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IN THE SUPREME COURT OF THE STATE OF UTAH

EDNA L. KOPP,

Plaintiff-Respondent,

vs.

SALT LAKE CITY, a Municipal Corporation of the State of Utah,

Defendant-Appellant.

Case No. 12999

Brief of Defendant-Appellant Salt Lake City Corporation

Appeal from an Order of the District Court of Salt Lake County, Utah
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INDEX

Page

NATURE OF CASE 1

DISPOSITION OF THE LOWER COURT.... 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 3

STATEMENT OF POINTS

POINT I

FOR A CLAIM OF DISCRIMINATION BECAUSE OF SEX TO BE SUSTAINED, THE PLAINTIFF MUST, IN FACT, BE EMPLOYED ON THE SAME JOB OR IN THE SAME JOB CLASSIFICATION OR POSITION, AND IN THIS CASE, THE PLAINTIFF WAS NOT EMPLOYED IN THE SAME JOB, JOB CLASSIFICATION OR POSITION. 4

POINT II

THE PLAINTIFF IN THE INSTANT CASE WAS NOT "OTHERWISE QUALIFIED" BECAUSE SHE DOES NOT POSSESS THE EDUCATION, TRAINING, ABILITY AND OTHER QUALIFICATIONS REQUIRED BY HER EMPLOYER FOR THE POSITION OF POLICE OFFICER. 17

POINT III

THE ANTI-DISCRIMINATION ACT CON-

Page

TEMPLATES ONLY A PROSPECTIVE APPLICATION OF THE ACT AND DOES NOT APPLY TO JOBS WHICH WERE, AT THE TIME OF THE ENACTMENT OF THE ACT, ALREADY CREATED AND FILLED; THEREFORE, THE ACT DOES NOT APPLY TO THE PLAINTIFF IN THAT THE POSITION SHE OCCUPIED WAS CREATED AND WAS FILLED BY HER AT THE TIME OF THE ENACTMENT OF THE ACT. 21

POINT IV

THE INDUSTRIAL COMMISSION EXCEEDED ITS AUTHORITY AND COMMITTED A BREACH OF DISCRETION BY AWARDING BACK-PAY IN THAT THIS IS NOT A CASE IN WHICH BACK-PAY SHOULD BE A CONSIDERATION. 23

POINT V

THE COURT ERRED IN ORDERING THE INTERROGATORIES OF PLAINTIFF TO BE ANSWERED REGARDING SALARIES OF THE POLICE OFFICERS IN THE DISPATCH OFFICE AND IN BASING THE AWARD FOR BACK-PAY UPON THOSE INTERROGATORIES. 28

POINT VI

AN AWARD FOR BACK-PAY MAY NOT BE AWARDED BEYOND THE THREE YEAR STATUTE OF LIMITATIONS AND ANY INSTALLMENT BEYOND THAT PERIOD IS BARRED BY SECTION 78-12-26, UTAH CODE ANNOTATED, 1953. 29

CONCLUSION 36

CASES CITED

Page

A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 79 L.ed. 1570, 55 S.Ct. 839 (1935) 25

Aachen & N.F. Ins. Co. v. Morton, (C.C.A. 6th) 156 F. 654, 15 L.R.A. (N.S.) 156 (1907) 33

Abbott v. City of Los Angeles, 50 Cal.2d 438, 326 P.2d 484 (1958) 33, 34

Abram v. Sam Joaquin Cotton Oil Co., (D.C. Cal.) 46 F. Supp. 969 (1942) 32

Adams and Freese Co. v. Kenoyer, 17 N.D. 302, 116 N.W. 98 (1908) 31

Ashton Jenkins Co. v. Bramel, 56 Ut. 587, 192 P. 375, 11 A.L.R. 752 (1920) 31

Bruner v. Martin, 76 Kan. 862, 93 P. 165 (1907) 33

Buckman v. Hill Military Academy, 182 Ore. 621, 189 P.2d 575 34

Buell v. Duchesne Mercantile Co., 64 Ut. 391, 231 P. 123 (1924) 33, 35

Chez v. Utah St. Bldg. Comm., 93 Ut. 538, 74 P.2d 687 (1937) 22

Crawford v. Hunt, 41 Ariz., 229, 17 P.2d 802 (1932) 35

Detective Endowment Ass'n Police Dept. v. Leary, 320 N.Y.S.2d 253 (1971) 18

Eley v. Cahill, 126 Ill. App.2d 272, 261 N.E. 819 (1970) 20, 21

Eureka City v. Wilson, 15 Ut. 67, 48 P. 150 (1897) 25

Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229 (1941) 35

Page

Gord v. Salt Lake City, 20 Ut.2d 138, 434 P.2d 449 (1967) 24

Hague v. Committee for Industrial Organization, 307 U.S. 496, 83 L.ed. 1423 26

Hanger v. Abbott, 6 Wall. (U.S.) 532, 18 L.ed. 939 (1868) 30

Home Building and Loan Association v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938) .. 22

Houg v. Houg, 206 Okl. 179, 242 P.2d 162 (1952) .. 32

Irvine v. Bossen, 25 Cal.2d 652, 156 P.2d 9 (1944) .. 33

Jennings v. Lowery and Berry, 147 Miss. 673, 112 So. 692 (1927) 31

Jersey Maid Mills Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577 26

Lamb v. Powder River Livestock Co., 132 F. 434, 67 L.R.A. 558 (1904) 31

Leonard v. Kleitz, 155 Kan. 626, 127 P.2d 421 (1942) 34

Lorenzetti v. American Trust Co., (D.C. Cal.), 45 F. Supp. 128 (1942) 32

Mize v. State Division of Human Rights, 328 N.Y.S. 2d 983 (Jan., 1972) 27

Morgan v. United States, 304 U.S. 1, 82 L.ed. 1129 25

Raymond v. Christian, 24 Cal. App.2d 92, 74 P.2d 536 (1937) 35

Riddles Barger v. Hartford F. Ins. Co., 7 Wall. (U.S.) 386, 19 L.ed. 257 (1869) 31

