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Sex Discrimination in Employment Under Title VII of The Civil Rights Act of 1964

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NOTES

Sex Discrimination in Employment Under Title VII of The Civil Rights Act of 1964

I. Introduction

On July 2, 1964, President Johnson signed into law the Civil Rights Act of 1964,[1] the most far-reaching civil rights legislation in history. Much has been written about the act, but almost without exception the writers have been concerned with the ban of discrimination in employment on the basis of race or color. But the most radical and troublesome characteristic of Title VII of the Civil Rights Act is its outlawing of employment discrimination based on sex.[2] It is the purpose of this note to examine this largely ignored aspect of the act. The inquiry will first examine the regulation of sex discrimination generally under the federal constitution and federal and state laws. Emphasis here will be placed on the treatment of discrimination under the fourteenth amendment, the Railway Labor Act, the National Labor Relations Act and, of primary importance, the interaction of Title VII with the similar provisions of the Equal Pay Act of 1963.[3] The legislative history of the inclusion of the word "sex" in Title VII will be examined, and a synopsis will be presented, to indicate the types of employment practices which have been deemed by the Equal Employment Opportunity Commission to be violative of the provision of the act. Finally, there will be an examination of the two aspects of the law which give rise to the greatest problems: the bona fide occupational qualification exception under which discrimination is permitted,[4] and the relationship between Title VII, state fair employment practice laws, and state laws regulating the employment of women.[5]

II. The Treatment of Sex Discrimination Under Other Laws

A. *Federal Law*

During the 1960's, more concern has been shown for the legal status of women than at any other time since the adoption of the nineteenth

1. 42 U.S.C. § 2000e (1964).
2. 42 U.S.C. § 2000e-2 (1964), bars employment discrimination on the basis of race, color, religion, sex or national origin.
3. 29 U.S.C. § 206(d) (1964).
4. 42 U.S.C. § 2000e-2(e) (1964).
5. *See* text, Part IV *infra* and accompanying notes.

amendment.[6] This concern has been evidenced by executive orders establishing commissions to study the problems surrounding the status of women[7] and by the passage of the Equal Pay Act, amending the Fair Labor Standards Act.[8] Such action shows marked contrast to previous lack of concern for women's rights. Until the Civil Rights Act of 1964,[9] sex had generally been an accepted ground for discrimination.

Attempts at explicit constitutional prohibition of sex discrimination, in the form of an equal rights amendment prohibiting the denial or abridgement of rights on account of sex have been introduced in every Congress since 1923.[10] Such amendments have passed the Senate twice, each time with the "Hayden rider" attached.[11] However, with the repeated defeat of this amendment, the nineteenth amendment remains the only constitutional mention of sex.[12] Efforts to gain equality of the sexes under the various aspects of the fourteenth amendment have also met with failure.[13] The equal protection clause requires that any legislative classification be rationally related to some goal which the state has a right to achieve,[14] but state laws discriminating between the sexes have been repeatedly upheld without specific proof of such relation.[15] Likewise, the privileges and immunities

6. U.S. CONST. amend. XIX.

7. Exec. Order No. 10,980, 26 Fed. Reg. 12059 (1961), established the President's Commission on the Status of Women. The Commission submitted its report in October, 1963. Exec. Order No. 11,126, 26 Fed. Reg. 717 (1963), set up the Interdepartmental Committee and Citizens' Advisory Council on the Status of Women to carry out the recommendations of the President's Commission.

8. 29 U.S.C. § 206(d) (1964). This provided for equal pay for equal work without discrimination on the basis of sex. For further discussion, see Part II, § A *infra*.

9. 42 U.S.C. § 2000e (1964).

10. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS 32 (1963). In its present form, the amendment provides that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *See, e.g.*, H.R.J. Res. 11, and S.J. Res. 85, 89th Cong., 1st Sess. § 1 (1965).

11. The amendment "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon persons of the female sex." 96 CONG. REC. 872-73 (1950); 99 CONG. REC. 8954-55 (1953).

12. U.S. CONST. amend. XIX prohibits discrimination on the basis of sex "in legislation prescribing the qualifications of suffrage." This wording has generally been construed literally.

13. In Strauder v. West Virginia, 100 U.S. 303 (1879), the Court held that due process does not prohibit selection of jurors of only one sex. This holding was later reaffirmed in Ballard v. United States, 329 U.S. 187 (1946).

14. Skinner v. Oklahoma, 316 U.S. 535 (1942).

15. There are numerous cases upholding liquor laws which treat the sexes differently without a connective link between the statutory distinction and the aim of the statute. *See, e.g.*, Henson v. City of Chicago, 415 Ill. 564, 114 N.E.2d 778 (1953); Anderson v. City of St. Paul, 226 Minn. 186, 32 N.W.2d 538 (1948). There is also an abundance of cases upholding laws providing for different criminal punishments for the sexes, different marriage qualificatious, and differeut political rights, seemingly with-

clause has been held not to confer upon a woman the right to practice law in a state.[16] It is this obvious gap in constitutional protection of women's equal rights which has led to the proposal for an equal rights amendment and which supported the inclusion of the word "sex" in Title VII.[17]

