WOMEN, WORK, AND THE LAW--A LEGISLATIVE REVIEW

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February 1974

P-5176

The Rand Paper Series

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The Rand Corporation
Santa Monica, California 90406

PREFACE

This review is intended to be an introduction to the legislation affecting the status of women. A primary focus of the legislative review is the detailing of what is illegal and legal treatment of employed women.

The review is not to be considered exhaustive of all legislation related to either the status of women or sex discrimination. It does, however, describe the significant legislation in the field.

INTRODUCTION

The feminist movement, though not new[1] in America, has recently become a highly visible, much-debated issue. Debates with regard to the feminist movement have indicated that there are varying attitudes and opinions as to the merit of the movement, varying degrees of support, and various levels of understanding about the scope of the movement.

While the feminist movement has gathered support, there still exists much opposition to the concept of equality for women or as the movement is more commonly referred to "women's lib." Often the feminist movement is dismissed with a smirk or an off-color joke. Derisive remarks that the movement consists of the unfounded ravings of sexually frustrated, homosexually prone women are also frequent. The image of an unmarried, physically unattractive, sexually frustrated, masculine appearing woman has also been a stereotype habitually presented by the media.

The impact of the feminist movement, however, is beyond whether an individual agrees or disagrees with the goals of the movement or the stereotyped characterization of its activists. The movement is about sexism. "Sexism refers to all those attitudes and actions which relegate women to a secondary and inferior status in society."[2]

It is both necessary and important in examining sexism or sexist behavior to make a distinction between public and private life. As long as an individual's attitudes are confined to his or her personal interactions, then it should be and is of no consequence to anyone

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[1]The feminist movement in America goes farther back in history than the woman's suffrage movement. As early as 1831, Anne Royall, a women journalist, published a newspaper in Washington. There are many examples of women of all races who can be identified as feminists from the time of the first colonial settlements in America. One in-depth historical overview is the 44-volume, *American Women: Images and Realities*, Annette K. Baxter and Leon Stein (eds.), Arno Press, 1972.

[2]"Guidelines for Improving the Image of Women in Textbooks," *Phi Delta Kappan*, October 1973, p. 103.

besides the individual and the individual's intimates. When these attitudes, however, are translated into action outside the individual's home and private life, then it becomes public business.

The Federal government of the United States of America has defined sexism or sex discrimination as a form of prejudice. Prohibitions against discrimination on the basis of sex have been written into the Federal government's affirmative action and civil rights program. It is therefore illegal to translate one's personal opinions or attitudes about women into covert or overt action that would place them in an inferior status or impair their equality of opportunity.

The legislative review will examine the most significant legislation affecting the status of women, specifically employed women, in the United States. Though a considerable amount of legislation is overlapping, there are several instances where aspects of a law are specifically applicable. For this reason as well as for clarity, I have divided the legislative review into three basic sections. The largest, significant Federal legislation related to the status of women, includes an examination of general legislation related to the status of women, legislation related to sex discrimination in educational institutions, women in the public service, and a discussion of the Equal Rights Amendment. The second section surveys state legislation related to the status of women. A concluding section discusses implementation of the previously examined legislation and the need for further research.

SIGNIFICANT FEDERAL LEGISLATION RELATED TO THE STATUS OF WOMEN

GENERAL LEGISLATION

One of the earliest laws utilized to fight sex discrimination is the Fourteenth Amendment to the United States Constitution which guarantees "equal protection of the laws." The Fourteenth Amendment has, however, been decreasingly utilized because of some of its inherent limitations and as the result of the passage of new laws with applicability to specific sex-related discrimination.

The major limitation of the Fourteenth Amendment in relation to sex discrimination is that it does not give women equal status with men as indicated by legal decisions upholding sex discrimination. New court decisions as evidenced in *Griggs v. Duke Power Co.*[3] have struck down procedures and laws discriminating against women, but have not overruled earlier decisions upholding sex discrimination.

The Federal Equal Pay Act, enacted in 1963 (effective June 11, 1964) as an amendment to the Fair Labor Standards Act,[4] prohibits discrimination on the basis of sex in the payment of wages for equal work on jobs that require equal skill, effort, and responsibility and that are performed in the same establishment under similar working conditions.

The Education Amendments Act of 1972 amended the Equal Pay Act to include sex and, for equal pay purposes, removed the exemption of executive, administrative, and outside sales people. Not prohibited are wage differentials based on a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor besides sex or any other prohibited factor.

The Equal Pay Act of 1963 is enforced by the Wage and Hour Division of the Department of Labor. In cases where there is a conflict with a state equal pay law or act, the Federal law takes precedence.

An Executive Order, though often having the same impact as a law, is not a formal statute. The Order is usually a series of rules and

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[3] 401 U.S. 424 (1971).

[4] As amended by the Education Amendments Act of 1972.

regulations that the affected parties must follow if they are to continue to receive or in the future to receive Federal monies. For example, Executive Order 11246 details rules and regulations that contractors must follow if they are to receive Federal funds.

In some instances an Executive Order may be used for other purposes. The Citizens' Advisory Council on the Status of Women was established on November 1, 1963, by President Kennedy's Executive Order No. 11126. President Kennedy acted on the advice of an appointed commission, the President's Commission on the Status of Women. The Advisory Council is composed of twenty private citizens appointed by the President for indeterminate terms.

