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Sex Discrimination in Employment

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COMMENTS

SEX DISCRIMINATION IN EMPLOYMENT

During the past six years, antifeminist employment practices have become a focal point of governmental concern. In 1961, President Kennedy established the President's Commission on the Status of Women,¹ and in 1963, Congress enacted the Equal Pay Act² in an attempt to secure for women compensation commensurate to their work. That same year, the Civil Service Commission established a policy of equal opportunity for both sexes in federal employment.³ Under federal initiative, many state governors have set up commissions to plan and effectuate the upgrading of women's social and civil status.⁴

Discrimination against women, while elusive to precise empirical analysis, clearly decreases their opportunities for employment, equal pay and advancement. The majority of working women have been relegated to certain traditional categories of employment, such as teaching, nursing and clerical work.⁵ Governmental studies indicate that women attain consistently lower salary scales than men, even when both engage in identical occupations.⁶ Subtler and more frustrating are the barriers imposed on talented women seeking to develop and advance in their chosen fields. The Committee on Private Employment of the President's Commission on the Status of Women reported that "although women in the work force have a somewhat higher-than-average schooling than men, they, more generally than men, work in jobs far below their native abilities or trained capabilities."⁷

Understandably, the President's Commission stressed the urgency of eliminating unfair restrictions in the employment of women. Women, for example, represent one-third of the national labor force, or between twenty-four and

1. Exec. Order No. 10980, 26 Fed. Reg. 12059 (1961).

2. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).

3. 5 C.F.R. §§ 713.101-102 (1964).

4. See Address by Equal Employment Opportunity Commission Chairman Roosevelt, National Council of Women's Conference on Women at Work, Oct. 12, 1965, in CCH Employment Practices Guide ¶ 8022, at 6034.

5. See President's Comm'n on the Status of Women, Report of the Committee on Private Employment 44 (1963) [hereinafter cited as Private Employment].

6. See *id.* at 32-33. Congress amended the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-19 (1964), by passing the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1964), in an attempt to remedy this injustice. The Committee on Protective Legislation of the President's Commission on the Status of Women noted, however, that the Fair Labor Standards Act failed to cover about eleven million workers, about six million of whom are women or approximately 25% of the total number of female workers. President's Comm'n on the Status of Women, Report of the Committee on Protective Labor Legislation 4 (1963) [hereinafter cited as Protective Legislation]. The Committee pointed out, moreover, that the estimated percentages of women in certain notoriously low-paying jobs are particularly high. For example, 50% of two and one-half million retail trade workers are women unprotected by the Equal Pay Act. *Ibid.*

7. Private Employment 1.

thirty million workers.⁸ The responsible heads of about ten per cent of all American families are women,⁹ and nearly half of these families subsist on an annual income of less than three thousand dollars.¹⁰ While an estimated eighty per cent of all American women at some time in their lives now actively compete in the labor market,¹¹ medical advances, changing standards of living, and evolving social customs all predict an increasing participation by women in the nation's economic life.¹²

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. *Legislative History*

During the debate on the Civil Rights Act of 1964,¹³ the House approved an amendment to the original bill adding sex to the list of proscribed forms of discrimination. The main supporters of this amendment were a group of southern Representatives who seemed apprehensive of the supposedly prejudicial tenor of the bill towards white women.¹⁴ Opponents of the amendment emphasized the need for comprehensive study of the limitless consequences of such a provision.¹⁵ The impropriety of linking sex and racial discrimination and thus jeopardizing the bill's primary objectives also influenced the opposition.¹⁶ Neither the House Committee on the Judiciary nor the House Com-

8. *Id.* at 30.

9. *Id.* at 31.

10. Women's Bureau, U.S. Dep't of Labor, *Women in Poverty* 2 (1964).

11. See President's Comm'n on the Status of Women, *American Women, Report and Other Publications of the Commission 78-95* (Mead & Kaplan 1965) [hereinafter cited as *American Women*].

12. *Id.* at 21.

13. 78 Stat. 241, 42 U.S.C. §§ 2000a-h (1964). Through a total of eleven titles, the Civil Rights Act sought to insure the free exercise of rights in the areas of voting, public accommodations, education, publicly owned or operated facilities, federally financed projects and employment. Title VII, dealing with employment, the longest and most complex in the act, aimed at eradicating the form of discrimination most noxious to individuals and society. See Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 *Brooklyn L. Rev.* 62 (1964). See generally Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 *Geo. Wash. L. Rev.* 232 (1965); Note, 78 *Harv. L. Rev.* 684, 688-96 (1965); Note, 50 *Iowa L. Rev.* 778 (1965).

14. See 110 *Cong. Rec.* 2579, 2583 (1964). Representative Rivers of South Carolina fairly summarized the arguments of nine southern colleagues by praising the amendment for "making it possible for the white Christian woman to receive the same consideration for employment as the colored woman. It is incredible to me that the authors of this monstrosity [the Civil Rights Act of 1964]—whomever they are—would deprive the white woman of mostly Anglo-Saxon or Christian heritage equal opportunity before the employer. I know this Congress will not be a party to such an evil." *Id.* at 2583.

