STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Hattie Mae Allison
1811-A West Capitol Drive
Milwaukee, Wisconsin

Complainant,

vs.

Jessen's Cleaners, Inc.
1221 North 68 Street
Wauwatosa, Wisconsin

Respondent.

FINDINGS OF FACT

CONCLUSIONS OF LAW

ORDER

Complainant filed a Complaint with the Department on May 10, 1971, alleging that Respondent had discriminated against her because of her sex in violation of the Wisconsin Fair Employment Act, Wis. Stat. ss 111.31-111.37 (1971).

The Department conducted an investigation and, on October 14, 1971 issued an Initial Determination that there was probable cause to believe that Respondent had violated the Act. An unsuccessful conciliation conference was held on November 15, 1971 and the matter was certified to hearing on that same day.

On May 19 and May 22, 1972 a hearing was held before Bruce O. Schrimpf, Hearing Agent, Department of Industry, Labor and Human Relations.

On January 18, 1973, the Hearing Agent submitted his recommended Findings of Fact, Conclusions of Law and Order.

On March 8, 1973, Respondent filed exceptions to the recommended decision and requested an oral argument before the Commission. Respondent filed a brief on July 12, 1973.

On July 19, 1973, oral argument was held before Commissioners Johnson, Lerman and Zinos.

Based upon the evidence received at the hearing, the briefs and the oral argument, the Department makes the following:

FINDINGS OF FACT

1. Complainant is a female resident of Milwaukee, Wisconsin.

2. Respondent is a cleaning establishment in Milwaukee, Wisconsin whose sole owner and stockholder is Mrs. Lawrence Kane. In 1958, when Mrs. Kane first acquired an interest in the business, Respondent employed approximately

80 to 85 individuals. As of May 1972, Respondent employed 34 individuals. The work force reduction was required by a decline in business and has been accomplished primarily by normal attrition (i.e., not hiring replacements when employes quit or retired).

3. Respondent is subject to a labor agreement between the AFL-CIO Laundry and Dry Cleaning International Union, Local #3008 and the Dry Cleaning Industry of Milwaukee, Wisconsin and Vicinity (hereinafter referred to as "the contract").

4. As of December 1971, Respondent's Wool Pressing Department consisted of the following employes:

   a. Mrs. Hattie Mae Allison, Complainant, full-time employe, classified as a Machine Woolen Operator.

   b. Mrs. Wardeen Cleveland, full-time employe, classified as a Machine Woolen Operator.

   c. Mr. Henry Rossa, part-time employe, classified as a Machine Woolen Operator.

   d. Mr. Louis Szablewski, full-time employe, classified as a Machine Woolen Leadman.

   e. Mr. Claire McDonald, full-time employe, classified as a Machine Presser Leadman.

5. On September 28, 1964, Complainant began working for Respondent in the Wool Pressing Department at a wage of $1.50 per hour. Her primary assignment was the pressing of men's suit coats. Her work was inspected and she was subject to the supervision of Respondent's Plant Manager, Mr. Jerome Doornek. She performed occasional household work such as pressing draperies, bed linens and table linens. However, the amount of household work performed by Complainant was minimal.

6. Prior to her employment by Respondent, Complainant worked for Novelty Cleaners and Vanity Dry Cleaners (both located in Milwaukee) for 12-1/2 years. While employed by these two cleaning establishments, Complainant pressed all types of items including trousers, table linens, bed linens, draperies, dresses, skirts, suit coats, top coats and overcoats.

7. As of December 1971, under the contract, Complainant was entitled to, and did in fact receive, an hourly wage of $2.54.

8. Mrs. Cleveland began working for Respondent in 1967. Her primary assignment was to press overcoats, but she was occasionally called upon to do some sewing. Her work was inspected and she was subject to the supervision of Mr. Doornek.

9. Prior to her employment by Respondent, Mrs. Cleveland worked for Adelman Laundry and Cleaners in Milwaukee. While employed by this cleaning establishment, she pressed all types of items including trousers, table linens, bed linens, draperies, skirts, dresses, suit coats, top coats and overcoats.

10. As of December 1971, under the contract, Mrs. Cleveland was entitled to, and did in fact receive, an hourly wage of $2.54.