President Johnson's Executive Order No. 11246, September 24, 1965, in its initial stage prohibited discrimination on the part of all employers with Federal contracts. It also required that Federal contractors take affirmative action "to ensure that applicants are considered without regard to their race, color, national origin, or sex."[5] Included in its affirmative action provisions were employment, upgrading, transfer, rates of pay and other forms of compensation, and selection for training including apprenticeship.

Retroactive pay is an item of contention under Executive Order 11246. The Department of Health, Education, and Welfare (HEW) and various women's rights groups support the view that the Order grants HEW the legal authority to compel payment of retroactive pay to compensate individuals for losses resulting from discrimination in employment practices. In informal decisions before organizationally affiliated review boards, women have been both denied and extended retroactive pay. Thus far, there has not been a Supreme Court ruling on the issue.

Executive Order No. 11375, October 13, 1967, effective one year later, was also issued by President Johnson. This Order formally added sex discrimination to the other legally prohibited forms of discrimination, i.e., race, color, religion, and national origin. The Order also resulted in the establishment by the Civil Service Commission of the Federal Women's Program.

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[5]The ban against sex discrimination was not effective until October 13, 1968, after the issuance of Executive Order 11375.

President Nixon's Executive Order No. 11478, August 8, 1969, placed the Federal Women's Program under the guidance of the Equal Employment Opportunity Program. This thereby integrated the Program into the total Equal Employment Opportunity effort. Further, the Order initiated the development and design of affirmative action plans specifically aimed toward eliminating employment inequities which were the result of sex discrimination.

An "Order" is usually a directive from a Federal agency which, as in the case with Executive Orders, though not a formal statute, often has the same effect as law. Order No. 4, a directive from the Department of Labor's Office of Federal Contract Compliance (OFCC) issued January 30, 1970, presented guidelines to implement Executive Order No. 11375's sex discrimination ban.

The guidelines require Federal contractors to "take affirmative action to recruit women to apply for those jobs where they have been previously excluded." Specific prohibition included in the guidelines are:

- o Advertising for workers in columns headed male or female unless sex is a bona fide occupational qualification.
- o Penalizing women because they are absent from work because of childbearing. Childbearing must be considered justification for a leave of absence for a reasonable length of time (usually 4-6 months) whether or not the employer has a leave policy.
- o Specifying any differences on the basis of sex in either mandatory or optional retirement age.

Revised Order No. 4 published by the Department of Labor on October 4, 1971, further details affirmative action requirements for Federal contractors. The Order includes requirements that employers analyze their work force to determine where women employees are being underutilized.[6] Where deficiencies are found, goals (not quotas) and timetables are to be developed to remedy the situation.

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[6]Revised Order No. 4 defines underutilization as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability."

Order No. 4, as well as the revised version, provides that if contractors refuse to make good-faith efforts to correct the underutilization of women through an effective affirmative action program, the government can cancel existing contracts and subcontracts. The organization can also be prevented from bidding on future contracts and subcontracts.

In determining whether women are being underutilized in any classification, a comparison is made between the female unemployment proportion of the total labor force in the immediate labor area, an area in which the contractor can reasonably recruit, and the numbers of females employed in these classifications by the contractor. Overall responsibility for the enforcement of both Order 4 and its revision is with the Office of Federal Contract Compliance in the Department of Labor. OFCC has assigned monitoring responsibility to fifteen other Federal agencies that award the majority of government contracts.

HEW was designated in 1967 as the compliance agency for all colleges and universities holding Federal contracts. To undertake this action, HEW established a Contract Compliance division in its Office of Civil Rights. Prohibitions against sex discrimination are to be enforced in the same manner as prohibitions against discrimination because of race, color, religion, or national origin.

Order No. 14 was originally issued to the heads of all Federal agencies on January 14, 1972, and implemented on July 1, 1972. Order No. 14 was revised and reissued on January 23, 1973.

Revised Order No. 14 is a directive from the Secretary of Labor to the Compliance Agencies. Revised Order No. 14 essentially operationalizes Revised Order No. 4. It details procedures, checklists, and reporting for ascertaining whether or not the organization has observed each of the requirements of Revised Order No. 4. Additionally, No. 14 outlines complete procedures for both on- and off-site reviews. Thus, Revised Order 14 has the effect of standardizing the evaluation procedures for reviewing contractors covered by Revised Order 4.

Titles VI and VII of the Federal Civil Rights Act of 1964 have far-ranging impact in the area of sex-based discrimination. Title VII (Amended) prohibits discrimination in private employment based on the

grounds of race, color, religion, national origin, and sex. Title VII is administered by the five-member, bipartisan Equal Employment Opportunity Commission (EEOC) appointed by the President.

Title VII was amended March 24, 1972. The Equal Employment Act of 1972 (Public Law 92-261) amended Title VII to expand coverage and strengthen enforcement provisions. Included in the coverage for the first time were employees of educational institutions and of state and local governments. Coverage was also extended to employers of 15 or more persons (formerly 25 or more). Further, it allows EEOC to bring suit in the appropriate Federal district court if conciliation efforts are unsuccessful. The Civil Service Commission was given stronger powers to enforce equal employment opportunity for Federal employees. A Federal employee may now sue his or her agency after exhausting existing administrative remedies.

