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Portia's Daughters: The Role of the Individual Litigant in Developing European Community Sex Discrimination Law

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PORTIA'S DAUGHTERS: THE ROLE OF THE INDIVIDUAL LITIGANT IN DEVELOPING EUROPEAN COMMUNITY SEX DISCRIMINATION LAW

HOLLY CULLEN &
ANDREW CHARLESWORTH*

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I. INTRODUCTION

European Community (EC) sex discrimination law has been recognized as the first, and best developed, aspect of what has been termed "the social dimension" (that group of policies which protects employees in the Single Market) of EC law.¹ This highly important area of EC law has been developed primarily by individual women who have fought to have their rights recognized as part of the sex equality law

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1. RUTH NIELSEN & ERIKA SZYSZCZAK, THE SOCIAL DIMENSION OF THE EUROPEAN COMMUNITY (2d ed. 1993).

of the EC. It is this aspect of EC sex discrimination law that is the focus of this Essay.

This Essay has two inspirations. First, Christopher McCrudden noted in a recent article² that one should not underestimate the value of dedicated individuals who have worked to increase protection against sex discrimination in EC law. Second, Frances Olsen argued for a "litigation strategy," similar to the development of American race and sex discrimination law, through the participation of civil liberties and women's rights organizations.³ The authors do not wish to dispute the potential utility of a more collectivist approach to sex discrimination litigation, nor do we fail to recognize the weakness of current EC sex discrimination law.⁴ However, we do wish to note, even to celebrate, the contribution of individual women to the shaping of the law.

Certainly the development of EC equal pay and equal treatment law has largely been a function of women, and some men,⁵ pushing their particular cases forward in order to vindicate their rights. They were possibly conscious of the effect of their actions on women throughout the EC, but they were not "test cases" in the understood sense of the term. Only recently have collective bodies, such as the United Kingdom's Equal Opportunities Commission,⁶ played a significant role in developing the law.

This Essay focuses on three women litigants who have contributed much to the state of EC sex equality law. These women have helped to develop many aspects of equality law, namely: equal pay, the extent of state obligations under EC law, equal retirement, compensation rights, and equal treatment of pregnant women. The one characteristic shared by these women is their dedication. All have spent years litigat-

2. Christopher McCrudden, *The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in Light of European Requirements*, 13 OXFORD J. LEGAL STUD. 320 (1993).

3. Frances Olsen, *Employment Discrimination in the New Europe: A Litigation Project for Women*, 20 J.L. & SOC'Y 131 (1993).

4. See Holly Cullen, *The Subsidiary Woman*, J. SOC. WELFARE & FAM. L. 407 (1994).

5. E.g., Case C-262/88, *Barber v. Guardian Royal Exch. Ins.*, 1990 E.C.R. I-1889.

6. E.g., *Equal Opportunities Comm'n v. Secretary of State for Employment*, [1994] All E.R. 910.

ing in national courts and the Court of Justice of the European Communities (ECJ) in order to enforce their rights; in two instances, more than one case was required to resolve the issues that they raised. For Gabrielle Defrenne, there was doubt whether it was even possible for an individual to rely on the guarantee of equal pay in the EC Treaty. Helen Marshall spent over a decade of her retirement establishing that she should not have been forced to retire in the first place, and that she was owed adequate compensation. Denied a job because she was pregnant, Carole Webb fought her way through national courts and was ultimately vindicated.

Defrenne, Marshall, and Webb are not the only European women who have contributed to the development of EC sex discrimination law, assumed the social risks of being labeled a troublemaker, and taken the financial risks often associated with complicated litigation. However, these three women's high-profile cases are the material from which law students and lawyers learn. To demonstrate how these women empowered themselves, and other European women, by using the law to establish equal citizenship in the European Union, this Essay changes the focus from the "rules" in these cases to the processes undertaken by the applicants. They used the power of the law to establish their equal citizenship of the European Union.

II. GABRIELLE DEFRENNE: DEVELOPING ARTICLE 119 EC

In a series of three cases before the ECJ during the 1970s, Gabrielle Defrenne, a Belgian airline hostess, was virtually single-handedly responsible for a radical overhaul of the EC's and Member States' attitude towards the right established in Article 119 EC. Article 119 EC provides that:

Each Member State shall . . . ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. . . .

For the purpose of this Article "pay" means ordinary or basic minimum wage or salary or other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment for his employer. . . .

Article 119 EC was based on the International Labor Organization Convention No. 100, June 29, 1951, although the latter in fact referred to "equal pay for work of equal value."⁷ Despite its pedigree, it seems that its initial inclusion in the Treaty was premised on an economic rationale rather than any concern with social policy. That is, it was aimed at preventing economic advantages accruing to those Member States who permitted the extensive use of lower paid female employees by national employers.⁸ The development of EC social policy in the early 1970s effectively gave Article 119 EC a dual objective by adding a social dimension. However, until the *Defrenne* cases, the social dimension (the aim of achieving equality between the sexes as a human right, as opposed to a purely economic mechanism) had been largely ignored by both EC institutions and Member States.⁹

Ms. Defrenne began her marathon journey through the Belgian and EC legal systems in 1970 when, in accordance with a condition in her contract of employment, the Belgian state airline SABENA compulsorily retired her from her position as an airline hostess. That condition required female cabin crew members to retire at the age of forty. There was no similar condition for male cabin crew members performing the same duties. Thus, males were able to continue working until they reached the age of fifty-five.

