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## **CLEMENTINE IN THE 1980's (EEO and the Woman Miner)**

**THOMAS H. BARNARD\***  
**BRENDA J. CLARK\*\***

### **INTRODUCTION**

Women are not exactly a new phenomena in coal mines. In England, women, as well as children, were frequently employed in coal mines during the Nineteenth Century. Apparently, they were considered to be of special value as they could crawl into small spaces where most men could not go. Yet, as recently as ten years ago, it was virtually unknown for women to work as coal miners in Twentieth Century America, primarily as a result of legal barriers.

Following the Industrial Revolution, the unregulated use of labor, which resulted in widespread employment of women and children in dangerous and dirty jobs, combined with long hours, pitifully low wages and unhealthy conditions, led to numerous attempts to regulate working conditions at the turn of the century.<sup>1</sup> One approach involved the enactment of state protective laws which prohibited women and children from working long hours and in hazardous occupations.<sup>2</sup> In many states, coal mining was

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<sup>1</sup> See generally U.S. DEP'T OF LABOR, GROWTH OF LABOR IN THE UNITED STATES (1967).

<sup>2</sup> A wide variety of state protective statutes were promulgated which restricted or totally prohibited the employment of women. One type of prohibitory law prevented women from working in physically or morally hazardous occupations, such as bartending, foundry-related occupations and mining. A second type limited the number of hours or nature of work performed by women. Included in this category of restrictive legislation were laws which limited the number of pounds females could lift and time of day that women could work. A third type of

one of these hazardous occupations, and as recently as 1969, seventeen states still prohibited women from being employed as coal miners.<sup>3</sup>

In addition to these legal barriers, other forces, such as superstition, operated to keep women out of coal mines until recently. It was considered bad luck for a woman to go into a coal mine.<sup>4</sup> This belief was so widely followed that Eleanor Roosevelt, while she was First Lady, was strongly urged to stay out of the mines lest the miners stage a wildcat strike.<sup>5</sup> Also, miners' wives are reputed to have posed formidable opposition to women in the mines.<sup>5.1</sup> At the same time, there were virtually no supporters; even friends and relatives could not be counted on for support by any women who may have been inclined to attempt to break these barriers.<sup>5.2</sup>

In the early 1970's, however, the situation began to change. The Equal Pay Act of 1963 had for several years required employers to give equal pay for equal work to both female and male employees.<sup>6</sup> Title VII of the Civil Rights Act of 1964 (Title VII),

protective statute provided additional benefits to women, such as premium overtime pay, minimum wages, and rest periods. See generally U.S. DEP'T OF LABOR, WOMEN'S BUREAU BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 261-79 [hereinafter cited as *Handbook*].

<sup>3</sup> HANDBOOK, *supra* note 2, at 277. Clerical or similar work is excepted from the prohibition in approximately half of these states. *Id.*

<sup>4</sup> See *Lady Miner Digs Her Job*, EBONY, Oct., 1974, at 122; Burns, *Why I Decided To "Go Underground,"* McCALLS, Sept., 1977, at 69.

<sup>5</sup> See *Lady Miner Digs Her Job*, EBONY, Oct., 1974, at 116.

<sup>5.1</sup> *Women in the Mines*, NEWSWEEK, Dec. 17, 1979, at 74; Burns, *Why I Decided To "Go Underground,"* McCALLS, Sept., 1977, at 69, 73.

<sup>5.2</sup> Burns, *Why I Decided To "Go Underground,"* McCALLS, Sept., 1977 at 69, 73; *In Coal Mine No. 29, Two Women Work Alongside the Men*, N.Y. TIMES, May 18, 1974, at 16, col. 1.

<sup>6</sup> 29 U.S.C. § 206(d) (1976). The Equal Pay Act was an amendment to the Fair Labor Standards Act (FLSA). The amendment requires equal pay for members of one sex covered by the FLSA who are performing work equal to that being performed by members of the opposite sex in the same establishment. 29 U.S.C. § 206(d)(1) (1976) provides:

No employer having employees subject to any provisions of this 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 the 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,

which included sex as one of the classes specifically protected against employment discrimination,<sup>7</sup> had been through its shake-down period, which involved the resolution of various procedural issues, the establishment of basic discrimination concepts, and the maturation of the Equal Employment Opportunity Commission (EEOC) as an enforcement agency. Executive Order 11246, which had previously provided for affirmative action for blacks and other minorities, had been amended in 1967 to include sex as a basis for non-discrimination by government contractors and subcontractors.<sup>8</sup> State protective laws were being challenged on

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 quality 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 this subsection, reduce the wage rate of any employee.

<sup>7</sup> 42 U.S.C. §§ 2000e (1-17) (1976). Title VII provides, among other things, that it is an unlawful employment practice for an employer "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 . . ." 42 U.S.C. § 2000e-2(a)(1) (1976). Title VII is administered and enforced by the Equal Employment Opportunity Commission (EEOC).

<sup>8</sup> Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Compilation), *as amended*, Exec. Order No. 11375, 3 C.F.R. 684 (1966-1970 Compilation). The amendment added sex to the classes against which discrimination is prohibited in the provisions that now must be inserted in virtually every government contract in excess of \$10,000. As to those contracts in excess of \$50,000, provisions must also be inserted to require the contractor to take affirmative action to eliminate sex discrimination. Exec. Order No. 11375, 3 C.F.R. 684 (1966-1970 Compilation), reads in part:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, up-grading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

*Id.* at § 202(1).

the basis that they did not protect women, but that they, in fact, contributed to women being the objects of discrimination in employment.<sup>9</sup> These legal developments combined with various social developments, such as birth control, legalized abortion and relaxed divorce statutes, brought the feminist revolution to the forefront and opened the doors for women to numerous jobs which previously had been available only to men.

The situation in the mining industry on the eve of the feminist revolution was not only that women were virtually non-existent in the mines,<sup>10</sup> but, for the thirty years prior to 1970, mining was one of two industries consistently employing the smallest percentage of women.<sup>11</sup> In 1968, women represented only six percent of the total mine work force, *including clerical workers*.<sup>12</sup> Not surprisingly, the vast majority of the women who were employed in the industry at that time worked in clerical and office-related jobs.<sup>13</sup>

In light of the above statistics, it was inevitable that mining, and particularly coal mining, would become a favorite target of the feminist movement. Coal mining unexpectedly became an even bigger, more attractive target in the middle seventies when the energy crisis caused the industry to suddenly reverse and become an expanding rather than a declining one.<sup>14</sup> With increased

<sup>9</sup> See generally Kennedy, *Sex Discrimination: State Protective Laws Since Title VII*, 47 NOTRE DAME LAW. 514 (1972); Barnard, *The Conflict between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved?*, 17 WAYNE L. REV. 25 (1971); Oldham, *Sex Discrimination and State Protective Laws*, 44 DEN. L.J. 344 (1967).

<sup>10</sup> See *Dark as a Dungeon Way Down in the Mines*, MS. MAGAZINE, April, 1975, at 19; *In Coal Mine No. 29, Two Women Work Alongside the Men*, N.Y. TIMES, May 18, 1974, at 16, col. 1; *Four Women Seek Jobs as Miners, and Man's World Is in Conflict*, N.Y. TIMES, Sept. 9, 1972, at 25, col. 1.

<sup>11</sup> See HANDBOOK, *supra* note 2, at 110, 112, 116, 117. See also Waldman & McEaddy, *Where Women Work—An Analysis by Industry and Occupation*, 97 MONTHLY LAB. REV. 3, 4 (May, 1974) [hereinafter cited as *Where Women Work*], where women are shown to make up 8% of total employment in mining as of 1970 and 6% in 1973.

<sup>12</sup> HANDBOOK, *supra* note 2, at 117.

<sup>13</sup> In 1970, 72.1% of the women employed in the mining and construction industries worked in clerical and related positions. *Where Women Work*, *supra* note 11, at 7.

<sup>14</sup> Prior to the energy crisis, the mining industry was viewed by some labor statisticians as a declining industry. "The Nation's man power requirements in

employment and generally high wages in the coal mining industry, it is not surprising that a substantial number of women wanted and continue to want a "piece of the action."<sup>15</sup> This natural inclination of some women to seek higher paying jobs in an expanding industry has been given a significant boost by the national news media, which has found the subject of women in coal mines to be a popular one. Moreover, the Office of Federal Contract Compliance Programs (OFCCP), one of two major federal EEO agencies, has targeted energy, particularly coal mining, as an

1975 will be influenced by the following projected changes in industrial composition . . . proportions of all workers in agriculture and in mining will continue long term declines." HANDBOOK, *supra* note 2, at 246. In fact, labor figures from 1968 through 1976 showed an increase from 145,000 miners in 1968 to 191,468 miners in 1976, and, if productivity remains constant between 1977 and 1985, employment in all U.S. mines is estimated to increase to 396,081. Nordlund & Mumford, *Estimating Employment Potential in U.S. Energy Industries*, 101 MONTHLY LAB. REV. 10, 11-12 (May, 1978).

Increased reliance on domestic energy sources and the resulting increased demand for coal will bring about expanded coal production as estimated in the table below:

ESTIMATED CHANGE IN COAL PRODUCTION, BY  
AREA AND TYPE OF MINE, 1976-85  
(Thousands of tons)

| Area                                       | 1976    | 1985      | Percent<br>Increase,<br>1976-85 |
|--|---------|-----------|---------------------------------|
| All U.S. mines                             | 644,911 | 1,422,410 | 120.5                           |
| Underground mines                          | 292,826 | 561,375   | 89.1                            |
| Surface mines                              | 352,085 | 861,035   | 144.5                           |
| All mines east of the<br>Mississippi River | 530,055 | 763,454   | 44.0                            |
| Underground mines                          | 274,356 | 458,205   | 67.0                            |
| Surface mines                              | 255,699 | 350,249   | 19.3                            |
| All mines west of the<br>Mississippi River | 114,856 | 658,956   | 473.7                           |
| Underground mines                          | 18,470  | 103,170   | 458.6                           |
| Surface mines                              | 96,386  | 555,786   | 476.6                           |

*Id.* at 12.