The Education Act also extended Title VII to provide that back pay may be awarded for up to two years prior to the date the complaint is filed. Additionally, as a result of the amendment to Title VII, the EEOC has issued new guidelines on discrimination because of sex, adding such provisions as fringe benefits, maternity leave, and leave for childbirth. Although the coverage of the Equal Pay Act of 1963 is more restricted than Title VII, which extends to areas unrelated to wages, in the case of wage discrimination based on sex, the Equal Pay Act takes precedent. Title VII will, therefore, defer to the rulings and opinions issued under the Equal Pay Act.

Title VI of the Civil Rights Act of 1964 prohibits discrimination against beneficiaries, i.e., students in Federally assisted programs. Until the passage of the Education Amendments Act of 1972, this prohibition did not apply to sex. After the Amendment, Title VI was applicable to sex discrimination in educational opportunity as well as employment related to education. This would cover such programs as work study and internships.

The last piece of generally applicable legislation to be discussed is section 702(e) of the Equal Employment Act of 1972. This section specifically provides that it is *lawful* to classify (discriminate) on the basis of religion, sex, or national origin where any of

these factors is a bona fide occupational qualification (bfoq) reasonably necessary to the normal operation of that particular business or enterprise. Race or color can *never* be a bfoq. Most courts have considered the question of what is a valid bfoq narrowly.[7] Women applicants and employees, for example, must be judged on the basis of their individual abilities. An employer cannot refuse to hire or promote because women in general or most women, or women as a group, cannot do the job. It is therefore illegal to classify a job as light or heavy, indicating a female or male preference.

The burden of establishing that a discriminatory practice constitutes a bona fide occupational qualification rests with the employer. This was the court's stand in *Bowe v. Colgate-Palmolive Co.*[8] and *Weeks v. Southern Bell Telephone and Telegraph Co.*[9]

LEGISLATION RELATED TO SEX DISCRIMINATION IN EDUCATIONAL INSTITUTIONS

In January 1970, Women's Equity Action League (WEAL) filed the first charges of sex discrimination against universities and colleges.[10] At this time no laws existed that prohibited sexual discrimination against women in education. Title VII of the Civil Rights Act of 1964, which forbade discrimination in employment, exempted educational institutions. Title VI of the Civil Rights Act of 1964, which forbade discrimination against beneficiaries, i.e., students in Federally assisted programs, applied to race, color, and national origin, but did not include sex discrimination. When WEAL filed its first charges of sex discrimination against universities and colleges, the Congressional hearings on the Equal Rights Amendment had not yet been held.

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[7] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[8] 416 F. 2d 711, 7th Cir. (1969).

[9] 408 F. 2d 228, 5th Cir. (1969).

[10] WEAL filed under the contract compliance provision of President Johnson's Executive Order 11246 (September 1965) as amended by Executive Order 11375 (October 1967). In order to file under this Order it is only necessary to submit a letter. Therefore, no formal documentation of the charges filed are available.

It was not until October 1972 that the U.S. Commission on Civil Rights had the authority to review sex discrimination cases.

Today, though the inequities against women in higher education are still present, there is legal recourse available. The Equal Employment Opportunity Act of 1972 amended Title VII to expand coverage and strengthen enforcement provisions. As of March 24, 1972, when the amendment was effective, Title VII covers not only discrimination in employment but also in *all* educational institutions irrespective of whether or not they receive Federal aid.

On June 23, 1972, the Education Amendments Act, also known as the Higher Education Act, was enacted. Title IX of the Act provides protection against sex discrimination in educational opportunity and employment and thereby expands the coverage of Title VI of the 1964 Civil Rights Act. This law includes coverage of preschools, elementary, and secondary schools, vocational education institutes, professional schools, and undergraduate and graduate education. Any program receiving Federal financial assistance in the form of grants, loans, or contracts is covered under the provisions of the Act. Admission policies are also covered by this Act.[11]

Specifically, this law affects such traditional, though discriminatory, procedures as requiring all males or all females to take sex designated classes, or denial of admission to certain classes because of the student's sex. It is, therefore, unacceptable to have home economics required for girls unless it is also required for boys. Preventing girls from enrolling in auto mechanics or machine shop is also prohibited.

These types of prohibitions also apply to institutions of higher learning. In both public and private undergraduate and graduate schools and colleges, admissions policies may not discriminate on the basis of sex. It is no longer admissible to restrict the numbers of women attending professional and graduate school, because they might not practice or they might have children and decide to stay home.[12]

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[11]Charlotte Hallam, "Legal Tools to Fight Sex Discrimination," *Phi Delta Kappan*, October 1973, p. 129.

[12]Ibid.

The Education Amendments Act of 1972 also includes an amendment to the Equal Pay Act of 1963. Effective July 1, 1972, the amendment expanded the coverage of the Equal Pay Act to include executive, administrative, and professional employees. Teachers and other professionals in educational institutions at all levels are for the first time protected from discrimination in salaries and fringe benefits on the basis of sex.

Differences in professional title alone will probably not be considered sufficient reason to deny equal pay. Female professors who have degrees and experience equal to their male counterparts and for the same teaching load receive less pay can challenge the institution concerning their salary policy. The fact that the female may have a lesser title is not justification for such practices.

