

Symposium on Women and the Law

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Sonia Pressman Fuentes

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Recommended Citation

Sonia Pressman Fuentes, *Federal Remedial Sanctions: Focus on Title VII*, 5 Val. U. L. Rev. 374 (1971).
Available at: <https://scholar.valpo.edu/vulr/vol5/iss2/6>

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FEDERAL REMEDIAL SANCTIONS: FOCUS ON TITLE VII†

SONIA PRESSMAN FUENTES*

INTRODUCTION

In the past few years the movement for women's rights has come to the fore as a matter of national concern. American women in increasing numbers are joining organizations to fight for equality, engaging in consciousness-raising sessions, writing magazine articles and books about sex discrimination and participating in protests, picketing and strikes. In the midst of all these activities to secure equal rights, women may tend to forget, or perhaps they never knew, the rights which they have already won.

Prior to 1963, when Congress passed the Equal Pay Act,¹ there was no federal legislation prohibiting discrimination based on sex. The following year Congress passed Title VII of the Civil Rights Act of 1964² which, among other things, prohibited sex discrimination in employment. The passage of those statutes and the resulting movement for women's rights triggered additional legislative and executive action on both the federal and state levels.³ As a result, there is today an entire panoply of remedies available to the individual who believes he is the victim of sex discrimination in employment.

It is vital that women recognize the rights which they have gained since 1963 in order that they may direct their future efforts to policing the enforcement of those rights by appropriate agencies and securing additional legislation where needed.

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* Director, Legislative Counsel Division of the Office of the General Counsel, Equal Employment Opportunity Commission. The views herein expressed, based on information available to the public, are solely those of the author and do not necessarily constitute the policy or opinion of the Equal Employment Opportunity Commission.

1. 29 U.S.C. § 206(d) (1964).

2. 42 U.S.C. §§ 2000e et seq. (1964).

3. Although this article focuses on federal remedies, fair employment practice commissions at both the state and municipal levels and state agencies which administer state equal pay legislation can serve as additional sources of relief in cases of sex discrimination. Moreover, some state and local laws and ordinances such as the Pennsylvania Human Relations Act; PA. STAT. ANN. tit. 43, §§ 951-63 (1964), *as amended*, PA. STAT. ANN. tit. 43, §§ 952-62.1 (Supp. 1971); the New York State Human Rights Law; N.Y. EXEC. LAW §§ 290-301 (McKinney Supp. 1971); the Montana Fair Employment Practices Act; MONT. REV. CODES ANN. §§ 64-301 to -03 (Repl. 1970); Pittsburgh, Pa., Fair Employment Practices Ordinance 75, *as amended*, Ordinance 395, July 7, 1969, and the West Virginia Human Rights Act; W. VA. CODE ANN. §§ 5-11-1 et seq. (Supp. 1970), go beyond existing federal legislation and prohibit sex discrimination in housing, education and/or places of public accommodation.

FEDERAL STATUTES, EXECUTIVE ORDERS AND AGENCIES

The principal statutes, executive orders and agencies that are available to provide relief in cases of employment discrimination based on sex may be summarized as follows:

1. *The Equal Pay Act*, which became generally effective in 1964, is administered by the Wage-Hour Administration in the Department of Labor.⁴ The Act requires the payment of equal salaries and wages for equal work. The Equal Pay Act has an advantage over Title VII in that the Wage-Hour Administrator has the authority to secure enforcement of violations in the courts whereas under Title VII the principal burden for securing enforcement rests on the aggrieved person. The Equal Pay Act, however, excludes from coverage administrative, professional and executive employees, and no such exclusions appear in Title VII.⁵

2. *Title VII of the Civil Rights Act of 1964*,⁶ which became effective on July 2, 1965, is administered by the Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC" or "the Commission"). It prohibits discrimination by employers, employment agencies and labor unions based on race, color, religion, sex or national origin.⁷

Relief under Title VII can be sought through both the EEOC and the Department of Justice. Whereas the Commission processes charges through conciliation, the Attorney General is authorized to institute a lawsuit whenever he has "reasonable cause to believe that any person

4. 29 U.S.C. § 206(d) (1964). The Interpretive Bulletin of the Equal Pay Act appears at 29 C.F.R. §§ 800 et seq. (1970).

5. In 1970, legislation was introduced which would have removed these exemptions from the Equal Pay Act. See, e.g., H.R. 18278, 91st Cong., 2d Sess. § 11 (1970). These bills, however, were not passed.

6. 42 U.S.C. §§ 2000e et seq. (1964). The Commission's regulations, including Guidelines on Sex Discrimination, appear at 29 C.F.R. §§ 1600 et seq. (1970).

7. The Act covers employers with 25 or more employees, employment agencies which procure employees for an employer and labor unions which maintain a hiring hall or have 25 or more members. While many of the principles discussed herein are phrased in terms of employer violations, similar principles are applicable to conduct by employment agencies and unions. In addition, employment agencies and unions are prohibited from discriminating with regard to referrals for employment, and unions are prohibited from discriminating with regard to membership. 29 C.F.R. § 1604.5 (1970) deals specifically with the responsibilities of employment agencies with regard to sex discrimination.

When a charge is filed with the EEOC and voluntary compliance is not achieved, an aggrieved person has the right to institute suit in federal court. 42 U.S.C. § 2000e-5(e) (1964). It may be possible that the courts will extend the benefits of 42 U.S.C. § 1981 to cases involving sex discrimination in employment, thereby permitting the institution of the suit absent the filing of an EEOC charge.

or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII.⁸

Title VII excludes from coverage instrumentalities of the federal, state or municipal governments except for the United States Employment Service and the system of state and local employment services receiving federal assistance. Thus, teachers in public schools and in federal and state colleges and universities, policewomen and women in the military services are among those who are excluded. The exemption of educational institutions with respect to the employment of individuals to perform work connected with the educational activities of such institutions⁹ excludes teachers and administrative personnel in private schools.¹⁰ Bills to amend Title VII to eliminate these exemptions have been introduced in the Congress, but none have been passed to date.¹¹

3. *Executive Order 11246*,¹² as amended by *Executive Order 11375*,¹³ effective October 13, 1968, is administered by the Office of Federal Contract Compliance (hereinafter referred to as "the OFCC") in the Department of Labor. It prohibits discrimination based on race, color, religion, sex or national origin by federal government contractors and subcontractors and on federally-assisted construction contracts. Under the Order, government contractors are required to develop and implement written affirmative action programs to eliminate sex discrimination or face the cancellation or future loss of government contracts. On June 9, 1970, the OFCC published interpretations of the affirmative action requirements in the area of sex discrimination.¹⁴

Since 1970, the OFCC has been engaged in processing charges filed by women's organizations alleging sex discrimination by educational institutions. Such institutions come within the coverage of the Executive

8. 42 U.S.C. § 2000e-6(a) (1964). The Attorney General may institute a suit whether or not a charge has previously been filed with the EEOC. Pursuant to section 706(e) of the Act, 42 U.S.C. § 2000e-5(e), the Attorney General may also, in the discretion of the court, intervene in civil actions brought by charging parties "if he certifies that the case is of general public importance."

9. 42 U.S.C. § 2000e-1 (1964). Discrimination in the employment of teachers and administrative personnel by both public and private educational institutions may, however, come within the jurisdiction of the OFCC where the institution involved is a government contractor. See notes 12-15 *infra* and accompanying text.

10. The section 702 exception, 42 U.S.C. § 2000e-1, applies only to educational institutions in their capacities as employers, not as employment agencies. Accordingly, the activities of a university placement office in advertising, recruiting or referring applicants for employment would come within the coverage of the Act unless the office was part of an exempt federal or state university.

11. See, e.g., H.R. 18278, 91st Cong., 2d Sess. § 14 (1970).

12. 3 C.F.R. 339 (1965).

13. 3 C.F.R. 320 (1967).

14. 35 Fed. Reg. 8888 (1970).