<sup>15</sup> *Women in the Mines*, NEWSWEEK, Dec. 17, 1979, at 74; Burns, *Why I Decided to "Go Underground,"* MCCALLS, Sept., 1977, at 69.

industry deserving its special enforcement efforts.<sup>16</sup> Currently the OFCCP's efforts are focused on a massive investigation of more than forty coal mine operators.<sup>17</sup>

In addition to public action, women have formed organizations designed to increase the number of women in the mines and to assist those who are already there. One such group, known as the Coal Employment Project, is the force behind the OFCCP review.<sup>18</sup> The Project, formed in 1977 and led by attorney Betty Jean Hall,<sup>19</sup> filed a class complaint on May 16, 1978, with the OFCCP against the more than forty companies the OFCCP is presently investigating.<sup>20</sup> In addition, the Project has recently sponsored a National Conference of Women Coal Miners and is engaged in other projects designed to bring attention to women miners and applicants.<sup>21</sup>

Thus, in light of the prior statistics and the fact that coal mining is a growth industry, as well as the government's close scrutiny of this industry and women's endeavors to obtain employment in the mines, it can be expected that the number of sex discrimination cases filed against coal mining companies will grow and the issues will proliferate in the immediate future. Notwithstanding the special attention that women in coal mines are receiving, there is, nevertheless, nothing particularly unique about the legal issues raised by women working or seeking work in the coal mines. There are, however, certain legal issues which predominate as the result of women entering into what has heretofore been a male bastion. The purpose of this article is to identify and analyze the most important of these issues. They are hiring, affirmative action, sexual harassment, harassment in job

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<sup>16</sup> DAILY LAB. REP. (BNA) No. 104, May 29, 1979, at A-6.

<sup>17</sup> OFCCP Policy Directive No. 79-87, Oct. 29, 1979, printed in OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,010 at 2713.

<sup>18</sup> *Id.*

<sup>19</sup> *The Militant Women Mining the Coalfields*, BUSINESS WEEK, June 25, 1979, at 30.

<sup>20</sup> OFCCP Policy Directive No. 79-87, Oct. 29, 1979, printed in OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,010 at 2713.

<sup>21</sup> *The Militant Women Mining the Coalfields*, BUSINESS WEEK, June 25, 1979, at 30.

assignment, sexually segregated facilities and pregnancy.

### I. HIRING

While many industries are presently facing issues involving female employees such as promotion, equal pay and comparable worth, the coal mining industry is still facing first and foremost the issue of hiring. Although a handful of women may have worked in small, family-owned mines, there were no reports of women even seeking jobs in any large coal mines until 1972. During that year, it was reported that four women sought jobs with the Clinchfield Coal Company in Cleveland, Virginia.<sup>22</sup> They apparently were told by the company that "we aren't hiring right now."<sup>23</sup>

The first report of women actually being employed in a major coal mine was the hiring of two women by Beth-Elkhorn Corporation, a subsidiary of Bethlehem Steel Corporation, in Jenkins, Kentucky.<sup>24</sup> When it hired the women, Bethlehem's manager of personnel indicated the company was responding to government pressure.<sup>25</sup>

Since 1974, the mines have begun hiring women in increasingly greater numbers. A 1978 article indicated that a thousand women have been employed as miners since 1973.<sup>26</sup> A subsequent article, dated June 25, 1979, stated that the ranks had grown to

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<sup>22</sup> *Four Women Seek Jobs as Miners, and Man's World Is in Conflict*, N.Y. TIMES, Sept. 9, 1972, at 25, col. 1.

<sup>23</sup> *Id.*

<sup>24</sup> *In Coal Mine No. 29, Two Women Work Alongside the Men*, N.Y. TIMES, May 18, 1974, at 16, col. 1. The first two women did not stay in the mines very long. A follow-up article reported that two years later neither of the women were working underground. *Follow-Up On the News*, N.Y. TIMES, Feb. 22, 1976, at 29, col. 1.

<sup>25</sup> *In Coal Mine No. 29, Two Women Work Alongside the Men*, N.Y. TIMES, May 18, 1974, at 16, col. 1. When the women miners were hired, Bethlehem's manager of personnel indicated they were responding to government pressure and said in a prepared statement: "We hired women as coal miners in accordance with our equal employment policy, in which the company recognizes that all job categories must be made available to all interested and qualified persons, regardless of sex." *Id.*

<sup>26</sup> N.Y. TIMES, Aug. 12, 1978 (Supplementary Materials from the N.Y. Times News Service and the Associated Press).



twenty-five hundred women workers,<sup>27</sup> and on February 19, 1980, a newspaper report indicated that there were three thousand women working in coal mines in the United States.<sup>28</sup>

To the extent that the ranks of women among coal miners have grown, it reasonably can be assumed that a great deal of growth was, as the Bethlehem personnel manager indicated, the result of legal pressure by the government. This pressure is both in response and in addition to pressure and legal actions by individuals.

The legal pressure by the government is not revealed in case decisions as there are none. It is found, however, in reports of settlements reached between the government or individual plaintiffs and various coal companies. Perhaps the most widely publicized settlement was between the OFCCP and Consolidated Coal Company. Reports indicate that as part of the settlement Consolidated agreed to pay \$370,000 to seventy-eight women.<sup>29</sup> The published portion of the conciliation agreement does not indicate the amounts actually paid to the class of women, but it does reveal the rest of the details about the agreement. Regarding the affected class of women entitled to back pay, it shows that these women were divided into two subclasses. One subclass consisted of females who were actually hired into the position of miner trainee.<sup>30</sup> Female applicants for the miner trainee position from 1973 to 1976 who were not hired formed the second subclass.<sup>31</sup> As to the first subclass of female employees, they were entitled individually to back pay and retroactive seniority if a male applied for a trainee position at the applicable hiring center *after* the class member but was hired *before* her.<sup>32</sup> Such relief was com-

<sup>27</sup> *The Militant Women Mining the Coalfields*, BUSINESS WEEK, June 25, 1979, at 30.

<sup>28</sup> *Coal's Lumps*, THE PLAIN DEALER, Feb. 19, 1980, § A, at 11, col. 1. A March 13, 1980, newspaper article stated that "[f]ederal officials say West Virginia leads the nation with nearly 900 female miners, while Kentucky is second with 625, and Pennsylvania is third with about 400." THE PLAIN DEALER, Mar. 13, 1980, § A, at 14, col. 1.

<sup>29</sup> N.Y. TIMES, Dec. 27, 1978, § A, at 12, col. 6; OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,012.

<sup>30</sup> OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,010 at 2723.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* One effect of a seniority readjustment was that if any subclass one members were laid off due to their late hire date, and male employees who had

puted by comparing the actual hire date of the subclass member with the hire date of the first hired male trainee who applied for employment at the applicable hiring center on or after her application date.<sup>33</sup> Subclass two members were entitled only to monetary awards in accordance with a formula agreed upon by the parties.<sup>34</sup>

Also included in the conciliation agreement were provisions to increase the recruitment and hiring of women. One of these provisions was the establishment of a fund by Consolidated, to which it made an initial contribution of \$10,000, devoted to increasing the number of qualified females for miner trainee positions.<sup>35</sup> The agreement also included a renewed commitment by Consolidated to make every reasonable good faith effort to achieve the significant features of its 1978 affirmative action program (AAP).<sup>36</sup> This AAP included an ultimate goal of employing females in 32.8% of the mining positions, which reflects the proportion of females in the total labor market in "the relevant geographic area," and an annual goal of employing females in 20.1% of the miner trainee positions.<sup>37</sup>

In addition to the Consolidated settlement, the OFCCP reports of settlements with two western coal companies, Decker Coal Company, Decker, Montana, and Big Horn Coal Company, Sheridan, Wyoming.<sup>38</sup> The compliance review conducted by the OFCCP of Decker in 1977 revealed that only one woman had been hired in a blue collar position since the mine opened in 1972 and that the total female representation in the company's work

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applied later but had been hired earlier were not laid off (or were laid off for shorter periods of time), the subclass members were entitled to back pay for the time or excessive time they were laid off. *Id.* at 2724.

<sup>33</sup> *Id.* at 2723-24. This individualized method for calculation of back pay is in keeping with recent court decisions. See generally *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

<sup>34</sup> OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,010 at 2724.

<sup>35</sup> *Id.* at 2725.

<sup>36</sup> *Id.* at 2726.