The problem of discrimination has been dealt with under the national labor statutes. The Supreme Court in *Steele v. Louisville & Nashville Railroad*[18] held that the Railway Labor Act[19] imposes on a bargaining representative the duty to fairly represent the interests of all members of its craft or class without discrimination. A later case under the act specifically banned union representation discrimination based on race, color, or creed.[20] The duty of fair representation, however, has not been extended to prevent racial discrimination in the denial of membership,[21] which is expressly forbidden under Title VII.[22] Although it would appear that the duty of fair representation established by the *Steele* case might impliedly ban discrimination against female members of a bargaining unit, the specific question of sex discrimination has not arisen under the act. The National Labor Relations Board (NLRB) has taken steps under the National Labor Relations Act similar to those in *Steele* to insure fair representation by a union, and will consider rescinding any certification of a bargaining representative if that representative denies equal representation to the employees in the unit for certain discriminatory reasons.[23] In determining an appropriate bargaining unit, the NLRB generally considers only such factors as skills, duties, and interests of employees; sex or race are not proper

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out the distinctions furthering the statutory aims. *See generally* Kanowitz, *Sex-Based Discrimination in American Law*, 11 ST. LOUIS U.L.J. 293 (1967).

16. *In re* Lockwood, 154 U.S. 116 (1894).

17. "[W]e withhold from our women a constitutional guarantee of equal treatment under the law . . . ." S. REP. No. 1558, 88th Cong., 2d Sess. 3 (1967).

18. 323 U.S. 192 (1944). A supplemental collective bargaining agreement between defendant and the Brotherhood of Locomotive Firemen to discriminate against Negro firemen with the ultimate aim of excluding all Negroes from service was held illegal.

19. 45 U.S.C. § 151 (1964). This act establishes a procedure whereby the employees' choice of collective bargaining agent may be ascertained in the railway and airlines industries and sets up the National Mediation Board as the agency for the settlement of representation disputes.

20. Conley v. Gibson, 355 U.S. 41 (1957).

21. Oliphant v. Locomotive Firemen & Enginemen, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935, *rehearing denied*, 359 U.S. 962 (1959).

22. 29 U.S.C. § 151 (1964).

23. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Pioneer Bus Co., 140 N.L.R.B. 54 (1962). Racial discrimination in membership classification, segregation of workers, or discrimination in the proceessing of grievances by a union will affect a union's certification. Locals 1 & 2, Independent Metal Workers (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964).

distinctions in unit determination.[24] But despite its expressed disapproval of racial discrimination, the NLRB never applied the NLRA's unfair labor practice sanctions to discrimination unrelated to employee organizational and bargaining rights until its decision in *Miranda Fuel*,[25] holding that discriminatory representation by the union and acquiescence by the employer violated employees' fundamental rights under section 7 of the NLRA.[26] The Labor Board's holding was denied enforcement by the Second Circuit[27] on the basis that the unfair labor practice sanctions should be applied only to discriminatory conduct encouraging or discouraging union membership and therefore section 7 does not provide a broad right against discrimination in a general sense. Despite this reversal, the Board has persisted in its holding,[28] and has won the approval of the Fifth Circuit,[29] but the conflict has yet to be resolved by the Supreme Court.[30] The positions of the NLRB and the Fifth Circuit appear to be the better, since treating discrimination as an unfair labor practice brings it within the jurisdiction of the Board, which can then provide the employee with a less expensive and more equitable decision than he might get in court.

24. For decisions holding that race is not a proper factor, *see, e.g.*, Andrews Indus. 105 N.L.R.B. 946 (1953); J. R. Simplot Co., 100 N.L.R.B. 771 (1952). The Board has held that units based upon separation of the sexes are inappropriate, Underwriters Salvage Co., 99 N.L.R.B. 337 (1952), and it will dismiss a petition for designating a unit predicated on such a separation absent a showing that there exists a substantial difference in skills between male and female employees. *See* Lloyd Hollister, Inc., 55 N.L.R.B. 32 (1944); H. W. Wilson Co., 48 N.L.R.B. 938 (1943). This requirement that there exist a substantial difference in the skills of the sexes parallels to some extent the exception under Title VII, treated in Part IV, *infra*, permitting sex discrimination when it is based on a bona fide occupational qualification.

25. 140 N.L.R.B. 181 (1962). The Board found that the employer's acquiescence to the union's demand for reduction in the seniority of a Negro union member was an unfair labor practice by both employer and union, violating sections 8(b)(1)(A), 8(b)(2), 8(a)(1), and 8(a)(3).

26. Section 7 guarantees employees the right to organize, to form, join or assist labor organizations, to bargain collectively, or to refrain from taking part in any or all of these activities. Sections 8(a) and 8(b) make employer and union interference with these right an unfair labor practice.

27. Miranda Fuel v. Teamsters Local 553, 326 F.2d 172 (2d Cir. 1963).

28. Locals 1 & 2, Independent Metal Workers (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964). The Board again held that racial discrimination by a bargaining representative could support the finding of an unfair labor practice.

29. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966). The court held that where a grievance would have been processed to arbitration but for arbitrary and racially discriminatory reasons, the refusal to so process was a violation of the union's duty to represent its members "without hostile discrimination, fairly, impartially, and in good faith." The court rejected the narrow interpretation of §§ 8(a) and 8(b) used by the Second Circuit in *Miranda Fuel* and held this to be an unfair labor practice.

30. In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court was presented with an opportunity to settle the split of authority, but it declined to do so.

Although the cases before the Board have dealt with racial discrimination, under Title VII, the unfair labor practice sanction will be extended to sex discrimination, so that the Board may become an available forum for an aggrieved female employee.