Two laws that were passed prior to the Education Amendments Act of 1972 are the Comprehensive Health Manpower Training Act of 1971 and the Nurse Training Act of 1971.[13] These laws were enacted to aid medical, nursing, and other health schools. These Acts also contain provisions prohibiting sex discrimination in the admissions policies of schools receiving Federal support.

The laws, though inapplicable to nonmedical or nonhealth-related schools, could have proven to be of substantial impact in opening doors for women in the designated schools. Unfortunately, these laws were little known and as a result of their anonymity had little impact on the affected parties. Today, however, in conjunction with the other recent legislation and increased awareness, the Nurse Training and the Comprehensive Health Manpower Acts are being increasingly utilized. The Office of Civil Rights, HEW, is responsible for the overseeing and administering of the two Acts.

WOMEN IN THE PUBLIC SERVICE

Women were employed in the public service before the Constitution was signed. A woman postmaster was appointed in 1773, thereby ante-

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[13] Also known as Public Law 92-157 and Public Law 92-158, respectively, these laws amended Title VII and Title VIII of the Public Health Service Act.

dating the United States Government by fourteen years.[14] The Civil Service Act of 1883, which established the merit system, also encouraged women to compete in civil service examinations under the same conditions as men. The first woman appointed to a civil service position achieved the highest score on the first examination administered; however, she received the second appointment.

Until 1923, the most common appointment for the women who passed the civil service exam was that of lady clerk. These lady clerks, however, were receiving $600 per annum for the same duties that the male clerks were being paid from $1,200 to $1,800 per annum to perform.[15] The Classification Act of 1923 established the concept of "equal pay for equal work." The salary for each Federal position was to be determined on the basis of the duties and responsibilities of the position and not on the basis of the individual employee's sex designation. However, this concept was not operationalized until more than four decades later.

One of the first actions of the Commission on the Status of Women, appointed in 1961 by President Kennedy, was a request to the Attorney General for a new interpretation of an 1870 law that permitted Federal agencies to restrict selection for civil service vacancies to men only or women only and was also responsible for the salary discrepancy between men and women.

The 1870 law had in 1934 been interpreted by the then Attorney General to allow the sex specification in filling Federal civil service positions. Attorney General Robert Kennedy in 1962 declared the previous interpretation unjustified. The law was finally repealed by Congress in 1965.[16]

President Johnson's 1967 Executive Order 11375, which added sex to other prohibited forms of discrimination, mandated the U.S. Civil

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[14]Helene Markoff, "The Federal Women's Program," *Public Administration Review*, March/April 1972, p. 145.

[15]Ibid.

[16]Helen Markoff, "Signposts of Success," *The Bureaucrat*, Fall 1972, p. 219.

Service Commission to establish the Federal Women's Program. The purpose of the program is to enhance the employment and advancement of women employed in the Federal government. It was not until President Nixon's Executive Order 11478 in 1969 that the Federal Women's Program was integrated into the overall Equal Employment Opportunity Program. This action raised both the status and the clarity of the program. As part of the EEO program, the Women's Program was a formal part of Federal agency directors' equal employment opportunity effort.

President Nixon in April, 1971, to encourage the full utilization of women at all levels of government, sent a memorandum to the heads of executive departments and agencies. The memorandum stated, in part, that the Federal government had the capacity as well as the charge to demonstrate its recognition of the equality of women by the more effective utilization of their skills in high-level positions.

The memorandum included a request for plans to attract senior-level (GS 13-15) women and women in top appointive and career position (supergrades GS 16 and higher). There was also a directive to agency heads to designate a substantial number of women on advisory boards and committees.

The Federal Equal Employment Opportunity Act (Public Law 92-261), March 24, 1972, strengthened fair employment legal sanctions applicable to private employment and state and local government. Significantly, it also provided greater rights for employees in the Federal government.[17] For the first time, Federal employees and agencies were included under the 1964 Civil Rights Act (Amended).

The 1972 Act also codified the Federal Women's Program. The emphasis on EEO thus changed from one of passive nondiscrimination to positive action and enforcement. The enforcement of the EEO program for the Federal Civil Service is administered by the Civil Service Commission. Federal agencies must present EEO and affirmative action plans to the Commission annually. Each plan must provide programs of training and education which will afford employees an opportunity to acquire skills and abilities needed to compete for advancement to positions of greater responsibility.

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[17] *Women*, Citizen's Advisory Council on the Status of Women, April 1973, p. 13.

THE EQUAL RIGHTS AMENDMENT

After passage of the Suffrage Act in 1920, the National Woman's Party, founded in 1913, introduced the first Equal Rights Amendment for women to Congress. The Equal Rights Amendment (ERA) initiated before Congress in 1923 was not approved in its present form by Congress until March 22, 1972.[18]

The Equal Rights Amendment, which would amend the Constitution of the United States, reads:

> "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

The ERA is currently in the process of being ratified by the states. In order for the ERA to become part of the Constitution, it must be ratified by thirty-eight states by March 22, 1979. Hawaii was the first state to ratify, and as of mid-1973, a total of 30 states have ratified the Amendment.[19]

Some questions have been advanced as to whether a state legislature may rescind a vote to ratify a constitutional amendment. The Counsel to the Constitutional Amendments Subcommittee of the U.S. Senate reviewed judicial and congressional precedents and concluded that:[20]

> ... It is my legal opinion as Counsel of the Subcommittee on Constitutional Amendments of the United States Senate that once a State has exercised its only power under Article V of the United States Constitution and ratified an Amendment thereto, it has exhausted such power, and that any attempt subsequently to rescind such ratification is null and void. The Attorney General of the State of Idaho has reeently expressed the same view in an opinion to the legislature of that state...