<sup>37</sup> *Id.*

<sup>38</sup> OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,012 at 2727.

force amounted to only 2.4%.<sup>39</sup> The facts at Big Horn Coal were similar with female representation comprising 1.2% of the work force in 1978.<sup>40</sup> Even though the company experienced a rapid growth from forty-six employees in 1974 to 231 employees in 1978, there were no females hired for blue collar jobs.<sup>41</sup> According to OFCCP reports of these settlements, Decker agreed to pay \$186,674 to 172 women and Big Horn agreed to pay \$11,326 to fourteen women.<sup>42</sup> In addition, the two companies agreed to seniority adjustments for seventeen female employees and to affirmative action programs calling for initial goals of filling over ten percent of the entry level blue collar jobs with women.<sup>43</sup>

In addition to these settlements resulting from OFCCP enforcement efforts, there are reports of numerous discrimination charges having been filed and of a fair number of individual claims having been settled for substantial amounts of money. For example, in the several news articles on the death of the first woman to be killed in a deep mine accident,<sup>44</sup> her problems in initially obtaining a job in the mine were often included. One article states that she was hired by the Rushton Company as one of its first women miners in 1977 pursuant to the settlement of a lawsuit which also awarded her \$30,000 in back pay.<sup>45</sup> Another news article reports that seven women recently were awarded \$41,000 as part of a sex discrimination settlement against Island Creek Coal Company in Kentucky.<sup>46</sup> The same report indicates that in West Virginia more than a dozen such cases are pending before the Human Rights Commission<sup>47</sup> and that "dozens of discrimination and harassment suits have been filed by women who have said they were mistreated by mine management or were discouraged by their supervisors from pursuing mining careers."<sup>48</sup> To date, however, few of those cases have been decided by the courts.

<sup>39</sup> *Id.* at 2728.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *E.g., One Fight For Women's Rights: A Coal Miner's Life and Death*, N.Y. TIMES, Nov. 8, 1979, § A, at 1, col. 1.

<sup>45</sup> *Id.* at 16, col. 3.

<sup>46</sup> *Coal's Lumps*, THE PLAIN DEALER, Feb. 19, 1980, § A, at 11, col. 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

In fact, only two sex discrimination hiring cases in the coal industry have been reported, and only one of these is of any significance. That case is *Holder v. Old Ben Coal Company*.<sup>49</sup>

In *Holder*, a split panel of the United States Court of Appeals for the Seventh Circuit affirmed a district court decision which had rejected the claim of a female job applicant with eleven years experience as a beautician for an unskilled position with a strip mining company.<sup>50</sup> The *Holder* case deserves close analysis as it deals with a problem which is common to most mining companies today. Namely, faced with bad statistical evidence and mounting legal pressure to hire women, how can a company hire the "best qualified" applicants, women included, yet not be subjected to legal liability every time a female applicant is rejected?

*Holder* was a suit against Old Ben Coal Company, which owned and operated two strip mines in Indiana. Between 1974 and 1978, Holder applied three times for an unskilled position with Old Ben. The first two times she was rejected. While there was some dispute over what her first application stated because it had not been retained, her other applications revealed that at the time she initially sought employment she had attended high school and beauty college, had been a beautician for eleven years, and had done some "light work" in a small factory during one winter.<sup>51</sup> By the time she submitted her third application, she had worked at another mine for sixteen months. Hence, with that application she was hired and, at the time of trial, she was an employee of Old Ben. She sought, nonetheless, back pay, seniority, pension credits, costs, and attorneys' fees for her earlier rejections of employment.<sup>52</sup> The district court dismissed her claim on the basis that she had not proven a *prima facie* case of sex discrimination as she had failed to prove that she was qualified for

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<sup>49</sup> 618 F.2d 1198 (7th Cir. 1980). The other case, *Monk v. Highland Creek Coal Co.*, 20 Empl. Prac. Dec. 11,780 (W.D. Va. 1979), was merely a preliminary legal skirmish in which the court held that the female plaintiff could not advance claims under 42 U.S.C. § 1985(3) (1976) (conspiracy to interfere with civil rights) and the Sherman and Clayton Antitrust Acts, but that she could proceed forward with a Title VII claim limited to hiring discrimination allegations.

<sup>50</sup> 618 F.2d 1198 (7th Cir. 1980).

<sup>51</sup> *Id.* at 1199.

<sup>52</sup> *Id.* at 1198.

employment the first two times she applied for employment. The Seventh Circuit affirmed the district court's decision two to one.

The main thrust of Holder's claim on appeal was that she could not be rejected for an unskilled job on the basis of lack of qualifications. The majority opinion held that "[a] job categorized as unskilled, however, does not necessarily mean that certain qualifications or experience are not required or preferred for the job."<sup>53</sup> The court observed that there was no evidence that the employer applied the term "unskilled" to mean a total lack of qualifications or experience.<sup>54</sup> The evidence demonstrated that Old Ben had primarily sought persons who had operated mobile equipment or had worked with heavy equipment and that it had mainly hired applicants with welding, truck driving and maintenance experience. The court went on to state that

it is not an unrealistic or impractical assumption, that the employer did not and would not necessarily consider all applicants for unskilled positions to be equally qualified. It simply does not amount to sex discrimination for a coal mine to fill an unskilled position with a person, male or female, who had had some experience with welding, electricity, heavy equipment, etc., instead of with a beautician.<sup>55</sup>

The other principle claim of Holder on appeal was that "the district court confused the burden of proof in Title VII claims by considering experience and comparable qualifications as a requirement of a plaintiff's *prima facie* showing."<sup>56</sup>

It is on this point that the dissent parted with the majority. The dissent said:

the plaintiff has made a *prima facie* showing of employment discrimination under *McDonnell Douglas Corp. v. Green*. The district court did not consider whether the defendant met its burden of rebutting plaintiff's showing by proving a legitimate business reason for preferring to hire the male applicants instead of plaintiff.<sup>57</sup>

The majority in *Holder*, however, did not rely solely on *Mc-*

<sup>53</sup> *Id.* at 1200.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1201.

<sup>56</sup> *Id.* at 1465.

<sup>57</sup> *Id.* at 1203 (citation omitted).

*Donnell Douglas* in analyzing the plaintiff's burden of proof. Citing *Furnco Construction Corp. v. Waters*<sup>58</sup> and *International Brotherhood of Teamsters v. United States*,<sup>59</sup> the court held that

[t]he plaintiff "carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'"<sup>60</sup>

The Seventh Circuit went on to say that

[a] desire to hire the more experienced or better qualified applicant is a nondiscriminatory, legitimate, and common reason on which to base a hiring decision. A Title VII plaintiff must show that the employer was seeking applicants of qualifications comparable to plaintiff's. The employer here consistently sought applicants for unskilled positions with mining related experience. The mere labeling of the job as unskilled does not make all applicants qualified within the meaning of *McDonnell Douglas*. The evidence fails to show that defendant ever sought or hired anyone with experience comparable to plaintiff's. Plaintiff has shown nothing more than she applied for a job labelled unskilled and she was rejected. This does not constitute a *prima facie* showing.<sup>61</sup>

The result in *Holder* may be somewhat unique, however. The court states that "some of plaintiff's exhibits helped establish the defendant's case."<sup>62</sup> In a footnote, the court also indicates that even if the plaintiff had established a *prima facie* case, little would be served by remanding the case "because the record convincingly reveals that defendant hired applicants who were more qualified than plaintiff."<sup>63</sup>

These observations by the majority should not be taken lightly if *Holder* is to be placed in its proper perspective. Although the defendant usually would have to come forward and justify why the plaintiff was not hired, total reliance on *Holder's* deviation from this general rule may be misplaced for two rea-

<sup>58</sup> 438 U.S. 567 (1978).

<sup>59</sup> 431 U.S. 324 (1977).

<sup>60</sup> 618 F.2d 1198, 1201 (7th Cir. 1980).

<sup>61</sup> *Id.* at 1201 (citations omitted).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, n.6.

sons. First, the court may have stretched too far the implications of its finding that the plaintiff was "unqualified." Secondly, it appears that the plaintiff offered sufficient evidence to disprove her own case. She apparently did not stop with the usual proofs under *McDonnell Douglas* but permitted evidence to be introduced which demonstrated that she was not as qualified as the males who were hired. Or, stated differently, the plaintiff's evidence showed a legitimate business reason for the defendant's actions and thus, the burden of proof never shifted to the defendant.

Applying *Holder* as well as the body of law which has developed generally under Title VII, how would a female plaintiff prove a *prima facie* case of hiring discrimination by a coal mine operator? The law is sufficiently settled that this does not require much speculation. Plaintiff would start with statistics. First, she ordinarily would offer evidence, probably in the form of an EEO-1 report,<sup>64</sup> showing the paucity of women working for the company, generally, and in blue collar jobs, specifically. Then she would seek information through the usual discovery routes about the number of women who had applied and the number who were hired and compare that ratio with the ratio of male applicants and hires. If the women's hire rate was less than eighty percent of the men's, those statistics could be expected to be part of plaintiff's evidence.<sup>65</sup>

Plaintiff then would follow the standard approach outlined in

<sup>64</sup> Every employer subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e 1-17 (1976), which employs 100 or more employees is required to file annually with the Joint Reporting Committee ("Joint" refers to the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Program), executed copies of Standard Form 100 (otherwise known as "Employer Information Report, EEO-1"). 29 C.F.R. § 1602.7 (1978). The EEO-1 report shows the composition of the employer's work force and the relationship of minority and female employees to the total work force in each of the specified job categories.

<sup>65</sup> See Section 4(D), Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,297 (1978), which reads in pertinent part:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. . . .

*McDonnell Douglas Corp. v. Green*<sup>66</sup> for proving a discrimination case. She would need to prove: (1) that she belonged to an affected class;<sup>67</sup> (2) that she applied and was qualified for a job for which the mine was seeking applicants; (3) that despite her qualifications she was rejected; and (4) that after her rejection the job for which she applied remained open and the mine continued to seek applications from persons of the plaintiff's qualifications to fill this job.<sup>68</sup> Proofs of (1), (3) and (4) would probably be routine. In light of *Holder*, however, the proof of whether she was qualified could be a major issue. In *Holder*, the evidence apparently showed a consistent pattern by Old Ben of seeking persons with experience in welding, truck driving, and working with heavy equipment or electricity. Ordinarily, this would be part of an employer's defense. The plaintiff would only need to show that the job was unskilled and that she was willing and physically able to perform the job.<sup>69</sup> However, if as part of plaintiff's case, or at some other point in the trial, evidence was offered, as it was in *Holder*, that the job carried certain qualifications or preferences, plaintiff could respond in several ways.