The reasoning behind the airline's policy is rarely articulated in any of the many articles that the case generated, but it seems clear that SABENA's management believed that young women employed as cabin staff attracted the (presumably predominantly male) international passenger. Thus, SABENA appeared to reason that when a woman entered middle age she was no longer sexually attractive and did not

7. See Derrick Wyatt, *Article 119 EEC: Definition of Pay*, 1 EUR. L. REV. 414, 415 (1976). The difference was addressed by the EC in Directive 75/177, 1975 O.J. L45 which, in Article 1, stated that the principle of equal pay meant "for the same work or for work to which equal value is attributed."

8. C. Crisham, Case 43/75, *Defrenne v. SABENA*, 14 COMMON MKT. L. REV. 102, 117 (1977).

9. *Id.* at 118.

project the preferred glamorous image that the airline wanted to portray. On the other hand, it would seem that men were perceived either not to lose their attraction as they aged, or were not seen to have the same role in promoting passengers' choice of airline. As one commentator noted, this attitude with regard to female hostesses was, and indeed still is, widespread in airline advertising.¹⁰

Whatever the airline's rationale, Ms. Defrenne took exception to her mandatory retirement and brought an action against the Belgian state before the Belgian *Conseil d'État*. Ms. Defrenne claimed that forced retirement at the age of forty deprived her of the improved pension conditions available to her male counterparts who could work until the age of fifty-five. Therefore, Ms. Defrenne argued that the terms of her retirement, its resulting effect upon her retirement pension, and its discriminatory effect, backed by a Belgian regulatory provision,¹¹ were contrary to Article 119 EC because retirement pension equalled pay for the purposes of that Article. The *Conseil d'État* referred the matter to the ECJ for a preliminary ruling on the issue of whether the retirement pension fell within the scope of the right of equal work for equal pay contained within Article 119 EC.

A. *The First Defrenne Case*

The first *Defrenne* case¹² was notable for a number of reasons; the first being the Advocate General's suggestion that Article 119 EC might be directly effective.¹³ This issue had not been raised by the Belgian *Conseil d'État* because Belgian law gave female workers an express right to invoke in the Belgian courts the principle of equal pay in Article 119 EC.¹⁴ The ECJ itself examined only superficially the issue of direct effect. However, in not questioning the right of Ms.

10. See L. Neville Brown, *Air Hostesses and Discriminating Employers*, 47 MOD. L. REV. 702 (1984).

11. Royal Decree, 3 Nov. 1969, Article 1 stated that the relevant retirement pension was available to all air crew, except airline hostesses.

12. Case 80/70, *Defrenne v. Belgium*, 1971 E.C.R. 445.

13. EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW 82 (1991).

14. Royal Decree No. 40, 24 Oct. 1967, Article 14. See Brown, *supra* note 10, at 693.

Defrenne to use Article 119 EC against the Belgian state, the ECJ gave credence to the belief that Article 119 EC was directly effective between an individual and a Member State; that is, it was capable of vertical direct effect.

On the main issue, the ECJ ruled that the term "pay" in Article 119 EC did not include the pension rights at issue because those rights were obtained as a result of legislation and not as the result of negotiation within the firm or undertaking concerned. Thus, the pension rights did not fall within the necessary requirement that they be received directly or indirectly from the employer.¹⁵ However, the Advocate General drew a distinction between the pension scheme at issue and other types of private occupational pension schemes which would constitute "pay" for the purposes of Article 119 EC. Those would include pensions paid by the employer to former employees and supplementary schemes, in addition to state social security schemes, which could, by their origins in collective agreements and by the nature of their set-up and management, be linked sufficiently with the employer to be covered.¹⁶

Despite this early setback, Ms. Defrenne continued with the litigation she had begun before the Belgian labor courts. She claimed damages from SABENA on three grounds: first, that her wages during her employment by SABENA were lower than those of her male colleagues; second, that the indemnity paid to her on her retirement was lower than that of her male colleagues; and third, that her pension was lower than that of her male colleagues.¹⁷ The court of first instance (*Tribunal du travail*) rejected all three grounds, whereupon she appealed to the appellate court (*Cour du travail*). Although rejecting Ms. Defrenne's indemnity and pension claims, the appellate court referred the wages claim to the ECJ requesting a ruling as to whether Article

15. See Brown, *supra* note 10, at 695.

16. I.M. McCallum & I. Snaith, *EEC Law and United Kingdom Occupational Pensions Schemes*, 2 EUR. L. REV. 266, 268 (1977). The decisions in Case 69/80, *Worringham v. Lloyds Bank*, 1981 E.C.R. 767 and Case C-262/88, *Barber v. Guardian Royal Exch. Ins.*, 1990 E.C.R. I-1889 would appear to follow this line of reasoning. See ELLIS, *supra* note 13, at 44-52.