Page

Robinson v. Union Pacific RR. Co., 70 Ut. 441, 261 P. 9 22

Romer v. Leary, 428 F.2d 186 (1970) 32

Roseborough v. Shasta River Canal Co., 22 Cal. App. 556 35

Shultz v. Brookhaven General Hospital, 305 F. Supp. 424 (1969) 7

Shultz v. Victoria Nat'l Bank, 240 F.2d 648 (1910) .. 12

Shultz v. Wheaton Glass Co., 421 F.2d 259 (1970) 7, 11

Smith v. Onondaga Pottery Co., 300 N.Y.S. 298, 164 Miss. 883 (1937) 32

Smith Eng. Works v. Custer, 194 Okl. 318, 151 P.2d 404 (1944) 32

State v. Lundquist, 60 Wash.2d 397, 374 P.2d 246 (1962) 23

State v. Marana Plantations, Inc., 75 Ariz. 111, 252 P.2d 87 26

Tillson v. Peters, 41 Cal. App.2d 671 (1941), 107 P.2d 434 34

United States v. Chicago, M.St. P. & P.R. Co., 282 U.S. 311, 75 L.ed. 359 25

United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 83 L.ed. 1446 26

Utah Const. Min. Co. v. Industrial Comm., 57 Ut. 279, 194 P. 657 (1920) 32

Walsh v. Dallas R. & Terminal Co., 140 Tex. 385, 167 S.W.2d 1018 25

Page

Weber v. State Harbor Comrs., 18 Wall. (U.S.) 57, 21 L.ed. 798 (1873) 30

West v. Theis, 15 Id. 167, 96 P. 932 (1908) 33

Wirtz v. Basic, Inc., 250 F. Supp. 786 (1966) 6

Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (1967) 13, 14, 15

Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049 (1967) 6, 16

Wirtz v. Wheaton Glass Co., 284 F. Supp. 23 (1968) 8, 9, 10, 11

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.ed. 220.. 26

CONSTITUTIONAL PROVISION CITED

Utah Constitution, Article VI, Section 29 24

STATUTES CITED

United States Code Annotated:
Sec. 29 U.S.C. 206 (d) (1) 4, 5

Utah Code Annotated, 1953:
Sec. 34-35-6 .... 6, 21

Sec. 34-35-7 (12) 23

Sec. 78-12-1 30

Sec. 78-12-26 30

TEXTS CITED

1 Am. Jur. 2d, Sec. 108 25

IN THE SUPREME COURT OF THE STATE OF UTAH

EDNA L. KOPP, *Plaintiff-Respondent,* vs. SALT LAKE CITY, a Municipal Corporation of the State of Utah, *Defendant-Appellant.*	Case No. 12999

Brief of Defendant-Appellant Salt Lake City Corporation

NATURE OF CASE

This is an appeal from an Order of the District Court of the Third Judicial District, in and for Salt Lake County, sustaining and affirming an Order of the Industrial Commission of the State of Utah, Anti-Discrimination Division, which Order awarded the Plaintiff-Respondent a judgment for back pay based upon a finding of discrimination because of sex pursuant to the

Utah Anti-Discrimination Act, Section 34-35-1, et seq., Utah Code Annotated, 1953, as amended. This appeal is for the purposes of interpreting the provisions of that Act.

DISPOSITION IN THE LOWER COURT

Proceedings were had before the Anti-Discrimination Division of the Industrial Commission of the State of Utah, and that body found that discrimination had occurred and awarded Plaintiff-Respondent a judgment for back-pay in an amount equaling the difference in salary actually paid to the Plaintiff-Respondent and that amount paid a police officer at the lowest Civil Service grade level, for the period from July 1, 1965, (the date the Anti-Discrimination Act took effect) until January 15, 1970, (the date the Defendant-Appellant, by ordinance, created the new position of "dispatcher.") Defendant-Appellant appealed to the Third Judicial Court and that Court sustained the finding and upheld the Order of the Industrial Commission.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have this court reverse the judgment of the lower court and the finding and order of the Industrial Commission.

STATEMENT OF FACTS

Plaintiff-Respondent, hereinafter referred to as Plaintiff, was employed by Defendant-Appellant, hereinafter referred to as Defendant, on or about December 7, 1961, as a clerk typist in the Salt Lake City Police Department. On or about May 15, 1962, Plaintiff was then assigned to the Dispatch Office of said Police Department to act as a radio operator, which was generally referred to as a "dispatcher." Plaintiff worked along side of male police officers who were also referred to as "dispatchers," who handled the incoming phone calls, decided whether or not it was a police matter, evaluated the information and made a decision as to what action should be taken. The information was then given to the female to broadcast to the field officers. At some point in time, which point of time was not very well established in the record, Plaintiff began, on her own initiative, to assume the task, in times of need, of answering the phone and helping out the police officers with their job. Gradually, Plaintiff began assuming more of the police officers' work until at the time of the filing of the complaint in this matter, Plaintiff was answering the phone when there was an overload of calls coming in to the dispatch office, when a police officer was not available because of sickness, vacation, etc. On the other hand, police officers operated the radio only when a female employee was not there, such as when she was out for lunch, home ill, vacations, or such. On or about November 21, 1969, Plaintiff filed a complaint with the Industrial Commission charging discrimination because of sex.

STATEMENT OF POINTS

The Industrial Commission erred in their finding of discrimination as well as its Order awarding back pay to the Plaintiff from July 1, 1965, to January 15, 1970, and the District Court erred in sustaining that erroneous finding and order for the following reasons:

POINT I

FOR A CLAIM OF DISCRIMINATION BECAUSE OF SEX TO BE SUSTAINED, THE PLAINTIFF MUST, IN FACT, BE EMPLOYED ON THE SAME JOB OR IN THE SAME JOB CLASSIFICATION OR POSITION, AND IN THIS CASE, THE PLAINTIFF WAS NOT EMPLOYED IN THE SAME JOB, JOB CLASSIFICATION OR POSITION.

The statute in question, since this is a question of first impression, has no legal precedence for guidance in the interpretation of that Act. The case before the Court at this time is a case of first impression. However, the *Equal Pay Act of 1963*, 29 U.S.C. 206(d)(1), is similar in nature to the Utah Anti-Discrimination Act, Title 34, Chapter 35, Utah Code Annotated, 1953, as amended. Therefore, cases decided under the Equal Pay Act can afford some guide line for the interpretation of the Utah Act. One difference between these acts, which should be noted at the outset is that the Federal Act provides for equal pay for equal work, while the Utah Act requires that an employee must be employed on the same job, job

classification or position to be filled or created; must be discriminated against in matters of compensation; and that discrimination must be due solely to one of the enumerated reasons, one of which is sex, before the requirement of equal pay must be met. The ***Federal Statute*** provides that an employer may not 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 . . . *for equal skill*, effort, and responsibility, and which are performed under similar working conditions, *except where such payment is made pursuant to . . . a differential based on any factor other than sex. . . .*" 29 U.S.C. 206(d) (1) (Emphasis added)

The *Utah Anti-Discrimination Act* provides:

> "(1) It shall be a discriminatory or unfair employment practice:
>
> (a) For an employer to refuse to hire, to discharge, to promote or demote, or *to discriminate in matters of compensation* against any person otherwise *qualified*, because of . . . sex . . . and no applicant or candidate for any job or position shall be deemed 'otherwise qualified' unless he or she possesses the education, training, ability, moral character, integrity, disposition to work, adherence to reasonable rules and regulations, and other qualifications required by an employer *for any particular job, job classification or position to be*

filled or created." Sec. 34-35-6, *Utah Code Annotated*, 1953, as amended. (Emphasis added)

It is definite in the case at bar that the men the Plaintiff has worked along side of were not in the same job classification with her. She had been classified as a "clerk typist" and was subsequently reclassified as a "dispatcher," while the men were, with the exception of one, police officers and had as their Civil Service designation either patrolmen, 1st, 2nd, 3rd, 4th or Sargeants. The one who was not classified as a police officer had a classification of "radio operator." Since the job classifications were not the same, the only question left to be answered is whether or not the Plaintiff and the men performed, in fact, the same "job" or performed within the same "position."

The test which should be applied in order to determine whether two jobs or two positions are the same or not is that the jobs, as a whole, should be viewed over the entire work cycle and not by taking isolated incidences into consideration. *Wirtz v. Rainbo Baking Co.*, 303 F. Supp. 1049 (1967); *Wirtz v .Basic, Inc.*, 250 F.Supp. 786 (1966). It is the substantiality test which is applied in the cases decided under the Federal Act, i.e., whether differences in the job are merely incidental, insignificant and inconsequential, or whether they are so substantial as to justify a different classification, therefore, considered as different jobs. This means that persons performing some functions which are the same, but where other functions are different, this does not constitute the

same job unless those additional functions are incidental, insignificant and inconsequential. The court in *Shultz v. Brookhaven General Hospital*, 305 F.Supp. 424 (1969), at page 426, stated the proposition thusly:

> "In determining a violation of the Equal Pay Act of 1963, the *requirements of the particular job should be compared* rather than the skill of individual employees, or their previous training and experience.
>
> " 'Equal' as used in the Equal Pay Act of 1963 does not mean identical and insubstantial differences in the skill, effort and responsibility requirements of particular jobs should be ignored. *The job requirements are to be viewed as a whole.*" (Emphasis added)

In *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (1970), the court, at page 265, said:

> "Congress in prescribing 'equal' work did not require that the jobs be identical but only that they must be substantially equal."

The Utah Legislature did not see fit to enact this same provision, that is, equal pay for equal work, which the courts interpret as requiring "substantially equal" jobs. Under the Utah Act an employee must be employed on the same "job, job classification or position to be filled or created." Thus, under the Utah law it would appear there is not the leeway that is given under the Federal Act for an employee to be in a different job and still be entitled to receive the pay of another job because it is "substanttially equal." This would mean that where there are two different jobs, even though some functions

are performed which are the same, the Utah Act would not require that both jobs be paid the same amount. Thus, under the Utah Act it is urged that the jobs must be identical in nature before a discrimination charge will be sustained.

The *Wheaton Glass Co.* case was appealed from the lower court and on appeal the decision of the lower court was reversed. In the lower court, the cases was entitled, *Wirtz v. Wheaton Glass Co.*, 284 F.Supp. 23 (1968). In that case, the lower court said that there might be economic reasons for having men and women performing the same functions at times and still allow a higher wage paid to the men because of added responsibility. The court acknowledged that these economic reasons would allow a finding that any discrimination which had occurred would not then be because of sex. In that case, men and women were performing the identical task 82% of the time on a job which was classified as "selector-packers." The job of selector-packers was to inspect the bottles for any defects as they emerged on a conveyor from the oven. The defective products were discarded while those that met the standards were packaged. The Company had another category of employees known as "snap-up boys," who crated and moved the bottles and generally functioned as handymen, sweeping, cleaning and performing other unskilled miscellaneous tasks. The male selector-packers spent about 18% of their time performing sixteen additional tasks, which tasks were performed by the snap-up boys on a full time basis. The lower court held that spending 18% of their time doing

other tasks was significant enough to require that the finding of the job of the male selector-packers was not even substantially equal with the job the female selector-packers performed. In that case the lower court stated:

> "The basic issue, of course, requires the determination of whether there is a difference, in fact, between male and female performance in the job of selector-packers and if so, *whether such difference is essential and substantial enough to constitute a realistic economic basis for disparity and wage rates.* However, if such difference is merely incidental, insignificant and unsubstantial to the performance of the principal task of the department in question, then it must be concluded that it is more artificial than real, leaving sex as the only realistic and distinctive basis for the wage dispartiy, contrary to the Act." *Wirtz v. Wheaton Glass Co.*, supra, at page 31. (Emphasis added)

In stating that the additional functions performed by the men constituted a separate job, and, therefore, allowed a disparity in pay, the court observed:

> "As heretofore stated, the declared purpose of the Act was to eliminate discrimination in wage payments to employees on the basis of sex where equal work was being performed by both men and women under the same or similar working conditions. However, if the differential is based upon any other factor other than sex, then that differential is beyond the reach of the Act." *Wirtz v. Wheaton Glass Co.*, supra, at page 31.

As in the Federal Act, the Utah Act should likewise be interpreted to mean that if the disparity in the

rate of pay is based upon any other factor other than sex, such disparity is "beyond the reach of the Act."

There must be allowed a discretion to the employer to evaluate the employee's work and to set wages accordingly.

> "For as was said by Congressman Goodell, in speaking of the intent of the Act, '(W)e want the private enterprise system, employer and employee and a union, if there is a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it . . . [sex] is the sole factor that we are insisting as a restriction.' " *Wirtz v. Wheaton Glass Co.*, supra, at page 32.

> "The Act was never intended to circumscribe an employer's appraisal or determination of the need and utilitarian value of an employee's performance. What was intended was prohibition of specious distinction based upon sex alone, all other things being equal." *Wirtz v. Wheaton Glass Co.*, supra, at page 33.

Hence, in order to have a claim for discrimination, all other factors, other than sex, must be the same. Under the Utah Act this requires that male and female must be on the same job, job classification or position to be filled or created.

> "True, in the assembly line phase of selecting and packing both men and women performed identical functions. If nothing more remained to be done, and in fact was not done, then it would seem clear that within the confines of this work function, they would be performing equal work for which equal pay should be mandated. But the

> evidence demonstrates that such is not the case. For the job of the male neither begins nor ends with the particular performance, as it does with the female. It is the extended scope of the male's job requirements, coupled with other distinguishing factors, heretofore set forth, and their cumulative effect upon which focus must be directed. So viewed, the proof amply demonstrates that men and women do not perform equal work under similar conditions within the intent of the Act. To the contrary, men are required to exert additional effort, to possess additional skill and to have additional responsibility, which frequently are performed and discharged under the ever changing demands of working conditions, dissimilar to those prevailing for women." *Wirtz v. Wheaton Glass Co.*, supra, at page 34.