15. Representative Celler, chairman of the House Committee on the Judiciary and a leading supporter of the Civil Rights Bill, opposed the amendment on these grounds, *id.* at 2577-78, as did Representative Edith Green, who sponsored the Equal Pay Act. *Id.* at 2720.

16. See *id.* at 2581-82. Representative Green pointed out, moreover, that some who strongly supported the sex amendment had opposed passage of the Equal Pay Act. *Id.* at 2591. In addition, ten southern representatives who spoke in favor of the sex amendment eventually

mittee on Education and Labor heard testimony regarding the sex amendment.¹⁷ No member of the House approached either committee to offer such a provision, nor did any civic or governmental organization petition the Congress to enact such legislation.¹⁸ In fact, the President's Commission on the Status of Women, in rejecting a suggestion of its Committee on Civil and Political Rights, not only declined to recommend such congressional action but termed legislation of broad application and enforcement unrealistic.¹⁹ The legislative history of the sex amendment reveals no clear congressional purpose or intent. Rather, it indicates dubious motivation, lack of intelligent study, and absence of direction.²⁰

B. Provisions

Title VII of the Civil Rights Act of 1964 includes a blanket prohibition of discrimination based on sex, which now renders it:

an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex²¹

To this sweeping prohibition title VII adds but one exception: those situations where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"²² To implement its basic purposes, title VII created an Equal Employment Opportunity Commission (EEOC).²³ This Commission, however, lacks remedial au-

voted against the full Civil Rights Bill: Smith, who proposed the amendment, Dowdy, Tuten, Pool, Andrews, Rivers, Huddleston, Gary, Watson and Gathings. *Id.* at 2804-05. Apparently, the sex amendment owed its introduction and support less to a chivalrous concern for the rights of women than to general animosity to the Civil Rights Bill. Representative Green charged flatly that the supporters of the amendment were "openly and honestly seeking to kill the entire bill." *Id.* at 2720.

17. *Id.* at 2582.

18. *Ibid.*

19. American Women 119.

20. An editorial from the New York Herald Tribune for February 10, 1964, which Representative Rooney entered into the Congressional Record, characterized the legislative history of the sex amendment as follows: "The goal of the clause is worthy. It came, however, as an unplanned byproduct of a confused debate, in which the implications could not be studied with the care they deserved. The issue was raised for mischievous reasons, and it may well have unhappy effects." 110 Cong. Rec. 2706 (1964).

21. Civil Rights Act § 703(a), 78 Stat. 255, 42 U.S.C. § 2000e-2(a) (1964). Section 701(b) defines "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks" in the calendar year. 78 Stat. 253, 42 U.S.C. § 2000e(b) (1964).

22. Civil Rights Act § 703(e)(1), 78 Stat. 256, 42 U.S.C. § 2000e-2(e)(1) (1964).

23. Civil Rights Act § 705(a), 78 Stat. 258, 42 U.S.C. § 2000e-4(a) (1964).

thority and may neither make determinations of unlawful conduct nor issue cease-and-desist orders.²⁴

The EEOC is authorized to receive complaints from aggrieved parties, to investigate charges of discrimination and to attempt the settlement of valid complaints through the informal methods of conference, conciliation and persuasion.²⁵ Title VII, however, does not authorize the EEOC to initiate litigation, so the burden of enforcement lies upon aggrieved individuals. A party who believes himself the victim of unlawful discrimination may sue in a federal district court, after initial recourse to the EEOC for informal relief,²⁶ even if the Commission determines the complaint to be without merit and refuses to attempt conciliation.²⁷ A court, upon finding that an employer intentionally engaged in unlawful discrimination, may order appropriate relief, including reinstatement or hiring, with or without back pay.²⁸ In processing complaints, the EEOC must defer to existing state fair-employment agencies which enjoy powers of enforcement.²⁹ Title VII's prohibition of sex discrimination is apparently meant to operate, therefore, only in jurisdictions lacking effective legislation.³⁰

C. *Problems of Interpretation*

While concededly laudable in purpose, title VII's prohibition of sex discrimination is replete with difficulties. In the first place, the bare language of the statute sheds little light on the practicalities of its enforcement. The conspicuous absence of legislative history reveals no clear congressional intent. No prior decisional or statutory law exists to provide interpretative guidelines. And finally, conflict between title VII and state protective labor legislation seems unavoidable.³¹

24. See *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

25. Civil Rights Act § 706(a), 78 Stat. 259, 42 U.S.C. § 2000e-5(a) (1964).

26. See *Hall v. Werthan Bag. Corp.*, 251 F. Supp. 184, 187-88 (M.D. Tenn. 1966).

27. See *ibid.* The *Werthan Bag* case held, moreover, that an aggrieved party might intervene in a class action brought by a fellow employee for injunctive relief against an employer allegedly practicing racial discrimination, even though the plaintiff had not exhausted the EEOC remedies. The court declared that the purpose of requiring preliminary resort to the Commission remedies is not to screen frivolous complaints from the courts but to "give a discriminator opportunity to respond to persuasion rather than coercion . . ." *Id.* at 188. The right of an aggrieved party to bring an action under title VII is apparently not contingent upon an EEOC finding of discrimination. See 110 Cong. Rec. 14191 (1964) (remarks of Senator Javits).