First, of course, she could prove that she met the qualifications. Secondly, she could show that the qualifications or preferences which eliminated her were not uniformly required of men so that in fact she was subjected to disparate treatment. Third, she could show that the qualifications or preferences were more

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<sup>66</sup> 411 U.S. 792, 802 (1973). See also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

<sup>67</sup> *Id.* Although *McDonnell Douglas* refers to "a racial minority," women, even though they constitute a majority of the population, are viewed as suffering the same disadvantages as racial minorities and, hence, are treated similarly in Title VII cases.

<sup>68</sup> 411 U.S. 792, 802 (1973).

<sup>69</sup> Small stature would not demonstrate a physical inability to perform the job. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the United States Supreme Court upheld the lower court's finding that 5'2" height and 120 pound requirements for prison guards had a disparate impact on females and constituted a violation of Title VII of the 1964 Civil Rights Act in the absence of evidence showing the job relatedness of such requirements. See also *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977) (disparate impact of airline's 5'7" minimum height requirement on female applicants established a *prima facie* case of sex discrimination); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated on other grounds*, 439 U.S. 950 (1979) (fire department's 5'7" height requirement that discriminates against Mexican-Americans not adequately validated).



likely to be held by men than women; hence, they had a disparate impact on female applicants.<sup>70</sup> With the showing of disparate impact, the burden would shift to the defendant to demonstrate that the selection criteria, whether called qualifications or preferences, were validated.<sup>71</sup>

With the percentage of females as low as it is in the coal mining industry and the fact that the entry level miner job is basically an unskilled position with hiring criteria, if any, unvalidated, many coal mine operators would be left without much of a defense, notwithstanding the *Holder* decision. But a coal mine operator cannot be expected to hire every woman who applies. How then can it defend against a discrimination claim? Basically, it must take the plaintiff's proofs and turn them around. Statistics may, in fact, provide the best defense. Since overall statistics are virtually certain to be unfavorable, the defendant may be able to attribute this fact to past discrimination, legal or otherwise, from which it may be protected by the statute of limitations, and focus on more recent hiring statistics. Primarily, this would involve application of the eighty percent test<sup>72</sup> in reverse, *i.e.*, the defendant would demonstrate that at the time the female plaintiff applied for a job, it did not discriminate against female applicants. In most cases this would mean at some point prior to the time the plaintiff applied, the defendant had implemented an affirmative action program whereby it started keeping applicant flow data<sup>73</sup> and the defendant could demonstrate that when the plaintiff applied, it was hiring women applicants roughly in the same proportion as male applicants.<sup>74</sup>

If there is no statistical defense, the second basic approach for a defendant is to validate its hiring criteria. Old Ben appar-

<sup>70</sup> See EEOC Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. 1607 (1978). In *Holder* there is no discussion of the disparate impact the job qualifications or preferences would or might have on females. Perhaps the plaintiff, having introduced the evidence of the qualifications or preferences, did not then offer evidence to show the disparate impact these preferences could have on females.

<sup>71</sup> See *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977).

<sup>72</sup> See note 65, *supra*.

<sup>73</sup> While applicant flow percentages are not quoted in the *Holder* case, Old Ben must have been helped by the fact that although it did not hire the plaintiff, it hired other women. 618 F.2d 1198, 1203 (7th Cir. 1980).

<sup>74</sup> See note 65, *supra*.

ently divided its applicants into two groups, those with experience in coal mining and those without. While such an approach would undoubtedly have a disparate impact on women, prior experience ordinarily is not questioned as a job preference. The difficult aspect would be the validation of the relationship between prior job *related* experience or education such as that preferred or required by Old Ben and work performance as a coal miner. This means the company would have to retain an expert to conduct a validation study which would demonstrate a significant positive correlation between certain educational backgrounds, such as shop courses in electricity, or certain prior job experiences, such as that of an auto mechanic, with success as a coal miner. While there is a certain amount of "facial validity" to these criteria, it simply cannot be assumed without a validation study that auto mechanics make better coal miners. The authors are unaware of any validation studies in the coal mine industry for entry level jobs.

## II. AFFIRMATIVE ACTION

While individual claims of discrimination and Title VII class actions will remain difficult to defend in many instances, the operators' real battle in the immediate future will probably lie with the OFCCP over affirmative action. If mine operators find hiring women at the proportion at which they apply a difficult proposition, they undoubtedly will find the OFCCP's arbitrary approach of statistical parity with women in the work force even more difficult to accept. In the Consolidated settlement, the OFCCP set 32.8% as an ultimate goal for hiring females in mining positions, a figure reflecting the proportion of females in the total labor market of the relevant geographic area.<sup>75</sup> In its current industry review on coal mining,<sup>76</sup> the OFCCP appears to seek a female hiring rate of twenty-five percent for entry level coal miners until women constitute at least twenty percent of the blue collar work force at the mines being reviewed.<sup>77</sup>

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<sup>75</sup> OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,010 at 2726.

<sup>76</sup> See note 16 and accompanying text, *supra*.

<sup>77</sup> OFCCP Policy Directive No. 79-87, Oct. 29, 1979, printed in OFCCP FED. CONTRACT COMPLIANCE MAN. (CCH) ¶ 21,010 at 2713. The Coal Employment Project sought these rates in their complaint and the OFCCP appears to have accepted these percentages as "equitable, just and proper." *Id.*

The problem with these goals is that no one, the OFCCP included, knows how many women would seriously like to be coal miners. Coal mining is an industry which, until the very recent past, has had virtually no experience in hiring women. Statistics annually reveal that it is the most dangerous occupation in America.<sup>78</sup> In addition to the safety hazards, there is the health hazard of black lung disease and the "dirtiness" of the coal itself. There is also the effect of present societal attitudes; notwithstanding the feminist movement, the wives of male miners, husbands and families continue to discourage women from working in the mines.<sup>79</sup> While undoubtedly there are numerous women who are willing to accept the dangerous and dirty conditions of the mines as well as the barbs of their relatives and neighbors due to the fact that coal mining is a high paying job, many or most women are going to be affected by the kinds of societal pressures which still exist.

To set goals for a percentage of women ultimately to be hired, when there is no past experience, is to force one segment of society's value systems on that of another. Although many women might be motivated by the high paying jobs in the coal mining industry, whatever the risk, it cannot be assumed that all or even most women today are similarly motivated. Such arbitrary goal setting, particularly when indulged in by the government, is no more defensible than the arbitrary exclusion of a woman because of her sex. For the present, the OFCCP would be much better advised to stick with its eighty percent rule<sup>80</sup> and gather experience data rather than plunge blindly ahead with the individual notions of well-meaning bureaucrats about how many women should be working in the mines.

Notwithstanding questionable goal setting by the OFCCP, its affirmative action requirements cannot be taken lightly. After all, it is the watchdog agency of government contractors and, in the

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<sup>78</sup> *Miners' Lives Found Better, But Job Is Most Dangerous*, N.Y. TIMES, Mar. 3, 1980, at 10, col. 4.

<sup>79</sup> *Women in the Mines*, NEWSWEEK, Dec. 17, 1979, at 74; N.Y. TIMES, Aug. 12, 1978 (Supplementary Material from the N.Y. Times News Service and The Associated Press); Burns, *Why I Decided to "Go Underground,"* MCCALLS, Sept., 1977, at 69, 73; *In Coal Mine No. 29, Two Women Work Alongside the Men*, N.Y. TIMES, May 18, 1974, at 16, col. 1.

<sup>80</sup> See note 65, *supra*.

same way the "commerce clause" was gradually eroded to include all employers, government contracting clauses which attempt to reach multi-tiered subcontractors<sup>81</sup> are now being used in an effort to cover virtually all employers. Moreover, the OFCCP carries a big stick—the threat of placing a contractor on its ineligibility list.<sup>82</sup> Most contractors, not being willing to risk loss of government contracts, will respond to these threats. These threats also will affect subcontractors who fear loss of business with major government contractors. As a result, most employers have bent to the will of the OFCCP with the result that very little legal precedent has been established for any of the OFCCP's requirements. Thus, employers who take issue with the agency or its individual compliance officers proceed at considerable peril.

OFCCP's most popular and effective tool is a utilization analysis which has as its end result the setting of annual and ultimate goals.<sup>83</sup> This is done by using an eight factor analysis which has the appearance of being scientific but in fact is only window dressing. The employer is initially responsible for performing the analysis and setting the goals, but the OFCCP, when conducting an audit, often will insist on higher goals. Using the eight factors, the agency will frequently manipulate the weights to be accorded the factors of its choice so as to force the contractor into establishing the highest possible goals. That is, the OFCCP will emphasize one set of factors in one locale or industry and another set elsewhere. Typically, most affirmative action programs place considerable weight on the following four factors:

- (1) The general availability of women having requisite skills in the immediate labor area;
- (2) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;
- (3) The availability of women seeking employment in the labor or recruitment area of the contractor;
- (4) The availability of promotable and transferable female employees within the contractor's organization.<sup>84</sup>

Yet, these four factors, which are usually the most significant, are virtually ignored when it comes to setting goals for coal

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<sup>81</sup> 41 C.F.R. § 60-1.3 (1979).

<sup>82</sup> 41 C.F.R. § 60-1.30 (1979).

<sup>83</sup> 41 C.F.R. § 60-2.11 (1979).