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[18] *Women*, Citizen's Advisory Council on the Status of Women, April 1974, pp. 2-5, and *Answer to Questions About Equal Rights Amendment*, National Woman's Party, 1972.

[19] See Appendix II for list of states.

[20] *Women*, p. 3.

The Equal Rights Amendment is one of the most controversial pieces of legislation in the area of women's rights. Before the Amendment was passed by the Senate, nine attempts led by Senator Ervin, a principal opponent of the ERA, were made to amend it.[21] While much of the opposition to the ERA is due to a misunderstanding of the legislation, a considerable amount is the result of persons rejecting the notion of change with pronouncements of what *could* happen after passage.

The ERA, if ratified, would give women legal status equal to that of a man. Thus women would be protected from the necessity of going to court to prevent sex discrimination. The ERA would also though not exclusively:

- o End the legal presumption that in a divorce the parent granted custody of the child is the mother.
- o Require that alimony be available to both men and women.
- o End prison sentence differences because of sex.
- o Invalidate state laws which treat men and women differently, e.g., in respect to property rights.
- o Invalidate protective laws that discriminate against women, so that each person must be treated as an individual.
- o Open admissions for women to institutions of higher learning requiring the criteria for admission be ability and not sex.
- o Equalize jury-duty requirements so that women will be relieved on the same basis as men.

With these rights and benefits would come new responsibilities. The most substantial and most controversial is that of military service. The ERA would require that men and women be treated alike with respect to military service. The exemptions now in effect would remain. Parents who are required to stay with children, either or both parents with small children, physical disabilities, conscientious objectors would continue to be reasons for exemption. Men and women would, however, be treated the same on exemptions, deferments, and benefits. With the operationalization of the all-volunteer army and the end of

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[21] Ibid., p. 2.

the draft, the resistance to the ERA as the result of its military provisions may decrease.

The ERA applies only to government action and legal rights; it has no control with regard to cultural, social customs, or any personal relationship between men and women. Who pays the dinner check, pulls out a chair or opens the door would be the decision of the individuals involved. The Equal Rights Amendment would end only the sex discrimination that exists under the law.

STATE LEGISLATION

PROTECTIVE LABOR LEGISLATION

In the early 1900s, many states adopted laws intended to protect women from the hazards of industry by placing limitations on such things as the hours they might work, the maximum allowable weight they could lift, and the types of jobs they could handle. These laws have been designated as state protective labor legislation for women.[22] The restrictive nature of state protective labor legislation has resulted in and requires different treatment of individual workers on the basis of their sex.

Title VII of the Civil Rights Act of 1964 is directly concerned with state protective labor legislation. Title VII (Amended, 1972) prohibits discrimination in employment on the basis of sex. Since the passage of Title VII, it has been an issue as to whether state protective legislation involves a conflict with the Title. In considering the relationship between the state legislation and Title VII, the basic question is whether the state laws are protective or whether they are inherently discriminatory.

The Equal Employment Opportunity Commission in August 1969 issued revised Guidelines on Discrimination because of sex, stating in part:[23]

> (2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exceptions.

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[22] *Laws on Sex Discrimination in Employment*, Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, 1970 (reprinted 1972), p. 10.

[23] Ibid.

FAIR EMPLOYMENT PRACTICES LAWS

Thirty-seven states, the District of Columbia, and Puerto Rico have mandatory fair employment practices laws (FEP). The FEP laws, in general, prohibit the same practices as those prohibited by Federal law (1964 Civil Rights Act). In some instances the wording is different from the Federal law but the intent is the same.[24]

Thirty-nine states, the District of Columbia, and Puerto Rico have amended or enacted legislation to prohibit sex discrimination in employment. Hawaii and Wisconsin are the only states where the prohibitions against sexual discrimination were enacted prior to the passage of the Civil Rights Act of 1964. South Carolina and South Dakota have human relations laws that include prohibitions of sex discrimination in employment.

FEP laws, as in the case of Title VII, are in conflict with state protective labor legislation. State FEP laws prohibit differential treatment of persons with respect to employment opportunities. Because of their intent to protect women from the hazards of industry, protective labor laws may deny women certain employment opportunities.

Some states[25] include specific provisions for the retention of state protective labor legislation for women. The August 1969 EEOC guidelines cited previously apply to these practices also.

The Federal courts have taken the same position as EEOC with regard to state laws that conflict with Title VII. Where state laws conflict with Title VII, the Federal law takes precedence. This is exemplified in the case of *Bowe v. Colgate-Palmolive Co.* (see page 8) where an employer was said to be in violation of Title VII in not permitting bids by women for jobs which required the lifting of weights in excess of 35 pounds. The lower court held that Title VII did not preclude the employer from establishing such restrictions. This finding was reversed by the Court

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[24] Ibid., p. 3.