The Attorney General has standing to bring an action whenever he has reasonable cause to believe that any person or group is engaging in a pattern of discrimination or a practice of resistance to title VII. Civil Rights Act § 707(a), 78 Stat. 261, 42 U.S.C. § 2000e-6(a) (1964). The EEOC has standing to sue under title VII only to compel compliance with a court order already issued in a civil action. Civil Rights Act § 706(a), 78 Stat. 261, 42 U.S.C. § 2000e-5(i) (1964).

28. Civil Rights Act § 706(g), 78 Stat. 261, 42 U.S.C. § 2000e-5(g) (1964).

29. Civil Rights Act § 706(b), 78 Stat. 259, 42 U.S.C. § 2000e-5(b) (1964).

30. Civil Rights Act § 1104, 78 Stat. 268, 42 U.S.C. § 2000h-4 (1964); 110 Cong. Rec. 1521 (1964) (remarks of Representative Celler).

31. See Address by EEOC Chairman Roosevelt, Governors' Commission on the Status

II. THE WORKINGS OF TITLE VII

A. *Discrimination by Sex under Prior Law*

The United States Constitution, except for the nineteenth amendment's guarantee of the franchise, fails specifically to derogate the status of legal nonentity allotted to women by the common law.³² The Constitution does not explicitly provide a right of equal opportunity for both sexes.³³ The Supreme Court has never declared employment discrimination based on sex to be unconstitutional. The Court, on the other hand, has consistently upheld the constitutionality of state legislation restricting the labor of women, even though such legislation did not apply equally to men.³⁴

Protective labor legislation first appeared around the turn of the century when abusive employment practices resulting from the industrial revolution stirred the nation's humanitarian concern.³⁵ These labor statutes, which regulate terms and conditions of employment, often apply to both men and women.³⁶ Frequently, however, these statutes regulate the labor of women only and are thereby vulnerable to attack under the fourteenth amendment. The Supreme Court has held that protective labor legislation applying only to women does not violate the fourteenth amendment's rights of due process and equal protection.

In 1908, in the leading case of *Muller v. Oregon*,³⁷ the Supreme Court upheld the constitutionality of an Oregon statute prohibiting work by women in factories, laundries and other industrial establishments more than ten hours

of Women, Aug. 27, 1965, in CCH Employment Practices Guide ¶ 8005, at 6010-11, which outlined these problems. Mr. Roosevelt also noted the EEOC's task of harmonizing the so-called Bennett amendment to title VII, Civil Rights Act § 703(h), 78 Stat. 257, 42 U.S.C. § 2000e-2(h) (1964), with the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1964). The Bennett amendment purports to allow differentiation by sex in compensation whenever such differentiation is authorized by the Equal Pay Act. The Equal Pay Act, however, does not authorize wage differentials based on sex but merely lists exceptions to the prohibition of discrimination where the factors determinative of the wage rate are other than sex. 77 Stat. 56 (1963), 29 U.S.C. § 206(d)(1) (1964). To avoid conflict, the EEOC has ruled that the standard of equal pay for equal work prescribed by the Equal Pay Act applies to the interpretation of title VII and that employees not covered by the Equal Pay Act but within the coverage of title VII are thereby insured the right to equal pay. 29 C.F.R. § 1604.7(a) (1966). The EEOC has also indicated its intent to adopt and apply relevant interpretations of the Administrator of the Wage and Hour Division of the Department of Labor to equal pay complaints filed under title VII. 29 C.F.R. § 1604.7(b)-(c) (1966).

32. See generally Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. Rev. 723 (1935).

33. See note 105 *infra*.

34. See *American Women* 128; Murray & Eastwood, *supra* note 13, at 237.

35. See *American Women* 128-30.

36. See generally Brown, *Police Power—Legislation for Health and Personal Safety*, 42 Harv. L. Rev. 866, 883-88 (1929).

37. 208 U.S. 412 (1908).

in any one day. Declaring that it took "judicial cognizance" of such "matters of general knowledge"³⁸ as women's inferior capacity in the struggle for subsistence resulting from her delicate physical structure and performance of maternal functions,³⁹ the Court reasoned that the maternal and familial functions of women, together with their unequal bargaining position in the labor market, provide rational bases for discriminating between the sexes in the incidence of protective labor legislation.⁴⁰

A considerable number of Supreme Court decisions have followed the doctrine of *Muller v. Oregon*.⁴¹ In *Quong Wing v. Kirkendall*,⁴² the Court emphasized that the fourteenth amendment does not create "a fictitious equality where there is a real difference" between the sexes.⁴³ Unequal application of protective labor legislation, the Court pointed out in *Radice v. New York*,⁴⁴ encounters the challenge of the equal protection clause only when "actually and palpably unreasonable and arbitrary."⁴⁵ As recently as 1948 the Supreme Court, in *Goesaert v. Cleary*,⁴⁶ upheld the constitutionality of a state law prohibiting the licensing of women bartenders unless they be the wife or daughter of the establishment's owner. After declaring that the fourteenth amendment disallows discrimination by sex only where such discrimination is without basis in reason, the Court held that the disputed statute entailed no "irrational discrimination" despite its unequal application even among women.⁴⁷ Though state law may reasonably restrict the employment of women in the sale of alcoholic beverages, wives and daughters of tavern owners, the Court surmised, faced lesser perils from the traffic of liquor than their unprotected coworkers.⁴⁸

38. *Id.* at 421.