17. Brown, *supra* note 10, at 695.

119 EC was directly effective, and if so, at what time would a cause of action arise.

B. *The Second Defrenne Case*

In this second preliminary ruling,¹⁸ the ECJ clearly stated that not only was Article 119 EC directly effective, but that:

Since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of the public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

This meant that Article 119 EC was horizontally directly effective and that it could be enforced against employers in the private sphere as well as organs of the State.¹⁹ This was a necessary step for the ECJ to take because SABENA, despite the Belgian government being its majority shareholder, was a private concern and had entered into private law contracts with its staff. The ECJ also held that the principle should have been applied from the end of the transitional period after the accession of the original six Member States in those Member States, and from the date of accession for the new Member States. The result of this holding was thus, effectively, a victory for Ms. Defrenne.

The ruling caused much consternation in some of the Member States because it was feared that it could lead to a huge number of retroactive claims against employers. The United Kingdom and Irish governments, in particular, made submissions to the court stating that the effect of backdating such claims either to the end of the transition-

18. Case 43/75, *Defrenne v. SABENA*, 1976 E.C.R. 455.

19. ELLIS, *supra* note 13, at 88. This both appears to follow from, and significantly expand the reasoning in Case 36/74, *Walrave & Koch v. Ass'n Union Cycliste Int'l*, 1974 E.C.R. 1405. The judgment of discrimination on the grounds of nationality in *Walrave* extended the scope of horizontal direct effect of the relevant Treaty Articles only to agreements regulating employment in a collective manner. The second *Defrenne* case took this approach further in extending Article 119 EC to cover contracts between individuals. The grounds used, however, were different. In *Walrave*, the ECJ held that horizontal direct effect could be used in order to attain the effective realization of a Treaty objective, while in *Defrenne*, the ECJ held that horizontal direct effect could be used where the Treaty provision was mandatory. See Crisham, *supra* note 8, at 109.

al period or to the date of accession, depending on the Member States, would have a ruinous effect on both individual employers and national economies.²⁰ The ECJ itself was also highly critical of the role of the Commission which, it noted, had provided misleading information about the legal obligations imposed by Article 119 EC and had failed to initiate legal proceedings against Member States who were in breach under Article 169 EC.²¹ The inference appeared to be that such an action would have placed the Member States on notice as to the likely implications of breaches of Article 119 EC.

After considering all the evidence, the ECJ took the unprecedented step of stating that it would temporally limit its judgment so that only Ms. Defrenne and those workers who had already begun legal proceedings before the date of the judgment could benefit from the direct effect ruling. Therefore, although the ECJ held that Article 119 EC had direct effect, it would be prevented from having any retroactive effect.

There has been much discussion over this controversial decision, not least over whether the ECJ, in ruling that its judgment could not have retroactive effect, was not in fact operating outside of its authority. Article 177 EC allows the ECJ to interpret EC law, but leaves the application of that law to the Member States' domestic courts. In limiting the temporal effect of its judgment, it would appear that the ECJ had in fact trespassed upon the jurisdiction of the national courts.²² A further argument is that the ECJ recognized that the Commission created a form of estoppel through its non-enforcement of Article 119 EC. However, in effect, the ECJ was allowing the Commission to waive, not its own rights, but the rights of women workers throughout the EC.²³

20. The United Kingdom government stated that the costs in such circumstances could be as high as £1,000 million.

21. See Crisham, *supra* note 8, at 115-16. This criticism, however, should be regarded in light of the fact that the Commission is under no duty or obligation to bring actions under Article 169 EC.

22. Philip Allott, *The European Court Ordains Equal Pay for Women*, 14 CAMBRIDGE L.J. 7, 10 (1977); M. Waelbroeck, *May the Court of Justice Limit the Retrospective Operation of its Judgments?*, 1 Y.B. EUR. L. 115, 122 (1981).

23. Cullen, *supra* note 4, at 409.

There appears to be a consensus among legal commentators that the decision to make the decision prospective in nature removed some of the uncertainty facing employers but, based as it was on fragile judicial reasoning, it was far from good law. Some measure of its controversial nature can be gauged by the fact that the ECJ appears to have been extremely unwilling to limit the retroactivity of its decisions in later cases.²⁴

Commentators have suggested that the primary importance of the second *Defrenne* case lies in the fact that it marks two changes in the nature of EC law: the first being that the ECJ began to emphasize that EC law did not just confer rights, but might also impose obligations;²⁵ and the second, the change of emphasis, particularly in Article 119 EC, from a purely economic to an increasingly social rationale. It certainly appears that the decision to extend the principle of horizontal direct effect to Article 119 EC came as a surprise to many commentators of the time.²⁶

However, the judgment, which limited the scope of Article 119 EC to areas where there was direct discrimination based on the equal work for equal pay criteria, failed to adequately define what was meant by those terms. As a result, this task was left to later legislation and case law.

The second *Defrenne* case was probably the most important of the three cases examined in this Essay in as much as it upset the whole area of legal regulation of equal pay for women in the EC, which as Allott points out, was by no means "fallow ground."²⁷ He notes that, in that one judgment, the ECJ in effect ruled that the International Labor Organization Convention obligations did not affect EC Treaty obligations; that the Belgian Decree of 1967 which expressly imple-

24. See, e.g., Case 69/80, *Worringham v. Lloyds Bank*, 1981 E.C.R. 767. However, prospective effect was allowed in Case C-262/88, *Barber v. Guardian Royal Exch. Ins.*, 1990 E.C.R. I-1889. The problems raised by this judgment, arising in part by disallowing retroactivity, have led to further litigation and a protocol to the Treaty on European Union specifically directed at interpreting the scope of the judgment.