[25] Connecticut, Massachusetts, Michigan, Missouri, Nebraska, and Oklahoma.

of Appeals, which held that weight-lifting restrictions do not constitute a bona fide occupational qualification. In addition, the Court of Appeals found that the intention of Title VII, as reflected by the EEOC guidelines, was to consider employees on an individual basis rather than to impose general restrictions on positions of employment. The employer, accordingly, was required to notify all workers of opportunities to demonstrate their capacities in connection with positions of more strenuous employment and, if qualified, to permit submission of job bids.[26]

EQUAL PAY LAWS

Thirty-five states have legislation prohibiting discrimination on the basis of sex in the payment of wages for equal work. Seven states--Delaware, Iowa, New Mexico, South Carolina, Utah, Vermont, and Wisconsin--and the District of Columbia do not have a distinct equal pay law, but do prohibit pay discrimination based on sex in their fair employment practices law or regulation. Thus, there are seven states that have neither an equal pay law or an FEP law including sex discrimination. These states are Alabama, Louisiana, Mississippi, North Carolina, Tennessee, Texas, and Virginia. Also included in this category is Puerto Rico.[27]

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[26] *Laws on Sex Discrimination in Employment*, p. 11.

[27] Ibid., p. 39.

CONCLUSIONS

IMPLEMENTATION

Although the recent legislation passed by both the Federal and state governments in conjunction with affirmative action guidelines has without qualification made clear the position of intolerance for any form of sex-based discrimination,[28] this position does not appear to have been translated effectively to the organizational or institutional level. This is partially the result of widespread unfamiliarity with the nature and scope of the legislation.

A substantial portion of the legislation prohibiting sex discrimination has been enacted quite recently.[29] Legislation with major impact was enacted as late as 1973.[30] The situation is thus where large numbers of institutions, both public and private, are unaware of the broad spectrum of the laws against sex discrimination. Further, there is increasing evidence as related sex discrimination complaints are filed that knowledge of the law by the employer is no guarantee that the information will be transmitted to the employees.

In the field of higher education, where the laws have been repeatedly tested, there still remain numerous inequities as well as massive problems with the complaint procedure. Uniform and generally acceptable mechanisms by which a complaint of sex discrimination can

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[28]This was not always the case. At the time President Johnson issued Executive Order 11246 (Sept. 24, 1965), the Federal government deliberately did not have a specified affirmative action program. The task of providing leadership and direction was placed upon the (employer) Federal contractor. At this point the government only suggested that action should be taken to revise or eliminate policies explicit or implicit that discriminated against minority groups. Also suggested was that positive action be undertaken to provide more and better jobs for minorities.
SOURCE: North Barry Dancy, "Affirmative Action in Labor Contracts: Some Implications for College and University Personnel," *Civil Rights Digest*, October 1972, p. 43.

[29]For example, the Equal Employment Opportunity Act was enacted March 1972, and the Education Amendments Act was effective in June 1972.

[30]Revised Order No. 14, which has the same impact as legislation, was not enacted until 1973.

be registered and processed do not exist. Where commissions or advisory groups have been established, unfamiliarity with judicial precedent has led to resolutions which if tried in a court of law would certainly be ruled illegal.[31]

The subject of pregnancy and childbirth illustrates a less than maximum effort of organizations to follow Federal guidelines. The Labor Department in December of 1970, in response to constitutional challenges in the courts and the likelihood of passage of the Equal Rights Amendment and other legislation prohibiting discrimination on the basis of sex, urged and warned states to eliminate sex discriminatory provisions. The results in terms of changes in practices have been negligible.[32] The Office of Federal Contract Compliance, which administers Executive Order 11246 (amended by Executive Order 11375) prohibiting discrimination by Federal contractors, has issued guidelines prohibiting discriminatory treatment in regard to reinstatement and seniority of women taking maternity leave. The compliance office mandates that employers must permit leaves of absence for pregnancy, even where the employer has formulated no general policy permitting such leaves.

The OFCC in November 1970 has determined that the question of when maternity leave should commence is not suitable to a blanket policy. The decision as to when a maternity leave commences ordinarily

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[31]An example of such a case is the Cheryl Clark case, filed at the University of Michigan, Wisconsin Campus, January 1971. Ms. Clark filed a complaint charging sex discrimination with the University of Michigan Complaint Appeal Committee, a charge which was subsequently held by the Committee to be unfounded. Ms. Clark's attorney in a post hearing brief pointed out numerous instances where the Complaint Committee's decision was contrary to the intent of Federal legislation, guidelines, and judicial rulings. However, because of the expenses entailed and the possibility of conflict of interest charges (the attorney was a Professor at the University's law school), no formal case was filed in a court of law.

[32]U.S. Dept. of Labor, Unemployment Insurance Letter No. 1097 (Dec. 31, 1970).

SOURCE: Elizabeth Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," *New York Law Forum*, Vol. 17, No. 2, 1971, p. 487.

is to be made by the employee and her physician.[33] As more court cases are adjudicated and the legislation becomes more familiar to employers and employees, action in regard to these issues should improve accordingly.

