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Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women

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EQUAL PAY, EQUAL EMPLOYMENT OPPORTUNITY AND EQUAL ENFORCEMENT OF THE LAW FOR WOMEN

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INTRODUCTION

> The right to work, I had assumed was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live.[1]

It is hoped that Justice Douglas, the author of the above quote, used the word "man" generically to include all human beings. In a democratic, capitalistic system there is no more important right than the right of an individual, whether man or woman, to work for a livelihood.[2] Women as well as men should have equal opportunities "to work," "to eat" and "to live." But this is not the case. Women are discriminated against in employment by state governments whose legislatures have passed laws barring them from certain employment. They are also discriminated against by private employers, labor unions and employment agencies in hiring, job placement and promotional opportunities. They are even paid lower wages than men with whom they work side by side on the same job. It was to remedy such rank injustices to American women that two important laws were passed: the Equal Pay Act of 1963[3] and the sex discrimination provision of Title VII of the Civil Rights Act of 1964.[4]

The Equal Pay Act, added as an amendment to the Fair Labor Standards Act, prohibits employers from discriminating on the basis of sex as follows:

> No employer having employees subject to any provision of this

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* Office of the Solicitor, Department of Labor. The views expressed in this article are those of the author and are not presented as the views of the Department of Labor or any other government agency.

1. Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (dissenting opinion).
2. The courts have held that the right to work for a living is a fundamental right which cannot be taken away by governmental action under the fifth and fourteenth amendments. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Smith v. Texas, 233 U.S. 630 (1914); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
3. 29 U.S.C. § 206(d) (1964).
4. 42 U.S.C. §§ 2000e et seq. (1964).

section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than a rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or equality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of the subsection, reduce the wage rate of any employee.[5]

Subsection (2) of that Act prohibits discrimination by labor unions.

No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such employer to discriminate against an employee in violation of paragraph (1) of this subsection.[6]

Title VII of the Civil Rights Act, section 703(a), covers a much wider range of discriminations.

It shall be 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 race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[7]

Sections 703(b) and 703(c) contain similar provisions prohibiting discrimination by employment agencies and labor organizations.

The Supreme Court has frequently stated that laws enacted for the

5. 29 U.S.C. § 206(d)(1) (1964).
6. *Id.* § 206(d)(2).
7. 42 U.S.C. § 2000e-2 (1964).

purpose of assuring fair treatment of employees are entitled to liberal construction because of the underlying humanitarian and remedial purposes. This principle is stated in *Tennessee Coal & Iron R.R. v. Muscoda, Local No. 123*:[8]

> We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.[9]

The Equal Pay Act and Title VII of the Civil Rights Act are thus in the category of statutes which must be construed broadly so as to advance their important purposes. The purpose of this article is to review the legislative background and judicial construction of these two Acts.

The Social and Economic Need for Legislation Prohibiting Sex Discrimination in Employment

There is no logical justification for sex segregation in employment. The earmarking by employers, unions and employment agencies of all well-paid, interesting jobs as "male" jobs and most poorly-paid, tedious jobs as "female" jobs is a cruel means of keeping women in a condition of poverty and degradation. The difference in strength between an "average" woman and an "average" man is not relevant in employment situations. The heavier work is largely done by machinery. In today's economy, able-bodied persons of both sexes can perform practically *all* jobs.[10] Furthermore, the relative strength of persons of both sexes varies so greatly that only a system of job placement based on individual qualifications is non-discriminatory. It is a myth that certain jobs must be reserved for "males only" because of their alleged superiority.

The Department of Labor's studies of approximately 75,000 job situations rated those jobs in terms of required physical strength as "sedentary," "light," "medium," "heavy" and "very heavy."[11] The low-paid job of "charwoman," which is traditionally considered a "female" job, was rated as "heavy"[12] while highly paid "male" jobs such as a

8. 321 U.S. 590 (1944).
9. *Id.* at 597.
10. *See* U.S. Dep't of Labor, Employment Service, Selected Characteristics of Occupations by Worker Traits and Occupational Strength (3d ed. 1968).
11. *Id.* at Supp. II to the Dictionary of Occupational Titles.
12. *Id.* at 89.

"concrete-mixing truck driver"[13] and "tower-excavator operator" are rated as "light."[14] The "male" job of "power shovel operator" is rated as "medium."[15] Very few jobs are rated as "heavy" and a negligible number of them were listed as "very heavy."[16]

The discrimination against women in employment originated in ancient customs and traditions and has no modern day justification. These discriminations have been perpetuated as a result of three factors: 1) the actions of employers who for economic self-interest wish to maintain lower wages for women so as to have a cheap, female labor pool for employment in unpleasant, traditionally low-paid jobs;[17] 2) the actions of male dominated labor unions who wish to keep women ghettoized in "female" jobs so as to reserve the better paid jobs for men;[18] and 3) the actions of unenlightened state legislators and state labor commissions who persist in enforcing anachronistic state laws restricting women in employment.[19]

The separate but unequal treatment of women in employment has had brutal effects. Sex discrimination is a major basis for the national poverty problem. Sixty-one percent of the nation's poor children live in families headed by women.[20] A comparison on the basis of sex and race of Americans living in poverty shows that 53.2 percent of the families are headed by non-white women, 25.2 percent of the families by white women, 19.9 percent of the families by non-white men and 6.3 percent of the families by white men.[21] Obviously, sex discrimination as well as race discrimination is a national blight.[22]

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13. *Id.* at 118.

14. *Id.*

15. *Id.* at 119. This government document makes no classification of jobs on the basis of the sex of the persons usually engaged in them. It is a matter of common knowledge that the persons employed as charwomen would be women and that in our present economy persons employed as concrete-mixing truck drivers, tower excavator operators and power shovel operators are men.

16. *See* U.S. DEP'T OF LABOR, *supra* note 10.

17. *See* notes 140-45, 192-206 *infra* and accompanying text.

18. In some cases employers and the unions representing their employees have brazenly agreed to sex discrimination in their collective bargaining contracts, specifically designating low paid jobs as "female" and the better jobs as "male." *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

19. *See* Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal.), *vacated*, 393 U.S. 83, *rehearing denied*, 393 U.S. 993 (1968), *rev'd & remanded*, 437 F.2d 563 (9th Cir. 1971); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *remanded*, 3 F.E.P. Cas. 130 (9th Cir. 1971).

20. U.S. Dep't of Labor, Fact Sheet on the American Family in Poverty, April, 1968.

21. U.S. Dep't of Commerce, Bureau of the Census: CPR-60, No. 68, Table D 1967.

22. *See* Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237 (1971).

Contrary to general belief, white women are the worst victims of employment discrimination in professional and managerial positions. Recent government statistics report the median earnings of year-round professional and managerial workers in central cities as follows: white men, $9,545; non-white women, $6,209; non-white men, $6,208 and white women, $5,910.[23] The median wage of women in general is only 58 percent of the median wage of men.[24] The differentials mentioned above cannot be justified on the ground that men are better educated than women. White women earned less than men with inferior educations regardless of race as demonstrated by a comparison of median wages of women who have attended college and men who have finished no more than the eighth grade: "White women with some college education, $3082; non-white men with eighth grade education, $3735; white men with eighth grade education, $4881."[25] Women are a long, long way from achieving equality in employment.

THE LEGISLATIVE HISTORY OF THE EQUAL PAY ACT AND THE SEX DISCRIMINATION PROVISION OF TITLE VII

The Equal Pay Act and the sex discrimination provision of Title VII were directed toward the same goal—the elimination of sex discrimination in employment. Title VII was passed about a year after the passage of the Equal Pay Act. Since feminists and their organizations were simultaneously working for passage of these two acts, which had common goals, the wealth of information on sex discrimination brought before Congress as a result of legislative hearings on the Equal Pay Act was influential in convincing Congress of the need for the sex discrimination provision of Title VII.[26] Equal Pay bills had been introduced in every Congress since 1945.[27] The battle, still unwon, for the Equal Rights Amendment to the Constitution had been waged in each Congress for over forty years.[28] There were no legislative hearings on the sex discrimination provision of Title VII, but the exploitation of

23. U.S. Dep't of Commerce, Bureau of Census: CPR-23, No. 27, 1967.

24. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, FACT SHEET ON THE EARNINGS GAP (1970).

25. U.S. Dep't of Commerce, Bureau of Census: CPR-60, No. 60, 1967.

26. Civil Rights Act of 1964 §§ 701-16, 42 U.S.C. §§ 2000e et seq. (1964).

27. *E.g.*, S. 2494, 87th Cong., 1st Sess. (1961); S. 3926, 86th Cong., 2d Sess. (1960); H.R. 394, 85th Cong., 1st Sess. (1957); H.R. 59, 84th Cong., 1st Sess. (1955); S. 176, 83d Cong., 1st Sess. (1953); H.R. 3550, 82d Cong., 1st Sess. (1951); S. 706, 81st Cong., 1st Sess. (1949); S. 1556, 80th Cong., 1st Sess. (1947); S. 1178, 79th Cong., 1st Sess. (1945).

28. *See* Eastwood, *Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U.L. REV. 281 (1971).

women in employment was such a well known fact in American life that no hearings were necessary.

It was easier for women to achieve passage of the Equal Pay Act since it covered a more limited area of discrimination than Title VII. The discrimination is of the most obvious and blatant type—discrimination in wages between persons performing equal work for the same employer in the same establishment. Furthermore, it was less controversial. Male dominated unions were less enthusiastic about the sex provision in Title VII because it permitted access to jobs for women which had previously been monopolized by men. However, the Equal Pay Act was considered innocuous since it had no such effect, and it *increased job security for men* by discouraging the replacement of men with lower paid women.

The legislative hearings and debates on the Equal Pay Act revealed the severe plight of women in employment and motivated Congress to pass both that Act and the sex discrimination provision of Title VII.[29] President John F. Kennedy summarized the conditions which necessitated it as follows:

> [T]he average woman worker earns only 60 percent[30] of the average wage for men . . . . Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force.[31] It is extremely important that adequate provisions be made for reasonable levels of income to them, for the care of the children . . . and for the protection of the family unit . . . . The lower the family income, the higher the probability that the mother must work. Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. I believe they bear the heaviest burden of any group in our nation. Where the mother is the sole support of the family, she often must face the hard choice of either accepting

29. *Cf.* 110 CONG. REC. 2581 (1964).

30. The opposition to equality for women in employment is so great that this percentage continues to decrease. *See* note 24 *supra* and accompanying text.

31. This figure had risen to 29.5 million women in August, 1968, constituting almost 38 percent of the nation's labor force. U.S. Bureau of Labor Statistics, Employment and Earnings, Aug., 1968.

> public assistance or taking a position at a pay rate which averages less than two-thirds of the pay rate for men.[32]

The same points were made by Secretary of Labor, Willard W. Wirtz,[33] and by a number of members of the Senate and the House in the congressional debates.[34]

While women's groups were pressing Congress for the Equal Pay Act, women advocates of equality in employment under the banner of the National Woman's Party[35] were entreating Congress to add protection for women to the fair employment practices bills which were the predecessors of Title VII. On December 16, 1963, when H.R. 7152,[36] the bill which was enacted as the Civil Rights Act, was pending before Congress, the National Council of the National Woman's Party adopted the following resolution which was presented to every member of Congress:

> *Whereas* the Civil Rights Bill [H.R. 7152] deals with the denial of Civil Rights on the ground of "Race, Color, Religion, or National Origin," and on no other grounds,—and does not concern itself in any way with the denial of Civil Rights to the countless women who are suffering from unemployment, from unequal pay, from unequal job opportunities, from unequal educational opportunities, and from many other handicaps and discriminations—solely on the ground of their sex;
>
> . . . .
>
> *Be it Resolved,* that the Congress of the United States be asked to *amend* the Civil Rights Bill [H.R. 7152] so as to make it serve the interests and welfare of *all* American citizens without distinction as to sex.[37]

The members of the National Woman's Party strongly believed that not only were women entitled to protection from discrimination in wage rates between them and men performing equal work in the same establishment but also that they needed further protection from the

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32. Remarks by the President upon Signing the Equal Pay Act, 21 CONG. Q. 978 (1963).