Order when they are federal government contractors or subcontractors.¹⁵

4. *Executive Order 11478*,¹⁶ issued by President Nixon on August 9, 1969, superseded a similar Order, 11375,¹⁷ issued by President Johnson on October 13, 1967. The Order, which is administered by the Civil Service Commission, prohibits sex discrimination in the executive agencies of the federal government, in competitive positions in the legislative and judicial branches and in the government of the District of Columbia. In implementation of Executive Order 11375, the Civil Service Commission in October, 1967, established the Federal Women's Program, which continues under Executive Order 11478.¹⁸

5. *The National Labor Relations Act*,¹⁹ which is administered by the National Labor Relations Board, could be utilized to a greater extent than it presently is by victims of sex discrimination. Although the National Labor Relations Act focuses on collective bargaining and union activity, the Board has ruled on sex discrimination in a number of contexts and will undoubtedly issue additional rulings in this area as the struggle for equality continues to grow. Thus, the Board has indicated that units based solely on the sexual identity of employees are inappropriate,²⁰ that a contract whose seniority provisions discriminate on the basis of sex would not bar a new election to determine union representation²¹ and that an employer violated the Act when he questioned an employee with regard to a complaint she had filed with the Labor Department alleging that the employer's wage rates discriminated on the basis of sex because the employee's conduct was protected "concerted" activity.²²

15. As noted above, discrimination in the employment of teachers and administrative personnel of educational institutions is excluded from the coverage of Title VII.

16. 3 C.F.R. 133 (1970).

17. 3 C.F.R. 320 (1967).

18. For information on the status of women in the federal government see Pressman, *How Can Women Improve Their Government Job Status?*, GOOD GOVERNMENT, Fall, 1970, at 8 (published by the National Civil Service League); Stafford, *Women on the March Again—Are They Being Discriminated Against in White-Collar Federal Jobs?*, GOVERNMENT EXECUTIVE, June, 1969, at 55. See also CIVIL SERVICE COMM'N, STUDY OF EMPLOYMENT OF WOMEN IN THE FEDERAL GOVERNMENT 1968 (1969); CIVIL SERVICE COMM'N, STUDY OF EMPLOYMENT OF WOMEN IN THE FEDERAL GOVERNMENT 1967 (1968); CIVIL SERVICE COMM'N, CHANGING PATTERNS, A REPORT ON THE 1969 FEDERAL WOMEN'S PROGRAM REVIEW SEMINAR (1969); Harrison, *The Working Woman: Barriers in Employment*, 24 PUB. ADM. REV. 78 (1964).

19. 29 U.S.C. §§ 151 et seq. (1964).

20. *United States Baking Co.*, 165 N.L.R.B. 951 (1967); *Cuneo Eastern Press, Inc.*, 106 N.L.R.B. 343 (1953). For a discussion of earlier Labor Board decisions holding that units based on sex are inappropriate see Note, *Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, 21 VAND. L. REV. 484, 487 n.24 (1968).

21. *St. Louis Cordage Mills*, 168 N.L.R.B. 981 (1967).

22. *Montgomery Ward & Co.*, 156 N.L.R.B. 7 (1965). For a case where sex dis-

Furthermore, the Board has established a number of principles with regard to discrimination based on race and national origin which would appear to be equally applicable to sex discrimination.²³ Thus, the Board has considered the effect of racial appeals on Board-conducted elections.²⁴ It has stated that a union which causes or permits discrimination against employers because of race or for other "invidious reasons" violates its duty to represent all members in the unit fairly,²⁵ that a union's refusal to pursue the grievance and arbitration procedure for reasons of race violates the Act²⁶ and that racial discrimination by the statutory bargaining representative requires revocation of the union's certification.²⁷

A recent case arising under the Labor Act with significant implications for women is *United Packinghouse Union v. NLRB*,²⁸ the first decision under the Labor Act finding that discrimination based on race and national origin *by an employer* constitutes a violation of the Act. It remains to be seen whether women will use the rationale of the *United Packinghouse* case and the mechanism of the Labor Board to secure redress in cases of employment discrimination.²⁹

crimination in wages resulted in a refusal to bargain charge under the Labor Relations Act and a suit under the Equal Pay Act. see *Midwest Mfg. Co.*, 185 N.L.R.B. No. 19 (1970); *Wirtz v. Midwest Mfg. Corp.*, 18 Wage & Hour Cas. 556 (S.D. Ill. 1968).

23. See Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 320 n.75 (1968).

24. Leading cases in this area are *Scwell Mfg. Co.*, 138 N.L.R.B. 66 (1962), and *Allen-Morrison Sign Co.*, 138 N.L.R.B. 73 (1962).

25. *Local 568, Teamsters v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967); *NLRB v. Local 1367, Longshoremen*, 368 F.2d 1010 (5th Cir. 1966); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966) (although the case involved a practice of maintaining separate seniority groups based on sex as well as race, 150 N.L.R.B. 312, 329, the separation of seniority groups by sex was not raised as an issue); *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

26. *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966). See *Vaca v. Sipes*, 386 U.S. 171 (1967).

27. *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964).

28. 416 F.2d 1126 (D.C. Cir. 1969), *remanding* 169 N.L.R.B. No. 70 (1968), *cert. denied*, 396 U.S. 903 (1969). The court found that such discrimination frustrates the possibility of effective concerted action; that it "inevitably sets group against group," thereby decreasing the possibility of "joint action against their common employer;" that such discrimination induces "docility" in the discriminated group; that such "docility" stems from a number of factors—"fear, ignorance of rights, and a feeling of low self-esteem engendered by repeated second class treatment;" that discrimination results in "degradation, disillusionment, lack of motivation, and lessening of incentive to improve;" that studies of discrimination point to its "psychologically debilitating effects," and its inducement in the victims of "self-hatred . . . a feeling of inferiority and lack of motivation to assert themselves to change their condition." *Id.* at 1135-37. It appears clear that this rationale is at least equally applicable to employer discrimination based on sex.

29. In addition, the Age Discrimination in Employment Act of 1967, 29 U.S.C.A.

RULINGS OF THE EEOC AND THE COURTS UNDER TITLE VII⁸⁰

The EEOC is the agency with the longest experience on the federal level in enforcing a statute which prohibits discrimination based on sex in all terms, conditions and privileges of employment. The rulings of the EEOC and the courts under Title VII frequently establish the principles which are then followed by other agencies on both the federal and state levels. For these reasons, the remainder of this article will focus on Title VII. The issues reviewed, however, are those which arise in cases of sex discrimination whether filed with the EEOC or one of the other agencies discussed above.

Charges of sex discrimination represent the second largest category of employment discrimination cases filed with the EEOC.³¹ From July 2, 1965, through December 31, 1970, the first five and one half years of the EEOC's operation, complaining parties filed about 75,000 charges of discrimination.³² About twenty percent of these charges, approximately 16,000 charges, involved allegations of discrimination based on sex.³³ Most of these charges involved allegations of discriminatory terms, conditions and privileges of employment rather than refusal to hire. While the predominant number of these charges have been filed by women, a

§§ 621 et seq. (Supp. 1971), which does not deal with sex discrimination, may be of particular use to women over 40 who wish to return to the labor market or change jobs. The Act, which is administered by the Department of Labor, prohibits age discrimination between the ages of 40 and 65.

30. See also Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U.L. REV. 326 (1971).

31. Charges of race discrimination represent the Commission's largest category of cases, followed by charges of discrimination based on sex, national origin and religion.

32. *Statistics on Charges*

FISCAL YEAR	1966	1967	1968	1969	1970	(first half) 1971	TOTAL
TOTAL CHARGES	6,026	8,512	11,172	14,471	17,903	16,470	74,554
CHARGES OF SEX DISCRIMINATION	2,031	2,003	2,410	2,689	3,597	3,350	16,080

33. The twenty percent figure is a nationwide figure covering the five and one half year period. In some of the Commission's field offices, the percentage of sex discrimination charges runs as high as forty or sixty percent.