Another example of delayed implementation is the Federal Women's Program. Mandated by the Civil Service Commission in 1968, the Program was only partially implemented in 1970. At the same time, the President's Task Force on the rights and responsibilities of women awaited action.[34]

The Office of Civil Rights (OCR), which receives complaints from various sources, including Federal agencies, has a record that details the status of sex discrimination complaints for 1971. This chart illustrates

OFFICE OF CIVIL RIGHTS INDIVIDUAL COMPLAINTS RECEIVED[a]

	Jan. 1-Nov. 15, 1971		
	Sex	Other	Total
Received	150	171	321
Not investigated	71	60	131
Under investigation	28	20	48
Under review, investigation completed	20	10	30
Closed as adjusted (found in favor of complainant)	6	23	29
Closed for insufficient evidence	11	36	47
Withdrawn by complainant	9	7	16
Referred to another agency	5	1	6
Closed, no jurisdiction	0	14	14

[a]*Oversight Hearings on Discrimination Against Women,* Hearings before the ad hoc subcommittee on discrimination against women of the Committee on Education and Labor, House of Representatives, 92d Congress, April 12, 1972, GPO, 1973, p. 44.

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[33]Memorandum to heads of agencies from John L. Wilkes, Director, OICC, Questions & Answers Concerning Sex Discrimination Guidelines, November 12, 1970.
SOURCE: Koontz, "Job-Related Benefits," *New York Law Forum*, Vol. 17, No. 2, 1971, p. 488.

[34]*Oversight Hearings on Discrimination Against Women,* Hearings before the ad hoc subcommittee on discrimination against women of the Committee on Education and Labor, House of Representatives, 92d Congress, April 26, 1972, Government Printing Office, Washington, 1973, p. 241.

that in terms of the resolution of sex discrimination complaints the situation is less than optimum. The passage of the 1972 Equal Employment Act which codified the Federal Women's Program should, because of new enforcement provisions, rapidly increase the effectiveness of the Program and thereby decrease the amount of sex discrimination complaints to OCR. In conjunction with actual legislation, the most effective tool for change and to implement new policy is education. This points to the need for awareness and sensitivity sessions in employment and institutional settings to facilitate awareness of the legislation and those changes intended by the legislation.

COMPLIANCE

The use of conciliation and its effectiveness in securing compliance with Title VII has also been characterized by a pattern of less than uniform success. The Equal Employment Opportunity Commission (EEOC)[35] initially had no power to bring direct civil action against respondents where conciliation was unsuccessful. This power was only accorded to the complainants.[36] The amendment of Title VII by the Equal Employment Act of 1972, as previously described, now empowers the Commission to secure enforcement of the law through civil action in Federal courts when voluntary compliance efforts are unsuccessful.[37] Conciliation can be thus acknowledged as a tool of compliance.

The compliance process is composed of a specifically defined series of actions. The purpose of this series of actions is to resolve complaints of job discrimination. The steps, in sequence, include:[38]

1. Initiation of a discrimination charge.

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[35]The Commission is composed of five members appointed by the President and approved by the Senate. EEOC is responsible for administration of Title VII and for the compliance process associated with it.

[36]*Toward Fair Employment and the EEOC*, U.S. Equal Opportunity Commission, 1972.

[37]Ibid., p. 2.

[38]Ibid., p. 7.

2. Investigation of the charge to determine the factual basis.
3. Analysis of the facts to determine whether there is reasonable cause to believe discrimination has occurred.
4. Conciliation of those charges which reveal probable discrimination.

Of the complaints received by the Equal Employment Opportunity Commission, discrimination on the basis of race has historically accounted for six out of ten charges received. Discrimination based on sex accounts for an additional two of every ten charges. Discrimination based on national origin and religion takes care of the remainder.[39]

RESEARCH

In order to thoroughly ascertain the effectiveness of the legislation and the accompanying policy implications, it will be necessary in the future to undertake a wide variety of research activities. Thus far, most of the research generated to study women in the labor force has centered on economic analysis with emphasis on earning (wage) differentials.[40] While this research activity along with census data on participation rates provide needed information, this information is insufficiently comprehensive to obtain a multidimensional profile of women in the labor force.

There is a need for research that examines changes in employment rates for women in specific industries and job categories since the passage of legislation prohibiting sex discrimination. Research that examines in a systematic manner the effect of such variables as sex,

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[39] Ibid.

[40] Illustrative of this focus are the following recent articles: James Gwartney and Richard Stroup, "Measurement of Employment Discrimination According to Sex," *Southern Economic Journal*, Vol. 39, No. 4, April 1973; Mary Townsend Hamilton, "Sex and Income Inequality Among the Employed," *American Academy of Political and Social Science Annals*, Vol. 409, September 1973; Burton Malkiel and Judith A. Malkiel, "Male-Female Pay Differentials in Professional Employment," *American Economic Review*, Vol. 63, No. 4, September 1973; and Isabel V. Sawhill, "The Economics of Discrimination Against Women: Some New Findings," *Journal of Human Resources*, Summer 1973.

education, and race on achievement, both social and economic, in specific employment and educational categories is also needed. In some professional categories, data are not yet available that provide details on the number of women employed in the field. In the professions where the female members have been identified, comparative information on race, earnings, and education is severely limited.

What is indicated is the need for research that gathers primary data on the status of employed women. Consideration should be given to the aforementioned areas as well as to such subjects as the success of Federal and local governmental programs aimed at the upgrading of female employees. This requires, however, more than just a numerical analysis. Attitudinal and social data are essential in determining where women are and what is needed to assure the intent of the legislation is realized.