33. 109 CONG. REC. 2888-89 (1963).

34. *Id.* at 2286 (1963) (Senator McNamara); *id.* at 8916 (Senator Hart); *id.* at 9199 (Representative Green); *id.* at 9202 (Representative Kelly); *id.* 9211-12 (Representative Ryan); *id.* at 9199-200 (Representative Dwyer) and *id.* at 9212 (Representative Donahue). *See also id.* at 8914.

35. The author has been a member of the National Council of the National Woman's Party since 1960.

36. 88th Cong., 1st Sess. (1963).

37. National Woman's Party, Bulletin of Feb. 10, 1964.

broader discriminations practiced against them in hiring, job assignments and promotions. Under the leadership of Miss Alice Paul,[38] founder and honorary chairman, and the late Mrs. Emma Guffey Miller, former president, the National Woman's Party launched a strenuous effort to educate Congress concerning the need for including women in Title VII. The Party furnished the members of Congress with sociological information and statistics from government publications which showed conclusively that 1) sex discrimination against both white and non-white women in employment was comparable to race discrimination,[39] 2) women in positions that required education and training were paid less for their services than men performing routine jobs requiring lesser skills[40] and 3) the median wage for men in some occupations was over twice that for women in the same occupations since women were assigned to dead-end jobs and were not considered for promotions.[41]

As a result of the campaign to convince Congress of its need, the amendment adding discrimination on the basis of sex to the other discriminations prohibited by Title VII of the Civil Rights Act was introduced, debated and adopted in the House of Representatives by a vote of 168 to 133 on February 8, 1964.[42] Protection against discrimination in employment based on sex was retained in the Senate version of the bill which passed both legislative bodies and was approved by the President on July 1, 1964.[43]

In the debates in the House of Representatives, the amendment adding protection against sex discrimination in employment received strong support from the women in Congress who undoubtedly were most influential in achieving its passage.[44] Representative Martha Griffiths pointed out that it had long been known that "white women and Negroes occupied relatively the same position in American society."[45] She also made the important point that the sex discrimination in Title VII would supersede discriminatory state restrictive laws which have long been used as an excuse for discrimination against women by both employers and labor unions.[46]

38. Miss Alice Paul and the organizers of the National Woman's Party led the campaign for women's suffrage which culminated in the passage of the nineteenth amendment. The National Woman's Party has also led the still unwon struggle for passage of the Equal Rights Amendment.

39. National Woman's Party Bulletin of Feb. 10, 1964.

40. *Id.*

41. *Id.*

42. 110 CONG. REC. 2584 (1964).

43. 1964 U.S. CODE CONG. & AD. NEWS 2355.

44. *See* 110 CONG. REC. 2577-84 (1964).

45. *Id.* at 2578.

46. *Id.* at 2580.

Representative Katharine St. George, another one of the amendment's chief supporters, pointed out that women want equality, not the phony so-called "protection" of discriminatory state laws:

> Protective legislation prevents, as my colleague from the State of Michigan just pointed out—prevents women from going into the higher salary brackets. Yes, it certainly does.
>
> Women are protected—they cannot run an elevator late at night and that is when the pay is higher.
>
> They cannot serve in restaurants and cabarets late at night —when the tips are higher—and the load, if you please, is lighter.
>
> So it is not exactly helping them—oh, no, you have taken beautiful care of women.
>
> But what about the offices, gentlemen, that are cleaned every morning about 2 or 3 o'clock in the city of New York and the offices that are cleaned quite early here in Washington, D. C.? Does anybody worry about those women? I have never heard of anybody worrying about the women who do that work.
>
> So you see the thing is completely unfair. . . . We do not want special privileges. We do not need special privilege. . . . I believe we can hold our own. We are entitled to this little crumb of equality.[47]

Representative Catherine May pointed out that for years women had attempted to get legislative action to prevent sex discrimination and that it was urgent for the amendment prohibiting sex discrimination in employment to be passed.

> We have been trying since 1923 to get enacted in the Congress an equal rights for women amendment to the Constitution.
>
> Since 1923 more and more Members have offered this amendment, but we have never gotten the bill out of the Committee on the Judiciary. The League of Women Voters, some Federated Women's Clubs, the National Federation of Business and Professional Women have joined the National Woman's Party in consistently asking that whenever laws or Executive orders exist which forbid discrimination on account of race, color, religion, or national origin that these same laws and orders should also forbid discrimination on account of sex.

47. *Id.* at 2580-81.

> Recently in our congressional mail we received a letter from Emma Guffey Miller, national chairman of the National Woman's Party, which expresses alarm over the complete absence in this bill of any reference to civil rights for women. . . .
>
> I share the views of my collegue from Oregon [Mrs. Green] in her desire to eliminate the proven discriminations which colored women have suffered, but at the same time I feel that it is only just and fair to give all women protection against discrimination.
>
> Mr. Chairman, this is to me the crux of the question before us. As I say, I am supporting the amendment on that basis and on behalf of the various women's organizations in this country that have for many years been asking for action from the Congress in this field, and who see this as the one possibility we may have of getting effective action.[48]

A number of the men in the House of Representatives made short statements urging passage of the sex discrimination provision.[49] However, the thought of equality for women in employment caused one male member, who was vehemently against it, to hysterically exclaim, "What would become of the crimes of rape and statutory rape? Would the Mann Act be invalidated?"[50] Fortunately the eloquent pleas for equality made by the women members of the House finally prevailed. The sex discrimination provision of Title VII became law, and the nation became committed to a policy of condemning discriminations against women in employment.[51]

In spite of the obvious humanitarian intent of the sex discrimination provision in Title VII and the urgent need for it, some adversaries of equality were enraged by its passage. They attempted to discredit the women's movement by disseminating the rumor that the purpose of the sex discrimination provision was to sabotage the Civil Rights Act and to damage the cause of racial minorities. There was no logical basis for the charge since the sex discrimination provision protects black women as well as white women. Black women who suffer the double discrimination based on their sex and race especially needed this addi-

48. *Id.* at 2582.

49. *See id.* at 2583-84.

50. *Id.* at 2577 (remarks of Representative Celler).

51. The thinly veiled strategy was to discredit the sex discrimination provision and hinder its enforcement by creating the false impression that persons who favor equality for women are advocates of racial discrimination. The sex discrimination provision was greatly needed by black women who suffer double discrimination based on sex and race. The accusation of opponents of equality for women was thus totally false.

tional protection. The antifeminists based their charge against the proponents of the sex discrimination provision on the ground that it had been introduced in the House by Representative Howard Smith who was opposed to civil rights legislation.[52] The charge, in effect, was that Mr. Smith, with political motivation, almost single-handedly achieved passage of the sex discrimination provision. As palpably untrue as this accusation was, a number of law review articles purported to give credence to it.[53]

Representative Smith repudiated the accusation against him with the following explanation:

> The statement that the amendment was "slipped in" the bill by me in an attempt to delay voting is utterly untrue, as the record shows.
>
> The amendment was a popular one. Particularly active in its adoption were the women Members of the House. It was debated fully and adopted in the House in open debate, and subsequently approved in the Senate.[54]

The record of proceedings before the Committee on Rules of the House of Representatives held during the week of January 9 through 16, 1964, shows that Representative Smith did not "slip the bill in." His intention to introduce the bill was announced weeks before its introduction when the following colloquy transpired between him, as Chairman of the Committee, and Representative Celler, the floor manager of the bill:

> *The Chairman.* I have just had a letter this morning which I was going to bring to your attention later, from the National Woman's Party. They want to know why you did not include sex in the bill. Why did you not?
>
> *Mr. Celler.* This is a civil rights bill.
>
> *The Chairman.* Don't women have civil rights?
>
> *Mr. Celler.* They have lots of them They are supermen.[55]

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52. Representative Smith voted against the entire Civil Rights Act. *Id.* at 2804.

53. *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 79 (1964); Kanowitz, *Sex Based Discrimination in American Law*, 20 HASTINGS L.J. 306, 311 (1968); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879 (1967); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 779 (1965).

54. Letter from Representative Howard Smith to Robert Stevens Miller, Jr., Jan. 4, 1966, cited in Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 883 n.34 (1967).

55. *Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 125 (1964).

Representative Smith later told Representative Celler, "I think I will offer an amendment. The National Woman's Party were serious about it."[56] The National Woman's Party's plea that protection against sex discrimination should be added to the bill had not been directed to Representative Smith alone but to all the members of Congress. In fact, Representative Bolton stated in the debates that she too had intended to introduce a sex discrimination amendment.[57] Obviously, the accusation of misogynists that the passage of the sex discrimination provision was Representative Smith's joke contrived to hurt racial minorities is utterly untrue. It was an insult both to the United States Congress and to feminists who had the courage to fight for this much needed legislation.

It is clear from the legislative history of the amendment adding sex to the other prohibited forms of discrimination that Congress recognized that women, as a class, were subjected to invidious employment discriminations comparable to those inflicted upon Negroes. There was also a clear intent as shown in the House debate, that federal law should supersede state restrictive laws which have been used as alibis for sex discrimination.[58] The federal courts in Title VII cases have properly recognized that sex discrimination and race discrimination in employment are equally serious and that women are entitled to the statute's protections against discrimination in the same manner as are blacks. For example, the Third Circuit in *Rosen v. Public Service Electric & Gas Co.*[59] stated: "We do not make the distinction . . . that discrimination on account of sex is any less reprehensible or any less protected than discrimination because of race." Similarly, in *Local 186, International Pulp, Sulfite & Paper Mill Workers v. Minnesota Mining & Manufacturing Co.*,[60] the court declared that it

> does not and will not draw any legal distinctions between the seriousness and gravamen of acts and policies of sexual discrimination alleged herein and the more frequently litigated acts of racial discrimination.[61]
>
> . . . [T]his court cannot conclude that under the allegations herein presented, sexual discrimination differs in any significant way from racial discrimination as a form of class discrimination.[62]

56. *Id.*
57. 110 CONG. REC. 2578 (1964).
58. *Id.* at 2580.
59. 409 F.2d 775 (3d Cir. 1969).
60. 304 F. Supp. 1284 (N.D. Ind. 1969).
61. *Id.* at 1287.
62. *Id.* at 1289.

It would appear, therefore, that the precedents established in race discrimination cases are equally applicable to cases of sex discrimination brought under Title VII of the Civil Rights Act.

