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Occupational Discrimination Against Women and the Law

Edith L. Fisch

COMMENTS

OCCUPATIONAL DISCRIMINATION AGAINST WOMEN AND THE LAW

EDITH L. FISCH†

Typical of the usual state anti-discrimination statutes which, either through design or neglect, fail expressly to include women within their coverage[1] are the New York statutes which deal with discrimination by employers,[2] unions,[3] and tax exempt educational institutions.[4] Because these statutes forbid discrimination on the basis of race, creed, color or national origin,[5] but do not mention sex, no penalities can be imposed under these statutes against an employer, union, or university that discriminates against women.

Fortunately, the gap left open by these statutes has been partially closed by the recent decision of *Wilson v. Hacker* et al.[6] Here the plaintiff, owner of a restaurant and tavern employing three women as bartenders, sought an injunction against the defendant unions who were picketing her premises in an effort to induce her to enter into a union shop agreement. The dispute arose from the fact that one of the defendant unions (Bartenders League of America) refused to accept women as members and the plaintiff refused to enter into a union shop agreement which would in effect require the discharge of the women bartenders.

In an unusually well written and far-seeing decision Halpern, J., granted an injunction, stating:

"Discrimination on the ground of sex, in the absence of any evidence of incompetence or bad moral character in the particular case, must be condemned as a violation of the fundamental principles of American democracy."[7]

It is true that the New York anti-discrimination statutes do not in express terms forbid discrimination in employment on the grounds of sex, but, as pointed out by the court, the anti-discrimination principle is not limited to

† Member of the New York Bar.

1. See, *e.g.*, ILL. REV. STAT. *c.* 29, § 24C (defense contracts) and *c.* 38, § 135 (1949) (accommodations and facilities); N. J. STAT. ANN. § 18; 25-12 (Supp. 1950) (unlawful employment practice to discriminate because of race, creed, color, national origin or ancestry); PA. STAT. ANN. tit. 43, § 153 (Supp. 1950) (discrimination in contracts for public works—race, color or creed). *Cf.* CAL. CONST. ART. XX § 18: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

2. N. Y. EXECUTIVE LAW § 131.

3. N.Y. CIV. RIGHTS LAW § 43; N.Y. EXECUTIVE LAW § 131.

4. N. Y. TAX LAW § 4 (6). See also N. Y. CIV. RIGHTS LAW § 42 (utility companies) and § 44 (industries involved in defense contracts); N. Y. LABOR LAW § 220-e (a) (public works); N. Y. CONST. ART. I § 11 (prohibits discrimination in civil rights on the basis of race, color, creed or religion).

5. *Cf.* N.Y. TAX LAW § 4 (6) (which speaks in terms of race, color or religion).

6. 101 N. Y. S. 2d 461 (1950).

7. *Id.* at 472.

express statutory provision. Because these statutes merely provide special procedures and penalties in certain cases it does not follow that "a court may not condemn such discrimination as a violation of fundamental principle. . . ."[8]

The holding of the *Wilson* case, reflects the gradual reversal of social and judicial opinion in regard to the legal and economic status of women. As is well known, the concept that women had the right to engage in any lawful occupation or profession was contrary to the spirit of the common law.[9]

The Supreme Court of the United States in 1872 endorsed the common law view in *Bradwell v. The State,*[10] when it upheld the decision of an Illinois court that had refused to grant a woman a license to practice law in that state. In the words of the court:

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

"The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[11]

This point of view, however, received noticeable opposition after the advent of the twentieth century.[12] The change in judicial attitude is well illustrated in *State v. McCune*[13] where the court declared:

"Women have the same inherent and inalienable rights as men guaranteed to them under both federal and state Constitution[s]. The constitutional provision that 'All men are by nature free and independent and have certain alienable [*Sic* inalienable] rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and seeking and obtaining happiness and safety,' applies to women the same as men.

"The emancipation of women from her political, industrial and civil fetters has been a slow, and for her, a difficult process; but today the rights of women must be as fully recognized as the rights of men."[14]

Again, sixty-seven years after the *Bradwell* case, a Massachusetts court, in

8. *Id.* at 473.

9. See Crozier, *Constitutionality of Discrimination Based on Sex,* 15 B. U. L. REV. 723 (1935).

10. 16 Wall. 130 (U. S. 1872).