SUMMARY

At this time, many of the legal prohibitions against sex discrimination simply remain unimplemented. The legislation has had the primary impact of slightly opening the door for women in the labor force to more equality of opportunity. The few women that are currently in or moving into high-level positions do not indicate that the problems of sex discrimination and women's rights have been eliminated. In fact, their high visibility is indicative of the tremendous changes that must be made before it is commonplace to have a competent individual in a high-level position who coincidentally happens to be a woman.

One major method the government has of indicating policy is the passage of laws. The legislation prohibiting sex discrimination passed by the various levels of government is a representation of public policy. Policy and policymaking, however, operate within the general framework of cultural values. If the (legislation) policy or policymaking is contrary to the predominant cultural values, then general acceptance is delayed. Because many traditional views of what is acceptable for women are being challenged by the new policy, the impact of the legislation will be limited until such time that there are substantive changes in values and attitudes in the area of women's rights.

Nevertheless, it will be the responsibility of public officials and those in decisionmaking positions, while operating within the framework of traditional cultural values, to adhere to the legal guidelines and work to accomplish the intent of the legislation. The resulting increased opportunities for women will expedite change and promote an atmosphere where equal rights and opportunities will be available, if they wish, for all women.

Appendix I

SELECTED COURT CASES RELATED TO THE STATUS OF WOMEN[1]

Reed v. Reed, 404 U.S. 71 (1971).[2]

Idaho statute giving preference to men over women in administering estates was held to be invalid by the Supreme Court on the ground that the classification was unrelated to any purpose to be achieved by the statute administrative convenience in determining who should be appointed administrator without the necessity to hold a hearing was considered insufficient justificationbby the court.

Frontiero v. Richardson 93 S. Ct. 1764 (1973).

The Supreme Court determined that a regulation permitting men in the armed service to declare their wives as dependent whether or not they actually achieved that status, while requiring women in the armed services to prove actual dependency by their husbands in order to receive a dependency allowance as well as other benefits, was invalid. The basis for the invalidation of this regulation wastthat "classification on the basis of sex, like classification based upon race, alienage, or national origin ... are indirectly suspect, and must therefore be subjected to strict judicial scrutiny."[2]

Phillips v. Martin-Marietta Corp., 91 S. Ct. 496 (1971).

The case involved a company policy rejecting applications for employment from women with preschool-age children. The same employment barrier did not apply to males with preschool-age children. The court

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[1]Two journals, the *Bureau of National Affairs Fair Employment Practices* series and the *Civil Service Journal*, Vol. 14, No. 2, October-December, 1973, U.S. Civil Service Commission, p. 30, were among the primary sources for the summaries of the cases.

[2]The majority opinion was signed by only four of the nine justices of the Supreme Court. A fifth concurred but on the basis of findings of the *Reed v. Reed* case. It would therefore appear that the majority of the Supreme Court judges are not yet prepared to find classification on the basis of sex inherently suspect.

determined that the proper test to be applied was whether the decision to hire men with preschool-age children, but excluding women with the same age children, was a bona fide occupational qualification. The court ruled:

> The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction. ... But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Thus the case upheld the principle that motherhood by itself was not a rational basis for exclusion.

Griggs v. Duke Power Co., 401 U.S. 424 (1971).

This case has direct relevance to the questions of job-related qualifications and of tests (education, experience, etc.) used as criteria for hiring. The court has said:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled by examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common-sense proposition that they are not to become masters of reality ... What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

Additionally, the Supreme Court said at 431:

> The [1964 Civil Rights] Act proscribes not only overt discrimination but also practices which are fair in form, but discriminating in operation....

Further, any job specification which operates to exclude any segment of society and which cannot be shown to be job-related is prohibited.

Schattman v. Texas Employment Commission, 330 F. Supp. 328 (W.D. Tex. 1971).

The EEOC appeared as amicus curiae arguing that an employer's policy of compelling female employees to resign after reaching a certain month of pregnancy constitutes a violation of Title VII of the Civil Rights Act of 1964. The Commission took the position that this

policy was only acceptable under Title VII if it could be shown that substantially all women were unable to perform safely and efficiently the duties of their particular job upon reaching the time established by the employer.

Pittsburgh Press Co. v. Pittsburgh Human Relations Commission, 413 U.S. 376 (1973).

Order of Pittsburgh, Pennsylvania, Commission on Human Relations prohibiting newspaper from placing in sex-designated columns help-wanted advertisements for job opportunities that are not exempt under City Human Relations Ordinance doesn't infringe on the newspaper's rights under the First Amendment to the Constitution.

Appendix II

STATES RATIFYING THE EQUAL RIGHTS AMENDMENT AS OF MID-1973[1]

Alaska	New Hampshire
California	New Jersey
Colorado	New Mexico
Connecticut	New York
Delaware	Oregon
Hawaii	Pennsylvania
Idaho	Rhode Island
Iowa	South Dakota
Kansas	Tennessee
Kentucky	Texas
Maryland	Vermont
Massachusetts	Washington
Michigan	West Virginia
Minnesota	Wisconsin
Nebraska	Wyoming

[1]Source: *Women*, Citizen's Advisory Council on the Status of Women, April 1973, p. 2.

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