This case, as mentioned, was reversed by the Appellate Court, but not because of any error the lower court made by its decision that the additional functions performed by the men, constituting only about 18% of their time, made the jobs different. One reason the decision was overturned was because:

> "While all male selector-packers received the higher rate of pay, there is no finding that all of them are either available for or actually perform 'snap-up boys' work." *Shultz v. Wheaton Glass Co.*, supra, at page 264.

The second reason was that the snap-up boys were paid only two cents (2c) an hour more than the female selector-packers, while the male selector-packers were paid 21½ cents more than the women.

> "On its face the record presents the incongruity that because male selector-packers spent a relatively small portion of their time doing the work of snap-up boys whose hourly rate of pay is $2.16, they are paid $2.355 per hour for their own work, while female selector-packers receive only $2.14. This immediately casts doubt on any contention that the difference in the work done by male and female selector-packers, which amounts substantially to what the snap-up boys do, is of itself enough to explain the difference in the rate of pay for male and female selector-packers on grounds other than sex." *Shultz v. Wheaton Glass Co.*, supra, at page 262.

In *Shultz v. Victoria Nat'l Bank*, 240 F.2d 648 (1910), the facts were that women were performing the exact same job as the men but being paid less. The defendant claimed that the men were on a training program which the court said was in practice, sporadic, unspecific, unpredictable, and unplanned and, therefore, did not comply with the exemption. The Victoria National Bank case stands for the proposition that, under the Federal Act, the defendant has the burden of proof as to whether one of the exemptions given under that Act is applied to his case. The Federal Equal Pay Act provides for several exemptions which allow a disparity in wages if the payments are made pursuant to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quality or quantity, or (4) a difference based on any other factor other than sex. The Utah Act does not provide for these exemptions. Therefore, the entire burden is upon the Plaintiff to establish that she is employed on the same job, or is classified in

the same job classification or position; that she has been discriminated against; and that discrimination has, as its sole basis, the reason of her being of a different sex. The Industrial Commission erred in applying the standards of the Federal Act requiring Defendant to establish that one of these exceptions of the Federal Act applied to this case. Even if it were true that in the case at bar the defendant must prove that it comes within one of the exceptions, this we have done. The disparity at hand is simply and purely for reasons other than sex. The first is, as previously discussed, because the two jobs in the dispatch office are not the same "job, job classification, or position to be filled or created." See Defendant's Memorandum filed before the Industrial Commission of Utah, designated in the record of the Industrial Commission as Item 284; the same is hereby made a part of this Brief and incorporated herein by reference. Secondly, the difference in pay is because of additional qualifications which the men possess so far as "education, training and ability," provided by their basic training, inservice training and their actual experience out in the field. It is for these reasons and these reasons alone, that the men are being paid at a higher rate of pay. When women perform the same job for Salt Lake City as do men, they are paid the same wages, e.g., Salt Lake City has two police women and they are paid on the same pay scale as police men.

Wirtz v. Dennison Mfg. Co., 265 F.Supp. 787 (1967), is also an interesting case regarding what constitutes a separate job or an unequal job under the Fed-

eral Equal Pay Act. Again, in that case the men and the women worked on the same machines doing exactly the same job, but the men had the additional job of changing over their machines when starting work on a new order and also making repairs and adjustments on their machines when necessary, as well as getting their own material to work on and moving their finished work to the shipping areas. Despite the fact that these additional functions required only about 10% of the male operator's time, the court held that these two jobs were not substantially equal. In discussing what the real issue in this case was, the court said:

> "The real issue is whether these differences are, as plaintiff contends, merely incidental, insignificant and inconsequential, or whether, as defendant argues, they are so substantial as to justify the pay differential which existed." *Wirtz v. Dennison Mfg. Co.*, supra, at page 789.

The court held these additional tasks to be different and substantial ones; thus, justifying the finding that these jobs were unequal.

> "The court finds that the difference was a substantial one. The men on the third shift had to possess skills not required by the women operators. Of course, they were not required to be experienced machinists, but they did have to possess a significant degree of mechanical skill and ability in order to change over their machines from job to job, and to repair them when necessary. They also had to perform the task of moving their own materials to and from their machines, a task which required physical effort which the women

> operators who testified said they could not or would not perform. These activities, while they may not have taken up more than 10% of the men's working time, were an essential part of their task which they had to perform on every working night and without which the job could not have been performed. They were clearly far more than incidental or occasional extra work." *Wirtz v. Dennison Mfg. Co.*, supra ,at page 789.

Here, where the men performed the same job as the women performed ninety percent of the time, but had additional tasks which took only ten percent of their time, the court said there was nothing to show that sex discrimination was involved in this instance.

> "In the situation here involved, there is nothing to show that sex discrimination played any part in determining the pay rate on the third shift (on which shift only men operated the machines). Defendant's action was clearly justified by other adequate motives of an economic nature." *Wirtz v. Dennison Mfg. Co.*, supra, at page 790.

In the case at bar, we have the exact opposite situation as was found in the Federal cases heretofore referred to. Rather than the women performing the identical job with the males a great majority of the time the Plaintiff in this case performed as a basic function a separate job from the males and only a small portion of the time was spent doing the same job as the males. In the dispatch office at the Police Department there are two separate jobs with the basic functions of the women being the task of operating the radio, while the basic function of the men is that of handling the incom-

ing calls, evaluating them, making decisions and directing what action is to be taken in response to these calls. There is some overlapping of responsibilities in that the women perform the same functions as do the men; however, they do not perform these same functions to exactly the same extent as do the men, nor do they perform these functions anywhere near the length of time the men do. The women perform these same functions only when there is no man available because of illness, holidays or vacations; or when there is an overload of incoming calls.

Merely because a person replaces another for periods of time or merely assists performing functions for that other person does not mean that he or she is entitled to the pay of that job. In *Wirtz v. Rainbo Baking Co.*, 303 F.Supp. 1049 (1967), the court said that a person working only a part of the time on a different job does not entitle that person to the pay of that job for the entire period. The court said that:

> "The fact that one of the men replaces the truck-loader one day a week is not a justification for paying him the entire week at a wage rate higher than that paid to women." *Wirtz v. Rainbo Baking Co.*, 303 F.Supp. 1049. (1967), at page 1052.