The Equal Pay Act,[31] a 1963 amendment to the Fair Labor Standards Act, provided the first specific federal statutory ban against sex discrimination, stating that an employer may not base wage differentials on the factor of sex. For purposes here, the primary concern with the Equal Pay Act centers around its interpretation in conjunction with Title VII of the Civil Right Act. By its own terms in section 703(h),[32] Title VII requires that it be harmonized with the Equal Pay Act, and the Equal Employment Opportunity Commission (EEOC) has expressed the view that the Equal Pay Act is incorporated into Title VII to the extent that wage differentials based on sex which are exempted from and, therefore, authorized by the Equal Pay Act will not be unlawful under Title VII.[33] Some of the more important exemptions from the Equal Pay Act are: executive, administrative and professional employees and outside salesmen.[34] There are, however, no similar exemptions from Title VII, and it is the opinion of the EEOC that although the Title VII ban against sex discrimination is co-extensive with that of the Equal Pay Act, it is not limited to the latter's express coverage.[35] So as concerns the coverage of employees, Title VII is clearly broader than the Equal Pay Act in banning sex discrimination in wages. But the latter act serves to limit Title VII by its incorporation, since under it, and therefore under

31. 29 U.S.C. § 206(d) (1964): "(1) No employer having employees subject to . . . this section shall 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 work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex." The act further provides that no labor organization shall cause or attempt to cause an employer to violate paragraph (1).

32. 42 U.S.C. § 2000e-2(h) (1964): "It shall not be an unlawful employment practice under this subchapter for an employer to differentiate upon the basis of sex in determining the amount of the wages . . . paid to employees . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29."

33. EEOC Opinion Letter, Dec. 29, 1965, *reprinted in* CCH EMPLOYMENT PRACTICES ¶ 17,251.

34. 29 U.S.C. § 213(a) (1964). A complete list of exemptions is defined and delimited in 29 C.F.R. §§ 775-86 (1967).

35. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.7 (1967). The regulations under the Equal Pay Act agree that the act does not excuse noncompliance with other state or federal laws imposing a higher standard of equality. 29 C.F.R. § 800.160 (1967).

Title VII, such discrimination is legal when pursuant to a seniority system, a system measuring earnings by quantity or quality of production, or a differential based on a factor other than sex.[36]

An important comparison to be made is the relative effectiveness of the remedies under the two acts. Since the Equal Pay Act states that, for purposes of enforcement, wages due under the equal pay standard will be treated as unpaid minimum wages and overtime pay,[37] it will have the same remedies as the minimum wage and overtime pay requirements of the Fair Labor Standards Act. The remedies thus available will be: (1) private suits by the employee to recover back wages due under the law plus an additional equal amount as liquidated damages; (2) criminal action by the Justice Department against "willful" violators; and (3) suits by the Secretary of Labor to collect pay due employees under the act or to enjoin employers from violations.[38] In sharp contrast, an employee injured under Title VII must look first to the EEOC for a remedy. The EEOC has no direct authority to enforce the law, but is limited to preliminary investigation and the informal methods of counsel, conciliation and persuasion to eliminate conduct it believes wrongful. It may not petition a court for enforcement of its findings, but can only notify the complainant of failure of the informal means, giving him 30 days in which to file a suit.[39] Since the remedies under the Equal Pay Act are so obviously more effective than those of Title VII, one complaining of sex discrimination within the purview of both acts would be well advised to proceed under the Equal Pay Act. The shortcoming of the Equal Pay Act is that it is limited to guaranteeing equal pay, and this guarantee is of little value to women who are denied the initial employment opportunity. It is this latter problem with which only Title VII deals.

B. *State Law*

At the time of the enactment of Title VII, 25 states had Fair Employment Practice (FEP) laws, none of which barred employment discrimination based on sex. Several states did and still do have laws regulating the employment of women, including: (a) prohibitions against employment in certain occupations; (b) maximum hour laws; (c) minimum wage laws; (d) prohibitions against employment during certain night hours; (e) weight lifting limitations; and (f) re-

36. *See* note 33 *supra*. *See also* Kilpatrick v. Sweet, 262 F. Supp. 561 (M.D. Fla. 1967), which held that if there are any factors for discrimination other than sex, then no violation of the Equal Pay Act.

37. 29 U.S.C. § 206(d)(3) (1964).

38. 29 U.S.C. § 216 (1964).

39. 42 U.S.C. § 2000e-4(f) (1964).

quirements for special facilities such as rest rooms and seats for women.[40] Since the enactment of Title VII, there has been a marked expansion in state FEP laws, and as of December 5, 1965, ten states had enacted FEP laws which outlaw employment discrimination on the ground of sex (in addition to race, color, religion and national origin), and provide for civil sanctions enforceable by state administrative authorities.[41] The important aspect of state FEP laws and state laws regulating the employment of women is their interaction with Title VII. The complex problems arising from this will be examined in Part IV below.

C. *Arbitration Decisions*

Labor arbitrators deciding disputes under collective bargaining agreements have developed different trends in the different classifications of disputes concerning sex discrimination. The most noticeable common thread running through the arbitration awards is that when sex discrimination is complained of, the arbitrators attempt to establish whether there is discrimination or whether, in the particular instance, sex is a necessary and valid ground for distinction between employees. Thus, in decisions involving a senior employee "bumping" a junior out of his job in order to avoid being laid off, arbitrators have held that a woman may not bump a junior male if she lacks the physical requirements for his job[42] or is otherwise unqualified,[43] and that a senior male may not bump a junior female if her job is properly designated as "female" in the collective bargaining agreement.[44] Likewise, in decisions involving rates of pay, arbitrators examine whether sex is a valid ground of distinction. If jobs are not similar, then a demand for equal wages will usually be denied,[45] but different sexes doing the same work have been awarded equal rates.[46] The similarity

40. For a full discussion of these types of state protective laws, see Waters, *Sex, State Protective Laws and the Civil Rights Act of 1964*, 18 LAB. L.J. 344, 348-49 (1967).