JUDICIAL ENFORCEMENT OF THE EQUAL PAY ACT

Scope of the Equal Pay Act

The Equal Pay Act applies to every employer having employees subject to a minimum wage under the Fair Labor Standards Act.[63] It prohibits such employers from discriminating on the basis of sex between employees working in the same establishment by paying wages to the employees of one sex at a lesser rate than employees of the other when such employees are engaged in "equal work on jobs the performance of which requires equal skill, effort, and responsibility" and such work is "performed under similar working conditions."[64] It prohibits an employer from reducing the wage rate of any employee in order to comply with the provisions of the Act.[65] Finally, it prohibits labor organizations from causing or attempting to cause an employer to discriminate against an employee in violation of the equal pay provisions.[66]

Only in a limited fact situation does the Equal Pay Act offer a remedy. The discriminations against women resulting from sex discrimination in hiring, promotion and job assignment and the exclusion of women from certain occupations, while not within the coverage of the Equal Pay Act, may in many instances be within the coverage of Title VII of the Civil Rights Act.[67] However, sex discrimination in employment is so deeply engrained that the courts have handled many equal pay cases dealing with employees in a variety of occupations: selector packers of a glass company;[68] bank tellers;[69] machine operators of a cup manufacturing firm;[70] laboratory analysts of a mining and refining company;[71]

63. 29 U.S.C. §§ 201 et seq. (1964).
64. 29 U.S.C. § 206(d)(1) (1964).
65. *Id.*
66. *Id.* § 206(d)(2) (1964).
67. 42 U.S.C. §§ 2000e et seq. (1964).
68. Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).
69. Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969), *dismissed sub nom.* Wirtz v. First Victoria Nat'l Bank 63 CCH Lab. Cas. ¶ 32,378 (S.D. Tex. 1970); Shultz v. First Nat'l Bank, 19 Wage & Hour Cas. 300 (E.D. Tex. 1969).
70. Shultz v. American Can Co.—Dixie Prod., 424 F.2d 356 (8th Cir. 1970), *relief granted sub nom.* Hodgson v. American Can Co., 314 F. Supp. 1192 (W.D. Ark. 1970), *aff'd on rehearing,* 317 F. Supp. 153 (W.D. Ark. 1970), *rev'd in part,* 19 Wage & Hour Cas. 1000 (8th Cir. 1971).
71. Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966).

bun packers of a bakery;[72] laboratory technicians of a brewing company;[73] inspectors of a glass manufacturing company;[74] extrusion press operators of a ceramics company;[75] punch press operators, paint line tenders, sub-assemblers, final assemblers, inspectors or checkers and packers of a toy gun manufacturer;[76] and machine operators and assemblers of an electrical equipment firm.[77] In many instances the suit is brought by the Secretary of Labor on behalf of women employees.

Equal Work

The plaintiff in an equal pay case has the burden of proving that he or she has performed work equal to that performed by employees of the other sex involving equal skill, effort and responsibility.[78] The plaintiff necessarily has to produce evidence which permits an accurate comparison of plaintiff's duties and those of employees of the other sex.

The courts have set forth some criteria for determining whether work is "equal" within the meaning of the Act. In *Shultz v. American Can Co. —Dixie Products*[79] and *Shultz v. Wheaton Glass Co.*,[80] the courts emphasized that in equal pay cases "equal" does not mean "identical." As the Third Circuit aptly stated the principle in *Wheaton Glass,*

> Congress in prescribing "equal" work did not require that the jobs be identical, but only that they must be *substantially equal.* Any other interpretation would destroy the remedial purpose of the Act.
>
> The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.[81]

Since "equal" means "substantially equal," employers cannot avoid the consequence of the Act by gerrymandering a few duties from its women

72. Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049 (E.D. Ky. 1967).
73. Murphy v. Miller Brewing Co., 307 F. Supp. 829 (E.D. Wis. 1969).
74. Shultz v. Corning Glass Works, 319 F. Supp. 1161 (W.D.N.Y. 1970).
75. Shultz v. Saxonburg Ceramics, Inc., 314 F. Supp. 1139 (W.D. Pa. 1970).
76. Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970).
77. Hodgson v. Square D Co., 19 Wage & Hour Cas. 753 (E.D. Ky. 1970).
78. *See* Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (D. Mass. 1967), a case in which the court concluded that the plaintiff's burden was not met.
79. 424 F.2d 356, 360 (8th Cir. 1970).
80. 421 F.2d 259, 265 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).
81. *Id.* (emphasis added).

employees to its male employees. This principle has been followed in a number of other court decisions.[82]

In deciding that the men and women selector packers in *Wheaton Glass* performed equal work, the Third Circuit refused to accept the defendant's defense that the work of the men and women was unequal because of extra duties performed by the men. The defendant company had claimed that a differential of 21½¢ per hour between the women selector packers and the men selector packers was justified because some of the men, as an insubstantial part of their duties, performed the work of lower paid male employees designated as "snap-up boys." The snap-up boys, the lowest paid males, were paid 2¢ an hour more than the women selector packers but 19½¢ less per hour than the men selector packers. Commenting on the "incongruity" of the company's claim that the men selector packers were more "flexible" and more valuable to their employer because of the occasional performance of the work of the snap-up boys, the court determined that

> [t]he motive . . . clearly appears to have been to keep women in a subordinate role rather than to confer flexibility on the company and to emphasize this subordination by both the 10% differential between male and female selector-packers and the two cents difference between snap-up boys and female selector-packers.[83]

A somewhat similar situation was presented in *Shultz v. American Can Co.—Dixie Products,*[84] a case involving machine operators manufacturing paper cups. It was claimed by the company that the differential pay between men and women operators was because of the extra duties of handling and loading paper performed by the men. The court rejected this argument, pointing out that the paper handling duties were performed on a regular basis by unskilled workers who were paid seventeen cents per hour less than the women machine operators.[85] The courts have quite properly considered invalid the specious defenses of employers based on the theory that the occasional performance by men employees of duties involving lesser skills than those primarily performed by them

82. Hodgson v. Square D Co., 19 Wage & Hour Cas. 753 (E.D. Ky. 1970); Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970); Shultz v. Saxonburg Ceramics, Inc., 314 F. Supp. 1139 (W.D. Pa. 1970); Shultz v. First Nat'l Bank, 19 Wage & Hour Cas. 300 (E.D. Tex. 1969); Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049 (E.D. Ky. 1967); Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966).

83. 421 F.2d at 264.

84. 424 F.2d 356 (8th Cir. 1970).

85. *Id.* at 361.

and their women counterparts will justify a pay differential in favor of such men employees.[86]

The courts have also held in equal pay cases that a violation occurs when a pay differential exists between men and women performng equal work, and the violation continues even though the members of the sex receiving the higher rates may be transferred to other jobs. To illustrate, *Shultz v. Saxonburg Ceramics, Inc.*[87] determined that women employees are entitled to receive the "male" rate of pay when they replace men to perform work previously performed by men. Similarly, in *Wirtz v. Koller Craft Plastic Products, Inc.*,[88] *Wirtz v. Versail Manufacturing, Inc.*,[89] and *Wirtz v. Midwest Manufacturing Corp.*[90] the transfer of men employees who had been receiving higher rates of pay than their women counterparts was considered by the courts to be no excuse for continuing to pay the women employees at the lower rate of pay. Furthermore, in *Murphy v. Miller Brewing Co.*[91] the court held that after women employees replacing men became entitled to the higher rate, newly hired men performing equal work with such women were likewise entitled to the higher rate, since any other conclusion would permit the reduction of wage rates contrary to the provisions of the Act.

Equal Skill, Effort and Responsibility

In equal pay cases the plaintiff must prove that he or she performs work which involves skill, effort and responsibility equal to that performed by counterparts of the other sex who receive a higher rate of pay. The defense most frequently made is that the work performed by men and women employees does not involve equal effort. Often it is claimed that minor weight lifting duties assigned to and performed by men employees while their women counterparts continue their often more difficult and exacting regular duties are the basis for differentials in favor of the men employees. The weight lifting, however, is frequently accomplished by machinery and does not require as much effort as the regular job. In many instances these alleged extra duties simply afford the men employees a break in the tedium of their regular assigned duties which often involve repetitive performance of exacting or detailed work—a break which their women counterparts do not get since they are required to stay at their posts of duty. In many instances where it is

86. *See* notes 92-117 *infra* and accompanying text.
87. 314 F. Supp. 1139 (W.D. Pa. 1970).
88. 296 F. Supp. 1195 (E.D. Mo. 1968).
89. 18 Wage & Hour Cas. 527 (N.D. Ind. 1968).
90. 18 Wage & Hour Cas. 556 (S.D. Ill. 1968).
91. 307 F. Supp. 829 (E.D. Wis. 1969).

claimed that the men employees perform weight lifting duties not assigned to women, such duties are performed by some, but not all, of the men even though all of the men employees are paid the higher rate of pay. In such cases the courts have found no difficulty in holding that minor differences in weight lifting responsibilities were not a permissible defense to equal pay violations.[92]

In *Shultz v. American Can Co.—Dixie Products,*[93] a case in which the court concluded that the work of men and women employees was equal, the Eighth Circuit dealt with the type of defenses typically raised in equal pay cases. The defendant claimed that the difference between male and female rates of pay was made because of the extra duties of handling and loading supplies performed by the male employees. The court rejected this claim on the ground that even if the extra weight lifting duties were "regularly" performed by the men employees, such duties did not render their work and that of their women counterparts unequal under equal pay standards. The court found that such weight lifting duties were "minor and incidental" and "most of the physical and mental effort extended in the performance of the job," as a whole, related to the primary duties which both men and women employees performed in common.[94]

A recent district court decision, *Hodgson v. Daisy Manufacturing Co.,*[95] is in accord with *American Can* in its evaluation of what constitutes "equal effort." Summing up the fact situation and its conclusion that the jobs of men and women packers were equal within the meaning of the Act, the court stated that

> [i]t is also clear that the males exert greater physical effort than the females when lifting and turning master cartons weighing 65 pounds, which constitute a majority of the master cartons involved. The females, however, in performing a variety of operations requiring comparatively greater mental alertness and concentration, exert greater mental effort and their jobs require greater job responsibility. The court simply cannot say that the greater physical effort expended by the males in a

92. *See* Shultz v. American Can Co.—Dixie Prod., 424 F.2d 356 (8th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970); Shultz v. Saxonburg Ceramics, Inc., 314 F. Supp. 1139 (W.D. Pa. 1970); Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970); Hodgson v. Square D Co., 19 Wage & Hour Cas. 753 (E.D. Ky. 1970); Shultz v. Hayes Indus., Inc., 19 Wage & Hour Cas. 447 (N.D. Ohio 1970); Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257 (E.D. Wis. 1970).

93. 424 F.2d 356 (8th Cir. 1970).

94. *Id.* at 360.

95. 317 F. Supp. 538 (W.D. Ark. 1970).

> basic and uncomplicated operation results in a substantial overall job inequality justifying a significant wage differential.[96]

Thus, in determining whether male and female jobs involve equal effort, effort does not mean the exercise of sheer brawn alone. It includes mental effort and the alertness and concentration that the job basically requires.

Another defense raised by the defendant in *American Can* was that the pay differential between men and women was justifiable because the men employees worked the night shift and were required to perform extra duties such as handling and loading rolls of paper. In rejecting this argument the court pointed out that the differential paid the male employees was in addition to a "shift premium" paid to all employees on the second and night shifts.[97] The differential over and above the amount of the regular shift premium, therefore, could not be attributed to the fact that the men employees worked on the night shift. Furthermore, the court noted that the men night shift operators received the higher male rate even though some of them were not required to perform the alleged extra duties for any significant period.[98] The court noted that the men operators received the higher rate of pay whether they spent "a few minutes or thirty-three minutes per shift in the handling and loading function, whether the rolls of paper weigh fifty or fifteen hundred pounds, whether the rolls are loaded manually or mechanically . . . or whether they perform the job alone or with . . . assistance" of other night shift employees.[99] Since the alleged extra night shift duties were not considered significant enought to justify a pay differential between the men who performed them and the men who did not, it was the court's conclusion that these extra duties were not significant enough to justify a differential between the men operators who performed them and the women operators who did not.[100]

The claim that the male employees were required to exert extra effort was also raised in *Hodgson v. Square D Co.*[101] This claim was based on the fact that the men machine operators and assemblers worked on larger parts than their female counterparts. The court pointed out that there was no evidence that the size of the part made the duties of the employee more difficult.[102] A comparison of the work performed by

96. *Id.* at 551.
97. 424 F.2d at 361.
98. *Id.* at 360.
99. *Id.* at 361.
100. *Id.*
101. 19 Wage & Hour Cas. 753 (E.D. Ky. 1970).
102. *Id.* at 754.

men and women based on actual job content showed that the effort involved was substantially equal. Therefore, the court concluded that "[t]he mere fact that jobs of the assembly workers and machine operators may be divided into arbitrary categories does not mean they require unequal degrees of skill, work effort and responsibility."[103]