39. *Ibid.*

40. *Id.* at 422-23.

41. E.g., *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (8 hour day for female hospital employees); *Miller v. Wilson*, 236 U.S. 373 (1915) (8 hour day for chambermaids); *Riley v. Massachusetts*, 232 U.S. 671 (1914) (56 hour week for women).

42. 223 U.S. 59 (1912).

43. *Id.* at 63.

44. 264 U.S. 292 (1924).

45. *Id.* at 296, quoting from *Arkansas Natural Gas Co. v. Railroad Comm'n*, 261 U.S. 379, 384 (1923).

46. 335 U.S. 464 (1948).

47. *Id.* at 466.

48. *Id.* at 466-67.

In his dissent to *Goesaert*, Mr. Justice Rutledge stated that the controverted statute envisaged a classification which was invidious. *Id.* at 468. While noting that the equal protection clause demands neither "abstract symmetry" nor "mathematical nicety," Mr. Justice Rutledge pointed out that under the proposed statute wives or daughters of an owner might be licensed as bartenders, though the owner remain always absent from the premises. A woman not so related to the owner, on the other hand, would be denied a license, though male supervision be always on hand. *Id.* at 467-68 (dissenting opinion).

During the House debate on title VII, the *Goesaert* opinion met sharp criticism from Representative Martha Griffiths, who termed it "the most vulgar and insulting of decisions handed down in this century by the Supreme Court, notable for its lack of legal learning as well as for its arrogant prejudice . . ." 110 Cong. Rec. 2580 (1964). In particular, Rep-

Since the *Muller v. Oregon*⁴⁹ decision, protective labor legislation for women has attained considerable volume and extent. Today, some form of such legislation appears on the books of all fifty states and the District of Columbia.⁵⁰ Most commonly, these statutes prescribe the maximum hours during which women may be employed daily and weekly.⁵¹ Other provisions establish minimum wages for female workers⁵² or prohibit certain hazardous and strenuous forms of work.⁵³ In certain instances, these statutes require separate facilities for women⁵⁴ or provide maternity or special health benefits.⁵⁵ Such protective legislation, though beneficially intended, contains clear discriminatory potential. An employer, for example, faced with both a male and a female applicant for the identical position and aware of the higher labor standards legally applicable to women, might understandably disregard an imbalance in merit or capacity and hire the less-qualified male.

B. Discrimination under Title VII

1. The Bona Fide Occupational Qualification

The fate of title VII's prohibition of sex discrimination hinges on interpretation of the "bona fide occupational qualification." An unduly liberal construction of this exception would nullify the amendment altogether. Too rigid an interpretation, on the other hand, might entail an "uncritical and unintended application of the principle of equality of the sexes in employment."⁵⁶

While title VII plainly dictates the elimination of arbitrary discrimination between the sexes in employment practices, its practical application appears problematic. It threatens to disrupt policies established by tradition or required by state legislation or collective bargaining agreements.⁵⁷ Common sense and sympathetic understanding of the position and needs of women workers must

representative Griffiths questioned the sense of legal realism which led the majority to declare that "the Constitution does not require a legislature to reflect sociological insight or shifting social standards any more than it requires them to keep abreast of the latest scientific standards." 110 Cong. Rec. 2580 (1964), quoting from *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

49. 208 U.S. 412 (1908).

50. See Women's Bureau, U.S. Dep't of Labor, *Labor Laws Affecting Women* (1966).

51. E.g., Cal. Labor Code Ann. § 1351 (8 hour day); N.Y. Lab. Law § 172 (48 hour week).

52. E.g., Ark. Stat. Ann. § 81-613 (1960) (\$1.25 per day).

53. E.g., Mo. Ann. Stat. § 293.060 (1965) (prohibiting female miners).

54. E.g., Mo. Ann. Stat. § 292.150 (1965) (wash rooms for women).

55. E.g., R. I. Gen. Laws Ann. § 28-41-8 (Supp. 1965) (unemployment benefits before and after childbirth).

56. Berg, *supra* note 13, at 72.

57. See 29 C.F.R. §§ 1604.1-7 (1966); General Counsel of the Equal Employment Opportunity Comm'n, Opinion Letter, Aug. 23, 1966, in CCH Employment Practices Guide ¶ 17304.03, at 7410 (collective bargaining agreement guaranteeing longer work week for males); General Counsel of the Equal Employment Opportunity Comm'n, Opinion Letter, Aug. 23, 1966, in CCH Employment Practices Guide ¶ 17304.09, at 7410 (collective bargaining agreement prohibiting female bartenders).

therefore guide interpretation of this statute. Though devoid of quasi-legislative power over substantive rights and obligations, the EEOC has authority to issue procedural regulations to assist the implementation of title VII.⁵⁸ Under title VII, moreover, good faith reliance on a formal EEOC interpretation or opinion constitutes a defense to a charge of unlawful discrimination.⁵⁹ An examination of the current EEOC rulings may, therefore, prove illuminative.