41. Hawaii, Maryland, Massachusetts, Missouri, Nebraska, New York, Utah, Wisconsin, Wyoming and the District of Columbia are those jurisdictions listed in the Commission Decision, Dec. 5, 1965, cited in B.N.A. LAB. REL. EXPEDITER 1892e.

42. Gould-Nat'l Batteries, Inc., 61-2 CCH LAB. ARB. AWARDS ¶ 8500 (Jan., 1961) (female not allowed to bump into foundry job).

43. Apex Mach. & Tool Co., 65-2 CCH LAB. ARB. AWARDS ¶ 8787 (Sept. 30, 1965) (women employees lacked skill to qualify as turret lathe operators).

44. Centrex Corp., 65-2 CCH LAB. ARB. AWARDS ¶ 8737 (Oct., 1965).

45. Collins Radio Co., 66-1 CCH LAB. ARB. AWARDS ¶ 8037 (Dec. 7, 1965) (male job more hazardous and required greater skill). In his decision, the arbitrator discusses the bona fide occupational qualification exception of Title VII. *See also* Cambridge Tile Mfg. Co., 66-1 CCH LAB. ARB. AWARDS ¶ 8098 (Dec. 2, 1965).

46. Rockwell-Standard Corp., 64-2 CCH LAB. ARB. AWARDS ¶ 8676 (April 20, 1964) (female doing man's job held entitled to man's rate of pay). *See also* Imperial Camera Corp., 66-2 CCH LAB. ARB. AWARDS ¶ 8424 (March 30, 1966).

of this approach by the arbitrators to that of the courts under the Equal Pay Act is noteworthy.[47] Arbitrators have also been concerned with state regulation of the employment of women. They have upheld the denial of promotion[48] or bumping rights[49] to women as not discriminatory when such denials were required by state law.

It is not possible here to complete a thorough examination of the treatment by arbitrators of sex discrimination, but the few examples given demonstrate that the arbitrators have already met and fashioned solutions for many of the programs which arise under Title VII, and which will be examined in Part IV. It would seem that the large number of these arbitration decisions might well provide guidelines for the EEOC to consider in the solution of its problems.

III. Legislative History of the Title VII Prohibition of Sex Discrimination

"The sex amendment can best be described as an orphan, since neither the proponents nor the opponents of Title VII seem to have felt any responsibility for its presence in the Bill."[50] The startling truth is that the presence of the word "sex" is the result of what could be termed an historical accident. H. R. 7152, later to become known as the Civil Rights Act of 1964, was introduced in the House by Representative Emanuel Celler on June 20, 1963, without any mention of the word "sex." While the bill was before the House Judiciary Committee, the sex amendment was introduced by Committee Chairman Howard Smith.[51] Representative Smith was an opponent of the bill, and indications are that he proposed the amendment in the hope that its addition would lead to defeat of the entire bill.[52] There was no testimony on the amendment before the Judiciary Committee, nor did any organization petition Congress to add the word "sex" to the bill.[53] It is doubtful that the amendment was favored by a majority

47. *See* Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966) (female lab analyst entitled to same wages paid to males when work was substantially equal and required substantially same skill and responsibility).

48. Lockheed-Georgia Co., 66-2 CCH Lab. Arb. Awards ¶ 8708 (undated) (promotion barred by state lifting restriction for females). *See also* Advanced Structures, 63-1 CCH Lab. Arb. Awards ¶ 8172 (Jan. 11, 1963).

49. Standard Oil Co. (Ohio), 65-2 CCH Lab. Arb. Awards ¶ 8591 (Aug. 11, 1965) (woman denied right to bump into job which required repeated lifting in excess of statutory limit).

50. Berg, *Equal Opportunity Under the Civil Rights Act of 1964,* 31 Brooklyn L. Rev. 62, 79 (1964).

51. *Hearings on H.R. 7152, Before the Comm. on Rules,* 88th Cong., 2d Sess. (Feb. 8, 1964).

52. *See* 110 Cong. Rec. 2583 (1964) (remarks of Representatives Celler & Green).

53. Indicating lack of support for the amendment in the House debate, Representative Celler introduced a letter from the Department of Labor stating that a bill

of those who supported the enactment of Title VII,[54] but in the Senate no one even proposed that the amendment be stricken. The position of those Congressmen who never voiced an opinion and then supported the sex amendment has never been explained.[55] Moreover, the accidental nature of the inclusion of sex as a prohibited basis of discrimination in Title VII and the concomitant lack of any helpful legislative history has presented serious problems to the EEOC.[56]

IV. DEVELOPMENTS UNDER THE TITLE VII PROHIBITION OF SEX DISCRIMINATION

A. *Unlawful Conduct*

By its terms, Title VII proscribes certain broad categories of conduct. An employer violates the law if, because of race, color, religion, sex or national origin, he: (a) fails or refuses to hire an applicant for employment; (b) discharges an employee; (c) discriminates against an applicant for employment or an employee in compensation, terms, conditions or privileges of employment; or (d) limits, segregates or classifies employees in any way which would deprive or tend to deprive employees of employment opportunities or adversely affect their status as employees.[57] Title VII also makes it an unlawful practice for an employment agency to fail or refuse to refer for employment, or otherwise discriminate for or against an individual on the basis of race, religion, color, sex or national origin.[58] A labor organization is

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giving separate treatment to sex discrimination would be preferable to its inclusion in H.R. 7152, and indicating that even leading women's organizations were not satisfied with its inclusion. *See* B.N.A., OPERATIONS MANUAL ON THE CIVIL RIGHTS ACT OF 1964, 336 (1964).