The fact that employees of one sex may on occasions and at identifiable times be assigned extra duties which would justify a differential between them and employees of the other sex does not justify paying a higher wage rate to the employees performing the extra duties since their entire job cycle includes the periods in which they perform equal work with their counterparts of the other sex.[104] To illustrate, in *Wirtz v. Basic, Inc.*,[105] a male laboratory analyst was employed in a position in which he normally performed equal work with women laboratory analysts. Every alternate two-week period he worked a swing shift for which an additional 5¢ per hour was paid. His employer, however, paid him a higher rate per hour than his women counterparts for *all* hours worked. In concluding that this was a violation of the Equal Pay Act, the court said:

> There could be no effective enforcement of the equal pay provisions if differentials between sexes were permitted for all hours worked because of the substantially different working conditions and responsibilities entailed in a specific part of the work performed at identifiable times and places. As "Shifts Analyst," [the male employee] is entitled to a different rate of pay while he is working as a shift analyst, but not while working on the day shift.[106]

The Equal Pay Act, of course, had no retroactive effects. However, the courts have held that it is relevant in equal pay cases for the plaintiff to introduce evidence of the historical background of an employer's policy of making a sex differential in wage rates. In *American Can,* the court pointed out that a differential between the wage rates of men and women existing before the effective date of the Equal Pay Act was indication of equal pay violations when such differential continued to exist after the Act became operative.[107] Similar conclusions were

103. *Id.*
104. Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049 (E.D. Ky. 1967); Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966).
105. 256 F. Supp. 786 (D. Nev. 1966).
106. *Id.* at 791.
107. 424 F.2d at 361.

reached in the cases of *Shultz v. Wheaton Glass Co.*,[108] *Shultz v. Corning Glass Works*,[109] *Shultz v. Saxonburg Ceramics Co.*[110] and *Murphy v. Miller Brewing Co.*[111] In each of these cases, prior to the effective date of the Equal Pay Act, the employers had dual pay schedules for men and women employees. After the Act became effective an attempt was made to explain the "male" and "female" jobs wage distinctions,[112] but no significant changes were made in job content as to the women employees and the differential in pay between men and women was not eliminated. The courts regarded evidence of practices of discrimination that were traditional and historical as relevant in determining whether equal pay violations existed. Seemingly neutral practices which preserve and effectively continue past sex discrimination are violative of the Equal Pay Act.

The courts have also held in equal pay cases that a violation occurs when a pay differential exists between men and women performing equal work even though they may not be employed simultaneously. In a number of cases it has been held that women employees are entitled to receive the "male" rate of pay when they replace men and function in the position previously held by the men and that the reassignment or transfer of the men employees did not affect the right of the women to be raised to a higher rate.[113] Consistent with the theory that after an equal pay violation has occurred the higher rate paid to the favored sex becomes the only legal rate, the courts declared in *Shultz v. American Can Co. —Dixie Products*,[114] *Shultz v. Corning Glass Works*,[115] and *Hodgson v. Square D Co.*[116] that the opening up of job classifications previously considered as "male" to women at the higher rate or the placing of men in classifications previously regarded as "female" at the lower rate did

108. 421 F.2d 259 (3d Cir. 1970).
109. 319 F. Supp. 1161 (W.D.N.Y. 1970).
110. 314 F. Supp. 1139 (W.D. Pa. 1970).
111. 307 F. Supp. 829 (E.D. Wis. 1969).
112. *Hodgson v. Daisy Mfg. Co.*, 317 F. Supp. 538 (W.D. Ark. 1970), is an example of how employers have sometimes changed their nomenclature without changing their system of wage differentials. In that case the employer had previously used "male" and "female" designations to describe the work of men and women employees. After equal pay violations were charged the employer changed the terminology. "Male" was changed to "heavy," "female" was changed to "light." The court held that the jobs of men and women were "equal" under equal pay standards and considered the terminology irrelevant.
113. Shultz v. Saxonburg Ceramic, Inc., 314 F. Supp. 1139 (W.D. Pa. 1970); Wirtz v. Koller Craft Plastic Prod., Inc., 296 F. Supp. 1195 (E.D. Mo. 1968); Wirtz v. Versail Mfg. Co., 18 Wage & Hour Cas. 527 (N.D. Ind. 1968); Wirtz v. Midwest Mfg. Co., 18 Wage & Hour Cas. 556 (S.D. Ill. 1968).
114. 424 F.2d 356 (8th Cir. 1970).
115. 319 F. Supp. 1161 (W.D.N.Y. 1970).
116. 19 Wage & Hour Cas. 753 (E.D. Ky. 1970).

not cure the violations or relieve the employer from the obligation to continue to pay the higher rate to the lower paid employees in the classification in which the violation occurred.[117]

Viewed from a logical standpoint, the courts have reached the correct conclusions. The transfer of men employees to different positions does not eliminate the discrimination which is being committed against the women employees. If the Act were construed to permit the lowering of women's wages because the men with whom they previously performed equal work had been transferred to other positions, its remedial purposes could easily be defeated by any employer who exercised a little ingenuity in reassigning his men employees and reducing the wage rates of his women employees. The cases holding that the wage rates of women employees may not be reduced after transfer of their male counterparts are consistent with the rules of statutory construction which prohibit giving a statute an interpretation which would tend to nullify it and defeat its intent.[118]

Potential Affirmative Defenses to Equal Pay Suits

The Equal Pay Act contains a clause stating that an employer will not be considered to have violated the Equal Pay Act if the pay differential between men and women employees is "pursuant to (i) a seniority system; (ii) a merit system; (iii)a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex . . . ."[119] The last clause, number (iv), is redundant because it adds nothing to the sense of the statute. Since the Equal Pay Act merely prohibits discrimination "on the basis of sex," obviously it does not prohibit discrimination "on any other factor other than sex." The other factors mentioned, *i.e.,* a seniority system, a merit system and a system which measures earnings on the basis of quantity and quality of production, are sometimes broadly referred to as "exceptions" although actually they are merely potential affiirmative defenses which a defendant in all cases has the burden of proving.

The enumeration of these potential affirmative defenses in the statute should not be interpreted to mean that an employer may "discriminate

117. Murphy v. Miller Brewing Co., 307 F. Supp. 829 (E.D. Wis. 1969); Koller Craft Plastic Prod., Inc., 296 F. Supp. 1195 (E.D. Mo. 1968); Wirtz v. Versail Mfg. Co., 18 Wage & Hour Cas. 527 (N.D. Ind. 1968); Wirtz v. Midwest Mfg. Co., 18 Wage & Hour Cas. 556 (S.D. Ill. 1968).

118. Statutes are never given "absurd and futile" interpretations. The courts interpret remedial acts so as to achieve their basic policy and purposes. *See* Roland Elec. Co. v. Walling, 326 U.S. 657 (1946); United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940).

119. 29 U.S.C. § 206(d) (1964).

. . . on the basis of sex" if he merely proves the existence of "a seniority system, a merit system or a system which measures earnings by quantity and quality of production." This could be the case only if the enumerated factors were "exceptions" from the statute's prohibitions. They are not "exceptions" since they are designed only to clarify, not to describe, situations in which discrimination is allowed. These factors were enumerated in the statute simply to make it clear that a defendant may prove as a defense that the differential in wages was not in fact based on sex but was based on a non-discriminatory seniority system, a non-discriminatory merit system or a non-discriminatory system which measures earnings by quantity or quality of production. A sex-based system or a system in which sex plays any part *cannot* be considered as a proper defense under the Equal Pay Act. Otherwise, employers could escape the impact of the act by establishing a "seniority system" providing different seniority lines for men and women, a "merit system" that applied differently to men and women, or a system measuring earnings by quantity or quality of production which set different standards for men and women.

Unlike section 703(h) of the Civil Rights Act,[120] the Equal Pay Act does not say that these systems must be "bona fide" or that they must not be the result "of an intention to discriminate . . . ." However, it is implicit in the Act, especially with its express intent to eliminate sex discrimination, that the seniority system, merit system or system rewarding quantity and quality of production must be bona fide and not a device for evading the Act. Any other conclusion would violate the cardinal rules of statutory construction—that a remedial statute must be liberally construed[121] and given a meaning which effectuates its purposes.[122] Accordingly, whether a defendant pleads one of the three systems mentioned as a defense or whether he claims the differential is based on some "factor other than sex," his defense will fail if sex is any part of the basis for the differential between men and women.

In line with these principles, the Fifth Circuit in *Shultz v. First Victoria National Bank*[123] rejected the defendant's claim that the pay differential between men and women tellers was based on a trainee program rather than sex because the evidence showed that the trainee program was itself discriminatory against women.[124] Women had been

120. 42 U.S.C. § 2000e-2(h) (1964).
121. *See* note 8 *supra* and accompanying text.
122. *See* note 117 *supra* and accompanying text.
123. 420 F.2d 648 (5th Cir. 1969).
124. *Id.* at 655-56.

arbitrarily excluded from being "trainees." Furthermore, the manner in which the bank dealt with the male "trainees" indicated that there was no bona fide trainee program. The Fifth Circuit therefore concluded that

> it is apparent that the training programs that the District Court found to exist and be the motivation for the discrimination were not specific and their metes and bounds were at best poorly surveyed. As structured and operated it was little more than a post-event justification for disparate pay to men and women from the commencement of employment up through advancement.[125]

Similarly the Eighth Circuit in *Shultz v. American Can Co.—Dixie Products*[126] concluded that the differential in pay between men and women machine operators could not be explained on the ground that the men were participating in a "training program" for maintenance work.[127] The court reasoned:

> The Company has no bona fide 'training program,' . . . to train night shift operators, whether male or female for maintenance responsibility. All operators have an equal opportunity to gain an understanding of maintenance problems by operating their machines. Furthermore, men hired as operators are not required to demonstrate greater mechanical ability than women hired for the same positions.[128]

Allegations by employers that women are absent more than men or that it costs more to employ women than to employ men cannot be a proper basis for defense under the Equal Pay Act. Making generalizations that members of one sex are inferior and using such an assumption as a justification for treating the individual members of such sex differently *is* sex discrimination.[129] This issue arose in *Wirtz v. Midwest Manufacturing Corp.*,[130] in which the company tried to defend on the ground that it cost more to employ women than it did to employ men. The court repudiated this agrument holding that a "wage differential

125. *Id.* at 655.
126. 424 F.2d 356 (8th Cir. 1970).
127. *Id.* at 362.
128. *Id.*
129. *See* Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61-62 (5th Cir.), *cert. denied,* 379 U.S. 933 (1964); Orleans Parish School Bd. v. Bush, 242 F.2d 156, 163 (5th Cir. 1957), *cert. denied,* 356 U.S. 969 (1958), wherein the courts held that black children could not be deprived of their right to attend integrated schools on the assumed ground that as a group they are academically inferior to white children.
130. 18 Wage & Hour Cas. 556 (S.D. Ill. 1968).

based on such claimed differences does not qualify as a differential based on any 'other factor other than sex.' "[131]

Of course the defendant would always have the burden of proving that a wage differential shown to exist between his men and women employees was not based on sex but on a bona fide seniority system, merit system, system that establishes wages on the basis of quantity or quality of production or some other ground in which sex played no part. The facts which would tend to establish such defenses would ordinarily be known only to the defendant. "Plaintiff is not required to establish a negative factor especially when that factor is within the peculiar knowledge of defendant."[132]

If the defendant fails to plead such a defense in his answer or by timely motion, he is regarded as having waived the right to make such defense under rule 12(h) of the Federal Rules of Civil Procedure.[133] He therefore is not entitled to raise a defense on appeal or on remand that has been waived. Economically powerful employers and their attorneys are sometimes adroit about conceiving other defenses when their first defense fails and thereby exhausting impecunious plaintiffs and their counsel with interminable litigation. Accordingly, rule 12(h) is a good rule for plaintiffs' attorneys to remember in cases under either the Equal Pay Act or Title VII.