The bona fide occupational qualification clause, in the opinion of the EEOC, should receive narrow construction according to the rule normally applied to statutory exceptions.⁶⁰ Although the EEOC has avoided the enumeration of positive conditions under which sex becomes a legitimate occupational qualification, it has listed certain factors which, in its opinion, fail to constitute acceptable grounds for claiming the exception. Under these rulings the following reasons for discriminating between the sexes in employment policies are invalid: the necessity of supplying separate facilities,⁶¹ assumptions of the comparative employment characteristics of the sexes,⁶² stereotyped characterizations and general attributes of the sexes,⁶³ and preferences of employers, coworkers or clients.⁶⁴ Thus, a refusal to hire a woman on the general assumption that the incidence of turnover among female workers exceeds the male rate would constitute an unlawful employment practice under the EEOC guidelines. Likewise, failure to employ women in marketing positions in the belief that they are less capable than men of aggressive salesmanship would be unlawfully discriminatory because it is based on a "stereotyped characterization." The present EEOC rulings do, however, indicate that the requirements of authenticity or genuineness may provide acceptable bases for asserting sex as a bona fide occupational qualification.⁶⁵ Sex will, for example, be a legitimate occupational qualification for a clothes model or a theatrical player.

The EEOC has itself recognized that "an overly literal interpretation of the prohibition [of sex discrimination] might disrupt longstanding employment practices . . . without achieving compensating benefits in progress towards equal opportunity."⁶⁶ However, the EEOC's declared intent to allow the bona fide occupational qualification only narrow construction, and its present rulings, which apparently allow sex as an occupational qualification only in cases of strict necessity, portend a rigid application of title VII. A test case now pending before the EEOC illustrates the problems involved. A complainant-union charges that the practice of certain airlines in hiring exclusively female flight attendants violates title VII's prohibition of sex discrimination.⁶⁷ Neither strict

58. Civil Rights Act § 713(a), 78 Stat. 265, 42 U.S.C. § 2000e-12(a) (1964).

59. Civil Rights Act § 713(b), 78 Stat. 265, 42 U.S.C. § 2000e-12(b) (1964).

60. 29 C.F.R. § 1604.1(a) (1966).

61. 29 C.F.R. § 1604.1(a)(1)(iv) (1966).

62. 29 C.F.R. § 1604.1(a)(1)(i) (1966).

63. 29 C.F.R. § 1604.1(a)(1)(ii) (1966).

64. 29 C.F.R. § 1604.1(a)(1)(iii) (1966).

65. 29 C.F.R. § 1604.1(a)(2) (1966).

66. 30 Fed. Reg. 14926, 14927 (1965).

67. CCH Employment Practices Guide, 20 Report Letter 4 (May 20, 1966).

necessity nor wholly arbitrary or irrational discrimination motivate this exclusive hiring policy. None of the duties of a flight attendant are beyond male capacities, yet the understandable belief that feminine pulchritude and charm are invaluable assets in the attraction and service of passengers undoubtedly dictates this hiring practice.⁶⁸ The current EEOC guidelines, however, would apparently condemn such a personnel policy on the grounds that general sex attributes and preferences of customers are inappropriate bases for a bona fide occupational qualification. On the other hand, if an airline is entitled to offer a certain atmosphere to its passengers as a legitimately ancillary service,⁶⁹ a contention that the hiring of female flight attendants is reasonably necessary to normal business operations might not be wholly untenable.⁷⁰

The stewardess case illustrates the subtleties involved in defining the limits of a bona fide occupational qualification based on sex in situations where differentiation by sex is neither necessary nor arbitrary but, in varying degrees, reasonable. Clearly, definition of those limits must follow a course of case by case determination, as the EEOC has recognized.⁷¹

Discrimination against women in the selection of executive trainees presents a crucial problem in the application and enforcement of title VII. Industry would apparently contend that women of marriageable age represent a far greater turnover risk than men and that the inclusion of women in executive training programs, which are maintained at considerable expense, involves an unreasonable risk of lost investment.⁷² Sound investment in executive training, industry might argue, is "reasonably necessary" to the normal functioning of any large business, and sex is, therefore, a bona fide occupational qualification of executive trainees. The EEOC, through its chairman, Franklin D. Roosevelt, Jr., has declared an uncompromising position against this form of discrimination against women on the ground that it initiates discrimination

68. See *ibid.*

69. Cf. Policy Statement of the Washington State Board Against Discrimination, Nov. 18, 1965, in CCH Employment Practices Guide ¶ 8034, at 6056, in which an employer's requirement that cocktail waitresses be "sexy and exciting" was held not to violate a state statute that prohibited age discrimination. Owners of cocktail lounges, the Board reasoned, are entitled to offer the public atmosphere in addition to food and alcoholic beverages. Since "atmosphere" may include the sex appeal of waitresses, the Board concluded that legitimate business reasons required that waitresses should meet certain standards of physical attractiveness. Although older women as a class might find these conditions difficult to meet, the owners' requirement was held to be not strictly an age requirement but a nondiscriminatory occupational qualification.