54. Berg, *supra* note 50, at 78-79.

55. Waters, *supra* note 40, at 347.

56. In a speech before the National Council of Women's Conference of Women at Work, Oct. 12, 1965, EEOC Chairman Roosevelt made the following remarks concerning the sex provision: "This provision was tacked on rather suddenly without the usual committee hearings, to a law concerned primarily with racial discrimination. We undertake its enforcement without the benefit of the guidelines, the legislative history and the court decisions that we can rely on in pursuing some of our other responsibilities under Title VII. So we must develop these guidelines as we go along."

57. 42 U.S.C. § 2000e-2(a) (1964). The act indicates in two places that in order to find an employer guilty of these unfair labor practices, it is necessary to find that he acted with discriminatory intent. Section 2000e-5(g) states that in a civil action by an individual, the court may enjoin the unlawful employment practice "[i]f the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice . . . ." (Emphasis added.) Likewise, § 2000e-6(a) grants the Attorney General power to bring a civil suit for an injunction or other appropriate relief if he has reasonable cause to believe that any person or group of persons is engaging in a pattern of resistance to the rights secured by the act "and that the pattern or practice is . . . *intended* to deny the full exercise of [these] rights . . . ." (Emphasis added).

58. 42 U.S.C. § 2000e-2(b) (1964).

guilty of an unlawful employment practice if, because of race, color, religion, sex or national origin it: (a) excludes or expels from membership or otherwise discriminates against an individual; (b) limits, segregates or classifies its membership in a manner which would deprive or tend to deprive or limit an individual with respect to employment opportunities or otherwise adversely affect an individual's status as an employee or applicant for employment; (c) curtails an individual's employment status or his opportunity for employment; (d) fails or refuses to refer an individual for employment; or (e) causes or attempts to cause an employer to discriminate against an individual.[59]

B. *EEOC Rulings and Guidelines*

Title VII established the EEOC to interpret and apply its provisions. Athough the Commission itself has no enforcement powers,[60] it serves a vital function in interpreting the application of broad areas of proscribed conduct to specific cases. The EEOC rulings and guidelines indicate that there are two basic types of sex discrimination: that affecting the right to obtain and hold a job; and that affecting the right to equal treatment of the sexes while on the job. The Commission's treatment of the more significant problems under each of these follows.

1. *The right to obtain and hold a job.*—A rule by an employer forbidding or restricting the employment of married women but not of married men is unlawful.[61] However, special circumstances may exist where an unmarried status is a bona fide occupational qualification for a job, such as appears to be the case in the requirement that airline stewardesses be single.[62] Refusal to recall a female following pregnancy leave violates Title VII, and an employer may not terminate the employment of a pregnant woman without first offering her a leave of absence. An exception arises if her job is such that it cannot be either filled temporarily or left vacant, in which instance she may be replaced. The employer does have the right to decide at what time during her pregnancy a woman's employment should be suspended.[63]

The EEOC analysis extends to pre-employment discrimination as well. Help-wanted advertising may not indicate a preference based

59. 42 U.S.C. § 2000e-2(c) (1964). To find a union gulity of an unlawful employment practice, it is necessary to establish discriminatory intent, just as in the case of an employer. *See* note 57 *supra.*

60. *See* note 39 *supra* and accompanying text.

61. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.3 (1967).

62. EEOC General Counsel Opinion, Sept. 22, 1965, *reprinted in,* CCH EMPLOYMENT PRACTICES ¶ 17,251.043.

63. EEOC Opinion Letter, June 23, 1966, *reprinted in,* CCH EMPLOYMENT PRACTICES ¶ 17,251.04.

on sex unless sex is a bona fide occupational qualification for the job involved.[64] Furthermore, in pre-employment questionnaires an employer may ask the applicant's sex only if the inquiry is made in good faith for a nondiscriminatory purpose.[65]

2. *The right to equal treatment of the sexes while on the job.*— The Commission interprets Title VII to make it an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex, unless sex is a bona fide occupational qualification. This same restriction applies to transfer, promotion, layoff, discharge and other terms and conditions of employment.[66] Furthermore, the payment of smaller sickness or life insurance benefits to female employees than to males is unlawful.[67] Finally, the refusal to allow females to work overtime where not prohibited by state law violates Title VII,[68] as does a discriminatory reduction of the work week[69] or a provision in the collective bargaining agreement for a longer guaranteed work week for men than for women, unless the men and women occupy different job classifications based on bona fide occupational qualifications.[70]

C. *Discrimination Not Within Title VII*

Title VII permits discrimination on the basis of race, religion, color, sex or national origin in a number of instances, most of which are of minor significance.[71] In addition, the EEOC has listed several other

64. EEOC Decision, Nov. 22, 1965.

65. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.6 (1967).

66. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1967).

67. EEOC Insurance Benefits Guidelines, June 29, 1966; EEOC Opinion Letters, Oct. 1, 1965, Oct. 12, 1965, Jan. 6, 1966, Jan. 28, 1966, Aug. 25, 1966, *reprinted in* CCH EMPLOYMENT PRACTICES ¶ 17,251.

68. EEOC Opinion Letter, Dec. 20, 1965, *reprinted in*, CCH EMPLOYMENT PRACTICES ¶ 17,251.

69. EEOC Opinion Letter, Dec. 10, 1965, *reprinted in*, CCH EMPLOYMENT PRACTICES ¶ 17,251.

70. EEOC Opinion Letters, March 11, 1966, July 29, 1966, *reprinted in*, CCH EMPLOYMENT PRACTICES ¶ 17,251.

71. The prohibitions of the act do not apply where: (1) religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the business enterprise (this most important exception is dealt with in Part IV); (2) an educational institution owned or supported by a religion employs members of that religion; (3) the persons discriminated against are members of the Communist party or a Communist-front organization; (4) the employer is subject to a government security program and the persons involved do not have security clearance; (5) a business operating on or near an Indian reservation accords preferential treatment to Indians; (6) the different standards of compensation or terms and conditions of employment are applied pursuant to a bona fide seniority program, merit system, or system that measures earnings by quantity or quality of production, or they result from the fact that the employees work in different locations; (7) the employer acts upon the results of a professionally developed ability test that is not designed or

situations of discrimination which are not within the purview of the act. Thus, Title VII does not apply to membership applications of private men's clubs and country clubs,[72] nor does it extend to the exclusion of women from jury duty service.[73] The number of possible bases of employment discrimination is almost infinite, and the EEOC has indicated several times that discrimination on any non-statutory ground is not outlawed.[74]

V. Problem Areas

A. *The Bona Fide Occupational Qualification (BFOQ) Exception*

Until discrimination because of sex was added to the law, the BFOQ exception was of such limited importance that even the supporters of the bill had difficulty citing an example of its applicability. With the addition of sex to the act, the exception assumed great importance as the only meaningful defense to a sex discrimination complaint, and it was thought by some to be a "saving exception."[75] From the wording of the statute it is clear that a broad or loose interpretation of this exception would render almost completely ineffective the prohibition of discrimination on the basis of religion, sex or national origin. Obviously aware of this, the EEOC has construed section 703(e) very restrictively except in extreme cases, such as employment involving strenuous activity, hazardous working conditions, intimate contact with fellow workers or customers, and situations in which a state law protects women from exploitation.[76] For example, generalizations about the different sexes will not support a BFOQ; rather, the employer must consider separately each situation. Thus, the as-

intended to be used to discriminate; or (8) differentiations in pay based on sex are authorized under the provisions of the Equal Pay Act of 1963. 42 U.S.C. § 2000e-2(e)-(i) (1964).

72. EEOC Opinion Letter, Oct. 1, 1965, *reprinted in*, CCH Employment Practices ¶ 17,251.

73. EEOC General Council Opinion, Dec. 10, 1965, *reprinted in* CCH Employment Practices ¶ 17,251. *See* note 13 *supra* and accompanying text for judicial treatment of this question.

74. The Commission has held that none of the following violate Title VII: (a) refusal to hire or promote persons who lack necessary educational qualifications, EEOC Opinion Letter, Oct. 2, 1965; (b) discrimination based on an employee's refusal to work overtime, EEOC Opinion Letter, Dec. 21, 1965; (c) discrimination based on age, EEOC Opinion Letter, Oct. 1, 1965; (d) discrimination based on political beliefs or union activity, EEOC Opinion Letter, Nov. 22, 1965. Some of these bases of discrimination are clearly violative of other laws, but they do not fall within the jurisdiction of the EEOC.

75. *See* Berg, *supra* note 50, at 72. *See also* Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 Iowa L. Rev. 778, 792 (1965).

76. EEOC Policy Statement, CCH Emplovt. Prac. Guide ¶ 16,903 (Aug. 19, 1966). For a discussion of the relation between Title VII and state laws regulating the employment of women, see Part IV(B) *infra*.

sumption that there is a higher turnover rate among females, that men are less capable at assembling intricate equipment, or that females are less aggressive in salesmanship will not furnish the basis for a BFOQ.[77] Also, co-worker, employer, or client preference for employees of a certain sex will not make sex a BFOQ, except where necessary for authenticity or genuineness, such as in the employment of an actor or actress.[78]

In addition to these and other rulings and policy decisions of the EEOC, a fund of interpretations of the bona fide occupational qualification is found in labor arbitration decisions since the enactment of Title VII. As shown in Part I(C) above, these decisions indicate the arbitrators' practice of frequently deciding disputes on whether the sex discrimination in a certain instance is founded on a bona fide distinction. The EEOC rulings, coupled with the decisions of the arbitrators, show that thus far the BFOQ exception has not been the "saving exception" for which some writers had hoped.[79] To the contrary, it appears that the Commission may have gone too far in its expressed desire to restrict the exemption.[80] It thus remains for the judiciary to set a final standard for the scope of the exemption, and to pass on the problem of what types of evidence will be relevant in establishing a bona fide occupational qualification.