Enforcement Provisions of the Equal Pay Act

While the remedy afforded for sex discrimination by the Equal Pay Act applies to a narrower area than that protected by Title VII of the Civil Rights Act, litigants under the Equal Pay Act have the advantage of the strong enforcement provisions of the Fair Labor Standards Act.[134] In case of equal pay violations, the employee or employees affected may sue for the amount of unpaid wages, an additional equal amount as liquidated damages and a reasonable attorney's fee under section 16(b) of the Fair Labor Standards Act.[135] Under section 16(c) of the Fair Labor Standards Act, on written request by an employee, the Secretary of Labor is authorized to bring suit for back wages on the employee's behalf if the case involves an issue of law which has been

131. *Id.* at 561.

132. United States v. Denver & R.G.R.R., 191 U.S. 84, 91-92 (1903).

133. Rule 12(h) allows "an objection of failure to state a legal defense to a claim" to be made in pleading motion for judgment on the pleadings, or at the trial on the merits. FED. R. CIV. P. 12(h)(2).

134. *See* 29 U.S.C. §§ 201 et seq. (1964).

135. 29 U.S.C. § 216(b) (1964).

finally settled by the courts.[136] The Secretary may also bring suit under section 17 for an injunction against the offending employer, coupled with a request for an order restraining withholding of back wages due employees as a result of equal pay violations.[137]

The Equal Pay Act and Title VII of the Civil Rights Act offer overlapping remedies in some instances. However, it is to the advantage of a litigant who has suffered discriminations prohibited by the Equal Pay Act to take advantage of that Act's stronger enforcement provisions. Sex discrimination in employment between men and women employees performing "equal work" is widely prevalent.[138] The Equal Pay Act has the potential to significantly improve the employment situation of women.

Judicial Enforcement of the Sex Discrimination Prohibition of Title VII of the Civil Rights Act[139]

Scope of the Sex Discrimination of Title VII

The sex discrimination provision of Title VII gives much broader protection than the Equal Pay Act. It protects women from discrimination in hiring, job assignment and promotions as well as discrimination between men and women performing substantially equal work. If the sex discrimination provision of Title VII had not been passed, employers committed to policies of sex discrimination with the collaboration of male dominated labor unions could have simply gerrymandered enough duties to make the jobs of men and women unequal for purposes of the Equal Pay Act and continued their traditional practices of sex discrimination with impunity. Title VII of the Civil Rights Act prohibits such tactics. However, women and their attorneys must insist on its most rigid enforcement if women are ever to be raised to positions of first class citizenship.

In achieving relief from discriminations in employment by court actions under Title VII, women have made some important progress. The Seventh Circuit's landmark decision of *Bowe v. Colgate-Palmolive Co.*[140] established the principle that Title VII will not permit the exclusion of women as a class from legitimate occupations and job assignments. In that case women employees in an Indiana plant with 600 potential jobs were confined by their employer to less than one hundred of the lowest paid jobs. The assumption had been made by the defendant com-

136. 29 U.S.C. § 216(c) (1964).
137. 29 U.S.C. § 217 (1964).
138. *See* Murray, *supra* note 22.
139. 42 U.S.C. §§ 2000e et seq. (1964).
140. 416 F.2d 711 (7th Cir. 1969).

pany that women as a class lacked the "ability" to perform all of the better jobs. The company also claimed that women were excluded from the higher paid jobs to "protect" them since the jobs required lifting of over 35 pounds.[141] The women employees who instituted this class action under Title VII considered the company's policies particularly unfair since some women workers were required to lift 17 tons of soap products a day while men operated automatic machines or handled empty plastic bottles for a higher rate of pay. The women plaintiffs lost their case in the district court[142] and appealed. The Seventh Circuit reversed, characterizing the sex discrimination in the defendant's plant as "blatant."[143] It held that stereotyped assumptions that women as a class were not qualified for certain positions because they lack the strength to efficiently perform the duties required do not constitute a permissible basis for defense under Title VII.[144] The court laid down the important principle that "individual qualifications and conditions" must be the criterion in making job placements and assignments of men and women employees.[145]

The rule that women like men must be dealt with in employment on the basis of *individual* ability and aptitude is the only permissible judicial interpretation of Title VII in view of the constitutional implications in cases involving employment. The Supreme Court has repeatedly held that the right to work for a living is a liberty and property protected by the due process and equal protection clauses of the fourteenth amendment[146] and the due process clause of the fifth amendment.[147] While the Supreme Court has held that individuals were protected under these constitutional provisions from government-imposed discriminations in employment because of their race, it has consistently dodged the opportunity of holding that women are entitled to similar protection from government discrimination because of their sex.[148] However, the fourteenth and fifth amendments expressly and specifically apply to all "persons," and the constitutional language itself will not permit a court to conclude that any person may be denied protection of the fourteenth

141. This was the basis of the lower court's decision for the defendant. 272 F. Supp. 332, 353-66 (S.D. Ind. 1967).

142. 272 F. Supp. 332 (S.D. Ind. 1967).

143. 416 F.2d at 719.

144. *Id.* at 718.

145. *Id.*

146. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Smith v. Texas, 233 U.S. 630 (1914); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

147. Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

148. *See* Eastwood, *supra* note 28, at 286-88.

and fifth amendments because of such "person's" normal human traits irrevocably determined at birth, *e.g.,* race, skin color or sex.[149] Consequently, women "persons" are entitled to the same constitutional protection against employment discrimination perpetrated by governmental action that has been afforded to racial groups.[150]

The Supreme Court has also ruled that when a court places the stamp of government approval on private discriminations so as to deprive persons of constitutional rights, the action of the court is governmental action prohibited by the fourteenth or fifth amendment.[151] Under the circumstances, the only constitutional interpretation that can be given Title VII by a government agency or a state or federal court is that it prohibits applicable employers[152] from making any classification whatsoever on the basis of sex which would exclude an otherwise qualified woman from engaging in any employment of her choice.

The BFOQ Provision

Because a woman's right to work for a living in an occupation of her choice cannot be taken away by governmental action, judicial or legislative, the courts are required to give the so-called "bona fide occupational qualification [BFOQ] provision" of Title VII a very limited interpretation. The provision states that

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .[153]

149. The fourteenth amendment provides that "No State shall . . . deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis supplied.) The fifth amendment states "nor shall *any person* . . . be deprived of life, liberty, or property, without due process of law . . . ." (Emphasis supplied.) Constitutional provisions *must* be interpreted as they read, and there is no excuse for interpolation, addition or limitation. Reid v. Covert, 354 U.S. 1, 8 (1957); United States v. Sprague, 282 U.S. 716, 731 (1931). It is constitutionally impermissible for a court to hold that the word "persons" means only "male persons." Such a distortion would have the effect of denying fundamental freedoms and basic human rights to one-half of the nation's citizens.

150. The male dominated judiciary has failed to give women the protection which they are entitled to under the express provisions of the Constitution. *See* Eastwood, *supra* note 28. Women litigants should be all the more vigorous in insisting on their rights as human beings. They are not non-persons.

151. Shelley v. Kraemer, 334 U.S. 1 (1948).

152. *See* 42 U.S.C. § 2000e(b)-(e) (1964).

153. *Id.* at § 2000e-2(e) (1964).

The pertinent legislative history of the BFOQ provisions shows that this provision was to be given very narrow construction. The House Judiciary Committee report on the Civil Rights Act of 1964 states that the BFOQ section is "very limited" and is applicable only in "rare situations."[154] Pointing this out in his well-reasoned concurring opinion in the recent case of *Phillips v. Martin Marietta Corp.*,[155] Justice Thurgood Marshall said:

> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes. . . .[156] Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for "bona fide occupational qualifications" was not intended to swallow the rule.
>
> That exception has been construed by the Equal Employment Opportunity Commission, whose regulations are entitled to "great deference," . . . to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex. Thus the exception would apply where necessary "for the purposes of authenticity or genuiness" in the employment of actors or actresses, fashion models, and the like. If the exception is to be limited as Congress intended, the Commission has given it the only possible construction.
>
> When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.[157]

Thus, if *maleness* itself is necessary to the performance of the particular work, a woman need not be considered, but the BFOQ provision cannot be given any broader interpretation. A decision of a federal court which purported to extend the BFOQ provision so as to deny any otherwise qualified woman employment in a specific occupation on the ground that women as a class may be excluded from such occupation

154. H. R. REP. No. 914, 88th Cong., 1st Sess. 27 (1963).

155. 91 S. Ct. 496 (1971), *rev'g* 411 F.2d 1 (5th Cir. 1969).

156. Justice Marshall quotes from a regulation of the Equal Employment Opportunity Commission. 29 C.F.R. § 1604.1(a)(ii) (1970). He also refers to *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), and *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

157. 91 S. Ct. at 498-99.

would run counter to the constitutional prohibitions of the fifth amendment. It would place the stamp of judicial approval on the private discrimination of the employer so as to make it a governmental discrimination, and, as a result, the woman job applicant would be denied her right to engage in a legitimate occupation—a "liberty" and "property" under the due process clause.[158]

The per curiam decision of the Supreme Court in *Phillips v. Martin Marietta Corp.*[159] does not deal as directly with the BFOQ provision as did Justice Marshall's concurring opinion, but his opinion cannot be construed as being inconsistent with the per curiam decision. As Justice Marshall pointed out, this issue was "not squarely" before the Court.[160] The case was brought by Ida Lee Phillips, alleging discrimination because of having been rejected for a job by the Martin Marietta Corporation because of its policy of refusing to employ women with preschool age children. Mrs. Phillips, however, was never given an opportunity to present her case on the merits. The company filed an answer in the district court, but it did not plead the BFOQ provision, an affirmative defense which it was obligated to plead under rule 8 of the Federal Rules of Civil Procedure.[161] Since this was not done, the defendant's right to raise the BFOQ provision as a defense had been waived under rule 12(h) of the Federal Rules of Civil Procedure and therefore could not have been raised on appeal to the Supreme Court.[162] Similarly, the defendant is not entitled to raise this issue on remand.[163] Accordingly, the per curiam opinion of the Supreme Court in *Phillips* must be viewed so as to take into consideration the posture of the case before it.

The pertinent portion of the per curiam opinion states:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children. The existence of such conflicting obligations, if demonstrably more relevant to job performance for a woman than

158. *See* notes 146-51 *supra* and accompanying text.
159. 91 S. Ct. 496 (1971).
160. *Id.* at 498.
161. A "party shall set forth" affirmative defenses. FED. R. CIV. P. 8(c).
162. *See* note 133 *supra* and accompanying text.
163. The case was remanded because the court of appeals erred in interpreting the Act to permit separate hiring policies.

> for a man, could arguably be a basis for distinction under § 703(e) of the Act [the BFOQ provision].[164]

Since, as pointed out above, Martin Marietta had not even pleaded the BFOQ provision in the district court and therefore waived this right, the BFOQ issue was not properly before the Supreme Court, and the statement regarding the effect of the BFOQ provision is pure dictum. While the dictum lacks clarity, obviously the Court did not mean that the BFOQ provision would permit an employer to defend in a sex discrimination case by introducing statistics purporting to show that women with pre-school age children are less efficient that other persons because it emphatically said that the sex discrimination provisions of Title VII will not permit "one hiring policy for women and another for men—each having pre-school age children."[165] Since the summary dismissal of Mrs. Phillips' case by the district court had prevented her from providing that she was qualified *as an individual* for the position for which she had applied, the Supreme Court's per curiam decision can only be construed as meaning that on remand her case should be tried on the merits in order that she can prove her qualifications for the job involved and such other facts that may prove her entitlement to the relief she had requested.