70. But cf. *Airlines Indus.*, CCH Employment Practices Guide ¶ 8051, at 6079 (N.Y. Human Relations Comm'n, March 23, 1965). The Commission ruled that a mandatory retirement age for airline stewardesses should be predicated solely on the individual's continued ability to perform the required duties of the position.

71. See Address by EEOC Chairman Roosevelt, National Council of Women's Conference on Women at Work, Oct. 12, 1965, in CCH Employment Practices Guide ¶ 8022, at 6033.

72. *Ibid.*

which will continue throughout their careers since top executives are usually selected from these training programs.⁷³

Thus, in a situation where industry argues a reasonable necessity for sex discrimination, women rightfully demand equal opportunity under title VII. The abstract guidelines announced by the EEOC, it is submitted, cannot forecast the solution of such a dilemma as satisfactorily as a pragmatic attempt to balance the interests of industry with the concrete needs and position of women workers. In a specific case, therefore, an employer asserting sex as a bona fide occupational qualification for an executive training program should be required to demonstrate that acceptance of a particular, qualified female candidate imposes a risk of investment loss sufficiently onerous to justify the exception to title VII.⁷⁴

One test proposed as a guide in interpreting the bona fide occupational qualification is the standard of reasonable discrimination applied to protective legislation for women to determine its validity under the equal protection clause.⁷⁵ By this criterion, an employer might legitimately assert an exception to title VII whenever he could demonstrate some basis in reason for discriminating between the sexes. Applied to discrimination in executive training programs, for example, this test might allow exclusion of women by a mere showing of some risk of lost investment. The exception might be denied, moreover, only where discrimination by sex involves "irrational discrimination" as prohibited by the fourteenth amendment.⁷⁶ Such an approach, however, seems adverse to the spirit of title VII. The wide abstractions of the fourteenth amendment, moreover, provide entirely too amorphous a test⁷⁷ to solve the complex problems of employment discrimination based on sex.

73. *Ibid.* The President's Commission also deplors the existence of this form of discrimination. Private Employment 39.

74. To require a particular employer to show that acceptance of an individual female represents a risk of investment loss sufficient to excuse compliance with title VII may seem stringent. A woman charging discrimination in the selection of executive trainees, however, might well be under an insurmountable burden. To obtain equitable relief under title VII an aggrieved party must show that an employer "intentionally engaged" in unlawful discrimination. Civil Rights Act § 706(g), 78 Stat. 261, 42 U.S.C. § 2000e-5(g) (1964). In view of the uniformly high qualifications of candidates and the subtleties of selection involved in such training programs, proof of intentional sex discrimination might be virtually impossible. Admission of statistical evidence of discrimination might, however, mollify a plaintiff's task. But see Civil Rights Act § 703(j), 78 Stat. 257, 42 U.S.C. § 2000e-2(j) (1964), which states that no employer shall be required to grant any individual or group preferential treatment on account of an imbalance in the number or percentage of employees of one sex already employed.

75. See Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 80 (1964).

76. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948).

77. See Brown, *supra* note 36, at 870.

Experience under state fair employment statutes sheds little light on the probable interpretation of the bona fide occupational exception. Before the Civil Rights Act of 1964 only Wisconsin prohibited sex discrimination in employment. Wis. Stat. Ann. § 111.32(5)

2. Conflict with Protective Labor Legislation

The EEOC, in the publication of its guidelines, noted the probability of conflict between title VII and protective labor legislation for women.⁷⁸ Under its present guidelines, an employer may assert a bona fide occupational qualification whenever a state law prohibits women from engaging in a particular form of work.⁷⁹ The Commission has stressed, however, that only statutes that provide protection from hazards reasonably to be apprehended will qualify for the exception⁸⁰ and that no law whose clear effect is discriminatory rather than protective will constitute a valid basis for the statutory exception.⁸¹ Moreover, the EEOC requires that an employer asserting a bona fide occupational qualification by reason of a protective statute shall have attempted, in good faith, to obtain from the appropriate state agency such administrative exceptions as might be available.⁸²

Critics of protective legislation for women have labeled it arbitrary and unjust.⁸³ Although the accusations leveled at these laws share varying degrees of plausibility, sound reasons exist to indicate the advisability of reevaluating

(a) (Supp. 1966). The Wisconsin statute allows discrimination by sex only "where the nature of the work or working conditions provide valid reasons for hiring only men or women . . ." Wis. Stat. Ann. § 111.32(5)(d) (Supp. 1966). The Wisconsin statute, then, merely articulates, in different language, the same exception as does title VII.

Hawaii enacted a statute prohibiting sex discrimination almost simultaneously with title VII. The Hawaii statute allows differentiation by sex only "for good cause relating to the ability of the individual to perform the work in question . . ." Hawaii Rev. Laws § 90A-1(a) (Supp. 1963). The Hawaii test apparently permits discrimination by sex only out of strict necessity.

78. See, e.g., 110 Cong. Rec. 2580 (1964).

79. 29 C.F.R. § 1604.1(c)(1) (1966).