<sup>84</sup> *Id.* § 60-2.11(b)(2)(iii-vi).

operators. Instead, most of the weight is placed on one factor, the percentage of the female work force as compared with the total work force in the immediate labor area.<sup>85</sup> Such an arbitrary approach makes the eight factor analysis a tool to be used at the whim of the government.

The other problem with the goal setting technique is that once the goals are established, they become, in reality, quotas. While the OFCCP has for years espoused that there is a difference between goals and quotas, claiming that quotas are rigid and goals are flexible and that if goals are not achieved the failure to reach them can be justified by proving "good-faith efforts," those employers and their counsel who have dealt with the OFCCP know that there are virtually no "good faith efforts" which will be accepted if the goals are not achieved.

It is, therefore, recommended that the coal mine operators who are reviewed by the OFCCP and find themselves faced with unrealistic "goals" establish their battle lines at the goal setting stage. They should establish their own goals and then prepare to defend and implement them. To establish these goals, the coal operators should use the eight factor analysis, balancing *all* the individual factors but also taking into account changing attitudes and a realistic assessment of what they can do to attract more female applicants through genuine recruitment efforts.

When it comes to attracting more applicants, the regulations promulgated by the OFCCP deserve credit and should be considered carefully.<sup>86</sup> Revised Orders 4<sup>87</sup> and 14<sup>88</sup> set forth in some detail positive approaches companies can follow to increase participation by disadvantaged groups. Recruitment is obviously the first step. At a minimum, the company should use currently employed women to attract other women. It should reach out into the community through women's groups, Career Days, "Job Fairs," unions and educational institutions. The company should strive to create a positive image in the community by supporting the efforts of women to gain coal mining jobs rather than opposing them. It also should use recruiting brochures which include

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<sup>85</sup> *Id.* § 60-2.11(b)(2)(ii).

<sup>86</sup> 41 C.F.R. § 60-2.24 (1979).

<sup>87</sup> 41 C.F.R. § 60-2 (1979).

<sup>88</sup> 41 C.F.R. § 60-60 (1979).

pictures of women miners. If these general approaches are followed, the benefits will be maximized and government intervention will be minimized because the factual basis for good legal defenses to individual as well as class-type actions will have been established. In addition, there will be fringe benefits, one of which will be that the company will establish a wider base from which to select the best possible miners.

Once women are on the payroll, however, affirmative action does not stop. Recruitment is only the first step. Industries which have traditionally employed substantial numbers of women are still actively involved in affirmative action programs because, traditionally, those women have been confined to clerical positions or other low paying jobs. In those industries, the OFCCP is pushing the advancement of women into technical, professional and managerial jobs. The coal mining industry will be expected to do the same. Once women miners are on the payroll, the coal mine operators should be viewing them as potential supervisors, just as they would consider any other miner. Moreover, when they recruit at colleges and universities for engineers and other professionals, they would be wise to consider female students as well as male students.

### III. SEXUAL HARASSMENT

Second only to the issue of hiring, the most prevalent problem of women coal miners appears to be sexual harassment. Uniformly, news articles and commentaries dealing with women miners include accounts of sexual harassment.<sup>89</sup> Reports of a meeting in November, 1979, of women miners sponsored by the United Mineworkers of America, state that "[a]t workshop sessions at the conference, the participants' unanimous complaint was that they were victims of sexual harassment."<sup>90</sup> More particularly, they said they were repeatedly subjected to physical assault and verbal provocation. The women miners claimed that "'company

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<sup>89</sup> E.g., *Women in the Mines*, NEWSWEEK, Dec. 17, 1979, at 74; *Women Who Work in Mines Assail Harassment and Unsafe Conditions*, N.Y. TIMES, Nov. 11, 1979, at 30, col. 1; Sullivan, *Women Say No to Sexual Harassment*, COAL AGE, Aug., 1979, at 74; *The Militant Women Mining the Coalfields*, BUSINESS WEEK, June 25, 1979, at 30.

<sup>90</sup> *Women Who Work in Mines Assail Harassment and Unsafe Conditions*, N.Y. TIMES, Nov. 11, 1979, at 30, col. 1.

men,' from foremen to mine superintendents . . . made propositions after refusing to act on their complaints of sexual harassment," and that they were faced with "repeated incidents of male exposure in the isolated mine tunnels."<sup>91</sup>

Sexual harassment, however, is not unique to the coal mining industry.<sup>92</sup> The EEOC, in fact, has recently amended its Guidelines on Discrimination Because of Sex by adding a new section on sexual harassment.<sup>93</sup> Moreover, it has become a major issue in

<sup>91</sup> *Id.*

<sup>92</sup> A recent survey of women ages 19 to 61 in two upstate New York cities by the Working Women's Institute found that 70% of the women interviewed had been sexually harassed at some point in their careers. "Some 75% of the victims reported that the advances continued even when they ignored them. Half of the 18% who complained to their employers found that nothing was done about the problem, and a third found that the complaints led to such retaliation as unpleasant job assignments." *Sexual Harassment Lands Companies in Court*, BUSINESS WEEK, Oct. 1, 1979, at 120.

Other studies confirm these high statistics. *On the Job Pinch or Pat*, THE PLAIN DEALER, July 30, 1979 at 1:

Graduate students of Dr. Lucile E. Wright, education professor, surveyed more than 400 workers and found 57% of the women and 25% of the men had been victims of sexual harassment on the job. Most said the harassment occurred at least once every four days.

Only 1% said they actually had been threatened with loss of their job if they failed to comply with sexual advances, almost the same number found in national studies.

Survey respondents said less serious harassment, such as supposedly accidental body contact or invitations for drinks or dinner were more common. But even without the direct threat of firing, those surveyed said the harassment was nerve-racking and decreased their efficiency.

<sup>93</sup> The EEOC has recently issued Final Guidelines on Sexual Harassment Discrimination, 45 Fed. Reg. 74,676 (Nov. 10, 1980), which amended its Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604, by adding § 1604.11. The Guidelines provide that acts of sexual harassment are violative of Title VII of the Civil Rights Act of 1964. Sexual harassment is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a).

With respect to such acts of harassment, an employer, under the Guidelines, will be responsible for its acts and those those of its agents and supervisory em-

sex discrimination cases. The two questions which the courts have faced most frequently in sexual harassment cases are: (1) whether the sexual harassment is in fact discrimination within the meaning of Title VII; (2) whether the sexual harassment constitutes a tort; and (3) under what circumstances does an employer become responsible for its employees' actions.

Today there is little doubt that sexual harassment by supervisors of subordinates, particularly when it impacts on a subordinate's job, is a violation of Title VII.<sup>94</sup> The earliest cases, how-

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employees, regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. 29 C.F.R. § 1604.11(c). An employer may also be held responsible for acts of sexual harassment, in the workplace, between fellow employees where the employer, or its agents or supervisory employees, knows or should have known of such conduct. *Id.* at § 1604.11(d). An employer, however, may rebut such apparent liability for the acts of non-supervisory employees "by showing that it took immediate and appropriate corrective action." *Id.*

Section 1604.11(e) of the Guidelines, however, takes §1604.11(d) one step further and provides that employers may be liable for acts of sexual harassment committed in the workplace against employees by non-employees. Though, as in subsection (a), to be found liable, an employer must have had knowledge, express or implied, and failed "to take immediate and appropriate corrective action." 29 C.F.R. §1604.11(e). Before imposing liability on the employer, the "Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." *Id.*

A final section was added to the Final Guidelines to caution that acts of sexual harassment with respect to one employee may have Title VII implications with respect to others. Section 1604.11(g) provides that "[W]here employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit." 29 C.F.R. §1604.11(g).

<sup>94</sup> *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Garber v. Saxon Business Prod., Inc.*, 552 F.2d 1032 (4th Cir. 1977); *cf. Vinson v. Taylor*, 22 Empl. Prac. Dec. 14,687 (D.D.C. 1980); *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979). *See also Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978); *Rinkel v. Associated Pipeland Contractors, Inc.*, 16 Empl. Prac. Dec. 5748 (D. Alaska 1978); *Brown v. City of Guthrie, Oklahoma*, No. c. iv-78-137 (W.D. Okla. May 30, 1980).

There is also some indication that an employer may be liable for sexual harassment of female employees by persons in non-supervisory positions or where the nexus between the harassment and job advancement has not been shown. In the case of *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977),



ever, held that sexual harassment did not violate Title VII. The district court in *Tomkins v. Public Service Electric & Gas Co.*<sup>96</sup> granted the defendant employer's motion to dismiss a Title VII action based on sexual harassment for failure to state a claim, reasoning in part that "gender lines might as easily have been reversed, or not even crossed at all."<sup>96</sup> Another district court in *Barnes v. Train*<sup>97</sup> granted defendant's motion for summary judgment, holding that sexual harassment practices were not encompassed in the actions prohibited by Title VII. The court viewed the plaintiff's allegations as claiming that she was discriminated against not because she was a woman but because she refused to have an affair with her supervisor.<sup>98</sup> Similarly, in *Garber v. Saxon Business Products, Inc.*<sup>99</sup> the district court dismissed the complaint of a female alleging that her discharge resulted from the fact she had rebuffed sexual advances of her male supervisor as failing to state a cause of action.<sup>100</sup> Then, in *Miller v. Bank of America*<sup>101</sup> the district court held that Title VII is directed at acts of employment discrimination and not at individual acts of discrimination. Therefore, individual acts of sexual harassment by one employee against another employee do not constitute a cause of action against the employer.<sup>102</sup> All the foregoing district court decisions were reversed by the United States court of appeals.