As pointed out in *Bowe v. Colgate-Palmolive Co.*,[166] since Title VII requires that employment of women must be on the basis of their individual abilities rather than assumptions that women as a class are inferior, the woman plaintiff simply has to show that she as an individual was qualified to perform the job in question. If this is shown, the defense of BFOQ is invalid.

The assumption that members of a group are inferior, and the subjection of individuals of that group to unequal treatment on such an assumption, is the essence of discrimination. Discrimination in employment on the basis of sex is expressly what Title VII forbids. Laws for the protection of certain groups against discrimination cannot be evaded by allegations that the group is inferior. This principle has been well-established in the courts. In *Stell v. Savannah County Board of Education*[167] and *Orleans Parish School Board v. Bush*,[168] the Fifth Circuit pointed out that under the fourteenth amendment a state government could not deprive Negro children of their right to attend integrated

164. 91 S. Ct. at 497-98.
165. *Id.* at 498.
166. 416 F.2d 711 (7th Cir. 1969).
167. 333 F.2d 55 (5th Cir. 1964).
168. 242 F.2d 156 (5th Cir. 1957).

schools on the assumption that Negro children as a group are academically inferior to white children as a group. Similarly, under the fifth amendment a federal court cannot place the stamp of approval on the policy of a private employer that denies a qualified woman her right to work in a job of her choice and justify such act with a court decreed edict that women as a group are inferior.

While irrelevant to the Title VII issue, it is noteworthy to point out the falsity of the allegation that women are inferior as employees because of absenteeism, a belief widely proclaimed by adversaries of equality. Government statistics show that the differences between men and women employees in absenteeism and labor turn-over is negligible.[169] The "absenteeism" defense is a specious one contrived to put a respectable front on invidious sex discrimination in employment.

Since the decision in *Phillips,* in the case of *Griggs v. Duke Power Co.*,[170] the Supreme Court has been more explicit as to its interpretation of Title VII:

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract.[171]

The Supreme Court has thus made it clear that women in employment situations must be considered on the basis of their individual abilities and may not be classified to their disadvantage on the basis of their sex.

In *Weeks v. Southern Bell Telephone & Telegraph Co.*,[172] decided prior to the *Bowe* case, the Fifth Circuit held that stereotyped assumptions of women's inferiority could not be the basis of a defense under the BFOQ provision. In holding that the woman plaintiff could not be denied employment as a switchman because of her sex, the court declared that a Georgia regulation forbidding the employment of women in work requiring the lifting of 30 pounds[173] did not have the effect of making sex

169. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, FACTS ABOUT WOMEN'S ABSENTEEISM AND LABOR TURNOVER (1969).

170. 91 S. Ct. 849 (1971).

171. *Id.* at 856.

172. 408 F.2d 228 (5th Cir. 1969).

173. Labor Rule 59, promulgated under authority of GA. CODE ANN. § 54-122(d) (1961).

a bona fide occupational qualification for jobs in which such weight lifting was required.

> Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.[174]

The Fifth Circuit set forth the following standard for determining whether sex is a BFOQ:

> [I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.[175]

The Fifth Circuit's standard would exclude a qualified woman from a job simply because "substantially all women" were not qualified to perform it. The Seventh Circuit's standard which is consistent with the Supreme Court in *Griggs* would require that the woman job applicant be judged on her own individual merits and capabilities.[176] The Seventh Circuit's approach is the only one consistent with preserving the constitutionally protected right of an individual to earn a living as she sees fit.

Men with unusual abilities engage in extraordinary types of employment "that substantially all men would be unable to perform." There is no reason why a *woman* of unusual abilities should not engage in an occupation that "substantially all women would be unable to perform." The Fifth Circuit's basic decision in *Weeks* correctly states the principle that Title VII protects women in their right to compete with men on the basis of their individual abilities for "strenuous. dangerous" or "obnoxious" jobs. The dictum which implies that a qualified woman can be denied employment because "substantially all women would be unable to perform its duties safely and efficiently" should not be given precedential force.

If the woman discriminatee were required to combat testimony that "substantially all women" could not perform the job in question, such a

174. 408 F.2d at 236.
175. *Id.* at 235.
176. *See* 408 F.2d at 235-36.

requirement would, as a practical matter, nullify the sex discrimination provision of Title VII. A jobless woman plaintiff who alleges that she has been denied a right to earn a livelihood on the basis of sex would not be in a financial position to produce expert testimony or statistics as to what "substantially all women" can or cannot do. In any event, such testimony or statistics are totally irrelevant in proving the plaintiff's entitlement to employment in a position from which she has been barred because of her sex. *If any woman can perform the job involved, the BFOQ provision is an invalid defense.*

In cases in which the BFOQ defense has been pleaded, the defense has been based on prejudice and a stereotyped idea that women are inferior, *e.g.,* women are weak and must be deprived of employment involving weight lifting; women ought to be at home to take care of their husbands and children so their hours of work should be limited; women cannot work at night because it is unsafe; women cannot work as bartenders because it is harmful to community morals. Quite properly the courts have recognized that such arguments are spurious.[177] Besides the cases of *Bowe* and *Weeks* mentioned above, the courts have held the BFOQ defense invalid in other cases involving weight lifting restrictions,[178] and in cases considering statutory hours restrictions[179] and the prohibition of women bartenders.[180]

The BFOQ provision should, of course, be given the same narrow construction regardless of whether the case involves sex discrimination against women or against men. This was not done, however, in two recent district court decisions involving male plaintiffs. In *Diaz v. Pan American World Airways, Inc.,*[181] a man was denied a position as flight attendant on an airline, and the court held that there was no violation of Title VII since being a woman was a bona fide occupational qualification for such position. Similarly in *Schrichte v. Eastern Airlines, Inc.,*[182] the court denied summary judgment in a case in which a male plaintiff

177. *See* Seidenberg, *The Federal Bar v. The Ale House Bar: Women in Public Accommodations,* 5 VAL. U.L. REV. 318 (1971).

178. Utility Workers, Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970); Tuten v. Southern Bell Tel. & Tel. Co., 2 F.E.P. Cas. 299 (M.D. Fla. 1969); Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *remanded,* 3 F.E.P. Cas. 130 (9th Cir. 1971).

179. Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *remanded,* 3 F.E.P. Cas. 130 (9th Cir. 1971).

180. McCrimmon v. Daley, *2* F.E.P. Cas. 971 (N.D. Ill. 1970).

181. 311 F. Supp. 559 (S.D. Fla. 1970).

182. 2 F.E.P. Cas. 950 (N.D. Ga. 1970).

had sued under Title VII because he had been denied the position of flight attendant because of his sex. In the latter case the court denied the motion on the ground that the defendant airline should be afforded the opportunity of proving that being a woman was a bona fide occupational qualification.[183] Both decisions are erroneous. Obviously men as a class *are* capable of being flight attendants, and the BFOQ defense is invalid as a matter of law.

The *Diaz* case advanced a theory that if airline customers prefer to have women serve them during flights, such customer preference is a valid basis for the claim that being a woman is a bona fide occupational qualification for flight attendants.[184] Of course, "customer preference," when based on bigotry or prejudice whether in favor of or against members of one sex, should have no place in judicial interpretations of civil rights legislation.[185] Obviously, one reason for racial discrimination in employment was the fact that employers often thought that their customers preferred persons of one particular race to others. The same attitudes of customers have influenced employment discriminations on the basis of religion and national origin. The pettiness of customers is no excuse for violation of Title VII any more than the prejudices of the employer himself.

Perhaps the only time when customer preference may be considered as providing a bona fide occupational qualification would be in the limited employment situations in which the services to be rendered involve physical contact with the customer so that the customer would prefer to be serviced by a person of the same sex for reasons of modesty or a desire for privacy. Even then, the bona fide occupational qualification provision is not applicable unless the job is one in which men employees have traditionally rendered the service *only* to men customers and women employees have traditionally rendered comparable services *only* to women customers. Helpless female patients at hospitals are attended by female aides while male patients similarly situated are attended by male orderlies. A masseuse would service female customers while a masseur would service male customers.

While *Diaz* and *Schrichte* involve sex discrimination against men,

183. *Id.*

184. 311 F. Supp. at 564-65 & n.8. Since this article went to press the Fifth Circuit reversed *Diaz*, ruling that the exclusion of men from the position of flight attendant violated Title VII. Diaz v. Pan American World Airways, Inc., 3 F.E.P. Cas. 337 (5th Cir. 1971). The court explicitly rejected the factor of customer prejudice. *Id.* at 340.

185. The Equal Employment Opportunity Commission has expressly stated that it does not consider customer preference to be a valid defense for sex discrimination. 29 C.F.R. § 1604.1(a)(1)(iii) (1970).

by far the greater number of sex discrimination cases involve women. The hostility toward women in employment is so deeply engrained, and employers' economic interest in exploiting them is so great, that the defense of BFOQ has been raised in Title VII cases in a deliberate effort to obtain nullification of the sex discrimination provision by judicial interpretation. The adversaries of equality for women were unable to block passage of the sex discrimination provision by the Congress. They later hoped to repeal it by interpretation. Fortunately, the courts have not permitted this to be done.

Effect of the Sex Discrimination Provision of Title VII on Restrictive State Labor Laws

As in *Weeks v. Southern Bell Telephone Co.*,[186] many of the sex discrimination cases involving the bona fide occupational qualification provision have involved state laws restricting women but not men.[187] As these laws collide with Title VII, the federal law, they are superseded and rendered unenforceable as a result of the supremacy clause of the Constitution.[188] Most of these restrictive laws were enacted near the turn of the century when only women of low income families worked outside their homes, and such women were completely ghettoized in low paid "women's jobs." There was no Fair Labor Standards Act to set a wage floor, and women frequently did not get a living wage. Women were usually paid by the day rather than by the hour. Under those circumstances legal restrictions in hours and weight lifting for women did not work to the disadvantage of those women whose lowly positions made them completely non-competitive with men.[189]

No honest justification for these laws exists today. The principle of equality for women citizens, the only true democratic principle, has replaced the view that a beneficent, paternalistic despotism of men should "take care of their women." In a modern day society, state restrictive laws for women serve no purpose other than providing a specious excuse for sex discrimination in employment.

These laws are sometimes erroneously referred to as "protective laws."[190] Working women, however, are well aware of the fact that these

186. 408 F.2d 228 (5th Cir. 1969).

187. *See also* Mink, *Federal Legislation to End Discrimination Against Women*, 5 VAL. U.L. REV. 397 (1971).

188. U.S. CONST. art. VI.

189. *See* Brief for Defendant (by Louis D. Brandeis) at 209, 338-39, Muller v. Oregon, 208 U.S. 412 (1908).

190. *See, e.g.*, 116 CONG. REC. H7955 (daily ed. Aug. 10, 1970) (remarks by Representative McCulloch).

restrictive laws have been perpetuated solely to exclude them from better jobs and to keep them locked in low-paid, sex-segregated positions. Their quite understandable resentment of these laws was well expressed by Georgianna Sellers, one of the plaintiffs in the *Bowe* case and Chairman of the Indiana-Kentucky Unit of the League for American Working Women (LAWW):

> We were kept off of higher paying easier jobs for years because the company wanted to "protect" us. I say it did not protect, but exploited women. Used their hard work for low pay, just as employers treated Negroes for years. Keep them under foot, not on top.
>
> . . . .
>
> . . . It is insulting for these males to use State restrictive laws as a gimmick for exploiting us by claiming they are protecting us. The males running the labor unions are merely trying to monopolize better jobs for themselves.
>
> . . . .
>
> American working women have learned the lesson that the black people have learned. There is no such thing as separate but equal. We do not want separate little unequal, unfair laws and separate little unequal low paid jobs. We want equality.[191]

Rosenfeld v. Southern Pacific Co.[192] is typical of the situations in which women have brought suit under Title VII and the defense of state restrictive laws has been made. Leah Rosenfeld was denied the position of agent-telegrapher on four different occasions because of California's hours and weight lifting restrictions on women. California law prohibits a woman employee from lifting more than 50 pounds.[193] This limitation was made even more restrictive by a regulation of the California Industrial Welfare Commission which prohibits women employees from lifting more than 25 pounds unless a special permit is obtained.[194] Section 1252 prohibits women employees from carrying objects weighing 10 pounds or more on stairways which rise more than five feet from their bases. Obviously, these laws are designed not to "protect" but to restrict women. Yet, under the guise of "protection" Mrs. Rosenfeld, a family

191. *Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate, Comm. on the Judiciary,* 91st Cong., 2d Sess. at 576-77.