The second basis for discrimination in the case at hand is the training, ability, and experience of the men as opposed to that of the Plaintiff. The Statute contemplates that persons possessing greater "education, training, ability, moral character, integrity, disposition

to work, adherence to reasonable rules and regulations and other qualifications required by an employer," may be classified at a higher rate of pay. It is because of this additional training and ability that the men working in the dispatch office had the basic responsibility of handling the incoming calls and making decisions as to how to respond to them, and it is because of this additional training and ability that they were paid more and not because of any discrimination having as its basis sex. Persons having greater training and ability working within the dispatch office are by virtue of that additional training and ability of greater value to the Defendant. It would be economically unfeasible for the Defendant to have had an additional man on duty to handle peak load periods or in the event of illness or vacations; hence, it was for this reason that the women were allowed to help out during these periods of time.

POINT II

THE PLAINTIFF IN THE INSTANT CASE WAS NOT "OTHERWISE QUALIFIED" BECAUSE SHE DOES NOT POSSESS THE EDUCATION, TRAINING, ABILITY AND OTHER QUALIFICATIONS REQUIRED BY HER EMPLOYER FOR THE POSITION OF POLICE OFFICER.

The Statute is clear that a person must possess the education, training, ability and any other qualifications required by the employer in order to be "otherwise

qualified" for any job, job classification or position to be filled or created. The pay which the Plaintiff is seeking is that of a police officer and in most instances she is seeking the salary of a patrolman first class. In order to gain that classification it is required that police officers pass a test to become patrolman fourth grade as well as having special training and education and specialized courses, such as, hand-to-hand combat, training in the use of various weapons, riot-control training, first aid and many more. A patrolman must also pass a test for each promotion, i.e., a test for advancement to patrolman third grade, one for advancement to second grade, and one for advancement to first grade. Further, in-service training is required each year. The Plaintiff had one day of formal class training while on her job for eight and one-half (8½) years and has never taken a test for any advancement; therefore, she does not possess the education, training, ability and other qualifications required by her employer, hence, is not "otherwise qualified" as defined by the Statute for the job of patrolman.

The court in *Detective Endowment Ass'n Police Dept. v. Leary,* 320 N.Y.S. 2d 253 (1971), held that the police commissioner had the right to assign patrolmen to perform duties of detectives for an extended period of time without receiving the higher pay of detectives. The court said that,

> "The assignment of a patrolman to the Detective Division does not involve the transfer to a position requiring an examination or involving tests

> or qualifications different from or higher than those required for the position of patrolman. The assignment of patrolman to any bureau of the Police Department does not change the patrolman's Civil Service status."

Further, the court said that, "[T]he designation of the patrolman as detective is wholly within the discretion of the police commissioner and may be revoked at his pleasure."

As in that case, the transfer of the Plaintiff to the dispatch office in the instant case was not one requiring a test or qualifications different from or higher than the lower classification of clerk typist, so in the instant case, the Chief of Police had the right to transfer clerks into the dispatch office "by assignment only" without the requirement of testing and promotion.

The Civil Service Commission established the classification of employees and this classification requires, upon hiring or promotion a different set of prerequisites, i.e., physical and mental testing, police training, both basic and in-service training, and different duties for each classification. No attack on the classification was made by the Plaintiff in the instant case. Unless the Civil Service Commission acted arbitrarily in its classification, a court should not interfere therewith. The question then comes down to, "Did the Plaintiff meet the requirements of the classification she is seeking the pay for?" If not, she is not entitled to the pay of that classification.

Merely because some duties may be performed by persons who are within two different pay classifications does not mean that they are entitled to the same pay.

In *Eley v. Cahill,* 126 Ill.App. 2d 272, 261 N.E. 819 (1970), the employees in the Animal Care Unit of the Police Department of Chicago filed a petition for a mandamus to compel the defendant to elevate them to the same pay scale as patrolmen and requested back salary. On January 1, 1959, the particular employees were reclassified from a higher grade with a pay equal to that of the patrolmen to civilian employees at a lower pay scale than patrolmen. These employees were required to take the oath, uphold and enforce the laws the same as were the patrolmen; purchase and wear uniforms similar if not identical to the uniforms worn by the patrolmen; purchase revolvers and ammunition; enforce the laws and the city ordinances as well as exercise powers of arrest the same as the patrolmen; respond to calls on the police radio and operate police department equipment and in all other ways perform the functions and duties of a patrolman assigned to a special detail. It was further alleged that regularly classified patrolmen were and had been assigned to the Animal Care Center and were assigned the same functions and duties as were the plaintiffs with a difference in pay.

The court held that without actually performing the identical overall functions of patrolmen they could not claim the same pay.

> "It is not sufficient that some duties of these employees coincide with duties of patrolmen if such duties are only incidental or auxiliary duties which these employees are required to perform." *Eley v. Cahill,* supra, at page 821.

This was so even though police officers, as part of their assignment, were assigned to perform the same tasks and functions as the Animal Care Unit.

> "Neither are plaintiffs allegations that regular patrolmen are occasionally assigned to the Animal Care Unit duties persuasive. The determinative question is not whether regularly classified patrolmen are assigned to Animal Care Unit functions but, rather, whether the plaintiffs are, in fact, assigned to the regular performance of patrolmen functions." *Eley v. Cahill,* supra at page 822.

POINT III

THE ANTI-DISCRIMINATION ACT CONTEMPLATES ONLY A PROSPECTIVE APPLICATION OF THE ACT AND DOES NOT APPLY TO JOBS WHICH WERE, AT THE TIME OF THE ENACTMENT OF THE ACT, ALREADY CREATED AND FILLED; THEREFORE, THE ACT DOES NOT APPLY TO THE PLAINTIFF IN THAT THE POSITION SHE OCCUPIED WAS CREATED AND WAS FILLED BY HER AT THE TIME OF THE ENACTMENT OF THE ACT.

Section 34-35-6(a), *Utah Code Annotated,* 1953, as amended, states that it is a discriminatory or unfair

employment practice to do certain prohibited acts because of race, color, sex, religion, ancestry or national origin if the person is "otherwise qualified." The Act then defines "otherwise qualified" and states that a person is not "otherwise qualified unless he or she possesses the education, training, ability, moral character, integrity, disposition to work, adherence to reasonable rules and regulations, and other qualifications required by an employer *for any particular job, job classification or position to be filled or created."* (Emphasis added). The words "to be filled or created" are in the future tense and for that reason it was the clear intent of the Legislature that this section was to apply only to jobs, job classifications or positions which were to be filled or created after the Act was enacted.