11. As of May 1972, Mr. Henry Rossa has been an employe of Respondent's for approximately 24 years. Although originally hired as a maintenance man, Mr. Rossa also presses items such as raincoats. His work is inspected and he is subject to supervision by Mr. Doornek. In addition to his part-time employment with Respondent, Mr. Rossa is a full-time employe of the Milwaukee and Suburban Transport Company and therefore must leave Respondent's plant by about noon each day.

12. As of December 1971, under the contract, Mr. Rossa was entitled to, and did in fact receive, an hourly wage of $2.54.

13. Mr. Szablewski was hired by Respondent in 1963 and is employed almost exclusively as a presser of trousers. Such trouser work is inspected and Mr. Szablewski is subject to the supervision of Mr. Doornek. On occasion, Mr. Szablewski has performed certain household work such as the pressing of draperies, bed linens and table linens. This work is not subject to inspection. However, the amount of household work performed by Mr. Szablewski is minimal.

14. As of December 1971, under the contract, Mr. Szablewski was entitled to an hourly wage of $3.03. However, he actually receives a flat $100 per week guarantee plus an hourly wage of $1.13 under a private agreement with Respondent.

15. As of May 1972, Mr. McDonald had been employed by Respondent for approximately 20 years. His principal assignment is to press household items such as draperies, table linens and bed linens. His work is not inspected and he is subject to minimal supervision.

16. As of December 1971, under the contract, Mr. McDonald was entitled to an hourly wage of $3.03. However, he actually receives a flat $100 a week guarantee plus an hourly wage of $1.16 under a private agreement with Respondent.

17. Employes of the Wool Pressing Department work anywhere from four to eight hours per day on fifteen minute intervals. Based upon the weekly guarantees and hourly rates involved, the following hourly wage rates would apply to Mr. McDonald, Mr. Szablewski, Complainant, Mrs. Cleveland and Mr. Rossa.

	McDonald	Szablewski	Allison	Cleveland	Rossa
4	6.16	6.13	2.54	2.54	2.54
4-1/4	5.87	5.84	2.54	2.54	2.54
4-1/2	5.57	5.54	2.54	2.54	2.54
4-3/4	5.37	5.34	2.54	2.54	2.54
5	5.16	5.13	2.54	2.54	2.54
5-1/4	4.97	4.94	2.54	2.54	2.54
5-1/2	4.80	4.77	2.54	2.54	2.54
5-3/4	4.64	4.61	2.54	2.54	2.54
6	4.49	4.46	2.54	2.54	2.54
6-1/4	4.36	4.33	2.54	2.54	2.54
6-1/2	4.24	4.21	2.54	2.54	2.54
6-3/4	4.12	4.09	2.54	2.54	2.54
7	4.02	3.99	2.54	2.54	2.54
7-1/4	3.92	3.89	2.54	2.54	2.54
7-1/2	3.83	3.80	2.54	2.54	2.54
7-3/4	3.74	3.71	2.54	2.54	2.54

Converting this information into weekly salaries, the most income by any employe would be $146.40 per week.

18. Within the dry cleaning industry, wool pressers are generally paid higher wages than those pressing household goods.

19. Other Milwaukee area cleaning establishments utilize those pressing trousers, suit coats and overcoats interchangeably and all such employes receive the same hourly wage.

20. The job functions performed by Complainant, Mrs. Cleveland, Mr. Rossa and Mr. Szablewski are substantially equal in skill, effort and responsibility. These four employes perform their job functions in substantially similar working conditions.

21. The sales tax returns filed by Respondent with the Wisconsin Department of Revenue for 1971 indicate a 12 percent decline in gross sales revenue from 1970 sales levels.

22. In October 1971, Respondent began considering the lay off of Complainant and Mrs. Allison because of the decline in business.

23. On December 29, 1971, Complainant and Mrs. Cleveland were laid off, effective 11:00 a.m. December 30, 1971, because of the general decline in Respondent's business. The layoff was conducted in accordance with the procedure required by the terms of the contract.

24. Despite the economic decline, Complainant and Mrs. Cleveland worked more total hours in November-December 1971 than in November-December 1970.

CONCLUSIONS OF LAW

Respondent is an "employer" within the meaning of the Wisconsin Fair Employment Act, Wis. Stat. ss 111.31-111.37 (1971). The Act prohibits discrimination on the basis of sex. Id. ss 111.32(5)(a) and 111.325. The only statutory exception to the bar on sex discrimination states that the prohibition

"does not apply to the exclusive employment of one sex in positions where the nature of the work or working conditions provide valid reasons for hiring only men or women, or to a differential in pay between employes which is based in good faith on any factor other than sex." Id. s 111.32(5)(d).