B. *Relation of Title VII to State Fair Employment Practice Laws*

In section 705(g)[81] Congress specifically rejects the application of the supremacy clause, therefore ending any contention that federal law affords the exclusive remedy for discrimination based on race, color, religion, sex or national origin. Specific language indicates that nothing in the act is to be construed as preempting or invalidating any aspect of state law, except where that law is inconsistent with the purposes of, or unlawful under, the federal law.[82] To the contrary, Title VII requires that a complainant first seek redress under his state FEP law before proceeding under Title VII. It further provides

77. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a) (1967). For example, an employer may not refuse a job requiring heavy lifting to a particular woman, on the assumption that women generally cannot lift heavy weights, without first testing her strength. EEOC Opinion Letter, Oct. 27, 1965, *reprinted in*, CCH EMPLOYMENT PRACTICES ¶ 17,251.

78. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1 (1967).

79. *See* note 75 *supra*.

80. The Commission's reasoning for this strict interpretation of the exception is vaguely stated in its Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a) (1967): "The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—'Men's jobs' and 'Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other."

81. 42 U.S.C. § 2000e-4(f) (1964).

82. 42 U.S.C. § 2000e-7 (1964).

that the EEOC is to cooperate with state agencies, utilize their services, and cede its authority to them where adequate remedies are available under state law.[83] On the surface, this desire of Congress seems fair and workable; in reality, however, it provides a maze of difficulty in attempting to reach a workable synthesis of Title VII, state FEP laws and, in the case of sex, state laws delimiting the terms and conditions of the employment of women. Such a synthesis is essential for the federal and state laws to work together in the way desired by Congress, yet it has thus far proved unreachable. This principal problem posed by Title VII results from its failure to fit smoothly into the framework of existing state laws. One major source of difficulty is that the sex amendment was tacked onto a bill which passed with so little discussion of the amendment that there is no expression of Congressional intent as to the relation to state law regulating the employment of women.[84]

1. *The Position of the EEOC.*—Pursuant to section 706(b), the EEOC will defer to those states which outlaw discrimination on the basis of race, color, religion and national origin and which provide for a state authority to grant relief in matters dealing with those grounds of discrimination (32 states). It will defer in cases of sex discrimination to those states in which FEP laws outlaw such discrimination and which provide for administrative relief.[85] The Commission will not defer to those states which, although banning various types of discrimination, do not provide a state administrative agency for enforcement, or which provide for only voluntary compliance.[86]

As to the interaction of Title VII with state laws regulating the employment of women, the EEOC's position is not so definite as in the relation to state FEP laws. That the Commission is in a quandary pending judicial decision is obvious. The Commission Guidelines state that the EEOC will not make a determination on the merits of a case which presents a conflict between Title VII and state protective legislation where administrative exceptions are unavailable.[87] In such a case, the EEOC will advise the charging parties of their right to bring suit, within thirty days after review by the

83. *See* 42 U.S.C. § 2000e-7 (1964).

84. Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 249 (1965). *See also* EEOC Chairman Roosevelt's speech before the National Council of Women's Conference of Women at Work, *supra* note 56.

85. *See* states listed in note 41 *supra.*

86. Idaho, Maine, Montana and Vermont provide criminal sanctions for employment discrimination an account of race, religion, color and national origin but do not establish a state enforcement agency. Arizona, Oklahoma, Tennessee and West Virginia provide only for voluntary compliance with anti-discrimination laws. Commission Decision, Dec. 5, 1965.

87. Commission Guidelines, issued Aug. 19, 1966.

EEOC under section 706(e), to secure a determination by the court of the validity of the state law or regulation. In such a case, the EEOC reserves the right to appear as amicus curiae and argue for what it considers the correct interpretation of Title VII. The EEOC general counsel has reiterated most of what appears in the Commission Guidelines and emphasizes that in the absence of a court ruling the EEOC will refuse to decide which law an employer may or must ignore when the state protective law and Title VII are in conflict.[88]

2. *The Need for Judicial Action.*—The discussion above points to the need for a court decision in this area. In the interim, one can only speculate as to how Title VII and the state protective laws will be reconciled. The issue can be reduced to whether the state protective law creates an absolute BFOQ, or one which is conditional upon its not conflicting with the policy of Title VII, or no BFOQ at all. State laws prohibiting the employment of women in hazardous positions such as mining present no problem, for such a distinction would probably be well within the BFOQ exception.[89] The problem arises when the Commission feels that the state's basis of protection is not a valid distinction, such as in a state law forbidding women to be bartenders.[90] As mentioned above, the Commission has frequently expressed disfavor with employers who decide a woman is unfit for a certain job because the employer's opinion is based upon the qualifications of a stereotyped woman; yet it is precisely on such stereotypes that state protective laws are based. The conflict resulting here cannot be reconciled within the framework of Title VII, and therefore must be resolved by the courts.

VI. CONCLUSIONS

As has been shown, the presence of the word "sex" in Title VII is largely an historical accident, and it was added with little thought given to consequences. But it is there nonetheless, raising problems which are largely the result of its thoughtless inclusion. Any evaluation of the provision against sex discrimination raises three questions: (a) whether an elimination of sex discrimination in employement is

88. EEOC General Counsel Opinion, Sept. 15, 1966, *reprinted in*, CCH EMPLOYMENT PRACTICES ¶ 17,251.

89. Berg, *supra* note 50, at 79.

90. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1 (1967). The Commission states that it believes that some state protective laws, while necessary at the time they were enacted, have now become outmoded and unnecessary, while others still serve the purpose of protecting women from exploitation and should be retained. The example given in the Guidelines is that of a state restriction on the weight women employees may lift on the job, which would not be in conflict with Title VII unless the limit were set too low.

desirable; (b) if it is desirable, whether a federal statute of the nature of Title VII is the appropriate way to end sex discrimination; and (c) whether Title VII is workable and effective in achieving this goal?