The plaintiff in *Tomkins*<sup>103</sup> was a secretary with Public Ser-

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the court held that an employer had an affirmative duty to investigate employee complaints of sexual harassment and to deal appropriately with the offending personnel. In that case, a female employee who claimed she was fired for refusing an assistant manager's sexual advances stated a cause of action against the assistant manager, his supervisor, and the employer. The court stated that the supervisor and employer ratified the assistant manager's alleged misconduct by supporting the employee's discharge without investigating her sexual harassment claims. See also *Kyriazi v. Western Electric Co.*, 476 F. Supp. 335 (D.N.J. 1979).

<sup>95</sup> 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

<sup>96</sup> *Id.* at 556.

<sup>97</sup> No. 1828-73 (D.D.C. Aug. 9, 1974), *rev'd sub. nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

<sup>98</sup> *Id.*

<sup>99</sup> EMPL. PRAC. GUIDE (CCH) 14 Empl. Prac. Dec. ¶ 7,586 (D. Va. 1976), *rev'd*, 552 F.2d 1032 (4th Cir. 1977).

<sup>100</sup> *Id.*

<sup>101</sup> 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

<sup>102</sup> *Id.*

<sup>103</sup> 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

vice Electric & Gas Co. Her complaint alleged that she had a history of constant progress toward positions of increasing responsibility. One day her supervisor invited her out to lunch, ostensibly to discuss her work, and while at lunch made sexual advances toward her. The complaint went on to state that when she refused his advances, she was threatened with physical force and recrimination in her employment, and that the defendant employer knew or should have known about the incident and failed to take adequate measures. Plaintiff also alleged that she agreed to transfer to another department after having been promised a comparable position. Her new job, however, was inferior and she repeatedly was subjected to harassment. She claimed to suffer physical and emotional distress as a result of the transfer, which caused her to be absent from work and thus to lose income, and finally, to be dismissed approximately fourteen months after the incident occurred.

The Third Circuit court of appeals reversed the district court's dismissal of her complaint.<sup>104</sup> The appellate court noted that the district court overlooked the allegation in Tomkins' complaint that her employer either knowingly or constructively made acquiescence to her supervisor's sexual demands a necessary prerequisite to continuation of or advancement in her job.<sup>105</sup> It further stated that the sex-related incident was clearly job-related in that the demand amounted to a condition of employment.<sup>106</sup> The court held that

Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotions, or other aspects of career development—on a favorable response to those advances or demands, and the employer does not take prompt or remedial action after acquiring such knowledge.<sup>107</sup>

In *Barnes v. Costle*,<sup>108</sup> the plaintiff, who had been employed as an administrative assistant to the director of equal employ-

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<sup>104</sup> 568 F.2d 1044 (3d Cir. 1977).

<sup>105</sup> *Id.* at 1046.

<sup>106</sup> *Id.* at 1047.

<sup>107</sup> *Id.* at 1048-49.

<sup>108</sup> 561 F.2d 983 (D.C. Cir. 1977).

ment opportunity for the Environmental Protection Agency, alleged in her complaint to the district court<sup>109</sup> that shortly after she was hired the director repeatedly made sexual demands and suggested that her employment status would be enhanced if she would give in to his demands. While the district court had held that plaintiff's claim was not that she was discriminated against because she was a woman but that she was discriminated against because she failed to have an affair, the District of Columbia court of appeals reversed and remanded the case on appeal.<sup>110</sup> In so doing, the court stated that plaintiff was claiming her job was conditioned upon her submission to sexual relations—a demand which the director would not have sought from any male. Under those circumstances, there is implied two separate terms of employment, one for men and one for women; if not for the plaintiff's womanhood, her participation in sexual activity would never have been solicited. The court further held that to constitute a violation of Title VII, it was sufficient to show that gender was a factor contributing to discrimination in a substantial way.<sup>111</sup>

Similarly, the Fourth Circuit court of appeals in *Garber v. Saxon Business Products, Inc.*<sup>112</sup> reversed and remanded a dismissal by the district court and held that the complaint and its exhibits, liberally construed, established an alleged employer policy or acquiescence in a practice of compelling female employees to submit to sexual advances of supervisors in violation of Title VII. A case before the Ninth Circuit court of appeals, *Miller v. Bank of America*,<sup>113</sup> added a little twist to the usual cause of action. The Bank in *Miller* argued that it should not be held responsible for unlawful sexual advances of a supervisor when it had established a policy against such behavior. The Ninth Circuit rejected that defense, stating that Title VII defines "employer" to

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<sup>109</sup> Ms. Barnes initially filed a formal complaint with the Civil Service Commission alleging race discrimination on the erroneous advice of agency personnel. An appeals examiner conducting a hearing in the case excluded evidence of sex discrimination and found no evidence of race discrimination. The agency concurred with this and the Civil Service Commission Board of Appeals refused to reopen her case on the grounds that the case was not within Title VII. *Id.* at 985-86.

<sup>110</sup> 561 F.2d 983 (D.C. Cir. 1977).

<sup>111</sup> *Id.*

<sup>112</sup> 552 F.2d 1032 (4th Cir. 1977).

<sup>113</sup> 600 F.2d 211 (9th Cir. 1979).

include any agent of the employer. The Bank was, therefore, potentially liable for any Title VII violation by its agent acting in his authorized capacity as a supervisor.<sup>114</sup> Although the supervisor's alleged sexual advances violated company policy, the action complained of related to the supervisor's authority to participate in hiring, firing, and promotion decisions.<sup>115</sup>

Recent cases which have dismissed sexual harassment claims have been decided on very narrow grounds. The First Circuit court of appeals in *Fisher v. Flynn*<sup>116</sup> recently affirmed the dismissal of a complaint by a district court because the plaintiff had not alleged a sufficient nexus between her refusal of sexual advances and her termination. That case involved an assistant professor of psychology at Bridgewater State College. In her complaint, Ms. Fisher in pertinent part alleged: "[T]ermination was caused solely by discriminatory matters of those who affected the termination decision at the defendant College. Some part of the above-mentioned discriminatory nature was the refusal by the plaintiff to accede to the romantic advances of [the department chairman]."<sup>117</sup> In upholding the dismissal of the complaint, the court of appeals stated that the plaintiff had failed to satisfy the "but for" causation required in impermissibly motivated termination cases, she had not stated sufficient facts to constitute a cause of action, and she had failed to indicate that employment was conditioned on her acquiescence to sexual overtures.<sup>118</sup>

Non-Title VII causes of action for sexual harassment have recently led to the recovery of damage awards in amounts which are considerably larger than amounts awarded under Title VII. A jury verdict awarding \$2,500 in compensatory and \$50,000 in punitive damages to a former employee of World Airways, Inc. in a tort action for sexual assault was recently upheld in *Clark v. World Airways, Inc.*<sup>118.1</sup> In that case, the plaintiff claimed to have been subjected to offensive touching, off-color remarks and explicit advances during her first week on the job. The court found sufficient basis for the jury's finding of sexual assault by

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<sup>114</sup> *Id.* at 213.

<sup>115</sup> *Id.*

<sup>116</sup> 598 F.2d 663 (1st Cir. 1979).

<sup>117</sup> *Id.* at 664-65.

<sup>118</sup> *Id.* at 665-66.

<sup>118.1</sup> No. 77-0771 (D.D.C., October 23, 1980).

the company president for which the corporation was liable as his employer. It declined, however, to find that such conduct amounted to sexual harassment in violation of Title VII because plaintiff's acceptance of the sexual advances did not constitute a condition of her employment.

Two former waitresses were recently awarded \$275,000 in damages from a union local in a suit charging that they were solicited by the local's secretary-treasurer to engage in prostitution and pornographic entertainment when they sought work through the union's hiring hall. In *Seritis v. Lane*<sup>118.2</sup> the court found that the union had breached its duty of fair representation, willfully inflicted emotional distress and discriminated against the waitresses in denying them job placement services. In reaching its conclusion, the court states:

[W]here, as here, a person in a position of power to grant or withhold employment opportunities uses that authority to attempt to induce workers and job seekers to submit to sexual advances, prostitution, and pornographic entertainment, and boasts of an ability to intimidate those who displease him, the tort of willful infliction of emotional distress is committed.<sup>118.3</sup>

Turning to the issue of damages, the court ordered the local to pay each woman \$25,000 for general damages for breach of its duty of fair representation and an additional \$50,000 because it had long known of the misconduct of its officer. The local and the officer were each ordered to pay one waitress \$50,000 in punitive damages plus an additional \$25,000 in general damages.

In *Nale v. Ford Motor Co.*,<sup>118.4</sup> the first sexual harassment case to be tried before a jury in a state court, plaintiff was awarded \$140,000 in damages. The plaintiff in that case had filed suit after she was fired following her resistance to sexual advances from her foreman. The jury found the company and foreman guilty of sexual harassment without specifying what portion of the damages award would be paid by each. In *Kyriazi v. Western Electric Co.*,<sup>118.5</sup> punitive damages in the amount of \$1,500 was assessed against each of plaintiff's co-workers who engaged in acts

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<sup>118.2</sup> No. 488584 (Sup. Ct. Calif., March 10, 1980).

<sup>118.3</sup> *Id.* at 4.

<sup>118.4</sup> No. 76-6200CZ (Mucomber Cir. Ct., Mich., December 1, 1980).