The Commission's statistics, which are published in its Annual Reports, do not contain a breakdown of the number of charges involving two forms of discrimination, i.e., race and sex or national origin and sex. Black and other minority group women are, however, frequently the victims of two forms of discrimination: that based on race or national origin and that based on sex. The effect of this double discrimination is revealed by the median wage or salary income of black women which is considerably below that of black men and white women. Pressman, *Job Discrimination and the Black Woman*, CRISIS, March, 1970, at 103. See *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971), *aff'g in part & vacating in part* 301 F. Supp. 97 (M.D.N.C. 1969).

number of significant issues have been raised in charges filed by men. Charges filed by men have involved a refusal to employ because of draft status and the maintenance of policies with regard to job classifications, seniority, wage and pay scales, shift assignments, rest periods, restrictions on the length and style of hair, retirement and pension plans and other conditions of employment which discriminate against men.⁸⁴

The law of employment discrimination based on sex is so new that the articulation of legal principles is just beginning. The EEOC and the courts have, however, issued a number of significant rulings to date on substantive questions of law. A discussion of the principal problem areas and the status of the law in those areas follows.

Job Classification and the Bona Fide Occupational Qualification (BFOQ)

The EEOC has stated that, as a general rule, employers may not maintain separate job classifications based on sex.⁸⁵ Title VII does, however, permit the hiring of members of one sex "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation" of a particular business or enterprise.⁸⁶

While "bona fide occupational qualification" is an esoteric term, its meaning and its consequences become clear when one translates it into everyday terms. A finding that sex is a BFOQ for a job permits an employer to lawfully close that job to all members of one sex.

In interpreting the BFOQ exception, the EEOC has found that those jobs for which sex is a BFOQ are rare indeed.⁸⁷ Individuals may not be refused employment because of assumptions or stereotypes about members of their sex as a class or because of the preferences of the

34. Among the court decisions involving charges filed by men are *Rosen v. Public Service Elec. & Gas Co.*, 2 F.E.P. Cas. 1090 (D.N.J. 1970); *Diaz v. Pan Am. World Airways, Inc.*, 3 F.E.P. Cas. 337 (5th Cir. 1971); *Cook v. Dixie Cup Div. of American Can Co.*, 274 F. Supp. 131 (W.D. Ark. 1967), and *Ward v. Firestone Tire & Rubber Co.*, 260 F. Supp. 579 (W.D. Tenn. 1966).

35. See 29 C.F.R. §§ 1604.1 et seq. (1970).

36. 42 U.S.C. § 2000e-2(e) (1964).

37. The EEOC has indicated that it would find sex to be a BFOQ for reasons of authenticity or genuineness (actor, actress), community standards of morality or propriety (restroom attendant, lingerie sales clerk) and for jobs in the entertainment industry for which *sex appeal* is an essential qualification. 29 C.F.R. § 1604 (1970); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TOWARD JOB EQUALITY FOR WOMEN 5-6 (1969).

The Commission's construction of the BFOQ exception follows the legal maxim that statutory exemptions, particularly those in remedial legislation such as Title VII, are to be narrowly construed. The burden of establishing that sex is a BFOQ for a job rests on the employer, employment agency or union which makes the claim.

employer, co-workers, clients or customers. Thus, an employer may not refuse to employ women for a job on the ground that the job has traditionally been held by men,³⁸ requires work with or supervision over men,³⁹ involves late-night hours or work in isolated locations,⁴⁰ or requires the lifting or carrying of heavy weights or other strenuous activity.⁴¹

In the area of the BFOQ provision, early publicity focused on charges of sex discrimination in the employment of flight cabin attendants, commonly referred to as stewards and stewardesses. Subsequent to a public hearing, the EEOC issued an Opinion finding that airlines discriminate on the basis of sex when they refuse to hire males as flight attendants because the basic duties of the job can be satisfactorily performed by members of both sexes.⁴² That view was supported by *Diaz v. Pan American World Airways, Inc.*,⁴³ the first court case on this issue.⁴⁴

The EEOC has also found that the termination or transfer to ground work of stewardesses on marriage or on reaching their early thirties violated the Act because such restrictions were part and parcel of the airlines' unlawful practice of restricting such jobs to women. These restrictions had never been applied to stewards or other male flight personnel, such as pilots, co-pilots and flight engineers, and were unrelated to satisfactory performance of the job.⁴⁵

38. 29 C.F.R. § 1604.1(a)(ii) (1970). See Case No. AL 68-3-243F, 1 CCH EMPL. PRAC. GUIDE ¶ 6015, at 4035 (EEOC June 4, 1969).

39. 29 C.F.R. § 1604.1(a)(iii) (1970).

40. Decision No. 70-382, 1 CCH EMPL. PRAC. GUIDE ¶ 6091, at 4138 (EEOC Dec. 16, 1969).

41. 29 C.F.R. § 1604.1(b) (1970).

42. 33 Fed. Reg. 3361 (1968). Similarly, the Commission found that women cannot be denied positions as pursers aboard United States merchant marine vessels. Case No. YNY 9-047, 1 CCH EMPL. PRAC. GUIDE ¶ 6010, at 4027 (EEOC May 21, 1969).

Kusner v. Maryland Racing Comm'n, No. 37,044 (Cir. Ct., Prince George's County, Md., 1968), involved a BFOQ although it was not a Title VII proceeding. In that case, the court ordered the Maryland Racing Commission to issue a jockey's license to Kathy Kusner after indicating that the prior denial of such a license had been based on sex. *Accord*, *Rubin v. Florida State Racing Comm'n*, No. 6819113 (11th Cir., Dade County, Fla., 1968), wherein the court issued an alternative writ of mandamus compelling the Florida State Racing Commission to issue an apprentice jockey's license to the female petitioner.

43. 3 F.E.P. Cas. 337 (5th Cir. 1971). The court stated that the word "necessary" contained in the BFOQ exception required the application of a "business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." *Id.* at 339.

44. The same issue is involved in another pending case wherein the Commission appears as amicus curiae. *Schrichte v. Eastern Air Lines, Inc.*, 2 F.E.P. Cas. 950 (N.D. Ga. 1970).

45. *Dodd v. American Airlines, Inc.*, 1 CCH EMPL. PRAC. GUIDE ¶ 6001, at 4005 (EEOC June 20, 1968); *Neal v. American Airlines, Inc.*, 1 CCH EMPL. PRAC. GUIDE ¶

The Commission's view that sex is rarely a BFOQ for a job was not adopted in several district court cases.⁴⁶ However, it was adopted in the first appellate court decision on this subject, *Weeks v. Southern Bell Telephone & Telegraph Co.*,⁴⁷ and has been adopted in all subsequent court cases.⁴⁸ *Weeks* established the principle that in order to rely on the BFOQ exception, an employer has the burden of proving that he had reasonable cause to believe, *i.e.*, a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. In dealing with the company's contention that women could not be hired on a job which required strenuous physical activity and work alone during late-night hours, the court said:

Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic

6002, at 4010 (EEOC June 20, 1968); *Colvin v. Piedmont Aviation, Inc.*, 1 CCH EMPL. PRAC. GUIDE ¶ 6003, at 4015 (EEOC June 20, 1968). There have been a number of court cases involving a stewardess' right to remain on her job after marriage. *Lansdale v. United Air Lines, Inc.*, 437 F.2d 454 (5th Cir. 1971), *vacating* 2 F.E.P. Cas. 462 (S.D. Fla. 1969); *Lansdale v. Air Line Pilots Ass'n Int'l*, 430 F.2d 1341 (5th Cir. 1970), *rev'g* 2 F.E.P. Cas. 462 (S.D. Fla. 1969); *Gerstle v. Continental Airlines, Inc.*, 50 F.R.D. 213 (D. Colo. 1970); *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970); *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967); *Evenson v. Northwest Airlines, Inc.*, 268 F. Supp. 29 (E.D. Va. 1967).

The Commission has also found that airlines violate Title VII when they refuse to grant maternity leave to stewardesses. Decision No. 70-600, 1 CCH EMPL. PRAC. GUIDE ¶ 6122, at 4217 (EEOC March 5, 1970).