80. *Ibid.*

81. 29 C.F.R. § 1604.1(c)(3) (1966). See also General Counsel of the Equal Employment Opportunity Comm'n, Opinion Letter, in CCH Employment Practices Guide ¶ 17304.07, at 7413-3.

82. 29 C.F.R. § 1604.1(c)(3) (1966).

83. Some have considered such legislation "perfectly adapted to the freeing of men workers from the competition of women in the better paid and more attractive positions . . ." Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. Rev. 723, 753 (1935). Others say such legislation "prevents women from going into the higher salary brackets." 110 Cong. Rec. 2580 (1964) (remarks of Representative Katherine St. George). The protective attitude behind such laws has, according to some, "penalized all women for the biological function of motherhood far in excess of precautions justified by the findings of advanced medical science." Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 239-40 (1965).

The Committee on Protective Legislation of the President's Commission, however, found the record of these protective statutes impressive and attributed to them partial responsibility for the advances made in employment opportunities for women. During the past fifty years, for example, the average real wages of working women have more than doubled, increasing at about a 10% faster rate than the earnings of men. Protective Legislation 1-2.

them. Provisions once adopted for valid protective reasons may now be obsolete in a technological economy which continually expands the role of the female worker.⁸⁴ Hence, the practical effect of such outmoded laws may be "not so much to protect as to disadvantage."⁸⁵

Already, the EEOC has received a volume of complaints charging unlawful discrimination under these protective labor statutes. The complainant in one such case charged a discriminatory denial of opportunities for premium overtime pay. The respondent-employer claimed justification under a provision of the California Labor Code which prohibits women from working in excess of eight hours daily or forty-eight hours weekly.⁸⁶ No finding appeared, moreover, that overtime work posed any threat to the complainant's well-being.⁸⁷ The case appears to present the conflict between title VII and protective labor legislation for women in total and unresolvable form. Accordingly, the EEOC has issued a special advisement declaring its intent, upon recurrence of this conflict, to advise complainants to sue in federal court to obtain a judicial determination of the disputed state law's validity in light of title VII.⁸⁸

In *Reynolds v. Mountain States Tel. & Tel. Co.*,⁸⁹ the Arizona Civil Rights Commission issued an opinion declaring that protective legislation which conflicts with title VII's spirit of equality of opportunity should yield to the federal law.⁹⁰ The complainant in the *Reynolds* case applied for the position of plant dispatcher, which had a higher wage rate than her position as a plant reports clerk. The employer-respondent admitted the complainant's qualifications for the position but defended its refusal to consider her on the grounds of a statute prohibiting the employment of women in excess of eight hours daily or forty-eight hours weekly.⁹¹ The employer granted, moreover, that the complainant could work the required extra hours without danger to her health or welfare. On these facts, the Arizona Civil Rights Commission found that the protective statute discriminates against women on the basis of their sex and that the respondent had violated the newly enacted state Civil Rights Act.⁹²

Thus, title VII may supersede much of the present labor legislation for women that is discriminatory rather than protective.⁹³ The advent of suits challenging

84. See 29 C.F.R. § 1604.1(b) (1966).

85. 30 Fed. Reg. 14927 (1965).

86. Cal. Labor Code Ann. § 1351.

87. Equal Employment Opportunity Comm'n, Processing of Cases Involving State Protective Laws, Aug. 19, 1966, in CCH Employment Practices Guide ¶ 16903, at 7317.

88. *Id.* at 7318.

89. CCH Employment Practices Guide ¶ 8111, at 6183 (Ariz. Civil Rights Comm'n Dec. 2, 1966).

90. *Id.* at 6184-85.

91. *Id.* at 6183.

92. *Id.* at 6185.

93. Section 708 of the Civil Rights Act provides that "nothing in this subchapter shall be deemed to exempt or relieve any person from any liability . . . provided by any . . . law of any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 78 Stat. 262, 42 U.S.C. § 2000e-7 (1964). But see, e.g., Mo. Ann. Stat. § 296.020(8)

the validity of state protective laws under title VII, it has been suggested, may also initiate relitigation of the constitutionality of discrimination by sex in the incidence of protective labor legislation.⁹⁴ To predict Supreme Court declaration of the unconstitutionality of protective labor legislation for women, however, contradicts established precedent. The constitutional requirements of equal protection do not require the legislative authority to extend its regulation to all possible cases, unless the unequal application of a particular statute constitutes an arbitrary discrimination.⁹⁵ Application of a maximum hours law to Negro women but not to white women, for example, would arbitrarily discriminate because racial difference is not a reasonable basis for unequal application of such a protective measure. The performance of maternal and familial functions, the Supreme Court has frequently held, provides a reasonable basis for differentiation between the sexes in the application of protective legislation.⁹⁶ Although some of these laws may suffer from the defect of outmoded utility, the possibility that superior protective measures might be devised would not necessarily render a particular statute unconstitutional.⁹⁷ Should title VII be held generally to supersede protective statutes for women, relitigation of their constitutionality, moreover, would become superfluous.