Throughout legal history until very recently, discrimination against women has been so common that it has been almost an assumed fact. By comparison to the length of time that women had almost no legal rights, their emancipation under the common law and their winning of suffrage under the nineteenth amendment are comparatively recent. And despite Title VII of the Civil Rights Act of 1964, sex-based inequality remains in a great many laws.[91] It is far more pervasive in our laws and customs than any form of racial discrimination, and exists in the laws of almost every foreign nation. Clearly the most obvious reason women have not been able to obtain legal rights is that, with the exception of a few militant groups who have constantly demanded rights, most women have not cared about their sex-based inequality.[92] The various movements started by such groups as The League of Women Voters and The National Women's Party have failed to stir all but those of the female "intellectual elite or those who have inherited or retained the feminist tradition."[93] It is noteworthy that no women's group even petitioned for or supported the sex amendment to Title VII. The most popular explanation of the apathy of American women over sex-based inequality is that advanced by Simon de Beauvoir in *The Second Sex,* in which the author states that throughout history women have become conditioned to thinking of themselves as "The Other" and, consequently, have lost their desire to compete with, or be equal to men.[94]

Another reason which may explain female apathy and which serves as an argument in favor of sex-based inequality is the nature of the laws which deny women equality. It is true that these laws are discriminatory, but they favor women in that their purpose is the protection of the "weaker" sex. It is accurate to say that the majority of these laws distinguish rather than discriminate. Traditionally, man has tended to protect woman, and it is doubtful that either Title VII or militant female organizations will change this.

But now that employment equality has been promised to women by Title VII, the strong argument in favor of such equality must come to the fore, and the basis of that argument is economic. Just as in the case of employment discrimination against the Negro, the past discrimination against women has left a vast productive resource largely unused. In the past, the jobs and pay rates available to women

91. *See generally* Kanowitz, *supra* note 15.
92. *See* Murray & Eastwood, *supra* note 84.
93. Kanowitz, *supra* note 15, at 296.
94. S. DE BEAUVOIR, THE SECOND SEX (1961).

have been quite inferior to those of men.[95] Yet figures from the President's Commission on the Status of Women reveal that as of April, 1962, 24,000,000 women were in the work force, and the forecast is for 30,000,000 by 1970.[96] It is estimated that eight or nine out of every ten women will be gainfully employed at some time during their lives. Furthermore, and most importantly, women are the responsible heads of 4,643,000, or one-tenth, of all families in the United States, and more than 23 per cent of non-white families are headed by women. Nearly half the families headed by women have incomes of less than $3,000 and nearly three-fourths of non-white families headed by women live in poverty. These statistics from the President's Commission present an almost irrebutable argument in favor of employment equality between the sexes. It remains, however, to evaluate the mechanism by which we seek to achieve this desired equality.

The questions of whether a federal statute such as Title VII is an appropriate way to regulate sex discrimination and whether the mechanism under Title VII is workable and effective are so interrelated that they may be considered together. As has been stated, inclusion of the sex amendment did not reflect the careful thought and debate which accompanied the Act's other provisions. Because of this, the EEOC started in a void with little or nothing in the way of guidelines from Congress concerning the sex discrimination provisions. Already, in its attempts to fill this void, the Commission has reached a dead end where state laws protecting women run afoul of the policy of the Act and must await resolution by the courts.

This lack of legislative planning has given rise to another problem which is, at present, insoluble—the bona fide occupational qualification exception. It has been argued with obvious logic that a loose interpretation would subvert the aim of equal employment opportunity.[97] Yet equally logical is the opposing view that a restrictive interpretation would fail to give adequate consideration to sound arguments for occasionally treating men and women differently in employment where office morale, client preferences, or other factors require. The EEOC has expressly followed the restrictive approach, but this view will almost certainly be challenged in the courts, so that the final scope of the bona fide occupational qualification exception may be a long time in being settled.

Finally, there is the uncertainty of how Title VII, state FEP laws,

95. *See generally* Sanborn, *Pay Differences Between Men and Women*, 17 IND. & LAB. REL. REV. 534 (1964).

96. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON PRIVATE EMPLOYMENT (1963).

97. Murray & Eastwood, *supra* note 84, at 244.

and state laws protecting women in employment should relate. The expressed desire of Congress that Title VII and state laws should enjoy a dynamic interaction is idealistic, but, to date, only ten states have followed the lead of the federal law and have made illegal any employment discrimination based on sex. The other wide difference between the state and federal law surrounds the state protective laws and leads to unpredictability as to when the EEOC will defer to the state protective policy and when it will say that the federal law supercedes.

The net effect of the above problems is unpredictability and uncertainty. The situation presented to the employer, union or employment referral agency is colossally puzzling. The inevitable conclusion must be that while Title VII is theoretically sound and well intentioned, it has proved to be nearly unworkable in many practical situations. The saving feature of it may well be that it does provide a mechanism whereby decisions can be made, and these decisions are reviewable. Perhaps several years of EEOC decisions and judicial review will eventually hew out of Title VII a workable and predictable mechanism to regulate sex discrimination in employment.

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