46. *Gudbrandson v. Genuine Parts Co.*, 297 F. Supp. 134 (D. Minn. 1968); *Weeks v. Southern Bell Tel. & Tel. Co.*, 277 F. Supp. 117 (S.D. Ga. 1967), *rev'd in part*, 408 F.2d 228 (5th Cir. 1969); *Ward v. Firestone Tire & Rubber Co.*, 260 F. Supp. 579 (W. D. Tenn. 1966); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd in part*, 416 F.2d 711 (7th Cir. 1969).

47. 408 F.2d 228 (5th Cir. 1969), *rev'g* 277 F. Supp. 117 (S.D. Ga. 1967). On April 19, 1971, the district court awarded plaintiff \$30,000 in back pay.

48. *Diaz v. Pan American World Airways, Inc.* 3 F.E.P. Cas. 337 (5th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), *rev'g* 272 F. Supp. 332 (S.D. Ind. 1967); *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969) (involving the lifting of over 90 pounds). *Cheatwood* contains an excellent discussion of medical testimony relevant to weight-lifting.

In *Bowe*, the court noted that where there are weight-lifting requirements on jobs it may be helpful to have a job study performed to analyze these requirements and then classify the jobs according to the degree of strength and stamina required. Employees would then be given an opportunity to demonstrate their capacity at different levels and to bid on those jobs at or below the level at which they qualified. 416 F.2d at 718 n.7.

Bowe illustrates the fact that attorney's fees may be quite substantial in class actions filed under Title VII. In the district court proceeding, the court awarded one of the plaintiffs' attorneys an \$11,000 fee and the other a \$1,500 fee payable with costs by the defendant company. For a discussion of the role private attorneys can play in representing complaining parties in cases of sex discrimination filed under Title VII see Pressman, *Sex Discrimination in Employment and What You Can Do About It*, 54 WOMEN LAW. J. 6 (1968).

tasks. Men have always had the right to decide whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.⁴⁹

Sex-Oriented State Employment Legislation

The EEOC issued a number of regulations on the relationship between Title VII and sex-oriented state employment legislation.⁵⁰ These state laws prohibit the employment of women in certain occupations such as mining⁵¹ and bartending,⁵² limit their hours of work⁵³ and the weight they may lift,⁵⁴ require certain benefits for women workers such as minimum wages,⁵⁵ premium pay for overtime,⁵⁶ rest periods⁵⁷ and phys-

49. 408 F.2d at 236.

50. 33 Fed. Reg. 3344 (Feb. 24, 1968); EEOC Policy Statement, Aug. 19, 1966 (unpublished); 30 Fed. Reg. 14927 (Dec. 2, 1965).

51. ALA. CODE tit. 26, § 166 (108) (Recomp. 1958); ARIZ. REV. STAT. ANN. § 23-261 (1971); ARK. STAT. ANN. § 52-612 (Supp. 1969); COLO. REV. STAT. ANN. § 92-10-2 (1963); ILL. REV. STAT. ch. 93, § 27 (1969); IND. STAT. ANN. § 46-2704 (1965); MO. ANN. STAT. § 293.060 (1965); N.Y. LABOR LAW § 405 (McKinney 1965); OHIO REV. CODE § 4107.43 (Baldwin 1964); OKLA. STAT. ANN. tit. 45, § 301 (1954); PA. STAT. ANN. tit. 43, § 103(c) (Supp. 1970); UTAH CODE ANN. § 34-22-1 (Supp. 1969); VA. CODE ANN. § 45.1-32 (Repl. 1967); WYO. CONST. art. 9, § 3 (1959).

52. ALASKA STAT. § 4.15.090 (1962); KY. REV. STAT. ANN. § 244.100 (1970); OHIO REV. CODE § 4107.43 (Baldwin 1964); R.I. GEN. LAWS ANN. § 3-8-2 (Supp. 1970).

53. ARK. STAT. ANN. § 81-601 (Repl. 1960); CAL. LABOR CODE §§ 1350 et seq. (West Supp. 1971); COLO. REV. STAT. ANN. § 80-14-10 (Supp. 1967); CONN. GEN. STAT. ANN. § 31-12 (Supp. 1970); D.C. CODE ANN. § 36-301 (1968); IDAHO CODE ANN. § 44-1107 (Supp. 1969); ILL. REV. STAT. ch. 48, § 5 (1969); KAN. STAT. ANN. § 44-640 (1964); KY. REV. STAT. ANN. § 337.380 (1969); LA. REV. STAT. § 23:332 (1964); ME. REV. STAT. ANN. tit. 26, §§ 491 et seq. (1965); MD. ANN. CODE art 100, § 52 (Supp. 1970); MICH. COMP. LAWS § 408.59 (1967); MINN. STAT. ANN. § 181.18 (1966); MISS. CODE ANN. § 6993 (1953); MO. REV. STAT. § 290.040 (1965); MONT. REV. CODE ANN. § 41-1118 (1961); NEV. REV. STAT. § 609.030 (1970); N.H. REV. STAT. ANN. § 275:15 (1966); N.J. STAT. ANN. § 34:2-24 (1965); N.M. STAT. ANN. § 59-5-1 (Supp. 1969); N.Y. LABOR LAW § 177 (McKinney Supp. 1971); N.C. GEN. STAT. § 95-17 (Supp. 1969); N.D. CENT. CODE § 34-06-06 (1960); OHIO REV. CODE § 4107.46 (Baldwin 1964); OKLA. STAT. ANN. tit. 40, § 81 (1954); PA. STAT. ANN. tit. 43, § 103 (Supp. 1970); R.I. GEN. LAWS ANN. § 28-3-9 (Repl. 1968); S.D. COMP. LAWS § 60-12-1 (1967); TENN. CODE ANN. § 50-718 (Repl. 1966); TEX. REV. CIV. STAT. art. 5172a, § 1 (1971); UTAH CODE ANN. § 34-22-3 (Supp. 1969); VA. CODE ANN. § 40.1-35 (1970); WASH. REV. CODE § 49.28.070 (Supp. 1970); WIS. STAT. ANN. § 103.02(1) (Supp. 1971); WYO. STAT. ANN. 27-218 (1967).

54. CAL. LABOR CODE §§ 1250 et seq. (West 1955); OHIO REV. CODE § 4107.43 (Baldwin 1964).

55. ARIZ. REV. STAT. ANN. § 23-328 (1971); CAL. LABOR CODE § 1197 (West 1955); COLO. REV. STAT. ANN. § 80-7-3 (1963); ILL. REV. STAT. ch. 48, § 198.2 (1969); KAN. STAT. ANN. § 44-643 (1964); LA. REV. STAT. § 23:353 (1964); MINN. STAT. ANN. §

ical facilities,⁵⁸ differentiate on the basis of sex with regard to the employment of minors, and prohibit the employment of women in certain occupations and industries immediately before and/or after childbirth.

In August, 1969, the Commission issued its current regulation on the subject, finding that state laws which restrict the employment of women are superseded by Title VII and, accordingly, do not justify the refusal to employ women.⁵⁹ Federal district courts have as a general rule adopted the EEOC's approach.⁶⁰

The view that such state legislation is superseded by Title VII was implicit in the first Title VII suit filed on the basis of sex by

177.121 (1966); OHIO REV. CODE ANN. § 4111.03 (Baldwin 1964); WIS. STAT. ANN. § 104.02 (1957).

56. CAL. LABOR CODE § 1350.5 (West Supp. 1971); COLO. REV. STAT. ANN. § 80-14-10 (Supp. 1969); IDAHO CODE ANN. § 44-1107 (Supp. 1969); N.M. STAT. ANN. § 59-5-1 (Supp. 1969); ORE. REV. STAT. §§ 653.261, 653.265 (1970).

57. ARK. STAT. ANN. § 81-609 (Repl. 1960); KY. REV. STAT. ANN. § 337.365 (1969); PA. STAT. ANN. tit. 43, § 107 (1964); WYO. STAT. ANN. § 27-218 (1967).