11. *Id.* at 141 (concurring opinion).

12. *In re* Opinion of the Justices, 303 Mass. 631, 22 N. E. 2d 49 (1939) (discrimination between married and single women barred); State v. McCune, 27 N. P. N. S. 77 (Ohio 1928); People v. Williams, 189 N. Y. 131, 81 N. E. 778 (1907). *But cf.* People v. Charles Schweinler Press, 214 N.Y. 395, 108 N.E. 639 (1915).

13. 27 N. P. N. S. 77 (Ohio 1928) (prohibition of employment of women as taxi drivers held unconstitutional).

14. *Id.* at 80.

holding several proposed bills that would disqualify certain women from public employment unconstitutional, stated:

"Women married or unmarried are members of the State. Subject only to constitutional limitations and valid statutory limitations they share with other citizens the duties and privileges of citizenship. And like other citizens they are entitled to the benefit of the constitutional guaranties against arbitrary discrimination. . . . It is true of women as of men that 'Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism in the administration of the trust.' "[15]

The excellent service rendered by women, both during and after World War II in occupations and trades traditionally held by men, including military service, provided great impetus to the principle of equal rights and after 1945 legislative bodies on the international level[16] have indicated that "the right to education and to choose any profession, occupation or trade, is in itself the rightful heritage of every human being—man or woman—and should have no more limitation than the extent of the individual's own possibilities and talents."[17]

Recognition of the equality principle appears in Chapter IX, Article 55 of the United Nations Charter which reads as follows:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

". . .

"(c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[18]

The Universal Declaration of Human Rights declares that everyone without distinction of any kind, expressly including sex, has the right to free choice of employment.[19]

It would also seem that the right of a woman to free choice of occupation is inherent in the Charter of the Organization of American States promulgated in 1948.[20] After proclaiming the fundamental rights of every individual without distinction of race, nationality, creed or sex the Charter provides that:

"All human beings, without distinction as to race, nationality, sex, creed or social

15. *In re* Opinion of the Justices, 303 Mass. 631, 645, 22 N.E.2d 49, 59 (1939).

16. U. N. CHARTER, 59 Stat. 1035 *et seq.* (1945); CHARTER OF ORGANIZATION OF AMERICAN STATES (1948); UNIVERSAL DECLARATION OF HUMAN RIGHTS Art. 2, 23 (1945).

17. PAN AMERICAN UNION, BULLETIN OF THE INTER AMERICAN COMMISSION OF WOMEN 4 (1948). On the local level statutes have been enacted prohibiting discrimination in rate of pay because of sex. See N.Y. LABOR LAW § 199-a; PA. STAT. ANN. tit. 43, § 375.2 (Supp. 1950).

18. 59 Stat. 1035 *et seq.* (1945).

19. UNIVERSAL DECLARATION OF HUMAN RIGHTS Art. 2, 23 (1945).

20. CHARTER OF THE ORGANIZATION OF AMERICAN STATES c. II, Art. 5 (j) (1948).

condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security."[21]

The *Wilson* case constitutes another milestone in the steady progress towards the firm establishment of a fundamental democratic principle—the right to be free from economic discrimination on class grounds. This case, for the first time, judicially brings arbitrary discrimination on the basis of sex by a union[22] into the sphere of prohibited conduct. Of equal significance is the utilization by the court of the common law theory of prima facie tort which thereby dispenses with any necessity for statutory relief. The decision, while focusing attention on the glaring defect in the New York anti-discrimination statutes in that they fail to mention sex, has at the same time succeeded in carrying out the letter and the spirit of the United Nations Charter and The Universal Declaration of Human Rights which the United States is morally, if not legally, committed to follow.[23]

It is to be hoped that the widespread adoption of the theory of this case will soon condemn occupational exclusion on class grounds to obsolescence, preserving it only as an echo from the past.

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21. *Id.*, c. VII, Art. 29.

22. Prior cases were all concerned with public or state action. Cases cited note 12 *supra*.

23. In Fujii v. State, 217 P. 2d 481 (Cal. 1950) several provisions of the United Nations Charter were used to hold unenforceable a California statute. It thus appears that the Charter exercises a legal as well as a moral compulsion. See Comment, 20 FORD. L. REV. 91 for a discussion of the *Fujii* case.