The rule of statutory construction is that whenever reasonably possible effect should be given to every word, phrase, clause and sentence of a statute. *Chez v. Utah St. Bldg. Comm.*, 93 Ut. 538, 74 P.2d 687 (1937). A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. "The court should, where possible without adding to or taking from the language, find the meaning compatible with reason and sense." *Chez v. Utah St. Bldg. Comm.*, supra, citing, ***Robinson*** *v.* ***Union Pacific RR. Co.***, 70 Ut. 441, 261 P. 9. This is especially true where the meaning of the words is plain. See ***Home Building and Loan Association*** *v.* ***City of Spartanburg***, 185 S.C. 313, 194 S.E. 139 (1938); or if a meaning can be reached without

the elimination of any words. *State v. Lundquist,* 60 Wash. 2d 397, 374 P.2d 246 (1962). The words "to be filled or created" have a clear and understood meaning and that meaning must be applied to them.

The job, job classification or position in which Plaintiff was employed was created and was filled by her prior to the enactment of said act; therefore, the Act has no application to her.

POINT IV

THE INDUSTRIAL COMMISSION EXCEEDED ITS AUTHORITY AND COMMITTED A BREACH OF DISCRETION BY AWARDING BACK-PAY IN THAT THIS IS NOT A CASE IN WHICH BACK-PAY SHOULD BE A CONSIDERATION.

The Anti-Discrimination Act provides in Section 34-35-7(12), *Utah Code Annotated,* 1953, as amended:

> "If, upon all the evidence at a hearing, the Commission shall find that a respondent has engaged in or is engaging in, any discriminatory or unfair employment practice as defined in this chapter, the Commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair employment practice and to take such *affirmative action*, including, but not limited to, hiring, reinstatement, or *up-grading of employees, with or without back-pay* . . . as in the

> judgment of the Commission will effectuate the purposes of this chapter." (Emphasis added)

The Commission has a right then to up-grade employees without giving back-pay as well as the granting of back-pay depending upon the fact situation. In the case of a municipality the governing body must establish a budget for each year and cannot vary that budget without reopening thereof. This matter of budgeting, setting of salaries, assignment of pay classifications, and assignment of personnel is a municipal function and purely a local matter to be established by the local government officials who are responsible to the citizens.

The Utah Constitution prohibits the delegation of any municipal function by the Legislature. Article VI, Section 29, of the *Utah Constitution* provides:

> "The Legislature shall not delegate to any special commission . . . any power to make, supervise or interfere with any municipal improvements, money, property or effects . . . or to perform any municipal function."

By granting back-pay, the Industrial Commission is supervising or interfering with municipal money and is performing a municipal function. This they cannot do. This court stated in *Gord v. Salt Lake City*, 20 Ut. 2d 138, 434 P.2d 449 (1967) at page 453:

> "The responsibility for the operation of the city government rests with the City Commission, who are elected by and responsible to the public."

Arbitrary power or uncontrolled discretion in an administrative agency is generally precluded.

> "It is a fundamental principle or our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative agencies, and this principle ought not to be surrendered for convenience, or in effect nullified for the sake of expediency." *1 Am.Jur. 2d*, Section 108.

A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative power. *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 79 L.ed. 1570, 55 S.Ct. 839 (1935); *Eureka City v. Wilson,* 15 Ut. 67, 48 P. 150 (1897). The Legislature cannot vest in an administrative agency the power, in its absolute or unguided discretion, to apply or withhold the application of the law, or to say to whom a law shall or shall not be applied. *Walsh v. Dallas R. & Terminal Co.,* 140 Tex. 385, 167 S.W.2d 1018.

The legislative authority must set up fixed legal principles which are to control in given cases by setting up standards or guide lines to indicate the extent and prescribe the limits of the discretion which may be exercised under the statutes by the administrative agency. *United States v. Chicago, M.St. P. & P.R. Co.,* 282 U.S. 311, 75 L.ed. 359; *Morgan v. United States,* 304 U.S. 1, 82 L.ed. 1129. In fact ,the generally accepted rule is that a statute which vests an arbitrary discretion in an administrative agency with reference to the rights or property of individuals or an ordinarily lawful business or occupation without prescribing a uniform rule

of action, making the enjoyment of such rights depend upon arbitrary choice of the agency without reference to all persons of the class to which the statute is intended to be applicable and without furnishing any definite standards or control of the agency, is unconstitutional and void. *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 83 L.ed. 1423; *Yick Wo v. Hopkins,* 118 U.S. 356, 30 L.ed. 220. The standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of power conferred upon it. *State v. Marana Plantations, Inc.,* 75 Ariz. 111, 252 P.2d 87; *Jersey Maid Mills Products Co. v. Brock,* 13 Cal.2d 620, 91 P.2d 577, and must also be sufficient to enable those affected to know their rights and obligations. *United States v. Rock Royal Cooperative, Inc.,* 307 U.S. 533, 83 L.ed. 1446. In the statute here in question there were absolutely no guide lines or standards set to govern with regards to whether or whether not back-pay should be awarded. The awarding or withholding of back-pay was left completely to the discretion of the Commission.

The Commission is further not authorized to grant solely back-pay as an award for discrimination. The Statute contemplates that back-pay may be awarded only in conjunction with other affirmative action, such as, "hiring, reinstatement, or up-grading of employees." The up-grading of employees or other affirmative action must be taken by the Commission upon which to base the award of back-pay. In the instant case there

was no affirmative action taken by the Commission other than an award for back-pay. The Act contemplates the elimination of discrimination and not the awarding of damages as a matter of right. The Commission did not up-grade the Plaintiff to the position of Police Officer as a Patrolman 1st, 2nd, 3rd, or 4th grade and did not place her within any other Civil Service classification, but merely awarded her back-pay.

This is also not a case for an award of back-pay since the basic reason for the disparity was not due to the underpayment of Plaintiff, but assignment of overqualified police officers within the dispatch office. The identical question was raised in ***Mize v. State Division of Human Rights,*** 328 N.Y.S. 2d 983 (Jan., 1972). In that case a woman acting as matron in the New York City jail was performing exactly the same functions as police officers who were acting in the capacity of "turnkey" (jailers). The Plaintiff in that case performed the same tasks with regard to the female prisoners as did the police officers with regard to the male prisoners. The court said, after finding that it was the same job and that discrimination had occurred, in regards to the question of back-pay, at page 988:

> "The final question is whether the matrons should be awarded back-pay to August 5, 1968. The Executive Law provides that the order of the Commission may provide for the up-grading of employees, with or without back-pay.... However, no standard is set forth for determining when back-pay should be awarded. We do not believe that back-pay should be awarded in this in-

stance, since the basic reason for the disparity in pay was not the under-payment of the matrons for the work performed but, rather, the assignment of overqualified personnel to the position of turnkey. We find that the award of back-pay by the Commission was an abuse of discretion."