58. ALA. CODE tit. 26, § 337 (Recomp. 1958); ARIZ. REV. STAT. ANN. § 23-261 (1971); ARK. STAT. ANN. § 81-620 (Repl. 1960); CAL. LABOR CODE § 1253 (West 1955); COLO. REV. STAT. ANN. § 80-2-13 (1963); CONN. GEN. STAT. ANN. § 31-27 (Supp. 1970); D.C. CODE ANN. § 36-310 (1968); GA. CODE ANN. § 54-401 (Rev. 1961); IDAHO CODE ANN. § 44-1108 (1948); ILL. REV. STAT. ch. 48, § 31.7 (1969); IND. ANN. STAT. § 40-1006 (Repl. 1965); KAN. STAT. ANN. § 44-111 (1964); KY. REV. STAT. ANN. § 338.110 (1969); LA. REV. STAT. § 23:293 (1964); MASS. GEN. LAWS ANN. ch. 149, § 103 (1965); MICH. COMP. LAWS § 408.74 (1967); MINN. STAT. ANN. § 182.44 (1966); MO. REV. STAT. § 292.170 (1965); MONT. REV. CODE ANN. § 41-1119 (1947); NEB. REV. STAT. § 48-201 (Reissue 1968); NEV. REV. STAT. § 609.130 (1970); N.H. REV. STAT. ANN. § 277:8 (Repl. 1966); N.J. REV. STAT. § 34:2-29 (1965); N.M. STAT. ANN. § 59-5-11 (Repl. 1953); N.Y. LABOR LAW § 203-b (McKinney 1965); N.C. GEN. STAT. § 95-29 (1965); OHIO REV. CODE § 4107.42 (Baldwin 1964); OKLA. STAT. ANN. tit. 40, § 75 (1954); ORE. REV. STAT. § 653.270 (1970); PA. STAT. ANN. tit. 43, § 108 (1964); R.I. GEN. LAWS ANN. § 28-21-4 (1969); S.C. CODE ANN. § 40-256 (1962); S.D. COMP. LAWS § 60-12-9 (1967); TENN. CODE ANN. § 50-607 (Repl. 1966); TEX. REV. CIV. STAT. art. 5172a (1971); UTAH CODE ANN. § 34-22-2 (Supp. 1969); VA. CODE ANN. § 40.1-34 (1970); WASH. REV. CODE § 49.12.220 (1962); W. VA. CODE ANN. § 21-3-11 (Repl. 1970); WIS. STAT. ANN. § 103.16 (1957).

59. 29 C.F.R. § 1604.1 (1970). In December, 1969, in a case involving the District of Columbia's maximum hours laws for women (D.C. CODE ANN. § 36-301 (1961)), the EEOC found that Title VII supersedes prior conflicting federal legislation as well as conflicting state legislation. Decision No. 70-382, 1 CCH EMPL. PRAC. GUIDE ¶ 6091, at 4138 (EEOC Dec. 16, 1969). On March 25, 1970, the Corporation Counsel for the District of Columbia issued an Opinion adopting the Commission's view, and on August 21, 1970, he issued an additional Opinion finding that Title VII supersedes the District's restrictions on the employment of minors to the extent it discriminates on the basis of sex.

60. *Kober v. Westinghouse Elec. Corp.*, 3 F.E.P. Cas. 326 (W.D. Pa. 1971); *Ridinger v. General Motors Corp.*, 3 F.E.P. Cas. 280 (S.D. Ohio 1971); *Garneau v. Raytheon Co.*, 3 F.E.P. Cas. 215 (D. Mass. 1971); *Local 246, Utility Workers v. Southern Cal. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Rosenfeld v. Southern Pac. Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970). The validity of state legislation is also involved in *Mengelkoch v. Industrial Welfare Comm'n* 437 F.2d 563 (9th Cir. 1971), and *Ward v. Luttrell*, 292 F. Supp. 165 (E.D. La. 1968).

the Department of Justice, *United States v. Libbey-Owens Ford Co.*,⁶¹ and in the consent order issued therein. The consent order provided for bidding into jobs and the assignment of overtime on a nondiscriminatory basis even though Ohio's legislation restricts overtime and weight-lifting for women.⁶²

Since 1969, the Attorneys General of South Dakota, Pennsylvania, Oklahoma, Michigan, Massachusetts, Wisconsin and Washington have issued Opinions finding that Title VII and/or their state fair employment practices legislation superseded their state legislation restricting the employment of women.⁶³ In jurisdictions where no definitive court decision or Attorney General's Opinion has been issued, employers may find themselves in a dilemma between the dictates of Title VII and state legislation. In such instances, a suit for a declaratory judgment under the Federal Declaratory Judgment Act is appropriate.⁶⁴

The Commission's current regulations contain no statement of position on the relationship between Title VII and state laws which require benefits for women workers, such as minimum wages, premium pay for overtime and rest periods.⁶⁵ The Commission is handling cases

61. 3 E.P.D. ¶ 8052 (N.D. Ohio 1971).

62. The view that Title VII supersedes Ohio's restrictions on maximum hours and weight-lifting for women was also expressed in *Ridinger v. General Motors Corp.*, 3 F.E.P. Cas. 280 (S.D. Ohio 1971). In *Ridinger* the court noted its disagreement with *Jones Metal Products Co. v. Walker*, 25 Ohio App. 2d 141, 3 F.E.P. Cas. 253 (1971). On May 3, 1971, in *General Electric v. Hughes*, No. 7922 (S.D. Ohio), the court issued a preliminary decree enjoining the Ohio Department of Industrial Relations and the Attorney General from enforcing Ohio's employment laws dealing solely with women against the plaintiff.

The consent order in *Libbey-Owens* is also significant as an example of the type of relief which may be appropriate in a case involving sex discrimination. The agreement provided, among other things, that the company and union would implement an education and training program for women employees to assist them in transferring to new jobs and departments and that the company, when hiring, would take positive steps, including advertising, to ensure that its file of pending applications included a sufficient number of applications from women so that it could hire on a nondiscriminatory basis, and that, to the extent qualified women employees were available, two of the next four foremen in certain departments would be women.

63. Cf. Opinion of the Attorney General of North Dakota, CCH LAB. L. REP. ¶ 49,995.02 (April 18, 1969). Furthermore, since the effective date of Title VII, many states and the District of Columbia have amended or repealed their legislation which will effectively broaden opportunities for women. Most of these changes are detailed in TASK FORCE ON LABOR STANDARDS, REPORT TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 56-68 (1968).

64. *Potlatch Forests, Inc. v. Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970).

65. In its previous regulation, the EEOC had stated that an employer will be deemed to have engaged in an unlawful employment practice if he refuses to employ or promote a woman in order to avoid providing a benefit for her required by law—such as minimum wage or premium overtime pay. 33 Fed. Reg. 3344 (1968); 30 Fed. Reg. 14927 (1965).

raising such issues on a case-by-case basis. It would appear, however, that the existence of such laws will not justify the refusal to hire or promote women. Furthermore, such laws may be harmonized with Title VII by extending the benefits involved to men. That was the view expressed in *Potlatch Forests, Inc. v. Hays*,⁶⁶ wherein the Commission participated as amicus curiae. In *Potlatch*, an employer sought a declaratory judgment that Arkansas law requiring overtime pay for women⁶⁷ was superseded by Title VII. The court found instead that there was no conflict between Title VII and Arkansas law because the employer could comply with both statutes by paying both men and women the overtime rate which the state required for women.⁶⁸

Classified Advertising

The Commission has long ruled that an advertiser may not indicate a preference or limitation based on sex in the content of classified advertising unless sex is a BFOQ for the job involved. The Commission's position with regard to advertising placed in sex-segregated advertising columns underwent various changes until its final ruling which became effective on January 24, 1969:

It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will

66. 318 F. Supp. 1368 (E.D. Ark. 1970). In *Ridinger v. General Motors Corp.*, 3 F.E.P. Cas. 280 (S.D. Ohio 1971), the court ruled that Title VII superseded Ohio law which prohibited the employment of women for more than five continuous hours without a 30 minute meal period, but found no conflict with Ohio law requiring seats for female employees and special provisions for lunchbreaks. In *Burns v. Rohr Corp.*, No. 69-132-S, pending in the Southern District of California, the male plaintiff alleges that the company's refusal to provide rest periods for men such as are provided for women pursuant to California law violates Title VII. The EEOC's position is stated in its regulations:

The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

29 C.F.R. § 1604.1(iv) (1970).

67. ARK. STAT. ANN. § 81-601 (Repl. 1960).

68. The EEOC's regulations are also silent with regard to the relationship between Title VII and state legislation which differentiates on the basis of sex in regulating the employment of minors. There has been, however, an Opinion by the Corporation Counsel for the District of Columbia finding that the District's act regulating the employment of minors is superseded by Title VII to the extent that it discriminates on the basis of sex. See note 59 *supra* and accompanying text.

be considered an expression of a preference, limitation, specification, or discrimination based on sex.⁶⁹

In spite of this ruling, newspapers are replete with advertisements which are placed in sex-segregated columns and contain unlawful sex preferences. There are a number of reasons for this. A suit filed by the American Newspaper Publishers Association and the Washington, D.C. *Evening Star* attacking the EEOC's proposed regulation concerning sex-segregated advertising columns delayed the effective date of the regulation⁷⁰ and caused confusion in the public mind as to its validity. That suit was dismissed on October 22, 1970. Secondly, relatively few charges have been filed attacking discriminatory classified advertising, apparently because the question of who has standing to file such charges has not yet been resolved in a court case. It would appear that anyone who has applied for the job advertised or is interested in applying for it, as well as an incumbent employee, would have standing to attack such advertising. It may also be found that anyone in the labor force who reads the advertisement has such standing.

A third reason for the continued existence of sex discrimination in classified advertising is the fact that newspapers' responsibility for such discrimination remains in litigation. In its amicus curiae brief in *Brush v. San Francisco Newspaper Printing Co.*,⁷¹ the Commission took the position that a newspaper which maintained classified advertising columns was acting as an employment agency and therefore came within the ambit of the Act. That position was not sustained by the district court, and the case is currently pending on appeal.

There have been, however, numerous developments involving sex-segregated advertising columns through recourse to city and state fair employment practice commissions which have clear jurisdiction over newspapers through municipal ordinances and state statutes. After charges were filed with the New York City Fair Employment Practices

69. 29 C.F.R. § 1604.4 (1970). The regulation is based on section 704(b) of Title VII which prohibits employers, unions and employment agencies from printing or publishing discriminatory advertising relating to employment or referral for employment. 42 U.S.C. § 2000e-3(b) (1964).

70. 29 C.F.R. § 1604.4, first announced in August, 1968, was scheduled to become effective on December 1, 1968. 33 Fed. Reg. 11539 (Aug. 14, 1968). The Publishers Association suit and the appeal from the district court's decision therein initially delayed the effective date of the Regulation. *American Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 100 (D.D.C. 1968). Thereafter, the appellate court permitted the Regulation to become effective on January 24, 1969, even though the litigation was still pending. *American Newspaper Publishers Ass'n v. Alexander*, 59 CCH Lab. Cas. ¶ 9203 (D.C. Cir. 1969).

71. 315 F. Supp. 557 (N.D. Cal. 1970):

Commission, the *New York Times* and all major New York City newspapers desegregated their advertising columns on December 1, 1968.⁷² Similar charges were filed with the Pittsburgh Commission on Human Relations involving the *Pittsburgh Press*.⁷³ On March 24, 1971, in the first state court decision on the issue, the Pennsylvania Court of Common Pleas affirmed the decision of the Pittsburgh Commission, finding that the *Pittsburgh Press* was in violation of the Pittsburgh ordinance by maintaining sex-segregated advertising columns.⁷⁴ On January 18, 1971, the three major newspapers in the District of Columbia desegregated their classified advertising columns pursuant to an agreement reached with the District's Human Relations Commission.⁷⁵

Terms, Conditions and Privileges of Employment

Wages and Salaries

As a general rule, equal terms, conditions and privileges of employment must be made available for men and women.⁷⁶ Thus, employees are entitled to equality with regard to wages and salaries. Title VII covers both the obvious type of discrimination where men and women in the same job classification are receiving disparate wages or salaries and the more subtle type where only women are employed in a job classification and the wage rate is discriminatorily depressed because only women have traditionally been employed in that classification.⁷⁷

Seniority

Title VII prohibits the establishment or maintenance of seniority lists or lines of progression based on sex.⁷⁸ Where plant-wide seniority

72. See 2 CCH EMPL. PRAC. GUIDE ¶ 26,175, at 8901.

73. National Organization for Women, Inc. v. Pittsburgh Press, Decision No. 558 (Pittsburgh Pa., Comm'n on Human Rights, July 23, 1970).

74. 3 E.P.D. ¶ 8154 (Pa. C.P. 1071), *construing* PITTSBURGH, PA., ORDINANCE NO. 75, § 8(e). See 1 CCH EMPL. PRAC. GUIDE ¶ 5093, at 3815.

75. See D.C. POLICE REGULATIONS, art. 47, § 4(d).

76. The Commission has found, for example, that a bank's policy of permitting male employees to smoke at their desks while female employees could smoke only in employee lounges violated Title VII. Decision No. 71-109, 1 CCH EMPL. PRAC. GUIDE ¶ 6165, at 4277 (EEOC July 29, 1970).

77. Such discrimination can be ascertained by comparing the wages of these women with the wages of men doing comparable work in the company involved or men doing the same work at other plants in the industry.

78. The placement of jobs in a line of progression may constitute sex discrimination where such placement has a disproportionate impact on women and is not warranted by business necessity. Thus, the Commission found unlawful an employer's placement in a line of progression of two job classifications that involved the lifting of heavy weights but did not involve the acquisition of any skills needed to perform jobs higher in the line of progression. Decision No. 71-865, 1 CCH EMPL. PRAC. GUIDE ¶ 6190, at 4323 (EEOC Dec. 23, 1970). For a case wherein backpay was awarded and a pre-

has been in effect, it may be possible to correct a segregated seniority system merely by integrating the system. However, where departmental, gang or job seniority is a factor in determining transfers and promotions, additional adjustments in the system may be needed to eliminate the effects of past discrimination. Otherwise, women with long years of plant service will remain excluded from certain jobs, gangs and departments.⁷⁹

Marital and Family Status

The EEOC has said that an employer may not refuse to hire married women or women with children, legitimate or illegitimate,⁸⁰ and may not discharge female employees because of marriage or parenthood unless it has a similar policy for men.⁸¹ Contrary to these views, the

liminary injunction issued on remand in connection with a seniority system based on sex, see *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

79. *United States v. Libbey-Owens-Ford Co.*, 3 E.P.D. ¶ 8122 (N.D. Ohio 1970); Decision No. 71-1062, 1 CCH EMPL. PRAC. GUIDE ¶ 6197, at 4331 (EEOC Dec. 30, 1970); Decision No. 71-1100, 1 CCH EMPL. PRAC. GUIDE ¶ 6197, at 4333 (EEOC Dec. 31, 1970). Cf. Decision No. 71-413, 1 CCH EMPL. PRAC. GUIDE ¶ 6204, at 4346 (EEOC Nov. 5, 1970).

The problems posed in correcting discriminatory seniority systems based on sex are similar to those posed by racially discriminatory seniority systems. The applicability of Title VII to racially discriminatory seniority systems has been involved in a number of cases, including *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969), *rev'g* 295 F. Supp. 803 (N.D. Ala. 1968); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *aff'g* 282 F. Supp. 39 (E.D. La. 1968), *cert. denied*, 90 S. Ct. 926 (1970); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

80. The Commission has indicated that an employer's policy of refusing employment to unwed mothers would violate Title VII even assuming, arguendo, that the employer attempted to apply the same policy to men who fathered illegitimate children: [B]earing a child out of wedlock is a fact not easily hidden from an employer's discovery procedures, whereas it's a wise employer indeed that knows which of its male applicants truthfully answered its illegitimacy inquiry. We note, therefore, the foreseeable and certain impact of an illegitimacy standard, even where an employer attempts to apply it equally, is to deprive females, but not similarly placed males, of employment opportunities.

