. Cas. 44,934 (S.D. Fla. 1971).
[63] *Id.* at 44,936.
[64] 62 CCH Lab. Cas. 44,117 (W.D. Ky. 1969).
[65] *Id.* at 44,118.
[66] *Id.* at 44,119.
[67] *Id.* at 44,121.

in the psychiatric unit in itself [was] a responsibility that justifies the difference in compensation." [68] Query: Would the result have been the same had the Secretary not limited his suit solely to the psychiatric ward?

In *Hodgson v. Golden Isles Nursing Homes, Inc.*[69] the emphasis was again on responsibility. Here the court attached great significance to the fact that orderlies were required to "float," *i.e.*, to help throughout the entire nursing home, a duty that the aides were not required to perform. With regard to this additional duty the court noted:

> [I]t should be observed that each orderly has the responsibility of helping all of the aides with all of the male patients, both in the area the orderly is originally assigned to as well as being available to the other two nurses' stations. No nurses' aide had the same responsibility as any full time orderly.[70]

In addition to the requirement of equal work, the court in *Good Shepherd Hospital* also focused on the necessity of *equal skill*, attaching particular significance to the performance of catheterization by the orderlies. After noting that orderlies were required to have attended training courses to learn this skill, the court stated:

> The orderly has special training to do and does male catheterization which is an extremely important hospital duty, calling for skill and training in sterile techniques not possessed by aides. Aides do not even perform catheterizations of female patients. Male catheterization is an important hospital function and is a special skill developed by training from urologists, and the senior orderly. This duty was performed by orderlies ranging from several a day to several a week consuming up to forty-five minutes of time. The hospital rules have prohibited nurses' aides from performing this procedure (even on females) since February 1, 1967. The importance of the orderly job is not confined to actual catheterization done—but his availability to do them.[71]

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[68] *Id.* at 44,124. "Orderlies perform another essential function that could not be performed by aides. They provide a psychological effect and approach because of the fact that they are males. The presence of a male orderly represents security to personnel that an aide cannot give." Hodgson v. Golden Isles Nursing Home, Inc., 64 CCH Lab. Cas. 44,607, 44,609 (S.D. Fla. 1971).

[69] 64 CCH Lab. Cas. 44,607 (S.D. Fla. 1971).

[70] *Id.* at 44,609. "As to responsibility for the whole Hospital, emergency calls, security, catheterizations, setting up orthopedic equipment, different working conditions, emergency room work of the orderly, these are clearly more than an incidental or occasional matter but the gravamen and crux of the real and primary work of the orderly. . . ." Hodgson v. Good Shepherd Hosp., 327 F. Supp. 143, 148 (E.D. Tex. 1971).

[71] Hodgson v. Good Shepherd Hosp., 327 F. Supp. 143, 145 (E.D. Tex. 1971). *But see* Hodgson v. Lancaster Osteopathic Hosp. Assn., Inc., 66 CCH Lab. Cas. 44,923 (E.D.

In contrast, the requirement of similar working conditions has received very little attention by the courts. However, again in *Good Shepherd Hospital,* the court found that the fact that orderlies were required to work all over the hospital, perform under demanding conditions in the emergency room and deal with the hard to handle patients, made their job unpleasant, dangerous, and more taxing, resulting in dissimilar working conditions.[72]

Under some circumstances, the courts have found that the defendant hospitals have brought themselves under one of the statutory exceptions. Although the court in *Golden Isles Nursing Home* found that the Secretary had not sustained his burden of proving a differential based on sex, the trial judge nevertheless noted that the defendant hospital did have a merit system that governed the employees' salaries. The initial salaries of both orderlies and aides were determined by past experience, personal interviews, educational qualifications, and prior training. All subsequent pay raises were based on regular employee evaluations, with criteria including performance, reliability, initiative, and responsibilities.[73]

Although each case presents a different factual situation, it is interesting to note that despite the above decisions, favorable to the defendant hospitals and nursing homes, there have been others that have held directly contra on identical issues. Courts have found that the presence of male orderlies to afford a measure of protection is not a duty at all, and that the performance of catheterizations does not warrant a wage differential. However, it is submitted that close scrutiny will reveal that a good portion of these decisions may well be "consent decrees."[74] The findings of fact and conclusions of

Pa. 1971) (consent decree); Hodgson v. Cheviot Hills Convalarium, 67 CCH Lab. Cas. 45,210 (C.D. Cal. 1972).