POINT V

THE COURT ERRED IN ORDERING THE INTERROGATORIES OF PLAINTIFF TO BE ANSWERED REGARDING SALARIES OF THE POLICE OFFICERS IN THE DISPATCH OFFICE AND IN BASING THE AWARD FOR BACK-PAY UPON THOSE INTERROGATORIES.

The Industrial Commission ordered the Defendant to pay to the Plaintiff, "an amount equaling the difference in salary actually paid her and that paid to a police officer at the lowest Civil Service grade level, for the period from July 1, 1965, to January 15, 1970. Exact amount payable to be determined from Salt Lake City Corporation payroll records." The District Court sustained the findings of the Industrial Commission and upheld its Order, the court used the interrogatories and erroneously applied the salary of the lowest paid police officer in the dispatch office. By so doing, the court arrived at a ridiculous result in that the back-pay awarded to the Plaintiff fluctuates depending upon the classification of the police officer working in the dispatch office at that particular period of time. The salary of the police officer is based upon longevity as well as

their training and successful passing of tests required for each position. By this erroneous order, the Plaintiff's salary fluctuated according to the longevity and promotions of the police officers within the dispatch office, rather than according to her own longevity. For this reason, it is respectfully submitted that any award, if such is granted, should be based upon the salary of a police officer at the lowest Civil Service grade level, which is a patrolman fourth grade. These figures are obtainable from the payroll records of defendant.

POINT VI

AN AWARD FOR BACK-PAY MAY NOT BE AWARDED BEYOND THE THREE YEAR STATUTE OF LIMITATIONS AND ANY INSTALLMENT BEYOND THAT PERIOD IS BARRED BY SECTION 78-12-26, UTAH CODE ANNOTATED, 1953.

In an action alleging discrimination under Section 34-35-7, subparagraph (12), *Utah Code Annotated,* 1953, as amended, there must be applied a period of limitation limiting the period for which back pay may be awarded. The applicable Utah Statutes are Sections 78-12-1 and 78-12-26, *Utah Code Annotated,* 1953. These sections, or the applicable portions thereof, are as follows:

> "Civil actions can be commenced only within the period prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed

by statute. Section 78-12-1, *Utah Code Annotated,* 1953.

"Within three years:

"(1) * * *
"(2) * * *
"(3) * * *
"(4) An action for a liability created by the statutes of this state other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state." Section 78-12-26, *Utah Code Annotated,* 1953.

The above statutes of the Utah Code are applicable sections which must be applied to a claim for back wages under an action alleging sex discrimination. There can be no doubt that the purported liability is one arising under a statute of Utah. The complaint itself charges that the Plaintiff was discriminated against in matters of compensation because of sex in violation of Section 34-35-6, subparagraph (1), *Utah Code Annotated,* 1953, as amended, and that she should be compensated for back pay pursuant to Section 34-35-7, subparagraph (12), *Utah Code Annotated,* 1953.

Statutes of limitation are founded upon the general experience of mankind that claims which are valid should not be allowed to remain neglected once a person has a right to sue thereon. *Weber v. State Harbor Comrs.,* 18 Wall. (U.S.) 57, 21 L.ed. 798 (1873); *Hanger v. Abbott,* 6 Wall. (U.S.) 532, 18 L.ed. 939 (1868). In order to encourage promptness in bringing an action, such statutes are enacted to restrict to a fixed

period of time the claims which might otherwise be asserted for an unlimited term. *Riddles Barger v. Hartford F. Ins. Co.,* 7 Wall. (U.S.) 386, 19 L.ed. 257 (1869).The very purpose and object of statutes of limitation is to compel the exercise of a right to action within a reasonable time. *Lamb v. Powder River Livestock Co.*, 132 F. 434, 67 L.R.A. 558 (1904), and to bring to rest any claim based upon that right. *Ashton Jenkins Co. v. Bramel,* 56 Ut. 587, 192 P. 375, 11 A. L. R. 752 (1920). If a claim is not asserted within the prescribed period, then the statute of limitation is a bar to any recovery based upon that claim.

A principle which is generally resorted to in the interpretation of statutes of limitation is that a court may consider reasonableness of the result of a particular construction and the practical effect of the adoption of a different interpretation. *Jennings v. Lowery and Berry,* 147 Miss. 673, 112 So. 692 (1927); *Adams and Freese Co. v. Kenoyer,* 17 N.D. 302, 116 N.W. 98 (1908). A ridiculous result could be reached in the case of back pay if no statute of limitation were applied. An employee could work on a job for 20 or 30 years without any complaint or without any request for additional pay and then bankrupt an employer with a claim for back wages for all of those years based upon a claim of discrimination.

That the case at bar is an action for a liability created by the statutes of this state cannot be disputed. A liability created by a statute is a liability which would

not exist but for the statute. *Houg v. Houg,* 206 Okl. 179, 242 P.2d 162 (1952); *Smith Eng. Works v. Custer,* 194 Okl. 318, 151 P. 2d 404 (1944).

It has been held that the statutory claims limitation period limiting an action created by a statute applies to claims for back wages where the claim was for overtime compensation under the Fair Labor Standards Act, 29 U.S.C.A., Sections 201-219, *Abram v. Sam Joaquin Cotton Oil Co.,* (D.C. Cal.) 46 F. Supp. 969 (1942); *Lorenzetti v. American Trust Co.,* (D.C. Cal.), 45 F. Supp. 128 (1942). The same limitation period also applies to the liability of an employer for injuries sustained by an employee, under the New York State Labor Law, *Smith v. Onondaga Pottery Co.,* 300 N.Y.S. 298, 164 Miss. 883 (1937). It has likewise been applied to actions brought under the Utah State Workman's Compensation Law, *Utah Const. Min. Co. v. Industrial Comm.,* 57 Ut. 279, 194 P. 657 (1920). In *Romer v. Leary,* 428 F. 2d 186 (1970), the Second Circuit Court of Appeals for the Southern District of New York held that where a policeman was discharged in 1963 for refusing to waive immunity from prosecution when he was called to testify before the Grand Jury, and where the action was not commenced until 1968, such claim is governed by the three year statute of limitation provided for suits "to recover upon a liability created or imposed by statute." In that case, the court, at Page 187, stated:

> "It is now settled by Swan v. Board of Higher Education (2nd Cir. 1963) 319 F. 2d 56, that a

suit seeking a declaratory for injunctive relief which is based on the Civil Rights Act, 42 U.S.C. 1983, the applicable limitation in a case arising in New York, is the three year limitation now provided for suits to 'recover upon the liability . . . created or imposed by statute' . . . that the present case seeking reinstatement and back pay, is cast in declaratory judgment form does not attract to it the six year statute that the state court would apply to an action commenced under the state declaratory judgment law. Cplr., Section 3001."