25. Crisham, *supra* note 8, at 110.

26. Waelbroeck, *supra* note 22, at 115.

27. Allott, *supra* note 22.

mented Article 119 EC, but failed to do so in the same terms as the court's interpretation, was irrelevant; and that EC acts purporting to lengthen the Article 119 EC implementation period could not alter its effect.²⁸

As a result of the favorable ruling by the ECJ, Ms. Defrenne was awarded the princely sum of 12, 716FB (approximately £180) for arrears of pay by the Belgian court. Perhaps not surprisingly, Ms. Defrenne was not satisfied by her success in this round of the battle and thus began a third bout of litigation with an appeal to the Belgian *Cour de cassation* against the unfavorable rulings which she had received from the *Cour du travail* on the issues of pension and indemnity. The *Cour de cassation* turned to the ECJ for a preliminary ruling under Article 177 EC on the following issues: Could Article 119 EC be interpreted as going further than requiring equality of pay, to the point where it required equality of conditions of employment for men and women? In particular, could a clause found in a female hostess's employment contract, but not in a male's contract, that mandated her retirement at the age of forty constitute discrimination prohibited by either Article 119 EC, or any other rule of EC law, where that clause had financial effects — notably those covering indemnities for enforced retirement and pension rights?

C. *The Third Defrenne Case*

In its ruling on the questions referred to it by the *Cour de cassation*, in *Defrenne v. SABENA*,²⁹ the ECJ held that non-discrimination was an issue of "fundamental personal human rights," the protection of which was held to be a general principle of EC law. That having been said, however, the ECJ went on to hold that Article 119 EC did not extend beyond the issue of equality of pay. Therefore, the issues of indemnities and pension rights were outside its scope. The ECJ noted that:

28. There was, for instance, a resolution of the Member States in 1961 to extend the time limit for the implementation of Article 119 EC until the end of 1964.

29. Case 147/77, *Defrenne v. SABENA*, 1978 E.C.R. 1365.

[A]s regards the relationships of employer and employee which are subject to national law, the Community had not, at the time of the events now before the Belgian courts, assumed any responsibility for supervising and guaranteeing the observance of the principle of equality between men and women in the matter of working conditions other than remuneration.

Thus, when Ms. Defrenne was compulsorily retired, there was no rule of EC law which forbade the discriminatory behavior engaged in by SABENA. The ECJ noted, however, that Directive 76/207, issued on February 9, 1976, was designed to ensure the principle of equality for the treatment of men and women concerning access to employment training and advancement within the professions and conditions of work. While affording some encouragement to those who followed in her footsteps, this was doubtless small consolation to Gabrielle Defrenne.

What then, did Ms. Defrenne achieve by her numerous appearances before four different Belgian courts, and in three preliminary rulings by the ECJ, over a period of eight years? Other than the satisfaction of knowing that SABENA had, in fact, illegally discriminated against her in terms of wages, she gained very little. Considering all the effort that she had expended, the damages awarded were negligible. However, the three *Defrenne* cases, by stimulating the development and enforcement of EC sex discrimination law and policy within the EC institutions and Member States, have ensured that she has achieved "[i]f not justice, at least immortality."³⁰

III. HELEN MARSHALL: AGE SHALL NOT WITHER HER

Helen Marshall, like Gabrielle Defrenne, was forced to retire while men of the same age were allowed to continue working. However, the issue for Ms. Marshall was more complex. Whereas Gabrielle Defrenne dealt with her employer's particular policies, Helen Marshall confronted the institutionalized differentials in retirement regimes that continue to prevail in several European states. In many European countries, women

30. Derrick Wyatt, *Article 119 EEC and the Fundamental Principle of Non-Discrimination Grounds of Sex*, 3 EUR. L. REV. 483 (1978).

become eligible for pensions at an earlier age than men. Through a specific derogation from the principle of non-discrimination in the State Social Security Directive, differential ages for pension entitlement are permitted.³¹ The practice of many employers in states which maintain the differential pension ages is to set the compulsory retirement ages at the pension ages. In the United Kingdom, pension ages are sixty for women and sixty-five for men. Helen Marshall's employer, the Southampton and South West Hampshire Area Health Authority, required that women retire at the age of sixty. When Ms. Marshall expressed her unwillingness to retire, she was permitted to continue working for two more years and was then forced to retire at age sixty-two in 1980. The Health Authority justified her dismissal solely on the basis that she was a woman who had reached retirement age. She then began her travels through the labyrinth of United Kingdom and EC courts, lasting until August, 1993, when she was seventy-five. She represented herself during the proceedings.