The possibility that protective labor legislation applicable solely to women may be struck down is not, however, wholly remote. In many instances, the rational relationship between such legislation and the actual protection of maternal and familial functions appears tenuous.⁹⁸ The Supreme Court's facile assumption in *Muller v. Oregon*⁹⁹ of the inferior capacities of women¹⁰⁰ and its curt dismissal of "sociological insight" and "shifting social standards" in *Goesaert v. Cleary*¹⁰¹ may become less persuasive with the passage of time.¹⁰²

(Supp. 1966), which provides that the Missouri fair employment act does not supersede other state laws which permit or require differentiation by sex. In Maryland, the Attorney General has ruled that title VII does not supersede a state law prescribing maximum hours for women because it envisaged no arbitrary or invidious discriminations as prohibited by the fourteenth amendment. Opinion of the Att'y Gen. of Maryland, Jan. 19, 1966, in CCH Employment Practices Guide ¶ 8044, at 6068. See also Opinion of the Att'y Gen. of Wyoming, No. 43, Sept. 14, 1965, in CCH Employment Practices Guide ¶ 8030, at 6048. But see *Reynolds v. Mountain States Tel. & Tel. Co.*, CCH Employment Practices Guide ¶ 8111, at 6183 (Ariz. Civil Rights Comm'n Dec. 2, 1966).

94. *Murray & Eastwood*, supra note 83, at 241-42. But see *Sarfaty v. Nowak*, 369 F.2d 256 (7th Cir. 1966).

95. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

96. See notes 37-40 supra and accompanying text.

97. Cf. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 152 (1963); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

98. See *Murray & Eastwood*, supra note 83, at 238-42.

99. 208 U.S. 412 (1908).

100. *Id.* at 421.

101. 335 U.S. 464, 466 (1948).

102. "The conditions which gave rise to the enactment of protective legislation for women have now disappeared in large measure. . . . Mortality tables consistently showing a greater life expectancy for females have led us to doubt our opinions about the frailties of women." *Reynolds v. Mountain States Tel. & Tel. Co.*, CCH Employment Practices

III. CONCLUSION

Despite its novelty and confused congressional history, the sex amendment to title VII may yet prove a beneficial piece of legislation.¹⁰³ If so, the courts must interpret the bona fide occupational qualification with reasonable flexibility. This exigency, it is suggested, demands revision of the present EEOC guidelines to allow reliance on such reasonable psychological factors as general sex attributes and client preferences in the determination of personnel policy where differentiation by sex is neither arbitrary nor oppressive. Finally, suits challenging the validity of state laws under title VII may spur legislative action to upgrade and standardize protective labor legislation¹⁰⁴ and may even terminate in a Supreme Court statement of the principle of equality of opportunity for both sexes.¹⁰⁵

Guide ¶ 8111, at 6184 (Ariz. Civil Rights Comm'n Dec. 2, 1966). See also *People v. Gardner*, CCH Employment Practices Guide ¶ 9015, at 6567 (Los Angeles Munic. Ct. Feb. 23, 1966).

103. In its first report to the President on the first hundred days of activity, the EEOC noted that about 15% of the total number of complaints received involved charges of sex discrimination, though comparatively few cases concerned complaints by members of one sex aspiring to jobs traditionally held by members of the other. The Commission stressed that implementation of the prohibition of sex discrimination represented a particularly challenging assignment, and that the task of translating the generalities of the statute into comprehensive and comprehensible standards has occupied a significant portion of its time and energy. EEOC Report, Oct. 9, 1966, in CCH Employment Practices Guide ¶ 8024, at 6034.

104. Protective Legislation 22-26. The Committee pointed out, for example, that certain state laws prohibiting women from lifting objects over a specified maximum weight were unrealistic. *Id.* at 17. See, e.g., Cal. Labor Code Ann. §§ 1251-52 (50 pound lifting maximum, 10 pound carrying maximum); Industrial Comm'n of Utah, Welfare Regulations for Any Occupation, 2 CCH Lab. L. Rep. ¶ 45525, at 58942 (1966) (30 pound lifting maximum, 15 pound carrying maximum). The EEOC has ruled that "restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women." 29 C.F.R. § 1604.1(c) (1966). The Committee on Protective Labor Legislation recommended that because of the many variable factors involved, such as individual strength and physical condition, the level, frequency and method of lifting and the compactness of the load, the regulation of weightlifting by both sexes "be carried out by appropriate and adequately authorized and financed regulatory bodies, rather than through specific laws . . ." Protective Legislation 17.

105. A constitutional amendment providing 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" has been introduced in each Congress since 1932. *American Women* 147. The amendment, H.R.J. Res. 63, 89th Cong., 2d Sess. (1967), was introduced on Jan. 12, 1967 by Representative Kupferman. See 113 Cong. Rec. H136 (daily ed. Jan. 12, 1967). The Senate approved such an amendment in 1950 after adding the so-called "Hayden rider." 96 Cong. Rec. 870-72 (1950). The "Hayden rider" provided that the amendment should "not be construed to impair any rights, benefits, or exemptions . . . conferred by law upon persons of the female sex." *Id.* at 870. Congress's reluctance to disturb protective legislation for women is perhaps indicative of its intent that such laws not be superseded by title VII. See 110 Cong. Rec. 2578, 2582 (1964) (remarks of Representative Thompson); 106 Cong. Rec. 15679-80 (1960) (remarks of Senator Hayden).