As of December 1971, under the labor agreement which governed Respondent, Complainant and Mrs. Cleveland were entitled to, and did in fact receive, $2.54 per hour as "Machine Woolen Operators." Mr. McDonald and Mr. Szablewski were entitled to receive $3.03 per hour as "Machine Presser Leadman" and "Machine Woolen Leadman," respectively. In fact, because of a $100 per week guarantee, Mr. McDonald receives anywhere from $3.74 to $6.16 per hour, depending upon the number of hours worked in any specific day. Because of the same $100 wage guarantee, Mr. Szablewski receives anywhere from $3.71 to $6.13 per hour.

In determining the legality of such pay differentials, the Department looks to cases decided under the Federal Equal Pay Act of 1963, 29 U.S.C. s 206(d)(i), which, like the Wisconsin Fair Employment Act, prohibits sex discrimination in the payment of wages. The Federal Act requires the payment of equal wages to both men and women when their jobs entail equal skill, effort and responsibility and are performed under similar working conditions. These same factors govern claims for equal pay under the Wisconsin Act.

When pursuing a claim under the Equal Pay Act, Complainant has the burden of establishing a prima facie case. Schultz v. Wheaton Glass Company, 421 F.2d 259 (3rd Cir. 1970), cert. denied, 90 S. Ct. 1696. In Wheaton Glass, Complainant carried the burden of establishing a prima facie case by showing that a wage differential existed for substantially similar jobs. This same burden must be carried by a Complainant alleging an illegal pay differential under Wisconsin's Fair Employment Act.

Complainant has clearly established that a substantial wage differential existed between the wage she and Mrs. Cleveland received and that paid to Mr. McDonald and Mr. Szablewski. The second part of the prima facie case requires a showing that the jobs involved are substantially similar in skill, effort and responsibility. Complainant's burden will be satisfied if her job (and that of Mrs. Cleveland) is substantially equal to that of either Mr. McDonald or Mr. Szablewski.

As the tests of equal skill, effort and responsibility are drawn from the Equal Pay Act, the Department looks to the interpretative bulletin of the Wage and Hour Administration, Department of Labor, 29 C.F.R. Part 800, for guidance in their application.

29 C.F.R. s 800.122 sets forth "General Guides for Testing Equality of Jobs" and states,

"What constitutes equal skill, equal effort or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration. The terms are considered to constitute three separate tests, each of which must be met in order for the equal pay standard to apply. In applying the tests it should be kept in mind that "equal" does not mean "identical." 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."

29 C.F.R. s 800.123 states that,

"Although the equal pay provisions apply on an establishment basis and the jobs to be compared are those in the particular establishment, all relevant evidence that may demonstrate whether the skill, effort and responsibility required in the jobs at the particular establishment are equal should be considered, whether this relates to the performance of like jobs in other establishments or not."

29 C.F.R. s 800.121 advises that the three tests are to be applied to the actual job requirements and performance rather than job classifications or titles.

With these general admonitions in mind, the specific tests of the equal pay standard will be applied to Complainant's job situation.

29 C.F.R. s 800.125 provides that in examining jobs for "equal skill," factors such as experience, training, education and ability are to be considered. It further states that "if an employe must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the Act as jobs the performance of which requires equal skill...."

Utilizing this standard to compare the jobs held by Complainant and Mrs. Cleveland with that of Mr. Szablewski, the evidence presented to this Department makes it clear that the jobs require substantially "equal skill." The physical functions involved in pressing a suit coat, a long coat and a pair of trousers are similar. Indeed, the testimony of Mr. Parr indicates that other cleaning establishments utilize employes who press these garments interchangeably because the "skill" involved in pressing the various woolen garments is the same. The interchangeable employes at other cleaning establishments are all paid the same wage rate. Parr's testimony regarding "industry practice" is supported by Complainant's testimony that, having pressed both trousers and other garments in her 20 years of work in the cleaning industry, she had found no difference in the amount of skill involved.

Unfortunately, there was no testimony as to the amount of experience, training, education and ability which an employe needs to competently perform the jobs in question. The testimony was instead aimed at indicating the experience, training, etc. actually possessed by the incumbents in those jobs. Such evidence is not directly relevant to the determination of whether the jobs require "equal skill." Suffice it to say that the Department is impressed with the qualifications of the employes involved.