[72] Hodgson v. Good Shepherd Hosp., 327 F. Supp. 143 (E.D. Tex. 1971). *See* Shultz v. Royal Glades, Inc., 66 CCH Lab. Cas. 44,934 (S.D. Fla. 1971).

[73] Hodgson v. Golden Isles Nursing Home, Inc., 64 CCH Lab. Cas. 44,607, 44,609 (S.D. Fla. 1971).

[74] When a defendant agrees to settle a case, the Solicitor's Office prepares a complaint, stipulation, and judgment, and forwards them to the appropriate court so that the order may be entered granting the injunction and back wages. Under some circumstances the Commerce Clearing House will report these cases. It appears that the report of the case amounts to nothing more than a reiteration of the "package deal" submitted by the Labor Department. It is easy to see how the Secretary could use this opportunity to establish favorable precedent, as defendants are not particularly concerned with the way the complaint, stipulation, and judgment are phrased; they are only concerned with the court's order which has already been agreed upon. It is submitted that the following cases are possible consent judgments:

1. Hodgson v. McMurray Hills Manor, Inc., 66 CCH Lab. Cas. 45,066 (W.D. Pa. 1971).
2. Hodgson v. Lancaster Osteopathic Hosp. Assn., Inc., 66 CCH Lab. Cas. 44,923 (E.D. Pa. 1971).
3. Hodgson v. Cheviot Hills Convalarium, 67 CCH Lab. Cas. 45,210 (C.D. Cal. 1972).

law in these cases seemingly suggest that the Secretary has taken advantage of his opportunities to establish false precedent, obviously affording the Department of Labor a stronger bargaining position. Therefore, when confronted with these decisions, a hospital or nursing home representative might well be disposed to settle a case on unfavorable terms where otherwise he would not.

V. Conclusion

Although entitled to great deference, the Secretary's interpretive bulletins are vague in many respects and provide little guidance for the employer. Consequently, the applicable district court decisions are diametrically opposed to each other. The most frequently advanced arguments of catheterization (skill), presence of orderlies to control unruly patients (responsibility), and heavy lifting (effort), may be readily accepted in one court while flatly rejected in another. Because the district court opinions do not adequately relate the facts relative to the nature and extent of the orderlies' participation in these activities, it is impossible to point to any group of decisions to formulate a rule. Thus, the burden of clarification clearly lies with the Circuit Courts.

Brookhaven General Hospital is the only appellate opinion to date. If there is in fact an emerging trend, therefore, it rests solely on this decision and is doubtless unfavorable to the employer. The *Brookhaven* court has taken the initiative and has delineated a definite test to be applied when dealing with the requirement of equal effort. The mandate is somewhat strict, calling for particularization on the part of the defendant. It is a difficult task indeed for a hospital to prove the extent of participation in a particular activity by an entire class of employees, especially when confronted with self-serving witnesses, *i.e.*, aides who realize that their testimony might well result in a windfall in the form of back wages and a subsequent salary increase. Moreover, *Brookhaven* has undermined the valid arguments concerning equal skill and responsibility by adopting the Secretary's interpretation that where the job requirements of the orderly can be proved to require extra skill and responsibility, such distinctions may be set off by the job requirements of the nurses' aide. Admittedly, these areas are nebulous, and it is difficult to determine whether the performance of a catheterization requires more skill than the care of infants and new mothers. However, the decision is not without some merit, as it is consistent with the broad remedial purpose of the FLSA.

4. Hodgson v. Stastny, 67 CCH Lab. Cas. 45,265 (N.D. Ill. 1972).
5. Hodgson v. Beverly Enterprises, 68 CCH Lab. Cas. 45,376 (E.D. Cal. 1972).
6. Hodgson v. South Shore Convacare, Inc., 67 CCH Lab. Cas. 45,186 (N.D. Ill. 1972).

Thus, from an examination of the decisions to date, it seems safe to conclude that the law is in a state of confusion. In view of this, and when confronted by the Wage and Hour Division and faced with the prospect of paying as much as $100,000 in back wages, hospitals and nursing homes will face a continuing dilemma until definite guidelines are established by administrative and judicial interpretation.

W. L. P., III