Decision No. 71-332, 1 CCH EMPL. PRAC. GUIDE ¶ 6164, at 4276 (EEOC Sept. 28, 1970). *Braddy v. Southern Bell Tel. & Tel. Co.*, No. 70-1187-Civ-CA, pending in the Southern District of Florida with the Commission as amicus curiae, is a class action wherein the plaintiff alleges that the respondent discriminates on the basis of sex because of its refusal to hire unwed mothers.

81. Title VII contains no prohibition against discrimination based on marital or family status unless it results in sex discrimination. Thus, an employer's refusal to employ married or single people or husband and wife in the same family for certain jobs would not constitute per se violations of Title VII. It might, however, be possible to establish that such policies violate Title VII where it can be shown that they have a disproportionate effect on women and are not required by business necessity. Civil Service Commission Regulations, which prohibit discrimination in covered positions in the federal government, prohibit discrimination based both on sex and marital status. 5 C.F.R. § 713.401 (1970).

Fifth Circuit in *Phillips v. Martin Marietta Corp.*⁸² ruled that an employer could lawfully refuse to hire women with pre-school age children although it hired men with such children. The court enunciated the "sex-plus" doctrine, ruling that an employer violated Title VII if it discriminated against women solely on the basis of their sex; however, if an employer discriminated against women for two reasons, *e.g.*, sex and having pre-school age children, such double-pronged discrimination was lawful. That rationale was repudiated by the Supreme Court when it vacated the decision and remanded the case on January 25, 1971.⁸³

Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualification be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children.⁸⁴

Maternity Leave

The Commission has established the principle that, as a general rule, an employer may not terminate an employee who is compelled to cease work because of pregnancy without offering her, alternatively, a

82. 411 F.2d 1 (5th Cir. 1969). Thereafter, one of the members of the court of appeals petitioned for a rehearing en banc, and the court on its own motion withdrew the opinion. In a 10-3 decision, the court denied the petition for rehearing. 416 F.2d 1257 (5th Cir. 1969).

On March 2, the Supreme Court granted the petition for certiorari after an amicus curiae brief in support of the petition had been filed by the EEOC and the Department of Justice. 397 U.S. 960 (1970). This was the first time that the Department of Justice had filed a brief on a matter of substance in a case involving sex discrimination. *Phillips* was the first Title VII case argued before the Supreme Court.

83. 91 S. Ct. 496 (1971). The case had been decided below on a motion for summary judgment; the Supreme Court remanded the case for a fuller development of the record.

84. The opinion also contained language indicating that the Court believed that jobs which women were able to perform might lawfully be closed to them if it could be shown that their obligations toward pre-school age children were "demonstrably more relevant to job performance" than similar obligations on the part of men. *Id.* at 498. In a concurring opinion, Justice Marshall stated:

I can not agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with preschool age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. . . .

When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.

Id. at 498-99.

leave of absence with the right of reinstatement to the position vacated at no loss of seniority or any of the other benefits and privileges of employment. While the employee is out on maternity leave, the employer should attempt to keep her job open or filled on a temporary basis.⁸⁵ The Commission has found that, absent a showing of business necessity, an employer's conditioning of maternity leave on two years of employment violated the Act where leaves of absence and disability leaves were not subject to any similar requirement,⁸⁶ that an employer's policy of granting maternity leave only to married female employees violated the Act in the absence of a provision for the termination of unmarried fathers, and that, absent a showing of business necessity, an employer's refusal to credit an employee for time spent on maternity leave taken prior to the effective date of the Act constituted an unlawful present effect of past discrimination.⁸⁷

The first judicial decision involving the employment rights of expectant mothers under Title VII, *Schattman v. Texas Employment Commission*,⁸⁸ was issued on February 25, 1971. In *Schattman*, wherein the EEOC appeared as amicus curiae, the court ruled that an employer's policy of requiring employees to cease work at the conclusion of their seventh month of pregnancy violated Title VII:⁸⁹

By virtue of female physiology, the Defendants' policy applies solely to women. Women are terminated not because of their

85. Decision No. 71-308, 1 CCH EMPL. PRAC. GUIDE ¶ 6170, at 4286 (EEOC Sept. 17, 1970); Case No. LA 68-4-538E, 1 CCH EMPL. PRAC. GUIDE ¶ 6125, at 4222 (EEOC June 16, 1969); Decision No. 70-600, 1 CCH EMPL. PRAC. GUIDE ¶ 6122, at 4217 (EEOC Mar. 5, 1970); Decision No. 70-360, 1 CCH EMPL. PRAC. GUIDE ¶ 6084, at 4130 (EEOC Dec. 16, 1969). If it is not possible to keep the employee's job open or filled on a temporary basis, the employer would be justified in replacing her. In such a case, upon the employee's return to work, the employer should attempt to place her in an equivalent position. Where this is not possible, he may be justified in offering her a temporary job in a lower classification until such time as she can be restored to her original job. If that is not possible, he may be justified in offering her a permanent position in a lower job classification. If it is impossible to place the employee in any position upon her return, fairness might require that she receive preferential consideration for future openings. The Commission determines whether or not the employer has made a sufficient effort to satisfy the rights of employees returning from maternity leave upon a review of all the circumstances in each individual case.

86. Decision No. 71-562, 1 CCH EMPL. PRAC. GUIDE ¶ 6184, at 4312 (EEOC Dec. 4, 1970).

87. Decision No. 71-413, 1 CCH EMPL. PRAC. GUIDE ¶ 6204, at 4346 (EEOC Nov. 5, 1970).

88. 3 F.E.P. Cas. 311 (W.D. Tex. 1971).

89. The defendant's policy, in pertinent part, provided that: "No employee anticipating maternity confinement may remain in active service with the [Texas Employment] Commission later than two months before the expected delivery date." An employee removed from active service pursuant to the above policy was not automatically granted leave without pay but might be placed on such leave upon written application for a period not to exceed six months which could be extended for an additional six months upon further application. *Id.* at 312.

unwillingness to continue work, their poor performance, or their need for personal medical safety, but because of a condition attendant to their sex. This is the very type of discriminatory regulation condemned by the interpretive regulations of the Equal Employment Opportunity Commission. . . . This is not to say that . . . [an employer] cannot have such a policy based on individual medical or job characteristics, but it does mean that broad policies not so justified are contrary to law.⁹⁰

Insurance Coverage

It would appear that Title VII's prohibition against sex discrimination in "terms, conditions, or privileges of employment" would require that job-related insurance plans be equally available to members of both sexes and that the benefits thereof must be equal for members of both sexes. These principles, however, have not yet been clearly articulated under Title VII for a number of reasons. First, the Wage-Hour Administrator of the Department of Labor, in interpreting the Equal Pay Act, has set forth different standards,⁹¹ and section 703(h) of Title VII

90. *Id.* at 311. The court thus adopted the argument made by the EEOC in its amicus brief that an employment policy which compels employees to resign after reaching a certain month of pregnancy violates Title VII unless the employer demonstrates that such a policy is essential to safely and efficiently perform the job involved. In a subsequent order denying a motion on the grounds that Title VII excludes state instrumentalities from the definition of "employer," the court noted that state employment agencies are subject to the Act and that the court had jurisdiction under the provisions of 42 U.S.C. § 1983. Pending in the Southern District of Texas with the Commission as amicus curiae is *Vick v. Texas Employment Comm'n*, Civil Action No. 70-H-1164, wherein the plaintiff alleges that the respondent refused to refer her for employment and declared her ineligible for unemployment benefits because she had reached her sixth month of pregnancy.