Ms. Marshall was successful at the first stage of proceedings at the Industrial Tribunal. However, the Employment Appeal Tribunal (EAT) decided that the exemption in the United Kingdom Sex Discrimination Act 1975, whereby the Act was not applicable to any "provision in relation to death or retirement," meant that it was not possible to state a claim under the Act for anything relating to retirement.³² The EAT was bound by a Court of Appeal case which had interpreted the exemption broadly.³³ Ms. Marshall's alternative argument was that, insofar as the United Kingdom statute denied her a remedy, it was in violation of EC law, specifically Article 5 of the Equal Treatment Direc-

31. Directive 79/7/EEC, O.J. 1979 L6, Article 7(1). This exception was not originally part of the directive, but was included on the insistence of Member States with differential pension age policies. Timothy Millet, *European Community Law: Sex Equality and Retirement Age*, 36 INT'L & COMP. L.Q. 616, 627 (1987).

32. The decision of the EAT is noted in Diana Guy & Angela Bainton, *Sex Discrimination: Retirement Age — Direct Effect of Directives*, 8 EUR. L. REV. 416 (1983).

33. *Roberts v. Cleveland Area Health Auth.*, [1979] 2 All E.R. 1163. As Jane N.D. Bates describes: "The approach of the English courts to the interpretation of these exclusions seems to reflect the government stance that, in the context of retirement and retirement benefits, the control of expenditures is a more important consideration than the uniform provision of sexual equality." Jane N.D. Bates, *Sex Discrimination and Retirement: Two Recent Decisions of the European Court of Justice*, PUB. L. 537, 540 (1986).

tive,³⁴ which prohibits sex discrimination in all conditions of work, including dismissal. Although the EAT accepted the substance of the EC law argument, it was reluctant to hold that the directive was binding on it. As a result, the case went to the English Court of Appeal and, from there, to the ECJ.

The ECJ found that as a state employee, Ms. Marshall had the right to claim her rights to equal treatment directly, even without clear implementing legislation in United Kingdom law.³⁵ In British law schools, *Marshall No. 1* is taught primarily for this ruling on the status of EC directives on the laws of the Member States.³⁶ Some commentators see the apparent resolution of this issue as the only matter of interest in *Marshall No. 1*.³⁷ However, the case also resolved a number of substantive issues of great importance to women workers and led to an amendment of the Sex Discrimination Act which clarified that women were not subject to compulsory retirement at an earlier age than men.

The problem of interpretation was twofold: Was retirement a form of dismissal for the purposes of Article 5 of the Equal Treatment Directive; and how, if at all, did the permission of differential pension ages affect the issue of retirement ages? Resolving both issues in favor of Ms. Marshall, the ECJ declared that dismissal must be inter-

34. Directive 76/207/EEC, 1976 O.J. L39.

35. Case 152/84, *Marshall v. Southampton & Southwest Hampshire Area Health Auth.* (Teaching), 1986 E.C.R. 723 [hereinafter *Marshall No. 1*].

36. The ECJ decided that directives could only create *direct effects*, or direct rights on which individuals could rely before national courts, against state institutions. This is known as vertical direct effect. Horizontal direct effect, or rights which can be invoked against other individuals or private bodies, was accepted for Articles of the EC Treaty in the second *Defrenne* case. It was rejected in *Marshall No. 1*, although the fact that the employer was a state body led many to believe that the issue was not yet closed. In 1994, the issue was relitigated before the ECJ, on a consumer protection issue, against a private corporation. The ECJ again rejected the possibility of the direct effect of directives. Case C-91/92, *Faccini Dori v. Recreb Srl* (E.C.J. July 14, 1994). The issue of horizontal direct effect is treated critically in Jason Coppel, *Rights, Duties and the End of Marshall*, 57 MOD. L. REV. 859 (1994). On the issue of legal status of EC law generally, see ANDREW CHARLESWORTH & HOLLY CULLEN, *EUROPEAN COMMUNITY LAW* ch. 5 (1994).

37. See Anthony Arnulf, *The Incoming Tide: Responding to Marshall*, PUB. L. 383 (1987); Nicholas Grief, *Retirement Ages, Sex Discrimination and EEC Law*, 15 INDUS. L.J. 187 (1986).

preted broadly. It characterized the actions of the Southampton and South West Hampshire Area Health Authority as "the fixing of an age limit with regard to the termination of employment pursuant to a general policy concerning dismissal."³⁸ Under this interpretation of EC law, compulsory retirement is simply another form of dismissal. An equally important aspect of the case was that the ECJ excluded the possible influence of the exemption in Article 7(1) of the State Social Security Directive on the issue of retirement. Pension ages and retirement ages are to be considered as distinct concepts. This eliminated a form of paternalism that justified the inferior position of the woman worker by granting welfare benefits based on her inferiority. Although women may claim a state pension³⁹ at an earlier age than men, most state pension schemes do not support the same standard of living as would a working wage. Furthermore, the intermittent participation of most women in the labor market often means that they have not made sufficient contributions to state pension schemes in order to derive a reasonable living from the resulting pension.⁴⁰ As a result, for most women the option to retire early is not realistic.

Marshall No. 1 affected United Kingdom law almost immediately. In that same year, the Sex Discrimination Act 1975 was amended to restrict the exclusion relating to retirement.⁴¹ However, women who had been forced to retire at age sixty before the amended legislation went into effect were able to use their EC law rights, as demonstrated in *Marshall No. 1*, with uneven results.⁴²

38. *Marshall No. 1*, 1986 E.C.R. at 745, para. 32.