<sup>118.5</sup> 476 F. Supp. 335 (D.N.J. 1979).

of harassment, some of which may be characterized as sexual, and each supervisor who was aware of but chose to ignore such conduct. The liability of the individual defendants was based upon tortious interference with plaintiff's contract of employment under state law. In addition to the individual liability, the court, finding that plaintiff's supervisors were aware of and acquiescent in the acts of sexual harassment by non-supervisory employees, held the employer liable for such behavior. Accordingly, Western Electric Company has agreed to pay plaintiff \$74,000 plus approximately \$25,000 in interest.<sup>118.6</sup>

Future cases will undoubtedly be directed toward the refinement of the employer's responsibility for the actions of its employees. In *Miller*,<sup>119</sup> the court of appeals indicated that the supervisor's knowledge alone was sufficient to hold the employer responsible if the supervisor participates in hiring, firing and promotion decisions.<sup>120</sup> The major issue remaining, however, is to what extent the employer is liable for sexual harassment, not by supervisors, but by fellow employees,<sup>121</sup> and accordingly, what action must an employer take when informed of such harassment.<sup>122</sup> The EEOC in its new Sexual Harassment Guidelines takes the position that an employer may be held responsible for acts in the workplace of its non-supervisory employees when the employer, its agents or its supervisory employers knew or should have known that such employees were so conducting themselves, but states that the employer may rebut such apparent liability "by showing it took immediate and appropriate corrective action."<sup>122.1</sup>

This position is consistent with one enforced by the district court in *Mumford v. James T. Barnes & Co.*<sup>123</sup> In that case, the court

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<sup>118.6</sup> N.Y. Times, June 8, 1980 at 53.

<sup>119</sup> See notes 109-11 and accompanying text, *supra*.

<sup>120</sup> *But see* Vinson v. Taylor, 22 Empl. Prac. Dec. 14,687 (D.D.C. 1980), where the court held that an employer could not be liable for the sexually harassing practice of one of its officers when its only notice of such harassment consisted of plaintiff's complaints to the harassing officer.

<sup>121</sup> See notes 118.5-118.6 and accompanying text, *supra*.

<sup>122</sup> In *Heelan v. Johns-Manville Corp.*, 451 F.Supp. 1382 (D.Colo. 1978), the court imposed an affirmative duty on employers to investigate any complaints and take appropriate actions. Failure to do so, it said, would be tantamount to condoning illegal acts. *Id.* at 1390.

<sup>122.1</sup> 29 C.F.R. § 1604.11(d).

<sup>123</sup> 441 F. Supp. 459 (E.D. Mich. 1977). See note 94 *supra*. See also *Lud-*

held that it is the employer's duty to investigate any and all claims of sexual harassment and to take action in the form of discipline toward an offending employee when an investigation supports a claim. This is clearly the safe approach. It not only gives the employer a good legal defense, but constitutes good employment relations and, particularly when the activity takes place on company time, makes sense from an efficiency standpoint.

#### IV. HARASSMENT IN JOB ASSIGNMENT

One form of harassment, which may not be quite as obvious as sexual harassment, is harassment through the assignment of women miners to dirtier, heavier jobs. The following account by a woman miner provides an example of such harassment:

We were moving and setting timbers that night—four men, the foreman and myself. He let those men switch off, first they'd drag timber, then they'd set it. He kept me dragging timber the entire shift.

At one point he told me to move a huge wet timber that none of the guys would go near. It was so enormous I didn't think I could budge it. He said "just put yourself in a harness and drag it like a horse, honey." I got so mad I was able to move it, but only a few feet. But, that was when I tore the muscles from my chest wall.<sup>124</sup>

This alleged action and other conduct by the company led the woman to file a charge against the company, which demanded her resignation, because "she could no longer fulfill the physical re-

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ington v. Sambo's Restaurants, Inc., 20 Fair Empl. Prac. Cas. 1000 (E.D. Wis. 1979). There plaintiffs were waitresses at defendant's restaurant. They alleged that the restaurant manager had subjected them to sexual harassment, including obscene and vulgar suggestions and physical conduct and that when the plaintiffs complained to defendant district manager, they were discharged in retaliation and viewed as "trouble makers." The district court held that the plaintiffs must allege that the acts of sexual harassment which resulted in their termination were in some manner, whether actively or passively, sanctioned by the employer or constituted an official policy of the employer. In support of its decision, the court cited the district court's decision in *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979). The district court, however, did give the plaintiffs leave to file an amended complaint.

<sup>124</sup> Sullivan, *Women Say No to Sexual Harassment*, COAL AGE, Aug., 1979, at 74.

quirements of her job."<sup>125</sup>

There is little doubt that the placement of female employees in less desirable positions, while male workers receive more favorable assignments, would constitute discrimination on the basis of sex in violation of Title VII of the 1964 Civil Rights Act. Certainly, this is the position of the EEOC. In two reported decisions involving other industries, the Commission has found such job assignment practices to be discriminatory. In one case,<sup>126</sup> the Commission found reasonable cause<sup>127</sup> to believe that an employer which had excluded women from production work for several years violated Title VII by assigning female employees to production jobs requiring a substantial amount of heavy lifting. After none of the women were able to perform the lifting aspects of the job, four were discharged and one resigned.

In another case,<sup>128</sup> the Commission found reasonable cause to believe that an employer violated Title VII when it required a female employee to move a vending machine by herself in order to retain her serviceman classification, and subsequently demoted her on the ground that she was unable to move such machinery. In arriving at its determination, the Commission noted that two male servicemen stated that such moving was normally done only by teams of three to four workers and always in the presence of a repairman.

As the assignment of undesirable jobs involving dirty or heavy work is a form of harassment which is not unique to women employees, employers should take care that male and female workers are treated equally. The court in *Local 2111, IBEW v. General Electric Co.*<sup>129</sup> denied defendant's motion to dismiss a sex discrimination action brought by male employees alleging that they were required to do heavier, dirtier and more hazardous work than women in the same job classification who received the same wages. In a similar sex discrimination case, *Utility Workers*,

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<sup>125</sup> *Id.* at 81.

<sup>126</sup> EEOC Decision No. 72-0561, 4 Fair Empl. Prac. Cas. 309 (1971).

<sup>127</sup> If the EEOC determines that there is reasonable cause to believe a charge is true, it endeavors to eliminate the challenged practices through informal methods of conference, conciliation, and persuasion. 42 U.S.C. § 2000-5(b) (1976).

<sup>128</sup> EEOC Decision No. 71-796, 3 Fair Empl. Prac. Cas. 174 (1970).

<sup>129</sup> 4 Empl. Prac. Dec. 5410 (S.D. Ohio 1971).



*Local 246 v. Southern California Edison Co.*,<sup>130</sup> the court denied an employer's motion to dismiss a male employee's claim that he was assigned only physical labor in his position as clerk even though the job specification for that position included both physical and non-physical work. Thus, in job assignments, the basic rule of good employee relations, "equal treatment," is once again the key to avoid needless charges, investigations and legal proceedings.

## V. SEXUALLY SEGREGATED FACILITIES

With the introduction of women into the coal mine work force, employers were faced with the reality that separate restroom and shower facilities for women did not exist. A recent magazine article described the tension-filled situation which existed at one mine when company officials attempted to curtain off a portion of the locker room facilities and to install a women-only shower at the request of female employees.<sup>131</sup> The article stated that "[t]he men were indignant and staged a sit-down strike, tossing water on the ground, an old symbol of discontent."<sup>132</sup> Trouble was finally averted, however, when the women agreed to continue to share the facilities with the men, "provided that the gentlemen kept their hands to themselves."<sup>133</sup>

Although regulations promulgated under the Federal Coal Mine Health and Safety Act of 1969 ("1969 Coal Act") set forth mandatory health standards which include provisions for bathing, toilet and clothing change facilities at both surface work areas and active workings of all underground coal mines subject to the Act, such standards do not require sexually segregated facilities.<sup>134</sup> The regulations specifically require that: (1) sufficient shower heads be furnished to provide approximately one for each five miners;<sup>135</sup> (2) sufficient sanitary flush toilets be furnished to provide approximately one for each ten miners;<sup>136</sup> and (3) change rooms be provided with ample space to permit the use of such

<sup>130</sup> 2 Empl. Prac. Dec. 517 (C.D. Cal. 1969).

<sup>131</sup> *Lady Miner Digs Her Job*, EBONY, Oct., 1974, at 116.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> 30 C.F.R. §§ 71.400-71.501, 75.1712-1 to -9.

<sup>135</sup> *Id.* at §§ 71.402(c)(1)(iii), 75.1712-3(c)(1)(iii).

<sup>136</sup> *Id.* at §§ 71.402(c)(2)(ii), 75.1712-3(c)(2)(ii).

facilities by all miners changing clothes prior to and after each shift.<sup>137</sup> These facilities are to be provided for the "use of the miners,"<sup>138</sup> with no requirement of separate facilities for male and female miners. The simple explanation, of course, is that when the regulations were promulgated no one would have considered separate facilities as there were no women miners.

In clear contrast to the 1969 Coal Act regulations, the Occupational Safety and Health Act ("OSHA") regulations expressly require separate shower facilities for each sex whenever showers are required by a particular standard.<sup>139</sup> OSHA regulations further require that toilet facilities be separate for each sex, unless the toilet room will be occupied by no more than one person at a time, can be locked from the inside, and contain at least one flush toilet.<sup>140</sup> The OSHA regulations are silent, however, on the question of separate change rooms for each sex.<sup>141</sup>

Even though mine operators are not explicitly required to provide separate facilities for women miners under federal mine regulations, they may not refuse to hire a female applicant in order to avoid providing separate restroom or shower facilities.<sup>142</sup> That such action would constitute sex discrimination in violation of Title VII is evidenced by the following EEOC guideline:

An employer will be deemed to have engaged in an unlawful employment practice if it refused to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.<sup>143</sup>

Similarly, the guidelines of the OFCCP regarding the implementation of Executive Order 11246 require that all government contractors' and subcontractors' employment policies and prac-

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<sup>137</sup> *Id.* at §§ 71.402(c)(3)(ii), 75.1712-3(c)(3)(ii).