Based upon the relevant testimony, Complainant has established her prima facie case as to "equal skill."

29 C.F.R. s 800.127 states that, in comparing jobs for "equal effort" the amount of mental and physical effort needed for the performance of the job is determinative. The testimony of Mr. Farr indicates that there is no difference in the "effort" exerted by Mr. Szablewski in pressing trousers as opposed to those garments pressed by Complainant and Mrs. Cleveland. It has been established that the equipment utilized to press various garments is similar. In addition, Complainant has testified that her experience in the industry indicated that there is more physical effort involved in pressing a suit coat as opposed to trousers. Based upon this evidence, Complainant has satisfied her prima facie burden as to "equal effort."

Respondent has attempted to indicate that the occasional performance of household work by Mr. Szablewski requires so much additional "effort" that Complainant has failed to carry her "equal effort" burden. In Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970), the "equal effort" test within the context of additional duties was established. The court stated that jobs do not entail equal effort "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" Id. at 725.

The household duties which Mr. Szablewski very occasionally performs do not "consume a significant amount" of his time and, as a result, these duties do not affect the sufficiency of Complainant's prima facie case as to "equal effort." It might also be noted that, as customers are charged less for household goods, the extra duties are not of "economic value commensurate with the pay differential." Therefore, any claim that Szablewski's extra duties mean that the jobs don't entail equal effort must fail under the Hodgson test.

29 C.F.R. s 800.129 provides that in comparing jobs for "equal responsibility," the key criterion is "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." The testimony of Mr. Doornek, Respondent's General Manager, indicates that the work of Complainant, Mrs. Cleveland, and Mr. Szablewski is inspected and thus all are equally "accountable." As Respondent charges the same rate for the pressing of a pair of trousers and a suit coat, it appears that the economic importance of the "job obligation" is also equal. On the basis of this evidence, Complainant has carried her prima facie burden as to the "equal responsibility" of the jobs.

As to the requirement of similar working conditions, the fact that Complainant, Mrs. Cleveland, and Mr. Szablewski all work in close physical proximity during similar hours clearly satisfies Complainant's burden in this area.

Having satisfied her prima facie burden as to the three jobs being compared, it is unnecessary to deal with the issue of the substantial equality of the jobs held by Complainant and Mrs. Cleveland when compared to that held by Mr. McDonald. However, as "wool pressers" are paid more than those pressing household goods in other area cleaning establishments, and as Respondent's employes generally considered Mr. McDonald's job to be the "easiest" in the plant, Complainant might

well be able to carry her prima facie burden for Mr. McDonald's job as well as that of Mr. Szablewski.

A prima facie case having been established, the pay differential is unlawful in the absence of a showing that it was based in good faith on some factor other than sex. Wis. Stat. s 111.32(5)(d) (1971). The Respondent bears the burden of demonstrating that such a factor exists. Nekoosa-Edwards Paper Co. v. DILHR, Case No. 127-335, 2 CCH E.P.D., para. 10,317 (Dane County Cir. Ct. 1970).

The factor asserted by Respondent as a justification for the wage differential is the superior ability, experience and interchangeability of Mr. McDonald. Respondent presents this factor because of Mr. McDonald's ability to perform household work when called upon to do so.

Based upon the testimony presented to this Department, it is clear that Complainant and Mrs. Cleveland are also able to competently perform household work. Each woman has performed household work for other cleaning establishments. In fact, testimony indicates that Complainant has performed household pressing for Respondent in the past. The fact that neither woman has been utilized to perform these very minimal household duties in the recent past is because Respondent has not given them that opportunity. Each woman has ability, experience and interchangeability which is equivalent to that possessed by Mr. Szablewski. Based on this evidence, the Department must conclude that Respondent's defense is not sufficient to counter Complainant's prima facie case.

Any claim that this is a valid "red circle" wage situation and therefore not violative of the equal pay standards under 29 C.F.R. s 800.146 must fail. Hodgson v. Goodyear Tire and Rubber Co., 358 F. Supp. 198 (D.C. Ohio 1973) provides a discussion of red circle rates within the context of the Equal Pay Act which is determinative of the issue at hand. The court in Hodgson stated that

"a red circle rate is a higher rate paid to a particular employe when he is transferred to a job at a lower skill and rate of pay than his former job, either on a temporary basis, to keep him available when he is needed again in his regular paid job, or to avoid hardship when an employe who has served long and faithfully has, by reason of age or illness, become unable any longer to perform his regular work." Id. at 144.