192. 293 F. Supp. 1219 (C.D. Cal. 1968).

193. CAL. LABOR CODE § 1251 (West 1955). The limit is ten pounds on stairways. *Id.* § 1252. *See generally id.* §§ 1250-56.

194. Cal. Indus. Welfare Comm'n Order No. 9-63

breadwinner and the mother of twelve children, was denied a better opportunity to meet her family's needs.

California's restrictive hours laws for women were also involved in *Rosenfeld*.[195] Section 1350.5 of the Labor Code prohibits employing women over 10 hours a day or 58 hours a week. At the time of the discrimination involved in Mrs. Rosenfeld's case, the California law was even more restrictive as it prevented women employees from working over 8 hours a day and 48 hours a week.[196] The state of California in its brief before the Ninth Circuit took the position that women should be required to work short hours and that they should go home early to be with their children and to do domestic work for their husbands.[197] The state's attitude thus ignored the facts of life. It is insensitive and brutal for a government agency to say that a woman who has heavy family responsibilities should be arbitrarily deprived of well-paid jobs which might enable her to meet such responsibilities.

Mrs. Rosenfeld lost the opportunity to have the higher paid job of agent-telegrapher because on some occasions it required working over eight hours a day, carrying ten pounds up steps five feet high, or lifting 25 pounds. Any normal human being, male or female, has the physical capacity for such duties. Yet, Mrs. Rosenfeld was compelled by the state to work on low paid jobs so she could go home early. One might ask, "but what will she feed her family—motherly love and sweet platitudes?"

The Central District of California ruled that the restrictive laws attacked in the *Rosenfeld* case were superseded by the provisions for equality of employment opportunities in Title VII.[198] The effective nullification of such laws is one of Title VII's greatest benefits to women.

Suits under Title VII and the Fourteenth and Fifth Amendments

In *Mengelkoch v. Industrial Welfare Commission*[199] and *McCrimmon v. Daley*,[200] women plaintiffs sought relief from discrimination occasioned by restrictive laws by combining Title VII suits with a constitutional attack against such laws under the fourteenth amendment. In *Mengelkoch*, the three-judge district court dismissed the case as to the con-

195. CAL. LABOR CODE § 1350.5 (West Supp. 1971). *See generally id.* §§ 1350-57.

196. In 1967 California amended § 1350 to exempt workers covered by the federal Fair Labor Standards Act. Such exempted employees are now covered under § 1350.5. The applicable statute for the case was § 1350.

197. *See* Brief for Industrial Welfare Commission, State of California.

198. 292 F. Supp. at 1224.

199. 437 F.2d 563 (9th Cir. 1971).

200. 2 F.E.P. Cas. 971 (N.D. Ill. 1970).

stitutional issue on the ground that it lacked jurisdiction and subsequently dissolved itself.[201] The single judge district court simultaneously dismissed Mrs. Mengelkoch's Title VII action on the ground that it would abstain, pending resolution of the issues in a *state* court—a *most* unusual ruling in view of the fact that Title VII suits under the statute itself must be brought in federal district courts.[202] On appeal, the Supreme Court held that when a three-judge district court dismisses a suit to enjoin enforcement of a state law for lack of jurisdiction, the appeal should be taken to the court of appeals.[203] On appeal to the Ninth Circuit the decision of the three-judge district court was reversed and the case was remanded.[204] The Ninth Circuit concluded that "the three judge court erred in dissolving itself for lack of jurisdiction on the ground that plaintiff's constitutional attack" upon the California law restricting hours of work for women[205] was "insubstantial."[206] The issues raised in Mrs. Mengelkoch's case have thus been unresolved, although her suit, filed in 1966, has been before three courts.[207]

In *McCrimmon v. Daley,*[208] the Northern District of Illinois held that a municipal ordinance which prohibited the women plaintiffs from being employed as bartenders[209] was "void on its face as being in violation of the Fourteenth Amendment to the Constitution of the United States in that it denies these plaintiffs property rights without due process of law."[210] In a similar case, *Patterson Tavern & Grill Association v. Borough of Hawthorne,*[211] a statute[212] precluding women from being bartenders was held invalid by the New Jersey Supreme Court. Three analogous decisions involving statutes requiring race discrimination and discrimination because of national origin declared such statutes to be violative of the fourteenth amendment.[213]

The fifth amendment has also proved to be a means whereby equitable treatment in employment can be obtained. Therefore, the

201. 284 F. Supp. 950 (C.D. Cal. 1968).
202. 284 F. Supp. 956 (C.D. Cal. 1968).
203. 393 U.S. 83 (1968).
204. 437 F.2d 563 (9th Cir. 1971).
205. CAL. LABOR CODE § 1350 (West Supp. 1971).
206. 437 F.2d at 567.
207. *See* Eastwood, *supra* note 28 at 292-95.
208. 2 F.E.P. Cas. 971 (N.D. Ill. 1970).
209. CHICAGO, ILL., MUNICIPAL CODE § 147-15.
210. 2 F.E.P. Cas. at 972.
211. 57 N.J. 180, 270 A.2d 628 (1970).
212. HAWTHORNE, NEW JERSEY ORDINANCE No. 1137, § 6.
213. *See* White v. City of Evansville, 310 F. Supp. 569 (S.D. Ind. 1970); Guzman v. Polich & Benedict Const. Co., 62 CCH Lab. Cas. ¶ 9385 (C.D. Cal. 1970); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

Supreme Court has ruled that the fifth amendment requires a union, authorized by the Railway Labor Act,[214] to act fairly for the employees it represents and to represent them equally and without discrimination.[215] In a recent district court decision, *Tippett v. Liggett & Myers Tobacco Co.*,[216] the court applied the doctrine of *Steele* and permitted women employees to join a claim under the fifth amendment of unfair representation by their union with a claim of discrimination under Title VII against both their employer and the union since the same proof of discrimination by the union would be required to sustain both claims.

Hopefully Title VII has increased the courts' awareness of the seriousness of discrimination in employment and has encouraged persons in exploited groups to seek more equitable treatment in employment and to resist illegal restrictions by governmental action by invoking the fourteenth and fifth amendments.

Discriminations Based on Sex Plus Some Other Factor

Defendants in some Title VII cases have raised the defense that the discrimination was not based entirely on sex but on sex plus some other factor. The recent decision of the Supreme Court in *Phillips v. Martin Marietta Corp.*,[217] in reversing a decision of the Fifth Circuit, has foreclosed the raising of such an issue by defendants. In *Phillips*, the district court and the Fifth Circuit ruled that Martin Marietta Corporation had not violated Title VII in denying Mrs. Phillips a job because she was a woman with a pre-school age child.[218] The Fifth Circuit reasoned that a violation of Title VII

> can only be discrimination based solely on one of the categories *i.e.*, in the case of sex; women vis-a-vis men. When *another* criterion of employment *is added* to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin. . . .
>
> . . . Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the *coalescence* of those *two elements* that denied her the position she desired.[219]

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214. 45 U.S.C. §§ 151 et seq. (1964).
215. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).
216. 316 F. Supp. 292 (M.D.N.C. 1970).
217. 91 S. Ct. 496 (1971).
218. 411 F.2d 1 (5th Cir. 1969), *affirming* 58 CCH Lab. Cas. ¶ 9152 (M.D. Fla. 1968).
219. 416 F.2d at 1260 (emphasis in original).

The fallacy of the Fifth Circuit's theory was pointed out in an amicus curiae brief filed before the Supreme Court:

> Race, color, religion, sex, and national origin are [by Title VII] excluded as permissible job qualifications. The employer and all his employment policies must in effect be blind to each of these characteristics of the individual applicant or employee.
>
> Any other interpretation subverts the very purpose of the law. If the addition of a second qualification to a protected class can exempt an employer policy or practice from the prohibitions against nondiscrimination, then Catholics with more than two children can be discriminated against, blacks can be required to pass a special stringent test to qualify for a job, and Spanish-surnamed Americans can be required to have PhD's in English. Any employer could easily dream up ways to continue to give job preferences to a favored class (e.g. white males) by adding a job qualification, relevant or irrelevant, for applicants of the protected classes he wishes to exclude.[220]

The short per curiam decision of the Supreme Court disposed of the "sex plus" theory by simply pointing out that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex" and concluding that the court of appeals erred in construing the Act "as permitting one hiring policy for women and another for men—each having pre-school age children."[221]

The issue as to whether sex plus other factors could be asserted as a defense has also been presented in situations in which it was claimed that sex plus marriage was ground for discharging women stewardesses or flight attendants. In *Lansdale v. Air Line Pilot Association,*[222] the Fifth Circuit held that sex plus being married were not proper grounds for the discharge of married airline stewardesses and reversed a district court decision which interestingly enough had relied on the Fifth Circuit's decision in *Phillips.*[223] The Northern District of Illinois in *Sprogis v. United Air Lines, Inc.,*[224] and the District of Colorado in *Gerstle v. Continental Airlines, Inc.*[225] held that stewardesses discharged

220. Brief of Human Rights for Women, Inc., as Amicus Curiae. Human Rights for Women Inc., Washington, D. C., is a non-profit corporation which provides legal assistance without charge to women seeking to invoke their rights under the Constitution and under statutory provisions.

221. 91 S. Ct. at 498.

222. 431 F.2d 1341 (5th Cir. 1970).

223. 411 F.2d 1 (5th Cir. 1969).

224. 308 F. Supp. 959 (N.D. Ill. 1970).

225. 50 F.R.D. 213 (D. Colo. 1970).

because of their sex plus the fact that they were married were entitled to relief under Title VII by injunction against future violations, reinstatement and back pay.[226] The defense that sex discrimination is no longer sex discrimination when coupled with some other basis of discrimination is specious and illogical, and these recent decisions have properly held it invalid.

Mootness as a Defense

In *Rosenfeld v. Southern Pacific Co.*,[227] mentioned above,[228] the Central District of California ruled that California's state restrictive laws[229] under which Mrs. Rosenfeld had been denied employment as agent-telegrapher were superseded by the sex discrimination provision of Title VII as a result of the supremacy clause. The position which was denied to Mrs. Rosenfeld was at the defendant company's Thermal, California, facility. The record, however, showed that in 1954 Mrs. Rosenfeld had bid on a similar position at Saugus, California. She had been assigned to that position but was discharged from it because of the same restrictive laws involved in her Title VII suit. The defendants appealed the district court's decision in favor of Mrs. Rosenfeld to the Ninth Circuit.

On January 7, 1971, more than two years subsequent to the district court's decision, the Ninth Circuit remanded the case to the district court "to consider whether plaintiff's case became moot when the Thermal station was closed" on July 15, 1968.[230]

There is no precedent for holding a case moot under such circumstances. Furthermore, it is irrelevant that the company closed its Thermal facility. The district court had ordered that the company consider Mrs. Rosenfeld in the future

> for any position sought by her . . . without regard to her sex and without regard to any limitation imposed on employers in the employment of female employees under or pursuant to Sections 1171 through 1256 and 1350 through 1357 of the California Labor Code or any administrative regulations issued pursuant thereto . . . .[231]

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226. *Cf.* Note, *Sex and the Single Man: Discrimination in the Dependent Care Deduction*, 5 VAL. U.L. REV. 415 (1971).
227. 292 F. Supp. 1219 (C.D. Cal. 1968).
228. *See* notes 192-99 *supra* and accompanying text.
229. CAL. LABOR CODE §§ 1171-1256, 1350-57 (1955).
230. 3 F.E.P. Cas. 130 (9th Cir. 1971).
231. 293 F. Supp. at 1227.