39. Since the *Barber* case, it is clear that the permissibility of differential pension entitlements under state schemes is not applicable to private or contracted-out pensions, which are to be considered as pay for the purposes of Article 119 EC, and therefore must provide equal entitlements to men and women.

40. Susan Atkins, *Equal Treatment and Retirement Age*, 49 MOD. L. REV. 508, 513 (1986).

41. Millett, *supra* note 31, at 630. The Employment Protection (Consolidation) Act 1978 was also amended, to allow women to claim unfair dismissal up to age 65 (before *Marshall No. 1*, women could only use this remedy up to age 60).

42. Because the ECJ had decided that directives could only create direct rights as against state bodies, the House of Lords rejected an appeal in *Duke v. GEC Reliance*, [1988] App. Cas. 618, arguing that it could not, through interpretation of UK law in light of the Equal Treatment Directive, give effect to her rights under EC law. However, in Case C-188/89, *Foster v. British Gas*, 1990 E.C.R. I-3313, the ECJ decided that some regulated

For Helen Marshall, however, the case was not over. Her case was returned to an Industrial Tribunal for the calculation of compensation to which she was entitled. Although the law set a ceiling on compensation of £6,520, the Industrial Tribunal awarded £19,405, including £7,710 in interest and £1,000 for emotional harm, nearly three times the ceiling. The Tribunal disregarded the statutory limits in order to interpret national law so as to give full effect to the obligation of Member States under Article 6 of the Equal Treatment Directive to provide adequate remedies for sex discrimination.⁴³ Disagreeing with the Tribunal, the EAT decided that the statutory damages were, in fact, adequate and that in any event, it was for the Member States to determine remedies.⁴⁴ However, the EAT was willing to acknowledge that remedies must not be derisory. Confirming the EAT's decision, the Court of Appeal emphasized that Article 6 of the Equal Treatment Directive had no direct effect.⁴⁵ The case was referred to the ECJ on a final national appeal to the House of Lords.⁴⁶

Marshall No. 2 concerned the scope of Member State obligations and discretion under Article 6 with respect to remedies.⁴⁷ Preferring the more vague "adequate compensation," the Advocate General was reluctant to endorse a requirement for full compensation. The ECJ, relying on the principle that EC law must be made effective, disagreed with the Advocate General. The court decided that when a dismissal violated Article 5 of the Equal Treatment Directive, a Member State's discretion as to remedies was limited to either ordering reinstatement

public service bodies nominally in the private sector ("emanations of the state") could be subject to directly effective duties to implement the rights granted under the Directive.

43. *Marshall v. Southampton & South West Hampshire Area Health Auth.*, 1988 I.R.L.R. 325.

44. *Southampton & South West Hampshire Area Health Auth. v. Marshall*, [1989] 3 C.M.L.R. 771.

45. [1990] I.R.L.R. 481.

46. Case C-271/91, *Marshall v. Southampton & South West Hampshire Area Health Auth.*, [1993] 3 C.M.L.R. 293 [hereinafter *Marshall No. 2*].

47. *Id.* at 322, paras. 11-15. The United Kingdom and Irish governments, intervening, argued that since the employer had agreed to pay the additional damages, and had appealed to the EAT only on the issue of interest, that the remit of the ECJ was limited to that issue. The ECJ rejected this claim, noting that the questions referred to it by the House of Lords had included the issue of the legality of the statutory ceilings.

(which in this case was not appropriate because Ms. Marshall was now over sixty-five) or providing full compensation.⁴⁸ Thus, according to the ECJ, limiting compensation was incompatible with Member State obligations under Article 6 of the Directive. Similarly, awarding interest was included in the goal of providing full compensation. *Marshall No. 2* demonstrated that awarding interest was essential to an effective remedy because, even if calculated at 1993 levels, after a thirteen-year delay, the award without added interest would be nominal. Allowing interest also served to deter employers from delaying and appealing for the purpose of financially and emotionally exhausting the applicant. Finally, arguably overruling an earlier decision, the ECJ accepted that Article 6, in conjunction with Article 5(1), could give rise to a directly effective right to a remedy.⁴⁹

The importance of remedies cannot be overestimated. As the ECJ has noted on several occasions, including *Marshall No. 2*, the sanctions for violating EC sex discrimination law must be effective not only in compensating the victim, but also in deterring employers from discrimination. The weakness of pre-*Marshall*, United Kingdom law in this area has been demonstrated by research.⁵⁰ It is gratifying to note that the necessary legislative amendments again followed quickly upon the ECJ's decision in *Marshall No. 2*.⁵¹

48. The limits on state discretion arise from the duty of solidarity between Member States and the EC as set out in Article 5 EC. See Tamara K. Harvey, *Door Opened for More Effective Enforcement*, J. SOC. WELFARE & FAM. L. 254, 258 (1994).