As the rate involved here isn't temporary, isn't a result of Mr. Szablewski's transfer from a different job, and isn't a result of his age or illness, it is not a valid red circle wage rate which could justify the wage differential.

It is also necessary to consider Respondent's argument that the employment of a male (Mr. Rossa) performing substantially the same duties as Complainant for the same wage precludes the finding of an illegal pay differential.

The evidence before this Department indicates that Mr. Rossa is only "part-time" and performs some maintenance functions in addition to his primary duties in the Wool Pressing Department. These two factors may well place Mr. Rossa in a job status which is distinct from that of Complainant and Mrs. Cleveland, and thus make his rate of pay an irrelevancy to the issue at hand. Unfortunately,

the evidence is insufficient to allow any definite conclusion as to the true equivalency of the jobs performed by Mr. Rossa, Complainant and Mrs. Cleveland.

Even assuming that Mr. Rossa performs a job which is substantially equal to that of Complainant, his presence in no way bears upon the issue of sex discrimination which is before this Department. As Complainant has made a prima facie case and Respondent has not demonstrated that the wage differential is based in good faith on any factor other than sex, the Department must find that Respondent's pay differential is discrimination on the basis of sex.

There remains the issue of whether the layoff of Complainant and Mrs. Cleveland on December 29, 1971 violated Wis. Stat. s 111.32(5)(g), which prohibits discrimination "against any person because he has opposed any discriminatory practices under this section or because he has made a complaint, testified or assisted in any proceeding under this section."

As the layoff occurred after the Department had made the initial determination of probable cause, an inference is raised that the layoff was retaliatory. Under this inference, the layoff was extended to non-Complainant Cleveland because, under the layoff clause in the contract, she had to be laid off to reach Mrs. Allison and because she would stand to benefit by any Department order which would be favorable to Complainant. Respondent has attempted to counter the retaliatory inference by citing the general decline in Respondent's business as the reason for the layoff.

The evidence before this Department has established that in 1971 Respondent sustained a 12 percent decline in gross sales revenue from 1970 sales levels. Respondent also submitted testimony which indicates that Respondent has allowed its work force to decline over the years by not hiring replacements when employes quit or retired. In addition, Respondent has established that the layoff was performed in accordance with procedures set out in the contract.

Thus, Respondent has presented sufficient evidence of a valid economic justification for the layoff to overcome the inference of retaliation. Therefore, the Department finds that the layoff of Complainant and Mrs. Cleveland did not violate Wis. Stat. s 111.32(5)(g).

COMMISSIONER ZINOS: Concurring in part, dissenting in part.

I concur with the Department's finding that the wage differential constituted sex discrimination in violation of Wisconsin's Fair Employment Act. However, I believe that the layoff of the two women was in retaliation for the filing of the Complaint with this Department and thus violated Wis. Stat. s 111.32(5)(g). Therefore, I must dissent from the Department's conclusion that the layoff was justified by the decline in Respondent's business.

The timing of the layoff and the fact that the hours worked by Complainant and Mrs. Cleveland had actually increased in the face of the alleged economic downturn create an inference of retaliation which Respondent has failed to overcome.

Based upon the evidence received at the hearing and the Findings of Fact and Conclusions of Law, the Department makes the following:

ORDER

1. Respondent shall cease and desist from discriminating against female employes with respect to all terms, conditions, and privileges of employment.

2. Respondent shall pay wages to all female employes at the same rate and on the same basis as it pays wages to all male employes where such female and male employes are performing work involving substantially the same skill, effort, responsibility and working conditions; provided, however, that different wages may be paid pursuant to a bona fide seniority or merit system, or pursuant to a bona fide system which measures earnings by quality or quantity of production.

3. Respondent shall not reduce the wages of any employe in order to comply with this Order.

4. The parties shall be advised that Complainant and Mrs. Wardeen Cleveland may bring civil actions for wages lost due to Respondent's discrimination. See Murphy v. Miller Brewing Co., 50 Wis. 2d 323, 184 N.W. 2d 141 (1971).

JUN 7 1974

Dated at Madison, Wisconsin, this _____

day of _____, A.D., 1974.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

/s/ Philip E. Lerman
Chairman

/s/ John C. Zinos
Commissioner

/s/ William A. Johnson
Commissioner