

U.S. DEPARTMENT OF LABOR
WORKPLACE STANDARDS ADMINISTRATION
Washington, D. C. 20210

February 3, 1971

24 AB 707.2
706.8

[Redacted]

This is in further reference to your letter of August 12, 1970, concerning the application of the equal pay provisions of the Fair Labor Standards Act. We regret the delay in responding to your inquiry, but greatly increased activity under the Equal Pay Act over the past year has resulted in a backlog of correspondence.

As we understand the situation, one of your clients operates a retail shoe store which includes various departments such as "men's", "ladies", and "children's". Most of the departments have both men and women sales clerks; however, at the time your letter was written only women were employed in the "children's" department. Sales clerks are paid according to a compensation plan which provides for a draw based on a percentage of each employee's commission earnings during a specified prior period.

You state that traditionally the volume of sales in the "children's" department is so low as compared to the other departments that the sales people in that department have no opportunity to sell in sufficient quantities so as to give them a meaningful draw when the above formula based on a percentage of each employee's earnings is applied. Your client would like to take the women sales clerks in the "children's" department off of the commission basis and put them on a straight salary basis. You ask whether such a proposed plan is consistent with the equal pay provisions.

There is not enough information in your letter for us to be able to determine precisely how the equal pay provisions would apply to your client's particular circumstances, but your attention is called to the fact that differences in the actual wages paid to men and women employees may well be a violation of the Act when the nature of the selling done by the men and women employees is substantially the same and requires substantially the same skill, effort, and responsibility. Comparison can be made for equal pay purposes between employees employed in the same establishment although they work in different departments, and differences in gross sales of employees would not alone justify a differential in pay particularly where it appears that sex plays a part in assigning women to departments with lower gross sales.

It should also be noted that classification systems under which employees of one sex are assigned to lower paid jobs contravene Title VII of the Civil Rights Act. See Interpretative Bulletin, Part 800, section 800.114(a), a copy of which is enclosed. In this regard, you may wish to advise your client that in the recent case of *Shultz v. Wheaton Glass* (421 F.2d 259 (C.A. 3), cert. denied 398 US 905), the Court of Appeals held that since the Equal Pay Act and Title VII of the Civil Rights Act " . . . serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which . . . would undermine the Civil Rights Act." Further information on the application of Title VII of the Civil Rights Act may be obtained from the Equal Employment Opportunity Commission at 1800 G Street, NW., Washington, D. C. 20506.

For an additional discussion on the application of the equal pay provisions to retail stores see Interpretative Bulletin, Part 800, section 800.123.

Sincerely,

/s/ Robert D. Moran

Administrator