49. In Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, the ECJ rejected a claim that Article 6 could create direct effects. In Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, however, the ECJ had recognized that the right of access to judicial remedies within Article 6 was directly effective. Despite the *Johnston* ruling, Deirdre Curtin argues that *Marshall No. 2* amounts to an overruling of the rejection of direct effect for Article 6 in *Von Colson*. Deirdre Curtin, Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Authority*, 31 COMMON MKT. L. REV. 631, 638 (1994). Her view is supported by the statement in *Marshall No. 2*, [1993] 3 C.M.L.R. at 326, para. 36, that Article 6 may in some circumstances, create direct effects on its own.

50. Barry Fitzpatrick & Erika Szyszczak, *Remedies and Effective Judicial Protection in Community Law*, 57 MOD. L. REV. 434, 440 (1994).

51. *Id.* See also THE SEX DISCRIMINATION AND EQUAL PAY (REMEDIES) REGULATIONS 1993.

IV. CAROLE WEBB: MOTHERHOOD ISSUES

Carole Webb only went to Luxembourg⁵² once. However, she has a place in this celebration because she brought a case that should not have been necessary. Two earlier cases, *Dekker* and *Hertz*,⁵³ should have resolved the law on pregnancy discrimination. However, the United Kingdom law was not amended after those cases. Sex discrimination law in the United Kingdom was particularly difficult to apply to pregnancy because the law required a male comparator. Consequently, pregnant women were compared to men who were ill.⁵⁴

Carole Webb's situation reveals how childbearing affects women in the workplace.⁵⁵ She was originally recruited in 1987 as a replacement for another woman at EMO Air Cargo who intended to take maternity leave. However, Ms. Webb was not hired as a temporary replacement, but as a permanent employee who would continue to work after her pregnant colleague returned to work.

The Industrial Tribunal hearing the case equated Ms. Webb's pregnant condition with that of a man who was unable to perform his job because he could not attend work. This form of analysis made her pregnancy invisible. In light of *Dekker*, where the ECJ decided that discrimination based on pregnancy was direct discrimination, the Industrial Tribunal's approach seemed quite deliberate.⁵⁶ Although the focus on availability for work is somewhat more realistic than a comparison with illness, it was used as evidence of the employer's gender-neutrality.

52. Luxembourg is the location of the ECJ.

53. Case 177/88, *Dekker v. Stichting Vormingcentrum Voor Jonge Volwassen Plus*, [1991] I.R.L.R. 27; Case 179/88, *Handels-OG Kontorfunktionserer-nes Forbund i Danmark (Hertz) v. Dansk Arbejdsgiverforening (Aldi Marked K/S)*, [1991] I.R.L.R. 31.

54. See, e.g., *Hayes v. Malleable Working Men's Club & Inst.*, [1985] I.C.R. 703.

55. It is estimated that the United Kingdom Equal Opportunities Commission receives over 700 inquiries annually concerning pregnancy discrimination. See Erika Szyzszak, *Sex Discrimination and Pregnant Women*, 22 *INDUS. L.J.* 133, 136 (1993).

56. The ECJ distinguishes between direct discrimination, for which no justification is possible unless it is specifically mentioned in the relevant law, and indirect or adverse impact discrimination, which can be justified based on objective economic needs of the employer's business and is subject to a strict test of proportionality. See Case 170/84, *Bilka-Kaufhaus v. Weber von Hartz*, 1986 E.C.R. 1607.

ty rather than for the male comparator analysis traditionally required under United Kingdom law.⁵⁷ This focus also indicated the sympathy that the Industrial Tribunal, and later the other United Kingdom courts, felt for the employer. To have one pregnant woman on the workforce was an inevitable inconvenience, but to have two was an insupportable burden.

Carole Webb was likewise unsuccessful before the EAT, the Court of Appeal, and the House of Lords. Although accepting that pregnancy discrimination is direct discrimination, the House of Lords⁵⁸ agreed with the lower courts that EMO's decision to dismiss Ms. Webb was based not on pregnancy, but on her prospective unavailability at "the critical time" when her colleague was on maternity leave. Furthermore, the House of Lords stated that Ms. Webb's pregnancy was not a relevant circumstance for the purposes of applying the Sex Discrimination Act 1975.

All the United Kingdom courts seemed fixated on the fact that Carole Webb had been recruited to replace another pregnant woman. According to the House of Lords, this fact alone made it unclear as to whether *Dekker* covered the situation before them. As a result, the case was referred to the ECJ.⁵⁹

The ECJ had only two alternatives: it must accept that Carole Webb had been the victim of discrimination, or it must recant its ruling that pregnancy discrimination was direct discrimination. The Advocate General focused on the difference between the employer-focused analysis of the United Kingdom courts and the victim-focused analysis of the ECJ. He reiterated that dismissal because of pregnancy is direct discrimination and that where pregnancy was the reason for an employee's temporary unavailability, dismissal on that account was sex discrimination. He also rejected the general approach of United Kingdom law of comparing pregnant women to sick men. The ECJ confirmed this rejection by stating that pregnancy was not comparable to a

57. Szyszczak, *supra* note 55, at 134.

58. [1993] I.R.L.R. 27.

59. The House of Lords did accept that if the EC law on direct pregnancy discrimination applied to Ms. Webb's situation, they would be obliged to interpret the Sex Discrimination Act 1975 accordingly.

pathological condition.⁶⁰ Even less appropriate, according to the ECJ, was to compare pregnancy with unavailability for work on other grounds. Furthermore, to allow the economics of the employer's business to override the right to non-discrimination on the basis of pregnancy would undermine the effectiveness of the Equal Treatment Directive.