The relief granted, therefore, was not confined to the Thermal station, and Mrs. Rosenfeld's need for such relief was just as great whether the Thermal facility was closed or open. The district court had also enjoined Southern Pacific from commiting further discrimination by relying on the state restrictive laws.[232] This injunction was necessary in order tc give the plaintiff complete relief and to protect her if she applied for other jobs from which she might be illegally excluded. The "mootness" plea should thus be regarded as invalid on its face in light of the district court's ruling.

The mootness plea should also be rejected since there is an exceedingly important public interest involved in expeditiously resolving legal issues in Title VII cases. The Seventh Circuit aptly pointed this out in *Bowe v. Colgate-Palmolive Co.*:[233]

> A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.*, race, sex, religion or national origin. In our view, it is indistinguishable on this point from actions under Title II relating to discrimination in public accommodations. In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400-402 . . . (1968), the court held that since vindication of the public interest is dependent upon private suits, the suits are private in form only and a plaintiff who obtains an injunction does so "as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968), and Jenkins v. United Gas Corporation, 400 F.2d 28, 35 (5th Cir. 1968), hold similarly as to Title VII actions regarding racial discrimination. We agree with the Fifth Circuit and perceive no reason under the law or the cases why the same should not be true of Title VII actions against sex discrimination.[234]

Because of the important public interest involved in the *Rosenfeld* case, the Supreme Court's decision in *Walling v. James V. Reuter, Inc.*[235] is directly in point. In that case the Court held that even the complete dissolution of a corporation which had been subjected to an injunction for violations of the Fair Labor Standards Act did not

232. *Id.* at 1225-26.
233. 416 F.2d 711 (7th Cir. 1969).
234. *Id.* at 719-20.
235. 321 U.S. 671 (1944).

invalidate the ground for granting the injunction or make the case against the corporation moot. In reaching this conclusion the Court said:

> Not only is such an injunction enforceable by contempt proceedings against the corporation, its agents and officers, and those individuals associated with it in the conduct of its business . . . but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant. . . . And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interest were involved.[236]

The principle of *Reuter* applies a fortiori in this case. It would seem that the closing of one small part of the defendant corporation's business operations should not render Mrs. Rosenfeld's case moot when it involves an important public interest which Mrs. Rosenfeld has attempted to vindicate in court acting as a "private attorney general." In any event, the *Rosenfeld* case is now pending before the same district court which originally decided it to determine whether the case is moot. The court of appeals has not decided any of the substantive issues presented in the appeal of this case.

Other Potential Affirmative Defenses to Title VII Actions

Section 703(h) of Title VII provides:

> (h) Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because

236. *Id.* at 674-75.

> of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.[237]

Employment policies based on a bona fide seniority system, a bona fide merit system, a bona fide system based on an individual's productivity on the job, or a bona fide ability test which reveals the individual's ability to perform the job in question are obviously not discriminatory on the basis of sex or on the other prohibited grounds of discrimination. As Senator Hubert H. Humphrey pointed out during the Senate discussion of section 703(h), that provision "does not narrow the application of the title, but merely clarifies its original present intent and effect."[238] By its very phraseology this provision makes it clear that it is not a loophole for discrimination. If the employment practice or policy is "discriminatory," it cannot be "bona fide."[239]

The courts have on most occasions followed several specific standards in determining what systems are non-discriminatory.

1) *The system under which distinctions in employment may be legally made must be neutral on its face.* As the Supreme Court pointed out in *Phillips v. Martin Marietta Corp.*,[240] an employment policy which specifically differentiates on the basis of sex cannot stand.

2) *The system though neutral on its face is violative of Title VII if it has the effect of perpetuating the effects of past discriminations.*[241] A seniority system which prior to the effective date of the Act had different seniority lines for men and women with all women excluded from the better jobs because of their sex does not become a valid legal system when the phraseology of sex identification in the collective bargaining contract is merely changed from "male" or "female" to some other characterization, and the basic difference in treatment of men and women employees continues unchanged. To illustrate, if women were not permitted to accrue department seniority in a department where the jobs were designated as "male" jobs, a change in the name of the job

237. 42 U.S.C. § 2000e-2(h) (1964).

238. BNA OPERATIONS MANUAL, THE CIVIL RIGHTS ACT OF 1964 at 302.

239. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969); Local 53, Asbestos Workers v. Volger, 407 F.2d 1047 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 297 F. Supp. 505, 517 (E.D. Va. 1968).

240. 91 S. Ct. 496 (1971).

241. 91 S. Ct. 849 (1971).

would not eliminate the discrimination because the women would still have no department seniority in that particular job and would be barred from it because of the residual effects of past discrimination.

A growing number of cases have held that a system neutral on its face is violative of the Act if it perpetuates the effects of past discrimination, even though the discriminatory practice began before the effective date of the Act.[242] In cases where the discriminatees under a system of department seniority have been denied access to work in certain departments, the courts have usually ordered that the affected group of employees be permitted to transfer to the departments from which they have been excluded on the basis of their plant seniority.[243]

3) *The system or test must be based on criteria relevant to the job in question and the individual employee's ability to perform it.* An employer has a right to employ those who are best qualified to perform the duties of the job involved since this is a matter of "business necessity."[244] In *Local 189, United Papermakers & Paperworkers v. United States,*[245] it was pointed out that under the theory of "business necessity," an employer could require that the employees placed in secretarial positions be able to type proficiently even though this might mean that disadvantaged black persons who had no training in this field would be excluded.[246] Similarly, a job that required lifting of one hundred pound weights might be one from which a large number of

242. Griggs v. Duke Power Co., 91 S. Ct. 849 (1971); Parkham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241 (E.D. La. 1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

243. Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241 (E.D. La. 1971); Irvin v. Mohawk Rubber Co., 308 F. Supp. 152 (E.D. Ark. 1970); Long v. Georgia Kraft Co., 2 F.E.P. Cas. 658 (N.D. Ga. 1970); Robinson v. P. Lorillard Corp., 2 F.E.P. Cas. 465, (M.D.N.C. 1970); United States v. Continental Can Co., 2 F.E.P. Cas. 1044 (E.D. Va. 1970); United States v. Local 189, Papermakers & Paperworkers, 282 F. Supp. 39 (E.D. La.), *affirmed,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

244. In *Griggs v. Duke Power Co.,* 91 S. Ct. 849 (1971), the Supreme Court expressed an explanation of "business necessity":

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes [or other members of a protected class] cannot be shown to be related to job performance, the practice is prohibited.

Id. at 853. Thus, "business necessity" cannot be claimed by an employer unless the claim is based on an employment practice established for the purpose of selecting the person who is best qualified as an individual for the job in question.

245. 416 F.2d 980 (5th Cir. 1969).

246. *Id.* at 988-89.

women as well as many men could be excluded, but an employer could nonetheless submit job applicants to tests to determine the individual applicant's ability to perform the required duties. The defense that a discriminatory system is permissible because of "business necessity" cannot be extended to other types of situations or to any situation that would permit the bigotry of either the employer or his employees to determine employment policies. For example, an employer's claim that his male employees disliked female supervisors is *not* a proper basis for the "business necessity" defense.

4) *The system of hiring or job assignment must be applied on an individual basis and not on the basis of sex (or race, etc.).* It may not be based on stereotyped conclusions that women as a group are inferior as employees.[247]

The provision of section 703(h) that states that "[i]t shall not be an unlawful employment practice . . . for an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions" of the Equal Pay Act[248] simply means that the Civil Rights Act and the Equal Pay Act must be interpreted consistently in situations where they overlap by offering remedies for the same type of discrimination. Therefore, paying a woman less than a man in a situation where the work of the man requires greater skill, effort or responsibility is not a violation of Title VII or of the Equal Pay Act.[249]

Cases in Which Combined Title VII and Equal Pay Actions Are Appropriate

A woman job applicant or employee who has been discriminated against in hiring, promotion or job assignment because of sex should consider bringing a suit under Title VII because of the coverage of the sex provision of that Act.[250] If the aggrieved person lives in a state which has a state or local law prohibiting the unlawful employment practice alleged and authorizing such state or local authority to grant or seek relief, the aggrieved person must first proceed under the local or

247. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). *See* note 129 *supra* and accompanying text.

248. 42 U.S.C. § 2000e-2(h) (1964).

249. *See* Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 254-55 (1965).

250. The proper representative of the Equal Employment Opportunity Commission should be contacted for further information.

state law.[251] If the aggrieved person believes that she has been discriminated against in wage payments because of her sex, *i.e.*, men who perform equal work involving equal skill, effort and responsibility receive higher wages, she should contact the Administrator of the Wage-Hour Division of the United States Department of Labor since her remedy can probably best be obtained under the Equal Pay Act.

In many instances, however, the aggrieved woman employee is one of a large group of women who have been discriminated against both under the Equal Pay Act and the sex discrimination provision of Title VII. Such a situation would occur in the following described hypothetical case: The women employees of the *X* Company are employed performing Job *A* along with men employees who receive 50¢ per hour more than the women. The work of women and men on Job *A* is equal under the standards of the Equal Pay Act. The *X* Company, fearing government sanctions and realizing that legal violations have occurred, transfers all the men employees from Job *A* to Job *B*, a job from which women are excluded. Job *B* pays 50¢ to 60¢ more than the women working on Job *A* receive. No women were considered for this transfer which, of course, would have meant a promotion for them.

In such a case the *X* Company has committed violations of the Equal Pay Act, and the women employees are entitled to have their wages raised 50¢ per hour and back pay under that Act. Under section 16(b) of the Fair Labor Standards Act,[252] they are also entitled to an additional equal amount as liquidated damages. However, their employer, the *X* Company, has also violated Title VII by offering job opportunities in Job *B* to men only and excluding women from consideration. Accordingly, it would be to the advantage of these women to pursue their remedies under both Acts.

Conclusion

Sex discrimination is more prevalent than any other kind of employment discrimination. Like men in minority groups, women are frequently barred from the better jobs and the better employment opportunities. In addition women have frequently been assigned to work side by side with men who are performing substantially the same work but are paid higher wages simply because they are men. Employers who have consistently exploited women consider that they have a vested right to continue to do so. Male dominated labor unions consider that their male

251. 42 U.S.C. § 2000e-5 (1964).
252. 29 U.S.C. § 216(b) (1964).

members have a vested right in the better jobs and that women should be kept out of the way and "in their place."

The Equal Pay Act and Title VII of the Civil Rights Act of 1964 will be most helpful in eliminating the injustices to working women. Many of the courts have begun to give these laws the liberal interpretation to which they are entitled. Sex discrimination like race discrimination is immoral as well as illegal. The judicial decisions regarding racial discrimination are directly in point in sex discrimnation cases. It is to be hoped that women who are the victims of discrimination and their attorneys will utilize these laws and the favorable decisions under them to the fullest extent.

Women victims of discrimination have been so helpless for so long that they were powerless to effectively fight for their rights protected by the fifth and fourteenth amendments. These rights are not lost by default. Under any proper construction of the law, women are protected by the Constitution from any governmental sex-based restrictions in their employment rights. Hopefully, women will fight vigorously to eliminate both private and governmental discriminations by use of existing laws and constitutional provisions and will demand equal treatment in employment with no differentiations whatsoever on the basis of sex.