91. The Equal Pay Interpretive Bulletin, section 800.116(d) states as follows: *Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of Section 6(d) [the Equal Pay Act], if the resulting benefits are equal for such employees.

29 C.F.R. § 800.116(d) (1970). However, section 800.113 states:

Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include . . . contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.

29 C.F.R. § 800.113 (1970). Section 800.113 was referred to by the court in footnote 1

contemplates a relationship between the Equal Pay Act and Title VII.⁹² Secondly, there has to date been no judicial decision on insurance coverage under either Title VII or the Equal Pay Act.⁹³

The EEOC has, however, indicated in Commission decisions that the following types of employee insurance coverage do not comport with the requirements of Title VII: a group health insurance plan provided by an employer at its own expense where hospital and surgical benefits are available only to the dependents of employees who have "head of household" status, a status the employer assumes applies to married males but not married females;⁹⁴ an employer's insurance plan that limits the purchase of health insurance covering all dependents and affording maternity benefits to those employees who have "head of household" status;⁹⁵ group insurance plans under which coverage is available for the wives of male employees but not the husbands of female employees;⁹⁶ and a group health insurance plan which provides immediate maternity benefits for the wives of male employees but conditions the eligibility of female employees on two years of employment.⁹⁷

of *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970), as follows: "We note also that it is far from clear that standard types of fringe benefits are eligible for inclusion in 'equal pay' determinations." See 29 C.F.R. § 800.113 (1970).

92. Section 703(h) of Title VII provides in pertinent part:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

42 U.S.C. § 2000e-2(h) (1964). In section 1604.7 of its regulations, dealing with the relationship between Title VII and the Equal Pay Act, the Commission has stated:

(a) . . . Accordingly, the Commission interprets Section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. . . .

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. . . . Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

93. *Taylor v. Goodyear Tire & Rubber Co.*, Civil Action No. CA 69-211, a sex discrimination case pending in the Northern District of Alabama, involves, among other things, a pension and insurance agreement effective from 1964 to 1967 under which disabled female employees were paid \$10 per week less than disabled male employees.

94. Case No. CL 7-6-694, 1 CCH EMPL. PRAC. GUIDE ¶ 6009, at 4026 (EEOC May 19, 1969).

95. Decision No. 70-495, 1 CCH EMPL. PRAC. GUIDE ¶ 6110, at 4162 (EEOC Jan. 29, 1970). with regard to conditioning the emoluments of employment on "head of household" status, see 29 C.F.R. § 800.149 (1970).

96. Decision No. 71-1100, 1 CCH EMPL. PRAC. GUIDE ¶ 6197, at 4333 (EEOC Dec. 31, 1970); Decision No. 70-660, 1 CCH EMPL. PRAC. GUIDE ¶ 6133, at 4232 (EEOC Mar. 24, 1970); Decision No. 70-510, 1 CCH EMPL. PRAC. GUIDE ¶ 6132, at 4231 (EEOC Feb. 4, 1970).

97. Decision No. 71-1100, 1 CCH EMPL. PRAC. GUIDE ¶ 6197, at 4333 (EEOC

Retirement and Pension Plans

The Commission has made the following pronouncements with regard to pension and retirement plans:⁹⁸

(a) A difference in optional or compulsory retirement ages based on sex violates Title VII.⁹⁹

(b) Other differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues.¹⁰⁰

On September 13, 1968, the EEOC's General Counsel issued an interpretive Opinion dealing with section 1604.31(a) declaring that women who had an option to retire within five, seven or ten years after October 1, 1968, under a plan existing on that date which permitted earlier optional retirement by women, might lawfully be permitted to exercise such options.¹⁰¹ The first judicial decision dealing with a retirement and pension plan under Title VII, *Rosen v. Public Service Electric & Gas Co.*,¹⁰² casts doubt on the validity of the Opinion. In *Rosen*, the court held that an employer violated Title VII by maintaining a retirement and pension plan which provided for differentials in retirement age and pension benefits based on sex. The court further held that a revision of this plan was unlawful even though it eliminated the sex differentials in the main because it contained an exception for certain incumbent female employees:

The exception in the . . . amended plan envisions a phasing out of the discriminatory pension system. Gradual improvement of employment opportunities does not in and of itself constitute compliance with Title VII. . . . A court is not limited to barring only present and future wrongs but may act to eliminate the

98. 29 C.F.R. § 1604.31 (1970).

99. Section 1604.31(a) was followed in Decision No. 70-45, 1 CCH EMPL. PRAC. GUIDE ¶ 6041, at 4072 (EEOC July 19, 1969); Decision No. 70-75, 1 CCH EMPL. PRAC. GUIDE ¶ 6049, at 4082 (EEOC Aug. 13, 1969); and Case No. YNY9-034, 1 CCH EMPL. PRAC. GUIDE ¶ 6050, at 4083 (EEOC June 16, 1969).

100. The Commission has found unlawful a pension plan which provides an annuity for widows of employees that is not provided for widowers of employees and a death benefits plan which provides a mandatory pension for widows of employees but does not provide a pension for the widowers of employees unless they are physically or mentally incapable of self-support and were actually supported in whole or in part by the deceased employee at the time of her death. Case No. YNY9-034, 1 CCH EMPL. PRAC. GUIDE ¶ 6050, at 4083 (EEOC June 16, 1969).

101. EEOC General Counsel, Opinion Letter, Sept. 13, 1968.

102. 2 F.E.P. Cas. 1090 (D.N.J. 1970).

present effects of past discriminations.¹⁰⁸

CONCLUSION

As has been illustrated, there is a great deal of law being made today at the administrative and judicial levels involving women's rights. This is not to say that the battle has been won on the legal front. The Equal Rights Amendment to the Constitution has not yet been passed. None of the provisions of the Civil Rights Act of 1964 with the exception of Title VII concern themselves with sex discrimination.¹⁰⁴ Discrimination based on sex in housing is not a violation of the federal Fair Housing Act¹⁰⁵ nor of most state and municipal housing laws. The Social Security Act still permits differentials in benefits based on sex.¹⁰⁶ Many states are still enforcing legislation which restricts the employment of women and female minors. Few states provide disability payments to women employees on maternity leave. Significant categories and numbers of women are excluded from the protections of Title VII, the Equal Pay Act and Executive Order 11478. The EEOC under Title VII has no power to enforce its decisions.¹⁰⁷

The articulation of legal protections for women, however, has begun. Until 1961¹⁰⁸ a woman who was the victim of sex discrimination in employment had no legal recourse on either the federal or state level. Today, there are many agencies to which she can turn for relief. It is now up to women to move ahead by insuring the implementation of the legal victories which have been won and by continuing to fight for those that are yet to be attained. But already women can echo the words of Martin Luther King:

103. *Id.* at 1096-97.

104. Those Titles of the Civil Rights Act of 1964 which deal with discrimination based on race, color, national origin and religion but exclude discrimination based on sex are:

Title II, Injunctive Relief Against Discrimination in Places of Public Accommodation.

Title III, Desegregation of Public Facilities.

Title IV, Desegregation of Public Education.

Title V, Commission on Civil Rights.

Title VI, Nondiscrimination in Federally Assisted Programs (also excludes discrimination based on religion).

Title VIII, Registration and Voting Statistics (also excludes religion).

Title IX, Intervention and Procedure After Removal in Civil Rights Cases.

Title X, Establishment of Community Relations Service (also excludes discrimination based on religion).

105. 42 U.S.C.A. §§ 3601 et seq. (1970).

106. *See* 42 U.S.C. § 402 (1964).

107. *See* 42 U.S.C. § 2000e-5 (1964).

108. The Wisconsin Fair Employment Practices Act, which became effective August, 1961, was the first such statute to prohibit sex discrimination.

We ain't what we oughta be,
we ain't what we wanta be,
we ain't what we gonna be,
but thank God we ain't what we was.¹⁰⁹

109. S. DAVIS, JR., J. BOYAR & B. BOYAR, *YES I CAN* (Preface) (1st ed. 1965).