Two facts seem to be crucial to the ECJ's determinations: first, that Ms. Webb's absence was only temporary,⁶¹ and second, that she was hired on an unlimited contract. If this last factor is emphasized by the United Kingdom courts and the ECJ in future cases, it could significantly undermine the ruling in *Webb*, because the use of temporary contracts is increasing in the British labor market. If an employer can avoid liability for sex discrimination by using temporary contracts, temporary contracts will be used more frequently. However, according to commentators,⁶² the ECJ would not have decided *Webb* differently if Ms. Webb had been under a temporary contract because, under both the logic of *Webb* and *Dekker*, distinctions between temporary and permanent contracts would not be justified.⁶³

While Carole Webb is still in the process of claiming compensation for her dismissal, it is likely, in light of *Marshall No. 2*, that she will have few difficulties in obtaining a fair remedy. Ironically, if litigated today, *Webb* would no longer raise a question of law, because the Pregnant Workers Directive prohibits dismissal on the grounds of pregnancy.⁶⁴ However, other forms of pregnancy-related discrimination

60. Case C-32/93, *Webb v. EMO Air Cargo* (E.C.J. July 14, 1994).

61. *Compare Hertz*, where an illness, which arose during pregnancy but extended many months beyond maternity leave, and which resulted in the employee's absence from work was found to have resulted in indirect discrimination on the basis of pregnancy/sex. [1991] I.R.L.R. 31.

62. Sarah Moore, *Sex, Pregnancy and Dismissal*, 19 EUR. L. REV. 653, 659 (1994); *Pregnant Woman not Comparable to Sick Man*, 502 INDUS. REL. L. BULL. 7, 8 (Aug. 1994).

63. It would also seem to be inconsistent with the ECJ's extensive caselaw disallowing distinctions between part-time and full-time workers on the basis of sex discrimination, albeit indirect discrimination. *See, e.g., Case 170/84, Bilka-Kaufhaus v. Weber Von Hartz*, 1986 E.C.R. 1607.

64. Directive 92/85/EEC, 1985 O.J. L348. Moore describes the EC law approach to pregnancy discrimination: "In this particular sphere Community law has two . . . aims. First,

could be decided under the Equal Treatment Directive, and possibly by Article 119 EC, if pregnancy affected pay structure or private pension contributions. Employers' groups have complained that the "burdens" imposed by the *Webb* judgment will result in employers avoiding women of childbearing age.⁶⁵ However, John Monks, General Secretary of the United Kingdom Trade Unions Congress, sounded a note of reality by stating that "[e]mployers will now have to accept that pregnancy is a normal part of women's lives."⁶⁶

V. CONCLUSION: THE CONTINUING INFLUENCE OF THE "EURO-HEROINES"⁶⁷

The development of European Community sex discrimination law has primarily been the story of the women who shaped it. The real lives of women workers have been brought before the ECJ for judgment. The ECJ has developed the general prohibitions in the EC Treaty, and Directives adopted under the Treaty, into concrete rights going to the core issues of women's working lives. Working women face the emphasis on physical attractiveness, as did Gabrielle Defrenne, the rejection of older women, as did Helen Marshall, and the refusal of employers to adapt to childbearing, as did Carole Webb.

These women, through dedication and sacrifice, demonstrated their power within the legal system. EC law allowed these women, and others, to bring a meta-state power to bear against the power of their own states. With the EC as an ally, these women set the agenda for

to protect the maternal bond during pregnancy and child-birth for the benefit of the mother, child and probably, society alike. Secondly, to ensure that a woman is not disadvantaged in the work-place by her absence during pregnancy and child-birth." Moore, *supra* note 62, at 659. The Directive is implemented in the United Kingdom by amendments to the Employment Protection (Consolidation) Act.

65. *Court Backs Job Security in Pregnancy*, FIN. TIMES, July 15, 1994. However, *The Pregnant Woman's Right not to be Dismissed*, 522 IDS BRIEF 1 (Aug. 1994), states that *Webb* changes very little and that attempting to avoid its consequences may also be illegal for employers.

66. *Landmark Victory for Woman Sacked when Pregnant*, THE TIMES (London), July 15, 1994, at 7.

67. This term is drawn from *Another Victory for Miss Marshall*, 18 EUR. L. REV. 365 (1993).

the rights that EC law would recognize in practical terms. Their efforts have had a profound and continuing effect on the women of Europe. As evidence of this, a female British army officer who had been forced to retire when she became pregnant was awarded £39,000 as compensation on Friday, January 27, 1995.⁶⁸ She should thank Gabrielle Defrenne, who put equal opportunities on the agenda of the ECJ; Helen Marshall, who established the illegality of ceilings on compensation; and Carole Webb, who demonstrated that dismissal for pregnancy is always discrimination.

68. *Army Captain Sacked for Being Pregnant Awarded £39,000*, THE GUARDIAN, Jan. 28, 1995, at 3. The article noted that the Ministry of Defense had had 5,000 similar cases to resolve, for an estimated total of £47 million in compensation.