<sup>138</sup> *Id.* at §§ 71.400, 75.1712-1.

<sup>139</sup> 29 C.F.R. § 1910.141(d)(3)(ii) (1979).

<sup>140</sup> *Id.* at § 1910.141(c)(1)(i).

<sup>141</sup> *Id.* at § 1910.141(e).

<sup>142</sup> See *McLean v. State*, 18 Empl. Prac. Dec. 5247 (Alaska 1978) (State ferry system's segregation of job positions in the steward department by sex, which prevented women from working in utility positions, was not justified because of the difficulties involved in providing sleeping, toilet and shower facilities for females.)

<sup>143</sup> EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.2(b)(5) (1979).

tices "assure appropriate physical facilities to both sexes."<sup>144</sup> The OFCCP guidelines continue to state that the contractor may not refuse to hire or deny men or women a particular job because restroom facilities are not available. An exception to this guideline exists when the contractor is able to show that the construction of such facilities would be unreasonable on grounds such as excessive expense or lack of space.<sup>145</sup>

A reasonable interpretation of the OFCCP regulation which requires appropriate physical facilities for both sexes is that separate shower and restroom facilities must be provided for male and female employees. Moreover, such facilities must not be provided to male and female miners in a disparate manner.<sup>146</sup>

## VI. PREGNANCY DISCRIMINATION BANNED

Since women are recent arrivals to the mines, most mine operators were not involved in the early legal battles over sex discrimination. One issue involved in many of these early disputes was the employers' treatment of pregnant employees. Although the legal resolution of this issue now is well established, coal mine operators easily could repeat some of the mistakes made by em-

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<sup>144</sup> OFCCP Sex Discrimination Guidelines, 41 C.F.R. § 60-20.3(e) (1979).

<sup>145</sup> *Id.* But see EEOC Decision No. 70-558, 2 Fair Empl. Prac. Cas. 538 (1970) (Absence of separate restroom facilities at shipyard did not justify refusal to hire female welder where employer was unable to demonstrate that the cost of installation of separate facilities in order to comply with state law would constitute an unreasonable expense in view of the fact that main water and sewer lines still existed from the days of World War II when several women worked at the shipyard.)

<sup>146</sup> See, e.g., *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (employer violated Title VII when male physical education teachers were provided with private toilet, lockers and shower facilities and plaintiff, a female physical education teacher, had to use the student facilities); *Laffey v. Northwest Airlines, Inc.*, 374 F. Supp. 1382 (D.D.C. 1974), *order modified*, 392 F. Supp. 1076 (D.D.C. 1975) (employer's failure to provide female flight attendants with single occupancy layover accommodations when it provided such accommodations for males constituted sex discrimination in violation of Title VII); see EEOC Decision No. 72-1291(2), 4 Fair Empl. Prac. Cas. 845 (1972) (both an employer and a labor union discriminated against female employees when the employer refused to provide them with the same housing accommodations or cost-of-living compensation in lieu of such facilities which it provided male employees and the union failed to take positive action to secure comparable housing accommodations for both sexes).

ployers in other industries. Hence, they would be well advised to be familiar with this aspect of the sex discrimination law.

The stereotype of female employees becoming pregnant and leaving the labor market was frequently at the core of the unfavorable treatment of women in the workplace.<sup>147</sup> Following two Supreme Court decisions which attempted to interpret the impact of Title VII on the subject,<sup>148</sup> the problem was statutorily resolved in 1978 when Title VII was amended to ban discrimination in employment based on pregnancy, childbirth or related medical conditions.<sup>149</sup> While the amendment specifically requires coverage for pregnancy, childbirth or related medical conditions in health, sick leave or disability benefit plans, it has the much broader effect of forbidding discrimination because of pregnancy in all employment practices, including employment, termination, reinstatement, promotion, seniority and determination of fringe benefits.<sup>150</sup>

<sup>147</sup> See S. REP. NO. 95-331, 95th Cong., 1st Sess. 3 (1977).

<sup>148</sup> See *Satty v. Nashville Gas Co.*, 434 U.S. 136 (1977); *Gilbert v. General Elec. Co.*, 429 U.S. 125 (1976).

<sup>149</sup> The amendment to section 701 of Title VII of the 1964 Civil Rights Act (codified at 42 U.S.C. § 2000e(k) (1976)) added the following new subsection:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

<sup>150</sup> When Congress enacted Title VII in 1964, it included within its prohibitions discrimination in employment on the basis of sex. In implementing this prohibition, the Equal Employment Opportunity Commission ("EEOC") issued guidelines relating to pregnancy discrimination. The guidelines made it clear that excluding applicants or employees from employment because of pregnancy or related medical conditions was a violation of Title VII, and specifically required employers to treat pregnancy or related medical disabilities the same as all other temporary disabilities.

Disabilities caused or contributed to by pregnancy, miscarriage, abor-

The basic purpose of the amendment is to require employers protect pregnant employees in precisely the same fashion they protect any other employee with a non-occupational disability. Employers may not refuse to hire or to promote women simply because female workers become pregnant. Women who take a pregnancy leave of absence must be credited with accumulated seniority when they return to work on the same terms applicable to persons absent from work for other non-occupational disabilities. In summary, pregnant women must be treated the same as other employees on the basis of their physical ability or inability to work.

Pregnant employees in the mining industry, perhaps more frequently and for longer periods of time than employees in other industries, will be physically unable to perform the functions of their jobs due to pregnancy-related reasons. When faced with this situation, employers must provide job accommodations for the pregnant employees to the same extent they would be provided

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tion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment . . . [Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

29 C.F.R. § 1604.10(b) (1975). Every federal appellate court which faced the issue of pregnancy discrimination under Title VII likewise interpreted the congressional purpose in passing the Act to forbid such discrimination. See *Communications Workers v. American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975), *vacated*, 429 U.S. 1033 (1977); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); *Gilbert v. General Electric Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *aff'd in part and vacated in part*, 434 U.S. 136 (1977); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Hutchison v. Lake Oswego School Dist.*, 519 F.2d 961 (9th Cir. 1975), *vacated*, 429 U.S. 1033 (1977).

Contrary to both the EEOC guidelines and the consistent appellate court rulings, the United States Supreme Court held in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that the exclusion of pregnancy and related disabilities from an income maintenance plan for temporarily disabled workers does not constitute discrimination on the basis of sex in violation of Title VII and broadly suggested that pregnant females could be treated differently from other employees. This decision served as an impetus for amending Title VII to explicitly prohibit discrimination based on pregnancy and related medical conditions. The effect of the amendment is to "reverse" the Supreme Court's ruling.

for other temporarily disabled workers. If the employer would provide modified tasks or alternative assignments for temporarily disabled employees, it must do the same for women who are temporarily unable to perform their job due to pregnancy. For example, a woman's assignment may be to operate a machine, and, incidental to the performance of that job, she may carry heavy materials to the machine. If other employees temporarily unable to lift heavy materials are relieved of this duty, the pregnant employee who also is unable to lift must be temporarily relieved of the task.<sup>151</sup>

In order to avoid allegations of discrimination, leaves of absence for pregnant women should be granted on the same basis as they are granted to other employees subject to disabling conditions. Setting an arbitrary time period for the commencement of all pregnancy leaves of absence is discriminatory. Consideration of each individual's ability to perform her job must be the basis of the decision as to when a pregnant employee should take a leave of absence. Since determinations of the continued ability to work should be based on medical opinion, an employer may require an examination by a company physician, provided such an examination is required of all disabled workers.<sup>152</sup>

The job of an employee who is absent on leave due to pregnancy or related medical conditions must be held open for her return on the same basis that jobs are held open for other employees on temporary disability leave. An exception would be if the employee on leave has informed her employer that she does not intend to return to work.<sup>153</sup>

While the amendment to Title VII prohibits discrimination based on pregnancy, childbirth or related medical conditions, it does not require an employer to give preferential treatment to pregnant women. An employer is not required to establish a plan covering sick leave or temporary disabilities where none presently exists. The amendment does require, however, employers who provide such benefits to other employees with non-occupational disabilities to extend the same benefits to pregnant workers.

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<sup>151</sup> See *Questions & Answers on the Pregnancy Discrimination Act*, 29 C.F.R. § 1604 App. No. 5 (1979).

<sup>152</sup> *Id.* No. 6.

<sup>153</sup> *Id.* No. 9.

Where the costs of an existing benefit plan are apportioned between the employer and employees, contributions necessary to cover the increased cost of equal benefits may be made in the usual proportion. The increase in costs of insurance premiums for disability and health insurance which includes pregnancy and related medical conditions may be substantial in the mining industry since strenuous labor would render a pregnant miner medically unable to work for a longer period of time than pregnant employees with less physically demanding jobs in other industries. The burden of this additional cost would be shared by the employer and all employees, not merely women or even pregnant women, under an apportioned benefit plan. All employees pay the price for pregnancy coverage under apportioned plans because pregnancy-related medical conditions must be included in every type of health insurance plan, including single coverage plans, provided by the employer since the employer is prohibited from offering a plan which excludes pregnancy.<sup>184</sup>

## VII. CONCLUSION

Women are not a passing phenomena in the coal mines. They are here to stay. Companies and unions which resist the employment of females are not only going to lose the battle but are likely to spend considerable amounts of money in the form of back pay and attorneys' fees in carrying on their last ditch fight. The only real legal issue remaining is how many women must be hired how soon. Other issues have largely been resolved in those industries where women traditionally have been employed.

In a sense, the coal mining industry is fortunate. It has the advantage of being able to learn from those experiences of other industries and, by applying this knowledge to assimilate women into the work force, doing it right the first time.

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<sup>184</sup> *Id.* Nos. 23 and 24.