

HOURS OF FEMALE EMPLOYMENT:
FEMALE EMPLOYEES:
WORKING HOURS:

The provisions of Section 290.040, RSMo 1959, stating that no female employed by certain named industries shall work more than 9 hours during any one day, or more than 54 hours during any one week, may not be waived by an individual female employee covered thereunder.

NOTE: This opinion when sent out should always be accompanied by Op. No. 231-1971.

Opinion No. 199 (1962)

August 10, 1962



Honorable Don L. Cummings, Director
Division of Industrial Inspection
State Office Building
Jefferson City, Missouri

Dear Mr. Cummings:

This is in response to your letter of May 1, 1962, requesting an opinion of this office regarding a waiver by a female employee of the provisions of Section 290.040, RSMo 1959, setting forth the maximum number of hours a female shall work in certain named industries.

In the letter attached to your request there was no question raised either as to the constitutionality of the statute or its applicability to the industry represented by the writer. The sole question was whether, at the request of her employer, a female employee covered by the statute could waive the provisions thereof and on certain occasions work "one-half to one hour in excess of the statutory maximum a few times a month, the occasion for such excess work being regulated by receipt of a rush order or for taking inventory, etc." This opinion therefore shall be confined to this question only.

The pertinent portion of Section 290.040, RSMo 1959, reads as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, * * * more than nine hours during any one day, or more than fifty-four hours during any one week; * * *"

Section 290.050, RSMo 1959, provides a penalty for any violation of this statute.

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In *Holden vs. Hardy*, (1898) 169 U.S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, it was held to be within the police power of a state to pass a statute limiting the employment of working men in all underground mines or workings to eight hours per day on the grounds such a limitation was necessary for the preservation of the health of the employees. A similar Missouri statute was upheld in *State vs. Cantwell*, (1904) 179 Mo. 245, 78 S.W. 569 (affirmed in 1905, 199 U.S. 602, 26 Sup. Ct. 749, 50 L. Ed. 329). In *Muller vs. Oregon*, (1908) 208 U.S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, the court upheld a statute limiting the hours of labor of women employed in laundries to ten hours daily on the grounds that "the physical well-being of woman becomes a subject of public interest and care in order to preserve the strength and vigor of the race. * * *" This was extended to other forms of employment for women in *Hawley vs. Walker*, (1913) 232 U.S. 718, 34 Sup. Ct. 479, 58 L. Ed. 813, and *Radice vs. New York*, (1924) 264 U.S. 292, 44 Sup. Ct. 325, 68 L. Ed. 690. In each of these cases, the statute in question was upheld as a valid exercise of the police power of a state to protect the public health and welfare of its citizens.

The question of a waiver by an employee of the provisions of Section 290.040 or similar statutes has not been decided by the courts of Missouri. However, the courts of other states unanimously have held the provisions of similar statutes cannot be waived by the employees covered thereunder. *Short vs. Bullion-Beck & Champion Min. Co.*, (1899) Utah, 57 P. 720; *State vs. Livingston Concrete Bldg. & Mfg. Co.*, (1906) Mont., 87 P. 980; *Montgomery Ward & Co. vs. Lusk*, (1932) Texas, 52 S.W. 2d 1110; and *Lewis vs. Ferrari*, (1939) Calif., 90 P. 2d 384. In each of these cases the court emphasized the statute in question was passed in exercise of the police power of the state for the benefit of all its citizens and for the good of the public as a whole. This protection to the public may not be waived by a single individual even though he or she may be directly benefited by the law.

A very good analysis of the question was made by the court in *Lewis vs. Ferrari*, supra. Plaintiff, a woman, sued her employer for overtime wages. Both had agreed that plaintiff work overtime but show only forty-eight hours per week, the limit allowed by statute which in its pertinent points is exactly like Section 290.040. The court held the woman could not recover for working the time in excess of the statutory limitation as both parties violated the statute, the provisions of which could not be waived. On page 387 the court held:

"But generally speaking where police regulations are made undertaking to

protect some particular class of persons, such protection is awarded because the welfare of such class of persons is conceived to be bound up with the welfare of the community as a whole. Particularly is this the case with women as a class. The circumstance that the restricting of their hours of labor inures to their benefit does not militate against its beneficial effect through them on the health and welfare of the community as a whole. When, therefore, a particular woman, participates in the violation of such a regulation, it seems to us fallacious to argue that she is justified in so doing because the regulation is meant for her benefit and she has a right to waive the benefit. We hold that she has no such right. The benefit is one intended for the community of which she is but a single member, and the circumstance that she may be one of the members of the community especially benefited by the regulation affords her no justification for violating it."

The same reasons given by other courts for refusing to allow an employee to waive the statutory limitation on the maximum number of hours he or she may work apply equally to Section 290.040.

This concept is furthered by the wording of the statute itself. Section 290.040 sets a maximum number of hours a female employed in the industries named therein may work. No exceptions were made. In this respect this statute is similar to the other Missouri statutes limiting the working hours of employees; Sections 290.020 (mining and metalurgy), 290.060 (females before and after childbirth), 294.030 (children), and 444.280 (miners). In none of these statutes was any provision made under which the employee covered could waive this limitation. These statutes may be contrasted with Section 290.010, RSMo 1959, wherein the legislature, after prescribing the period of eight hours a legal day's work, went on to add: "but nothing in this section shall be so construed as to prevent parties to any contract for work, services or labor from agreeing upon a longer or shorter time." It is our opinion if the legislature intended a similar exception in Section 290.040, it would have so provided.

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The contention that an employee should be free to determine his or her own working hours over a prescribed minimum was answered fully by the court in State vs. Livingston Concrete Bldg. & Mfg. Co., supra, on page 982 wherein it stated:

"If it was the legislative will that no exception be made to the rule announced, the courts cannot say that a different policy should have been pursued."

If a female or other employee benefited by the laws of the State of Missouri limiting their hours of employment could individually waive the provisions of these laws, their situation could easily become no different than before the enactment of these laws and the evil they sought to correct would still exist.

CONCLUSION

Therefore, it is the opinion of this office that the provisions of Section 290.040, RSMo 1959, limiting the work of a female in certain specified industries cannot be waived by a female employee covered thereunder.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JD:BJ