The next question which arises is when does the period of limitation in the present case begin to run? The prescribed statute of limitation period runs from the time the action accrues, i.e., when the plaintiff has a right of action and when there is a remedy available. *West v. Theis,* 15 Id. 167, 96 P. 932 (1908); *Bruner v. Martin,* 76 Kan. 862, 93 P. 165 (1907); *Irvine v. Bossen,* 25 Cal. 2d 652,156 P.2d 9 (1944). The rule is that the right of action accrues whenever a wrong has been sustained as will give a right to bring and sustain a suit. *Aachen & N.F. Ins. Co. v. Morton,* (C.C.A 6th) 156 F. 654, 15 L.R.A. (N.S.) 156 (1907). An installment of periodic payment is a continual one, and any limitation on the right to sue for each installment necessarily commences to run from the time that each installment actually falls due. *Abbott v. City of Los Angeles,* 50 Cal.2d 438, 326 P.2d 484 (1958); *Buell v. Duchesne Mercantile Co.,* 64 Ut. 391, 231 P. 123 (1924).

This principle has been applied against rental installments and held the right of action accrues on each

installment when that installment becomes due and any past due installments beyond the period prescribed by the statute of limitation are barred. *Tillson v. Peters,* 41 Cal.App.2d 671 (1941), 107 P.2d 434. Likewise, when payments are due in installments for payment under a judgment for child support, any installments beyond the statute of limitation are barred. *Leonard v. Kleitz,* 155 Kan. 626, 127 P.2d 421 (1942). When a note is payable in installments, the statute begins to run against each installment when that installment becomes due and payable. *Buckman v. Hill Military Academy,* 182 Ore. 621, 189 P.2d 575. When the question arose as to what period of limitation should be applied to additional back-pay under a pension payment program, the court in *Abbott v. City of Los Angeles,* supra, at page 498, stated:

> "As indicated in Martin v. Hendrickson, 40 Cal.2d 583, 593, 225 P.2d 416 (1953), the rule is, however that the availability for an action for declaratory relief in no way affects the period of limitations commencing upon the breach of an obligation to pay money. Neither is the right to declaratory relief with respect to the obligation to make payments which fall within the limitations barred. . . . Here, as we have seen, the statutory time limitation upon the right to sue for each pension and installment commences to run from the time when that installment falls due. It follows that even though plaintiffs might have earlier brought suit for declaratory relief . . ., their failure to do so does not operate to bar this right to declaratory relief with respect to future pension payments, as well as the monetary judgment

> for the difference, for three years. . . . In *Dillon v. Board of Pension Com'rs.*, 18 Cal.2d 427, 431-432, 116 P.2d 37, 136 A.L.R. 800 (1941); . . . this court declared. . . . 'If the pension is granted, he is entitled to receive payments in the future, but can recover only those past payments which would have accrued within a period of six months prior to the time of the making of the claim.' "

In *Buell v. Duchesne Mercantile Co.*, supra, at page 124, the court said:

> "The authorities seem to be overwhelmingly in favor of the claim made by respondent that, 'When a judgment is rendered payable in installments, the statute of limitations begins to run against it from the time fixed for the payment of each installment for the part then payable.' 23 Cyc. 1510. Respondent has cited the following authorities supporting the general rule of law contained in the above quotation."

The court then cited several cases.

Since wages are a periodic payment falling due upon each payday, wages beyond the period of limitation are barred by the statute of limitation. *Fry v. Board of Education,* 17 Cal.2d 753, 112 P.2d 229 (1941). *Roseborough v. Shasta River Canal Co.,* 22 Cal.App. 556; *Raymond v. Christian,* 24 Cal. App.2d 92, 74 P.2d 536 (1937). The limitation statute which is applicable to an action for salary begins to run against each installment of salary as soon as it is due. *Crawford v. Hunt,* 41 Ariz., 229, 17 P.2d 802 (1932). Hence, in the case at bar, the Plaintiff could not recover for back

wages for a period of more than three years prior to the commencement of this action.

CONCLUSION

The intent of the Utah Legislature was not to allow claims of discrimination every time a male and a female perform some of the same tasks, but was to provide for equal treatment of an employee by an employer. Unless the female is performing the same job there is no basis for discrimination. In the case before the bar, the plaintiff performed the same tasks as the men only on occasion and this does not constitute the same job, job classification or position to be filled or created. Unler the Federal Act, it has been decided that even though men and women perform the same identical tasks 90% of the time this does not constitute the same job. In the case at hand the plaintiff did not perform the same tasks any where near this amount of time.

The Legislature also intended that the Act apply only to jobs, job classifications and positions which were to be created or filled in the future so that discrimination might be eliminated over a period of time. Thus, the Act was not to have a retroactive effect.

The plaintiff did not possess the qualifications which were possessed by the police officers and did not have the training, education or ability which the police officers had and which were required of them by the

defendant. One cannot claim equal pay unless he or she meets all qualifications required by an employer.

Even in the event there was discrimination and the discrimination had as its sole basis sex, there are three reasons why this case is not one requiring back pay. (1) The plaintiff was not underpaid for the job she performed, but the men with whom she was working were over-qualified in their assignment in the dispatch office. (2) The Commission could not grant back pay without up-grading the plaintiff, because the Act was not established for the purpose of fining or penalizing an offender, but for the purpose of eliminating discrimination. The elimination of discrimination must be accomplished by an up-grading of the employee which in this case was not done. (3) An administrative agency cannot, because of the restrictions imposed by the Utah Constitution, perform a municipal function nor can it interfere with or supervise money or property of a municipality.

In the event an award for back pay is granted, it should be the difference between the salary paid plaintiff and that of a patrolman at the lowest Civil Service classification and not the difference between that paid the plaintiff and that of higher classified police officers working in the dispatch office. No person's salary should be allowed to fluctuate depending upon the longevity and promotions of another with whom they work.

Lastly, there must be a period of limitation applied to any award for back pay and the period in this case

is three years as provided by the Utah statute. The statute of limitation operates as a bar against any installment due prior to three years from the filing of the complaint.

Respectfully submitted,

O. WALLACE EARL